DISPUTE RESOLUTION

THE APPLICATION OF THE "PLAINLY WRONG" TEST BY AN APPEAL COURT IN REVERSING THE FINDINGS OF FACTS BY A TRIAL COURT

The Federal Court in the case of *Ng Hoo Kui & Anor v Wendy Tan Lee Peng, Pentadbir Kepada Harta Pusaka Tan Ewe Kwang, Simati & Ors [2020] MLJU 1469* took the position 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 decided in previous Federal Court cases should be retained as a flexible guide for appellate courts. As such, there is no necessity to have a rigid guideline to be adopted by an appellate court in the application of the "plainly wrong test" in reversing finding of facts by a trial court.

This article discusses the facts, issues and judgment of the case.

FACTS This appeal arose as a result of the decision of the Court of Appeal which reversed the decision of the High Court on findings of fact on the main issue, namely, whether the monies paid by the 1st appellant ("**Ng**") to the deceased, Tan Ewe Kwang ("**TEK**") was for capital contribution for shares in the 2nd appellant, Alor Vista Development Sdn Bhd ("**AVD**"). The appellants were the plaintiffs in the High Court.

The High Court after a full trial, held that the monies paid by Ng to TEK was for capital contribution for shares in AVD and not for premium payment payable to TEK for participation in the land development undertaken by AVD. It further held that the 2nd and the 3rd respondents held the shares (to the value of the investment by Ng) in AVD as trustees for Ng and ordered the transfer of the said shares to him (Ng).

However, on appeal, the Court of Appeal reversed the decision of the High Court and held that the payment made by Ng was not for capital contribution nor were the other payments, towards capital investment in AVD.

ISSUE At the Federal Court, the appellants were granted leave to appeal on the sole question of law as follows. Whether the application of the "plainly wrong" test by an appeal court in reversing the findings of facts by a trial court should be subject to guidelines and whether the guidelines laid down by the UK Supreme Court in *Henderson v Foxworth Investments Ltd and Another (2014) 1 WLR 2600* and *Mc Graddie v Mc Graddie and Another (2013) 1 WLR 2477* should be adopted as the relevant guidelines or such other guidelines as may be relevant or appropriate.

THE LAW ON APPELLATE INTERVENTION The Federal Court in this case followed the position in *Tengku Dato' Ibrahim Petra Tengku Indra Petra v Petra Perdana Berhad & Anor Appeal [2018] 2 CLJ 641* wherein the Federal Court at the time referred to *McGraddie supra* as well as *Henderson supra* and had adopted the *Henderson supra* approach of the "plainly wrong" test in determining whether the trial court's findings of fact is reversible upon appeal.

As such, the Federal Court in the instant case affirmed that 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.

After an examination of *Henderson supra* and *Mc Graddie supra*, in summary, the Federal Court noted that the following is a non-exhaustive list of factors that may satisfy the "plainly wrong" criterion:

1) A material error of law;
2) Making of a critical finding of fact which has no basis in the evidence;
3) Demonstrable misunderstanding of relevant evidence;

4) Demonstrable failure to consider relevant evidence;
5) There is misdirection by the judge;
6) There is no evidence to support a particular conclusion;
7) There is material inconsistencies or inaccuracies; and/or
8) The trial Judge fails to appreciate the weight and bearing of circumstances admitted or proved.

DECISION The Federal Court held that the Court of Appeal had erroneously applied the "plainly wrong" test in a broad and general manner. The Court of Appeal reversed the findings of the trial Judge on facts when it held that "there was no judicial appreciation of the evidence adduced before it".

The Federal Court found that the trial Judge had arrived at his findings of fact based on what he heard and saw from the main plaintiffs' witness. Thus, the Federal Court were not able to conclude that the trial Judge's findings of fact or conclusion was one where no reasonable judge would make in the circumstances.

Zabariah Mohd Yusof FCJJ notes that the assessment of credibility of witnesses is well within the purview of the trial Judge and it is not for the appellate court to interfere given that the appellate court has not enjoyed the opportunity to assess the same.

CONCLUSION Zabariah Mohd Yusof FCJJ emphasized in the instant case that the Supreme Court in ***Henderson*** supra was not setting any guidelines to the plainly wrong test. It merely provides a construction as to what amounts to the "plainly wrong" test in appellate intervention.

The Federal Court took the position 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 decided in previous Federal Court cases should be retained as a **flexible guide** for appellate courts. As such, there is **no necessity to have a rigid guideline** to be adopted by an appellate court in the application of the "plainly wrong test" in reversing finding of facts by a trial court.

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. As such, factual findings that are not "*repugnant to common sense*" ought not to be disturbed. Trial judges should be given "*a margin of appreciation*" when their assessment of the evidence is examined by an appellate courts.

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