

Ching Mun Fong (executrix of the estate of Tan Geok Tee, deceased) v Liu Cho Chit (No 2)
[2001] SGCA 36

Case Number : CA 129/2000
Decision Date : 09 May 2001
Tribunal/Court : Court of Appeal
Coram : Chao Hick Tin JA; L P Thean JA; Yong Pung How CJ
Counsel Name(s) : Michael Khoo SC and Josephine Low (Michael Khoo & Partners) for the appellant;
CR Rajah SC (instructed) and Harpal Singh (Harpal Mahtani Partnership) for the respondent
Parties : Ching Mun Fong (executrix of the estate of Tan Geok Tee, deceased) — Liu Cho Chit (No 2)

Limitation of Actions – Particular causes of action – Contract – Total failure of consideration – Payment pursuant to contract for purchase of alleged interest in property – Court deciding no such interest exists – Claim for money had and received for total failure of consideration – Whether claim contractual – Whether claim time-barred – s 6(1)(a) Limitation Act (Cap 163, 1996 Ed)

Limitation of Actions – When time begins to run – Relief from consequences of mistake – Payment pursuant to contract for purchase of alleged interest in property – Court deciding 17 years later no such interest exists – Claim to recover money paid under mistake – When limitation period begins to run – Whether plaintiff has or can with reasonable diligence have discovered mistake before court's decision – Whether claim time-barred – s 29(1)(c) Limitation Act (Cap 163, 1996 Ed)

Restitution – Failure of consideration – Total failure of consideration – Proper parties – Plaintiff and defendant making agreement for sale of property by plaintiff's company to defendant's wife and plaintiff's daughter – Plaintiff contracting with defendant for purchase of defendant's wife's alleged interest in property – Plaintiff paying defendant with funds from another company – Court deciding defendant's wife has no interest in property – Claim for money had and received for total failure of consideration – Whether proper parties before court – Whether true contracting parties plaintiff and defendant

Restitution – Mistake – Proper Parties – Claim to recover money paid under mistake – Whether proper parties before court – Whether true contracting parties plaintiff and defendant – Whether defendant can properly be sued even if defendant receives payment as agent – Whether plaintiff can properly sue even if plaintiff make payment as agent

Restitution – Unjust enrichment – Remedial constructive trust – Parties' relationship wholly commercial – Payment pursuant to contract for purchase of alleged interest in property – No intention for money to be kept distinct as identifiable fund – Court deciding no interest as alleged – Whether remedial constructive trust can and should be imposed

Trusts – Constructive trusts – Remedial constructive trust – Parties' relationship wholly commercial – Payment pursuant to contract for purchase of alleged interest in property – No intention for money to be kept distinct as identifiable fund – Court deciding no interest as alleged – Whether remedial constructive trust can and should be imposed

dismissed Fook Gees claim for the repayment of the alleged loan. However, the she gave judgment for Madam Lim against Lee Tat, for the balance of the purchase price.

The matter was taken to the Court of Appeal, which delivered its judgment on 6 February 1998. The Court of Appeal dismissed Fook Gees appeal. However, the appeal by Lee Tat was allowed, on the ground that Madam Lim never had any interest in the joint venture site, and consequently had no interest in the Property which she could sell.

On 4 June 1998, Madam Ching, as executrix of Mr Tans estate, commenced the present proceedings

against Mr Liu seeking to recover the sum of \$1,368,420.71 (being the equivalent of US\$642,451.04 at the agreed rate of exchange at the time of payment to Mr Liu) as money had and received, on the ground that the US\$642,451.04 was paid to Mr Liu under a mistaken assumption that Madam Lim had an interest in the Property. After further litigation, Madam Ching managed to amend her statement of claim to include a claim for a remedial constructive trust.

The trial judge dismissed Madam Chings claims on two grounds. Firstly, it was held that the true contracting parties in the sale of Madam Lims alleged interest to Lee Tat was Madam Lim (as the purported vendor) and Lee Tat (as the purported purchaser). As such, any action for money paid under a mistake ought to have been brought by Lee Tat against Madam Lim. Mr Tans estate was not the proper plaintiff, and Mr Liu was not the proper defendant. Secondly, the trial judge held that in any case, the claim was time barred, and no remedial constructive trust arose.

Madam Ching thus brought the present appeal. On the question of the proper parties to the action, Madam Ching argued that the true contracting party to the joint venture was Mr Liu, and that Madam Ching was purportedly conveyed the joint venture site as Mr Lius nominee. As such, any interest in the joint venture site (and consequently in the Property) was supposed to have been vested in Mr Liu. Conversely, when Lee Tat contracted to purchase the interest in the Property from Mr Liu, it did so as Mr Tans nominee. Madam Ching thus contended that the true contracting parties in the purported sale of Madam Lims interest in the Property to Lee Tat were actually Mr Liu and Mr Tan, so that the parties were properly constituted for the present action.

With regards to the issue of time bar, Madam Ching contended that the mistaken assumption that Madam Lim had an interest in the Property was discovered only on 6 February 1998, when the Court of Appeal pronounced its judgment. Madam Ching therefore claimed that the limitation period began to run only as of that date, so her claim was not time-barred. Alternatively, Madam Ching argued that when the Court of Appeal pronounced its judgment on 6 February 1998, Mr Liu could no longer retain the monies without his conscience being affected. She thus contended that the monies became impressed with a remedial constructive trust as of 6 February 1998.

Held

, dismissing the appeal:

(1) The true contracting parties were Mr Tan and Mr Liu and nobody else. (22-25). Madam Ching as the executrix of the estate of Mr Tan, was thus entitled to bring this action against Mr Liu for the recovery of the sum paid to him. The proper parties were before the court (26).

(2) The trial judge was correct in holding that the six year limitation period found in s 6(1)(a) of the Limitation Act applied to Madam Chings claim (27). However, if the monies sought to be recovered were paid under a mistake, then by virtue of s 29(1)(c) of the Limitation Act, the limitation period would begin to run only as of the time when the mistake could have been discovered (28).

(3) The contention that the mistake underlying the payment could not have been discovered until the Court of Appeal delivered its decision on 6 February 1998 was rejected (29). In the 1984 action brought by Madam Lim, Mr Tan asserted in his affidavit, filed on 1 February 1989, that Madam Lim had no interest in the Property. Thus, as of 1 February 1989, if not earlier, he had

already discovered the mistake. Even if the limitation period was postponed by virtue of s 29(1)(c) of the Limitation Act, the time bar would have set in by 1 February 1995, at the latest (30). Section 29(1)(c) of the Limitation Act states quite clearly that time begins to run once the plaintiff could with reasonable diligence have discovered the mistake. As far as s 29(1)(c) is concerned, it is the plaintiffs means of ascertaining the mistake, and not what the court eventually decides, that is relevant in determining when the limitation period begins to run (32).

(4) A remedial constructive trust arises where the court imposes a constructive trust de novo on assets which are not subject to any pre-existing trust as a means of granting equitable relief in a case where it considers just that restitution should be made (34). In order for a remedial constructive trust to arise, the payees conscience must have been affected, while the monies in question still remain with him. If the payee learns of the mistake only after the monies have got mixed with other funds or dissipated, no constructive trust in respect of these monies can arise. This is because there would no longer be an identifiable fund for the trust to bite (36).

(5) On the facts of this case, there was no ground for imposing a remedial constructive trust on Mr Liu in respect of the US\$642,451.04 paid to him. The relationship between Mr Liu and Mr Tan was only that of a vendor and purchaser and was wholly commercial. There was no dishonest conduct on the part of Mr Liu. The sum was paid to Mr Liu in April 1981 with the intent that he was free to deal with it as his money. It was never intended by either Mr Tan or Mr Liu that it should be kept, and it had never been kept, distinct as an identifiable fund. On the basis of Mr Khoos contention that Mr Liu discovered the mistake only in February 1998 or thereabouts, there was a span of some 17 years and the sum paid to Mr Liu must have, in the meanwhile, been spent or mixed with other funds of Mr Liu. There was no sum or fund on which a remedy of constructive trust could be imposed by the court. The sum paid to Mr Liu was certainly not trust property. There was, of course, an obligation on the part of Mr Liu to return the monies to Mr Tan, but that was only a personal obligation (37).

Case(s) referred to

Kleinwort, Sons & Co v Dunlop Rubber Co

(1907) 97 LT 263 (refd)

Metal Und Rohstoff A G v Donaldson Lufkin & Jenerette Inc and Anor

[1990] 1 QB 391 (refd)

Westdeutsche Landesbank Girozentrale v Islington London Borough County Council

[1996] AC 669 (refd)

Legislation referred to

JUDGMENT:

Grounds of Judgment

1. This was an appeal against the decision of Woo Bih Li JC, in which he dismissed the claim of the appellant, Madam Ching Mun Fong (Madam Ching) suing as the executrix of the estate of Tan Geok Tee deceased (Mr Tan), against the respondent, Mr Liu Cho Chit (Mr Liu) for the sum of \$1,386,420.71 (being the equivalent of US\$642,451.01 at the rate of exchange of S\$2.13 to US\$1) as money had and received. We dismissed the appeal and now give our reasons.

Background facts

2. The material facts that led to this appeal stretch back to some 27 years. The convenient starting point was 18 July 1972, when a company called Peng Ann Realty Pte Ltd (Peng Ann) purchased a large parcel of land situate at Kampong Chai Chee, comprising lots 21-26, 4-4, 4-7, 112, 122, 123 and 221 of Mukim 28 having an area of 186.7 acres. At that time, there were three shareholders of the company, and Mr Liu was one of them. He was also the managing director of the company. Two days after the sale and purchase agreement was made, there appeared in the government gazette a notification of compulsory acquisition by the government of two of the lots, namely, Lots 4-4 and 221. Being apprehensive of further compulsory acquisitions by the government, Mr Liu and his co-directors decided to sell the remaining lots of land. In December 1972, Mr Liu was introduced to Mr Tan, who was interested in purchasing the remaining lots. Negotiations took place between the two of them and eventually they reached an agreement. The agreement was signed on 23 January 1973, and it was made between Peng Ann and one of Mr Tans family companies, Lee Kai Investments Pte Ltd (Lee Kai) (then known as Collin Investment Pte Ltd). Under the agreement, Peng Ann agreed to sell to Lee Kai three of the lots, namely, lots 21-26, 4-7 and 123, having a total area of 178 acres, at the price of \$2,050,000.

3. In the meanwhile, Mr Tan and Mr Liu had orally agreed to enter into a joint venture to develop a small parcel of land containing an area of 5 acres, which was within lot 21-26 and zoned residential (the joint venture site). The terms of this joint venture were subsequently reduced into four written agreements (collectively called the joint venture agreements). The agreement most material to the present appeal was the sub-sale agreement of the joint venture site expressed to be made between on the one hand Lee Kai, and on the other Mr Lius wife, Madam Lim Siam Soi (Madam Lim), and Mr Tans daughter, Collin Tan (Collin). Under this sub-sale agreement, Lee Kai agreed to sell the joint venture site to Madam Lim and Collin at the price of \$50,000. The agreement was signed by Mr Tan on behalf of Lee Kai and Collin respectively and by Mr Liu on behalf of Madam Lim. The other material joint venture agreements were (i) a pre-incorporation agreement, whereby Collin and Madam Lim agreed to incorporate a joint venture company, and (ii) a further sub-sale agreement, whereby Collin and Madam Lim agreed to transfer to the joint venture company the joint venture site in exchange for shares to be issued by that company to them respectively. These other agreements were also signed by Mr Tan on behalf of Collin and by Mr Liu on behalf of Madam Lim. However, neither Collin nor Madam Lim was aware of the agreements signed on their behalf or even of the joint venture itself.

4. The sale of the three lots, 21-26, 4-7 and 123, by Peng Ann to Lee Kai was completed on 14 March 1973, and the lots were conveyed, on the direction of Mr Tan presumably on behalf of Lee Kai, to another company of Mr Tan, called Lee Tat Development Pte Ltd (Lee Tat) (then known as Collin Development Pte Ltd).

5. On 23 July 1976, these three lots, except a portion containing an area of 4.2 acres on Lot 21-26, were compulsorily acquired by the government. The unacquired land comprised: (i) a portion of 3.7 acres of the joint venture site, and (ii) another portion of about 21,808 sq ft of land, which was immediately adjoining the joint venture site and zoned rural and was also part of Lot 21-26. The entire area of the unacquired land was subsequently resurveyed and was described as resurvey Lot 1606 (the Property).

6. As it transpired, the joint venture entered into between Mr Tan and Mr Liu was not implemented. In particular, neither Mr Tan nor Mr Liu took any step to implement or carry out the terms of any of the joint venture agreements. Nor did their respective nominees, Madam Lim and Collin. Among other things, the proposed joint venture company was never incorporated. In the result, the Property remained vested in Lee Tat and was never conveyed to Madam Lim and Collin or the proposed joint venture company. To all intents and purposes, the joint venture was abandoned.

7. It was only in 1980 that Mr Tans and Mr Lius interests in developing the Property revived. In that year they appointed a firm of architects to draw up plans for the development of a housing project on the Property and planning approval was sought. However, the negotiations between Mr Tan and Mr Liu to develop the property did not lead to fruition, as they could not agree on the proposed development; each had in mind a different type of development.

8. All this while, Mr Liu claimed that he or his wife, Madam Lim, had an interest in the Property and he offered to sell this interest to Mr Tan. According to Mr Liu, he negotiated with Mr Tan on the price and Mr Tan agreed to purchase his or his wives interest in the Property at the price of \$3.8 m net of tax and agreed to pay a sum of \$2 m by April 1981 and the balance two months later. On 23 April 1981, the parties met in Hong Kong, and Mr Tan handed to Mr Liu two cashiers orders for the total sum of US\$642,451.04 (being the equivalent of \$1,368,420.70 at the exchange rate of S\$2.13 to US\$1). Mr Liu claimed that thereafter he asked Mr Tan for payment of the balance of the purchase price, but no payment was made by the latter.

9. About two years later, on 25 August 1983, a Hong Kong company owned by Mr Tan and his wife, Madam Ching, called Fook Gee Finance Ltd (Fook Gee), commenced an action in Suit No 4141 of 1983 (the 1983 action) against Mr Liu, claiming the sum of US\$642,451.04 as a loan which, it was alleged, had been advanced to Mr Liu and seeking the repayment of that amount. Mr Liu resisted the claim. His defence was that there was no loan made to him by Fook Gee, and that the amount was part payment of the purchase price made by Mr Tan for Madam Lims interest in the Property which Mr Tan had agreed to purchase at the price of \$3.8 m net of tax.

10. About a year after Fook Gee had commenced the action, Madam Lim commenced an action in Suit No. 4149 of 1984 (the 1984 action) against Lee Tat, Mr Tan and Lee Kai, claiming, inter alia, the balance of the purchase price. She subsequently joined Collin as the fourth defendant. The defence put forward on behalf of the defendants was essentially that Madam Lim never had any interest in the Property. Mr Tan died before the action came on for trial and Madam Ching was appointed to represent his estate.

11. Both the actions, were tried together before Lai Siu Chiu J, as the events and the evidence were inextricably linked. The judge found that there was no evidence that the sum of US\$642,451.04 was a loan by Fook Gee to Mr Liu, and that the sum came from the funds of a Liberian import and export company called Komala Deccoff & Co SA, which was owned by Mr Tan and another person. She therefore dismissed Fook Gees claim in the 1983 action. Turning to the claim of Madam Lim in the 1984 action, the judge found that Madam Lim did have an interest in the Property, that Mr Tan had agreed to buy that interest at the price of \$3.8 m, and that the sum of US\$642,451.04 paid to Mr Liu was a part payment of the purchase price. She therefore entered judgment in her favour but only against Lee Tat for the balance sum, being the difference between the purchase price of \$3.8 m and the sum of \$1,368,420.70 (being the equivalent of US\$642,451.04 at the exchange rate of S\$2.13 to US\$1) that had already been paid.

12. Against her decision, Lee Tat, Madam Ching representing the estate of Mr Tan and Lee Kai as well as Fook Gee appealed to this Court by two separate appeals. Both the appeals were heard together. This Court dismissed Fook Gees appeal and affirmed the decision below in the 1983 action. However, this Court allowed the appeal by Lee Tat, Madam Ching representing the estate of Mr Tan and Lee Kai, and set aside the judgement in the 1984 action. The Court held that Madam Lim had not established that she had any interest in the Property and thus dismissed her claim in the 1984 action: see *Fook Gee Finance Co Ltd v Liu Cho Chit and another action* [1998] 2 SLR 121.

13. As a sequel to the decision of this Court, Madam Ching, as the executrix of Mr Tans estate, on 4 June 1998, commenced the present proceedings in Suit No 862 of 1998 against Mr Liu seeking to recover the sum of \$1,368,420.71 (being the equivalent of US\$642,451.04 at the agreed rate of exchange at the time of payment to Mr Liu) as money had and received, on the ground that

the US\$642,451.04 was paid to Mr Liu under a mistaken assumption that Madam Lim had an interest in the Property, and/or that the consideration for the sum of US\$642,451.04 had totally failed.

14. After the close of pleadings, Mr Liu applied to strike out the statement of claim on the ground that it was frivolous, vexatious or otherwise an abuse of process, or alternatively on the ground that the claim was time barred. Upon being served with the application to strike out, Madam Ching applied to have the statement of claim amended by the addition of an alternative claim for a constructive trust. Both the applications were heard before the assistant registrar, who dismissed Madam Chings application to amend the statement of claim and allowed Mr Lius application to strike out the statement of claim. The assistant registrar held that the claim was time barred under s 6 of the Limitation Act (Cap 163, 1996 ed), and that the facts did not give rise to any constructive trust. Against the decision of the assistant registrar, Madam Ching appealed to a Judge in Chambers and the appeal was dismissed.

15. On further appeal, this Court allowed both the appeals, i.e. the appeal against the striking out of the statement of claim and the appeal against the refusal to allow the amendment: see *Ching Mun Fong (executrix of the estate of Tan Geok Tee deceased) v Liu Cho Chit & another* [2000] 1 SLR 517. Hence, the action proceeded to trial. The trial judge at the conclusion of the hearing dismissed Madam Chings claim. Against that decision this appeal was brought.

The appeal

16. The issues canvassed before us were the same as those raised and decided below, namely:

- (1) whether the proper parties were before the court;
- (2) whether Madam Chings claim for the sum of \$1,368,420.71 was time barred by the Limitation Act; and
- (3) whether a remedial constructive trust arose on the facts of this case.

The proper parties

17. One of the defences raised by Mr Liu in the pleadings was that the proper parties were not before the court. First, Madam Ching as the executrix of the estate of Mr Tan was not the proper plaintiff. The reason for this was that it was established in the 1983 action that the monies paid to Mr Liu came from a company, Komala Decoff SA, and therefore the monies belonged to that company and accordingly that company should be the plaintiff. Secondly, Mr Liu was not the proper defendant. Here, the reason was that in the 1984 action, the judge found that Madam Lim had entered into an agreement, through Mr Liu, to sell her interest in the Property and that Mr Liu was only the agent for Madam Lim, and therefore the proper defendant should be Madam Lim and not Mr Liu.

18. On this issue, the judge held that the correct plaintiff should be Lee Tat and that the correct defendant should be Madam Lim. The basis for this conclusion was that the parties to the underlying agreement for the sale of Madam Lims alleged interest were Madam Lim and Lee Tat. The judge approached the issue thus:

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

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

The judge then turned to what was found in the 1983 and 1984 actions by the High Court, and said:

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

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

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

37 When the Court of Appeal reversed the trial judges decision, it was only on the basis that Mdm Lim had not established that she had, or had acquired, an interest in the Property.

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

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

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

19. Before us, Mr Michael Khoo, counsel for Madam Ching, argued that the approach of the judge ignored the fact that the true contracting parties were Mr Tan and Mr Liu, which was accepted by Mr Liu in his evidence. On a true analysis of the facts, so far as Mr Liu was concerned, Madam Lim was his nominee, and the interest in the Property which he thought had been acquired was his but held by Madam Lim as his nominee. In the negotiation with Mr Tan, Mr Liu acted in his personal capacity as the beneficial owner. As for Mr Tan, he also negotiated with Mr Liu as the true owner of the Property and not as the agent for Lee Tat. The negotiations were conducted only between Mr Tan and Mr Liu and the agreement was reached between them as

the contracting parties, and the moneys were handed by Mr Tan to Mr Liu. Mr Khoo thus contended that the money should be recovered from Mr Liu, not Madam Lim, and the action was properly brought by Madam Ching, as the executrix of the estate of Mr Tan, against Mr Liu.

20. On the other hand, Mr C R Rajah, counsel for Mr Liu, argued that the claim brought by Madam Ching against Mr Liu was for the return of some \$1.3 m paid by mistake as part of the purchase price under a contract for the purchase of an interest in the Property, which the vendor did not have. The contract was made between Mr Liu on behalf of his wife, as the vendor and Mr Tan on behalf of Lee Tat as the purchaser. If this sum had to be returned, it would be by the vendor, Madam Lim, to the purchaser, Lee Tat. On this point, Mr Rajah relied on what transpired in the 1983 and 1984 actions and what the High Court found in those actions. He thus maintained that the proper plaintiff should be Lee Tat and the proper defendant Madam Lim.

21. We were unable to agree with Mr Rajah. It should be borne in mind that, in the 1984 action, before the High Court and on appeal before this Court, the question as to the proper parties for the recovery of the sum of \$1,368,420.71 (being the equivalent of US\$642,451.01) was not in issue. The main issue there was whether Madam Lim had an interest in the Property. The High Court held that she had, but on appeal this Court found that she had not established that she had such interest. As Mr Khoo rightly pointed out, both the High Court and this Court, at times in the course of the respective judgments, dealt with the alleged interest in the Property as interchangeably that of Mr Liu and Madam Lim. Certainly this Court did not make any clear distinction between the two.

22. On the facts, there was no doubt that both in the joint venture agreements made in January 1973 and in the sale of the alleged interest in the Property in April 1981, the true contracting parties were Mr Tan and Mr Liu and nobody else. In respect of the joint venture, Mr Tan and Mr Liu were the ones who negotiated with each other and reached an agreement, which was then reduced into four separate agreements. So far as Mr Liu was concerned, his wife, Madam Lim, was merely his nominee. In entering into the joint venture with Mr Tan in 1973, he made use of his wife as a nominal party to the joint venture agreements and signed the agreements on her behalf. She did not even know of the joint venture or of any of the agreements which were made in her name. The same applies to Mr Tan with regard to using his daughter, Collin, and his family company, Lee Kai, in entering into the joint venture agreements. Mr Tan signed the agreements on behalf of Collin and Lee Kai respectively. Like Madam Lim, Collin did not even know of the joint venture or any of the joint venture agreements. In truth and in fact, Mr Liu and Mr Tan were the contracting parties. As Mr Khoo submitted, and we agreed, none of the nominal parties to the joint venture agreements had any independent thought or action as regards any of the agreements. Further, the subsequent dealings in relation to the proposed development on the joint venture site were between Mr Tan and Mr Liu only.

23. Subsequently, in April 1981, when Mr Liu and Mr Tan negotiated on the sale and purchase of what was then believed to be Madam Lim's or Mr Liu's interest in the Property, only Mr Liu and Mr Tan were the parties involved in such negotiations. So far as Mr Liu was concerned, his wife was the nominee and the interest acquired was his, and in the negotiations he was acting in his personal capacity as the beneficial owner of that interest. The evidence of Mr Liu was that he negotiated with Mr Tan on the sale of that interest, and they reached an agreement, whereby Mr Tan agreed to purchase that interest at the price of \$3.8 m, and in part payment of the purchase price, Mr Tan handed to him the two cashiers orders for the total amount of US\$642,451.04. It was Mr Tan who made the payment. Where he got the funds from was immaterial.

24. Even if it can be said, as it was so argued on behalf of Mr Liu, that Madam Lim was the contracting party and that the sum of US\$642,451.01 was a purported part payment, through Mr Liu, to Madam Lim of what was then believed to be her interest in the Property, and thus the payment was made to Mr Liu as the agent for Madam Lim, an action could still be brought, as was brought here, to recover that sum from him. He was the sole recipient and beneficiary of this sum, and the irrefutable evidence was that no part of that sum was ever paid to Madam Lim. He had kept this sum and treated it as his. He could properly be sued, as he was here, for repayment of the money that was paid to him. There is authority for the proposition that, where a payer makes a payment to an agent of the payee under a mistake of fact, the payer can recover the payment from the agent, if

the agent has not paid it over to the principal: *Kleinwort, Sons & Co v Dunlop Rubber Co* (1907) 97 LT 263, at 264 and 265. See also Goff and Jones, *The Law of Restitution* (5th edn) (1998) at pp 186 and 833.

25. Turning to Mr Tan, it was not in evidence that Mr Tan on behalf of Lee Tat entered into the sale and purchase agreement with Mr Liu; there was only an inference that he probably did so, because the Property was then vested in Lee Tat. The undisputed evidence was that it was Mr Tan who negotiated with Mr Liu for the purchase of the alleged interest of Madam Lim or Mr Liu in the Property, that it was Mr Tan who agreed with Mr Liu on the price for the alleged interest, and that it was Mr Tan who paid the monies to Mr Liu. The monies were clearly his, and there was no evidence that the monies were Lee Tats. In any case, Lee Tat was his nominee and his company, and to all intents and purposes the Property was his. There was nothing to prevent him, on his own account, from purchasing what he believed was Madam Lims or Mr Lius interest in the Property and made the part payment. Even if, acting as an agent of Lee Tat, he made the payment to Mr Liu, he did so in the mistaken belief that Madam Lim or Mr Liu had an interest in the Property, which in fact neither of them had. In such circumstances, that mistake was entirely his and not his principals; nor could it be attributed to his principal, and he can recover the monies from the payee: see Goff and Jones, *The Law of Restitution* (5th edn) (1998) at pp 183 184.

26. In our judgment, Madam Ching as the executrix of the estate of Mr Tan, was entitled to bring this action against Mr Liu for the recovery of the sum paid to him. The proper parties were before the court. On this point, with respect, we were unable to agree with the judge below.

Periods of limitation

27. With respect to Madam Chings claim for money had and received for a total failure of consideration, the judge held that the cause of action was founded on contract, and s 6(1)(a) of the Limitation Act (Cap 163) applied. As the money was paid to Mr Liu on or about 23 April 1981, the claim for the recovery of this sum had been barred by 22 April 1987. He said:

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

6 - (1) Subject to this Act, the following actions shall not be brought after the expiration of 6 years from the date on which the cause of action accrued:

(a) actions founded on a contract or on tort;

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

76 Accordingly these causes of action would be time-barred long before the

commencement of the present action on 4 June 1998.

The judges reasoning on this point was, with respect, correct. We agree with him entirely.

28. We now turn to the claim for recovery of the monies on the ground that the payment was made under a mistake. If the monies were paid under a mistake, then the limitation period for Madam Lims action would have been postponed under s 29(1)(c) of the Limitation Act. The provision states:

29(1) Where, in the case of any action for which a period of limitation is prescribed by this Act

(c) the action is for relief from the consequences of a mistake, the period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake, as the case may be, or could with reasonable diligence have discovered it.

29. It was Mr Khoos contention that payment of the US\$642,451.04 was made under a mistake of law, and that this mistake could not have been discovered until this Court delivered its decision on 6 February 1998. He thus argued that the present proceedings, which were commenced in 1998, were not time barred. This argument was rejected by the judge below. We too rejected it.

30. There was ample evidence before the court that Mr Tan discovered the mistake long before the judgment of this Court was delivered. The judge laid out the evidence as follows:

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

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

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

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

97 Lee Tats and Tans position was reiterated in paragraph 12 of the Amended Defence (of the first three defendants), filed on 7 October 1987, in the 1984 action, which states:

12. Paragraphs 5 and 6 of the Statement of Claim are denied. Further the Statement of Claim discloses no share which the Plaintiff owned at the said date which she could agree to sell. The Defendants reserve the right to plead further hereto when the case is properly particularised.

Apart from the pleadings filed in that action, Mr Tan himself asserted in his affidavit filed on 1 February 1989 that Madam Lim had no interest in the Property. Thus, as of that date, if not earlier,

he had already discovered the mistake. That was the most damning piece of evidence against the claim that the mistake was not discovered until the decision of this Court. The judge referred to Mr Tans affidavit and said:

99 Furthermore, paragraph 20(iii) of Tans affidavit affirmed on 1 February 1989 for the 1984 action stated:

(20) In June 1984, 11 years after the alleged Second Agreement was purportedly entered into, the Plaintiff commenced this action to claim the following relief:-

(iii) as against the 1st Defendants and/or myself, she claims specific performance of a purported oral agreement made sometime in April 1981, under which the 1st Defendants and/or myself allegedly agreed to buy her share in Lot 1606 of Mukim 28 for \$3.8 million (hereinafter called "the alleged oral Third Agreement").

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

(25) The Plaintiffs claim that the 1st Defendants are holding Lot 1606 of Mukim 28 on trust for her and Collin Tan is also misconceived and cannot be sustained for the following reasons:-

(a) At all material times, the Plaintiff had *no proprietary interest in the property*;

(b)

(c)

(26)

(27) Further, for any or all of the above reasons, the Plaintiff had *no interest in the property* and, consequently, nothing for which she could allegedly sell to the 1st Defendants or myself.

(28) Besides, the 1st Defendants were at all material times the de facto and de jure owner of the property (including Lot 1606 of Mukim 28). Even if the alleged oral Third Agreement existed, which is denied, there was no consideration to support it.

(29) At the time of the alleged oral Third Agreement, she had no right whatsoever in the property. For this reason,

the alleged oral Third Agreement is invalid for want of consideration. [Emphasis is added]

In view of what had transpired, it was impossible to argue on behalf of Madam Ching that Mr Tan could not have known about Madam Lims want of interest until this Courts decision. At the latest, Mr Tan knew about it by 1 February 1989, when he affirmed the affidavit. Even if the limitation period was postponed by virtue of s 29(1)(c) of the Limitation Act, the time bar would have set in by 1 February 1995, at the latest.

31. The following argument was, nevertheless, raised by Mr Khoo on behalf of Madam Ching in the Appellants Case:

86. It was held by the Lords in *Kleinwort Benson v Lincoln County Council* that the date when the local authority interest swap rate transactions proved to be void was when the House of Lords made its decision in *Hazell v Hammersmith and Fulham London Borough Council*. It is submitted that it is implicit if not express in that judgment that the cause of action to recover a payment made under a mistake of law only accrues when the court determines that there is a mistake of law.

..

89. Therefore it was not until the Court of Appeal judgment of 6th February 1998 that it was established that there had been a mistake in 1981 when the moneys were paid over to the respondent. The mistake was therefore not "discovered" until the Court of Appeal held that Mdm Lim/the respondents assumed interest was not an interest at all.

32. We were unable to accept this argument. The provision in question is s 29(1)(c) of the Limitation Act, which states quite clearly that time begins to run once the plaintiff could with reasonable diligence have discovered the mistake. As far as s 29(1)(c) is concerned, it is the plaintiffs means of ascertaining the mistake, and not what the court eventually decides, that is relevant in determining when the limitation period begins to run. While the fact that Madam Lim (or Mr Liu) had no interest in the Property was determined only after this Courts decision on 6 February 1998, Mr Tan obviously knew about the true state of affairs long before that date. In fact, he had already discovered the mistake by the time he affirmed his affidavit on 1 February 1989. In these circumstances, it was impossible to maintain that Mr Tan *could not with reasonable diligence* have discovered that Madam Lim (or Mr Liu) had no interest in the Property until only after the decision of this Court.

Remedial constructive trust

33. Mr Khoo finally argued that the court should impose a constructive trust on the sum of US\$642,451.01 paid to Mr Liu. His argument was along the following line. The money was paid to Mr Liu under a mistake, and although the mere receipt of the money in ignorance of the mistake did not give rise to a trust in favour of Mr Tan at that time, the retention of the money by Mr Liu after he discovered the mistake, i.e. after this Court had delivered its decision, gave rise to a constructive trust, because thenceforward his conscience was affected by the fact that the monies received by him had been paid for no consideration or under a mistake. It was the continued retention of such

monies by Mr Liu that gave rise to this remedial constructive trust, which the court should now impose, requiring Mr Liu to return the money to Mr Tan. Mr Khoo then invoked s 22(1) of the Limitation Act, which provides:

No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action

.

(b) to recover from the trustee trust property or the proceeds thereof in the possession of the trustee, or previously received by the trustee and converted to his use.

34. A remedial constructive trust arises where the court imposes a constructive trust de novo on assets which are not subject to any pre-existing trust as a means of granting equitable relief in a case where it considers just that restitution should be made (per Slade LJ in *Metal Und Rohstoff A G v Donaldson Lufkin & Jenerette Inc and Anor* [1990] 1 QB 391, 478. Slade LJ, however, said (at p 479) that the extent to which a constructive can properly be treated as a remedy is far from clearly defined in the authorities, and said at the end of p 479:

While we have had the benefit of very full argument on almost all other aspects of the law involved in this case, we have neither heard nor invited comprehensive argument as to the circumstances in which the court will be prepared to impose a constructive trust de novo as a foundation for the grant of equitable remedy by way of account or otherwise. Nevertheless, we are satisfied that there is a good arguable case that such circumstances may arise and, for want of a better description, will refer to a constructive trust of this nature as a "remedial constructive" trust.

35. Mr Khoo relied on certain dicta of Lord Browne-Wilkinson in *Westdeutsche Landesbank Girozentrale v Islington London Borough County Council* [1996] AC 669. In that case, a bank in June 1987 entered into a swap contract with a local authority, and pursuant to that contract paid certain sums to the local authority. As a result of the decision of the House of Lords in *Hazell v Hammersmith and Fullam London Borough Council* [1992] 2 AC 1, such a contract was ultra vires the authorities and therefore void. The bank therefore sought the recovery of the sums from the local authority it had paid together with compound interest and succeeded before the trial judge and the Court of Appeal. The local authority appealed to the House of Lords and one of the questions for consideration was whether the bank could get compound interest on the sums recovered from the authority. As the general rule was that, in the absence of fraud, equity would not award compound interest except against trustees or other persons in a fiduciary position in respect of profits improperly made, the bank sought to argue that the sums received by the authority were held on trust for the bank. This argument was rejected and it was held, inter alia, that a recipient of monies under a contract subsequently declared void or as being ultra vires does not hold those monies on a resulting trust and that equity would not award the bank compound interest in aid of their common law claim of restitution. In the course of his speech, Lord Browne-Wilkinson discussed the possibility of a remedial constructive trust being available and distinguished the remedial constructive trust from the normal institutional constructive trust as follows:

Under an institutional constructive trust, the trust arises by operation of law as from the date of the circumstances which give rise to it: the function of the court is merely to declare that such trust has arisen in the past. The

consequences that flow from such trust have arisen (including the possibly unfair consequences to third parties who in the interim have received the trust property) are also determined by rules of law, not under a discretion. A remedial constructive trust, as I understand it, is different. It is a judicial remedy giving rise to an enforceable equitable obligation: the extent to which it operates retrospectively to the prejudice of third parties lies in the discretion of the court.

And later at p 716 his Lordship said:

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

36. Reverting to the case at hand, the judge below held that even if remedial constructive trust applies in Singapore, no remedial constructive trust arose in this case. He said:

141 I am satisfied that on the particular facts before me, the Plaintiff has failed to establish such a trust.

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

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

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

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

We agree with these observations of the judge. A remedial constructive trust is a restitutionary remedy which the court, in appropriate circumstances, gives by way of equitable relief. In order for a remedial constructive trust to arise, the payees conscience must have been affected, while the monies in question still remain with him. If, as was the situation in the *Westdeutsche* case, the payee learns of the mistake only after the monies have got mixed with other funds or dissipated, no constructive trust in respect of these monies can arise. This is because there would no longer be an identifiable fund for the trust to bite. It is significant to note that the plaintiff bank in the *Westdeutsche* case expressly disavowed any intention of pursuing a claim in constructive trust. The

reason for their not having done so was stated by Lord Browne-Wilkinson at p 707:

This is not a case where the bank had any equitable interest which pre-dated receipt by the local authority of the upfront payment. Therefore, in order to show that the local authority became a trustee, the bank must demonstrate circumstances which raised a trust for the first time either at the date on which the local authority received the money or at the date on which payment into the mixed account was made. *Counsel for the bank specifically disavowed any claim based on a constructive trust. This was plainly right because the local authority had no relevant knowledge sufficient to raise a constructive trust at any time before the moneys, upon the bank account going into overdraft, became untraceable. Once there ceased to be an identifiable trust fund, the local authority could not become a trustee: In re Goldcorp Exchange Ltd. [1995] 1 A.C. 74.* Therefore, as the argument for the bank recognised, the only possible trust which could be established was a resulting trust arising from the circumstances in which the local authority received the upfront payment. [Emphasis is added]

37. Turning to the facts of this case, we found that there was no ground for imposing a remedial constructive trust on Mr Liu in respect of the sum US\$642,451.01 paid to him. The relationship between Mr Liu and Mr Tan was only that of a vendor and purchaser and was wholly commercial. There was no dishonest conduct on the part of Mr Liu. The sum was paid to Mr Liu in April 1981 with the intent that he was free to deal with it as his money. It was never intended by either Mr Tan or Mr Liu that it should be kept, and it had never been kept, distinct as an identifiable fund. On the basis of Mr Khoos contention that Mr Liu discovered the mistake only in February 1998 or thereabouts, there was a span of some 17 years and the sum paid to Mr Liu must have, in the meanwhile, been spent or mixed with other funds of Mr Liu. There was no sum or fund on which a remedy of constructive trust could be imposed by the court. The sum paid to Mr Liu was certainly not trust property. There was, of course, an obligation on the part of Mr Liu to return the monies to Mr Tan, but that was only a personal obligation. In our judgment, no remedial constructive trust could and should be imposed on the facts of this case.

Conclusion

38. In the result, Madam Chings appeal failed, and we dismissed it.

Yong Pung How

L P Thean

Chao Hick Tin

Chief Justice

Judge of Appeal

Judge of Appeal

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