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 — Appellant (Defendant)

- AND -

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

CASE FOR THE RESPONDENTS

RECORD

1. This is an appeal by the Appellant, Haron Bin Mohd. Zaid, from two Orders made by the Federal Court of Malaysia (Suffian L.P., Raja Azlan Shah, Ag C.J. Malaya, Wan Suleiman F.J.):

(i) an Order dated the 27th day of February 1979, wherein the Federal Court dismissed the Appellant's Notice of Motion dated 13th October 1978, in which the Appellant had moved to dismiss the Respondents' Appeal from two Orders of Harun J. both dated the 28th day of June 1978, on the ground that the Respondents had not obtained leave from a Judge of the High Court or from the Federal Court in compliance with section 68(2) of the Courts of Judicature Act 1964. — p.137, p.134, p.102, p.104

(ii) an Order dated the 16th day of May 1979 which: — p.160

(a) allowed the Respondents' Appeal from the Orders of Harun J. dated the 28th day of June 1978 giving the Appellant judgment against the Respondents for MS4,186,224 with interest and costs; — p.102, p.104

(b) gave directions in the third party proceedings brought by the Appellant against the Respondents; and

(c) ordered the consolidation of the third party proceedings with proceedings brought by the Appellant against the Respondents in the Kuala

Lumpur High Court, Civil Suit No. 2323 of 1976.

2. It is convenient at the outset to identify the main individuals and companies concerned in the events giving rise to these proceedings, and thereafter to set out the principal assertions of fact made by each party and the history of these proceedings. Unless otherwise indicated the facts stated are common ground between the parties; where they are, or may be, in issue the party asserting them is identified.

p.2	3.	Syarikat Seri Padu Sdn Bhd. ("SSP")	A company incorporated in the States of Malaya and the Plaintiffs in these proceedings.
p.59		Central Securities (Holdings) Berhad ("the Respondents")	A public limited company incorporated in Malaysia and which carries on business, inter alia, as an industrial
p.59			holding company. The Third Party in these proceedings and the Respondents to this Appeal.
p.60		United Holdings Berhad ("UH")	A public limited company incorporated in Malaysia whose shares were the subject of the sale agreement with which these proceedings are concerned.
		International Holdings (Pte.) Limited ("IHP")	A company incorporated in Singapore.
p.59		Sungei Kinta Tin Dredging Limited ("SK")	A public limited company incorporated in England which held approximately 30% of the issued share capital of UH.
p.34		Koh Kim Chai ("Mr. Koh")	At all material times a Director of SSP and a principal in the firm of Advocates and Solicitors
p.36,61 p.30 p.38-9, p.22 p.23, p.30, p.38-9, p.114			known as K.C. Koh & Co, which firm has acted as Solicitor to the Appellant, Since 23rd December 1974 a Director of UH.
		Haron Bin Mohd. Zaid ("the Appellant")	The Defendant in these proceedings and the Appellant in the Appeal.
p.21			A businessman and at all material times a director of

			RECORD
		SSP. Since 23rd December 1974 a Director of UH and, according to the Respondents, Secretary of UH between 23rd December 1974 and 12th January 1975. A brother-in-law of Mr. Koh.	p.42 p.114 p.67
	Yap Ping Kon	Secretary of UH between 12th January 1975 and 15th June 1976.	p.67, 52
	John Chew Sun Hey	Secretary of UH.	p.72
	Mah King Hock	A Director of the Respondents.	p.13
	Dato Loy Hean Heong	A Director of the Respondents.	p.40
	Dr. Chong Kim Choy	Up to 5th December 1974 a Director of UH.	p.114

4. 2nd November 1974

According to the Respondents, the Respondents agreed to buy 1,002,268 shares in UH from a third party. p.61

28th November 1974

According to the Respondents, SK agreed to purchase 397,732 shares in UH from another third party. p.61

5th December 1974

All 4 directors at that time of UH, including Dr. Chong, resigned. p.114

6th December 1974

According to the Respondents, SK authorised and agreed that the Respondents should sell their 397,732 shares in UH for not less than MS8/- per share. p.61

7th December 1974

(a) By an agreement in writing (hereinafter referred to as "the Sale Agreement") the Respondents agreed to sell to the Appellant 1,400,000 shares in UH for a total price of MS 11,200,000/-. p.10, 61

(b) This represented 70% of the issued share capital of UH. p.44,49

RECORD

p.61-2 (c) According to the Respondents, in entering into the Sale Agreement the Appellant was acting jointly with and/or as nominee for, or agent of, Mr. Koh, and there

p.62 were express terms of the Sale Agreement that

(i) The Respondents would deliver 1,002,268 of such shares on completion and the Appellant would then pay MS 10,700,000/-;

(ii) the Respondents would deliver the balance (397,732) of such shares within 60 days from 7th December 1974.

19th December 1974

p.62 According to the Respondents, the Vendor to SK of 397,732 shares in UH advised SK that he could deliver only 20,000 shares. Accordingly the Respondents were obliged to acquire shares on the market in order to satisfy their obligation to deliver a further 397,732 shares to the Appellant.

Between 7th December 1974 and 23rd December 1974

p.22 According to the Appellant, he discovered that the Respondents had falsely represented that they were the benefcial owners of 1,400,000 shares in UH, and he verbally repudiated the Sale Agreement.

23rd December 1974

p.22 (1) According to the Appellant in his Statement of Claim in Civil Suit 2323, he sent a letter through the legal firm of K.C. Koh & Co. giving the Respondents notice of rescission of the Sale Agreement and demanding the

p.24 return of MS11,200,000 paid by him to the Respondents.

p.66 The Respondents deny the receipt of such a letter.

p.16-17 (2) According to the Respondents, the Respondents

p.62 delivered to the Appellant share certificates representing

p.16 a total of 1,002,268 shares in UH and the Appellant paid them MS 10,700,000. The certificates included Certificate No. 0227 for 523,278 shares, which was accompanied by a Memorandum of Transfer signed by Dr. Chong in favour of IHP.

pp17-18 The Appellant acknowledged receipt of the

p.31 certificates in writing; copies of the acknowledgment and of the Memorandum are in the Record.

p.114 (3) Mr. Koh and the Appellant were appointed Directors of UH.

(4) The Directors of UH requested temporary

p.112 suspension of trading of UH's shares on the Kuala Lumpur Stock Exchange and the Stock Exchange of Singapore.

pp.62-3 Relisting has been requested but still awaits approval.

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(5) According to UH's Annual Report for 1975, signed by the Appellant and Mr Koh UH acquired the whole of the issued share capital of Syarikat Bunga Raya Timor-Jauh Sdn. Bhd. ("BR") on this date. According to the Respondents, Mr. Koh (a Director of BR) and the Appellant (who together by themselves or their nominees controlled BR), caused UH to make this purchase in or about February 1975, but purported to backdate the purchase agreement to 23rd December 1974. p.119 p.64 p.61 p.60 p.64

January 1975

According to the Respondents, Mr. Koh and the Appellant approached the Respondents and requested the Respondents to buy from them such shares as they needed to fulfil the Sale Agreement. p.63

22nd January 1975

(1) According to the Respondents, by a further written agreement ("the Supplementary Agreement") the Respondents agreed to buy 100,000 shares in UH from Mr. Koh and the Appellant at MS6.40 per share, such shares (and the consideration therefor) to be offset against the balance of 397,732 shares sold to the Appellant under the Sale Agreement but not yet delivered. pp.63,

(2) According to the Appellant, the Appellant paid the Respondents MS 11,200,000 and received share certificates including certificate No. 0227 together with the form of transfer from Dr. Chong to 1HP referred to above. pp.6, 10, 28-9

4th February, 1975

According to the Respondents, the Sale Agreement and the Supplementary Agreement were completed by the Respondents delivering to the Appellant the balance of 297,732 shares in UH and a cheque for MS 140,000 pursuant to the terms of the Supplementary Agreement. p.64

12th March 1975

According to the Appellant, he sold the 523,278 shares in UH held under share certificate No.0227 to SSP and delivered to them the share certificate together with the relevant Memorandum of Transfer delivered to him by the Respondents. (These shares were part of the 1,400,000 shares of which the Appellant claims in Civil Suit 2323 to have repudiated the purchase.) pp.7,10 p.22

17th March 1975

Yap Ping Kon (Secretary of UH) wrote to Dr. Chong requesting him to execute a new transfer form in respect of p.88

RECORD

share certificate No.0227. The letter stated that the 523278 shares had been sold to the Respondents and subsequently to Mr Koh.

22nd April 1975

p.89 Yap Ping Kon wrote to Dr. Chong again requesting him to sign a transfer form.

25th April 1975

p.90 Dr. Chong wrote to UH declining to execute a new transfer form on the grounds that he held the shares as trustee for I.H.P. to whom application should be made.

30th June 1975

pp.49-56 The Annual Return of UH made up to 30th June 1975 and dated 8th July 1975 showed

(a) that Dr. Chong (who in the Annual Return of UH made up to 29th July 1974 was shown as the registered holder of 524,278 shares in UH) now held only 1,000 shares in UH, and

p.44-8
p.48

p.111 (b) that three parties who did not appear in the Annual Return up to 29th July 1974 held respectively:

p.112	The Appellant	50,000 shares
p.113	Mr. Koh	100,000 shares
p.114	SSP	985,510 shares
	Total	1,135,510 shares

8th October 1976

pp.19-20 The Appellant commenced proceedings against the Respondents in Civil Suit 2323 claiming rescission of the Sale Agreement, the return of the entire purchase price of the said shares in UH (alleged to be MS11,200,000) and damages, on the ground of alleged fraudulent misrepresentation on the part of the Respondents to the effect that they were at the date of the Sale Agreement the beneficial owners of 1,400,000 shares in UH. In his Statement of Claim the Appellant alleged that verbally and by letter dated 23rd December 1974 he had given the Respondents notice of rescission of the Sale Agreement and had demanded the return of the sum of MS11,200,000.

pp.21-23

22nd October 1976

pp.23-26 The Respondents filed their Defence in Civil Suit 2323, They denied the misrepresentation alleged, denied receipt of the alleged letter giving notice of rescission, and further contended (inter alia) that the Sale Agreement of 7th December, 1974 had in any event been affirmed by the

Appellant by virtue of the Supplementary Agreement and by virtue of the fact that the Appellant and Mr. Koh had at all times since 23rd December 1974 continued to carry on and control the business of UH. RECORD

December 1976/January 1977

(1) According to the Appellant and Mr Koh on or about 13th December 1976 SSP discovered for the first time that the Memorandum of Transfer relating to the share certificate No. 0227 was executed by Dr. Chong in favour of IHP, and the Appellant asked Mr. Koh as Solicitor to request the Respondents to deliver a proper Memorandum of Transfer. pp.7,10 p.30

(2) According to John Chew Sun Hey a letter was written on 13th December 1976 by UH to SSP. p.72-74

(3) According to Mr. Koh;

(a) the Appellant asked him to obtain a proper and registrable Memorandum of Transfer from the Respondents. p.37

(b) on or about 15th December 1976 he made that request to Dato Loy Hean Heong (a joint Managing Director of the Respondents).

(c) Dato Loy said that unless the Respondents were paid a further M$523,278 calculated at $1/- per share the required Memorandum of Transfer would not be delivered

(d) Mr. Koh protested against what he described as "this unmitigated sharp practice"

(e) he wrote to the Respondents on 15th December 1976 requesting a new Memorandum of Transfer. p.37,38

(f) on 30th January 1977 he wrote a further letter requesting a reply to the previous letter. p.39

(4) These allegations have from the outset been sharply in issue in these proceedings. pp.40-43

21st May 1977

SSP commenced proceedings against the Appellant in this action, claiming damages for breach of the alleged agreement of 12th March 1975 to sell to SSP 560,000 shares of UH. In their Statement of Claim, SSP alleged that the Appellant had delivered only 36,722 shares and claimed recovery of the purchase price of the 523278 shares alleged not to have been delivered. pp.1-3

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16th August 1977

pp.9-11 The Appellant issued the Third Party Notice herein against the Respondents pursuant to leave granted on 18th July 1977.

6th September 1977

pp.12-14 The Respondents entered a Conditional Appearance to the Third Party Notice and, on 30th September 1977, the
pp.14-15 Respondents issued a Summons-in-Chambers to set aside the Third Party Notice on the grounds, inter alia,

(a) that there was no proper question to be tried between the Appellant and the Respondents, and

(b) that the issue between the Appellant and the Respondents formed the subject of a separate action already pending before the Court, namely Civil Suit No. 2323 of 1976.

3rd October 1977

pp.26-28 The Appellant issued a Summons for Third Party Directions in which he sought an order, inter alia, that he be at liberty to enter judgment against the Respondents for the sum of M$4,186,224 and for damages, interest and costs.

28th October 1977

pp.33-34 SSP issued a Summons-in-Chambers for an order for leave to enter final judgment against the Appellant for the sum of M$4,186,224 and for interest and costs.

22nd November 1977

p.113 Mr. Koh and the Appellant on behalf of the Board of UH made UH's Directors' Report for 31st October 1975, and
pp.116-123 certified UH's accounts and the notes thereto for the year ended 31st October 1975 as giving a true and fair view.
p.121 Note 5 to the Accounts stated that SSP owned a 49% interest in the share capital of UH.

15th December 1977

pp.75-84 UH's Annual Return made up to 15th December 1977 and dated 7th January 1978 purported to show that as at 15th
p.84 December 1977 SSP were the registered holders of 462,232 shares in UH (523,278 less than on 30th June 1975) and Dr. Chong was the registered holder of 524,278 shares (523,278 more than on 30th June 1975).

28th June 1978

The Summonses of the Respondents, the Appellant and SSP

were heard together by Harun J., who, pursuant to Order 54, rule 22 of the Rules of the Supreme Court 1957, adjourned the Summonses into Open Court. The Appellant submitted to judgment in favour of SSP. By the terms of his Order, Harun J. RECORD

(i) gave leave to SSP to enter final judgment against the Appellant in terms of SSP's Summons, pp.101

(ii) dismissed the Respondents' Summons; p.101

(iii) gave leave to the Appellant to enter judgment against the Respondents for the sum of M$4,186,224 with interest and costs. pp.102-103

Judgment was thereafter entered for SSP against the Appellant and for the Appellant against the Respondents. pp.103-4 pp.104-5

29th June 1978

The Respondents applied in writing for the said Summonses to be adjourned into open court for further argument pursuant to Order 54, rule 22A of the Rules of the Supreme Court 1957. p.106

4th July 1978

Harun J. certified that he required no further argument. p.107

6th July 1978

The Respondents issued their Notice of Appeal to the Federal Court from the decision of Harun J. in relation to the Summonses of 30th September and 3rd October 1977. p.126

8th September 1978

Harun J. delivered a judgment giving the grounds for his decision and orders. He held, inter alia:- pp.96-100

(i) that there was a basic difference between the causes of action in Civil Suit 2323/76 and Civil Suit 1364/77, the former being based on fraud and the latter on failure of consideration, and that the fact that the relief sought in the two actions was the same was insufficient to justify consolidation of the two actions or the setting aside of the Third Party proceedings;

(ii) that the registration of SSP as holders of the shares represented by Share Certificate No. 0227 was erroneous, the transfer form having been executed by Dr. Chong in favour of IHP, and that SSP remained so registered until the error was discovered by the Secretary of UH in December 1976 and SSP was removed from the register;

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(iii) that, on the facts, the Respondents had not performed their part of the Sale Agreement;

(iv) that the provisions of Section 162 of the Companies Act (relating to the rectification of company registers pursuant to an order of the Court) were irrelevant to the issue;

(v) that the Respondents' arguments based on laches, acquiescence and estoppel on the grounds that the Appellant and Mr. Koh were Directors of both SSP and UH at the material time were likewise irrelevant and that, accordingly, the Respondents' application to set aside the Third Party Notice should be dismissed;

(vi) that the only defence of the Respondents to the Appellant's claim was that they had physically delivered share certificate No. 0227 to the Appellant and the fact of registration in 1975 of these shares in the name of SSP: "That registration was an error and has since been rectified. It is equally clear that by section 103 of the Companies Act the Third Party is required to deliver a proper instrument of transfer. The Third Party has not fulfilled this requirement. The fact remains that share certificate numbered 0227 is still registered in the name of Dr. Chong Kim Choy and neither the Plaintiffs nor the Defendants could deal with it. They had no right of sale and therefore there has been no effective sale by the Third Party to the Defendant". (Record, p.100, lines 2-14);

(vii) that, for these reasons, there was no issue to go to trial.

After 8th September 1978

pp.127-133 In the Memorandum of Appeal filed in support of their appeal the Respondents relied on the following grounds, inter alia, for contending that unconditional leave to defend the Third Party proceedings should have been granted to the Respondents:

(i) the Appellant had acquired the beneficial ownership of the shares in question in 1974 and thereafter had exercised all rights of ownership in respect thereof;

(ii) there was no, or no sufficient, evidence to show that the registration of the shares in the name of SSP was made in error and the purported change of registration in or after December 1976 without a Court order for rectification of the register was invalid and/or ineffective;

(iii) the circumstances in which UH had purported to delete SSP from the register after SSP had been on the register for at least 21 months and during which period the Appellant had taken control of UH and had

appointed his nominees to the Board of Directors of the company and exercised all rights of management of the company were matters which required to be investigated at trial and/or gave rise to triable defences based on acquiescence, laches and/or estoppel; RECORD

(vi) as the Sale Agreement had been wholly or partly performed by the Respondents and the Appellant had derived some of the benefit for which he had bargained the Appellant's sole remedy, if any, lay not in the recovery of the price but in damages.

13th October 1978

The Appellant applied to the Federal Court by Notice of Motion for an Order dismissing the Respondents' Appeal on the grounds that it had been brought improperly and incompetently, since 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 ("the 1964 Act"). pp.134-.35

26th-27th February 1979

The Appellant's application was heard by the Federal Court (Suffian L.P., Raza Azlan Shah, Ag. C. J. Malaya, Wan Suleiman, F.J.).

27th February 1979

The Federal Court dismissed the application without giving grounds for the decision. pp.137-138

27th February - 2nd March 1979

The Federal Court heard the Respondents' Appeal from the decision of Harun J.

16th May 1979

The Federal Court allowed the Respondents' Appeal with costs and ordered pp.160-161

(i) that the Respondents should have unconditional leave to defend the Third Party proceedings;

(ii) that Third Party directions should be issued in terms of the Appellant's application of 3rd October 1977;

(iii) that the Third Party proceedings should be consolidated with Civil Suit No. 2323 of 1976.

In Its Judgment the Federal Court held, inter alia; pp.139-159

(i) that the issue which arose was whether the Court was satisfied that there was a question proper to be tried

RECORD

between the Appellant and the Respondents;

(ii) that the decision of Harun J. to give leave to the Appellant to sign final judgment against the Respondents without trial was wrong and insupportable, there being a number of issues requiring full investigation in a witness action and which were not fit to be determined upon affidavit evidence. In particular,

(a) Harun J. held that the registration of SSP as holders of the shares of UH was an error. Whether the act of registration was an error required to be tested by evidence which the Respondents should be given the opportunity to cross examine and should not be accepted on the basis of a bare assertion in an affidavit. This was particularly so, having regard to the several circumstances of the case, namely

(1) the Appellant and Mr. koh effectively controlled SSP and the registration of the 523,278 shares in SSP meant that they had held from June 1975 to December 1977 an absolute majority of the issued share capital of UH. This had enabled them to put the Appellant and Mr. Koh on the Board of Directors displacing, amongst others, Dr. Chong and, with their voting strength, to do what they liked with the company and its assets;

(2) despite the exchange of correspondence between the Company Secretary of UH and Dr. Chong and despite his knoweledge that it was wrong to do so, the Company Secretary registered the transfer of the shares in the name of SSP. Whether he did so of his own motion or at the direction of another or others required to be examined, as did the fact that much later anddin direct contravention of Section 162 of the Companies Act, the Company Secretary deregistered SSP and registered the same shares in the name not of IHP but of Dr. Chong;

(3) Mr. Koh and his Board of Directors of UH had on 23rd December 1974 sought and obtained a suspension of trading of the company's shares on the Kuala Lumpur Stock Exchange, allegedly for the purpose of re-organising and restructuring the company. An application for re-listing of the company had been made on 20th March 1975 but approval had, to date, still not been forthcoming.

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(b) Harun J. had erred in holding that in the circumstances issues regarding laches, acquiescence and estoppel were irrelevant: a buyer is required to take action with reasonable promptness to rescind a contract or reject goods sold under the contract, otherwise the right might be lost. It might similarly be lost if the buyer takes a benefit under the contract or does something amounting to an acceptance of it after becoming aware of a misrepresentation. Similarly the right may be lost if it is impossible through altered circumstances to restore the parties to their original positions: "Everything depends upon the facts of the case and the nature of the contract and these must be gone into upon a full investigation upon a witness action and not upon affidavit evidence." (Record, p.150, lines 39-43).

(c) Harun J. erred in holding that section 162 of the Companies Act was irrelevant in the present case. There was an issue as to whether UH, having once registered SSP as shareholders, were entitled proprio motu to strike them off the register without an application to the court for rectification. There was, further, doubt as to whether rectification of the register would have been ordered under the section or whether the proper remedy would have been by way of suit. Moreover, the delay of about 2 years was a material consideration: "If a man is too late to secure rectification it must follow that he is too late to avoid the contract." (Record, p.158, lines 19-22).

(iii) that having regard to all the circumstances of the case, Harun J. was wrong in giving summary judgment to the Appellant and that there was a question proper to be tried between the parties;

(iv) that the Third Party proceedings in Civil Suit No.1364 of 1977 should be consolidated with Civil Suit No.2323 of 1976, the causes of action in the two proceedings arising out of the same series of transactions and there being questions offact or law common to both actions.

22nd August 1979.

The Appellant applied by Notice of Motion to the Federal Court pp.162-163

(i) for leave to appeal to His Majesty, the Yang Di-Pertuan Agong against the whole of the decision of the Federal Court of 27th February 1979 on the Appellant's Notice of Motion dated 13th October 1978;

(ii) for leave to appeal to His Majesty, the Yang Di- pp.170-171

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Pertuan Agong, against the whole of the decision of the Federal Court of 16th May 1979 with regard to the Federal Court Civil Appeal No. 105 of 1978 and for an order staying the Third Party Directions and the consolidation of the two civil suits until after such appeal be finally disposed of or until further order.

1st November 1979

pp.196-197 198-199 The Federal Court (Raja Azlan Shah, Ag. C.J., Malaya, Chang Min Tat F.J., Ibrahim Abdul Manan F.J.) dismissed the Appellant's applications for leave to appeal from the decisions of the Federal Court of 27th February and 16th May 1979 respectively and ordered that an early date for hearing be fixed for the trial of the consolidated actions.

pp.182-195 In its Judgment, the Federal Court held, inter alia:

(i) that under section 68(2) of the 1964 Act, leave to appeal from an interlocutory order made by a Judge in Chambers is not a sine qua non without which an appeal cannot proceed, if an application has been made for further argument within four days and the Judge has certified, after application, that he requires no further argument: leave is only required if no application has been made and no certificate has been issued.

(ii) that, having regard to the fact that this was not a case where further argument had been heard, the Court was not called upon to decide between the conflicting decisions of Nagappa Rengasamy Pillai v. Lim Lee Chong [1968] 2 M.L.J. 91 F.C. and T.O. Thomas v. K.C.I. Reddy & Anor. [1974] 2 M.L.J. 87 F.C.: in the present case the Respondents had applied for a certificate within the period prescribed and the certificate had been granted; accordingly, the first limb of section 68(2) of the 1964 Act had been satisfied and in the circumstances no conflict arose between section 68(2) and Order 54, rule 22A of the Rules of the Supreme Court 1957.

(iii) that in any event the Order made by Harun J. under Order 16A, rule 7(1)(a) was a final and not an interlocutory order with the consequence that no leave to appeal was required by the Respondents: in its decisions in Peninsular Land Development Sdn. Bhd. v. K. Ahmad (No.2) [1970] 1 M.L.J. 253 F.C. and in Hong Kim Sui & Anor. v. Malayan Banking Berhad [1971] 1 M.L.J. 289 F.C., the Federal Court had preferred the test laid down in Bozson v. Altrincham Urban District Council [1903] 1 K.B. 547 to that set out in Salaman v. Warner [1891] 1 Q.B. 734 for the purposes of determining whether an order was final or interlocutory and had held that an order giving leave to sign final judgment was a final and not an interlocutory judgment: in the present case the Court was bound to and would follow its two earler decisions.

8th May 1980 RECORD

The Judicial Committee of the Privy Council granted the Appellant special leave to appeal to His Majesty, the Yang Di-Pertuan Agong from the Orders of the Federal Court dated the 27th February, 1979 and the 18th May, 1979. pp.198-199

5. The following are the principal questions raised in the Appeal:

(1) whether the Order of Harun J. dated 28th June 1978 giving leave to the Appellant to enter final judgment against the Respondents pursuant to Order 16A, rule 7(1)(a) of the Rules of the Surpreme Court 1957 was a final order or an interlocutory order;

(2) whether, assuming that the said Order of Harun J. was an interlocutory Order, the grant by Harun J. on 4th July 1978, pursuant to Order 54 rule 22A, of a certificate that he required no further argument was sufficient to entitle the Respondents to appeal to the Federal Court from the Order of Harun J. pursuant to section 68(2) of the 1964 Act, without needing to obtain leave to appeal from the Federal Court or from a Judge of the High Court;

(3) whether, on the basis of the material before it, the Federal Court erred in law in holding that there existed questions proper to be tried and/or issues requiring full examination in a witness action and in thereby granting to the Respondents unconditional leave to defend the Third Party proceedings by the Appellant in Civil Suit No. 1364 of 1977;

(4) whether the Federal Court erred in law in ordering the consolidation of Civil Suits Nos. 1364 of 1977 and 2323 of 1976, there being no application before the Court to consolidate the same.

6. The issues in this Appeal are entirely issues relating either to the procedure of the Courts of Malaysia or to the exercise of discretion by those Courts. In relation to all these issues the Respondents contend as their primary submission that on such matters the Privy Council should be slow to interfere with the decision of the Court below, and that they should not do so in the present case. In the following cases their Lordships have held that in matters of procedure the Privy Council should be slow to interfere with the decision of the Court below: Boston v. Lelievre (1870) L.R. 3 P.C. 157; Mayor of Montreal v. Brown & Springle (1876) 2App. Cas. 168; Ratnam v. Cumarasamy /1965/ 1 W. L.R. 8; Bank of America National Trust and Savings Association v. Chai Yen /1980/1 W.L.R. 350.

Issue (1)

7. The right to appeal to the Federal Court against an

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Order of the High Court in civil matters is governed by Sections 67-68 of the Courts of Judicature Act 1964. So far as is material the sections provide as follows:-

"67.(1) The Federal Court shall have jurisdiction to hear and determine appeals from any judgment or order of any High Court in any civil matter, whether made in the exercise of its original or of its appellate jurisdiction, subject nevertheless to this or any other written law regulating the terms and conditions upon which such appeals shall be brought

(2) ....

68.(1) ....

(2) 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 further argument, or unless leave is obtained from the Federal Court or from a Judge of the High Court.

(3) ..."

8. In determining that the order of Harun J. granting leave to the Appellant to enter final judgment against the Respondents in the Third Party proceedings was a final order, the Federal Court adopted the test of finality laid down by the Court of Appeal in Bozson v. Altrincham Urban District Council [1903] 1 K.B. 547 (hereinafter referred to as "the Bozson test") in preference to that set out in Salaman v. Warner [1891] 1 Q.B. 734 (hereinafter referred to as "the Salaman test"). As their Lordships noted in Tampion v. Anderson (1973) 48 A.L.J.R. 11 P.C., there remains in England

"..... a continuing controversy whether the broad test of finality in a judgment depends on the effect of the order made (Bozson) or on the application being of such a character that whatever order had been made thereon must finally have disposed of the matter in dispute (Salaman)" (ibid at p.12).

9. Each of the tests has been applied and adopted in a number of subsequent decisions of the Court of Appeal, the Bozson test being approved and applied in, for example, the decisions in Isaacs & Sons v. Salbstein [1916]2 K.B.139 and Peek v. Peek [1948] 2 All E.R. 297 and the Salaman test being applied in, for example, In re Page, Hill v. Fladgate [1910] 1 Ch. 489 and approved and applied in Salter Rex & Co. v. Ghosh [1971] 2 Q.B. 597. The controversy has not been resolved by their Lordships of the Privy Council, neither of the tests having been held to be

universally correct and applicable. In his Petition for Special Leave to appeal the Appellant contended that the Federal Court had erred in applying the Bozson test in preference to the Salaman test having regard to the fact that their Lordships had approved and applied the Salaman test in Becker v. Marion City Corporation /1971/ A.C. 271. It is respectfully submitted that their Lordships' decision in the Becker Case provides no support for the contention that the Salaman test alone is a valid test of the finality of an order. While their Lordships approved passages in the Judgments of Hogarth J. and Mitchell J. to the effect that the judgment was final since, whichever way the decision went, it was a final decision as between the parties (the Salaman test), their Lordships also had regard (at pages 281 F-H and 282 E-F) to the nature of the order made by the Full Court and to the fact that the Court had answered the Plaintiff's question in the negative (the Bozson test).

10. In Tampion v. Anderson (1973) 48 A.L.J.R. 11 their Lordships declined to formulate a test of universal application and emphasised the difficulty which arose

> "..... out of attempts to frame a definition of 'final' (or of 'interlocutory') which will enable a judgment to be recognised for what it is by appealing to some formula universally applicable in any contingency in which the classification falls to be made." (1973) 48 A.L.J.R. 11, 12.

Their Lordships approved the dictum of Lord Denning M.R. in Salter Rex & Company v. Ghosh /1971/ 2 Q.B. 597 that

> "..... the question of "final" or "interlocutory" is so uncertain that the only thing for practitioners to do is to look up the practice books and see what has been decided on the point. Most orders have now been the subject of decision. If a new case should arise, we must do the best we can with it. There is no other way." /1971/ 2 Q.B. 597, 601 C-D.

11. In his Petition for Special Leave, the Appellant relying on the statements of Lord Denning M.R. in Salter Rex & Company v. Ghosh (supra, at p.601A) and in Technistudy Limited v. Kelland /1976/ 1 W.L.R. 1042, 1045C, contended that practioners in England had "always regarded judgment under Order 14 as interlocutory". It is respectfully doubted whether this is an accurate statement of the practice in England.

(1) Since 1925 an order of a judge refusing unconditional leave to defend an action has by statute been deemed to be a final order for the purposes of an appeal to the Court of Appeal, no leave to appeal being required by a defendant against whom judgment is entered under Order 14: by section 31(2) of the

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Supreme Court of Judicature (Consolidation) Act 1925 it is provided that "An order refusing unconditional leave to defend an action shall not be deemed to be an interlocutory order within the meaning of this section." Likewise, express provision is made by the Rules of the Supreme Court for the time within which an appeal is to be lodged from a judgment or order given or made under Order 14: by R.S.C. Order 59, rule 4(1) it is provided that

"Subject to the provisions of this Order, every notice of appeal must be served under rule 3(5) within the following period (calculated from the date on which the judgment or order of the court below was signed, entered or otherwise perfected), that is to say:

(a) in the case of an appeal from an interlocutory order ..... and in the case of an appeal from a judgment or order given or made under Order 14 or Order 86, 14 days:

(b) .....

(c) ....."

(2) It is to be doubted whether even prior to 1925 judgment under Order 14 was universally regarded by practitioners as interlocutory. In the notes to R.S.C. Ord. 59, rule 4 in the Supreme Court Practice 1982 (Note 59/4/3) three cases are cited in support of the proposition that an order empowering the plaintiff to sign final judgment under Order 14 is to be treated as an interlocutory order only - Standard Discount Co. v. Otard de la Grange [1877] 3 C.P.D. 67; Re a Debtor (1903) 19 T.L.R. 152; Roffe v. Lawrence (1947) 63 T.L.R. 609. It is apparent from the three authorities that a distinction was drawn between an order which gave leave to sign final judgment (which was treated as interlocutory since the further step was necessary of signing judgment before the Plaintiff could issue execution) and the judgment itself; which was treated as final when it was signed.

12. Even if it were the practice in England to treat an order and judgment under Order 14 as an interlocutory Order, it would in the submission of the Respondents not follow that the Federal Court erred in adopting a different practice. Since the decision of the Federal Court in Peninsular Land Development Sdn. Bhd. v. K. Ahmad (No.2) [1970] 1 M.L.J. 253 F.C. it has been the established practice in Malaysia to treat an order of the Court giving leave to a plaintiff to sign final judgment as a final order, thus entitling the defendant to appeal to the Federal Court without the necessity of obtaining leave. In this regard the practice in Malaysia has been assimilated to that which has existed in England since the passing of

the Supreme Court of Judicature (Consolidation) Act 1925. This practice has been followed and affirmed by the Federal Court in the subsequent cases of Hong Kim Sui & Anor. v. Malayan Banking Bhd. /1971/ 1 M.L.J. 289 F.C. and Ng Cheng Yoon v. Mah binti Mat Isa /1981/ 1 M.L.J. 218. It is respectfully submitted that the Federal Court were not in error in affirming and applying the same practice in their judgment of 1st November 1979 in the present case and in holding that no leave was required by the Respondents to appeal from the Order of Harun J. giving leave to the Appellant to sign final judgment or from the judgment entered by the Appellant pursuant to such leave.

Issue (2)

13. If, contrary to the submission of the Respondents, the Order of Harun J. is properly to be regarded as an interlocutory order, it is alternatively submitted that the Federal Court were correct in holding that, by obtaining a certificate from the Learned Judge pursuant to Order 54, rule 22 of the Rules of the Supreme Court 1957 that further argument in Open Court was not required, the Respondents were entitled to appeal to the Federal Court without obtaining leave to appeal.

14. By Order 54, rule 22 of the Rules of the Supreme Court 1957, it is provided:

"The Judge in Chambers if he thinks it desirable that any summons, appeal or application owing to its importance or the length of the time likely to be occupied or for any other reasons should be heard in Court may direct that the same be so heard or may adjourn the same to be so heard. Provided that any decision in Court on any such summons, appeal or application shall be deemed to be a decision at Chambers."

Order 54, rule 22A provides:

"Any party dissatisfied with any order made by a Judge in Chambers may apply, at the time the order is made, orally, or at any time within four days from the day of the order in writing to the Registrar, for the adjournment of the matter into Court for further argument; and on such application, the Judge may either adjourn the matter into Court and hear further argument, or may certify in writing that he requires no further argument. If the Judge hears further argument he may set aside the order previously made, and make such other order as he thinks fit."

15. The Appellant's Summons-in-Chambers dated 3rd October 1977 was adjourned by Harun J. into Open Court pursuant to Order 54, rule 22; on 29th June 1978 (the day after the decision of Harun J. on the Summons) the Respondents requested, pursuant to Order 54, rule 22A that the application be adjourned into Open Court for further argument; on 4th July, 1978 Harun J. certified pursuant to

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Order 54, rule 22A, that he required no further argument in Open Court; on 6th July 1978, the Respondents filed their Notice of Appeal against the said decision and order of Harun J.

16. In argument before the Federal Court and in his Petition for Special Leave, it was contended by the Appellant

(i) that once a Judge hears an application and full argument in Open Court, without hearing any argument in Chambers, pursuant to the provisions of Order 54, rule 22, although any decision on such application is deemed by Rule 22 to have been made "at Chambers", the first limb of section 68(2) of the 1964 Act does not apply, there being no room for an application for further argument in Open Court or for a certificate that no further argument is necessary;

(ii) that, likewise, Rule 22A has no application in such case since all arguments have already been exhausted in Open Court, although deemed to be "at Chambers" under Rule 22;

(iii) that the first limb of section 68(2) of the 1964 Act being inapplicable in such a case, it was necessary for the Respondents to apply for and obtain leave to appeal under the second limb of that sub-section.

In support of this contention the Appellant relied on the decision of the Federal Court in Sri Jaya Transport Co. Ltd. v. Fernandez [1971] M.L.J. 87.

17. The Respondents respectfully make the following submissions:

(i) The decision in the Sri Jaya case was purportedly based on the decision of the Federal Court in Nagappa Rengasamy Pillai v. Lim Lee Chong [1968] 2 M.L.J. 91 which case was said to establish

> "..... that, notwithstanding the proviso to Order 54, rule 22, in these circumstances [i.e. where an application is heard in Open Court under Rule 22] the first limb of sub-section (2) of section 68 of the Courts of Judicature Act, 1964, does not apply, so that no appeal lies unless leave is obtained from this court or from a judge of the High Court. In other words, there is no need for the aggrieved party to apply, as has been done here, within four days of the making of the interlocutory order for a certificate from the judge that he requires no further argument". [1971] M.L.J. 87, at p.87 G-I.

It is respectfully submitted that the Court's judgment reveals a misunderstanding of the decision in the

Nagappa Case which was wrongly assumed to be a case where the Summons-at-Chambers had been adjourned into Open Court pursuant to Rule 22. In fact, as is clear from the judgment of the Court in the Nagappa Case /1968/ 2 M.L.J. 91 at p.91 B-C, the summons was originally heard at Chambers and not in Open Court; an application was made after the decision of the Court at Chambers pursuant to Rule 22A (not Rule 22) for further argument in Open Court; and the application was granted, further argument in Court taking place under Rule 22A. It was in these circumstances that the Federal Court in the Nagappa Case held that since further argument in Court had taken place, the first limb of section 68(2) had no application and that it was necessary to apply for leave under the second limb of the sub-section.

(ii) In the subsequent decision of the Federal Court in T.O. Thomas v. K.C.I. Reddy & Anor. /1974/ 2 M.L.J. 87 F.C. the majority of the Court (Azmi L.P. and Gill C.J. (Malaya)) declined to follow the decision in the Nagappa case, Gill C.J. (Malaya) expressly holding (at p.92 I) that the case was wrongly decided: the Federal Court in the T.O. Thomas case held that, where a judge complied with a request for further argument in Court under Rule 22A and adjourned the Summons into Court for further argument, any order which he made after such further argument would be an order made in Court and not an order made in Chambers (the proviso in Rule 22 having no application) with the consequence that an appeal against such an order lay as of right. It is submitted that the decision and reasoning of the majority of the Court in the T.O. Thomas case is to be preferred to that in the Nagappa Case and that the decision in the Nagappa Case forms no sound basis for the decision of the Court in the Sri Jaya Case.

(iii) The proviso to Rule 22 is clear in its terms: a decision made on an application heard in Open Court or adjourned into Open Court under Rule 22 is deemed (without limitation) to be a decision at Chambers. In consequence, any party dissatisfied with an order made by a Judge on application heard in Open Court under Rule 22 is entitled to apply to the Court for further argument under Rule 22A. There is no justification for placing a gloss on the words in Rule 22A and in section 68(2) "order made by a Judge ..... in Chambers" to exclude orders made by a Judge after a hearing in Open Court under Rule 22. Nor is there any ground for the contention that in such circumstances Rule 22A and the first limb of Section 68(2) have no application since all arguments have already been exhausted in Open Court.

(iv) Alternatively if, contrary to the Respondents' contention, a decision made on an application heard

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in Open Court under Rule 22 is properly to be regarded as a decision in Open Court so as to render Rule 22A inapplicable, it is submitted that an appeal lies without leave from such a decision, since Section 68 (2) applies only to "an interlocutory order made by a Judge of the High Court in Chambers". Thus, either the order of Harun J. was made in Chambers, in which case Rule 22A applies and the Respondents are entitled to rely on the Learned Judge's certificate under Section 68(2) without obtaining leave to appeal, or the order of Harun J. was made in Open Court, in which case section 68(2) is inapplicable and the Respondents were entitled to appeal without leave and without needing to obtain a certificate.

(v) For the above reasons it is submitted that the Sri Jaya case was wrongly decided. It is further submitted that the Federal Court correctly held that, the certificate of Harun J. under Rule 22A having been given after application was made within time, the first limb of section 68(2) had been satisfied by the Respondents with the consequence that the Respondents were entitled to appeal without needing to obtain leave.

Issue (3)

18. In his Petition for Special Leave the Applicant took two preliminary objections to the decision of the Federal Court in granting to the Respondents unconditional leave to defend, namely

(a) the allegation that the Federal Court had, notwithstanding the Appellant's objections, wrongly allowed the Respondents on appeal to rely on entirely new and different grounds from the single ground relied on before Harun J., namely, that by delivering the share certificate No. 0227 together with the transfer form they had duly delivered to the Appellant a valid and proper share certificate and a valid and proper instrument of transfer in performance of their obligations under the Sale Agreement;

(b) the allegation that the Federal Court had wrongly drawn inferences from and formulated issues on matters contained in the pleadings in Civil Suit No. 2323 and Civil Suit No. 3430 of 1977, when there were no Affidavits before the Court deposing to the truth of the contents of the said pleadings and when there was not any or any proper evidence to support the inferences drawn or the issues formulated by the Court.

19. The Respondent's primary submission is that each of the above matters is a matter within the discretion of the Federal Court. In the absence of material to show that the discretion was exercised on wrong principles, no grounds

exist for interfering with such exercise (Ratnam v. Cumarasamy [1965] 1 W.L.R. 8, 12). In the exercise of their discretion the Federal Court were entitled to permit the Respondents to rely on grounds and arguments which were raised in the Respondents' Notice of Appeal notwithstanding the fact (if such it be) that the grounds or arguments were not fully developed in the Court below, and to rely on facts which were not verified by affidavit. The Respondents respectfully make the following further submission in relation to the preliminary objections to the decisions of the Federal Court:

(a) New Grounds

(1) Contrary to the contention of the Appellant, the Respondents did not in the two Summonses before Harun J. rely solely on the ground that by delivering the share certificate No. 0227 and the transfer form they had performed their obligations under the Sale Agreement. As is clear from the Learned Judge's Notes of Argument and from the grounds of judgment of Harun J. the Respondents further argued

(i) that by reason of the delay on the part of the Appellant and/or UH and/or SSP (companies which the Appellant and Mr. Koh controlled) before purporting to de-register the shares in question, the Appellant was barred from recovering the purchase price of the shares by the doctrines of laches, acquiescence and/or estoppel;

(ii) that, in any event, there existed a serious issue concerning the rectification of the register of UH otherwise than pursuant to an order of the Court under Section 162 of the Companies Act.

In his grounds of judgment Harun J. referred to but rejected both arguments as irrelevant:

"It was suggested that rectification of the register could only be effected by an order of the Court under section 162 of the Companies Act. In my view this provision is irrelevant to the issue. So also the argument regarding laches, acquiescence and estoppel on the ground that the Defendant and Koh Kim Chai were the Directors of the Plaintiff Company and United Holdings Bhd. at the material time". (Record p.99, lines 35-44). Further, contrary to the Appellant's contention in his Petition for Special Leave, the Respondents did rely as one ground for their appeal to the Federal Court on a submission that, by delivering the relevant share certificate and transfer form, they had fulfilled their obligations under the Sale Agreement.

(2) The Respondents succeeded in the Federal Court on the grounds that there were issues of fact and law which were proper to be tried and which were not capable of being

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resolved summarily on affidavit. Insofar as new questions could be said to have been raised by the Respondents in the Federal Court they were questions of law which arose from the undisputed facts that the Appellant and/or SSP had for a period of 2 years controlled and exercised all rights of management over UH, that SSP had for a period of 1½ years been registered as holders of the shares in question, that the shares were de-registered by UH of their own motion and without an order of the Court for rectification of the register, and that the purchase was of a controlling interest in UH and without the 523,278 shares the purchaser would not have acquired a controlling interest.

(b) Lack of Evidence

(3) There is no requirement imposed by the rules that the Defendant (in Order 14 proceedings) or the Third Party (in proceedings under Order 16A rule 7(1)) may rely only on facts verified by affidavit for the purpose of establishing that there is an issue fit to be tried: nor is the Court in its determination of the question whether leave to defend should be given limited to the examination of material which is expressly verified by affidavit. The documents exhibited to the Affidavits filed on behalf of the Respondents included the Statement of Claim and the Defence in Civil Suit No. 2323 and the Statement of Claim in Civil Suit No. 3430 of 1977 between the Respondents (as Plaintiffs) and the Applicant and Mr. Koh (as Defendants). Both actions were closely connected with the present proceedings and arose out of the same series of transactions. At the hearing before the Federal Court, Counsel for the Appellant objected to the Respondents relying on facts alleged in pleadings in other actions but not verified by Affidavit. Having heard those objections, the Federal Court acted within the proper exercise of its discretion in having regard to facts alleged in those pleadings, to the extent, if at all, that it did so (which is dealt with below). Those pleadings disclose issues between the Appellant and the Respondents directly relevant to the present action which were proper to be tried and which were unsuitable for determination in proceedings for summary judgment.

pp.21-23
p.59ff

(4) Further and in any event, contrary to the contention in the Applicant's Petition for Special Leave, the Federal Court did not draw inferences from, or formulate issues on, matters which were contained exclusively within the Respondents' pleadings in the other two Civil Suits. In concluding that there were issues and questions which required to be tried, the Federal Court relied on facts which were not in dispute between the parties namely:-

(i) the fact that the Appellant and Mr. Koh had since December 1974 controlled UH and had exercised all rights of management over the Company;

(ii) the fact that the Appellant and Mr. Koh effectively controlled SSP: RECORD

(iii) the fact that SSP were registered by UH as holders of the shares in question for a period of 2½ years;

(iv) the fact that such registration occurred notwithstanding the exchange of correspondence between the Secretary of UH and Dr. Chong in March and April 1975;

(v) the fact that Mr. Koh and his board of Directors of UH had in December 1974 secured the suspension of trading of the shares of UH and had failed in March 1975, or at any time thereafter, to secure the re-listing of the Company;

(vi) the fact that in December 1976 the Secretary of UH de-registered SSP without an order of the Court for rectification of the register and without an application being made for rectification by Dr. Chong or by IHP.

20. In the submission of the Respondents the Federal Court were correct to conclude on the basis of these undisputed facts that there were issues proper to be investigated at a trial and that the Respondents had raised triable defences entitling them to defend the action. In addition to the factual issues identified by the Federal Court as requiring investigation, it is submitted that there were other issues justifying the Federal Court in holding that the Respondents had raised triable issues of law. These include:-

(1) Whether there was in fact a total failure of consideration by reason of the defect in the transfer form relating to the shares in question.

It is the Respondents' case that the Federal Court rightly held that the Respondents were entitled to deal with the shares pending registration and that the Respondents having purchased or agreed to purchase the shares from a third party, became the beneficial owners of the shares and were capable of dealing with them. It is further the Respondents' case that, the Appellant having secured the registration of the shares in the name of his nominee or transferee and the shares having been so registered for a period of at least 1½ years (and more probably 2½ years having regard to UH's Annual Report for 1975) during which period the Appellant and/or Mr. Koh controlled and exercised all rights of management over the company, there was no total failure of consideration entitling the Appellant to recover the price of the shares in question. p.121

(2) Whether the Sale Agreement constituted an entire contract, such that the Appellant, having accepted part of the 1,400,000 shares, is not entitled to reject the 523,278 shares in question.

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It is the Respondents' case that the Sale Agreement was an entire contract and that the Appellant having had full and due performance as regards at least 976,722 shares and having thereby obtained and exercised control of the management of UH, is not entitled to reject part of the shareholding or recover the price thereof.

(3) Whether, assuming that the Sale Agreement was a divisible contract, the Appellant is entitled to recover the purchase price of the shares in question, having regard to the events which took place after the date of the purchase.

It is the Respondents' case

(i) that the Appellant affirmed the Sale Agreement and is unable to claim the return of the purchase price on the ground of a total failure of consideration, by reason of (inter alia)

(a) his entering into the Supplementary Agreement of 22nd January 1975;

(b) the alleged sale to SSP;

(c) the Appellant's exercise of control over UH for over 2 years including the appointment of directors and the secretary and the making of substantial changes in UH's business;

(d) the Appellant's successfully seeking the suspension of UH's share listing.

(ii) that having regard to the facts referred to above, the Appellant lost the right to reject the shares in question or recover the price thereof by virtue of section 13(2) of the Sale of Goods (Malay States) Ordinance (No. 1 of 1957);

(iii) that, in view of the substantial changes made to UH by the Appellant and his associates, including the disposal of the company's assets and the suspension of the company's share quotation, the Respondents cannot be restored to their original position and the Appellant is thereby precluded from claiming the return of the purchase price;

(iv) that by reason of the facts and matters set out above, the Appellant is estopped from claiming to reject the shares and recover the purchase price.

(4) Whether UH having once registered SSP as shareholders were entitled proprio motu to strike them off the register, and whether such action and the re-registration of Dr. Chong was valid and lawful.

It is the Respondents' case that, having once registered SSP as shareholders, the company was not entitled to strike them off the register, otherwise than pursuant to an order of the Court for rectification and that in the circumstances of the case no such rectification would have been ordered.

(5) Whether the Plaintiff's allegations as to the date of the discovery of the defect in the share transfer form, the events of 15th December 1976 and the letters of 15th December 1976 and 30th January 1977, are true.

21. In the course of their Judgment, the Federal Court stated as follows:-

"Everything depends upon the facts of the case, and the nature of the contract and these must be gone into upon a full investigation upon a witness action and not upon affidavit evidence.

At this stage of the proceedings we will not undertake a preliminary trial of the action beyond noting the several circumstances which lead us to the conclusion that the decision to give leave to /the Appellant/ to sign final judgment against /the Respondents/ without trial was to say the least wrong and unsupportable". (Record p.150-151).

It is submitted that the Federal Court's decision was fully justified in the light of the issues of fact and of law canvassed in their judgment. The Federal Court's conclusion that there was a case proper to be tried is in no way weakened by the Court's mistaken reference to the Appellant's case as being based on misrepresentation, since substantially the same issues of fact and law arise in an action based on a total failure of consideration, the Respondents' case being that the Appellant is barred by his delay and affirmation of the contract from recovering the purchase price of the shares in question. It is further submitted that, in the absence of any special circumstances justifying intereference with the decision of a lower Court granting unconditional leave to defend, such decision should stand (Wing v. Thurlow (1893) 10 T.L.R. 151; Papayanni v. Coutpas /1880/ W.N. 109); no such special circumstances have been shown in the present case.

Issue (4)

22. In his Petition for Special Leave, the Appellant contended that the Federal Court had erred in ordering that the Third Party proceedings in Civil Suit No.1364 of 1977 and Civil Suit No. 2323 of 1976 should be consolidated when there was no application before the Court to consolidate the same.

23. The Appellant's contention is without foundation. As appears from the Notes of Evidence before Harun J. (Record

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p.93, lines 12 and 38) the Respondents applied, in the alternative to their application to set aside the Third Party proceedings, for consolidation of the two actions. The alternative applications were expressly considered by Harun J. in his grounds of judgment and were both dismissed: "The evidence required to prove the allegations in respect of the two actions are not the same. Even learned Counsel for Central Securities conceded that the causes of action are not the same but he contends that the relief sought is the same. In my view this alone is insufficient to justify consolidation of the two causes or to set aside Third Party proceedings." (Record, p.98 lines 20-28). Likewise, it is apparent from the Notes of Evidence of each of the Judges of the Federal Court that the Respondents renewed their application for consolidation of the two actions and that the issue of consolidation was fully argued by Counsel on both sides.

24. It is accepted that an application for consolidation was not included in the Respondents' Summons dated 30th
p.14-15 September 1977 and that no express reference to consolidation was made in the Respondents' Memorandum of
p.128ff Appeal to the Federal Court. However in the submission of the Respondents neither omission is material for the following reasons:

(1) Order 30, rule 4 of the Rules of the Supreme Court 1957 requires that, on the hearing of the Summons for Directions, any party to whom the Summons is addressed shall, so far as is practicable, apply for any order or directions as to any interlocutory matter or thing in the action which he may desire. In contrast to Order 25, rule 7(1) of the current English Rules of the Supreme Court, there is no requirement in the Malaysian Rules for the respondent to the Summons for Directions to give written notice of the directions which he intends to seek. Similarly, Order 16A, rule 7(1) of the Rules contains no requirement that a Third Party should give advance written notice of the directions for which he intends to apply.

(2) The position is not affected by Order 49, rule 8(2) which provides that an application for consolidation "shall be made by summons in one action that such action may be consolidated with some other action": the purpose of the Rule is not to require that an application for consolidation should in all cases be made by summons, whether such application is made by an applicant or respondent to a summons, but rather to make clear that it is unnecessary to make an application for consolidation in both actions.

(3) Further and in any event it is submitted that Harun J. was empowered proprio motu in the exercise of the inherent jurisdiction of the Court to consider and give such directions as might lead to the saving of costs and time including a direction for consolidation of the two actions.

(4) As to the appeal of the Federal Court, although no express reference to consolidation was made in the Respondents' Memorandum of Appeal, the Respondents by their Notice of Appeal gave notice of their intention to appeal against the whole of the decision of Harun J., including the Learned Judge's refusal of the Respondent's application to consolidate the two actions: the issue of consolidation was accordingly properly before the Federal Court.

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(5) Further and in any event, the omission of a written application for consolidation is at most an irregularity within Order 70, rule 1 of the Rules of the Supreme Court 1957; a mere irregularity of procedure does not warrant the intervention of their Lordships when it is not shown that any injustice has resulted - Lam Kee Ying Sdn. Bhd. v. Lam Shes Tong /1975/ A.C. 247, 257-8.

25. It is respectfully submitted that the Federal Court was correct in ordering the consolidation of the two actions, there being common questions of law and fact such as to render it desirable that the whole should be disposed of at the same time.

26. The Respondents respectfully submit that this Appeal should be dismissed with costs and that the Judgment and Order of the Federal Court of 16th May 1979 be affirmed for the following among other

R E A S O N S

(1) BECAUSE the decision and Order of Harun J. of 28th June 1978 giving final judgment in favour of the Appellant pursuant to order 16A rule 7(1)(a) of the Malaysian Rules of the Supreme Court 1957 was a final decision and order from which the Respondents were entitled to appeal to the Federal Court without leave from the Federal Court or of a Judge of the High Court;

(2) BECAUSE, alternatively to (1), Harun J. having issued his certificate dated 4th July 1978, the Respondents were entitled to appeal to the Federal Court pursuant to Section 68(2) of the Courts of Judicature Act 1964, without the necessity of obtaining the leave of the Federal Court or of a Judge of the High Court;

(3) BECAUSE, by reason of (1) and (2) above, the Respondents' appeal to the Federal Court from the said decision and order of Harun J. was properly and competently brought;

(4) BECAUSE the Respondents have sufficiently shown that there is a proper case to be tried between the Appellant and the Respondents and the Federal Court were correct in granting the Respondents unconditional leave to defend the Third Party proceedings;

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(5) BECAUSE the Federal Court were correct in considering and ordering the consolidation of the Third Party proceedings in Civil Suit No.1364 of 1977 and Civil Suit No. 2323 of 1976;

(6) BECAUSE the judgments of the Federal Court were correct.

Samuel Stamler Q.C.

IN THE PRIVY COUNCIL No.55 of 1980

ON APPEAL

FROM THE FEDERAL COURT OF MALAYSIA
(APPELLATE JURISDICTION)

B E T W E E N :-

HARON BIN MOHD. ZAID — Appellant (Defendant)

- and -

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

CASE FOR THE RESPONDENTS

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