

True Economic Substance of Transaction Relevant in Determining Presumption of Resulting Trust

In *Kotagaralahalli Peddappaiah Nagaraja v Moussa Salem and others* [2023] SGHC 6 (*KPN v Moussa Salem*), the General Division of the High Court of Singapore (**General Division**) adopted the approach taken in the English case of *FanmailUK.com Ltd and others v Cooper and others* [2008] All ER (D) 183 (*Fanmail*), and held that, in determining whether a presumption of resulting trust has arisen over property in favour of a party, the court may have regard to the true economic substance of the parties' transaction seen in its wider context, and not just the direct consideration for the property.

Relying on *Fanmail*, the General Division found, despite the execution of a trust deed declaring that shares in a company were held on trust for the plaintiff, the first defendant and another party in equal proportions, that all shares were held on a presumed resulting trust in favour of the first defendant alone, as the first defendant had borne the consideration for the incorporation of the company, having paid the fees and disbursements of the company's incorporation and having contributed the company's initial paid-up capital.

On 23 October 2023, the Appellate Division of the High Court of Singapore (**Appellate Division**) heard and dismissed the plaintiff's appeal against the General Division's decision.

Our partners Koh Swee Yen, SC and Lin Chunlong successfully represented the first defendant before both the General Division and the Appellate Division. Our associates, Darren Tan and Cindy Chua, were part of the team representing the first defendant in the appeal before the Appellate Division.

Our Comments

The General Division's decision in *KPN v Moussa Salem* is significant as it clarifies that, in deciding whether a presumption of resulting trust arose in favour of a party, the dispositive factor is who, *in true economic substance*, bore the consideration under the transaction which caused the property to vest in the trustee. This approach is commonsensical and accords with commercial reality. It represents a shift from the traditional focus on the direct purchase consideration of the property. Under this approach, the court may discount, if not disregard, any contribution which is in economic substance *de minimis*.

In the context of shares which are allotted and issued to a party as subscriber shares, if that party's contribution or obligation to contribute to the company's capital arising from those shares is *de minimis* when the true economic substance of the parties' transaction is seen in its wider context, the presumption of resulting trust will arise in favour of the person who undertakes a contractual obligation to pay the fees and disbursements associated with incorporating the company or who actually pays those fees and disbursements.

KPN v Moussa Salem is also significant because, notwithstanding the existence of a written trust deed which expressly provided that the second defendant held shares on trust for the plaintiff, the first defendant and another party in equal shares, the General Division found that the second defendant held all shares on trust for the first defendant, on the basis that a presumption of resulting trust arose in the first defendant's favour.

Background

The plaintiff brought an action claiming that he was either the beneficial owner of one third of the shares in the third defendant company (**Company**) or the beneficial owner of one share in the Company. The plaintiff relied on a written declaration of trust executed by the second defendant on 23 July 2015 (**2015 Trust Deed**).

The first defendant opposed the plaintiff's claim, and contended that the second defendant held all the shares in the Company for the first defendant on a resulting trust, which arose from the following payments:

- (a) Payment to a law firm in Singapore of all the fees and disbursements necessary for the law firm to incorporate the Company; and
- (b) Payment to the second defendant of all of the capital payable on the shares upon its incorporation.

The Company was incorporated on 23 July 2015 as a vehicle to invest in a project with the Government of Sri Lanka to revive the then-defunct Kantale Sugar Factory. The Company's initial share capital comprised three shares of US\$1 each (**Subscriber Shares**) and they were held by the second defendant.

On 23 July 2015, the second defendant also executed the 2015 Trust Deed. By its express terms, the second defendant declared that she held the Subscriber Shares on trust for the plaintiff, the first defendant and one Mr Mendel Gluck in equal shares.

In December 2016, an additional 9,997 shares in the Company were allotted and issued to the second defendant at US\$0.10 per share (**Additional Shares**), and the Company's shares increased to 10,000 shares. The plaintiff claimed that he also become the beneficial owner of one third of the Additional Shares by virtue of the 2015 Trust Deed and Article 47 of the Company's articles of association which conferred on the plaintiff rights of pre-emption in relation to one third of the Additional Shares.

The General Division's Decision

The General Division dismissed the plaintiff's claim, holding that the second defendant held all the shares in the Company on a presumed resulting trust for the first defendant alone.

Law on the presumption of resulting trust

The General Division noted that one of the circumstances in which equity will presume a resulting trust to arise is when one person (B) furnishes the consideration for property and directs that it be conveyed to another person (T). The presumption of resulting trust may be rebutted either by evidence that B intended to make gift of the property to T or by the counter-presumption of advancement.

While the General Division acknowledged that the presumption of resulting trust (as well as the presumption of advancement) should be treated as "*an evidential instrument of last resort*", the General Division applied the presumption of resulting trust in this case instead of "*looking for clear evidence of donative intent*" for three reasons:

- (a) This was not a usual dispute between B and T. T in the present case was the second defendant and it was accepted by everyone (including the second defendant) that nobody had any donative intent in favour of her.

- (b) It was not clear whether the court should look for clear evidence of the plaintiff's donative intent in favour of the first defendant or the first defendant's donative intent in favour of the plaintiff. Choosing to examine the donative intent from one party's perspective amounted to accepting that party's case without analysis.
- (c) The plaintiff and first defendant never had a single common intention.

The General Division applied the case of *Fanmail* which is clear authority that, in determining whether the presumption of resulting trust arose over certain property in favour of the beneficiary, it is legitimate – and may even be necessary – to have regard to the true economic substance of the parties' transaction seen in its wider context. The dispositive factor is who, in true economic substance, bore the consideration under the transaction which caused the property to vest in a trustee. This approach allows the court to discount, if not disregard, any contribution which is in economic substance *de minimis*. In a resulting trust analysis, there may be circumstances in which it may be legitimate to have regard to other transaction costs in a conveyance of property, so long as they are of economic substance and not *de minimis*. Parties' contributions to the cost of acquiring the property included their contribution to the purchase price as well as transaction costs such as incidental costs, fees and disbursements.

Presumed resulting trust in Subscriber Shares

In this case, the General Division found that a presumption of resulting trust arose in favour of the first defendant because: (a) he assumed a contractual obligation to pay the necessary ancillary costs of the Company's incorporation (**Incorporation Fees**) (which included, amongst other things, the law firm's fees for incorporating the Company, charges payable to the Accounting and Regulatory Authority on the occasion of incorporating the Company, and other miscellaneous incidentals); and (b) he contributed the paid-up capital of US\$3 payable to the Company on the Subscriber Shares.

With respect to the paid-up capital, the General Division noted that the amount was *de minimis* both in absolute terms and also relative to the Incorporation Fees (amounting to S\$8,093.46) "*when the true economic substance of the parties' transaction is seen in its wider context*", and "[i]t was the first defendant's payment of the [Incorporation Fees] which, in economic substance, had [the] causative force in calling the Subscriber Shares into existence and vesting them in the second defendant".

On the facts, the General Division found that there was no donative intention on the first defendant's part when the Subscriber Shares were called into existence to rebut the resulting trust presumed in the first defendant's favour. The General Division accepted the first defendant's evidence that the terms of the 2015 Trust Deed were intended "*only as a stop gap measure*", and found that the 2015 Trust Deed went against the weight of the evidence which showed that there was no donative intention on the first defendant's part.

Presumed resulting trust in Additional Shares

The General Division held that the plaintiff's claim for a beneficial interest in one-third of the Additional Shares stood or fell with his claim for a beneficial interest in one of the Subscriber Shares. As the plaintiff had no beneficial interest in any of the Subscriber Shares, his claim for a beneficial interest in one third of the Additional Shares also failed.

The Appellate Division's Decision

The plaintiff's appeal against the General Division's decision was dismissed by the Appellate Division on 23 October 2023. The Appellate Division held that, even if the General Division was not correct to begin with the presumption of resulting trust in the analysis of the evidence as to the parties' intention about the one Subscriber Share, "a holistic assessment of the evidence" indicated that the one Subscriber Share belonged beneficially to the first defendant and not the plaintiff. That being the case, the plaintiff's claim in respect of the Additional Shares could not stand.

If you would like information and/or assistance on the above or any other area of law, you may wish to contact the Partner at WongPartnership whom you normally work with or any of the following Partners:



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