Ching Mun Fong (executrix of the estate of Tan Geok Tee, deceased) v Liu Cho Chit (No 2) [2000] SGHC 199

Case Number : Suit 862/1998

Decision Date : 29 September 2000

Tribunal/Court : High Court

Coram : Woo Bih Li JC

Counsel Name(s) : Michael Khoo SC and Josephine Low (Michael Khoo & Partners) for the plaintiff; Woo Tchi Chu (Robert WH Wang & Woo), Harpal Singh and Ee Von The (Harpal Wong & M Seow) for the defendant

Parties : Ching Mun Fong (executrix of the estate of Tan Geok Tee, deceased) — Liu Cho Chit (No 2)

Civil Procedure – Contracting parties – Executrix of deceased owner of company suing agent of person who received moneys – Whether executrix and agent correct parties in these proceedings

Equity – Unreasonable delay or negligence – Whether unreasonable delay or negligence by plaintiff in pursuing claims – s 32 Limitation Act (Cap 163, 1996 Ed)

Limitation of Actions – Mistake – Whether action time-barred – Whether plaintiff knows or could have discovered mistake – Whether time of defendant's discovery of mistake relevant – s 29(1)(c) Limitation Act (Cap 163, 1996 Ed)

Limitation of Actions – Total failure of consideration – Moneys had and received – Whether action time-barred – s 6(1)(a)Limitation Act (Cap 163, 1996 Ed)

Limitation of Actions – Particular causes of action – Remedial constructive trusts – Whether action time-barred – Limitation Act (Cap 163, 1996 Ed) s 22(1)(b)Limitation of Actions – Particular causes of action – Remedial constructive trusts – Whether action time-barred – s 22(1)(b) Limitation Act (Cap 163, 1996 Ed) Limitation of Actions – Particular causes of action – Remedial constructive trusts – Whether action time-barred – s 22(1)(b) Limitation Act (Cap 163, 1996 Ed)

Restitution – Failure of consideration – Total failure of consideration – Whether action time-barred – s 6(7) Limitation Act (Cap 163, 1996 Ed)

Trusts – Constructive trusts – Remedial constructive trusts – Whether doctrine applies in Singapore – Whether such trust established

: The plaintiff, Mdm Ching, is the executrix of the estate of Tan Geok Tee, deceased (`Tan`).

The claim in this action is based on facts which go as far back as 1972. It is therefore necessary for me to go into the background facts, most of which are found in the judgment of the Court of Appeal in **Ching Mun Fong (executrix of the estate of Tan Geok Tee, deceased) v Liu Cho Chit & Anor** [2000] 1 SLR 517 .

Background

In 1972, a company called Peng Ann Realty Pte Ltd (`Peng Ann`) purchased a large parcel of land situate at Kampong Chai Chee comprising lots 21-26, 4-4, 4-7, 120, 121, 122, 123 and 221 of Mukim 28, having an area of 186.7 acres. The company was specifically incorporated to purchase the land. The defendant was at that time a shareholder and the managing director of the company. The purchase price was $1,090,000 and the agreement for sale and purchase was made on 18 July 1972 with completion scheduled to take place on 27 October 1972. Two days after the sale and purchase agreement was made, that is on 20 July 1972, two of the lots, namely, lots 221 and 4-4, with a total

area of about 5.8 acres, were gazetted by the Government for acquisition; some neighbouring and other lands were also included in the gazette notification. As a result, the defendant and his co-directors were apprehensive that there might be a further acquisition by the Government of the other lots which Peng Ann had bought. They therefore decided to sell the remaining lots of the land.

In December 1972, the defendant was introduced to Tan and following negotiations between them, a sale and purchase agreement was made on 23 January 1973 between Peng Ann and Collin Investment Pte Ltd (`CIP`), whereby Peng Ann agreed to sell to CIP three of the lots, namely, lots 21-26, 4-7 and 123 (`the three lots`) having a total area of about 178 acres, at the price of $2,050,000 (`the main agreement`). CIP was one of Tan`s family companies. The defendant and Tan also orally agreed to develop jointly a portion of lot 21-26 containing an area of approximately 5 acres, zoned permanently residential (`the joint venture site`). The terms of their joint venture were subsequently reduced in writing and made in the names of the defendant`s wife, Mdm Lim, and Tan`s daughter, Collin. These terms were embodied in four written agreements (collectively called `the joint venture agreements`), and I need to mention only three of them.

The first was an agreement whereby the joint venture site was sold by CIP to Mdm Lim and Collin at the price of $50,000. Special condition 1 provided that the purchasers on behalf of the vendor would immediately apply for subdivision of lot 21-26 so as to delineate the joint venture site separately from the remainder of the lot, and that the costs and expenses in respect thereof would be borne by the purchasers. This sub-sale agreement was signed by Tan on behalf of CIP, and by the defendant on behalf of Mdm Lim. Tan was supposed to have signed on behalf of Collin but the copy I have seen does not have his signature on behalf of Collin.

The second was a pre-incorporation agreement, under which Mdm Lim and Collin were to procure the incorporation of a company to be called Collden Realty Private Limited (`Collden`), with an authorised capital of $2m. The pre-incorporation agreement was signed by the defendant on behalf of Mdm Lim and Tan on behalf of Collin.

The third agreement was expressed to be made between Mdm Lim and Collin of the one part and Collden of the other, under which Mdm Lim and Collin were to convey the joint venture site to Collden in return for certain shares credited as fully paid to be allotted to Mdm Lim and Collin respectively. This agreement was signed only by the defendant and Tan on behalf of Mdm Lim and Collin respectively; it was not signed by anyone representing Collden. All the agreements were backdated to 23 January 1973, being the same date on which the main agreement was executed.

It was not in dispute that neither Mdm Lim nor Collin was aware of the joint venture or the agreements signed on their behalf.

The sale under the main agreement was completed on 14 March 1973 and all the three lots were conveyed on the written direction of Tan (presumably on behalf of CIP) to Collin Development Pte Ltd, another company of Tan.

CIP was subsequently called Lee Kai Investments Pte Ltd and Collin Development Pte Ltd was subsequently called Lee Tat Development Pte Ltd (`Lee Tat`).

On 23 July 1976, the three lots conveyed to Lee Tat, except a portion of 4.2 acres, were acquired by the Government, and compensation in the sum of $2,500,000 was awarded. The unacquired land comprised: (a) a portion of 3.7 acres of the joint venture site; and (b) another portion of about 21,808 sq ft of land, also part of Lot 21-26, which was immediately adjoining the joint venture site and zoned rural. The entire area of the unacquired land was subsequently resurveyed and was

described as resurvey Lot 1606 (`the property`). As it transpired, the joint venture did not materialise. Neither the defendant nor Tan, and of course nor Mdm Lim nor Collin, took any step to implement the terms of the other joint venture agreements. Thus, the joint venture was effectively abandoned by the defendant and Tan.

It was only in 1980 that their interests in developing the property revived. However, negotiations between them eventually failed, as they could not agree on the development plans. All this while, the defendant claimed Mdm Lim had a share or interest in the property. He claimed that in 1981 as a result of the differences of opinion between him and Tan he offered to sell his wife`s share in the property to Tan and in April 1981 Tan invited him to Hong Kong, where after some negotiations Tan agreed, on behalf of Lee Tat, to buy his wife`s share at the price of `S$3.8m net of tax`. Tan further agreed to pay a sum of $2m by 24 April 1981 and the balance two months later.

On 23 April 1981, in Hong Kong, Tan handed to the defendant two cashier`s orders amounting to the sum of US$642,451.04 (equivalent to S$1,368,420.70 at the then exchange rate of approximately S$2.13 to US$1). The defendant claimed that the sum of US$642,451.04 (or S$1,368,420.70) was a part payment of the purchase price. He further claimed that thereafter he called Tan asking for payment of the balance of the purchase price but Tan informed him that his (Tan`s) wife, Mdm Ching, was not happy with the agreed price, as she felt that it was too high. Tan then asked the defendant to sign and the defendant signed a letter dated 28 April 1981 prepared by Tan`s general manager in Singapore. This letter was addressed to Lee Tat and instructed and authorised Lee Tat to bank in a cashier`s order for US$293,555.99. The cashier`s order was to be deposited into the defendant`s current account with Ka Wah Bank Ltd in Hong Kong.

The US$293,555.99 was equivalent to S$625,274.26 (at the exchange rate of S$2.13 to US$1). Taking into account the S$1,368,420.70 (US$642,451.04) already received by the defendant, the payment of US$293,555.99, if made, would have brought the total payments to the defendant to S$1,993,694.96, close to the S$2m (out of the S$3.8m) that was supposed to have been received by the defendant by 24 April 1981.

According to the defendant, Tan would make this payment when his wife had cooled down, but this sum of US$293,555.99 was never paid.

There was correspondence between April 1981 and April 1983 which I shall refer to later.

On 25 August 1983, Fook Gee Finance Co Ltd (`Fook Gee`) instituted an action in Suit 4141/83 (`the 1983 action`) against the defendant claiming the sum of US$642,451.04. Fook Gee alleged to have lent this sum to the defendant. The defendant admitted receiving this sum from Tan and pleaded that at all material times Tan was acting for Lee Tat or alternatively as principal (see para 2 of the amended defence in that action). He also pleaded that he, acting on behalf of his wife Mdm Lim, had agreed to sell her share in the property to Tan `acting as aforesaid` (see para 3 of the amended defence). He further alleged that Tan had paid him the sum as a part payment of the purchase price of Mdm Lim`s share in the property. The defendant also pleaded in the alternative that, if the sum was a loan, it was void and unenforceable by virtue of the Money Lenders Ordinance of Hong Kong. Although the main defence to the claim in that action was the sale, the defendant did not take, or cause Mdm Lim to take, at that time, any action to recover the balance of the purchase price.

It was only about one year thereafter, on 23 June 1984, that Mdm Lim took action by instituting Suit 4149/84 (`the 1984 action`) against four parties, ie Lee Tat, Tan, Lee Kai and Collin claiming, inter alia, the balance of the purchase price. In para 24 of the amended statement of claim, Mdm Lim asserted that Tan, acting at all material times either for and on behalf of Lee Tat or alternatively as

principal, had orally agreed to purchase her share in the property or alternatively her interest in a particular agreement for S$3.8m net of tax.

Both suits were tried together as the evidence and events which transpired were inextricably linked. The trial judge found that Mdm Lim had acquired an interest in the property and that through the defendant she had entered into an agreement to sell it to Lee Tat in 1981. She also found that the sum of US$642,451.04 (or S$1,368,420.70) paid to the defendant in 1981 was a part payment of the purchase price and not a loan. Mdm Lim was granted judgment in the 1984 action for S$2,431,579.10 against Lee Tat `only`. This sum represented the balance of the purchase price of S$3.8m (see paras 117 to 120 of the judgment in the 1983 and 1984 actions). Against this decision, Lee Tat, Mdm Ching, representing the estate of Tan, and Lee Kai appealed to the Court of Appeal in CA 94/97.

As for the claim by Fook Gee for the sum of US$642,451.04, the trial judge found that the sum came from a company called Komala Deccoff & Co SA (`Komala Deccoff SA`) owned by Tan and another person, and there was no evidence that this sum was a loan made by Fook Gee to the defendant. She therefore dismissed Fook Gee`s claim in Suit 4141/83, and against this decision, Fook Gee appealed to the Court of Appeal in CA 93/97.

Both the appeals were heard together, and the judgment of the Court of Appeal was delivered on 6 February 1998. The trial judge`s decision granting judgment to Mdm Lim was reversed by the Court of Appeal which held that, on the evidence, Mdm Lim had not established that she had acquired an interest in the property. As for Fook Gee`s appeal, the Court of Appeal, like the trial judge, could find no evidence to suggest that the two amounts paid to the defendant in April 1981 were in fact a loan from Fook Gee. That appeal was accordingly dismissed. [See [1998] 2 SLR 121.]

Present proceedings and the application to strike out the statement of claim

On 4 June 1998, the plaintiff, as the executrix of Tan`s estate, instituted proceedings in the present action before me against the defendant seeking to recover the sum of S$1,368,420.71, being the equivalent of US$642,451.04 at the time of payment.

After the close of pleadings, the defendant applied to strike out the statement of claim under O 18 r 19 of the Rules of Court or under the inherent jurisdiction of the court on the ground that it is frivolous, vexatious or otherwise an abuse of the process of the court or alternatively on the ground that the claim is statute barred. Upon being served with the application, the plaintiff applied to amend the statement of claim. Both the applications were heard together before an assistant registrar who dismissed the plaintiff`s application to amend the statement of claim and allowed the defendant`s application to strike out the statement of claim, and, in consequence, he dismissed the action. He held that the applicant`s claim was time barred by s 6 of the Limitation Act (Cap 163, 1996 Ed) (`the Limitation Act`), and that the facts relied on did not give rise to a constructive trust or any other proprietary remedy in favour of the appellant. Against the decisions of the assistant registrar, the plaintiff appealed to a judge (judicial commissioner) in chambers.

Before the learned judicial commissioner the plaintiff proposed a further amendment, namely, the addition of para 13A, which is to the effect that arising from the judgment of the Court of Appeal in the 1983 and 1984 actions (delivered on 6 February 1998), the plaintiff became aware that Mdm Lim had no interest in the property for which the payment of the sum of US$642,451.04 was made to the defendant and that such payment was made for no consideration or was made under a mistake that Mdm Lim had an interest in the property, and that the retention of that sum by the defendant gave rise to a constructive trust on the part of the defendant. The learned judicial commissioner agreed

with the decision of the assistant registrar in striking out the statement of claim. He further held that the plaintiff was precluded from bringing the present proceedings by reason of the doctrine of res judicata in the wider sense as enunciated in the decision of the Privy Council in **Yat Tung Investment Co Ltd v Dao Heng Bank & Anor** [1975] AC 581. In the learned judicial commissioner`s view, Tan was a party in the 1984 action and had chosen not to raise in that suit any of the causes of action now raised in these proceedings, and the plaintiff, his executrix, could not be permitted to raise them now. For her to do so would be an abuse of the court`s process. He therefore dismissed both appeals.

The plaintiff then appealed to the Court of Appeal. Both her appeals regarding her application to amend and against the striking out of the action were allowed. [See [2000] 1 SLR 517.]

The Court of Appeal found the case of **Gleeson v J Wippell & Co** [1977] 1 WLR 501 instructive and cited, inter alia, the following passage from the judgment of Megarry VC at p 518:

> *... I can well see the justice of refusing to permit a plaintiff who has failed to take an obvious point against the defendant to have a second bite at the cherry in order to take that point. What I cannot see is the justice of refusing to permit a plaintiff to sue a person at all because the plaintiff failed to join him as a defendant in other proceedings against another person. Such a failure may provide material for cross-examination in the second proceedings, and it may also sound in costs, especially if the second proceedings have the same result as the first; but the drastic step of striking out the proceedings is quite another matter.*

In the present case, Liu is the defendant but he was not a party in the 1984 action. Although he was a party in the 1983 action, Tan was not.

Causes of action pleaded

After all these developments, the causes of action are found in paras 13A, 14, 15 and 16 of the amended statement of claim of 3 December 1999 which state that:

> *13A As from the judgment of the Court of Appeal dated 6 February 1998 the defendant became aware that Madam Lim`s attempt to establish the existence of an interest in the property for which the payment of US$642,451.04 had been made and accepted as part payment had failed. The payment had been made for no consideration or, alternatively, it was made under a mistake that Madam Lim had an interest in the property. The retention thereafter of that money, notwithstanding knowledge of that failure or mistake, gave rise to a constructive trust. The failure and refusal thereafter to refund what, as the defendant well knew had been paid for nothing or under a mistake, constituted a continuing breach of that constructive trust.*
>
> *14 In the premises, the defendant has held and continues to hold the said sum of US$642,451.04 (the equivalent of S$1,368,420.71) as constructive trustee for the benefit and use of the plaintiffs.*
>
> *15 Further or in the alternative, if as the defendant contends the said sum of US$642,451.04 (then equivalent (sic) of S$1,368,420.71) had been paid by the*

late Mr Tan to the defendant, and received by him purportedly as part payment of the purchase price of the defendant`s or his wife`s share in the property, such payment was made by the late Mr Tan under a mistake of fact as the Court of Appeal has found that neither the defendant nor his wife had an interest in the property.

16 Further or in the alternative, the consideration for the payment of the S$1,368,420.71 has wholly failed, and the defendant has had and received the said sum to the use of the late Mr Tan.

Parties

The defendant submitted that Mdm Ching, as the executrix of Tan`s estate, was not the correct plaintiff because the moneys which funded the two cashier`s orders totalling US$642,451.04 came from Komala Deccoff SA. Therefore the moneys belonged to that company which should be the correct plaintiff.

As for the proper party who should be the defendant, the defendant submitted that at the trial of the 1983 and 1984 actions, the trial judge had established that Mdm Lim had entered into an agreement to sell her interest in the property through Liu. The submission was that Liu was only an agent of Mdm Lim and therefore the correct defendant should be Mdm Lim and not Liu.

On the other hand, the plaintiff`s position was that the findings of the trial judge in the 1983 and 1984 actions did not amount to a finding that Tan had paid the moneys on behalf of Komala Deccoff SA. Komala Deccoff SA was not known to Liu and the moneys were in fact `paid by the late Mr Tan directly to the defendant in part payment for the purchase by the former of the latter`s wife`s interest in the property` (see para 31 of her opening statement).

The plaintiff further argued that in any event, Komala Deccoff SA was a family company of Tan who was its controlling mind and was his alter ego. All moneys placed in fixed deposits in its name in fact belonged to Tan. As the company was defunct since 1983 and as the moneys belonged to Tan, she is the correct plaintiff.

As for who the correct defendant should be, the plaintiff submitted that in respect of the suggested interest in the property, it was to held by Mdm Lim as nominee for the defendant and therefore the defendant was the correct party to be sued.

As regards the question as to who the correct plaintiff should be, I am of the view that the material point is not where the moneys came from or who paid the moneys or who the moneys belonged to. The material point is who the contracting parties were. This would also be the correct approach on the question as to who the correct defendant should be.

For example, if X enters into a contract with Y to buy Y`s interest in a property and moneys are paid pursuant to that contract to purchase Y`s interest, it is irrelevant as between X and Y whether the money came from X`s parents or a family company or a financial institution. It is also irrelevant whether Y received the moneys personally or not. X is the correct person to sue and Y is the correct person to be sued if there is a total failure of consideration on Y`s part or if the payment was made pursuant to a mistake.

The findings of the trial judge in the 1983 and 1984 actions

As I have mentioned, in the 1983 and 1984 actions, the trial judge had found:

(a) that the moneys were paid as part payment of Mdm Lim`s interest in the property pursuant to an agreement in April 1981 which Mdm Lim had entered, through Liu, to sell her interest to Lee Tat, and

(b) that Mdm Lim had acquired an interest in the property and therefore there was something for her to sell. Accordingly the trial judge had ordered Lee Tat, and only Lee Tat, to pay the balance of the purchase price to Mdm Lim.

When the Court of Appeal reversed the trial judge`s decision, it was only on the basis that Mdm Lim had not established that she had, or had acquired, an interest in the property (see [para] 17 and 41 of the judgment as reported in **Fook Gee Finance Co Ltd v Liu Cho Chit and another action** [1998] 2 SLR 121 and [para] 8 and 9 of the second Court of Appeal judgment which was given in the present action before me as reported in **Ching Mun Fong v Liu Cho Chit** [2000] 1 SLR 517).

The Court of Appeal did not disturb the other findings of the trial judge in the 1983 and 1984 actions, ie that the purchaser was Lee Tat and the vendor was Mdm Lim.

Accordingly, as regards the causes of action based on mistake of fact and total failure of consideration, and moneys had and received, I am of the view that in the light of the findings of the trial judge in the 1983 and 1984 actions, the claims before me should have been made by Lee Tat against Mdm Lim and not by Mdm Ching, as executrix of Tan`s estate, against Liu.

As for the cause of action based on a remedial constructive trust, I am of the view that even though Liu had received the moneys, the findings of the trial judge in the 1983 and the 1984 actions would also mean that Liu had received the moneys on behalf of Mdm Lim. Whether he had parted with the moneys to Mdm Lim is a matter between them. It would then follow that it is Mdm Lim, not Liu, who is to account as trustee for the moneys even if I should find that the plaintiff has established a remedial constructive trust.

My findings, aside from the findings of the trial judge in the 1983 and 1984 actions

Besides the findings of the trial judge in the 1983 and 1984 actions, I also considered the following.

As regards the identity of the purchaser, I note that in the 1984 action as well as in the action before me, the plaintiff did not distinguish between Lee Tat and Tan.

Paragraph 7 of the amended statement of claim before me states:

> *It was Madam Lim`s pleaded case in Suit 4149 that sometime in April 1981, her husband, the defendant in the present action, had orally agreed to sell her interest in the said property to the late Mr Tan Geok Tee (`the late Mr Tan`) for S$3.8m net of tax, and that pursuant to the said agreement, the late Mr Tan had paid part of the purchase price amounting to S$1,368,240.71 to the defendant herein `for and on behalf of` herself.*

This is not entirely accurate. I have already mentioned (in [para] 18 above) that in para 24 of Mdm Lim`s re-amended statement of claim in the 1984 action, she had pleaded that Tan acting either for and on behalf of Lee Tat or alternatively as principal had orally agreed to purchase her share in the property.

Paragraph 11 of the amended statement of claim before me states:

> *In Suit 4141, the plaintiffs in that action Fook Gee Finance Co Ltd had commenced an action against the defendant herein, claiming for the return of the sum of US$642,451.04 being money lent by the plaintiffs therein to the defendant, with interest thereon. The defendant while not disputing that he had received the said sum of US$642,451.04 from the late Mr Tan, however maintained in his defence to the claim, that he was acting on behalf of his wife, Madam Lim when he entered into an agreement with the late Mr Tan for a consideration of S$3.8m net of tax, with the purchase price to be paid by instalments.*

Again this is not entirely accurate. I have also already mentioned (in [para] 17 above) that in paras 2 and 3 of Liu`s amended defence in the 1983 action, Liu had asserted that Tan was acting at all material times for and on behalf of Lee Tat or alternatively as principal.

Paragraph 5 of the plaintiff`s opening statement in the action before me states:

> *The trial judge in the previous actions had found that -*
>
> *(i) the defendant`s wife had acquired an interest in Lot 1606 and that through the defendant she had entered an agreement to sell it to* ***Lee Ta*** *t in April 1981. [Emphasis added.]*

However, para 7 of the plaintiff`s closing submission made a change which is not insignificant. It said:

> *The trial judge in the previous actions had found that -*
>
> *(i) ... she had entered an agreement to sell it to Lee Tat/* ***the late Mr Tan*** *in April 1981. [Emphasis added.]*

As I have already pointed out (in para 19 above), the trial judge in the 1983 and 1984 actions had found that the sale was to Lee Tat, not to Tan. The plaintiff had accepted this in her opening statement but sought to change her position in her closing submission.

As regards the identity of the vendor, I note that in the pleadings before me, para 13A of the amended statement of claim, which I have cited above, asserts unequivocally that the payment of the moneys was on the basis that Mdm Lim (not Liu) had an interest in the property, although para 15 of the amended statement of claim is equivocal as it refers to `the defendant`s or his wife`s` share in the property.

I also note the following telling statements at paras 5 and 7 of the plaintiff`s opening statement:

> *5 The trial judge in the previous actions had found that -*
>
> *(i) the defendant`s wife had acquired an interest in Lot 1606 and that through the defendant she had entered an agreement to sell it to Lee Tat in April 1981*
>
> *(ii) the sum of US$642,451.04 paid to the defendant was a part payment of the purchase price and not a loan by Fook Gee Finance Ltd.*
>
> *(See [para] 8 of the second judgment of the Court of Appeal.)*
>
> *6 ...*
>
> *7 It is the plaintiff`s case that the first Court of Appeal judgment is conclusive and binding on the parties to the present action in so far as it relates to the purpose for which the payments were made to the defendant in 1981 that is to say -*
>
> *(i) that the payments were made to the defendant as part payment for* ***his wife`s interest*** *in the property, but in respect of which she had none*
>
> *(ii) that the payments were never made as a loan to the defendant by Fook Gee. [Emphasis added.]*

I would also reiterate para 31 of the plaintiff`s opening statement which I have referred to in [para] 31 above.

I note the plaintiff`s attempt in cross-examination and in her closing submission to present the argument that the sale was entered into in the name of Mdm Lim only as nominee of the defendant and hence the defendant was the correct party to be sued.

For example, although para 9 of the plaintiff`s closing submission appeared to mirror para 7 of the plaintiff`s opening statement, there was again a change, this time to para 9 of the closing submission, which was also not insignificant:

> *It is the plaintiff`s case that the first Court of Appeal judgment is conclusive and binding on the parties to the present action in so far as it relates to the purpose for which the payments were made to the defendant in 1981 that is to say -*
>
> *(i) that the payments were made to the defendant as part payment for* ***his*** */his wife`s interest in the property, but in respect of which she had none*
>
> *that the payments were never made as a loan to the defendant by Fook Gee. [Emphasis added.]*

I am of the view that this was part of an attempt by the plaintiff to shift her position as to whose interest was being purchased.

As for the evidence, it is true that in cross-examination, the defendant had conceded:

(a) that his wife was his nominee (NE 186 line 18 to 20),

(b) that he was the actual contracting party with Tan (NE 188 line 23 to NE 189 line 3),

(c) that his wife`s interest in the property coincided with his interest, ie the interest was his wife`s and his) (NE 231 line 9 to 22).

However it must be borne in mind that the witness was and is a layman. To him, he was the one who had negotiated with Tan and he had wanted his wife to have the benefit of the contract. Also, to him, there was no difference between his wife and him.

Even plaintiff`s counsel treated the interest of the two persons as one and the same as in his questions in the later part of his cross-examination, he referred to the defendant`s/Mdm Lim`s interest in the property (see, for example, NE 232 line 1 to 6 and NE 233 line 21 to 22).

While it may be convenient for laypeople to treat the interests of these two persons as the same, the law requires a more precise treatment.

As for the argument that Mdm Lim had said during the trial of the 1983 and 1984 actions that she was not aware of the negotiations and the contracts, this is neither here nor there. A husband can enter into contracts for his wife for her benefit even if she was not aware of what he was doing. The point is whether he had the authority to do so and she had said in that same trial that Liu did have such authority (see the notes of evidence in that trial at pp 11 to 12, found also in the record of appeal for CA 93 and 94/97 Vol 3 Part A at pp 228 to 229).

I also note that, notwithstanding the concessions made by Liu during cross-examination in the trial before me, which concessions I have mentioned above, Liu had also said in the same cross-examination that he had his wife`s full authorisation to enter into various contracts for her (NE 190 line 6 and NE 191 line 4).

I also considered the documentary evidence.

There were various letters from Liu which were addressed to Lee Tat as the purchaser and referring to Mdm Lim as the vendor.

For example, Liu`s letter dated 2 June 1981 to Lee Tat states, at the second paragraph thereof:

> *I acknowledge that I have so far received on behalf of my wife two payments of US$174,982.49 and US$467,468.55 respectively totalling US$642,451.04 being part payment made by you of the purchase price agreed at S$3,800,000 net for my wife`s share.*

Another letter of his dated 26 August 1981 also addressed to Lee Tat states:

I am surprised not to have received the courtesy of a reply to my letter to you dated 2 June 1981.

You will recall that you agreed to purchase my wife`s share in the above mentioned property for S$3.8m net of tax and you have so far paid the equivalent of S$1,368,420.70. A further instalment of some S$600,000.00 odd (to make up to S$2m) was due on 28 April 1981, which you have refused without explanation to pay.

I am informed by Architects 61 that you informed them that you had purchased my wife`s share and had therefore instructed them to cease sending me the copy correspondence concerning the purposed development. As you are aware, this is not true as you have yet to pay the balance of the agreed price. I have received a copy of the architects` letter to you dated 26 June 1981 to which I have since replied.

Please let me know, without further delay, when you propose to complete our agreement. If you will instruct your solicitors to prepare the necessary documents, my wife will sign and deliver them to you against the release of the balance of the agreed price.

Lee Tat did not deny in 1981 that it was the purchaser or that Mdm Lim was the vendor.

Although the architects did send some correspondence alluding to Tan as the purchaser and Liu as the vendor, I do not give much weight to such correspondence because the architects were not involved in the sale and purchase and were dealing with Tan and Liu regarding the intended development of the joint venture site. In their minds it could not have been material who, strictly speaking, the purchaser was and who the vendor was.

Therefore, aside from the findings of the trial judge in the 1983 and 1984 actions, but bearing in mind the pleadings (in all the actions), the opening statements, the closing submissions and the evidence as a whole, I find that the contract was between Lee Tat and Mdm Lim to buy Mdm Lim`s interest in the property and that correspondingly they are the correct plaintiff and defendant respectively.

My decision as regards the correct plaintiff and defendant is sufficient to warrant a dismissal of the plaintiff`s claim. However, for completeness, I will address other issues.

Before I do so, I would add that even if Lee Tat and Mdm Lim were the plaintiff and defendant respectively before me, Lee Tat would have been precluded by the doctrine of res judicata in the wider sense from pursuing the action as both Lee Tat and Mdm Lim were parties in the 1984 action. Perhaps that is the reason why Mdm Lim is not named as the defendant in the action before me.

Total failure of consideration and moneys had and received

As the Court of Appeal has found that Mdm Lim never had an interest in the property, the causes of action based on total failure of consideration and on moneys had and received would arise when the moneys paid were deposited into Liu`s account sometime on or about 23 April 1981 and would be time-barred by about 22 April 1987.

I am of the view that such causes of action are `founded on a contract` for the purpose of s 6(1)(a) of the Limitation Act (Cap 163) which states:

> *6(1) Subject to this Act, the following actions shall not be brought after the expiration of 6 years from the date on which the cause of action accrued:*
>
> *(a) actions founded on a contract or on tort; ...*

The moneys which are the subject of this action were paid pursuant to the oral contract to purchase Mdm Lim`s interest. The claim for moneys had and received are also founded on the oral contract in that it was not as though the moneys were received on a basis apart from the oral contract. In addition, the words `founded on a contract` are wide enough to cover claims for the recovery of moneys paid pursuant to a contract where the underlying subject matter of the agreement did not exist or did not materialise.

In any event, even if, for the sake of argument, these causes of action can be said to be founded upon some equitable principle of restitution, they would then come under s 6(7) of the Limitation Act which states:

> *Subject to sections 22 and 32, this section shall apply to all claims for specific performance of a contract or for an injunction or for other equitable relief whether the same be founded upon any contract or tort or upon any trust or other ground in equity.*

Although this provision is subject to ss 22 and 32 of the Limitation Act, s 22 does not apply to these causes of action. Furthermore, s 32 deals with the court`s equitable jurisdiction to refuse relief on the ground of acquiescence, laches or otherwise, which I shall deal with later.

Accordingly these causes of action would be time-barred long before the commencement of the present action on 4 June 1998.

Mistake

Paragraph 15 of the amended statement of claim alleges that the payment of the moneys was made under a mistake of fact as the Court of Appeal (in respect of the 1983 and 1984 Actions) had found that neither Liu nor his wife had an interest in the property.

I should reiterate that the Court of Appeal`s finding related only to Mdm Lim`s interest in the property and not Liu`s (see again [para] 41 of its judgment reported in [1998] 2 SLR 121). This may be because it was not asserted by any one then that Mdm Lim was only a nominee of the defendant.

The plaintiff was relying on mistake to avoid the consequences of ss 6(1) and 6(7) of the Limitation Act (Cap 163) by relying on s 29(1)(c) of the Act which states:

29	(1)	Where, in the case of any action for which a period of limitation is prescribed by this Act -	
		(c)	the action is for relief from the consequences of a mistake,
the period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake, as the case may be, or could with reasonable diligence have discovered it.			

As for the nature of the mistake, para 25 of the plaintiff`s opening statement said that the cause of action was for payment under a mistake of law, contrary to para 15 of the amended statement of claim, and went on to assert that such a cause of action could not, as a matter of law, have accrued prior to the decision of the Court of Appeal on 6 February 1998. The allegation of a mistake of fact was relegated to an alternative position.

It seems to me that the plaintiff had decided again to shift her position and couch the mistake, first, as one of law (in her opening statement) to strengthen her argument that the mistake could not have been discovered until the decision of the Court of Appeal. Yet in para 25 of her reply to defendant`s closing submissions, it was asserted that it did not matter whether the mistake was one of fact or of law.

In my view, the decision of the Court of Appeal on 6 February 1998 did not create any new law or vary any existing law. Therefore, there was no mistake of law by Tan or Liu, even if there was a mistake.

Furthermore, the decision of the Court of Appeal did not create any new fact or vary any existing fact. It simply determined what the factual position was, ie that Mdm Lim did not have and did not acquire an interest in the property to found her claim for the balance of the purchase price of the property.

The defendant submitted that there was no mistake because the plaintiff had asserted in the 1983 and 1984 actions that the payment was pursuant to a loan and not pursuant to an oral agreement to buy Mdm Lim`s interest in the property.

In the light of the Court of Appeal`s decision on 6 February 1998, I am of the view that this submission is not valid and it was open to the plaintiff to now assert that the payment was made pursuant to a mistake about Mdm Lim`s interest in the property subject to the considerations as to who the correct parties should be, limitation and laches.

In the action before me, both the plaintiff and the defendant had asserted that the payment was to buy Mdm Lim`s interest in the property. The Court of Appeal had determined that Mdm Lim did not

have any interest in the property to sell. I find that the moneys were paid and received under the mistaken belief, held by both Tan and Liu, at the time of payment, that Mdm Lim did have an interest to sell.

However that is not all. Under s 29(1)(c) of the Limitation Act, the period of limitation will begin to run when the plaintiff has discovered the mistake or could with reasonable diligence have discovered the mistake.

The plaintiff sought to overcome this hurdle by alleging that she was ignorant of what had transpired between Tan and Liu. She said she was away at a construction site when discussions pertaining to the payment of the moneys took place between Tan and Liu and she only began to come into the picture after Tan had passed away (on 27 May 1993) and even then only gradually. She tried to suggest that even during the trial of the 1983 and 1984 actions (starting 30 September 1996) to the end thereof (4 November 1996), she was not fully aware of all the facts.

The purported ignorance of the plaintiff is contradicted by her evidence at the trial of the 1983 and 1984 actions.

At the trial of the 1983 and 1984 actions, she said (at NE 225E to 227C):

> *I see 3AB1, yes these are two Bangkok Bank drafts paid from Hong Kong Branch addressed to PW2 both dated 23.4.81. Yes I was in Hong Kong that day but I was not in the office when these two drafts were handed to PW2, our office was at 45 Des Veoux Road Central, I didn`t know my husband would hand over these drafts.*
>
> *I see 3AB3 a HSBC draft dated 24.4.81 for US$293,555.59. Yes I saw this draft. On 24.4.81 when I went to my office in Hong Kong PW2 was already there. I then asked my manager why PW2 was there. My assistant manager then told me about this draft and the two drafts at 3AB1 and that PW2 came to borrow money. Yes my husband was also in the office. My reaction - I then asked my husband whether PW2 had provided any security or guarantee. My husband kept quiet. PW2 then said he did not bring along any security with him. At that time I knew the two Bangkok Bank drafts had already been given to PW2 and I asked him to return them straight-away, because he said he did not bring along any security.*
>
> *The HSBC draft was not handed to PW2 because I took it, I stopped my husband from giving it to him. When I asked him for the two drafts PW2 said they were not with him, they were in the hotel, he tapped his stomach and claimed the drafts were not with him. Yes he said he would return to his hotel and retrieve the drafts. He then left my office after promising he would return the drafts to me. No he did not come back, he disappeared after that. When PW2 did not return with the two drafts, I told my husband he was a master, I was only a disciple and he should be careful in his business. I told my husband to get the money back from PW2. Subsequently I am aware my husband made demand of return of drafts, he told me. My husband told me PW2 promised to repay the money once his financial status had improved. I myself did not speak to PW2 personally to return the money. Yes I head my counsel put it to PW2 in cross-examination that I had asked him to return the money, no that is no correct. I asked my husband to ask PW2 to return the money.*

The plaintiff also said that she was just a simple woman (NE 116 line 12). Having considered the

plaintiff`s demeanour and her testimony, I am of the view that she is far from being a simple woman.

In any event, whether the plaintiff was ignorant of what had transpired between Tan and Liu or not, the following facts are clear.

By a letter dated 4 May 1983, M/s Drew & Napier, acting for Fook Gee, demanded the return of the moneys paid and interest from Liu on the basis that Fook Gee had lent the moneys to Liu.

By a letter dated 11 May 1983, M/s Allen Yau, acting for Liu, replied. They said that Liu had received on behalf of Mdm Lim the moneys from Lee Tat. They also said that the moneys represented part payment of a purchase price for Mdm Lim`s interest in the property.

By a letter dated 27 July 1983, M/s Drew & Napier asserted that Mdm Lim `never had any direct interest in the land`.

M/s Drew & Napier must have been taking instructions from Tan as Tan was controlling Fook Gee and Lee Tat.

Lee Tat`s and Tan`s position was reiterated in para 12 of the amended defence (of the first three defendants), filed on 7 October 1987, in the 1984 action, which states:

> *Paragraphs 5 and 6 of the statement of claim are denied. Further the statement of claim discloses no share which the plaintiff owned at the said date which she could agree to sell. The defendants reserve the right to plead further hereto when the case is properly particularised.*

This position was maintained in the re-amended defence (of the first three defendants) filed on 13 January 1993 and the re-re-amended defence (of the first three defendants) filed on 27 September 1996.

Furthermore, para 20(iii) of Tan`s affidavit affirmed on 1 February 1989 for the 1984 action stated:

> *(20) In June 1984, 11 years after the alleged second agreement was purportedly entered into, the plaintiff commenced this action to claim the following relief:*
>
> *(iii) as against the first defendants and/or myself, she claims specific performance of a purported oral agreement made sometime in April 1981, under which the first defendants and/or myself allegedly agreed to buy her share in Lot 1606 of Mukim 28 for $3.8m (hereinafter called `the alleged oral third agreement`).*

Paragraphs 25(a) and 27 to 29 of the same affidavit stated:

> *(25) The plaintiff`s claim that the first defendants are holding Lot 1606 of Mukim 28 on trust for her and Collin Tan is also misconceived and cannot be sustained for the following reasons:*

(a) At all material times, the plaintiff had no proprietory interest in the property;

(b) ...

(c) ...

(26) ...

(27) Further, for any or all of the above reasons, the plaintiff had no interest in the property and, consequently, nothing for which she could allegedly sell to the first defendants or myself.

(28) Besides, the first defendants were at all material times the de facto and de jure owner of the property (including Lot 1606 of Mukim 28). Even if the alleged oral third agreement existed, which is denied, there was no consideration to support it.

(29) ... At the time of the alleged oral third agreement, she had no right whatsoever in the property. For this reason, the alleged oral third agreement is invalid for want of consideration.

Since Liu and Mdm Lim were asserting that the moneys were part of Lee Tat`s purchase of Mdm Lim`s interest in the property, and since Fook Gee, Lee Tat and Tan were asserting that she had no such interest, it was open to Tan to cause Lee Tat to commence an action against Mdm Lim for the return of the moneys on the basis of total failure of consideration and include moneys had and received and/or moneys paid under a mistake of fact as a matter of caution. This could have been done instead of using Fook Gee to sue on the basis of a loan. Alternatively, Lee Tat could and should have commenced a separate action based on these causes of action, and thereafter Fook Gee`s action and Lee Tat`s action could have been heard one after another.

Furthermore, as things turned out, Mdm Lim had commenced the 1984 action in which Lee Tat was the first defendant and Tan was the second defendant. In that action, Mdm Lim had made various claims. One of her claims was that there was a contract between Lee Tat and her to purchase her interest in the property and she was claiming the balance of the purchase moneys.

This was an opportune moment for Lee Tat to make a counterclaim on the basis that if indeed the moneys were paid pursuant to a contract between Mdm Lim and Lee Tat, to purchase Mdm Lim`s interest, then, as she had no such interest, the moneys had to be returned to Lee Tat based on the causes of action which I have mentioned. This counterclaim could then have been run at the same time as the claim by Fook Gee and heard together, as was done for the 1983 and 1984 actions.

However, none of the steps which I have mentioned above were taken for Lee Tat (or for Tan for that matter).

I also note that while the plaintiff argues that she is unable to explain why her husband, Tan, had chosen to claim (in the 1983 action) that the moneys were a loan given to the defendant by Fook Gee, she stopped short of saying in her evidence that both Tan and his then solicitors did not have enough facts to take any of the steps (which I have mentioned) much earlier. Furthermore, while Tan

is no longer available to give evidence, I presume that his then solicitors were available but did not give evidence, since nothing to the contrary was suggested to me.

I find that Tan and his solicitors must have been aware of the various options which I have mentioned but chose not to exercise them since Tan had already decided on using Fook Gee as the claimant. Having decided this, Tan did not want to make another claim, through Lee Tat, based on a cause of action inconsistent with Fook Gee`s.

The plaintiff cannot, by her professed ignorance of facts, stand in a better position than Tan.

Accordingly, I find that the mistake was discovered by Tan by 27 July 1983, alternatively, by 7 October 1987 or by 1 February 1989. Even if it was not in fact discovered by then, it could with reasonable diligence have been discovered . A claim should have been made long ago for the return of the moneys based on the causes of action I have mentioned. By 27 July 1989 or 7 October 1993 or 1 February 1995, any claim on such causes of action was time-barred.

In addition, para 35 of the appellant`s case, submitted on 28 August 1997, for Fook Gee in CA 93/97 states:

> *Even if Tan had, **mistakenly and wrongly** assumed that Liu/Madam Lim had an interest in Lot 1606, it was highly unlikely that Tan would have entered into the alleged oral agreement to buy that interest from Liu/Madam Lim without the services of solicitors to advise him on the transaction, and without proper or any documentary record of the million-dollar deal. [Emphasis added.]*

It was, therefore, quite absurd for the plaintiff to now contend that the mistake was discovered only when the Court of Appeal had delivered its judgment on 6 February 1998.

In the plaintiff`s closing submission on the cause of action based on a mistake, it was also argued (at para 28) that the defendant had discovered the mistake only when the Court of Appeal had delivered its judgment on 6 February 1998, and that the defendant`s mistake was the operative mistake. The suggestion seemed to be that, therefore, the date of realisation of the defendant of his mistake was the date when time began to run for the commencement of an action based on mistake.

I am of the view that even if it were true that the defendant had discovered the mistake only when the Court of Appeal delivered its judgment on 6 February 1998, on which I shall say more about later, this was irrelevant.

Under s 29(1)(c) of the Limitation Act, time begins to run when the plaintiff, not the defendant, has discovered the mistake or could with reasonable diligence have discovered it.

I would also point out that the plaintiff`s argument about the defendant`s knowledge of the mistake for the purpose of s 29(1)(c) is different from her argument that a remedial constructive trust arose when the defendant discovered the mistake.

Remedial constructive trust

Cases

The plaintiff`s case is that the defendant had learnt from the Court of Appeal judgment on 6 February 1998 that Mdm Lim had no interest in the property. It was argued that when the defendant discovered that mistake, the retention by the defendant of the moneys gave rise to some sort of remedial constructive trust.

Accordingly the plaintiff argues that she is entitled to rely on s 22(1)(b) of the Limitation Act to avoid any period of limitation prescribed by the Act. Section 22(1)(b) states:

> *22(1) No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action -*
>
> *(b) to recover from the trustee trust property or the proceeds thereof in the possession of the trustee, or previously received by the trustee and converted to his use.*

The plaintiff relies primarily on certain statements made by Lord Browne-Wilkinson in **Westdeutsche Landesbank Girozentrale v Islington London Borough Council** [1996] AC 669.

In that case the issue was whether a bank was entitled to recover compound or simple interest on moneys received by a council and apparently the general rule was that equity had never awarded compound interest except against a trustee or other person in a fiduciary position in respect of profits improperly made. So the question was whether the council had received the moneys as trustee.

Lord Browne-Wilkinson discussed various cases.

In **Sinclair v Brougham** [1914] AC 398, a building society had been carrying on business as a bank which, it was held, was ultra vires its objects. It had therefore received deposits in the course of its ultra vires banking business. An issue arose as to how the liquidator was to distribute its assets. The depositors claimed first in quasi-contract for money had and received and secondly to trace their deposits into the assets of the society.

Lord Browne-Wilkinson said (at p 710) that the depositors should have had a personal claim to recover the money at law based on a total failure of consideration. He did not agree that they could succeed on the tracing claim and disagreed with Lord Haldane LC`s approach in that case of an equitable right arising under `a resulting trust, not of an active character` which existed from the moment when the society received the money.

Lord Browne-Wilkinson noted that it was the intention of the parties that the society should be free to deal with the money as its own and this was inconsistent with a resulting trust.

He also noted that since the depositor`s moneys were intended to be mixed with that of the society, there was never any intention that there should be a separate identifiable trust fund which is an essential feature of any trust.

Accordingly he concluded thus:

> *If **Sinclair v Brougham**, in both its aspects, is overruled the law can be*

established in accordance with principle and commercial common sense: a claimant for restitution of moneys paid under an ultra vires, and therefore void, contract has a personal action at law to recover the moneys paid as on a total failure of consideration; he will not have an equitable proprietary claim which gives him either rights against third parties or priority in an insolvency; nor will he have a personal claim in equity, since the recipient is not a trustee.

Lord Browne-Wilkinson then considered **Chase Manhattan Bank NA v Israel-British Bank (London) Ltd** [1981] Ch 105. In that case, Chase Manhattan, a New York bank, had by mistake paid the same sum twice to the credit of the defendant, a London bank, which shortly thereafter went into insolvent liquidation.

At pp 714 to 715, Lord Browne-Wilkinson said:

Goulding J was asked to assume that the moneys paid under a mistake were capable of being traced in the assets of the recipient bank: he was only concerned with the question whether there was a proprietary base on which the tracing remedy could be founded: p 116B. He held that, where money was paid under a mistake, the receipt of such money without more constituted the recipient a trustee: he said that the payer `retains an equitable property in it and the conscience of [the recipient] is subjected to a fiduciary duty to respect his proprietary right:` p 119.

It will be apparent from what I have already said that I cannot agree with this reasoning. First, it is based on a concept of retaining an equitable property in money where, prior to the payment to the recipient bank, there was no existing equitable interest. ...

However, although I do not accept the reasoning of Goulding J, ***Chase Manhattan*** *may well have been rightly decided. The defendant bank knew of the mistake made by the paying bank within two days of the receipt of the moneys: see at p 115A. The judge treated this fact as irrelevant (p 114F) but in my judgment it may well provide a proper foundation for the decision. Although the mere receipt of the moneys, in ignorance of the mistake, gives rise to no trust, the retention of the moneys after the recipient bank learned of the mistake may well have given rise to a constructive trust: see* ***Snell`s Equity****, p 193;* ***Pettit, Equity and the Law of Trusts*** *(7th Ed, 1993) p 168;* ***Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc*** *[1990] 1 QB 391, 473-474.*

He went on to say, at p 716:

Although the resulting trust is an unsuitable basis for developing proprietary restitutionary remedies, the remedial constructive trust, if introduced into English law, may provide a more satisfactory road forward. The court by way of remedy might impose a constructive trust on a defendant who knowingly retains property of which the plaintiff has been unjustly deprived. Since the remedy can be tailored to the circumstances of the particular case, innocent third parties would not be prejudiced and restitutionary defences, such as change of position, are capable of being given effect. However, whether English law should follow the United States and Canada by adopting the remedial constructive trust will have to be decided in some future case when the point is directly in issue.

Eventually he concluded that simple interest should be paid.

In **Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc** [1990] 1 QB 391, the Court of Appeal said, at p 479:

> *The extent to which a constructive trust can properly be treated as a remedy is far from clearly defined in the authorities. The position is stated thus in* ***Snell`s Principles of Equity*** *(28th Ed, 1982), p 193:*
>
> *`In some jurisdictions the constructive trust has come to be treated as a remedy for many cases of unjust enrichment; whenever the court considers that the property in question ought to be restored, it simply imposes a constructive trust on the recipient. In England, however, the constructive trust has in general remained essentially a substantive institution; ownership must not be confused with obligation, nor must the relationship of debtor and creditor be converted into one of trustee and cestui que trust. Yet the attitude of the courts may be changing; and although the constructive trust is probably not confined to cases arising out of a fiduciary relationship, it is far from clear what other circumstances suffice to raise it or how far it can be employed as a species of equitable remedy to enforce legal rights.`*
>
> *However, the authors of* ***Goff and Jones, The Law of Restitution*** *(3rd Ed, 1986), after a comprehensive review of the authorities, state their views, at p 78:*
>
> *`Equity`s rules were formulated in litigation arising out of the administration of a trust. In contrast restitutionary claims are infinitely varied. In our view the question whether a restitutionary proprietary claim should be granted should depend on whether it is just, in the particular circumstances of the case, to impose a constructive trust on, or an equitable lien over, particular assets, or to allow subrogation to a lien over such assets.`*
>
> *While we have had the benefit of very full argument on almost all other aspects of the law involved in this case, we have neither heard nor invited comprehensive argument as to the circumstances in which the court will be prepared to impose a constructive trust de novo as a foundation for the grant of equitable remedy by way of account or otherwise. Nevertheless, we are satisfied that there is a good arguable case that such circumstances may arise and, for want of a better description, will refer to a constructive trust of this nature as a `remedial constructive trust`.*

Notwithstanding the plaintiff`s citation of passages from ***Westdeutsche Bank*** and from ***Metall und Rohstoff AG*** , the plaintiff appears to accept that the English courts have not gone beyond raising the remedial constructive trust as only a possible form of equitable remedy.

I would add that subsequent to the judgment in ***Westdeutsche Landesbank*** , the Court of Appeal in **A-G v Blake (Jonathan Cape Ltd, third party)** [1998] Ch 439[1998] 1 All ER 833, said (at [1998] Ch 439, 459; [1998] 1 All ER 833, 846):

> *C Conclusion*

> *In **Snepp v US** [1980] 444 US 507 a majority of the United States Supreme Court awarded restitutionary damages for breach of contract in circumstances closely resembling those of the present case. They did so by invoking the concept of the remedial constructive trust impressed on the proceeds of publication without prior clearance. We find the conclusion more attractive than the route by which it was reached. We would prefer to award restitutionary damages directly for breach of contract rather than distort the equitable concepts of fiduciary duty or constructive trust in order to accommodate them.*

However I would also mention that the judgment of the House of Lords in ***Westdeutsche Landesbank*** does not appear to have been raised in the Court of Appeal in ***Blake*** .

In Singapore, the question of a remedial constructive trust was considered briefly by the learned Chief Justice in **PP v Intra Group (Holdings) Co Inc** [1999] 1 SLR 803 . He said (at [para] 46):

> *If it is to be regarded as correct in result but not reasoning, it may well be, if it were to be decided again today, that **Sinclair v Brougham** might be classified as a remedial constructive trust, a category of trusts not as yet recognised in English or Singapore law, though the possibility that such a doctrine may yet be entertained at some future date was mooted by Lord Browne-Wilkinson in **Westdeutsche** in his consideration of **Chase Manhattan Bank NA v Israel-British Bank (London) Ltd** [1981] Ch 105[1980] 2 WLR 202, a decision in which a proprietary claim was awarded for a mistake of fact ...`*

After citing Lord Browne-Wilkinson`s observations, the learned Chief Justice said (at [para] 47):

> *For the same reasons I do not propose to consider the applicability of the doctrine of remedial constructive trusts here, at least not without the benefit of counsel`s submissions.*

Textbooks/articles

Both the plaintiff and the defendant referred to ***Constructive Trust*** by AJ Oakley (3rd Ed, 1997). I would refer to the following passages from that textbook.

At p 19:

> *1 The Attitude of the North American Jurisdictions*
>
> *The United States of America has long adopted the attitude that the constructive trust is an instrument for remedying unjust enrichment. Thus a constructive trust may be imposed whenever the constructive trustee has been unjustly enriched at the expense of the constructive beneficiary. In other words, all that has to be shown is that the constructive trustee has received some benefit which, as against the constructive beneficiary, he cannot justly retain. This does not mean that a constructive trust will be imposed whenever*

unjust enrichment is found to exist; a constructive trust is merely one of a number of remedies available to the court and will be imposed when the court feels that it is appropriate to give the victim of the unjust enrichment a proprietary remedy.

At pp 22 to 25:

2 The Attitude of the Remaining Common Law Jurisdictions

The remaining common law jurisdictions have not as yet accepted that the unjust enrichment of the constructive trustee is, without more, a sufficient ground for the imposition of a constructive trust. This has recently been illustrated in this jurisdiction by the decision of the Court of Appeal in ***Halifax Building Society v Thomas*** *...*

That is not to say that there have never been any other attempts to introduce the principles adopted in North America into English law. In the years immediately before and after 1970, it did appear that English law might be moving towards an approach similar to that which was subsequently adopted in Canada. At that time, a number of decisions emanating from the Court of Appeal suggested that a constructive trust `is a trust imposed by law whenever justice and good conscience require it ... it is an equitable remedy by which the court can enable an aggrieved party to obtain restitution.` The underlying and indeed often expressed objectives of the judges in the cases in which what became known as `new model` constructive trusts were imposed was to prevent results which would otherwise have been inequitable. Indeed in the first edition of this work in 1978 it was stated that this approach `may be symptomatic of a general change of attitude towards the constructive trust`.

However, this view was rejected both in Australia and in New Zealand and the approach manifested in this series of cases was not followed up in the subsequent decisions of the Court of Appeal. English law seemed, therefore, to have reverted to its traditional attitude towards the constructive trust, an attitude which has perhaps been most accurately described by the statement that in England `the constructive trust continues to be seen as an institutional obligation attaching to property in certain specified circumstances`; certainly by the time of the second edition of this work in 1987, it was no longer possible to contend that English law was in a transitional stage.

Although the constructive trust is therefore not at present a remedy for unjust enrichment, there have, however, been some indications in the last few years of the possibility of a move towards a more remedial approach. In ***Metall und Rohstoff AG v Donaldson Lufkin & Jenrette****, the Court of Appeal accepted that `there is a good arguable case` that circumstances may arise in which `the court will be prepared to impose a constructive trust de novo as a foundation for the grant of equitable remedy by way of account or otherwise`, classifying such a trust as a `remedial constructive trust`...*

However, just before this edition went to press, Lord Browne-Wilkinson in ***Westdeutsche Landesbank Girozentrale v Islington LBC*** *seized on the remarks of the Court of Appeal in* ***Metall und Rohstoff AG v Donaldson Lufkin & Jenrette*** *as a possible justification for the decision of Goulding J in* ***Chase Manhattan Bank v Israel-British Bank (London)*** *that a bank which had*

mistakenly paid the same sum twice rather than once to another bank could maintain an equitable proprietary claim against the other bank. ...

This is not the only recent occasion on which Lord Browne-Wilkinson has enunciated a broad principle capable of being developed in such a way as to bring about substantial changes to the existing law. These particular remarks certainly cannot be described as strictly neutral and there can, therefore, be little doubt that the House of Lords will one day soon be called upon to decide whether to return to the trail blazed by the Court of Appeal immediately after 1970 or to retain the more traditional approach adopted before and after that period.

Similar observations had been made several years earlier in the High Court of Australia. In ***Hospital Products International v United States Surgical Corporation*** *Deane J (admittedly dissenting on this point) stated that the plaintiff was entitled to a declaration that the defendant was liable to account as a constructive trustee:*

`in accordance with the principles under which a constructive trust may be imposed as the appropriate form of equitable relief in circumstances where a person could not in good conscience retain for himself a benefit or the proceeds of a benefit, which he has appropriated to himself in breach of his contractual or other legal or equitable obligations to another. Since this particular aspect of the matter was not explored in argument and a majority of the court is of the view that there is no basis for any finding of constructive trust however, it is preferable that I defer until some subsequent occasion a more precise identification of the principles governing the imposition of a constructive trust in such circumstances.`

However, although Deane J had on several subsequent occasions prior to his recent retirement the opportunity to identify more precisely the principles governing the imposition of a constructive trust in such circumstances, most notably in his lengthy judgment in ***Muschinski v Dodds****, he in fact emphatically rejected the notion of the constructive trust as a general equitable remedy, saying in that case:*

`The fact that the constructive trust remains predominantly remedial does not, however, mean that it represents a medium for the indulgence of idiosyncratic notions of fairness and justice. As an equitable remedy, it is available only when warranted by established equitable principles or by the legitimate processes of legal reasoning, by analogy, induction and deduction, from the starting point of a proper understanding of the conceptual foundation of such principles ...

Thus it is that there is no place in the law of this country for the notion of a "constructive trust of a new model" which, "by whatever name it is described, ... is ... imposed by law whenever justice and good conscience" (in the sense of "fairness" or what "was fair") "require it": per Lord Denning MR, ***Eves v Eves****.`*

At pp 26 to 27:

It has never been the practice of English courts to alter existing property rights merely in order to do justice inter partes. The House of Lords has repeatedly stated that rights of property are not to be determined according to what is

reasonable and fair or just in all the circumstances. This proposition was expressly asserted by four of the members of the House in ***Pettit v Pettitt*** *and was also crucial to the subsequent decisions of the House in* ***Gissing v Gissing*** *and* ***Lloyds Bank v Rosset****. The fundamental nature of this principle was emphatically stated by Bagnall J in* ***Cowcher v Cowcher*** *where he said:*

`In any individual case the application of [established principles of property law] may produce a result which appears unfair. So be it: in my view that is not an injustice. I am convinced that in determining rights, particularly property rights, the only justice that can be attained by mortals, who are fallible and are not omniscient, is justice according to law; the justice that flows from the application of sure and settled principles to proved or admitted facts. So in the field of property law the length of the Chancellor`s foot has been measured or is capable of measurement. This does not mean that equity is past child-bearing; simply that its progeny must be legitimate - by precedent out of principle. It is as well that this should be so; otherwise no lawyer could safely advise on his client`s title and every quarrel would lead to a law suit.`

The defendant also referred to ***Restitution and Constructive Trusts*** by Sir Peter Millet, writing extra-judicially (see ***Restitution, Past Present and Future, Essays in Honour of Gareth Jones*** , 1998).

Sir Peter Millet said, at pp 209 to 210:

5 What relief is available? The primary question here is whether the plaintiff is entitled to a proprietary remedy. Only equity provides proprietary remedies, so we must turn to equity for the answer. It is my thesis that the law of restitution tells us only that a personal restitutionary remedy is available - an order for an account and payment. In order to discover whether there is a proprietary restitutionary remedy available we must turn to the law of property, specifically to that part of the law of property which is within the province of equity, and more specifically to the law of resulting trusts.

In saying this I may appear to be flying in the face of the opinion of Lord Browne-Wilkinson in the ***Westdeutsche Landesbank*** *case where he described the resulting trust as an unsuitable basis for developing proprietary restitutionary remedies, and indicated that the remedial constructive trust, if introduced into English law, might provide a more satisfactory road forward. But this was based on what I would respectfully describe as unorthodox views both of the nature of the resulting trust and of the doctrine that equity acts on the conscience ...`*

At pp 211 to 213, he said:

In my view there was no question of a proprietary remedy in the ***Westdeutsche Landesbank case****. There was certainly no question of a constructive trust. For the reasons given by Lord Browne-Wilkinson, ie because it would not have been unconscionable for the local authority to assert its beneficial interest and deny that it held the money on trust for the bank even after it was advised that the transactions were ultra vires. It would have been unjustly enriched if it retained the money without accounting for it; but it would not have been unjustly enriched merely because it did not pay over the money* ***in specie*** *the moment it received it. It had no such obligation. It was not a*

fiduciary. The relationship between the parties was exclusively commercial. The local authority was accountable, but the money was not trust property.

Nor was there any question of resulting trust, again for the reasons given by Lord Browne-Wilkinson. The bank made and the local authority received the payment with the intention that the money should become the absolute property of the local authority. The parties were under a misapprehension that the payment was made in pursuance of a valid contract, and that was sufficient to justify restitution. But it did not affect the parties` intention that the money should become the property of the local authority. The payment is explained by the supposed contract, and the explanation is sufficient to rebut any inference of a resulting trust. The circumstances in which the authority became beneficially entitled to the money rendered it accountable to the bank, but since it became beneficially entitled to the money at the moment of receipt it was not then and (I suggest) could not afterwards become liable to a proprietary claim.

...

I agree with Lord Brown-Wilkinson that ***Chase Manhattan Bank NA v Israel-British Bank (London) Ltd*** *was wrongly decided, but it was wrongly decided, not because the defendant had no notice of the plaintiff`s claim before it mixed the money with its own, but because the plaintiff had no proprietary interest for it to have notice of. The plaintiff had intentionally though mistakenly parted with all beneficial interest in the money. To this extent the case is on all fours with the* ***Westdeutsche Landesbank*** *case.*

The fact that the transferor intended to part with the beneficial interest was inconsistent with the existence of a resulting trust. The fact that the money was paid by mistake afforded a ground for restitution. By itself notice of the existence of a ground of restitution is obviously insufficient to found a proprietary remedy; it is merely notice of a personal right to an account and payment. It cannot constitute notice of an adverse proprietary interest if there is none.`

My conclusion

I have doubts as to whether the doctrine of remedial constructive trusts should apply in Singapore. However it is not necessary for me to decide that as I am satisfied that on the particular facts before me, the plaintiff has failed to establish such a trust.

The plaintiff`s case was that the payment was made pursuant to a contract of sale of Mdm Lim`s interest. The Court of Appeal has found that Mdm Lim did not have such an interest.

The plaintiff is in no better position than the depositors in ***Sinclair v Brougham*** where the moneys were paid pursuant to a void contract.

As in that case, when the moneys were paid to purchase Mdm Lim`s interest, it was intended that she should be free to deal with the moneys and she was entitled to mix the moneys with other moneys of hers or anyone else for that matter. Whether it was in fact mixed is irrelevant.

The plaintiff`s cause of action is one based on a total failure of consideration and not trust. Mdm Lim has been unjustly enriched and was accountable for the moneys received but the relationship was exclusively commercial and the moneys were and are not trust property.

If the plaintiff should succeed in establishing a remedial constructive trust in the circumstances, this would render nugatory the concept of total failure of consideration and even the traditional constructive trust in which breach of a fiduciary relationship or knowledge of a breach of a fiduciary relationship is a requirement.

There is also no compelling reason here as to why the plaintiff should now be allowed to succeed. This is not a case where Tan never had any other cause of action available. Tan had elected to embark on a certain course of action and, having done so, chose not to have an alternative as a fall-back. Even if, contrary to my finding, he was unaware of his mistake, the point is that he could with reasonable diligence have discovered it.

This is also not a case where Liu has been guilty of some dishonest conduct or motive as was conceded by plaintiff`s counsel (see NE 56 line 2 to 7, NE 57 line 9 to 12, NE 57 line 23 to NE 58 line 2).

I would also add three other points.

First,, even if the plaintiff were to succeed in establishing a remedial constructive trust on the basis of the subsequent knowledge of Liu after the moneys had been received, it does not necessarily follow that the moneys received are trust property for the purpose of s 22(1)(b) of the Limitation Act. When the moneys were received, they were clearly not trust property.

In an article by HM McLean entitled `Limitation of Actions in Restitution` in the ***Cambridge Law Journal*** 1989, McLean said (at p 498):

> *It seems unsatisfactory that limitation provisions which were designed to protect pre-existing trust interests, should be invoked in a case involving the simple mistaken payment of money and parties with no previous fiduciary relationship.*

I think this comment also applies in the context of the reservation I mentioned above.

However, in the light of my decision that the facts do not give rise to a remedial constructive trust, it is not necessary for me to decide whether the moneys received are trust property for the purpose of s 22(1)(b).

Secondly, I do not think that Liu had realised the mistake (about Mdm Lim`s non-interest) only when the Court of Appeal delivered its judgment on 6 February 1998.

It may be that Liu does not want to accept that there was a mistake which is a different point. Indeed, his evidence was that even with the judgment of the Court of Appeal in the 1984 action, he still did not accept that there was a mistake (NE 238 line 1 to 4).

However, I find that whether or not Liu wishes to accept that there was a mistake, he must have realised the mistake before the judgment of the Court of Appeal on 6 February 1998 in the light of M/s

Drew & Napier`s letter dated 27 July 1983 to M/s Allen Yau, the amended defence (in the 1984 action) filed on 7 October 1987 and Tan`s affidavit (in the 1984 action) affirmed on 1 February 1989. Whether Mdm Lim could have succeeded in the 1984 action in establishing that she had an interest in the property is another matter.

Thirdly, although Liu did say that he would not keep the moneys if he knew that there had been a mistake (NE 238 line 14), this does not give rise to a binding commitment on his part to return the moneys.

Laches

If, for the sake of argument, there is some sort of remedial constructive trust in favour of the plaintiff, this may avoid the periods of limitation prescribed by the Limitation Act but it does not affect the court`s equitable jurisdiction to refuse relief on the ground of acquiescence, laches or otherwise (see s 32 of the Limitation Act).

The plaintiff argues that Liu only discovered the mistake from the Court of Appeal`s judgment on 6 February 1998 and hence the remedial constructive trust could only arise then. In the light of what I have said, Liu must have discovered the mistake much earlier by 27 July 1983, alternatively, by 7 October 1987 or 1 February 1989 at the same time as when the point about Mdm Lim`s non-interest was raised by Fook Gee, Lee Tat and Tan.

Limitation Periods by Andrew McGee (2nd Ed, 1994), states (at p 17):

> *With regard to the use of analogy, a court of equity has a discretion to take account of the expiry of any statutory period of limitation when considering whether to grant an equitable remedy. It might, for example, be a relevant consideration that the plaintiff`s common law remedy was time-barred, and that the application for an equitable remedy was an attempt to circumvent this problem. In practice, it seems, however, likely that the action in this case can be dismissed on the similar ground of laches. It is a principle of equity that the plaintiff must come to court quickly and it seems unlikely that there will be many cases where the statutory limitation period has expired but the court is prepared to grant an equitable remedy.*

In the present case before me, it is obvious that the only reason why the plaintiff is raising the argument about a remedial constructive trust is to circumvent the period of limitation prescribed by s 6 of the Limitation Act, and in case she does not succeed on s 29(1)(c) of the Limitation Act about the payment having been made under a mistake.

In **Scan Electronics (S) Pte Ltd v Syed Ali Redha Alsagoff** [1997] 3 SLR 13 , the Court of Appeal said (at [para] 20):

> *Suffice it to say that the defence of laches may operate where the plaintiff has `by his conduct or neglect ... put the other party in a situation in which it would not be reasonable to place him, if the remedy were afterwards to be asserted`: **Lindsay Petroleum Co v Hurd** [1874] 5 LR PC 221 at p 240. Thus, unreasonable delay or negligence in pursuing a right or claim, particularly an equitable one, may be held to disentitle the plaintiff to relief. ...*

For the reasons I have mentioned, I am of the view that there has been unreasonable delay or negligence in pursuing the claims before me and that this is another reason why the plaintiff`s claim should not be allowed to succeed.

Summary

I am of the view that the plaintiff has used the judgment of the Court of Appeal on 6 February 1998 to disguise her attempt to have a second bite at the cherry.

The plaintiff`s claim is dismissed with costs to be paid by the plaintiff to the defendant.

Outcome:

Plaintiff`s claim dismissed.