

IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1997] SGHC 96

Suit No 1510 of 1994

Between

D & C Property Pte Ltd

... Plaintiff

And

Lew Guan Seng
Chin Lee Kim
Ng Pheck Noi

... Defendant

GROUND OF DECISION

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D & C Property Pte Ltd v Lew Guan Seng and Others

[1997] SGHC 96

Suit No 1510 of 1994
C R Rajah JC
14 April 1997

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Judgment:

2 J U D G M E N T

3 1. This hearing was fixed to determine a preliminary issue that had arisen
in this

action between the Plaintiffs and the 2nd Defendant. Both parties confirmed at
the hearing

that the issue was:- Whether the 2nd Defendant had an interest in,

4 (a) the United Overseas Bank Account No. 126-303-588-2 ("the UOB
account");

5 (b) the property known as 17B, Nassim Road, #02-04, Singapore ("the
Nassim prope

6 Background Facts

which is in her name. The Writ was served on the 1st and 2nd Defendants by substituted

service and judgment in default of appearance against both of them was obtained on

20/10/94. On 6/1/95 the default judgment against the 2nd Defendant was set aside on her

application and she thereafter entered appearance and defended this action. On 6/1/95 too,

the Plaintiffs discontinued this action against the 3rd Defendant with liberty to commence

a fresh action if the default judgments against the 1st Defendant or the 2nd Defendant

were set aside.

8 3. The 2nd Defendant came to Singapore from Malaysia. After leaving school she worked

as a clerk for a few years earning a \$500/- to \$600/- a month. She then worked as a

beautician and had her own beautician business in both Singapore and Malaysia from which

she earned a few thousand dollars monthly. She opened the UOB account in her name in 1987.

She came to know the 1st Defendant in 1989. She was then 26 years old. By July 1990 the

1st Defendant and she were going steady and she had stopped working. The 1st Defendant now

more or less supported her although she had some savings of her own. They married in May

1991. From the date of their marriage, the 1st Defendant was the sole breadwinner. She,

however, dabbled on the stock market and paid the monies received from these deals into

the UOB account.

9 4. On 31/10/90, some 6 months prior to her marriage, the 2nd Defendant obtained an

option to purchase an apartment in Olina Lodge, 15 Holland Hill, Singapore ("the

Olina apartment") at a price of \$635,000/-. The 2nd Defendant says she used her own

money to pay the \$5,000/- option money. She obtained in her name a bank loan

for

\$450,000/- to help pay the purchase price. She said the balance of the purchase price

amounting to \$185,000/- was all paid for from her own funds. She says these monies came

from her savings and from her father who gave her the money as she was not married at that

time. I accept her evidence in this regard. Her purchase of the Olina apartment was

completed in February 1991.

10 5. The 2nd Defendant says she originally bought the Olina apartment as an investment

and intended to rent it out. However, as the 1st Defendant did not own any residential

property at that time they made the Olina apartment their matrimonial home when they got

married. From the time she bought the Olina apartment until she sold it, she was its sole

registered owner. She also says she was its sole beneficial owner. 6. In July 1993 the 1st

and 2nd Defendants decided to buy a unit from the developer of the Nassim Park

condominium. The 2nd Defendant said that the 1st Defendant told her he would pay for it

and give her a half share in it. On 28/7/93, the 1st and 2nd Defendants obtained in their

joint names upon payment of option money or a booking fee of \$84,000/-, an option to

purchase unit #02-03 in the Nassim Park condominium at a price of \$1,680,000/-. Soon

thereafter, the 1st and 2nd Defendants exchanged unit #02-03 for unit #02-04 (i.e. the

Nassim property) with a friend of the 1st Defendant who had an option to purchase unit

#02-04. The purchase price for the Nassim property was also \$1,680,000/-. The developers'

solicitors Foo & Quek's letter dated 8/8/93 to the 1st and 2nd Defendants'

solicitors

in the purchase Robert K.B. Teo & Co. shows that this exchange had been effected by

that date. By a sale and purchase agreement dated 16/8/93 the 1st and 2nd Defendants

entered into an agreement to purchase the Nassim property from the developers.

11 7. The option money or booking fee of \$84,000/- was paid out of the UOB account. The

bulk of the balance of the purchase price was paid from a bank facility granted by

Overseas Union Bank Limited ("OUB") to the 1st Defendant comprising of a term

loan for \$500,000/- and an overdraft for \$1,000,000/-. The total bank facility of

\$1,500,000/- was secured by a mortgage on the Nassim property. As this property was

purchased in the joint names of the 1st and 2nd Defendants, both of them were the

mortgagors even though only the 1st Defendant was the borrower. Although a

copy of the

mortgage deed was not before the Court, I have no reason to believe that it would have

been other than in the standard form used by local banks for such mortgages. The 2nd

Defendant would therefore not only have mortgaged all her interest in the Nassim property

as security for the bank facility but in all likelihood also have covenanted to be a

surety for the loan and to pay OUB personally any monies which remained owing by the 1st

Defendant on the said bank facility. The purchase of the Nassim property in the joint

names of the 1st and 2nd Defendants was completed on or about 20/10/93.

12 8. On 21/2/94, the 2nd Defendant sold the Olina partment by giving its purchasers an

option to purchase. This option as exercised by the buyers on 7/3/94. The sale price was

875,000/-. After repaying all monies owing in respect of the Olina apartment and the

expenses of sale, there was a net balance of \$344,374.21. The 2nd Defendant had received a

total of \$87,500/- thereof when the purchasers first bought and later exercised the

option. The remaining \$256,874.21 was paid on completion. The 2nd Defendant said that the

1st Defendant asked her to lend him this \$256,874.21 to reduce his overdraft with OUB

arising from the purchase of the Nassim property. He told her that when the Nassim

property was sold, he would repay her this amount from his half share of the proceeds of

sale. As she had no need for the money at that time she agreed to let him have the money.

When the sale of the Olina apartment was completed on or about 15/6/94 which was some 8

months after the purchase of the Nassim property, this \$256,874.21 was paid

into the 1st

Defendant's overdraft account with UOB.

13 The UOB Account 9. When the UOB account was first opened in 1987

I find that as between

the 1st and 2nd Defendants, the 2nd Defendant provided all the monies for this account. At

that time she had not even met the 1st Defendant. When she completed her purchase of the

Olina apartment I find that she was still the sole beneficial owner of the UOB account. By

1993, however, as the 2nd Defendant said in paragraph 29 of her affidavit filed herein on

28/11/94 with regard some payments of \$40,000/-, \$25,500/- and \$30,180/- into the UOB

account in January, March and April 1993:-

14 "Although the account is in my name, it is in fact an account which is used by oth

the 1st Defendant and me. It is quite usual and acceptable for the 1st Defendant to put

monies of such amounts into my account. Some of the deposits were made by me, some by the

1st Defendant at my request when I was short of funds, and some by the 1st defendant

himself. As for withdrawals, they were by way of cheques drawn by me. Some of these

withdrawals were for my own expenses and payments, while others were at the request of the

1st Defendant. I did not object or refuse any such withdrawals requested by the 1st

Defendant. I do not enquire of the 1st Defendant the purpose of the withdrawal."

15 10. Although the 2nd Defendant claimed during her examination-in-chief that all the

monies standing in the UOB account are hers and she may well believe this to be so, it is

plain from her aforesaid affidavit of evidence that at least by January 1993, much of the

monies paid into this account were from the 1st Defendant. Unless the payments made by the

1st Defendant into the account were made by way of gift to her, the 1st Defendant would

have some interest in the monies in the account. Did the 1st Defendant intend to make a

gift to the 2nd Defendant of such of his monies paid into the UOB account? From what the

2nd Defendant said in her affidavit, and I accept this evidence, it appears that at least

by January 1993, both she and the 2nd Defendant treated the monies in the UOB account as

being monies which either of them could use for their respective needs and purposes. By

then the UOB account was treated as a joint account. Although the 1st Defendant would

therefore have not objected to the 2nd Defendant using the monies he paid into the

account, he did not make a gift of it to her in the sense that he lost the right to

use

these monies unless she was prepared to give the monies back to him. And I find the same

applied, mutatis mutandis, to any monies paid into the UOB account by the 2nd Defendant.

By now both of them were treating the monies in the UOB account as joint property. The

fact that there is no evidence to show exactly who was now putting what into the UOB

account, and that even if the 1st Defendant was putting in more monies than the 2nd

Defendant he could well also have been taking out more, makes this an appropriate case to

treat equality as equity.

16 11. On the preliminary issue relating to the UOB account I therefore find as follows:-

17 (a) the 2nd Defendant was and is the sole legal owner of the UOB account;

18 (b) the 2nd Defendant was the sole beneficial owner of the UOB account when it as first

opened in 1987 and continued to be so when the purchase of the Olina apartment was

completed in February 1991 but at all material times from at least January 1993 onwards

she as the beneficial owner of only half the UOB account.

19 The Olina Apartment 12. It would facilitate the resolving of the preliminary issue

relating to the Nassim property if the respective rights and interests of the 1st and 2nd

Defendants in the Olina apartment were first determined. I have found that all the monies

provided for the purchase of the Olina apartment came either from 2nd Defendant or the

loan that 2nd Defendant obtained from UOB. This coupled with the fact that it was

purchased and registered in her sole name establishes her as its sole legal and beneficial

20 13. The Plaintiffs nevertheless maintain that it was the 1st Defendant
who provided all

the time of the purchase of the Olina apartment the 1st Defendant had been served with 3

assets out of the reach of his creditors he therefore purchased the Olina apartment in the

2nd Defendant's name. The Plaintiffs have provided no evidence of what monies
the 2nd

Defendant provided. All they have said is that the 2nd Defendant could not have raised the

money herself. I have accepted her evidence that she could from what she had saved and

what her father gave her. However, even if this theory of the Plaintiffs' was true,

and

even if the 2nd Defendant knowingly participated in such a scheme, of which there is no

allegation nor any evidence, that would still not entitle the 1st Defendant to claim any

beneficial interest in the Olina apartment as between himself and the 2nd Defendant.

21 14. In *Gascoigne vs. Gascoigne* < 1918 > 1 KB 223 a husband leased land in his

wife's name and built a house on it with his own money. He used his wife's name with her

knowledge and connivance because he wanted to protect the property from his creditors. He

sought a declaration against his wife that she held the property as a trustee for him. The

Court refused to allow the husband to claim such relief in equity against the wife who

held the legal title. The Court applied the rule that in cases where both parties were

tainted with dishonesty, the Court would not interfere but let the estate lie where it

falls. Accordingly, even if the 1st Defendant had paid for the Olina apartment and

purchased it in the 2nd Defendant's name to evade his creditors, as between the 1st and

2nd Defendants inter se, the Court will not intervene to grant the 1st Defendant any

beneficial interest therein. All the more so when the 2nd Defendant was not a party to the

scheme.

22 The Nassim Property 15. There is no dispute that this property was bought and

registered in the joint names of both the 1st and 2nd Defendants. Legal ownership therein

vested in both the 1st and 2nd Defendants jointly. The 2nd Defendant says that it was also

beneficially owned by them equally. Not only was the \$84,000/- booking fee

paid for from

the UOB account but more importantly the 1st Defendant agreed to pay for the whole of the

Nassim property and give her a half share in it. Because of this promise she subsequently

lent him \$256,874.21 belonging to her from the proceeds of sale of the Olina apartment to

help reduce the burden of the 1st Defendant's overdraft. Neither the \$84,000/- which she

claimed was her money nor this \$256,874.21 were, however, contributions towards the

purchase price but simply loans to the 1st Defendant which he promised to repay to her.

Even if he had not given her the half share, the presumption of advancement would operate

in her favour to entitle her, as the 1st Defendant's wife, to a half share in the

beneficial ownership of the Nassim property. That was the 2nd Defendant's case.

purchase of the Nassim property as a loan to the 1st Defendant to help him pay

for the

Nassim property. They were therefore not paid as her contribution to the purchase cost for

her half share in the Nassim property. The Plaintiffs also say that in any event, the

\$84,000/- was paid as a booking fee for unit #02-03, a different unit from #02-04 which

was the Nassim property, and cannot therefore be said to be payment by the 2nd Defendant

towards the Nassim property. In these circumstances they say the 2nd Defendant held her

half share in the Nassim property on a resulting trust for the 1st Defendant. That was the

Plaintiffs' case.

24 17. I have already found that the 2nd Defendant was beneficially entitled to the whole

of the Olina apartment. Therefore the \$256,278.15 was her money. I have also found that by

the time the \$84,000/- was paid from out of the UOB account for the booking fee, this

account was beneficially owned equally by the 1st and 2nd Defendants. I find no merit in

the argument that since the booking fee of \$84,000/- was paid to purchase unit #02-03 at

the time it was paid, that payment cannot be said to relate to the purchase of the Nassim

property. The 1st and 2nd Defendants' purchase of #02-03 was switched to the Nassim

property within a week of the payment of the booking fee for #02-03. All parties concerned

including the developer who was selling both the units accepted this and quite obviously

treated all payments made by the 1st and 2nd Defendants to them as payment for the Nassim

property.

25 18. The Plaintiffs also argue that even if the \$84,000/- and \$256,278.15 are held to be

the 2nd Defendant's monies they total \$340,278.15 which only amounts to some 20% of the

purchase price of \$1,680,000/-. The 2nd Defendant cannot therefore claim a 50% share in

the property. Implicit in this argument is that the 1st Defendant paid 90% of the purchase

price. But did he? To complete the purchase, the 1st and 2nd Defendants had to pay

\$1,680,000/- for the purchase price and some \$48,000/- in stamp fees and other expenses of

purchase making a total of \$1,728,000/-. The source for these funds were the \$1,500,000/-

from the OUB bank facility, the \$84,000/- from the UOB account and \$43,000/- from the 1st

Defendant's CPF account leaving a balance of \$101,000/-. It is not clear where this

balance \$101,000/- came from but for present purposes I will assume it came from the 1st

Defendant. The 1st Defendant's \$144,000/- contribution towards the Nassim property was

therefore much less than the \$256,278.15 later provided by the 2nd Defendant to reduce

monies owing on the OUB facility and amounts to only 8.3% of the purchase price and

expenses of purchase.

26 19. There is also no evidence of any significant repayments by the 1st Defendant to

reduce the OUB facility or repay interest thereon. This can be gathered from the fact that

when the 1st and 2nd Defendants completed the sale of the Nassim property in September

1994, some 11 months after they had completed their purchase of it, the net proceeds of

sale amounted to only \$420,985.52. As they sold it for \$2.2 million and had borrowed \$1.5

million, even if they had made no repayments towards the facility in the intervening 11

months, they should have received \$700,000/- less repayment of the 1st Defendant's CPF

(say \$47,000/- inclusive of interest), expenses of sale (say \$30,000/- and assuming 1%

agent's commission was paid), and interest on the \$1.5 million facility for 11 months (say

\$200,000/-). Based on these estimates, which total \$277,000/-, the net proceeds of sale

should have come to some \$423,000/- which more or less equates to the actual \$420,985.52

received. But, we know that \$256,278.15 was actually paid by the 2nd Defendant into the

1st Defendant's overdraft account with the UOB to reduce the monies outstanding on the

\$1.5 million facility. The net proceeds should therefore have been increased by at least

this amount unless the 1st Defendant who was the only party who operated the OUB overdraft

had earlier withdrawn these monies. Any such withdrawal would far exceed his initial

\$144,000/- contribution. His net monetary contribution towards the Nassim property would

appear to be negative.

27 20. It is true that the OUB facility for \$1,500,000/- was borrowed in the 1st

efendant's name alone and therefore he was solely responsible to OUB therefor.

But if, as

it seems likely, the mortgage deed signed by the 2nd Defendant as a joint mortgagor

included a covenant by the 2nd Defendant to be a surety for the loan then the 2nd Defendant

would have been just as exposed to personal liability on the facility as the 1st Defendant.

In all the aforesaid circumstances, I do not accept the Plaintiffs' argument that the 2nd

Defendant contributed less than the 1st Defendant towards the purchase price of the Nassim

property.

28 21. I accept the 2nd Defendant's evidence that it was the 1st Defendant's intention to

give her a half share in the Nassim property. I therefore find that it was the specific

intention of both the 1st and 2nd Defendants when they purchased the Nassim property in

their joint names that they should each have an equal half share in the legal and

beneficial ownership of the Nassim property. There is therefore no need for me to consider

whether the principle of advancement should prevail. But if I was unable to determine what

the specific intention of the 1st and 2nd Defendants was, I would still have held in the

circumstances of this case that the 2nd Defendant had half share in the legal and

beneficial ownership of the property as this is a case where the presumption of

advancement applies and there is nothing in the surrounding circumstances

sufficient to

rebut this presumption.

29 22. The Plaintiffs have also argued that as the 1st Defendant is the only person who

can verify the 2nd Defendant's version of the events, the Court should draw an adverse

inference against the 2nd Defendant under Section 116 illustration (g) of the Evidence Act

(Cap. 97, 1990 Edition) for not calling the 1st Defendant as a witness. Illustration (g)

states:-

30 "that evidence which could be and is not produced would if produced be unfavour

ble to the person who withholds it."

31 The Plaintiffs have not shown that the 1st Defendant could have been called i.e. that

he was within the jurisdiction so that he might be subpoenaed or that if he was out of the

jurisdiction he would be ready, willing and able to come within the jurisdiction to

testify. Furthermore, if the Court is asked to presume that the 1st Defendant's evidence

would be unfavourable to the 2nd Defendant it follows that the Court must presume that it

would be favourable to the Plaintiffs. Why then did the Plaintiffs themselves not call the

1st Defendant to testify in support of their case which after all promoted his interest in

the UOB account and the Nassim property to the exclusion of the 2nd Defendant? If it was

because they feared his testimony would be unfavourable to their case, why should the

Court draw an adverse inference against the 2nd Defendant for not calling him? If this was

not why they did not call the 1st Defendant, they have not explained what their reason

was. In the circumstances it is not appropriate for the Court to draw any adverse

inference as sought by the Plaintiffs.

32 23. The Plaintiffs also argue that if the Court finds that the 2nd Defendant's interest

in the Nassim property arose by way of a gift from the 1st Defendant, and I have so found

in accepting the 2nd Defendant's evidence in this regard, then under section 52(1) of the

Bankruptcy Act (Cap. 20 Rev. Ed. 1995) (which was the relevant section at the material

time) this gift is void against the Official Assignee as having been made within 2 years

of the 1st Defendant's bankruptcy. The 1st Defendant was apparently adjudicated a bankrupt

on 26/5/95 and the 1st and 2nd Defendants' agreement with the developer for the purchase

of the Nassim property is dated 16/8/93. If the gift by the 1st Defendant to the 2nd

Defendant of her half share in the Nassim property was made on 16/8/93, as

seems likely,

then the gift would have been made within 2 years of the 1st Defendant's
bankruptcy and

void against the Official Assignee. But whether or not any gift by the 1st
Defendant to

the 2nd Defendant of her share in the Nassim property was void against the
Official

Assignee was not in issue before me nor was the Official Assignee a party before
me. I

therefore make no finding on whether the 1st Defendant's gift to the 2nd
Defendant of half

share in the Nassim property is void or not and confine my findings in relation
to the

Nassim property as to what the respective interests therein were between the 1st
Defendant

and the 2nd Defendant inter se.

33 24. On the preliminary issue as it relates to the Nassim property I
therefore find that

the 2nd Defendant was at all material times owner of half the legal and beneficial

interest in the Nassim property.

34 25. On the issue of costs, as my findings herein are on a preliminary issue, I reserve

the question of the costs of this hearing to the Court hearing the trial of this action.

Purely for the assistance of that Court and without in any way seeking to trammel its

discretion in the matter, I add that my findings on the preliminary issue are essentially

as claimed by the 2nd Defendant and if it was the only issue to be tried in this action, I

would have awarded the 2nd Defendant costs against the Plaintiffs, such costs to be taxed

if not agreed.

35 C.R. RAJAH

36 JUDICIAL COMMISSIONER

C R Rajah JC

Christopher Chuah with Tan Liam Beng (Drew & Napier) for the
plaintiffs
Siaw Kheng Boon with Fan Kin Ning (Tang & Company) for the 2nd
defendant
