IN THE APPELLATE DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2024] SGHC(A) 24

Appellate Division / Civil Appeal No 57 of 2023

Between

(1) Chan Wai Leen, as the administratrix of the estate of Wong Ching Fong, deceased, and in her personal capacity
(2) Wong Cai Juan

… *Appellants*

And

Ho Dat Khoon

… *Respondent*

In the matter of Suit No 1095 of 2020

Between

Ho Dat Khoon

… *Plaintiff*

And

(1) Chan Wai Leen, as the administratrix of the estate of Wong Ching Fong, deceased, and in her personal capacity
(2) Wong Cai Juan

… *Defendants*

GROUNDS OF DECISION

[Gifts — Avoidance]
[Civil Procedure — Costs]

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v
Ho Dat Khoon

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Appellate Division of the High Court — Civil Appeal No 57 of 2023
Woo Bih Li JAD, Kannan Ramesh JAD, Philip Jeyaretnam J
7 May 2024

28 August 2024

Woo Bih Li JAD (delivering the grounds of decision of the court):

Introduction

1 This is an appeal against the decision of a judge in the General Division of the High Court (the "Judge") in HC/S 1095/2020 ("Suit 1095").

2 The action below was commenced by Mdm Ho Dat Khoon (the "Plaintiff") against two defendants (the "Defendants"). The first defendant was Mdm Chan Wai Leen ("Mdm Chan"), who was sued as the administratrix of the estate of her late husband, Mr Wong Ching Fong, Alan ("Mr Wong"), and in her personal capacity. The second defendant was their second daughter, Ms Wong Cai Juan ("D2"). Mr Wong was the nephew of the Plaintiff and hence Mdm Chan is the Plaintiff's niece-in-law. D2 is a grandniece of the Plaintiff.

3 In Suit 1095, the Plaintiff mainly sought to invalidate the transfer of a property at Emerald Hill Road (the "Property") from her to D2. On 2 December 2016, the Plaintiff had signed an instrument of transfer (the "Transfer") of the Property in favour of D2 as the sole transferee. She also signed a will on the same day (the "2016 Will"). However, the Plaintiff claimed that she had not intended to make an *inter vivos* gift when she executed the Transfer. The Judge found that the Transfer was made under a mistake, and ordered the cancellation of the registration of the Transfer as well as the rectification of the land-register to reflect the Plaintiff's continued ownership over the Property. The Judge also ordered the Defendants to pay the Plaintiff party-to-party costs in the sum of $360,000 and reasonable disbursements in the sum of $123,019.17 with Goods and Services Tax ("GST") at the rate of 8% and the usual statutory interest of 5.33% per annum on $360,000. The Defendants then appealed.

4 Having heard the parties on 7 May 2024, we dismissed the appeal and ordered the Defendants to pay the costs of the appeal to the Plaintiff forthwith fixed at $52,000 including disbursements. We said that we would be directing the Registrar of the Supreme Court to refer the conduct of Mr David Liew Tuck Yin ("Mr Liew"), a solicitor who acted for the Plaintiff in the preparation and execution of the Transfer of the Property and the 2016 Will, to the Law Society of Singapore (the "Law Society"). We now set out the brief grounds for our decision.

Background

5 On 2 December 2016, the Plaintiff was 76 years of age. The trial was held in May 2022. She was 81 years of age then.

6 She had five other siblings, including her sister who passed away in 2017, Mdm Ho Tat Noor ("Mdm HTN"). One of Mdm HTN's children was Mr Wong.

7 The Plaintiff's siblings also included her brother who passed away in 2017, Mr Ho Tat Song ("Mr HTS"). Mr HTS had six children, two of whom are Mr Ho Chiuen Sheey and Ms Nicola Reece Sheffield Ho Chuien Yheeg (He Junyu). On 30 April 2020, pursuant to a Power of Attorney, they became the attorneys of the Plaintiff (the "Attorneys"). The Attorneys were involved in obtaining legal advice and giving evidence on behalf of the Plaintiff for her claim.

8 In 1970, the Plaintiff's late father purchased the Property and registered it in the Plaintiff's name. It was the Plaintiff's only property. On 2 December 2016, she signed the Transfer in favour of D2 as the sole transferee. The Transfer was then registered in D2's name in 2017. The Transfer stated that the Transfer was made "BY WAY OF GIFT". As mentioned, the Plaintiff also executed the 2016 Will which expressed her intention for the Property to be a testamentary gift to D2. Mr Liew acted for the Plaintiff in the preparation and execution of the Transfer and the 2016 Will.

9 On 13 November 2020, the Plaintiff commenced Suit 1095 against the Defendants, mainly claiming that the Transfer should be set aside as she did not intend to make an *inter vivos* gift to D2 when she executed the Transfer. Her action, however, did not seek to invalidate the 2016 Will, although she also took the position that she did not intend to make the bequest to D2 under the 2016 Will. In gist:

(a) The Plaintiff relied on medical reports to prove that she was not fully aware of what she was doing when she signed the Transfer and that her cognition was likely to have been affected to a significant degree due to her various medical conditions.

(b) The Plaintiff submitted that she was the legal and beneficial owner of the Property prior to the Transfer and was not, as the Defendants suggested, holding the Property on trust for Mdm HTN's family.

(c) The Plaintiff sought to reverse the Transfer on the bases of: (i) total lack of consideration; (ii) mistake; (iii) unconscionability; and (iv) undue influence. She also argued that she was entitled to rectification of the land-register under s 160 of the Land Titles Act 1993 (2020 Rev Ed) (the "LTA"), paragraph 14 of the First Schedule to the Supreme Court of Judicature Act 1969 (2020 Rev Ed), and/or the inherent jurisdiction of the court.

10 On the other hand, the Defendants essentially argued that the Plaintiff had the mental capacity to execute the Transfer, and in fact, held the Property on trust for Mdm HTN's family, in line with the intentions of her late father who had purchased the Property. In the alternative, the Defendants submitted that the Plaintiff had intended to give the Property to HTN's family, which included D2. They also argued that the Plaintiff had, at all material times, the benefit of independent legal advice, received explanations of the documents which she signed, and was fully aware of the nature, effect, and consequences of the Transfer.

Decision below

11 In his Grounds of Decision ("GD"), the Judge found that while the Plaintiff had mental capacity at the time of the Transfer (GD at [26]), the Transfer should be set aside for mistake as the Plaintiff was, at the time of the Transfer, under a mistaken belief as to the legal effect of the Transfer and it was unconscionable to deny relief (GD at [27]). His reasons were:

(a) The Plaintiff had not intended to make an *inter vivos* gift of the Property to D2 when she executed the Transfer, and instead, intended to make a testamentary gift to D2. The Judge arrived at this finding for two reasons. First, to make an *inter vivos* gift would have been inconsistent with the 2016 Will. Second, it was likely that the Plaintiff misunderstood the effect of the Transfer given the lack of clarity in the explanations provided to her in that regard (GD at [28]–[38]).

(b) There was no basis for the assertion that the Plaintiff held or believed herself as holding the Property on trust for the benefit of Mdm HTN's family or that she intended to make an *inter vivos* gift through the Transfer pursuant to the alleged trust arrangement (GD at [39]–[47]).

(c) The legal effect of the Plaintiff's mistake was that the Transfer was set aside. There was a causative mistake as to the legal effect of the Transfer, and it was of such gravity that it would be unconscionable to refuse relief (GD at [48]–[50]).

(d) The requirements of ss 160(1)(*b*) and 160(2) of the LTA were met, and the court was thus entitled to order rectification of the land-register (GD at [51]–[54]).

(e) The other vitiating factors relied on by the Plaintiff to set aside the Transfer, namely lack of consideration, undue influence and unconscionability, were not made out (GD at [55]–[58]).

12 As for costs, the Judge rejected the Defendants' submission that the Plaintiff should not be awarded more than half her costs, and did not find any reason to make a "Type I Order" to reduce the costs awarded to the Plaintiff (GD at [89]–[90]). The Judge also disagreed with the Defendants that the applicable rate for GST for some of the disbursement items should be 7% and not the prevailing rate of 8% at the time of the costs order (GD at [95]–[96]).

13 The Judge thus ordered the cancellation of the registration of the Transfer, as well as the rectification of the land-register, to reflect the Plaintiff's continued ownership over the Property, and the other orders mentioned at [3] above.

Parties' Cases on Appeal

14 We briefly summarise the key arguments in the parties' cases on appeal.

The Defendants' case on appeal

15 The Defendants submitted that the Judge was incorrect in holding that the Transfer should be set aside on the basis of mistake. First, they argued that the Judge's finding that it was implausible for the Plaintiff to have intended an *inter vivos* gift alongside a testamentary gift was incorrect. It was not the Plaintiff's position below that she only intended a testamentary gift and not an *inter vivos* gift. Instead, she pleaded that she was led by Mdm Chan to "incorrectly consciously believe or incorrectly tacitly assume that the [Transfer] related to the replacement of some important missing document of the

[Property]", and that she was "not in the right frame of mind" to sign the Transfer and the 2016 Will. It was thus not open to the Judge to find that the Plaintiff intended a testamentary gift only and that she had simply accepted that both instruments were necessary to ensure that D2 would inherit the Property after her death, as this was not the case put forward by the Plaintiff. Second, the Judge's finding that there was a lack of clarity in the explanations provided to the Plaintiff regarding the Transfer was incorrect. The Plaintiff claimed that no explanation at all was made to her regarding the documents. Similarly, it was not open to the Judge to have allowed the Plaintiff's claim on a ground contrary to her own case. There was also no lack of clarity in Mr Liew's explanation. Third, the evidence did not support the conclusion that the Plaintiff did not intend to make an *inter vivos* gift. The Plaintiff was not a credible witness, and was also an uncooperative and/or evasive witness during the trial.

16 The Defendants also submitted that the court erred in ordering rectification of the land register. There was no evidence that D2 was aware of the Plaintiff's purported mistake, nor was the question of whether she was aware put to her during the trial. D2 could not have been privy to the Plaintiff's purported mistake, as she was not present when Mr Liew met the respondent on 2 December 2016.

17 Finally, the Defendants submitted that the Judge's orders on costs and the applicable GST were incorrect. Even if the appeal was dismissed, the costs order below should be overturned as the Judge erred in awarding the Plaintiff her full party-and-party costs. The Defendants also disagreed with the Judge's holding that the applicable rate of GST for disbursements should be 8% and argued that it should be 7% for some of the items as that was the prevailing rate for the year before, *ie*, 2022.

The Plaintiff's case on appeal

18 The Plaintiff submitted that the Judge was correct in finding that she had executed the Transfer under mistake and in ordering rectification of the land register. Both reasons relied on by the Judge in arriving at the conclusion that the Plaintiff did not intend to make an *inter vivos* gift were pleaded by the Plaintiff. Given the pleadings, the Judge was entitled to ascertain the scope of the Plaintiff's intention. Further, the Judge was not constrained by the pleadings in ascertaining the facts of the case.

19 The Plaintiff also argued that the Defendants' account of the events leading up to the execution of the 2016 Will and the Transfer should not be believed. There was also a lack of clarity in the explanations provided by Mr Liew to the Plaintiff. Mr Liew even admitted during the trial that he did not ascertain from the Plaintiff what her true intention was. Mr Liew also said that he translated the documents to the Plaintiff in a mixture of Mandarin and Cantonese, but the Plaintiff could not understand Cantonese. It was also unlikely that Mr Liew went through every document line by line on 2 December 2016 as he alleged because the meeting that day only lasted around 30 minutes. Moreover, Mr Liew unduly focused on the need for the Transfer to be signed for the stamp duty to be assessed, and that the Plaintiff believed that by signing the Transfer, the Property would not be immediately or automatically given away.

20 The Plaintiff submitted that the court could order rectification of the land register under s 160 of the LTA as D2 was privy to the Plaintiff's mistake.

21 Finally, the Plaintiff submitted that the Judge's orders on costs and the applicable GST should be upheld. It was in fact the Defendants who

complicated and protracted the litigation. The shift in their defence and inclusion of discrete heads of expenses and equitable relief as counterclaims added to the complexity of the case. Costs are not recoverable without a court order – it was only after the costs order made on 12 December 2023 that the Plaintiff could recover her costs and disbursements. As such, the Judge's order on the applicable GST should be upheld.

Our decision

22 In closing submissions below, the Defendants' primary position was that the Plaintiff held the Property on trust for Mdm HTN's family, and that in any event, she intended to make an *inter vivos* transfer of the legal ownership of the Property to D2.

23 The argument that the Transfer was a gift was inconsistent with the argument that the Property was held on trust. After the latter was rejected by the Judge, the Defendants relied only on the former in the appeal, *ie*, they no longer pursued the trust argument. However, their evidence fell short to establish the gift. For example, it was significant that although they relied on the gift argument on appeal, their evidence on affidavit did not raise or elaborate on this allegation.

24 This is not to say that the Plaintiff did not have to prove her case in the action. However, we emphasise that the court was entitled to consider *all* the evidence. This included the evidence for the Defendants. In the present case, the legal burden of proof, which is the obligation to prove the existence of any relevant fact necessary to make out a plaintiff's claim on a balance of probabilities (see *Britestone Pte Ltd v Smith & Associates Far East, Ltd* [2007] 4 SLR(R) 855 ("*Britestone*") at [58]), was on the Plaintiff. The evidential

burden of proof, on the other hand, is the "tactical onus to contradict, weaken or explain away the evidence that has been led" (*Britestone* at [59]), and thus can shift from one party to the other based on the state of the evidence. While the legal burden and evidential burden both fell on the Plaintiff at the start of her case, upon her adducing some (not inherently incredible) evidence to establish her case, the evidential burden would have shifted to the Defendants to adduce some evidence in rebuttal (*Britestone* at [60]).

25 In arriving at our decision, we considered all the evidence before the court, including the evidence for the Defendants. It was crucial to us that in the action below, the initial defence did not even mention the argument that the Plaintiff held the Property on trust for Mdm HTN's family, allegedly in line with the intentions of the Plaintiff's late father who had purchased the Property (see [10] above). Instead, the defence only averred that the Plaintiff intended to give the Property to Mr Wong's family. The defence was then amended to include the trust argument as the main defence while the *inter vivos* gift argument was retained as an alternative and amended such that the intended recipient of the gift was Mdm HTN's family instead of Mr Wong's family ("should the Court find that the beneficial interest in [the Property] belonged to the [Plaintiff], the [Defendants] aver that the [Plaintiff] … evinced an intention to make a gift of all her beneficial interest in [the Property] to HTN's Family, which included [D2]"). However, the affidavit evidence for the Defendants, and in particular, the affidavit evidence of Mdm Chan, did not elaborate as to why the Plaintiff chose to make the gift only to D2 when she had other relatives. Instead, the affidavit evidence of Mdm Chan sought to explain the execution of the Transfer, as well as the 2016 Will, on the basis of the trust argument. Any subsequent evidence to sustain the gift argument was too little and too late.

26 We upheld the Judge's finding that the Transfer was not validly executed. In brief, it was clear to us that the Plaintiff did not understand the nature and effect of the Transfer that she had signed. She did not intend to give the Property to D2.

The Plaintiff's mental capacity at the time of the Transfer

27 We first examined the evidence presented by the doctors on the Plaintiff's mental capacity at the time of the Transfer. We saw no reason to disagree with the Judge that the evidence showed that although the Plaintiff suffered from various ailments and conditions, she did have mental capacity at the time of the Transfer (see GD at [21]–[26]). Neither party challenged the Judge's findings in this regard.

28 At this juncture, we mention that although the Plaintiff was found to have mental capacity at the time of the Transfer, that is not to say that the medical evidence was entirely irrelevant. In our view, it provided important background context as to the Plaintiff's physical and mental state. For example, the Plaintiff sustained a head injury from a fall on 25 August 2016, and was subsequently admitted and treated at Singapore General Hospital, before being discharged on 1 September 2016. Further, the Plaintiff was also diagnosed as suffering from moderate to severe presbycusis, which is age-related hearing loss. Dr Lau Pang Cheng David, who is a Consultant Specialist Ear Nose & Throat Surgeon, opined that the Plaintiff was likely to have had significant hearing loss even four to five years prior to the date when he first examined the Plaintiff on 6 February 2021. In other words, the Plaintiff was likely already suffering from hearing loss when she executed the Transfer in 2016. The Plaintiff had also informed at least one of the doctors that she did not understand Cantonese, and had generally expressed that she only spoke Hainanese or

Mandarin. Dr Calvin Fones Soon Leng, who is a Consultant Psychiatrist and who had conducted a psychiatric assessment of the Plaintiff, also opined that while she did not suffer from any psychiatric disorder at the time of examination, it was quite possible that as at 2 December 2016, she had significant impairment of cognition and the circumstances were such that she was susceptible to undue influence.

The 2003 Will, the 2013 Will and the application for a replacement certificate of title of the Property in 2014

29 In gist, the Defendants argued below that the Plaintiff had all along evinced an intention to benefit Mdm HTN's family with the Property, and that this intention was evinced in three separate wills, *ie*, a will executed in 2003 (the "2003 Will"), a will executed in 2013 (the "2013 Will"), and the 2016 Will. We discuss the 2003 Will and the 2013 Will, before elaborating on the 2016 Will along with the Transfer.

30 The 2003 Will was irrelevant to the appeal as the Defendants could not find a copy of the 2003 Will to begin with. As for the 2013 Will, it provided that all of the Plaintiff's real and personal property including but not limited to the Property would be given to her trustee (*ie*, one of D2's sisters, or if she did not survive the Plaintiff, D2) upon trust, and after payment thereout of her debts, funeral and testamentary expenses and estate duties, the balance would be distributed to Mr Wong, Mdm Chan, D2, and D2's two sisters.

31 The 2013 Will was prepared by the law practice of Goh JP & Wong ("GJPW"). Two persons who were working in GJPW and involved in the taking of instructions and/or attending to the Plaintiff's execution of the 2013 Will gave evidence in Suit 1095:

(a) Rosaline Por, a legal secretary ("Ms Por"); and

(b) Wong Fung Kwai, also known as Judy Wong, a lawyer who was working part-time then ("Ms Judy Wong").

32 From their evidence, it transpired that it was Mdm Chan who approached GJPW in or around October 2013 to prepare a will for the Plaintiff. She spoke to Ms Por who provided a copy of a Wills Questionnaire (the "WQ") which the firm used for intended testators to set out their instructions. Thereafter, Mdm Chan gave instructions to Ms Por and Ms Por wrote her instructions into the WQ. The initial instruction was that Mdm Chan and Mr Wong were the beneficiaries. This instruction was changed one or two days later by Mdm Chan to include their three daughters as beneficiaries.

33 Using the instructions in the WQ, Ms Judy Wong then prepared a draft will. On 21 October 2013, Ms Por sent a copy of the draft will to Mdm Chan at the email address stated in the WQ. The email address belonged to one of Mdm Chan's daughters, but it was indicated in the email that the draft will was "for the Testator's perusal and comment, if any". Thereafter, Mdm Chan called Ms Por to give further instructions about the Plaintiff's intention on the appointment of her executrix and trustee.

34 On 24 October 2013, the Plaintiff attended at the office of GJPW to execute the will. She was accompanied by Mdm Chan and Mr Wong. Ms Judy Wong attended to the Plaintiff while Mdm Chan and Mr Wong were also present. She went through the will line by line with the Plaintiff in Mandarin. Thereafter, the Plaintiff executed the will in the presence of Ms Judy Wong and Ms Por. It appeared to Ms Judy Wong and Ms Por that the Plaintiff understood the contents of the will. The Plaintiff did not say much and nodded her head

most of the time when the contents of the will were explained to her. Ms Judy Wong and Ms Por did not consider the possibility of undue influence on the Plaintiff. It did not occur to them to ask Mdm Chan or Mr Wong to wait outside the room where Ms Judy Wong was attending to the Plaintiff. There was no attendance note of that meeting. The whole process ended quite quickly.

35 We add that from the WQ, it appeared that Mdm Chan had instructed Ms Por "to prepare general will [for the Plaintiff] but to also mention in particular the house that the [the Plaintiff] is staying in now". This was a reference to the Property. However, it was common ground that the Plaintiff was in fact *not* staying at the Property at any time.

36 Accordingly, we had doubts as to whether the Plaintiff really understood the contents of the 2013 Will and there was also the possibility of undue influence. However, it was not necessary for us to decide on the validity of the 2013 Will.

37 In addition, the Defendants also asserted that in 2014, the Plaintiff requested Mr Wong and Mdm Chan to accompany her to a law firm, *ie*, GJPW, to replace the certificate of title of the Property, which was missing but was required to effect the subsequent transfer. The suggestion was that she also understood what she was doing then. However, it was the Plaintiff's evidence that Mr Wong and Mdm Chan had brought her to the law firm to sign a legal document although she could not understand the document and could not recall if anyone had translated it for her. The Plaintiff was of the understanding that some important document relating to the Property was missing, and that she had to sign the documents to get a replacement copy.

38 The application to replace the certificate of title was done through Ms Por again and another lawyer at GJPW, Mr Goh Teck Wee ("Mr Goh"). Mr Goh's evidence was that even though information for the application was initially provided by Mdm Chan, such information was verified with the Plaintiff who signed a Warrant to Act for GJPW. However, it was the case that the Plaintiff was accompanied by Mdm Chan and Mr Wong when she attended at the office of GJPW to sign the necessary documents for the application. Significantly, one of the documents was a statutory declaration (the "SD"). Another document was the application itself. Mr Goh said he understood from Ms Por that the Plaintiff provided the details for the SD such as where the certificate of title had been kept, when she noticed that it was missing, and that she was able to respond to Ms Por's questions.

39 When the Plaintiff attended at the office of GJPW on 24 March 2014, Mr Goh explained the application to her in Mandarin and confirmed that she had no further queries and understood what she was about to sign. She then signed the application before him.

40 As for the SD, the Plaintiff was brought to Mr Chan Eng Thai ("Mr Chan"), a Commissioner for Oaths, to sign it before him. Mr Chan's evidence was that he interpreted and explained the SD to the Plaintiff in Mandarin. After confirming with the Plaintiff that she understood the contents of the SD, he witnessed her signature on the SD.

41 However, we noted that the SD stated that notwithstanding an exhaustive search by the Plaintiff in the Property where the certificate of title was kept, she was unable to trace or locate it. In the SD, the Plaintiff also declared that to the best of her knowledge, the certificate of title had not been used as security for any purpose. Therefore, the SD gave the impression that the

Plaintiff had kept the certificate of title and had searched for it but was unable to find it. However, it appeared from the evidence that the Plaintiff did not stay at the Property or keep the certificate of title. According to Mdm Chan, it was kept by Mdm HTN at the Property since 1996. Mdm HTN passed away in 2018. Therefore, it was unlikely that the Plaintiff would have searched for the certificate of title at the Property. Likewise, the Plaintiff would not have known whether the certificate of title had been used as security for any purpose.

42 It also seemed likely to us that Mdm Chan was the one who provided the information for the application to Ms Por. Whether Ms Por then verified the information with the Plaintiff and the extent of the care taken to verify the information was another matter.

43 The attendance of Mr Goh and Mr Chan, respectively, on the Plaintiff to explain the relevant document to her and witness her signature also warranted more scrutiny. Was it a case of simply interpreting a document to her and asking if she understood the contents or did either of them ask her open-ended questions to check if she really understood what she was doing? However, it was also not necessary for us to decide on the validity of the SD (as well as the application).

44 Suffice it for us to say that the circumstances leading to the Plaintiff's execution of the same, as well as the 2013 Will, did not provide much support to the Defendants' contention that she knew what she was doing when she signed the Transfer and the 2016 Will which we next address.

The 2016 Will and the Transfer

45 We were of the view that the Plaintiff did not understand the nature and effect of the Transfer. In particular, Mr Liew's conduct in acting for the Plaintiff caused us concern as to whether Mr Liew had acted in the best interest of the Plaintiff.

46 First, the evidence revealed that it was Mdm Chan who contacted the office of Mr Liew. Mr Liew had acted for Mdm Chan before in respect of the estate of Mr Wong. Mdm Chan spoke to Mr Liew's secretary, Ms Christina Tay ("Christina"), on the phone. Thereafter Mr Liew spoke to the Plaintiff on the phone. It was Mdm Chan's evidence that she passed the phone to the Plaintiff after speaking to Christina. According to Mr Liew, the Plaintiff's instructions were about: (a) the transfer of the Property to D2 within the lifetime of the Plaintiff and the relevant stamp duty implications; and/or (b) giving the Property through a will. He said he was instructed to prepare a draft will while the Plaintiff discussed with the family of Mdm Chan about payment of stamp duty on a transfer. He allegedly spoke to the Plaintiff in a mixture of Cantonese and Mandarin and the Plaintiff confirmed that she understood Cantonese (although it was the Plaintiff's position that she did not understand Cantonese). Furthermore, he was instructed to and agreed to send all documents and correspondence directly to the Plaintiff's grandnieces, including D2, as they would be able to explain the contents thereof to her since she did not read or write English. The Plaintiff also explained that she was not staying at the Property and hence it was not convenient to send documents to the Property. Mr Liew had made a handwritten note of the telephone discussion which was not a formal attendance note as such.

47 Second, after taking instructions from the Plaintiff, Mr Liew prepared a draft will. Mdm Chan's evidence was that she was contacted by Mr Liew's office to collect the draft will. She did so and purportedly explained it to the Plaintiff. She then called Mr Liew's office to say that the Plaintiff had confirmed the contents of the draft and was ready to sign a transfer. By then, Mdm Chan and her daughters had agreed to raise funds to pay the stamp duty on a transfer. Mr Liew was subsequently informed by Christina that the Plaintiff had approved the draft will, and to prepare a transfer of the Property to D2. Mr Liew did not confirm any of this with the Plaintiff in person or over the telephone, although he alleged that he did have a second telephone discussion with her about the Transfer in which he allegedly informed her that she could get her own lawyers to represent her in the Transfer. However, there was no attendance note by Mr Liew of this alleged conversation.

48 Subsequently, instructions were received over the telephone again for Mr Liew to meet the Plaintiff for her to execute both the 2016 Will as well as the Transfer. It is unclear who gave the instructions as they were conveyed to Christina who did not give evidence.

49 Third, Mr Liew eventually met the Plaintiff on the day that she executed the Transfer and the 2016 Will, *ie*, 2 December 2016. This was not at his office or at her workplace or residence, but at a location near her workplace. He noticed that she appeared hurried, and he was under the impression that she wanted to get the signing over and done with as quickly as possible, but did not question this. He said that he proceeded to go through various documents with her near a taxi stand and she then signed the following documents:

(a) one Warrant to Act in respect of the 2016 Will;

(b) one Warrant to Act in respect of the Transfer;

(c) the 2016 Will;

(d) the Transfer; and

(e) the seller's Stamp Duty Declaration Form.

She also signed on a copy of her identity card which had been previously provided to his office by Mdm Chan.

50 According to Mr Liew, he went through the documents individually with the Plaintiff in a mixture of Cantonese and Mandarin. He went through the 2016 Will line by line with her and she confirmed the contents. He also explained that she had to sign the Transfer to obtain an assessment of stamp duty. He had emphasised to her that the signature on the Transfer did not mean that the Transfer had taken place as stamp duty had to be paid. That meeting was around 15 to 30 minutes long. Mr Liew did not make an attendance note of that meeting.

51 At no point in time did Mr Liew ever ascertain with the Plaintiff whether she had other relatives and why she was giving the Property to D2 only, whether by way of an *inter vivo* gift or a will. Neither did he advise her on the prudence of such a course of action and the likelihood or possibility that it might invite litigation from other relatives. The meeting on 2 December 2016 appeared to be for the primary purpose of executing the documents without more, rather than to first ascertain for himself whether the Plaintiff truly understood her purported instructions.

52 In light of the above, we had doubts as to whether Mr Liew had properly taken the Plaintiff's instructions in relation to the 2016 Will and the Transfer, as well as whether the Plaintiff understood the nature and effect of the Transfer.

Summary on the evidence below

53 In summary, we were persuaded by all the evidence that the Plaintiff did not understand the nature and effect of the Transfer and that she did not at any point intend to give the Property to D2 or anyone else for that matter. We clarify that while we had reservations about the Judge's finding that the Plaintiff had validly executed the 2016 Will, we did not make any finding with respect to the validity of the 2016 Will as the appeal did not raise this issue.

Rectification

54 In our view, the court was entitled to order rectification of the land register.

55 Sections 160(1)(*b*) and 160(2) of the LTA are relevant. They state:

> 160.—(1) Subject to subsection (2), the court may order rectification of the land-register by directing that any registration be cancelled or amended in any of the following cases:
>
> (*a*) …
>
> (*b*) where the court is satisfied that any registration or notification of an instrument has been obtained through fraud, omission or mistake;
>
> (*c*) …
>
> (2) The land-register must not be rectified so as to affect the registered estate or interest of a proprietor who is in possession unless that proprietor is a party or privy to the omission, fraud or mistake in consequence of which the rectification is sought, or has caused that omission, fraud or mistake or substantially contributed thereto by that proprietor's act, neglect or default.

56 There are two cumulative requirements for the rectification of the land-register under ss 160(1)(*b*) and 160(2) of the LTA. First, the registration or notification of any instrument must have been obtained through fraud, omission, or mistake. Second, the proprietor who is in possession must be a party or privy to the omission, fraud, or mistake in consequence of which the rectification is sought, or has caused that omission, fraud or mistake or substantially contributed thereto by that proprietor's act, neglect, or default.

57 The Judge held that the requirements were satisfied, as the Plaintiff had executed the Transfer upon a mistaken belief, and D2 was privy to the Plaintiff's mistake, since D2 and Mdm Chan would have been apprised as to the legal effect of the Transfer on their own case that they had discussions with the Plaintiff about the Transfer (see GD at [53]).

58 However, we were cognisant that it was said by the Court of Appeal in *United Overseas Bank Ltd v Bebe bte Mohammad* [2006] 4 SLR(R) 884 ("*Bebe*") at [44]–[47] that under s 160(1)(*b*) of the LTA, the registration of the instrument must have been obtained through fraud, omission or mistake on the part of the party who presents the instrument to the registry for registration. In the case of a transfer, this would be the transferee. This was consistent with the grammatical structure of s 160(*b*) and its ordinary meaning in the context of existing conveyancing practice in Singapore. The court said at [48] that it is "only just if as a result of his fraud, mistake or omission, a registered proprietor thereby obtains title to the property that the court should have the power to set the matter right by exercising its power of rectification under s 160(1)(*b*)". Hence, the decision suggests that s 160(*b*) of the LTA would not be satisfied if the mistake was that of the transferor. If that were the case, the requirement in s 160(1)(*b*) of the LTA would not be satisfied in the present case as the party

who presented the instrument to the registry for registration was the transferee, *ie* D2. However, the registration was not obtained through D2's mistake.

59 Neither side made any submission on *Bebe*. Hopefully, *Bebe* will be clarified in the future as it seems illogical that s 160(1)(*b*) should be confined to a mistake by the transferee and would not extend to a mistake by the transferor.

60 It was unnecessary for us to venture a definite view on the above point since we were of the view that the Judge was entitled to order rectification of the land register in any event as D2 cannot assert indefeasibility of title which was what she was really trying to do by her argument about non-rectification. In *Mahidon Nichiar bte Mohd Ali and others v Dawood Sultan Kamaldin* [2015] 5 SLR 62 ("*Mahidon*"), the Court of Appeal set aside a deed (the "Deed") under which three siblings (the "Three Siblings") renounced their respective interests in their late father's estate under the certificate of inheritance in favour of their mother and other sibling (the "Other Sibling"), and also affirmed the finding below that there was no other agreement between the parties as to the Three Siblings' renunciation of their respective interests in the estate. The Deed was set aside on the basis that the Three Siblings did not fully appreciate the nature and effect of the document which they were signing when executing the deed, and instead, executed it in the mistaken belief that it was an instrument necessary to appoint the Other Sibling as the sole administrator of the father's estate (at [117]). In considering what the position should be in respect of the registered title to the property now that the Deed had been set aside, the court rejected the submission that the Other Sibling could assert indefeasibility of title under s 46(1) of the LTA, as s 46(3) restricted the class of persons who are entitled to assert indefeasibility of title to *purchasers* (at [130]–[135]). A "purchaser" is defined in s 4 of the LTA as a person who, in good faith and "for valuable consideration", acquires an interest in land. As the Deed had been set

aside and the Other Sibling could not establish that he provided good consideration for the transfer of the property into his name as a joint tenant, the court found that he could not avail himself of s 46(1) of the LTA to assert indefeasibility of title against the Three Siblings (at [134]). In essence, although the LTA confers an indefeasible title on the proprietor of a property (subject to certain overriding interests, including the power of the court to rectify the land-register under s 160 of the LTA, and the exceptions specified in s 46(2) of the LTA), s 46(3) restricts the class of proprietors to purchasers. A proprietor claiming otherwise than as a purchaser does not have better title than that held by his immediate predecessor.

61 In the present case, given that the Transfer was set aside, and that D2 was not a purchaser who could assert indefeasibility of title against the Plaintiff under s 46(1) of the LTA, it followed that the court may order the rectification of the land register to reflect the title of the Property before the Transfer was registered. Otherwise, there would be an illogical result that a transfer may be set aside but the land register may not be rectified to reflect this.

Costs and disbursements

62 The Defendants submitted that the Plaintiff should be awarded no more than half of her costs, and that her claim for disbursements for the visits to the various doctors should be disallowed. However, we were not persuaded that the Judge incorrectly exercised his judgment with respect to the appropriate quantum of costs and disbursements.

63 First, the Defendants' position appeared to rest on the argument that the two criteria set out in *Comfort Management Pte Ltd v OGSP Engineering Pte Ltd and another* [2022] 5 SLR 525 ("*Comfort Management*") at [85(d)] for

when a successful party may be deprived of the right to recover all or part of his costs of the action were satisfied in the present case. In this regard, the High Court in *Comfort Management* held that a "Type I Order", which deprives the successful party of the right to recover all or part of his costs from the unsuccessful party, would be justified under O 59 r 6A of the Rules of Court (2014 Rev Ed) when: (a) the successful party failed to establish a discrete claim or issue which he raised in the litigation; and (b) he thereby unnecessarily or unreasonably protracted or added to the costs or complexity of the litigation. We disagreed with the Defendants that the two criteria for a "Type I Order" were satisfied. The Defendants submitted that the Plaintiff's case was not that she was under the mistaken belief that the purpose of the Transfer was to effect a testamentary gift, and she therefore "cannot be said to have succeeded in establishing [the same factual background] upon which [she] had relied on in support of her claims". However, we were of the view that the Defendants' submission was without merit. The point was that the Plaintiff did not fail to establish a *discrete claim or issue*, since the other arguments on undue influence and unconscionability, on which she failed, were *not* discrete issues from the issue of mistake, on which she succeeded. We agreed with the Judge that the facts underlying these issues overlapped, such that "all these issues could be said to broadly arise from the same factual background" (see GD at [90]). In any event, we add that the Defendants' position that the Plaintiff should be awarded *no more than half* of her costs was not properly explained. Even if a deduction were appropriate, it was unclear why a deduction of at least 50% was warranted.

64 Second, we were also not persuaded by the Defendants' submission that the Plaintiff's claim for disbursements for the visits to the various doctors should be disallowed. The Defendants argued that most of the Plaintiff's

witnesses were called to give evidence in relation to her mental capacity, but the Judge found that she had full mental capacity. Thus, it was submitted that the Plaintiff unnecessarily and unreasonably protracted and added to the costs and complexity of litigation. However, we disagreed with the Defendants. Although the Judge was not persuaded that the Plaintiff had lacked mental capacity when she signed the Transfer, the evidence canvassed on the Plaintiff's mental capacity and mental state at the time of the Transfer was relevant to the issues of mistake, undue influence and unconscionability. As mentioned (see [28] above), the evidence was still helpful to understand her mental state.

Applicable rate of GST

65 In the Appellants' Case, the Defendants disagreed with the Judge's holding that the applicable rate of GST for *disbursements* should be 8% and not 7% for some of the items. However, during oral submissions, the Defendants clarified that they were in fact contesting the applicable rate of GST for *costs*. To be clear, the Defendants did not challenge that GST was applicable to party-to-party costs. Instead, their contention lay in whether the rate of GST applied was correct.

66 Preliminarily, we had reservations as to whether GST should even be applicable to party-to-party costs, since it cannot be said that any "service" was rendered to the Defendants. However, as the Defendants did not challenge that GST was applicable to party-to-party costs as a matter of principle, we do not express any views on the principle. In so far as the rate of GST is concerned, we were of the view that there was no reason why the rate should not be pegged at the prevailing rate at the time of the costs order. In any event, the difference of 1% in terms of the rate of GST would only result in a rather insignificant

difference of $3,600. In light of this, there was even less reason to disturb the Judge's order on the applicable rate of GST.

67 We thus upheld the Judge's order on costs and disbursements as we were not persuaded that the Judge had erred.

Mr Liew's conduct

68 We have elaborated on Mr Liew's conduct in the taking of instructions and the execution of the Transfer, as well as the 2016 Will (see [45]–[52] above). Although we did not rule on the validity of the 2016 Will, we were of the view that it seemed that he might not have acted in the best interest of the Plaintiff in respect of both documents.

69 The Plaintiff was advanced in years and did not speak or write English. Mr Liew did not know who the Plaintiff was before the first telephone call.

70 Yet, Mr Liew was content to take instructions from the Plaintiff over the telephone. He was also content to accept instructions that written communication be sent to the Plaintiff's grandnieces.

71 While the above step was not wrong in itself, he did not ask to meet her alone, *ie*, in the absence of any relative of hers, to verify for himself, first, the reliability of the instructions about a transfer of the Property and a will, and second, the reason for the instructions on the mode of communication, before the drafting of the 2016 Will and the Transfer or before the execution thereof. Neither did he render any advice about such instructions.

72 He was content for Christina to be the contact person to receive oral instructions and documents and to hand documents over without ascertaining

who Christina was actually dealing with, when he knew that written communication was not sent to the Plaintiff but to her grandnieces.

73 He did not ascertain from the Plaintiff herself as to whether the Plaintiff had other relatives and why she wanted to give the Property, whether by a transfer or a will, to D2 only. As mentioned, he did not advise her on the prudence of such a course of action or on the likelihood or possibility that this might invite litigation from other relatives.

74 He seemed to be content to explain documents to the Plaintiff (at the meeting for the execution of documents) without more, *ie*, without asking her open-ended questions to ascertain whether she truly knew what she was doing and to advise her accordingly.

75 The possibility that the Plaintiff might not fully understand what she was doing or might be acting under the undue influence of someone else appears to have eluded him when the circumstances required him to consider that possibility.

76 The point is not just whether the Transfer or the 2016 Will was validly executed but first whether he in fact acted in her best interest.

Conclusion

77 For these reasons, we dismissed the appeal. We ordered the Defendants to pay the costs of the appeal to the Plaintiff forthwith fixed at $52,000 including disbursements.

78 We direct the Registrar of the Supreme Court to refer the conduct of Mr Liew to the Law Society of Singapore for its Council to refer the matter to the Chairman of the Inquiry Panel under s 85(3)(*a*) of the Legal Profession Act 1966 (2020 Rev Ed) to inquire whether Mr Liew had acted in the best interest of the Plaintiff in the entire process leading to the execution of the Transfer and the 2016 Will.

Woo Bih Li
Judge of the Appellate Division

Kannan Ramesh
Judge of the Appellate Division

Philip Jeyaretnam
Judge of the High Court

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