

TRUSTS OF HDB FLATS

*Cheong Yoke Kuen v Cheong Kwok Kiong*¹

TO what extent can the owner of a Housing and Development Board (HDB) flat create a trust over his property? In *Cheong Yoke Kuen v Cheong Kwok Kiong* a flat was purchased in 1983 from the HDB in the joint names of the parties' mother and the respondent. The respondent paid the deposit on the flat and also the subsequent monthly payments to the HDB and all outgoings. The flat was registered in the joint names of the mother and the respondent because at that time it could not be registered in the sole name of the respondent. In 1986 the respondent was allocated a new HDB flat, but his mother wished to remain in the old flat. Since the HDB rules did not permit someone to own more than one flat at the same time he transferred his interest in the old flat to his mother, who thereby became the sole owner. However, he paid all the costs and expenses relating to the transfer and asserted that he merely wanted to provide a place for his mother to live during her lifetime and did not intend to make a gift of the flat to her. He continued to pay all the outgoings of the flat after the transfer. The mother died intestate in 1995 and a dispute arose as to the ownership of the flat between the respondent and his siblings, who claimed that the flat belonged to their mother beneficially and formed part of her estate, to which her children were entitled in equal shares under the Intestate Succession Act.²

Under the general law the beneficial ownership would undoubtedly have remained in the respondent by way of a resulting trust. However, section 51 of the Housing and Development Act³ lays down the following provisions in relation to HDB flats:

¹ [1999] 2 SLR 476 (Court of Appeal).

² Cap 146, 1985 Rev Ed.

³ Cap 129, 1997 Rev Ed.

... ..

(4) No trust in respect of any such flat, house or other building shall be created by the owner thereof without the prior written approval of the Board.

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

It was held by the Court of Appeal that both express and resulting trusts were caught by the section and that therefore the resulting trust in this case was void. The court drew a clear distinction for the purposes of the section between resulting and constructive trusts. LP Thean JA said:

The nature of a constructive trust is such that it could not be said to be 'created' by the parties. It is a trust which is *imposed* by equity in respect of an interest in a property in a variety of circumstances which would render it inequitable for the owner of the property or any interest therein to hold it for his benefit. It arises independently of the intention of the parties. A resulting trust, however, is different. It arises from a certain transaction carried out intentionally by the parties concerned and the court infers an intention to create a trust in favour of a party.⁴

The view that a resulting trust is based on the inference of an intention to create a trust can be supported by reference to the speech of Lord Browne-Wilkinson in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council*.⁵ Certainly the view of Megarry J in *Re Vandervell's Trusts (No 2)*⁶ that in certain circumstances a resulting trust may arise automatically without reference to intention would seem no longer to represent the consensus of opinion on this subject. However, the exact nature of the resulting trust is still the subject of some debate. There is much to be said for the view of Chambers that resulting trusts do not depend on an implied intention to create a trust, but rather that they come into being because the provider of the property did not intend to benefit the recipient.⁷

⁴ *Supra*, note 1, at 482.

⁵ [1996] AC 669, 708.

⁶ [1974] Ch 269, 289.

⁷ See Robert Chambers, *Resulting Trusts* (Oxford 1997). This view obviously supports that of Professor Peter Birks who has argued for an extended role for resulting trusts in the law of restitution. See Birks, "Restitution and Resulting Trusts" in *Equity and Contemporary*

It is doubtful whether it was strictly necessary for the court to decide that all resulting trusts over HDB properties are prohibited by section 51(4) and (5) or indeed to essay a definition of the nature of resulting trusts. In the present case, as LP Thean JA pointed out, when the respondent “transferred his entire interest in the flat to the mother he intended to remain the beneficial owner of the flat. By such transfer he in effect ‘created’ a trust of the flat in his favour ... the resulting trust which arose in this case was ‘created’ by the respondent”.⁸

The view that express and resulting trusts are prohibited under section 51(4) and (5) whereas constructive trusts are permitted seems at first sight to offer a simple solution to the problems inherent in the interpretation of the statutory provisions. Unfortunately, however, such an approach may lead to the drawing of arbitrary distinctions between similar cases and can on occasion cause real injustice, as the following illustrations may serve to show.

1. H and W each pay half the purchase price of an HDB flat which is taken in the sole name of H. H declares in writing that he holds his legal interest on trust for W and himself. This is an express trust which is defeated by section 51(5).
2. The facts are as in (1) above except that there is no written declaration of trust. Under the general law H would hold his legal title on a resulting trust for W and himself, but this trust is void under section 51(5).
3. H and W live in an HDB flat which is in the name of H alone and which was paid for by H. They agree, however, that the flat should belong to them in equal shares and H executes a written declaration of trust recording this agreement. In reliance on this understanding W incurs considerable expense in renovating the flat. This is a case of an express trust which is void under section 51(5). H owns the entire beneficial interest in the flat.
4. The facts are as in (3) above except that there is only an oral agreement between H and W. There is nothing in writing. The oral agreement may amount to a declaration of trust, but in the

Legal Developments (ed Goldstein, Jerusalem 1992), p 335. For a critique of this approach see Swadling, “A New Role for Resulting Trusts?” (1996) *Leg St* 110.

⁸ *Supra*, note 1, at 484. In the same way it can undoubtedly be said that the resulting trust which arose at the time of purchase was also created by the respondent.

absence of writing it is unenforceable under section 7 of the Civil Law Act.⁹ However, as W has acted to her detriment in reliance on the agreement, the courts will impose a constructive trust on H the terms of which are the same as the parties' agreement. This is sometimes called a "common intention" constructive trust. However, as it is a constructive trust, it is not covered by section 51(4) and (5). H will therefore hold his legal title on trust for W and himself.

5. H pays the deposit to buy a flat, but after it has been purchased, W pays some of the mortgage instalments. This may be seen as giving W an equitable interest in the flat on the basis of a resulting trust.¹⁰ It may be preferable, however, to view this as a case where the courts can infer an agreement that W should have such a share in the property as is represented by her mortgage payments.¹¹ This is enforced by way of constructive trust. If the former view is adopted *Cheong Yoke Kuen v Cheong Kwok Kiong* would lead to the trust being defeated by section 51(5), but if the latter view is adopted it would seem that the trust falls outside the mischief of section 51(4) and (5).
6. E, who is employed by X to buy supplies for his plant, receives secret commissions from M, a manufacturer of widgets, in return for buying from M and not from some other manufacturer. E will hold the secret commissions on constructive trust for X. If he invests the secret commissions in the purchase of an HDB flat, he will hold the flat on a constructive trust for X.¹² This constructive trust is not defeated by section 51(5).
7. S, the owner of an HDB flat, wishes to transfer the flat to T1 and T2 to hold on trust for B. He approaches the HDB, which gives its written consent to the proposed trust. S then executes a transfer of the flat in favour of T1 and T2 to hold on trust for B. However, unknown to the parties, B died shortly before the execution of the transfer. Under the general law because the express trust has failed a resulting trust will arise in favour of

⁹ Cap 43, 1999 Rev Ed.

¹⁰ *Gissing v Gissing* [1971] AC 886, 906; *Huntingford v Hobbs* [1993] 1 FLR 736.

¹¹ *Lloyds Bank plc v Rosset* [1991] 1 AC 107.

¹² *Sumitomo Bank Ltd v Kartika Ratna Thahir* [1993] 1 SLR 735; *AG for Hong Kong v Reid* [1994] AC 324.

S. However, the HDB has not given its prior written approval for this particular trust. If *Cheong Yoke Kuen v Cheong Kwok Kiong* is understood as standing for the proposition that all resulting trusts are caught by section 51(4) and (5), the trust is void giving rise to the extraordinary result that T1 and T2 now own the flat beneficially.

The predecessor to subsections 4 and 5 of section 51 was the then section 44(4) which contained a blanket prohibition against the creation of any trusts over HDB properties “whether the trust is express, implied or constructive”.¹³ The current provision contains no reference to the different types of trust. It is submitted that in deciding whether section 51(4) and (5) avoids a particular trust, one should not focus on the question of whether the trust is express, resulting or constructive, but should ask rather whether the trust, whatever its nature, can reasonably be described as having been created by the owner of the HDB flat in question. Approached in this way it can be said that all the trusts arising in the first five situations above were created by the owner of the flat.

The only difference between the first and third situations on the one hand and the second and fourth situations on the other lies in the presence or absence of a written declaration of trust. This should make no difference to the result because the written declaration merely recorded the property arrangements which were implicit in the parties’ actions and which were therefore created by the owners of the flats in question. The court accepted this in relation to the second situation in *Cheong Yoke Kuen v Cheong Kwok Kiong*.¹⁴ If one accepts that the trust in the second situation is created by the owner in spite of the absence of a written, or indeed an oral, declaration of trust, then it is hard to see how one can avoid the same conclusion in relation to the fourth situation where there is an oral, but unenforceable, declaration of trust. The fifth situation is merely a variation on the second and illustrates the difficulties caused by determining the applicability of section 51(4) and (5) on the basis of the label that the courts give to the trust in question.

In the sixth situation the trust was clearly not created by the owner of the flat. On the contrary it is imposed by the courts against his wishes to prevent his unjust enrichment. In the seventh situation the owner did indeed want to create a trust of the flat and he had the consent of the HDB to do this, but the trust which actually arose was not the one he tried to create. It arises by operation of law because when he transferred legal title to T1

¹³ This provision was amended by the Housing and Development (Amendment) Act 1984.

¹⁴ *Supra*, note 1, at 483.

and T2 he did not intend them to hold the property beneficially. It cannot reasonably be said that the trust was created by the owner and therefore it is outside the mischief of section 51(4) and (5).

Constructive trusts arise commonly in cases of matrimonial and quasi-matrimonial property and also where family members buy property together. If, as is argued here, constructive trusts are not necessarily excluded from the ambit of section 51(4) and (5), there is the risk that hardship may result from the fact that the statute makes the trust void. There may, however, be certain techniques which the courts can adopt to deal with these situations. In the first place it is clear from the speech of the Minister for National Development in Parliament in moving the second reading of what is now section 51(4) and (5) that the object of the statutory provisions was to "prevent abuse by persons not eligible for HDB flats from purchasing a flat in the name of nominees".¹⁵ Arguably section 51(4) and (5) can be read to avoid a trust only where the beneficiary is ineligible to purchase an HDB flat.

In the case of matrimonial property it is clear that no order made by the court under section 112 of the Women's Charter¹⁶ to order the division of matrimonial assets is affected by section 51(4) and (5). Even if the court were to declare a trust of the HDB flat under its powers under section 112, such a trust could not reasonably be described as having been created by the owner of the flat, but rather by the order of the court.¹⁷

Unfortunately, however, section 112 is only available where a marriage is dissolved by divorce or decree of nullity or where an order is made for judicial separation. If the issue falls to be decided during the currency of the marriage or where one of the parties has died, the property rights of the couple have to be determined in accordance with normal common law principles. The same is true where the dispute is between an unmarried couple or family members. Even in such cases, however, relief may be available through the doctrine of proprietary estoppel.

As proprietary estoppel can be argued in cases which may otherwise be seen as involving a common intention constructive trust,¹⁸ a purist might argue that by granting relief in such a case, the court is enforcing indirectly the very trust which is prohibited under section 51(4) and (5). There is,

¹⁵ Quoted in the case *ibid.*

¹⁶ Cap 353, 1997 Rev Ed.

¹⁷ In *Tan Poh Soon v Phua Sin Yin* GP Selvam J said that the same was true of a court order made under section 57 of the Women's Charter, but with respect it is difficult to accept this view because the court has no power under this section to adjust property rights: see *Pettitt v Pettitt* [1970] AC 777; *PQR v STR* [1993] 1 SLR 574.

¹⁸ See, eg, *Grant v Edwards* [1986] Ch 638.

however, an important difference between the common intention constructive trust and proprietary estoppel. In the former case the court enforces the understanding arrived at by the parties. In the latter case, this understanding or representation coupled with reliance gives rise to an equity and the court does the minimum necessary to satisfy the equity.¹⁹ The remedy is at large. The court may grant a greater or lesser property interest than the one agreed on²⁰ or may even award monetary compensation instead of a property interest.²¹ Even if the court should decide to declare that the owner should hold the property on trust for another party, the court does this in the exercise of its discretion. It cannot therefore reasonably be said that the trust was created by the owner of the flat. Indeed in deciding how best to satisfy the equity that arises in such a case, there seems no reason why the court should not take into account the policy objectives which underlie the Housing and Development Act.²²

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¹⁹ *Crabb v Arun District Council* [1976] Ch 179.

²⁰ See, eg, *Pascoe v Turner* [1979] 1 WLR 431.

²¹ See, eg, *Dodsworth v Dodsworth* (1973) 228 Estates Gazette 1115.

²² *Cf Dodsworth v Dodsworth*, *ibid*, where in fashioning the remedy the court had regard to the effect of the Settled Land Act 1925 on any order it might make.

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