

CHAPTER THREE

VARIOUS KINDS OF TRUSTS

Introduction

It is well-known that the English law boasts of various kinds of trusts. As regards Malaysia, a trust has been defined to include "every species of express, implied, or constructive fiduciary ownership."¹ In addition, section 2 of the Trustee Ordinance 1949 also defines "trusts" to include "implied and constructive trusts."

It is therefore proposed here to go briefly into the various classifications of trusts in English law and to see the extent to which the Malaysian courts have adopted them in our country.

Completely and Incompletely Constituted Trusts

Any trust require the clear intention of creating a trust. An express trust does not only require such an intention but also a conveyance or transfer of the trust property to the trustee. If the settlor or testator does not transfer or vest the property, then the trust is said to be incompletely constituted.

Therefore, an express trust is said to be completely constituted either by an effective transfer of the property to trustees, or by an effective declaration of trust. The implications of this principle were clearly brought out in the classic judgement of Turner C.J. in Milroy v Lord²:

"In order to render a voluntary settlement valid and effectual, the settlor must have done everything which, according to the nature of the property comprised in the settlement, was necessary to be done in order to render the settlement binding upon him. He may, of course, do this by actually transferring the property to the persons for whom he intends to provide and the provision will then

1. Specific Relief Act 1950, section 2.

2. (1862) 4 De G.F. & J. 264 at 274, applied and quoted by Upjohn J. in Re Wale [1956] 1 WLR 1345.

be effectual and it will be equally effectual if he transfers the property to a trustee for the purposes of settlement, or declares that he himself holds it in trust for those purposes; and if the property is personal the trust may, I apprehend, be declared either in writing or parol; but in order to render the settlement binding, one or other of these modes must, as I understand the law of this Court, be resorted to, for there is no equity in this Court to perfect an imperfect gift."

Transfer of Trust Property:

If the subject-matter of the trust is a legal estate or interest, then the transfer must be effective to vest such estate or interest in the trustees. This has the result that the settlor must comply with all the formalities required for a complete transfer of the property in order that the trustees have a full legal title to it.

In England, therefore, if land is the subject-matter of the trust, it should be conveyed by deed³; if it is a bill of exchange payable to bearer, delivery and endorsement are necessary⁴ and if it is shares in a company, the correct form of transfer should be made.

Transfer of Shares:

On the question of transfer of shares, however, there is the English case of the Re Rose⁵ where the principle enunciated seems to be that if the transferor has done everything which is necessary for him to do to render it effectual, but something has yet to be done by a third party, the transfer will be valid in equity.

In Re Rose⁶, the transferor executed on March 30 transfers of shares in a company, to be held on trust. The transfers were

3. Law of Property Act 1925, Section 52.

4. See Antrobus v Smith (1806) 12 Ves 39; and see also Jones v Lock (1865) 1 Ch. App. 25.

5. [1952] Ch. 499.

6. Ibid.

registered by the company on June 30. The transferor died more than five years after the execution of the transfers, but within five years of the registration of the company. The transaction would not have attracted estate duty if the gift had been made five years or more before his death.

The all-important question in this case, therefore, was whether or not the gift had been perfected at the date of execution of the transfer. It was held by the Court of Appeal that the gift was perfected on the date of execution; there was nothing more the transferor could do to divest himself of the shares in favour of the transferee. The formality of registration was to be performed by a third party, namely, the company, and the transferor had nothing to do with that. Accordingly, the transfer was effective in equity. By effectiveness in equity is meant that until the registration is effected by the company, the transferor will be a trustee for the transferee; when it is effected, the transfer will be effective at law.

It has to be noted, however, that the above case appertains to transfer of shares. The scope of the above case has not really been settled; the question still remains as to whether it could be applicable to matters such as land. It is humbly submitted that, the English system of land law being what it is, the above proposition in Re Rose⁷ can be made equally applicable to the transfer of land.

Volunteers

The question of 'volunteers' does not arise in the case of a completely constituted trust. Effectual transfer or declaration is the method by which a trust is completely constituted. If it is not completely constituted, then the maxim that "Equity will not assist a volunteer" applies. A trust which is incompletely constituted is enforceable only as an agreement to create a trust and this will be so only if consideration is furnished.

7. Ibid.

Briefly, a person is not a volunteer if:

- a) he has given valuable consideration in the common law sense; or
- b) he is an object of a marriage settlement.

In England, consideration such as natural love and affection simpliciter is not enough. As regards (b) above, the settlement must be made before, and in consideration of marriage or, alternatively, if made after marriage, it must be made in pursuance of an ante-nuptial agreement.⁸ It appears settled too that, subject to one qualification, the only persons within a marriage consideration are the husband, wife and issue of the marriage.⁹ The qualification is that children of an earlier marriage may enforce a covenant where their interests are "interwoven" with those of the children of the marriage in consideration of which the covenant is made.¹⁰ Next-of-kins of the settlor are also volunteers."¹¹

As regards the Malaysian case-law development on the question of completely and incompletely constituted trust, there are virtually no cases on it, although in the case of Lee Eng Teh & Ors v Teh Thiang Seong & Ors,¹² the question was brought up.

In this case, the plaintiffs, who claimed to be trustees and principal officers of a school in Klang, brought an action against the defendants for a declaration that the school was entitled to land in Klang, and for an order that the land be transferred to three of the plaintiffs. The Attorney-General was joined as a plaintiff with his consent.

8. See Pullan v Koe [1913] 1 Ch. 9

9. See for instance Re Cook's Settlement Trusts [1965] Ch. 902

10. Att.-Gen. v Jacobs-Smith [1895] 1 QB 341, and supported by Re Cook's Settlement Trusts.

11. Re Pluntre's Settlement [1910] 1 Ch. 609.

12. [1967] 1 MLJ 42.

It was alleged that the first defendant had agreed to donate the land to the school. At that time, the first defendant was not the registered owner of the land, but he was the managing director of the second defendant company, which had purchased the land for development. The said defendant company as such had not made any promise to donate any part of the land to the school. The school had a building committee of which the first defendant was chairman. This committee had collected funds and they had put up a school on part of the land.

Gill J. held that the first defendant incurred no contractual liability by making a promise to donate the land for the building of the school, and as the promise was a gratuitous one, there was no question of any incompletely constituted trust having arisen. He came to this conclusion after citing Turner L.J. in Milroy v Lord.¹³

However, it was further held that the principle in Dillwyn v Llewelyn¹⁴ applied and the second defendant, having allowed the school to be built on their land, must be deemed to hold such land subject to the equity that they will allow the school building to remain there indefinitely; but it is not the sort of equity on the basis of which, in the absence of an unequivocal promise by the second defendant to make a charitable gift, the plaintiffs are entitled to the declaration they were asking for.

Apart from the above case, there is no actual case-law on the present subject. Nevertheless, the following points may be noted:-
1) In Malaysia, by virtue of section 26 (a) of the Contracts Act 1950 (Revised - 1974), 'natural love and affection between near relatives constitute valid consideration, provided that it is in writing. Therefore, it would appear that a beneficiary in Malaysia can enforce an incompletely constituted trust if the settlor or testator or near relation has created it out of 'natural love and affection.'

13. As quoted in the beginning of this chapter, p. 23.

14. (1862) 6 L.T.R. 878.

11) While there is no actual Malaysian case-law development as such, it is humbly submitted that on the question of completely and incompletely constituted trusts, the same principles as those above apply in Malaysia. Even the principle enunciated in Re Rose¹⁵, can be made applicable to transfers of land. Granted that the formality of transfer of land has to be complied with by using the prescribed form¹⁶ and section 215 (2) of the National Land Code categorically states that title shall pass and vest in the transferee only upon registration. But so long as the transferor has done everything in his power that is required of him to do and the transfer has not been registered by a third party, i.e. the Registrar, it is submitted that the transfer is valid in equity in the sense that the transferor will be a trustee for the transferee.

Discretionary Trusts

A discretionary trust is one in which the trustees hold property on trust for a group of beneficiaries, and are required by the terms of the trust to apply the income or capital in favour of such beneficiaries as the trustees shall, in their discretion, think fit.

In a discretionary trust, the right of a beneficiary is but the right to be considered when the trustee exercises his discretion. He takes what the trustee gives, if any. This is very evident from the English cases of Re Weirs Settlement¹⁷ and Sainsbury.¹⁸

The Discretionary Trust as a Tax-planning Device

An interesting facet in our law of trust is the fact that in Malaysia, the discretionary trust is a powerful weapon that can be employed to mitigate some of the rigours of the Estate Duty Enactment 1941.

15. *Supra*.

16. Form 14A, section 215 (1) of the National Land Code (Act 56 of 1965).

17. [1968] 2 All E.R. 524

18. [1967] 1 All E.R. 878.

The government in this country, in tune with its stated aim of equalising wealth, has imposed ever-increasing rates of income tax and death duties. Thus, a rich person, in danger of having his estate substantially reduced on his death, may find it profitable to effectively transfer his property to a discretionary trust, where the income taxes would be lower and death duty avoided or postponed.

Section 4 (1) of the Estate Duty Enactment 1941 provides that estate duty is payable on property passing on the death of the deceased. But death duty can be avoided or, at least, postponed, if the above-mentioned transfer is made:

- a) five years prior to the death of the donor;¹⁹ and
- b) in such a manner that there is no reservation of benefit of any sort for the donor.²⁰

This achieved, the property comprised in the trust escaped death duty on the death of the donor. The next occasion when death duty would become payable is on the death of any beneficiary, if any were entitled to such trust property. This event can in turn be postponed by not having such a beneficiary by giving the trustee a discretion to pay or not to pay. On the death of a beneficiary of such a discretionary trust no death duty is payable as no property passed on the death: the beneficiary died possessed only of the mere possibility of having the discretion exercised in his favour.

This device can be used to avoid death duty for the duration of the trust, such duration being limited by the rule against perpetuities. When this limit is reached, the trust property can be distributed and in the appropriate case, a new trust can be set up to repeat the cycle. With proper planning therefore property can be kept undiminished by death duties for a very long period of time.

19. See Estate Duty Enactment 1941 Section 5(3), which provides that trust property created 5 years immediately preceding the deceased's death is not 'property passing.'

20. Ibid. section 5(2).

Similarly, in England, tax considerations are often the most important reasons for the creation of discretionary trusts.²¹ It has to be mentioned, however, that an effort was made in 1969 to prevent the avoidance of death duties by making a change in the law. Sections 36 and 37 of the Finance Act 1969 had the effect of bringing trust property to charge for death duty on the death of a beneficiary of the discretionary class in proportion to the share of trust income actually paid to him over the seven years prior to his death.

The shrewd and inscrutable English tax-planners merely took the Finance Act 1969 in their stride by confining payments of income as far as possible to those members of the discretionary class who were the least likely to die, and meeting the needs of the more 'mortal' senior members by other means. This resulted however in the Capital Transfer Tax. Now, discretionary trusts are subject to penal taxation by the presumed passing of the property of the trust once in every ten years for purposes of imposing a Capital Transfer Tax and once every seven years for the purpose of imposing any Capital gains Tax that may be due.

Protective Trusts

A protective trust, on the other hand, is but a life-interest given to a person which will determine and become a discretionary trust on the event of something being done which is prohibited by the trust instrument.

While the main purposes of a trusts are essentially the same as those of a discretionary trust, i.e. to protect the trust property from being 'wasted' and to protect the said property from the Official Assignee, the fact remains that, in the latter, the beneficiary or beneficiaries are virtually at the mercy of the trustees. Thus in order to allow the beneficiaries some enjoyment over the said property, some settlors prefer to employ a protective trust.

21. See David B. Parker and Anthony R. Mellows, The Modern Law of Trusts (3rd edn.) Sweet & Maxwell (London), pp. 58 - 61 for a good account.

As regards a protective trust, one would have to make a distinction between a conditional interest, which is an absolute gift cut down by a conditional subsequent, and a determinable interest which, from its beginning, no absolute interest is given - usually only a life-interest-until a determining event.

This distinction is necessary because of the different legal consequences that flow from the invalidity of a condition and that of a determinable interest. If the condition is invalid such as when it goes against the law of bankruptcy or the prevention of alienation, the donee takes the gift free of the trust. On the other hand, should the determinable interest be invalid, the transaction is destroyed and the settlor gets back the property.²²

Both in England and Malaysia, there are basically two ways of setting up a protective trust:-

- 1) to set up one's own trust instrument and insert the determining event; and
- 2) in accordance with section 33 of the English Trustee Act 1925, which is in pari materia with section 35 of our Trustee Ordinance 1949.

It may be mentioned that it was formerly the practice to set out protective trusts in extense. But with a view to shortening the length of settlement, section 33 of the Trustee Act 1925 and section 35 of our Trustee Ordinance 1949 provides that a mere reference to "protective trusts" will bring into play the protective trusts set forth in that section.

The above sections provide that where income including an annuity or ~~any~~ other periodical payment, ~~is~~ directed to be held on protective trusts for the benefit of any person for his life or any less period (such person being described as the "principal beneficiary") then during that period the income is held on the following trusts, although this must be without prejudice to any prior interests:

22. See Brandony Robinsen and Re Brown [1754] Ch. 39.

as implied trusts because they arise of presumed to arise from the implied intention of the settlor.

• This a resulting trust is said to occur when equity regards property which is held by one person as belonging to the person who transferred it to him, or caused it to vest in him. There are many ways or situations in which a resulting trust may arise:-

i) Where a trust fails, there is a resulting trust of the trust property for the settlor or his estate.²³

ii) The above principle will also be applied where the beneficial interest is not wholly disposed of.²⁴

iii) A trust can also result from the purchase price being paid by a person other than the registered own. Thus, if the full purchase price of property is paid by A and the property is transferred to B, or transferred to A and B jointly, whatever share B holds, he holds it in resulting trust for A.²⁵ This is but a rebuttable presumption; this presumption can be rebutted by showing one of four things:-

a) that the purchase-money was given as a loan and not as purchase-money as such,²⁶

b) that it is against public policy to hold that there is no resulting trust;²⁷ or

c) that there is the clear intention to benefit,²⁸ and

d) that there is a presumption of advancement: where the facts give rise to a presumption of advancement, then the presumption of a resulting trust does not operate. It only applies, however, where the real purchaser is the husband or father of or persons standing in loco parentis to the nominal purchaser. In these cases, the presumption is that the transferor intended to advance the transferee, and there is no resulting trust.²⁹ This presumption of advancement can also be rebutted.³⁰

23. See Re Ames' Settlement /1946/ Ch. 217

24. See Re Gillingham Bus Disaster Fund /1958/ Ch. 300

25. Dyer v Dyer (1788) 2 Cox Eq. 92 26. Ibid.

27. Palaniappa Chettiar v Arunagalam Chettiar (1962) 28 MLJ 143, P.C.

28. Standing v Bowring (1885) 31 Ch.D. 282.

29. See Crabb v Crabb (1834) 1 Myl. & K. 511.

30. Evidence adduced to show that the transfer was for a fraudulent or illegal purpose cannot be admitted to rebut this presumption: P. Chettiar v A. Chettiar /1962/ AC 294. See also Shepard v Cartwright /1955/ AC 431, the leading case on admissibility of evidence in rebuttal.

So far as the Malaysian position is concerned, there are a number of cases which have readily applied the English law of trusts in recognition of the resulting trust. In Firm of P.M.N. v Syed Alsagoff,³¹ Elphinstone C.J. in the court of first instance, held that where there was a total want of consideration for a transfer of land, the registered transferees held the land under a resulting trust.

In Re. Transfer of Eng Joe Estate,³² where the promoters of a company allowed their solicitors to acquire land in the latter's names as trustees for the company yet to be formed, it was held that there was a resulting trust in favour of the promoters who provided the purchase price. In Haji Abdullah bin Mohd. v Abdul Majid bin Ibrahim and Ors³³, however, a similar situation before the court was unsuccessful in invoking a resulting trust. Here, the plaintiff claimed that land registered in his brother's name in 1916 was in fact purchased by the plaintiff. He gave as reason the fact that, as a government servant, he was not allowed to hold land. The Court ruled that, on the facts before it, there was no resulting trust.

In Chang Lin v Chong Swee Sang³⁴, a father purchased land as a gift to his daughter which was however registered in her husband's name. It was held by the Court of Appeal that the land was subject to a resulting trust in favour of the daughter. And in Chin Shah Len v Lin Fah³⁵, a husband who purchased land with money provided by his wife was held to be her trustee.

31 (1929) 7 F.M.S.L.R. 93

32 (1910) Innes, 121

33 [1949] M.L.J. 12

34 (1908) Innes, 95

35 (1962) 28 MLJ 418

In the case of Dhanaratna v Dhanaratna,³⁶ a man bought two pieces of land which were registered in the name of his mistress with whom he had then lived for 10 years and who had several children by him. The Court of Appeal held, as a further example of how English trust principles have been followed, that the presumption of a resulting trust in favour of the man was rebutted by the evidence of his intention to benefit the woman in whose name he had the land registered.

In Nagapushani v Mesaratnam,³⁷ Raja Azlan Shah J. held that where a husband and his wife both contributed money for the purchase of a house and the exact amounts of their respective contributions could not be ascertained, they were treated in equity as having equal shares in the property. In this case, the house was originally assigned to the wife in her name who subsequently re-assigned it to her husband. This also raised an issue of whether she was entitled to the whole property as a gift from her husband. The judge held that the presumption of an intention to effect a gift was rebutted by the wife's subsequent re-assignment but ^{that} the husband was nevertheless to be regarded as holding the property on a resulting trust for his wife in respect of her half-share. In Liu San v Henry,³⁸ A applied for and obtained a mining lease from the State at the request of B who reimburse A for all fees incurred in acquiring the lease.

36 [1939] P.M.S.L.R. 99; (1939) 8 W.L.J. 310

37 [1970] 2 W.L.J. 8

38 (1912) Immes 186

A claimed that B held the lease on a resulting trust for him. It was held that the presumption of a resulting trust was rebutted in view of the subsequent conduct of the parties in that they later entered into an agreement whereby B was allowed to mine the land on his paying a tribute to A.

In Palaniappa Chettiar v Arunasalam Chettiar,³⁹ there were certain regulations governing the holding of rubber plantations. The material regulations differentiated between holdings of more than one hundred acres on the one hand and less than that number on the other. If more were held the permissible production was controlled by an assessment committee. The father owned ninety-nine acres and then acquired a further forty. In order to avoid having to disclose to the authorities that he held more than 100 acres he transferred the 40 acres into the name of his son. He had no intention of giving them. He now claimed that the son held the land in trust for him.

The Judicial Committee of the Privy Council in an opinion delivered by Lord Denning held that to make out his claim he had to rebut the presumption of advancement. In so doing, he had necessarily to disclose his own illegality in making the transfer, namely his deceit of the public administration. The court was bound to take notice of the illegality: it would not therefore lend its aid to the father and would let the legal estate lie where it fell.

³⁹ (1962) 28 MLJ 143, P.C.

Lord Denning observed that if the illegal purpose had not been carried out the father might have been entitled to a re-transfer of the land by way of resulting trust. The Privy Council was obviously applying English legal principles relating to resulting trust in cases where a trust has been constituted for an unlawful purpose.

Whether a transfer of land made by a parent was a gift consequent on advancement or whether there was in fact a trust was the question in the case of Yew Phaik Hoon v Quah Ooi Keat & Anor.⁴⁰

Involving a family dispute over land of approximately 1000 acres, and, relating to events which happened 30 - 35 years earlier, the trial judge (Azmi J. in the Hi Ct) faced with the problem of determining whether the two registered owners of land could have imposed upon them, a trust based on oral evidence of events which had taken place a long time ago, found for the plaintiff.

The Federal Court reversed the verdict with Thompson LP dissenting but the P.C. advised that the judgement at first instance be restored for the finding of facts by Azmi J. that the land was held in trust for the plaintiff could not be disturbed as there was supporting evidence and no factual misapprehension of evidence was shown in the judgement.

The above cases suffice to show that the English law on resulting trusts has been followed in Malaysia.

Constructive Trusts

A constructive trust does not arise from the express or limited intention of the parties. It arises by the operation of law to prevent dishonesty and unjust enrichment.

40. P.C. [1969] 1 MLJ 32.

Even at English law, there are many differing opinions as to when a constructive trust arises. But generally speaking, there are five categories of constructive trusts:-

- 1) Constructive trust of the profits made by a fiduciary or a quasi-fiduciary;
- 2) Constructive trust arising when a stranger intermeddles with trust property;
- 3) Constructive/^{trust} arising under mutual wills;
- 4) Constructive trust which arises where property is acquired by fraud;
- 5) The vendor of land as a constructive trustee for the purchaser or vendee.

I Constructive Trusts of Profits made by a Person in a Fiduciary Position:

As to the initial question as to who is in a fiduciary position, a person is said to be in a fiduciary position or relationship if he is bound to exercise rights and powers in good faith for the benefit of the others.

Here, the rule is that if a person manages property and is in a fiduciary position he is prohibited from obtaining any personal benefit by availing himself of his position in the absence of authorisation from the beneficiary. And if he does obtain an advantage, he is a constructive trustee of any benefits for the persons beneficially entitled to the property in question.

This principle is sometimes called the doctrine in Keech v Sandford⁴¹ and extends beyond the strict trust relationship: it has been held to apply to agents⁴², tenants for life⁴³, partners⁴⁴ and even to an employee in a confidential capacity.⁴⁵

41. (1726) Sel. Cas. Ch. 61

42. Boardman v Phipps [1967] 2 A.C. 46

43. James v Dean (1803) 15 Ves. 236

44. Featherstonhaugh v Fenwick (1810) 17 Ves. 298

45. Industrial Development Consultants Ltd. v Cooley [1972] 1 WLR 443.

II Stranger Intermeddling with Trust Property:

If a stranger knowingly receives trust property and also knows that it is transferred to him in breach of trust, he holds it upon a constructive trust for the beneficiaries. The knowledge may be actual or constructive but is all important.⁴⁶

Receipt of trust property is not essential for liability as a constructive trustee on the basis of "intermeddling". A person will still become a constructive trustee if he knowingly enables a fraudulent purpose to be effected, but again knowledge, actual or constructive, is necessary. For, in Selangor United Rubber Estates Ltd. v Craddock (No. 3)⁴⁷, Ungood-Thomas J. held that in a case of fraud or dishonesty, "knowledge" was knowledge of circumstances which would indicate to an "honest, reasonable man" that a dishonest and fraudulent design, i.e. conduct which was morally reprehensive, was being committed or would put him on inquiry whether it was being committed.

Nevertheless "Strangers are not to be made constructive trustee merely because they act as the agents of trustees in transactions within their legal powers, transactions perhaps of which a court of equity may disapprove, unless those agents receive and become chargeable with some part of the trust property, or unless they assist with knowledge in a dishonest and fraudulent design on the part of the trustee."⁴⁸

III Constructive Trusts Arising Under Mutual Wills:

This is another case where a constructive trust⁴⁹ will arise. If two testators desire to make provision for each other, they may, if they choose, make separate wills in substantially identical terms in the other's favour with remainder to the same ultimate beneficiary; these are known as "mutual wills." The two parties are usually, but not necessarily, husband and wife.

46. Lee v Sankey (1872) L.R. 15 Eq. 204 at 211; Soar v Ashwell [1893] 2 Q.B. 390 at 296.

47. [1968] 1 W.L.R. 1555 at 1590

48. per Lord Selborne L.C., Barnes v Addy (1874) 9 Ch. App. 244 at 251.

49. The view is sometimes taken that these give rise to an implied trust. However, the question of classification in this case does not appear to have any practical significance.

A great deal of the advantage of such wills would be lost if a testator remained free to revoke his will. At the same time, every will is revokable by a testator until his death. Nevertheless, this rule of testamentary law will not prevent the possibility of a trust arising in favour of a beneficiary. What is therefore required is an agreement between the parties to create irrevocable interests in favour of ascertainable beneficiaries. The revocable nature of the wills under which the interest arises is fully recognised by the courts but equity will protect and enforce the interests created by the agreement despite revocation of the will by a testator after the death of the other without having revoked his will.⁵⁰

Be that as it may, there must, however, be evidence of an agreement to create irrevocable interests. If there is no such evidence a trust will not come into being.⁵¹

IV Constructive Trusts which arises where Property is acquired by Fraud:

Where one person has acquired property in consequence of his fraud upon another, Equity converts him into a constructive trustee, for the benefit of the person who has been injured by the fraud. This is not always the person upon whom the fraud had operated. Thus, where a person is induced not to make a will because the person entitled ~~that~~ on intestacy promises the intending testator that he will benefit X as the testator desires, this is a secret trust which Equity will impose as a constructive trust upon the intestate successor.⁵²

The above principle has an exceedingly wide orbit. In Barnister v Barnister⁵³, for example, the plaintiff bought the defendant's cottage for less than its value, under an oral agreement that the defendant could live in it rent free as long as she liked. The Court of Appeal held

50. See Dufour v Pereira (1769) 1 Dickens 419, for an early formulation of the general principle.

51. See Re Oldham [1925] Ch. 75, and see also Re Hagger [1930] 2 Ch. 190.

52. Sellack v Harris (1708) 5 Vin. Abr. 521.

53. [1948] 2 All. E.R. 133.

that this created a life interest in the defendant's favour, and also that the plaintiff could not set up the absolute character of the conveyance so as to defeat the defendant's beneficial interest. The fraud, of course, consisted ~~of~~ in setting up the absolute character of the conveyance.

V The Vendor of Land as Constructive Trustee:

The effect of a binding contract for the sale of land is to render the vendor a constructive trustee of the land. The basis of the trusteeship is that the purchaser is entitled to call for specific performance of the contract and therefore takes an equitable interest in the property.

Jessel M.R. said in Lysaght v Edwards⁵⁴ that it had been settled for two centuries that the vendor is a constructive trustee for the purchaser from the time the contract is made.

As regards constructive trusts, there are a number of Malaysian cases. In Ng Ah Kiang v Foo Choo Choon,⁵⁵ the English ~~law~~ principles were applied in a typical case of constructive trust. An administrative renewed a mining lease belonging to the deceased's estate in her own name. It was held that she was a constructive trustee in respect of the lease and of all profits she had personally received therefrom for the beneficiaries.

In Lee Chee Peng & Anor v Lee Chee Pooi & Ors.,⁵⁶ a number of persons, including the plaintiffs and defendants, were formerly registered co-lessees of a piece of land held under a mining certificate from the State for a ten years' term, and were all partners in a 'kongsil' which worked the mines. Both before and after the expiry of the mining certificate, one of the defendants twice attempted applying for a renewal of the mining lease on behalf of all the co-lessees, but these applications

54. (1876) 2 Ch. D. 499 at 507.

55. (1908) 1 F.M.S.L.R. 36.

56. [1968] 1 M.L.J. 198.

were rejected. About two and a half years later, the defendants applied on their own for a new mining lease which was subsequently granted to them. The plaintiffs claimed that the defendants held the new lease on constructive trust for all the former co-lessees.

McIntyre J. disallowed the claim, finding that their relationship as co-lessees had ceased when the former mining certificate expired and their partnership was in fact dissolved soon thereafter. The judge however said that had the partnership subsisted at the time when the defendants made the application for a new lease, he would not have hesitated to grant the reliefs prayed for. He also observed that "in normal circumstances", if a co-lessee obtained a renewal of a lease for himself, there would arise a rebuttable presumption, that he held it for the benefit of the original co-lessees.

Similarly, in the case of G.R. Nair & Anor v Eastern Mining & Metals Co. Sdn. Bhd.,⁵⁷ the defendant company had taken out a Group All Sickness Policy on their employees, but the policy money was payable only to the defendants. The plaintiffs being two of the workers tried to claim that a trust had been set up by the actions of the company in taking out the policy and in making payments to previous employees.

The only way in which the plaintiffs could succeed in the face of the terms of the policy and other facts was to fix the defendant company with a constructive trust. On the facts, the High Court held that there was neither an express trust nor a constructive trust in favour of the plaintiffs.

Conclusion

In the development of our law one fact stands clear and steady, namely, that our judges are ready and willing to draw on the experiences of their experienced counter-parts in England and adopt the principles of the English law of trusts as the basis of our law of trusts. In the opinion of

the writer this is an expedient and wise move for the English principles, though moulded in a foreign setting, were the result of wisdom and experience and which have worked well wherever English equity has been exported or imported.