Case Summary 05/2021

A summary of the Federal Court's decision in *Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors* [2020] 12 MLJ 67.

The 'plainly wrong' test should be retained as a flexible guide for appellate courts

BACKGROUND FACTS

The 1st Appellant is a director and shareholder of the 2nd Appellant.[1]

The 1st Respondent is the administratrix of the estate of Tan Ewe Kwang ("**Deceased**"), whereby the Deceased was a shareholder and former director of the 2nd Appellant.[2]

The 1st Appellant and the Deceased incorporated the 2nd Appellant to develop a mixed housing project on two pieces of land ("**Land Development**").[3]

The 1st Appellant made the following payments:

i. RM4.29m to the 2nd Appellant's account;

ii. RM4m to the 4th Appellant;

iii. RM2m to the 4th Appellant; and

iv. RM200k to the Deceased.

[1] *Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors* [2020] 12 MLJ 67, at paragraph 4 read together with paragraph 6

[2] *Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors* [2020] 12 MLJ 67, at paragraph 4 read together with paragraph 7

[3] *Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors* [2020] 12 MLJ 67, at paragraph 4 read together with paragraph 8

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The 1st Appellant claimed that items ii) and iii) above were paid to the 4th Appellant as a conduit to transfer to the 2nd Appellant as the 1st Appellant's paid up capital.[4]

Meanwhile, item iv) above was paid to the Deceased as the 1st Appellant's paid up capital in the 2nd Appellant.[5]

The 1st Appellant was allotted two million units of shares in the 2nd Appellant but this was inconsistent with the 1st capital contribution.

The 1st Appellant persistently demanded from the Deceased for his additional entitlement of shares in the 2nd Appellant.[6]

The Respondents counterclaimed for the return of 2,224,450 shares in the 2nd Appellant by converting the Deceased's loan of RM2,254,450 to the 2nd Appellant into shares.[7]

HIGH COURT'S DECISION

After full trial, the High Court held that the monies paid by the 1st

[4] *Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors* [2020] 12 MLJ 67, at paragraph 10(b)
[5] *Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors* [2020] 12 MLJ 67, at paragraph 10(c)
[6] *Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors* [2020] 12 MLJ 67, at paragraph 15
[7] *Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors* [2020] 12 MLJ 67, at paragraph 20

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Appellant to the Deceased was for capital contribution for shares in the 2nd Appellant rather than premium payment for the Deceased's participation in the Land Development.[8]

The High Court also held that the 2nd and 3rd Respondents were holding shares (to the value of the 1st Appellant's investment) as trustees for the 1st Appellant.[9]

Accordingly, the High Court ordered that the shares be transferred to the 1st Appellant.[10]

The High Court also dismissed the Respondents' counterclaim.[11]

COURT OF APPEAL'S DECISION

The Court of Appeal reversed the High Court's decision[12] and held that the payment made by the 1st Appellant to the Deceased was not for capital

[8] *Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors* [2020] 12 MLJ 67, at paragraph 3

[9] *Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors* [2020] 12 MLJ 67, at paragraph 3

[10] *Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors* [2020] 12 MLJ 67, at paragraph 3

[11] *Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors* [2020] 12 MLJ 67, at paragraphs 20 to 21

[12] *Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors* [2020] 12 MLJ 67, at paragraph 3

contribution nor were the other payments, towards capital investment in the 2nd Appellant.[13]

Inter alia, the Court of Appeal held that the money trail prepared by the plaintiffs was 'based on assumptions and unsupported by any contemporaneous evidence'.[14]

FEDERAL COURT'S DECISION

The Appellants obtained leave to appeal to the Federal Court based on the following question:

> "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 *McGraddie v McGraddie and another* [2013] 1 WLR 2477 should be adopted as the relevant guidelines or such other guidelines as may be relevant or appropriate?"[15]

[13] *Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors* [2020] 12 MLJ 67, at paragraph 3

[14] *Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors* [2020] 12 MLJ 67, at paragraph 26

[15] *Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors* [2020] 12 MLJ 67, at paragraph 1

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The Federal Court answered the leave question in the negative.[16]

The Federal Court was of the view that "… the 'plainly wrong' test as espoused in decisions of this court should be retained as a flexible guide for appellate courts. 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."[17]

In relation to the specific case before them, the Federal Court remarked that "essentially the Court of Appeal disagreed with the learned trial judge's conclusion as to the purpose of the payment of RM6m by [the 1st Appellant] to [the Deceased] and reversed the said conclusion premised on their disagreement. Clearly it had erred in taking the approach that it could, on an assessment of the evidence before the trial judge, reach a different conclusion on the facts from that of the learned trial judge because it disagreed with it."[18]

[16] *Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors* [2020] 12 MLJ 67, at paragraph 149

[17] *Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors* [2020] 12 MLJ 67, at paragraph 148

[18] *Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors* [2020] 12 MLJ 67, at paragraph 150

This, therefore, warranted appellate intervention on the part of the Federal Court.[19]

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[19] *Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors* [2020] 12 MLJ 67, at paragraph 154