

Property

Can I Claim Any Beneficial Interest in a Property If I Fund My Family Member to Purchase the Property?

Introduction

Because of the high property prices in Hong Kong nowadays, it is not uncommon that when a child wants to purchase a property, the down payments may actually be paid by his/her parents without any written documents recording the parents' beneficial interest in the property. When family relationship turns sour or the child gets into financial difficulty, his/her parents may be anxious to claim back beneficial interest in the property by claiming that the child holds his/her interest in the property on trust for his/her parents. In such circumstances, the Court will consider, on a case-by-case basis, the intention between the parties at the time of the acquisition of the property to ascertain whether a common intention constructive trust exists. In a recent case of *Yip Yuk Kwong v Yip Chun Yin* HCMP 2552/2014, the father succeeded in establishing that the son held his interest in the property on trust for the father.

Yip Yuk Kwong case

Facts

Yip Chun Yin ("**Paul**") and his mother, Wong Kit Bing ("**Madam Wong**"), purchased the subject property ("**Property**") as joint tenants in 1997. Paul became bankrupt in May 1998, so his interest in the Property became vested in the Official Receiver. Paul stated that the Property was purchased in his name to obtain the employee's benefit of concessionary legal fees provided by his law firm. He claimed that his father, Yip Yuk Kwong ("**Mr. Yip**"), paid off all the mortgage repayments since the acquisition of the Property. He was simply holding his interest in the Property on trust for Mr. Yip so that he did not have any beneficial interest in the Property. The Official Receiver was not conclusively satisfied with the existence of such intention, so Mr. Yip applied to the Court to remove orders relating to Paul's bankruptcy from the title to the Property and recording title to the Property in the name of himself and Madam Wong as joint tenants. The issue before the Court was whether, at the time of the purchase of the Property, there was a common intention between the parties that the interest of Paul was held on trust for Mr. Yip such that a common intention constructive trust arose.

Legal Principles

The Court stated that Mr. Yip must prove the following elements to establish such constructive trust:-

1. There was a common intention between Mr. Yip and Paul that Mr. Yip was to be the beneficial owner of the Property despite it was acquired in Paul's name;
2. Mr. Yip relied on such intention and altered his position to his detriment; and
3. It is unconscionable for Paul to assert ownership in reliance on his legal title to the Property.

Decisions

The Court held that it was the common intention of the three family members that Paul would hold his interest in the Property on trust for Mr. Yip. Paul's immediate assertion of trust in his bankruptcy petition dated 11 May 1998 was only one year after the acquisition of the Property on 5 May 1997, so his assertion of trust was not to avoid the effects of bankruptcy. The Official Receiver challenged that the monthly mortgage payment was two thirds of Mr. Yip's salary, so part of the mortgage payments should have been contributed by Paul and Madam Wong. However, the Court commented that it was normal for adult family members to contribute to the household expenses, including mortgage payments. The Official Receiver also argued that it was against Paul's personal interest to become the registered owner of the Property and accept a personal liability under the mortgage, while the beneficial interest was actually vested in Mr. Yip. However, the Court viewed that such behaviour was consistent with the filial obligation of an adult child to assist his parents and did not detract from the common intention of the parties. In conclusion, the Court declared that Paul, prior to his bankruptcy, held his interest in the Property on trust for Mr. Yip; and ordered recording title to the Property in the name of Mr. Yip and Madam Wong as joint tenants.

Re Chow Chung Kwan HCB 2942/2005

Facts

In contrast, in another case involving the purchase of a property in the joint name of the husband and the wife, Chow Chung Kwan ("**Chow**") and his wife, Leung Lai Ping ("**Leung**"), purchased the subject property ("**Property**") as joint tenants in 2002. Chow became bankrupt in 2005 and his interest in the Property became vested in the trustees in bankruptcy of Chow ("**Trustees**") who had the statutory duty to realise Chow's assets (including the Property) for the benefit of the creditors. Chow was automatically discharged from bankruptcy in 2009 but his interest in the Property had still not been realized and distributed to the creditors. The Trustees wrote to Leung in 2011 to invite her to purchase Chow's share of the Property or to agree to co-sell the Property together with the Trustees. However, Leung declined such proposals. Therefore, the Trustees applied to the Court for an order for sale of the Property. Leung opposed the application and argued that Chow held his interest in the Property on trust for her so that Chow did not have any beneficial interest in the Property; and alternatively, an order for sale of the Property would cause great hardship to

Chow and/or Leung. The relevant legal issue was whether, prior to Chow's bankruptcy, Chow held his interest in the Property on trust for Leung.

Legal Principles

The Court stated that when a couple purchased a property in joint names without any written records of their respective beneficial interests in the property, they were presumed to be equal beneficial owners in the property. This presumption could be replaced by showing that the parties had a different common intention at the time when they acquired the home, or that they later formed the common intention that their respective interests would change. Their common intention was to be deduced objectively from their conduct. The Court would consider all circumstances e.g. financial contributions for the purchase and usual outgoings, how and why the Property was acquired and the nature of the parties' relationship, in order to ascertain the parties' intention.

Decisions

The Court found that there was no common intention that Chow held his interest in the Property on trust for Leung. Chow alleged that the purchase of the Property was done in joint names due to the requirement of the Hong Kong Housing Authority, so he was a mere nominee. However, the Court rejected this allegation since Chow had to incur potential liability for the purchase of this family home. On the contrary, this inferred that Chow was to be beneficially interested in the Property. Chow also argued that Leung was the only one to make monthly mortgage payments, as evidenced in her bank account. However, the Court commented that before every monthly mortgage payment was debited from her bank account, the same amount of money was deposited into such account. Therefore, the Court doubted whether it was only Leung who actually repaid the mortgage loan. Leung also failed to prove that her earnings and/or savings prior to Chow's bankruptcy would have enabled her to accumulate sufficient funds to make mortgage payments. The Court also found it unconvincing that Chow did not make any contribution to the household expenses when he earned his living as a businessman/driver before his bankruptcy. As there was no common intention that Chow held his interest in the Property on trust for Leung, the Trustees held an equal beneficial interest in the Property together with Leung.

Conclusion

The above cases illustrated that any recognition of a common intention for one family member to hold his interest in a property on trust for another family member is fact-sensitive and determined by the Court objectively from their conduct. If a family member contributes to the purchase of a property but, for whatever reasons, does not intend to be a registered owner of the property, he should protect his own interest by consulting his lawyer and, where appropriate, execute a declaration of trust at the time of the acquisition of the property. If this is not practicable, he should record his financial contributions to any household expenses

(including mortgage payments) and the relevant parties' intentions at the time of the acquisition of the property. These materials may become useful evidence for him to claim back his beneficial interest in the property in future legal proceedings.

It should be warned that if a buyer of residential property intends to claim exemption from the Buyer's Stamp Duty and payment of ad valorem stamp duty at the lower rate,¹ he/she is required to make a statutory declaration that he/she is a Hong Kong permanent resident purchasing the property on his/her own behalf. If he/she subsequently claims in the legal proceedings that he/she is simply holding his/her interest in the property on behalf of his/her family member, he/she would have made a false declaration and may attract criminal liabilities.

For enquiries, please contact our Property Department:

E: property@onc.hk
W: www.onc.hk

T: (852) 2810 1212
F: (852) 2804 6311

19th Floor, Three Exchange Square, 8 Connaught Place, Central, Hong Kong

Important: The law and procedure on this subject are very specialised and complicated. This article is just a very general outline for reference and cannot be relied upon as legal advice in any individual case. If any advice or assistance is needed, please contact our solicitors.

Published by **ONC** Lawyers © 2015

¹ Please see our article in March 2014: [Stamp Duty on Property Transactions – an Update](#).