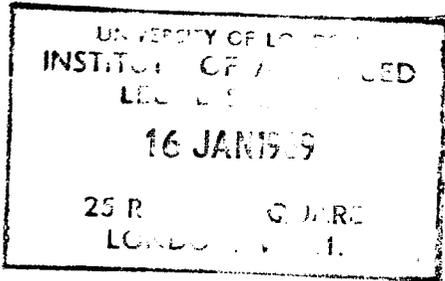


23, 1968



No. 5 of 1967

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

ON APPEAL
FROM THE FEDERAL COURT OF MALAYSIA
(APPELLATE JURISDICTION)

B E T W E E N:

YEW PHAIK HOON (M.W.) (Plaintiff)
Appellant

- and -

QUAH OOI KEAT and
QUAH OOI JIN (Defendants)
Respondents

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C A S E FOR THE APPELLANT

Record

1. This is an Appeal from the Judgment and Order of the Federal Court of Malaysia (Appellate Jurisdiction) dated the 15th May 1966 pursuant to leave of that Court dated 23rd January 1967 allowing an Appeal by the Respondents (Defendants) and thereby setting aside the Judgment and Order of the High Court holden at Johore Bahru dated 9th May 1965.

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2. Under the Order and Judgment of the said High Court dated 2nd May 1965, it was declared that the Respondents hold the properties, specified in the next paragraph in trust for the Appellant and it was ordered that the Respondents do execute a transfer of the said properties to the Appellant and ordered alternatively that the Commissioner of Lands do make a memorial on each of the Register and issue documents of title registering the Appellant as proprietor thereof.

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3. In Paragraph 1 of the Statement of Claim the Appellant alleged that on and before 9th November

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1940 one YEW HUN ENG (since deceased), a brother of the Appellant was the registered owner of the following properties (hereinafter called the said properties):

- (1) Johore Grant for Land No.17933 District of Kluang, Mukim of Kluang Lot No.1831.
- (2) Johore Grant for Land No.17934, District of Kluang, Mukim of Kluang, Lot No.1832.
- (3) Johore Grant for Land No.17935, District of Kluang, Mukim of Kluang, Lot No.1833. 10

and held the said properties in trust for the Appellant.

4. In Paragraph 2 of the Statement of Claim, the Appellant alleged that the said YEW HUN ENG transferred the said properties into the names of the Respondents who are respectively her stepson and her natural born son and that the Respondents have since held the said properties in individual shares as trustees for the Appellant and are not the beneficial owners thereof. 20

5. In Paragraph 3 of the Statement the Appellant alleged that, notwithstanding that the above transfer recited that \$36,000 dollars was the consideration for the transfer, no consideration passed from the Respondents to the said YEW HUN ENG or at all, such recital being made for the purpose of affixing stamps.

6. In Paragraph 4 of the Statement of Claim the Appellant alleged that she had requested the Respondents to transfer the said properties but the Defendants had failed and neglected to do so. In the Prayer, the Appellant claimed the relief granted by the said High Court. 30

7. In their joint amended Defence the Respondents first put the Appellant to strict proof of the facts alleged in Paragraph 1 of the Statement of Claim.

8. In Paragraph 2 of the Defence, the Respondents admitted that on the 9th November 1940 the said properties were transferred to them in undivided shares by the said YEW HUN ENG and that no consideration passed for such transfer but denied that they were to hold such properties as trustees for the Appellant and alleged that the said properties were transferred to them as beneficial owners thereof.
- 10 9. In Paragraph 3 of the Defence, the Respondents denied that the said properties were transferred at the request of the Appellant.
10. In Paragraph 4 of the Defence, the Respondents did not admit that the consideration expressed in the transfer was for the purpose only of affixing stamps and contended that the Appellant was estopped from alleging that the transfer was otherwise than for valuable consideration.
- 20 11. The Statement of Claim was delivered on 5th November 1962. The date of delivery of the above Defence is not specified in the Record but this Defence was amended on the 26th April 1964 to include the following paragraphs.
12. In Paragraph 5 of the Defence, the Respondents alleged that the said properties were given to them by QUAH HONG CHIAM in November 1940.
- 30 13. In Paragraph 6 of this Defence, the Respondents alleged that, if the said properties did not belong to the said QUAH HONG CHIAM, who was the Appellant's husband, they were to the knowledge of the Appellant treated as his property and that the Appellant knew of the transfer and by her conduct agreed thereto.
14. In Paragraph 7 of this Defence, the Respondents denied that any oral trust was created and contended that the Appellant was precluded from alleging any trust since there was no memorandum in writing thereof.
- 40 15. In Paragraph 8 of this Defence, the Respondents alleged that the transfer of the said properties was part of 3 other dispositions of

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property.

- (a) a house in Janan Pasa, Kluang, from YEW HUNG ENG a nominee to LIM THEN.
- (b) three houses in Jalan Mersing, Kluang to QUAH OOI CHIM and
- (c) a rubber estate known as Yew Phaik Hoon Rubber Estate at the 5 m.s. Jalan Mersing, Kluang.

16. In Paragraph 9 of this Defence it was alleged that, if contrary to their contention, the facts were as alleged in the Statement of Claim, the said arrangements were carried through with a view to fraudulently avoiding the provisions of the Estate duty and the Income Tax Ordinance. 10

17. In Paragraph 10 of this Defence, it was alleged that profits arising from the enjoyment of the said properties had been declared to the Income Tax Authorities to be the profits of the Respondents, who, to the knowledge both of the Appellant and her husband considered such profits to be their property. 20

BACKGROUND

18. This appeal involves a family dispute. The head of the family is QUAH HONG CHIAM, hereinafter called the father. The history goes back to 1932 when the father became bankrupt. At that date he had certain rights over the said properties and on his bankruptcy these rights passed to the Official Assignee.

19. In 1932 the father had 15 children and 2 wives. The first wife was LIM THEN or LIM PHIEN, hereinafter called the first wife. There were 4 children of this marriage, a natural born son, an adopted son and 2 daughters. The precise ages of this family are not in evidence. The natural born son is the first Respondent. The Appellant is the second wife of the father. The eldest child of this marriage was QUAH OOI CHIM, hereinafter called the eldest son. He was born in 1909. At the trial, the witnesses 30 40

for the Appellant were the father, the eldest son and the Appellant herself. The second child of this marriage was the second Respondent. He was at school in 1933 but his exact age is not in evidence. There were 4 further sons and a daughter of the marriage, but they do not feature in the evidence. Both Respondents gave evidence but called no other witnesses.

10 20. The Appellant's brother YEW HUN ENG, hereinafter called YEW plays an important role in the history of this case but he died in 1944. In 1935 he came over from Penang to assist in the management of the family business and on the 24th August 1935 he acquired from the Official Assignee the father's interest in the said properties. It is common ground that at no time did YEW have any beneficial interest in the said properties. Again it is common ground that YEW returned to Penang in 1940 and on the 9th November 20 1940 he transferred the said properties in undivided shares to the Respondents for no consideration.

Main issues arising on this appeal

21. (a) The ultimate issue is whether or not the transfer of the said properties by YEW to the Respondents was by way of gift. In the absence of gift, to be inferred possibly from the act of Transfer itself or supported by independent evidence, the Appellant 30 contends that the Respondents must hold the said properties upon the same trust that they were held by the transferring trustee.
- (b) As a primary fact leading to the solution of the ultimate issue, did YEW hold the said properties in trust for the Appellant as the Appellant contends or in trust for the father as 40 the Respondents contend.
- (c) What presumptions of advancement, if any, should be made by reason of the relations of the respective parties to each other.

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(d) What independent evidence was there to support or to negative a gift.

22. The case came on for hearing on the 26th, 27th, 28th April 1964 and was then adjourned until the 5th December 1964. On the 31st March 1965, AZMI J. gave a reserved judgment in favour of the Appellant.

THE EVIDENCE

23. The evidence is disjointed but the broad effect has been carefully summarised in the judgment of Thomson, Lord President on paper 109-115 of the Record and these passages should be regarded as part of this case. 10

The findings of AZMI, J.

24. AZMI, J found as follows:-

"I find from the evidence as a whole that so far as dealings with Government Departments were concerned, the property, in dispute had been regarded as that of the registered owners, but on the other hand none of the Defendants enjoyed the income as their own separate income until the dispute arose about this property, and all the debts due to the Government, for example income tax, were paid out from a common fund of the family. 20

The 1st Defendant himself explained that he was made a co-owner because he had the responsibility of looking after the members of the family in Kluang, including his grandmother. The 2nd Defendant, however, said in effect that so far as he was concerned, it was intended that he would be the owner of the other half for himself alone. His version of the story was that all the properties have always belonged to his father, who always had enough money, although openly he had become a bankrupt. 30

Insofar as the oil palm estate is 40

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concerned, I hold the view on the evidence before me that it was bought from the Official Assignee by Yew Hung Eng on behalf of the Plaintiff, and Yew Hung Eng, therefore, held the land merely as trustee for the Plaintiff. He continued to look after the land until he decided to return to Penang. Because Yew Hung Eng was to look after the property the land was registered in his name. There seemed to be an idea in the family that the land must be registered in the land office in the name of whoever was to look after the property. On the facts of the case, therefore, I accept the evidence of the Plaintiff, her husband and her eldest son that when this property was transferred to the two Defendants after the departure of Yew Hung Eng to Penang, the two Defendants were to hold the property in trust for her.

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With reference to Defendants' contention that if it was intended that the Defendants were to hold the oil palm estate as trustees there would be fraud on the Government with a view to the payment of death duty on the death of the beneficial owner, I would say that the fraudulent purpose had not yet been carried out and on the authority of *Symes v. Hughes* (1870) L.R. 9 Eq.475 referred in *Chettiar v. Chettiar* (1962) 1 All E.R. at page 497 - para. G - this defence must fail.

In any case it was never the intention of the parties to so defraud the Government either in the matter of death duties or in the matter of income tax."

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25. The Respondents appealed and the Appeal came on for hearing on the 3rd October 1965 before Thomson, Lord President, ONG Chief Justice and ISMAIL KHAN J. By Judgment and Order dated 15th May 1966 (Thomson, Lord President dissenting) the Appeal was allowed.

26. In his dissenting judgment, Thomson Lord President first reviewed the facts as set out

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in Paragraph 23 hereof, then recited the findings of AZMI, J and then gave his conclusions thereon in the following passage inter alia.

"Here I would say that I am not overlooking the presumption that arise in the matter. Yew Hun Eng was himself affected by a trust and on the transfer by him to the defendants without consideration there was a presumption that in relation to it they were subject to a trust in favour of the person for whom Yew Hun Eng held it in trust. If that person was the plaintiff that presumption operated alone though of course if that person was her husband then the presumption of advancement operated per contra in favour of the defendants. 10

For myself I would say that the evidence is so nicely balanced as to entitle the defendants to succeed if it were not for three considerations which to my mind definitely swing the balance of probability in favour of the plaintiff. 20

In the first place, on the basis of credibility the trial Judge clearly preferred the evidence of the father and the mother to that of the defendants. In a case of this nature that may not be of paramount importance but still the plaintiff is entitled to the benefit of it.

In the second place there is the significant fact that transfer to the defendants was before and not after the incorporation of the Johore Lumbering Company and yet the defendants were given the same share in that Company as the other sons for whom no special provision had been made. 30

And in the third place there is the matter of the possession of the title deeds, the grants issued by the State of Johore. 40

There is no suggestion that those

10 deeds have at any time been in the possession of either of the defendants though they must have been presented to the Land Office when transactions in relation to the land had to be registered. For many years they were in the possession of the plaintiff. Then they were kept with the papers of the Johore Lumbering Company at Kluang and they have been produced in the present case as the plaintiff's documents."

20 27. Ong, Chief Justice, gave a judgment in favour of the Respondents. He relied on the Appellants admission that at no time did she know what was going on in relation to her or the family's business concerns and that everything was left in the hands of the father. He correctly quoted the Appellant as stating that she did not know that the said properties had been transferred to the Respondents until shortly before the case and regarded this admission as fatal to her case.

He continued:

30 "From this admission and the evidence as a whole, I think there can be no doubt that Yew Hun Eng, transferred the lands at the behest of Quah Hong Chiam. It is to be observed that there is no allegation of any breach of trust against Yew Hun Eng. As Quah Hong Chiam managed all plaintiff's affairs and she was ignorant of the transfer, it must have been carried out pursuant to instruction from no other than Quah Hong Chiam.

40 Since he, in all but name, possessed all the powers and privileges of ownership, whereas the plaintiff had none, I think the truth is that Yew Hung Eng held the lands in trust for Quah Hong Chiam rather than the plaintiff, whose beneficial ownership was a mere fiction serving to provide a shield for the bankrupt.

In support of her claim the plaintiff had alleged that the purchase moneys came from her. She said: "The money spent on buying

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land was my own money. I bought it for \$600. It partly came from my mother and partly from my old jewelleries." I very much doubt that she used her own moneys when all other property but this had allegedly been purchased with the Bank loan. Nevertheless, even assuming this to be true, I fail to see how that fact per se is at all material to the question: for whom did Yew Hun Eng hold the land as trustee? Providing the purchase moneys did not ipso facto make Yew Hung Eng a trustee on her behalf unless there is unambiguous proof - of which there is none - strong enough to displace the abundant evidence on the record that Yew Hun Eng was a mere tool and false front for the bankrupt."

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After a further examination of the evidence he came to this further finding:

"Finally I think there was ample evidence to support the defendants' contention that the palm oil lands were a gift which took place at or about the time when the members of the family shared in a distribution of property by Quah Hong Chiam. First, a house No. 7 Jalan Pasar, Kluang, held under Grant 2536 (Ex.D2) was transferred by Yew Hun Eng to Lim Phien on November 16, 1938. The premises were originally the property of Quah Hong Chiam and bought by Yew Hun Eng from the Official Assignee. Quah Hon Chiam admitted that these premises now belong to Lim Phien beneficially. Secondly, three houses in Jalan Mersing, Kluang, which were built from funds of the Johore Lumbering Co. were and still are registered in the name of Quah Ooi Chim who said: 'On the death of my father the houses are mine legally', though he went on to state that he held them subject to directions from his mother as to their disposal. Thirdly, an estate in Kluang, known as Yeoh Phaik Hoon Rubber Estate, which originally was the property of Quah Hong Chiam and was purchased from the Official Assignee, is now registered in the name of the plaintiff as owner.

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10 "Fourthly, the second defendant stated in his evidence, which was uncontradicted, that five pieces of padi land were put in his name as a gift of Quah Hong Chiam and no claim has yet been made for their return. Fifthly the evidence of the first defendant, also uncontradicted, disclosed that 6 acres of land were given to his adopted brother in 1940, of approximately equal value to the three pieces of jungle land transferred to himself and the second defendant. Lastly, shares in the limited company were distributed to every member of the family.

20 For the various reasons stated above I need only mention, in passing, that I do not consider the agreement of June 29, 1940 (which was relied on by the plaintiff as evidence of the alleged trust) of any value towards establishing her case. As plaintiff she had failed miserably to discharge the onus which lay on her."

30 28. Ismail Khan, J began by stating that he had read the judgments of Thomson Lord President and Ong, Chief Justice and then gave his reasons for preferring the judgment of Ong, Chief Justice. He first held that the Appellant was bound by her pleadings in which she had alleged that the original trust in her favour by YEW was created orally and that she had failed to prove that trust. He also relied upon the fact that she admitted she did not know of the transfer to the Respondents in 1940 and regarded that as fatal to her case. He stated that he agreed with the findings of Ong, Chief Justice on the primary facts. The following two passages give an indication of his view of her case.

40 "The fact of the matter is that all her life she was content to leave the entire management of business affairs in her husband's capable hands. As the events proved he was worthy of her confidence. Such being the case, it was only natural that no question could ever have arisen, whether during or after his bankruptcy, requiring any clear distinction to be drawn between

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"property that was his and hers respectively. A false front had been found in the person of Yew Hung Eng. Sheltered by his name no embarrassing inquiries could arise from any quarter for going behind his nominal title. Yew Hung Eng was paid a salary. Yet there was no evidence that his sister not Quah Hong Chiam, was his employer. After Quah Hong Chiam's discharge, he took over all the existing enterprises and Yew Hun Eng retired to Penang, having outlasted his usefulness. The plaintiff's husband thereafter distributed his property among various members of his family. The plaintiff herself had no say in the distribution whatever and it is to be noted that one of the beneficiaries was the other wife of Quah Hong Chiam whom the plaintiff had no obligation to provide for."

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and

"Finally, on a question of law, I do not think that English authorities, whether on a gift by a mother to a child, or a gift to a stepson, can apply to the affairs of a polygamous Chinese family. Chinese family custom is manifestly different from English ways. For my own part I am also satisfied that, on the facts, gift of the palm oil estate must have been made to the defendants, unencumbered by a trust in any form. It is true that the father, or the Johore Lumbering Company on his instructions, financed the development of this estate, but he was clearly in a position to protect his investment or advances by collecting repayments, as he in fact did. Any moneylender or finance company lending moneys for similar purposes cannot lay claim to beneficial ownership of the developed property on that account. Hence I cannot see why the father or mother should have any better right. Retention of title deeds by a creditor, by way of security, is in my view, a sufficient explanation for the defendants leaving the titles in the

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"custody of the parent or parents, especially as the parties were on good terms."

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29. The Appellant contends that there is ample evidence from which to infer an oral trust by YEW in her favour. On this assumption all the necessary facts were alleged in her Statement of Claim to support her contention that there was a resulting trust in her favour on the transfer of the said properties by YEW to the Respondents. Further the fact that the Appellant did not know or remember the fact of the transfer to the Respondents was immaterial because for all business purposes the father was her 'alter ego'.

30. The Appellant further contends that the view in 1935 and at other periods during the bankruptcy of the father YEW was the false front for the father is not the correct legal view. The fact that the family was a well knit family and that the father could implicitly rely on the Respondent to accept his authority as her husband supports her conclusion that it was the intention of the father that she was to be the beneficial owner so as to guard the property.

31. The Appellant further contends that the extent to which she may have encumbered her beneficial rights in favour of the Johore Lumbering Company Ltd. is "Res Inter Alios Acta" so far as proceedings between herself and the Respondents are concerned.

32. The Appellant further contends that the Respondents cannot resist her claim, in the absence of a gift, by asserting that the trust is in favour of the father when both the father and the Appellant are agreed as between themselves, that it is in favour of the Appellant.

33. Accordingly, the Appellant humbly submits that the Appeal should be allowed and that the judgment of the High Court should be restored for the following, amongst other

R E A S O N S

- (a) That prior to the 9th November 1940 YEW held the said properties in trust

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for the Appellant.

- (b) That upon the transfer of the said properties by YEW to the Respondents no valuable consideration was given by the Respondents.
- (c) That upon the transfer of the said properties by YEW to the Respondents, there was no gift expressly or by implication.
- (d) That the evidence of the Appellant's witnesses should be accepted and the evidence of the Respondents on matters of conflict should be rejected. 10
- (e) That the proper view of the evidence taken as a whole was the view expressed by Azmi, J and Thomson, Lord President.
- (f) That ONG, Chief Justice and ISMAIL KHAN J. were not justified, in the exercise of their appellate jurisdiction, in disturbing AZMI J's findings of fact. 20

E.F.N. GRATAEN
IAN C. BAILLIEA.

No. 5 of 1967

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BETWEEN:

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(Plaintiff) Appellant

- and -

QUAH OOI KEAT and
QUAH OOI JIN
(Defendants) Respondents

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