

## IN THE COURT OF APPEAL OF MALAYSIA

**Coram:** Hamid Sultan Abu Backer, JCA; Iskandar Hashim, JCA; Kamardin Hashim, JCA

**Goh Jui Leang v Tay Sing Hwa**

**Citation:** [2018] MYCA 204 **Suit Number:** Civil Appeal No. W-02(NCVC)(W)-1859-09/2017

**Date of Judgment:** 11 June 2018

*Purchase of house – Sum of RM 280,000 given by the plaintiff to the defendant (with whom he was in a romantic relationship) allegedly as a monetary gift to support the defendant in her purchase of a house – House purchased by and registered in the defendant’s name – Sale of house – Whether the defendant was entitled to the whole proceeds of the sale of house*

*Agreement between the parties – Whether there was an oral agreement/ understanding that the defendant was to hold the house in trust for the plaintiff – Whether there was an oral agreement/ understanding that the defendant was to pay to the plaintiff 50% of the proceeds of sale of house – Whether the sum of RM 280,000 given by the plaintiff to the defendant as a monetary gift*

*Trust – Resulting trust – Whether there was a resulting trust and/or constructive trust – Applicability of the presumption of a resulting trust – Rebuttal of the presumption of a resulting trust – Whether the presumption of advancement and/or gift relied on by the defendant to rebut the resulting trust applicable*

**JUDGMENT****INTRODUCTION**

[1] This was the Appellant’s (the Plaintiff) appeal against the whole decision of the learned High Court Judge on 30.8.2017 in dismissing the Appellant’s claim with costs of RM 5,000.

[2] The Plaintiff claim against the Respondent (the Defendant) was for declarations that the Defendant held a property bearing the postal address No. 35, Jalan Tempinis Kanan 4, Taman Lucky Bangsar (“**House No. 35**”) on oral trust for the Plaintiff and 50% of the proceeds of sale of House No. 35 in the sum of RM 2,260,000 was held on oral trust for the Plaintiff. The sum claim was for RM 1,160,000.00.

[3] At the High Court, the Plaintiff claimed that there was an oral agreement and/or understanding between the Plaintiff and the Defendant that the Defendant was to hold House No. 35 on trust for the Plaintiff which the Defendant was to pay to the Plaintiff 50% of the proceeds of sale of House No. 35. After selling House No. 35 to third party buyers, the Defendant failed to pay to the Plaintiff 50% of the proceeds of sale of House No. 35.

[4] The Defendant denied the Plaintiff's claim and in her defence, the Defendant pleaded that the Plaintiff and the Defendant were in a romantic, intimate and extra-marital relationship ("**Relationship**") at the material time and because of the Relationship, the Plaintiff gave to the Defendant the sum of approximately RM 280,000.00 as a monetary gift to support the Defendant in her purchase of House No. 35.

[5] It is not disputed that House No. 35 was purchased by the Defendant and transferred to and registered in the Defendant's name. As the registered and beneficial owner of House No. 35, the Defendant claimed that she had an indefeasible ownership of and right to House No. 35. Accordingly, she was entitled to the whole proceeds of the sale of House No. 35. She further stated that at all material times, the Defendant never agreed to any oral agreements and/or understanding with the Plaintiff that she was to hold House No. 35 on trust for the Plaintiff or that she was to pay the Plaintiff 50% of the proceeds of sale of House No. 35.

#### **BACKGROUND FACTS**

[6] In or around 1989, the Defendant resided in Petaling Jaya and worked full time at the Japan Graduates' Association of Malaysia. At the same time, the Defendant also worked part-time at Ono Supper Club, a lounge club, at Jalan Ampang, Kuala Lumpur ("**Ono Supper Club**").

[7] The Plaintiff was a regular customer of Ono Supper Club. The Defendant met the Plaintiff while she was working at Ono Supper Club some time in 1989.

[8] The Plaintiff then pursued the Defendant and the Relationship started between the Plaintiff and Defendant in or around 1991.

[9] The Relationship was in the nature of an extra-marital affair as far as the Plaintiff was concerned, as at that material time, the Plaintiff was married with 3 children.

[10] In or around 1992, the Defendant started renting and moved into No. 20, Jalan Tempinis 4, Lucky Garden, 59100 Bangsar, Wilayah Persekutuan Kuala Lumpur ("**House No. 20**"). The Plaintiff then moved in and cohabited with the Defendant at House No. 20 and was required to contribute to the rent of House No. 20.

[11] In or around January 1994, the landlord of House No. 20 decided to terminate the Defendant tenancy. As such, the Defendant had to search for a new house to stay.

[12] The Defendant came across House No. 35 which was owned by one Ang Saw Bee and decided

to purchase the said house. The purchase price was agreed at RM 274,000.00. Accordingly, the Defendant paid an earnest deposit of RM 3,000.00 to Ang Saw Bee for the purchase of House No. 35.

[13] In February 1994, Ang Saw Bee and the Defendant executed a sale and purchase agreement for House No. 35. The Defendant initial plan was to obtain a bank loan to finance the purchase of House No. 35. However, the Plaintiff decided to make a monetary gift of approximately RM 280,000.00 to the Defendant to support the Defendant in her purchase of House No. 35. As the gift was made without any conditions, the Respondent decided to accept the gift. Accordingly, the Plaintiff issued a cheque in the sum of RM 280,000.00 in the Defendant's favour. The balance purchase price of RM 271,000.00 was subsequently paid by the Defendant to Ang Saw Bee.

[14] On 9.3.1994, House No. 35 was transferred to and registered under the Defendant's name and the issue document title of House No. 35 was issued to the Defendant.

[15] On or about 5.7.1994, the Plaintiff moved into House No. 35 and cohabited with the Defendant there.

[16] On or about 20.12.1994, the Plaintiff ended the extramarital Relationship with Defendant and moved out of House No. 35.

[17] In our around 2007, the Defendant decided to put House No. 35 up for sale. In 2009 the Defendant moved out of House No. 35 and decided to rent out the said house.

[18] In or around January 2014, the Defendant decided to sell House No. 35 and on 27.2.2014, House No. 35 was sold to Chong Kwai Fong and Choong Wei Yee ("**Buyers**") for the purchase price of RM 2,320,000. Subsequently, on 21.5.2014, the ownership of House No. 35 was transferred to the buyers.

#### **THE ISSUES BEFORE THE HIGH COURT.**

[19] The agreed issues to be tried before the High Court were as follows:-

- (i) Whether there was an oral agreement and/or understanding between the Plaintiff and Defendant that the Defendant was to hold House No. 35 on trust for the Plaintiff;
- (ii) Whether there was an oral agreement and/or understanding between them that the Defendant was to pay to the Plaintiff 50% of the proceeds of sale of House No. 35; and
- (iii) Whether the sum of approximately RM 280,000.00 was given by the Plaintiff to the Defendant as a monetary gift to support the Defendant in her purchase of House No. 35.

#### **DECISION OF THE HIGH COURT**

[20] The trial of the matter went on for 3 days on 9.5.2016, 10.5.2016 and 19.9.2016 respectively and the decision was given on the 30.8.2017 wherein the High Court Judge ("HCJ") dismissed the

Plaintiff's claim with costs of RM 5,000.00.

[21] The learned HCJ's Grounds of Judgment is in the Supplementary Record of Appeal at pages 1 to 39. The learned HCJ's finding of facts is page 29. She had evaluated evidence of witnesses and documentary evidence and applied the correct law to the facts of the case in her judgment. After making assessment on the whole evidence, she made a finding of facts that there is an existence of the romantic and intimate Relationship between the Plaintiff and Defendant and their cohabitation at that material time has been proven by the Defendant.

[22] On the balance of probabilities, she found the Plaintiff had given the cheque for RM 280,000.00 to the Defendant to support the Defendant in buying House No. 35 and it was given on the basis of love and affection of the Plaintiff to the Defendant.

[23] The Plaintiff had commenced proceedings to enforce a trust he claimed had arisen in his favour. The learned HCJ made a finding that in the circumstances of this case, it does not show that the Defendant hold on trust of House No. 35 or Defendant is subject to any agreement that the Defendant was to pay to the Plaintiff 50% of the proceeds of sale of House No. 35.

[24] Notably, the Plaintiff's shifted his argument that the purchase of House No. 35 which is registered under the Defendant's name is a "resulting trust" and/or "constructive trust" relying on settled principle of law in **Chua Cheow Tien v Chua Geok Eng & Anor** [1968] 1 LNS 25; [1968] 2 MLJ 180 that if A buys property in the name of B, who is not a relative, B is held to be trustee of that property for A but if B is a child or a wife of A no such trust is presumed and the law presumes that the legal and beneficial ownership is in the child or the wife so that the onus is on those who seek to rebut the presumption and establish an absolute trust for the father. In that case, since the Defendant was not the child nor the wife of the Plaintiff, the presumption that arises and should arise would be not one of advancement in favour of the Defendant but rather one of trust in favour of the Plaintiff. The onus therefore shifted to the Defendant to rebut the presumption of trust. The learned judge then went on to hold that the Defendant had failed to rebut the presumption of resulting trust.

[25] The learned HCJ rejected the Plaintiff's argument. She had addressed her mind that the correct law to follow is what had been decided in the Court of Appeal case of **Hang Gek Kiau v Goh Koon Suan** [2007] 6 CLJ 626, which requires meticulous examination of the facts and evidence of the surrounding circumstances before deciding whether the purchaser in a particular case had a donative intention as opposed to a resulting trust or constructive trust. The learned HCJ had examined the facts and circumstances of the case and found that the money given to the Defendant to purchase House No. 35 is a "gift" to the Defendant by the Plaintiff. Therefore, there was a donative intention on the part of the Plaintiff and that is the end of the matter. In other words, the presumption of House No. 35 is "resulting trust" or "constructive trust" has been rebutted.

[26] The learned HCJ found that the Plaintiff had failed to prove his claim.

## **THE GROUNDS OF APPEAL**

[27] The Appellant decided to appeal against the decision based on the following grounds:-

(i) The learned High Court Judge erred in fact and/or in law in deciding that the said House and/or RM 280,000.00 was an outright gift to the Defendant by the Plaintiff;

(ii) The learned High Court Judge erred in fact and/or in law in deciding that a resulting trust does not arise in favour of the Plaintiff;

(iii) The learned High Court Judge erred in fact and/or in law in failing to appreciate that the presumption of advancement and/or gift relied by the Defendant to rebut the resulting trust is inapplicable to a cohabitee;

(iv) The learned High Court Judge erred in fact and/or in law in deciding that the presumption of resulting trust is not to be taken into account if there is a donative intention by the Plaintiff towards the Defendant;

(v) The learned High Court Judge erred in fact and/or in law in adopting the principles in the case of **Heng Gek Kiau v Goh Koon Suan** [2007] 6 CLJ 626 without considering the applicability of the presumption of resulting trust;

(vi) The learned High Court Judge erred in fact and/or in law in finding that a constructive trust does not arise in favour of the Plaintiff;

(vii) The learned High Court Judge erred in fact and/or in law in failing to draw an adverse inference against the Defendant for her refusal and/or failure to produce relevant material evidence; and

(viii) The learned High Court Judge has erred in fact and/or in law in finding that the credibility of Defendant as witness is intact despite having given contradictory oral evidence during trial.

## **THE APPEAL**

[28] We heard the appeal and at the outset we informed the Plaintiff's counsel that from the submissions we have read, the appeal in our view is wholly against the finding of facts by the learned HCJ. We then asked counsel the pertinent question whether he agreed that the Plaintiff and the Defendant were living together and cohabited with the Defendant.

[29] Counsel for the Plaintiff did not deny this fact. We told Counsel in view of such fact which the learned HCJ had found, there is nothing for the Plaintiff to pursue further, because once the learned HCJ upon examining the facts and circumstances of the case had made a positive finding that the money given to the Defendant to purchase House No. 35 was intended as a gift from the Plaintiff to the Defendant, that is the end of the matter. The learned HCJ's finding of facts cannot be simply disturbed without any reason for doing so.

[30] It is trite law that the court will not readily interfere with the findings of fact arrived at by the

court of first instance to which the law entrusts the primary task of evaluation of the evidence (See **Sivalingam A/L Periasamy v Periasamy & Anor** [1995] 3 MLJ 395).

[31] The judgment of the trial judge on the facts may be demonstrated on the printed evidence to be affected by material inconsistencies and inaccuracies or he may be shown to have failed to appreciate the weight or bearing of circumstances admitted or proved or otherwise to have gone plainly wrong (See: **Teoh Chu Thong v Anantha Kiruisan PSR @ Anantha Krishnan & Anor** [2008] 3 MLJ 559, **Choo Kok Beng v Choo Kok Hoe & Ors** [1984] 2 MLJ 165 (also [1984-1985] SLR 21), **Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors** [2005] 2 MLJ 1).

[32] It is a settled principle of law that in an appeal where facts have to be reviewed, it is undesirable to do so where the conclusions reached must to a large extent depend on the credibility of the witnesses and the impression formed by a court which has seen them and can judge their honesty and accuracy (See: **China Airlines Ltd v Maltran Air Corp Sdn Bhd (Formerly Known as Maltran Air Services Corp Sdn Bhd) And Another Appeal** [1996] 2 MLJ 517).

[33] The Plaintiff's pleaded case is that the Defendant was to hold House No. 35 on trust for the Plaintiff. We agreed with the learned HCJ that there is no evidence that the Defendant hold on trust of House No. 35 or Defendant is subject to any agreement that the Defendant was to pay to the Plaintiff 50% of the proceeds of sale of House No. 35.

[34] We also agreed with the learned HCJ that the claim for "resulting trust" or "constructive trust" does not come into play.

[35] There is no legislation that defines the word 'trust' but this words can be found in several statutes. However, Section 3 of the **Civil Law Act** provides the application of U.K common law, rules of equity and certain statutes in Malaysia. Reference can be made in the case of **Parameshiri Devi & Anor v Pure Life Society** [1971] 1 MLJ 142:

*"Trust can be defined as an equitable obligation binding a person who is called a trustee to deal with property which he has control which is called trust property for the benefit of a person who are called beneficiary of whom he be the one and anyone of whom may be enforced the obligation"*

[36] In **Datuk M Kayveas v See Hong Chen & Sons Sdn Bhd & Ors** [2014] 4 MLJ 64, it was held that:-

*"[32] A trust is an obligation enforceable in equity, which rests on a person as owner of some property, for the benefit of another or for the advancement of certain purposes (Principles of the Law of Trusts by HAJ Ford and WA Lee). As distinct to a trust for a purpose, a beneficial owner may enforce it by a suit as in the current case. Equity, which was historically dispensed by the Chancery Court, and against his person (ie in personam) now compels the trustee to administer the trust in accordance with his conscience, with even a possible sanction of imprisonment until he has made good the loss caused to the trust property."*

[37] We also noted that the Plaintiff moved his claim to another direction that the purchase of House No. 35 is a resulting trust or constructive trust. Based on the facts, the learned HCJ did not agree with him. In our view, the learned HCJ was correct.

[38] A resulting trust is an implied trust by operation of law and is meant to restore or to jump back the equitable interest in property to its original beneficial owner. The nature is not based on the actual intention of the parties. However, it comes from the rising of presumed intention. Reference can be made in the case of **Westdeutsche Landesbank Girozentrale v Islington London Borough Council** [1996] AC 669 where House of Lords sets out two situations:

- (i) Situation in which a person makes a contribution to the purchase price of property
- (ii) Situation in which the settlor has failed to explain the allocation of equitable interest in the property.

[39] The case of **Megarry J in Re Vandervell's Trust** [1974] Ch 269 suggested that there are two type of resulting trust:

- (i) Presumed resulting trust
- (ii) Automatic resulting trust

[40] A presumed resulting trust is made in or a transfer is made into the name of another person without any express trust being constituted. There is a presumption that the other holds property in question on resulting trust for the real purchaser or the transferor. In other words, it is created by implication as the result of a purchase in or transfer into the name of another.

[41] An automatic resulting trust arises when a transfer has been made on express trust, but has not completely disposed of the beneficial interest in the trust property. In this context, the transferee of the property automatically holds it on resulting trust for the transferor to the extent that the beneficial interest has not been disposed of. It does not depend on any intentions or presumptions of parties, but it automatic consequence after the failure of the transferor to dispose of the entire beneficial interest. It is the implication of an intention does not actually appear.

[42] Presumed Resulting trust may arise in 3 ways either by voluntary transfer or purchase in the name of another or by way of joint purchase in the name of another/ joint name. However, it can be rebutted if there are inconsistencies of evidence which can deny any facts which call presumption into operation and must assist the court by submitted evidences to show that there is a clear intention on behalf of the settlor to give the property to him as a gift. Otherwise, the court will assume that the settlor is entitled to enjoy his equitable right over the transferred property.

[43] Lord Diplock in **Gissing v Gissing** [1970] 2 All ER 780 (790) said:

*A resulting, implied or constructive trust-and it is unnecessary for present purposes to distinguish between these three classes of trust-is created by a transaction between the trustee*

*and cestui que trust in connection with the acquisition by the trustee of a legal estate in land, whenever the trustee has so conducted himself that it would be inequitable to allow him to deny to the cestui que trust a beneficial interest in the land acquired.*

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

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

[45] The Court in **Takako Sakao (f) v Ng Pek Yuen (f) & Anor** [2009] 6 MLJ 751; [2010] 1 CLJ 381 held that:

*“A constructive trust is imposed by law irrespective of the intention of the parties. And it is imposed only in certain circumstances. Two examples readily available ... are (i) where there is a specifically enforceable contract for the sale of property (moveable or immovable), the vendor holds the property on a constructive trust for the purchaser, ... and where a gift made as a donatio mortis causa fails, the intended beneficiary of the gift holds it in trust of the donor ... What equity does in those circumstances is to fasten upon the conscience of the holder of the property a trust in favour of another in respect of the whole or a part thereof.”*

[46] The Plaintiff relied on the case of **Chua Cheow Tien v Chua Geok Eng & Anor** (supra). The Plaintiff commenced an action against the Defendant to recover a house he had purchased in her name. The Plaintiff cohabited with the Defendant who was not his wife. The relationship between him and Defendant is excluded from this presumption.

[47] However, our considered opinion is that in certain circumstances, the judge may give the decision in favour of the mistress to have the property as an outright gift from the man. We noted that Gopal Sri Ram in **Heng Gek Kiau** (supra), does not agree with Chua J. in **Chua Cheow Tien v Chua Geok Eng & Anor** (supra). In the case of **Heng Gek Khiau** (supra) the High Court held that there is no presumption of advancement (way of gift) as there is no reason to invoke the presumption no relation between the Plaintiff (the man) and the Defendant (the mistress). Conversely, the Court of Appeal ruled in favour of the Defendant, the mistress. It is based on the real intention of the purchaser. Although the Plaintiff provided the purchase price, he not only registered the property in the Defendant's name, he also permitted her to occupy the house. The Plaintiff allowed the Defendant to deal with the house as if she was the beneficial owner. He permitted her to deal with the authorities to have water and electricity supply connected to the house. The Plaintiff had not informed the solicitors who attended to the purchase and transfer that the Defendant was the mere

nominal owner of the house that he was the true beneficial owner. The reason provided by the Plaintiff for purchasing the house in the Defendant's name.

[48] Gopal Sri Ram JCA held that there was no resulting trust:

*“[7] With respect, we are unable to agree with the approach adopted by the learned judge. In our judgment the correct approach in cases such as the present is for a court first to determine the true intention of the purchaser. **The question whether the purchaser in a particular case had a donative intention is to be determined objectively through a meticulous examination of the facts and evidence of the surrounding circumstances.** If after such an examination the court concludes that there was a donative intention on the part of the purchaser **that is the end of the matter and there is no room for the operation of the presumption of resulting trust or advancement as the case may be.** It is only where there are no or insufficient facts or evidence from which a fair inference on intention may be drawn that a court should turn to presumptions as a last resort to resolve the dispute.”*

[49] The Court of Appeal then proceeded to evaluate the evidence of the facts of the case, which is similar to our present case:

*[12] We now turn to the evidence from which the real intention of the plaintiff may be deduced. **First, although the plaintiff provided the purchase price he not only registered the property in the defendant's name, but also permitted her to occupy the house.** If he only intended, the defendant to be his mistress without receiving any propriety benefit from the relationship he could have easily rented the premises and installed her there. After all, he was a very wealthy man and could have easily afforded it. His conduct in this respect points towards an intention to make a gift of the house to her. **Second, the plaintiff allowed the defendant to deal with the house as if she was the beneficial owner.** He permitted her to deal with the appropriate authorities to have water and electricity supply connected to the house. He allowed her to pay the annual quit rent and assessment to the said property from 1981 and never reimbursed her. He obviously intended the defendant to have the beneficial ownership in the house for otherwise he would not have met these outgoings. He permitted her to apply for approval from the local authority to renovate the house. By his acts and omissions, he obviously encouraged the defendant to believe that she was not merely the owner of the house at law but also in equity. **Third, at no time did the plaintiff inform the solicitors who attended to the purchase and transfer that the defendant was the mere nominal owner of the house and that he was the true beneficial owner.** If he had not intended a gift the easiest thing for him to have done was to have a declaration of trust drawn up. **Fourth, and perhaps most important of all, is the reason provided by the plaintiff for purchasing the house in the defendant's name.** He said he meant it as an investment. And he bought it in the defendant's name because he was advised by someone called Chan Meng-an electrical contractor-that as a foreigner the plaintiff could not own property in Malaysia. But it appears from the evidence that at the date of the purchase the defendant was a foreigner as well. We must say at once that the plaintiff's explanation when viewed against the objective facts and the probabilities of the case defies credulity. Here we have*

*a seasoned businessman who has recourse to legal advice but chooses to act on the say so of an electrical contractor. If he as a foreigner could not own the house, then neither could the defendant who was a foreigner as well at the material time. The other point is this. **It is highly improbable that the plaintiff-a multimillionaire-would choose to make an investment in a house worth a mere RM 61,000 by having it registered in the name of his mistress and the mother of his child. It is unfortunate that the High Court however turned an indulgent eye upon evidence that called for, if not demanded, for the closest of scrutiny.***

[50] Similarly in our present case, we noted that the learned HCJ before concluding that there was a donative intention on the part of the Plaintiff, she had determined objectively through a meticulous examination of the facts and evidence of the surrounding circumstances. She had found the money given was a gift from the Plaintiff to the Defendant and rightly said that was the end of the matter and there was no room for the operation of the presumption of resulting trust.

[51] The presumption of resulting trust may be rebutted by evidence of any intention inconsistent with such a trust, and that it is unnecessary to bring home an express donative intent on the part of the purchaser to rebut the presumption. Lord Browne-Wilkinson in **Westdeutsche Landesbank Girozentrale v Islington LBC** [1996] AC 669 accepted this view.

[52] The learned HCJ's decision above was based on her accurate finding from her observation of the facts and evidence of this case as follows:

- (i) The Plaintiff did not inform the solicitors who attended to the purchase and transfer of House No. 35 that the Defendant was the mere nominal owner and that the Plaintiff was the true beneficial owner;
- (ii) The Plaintiff was never involved in the procurement, negotiations and purchase of House No. 35;
- (iii) After leaving House No. 35, the Plaintiff allowed the Defendant to remain staying in House No. 35;
- (iv) For 20 years, the Plaintiff did not make any transfer of ownership of House No. 35 or formalize any oral agreement (if any), even during the 15 years after the divorce of his wife;
- (v) The Defendant rented our House No. 35 in her own name and benefitted from the whole proceeds at all material times;
- (vi) The Plaintiff never claimed for the profits obtained by the Defendant from the income of House No. 35;
- (vii) The Defendant was fully responsible for the maintenance of House No. 35 including paying for everything that needed to be paid as an owner of House No. 35;
- (viii) The Plaintiff did not take any actions to lodge a caveat on House No. 35 to protect his

beneficial rights of House No. 35 (if any);

(ix) There are no documents at that material time that are able to show that the Defendant held House No. 35 on trust for the Plaintiff; and

(x) The Plaintiff also has never claimed from the Defendant at all material times to secure his position that he is entitled to 50% of the proceeds of sale of House No. 35 in the event the Defendant sells House No. 35.

[53] The Counsel then raised other points for us to consider. Firstly, he said there was a ‘Mareva injunction’ Order obtained from the High Court against the Defendant to stop her from disposing the House No. 35. It means there was a recognition by High Court with regards to the Plaintiff’s interest in the said property. We gave our view that the Order was an ex-parte Order which any person can obtain as temporary measure but could not sustain as permanent remedy to the Plaintiff. Secondly, counsel argued that the learned HCJ failed to address her mind to the various inconsistencies in the Defendant’s evidence which severely undermines her credibility. He further stated that the HCJ did not state in her judgment which versions of evidence that HCJ should believe. We gave our view that the conclusions reached by the learned HCJ must to a large extent depend on the credibility of the witnesses and the impression formed by a court which has seen them and can judge their honesty and accuracy (See: **China Airlines Ltd v Maltran Air Corp Sdn Bhd (Formerly Known as Maltran Air Services Corp Sdn Bhd) And Another Appeal** [1996] 2 MLJ 517). In this case, it is the learned HCJ who had the benefit of seeing the witnesses and judge the honesty and accuracy of the Defendant. Thirdly, counsel contended that the purchase of House No. 35 was for investment purposes. Our view is, it cannot be an investment based on the facts and circumstances of the case. In fact, the Plaintiff expressly agreed that, if his allegation was true, the oral trust agreement was a bad investment (See Notes of Proceeding dated 10.5.2016, line 16 to 24, pg. 214 of Rekod Rayuan Jilid 2(1)).

*Cross-Examination of the Appellant*

*RMM: Yes. Does that mean then, Mr. Goh, if you bought the house for RM 280,000.00 in 1994 and you, you know, both of you sold the house in 1995, she would have walked away with half?*

*GOH: I believe so.*

*RMM: That would have been a very **bad investment** for you, isn’t it?*

*GOH: Yes.*

[54] We were not convinced with the three points submitted by the Plaintiff’s counsel.

[55] We upheld the conclusion reached by the learned HCJ in her meticulous examination of the facts and evidence of the surrounding circumstances which found there existed a romantic and intimate Relationship between the Plaintiff and Defendant and that their cohabitation at that material time has been proven by the Defendant.

[56] Apart from Plaintiff's witness's statement and corroboration by Defendant's witnesses, the learned HCJ had the advantage of looking into the Photographic evidence of the Plaintiff and Defendant living and holidaying together as a couple in a romantic and intimate Relationship and Documentary evidence adduced by the Defendant.

[57] Learned counsel for the Defendant submitted that the Plaintiff's allegations of the existence of implied trust (whether resulting and constructive) were never pleaded nor raised by the Plaintiff in its pleadings and in the course of the Plaintiff's Injunction Application and Plaintiff's Striking out Application.

[58] It was submitted that the existence of the alleged implied trust was also not an issue to be tried in this matter. Instead, it was agreed by both parties that the issues to be tried in this matter are expressly and specifically confined to the issues to be tried.

[59] With respect, we agreed with his submissions. It is trite law that parties are bound by their pleadings. In **Veronica Lee Ha Ling & Ors v Maxisegar Sdn Bhd** [2009] 6 CLJ 232, the Federal Court as per Gopal Sri Ram FCJ, in delivering the judgment of the court, held that:-

*"It is settled law that a litigant should not be permitted to succeed in an appeal upon a point not raised or pleaded before the court of first instance. The matter is really one of natural justice. It would be manifestly unjust for the appellants to succeed before this court on a point not taken before the High Court..."*

[60] The High Court in **Yii Ching Huat v Oh Tiam Sing & Ors** [2013] 1 LNS 222 held that:

*"Based on the totality of the evidence adduced, I find that the Plaintiff has **no reasonable cause of action** against D3 to D8 for the following reasons:*

...

*(13) The Plaintiff also **did not plead constructive trust and resulting trust** regarding the Plaintiff's CRPS in D3 and his shares in D6 in relation to D3 to D8. Furthermore, **no evidence** at all was adduced by the Plaintiff regarding these two matters."*

## CONCLUSION

[61] We agreed with learned trial judge that in this case no resulting trust arose and/or arises between the Plaintiff and Defendant at all material times. The truth is that both parties were in an extra-marital Relationship at that material time, and the Plaintiff gave to the Defendant the sum of approximately RM 280,000.00 as a monetary gift to support the Defendant in her purchase of House No. 35.

[62] Our decision was unanimous that the Plaintiff's appeal was dismissed with no order as to costs.

Dated this 11<sup>th</sup> Jun 2018

t.t

**Kamaludin Md. Said**

Judge

Court of Appeal Malaysia

Putrajaya

**COUNSEL**

For the Appellant: Gideon Tan and Brian Ernest Cumming (Messrs Gideon Tan Razali Zaini)

For the Respondent: Raymond Mah and John Chan (Messrs Mah Weng Kwai & Associates)

**LEGISLATION REFERRED TO:**

*Civil Law Act, Section 3*

**JUDGMENTS REFERRED TO:**

*China Airlines Ltd v Maltran Air Corp Sdn Bhd (Formerly Known as Maltran Air Services Corp Sdn Bhd) and Another Appeal [1996] 2 MLJ 517*

*Choo Kok Beng v Choo Kok Hoe & Ors [1984] 2 MLJ 165*

*Chua Cheow Tien v Chua Geok Eng & Anor [1968] 1 LNS 25; [1968] 2 MLJ 180*

*Datuk M Kayveas v See Hong Chen & Sons Sdn Bhd & Ors [2014] 4 MLJ 64*

*Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1*

*Gissing v Gissing [1970] 2 All ER 780 (790)*

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