

**DALAM MAHKAMAH RAYUAN MALAYSIA DI KUCHING**

**(BIDANGKUASA RAYUAN)**

**RAYUAN SIVIL NO. Q-02-693-2002**

**ANTARA**

**1. MATAIR BIN SUHAILI**

**2. LAW HAN CHAI**

**...**

**PERAYU-PERAYU**

**DAN**

**1. ROSE FOO CHIN LAN (P)**

**2. SU MEU GING (P)**

**3. WONG DEE LIONG**

**4. YEK TIEW KWONG**

**5. WONG LIANG UNG**

**6. TANG LEONG HUAT**

**7. TANG CHUNG KIAW (P)**

**...**

**RESPONDEN-RESPONDEN**

[Dalam Perkara Mahkamah Tinggi Guaman No. MR. 44 Tahun 1992  
Di Mahkamah Tinggi Sabah dan Sarawak di Miri

Antara

1. Matair bin Suhaili

2. Law Han Chai

...

Plaintif-Plaintif

Dan

1. Rose Foo Chin Lan (p)

2. Su Meu Ging (p)

3. Wong Dee Liong

4. Yek Tiew Kwong

5. Wong Liang Ung

6. Tang Leong Huat

7. Tang Chung Kiaw (p)

...

Defendan-Defendan]

Coram:

Mokhtar Sidin, J.C.A.  
James Foong Cheng Yuen, J.C.A.  
Zulkefli Ahmad Makinudin, J.C.A.

**JUDGMENT OF THE COURT**

We have allowed the appeal and dismissed the two cross-appeals earlier and we now give our reasons for doing so. We will refer to the parties as they were in the court below.

In their re-amended statement of claim the plaintiffs stated, inter alia, as follows:

- “1. The 1<sup>st</sup> plaintiff is, and was at material times, the registered proprietor of all that parcel of land situate at Luak, Miri containing an area of 6596 square metres (1.63 acres), more or less, and described as Lot 2676 Lambir Land District (hereinafter referred to as “the said land”).
2. By an agreement in writing dated the 29<sup>th</sup> day of August, 1981, the 1<sup>st</sup> Plaintiff agreed to sell and the 1<sup>st</sup> Defendant agreed to purchase the said land upon the terms and conditions, inter alia, as follows:
  - (a) that as consideration of the sale, the 1<sup>st</sup> Defendant shall:

- i) transfer her motor car Mazda 323 No. MB 1630 to the 1<sup>st</sup> Plaintiff;
    - ii) hand over one rice mill to the 1<sup>st</sup> Plaintiff;
    - iii) pay to the 1<sup>st</sup> Plaintiff the total sum of \$11,000.00 in cash, made up of \$4,000.00 which was stated to have been paid and a further sum of \$7,000.00 upon signing;
    - iv) shall discharge the 1<sup>st</sup> Plaintiff's indebtedness of \$5,000.00 or thereabouts to the Labour Department under the aforementioned Caveat No. L.1119/1967.
  - (b) upon signing, the 1<sup>st</sup> Plaintiff shall simultaneously execute a valid and registrable Memorandum of Transfer of the said land in favour of the Purchaser or her nominee/nominees.
3. Pursuant to the said agreement, the 1<sup>st</sup> Plaintiff executed a valid and registrable Memorandum of Transfer in favour of the 1<sup>st</sup> Defendant, and, handed over to her, the issue document of title to the said land.
  4. In breach of the said agreement and despite repeated demands, the 1<sup>st</sup> Defendant did not in fact pay the said sum of \$4,000.00 stated therein to have been paid and the further sum of \$7,000.00, or alternatively \$5,000.00, mentioned in paragraph 2(a)(iii) hereinabove.

5. Further, in breach of the said agreement, the 1<sup>st</sup> Defendant failed and still fails to discharge the 1<sup>st</sup> Plaintiff's indebtedness of \$5,000.00 mentioned in paragraph 2(a)(iv) hereinabove.
- 5A. The 1<sup>st</sup> Plaintiff avers that on the 22<sup>nd</sup> day of May, 1996 he was induced by the 5<sup>th</sup> Defendant to sign certain documents and to accept the sum of RM13,000.00 in full discharge of the balance of the purchase price owed by the 1<sup>st</sup> Defendant by fraudulently misrepresenting to him that the 2<sup>nd</sup> Plaintiff had settled his claims herein against the Defendants. By reason of the aforesaid conduct of the 5<sup>th</sup> Defendant, the Defendants are estopped or precluded from claiming that the 1<sup>st</sup> Defendant had complied with all the conditions of the said sale and purchase agreement.
6. Although the 1<sup>st</sup> Defendant was in breach of the said agreement as aforesaid, the 1<sup>st</sup> Defendant by her advocates, Mr. Yee Shin Ching, lodged a Caveat vide Instrument No. L. 6729/1991 registered on the 17<sup>th</sup> day of October, 1991.
7. By a letter dated 29<sup>th</sup> November, 1991, by his solicitors, Messrs Khoo & Company, the 1<sup>st</sup> Plaintiff, as he was entitled to, elected to rescind, the said agreement with the 1<sup>st</sup> Defendant.
8. On the 4<sup>th</sup> day of March, 1992, the 2<sup>nd</sup> to 7<sup>th</sup> Defendants lodged a Caveat against the said land, registered as

Instrument No. L. 1544/92 under and by virtue of an unregistered Memorandum of Transfer purportedly executed by the 1<sup>st</sup> Plaintiff on the 13<sup>th</sup> day of January, 1983.

9. Under the said unregistered Memorandum of Transfer, the 1<sup>st</sup> Plaintiff purportedly received a sum of \$80,000.00 as consideration for the sale of the said land to the 2<sup>nd</sup> to 7<sup>th</sup> Defendants.
10. The 1<sup>st</sup> Plaintiff did not at any time have any dealings with the said 2<sup>nd</sup> to 7<sup>th</sup> Defendants and, if the said Memorandum of Transfer was executed by the 1<sup>st</sup> Plaintiff (which is denied), it was without knowing the true intent or purport thereof.
11. Further, the 1<sup>st</sup> Plaintiff did not receive the said consideration of \$80,000.00 or at all mentioned in the said unregistered transfer.
- 11A. By a Notice dated the 18<sup>th</sup> day of November, 1992, issued by the Assistant Registrar of the Land & Survey Department, Miri the 2<sup>nd</sup> Plaintiff was notified that the 2<sup>nd</sup> to the 7<sup>th</sup> Defendants had applied for the registration of the aforesaid unregistered Memorandum of Transfer.
- 11B. The Plaintiffs aver that the sale/transfer of the said land from the 1<sup>st</sup> Plaintiff to the 2<sup>nd</sup> to 7<sup>th</sup> Defendants by the said unregistered Memorandum of Transfer dated the 13<sup>th</sup> day of January, 1983 for the consideration of

RM80,000.00 amounted to an evasion of real property gains tax on the part of the 1<sup>st</sup> Defendant and is illegal as it contravened the Real Property Gains Tax Act, 1976.

12. By reason of the matters mentioned on in paragraphs 9, 10, 11A and 11B hereof, the said unregistered Memorandum of Transfer is null and void and of no legal effect, and, no interest by virtue thereof passed to the 2<sup>nd</sup> to 7<sup>th</sup> Defendants.
13. Further or alternatively, by reason for the matters in paragraphs 4 and 5 hereof, the sale of the said land by the 1<sup>st</sup> Defendant to the 2<sup>nd</sup> and 7<sup>th</sup> Defendants referred to in paragraph 11 hereinabove was ineffective to pass any interest to the 2<sup>nd</sup> and 7<sup>th</sup> Defendants.
14. By an agreement in writing dated the 22<sup>nd</sup> day of July, 1991 made between the 1<sup>st</sup> Plaintiff of the one part and the 2<sup>nd</sup> Plaintiff of the other part, the 1<sup>st</sup> Plaintiff agreed to sell the said land to the 2<sup>nd</sup> Plaintiff upon the terms and conditions as follows:
  - (a) the purchase price shall be the sum of \$80,000.00 payable as follows:
    - (i) \$5,000.00 as deposit and part payment upon signing thereof; and
    - (ii) the balance sum of M\$75,000.00 to be paid upon valid registration for the Memorandum of Transfer in favour of the 1<sup>st</sup> Plaintiff; and

- (b) upon signing, the 1<sup>st</sup> Plaintiff shall simultaneously execute a valid and registrable Memorandum of Transfer in favour of the 2<sup>nd</sup> Plaintiff or his nominees in respect of the said land.
15. Pursuant to the said agreement, the 2<sup>nd</sup> Plaintiff paid the deposit of \$5,000.00 to the 2<sup>nd</sup> Plaintiff and the 1<sup>st</sup> Plaintiff executed a Memorandum of Transfer in favour of the 2<sup>nd</sup> Plaintiff.
16. By virtue of the matters mentioned in paragraphs 14 and 15 hereinabove, the 2<sup>nd</sup> Plaintiff became and still is beneficially entitled to the said land.
17. On the 23<sup>rd</sup> day of July, 1991, the 2<sup>nd</sup> Plaintiff as he was entitled to by reason of the said agreement, lodged a Caveat against the land which was registered at the Miri Land Registry Office as Instrument No. L. 4588/1991.
18. At the time the 2<sup>nd</sup> Plaintiff lodged the said Caveat, there was no interest registered in favour of the 2<sup>nd</sup> to 7<sup>th</sup> Defendants and the 2<sup>nd</sup> Plaintiff had no notice at all of the interest, if any, of the 2<sup>nd</sup> to 7<sup>th</sup> Defendants in the said land.
19. In the premises, and as bona fide purchaser for value of the said land, the 2<sup>nd</sup> Plaintiff obtained an interest therein which ranked in priority over the interest, if any, of the 2<sup>nd</sup> to 7<sup>th</sup> Defendants.
- I. AND the 1<sup>st</sup> Plaintiff prays for:

- (1) as against the 1<sup>st</sup> Defendant, a declaration that the agreement dated the 29<sup>th</sup> day of August, 1981 made between the 1<sup>st</sup> Plaintiff and the 1<sup>st</sup> Defendant has been validly rescinded; or alternatively, for an order of rescission of the said agreement;
- (2) as against the 2<sup>nd</sup> to 7<sup>th</sup> defendants, a declaration that the unregistered Memorandum of Transfer dated the 13<sup>th</sup> day of January, 1983 is null and void;
- (3) a declaration that the 2<sup>nd</sup> to 7<sup>th</sup> Defendants do not have any interest in the said land;
- (4) an order that the Caveat lodged by the 1<sup>st</sup> Defendant against the said land and registered at the Miri Land Registry Office on the 17<sup>th</sup> day of October, 1991 as Instrument No. L. 6729/91 be removed forthwith;
- (5) an order that the Caveat lodged by the 2<sup>nd</sup> to 7<sup>th</sup> Defendants and registered at the Miri Land Registry Office on the 5<sup>th</sup> day of March, 1992 as Instrument No. L. 1544/92 removed forthwith;
- (6) an order that, the 1<sup>st</sup> Defendant or 2<sup>nd</sup> to 7<sup>th</sup> Defendants or any one or more of them having custody of the issue document of title to the said

land, do deliver the document of title to the 1<sup>st</sup> Plaintiff within 14 days from the date of the order;

(7) such further or other relief; and

(8) costs.

2. AND the 2<sup>nd</sup> Plaintiff prays for:

i) a declaration that he is beneficially entitled in the said land under and by virtue of agreement dated the 22<sup>nd</sup> day of July, 1991 made between himself and the 1<sup>st</sup> Plaintiff;

ii) a declaration that he has obtained an interest in the said land which ranks in priority over the interest, if any, of the 2<sup>nd</sup> to 7<sup>th</sup> Defendants;

iii) an order that the Caveat lodged by him and registered at the Miri Land Registry Office on the 23<sup>rd</sup> day of July, 1991 as Instrument No. L.4588/1991 shall not lapse by reason of the Notice No. 11/1992 dated the 18<sup>th</sup> day of September, 1992 served upon him by the Assistant Registrar, Land & Survey, Miri;

iv) further or alternatively, for an order that the said Caveat be extended until after the hearing of this action;

v) such further or other relief;

vi) costs.”

There are two Statements of Defence filed by the defendants. The first is the amended statement of defence of the 1<sup>st</sup> defendant and the second is the statement of defence of the rest of the defendants. The amended defence and counterclaim of the 1<sup>st</sup> defendant reads:

- “1. The 1<sup>st</sup> Defendant admits Paragraph 1 of the Amended Statement of Claim but shall contend that the 1<sup>st</sup> Plaintiff has divested himself of all beneficial interests in the said property under and by virtue of the Sale and Purchase Agreement dated 29<sup>th</sup> August, 1981 and now holds the legal title of the said property as bare trustee for the 1<sup>st</sup> defendant and/or her nominees.
2. Paragraphs 2 & 3 of the Amended Statement of Claim are admitted.
3. The 1<sup>st</sup> Defendant denies that she has breached the said Sale .and Purchase Agreement as alleged or at all.
4. The 1<sup>st</sup> Defendant shall contend that the 1<sup>st</sup> Plaintiff is now estopped from alleging a breach of the terms of the said Sale and Purchase Agreement as the 1<sup>st</sup> Plaintiff has admitted to signing the same and to being bound by the provisions therein.
5. Paragraphs 5 and 6 of the Amended Statement of Claim are admitted but the 1<sup>st</sup> Defendant shall contend that the 1<sup>st</sup> Plaintiff’s letter dated the 29<sup>th</sup> July, 1991 purporting to

rescind the said Sale and Purchase Agreement was defective and ineffective in law.

- 5A. The 1<sup>st</sup> Defendant strictly has no knowledge of the allegations in Paragraph 5A of the Amended Statement of Claim and categorically says that she has no knowledge of and was not privy to the events leading to, and including, in itself, the alleged signing of certain documents on the 22<sup>nd</sup> day of July, 1996. The 1<sup>st</sup> defendant could not be estopped from insisting on her strict legal rights as a result of an act between the 1<sup>st</sup> Plaintiff and other third parties (other than the 1<sup>st</sup> Defendant) of which the 1<sup>st</sup> Defendant has no knowledge and was not privy thereto.
6. The 1<sup>st</sup> Defendant has no knowledge of the matters stated in Paragraphs 8 to 19 of the Amended Statement of Claim and puts the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs to proof thereof.
- 6A. The 1<sup>st</sup> Defendant strictly denies Paragraph 11B of the Amended Statement of Claim and categorically denies she has had been, either intentionally or unintentionally, part of any attempts to evade provisions of the Real Property Gains Tax Act, 1976.
7. Save as is herein before specifically admitted or traversed the 1<sup>st</sup> Plaintiff denies each and every allegation contained in the Amended Statement of Claim as if the same were set out herein and traversed seriatim.

## AMENDED COUNTERCLAIM

8. The 1<sup>st</sup> Defendant repeats Paragraphs 1 to 16 of the Amended Defence.
9. The 1<sup>st</sup> Defendant has fulfilled her obligations under the Sale and Purchase Agreement but despite repeated reminders, the 1<sup>st</sup> Plaintiff has failed and/or refused to transfer the said property to the 1<sup>st</sup> Defendant and/or her nominees.
10. The 1<sup>st</sup> Plaintiff has threatened to breach the said Sale and Purchase Agreement by entering into a 2<sup>nd</sup> Sale and Purchase Agreement with the 2<sup>nd</sup> Plaintiff who had knowing of the 1<sup>st</sup> Defendant's interest in the said property induced and/or attempted to induce the 1<sup>st</sup> Plaintiff to breach the said Sale and Purchase Agreement with the 1<sup>st</sup> Defendant.
11. In the premises, the 1<sup>st</sup> Defendant prays that the claims of the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs against her be dismissed with costs.
12. And the 1<sup>st</sup> Defendant claims against the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs for the followings:
  - (i) a declaration that the 1<sup>st</sup> Defendant or her nominees is beneficially and legally entitled to the said property;

- (ii) an Order that the 1<sup>st</sup> Plaintiff convey the said property to the 1<sup>st</sup> Defendant free from all encumbrance;
- (iii) alternatively, an Order that the Caveat of the 2<sup>nd</sup> Plaintiff and registered at the Miri Land Registry as Instrument No. L. 4588/1991 be removed;
- (iv) costs of this action and counterclaim; and
- (v) any further or other Order as this Honourable Court shall in the circumstances deems fit and proper.”

The amended defence of the 2<sup>nd</sup> to 7<sup>th</sup> Defendants reads:

- “1. Paragraph 1 of the statement of claim is admitted. Further the Defendants aver that the 1<sup>st</sup> Plaintiff is a bare Trustee for the Defendants.
2. Paragraphs 2 and 3 of the statement of claim are admitted.
3. With reference to paragraphs 4 and 5 of the statement of claim, the Defendants aver that the 1<sup>st</sup> Defendant had fully complied with the terms and conditions stated in the agreement. Further the Defendants aver that the allegation that there was non-payment of the \$7,000.00 or alternatively \$5,000.00 is true (the Defendants deny) the claim is Statutory barred under the Limitation Ordinance and it is bad in law for the 1<sup>st</sup> Plaintiff to seek for a declaration where the Plaintiff could not sue for the

payment of the \$7,000.00 or alternatively \$5,000.00 because it is statutory barred.

4. With reference to paragraph 6 of the statement of claim, the Defendants deny that the 1<sup>st</sup> Defendant was in breach of the agreement. Further the Defendants admitted that no Caveat was lodged by Mr. S.C. Yee immediately after the execution of the agreement on the 28<sup>th</sup> day of August, 1981. The Defendants could not register the Memorandum of Transfer in 1983 because there was Caveat lodged by Labour Department under Instrument No. L. 1119/1967.

4.1 Only on the 17<sup>th</sup> day of October, 1991 when Mr. S. C Yee heard that the 1<sup>st</sup> Plaintiff in collusion with the 2<sup>nd</sup> Plaintiff entered into a Sale and Purchase Agreement on or about 27<sup>th</sup> day of July, 1991, a Caveat was lodged. The 2<sup>nd</sup> Plaintiff knew that the 1<sup>st</sup> Plaintiff was a bare Trustee by taking advantage of the fact that no caveat was lodged by the Defendants before 27<sup>th</sup> day of July, 1991, more particularly as follows:

(a) the sequent of the events leading towards this action in that the Plaintiffs entered into the purported Sale and Purchase Agreement on the 22<sup>nd</sup> day of July, 1991 and a Caveat was lodged on next day 23<sup>rd</sup> day of July, 1991. Only after lodging the Caveat, the 1<sup>st</sup> Plaintiff wrote to the 1<sup>st</sup> Defendant purported to terminate the Sale and

Purchase Agreement dated the 29<sup>th</sup> day of August, 1981.

- (b) At the time of making the Sale and Purchase between the Plaintiffs, the Plaintiffs expected that the 1<sup>st</sup> Defendant would also conspire with them to defeat the interest of the Defendants.
  - (c) In November, 1992 the 2<sup>nd</sup> Plaintiff approached the 1<sup>st</sup> Defendant's husband, David Lee Seng Chai and offered to pay him a large sum of money if he co-operate with him but the said David Lee refused.
5. With reference to paragraph 7 of the Defendants admitted that the 1<sup>st</sup> Plaintiff wrote a letter to the 1<sup>st</sup> Defendant but deny that the purported rescission is good in laws.
  6. Paragraph 6 of the statement of claim is admitted. Further the Defendants aver that the Memorandum of Transfer was prepared and executed in front of the lawyer Mr. S.C. Yee on the 13<sup>th</sup> day of January, 1983.
  7. With reference to paragraph 9 of the statement of claim, the Defendant admitted that no payment of RM80,000.00 was made to the 1<sup>st</sup> Plaintiff upon the execution of the Memorandum of Transfer for the reason that at that material time, on the 13<sup>th</sup> day of January, 1983, the 1<sup>st</sup> Defendant was signing the Memorandum of Transfer as bare Trustee for the 1<sup>st</sup> Defendant and the beneficial owner for the RM80,000.00 was the 1<sup>st</sup> Defendant

because on the 28<sup>th</sup> day of August, 1981 when the 1<sup>st</sup> Defendant made full payment of the purchase price the 1<sup>st</sup> Plaintiff was unable to register the Memorandum of Transfer as there was a Caveat lodged by Labour Department under Instrument No. L. 1119/1967.

8. With reference to paragraph 10 of the statement of claim, the Defendants repeat paragraph 9 of the Defence. Further, the Defendants aver that the Memorandum of Transfer dated 13<sup>th</sup> day of January, 1983 was fully explained by Mr. S.C. Yee.
9. With reference to paragraph 11 of the statement of claim, the Defendants repeat paragraph 9 of the Defence.
10. With reference to paragraphs 11.1 and 11.2, the Defendants admitted that they bought the said land from the 1<sup>st</sup> Defendant on the 13<sup>th</sup> day of January, 1983 because at that material time the 1<sup>st</sup> Plaintiff was a Trustee for the 1<sup>st</sup> Defendant and because of the Labour Department's Caveat under Instrument No. L. 1119/1967 the 1<sup>st</sup> Defendant had to execute the Memorandum of Transfer and in fact and the 1<sup>st</sup> Plaintiff did.
11. Paragraph 13 is denied and put the Plaintiffs into strict proof thereof.
12. With reference to paragraph 14 of the statement of claim, the Defendants aver that the 1<sup>st</sup> Plaintiff already divest all his interest in the land to Defendants that he had nothing

to sell. Alternatively, the purported agreement is only a conditional agreement. Until the conditions are fulfilled the agreement is ineffective. Paragraph 6 of the purported agreement stated that in the event that if the 1<sup>st</sup> Plaintiff did receive full payment from the 1<sup>st</sup> Defendant then the agreement is ineffective and the 1<sup>st</sup> Plaintiff should refund the RM5,000.00 to the 2<sup>nd</sup> Plaintiff.

13. No admission is made to paragraph 15. Further the purported Memorandum of Transfer does not pass any interest to the 2<sup>nd</sup> Plaintiff for the reason that there was nothing to sell by the 1<sup>st</sup> Plaintiff and it was only partial payment (if any) was made.
14. Paragraph 16 of the statement of claim is denied and put the Plaintiffs into strict proof thereof.
15. Paragraphs 17, 18 and 19 of the statement of claim are denied. Further the Defendants aver that the 2<sup>nd</sup> Plaintiff was not a bona fide purchase for value without notice and repeat the defence hereof.
16. Save as is hereinbefore expressly admitted the Defendants denies each and every allegation contained in the statement of claim as if the same were set forth herein and specifically traversed.”

The learned trial judge in his judgment stated as follows:

“ From the pleadings I agree with the learned counsel for the Plaintiffs that the main issues for determination by this Court are as follows:

- (1) *Whether the 1<sup>st</sup> Plaintiff is a bare trustee of the 1st Defendant?*
- (2) *Whether there was a breach of sale and purchase agreement dated 29.8.81 by the 1<sup>st</sup> Defendant? Whether the said agreement was rescinded by the 1<sup>st</sup> Plaintiff?*
- (3) *Whether the Memorandum of Transfer dated 13.1.83 was void as against public policy?*
- (4) *Did the said Memorandum of Transfer dated 13.1.83 pass any interest to the 2<sup>nd</sup> to 7<sup>th</sup> Defendants?*
- (5) *Is the 1<sup>st</sup> Plaintiff barred from contradicting the sale and purchase agreement dated 29.8.81?*
- (6) *Are the 1<sup>st</sup> Defendant's claims under prayer (1) and (2) time-barred? Is the 1<sup>st</sup> Defendant precluded from claiming them?*
- (7) *Are 1<sup>st</sup> Plaintiff's claims time-barred?*
- (8) *Is the Sale and Purchase Agreement dated 22.7.91 a conditional agreement?*
- (9) *Whether the 2nd Plaintiff has a beneficial interest in the said land under the Sale and Purchase Agreement dated 22.7.91? Whether it should rank in priority over the interest, if any, of the 2<sup>nd</sup> to 7<sup>th</sup> Defendants?”*

*In addition, the learned counsel for the 2<sup>nd</sup> to 7<sup>th</sup> Defendants has raised several issues in his submission. The first point raised by the learned counsel for the 2<sup>nd</sup> to 7<sup>th</sup> Defendants is that the 2<sup>nd</sup> to 7<sup>th</sup> Defendants are bona fide purchaser for value and the allegation of the*

*non-payment of purchase price was only against the 1<sup>st</sup> Defendant. The 2<sup>nd</sup> to 7<sup>th</sup> Defendants are holders of an executed Memorandum of Transfer in statutory forms. In fact the stamp duties in the sum of RM4,290.00 for the Memorandum of Transfer have already being paid. If not for the 1<sup>st</sup> Plaintiff's caveat the Memorandum of Transfer would have been registered. In view of the above fact he submitted that the Plaintiffs have no case whatsoever against the 2<sup>nd</sup> to 7<sup>th</sup> Defendants.*

*In reply to that the learned counsel for the Plaintiffs submitted that at the time the 1<sup>st</sup> Defendant sold the land to 2<sup>nd</sup> to 7<sup>th</sup> Defendants, the 1<sup>st</sup> Plaintiff was not a bare trustee of the 1<sup>st</sup> Defendant because of the non-payment of the full consideration under Clause 1(c) of the said agreement and also because the Memorandum of Transfer dated 28<sup>th</sup> day of August 1981 was void for want of consideration and therefore was not registrable. The 2<sup>nd</sup> to 7<sup>th</sup> Defendants therefore did not obtain any interest, legal or equitable under the said Memorandum of Transfer.”*

The learned judge's finding on the issues are as follows:

*“Issue (1): Is the 1<sup>st</sup> Plaintiff a bare trustee of the 1<sup>st</sup> Defendant?*

*It is not in dispute that there were two transactions involving the 1<sup>st</sup> Plaintiff and the 1<sup>st</sup> Defendant, namely, the Memorandum of Transfer dated 28.8.81 and the Sale and Purchase Agreement dated 29.8.81. Both the 1<sup>st</sup> Defendant and the 2<sup>nd</sup> to 7<sup>th</sup> Defendants rest their cases of bare trusteeship on these transactions. The 1<sup>st</sup> Plaintiff's case is that he was not paid the full consideration mentioned in Clause 1(c) of the said agreement. Therefore, the issue of bare trusteeship may be decided by reference to the tests laid down in *Borneo Housing Mortgage Finance Bhd v. Time Engineering Bhd* (1996) 2 MLJ 12 and by asking the questions:*

- (i) Did the 1<sup>st</sup> Plaintiff receive in full the consideration in cash and kind as stated in Clauses 1(a), (b) and (c) of the said agreement?*

(ii) *Did he execute a registrable Memorandum of Transfer in favour of the 1<sup>st</sup> Defendant?*

.....

*On this issue it is my finding that, after evaluating the evidence given by the witnesses for both sides, the said sum of RM4,000.00 was not paid to the 1<sup>st</sup> Plaintiff. I agree with the submission and the reasons put forth by the learned counsel for the Plaintiffs that the evidence of DW1, DW2 and DW4 on the alleged payment of RM4,000.00 is riddled with serious unexplained discrepancies. As such there is a doubt as to whether any of them is telling the truth.*

*The next point for determination is whether the sum of RM7,000.00 under Clause 1(c) of the said agreement had been paid to the 1<sup>st</sup> Plaintiff by the 1<sup>st</sup> Defendant.*

*Under Clause 1(c) of the said agreement, from the sum of RM7,000.00, DW1 was to retain RM2,000.00 for spraying the car red, check the engine and renew the road tax. According to the 1<sup>st</sup> Plaintiff, when he received the car, he noticed that it was sprayed red and the road tax renewed but he was never paid RM5,000.00. According to DW1, Rose Foo, the sum of RM7,000.00 in cash was paid through lawyer Yee in the latter's office and similar evidence was given by her husband DW2 and lawyer Yee, DW4. Thus, there is a conflict of evidence on whether the stipulation of consideration as regards RM7,000.00 was fulfilled.*

.....

*I have my doubt on the accuracy of DW4's evidence regarding the payment of the sum of RM7,000.00 to the 1<sup>st</sup> Plaintiff as there was no record to support his evidence. This is because his evidence regarding the payment of RM4,000.00 contradicted the evidence of DW1 and DW2. According to him the sum of RM4,000.00 was paid to the 1<sup>st</sup> Plaintiff on 28<sup>th</sup> August 1981 in his presence. However DW2 said in his evidence that the sum of RM4,000.00 was paid to the 1<sup>st</sup> Plaintiff 3 months prior to the*

*signing of the said agreement. As such I am unable to believe the evidence of DW4 notwithstanding the fact that he is a very senior lawyer.*

*After considering the evidence adduced by both sides on this issue it is my finding that the sum of RM7,000.00 had not been paid to the 1<sup>st</sup> Plaintiff by the 1<sup>st</sup> Defendant. I agree with the submission made by the learned counsel for the Plaintiffs. Accordingly I find that the 1<sup>st</sup> Plaintiff had not received the consideration in cash as stated in the said agreement.*

*The next point to be decided is whether the 1<sup>st</sup> Plaintiff had executed a registrable Memorandum of Transfer in favour of the 1<sup>st</sup> Defendant. The learned counsel for the Plaintiffs submitted that the Memorandum of Transfer was void as it was made without consideration and it did not fall within any of the exceptions of Section 26 of the Contract Act, 1950. As such no interest passed by virtue of it to the 1<sup>st</sup> Defendant.*

*I have decided earlier that the 1<sup>st</sup> Plaintiff had not received the consideration in cash. However the consideration in kind in the form of a motorcar and one rice machine had been given to the 1<sup>st</sup> Plaintiff by the 1<sup>st</sup> Defendant. As such I am unable to agree with the learned counsel for the Plaintiffs that the Memorandum of Transfer was void as it was made without consideration. There was no total failure of consideration as part of the consideration had been given to the 1<sup>st</sup> Plaintiff. The facts in *Macon Works & Trading Sdn Bhd v Phang Hon Chin & Anor* (1976) 2 MLJ 177 can be distinguished from the facts in the instant case as in that case no consideration was given in the agreement.*

*Under the circumstances I am of the view that the Memorandum of Transfer was not void. It was therefore registrable. However in view of the fact that the 1<sup>st</sup> Plaintiff had not received the full purchase price from the 1<sup>st</sup> Defendant the 1<sup>st</sup> Plaintiff could not be said to have divested himself of all the beneficial interest in his land. (See *Karupiah Chettiar v Subramaniam* [1971] 2 MLJ 116).*

*Issue (2): Whether there was a breach of the said agreement by the 1<sup>st</sup> Defendant? Whether the said agreement was rescinded by the 1<sup>st</sup> Plaintiff?*

*I have decided that the 1<sup>st</sup> Defendant had not paid the money stated under Clause 1(c) of the said agreement. Accordingly I hold that the 1<sup>st</sup> Defendant had breached the said agreement.*

....

*I am bound by the Supreme Court decision in Rasiah Munusamy's case that the refusal to pay the balance of purchase price must be absolute. Based on that principle of law I will now consider the evidence adduced by both sides on this matter.*

.....

*Having considered the evidence as a whole I have no doubt that the 1<sup>st</sup> Plaintiff did in fact make repeated demands on the 1<sup>st</sup> Defendant for the said sum. Since the period was too long i.e. for almost 10 years it was my view that it would not have made any difference whether the 1<sup>st</sup> Plaintiff had given the 1<sup>st</sup> Defendant time for her to pay the said sum. This is because she was unwilling and would not have made payment for the sums stated under Clause 1(c) of the said agreement as her contention was that she had paid the said amount in full. As such I hold that the failure on the 1<sup>st</sup> Plaintiff's part to give notice to the 1<sup>st</sup> Defendant to make payment is not fatal for even if such notice was given, it would have been to no avail.*

....

*In addition, the stand taken by the 1<sup>st</sup> Defendant now is contradictory to her pleaded case and her case as presented in court that she had fulfilled all her obligations under the said agreement. As such I agree with the submission made by the learned counsel for the Plaintiffs that it is not open to the 1<sup>st</sup> Defendant to say that she could have fulfilled her obligation to pay the balance of the purchase price, if given the*

*opportunity. If the 1<sup>st</sup> Defendant is allowed to advance such a case it would be a departure from her case as this was never pleaded.*

*For the foregoing reasons I hold that the 1<sup>st</sup> Plaintiff was entitled to rescind the said agreement notwithstanding that notice for payment was not given. Accordingly the said agreement was validly terminated by the 1<sup>st</sup> Plaintiff when the 1<sup>st</sup> Defendant received the letter from Messrs Khoo & Co. dated 29<sup>th</sup> July, 1991.*

(3) *Whether the Memorandum of Transfer dated 13.1.83 (Ex. P3) was void as against Public Policy*

*Under the Real Property Gains Tax Act, 1976, a real property gains tax is chargeable in accordance with the Act in respect of chargeable gain on the disposal of real property and there is a chargeable gain, where upon the disposal of the chargeable asset, the disposal price exceeds the acquisition price. (See Section 3 and 7(ii)(a)). By paragraphs 14 and 15(3)(ii) of the Schedule to the Act, the chargeable gain is deemed, to accrue on the date on which the whole of the value of the consideration was received by the 1<sup>st</sup> Defendant. By Section 13(1), the chargeable person is required to submit returns specifying the asset disposed, the acquisition price and the disposal and all information necessary to determine these prices. The rates of tax applicable as set out in Schedule 5 of the Act.*

.....

*In view of that decision I am unable to agree with the submission made by the learned counsel for the Defendants that for a contract to be illegal it is necessary that the act or dealing objected to must be prohibited by the Act itself. It is, in my view, sufficient if the object of such dealing is of such a nature if permitted, would defeat any law. In the present case the dealing has resulted in the loss of revenue for the government. This matter could be gathered from the evidence of DW4, the 1<sup>st</sup> Defendant's lawyer who stated in his evidence that:*

*“So I told her why don’t transfer the land from Mair to the 6 purchasers and it would save on the real property gain tax and the stamp duty. Rose Foo agreed and so prepared this transfer.”*

*This piece of evidence also showed that the 1<sup>st</sup> Defendant was fully aware what she was doing contrary to the counsel’s contention that she had no mens rea or that she had left the matter to her lawyer. The decision to transfer the land direct from Mair to the 2<sup>nd</sup> to 7<sup>th</sup> Defendants was made by her. That piece of evidence also did not support the 1<sup>st</sup> Defendant’s contention that she had no intention to evade the real property gains tax.*

*In Napier v National Business Agency Ltd. (1951) 2 All E.R. 264, the plaintiff claimed for payment of £13 a week for a certain period, in lieu of notice, after he was summarily dismissed by his employer. The plaintiff was paid £13 a week as income with £6 as reimbursement for expenses, but, the £6 as expenses was not genuine although it was disclosed in the returns to the Inland Revenue Commissioners. In holding that the agreement as to expenses was contrary to public policy, His Lordship Sir Raymond Evershed, M.R. said at page 266:*

*“It must surely be that, by making an agreement in that form the parties to it were doing that which they must be taken to know would be liable to defeat the proper claims of the Inland Revenue and to avoid altogether, or at least to postpone, the proper payment of income tax. If that is the right conclusion, it seems to me equally clear .... that the agreement must be regarded as contrary to public policy. There is a strong legal obligation placed on all citizens to make true and faithful returns for tax purposes, and, if parties make an agreement which is designed to do the contrary, i.e., to mislead and to delay, it seems to me impossible for this court to enforce that contract at the suit of one party to it.”*

*Under the circumstances I am of the view that the dealing under exhibit P3 if permitted would defeat the Real Property Gains Act and as such it is impossible for this court to countenance such dealing. The dealing is therefore void.*

*On the claim by the 2<sup>nd</sup> to 7<sup>th</sup> Defendants that they are not a party to any illegality in the said dealing I am also of the view that there is no merit in that. This is because from the evidence given by the 5<sup>th</sup> Defendant it is clear that it was also the idea of the 5<sup>th</sup> Defendant that the land be transferred to them from the 1<sup>st</sup> Plaintiff. This is what he said under cross-examination by the learned counsel for the Plaintiffs:*

*“I do not know about the procedure but what I know is I bought the land from Rose Foo and I wanted the money to be paid to Rose Foo and I wanted the land to be transferred from the original land owner”.*

*As such it cannot be disputed that the 5<sup>th</sup> Defendant was also a party to such dealing.*

*I am also of the view that it is misleading for the learned counsel for the 2<sup>nd</sup> to 7<sup>th</sup> Defendants to rely upon the passages from Kho Kwong Choon v Phuman Singh (1968) 1 MLJ 183 at page 184 and Pappa v Saminathan for the proposition that illegality will not defeat the 2<sup>nd</sup> to 7<sup>th</sup> Defendant’s interest. These passages are inapplicable to the facts of this case. The proposition applies only to interest which have been registered and are subject to statutory protection. It cannot apply to our case because the 2<sup>nd</sup> to 7<sup>th</sup> Defendants’ interest have yet to be registered and is not protected by the indefeasibility provisions of the Land Code. It has been established that the purpose of the transfer sought to be enforced by the 2<sup>nd</sup> to 7<sup>th</sup> Defendants is to defeat the object of the Real Property Gains Tax Act, 1976, by causing a loss of revenue to the government. Once illegality is brought to the attention of the Court, its duty is to prevent the enforcement of the transfer.*

(4) *Did the said Memorandum of Transfer dated 13.1.83 (Ex. P3) pass any interest to the 2<sup>nd</sup> to 7<sup>th</sup> Defendants?*

*Regarding this issue the learned counsel for the Plaintiffs submitted that the said Memorandum of Transfer was incapable of passing any interest, legal or equitable to the 2<sup>nd</sup> to 7<sup>th</sup> Defendants as the transfer*

*was void for want or failure of consideration. From the evidence it is clear that the consideration of RM80,000 was paid to the 1<sup>st</sup> Defendant and not to the 1<sup>st</sup> Plaintiff and the transfer was executed in favour of the 2<sup>nd</sup> to 7<sup>th</sup> Defendants not as nominees of the 1<sup>st</sup> Defendant.*

*The learned counsel for the 2<sup>nd</sup> to 7<sup>th</sup> Defendants submitted that under Section 134 of the Land Code a document can be set aside only in the case of actual fraud. According to him in our instant there was no allegation of fraud and therefore once the Memorandum of Transfer dated 13<sup>th</sup> day of January 1983 was executed the 1<sup>st</sup> Plaintiff is not entitled to set it aside. It is further argued by the learned counsel that as a holder of an executed statutory instrument, namely the Memorandum of Transfer between the 1<sup>st</sup> Plaintiff and the 1<sup>st</sup> Defendant dated 28<sup>th</sup> day of August, 1981 the 1<sup>st</sup> Defendant had the assignable right to the said land.*

*According to him as a trustee the 1<sup>st</sup> Plaintiff is not entitled to the RM80,000.00 which was paid to the 1<sup>st</sup> Defendant by the 2<sup>nd</sup> to 7<sup>th</sup> Defendants. The 1<sup>st</sup> Plaintiff may argue that he did not receive the full purchase price therefore he is not the trustee. However, equity will not allow such a contention because at the time when the 1<sup>st</sup> Plaintiff signed the Memorandum of Transfer (Ex. P3) on 13.1.1983 the 1<sup>st</sup> Plaintiff did not complain that he did not receive the full purchase price. It is submitted that anybody who read the sale and purchase agreement dated 29.8.1981 between the 1<sup>st</sup> Plaintiff and the 1<sup>st</sup> Defendant would understand that full purchase price had been paid. This would include the 2<sup>nd</sup> Plaintiff.*

*I agree with the contention made by the learned counsel for the 2<sup>nd</sup> to 7<sup>th</sup> Defendants that it is inequitable to allow the 1<sup>st</sup> Plaintiff to contend that the Memorandum of Transfer dated 13.1.83 did not pass any interest to the 2<sup>nd</sup> to 7<sup>th</sup> defendants as the transfer was void for want or failure of consideration because the said Memorandum of Transfer (Ex. P3) was signed by the Plaintiff on the 13<sup>th</sup> of January, 1983 which was about 1½*

*years after the sale and purchase agreement between the 1<sup>st</sup> Plaintiff and the 1<sup>st</sup> Defendant was signed and when signing (Ex. P3) the 1<sup>st</sup> Plaintiff did not complain that he did not receive the full purchase price. It is my view that anybody who read the said sale and purchase agreement dated 29<sup>th</sup> of August 1981 would have come to the conclusion that full purchase price had been paid over the transaction. Furthermore the 1<sup>st</sup> Plaintiff filed this application for a declaration that the said Memorandum of Transfer (Ex. P3) is null and void only in November 1992 which was more than 9 years after he signed that Memorandum. Surely there is a delay on the 1<sup>st</sup> Plaintiff's part to assert his claim.*

(5) *Is the 1<sup>st</sup> Plaintiff barred from contradicting the sale and purchase agreement dated 29.8.81?*

*By paragraph 4 of her Amended Defence and Counterclaim, the 1<sup>st</sup> Defendant alleges that "the 1<sup>st</sup> Plaintiff is now estopped from alleging a breach of terms of the said agreement as the 1<sup>st</sup> Plaintiff had admitted to signing the same and to being bound by the provisions therein". In effect, the 1<sup>st</sup> Defendant is relying on the principle that parole evidence cannot be received to contradict, vary, add or subtract from the terms of a written contract. See Section 92 of the Evidence Act, 1956.*

*This Defence is directed at the 1<sup>st</sup> Plaintiff's assertion that there was a failure of part of the consideration represented by the sums of RM4,000.00 and RM7,000.00 stipulated in Clause 1(c) of the said agreement.*

*It is my view that this defence is devoid of merits on the ground that under proviso (a) of Section 92 the 1<sup>st</sup> Plaintiff is entitled to prove by oral evidence that the consideration in cash in the sums of RM4,000.00 and RM7,000.00 was not paid and that this part of the consideration failed. (See Sarkar on Evidence (14th Ed.) pages 1240-1242).*

(6) *Are the 1<sup>st</sup> Defendant's claims under prayer (1) and (2) time-barred? Is the 1<sup>st</sup> Defendant precluded from claiming them.*

*By her Amended Defence and Counterclaim the 1<sup>st</sup> Defendant is counterclaiming against the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs for:*

- (i) a declaration that the 1<sup>st</sup> Defendant or her nominees are beneficially or and legally entitled to the said property, and*
- (ii) an order that the 1<sup>st</sup> Plaintiff convey the said property to the 1<sup>st</sup> Defendant free from encumbrances.*

*Under Item 90 of the Schedule to the Limitation Ordinance (Cap. 49) the limitation period for commencing an action for specific performance is 3 years from the date “the plaintiff has notice that performance is refused”.*

*According to the learned counsel for the Plaintiffs by both the reliefs the 1<sup>st</sup> Defendant is praying for specific performance of the said agreement. This agreement was rescinded by the 1<sup>st</sup> Plaintiff on 22.7.91 when he made the alternative agreement with the 2<sup>nd</sup> Plaintiff or at the latest on 29.7.91 when the notice of termination was given to the 1<sup>st</sup> Defendant by the letter from Messrs Khoo & Company. Therefore, the limitation period ran from 29.7.91 and expired on 29.7.94. However, the counterclaim of the 1<sup>st</sup> Defendant was filed one and half years’ late on 10.10.96. It was time-barred when it was commenced.*

*On this issue I agree with the submission made by the learned counsel for the Plaintiffs that the 1<sup>st</sup> Defendant’s claims under prayer (1) and (2) of her counterclaim are time-barred and as such she is precluded from claiming them. I agree that the limitation period of 3 years as stated under Item 90 of the schedule to the Limitation Ordinance is applicable to the 1<sup>st</sup> Defendant’s claims. The limitation period ran from 29.7.91 when the notice of termination was given to the 1<sup>st</sup> Defendant by the letter from Messrs Khoo & Company.*

- (7) Are the 1<sup>st</sup> Plaintiff’s claims time-barred?*

*In paragraph 3 of their Amended Defence the 2<sup>nd</sup> to 7<sup>th</sup> Defendants raised a plea of limitation in the following terms:*

*“Further the Defendants aver that if the allegation that there was non-payment of the \$7,000.00 or alternatively \$5,000.00 is true (the Defendants deny) the claim is Statutory barred under the Limitation Ordinance and it is bad in law for the 1<sup>st</sup> Plaintiff to seek for a declaration where the Plaintiff could not sue for the payment of the \$7,000.00”.*

*It is my view that there is no merit in such contention made by the 2<sup>nd</sup> to 7<sup>th</sup> Defendants. This is because I have decided that the 1<sup>st</sup> Plaintiff had lawfully terminated his contract with the 1<sup>st</sup> Defendant on 29.7.91. He filed this action on 3.11.92. As such the 1<sup>st</sup> Plaintiff was within the periods set out in Item 92 and 97 of the Schedule to the Limitation Ordinance and is not time-barred.*

(8) *Is the Sale and Purchase Agreement dated 22.7.91 a conditional agreement?*

*It is the contention of the 2<sup>nd</sup> to 7<sup>th</sup> Defendants that Clause 6 of the said second agreement which stipulates that the deposit of RM5,000.00 was to be refunded to the 2<sup>nd</sup> Plaintiff in the event that the 1<sup>st</sup> Plaintiff received full payment or Rose Foo could prove she had fully complied with the terms of the agreement dated 29.8.91 makes the said second agreement conditional and it could not pass any interest to the 2<sup>nd</sup> Plaintiff.*

*On this issue I agree with the learned counsel for the Plaintiffs that Clause 6 cannot be considered in isolation and in interpreting it the whole contract must be considered. In my view the said Clause 6 is merely a term of the contract and it does not operate as a condition precedent to the formation of the said contract.*

*From the express language of Clause 6, it merely provides for the refund of RM5,000.00 upon the occurrence of a specified event. Any other construction will cause violence to its language and disharmony with*

*other clauses, in particular, with the stipulations in Clauses 7 and 12. If Clause 6 were to operate as a condition precedent as to the formation of the agreement, then Clauses 7 and 12 will be rendered superfluous. Why was there a need to provide for an indemnity to the 2<sup>nd</sup> Plaintiff if the agreement for sale was not already entered or was contingent upon Rose Foo's interest in the land?*

*(9) Is 2<sup>nd</sup> Plaintiff beneficially interested in the land? Does it rank in priority?*

*I have already decided under issue number (4) that the Memorandum of Transfer dated 13.1.83 i.e. Ex. P3 did not pass any interest to the 2<sup>nd</sup> to 7<sup>th</sup> Defendants as it was void on ground of illegality. As such the question of priorities of equities does not arise.*

*In addition to the issues mentioned above there are other issues raised by the learned counsel for the 2<sup>nd</sup> to 7<sup>th</sup> Defendants. He submitted that the declaration prayed for by the Plaintiffs should not be granted because the prayers asked in the Statement of Claim are against the well established principles of laws in the following aspects:*

- (a) action for the balance of purchase price is statutory barred;*
- (b) the purported rescission is invalid in laws;*
- (c) the conduct of the Plaintiffs are inequitable.*

*I have already considered and made my decision on issues (a) and (b) and that means I only need to consider issue (c). According to the learned counsel the Plaintiff is estopped from seeking for the declaration against the 1<sup>st</sup> Defendant under prayer 1 that the said agreement had been validly rescinded for the simple reason that it was the 1<sup>st</sup> Plaintiff who signed the Memorandum of Transfer (Ex. P3) in favour of 2<sup>nd</sup> to 7<sup>th</sup> Defendants and 2<sup>nd</sup> to 7<sup>th</sup> Defendants relied on the Memorandum of Transfer and paid the RM80,000.00 to the 1<sup>st</sup> Defendant. It was the*

*contention of the learned counsel for the 2<sup>nd</sup> to 7<sup>th</sup> Defendants that the conduct or representation of the 1<sup>st</sup> Plaintiff clearly had caused the 2<sup>nd</sup> to 7<sup>th</sup> Defendants to act to their detriment.*

*It was also submitted by the learned counsel for the 2<sup>nd</sup> to 7<sup>th</sup> Defendants that in view of the fact that the 1<sup>st</sup> Defendant had already sold the said land to the 2<sup>nd</sup> to 7<sup>th</sup> Defendants all the 1<sup>st</sup> Plaintiff entitled to is to claim for the balance of purchase price and not rescission.*

*It was also submitted that it is inequitable to grant declarations in favour of the Plaintiffs because the 1<sup>st</sup> Plaintiff had obtained 3 sets of payment for the same piece of land, namely:*

- (i) Under the said agreement he received one motorcar and one rice machine together with RM11,000.00 cash;*
- (ii) From the 2<sup>nd</sup> Plaintiff he received a sum of RM5,000.00 for the same parcel of land;*
- (iii) From the 2<sup>nd</sup> to 7<sup>th</sup> Defendants he received RM13,000.00 for the abortive settlement. The 1<sup>st</sup> Plaintiff repudiated the purported settlement but still keeps RM13,000.00.*

*In addition the learned counsel for the 1<sup>st</sup> Defendant submitted that restitutio in integrum is impossible if the agreement is rescinded.*

*I am fully aware that declaration is an equitable remedy and equitable defence is available to the Defendants. One of the 12 maxims stated by Snell's Principles of Equity (26<sup>th</sup> ED) is that "he who seeks equity must do equity". At page 34 it was stated:*

*"He who seeks equity must do equity. To obtain equitable relief the Plaintiff must be prepared to do "equity", in its popular sense of what is right and fair to the Defendant. This is a rule of "unquestionable justice" which, however, "decides nothing in itself; for you must first inquire what are the equities which the Defendant must do, and what the plaintiff ought to have."*

*I have given a careful consideration to the facts of this case and it is my view that it is inequitable to grant the declarations sought for by the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs on the following grounds:*

(i) *The conduct or representation of the 1<sup>st</sup> Plaintiff clearly had caused the 2<sup>nd</sup> to 7<sup>th</sup> Defendants to act to their detriment. The 2<sup>nd</sup> to 7<sup>th</sup> Defendants paid to the 1<sup>st</sup> Defendant RM80,000.00 after the 1<sup>st</sup> Plaintiff signed exhibit P3. At no time did the 1<sup>st</sup> Plaintiff indicate to the 2<sup>nd</sup> and 7<sup>th</sup> Defendants that he had not received the balance purchase price from the 1<sup>st</sup> Defendant. Anybody reading the said agreement would come to a conclusion that the sale of the said land to the 1<sup>st</sup> Defendant was in order. Furthermore the 1<sup>st</sup> Plaintiff had been sleeping on his rights all along. The said agreement was made on 29<sup>th</sup> of August 1981 and exhibit P3 was made on 13<sup>th</sup> of January 1983.*

*However despite the non-payment of the balance purchase price by the 1<sup>st</sup> Defendant the 1<sup>st</sup> Plaintiff only took action to terminate the said agreement in July 1991 which was almost 10 years later. This suit was only filed in 1992.*

(ii) *The 1<sup>st</sup> Plaintiff had received RM13,000.00 from the 2<sup>nd</sup> to 7<sup>th</sup> Defendants. According to the 1<sup>st</sup> Plaintiff the amount remains unpaid by the 1<sup>st</sup> Defendant is only RM9,000.00. As such the 1<sup>st</sup> Plaintiff had been compensated for his loss.*

(iii) *I agree with the learned counsel for the 1<sup>st</sup> Defendant that restitutio in integrum is almost impossible in this case as the rice machine and the used car were transferred to the 1<sup>st</sup> Plaintiff from the 1<sup>st</sup> Defendant in 1981.*

*For the reasons stated above I refuse to exercise my discretion to grant the declarations sought by the Plaintiffs and accordingly I dismiss the Plaintiffs' claims. As regards the costs, in view of my finding that the*

*1<sup>st</sup> Plaintiff has proved his case but for the fact that it is inequitable to grant the declarations prayed for by the 1<sup>st</sup> Plaintiff I order that each party to bear its own cost.*

*As regards the counterclaim by the 1<sup>st</sup> Defendant I hold that there is no merit in her claim. I therefore dismiss her counterclaim against the 1<sup>st</sup> Plaintiff with costs.”*

It is necessary for me to go at great length into the relevant part of the learned judge’s judgment for the reasons I will state later. Let me deal first as to what transpired during the hearing of this appeal.

When this appeal was called, the learned counsel for the 1<sup>st</sup> defendant, Mr. C.T. Voon stood up and addressed the court. He informed the court that there was a motion (enclosure (14a)) which was an application by him to discharge himself from acting for the 1<sup>st</sup> defendant. He also informed the court that he was not able to serve the application on the 1<sup>st</sup> defendant. The application was sent to the last known address of the 1<sup>st</sup> defendant but she was not at the said address anymore. Furthermore, he tried to trace the 1<sup>st</sup> defendant everywhere in Sarawak but was not successful. The court inquired from the counsel for the other defendants, Mr. K.Y. Lin, and the response from him was that he and the other defendants did not know the whereabouts of the 1<sup>st</sup> defendant. The learned counsel for the plaintiffs, Mr. M.S. Sandhu, insisted that the appeal should go on for the simple reason that this case had been long outstanding and his client is very old and sickly and

the subject matter arose in 1983. Since there was no indication from the parties that there was a likelihood that the 1<sup>st</sup> defendant could be traced in the near future, it was decided by the three of us that the appeal should be proceeded upon. As a result of that, the learned counsel for the 1<sup>st</sup> defendant withdrew the motion, enclosure 14(a). The court then struck off the motion with no order as to costs.

In his submission, the learned counsel for the plaintiffs stated that there are three appeals before the court. The first is the substantive appeal by the plaintiffs. There are two cross-appeals, one by the 1<sup>st</sup> defendant and the other by the rest of the defendants.

The learned counsel for the plaintiffs in his submission said that the trial in the court below was a full trial. At the end of the trial the learned trial judge made the following findings:

- (1) that the unregistered memorandum of transfer (Ex. P3) was void as against the public policy on the ground that it was an illegal dealing to evade real property gains tax and that both the 1<sup>st</sup> defendant and the 2<sup>nd</sup> to 7<sup>th</sup> defendants were parties to it;

- (2) that the memorandum of transfer (Ex. P3) did not pass any interest to the 2<sup>nd</sup> to 7<sup>th</sup> defendants as it was void on ground of illegality;
- (3) that the agreement dated 29.8.1991 was validly terminated by the 1<sup>st</sup> plaintiff; and
- (4) that the agreement dated 22.7.1991 between the 1<sup>st</sup> plaintiff and the 2<sup>nd</sup> plaintiff was not a conditional agreement.

It was contended by the plaintiffs that one of the consequences, after the above finding of facts by the learned judge, would be the order to remove the caveats lodged by the defendants. The learned judge did not make the order of removing the caveats.

The learned counsel for the 1<sup>st</sup> defendant stated that since he had not received any instruction from the 1<sup>st</sup> defendant, it is not proper for him to do any submission on behalf of the 1<sup>st</sup> defendant. In our view, he is right in doing so. Since the 1<sup>st</sup> defendant did not make any submission in respect of this appeal, the learned counsel for the 2<sup>nd</sup> to 7<sup>th</sup> defendants (hereinafter referred to as “the other defendants”) was not able to submit on the caveat.

Before us, the learned counsel for the plaintiffs raised the following issues:

- (1) error of law in refusing to declare agreement validly rescinded (grounds 1, 2, 5, 6, 7, 8 and 10);
- (2) error in refusing to remove caveat lodged by the 1<sup>st</sup> defendant; and
- (3) error in refusing relief to the 2<sup>nd</sup> plaintiff.

**1. *Error of Law In Refusing To Declare Agreement Validly Rescinded (Grounds 1, 2, 5, 6, 7, 8 And 10)***

The learned judge in his judgment found that the 1<sup>st</sup> defendant had not paid the balance of the money stipulated under clause 1(c) of the Sale and Purchase Agreement dated 29.8.1981 (see his judgment cited above) and he held that: (1) *the 1<sup>st</sup> defendant had breached the said agreement*; and (2) *the said agreement had been validly terminated by the 1<sup>st</sup> plaintiff by a letter dated 29.7.1991*. Yet the learned judge refused to grant the order of declaration sought by the plaintiffs. His refusal was on the ground that the conduct of the 1<sup>st</sup> plaintiff was inequitable in that the 1<sup>st</sup> plaintiff failed to inform the other defendants of non-payment of full purchase price, inordinate delay in terminating the agreement, receipt of the RM13,000.00 and on *restitutio in integrum*.

From the evidence, the claim by the other defendants was on a purported agreement between the 1<sup>st</sup> defendant and the other defendants. The statement of defence and counterclaim of the 1<sup>st</sup> defendant denied any dealing between the 1<sup>st</sup> defendant and the other defendants and it could not be found anywhere in the statement of defence and counterclaim of the other defendants which challenged the denial. The parties are bound by their pleadings and for that reason the other defendants could not have any claim on the said land. Secondly, it is observed that the agreement between the 1<sup>st</sup> defendant and the other defendants (if any) would depend on whether there was a valid and binding agreement between the 1<sup>st</sup> plaintiff and the 1<sup>st</sup> defendant in respect of the said land. The learned trial judge held that the agreement dated 29.8.1981 between the 1<sup>st</sup> plaintiff and the 1<sup>st</sup> defendant was void for want of consideration and the 1<sup>st</sup> plaintiff had validly terminated the said agreement. The said land is the subject matter of the agreement and since the agreement had been declared null and void the ownership of the said land never passed to the 1<sup>st</sup> defendant. For that reason the 1<sup>st</sup> defendant could not enter into any agreement with any party in respect of the said land. In my view, whatever agreement entered between the 1<sup>st</sup> defendant and the other defendants would have no effect whatsoever. Furthermore, there is nothing in the evidence to show that when the 1<sup>st</sup>

defendant entered into the purported agreement with the other defendants the 1<sup>st</sup> plaintiff was a party to the purported agreement. For that reason there was no obligation on the part of the 1<sup>st</sup> plaintiff to inform the other defendants that the balance of the purchase money had not been paid.

The learned counsel for the other defendants submitted that the learned judge was correct in not exercising his discretion to grant the plaintiffs the declaration sought by the plaintiffs on the ground that the conduct of the plaintiffs were inequitable. The learned judge found that the 1<sup>st</sup> plaintiff's conduct was inequitable because he did not inform the other defendants that the balance of the purchase money had not been paid by the 1<sup>st</sup> defendant and the 1<sup>st</sup> plaintiff delayed in terminating the agreement. As I have stated above, the other defendants were not a party to the agreement dated 29.8.1981 and as such the 1<sup>st</sup> plaintiff was not under a duty or obligation to inform the other defendants of the non-payment of the balance of the purchase price. The obligation was with the 1<sup>st</sup> defendant with whom the other defendants entered into the purported agreement. The learned judge also accepted the 1<sup>st</sup> defendant's submission that *restitutio in integrum* is almost impossible in this case as the rice machine and the used car could not be valued. I agree with the learned counsel for the plaintiffs that there should be value given to those articles when the sale and purchase

agreement dated 29.8.1981 was executed. The husband of the 1<sup>st</sup> defendant gave evidence that the value of those articles at the time when the agreement was entered was about RM60,000.00 to RM 70,000.00. If there is any restitution that would be the amount. It is noted that the learned judge found that the breach was by the 1<sup>st</sup> defendant and in the absence of any clause for refund of any stipulated sum, in my view, the 1<sup>st</sup> plaintiff is entitled to forfeit the whole amount. Further, I could not find anywhere in the statement of defence of the 1<sup>st</sup> defendant seeking the refund of the money paid.

The point I would like to point out here is that there is no evidence to show that the 1<sup>st</sup> plaintiff's conduct was inequitable and that *restitutio in integrum* could not be ordered. Even if the learned judge was right in both, I am of the view that he was in error in not granting the declaratory order prayed for because the learned judge himself found that the 1<sup>st</sup> plaintiff had validly terminated the agreement. The normal sequence of a finding that the agreement had been validly terminated by the 1<sup>st</sup> plaintiff would be a declaratory order pronouncing that the agreement had been validly terminated.

## **2. *Error In Refusing To Remove Caveat Lodged By 1<sup>st</sup> Defendant***

This is another puzzling part of the judgment of the learned judge. The learned judge in his judgment found that the 1<sup>st</sup> plaintiff had validly

terminated the agreement when the 1<sup>st</sup> plaintiff's solicitors, by their letter dated 29.7.1991, rescinded the agreement for non-payment of the balance of the purchase price. With the termination of the said agreement, the interest of the 1<sup>st</sup> defendant in respect of the said land disappeared. For that reason the 1<sup>st</sup> defendant has no caveatable interest on the said land. The natural sequence would be an order that the caveat lodged by the 1<sup>st</sup> defendant should be removed.

I am of the view that the learned judge was in error in refusing to remove the caveat filed by the 1<sup>st</sup> defendant.

### ***3. Error In Refusing Relief To The 2<sup>nd</sup> Plaintiff***

It was submitted by the learned counsel for the plaintiffs that when the learned judge came to the conclusion that the Sale and Purchase Agreement dated 22.7.1991 entered into by the 1<sup>st</sup> plaintiff and the 2<sup>nd</sup> plaintiff was not contingent on the 1<sup>st</sup> defendant's interest on the land, the learned judge ought to have held that the 2<sup>nd</sup> plaintiff has beneficial interest on the said land.

I am of the view that the learned judge was right in not making the declaratory order prayed for by the 2<sup>nd</sup> plaintiff (prayer 2(i)). It is clear from the evidence that when the solicitors for the 1<sup>st</sup> plaintiff gave notice of termination to the 1<sup>st</sup> defendant, the 1<sup>st</sup> defendant disputed the termination. The termination became final only when the court found that the 1<sup>st</sup> plaintiff

had validly terminated the agreement for breaches by the 1<sup>st</sup> defendant. The agreement between the 1<sup>st</sup> plaintiff and the 2<sup>nd</sup> defendant was dated 22.7.1992. On that date the agreement dated 29.8.1981 was still subsisting until it was held by the court to be validly terminated by the 1<sup>st</sup> plaintiff. For that reason the 1<sup>st</sup> plaintiff could not enter into any agreement with any party including the 2<sup>nd</sup> plaintiff. As such, we see no merit in the submission of the 2<sup>nd</sup> plaintiff.

### ***Conclusion***

As we have stated our decision in open court, the appeal by the plaintiffs is hereby allowed with costs here and below and the counter-appeals by the 1<sup>st</sup> defendant and the other defendants are hereby dismissed. The 1<sup>st</sup> plaintiff is entitled to the following:

- (1) as against the 1<sup>st</sup> defendant, a declaration that the agreement dated the 29<sup>th</sup> day of August, 1981 made between the 1<sup>st</sup> plaintiff and the 1<sup>st</sup> defendant has been validly rescinded;
- (2) as against the 2<sup>nd</sup> to 7<sup>th</sup> defendants, a declaration that the unregistered Memorandum of Transfer dated the 13<sup>th</sup> day of January, 1983 is null and void;

- (3) a declaration that the 2<sup>nd</sup> to 7<sup>th</sup> defendants do not have any interest in the said land;
- (4) an order that the caveat lodged by the 1<sup>st</sup> defendant against the said land and registered at the Miri Land Registry Office on the 17<sup>th</sup> day of October, 1991 as Instrument No. L. 6729/91 be removed forthwith;
- (5) an order that the caveat lodged by the 2<sup>nd</sup> to 7<sup>th</sup> defendants and registered at the Miri Land Registry Office on the 5<sup>th</sup> day of March, 1992 as Instrument No. L. 1544/92 be removed forthwith; and
- (6) an order that, the 1<sup>st</sup> defendant or 2<sup>nd</sup> to 7<sup>th</sup> defendants or any one or more of them having custody of the issue document of title to the said land, do deliver the document of title to the 1<sup>st</sup> plaintiff within 14 days from the date of the order.

In respect of the appeal by the 2<sup>nd</sup> plaintiff, it is clear to me that when the agreement between the 1<sup>st</sup> plaintiff and the 2<sup>nd</sup> plaintiff was executed the agreement dated 29.8.1981 had not been validly terminated. For that reason the 2<sup>nd</sup> plaintiff has no cause of action against the defendants. The appeal by

the 2<sup>nd</sup> plaintiff is hereby dismissed with no order as to costs. The deposit is to be refunded to the plaintiffs.

My learned brothers, James Foong Cheng Yuen and Zulkefli Ahmad Makinudin, JJ.C.A. have seen this judgment in the draft and have stated their agreement to it.

Dated: 6 August 2007

(Datuk Haji Mokhtar bin Haji Sidin)  
Judge  
Court of Appeal, Malaysia

Counsel:

Mekanda Singh Sandhu (Satinder Singh Sandhu with him) for the appellants.  
(Messrs Sandhu & Co.)

C.T. Voon for the 1<sup>st</sup> respondent.  
(Messrs Voon & Company)

K.Y. Lin for the 2<sup>nd</sup> to 7<sup>th</sup> respondents.  
(Messrs Kadir, Wong, Lin & Co.)