

VALERIANO GALVEZ PONCE

....Appellant

AND

TAN SUI SENG

.....Respondent

**(Court of Appeal of Brunei Darussalam)
(Civil Appeal No. 6 of 2019)**

Before: Burrell P, Seagroatt and Lunn JJ A.
26th November 2019

Mr. Mathew Chiew Siew Koun (Messrs MCSK Advocates and Solicitors) for Appellant
Mr. Pg Izad Ryan bin PLKD Pg Haji Bahrin and Mr. Mohd Noorsuhaimy bin Haji Kasmany
(Messrs. Pengiran Izad & Lee) for Respondent

Seagroatt, JA.:

This is an appeal against the decision of Judicial Commissioner Woolley on the 25th September 2019 whereby he dismissed with costs the plaintiff's claim for a declaration of trust in respect of one property that he alleged was held in the defendant's name on trust for the plaintiff. The defendant conceded that two other properties were in fact held by him on trust for the plaintiff.

The defendant counterclaimed for rent lost in respect of the disputed property. The judge dismissed that counterclaim with an order for costs against the defendant.

The action commenced by the appellant relates to three properties registered in the name of the respondent, the defendant to the action. In all three cases the appellant (plaintiff) claimed that they were held on trust for him. He seeks an order that the respondent execute the necessary documents in order to transfer the legal title to the appellant's nominee.

The appellant is a Philippine national and cannot hold property in his own name. The respondent is a Bruneian and therefore capable of holding property in his name.

They have had a long business relationship out of which grew a degree of friendship.

This action is concerned with one of the three properties designated as EDR BD 26795 Lot No 29256.

According to the appellant's evidence he purchased Lot No 26106 in July 1990 for B\$400,000. The respondent was the registered holder of the legal title but there was a delay until a declaration of trust was entered into by him on the 18th August 1997.

Lot 25727 was purchased by the appellant in September 1994 for B\$350,000, again with the respondent registered as legal title holder. He entered into a declaration of trust in respect of this property in June 2000.

The sequence of events becomes important in this dispute since no declaration of trust exists in relation to the property purchased in July 1993 for B\$396,300, his second purchase in time. Declarations of trust in respect of the other two properties were made 4 years and nearly 7 years respectively after the purchase of the disputed property.

Of particular significance is the fact that the appellant's solicitors, who were preparing the declaration of trust in respect of lot No 26106, the first of the properties purchased on the 25th July 1997, wrote to the appellant inquiring as to whether they should prepare a declaration of trust noting that the property had been registered "in the name of your nominee" i.e. the common factor with regard to the other two properties, although the declaration of trust was not entered into in respect of lot 25727 at that time.

The state of play as at 18th August 1997 was that a declaration of trust was executed in respect of Lot No 26106, the first purchased in time, but not in respect of either of the other two properties. Although the solicitor raised the query in respect of Lot 29256 he does not appear to have done so with regard to Lot No 25727 which did not have a declaration of trust until nearly 3 years later.

The appellant in his evidence said that he told his lawyers that a declaration of trust was not necessary (when they raised their query in July 1997) because he trusted the defendant. When cross-examined he seemed to suggest that they – lawyer and/or himself – had overlooked the matter. As the trial judge noted this was one of the unsatisfactory features of the evidence.

The property itself had been purchased not by way of a cash transaction, or other financial means. A developer who built the property owed the appellant's business a large sum of money and paid this debt by way of a transfer of the property. The appellant explained that he repaid the company the amount owed to it and thus acquired the property in lieu which was registered in the respondent's name.

It was eventually used to house employees of the appellant – a plant manager and/or a number of workers. In the late 1990's the appellant's business terminated and the property became mainly vacant until March 2017 when the appellant became aware that the respondent's workers were living there.

The respondent's case as presented at trial, was simply that the property was given to him in recognition of his close relationship with the appellant and the business assistance he had provided over the years, and that he had always used the property as his own. However his use would have commenced after the late 1990s as prior to that the appellant had the use of the property which the respondent does not deny.

He further relied upon the fact that he charged the property to the Baiduri Bank in 2010/2011 and then to the RHB Bank in 2016 as security for his own banking facilities.

He obtained by means of a Statutory Declaration in the Magistrates Court on the 11th April 2011, a duplicate Certificate of Title from the Land Registry on the 20th April 2011 claiming that he had mislaid the original certificate. This was no doubt an essential requirement of the Baiduri Bank.

He also claimed that he had paid land tax and insurance for the lot but was unable to produce any documentation to support that save for the period 2013 to 2016 in respect of land tax, and from 2015 to 2016 in respect of insurance.

By contrast the appellant was able to produce what he claimed to be the original certificate of title but it was not issued until 4th November 2004 though clearly pre-dating the duplicate obtained by the defendant over 6 years later.

The judge's consideration of these features led him to conclude that the defendant made no assertion of ownership of the property until 2011. The judge declined, very properly, to make any finding concerning the defendant's claimed reason for obtaining a duplicate certificate.

The judge's fundamental findings of fact

Against the background of his conclusion that the evidence on both sides was "extremely unsatisfactory", having heard from both parties and considered the limited documentary evidence, the judge concluded that he was "not satisfied that [he] had heard a full and honest account of what transpired between 1997, when the trust documents was signed for the first property (26106) and 2015 when the events that give rise to this action commenced."

The pivotal point was, he found, the lack of a declaration of trust for the property lot in dispute - no .29256 - in July 1997 when the appellant was specifically asked by his solicitors if they should prepare one, from which the judge concluded that the disputed property was to be "considered in a different light from the others purchased and placed in the defendant's name." Accordingly he found on the balance of probabilities that Lot No. 29256 was not to be held on trust for the appellant but was to remain in the respondent's ownership. This is an unassailable finding of fact amply supported by the evidence and the inferences to be drawn from it.

Inevitably the failure to plead an oral or resulting trust in the Statement of Claim was fatal. There was no amendment to remedy this and so the case proceeded on a fundamental allegation which was misconceived. The appellant had to fall back on an oral claim which clearly the judge did not accept. Neither party impressed him.

On behalf of the appellant Mr. Chiew sought to argue that paragraphs 8 and 9, and to some extent paragraph 13 of the Amended Defence overcame the fact that the Statement of Claim alleged a written declaration of trust, which was on the face of it fatal to the plaintiff's claim since it was conceded there was no such declaration. He contended that by virtue of the respondents pleading (para 8) that "the plaintiff requested the defendant to act as the nominee/trustee of the plaintiff in respect of [three properties]," and in paragraph 9 "Lot 29256 was being transferred to the defendant no trust deed or formal gift was required," any deficiency in the Statement of Claim was of no consequence.

Those pleaded paragraphs Mr. Chiew said could be construed as an admission of an oral or resulting trust, so that the misstatement in the plaintiff's case was not fatal. This argument is misconceived.

At this stage before this court he sought leave to amend his pleading so as to allege a trust created by an oral agreement, and/or a resulting trust. Unfortunately this comes far too late. It should have been made at the latest before the trial judge. In any event the trial judge's finding was clear, on the facts he found and the inferences he drew properly from those facts and documents, that there was no such trust. The plaintiff's own evidence was conclusive. The failure to have his solicitor prepare a Declaration of Trust when he was alerted to the matter he explained in two different ways – one, he trusted the defendant and two, it was overlooked by the solicitor. Neither holds water. The first is unconvincing because the other two properties were subject to a Declaration of Trust, and the second similarly so because the solicitor had expressly written for instructions as to the preparation of a Trust Deed and Power of Attorney in respect of Lot No 29256.

Any argument under the Law of Property Act 1925 could not assist the appellant. The original title had been vested in the defendant in 1993, and there was no document since which suggested any change or transfer of legal or equitable interest. The judge dealt succinctly with the effect of the Torrens system of land registration. The appellant had failed to displace the presumption.

The judge's decision was essentially based on his findings of fact and on the pleadings. On the limited issue of law, though not essential to his decision, he was also correct.

This appeal is dismissed with costs. There is no appeal by the respondent against his decision on the counterclaim.

Burrell, P.

Seagroatt, J.A.

Lunn, J.A