

**Hj Roney bin Hj Roslee
@ Roni bin Hj Rosli**

... **Appellant**

AND

Kheng Ah Beng

... **Respondent**

**(Court of Appeal of Brunei Darussalam)
(Civil Appeal No. 15 of 2011)**

Before: Mortimer, P.; Davies and Leonard, JJ.A.

17th November, 2011.

Appeal against order refusing to stay judgment of this Court - effect of payment by purchaser of whole of purchase price - effect of clause requiring successive applications for approval of transfer

Lt. Col (R) Hj Harif bin Hj Ibrahim of M/S Lt. Col (Rtd) Harif Eric Advocates and Solicitors for the Appellant.

Daljit Singh Sandhu and Vincent Joseph of M/S Sandhu & Company for Respondent.

Davies, J.A.:

On 3 September 2009 Findlay JC gave judgment for the respondent in the following terms:

IT IS HEREBY

1. declared that the Defendant was, at all material times, holding one-half of the said land in trust for the Plaintiff;
2. declared that the Defendant now holds one half of the proceeds of the sale of the said land, namely the sum of B\$800,000 and any profits made thereon, in trust for the Plaintiff;
3. ordered that the Defendant pays the Plaintiff the sum of \$800,000;
4. ordered that the Defendant accounts for any profits that he made from receiving the sum of \$800,000;
5. ordered that the Defendant shall pay the plaintiff interest at the rate of 6% p a on the following terms:
 - a. B\$8,000.00 from 10.01 2009 until 3.09.2009;
 - b. B\$152,000 from 17.01.2009 until 3.09.2009; and

c. B\$640,000 from 22.01.2009 until 3.09.2009.

- 6. ordered that the Defendant shall pay the Plaintiff interest at the rate of 6% per annum on all judgment debt from 4.09.2009 until full and final settlement;
- 7. ordered that if the sum of B\$800,000, including the interest accrued thereon, is not paid by the Defendant to the Plaintiff, the Plaintiff shall be at liberty to commence proceedings for tracing, in addition to the execution proceedings against the Defendant; and
- 8. ordered that the Defendant do pay costs of this action to the Plaintiff to be taxed, if not agreed.

An appeal against that judgment was dismissed by this Court on 20 May 2010. A brief explanation of the judgment of Findlay JC is necessary to understand what ensued after the judgment of this Court.

The respondent claimed that he and the appellant's father bought the land, the subject of the action, in equal shares but, for reasons which now do not matter, agreed that legal title to the land should be vested in the appellant. By the time of the action the appellant's father had died and the appellant had entered into a contract to sell the land to a third-party for \$1.6 million and had received part of the purchase money, namely \$800,000. The learned judge accepted the respondent's evidence in this respect, rejected any evidence to the contrary and consequently made the above orders. By the time of the judgment of this Court the transfer of the land to the third-party had not been registered. It is not clear whether, by that time, the transfer had been lodged for registration.

Section 23 of the *Land Code* Cap 40 relevantly provides:

"23.

Provided that a transfer..... of land to any person shall be null and void and shall not be registered except with the prior approval in writing of His Majesty in Council

....."

Section 27 thereof provides:

"27. No claim to or interest in any land shall be valid unless it has been registered in the Land Office."

In January 2011 the Land Office wrote to the appellant informing him that His Majesty in Council had declined to approve the transfer of the subject land from the appellant to the third-party. Consequently, on 8 June 2011 the appellant filed a summons in the Supreme Court seeking to vary the orders made on 3 September 2009 so as to stay them. That application was dismissed by Findlay JC on 14 July 2011. From that dismissal the appellant sought to appeal to this Court.

The appellant's argument in this Court was that the contract between him and the third-party was subject to approval by His Majesty of the transfer of the land to the third-party. Consequently, he submitted, that if that condition was not fulfilled, the contract could be rescinded by the third-party, upon which the appellant would be obliged to return the whole of the purchase price to the third-party.

At the end of the hearing of this appeal it was dismissed and the Court ordered the appellant to pay the respondent's costs. The following are our reasons for that dismissal.

There are further facts relevant to this appeal which should now be stated. The first is that the contract of sale of the subject land between the appellant and the third-party contained the following clause:

"11. Non-approval of the Transfer

Where the Memorandum of Transfer is not approved the Vendor and the Purchaser or his nominee shall make successive applications for the requisite approvals."

The second relevant fact is that there is no evidence before this Court that, following the rejection of approval referred to above, the appellant or the third-party made any further application for approval. The respondent, in his written submission, purported to give some evidence that such a clause is not uncommon and, in effect, that there is some justification for it. Whilst we would reject evidence given in this way, the submission does explain the presence of such a clause, namely that there may be a number of reasons for such non-approval some of which may be removed before a further application is made; for example, that the purchaser already has several other pieces of land registered in his name and may be able to dispose of these before applying again.

Whatever may be the explanation for such a clause, it imposes obligations on both the vendor and the purchaser to make successive applications, that is, more than one further application. And, in the absence of evidence to the contrary, we would infer that these have not been made. Until they have been made and failed, the contract between the appellant and the third-party would remain on foot without the necessity of adding the following facts.

The third relevant fact, as it now appears, is that the third party has paid the whole of the purchase price, \$1,600,000, to the appellant.

The fourth relevant fact is that, though the appellant, at least initially before this Court, contended against the respondent that the contract between him and the third party is at an end, he appears to have made no such contention against the third party; nor has he paid or offered to return to the third party any part of the \$1,600,000 paid to him by the latter. Indeed, neither he nor his solicitor appears to have made any attempt to contact the third-party since that refusal of approval.

And the fifth relevant fact is that, notwithstanding section 27 of the *Land Code*, set out above, the third party contends that, as between him and the appellant, from the time of receipt of the whole of the purchase price the latter has held the subject land in

trust for the third party: see his lawyer's letter to the respondent's lawyer dated 8 June, 2011, annexed to the affidavit of Mr Sandhu in these proceedings. It follows from the first paragraph of that letter that the third-party has waived any right to rescind the contract if successive applications for approval fail to obtain it.

We think that that contention is correct (see paragraphs 22 to 24 of our reasons for judgment in this appeal) and that, consequently, the appellant's contention that the contract remains subject to the granting of His Majesty's approval to the transfer fails.

In those circumstances there is no basis for the stay sought by the appellant.

Mortimer, P.

Davies, J.A.

Leonard, J.A.