

**DALAM MAHKAMAH RAYUAN MALAYSIA
(BIDANGKUASA RAYUAN)
RAYUAN SIVIL NO: W – 02 – 683 – 2006**

ANTARA

WONG YEW KWAN
(K/P No. 490109-10-5741) ... PERAYU

DAN

1. WONG YU KE
(K/P No. 500822-10-5161)
2. WONG YEW KIT
(K/P No. 521101-14-5019) ... RESPONDEN-
RESPONDEN

(Dalam Perkara Guaman Sivil No. S4-22-1352-2004 dalam
Mahkamah Tinggi Malaya di Kuala Lumpur
(Bahagian Dagang)

Antara

1. Wong Yu Ke
(K/P No. 500822-10-5161)
2. Wong Yew Kit
(K/P No. 521101-14-5019) ... Plaintiff-Plaintif

Dan

Wong Yew Kwan
(K/P No. 490109-10-5741) ... Defendan)

Coram: Gopal Sri Ram, J.C.A.
Zaleha Zahari, J.C.A.
Zainun Ali, J.C.A.

JUDGMENT OF GOPAL SRI RAM, J.C.A.

1. The appellant before us (defendant in the court below) had his defence and counterclaim struck out. He complains that his is an arguable case and hence he ought not to have been driven away from the judgment seat.

2. The relevant facts have been admirably summarised by the learned judge and I gratefully quote from her:

“The plaintiffs and defendant are brothers. The plaintiffs are registered co-owners of the land which was transferred to them by their father Wong Hong. The land includes a 4 storey building, where their father used to occupy the ground floor. The defendant was invited to join the father then doing business under the style and name Hong Kee Trading. The defendant has remained in occupation of the said land till now. The plaintiffs being registered owners have demanded delivery of vacant possession by a letter dated 31 July 2004. The defendant refused to deliver vacant possession and hence the plaintiffs filed this legal action.”

3. She went on to accurately summarise the case before her as follows:

[12] The thrust of the plaintiffs’ application was based on the fact that the plaintiffs are both registered co-owners whilst the defendant has been in occupation of the property originally as licensee which has been terminated by the plaintiffs.

[13] Premised on the Torrens system concept of indefeasibility of title the right of the defendant if

any would be the exception to s. 340(2) of the National Land Code 1965. As provided in that section registered title can only be defeated on grounds of fraud, misrepresentation, forgery or by authority of law.

[14] The defendant in the statement of defence raised the defences of; fraud, a promise by his mother to give a portion of the property due to some payment made by him as directed by the parent, that he is a licensee coupled with equity and having an irrevocable licence. Pursuant to that defence the defendant in his prayer in the counterclaim claims to own 1/4 of the land, and that he be registered as a co-owner with 1/4 share.

[15] The defendant alleged that the transfer to the plaintiffs by their father was by way of fraud, but no particulars were pleaded in the statement of defence or the counterclaim, it is trite law that particulars of fraud must not only be pleaded, but must be specifically pleaded. In the High Court case of *Malayan Banking Berhad v. Lim Tee Yong* [1994] 4 CLJ 558 it was held by the High Court that it is established law that the expression fraud cannot be generally or vaguely pleaded. In *Lee Kim Luang v. Lee Shiah Yee* [1988] 1 CLJ 619; [1988] 1 CLJ (Rep) 717 the High Court held that a

general allegation of fraud is insufficient event to amount to averment of fraud. There is good reason why fraud must be specifically pleaded and required in O. 18 r. 8(1) of the RHC. It is not to take the other party by surprise. In fact L. Denning MR in *Associated Leisure Ltd. & Ors v. Associated Newspapers Ltd* [1970] 2 QB 450 said that 'it is the duty of the counsel not to put a plea of fraud on the record unless he has clear and sufficient evidence to support it'.

[16] In his submission Mr. Lee suggested that though particulars of fraud are not specified, it can be done later by way of amendment. This is because the defendant is still in the process of investigating the matter. That being the case, it is clear that the plea of fraud in the statement of defence as well as in the counterclaim of the defendant is a mere speculation. As such, it is even clearer that the defendant has no defence but hoping to find something to establish fraud. In any event, fraud or forgery is not a matter barred by statute of limitation the defendant can take his time with his investigation. However, it would not be fair for the plaintiffs to be made to wait for the completion of the investigation by the defendant before they can exercise their rights and benefits

as registered land owners.

[17] Besides the general allegation of fraud the defendant raised issues of payment that had been allegedly made as directed by their mother resulting in a promise of 1/4 shares to the defendant. At the same time the defendant admitted that the property was transferred to the plaintiffs by their father. The defendant also alleged that the transfer was done without the knowledge of the defendant. The defendant further alleged that the transfer to the plaintiffs was done under mysterious situation. All these defences pleaded are not defences that can create exception to the title of the plaintiffs under s. 340 of the NLC. As such I do not see the need to dwell further into any of them.”

4. In my judgment the learned judge was entirely correct in striking out the appellant’s pleading as being plainly and obviously unsustainable. Both principle and authority favour her decision. First the principle. It is to be found in section 340(1) of the National Land Code to which she adverted in her judgment. That section immunises the title of a registered proprietor from impeachment save in the limited circumstances that are housed in subsection (2), namely, registration that has been occasioned by fraud or forgery or by an insufficient or void instrument. In the present case, the appellants sought to rely on the fraud exception. But, as correctly

pointed out by the learned judge, mere general allegations of fraud are insufficient to constitute a pleaded case of fraud. As Lord Hatherley said in **Wallingford v Mutual Society (1880) 5 App Cas 685**:

“There is the question of fraud upon which I said I should touch in one moment. Now I take it to be as settled as anything well can be by repeated decisions, that the mere averment of fraud, in general terms, is not sufficient for any practical purpose in the defence of a suit. Fraud may be alleged in the largest and most sweeping terms imaginable. What you have to do is, if it be matter of account, to point out a specific error, and bring evidence of that error, and establish it by that evidence. Nobody can be expected to meet a case, and still less to dispose of a case, summarily upon mere allegations of fraud without any definite character being given to those charges by stating the facts upon which they rest.”

5. As for authority, I need go no further than **Teh Bee v Maruthamuthu [1977] 2 MLJ 7**, which supports the proposition that even if the registered proprietor acquired his title unlawfully, that is to say, in breach of written law, he may nevertheless assert it against the whole world until proceedings are brought to remove him from the register. In that case, the defendant was in occupation of certain land of which the plaintiff was the registered proprietor. He had been

there for a very long time – since 1952. He occupied it by virtue of a temporary occupation licence which had been issued to him by the appropriate authority. The plaintiff had obtained registration of her title in breach of the express provisions of the Code which the State Authority had failed to observe. The plaintiff brought an action against the defendant in the magistrate's court for vacant possession. In his defence, the defendant denied that the plaintiff was the registered proprietor of the land. He said that the State Authority had acted unlawfully in issuing the title to the plaintiff. He also said that the plaintiff's title was invalid because it had been obtained by fraud, misrepresentation and by unlawful means. He however did not file an action against the plaintiff and the State Authority claiming a declaration of invalidity and consequential orders. There was simply no frontal attack on the plaintiff's title. This proved fatal. Because, what remained was only the issue whether the plaintiff's name appeared on the register. It did. And on that ground she was entitled to succeed.

6. So too here. The plaintiffs (respondents before us) are the registered proprietors of the land in question. There is no frontal attack upon their title. They are therefore entitled to vacant possession of the land.

7. Giving the appellant's case a most generous interpretation, what he apparently seeks to do is to fasten upon the respondents' conscience a promise made by their mother. If this is an attempt to seek to attack the respondents' title by an *in personam* claim, the matters relied upon by the appellant fall far short of what is required

for a Court of Equity to act. For equity to act *in personam*, it is necessary that the opposite party must be acting unconscionably. In other words, the charge of unconscionability must be directed at something the respondents had done or promised to do. That is not the appellant's case. Taking his case at its highest, there are simply no facts pleaded that bring the case within the *in personam* jurisdiction of a Court of Conscience. As Lord Tomlin said in **Maine and New Brunswick Electrical Power Co. v Hart AIR 1929 PC 185:**

“In order to invoke a rule of equity it is necessary in the first instance to establish the existence of a state of circumstances which attracts the equitable jurisdiction, as, for example, the non-performance of a contract of which equity can give specific performance.”

It is clear that the appellant's pleaded case does not assert the existence of a state of circumstances which attracts the equitable jurisdiction.

8. An example of a case attracting the equitable jurisdiction is **Bannister v Bannister [1948] 2 All ER 133.** The facts were these. The plaintiff gave the defendant an oral undertaking that the latter would be allowed to live in a cottage rent free for as long as she desired. Relying upon that undertaking the defendant agreed to sell to him that and an adjacent cottage. The plaintiff's oral undertaking was not included in the formal conveyance and was unenforceable at law by reason of section 53(1)(b) of the Law of Property Act 1925. Later, the plaintiff brought an action to recover claiming that the

defendant was a tenant at will. The defendant pleaded the oral undertaking and the plaintiff relied on the statute. It was held that the plaintiff was guilty of unconscionable conduct in seeking to rely on the absolute conveyance. In the words of Scott LJ:

“It is, we think, clearly a mistake to suppose that the equitable principle on which a constructive trust is raised against a person who insists on the absolute character of a conveyance to himself for the purpose of defeating a beneficial interest, which, according to the true bargain, was to belong to another, is confined to cases in which the conveyance itself was fraudulently obtained. The fraud which brings the principle into play arises **as soon as the absolute character of the conveyance is set up for the purpose of defeating the beneficial interest**, and that is the fraud to cover which the Statute of Frauds or the corresponding provisions of the Law of Property Act, 1925, cannot be called in aid in cases in which no written evidence of the real bargain is available. Nor is it, in our opinion, necessary that the bargain on which the absolute conveyance is made should include any express stipulation that the grantee is in so many words to hold as trustee. It is enough that the bargain should have included a stipulation under which some sufficiently defined beneficial

interest in the property was to be taken by another.” [Emphasis added.]

9. The facts relied on by the appellant in his pleaded case do not come anywhere near those of **Bannister v Bannister**. Indeed, they fall far short of any inequitable or unconscionable conduct on the respondents’ part in relying upon their indefeasible title. In these circumstances the appellant’s pleading is clearly demurrable and was rightly struck out by the learned judge.

10. For the reasons already given, this appeal is without merit and was dismissed. The usual orders consequent upon a dismissal were also made.

Dated: 19 December 2008.

Gopal Sri Ram
Judge, Court of Appeal
Malaysia
Putrajaya

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