

KOH HAN KIONG

AND

HUA CHAN NAM

**(Court of Appeal of Brunei Darussalam)
(Civil Appeal No. 1 of 2018)**

Before: Mortimer P, Burrell and Seagroatt JJ A.

12 May 2018

Headnote:

Issue concerning Beneficial ownership of land – whether the beneficial ownership had passed to the registered owner. Purely a question of fact decided by the judge on oral evidence and the absence of contemporaneous record. Appeal purely on fact dismissed.

Mr Zamri bin Haji Mohammad Taha (Messrs Zamri Taha Associates)) for Appellant
Ms Veronica K Rajakanu (Messrs. Zuls Partners Law Office) for Respondent

Cases cited in the Judgment:

Zainal Abidin Jahad V PP (CA No 24 of 2016)

Mortimer P:

This appeal concerns the beneficial ownership of 3 properties. Lot number 26463 (0.331 acres); Lot number 26465 (0.410 acres); and lot number 26466 (0.330 acres). All 3 properties are in the Muara District.

The plaintiff was the purchaser of the properties in dispute many years ago. They were registered in the defendant's name and the plaintiff retained the beneficial ownership. The plaintiff became ill and was unable to conduct litigation so after a dispute between the plaintiff and the defendant concerning the beneficial ownership of the properties an action was brought by his Guardian ad litem. The action was heard by the judge who found in favour of the plaintiff. The defendant appeals.

Background

Some years ago and before the plaintiff became ill he purchased the 3 properties which were part of a larger lot (the mother lot). By arrangement the mother lot was registered in the name of the defendant as he was a yellow identity card holder entitled to be a registered owner. The plaintiff was a green identity card holder not so entitled. There is no dispute that the mother lot, although registered in the defendant's name, was beneficially owned by the plaintiff.

The mother lot was later divided into 6 smaller lots of which 3 were sold by the plaintiff. The remaining 3 are the properties in dispute. At all times the plaintiff remained in control or possession of the title documents.

Summary of the Plaintiff's Case below

After the plaintiff became ill one of the plaintiff's daughters contacted the defendant asking him to transfer the properties to the plaintiff or his nominee. Sometime in 2011 at a meeting between the daughters and the defendant, the defendant said that he was owed RM 150,000 by the plaintiff and that if that were paid he would transfer the property. The defendant acknowledged the plaintiff's beneficial ownership.

The plaintiff's daughters knew nothing of this debt and were surprised because according to the records of the father's company Lisa Development the defendant owed it just short of \$300,000.

A further meeting was held in 2012 at which the defendant said the amount owed by the plaintiff to him was RM 270,000 and only upon the payment of that sum would he transfer the property.

Further negotiations came to nothing and this action was brought.

Summary of the Defendant's Case below

The defendant's case was that about 20 years ago the plaintiff wanted to purchase property in Labuan and develop a shopping and hotel complex but he was short of money. He asked the defendant to participate in the sum of RM 270,000 for which he would get 25% ownership of the complex. The defendant agreed and paid a total of B\$ 200,000 in 2 instalments.

The project failed and was sold at a loss. The defendant claimed his money back and an arrangement was made whereby the sum was converted into a debt and the plaintiff agreed to repay the money over the following 3 years with the properties in dispute as security. The plaintiff failed to repay so the beneficial rights to the property passed to the defendant already the registered owner.

The defendant claimed that he asked the plaintiff for the title deeds but the plaintiff was evasive and that anyway he had parted with some of the title deeds as security for a debt of \$30,000.

As the registered owner of the properties he paid the small annual land tax.

He denied being in debt to the plaintiff's company describing the allegation as ridiculous.

The Judge's Finding

The case turned on the central issue whether the defendant participated in plaintiff's development project in Labuan by contributing RM270,000 which later had been converted into a debt which had never been repaid.

This issue turned entirely upon oral evidence and lack of documentary support.

The central issue whether the defendant had participated in the failed Labuan development to the extent of RM 270,000 which the plaintiff had agreed to repay as a debt over 3 years with the properties as security and whether the debt had never been repaid so that the beneficial ownership of the three properties had passed to the defendant depended entirely upon oral evidence.

The judge heard the daughters of the disabled plaintiff say that they were quite unaware of this arrangement and the plaintiff had never mentioned such to them and the defendant gave evidence on his own behalf.

The allegation of the debt and the security and the passing of the beneficial interest in the property was raised by the defendant. He therefore had the burden of establishing his case on the balance of probability.

Having heard and seen the witnesses the judge was unable to accept the defendant's evidence on this for the following principal reasons:

1. There is no dispute that the mother lot was registered by the defendant and held in trust for the plaintiff.
2. That at all times the plaintiff was in possession of or in control of the title documents in spite of having handed over 2 of them as security for a \$30,000 debt.
3. After the 3 years of non-payment by the plaintiff the defendant never asserted his right to the beneficial interest in the 3 properties.
4. Only when asked for the 'transfer' of the properties did the defendant raise the non-payment of the debt and even then was willing to hand over the properties if it was repaid. As on balance the judge found the value was far greater than the debt this was 'peculiar' and 'contrary to one who was secure in his possession.'
5. The judge accepted the plaintiff's explanation as to why the plaintiff had not sought to enforce his rights earlier. And indeed unless there was some doubt concerning the beneficial title there was no reason for the plaintiff to take any action.
6. Finally the judge ruled:

"As regards the purported payment of RM 270,000 for the purchase of land in Labuan, I believe the defendant knew of the plaintiff's purchase of the land in Labuan although he may not know the detail of it or for that matter it was subsequently sold at a loss. I find it difficult to accept that the defendant would in 1987/1988 merely hand RM 270,000 to the plaintiff without there being any documents of any sort to record this transaction as for that matter to record what the transaction was for. Knowing the plaintiff's investment in Labuan, I believe that the defendant seized the opportunity and used the RM 270,000 purported loan to tie it up to the properties which he holds on trust to justify the trust was broken by the alleged failure of the plaintiff to pay the amount within 3 years.

..... I believe that the Labuan loan was purely made up by the defendant to stifle the plaintiff's claim against him. As for the payment of the land tax, I am inclined to agree with the plaintiff's counsel's submission that it is not proper to associate the evidence of payment of the tax to ownership of the properties given that the amount was very nominal.

Overall I find the plaintiff's witnesses testimony to be consistent and I have no hesitation in accepting them to be the truth to compare to the defendant. I'm satisfied on the balance of probabilities that the trust was never broken and accordingly I allow the plaintiff's claim. I also ordered cost the plaintiff to be taxed if not agreed"

7. The judge rightly held that if the trust was not broken as contended for by the defendant claim is not statute barred. (Section 27 (1) of the Limitation act, chapter 14 which provides an exception to the operation of section 21 (1)). This finding is not challenged on appeal unless the court were to find that the trust was broken.

Discussion

Any appellant who seeks to disturb a judge's finding of fact having seen and heard the witnesses faces an uphill task. It is well recognised that a judge who has seen and heard the witnesses has a huge advantage over the Court of Appeal which sees only the record. This is particularly so if the judge's decision depends solely on fact and without any supporting record or contemporaneous document.

Often the absence of contemporaneous records in circumstances where they are to be expected is crucial – as in this case.

In order to succeed in disturbing the judge's findings the appellant must show that the his finding was plainly wrong, usually by demonstrating that he took into account something central to the decision which it was not open to him to take into account or that he failed to take into account something of sufficient importance that would have altered his decision. This is trite law of which there is an abundance of authority.

The Appeal

Of the appellant's 12 grounds of appeal 10 of them advance arguments appropriate to be put before the judge at the end of oral evidence concerning the weight which the he ought to attach to the evidence. No doubt these arguments were put before the judge and he had them well in mind.

Similarly the defendant submits that as his evidence concerning the advance of RM 270,000 was not, and could not in the circumstances, be directly rebutted by the plaintiff the judge ought to have accepted the evidence of the defendant. This again is an argument suitable to be put before the judge and no doubt was put before him. But as we have already indicated the defendant raised the issue concerning the payment of RM 270,000 and the burden was on him to establish it. It was open to the judge not to accept the defendant's evidence even if not rebutted directly.

Crucial to this decision was the absence of any contemporaneous document or record. On any view this is surprising. After all, according to the defendant he had a substantial interest in the development of the land and the proposed hotel.

In none of these 10 grounds is the appellant able to demonstrate took into account or omitted taking into account some uncontroverted evidence which demonstrates that his decision was plainly wrong or that he took into account, or failed to take into account, crucial matters.

We turn to the 2 grounds of appeal in which errors of law are alleged.

The 4th Ground of Appeal

The learned Judge erred in law in holding that there should have been documentary proof or evidence of the said loan given the size thereof.

We can deal with this briefly. The submission that the judge erred in law in taking into account the absence of documentary proof is simply wrong. He took this into account in deciding whether to accept the oral evidence. It is not a question of law.

The 5th Ground of Appeal

The learned Judge erred in law in admitting the Valor property valuation report without its maker being called as a witness.

The letter complained of was the only useful matter before the judge concerning the possible value of the property at the appropriate time. As this matter was before him he took it into account in spite of any submissions to the contrary by the defendant. As this matter was before him he was entitled to take it into account with all its flaws.

In any event the judge's decision on the evidence was so clear that even in the absence of the Valor letter his decision on the facts would inevitably have been the same.

Conclusion

The judge had the advantage of seeing and hearing witnesses giving their oral evidence. The question whether the plaintiff owed the defendant RM 270,000 and had not been repaid with the result that the beneficial ownership of the 3 properties passed to the defendant was purely a question of oral evidence with the burden on the defendant. The defendant has not demonstrated that the judge's decision was plainly wrong or flawed by any crucial error of law.

For these reasons the appeal must be dismissed.

Order

The appeal is dismissed with in order nisi for costs to be taxed if not agreed. The order for costs will become final at midday 14 May 2018 in the absence of an application to this court.

Mortimer, P.

Burrell, J.A.

Seagroatt, J.A