IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2016] SGHC 263

Suit No 1007 of 2015

Between

Cheong Woon Weng

… *Plaintiff*

And

Cheong Kok Leong

… *Defendant*

JUDGMENT

[Land] – [Interest in land]

Cheong Woon Weng
v
Cheong Kok Leong

[2016] SGHC 263

High Court — Suit No 1007 of 2015
Audrey Lim JC
29 – 30 September; 4 – 5 October 2016

28 November 2016 Judgment reserved.

Audrey Lim JC:

1 This dispute concerns a property located at 47 Hillview Avenue #08-04, Singapore 669614 ("the Property"), purchased for $880,440 and registered solely in the defendant's name. The plaintiff, who is the defendant's elder brother, claims that he is entitled to an equal share in the Property with the defendant as tenants-in-common, on the basis that the plaintiff contributed $200,000 to the purchase price. The defendant, on the other hand, alleges that the $200,000 was a loan made to him in order to assist him to purchase the Property. The defendant claims that he repaid the loan, and that additionally he lent a further $120,000 to the plaintiff. The defendant counterclaims for repayment of this further sum.

The plaintiff's case

2 In July 2000, the defendant proposed to the plaintiff to jointly invest in a condominium unit believing that its value would appreciate over time and that they would both enjoy substantial profits when it was sold a few years later. Around 14 July 2000, the plaintiff, his wife ("Mdm Ho") and the defendant viewed the show flat in relation to the Property. The parties then orally agreed to jointly purchase the Property on the following terms ("the Oral Agreement"):

(a) the plaintiff would bear the down payment of the purchase price;

(b) the parties would be equal beneficial owners of the Property although it would be registered in the defendant's name;

(c) as the legal owner, the defendant would manage the Property on their behalf and it would be sold in a few years;

(d) meanwhile the Property would be rented out and the net rental proceeds would be distributed equally between them as dividends;

(e) upon the sale of the Property, the proceeds of the sale (less any outstanding mortgage and other related expenses) would be distributed equally between them.

3 Although the defendant placed a booking fee on 14 July 2000, he did not make any payment towards the purchase price that day. The option to purchase was exercised on or around 19 July 2000. On 28 July 2000, the parties went to the office of one Mr Seow Teo Tiew ("Mr Seow"), the defendant's conveyancing lawyer. There, Mr Seow advised the plaintiff that

he could not be named as an owner of the Property because he had just purchased a Housing and Development Board ("HDB") flat. Mr Seow also informed the plaintiff that the plaintiff's children could not be named as owners alongside the defendant since they had not reached the requisite age.

4 In addition, Mr Seow was made aware of the Oral Agreement and that, despite the plaintiff's contribution to the purchase price, the Property would be registered in the defendant's sole name. On the same day, the defendant signed a Memorandum of Loan, in Mr Seow's presence, acknowledging the plaintiff's contribution of $200,000 towards the purchase of the Property. The parties also entered into a collateral agreement to the Memorandum of Loan ("Collateral Agreement"), in which the defendant acknowledged the plaintiff's entitlement to a half-share in the net profits, in the event the Property was sold. The Collateral Agreement was signed in Mr Seow's presence and a copy of the documents was given to the defendant. The plaintiff then handed Mr Seow a cashier's order for $200,000, which came from the plaintiff's and Mdm Ho's joint savings.

5 Completion took place on or about 27 July 2003 and the Property was rented out around September 2003 to a faculty member of the National University of Singapore for two years at $1,700 per month. The plaintiff was apprised of this as he was the one who found the property agent for the tenancy. However he did not have any knowledge of subsequent tenancies, as the defendant failed to abide by his promise to update the plaintiff on such matters.

6 In late 2004, the plaintiff retired. He thus had little income and yet had to care for his elderly father. He approached the defendant on several occasions to ask for an update on the status of their joint investment in the

Property. The defendant was unwilling to sell the Property. Further, despite many reminders, the defendant never paid the plaintiff any returns on his investment. Around 31 August 2007, the plaintiff approached the defendant once more to persuade him to sell the Property but was unsuccessful. Instead, the defendant gave the plaintiff a cheque for $50,000 informing him that this was his share of the dividends from the investment. The plaintiff accepted this cheque. The plaintiff nevertheless continued to ask the defendant on various occasions in 2007, 2008 and 2010 to sell the Property, but on each occasion the defendant refused. Meanwhile, the plaintiff accepted a cheque dated 24 December 2008 for $25,000, and another cheque on 7 May 2010 for $12,000, as further "dividend payments" from the rental proceeds of the Property.

7 Sometime in 2011, the plaintiff became deeply unhappy when he discovered that the defendant had moved into the Property without his consent. The defendant also had not informed the plaintiff that the Property was no longer being rented out. By then, the relationship between the parties had broken down. In December 2014, the plaintiff again pressed the defendant to sell the Property. The defendant offered to buy out the plaintiff's share and informed the plaintiff and Mdm Ho that he would borrow around $500,000 from the bank and return the monies due to them by January 2015. This proposal never materialised.

8 As the defendant had no intention to sell the Property, the plaintiff commenced this suit to claim his beneficial share in the Property. In the event that the court finds that the plaintiff has no beneficial interest, the plaintiff seeks repayment of the sum of $200,000 he advanced to the defendant. As for the defendant's counterclaim, the plaintiff denies having received any monies from the defendant other than the three cheques, totalling $87,000 ("the three cheques"), that were handed over as dividend payments on the investment.

Mdm Ho's testimony

9 Mdm Ho had accompanied the parties to view the show flat relating to the Property and had been present when the parties discussed the terms of the Oral Agreement. She had agreed with the plaintiff to use $200,000 of their joint savings to invest in the Property. The remainder of her testimony was largely based on what the plaintiff had told her, at around the time the events transpired. This included the events at Mr Seow's office, the occasions on which the plaintiff had approached the defendant for his share of profits or the returns on investment on the Property, and that the defendant had informed the plaintiff that the three cheques were dividend payments towards the plaintiff's share of his investment in the Property. All this, if used to show the truth of these averments, was strictly speaking hearsay.

10 In December 2014, the plaintiff and Mdm Ho met the defendant to discuss about the Property. She queried the defendant on why he refused to sell the Property despite having held it for more than 10 years, when the initial agreement was for it to be sold within a few years. The defendant said that he would eventually sell the Property and meanwhile he would borrow $500,000 from the bank to pay off the plaintiff. The defendant did not keep his word.

The defendant's version of events

11 The defendant is the managing director and sole shareholder of Academic Centre and Clinic Pte Ltd ("Company"). He intended to purchase a property sometime in 2000. He viewed the show flat in relation to the Property with the plaintiff, but could not recall if Mdm Ho was present. He paid the 5% booking fee of $44,022 using monies in his Central Provident Fund ("CPF") account. As the parties shared a close relationship, he requested the plaintiff to lend him $200,000 to assist in the purchase of the Property.

12 On 28 July 2000, the defendant went to Mr Seow's office to sign the sale and purchase agreement. The plaintiff brought along a cheque for $200,000. In Mr Seow's presence, the defendant signed the Memorandum of Loan, which was drafted by Mr Seow. The defendant could not recall how the Collateral Agreement came about and who drafted it. The plaintiff handed the defendant the Collateral Agreement shortly after they had left Mr Seow's office. The plaintiff represented to him that the document was to "protect" the plaintiff's "friendly loan". The plaintiff did not inform him that the document conferred on the plaintiff a beneficial interest in the Property.

13 The defendant signed the Collateral Agreement without going through it as he had no reason to be suspicious of his brother and had accepted the plaintiff's representation that it was to "protect" his loan. He would not have signed it had the plaintiff told him that it was to grant the plaintiff a beneficial interest in the Property or to create a trust over the Property in the plaintiff's favour. The defendant was also not given a copy of the Collateral Agreement.

14 The defendant managed the Property and made all necessary payments including repayment of the monthly mortgage, property tax and maintenance fees. Initially, the Property was rented out for several years before the defendant moved in around 2008. The defendant denies having agreed with the plaintiff to jointly invest in the Property.

15 Several years after the purchase of the Property, the plaintiff fell on hard times and did not have a regular source of income. He began to approach the defendant for money on a regular basis. The plaintiff felt that the defendant "owed it" to him as the defendant still owed the plaintiff $200,000. As the defendant was doing well and was grateful for the plaintiff's help rendered in 2000, he gave various sums of money to the plaintiff over a span of 15 years.

This comprised the three cheques, which were drawn from the Company account. A further $233,000 was given in cash to the plaintiff from time to time for amounts ranging from $1,000 to $6,000, all of which were also drawn from the Company account. There was a "tacit understanding" that the money given to the plaintiff was to offset the loan of $200,000.

16 Eventually the loan was repaid but the plaintiff continued to ask for money. The defendant continued to support the plaintiff, this time by lending the plaintiff money. He felt obliged to help the plaintiff as the plaintiff had previously helped him when he purchased the Property. In total, the defendant had given the plaintiff $320,000, comprising the return of the loan of $200,000 and an excess of $120,000 which formed the basis of the defendant's counterclaim. The defendant also pleaded that the Collateral Agreement was null and void as it was signed based on a misrepresentation by the plaintiff.

Michael Seow's testimony

17 Mr Seow could not recall handling the conveyancing for the Property as it had taken place a very long time ago. He only remembered acting in the purchase of a property at Hillington Green Condominium – the development in relation to the Property. Neither could he recall any meeting that had taken place at his office on 28 July 2000 nor could he recognise the plaintiff let alone recall any conversation that they might have had.

18 Mr Seow also could not remember preparing the Memorandum of Loan. He accepted that he could have prepared it as the document bore both his signature and stamped name. He also could not recall preparing the Collateral Agreement. He explained that if he had indeed drafted the Collateral Agreement and that if it had been signed in his presence, he would similarly

have signed and stamped the document. He also stated it was unlikely that he had drafted the Collateral Agreement as it was inconsistent with the Memorandum of Loan.

My decision

19 The following facts are not disputed. The parties viewed the show flat for the Property together. They went to Mr Seow's office on 28 July 2000 whereupon the defendant executed the Memorandum of Loan in Mr Seow's presence and the plaintiff gave a cashier's order for $200,000 to Mr Seow. The defendant also signed the Collateral Agreement on the same day. The plaintiff subsequently received the three cheques, namely, a cheque dated 31 August 2007 for $50,000, a cheque dated 24 December 2008 for $25,000 and a cheque dated 7 May 2010 for $12,000. To date, the defendant has borne the mortgage repayments and all other outgoings in relation to the Property.

20 From the foregoing, there are two principal issues to be determined: (a) whether the plaintiff had advanced $200,000 as a loan to the defendant or as a contribution for the plaintiff's joint investment in the Property; and (b) whether the defendant had advanced a total of $320,000 to the plaintiff. In determining these two issues, I will evaluate the evidence in relation to the various factual disputes between the parties.

Existence of Oral Agreement and payment of first 20% purchase price

21 I accept the plaintiff's testimony that the parties had agreed to jointly purchase the Property on the terms set out in the Oral Agreement. The plaintiff's version was corroborated by Mdm Ho's testimony. I find that she had been present at the show flat on or about 14 July 2000, when the parties discussed the terms of the Oral Agreement. I also accept that she thereafter

agreed with her husband to use their joint savings to invest in the Property. The discussion between the parties and terms of the Oral Agreement are matters within her personal knowledge.

22 While I am cognisant of the fact that Mdm Ho is an interested party in this suit, I am satisfied that she was a truthful witness. She was candid about those matters that she had personal knowledge of and those matters that were merely recounted to her. If she wanted to fabricate matters, she could have claimed that she had been present at most of the significant events. Her testimony was also not shaken in cross-examination. Given that the $200,000 (which was not insubstantial) had come from her joint savings with the plaintiff, it is unsurprising that she would have remembered the material events, even if they had occurred some 10 years ago. It was a large commitment on her part and that of the plaintiff.

23 Given the size of the commitment involved, I find it unlikely that the plaintiff and Mdm Ho would have agreed to advance such a sum to the defendant with no interest and with no fixed repayment date, unless some other form of benefit would accrue to them. It is far more likely that the plaintiff would have insisted on obtaining an interest in the Property in return for his contribution. Thus, on balance, the plaintiff's (and Mdm Ho's) evidence is more consistent with the actual conduct of the parties.

24 I also find that the sum of $200,000 was mentioned and agreed upon before the parties went to Mr Seow's office. This is consistent with the defendant's evidence-in-chief. Although the defendant later stated that the $200,000 figure was only raised at Mr Seow's office on 28 July 2000, he later admitted that this sum was mentioned prior to that date. It is not disputed that the plaintiff had already prepared a cashier's order of $200,000 when he went

to Mr Seow's office, and I do not think that the plaintiff would have gone to Mr Seow's office without first knowing how much he was going to contribute.

25 I now turn to the issue of the party who contributed the down payment of 20% of the purchase price. I am satisfied that the defendant paid the 5% booking fee (amounting to $42,022) with monies from his CPF account. This finding is supported by the Option to Purchase dated 18 July 2000 and the defendant's CPF statement. Moreover, in a solicitor's letter dated 25 July 2000, the defendant was reminded to pay the balance of $132,066 due (which computes to 15% of the purchase price) and the plaintiff had only handed over the cashier's order for $200,000 to Mr Seow after that date.

26 My finding above means that the plaintiff was not the sole contributor towards the down payment amounting to 20% of the purchase price. I am, however, of the view that the plaintiff was genuinely mistaken on this matter as opposed to lying. The plaintiff, who is not highly educated, had left the completion of the sale and purchase of the Property to the defendant. As the Property was purchased in the defendant's name, only he would have been involved in the paper work in relation to the sale and purchase. Any correspondence between the developer and conveyancing lawyer would have been directed to the defendant alone. The plaintiff might thus have been unaware of the actual details pertaining to the transaction and believed that the entire sum of his contribution had gone towards the down payment.

27 In fact, the same mistake was made by the conveyancing solicitor. The solicitor's letter to the defendant referred to the sum of $132,066 as being the "balance 20% of the purchase price" when the correct description should have been "the balance *15%* of the purchase price", as Mr Seow subsequently clarified. The Memorandum of Loan (drafted by a lawyer and signed by the

defendant) also referred to the sum of $200,000 as being paid "towards the first 20% deposit" in respect of the sale and purchase of the Property – this would have no doubt led the plaintiff to believe, erroneously, that the sum of $200,000 was utilised to pay the first 20% of the purchase price.

28 As there is a perfectly legitimate explanation for the plaintiff's erroneous belief, my rejection of his evidence that he contributed wholly to the down payment does not affect the other aspects of his evidence (see *Alwie Handoyo v Tjong Very Sumito* [2013] 4 SLR 308 at [61]). I should add that this issue of contribution towards the initial 5% of the purchase price does not affect my findings on the circumstances in which the plaintiff had contributed the $200,000. The parties had intended the $200,000 to be used towards the purchase of the Property. This was the defendant's pleaded case and was clearly reflected in the Memorandum of Loan and Collateral Agreement.

29 On the whole, I accept the plaintiff's evidence that the parties had agreed to jointly invest in the Property on the terms broadly set out in the Oral Agreement and that the sum of $200,000 was advanced to the defendant pursuant to that agreement. The plaintiff's testimony in this regard is consistent in all material aspects and is supported by contemporaneous evidence such as the Memorandum of Loan and Collateral Agreement (I will consider the admissibility of evidence relating to the Oral Agreement below).

Events at Mr Seow's office

30 At this juncture, it is useful to set out the contents of the Memorandum of Loan and Collateral Agreement as they are crucial to this suit.

31 The Memorandum of Loan states as follows:

MEMORANDUM OF LOAN

I, Chong Kok Leong hereby acknowledge that Cheong Woon Weng (Nric No. [***xxx***]) will be contributing the sum of S$200,000 towards the purchase of the property known as Block 47 Hillview Avenue, #08-04 Singapore (hereinafter called "the Property") which is being purchased by me from the Developers.

This sum of money shall be paid towards the first 20% deposit in respect of the sale and purchase of the property.

I confirm that the said money is a friendly loan from him to me, and which I shall repay when the Property is sold.

DATED 28/7/2000

Signed by)
Cheong Kok Leong)
In the presence of)

32 The Collateral Agreement states as follows:

This acknowledgement is collateral to the memorandum of loan dated ***28/7/2000*** signed by Cheong Kok Leong in favour of Cheong Woon Weng, whereby Cheong Kok Leong acknowledges a contribution of S$200,000 towards the purchase price of the Property known as Blk 47 Hillview Avenue, #08-04 Hillington Green, Singapore (hereinafter called "the Property").

In consideration of the said contribution, the parties hereto acknowledge that Cheong Woon Weng has a share in the Property in the proportion of the amount of the contribution vis-à-vis the purchase price of $880,440.00.

In the event that the Property is sold, Cheong Woon Weng shall be entitled to half a share in the net profits (ie profits less taxes, interest, reasonable expenses etc), or loss, as the case may be.

Cheong Kok Leong shall not sell the property unless Cheong Woon Weng has agreed, in writing that he agrees with the sale at the price agreed.

This share in the Property is not in addition to Cheong Woon Weng's right to repayment of his contribution towards the purchase price.

Dated this the ***28th*** day of July 2000.

Signed by Cheong Kok Leong

Signed by Cheong Woon Weng

33 The two documents were typewritten, with the exception of those words that I have reproduced in bold italics. Those specific words were handwritten. The defendant claimed that he wrote the words (which are in bold italics) in the Memorandum of Loan, and the date "28/7/2000" in the Collateral Agreement. I have no reason to disbelieve him. In any event, Mr Seow denied that those words were in his handwriting.

34 As to the identity of the person who drafted the Collateral Agreement, on balance, I accept the plaintiff's testimony that it was drafted by Mr Seow, despite Mr Seow's evidence to the contrary. I have serious doubts that the plaintiff, a person of relatively low education, would have been able to draft such a document, which contained legal language and terms not commonly used by a lay person, such as "in consideration of the said contribution" and "vis-à-vis". Even assuming that the defendant signed the Collateral Agreement shortly after he left Mr Seow's office (a point which I will address in due course), it would not have been possible for the plaintiff to prepare such a document so shortly after the Memorandum of Loan was prepared and signed. In addition, I observe the typewritten words in both documents were of the same font type and size.

35 On the whole, I find Mr's Seow's evidence to be unreliable. He admitted that since the event took place a very long time ago, he could not recall preparing the Memorandum of Loan but inferred that he must done so, given his signature and stamp appearing on it. Applying the same reasoning,

he concluded that he did not draft the Collateral Agreement as he did not sign it. As a witness of fact, Mr Seow can only testify on matters within his personal knowledge. It is for the court to draw the appropriate inferences.

36 An inference that Mr Seow did not prepare the Collateral Agreement because his signature did not appear on it would be justified if it was his evidence that, in the course of his practice, he signed every document he prepared. He also has to satisfy me (which he did not) that he conscientiously signed every document prepared such that the only explanation, on a balance of probabilities, for the non-appearance of his signature on the Collateral Agreement was that he did not prepare that document (see *Chua Kok Tee David v DBS Bank Ltd* [2015] 5 SLR 231 at [79]). Thus, the mere fact that he did not sign the Collateral Agreement does not necessarily lead to a conclusion, on a balance of probabilities, that he could not have drafted it.

37 Similarly, Mr Seow's inference that he could not have drafted the Collateral Agreement because it was inconsistent with the Memorandum of Loan – given that the latter document evidenced a loan and the former evidenced an interest in the Property – is of no weight. In any event, I do not agree with the inference. His reasoning is based on looking at the two documents in court, many years later. It is noteworthy that even the Memorandum of Loan was inaccurately drafted. For instance, it states that the $200,000 was to be paid towards the first 20% deposit of the purchase price (instead of towards the first 15%). Mr Seow admitted that he did not prepare memorandum of loans in the course of his conveyancing practice.

38 Given the above, I am satisfied that on balance, the Memorandum of Loan and the Collateral Agreement were prepared by Mr Seow and signed at his office on 28 July 2000. In determining that the Collateral Agreement was

signed at Mr Seow's office, I have also considered the defendant's testimony of how he came to sign the Collateral Agreement, which I will now turn to.

Misrepresentation on nature of Collateral Agreement

39 The defendant alleged that shortly after he left Mr Seow's office, the plaintiff approached him with the Collateral Agreement and represented to him that the document was to protect the plaintiff's "friendly loan". The defendant stated that at no time did the plaintiff inform him that the effect of the Collateral Agreement was to confer the plaintiff a beneficial interest in the Property.

40 The defendant does not make clear the type of misrepresentation he is relying on. At the very least, to prove misrepresentation, the defendant has to show: (a) that the plaintiff had made a representation of fact which was intended to be acted upon; (b) the defendant acted upon the representation; and (c) the defendant suffered damage (see *Panatron Pte Ltd and another v Lee Cheow Lee and another* [2001] 2 SLR(R) 435 at [14] regarding fraudulent misrepresentation; and s 2(1) of the Misrepresentation Act (Cap 390, 1994 Rev Ed) regarding statutory liability for misrepresentation).

41 Despite the defendant's assertion in his affidavit of evidence-in-chief that "he did not think much of [the Collateral Agreement] or [went] through the [Collateral Agreement] in detail", he painted a different picture in court. The defendant admitted that he read through the Collateral Agreement at the material time and "saw some key phrases", albeit all done "in a rush", and even explained the paragraphs and phrases that he read. He further admitted that by signing the Collateral Agreement, he agreed to the terms therein. He

also admitted that he could not sell the Property without the plaintiff's agreement, under the terms of the Collateral Agreement.

42 The defendant understood, at the time he signed the Collateral Agreement, that the effect of the document was that "if there was a repayment [of the loan], the *share* [in the Property] will not be there anymore … It will be nullified … if there is no repayment of the loan, the *share* stands" [emphasis added]. He claims that his obligation under the Collateral Agreement had been discharged as he had repaid the loan of $200,000 and the "Collateral Agreement says very clearly that as long as [he] made repayment … the *share* in the property is not there anymore" [emphasis added]. This is a very telling assertion as it shows that the defendant knew the contents and effect of the Collateral Agreement. He admits that the plaintiff's contribution was in consideration for a *share* in the Property, albeit with the qualification that if he repaid the loan that *share* would cease to exist.

43 At the time the defendant signed the Collateral Agreement he was pursuing a medical degree and had worked at Bayer as the regional head of marketing for the Asia-Pacific region. It is unlikely that, given his background and the circumstances in which the Collateral Agreement came about, he would not have carefully considered the document or appreciated its nature, particularly when the document was exceedingly brief. It is also unlikely that having seen the reference in the Collateral Agreement to the plaintiff having a *share* in the Property or proceeds of its sale (the word "share" appearing three times in the document), he would not have raised any objections, if the sum of $200,000 had been merely a loan to the defendant.

44 Thus, I find that the plaintiff did not make any representation to the defendant on the Collateral Agreement, and much less so was any reliance

placed by the defendant on any such representation. Taken together with all the other evidence, I prefer the plaintiff's version and find that the defendant had signed the Collateral Agreement (together with the Memorandum of Loan) knowing of its contents and without being misled in any way.

Nature of the three cheques and whether the defendant advanced a further $233,000 in cash to the plaintiff

45 The plaintiff claimed that the three cheques of $50,000, $25,000 and $12,000 respectively were for his share of the rent. The defendant alleged that they were part repayment of the plaintiff's loan and that he had also handed over cash to the plaintiff between 2005 and 2013 totalling a further $233,000. The nature of the three cheques and whether the plaintiff received another $233,000 are related matters and I will deal with them together.

46 The defendant bears the burden of proving that he had advanced the $233,000 to the plaintiff and the purpose of such payments (*SCT Technologies Pte Ltd v Western Copper Co Ltd* [2016] 1 SLR 1471 at [31]). He explained that whenever the plaintiff approached him for money, he would write a cash cheque (from his Company account), withdraw the money from the bank and hand the cash to the plaintiff. He claims that the plaintiff did not want to accept cheques as it was troublesome to encash them. I reject the defendant's evidence for the following reasons.

47 First, if the plaintiff was seeking money from the defendant, it was strange that the defendant would oblige him by going to the bank to withdraw the money for him, on 65 *separate* occasions, when he could have simply given him cheques. Indeed, there were occasions on which the defendant wrote cheques payable to the plaintiff or his wife, namely, the three cheques (albeit for larger sums). Moreover, a cheque dated 14 August 2011 for $6,000

(which the defendant claimed was also to repay the plaintiff's loan) and a cheque dated 11 October 2007 for $2,400, both for amounts in the region of the 65 cash cheques, were handed to the plaintiff. This casts serious doubt on the defendant's claim that the plaintiff did not want to accept cheques. To avoid doubt, I am not making any findings on the cheques for $6,000 and $2,400 as they are not the subject of the defence or counterclaim.

48 Second, the defendant failed to produce any evidence to discharge his burden of showing that the moneys encashed in respect of any of the 65 cash cheques were handed over to the plaintiff. The defendant did not keep records of any of the 65 occasions to indicate that the cash cheques were drawn in the plaintiff's favour or that the cash was advanced to the plaintiff.

49 In contrast, the defendant produced a cheque stub, for a cash cheque of $500 dated 22 January 2012 which he claimed was encashed for the plaintiff as he had written the word "bro" (meaning "brother") in the "payee" column of the stub. The defendant did not make a claim for this cheque as he could not recall the purpose of this cheque. Yet, oddly enough, he could recall the purpose of all 65 cash cheques, despite of an absence of any indication on the cheque stubs (or elsewhere) as to the payee's name or purpose of those cheques. The defendant "assumed" it was highly probable that each of the 65 cash cheques were encashed for the plaintiff as he recalled giving the plaintiff a few thousand dollars on each occasion. I find this to be unconvincing.

50 The defendant did not make a record of the payee relating to the 65 cash cheques, despite the larger amounts of between $1,000 and $6,000 withdrawn each time. This has to be contrasted with the few occasions on which he had made a record of the payee and even the purpose of certain cheques (namely the $500 cheque mentioned at [49] and the $2,400 and

$6,000 cheques mentioned at [47]). This again suggests that the 65 cash cheques were not drawn in order to make payment to the plaintiff.

51 In fact, the defendant was reluctant to reveal whether any of the cheque stubs relating to the 65 cash cheques had some indication that they was drawn in the plaintiff's favour. He initially stated that he could not find the cheque stubs. However he later admitted that he had cheque stubs for some of those cheques but none of the stubs indicated the plaintiff as the "payee" of the cheques. The lack of documentary evidence relating to the alleged payments, coupled with the defendant's conduct in court, was very telling.

52 Next, the defendant categorically maintained that the three cheques were issued to repay the plaintiff's loan. He claimed that *after* he repaid the loan *entirely*, the remaining monies advanced to the plaintiff were loans to the plaintiff. In his affidavit of evidence-in-chief, the defendant tabulated each amount advanced to the plaintiff in chronological order. The defendant admitted that based on his tabulation, he would have discharged the plaintiff's loan by 30 June 2008 (via cash cheque 0300824). Yet, two of the three cheques for $25,000 and $12,000 were only given to the plaintiff long *after* June 2008 (in December 2008 and May 2010 respectively). If the defendant had discharged the plaintiff's loan entirely by June 2008, these two cheques could not have been for the purposes of repaying the plaintiff's loan, but would have formed part of the moneys lent to the plaintiff. The defendant's evidence in this respect was further indication that his case was without merit.

53 The defendant claimed that there was a "tacit understanding" that the monies he gave the plaintiff were to offset the $200,000 loan. He explained that on the first few occasions he gave moneys to the plaintiff, there was a "mutual understanding" that it was to repay the loan. On subsequent

occasions, he did not inform the plaintiff of the purpose of the moneys but just "assumed" that the plaintiff knew what they were for. The defendant also stated that after repaying the plaintiff's loan, the monies the defendant gave him "turned from [the defendant's] repayment of a debt to [the plaintiff] to become [the plaintiff's] debt to [him]". However the defendant did not, at any point, inform the plaintiff that the plaintiff's loan had been fully repaid and that thenceforth he was lending the plaintiff money, and that the plaintiff's entitlement to a share in the Property had ceased to exist.

54 The defendant's evidence is not credible. If he had discharged the loan, it was in his interest to inform the plaintiff or to document such an important matter, in the way that the plaintiff had documented his $200,000 advance to the defendant. If the defendant was thereafter lending money to the plaintiff, it would have clearly been in his interest to inform the plaintiff as such, and to keep a proper record of all these advances.

55 I accept the plaintiff's evidence that he did not approach the defendant for moneys on a monthly basis, as the defendant alleged. Although the plaintiff, a contractor, had retired in 2004, he continued to do some jobs from time to time. The plaintiff produced some evidence to show that he and his wife had other sources of income such as lottery winnings of $72,600 (although admittedly it is unclear how much he spent on lottery tickets) and yearly dividends from Mdm Ho's investment in a goldsmith shop. I found that the plaintiff, together with Mdm Ho, had some means, albeit not substantial. In my mind, this was why he had tried on numerous occasions to persuade the defendant to sell the Property in order to realise his investment.

56 The defendant also claims that the three cheques could not have been to pay the plaintiff his share of the rent, as the rent could barely cover the

expenses for maintaining the Property. I am unconvinced. The defendant failed to keep the plaintiff informed of what he had done with the Property throughout the years. There was no clear evidence on how long the Property was rented out, the total amount of rent collected and the maintenance expenses. All these were matters within the exclusive knowledge of the defendant. Moreover, the first cheque of $50,000 was given to the plaintiff four years after the defendant took possession of the Property, and the three cheques were given over a span of seven years from the time the defendant took possession of the Property.

57 In the circumstances, I accept the plaintiff's evidence that he had been told by the defendant that the three cheques were his share of the rent and thus he regarded the payments as having been made for that reason. Regardless of whether the defendant had actually obtained such amount of rent, the parties' Oral Agreement was for the Property to be rented and rental proceeds to be shared equally. In my view, the defendant, having been repeatedly pestered by the plaintiff to sell the Property, gave the three cheques to appease the plaintiff and to postpone or stave off the sale for as long as he could.

58 Overall, I found the defendant to be an evasive and unreliable witness. His testimony in court on the material issues was unconvincing and often inconsistent. He could not produce any documentary evidence to prove that the cash cheques were drawn in the plaintiff's favour. On the whole, I found that the defendant had not "repaid" the plaintiff $200,000 nor lent a further $120,000 to him. It is also telling that the defendant had made no attempt to recover any of the alleged loans until the plaintiff commenced this suit.

Event that transpired in December 2014

59 An issue was raised by defence counsel in relation to an event that allegedly transpired in December 2014. I will deal with this, although I do not think that it affects the plaintiff's case in any material way.

60 The plaintiff stated that in December 2014, he and Mdm Ho pressed the defendant to sell the Property. The plaintiff claimed that the defendant acknowledged the terms of their agreement relating to the joint investment of the Property and said that he would return $500,000 to them, so as to buy out their share in the Property. The defendant claimed that the plaintiff approached him for $500,000 which the defendant refused to give. Defence counsel suggested that the plaintiff was lying as an offer of $500,000 (taken together with the $87,000 given in the three cheques) was too good to be true.

61 On balance, I accept the plaintiff's evidence on this matter. The defendant's bank mortgage statements, as at 31 December 2014, showed an outstanding mortgage of $494,601. This means that he had contributed roughly $253,000 to the purchase of the Property, excluding any other possible expenses that had to be incurred. Suffice to say, his contribution, as at December 2014, corresponds approximately to the plaintiff's. Assuming the Property had appreciated in value since its purchase some 14 years ago, and that the parties had agreed to share equally in the net profits if the Property were sold, the defendant's offer, at that time, to buy out the plaintiff's share for $500,000 was not "too good to be true". In fact, as it represented a substantial return on the investment, there was no reason for the plaintiff and Mdm Ho not to accept it since they wanted to realise their investment.

Events during Chinese New Year of 2015

62 The plaintiff said that around January 2015, the defendant informed him to collect a cheque from his office. By this time, the defendant had moved into Property and thus the plaintiff had surmised the defendant felt bad for not telling him about this. He went to the office on 18 February 2015, on Chinese New Year eve. The defendant's clerk handed the plaintiff a cheque for $15,000 with a receipt stating that it was a loan. The plaintiff returned the receipt asking to be issued another one without it being stated that the cheque was a loan. He then acknowledged receipt of the cheque. Upon leaving the office, the plaintiff discovered that written on the back of the cheque was the word "loan". He was upset and had not wanted to accept the cheque. He called the defendant and asked him to return the receipt but the defendant ignored his request. The plaintiff scolded the defendant as he thought the defendant was trying to trick him into accepting a loan. On 23 February 2015, he went back to the defendant's office and left the cheque there.

63 Defence counsel suggested that the plaintiff concocted the story above, which happened a few months before filing of the writ, to support his case. Defence counsel suggested that it was the plaintiff who had asked for money as it was Chinese New Year, and submitted that the plaintiff had clearly signed the acknowledgment receipt despite his claims that it was forged. In cross-examination, the plaintiff admitted that he had signed the receipt.

64 In my view, this incident does not materially affect the plaintiff's case. It is no doubt curious that the plaintiff thought he was receiving dividends from his investment in the Property although he knew that the defendant was now staying in the Property. Nevertheless, I accept the plaintiff's explanation that he thought the defendant was paying him because the latter felt bad for

staying in the Property without his consent. The plaintiff could have thought that the defendant was compensating him for losses in rental which resulted from the defendant occupying the Property. It is also material that the plaintiff did not accept the cheque, which the defendant intended it to be a loan. This shows that he was not willing to accept a loan from the defendant and was genuinely seeking payment as some sort of compensation from the defendant. As an aside, this also undermines the defendant's case that he gave cash to the plaintiff because the latter did not want to accept cheques. The plaintiff was more than willing to accept this particular cheque until he realised it was given as a loan. This incident reinforces my view that there was no repayment of the $200,000 and no loan sums given by the defendant to the plaintiff.

Delay in commencing suit against defendant

65 Much was made by defence counsel of the fact that the plaintiff did not commence this suit against the defendant much earlier, because the defendant had already discharged the plaintiff's "loan" in full. I do not think much of this point and, in any event, I accept the plaintiff's explanation for the delay. The parties are not commercial parties dealing at arm's length; they are brothers. Litigation would naturally be a last resort as once they escalated their dispute to such a level, the damage done to their relationship would be hard to repair. The plaintiff explained that after the incident on Chinese New Year in 2015, he paid $350 to a lawyer who was reluctant to move his case forward. After this, he engaged another lawyer and the suit was commenced. In any event, it was not as though the plaintiff had done nothing during the intervening years. He had approached the defendant on numerous occasions to sell the Property.

What were the agreed terms and the plaintiff's interest in the Property?

66 On the totality of the evidence I am satisfied that the plaintiff has, on a balance of probabilities, proved that he had contributed the sum of $200,000 towards the purchase price in return for a share in the Property. The plaintiff's testimony was largely consistent and was supported by his conduct, Mdm Ho's testimony and the contemporaneous documents.

67 I accept the plaintiff's explanation that he could not be named a joint owner of the Property as he had just purchased an HDB flat in the same year and thus could not own a private property. Moreover, he assisted the defendant in finding a tenant shortly after completion and knew the amount the Property was rented out for. That the Property was rented out for two years from late 2003 was corroborated by the defendant's testimony. It is understandable that the plaintiff left the management of the Property to the defendant given that he trusted the defendant (whom he was close to at the material time) and viewed him as the more savvy of the two. Nevertheless he did not fully trust his brother, and sought to have some documentation as proof of his contribution. This is not unusual given the large sum involved. All in all, the plaintiff's conduct was consistent with a person having an interest in the Property, which went beyond a mere security interest for repayment of a loan.

68 It is thus left for me to determine the actual agreement between the parties, based on the Memorandum of Loan and Collateral Agreement viewed in light of the terms of the Oral Agreement. It is apparent that the Collateral Agreement contradicted the Memorandum of Loan. It is also apparent that if the parties' intent was embodied in the Oral Agreement, this was not captured entirely in the Memorandum of Loan or Collateral Agreement. In particular, the plaintiff's case that the Property would be rented out and the net proceeds

of the rental income would be distributed equally between the parties ("the rental agreement") was not embodied in either document. Further, the Oral Agreement in which the plaintiff was to obtain an equal share in the interest of the Property was contradicted by the Collateral Agreement which stated that his interest was *in proportion to his contribution*.

69 An issue arises as to whether ss 93 and 94 of the Evidence Act (Cap 97, 1997 Rev Ed) ("parol evidence rule") apply to exclude the rental agreement and the agreement on the proportion of the plaintiff's share in the Property. Section 94 read with s 93 essentially states that where the terms of a contract has been reduced to a written form, extrinsic evidence cannot be admitted to contradict, vary, add to or subtract from the written instrument, unless one or more of provisos (*a*) to (*f*) of s 94 are satisfied.

70 Thus the crucial question is whether or not the parol evidence rule operates on the facts. In *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029, the Court of Appeal set out the position on the law (at [132(b)]:

> If the court is satisfied that the parties intended to embody their entire agreement in a written contract, no extrinsic evidence is admissible to contradict, vary, add to, or subtract from its terms (see ss 93–94 of the Evidence Act). *In determining whether the parties so intended, our courts may look at extrinsic evidence and apply the normal objective test, subject to a rebuttable presumption that a contract which is complete on its face was intended to contain all the terms of the parties' agreement* … In other words, where a contract is complete on its face, the language of the contract constitutes *prima facie* proof of the parties' intentions.
>
> [emphasis added]

71 The Court of Appeal (at [132(a)]) had also pointed out that a court had to "take into account the essence and attributes of the document being

examined" and that generally the court ought to be more reluctant to allow extrinsic evidence to affect standard form contracts and commercial documents.

72 In the present case, I am satisfied that the parties did not intend to embody their entire agreement in the Memorandum of Loan and Collateral Agreement. First, there was no evidence that the documents were intended to contain all the terms of the parties' agreement. I find that not only are the documents incomplete as a record of the parties' agreement, they in fact contradict each other, as I have earlier observed. The Memorandum of Loan states that the money advanced by the plaintiff was a "friendly loan" but the Collateral Agreement states that the plaintiff had a share in the Property in the proportion of the amount of the contribution to the purchase price. To compound matters, the very next line of the Collateral Agreement provides that the plaintiff had a half share of the net profits which is inconsistent with saying that he had a share in the Property in proportion with his contribution.

73 Second, considering the nature and attributes of the documents, I find them to be anything but commercial documents. While parties ostensibly had the benefit of legal advice, the Memorandum of Loan and Collateral Agreement were shoddily drafted. The way the documents were drafted reflected the true nature of the agreement between the parties – an agreement not at arm's length between two brothers who were, at the material time, on amicable terms.

74 For the above reasons, I find that the parol evidence rule is inapplicable and extrinsic evidence is admissible to add to or vary the written agreement. I am satisfied that the Oral Agreement can be admitted to shed

light on the parties' intention (which was largely embodied in the Memorandum of Loan and Collateral Agreement), as follows:

(a) the parties would be equal beneficial owners of the Property, although registered in the defendant's name;

(b) as legal owner, the defendant would manage the Property on their behalf;

(c) the Property would be sold in a few years upon agreement by both parties;

(d) meanwhile the Property would be rented out and the net proceeds (if any) of the rent would be distributed equally between the parties as dividends; and

(e) upon the sale of the Property, the net proceeds of the sale (less any outstanding mortgage and other related expenses) would be distributed equally between the parties.

75 The first term of the Oral Agreement clearly showed that the parties intended the defendant to be the legal owner of the Property but for him to hold it on trust for both parties as tenants in common with an equal share. As I have observed, this is consistent with the parties' conduct at the time of the purchase and even many years thereafter. I am satisfied that what was intended when the Memorandum of Loan and Collateral Agreement were signed was to confer on the plaintiff an interest in the Property in return for his $200,000 contribution. Both these documents, which reduced some of the terms of the Oral Agreement into writing, made reference to the plaintiff's contribution as being linked to the purchase of the Property. Further, if it had been a mere loan, there was no need for a requirement, in the Collateral

Agreement, that the plaintiff's consent should be obtained before the Property was sold. Such a term is more consistent with the plaintiff having an interest in the Property going beyond the mere repayment of a loan.

76 The Memorandum of Loan further stated that the "friendly loan" was to be repaid to the plaintiff "when the Property was sold". The defendant stated that he did not have to repay the "loan" if the Property was not sold. In other words, the plaintiff would never get his money back unless the defendant agreed to sell the Property. This would have made no commercial sense to the plaintiff (in addition to the fact that the "loan" did not yield any return by way of interest). This reinforced my view that such an arrangement could only have come about because the parties had intended the Property to be sold a few years after it was purchased, and not for it to be kept by the defendant indefinitely according to his whim. The lack of precision or clarity in the Memorandum of Loan and Collateral Agreement could be attributed to Mr Seow's inexperience in drafting such documents, as he candidly admitted that he did not prepare such documents in his conveyancing practice. The documents were also most likely prepared on the spot at Mr Seow's office on 28 July 2000, as he would not have known of the parties' prior Oral Agreement before that date.

77 In determining that the plaintiff has an equal beneficial interest in the Property and is entitled to a half share of the net proceeds of sale, I am aware that the Plaintiff had contributed only $200,000 towards the purchase price of $880,440. However, I am satisfied that the plaintiff has shown that this was what the parties had agreed to. In particular the apportionment of the net proceeds of sale in equal shares is clearly stated in the Collateral Agreement. Clearly the defendant would not have been able to purchase the Property without the plaintiff's contribution. He admitted that he needed cash to

partially fund the purchase. That he was short of cash was evident – apart from the plaintiff's $200,000, the defendant paid the first 5% through his CPF account, utilised another $43,771.32 from his CPF account and took a mortgage for the rest of the purchase price. At no point did he fork out cash for the purchase. Indeed, there was a potential upside for the defendant who would gain if the Property was sold after significant appreciation and would be obtaining rental income in the meantime. It was not as though the agreement represented a bad bargain for the defendant.

78 I also find that the defendant had moved into the Property without the plaintiff's consent, in a breach of the terms of the Oral Agreement. The plaintiff is entitled to damages for breach of this term to be assessed at the notional rent that he was entitled to, had the defendant not moved into the Property. This would be half the amount, less any related expenses, that the Property could have been rented out for during the time the defendant was occupying it.

Conclusion

79 In conclusion, I find that the plaintiff has proven his case on the balance of probabilities. I therefore allow the claim. The defendant has failed to show on a balance of probabilities that, other than the $87,000 paid to the plaintiff, he had given the plaintiff the rest of the moneys as claimed in his defence and counterclaim. The counterclaim is thus dismissed. The sum of $87,000 nevertheless has to be set-off from any sum due from the defendant (although I note that the monies had come from the defendant's Company). In light of my findings, I make the following orders:

(a) I declare that the Property is held on trust by the defendant for the plaintiff in equal shares with the defendant.

(b) The Property be sold within six months from the date of this judgment (or such later date as the parties may agree) and the net proceeds (after deducting taxes, interest payments, maintenance expenses, lawyers' fees and stamp fees, as well as refunding the plaintiff's $200,000 contribution and the defendant's CPF and mortgage contributions) distributed equally between the plaintiff and defendant. If there are no net proceeds of sale, the parties are to bear the net loss in equal proportion.

(c) The defendant is to account to the plaintiff for all rent collected and expenses relating to the Property from the date the Temporary Occupation Permit was issued until the present, and is to pay the plaintiff 50% of the net proceeds of all rental income. This is after deducting all expenses related to the rental of the Property including, but not limited to, fees charged by the property agent (if any) in securing a tenant, any repairs and maintenance required to upkeep the Property and any tax payable on the rental income, but excluding expenses that have already been accounted for under (b) above.

(d) The defendant to pay damages for breach of the Oral Agreement (if any) to be assessed.

(e) The sum of $87,000 which the defendant paid the plaintiff is to be set off against the amounts due to the plaintiff.

80 In ordering that the Property be sold (which power I have under s 18(2) of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) read with para 2 of Sched 1) I bear in mind the principles in *Su Emmanuel v Emmanuel Priya Ethel Anne* [2016] 3 SLR 1222 at [57]. This order would accord with the parties' Oral Agreement for the Property to be sold a few years after its

purchase to realise their investment. The defendant's refusal to abide by the parties' agreement no doubt materially contributed to a deterioration of their relationship such that they could no longer co-operate with each other. There is also no serious prejudice to the defendant. He can use the proceeds of the sale to purchase another property. In the words of Judith Prakash J in *Chiam Heng Luan v Chiam Heng Hsien* [2007] 4 SLR(R) 305, this is "not a case of a wife being evicted from her matrimonial home or an elderly person who may be put to great disadvantage if asked to leave his home". To avoid doubt, nothing in my order precludes one party from selling his interest to the other party at a mutually agreed price.

81 The plaintiff had made an offer to settle dated 11 July 2016 which the defendant did not accept. As the plaintiff obtained a judgment not less favourable than the terms of the offer to settle, under O 22A r 9 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed), I award costs to the plaintiff on a standard basis to 11 July 2016 and on an indemnity basis commencing 12 July 2016.

Audrey Lim
Judicial Commissioner

Loh Kia Meng and Quek Ling Yi (Denton Rodyk & Davidson LLP) for the plaintiff;
Gregory Fong and Fong Chee Yang (Fong & Fong LLC) for the defendant.