

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

ON APPEAL

FROM THE FEDERAL COURT OF MALAYSIA

BETWEEN : -

KIM GUAN AND COMPANY
SENDIRIAN BERHAD

Appellant
(Plaintiff)

- and -

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YONG NYEE FAN & SONS
SENDIRIAN BERHAD

Respondent
(Defendant)

CASE FOR THE RESPONDENT

RECORD

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1. This is an appeal from a judgment of the Federal Court of Malaysia (Chang Min Tat F.J., Syed Othman F.J. and Eusoffe Abdoolcader J.) dated 15th November 1978, allowing with costs the Respondent Company's appeal from a judgment of Hashim J. in the High Court of Malaysia at Ipoh dated 14th December 1976, whereby the following declarations and order were made in relation to certain freehold property known as 26 Hugh Low Street, Ipoh ("the shop premises") -

p. 70 1. 27-
p. 88 1. 25
p. 37 1. 5-
p. 65 1. 4

(a) that the Respondent Company held an undivided 19/56th share of the shop premises in trust for the Appellant Company;

(b) that the Respondent Company held the remaining 37/56th share in the shop premises in trust for the Appellant Company subject to the payment to the Respondent Company of the sum of \$45, 000; and

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(c) that the Respondent Company should transfer the whole of the shop premises to the Appellant Company on payment of the said sum of \$45, 000.

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2. The main issue in this appeal is whether the trial Judge was correct in upholding the Appellant Company's claim that the shop premises were held on the trust alleged by the Appellant Company, in circumstances where -

(a) there was undisputed evidence that the shop premises were purchased and paid for by the Respondent Company out of its own monies, and were transferred to and have since November 1954 been registered in the name of the Respondent Company;

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(b) all the documentary evidence in the case is consistent (and consistent only) with the view that the Respondent Company has since November 1954 been sole legal and beneficial owner of the shop premises, and has been in receipt of rent from the Appellant Company as tenant of the shop premises; and

(c) in allowing the Appellant Company's claim the trial Judge was in effect disregarding the documentary evidence in favour of oral evidence as to oral arrangements which were said to have taken place 20 years before the trial, and as to which the most material witness for the Respondent Company would have been an individual who died in 1960.

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3. The Federal Court of Malaysia held that the Judge, in finding in favour of the Appellant Company, was in error in that he paid insufficient attention to the documentary evidence, ignored the legal and evidential difficulties in the way of the Appellant Company's claim, drew incorrect inferences from the evidence, and ultimately decided the case on his assessment of oral evidence as to matters of no probative value. In the respectful submission of the Respondent Company, the Federal Court, in allowing the appeal, reached the right decision and for the right reasons.

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4. Both Courts below regarded the facts of the case as unusual, and in order to clarify the issues on this appeal it is necessary to summarise some salient matters of fact as to which there is no dispute.

(a) The three individuals most closely concerned in the matter were three Chinese business men living at Ipoh, namely Yap Fook Sen ("Yap") who gave evidence at the trial and was then 61 years of age; Tan Phang Nam ("Tan") who gave evidence

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- at the trial and was then 72 years of age; and Yong Nyee Fan ("Yong") who died in 1960. Yap Tan and Yong were acquaintances and business associates. Immediately before the material events, Yap and Tan were carrying on the business of cloth merchants in partnership at 65, Hugh Low Street, Ipoh. The Respondent Company had been incorporated sometime before, and its main business was holding freehold property as an investment. The shareholders and directors of the Respondent Company were members of Yong's family; he himself was a director and a minority shareholder for some periods, although not during 1954, 1955 or 1956. Yong, Yap and Tan were also interested in a mining company named Yong Nyee Fan Tin Mines Limited.
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- p. 21 1.22-
p. 25 1.45
- p. 9 1.18-28
- DSR pp. 94-
129
- p. 9 1.33-36
- (b) During 1954 there were discussions between Yap, Tan and Yong as to the possibility of carrying on business at the shop premises, which were then owned by one Chin Thin Voon and rented by one Tong Seng Woh. The outcome of these discussions (expressed in neutral language) was that (i) Yong would arrange for the purchase of the freehold of the shop premises, (ii) Yap and Tan would arrange to obtain vacant possession of the shop premises from the tenant, and (iii) a new company would be formed, in which all three individuals (and persons nominated by them) would be shareholders, to carry on business at the shop premises.
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- p.10 1.8-
p.11 1.5
- (c) Pursuant to the above-mentioned arrangements:-
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- (i) The Respondent Company purchased the shop premises for \$35,000 (that sum, and a further \$1,444.40 for commission, registration fees and legal fees, being provided out of the Respondent Company's own monies), the purchase being completed by a registered transfer dated 28th October 1954 made under section 110 of the National Land Code.
- p. 171 1.1-
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DSR pp.155-
157
- p.173 1.22-
p.175 1.18
- (ii) The Appellant Company was incorporated under section 15 of the Companies Ordinances, 1940 to 1946 on 12th February 1955, and the first meeting of its Board of Directors was held on 25th February 1955.
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- DSR p. 2
- p.107 1.1-
p.108 1.50

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p. 90 1.1- p. 96 1.46	(iii) On 24th March 1955 Tan and Yap entered into a written agreement with the Appellant Company for the sale by them, and the purchase by the Appellant Company, of their partnership business together with its assets, but subject to its debts and liabilities as from 1st January 1955. As appears from the recitals to that agreement, the vendors were then carrying on business from the shop premises. The purchase price for the sale was \$178,200 (arrived at by reference to a schedule containing a detailed valuation of the net assets of the partnership business). The purchase price was to be satisfied by the allotment to the vendors or their nominees of 1,782 \$100 shares in the capital of the Appellant Company, credited as fully paid up.	10
DSR p.14 p.107 1.12-19	(d) The first directors of the Appellant Company were Yong, Tan and Yap.	
p.10 1.46-49 DSR p.130	(e) In addition to the 1,782 shares allotted credited as fully paid up pursuant to the above-mentioned agreement, a further 1,208 shares of \$100 each were allotted for cash, 990 shares being paid for by Yong and allotted to him or his nominees, and 218 shares being paid for by Yap and Tan and allotted to them or their nominees.	20
p.11 1.10-15 p.22 1.26-30	(f) On or about 15th February 1955 the Respondent Company demanded payment from the Appellant Company of rent for the months of December 1954 and January and February 1955 at the rate of \$220 per month. According to the oral evidence of Yap and Tan they both objected to the rent demand. Nevertheless the Appellant Company paid the demand, and continued to make regular payments in respect of rent demands from then until commencement of proceedings in 1973, initially at the rate of \$220 per month, and from September 1956 at the rate of \$300 per month.	30
pp.163-170 DSR pp.158-164	5. If (as the Appellant Company claims) the true intention of the parties had been that the shop premises should be held by the Respondent Company as bare trustee or nominee for the Appellant Company, then in February 1955 it was already apparent that that intention was not being carried out, and experienced business men like Yap and Tan would have been expected to have taken some positive action to resolve the dispute and enforce the claims which they were putting forward on behalf of the Appellant Company. In fact, however, payment of rent continued as already mentioned; the accounts of the Appellant Company described the payments	40
pp.182-183		

as rent, and contained no indication of any claim to freehold ownership of the shop premises, or any liability to pay the purchase price for the freehold premises; and minutes of Board Meetings of the Appellant Company contained very few references to the shop premises, such references as there were being hardly consistent with the supposed claim. In their oral evidence Yap and Tan averred that the payments described as rent were in fact payments of interest, and sought to explain the increase in rent by reference to a rise in bank rate from 6% to 8%. But the Federal Court in its judgment demonstrated that this claim was wholly unconvincing.

p.116 1.32-
p.117 1.12
p.118 1.15-20
p.11 1.28-48
p.22 1.37-
p.23 1.5
p.79 1.37-
p.80 1.43

6. There are other contemporaneous matters inconsistent with the alleged trust:-

(a) The Respondent Company was an established investment company which, although controlled by members of Yong's family, was by no means an "one-man company" of Yong's (as mentioned above, he was neither a director nor a shareholder for most of the material time). There was no evidence that Yong had any authority, actual or ostensible, to act as agent for the Respondent Company either in making any declaration of trust, or in contracting for the sale of its property.

DSR pp.94-129

(b) It is undisputed that the Respondent Company paid from its own resources for the acquisition of the freehold of the shop premises, and there was no evidence that it ever resolved to make, or had any power to make, a declaration of trust in favour of the Appellant Company.

p.171 1.1-26
DSR pp.155-157

(c) Moreover, at the time of the Respondent Company's purchase of the shop premises the Appellant Company had not been incorporated and was not in existence. Prior to the incorporation of the Appellant Company the Respondent Company could not make any declaration of trust in its favour, or act as its agent, or contract with it as a principal.

(d) If the arrangement between Yap, Tan and Yong had been as the Appellant Company alleges, the natural course (as the Federal Court observed in its judgment) would have been for the Respondent Company to have entered into a sale agreement with the Appellant Company shortly after its incorporation, similar to that dated 24th March 1955

p.79 1.20-36

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p. 90 1.1-
p. 96 1.46

entered into between Yap and Tan (of the one part) and the Appellant Company (of the other part) for the sale and purchase of the net assets of the partnership business, the purchase price to be satisfied by the allotment of shares. That sale agreement provided an obvious precedent to follow, if the intention of the parties had been as the Appellant Company alleges.

p. 3 1.23-37
p. 5 1.16-32

7. As an alternative way of putting its case the Appellant Company relied on an alleged oral agreement for the Appellant Company to purchase the interest of the Respondent Company in the shop premises for \$37,000 (later said to have been revised to \$45,000). This alleged agreement is pleaded in paragraph 11 of the Appellant Company's Statement of Claim (as amended on the first day of the trial) and the Appellant Company's case was that the agreement had been entered into by Yong (presumably as agent for the Respondent Company). But there was no evidence that Yong had any authority, actual or ostensible, to enter into this or any similar agreement on behalf of the Respondent Company. Nor is there any documentary evidence (whether in the minutes of the Board of Directors of the Appellant Company, or in the accounts of the Appellant Company, or in any minutes or accounts of the Respondent Company) that Yong, or anyone else purporting to act on behalf of the Respondent Company, entered into any contract on its behalf. As the Federal Court observed in its judgment, any inference which might otherwise have been drawn from the minutes of the Appellant Company's Board Meeting on 5th February 1957 was negated by the minutes of the next Board Meeting on 11th March 1957. 10 20 30

p. 74 1.16-
p. 75 1.14

8. The Respondent Company respectfully submits that the Appellant Company's claim to establish an express or constructive trust proves, on analysis, to be without foundation, and its claim comes down to the assertion of a contract of sale which was left uncompleted for 15 years before the commencement of proceedings; and there was no evidence, documentary or oral, that the Respondent Company, or any duly authorised agent of the Respondent Company, ever entered into such a contract. The point is clearly made in the judgment of the Federal Court in the following passages:- 40

p. 83 1.15-46

"If the legal gloss which was put over the purchase of the house is removed, then the contention of (the Appellant Company) must be seen to be nothing

10 more or less than an alleged agreement with Yong Nyee Fan that the latter was to buy the house and later sell it to (the Appellant Company). That promise, if founded on fact and if given for good consideration, could possibly give rise to a claim in contract subject, of course, at this stage to any defence on limitation, but it did not fit in with the classical case of a purchase being taken in the name of a stranger, which would constitute the nominal purchaser a resulting trustee for the one who provided the purchase money. Nor did this alleged promise to sell constitute Yong Nyee Fan a constructive trustee, since it did not establish that the property was acquired through the medium of a trust

20 "If there was any claim at all in 1954, it was a claim in contract against Yong Nyee Fan or against his estate but it could not be against (the Respondent Company) the registered proprietor of the land. At the time of the alleged promise, Yong Nyee Fan was neither a director nor a shareholder of (the Respondent Company) and any promise he made would be in his personal capacity. "

30 9. Before the trial Judge the Appellant Company succeeded in its claim that the Respondent Company held a 19/56th share of the shop premises in trust for the Appellant Company by virtue of the payment of \$19,000 made to the former tenant of the shop premises for giving up vacant possession. The Respondent Company does not challenge the finding that Yap and Tan paid that sum to the former tenant, probably at or about the time that the tenant's letter dated 30th November 1954 was written to the Respondent Company; and this enabled Yap and Tan's partnership to go into occupation of the shop premises and trade from them before the incorporation of the Appellant Company (as appears from the vending agreement dated 24th March 1955). But Yap and Tan obtained full reimbursement of their outlay since the sum of \$100,000 for good-will included in the computation of the price payable under the vending agreement (and satisfied by the issue of shares in the Appellant Company, credited as fully paid) must, as the Respondent Company submits, have reflected (inter alia) the fact that the partners were then in occupation of, and trading from, the shop premises. It would not therefore have been necessary or appropriate for Yap and Tan to have been allotted further shares in the Appellant Company in respect of this payment (a

p. 72 1.20-26
p. 175 1.25-36
p. 90 1.21-25
p. 95 1.9
p. 79 1.30-37

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possibility mentioned by the Federal Court in its judgment). The Appellant Company's claim that the payment of \$19,000 gave rise to a constructive trust is therefore (as the Federal Court correctly held) unfounded, being inconsistent with the evidence, and in particular -

p. 173 1.22-
p. 175 1.18 (a) the registered transfer of the shop premises to the Respondent Company for the sum of \$35,000, thereby conferring an indefeasible title on the Respondent Company; 10

p. 175 1.25-36
p. 163 (b) the fact that it was wholly appropriate for the Respondent Company to pay the tenanted value only of the shop premises, since they were immediately let to the unincorporated partnership and then to the Appellant Company, the tenancy being protected as the former tenant's had been; and

p. 116 1.32-
p. 117 1.12
p. 118 1.15-20
p. 171 1.1-26
pp. 182-183 (c) the fact that there was nothing in the minutes or accounts of either company to support these claims to a trust arising out of the payment; on the contrary, the claim was inconsistent with all this documentary evidence. 20

p. 81 1.45-
p. 82 1.8 10. In this appeal the Appellant Company may rely on the principle that an appellate tribunal ought not, in general, to differ from the trial Judge's findings of fact where they depend on the assessment of oral evidence of witnesses whom the Judge has had the advantage of seeing and hearing in the witness box - a principle which the Federal Court acknowledged in its judgment. As to this the Respondent Company respectfully submits as follows:- 30

p. 23 1.20-27
p. 28 1.30-32
p. 47 1.2-28
p. 50 1.1-19 (a) The principle applies particularly strongly if an appellate tribunal is asked to reverse a trial Judge who has decided that an allegation of fraud, raised on the pleadings, has not been proved. It applies very much less strongly, if at all, to the converse case of an appellate tribunal which reverses a trial Judge who has drawn adverse inferences, amounting to fraud, against a witness against whom no allegation of fraud was made on the pleadings, or in cross-examination. That is what the trial Judge did in relation to the evidence of Yong's daughter Yong Toong Liew, and the Federal Court was right in criticising those findings and not accepting them. 40

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(b) The Federal Court also rightly criticised the trial Judge for his approach to conflicting oral and documentary evidence in a case which amounted (at least in part) to a claim against the estate of a deceased person, that claim having first been brought more than 12 years after Yong's death. The more closely the Appellant Company seeks to identify Yong (while living) with the Respondent Company, the stronger this point becomes.

p. 75 1.15-
p. 76 1.48
p. 80 1.52-
p. 81 1.44

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(c) More generally, many of the trial Judge's findings of fact (especially in relation to the all-important matter of the alleged trust) were, as the Federal Court rightly observed, based on inferences rather than being findings of primary fact. Where it is a matter of drawing inferences, an appellate tribunal can and should form its own judgment, making such allowances as may be appropriate for not having seen and heard the witnesses.

p. 82 1.3-9

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(d) On some points the Judge made no finding (whether of primary fact, or based on inference) to support the conclusions which he drew. The most important of these is that the Judge made no finding that Yong had any authority to act on behalf of the Respondent Company in creating any trust or entering into any contract.

(e) The conclusions reached by the trial Judge are challenged not only as being based on incorrect inferences and findings of fact, but also as being wrong in law, particularly as follows :-

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(i) The Judge failed to distinguish between the Respondent Company and Yong as separate legal persons.

(ii) The Judge did not therefore address his mind to whether Yong had authority to act on behalf of the Respondent Company.

(iii) The Judge erred in law as treating the Appellant Company as if it had come into existence as a legal person at a time before its incorporation.

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(iv) The Judge erred in law in finding a

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constructive trust in circumstances where the conditions for raising such a trust were not satisfied.

(v) The Judge failed to take account of the indefeasible title (in the absence of fraud, which was neither pleaded nor proved) conferred on the Respondent Company by the registered transfer of the shop premises.

11. Since the Federal Court found that the alleged trust had not been established, the Federal Court did not find it necessary to express any view as to - 10

p. 85 1.19-22 (a) the Respondent Company's plea of laches and reliance on the Limitation Ordinance; or

p. 85 1.50-
p. 86 1.3 (b) the question whether a trust, even if established, could have affected the Respondent Company's registered title under the Torrens system of land registration embodied in the National Land Code (a matter on which the Privy Council has recently made important observations in the case of Damodaran v. Choe Kuan Him 1980 A.C. 497 at pp. 502-3). 20

The Respondent Company respectfully asks leave to maintain these points, if necessary, as subsidiary issues on this appeal.

p. 88 1.30-
p. 89 1.42 12. On 9th July 1979 the Federal Court of Malaysia made an order granting the Appellant Company final leave to appeal to His Majesty the Yang di-Pertuan Agong. The Respondent Company respectfully submits that the appeal should be dismissed with costs for the following among other 30

R E A S O N S

- (1) BECAUSE the Respondent Company never made, or authorised Yong Nyee Fan (since deceased) to make on its behalf, any declaration of trust of the shop premises known as 26 Hugh Low Street, Ipoh.
- (2) BECAUSE there was no ground in fact or in law for treating the Respondent Company as a constructive trustee of the said premises (or any share therein).

- (3) BECAUSE the Respondent Company was at all times registered with an indefeasible title to, and was sole beneficial owner of, the freehold of the said premises, the Appellant Company being at all times a tenant thereof at a rent.
- (4) BECAUSE the judgment of Hashim J. was wrong in law and against the weight of the evidence.
- (5) BECAUSE the judgment of the Federal Court of Malaysia was correct and ought to be upheld.

ROBERT WALKER

IN THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL

ON APPEAL
FROM THE FEDERAL COURT OF MALAYSIA

BETWEEN : -

KIM GUAN AND COMPANY (Plaintiff)
SENDIRIAN BERHAD Appellant

- and -

YONG NYEE FAN & SONS (Defendant)
SENDIRIAN BERHAD Respondent

CASE FOR THE RESPONDENT

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