

Chng Bee Kheng and another (executrixes and trustees of the estate of Fock Poh Kum,
deceased) v Chng Eng Chye
[2013] SGHC 48

Case Number : Suit No 860 of 2011
Decision Date : 26 February 2013
Tribunal/Court : High Court
Coram : Chan Seng Onn J
Counsel Name(s) : Alvin Yeo SC, Sim Bock Eng and Lionel Leo (Wong Partnership LLP) for the Plaintiffs; Cavinder Bull SC, Foo Yuet Min and Daniel Cai (Drew & Napier LLC) for the Defendant.
Parties : Chng Bee Kheng and another (executrixes and trustees of the estate of Fock Poh Kum, deceased) — Chng Eng Chye

Trusts – Express trusts

Equity – Estoppel

26 February 2013

Judgment reserved.

Chan Seng Onn J:

Introduction

1 The dispute arises out of the administration of the estate of the parties' deceased mother, the late Mdm Fock Poh Kum ("Mdm Fock"). It concerns the beneficial ownership of a two-storey linked house with a land area of approximately 5,712 square feet or 531 square metres at 7 Robin Walk Singapore 258152 (the "Property"), which is the subject of a trust deed. The disputing parties are family members. The Plaintiffs, who are the executrixes and trustees of Mdm Fock's estate, claim that the Property is held on trust for Mdm Fock's estate. The Defendant, who is the brother of the Plaintiffs and the legal owner of the Property, alleges that the trust deed is a sham and does not mean what it says. Mdm Fock's estate therefore is not the beneficial owner of the Property.

Background

2 Although the trial was relatively short with just five witnesses from both sides, the dispute revolves around events which took place over the course of four decades. The determination of the key issues, in my view, turns on one's interpretation of the factual matrix, particularly the intention of the key family members at the material time and the nature of the relationships between the family members. I have therefore endeavoured to illustrate as much of the context as is relevant to the ascertainment of the intention and knowledge of the key protagonists.

The family

3 Mdm Fock married Mr Chng Gim Cheng ("Mr Chng") in 1944. They have six children. The Defendant is the second eldest, while the 1st and 2nd Plaintiffs are the fourth and sixth child respectively. Mr Chng passed away on 3 September 1988, while Mdm Fock passed away more recently on 23 November 2009. The other three children are Chng Bee Suan ("Bee Suan"), the eldest;

Chng Eng Hwee, the third eldest; and Chng Bee Choo, the fifth eldest. The Defendant's wife, Augustine Chng ("Augustine"), moved in and stayed with the family at the Property when she married the Defendant in 1977.

The Property

4 The Property was purchased for \$260,000 and was paid for in various tranches, as evidenced by receipts signed off by Mr Robert Hsieh of Boswell, Hsieh & Lim ("Mr Hsieh"), who was the solicitor acting for Mr Chng. The last tranche was paid on 21 February 1974. The transfer of the Property was executed and lodged on 23 February 1974, though the Property was only registered in the Defendant's sole name on 11 March 1974. It is not clear why there was this lapse of time of 16 days between the execution and lodgement of the transfer and the registration of the Defendant as the owner of the Property.

5 There are a total of three receipts. The first receipt dated 9 January 1974 shows that Mr Chng paid \$26,000. [\[note: 1\]](#) This was the 10% deposit for the Property. Although Mr Hsieh sought the balance of the purchase price and his costs from Mr Chng, [\[note: 2\]](#) two receipts dated 21 February 1974 show that the second and third tranches of approximately \$112,000 and \$131,000 respectively were paid for not by Mr Chng directly, but by the Defendant and Far Eastern Bank respectively. [\[note: 3\]](#) Far Eastern Bank disbursed the sum pursuant to an overdraft facility account under the Defendant's name, but for which Mr Chng was the guarantor. [\[note: 4\]](#) The Defendant clarified that the \$112,000 paid by him in the second tranche was a combination of drawings on the overdraft facility at Far Eastern Bank and monies given to him by Mr Chng. [\[note: 5\]](#) This is a noteworthy clarification as the Defendant was only 24 years old when the Property was purchased. He had just completed his National Service and was starting work at Mr Chng's trading business, Sumber Trading Company ("Sumber Trading"), earning a monthly income of \$800. The overdraft facility at Far Eastern Bank was eventually cleared and the account was closed on 19 March 1984. [\[note: 6\]](#) The Defendant claimed that he cleared his overdraft facility using funds provided by his parents-in-law and Mr Chng. [\[note: 7\]](#)

6 The entire family of eight stayed in a flat at 33-B Tiong Poh Road (the "Tiong Poh flat") before they moved into the Property in 1974. The Tiong Poh flat was fully paid for by Mr Chng, but was registered in Mdm Fock's name to protect it from Mr Chng's potential business creditors. [\[note: 8\]](#) At the Property, Mr Chng and Mdm Fock occupied the master bedroom, while the six children shared the other three rooms. After the Defendant got married in 1977, he and Augustine stayed in the Defendant's room. Except for the Defendant, Mr Chng's other five children moved out of the Property when they got married. The 2nd Plaintiff was the last to move out in 1987. When Mr Chng passed away, Mdm Fock continued to occupy the master bedroom. [\[note: 9\]](#)

The Trust Deed

7 A trust deed was executed by the Defendant as trustee on 23 February 1974 (the "Trust Deed"), even though the Defendant was only registered as the owner of the Property 16 days later on 11 March 1974. However, it is significant to note that the Trust Deed was executed on the same day that the transfer of the Property was executed and lodged on 23 February 1974. The Trust Deed, which was drafted and witnessed by Mr Hsieh, reads:

WHEREAS the Trustee is the registered proprietor of all that land and premises known as No. 7 Robin Walk, Singapore (hereinafter called "the said property") but the consideration for the said

property was provided by FOCK POH KUM of No. 33-B Tiong Poh Road, Singapore and the said property was transferred to the said Trustee as trustee for the said FOCK POH KUM as the trustee hereby acknowledges.

NOW THIS DEED WITNESSETH that the said CHNG ENG CHYE declares that he holds the said property in trust for the said FOCK POH KUM according to the nature and tenure thereof and hereby agrees that he will at the request and cost of the said FOCK POH KUM make application to the Land Titles Registry or other appropriate authority and execute and do all such documents acts and things as may be necessary to procure the said property to be transferred to and registered in the name of such person or otherwise dealt with at such time and in such manner as the said FOCK POH KUM shall direct or appoint.

IN WITNESS WHEREOF the said CHNG ENG CHYE has hereunto set his hand and seal the day and year first above written.

8 In essence, the Trust Deed states that: (a) the purchase price of the Property was provided by Mdm Fock; and (b) the Property was transferred to the Defendant to be held on trust for Mdm Fock.

9 Mdm Fock was not present when the Trust Deed was executed. Interestingly, although Mr Hsieh's bill of costs for the execution of the Trust Deed reflected the Defendant as the client, the cover letter enclosing the bill of costs was addressed to Mdm Fock. [\[note: 10\]](#) It is undisputed that the Trust Deed was handed over to Mdm Fock after it was executed and was in her possession till her death in November 2009.

10 The Trust Deed was discovered by the 2nd Plaintiff when she opened Mdm Fock's safe deposit box at United Overseas Bank ("UOB safe deposit box") on 17 December 2009. In addition to the original Trust Deed, the UOB safe deposit box also contained, *inter alia*, Mdm Fock's original will (the "Will"), which was executed on 18 November 2002, a copy of the certificate of title to the Property, the original bill of costs from Mr Hsieh, several pieces of jewellery which were tagged with the names of the persons they were to be given to, and a certificate for over 1 million shares in Sumber Holdings Private Limited ("Sumber Holdings"). [\[note: 11\]](#) Sumber Holdings is the successor entity to Sumber Trading. [\[note: 12\]](#)

Key events after Mdm Fock's death

(i) The 31 January 2010 meeting

11 On 10 January 2010, the 2nd Plaintiff distributed copies of the Will to the family. On 31 January 2010, there was a meeting at the 1st Plaintiff's home to discuss the administration of Mdm Fock's estate. All six children were present. The Plaintiffs informed everyone of the Trust Deed at this meeting. At this point, there is a divergence of views as to what transpired. According to the 2nd Plaintiff, the Defendant said that he had signed the Trust Deed and that it remained valid. When the 1st Plaintiff stated that the Property had to be included in the Schedule of Assets as part of Mdm Fock's estate, the Defendant purportedly replied that the Plaintiffs could "go ahead". [\[note: 13\]](#) The Defendant's version, however, was that he had maintained that he was the rightful owner of the Property. [\[note: 14\]](#)

(ii) The 19 April 2010 letter

12 On 19 April 2010, the Defendant wrote a letter to the Plaintiffs marked "Without Prejudice" ("the 19 April 2010 Letter"). [\[note: 15\]](#) In the letter, he disagreed that he was holding the Property on trust for Mdm Fock (or her estate). The Defendant also asserted that "the money to purchase the Property came from [him]", and that the Trust Deed was executed "simply to give [Mdm Fock] peace of mind so that she could live in the Property without fear of being evicted one day". The Plaintiffs responded with a letter on 4 May 2010 and proposed a meeting to "address and resolve the issues at hand". [\[note: 16\]](#)

(iii) *The 24 May 2010 meeting*

13 A meeting took place on 24 May 2010 at the Defendant's office at Sumber Holdings ("the 24 May 2010 Meeting"). It was attended by Bee Suan, the Plaintiffs, the Defendant, and the Defendant's son, William Chng. The conversation at the meeting was recorded on tape. From the transcript of the recording, the Defendant stated that it was Mr Chng who had paid for the Property. [\[note: 17\]](#) The Defendant also repeated that the Trust Deed had been executed to give Mdm Fock the peace of mind that she would not be evicted from the Property, and he said that it was Mdm Fock who had wanted the Trust Deed. [\[note: 18\]](#)

The present proceedings

14 On 8 July 2010, the Plaintiffs' solicitors wrote to the Defendant for the return of the Property to Mdm Fock's estate. The Defendant did not comply and the Plaintiffs commenced the present proceedings on 24 November 2011 seeking, *inter alia*, a declaration that the Property is held on trust by the Defendant for the Plaintiffs as the executrixes and trustees of Mdm Fock's estate.

Summary of the parties' respective cases

15 As the Plaintiffs' starting point is premised simply on the existence of the Trust Deed and its terms, it will be more useful in the present case to first set out the salient features of the Defendant's case as to why the Property belongs to the Defendant, notwithstanding the Trust Deed, before turning to the Plaintiffs' case.

The Defendant's case

16 The Defendant's case is multi-faceted. The thrust of his case is that the Trust Deed was a sham and was not intended to mean what it said (the "Sham Argument"). [\[note: 19\]](#) Counsel for the Defendant, Mr Cavinder Bull SC ("Mr Bull"), conceded that if the Trust Deed was not a sham, the Property would be held on trust by the Defendant for Mdm Fock's estate, subject to any estoppel which might operate to prevent Mdm Fock's estate from asserting beneficial ownership over the Property as Mdm Fock had allowed the Defendant to expend considerable costs on the maintenance, upkeep and renovation of the Property (the "Estoppel Argument").

(i) *The Sham Argument*

17 In support of the Sham Argument, Mr Bull made the following points.

(1) The purpose of the Trust Deed

18 First, the only purpose of the Trust Deed was to protect the Property from creditors. The

Defendant's case on this aspect is somewhat unclear. Initially, the focus appeared to be on Mr Chng's intention. Hence, Mr Bull argued that Mr Chng had to choose someone whom both he and the Defendant could trust to repose the beneficial interest in the Property in for the purposes of protecting the Property from creditors, and Mdm Fock was that trustworthy someone. [\[note: 20\]](#) It was this premise, coupled with Mr Chng's instruction to Mr Hsieh that the purchaser was the Defendant, which prompted Mr Hsieh to suggest using the Trust Deed with the Defendant as the legal owner. [\[note: 21\]](#) Mr Bull then posed the following hypothesis. If Mr Chng had wanted Mdm Fock to have the Property, he could easily have registered the Property in her name, just as he had registered the Tiong Poh flat in her name to protect the latter property from creditors. Thus, if Mr Chng had simply wanted to protect the Property from creditors without at the same time giving the entire interest in the Property to the Defendant, he could have similarly registered the Property in Mdm Fock's name. The fact that he had not done so, when he could easily have done so, suggested that the purpose of the Trust Deed was *not* to gift the Property to Mdm Fock.

19 Up to this point, the focus was squarely on Mr Chng's intention and knowledge. Subsequently, however, Mr Bull asserted that the Defendant was the sole settlor and trustee of the alleged trust, and "therefore the only relevant intention is the Defendant's intention". This argument is briefer: since the Defendant did not have any intention to declare a trust in favour of Mdm Fock, the Trust Deed was a sham. [\[note: 22\]](#)

(2) Purchase price of the Property

20 Second, Mr Bull pointed out an inconsistency in the wording of the Trust Deed. Apart from the initial deposit of \$26,000 which was paid for by Mr Chng, the remainder of the purchase price of the Property came from the Defendant. [\[note: 23\]](#) Thus, contrary to the express wording of the Trust Deed, no part of the purchase price of the Property came from Mdm Fock. Mdm Fock also never paid for the maintenance and upkeep of the Property. [\[note: 24\]](#)

(3) Mdm Fock's subsequent conduct

21 Third, Mr Bull submitted that Mdm Fock's own conduct was consistent with the Defendant's position that the Trust Deed was a sham. First, the Property was not named as one of Mdm Fock's assets in her Will, even though it would have been her most valuable asset. Second, Augustine stated that when Mdm Fock passed the certificate of title to the Property to her in 2002, Mdm Fock told her that the Property belonged to the Defendant and that the Defendant should therefore keep the certificate. [\[note: 25\]](#)

(4) The Defendant was the sole legal and beneficial owner of the Property

22 Fourth, Mr Bull argued that Mr Chng favoured the Defendant and wanted the latter to take over the family business. Thus, Mr Chng gave the Defendant the Property – which was to be the Defendant's matrimonial home [\[note: 26\]](#) – in return for the Defendant agreeing not to pursue further studies and to stay in Singapore and start learning the ropes of the family business. [\[note: 27\]](#) Alternatively, Mr Chng wanted to help the Defendant purchase the Property simply as a parent helping his child. [\[note: 28\]](#) Whatever funds Mr Chng provided the Defendant with for the purchase of the Property were obviously Mr Chng's gifts to the Defendant. [\[note: 29\]](#) Mr Bull submitted that there was no evidence that Mr Chng wanted to make a gift of the Property to Mdm Fock, or to give Mdm Fock the funds to purchase the Property. [\[note: 30\]](#)

(ii) The Estoppel Argument

23 The Defendant's case for an estoppel is that Mdm Fock had promised, represented or conducted herself in such a manner that it led the Defendant to believe that he was the beneficial owner of the Property. Consequently, the Defendant had detrimentally relied on Mdm Fock's promise, representation or conduct by paying for most of the expenses relating to the upkeep of the Property, including fire insurance and property tax, while none of the other children had contributed to any of the household expenses. Mdm Fock, too, had not paid for any of the maintenance or upkeep of the Property despite having had the means to do so. [\[note: 31\]](#) Furthermore, the Defendant had spent a substantial sum on renovations when Mdm Fock was alive, and after she passed away. At no point did either Mdm Fock or the Plaintiffs (after they discovered the Trust Deed) prevent the Defendant from spending money on the renovations. [\[note: 32\]](#)

The Plaintiffs' case

24 The Plaintiffs' positive case is simple. It is founded on the existence of the Trust Deed and the words contained in it, which, they claim, unambiguously provide that the Defendant holds the Property on trust for Mdm Fock's estate. Invariably, the crux of the Plaintiffs' case centred on the submission that the Trust Deed was not a sham. According to the Plaintiffs, the Trust Deed was executed to enable Mdm Fock to beneficially own the Property so that the family would be taken care of and so that the creditors of the family business could not take the Property should the business run into financial difficulties. [\[note: 33\]](#) The Defendant therefore did not beneficially own the Property. The Plaintiffs' alternative argument is that even if the Trust Deed was for a sham purpose, the Defendant cannot rely on his sham purpose to invalidate the Trust Deed (the "Illegality Argument"). Lastly, the Plaintiffs deny that they are estopped from asserting beneficial interest in the Property.

(i) The Sham Argument

25 Counsel for the Plaintiffs, Mr Alvin Yeo SC ("Mr Yeo"), accepted that the Defendant was both the settlor and the trustee. Consequently, he also accepted that it was the Defendant's intention behind the constitution of the trust that mattered. [\[note: 34\]](#) In this respect, the Plaintiffs' and the Defendant's respective cases are on common ground. Mr Yeo, however, argued that Mr Chng's intention was more important from an "evidential point of view" as he was "the soul and spirit behind the purchase of the Property (having paid the entire purchase price) and the execution of the Trust Deed". [\[note: 35\]](#) It appears that the Plaintiffs' case is that both the intention of Mr Chng and that of the Defendant were identical inasmuch as Mr Chng intended the Defendant to hold the Property on trust for Mdm Fock and the Defendant intended likewise – whether out of filial piety, obedience or some other reason – when he executed the Trust Deed.

(1) Mr Chng's intention

26 On Mr Chng's intention, Mr Yeo argued that Mr Chng could not have intended his 24-year-old son to beneficially own the Property in 1974 when the Property was a substantial asset of the family, especially when Mr Chng, Mdm Fock and the remaining five children who were between 17 and 26 years old then were still staying with the family. First, the Defendant had just completed National Service in 1974. Second, Mr Chng was not the kind who favoured sons over daughters such that he would have intended to reward the Defendant in 1974 with the Property over all his other children. [\[note: 36\]](#) Third, Mr Chng also could not have intended to compensate the Defendant for agreeing not to pursue further studies overseas; the Defendant did not find studying easy and had done poorly in

his various school examinations and courses up till then. [\[note: 37\]](#)

27 Thus, Mr Yeo submitted that Mr Chng wanted Mdm Fock to own the Property beneficially so that the family would be taken care of *and* so that the creditors of Mr Chng's sole proprietorship could not take the Property should the business fail. [\[note: 38\]](#) It is pertinent to note that the latter purpose is incidentally also an integral aspect of the Defendant's Sham Argument. Mr Yeo suggested that it was for these reasons that Mr Chng had previously registered the Tiong Poh flat in Mdm Fock's name. [\[note: 39\]](#) Mr Yeo proffered that the reason why Mr Chng had not simply registered Mdm Fock as the legal owner of the Property was because Mr Chng had foreseen the need for the Defendant to sign guarantees on behalf of the family business and it would have been easier for the Defendant to provide a guarantee if he held the Property under his name. [\[note: 40\]](#)

(2) The Defendant's intention

28 Mr Yeo pointed out that the Defendant had admitted that: (a) Mr Hsieh had explained to him the true effect of the Trust Deed, *ie*, that the beneficial ownership of the Property would vest in Mdm Fock; (b) he understood Mr Hsieh's explanation; and (c) he had signed the Trust Deed willingly. [\[note: 41\]](#) At no time had Mr Hsieh said that the Trust Deed would have no effect except when the Defendant chose to use it against his creditors. Based on these circumstances, Mr Yeo argued that the Defendant had intended the beneficial interest in the Property to vest in Mdm Fock.

(3) Mdm Fock's subsequent conduct

29 Although Mr Yeo stressed that Mdm Fock's conduct as a beneficiary of the trust was not determinative of the validity of the Trust Deed, he submitted that her conduct was in any event consistent with the Trust Deed as having created a trust. First, Mdm Fock was in possession of the Trust Deed until after she passed away, when it was discovered in her UOB safe deposit box in 2009. If the Trust Deed had merely been a sham to fend off potential creditors, it would have been logical for the Defendant to hold on to the Trust Deed. Second, when asked why he had not kept the Trust Deed, the Defendant could only reply that he had not thought of it. Third, the Defendant never asked for the Trust Deed back from Mdm Fock in the 1980s even though by that time, the relationship between the Defendant and Mdm Fock had worsened. Fourth, the Plaintiffs testified that Mdm Fock had told them on separate occasions that she was the owner of the Property. [\[note: 42\]](#)

(ii) *The Illegality Argument*

30 The substance of this argument is that the Defendant cannot fashion a trust for the purpose of defrauding his potential future creditors only to subsequently rely on that same fraudulent purpose to revoke the trust. This is so whether the fraudulent purpose is ultimately carried out. [\[note: 43\]](#)

(iii) *The Estoppel Argument*

31 Lastly, Mr Yeo submitted that the Defendant could not rely on any form of estoppel. First, the alleged promise, representation or conduct of Mdm Fock relied upon by the Defendant to found an estoppel was equivocal at best. [\[note: 44\]](#) Second and more importantly, the Defendant could not have been induced by any promise, representation or conduct which Mdm Fock was alleged to have given. This was because the Estoppel Argument was an alternative argument that was premised on the Trust Deed being valid, *ie*, that the beneficial interest in the Property belonged to Mdm Fock. The Defendant therefore would have known of Mdm Fock's beneficial interest and could not have been

induced by Mdm Fock's representation, promise or conduct to the effect that he was the beneficial owner of the Property. [\[note: 45\]](#)

The issues

32 The parties' submissions reveal three major issues:

- (a) whether the Trust Deed was a sham, and if so, what are the consequences of a sham trust;
- (b) if the Trust Deed was a sham, whether the Defendant can nevertheless rely on the sham purpose to invalidate the Trust Deed; and
- (c) if the Trust Deed was not a sham, whether the Plaintiffs are estopped from asserting that Mdm Fock's estate is the beneficial owner of the Property.

Analysis

Evidential considerations

Witnesses' testimonies

(1) Intention and knowledge of Mr Chng and Mdm Fock

33 It is common ground that how Mr Chng and Mdm Fock acted, and what they intended or knew at the material time in 1974 (when the Property was purchased and the Trust Deed executed) are key to the dispute. However, I am somewhat handicapped in my assessment of the factual matrix with respect to the intention and knowledge of the two key protagonists as both have since passed away. While both sides' witnesses – which include the Defendant and the Plaintiffs – have given evidence on what Mr Chng and Mdm Fock had apparently told or said to them, I am extremely cautious in treating the generally self-serving evidence as proof of Mr Chng's and Mdm Fock's intention and knowledge at the material time. A testimony by a witness who claims to have firsthand knowledge of specific events and conversations that took place only gives evidence of the fact that such events did take place and of what was in fact said by various parties during those conversations. A third party cannot purport to reveal the *actual* and *true* intention and knowledge of Mr Chng or Mdm Fock. If Mr Chng and Mdm Fock during those conversations had disclosed what was their intention or knowledge during a particular conversation which was in fact heard by a witness, then the witness can do no more than give evidence of what Mr Chng or Mdm Fock had in fact said or disclosed (to the witness) as their intention or knowledge, and no more than that.

34 Furthermore, the only surviving witness to the various events and conversations in 1974 (assuming all of those did take place) is the Defendant. Mr Chng, Mdm Fock and Mr Hsieh, who are the only other proper contradictors or affirmers of some of the key events and conversations which are said to have taken place in 1974, are no longer able to give evidence. In these circumstances, the court should not simply accept the Defendant's evidence on what had transpired in 1974 at face value. This is not to say that the Defendant should not be believed from the outset. Whatever evidence adduced by the Defendant as to what was told or said to him by Mr Chng and Mdm Fock, which might reveal what could have been the intention and knowledge of Mr Chng and Mdm Fock, must be assessed in the light of and tested against all the circumstances subsisting at the relevant time, including the available documentary evidence and good common sense. As Lord Blackburn once said, "the weight of evidence depends on rules of common sense": *Lord Advocate v Blantyre* (1879) 4

(2) The respective witnesses' credibility

35 As both sides have alleged that the other party's evidence is unreliable and untruthful, it is necessary for me to clarify how I perceived the respective parties' credibility in the course of their oral testimonies.

(A) The Defendant

36 I found the Defendant to be generally evasive and shifty in his evidence. Four instances stand out, although there are other examples.

37 First, at the 24 May 2010 Meeting, where, *inter alios*, the Plaintiffs were present, the Defendant said that it was Mdm Fock who wanted to have a trust deed, and the Trust Deed was accordingly executed to give her the peace of mind that she would not be evicted from the Property. This seems to suggest that the idea of having a trust deed originated from Mdm Fock. However, in his affidavit of evidence-in-chief, the Defendant stated that it was Mr Chng who first suggested that the Defendant "create a document which could be shown to any future creditors who might be after my [the Defendant's] assets. The document he [Mr Chng] suggested was a trust deed in favour of my late mother [Mdm Fock]." [\[note: 46\]](#) Further, the Defendant gave evidence during cross-examination that the first time that the concept of a trust was brought to Mr Chng's attention was in a meeting with Mr Hsieh where the Defendant was also present. [\[note: 47\]](#) It was Mr Hsieh, *not* Mr Chng or Mdm Fock, who suggested the concept of a trust to hold the Property.

38 Second, at the trial, the Defendant tendered the 19 April 2010 Letter. [\[note: 48\]](#) In that letter, he stated that "the money to purchase the Property came from me and did not come from Mother [Mdm Fock]. The trust deed was simply to give Mother peace of mind so that she could continue to live in the Property without fear of being evicted." Ostensibly, the purpose of the Trust Deed stated by the Defendant in his letter is false, as the Defendant later admitted that he knew that the Trust Deed was intended to protect the Property from his potential future creditors (see [65]–[67] below). Indeed, that is now his case for this suit. The Defendant's sole explanation for misleading the Plaintiffs in the 19 April 2010 Letter was that he was "not really ready to disclose why the [T]rust [D]eed was made". [\[note: 49\]](#)

39 Third, the Defendant provided numerous varied explanations for the sources of his funds for the payment of the Property. He oscillated between claiming that the monies came from him, [\[note: 50\]](#) and that the monies were provided by Mr Chng. [\[note: 51\]](#) For instance, in the 19 April 2010 Letter, the Defendant stated that the money for the Property came from him and not Mdm Fock. Yet, at the 24 May 2010 Meeting, the Defendant admitted in the presence of the Plaintiffs and others that the money for the Property came from Mr Chng. By the end of the trial, it was plainly evident to me that most, if not all, of the funds used to pay for the Property either came directly or indirectly from or were arranged by Mr Chng. In my view, it is unlikely, even with the passage of time, that the Defendant could have been unclear or confused at any time about where the funds to purchase the Property actually came from. The Defendant was in 1974 only a young man of 24 years of age who did not have any savings or the means to purchase the Property, a large and expensive house by any measure. Without Mr Chng acting as the guarantor, I doubt that the Defendant could have obtained any bank loan or overdraft facilities in his name to finance the balance of the purchase price of the Property. In my view, the Defendant could not possibly have had the financial capacity to buy the Property, nor could he possibly have serviced and eventually repaid the loan from Far Eastern Bank

(see [5] above) without Mr Chng's financial support. I do not believe that the Defendant could have forgotten that he was never the source of any funding to finance the purchase of the Property. This kind of discrepancy is not about a particular date or year in which a particular event took place, where a person is likely to remember wrongly or be confused in his recollection of the date or year with the passage of time.

40 Fourth, I find the Defendant's evidence over how he came into possession of \$100,000 apparently gifted [\[note: 52\]](#) to him by one Mr Chng Pik Cong ("CPC") – whom the Defendant initially purported to be "a relative of [his] in Indonesia" [\[note: 53\]](#) – to pay for the Property to be incredible. According to the Defendant, when CPC heard that the Defendant wanted to buy a house, he, apparently as a generous relative, offered to sponsor \$100,000 towards the Defendant's purchase: [\[note: 54\]](#)

Court: Number two is you also never asked Mr Chong [*sic*] Pik Chong, please, I need \$100,000, he gave to you. He never did that, right?

A: No, because while he was in Singapore, he heard about this, so after he went back, he called me, hey, you are buying the house, yah, I'd like to sponsor \$100,000 for you. That's all.

Court: So he called you out of the blue; you didn't ask him; right?

A: Yah, I didn't ask him. I don't know, as I say, I'm not saying or implicating whether my father—

Court: Very nice phone call, all of a sudden it appeared, \$100,000. "I heard you are buying a house, I'll give you \$100,000."

A: Yes.

41 However, it was revealed later during cross-examination that: (a) CPC was *not* a blood relative of the Defendant; [\[note: 55\]](#) (b) CPC was in fact Mr Chng's business partner; and (c) without Mr Chng's intervention and arrangements with CPC for the money to be furnished, CPC would not likely have transferred the \$100,000 to the Defendant: [\[note: 56\]](#)

Mr Yeo: ... So would you still not accept that the \$100,000 from Mr Chng Pik Chong would have been arranged by your father?

A: On that I cannot confirm because I'm not really sure if it's as arranged, but as what you put earlier, if not for my father, would this money come? Yes. Then I will say yes.

Court: *If not for your father—if your father wasn't the one who did something, it would not come.*

A: *Yes, I agree with that.*

[emphasis added]

42 These examples highlight the shifts and inconsistencies in the positions taken by the Defendant on a spectrum of issues from the time the dispute arose to the conclusion of the trial. Coupled with

the fact that the Defendant was visibly evasive at various points during the cross-examination, I am of the view that his evidence must be treated with a healthy dose of suspicion. I am therefore more sceptical of the Defendant's evidence, particularly where it relates to what the Defendant recalls as having been told to him by Mr Chng and Mdm Fock, including what they might have said or disclosed to him as to their knowledge and intention.

(B) The Plaintiffs

43 Mr Bull, too, submitted that the Plaintiffs were unreliable and untruthful witnesses. He referred to the 2nd Plaintiff's evidence on two joint accounts which Mdm Fock had opened with the 2nd Plaintiff. At the trial, the 2nd Plaintiff was confident that the accounts were opened before 1987. [\[note: 57\]](#) However, upon Mr Bull's request, the 2nd Plaintiff checked and found out from the bank that the joint accounts were opened in 1996. Mr Bull therefore urged the court to treat the 2nd Plaintiff's evidence with circumspection. I accept that the 2nd Plaintiff's memory may be somewhat patchy with regards to her recollection of the year in which the accounts were opened. However, given that these events took place many years ago, it is unrealistic to expect the witness to have perfect memory in recalling the date or the year when those events took place. In any event, I did not find the 2nd Plaintiff's evidence to be of much direct assistance in helping me to arrive at my conclusions on the various issues. The Plaintiffs' credibility did not have any material impact on the factors which I have relied on in arriving at my decision.

Whether the Trust Deed was a sham

(i) *Was there even a valid trust?*

44 Before delving into the crux of the Sham Argument, I shall briefly deal with an associated argument canvassed by Mr Bull. He suggested that on a strict construction of the words of the Trust Deed, there could not have been any valid declaration of trust on 23 February 1974. This was because the Defendant was not the registered proprietor of the Property on that date; he only became the registered proprietor on 11 March 1974. He could not have constituted a valid trust without first being the legal owner of the Property. Mr Bull's explanation for the "erroneous" Trust Deed was that it was all intended to be a sham. In other words, the accuracy and wording of the Trust Deed were inconsequential since the Trust Deed was intended to be a sham. Mr Bull cited *Yeong Ah Chee v Lee Chong Hai & Anor* [1994] 2 MLJ 614, a decision of the Malaysian Supreme Court, for the proposition that in order for a trust to be valid, the settlor must vest the trust property in the trustee completely, both in law and equity. Mr Bull also brought to my attention a High Court of Kuching decision, *Cheu Kuok King v Jurudaya Construction Sdn Bhd* [2007] 4 MLJ 720, where the court found at [20] that there was no valid trust because the defendant settlor of the trust was not the registered owner of the property at the time the trust deed was executed on 1 November 1991. The memorandum of transfer was dated 31 October 1991, but was only registered on 2 November 1991. Mr Bull further contended that on the Plaintiffs' case, if it was indeed Mr Chng who had paid the purchase price of the Property, he would have been the beneficial owner, not the Defendant. As Mr Chng never executed any written instrument of transfer to dispose of his equitable interest, as required by the then equivalent of s 7(2) of the Civil Law Act (Cap 43, 1999 Rev Ed), he retained beneficial interest in the Property at all times. The Defendant therefore could not have purported to declare that he held the beneficial interest on trust for Mdm Fock. [\[note: 58\]](#)

45 Mr Yeo responded first by arguing that the Defendant had consistently taken the position, both in his affidavit of evidence-in-chief as well as in his closing submissions, that he was the sole settlor

and trustee of the Trust Deed. The argument that the Defendant could not have settled the trust because he did not have legal interest in the Property was therefore an afterthought that should not be entertained. On the point that the beneficial interest resided in Mr Chng and not the Defendant, Mr Yeo submitted that although Mr Chng had paid for the Property, he had not intended to obtain any beneficial interest for himself and had, through the procurement of the Trust Deed, intended that Mdm Fock should own the Property beneficially. The Property was to be transferred from the previous registered proprietors to the Defendant absolutely, and the Defendant was to vest the beneficial interest of the Property in Mdm Fock, which he did through the Trust Deed. Mr Chng had not disposed of any beneficial interest in the Property; it was the Defendant who had disposed of his beneficial interest in the Property to Mdm Fock. This disposition was effected by the Trust Deed, which was in writing and thus did not offend the then equivalent of s 7(2) of the Civil Law Act.

46 While Mr Bull's argument may appear tenable at first blush, I do not think that this was an avenue which the Defendant could legitimately pursue while at *the same time* maintaining that the Trust Deed was a sham. For the Sham Argument to have any traction, it must be predicated on the assumption that in principle, the Trust Deed was capable of giving rise to a trust in the first place, albeit one which ought not to be recognised retrospectively because of the sham (see [50]–[57] below). The Defendant's case was not that he could not have declared the trust; it was that *notwithstanding* that he had declared a trust, it should not be given effect as it was a sham. It was, of course, open to Mr Bull to argue that the Sham Argument would apply as an alternative argument if the court found that the Trust Deed could have given rise to a trust. However, that was not the position taken in the Defendant's affidavit of evidence-in-chief, as well as in his closing submissions, as Mr Yeo correctly pointed out. More importantly, the Defendant's case was not framed as such. In his pleadings, the Defendant averred: [\[note: 59\]](#)

... The Defendant avers that the alleged trust deed dated 23 February 1974 (the alleged trust deed) is not valid as the Defendant, at *the time of execution of the alleged trust deed (or at any point before or thereafter)*, did not have the intention to hold the Property in trust for Fock Poh Kum nor the intention to cause the Property, at any point in time, to be transferred to and registered in the name of such persons as Fock Poh Kum may have directed or appointed.

[emphasis added]

47 The above already seems to suggest that the Defendant accepted that he had executed the Trust Deed, albeit he did not have any intention at the material time to hold the Property on trust for Mdm Fock, *ie*, the Sham Argument. This is markedly different from Mr Bull's submission now that the Defendant could not have constituted a trust without holding legal interest in the Property. In his particularisation of the defence that the Trust Deed was a sham and therefore invalid, the Defendant stated:

...

(c) The late Mr Chng ... decided to help the Defendant financially to purchase the Property ... Both the late Mr Chng ... and the Defendant intended ... that the Defendant would have the sole legal and beneficial ownership of the Property.

(d) However, the late Mr Chng Gim Cheng was concerned about having the Property registered in the Defendant's name because the Defendant was just about to be involved in the family business. As such, the late Mr Chng Gim Cheng suggested that the Defendant executed a trust deed in favour of Fock Poh Kum in order to protect the Property from potential future creditors. As a young man and a filial son, the Defendant followed his father's wishes.

...

- (i) *On or about 23 February 1974, the Defendant executed the alleged trust deed despite having no intention to hold the Property in trust for Fock Poh Kum. ...*

[emphasis added]

Therefore, the entire substratum of the Defendant's case is that he had executed the Trust Deed, *but* the reason why beneficial interest did not pass was because he never intended to pass it to Mdm Fock. That was the sham. His case is not that he had no beneficial interest to pass because he had no legal interest, and, *hence*, no trust could be constituted under the Trust Deed. The Defendant finally concluded in no uncertain terms (at paragraph 6 of the Defence):

Paragraph 4 of the Statement of Claim is denied. *The alleged trust deed is not valid as the Defendant, **being the sole settlor/testator of the alleged trust deed, had never intended to hold the Property in trust for Fock Poh Kum** . Instead, the Defendant had always intended that he would have the sole legal and beneficial ownership of the Property, and so was the intention of the Defendant's late father, Mr Chng Gim Cheng.*

[emphasis added in italics and bold italics]

In consequence of the Defendant's unambiguous pleadings, I agree with Mr Yeo that Mr Bull's argument – viz, that there was no valid trust because the Defendant was not the registered proprietor of the Property at the point of execution of the Trust Deed – should not be entertained at this stage.

48 In any case, even on the merits, I would have concluded that Mr Bull's clever but technical argument does not carry the Defendant very far. Although it is unclear who the contracting parties to the contract for the sale of the Property were, the instrument of transfer recorded that the Property was transferred to the Defendant "in consideration of ... [\$260,000] paid ... by [the Defendant]". [\[note: 60\]](#) As such, at least as of 23 February 1974 when the transfer was executed, the Defendant had beneficial interest in the Property. At this juncture, it is evident that Mr Bull's point that Mr Chng retained the beneficial interest falls away. The more important question is whether the Trust Deed was effective to convey beneficial interest to Mdm Fock, given that at the time of its creation, the Defendant only had the beneficial interest but not the legal interest in the Property. In my view, the answer must be yes. A person can establish an express trust even if he is not the absolute owner of the property. Thus, a lease over land may be the subject matter of a trust: *Keech v Sandford* (1726) Sel Cas Ch 61. Likewise, an equitable interest in a trust may itself be the subject matter of a trust: Geraint Thomas & Alastair Hudson, *The Law of Trusts* (Oxford University Press, 2nd Ed, 2010) at para 1.02. The definition of what may constitute trust property is expressed in even wider terms in another leading textbook, Philip H Pettit, *Equity and the Law of Trusts* (Oxford University Press, 12th Ed, 2012) ("*Pettit*"). The learned author in *Pettit* commented (at p 51):

In order to establish a trust there must be identifiable trust property, *but there is no restriction as to what kind of property it may be*. There can be a trust of a chattel or of a chose in action, or of a right or obligation under an ordinary legal contract, just as much as a trust of land or money.

[emphasis added]

49 This is not a case of a trust over some future property which has not come into existence,

which Mr Bull appeared to be alluding to in his submissions. The Property existed at the time of the execution of the Trust Deed; it was explicitly identified in the Trust Deed. The prohibition against constituting trusts of future property covers, for instance, property that a person may have or will take under the exercise of a special power of appointment, future royalties, or proceeds of any future sale of specific property. The commonality across these types of future property is the fact that they do not exist at the material time and, for that reason, cannot be assigned either at law or in equity or held on trust: *Pettit* at p 120. With respect, I am unable to agree with the Malaysian decisions cited to me by Mr Bull. The fact that the Defendant only held the beneficial interest but not the legal interest in the Property at the time of the execution of the Trust Deed is not a bar to the constitution of a trust to hold the Property beneficially for Mdm Fock. I would add, for completeness, that in *Re Ralli's WT* [1964] 1 Ch 288, the court held that a settlor who had a remainder interest under another trust could create a valid trust over that remainder interest. With this out of the way, I turn now to the main thrust of the Defendant's case, viz, the Sham Argument.

(ii) *Concept of a sham*

(1) Generally

50 The basic idea of a sham can be found in Lord Diplock's statement in *Snook v London and West Riding Investments Ltd* [1967] 2 QB 786 at 802:

As regards the contention of the plaintiff that the transactions between himself, Auto Finance and the defendants were a "sham," it is, I think, necessary to consider what, if any, legal concept is involved in the use of this popular and pejorative word. I apprehend that, if it has any meaning in law, it means ***acts done or documents executed by the parties to the "sham" which are intended by them*** to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create. But one thing, I think, is clear in legal principle, morality and the authorities ... that for acts or documents to be a "sham," with whatever legal consequences follow from this, ***all the parties thereto must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating*** .

[emphasis added in italics and bold italics]

51 There are two important general points to note in relation to the Sham Argument raised by the Defendant. First, the person alleging that a document is a sham has the burden of proving that the parties intended the document to be a pretence: *National Westminster Bank plc v Rosemary Doreen Jones & Ors* [2001] 1 BCLC 98 ("*National Westminster Bank*") at [68]. Second, there is a very strong presumption that parties intend to be bound by the provisions of agreements which they enter into. As Neuberger J (as he then was) explained in the same case (at [59]):

... Because a finding of sham carries with it a finding of dishonesty, because innocent third parties may often rely upon the genuineness of a provision or an agreement, and because the court places great weight on the existence and provisions of a formally signed document, there is ***a strong and natural presumption against holding a provision or document a sham***.

[emphasis added]

(2) Need for common intention to mislead

52 The crux of the sham concept is a common intention to mislead: Matthew Conaglen, "Sham Trusts" (2008) 67(1) CLJ 176 ("Conaglen") at pp 183–184. As Neuberger J explained in *National Westminster Bank at* [59], a sham is "a provision or agreement which the parties do not really intend to be effective, but have merely entered into for the purpose of leading the court or a third party to believe that it is to be effective". In the absence of a common intention to mislead, the court will simply construe an agreement according to the actual objective intention of the parties (*Yorkshire Railway Wagon Company v Maclure* (1882) 21 Ch D 309 at 318):

If it were a mere cloak or screen for another transaction one could see through it, but once come to the conclusion that it was the *bonâ [sic] fide* real transaction between the parties, intended by both sides to operate according to its tenor, there is no mode that I know of holding it illegal unless you find it prohibited by some Act of Parliament or void by reason of some principles of law.

53 In *TKM (Singapore) Pte Ltd v Export Credit Insurance Corp of Singapore Ltd* [1992] 2 SLR(R) 858 ("TKM"), G P Selvam JC (as he then was) stated (at [48]):

To ascertain whether the documents represent the true relationship between parties the following test as laid down by Lindley LJ in the *Yorkshire Railway Wagon Company* case ... and Diplock LJ in the *Snook* case ... may be formulated: Whether the documents were intended to create legal relationships *and* whether the parties *did actually act according to the apparent purpose* and tenor of the documents.

[emphasis added]

Selvam JC's formulation was recently applied by Belinda Ang Saw Ean J in *Koon Seng Construction Pte Ltd v Chenab Contractor Pte Ltd and another* [2008] 1 SLR(R) 375 ("Koon Seng") at [64].

(3) Test of parties' intention to enter into a sham agreement is "subjective"

54 It has been said that the test of whether the parties intend their agreement to be a sham is subjective: *Hitch v Stone* [2001] STC 214 ("Hitch") at [66]. Professor Conaglen explains (*Conaglen at* p 186):

The fact that the intention must be subjective flows from the fact that the very purpose of a sham transaction is to mislead third parties. *To rely solely on the objective intention of the parties, ascertained in the normal way, would give direct effect to the sham: a sham can only work its mischief if its objective appearance is treated as the reality. ... If it is objectively clear that the parties did not intend a transaction of type X and in fact, as a matter of law, intended rights and obligations which constitute a type-Y transaction, then the courts are capable of treating the transaction as one of type-Y without need of any sham doctrine: they can simply categorise it as type-Y. Only where the objective appearance of the transaction is type-X do the courts need a justification to look behind the objective appearance in order to get at "the real truth of the matter"*. In the case of an allegation that the transaction is a sham, it is the parties' subjective intention which provides that justification, on the basis that the parties subjectively intended to mislead third parties. It will, of course, often be the case that the "court is left with little direct evidence and is therefore required to draw inferences from the circumstances surrounding the relevant events", but the important point is that the touchstone of that inquiry is the parties' subjective intention to mislead because it is that intention which justifies the court in departing from the normal process and rules of construction.

[emphasis added in italics and bold italics; original footnotes omitted]

55 Because the inquiry is one into the subjective intention of the parties, the court is not restricted to the usual rules governing the interpretation of documents. It appears that the court may have regard to a wider category of evidence, such as the parties' subsequent conduct: *Hitch* at [65]. Thus, in *AG Securities v Vaughan and others* [1988] 3 WLR 1205, Lord Jauncey stated (at 1227) that "although the subsequent actings of the parties may not be prayed in aid for the purposes of construing the agreements, they may be looked at for the purposes of determining whether or not parts of the agreements are a sham in the sense that they were intended merely as 'dressing up' and not as provisions to which any effect would be given". Both parties accepted this approach.

(4) Common intention must generally belong to *both* the settlor and the trustee

56 The relevant common intention generally refers to the intention of the settlor *and* the trustee: see *In re Esteem Settlement* (2003) JLR 188 at [53]–[54]; *Shalson and others v Russo and others* [2003] EWHC 1637 at [188]. What is clear is that the beneficiary's intention at the time of the constitution of the trust is strictly irrelevant for the purpose of determining or ascertaining if a trust is a sham when it was first created, save perhaps in one circumstance (see [57] below). Mdm Fock's knowledge or intention at the time of the execution of the Trust Deed and, consequently, her conduct are therefore inconsequential, unless they can count as supporting evidence of the settlor's and the trustee's intention.

57 The one circumstance alluded to above where the beneficiary's intention may be relevant is this: a beneficiary's intention subsequent to the formation of a trust may transform what was a properly constituted trust which was not *ab initio* a sham into a sham. For that to occur, all the beneficiaries to the trust must join together with the trustees in that sham purpose: *A v A and St George Trustees Limited and others* [2007] EWHC 99 ("*A v A*") at [44]. However, this principle has no application here as the Defendant has not pleaded that the Trust Deed became a sham only sometime *after* it was executed, or that Mdm Fock had, through her conduct, displayed an intention to collude with the trustee (*ie*, the Defendant) to use the Trust Deed *subsequently* as a sham even though it was not intended to be a sham when the Trust Deed was first made. The Defendant's case is that the Trust Deed was a sham from its very inception. Thus, Mdm Fock's intention *qua* beneficiary does not inform whether the Trust Deed is a sham. The sole intention that is determinative is the Defendant's *qua* settlor and trustee of the Trust Deed, albeit Mdm Fock's conduct and intention may be indicative of what the Defendant's intention might have been at the time of the execution of the Trust Deed (see [56] above and [67] below).

(5) The present case

58 Before applying the applicable principles, it is necessary to first establish the identity of the settlor of the trust under the Trust Deed. If the settlor is a different person from the trustee, then both the settlor and the trustee must have the common intention to perpetuate the sham in order for the Trust Deed to be considered a sham. On this point, the parties were in agreement that the Defendant was both the settlor and the trustee (see [19] and [25] above). The Trust Deed amounts to a unilateral declaration of trust. As stated in *Lewin on Trusts* (Sweet & Maxwell, 17th Ed, 2000) at para 4-23, where a trust is unilaterally declared, only the settlor's intention is "conceivably relevant". Therefore, I find that the only intention that matters is the Defendant's, especially in the light of both parties' starting position that the Defendant was the sole settlor and trustee under the Trust Deed. That said, as I will elucidate below, I accept that Mr Chng's intention is relevant in ascertaining what the Defendant intended in executing the Trust Deed.

59 In my view, the proper question to be answered is: did the Defendant – whether in consequence of Mr Chng’s instructions or not – intend the Trust Deed to be a sham at the time he signed the Trust Deed? The answer is no. Applying the test formulated in *TKM* and applied in *Koon Seng*, I am unable to reach the conclusion that the Defendant intended the Trust Deed to be a sham at the time it was made. I shall elaborate now.

60 The context in which the Property was purchased is crucial. When the Property was purchased in 1974, the Defendant was only 24 years old and had just completed National Service. He did not appear to have fared well in school, and had just joined the family business as an office boy. The Property was purchased to serve as the family home for a family of eight persons. Notwithstanding that on paper, a large chunk of the purchase price was paid by the Defendant in cash and through his overdraft facility with Far Eastern Bank (albeit with Mr Chng as the guarantor), there is no denying that the source of these funds was ultimately Mr Chng. There is no credible evidence or explanation before me that suggested that an office boy with a monthly salary of \$800 could have financed the purchase of a \$260,000 house. As I have found earlier (see [40]–[42] above), I rejected the Defendant’s evidence that he had, on his own, obtained substantial funding from a supposed blood relative, CPC. On balance, I find that the Property was purchased entirely with Mr Chng’s direct and indirect financial assistance to the Defendant.

61 More pertinently, Mr Chng was not simply the *de facto* purchaser of the Property. He was also the provider of the whole family at that time in 1974, and all his six children were then staying with him and Mdm Fock in the Tiong Poh flat. I find it extremely implausible that in the light of the above context and factors, Mr Chng would have intended to simply allow the Defendant to register the Property in his own name, *and* to retain the beneficial interest completely. There is no evidence that Mr Chng had such an intention, and I do not accept that that could have been his intention. I accept that Mr Chng may have had some general desire to “compensate” or “reward” the Defendant for helping out with the family business. However, compensation or reward in the form of full legal and beneficial ownership of the family home worth \$260,000 in 1974 for the second eldest child out of six children at a time when Mr Chng and Mdm Fock were 51 and 46 years [\[note: 61\]](#) old respectively is, to put it mildly, irrationally excessive and quite inconceivable. After all, three of Mr Chng’s other children also did not attend university and helped out with the family business. [\[note: 62\]](#)

62 The Defendant gave evidence that Mr Chng had expressly told Mr Hsieh that he wanted the Defendant, and not Mdm Fock, to own the Property: [\[note: 63\]](#)

Court: What did he [Mr Chng] tell Robert Hsieh, basically? I don’t want the reasoning.

A: Okay.

Court: I want exactly what he told Robert Hsieh.

A: I’m sorry. He—when the cheque of \$26,000 was paid to him then he asked Robert Hsieh, no, it’s my son who will buy the property. So, okay, it doesn’t matter to Mr Robert Hsieh anyway, so then he ask, is there a way that the property can be protected from creditors? So Robert Hsieh [said], well, various ways. You can, of course, put the property in somebody’s name that you think you can trust, like, for example, your wife or something. All right.

So then my father said to Robert Hsieh, no, my wife already has a property. I do not want to make things complicated and anyway it is my son who should own the house and I do not want any future argument that whose house it is. So what is the way that the house should be registered in his name but is there a way to protect it?

Then Mr Robert Hsieh suggested, well, again, as I say, you could execute a trust deed to somebody to hold for you and this will eventually probably be able to help your—I mean, the son if anybody were to come after him and want to take the house.

63 I do not believe that this conversation, if it did take place, was accurately depicted by the Defendant. In any event, this purported conversation does not unequivocally evidence an intention by Mr Chng that beneficial ownership of the Property should rest with the Defendant and not with Mdm Fock. All that this purported conversation shows is that Mr Chng had an intention to protect the Property from the Defendant's potential future creditors, a position which even Mr Yeo accepts. In fact – and this is the crux of my decision – both sides' arguments have the same premise, namely, that the Trust Deed was intended to protect the Property from Mr Chng's and/or the Defendant's potential future creditors. [\[note: 64\]](#) I agree that the Trust Deed was entered into for that purpose and, on its face, does in fact achieve that purpose. That *per se* is not a sham. The only point of departure is whether Mr Chng intended the Defendant or Mdm Fock to ultimately own the beneficial interest in the Property. As I have already explained (at [60]–[61] above), I find it unlikely that Mr Chng intended, by this arrangement, to confer on the Defendant the full legal and beneficial ownership of the Property when, on the face of the Trust Deed, vesting the beneficial ownership in Mdm Fock would eminently achieve Mr Chng's objective of protecting the Property from potential future creditors. After considering all the surrounding facts and circumstances of this case, I prefer Mr Yeo's explanation that Mr Chng had intended Mdm Fock to beneficially own the Property as that was how he wanted to protect the Property from potential future creditors.

64 Nevertheless, it must be cautioned, once again, that Mr Chng's intention is *strictly* speaking irrelevant except to the extent that it may shed light on what the *Defendant* had intended in executing the Trust Deed. Thus, even if Mr Chng had intended Mdm Fock to beneficially own the Property, it is still necessary to establish that the Defendant had the same intention, and not the contrary intention that he would be both the legal *and* beneficial owner notwithstanding what was stated on the face of the Trust Deed. This brings us back to the circumstances surrounding the execution of the Trust Deed.

65 I reiterate the parties' common premise that the Trust Deed's purpose was to protect the Property from the Defendant's potential future creditors. This was the same reason, according to the Defendant, why the Tiong Poh flat was registered in Mdm Fock's name even though Mr Chng paid for it. [\[note: 65\]](#) I also accept that Mr Chng wanted the Defendant to be the registered owner of the Property. As to why Mr Chng wanted to have the Property registered in the Defendant's and not Mdm Fock's name, I find Mr Yeo's case theory that Mr Chng foresaw that eventually, the Defendant would need to sign guarantees on behalf of the family business [\[note: 66\]](#) to be tenable. Therefore, although Mr Chng wanted to help the Defendant appear more creditworthy, he was at the same time afraid that the Defendant's future potential creditors might enforce the Defendant's debts against the Property, which was, at that time, functioning as the family home. This was why Mr Chng intimated to Mr Hsieh that the Property should be owned in a manner which protected it from the Defendant's potential future creditors. Mr Hsieh then proposed the idea of a trust to Mr Chng and the Defendant, [\[note: 67\]](#) and explained the mechanism of the Trust Deed and its legal consequences to Mr Chng and

the Defendant. The Defendant's own account of Mr Hsieh's explanation is telling as it shows what the Defendant understood the Trust Deed to mean and to be its legal effect at *that time* before he signed it: [\[note: 68\]](#)

Court: What else did the lawyer [Mr Hsieh] say? When your father told him, okay, put it in your name, what did the lawyer say?

A: Then the lawyer say that, in that case, if you want to protect the property then one way is to make a trust deed to somebody again to say that, okay, you are holding the property in trust, just in the event that what you—you intend to do, you're afraid that somebody come after the house, then you have this trust deed to say that, look, you know, probably the house is not—but that was not explained on that spot to me.

Court: Can you finish that part first?

A: Okay, sorry. *That means to say that if the house—somebody comes knocking on the house, we can prevent that and say that, look, this house is not mine.*

Court: ***Not yours but your mother's, right?***

A: ***Well, if the trust deed is made to my mother, it becomes my mother.*** If I make the—

Court: *That's what the lawyer told you?*

A: ***Yes .***

Court: ***The house belongs to your mother. That's what the lawyer said, didn't he?***

A: ***Yes . So obviously, my mother is the most suitable candidate—I mean, who else can I trust?***

Court: *Yes. So therefore the lawyer never told you, you can wave it when creditors come along and say, no, it doesn't belong to the mother but it belongs to you.*

A: *That way, yes, he did not say to me you can wave that before creditors, no .*

Court: ***Or he said the trust deed means the same thing goes to your mother. That's what he told you, right? It belongs to your mother .***

A: ***Yes, he means to say that then your mother can have a right to take the house and claim, yah .***

Court: ***So he explained the true effect of the trust deed to you all, basically ?***

A: ***That's right. He did .***

Mr Yeo: Thank you, Your Honour. I think Your Honour's questioning is more effective than mine.

[emphasis added in italics and bold italics]

66 The Defendant's oral evidence speaks for itself. At the time when the Trust Deed was signed, the Defendant was aware of Mr Chng's intention that the Property would be in the Defendant's name, but to protect it from his potential future creditors, Mdm Fock would beneficially own the Property. Mr Hsieh (a) explained that the Property would not be seized by creditors if it was held on trust for Mdm

Fock; (b) drafted the terms of the Trust Deed on that basis; and (c) explained the effect of the Trust Deed to both Mr Chng and the Defendant. The Defendant then signed the Trust Deed with the knowledge of how the Trust Deed was to work as explained by Mr Hsieh. [\[note: 69\]](#) The simple fact of the matter is that at the time that the Defendant signed the Trust Deed, his understanding of the document was that it was to have the precise effect that a trust would ordinarily have. That makes perfect sense because the understanding and common intention all along of Mr Chng and the Defendant, after the explanations given to them by Mr Hsieh, was that the Trust Deed would secure the Property in the family's hands and keep it safe from creditors because the beneficial ownership would truly vest in Mdm Fock. That was the basis upon which Mr Hsieh drafted the Trust Deed for the Defendant to sign. None of the parties at that time intended the Trust Deed to be a sham in the sense that beneficial ownership of the Property was not to vest in Mdm Fock but was to remain with the Defendant after the Trust Deed was signed. No one intended a situation contrary to what was stated in the Trust Deed. I do not believe that Mr Hsieh was likely to have prepared the Trust Deed for the purpose of implementing some sham. More likely than not, Mr Hsieh would have prepared the Trust Deed to give effect to a genuine trust, in accordance with the instructions of Mr Chng. The Defendant was not likely to have given a different set of instructions to Mr Hsieh as the Defendant was at that time entirely dependent on Mr Chng financially for the purchase of the Property. I cannot see how the Defendant could have had some other say in the matter that was different from Mr Chng's. He simply would have had to obey Mr Chng's wishes and fall in line with what Mr Chng intended. Further, the Defendant admitted on more than one occasion that at no time right up to the signing of the Trust Deed did he have the understanding that the Trust Deed would have no meaning or effect: [\[note: 70\]](#)

Mr Yeo: You have also confirmed that Mr Robert Hsieh *did not say anything* at that meeting which you attended with your father ***about the trust deed having no meaning, no effect***, there's no trust being created, correct?

A: Yes, but it's not for the lawyer to say that whether the trust is right or wrong.

...

Q: Mr Chng [*ie*, the Defendant], the lawyer didn't say anything about that and your father at this meeting also did not say anything about the trust deed—I'm *talking about at this meeting with Robert Hsieh—having no meaning, no effect and no real trust being created, because you have told us that the first time he spoke of that was after you and he came home when you had signed the trust deed with the signed trust deed, okay? So your father at this meeting with Robert Hsieh also said nothing about the trust deed having no meaning, no effect, there's actually no real trust being created, correct?*

A: **Yes .**

Q: Robert Hsieh explained the trust deed to you, you understood what it meant, and you signed it willingly, correct?

A: Yes, I do.

...

Q: *So when you signed the trust deed, you had no thought that in fact the trust deed was to have no meaning and no effect, correct?*

A: Well, it's incorrect, because it doesn't mean that it doesn't cross my mind, but I'm aware that, you know I need to do some kind of documents to say that, you know—but I still know that actually the house is supposed to be bought for me.

Q: Mr Chng, you are wriggling around when we want to [sic] you tell the truth. You earlier said you didn't have the thought, then you realised, oh, dear, I've spoken the truth.

A: **No, I didn't have the thought** —that doesn't mean that I don't speculate. No, at that moment, I mean the arrangement was that the house will be bought and the arrangement of the buying of the house is that way. *Okay, and at that point we also understood that we are looking at a way to protect his property, even though—*

Court: **The way was achieved by the deed, wasn't it?**

A: **Yes** , so it wasn't very specific to say that what is the way to protect the deed, until, well, my father talks with the lawyer and when the lawyer presents that this would be the deed, that's all.

...

Mr Yeo: ... Mr Chng, *you had not heard from your father that the trust deed was to have no effect or meaning **until after you both came home with the signed trust deed, so I'm going to suggest to you at the time you signed the trust deed, you could not have thought that this document you are signing will have no meaning*** . You can agree or disagree with that.

A: I am aware that I need to sign something to—in effect to protect, but *not really to see whether the trust deed means to say that I am giving up my rights, **because that never occurred to me then*** .

Q: Mr Chng, *Robert Hsieh explained to you the effect of the trust deed is that **your mother owns the house beneficially*** . Do you still stay with that answer, or do you want to change?

A: **Yes, he read the trust deed and it is to this effect, that's correct** .

Court: **That's what the lawyer explained to you** .

A: **Yah, yah** .

Mr Yeo: **And you understood it** .

Court: **That's what you understood the lawyer to say** .

A: **I understood the contents of the deed** —

Court: As explained to you by the lawyer.

A: Yes, but we are clear about the *purpose of the deed, and that's all*.

Court: On that basis you signed, right?

A: Yes.

Mr Yeo: **So you knew you were signing a document which stated that your mother owned the house beneficially, correct?** You knew you were signing a document which stated that your mother is to own the house beneficially.

A: **Yes .**

Q: ***That would be a way to protect the family home at 7 Robin Walk from creditors, because you were going to be exposed to the family business; when you came later to sign guarantees, it was foreseen by your father, so by signing the this trust deed, this does protect the family home from the creditors of the family business. That's correct, isn't it?***

A: **Yes .**

[emphasis added in italics and bold italics]

67 On the basis of the above excerpt, there is really no basis for me to find that the Defendant had any other conception of the Trust Deed except that which was explained by Mr Hsieh, namely, that Mdm Fock would own the beneficial interest in the Property and that was how the Property would be protected from the Defendant's potential future creditors. On the whole, it is clear to my mind that the strong presumption (*per* Neuberger J in *National Westminster Bank*) that the Trust Deed means what it says has not been displaced. I reiterate that the mere fact that the Trust Deed was intended by Mr Chng, Mr Hsieh and the Defendant as a means to protect the Property from the Defendant's potential future creditors does not make the Trust Deed a sham. Indeed, as the Defendant conceded, the Trust Deed would serve that very protective purpose *if* it were to operate on its true and express terms without any qualification. To say that the Trust Deed is a sham means that while the Trust Deed professed to accord beneficial ownership to Mdm Fock, it in fact meant something different in that the true beneficial owner of the Property was the Defendant and not the person stated on the face of the Trust Deed (see *W T Ramsay Ltd v Inland Revenue Commissioners* [1982] AC 300 at 323). In other words, that something different, as Mr Bull has sought to argue, is that the beneficial ownership resided with the Defendant notwithstanding the Trust Deed. However, the Trust Deed was clearly part of the composite arrangement which included the purchase of the Property, a decision which was undertaken and financed by Mr Chng. As mentioned earlier, I find that it is extremely implausible that Mr Chng had contemplated the composite transaction to result in the Defendant having both legal and beneficial ownership of the Property in the circumstances and context subsisting in 1974. To put it simply, when the Property was purchased and the Trust Deed entered into, the Defendant was an obedient son who was merely following his father's instructions. From the way the Property was to be owned legally and beneficially for the purpose of protecting it from creditors to the way its purchase was to be financed, Mr Chng was the mastermind and the Defendant was the pliant executioner. A doubt raised by Mr Bull as to why the Trust Deed had stated that the Property was "*transferred*" [emphasis added] to the Defendant to hold on trust for Mdm Fock may be explained on the basis that the Defendant received the Property from someone else – ostensibly Mr Chng – and the Defendant was merely a conduit for a collateral purpose. Indeed, the Defendant admitted in his Defence that "as a young man and a filial son ... [he was following] his father's wishes". [\[note: 71\]](#) He was carrying out Mr Chng's instructions (see the excerpt at [47] above). [\[note: 72\]](#) At 24 years of age and having been given the opportunity to work in the family business, there is no reason to expect the Defendant to have done otherwise. This inference is also consistent with the fact that Mdm Fock kept the Trust Deed ever since it was executed till the time she passed away. If the Trust Deed was truly intended by the Defendant to be a sham in the sense of showing it to his potential future creditors and nothing else, one would expect that he would be the one keeping the Trust Deed, not Mdm Fock. It would appear that Mdm Fock also kept the certificate of title to the Property for some 28 years from 1974 to 2002, demonstrating that from the very beginning, she regarded the Property as beneficially owned by her.

68 Therefore, in my judgment, there is no doubt that the Defendant, in executing the Trust Deed, was obeying Mr Chng's instructions and wishes "down to a T". For all intents and purposes, Mr Chng's intention was tantamount to the Defendant's intention. Given what Mr Chng's intention was and what Mr Hsieh explained to the Defendant prior to the signing of the Trust Deed, I find it nigh implausible – beyond the realm of conceivability – that the Defendant could have had a contrary intention, viz, that he was instead the beneficial owner because the Trust Deed was not meant to have any real effect. For completeness, I also reject the argument that the Defendant's subsequent change of intention rendered what was a valid trust a sham. As a matter of principle, a trust which is not initially a sham cannot subsequently become a sham simply because the settlor or trustee does not wish to recognise the trust deed after it has been duly created. Once a trust has been properly constituted, the property which is the subject matter of the trust cannot lose its character as trust property save in accordance with the terms of the trust itself: *A v A* at [42].

69 Hence, unless the Plaintiffs are estopped from asserting that Mdm Fock's estate is the beneficial owner of the Property (see [93]–[113] below), their claim must be allowed. However, before considering the Estoppel Argument, in deference to the efforts of both parties' counsel and in the event that I am wrong on the Sham Argument, I shall first address the Illegality Argument.

Whether the Defendant can rely on the sham purpose to invalidate the Trust Deed

70 If I had found that the Trust Deed was intended to be a sham, Mr Yeo argued that the Defendant could not rely on his sham purpose to invalidate the Trust Deed to benefit himself. He cited a New Zealand Court of Appeal decision, *Official Assignee v Wilson* [2008] 3 NZLR 45, in support of this proposition. There, the Official Assignee sought a declaration that the trust which Mr Reynolds, the settlor-bankrupt, had set up was a sham. The Official Assignee argued that the court, as a result of Mr Reynolds' "improper, overbearing and perhaps unlawful activities, should treat the legitimate rights of the discretionary beneficiaries as being extinguished". The court declined to grant the declaration, stating (at [23]):

It is unsustainable to assert that Mr Reynolds could come before the Court and ask to benefit as a result of his own slackness, informality or perhaps even illegality. The [Official Assignee] does not, in these circumstances, have a different stance from that of Mr Reynolds. No matter how condemnatory the Court were to be in its assessment of the acts and omissions of the relevant players, it could never reach the point where there could be integrity or justification in allowing Mr Reynolds to seek relief which is effectively for his own benefit.

71 Mr Yeo also cited an old decision of the Supreme Court of the Federated Malay States, *Au Phin Yeang v Kan Tak Fee, Ng Ah Hoe, Foo Lin Yin* [1934] FMSLR 5, which held that the defence of fraud could only be pleaded by an innocent party. The defendant there had accepted the transfer of ten pieces of land belonging to one Mr Kan, who was the first plaintiff's father and the second and third plaintiffs' husband, to defeat the creditors of Mr Kan. The court found that the defendant's subsequent declaration of trust over the ten pieces of land for the plaintiffs was a further protection of the properties from Mr Kan's creditors. The plaintiffs did not know of either the original transfer or the subsequent declaration of trust when those transactions were made. When the plaintiffs commenced court proceedings for breach of trust with respect to the defendant's dealing with two of the pieces of land held on trust, the defendant alleged that the trust was only a fictitious transaction and he was never in fact a trustee for the plaintiffs. Rejecting the defendant's argument, the court held:

... the law is quite clear ... the defendant cannot be heard to say that his own deed is to be avoided by his own fraud. His declaration of trust is irrevocable even though the plaintiffs are

volunteers [*Paul v. Paul* (20 Ch. D. 742.)] and it is not open to him to say that it is a fiction.

72 Mr Bull did not have a direct response to this plank of the Plaintiffs' case. He did not deny that the Defendant could not invalidate the Trust Deed for his own benefit, given that on the Defendant's case, the Defendant was the perpetrator of the sham purpose. Mr Bull, however, attacked the right of the Plaintiffs to rely on the Trust Deed on two grounds. First, Mdm Fock herself was a party to the sham. Her estate, therefore, could not rely upon the fraud to which she was a party to assert title to the Property. Second, the sham purpose was never carried out. Mr Bull argued that where the fraudulent or illegal purpose behind a transaction had not been carried out, the rule that a party could not raise or rely on his own fraud or illegality to found a claim did not attach. I shall consider these two arguments in turn.

(i) *Was Mdm Fock a party to the sham?*

73 Mr Bull's indirect approach is conceptually sound. The Plaintiffs bear the burden of proving their claim. Since their claim is founded on the validity of the Trust Deed, if Mdm Fock was a party to the sham, the very rule that Mr Yeo argued precludes the Defendant from invalidating the Trust Deed will apply to preclude the Plaintiffs from relying on the Trust Deed – what is sauce for the goose is sauce for the gander.

74 The question turns on what it means to be a party to a sham. Obviously, if Mdm Fock shared the sham intention either at the time of the execution of the Trust Deed or subsequent to it, she would be a party to the sham. A party who displays reckless indifference to a sham will also be considered to be a party to the sham: *Midland Bank PLC v Wyatt* [1995] 1 FLR 696 at 699. It is apposite to reiterate that the sham here is not that the Trust Deed would protect the Property from the Defendant's potential future creditors *per se*, but that the beneficial ownership was to reside with the Defendant notwithstanding the Trust Deed.

(1) At the time the Trust Deed was executed

75 I am not persuaded that Mdm Fock even had knowledge of the Trust Deed before or at the time that it was executed (although she did have knowledge of it *after* it was executed (see [9] above)), with the corollary being that she could not have had an intention *qua* beneficiary to defraud the Defendant's potential future creditors into believing that she was the beneficial owner when she knew that she was not. I have come to this conclusion for two reasons. First, the Defendant had testified that the idea of the Trust Deed was mooted by Mr Hsieh. It was not the case that Mr Chng had knowledge of structuring trusts and then discussed with Mdm Fock first before seeing Mr Hsieh together with the Defendant, and thereafter instructed Mr Hsieh to prepare the Trust Deed. Second, the only evidence that Mdm Fock might have had an inkling of the Trust Deed is from an inference made by the Defendant. He claimed that as Mdm Fock did not look surprised when Mr Chng informed her of the Trust Deed *after* it had been executed, he (the Defendant) himself inferred that Mr Chng could have previously discussed the "issue of the protection of the Property" [\[note: 73\]](#) with Mdm Fock without his presence.

76 Even if I accept that such a conversation between Mr Chng and Mdm Fock took place, I have difficulty accepting that Mdm Fock did not display any discernible look of surprise, or that the absence of any look of surprise on Mdm Fock's face leads to the reasonable inference that she must have discussed the Trust Deed with Mr Chng *prior* to its being executed. The Defendant's evidence on this particular conversation is contradictory:

Mr Yeo: Mr Chng [*ie*, the Defendant], after this issue of a trust deed had been raised—and I'm still talking about the meeting at the lawyer's office, the meeting you and your father had with Robert Hsieh—did your father say anything to you or in your presence about the trust deed having no effect, no meaning, in the sense that no trust is really being created?

A: Not in the lawyer's office.

Court: Okay. Then? Whatever sequence it is doesn't matter. He never said it, so we go to the home.

Q: Are you saying, Mr Chng, that your father said that to you or in your presence on some other occasion?

A: Yes. When the trust deed was signed, we brought the trust deed back to the house to my mother.

Court: To show your mother?

A: To give it to my mother.

Court: To give to your mother.

A: My father did explain to her how the trust deed is written.

Court: What did he explain?

...

A: *My father said to my mother that the trust deed says that she is the one who paid for the house, and **then my mother [said], no , I'm not the one who pay for the house** , so my father said, just take it that way, and we all know that there is no real trust deed here, it's just something that in the event if there is a need then it will be used. So there is basically no trust deed, but it is only to hold it for any eventual—you know, if he really need it.*

[emphasis added in italics and bold italics]

77 Pausing here for a moment, there are two points to be observed. First, according to the Defendant, immediately after the Trust Deed was executed, it was brought back to be given to Mdm Fock. It was not to be kept by the Defendant, which is what one would expect if the *sole* intention of executing the Trust Deed was for him to show it to potential future creditors. Second, Mr Chng explained to Mdm Fock that the Trust Deed stated that she was the one who had paid for the Property, a point which Mdm Fock denied. If Mr Chng had already discussed the Trust Deed with Mdm Fock, as the Defendant said he had inferred (see [75] above), Mr Chng would not have had to tell Mdm Fock that piece of information, and, more importantly, Mdm Fock would not have contradicted Mr Chng. Moving on with the Defendant's evidence on this point, after the Defendant and Mr Chng left Mr Hsieh's office with the Trust Deed, the following conversation took place when they went home and saw Mdm Fock:

Court: You mean your father explained like this to your mother?

A: Yes.

Court: Your mother would not know what he is talking about.

Mr Yeo: Mr Chng—

Court: The father explained like that to the mother? He is telling me that.

A: No, my father say that his is a trust deed that we have executed in the office and it is read—I mean, he did read, but he didn't really read the second part or third part. I mean, he just say that, okay—

Court: I am asking you, tell me precisely how your father told your mother.

A: But it will be very difficult to say the exact words then. I—

Court: But the gist. You mean, straight away the father launched into telling your mother, this is a trust deed? She will say, what's this, you know?

A: *No, my mother is not surprised. I **believed**, as I say, they **could have** discussed this also.* My father probably would not limit it to say to meet the lawyer only with me, so basically I will accept that it would have been discussed between the two of them.

Court: *This is what you speculate?*

A: Yes, I will.

[emphasis added in italics and bold italics]

78 As I alluded to during the cross-examination of the Defendant, Mdm Fock was unlikely to have understood what a trust encompassed. It would be surprising that Mdm Fock was indeed not in the least surprised when told of the Trust Deed and its terms. Even if Mdm Fock was not surprised, she must have been confused at the very least. She was clearly disagreeable insofar as the language of the Trust Deed, which provided that she had paid for the Property, was concerned. Even if the Defendant's description of the way the conversation (or explanation) went is accepted, it still does not justify the inference that Mr Chng and Mdm Fock had previously discussed the "issue of the protection of the Property" such that it can be said that Mdm Fock was a participant of the sham. Finally, even if Mr Chng and Mdm Fock *might* have discussed the creation of a trust over the Property with the Defendant as the trustee and Mdm Fock as the beneficiary to protect the Property from the Defendant's potential future creditors, there is no basis to impute into that discussion a *further* purpose that such a trust arrangement was to be a sham in that the true beneficiary was to be the Defendant in spite of what the Trust Deed said, with Mdm Fock being the beneficiary in appearance only in the eyes of the Defendant's potential future creditors and in *no other circumstance*. This inference requires a leap of logic which I am not prepared to take. The Defendant's inference is, as he admits, speculative. [\[note: 74\]](#) For these reasons, I find it unlikely that Mdm Fock had any knowledge of the Trust Deed at the time that it was executed.

79 Assuming *arguendo*, on the Defendant's best case, that Mdm Fock might have known of the purpose of the Trust Deed (*viz*, to protect the Property from the Defendant's potential future creditors) at the time when the Trust Deed was executed, such knowledge does not make Mdm Fock a party to the sham *unless* she was aware that under the arrangement, the true intention was for the Defendant, and not her, to have the beneficial ownership. There is no indication that she had this knowledge or was recklessly indifferent to this arrangement at the time the Trust Deed was executed.

(2) After the Trust Deed was executed

80 Mr Bull then argued that Mdm Fock knew of the sham purpose *after* the Trust Deed was executed. He referred again to the Defendant's evidence of how Mr Chng had explained the purpose of the Trust Deed to Mdm Fock:

Court: I don't want you to speculate. At the time the time [sic] your father bought the thing [the Trust Deed] home and explained to your mother, my simple question is how did he do it?

A: He—he said this is the trust deed that is made and it says like that. So my mother—

Court: He showed the mother and said it like that?

A: No, no, my—well—

...

A: I said when we brought the trust deed back home, my father gave it to her and say, this is a trust deed that we have executed in the office of Mr Robert Hsieh. Okay. This trust deed says that it is like this. So my—again, as I said, my mother said, no, I didn't pay for it. So my father said to her, well, it doesn't matter. This trust deed, *we all understand, is **basically to protect the property, so you just keep it and, well, in the—I don't know—if in the event there's a need then it's used. Otherwise this trust deed has no effect.** That is what he said to my mother.*

[emphasis added in italics and bold italics]

81 I am unable to accept that from this brief explanation (even on the assumption that it took place), Mdm Fock knew of the sham purpose and was a participant in the transaction. All that the Defendant testified is that Mr Chng *told* Mdm Fock that: (a) the Trust Deed was to protect the Property; (b) the Trust Deed might be used in the future; and (c) if the Trust Deed was not used, it had no effect. There is no indication that Mdm Fock understood the concept of a trust and its prophylactic effect against the Defendant's potential future creditors. The requisite degree of assent in terms of knowledge of *and* participation in the sham purpose (see *Ashmore, Benson Pease & Co Ltd v AV Dawson Ltd* [1973] 1 WLR 828 at 836) which is necessary to preclude Mdm Fock and, by extension, the Plaintiffs from relying on the Trust Deed is lacking. Apart from her allegedly unsurprised look, Mdm Fock's response, if any, upon hearing what Mr Chng told her about the Trust Deed was not presented to the court. There is therefore no evidence on whether Mdm Fock had expressly stated that she understood and *agreed* with what was simply told to her by Mr Chng, namely, that the Trust Deed was to have "no effect", other than "basically to protect" the Property. For the avoidance of doubt, I am not saying that Mdm Fock must have been educated on the legal nuances of a trust before she could qualify as a participant of a sham trust. However, if Mdm Fock did not know of the alleged sham purpose or effect of the Trust Deed in terms of how it affected the beneficial ownership of the Property, there is no basis to hold that she had become a participant to the sham even on the shaky assumption that the conversation at [80] above had taken place.

82 Mr Bull also raised three points on Mdm Fock's subsequent conduct to suggest that Mdm Fock was a party to the sham. First, he submitted that the fact that Mdm Fock kept the Trust Deed at all times suggested that she was part of the sham. I find this submission logically deficient. Mdm Fock could have kept the Trust Deed precisely because she thought that she was the beneficial owner of the Property.

83 Second, although Mdm Fock kept the Trust Deed, she did not list the Property as one of her

assets in her Will. Mr Bull submitted that if Mdm Fock was not aware of the sham, she should have considered herself the rightful owner of the Property and should have listed it as one of her assets in her Will. This inference is undoubtedly attractive at first blush. However, I am simply not in a position to speculate why Mdm Fock did not include the Property in her Will despite having possession of the Trust Deed at all times. One reason may indeed be due to her knowledge of the sham, but there are, to my mind, other equally plausible reasons. For instance, she could have simply forgotten about the Trust Deed in her UOB safe deposit box; it could be that she remembered the Trust Deed, but was uncertain about the ownership effect of the Trust Deed; or she might have thought that there was no need to expressly provide for the Property in her Will. At the bottom line, I am unconvinced that the mere fact that the Property was not expressly provided for in Mdm Fock's Will is sufficient evidence of her knowledge of and participation in the sham purpose such that she and, by extension, the Plaintiffs would not be able to rely on the Trust Deed.

84 Third, Mr Bull submitted that Mdm Fock did not at any point in time, despite her strained relationship with the Defendant, enforce the Trust Deed against him. Again, it is difficult to second-guess why Mdm Fock did not enforce the Trust Deed, but her non-enforcement cannot be indicative of her knowledge that the Trust Deed was a sham and her participation in the sham. Additionally, while there may have been tensions between Mdm Fock and the Defendant, they were ultimately still one family in the end. Asserting her beneficial ownership at the expense of the Defendant (and his family at that) would have been a drastic recourse. In fact, using the Defendant's logic, since the Defendant too did not appear to have enforced what he now purports to be the true ownership arrangement by, for example, reclaiming the use of the master bedroom, evicting Mdm Fock or selling the Property against her wishes, [\[note: 75\]](#) the court should infer that the Trust Deed meant what it said, *viz*, that Mdm Fock was the true beneficial owner.

85 I am therefore unable to agree that Mdm Fock was, either before or after the Trust Deed was executed, even aware of the sham purpose of the Trust Deed. *A fortiori*, it follows that she could not have had a common intention to defraud the Defendant's potential future creditors into believing that the Defendant was not the true beneficial owner. Mdm Fock was plainly not a party to the sham purpose of the Trust Deed. One has to bear in mind that steps taken to protect property against future creditors are not *per se* illegal and a sham. Even if Mdm Fock understood that she was to be the actual beneficial owner of the Property through the Trust Deed to protect the Property against creditors, there could have been no sham. When protection was no longer needed (*eg*, when the Defendant was no longer involved with the family business as a director), it would then be up to Mdm Fock whether she wanted to gift the Property subsequently to the Defendant, and if she was minded to do so, she could properly execute another document to transfer her beneficial ownership to the Defendant. But, Mdm Fock never did that before her death and as such, the beneficial ownership must remain with her.

(ii) *Can the Defendant invalidate the Trust Deed if the sham was not carried out?*

86 Turning to the second of his two responses (see [72] above), Mr Bull argued that irrespective of whether Mdm Fock was a party to the sham, the Defendant could invalidate the Trust Deed as long as the sham had not been carried out. Mr Bull cited the Singapore Court of Appeal decision of *Shi Fang v Koh Pee Huat* [1996] 1 SLR(R) 906 ("*Shi Fang*") in support of his argument. In *Shi Fang*, the Court of Appeal endorsed (at [25]) the principle stated in *Tribe v Tribe* [1996] 1 Ch 107 ("*Tribe*") that a person who seeks to recover property transferred by him for an illegal purpose can lead evidence of his dishonest intention whenever it is necessary for him to do so provided that he has withdrawn from the transaction before the illegal purpose was carried out. This is known as the doctrine of *locus poenitentiae*, which operates as an exception to the maxim that "he who comes to equity must come with clean hands": *Tribe* at 134.

87 Mr Bull pointed out that there was no dispute that no creditors had been defrauded in the present case. [\[note: 76\]](#) As such, the illegal purpose had not been carried out and the Defendant could rely on the sham to invalidate the Trust Deed. On the Plaintiffs' part, Mr Yeo argued that *Shi Fang* was distinguishable because it was not a case involving any sham arrangements. According to Mr Yeo, the court in *Shi Fang* was asked to decide whether the property in question was owned by the father or the son, and this question depended on the applicability of the presumption of resulting trust or advancement. [\[note: 77\]](#) As *Shi Fang* is a key authority on this issue, I shall examine the facts and holdings of that case in greater detail.

88 The parties in *Shi Fang* were a husband and his wife. They stayed in a semi-detached house. At some point, the marriage came under severe strain and the wife returned to China, where she was a national, for a visit. When she returned to Singapore, she found that the lock to the house had been changed and that her personal belongings had been removed. She was not allowed to move back to the house. Instead, she stayed with the husband's parents in their house nearby. Upon the advice of solicitors, the wife later lodged a caveat on the house claiming an interest as a beneficial co-owner on the ground that the house was matrimonial property. Three separate proceedings were then commenced, one of which was a proceeding commenced by the husband for a declaration that the house, which was registered in his name, was held on trust for his father.

89 Khoo J in the High Court found that the father had provided the purchase money for the house, and retained full control of the house *like a true owner*. The house had been put in the son's name simply to make it appear that it was the son who owned it when it was not so owned. The objective of this arrangement was to evade estate duty payable on the death of the father. Khoo J held that the presumption of advancement was not rebutted on the ground that in order to rebut the presumption, the father had to rely on evidence of the illegal purpose. Thus, he concluded that the house was a gift by the father to the son (the husband), and it therefore remained the property of the husband: see *Shi Fang* at [11].

90 Although the appeal was conducted on the basis that the house belonged to the husband, the Court of Appeal made some observations relating to the rebuttal of the presumption of advancement. First, it noted (at [12]) that it saw no reason why the husband's admission that he held the house on trust for the father should not be accepted. In other words, the husband did not rely on any illegality of his in admitting that he held the house on trust for his father to rebut the presumption of advancement: *Shi Fang* at [18]. Insofar as this is one of the holdings of *Shi Fang*, I agree with Mr Yeo that this authority is distinguishable from the present case. The mastermind of the sham in *Shi Fang* was the father, not the husband. Therefore, even if the basis for the trust in *Shi Fang* was the father's illegal intention to evade estate duty, the husband could admit that he was holding the house on trust without relying on any illegal purpose of *his own*.

91 However, referring to the line of authorities leading to *Tribe*, the Court of Appeal further held that there was another *separate* ground for holding that the presumption of advancement had been rebutted. The Court of Appeal held (at [25]) that the father's purpose of transferring and registering the house in the husband's name had not been achieved or carried into effect as the revenue authority was not deceived. The question of payment of estate duty had not even arisen. Thus, even the *father* could rely on evidence as to the illegal purpose of the transfer to rebut the presumption of advancement. I am unable to agree with Mr Yeo's assertion that *Shi Fang* is distinguishable on this latter ground. Other cases apart from *Shi Fang* point to the same conclusion. For instance, the crucial feature in *Tribe* was that the transfer document had never been shown to the landlord or any other creditor and, hence, no one had been deceived. The High Court of Australia in *Perpetual Executors and Trustees Association of Australia Ltd v Wright* (1917) 23 CLR 185 (cited with approval in *Shi Fang*

at [19]) too placed emphasis on the fact that no creditors were deceived. As Barton CJ said (at 193), there were “no creditors to hoodwink, and the whole thing rested on what might happen but never did happen.” So also in *Painter v Hutchinson and another* [2007] EWHC 758, the plaintiff’s argument that her declaration of trust was a sham was allowed by the court. One of the reasons for the court’s holding that the sham had not been carried into effect was the fact that the declaration of trust was never shown to the Inland Revenue: at [128(v)].

92 There was no evidence before me that any of the Defendant’s creditors or other third parties were hoodwinked by the Trust Deed. Therefore, if I am wrong on the Sham Argument, and if the Defendant had decided to defy Mr Chng’s unambiguous intention and had intended at the time he signed the Trust Deed to retain beneficial interest in the Property, with the Trust Deed being a mere sham vehicle to hide his beneficial interest from creditors, the doctrine of *locus poenitentiae* as accepted by the Court of Appeal in *Shi Fang* is applicable. The Defendant is not precluded from relying on his own sham to invalidate the Trust Deed.

Whether the Plaintiffs are estopped

93 I return to the Estoppel Argument, which is more relevant because I have found that the Trust Deed was not a sham and, therefore, was not invalid. Mr Bull submitted that Mdm Fock’s estate was estopped from claiming ownership of the Property under the doctrine of estoppel by convention or, alternatively, promissory estoppel. It is apposite to mention that a defence of promissory estoppel cannot be found on a strict construction of the Defendant’s pleadings: [\[note: 78\]](#)

11. Further and/or in the alternative, from 1974 until her death in 2009, the late Fock Poh Kim had *acknowledged, agreed and accepted by conduct* that the beneficial interest in the Property would be vested solely in the Defendant, and the Defendant had acted on this *representation* to his detriment.

Particulars

- (a) Even if the alleged trust deed is valid ... the late Fock Poh Kum, in allowing the Defendant to expend money on the Property and to deal with the Property freely, had *encouraged or acquiesced* in the Defendant’s belief that the Defendant had a beneficial interest in the Property.
 - (b) The Defendant relied on and acted to his detriment on this belief and expended substantial costs in relation to the maintenance and upkeep of the Property. ...
12. By reason of the aforesaid, the late Foh Pock Kum must have been and was aware at all material times, of the Defendants [*sic*] belief that he held a beneficial interest in the Property, and *acquiesced* in the same. The late Fock Poh Kum indicated by her conduct that she had no objections to such use, which at all material times was relied upon by the Defendant. ...

[emphasis added]

94 Nothing in the Defendant’s pleadings refers to a promise by Mdm Fock. The most that can be said is that: (a) Mdm Fock represented by conduct that the beneficial interest in the Property belonged to the Defendant, and (b) the Defendant believed that the beneficial interest in the Property belonged to him and Mdm Fock’s conduct reflected her acquiescence in his belief. Even though Mr Yeo did not object to this defect in pleading and proceeded to submit on the basis that the

Defendant's case was founded on estoppel by representation, promissory estoppel, proprietary estoppel and estoppel by convention, [\[note: 79\]](#) I am of the view that the Defendant has to plead his case accurately. The different types of estoppel may have similar undertones, but, as will be seen below, their constituent elements are dissimilar, and the facts relevant to the elements would accordingly differ and must be pleaded specifically. For instance, while Mr Bull argued that there was promissory estoppel, he described the alleged "promises" as "representations". [\[note: 80\]](#) There is a distinction between the two as a representation refers to a representation of fact and is not promissory in nature.

95 If the Defendant was approaching the Estoppel Argument by way of some single unified test, which I accept is not completely without some authority (see *Amalgamated Investment and Property Co Ltd v Texas Commerce International Bank Ltd* [1982] QB 84 at 122, but *cf* a critical view of this proposition in Sean Wilken, *Wilken and Villiers on The Law of Waiver, Variation and Estoppel* (Oxford University Press, 2nd Ed, 2006) ("*Wilken and Villiers*") at paras 10.04–10.07), he should have done so clearly. There was only a single line in Mr Bull's submissions suggesting that unconscionability is the "overarching inquiry" in determining whether an estoppel ought to be found. [\[note: 81\]](#) In my view, Mr Bull's supporting authority, *Hong Leong Singapore Finance Ltd v United Overseas Bank Ltd* [2007] 1 SLR(R) 292 ("*Hong Leong*") at [171] and [191], does not stand for what he sought to argue. Sundaresh Menon JC (as he then was) in that case was explaining that in deciding whether a proprietary estoppel had arisen, unconscionability was an overarching inquiry in the sense that the court would grant the proprietary estoppel if it was satisfied that it would be unconscionable to do otherwise, having regard to all the circumstances. This is very different from saying that unconscionability is the only test when considering whether to grant *any* form of estoppel.

96 Thus, the Defendant's pleadings and submissions on the Estoppel Argument were, with respect, not too helpful. Unfortunately, Mr Yeo also did not help to isolate the respective estoppels and distil which estoppels were properly pleaded and argued before the court. In my view, the Defendant's pleadings lend themselves to the defence of: (a) estoppel by representation by conduct; (b) estoppel by convention; (c) proprietary estoppel; and (d) estoppel by acquiescence. As such, notwithstanding Mr Bull's submissions (at [23] above), I will address the Defendant's Estoppel Argument on the basis of these four estoppels.

(i) *Estoppel by representation by conduct*

97 It is settled law that for a party to successfully raise the defence of estoppel by representation, three elements must be satisfied (*United Overseas Bank Ltd v Bank of China* [2006] 1 SLR(R) 57 at [13]):

- (a) the respondent must have made a representation of fact;
- (b) which was relied on by the claimant; and
- (c) the claimant suffered detriment as a result of the reliance.

98 Mr Yeo argued that there could be no estoppel by representation in the first place because the Estoppel Argument was relevant only in the event that the Trust Deed was *not* a sham, in which case the Defendant must be taken to have known that the beneficial interest resided with Mdm Fock as per the Trust Deed. He thus could not have been induced by any representation by Mdm Fock that he was the beneficial owner of the Property. The conceptual difficulty for the Defendant under Mr Yeo's argument is that given my finding that the Trust Deed is genuine, the Defendant must then be taken

to have known that he was in fact not the beneficial owner of the Property. It ought then to follow that the Defendant could not be misled by representations from Mdm Fock that he was instead factually the true beneficial owner. Paraphrased, the Defendant could not have been misled or induced by a fact which he knew to be untrue.

99 While I appreciate the general tenor of Mr Yeo's argument, I would only go so far as to say that in such circumstances, strong evidence is generally required before a recipient in the shoes of the Defendant can prove that he relied on any representations of fact which he *originally* knew to be untrue. As a matter of logic, I can accept that such a recipient may, after being told of the wrong facts, subsequently believe himself to have been mistaken (although what he thought he knew originally was factually correct) and thereafter rely on the representations of wrong facts to his detriment. Hence, it is possible that even though the Defendant must be taken to have originally known that he was in fact not the beneficial owner at the time of the execution of the Trust Deed as a result of my finding on the Sham Argument, he *may* subsequently believe himself to be mistaken about the true factual state of affairs due to the passage of time or due to representations of erroneous facts from others coupled with his failure of memory or for other reasons. This may then trigger the operation of estoppel by convention (see [107] below). Nevertheless, given my finding on the Sham Argument with the corollary that the Defendant must be taken to have known that he was not the beneficial owner of the Property, what is more relevant for the Defendant's case is actually whether there were any *promises* emanating from Mdm Fock to the effect that she would not be exercising strictly her rights as the beneficial owner such that the Defendant, as the legal owner, was subsequently induced to act to his detriment in consequence of his believing and relying on those promises of Mdm Fock not to exercise her legal rights. But, this would amount to a case of promissory estoppel, which, as I have said, was not pleaded by the Defendant.

100 Irrespective of the above, it is trite that the representation of fact relied upon must be unequivocal for any estoppel to attach. To that end, Mr Yeo contended that Mdm Fock's conduct was equivocal at best. [\[note: 82\]](#) The evidence relied upon by Mr Bull of the purported representations of fact by Mdm Fock – viz, that the Property belonged entirely to the Defendant and he could do whatever he wanted with the Property – was given by Augustine and the Defendant's daughter. First, Mdm Fock had apparently told the Defendant's daughter on several occasions that the Property belonged to "[the Defendant] and us and there was no point in spending money on repairs to her bedroom." [\[note: 83\]](#) The Defendant's daughter stated in her affidavit that Mdm Fock never once mentioned the Trust Deed and had instead always maintained that the Property belonged to the Defendant. [\[note: 84\]](#) Second, when Mdm Fock returned the certificate of title to the Property to Augustine in 2002, Mdm Fock apparently said to Augustine that the Property belonged to the Defendant. [\[note: 85\]](#)

101 Against their evidence is the 2nd Plaintiff's evidence that Mdm Fock had previously stated that she wanted to "*die in her own house* [emphasis in original]". [\[note: 86\]](#) Also, Mdm Fock had told the 2nd Plaintiff that she was worried about "*signing the property away* [emphasis in original]" whenever the Defendant requested her to sign documents when she was still a director of the family companies. [\[note: 87\]](#) The 1st Plaintiff too attested that when Mdm Fock became ill, she declined to move to the 1st Plaintiff's house, saying "[t]his [the Property] is my house, why should I move? [emphasis in original]" [\[note: 88\]](#)

102 There is no gainsaying that the testimonies of both parties' witnesses are self-serving and must be viewed with some circumspection. In the end, the burden is on the Defendant to prove that Mdm

Fock had conducted herself in a manner which suggests that she had *unequivocally* represented as a fact that the Property belonged to the Defendant beneficially. I am unable to find in favour of the Defendant on this count. Even if I accept (which I do not) that Mdm Fock may have given Augustine and the Defendant's daughter the impression that the Defendant could renovate the Property as he wished, that falls short of an *unequivocal* representation of fact to the Defendant that the Trust Deed was a sham document and, therefore, the Defendant, as the registered legal owner, was in fact the legal and beneficial owner of the Property.

103 Taking the Defendant's case at its highest, even if Mdm Fock had so conducted herself as to unequivocally represent that the Property belonged to the Defendant beneficially, I find that the Defendant did not rely on her conduct in contributing towards the various expenses and renovations of the Property. This is quite apart from the point made earlier that he could not have been induced into thinking that he was the true beneficial owner of the Property because he must be taken to have known that any such representation of fact was untrue. After 1987, the Property was occupied by Mr Chng, Mdm Fock, the Defendant and his family. The Defendant's other siblings had already moved out. It was therefore not abnormal that the Defendant would be responsible for the outgoings of the household. The Defendant also admitted that as a filial son, [\[note: 89\]](#) he would still have paid for the renovations even if the Property belonged to Mdm Fock beneficially. [\[note: 90\]](#) In other words, even if the beneficial interest was vested in Mdm Fock and the Defendant knew and accepted this, there is no reason to expect that the Defendant would not have paid for the household expenses. I do not agree, therefore, that he paid for the expenses and renovations of the Property in reliance on any representations of fact by Mdm Fock that he was the beneficial owner of the Property.

104 Hence, I find that the Defendant was not misled by any of Mdm Fock's representation to the effect that the Trust Deed was a sham and that factually, he was both the legal and beneficial owner of the Property. The Defendant therefore cannot invoke any estoppel by representation to resist the Plaintiffs' claim.

(ii) *Proprietary estoppel*

105 A claim in proprietary estoppel will only arise where (*Hong Leong at* [170]; *Wilken and Villiers at* para 11.02):

- (a) the claimant detrimentally relies on a belief or expectation that he has or will be granted rights over an item of property;
- (b) in circumstances where the owner of the property acquiesces in or encourages the claimant's belief or expectation; and
- (c) it would be unconscionable in all the circumstances to deny the claimant the remedy.

106 First, I have difficulty finding clear evidence that Mdm Fock had conducted herself in such a manner that would reasonably have allowed the Defendant to come to only one conclusion, viz, that Mdm Fock had chosen to forego her rights under the genuine Trust Deed. It is an inescapable fact that Mdm Fock continued to keep the genuine Trust Deed in her possession very carefully in her UOB safe deposit box together with other important documents till her death in November 2009. This does not seem to me to be the behaviour of someone who was never going to rely on the Trust Deed. Mdm Fock did not tear up or destroy the Trust Deed or hand it over to the Defendant for him to do whatever he wanted with it, including destroying it at any time that it was convenient for him to do so. The Defendant must also have known that Mdm Fock never gave him the Trust Deed, but continued to safeguard it. Yet, he did not do anything about it. Second, while I accept that the

Defendant had expended sizeable sums on the maintenance, upkeep and renovation of the Property, it cannot be gainsaid that the Defendant, Augustine and their children were the main occupants. That these expenditures were borne by the Defendant was therefore, as Mr Yeo puts it, unsurprising. I do not find a clear link showing that the Defendant's expenditure of these monies on the Property was to his detriment and was also only because of his detrimental reliance on an unequivocal acquiescence or encouragement given to him by Mdm Fock that she was not going to enforce her rights under the genuine Trust Deed. Third, the major obstacle which the Defendant faced, particularly in the context of seeking proprietary estoppel, was in showing that Mdm Fock had acted so unconscionably that to deny the Defendant the remedy of proprietary estoppel would be itself unconscionable. I have not seen sufficient evidence which suggests that Mdm Fock even knew of the Defendant's belief or expectation that he was the beneficial owner of the Property. *A fortiori*, if Mdm Fock did not know that the Defendant had such a belief or expectation, she could not have acquiesced in or encouraged him to act on his belief or expectation. It may well be that the Defendant mistakenly thought that he was the beneficial owner, and therefore expended all these sums towards improving the Property. But, unless and until Mdm Fock also knew of his mistaken belief or expectation and accordingly acted in a manner to encourage him to continue subscribing to that mistaken belief or expectation, I cannot see how there can be any unconscionability on the part of Mdm Fock and I cannot see how a proprietary estoppel can arise.

(iii) *Estoppel by convention*

107 For an estoppel by convention to operate, the following elements must be present (see *Singapore Telecommunications Ltd v Starhub Cable Vision Ltd* [2006] 2 SLR(R) 195 at [28]; reaffirmed in *Travista Development Pte Ltd v Tan Kim Swee Augustine and others* [2008] 2 SLR(R) 474 at [31]):

- (a) the parties must have acted on "an assumed and incorrect state of fact of law" in their course of dealing;
- (b) the assumption must be either shared by both parties pursuant to an agreement or something akin to an agreement, or made by one party and acquiesced to by the other; and
- (c) it must be unjust and unconscionable to allow the parties (or one of them) to go back on that assumption.

108 The assumed and incorrect state of facts suggested by Mr Bull is that Mdm Fock and the Defendant had all along assumed that the Defendant was the beneficial owner of the Property notwithstanding the Trust Deed. This was a shared assumption because the Defendant had expended huge sums of money on the household expenses and renovation costs throughout the years. Mr Bull also relied on the same purported representations made by Mdm Fock to Augustine and the Defendant's daughter to show that there was such an assumed state of facts.

109 Mr Yeo had two responses. The first was already canvassed in relation to estoppel by representation, namely, that an estoppel by convention cannot arise as the Estoppel Argument based on a genuine Trust Deed is an alternative to the Sham Argument based on a non-genuine Trust Deed. If the Sham Argument is rejected and the Trust Deed is regarded as genuine, then the Defendant could not have acted on a wrongly assumed state of facts since he must be taken to have known that the beneficial ownership of the Property was truly vested in Mdm Fock. [\[note: 91\]](#) As I have already adverted to, even though it is my finding that the Trust Deed was genuine and that the Defendant must be taken to have known that the beneficial interest in the Property vested in Mdm Fock at the time of the execution of the Trust Deed, it is possible that both the Defendant and Mdm Fock genuinely forgot about the Trust Deed subsequently. In that case, if both had a mistaken and

wrong apprehension as to the true beneficial owner of the Property arising from the fact that the Defendant was the registered owner of the Property, and had conducted themselves in a manner which suggested to the Defendant that he was the beneficial owner (when in fact he was not), I do not see why, in principle, an estoppel by convention cannot arise. Therefore, on this point, I am with Mr Bull. [\[note: 92\]](#) The Defendant could, as a matter of fact, have been honestly mistaken as to his rights in the Property, with the corollary that an estoppel by convention might have arisen.

110 The question is whether, on the facts, there was indeed such an assumed incorrect state of facts which was honestly shared by both the Defendant and Mdm Fock such that it would be unconscionable to now allow the Plaintiffs, on behalf of Mdm Fock's estate, to resile from that incorrectly assumed state of facts. For the reasons which I have given above (at [100]–[102]), I agree with Mr Yeo's other submission that the representations relied upon by Mr Bull are equivocal and do not support the assumed incorrect state of facts contended by the Defendant. Likewise, as I have just explained (at [103] and [106] above), the Defendant's expenditure on the upkeep, maintenance and renovation of the Property also do not demonstrate that there was an assumed incorrect state of facts that the Defendant was the beneficial owner of the Property. The defence of estoppel by convention therefore fails as well.

(iv) Estoppel by acquiescence

111 In *Nasaka Industries (S) Pte Ltd v Aspac Air cargo Services Pte Ltd* [1999] 2 SLR(R) 817, Judith Prakash J held (at [70]) that to raise estoppel by acquiescence, five circumstances must be present:

- (a) the party seeking the estoppel must be mistaken as to his own legal rights;
- (b) the party seeking the estoppel must expend money or do some act on the faith of his mistaken belief;
- (c) the party being estopped must know of his own rights;
- (d) the party being estopped must know of the other party's mistaken belief; and
- (e) the party being estopped must encourage the other party in his expenditure of money or other act, either directly or by abstaining from asserting his legal right.

112 The fourth limb of the test is not satisfied in the present case. There is simply no evidence that Mdm Fock knew of the Defendant's mistaken belief that the beneficial interest in the Property belonged to him (see [106] above). It is one thing to say that Mdm Fock herself was mistaken (which I do not find was established to be the case). It is another, and more onerous burden, to say that Mdm Fock knew that the Defendant was mistaken as to his rights over the Property (which I also do not find to be proved). Thus, I find that no estoppel by acquiescence arises on the facts.

113 Hence, none of the estoppels relied on by the Defendant lie against the Plaintiffs.

Conclusion

114 For the above reasons, I allow the Plaintiffs' claim. Subject to the parties writing to the court within seven days to be heard on costs, I further order that the costs of the Plaintiffs are to be taxed if not agreed.

[\[note: 1\]](#) Agreed Bundle Vol 1 at p 4.

[\[note: 2\]](#) Agreed Bundle Vol 1 at p 3.

[\[note: 3\]](#) Agreed Bundle Vol 1 at p 5.

[\[note: 4\]](#) Defendant's AEIC at para 29.

[\[note: 5\]](#) Defendant's AEIC at para 30.

[\[note: 6\]](#) Defendant's AEIC at p 217.

[\[note: 7\]](#) Defendant's AEIC at paras 50–51.

[\[note: 8\]](#) Defendant's AEIC at para 26.

[\[note: 9\]](#) 2nd Plaintiff's AEIC at para 12.

[\[note: 10\]](#) Agreed Bundle Vol 1 at pp 8–9.

[\[note: 11\]](#) 2nd Plaintiff's AEIC at para 16.

[\[note: 12\]](#) Defendant's AEIC at para 3.

[\[note: 13\]](#) 2nd Plaintiff's AEIC at para 21.

[\[note: 14\]](#) Defendant's AEIC at para 80.

[\[note: 15\]](#) Exhibit D-1.

[\[note: 16\]](#) Agreed Bundle Vol 1 at pp 106–107.

[\[note: 17\]](#) Agreed Bundle Vol 1 at p 128.

[\[note: 18\]](#) Agreed Bundle Vol 1 at p 182.

[\[note: 19\]](#) Defendant's closing submissions at para 24.

[\[note: 20\]](#) Defendant's closing submissions at para 68.

[\[note: 21\]](#) Defendant's closing submissions at para 70.

[\[note: 22\]](#) Defendant's submissions at para 77.

[\[note: 23\]](#) Defendant's submissions at para 71.

[\[note: 24\]](#) Defendant's submissions at para 81(b).

[\[note: 25\]](#) Augustine's AEIC at para 19.

[\[note: 26\]](#) Defendant's AEIC at para 46.

[\[note: 27\]](#) Defendant's closing submissions at para 35.

[\[note: 28\]](#) Defendant's closing submissions at para 34.

[\[note: 29\]](#) Defendant's closing submission at para 55.

[\[note: 30\]](#) Defendant's closing submissions at para 52.

[\[note: 31\]](#) Defendant's closing submissions at para 172.

[\[note: 32\]](#) Defendant's closing submissions at para 174.

[\[note: 33\]](#) Plaintiffs' closing submissions at para 43.

[\[note: 34\]](#) Plaintiffs' closing submissions at paras 31–32.

[\[note: 35\]](#) Plaintiffs' closing submissions at para 33.

[\[note: 36\]](#) Plaintiffs' closing submissions at para 40.

[\[note: 37\]](#) Plaintiffs' closing submissions at para 41.

[\[note: 38\]](#) Plaintiffs' closing submissions at para 43.

[\[note: 39\]](#) Plaintiffs' closing submissions at para 44.

[\[note: 40\]](#) Plaintiffs' closing submissions at para 45.

[\[note: 41\]](#) Plaintiffs' closing submissions at para 63.

[\[note: 42\]](#) Plaintiffs' closing submissions at paras 75–78.

[\[note: 43\]](#) Plaintiffs' closing submissions at paras 89–95.

[\[note: 44\]](#) Plaintiffs' closing submissions at paras 121–138.

[\[note: 45\]](#) Plaintiffs' closing submissions at paras 115–117.

[\[note: 46\]](#) Defendant's AEIC at para 35.

[\[note: 47\]](#) Transcript dated 30 Aug 2012 at p 22.

[\[note: 48\]](#) Exhibit D1.

[\[note: 49\]](#) Transcript dated 30 Aug 2012 at p 138.

[\[note: 50\]](#) Defence at para 5(g).

[\[note: 51\]](#) Agreed Bundle Vol 1 at p 128.

[\[note: 52\]](#) Transcript dated 29 Aug 2012 at p 190.

[\[note: 53\]](#) Defendant's AEIC at para 32.

[\[note: 54\]](#) Transcript dated 29 Aug 2012 at p 183.

[\[note: 55\]](#) Transcript dated 29 Aug 2012 at pp 186–187.

[\[note: 56\]](#) Transcript dated 29 Aug 2012 at pp 183–185.

[\[note: 57\]](#) Transcript dated 29 Aug 2012 at pp 41–43.

[\[note: 58\]](#) Defendant's closing submissions at paras 159–169.

[\[note: 59\]](#) Defence at pp 2–4.

[\[note: 60\]](#) Agreed Bundle Vol 1 at p 10.

[\[note: 61\]](#) Transcript dated 29 Aug 2012 at pp 7–8.

[\[note: 62\]](#) Second plaintiff's AEIC at para 36.

[\[note: 63\]](#) Transcript dated 30 Aug 2012 at pp 13–14.

[\[note: 64\]](#) Plaintiffs' closing submissions at para 43; Defendant's closing submissions at para 67.

[\[note: 65\]](#) Transcript dated 30 Aug 2012 at p 4.

[\[note: 66\]](#) Plaintiffs' closing submissions at para 45.

[\[note: 67\]](#) Transcript dated 30 Aug 2012 at p 22.

[\[note: 68\]](#) Transcript dated 30 Aug 2012 at pp 35–36.

[\[note: 69\]](#) See transcript dated 30 Aug 2012 at pp 78–79.

[\[note: 70\]](#) Transcript dated 30 Aug 2012 at pp 59–61.

[\[note: 71\]](#) Defence at para 5(d).

[\[note: 72\]](#) Transcript dated 30 Aug 2012 at p 11.

[\[note: 73\]](#) Defendant's closing submissions at para 88.

[\[note: 74\]](#) Transcript dated 30 Aug 2012 at pp 43–44.

[\[note: 75\]](#) See second plaintiff's AEIC at para 51.

[\[note: 76\]](#) Defendant's closing submissions at para 93.

[\[note: 77\]](#) Plaintiffs' closing submissions at para 95.

[\[note: 78\]](#) Defence at para 11.

[\[note: 79\]](#) Plaintiffs' closing submissions at paras 115 and 117.

[\[note: 80\]](#) Defendant's closing submissions at paras 179–180.

[\[note: 81\]](#) Defendant's closing submissions at para 182.

[\[note: 82\]](#) Plaintiffs' closing submissions at paras 119–143.

[\[note: 83\]](#) Lilian's AEIC at para 21.

[\[note: 84\]](#) Lilian's AEIC at para 22.

[\[note: 85\]](#) Augustine's AEIC at para 19.

[\[note: 86\]](#) Second plaintiff's AEIC at para 51.

[\[note: 87\]](#) Second plaintiff's AEIC at para 49.

[\[note: 88\]](#) First plaintiff's AEIC at para 6.

[\[note: 89\]](#) See also transcript dated 31 Aug 2012 at p 68.

[\[note: 90\]](#) Transcript dated 31 Aug 2012 at p 84.

[\[note: 91\]](#) Plaintiffs' closing submissions at paras 115–118.

[\[note: 92\]](#) Defendant's reply submissions at para 77.