

HONG KONG / JUDGMENT

FAITHWAY ENTERPRISE LTD v. LEE WAN

COURT

Court of Appeal

DECIDED

8 May 2007

CASE / FILE NUMBER

CACV419/2006

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bjbj cacv 419/2006 in the high court of the hong kong special administrative region court of appeal civil appeal no. 419 of 2006 (on appeal from HCMP NO. 1021 of 2006) IN THE MATTER of section 12 of the Conveyancing and Property Ordinance, Cap.219 and IN THE MATTER of a Sale and Purchase Agreement dated 31st March 2006 and IN THE MATTER of the property known as ALL THAT one equal undivided 1,580th parts or shares of and in ALL THAT piece or parcel of ground registered in the Land Registry as THE REMAINING PORTION OF NEW KOWLOON INLAND LOT NO.5087 And of and in the messuages erections and buildings thereon TOGETHER with the sole and exclusive right and privilege to hold use occupy and enjoy ALL THAT FLAT C on the FIFTH FLOOR of NO.107 BROADWAY (the Property BETWEEN FAITHWAY ENTERPRISE LIMITED (Omi gP on JA: This was an appeal from the judgment of Deputy High Court Judge Muttrie dated 21 November 2006. The matter before the judge was a vendor and purchaser summons taken out by the plaintiff purchaser for declarations that its requisition had not been sufficiently and satisfactorily answered by the defendant vendor, that good title to the property had not been shown, that it was entitled to a lien over the property by virtue of the deposit it had paid the vendor and that it was entitled to rescind the agreement and recover the deposit. The judge dismissed the purchaser s summons. At the conclusion of the appeal hearing, the appeal was allowed with written reasons to be given later which we now do.

Background

On 22 May 1984, Pong Chung Toi assigned the property to Chan Koon Ying (Madam Chan) for value. On the same day, Madam Chan executed a deed of trust. Although it was professed to be made between herself as the Trustee of the one part and Madam Chan, Ng Yuk Chan, Michael, student holder of the Hong Kong Identity Card No.C505517 and Ng Yuk Chiu, Stephen, student holder of Hong Kong Identity Card No.G454617 (the Beneficiaries) of the other part, it was in fact a declaration of trust by Madam Chan constituting herself trustee of the property. It was apparent from the recitals that the property had been purchased by Madam Chan as trustee for and on behalf of the Beneficiaries who had provided the purchase price of \$490,000 save and except for \$190,000 that had been advanced by a bank and secured by a mortgage. Madam Chan as trustee covenanted with the Beneficiaries that she would assign the property to them as joint tenants as

and when Michael and Stephen should both attain majority. The deed of trust did not confer on the trustee any power of sale. On 9 January 1985, Madam Chan assigned the property to Kwok Chun Ping (Kwok) for \$540,000 of which \$40,000 was for fixtures, fittings etc. Madam Chan executed that assignment (the 1985 assignment) as Chan Koon Ying Married Woman as trustee for Chan Koon Ying, Ng Yuk Chan Michael a minor and Ng Yuk Chiu Stephen a minor (the Vendor . Kwok sold the property to the defendant in 2005. Nothing was known about the relationship of Madam Chan to Michael and Stephen. Nor was anything known about the ages of Michael and Stephen at the date of the deed of trust. In view of the absence of any power of sale in the trustee and the fact that Michael and Stephen were described as minors in the 1985 assignment, it was hardly surprising that the plaintiff s solicitors saw fit to raise a requisition. The requisition The requisition in question was raised in a letter dated 8 May 2006:

1. Assignment Memorial No.UB2618049, Deed of Trust Memorial No.UB2618051 and Assignment Memorial No.UB2715579 (copy enclosed) Upon perusal the above Assignment Memorial No.UB2618049 and Deed of Trust Memorial No.UB2618051, we note that the property was hold by Chan Koon Ying as Trustee in trust for herself, NG YUK CHAN MICHAEL and NG YUK CHIU STEPHEN, the Beneficiaries and will assign the said property to themselves as Joint Tenants and when the said NG YUK CHAN MICHAEL and NG YUK CHIU STEPHEN shall both attain majority and without giving any power of sale to the Trustee. As only the said Chan Koon Ying as trustee for herself, Ng Yuk Chan Michael a minor and Ng Yuk Chiu Stephen a minor executed the above subsequent Assignment Memorial No.UB2715579, since Ng Yuk Chan Michael and Ng Yuk Chiu Stephen were minor without join in as confirmors and/or cannot give their consent and confirm the sale and purchase of the above property. In this connection, we are of the view that without such consent, Ng Yuk Chan Michael and Ng Yuk Chiu Stephen, the beneficiaries have a right to claim for their share(s) in the said property which may result the transaction be void and render the Vendor s title defective. We take the view that, unless further evidence such as a court order or a rectification or authorization can be produced, the Trustee may be in breach of her fiduciary duty, and acting outside her scope of authority in such case, the said Assignment Memorial No.UB2715579 may be voidable. Following that requisition, correspondence ensued. The defendant s solicitors responded by letter dated 10 May 2006 as follows:
 1. Even if there was a breach of trust as you alleged, which is denied by us, by virtue of the Limitation Ordinance since no action has been taken by the beneficiaries for over 20 years, such action has long been time-barred, and the 1985 Assignment will be unchallengable, and title therefore unaffected whether or not the beneficiaries had consented to the said Assignment. Pausing there, it is to be observed that Michael and Stephen being minors would not have been capable of giving consent to the 1985 assignment. The purchaser s solicitors were not satisfied with that answer and wrote on 11 May 2006 making it clear that the purchaser did not accept that any action by Michael and Stephen would be time-barred. Reference was made to Sections 20, 22 and 26 of Limitation Ordinance Cap. 347. The defendant s solicitors replied the following day in these terms: Section 20(2) of Limitation

Ordinance expressly says that no action to recover trust property or in respect of a breach of trust by a beneficiary can be brought 6 years after the date the right of action accrued. The right of action would have accrued from the date of the Assignment dated 9th January 1985 by Memorial No.UB2715579. And since over 6 years have passed, it would be time-barred. As regards Section 56 of Trustee Ordinance, and the case of Kwong Suk Chun, they only confirm that it is possible to obtain a Court order for sale to enable the trustee to sell, but will not contradict Section 20(2) of Limitation Ordinance. Without affecting the generality of the above, we would further add that since over 20 years have passed since the date of the alleged breach of trust, and no action has been taken, there is no real risk of such action being taken anymore, by the reasonableness test laid down in MEPC Limited v Christian Edwards case. Thereafter both sides stood their ground. Completion did not take place and the defendant forfeited the plaintiff's deposit. The judgment below The issue below was whether the defendant's solicitors had satisfactorily or sufficiently answered a requisition on title raised by the purchaser's solicitors such that the vendor was entitled to forfeit the purchaser's deposit when the purchaser failed to complete by the date stipulated in the agreement of the sale and purchase of the property. As noted above, the judge found in favour of the defendant. He held, inter alia, that section 20 of the Limitation Ordinance was irrelevant, there being nothing to indicate fraud or fraudulent breach of trust and that any action would not be against the trustee but a subsequent owner who took title subject to the rights of the beneficiaries. As to section 22, whilst it was relevant in as much as the limitation period in respect of each of the minors would extend to 6 years from the date the minor attained majority, the judge proceeded to evaluate the risk of such a claim being made. Given that over 20 years had elapsed since the 1985 assignment without any claim having been advanced by the minors, he did not consider that there was any real risk to the purchaser of a successful assertion against him of the incumbrance. This appeal It should be mentioned that at the hearing of the appeal Mr Hung who appeared for the defendant sought leave to adduce new evidence in the form of an affirmation of the defendant exhibiting a letter dated 5 March 2007 from the Commissioner of Registration. Leave was refused as the defendant was unable to satisfy the first of the Ladd v Marshall conditions. Ms Fung who appeared for the plaintiff referred to the decision of this court in Sun Shek Haw v Au So Kum [1999] 3 HKLRD 12 in support of her contention that a subsequent purchaser who takes with constructive notice is a constructive trustee within section 20(1)(b) of the Limitation Ordinance (the Ordinance) with the effect that no limitation period would apply to any action by Michael and Stephen. In Sun's case, W died intestate in 1972 leaving H and five children, four of whom were minors. H and the adult son were the administrators of W's estate whose only asset was a property. The administrators conveyed this property to H in 1974 for no value. The subsequent purchasers were purchasers for value. In 1997, D agreed to sell the property to P. P contended that the 1974 conveyance was impeachable and that the underage children were not barred by the Ordinance from asserting a claim. Rogers JA (as he then was) held that where a purchaser receives trust property with actual or constructive notice that it was trust property and that the transfer to him was in breach of trust, he becomes a constructive trustee and that dishonesty was not a necessary ingredient. Godfrey

JA considered that it was at least arguable that no period of limitation would apply to an action brought by any of the children other than the adult son. Mortimer VP agreed with both judgments. On the basis of that authority, at the very least, it is arguable that section 20(1)(b) of the Ordinance is applicable such that no limitation period would be applicable to any claim that may be brought by Michael or Stephen in respect of their shares in the property. Mr Hung who appeared for the defendant complained that Sun's case was not argued below and that the plaintiff had never specifically raised the constructive trustee argument as now articulated in its requisition. However it is clear from the plaintiff's requisition and the letter of 11 May 2006 from its solicitors set out in paragraph REF _Ref165689479 \r \h above that the concern was that any action by Michael and Stephen as beneficiaries claiming trust property would not be time-barred and would render the title defective. I do not therefore accept that this was a new point which was not part of the requisition which the defendant had to answer. The issue is whether it had been satisfactorily and sufficiently answered. As to the limitation point taken by Ms Fung, Mr Hung's answer was that it is a well-established principle of English law that there are two classes of constructive trustees and that subsequent purchasers, even if they have constructive notice, belong to the second class to which section 20(1)(b) does not apply. Such trustees are thus able to avail themselves of the six-year limitation period. In *Paragon Finance PLC v DB Thakerar & Co (a firm)* [1999] 1 All ER 400 at 408-414, Millett LJ (as he then was) undertook a detailed review and analysis of the relevant law concerning the two classes of constructive trustees and the applicable limitation period if any in respect of each of those classes. It is unnecessary for present purposes to consider the distinction between the two classes of constructive trustees in any detail or to decide if a subsequent purchaser with notice is indeed within the second class and therefore subject to (and protected by) the six-year limitation. It suffices to note that that was a decision of the English Court of Appeal which is not binding on this court and that there exists a decision of this court (i.e. Sun) to the contrary effect although it is true that *Paragon Finance* was neither cited nor argued in *Sun*. Further, it is to be noted that in *Extra Money Ltd & Another v Chan, Lai, Pang & Co (a firm)* [1992] 1 HKLR 244 at 251, on an interlocutory appeal to this court, the question whether any limitation period was available to a constructive trustee of the second class was held to be a triable issue. The judge below had decided that the claims sought to be introduced by an amendment were against constructive trustees of the second class and were time-barred following *Taylor v Davies* [1920] AC

636. On appeal it was argued that the distinction between the two classes of constructive trust was abolished when the Ordinance was enacted in 1965. Indeed, it appears from *Paragon Finance* itself (at 411e-g) that the Law Reform Committee in England has recommended the abolition of the distinction between the two classes of constructive trusts. The upshot of all this is that it can fairly be said that at the very least there is a degree of uncertainty under Hong Kong law as to whether any limitation period is applicable to a subsequent purchaser who takes with notice. As this point is unsettled and it is one that is plainly arguable, to force such a title on the purchaser is little short of requiring him to buy a lawsuit. In my

view, the answer given to the plaintiff's requisition was neither sufficient nor satisfactory. For these reasons, the judgment below must be set aside and the appeal allowed with costs, here and below, in favour of the plaintiff. The plaintiff is also entitled to the declarations sought and the return of the deposit. Hon Yuen JA: I agree. Hon Waung J: I agree. (Doreen Le Pichon) Justice of Appeal (Maria Yuen) Justice of Appeal (William Waung) Judge of the Court of First Instance Ms Carol S K Fung, instructed by Messrs Yaddy Cheung & Co., for the Pl 1udk A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V 1udk 2QX[2QX[2QX[H; < jFen & 6" ABC-Final (fair)1.dot setup Microsoft Word 9.0 Title Source Erica P ' P ' P ' Microsoft Word Document MSWordDoc Word.Document.8

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