

YAN BOON KAI

.....Plaintiff

AND

**KAI WANG SDN BHD
LAU KUNG CHING
AK ZAINI BIN PG HJ OTHMAN**

**.....1st Respondent
.....2nd Respondent
.....3rd Respondent**

**(Court of Appeal of Brunei Darussalam)
(Civil Appeal No. 15 of 2018)**

Before: Burrell P, Seagroatt and Lunn JJ A.
29th April 2019

Mr. Rudi Lee Kim Boon (Messrs Rudi Lee, Annie Kon & Associates) for Plaintiff
Mr Lee Yew Choh (Messrs. YC Lee and Lee) for Respondents

Burrell, P.:

The trial judge, Findlay J.C was concerned with the issue of ownership of two parcels of land, Lots nos. 64004 and 63654. They were the subject of separate actions (No 74 of 2012 in respect of 64004 and No 29 of 2013 in respect of 63654) which the judge heard together.

This appeal is only concerned with disputes concerning the latter lot, 63654. However, some background in relation to both lots is necessary.

The plaintiff in 74/2012 was Ms Yan Yee Han ("YHH"). The appellant in 29/3013 is her brother Yan Boon Kai ("YBK") who was the unsuccessful defendant at trial. The defendants in 74/2012, a company and its two directors challenged YYH's title to lot 64004. Her title was similarly challenged with regard to 63654 although, surprisingly, she was not a party to that action (29/2013).

In short, the judge found YYH to be a "most excellent" witness and resolved all relevant factual issues in her favour.

It is unnecessary for the purposes of this appeal to consider the judge's factual findings based on all the evidence he heard which led him to the conclusion that

"There is no basis whatever for any allegation that Ms Yan was guilty of any fraud or misrepresentation and there has been no serious attempt to prove this.

Accordingly, Ms Yan is entitled to be confirmed in her ownership of both Lots and she is also entitled to damages to be assessed for the admitted trespass on her hand."

Prior to this conclusion he had, in any event, correctly noted that:-

"It may be that all this is irrelevant, because, in any event, Ms Yan has protection provided by law. Section 28(3) of the Land Code [Chapter 40] provides

Every entry in the Register shall be taken as conclusive evidence that the person named therein as owner of the land is the absolute and indefeasible owner thereof for the estate specified therein subject to the conditions upon which the original entry was made and the title of such proprietor shall not be subject to challenge except on the ground of fraud or misrepresentation to which he is proved to be a party."

The starting point for this appeal therefore is the unappealed finding that YYH was a bona fide purchaser for value of both lots.

The Appeal

At trial the real dispute concerned the transfers in respect of both lots after YYH had acquired them. This appeal does not concern 64004. The judge found that the sale to her brother, YBK, was a valid transfer.

With regard to 63654 the issue was the respondent's claim that YBK had no right to sell or deal with it in any way as he had no title to it.

The judge's findings in relation to 63654

On 19 December 2011 YKB and the respondent company Kai Wang, signed a "Settlement Agreement". By this agreement, inter alia, YKB agreed to return to Kai Wang the title deeds to a number of properties, including 63654. Lot 64004 was not referred to in the settlement agreement. In fact YKB had already sold 63654 to his sister, YYH. As the judge found:-

"The settlement agreement on which Kai and the other plaintiffs in HCCS 29 of 2013 rely was entered into on 19 December 2011. This agreement was entered into after Mr Yan had sold the disputed land so it cannot affect those sales as far as Ms Yan is concerned."

YKB's case at trial and the basis of his appeal is that 63654 should not have been included in the settlement agreement. He submits that it was inserted surreptitiously in an underhand way at the 11th hour.

He alleges specifically that it was inserted at a late stage "by mistake, fraud or misrepresentation." He further submits that as it was not his property to give the written agreement should be "rectified" by excluding it. In support, it is argued that the agreement was revised, over a short period of time, on eight occasions and it was only in the eighth revision did lot 63654 appear for the first time. To put this submissions in context it should be noted that 63654 was not the sole property included in the eighth revision. There were four others as well.

Having heard considerable evidence on this issue the judge crucially found that:-

“against this, on 24 December 2011, days after the settlement agreement was signed, giving plenty of time to absorb and consider the terms of the agreement, Mr Yan’s solicitors wrote to the defendants’ solicitors specifically addressing the inclusion of Lot 63654 in the agreement, but did not suggest there had been a mistake, fraud or misrepresentation in doing that. The letter said only that “MOT has already been executed”. If, indeed, Lot 63654 had been included without the agreement of Mr Yan and by some sleight of hand by Mr Lau or his solicitors, I would have expected an expression of outrage and indignation that about what Mr Rudi Lee now calls this “sneakiness”.

I do not accept that there was any underhand behavior in the insertion of Lot 63654 in the agreement. The inclusion of Lot 63654 in the final draft was, amongst other items, highlighted and due diligence in reading the final draft would have immediately revealed this. The simple fact of the matter is that if Mr Yan signed this agreement without due care and he must accept responsibility for what he agreed.”

This is a plainly a finding of fact by the judge which leaves the onus on the appellant to satisfy this court that the judge was plainly wrong and that his statement. *“I do not accept that there was any underhand behavior in the mention of Lot 63654 in the agreement”* was against the weight of the evidence.

In reality, there are two limbs to YKB’s appeal, both of which were argued before the judge. Mr. Rudi Lee, who has represented YKB both at trial and appeal has submitted a thorough 41 page written submission which, apart from the question of damages with which we deal later in this judgment, comes down to two points.

1. The “Nemo dat” rule

Mr. Rudi Lee argues that by virtue of the principle of “nemo dat quod non habet” Lot 63654 could not be the proper subject matter of the settlement agreement. It had been transferred to YYH and therefore YKB had no authority to deal with it. He submits that any reference to Lot 63654 in the settlement agreement must, as a matter of law, be null and void. The consequence of this submission is, as we understand it, that “63654” be simply redacted from the text of the agreement.

The judge rejected this submission and stated.

“Firstly, Mr. Rudi Lee relies on the rule that a person cannot give what he has not got. This is true. It is so, I accept, that Mr Yan cannot deal with Lot 63654 because he has sold it, but that does not let him off the hook. If he fails to do what he undertook to do, he is breach of the agreement and must pay damages for that breach.”

As correctly observed by Mr. Y.C.Lee, appearing for the respondent to this appeal, the rule is designed to protect the true owners of the property not the person who wrongly purports to dispose of it. The latter renders himself liable for the damages, the former’s ownership is unaffected. Mr. Y.C.Lee cites from Treitel Law of contract, 5th Edition, in support.

“a contract may be void if it provides that something shall be done which cannot, as a matter of law be done”, it also states that “a contract is not void merely because it

purports to dispose of property which belongs to a third party, for in such a case the vendor might be able to acquire the property and then make a proper transfer"

Mr. Y.C. Lee's submission is that even though YKB was not the owner at the time of the settlement agreement the respondent was entitled to assume that YKB would take such steps as were necessary in order to comply. He notes that by clause C(i) YKB undertook to return all original documents in his control and possession to a number of properties, including 63654. By clause C (vi) he undertook to reassign, if necessary, properties, including 63654 to the respondent. By clause (v) YKB warranted that he had not charged, assigned or sold properties, again including 63654.

In such circumstances it was plainly right and not surprising that the judge found as he did and that, by YKB's failure to return 63654 he was in breach of contract and liable in damages for that breach.

2. Rectification due to "mistake"

Secondly, Mr. Rudi Lee submits that lot 63654 should be taken out of the settlement agreement. Thus the agreement should be rectified. It should continue to be binding in all other respects. Put simply, all references to 63654 be redacted.

This submission is based on the contention that lot 63654 was included in the Settlement Agreement by the respondents' solicitors in the 8th revision to the written agreement "at the last minute" presumably in the hope that it would not be noticed by the appellant's solicitors. He describes it as a "sneaky" act. In the preamble of his written submission he uses the word "sneaky" about six times and later when dealing with the issue specifically the word "sneaky" (or similar) appears another six times or so. The repetition of the word does not improve the argument.

Rectification is sought on the basis of "mistake." Plainly, there was no mistake on the part of the respondent in including it in the 8th revision. It was clear, unambiguous and deliberate. The only "mistake" was that of the appellant in taking no action whatever, after its inclusion.

The judge dealt with this issue, not surprisingly, in the respondents' favour as follows:

"Mr. Rudi Lee argued that the settlement agreement should be rectified to express the true intention of the parties. To obtain rectification, the party seeking it must show that there was a clear mistake. Here, Mr Yan must show that there was a clear mistake in the insertion of Lot 63654 into the agreement and Kai knew this. He has not been able to show this..."

...lastly, Mr. Rudi Lee argues that the lot was included by mistake, fraud or misrepresentation. I have already rejected this. There is no evidence that this could be so. It may well be that Kai, as an afterthought, sought Mr Yan's agreement to transfer Lot 63654 on the off-chance that he would agree, but there is nothing wrong with that."

This was a clear finding of fact which the appellant must demonstrate was plainly wrong and against the weight of the evidence in order for this court to reverse the

finding. A brief examination of the evidence supports the contrary, namely that it was plainly right. For example and taken together:-

- (i) The reference to 63654 in the 8th revision (the 9th draft) was highlighted either in red, in one version or underlined, in another version. It was obvious.
- (ii) The very fact that there had been a number of previous amendments should alert the reader to the change in this particular revision.
- (iii) It was not the only new addition of parcels of land. There were four others.
- (iv) On 18 August 2011 the respondents' solicitors had written to YKB asking for the return of the title to 63654. His solicitors replied that the lot is "in the process of transfer". Its later inclusion should not therefore be regarded as a "sneaky" surprise.
- (v) Two days after the settlement agreement had been signed a follow-up letter was written to YKB's solicitors. Their reply, on 24th December (four days having passed for the reading of and consideration of the written agreement) made no complaint, reference or enquiry relating to the inclusion of 63654. Subsequent correspondence was also silent on the matter until August 2012.
- (vi) On 24 August 2012, 8 months later and for the first time the appellant's solicitors wrote that they were "surprised" that it had been included and contended that it was "suspicious".

The judge's findings, below, are unimpeachable:-

"...if indeed, Lot 63654 had been included without the agreement of Mr Yan and by some sleight of hand by Mr Lau or his solicitors, I would have expected an expression of outrage and indignation that about what Mr Rudi Lee now calls this "sneakiness." I do not accept that there was any underhand behavior in the insertion of Lot 63654 in the agreement. The inclusion of Lot 63654 in the final draft was, amongst other items, highlighted and due diligence in reading the final draft would have immediately revealed this. The simple fact of the matter is that if Mr Yan signed this agreement without due care and he must accept responsibility for what he agreed."

Given that the appellant's two primary grounds of appeal (referred to as 'The Nemo dat' submission and the 'rectification for mistake' point) are both wholly untenable it is unnecessary to make any further consideration of the grounds of appeal save for the matter of damages to which we now turn.

Damages

The judge's ruling was as follows:-

"In the first place, Kai is entitled to receive the value of Lot 63654 as at the date of the settlement agreement. The evidence is that this value is \$280,000 so I grant judgment against Mr Yan in favour of Kai in this sum, together with interest thereon at the rate of 6% per annum from the 19 December 2011 to date of payment."

Kai also claims for the loss of use and enjoyment of Lot 63654 from 19 December 2011. The evidence is that Ms Yan has been receiving rental in respect of Lot 63654 of amounts of \$1500 and \$1800 per month. It seems to me fair that, under this head, Mr

Yan should pay Kai the sum of \$1600 per month from 1 February 2012 to the date of payment of the damages of \$280,000."

Mr Rudi Lee makes two points:-

- (1) The judge erred in valuing the land at \$280,000. It should have been \$206,000 being the "agreed" value when the land was given to the appellant.
- (2) The judge should not have awarded any loss of rent given that he had also awarded 6% interest on the sum of \$280,000 from 1 February 2012 until full payment. He describes this as "double compensation".

We disagree.

The judge had the benefit of the evidence of YKB himself who provided the figure of \$280,000. The relevant date of the valuation is the date of the settlement agreement. There is no reliable evidence to challenge YKB's own testimony.

Awarding the respondents interest as well as loss of rental income does no more than reflect the actual loss. The \$280,000 is like any other award of damages which attracts interest whilst it remains unpaid. As a separate head of damages the appellant's could have received rent had the property been transferred at the material time and the evidence of quantum as to rent came from the appellant's sister. It was rent actually received by her.

For the reasons given we dismiss this appeal.

Costs

We make a costs order nisi that the costs of and arising from the appeal be to the respondents to be taxed if not agreed.

Any submission arising out of our nisi order shall be made in writing (maximum 2 pages) and filed with the court by 4.00p.m on 30 April 2019. In the absence of submissions the order will become final on 1st May 2019.

Burrell, P.

Seagroatt, J.A.

Lunn, J.A