

IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2021] SGHC 04

Suit No 836 of 2019

Between

Soemarto Sulistio

... Plaintiff

And

- (1) Stukan Yetty Fang
- (2) Sulistio Yena
- (3) Rudy Sulistio
- (4) Hino Yenny Sulistio
- (5) Sulistio Edy

... Defendants

JUDGMENT

[Trusts] — [Constructive trusts] — [Subsequent intention]
[Trusts] — [Resulting trusts] — [Presumed resulting trusts]

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Soemarto Sulistio
v
Stukan Yetty Fang and others

[2021] SGHC 04

High Court — Suit No 836 of 2019

Valerie Thean J

22–24, 29–30 September, 1–2 October, 23 November 2020

7 January 2021

Judgment reserved.

Valerie Thean J:

1 This suit concerns the ownership of 122 gold bars of one kilogram each (“the gold bars”). The gold bars were purchased in 1989 by the plaintiff, Mr Sulistio, and his wife, Mdm Soemiati, in their joint names.¹ Both were Indonesian citizens of Hakka descent who married in the 1950s. There are five children from their marriage. These are, from the eldest to the youngest: the first defendant, Stukan Yetty Fang (“Yetty”); the second defendant, Sulistio Yena (“Yena”); the third defendant, Rudy Sulistio (“Rudy”); the fourth defendant, Hino Yenny Sulistio (“Yenny”); and the fifth defendant, Sulistio Edy (“Edy”).

2 This judgment examines the joint intent of Mdm Soemiati and Mr Sulistio in respect of the gold bars. The relevant certificates to the gold bars

¹ Agreed Bundle of Documents vol I (“1AB”) 1 – 12.

were in Mdm Soemiati's possession from the time of purchase.² There is no dispute that at the time of purchase, the couple had a common intention to hold the gold bars for their joint benefit, with the right of survivorship to apply. The dispute centres upon the intention of Mr Sulistio and Mdm Soemiati in and after 17 April 2016, when, at Mdm Soemiati's request, Mr Sulistio put his signature under the "Delivery Instructions" section of the gold certificates. The defendants contend that this action signalled a change in the couple's joint intention, which was, at that juncture, to gift the gold bars to Mdm Soemiati. Mr Sulistio contends that the earlier common intention remained, notwithstanding his action, and that the gold bars remained in Mdm Soemiati's custody under a common intention constructive trust.

3 Mdm Soemiati died in April 2017 and her will bequeathed the gold bars to the first, second, fourth and fifth defendants. Mr Sulistio, presently 87 years old, now sues these four defendants for the return of the bars. Rudy, the third defendant in the suit, has aligned himself with Mr Sulistio in this suit. All references, therefore, to "the defendants" in this judgment refer to Yetty, Yena, Yenny and Edy, unless otherwise stated.

Facts

4 Mr Sulistio, now retired, was an extremely successful businessman in the timber logging business. The gold bars were purchased in 1989 from UOB Singapore as an investment. At the date of purchase, they were held under 6 UOB Gold Certificates ("the Original Gold Certificates") bearing the serial numbers 00272, 00273, 00274, 00275, 00276 and 00277 and dated 11 February

² Certified Transcript (29.09.2020) at p 8, lines 11 – 17.

1989.³ It is not disputed that, at the time, all the couple's assets were held for their joint benefit. The gold bars were purchased with money from the couple's joint account and were held in the joint names of Mr Sulistio and Mdm Soemiati. Mdm Soemiati managed the couple's finances from their joint accounts and the Original Gold Certificates were kept in her safe.

5 On 17 April 2016, Mdm Soemiati asked Mr Sulistio to sign the Original Gold Certificates under the section with the heading "Delivery Instructions".⁴ At the time he signed, the "transferee" section of the Original Gold Certificates was left blank.⁵ When the suit was first commenced, Mr Sulistio assumed that Mdm Soemiati's name was listed as the transferee at the time of his signature. Parties realised just prior to trial and do not dispute that sometime later Mdm Soemiati was listed as the transferee within that section. The state of the relationship between the couple in the years leading up to this event is a matter in dispute, as is Mr Sulistio's intention in signing the document.

6 On 26 May 2016, Mdm Soemiati made a trip to UOB Singapore to effect a change of ownership of the Original Gold Certificates. The gold bars held under the Original Gold Certificates were placed under her sole name and UOB accordingly cancelled the Original Gold Certificates⁶ before issuing new gold certificates bearing serial numbers 30041, 30042, 30043, 30044, 30045 and 30046 ("the New Gold Certificates").⁷ These certificates listed #4601 Convention Plaza Apartments 1 Harbour Road Wan Chai ("the 4601

³ 1AB 1 – 12.

⁴ 1AB 1 – 12.

⁵ 1AB 1 – 12.

⁶ 1AB 13 – 24.

⁷ 1AB 25 – 30.

Apartment”) as the address of the gold bar’s owners. This is despite the fact that at the time the New Gold Certificates were issued, Mdm Soemiati had moved out of the 4601 Apartment and had been staying in a separate apartment (“the 2502 Apartment”).

7 On 16 April 2017, Mdm Soemiati passed away. Mr Sulistio and Rudy came to Singapore in May 2017 and checked the couple’s safe deposit box at UOB. Mr Sulistio discovered that Mdm Soemiati had changed the ownership of the gold bars.⁸ Believing that Mdm Soemiati had died intestate, Mr Sulistio applied for, and was granted, letters of administration at the Singapore Family Justice Courts.⁹

8 Unknown to Mr Sulistio, however, Mdm Soemiati had executed a will dated 31 March 2016 (“the Will”).¹⁰ Under the Will, she appointed the defendants as the executors and beneficiaries of her entire estate. The Original Gold Certificates were specifically named and devised to the defendants:

I GIVE DEVISE AND BEQUEATH my gold certificates Serial Numbers 00272, 00273, 00274, 00275, 00276 and 00277 being held at United Overseas Bank Limited Head Office, 80 Raffles Place UOB Plaza, Singapore 048624 unto my said daughters SULISTIO YENA, STUKAN YETTY FANG and HINO YENNY SULISTIO and my said son SULISTIO EDY for their own use and benefit absolutely in equal shares.

9 Being aware of the Will, Yetty sought and was granted probate by the Hong Kong Court of First Instance on 7 September 2017.¹¹ On 21 November

⁸ Certified Transcript (29.09.2020) at p 37, lines 1 – 13.

⁹ 1AB 215.

¹⁰ 1AB 37 – 39.

¹¹ 1AB 240.

2017, Yetty lodged a caveat against the Singapore grant of letters of administration, on the basis of the will that Mdm Soemiati executed on 31 March 2016.¹² She also applied to set aside the letters of administration on 24 January 2018.¹³ That application has been stayed (by consent) for the time being.

10 Mr Sulistio fell gravely ill in September 2017 and was warded in the intensive care unit of a hospital in Hong Kong for more than a year.¹⁴ The defendants were unable to visit Mr Sulistio. Their evidence was that they were prevented from doing so by Rudy.¹⁵ Rudy's evidence was that the defendants were not allowed to see Mr Sulistio at the instruction of the doctors.¹⁶ Rudy informed Mr Sulistio about the Will while he was in the hospital. Mr Sulistio thereafter made a declaration on 22 December 2017 stating that the gold bars had been held on trust for him by Mdm Soemiati.¹⁷

11 On 27 February 2018, Mr Sulistio and Rudy commenced proceedings in Hong Kong to challenge the validity of the Will.¹⁸ On 23 August 2019, those proceedings were struck out by the Court of First Instance.¹⁹

12 On 26 August 2019, Mr Sulistio commenced the present proceedings claiming beneficial ownership of the New Gold Certificates. As the Hong Kong

¹² 1AB 216.

¹³ 1AB 225 – 231.

¹⁴ Certified Transcript (29.09.2020) at p 37, lines 16 – 25.

¹⁵ Certified Transcript (30.09.2020) at p 141, line 24 to p 142, line 23; Certified Transcript (01.10.2020) at p 134, lines 3 – 10.

¹⁶ Certified Transcript (22.09.2020) at p 112, lines 16 – 22.

¹⁷ 2AB 449 – 450.

¹⁸ 2AB 286.

¹⁹ 2AB 365 – 366.

proceedings were under appeal at the time this suit was filed, Rudy was joined as a defendant in this suit.²⁰ That appeal has since been dismissed.²¹

The claim and the defence

13 It is common ground that at the time of purchase on 11 February 1989, both Mr Sulistio and Mdm Soemiati had a common intention to hold all assets (including the gold bars) jointly. It was also agreed that this common intent subsisted up until 26 March 2016.²²

14 Mr Sulistio’s assertion is that the couple’s intention remained the same, notwithstanding his signing the certificate on 17 April 2017. As such, Mdm Soemiati had held the gold bars for him on trust. He particularized the nature of such a trust in his further and better particulars. Initially, he averred that the trust was either a “resulting trust including a *Quistclose* trust, or in the alternative a constructive trust.”²³ By the end of trial, arising from his evidence on the stand, his claim was narrowed to the assertion of a common intention constructive trust, namely, that pursuant to the couple’s common intention that their assets would be held jointly, all assets would devolve to the remaining survivor. He therefore claims beneficial ownership of the gold certificates.

15 The defendants’ contention, in contrast, is that by Mr Sulistio’s signature, Mr Sulistio intended and did sever the joint tenancy in the Original Gold Certificates and transferred ownership to Mdm Soemiati absolutely. This

²⁰ Rudy’s AEIC dated 11 August 2020 (“Rudy’s AEIC”) at para 5.

²¹ 2AB 378, 410.

²² Transcript, 23 November 2020, lines 12-13.

²³ Mr Sulistio’s Further and Better Particulars served 2 December 2019, Answer 3(a)

transaction was explained as part of a wider transaction where the couple separated their assets, specifically to address Mdm Soemiati's insecurity about having enough funds for private hospital care as her health deteriorated.

The applicable legal principles

16 In *Chan Yuen Lan v See Fong Mun* [2014] 3 SLR 1048 (“*Chan Yuen Lan*”), a piece of property was purchased in the appellant-wife's name. It was found that the respondent-husband had contributed 84.17% of the purchasing price, and the wife held that beneficial interest on resulting trust for the husband. The wife failed to rebut the presumption of resulting trust, as (at [92]) “there was no convincing reason why [the husband], a man nearing retirement who had just begun an affair, would make the biggest purchase of his life, only to gift it to someone who was his wife in name only.” The Court of Appeal then articulated a structured framework for analysing beneficial interests in a property in *Chan Yuen* at [160]:

160 In view of our discussion above, a property dispute involving parties who have contributed unequal amounts towards the purchase price of a property and who have not executed a declaration of trust as to how the beneficial interest in the property is to be apportioned can be *broadly* analysed using the following steps in relation to the available evidence:

(a) Is there sufficient evidence of the parties' respective financial contributions to the purchase price of the property? If the answer is “yes”, it will be presumed that the parties hold the beneficial interest in the property in proportion to their respective contributions to the purchase price (*ie.* the presumption of resulting trust arises). If the answer is “no”, it will be presumed that the parties hold the beneficial interest in the same manner as that in which the legal interest is held.

(b) Regardless of whether the answer to (a) is “yes” or “no”, is there sufficient evidence of an express or an inferred common intention that the parties should hold the beneficial interest in the property in a proportion which is different from that

set out in (a)? If the answer is “yes”, the parties will hold the beneficial interest in accordance with that common intention instead, and not in the manner set out in (a). In this regard, the court may not impute a common intention to the parties where one did not in fact exist.

(c) If the answer to both (a) and (b) is “no”, the parties will hold the beneficial interest in the property in the same manner as the manner in which they hold the legal interest.

(d) If the answer to (a) is “yes” but the answer to (b) is “no”, is there nevertheless sufficient evidence that the party who paid a larger part of the purchase price of the property (“X”) intended to benefit the other party (“Y”) with the entire amount which he or she paid? If the answer is “yes”, then X would be considered to have made a gift to Y of that larger sum and Y will be entitled to the entire beneficial interest in the property.

(e) If the answer to (d) is “no”, does the presumption of advancement nevertheless operate to rebut the presumption of resulting trust in (a)? If the answer is “yes”, then: (i) there will be no resulting trust on the facts where the property is registered in Y’s sole name (*ie.* Y will be entitled to the property absolutely); and (ii) the parties will hold the beneficial interest in the property jointly where the property is registered in their joint names. If the answer is “no”, the parties will hold the beneficial interest in the property in proportion to their respective contributions to the purchase price.

(f) Notwithstanding the situation at the time the property was acquired, is there sufficient and compelling evidence of a subsequent express or inferred common intention that the parties should hold the beneficial interest in a proportion which is different from that in which the beneficial interest was held at the time of acquisition of the property? If the answer is “yes”, the parties will hold the beneficial interest in accordance with the subsequent altered proportion. If the answer is “no”, the parties will hold the beneficial interest in one of the modes set out at (b) – (e) above, depending on which is applicable.

[italics in original; emphasis added in bold]

The parties' cases

Plaintiff's position

17 Mr Sulistio argues that step (a) of the *Chan Yuen Lan* analysis is not relevant here. He submits that at the time of acquisition, there was “an express or inferred common intention between [him] and Mdm Soemiati [...] to own the beneficial interest [in the gold bars] jointly”.²⁴ Mr Sulistio acknowledged during trial that if he had passed away before his wife, the gold would have been hers.²⁵ Such an express (or inferred) common intention would satisfy step (b) of the *Chan Yuen Lan* analysis and would necessarily overtake any analysis of the parties' respective financial contributions, as undertaken in step (a).

18 A common intention between the parties having been established at the time of acquisition of the gold bars, the only question then, was whether there had been a subsequent deviation of Mr Sulistio and Mdm Soemiati's common intention. Such an analysis was to be conducted at step (f) of the *Chan Yuen Lan* analysis, and it is there that Mr Sulistio rested his case.²⁶ Mr Sulistio contended that there was no “sufficient and compelling evidence” of a subsequent express or inferred common intention different from the earlier one.

Defendants' position

19 The defendants' case is that at the time of acquisition, the gold bars had been held jointly since they were purchased with “commingled funds from their joint account [consisting] of their joint earning, savings as well as funds from

²⁴ Plaintiff's Closing Submissions dated 23 October 2020 (“PCS”) at para 36.

²⁵ Certified Transcript (29.09.2020) at p 29, lines 6 – 8.

²⁶ PCS at para 42.

investments”.²⁷ The defendants adduced evidence in respect of their mother’s contribution to their father’s business. It was not disputed, in any event, that the gold bars were held in the joint names and for the joint benefit of the couple. This was also Mr Sulistio’s case that such was the common intention at the time of the acquisition.

20 The defendants advance a different position from Mr Sulistio as to when the *Chan Yuen Lan* analysis was to be applied. While Mr Sulistio’s step (b) analysis was conducted with reference to the *purchase* of the gold bars, the defendants’ step (b) analysis was conducted with reference to the *transfer* of the gold bars from Mr Sulistio to Mdm Soemiati.²⁸

21 In the defendants’ view, the owner of the legal title would presumptively be the owner of the beneficial interest in the property as well.²⁹ That was the starting point of the analysis since “equity follows the law”. It fell to Mr Sulistio to produce “sufficient evidence” under step (b) that he had never intended to benefit Mdm Soemiati when he signed the Original Gold Certificates.

22 Besides suggesting that the legal burden of proof (under step (b) of the *Chan Yuen Lan* analysis) lay on Mr Sulistio, the defendants also advance a positive case about Mr Sulistio’s intentions when he signed the Original Gold Certificates. The defendants submitted that the relationship between Mr Sulistio and Mdm Soemiati had broken down by the time the gold bars had been

²⁷ Defence (Amendment No 2) at para 37(a).

²⁸ Defendants’ Closing Submission dated 23 October 2020 (“DCS”) at paras 70(a) – 70(b), 103 – 154.

²⁹ DCS at para 56 – 57.

transferred to her,³⁰ and that the transfer had been part of a deal where Mdm Soemiati would receive the financial security of these gold bars³¹ in exchange for Mr Sulistio keeping the rest of their combined wealth.³² On that reading, there could have been no common intention for Mdm Soemiati to keep the bars on trust for him. In the alternative, the defendants submitted that pursuant to step (e) of the *Chan Yuen Lan* analysis, a presumption of advancement arose when Mr Sulistio transferred the gold bars to Mdm Soemiati.³³

23 Finally, regarding stage (f) of the *Chan Yuen Lan* analysis in the event Mr Sulistio's interpretation of the law is accepted, the defendants argue that there was no subsequent common intention to hold the gold bars jointly in 2016.³⁴

Analysis on the law

24 I deal first with the correct approach to take in applying *Chan Yuen Lan* in this case. In my view, step (b), together with step (a) of the *Chan Yuen Lan* analysis, are conducted at the time the relevant property is acquired. This is because it is the financial contribution of parties that is key. A resulting trust, if any, crystallizes at the time the property is acquired: *Lau Siew Kim v Yeo Guan Chye Terence and another* [2008] 2 SLR(R) 108 at [112] ("*Lau Siew Kim*"). It is "in theory strictly based on the parties' respective contributions to the purchase price of the property": *Lau Siew Kim* at [113] (emphasis in original).

³⁰ DCS at paras 118 – 129.

³¹ DCS at paras 105 – 117.

³² DCS at paras 145 – 149.

³³ DCS at paras 153 – 154.

³⁴ DCS at paras 70(c) – 70(d) and paras 156 – 163.

Step (b), which seeks to answer *directly* what step (a) can only approximate/presume by reference to the parties' financial contributions to the purchase, looks to identify the intentions of the parties *at the time of acquisition*.

25 Here, the relevant point of acquisition was in 1989, when the gold bars were first purchased. They were fully paid for then, and the financial contribution of parties was made at that point. Any common intention analysed under step (b) of the *Chan Yuen Lan* analysis must be that which was subsisting at the time of the gold bar's purchase. The common intention then was undisputed. The gold bars were to be held jointly. The couple's financial contribution did not change in 2016 despite the change in legal status. Therefore, their intention at that point in time is more appropriately addressed at step (f) of the *Chan Yuen Lan* analysis.

26 Conversely, even where financial contribution changes between parties, so long as parties remain the same, it is still important to consider the initial agreement between parties at the time of acquisition, and in that specific context, whether that initial agreement has changed. In *Su Emmanuel v Emmanuel Priya Ethel Anne and another* [2016] 3 SLR 1222, for example, parties signed a sale and purchase agreement for one Priya to purchase 49% of the property in question. However, Priya serviced the mortgage on her own after the agreement, resulting in her contributing 70% of the mortgage payments. The Court of Appeal held that there was no "sufficient and compelling" evidence of any change in the agreement between parties. Priya's ownership interest remained at 49%, and equitable accounting was used instead to take into account her additional financial contribution. In contrast, where new parties enter the fray, the analysis begins at that point: see, for example, *BUE and another v TZQ and another* [2019] 3 SLR 1022 at [45] – [46] and *Low Yin Ni and another v Tay Yuen Wei Jaycie (formerly known as Tay Yeng Choo Jessy) and another*

[2020] SGCA 58. This is a logical application of *Lau Siew Kim*. As envisaged at [24] above, any resulting trust would crystallise at the point the new parties make financial contribution; therefore, the intention of all relevant parties would require to be ascertained at that point to determine if any trusts arise.

27 It follows, then, that the change in legal ownership in 2016 must be considered as part of, and together with other evidence on, the question whether under step (f) of the *Chan Yuen Lan* analysis, there was sufficient and compelling evidence of a change in the operative agreement between Mr Sulistio and Mdm Soemiati. Equity follows the law, as submitted by the defendants, “but not slavishly or always”, *per* Cardozo J in *Graf v Hope Building Corp* (1920) 254 NY 1, 9. I turn, therefore, to the evidence at hand.

Analysis on the facts

28 Coming then, to what is “sufficient and compelling evidence”, Lord Neuberger’s minority judgment in *Stack v Dowden* [2007] 2 AC 432 (which the Court of Appeal in *Chan Yuen Lan* cited with approval at [153] – [159]) explained it (at [146]) as normally involving:

... discussions, statements or actions, which can fairly be said to imply a positive intention to depart from [the original] apportionment...

29 The time period in question between the initial agreement in 1989 and Mr Sulistio’s signing of the certificates in 2016 is almost 30 years. I consider in turn the following to ascertain whether there was a change in the intention of parties in that time: the context of the couple’s relationship; Mdm Soemiati’s motivation for asking Mr Sulistio for his signature; Mr Sulistio’s evidence as to his own intention; and events that occurred after the signing.

The contextual frame of the couple's relationship in 2016

30 The defendants contend that the agreement was ultimately a reflection of Mr Sulistio and Mdm Soemiati's relationship at that time. According to Yena and Yenny, the marital relationship had broken down as early as 2012.³⁵ At least one part of the explanation lay in her difficult relationship with Mr Sulistio's nurse, one Mr Lee Yan Wo ("Mr Lee"). According to Yetty, Mdm Soemiati had been bullied and mistreated by Mr Lee but Mr Sulistio had not done anything to help her or stand up for her.³⁶ This had upset Mdm Soemiati and put a strain on her relationship with Mr Sulistio, eventually leading to her moving out to the 2502 Apartment with her own live-in helper.³⁷

31 Mr Sulistio, on the other hand, insisted that the couple had an amicable relationship up to the time of Mdm Soemiati's death. According to Rudy, Mdm Soemiati had merely moved to the 2502 Apartment in order to have the freedom to play mah-jong with her friends.³⁸ Mr Lee testified that he had a good relationship with Mdm Soemiati. He asserted it was with Yena with whom he quarrelled.³⁹

32 In my assessment, the couple's relationship was not as smooth as Rudy and Mr Sulistio made out. Rudy's explanation for Mdm Soemiati's move was not a convincing one. Mdm Soemiati could have used the 2502 Apartment to play mah-jong, she did not have to move apartments to do so. There was no

³⁵ Yenny's AEIC dated 11 August 2020 ("Yenny's AEIC") at para 62; Yena's AEIC dated 11 August 2020 ("Yena's AEIC") at para 60.

³⁶ Yetty's AEIC dated 11 August 2020 ("Yetty's AEIC") at para 49.

³⁷ Yetty's AEIC at para 50.

³⁸ Certified Transcript (22.09.2020) at p 57, line 18 to p 58, line 22.

³⁹ Certified Transcript (23.09.2020) at p 58, line 25 to p 59, line 6.

evidence that she was an avid mah-jong player, and it appeared that meals with friends were hosted at Mr Sulistio's apartment. Mr Lee's testimony about his good relationship with Mdm Soemiati was not convincing either. It was common ground that there was an occasion where a quarrel involving Mr Lee became extremely heated, during which security personnel from the apartment building were summoned.⁴⁰ Yena testified that the dispute was between Mr Lee and her mother. Mr Lee's explanation (an explanation he offered for the first time when he was on the stand) was that his argument had been with Yena and was about his being paid mandatory contribution sums (the Hong Kong equivalent of our Central Provident Fund).⁴¹ I accept Yena's version of events and evidence about the state of the relationship between Mr Lee and her mother. Crucial light could have been shed on this relationship by Mr Sulistio while he was on the stand, and yet he chose not to answer the cross-examination head on, instead reiterating, more than once, that he was "not sure" about Mr Lee's relationship with Mdm Soemiati.⁴²

33 In my view, Mdm Soemiati's move to the 2502 Apartment was a reflection of her compromise. The couple continued thereafter to have meals together, in particular when family or friends visited (as stated in both Yena's and Rudy's affidavits of evidence-in-chief),⁴³ and travelled together in the years following Mdm Soemiati's move to the 2502 Apartment.⁴⁴ The picture that emerged was complicated and this is the context which must be borne in mind

⁴⁰ Yena's AEIC at para 54; Certified Transcript (23.09.2020) at p 58, lines 18 – 24.

⁴¹ Certified Transcript (23.09.2020) at p 63, lines 12 – 23 and p 65, line 20 to p 66, line 5.

⁴² Certified Transcript (29.09.2020) at p 11, lines 4 – 14.

⁴³ Yena's AEIC at para 60; Rudy's AEIC at para 38.

⁴⁴ 2AB 411 – 414.

when considering the conflicting narratives advanced by parties throughout trial. In particular, this context is crucial when examining the contentions about surrounding events on, during and after the April 2016 signing.

Mdm Soemiati's motivation and intention

34 The defendants contend that there was a compelling motive behind Mdm Soemiati's request for the gold bars, and an explanation as to why Mr Sulistio acceded to the request. This was that Mdm Soemiati's motivation in seeking the gold bars was to guarantee financial security for herself. The joint funds that she held with Mr Sulistio were being depleted because large sums of money had been transferred to Rudy over the years. At the same time, Mdm Soemiati was seriously ill with mounting medical expenses.⁴⁵ The defendants' case was that she had concerns about her ability to continue to afford private care.

35 As for Mr Sulistio, it was not disputed that he wanted Rudy appointed as the couple's representative in dealing with their assets in Indonesia. In fact, Rudy had arranged for an Indonesian notary public to be flown to Hong Kong to witness the signing of documents that would grant him power of attorney over Mr Sulistio and Mdm Soemiati's assets in Indonesia.⁴⁶ However, Mdm Soemiati had refused to sign the documents.⁴⁷ Yena recounted the incident as follows:⁴⁸

... about four days or so before [an email sent on 26 March 2016], my mother, all of a sudden, like, receive a phone call from my dad and said that Rudy had sent a notary and she is

⁴⁵ Certified Transcript (01.10.2020) at p 67, lines 17 – 22.

⁴⁶ Yenny's AEIC at para 53; Certified Transcript (01.10.2020) at p 65, lines 11 – 18.

⁴⁷ Certified Transcript (02.10.2020) at p 20, lines 1 – 8.

⁴⁸ Certified Transcript (01.10.2020) at p 65, lines 10 to p 66, line 13.

at – she is show up already at the Hong Kong and – the hotel next door. So she [sic] told my mum, “Be prepared, you need to sign the power of attorney right now”, because the notary was there. So my mum was freaking out, “You never tell me now the notary is at the door?” So she just did not want to answer the phone. Phone ring off the hook... So my mother for two days refused to go out and then after that, she will take the phone out... For a couple of days, she did not want to take my dad’s phone call – did not want to take my dad’s phone call, ignore him. Lock the door... Because she was very frantic, she was upset; like, she was being pressured to do it.

36 Mdm Soemiati eventually answered the phone, resuming contact with her husband. Mdm Soemiati signed the power of attorney, appointing and authorising Rudy to deal with all of the couple’s joint assets in Indonesia. In exchange, she was given the gold certificates.⁴⁹ Yena overheard the telephone conversation and recorded the agreement in an email which was sent to her siblings (“the 26 March 2016 Email”), which read: ⁵⁰

Mum cannot bear the pressure anymore

Mum put the phone line back this afternoon and got a phone call from dad. Dad told her the government would take the properties if they did not sign the paper to Rudy

I think she would have dad signed [sic] the moos certificate in exchange for the properties. what [sic] do you think? She seems happy about it and tell [sic] dad to be on his own about his own expenses, Rudy can take care of him. His rent, credit card, electric bill, parking, internet, phone bills, doctors, food and workers will be on his own. Rudy can help out.

Yena explained in testimony that Mdm Soemiati used the term “moos certificate” to refer to the gold certificates.⁵¹

⁴⁹ Certified Transcript (01.10.2020) at p 66, line 13 to p 67, line 7.

⁵⁰ 2 AB 437

⁵¹ Transcript, 1 October 2020, p 71 lines 21 – 24.

37 In my view, the agreement as asserted by the defendants was a rational one on the facts. First, it would have assuaged any reservations that Mdm Soemiati might have had about involving Rudy with the couple's joint assets. Rudy did not challenge receiving some USD 7.2 million from 2010 to June 2016.⁵² These amounts were collated by Yetty at Mdm Soemiati's instruction because of Mdm Soemiati's concern over the dwindling of funds in the joint accounts she managed.⁵³ She had expressed her concern about the depletion of the joint accounts to both her husband and her children.⁵⁴ The defendants further contended that Mdm Soemiati did not trust Rudy. Yetty gave unchallenged testimony that the last time Rudy had been authorized to transact on behalf of his parents, he had been tardy about transferring the proceeds from the sale of land to Mdm Soemiati and Mr Sulistio's joint accounts.⁵⁵ At least USD 1 million remained unaccounted for.⁵⁶ With the 22 gold bars, Mdm Soemiati effectively carved out for herself a portion of the assets that was out of Rudy's reach.

38 Second, the agreement would have ensured some degree of financial security for Mdm Soemiati, giving her a reserve fund for private medical care. As Yetty put it,⁵⁷

⁵² Transcript, 22 September 2020, p 70 lines 5 – 7

⁵³ 1AB 82 – 111.

⁵⁴ Certified Transcript (29.09.2020) at p 15, line 19 to p 16, line 7; Certified Transcript (30.09.2020) at p 58, lines 18 – 23; Certified Transcript (01.10.2020) at p 66, lines 16 – 19 and p 66, line 25 to p 67, line 7; Certified Transcript (02.10.2020) at p 48, lines 12 – 25.

⁵⁵ Certified Transcript (30.09.2020) at p 59, line 7 to p 60, line 17; Yetty's AEIC at para 59.

⁵⁶ Yetty's AEIC dated 11 August 2020 at para 59.

⁵⁷ Certified Transcript (01.10.2020) at p 66, line 19 to p 67, line 2.

[Mdm Soemiati] was worrying that in 2017 or the year to come, she can no longer use the private hospital because she has no more money. So all this was she wanted gold, because gold is liquid. You can just cash it out ... So she is happy that she is secure, the money that she can secure for her old days because that's what she wanted.

39 Third, the agreement was consonant with contemporaneous evidence. The 26 March 2016 Email described a deal struck between Mdm Soemiati and Mr Sulistio (“[Mdm Soemiati] would have [Mr Sulistio] sign the [Original Gold Certificates] in exchange for the properties”).⁵⁸ It was also consistent with Yetty’s testimony about the events that transpired when the notary public arrived in Hong Kong.

40 Taken together, these suggest that there had indeed been an agreement of the sort set out by the defendants. The agreement would explain why Mdm Soemiati had not disclosed the existence of the Will to Mr Sulistio, and took pains to have the Will signed outside her apartment. Mr Sulistio had agreed to give the gold bars to Mdm Soemiati. From her long experience with Mr Sulistio, it would have been plain to Mdm Soemiati that Mr Sulistio would have been deeply opposed to the Will’s content. Mr Sulistio’s supplementary affidavit of evidence in chief stated: “If my wife had told me about her Will, I would not have signed the gold certificates”.⁵⁹ In cross-examination, he conceded that he disagreed with her choice of beneficiaries and would not have wanted to give the gold bars to any of the four defendants.⁶⁰ Mdm Soemiati would not have disclosed the Will since it could have jeopardized the agreement. The lack of

⁵⁸ 2AB 437.

⁵⁹ Mr Sulistio’s Supplementary AEIC dated 11 September 2020 (“Mr Sulistio’s Supplementary AEIC”) at para 6(c).

⁶⁰ Transcript, 29 September, p.29, lines 34-5 and p.30 line 1.

disclosure does not affect their agreement, however, as Mr Sulistio did not make his gift conditional in any way. He made the gift in exchange for Mdm Soemiati's cooperation with the notary.

41 The Will, too, is consistent with and provides contemporary evidence of the agreement. First, it furnished a specific and consistent reason for Mdm Soemiati's omission to include Rudy:

I DECLARE that no share and interest of and in my personal and real property of whatsoever nature will be given to my son RUDY SULISTIO upon my death as I had given a large sum of money to my said son RUDY SULISTIO previously.

Second, the Will was signed on 31 March 2016, after the 26 March 2016 agreement. Her plans for the Will and the correspondence that accompanied the drafting of the will showed that she had treated the gold bars as hers to deal with as she wished.⁶¹ Admittedly, this correspondence was between Mdm Soemiati's lawyers and the defendants (rather than with Mdm Soemiati herself). At first glance, it would have been difficult to accept such correspondence as evidence of *Mdm Soemiati's* intentions, especially since the defendants were direct beneficiaries of the will which they helped draft. Notwithstanding this, I accept that the defendants were acting for Mdm Soemiati and that the instructions they conveyed to her lawyers faithfully communicated Mdm Soemiati's intentions. This is for three reasons.

42 First, Mr Sulistio did not challenge the validity of the Will in these proceedings. Second, Rudy and Mr Sulistio had attempted to challenge the validity of the Will in another set of proceedings (the Hong Kong proceedings described at [11] above). They failed. They had, among other things, challenged

⁶¹ 1AB 112 – 126.

Mdm Soemiati's testamentary capacity,⁶² claimed that she "did not know of and/or approve the contents of the [...] will"⁶³ and suggested that the will had been "executed under the undue influence of the [defendants]".⁶⁴ I note that these issues were fully ventilated and both Rudy and Mr Sulistio were given ample opportunities to provide evidence of (a) Mdm Soemiati's "questionable mental capacity" at the time the will was signed,⁶⁵ (b) the "pressure" that had been supposedly exerted on Mdm Soemiati during the time the will was being executed⁶⁶ and (c) the negligence of Mdm Soemiati's lawyers in preparing her will.⁶⁷ They failed to provide any evidence or particulars of their allegations even after having been given a whole year to do so. Third, the Will was ultimately signed by Mdm Soemiati.⁶⁸ Taken together, I accept that the defendants faithfully represented Mdm Soemiati when the Will was being drafted and that Mdm Soemiati's interpretation of the couple's joint intention was that the gold certificates were hers to deal with as she saw fit.

43 Mdm Soemiati's intention was therefore clear. Mdm Soemiati sought to gain sole ownership of the gold bars. She was the one who had approached Mr Sulistio to have the Original Gold Certificates signed. There was no other reason for her to do this, since she would, on Mr Sulistio's own case, have been entitled to the gold bars if Mr Sulistio had pre-deceased her.⁶⁹ Instead, by effecting a

⁶² 2AB 289.

⁶³ 2AB 289.

⁶⁴ 2AB 290.

⁶⁵ 2AB 337 – 339.

⁶⁶ 2AB 340 – 348.

⁶⁷ 2AB 340.

⁶⁸ 1AB 38.

⁶⁹ Certified Transcript (29.09.2020) at p 29, lines 6 – 8.

transfer, she had taken active steps to remove the gold bars from joint ownership and place them under her sole name. She wished to secure the gold bars for her own purposes, and if she were to die without using the gold bars, she wished to benefit the defendants.

What were Mr Sulistio’s intentions?

44 Mr Sulistio’s intentions, on the other hand, were less clear. On 22 December 2017, he stated that the gold bars had been held on trust for him by Mdm Soemiati in the following terms:⁷⁰

DECLARATION

I, SOEMARTO SULISTIO [Holder of Republic of Indonesia Passport No. A5417215 and Hong Kong Identity Card No. R314546(7)], hereby [sic] confirm and declare that the nature of transfer of all my relevant properties including but not limited to gold and jewellery [sic] to my wife SOEMIATI Alias SUMIATI SULISTIO [Holder of Republic of Indonesia Passport No. W335018 and Hong Kong Identity Card No. R314551(3)] prior to her demise was for her to hold on trust for me; it was never a gift to her or to anyone, and there wasn’t any such intention at all.

This document is hereby made as proof.

Dated this 22nd day of December 2017

45 I accept that this declaration, albeit belated, is admissible: *Tan Yok Koon v Tan Choo Suan and another and other appeals* [2017] 1 SLR 654 at [110]. Nevertheless, Mr Sulistio’s explanation for the timing of the declarations not convincing. He chose not to make the declaration at the time of his signing or soon after, but when he was near death, in the intensive care unit of the hospital. According to Mr Sulistio when he was cross-examined, this declaration had been made to explain that the “nature of transfer of all [his]

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2AB 449 – 450.

relevant properties, including but not limited to gold and jewellery to [his] wife prior to her demise was for her to hold on trust for [him]”.⁷¹ He wanted to “spell things out clearly”⁷² while his health still permitted⁷³ and ensure that the gold bars were not left to the defendants.⁷⁴ While these statements explained that he did not want the defendants to benefit from Mdm Soemiati’s bequest, it did not explain how the declaration accurately reflected his intention in 2016.

46 To the contrary, the rest of the evidence belied his position in the declaration and at trial. First, there was no denying the fact that he had signed the Delivery Instructions for the Original Gold Certificates. This, absent any indication otherwise, would suggest that he had intended to transfer (both legal and beneficial) ownership of the gold bars.

47 Second, Mr Sulistio’s initial recollection, when he first brought the suit, was that Mdm Soemiati’s name was in the delivery section. That initial recollection indicated that in his mind, the gold certificates were already signed to Mdm Soemiati.⁷⁵ Parties discovered after the affidavits were exchanged, that at the time the certificates were signed, the transferee’s name had not been filled out in the delivery instruction section. This discovery did not assist his case, as the effect of signing delivery instructions without specifying any transferees explicitly was to give its holder a blank cheque to deal with the gold bars as she wished. It was not disputed that the certificates were thereafter retained by Mdm Soemiati.

⁷¹ Certified Transcript (29.09.2020) at p 39, lines 12 – 18.

⁷² Certified Transcript (29.09.2020) at p 40, line 19.

⁷³ Certified Transcript (29.09.2020) at p 40, lines 23 – 24.

⁷⁴ Certified Transcript (29.09.2020) at p 42, lines 1 – 5.

⁷⁵ SOC (Amendment No 2) at para 16.

48 Third, he has not contested the validity of the transfer itself. He has not suggested that there had been any form of duress, undue influence, mistake or unconscionability on Mdm Soemiati's part. It was, in other words, a fully voluntary and deliberate transfer of title. Further, there is no dispute that the gold certificates, after Mr Sulistio signed, were thereafter kept in Mdm Soemiati's custody. As an experienced businessman, he was no doubt aware that Mdm Soemiati could thereafter use the certificates at any time.

49 Fourth, Mr Sulistio was unable to offer a credible statement of his own intentions. Over the course of trial, Mr Sulistio advanced various explanations for why he signed the Delivery Instructions for the Original Gold Certificates. I found none of them convincing:

(a) In his first affidavit of evidence-in-chief, he stated that he had signed the gold bars away because Mdm Soemiati had been "concerned about the state of [his] health and wanted [him] to sign the gold bars to her name so that she could be assured the gold bars would go to her after [his] death".⁷⁶ The need for Mdm Soemiati to be assured about her inheritance after his death made no sense. The certificates were already in their joint names. If Mr Sulistio had pre-deceased Mdm Soemiati, the gold bars would have been Mdm Soemiati's under the principle of survivorship. He conceded as much during cross-examination:⁷⁷

Q: If you had died before your wife, would you have wanted her to get the gold certificates?

A: Yes, if I pass on before her, the gold will be hers.

⁷⁶ Mr Sulistio's AEIC dated 21 August 2020 at para 23.

⁷⁷ Certified Transcript (29.09.2020) at p 29, lines 6 – 17.

Q: You would agree, Mr Sulistio, that because you were joint owner of the gold certificates with your wife, if you died before her, she would automatically get the gold certificates; correct?

A: Yes.

Q: If that's the case, Mr Sulistio, would you agree it doesn't make any sense for her to ask you to sign on the gold certificates?

A: Agree.

(b) In his supplementary affidavit of evidence-in-chief, Mr Sulistio did not discuss his likely demise but averred that Mdm Soemiati had been “concerned about the state of [his] health and wanted [him] to sign the gold certificates. [Mdm Soemiati] did not ask me to give the gold certificates to her.”⁷⁸ In effect, Mr Sulistio’s explanation was that he had signed the documents because his wife had told him to do so. The suggestion was that Mr Sulistio had pliantly signed the documents without enquiring or asking Mdm Soemiati to explain herself. I find this unbelievable, especially since Mr Sulistio himself admitted that he had been surprised by this request,⁷⁹ and that Mdm Soemiati had not been in the habit of asking him to sign documents.⁸⁰ In cross-examination, he conceded that his excuse, “[at] that time, my health was not the best” was not cogent, and what he proffered as her reasons was speculative on his part, as Mdm Soemiati had not expressed any such concerns to him:⁸¹

Q: Mr Sulistio, you have just testified that you were surprised when your wife asked you to sign on the gold

⁷⁸ Mr Sulistio’s Supplementary AEIC at paras 6(b) and (d)

⁷⁹ Certified Transcript (29.09.2020) at p 23, lines 8 – 10.

⁸⁰ Certified Transcript (29.09.2020) at p 24, lines 1 – 3.

⁸¹ Certified Transcript (29.09.2020) at p 24, line 12 to p 25, line 9.

certificates in April 2016. If you were surprised by her request, why did you sign on the gold certificates?

A: At that time, my health was not the best.

Q: But you also never asked her for a reason why she wanted you to sign the gold certificates; correct?

A: Yes.

Q: Mr Sulistio, what does your poor health have anything to do with signing the gold certificates for your wife?

A: Because I was in poor health so she asked me to sign

Q: Did your wife tell you that because of your poor health, she wanted you to sign the gold certificates?

A: This was probably her intention.

Q: No, Mr Sulistio, my question is very clear. Let me repeat it to you. *Did your wife tell you she wanted you to sign the gold certificates because of your poor health?* Did she tell you?

A: *She didn't say so.*

[emphasis in italics added]

(c) Mr Sulistio's inability to explain is illustrated by his final iteration: "I signed to prove the gold was mine".⁸² This was clearly contrary to the effect of his signature. Mr Sulistio is not claiming that this had been a mistake and has not contested the validity of the transfer either. Pressed even further about the plausibility of this answer, he returned to his earlier explanation: "because my wife asked me to sign".⁸³

⁸² Certified Transcript (29.09.2020) at p 25, line 17.

⁸³ Certified Transcript (29.09.2020) at p 26, lines 13 – 17.

50 Therefore, Mr Sulistio could not give any coherent reason as to why the intention between Mdm Soemiati and him remained the same, despite all the indications that a new agreement between parties had arisen.

51 I deal, finally, with Rudy's explanation in support of Mr Sulistio's case that their intention remained one of joint benefit with the right of survivorship. Rudy asserted that the transfer had merely reproduced the same state of affairs that would have arisen if Mr Sulistio had pre-deceased Mdm Soemiati. Mdm Soemiati, expecting to outlive Mr Sulistio, had simply asked for the transfer as early, prospective assurance of what would have happened anyway.⁸⁴ Rudy averred that Mdm Soemiati would not have needed to rely on the gold bars for her financial needs - the gold was only a small component of the couple's fortune and Mdm Soemiati was the joint owner of *all* of the couple's wealth. This ignores the defendants' evidence that Mdm Soemiati was concerned about Rudy depleting the joint assets she shared with Mr Sulistio. The size of the fortune was not important to Mdm Soemiati. Her object was to secure funds for private care for the rest of her life. Her gift to the defendants was on the contingency that she no longer needed the extra fund. It would not have been her main motivation, because she was aware that Mr Sulistio had distributed much of his assets in 2007 to his children.⁸⁵ In any event, if she were to outlive Mr Sulistio, any part of his fortune left to her would pass to the defendants as well under the Will's residuary clause.⁸⁶ The gold bars were specifically mentioned, in the same vein as her jewellery, because she was their sole owner.

⁸⁴ Rudy's AEIC at para 49.

⁸⁵ Certified Transcript (30.09.2020) at p 52, line 25 to p 53, line 3; Certified Transcript (01.10.2020) at p 44, lines 16 – 21.

⁸⁶ 1AB 37 – 39.

52 In my judgment, Mr Sulistio did intend to gift ownership of the gold bars to Mdm Soemiati. This was their common intention in 2016. He did so because that was the condition Mdm Soemiati imposed for her signature on the power of attorney for Rudy to deal with their Indonesian land. His signature on the gold certificates was not a neutral action and had legal effect - of which he has not pleaded he was unaware - and was in itself sufficient and compelling evidence. The onus was on him to explain why parties' operative agreement remained unchanged despite the change in legal status, and his explanation at trial did not pass muster. Events subsequent to the signing support the same conclusion, and I turn to these.

Circumstances after April 2016

53 Mdm Soemiati followed up with a trip to UOB in Singapore to finalise the transfer of the gold bars to herself. According to the defendants, Mdm Soemiati had informed Mr Sulistio about her trip to Singapore and her purpose to transfer of the gold certificates to her name.⁸⁷ Mr Sulistio professed not to know even about the trip, but this was highly unlikely in view of the fact that the couple had meals together and lived in the same building. Of relevance was the fact that Mdm Soemiati listed the 4601 Apartment as the official address on the New Gold Certificates. This was a different address from that used for the Original Gold Certificates, and a different address from her own 2502 Apartment. The original ones listed Yenny's American address⁸⁸ and arrangements were put in place for Yenny to manage the bank correspondence which would be posted to her address. In much the same way, Mdm Soemiati knew that the bank would send any administrative instructions, including bills

⁸⁷ Yena's AEIC at para 98.

⁸⁸ 1AB 1 – 12.

for custodian fees,⁸⁹ pertaining to the New Gold Certificates to the 4601 Apartment. According to Yena, this was no mistake. When queried by Yena as to why she did not list the 2502 Apartment, Mdm Soemiati explained that she had nothing to hide as the gold bars had been given to her.⁹⁰

54 In my view, two subsequent events confirm that Mr Sulistio had accepted the financial segregation contemplated in the agreement. First, after 24 June 2016, Yena, who previously assisted her mother with the couple's financial matters, found that the lock to the mailbox at the 4601 Apartment had been changed.⁹¹ She was thereafter denied access to the mailbox. The 4601 Apartment's mailbox, once the receptacle for any correspondence concerning the couple's jointly owned assets, was now closed to Yena. Second, a power of attorney was subsequently executed, appointing and authorizing Rudy to liaise and transact on behalf of the couple's joint assets. Crucially, all proceeds were to be remitted to *Mr Sulistio's* bank account in Hong Kong.⁹² The decision to remit proceeds to Mr Sulistio's account was deliberate. Earlier drafts of the power of attorney showed that the original intention had been to remit proceeds directly to the couple's *joint* account. In my view, the fact that Mdm Soemiati agreed to this change was consistent with my finding that the couple had made a new agreement regarding their assets.

55 Mr Sulistio averred in his statement of claim (and the defendants acknowledged in their defence) that he paid for all of Mdm Soemiati's final

⁸⁹ Yenny's AEIC at para 67.

⁹⁰ Certified Transcript (01.10.2020) at p 120, lines 13 – 17.

⁹¹ Certified Transcript (01.10.2020) at p 48, line 13 to p 49, line 2.

⁹² 2AB 442.

hospital expenses.⁹³ The implication here was that there could not have been any agreement to segregate the couple's financial assets if the relationship had been amicable enough for Mr Sulistio to foot Mdm Soemiati's entire medical bill. I do not agree that such an inference may be drawn. As stated above at [32], I find that the relationship between the parties was a complex one, in which they remained dutiful to each other despite their obvious disagreements. Mdm Soemiati did not seek to alienate her children from Mr Sulistio, even as the couple had their differences. On Yetty's evidence, "[g]o pay a visit to your father" was her instruction to the children when they came to stay with her; she would also accompany them to the 4601 Apartment when they did so.⁹⁴ Although she moved out of the 4601 Apartment, this was to a unit in the same building. The couple continued to meet for meals with friends in his apartment and travelled together. To be clear, Mdm Soemiati did not question Mr Sulistio's desire to provide for her for the rest of his life. Mdm Soemiati's concern in 2016, rather, was to ensure that the diversion of money to Rudy would not deplete the couple's joint accounts beyond what would be sufficient to provide for her private health care.

56 In my view, the agreement between Mdm Soemiati and Mr Sulistio to allow Rudy to manage the land in exchange for the transfer of the gold bars to her could rationally exist side by side with, and indeed explained, their continuing relationship with each other. The agreement they reached was a compromise. It put into the past a source of tension for Mdm Soemiati, after which she no longer worried about Rudy dealing with the Indonesian land and

⁹³ Statement of Claim (Amendment No 2) at para 23; Defence (Amendment No 2) at para 27.

⁹⁴ Transcript 30 September 2020 p 28 lines 10 – 14.

felt secure about her financial future. The couple were able to move forward on this basis. Mr Sulistio's daily visits to her each day in hospital near the end of her life and his choosing to pay for her final hospital expenses are easily reconcilable with their mutual devotion to each other in the course of a marriage that weathered complex issues over many decades.

Rationalising the 2018 declaration

57 Viewed in context of the events prior to Mdm Soemiati's passing, the 2018 declaration is anomalous and is best explained as Mr Sulistio's reaction to the contents of her Will. Nevertheless, once the certificates were gifted to Mdm Soemiati, they were hers to deal with as she pleased. No conditions or terms were put on his gift to her, and therefore her silence in respect of her will does not affect the gift. While his legal case has been run on the basis that each party would leave his or her property to his or her spouse upon death, that assumption arose from the joint ownership of the gold bars. That joint ownership was specifically changed in 2016.

Conclusion

58 In my view, the existence of the agreement, paired with the signing of the Original Gold Certificates, adequately fulfils the requirement of “sufficient and compelling evidence”. As such, I find that the subsequent common intention of the parties in 2016 had been to transfer both beneficial and legal ownership of the gold bars to Mdm Soemiati. Accordingly, I dismiss Mr Sulistio’s claims. I shall hear counsel on costs.

Valerie Thean
Judge

Tan Yew Cheng (Tan YC Law Practice) for the plaintiff;
Basil Ong Kah Liang and Kerri Tan Kheng Ling (PK Wong & Nair
LLC) for the first, second, fourth and fifth defendant;
the third defendant unrepresented.
