IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2021] SGHC 83

Suit No 428 of 2018

Between

Chye Seng Kait

… *Plaintiff*

And

Chye Seng Fong (executor and trustee of the estate of Chye You, deceased)

… *Defendant*

GROUNDS OF DECISION

[Succession and Wills] — [Construction]
[Probate and Administration] — [Personal representatives] — [Liabilities]

TABLE OF CONTENTS

Chye Seng Kait
v
Chye Seng Fong (executor and trustee of the estate of Chye You, deceased)

[2021] SGHC 83

General Division of the High Court — Suit No 428 of 2018
Vinodh Coomaraswamy J
16–18 June, 29 September 2020

20 April 2021

Vinodh Coomaraswamy J:

Introduction

1 The plaintiff and the defendant are brothers. Their father died in 2015. His will named the defendant as the executor of the estate. The schedule of assets which the defendant annexed to the father's grant of probate values the estate at $1.7m.[1] The plaintiff believes that the value of the father's estate is substantially more than $1.7m.[2] The plaintiff points out that the father was a fairly successful property developer in his lifetime. The plaintiff therefore puts the likely value of the father's estate at $7m.[3] The plaintiff now brings this

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1 Agreed Bundle of Documents ("AB") at pp 48–49.

2 Reply and Defence to Counterclaim (Amendment No 2) ("Reply") at [9] and [11].

3 Plaintiff's Closing Submissions ("PCS") at [4]; Notes of Evidence ("NEs"), 16 June 2020, at p 72, lines 13–15.

action against the defendant seeking relief for what he asserts are the defendant's breaches of duty as executor.[4]

2 I have dismissed the plaintiff's claim. I have found that the defendant has not breached any of his duties as executor. The plaintiff has appealed against my decision. I now give my reasons in full.

The parties' cases

The plaintiff's case

3 The plaintiff's case is that one of the defendant's duties as executor of the father's estate is to make sufficient inquiry in order to identify the assets of the estate.[5] The relief which the plaintiff seeks for the defendant's alleged breach of this duty is an order for the defendant to account for the father's estate either on the wilful default basis[6] or the common account basis.[7] In the alternative, the plaintiff asks the court to remove the defendant as executor and to appoint in his place either the plaintiff or such other person as the court sees fit.[8]

4 An executor owes a duty to call in his testator's estate: *Lee Yoke San and another v Tsong Sai Sai Cecilia and another* [1992] 3 SLR(R) 516 ("*Lee Yoke San*") at [35]. I accept that this duty necessarily entails a subsidiary duty to make sufficient inquiry in order to identify the assets of the estate. What amounts to

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4 PCS at [1].

5 PCS at [1].

6 Statement of Claim (Amendment No 3) ("SOC") at [14(d)]; PCS at [102]; NEs, 29 September 2020, at p 3, lines 11–16.

7 SOC at [14(d)]; PCS at [101].

8 SOC at [14(c)].

sufficient inquiry will depend on what is reasonable in all the circumstances of the case, bearing in mind the type of asset in question, the value of the asset, the nature and extent of the inquiry already made and the cost or practicality of making further inquiry.

5 It is part of the plaintiff's case that claims which an estate may have to recover estate assets from those who have misappropriated them are equally assets of the estate which an executor has a duty to make sufficient inquiry into. I accept this also.

6 When the father died in 2015, he was an account holder of three bank accounts:[9]

(a) A joint account with OCBC which the father opened with his wife ("the Wife's Joint Account"). This account held over $200,000 at the time of his death.

(b) A joint account with OCBC which the father opened in 1999 with his youngest daughter, Chye Moi June ("the OCBC Joint Account"). This account held over $40,000 at the time of his death.

[9] AB at p 48; Chye Seng Fong's AEIC at [30] and [48].

(c) A joint account with DBS which the father opened in 2006 with Chye Moi June ("the DBS Joint Account"). This account held over $70,000 at the time of his death.

7 The plaintiff alleges that the defendant is in breach of his duty to make sufficient inquiry into the following:

(a) The disposal of the money in the DBS Joint Account and the OCBC Joint Account (collectively, "the CMJ Joint Accounts"),[10] including two specific transactions on the CMJ Joint Accounts;[11] and

(b) The distribution in 2007 of the net proceeds of the sale of a property which the father purchased with Chye Moi June in 1999 in Killiney Road ("the Killiney property").[12]

8 The plaintiff also pleaded six other breaches of duty against the defendant. Sensibly, the plaintiff no longer pursues any of these other breaches.[13]

The defendant's case

9 The defendant asserts that he has indeed made sufficient inquiry in order to identify the assets of the estate, including inquiry into the two transactions on

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10 SOC at [10(a)].

11 SOC at [10(b)–(f)]; Further and Better Particulars of the Statement of Claim (Amendment No 3) Pursuant to Request Dated 27 December 2019 ("F&BP") at (a) and (b).

12 SOC at [10(g)].

13 PCS at [1]; NEs, 29 September 2020, at p 3, lines 17–32.

the CMJ Joint Accounts and inquiry into the distribution of the net proceeds of sale of the Killiney property.[14]

10 The defendant brings a counterclaim for the legal expenses which he has incurred over the years in dealing with the plaintiff's allegations as to the defendant's executorship of the estate.[15] Sensibly, the defendant no longer pursues his counterclaim.[16]

Preliminary point on wilful default

11 Before considering the plaintiff's case, I make a preliminary point on the plaintiff's claim for an account on the wilful default basis. The plaintiff submits: (a) that the defendant's breach of duty amounts to a breach of trust; and (b) that this breach of trust justifies an order for an account of the estate on the wilful default basis.[17]

12 On the first point, it is true that an executor's duty to call in the assets of the estate is a fiduciary duty: Roger Kerridge, *Parry and Kerridge: The Law of Succession* (Sweet & Maxwell, 13th Ed, 2016) ("*Parry and Kerridge*") at para 23-31, citing *Re Hayes' Will Trusts* [1971] 1 WLR 758 at 764–765. This duty, however, is a duty owed as executor, not as trustee. Breach of this duty is, strictly speaking, not a breach of trust because the executor has yet to assume the role of trustee of those assets: see *Lee Yoke San* ([4] *supra*) at [35]; Alexander Learmonth *et al*, *Williams, Mortimer and Sunnucks on Executors,*

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14 Defence and Counterclaim (Amendment No 2) ("D&CC") at [18], [21(3)] and [22].

15 D&CC at [37] and prayer 4.

16 NEs, 29 September 2020, at p 72, lines 10–11.

17 NEs, 29 September 2020, at p 6, line 31–p 7, line 1.

Administrators and Probate (Sweet & Maxwell, 21st Ed, 2018) ("*Williams, Mortimer and Sunnucks*") at para 52-04.

13 As for the plaintiff's second point, even though breach of this duty is not a breach of trust, an executor may be liable to account on the wilful default basis where his breach is a *devastavit* causing loss: *Parry and Kerridge* at para 24-08; *Williams, Mortimer and Sunnucks* at para 52-05. In the present case, the loss to the estate which the plaintiff has pleaded is the loss arising from the two transactions on the CMJ Joint Accounts and the father's failure to receive his full entitlement to the sale proceeds of the Killiney property.[18]

The Joint Accounts

14 The plaintiff submits that the CMJ Joint Accounts are estate assets because a resulting trust arose in favour of the father in his lifetime which endures and prevails over any interest which CMJ might otherwise have acquired by survivorship upon the father's death.[19] The two transactions from the CMJ Joint Accounts are therefore a disposal of estate assets and within the scope of defendant's duty to make sufficient inquiry.

15 The defendant accepts that the father contributed all of the money in both of the CMJ Joint Accounts. He therefore accepts that Chye Moi June held the CMJ Joint Accounts on resulting trust for the father during his lifetime.[20] The defendant's case is that inquiry into the two transactions is unnecessary

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18 SOC at [10(e)]; Reply at [9].

19 PCS at [14].

20 NEs, 29 September 2020, at p 51, line 20 to p 52, line 2.

because cl 2 of the father's will made an absolute gift of the CMJ Joint Accounts to Chye Moi June.[21]

16 I accept the defendant's case for the reasons which follow.

Resulting trust in favour of the father

17 The plaintiff addressed the existence of a resulting trust at length. So I first explain why the father and Chye Moi June held the CMJ Joint Accounts on resulting trust for the father during his lifetime.

18 Absent clear evidence of A's intention (*Chan Yuen Lan v See Fong Mun* [2014] 3 SLR 1048 at [51]–[52]), where A provides money for property the legal title to which vests in B alone or in the joint names of A and B, a resulting trust is presumed to arise in favour of A: *Lau Siew Kim v Yeo Guan Chye Terence and another* [2008] 2 SLR(R) 108 ("*Lau Siew Kim*") at [34]. The father provided all the money in the CMJ Joint Accounts.[22] There is no evidence of the father's intention at that time to gift the CMJ Joint Accounts to Chye Moi June. There is therefore a presumption of a resulting trust over the CMJ Joint Accounts in his favour.

19 The presumption of a resulting trust may be displaced by the presumption of advancement. This presumption applies to a transfer from a parent to a child: *Lau Siew Kim* at [57] and [66]–[67]. Two elements affect the strength of the presumption of advancement on the facts of any given case: (a) the nature of the relationship between parent and child, including the child's financial dependence on the parent; and (b) the state of the relationship between

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21 D&CC at [16]; Defendant's Closing Submissions ("DCS") at [67]–[70].

22 SOC at [10(a)]; Defendant's Reply Submissions ("DRS") at [11(1)].

the parent and the child at the time of the transfer: *Lau Siew Kim* at [67]–[68], [78] and [139].

20 The plaintiff accepts that the presumption of advancement arises in this case because the father opened the CMJ Joint Accounts in the joint names of himself and his child.[23] But he argues that the presumption of advancement is rebutted on the facts, as it was in *Low Gim Siah and others v Low Geok Khim and another* [2007] 1 SLR(R) 795 ("*Low Gim Siah*").[24]

21 In *Low Gim Siah*, a father opened joint bank accounts with a child, ensuring that only the father could draw on the joint accounts and keeping the interest earned as his own (at [49]). The Court of Appeal held that the father's full and complete dominion over the joint accounts rebutted the presumption of advancement (at [51]).

22 Another example of full and complete dominion is the Ontario case of *Saylor v Madsen Estate* (2006) 261 DLR (4th) 597, cited in *Low Gim Siah* (at [52]). The presumption of advancement was rebutted in that case because: (a) the father claimed all the interest in the joint accounts; (b) his child did not deposit any of her own money into the accounts; and (c) the child drew cheques on the accounts only at the father's direction.

23 I accept the defendant's submission that the presumption of advancement is rebutted on the facts of this case for three reasons. First and most significantly, I accept, as the plaintiff claims, that the father exercised full

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[23] PCS at [18].

[24] PCS at [19]–[20] and [22].

and complete dominion over the CMJ Joint Accounts in his lifetime.[25] Chye Moi June testified that the father operated the CMJ Joint Accounts without consulting her[26] and that he retained possession and control of the cheque books and bank statements.[27] She did not know about any of the transactions on the CMJ Joint Accounts and never questioned the father about them. Second, Chye Moi June also testified that she was financially independent when the father opened the CMJ Joint Accounts and remained so at all times thereafter.[28] This is borne out by the objective facts. Chye Moi June is a Senior Vice-President of a public company listed on the Singapore Exchange.[29] Finally, Chye Moi June herself accepted in cross-examination that the CMJ Joint Accounts belonged to the father in his lifetime.[30] Whether Chye Moi June held the CMJ Joint Accounts on resulting trust for the father is, of course, a question of law. Her evidence on this point cannot therefore be an "admission" which concludes the analysis on this legal question. But her evidence that the CMJ Joint Accounts belonged to the father is evidence of her intention when these joint accounts were opened, and by implication of the father's intention at that time.

24 For the foregoing reasons, on the facts of this case, I hold that the presumption of advancement is rebutted in relation to the CMJ Joint Accounts. Chye Moi June accordingly at all times held her interest in the CMJ Joint Accounts on resulting trust for the father. The father was therefore the full owner in equity of both of the CMJ Joint Accounts during his lifetime.

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25 PCS at [20(d)].

26 NEs, 17 June 2020, at p 95, lines 14–21.

27 NEs, 17 June 2020, at p 96, lines 1–21.

28 Chye Moi June's AEIC at [31].

29 Chye Moi June's AEIC at [1].

30 NEs, 17 June 2020, at p 99, lines 12–20.

The two transactions

25 As I have mentioned, it is the plaintiff's case that the defendant has breached his duty as executor by failing to make any or any sufficient inquiry into two specific transactions from the CMJ Joint Accounts. I now consider these two transactions.

$200,000 withdrawal in 2007

26 The first transaction is a debit of $200,000 representing a cheque drawn on and cleared from the DBS Joint Account in 2007, eight years before the father passed away.[31] The plaintiff's pleaded case is that: (a) it was Chye Moi June who drew the cheque and received the $200,000; (b) she did so wrongfully; and (c) the defendant has, in breach of duty, failed to make sufficient inquiry into this transaction and to hold Chye Moi June to account for it.[32]

27 The plaintiff's pleaded case that Chye Moi June drew this cheque and received the $200,000 wrongfully is devoid of any merit. The plaintiff accepts that there is no evidence that Chye Moi June drew this cheque in her own favour or that the father drew this cheque in her favour as payee.[33] In fact, precisely because the father exercised complete control over the DBS Joint Account and the chequebooks, it is the plaintiff's own evidence that: (a) he believes that it was the father who drew the cheque;[34] (b) there is no evidence as to who the

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31 AB at pp 218–220.

32 SOC at [10(b)] and [10(d)–(e)]; F&BP at (a).

33 PCS at [34]–[35].

34 NEs, 16 June 2020, at p 25, lines 20–22.

payee was;[35] and (c) Chye Moi June "[didn't] know where the cheque [went]".[36] This is entirely consistent with Chye Moi June's evidence that: (a) she did not draw this cheque; (b) she did not receive the proceeds of this cheque; and (c) she does not know who the payee was because the father retained possession and control over the chequebooks.[37]

28 I therefore find that the defendant is not in breach of his duty to make sufficient inquiry with respect to this transaction. He made inquiry of Chye Moi June herself as to whether she received the $200,000 or knew who the payee was.[38] He was satisfied with her response. In addition, as the defendant points out,[39] he has authorised the plaintiff to obtain the statements for the CMJ Joint Accounts directly from OCBC and DBS.[40] I find this to be sufficient inquiry in all the circumstances of the case, particularly given how long ago the transaction took place and the complete lack of any evidence to support the plaintiff's allegations. The defendant is under no duty to make any further inquiry.

Share subscription in 2014

29 The second transaction is a withdrawal of $15,300 which Chye Moi June made in 2014 from the OCBC Joint Account.[41] Chye Moi June withdrew this

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35 NEs, 16 June 2020, at p 26, lines 8–10.

36 NEs, 16 June 2020, at p 26, lines 13–20.

37 Chye Moi June's AEIC at [25]; NEs, 17 June 2020, at p 96, lines 1–12.

38 Chye Seng Fong's AEIC at [37].

39 DCS at [47].

40 Chye Seng Kait's AEIC at [19]–[20].

41 SOC at [10(b)–(e)]; F&BP at (b).

money to subscribe for a rights issue of OCBC shares on the father's behalf and for his benefit.[42]

30 The father was diagnosed with dementia in 2010.[43] By 2014, he was suffering from moderately severe to severe vascular dementia.[44] It is therefore undisputed that the father lacked the capacity in 2014 to decide for himself whether to withdraw this sum or to subscribe for the rights issue.[45]

31 The plaintiff submits that Chye Moi June withdrew this sum and applied it towards the OCBC rights issue in "breach" of the resulting trust on which she held the OCBC Joint Account. His case is that she did this without the father's consent and without any authorisation from the family.[46] It is not clear to me what relevance authorisation from the family could have had. A family member does not, by virtue of that relationship alone, have the power to consent for or on behalf of another family member who lacks capacity. Only a deputy duly appointed under the Mental Capacity Act (Cap 177A, 2010 Rev Ed) has that power.[47]

32 I accept the defendant's submission that the defendant did not breach his duty to inquire into this transaction.[48] As the defendant points out,[49] Chye Moi

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42 AB at pp 566–567 and 600–601; Chye Moi June's AEIC at [13(2)]; NEs, 17 June 2020, at p 97, lines 3–8.

43 Dr Sitoh's AEIC, Exhibit SYY-1, at [15] and [17]–[18].

44 Dr Sitoh's AEIC, Exhibit SYY-1, at [82]–[83].

45 PCS at [59]; DCS at [55]; NEs, 17 June 2020, at p 97, line 25–p 98, line 3.

46 Plaintiff's Reply Submissions ("PRS") at [47]–[48].

47 PRS at [47].

48 DCS at [63].

49 DCS at [59].

June withdrew the $15,300 and subscribed for the rights issue on the father's behalf,[50] not for her own benefit. I accept Chye Moi June's evidence was that "[i]t was a no-brainer" to subscribe for the rights issue because OCBC is a blue-chip stock and was offering the shares to the father at a discount to the market price.[51] I therefore reject the plaintiff's submission[52] that Chye Moi June's decision to withdraw the $15,300 and to purchase these shares was a speculative venture and a "breach" of the resulting trust which warrants further inquiry or action. I accept that the defendant made sufficient inquiry into this transaction.

33 Chye Moi June later reimbursed the OCBC Joint Account by transferring $15,300 to it from the Wife's Joint Account. I accept Chye Moi June's evidence that she reimbursed the account in this way "to comply with [the father's] earlier instructions to [the defendant] that all [their] parents' expenses were to be funded from [the parents'] joint account".[53] I therefore do not accept that this reimbursement is any sort of acknowledgement of wrongdoing by Chye Moi June.

34 In any event, I also accept the defendant's submission that this transaction led to no loss to the estate.[54] First, Chye Moi June reimbursed the OCBC Joint Account in full. Second, the subscription in fact increased the father's assets. As the defendant points out,[55] the shares were trading at a price

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50 AB at p 599.

51 NEs, 17 June 2020, at p 97, lines 16–20.

52 NEs, 29 September 2020, at p 17, lines 19–20.

53 Chye Moi June's AEIC at [28].

54 DCS at [61].

55 DCS at [61].

higher than the subscription price paid in 2014 when the father died in 2015.[56] These shares remained the father's assets at that time.[57]

Clause 2 of the will

35 Another reason I reject the plaintiff's case on the CMJ Joint Accounts is because I find that the father made an absolute gift of these two accounts to Chye Moi June by cl 2 of his will. If anybody has suffered loss by reason of these two transactions, therefore, it is Chye Moi June and not the estate.

36 Clause 2 of the father's will provides as follows:[58]

> I hereby declare that any immovable property held by me jointly with the co-owner as joint tenants shall belong to the surviving joint tenant absolutely by virtue of the right of survivorship. I further declare that any account held by me with any other person(s) jointly in any financial institution shall also belong to such joint account holder(s) absolutely by virtue of the right of survivorship.

The parties' cases

37 The defendant submits that cl 2 of the father's will manifests his intention to make an absolute gift of the CMJ Joint Accounts to Chye Moi June.[59]

38 The plaintiff submits cl 2 does not in itself gift any interest to the joint account holder. His submission is that cl 2, read in light of the common law presumption against double portions and also in light of cl 4 of the father's

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56 AB at p 48, item 6(2).

57 AB at p 100, item 6(2).

58 AB at p 32.

59 D&CC at [16].

will,[60] does no more than merely restate the legal position when a right of survivorship operates by law.[61]

39 I accept the defendant's submissions and reject the plaintiff's.

Clause 2 makes an absolute gift to Chye Moi June

40 In construing a will, the court seeks to ascertain and give effect to the testator's intention as expressed in his will, read as a whole in light of any admissible extrinsic evidence: *Low Ah Cheow and others v Ng Hock Guan* [2009] 3 SLR(R) 1079 at [19]. I accept the defendant's submission that the second sentence of cl 2 properly construed makes an absolute gift of the CMJ Joint Accounts to Chye Moi June. I do so for two reasons.

41 First, on a plain reading of cl 2, the father intended to gift jointly owned property – immovable property held as joint tenants and joint accounts in financial institutions – to the joint owner. In cl 2, the father "declare[d]" to whom the jointly owned property "shall" belong. This imperative language shows that the father's intent was actively to make a gift, not passively to state that he was content with the legal position which would obtain in any event when a right of survivorship operates by law.

42 Second, the plaintiff's interpretation gives no meaning whatsoever to cl 2 of the will.[62] But the principle in construing a will is that the court seeks to give effect to every word on the premise that a testator does not will in vain. The court should not disregard a part of the will as long as some meaning can

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60 PCS at [23]–[29].

61 NEs, 29 September 2020, at p 11, lines 13–21.

62 NEs, 29 September 2020, at p 11, lines 17–21.

be ascribed to it and that meaning is not contrary to an intention plainly expressed elsewhere in the will: *Goh Nellie v Goh Lian Teck and others* [2007] 1 SLR(R) 453 at [62]. I therefore decline to construe cl 2 as merely reiterating the legal position that would obtain when a right of survivorship operates by law. Adopting the plaintiff's construction would render cl 2 entirely superfluous. I do not consider that to be the correct approach.

43 In contrast, the defendant's construction ascribes some meaning to cl 2 and does not render it superfluous. I interpret the phrase "shall belong … absolutely by virtue of the right of survivorship" to mean that the surviving joint tenant receives the entire interest in the jointly-owned property by way of absolute gift under the will.

44 If my interpretation of the phrase is not correct, I construe cl 2 as if the phrase "by virtue of the right of survivorship" were omitted. With those words read out of cl 2, the imperative nature of the donative intent expressed in that clause is even clearer. Words may be read out for repugnance, inconsistency or senselessness in the context where they are clearly contrary to the intention expressed in the will: Francis Barlow *et al*, *Williams on Wills* vol 1 (LexisNexis, 10th Ed, 2014) ("*Williams on Wills*") at para 52.6. It is true that no meaning will then be ascribed to the omitted phrase, which appears at the end of both sentences in cl 2. But between giving no meaning to just a *part* of cl 2 and giving no meaning to the *entirety* of cl 2, I consider that the former gives greater effect to more of the language of the will and therefore is more likely to give effect to the father's true intention.

Double portions

45 I do not accept the plaintiff's submission that construing cl 2 of the will in light of the presumption against double portions suggests that the father did not intend to make an absolute gift to Chye Moi June of the CMJ Joint Accounts. The plaintiff raises the presumption against double portions because the father sold an apartment in a development called the Waterside ("the Waterside property") about a decade before his death. He gave each daughter $200,000 and each son $100,000 from the sale proceeds.[63]

46 The plaintiff argues that the principle of ademption by virtue of the presumption against double portions applies.[64] In this form of ademption, a parent's gift by will, that gift being a portion, is adeemed when he provides a portion to the child during his lifetime: John G Ross Martyn *et al*, *Theobald on Wills* (Sweet & Maxwell, 18th Ed, 2016) ("*Theobald on Wills*") at para 34-016. This form of ademption is based on the rebuttable presumption that a testator who is a parent (or a person *in loco parentis*) does not intend to provide double portions to his children. The testator is presumed to have intended the portion provided during the testator's lifetime as a substitution for the legacy: *Theobald on Wills* at para 34-016; *Ng Kwok Seng & anor v Mei Lin Ng (f)* [2015] 8 MLJ 455 at [18].

47 As the defendant points out,[65] this form of ademption applies only where the will predates the *inter vivos* gift: see *Theobald on Wills* at paras 34-016–34-017; *Williams on Wills* at para 44.3. This is because the *inter vivos* gift

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63 Exhibit D1; NEs, 17 June 2020, at p 65, line 25 – p 66, line 13 and p 67, lines 3–10.

64 PCS at [27].

65 DCS at [102]–[103].

accelerates the enjoyment of the provisions of the will: *Theobald on Wills* at para 34-016.

48 In this case, the father made gifts from the sale proceeds of the Waterside property in June 2006.[66] He made the will five months later, in November 2006.[67] The plaintiff cites no authority for his submission that the presumption can operate where the will is made after the *inter vivos* gift.[68] I therefore find that the gift to Chye Moi June under cl 2 was not adeemed by the father having given Chye Moi June a portion of the sale proceeds from the Waterside property in his lifetime.

Clause 4 of the will

49 I do not accept the plaintiff's submission that construing cl 2 of the will in light of cl 4 of the will suggests that the father did not intend to make an absolute gift to Chye Moi June of the CMJ Joint Accounts.[69] Clause 4 reads:[70]

> I would like to mention that I have excluded my wife and daughters from this my Will as I have made sufficient provisions for them during my life time [*sic*].

50 The plaintiff's pleaded case is that "sufficient provisions" in cl 4 refers to the father's gifts to his daughters of part of the sale proceeds from the Waterside property.[71] Regardless of whether that is true, I do not consider that cl 4 undermines my construction of cl 2. In my view, the purpose of cl 4 is to

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66 Exhibit D1.

67 AB at p 33.

68 PRS at [66].

69 PCS at [29]; PRS at [67].

70 AB at p 32.

71 Reply at [3].

explain why the father named only his two sons, the plaintiff and the defendant, as his residuary legatees in cl 3 of the will.

51 According to the plaintiff,[72] the father named only his sons as residuary legatees in cl 3 of the will and expressly excluded his daughters in cl 4 of the will because the father wanted "all his money [to] remain in the Chye family", that is, to pass only to his sons.[73] To support this aspect of his case, the plaintiff gave evidence under cross-examination that the father also told him that "[the father] would clear off [*sic*] all money in the [CMJ Joint Accounts]",[74] *ie* reduce all the balances to zero. This alleged conversation appears nowhere in the plaintiff's affidavit of evidence in chief. This conversation, if it happened, had a direct relevance to the matters in issue in this action. Even a lay person would have appreciated that and would have included evidence of this conversation in his affidavit of evidence in chief. The plaintiff did not. I reject this part of the plaintiff's evidence as a contrivance and an afterthought.

52 It is also the case that cl 3 of the will disposes only of real and personal property "not hereby … specifically disposed of".[75] This supports my holding that the father intended to make specific dispositions by another part of the will. That to my mind is another indication that the father intended positively to make gifts to the co-owners by cl 2 of the will. But as the defendant did not raise this argument, I do not rest my construction of cl 2 on these words in cl 3.

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72 PCS at [28].

73 NEs, 16 June 2020, at p 23, lines 4–6.

74 NEs, 16 June 2020, at p 23, lines 3–4.

75 AB at p 32.

53 On the proper construction of cl 2, as I have found it, Chye Moi June is entitled absolutely to the CMJ Joint Accounts, containing a total of over $115,000 at the time of the father's death. The plaintiff submits that this cannot have been the father's intention because there is "no convincing reason" why the father would have preferred Chye Moi June in this way over his other children.[76] But a possible reason was provided by Chye Sing Neok. She is the eldest child of the family[77] and gave evidence for the plaintiff under subpoena.[78] She testified that Chye Moi June lived with the parents into their dotage and was their principal caregiver.[79] It is also the case that she was closer to the father than the other siblings were.[80]

54 For the foregoing reasons, I find that the father's donative intent as expressed in cl 2 of his will was to make Chye Moi June the absolute owner of the CMJ Joint Accounts. This is yet another reason for my finding that the defendant has not breached his duty to make sufficient inquiry into the CMJ Joint Accounts and the two specific transaction which the plaintiff queries.

The sale proceeds of the Waterside property

55 An issue which arose at trial was whether the sale proceeds of the Waterside property were paid into the Wife's Joint Account or the OCBC Joint Account before the father made gifts out of the sale proceeds. I need not make findings on this issue given my construction of the will as making an absolute

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76 PCS at [27].

77 Chye Moi June's AEIC at [2].

78 HC/SBP 32/2020.

79 NEs, 16 June 2020, at p 107, lines 15–19 and p 114, lines 13–25.

80 NEs, 16 June 2020, at p 115, lines 12–15.

gift to Chye Moi June of the CMJ Joint Accounts. But, as the parties led evidence and made submissions on this point, I will set out my findings.

56 I find that the father made the gifts from the Wife's Joint Account, not from the OCBC Joint Account.

57 The father made the gifts by seven cheques ("the Waterside Cheques").[81] The defendant testified that the Waterside Cheque which he received was drawn on the Wife's Joint Account.[82] Chye Sing Neok initially testified, however, that the Waterside Cheques were drawn on the OCBC Joint Account,[83] because the Wife's Joint Account was an overdraft account.[84]

58 Chye Sing Neok was later recalled to the stand in order to be shown a different cheque and a cheque register recording the Waterside Cheques. She then acknowledged that she had been mistaken and accepted that the Waterside Cheques were in fact drawn on the Wife's Joint Account.[85] The cheque numbers of the Waterside Cheques start with the same four digits as three other cheques that were indisputably drawn on the Wife's Joint Account in the preceding and following months.[86] Given the inherent probabilities, I therefore find that all the Waterside Cheques came from the Wife's Joint Account.

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81 Exhibit D1; NEs, 17 June 2020, at p 67, line 2 – p 68, line 25.

82 NEs, 17 June 2020, at p 15, line 25 – p 16, line 4.

83 NEs, 16 June 2020, at p 120, lines 7–13.

84 NEs, 16 June 2020, at p 119, lines 15–20 and p 120, line 25 – p 121, line 2.

85 NEs, 17 June 2020, at p 73, lines 10–14 and p 73, line 23 – p 74, line 4.

86 Exhibits D2 and D4; NEs, 17 June 2020, at p 13, lines 15–22 and p 16, lines 6–8.

The Killiney property

59 It is also the plaintiff's case that the defendant has breached his duty as executor because he has failed to make any or any sufficient inquiry into the distribution of the sale proceeds from the Killiney property. This was a property which Chye Moi June and the father acquired in 1999 as tenants in common in equal shares.[87] When the property was sold, the net sale proceeds were divided equally between the two of them.[88] The defendant has made inquiry of Chye Moi June as to why the net proceeds of sale were distributed in this way. He accepts her explanation that this was because she and the father contributed equally to the purchase of the Killiney Property.[89]

60 The plaintiff's case is that the defendant has failed to make sufficient inquiry into the distribution of the net sale proceeds of the Killiney Property. His case is that the father's and Chye Moi June's contributions to its purchase price were not equal.[90] He submits that the father contributed about 67% of the purchase price and was therefore entitled to that same proportion of the net sale proceeds.[91]

61 It is undisputed that (a) the father paid 50% of the purchase price of the Killiney Property in cash; (b) Chye Moi June paid about 16% of the purchase price in cash and from her CPF account; and (c) Chye Moi June funded the remaining 34% of the purchase price by taking a bank loan secured on a

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87 AB at p 183; Chye Seng Kait's AEIC at [27].

88 AB at p 34.

89 DCS at [8].

90 SOC at [10(g)]; PCS at [97(d)].

91 PCS at [97(c)].

mortgage over the Killiney property.[92] What is disputed is whether the loan should be treated as a contribution by Chye Moi June only or whether it should be treated as a contribution by Chye Moi June and the father in equal shares.

62 Chye Moi June was the sole borrower for this loan. But she and the father, as co-owners of the property, were co-mortgagors. The plaintiff points out that, under the terms of the mortgage, both co-mortgagors undertook a joint and several personal liability to repay the loan.[93] The plaintiff therefore submits that the father's personal liability for the loan justifies treating half of the loan as his contribution to the purchase price.[94]

63 I do not accept the plaintiff's submission. A purchase price resulting trust in favour of the father might have arisen if he had paid the loan instalments in accordance with a clear agreement or a common understanding existing at the time the father and Chye Moi June bought the property as to the ultimate source of the money for the purchase: see *Lau Siew Kim* ([18] *supra*) at [116]–[117]; *Tan Yok Koon v Tan Choo Suan and another and other appeals* [2017] 1 SLR 654 at [153]. But there is no evidence of any such agreement or common understanding.

64 Chye Moi June's uncontradicted evidence is that she paid the loan instalments herself. There is no evidence whatsoever that the father paid any of the loan instalments. The plaintiff initially alleged that Chye Moi June paid the loan instalments in part with the father's 50% share of the rental income.[95] But,

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92 PCS at [42]; DCS at [9]–[13]; AB at p 4.

93 AB at pp 11–12 and 16.

94 Reply at [8]; PCS at [38].

95 SOC at [10(g)], *cf* PCS and PRS.

once again, he made this allegation without any evidence whatsoever. His own evidence is that he "[does] not know what has happened to any rental received".[96] As a result, the plaintiff withdrew this allegation.

65 In any event, I accept Chye Moi June's evidence that she accounted to her father for his half share of the rental income.[97] Chye Moi June's evidence is supported by the following documents:

(a) A schedule of payments kept by the father;[98]

(b) Chye Moi June's cheque register;[99] and

(c) An email which Chye Moi June sent the plaintiff after four years of renting out the Killiney property. In this email, she reminded the plaintiff to repay a loan she had made to him because she needed to pay the loan instalments on the Killiney property and asserted that she was paying half of the rental income to the father.[100]

66 I therefore accept that Chye Moi June paid the loan instalments entirely from her own resources.

67 Still, it is not fatal to the plaintiff's case if the father did not actually *pay* any part of the loan instalments. It suffices for the plaintiff to prove an agreement or a common understanding between Chye Moi June and the father

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96 Chye Seng Kait's AEIC at [32].

97 Chye Moi June's AEIC at [31].

98 AB at pp 19 and 183.

99 AB at pp 26–28.

100 Defendant's Bundle of Documents, Tab 1; NEs, 16 June 2020, at p 55, line 18 – p 56, line 18.

at the time of purchase that he would pay half the loan instalments, even if he ultimately did not do so. This follows from the position reiterated in *Su Emmanuel v Emmanuel Priya Ethel Anne and another* [2016] 3 SLR 1222 ("*Su Emmanuel*") that the proprietary interests under a resulting trust crystallise at the time of purchase and do not fluctuate as and when a party makes payments towards the reducing the loan over time (at [92]). Just as A's overpayment of loan instalments – *ie*, over and above the share which A was to pay under a prior agreement or common understanding – cannot increase A's proprietary interest under a resulting trust, so also A's underpayment of the loan instalments cannot reduce A's proprietary interest under a resulting trust. A's underpayment of the loan instalments may, however, make less credible B's claim that the parties had the alleged prior agreement or common understanding in the first place.

68 The identity of the borrower or mortgagor is not determinative of the parties' agreement or understanding as to who is to repay the loan. In addition, subsequent conduct may be evidence of the agreement or understanding. In *Su Emmanuel*, the Court of Appeal said (at [90]):

> Many factors are engaged in the determination of the precise agreement or understanding between the parties as to who would repay the mortgage. *The focus should not lie exclusively on who took on liability for the mortgage as against the bank. Often such liability will be joint because the bank would like to have the widest choice of the parties against whom it can enforce the liability under the mortgage. Rather, the question will turn on what the operating agreement was between the co-owning parties at the time the loan was taken out. In this regard, subsequent conduct may be relevant to the extent that it sheds light on such an agreement (if any) between the co-owners.* Thus, in *Chan Yuen Lan*, despite the fact that liability for the loan fell on the wife, the court found that the agreement between the parties was for the husband to repay the loan and therefore the loan amount of $400,000 was attributed to the husband as his direct contribution to the acquisition of the property (at [81]–[87]).
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> [emphasis in original omitted; emphasis added in italics]

69 The plaintiff bears the burden of proof in this action. He has failed to prove that the father and Chye Moi June had an agreement or a common understanding at any time that the father would pay half the loan instalments. Indeed, my finding is to the contrary effect. I find that the father and Chye Moi June had a prior agreement or, at the very least, a common understanding, that it would be Chye Moi June who would be responsible for paying all of the loan instalments in full herself. I make this finding for two reasons.

70 First, this understanding accounts for the structure of the investment and Chye Moi June's payments of the instalment. It explains why Chye Moi June was named as the sole borrower of the loan even though she and the father, as the co-owners of the property, were co-mortgagors. Further, she alone paid the loan instalments in full, entirely from her own resources.[101] Finally, when they sold the Killiney Property, the outstanding loan was paid entirely out of Chye Moi June's 50% share of the sale proceeds. The conveyancing solicitors did this on her instructions.[102]

71 Second, the father and Chye Moi June understood they each had made equal capital contributions to this investment. I infer this from their understanding that they each had an equal economic interest in the income and capital gain generated by this investment. This is shown by their agreement to divide equally between themselves the rental income and the net proceeds of sale. It is true that it was Chye Moi June, and not the father, who instructed the conveyancing solicitors to divide equally the net sale proceeds.[103] But, as the

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101 Chye Moi June's AEIC at [31].

102 AB at p 34.

103 AB at p 34.

plaintiff points out,[104] the father received the solicitors' completion account showing the equal division and did not suggest that he was entitled to more.

72 In cross-examination, the plaintiff alleged that the father had complained privately to him about his joint investment in the Killiney property with Chye Moi June. The plaintiff's evidence was that the father was worried that his other daughters would propose similar investments where the father would be expected to make a 50% capital contribution in cash while the daughters made their capital contribution largely by loan.[105] I reject this evidence as an afterthought. It is wholly unsupported by any other evidence. In any event, all that this evidence shows is that the father was allegedly unhappy that the other daughters might put a strain on his capital. This evidence, even if true, does not show that the father viewed himself as having contributed more towards the purchase price of the Killiney Property than Chye Moi June or that he was unhappy with the equal division of the sale proceeds of the Killiney Property.

73 Because no purchase price resulting trust arose in favour of the father, Chye Moi June was entitled to 50% of the net proceeds of sale of the Killiney property. The other 50% was duly paid to the father in his lifetime and absorbed into the assets which ultimately formed his estate. The distribution of the net sale proceeds was entirely in order. There is nothing for the defendant to inquire into. The defendant therefore has not breached his duty to make sufficient inquiry into the distribution of the net sale proceeds of the Killiney property.

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104 DCS at [117].

105 NEs, 16 June 2020, at p 49, lines 11–19.

Other alleged breaches of duty

74 For completeness, I also find that the plaintiff has failed to establish two other allegations of the defendant's breach of duty.[106]

75 First, I find that the defendant did not breach his duty to safeguard the assets of the estate and to avoid a conflict of interest. The plaintiff pleads that the defendant breached both of these duties by deducting from the assets of the estate certain legal fees which he incurred in his personal capacity.[107] These legal fees were relate to work done in corresponding with the plaintiff, his lawyers and Chye Moi June in 2016 and 2017.[108] I accept the defendant's submission that these legal fees were testamentary and administrative expenses.[109] Testamentary and administrative expenses are "expenses incident to the proper performance of the duty of the executor". They include expenses incurred in taking legal advice as to the distribution of the estate: *Foo Jee Boo and another v Foo Jhee Tuang and others* [2016] SGHC 260 at [77], citing *Sharp v Lush* [1879] 10 Ch D 468 at 470–471.

76 Second, I find that the defendant did not breach his duty to distribute the assets of the estate promptly and fairly. Within 15 months of the issue of the grant of probate, the defendant proposed to distribute to the plaintiff $72,451.34 upon the plaintiff confirming that he did not object to the defendant's statement of account.[110] The plaintiff submits that the defendant breached this duty by making the distribution conditional on the plaintiff accepting the accuracy of

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106 Plaintiff's Opening Statement ("POS") at [11].

107 SOC at [10(h)–(i)].

108 AB at pp 113–118; D&CC at [27]; Defendant's Opening Statement ("DOS") at [30].

109 DOS at [32].

110 AB at p 119.

the statement of account.[111] I reject this submission. The plaintiff calculated the sum of $72,451.34 as half of the residue of the estate due to the plaintiff in accordance with cl 3 of the will.[112] In the circumstances of this case, there is nothing unreasonable about the defendant making the distribution conditional on the plaintiff accepting the statement of account as accurate. In so far as the distribution of the assets of the estate has been delayed beyond that, that delay is a consequence of the plaintiff's action, not the defendant's inaction.

Conclusion

77 For the foregoing reasons, I find that the defendant is not in breach of any of his duties as the father's executor. I also find that Chye Moi June has not breached any duty she owed to her father or to the estate.

78 It appears to me that these are not the plaintiff's true grievances. It appears to me that the plaintiff's true grievance is his disappointment with the size of his father's estate and the size of his inheritance under the father's will. The father may have been a fairly successful property developer in his lifetime. But it appears from the evidence that his wealth was much diminished by the time he died.

79 The plaintiff may also be aggrieved that the father failed to leave the whole of his estate to be divided between the two brothers and instead made a gift under cl 2 to his wife and to Chye Moi June. But that is what I have found the father intended to do by cl 2 of his will, as was his right.

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111 POS at [50]–[51].

112 AB at pp 99–102.

80 I therefore dismiss the plaintiff's claim in its entirety. Costs will follow the event. I have ordered the plaintiff to pay the costs of and incidental to this action to the defendant, such costs fixed at $129,500. The plaintiff will also have to pay to the defendant his reasonable disbursements, such disbursements to be taxed if not agreed.

81 As requested by the defendant,[113] I make no order on his counterclaim which he no longer pursues.

Vinodh Coomaraswamy
Judge of the High Court

Lim Seng Siew and Lip Wei De Eric (OTP Law Corporation) and Lai Swee Fung (UniLegal LLC) for the plaintiff and defendant-in-counterclaim;
Michael Khoo, SC and Josephine Low (Michael Khoo & Partners) and Andy Chiok (JHT Law Corporation) for the defendant and plaintiff-in-counterclaim.

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[113] NEs, 29 September 2020, at p 72, lines 10–11.