Low Heng Leon Andy *v* Low Kian Beng Lawrence (administrator of the estate of Tan Ah Kng, deceased)
[2011] SGHC 184

Case Number	: Suit No 252 of 2011 (Summons No 8074 of 2010)
Decision Date	: 05 August 2011
Tribunal/Court	: High Court
Coram	: Chan Wei Sern Paul AR
Counsel Name(s)	: Gopinath S/O Pillai (Eldan Law LLP) for the Plaintiff; Tan Tian Luh (Chancery law Corporation) for the Defendant.
Parties	: Low Heng Leon Andy — Low Kian Beng Lawrence (administrator of the estate of Tan Ah Kng, deceased)

Civil Procedure

Equity

5 August 2011 Judgment reserved.

Chan Wei Sern Paul AR:

Introduction

1 In the present application to strike out the Plaintiff's statement of claim, or part thereof, two separate issues of law were presented for the court's determination. First, what is the nature and effect of consent orders and did a prior consent order entered into between the parties preclude the Plaintiff's action in the present suit? Secondly, did the effect of section 51(10) of the Housing and Development Act (Cap 129, 2004 Rev Ed) ("HDA") extend so far as to preclude the bringing of a proprietary estoppel claim involving a Housing and Development Board ("HDB") flat? Although these issues appear novel at first sight, the answers were, in truth, not far to find once the principles already espoused in the relevant areas of law were properly considered. To this task I now turn my attention.

The background to the application

(i) the factual background

2 The Plaintiff and the Defendant are cousins. Their dispute arose following the demise of their common grandmother, Tan Ah Kng ("the Deceased"), and revolved around a flat situated at Block 306, Hougang Avenue 5, #02-355 Singapore 530306 (the "Flat") that she left behind. This was a flat sold by the HDB and which was subject to the provisions of the HDA. While the Defendant did not necessarily agree with everything stated in the Plaintiff's statement of claim and his subsequent affidavit, it was only necessary, for the purposes of the present application, to consider the Plaintiff's version of the facts.

3 A note, before we continue, about the pleadings. I am not given to be particularly particular about particulars. However, it would not be inaccurate to describe the statement of claim filed by the Plaintiff as inadequately bare. In it, he set out the relationship between the main protagonists, the

gist of the main facts as well as the breakdown for his claim of S$18,350.50. Unfortunately, much of the relevant, and indeed crucial, facts were not properly pleaded. While brevity in pleadings is a virtue that should be encouraged, the austerity of the Plaintiff's statement of claim in this case meant that it was impossible to discern what the legal basis for his claim was. Indeed, it almost appeared that the Plaintiff himself was unclear as to his legal claim, merely that he had disparate grievances that required airing. It was not until the Plaintiff filed a subsequent affidavit, for the purposes of this application, that much of his case could be understood. It is mostly on the basis of the subsequent affidavit that most of the following facts are recounted.

4 Insofar as I was able to discern, the Flat was purchased around 1983. At the time of the purchase, the Deceased was the sole owner of the Flat but at some unknown subsequent point in time, one of her daughters, Low Eng Cheng ("the Aunt"), was added as an owner such that the Flat was owed in joint tenancy between the two of them. Be that as it may, it was the Plaintiff and his immediate family who had use of the Flat as their family home for many years. This certainly was the case from the time the Plaintiff was born (in 1984) until 2003. In that latter year, for reasons undisclosed, most of the Plaintiff's family moved out of the Flat, save for one of the Plaintiff's brother and the Plaintiff himself. About two years later, in 2005, the Deceased and the Aunt also made the Flat their residence. The year after, the Plaintiff's brother moved out. This, of course, left the Deceased, the Aunt and the Plaintiff as the remaining occupants of the Flat.

5 The Plaintiff averred that almost immediately after his brother had left the Flat, the Plaintiff had to look after both the Deceased and the Aunt as they were in poor physical health. The Aunt was diagnosed with ovarian cancer while the Deceased, towards the end of her life, contracted tuberculosis. The responsibility for caring for the infirm fell to the Plaintiff who, I am told, fulfilled his familial obligations selflessly. Despite the Plaintiff's efforts, both the Aunt and the Deceased eventually succumbed to their illnesses and passed away in 2007 and 2008, respectively. Both of them died intestate.

6 On 28 April 2009, the Defendant was granted letters of administration in respect of the Deceased's estate. The only asset which had to be distributed was the Flat (which the Deceased owned wholly following the earlier death of the Aunt). Pursuant to the Intestate Succession Act (Cap 146, 1985 Rev Ed), the beneficiaries of the estate were the five surviving children of the Deceased; the Plaintiff was therefore not a beneficiary of the estate. The Defendant then took the view that the Plaintiff was, whilst the Deceased was alive, a free lodger and, now, an illegal occupier of the Flat. Accordingly, in what he regarded was his lawful duty as the administrator of the Deceased's estate, the Defendant endeavoured to remove the Plaintiff from the Flat. In succession, the Defendant orally informed the Plaintiff to vacate the Flat, called a locksmith to pick the lock of the Flat and instructed solicitors to issue a letter of demand to the Plaintiff.

(ii) the legal background

7 Finally, given the Plaintiff's lack of response to his entreaties, the Defendant commenced Originating Summons No. 213 of 2009 (the "Order 81 Application"). In that application, the Defendant sued, pursuant to Order 81 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("ROC"), for immediate possession of the Flat as well as costs for the legal proceedings. Thereafter, but prior to the hearing of the Order 81 Application, attempts at an amicable settlement were made, the details of which would turn out to be significant for the present application.

8 The olive branch was first extended by the Defendant even though he was also the one who commenced the Order 81 Application. On 13 July 2009, his counsel wrote to the Plaintiff's counsel in the following terms:

2. The [Defendant] offers to settle this OS [the Order 81 Application] as follows:

    a. That the [Plaintiff] does agree to vacate the HDB flat in question within a date no later than 31 July 2009;

    b. In return, the [Defendant] will not ask for the costs of the OS and the Plaintiff will agree to abandon the claims arising from trespass and unlawful occupation;

    c. This agreement to be recorded in a consent order within on or before 24 July 2009.

9 To that offer counsel for the Plaintiff responded on 17 July 2009 in a somewhat equivocal fashion:

2. We write to confirm that our client will accept the offer as set out in your Fax, without prejudice to any claims that he may have against the estate, particularly in respect of any moneys expended and/or ownership.

10 In the following fax, on 21 July 2009, counsel for the Defendant set out the Defendant's view that the Plaintiff had made a counteroffer:

1. We refer to your fax dated 17 July 2009 accepting our client's offer to settle this OS. Technically, the fax contains a counter offer in paragraph 2 after the first comma. That portion is not part of any settlement which the [Defendant] agrees to and will have to be left to be resolved under the general law, if applicable.

2. We enclose the draft Order for your reference. This document will also be served on you by EFS.

3. We will attend before the District Judge on Friday to record the settlement before extracting the Order. Please let us know if you wish for us to mention on your behalf.

Significantly, the terms of the draft order enclosed with the foregoing fax were similar to those of the consent order eventually entered into: see [12], below. The terms, in short, were that the Plaintiff vacates the Flat and the Defendant abandons any claim for trespass and unlawful occupation as well as costs.

11 This chain of correspondence finally concluded with counsel for the Plaintiff writing to the Defendant's counsel on 22 July 2009 in the following manner:

1. We refer to your fax of 21 July 2009, received by us at 9.00pm (the "Fax").

2. We acknowledge the contents of the Fax. Rather than making a counter-offer, we were merely reiterating that the acceptance of your client's offer was not be deemed an abandonment of any claims that he may have against the Estate.

3. We enclose herewith the amended draft consent order, duly approved by us for your necessary action. As the amendments are extensive, we have redrafted and approved the same. We trust you will have no objections to this.

The draft was essentially amended for organisation and to comply with the standard form for Orders of Court. The substantive terms of the order remained unaltered.

12 Indeed, the form and substance of the amended draft prepared by the Plaintiff's counsel reflected the actual one eventually entered into before Deputy Registrar Julian Chin on 24 July 2009. The learned Deputy Registrar recorded the terms as follows:

i. the [Defendant] be given immediate possession of the [Flat];

ii. the [Plaintiff] shall deliver vacant possession of the Flat to the [Defendant] by 31 July 2009;

iii. provided the [Plaintiff] vacates the Flat by 31 July 2009, the estate of Tan Ah Kng ("the Estate") shall agree to abandon any claims by the Estate against the [Plaintiff] arising from the [Plaintiff's] occupation of the Flat in respect of trespass and unlawful occupation; and

iv. that there be no order as to costs.

Thereafter, the Flat was duly delivered to the Defendant, sold and the proceeds thereof distributed.

13 Subsequently, the Plaintiff commenced the present suit to recover, as I have mentioned, a total of S$18,350.50 or, alternatively, damages to be assessed. According to the statement of claim, the claim was for "the monies expended in taking care of [the Deceased] during her lifetime" and that "[t]he Plaintiff's claim against the Defendant arose when the Deceased passed away and the Defendant gave notice to the Plaintiff to evict out of the flat…" The claim of S$18,350.50 was obtained by totalling various household expenses, including expenses for power services, telecommunication services, transport and town council charges which the Plaintiff had paid for. Dissatisfied with the action, the Defendant took out the present application to strike out the statement of claim, in whole or in part, pursuant to Order 18, rule 19(1)(a), (b) and (d) of the ROC.

The parties' submissions

(i) the Plaintiff's case

14 As alluded to earlier, the affidavit that the Plaintiff filed for the purposes of the present application cleared up much of the factual ambiguity created by the statement of claim. However, the legal basis of the Plaintiff's claim was still unclear. To further complicate matters, at different points in his affidavit, the Plaintiff made oblique references to licenses, proprietary estoppel and constructive trust without stating explicitly which ground he was seriously pursuing or if he was relying on all of them. Even in the written submissions tendered before me, it was maintained that the "causes of action against the Defendant lie in estoppel and constructive trust." However, before me, counsel for the Plaintiff confirmed that the Plaintiff's case was one of proprietary estoppel on the basis of the following facts:

i. The Deceased had, on various occasions prior to her demise, promised that the Flat should not be sold, that the Plaintiff could live in the Flat for as long as he wanted and that he could use the Flat as his family home. Such promises were made not just in the presence of the Plaintiff but also in the presence of other family members.

ii. In reliance of those promises, the Plaintiff acted to his detriment. For instance, he took care of the Deceased by paying for the household and medical expenses. He also gave up a relatively rewarding career as a financial planner to work from home as a tutor so as to take better care of the Deceased. Furthermore, the Plaintiff exposed himself to danger by living in close proximity with the Deceased who had tuberculosis and had to undergo the ordeal of medical examinations to ascertain that he, himself, had not contracted the disease.

iii. As a result, of the foregoing, an equity had been raised. However, the Plaintiff did not seek a trust over any interest in the Flat to satisfy that equity. Instead, the Plaintiff sought to be compensated by damages for the outlay he had already incurred in reliance of the Deceased's promises. In short, the Plaintiff had paid for various household and medical expenses in reliance of the representation that he would be allowed to stay in the Flat for as long as he desired. The promise not having been kept, he sought to be put back into the same position he would have been in had he not relied on those promises.

(ii) the Defendant's submissions

15 Counsel for the Defendant essentially presented two arguments, one revolving around the Order 81 Application and the other around the HDA.

16 First, counsel for the Defendant argued that the Plaintiff was estopped from raising his claim. This was because the issue as to whether the Plaintiff was entitled to any interest in the Flat was first brought before the courts in the Order 81 Application. In an affidavit to support that application, the Defendant had alleged that the Plaintiff was an illegal occupier of the Flat. The natural import of such an allegation was that the Plaintiff had no claim to or interest in the Flat. If the Plaintiff thought otherwise, he should have challenged the Defendant's Order 81 Application. Instead, the Plaintiff chose to enter into a consent judgment and give up possession of the Flat. By so doing, the Plaintiff had, in fact, *agreed* with the Defendant's allegations as set out in the supporting affidavit and should not now be allowed to re-open the issue.

17 The other distinct argument made by the Defendant's counsel was that the Plaintiff was precluded from bringing his claim by virtue of section 51(10) of the HDA, which reads as follows:

> No person shall become entitled to any protected property (or any interest in such property) under any resulting trust or constructive trust whensoever created or arising.

It was not disputed between the parties that the Plaintiff was ineligible to own the Flat as he, being unmarried and without a family nucleus, did not satisfy the HDB's Eligibility Rules. However, given how the Plaintiff's pleadings were initially unclear and how the Plaintiff's counsel had subsequently clarified that the claim was based on proprietary estoppel and not constructive trust, I asked counsel for the Defendant if he was still pursuing this argument. He answered in the affirmative. His view was that the Plaintiff's claim, if successful raised, necessarily raised an equitable interest in the Flat. While it may be that the Plaintiff was presently seeking only liquidated damages and not an interest in the Flat, this prayer was in lieu of, and therefore based on, an equitable interest. By his reckoning, all equitable interests in a HDB flat raised in favour of an ineligible person are prohibited. As such, the Plaintiff's claim was doomed to failure and should be struck out for that reason.

(iii) the Plaintiff's reply

18 The Plaintiff's response to the Defendant's arguments was relatively straightforward.

19 Addressing the Defendant's argument on issue estoppel, counsel for the Plaintiff pointed out that in the correspondence leading up to the making of the consent judgment, the Plaintiff had emphasised that that he was preserving his rights to any claim he may have against the Defendant, including the present one he was making. In effect, all that he was consenting to in the Order 81 Application was to vacate and give up possession of the Flat. This was reflected by the circumstances in which the consent order was entered into as well as the very terms in the eventual order made: see [12], above. The Plaintiff was therefore not estopped from pursuing the present claim.

20 Where the issue involving the HDA was concerned, the Plaintiff's counsel made clear that the Plaintiff's case, in no way, involved a constructive trust. It was, as stated earlier, grounded in proprietary estoppel. If the claim was successful, no interest in the Flat need arise as the Plaintiff was seeking for equitable compensation. This was different from a claim seeking an equitable proprietary interest in the Flat. The court, it was submitted, may satisfy an equity raised by a claim of proprietary estoppel in a number of ways, including by declaring a trust over the Plaintiff's interest or by awarding equitable compensation. The latter remedy was independent of the former. As such, the Plaintiff's claim was not precluded by section 51(10) of the HDA which only prohibited an ineligible person from being entitled to a HDB flat by way of a constructive or resulting trust.

The decision of the court

21 The Defendant's present application was made pursuant to Order 18, rule 19(1)(a), (b) and (d) of the ROC, reproduced below:

> **19-(1**) The Court may at any stage of the proceedings order to be struck out or amended any pleading or endorsement of any writ in the action, or anything in the pleading or in the endorsement, on the ground that –
>
> (a) it discloses no reasonable cause of action or defence, as the case may be;
>
> (b) it is scandalous, frivolous or vexation;
>
> (d) it is otherwise an abuse of the process of the Court,
>
> and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

22 The standard which must be satisfied before pleadings can be struck out was clearly set out in the Court of Appeal case of *Gabriel Peter & Partners (suing as a firm) v Wee Chong Jin and oths*, [1997] SLR(R) 649, which reads, *inter alia*:

> 18 In general, it is only in plain and obvious cases that the power of striking out should be invoked. This was the view taken by Lindley MR in *Hubbuck & Sons v Wilkinson, Heywood and Clark* [1899] 1 QB 86 at p 91. It should not be exercised by a minute and protracted examination of the documents and facts of the case in order to see if the Plaintiff really has a case of action. The practice of the courts has been that, where an application for striking out involves a lengthy and serious argument, the court should decline to proceed with the argument unless, not only does it have doubts as to the soundness of the pleading, but in addition, it is satisfied that striking out will obviate the necessity for a trial or reduce the burden of preparing for a trial.

In *Tan Eng Khiam v Ultra Realty Pte Ltd* [1991] 1 SLR(R) 844, G P Selvam JC explained the court's

reluctance to summarily strike out a claim (at [31]) as follows:

> …This is anchored on the judicial policy to afford a litigant the right to institute a bona fide claim before the courts and to prosecute it in the usual way. *Whenever possible the courts will let the Plaintiff proceed with the action unless his case is wholly and clearly unarguable…* [Emphasis added.]

23 Although the Defendant had cited three limbs of Order 18, rule 19(1) as the basis for his application, counsel for the Defendant only seriously pursued the "frivolous and vexatious" limb before me. In respect of those words, Lai Siu Chiu J, delivering judgment on behalf of the Court of Appeal, stated in *Ridhuan bin Yusof v Khng Thian Huat and another* [2005] 2 SLR(R) 188 that:

> 29 In *Afro-Asia Shipping Co (Pte) Ltd v Haridass Ho & Partners* [2003] 2 SLR(R) 491 I had defined (at [22]) the words "frivolous or vexatious" under O 18 r 19(1)(b) of the Rules to mean "cases which are obviously unsustainable or wrong, [and where] the words connote purposelessness in relation to the process or a lack of seriousness or truth and a lack of *bona fides*". The definition as held by Yong Pung How CJ in *Goh Koon Suan v Heng Gek Kiau* [1990] 2 SLR(R) 705 at [15], also included proceedings where a party "is not acting *bona fide* and merely wishes to annoy or embarrass his opponent, or when it is not calculated to lead to any practical result".

There being no serious suggestion that the Plaintiff was not acting *bona fide*, I had, therefore, only to ascertain if the Plaintiff's cause of action was obviously unsustainable or wrong.

24 In connection thereto, and arising from the submissions made by counsel for the Defendant, two main issues arose for consideration:

i. whether the Plaintiff's claim was precluded by the consent order entered into between the parties in the Order 81 Application; and

ii. whether the Plaintiff's claim was precluded by section 51(10) of the HDA.

Whether the Plaintiff's claim was precluded by the consent judgment

25 The key to this issue really laid in understanding the nature of a consent order and the effects thereof. To this end, a short survey of case law is necessary.

The law on consent orders

26 In *Siebe Gorman & Co Ltd v Pneupac Ltd* [1982] 1 W.L.R. 185 ("*Siebe Gorman*"), a decision of the English Court of Appeal, the Plaintiffs issued a writ against the Defendants in respect of a transaction of goods. After the close of pleadings, the Defendants took out a summons for specific discovery to be provided within 10 days of the date of the order sought. The summons also prayed for a peremptory order in default of compliance with the order, even though this was the first summons for discovery. Just prior to attending before the Master for the hearing of the summons, solicitors for both parties had a brief discussion and agreed that, in return for the Plaintiffs consenting to the order sought, the Defendants would allow the Plaintiffs ten days to comply with the order. No mention was made of the peremptory prayer then. However, when the Defendants drew up the order, the peremptory prayer was included. Naturally, the Plaintiffs failed to comply with the order for

discovery. After the Defendants took the position that the Plaintiffs' claim had been struck out, the Plaintiffs applied for an extension of time to comply. This was allowed at first instance but was reversed upon appeal. The Plaintiffs then further appealed to the Court of Appeal.

27 The leading judgment was written by Lord Denning M.R. who, in his usual breezy manner, allowed an extension of time for the Plaintiffs to comply with the discovery order. In so doing, he noted that not all consent orders were alike (at 189) as follows:

> We have had a discussion about "consent orders". It should be clearly understood by the profession that, when an order is expressed to be made "by consent", it is ambiguous. There are two meanings to the words "by consent." That was observed by Lord Greene M.R. in Chandless-Chandless v Nicholson [1942] 2 K.B. 321, 324. One meaning is this: the words "by consent" may evidence a real contract between the parties. In such a case the court will only interfere with such an order on the same grounds as it would with any other contract. The other meaning is this: the words "by consent" may mean "the parties hereto not objecting." In such a case there is no real contract between the parties. The order can be altered or varied by the court in the same circumstances as any other order that is made by the court without the consent of the parties. In every case it is necessary to discover the meaning is used. Does the order evidence a real contract between the parties? Or does it only evidence an order made without objections?

Thus, Lord Denning distinguished between contractual consent orders and 'no objections' consent orders. The former is, in essence, a contract entered into in the presence of the court; the latter, as observed by Templeman LJ in *Tigner-Roche & Co Ltd v Spiro*(1982) 126 SJ 525 ("*Tigner-Roche*"), is merely a case where "...the Plaintiffs [or the Defendants as the case may be] merely bowed their heads and submitted to such an order". This distinction has since been followed in many English cases thereafter: see *Greater London Council v Rush Tomkins* (1984) 128 SJ 722 (full transcript available on Lexis), *RG Carter (West Norfolk) Ltd v Ham Gray Associates Ltd* (1994) 42 ConLR 68, *Boyle v Hagerty* (unreported, 29 October 1987, full transcript available on Lexis), *Wembley Laboratories Ltd v Joyce Ground Engineering Ltd* (1989) 19 ConLR 143 and *Community Care North East (a partnership) v Durham County Council* [2010] 4 All ER 733.

28 In the circumstances of the case, Lord Denning considered the consent order made in the application before him to be a "no objections" consent order (at 190):

> I cannot put any such interpretation [an interpretation that the consent order was a contractual consent order] on the order which was drawn up in this case. It often happens in the Bear Garden that one solicitor or legal executive says to the other, "Give me 10 days." The other agrees. They go in before the master. They say, "We have agreed the order." The master initials it. It is said to be "by consent." But there is no real contract. All that happens is that the master makes an order without any objection being made to it. It seems to me that that is what exactly happened here. The solicitors for the Plaintiffs were saying, "We do not object to the order. Give us the extra 10 days from the time of inspection, and that is good enough." It seems to me quite impossible in this case to infer any contract from the fact that the order was drawn up as "by consent."

29 The first local case that picked up on the distinction drawn by Lord Denning was, I believe, the High Court case of *Wiltopps (Asia) Ltd v Drew & Napier and another* [1999] 1 SLR(R) 252 ("*Wiltopps*"). In that case, after the writ was filed, the Plaintiff failed to comply with a court order to file affidavits of evidence-in-chief. Initially, the Defendants were happy to provide the Plaintiff with more time. Eventually, however, the delay was so exorbitant that the Defendants filed an application praying that unless the exchange of affidavits of evidence-in-chief took place within three days, the Plaintiff's

action would be dismissed with costs without further order. At the hearing of that summons, it was recorded in the Notes of Evidence that the Plaintiff was "prepared to accept an unless order, provided that the summons in chambers is for seven days". To that effect the court so ordered. Unfortunately, the Plaintiff again failed to comply by the deadline. Pursuant to the unless order, the Defendants extracted an order for the action to be dismissed. The Plaintiff sought to set aside this default judgment.

30 Lee Seiu Kin JC cited the case of *Siebe Gorman*, applied the analysis to the case before him and held that the consent order entered into was of the contractual kind. He reasoned (at [19]):

> In the present case the unless order was made pursuant to an application taken out by the Defendants who had prayed for an unless order that gave the Plaintiffs three days to comply. At the hearing of that application, the Plaintiffs' solicitors offered to consent to the order if they were given seven days, to which the Defendants' solicitors agreed. It was on this basis that the court made the order. It is clear that there was consideration flowing from the Defendants to the Plaintiffs in that they would otherwise have maintained their application for a three-day deadline, in respect of which there was a possibility that they would obtain it. This was therefore an order giving effect to the contract between the parties.

Having so decided, Lee JC then went on to examine the effect of a contractual consent order. To this end, he observed (at [23]):

> A judgment or order by consent is binding until it is set aside and fresh proceedings must be commenced if it is sought to set aside a consent order. In *Wilding v Sanderson* [1897] 2 CH 534, Byrne J said, at 543:
>
> > A consent judgment or order is meant to be the formal result and expression of an agreement already arrived at between the parties to proceedings embodied in an order of the Court. The fact of its being so expressed puts the parties in a different position from the position of those who have simply entered into an ordinary agreement. It is, of course, enforceable while it stands, and a party affected by it cannot, if he conceives he is entitled to relief from its operation, simply wait until it is sought to be enforced against him, and then raise by way of defence the matters in respect of which he desires to be relieved. He must, when once it has been completed, obey it, unless and until he can get it set aside in proceedings duly constituted for the purpose.

31 The next significant case is that of *Wellmix Organics (International) Pte Ltd v Lau Yu Man* [2006] 2 SLR(R) 117 ("*Wellmix*"). *Wellmix* revolved around an alleged consent unless order, this time for the Defendant, rather than the Plaintiff, to serve affidavits of evidence-in-chief failing which the defence would be struck out. This unless order was entered into after counsel for both parties had a discussion outside chambers. After the Defendant failed to comply with the unless order, the Plaintiff attempted to enforce the same; the Defendant denied that the unless order was by consent and appealed against the decision of the assistant registrar who had agreed with the Plaintiff.

32 Against this backdrop, Andrew Phang Boon Leong J set out the methodology to be employed in ascertaining whether there was a contractual consent order (at [14]) as follows:

> The *general* (albeit crucial) starting-point is this: One has to adopt an *objective* approach towards ascertaining *the parties' intentions* at the initial hearing before the assistant registrar and, indeed, before he made the order concerned. In this regard, close attention had to be paid not only to the parties' own actions *in the context of the relevant surrounding circumstances*

but also to the *language and terms of the actual order made by the assistant registrar himself*. Looked at in this light, it is clear that the assistant registrar's own *subjective* interpretation of the order he had made earlier on, whilst not totally irrelevant, was clearly not decisive by any means. [Emphasis in original.]

In the circumstances before him, Phang J found that the unless order made between the parties was not a contractual consent order. This was because the discussion between counsel was a short one and there was no prior negotiations nor clear written correspondence. Neither were the words "By consent" used by the assistant registrar in making his order. On that basis, *inter alia*, Phang J set aside the interlocutory judgment entered in favour of the Plaintiff.

33 A brief pause, if I may, to address an issue not strictly relevant to the present proceedings. In *Wiltopps*, Lee JC also considered the following question: once a contractual consent order has been entered into, can the court subsequent to that interfere with the terms of the agreement? He noted the two differing opinions proffered by the coram in *Purcell v F C Trigell Ltd* [1971] 1 QB 358 ("*Purcell*") on this issue. Specifically, Lord Denning proposed a further distinction between a contractual consent order in an interlocutory matter and a contractual consent order made as a final judgment. As to the former, Lord Denning was of the opinion (at 363) that:

> The court has always a control over interlocutory orders. It may, in its discretion, vary or alter them even though made originally by consent.

Where a final judgment is made by consent, however, the court - Lord Denning reckoned - has no discretion to interfere, save pursuant to ordinary contractual principles. However, the majority, including Winn LJ and Buckley LJ, saw no reason to make the same distinction. Regardless of whether the contractual consent order was an interlocutory judgment or a final judgment, they were of the opinion that it can only be set aside on ordinary contractual principles.

34 Lee JC did not, in *Wiltopps*, make a decision as to which view was correct as it was unnecessary for him to do so. However, he made clear that the majority view was the one he preferred, *i.e.*, a contractual consent order can only be set aside on grounds that would justify the setting aside of a contract. Phang J, in *Wellmix*, did however take a decisive stand on this issue. After carefully examining all the relevant authorities and materials on this issue (including *Purcell* and *Wiltopps*), Phang J held:

> 89 However, I would be prepared to accept that, the objections in the preceding paragraphs notwithstanding, **it would still be desirable to allocate to the court a residuary discretion of the type suggested by Lord Denning MR in *Purcell* . In this regard, I also respectfully differ from the view preferred by Lee JC in the *Wiltopps* case**, and I do so for the following main reason.
>
> 90 It must be borne in mind that a consent unless order, whilst technically a contract between the parties, is one that allows one party to wholly deprive the other of its legal rights in the context of litigation. Even though such an order has been agreed upon between the parties, there may, in my view, arise certain circumstances where it would nevertheless be unjust for the party in whose favour the consent order operates to insist on its enforcement in the absence of a high degree of intentionally contumacious or contumelious conduct.
>
> 91 Such a discretion is, in the final analysis, merely an aspect of the court's power to have ultimate control over its own procedure. This is not at all unreasonable, in my view, and does, on balance, conduce to justice and fairness. The focus is still on procedure, rather than substance.

> It might be argued that the substantive rights of the Plaintiff would be adversely affected. This is arguably the case but it must never be forgotten that an unless order is part of the procedural armoury and is not based on the substantive merits of the case as such. Thus, an unless order (whether by consent or otherwise) deals, in the final analysis, with the *litigation process and, on this score, the courts ought to have the final say*.
>
> [Emphasis in italics in original. Emphasis in bold added.]

This was the other basis on which Phang J arrived at his decision.

35 The last local case which has added to our understanding of consent orders is that of *Woo Koon Chee v Scandinavian Boiler Service (Asia) Pte Ltd and others* [2010] 4 SLR 1213 ("*Woo Koon Chee*"). In that case, it was not disputed that there was a contractual consent order made which was aimed at resolving the substantive conflict between the parties. Unfortunately, the appellant failed to abide by the terms of that contractual consent order. The respondents then took out a summons for specific enforcement. The issue at hand was the appropriate manner in which a contractual consent order should be enforced.

36 The Court of Appeal endorsed the following passage found in the *Singapore Court Practice 2009* (Jeffrey Pinsler gen ed, LexisNexis 2009) in holding that the respondents need not start a separate action to enforce the contractual consent order:

> **42/1/6. Consent judgments and orders**. The terms of a settlement agreement may be enforced by a separate action, assuming the agreement has the status of a legally binding contract…
>
> However, the advantage of embodying the terms of the settlement in a consent judgment or order is that it may be *automatically* enforced in the event of non-compliance…
>
> [Emphasis in original.]

More pertinent to the present application before me, the Court of Appeal also touched upon the nature of a contractual consent order as well as the action pursuant to which the order was made (at [18]):

> By Summons No 76, the Relevant Respondents were clearly seeking to enforce their rights under the Consent Order and not under Suit 53 of 2008, **which cause** (consistent with the principle enunciated in *IOB v Motorcycle Industries* at [12] above) **had been merged with and superseded by the Consent Order**. [Emphasis added.]

In *Indian Overseas Bank v Motorcycle Industries (1973) Pte Ltd* [1992] 3 SLR(R) 841 ("*IOB v Motorcycle Industries*"), the Court of Appeal had relied on the following passage in *Halsbury's Laws of England* vol 37 (Butterworths, 4th Ed) at para 391:

> …[w]here the parties settle or compromise pending proceedings, whether before, at or during the trial, the settlement or compromise constitutes at a new and independent agreement between them made for good consideration. **Its effects are (1) to put an end to the proceedings, for they are thereby spent and exhausted; (2) to preclude the parties from taking any further steps in the action, except where they have provided for liberty to apply to enforce the agreed terms; and (3) to supersede the original cause of action altogether...** An agreement for a compromise may be enforced or set aside on the same grounds and in the same way as any

other contract… [Emphasis added.]

37 The following is, then, the law relating to consent orders as I understand it:

i. There are two kinds of consent orders. One is a contractual consent order. This is a real contract between the parties, recorded in the presence of the court. The other is a 'no objections' consent order. This is, in essence, a passive consent order in that one party simply does not object to the prayers sought by the other party: see *Siebe Gorman, Wiltopps* and *Wellmix*.

ii. To distinguish between the two, one must adopt an objective approach and look at all relevant circumstances of the case, including the parties' conduct and the order made: *see Wellmix*.

iii. In the case of a contractual consent order which aims to settle the substantive dispute, the consent order supersedes the original cause of action altogether. The original proceedings are then spent and exhausted: see *Woo Koon Chee* and *IOB v Motorcycle Industries*. Presumably, a contractual consent order dealing with an interlocutory matter supersedes the interlocutory application and the application is then spent and exhausted.

iv. Where enforcement is concerned, a consent order, whether a contractual or a 'no objections' one, may be, but need not be, enforced without a fresh action. It may be enforced like any other court order: see *Woo Koon Chee*.

v. However, different principles apply to the setting aside or variation of a contractual consent order and a 'no objections' consent order. In the former case, the consent order can only be set aside or varied pursuant to ordinary principles applied in the law of contract. In a 'no objections' consent order, the principles applicable to the setting aside or variation of an ordinary court order applies: see *Siebe Gorman* and *Wellmix*.

vi. There is one rider to the principle stated in (v). Insofar as a contractual consent order regarding interlocutory matters is concerned, the court has an overriding discretion to vary or alter the terms of the order: see *Wellmix* and Lord Denning *per Purcell*. This is an exception to the general rule that contractual consent orders may be set aside or varied pursuant only to ordinary contract law principles.

Application of the law to the facts

38 In order to address the arguments presented by the Defendant's counsel, it must first, of course, be ascertained what kind of consent order was agreed to between the parties in the Order 81 Application. This was to be done by using an objective approach, taking into account all relevant circumstances of the case. Upon a close examination of the correspondence between the parties leading up to the making of the consent order, there was no doubt in my mind that the consent order arrived at was a consent order of the contractual kind.

39 The genesis of the consent order was the olive branch extended by the Defendant on 13 July

2009: see [8], above. In this fax, the Defendant agreed not to seek costs for the Order 81 Application and to abandon any claims for trespass if the Plaintiff will vacate the Flat by 31 July 2009. This, obviously, was an offer as understood in contract law to settle the Order 81 Application on the terms set out. However, the nature of the response by the Plaintiff's counsel on 17 July 2009 (see [9], above) was not so easy to discern. This was because counsel for the Plaintiff did not accept the olive branch unequivocally but said that "our client will accept the offer…without prejudice to any claims that he may have against the estate, particularly in respect of any moneys expended and/or ownership." To my mind, this response may be understood in two ways. First, it may be understood as a counteroffer in that the Plaintiff accepted all the terms set out in the Defendant's initial offer but wished to include a separate term that the Plaintiff was to be allowed to pursue any claims against the estate that he may have. This was indeed the way the Defendant's counsel understood the response. Secondly, the response may also be understood as a request for clarification. The Plaintiff wanted to ascertain that the terms of the Defendant's initial offer did not implicitly preclude the Plaintiff from claiming against the estate. If so, the Plaintiff was willing to accept the Defendant's offer. I myself preferred this second interpretation of the Plaintiff's response. However, regardless of whichever interpretation was correct, the significant point was that there was no contract formed at this stage as there was no unequivocal acceptance.

40 What then is to be made of the next fax of 21 July 2009 by the Defendant's counsel (see 10, above)? To reiterate, the Defendant's counsel wrote, *inter alia*, that:

> [t]echnically, the fax [from the Plaintiff's counsel] contains a counter offer in paragraph 2 after the first comma. That portion is not part of any settlement which the [Defendant] agrees to and will have to be left to be resolved under the general law, if applicable.

Thereafter, a draft order of court was attached which reflected the same terms set out in the Defendant's initial offer. In my opinion, the Defendant was, again, making the same offer it did before (on 13 July 2009). This time, however, the Defendant made clear that the Plaintiff's possible claims were *not* part of the settlement and that any such claim was to be resolved separately, *i.e.*, "under general law". This was also clear because the Plaintiff's potential claims were, at this point, a live issue. Since the Defendant did not explicitly state that the Plaintiff was to abandon any claims that he may have in the draft order, it must mean that any such term was not part of the agreement.

41 Thereafter, counsel for the Plaintiff redrafted the consent order for form but not substance: see [11], above. At this point, if not before, there was a meeting of minds between the Plaintiff and the Defendant as to the terms of the formal contract to be entered between them. While it had not yet been formally recorded, there was nevertheless *consensus ad idem* between the parties. The formal recording of the contract finally took place on 24 July 2009 before Deputy Registrar Julian Chin in the form of the consent order.

42 The above, I believe, is the proper way to analyse the correspondence between the parties. The consent order entered into between the parties was therefore a contractual consent order rather than a 'no objections' consent order. At all times, counsel for both parties were fully aware of, and in agreement with, the terms of the contract. Equally, they were also aware of a live outstanding issue – that of the Plaintiff's claims – which was not part of the agreement. Even so, there was sufficient consideration from the Plaintiff, given that he had vacated the Flat, for contract formation.

43 Since the consent order entered into between the parties in the Order 81 Application was, in essence, a contract, the effect of that contract must be determined solely by reference to the terms of the contract. The terms of the contract were encapsulated by the consent order (see [12], above) and did not include one to the effect that the Plaintiff was to give up his right to take out the

present action. I do not agree with the argument that the Plaintiff had, by entering into the consent order, agreed with the Defendant's allegations (that the Plaintiff was an unlawful occupant of the Flat) as set out in the Defendant's supporting affidavit for the Order 81 Application. The supporting affidavit did not form part of the contract between the parties. The facts set out therein did not, therefore, bind the Plaintiff. Indeed, in the correspondence leading up to the consent order, the Defendant had expressly agreed that such any issue regarding the Plaintiff's right to sue the estate was to be "resolved under the general law".

44 The Defendant's counsel also pointed to two cases in support of the Defendant's present application which I will now address. First, counsel argued that issue estoppel applied on the basis of Sundaresh Menon JC's decision in *Goh Nellie v Goh Lian Teck and others* [2007] 1 SLR(R) 453 ("*Goh Nellie*"). In that case, the plaintiff, as trustee, sought the right to sell a particular piece of property without the fifth defendant's permission. Prior to this application, the fifth defendant had applied via Originating Summons No 618 of 2005 ("OS 618/2005") for a determination of her right to stay in a particular piece of property. That application was disposed off by Phang JC, as he was then, who made a substantive order to the effect that the fifth defendant had the right to stay on the property as long as she personally resides there. On that basis, the fifth defendant argued, *inter alia*, that issue estoppel applied to the plaintiff's application before Menon JC. On this point, Menon JC wrote (at [29]):

> *In the present case, there can be no doubt that the order made in OS 618/2005 was a final determination of the right of Rosaline [the fifth Defendant] to reside at No 61*. There was nothing that remained to be decided in relation to this. Counsel for Nellie [the Plaintiff] submitted, however, that OS 618/2005 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 618/2005 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. [Emphasis added.]

Although the second italicised sentence in this passage seemed to support the Defendant's position at first glance, a proper understanding of Menon JC's decision revealed that this was not so.

45 The critical part of the passage was the fact that Menon JC found that there was a "final determination" in OS 618/2005: see the first italicised sentence of the preceding passage. There was, in other words, a final and conclusive judgment *on the merits*. To my mind, the consent order in OS 618/2005 must therefore have been a 'no objections' consent order rather than a contractual consent order, although this was not explicitly stated. This was because in a contractual consent order, there would have been no final and conclusive judgment *on the merits*. As explained earlier, in a contractual consent order, the judge merely records a contract agreed between the parties. The judge does not apply his mind to the case to ascertain, according to law, whether the application or the prayers sought should be granted. In fact, as the Court of Appeal in *Woo Koon Chee* explained (see [35] to [37], above), the contractual consent order supersedes the original cause of action altogether. The original proceedings are then spent and exhausted. This is different from a 'no objections' consent order where the judge makes a judicial determination as to the rights between parties, albeit without objections from one party. This view is supported by the fact that Phang JC had came to his final determination in OS 618/2005 "[o]n a true construction of paragraph 2(a) of the Last Will & Testament of Low Gek Huay and in the events that have happened…" This suggests that Phang JC had applied his mind to the merits of the application. Thus, when Menon JC suggested that it did not matter whether the order made in OS 618/2005 was a consent order or not (and that issue estoppel applied anyways), he actually meant that it did not matter *whether the order was a 'no objections'*

consent order or whether the order was made after full arguments. This was because in either case there would have been a judgment *on the merits*. However, it would be a very different if the consent order made in OS 618/2005 was a *contractual* consent order. Had that been the case, it would be very surprising if Menon JC had arrived at the same conclusion he did. For this reason, I was not of the view that the case of *Goh Nellie* supported the Defendant's case.

46 The second case which counsel for the Defendant raised was much simplier to deal with. In *Sim Lian (Newton) Pte Ltd v Gan Beng Cheng Raynes and Another* [2007] SGHC 84, Assistant Registrar Paul Tan had occasion to deal with an application pursuant to Order 81 of the ROC. In that case, AR Tan analysed the nature of an Order 81 application and reasoned that:

> 31 [s]everal consequences flow from the summary nature of proceedings under O 81. First, where there is a dispute on the facts or on legal issues, O 81 would not be the appropriate procedure and the applicant should have his claim adjudicated by the usual process, including trial if necessary…
>
> …
>
> 33 …in summary proceedings, it is not the function of the court to resolve the case on its merits but only to judge whether there is a dispute that ought to be adjudicated by trial. In this regard, once the applicant has present a *prima facie* case, it falls on the responding party to "lead trump or risk losing" (see, *1061590 Ontario Ltd v Ontario Jockey Club* (1995) 21 O.R. (3d) 547 at 36).

On the basis of these passages, counsel for the Defendant argued that the Plaintiff should have claimed trial instead of consenting to the order made in the Order 81 Application. Having consented, he could not now reopen the issue.

47 With respect, counsel's argument was misconceived. The responsibility of the Plaintiff to "lead trump or risk losing" in the Order 81 Application only applied if the Defendant had pursued his case against the Plaintiff. However, as it turned out, the Defendant did not. Rather, the Defendant chose to enter into a contractual consent order with the Plaintiff. At the risk of repetition, this meant that the consent order superseded the Defendant's cause of action in the Order 81 Application altogether. The Order 81 Application was then spent and exhausted: see *Woo Koon Chee*. Since the Defendant did not pursue his case, the Plaintiff had no case to respond to. Accordingly, the fact that the Plaintiff did not challenge the Order 81 Application then did not mean that he could not now pursue the present action.

48 For all of the above reasons, I was of the view that the Plaintiff was not precluded from pursuing the present action by reason of the consent order entered into between the parties in the Order 81 Application.

Whether the Plaintiff's claim is precluded by section 51(10) of the HDA

49 I now turn to the second issue. To reiterate, the argument made on behalf of the Defendant was that the Plaintiff was precluded from bringing his claim by virtue of section 51(10) of the HDA. To assess the validity of this argument, it was necessary to understand fully the nature of a proprietary estoppel claim.

Proprietary estoppel and constructive trust

50 When reading caselaw, it is not often easy to distinguish proprietary estoppel from another equitable action known as constructive trust. This confusion may, to my mind, be the result of at least four factors. First, the term 'constructive trust' has been used to mean different things; Indeed, Sir Peter Millet commented that "the use of the language of constructive trust has become such a fertile source of confusion that it would be better if it were abandoned": see McKendrick, *Commercial Aspects of Trusts and Fiduciary Obligations*, (Oxford University Press, 1992), p. 3. Secondly, the use of the term 'proprietary estoppel' is relatively modern although the pith of that cause of action is deeply antiquated, dating from before the nineteenth century. Even when the term 'proprietary estoppel' was used in the twentieth century, it was not used consistently. This means that one cannot always be certain that a particular decision was based on proprietary estoppel or some other cause of action. Thirdly, the exact ambit of proprietary estoppel is not particularly settled. On the contrary, the common law, I believe, is still in the midst of feeling out its edges. Fourthly, facts that may suffice to make out a proprietary estoppel are often also sufficient to make out a constructive trust, particularly a common intention constructive trust, claim.

51 Be that as it may, it is relatively clear that while there are areas of overlap between a proprietary estoppel claim and constructive trust claim, the two are distinct causes of action. The exact boundaries of these causes of action may be difficult to define but the two causes of action are conceptually different and independent of each other. I shall attempt to explain the difference between the two.

52 I begin with constructive trust for the law regarding constructive trust is more settled. The term 'constructive trust' may be used to describe a cause of action or an equitable remedy. As a cause of action, English law has, generally only recognised the existence of an 'institutional' constructive trust (as opposed to a 'remedial' constructive trust). (I note, however, the decision of Judith Prakash J in *Koh Cheong Heng v Ho Yee Fong* [2011] 3 SLR 125 ("*Koh Cheong Heng*") which seemed to accept a very limited form of remedial constructive trust in Singapore.) The primary feature of an institutional constructive trust is that it is brought into being on the occurrence of specified, well-established events, without the need for the intervention of the court. As a cause of action, the term 'constructive trust' is simply a way to categorise these disparate specified events under one umbrella. These specified events are disparate because the facts required to make out these events are quite distinct. That said, there is a commonality underlying these events – in each of these events, it would be inequitable – or some would say unconscionable – for the holder of the legal title to assert absolute entitlement to the property.

53 Although unconscionability is a vague idea, the conditions under which a constructive trust cause of action may be made out are relatively well circumscribed under English law. Without attempting to be exhaustive, the following are facts that would generally found a constructive trust claim:

i. fraud;

ii. the retention of property acquired as a result of a crime causing death;

iii. a profit in beach of a fiduciary duty;

iv. the retention of property by a vendor after the vendor had entered into a specifically enforceable contract to sell the property;

v. the changing of a will by the survivor of two persons who had entered into a contract to execute wills in a common form;

vi. the acquisition of land expressly subject to the interests of a third party;

vii. the assertion of full entitlement to property after a common intention to share property had been formed (also known as a 'common intention constructive trust').

So far, English law has taken the view that a constructive trust claim may not be established outside of these well-defined and accepted events.

54 Once these events are established, the court *declares* the existence of a constructive trust. A constructive is not imposed because the trust exists from the time the relevant events occurred. The court merely recognises that the beneficiary enjoys a pre-existing interest in the property. The corollary to this principle is that the court does not have a discretion as to the appropriate remedy to be rendered. Once the facts are found to have arisen, a constructive trust *must* be declared. Accordingly, a constructive trust may be capable of gaining priority over other subsequent interests in the property. The court's function is, therefore, to declare proprietary interests as they are, not to alter them.

55 A proprietary estoppel claim is a little different. As expressed in Pearce, Stevens & Barr, *The Law of Trusts and Equitable Obligations*, (Oxford University Press, 2010, 5th Ed), (at p 339):

> Proprietary estoppel is an entirely different equitable device from either the constructive or resulting trust, because it does not operate by recognizing the existence of a beneficial interest already created by the parties themselves, as it the case with express, resulting, and constructive trusts. Instead, it provides an equitable remedy, even though the remedy may allow a party to acquire an interest in the property.

The moral force of a proprietary estoppel claim lies in the unconscionability of a 'frustrated expectation': see Gray and Gray, *Elements of Land Law*, (Oxford University Press, 5th edn, 2009) ("Elements of Land Law") (at [9.2.119]). In essence, the legal owner of a property must have conducted himself (whether by way of encouragement or representation) in such a manner that the claimant believes that he has, or will obtain, some rights in respect of that property. The claimant must thereafter have relied on the legal owner's behaviour to his detriment. When such a situation arises, it would be unconscionable for the legal owner to then assert his strict legal entitlement to the property and equity will intervene to prevent this. The court, in essence, has to identify circumstances in which a legal owner's conduct can be said to be unconscionable.

56 If the above sounds similar to a constructive trust – particularly a common intention constructive trust - claim, it is. The moral force of a constructive trust and a proprietary estoppel claim is, I believe, rooted in the same source – unconscionability. What is different is the focus of the judicial enquiry, the degree of unconsionability and the legal consequences resulting thereto. As stated in *Elements of Land Law* (at [9.2.119]):

> In so far as any distinction exists between the doctrines of proprietary estoppel and constructive trust, it is sometimes said that the balance of emphasis in the constructive trust falls on the notion of frustrated bargain, whereas the 'equity' of estoppel is more obviously founded upon the notion of frustrated expectation.

As compared to a constructive trust claim, proprietary estoppel is a far more flexible and versatile doctrine, more suited to dealing with lesser degrees of unconscionability arising from lay persons' varied and informal arrangements with regards to property. When circumstances giving rise to a proprietary estoppel claim occurs, only an inchoate estoppel equity is raised. Unlike a constructive trust claim, no trust automatically arises as a result of such facts occurring. The claimant is thus entitled to remedial relief in order to satisfy the equity. At this point, the court must then decide what remedy is appropriate in the circumstances to satisfy the expectation raised by the estoppel. In some cases, a trust will be *imposed* over the property. But this is not the inevitable result. The court may select from the full range of equitable remedies available at law including ordering injunctions or awarding equitable damages. The court is limited only by the principle that it should award the *minimum* right or interest necessary to do justice between the parties. The court's primary function is, therefore, not to ascertain proprietary rights as they are but to rectify the unconscionability in a proportionate manner.

57 Despite the doctrinal differences highlighted in the preceding paragraphs, it cannot be gainsaid that there is, in practice, a substantial area of overlap between constructive trusts and proprietary estoppel. Often, the same factual matrix may give rise to both a constructive trust and a proprietary estoppel claim. However, that there is an area of overlap does not, in any way, diminish – much less eliminate - their areas of differences and, consequently, the fact that the two causes of action are distinct and separate. Indeed, Lord Walker expressed doubt in *Stack v Dowden* [2007] 2 AC 432 (at [37]) that the two areas of law "can or should be completely assimilated" and held that:

> [p]roprietary estoppel typically consists of asserting an equitable claim against the conscience of the 'true' owner. The claim is a 'mere equity'. It is to be satisfied by the minimum award necessary to do justice…which may sometimes lead to no more than a monetary award. A 'common intention' constructive trust, by contrast, is identifying the true beneficial owner or owners, and the size of their beneficial interests.

Application of the law to the facts

58 Having so understood the law, the answer to the Defendant's objections to the Plaintiff's claim presented itself. In my view, section 51(10) of the HDA did not make the Plaintiff's claim obviously unsustainable.

59 Section 51(10) of the HDA reads:

> No person shall become entitled to any protected property (or any interest in such property) under any resulting trust or constructive trust whensoever created or arising.

This provision was amended to its current wording in 2010. Prior to that, the equivalent provision, which is section 51(6) of the then-HDA, read:

> No person shall become entitled to any such flat, house or other building under any resulting trust or constructive trust, whensoever created.

The main change was, therefore, the addition of the words "or arising".

60 Prakash J explained in *Koh Cheong Heng* that the amendment did not change the effect of the provision but merely reflected that a resulting trust or a constructive may sometimes be more accurately said to have "arisen" rather than "created". She explained (at [56]):

> Although the amended legislation includes the words "or arising" at the end of the relevant provision, in my opinion the addition of the words "or arising" only clarify that a "resulting trust" or a "constructive trust" may be more properly said to arise by operation of law, rather than by the creation of parties.

As a result, materials pertinent to understanding the previous section 51(6) were also relevant apropos the present section 51(10).

61 To understand objectives lying behind the older provision, the Ministerial Statement that was read at the second reading of the Bill was instructive. The Minister stated as follows (see *Singapore Parliamentary Debates, Official Report* (15 August 2005) vol 80 at col 1252 (Mah Bow Tan, Minister for National Development)):

> Clause 6 of the Bill amends section 51 to make it clear that, in addition to prohibiting the voluntary creation of trusts over an HDB flat, the Act also prohibits any person from becoming entitled to a HDB flat under a resulting trust or a constructive trust. *This will help to prevent a situation where a person who is ineligible to own an HDB flat may become entitled to own one, for example, by paying the purchase price of the flat on behalf of the owner*. [Emphasis added.]

The intent of section 51(6) of the then-HDA was therefore to prevent ineligible persons from owning HDB flats. This was also the understanding of the High Court in the case of *Tan Chui Lian v Neo Liew Eng* [2007] 1 SLR(R) 265. The restriction, in other words, operated within strict boundaries. The conditions were that:

(i) the purported beneficiary must be one who is ordinarily ineligible to own a HDB flat;

(ii) the beneficiary must be claiming an interest in the HDB flat; and

(iii) the beneficiary must be entitled to the interest in the flat by way of a resulting or constructive trust.

Since the effect of section 51(6) of the then-HDA was not changed by the subsequent amendment, the present section 51(10) must be understood to operate within the same boundaries.

62 In the present case, although criterion (i) (as listed in the preceding paragraph) was satisfied, criteria (ii) and (iii) were not. The Plaintiff was making a proprietary estoppel claim on the basis of certain representations made to him by the Deceased. He was not making any of the constructive trust claims enumerated in [53], above. As a result, no trust need necessarily be declared by virtue of the nature of his claim, if successfully made. All that arose out of the unconscionability of the facts would be a mere estoppel equity, not a trust. To this end, counsel for the Defendant had confused the doctrine of proprietary estoppel for that of constructive trust. Furthermore, the Plaintiff did not

seek for the equity to be satisfied by way of a trust. In fact, the Plaintiff was not even seeking an interest in the Flat. Rather, the Plaintiff was merely asking for equitable damages in order to satisfy the equity raised. This prayer was one that was within the court's equitable discretion to grant. Given the particular way in which the Plaintiff's case had been framed, it could not be said his claim was necessarily precluded by section 51(10) of the HDA.

63 Allow me to conclude with a personal observation. In my view, the present case is exactly the kind of case that the proprietary estoppel doctrine is uniquely suited to deal with. Indeed, given the recent liberalisation of the common intention constructive trust doctrine (see *Oxley v Hiscock* [2005] Fam 211 and *Stack v Dowden*), the time may soon come when proprietary estoppel is used only to do the minimum required to remedy any unacceptable unconscionability rather than allocate proprietary interests. If that happens, one will expect it to be the exception rather than the norm for an estoppel equity to be satisfied by the imposition of a constructive trust.

Conclusion

64 I had dealt with the Plaintiff's case on the basis of the representations made by his counsel that the Plaintiff claim was based only on proprietary estoppel and that the Plaintiff was not seeking a trust to satisfy any equity raised. For all of the above reasons, I came to the conclusion that the Plaintiff's case was not obviously unsustainable or wrong. I was, therefore, not of the view that the appropriate course of action was to strike out the Plaintiff's case entirely. However, that the Plaintiff's statement of claim was inadequately defective remained so. Accordingly, I ordered that the Plaintiff amend his statement of claim to properly reflect his proprietary estoppel claim.

65 Both sets of counsel before me agreed that the Defendant should be awarded costs of this application. In the circumstances, I awarded fixed costs of S$5000, excluding disbursements, to be paid by the plaintiff.