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Equity and trusts [2014]

Hang Wu TANG

Singapore Management University, hwtang@smu.edu.sg

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15. EQUITY AND TRUSTS

TANG Hang Wu

*LLB (National University of Singapore). LLM, PhD (Cambridge);
Advocate and Solicitor (Singapore);
Professor, School of Law, Singapore Management University.*

Express trust

15.1 The case of *Goi Wang Firn (Ni Wanfen) v Chee Kow Ngee Sing (Pte) Ltd* [2015] 1 SLR 1049 raises a very interesting point with regard to the “beneficiary principle”. In this case, the late Goi had declared that he held certain property on trust for a company. When Goi passed away, his executor’s counsel attempted to undermine the trust by arguing, *inter alia*, that the “beneficiary principle” precluded a settlor from declaring an express trust for a non-human entity. Steven Chong J rejected this argument, holding that (at [27]):

My understanding of the ‘beneficiary principle’ has always been that it is intended, through its insistence on the presence of some identifiable beneficiary, to ensure that a trust can both be enforced against the trustee and controlled by the courts. The aim of this is to nullify those trusts which have as their objects purely private purposes that, by virtue of their wholly abstract nature, cannot conceivably be enforced or policed ... It was therefore not immediately apparent to me where the objection lay in recognising that a company could own property beneficially under an express trust since it is trite that a company is a legal person capable of suing in its own right ... and can, accordingly, enforce a trust if necessary. [emphasis in original]

15.2 *Guy Neale v Nine Squares Pty Ltd* [2015] 1 SLR 1097 (“*Guy Neale*”) is a case which considered, *inter alia*, whether a trade mark is held on an express trust for a partnership. In this case, the plaintiffs were partners of a well-known restaurant, bar and club in Bali called “Ku De Ta”. The defendant, Nine Squares Pty Ltd (“Nine Squares”), is the registered owner of two trade marks in Singapore bearing the name “Ku De Ta”. Nine Squares was a company incorporated in the State of Victoria, Australia, where at all material times, a partner in “Ku De Ta” Bali, one Arthur Chondros, owned 50% of the shares. The plaintiffs argued that an express trust had been created whereby Nine Squares held the trade mark on trust for the plaintiffs. In this case, there was no dispute as to the certainty of subject matter and objects of the express trust. The primary contention is certainty of intention. Overturning the trial judge on the facts, the Court of Appeal found that there was sufficient evidence that Nine Squares intended to hold the trade marks on an express trust for the

plaintiffs. After analysing the cases on certainty of intention to create a trust, Menon CJ observed that the focus seemed to be (at [58]):

... whether it was possible and appropriate to infer an intention to create a trust by looking at evidence not only of the alleged settlor's words and conduct, but also of the surrounding circumstances and the interpretation of any agreements that might have been entered into.

15.3 Questions concerning older trust instruments continue to surface in the Singapore courts. In *Zulaikha Bee bte Mohideen Abdul Kadir v Quek Chek Khiang* [2014] 4 SLR 532, the High Court had to consider a trust declared in 1971 by the late Fatimah over certain properties in Joo Chiat for the benefit of her daughter, Zulaikha. Zulaikha sought to enforce the trust and this was resisted by Fatimah's estate and other children on several grounds. First, it was argued that the trust was invalid because it was not registered pursuant to the Registration of Deeds Act (Cap 269, 1989 Rev Ed) ("RODA"). Second, it was contended that the trust was not validly declared because Fatimah did not understand the contents of the trust deed, which was drafted in English. Finally, the enforcement of the trust was said to be precluded by the doctrine of laches. All these defences were rejected and the trust was upheld. With regard to the RODA point, Tan Siong Thye JC (as he then was) rightly pointed out that the relevant applicable statute is now the Land Titles Act (Cap 157, 2004 Rev Ed). Non-registration of the trust deed under RODA does not make it inadmissible as evidence or affect its validity. The learned judge also found as a matter of fact that the trust deed was interpreted to Fatimah. Hence, the allegation that Fatimah did not understand the contents of the trust deed was rejected. With regard to the doctrine of laches, Tan JC observed rightly that it would be extremely rare for the doctrine of laches to apply to an express trust. In any case, the defendants were not prejudiced by the time lapse as the key witnesses were still available.

Resulting trusts

15.4 The decision of the Singapore Court of Appeal in *Chan Yuen Lan v See Fong Mun* [2014] 3 SLR 1048 ("*Chan Yuen Lan*") (noted in Hang Wu Tang, "A Dispute in Chancery Lane: Re-considering the Resulting and Common Intention Constructive Trust" (2015) Conv (forthcoming) and Rachel Leow & Timothy Liao, "Resulting Trusts: A Victory for Unjust Enrichment" (2014) 73(3) Camb LJ 500) is the most significant case of the year in equity and trusts. At the heart of the dispute was a disagreement about the arrangement that existed between See Fong Mun ("See") and Chan Yuen Lan ("Chan") in relation to the house. See alleged that he was the true owner; Chan's money was merely an interest-free loan to him. The house was registered in her name merely so that Chan could boast to her friends. In contrast, Chan said

that she owned the house absolutely. She needed the financial security of owning a house because See was having an affair with his secretary. Chan alleged that See agreed to this arrangement to appease her over the affair. Whatever the true arrangement was between the parties, it was undisputed that Chan executed a power of attorney in respect of the house. The power of attorney authorised See and one of their sons to “take charge of, manage and improve [her] property” and, in particular, sell the house for such consideration as they saw fit and give receipts for the money received: at [17]. An uneasy truce apparently prevailed between Chan and See for many years. On 5 April 2011, Chan revoked the power of attorney. This prompted See to seek a declaration from the courts that the house belonged to him beneficially.

15.5 *Chan Yuen Lan* provided the Singapore court with the opportunity to reconsider the true jurisprudential basis of the doctrine of resulting trust. V K Rajah JA, who delivered the judgment of the Court of Appeal, considered head on the following question: “What does the resulting trust respond to?” In answering this question, Rajah JA endorsed Robert Chambers’ (see Robert Chambers, *Resulting Trusts* (Clarendon Press, 1997)) lack of intention thesis on the resulting trust, saying (at [43]):

... a resulting trust may arise independently of the presumption of resulting trust so long as it can be shown that the transfer *was not intended to benefit the recipient*, and conversely, a resulting trust may not arise if it can be shown that the transfer was indeed intended to benefit the recipient. The intention of the recipient is therefore irrelevant to the question of whether a resulting trust has arisen. [emphasis in original]

15.6 The learned judge observed (at [44]) that much ink has been spilt on the preferred doctrinal basis of the resulting trust; however, going forward, in Singapore “the lack-of-intention analysis may potentially provide a more sensible basis for the principled yet pragmatic development of this equitable doctrine”.

15.7 The acceptance of Chambers’ lack of intention thesis is unlikely to have significant practical ramifications. This is because Rajah JA was careful to say that (at [48]):

... the courts should tread carefully in this area of the law because an unduly wide doctrine of resulting trusts and potential blurring of the distinction between claims based on unjust enrichment and claims based on resulting trusts might have unsettling effects on the rights of third parties and the security of commercial transactions.

15.8 In this regard, Rajah JA agreed with Graham Virgo (Graham Virgo, *The Principles of the Law of Restitution* (Oxford University Press, 2006) at p 598) that the inquiry as to when a plaintiff’s intention to

benefit the defendant was vitiated for the purposes of identifying an unjust factor should not be conflated with the absence of intent analysis for the purposes of identifying a resulting trust. The latter should be defined more restrictively as compared to the former.

15.9 Another significant aspect of *Chan Yuen Lan* is the observation that payments towards a mortgage loan may be taken into account in quantifying a party's share of the beneficial interest in the property. Under orthodox law, only direct contributions to the purchase price at the time of acquisition are considered to be relevant in quantifying a party's share. As Peter Gibson LJ observed in *Curley v Parkes* [2004] EWCA Civ 1515 at [14]:

Subsequent payments of the mortgage instalments are not part of the purchase price already paid to the vendor, but are sums paid for discharging the mortgagor's obligations under the mortgage ...

This was also the position in Singapore. In an earlier case, *Lau Siew Kim v Yeo Guan Chye Terence* [2008] 2 SLR(R) 108 (noted in Kelvin Low, "Apparent Gifts: Re-examining the Equitable Presumptions" (2008) 124 LQR 369), V K Rajah JA thought that only contributions to the repayment of a mortgage could be taken into account if there was a prior agreement between the parties. Absent such an agreement, payment of mortgage instalments would not give rise to a resulting trust.

15.10 This strict approach has come under trenchant criticism by Martin Dixon. In the latest edition of his textbook, *Modern Land Law* (Routledge, 2014) at p 176, Dixon writes:

... [I]t is not immediately apparent why repayment of a mortgage (or the financing of its debt if the mortgage is interest-only) that was used to purchase the property cannot be regarded as making a contribution to its acquisition at the relevant time. It takes only a little imagination to regard the mortgagee as the agent of the purchasers, paying at the time of purchase, with the mortgagee being repaid as agent with interest by the contributors ...

15.11 Rajah JA cited the passage above in *Chan Yuen Lan* and described Dixon's argument as persuasive. Relying on Lord Neuberger's speech in *Stack v Dowden* [2007] 2 AC 432 and his judgment in the Court of Appeal case of *Laskar v Laskar* [2008] 1 WLR 2695, Rajah JA appeared to have endorsed Lord Neuberger's analysis of invoking equitable accounting in calculating parties' shares where there are contributions to the mortgage instalments.

15.12 *Chan Yuen Lan* also considered whether the common intention constructive trust provided a more satisfactory doctrinal tool in resolving disputes in the domestic context as compared to the resulting

trust. The learned judge gave five reasons for preferring Lord Neuberger's dissenting judgment in *Stack v Dowden*. First, the resulting trust provides pragmatic and clear guidance as compared to the common intention constructive trust. Rajah JA accepted Dixon's criticism (see Martin Dixon, "Editor's Casenotes" [2007] Conv 352) that Baroness Hale's analysis is a "litigation generator" and "the property lawyers" equivalent of Pandora's Box": *Chan Yuen Lan* at [156]. Second, Lord Neuberger's approach premised on the resulting trust removes a distinction between a domestic and commercial context and thus ensures a better consistency of results. Third, the resulting trust approach "prevents the court from imputing to the parties an intention which they never had *vis-à-vis* the quantification of their respective shares of the beneficial interest in the property concerned": *Chan Yuen Lan* at [156]. According to Rajah JA, the resulting trust approach avoids the suspicion of "'palm tree' justice being applied in this area in an unprincipled and arbitrary manner": *Chan Yuen Lan* at [156]. Fourth, Lord Neuberger's approach extends the operation of the common intention constructive trust in the commercial context. Again, this ensures consistency of application of the doctrine in all circumstances. Finally, the primacy of the resulting trust as the default analytical tool in the absence of any evidence of a common intention between the parties is also consistent with Chambers' lack of intention analysis.

15.13 After *Chan Yuen Lan*, the primary doctrinal analysis to apply in Singapore is the resulting trust. First, the presumption is that parties hold the beneficial interest in the property in proportion to their respective contributions to the purchase price. However, this presumption of resulting trust may be rebutted by the presumption of advancement which may be applied to certain relationships. Second, the presumption of a resulting trust may also be displaced if there is sufficient evidence of an express or an inferred common intention that the parties should hold their interest in the property in a different proportion to their contributions. However, Rajah JA was very firm in saying "the court may not impute a common intention to the parties where one did not in fact exist": *Chan Yuen Lan* at [160]. Third, if there is evidence that one party intended to benefit another party with the amount which he or she paid, then the presumption of resulting trust would not apply. In such cases, the party who paid more would be regarded as making a gift to the other person.

15.14 The case of *Quek Hung Heong v Tan Bee Hoon (executrix for estate of Quek Cher Choi, deceased)* [2014] SGHC 17 concerned a dispute over 8A Coronation Road, a two-storey bungalow, in Bukit Timah. It was purchased in 1966 and conveyed to five members of the Quek family as tenants-in-common in equal shares. The youngest member of the Quek family brought a claim in 2011 claiming that the property was held by his family members on, *inter alia*, a resulting trust

for him. In a nutshell, the plaintiff's case was that there was a family arrangement whereby the family members were obliged to recognise his beneficial interest upon full repayment of a loan provided by the family company. Vinodh Coomaraswamy J was not satisfied as matter of evidence that there was such a family arrangement. In any case, the learned judge pointed out that there was a conceptual difficulty with the plaintiff's resulting trust claim because typically a resulting trust arises at the point when the property is acquired. In the present case, the resulting trust claim was alleged to have arisen after the purchase price was paid. Thus, Coomaraswamy J held that the resulting trust claim was simply incompatible with the facts of the case. Also, since the court rejected the existence of the family arrangement, the claim based on the common intention constructive trust similarly failed.

15.15 *Mak Saw Ching v Yam Hui Min, Barbara Rebecca* [2014] SGHC 212 was a dispute regarding the beneficial interest of a Housing and Development Board ("HDB") flat. In this case, Mak Saw Ching ("Mak"), added her granddaughter ("Rebecca") as a joint tenant of her HDB flat. Rebecca is the daughter of Mak's son, Yam Wing Kong ("Wing Kong"), with Maria Yam ("Maria"). Unfortunately, Wing Kong and Maria's marriage broke down three years after the addition of Rebecca as a joint tenant. Rebecca sided with her mother in the divorce proceedings and moved out of the family home. Mak filed the present proceedings and argued that Rebecca held the flat on, *inter alia*, a resulting trust on the basis that Rebecca did not contribute towards the purchase price of the flat. It was further contended that there was no presumption of advancement between a grandmother and granddaughter and Rebecca had to strictly prove the transfer was a gift. In Mak's further submissions, her counsel advanced the case that Mak intended to create an express trust where Rebecca was the trustee and Wing Kong was the beneficiary. Lee Kim Shin JC rightly held that such an express trust was avoided by reason of s 51 of the Housing and Development Act (Cap 129, 2004 Rev Ed) which prohibited the creation of an express trust without the consent of the HDB. The learned judge dismissed the claim because he found that Mak's express trust claim was inconsistent with the case that a presumption of a resulting trust arose in her favour. Lee JC expressed (at [50]) the following sensible sentiments, that is, "where property is transferred gratuitously, it is perhaps difficult to imagine that ordinary members of society today would expect the transfer to be anything but a gift". This case illustrates that a resulting trust does not arise simply because the donor subsequently regrets making a gift to the donee.

Constructive trust

15.16 The facts of *Guy Neale* (above, para 15.2) have already been narrated above. This case is also significant because it considered whether an institutional constructive trust should be declared in the context of a breach of fiduciary duty: for a recent review on the constructive trust jurisprudence, see Yip Man, “Singapore’s Remedial Constructive Trust: Lessons from Australia?” (2014) 8 J Eq 77. After reviewing the decision of the UK Supreme Court in *FHR European Ventures LLP v Cedar Capital Partners LLC* [2014] UKSC 45 which considered the issue of a declaration of a constructive trust over bribes received by an agent, Sundaresh Menon CJ said what is relevant for the present purposes is (at [130]):

... that a principal is entitled to all the benefits acquired by a fiduciary in the course of the fiduciary acting in breach of the duties which he owes to his principal. In order to give legal effect to this, specific property can be ordered to be delivered up to the principal.

15.17 In *Guy Neale*, the Court of Appeal held that one of the partners, Chondros, had usurped a corporate opportunity which properly belonged to the partnership. The partnership agreement was governed by the law of Victoria, Australia, and the test for conflict of interest in Victoria is the “real and substantial” possibility of conflict. In the Court of Appeal’s view, there was a real and substantial possibility of conflict in that the partnership would have wanted to license the use of the Singapore trade mark to third parties if the opportunity arose. Since Chondros caused the Singapore trade marks to be registered in Nine Squares’ name, he acted in breach of his fiduciary duties by usurping a corporate opportunity that belonged to the partnership. Eventually, the matter was decided on the express trust point. However, the Court of Appeal made it clear that, had it been necessary, it was prepared to declare an institutional constructive trust over the trade marks as well as the profits derived from their exploitation.

Trust for sale

15.18 *Salbiah bte Adnan v Micro Credit Pte Ltd* [2015] 1 SLR 601 (“*Salbiah bte Adnan*”) is a brilliant decision which clarifies the issue of an interest in land in relation to caveats. Under s 115(3) of the Land Titles Act (Cap 157, 2004 Rev Ed), “any person who has an interest in the proceeds of sale of land” is regarded as having an interest in land which allows him or her to caveat the land. This section has been used by moneylenders as a method to caveat property by simply including a clause that the lenders of a loan were entitled to be paid from the proceeds of the sale of land. Edmund Leow JC perceptively and carefully demolished this argument in *Salbiah bte Adnan*. Leow JC astutely

pointed out that the original drafter of the Land Titles Act, John Baalman, envisaged this section to apply to a person who was originally entitled to land but who is affected by the equitable doctrine of conversion. An illustration of this is a beneficiary of a trust for sale. As such, the learned judge held that a person who merely had a contractual right to be paid from the sale proceeds of the property should not be regarded as having an interest to caveat the land. If the moneylender intended to take security over the borrower's property, the moneylender should create a mortgage or a charge. Edmund Leow JC's judgment illustrates the importance of a careful interpretation of the Land Titles Act with reference to its historical context.

Charities

15.19 *Koh Lau Keow v Attorney-General* [2014] 2 SLR 1165 is destined to become the *locus classicus* on charity law. In this case, there was a declaration of a trust over 10 Rangoon Lane. The trust provided for the property to be used as, *inter alia*, a temple. One of the permitted uses of the property was "a home or sanctuary for such Chinese women vegetarians of the Buddhist faith as may from time to time be chosen by the trustees of this deed". The question which the court had to decide on was whether the stated purpose was charitable. In the High Court, Tay Yong Kwang J found that the trust was one which advanced religion or was capable of being construed as a trust for relief of poverty. On appeal, this holding was overturned by the Court of Appeal. In construing this trust deed, Chao Hick Tin JA relied on extrinsic evidence that the settlor had never allowed poor or destitute Buddhist vegetarian women to stay on the property. Instead, the settlor had always used part of the property as a private residence for herself and her close friends. Chao JA said (at [25]):

While purely subjective and uncorroborated evidence by a settlor as to his intentions at the time the trust deed was drafted is inadmissible (*Tudor* at para 4-004), *objective* evidence of the settlor's intent is highly relevant in construing a trust deed, especially in cases where its language is ambiguous. [emphasis in original]

The learned judge also thought that this trust did not advance religion because there was no sufficient element of public benefit. Chao JA applied a line of well-known cases which have held that gifts in favour of individuals conducting private religious worship do not satisfy the public benefit requirement.

Fiduciary relationships

15.20 *Ho Kang Peng v Scintronix Corp Ltd* [2014] 3 SLR 329 (noted in Wai Yee Wan, “Corporate Claims against Director for Paying Bribes on Company’s Behalf” [2014] LMCLQ 478) dealt with the issue of a company director’s liability for authorising bribes paid to third parties ostensibly for the purpose of securing business for the company. In the present case, the Court of Appeal found that the disputed payments in question were meant as gratuities to a third party in order to procure certain business for the company. Chao Hick Tin JA held that a director who creates a sham contract and makes unauthorised payments out of the company’s funds for the purpose of securing business for the company cannot be regarded as acting *bona fide* in the interests of the company. Taking a firm stance against bribery, Chao JA observed (at [40]):

Such a director would not be acting honestly even if he claims to be furthering the company’s financial interests in the short term. The ‘interests of the company’ is not just profit maximisation. Neither is it profit maximisation by any means. It is as much in the interests of the company (comprising its shareholders) to have its directors act within their powers and for proper purposes, to obtain full disclosure from its directors, and not to be deceived by its directors. Furthermore, there can be no doubt that a director who causes a company to make payments which are in effect gratuities, thereby running the unjustified risk of subjecting the company to criminal liability, is not acting in the company’s interests.

15.21 The High Court’s decision in *Dynasty Line Ltd v Sia Sukamto* [2013] 4 SLR 253 was reviewed last year. On appeal ([2014] 3 SLR 277), the Chief Justice confirmed the High Court’s holding on the issue of limitation period and a breach of fiduciary duty in the context of company directors. Sundaresh Menon CJ held that s 22 of the Limitation Act (Cap 163, 1996 Rev Ed) applied to a breach of fiduciary duty. Section 22 of the Limitation Act provides that no period of limitation shall apply to an action by a beneficiary under a trust “in respect of any fraud or fraudulent breach of trust”. Here, the directors had dealt with the company’s property in breach of the trust and confidence that had been placed in them as directors. Applying the Court of Appeal’s earlier decision in *Yong Kheng Leong v Panweld Trading Pte Ltd* [2013] 1 SLR 173 as standing for the proposition that a director who disposes of company property in breach of his fiduciary duties is treated as having acted in breach of trust and, more specifically, is a Class 1 constructive trustee, the learned Chief Justice found that the present action was not time barred. Furthermore, the claim was not defeated by laches or acquiescence because the claimant had a valid explanation for the delay and the defendant was not severely prejudiced by the delay.

15.22 *Griffin Travel Pte Ltd v Nagender Rao Chilkuri* [2014] SGHC 205 is significant because it contains valuable discussion on when an employee is considered to be a fiduciary to his or her employer. After an impressive review of both the local and English jurisprudence, Chan Seng Onn J said an employee can in appropriate circumstances be considered to be a fiduciary. The crucial determining factor is whether the employee has placed himself or herself in a position where he must act solely in the interests of his employer. On the facts, the learned judge held that two of the defendant employees, Adella and Prasad, were not fiduciaries to the plaintiff employer. They were not put in a position where they could make decisions which could materially affect the plaintiff.

Equitable compensation

15.23 The case of *Maryani Sadeli v Arjun Permanand Samtani* [2015] 1 SLR 496 is worth a brief mention in the context of equitable compensation. The High Court's decision in *Then Khek Koon v Arjun Permanand Samtani* [2014] 1 SLR 245 considered in great detail the issue of causation in equitable compensation. The Court of Appeal declined to say much about the difficult issue of causation in equitable compensation save for noting that this is a very complex area. Eventually, this case was decided on another ground. Thus, the issue of causation in relation to equitable compensation is by no means settled in Singapore: for a critique of the High Court's decision, see Tan Ruo Yu, "Causation in Equitable Compensation" (2014) 26 SAclJ 724.

Dishonest assistance and knowing receipt

15.24 *Clearlab SG Pte Ltd v Ting Chong Chai* [2015] 1 SLR 163 involved a bitter dispute between an employer and its former employees. The plaintiff accused some of its former employees of a myriad of civil wrongs including dishonest assistance of a breach of trust. Furthermore, the plaintiff sued their former employees' new employer for knowing receipt of confidential information. Both these claims were dismissed. With regard to the dishonest assistance claim, it was argued that the former employees were trustees of the plaintiff's confidential information. When the information was disclosed to their new employer, it was argued that this meant that the employees had dishonestly assisted in a breach of trust. Lee Seiu Kin J rejected this convoluted characterisation. Lee J held that it was very difficult to see how a trust arose over the plaintiff's confidential information. The learned judge thought that proper characterisation was simply an action against the former employees for a breach of confidence. There was simply no need to use the trust framework in this context. Similarly,

Lee J rejected the knowing receipt claim. The learned judge held that knowing receipt must necessarily involve the receipt of property. In this regard, Lee J held that confidential information could not be regarded as property in the context of knowing receipt.

15.25 *M+W Singapore Pte Ltd v Leow Tet Sin* [2015] 2 SLR 271 was a case which dealt with, *inter alia*, the issue of accessory liability in a breach of trust. The plaintiff, M+W Singapore Pte Ltd (“M+W”), was appointed by Jurong Data Centre Development Pte Ltd (“JDD”) to design and build a data centre. The first and second defendants were the directors of JDD and joint signatories of its bank accounts. As JDD was defaulting on its payment, JDD and M+W entered into negotiations to resolve this difficulty. JDD granted M+W a security by way of a debenture where JDD agreed that all “monetary claims” would be charged to M+W via a fixed charge to be effected by depositing the monetary claims into a claims account. Subsequently, the Inland Revenue Authority of Singapore paid JDD over \$6m GST refund. This money was not paid into the designated claims account. In this case, M+W sued the first and second defendants for dishonest assistance of a breach of trust. Judith Prakash J crystallised the issues as follows (at [42]):

- (a) What did the defendant[s] know of the transaction?
- (b) Does participation in the transaction with this knowledge offend ordinary standards?

On the facts of this case, Prakash J found that the defendants knew enough to render their participation in the non-payment of the money to a designated bank account to be dishonest.