LOH HOLDINGS SDN. BHD.

v.

PEGLIN DEVELOPMENT SDN. BHD. & ANOR.

FEDERAL COURT, KUALA LUMPUR
WAN SULEIMAN FJ
GEORGE SEAH FJ
MOHD. AZMI FJ
[CIVIL APPEAL NO. 74 OF 1982]
21 APRIL 1984

CIVIL PROCEDURE: *Application to strike out action - Whether there is a cause of action - Principle applicable - Res judicata - Whether applicable.*

CONTRACT: *Agency - Agent's act of fraud - Whether could be imputed to principal.*

The 1st, 2nd, 3rd and 4th defendants in the High Court civil suit held shares in the 5th defendant company (1st respondent), the principal asset of which was a piece of land in Malacca registered in its name. In December, 1977, the plaintiff (the appellant) entered into an agreement with the 1st, 2nd, 3rd and 4th defendants on behalf of themselves and all the other ordinary shareholders of the 5th defendant company to take over the 5th defendant company through a sale of all shares in that company. The price of each share was worked out on the basis of the price of the land. An extension of the date of completion of the agreement was granted by the 1st defendant. Subsequently, the appellant lodged a private caveat against the land. On 22 September 1979 the appellant commenced action against the 5th defendant for specific performance of the agreements of 2 December 1977. The 5th defendant applied successfully for removal of the caveat and for the action to be struck out. On 17 September 1980, the appellant instituted proceedings against the 1st, 2nd, 3rd and 4th defendants for specific performance of the agreement of 2 December 1977 and against the 5th and 6th defendants for injunction, and for damages for inducement of breach of contract. It was alleged that in October 1979, a sale agreement was entered into between the 5th defendant and the 6th defendant for the sale of the land, thereby inducing a breach of the agreement of 2 December 1977. The 5th and 6th defendants applied to strike out the claim against them. Judgment was given in their favour. The Judge found *res judicata* and issue estoppel applied against the appellant. He also held that no cause of action could be successfully maintained against the 5th and 6th defendants and that there was no evidence to indicate a breach of the agreement on the part of the 5th and 6th defendants. The appellant appealed.

Held:

A. The Tort of Inducing Breach of Contract

[1] It was not for the Court to decide at the appeal whether the first agreement had been breached.

[2] There was evidence to support the view that the 5th and 6th defendants must be taken to be aware that the implication of the agreements which were subsisting so far as the appellant was concerned was that the land could not be disposed of to any third party.

[3] The trial Judge erred in applying the principle in the cases of *Doshi* [1975] 1 MLJ 85 and *Belmont* to the case before the Court.

Per Curiam: "It cannot be gainsaid that under O. 18 r. 19 pleadings will only be struck out in plain and obvious cases. So long as the statement of claim discloses some ground of action, the mere fact that the plaintiff is unlikely to succeed at the trial is no ground for striking out."

B. Res Judicata

The doctrine of *res judicata* should not be applied. The causes of action and issues in the earlier case and the case before the Court were different.

[*Appeal allowed.*]

Cases referred to:

Greig v. Insole [1978] 1 WLR 302
Torquay Hotel Co. Ltd. v. Cousins [1969] 2 Ch 106
Rookes v. Barnab [1964] AC 1129
Emerald Construction Company Limited v. Lewthian [1966] 1 WLR 691
Thomson & Co. Ltd. v. Deakin [1952] Ch 646
H.L. Bolton (Engineering) Co. Ltd. v. T.J. Graham & Sons Ltd. [1956] 1 QB 159
Mooney v. Peat Marwick & Mitchell [1967] 1 MLJ 87
Rediffusion (Hong Kong) Ltd. v. Attorney-General of Hong Kong [1970] AC 1136
Gilford Motor Co. v. Horne [1933] Ch 935
Jones v. Lipman [1962] 1 WLR 832
Connors Ltd. v. Connors [1940] 4 All ER 179
Doshi's case [1975] 1 MLJ 85
Syarikat Eastern Plastics Industry v. Syarikat Lam Seng Trading [1972] 1 MLJ 21
Carl-Zeiss-Stiftung v. Rayner & Keeler Ltd. [1966] 2 All ER 536
Yat Tung Investment v. Dao Heng Bank [1975] AC 581
Brisbane City Council v. Attorney-General [1947] 2 All ER 255

Legislation referred to:

Rules of the High Court 1980, O. 18 r. 19

For the appellant - Raja Aziz Addruse (Tan Chee Lan with him); M/s. Vohrah & Tan Chee Lan
For the respondents - R.R. Chelliah (J. Gurusamy & Dennis Xavier with him); M/s. Sethu, Ghazali & Gomez

JUDGMENT

Wan Suleiman FJ:

It will be necessary to set out in some detail the pre-history leading up to the present appeal so as to enable us to better understand the issues at stake.

We shall be referring to the parties in Malacca High Court Civil Suit No. 111 of 1980 in the same order in which they were referred to therein.

Defendants 1, 2, 3, and 4 held shares in the 5th defendant company (first respondent in the present appeal). 5th defendant had a piece of land known as Holding No. 236, Mukim Berendam, Malacca, which formed the principal asset of the 5th defendant company. Sometime in July 1977, appellant negotiated to take over the 5th defendant company through sale of all shares in the 5th defendant company. Negotiations were carried out through Datuk Yeap Kee Aik the 1st defendant. The price of each share was worked out on the basis of the price of the land. This is not in dispute - see para. 7 of statement of defence at p. 31.

The parties entered into an agreement on 2 December 1977 - see Agreement at pp. 155 to 168. The parties to the agreement were Datuk Yeap Kee Aik, Datin Yeap Kee Aik and Chuan Hiang Realty Sdn. Bhd. on behalf of themselves and all the other holders or ordinary shares of the 5th defendant company, as vendors and the appellant as purchaser.

Recital 2 at p. 156 states, "The Vendors are the beneficial owners of the numbers of the ordinary shares in the capital of the company set out opposite their respective names in the third column of the schedule hereto aggregating the whole of the issued capital of the company (hereinafter collectively called the said shares.)".

Recital 3 at p. 156 states, "(a) The company is the registered proprietors of the freehold land known as Holding No. 236 situate in the Mukim of Batu Berendam more particularly described in the 2nd Schedule hereto (hereinafter called the said land)."

The company here refers to the Peglin Company. The consideration then paid was RM90,000. Clause 3 at p. 157 sets out the manner in which the balance of the purchase price of RM810,000 should be paid. Clause 8 (III) (a) (ii), the next relevant clause states that the Vendors hereby jointly and severally undertake with the purchaser that:

> (ii) they would obtain the approval (the terms and conditions of the approval to be acceptable to the Purchaser) from the appropriate authorities for the sub-division of the said land into a housing estate by 6th March 1978 and the fees for the issue of separate documents of titles, for the sub-division of the said land shall be borne by the Purchaser."

Clause 8 III (b) at p. 163 states as follows:

> In the event of the Vendors' failure to obtain the requisite approval for the sub-division of the said land from the appropriate authorities by 6th March 1978 the deposit and part payment paid under Clause 3 *supra* shall at the sole discretion of the purchaser, either, be refunded to the Purchaser, free of interest within two (2) weeks or, be treated as part payment and the sale and purchase of the company to be completed nonetheless. Thereafter this agreement shall become null and void and no compensation shall be payable to either party for any reason whatsoever.

It is clear from the agreement, submits learned Counsel for the appellant that the company was to be taken over with the land.

On 27 February 1978, appellant's solicitors wrote to the 1st defendant a letter, for an extension of the date of completion in accordance with the terms of the agreement dated 2 December 1977. First defendant's reply at p. 59 confirmed the extension of the date of completion requested for.

To give effect to this new date of completion the appellant's solicitors drafted a supplementary agreement. Paragraphs 14, 15 and 16 of the affidavit of Tan Chee Lan, solicitor for the appellant refer to a letter sent to the 5th defendant on 13 April 1978 for the attention of 1st, 2nd and 4th defendants together with the draft supplementary agreement, a reminder when there was no response and subsequent lodging of the private caveat against the land on behalf of the appellant.

On 24 May 1979 a notice to remove the caveat was served on the appellant.

On 19 June 1979 appellant applied to extend the duration of the caveat and on 27 June 1979 the High Court, Malacca extended the duration of the caveat "until the final determination of the civil suit which the Applicant should commence against the registered proprietors of the said land within three (3) months."

On 22 September 1979 appellant commenced Civil Suit No. 92/79 against the 5th defendant, the registered proprietors of the land. Paragraph 1 of the statement of claim reads:

> By an agreement entered into between plaintiffs and the defendants, the latter agreed to sell and the plaintiffs agreed to buy 1,050,000 ordinary shares in the defendant company known as Peglin Development Sendirian Berhad for a total consideration of RM900,000.

The main defence to this is a total denial by the defendant that he had entered into such an agreement adding as alternative that in any event it was illegal to enter into any such agreement.

On 8 November 1979 the 5th defendant in the aforementioned civil suit applied to strike out the appellant's claim in that action. The affidavit in support of which signed by 1st defendant as director and shareholder of defendant company reads as follows:

> 5. I crave leave to refer to the preamble of the said Agreement and I hereby affirm that the said Agreement was for the Sale of the shares held by myself, Datin Yeap Kee Aik nee Tan Siew Kim and Chuan Hiang Realty Sdn. Bhd., as shareholders in the defendant company. We did not at any stage contract to sell the shares for and on behalf of the defendant company. I am advised that the defendant company cannot sell its shares.
>
> 6. I further crave leave to refer to the 1st schedule and to the signatories on page ten (10) of the said Agreement. I hereby affirm that I did not contract to sell the shares for and on behalf of Edward Eu (Pte) Ltd. nor did I sign the said Agreement in that capacity.

This was supported by the affidavit of the 2nd defendant substantially to the same effect as the 1st defendant's affidavit and the affidavit of Yeap Yu Lin, daughter of the 1st and 2nd defendants and a director of the 5th defendant company, also to the same effect.

On 13 November 1979 5th defendant applied to remove the caveat, an application supported by the affidavit of Yeap Yu Lin. On 7 March 1980 both the application to strike out and the application to remove the caveat came up for hearing before the High Court at Malacca and on 2 June 1980 judgment was given for the 5th defendant.

On 17 September 1980 the appellant instituted the present proceedings against 4 shareholders of the 5th defendant company, the 5th defendant and the 6th defendant. The prayer for relief is set out on pp. 9 to 10. To preserve the property the appellant applied for an interim injunction which was granted on 16 December 1980.

On 27 October 1980 the 5th defendant and the 6th defendant took out separate summons to strike out appellant's claim against them. The main ground of the 5th defendant's application is set out in paras. 3 to 6 of the affidavit of Yeap Yu Lin at pp. 135 and 136. The grounds of the 6th defendant's application are at para. 4 to 9 of the affidavit in support on p. 131.

Both applications were heard on 27 March 1981 and judgment delivered on 20 March 1982 against the appellant on two grounds i.e.,

(a) The Judge found *res judicata* and issue estoppel applied against appellant. The Judge held further that "no cause of action could be successfully maintained against 5th and 6th defendants".

(b) In the course of his judgment the Judge also concluded that there was no evidence to indicate a breach of the agreement on the part of the 5th and 6th defendants.

The present claim of the appellant against defendants 1, 2, 3 and 4 is for specific performance of the agreement of 2 December 1977. There is a dispute as regards the position of defendant 3 as a party to the agreement - the claim is against defendants 1, 2, 3, and 4 whereas in the alternative claim it is against 1st, 2nd and 4th defendants only.

The issue in regard to the claim against the 5th and 6th defendants in the present action is set out in paras 17 to 20 of the statement of claim which reads as follows:-

> 17.(i) On or about 5th October 1979, without the plaintiff's knowledge, a sale agreement was entered into between the 5th defendant of the one part and the 6th defendant of the other part whereby the 5th defendant agreed to sell and the 6th defendant agreed to purchase the said land for a consideration of RM1.2 million free from all charges and encumbrances and with vacant possession (hereinafter called the Peglin-Ricwal Agreement).
>
> 18. Covenant of the Peglin-Ricwal Agreement stated that the sale is subject to and conditional upon the Vendor being able to successfully remove the private caveat lodged by Loh Kee Peng on behalf of the plaintiff.
>
> 19. On 10 October 1979 the 6th defendant lodged a private caveat against the said land.

The affidavit in support filed by Tan Chee Lan on behalf of the appellant is as follows:

> 17. On or about the 15th October 1979, without the plaintiff's knowledge, a sale agreement was entered into between the 5th defendant of the one part and the 6th defendant of the other part whereby the 5th defendant agreed to sell and the 6th defendant agreed to purchase the said land for a consideration of RM1.2 million free from all charges and encumbrances and with vacant possession (hereinafter called the Peglin-Ricwal Agreement). The copy of the Peglin-Ricwal Agreement as supplied to the plaintiff is annexed and marked "TCL B".
>
> 18. Covenant 2 of the Peglin-Ricwal Agreement stated that the sale is subject to and conditional upon the Vendor being able to successfully remove the private caveat lodged by Loh Kee Peng on behalf of the plaintiff.
>
> 19. (i) At or before they entered into the Peglin-Ricwal Agreement, both the 5th defendant and the 6th defendant knew of the existence of Loh-Peglin Agreement and in particular were aware of the terms of Covenant 4 (i).
>
> (ii) By entering into the Peglin-Ricwal Agreement both the 5th defendant and the 6th defendant knew and intended that the Peglin-Ricwal Agreement would constitute a breach by the 1st, 2nd, 3rd and 4th defendant of the said Covenant 4 (i).
>
> (iii) The 5th and 6th defendants thereby induced a breach of the said covenant.

The claim, it should be noted, is therefore based on inducement. In that regard we were urged to note the following:

(a) The agreement of 2 December 1977 had never been terminated. The caveat was entered to protect the appellant and the caveat was only applied for on 9 November 1978.

(b) The 745,500 shares of defendants 2, 3 and 4 in the 5th defendant company would constitute a majority in the shareholding. The appellant has no claim against defendant 3 who had only 34,500 shares.

(c) The land which was the main asset of the 5th defendant company formed an integral part of the sale of shares. It was submitted that Clause 3 at p. 156, Clause 4 of the agreement at p. 158 and Clause III (a) at pp. 162 and 163 would lend support to this argument.

The claims against defendants 5 and 6 are:

(i) an injunction to restrain 5th and 6th defendants, etc, from conveying or otherwise disposing of the land to any other person, and

(ii) damages for including a breach by the 1st, 2nd, 3rd and 4th defendants, alternatively by the 1st, 2nd and 4th defendants of Covenant 4 (i) of the Loh-Peglin Agreement.

The causes of action in the two different Civil Suits are therefore:

(a) In Civil Suit No. 92/79 - specific performance of the alleged contract between appellant and the 5th defendant;

(b) In the present action i.e Civil Suit No. 111/80 - 5th and 6th defendants by entering into the 2nd agreement induced a breach between appellant and the 1st, 2nd, 3rd and 4th defendants, a cause of action based on tort.

The Tort of Inducement of Breach of Contract

Learned Counsel for the appellant referred us to *Greig v. Insole* [1978] 1 WLR 302 at 333, a passage in which, he submits summarises the law regarding the tort of inducement to breach of contract.

At common law it constitutes a tort for third persons deliberately to interfere in the execution of a valid contract which has been concluded between two or more other parties, if five conditions are fulfilled:

There must be (a) "direct" interference or

(b) "indirect" interference coupled with the use of unlawful means; per Lord Denning MR in *Torquay Hotel Company Ltd. v. Cousins* [1969] 2 Ch 106, 138.

As to the meaning of "interference" this is not confined to the actual procurement or inducement of a breach of contract: it can cover a case where the third person prevents or hinders one party from performing his duties even though this is not a breach.

Secondly, the defendant must be shown to have knowledge of the relevant contract.

Thirdly, he must be shown to have had intent to interfere with it.

Fourthly, in bringing an action, other than *quia timet* action the plaintiff must show that he has suffered special damage, that is more than nominal damage; see *Rookes v. Barnab* [1964] AC 1129, 1212, per Lord Devlin.

In *quia timet* action, the plaintiff must show the likelihood of damage to him resulting if the act of interference is successful; *Emerald Construction Company Limited v. Lewthian* [1966] 1 WLR 691, 703, per Diplock LJ.

Fifthly, so far as it is necessary the plaintiff must successfully rebut any defence based on justification which the defendant may put forward.

Raja Aziz next referred to *Thomson & Co. Ltd. v. Deakin* [1952] Ch 646, 679, 681 where it was held *inter alia* that:

> apart from a conspiracy to injure, which was not in question here, acts of third party lawful in themselves do not constitute an actionable interference with contractual rights merely because they bring about a breach of contract, even if they are done with the object and intent of bringing about such breach. The tort of procuring a breach of contract however is not confined to direct intervention. The intervener knowing of the existence of a contract between A and B and acting with the object of procuring its breach by A to the damage of B will be liable not only (1) if he intervenes by persuading A to break it, but also (2) if he intervenes by the commission of some act wrongful in itself so as to prevent A from in fact performing his

> contract and also (3) if he persuades a third party to do an act in itself wrongful or not legitimate (as committing a breach of a contract of service with A) so as to render, as was intended, impossible A's performance of his contract with B.

Referring next to a passage at p. 681 which reads:

> I come then to such formulation of the result as seems to me to be correct; but I should first add this. The argument that this tort should be confined to such direct intervention or interference as is illustrated, for example, in *Lumley v. Gye* introduces this strange difficulty. A limited company, a *persona ficta*, can only act through agents or servants. If the intervention has to be of so direct a kind, it would obviously create strange problems in the case of a limited liability company. No doubt, if I approach some person in the company who has authority on the company's behalf to make contracts, I may be said to be approaching the company direct. I think that the illustration of the company emphasizes the anomaly which would result if, in the case of a limited company, a tortious act were only committed if the person approached or induced had a particular office or responsibility (actual or perhaps ostensible) in the company.

From this, he says, two propositions follow. Firstly if the person approached has authority e.g. a managing director it should be regarded as interference with the party who is a party to the contract. It becomes particularly relevant in the context that Datuk Yeap Kee Aik was the managing director of Peglin Development, not a mere officer or servant.

We were referred to a number of cases, of which the most significant, in this respect, is *H.L. Bolton (Engineering) Co. Ltd. v. T.J. Graham & Sons Ltd.* [1956] 1 QB 159 at 172.

A company, he says may in many ways be likened to a human body. It has a brain and nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such. So you will find that in cases where the law requires personal fault as a condition of liability in tort, the fault of the manager will be the personal fault of the company.

Secondly, the evidence, we were urged indicates that 5th defendant knew or ought to know of the agreement of 2 December 1977 which required the defendants to hand over control and management of the 5th defendant company to appellant on completion of the sale. (Clause 8(c) of Agreement, p. 160 of Record).

For instance, the agreement between 5th defendant/6th defendant mentioned the caveat, at Clause 3. This together with the statutory declaration of the director of the appellant company and its annexures show that the agreement of 2 December 1977 still subsisted. Also that for the same reasons 6th defendant knew of the existence of the caveat. The other defendants (or defendants 1, 2 & 4) he added made use of the 5th defendant being a separate legal entity as vehicle for disposing the land to 6th defendant.

From this, two inferences, he added should be drawn - firstly 5th defendant knew of the 1st agreement through the 1st defendant because knowledge of the latter will be imputed to the 5th defendant that the sale of the land would deprive appellant of his benefits under the agreement, and on the basis of what was said in *Thomson v. Deakin* (*supra*) that when the intervenor deals directly with the controlling mind he is to be taken as dealing in effect with the party to the contract. The 6th defendant, in dealing with the 1st defendant, Datuk Yeap was directly interfering with the contract entered into between the appellant and the four defendants.

It cannot be gainsaid that under O. 18 r. 19 pleadings will only be struck out in plain and obvious cases. So long as the statement of claim discloses some ground of action, the mere fact that the plaintiff is unlikely to succeed at the trial is no ground for striking out. See *Mooney v. Peat Marwick & Mitchell* [1967] 1 MLJ 87. We need only refer to a passage from another authority referred to by learned Counsel, the Privy Council decision in *Rediffusion* (*Hong Kong*) *Ltd. v. Attorney-General of Hong Kong* [1970] AC 1136:

> It is a well established principle that the summary power under RSC O. 18 r. 19 to strike out a writ or pleading as disclosing no reasonable cause of action or defence should be exercised only in plain and obvious cases ... No evidence is admissible on a cause of action summons ... the only documents that can be looked at are the writ, the documents referred to in the writ ...

Counsel therefore submitted that it was premature for the Judge to hold that the claim against defendants is bad because there is no cause of action.

Direct Interference

Though the law recognises that a company is a separate legal entity from its shareholders, Courts have from time to time been quite prepared to prevent the shareholders from committing fraud, submits Counsel.

We were referred to *Gilford Motor Co. v. Horne* [1933] Ch 935 and *Jones v. Lipman* [1962] 1 WLR 832 as two such instances.

In the former case, an agreement had been entered between the company and its managing director, Horne who covenanted not to solicit customer and persons "in the habit of dealing with other company", whilst holding office or afterwards. Defendants opened a spare parts business for the sale of spare parts of Gilford vehicles, the vehicles assembled and sold by the plaintiff company.

The Court held that business carried on by Horne was formed as a device, a strategem, in order to mask the effective carrying on of business of Horne.

In *Jones v. Lipman & Anor.* the 1st defendant agreed to sell freehold land with registered title to the plaintiff for £5,250. Pending completion he sold and transferred the land to the defendant company (having a capital of £100), which he acquired and of which he and a clerk of his solicitors were sole shareholders and directors, for £3,000, of which £1,564 was borrowed by the defendant company from a bank and the rest remained owing to the first defendant.

The Court held that the defendant company was a cloak for the 1st defendant, who could compel a transfer of land to the plaintiffs, and specific performance was accordingly decreed against both defendants.

We were also referred to *Connors Ltd. v. Connors* [1940] 4 All ER 179 PC where in disposing of the shares in the company, there was no mention of goodwill. Counsel drew a parallel between *Connors's* case and the present appeal.

Indirect Interference

It was submitted that the 5th defendant is in fact the creature of the 1st defendant. The agreement requires the land to be in the name of the 5th defendant when the shares were taken over eventually. It is therefore implied that the 5th defendant will not part with the land for so long as the agreement between the appellant and the four defendants was still subsisting. This implied restraint was known to the 5th defendant because it was aware of the existence of the caveat. In fact, it was the 5th defendant who applied for the removal of the caveat even before the commencement of the Civil Suit No. 92/79.

The 6th defendant by entering into the agreement with the 5th defendant must have intended to cause the 5th defendant to commit breach of the implied covenant. Breach of the implied covenant is an unlawful act. This forms an unlawful element according to the alternative test of indirect interference.

Counsel also referred us to a passage from the judgment of Lord Denning in *Torquay Hotel Co. Ltd. v. Cousins* [1969] 2 Ch 106 at 135:

> Indirect interference will not do. Thus a man who "covers the market" in a commodity may well know if it may prevent others from performing their contracts, but he is not liable to an action for so doing ... . Indirect interferences is only unlawful if unlawful means are used.

Even if the 5th defendant is a separate entity, and Datuk Yeap 1st defendant has nothing to do with it, still because of the implied condition that the property will not be transferred, the first agreement will still subsist. That is known to 5th defendant and it should also be known to 6th defendant by entering into this agreement to take away the property in the agreement and therefore inducing a breach of agreement to sell the shares with the land. Thus there had been indirect interference by unlawful means.

Knowledge of the subsisting agreement would Counsel urges, arise from the existence of the caveat itself. A passage from the decision in *Greig v. Insole* was cited.

> If the officers of the trade union, knowing of the contract, deliberately sought to procure a breach of it, they would do wrong: see *Lumely v. Gye* [1853] 2E & B 216. Even if they did not know of the actual terms of the contract, but had the means of knowledge - which they deliberately disregarded - that would be enough. Like the man who turns a blind eye. So here, if the officers deliberately sought to get this contract terminated, heedless of its terms, regardless whether it was terminated by breach or not, they would do wrong. For it is unlawful for a third person to procure a breach of contract knowingly, or recklessly, indifferent whether it is a breach or not.

The trial Judge himself found that there was knowledge (p. 392 of Record).

Regarding the question of intention, it was clear from the statutory declaration (p. 73 of Record at p. 74) that the agreement had not been terminated, it was submitted. The caveat was after all lodged by the appellant and if the 6th defendant knowing of it went on with the agreement of 5 October, then there was intent to cause wrong doing.

As to the fourth ingredient of damage, there is a difference of RM300,000 in the price between the first agreement and the second. But more than that the appellant, who had made payments under the earlier agreement would have ended up with a "shell" company, had the second agreement been allowed to be performed.

Justification in law, he went on was for the 5th and 6th defendant to put forward (see *Greig v. Insole* p. 340) and in the proceedings, they have not provided any justification.

There was therefore, he says a cause of action either on the basis of direct interference or alternatively an indirect interference disclosed against both respondents for inducement to breach of contract.

Referring now to the grounds of judgment, it was indicated to us that in both the cases cited therein, *Doshi* and *Belmont*, the principle was that for knowledge not to be imputed to the person, there must be fraud present in the act of the agent i.e. the agent must be acting in fraud of the principal or that the agent, together with others are conspiring to defraud the principal. In this appeal the position is different. Here 1st defendant is trying to use 5th defendant as a cloak in order to transfer the land to 6th defendant, and not to act in fraud of the 5th defendant, or conspiring with 2nd, 3rd and 4th defendants so to do.

It seems to us that Counsel is correct in saying that the learned trial Judge erred in applying the principles in *Doshi's* case [1975] 1 MLJ 85, and *Belmont's* to the present one. In the former case, Chooi and his wife were the sole directors and shareholders of the nominee company, and Chooi acted as respondents' solicitors in relation to the transfer of the premises to him by the company. It was alleged that the transfer of the premises from Chooi to the nominee company was in fraud of the appellant because the purported consideration was far below the market value. It was held that the solicitors' knowledge of fraud, if any, cannot be imputed to the respondent.

The facts of *Belmont's* case are equally different from those of the present appeal, so that the principle arising from that decision is equally inapplicable. Again it should be emphasised that 1st defendant was not using the 5th defendant company to defraud itself, but merely as a cloak for his own activities.

Mr. Chelliah says that the only person who can break the contract is the 1st defendant or the 4th defendant because the 5th defendant company cannot break the contract, not being a party to it. So the most that could be said was that the first defendant in order to enable himself to break the contract got the 5th defendant to agree to sell the land to 6th defendant. There was therefore merely a party finding an excuse to break the contract, not a case of inducement to break the contract.

Summarising his stand on this issue, he maintains that:

(1) on the facts itself the contract was broken before the alleged act of the 1st, 5th and 6th defendants on 5th October 1979;

(2) even if the contract was not so broken before 5 October 1979 the alleged act of entering into the contract with the 6th defendant on 5 October does not show any interference or intention either directly or indirectly in order to bring about a breach of the contract;

(3) even if the act of entering into the agreement of 5 October 1979 indirectly brought about the result of breaking the contract, the act itself was the **lawful** act which 5th and 6th defendants are entitled to do and therefore that cannot be based on tort of inducing breach of contract.

As regards (1) we are inclined to agree with Raja Aziz that it is not for us to decide at this appeal whether the first agreement had been breached. Appellant's position is that he did not pay on 6 March because they were told (by Datuk Yeap) that it was all right not to pay. See *Syarikat Eastern Plastics Industry v. Syarikat Lam Seng Trading* [1972] 1 MLJ 21.

In reply to points (2) and (3) Raja Aziz says and we are inclined to agree with him that there is evidence to support the view that 5th and 6th defendants must be taken to be aware that the implication of the agreements which are subsisting so far as the appellant is concerned, was that the land cannot be disposed of to any third party. Indeed the term used by the appellant in the application for the caveat was that it is to prevent the land from being disposed of to any third party, and 6th defendant is a third party, the inducer. The inducement is the extra RM300,000 being offered for the land.

He goes on to say that thus acting through the 1st to 4th defendants, 6th defendant induces the 5th defendant to break the agreement, such breach being a "wrongful act", and therefore making it tortiously liable. The following portion of the judgment in *Thomson v. Deakin* cited is relevant:

> The matter then proceeds to the next stage. So far I have considered only the case in which the intervener directly acts himself, either by persuasion or by some wrongful act of his own. What is the situation if he attains the same result, indirectly, by bringing his persuasion or procuration to bear upon some third party, commonly a servant of the contracting party, but possibly an independent third person? In my judgment, it is reasonably plain (and the result, as it seems to me, would otherwise be highly illogical and irrational) that, if the act which the third party is persuaded to do is itself an unlawful act or a wrongful act (including in that phrase a breach of contract) and the other elements are present (namely, knowledge and intention to do the damage which is in fact suffered), then the result is the same and the intervener or procurer will be liable for the loss or damage which the injured party sustains.

Res Judicata

Raja Aziz referred us to the House of Lords' decision in *Carl-Zeiss-Stiftung v. Rayner & Keeler Ltd.* [1966] 2 All ER 536 at p. 572:

> The broader principle of *res judicata* is founded on the twin principles so frequently expressed in Latin that they should be at an end to litigation and justice demands that the same party shall not be harassed twice for the same cause. It goes beyond the mere record; it is part of the law of evidence for, to see whether it applies, the facts and reasons given by the Judge, his judgment, the pleadings, the evidence and even the history of the matter may be taken into account (see *Marginson v. Blackburn Borough Council* [95]). *Res judicata* itself has two branches:
>
> (i) Cause of action estoppel.
>
> (ii) Issue estoppel.

Counsel says that in this case, it cannot be a cause of action estoppel because the cause of action in the earlier case is quite different from the present one. There the 5th defendant was sued for breach of contract, whereas in the present case the cause of action is the tortious act of inducing a breach of contract. This same argument was not viewed with favour in the Court below.

The learned trial Judge considered the principles enunciated in the Privy Council decision in *Yat Tung Investment v. Dao Heng Bank* [1975] AC 581.

A scrutiny of the facts there shows that, there indeed unlike the present appeal the issues raised in the second litigation was the fundamental part of the first.

The defence of *res judicata* and the authorities considered by the learned trial Judge were reviewed in *Brisbane City Council v. Attorney General* [1947] 2 All ER 255 the facts wherein are as follows:

In 1938 the trustees of a society whose main function was to organise a district annual show conveyed about 20 acres of land to Brisbane City Council in consideration of the Council's discharging a debt of £450 owed by the society and on the following conditions (recorded in the minutes of the Council and in a letter of 25 October 1937, from the Council to the trustees):

> (a) the area to be set apart permanently for show-ground, park and recreation purposes; (b) the show ring to be levelled off; (c) the show society to be granted the exclusive use of the ground without charge for a period of two weeks in each and every year, for the purposes of and in connection with the district annual show.

In 1970 developers applied under the City of Brisbane Town Planning Act 1964 for consent to use the land as a shopping centre and the Council contracted to sell the land to them. The relator S. gave notice of objection to the granting of planning consent: his appeal to

Local Government Court eventually reached the High Court of Australia. Another appeal against the Local Government Court was dismissed in December 1975. In March 1971, during the pendency of the planning appeals, the Attorney-General at the relation of S. brought an action against the council and the developers for a declaration that the purported sale to the developers was *ultra vires* and void. That action was dismissed. In the present proceedings, the Attorney-General on the relation of S. and B. sought, as against the Council and the developers, a declaration that the land was subject to a valid and enforceable charitable trust. The trial Judge found as a fact that a "show" in Queensland operated to encourage agriculture and horticulture and made an order granting the declaration. The Council and the developers appealed on the grounds that the Council did not hold the land as trustees; that there was no valid and enforceable public charitable trust and that even if there were the Attorney-General was debarred from asserting it in that, *inter alia*, the existence of the trust could and should have been asserted in the previous litigation against the Council. The Full Court of the Supreme Court dismissed the appeal.

The defence of *res judicata* was considered and disposed of at p. 425, and we cite:

> The second defence is one of *res judicata.* There has, of course, been no actual decision in litigation between these parties as to the issue involved in the present case, but the appellants invoke this defence in its wider sense, according to which a party may be shut out from raising in a subsequent action an issue which he could, and should, have raised in earlier proceedings. The classic statement of this doctrine is contained in the judgment of Wigram V.C. in *Henderson v. Henderson* [1843] 3 Hare 100 and its existence has been reaffirmed by this Board in *Hoystead v. Commissioner of Taxation* [1926] AC 155. A recent application of it is to be found in the decision of the Board in *Yat Tung Investment Co. Ltd. v. Dao Heng Bank Ltd.* [1975] AC 581. It was, in the judgment of the Board, there described in these words:
>
> > ... there is a wider sense in which the doctrine may be appealed to, so that it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings.
> > (p. 590).
>
> This reference to "abuse of process" had previously been made in *Greenhalgh v. Mallard* [1947] 2 All ER 255 per Somervell LJ and their Lordships endorse it. This is the true basis of the doctrine and ought only to be applied when the facts are such as to amount to an abuse: otherwise there is a danger of a party being shut from bringing forward a genuine subject of litigation.
>
> In their Lordships' opinion there is no room for application of this doctrine here.

We are satisfied that in this appeal, likewise *res judicata* should not be applied because the cause of action and the issues are different.

We would allow the appeal with costs.

Also found at [1984] 2 CLJ 88