

## LEGISLATION COMMENTS

### HOUSING AND DEVELOPMENT (AMENDMENT) ACT 1984<sup>1</sup>

A BARELY noticed amendment to the Housing and Development Act<sup>2</sup> ("the principal Act") which will probably be of limited practical significance nevertheless sheds interesting light on the status and rights of Housing and Development Board (HDB) flat dwellers.

#### *The Old Law*

The amendment concerned section 44 of the Act, which contains a number of restrictions on the powers of purchasers<sup>3</sup> of HDB flats, providing, for instance that no lien by deposit of title deeds as security for a debt can be created in relation to any such flat.<sup>4</sup>

Subsection (4) provided as follows:

Every trust or alleged trust, whether the trust is express, implied or constructive, which purports to be created in respect of any such flat by the owner thereof shall be null and void and shall be incapable of being enforced by any court.

In some ways this is a rather curious provision. The contention of the Minister of National Development, when the Amendment Bill was read for a second time, was that "no trust in any form can be created in respect of an HDB dwelling or property,"<sup>5</sup> but this is arguable on the wording of the statute. For a start, the subsection did not say simply "Every trust...", but rather, "Every trust... created by the owner". On the face of it, this would appear to limit the operation of the section to the prohibition of express trusts only. This was clearly not the case, however, because provision was specifically made for the prohibition of implied and constructive trusts also. The plot thickens. Nobody can agree on what is meant by the nebulous phrase "implied trust".<sup>6</sup> In any event, the only type of implied trust that could legitimately be regarded as "created by the owner" of property is the form of trust arising out of mutual wills, and it is unlikely that that was the mischief at which the original provision was aimed. The standard definition of implied trusts is that they comprise resulting and constructive trusts.<sup>7</sup> Constructive trusts were, of course, separately

<sup>1</sup> Act No. 30 of 1984.

<sup>2</sup> Cap. 271, Singapore Statutes, 1970 Rev. Ed. (reprinted 1982).

<sup>3</sup> A purchaser of an HDB flat buys a 99 year lease. "Owner" in the Act "includes a person who has purchased a leasehold interest in the property and also includes a purchaser under an agreement for a lease." *Ibid.*, s. 2.

<sup>4</sup> S.44(1).

<sup>5</sup> Singapore Parliamentary Debates, (1984) Vol. 45, col. 2026. The ability to create a trust is, of course, an essential ingredient of ownership.

<sup>6</sup> See, e.g., Pettit, *Equity and The Law of Trusts* (5th ed. 1984), 54.

<sup>7</sup> See Hanbury and Maudsley, *Modern Equity* (11th ed., 1981), 193.

catered for, and that raises another problem. It is difficult, if not impossible, to find a constructive trust "created" by the owner. The whole point about constructive trusts is that they are created in spite of the owner, to prevent unconscionable conduct<sup>8</sup> or the making of unauthorized profits.<sup>9</sup> If the true intent of the section were to prohibit all constructive trusts it would be the greatest blow to Equity since Coke's assault on it during the reign of James I. If the true intent was actually only to prohibit constructive trusts created by the owner, then the provision was otiose because no such trusts exist (unless it is argued that secret trusts are constructive).<sup>10</sup>

Meanwhile, what of resulting trusts? Many would say that resulting trusts are truly *implied* (unlike constructive trusts which are imposed rather than implied). Also it could at least be argued that some resulting trusts are "created by the owner". The situations found in cases like *Vandervell v. I.R.C.*,<sup>11</sup> and *Barclay's Bank Ltd. v. Quistclose Investments Ltd.*,<sup>12</sup> for instance, could well be thus described. It is, however, highly unlikely that such situations were being contemplated by the draftsmen of the Act. The only type of resulting trust that is likely to arise in the context of an HDB flat is the "purchase money resulting trust" in relation to matrimonial property. Such trusts are clearly not "created by the owner," and were, therefore, presumably not outlawed by the Act.<sup>13</sup>

Emerging from this muddle it is worth remembering the actual function of the subsection, because about this there is very little doubt. Public housing is a privilege, not a right, and various categories of people (for example, people who have infringed the HDB's rules and have been placed on a debarment list) are ineligible to apply to purchase flats. It would make nonsense of the HDB's eligibility rules if they could be avoided by use of that simple and classic rule-avoiding device, the trust.<sup>14</sup> It is unfortunate that the draftsmen of the original subsection, in their zeal to plug as many loopholes as possible, designed a formula that was almost meaningless. It is now time to see whether the draftsmen of the 1984 version have been more successful.

### *The Amendment*

Section 3 of the Amendment Act replaces section 44(4) of the principal Act with the following provision.

(4) (a) No trust in respect of any... flat shall be created by the owner thereof without the prior written consent of the Board.

(b) Every trust which purports to be created in respect of any such flat,... without the prior written approval of the Board shall be void.

<sup>8</sup> See, e.g., *Binions v. Evans* [1972] Ch. 359. If such a case were to arise in the case of an HDB flat, the principle that equity will not allow a statute to be an instrument of fraud might come into play.

<sup>9</sup> See, e.g., *Keech v. Sandford* (1726) Sel. Cas. Ch. 61.

<sup>10</sup> See Nathan and Marshall, *Cases and Commentary on the Law of Trusts* (7th ed., 1980), 452.

<sup>11</sup> [1967] 2 A.C. 291.

<sup>12</sup> [1968] 3 W.L.R. 1077 (H.L.).

<sup>13</sup> There was no discussion of this point in *Fan Po Kie v. Tan Boon Son* [1982] 2 M.L.J., 137 (appeal, unreported, but noted in *The Straits Times*, 14.1.82).

<sup>14</sup> See the Minister's statement referred to in n. 5, *supra*.

First, it may be useful (though strictly speaking, of no legal relevance) to examine the legislature's intention. The Minister, having noted that all trusts were ruled out by the original subsection, and that the policy behind it was to prevent avoidance of the HDB's rules, proceeded as follows:<sup>15</sup>

Over the years, however, there has been increasing need for the HDB to permit the creation of trusts for legitimate reasons. For example, it is necessary to empower trustees to hold flats in trust for minor children who are citizens in the event of the death of the lessee parent, and where the surviving parent is neither a citizen nor a permanent resident and therefore not eligible to assume ownership of the flat.

Pausing there, this is really rather strange. In the situation described by the Minister, one can certainly see that problems concerning the legal ownership of the flat are caused by the Board's eligibility rules (in this case, those restricting ownership of HDB flats to citizens or permanent residents). That problem could be solved by a rule providing, for instance, that while the minor citizen is under age, ownership of the flat can be vested in someone who is not a member of the nuclear family listed in the application form. The point is, though, that the problem is *not* caused by section 44(4). If a trust arises in the circumstances described by the Minister, unless it is expressly created by the will of the deceased lessee, it is not a trust "created by the owner", and its existence was therefore not barred by the former provision.<sup>16</sup> (It should be remembered that a minor can never hold a legal estate in land, and such land must be held on trust).<sup>17</sup> It follows, of course, that the amendment does not remedy the problem, although the provision, *prima facie*, makes good sense: a classic case of doing the right thing for the wrong reason.

There is, however, one disturbing feature of the new subsection. If the draftsmen thought that trusts for infants were caught by the old rule, it is reasonable to assume that they thought that all trusts were caught (as indeed the Minister's own words, quoted above, indicate). That must mean that it was felt that constructive trusts and, in particular, purchase money resulting trusts, were caught by the old rule. If that is right, it is arguable that the position of, for instance, a wife who is not a legal co-owner but who contributed to the purchase of a flat, is not really helped by the new provision. In that case the wife's equitable interest arises because of her contribution and it would be unfortunate if her interest were at risk because of the absence of the "prior written approval of the Board". To be fair, the position of the spouses of HDB flat owners is probably more secure than that of their counterparts in the private sector (for instance, a flat cannot be resold without the spouse's written consent, and a flat cannot vest

<sup>15</sup> *Ibid.*

<sup>16</sup> And a trust does not fail for want of a trustee, so the "eligibility problem" would not prevent the trust from arising either.

<sup>17</sup> Conveyancing and Law of Property Act, Cap. 268, ss. 40-42. There is no clear provision to the effect that an infant cannot hold a legal estate, but land vested in an infant is deemed to be a settled estate governed by the Settled Estates Act (Cap. 39). Section 2 of that Act defines "settlements" as invariably involving trusts, and although as a matter of strict statutory interpretation the matter is not entirely clear, it is submitted that this situation will invariably involve a trust.

in the Official Assignee)<sup>18</sup> but it would be preferable if the Act were to make it clear whether resulting and constructive trusts can exist in HDB flats. All in all, it would be reassuring to have a stronger feeling that the draftsmen knew what they were doing, not to mention why they were doing it.

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<sup>18</sup> S.44(2).