

**IN THE FAMILY JUSTICE COURTS OF THE REPUBLIC OF SINGAPORE**

**[2026] SGHCF 18**

Registrar's Appeal No 3 of 2026

Between

YET

*... Appellant*

And

YEU

*... Respondent*

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**JUDGMENT**

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[Civil Procedure — Affidavits — Expunging evidence pursuant to r 647 of the Family Justice Rules 2014]

[Courts and Jurisdiction — Jurisdiction — Family Court]

[Mental Disorders and Treatment — Mental Capacity — Whether donee's prior conduct is relevant to determination of P's best interest]

## TABLE OF CONTENTS

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<b>INTRODUCTION</b> .....	<b>1</b>
<b>APPLICABLE LAW</b> .....	<b>4</b>
<b>KEY ISSUES</b> .....	<b>5</b>
<b>PRELIMINARIES</b> .....	<b>6</b>
<b>RELEVANCE TO ISSUE OF MENTAL CAPACITY</b> .....	<b>7</b>
R’S CASE .....	7
A’S CASE.....	10
DECISION .....	11
<b>RELEVANCE TO WHETHER A HAS ENGAGED IN CONDUCT THAT CONTRAVENES DONEE’S AUTHORITY</b> .....	<b>12</b>
<b>RELEVANCE TO WHETHER A HAS ENGAGED IN CONDUCT THAT IS NOT IN P’S BEST INTEREST</b> .....	<b>13</b>
STATUTORY INTERPRETATION OF S 17(3)(B)(II) OF THE MCA.....	13
MISUSE ALLEGATIONS IRRELEVANT IN ANY EVENT .....	19
<b>PROPOSAL FOR NEUTRAL STATEMENT</b> .....	<b>21</b>
<b>CONCLUSION</b> .....	<b>23</b>

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**YET**

**v**

**YEU**

**[2026] SGHCF 18**

General Division of the High Court (Family Division) — Registrar's Appeal  
No 3 of 2026  
Kwek Mean Luck J  
13 May 2026

Judgment reserved.

4 June 2026

**Kwek Mean Luck J:**

### **Introduction**

1 This appeal involves an application to expunge allegations that a donee of a Lasting Power of Attorney (“LPA”) had misused and misappropriated monies belonging to the principal, prior to the creation of the LPA.

2 The underlying action seeks the revocation of the LPA or the revocation of the donee's appointment under the LPA. Such matters fall within the jurisdiction of the Family Court. At the same time, it is clear that the Family Court does not have the jurisdiction to determine issues relating to misappropriation of monies.

3 Should the evidence of the allegations relating to misappropriation and misuse of monies then be expunged, or are the allegations nevertheless relevant to determining whether the principal had mental capacity at the time of the creation of the LPA and whether the donee had engaged in conduct that is not in the principal’s interest. This engages novel issues relating to the ambit of relevant evidence for assessing mental capacity and the interpretation of “conduct that is not in the principal’s interest” under s 17(3)(b)(ii) of the Mental Capacity Act 2008 (2020 Rev Ed) (“MCA”).

### **Background**

4 I begin with the factual and procedural background. The appellant (“A”) and the respondent (“R”) are brothers. The LPA of their father (“P”) was executed on 19 January 2016. Both A and R were appointed as co-donees under P’s LPA. In November 2023, R commenced FC/OSM 389/2023 (“OSM 389”). R initially sought, amongst other things, to revoke the LPA in so far as the LPA related to A, on the sole basis that A had misused and/or misappropriated P’s monies and thus engaged in conduct that is against P’s best interests and contravenes A’s authority as a co-donee. At that time, R’s case was premised on P having mental capacity to execute his LPA on 19 January 2016.<sup>1</sup>

5 In R’s affidavits filed in OSM 389, R levied allegations that A had misused and misappropriated P’s monies for his own purposes. Some of these allegations pertained to events that occurred prior to the execution of the LPA on 19 January 2016 and will be referred to as the “Misuse Allegations”.<sup>2</sup> In the Misuse Allegations, R alleged that A had taken, kept or used P’s monies from

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<sup>1</sup> Appellant’s Written Submissions (“AWS”) dated 17th March 2026 at [6].

<sup>2</sup> AWS at [7].

(a) accounts belong to P; (b) accounts jointly owned by P and A; and (c) accounts jointly owned by P, A and R which were meant to safeguard P's monies.<sup>3</sup>

6 In response to the Misuse Allegations, A took the position that sometime between 25 June 2014 and 18 January 2016, before the execution of the LPA, P had either gifted the monies to him or expressly permitted him to use the monies in the joint accounts. The mother of A and R filed an affidavit on 15 July 2024, to testify that A had taken care of P before he was sick, that P loved A most out of their four children, and that P trusted A and would let him use the money that they shared in their joint account. On or around 12 May 2015, P had executed a handwritten note dated 12 May 2015, stating that he is leaving his property to A.<sup>4</sup>

7 R later sought and was granted permission to amend OSM 389 to seek revocation of P's LPA. In the amended prayers, he sought revocation on the ground that P lacked mental capacity at the time P's LPA was executed (which he did not dispute previously). In the alternative, R sought for A's appointment under P's LPA to be revoked on the ground that A had engaged in conduct that contravenes the donee's authority and/or that is not in P's best interests.<sup>5</sup>

8 A applied to strike out portions of R's affidavits filed in OSM 389 relating to the Misuse Allegations (which occurred before P's LPA was executed on 19 January 2016). The application was made pursuant to r 647 of

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<sup>3</sup> AWS at [7].

<sup>4</sup> AWS at [8].

<sup>5</sup> AWS at [9].

the Family Justice Rules 2014 (Act 27 of 2014) (“FJR”), on the basis that the Misuse Allegations are irrelevant, scandalous or otherwise oppressive.<sup>6</sup>

9 The District Judge (“DJ”) declined to strike out those portions of R’s affidavits, holding that the evidence could lead to a finding of potential conflict of interest on the part of A as a donee, and whether such conduct would not be in P’s best interests, for any potential revocation of LPA.

10 A appealed against the DJ’s decision.

### **Applicable law**

11 Rule 647 of the FJR states that “(t)he Court may order any matter, in an affidavit, which is scandalous, irrelevant or otherwise oppressive to be struck out.” The same provision is found in O 41 r 6 of the Rules of Court (2014 Rev Ed) (“ROC 2014”) and r 21 of the Insolvency, Restructuring and Dissolution (Corporate Insolvency and Restructuring) Rules 2020 (“CIR Rules”).

12 In the application of these provisions, it has been held that a court should only expunge parts of an affidavit if it can be shown that the impugned materials are clearly irrelevant or relate to unsustainable allegations: *Re X Diamond Capital Pte Ltd (Metech International Ltd, non-party)* [2024] 3 SLR 913 at [14]; *Lim Jinn Tonn Zanelle v Royal Amulet Pte Ltd* [2024] SGHC 205 at [38]. Generally, assertions of dishonesty or impropriety are not scandalous if they are relevant to the issues at trial: *Rockline Ltd v Anil Thadani* [2009] SGHC 209 at [2].

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<sup>6</sup> ROA I p 65–71.

13 Given that r 647 of the FJR contains the same provision as O 41 r 6 of ROC 2014 and r 21 of the CIR Rules, I am of the view that the above principles are equally applicable to the consideration of r 647 of the FJR.

### **Key Issues**

14 Pursuant to s 26(1) read with ss 22(1)(a) and 22(1)(b) of the Family Justice Act 2014 (2020 Rev Ed) (“FJA”), the Family Courts’ jurisdiction only encompasses the specific areas of civil jurisdiction covered by ss 17(a), 17(d), 17(e), 17(f) and 17A of the Supreme Court of Judicature Act (2020 Rev Ed) (“SCJA”), and the jurisdiction relating to family proceedings as is vested in or conferred on the General Division of the High Court by any written law.

15 Parties agree that the Family Court has no jurisdiction to determine if the past transfers of P’s assets to a donee were valid.<sup>7</sup> Such transfers fall outside the scope of the above provisions of the SCJA. There is no contention that any written law confers such jurisdiction on the Family Division of the High Court. Instead, such matters should be the subject of a civil action by P’s representatives in the General Division of the High Court. A consequently seeks to strike out the Misuse Allegations on the basis that they are irrelevant, scandalous or otherwise oppressive. R disagrees.

16 The key issues in this appeal are whether the Misuse Allegations are irrelevant to the two grounds stated in OSM 389, that: (a) the LPA should be revoked as P did not have mental capacity at the time the LPA was executed, and (b) the appointment of A as donee should be revoked as A has engaged in

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<sup>7</sup> AWS at [21]; Respondent’s Written Submissions (“RWS”) dated 2nd April 2026 at [3] and [24].

conduct that contravenes his authority as a donee and/or is not in P's best interests.

### **Preliminaries**

17 Before addressing the key issues, I will deal preliminarily with two arguments surfaced by R. First, R submits that A himself admitted that the evidence relating to the Misuse Allegations are relevant. This is because A filed an affidavit on 8 February 2024 with lengthy rebuttals to R's evidence on the transfers of P's monies and/or assets to A. His substantive engagement shows that he accepted the relevance of the evidence to OSM 389. When applying to convert OSM 389 into a writ, A highlighted that P's intention behind the alleged gifts from P goes to the pith and marrow of the dispute in OSM 389.<sup>8</sup>

18 It is undisputed that when A engaged in the above, R was still proceeding in OSM 389 on the basis of the Misuse Allegations. Subsequently, R amended the prayers in OSM 389 on 20 May 2025, removing his reliance on them as a basis for the revocation of P's LPA. Consequently, nothing can be placed on A's earlier engagement with R's submissions based on his original prayers in OSM 389.

19 Second, R submits that expunging the Misuse Allegations will lead to an impermissible collateral attack on the Family Court's grant of an interim injunction in FC/SUM 3584/2023, suspending A's powers as a donee under the LPA, and restraining A from withdrawing any monies from bank accounts holding P's monies, pending the determination of OSM 389.<sup>9</sup>

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<sup>8</sup> RWS at [29]–[30].

<sup>9</sup> RWS at [31]–[32].

20 I note that at the time that the interim injunction was granted on 9 January 2024, R was still proceeding in OSM 389 on the basis of the Misuse Allegations, which he no longer relies upon for the revocation of A as donee. The grant of an interim injunction by the Family Court only goes to show that the court considered that there was sufficient evidence before it then, to merit suspension of A’s powers as a donee and to restrain A from further withdrawals of P’s monies. It does not address the relevance of the Misuse Allegations to the amended prayers brought by R in OSM 389. There is hence no impermissible collateral attack.

### **Relevance to issue of mental capacity**

21 I now turn to consider the relevance of the Misuse Allegations to the first ground in OSM 389, where R seeks to revoke the LPA on the ground that P lacked mental capacity to execute the LPA, pursuant to s 17(4) of the MCA.

#### ***R’s case***

22 R relies on *XKG v XKF* [2025] SGHCF 66 (“*XKG*”), where Teh Hwee Hwee J held that the assessment of mental capacity to execute an LPA is necessarily highly fact-sensitive and context-dependent: at [71].

23 R submits that the evidence on the Misuse Allegations is relevant to assessing P’s mental capacity to execute the LPA on 19 January 2016. R has provided evidence that P was not in the habit of giving large sums of money to any of his children. When P’s mind was still sharp and lucid, he had never once made wholesale gifts of six or seven-figure sums to his family members. On the occasions when P did transfer funds to his children, he typically kept detailed written records of the date, purpose and quantum of each transfer, and would

typically mention such transfers to his family members. R has also given evidence of P's fastidious record-keeping for monies that he had passed to A.

24 Consequently, R submits that the size of the transfers that A now claims are gifts to him from P, are completely out of character for P. When P's mind was still sharp and lucid, P had never once made wholesale gifts of six or seven-figure sums to his family members. Further, P had never mentioned such large gifts to his other family members (including to R or his sister, who both lived with P), or recorded them in any of his detailed diaries or records. Moreover, A seeks to expunge evidence of a significantly large sum of approximately \$2,243,506.42 of P's money that was transferred to A or to a joint account with A.<sup>10</sup> Apart from P's ownership of his landed home and his 50% tenancy-in-common interest in a condominium, P's assets are all held in cash and shares.<sup>11</sup> If A is claiming effectively all of P's cash and shares as his own, or if A is claiming that he can use what remains of P's cash and shares for the A's personal use, P will be left with little to maintain himself.<sup>12</sup> There is no conceivable benefit for P to give away practically all his liquid assets to A in his lifetime, for A's personal use. This is especially if P had any meaningful insight on the state of his health, and his likely financial needs for the remainder of his life.<sup>13</sup> Collectively, these facts raise serious questions on whether P could even understand, retain, use or weigh information relevant to his property and affairs at the time of the execution of the LPA.<sup>14</sup>

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<sup>10</sup> RWS at [54].

<sup>11</sup> RWS at [55].

<sup>12</sup> RWS at [55].

<sup>13</sup> RWS at [56].

<sup>14</sup> RWS at [57].

25 R submits that while parties have opposing characterisations of the transfers, the Family Court could draw the following inferences that are relevant to R's case, without having to determine which is true (which the Family Court does not have the jurisdiction to do):<sup>15</sup>

(a) if P did not know or appreciate that A had been helping himself to P's money and shares at the material time, it is another reflection of P's impaired mental and executive function around the time he executed the LPA, and his lack of comprehension over his assets; and

(b) if P did in fact gift A practically all of P's money and shares, or allowed A to freely use it, then bearing in mind the entire factual matrix, it indicates that P did not understand or appreciate the full consequences of that decision.

26 R submits that the Misuse Allegations are also relevant to the court's assessment of the medical evidence on P's mental capacity.

27 A relies on Dr Ong Seh Hong's ("Dr Ong") assessment of P on 19 January 2016 to uphold the validity of the LPA.<sup>16</sup> However, from Dr Ong's report and her medical notes, Dr Ong accepted P's description of his property at face value, without verification from the donees who were present. Dr Ong did not ask how P wished to use his monies for the rest of his life, or whether P had made any large disposals or gifts recently.<sup>17</sup> This meant that Dr Ong did not know of A's claims to practically all of P's cash and shares<sup>18</sup> Dr Ong also did

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<sup>15</sup> RWS at [58].

<sup>16</sup> RWS at [61].

<sup>17</sup> RWS at [61].

<sup>18</sup> RWS at [62].

not know that, merely one day before Dr Ong assessed P, there was a transfer of \$510,721.09 of P's money from a joint account held by P and A, to A's personal bank account.<sup>19</sup> Dr Ong was therefore deprived of the chance to ask P whether he was aware of the transfers, and what he understood of such transfers and gifts. P's answers would have been important additional material for a holistic and objective assessment.<sup>20</sup> Without such information, it is unsafe to place too much weight on Dr Ong's medical report.<sup>21</sup> However, if the Misuse Allegations were expunged, R will not be able to examine Dr Ong on the relevance of the transfers, and how these would impact Dr Ong's assessment.<sup>22</sup>

### *A's case*

28 A submits that the transfers of monies from P to accounts held in A's name or joint accounts with A *ipso facto* do not shed any light on whether P had the mental capacity to execute his LPA on 19 January 2016.<sup>23</sup> R's argument, that allegations of large transfers from P into A's control before 19 January 2026 are relevant to whether P had mental capacity on 19 January 2026, requires the Family Court to accept R's characterisation of the transfers as wrongful or suspicious, and to reject A's position that these transfers were *gifts*, made by P in keeping with the close relationship A shared with P, at a time when P *had capacity*.<sup>24</sup> To decide if the transfers before 19 January 2016 are evidence of P's lack of capacity as at 19 January 2016, the Family Court would first have to determine *why* they were made. This is a determination the Family Court has no

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<sup>19</sup> RWS at [62].

<sup>20</sup> RWS at [63].

<sup>21</sup> RWS at [63].

<sup>22</sup> RWS at [63].

<sup>23</sup> AWS at [21].

<sup>24</sup> AWS at [21].

jurisdiction to make.<sup>25</sup> In any case, the relevant evidence to determine P's mental capacity should be the evidence of the six doctors that examined P on or around the time of the execution of the LPA.<sup>26</sup>

### ***Decision***

29 A court should only expunge materials in an affidavit if it can be shown that the impugned materials are clearly irrelevant or relate to unsustainable allegations. Generally, assertions of dishonesty or impropriety are not scandalous if they are relevant to the issues at trial: see [12] above. As the Family Court does not have the civil jurisdiction to determine whether the *inter vivos* transfers between P and A were gifts as alleged by A (see [14] and [15] above), the court would not be able to determine whether P intended to make the said gifts. However, the Misuse Allegations are nevertheless relevant to the issue of mental capacity, in a manner which does not require the Family Court to determine whether P intended to gift A the monies.

30 In *XKG*, Teh J held that a donor's awareness exists on a spectrum. The extent of a donor's awareness of his financial circumstances, or where a donor lies on this spectrum, should be assessed alongside other evidence of the donor's ability to understand, retain and use or weigh information, to determine whether the donor had capacity to execute the LPA: at [68]. I fully agree with Teh J that a donor's awareness of his financial circumstances is a relevant factor in determining the mental capacity of a donor.

31 In this case, the Misuse Allegations would be relevant to R's case that they may have led Dr Ong to conclude differently about P's mental capacity,

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<sup>25</sup> AWS at [21].

<sup>26</sup> AWS at [22].

and R should be allowed to examine Dr Ong on this. Such a line of questioning could affect Dr Ong's assessment of whether P knew or appreciated that A had been helping himself to P's monies and assets at the material time, thereby affecting Dr Ong's assessment of whether P's mental capacity was impaired at the material time. Even on the assumption that P did gift A the monies or allow A to freely use it, they could affect Dr Ong's assessment of whether P understood or appreciated the full consequences of his decision, since it was so out of character for P and inconsistent with his past behaviour.

32 As the Misuse Allegations are relevant to R's case that Dr Ong may have arrived at a different assessment of P's mental capacity to execute the LPA, they should not be expunged.

33 The appeal would be dismissed on this basis alone. Nevertheless, for completeness, I will address also whether the Misuse Allegations are relevant to R's second ground in OSM 389, in particular, that A has engaged in conduct that contravenes A's authority as a donee or that is not in P's best interest.

**Relevance to whether A has engaged in conduct that contravenes donee's authority**

34 It is undisputed that the events in the Misuse Allegations arose before A's appointment as a donee under P's LPA. In that respect, I agree with A that they are not relevant to R's alternative prayer in OSM 389, which seeks revocation of A's appointment as a donee under the LPA on the basis that A "has engaged in conduct that contravenes the donee's authority". Section 17(3)(b)(ii) of the MCA read with ss 17(4)(b) and 17(5) of MCA provides that the court could revoke a LPA in so far as it relates to a donee if satisfied, amongst other things, that the donee "engages or has engaged in conduct that contravenes the donee's authority". This must clearly mean that

only conduct after a donee was appointed is material to this provision. Counsel for R, Mr Wilson Zhu (“Mr Zhu”), accepted this at the hearing of the appeal.

**Relevance to whether A has engaged in conduct that is not in P’s best interest**

35 Mr Zhu instead focused his oral submission for this ground of OSM 389 on the second limb of s 17(3)(b)(ii) of the MCA, that A as a donee has engaged in conduct “that is not in P’s best interest (whether or not the donee is acting under a [LPA])”. The Misuse Allegations took place before the execution of the LPA, and it was submitted that the conduct to be considered under s 17(3)(b)(ii) of the MCA, includes conduct prior to the appointment of a donee.

***Statutory interpretation of s 17(3)(b)(ii) of the MCA***

36 This raises a question of statutory interpretation: does conduct that a donee has engaged in “that is not in P’s best interest” under s 17(3)(b)(ii) of the MCA, include only conduct that arose after his appointment as a donee, or does it also include conduct that occurred prior to his appointment as a donee.

37 Section 9A of the Interpretation Act 1965 (2020 Rev Ed) requires the court to adopt a purposive approach when engaging in an exercise in statutory interpretation. In *Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850 (“*Tan Cheng Bock*”), the Court of Appeal set out a three-step approach for undertaking a purposive interpretation of a legislative provision at [37]: (a) first, ascertain the possible interpretations of the provision, having regard not just to its text but also to the context of that provision within the written law as a whole; (b) second, ascertain the legislative purpose or object of the statute; and (c) third, compare the possible interpretations of the text against the purposes or objects of the statute.

38 For ease of reference, I set out below, ss 17(3)(b) and 17(4)-(5) of the MCA:

(3) Subsection (4) applies if the court is satisfied —

(b) that the donee (or any of the donees, if more than one) of a lasting power of attorney —

(i) is convicted, on or after 1 September 2018 (but not before the donee's appointment under the lasting power of attorney), of an offence (whenever committed) of criminal misappropriation, criminal breach of trust, cheating, theft or extortion or any other offence involving fraud or dishonesty, whether as against P or another person;

(ii) engages or has engaged in conduct that contravenes the donee's authority, or that is not in P's best interests (whether or not the donee is acting under a lasting power of attorney); or

(iii) proposes to engage in conduct that would contravene the donee's authority, or that would not be in P's best interests (whether or not the donee is acting under a lasting power of attorney); or

...

(4) The court may —

(a) direct that an instrument purporting to create the lasting power of attorney is not to be registered;

(b) if P lacks capacity to do so, revoke the instrument or the lasting power of attorney; or

(c) in a case referred to in subsection (3)(c), revoke the instrument or the lasting power of attorney so far as it relates to the donee whose registration as a professional deputy is cancelled or who is no longer within a class of persons prescribed as qualified to be a professional donee.

(5) If there is more than one donee, the court may under subsection (4)(b) revoke the instrument or the lasting power of attorney in respect of all or such of the matters to which the lasting power of attorney relates as the court thinks fit, so far as it relates to any of the donees.

39 The ordinary meaning of the second limb of s 17(3)(b)(ii) of the MCA allows for two interpretations. First, that the “conduct” referred to therein, includes conduct that occurred prior to the appointment. Second, that the “conduct” referred to excludes conduct that occurred prior to the appointment of the donee.

40 In favour of the first interpretation (that *includes* prior conduct), Mr Zhu highlighted that s 17(3)(b)(ii) does not contain any explicit temporal limitation, unlike s 17(3)(b)(i) which specifically excludes past convictions. He submitted that if Parliament had intended for s 17(3)(b)(ii) to contain a temporal limitation, it could have done so, but it did not.

41 On the other hand, the second interpretation (that *excludes* prior conduct), is more consistent with s 17(3)(b) as a whole.

(a) Section 17(3)(b)(i), which was introduced subsequent to s 17(3)(b)(ii), imposes a temporal limitation, in that only convictions that take place after the donee’s appointment are relevant.

(b) The first limb of s 17(3)(b)(ii) considers conduct that contravenes the donee’s authority. This would necessarily limit such conduct to post appointment conduct.

42 The second limb of s 17(3)(b)(ii) contains the phrase in parentheses “(whether or not the donee is acting under a lasting power of attorney)”. Thus, it is more likely that the second limb is intended to emphasise the relevance of a donee’s conduct even when not acting under a LPA, rather than to state that conduct prior to the execution of the LPA is relevant.

43 For purposes of the second step of the *Tan Cheng Bock* approach, which is to ascertain the legislative purpose of the statute, Ms Charis Wong (“Ms Wong”), counsel for A, referred to the speech made by Mr Tan Chuan-Jin (“Mr Tan”) who was then Minister for Social and Family Development, at the Second Reading of the Mental Capacity (Amendment) Bill on 14 March 2016: Singapore Parl Debates; Vol 94, Sitting No 9; [14 March 2016] (Tan Chuan-Jin, Minister for Social and Family Development). This was the bill that introduced s 17(3)(b)(i) of the MCA. I set out below, relevant excerpts of Mr Tan’s statement:

Passed in 2008, the MCA introduced the Lasting Power of Attorney (LPA). *This is a legal instrument that allows each of us to choose someone we trust to make decisions for us, if and when we are no longer able to do so. We are called the "donor". The entrusted proxy decision-maker, who is usually a family member, is called the "donee".*

...

The MCA is undergirded by three fundamental principles. *First, we respect the choices of a person who has mental capacity. We cannot assume a donor lacks capacity just because we think he or she could have made a better decision. This is so, even in respect of the choice of donee.*

*Secondly, family should be the first line of support and the community should also play a part in supporting those who do not have familial support when they lose capacity.*

*Third, the state must build a system with sufficient checks and balances to protect individuals who lack mental capacity from abuse or having their interest compromised. This has to be done without making access to LPAs too restrictive, which will defeat the purpose of the LPA in the first place.*

[emphasis added]

44 The first two principles set out in the above are particularly relevant in considering the legislative purpose of the MCA. It makes clear that in legislatively providing for the execution of a LPA by a donor, the intention is to

respect the choice of a person who has mental capacity, and that the family should be the first line of support.

45 The second interpretation of s 17(3)(b)(ii) (that *excludes* prior conduct) is more aligned with the above principles. Over the course of the history of a family, a family member may have engaged in conduct that is not in the best interest of the donor. A donor may nevertheless choose to appoint that family member as a donee, during the time when the donor has mental capacity. To allow conduct prior to the execution of the LPA to be relied on to revoke the LPA, would undermine the choice of the donor. One illustrative example of this is the story of the prodigal son. For all that was done to deplete the family assets through wanton behaviour, the father forgave the son. If the father chose to then appoint such a son as donee, why should that choice not be respected?

46 It may be argued that there could be past conduct that was not brought to the attention of the donor. However, it has to be borne in mind that litigation relating to s 17(3)(b) of the MCA often takes place after the donor has already lost mental capacity. Where the donor's mental capacity is in doubt, it would be difficult to ascertain whether the donor was aware and chose to nevertheless appoint the donee, or if the donor was simply unaware. In any event, it is in furtherance of the principle of respecting the choice of the donor, to take the donor as having made a considered choice. As Mr Tan said in his speech: "We cannot assume a donor lacks capacity just because we think he or she could have made a better decision. This is so, even in respect of the choice of donee".

47 The second principle highlighted by Mr Tan, that family should be the first line of support, reinforces this. Donors may, whilst having mental capacity, wish to appoint their closer family members as donees, regardless of what these

family members may have done, because they still trust them more than others. Such inclination and choice should be respected.

48 I would add that while R relied on *BB, CD v PP (by the Official Solicitor as litigation friend), The Public Guardian* [2016] EWCOP 65 (“*Re BB*”) to support the proposition that A’s prior conduct can constitute a conflict of interest as a donee<sup>27</sup>, the relevant actions there were taken only after the appointment of the donee. In that case, the donee was said to have gifted the donor’s (“PP’s”) money to his wife and used PP’s money to buy investments which would only benefit the donee, and not PP, in his lifetime. The English Court of Protection revoked the LPA, finding that the donee had a conflict of interest in deciding whether the investments were in PP’s best interests and making future decisions about investments solely in PP’s best interests. Mr Zhu informed the court that he did not have any authority, where a conflict of interest was found on the basis of conduct that occurred prior to the appointment of a donee.

49 Thus, on the whole, I find the second interpretation of s 17(3)(b)(ii) (that it *excludes* prior conduct) to be the more likely interpretation. It accords more with the legislative purpose. It is also more consistent with the position taken in other parts of s 17(3)(b) of the MCA. I therefore hold, that in considering s 17(3)(b)(ii) of the MCA, conduct that occurred before the appointment of the donee, is not relevant to the assessment of whether the donee has engaged in conduct “that is not in P’s best interest (whether or not the donee is acting under a lasting power of attorney)”. The Misuse Allegations are, for this reason, not relevant to R’s second ground in OSM 389.

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<sup>27</sup> RWS at [71].

50 I would add that even if the first interpretation of s 17(3)(b)(ii) (that *includes* prior conduct) is adopted, the Misuse Allegations are not relevant to the second ground and should be expunged.

***Misuse Allegations irrelevant in any event***

51 R's case is built around three prongs: (a) that there is actual conduct by A that is contrary to P's interest; (b) there is potential conflict of interest; (c) the donees can no longer work together.

52 The first prong is premised on the Misuse Allegations constituting actual conduct that is contrary to P's interest. However, parties accept that the Family Court does not have the jurisdiction to make a determination of whether P gifted A the said monies and shares or allowed A to use their joint monies in the manner claimed by A.

53 In the second prong, R advances the position that the court need not find actual wrongdoing on the part of A, as all that is required is an inference of potential, rather than actual, conflict of interest. However, it is unclear how such an inference of potential conflict could be made, without a determination as to the validity of the Misuse Allegations.

54 Moreover, in interlocutory proceedings for OSM 389, R had resisted the expansion of the scope of cross-examination to include P's relatives who could give evidence on P's intent to gift monies and/or assets to A and the context behind the Misuse Allegations. R resisted this on the basis that such evidence would be on unrelated matters and therefore outside the scope of OSM 389, and that issues relating to *inter vivos* gifts purportedly made by P are not within the jurisdiction of the Family Court. The Family Court agreed with R's position and held that the scope of cross-examination should not be expanded to include such

witnesses. Without the full range of evidence before it, it is not clear how any inference of potential conflict arising from the Misuse Allegations could be fairly made by the Family Court.

55 I would add that the above interpretation does not disable a court from considering factual matrixes such as those surfaced in the Misuse Allegations. However, as set out above, they arise in relation to the question of mental capacity at the time the LPA was executed, rather than whether the donee engaged in conduct that is not in P's best interest.

56 R's third prong is that the donees can no longer work together. There are two facets of this prong. First, it is submitted that A refuses to answer R's inquiries about the transfers from P to A. In my view however, this is not a material consideration. A's obligations as co-donee only extends to when he was appointed as donee, and not to transfers or actions undertaken by P, prior to the execution of the LPA.

57 Second, R submits that the relationship between A and R has broken down, with the Misuse Allegations being a root cause of the breakdown. R relies on *LCR v SC, AEC, CP, KC (by her litigation friend, the Official Solicitor)* [2020] EWCOP 62 ("*LCR*") at [45], where the court refused to register an LPA on grounds that the relationship between donees was so acrimonious that there was no prospect of them being able to make decisions together. However, *LCR* deals with the registration of an LPA. The question before the court was a prospective one. The revocation of a donee who is already appointed under a LPA, is statutorily prescribed. As R relies on s 17(3)(b)(ii), the primary question is still whether in A's engagement with R, he has engaged in conduct that is contrary to P's interest. Given that the Misuse Allegations remain a point of dispute and are subject to further determination in a civil action, it could not be

said that merely because of A and R's disagreements over it, that A has engaged in conduct contrary to P's interest. Consequently, the Misuse Allegations are also irrelevant on the basis of this argument.

58 In summary, I find that the Misuse Allegations are not relevant to R's second ground in OSM 389.

### **Proposal for neutral statement**

59 In the written submissions, A originally submitted that if the Misuse Allegations are not expunged, the court should direct that there shall be no cross-examination on the Misuse Allegations at the trial of OSM 389, in line with the Judge-led approach as set out in r 22 of the FJR. This was on the basis that the Family Court has no jurisdiction over the determination of the Misuse Allegations, and that there would be prejudice in relation to the cross-examination of them, given that the Family Court had also rejected A's proposal to include the evidence of A's relatives for purposes of cross-examination. I have considered these factors in my assessment of the second ground of OSM 389, and have ruled above that for these and other reasons, the Misuse Allegations are irrelevant to the second ground.

60 However, the manner in which the Misuse Allegations are relevant to the first ground of OSM 389, would necessitate their being brought into the cross-examination of Dr Ong (see [31] above). In response to the earlier queries of the court regarding the relevance of the Misuse Allegations to the cross-examination of Dr Ong on the issue of the mental capacity of P, Ms Wong proposed towards the end of the hearing, an alternative approach. This was for the contested materials to be expunged and be replaced by a neutral statement containing only the transactions made prior to the execution of the LPA, without each parties' characterisations of the transactions. She submitted that this would

save time for the cross-examination of Dr Ong and the court as well as costs for parties, by not having to go through the extensive materials which formed the Misuse Allegations. Mr Zhu objected to this. He submitted that the trial judge can assess and control the length of the proceedings. Stripping away all context would mean giving the trial judge and Dr Ong a truncated version of the events, knowing that there is disagreement, but not what the disagreement entails.

61 Having considered this, I do not find it necessary to order for a neutral statement as proposed by Ms Wong. The context provided by the Misuse Allegations would be useful to understanding the positions taken by A and R. This would be lost if the neutral statement was substituted in the place of the Misuse Allegations. I also agree with Mr Zhu that the trial judge can control the proceedings, including the cross-examination of Dr Ong.

### **Conclusion**

62 For the reasons set out above, I find that the Misuse Allegations are relevant to the first ground, although they are not relevant to R's second ground in OSM 389. The appeal is therefore dismissed. If parties are unable to agree on the issue of costs, they are to file written submissions of not more than five pages, within a week of this Judgment. I record my gratitude to Ms Wong and Mr Zhu, who provided helpful and able assistance to the court through their advocacy.

Kwek Mean Luck  
Judge of the High Court

Wong En Hui Charis, Teo Hui Yan Sarah and Lee Ee Yang  
(Covenant Chambers LLC) for the appellant;  
Zhu Ming-ren Wilson, Wayne Yeo (Yang Weien) and Sarah Tan  
(Rajah & Tann Singapore LLP) for the respondent.

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