Privy Council Appeal No. 42 of 1982

Choo Kok Beng *Appellant*

v.

Choo Kok Hoe and Others *Respondents*

FROM

THE COURT OF APPEAL IN SINGAPORE

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 23RD JUNE 1984

Present at the Hearing:

LORD FRASER OF TULLYBELTON
LORD ROSKILL
LORD BRIDGE OF HARWICH
LORD BRIGHTMAN
SIR ROBIN COOKE

*[Delivered by **Lord Roskill**]*

This appeal from an order of the Court of Appeal in Singapore (Wee Chong Jin C.J., Chua and Sinnathuray JJ.) dated 17th February 1982 reversing an order of Rajah J. dated 5th December 1980, arises out of a bitter and long-standing dispute between brothers regarding title to land in Singapore now known as numbers 1, 3, 5, 7, 9, 11, 15, 17, 19 and 21 Jalan Jermin, Singapore ("the property") those being the numbers of certain houses built on that land after its acquisition in 1954. The circumstances of that acquisition were acutely in issue at the trial of the action before Rajah J. in the High Court of Singapore in March and April 1980. The plaintiff in the action, now the appellant before this Board, initially sued his three brothers, the first three defendants in the action and others who need no specific mention, asserting as against them a legal and beneficial title to the property and also claiming specific performance of what became known at the trial as "the exchange agreement", allegedly concluded between the appellant and his brothers in 1966 or 1967. Subsequently one of the brothers, (the third defendant), died and the administrators of his

[33] estate were substituted as the third defendant.

Those administrators are now the third respondent. The first two defendants are the first two respondents to this appeal.

At the trial the appellant alleged certain facts in support of his claim which if proved to the satisfaction of the trial judge would have gone some way to establish his claim. Their Lordships summarise those facts as follows:-

1. The first respondent bought the property at an auction in February 1954, together with two other pieces of land also then vacant but not presently relevant, for a total of $17,792.00.
2. In so buying the property the first respondent was acting as agent for the appellant.
3. Though the first respondent paid first the 25% deposit and thereafter the balance of 75% of the purchase price by means of his own cheques drawn on his own bank account, the appellant had successively reimbursed the first respondent in respect of each of those two amounts. Each reimbursement was in cash, that cash emanating from profitable transactions of an unspecified kind effected during the Japanese occupation of Singapore. The property was accordingly conveyed to and registered in the name of the appellant who thereafter held the title deeds.
4. Between 1954 and 1959 the appellant advanced to the first respondent a total of $200,000 in four equal sums of $50,000. The making of these advances was said to be evidenced by contemporary pencil entries in a notebook kept by the appellant. That notebook was put in evidence at the trial.
5. In 1962 the appellant wished to develop the property and to obtain repayment of these loans. The first respondent was unable to repay the loans but offered to develop the property for the appellant and it was agreed that the ten semi-detached houses which their Lordships have already mentioned should be built. All the arrangements were made by the first respondent to employ the architect and pay him and the building contractors. The development was completed in March/April 1967. On completion the title deeds were given to the appellant by the first respondent.
6. In 1966 or 1967 the exchange agreement was concluded. Their Lordships do not find it necessary to relate the details of what was claimed to have been agreed on this occasion but are content gratefully to adopt the summary in the judgment of the Court of Appeal.
7. During 1967 the brothers and their families took possession of the various semi-detached houses on completion. The appellant thereafter occupied numbers 19 and 21.
8. In April or May 1968 the title deeds were given

by the appellant to a firm of solicitors in Singapore with instructions to obtain the issue of separate titles to the various houses, but thereafter the present dispute arose. The present action started in 1972 and the application for separate titles remained in abeyance.

Their Lordships can summarise the answers of the respondents to these allegations equally briefly.

1. The first respondent purchased the property for himself and the second respondent, using his own funds and his own cheques for that purpose. It was untrue that the appellant had reimbursed the first respondent the two sums which the first respondent had paid.
2. The story regarding the four loans of $50,000, totalling $200,000, between 1954 and 1959 was wholly untrue and the alleged contemporary entries in the notebook were not only not contemporary but were false.
3. The conveyance to and registration of the title in the name of the appellant was a matter of family arrangement and convenience.
4. The story about the exchange agreement was also wholly untrue.
5. The first respondent had arranged the development of the property himself and had out of his own funds financed the development; he had obtained the necessary consents and paid all the property tax and collected and retained the rents.
6. It was therefore certain of the respondents who were, and not the appellant who was, the beneficial owner of the property and they were entitled to the relief sought in their counterclaim.

When the appellant's claim came on for trial in 1980 it was over a quarter of a century since the property was purchased, over twenty years since the alleged loans were made and over fifteen years since the development of the property began. It was some ten years since the relationship between the brothers had deteriorated and some eight years since the litigation had begun. The litigation was of a type in which truth was likely to be an early casualty and the learned judge was faced with the unenviable task of disentangling stale and conflicting stories for little, if any, of which was any corroboration likely to be available.

The learned judge after hearing the evidence dealt with the matter in a somewhat unusual way. After the hearing was concluded, he subsequently on 23rd April 1980 informed the parties of his conclusions of fact, to which their Lordships will presently advert, and stated that on those findings he could dismiss both

claim and counter-claim but that he would give the parties the opportunity of considering the consequences of his conclusions of fact, pointing out that there appeared to be three options open. Those options were first to proceed without more ado on the basis of these findings; second for suitable amendments to be made to the pleadings, in the light of those findings, and third for the parties, in the light of his findings, to agree upon a consent order.

The hearing was then further adjourned until 28th November 1980. There was then further argument. On 5th December 1980 the learned judge approved and initialled an order on the basis of the findings of fact which their Lordships have mentioned, and to which they must now advert. The learned judge's order was designed to give effect to what he held to be certain equitable rights of the respondents arising by reason of the respondents' expenditure in the development of the property which, in the learned judge's view, was beneficially owned by the appellant, but who had (contrary to his own story) in no way contributed to that expenditure.

The learned judge's order was entered on 8th December 1980. But it was not until 23rd February 1981 that he gave the reasons for his judgment. These also took a somewhat unusual form. After devoting some five pages to setting out the pleadings the learned judge in paragraph 13 of his grounds for judgment stated thus:-

> "This was a case which depended entirely on the credibility or otherwise of the witnesses testifying before me. At some stage or the other both the plaintiff and the first and third defendants were giving me fanciful and incredible accounts of what had happened. On the evidence before me I made the following findings of fact:-
>
> 1. That the title deeds of the Jalan Jermin properties, the subject matter of the litigation, were in the possession of the plaintiff and that he handed them to the first defendant for the purposes of splitting the title.
> 2. That the 1st defendant acted on behalf of the plaintiff in the purchase of the said Ja'an Jermin properties.
> 3. That the plaintiff did not lend to 1st defendant $200,000 as alleged by him or any portion thereof; (a) That there was no request for repayment as alleged in paragraph 3 of the statement of claim.
> 4. That the said Jalan Jermin properties were developed by and paid for by the partnership in which the 1st and 3rd defendants were equal partners.
> 5. That this development took place with the knowledge and consent of the plaintiff.

6. That there was no such agreement as alleged in paragraphs 4 and 6 of the statement of claim between the plaintiff and the 1st, 2nd and 3rd defendants.
7. That there was no such further agreement as alleged in paragraph 6 of the statement of claim between the plaintiff and the 1st, 2nd and 3rd defendants.
8. There was no such agreement as alleged in paragraph 4 of the defence of the 1st, 3rd and 5th defendants between the plaintiff and the 1st and 3rd defendants."

These findings so far as now relevant may be summarised thus:-

1. The appellant's story that the first respondent had acted as his agent in effecting the purchase of the property was true.
2. No express finding is made - their Lordships find it a somewhat strange omission - that the appellant paid the purchase price out of his own funds though the order of 5th December 1980 does so declare in paragraph 1. Their Lordships are, therefore, content to assume that this finding was intended but was omitted by an oversight.
3. The appellant's story about the four loans of $50,000 each was false. This carries with it the clear implication that the entries in the notebook were also false and, indeed, forgeries.
4. The appellant did not finance the development which was exclusively paid for by the first and third respondents; the appellant knew of the development and its financing and consented to it.
5. The appellant's story of the exchange agreement was false.

It follows in their Lordships' view that of the three main supports for the appellant's case, the appellant was found to be positively untruthful on two. The only findings favourable to the appellant were (a) that the first respondent bought the property as the appellant's agent and (b) by implication that the appellant financed the purchase. The learned judge before reaching the single conclusion favourable to the appellant does not seem to have put into the scales his adverse findings on the other two matters which showed the appellant to be an untruthful and unreliable witness. A single statement in the judgment that the matter was one of credibility as between the parties, when the foundation of the appellant's credibility had already been destroyed by the learned judge's other findings cannot, in those circumstances, be of itself sufficient justification for the favourable findings. Those finding were made without any analysis of the

evidence or consideration of the rival probabilities or, indeed, with any reasons given save the bare statement regarding credibility. If a trial judge feels compelled to reach a conclusion partly favourable to one party and partly to another in a case in which it must at least be plain that one party or the other is not telling the truth, it behoves him to analyse the rival stories with care and to consider their respective probabilities and at least to give reasons for a conclusion which, in the absence of reasons can, not unfairly, be said to be surprising in the light of the destruction of the appellant's own credibility on two of the main points in issue.

Their Lordships do not find it surprising that the Court of Appeal not only felt obliged to reach the conclusion which they expressed orally at the conclusion of the hearing of the appeal that the learned judge's findings on the issue favourable to the appellant could not be supported, and that that Court must reverse the learned judge's judgment and enter judgment for the respondents, but that in their written judgment they should have said that in basing his finding "entirely on the credibility or otherwise of the witnesses testifying before him" the learned judge was guilty of "a plain misdirection". Their Lordships respectfully agree with the Court of Appeal that the findings favourable to the appellant were arrived at "without an adequate scrutiny and consideration of all the evidence before him".

Their Lordships are well aware, as no doubt were the Court of Appeal, of the limited circumstances in which it is open to an appellate court to reverse the findings of a trial judge based on credibility of the witnesses who have given evidence at the trial. But when a trial judge has so manifestly failed to derive proper benefit from the undoubted advantage of seeing and hearing witnesses at the trial and, in reaching his conclusion, has not properly analysed the entirety of the evidence which was given before him, it is the plain duty of an appellate court to intervene and correct the error lest otherwise that error result in serious injustice.

One example will suffice. Their Lordships have already pointed out that the learned judge rejected the appellant's story of the loans. The appellant sought to boost this part of his story which the learned judge found to be untrue, by calling his son as a witness. The judge's own note of the son's evidence shows that the son was born in 1949 and thus was 5 years old in 1954 when the property was acquired. In 1980 the son gave evidence which the learned judge noted as follows:-

> "In 1954 at 15 Norris Road I saw money passing between my father and my uncle, the 1st

> defendant. I subsequently asked my mother about it and she said that the amount of money is $50,000 and it was to be a loan to my uncle."

Even if it be predicated that the second sentence was admissible evidence against the first respondent, which their Lordships take leave to doubt, for such evidence to be given in 1980 by a witness of an event 26 years before which he claimed to have taken place when he was a child of 5, and to have recollected over that long period, stretches even judicial credulity far too far. Their Lordships do not find it surprising that the learned trial judge wholly rejected this part of the appellant's case. But they do feel bound to express surprise, which no doubt the Court of Appeal shared, that having done so the learned judge should have felt that there could be any credibility left in a case one part of which was sought to be supported by incredible evidence of this kind.

As their Lordships have already pointed out, the learned judge seems not to have considered the probabilities. In their Lordships' view, the probability, if the appellant honestly believed he was beneficially entitled to the property, of his sitting by silently and without protest and allowing the development (of which he was found by the learned judge to have been aware) to take place is, to say the least, slight. On the other hand, in their Lordships' view, there is nothing inherently improbable in the respondents' story.

For these reasons their Lordships are satisfied that the order of the Court of Appeal was correct and the appeal must be dismissed. The appellant must pay the respondents' costs of the appeal, those costs to include any extra costs occasioned by the respondents', in their Lordships' view quite reasonably, insisting on the inclusion of certain documents which would have been needed to support possible alternative submissions which in the event their Lordships have not had to consider.