Hannah Kam Zhen Yi v Tan Sri Dato' Kam Woon Wah & Anor and another appeal [2020] MLJU 1287

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COURT OF APPEAL (PUTRAJAYA)

KAMARDIN HASHIM, ABUL KARIM ABDUL JALIL AND MOHAMAD ZABIDIN MOHD DIAH JJCA

CIVIL APPEAL NO.: W-02(IM)(NCVC)-1165-05/2018 AND CIVIL APPEAL NO.: W-02(IM)(NCVC)-1236-06/2018

16 July 2020

Mathew Thomas Philip (Voon Su Huei, with him) (Thomas Philip) Irzan Iswatt (Haniff Khatri) for the Appellant/Defendant.
Dato' Sri Gopal Sri Ram (Y.C. Wong, David Yii and Marcus Lee, with him) (Y.C. Wong) for the Respondent/Plaintiff.

Kamardin bin Hashim JJCA:

JUDGMENTIntroduction

[1]There were two appeals before us, both originated from the same Civil Suit No. WA-22 NCVC-140-03/2018 filed at the High Court at Kuala Lumpur. Both appeals were against the decision of the High Court given on the 14.5.2018 in allowing the 1st Respondent/Plaintiff's application to extend private Caveat No. PDB 1628/2018 ('the impugned Caveat') lodged by the 1st Respondent/Plaintiff against a property held under Grant No. 36830 for in Lot 4837 Mukim Batu, Daerah Kuala Lumpur with a bungalow addressed at No. 1, Persiaran Bukit Tunku, Bukit

Tunku, 50480 Kuala Lumpur ('the said Property') until the disposal of the 1st Respondent/ Plaintiff's suit.

[2]We heard the appeals on 22 June 2020. After hearing the parties and taking into consideration the written and oral submissions, we dismissed the appeals and affirmed the decision of the High Court. Our reasons for doing so now follow.

[3]For ease of reference, the parties will be referred to in this judgment as they were in the High Court.

The Background Facts

[4]The said Property was originally belonged to Akay Holdings Sdn Bhd. It was then sold and transferred to Lead Enterprises Sdn Bhd ('Lead') for the consideration of RM12,000.000.00. The Plaintiff and his biological son, Dato' Sri Andrew Kam Tai Yeow ('Andrew Kam'), were the only shareholders and directors of Lead.

[5]It is to be noted that the Plaintiff is the biological grandfather of the 1st Defendant, she being the biological daughter of Andrew Kam.

[6]It's an undisputed fact that Lead was indebted to the Plaintiff. At the request of the Plaintiff, Lead was agreeable to settle the debt by transferring the said Property to the Plaintiff and/or his nominee. The Plaintiff nominated the 1st Defendant as the recipient of the said Property, in full and final settlement of the debt owed to him by Lead. This was made possible pursuant to a Deed of Gift dated 31.5.2017 and a Settlement Agreement signed between the Plaintiff and Lead on the even date.

[7]Pursuant to the Deed of Gift, the Plaintiff declares that he wilfully and voluntarily makes a gift of the said Property to the 1st Defendant absolutely in consideration of the love and affection between a grandfather and a granddaughter. Subsequently on 6 July 2017, the 1st Defendant became the sole registered proprietor of the said Property.

[8]On or around 26 January 2018, the 1st Defendant entered into a sale and purchase agreement ('the SPA') with the 2nd Defendant and sold the said Property to him for valuable consideration. Thereby, in order to protect his interest, the 2nd Defendant entered a private

Caveat against the said Property sometime or around 20 January 2018. The 2nd Defendant subsequently discovered that the Plaintiff had entered a caveat (impugned Caveat) against the said Property on or around 9 February 2018.

[9]The 2nd Defendant then filed an application to the Registrar of Land Title, Kuala Lumpur ('the Registrar') to remove the impugned Caveat pursuant to section 326(1) of the National Land Code (NLC). A notice under section 326(1A) of the NLC was issued by the Registrar to the Plaintiff ('the Notice'). Pursuant to which the impugned Caveat would lapse within the period of two (2) months from the date of service of the Notice, or until such further period as the Court ordered.

[10]Subsequently on 21 March 2018, the Plaintiff filed the present suit against the 1st Defendant and the 2nd Defendant seeking for, *inter alia*, a retransfer of the said Property back to him. The Plaintiff claimed that the gift of the said Property to the 1st Defendant had been conditional on the 1st Defendant not using the said Property or allowing the said Property to be used to help her father, Andrew Kam, against the Plaintiff due to the acrimonious relationship between both of them. The 1st Defendant filed a counterclaim for damages for *inter alia*, the tort of abuse of process. The suit is still pending at the Court below.

[11]Pending trial, on 30 March 2018, the Plaintiff filed an application under section 326 NLC in Enc. 7 for the extension of the impugned Caveat with supporting affidavit alleging that:

(a) he had a caveatable interest in the said Property;

(b) there was a serious question to be tried; and

(c) the balance of convenience favoured the extension of the impugned Caveat.

At the High Court

[12]The learned High Court Judge ('the learned Judge') after considering and perusing the Plaintiff's application and all the affidavits filed by all parties, was satisfied that the Plaintiff had discharged his burden to prove that the gift was subject to an oral agreement/condition as alleged by the Plaintiff. Relying on the affidavits evidence, the learned Judge accepted the facts that Andrew Kam, the father of the 1st Defendant, was having a financial difficulty and was

having an acrimonious relationship with the Plaintiff prior to the transfer of the said Property to the 1st Defendant as a gift from the Plaintiff.

[13]The learned Judge further found that it is reasonable to infer that the Plaintiff had imposed the oral agreement/condition on the gift. The learned Judge opined that this agreement/condition had been supported and further fortified by the affidavit of Kam Lee Ching, the Plaintiff's own sister. The learned Judge accepted the affidavit evidence of Kam Lee Ching and found that there was no reason for him to reject the same.

[14]The learned Judge was of the view that based on decided cases, an evidence of the alleged oral agreement/condition is not totally disallowed under section 92 of the Evidence Act, 1950, especially for the purpose of deciding on interlocutory application such as the present application under section 326 NLC.

[15]The learned Judge holds that the Plaintiff had a caveatable interest on the said Property and has a *locus standi* to apply for an extension of the impugned Caveat. Based on the affidavit evidence, the learned Judge was satisfied that there are serious questions to be tried in the main suit including the alleged oral agreement/condition, financial status of Andrew Kam, the 1st Defendant's father and on the validity of the SPA to the 2nd Defendant.

[16]Finally, the learned Judge was of the view that on balance of convenience, the *status quo* of the said Property should be maintained and preserved until the final disposal of the main suit. Without that order, the said Property is bound to be retransferred to a third party. That will prejudice the Plaintiff as he could lose the said Property forever before the main suit been finally disposed off.

The Appeal

[17]Before us, learned counsel for the 1st Defendant canvassed the same arguments in trying to convince us that the learned Judge had fallen into error in allowing Enc. 7 and therefore, the appeals ought to be allowed. It was argued before us that the learned Judge had misapplied the legal principles governing the granting of an extension of the impugned Caveat under the NLC. Learned counsel relied on the three tests in determining whether or not a caveat should remain

on the register as explained by this Court in *Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng & Anor* [1995] 1 MLJ 719.

[18]Learned counsel for the 1st Defendant raised the following two issues in the appeal. The first issue was that the Plaintiff has no caveatable interest in the said Property. The second issue raised was that the learned Judge had gone beyond the scope of his jurisdiction in going into the merits of the suit.

[19]Learned counsel for the 2nd Defendant canvassed almost similar issues raised by learned counsel for the 1st Defendant. The learned counsel for the 2nd Defendant even went further into the merit of the main suit. But, nevertheless, learned counsel solely relied and adopted in total the oral submissions of learned counsel for the 1st Defendant.

[20]It is trite that an appellate Court will not interfere with the discretion exercised by the lower Court unless it is satisfied that the discretion has been exercised on a wrong principle or that there has been a miscarriage of justice. The appellate Court may intervene against the decision of the Court below if the impugned decision was plainly wrong. The Federal Court in *Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd* [2015] 2 CLJ 453 had succinctly explained the law at page 476:

> "[60] It is now established that the principle on which an appellate court could interfere with findings of fact by the trial court is "the plainly wrong test" principle; see the Federal Court in *Gan Yook Chin & Anor (P) v. Lee Ing Chin @ Lee Teck Seng & Anor* [2004] 4 CLJ 309; [2005] 2 MLJ 1 (at p. 10) per Steve Shim CJ SS. More recently, this principle of appellate intervention was affirmed by the Federal Court in *UEM Group Berhad v. Genisys Integrated Engineers Pte Ltd* [2010] 9 CLJ 785 where it was held at p. 800:
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> > It is well settled law that an appellate court will not generally speaking, intervene with the decision of a trial court unless the trial court is shown to be plainly wrong in arriving at its decision. A plainly wrong decision happens when the trial court is guilty of no or insufficient judicial appreciation of evidence. (See *Chow Yee Wah & Anor v. Choo Ah Pat* [1978] 1 LNS 32; *Watt v. Thomas* [1947] AC 484; and *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309)."

[21]Similarly in *Vasudevan v. T. Damodaran & Anor* [1981] 2 MLJ 150, the Federal Court through the judgment of Abdool Cader J. said:

> "There is a catenation of cases on this point and it will suffice to cull and refer to a few which restate the well-settled

principles. An appellate court can review questions of discretion if it is clearly satisfied that the judge was wrong but there is a presumption that the judge has rightly exercised his discretion and the appellate court must not reverse the judge's decision on a mere "measuring cast" or on a bare balance as the mere idea of discretion involves room for choice and for differences of opinion (*Charles Osenton & Co. v. Johnston* at page 148 per Lord Wright). The Privy Council held in *Ratnam v. Cumarasamy & Anor* that an appellate court will not interfere with the discretion exercised by a lower court unless it is clearly satisfied that the discretion had been exercised in a contrary way or that there has been a miscarriage of justice, referring to *Evans v. Bartlam.*

The House of Lords, approving the decision of the English Court of Appeal in *Ward v. James*, held to the same effect in *Birkett* (at pages 317, 326). For good measure, we would refer to the felicitous expression of Goulding J., in *Re Reed (a debtor)* on this point (at page 25):

> "… the duties of an appellate court in such a matter as this are, in my judgment, confined to those normally exercisable where the lower court has a discretion, that is to say, we are not justified in setting aside or varying an order simply because we may think we might have come to a different conclusion ourselves on similar material. We can only interfere if either we can see that the court below has applied a wrong principle, or has taken into account matters that are in law irrelevant, or has taken into account matters that are in law irrelevant, or has excluded matters that it ought to have taken into account, or otherwise that no court, properly instructing itself in the law, could have come to the conclusion which in fact was arrived at."

[22]Instances where appellate intervention were warranted had been articulated by this Court in *Perembun (M) Sdn Bhd v. Conlay Construction Sdn Bhd* [2012] 4 MLJ 149, at page 154 , as follows:

> "[7] There is almost no limit to the range within which cases in court may vary. At one end there are cases that involve solely questions of law, and no facts are disputed. On the other there are cases that involve no law but all the facts are disputed. Within these cases there may be cases with disputed facts that involve solely interpretation and inferences leading to a conclusion on a finding on the disputed fact, and there may be other cases with disputed facts that involve solely oral evidence and the finding depends entirely upon an assessment of the credibility of witnesses who testified and were tested before the trial judge.
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> [8] Hence, the proper approach is that if (a) it is shown that the judgment cannot be explained or justified by the special advantage enjoyed by the trial judge by reason of having seen and heard the witnesses testify and being tested before him, and (b) an injustice is demonstrated to have been occasioned by any error by the trial judge, for example:
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> (a) The judgment is based upon a wrong premise of fact or of law;
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> (b) There was insufficient judicial appreciation by the trial judge of the evidence of circumstances placed before him;
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> (c) The trial judge has completely overlooked the inherent probabilities of the case;
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> (d) That the course of events affirmed by the trial judge could not have occurred;

(e) The trial judge had made an unwarranted deduction based on faulty judicial reasoning from admitted or established facts; or

(f) The trial judge had so fundamentally misdirected himself that one may safely say that no reasonable court which had properly directed itself and asked the correct questions would have arrived at the same conclusion;

an appellate court will intervene to rectify that error so that injustice is not occasioned.

[9] Thus, an appellate court cannot simply substitute the decision of the trial court with one of its own on any ground at will ……"

[23]As alluded to earlier, the main issue posited by learned counsel for the 1st Defendant before us was that the Plaintiff had no caveatable interest over the said Property. It was argued that the said Property was directly transferred to the 1st Defendant and was never transferred and registered in the Plaintiffs' name. Both the Settlement Agreement and the Deed of Gift stipulated that Lead was the registered and beneficial owner of the said Property before being transferred in the 1st Defendant's name. Therefore, the Plaintiff was never the legal and/or beneficial owner of the said Property. Thus, there is no basis for the Plaintiff to claim any caveatable interest over the said Property.

[24]The second point raised by learned counsel on the same issue on caveatable interest was that the said Property was given to the 1st Defendant as an absolute gift as it was transferred to her in consideration of love and affection. It was argued that the 1st Defendant was thus free to deal with the said Property at her discretion and will. Learned counsel relied on the Federal Court decision of *Jasbir Kaur & Anor v. Thavumber Singh* [1974] 1 MLJ 224 where it was held:

"Mr. Devaser prepared a document of transfer with the first defendant as the transferee and trustee for the child. Both Plaintiff and first defendant signed the documents. The transfer was for love and affection. In other words it was a gift."

[25]The third and final point raised by Mr. Matthew Thomas Philip on behalf of the 1st Defendant was that the purported oral agreement/ condition raised by the Plaintiff was inherently improbable if not impossible given the clear and unambiguous terms of the Deed of Gift and the Settlement Agreement. The 1st Defendant had all along denied the existence of the said purported oral agreement/condition. Learned counsel relied in the High Court decision of *Shahmi Anand B Shah v. Balendram & Ors. v. Susilah Devi a/p S Vallipuram* [2010] 4 MLJ 64, at pages 74-75:

"[14] Be that as it may, 'my property' if any even for the sake of argument must surely refer to any property which the deceased had owned at the material time on 3 January 2001. The deceased could not have referred to the said land which was not owned by him and where in fact had been transferred to the defendant and registered in her name absolutely about seven years ago on 8 February 1994 unless the said land was specifically described in P2. At this stage, it is important to note that the deceased being a senior member of the BAR which is not denied, if he had any intention or at all to give the said land to the plaintiff, he could have reduced into writing or at least said in clear terms to the effect that the said land was transferred to the defendant to be held in trust for the plaintiff. Alternatively, the deceased could have also transferred the said land to himself as trustee for the plaintiff as the same is recognised and valid under the Islamic law. Unfortunately, there was no explanation or any satisfactory explanation why the alleged trust was not reduced into writing or transferred to the deceased as trustee for the plaintiff except for the bare evidence produced by PW3, PW4, PW5 and PW6 that the deceased had said that the house is for the plaintiff and that members of the Kuantan Club and the whole town knew that the said land was for the plaintiff as testified by PW5. The deceased being a lawyer and not a layman had executed Form 14A (exh P5 (A-O)) in favour of the defendant and it was an unequivocal transfer of the said land and this is confirmed by PW2."

[26]Learned counsel concluded that given the above consideration, the 1st Defendant prays that this appeal be allowed as the 1st Defendant's title and interest in the said Property is indefeasible. Thus, the Plaintiff has no basis to claim a caveatable interest and accordingly, the impugned Caveat would not serve any purpose.

[27]The law in this regard is well-established. Both parties, as well as the learned Judge, referred to and relied on the test as stipulated in **Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng & Anor** (supra) where this Court laid down a three-stage test which a Court should go through when evaluating whether a caveat ought to be removed or allowed to remain on land. The three-stage test had been summarised by this Court in *Murugappa Chettiar Lakshmanan v. Lee Teck Mook* [1995] 1 MLJ 782 as follows:

"In the resolution of this issue, reference may be made to the recent decision of this court in *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor* Civil Appeal No W-02-38-94, yet unreported [since reported in [1995] 1 MLJ 719]. We there attempted to collect some of the relevant authorities and to restate the law on the subject. In particular, we enumerated the three steps or stages through which a caveator must pass in order to sustain his caveat. We do not propose to repeat what was said in that case with regard to interests that are caveatable and to the approach that a court should take when deciding whether a caveat should remain or be removed.

The principles formulated in *Luggage Distributors* as applied to the present appeal require an investigation into the following matters. First, whether the respondent, on the material set out by him in his application under s 323 (1) of the Code, has disclosed a caveatable interest. Secondly, if he has established a caveatable interest, then, whether the evidence he produced before the learned judicial commissioner in support of his claim to that caveatable interest discloses a serious question to be tried. Lastly, if the first two questions are resolved in the respondent's favour, then, whether the balance of

convenience, or more appropriately, the balance of justice, lies in favour of the Caveat remaining on the register pending the disposal of the suit."

[28]The onus lies on the Plaintiff to satisfy the Court that on the evidence presented, in this case through the affidavits filed by the parties, that his claim to an interest in the said Property did raise a serious question to be tried and having done so, he must go on to show that on the balance of convenience it would be better to maintain the status quo until the disposal of the main suit.

[29]In this connection, we found that the learned Judge had accepted the affidavit evidence that there was an oral agreement/condition between the Plaintiff with the 1st Defendant that the said Property should not or would not be used to help Andrew Kam, the 1st Defendant's father. The learned Judge, in our view, correctly decided that the Plaintiff has caveatable interest in the said property. This can be further fortified through the evidence of witnesses to be adduced later at the trial proper.

[30]We agreed with the learned Judge's finding that the oral agreement/ condition is admissible under section 92 of the Evidence Act 1950 under the circumstances prevailing in this case. The proposition had been decided by the Federal Court in **Tan Chong & Sons Motor Co. (Sdn) Bhd v. Alan Mc Knight** [1983] 1 MLJ 220, at page 229:

"There is this rule of evidence contained in section 92 of the Evidence Act to the effect that no oral evidence will be admissible to contradict, vary, add or subtract the terms of a written agreement unless the oral evidence comes within one of the exceptions or illustrations contained in the section. Counsel for the appellants therefore submitted that the representations having been orally made, whilst the agreement, namely the Order, being in writing, the representations were therefore not admissible. The case of *Wong Wai Cheng v. A.G. Singapore* was referred to in the court below as an authority for the submission. That case, however, dealt with an attempt by a party to the contract to prove an implied term which would affect the terms of the written contract by relying upon pre-contract negotiations and statements. But the primary purpose – rather the dominant purpose – of proving the pre-contract statements in the case under the present appeal was not to contradict, vary, add or subtract the terms of the Order, but to prove the existence of a warranty, a separate contractual promise, although such proof resulted in a conflict between the warranty and the terms of the contract subsequently entered into. Such proof is obviously allowed by the provisions (b) and (c) and also illustrations (d), (g) and (h) of section 92. Perhaps, a short answer to the objection can be given in that the prohibition against admissibility of evidence under section 92 only applies where all – as opposed to some only – of the terms of the contract are written into the agreement. Thus where some terms are given orally and some in writing, oral evidence could be given to prove the terms agreed to orally. The expression "When the terms of any such contract" at the beginning of section 92 must be read to mean "When *all* the terms of any such contract". *Damu Jadhao v. Paras Nath Singh."*

[31]Without going into the merit, we agreed with learned counsel for the Plaintiff's submission that once the conditions of the gift failed or unfulfilled, no matter the condition is one to be performed before the gift takes effect or after the gift has taken effect, the gift will be put to an end. When the 1st Defendant breaches the said condition, the gift will come to an end and the 1st Defendant will hold the property on trust for the Plaintiff. By claiming the title to the said Property, thus his application has disclosed a caveatable interest as envisaged under section 323 (1)(a) of the NLC. Therefore it is our considered view that the 1st Defendant's title and interest in the said Property can be challenged and was defeasible.

[32]With respect to the second issue raised by the learned counsel for the 1st Defendant viz. the learned Judge had gone beyond the scope of its jurisdiction by going into the merits of the suit, with respect, we disagree. In order to determine whether or not there are serious questions to be tried as well as on the issue on balance of convenience, the learned Judge has to consider the affidavit evidence filed by both parties. Whether the existence of the so called oral agreement or condition itself is a serious question to be tried. Kam Lee Ching who was present when the 1st Defendant agreed to the condition has affirmed an affidavit. She has to be called to give evidence in Court. This issue could not be resolved by affidavit evidence.

[33]Whether the 1st Defendant has breached the oral agreement/ condition is in our mind another serious question to be tried and could not be resolved by affidavit evidence. Another serious question is surely whether the agreement entered into between the 1st Defendant and the 2nd Defendant is a sham sale and purchase agreement or a money-lending transaction. Likewise, whether the entire agreement clause applies to the gift which require full argument and mature consideration after a trial on merits. We are of the view that the learned Judge did not err when he came to the conclusion that the balance of convenience is in favour of the Plaintiff to preserve the status quo of the said Property pending the disposal of the main suit.

Conclusion

[34]In the circumstances, and for the reasons we have given, we were of the view that both the appeals were without merit. The appeals were therefore dismissed. We ordered the costs will be in the cause as agreed by the parties. The order of the High Court was affirmed.

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