## Datuk M Kayveas v See Hong Chen & Sons Sdn Bhd & Ors

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02–10–2012(W)
RAUS SHARIF PCA, ZULKEFLI CJ (MALAYA), SURIYADI, AHMAD MAAROP AND JEFFREY TAN FCJJ
15 JANUARY 2013

*Civil Procedure — Appeal — Appeal to Court of Appeal — Subject of appeal — Interference — Whether interference justified — Issue of breach of bare and constructive trust — Whether trustee in breach of trust — Whether conduct conscionable — Whether constructive trust created when shares transferred out to third party*

The appellant had appeared in a representative capacity for a political party ('PPP') and had incorporated the fifth defendant to function as PPP's investment arm. In 2003, the appellant made a successful bid for an auctioned property and paid a 10% deposit and the appellant obtained a friendly loan of about RM2.4m from the first defendant to complete the payment and had paid the full purchase price of the property through the fifth defendant, the registered proprietor of the property. As security for the loan, the appellant transferred the shares in the fifth defendant to the first defendant on trust, until the full payment of the loan. Despite being a mere trustee, the first defendant proceeded to increase the fifth defendant's shares from two to 100,000, allotted 99,998 of the shares to himself and the balance two to his nominees, the second and third defendants, and appointed them as directors of the fifth defendant. In November 2005, the first, second and third defendants disposed the fifth defendant's shares to the fourth defendant for RM2.5m. The fourth defendant allotted two of the latter's 100,000 shares to the sixth and seventh defendants respectively. In July 2008, the fourth defendant, seeking to oust the appellant from the property, commenced a trespass action. The appellant submitted that the first defendant was in breach of the trust when he transferred the fifth defendant's shares to the fourth defendant, and that the sale of the shares to the fourth defendant was void. The appellant applied to the High Court, inter alia, for declarations which was granted by the same. The High Court judge held that: a trust was created when the appellant transferred the shares of the fifth defendant to the first defendant; the trust had transformed into a constructive trust when the first defendant had unconscionably transferred them to the fourth defendant who had notice of the trust; and such a constructive trust was equally applicable to the fourth, fifth, sixth and seventh defendants ('the collective respondents'). The collective respondents appealed against the decision and the Court of Appeal allowed the appeal and set aside the orders of the High Court. It was the Court of Appeal's view that no express trust existed

in 2003 by way of transfer of the two shares in the fifth defendant to the first defendant, and therefore, since the appellant's pleaded case was essentially premised on the existence of an express trust, the appellant's case must necessarily fail. The appellant averred that the Court of Appeal was wrong in adverting to express trust the way it did, as the matter of the existence or otherwise of an express trust was never an issue before that court, nor was it ever being pleaded by him. Hence, the appellant applied for and having obtained leave to appeal, submitted the issues to the present court on whether the Court of Appeal, in determining the appeal before it, had the jurisdiction to interfere with part of the judgment of the judge not forming the subject of the appeal; whether when a moveable property that was held on trust was disposed to a third party in breach of the trust, the said third party was entitled to title if it was a bona fide purchaser for value without notice; and whether it was incumbent for such third party bona fide purchaser for value without notice to establish that consideration had in fact moved from him to the vendor.

**Held,** allowing the appeal with costs:

(1) There was nothing in the appellant's statement of claim to indicate that the appellant had pleaded 'express trust'. The statement of claim merely stated 'trust'. The finding by the Court of Appeal that the judge had made a finding of the existence of an express trust, and that the first defendant was the express trustee of the entire 100,000 shares, was also erroneous. There was nothing in the judge's grounds of judgment that indicated a finding of fact or law that the first defendant was the express trustee of the shares (see para 20).

(2) A perusal of the memorandum of appeal regarding the trust showed that it pertained more to the dissatisfaction of want of evidence. Even the collective respondents conceded that they were found to be constructive trustees by the judge — and not trustees of an express trust. The Court of Appeal in deciding the way it did had thus gone outside the four corners of the memorandum of appeal (see para 24).

(3) The first defendant was merely instructed to hold on to the shares pending the full repayment of the loan, and was never granted the power of disposal by the appellant of those shares. Once payment was completed, the shares were to be returned. It was obvious that at the initial stage only a bare trust existed as the first defendant had no active duty to perform (see para 39).

(4) It was improbable that full repayment to the first defendant would not have taken place as gleaned from the facts. The appellant was an established body and was housed on that property. A sum of RM1.8m had already been paid enforcing the certainty of the fulfilment of the appellant's obligation towards full payment of the loan. The instruction to hold it on trust and not to dispose the shares was made crystal clear by

the appellant to the first defendant, and it was obvious that factually and legally the appellant never abandoned its beneficial interest. The first defendant had thus acted unconscionably when he transferred the shares to the fourth defendant. At the instance when the wrongful act was committed by the first defendant, a constructive trust came into existence (see para 40).

(5) There was no evidence adduced by the collective respondents to show that monies had been paid to the first, second and third defendants for the shares of the fifth defendant. In fact, there was corroboration of non-payment when the second and third defendants, who were directors of the fifth defendant, evinced that they did not receive any money for the transfer of their shares to the fourth defendant (see para 44).

(6) The court was convinced that the shares of the fifth defendant had been transferred by the appellant in 2003 to the first defendant on trust. The latter being bereft of any title or interest could not transfer the shares to anyone, and a constructive trust came into existence the moment the shares were transferred to the collective respondents who had notice of the trust. It ought also to be noted that although the collective respondents purchased the shares from the first defendant, and not from the appellant, the hurdle of privity of contract could be overcome by enforcing equity on the former, in the light of them having notice of the creation of the trust (see paras 46–47).

**[Bahasa Malaysia summary**

Perayu telah hadir dalam kapasiti sebagai wakil untuk parti politik ('PPP') dan telah memasukkan defendan kelima untuk berfungsi sebagai cabang pelaburan PPP. Pada 2003, perayu telah membuat bidaan yang berhasil mendapatkan hartanah yang telah dilelong dan telah membayar deposit 10% dan perayu telah memperoleh pinjaman lebih kurang RM2.4 juta daripada defendan pertama untuk menyelesaikan bayaran dan telah membayar harga belian penuh hartanah melalui defendan kelima, tuan punya berdaftar hartanah itu. Sebagai cagaran pinjaman itu, perayu telah memindahkan saham dalam defendan kelima kepada defendan pertama atas amanah, sehingga bayaran penuh pinjaman. Walaupun hanya sebagai pemegang amanah, defendan pertama telah menambah saham defendan kelima daripada dua kepada 100,000, memperuntukkan 99,998 saham itu kepada dirinya sendiri dan baki dua itu kepada penamanya, defendan kedua dan ketiga, dan melantik mereka sebagai pengarah-pengarah kepada defendan kelima. Pada November 2005, defendan-defendan pertama, kedua dan ketiga telah menjual saham defendan kelima kepada defendan keempat untuk RM2.5 juta. Defendan keempat memperuntukkan dua saham 100,000 defendan kelima kepada defendan-defendan keenam dan ketujuh masing-masingnya. Pada Julai 2008, defendan keempat memohon untuk menyingkirkan perayu daripada hartanah itu dengan memulakan tindakan pencerobohan. Perayu berhujah bahawa

defendan pertama telah melanggar amanah apabila dia memindah saham defendan kelima kepada defendan keempat, dan bahawa jualan saham kepada defendan keempat adalah tidak sah. Perayu memohon ke Mahkamah Tinggi, antara lain, untuk deklarasi-deklarasi yang diberikan. Hakim Mahkamah Tinggi memutuskan bahawa: amanah dibuat apabila perayu memindah saham defendan kelima kepada defendan pertama; amanah itu telah bertukar menjadi amanah konstruktif apabila defendan pertama memindahkannya kepada defendan keempat yang mempunyai notis amanah itu; dan amanah konstruktif sebegini sama terpakai kepada defendan-defendan keempat, kelima, keenam dan ketujuh ('responden kolektis'). Responden kolektif telah merayu terhadap keputusan itu dan Mahkamah Rayuan membenarkan rayuan itu dan mengetepikan perintah-perintah Mahkamah Tinggi. Adalah pandangan Mahkamah Rayuan bahawa tiada amanah nyata yang wujud pada 2003 melalui pemindahan dua saham dalam defendan kelima kepada defendan pertama, dan oleh itu oleh kerana kes yang dipli perayu berasaskan kewujudan amanah yang nyata, kes perayu patut gagal. Perayu menegaskan bahawa Mahkamah Rayuan terkhilaf dalam memutuskan amanah yang nyata sebegitu, kerana perkara yang wujud atau sebaliknya berhubung amanah yang nyata itu tidak pernah menjadi isu di hadapan mahkamah, mahupun ia pernah dirayu olehnya Justeru, perayu dengan memohon untuk dan telah memperoleh kebenaran untuk merayu, berhujah isu-isu ke mahkamah ini berhubung sama ada Mahkamah Rayuan, dalam menentukan rayuan di hadapannya, mempunyai bidang kuasa untuk campur tangan dengan sebahagian daripada penghakiman hakim kerana tidak membentuk hal perkara rayuan; sama ada apabila hartanah boleh alih yang dipegang atas amanah dijual kepada pihak ketiga melanggar amanah itu, pihak ketiga tersebut berhak memilikinya jika ia adalah pembeli berniat baik untuk nilai tanpa notis; dan sama ada ia sedia ada untuk pembeli pihak ketiga berniat baik untuk nilai tanpa notis membuktikan bahawa pertimbangan itu pada hakikatnya telah beralih daripadanya kepada penjual.

**Diputuskan**, membenarkan rayuan dengan kos:

(1) Tiada apa dalam penyataan tuntutan perayu untuk menunjukkan bahawa perayu telah mempli 'express trust'. Penyataan tuntutan hanya menyatakan 'trust'. Penemuan oleh Mahkamah Rayuan bahawa hakim telah membuat penemuan tentang kewujudan amanah yang nyata, dan bahawa defendan pertama adalah pemegang amanah yang nyata untuk keseluruhan 100,000 saham itu, juga salah. Tiada apa-apa dalam penghakiman hakim untuk menunjukkan penemuan fakta atau undang-undang bahawa defendan pertama adalah pemegang amanah yang nyata untuk saham tersebut (lihat perenggan 20).

(2) Penelitian memorandum rayuan berkaitan amanah itu menunjukkan bahawa ia lebih berkenaan ketidakpuasan menghendaki keterangan. Walaupun responden kolektif mengakui bahawa mereka merupakan

pemegang amanah konstruktif oleh hakim — dan bukan pemegang amanah untuk amanah yang nyata. Mahkamah Rayuan dalam membuat keputusan sebagaimana dilakukannya telah menjangkau luar daripada memorandum rayuan itu (lihat perenggan 24).

(3) Defendan pertama hanya mengarahkan untuk memegang saham itu sementara menunggu bayaran balik penuh pinjaman, dan tidak pernah memberi kuasa untuk menjual oleh perayu terhadap saham-saham tersebut. Setelah bayaran selesai, saham itu patut dikembalikan. Adalah nyata bahawa di peringkat awal hanya amanah biasa wujud kerana defendan pertama tiada kewajipan aktif untuk dilaksanakan (lihat perenggan 39).

(4) Adalah mustahil bahawa bayaran balik penuh kepada defendan pertama tidak berlaku seperti yang terdapat dalam fakta. Perayu merupakan badan yang ditubuhkan dan berasaskan hartanah itu. Sejumlah RM1.8 juta telahpun dibayar untuk menguatkuasakan kepastian pelaksanaan tanggungjawab perayu terhadap bayaran penuh pinjaman itu. Arahan untuk memegangnya atas amanah dan bukan dijual sahamnya jelas dibuat oleh perayu kepada defendan pertama, dan adalah jelas bahawa secara fakta dan daripada segi undang-undang perayu tidak pernah mengabaikan kepentingan benefisiarinya. Defendan pertama dengan itu telah bertindak tidak berpatutan apabila dia memindahkan saham itu kepada defendan keempat. Di mana perbuatan salah dilakukan oleh defendan pertama, amanah konstruktif telah wujud (lihat perenggan 40).

(5) Tiada keternagan dikemukakan oleh responden kolektif untuk menunjukkan bahawa wang telah dibayar kepada defendan-defendan pertama, kedua dan ketiga untuk saham defendan kelima. Bahkan, terdapat sokongan tiada pembayaran apabila defendan-defendan kedua dan ketiga, yang merupakan pengarah-pengarah defendan kelima, memperlihatkan bahawa mereka tidak menerima apa-apa wang dari pemindahan saham mereka kepada defendan keempat (lihat perenggan 44).

(6) Mahkamah yakin bahawa saham defendan kelima telah dipindahkan oleh perayu pada tahun 2003 kepada defendan pertama atas amanah. Defendan pertama yang dinafikan apa-apa hak milik atau kepentingan tidak boleh memindahkan saham itu kepada sesiapa, dan amanah konstruktif dengan itu wujud pada masa saham itu dipindahkan kepada responden kolektif yang mempunyai notis amanah itu. Ia juga patut ditekankan bahawa meskipun responden kolektif yang membeli saham itu daripada defendan pertama, dan bukan daripada perayu, halangan priviti kontrak boleh diatasi dengan menguatkuasakan ekuiti ke atas yang terdahulu, berdasarkan notis yang terbentuk daripada amanah itu (lihat perenggan 46–47).]

**Notes**

For cases on appeal to Court of Appeal, see 2(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 901–915.

**Cases referred to**

*Bar Malaysia v HF Vitality (Malaysia) Sdn Bhd* [2003] 3 MLJ 143; [2003] 1 CLJ 510, HC (refd)
*Berry v British Transport Commission* [1961] 3 All ER 65, CA (refd)
*Christie v Ovington* (1875) 1 Ch D 279, Ch D (refd)
*Cunningham and Frayling, Re* [1891] 2 Ch 567, Ch D (refd)
*De Mattos v Gibson* (1843–60) All ER Rep 803, CA (refd)
*Foskett v McKeown & Anor* [2000] 3 All ER 97, HL (refd)
*Gissing v Gissing* [1970] 2 All ER 780, HL (refd)
*Hussey v Palmer* [1972] 3 All ER 744, CA (refd)
*Lord Strathcona Steamship Co Ltd v Dominion Coal Co Ltd* [1926] AC 108, PC (refd)
*Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281, CA (refd)
*Paragon Finance Plc v DB Thakerar & Co* [1999] 1 All ER 400, CA (refd)
*Pekan Nenas Industries Sdn Bhd v Chang Ching Chuen & Ors* [1998] 1 MLJ 965; [1998] 1 CLJ 793, FC (refd)
*Takako Sakao (f) v Ng Pek Yuen (f) & Anor* [2009] 6 MLJ 751; [2010] 1 CLJ 381, FC (refd)
*Tulk v Moxhay* [1843–60] All ER Rep 9 (refd)
*Westdeuthsche Landesbank Gironzentrale v Islington London Borough Council* [1996] 2 All ER 961, HL (refd)

**Legislation referred to**

Courts of Judicature Act 1964 ss 67, 68, 96, 98

**Appeal from:** Civil Appeal No W-02 (NCC)-1183 of 2011 (Court of Appeal, Putrajaya)

*Malik Imtiaz Sarwar (M Menon and V Mugunthan with him) (Jaffar Menon) for the appellant.*
*Harpal Singh Grewal (Joseph Yeo, Paari Perumal and Reny Rao with him) (Joseph Yeo) for the respondent.*

**Suriyadi FCJ (delivering judgment of the court):**

**[1]** For ease of reference, the plaintiff who is intituled in the statement of claim as Datuk M Kayveas though on a representative capacity shall be referred to as the appellant. Parties agree that the actual appellant is a political party ie the People's Progressive Party of Malaysia ('PPP'). The first, second, and third defendants will be referred to in their respective original nomenclature as they

never filed any appeal at any stage of the way. The fourth, fifth, sixth, and seventh defendants (who are in the one camp), being the relevant respondents in this appeal, will be referred to collectively as the 'collective respondents'. Whenever necessary the specific persons will be referred to in their respective specific titles.

**[2]** The appellant filed an action against seven defendants and was successful at the High Court after a lengthy hearing. Being dissatisfied, only the collective respondents filed an appeal at the Court of Appeal. They succeeded and the High Court order was accordingly set aside. The next phase saw the appellant successfully obtaining leave to file an appeal against the decision of the Court of Appeal of 23 August 2011 and hence the matter before us.

**[3]** Leave was obtained pursuant to s 96 of the Courts of Judicature Act 1964 to determine these questions, namely:

(a) whether the Court of Appeal has the jurisdiction and/or power under ss 67 and 68 of the Courts of Judicature Act 1964 to interfere with a part of the judgment of the learned judge not forming the subject of an appeal in determining the appeal before it;

(b) where moveable property is held on trust and disposed to a third party in breach of the said trust, whether the said third party is entitled in law to claim title to such property where it is a bona fide purchaser for value without notice; and

(c) whether it is incumbent upon a party claiming to be a bona fide purchaser for value of immoveable property without notice to establish as a threshold requirement that consideration had in fact moved from the third party to the vendor.

**[4]** To appreciate the matter before us, it will not be inappropriate at the outset to state that the first defendant who is an important player in this case, has shown no interest in the outcome of the case at any stage of the way, even up to the current stage. He simply refused to defend his position or come forward to adduce evidence when subpoenaed by both parties. The second and third defendants being nominees of the first defendant likewise failed to file any appeal at the Court of Appeal, thus leaving only the 'collective respondents' to contest the appeal. As the fourth defendant is the alter ego of the fifth defendant ('a company'), and the sixth and seventh being his nominees, the fourth defendant's evidence will equally be applicable to them.

FACTS OF THE CASE

**[5]** Being interested in an auctioned piece of property known as Grant No

27024 Lot 522 of Section 69, in Kuala Lumpur, Wilayah Persekutuan ('the property'), and in which the appellant was housed since 1998, the appellant made a successful bid for it on 28 August 2003. A 10% deposit of the reserve price fixed at RM2,673,000 was paid by the appellant from its own funds through the fifth defendant. The fifth defendant which was incorporated as the investment arm of the appellant was the entity to hold the property. As far as the appellant was concerned, as there were only two subscriber shares in the fifth defendant and the appellant controlled them, not only did he own the company but would also have direct beneficial interest over the property.

**[6]** To complete the payment of the successful bid and in order to finance the purchase of the property, the appellant obtained a friendly loan of RM2,405,700 from the first defendant. On 26 December 2003 the balance purchase price of RM2,405,700 was paid to the assistant registrar at the Kuala Lumpur High Court financed adequately by that loan. The payment was similarly made through the fifth defendant and the property was then registered in its name. As security for that loan the appellant agreed that the shares in the fifth defendant be transferred to the first defendant on trust until the full repayment of the loan. Once full payment was achieved the shares in the fifth defendant would be transferred back to the nominees of the appellant. In the meanwhile the first defendant was prohibited from selling, disposing or transferring those entrusted shares at anytime to anyone or to any nominee; in a word he could do nothing with the shares except to hold and hand them over to the appellant when instructed.

**[7]** With control entrenched in the hands of the first defendant, once the shares were transferred to him even though on trust, sometime on 17 March 2005 he increased the number of shares from 2 to 100,000, with 99,998 shares for himself and the other two shares allotted each to the second and third defendants as nominees. Being nominees these two defendants were also appointed as directors of the fifth defendant. A further development was witnessed when on 29 November 2005 the first defendant (together with the second and third defendants), entered into a share sale and purchase agreement of the fifth defendant shares with the fourth defendant for an alleged sum of RM2,500,000. The effect was that the fourth defendant took over the running of the fifth defendant and by consequential progression, the property too.

**[8]** On 18 July 2008 the appellant realised something had gone awry when, after staying rent free on the property since 2003, and having paid taxes and assessments for it, received a notice for vacant possession from the fourth defendant ie the new owner of the fifth defendant. This was followed by a

trespass action against the appellant.

CASE FILED BY THE APPELLANT

**[9]** On 14 October 2010 the appellant commenced an action against all the defendants (seven altogether). In a nutshell, the case of the appellant as pleaded was that it entrusted shares of the fifth defendant into the hands of the first defendant as security for a loan given by the latter, to buy a piece of property. That property was subsequently registered in the name of the fifth defendant. The first defendant unfortunately breached the trust when it transferred and registered the shares of the fifth defendant, which was enriched by the property, to the fourth defendant. The fourth defendant concluded the contract despite having knowledge of the trust. Exercising his rights, out of the 100,000 shares the fourth defendant allotted two shares, one each for the sixth and seventh defendants.

**[10]** The appellant pleaded that it wanted the return of the shares on the premise that the sale of the shares to the fourth defendant was void in light of him knowing that the first defendant held the shares in trust for the appellant. The prayers sought by the appellant also included a declaration that the 29 November 2005 share sale agreement was null and void, the share transfer certificate dated 12 November 2007 transferring shares of the first, second and third defendants in the fifth defendant to the fourth defendant as void for misrepresentation, and that following the cancellation of the share sale agreement of 29 November 2005 the shares registered in the names of the sixth and seventh defendants be transferred back in the names of the appellant's committee members.

WHAT TRANSPIRED AT THE HIGH COURT

**[11]** The first defendant apart from not filing any appearance failed to appear in court to adduce evidence for the defendants despite being subpoenaed (and being consistent, has also shown no interest over this appeal). The second and third defendants in essence countered that they were mere nominees of the first defendant and were unaware of the appellant's rights. Their non-filing of any appeal at the Court of Appeal merely confirmed their lack of interest in the eventual outcome of the matter facing them.

**[12]** The 'collective respondents' countered that in 2003 the fourth defendant ('DW1') had given a friendly loan of RM2,405,700 to the first defendant though was eventually paid up. In 2005, the first defendant asked the fourth defendant to buy the fifth defendant, and after agreeing, bought the entire share capital of the company through a share sale and purchase agreement of 29 November 2005 for a sum of RM2,500,000. As far as the sixth

and seventh defendants were concerned they were mere nominees of the fourth defendant, and together with the latter, knew nothing of the alleged trust at the time of the transaction. In a gist their position was that the fourth defendant was a bona fide purchaser when he bought over the fifth defendant's shares from the first defendant and his nominees.

RELEVANT FINDINGS OF THE LEARNED JUDGE

**[13]** The learned judge found that a trust was created when the appellant transferred the shares in the fifth defendant to the first defendant. He accepted the appellant's submission that the doctrine of constructive trust had been established in the circumstances of the case and therefore also applicable against the 'collective respondents'. His words verbatim were as follows:

> I accept the submission of the plaintiff that the plaintiff has discharged the burden of proof on a balance of probabilities as to the existence of a trust via both documentary evidence as well as oral evidence and I accept the submission of the plaintiff *that the doctrine of constructive trust will be applicable in the instant case to provide the relief as prayed against the fourth, sixth and seventh defendants …* (Emphasis added.)

**[14]** From the above remarks the obvious conclusion is that a constructive trust came into existence when the first defendant unconscionably transferred the shares to the 'collective defendants'. The consequential effect was that as the 'collective respondents' had notice of the trust and therefore could not qualify as bona fide purchasers of the shares of the fifth defendant, they likewise became constructive trustees. More of this later. On that premise, the learned judge allowed the relief as prayed against them.

**[15]** The learned judge arrived at the constructive trust finding, whether against the first defendant or the 'collective respondents', as he believed the appellant's witnesses. He found them to be credible witnesses. Further, with the case of *Bar Malaysia v HF Vitality (Malaysia) Sdn Bhd* [2003] 3 MLJ 143; [2003] 1 CLJ 510 amongst others in mind, the learned judge considered the issue of trust or other issues as having been proved and admitted, in light of the first defendant's refusal to attend court; his non-appearance which left the appellant's witnesses evidence unrebutted strengthened the appellant's case.

TREATMENT OF DEFENCE WITNESSES

**[16]** The defence called four witnesses with the fourth and seventh defendants ('DW1 and DW2') being the relevant ones. Unfortunately their evidence was not looked upon favourably by the learned judge. A cause for concern had arisen regarding the credibility of DW1 as the learned judge came

across evidence of a complaint against him being involved in a disguised non-permissible money lending transaction with another group of people. He found the dismal information in an amendment application of the statement of claim, wherein it was divulged that a complaint was filed earlier with the Bar Council of his involvement in a similar kind of transaction, and applying the same modus operandi as the current case.

**[17]** Credibility apart, the 'collective respondents' defence failed to impress the learned judge in light of their uncorroborated testimony. The first defendant was a key player in the share sale and purchase agreement of 29 November 2005 and his failure to come to court left the fourth defendant's defence uncorroborated (and affected the rest of the 'collective respondents' defence). Had the first defendant been present and impressed upon the court of the fourth defendant's innocence pertaining to the existence of the trust his defence could have been more tenable. In the end, even the fourth defendant's defence that he was a bona fide purchaser completely fell on his bare testimony adduced in the course of the trial; and as said above the learned judge disbelieved him.

**[18]** Bearing in mind RM2,500,000 was a huge consideration sum for the shares of the fifth defendant, with no payment receipts to confirm that share sale agreement, it was difficult for the learned judge to accept their evidence or defence at face value of that agreement being a genuine transaction, let alone the defence of being a bona fide purchaser. They could not suggest innocence of the relevancy of such documents, as pursuant to the filing of encl 45, the 'collective respondents' were required to produce those documents. Unless the learned judge believed their oral testimony, that payment which was not backed by any corroborative evidence, would remain a bare assertion. The confirmation by the second and third defendants of the want of payment of their two subscribed shares by the fourth defendant merely strengthened the belief of the learned judge that no payment of the RM2.5m was made, and the sale of the fifth defendant's shares a sham transaction to disguise a loan. After testing the evidence of both the defence witnesses against the backdrop of the appellant's evidence it was no surprise that he found them as 'not witnesses of truth'.

**[19]** As reflected in the learned judge's grounds of judgment, he opined that, 'the real issue for determination, inter alia, appears to be whether the fourth defendant's purchase of the shares of the fifth defendant was a bona fide transaction'. Having found the existence of a trust when the appellant transferred the shares of the fifth defendant to the first defendant, which transformed into a constructive trust when the latter unconscionably transferred them to the fourth defendant who had notice of that trust, the learned judge concluded that such a constructive trust was equally applicable

against the 'collective respondents'. He then granted the consequential orders. The prayers for a declaration that the share and sale purchase agreement dated 29 November 2005 was null and void, that the shares that were registered in the names of the sixth and seventh defendants be transferred to the appellant's committee members, and the assistant registrar be given the authority to transfer the shares in the fifth defendant to the appellant's representatives were all granted.

**[20]** It was pursuant to the above finding and orders that the 'collective respondents' filed an appeal at the Court of Appeal. They were successful and the learned judge's orders were set aside. The first, second, and third defendants as said earlier filed no appeal. The Court of Appeal's finding of facts did not depart much from that of the learned judge except on certain substantive matters. The Court of Appeal disagreed that an express trust existed in 2003 by way of transfer of the two shares in the fifth defendant to the first defendant when evidentially no such transfer took place, disagreed that an express trust existed in 2003 by way of transfer of the 99,998 shares in the fifth defendant when these shares were created only in 2005, and expressed its disagreement with the conclusion of the learned judge that the defendants' failure to call the first defendant absolved the appellant from proving its claim of the existence of the express trust, and disagreed with the learned judge for invoking an adverse inference arising from the appellant's failure to call one Lau Kean Fai.

## THE PATH TO OUR DECISION

**[21]** In a nutshell, the Court of Appeal had concluded that by reason of the learned judge having acted upon the wrong principles of law and upon a misapprehension of the evidence, the 'collective respondents' appeal was allowed. A myriad of reasons were supplied by the appellant to support its appeal, and to avoid confusion we have compressed the essence of the complaints under the following sub-headings.

## THE FIRST COMPLAINT

**[22]** This sub-heading begs the question whether it was the appellant's *pleaded* case that an express trust existed in 2003 in pursuance of the friendly loan. This issue was strenuously argued by the appellant as the Court of Appeal opined that the appellant's claim 'was that an express trust came into existence in 2003 as a result of the intention of the parties contained in the gentlemen's agreement of 2003.' To resolve this matter it necessitates a scrutiny of the statement of claim.

**[23]** The relevant plea in the statement of claim on this issue, if any would be found in paras 21(iii) (c-f), 22 (v), 25, 29-32, and 33 (iii), (v) (vii), 45 (ii) and

48. Having perused those paragraphs carefully and in fact the whole statement of claim, we found *nothing* printed on them to indicate that the appellant had pleaded 'express trust'. The statement of claim merely states 'trust'. As this is quite clear no further discussion is required.

THE SECOND COMPLAINT

**[24]** The appellant ventilated that the alleged finding of the first defendant being an express trustee of the 100,000 shares by the learned judge, was never part of the ground of appeal of the 'collective respondents' at the Court of Appeal stage (see ground 12 of the MOA). Thus the Court of Appeal should not have delved into something that was never appealed against. To resolve this issue we need to peruse the memorandum of appeal in order to arrive at that factual complaint. A perusal of the memorandum of appeal regarding the trust, pertained more to the dissatisfaction of want of evidence that the first, second, and third defendants 'were holding the shares on trust for the respondent at the time when the share sale agreement was entered between the first appellant ('fourth defendant') and the first, second, and third defendants.' Interestingly enough, even the 'collective respondents' conceded in ground 13 of the memorandum of appeal that they were found to be constructive trustees by the learned judge; and not trustees of an express trust. We could only conclude after a perusal of the memorandum of appeal that the Court of Appeal had indeed gone outside the four corners of the memorandum of appeal.

THE THIRD COMPLAINT

**[25]** Under this sub-heading the complaint is that the Court of Appeal had misdirected itself when it found, first, that the learned *judge personally found*, and secondly that he found an *express trust* in existence in 2003. This was followed by the conclusion of the Court of Appeal that 'no express trust could have come into existence in 2003' pertaining to the 100,000 shares of the fifth defendant. The latter view would not have caused much violent reaction and objection from the appellant, had it not been for the remark by the Court of Appeal that it was the learned judge who found the existence of such express trust. As an illustration, at p 14 of the grounds of judgment, the Court of Appeal in succinct terms said:

> Once it is acknowledged that the subject matter of the trust was not even in existence in 2003 and created by way of an allotment then, with respect, the learned trial *judge's finding* that the *first defendant was the express trustee* of the entire 100,000 shares of the second appellant is clearly without foundation. (Emphasis added.)

**[26]** Again at p 28 of the grounds of judgment the Court of Appeal wrote:

> In our opinion, the learned trial judge fell into error both in the application of legal principles, as well as in the judicial appreciation of the evidence. In summary, the errors committed by the learned judge included the following:
>
> a *finding the existence of the express trust* in 2003 by way of transfer to the first defendant of the only two shares of the second appellant to the first defendant when no such transfer took place … (Emphasis added.)

**[27]** With respect, we found *nothing* in the grounds of judgment of the learned trial judge which indicated that the learned judge ever made a finding of fact or law that the first defendant was the express trustee of the shares. The appellant ventilated that this erroneous finding had caused a miscarriage of justice when the Court of Appeal disregarded the actual finding of the learned judge.

**[28]** Before identifying the type of trust a need arises for us to arrive at a finding whether there actually was a trust in existence when the shares were transferred to the first defendant by the appellant. The answer is obvious. The second, third, and the 'collective respondents' at best could only say that they had no notice of the trust between the appellant and the first defendant but not to assert that no trust was in existence. As opposed to this, the court had before it positive and unrebutted evidence from the appellant of the existence of a trust. Unless this positive testimony, which went through the rigours of a trial is contradicted this failure to do so must mean that the appellant's evidence had been successfully established, or taken as admitted by the opposing party.

**[29]** By analogy, Gopal Sri Ram when evaluating an unrebutted affidavit in *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281 at p 286 had this to say:

> Now, it is a well settled principle governing the evaluation of affidavit evidence that where one party makes a positive assertion upon a material issue, the failure of his opponent to contradict it is usually treated as an admission by him of the fact so asserted.

**[30]** In *Takako Sakao (f) v Ng Pek Yuen (f) & Anor* [2009] 6 MLJ 751; [2010] 1 CLJ 381 the appellant had commenced proceedings to enforce a trust she claimed had arisen in her favour. The first respondent did not attend court, give evidence or take part in the case. The appeal was allowed and the orders of the High Court and Court of Appeal were set aside. On the issue of the effect of the non-presence of the first respondent in court, Gopal Sri Ram FCJ had remarked:

> In our judgment, two consequences inevitably followed when the first respondent who was fully conversant with the facts studiously refrained from giving evidence. In the first place, the evidence given by the appellant ought to have been presumed to

> be true … In these circumstances it was the duty of the judge to have accepted her evidence as true in the absence of any evidence from the first respondent going the other way.

**[31]** Without the evidence of the first defendant's denial of the trust's existence, leaving only the untouched appellant's evidence standing like a sore thumb, and without the need to invoke the adverse inference principle in light of the abundance of direct evidence, the learned judge was right in concluding that the first defendant was entrusted with those shares (*Berry v British Transport Commission* [1961] 3 All ER 65). This trust issue thus must be construed as proved and established.

**[32]** A trust is an obligation enforceable in equity, which rests on a person as owner of some property, for the benefit of another or for the advancement of certain purposes (*Principles of the Law of Trusts* by HAJ Ford and WA Lee). As distinct to a trust for a purpose, a beneficial owner may enforce it by a suit as in the current case. Equity, which was historically dispensed by the Chancery Court, and against his person (ie in personam) now compels the trustee to administer the trust in accordance with his conscience, with even a possible sanction of imprisonment until he has made good the loss caused to the trust property. On the issue of restitution, Lord Denning MR in *Hussey v Palmer* [1972] 3 All ER 744 had occasion to say at p 747:

> Although the plaintiff alleged that there was a resulting trust, I should have thought that the trust in this case, if there was one, was more in the nature of a constructive trust … By whatever name it is described, it is a trust imposed by law whenever justice and good conscience require it. It is a liberal process, founded on large principles of equity, to be applied in cases where the defendant cannot conscientiously keep the property for himself alone, but ought to allow another to have the property or a share in it. The trust may arise at the outset when the property is acquired, or later on, as the circumstances may require. It is an equitable remedy by which the court can enable an aggrieved party to obtain restitution.

**[33]** With the advent of new concepts and classes of trusts, it is rather difficult to draw the line between an express and a constructive trust, though a trust is still an express trust however ambiguous or clumsy the language has been used by the settlor subject to the court being satisfied that such a trust was intended. Such intention may be oral or written. Notwithstanding, an express trust which may be divided into a private trust and public or charitable trust, once the property is transferred to the trustee on trust for a third party or even the transferor, the trust is complete. For a brief but clearer picture, *Underhill's Law of Trusts and Trustees* (12th Ed) at p 10 authored:

A Thus words of entreaty, prayer, or expectation (precatory words) may be held to create an express trust if, on the whole instrument the court considers that the person using them intended them to be imperative and binding …

Illustrations

B …

Express Trusts

A, by his will, devises property to B, in trust for C; that is a direct express trust.

A, by his will, gives property to B, in full confidence that he will apply it for the C benefit of C and her children. If, on the whole will, the court thinks that the expression of confidence was intended to be imperative, a precatory trust, which is always an express trust, will be created.

**[34]** We now discuss the constructive trust. In *Gissing v Gissing* [1970] 2 All D ER 780 (790) Lord Diplock said:

A resulting, implied or constructive trust — and it is unnecessary for present purposes to distinguish between these three classes of trust — is created by a transaction between the trustee and cestui que trust in connection with the E acquisition by the trustee of a legal estate in land, whenever the trustee has so conducted himself that it would be inequitable to allow him to deny to the cestui que trust a beneficial interest in the land acquired.

**[35]** In *Paragon Finance Plc v DB Thakerar & Co* [1999] 1 All ER 400 F Millet LJ said:

A constructive trust arises by operation of law whenever the circumstances are such that it would be unconscionable for the owner of property *usually but not necessarily the legal estate* to assert his own beneficial interest in the property and deny the G beneficial interest of another. In the first of case *and this is the class with which we are presently concerned*, however, the constructive trustee really is a trustee. He does not receive the trust property in his own right but by a transaction by which both parties intend to create a trust from the outset and which is not impugned by the plaintiff. His possession of the property is coloured from the first by the trust and confidence by means of which he obtained it, and his subsequent appropriation of the property H to his own use is a breach of the trust. Well known examples of such a constructive trust are … (Emphasis added.)

**[36]** The court in *Takako Sakao v Ng Pek Yuen & Anor* opined that:

I A constructive trust is imposed by law irrespective of the intention of the parties. And it is imposed only in certain circumstances. Two examples readily available … are (i) where there is a specifically enforceable contract for the sale of property (moveable or immoveable), the vendor holds the property on a constructive trust for the purchaser, … and where a gift made as a donatio mortis causa fails, the intended

> beneficiary of the gift holds it in trust of the donor … What equity does in those circumstances is to fasten upon the conscience of the holder of the property a trust in favour of another in respect of the whole or a part thereof.

**[37]** Due to the fine line drawn between an express trust and a constructive trust, perhaps a comparison of these two classes of trusts may help give a clearer picture. An obvious difference is that an express trust comes into existence the moment the trust is expressed while for a constructive trust the unconscionable behaviour of the trustee ignites it into existence. Geraint Thomas Alastair Hudson in *The Law of Trusts* (2nd Ed) wrote:

> One significant distinction between an express trust and a constructive trust is that an express trust necessarily comes into existence from the moment at which the settlor declared it, whereas a constructive trust cannot exist but for the unconscionable behavior of the defendant which brings it into existence; therefore the express trust is brought into existence by the deliberate act of the settler whereas a constructive trust is brought into existence by means of the wrongful act of the trustee Thus, the constructive trust is dependent on the unconscionability of the defendant's actions …

**[38]** From the various opinions above it may be construed that a constructive trust arises by operation of law irrespective of the intention of the parties, in circumstances where the trustee acquires property for the benefit of the beneficiary, and making it unconscionable for him to assert his own beneficial interest in the property and deny the beneficial interest of another. Being bereft of any beneficial interest, and with equity fastened upon his conscience, he cannot transfer any interest to himself let alone a third party. If he does, then a constructive trust comes into existence. An aggrieved party, by equitable remedy, may demand restitution of the property if he has been deprived of his beneficial interest.

**[39]** Perusing the facts of the current case, it was obvious that the first defendant was instructed merely to hold on to the shares pending the full repayment of the loan, and was never granted the power of disposal by the appellant of those shares. Once payment was completed the shares were to be returned. From these simple facts it was obvious that at the initial stage only a bare trust existed as the first defendant had no active duty to perform. The first defendant's duty was only to convey the shares back to the appellant ie the beneficiary who was entitled to the entire equitable interest, when instructed to do so (*Christie v Ovington* (1875) 1 Ch D 279; *Re Cunningham and Frayling* [1891] 2 Ch 567; 9780 HAJ Ford, *The Law of Trust by Geraint Thomas* (2nd Ed) p 22).

**[40]** It was improbable that full repayment would not take place as gleaned from the facts. The appellant is an established political body and was housed on

that property. A sum of RM1.8m had already been paid enforcing the certainty of the fulfillment of the appellant's obligation towards full repayment of the loan. The above instruction to hold it on trust and not dispose of the shares were made crystal clear by the appellant to the first defendant. It was obvious that factually and legally the appellant never abandoned its beneficial interest. Despite being bereft of any beneficial right over the shares the first defendant still acted unconscionably when it transferred the shares to the fourth defendant. At that instance when the wrongful act was committed by the first defendant a constructive trust came into existence.

**[41]** Whether the learned judge was correct when he concluded that a constructive trust would be applicable against the 'collective respondents' would depend on whether they had knowledge of the trust. The fourth defendant had pleaded that he was a bona fide purchaser of the shares. Obviously if he fails in this defence then focus would shift to the prayers sought, in particular whether the shares in the hands of the 'collective respondents' could be returned to the appellant (*Malaysian Trust law by Mary George*).

WAS THE FOURTH DEFENDANT A BONA FIDE PURCHASER

**[42]** Aside from the dearth of evidence of payment by the fourth defendant to the first, second, and third defendants for the fifth defendant's shares, we found several unanswered questions, amongst them being why did the transfer of shares forms record the consideration to be RM100,000 and not RM2,500,000, why the purchase price was less than the auctioned price of the property or the true value of the company (RM2,673,000+RM100,000 (paid up capital), why the share transfer forms were dated 12 November 2007 despite the contract being executed on 29 November 2005, and why those documents were stamped only in December 2007? Could the depressed consideration sum and late execution date imply that the forms had been deliberately left empty and executed only on 12 November 2007 by the fourth defendant ie when there was failure on the part of the first defendant to repay the loan? All the answers were within the knowledge of the 'collective respondents' but none were forthcoming.

**[43]** We likewise find the following findings of the learned judge safe and reasonable, and therefore agree with them:

**[44]** With the fifth defendant having no financial capacity to purchase and own the property, it was no surprise that the appellant took up a friendly loan from the first defendant. As regards the buying of the fifth defendant's shares, we also found no evidence adduced by the 'collective respondents' to show that monies had been paid to the first, second and third defendants for them. In fact

there was corroboration of non-payment when the second and third defendants, who were directors of the fifth defendant, had evinced that they did not receive any money for the transfer of their shares to the fourth defendant. This non-payment was one of the disturbing factors that caused the learned judge to remark that the shares were being held by the first, second and third defendants on trust. We likewise find the conduct of the defendants inexcusable as they failed to produce the relevant documents in their possession despite being required to do so. The 'collective respondents' said they were bona fide purchasers but failed to prove it. As this was a matter peculiarly within their knowledge the onus was on them (*Pekan Nenas Industries Sdn Bhd v Chang Ching Chuen & Ors* [1998] 1 MLJ 965; [1998] 1 CLJ 793). The non-payment of rents when occupying the property after the successful bid of 2003 and the regular payment of taxes and assessments of the property merely strengthened the claim of the appellant.

**[45]** From the above facts, questions posed but left unanswered, want of evidence of payment, questionable documentary evidence, unrebutted evidence of the appellant, conduct of the parties etc we have no hesitation in deciding that the fourth defendant was not a bona fide purchaser of the fifth defendant's shares from the first defendant.

CONCLUSION

**[46]** With such overwhelming evidence before us we are convinced that the shares of the fifth defendant had been transferred by the appellant in 2003 to the first defendant on trust. The latter being bereft of any title or interest could not transfer the shares to anyone. A constructive trust came into existence the moment the shares were transferred to the 'collective respondents'. As the latter had notice of the trusts they therefore assumed the role of constructive trustees. *Halsbury's Laws of England*, (4th Ed), Vol 48 authored that 'a stranger who receives property in circumstances where he has actual or constructive notice that is trust property being transferred to him in breach of trust will, however be also constructive trustee of that property.'

**[47]** As the purchase of the shares were from the first defendant, how is the appellant to circumvent the privity of contract hurdle as the 'collective respondents' when purchasing the shares were far removed from the appellant? Again the answer is the enforcement of equity on the 'collective respondents' in light of them having notice of the creation of the trust. In *Westdeuthsche Landesbank Gironzentrale v Islington London Borough Council* [1996] 2 All ER 961 Lord Brown Wilkinson observed:

> Once a trust is established, as from its date of establishment the beneficiary has, in equity, a proprietary interest in the trust property which propriety interest will be enforceable in equity against any subsequent holder of that property … other than the purchaser of value of the legal interest without notice.

**[48]** In the case of *Foskett v McKeown & Anor* [2000] 3 All ER 97 at 122 f–h, Lord Millet observed as follows:

> … The beneficiary's proprietary claims to the trust property or its traceable proceeds can be maintained against the wrongdoer and anyone who derives title from him except that of a bona fide purchaser for value without notice of the breach of trust. The same rules apply even where there have been numerous successive transactions, so long as the tracing exercise is successful and no bona fide purchaser for value without notice has intervened.

**[49]** In *Tulk v Moxhay* [1843–60] All ER Rep 9 (22 December 1848), the plaintiff ie Tulk being the owner of a vacant lot and some nearby houses in Leicester Square, sold that vacant lot to one Elm in1808 conditional on that sold piece of land being used for certain specific purposes eg as a garden or pleasure ground etc. The conditions of the contract (covenants) applied to Elm's heirs and assigns. The deed of that vacant lot passed many hands with the last being Moxhay. Therefore Moxhay never bought the vacant lot from Tulk. By the time he bought the land the deed said nothing of the covenant though admitting that he knew of the covenant and restrictions of the 1808 sale. Since he owned the land, and nothing was said in the deed about a pleasure garden, Moxhay decided to alter the character of the square garden. The plaintiff was not happy about that intention and successfully obtained an injunction from the master of rolls. The defendant then filed a motion to discharge that injunctive order. The Lord Chancellor (Cottenham) without calling the plaintiff to reply refused the motion. He said:

> That the question does not depend upon whether the covenant runs with the land is evident from this, that if there was a mere agreement and no covenant, this court would enforce it against a party purchasing with notice of it; for if *an equity is attached to the property* by the owner, no one purchasing with notice of that equity can stand in a different situation from the party from whom he purchased. (Emphasis added.)

**[50]** In *De Mattos v Gibson* (1843–60) All ER Rep 803 Knight-Bruce LJ said:

> Where a man has acquired property, with a full knowledge of a previous existing contract, legally entered into, that that property should be used in a particular manner, the acquirer should not be allowed to apply or use the property otherwise than under the contract, or to the damage of the person with whom the earlier contract had been made … why should not a *court of equity* interfere to prevent a positive breach? (Emphasis added.)

**[51]** *Lord Strathcona Steamship Co Ltd v Dominion Coal Co Ltd* [1926] AC 108 approved and applied the principle laid down by Knight Bruce LJ With the enforcement of equity in mind the appropriate order in the circumstances of the case (as the shares are still with the 'collective respondents'), is their return to the appellant.

QUESTIONS FOR OUR DETERMINATION

**[52]** For the reasons above stated we would answer the questions posed as follows:

> Question 1 specifically mentioned ss 67 and 68 of the Courts of Judicature Act 1964, provisions which give the Court of Appeal jurisdiction to hear and determine civil appeals. These provisions not only are substantive in one context but also procedural on the other, depending upon the context they are being used. Be that as it may when interpreting them the outcome should not result in unfairness or produce manifest injustice in particular relating to procedure (*Sim Seoh Beng @ Sim Sai Beng & Anor v Koperasi Tunas Muda Sungai Ara Berhad* [1995] 1 AMR 501). In the instant case no jurisdictional error was committed by the learned judge, which could justify the Court of Appeal to interfere or act to straighten things out. Further, in the course of the unnecessary interference of a part of the judgment that did not form part of the appeal, and due to a misreading of the grounds of judgment, the Court of Appeal had instead caused injustice to the appellant. In the circumstances of the case, the answer to the first question is in the negative. This ground by itself is sufficient for us to allow the appeal. Thus, there is no necessity to answer Questions 2 and 3.

**[53]** Being unable to support the reasoning of the Court of Appeal we therefore unanimously allow the appeal with costs. The orders of the learned judge are reinstated.

*Appeal allowed with costs.*

Reported by Afiq Mohamad Noor