

Hjh Rokayah binti Abdullah
(suing as personal representative of
the estate of Hj Abu bin Mohd Yusof)

... **Appellant**

AND

Hj Yahya bin Md Yusof

... **Respondent**

(Court of Appeal of Brunei Darussalam)
(Civil Appeal No. 10 of 2010)

Before: Mortimer, P.; Davies and Rogers, JJ.A.
25th May, 2011.

Action for declaration that the plaintiff was the owner of a shophouse dismissed on grounds he has sold it to the defendant. Appeal on questions of fact dismissed.

Mr Shazale Salleh of Messrs. Mohd Shazale Salleh for the Appellant.
Ms Geetha Menon of Messrs Abrahams Davidson & Co. for the Respondent.

Case cited in the Judgment:

Yuill v Yuill [1945] P 15 at 19-20

Mortimer, P.:

We dismissed this appeal with costs on 17 May 2011. We now give our reasons.

This is the appeal in an action between two brothers concerning the sale and purchase of a shophouse by the appellant plaintiff (the plaintiff) to the respondent defendant (the defendant). The plaintiff brother has died and the action is continued by his widow on behalf of his estate.

The claim is for a declaration that the deceased plaintiff's estate is the legal and beneficial owner of a shophouse at Unit A1 of Block A on lot number 2541 Kg Sengkarai Tutong.

On 3 July 2010 the Chief Justice dismissed the claim and found that the defendant had agreed to buy the shophouse from the plaintiff for B\$150,000 in an oral agreement made in November 2002 which was confirmed in 2 written agreements signed by both the plaintiff and the defendant on 31 March or 1 April 2004 and witnessed by their wives as well as two other relatives. The defendant has paid instalments to the plaintiff under the agreement amounting to B\$98,981.00.

The widow of the plaintiff now appeals and asks for judgment in favour of the plaintiff's estate.

The Background

The background to this purchase is that the land on which the shophouse is built belonged to the father of the parties. He transferred it to the plaintiff so that he could obtain a government loan on condition that when the loan had been repaid he would transfer the land to the beneficiaries of his estate.

The plaintiff repaid the loan but failed to transfer the land to the beneficiaries. The defendant wanted a stake in the family land and offered to buy the shophouse from the plaintiff. After some negotiation an agreement was made for the defendant to buy the shophouse for \$150,000 and to pay for it, in such instalments as he could afford, directly into the plaintiff's bank account. He was to account for these payments periodically evidenced with paying-in slips.

The plaintiff conceded that an oral agreement had been made for the sale and purchase but contended that the price was \$300,000 and only for the granting of a 90 year lease. As for the written agreements both parties are agreed that they were signed in Kuala Lumpur on 31 March or 1 April 2004.

Nevertheless the plaintiff contended that the deceased is not bound by either, first because he was having radiotherapy and was too ill and confused to know what he was doing when he signed (non est factum). Second, because the defendant misrepresented the nature of the agreement before he signed, indicating that the agreement only confirmed the plaintiff's version of the oral agreement.

Having given detailed consideration to the evidence put before him and to all the circumstances the Chief Justice rejected the plaintiff's account of the oral agreement and the suggestion that he was too ill to understand what he was doing. Also, he rejected the evidence that the defendant had misrepresented the nature of the written agreements. He found for the defendant

The Chief Justice had the great advantage of seeing and hearing the witnesses and having done so he considered the background, the circumstances, the consistency of the accounts, contemporaneous events and the inherent probabilities before reaching his conclusion.

Appeal on the finding of facts

Mr Shazale, who appears for the appellant plaintiff, contends that the Chief Justice's findings of fact were mistaken. He says that the Chief Justice ought to have found the facts in the plaintiff's favour and ought to have given judgment accordingly.

He chose to augment 3 of his submissions. He submits in the first that the Chief Justice ought not to have accepted the defendant's explanation of the 5 months delay in providing the plaintiff with copies of the written agreements. He says that the defendant's reasons for not supplying them are flawed. We were invited to consider the Chief Justice's note of this evidence and the cross-examination.

Having done so we can discern no reason why the Chief Justice ought not to have accepted the evidence given.

Mr Shazale also made submissions upon the manner in which the defendant had obtained the keys to the 6 shophouses on his brother's land so that he could tag those of the 5 not in dispute. He suggested that the manner of his retention of the keys to shophouse A1 was surreptitious. On the other hand however, this conduct is consistent with his case that the shophouse A1 had been transferred to him.

Finally in oral argument Mr Shazale suggests that there were discrepancies in the defendant's affidavit in paragraphs 3.3 compared with paragraphs 11.1 about the price the plaintiff was asking. But in neither of these paragraphs nor in the cross-examination concerning them are we able to discern any significant inconsistency to which the Chief Justice ought to have given effect.

Similarly, we have considered Mr Shazale's detailed written submissions. With respect, there is nothing in any of the submissions which shows this court that the Chief Justice was mistaken in his findings.

Appeals against Findings of Fact

It is well recognised that a party appealing against a judge's finding of fact, particularly based on the credit of witnesses as here, faces an uphill task. A judge has a great advantage over the appellate court in deciding such issues because he sees and hears the witnesses. This advantage is such that in order to succeed the appellate court must be convinced that the judge plainly wrong. Normally this can only be done if the appellant shows that the judge's reasoning is flawed, that he has overlooked an established or agreed material fact, that he has failed to profit by seeing and hearing the witnesses or that the decision flies in the face of reality.

Similar statements have been made many times. The words of Lord Greene MR in *Yuill v Yuill* [1945] P 15 at 19-20 are in point:

"We were reminded of certain well-known observations in the House of Lords dealing with the position of an appellate court when the judgment of the trial judge has been based in whole or in part on his opinion of the demeanour of witnesses. It can, of course, only be on the rarest occasions and in circumstances where the appellate court is convinced by the plainest considerations, that it would be justified in finding that the trial judge had formed a wrong opinion. But when the court is so convinced it is, in my opinion, entitled and indeed bound to give effect to its conviction."

All experienced judges readily accept that mistakes in the assessment of witnesses and the finding of facts are made and it is always open to challenge a finding of fact provided the difficulties of showing that the judge was plainly wrong and consequent risk in costs are borne in mind.

Discussion

Having considered Mr Shazale's detailed submissions as well as his oral arguments with care there is nothing in them which comes near to establishing that the Chief Justice was plainly wrong or that he overlooked any agreed or established material fact or that he failed to take full advantage of seeing and hearing the witnesses. His decision was based

on his assessment of the witnesses who had signed clear written agreements which fully supported the defendant's case.

His judgment was an impressively careful consideration of the factual issues. Nothing put before us has led us to doubt its soundness.

Conclusion and order

For these reasons:

1. The appeal is dismissed.
2. The judgment and orders in the defendant's favour are affirmed.
3. The plaintiff will pay the costs of the appeal.

Mortimer, P.

Davies, J.A.

Rogers, J.A.