Goh Nellie v Goh Lian Teck and Others
[2006] SGHC 211

Case Number : OS 950/2006

Decision Date : 22 November 2006

Tribunal/Court : High Court

Coram : Sundaresh Menon JC

Counsel Name(s) : Valiappan Subramaniam (Veritas Law Corportation) for the plaintiff; Andre Maniam (Wong Partnership) for the second defendant, Jagit Singh (Gurdip & Gill) for the fifth defendant, eighth and ninth defendants in person

Parties : Goh Nellie — Goh Lian Teck; Goh Lian Chyu; Estate of the late Goh Annie; Goh Molly; Goh Rosaline; Goh Lian Poh; Goh Lian Hing; Goh Shirley; Goh Judy; Goh Boon Hui Roney

Res Judicata – Whether plaintiff's action should be dismissed on grounds of "cause of action estoppel", "issue estoppel" and/or defence of abuse of process – Applicable principles

Succession and Wills – Construction – Plaintiff beneficiary under will seeking to sell property – Defendant beneficiary under will objecting to sale of property – Whether will containing clear indication that each beneficiary having right to veto sale of property – Whether court should exercise discretion to allow sale of property – Section 56(1) Trustees Act (Cap 337, 2005 Rev Ed)

22 November 2006 *Judgment reserved.*

Sundaresh Menon JC:

1 Madam Loh Gek Huay ("Madam Loh") had two properties to her name. One was No. 59 Kovan Road, Singapore 548148 ("No. 59"), on which an apartment building was developed and now stands. The other was No. 61 Kovan Road, Singapore 548189 ("No. 61"), where Madam Loh stayed with her family until her death. A well-intentioned mother, Madam Loh bequeathed these properties variously to her ten children, her grandson and her daughter-in-law. Unfortunately, good intentions are not always reciprocated and following her demise, these properties have become the centre of a bitter dispute among the beneficiaries, in particular, the plaintiff ("Nellie"), the second defendant ("Lian Chyu") and the fifth defendant ("Rosaline").

2 Both properties were the subject of Madam Loh's last will and testament ("the will") and they were bequeathed in the following terms:

> Subject to payment of my just debts, funeral and testamentary expenses including estate duty, I GIVE DEVISE and BEQUEATH my properties to the persons and in the manner following:
>
> (a) My *residential premises* known as No. 61 Kovan Road, Singapore, to the following persons in equal shares:
>
> (1) my daughter GOH ANNIE
>
> (2) my daughter GOH MOLLY
>
> (3) my son GOH LIAN CHYU
>
> (4) my son GOH LIAN HING

(5) my daughter GOH SHIRLEY

(6) my daughter GOH NELLIE

(7) my daughter GOH JUDY

(8) my son GOH LIAN POH

(9) my daughter GOH ROSALIND [*sic*]

(10) my son GOH LIAN TECK

(11) my grandson GOH BOON HUI RONEY

My *above stated residential premises* shall be used as a *residence* by my children abovenamed and *shall not be sold without the consent in writing of the abovenamed 11 beneficiaries* and that until completion of the sale thereof my trustee shall permit my children abovenamed *or any one of them* to occupy the same rent free so long as he or she shall desire.

(b) The *irremovable property* known as No 59 Kovan Road, Singapore 548148, to all the beneficiaries named below as allocated:

(1) my son GOH LIAN HING: #01-02 (Type B)

(2) my daughter GOH ROSALIND: [sic] #01-03 (Type C)

(3) my son GOH LIAN POH: #02-02 (Type D)

(4) my daughter NELLIE GOH: #02-03 (Type C)

(5) my son GOH LIAN CHYU: #03-02 (Type D)

(6) my son GOH LIAN TECK: #03-03 (Type C)

(7) my daughter-in-law, LOW DJAU AI: #01-01, #02-01 and #03-01 (Type A) (This is in appreciation of LOW DJAU AI advancing finance for the development of this project).

(emphasis added; NRIC Nos. redacted)

3 Soon after Madam Loh's death, the quarrels started in relation to the properties she had left behind. The extent of the acrimony is demonstrated in the fact that this is the third action involving Madam Loh's beneficiaries to come before the courts. The first, MC Suit 411 of 2003, concerned a complaint by Rosaline that Lian Chyu and Nellie had unlawfully removed and disposed of some kennels that Rosaline had set up in No. 61 for her pet dogs. The case was eventually settled. The second, OS 618 of 2005 ("OS 618"), is related to the present cause of action. That was an application by Rosaline, *inter alia*, for a determination of her right to reside in No 61. It came before Andrew Phang Boon Leong JC (as he then was), who made the following order on 8 August 2005:

On a true construction of paragraph 2(a) of the Last Will & Testament of Low Gek Huay and in the events that have happened, that the Plaintiff has the beneficial right to occupy the Property [ie No. 61] as a residence rent free as long as the Plaintiff desires (until sale) *and that it shall not*

be sold without the consent (in writing) of the Plaintiff provided that if the Plaintiff so chooses to exercise her right of occupation, she must in fact personally reside in the said Property.

(emphasis added; NRIC No. redacted)

4 In the wake of these disputes, the first defendant ("Lian Teck"), who was originally the administrator of the estate, relinquished his appointment and Nellie took over on 8 August 2005.

The present action

5 The hostility among the main actors in these disputes did not abate. The current action stemmed from a meeting of the beneficiaries that was held on 15 October 2005. The sale of No. 61 was proposed at that meeting. The ostensible reason given was that the sale was necessary in order to raise funds to meet the expenses incurred by the estate.

6 Rosaline objected to the sale. So too did three other beneficiaries: the seventh defendant ("Lian Hing"), the eighth defendant ("Shirley") and the ninth defendant ("Judy"). In these proceedings, each of them filed an affidavit supporting Rosaline's position and opposing Nellie's application.

7 As a result of Rosaline's opposition to the sale of No. 61, Nellie, in her capacity as administratrix, applied to this court for an order pursuant to s 56 of the Trustees Act (Cap 337, 2005 Rev Ed) ("the Act") sanctioning the sale of No. 61. She maintained that this issue was not resolved by the order of Phang JC made in OS 618 and that the terms of the will do not prohibit the sale of No. 61. In her affidavit, Nellie cited two reasons that should move this court to exercise its discretion under s 56(1) of the Act:

(a) that No. 61 is and has been a constant source of conflict between Rosaline and Lian Chyu, who is currently residing in No. 61 with his wife; and

(b) that the sale of No. 61 is necessary in order to raise the funds referred to at [5] above.

8 Further, Nellie also deposed to her belief that her mother had wanted to ensure that all her beneficiaries had a roof over their head. She submitted this was no longer a concern as each of the beneficiaries had their own property and the will should be construed with this in mind.

9 Rosaline, on the other hand, submitted that:

(a) the question, whether the beneficiaries to No. 61 each had a veto over its sale, had already been answered in the affirmative in OS 618 and is therefore *res judicata*;

(b) even if the issue remained open for consideration by this court, there is an express prohibition in the will against the sale of No. 61 unless all the beneficiaries consent in writing. Therefore, this court has no power to sanction the sale under s 56(1) of the Act;

(c) even if the court has the power to sanction a sale under s 56(1) of the Act, the reasons cited by Nellie do not stand up to scrutiny.

The legal issues in this matter

10 The starting point of the analysis in this case is 56(1) of the Act, which reads as follows:

56. —(1) Where in the management or administration of any property vested in trustees, any sale, lease, mortgage, surrender, release, or other disposition, or any purchase, investment, acquisition, expenditure, or other transaction, is in the opinion of the court expedient, *but the same cannot be effected by reason of the absence of any power for that purpose vested in the trustees by the trust instrument*, if any, or by law, the court may —

(a) by order confer upon the trustees, either generally or in any particular instance, the necessary power for the purpose, on such terms, and subject to such provisions and conditions, if any, as the court may think fit; and

(b) direct in what manner any money authorised to be expended, and the costs of any transaction, are to be paid or borne as between capital and income.

(emphasis added)

11 In *Rajabali Jumabhoy and Others v Ameerali R Jumabhoy and Others* [1998] 2 SLR 439 ("*Jumabhoy*") the Court of Appeal held that a court's powers under s 56(1) of the Act (then s 59(1)) in relation to the management and administration of trust property are limited by the express terms of the trust instrument. This is no more than a reflection of the time-honoured principle that it is not for the courts to rewrite a trust instrument save in very limited circumstances where recourse may be had to the court's inherent jurisdiction: see, for example, *In re New* [1901] 2 Ch 534; *Jumabhoy* at [68] – [75]; and *Re Tan Tye, Deceased* [1957] MLJ 114. No argument was raised before me seeking recourse to the court's inherent jurisdiction in the present circumstances and I have therefore confined myself to a consideration of the position under s 56(1) of the Act. As to this, it is clear that while s 56(1) allows a court the discretion to empower a trustee to perform an act that is *not expressly authorised by the instrument*, it cannot empower him to perform an act that is *expressly forbidden by it*. Commenting on s 57 of the UK Trustees Act 1925 (*in pari materia* with our s 56(1)), Evershed MR and Romer LJ stated as follows in *Re Downshire Settled Estates, Re Chapman's Settlement Trusts, Re Blackwell's Settlement Trusts* [1953] Ch 218 at 248:

In our judgment, the object of s 57 was to secure that trust property should be managed as advantageously as possible in the interests of the beneficiaries and, with that object in view, to authorise specific dealings with the property which the court might have felt itself unable to sanction under the inherent jurisdiction, either because no actual 'emergency' had arisen or because of inability to show that the position which called for intervention was one which the creator of the trust could not reasonably have foreseen; *but it was no part of the legislative aim to disturb the rule that the court will not rewrite a trust*, or to add to such exceptions to that rule as had already found their way into the inherent jurisdiction.

(emphasis added)

12 Accepting this proposition, the Court of Appeal in *Jumabhoy*, at [84], stated that the court's powers were not without limit, notwithstanding the wide discretion conferred by s 56(1) of the Act:

We think it is implicit in s 59(1) that that section cannot be invoked to sanction or authorise an act or transaction, where there is an express prohibition against such act or transaction contained in the trust instrument. In this respect, the crucial words in that subsection are 'the same [ie the act or transaction] cannot be effected by reason of the absence of any power for that purpose vested in the trustees by the trust instrument'. In a case, such as the present one, there is no 'absence of any power' in the trust instrument. On the contrary, there is, in this case in the trust instrument, cl 5 which expressly forbids the act or transaction to be carried out, ie to

invest in any securities in Singapore. *In the face of this prohibition, the court cannot sanction or authorise an act or transaction proposed to be carried out, or ratify and approve such act or transaction which has been carried out, which is contrary to the terms of the trust. The intention of the settlor as expressed in the settlement ought to be respected.*

(emphasis added)

13 These observations on the ambit of s 56(1) of the Act were not really controversial before me. Indeed, the principle that the court has a discretion to sanction the performance of an act by a trustee under s 56(1) subject to any express intention evidenced by the trust instrument under consideration was recently affirmed by the Court of Appeal in *Leo Teng Choy v Leo Teng Kit* [2001] 1 SLR 256 ("*Leo Teng Choy*") at [24] which was a case relied on heavily by Mr Andre Maniam who appeared for Lian Chyu.

14 Accordingly, the first task for a court faced with an application for it to exercise its powers under s 56(1) of the Act is to construe the terms of the trust instrument (in this case, paragraph 2(a) of the will), in order to ascertain whether there is an express prohibition of the very act that the trustee wishes, with the court's leave, to perform. It is only in the absence of any such prohibition that the court needs to assess the application on its merits.

15 This, however, runs into a yet prior objection arising out of the litigation that has preceded this action. In particular, Rosaline claims that the issue of whether the will prohibits the sale of No. 61 has already been answered in the affirmative by Phang JC in OS 618 in so far as he ordered that no sale of No. 61 could take place unless Rosaline consented to it in writing (see [3] *supra*). This therefore raises the anterior question as to whether the issue to be decided in this case is foreclosed by the doctrine of *res judicata*.

16 Accordingly, the two preliminary issues that Nellie's case must cross before an assessment can be made of whether the court should exercise its discretion under s 56(1) of the Act are:

(a) whether, the existence or otherwise of a right on the part of the beneficiaries, whether singly or in concert, to veto the sale of No. 61 has already been determined in OS 618 and is therefore *res judicata*; and

(b) if the issue stated in (a) is answered in the negative, whether, properly construed, the will expressly forbids the sale of No. 61 in the event that any one or more of the beneficiaries object to its sale. If so, the court has no power under s 56(1) of the Act to order its sale.

It was decided with the consent of the parties that I should first give my decision on these two issues and this I now do.

Whether the application made in this action is estopped

The doctrine of res judicata

17 The umbrella doctrine of *res judicata* encompasses three conceptually distinct though interrelated principles. The first of these is known as "cause of action estoppel" and it was famously explicated in the judgment of Diplock LJ (as he then was) in *Thoday v Thoday* [1964] P 181 ("*Thoday*") as follow at 197-198:

[C]ause of action estoppel…prevents a party from asserting or denying as against the other

party, the existence of a particular cause of action, the non-existence or existence of which has been determined by a court of competent jurisdiction in previous litigation between the same parties. If the cause of action was determined to exist, i.e. judgment was given upon it, it is said to be merged in the judgment... If it was determined not to exist, the unsuccessful plaintiff can no longer assert that it does; he is estopped per rem judicatam.

18 If the previous decision does not determine the cause of action sued on in the later proceedings, that decision may still be invoked as having determined, as an essential step in its reasoning, an issue that proves relevant in the later case and further consideration of that issue may be foreclosed: Spencer Bower, Turner and Handley eds., *The Doctrine of Res Judicata* (London: Butterworths, 1996) ("*The Doctrine of Res Judicata*") at para 182. This is commonly known as "issue estoppel" and was also explained by Diplock LJ in *Thoday* at 198 as follows:

> [I]ssue estoppel is an extension of the same rule of public policy. There are many cases of action which can only be established by proving that two or more different conditions are fulfilled. Such causes of action involve as many separate issues between the parties as there are many conditions to be fulfilled by the plaintiff in order to establish his cause of action; and there may be cases where the fulfilment of an identical condition is a requirement common to two or more different causes of action. If in litigation upon one such cause of action any of such separate issues as to whether a particular condition has been fulfilled is determined by a court of competent jurisdiction, either upon evidence or upon admission by a party to the litigation, neither party can, in subsequent litigation between one another upon any cause of action which depends upon the fulfilment of the identical condition, assert that the condition was fulfilled if the court has in the first litigation determined that it was not, or deny that it was fulfilled if the court in the first litigation determined that it was.

19 In some cases, where neither cause of action estoppel nor issue estoppel is available, a defendant may rely on what the authors of *The Doctrine of Res Judicata* term as "the extended doctrine of res judicata" or, as it is more popularly known, the defence of abuse of process. It has been questioned whether abuse of process in this context is a principle that is truly distinct from cause of action and issue estoppels (see per Lord Denning MR in *McIlkenny v Chief Constable of the West Midlands* [1980] 1 QB 283 at 322) ("*McIlkenny*"). Lord Denning was undoubtedly correct that some of the cases that were said to have been applying the doctrine of abuse of process in fact could have been decided on traditional *res judicata* principles. On the other hand, there are other cases which clearly fall outside the traditional reach of cause of action and issue estoppels but which have nonetheless been barred from proceeding and these rest on the doctrine of abuse of process. The doctrine has clearly been recognised as a part of the law in England (see *Johnson v Gore Wood & Co (a firm)* [2002] 2 AC 1) ("*Johnson*"). It has also been accepted in Singapore (see the decision of the Court of Appeal in *Lee Hiok Tng (in his personal capacity) v Lee Hiok Tng & Anor (executors and trustees of the estate of Lee Wee Nam, deceased)* [2001] 2 SLR 41 ("*Lee Hiok Tng*") as well as the decision of the same court in *Lai Swee Lin Linda v AG* [2006] 2 SLR 565 which at [62] followed *Johnson*.

20 The distinct features of the doctrine of abuse of process are well illustrated in the decision of the House of Lords in *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 ("*Hunter*") on appeal from the decision of the Court of Appeal *sub nom McIlkenny* at [19] above. The appellant in that case was one of the accused in the notorious "Birmingham Six" criminal trial. The appellant and his other co-accused alleged that their confessions had been induced by police violence. The trial judge ruled that their confessions were voluntary and they were accordingly convicted. The appellant then brought a civil claim against the police for damages for assault based on the alleged violence inflicted in the course of extracting his confession. The House of Lords unanimously held that the

claim should be struck out as an abuse of process because it was in fact an attempt to relitigate an issue that had already been decided. It was in essence a collateral attack mounted by means of a civil action, against the decision of the criminal court on the same point. Lord Diplock (who delivered the leading judgment in which the other Law Lords concurred) noted as follows at 541:

> The abuse of process which the instant case exemplifies is the initiation of proceedings in a court of justice for the purpose of mounting a collateral attack upon a final decision against the intending plaintiff which has been made by another court of competent jurisdiction in previous proceedings in which the intending plaintiff had a full opportunity of contesting the decision in the court by which it was made.

21 Lord Diplock at 542 also cited favourably the following dictum of Lord Halsbury LC in *Reichel v Magrath* (1889) 14 App. Cas. 665 at 668:

> I think it would be a scandal to the administration of justice if the same question having been disposed of by one case, the litigant were to be permitted by changing the form of the proceedings to set up the same case again.

22 The House of Lords relied on the abuse of process defence rather than cause of action estoppel or issue estoppel because the parties involved in the civil proceedings were different from those in the criminal proceedings. While Lord Denning MR and Sir George Baker in the court below were prepared to hold that the fact that the parties were formally different did not and should not prevent the application of the doctrine of issue estoppel (see *McIlkenny* [19] above at 319 and 346 respectively), Lord Diplock thought it best, in order to avoid confusion and to maintain the distinction between issue estoppel and abuse of process, that issue estoppel should be restricted to that species of estoppel *per rem judicatam* that may arise in civil actions between the same parties or their privies: *Hunter* at 540 - 541.

23 The distinction between *res judicata* (cause of action estoppel and issue estoppel) on the one hand and abuse of process on the other was further explained in *Bradford & Bingley Building Society v Seddon* [1999] 1 WLR 1482, where Auld LJ said at 1490:

> In my judgment, it is important to distinguish clearly between *res judicata* and abuse of process not qualifying as *res judicata* … The former, in its cause of action estoppel form, is an absolute bar to relitigation, and in its issue estoppel form also, save in "special cases" or "special circumstances" … The latter, which may arise where there is no cause of action or issue estoppel, is not subject to the same test, the task of the court being to draw the balance between the competing claims of one party to put his case before the court and of the other not to be unjustly hounded given the earlier history of the matter.

24 This *dicta* was cited and the distinction accepted by Belinda Ang Saw Ean J in *Kwa Ban Cheong v Kuah Boon Sek and Others* [2003] 3 SLR 644 ("*Kwa Ban Cheong*") at [24], and I agree that it accurately identifies the distinction between *res judicata* and abuse of process.

25 In the present case, Rosaline relies only on the defences of issue estoppel and abuse of process.

Issue estoppel

26 In *Lee Tat Development Pte Ltd v Management Corporation of Grange Heights Strata Title No 301 (No 2)* [2005] 3 SLR 157 ("*Lee Tat*") the Court of Appeal at [14] to [15] held that the

following requirements had to be met to establish an issue estoppel:

(a) there must be a final and conclusive judgment on the merits;

(b) that judgment must be of a court of competent jurisdiction;

(c) there must be identity between the parties to the two actions that are being compared; and

(d) there must be an identity of subject matter in the two proceedings.

27 I turn to examine whether these criteria are satisfied in this case.

28 The first issue is whether the prior decision is a final and conclusive judgment on its merits. It is important not to equate finality for the purposes of *res judicata* with the vexed issue of finality for the purposes of an appeal. The distinction between "final" and "interlocutory" decisions is not relevant to the doctrine of finality in respect of *res judicata*: *McIlkenny* at 321 (per Lord Denning MR). Finality for the purposes of *res judicata* simply refers to a declaration or determination of a party's liability and/or his rights or obligations leaving nothing else to be judicially determined: *The Doctrine of Res Judicata* at para 154. Whether the decision in question is a final and conclusive judgment on the merits may be ascertained from the intention of the judge as gathered from the relevant documents filed, the order made and the notes of any evidence taken or arguments made. Andrew Ang J recently noted as follows in *Alliance Entertainment Singapore Pte Ltd v Sim Kay Teck* [2006] 3 SLR 712 at [23]:

> That, in this respect, the intention of the judge is critical can also be seen in *Hendrawan Setiadi v OCBC Securities Pte Ltd* [2001] 4 SLR 503. In that case, Woo Bih Li JC (as he then was) had to decide whether the plaintiff was estopped from bringing a second action against the defendants by reason of an earlier action between the same parties having been struck out after counsel for the plaintiff unsuccessfully sought leave to discontinue. The plaintiff argued that as his claim in the first action had not been dismissed he was not precluded from re-litigating it. Woo JC went through the trial judge's notes of the proceedings in chambers on the plaintiff's application for leave to discontinue and concluded that, in refusing the plaintiff's application and ordering a striking out of the action, the trial judge had intended to preclude any fresh action.

29 In the present case, there can be no doubt that the order made in OS 618 was a final determination of the right of Rosaline to reside at No 61. There was nothing that remained to be decided in relation to this. Counsel for Nellie submitted, however, that OS 618 was a consent order and he contended that consent orders are incapable of forming the basis upon which an issue estoppel could arise. In my judgment, this is misconceived. Leaving aside the question whether OS 618 was a consent order to begin with, this would not prevent it forming the basis of an issue estoppel so long as the order was final: see, *The Doctrine of Res Judicata* at para 38, citing *Kinch v Walcott* [1929] AC 482.

30 Counsel for Lian Chyu advanced a slightly different argument. He accepted that a consent judgment could found an estoppel, but he argued that this emanated from the agreement of the parties. He referred to the decision of Andrew Phang Boon Leong J (as he then was) in *Wellmix Organics (International) Pte Ltd v Lau Yu Man* [2006] 2 SLR 117 ("*Wellmix Organics*") in support of the notion that a consent order rested on the fact of agreement so that once the consent order was vitiated as an agreement it could not be relied upon. With respect, this too is misconceived. As counsel accepted, *Wellmix Organics* was not concerned with issue estoppel. Rather, it was

concerned with the breach of an "unless order". There was an issue as to whether it was an order made by consent. Phang J found on the facts it was not. That did not displace the fact that it was still an "unless order". Phang J then considered whether the breach of the "unless order" was contumelious or contumacious and found it was not and he allowed the appeal on that ground (see *Wellmix Organics* at [106], [107] and [110]).

31 The second requirement, that the prior decision must have been made by a court of competent jurisdiction, is obviously satisfied. Neither party sought to argue otherwise.

32 The third requirement is identity between the parties involved in the previous litigation and in the present proceedings. The courts have not taken a narrow view of what this means. In *Lee Tat*, for example, even though the appellant had brought the earlier action as owner of two *dominant* tenements and the later proceedings as owner of a *servient* tenement, this change in status did not prevent the Court of Appeal from holding that the "effective parties" were the same for the purpose of satisfying this requirement: at [14] and [16]. In *Hunter*, Lord Diplock also stated that issue estoppel may arise in civil actions between "the same parties *or their privies*": at 541 (emphasis added).

33 In OS 618, Rosaline brought her action against Lian Teck (in his capacity as administrator of the estate), Lian Chyu and Nellie. In this respect, it was eventually conceded – and rightfully so – by counsel for Lian Chyu that the order in OS 618, made against Lian Teck *in his capacity as administrator of the estate* must necessarily bind all the beneficiaries jointly and severally and, for that matter, anyone stepping into the shoes of the administrator. In the current application, Nellie was acting *in her capacity as administratrix of the estate* and Rosaline as the principal beneficiary opposing the application. In my judgment, it is clear that the principal players in both actions – Rosaline and the administrator of the estate (representing the beneficiaries) – are effectively identical. As such, this requirement also is met.

34 The main difficulty in deciding whether issue estoppel arises on the facts of this case lies in determining whether the issues litigated in OS 618 and the issues presented in this application are identical. The requirement that the subject matter of both proceedings be identical encapsulates a number of discrete conceptual strands. Firstly, the issues must be identical in the sense that the prior decision must traverse the same ground as the subsequent proceeding and the facts and circumstances giving rise to the earlier decision must not have changed or should be incapable of change. Where this is not the case, issue estoppel may not arise. Thus, in *Richards v Richards* [1953] P 36, the court allowed a wife to bring a second action against her husband alleging cruelty and traversing some of the ground already covered in an earlier action which also alleged cruelty but had failed. This was because "the conduct which is alleged … to amount to persistent cruelty can only be judged in the light of the whole course of conduct, and the mere fact that at an earlier stage, when the conduct was only partly completed, a court has adjudged that at that point it does not amount to persistent cruelty, does not shut that evidence out forever": see at 40 citing *Molesworth v Molesworth* [1947] 2 All ER 842. Similarly, in *Mills v Cooper* [1967] 2 QB 459, it was held that because the question of whether someone was a gipsy could change depending on his circumstances, an earlier decision that the defendant was not a gipsy did not bar subsequent proceedings contending that he was.

35 The second idea which is contained within the requirement of an identity of subject-matter is that the previous determination in question must have been fundamental and not merely collateral to the previous decision so that the decision could not stand without that determination: see *The Doctrine of Res Judicata* at para 201. The authors of *The Doctrine of Res Judicata* trace the authorities for this principle back to the decision of Lord Holt in *Blackham's Case* (1709) 1 Salk 290,

but a more recent statement may be found in *Blair v Curran* (1939) 62 CLR 464, in which Starke J held at 510:

> [A] judgment concludes not merely the point decided but matters which were necessary to decide and which were actually decided as the groundwork of the decision itself though not then directly the point at issue and that a judgment is conclusive evidence not merely of the facts directly decided but of those facts which are necessary steps to the decision – *so cardinal to it that without them it cannot stand*.
>
> (emphasis added)

36 In the same case, Dixon J said as follows at 532:

> In the phraseology of Lord Shaw [in *Hoystead v Commissioner of Taxation* [1926] AC 155], "a fact fundamental to the decision arrived at" in the former proceedings…must be taken as finally and conclusively established…[M]atters of law or fact which are subsidiary or collateral are not covered by the estoppel…*Decisions upon matters of law which amount to no more than steps in a process of reasoning tending to establish or support the proposition upon which the rights depend do not estop the parties if the same matters of law arise in subsequent litigation*.
>
> (emphasis added)

37 The distinction between those issues that are "no more than steps in a process of reasoning" and those which are "so cardinal" that the decision "cannot stand without them" is not an easy one. The authors of *The Doctrine of Res Judicata*, at para 202, propose that one test is whether the issue in question may be appealed. If there can be no effective appeal against that determination, then the issue is not fundamental to the judgment. However, as even they concede, this test may not always be useful because many determinations which may be necessary to the decision for purposes of *res judicata* may not be susceptible to challenge by appeal. In my judgment, the assessment of which side of the line an issue falls should be approached from a commonsensical perspective, balancing between the important public interest in securing finality and in ensuring that the same issues are not repeatedly litigated on one hand, and on the other, the private interest in not foreclosing a litigant from arguing an issue which, in substance, was not the central issue decided by a previous court. In this regard, I find Lord Upjohn's dictum in *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)* [1967] 1 AC 853 ("*Carl Zeiss*") at 947 apposite:

> All estoppels are not odious but must be applied so as to work justice, and not injustice and I think the principle of issue estoppel must be applied to the circumstances of the subsequent case with this overriding consideration in mind.

38 It might be thought that a third idea that is encompassed within the requirement of an identity of issues is that the issue in question should be shown in fact to have been raised and argued. At one level, this is no more than a logical corollary of the first two ideas I have referred to and indeed of the primary basis on which *res judicata* operates. This was described in the following terms by Lord Maugham LC in the House of Lords decision in *New Brunswick Rly Co v British and French Trust Corpn Ltd* [1939] AC 1 ("*New Brunswick Rly Co*"), at 19-20:

> [T]he doctrine of estoppel (per rem judicatam) is one founded on considerations of justice and good sense. *If an issue has been distinctly raised and decided in an action, in which the parties are represented*, it is unjust and unreasonable to permit the same issue to be litigated afresh between the same parties or persons claiming under them.

(emphasis added)

39 Plainly if an issue has in fact been raised and decided in one set of proceedings, then on the face of it, it would not be permissible to relitigate the same issue as between the same parties in a subsequent action. But, where the issue in question has not in fact been argued or submitted upon, it is less obvious that the policy goals underlying the doctrine of *res judicata* – the interest in the finality and conclusiveness of judicial decisions as well as the right of individuals to be protected from vexatious multiplication of suits and prosecutions (see *The Doctrine of Res Judicata* at para 10) – are necessarily attracted. This indeed is the context in which the dictum of Lord Maugham above should be construed because that was a case where a judgment in default of appearance had been entered against the appellants in an earlier action and the question raised related to the effect of such a judgment in the later action. In that context, Lord Maugham thought that in the case of a judgment in default of appearance the estoppel should be confined to defences which were "necessarily, and with complete precision, decided by the previous judgment; in other words, by *res judicata* in the accurate sense" (see *New Brunswick Rly Co* at 21). In my judgment, this is authority for the proposition that in cases where there has been no actual investigation of a point, issue estoppel in the strict sense would only apply to those aspects of the earlier decision that were directly and precisely to be decided by it. However, this cannot be taken too far. Thus, where a litigant raises a point but either concedes or fails to argue it, issue estoppel may still arise in respect of the point conceded or not argued: *Khan v Golechha International Ltd* [1980] 1 WLR 1482; *SCF Finance Co Ltd v Masri (No 3)* [1987] QB 1028; *Linprint v Hexham Textiles* (1991) 23 NSWLR 508 ("*Linprint*"); *Hendrawan Setiadi v OCBC Securities Pte Ltd and Others* [2001] 4 SLR 503 ("*Hendrawan Setiadi*").

40 Furthermore, in my judgment the question whether subsequent litigation is in fact foreclosed in the circumstances, would depend also on the applicability of the defence of abuse of process. In *Hendrawan Setiadi*, Woo Bih Li JC (as he then was) cited at [61] the following *dictum* of Kirby P in the decision of the Court of Appeal of New South Wales in *Linprint* at 521 and went on to hold at [66] that an issue estoppel could arise even where there had been no decision on the merits:

> Issue estoppel: a wider principle:
>
> If, contrary to the foregoing conclusions, a proper interpretation of the proceedings in the County Court of Victoria is that there was no judicial adjudication of the matters involved in the counter-claim by virtue of the withdrawal of the respondent, and therefore that *res judicata* does not apply, the same result nonetheless follows from the application of the law of issue estoppel. The issues which the respondent now wishes to litigate in the Supreme Court of this State were either (a) necessarily inherent in the issues raised by the counter-claim and defence in the County Court of Victoria or (b) so intimately connected with those issues that the Court would require that the party to the litigation should have pleaded them in such a way as to have them resolved in the Victorian proceedings. It would have been unreasonable not to have pleaded them in those proceedings and, to the extent that they were not pleaded, they should not now be allowed to be pleaded again.

41 In my judgment, the relevant principle is that where the issue has in fact been directly covered by the earlier decision, it will be caught either by cause of action estoppel or issue estoppel. As one moves further away from what was directly covered by the earlier decision, then the relevant doctrine becomes the defence of abuse of process rather than issue estoppel. Thus where the issue ought to have been raised and was not, it might nonetheless amount to an abuse of process subsequently to litigate that same issue: see *Henderson v Henderson* [1843-60] All ER Rep 378 ("*Henderson*") which was followed in *Hendrawan Setiadi*. Whether it does or does not in any given case will depend on a wider analysis which I deal with at [51] to [56] below. In my judgment, the

following dictum of Lord Shaw in the decision of the Privy Council in *Hoystead v Commissioner of Taxation* [1926] AC 155 at 170 is to be seen in that light:

> It is seen from this citation of authority that if in any Court of competent jurisdiction a decision is reached, a party is estopped from questioning it in a new legal proceeding. But the principle also extends to any point, whether of assumption or admission, which was in substance the ratio of and fundamental to the decision. The rule on this subject was set forth in the leading case of *Henderson v Henderson* by Wigram Vc.

42 In fact, it may be noted that *Henderson* is widely regarded as the root of the defence of abuse of process. Similarly, I consider that the following statement of Lord Wilberforce in *Carl Zeiss* ([37] *supra*) at 965 can be reconciled with the statement of the relevant principle as I have set it out at [41] above:

> Mr Spencer Bower, in his work on *Res Judicata* states the principle as being "that the judicial decision *was, or involved,* a determination of the same question as that sought to be controverted in the litigation in which the estoppel is raised" (*Res Judicata*, p. 9) – a formulation which invites the inquiry how what is "involved" in a decision is to be ascertained. One way of answering this is to say that any determination is involved in a decision if it is a "necessary step" to the decision or a "matter which it was necessary to decide, and which was actually decided, as the groundwork of the decision" (*Reg. V Inhabitants of Hartington Middle Quarter Township* [FN312]) and from this it follows that it is permissible to look not merely at the record of the judgment relied on, but at the reasons for it, the pleadings, the evidence (*Brunsden v Humphrey* [FN313] and if necessary other material to show what was the issue decided (*Flitters v Allfrey* [FN314]). The fact that the pleadings and the evidence may be referred to, suggests that the task of the court in the subsequent proceeding must include that of satisfying itself that the party against whom the estoppel is set up did actually raise the critical issue, or possibly, though I do not think that this point has yet been decided, that he had a fair opportunity, or that he ought, to have raised it.

43 Finally, the fact that the issues decided in both the earlier and the later actions may be identical may not always bar the second round of litigation. The cases recognise that in special circumstances, it may be unjust to enforce the strict letter of the doctrine. The leading authority for this is the decision of the House of Lords in *Arnold v National Westminster Bank plc* [1991] 2 AC 93 ("*Arnold*"), where Lord Keith (with whom the other Law Lords concurred) held that issue estoppel at least was not absolute at 108 - 109:

> But there is room for the view that the underlying principles upon which estoppel is based, public policy and justice, have greater force in cause of action estoppel, the subject matter of the two proceedings being identical, than they do in issue estoppel, where the subject matter is different. Once it is accepted that different considerations apply to issue estoppel, it is hard to perceive any logical distinction between a point which was previously raised and decided and one which might have been but was not. Given that the further material which would have put an entirely different complexion on the point was at the earlier stage unknown to the party and could not by reasonable diligence have been discovered by him, it is hard to see why there should be a different result according to whether he decided not to take the point, thinking it hopeless, or argue it faintly without any real hope of success. In my opinion your Lordships should affirm it to be the law that there may be an exception to issue estoppel in the special circumstance that there has become available to a party further material relevant to the correct determination of a point involved in the earlier proceedings, whether or not that point was specifically raised and decided, being material which could not by reasonable diligence have been adduced in those

proceedings. One of the purposes of estoppel being to work justice between the parties, it is open to courts to recognise that in special circumstances inflexible application of it may have the opposite result.

44 While Lord Keith's dicta is capable of a broad and expansive reading, it should be noted that the decisive factor in *Arnold* was the fact that there was an absence of an effective right of appeal from what the House of Lords thought was an erroneous decision by the court of first instance in the earlier litigation: see *Arnold* at 110-111.

45 I turn to the case at hand in the light of the foregoing principles. The arguments relating to whether the issue decided in OS 618 and that raised in the present application are identical may be summarised as follows. Nellie claims that the central question raised in OS 618 was not the right of each beneficiary to veto the sale of No. 61 ("the sale issue") but the right of each beneficiary (particularly, Rosaline) to reside at No. 61 *until sale* ("the residence issue"). Therefore, it is suggested that any aspect of the decision of Phang JC, which purports to decide what the will says in respect of the sale issue must be merely ancillary and not fundamental to the ultimate issue that was raised and decided (*viz*., the residence issue). In addition, Nellie's submission is that Phang JC did not decide – and could not have decided – the sale issue because the question was not even raised to begin with. Any mention of the sale issue in the terms of the order that was made (see the italicised words at [3] above) simply recites, without deciding, the prayer for relief. Therefore, Nellie argues that the issue raised in this application is not foreclosed by the order made in OS 618.

46 On the other hand, Rosaline's position is that the issues in OS 618 and in the present application are identical. It is submitted on her behalf that in deciding whether Rosaline had a right to reside at No. 61, Phang JC would have had to consider the testamentary intentions of Madam Loh, and given that the issue presented in this application must also be decided in the light of Madam Loh's testamentary intentions, the issues in the two sets of proceedings are similar, if not identical. Moreover, it is argued, a plain reading of the order made in OS 618 shows that Phang JC did decide on the proper construction of paragraph 2(a) of the will, which is the precise provision that is also now in issue.

47 In my judgment, the mere fact that the order made by Phang JC appears to suggest that it extended to the sale issue is not decisive: see the decision of the House of Lords in *Juan José de la Trinidad Concha v Manuel Antonio Concha* (1886) 11 HL 541 where it was held that a decree expressing a finding as to domicile did not foreclose a subsequent determination of this issue because that finding was unnecessary to the decree.

48 In the final analysis, the question whether OS 618 in fact decided the sale issue, and therefore renders it *res judicata*, depends on a variety of considerations. It is certainly true, as Rosaline contends, that in order for Phang JC to have decided OS 618, it would have been necessary to ascertain Madam Loh's intentions. Thus, in so far as the residence issue was decided on the basis that Rosaline (as well as any of the relevant beneficiaries for that matter) has the right to reside rent free at No. 61 for as long as she likes, it might be argued that this carries with it, implicitly, a decision that Rosaline has the right to veto a sale since otherwise the right of residence might be stripped of effect.

49 In my judgment, while that may yet be true on a proper construction of the will, there is nothing to suggest it was so presented to or contemplated by Phang JC. The matter must be seen from the perspective of the hearing before Phang JC. In that context, it is clear that Rosaline's position before me conflates what could, in substance, be two quite different and separate issues. There is nothing inherent in a right of residence that requires that it must necessarily extend to a

right to veto the sale of the residence. One could have a right of residence *until sale* which could, conceivably, co-exist with a right to sell that residence at which point the right of residence would end. This becomes critical in the context of considering just what it was that Phang JC decided. If the only issue before him was as to Rosaline's right to reside at No. 61 there being no contemplation at all at that time that the property might be sold, then the possibility of a dichotomy between the right of residence and the right to veto the sale becomes relevant. In short, the fact that the beneficiaries have a right to reside at No. 61 tells one nothing necessarily about the right, if any, of the beneficiaries to veto the sale of No. 61. In the language of Starke J in *Blair v Curran* at [35] above, any determination on the sale issue cannot be said to have been so cardinal to the residence issue that without the former, the latter cannot stand.

50 In this light, it becomes a point of fundamental importance that that there was no argument before Phang JC as to the construction of the will in relation to the sale issue. In that sense, I do not consider that the issue is covered by the decision of Phang JC and it cannot then be said that the issue before me traversed the same ground as was canvassed before Phang JC. The public interest in deterring or avoiding re-litigation of similar or identical issues between the same parties is therefore not undercut. Accordingly in my judgment, there is no identity of subject matter and therefore no issue estoppel in relation to the sale issue arises out of Phang JC's order in OS 618.

Abuse of process

51 I turn to consider briefly the applicability of the abuse of process doctrine. In *Henderson* ([41] *supra*), it was noted by Wigram VC as follows at [381 – 382]:

> Where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. *The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at that time*.
>
> (emphasis added)

52 This is often regarded as the root of the doctrine of abuse of process but it has since been restated. In *Hunter* ([20] *supra*), the failure to bring forward matters which "belonged to the subject of litigation" in the previous court was not seen as the only basis on which an argument of abuse of process could be grounded. Abuse of process was found in the fact that the later proceedings were considered in substance merely to be a collateral attack on the previous decision. The modern restatement of the doctrine is to be found in the decision of the House of Lords in *Johnson* ([19] *supra*), where the respondent argued that the appellant ought not be allowed to bring a claim (for negligence and breach of duty) in his own name and for his own benefit; and that any such claim ought to have been brought in an earlier action by one of the appellant's businesses against the respondent. To allow the appellant's case to proceed, the respondent submitted, would amount to an abuse of process because the appellant was mounting a collateral attack on the outcome of the earlier proceedings, which had been settled by the respondent without admission of liability. The House held in favour of the appellant, and in so doing, recast the law on abuse of process. The following dictum of Lord Bingham of Cornhill at 31 is instructive:

But *Henderson v Henderson* abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. *The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not.* Thus while I would accept that lack of funds would not ordinarily excuse a failure to raise in earlier proceedings an issue which could and should have been raised then, I would not regard it as necessarily irrelevant, particularly if it appears that the lack of funds has been caused by the party against whom it is sought to claim. *While the result may often be the same, it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances.* Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice.

(emphasis added)

53 This has been followed in our jurisprudence by Belinda Ang Saw Ean J in *Kwa Ban Cheong* ([24] *supra*) at [25] to [33] as well as by the Court of Appeal in *Lai Swee Lin Linda v AG* ([19] *supra*). To put it shortly, a court should determine whether there is an abuse of process by looking at all the circumstances of the case, including whether the later proceedings in substance is nothing more than a collateral attack upon the previous decision; whether there is fresh evidence that might warrant re-litigation; whether there are *bona fide* reasons why an issue that ought to have been raised in the earlier action was not; and whether there are some other special circumstances that might justify allowing the case to proceed. The absence or existence of these enumerated factors (which are not intended to be exhaustive) is not decisive. In determining whether the ambient circumstances of the case give rise to an abuse of process, the court should not adopt an inflexible or unyielding attitude but should remain guided by the balance to be found in the tension between the demands of ensuring that a litigant who has a genuine claim is allowed to press his case in court and recognising that there is a point beyond which repeated litigation would be unduly oppressive to the defendant. In the context of cases such as the present, the inquiry is directed not at the theoretical possibility that the issue raised in the later proceedings could conceivably have been taken in the earlier, but rather at whether having regard to the substance and reality of the earlier action, it reasonably ought to have been. In my judgment, the answer to that in the present case is plainly no.

54 Rosaline’s argument in the present application is that even if it is found that the sale issue

was not decided by Phang JC in OS 618, and therefore issue estoppel does not strictly arise, the doctrine of abuse of process applies. But it is not clear on what basis that can be correct on the facts of this case. To begin with, any argument that the present application is in reality a collateral attack on Phang JC's order in OS 618 would be without merit. As I have stated at [47 - 50] above, the sale issue and the residence issue are conceptually two separate and distinct points and were not seen in any other way by Phang JC.

55 In my judgment, it would be equally implausible (and for the same reasons) to maintain that the sale issue was properly within the "subject of litigation" of OS 618 and ought to have been brought forward earlier. It is useful here to refer to the case of *Lee Hiok Tng* ([19] *supra*). In that case, an earlier action had been brought to decide, *inter alia*, to whom certain lots of shares belonged. In a subsequent action brought by the appellant in relation to one lot of the shares in order to determine whether it had been given to him as a gift, one of the questions that the Court of Appeal had to decide was whether the appellant was precluded from bringing the action because his claim ought to have been raised earlier as it fell within the "subject of litigation" of the earlier action. The court held that there was no abuse of process in the appellant instituting the second cause of action because the question as to whether that one lot of shares were transferred to him as a gift could only be decided after it had been determined to whom the shares belonged in the first place. Indeed, the court stated that to have raised the gift question earlier would not have facilitated the orderly disposal of the earlier action and would in fact, have been premature. In my judgment, although the facts are different, the principle is the same. Where there are two distinct issues, it does not necessarily follow that both should be required to have been raised in the same proceedings. This is all the more so in the present case given that the only live issue before Phang JC was the residence issue. It was therefore not at all unreasonable for Nellie or the other defendants in OS 618 not to have addressed the sale issue before Phang JC.

56 Accordingly, in my judgment, the bringing of the present application does not amount to an abuse of process notwithstanding the order made in OS 618. Nellie is therefore not precluded from pursuing this matter.

The Construction of the Will

57 It remains for me to consider whether there is an express prohibition against the sale of No. 61 so as to exclude the exercise of any discretion on my part under to s 56(1) of the Act.

General principles of construction

58 The principles governing the proper construction of a will are many: see generally, *C H Sherrin* et al eds, *Williams on Wills* (London: Butterworths, 8 ed, 2002) ("*Williams*") at chapter 50; Clive V Margrave-Jones ed., *Mellows: The Law of Succession* (London: Butterworths, 5th ed, 1993) ("*Mellows*") at chapter 10. For the purposes of the present application, the following principles may be noted.

59 First, the overriding aim of any court construing a will is to seek and give effect to the testamentary intention as expressed in the words employed by the testator: see *Williams* at para 50.1. The court's function is not to rewrite the will or to seek to "improve upon or perfect testamentary dispositions": *Re Bailey* [1951] Ch 407 at 421.

60 Second, the general rule for ascertaining the meaning of the words used is to read the will as a whole without regard to particular canons of construction. The following passage from *Williams* at paragraph 50.2 (omitting citations) provides a concise summary:

General rule for ascertaining the meaning of words. For the purpose of ascertaining the intention, the will is read in the first place without reference or regard to the consequences of any rule of law or canon of construction. Words are given the meaning which is rendered necessary by the context of the whole will, the particular passage being taken together with whatever is relevant in the rest of the will to explain it. Where the court finds on the face of the will a clear, general or paramount intention to which effect can be given, and a particular or subordinate intention to which, by reason of some rule of law, the court cannot wholly or partially give effect, or which is inconsistent with or does not carry out all the intentions which the testator has or is presumed to have, then the particular intention must be rejected or modified, and the general intention of the testator carried into effect …

The will itself is taken as the dictionary from which the meaning of the words is ascertained, however inaccurate such meaning would be in ordinary or legal use. The only qualification on the application of this general principle is that a clear context is required in order to exclude the usual meaning of a word.

61 Third, because a court is to construe the will as a whole and is not to adopt a clause-bound view of each part of the will (see *Mellows* at para 10.13; *Leo Teng Choy* at [25 - 26]), a court should pay particular attention to two things. One is the overall architecture of the will, meaning the structural placement of certain words and phrases. If certain clauses are found in one area of the will but not another, this cannot readily be dismissed as being without significance, unless the context indicates otherwise. The second point is that the intratextual use of words, phrases and language is often important. A court should compare and contrast identical words used in different parts of the will so as to elucidate the most complete meaning or intention that should be ascribed to the words used.

62 Finally, there is a presumption that effect should be given to every word: *Re Sanford, Sanford v Sanford* [1901] 1 Ch 939. A court should not disregard parts of the will as long as some meaning can be ascribed to it and that meaning is not contrary to some intention plainly expressed in other parts of the will: *Williams* at para 50.15. A testator, in other words, does not will in vain.

Application of principles to the facts

63 In submitting that paragraph 2(a) of the will (see [2] above) does not expressly prohibit the sale of No. 61 without the consent in writing of all the beneficiaries, Nellie makes the following arguments:

(a) If the will was construed to allow each beneficiary a veto, it would mean that No. 59 may or would have to be sold even if that did not make commercial sense;

(b) Even if No. 59 was sold, there would have to be some necessary adjustment in relation to the payment of debts and expenses so that they are not taken solely from the shares of the beneficiaries to No. 59. This arises from the reference in the opening words of paragraph 2 of the will to such debts and expenses being paid. It is argued on this basis, that it might entail the possibility of the beneficiaries to No. 59 paying for such expenses and debts without being able to realise their shares in No. 61;

(c) The sale of No. 59 might not be sufficient to meet the expenses of the estate; and

(d) the beneficiaries to No. 59 and No. 61 are not all the same. In particular, Madam Loh's daughter-in-law ("Djau Ai") is entitled to three units in No. 59 but has no share in No. 61. If

No. 61 was subject to a veto, Djau Ai would be put in a better position than some of Madam Loh's sons and daughters who may not be able to realise their asset in No. 61, whereas Djau Ai would be able to sell No. 59 with considerably less difficulty.

64 These arguments are not unreasonable and perhaps if they had been put before Madam Loh, she might have structured her will differently. But this court is not empowered to re-write the will of the testatrix even if it considered the intended dispositions unwise or ill-advised. Subject to law, it is the right of the testator alone to determine the destiny of his property on his death: *Mellows* at para 10.11. To that extent, Nellie's contentions are ultimately unpersuasive: the conclusion that is urged on her behalf rests upon a premise that has been assumed, namely that Madam Loh did not intend to draw a distinction between the two properties. For the reasons that follow, I am of the view that Madam Loh did intend – and clearly did express – that No. 61 was to be dealt with differently from No. 59.

65 The first indication that Madam Loh did not intend the same rules to apply in respect of No. 59 and No. 61 is the paragraph found after the beneficiaries named in paragraph 2(a) of the will and which was appended only in relation to No. 61. It states:

> My *above stated residential premises* shall be used as a *residence* by my children abovenamed and *shall not be sold without the consent in writing of the abovenamed 11 beneficiaries* and that until completion of the sale thereof my trustee shall permit my children abovenamed *or any one of them* to occupy the same rent free so long as he or she shall desire. (emphasis added)

66 If Madam Loh had desired that both properties be devised in the same manner, one would have expected the same clause to be appended in relation to both properties or to neither. Therefore, the very structure of the will suggests that a distinction is to be drawn between No. 59 and No. 61. As I said to Mr Maniam in argument, the testatrix appeared to have had some definite reasons for including this paragraph in relation to one of the properties but not to the other, and it seemed to me wrong to construe the will so as to give no effect at all to this paragraph. Yet this would be the effect of accepting the construction of the will that was urged upon me on Nellie's behalf.

67 The second indication lies in the attention given to the language used in describing the two properties which suggests a difference in Madam Loh's attitudes towards them. In respect of No. 61, Madam Loh employed the phrase "my residential premises". In referring to No. 59, she called it "the irremovable property". One inference from this is that Madam Loh regarded the two properties as possessing distinct purposes and, as a corollary, willed them differently. In line with this, one would not be surprised if No. 61 was willed to the beneficiaries in question at least in part to assure each of them shelter and residence.

68 It is also significant that the words used indicate that "any one" of the beneficiaries may stay rent-free suggesting that Madam Loh intended to give an overriding right to each beneficiary to reside in the premises. It could not have eluded her that this might create conflict among the beneficiaries. The right to reside was therefore fundamental to how she intended to dispose of No. 61. This ties in with what I have stated at [67] above.

69 This is further amplified by the explicit provision in paragraph 2(a) that the "written consent of the abovenamed 11 beneficiaries" is necessary in order to effect a sale of No. 61. The natural meaning of this is that each beneficiary is to have a veto over the sale. To hold otherwise would be to violate the presumption that each word in a will must be given meaning and effect. This interpretation would also be consistent with – and would in fact promote – the overriding intention of

Madam Loh to provide the security of *residence* at No. 61 to each of the named beneficiaries as I have noted at [65] to [68] above. If it was true that no right to veto the sale existed in respect of No. 61, that would effectively put the position of the beneficiaries to No. 59 and No. 61 on the same footing in respect of the right to sell each of these properties. That is wholly inconsistent with the linguistic differences apparent in the way Madam Loh willed these properties. It would also considerably weaken the force and effect of the right of residence.

70 In my judgment, all of these factors take this will outside the ambit of the decision in *Leo Teng Choy*, on which Nellie relies. In that case, the Court of Appeal held that even though there was a clause in the testator's will to the effect that the property in question "shall not be sold, rented out or in any way converted into cash unless and until unanimously agreed upon by my said sons", the intention of the testator, as construed from the entire will, was not to prohibit the sale of the property but to ensure an equitable distribution of the proceeds if it was sold. Accordingly, the court had the power to sanction the sale of the property under s 56(1) of the Act. In the present case, the overriding intention of the testatrix, in my judgment, was not to grant the equal right of each beneficiary to the proceeds of sale *per se*; but rather, to ensure that each beneficiary to No. 61 would have the right to reside there if they needed or wanted to.

71 In any event, a particular construction given to a particular will has no binding effect even if the will in question appears to be worded similarly. A court must approach the construction and interpretation of each will afresh. In the present case, it is not so much the similarities but the dissimilarities with *Leo Teng Choy* that are significant in my view.

72 The practical consequences of my construction of the will are not entirely free from fuss, but they are by no means impossible. Nellie claims, there is a need to raise funds to meet certain expenses and debts. It was suggested that having recourse to selling units at No. 59 for this purpose might visit the burden of these expenses unfairly on one set of beneficiaries. Whether that is so or not depends on a separate issue of construction of the will which was not argued before me and which I do not rule on. But even if it were, there is nothing to say it was not open to Madam Loh to so provide if she wished.

73 As to the other arguments at [63a and 63d] above, assuming these contentions were correct, they too rest on the same premise that is fatally flawed: namely that it was not open to Madam Loh to so provide if she wished. That is clearly wrong. Further, it assumes that the entitlement to the proceeds of sale of the properties was the ultimate prize that Madam Loh intended to bestow on her children. This also is not so in my judgment. It is evident at least in relation to No. 61, that Madam Loh viewed the security of having a house to reside in as being the critical provision she wished to make for the beneficiaries in question, rather than giving some of them the right to access the proceeds of its sale over the objections of others.

74 In the final analysis, I am left with the impression that Madam Loh, was a well-intentioned mother who, above all, wanted to guarantee her children a place to reside in. She took much care to express her intentions in her will. In my judgment, her intentions in relation to No. 59 and No. 61 were not identical. She did intend that No. 61 should not be sold as long as any of the beneficiaries wished to use it as a residence. In the present circumstances, it was not argued and also was not necessary for me to decide whether the position would be different if none of the beneficiaries in fact wished to use the premises as a residence. I therefore do not decide this point. However, as long as any of the beneficiaries are using and do wish to use the premises as a residence, I do not consider the court has power under s 56(1) of the Act to authorise the sale of the property.

Conclusion

75 In the premises, it is not necessary to proceed further to decide whether the reasons cited by Nellie for selling No. 61 are valid or not. The application for this court to sanction the sale of No. 61 is denied. I will hear the parties on costs.