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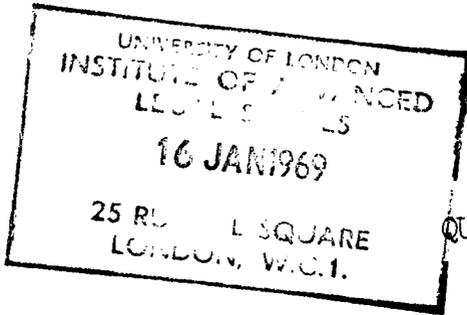
IN THE JUDICIAL COMMITTEE OF THE No. 5 of 1967

PRIVY COUNCIL

ON APPEAL FROM THE FEDERAL COURT

OF MALAYSIA

B E T W E E N:



YEW PHAIK HOON
(Married Woman)

Appellant

- and -

QUAH OOI KEAT and
QUAH OOI JIN

Respondents

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CASE FOR THE RESPONDENTS

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1. This is an appeal from the judgment of the Federal Court of Malaysia in its Appellate Jurisdiction (Ong, Ag.C.J. and Ismail Khan, J., Thomson, L.P. dissenting) dated the 15th May, 1966, which allowed with costs the Respondents' appeal and set aside the order of the High Court at Johore Bahru (Azmi, J.) dated the 31st March, 1965, whereby judgment was given for the Appellant declaring that the Respondents held certain lands at Kluang, Johore on trust for the Appellant and ordering them to transfer such lands to her.

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2. The Appellant's Statement of Claim, dated the 5th November, 1962, and the particulars given of it, alleged that prior to the 9th November, 1940 one Yew Hun Eng, a brother of the Appellant, had been the registered owner of Lots nos. 1831, 1832 and 1833 in the District of Kluang, Mukim of Kluang, Johore (hereinafter called "the land"), and had held the land in trust for the Appellant under an oral arrangement made about August, 1935, and confirmed in a document dated the 29th June, 1940. It was

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further alleged that the land was on the 9th November, 1940, on the oral request of the Appellant, transferred into the names of the Respondents, respectively the stepson and son of the Appellant, who thereafter held the land in undivided shares under an oral trust made at the time of the transfer as trustees for the Appellant, and not as beneficial owners. The Respondents, it was alleged, had failed and neglected to transfer the land to the Appellant upon her request, and the Appellant claimed a declaration that the Respondents held the land upon trust for her, an order for the transfer of the land to her, and consequential relief.

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3. The amended Defence, dated the 26th April, 1964, admitted that on the 9th November, 1940 the land had been transferred to the Respondents as beneficial owners, by Yew Hun Eng without any consideration passing, and denied that the Respondents held the land on trust for the Appellant; the land was then the property of Quah Hong Chiam, their father and the Appellant's husband, and had been given by him to the Respondents; it was denied that there had ever been any trust in favour of the Appellant.

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4. The hearing of the action took place in the High Court at Johore Bahru before Azmi, J. on the 26th to 28th April and 5th December, 1964. The appellant gave evidence on her own behalf. She said that her younger brother, Yew Hun Eng, had died 10 years before, but that before the war she had owned the Johore Lumbering Co. and her brother had bought land for her; she had provided the money, and she produced the transfers for the land which had been acquired by Yew Hun Eng in October, 1937 from the Official Assignee acting in the bankruptcy of her husband. In 1940 she said, Yew Hun Eng had appointed the Respondents to look after the land as he had been doing, but the land had not been transferred to them; she had not intended to give it to them. She said she did not know in whose possession the title deeds had been kept, or who had paid the land rent; she denied that she had authorised her husband to give the

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land to the Respondents, as, she said, it was her land. In cross-examination she said that she had only come to know that the land was in the name of the Respondents just before the writ had been issued; her brother had never consulted her about the transfer to the Respondents; her profit on the land had been paid into the company, and her husband had been solely in charge of the disposal of her profits from the land. For the last few years she had not taken the profits from the land and had not bothered about them.

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5. Evidence was given for the Appellant by Quah Hong Chiam, her husband. He said that after he had been made bankrupt in 1932 the land, which had previously belonged to him, had been sold to Yew Hun Eng on behalf of the Appellant, whose mother had provided the price; in 1940 the land had been transferred to the Respondents, as they had then to look after the land. It was not true, he said, that he had given the land to the Respondents. The land had not been transferred to the Appellant because she was a woman and had not known the affairs of the jungle. In cross-examination, he agreed that after the war a loan had been made on the security of the land on the application of the Respondents, and they had been assessed to income tax on the profits of the land, although he said that the tax had been provided for by the Johore Lumbering Co. Ltd.

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6. Quah Ooi Chim, a son of the Appellant, also gave evidence. He said that in 1935 the Appellant had borrowed \$10,000; she had paid \$600 for the land to Yew Hun Eng on her husband's suggestion. 10 years previously the Appellant had tried to get the land back, and at that time the Respondents had not said that it belonged to them. In cross-examination, he said that he had written the document A10, dated the 29th June, 1940; it appeared to acknowledge payments made by the Appellant on behalf of Yew Hun Eng, but it really recorded a personal loan to the Appellant. In re-examination he said that the main business referred to in paragraph 1 of document A10 was the Kahang Saw Mill, and

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that all other properties were intended to be included.

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7. Both Respondents gave evidence. The First Respondent said that he and the Second Respondent had been proprietors of the land since 1940. His father had become bankrupt in 1932, and the land, which his father had previously owned, was purchased by Yew Hun Eng, whom his father had used to do business for him. His father had told him that he was being given the land because he was the only son on his side of the family and because he was more experienced. After the war

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he had signed an application for a loan of \$100.000 on the security of the land. The Second Respondent said that the land had been transferred jointly to him and the First Respondent in 1940, when gifts had been made by his father to other children. After the war he had raised money on the security of the land and had made income tax returns in relation to the profits on it.

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8. Azmi, J. gave judgment for the Appellant in a reserved judgment dated the 31st March, 1965. The judgment began by referring to the issues raised by the pleadings, and then summarised the evidence given on behalf of the Appellant, and referred in particular to the Appellant's evidence that she had paid for the land and to the Agreement of the 29th June, 1940; the document of title showed a transfer to the Respondents on 18th November, 1940, but this transfer was said by the Appellant and her witnesses to have been on trust for the Appellant. The learned judge continued:

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"I find from the evidence as a whole that so far as dealings with Government Departments were concerned, the property in dispute had been regarded as that of the registered owners, but on the other hand none of the Defendants enjoyed the income as their own separate income until the dispute arose about this property, and all the debts due to the Government, for example income tax, were paid out from a

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common fund of the family.

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10 The 1st Defendant himself explained that he was made a co-owner because he had the responsibility of looking after the members of the family in Kluang, including his grandmother. The 2nd Defendant, however, said in effect that so far as he was concerned, it was intended that he would be the owner of the other half for himself alone. His version of the story was that all the properties have always belonged to his father, who always had enough money, although openly he had become a bankrupt. In so far as the oil palm estate is concerned, I hold the view on the evidence before me that it was bought from the Official Assignee by Yew Hun Eng on behalf of the Plaintiff, and Yew Hung Eng, therefore, held the land merely as trustee for the Plaintiff. He continued to look after the land until he decided to return to Penang. Because Yew Hun Eng was to look after the property the land was registered in his name. There seemed to be an idea in the family that the land must be registered in the land office in the name of whoever was to look after the property. On the facts of the case, therefore, I accept the evidence of the Plaintiff, her husband and her eldest son that when this property was transferred to the two Defendants after the departure of Yew Hun Eng to Penang, the two Defendants were to hold the property in trust for her."

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The learned Judge then rejected an argument on behalf of the Respondents that if the Appellant was right her case disclosed a fraudulent evasion of estate duty, on the ground that no such fraudulent purpose had yet been carried out. Judgment was then given in favour of the Appellant, and the Respondents were ordered to transfer the land to her.

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9. The Respondents appealed against the judgment of Azmi, J. to the Federal Court of Malaysia, and the appeal was heard by Thomson, L.P.,

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Ong, Ag.C.J. and Ismail Khan, J. on the 3rd and 4th October, 1965. Judgment was given by the Federal Court on the 15th May, 1966, when, by a majority (Thomson L.P. dissenting), the appeal was allowed with costs and judgment was entered for the Respondents.

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10. Thomson, L.P. in his judgment reviewed the evidence in detail. He pointed out that the Appellant, an illiterate blind woman of over eighty, had admitted that she did not know or did not remember very much about the business and that everything had been arranged by her husband and her brother. In the learned Lord President's own view of the case, this case was an example of the difficulty of applying an alien system of law to people who were ignorant of it. For his part, he said, he would attach little value to the evidence of the parties, particularly since Yew Hun Eng had died. The evidence was so nicely balanced that the Respondents would have been entitled to succeed, but for three considerations which had swung the balance of probability in favour of the Appellant; first, Azmi, J. had clearly preferred the evidence of the father and mother; secondly, there was the significant fact that the transfer to the Respondents had been before the incorporation of the Johore Lumbering Company and yet they had received the same share in that company as the other sons; and, thirdly, the title deeds had for many years been in the possession of the Appellant (the learned Lord President appears on the evidence to have been wrong in saying this). For these reasons the appeal, Thomson, L.P. said, should be dismissed.

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11. Ong, Act C.J. of Malaya, in his judgment, pointed out that Azmi, J. had based his decision on inferences from primary facts, which, however, he had not stated. The statement of claim required the Appellant to prove that the land was held in trust for her alone by Yew Hun Eng, that the transfer to the Respondents was at her request, and, finally, that her motive, at the time of transfer, was

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to substitute the Respondents as trustees, and not to benefit them personally. In a close review of the evidence, the learned Chief Justice concluded that none of those three steps was established by the evidence; in particular the Appellant had said that she knew nothing of the ownership or use of the land and had not known that the land was in the names of the Respondents until just before the proceedings began. The evidence established that Yew Hun Eng had held the land, not for the Appellant, but for her husband, as a shield for him in his bankruptcy. There was no reason for the land to be transferred to the Respondents on trust, and no sufficient evidence that any trust had been imposed on them. At the time of the transfer the land was of little value, and it was only since it had become more valuable that the Appellant's husband, not herself, had tried to persuade the Respondents to retransfer the land. The land had been given to the Respondents at a time when other children were sharing in a distribution of property by their father; the agreement of the 29th June, 1940 did not support the Appellant's case, which she had failed to prove. Ong, Ag.C.J. therefore concluded that the appeal should be allowed and the order of the trial judge should be set aside.

12. Ismail Khan J. agreed that the appeal should be allowed. The case had to be decided on the issues pleaded; it was an essential step in the Appellant's case to establish that prior to 1940 the land had been held on trust for her by an oral trust created in 1935, but there had been no evidence to that effect, and the agreement of the 29th June, 1940, properly read, was contrary to the Appellant's case. It had further been pleaded that the transfer to the Respondents as trustees in 1940 had been at the oral request of the Appellant; her own evidence that she knew nothing of the transfer contradicted this allegation. On these grounds alone the appeal should succeed. The learned judge agreed, however, with the conclusions of Ong, Act. C.J. upon the rest of the case; the evidence showed that the Appellant had always left her business affairs to her husband, and it

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had been his property that had been distributed among his children and former wife after his discharge from bankruptcy. The case was inappropriate for any application of English authorities relating to presumptions connected with advancements. The learned judge was satisfied on the facts that the land had been transferred beneficially to the Respondents.

13. The Respondents respectfully submit that the judgments of the majority of the Federal Court were correct and that this appeal should be dismissed. It is submitted that the Appellant failed at the trial to establish any material allegation of the case pleaded, and that the effect of the evidence was to contradict the case pleaded. The conclusions of the learned trial Judge were based upon inferences from the primary facts, upon which he had not made, and would not have been justified in making, conclusive findings. In particular, the Appellant failed to prove that the land had been held in her exclusive favour under an oral trust made by her in 1935. The Appellant further failed to prove that the transfer of title to the Respondents in 1940 was in consequence of a further oral trust made by her, and her evidence made such a finding impossible. The Appellant failed to establish any sufficient connection between herself and the land, either before or after 1940, to justify any finding that she was at the date of trial beneficially entitled to the land. It is further submitted that the evidence upon the surrounding facts relating to the land, and to the dealings between members of the family of the parties, provided no assistance to the Appellant's case as pleaded.

14. The Respondents respectfully submit that the Appellant wholly failed to prove that she had provided the funds for the purchase of the land in 1935. The Appellant alleged that for that purpose she had borrowed \$10,000 through the administrators of the estate of Yew Say Kheng deceased from the Overseas Chinese Bank in Penang and that the sum was repaid in 1941. The evidence indeed showed a loan by the Bank referred to (Exhibit D14) which was made for the purposes of

the estate to the Administrators. There was also in evidence (Exhibit D15) a record of repayment of the sum of \$10,000 together with \$8,000, representing interest on the principal sum, to the Appellant's husband by the Administrators of bonis non of the estate of Yew Say Kheng deceased. This repayment was made necessary by the fact that the Appellant's husband had assisted the estate by repaying the loan of \$10,000 to the Bank in 1941 and was thus entitled to be reimbursed by the estate. If the said sum had in fact been used to purchase the land for the Appellant, as alleged by her, there would have been no ground for the Appellant's husband to make any claim upon the estate of Yew Say Kheng deceased, and no necessity for that estate to make the payment recorded in Exhibit D15. The learned trial judge, it is submitted, accordingly misdirected himself in accepting the Appellant's evidence that the loan made by the Bank to the estate of Yew Say Kheng was used for the purchase of the land. It is further submitted that Ong. Act. C.J. and Ismail Khan J. were correct in their conclusions that, on a proper analysis of the evidence relating to the loan, it was established that the money lent was not used for the purchase of the land.

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15. It is respectfully submitted that the judgment of Thomson, L.P. in the Federal Court was not correct. In particular, Thomson, L.P. said that he based his decision upon three considerations which, he said, swung the balance in favour of the Appellant. The first was that the trial Judge had clearly preferred the evidence of the Appellant and her husband; however, the question to be decided depended upon the proper inferences to be drawn from the evidence, and not upon credibility of the witnesses. The second consideration was that the Respondents, after the transfer of title in the land to them, were given the same share in Johore Lumbering Company, Ltd. upon its incorporation as other sons; it is submitted that this fact cannot be conclusive, as is shown by the distribution of assets to other members of the family about 1940, analysed in

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the other judgments in the Federal Court. The third consideration was stated by Thomson L.P. to be that for many years the title deeds were in the possession of the Appellant; this conclusion, it is submitted, is wrong and results from a mis-reading of the evidence. The First Respondent said that the deeds were kept for a number of years by his mother; however he, was the step-son of the Appellant, not her son, and this reference must have been to his mother, Lim Phien, not to the Appellant.

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16. The Respondents respectfully submit that the judgment of the Federal Court was correct and should be affirmed, and this appeal should be dismissed with costs, for the following among other

R E A S O N S

1. BECAUSE the Appellant had never been beneficially entitled to the land.
2. BECAUSE the land was not held prior to 1940 on trust for the Appellant.
3. BECAUSE the land was not held after 1940 on trust for the Appellant.
4. BECAUSE the Respondents acquired in 1940 the legal and beneficial interest in the land.
5. BECAUSE there was no evidence to support the Appellant's claim.
6. BECAUSE the evidence given at the trial was contrary to the Appellant's claim.
7. BECAUSE of the other reasons given by the majority of the Federal Court.

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J.G. LE QUESNE

MERVYN HEALD.

No. 5 of 1967

IN THE JUDICIAL COMMITTEE OF

THE PRIVY COUNCIL

ON APPEAL FROM THE FEDERAL

COURT OF MALAYSIA

B E T W E E N :

YEW PHAIK HOON
(Married Woman) Appellant

- and -

QUAH OOI KEAT and
QUAH OOI JIN Respondents

C A S E

FOR THE RESPONDENTS

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