Top 2 Global Sdn Bhd v Dato' Seri Yong Tu Sang and another appeal [2025] MLJU 1082

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COURT OF APPEAL (PUTRAJAYA)

S NANTHA BALAN, LIM CHONG FONG AND AHMAD KAMAL MD SHAHID JJCA

CIVIL APPEAL NOS T-02(NCvC)(W)-1292-07 OF 2022 AND T-02(NCvC)(W)-1293-07 OF 2022

7 April 2025

Muhamad Hiqmar Danial bin Hidzir (with Goh Hong) (Cheang & Ariff) for Top 2 Global and Wee Woan Jiuan. Mirdhulekha Muralidharan (with Venothani Rajagopal) (David Gurupatham & Koay) for Dato' Seri Yong Tu Sang.

Lim Chong Fong JCA:

GROUNDS OF JUDGMENT

INTRODUCTION

[1] These are post-trial appeals relating to disputes arising from a joint housing development agreement.

[2] The Appellant in Appeal no. T-02(NCvC)(W)-1292-07/2022 **("Appeal 1292")** and the Respondent in Appeal no. T-02(NCvC)-1293-07/2022 **("Appeal 1293")** who was the first defendant in original action and the plaintiff in the counterclaim below is a private limited company (hereinafter **"Top 2 Global").** Wee Woan Jiuan who was the second defendant in the original action is an individual and the shareholder as well as director of Top 2 Global.

[3] The Respondent in Appeal 1292 and the Appellant in Appeal 1293 who was the plaintiff in the original action and defendant in the counterclaim below is an individual (hereinafter **"YTS").** YTS is a shareholder and director of Kuala Ibai Development Sdn Bhd (hereinafter **"Kuala Ibai Development").**

[4] Kuala Ibai Development has a few subsidiary companies that include Ibai Leisure Sdn Bhd (hereinafter **"Ibai Leisure")** and Ibai Mas Sdn Bhd **("Ibai Mas").**

[5] We heard the appeals together on 7th January 2025 and thereafter adjourned to consider and deliberate them accordingly.

[6] Having done so, we furnish our decision below together with the supporting grounds.

BACKGROUND

[7] Ibai leisure is the registered and beneficial owner of Lots 2264, 2265 and 266 PT nos. 2192-2282 Mukim Bukit Besar, Kuala Terengganu (hereinafter **"Lands").**

[8] Ibai Leisure charged the Lands to Bank Kerjasama Rakyat (hereinafter **"Bank Rakyat")** to secure the Islamic banking facilities given to Kuala Ibai Development.

[9] By a written joint venture agreement dated 3rd February 2009 (hereinafter **"Agreement"),** Ibai Leisure as proprietor of the Land and Top 2 Global as developer of the Land jointly agreed to develop 149 units of 2 and 3 storey terrace houses on the Land to be known as Taman Green Acres. It is provided, *inter alia,* in the Agreement as follows:

> **Clause 6.01 The Entitlements of the Proprietor and the Developer**
>
> a) The parties hereto hereby irrevocably agrees that in consideration of the Proprietor appointing the Developer to undertake the Development on the Said Lands upon the terms and conditions specified herein: -

(1) The Developer shall pay to the Chargee for and on behalf of KIDSB a cash sum equivalent to the Redemption Sum as and when the Banking Facilities are available for drawdown, and such payment shall be deemed to have been duly made to the Proprietor as part of the consideration for this Agreement Provided That in the event: -

i) That the Redemption Sum shall exceed twenty five per cent (25%) of the aggregate of the proposed selling price for all the Building Units, the proprietor shall, upon demand, pay to the Developer the shortfall thereof as and when the Banking Facilities are available for drawdown to enable the Developer to remit the full amount of the Redemption Sum to the Chargee;

ii) That this Agreement shall be terminated for any reason whatsoever, the Proprietor shall, upon demand, refund to the Developer the full amount of the Redemption Sum together with interest thereon at the rate of ten per centum (10%) per annum calculated on a daily basis from the date of payment thereof until the date off full refund thereof by the Proprietor to the Developer, without prejudice to any right to damages as may be available to the aggrieved party against the defaulting party;

(2) If the Redemption Sum is less than twenty five per cent (25%) of the aggregate of the proposed selling price for all the Building Units (the differential sum thereof is hereinafter referred to as "the said Surplus"), in addition to the Redemption Sum, the Developer shall: -

i) allocate to the Proprietor such number of units of the Building Units comprised in the Development with an aggregate proposed selling price equivalent to or less than the said Surplus (hereinafter referred to as "the Proprietor's Entitlement") without any further payment of any purchase price. Each of the Building Units comprised in the Proprietor's Entitlement shall be selected by the Developer at its absolute discretion six (6) months after offering the Building Units for sale to the public; and

ii) pay to the Proprietor in cash the differential sum between the said Surplus and the aggregate proposed selling price of the Proprietor's Entitlement (which differential sum payable in cash together with the Redemption Sum are hereinafter collectively referred to as "the Cash Entitlement") simultaneously with the date of delivery of vacant possession of the last unit of the Building Unit comprise in the Proprietor's Entitlement to the Proprietor or its nominee.

b) The parties hereto hereby irrevocably agrees that in consideration of the Developer agreeing to undertake the Development on the Said Lands and to pay or undertake and deliver the Cash Entitlement and the Proprietor's Entitlement upon the terms and conditions specified herein, the Developer shall be entitled to all of the reminder of the Building Units comprised in the Development other than those forming part of the Proprietor's Entitlement

c) (hereinafter collectively reffered to as "the Developer's Entitlement"), to sell and to retain all of the sale proceeds of the same .

d) Subject however to the provisions of Clause 8.05, the Developer undertakes that upon delivery of vacant possession of the Building Units comprised in the Proprietor's Entitlement to the Proprietor or its nominee or nominees, such Building Units shall be free from all encumbrances and subject any conditions expressed or implied affecting the tittle thereto.

e) The resale of any Building Units by the Proprietor to third parties or by such third parties to subsequent parties shall be subject to the written consent of the Developer who may impose an administrative or other fee or may impose such other terms in giving such consent Provided That such consent shall not be unreasonably withheld.

f) The management fee, service charges quit rent and other contribution to be borne by the Proprietor in respect of the Building Units comprised in the Proprietor's Entitlement will be at the same rate as that imposed on all the other buyers of the same type of the Building Units developed under the Development.

g) The Developer may sell or dispose of the Developer's Entitlement of the Building Units to such purchaser or purchasers as it deems fit and to enter into any SPA or deed of mutual covenants with such purchaser or purchasers upon such terms and conditions as it may deem fit. The selling price of all such Building Units available for sale within the Development shall be determined solely by the Developer as it may at its absolute discretion deem fit.

[10] Subsequently, by a supplementary agreement dated 6th April 2009 (hereinafter **"Supplementary Agreement"),** Ibai leisure and Top 2 Global agreed to vary the redemption payment of the Land from 25% to 35%.

[11] On 9th November 2009, Bank Rakyat notified Kuala Ibai Development that the redemption sum of the Land is fixed at the flat rate of 35%.

[12] Furthermore, there was an internal arrangement amongst Bank Rakyat, Kuala Ibai Development and Ibai Leisure that the redemption sum payment would be adjusted to 50% to Top 2 Global.

[13] The development of the Land was eventually completed.

[14] However, a dispute subsequently ensued between the parties pertaining to the development of the Land which resulted in YTS on 31st May 2019 commencing the original action in the High Court against Top 2 Global and Wee Woan Jiuan predicated on inter-alia allegations of breach of trust and tort of conspiracy.

IN THE HIGH COURT

[15] For purposes of these appeals, we shall confine our review to matters raised by the parties in their respective notices and memorandum of appeal and disregard other matters contended in the High Court below.

[16] In this respect, YTS has in the original action pleaded that besides the Agreement and Supplementary Agreement, there existed an oral agreement between Ibai Leisure and Top 2 Global wherein Top 2 Global agreed to give 4 units of terrace houses developed on the Land free of encumbrances to YTS (hereinafter **"Oral Agreement").** Subsequently, YTS directed Top 2 Global to sell the 4 units terrace houses to third party purchasers. They were sold at the total aggregate sum of RM1,150,000.00 (hereinafter **"Sale Proceeds").**

[17] According to YTS, he only received the sum of RM287,500.00 of the Sales Proceeds leaving an unpaid balance of RM862,500.00.

[18] Consequently, he initiated the original action to claim and recover the same.

[19] By counterclaim, Top 2 Global pleaded that pursuant to the Oral Agreement, Top 2 Global spent as follows:

(i) RM401,625.00 was utilized to redeem 4 units terrace houses from Bank Rakyat;

(ii) RM317,500.00 was directly remitted to YTS; and

(iii) At the request of YTS, RM576,307.00 was directly remitted to Ibai Mas towards payment of Ibai Mas's repayment of its loan from Malayan Banking Bhd, aggregating to RM1,295,432.00.

[20] Since the Sales Proceeds amounted to RM1,150,000.00 only, there is a shortfall of RM145,432.00 which Top 2 Global hence counterclaimed from YTS on the premise that Top 2 Global has mistakenly overpaid YTS.

[21] At the conclusion of the trial, the learned High Court Judge dismissed both YTS's claim as well as Top 2 Global's counterclaim with each party to bear its own costs (hereinafter **"Judgment").**

[22] The Learned Judge's reasons for dismissing the claim by YTS and Top 2 Global's counterclaim may be gathered from the following paragraphs of Judgment (in Bahasa Malaysia):

> *"[55] Mahkamah mendapati daripada hasil jualan satu jumlah tertentu iaitu RM401,625.00 telah dibayar kepada BR untuk penebusan 4 Unit, RM317,500.00 dimasukan ke akaun Alliance Bank no. 130120020016424 milik Plaintif. Keterangan juga menunjukkan terdapat pengaturan lisan di antara Plaintif dan Top 2 untuk membayar dua kemudahan pinjaman yang diberikan oleh Maybank kepada IBM di mana Top 2 telah mendepositkan sebanyak RM576,307.00 ke dalam akaun maynak milik IBM no. 41314203720 dengan menggunakan hasil jualan. Plaintiff tidal menafikan akaun-akaun tersebut milik Plaintif dan juga IBM. Mahkamah berpendapat kesemua keterangan Defendan ini adalah probable kerana adalah tidak munasabah pihak Defendan akan memasukkan satu jumlah wang yang besar ke dalam akaun miliknya tanpa apa-apa sebab yang munasabah kecuali atas permintaan Plaintif. Tambahan pula Plaintif tidak ada menyatakan dalam keterangannya tujuan pihak Defendan memasukkan sejumlah wang ke dalam akaun IBM dan Alliance.*
>
> *[56] Berdasarkan di atas Mahkamah memutuskan di atas imbangan kebarangkalian ke atas pihak Defendan. Plaintif tidak mengalami apa-apa kerugian kerana beliau tidak memberikan apa-apa balasan. Perjanjian 4 Unit itu pada pendapat Mahkamah adalah suatu perjanjian hibah. Oleh yang demikian Mahkamah telah menolak tuntutan Plaintif.*
>
> *[57] Pihak Plaintif mengatakan Defendan mengatakan telah membuat bayaran sebanyak RM20,000.00 pada tahun 2015 dan RM10,000.00 pada tahun 2017 kepada Plaintif. Ini adalah bertentangan dengan keterangan pihak Defendan bahawa*

mereka telah membuat bayaran penebusan dan pembayaran balik pinjaman dengan menggunakan hasil jualan 4 Unit yang telah diselesaikan pada tahun 2014 dan fakta ini merupakan suatu pemikiran semula.

[58] Mahkamah bersetuju dengan penghujahan Plaintif. Walaupun pihak Defendan telah membuktikan satu jumlah tertentu telah dibayar kepada pihak Plaintif tetapi pihak Defendan tidak dapat membuktikan dengan tepat lebihan amaun yang telah dibayar. Amaun RM20,000.00 dan RM10,000.00 adalah jelas suatu jumlah bayaran yang baru selepas transaksi bayaran penebusan dan pembayaran balik pinjaman.

[59] Oleh itu Mahkamah telak menolak tuntutan balas Defendan."

[23] Both parties are dissatisfied with the Judgment and have on 8th July 2022 and 11th July 2022 lodged their respective appeal to the Court of Appeal.

FINDINGS OF THIS COURT

[24] The appellate function of the Court of Appeal is that of review and is well explained by Zaleha Yusof FCJ in *Ng Hoo Kui & Anor v. Wendy Tan Lee Pheng, Administrator of the Estates of Tan Ewe Kwang, Deceased & Ors* [2020] 10 CLJ 1 (FC) as follows with emphasis added by us:

"[71] From the aforesaid authorities, there appears to be a difference in approach taken and applied by the UK Supreme Court and the approach taken by the Malaysian courts. Whilst Lord Reed in Henderson (supra) separated the four non-exhaustive identifiable errors of a trial judge from the plainly wrong test:

(i) *a material error of law;*

(ii) *a critical finding of fact which has no basis in the evidence;*

(iii) ***demonstrable misunderstanding of relevant evidence;*** *and*

(iv) ***a demonstrable failure to consider relevant evidence;***

(all of which justifies appellate intervention of a trial judge's decision), this court in Gan Yook Chin (supra) effectively included them under what amount to the trial judge as being "plainly wrong".

[72] ***The phrase "lack of judicial appreciation of evidence" used in Gan Yook Chin (supra) could very well encompass three out of four errors of a trial judge*** *(other than the "material error of law") said to be identifiable by Lord Reed in Henderson (supra), namely:*

(i) *critical factual finding which has no basis in evidence;*

(ii) *demonstrable misunderstanding of relevant evidence; and*

(iii) *demonstrable failure to consider relevant evidence.*

[73] ***Given that the issue at present is about identifying situations where the findings of fact by a trial court justify appellate intervention, the other identifiable error of "material error of law" listed by Lord Reed in Henderson (supra) can occur when a trial judge erroneously apply legal principles (eg rules of evidence) in the course of making a finding of fact, thus resulting in a lack of judicial appreciation of evidence. For example, when a trial judge erroneously placed a burden of proof on a party, that will lead the judge to misdirect himself when he attempts to interpret the factual matrix before him. The commission of material error of law by the trial judge in arriving at his conclusions*** *(eg, the requirement of proof of intention in constructive trust as opposed to express trust), also justifies an appellate court reversing such conclusions.*

[74] Thus, whilst there is a slight difference in approach of appellate intervention, both the UK Supreme Court and our Federal Court effectively shares a common thread where it has been held that appellate intervention is justified where there is lack of judicial appreciation of evidence.

[75] The Court of Appeal in Singapore applies the plainly wrong test which is similar to our Federal Court, as illustrated in Damu Jadhao v. Paras Nath Singh [1965] CLJU 30; ; [1965] 1 LNS 30; ; [1976] 1 MLJ 151*, when it held:*

The principles under which an appellate court acts when an appellant seeks to displace the conclusion arrived at by a trial judge on questions of fact have been very recently restated by the Privy Council in the case of Tay Kheng Hong v.

Heap Moh Steamship Co Ltd [1964] CLJU 202; ; [1964] 1 LNS 202; ; [1964] MLJ 92 and ; *[1965] 2 MLJ 151 at 153 need only refer to a passage of the judgment of Lord Guest when dealing with the matter, where he states:*

> *Before the Court of Appeal in Singapore was entitled to reject the trial judge's estimate of the credibility of the appellant and Goh Leh they would have to be satisfied that the trial judge's view was plainly wrong and that any advantage which he enjoyed by having seen and heard the witnesses was not sufficient to explain his conclusion.*

This case seems to me to be completely dependent on the trial judge's estimate of the credibility of the appellant and his witnesses and nothing that counsel for the appellant has put forward in his arguments before me has persuaded me that the trial judge's view of the credibility of the witnesses before him was in any way plainly wrong.

[76] ***What is pertinent is that, the "plainly wrong" test is not intended to be used by an appellate court as a mean to substitute its own decision for that of the trial court on the facts.***

[77] ***It is to be observed that this court in Tengku Dato' Ibrahim Petra Tengku Indra Petra (supra) had referred to McGraddie (supra) and Henderson (supra) and has adopted the Henderson (supra) approach of the "plainly wrong" test in determining whether the trial court's findings of fact is reversible upon appeal:***

> *Recently in Henderson v. Foxworth Investments Ltd and Another [2014] 1 WLR 2600, the United Kingdom Supreme Court held that in the absence of some other identifiable error, such as a material error of law or the making of a critical factual finding which had not interfered with the factual finding which had no basis in the evidence, an appellate court should not interfere with the factual findings of a trial judge unless it was satisfied that the decision of the trial judge was "plainly wrong" in the sense that it could not reasonably be explained or justified and so was one which no reasonable judge could have reached, and that if the appellate court was not satisfied that the decision came within that category it was irrelevant that, with whatever degree of certainty, it considered that it would have reached a different conclusion from the trial judge.*

[78] Hence following this court's ruling in Tengku Dato' Ibrahim Petra Tengku Indra Petra (supra) an appellate court should not interfere with the factual findings of a trial judge unless it was satisfied that the decision of the trial judge was "plainly wrong" where in arriving at the decision it could not reasonably be explained or justified and so was one which no reasonable judge could have reached. If the decision did not fall within any of the aforesaid category, it is irrelevant, even if the appellate court thinks that with whatever degree of certainty, it considered that it would have reached a different conclusion from the trial judge.

[79] The outcome of the present appeal would therefore turn upon whether the findings of the learned trial judge were reasonably made.

[148] Given the aforesaid, ***we form the view that rather than adopting a rigid set of rules to demarcate the boundaries of appellate intervention insofar as findings of fact are concerned, the "plainly wrong" test as espoused in decisions of this court should be retained as a flexible guide for appellate courts. As long as the trial judge's conclusion can be supported on a rational basis in view of the material evidence, the fact that the appellate court feels like it might have decided differently is irrelevant. In other words, a finding of fact that would not be repugnant to common sense ought not to be disturbed. The trial judge should be accorded a margin of appreciation when his treatment of the evidence is examined by the appellate courts.****"***

See also *Perembun (M) Sdn Bhd v. Conlay Construction Sdn Bhd* [2012] 1 LNS 1416 **(CA).**

[25] We will accordingly review Appeal 1293 followed by Appeal 1292 *seriatim.*

[26] In respect of Appeal 1293 on the shortfall of payment of RM862,500.00 claimed by YTS, we observed that the Learned Judge has found as a matter of fact that the Oral Agreement was made gratuitously without consideration; hence YTS has no legal right to recover his alleged shortfall.

[27] This is primarily a finding of fact, and the Court of Appeal is hesitant to interfere, as it is heavily dependent on the testimony of the rival witnesses from each party. It is trite that the Learned Judge is best placed to determine the credibility of the witnesses and to assess the relative weight to be given to their evidence. We thus defer to the findings of the Learned Judge on this aspect, particularly regarding the conflict in the witnesses' testimonies; see *Abd Latif Sakimin v. PP* *[2009] MLJU 1828* **(FC).**

[28] Additionally, we also noticed that the Oral Agreement as pleaded was made between Top 2 Global and Ibai Mas but not YTS. Thus, YTS as the stranger thereto cannot take benefit of the Oral Agreement and sue upon it.

[29] That notwithstanding, we have scrutinised the relevant documentary evidence and testamentary explanation of witnesses and we are satisfied that Top 2 Global has firstly paid RM401,625.00 towards redemption of 4 units terrace houses from Bank Rakyat pursuant to the loan of Ibai Leisure, secondly paid RM576,307.00 towards repayment to Malayan Banking Bhd pursuant to the loan of Ibai Mas and finally paid RM317,500.00 to YTS personally. These payments totalling to RM 1,295,432.00 were all done at the request of YTS.

[30] As a result, albeit there is no legal right of entitlement for YTS arising from the Oral Agreement, we nonetheless find that Top 2 Global has, as a matter of fact, arithmetically paid all that was required to be paid to YTS, which has directly benefited him personally as well as indirectly in his capacity as a shareholder of Ibai Leisure and Ibai Mas.

[31] In the premises, we find no appealable error on the part of the Learned Judge in Appeal 1293 that warrants appellate intervention.

[32] As for Appeal 1292 on the issue of recovery of overpayment (by mistake) by Top 2 Global of RM145,432.00, it is plain that this is made up of the difference between the Sales Proceeds of RM1,150,000.00 and the aggregate amount of RM1,295,432.00 paid by Top 2 Global as elaborated in paragraph [27] above pursuant to the Oral Agreement.

[33] We noticed that the Learned Judge did not doubt that RM1,295,432.00 was paid by Top 2 Global save for the two payments of RM10,000.00 and RM20,000.00 out of RM317,500.00 paid by Top 2 Global directly to YTS.

[34] We have accordingly carefully scrutinised the aforesaid two payments. From the documentary evidence as well as testamentary evidence of Wee Woan Jiuan, we find that the RM10,000.00 was paid in a single payment by Top 2 Global into YTS's bank account on 16th February 2015; see exhibit D14. The other RM20,000.00 was paid in 6 separate payments of RM4,650.00, RM4,850.00, RM4,800.00, RM4,700.00, RM750.00 and RM250.00 into YTS's bank account on 25th January 2017 totalling RM20,000.00. This has been admitted by YTS under cross examination.

[35] We, however, find it inexplicable that the Learned Judge rejected these two payments totaling RM30,000.00 as an afterthought. No reasons were given by the Learned Judge is support of this conclusion. This in our view is a misdirection.

[36] Furthermore, the Learned Judge did not provide any reasons whatsoever for rejecting the balance of RM115,432.00 (RM145,432.00 claimed minus RM30,000.00)

[37] Consequently, we find that the Learned Judge was plainly wrong and erred in dismissing the counterclaim of Top 2 Global. In the circumstances, for the reasons stated above, we are satisfied that appellate intervention is warranted.

CONCLUSION

[38] For the foregoing reasons, we dismiss Appeal 1293 and the order of the High Court in respect of the claim of YTS is affirmed. However, we allow Appeal 1292 and the order of the High Court in respect of the counterclaim of Top 2 Global is set aside. Hence, we enter judgment for Top 2 Global against YTS in the sum of RM145,432.00 with interest of 5% per annum from the date of filing of the Writ till full realisation.

[39] We award global costs of RM 40,000.00 to Top 2 Global for both appeals here and in the High Court below.