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Public Policy and the Defence of Illegality

Pang Mun Chung & Anor v Cheong Huey Charn ^[1]

| by CK Lung |

Two siblings who jointly owned a piece of property wished to charge their asset to a bank to raise capital for a business. They soon discovered that this was not possible because one of them was a non-citizen, which would go against the bank's internal policy not to grant loans to non-citizens.

To circumvent the bank's policy, the siblings purported to sell the property to the first defendant who was a citizen, and who was romantically involved with the first sibling, on the understanding that she would hold the property on trust for them.

The siblings signed a sale and purchase agreement and transferred the property to the first defendant, who then charged it to the bank for a loan. The first defendant did not make any payment on the purchase price of the property, nor did she pay for the bank loan taken out in her name.

Over the next 15 years, it was the siblings who made payment on the loan, but when they faced difficulties in servicing the same, the property was sold by the bank in a charge action which fetched a surplus of RM431,201.11.

In order to secure the payment to themselves of the proceeds of sale, the siblings brought an action against the first defendant, essentially seeking a declaration that she held the property on trust for them, and that they were entitled to the surplus funds which were still held by the bank.

The first defendant, no longer on friendly terms with the first sibling, contended that she was entitled to the surplus funds because the whole arrangement was a sham to circumvent the bank's policy and was therefore against public policy in violation of s 24(e) of the Contracts Act 1950.

The Court of Appeal, in holding that the siblings were entitled to the surplus funds, said, *inter alia*, that:

- (a) Without any evidence as to the rationale of the bank policy and how it would affect public interest, it remains an internal policy and not a public policy that would render the arrangement between the parties illegal.
- (b) Even if the arrangement were illegal for contravening s 24(e) of the Act, the siblings would nonetheless still be entitled to relief because public policy of denying the first defendant an unjust windfall must take precedence over any policy advanced in favour of applying the defence of illegality.

The grounds of judgment of the Court of Appeal may also be viewed [here](#).

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