IN THE FAMILY JUSTICE COURTS OF THE REPUBLIC OF SINGAPORE

[2017] SGHCF 10

HCF/Suit No 3 of 2015

Between

UAM

… *Plaintiff*

And

(1) UAN
(2) UAO

… *Defendants*

JUDGMENT

[Abuse of Process] — [Extended doctrine of *res judicata*]
[Equity] — [Defences] — [Laches]
[*Res Judicata*] — [Issue estoppel]
[Succession and Wills] — [Revocation] — [Later instrument]
[Succession and Wills] — [Testamentary capacity]

Version No 2: 28 Oct 2020 (02:01 hrs)

TABLE OF CONTENTS

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UAM
v
UAN and another

[2017] SGHCF 10

High Court — HCF/Suit No 3 of 2015
Valerie Thean JC
14-18, 21 November; 17 January 2017.

13 April 2017 Judgment reserved.

Valerie Thean JC:

Introduction

1 This is a probate action seeking the revocation of an earlier grant of probate issued on 10 December 1990 in respect of a will of the mother of the plaintiff ("the mother") dated 15 April 1980 ("the 1980 Will"). The plaintiff seeks in this action to pronounce against the validity of the 1980 Will and to pronounce in solemn form the mother's later will dated 23 June 1981 ("the 1981 Will"). The 1981 Will appoints the plaintiff as the sole executor of the mother's estate and devised her one-fifth share in a property to the plaintiff absolutely.

2 The 1980 Will, on the other hand, appointed the plaintiff's late brother ("the brother") and his wife, the 1st defendant, as co-executors, and devised the mother's one-fifth share to the 2nd defendant (the son of the 1st Defendant) as

the sole beneficiary. By their counterclaim, the defendants ask the court to pronounce against the validity of the 1981 Will and hold the 1980 Will valid.

3 The only asset in the mother's estate is her one-fifth (1/5) share of the property just off Bukit Timah Road ("the Property"), upon which a bungalow stands. The plaintiff had, in various earlier actions, as a plaintiff in two writ actions filed in 2011 and 2012 ("Suit No.1" and "Suit No. 2"), which were consolidated and tried; and then as a defendant to an originating summons filed in 2014 ("Suit No.3") and appellant in the appeal against that decision in the Court of Appeal, unsuccessfully sought to establish that he was the sole beneficial owner or otherwise had a right to lifetime exclusive possession of the Property.

4 For the reasons given below, I dismiss the plaintiff's claim and allow the defendants' counterclaim.

Background facts

Parties and Property at stake

5 In 1966, the five members of the plaintiff's family purchased the Property and held it as tenants-in-common in equal shares. The registered proprietors were the following:

(a) The father of the plaintiff ("the father");

(b) The mother;

(c) The brother, the plaintiff's late brother, who was the oldest of the father and mother's three children;

Version No 2: 28 Oct 2020 (02:01 hrs)

(d) The plaintiff's elder sister, the middle child of the father and mother; and

(e) the plaintiff, the youngest child of the father and mother.

6 The father ran a family business through a company ("the company") with the help of his two sons. At the time, the family was living in various different properties. The father and mother lived at Queen Street. The brother and his family lived at Beach Road, near the company. The plaintiff's sister had married and moved out of Queen Street. The plaintiff initially lived with his sister, and then moved into the Property in or around late 1966. Between 1968 to around 1978, the father and mother alternated from staying at Queen Street and the Property, and moved into the Property permanently in 1979 when the Queen Street property was acquired by the government. The father's health began to deteriorate in 1979.

Discord within the family

7 The plaintiff and his brother were not close as children. There was a large age gap of 11 years between them and they did not live together when growing up.[1] They drifted apart even further when the plaintiff went to Australia for his university education,[2] and their relationship was volatile after the plaintiff returned from his education abroad in the 1960s.[3]

8 In or around 1978 to 1979, the plaintiff and his brother fell out with each other over certain potential Middle East business activities. The falling out was so severe that there were two police reports lodged by the brother: the

1 P's AEIC, para 60.

2 P's AEIC, para 61.

3 D1's AEIC, para 33.

Version No 2: 28 Oct 2020 (02:01 hrs)

first on 26 January 1979,[4] and the second on 9 May 1979.[5] According to the first report, the brother went to the Property to collect certain stationery items, but the plaintiff reportedly refused to allow him to do so, and ordered a dog to bite him. According to the second report, the brother was attacked by the plaintiff at the Property, causing him to sustain injuries on his face and bruises on his buttocks. The parties do not dispute the contents of the police reports. The plaintiff admits to these two altercations and claims his brother, during the first incident, accused him of cheating the brother of the Middle East transactions that did not come to fruition; and that his brother threatened him with a knife in the second incident, which ended up with the two of them exchanging blows.[6]

9 The plaintiff also fell out with his father because of the Middle East transaction. In early 1979, the father placed various notices in the English and Chinese newspapers to state that the plaintiff was not a representative of the company nor was he authorised to transact business on the company's behalf. According to the 1st defendant, the father asked the plaintiff to vacate the Property, but the plaintiff refused. Instead, the parents moved out to a rented accommodation at Rangoon Road.

10 On 14 August 1979, the plaintiff received a letter from the law firm Donaldson & Burkinshaw purporting to act for his brother and their parents,[7] alleging that the plaintiff was occupying the Property as a licensee since 1966 and demanded that the plaintiff vacate the Property by 30 September 1979 failing which they (his brother and parents) would commence proceedings

4 1 AB, p 44.

5 1 AB, p 51.

6 P's AEIC, paras 72–73.

7 1 AB, p 59.

Version No 2: 28 Oct 2020 (02:01 hrs)

against him and claim rental. The plaintiff replied on 23 August 1979, asking for the reasons for demanding that he vacate the Property.[8] The plaintiff did not subsequently receive a reply, and he sent another letter to follow up on the matter on 7 September 1979. Again, there was no reply.[9]

11 On 15 March 1980, Drew & Napier sent the plaintiff a letter, purportedly acting for his brother and their parents, stating that the firm had been instructed to commence proceedings against the plaintiff in relation to the Property and that the plaintiff's parents and brother were seeking a court order for the following reliefs:

(a) to sell the Property and divide the proceeds thereafter in equal shares;

(b) for the plaintiff to pay open market rental on the Property to the other registered co-owners in respect of the plaintiff's occupation of the Property from 1974; and

(c) for a contribution from the plaintiff for all the expenses and interest paid for the upkeep, maintenance and renovation of the Property.[10]

The plaintiff did not reply to this letter, and there was no subsequent court action commenced against him in furtherance of this letter.[11]

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8 P's AEIC, p 159.

9 P's AEIC, paras 81–82.

10 1 AB, p 62.

11 P's AEIC, para 86.

Version No 2: 28 Oct 2020 (02:01 hrs)

The 1980 Will

12 Both the father and the mother executed a will each on 15 April 1980. At that time, they were living in a rented accommodation at Rangoon Road while the brother and the 1st defendant lived at Beach Road.[12] Ms Momo Tay Ai Siew ("Ms Tay"), the solicitor who witnessed the execution of the 1980 Will, said that she received instructions for the wills from the brother.[13] Both father and mother attended at Ms Tay's office on 15 April 1980 for the execution of their respective wills, accompanied by the brother.[14]

13 The 1980 Will appointed the brother and the 1st defendant as co-executors, and devised the mother's one-fifth share in the Property to the 2nd defendant as the sole beneficiary. The father's will similarly appointed the brother and 1st defendant as co-executors, and devised his one-fifth share of the Property to the 2nd defendant's elder brother. Ms Tay was unaware of the relationship between the brother and the two beneficiaries. She testified that she asked the father and the mother about their relationship with the beneficiaries, and was told that the beneficiaries were "their favourite grandchildren". Both the father and the mother then signed their respective wills and an original carbon copy.

The plaintiff redeems the mortgage on the Property

14 In the meanwhile, an overdraft on the Property remained unserviced. On 29 November 1980, Chung Khiaw Bank's solicitors wrote to the plaintiff and his brother demanding repayment of $47,850 and threatened foreclosure.

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12 1D's AEIC, para 46.

13 Transcript dated 21 November 2016, p 62.

14 Ms Tay's AEIC, para 9.

Version No 2: 28 Oct 2020 (02:01 hrs)

The plaintiff wrote to the brother to ask him to repay but the brother refused. On 17 January 1981, the plaintiff paid the outstanding sum of $47,850 and the bank released to him the original certificate of title.

The mother's departure from Ming Teck Park

15 The father and mother began staying with the brother's family at Ming Teck Park on or around March 1981.[15] Around June 1981, the mother moved out of Ming Teck Park to stay with the plaintiff's elder sister instead. It seems the mother had, after a medical appointment, left by herself in a taxi without taking any of her belongings at Ming Teck Park.[16] The father was still alive and continued to stay at Ming Teck Park. The brother, 1st defendant and their family members subsequently neither visited the mother nor brought her belongings that she left behind at Ming Teck Park to her.[17]

The Trust Acknowledgement and the 1981 Will

16 On 9 June 1981, the plaintiff visited his mother at his sister's house and told the mother how he prevented foreclosure on the Property and about the problems that the plaintiff had with his brother.[18] The plaintiff prepared two documents for his mother to sign: one was an acknowledgement that she held her one-fifth share in the Property on trust for the plaintiff and the other was a letter to discharge Drew & Napier from acting further for her. The mother signed both documents[19] with a circle in the presence of the plaintiff and his wife.

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15 D1's AEIC, para 46; Transcript dated 17 November 2016, p 4.

16 Transcript dated 18 November 2016, p 7.

17 Transcript dated 17 November 2016, p 11.

18 P's AEIC, para 102.

19 P's AEIC, paras 103–104.

Version No 2: 28 Oct 2020 (02:01 hrs)

17 The plaintiff further contends that around the same time, he met his mother at a coffee shop in Victoria Street where he brought up the topic of the letter from Drew & Napier (see [11] above).[20] The mother decided that she wanted all her assets to vest in the plaintiff upon her death. She informed him so, and asked that the plaintiff bring her to see lawyers in connection with this matter.[21] The plaintiff thus brought his mother to People's Park Centre as he knew that many lawyers' offices were located there. They walked into one that they came across and executed the 1981 Will there.

18 The 1981 Will appoints the plaintiff as the sole executor of the mother's estate and devised her one-fifth share in the Property to the plaintiff absolutely.

The demise of the parents

19 The father passed away on 8 November 1981. The mother was at Ming Teck Place for seven days until the funeral was completed.[22]

20 On 20 November 1986, the mother passed away. The petition for probate of the mother's 1980 Will was filed on 13 March 1990 and probate was extracted on 10 December 1990 in Probate 25/1990. The estate duty certificate listed the mother's one-fifth share of the Property as an estate asset (which was exempt from estate duty by that time).

21 In Probate Petition No 25 of 1990 ("Probate 25/1990"), a limited grant of probate in respect of the 1980 Will was obtained by the brother on the basis

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20 P's AEIC, para 98.

21 P's AEIC, para 107.

22 Transcript dated 17 November 2016, p 11–12.

Version No 2: 28 Oct 2020 (02:01 hrs)

of the original carbon copy of the 1980 Will. The brother did not however take any further action.

The demise of the brother

22 The brother passed away on 7 January 2006. By his will dated 12 November 2005, his one-fifth share was to be sold and the same proceeds distributed equally amongst his six children.

23 After his passing, the 1st defendant found the original 1980 Will among the brother's personal belongings and papers. Having forgotten that the brother had previously instructed solicitors to obtain probate in respect of the duplicate 1980 Will, the 1st defendant instructed solicitors to obtain probate through commencing DCP 926 of 2009 ("DCP 926/2009").[23] The solicitors then discovered that grant of probate had been obtained in Probate 25/1990.

Previous legal proceedings

24 On 14 October 2011, the plaintiff commenced Suit No.1 against the estate of the father, the sister and the personal representatives of the brother, claiming the entire beneficial interest of the Property by reason of, alternatively, a resulting trust, constructive trust, or a proprietary estoppel and seeking to compel his family members (or their estates) to transfer to him what he claimed was their bare legal interest in the Property. Through the Defence filed in the action, the plaintiff learnt of his mother's 1980 Will. He commenced Suit No.2 against his mother's estate seeking the same reliefs, and this suit was consolidated with Suit No.1. The consolidated action was dismissed on 27 January 2014 by the High Court ("the 2014 Judgment") and

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[23] D1's AEIC, paras 73–75.

Version No 2: 28 Oct 2020 (02:01 hrs)

the plaintiff did not appeal. The judge ("the Judge") found that the plaintiff failed to establish the factual elements necessary for his claim on any one of the three legal bases.

25 Thereafter, the 1st defendant, as the executrix of the mother's estate, applied in Suit No.3 on 31 July 2014 for an order of partition of the Property in accordance with the respective shares of the tenants-in-common, or alternatively in lieu of partition an order of sale with vacant possession with the sale proceeds to be distributed accordingly. The application was allowed on 16 March 2015 and the Judge ordered that the Property be sold after six months with vacant possession, and the sale proceeds to be distributed in accordance with the respective shares of the tenants-in-common. The plaintiff's appeal against the entire decision ("the 2015 GD") was dismissed by the Court of Appeal on 14 March 2016.

26 On 13 July 2015, the plaintiff commenced this action against the defendants.

The plaintiff's and defendants' positions

27 The plaintiff essentially claims that the 1980 Will is invalid as the mother did not possess the requisite testamentary capacity when she executed it, she did not know and approve its contents and/or it was procured by way of undue influence exerted on her by the brother and the 1st defendant. Further, the plaintiff submits that the 1981 Will prevails as it supersedes the 1980 Will by virtue of the fact that it is later in time. The 1981 Will is valid as the mother possessed the requisite testamentary capacity, and she knew and approved the contents of the 1981 Will and there were no suspicious circumstances attending the preparation and execution of the 1981 Will. Hence, the plaintiff seeks to revoke the earlier 1990 grant of probate, for the court to pronounce

Version No 2: 28 Oct 2020 (02:01 hrs)

against the validity of the 1980 Will and in its place pronounce in solemn form the 1981 Will as the mother's true and last will.

28 The defendants' case is that the plaintiff is estopped from raising the validity of the 1980 Will which was already litigated previously. They also submit that the present proceedings amount to an abuse of process, and further or in the alternative that the plaintiff having elected to forgo his claim under the 1981 Will, he has waived it thereunder, and the doctrine of approbation and reprobation supports their case. In any event, they claim that there were suspicious circumstances surrounding the preparation and execution of the 1981 Will. The 1981 Will is thus invalid as the mother did not know and approve the contents of the said will. Further, while they concede the plaintiff's claim is not barred by limitation, it is unconscionable in the circumstances to grant the plaintiff the reliefs he seeks as the plaintiff is guilty of prolonged, inordinate and inexcusable delay. In light of these contentions, the defendants counterclaim that the court pronounces against the validity of the 1981 Will propounded by the plaintiff, that the court holds the 1980 Will to be valid and that the 1st defendant be allowed to admit into Probate 25/1990 the original 1980 Will.

The issues

29 A later, duly executed will supercedes an earlier, duly executed will: s 15(b) of the Wills Act (Cap 352, 1996 Rev Ed). This case may thus be analysed by reference to three main issues:

(a) Whether the 1981 Will is valid.

(b) If not, whether the 1980 Will is valid.

Version No 2: 28 Oct 2020 (02:01 hrs)

(c) The effect of the plaintiff's extended delay on these proceedings.

30 My findings on the three issues are as follows:

(a) **The validity of the 1981 Will:** I am of the view that the plaintiff's present action amounts to an abuse of process. In any event, there are suspicious circumstances surrounding the 1981 Will, and I find on the facts that its validity is not proved.

(b) **The validity of the 1980 Will:** In light of the above, the 1980 will becomes relevant. Here, issue estoppel applies to bar the plaintiff's contention that the 1980 Will is not valid. If not, abuse of process would equally apply. In the event I am wrong on these issues, there is insufficient factual basis upon which to query the validity of the 1980 Will.

(c) **Effect of the delay in these proceedings:** In this case, there has been delay on the plaintiff's part. The Limitation Act (Cap 163, 1996 Rev Ed) ("Limitation Act") does not apply. If laches did apply, it would be unconscionable to allow the plaintiff's claim.

My reasons for so holding follow.

The 1981 Will

Abuse of process

31 The defendants contend that the issue of the validity of the 1981 Will properly belonged to the subject of litigation in Suit Nos.1, 2 and 3. I find that the present probate proceedings could and should have been raised earlier, and that the plaintiff has not given an adequate reason why this was not done.

Version No 2: 28 Oct 2020 (02:01 hrs)

32 The "extended" doctrine of *res judicata* or doctrine of "abuse of process" provides that where an issue *ought* to have been raised and was not, it could amount to an abuse of process to subsequently litigate that issue. Attributed to the foundational authority of *Henderson v Henderson* (1843) 3 Hare 100 ("*Henderson*")) as enunciated more recently by the House of Lords in *Johnson v Gore Wood & Co* [2002] 2 AC 1 ("*Johnson*"), this was considered by our High Court in *Goh Nellie v Goh Lian Teck and others* [2007] 1 SLR(R) 453 ("*Goh Nellie*") and the Court of Appeal in *Lai Swee Lin Linda v Attorney-General* [2006] 2 SLR(R) 565. The defendants plead that the present proceedings amount to an abuse of process as the plaintiff ought to have canvassed his entire case on the issue of the validity of the 1980 Will during the consolidated Suit No.1.

33 The doctrine is said to be "extended" because it goes beyond precluding a party from raising claims or issues previously brought before the court and extends to issues which were "so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them" (see *Greenhalgh v Mallard* [1947] 2 All ER 255 at 257, cited in *Ching Mun Fong (executrix of the estate of Tan Geok Tee, deceased) v Liu Cho Chit and another appeal* [2000] 1 SLR(R) 53 ("*Ching Mun Fong*") at [23] and *Humpuss Sea Transport Pte Ltd (in compulsory liquidation) v PT Humpuss Intermoda Transportasi TBK and another* [2016] 5 SLR 1322 ("*Humpuss*") at [58]). It includes *every point which properly belonged to the subject of litigation or proceedings previously*, and which the parties, exercising reasonable diligence, might have brought forward at the time: see *The Royal Bank of Scotland NV (formerly known as ABN Amro Bank NV) and others v TT International Ltd (nTan Corporate Advisory Pte Ltd and others, other*

Version No 2: 28 Oct 2020 (02:01 hrs)

parties) and another appeal [2015] 5 SLR 1104 ("*TT International Ltd*") at [101].

34 The extended doctrine of *res judicata* is a matter of weighing competing interests. The courts are concerned with ensuring finality in judicial decisions and preventing a party from being unjustly hounded given the earlier history of the matter. The question is whether the issue ought to have been raised with reasonable diligence in the previous proceedings. However, the mere fact that the issue was not raised in the earlier proceedings does not necessarily render raising the issue in the later proceedings an abuse of process. It is for the court to consider whether it is in fact an abuse of the process of the court to raise the issue only at the later proceedings which could have been raised before (see *Goh Nellie* at [52]).

35 The inquiry is a broad-based one that takes into account all the facts and circumstances of the case, and there is a marked difference in analytical approach as opposed to considering whether cause of action and/or issue estoppel is made out (*TT International Ltd* at [105]; *Johnson* at 31D). Much depends on the overall justice of the case. Hence, there is a higher degree of flexibility, and the court is not to "adopt an inflexible or unyielding attitude" (*Goh Nellie* at [53]). The requirement of identity of parties under this doctrine has since also been dispensed with: *Humpuss* at [61]. The considerations that the court may consider include whether the later proceedings constitute a collateral attack upon the previous decision, whether there is fresh evidence that warrants re-litigation, whether there are *bona fide* reasons why a particular issue that ought to have been raised in the earlier proceedings was not, and whether there are other special circumstances that might justify allowing the case to proceed (*Humpuss* at [63]).

Version No 2: 28 Oct 2020 (02:01 hrs)

36 In the present case, both the issues of the validity of the 1980 Will and the same of the 1981 Will in the plaintiff's probate action to revoke the grant of probate with regard to the former and to pronounce the latter in solemn form ought to have been raised in the previous action Suit No.1, or even in Suit No.3 when the plaintiff was resisting the application for an order for sale after judgment in the first action. The plaintiff had been afforded more than ample opportunity to present his case as to why he had any proprietary interest, beneficial or otherwise, over the Property in earlier proceedings, but yet persists now to attempt to present his case under yet another guise.

37 There are no new facts or fresh evidence. All the relevant circumstances pertaining to the preparation of the 1980 Will and the 1981 Will have not changed. It is striking that the plaintiff's AEICs in Suit No.1 and the present proceedings essentially cover the *same* alleged circumstances. I also do not accept the plaintiff's suggestions that there are documents and information pertaining to the validity of the 1980 Will that had "recently surfaced". The plaintiff filed Suit No.2 because of his discovery of the 1980 Will, and could easily have obtained all necessary evidence if he had exercised reasonable diligence.

38 Further, in Suit No.3 when an order of court was being sought by the 1st defendant as the executor of the plaintiff's parents' estates, the plaintiff resisted the order by raising a number of arguments, including various estoppels and adverse possession. By not challenging the validity of the 1980 Will then or seeking to revoke the 1990 grant of probate in Suit No.3 when he could, it further bolsters the fact that the present action is a belated and inconsistent attempt on the plaintiff's part.

Version No 2: 28 Oct 2020 (02:01 hrs)

39 Having regard to the *substance* and *reality* of the three earlier actions and the unsuccessful appeal to the Court of Appeal in the last of the three actions, I find that the present issues reasonably ought to have been raised earlier. The present action clearly only arises as a direct result of the plaintiff's failure to obtain judgment in his favour in earlier litigation, and is substantially the plaintiff's attempt at having multiple bites of the proverbial cherry. The higher degree of flexibility in the extended *res judicata* doctrine addresses any potential technical distinction based on the different nature of the claims here. The reality of the present action is that *effectively*, the plaintiff seeks the same proprietary interest in the Property ultimately, be it through the mother's 1981 Will or his earlier arguments that he was the beneficial owner of the whole Property based on an alleged family arrangement. In the interests of finality of litigation, he should have and could have raised the alternative arguments regarding the wills, especially when the actions all concern the same factual matrix and events. An examination of the plaintiff's AEIC in Suit No.1 and the present proceedings are almost identical in relation to his narration of the events that took place in or around June 1981.[24] The plaintiff had also sued and counterclaimed against the 1st defendant previously in the earlier actions *in her capacity as executrix of the mother's estate*.

40 In the light of these issues, a good explanation is required of the plaintiff, and in this case there is none. Notably, the plaintiff indicated on the stand that he reserved his rights to challenge the father's will, and stated that "the reason why [he] commenced this action to invalidate [the mother]'s 1980 Will is because [she] did execute a later will". The plaintiff also indicated that the 1981 Will was merely a "safety net" for him:[25] he thought it unnecessary to

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24 P's AEIC, paras 98–112; P's AEIC in Suit No.1, paras 118–124.

25 P's AEIC, para 212.

Version No 2: 28 Oct 2020 (02:01 hrs)

seek a grant of probate with regard to the 1981 Will as he was under the "mistaken belief" that he was the beneficial owner over the entire Property. His "safety net" comment reflected his expectation that he could have multiple – and inconsistent – attempts at the several ways that he could think of to gain or assert his proprietary interest over the Property.

41 A claimant is not required to pursue all available remedies against all possible defendants in one proceeding, and plaintiffs are not required to make case management decisions that result in the most efficient and economical use of the court's resources. However, I find that the plaintiff has acted unreasonably here, bringing proceedings that rely on inconsistent claims from those brought in previous proceedings. His vexatious conduct is also apparent from the fact that he was aware of the existence of the 1981 Will all along but only chose to propound it now after his multiple failed attempts to claim beneficial ownership over the Property. The present case should be distinguished from cases where the principle of party autonomy ought to be defended, when conducting litigation incrementally may be a *bona fide* case management decision. This is not a "complex commercial matter" (see *Aldi Stores Ltd v WSP Group plc and others* [2007] EWCA Civ 1260 at [25]) where expecting a plaintiff to bring a single set of complicated proceedings against a wide range of defendants with ensuing cross-claims between parties would be imposing a standard that puts a litigant in an impossible position.

42 As the causes of action are technically distinct, I considered whether adding the current claims to earlier proceedings would "transform the whole proceedings" and turn a relatively simple action to a one much wider in scope (*Stuart v Goldberg Linde (a firm) and others* [2008] EWCA Civ 2 ("*Stuart*") at [55]). It does not. Both the 1980 and 1981 Wills were in evidence in Suit No.1 and the plaintiff had already relied on the 1981 Will then as evidence

Version No 2: 28 Oct 2020 (02:01 hrs)

that the mother always saw the benefit of her one-fifth share in the Property as belonging to him (see the 2014 Judgment at [63]). Further, the plaintiff had in that suit raised and argued issues regarding the mother's testamentary capacity - key to any action propounding or pronouncing against a will - in relation to the 1980 Will (see [79]–[83] below) and the 2014 Judgment had recognised this and made factual findings in relation to whether the 1980 Will represented the mother's testamentary intentions (see the 2014 Judgment at [104]–[106]). Thus, the consideration in *Stuart* does not apply on the present facts and I do not find that there are any *bona fide* reasons why the present issues were not raised in the earlier proceedings.

43 Counsel for the plaintiff argued that the doctrine of abuse of process is a mere "technical and procedural objection".[26] I do not agree that it is a mere technicality. Indeed, we see from the facts of this case that the rule operates here to give substantial justice to litigants who would otherwise be harassed by continual litigation. It was telling that the plaintiff was hard put to explain the contradiction between his request to the mother to sign the trust document and the 1981 Will, two contradictory documents, the first of which said that the share of the Property was "returned herewith". He admitted on the stand that his earlier case would have collapsed if he had taken the position in that suit that the 1981 Will was valid.[27] The plaintiff contends that, now convinced by the 2014 Judgment, he now returns with the 1981 Will. I find his contention that the previous suit was based on a "mistaken belief"[28], and reliance here in the case at hand, on the Judge's adverse finding against his version of events in the earlier suit, too disingenuous. He lacked a conviction about the 1981

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26 Plaintiff's Points of Rebuttals ("P6"), para 14.

27 Transcript dated 14 November 2016, p 20.

28 P's Opening Statement, para 2; Transcript dated 14 November 2016, pp 12, 24.

Version No 2: 28 Oct 2020 (02:01 hrs)

Will earlier, when his case would have suffered credibility issues with the use of two opposing arguments. Now, it seems the Judge's *rejection* of what he must have viewed as a stronger premise *grounds this case*, and this is the argument *which he did not have sufficient conviction to advance earlier*. In my view, the plaintiff's prejudicial delay, the absence of fresh evidence and the advancement of inconsistent arguments in two prior cases reflect precisely the kind of abuse that the extended doctrine of *res judicata* is designed to prevent.

Election and waiver

44 Further, the defendants also submit that the plaintiff has *waived* his right to assert that the 1981 Will is valid in these proceedings, having *elected* to assert his beneficial ownership of the Property in Suit No.1. On or around the time of the commencement of that suit, the plaintiff either could have proceeded on the basis that the mother held her share of the Property on trust for him, pursuant to the family arrangement and trust acknowledgement, or on the basis that the mother was the beneficial owner of her share and had bequeathed it to the plaintiff pursuant to the 1981 Will. Having elected to assert a trust in Suit No.1 (and necessarily treating the 1981 Will as invalid), the defendants claim the plaintiff cannot now retract his position in these proceedings to assert that the 1981 Will is valid.[29] Initially, the plaintiff's counsel argued that this was not pleaded, but conceded otherwise in her closing oral reply.

45 Such waiver by election has been explained as an "abandonment of a right which arises by virtue of a party making an election": see Lord Goff of Chieveley in the House of Lords decision of *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corporation of India (The "Kanchenjunga")* [1990]

[29] DCS, paras 91–92.

Version No 2: 28 Oct 2020 (02:01 hrs)

1 Lloyd's Rep 391 ("*The Kanchenjunga"*) at 397–399 (as adopted by the Court of Appeal in *Chai Cher Watt (trading as Chuang Aik Engineering Works) v SDL Technologies Pte Ltd and another appeal* [2012] 1 SLR 152 (at [33])). A review of the relevant authorities suggest three criteria where the assertion of inconsistent rights may be held to amount to an election:

(a) a concurrent existence of two inconsistent sets of legal rights. Because "they are inconsistent neither one may be enjoyed without the extinction of the other and that extinction confers upon the elector the benefit of enjoying the other, a benefit denied to him so long as both remained in existence": see the Court of Appeal's decision in *Ang Sin Hock v Khoo Eng Lim* [2010] 3 SLR 179 (at [30]), quoting the High Court of Australia's decision of *Sargent v ASL Developments Limited* (1974) 131 CLR 634;

(b) knowledge of the facts which have given rise to the two sets of rights as a prerequisite to election: see Lord Goff in *The Kanchenjunga* at 398; and

(c) an unequivocal representation by the party making the election in relation to the right or remedy allegedly being waived: see the High Court's decision in *The "Pacific Vigorous"* [2006] 3 SLR(R) 374 at [22], referring to Lord Goff in *The Kanchenjunga*.

46 In the present case, the key inconsistency in my judgment lies with the inconsistent ownership *rights or interests* being asserted over the same Property in separate proceedings by the plaintiff. Neither the causes of action *per se* (a probate action now as opposed to claims of a resulting trust, constructive trust or a proprietary estoppel) nor the relief or remedy sought (the pronouncement of a later will and revocation of an earlier probate grant as

Version No 2: 28 Oct 2020 (02:01 hrs)

opposed to the transfer of alleged bare legal interest in the Property), are inherently contradictory or inconsistent.

47 After 15 November 2011, when the 1st defendant disclosed the existence of the 1980 Will and the grant of probate extracted in respect of it, and when the plaintiff filed his reply and commenced Suit No.2 against the 1st defendant as executrix of the mother's estate on 11 January 2012 (which was eventually consolidated into Suit No.1), the plaintiff had essentially chosen to proceed on the basis that the mother only had a bare legal title to the Property and held her one-fifth share of the Property on trust to him. Despite knowing that an earlier grant of probate existed in respect of an earlier 1980 Will that was inconsistent with the 1981 Will that named him the sole beneficiary instead, he took the position that beneficial interest to the entire Property, including the mother's share, lay with him. To this extent, the underlying facts and rights of ownership being insisted upon earlier and in this claim are plainly inconsistent. The mother cannot possibly have had full ownership over her share of the Property that she could bequeath to the plaintiff in the 1981 Will while the plaintiff had beneficial ownership over that same share. Although the direct interests in terms of that in propounding a will and that in claiming beneficial ownership are not apparently inconsistent, there is an *inconsistency of substantive proprietary rights underlying these claims*: a "cause of action" constitutes the "essential *factual material* that supports a claim" [emphasis added] (see *Multistar Holdings Ltd v Geocon Piling & Engineering* Pte Ltd [2016] 2 SLR 1 at [34]).

48 Nevertheless, the crucial question is whether the plaintiff had two inconsistent substantive rights *at the material time* after he filed his reply in Suit No.1. The nature of his rights under the prior beneficial ownership claim and under the 1981 Will has to be closely examined in this context. In the

Version No 2: 28 Oct 2020 (02:01 hrs)

earlier suit, the plaintiff mounted a *claim* to beneficial ownership based on an alleged purchase money resulting trust, common intention constructive trust and/or proprietary estoppel. His *claim* to beneficial ownership over the entire Property mainly pivoted on the factual assertion that there was a family arrangement where his other family members were obliged to recognise his beneficial interest in the Property upon full repayment of an alleged purchase-price loan. I do not find that the plaintiff had a *choice* between rights, *as he did not have those rights to insist upon* at the material time, for three reasons.

49 First, as the High Court held in respect of the resulting trust claim (2014 Judgment at [118]), the alleged family arrangement in itself "could not [bring] into existence any proprietary right vested in the plaintiff" as a resulting trust crystallises at the point where the property is acquired and not thereafter (see also *Lau Siew Kim v Yeo Guan Chye Terence* [2008] 2 SLR(R) 108 at [112]).

50 Second, a constructive trust is a trust which is declared by operation of law in certain circumstances according to equitable principles. That there was no relevant common intention as there was no family arrangement as alleged by the plaintiff earlier meant that there was no "legally significant event sufficient to create an equitable interest in favour of the plaintiff" (2014 Judgment at [121]). A constructive trust did not exist from the time the alleged relevant events occurred, as factually it was found that they did not occur.

51 Lastly, no equity also arose in the plaintiff's favour in his proprietary estoppel claim, be it a mere inchoate equity based on the alleged family arrangement or a crystallised interest upon the granting of a remedy. Even if it had arisen, the court does not necessarily have to award an interest in the land to the plaintiff to satisfy the equity based on proprietary estoppel; monetary

Version No 2: 28 Oct 2020 (02:01 hrs)

compensation for the detriment suffered would have been a possible remedy (see *Low Heng Leon Andy v Low Kian Beng Lawrence (administrator of the estate of Tan Ah Kng, deceased)* [2013] SGHC 101 at [30(d)]).

52 Accordingly, the plaintiff did not at the material time have any inconsistent rights *to elect between,* as it were. In *Oliver Ashworth (Holdings) Ltd v Ballard (Kent) Ltd* [2000] Ch 12 ("*Oliver Ashworth*"), the English Court of Appeal held that the landlord had no choice of valid substantive rights to speak of, as the tenant's break notice was good and the landlord possessed no right to treat the tenancy as continuing. Hence, the tenant could not rely on an argument that the landlord had elected between treating the lease as continuing and demanding for double rent which were inconsistent. Similarly here, the plaintiff had no beneficial interest that had crystallised at the material time and therefore cannot be said to have a choice between substantive rights. I thus agree with the plaintiff that *he did not have available to him to exercise, two inconsistent sets of rights, at the material time.*

53 For completeness, I will state that if I had found that legally the plaintiff had a choice between inconsistent substantive rights at the material time, I would have had no trouble finding that he had exercised such a choice by his conduct in continuing with the beneficial interest claim and not insisting on determining the validity of the 1981 Will, while choosing instead to put it in evidence. On whether he had made an informed choice, as Stephenson LJ said in *Peyman v Lanjani* [1985] Ch 457 at 487, "[w]hen a party has legal advice, he will be more easily presumed to know the law and evidence or special circumstances may be required to rebut the presumption". He had legal advice in the earlier suit, and also acknowledged that to have asserted his 1981 Will was valid in that suit would have undermined his case that the entire Property was held on trust for him.[30]

Version No 2: 28 Oct 2020 (02:01 hrs)

The doctrine of approbation and reprobation

54 The defendants also raise the doctrine of approbation and reprobation, relying upon *Evans v Bartlam* [1937] AC 473 ("*Evans v Bartlam*"), where it was said that a person "having accepted a benefit given [to] him by a judgment cannot allege the invalidity of the judgment which conferred the benefit" (at 483). The High Court applied this doctrine in *Treasure Valley Group Ltd v Saputra Teddy and another (Ultramarine Holdings Ltd, intervener)* [2006] 1 SLR(R) 358 ("*Treasure Valley*") where a party asked the court to set aside the arrest of a vessel where earlier it had allowed the sale of the vessel to proceed. In *Treasure Valley*, the doctrine was dealt with as a variant of election (see the reference at [31] to *Halsbury's Laws of Australia* vol 12 (Butterworths, 1995) at para 190-35). If we deal with this argument in the same manner, this contention would fall together with the argument on waiver by election.

55 I am aware that the doctrine has been extended to be of more general application to encompass situations where there are inconsistent positions: see *eg*, *Express Newspapers v News (UK) Ltd* [1990] 1 WLR 1320 ("*Express Newspapers*"), where Brown-Wilkinson VC, in a case involving two copyright disputes between two newspapers "Daily Express" and "Today", held that having obtained a benefit against "Today" on the basis that a particular argument was wrong, it was not then open to "Daily Express" to deny "Today" a similar benefit on the basis that the argument was right. An argument couched in this manner was not, however, raised by the defendants. Without the benefit of argument by parties. I hesitate to apply the extended doctrine in these circumstances.

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[30] Transcript dated 14 November 2016, pp 99–100.

Version No 2: 28 Oct 2020 (02:01 hrs)

Whether the mother knew and approved the contents of the 1981 Will

56 I further find that the plaintiff has not satisfied his burden of proof with regard to the validity of the 1981 Will.

Principles on burden of proof in relation to propounding and challenging the validity of wills

57 The propounder of a will bears the legal burden of proving that the testator had testamentary capacity. Testamentary capacity will generally be presumed when the testator was not suffering from any kind of mental disability and the will was duly executed in "ordinary circumstances": *Chee Mu Lin Muriel v Chee Ka Lin Caroline (Chee Ping Chian Alexander and another, interveners)* [2010] 4 SLR 373 ("*Muriel Chee*") at [46]. The defendants are not alleging any lack of mental capacity, and in the course of trial withdrew earlier contentions of undue influence. Ordinarily, a rebuttable presumption would then arise that the testator knew and approved the contents of the will. Nevertheless, this presumption does not arise when there are *suspicious circumstances* surrounding the execution of the will which would raise a well-grounded suspicion that the will did not express the mind of the testator. Where there are relevant circumstances that excite the suspicion of the court, it will be for those who propound the will to remove such suspicion by proving affirmatively that the testator knew and approved the contents of the will: *Muriel Chee* at [48].

58 Suspicious circumstances that may be taken into account must be *related to the preparation and/or execution of the will in question*. The Court of Appeal gave the following guidence in *Lian Kok Hong v Lian Bee Leng and another* [2016] 3 SLR 405 ("*Lian Kok Hong*") at [65]:

> *Muriel Chee* … should not be read as authority that all suspicious circumstances, whether or not they relate to the

Version No 2: 28 Oct 2020 (02:01 hrs)

> execution and preparation of the will, may be taken into account in determining if the usual presumption that a testator who has testamentary capacity knew and approved the contents of the will operates. *Circumstances are relevant only if they attend or relate to the preparation and execution of the will*. Otherwise, all kinds of non-related circumstances may be used to rebut the presumption. …
>
> [emphasis added]

With that in mind, I turn to the circumstances of this case.

What were the relevant suspicious circumstances in this case?

59 The degree of suspicion varies with the circumstances of each case, and the court has to determine whether the circumstances are suspicious enough so as to shift the burden of adducing affirmative evidence of the testator's knowledge and approval of the contents of the will to the propounder: *Muriel Chee* at [47]. Here, the defendants raise seven reasons why suspicious circumstances arise:

> (a) First, the 1981 Will was executed at a time when the relationships in the family were fractured, including the claim that the brother and 1st defendant were on one side, with the plaintiff on the other.[31]
>
> (b) Second, since the 1981 Will was executed just a year after the 1980 Will, the mother took a contrary position even though she was a "typical traditional Chinese woman" who was unlikely to act contrary to the wishes of the brother.[32]

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31 DCS, paras 125–127.

32 DCS, paras 128–130.

Version No 2: 28 Oct 2020 (02:01 hrs)

(c) Third, the plaintiff had met the mother four times within a span of approximately two weeks with the mother executing no less than three documents of a legal nature during that period (the trust acknowledgement, a letter discharging her lawyers from acting for her, and the 1981 Will).[33]

(d) Fourth, the plaintiff caused the mother to execute two *inconsistent* documents within that same span of two weeks, namely the trust acknowledgement and the 1981 Will.[34]

(e) Fifth, the plaintiff was taking steps to have his family members transfer their respective shares of the Property to him during that relevant period, as such it would only be logical that he would have been interested in the contents of the 1981 Will.[35]

(f) Sixth, the plaintiff's failure to prove the 1981 Will and obtain probate in respect of the same for over 29 years were signs that the *plaintiff* had treated the trust acknowledgement and not the 1981 Will as valid.[36]

(g) Seventh, the plaintiff had taken or must have taken the position in Suit No.1 that the 1981 Will was invalid, with this subsequent conduct demonstrating that the *plaintiff* himself did not believe the 1981 Will represented the actual state of mind of the mother in relation to the disposition of the Property.[37]

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33 DCS, paras 131–132.

34 DCS, paras 133–147.

35 DCS, paras 148–156.

36 DCS, paras 157–162.

37 DCS, paras 163–164.

Version No 2: 28 Oct 2020 (02:01 hrs)

60 Regarding the first reason, I do not find it relevant. The strained relationship within the family that dominated the period seems to be that primarily between the plaintiff and his brother. In substantiating this reason, it is telling that the defendants cite the two police reports relating to the altercations between the brothers at the Property (see [8] above). As for the plaintiff saying that the relationship between the mother and the 1st defendant was strained such that the mother wished to leave Ming Teck Park, there was no evidence that linked this to an intention on her part that she wished to sign a new will. While the mother did have contact with the plaintiff after she left Ming Teck Park, that would not shed light on her state of mind in relation to the 1981 Will.

61 Next, the second point about the mother being unlikely to take a contrary position from the wishes of the father since she had in 1980 executed a will in favour of one of the brother's sons as the sole beneficiary of his share in the Property due to the fact that she was a "typical traditional Chinese woman". I do not find this to be plausible for two reasons. First, this assertion contradicts the defendants' own position that the mother was "capable of making [her] own decisions as to what [she] wanted and [was] able to do as [she] pleased.[38] Second, the fact that the mother actually left Ming Teck Park on her own accord, even though her husband was still staying there, and lived separate and apart from him flew against such a portrayal of the mother as being subservient to the father's wishes. The mother clearly could make decisions by her own and had exercised her own mind.

62 In contrast, taking the third, fourth and fifth points together, I find that collectively they amount to *highly* suspicious circumstances that would

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[38] D1's Supplementary AEIC, para 15; Transcript dated 17 November 2016, p 28.

Version No 2: 28 Oct 2020 (02:01 hrs)

prevent the presumption that the mother knew and approved the contents of the 1981 Will from operating. It cannot be disputed that the plaintiff, who clearly obtains a substantial benefit from the 1981 Will as the sole named beneficiary, played an active role in procuring its execution. It was the plaintiff who brought the mother on his own to People's Park Centre to meet with lawyers concerning the will on two occasions. This, together with the fact that the plaintiff caused the mother to execute two other documents of a legal nature (one of which was patently inconsistent with the 1981 Will and yet also similarly involved the plaintiff's ownership interest in the Property) within that short period of approximately two weeks, renders the situation highly suspicious.

63 As was found by the Judge in Suit No.1, both the trust acknowledgement and the discharge letter were prepared by the plaintiff and presented to the mother; and these were "self-serving documents, drafted to bolster the plaintiff's case at a time when disputes had already arisen" (2014 Judgment at [103]). I also take into consideration the fact that the plaintiff had been in that period taking steps to have his other family members (his sister as well as his father) sign similar letters of trust acknowledgement to recognise or transfer their respective shares in the Property to him. The plaintiff was clearly interested in recovering what he firmly believed was his interest in the Property. Against such a context where he was such an interested party, it is *highly* suspicious when the plaintiff played such a pivotal role in the execution of the 1981 Will. The presumption that the mother knew and approved the contents of the 1981 Will should thus not operate.

64 In this context, what do I make of the sixth and seventh points? These last two points are *not* relevant to the *mother's state of mind*. Non-contemporaneous events after the execution of the will are only relevant if

Version No 2: 28 Oct 2020 (02:01 hrs)

they have a *direct bearing* on whether the testator knew and approved the contents of the will: see *Lian Kok Hong* at [63]. In *In the Estate of Musgrove* [1927] P 264, Lawrence LJ held that the *executrix's* inaction did *not* have a direct bearing on whether the testator knew and approved of the contents of the will as it could have been explained by possible forgetfulness. As the plaintiff correctly points out, the mother's intentions are "paramount" and any belief on the part of the plaintiff whatever it may be should not be taken to be the mother's belief.[39] These points, while not relevant to the mother's mental state, go to the heart of the plaintiff's credibility, however: while not relevant to the issue of the presumption, in my view, they reinforce my conclusion that he is unable to establish his burden of proof that the mother knew the contents of the 1981 Will, as explained below.

Did the mother know and approve the contents of the 1981 Will?

65 Since the presumption of testamentary capacity is inapplicable, the plaintiff bears the burden of proof to establish that the mother knew and approved the contents of the 1981 Will. The requisite standard of proof in this inquiry is that of a balance of probabilities, and the lightness or gravity of the suspicions aroused by the circumstances determines the amount of evidence required to dispel the suspicions: *Lian Kok Hong* at [70]. The greater the degree of suspicion, the stronger must be the affirmative proof to remove it. If the testator is illiterate - and the mother was by the plaintiff's evidence, illiterate - the court would require evidence of knowledge and approval of the testator such as evidence that the will was read over to him or her before execution: Martyn *et al*, *Theobald on Wills* (Sweet & Maxwell, 17th Ed, 2010) at para 3-022.

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[39] PCS, para 156.

Version No 2: 28 Oct 2020 (02:01 hrs)

66 The plaintiff argues that the 1981 Will was duly executed in the presence of two solicitors, Mr Choo Kwun Kiat ("Mr Choo") and Mr Yap Gim Chuan ("Mr Yap") [40] – he further avers that the will was read over and explained to the mother by Mr Choo in the Teochew dialect and that the instructions for the 1981 Will were given by the mother who had discussed its terms with Mr Yap.[41] However, that the testamentary instrument was read over by, or to, the testator or that the testator gave instructions for the drafting of the will may not be sufficient if the circumstances so require "further evidence": *Muriel Chee* at [48], referring to *W Scott Fulton, Isabella D Fulton and Margaret Fulton v Charles Batty Andrew and Thomas Wilson* (1874–1875) LR 7 HL 448 ("*Fulton*") at 469.

67 In my judgment, the present case is one that warrants such "further evidence". The extent of evidence needed here as affirmative proof is higher as the degree of suspicion is great (see [62] above). Although it is usually likely that a will represents the testator's instructions at the point of its execution when it is professionally prepared by a solicitor, duly executed and read over to the testator before signing, the unusual circumstances of an inconsistent document signed two weeks earlier in this case calls into question whether the mother truly knew and approved the contents of the 1981 Will. At trial, the plaintiff admitted that he did not explain the difference between a trust and ownership: "No, I did not explain the difference on all this terminology to her".[42] He also testified, inconsistently against his assertion that she had in fact understood and approved the contents of the 1981 Will, that the mother did *not* understand the implications of the trust acknowledgement that

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40 PCS, para 89.

41 PCS, para 92.

42 Transcript dated 14 November 2016, p 50.

Version No 2: 28 Oct 2020 (02:01 hrs)

she signed, as well as the implications of the 1981 Will, and that she was illiterate:[43]

> Q Are you saying that [your mother] didn't understand the implications after signing the acknowledgement of trust?
>
> A She did not understand the implication. Yes, that's correct.
>
> Q And therefore, she also did not understand the implications when they signed the will?
>
> A Yes, that is absolutely correct.

68 The lawyers who were involved were not informed and did not know about the trust acknowledgement signed just two weeks prior. The lawyers could not have ascertained whether the mother was aware of or appreciated this inconsistency and whether she understood the consequences of signing the 1981 Will. Mr Choo even went to the extent of stating unequivocally that he would not have "be[en] a part of"[44] the execution of the 1981 Will if he had known about the trust acknowledgement then, and agreed that the mother should not have signed the 1981 Will as she had nothing to give away based on the wording of the trust acknowledgement.[45] Indeed, Mr Choo's response on the stand when informed that where the mother had signed a trust acknowledgement just two weeks before executing the 1981 Will was: "[s]he would not have understood what she wanted to sign".[46]

69 Further, the lawyers' evidence was that they had no actual recollection of the incident, as it took place more than 35 years ago. Mr Yap testified that

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43 Transcript dated 14 November 2016, p 68.

44 Transcript dated 16 November 2016, p 9.

45 Transcript dated 16 November 2016, pp 6–7.

46 Transcript dated 16 November 2016, p 9.

Version No 2: 28 Oct 2020 (02:01 hrs)

he could not confirm who was present at the time instructions were taken or at the time the 1981 Will was executed.[47] Similarly, Mr Choo also expressly stated that he "specifically … cannot remember what transpired.[48] On this basis, the plaintiff's evidence that he was not present when the mother met with the lawyers, and that he did not speak or communicate with them at all in terms of the instructions regarding the terms of the 1981 Will is not supported by any other evidence. On the contrary, Mr Yap testified that the beneficiary to a will may at times be present when instructions were being taken for the drafting or at the time of execution, depending on the testator's instructions.[49]

70 In this context, the plaintiff's argument in relation to his close relationship with the mother, that he relies upon as the "crux and the core"[50] of his case, is not persuasive. While a close relationship could explain why she *might* want to benefit him, it was *insufficient*, in and of itself, in the *present circumstances* to show she *intended* to do so. The crucial point is that she has executed *two inconsistent documents* in quick succession, and there is no affirmative evidence that she understood the consequences of *either* document. While she may have had some *general* intention to go along with his plans, I hold that it is unlikely that she had *specific* testamentary intention.

71 Thus, for the reasons stated, I find that the plaintiff has not proved that the mother knew and approved of the contents of the 1981 Will. The circumstances surrounding the preparation and execution of the 1981 Will are highly suspicious, shifting the evidential burden to the plaintiff. Examining the evidence as a whole, I am satisfied that the plaintiff has not met his evidential

47 Mr Yap's AEIC, para 10; Transcript dated 16 November 2016, p 27.

48 Transcript dated 16 November 2016, p 8.

49 Transcript dated 16 November 2016, pp 33–34.

50 P6, para 6.

Version No 2: 28 Oct 2020 (02:01 hrs)

burden. There is no clear basis to conclude that the mother knew and approved of the contents of the 1981 Will.

Validity of the 1980 Will

72 Having dealt with the 1981 Will, the validity of the 1980 Will becomes pertinent.

Issue estoppel

73 The defendants rely on issue estoppel, which precludes an issue of fact or law which was necessarily decided and concluded in favour of one party in earlier proceedings from being reopened in subsequent proceedings between the same parties, even if the causes of action in question are not the same. The following four requirements were recognised by the Court of Appeal in *Lee Tat Development Pte Ltd v Management Corporation Strata Title Plan No 301* [2005] 3 SLR(R) 157 ("*Lee Tat*") at [14]–[15]:

> (a) a final and conclusive judgment on the issue concerned on the merits;
>
> (b) that the judgment on the issue in question be made by a court of competent jurisdiction;
>
> (c) identity between parties to the two proceedings being compared; and
>
> (d) identity of subject matter between the two proceedings concerned.

Parties agree that the second requirement is clearly satisfied. I turn to deal with the other three requirements.

Version No 2: 28 Oct 2020 (02:01 hrs)

Final and conclusive judgment on the merits

74 A judgment is final and conclusive on the merits if it is one which cannot be varied, re-opened or set aside by the court that delivered it; and also if it is a decision which (*D.S.V. Silo-Und Verwaltungsgesellschaft mbH v Owners of The Sennar and 13 Other Ships* [1985] 1 WLR 490 at 499, as approved and quoted by the Court of Appeal in *The "Bunga Melati 5"* [2012] 4 SLR 546 at [81]):

> … establishes certain facts as proved or not in dispute; states what are the relevant principles of law applicable to such facts; and expresses a conclusion with regard to the effect of applying those principles to the factual situation concerned. …

Whether the decision in question is a final and conclusive judgment on the merits may be ascertained from the intention of the judge as gathered from the relevant documents filed, the orders made and the notes of any evidence taken or arguments made (*Goh Nellie* at [28]).

75 It is not contested here that the decision in Suit No.1 is a final and conclusive one on the issue of the Judge's determination that a family arrangement as described by the plaintiff did not exist and that the three bases the plaintiff relied upon to claim beneficial interest over the entire Property were not made out. The plaintiff, in fact, deposes in his Affidavit of Evidence-in-Chief ("AEIC") in the present action that he "wholly accept[s]" the Judge's decision and did not appeal against it.[51]

76 The plaintiff points out, however, that the requirement is for a final and conclusive judgment *on the issue concerned* on the merits. To the extent that the plaintiff disputes that the validity of the 1980 Will was not litigated or

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[51] P's AEIC, para 16.

Version No 2: 28 Oct 2020 (02:01 hrs)

determined in Suit No.1, he argues that there was no final and conclusive judgment *of the issue of the validity of the 1980 Will* there. This argument concerns the requirement of identity of subject matter, and I deal with this issue below.

Identity of subject matter

77 Turning next to the requirement of identity of subject matter, the plaintiff submits that the issue of the validity of the 1980 Will was not litigated or determined in Suit No.1.[52] This first consolidated action concerned the issue of the extent of the plaintiff's beneficial interest in the Property. Although the 1980 Will was introduced as evidence to counter the plaintiff's allegation that he had the sole beneficial interest in the Property, the decision in Suit No.1 did not involve the question of the validity of the 1980 Will. He relies upon the grounds of decision (2014 Judgment at [63]) where the Judge expressly made no observations on the *validity* of the two wills by the mother, stating: "[w]hatever the strict legal position may be as a result of the mother's 1980 will having been proved and her 1981 will being unproved".

78 The issue of identity of subject matter is not as simple as the plaintiff contends, however. It involves, first, what had been *litigated* and, secondly, what had been *decided*: *Lee Tat* at [15]. In *Wing Joo Loong Ginseng Hong (Singapore) Co Pte Ltd v Qinghai Xinyuan Foreign Trade Co Ltd and another and another appeal* [2009] 2 SLR(R) 814 (at [167]–[170]), the Court of Appeal affirmed three "discrete conceptual strands" enunciated in *Goh Nellie* by Sundaresh Menon JC (as he then was) as being an accurate explication of the identity of the subject matter requirement:

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52 PCS, pp 98–100.

Version No 2: 28 Oct 2020 (02:01 hrs)

(a) First, the court held that the issues must be identical in the sense that the prior decision must traverse the same ground as the subsequent proceedings and the facts and circumstances giving rise to the earlier decision must not have changed or should be incapable of change (*Goh Nellie* at [34]).

(b) Second, the previous determination in question must have been fundamental and not merely collateral to the previous decision so that the decision could not stand without that determination (*Goh Nellie* at [35]).

(c) Third, and finally, the issue should be shown to have in fact been raised and argued (*Goh Nellie* at [38]).

79 The first conceptual strand is the most easily dealt with of the three. The facts and circumstances surrounding the preparation, execution and contents of the 1980 Will clearly have not changed and are incapable of being changed.

80 I next consider whether the issue was raised and argued. Having perused the plaintiff's AEIC and the transcripts in Suit No.1, it cannot be denied that the plaintiff had made allegations that his parents' 1980 wills did not reflect their testamentary intentions. At trial, the 1st defendant was also cross-examined on the 1980 Will.[53] The plaintiff's AEIC clearly contained claims that the brother may have exerted pressure on the mother in executing the 1980 Will:

> 125 Unbeknownst to me at that time, [my mother] had made a [sic] earlier will on 15 April 1980 appointing [my brother and his wife] … to be the executor/executrix of her

[53] 2 AB, pp 1269–1274 (Suit No.1 Transcript).

Version No 2: 28 Oct 2020 (02:01 hrs)

> estate and giving the 1/5 share of the "leasehold land and premises [in the Property]" to her grandson and [my brother's] son …
>
> 127 Looking at the dates of the 2 wills purportedly made by my parents which were in 1980, these wills were made after my altercations with [my brother] in 1979 when he took steps in contradiction to the Family Arrangement.
>
> 128 I believe that [*my brother*] *may have exerted some pressure on my parents to make the wills in 1980*. This was consistent with [my brother's] action … due to his ongoing grudge against me after our altercations in 1979. The fact that [my brother] was one of the witnesses to both wills made by my parents is *telling of his influence on them. In addition, the wills…gave their respective 1/5 shares to [my brother's] sons …*
>
> 129 Another telling fact that *my parents did not willingly make their 1980 wills* was for a leasehold property … The Subject Property is instead a freehold property … I believe that these may have been deliberate mistakes on my parents' part to try to render the purported gift of their respective 1/5 share in the Subject Property ineffective.
>
> [emphasis added]

81 I therefore find it rather disingenuous that the plaintiff claims now that "[n]o argument was made … on the specific issue of the validity of the 1980 Will".[54] Although the plaintiff had not earlier sought to declare the 1980 Will invalid or to seek a revocation of the relevant grant of probate, the same allegations regarding the mother's testamentary capacity and intention were previously canvassed by the plaintiff. Issue estoppel precludes an issue of fact or law which was necessarily decided and concluded in favour of one party in earlier proceedings, *even if the causes of action in question are not the same*. Thus, even if the validity of the 1980 Will was not a *specific* issue to be decided in Suit No.1, I find that the issues regarding the mother's testamentary capacity in relation to the 1980 Will, which is key to any party propounding or pronouncing against a will, has been raised and argued previously.

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[54] PCS, para 174.

Version No 2: 28 Oct 2020 (02:01 hrs)

82 In the present action, the plaintiff rehashes the same arguments to invalidate the 1980 Will, relying once again (see extract of the plaintiff's AEIC in Suit No.1 reproduced at [79] above) on the misdescriptions of the Property in the 1980 Will, the fact that the brother was one of the witnesses to the 1980 Will, and the fact that the beneficiary of the 1980 Will was the brother's son, a minor at that point in time, to suggest that the 1980 Will was deficient.[55] The 2014 Judgment also alludes to these issues.

83 Regarding the second criterion that the previous determination must have been fundamental to the previous decision, the plaintiff argues that the observations in the 2014 Judgment regarding the validity of the 1980 Will are *obiter dicta* and hence merely collateral to the actual issues decided, being the questions of resulting trust, constructive trust and proprietary estoppel concerning whether the plaintiff could claim beneficial interest over the entire Property. This is misconceived. The Judge's express pronouncement on the 1980 Will as reflecting the true testamentary intention of the mother, without any pressure or influence, was a determination fundamental to the Judge's factual finding that a family arrangement did not exist. This is clear from the following extracts from the 2014 Judgment:

> 104 Finally, *the plaintiff suggests that his parents' separate 1980 wills do not reflect their true testamentary intentions*. In both wills, the Property is misdescribed in two respects. First, the address is given as 8 … rather than 8A … Second, the Property is described as being leasehold when in fact it is a freehold property. The plaintiff suggests that these are errors his father would have been expected to note and correct before he and the mother signed their wills. The plaintiff invites me to infer from the failure to do so that his parents did not sign their wills willingly and deliberately left the errors uncorrected to make their gifts to their grandchildren void.

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55 PCS, paras 74–78.

Version No 2: 28 Oct 2020 (02:01 hrs)

> 105 *There was nothing to the plaintiff's suggestion. I reject it.* The lot number of the Property is correctly set out in both of the 1980 Wills … and is the same lot number referred to in the mother's 1981 acknowledgement prepared by the plaintiff … The misdescription of the tenure of the Property and its street address was to my mind an inconsequential error that had no bearing on his parents' true testamentary intention or on this case.
>
> 106 In the premises, *I find that the family arrangement as described by the plaintiff did not exist.*
>
> [emphasis added]

From the above, it is clear that the Judge considered whether the 1980 Will reflected the mother's true testamentary intention and rejected the plaintiff's suggestion that it did not, before finding that the family arrangement as alleged by the plaintiff did not exist. Conversely, if the Judge had agreed with the plaintiff's suggestion that the father's and mother's 1980 Wills did not reflect their respective testamentary intentions (with the legal consequences of such a determination being that the wills are not valid), it would have been consistent with a family arrangement as alleged by the plaintiff. It would have led to the conclusion that he was the owner of the entire beneficial interest in the Property even though it was registered in the names of all five family members. Hence, I do not consider the Judge's determination on the issue to be merely collateral. Such a finding was necessary for the Judge to delineate the totality of facts in order to assess and determine the existence of the family arrangement, which was the very factual basis of the legal rights being asserted by the plaintiff in that suit.

84 Accordingly, the requirement of identity of subject matter is met.

Identity between the parties

85 Turning to the last requirement of identity between the parties, I also find that this is satisfied on the present facts. The courts have not taken a

Version No 2: 28 Oct 2020 (02:01 hrs)

narrow view in relation to this requirement. Instead, the courts have focused on the substance as opposed to the form in considering whether, in substance, the parties involved in the two sets of proceedings are effectively "the same parties or their privies" (*Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 at 541; see also *Lee Tat* at [14] and *Goh Nellie* at [33]). In the present case, the instigator of both suits are the plaintiff, and the 1st defendant is also sued in her capacity as executrix of the mother's estate in both. The 2nd defendant not being a party to the earlier suit does not preclude the application of issue estoppel with regard to the requirement of identity between the parties. The defendants submit,[56] and I agree, that the effective parties are the same in both actions.

86 Hence, I conclude that the judgment in Suit No.1 was a final and conclusive judgment on the merits and there were both identity of subject matter and parties in both suits: issue estoppel applies in relation to the particular issue of the validity of the 1980 Will.

Extended **res judicata**

87 In the event that I am wrong on the point of issue estoppel, abuse of process would apply (see above at [31]–[43]). I am of the view that this issue ought to have been litigated in the earlier actions.

88 In this context, I make clear that I do not accept the plaintiff's suggestions that there were documents pertaining to the validity of the 1980 Will that surfaced recently.[57] These documents, such as the papers in relation to the application of the Grant of Probate in relation to the 1980 Will, could

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56 DCS, paras 34–35.

57 P's AEIC, para 217.

Version No 2: 28 Oct 2020 (02:01 hrs)

have easily been obtained much earlier by the plaintiff if he had put the issue in play. Indeed, if he had raised the matter in the earlier suits, the discovery process would likely have yielded the information, as was the case in the present suit. These were not material which "could not by reasonable diligence have been adduced" (see *Arnold v National Westminster Bank plc* [1991] 2 AC 93 at 108–109).

Did the mother approve the 1980 Will?

89 The plaintiff is not pleading that the mother had no mental capacity when executing the 1980 Will or 1981 Will; he gave evidence at trial that she had the ability to understand that the Property belongs to her as a legal owner registered in title deeds, that she knew the consequences of signing a will, and that she knew the contents of the 1981 Will and had approved it.[58]

90 There being no issues as to the mother's testamentary capacity in relation to the execution of the 1980 Will, a rebuttable presumption would arise that the testator knew and approved the contents of the will unless the plaintiff is able to show suspicious circumstances surrounding the preparation and execution of the 1980 Will: *Muriel Chee* at [46]. The suspicious circumstances that the plaintiff raises are not convincing. The argument that the beneficiary of the 1980 Will is not really the mother's favourite grandchild does not prove that the 1981 Will was not executed validly. Further, any suggestion of undue influence on the mother in her execution of the 1980 Will is not persuasive. The mother was not living with the brother's family at the time. The plaintiff attempts to cast Ms Tay, the lawyer involved with the execution of the 1980 Will, as being not completely independent because she took instructions directly from the brother regarding the execution of the 1980

[58] Transcript dated 14 November 2016, pp 60–63.

Version No 2: 28 Oct 2020 (02:01 hrs)

Will. Ms Tay explained that she was not aware of the relationship between the brother and the beneficiaries. To the extent that Ms Tay, just like the lawyers who executed the 1981 Will at [69] above, was not able to recall the details surrounding the execution of the 1980 Will,[59] her evidence do not go either way with regard to any inferences as to the circumstances surrounding the execution of the 1980 Will.

91 I also reject the plaintiff's contention about the mother executing two different versions of the 1980 Will.[60] The typewritten content in the two different alleged versions are exactly identical, with only minor differences in the texts that was *handwritten* on the two different "versions" such as the placement of a full stop, placement of the word "me" (whether the phrase "Explained by me" was written all in one line or had ended with a run-on line with "me" on a second line), and the placement of the word "Solicitor" in "Advocate & Solicitor" (similar difference as "me" as to whether it appeared on the first or fell to the next line).[61] The plaintiff uses these differences to argue and somehow speculate about how there was some form of undue influence on the part of the brother in obtaining the two originals. He speculates that the brother knew it was not the mother's genuine intention to bequeath her share of the Property to her grandson and thus the brother ensured that two original 1980 Wills were executed so that he would be able to retain one original for safekeeping immediately after the mother's execution of the same (to insure against the possibility he was afraid of, that the mother would destroy the 1980 Will that she executed).[62] He then goes on to speculate

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59 Transcript dated 21 November 2016, pp 58–60.

60 P's AEIC, paras 24–27.

61 P's AEIC, para 26(c).

62 P's AEIC, paras 157–158.

Version No 2: 28 Oct 2020 (02:01 hrs)

that the brother kept the original of his version so well that he was unable to locate it when seeking the grant of probate in 1989 with regard to the 1980 Will. These contentions are in the realm of pure speculation. Ms Tay explained on the stand that her practice was to have testators sign both the original will and a carbon copy,[63] and I accept her explanation, which I find plausible and reasonable.

92 The plaintiff raised two general matters that were not relevant to the preparation and execution of the 1980 Will. The first comprised queries as to why the 1st defendant could not recall the earlier probate or why she did not obtain probate eventually in DCP 926/2009 when the grant in Probate 25/1990 was limited until the original will is admitted. The second related to the failure on the brother's and the 1st defendant's part to notify him of the earlier probates. While neither argument dislodges the presumption, I deal with them for completeness.

93 The 1st defendant's explanation for the recent probate stemmed from her strained relationship with her husband from the early 1990s, and the two began living separately from around 1994.[64] The 2nd defendant also testified that his relationship with his father was "distant".[65] He testified that he reminded his mother after the passing of his father. I accept the 1st defendant's evidence that it was mainly the brother that handled on his own the legal and probate matters concerning the brother, the mother and the plaintiff and that it was only after the brother's passing that she started to look into the matter. I am also not convinced that it is suspicious merely because the 1st defendant

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63 Transcript dated 21 November 2016, pp 103–104.

64 D1's AEIC, para 63.

65 Transcript dated 18 November 2016, p 34.

Version No 2: 28 Oct 2020 (02:01 hrs)

failed to pursue DCP 926/2009 further. It was in late September 2010 when the 1st defendant's former solicitors were informed of the earlier 1990 grant of probate. Consequently, the solicitors wrote on 25 February 2011 to retrieve the original 1980 Will for admission to which they received a reply on 7 March 2011 to file a formal application. It is clear also from the grandson's evidence that the 1st defendant's attention was focused on the litigation in Suit No.1 after the plaintiff began to allege his beneficial ownership over the entire Property from April 2011.[66] After this, the 1st defendant in her capacity as executrix of both estates for the mother and the brother sought an order for sale of the Property in Suit No.3 pursuant to the 2014 Judgment. The present suit by the plaintiff followed thereafter. In the circumstances, there has not been any unreasonable delay on the 1st defendant's part.

94 Next, the plaintiff claims that it is suspicious that the brother and/or the 1st defendant did not notify or contact him about Probate 25/1990.[67] This is a non-starter as there was no such obligation to do so when the plaintiff was neither the executor nor the beneficiary under the 1980 Will. Further, as the plaintiff himself notes, the relationship between the two brothers was already strained during that period. Not contacting the plaintiff when they were not obliged to would just evince such a strained relationship and did not indicate any relevant suspicious circumstances as to the execution of the 1980 Will.

95 For the reasons stated above, I find that the presumption operates and there is no basis to any of the plaintiff's arguments on the invalidity of the 1980 Will.

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66 Transcript dated 18 November 2016, p 57.

67 P's AEIC, paras 176–180.

Version No 2: 28 Oct 2020 (02:01 hrs)

Extended delay

96 The plaintiff's delay in coming forward with the 1981 Will is significant in this case. The plaintiff's present action is 29 years after the mother passed away on 20 November 1986 and 9 years after the brother passed away on 7 January 2006. Counsel for the plaintiff contended there was similarly delay on the part of the defendants. I disagree. As explained at [93], the defendants took action once they were reasonably in a position to do so.

No applicable statutory limitation period

97 Initially, the defendants submitted that the plaintiff's action was barred by the 12-year limitation period under ss 9(1) read with 10(2) of the Limitation Act from the date of the mother's demise. The plaintiff pointed out that s 9 of the Limitation Act only applies to actions concerning an action by a person with legal title to the land against an adverse possessor. Defendants' counsel conceded the point during oral closing submissions. Parties are thus in agreement that no limitation period is applicable to probate claims. I note in passing that this was also the assumption of the Law Reform Committee in its 2007 Report: see Law Reform Committee, Singapore Academy of Law, *Report of the Law Reform Committee on the Review of the Limitation Act (Cap 163)* (February 2007) at [88].

Laches

98 The Plaintiff also argues that the doctrine of laches ought not to apply, as the claim is not an equitable one. The defendants do not counter directly on laches, contending instead that the protracted delay caused prejudice such that it would be unconscionable for the claim to succeed. The defendants do not fully articulate their contention as to unconscionability, but their argument

Version No 2: 28 Oct 2020 (02:01 hrs)

rests in part on the 2014 Judgment, in which laches was applicable to the equitable claim.

99 Insofar as the argument touched on laches, it should be noted that, contrary to the assumption of the plaintiff, whether laches could apply may be open to argument.

100 In *eSys Technologies Pte Ltd v nTan Corporate Advisory Pte Ltd* [2013] 2 SLR 1200 ("*eSys Technologies*"), the Court of Appeal (at [37] and [38]) adopted Andrew Ang J's observations in *Cytec Industries Pte Ltd v APP Chemicals International (Mau) Ltd* [2009] 4 SLR(R) 769 ("*Cytec Industries*") that an *equitable* defence of laches has no application in a case where a *legal* remedy was sought to enforce a *legal* right, and where a statutory limitation period applied. Laches would be relevant only when the equitable jurisdiction of the court is being invoked. Both *eSys Technologies* and *Cytec Industries* involved causes of action *where statutory limitation periods applied*. In arriving at their decision, the Court of Appeal noted that their previous decision in *Management Corporation Strata Titles Plan No 473 v De Beers Jewellery Pte Ltd* [2002] 1 SLR(R) 418 ("*De Beers*") (where the doctrine of laches was applied to a common law claim in restitution even though no equitable relief was sought) could be distinguished on the basis that a claim in restitution did not appear to fit neatly into any of the causes of action set out in s 6 of the Limitation Act and that there was an underlying thread that "*it would be contrary to both logic as well as public policy for there to be no applicable time constraint* whatsoever to a claim founded on restitution as opposed to contract or tort" (*eSys Technologies* at [41], emphasis added). The Court of Appeal *declined to express any conclusive view on whether the doctrine of laches is applicable to a common claim* (*eSys Technologies* at [42]) and left this issue to a future court for determination.

Version No 2: 28 Oct 2020 (02:01 hrs)

101 In Canadian and Australian jurisdictions, laches has been held to apply to probate actions. Thus, Haley J in the Ontario Superior Court of Justice case of *Oestreich v Brunnhuber* [2001] WDFL 406; OJ No 338 considered that a court should not be limited by the strict differentiation between law and equity. He also cited an Ontario High Court case of *Re O'Reilly (No 2)* (1980) 28 OR (2d) 481 (affirmed on appeal by the Ontario Court of Appeal), where Rutherford J held that an unreasonable delay in seeking grant of letters of administration amounted to laches and acquiescence. The Ontario jurisdiction, similar to Singapore, *has no time limitation in statute* within which a person is required to prove a will in solemn form. In *Bermingham v Bermingham* [2007] OJ No 1320, the Ontario Superior Court of Justice again reviewed the cases about the doctrine of laches in the context of a belated claim to have a will proved in solemn form. While noting the availability of the equitable defence of laches in probate proceedings, Perrell J stated at [54] "a judicial reluctance to employ these doctrines to preclude proof of the Will in solemn form because it is a sound policy to have the validity of a Will scrutini[s]ed when there are any suspicious circumstances or there is a reasonable doubt about the testamentary capacity of the testator or testatrix". Thus, although laches could apply as a defence, the competing policy consideration of ensuring that the true wishes of testators are given effect is still emphasised.

102 In New South Wales, the Supreme Court also considered that laches may bar probate proceedings, provided that "other features beyond mere delay" are present (*Dickman v Holley (estate of Simpson)* [2013] NSWSC 18 at [136]). Other Australian authorities that accept that the defence of laches can apply in probate proceedings include *Re Goode* (1890) 11 NSWR (Eq), *Bramston v Morris* (Powell J, Supreme Court of New South Wales unreported, 20 August 1993; BC9303644) and *Bowler v Bowler* (Young J, Supreme Court of New South Wales unreported, 18 December 1989) ("*Bowler*").

Version No 2: 28 Oct 2020 (02:01 hrs)

103 These authorities would suggest that the defence of laches could be applied to probate proceedings; at the same time, because of the policy to give effect to the wishes of testators, the threshold for a defence of laches to succeed is higher in probate proceedings than in other situations: see Young J (as he then was) in *Bowler* at 37. Nevertheless, this point has not been argued by parties and I do not rely upon it. Neither does the outcome of this case turn upon the point. I mention this in the event that parties take this case further.

104 As a factual matter, if the defence of laches was indeed available, I would not hesitate to find that it is made out on the facts. I am satisfied that it would be unconscionable to allow the plaintiff to pursue his claim based on the length of the delay and of the plaintiff's inaction in pronouncing the 1981 Will that he had since the demise of the mother in 1986. Nothing precluded him from doing so and he has not put forth any satisfactory explanation. Contrary to his assertions, his ability to prove the 1981 Will is in no way contingent upon knowledge of the 1980 Will. Similar to the views of the Judge in the 2014 Judgment at [129], in my opinion, the delay here greatly prejudices the defendants in their ability to defend the claim because it has deprived the defendants of direct evidence of the witnesses with personal knowledge of the circumstances surrounding the execution of the 1981 Will. The solicitors who prepared and witnessed the execution of the 1981 Will have no recollection of the events at the material time, and the physical file opened for the 1981 Will is also no longer in their possession. With regard to the contentions regarding the validity of the 1980 Will, the passing of the brother also prejudices the defendants. Material evidence is no longer available with the passing of almost three decades since the mother's death and a decade since the brother's.

Version No 2: 28 Oct 2020 (02:01 hrs)

Conclusion

105 For the reasons set out above, I dismiss the plaintiff's claim. I pronounce against the validity of the 1981 Will and instead hold the 1980 Will to be valid as prayed for in the counterclaim. I do not order for the original will to be admitted into probate as further prayed in the counterclaim: as explained to counsel prior to the end of the trial, the defendants should, in these circumstances, apply administratively to the Probate Registry for a further (cessate) grant under s 27 of the Probate and Administration Act (Cap 251, 1985 Rev Ed): see JI Winegarten, R D' Costa & T Synak, *Tristram and Coote's Probate Practice* (LexisNexis, 30th Ed, 2013) at para 13.85. I shall hear parties on costs.

Valerie Thean
Judicial Commissioner

Foo Soon Yien, Beverly Ng and Gemma Tse (Bernard & Rada Law Corporation) for the plaintiff;
Hee Theng Fong, Sharmini Selveratnam and Jaclyn Leong (Harry Elias Partnership LLP) for the defendants.

Version No 2: 28 Oct 2020 (02:01 hrs)