AEL and others *v* Cheo Yeoh & Associates LLC and another
[2014] SGHC 129

Case Number : Suit No 822 of 2011/E

Decision Date : 02 July 2014

Tribunal/Court : High Court

Coram : Chan Seng Onn J

Counsel Name(s) : Andrew Ho Yew Cheng (Engelin Teh Practice LLC) for the plaintiffs; Chandra Mohan Rethnam and Mrinalini Singh (Rajah & Tann LLP) for the defendants.

Parties : AEL and others — Cheo Yeoh & Associates LLC and another

Tort – Negligence – Duty of care

Tort – Negligence – Causation

2 July 2014 Judgment reserved.

Chan Seng Onn J:

Introduction

1 The late [X] ("the Testator") was an Indonesian businessman who had made a will ("the New Will") for the distribution of his assets in Singapore. The New Will was made with the legal assistance of the second defendant ("Cheo"), a solicitor of the first defendant firm, and it was intended to replace an earlier will ("the Old Will") which the Testator had made jointly with his wife who predeceased him. However, the New Will was later discovered to be defective as it had been executed in the presence of only one witness, hence failing to comply with s 6(2) of the Wills Act (Cap 352, 1996 Rev Ed). This discovery was made only after the death of the Testator when an application for probate was rejected. In the event, letters of administration were applied for and granted and the Testator's estate was, accordingly, distributed under the Intestate Succession Act (Cap 146, 1985 Rev Ed) ("ISA").

2 The 1st to 3rd plaintiffs are three of the Testator's six children. The 4th to 18th plaintiffs are the Testator's 15 grandchildren. They are, collectively, the disappointed beneficiaries under the New Will which they claim was rendered defective because of Cheo's negligence in properly supervising its execution. Accordingly, they bring this action in tort to claim, primarily, for damages equivalent to the difference in amount which they would have received under the terms of the New Will and that which they actually did receive under intestacy. Additionally, the plaintiffs also claim for the reimbursement of expenses which they paid to Indonesian solicitors in connection with their application for letters of administration.

3 After careful consideration, I am allowing the plaintiffs' claim. I now proceed to set out the facts in greater detail before providing the reasons for my decision.

Background facts

The Testator and his family

4 The Testator was an Indonesian businessman who married one [Y] in 1954. [note: 1] He lived in Indonesia where he carried on, at various times, a construction business [note: 2] as well as other businesses which traded in goods such as flour, textiles and cigarettes. [note: 3] The Testator thus accumulated a variety of assets in Indonesia during his lifetime which included shophouses, [note: 4] pieces of land, [note: 5] monies in bank accounts, [note: 6] and other personal effects. Importantly, he also had assets in Singapore which consisted solely of monies held in various bank accounts. It is with the distribution of these Singapore assets, specifically, that the present dispute is concerned.

5 Together with his wife, the Testator has four sons—[S], [M], [D] and AEN—and two daughters—AEL and AEM. Of these six children, only three are plaintiffs in this suit, namely, AEL, AEM and AEN. They are named, in that order, as the 1st to 3rd plaintiffs. While the Testator's three other children are not parties to this suit, I should mention here that they also have some involvement in these proceedings. All three of them have sworn a joint affidavit [note: 7] together with their plaintiff siblings while [M] and [D] also gave evidence at the trial.

6 All the Testator's children are adults in their fifties or sixties [note: 8] and, with the exception of AEL, they currently reside in different parts of Indonesia. [note: 9] AEL moved to Singapore in the mid-1980s [note: 10] and has been living here since. She would thus help the Testator when he came to Singapore to conduct his affairs, for example, by driving him to the bank. [note: 11]

7 All the Testator's children also have children of their own (*ie*, the Testator's grandchildren). By the time this action was brought, the Testator had a total of 15 grandchildren who are the 4th to 18th plaintiffs in this suit.

The Old Will

8 The Testator executed the Old Will jointly with his wife in Singapore on 16 November 1990 to provide for the distribution of their assets in Singapore. [note: 12] The Old Will stipulates that, upon the death of either the Testator or his wife, it can be revoked by the surviving spouse. However, if the Old Will is not so revoked, then the assets are to be distributed in the following manner upon the death of the surviving spouse: 20% to AEN, 10% each to the remaining five children, and 30% to be divided equally among all the grandchildren.

The New Will

9 Some 14 years after the Old Will was made, the Testator's wife passed away on 29 January 2005. [note: 13] Thereafter, the Testator sought to revoke the Old Will and alter the distribution contemplated therein by executing the New Will. To that end, he sought the legal assistance of Cheo.

Correspondence prior to execution of the New Will

10 Cheo's evidence is that, sometime in April 2006, the Testator made first contact with him via a telephone call. [note: 14] During this telephone call, the Testator and Cheo arranged for a face-to-face meeting at the office of Citibank Singapore ("Citibank") along Church Street to discuss the terms of the New Will. [note: 15]

11 At the meeting in Citibank's office, the Testator, who was accompanied by AEL, told Cheo that

the New Will was to provide for the distribution of his assets in Singapore which consisted solely of monies in accounts with Citibank. Importantly, it is common ground between the parties that the Testator had also given a notarised copy of the Old Will [note: 16] to Cheo to aid in the latter's drafting of the New Will. [note: 17]

12 Subsequently, on 13 April 2006, Cheo sent the Testator and AEL a draft copy of the New Will by facsimile and email respectively. [note: 18] Minor amendments were made and the execution of the New Will was then arranged to take place at Citibank's office on 17 April 2006. According to Cheo's account, this arrangement to execute the New Will was made during a telephone discussion which he had with AEL on 15 April 2006. Cheo stated that AEL first asked if both she and Cheo could be witnesses to the execution of the New Will. Cheo agreed to be a witness himself but advised AEL that she could not be a second witness as she was a beneficiary under the New Will. [note: 19] It was significant, according to Cheo, that AEL then proposed, either of her own initiative or on instructions from the Testator, that the Testator would procure one of the Citibank officers to be the other witness to the New Will's execution. [note: 20]

Execution of the New Will and its contents

13 On 17 April 2006, the Testator, again accompanied by AEL, met Cheo at Citibank's office as arranged. It is undisputed that the execution of the New Will was then *solely* witnessed by Cheo. [note: 21] Thereafter, Cheo rendered the Testator an invoice [note: 22] for professional fees and disbursements amounting to a total of $340 which the Testator duly paid. [note: 23]

14 I pause at this juncture to mention two points regarding the contents of the New Will. First, the New Will, as drafted by Cheo, appointed both AEL and AEN as the "sole [t]rustees" of the Testator's estate. No executors have been explicitly appointed as such. Second, the New Will provides that, upon the Testator's death, his estate is to be distributed in the following manner: 20% each to the 1st to 3rd plaintiffs, 10% to [S], and 30% to be distributed equally among all his grandchildren. [note: 24] Essentially, the difference between this distribution and that under the Old Will (at [8] above) is that the Testator intended to completely disinherit two of his sons, namely [M] and [D], of their 10% shares in his estate while, at the same time, increasing the shares of each of his two daughters by 10%. The shares of [S], AEN and the Testator's grandchildren remain unaffected. I summarise these differences in distribution in a tabular form here:

	Testator's children						**Testator's grandchildren**
	[M]	**[D]**	**[S]**	**AEL (1st Pf)**	**AEM (2nd Pf)**	**AEN (3rd Pf)**	**4th to 18th Pfs**
Old Will	10%	10%	10%	10%	10%	20%	30%
New Will	0%	0%	10%	20%	20%	20%	30%
+/-	-10%	-10%	-	+10%	+10%	-	-

Correspondence subsequent to execution of the New Will

15 After the New Will was executed, Cheo did not have any further direct communication with the Testator. [note: 25] However, he did inform AEL by email two days later that he had notified the relevant authorities about the New Will's execution and that she should convey this to her father. [note: 26] This was the final correspondence between AEL and Cheo until after the Testator's death. [note: 27]

Death of the Testator

16 The Testator died some four years later on 24 November 2010 [note: 28] and AEL communicated this news to Cheo on 2 December 2010. [note: 29]

The rejected application for letters of probate

17 Cheo advised AEL that an application would have to be made for letters of probate on the New Will [note: 30] and such application was subsequently filed on 22 March 2011. [note: 31] However, the application was rejected as the New Will had been executed before only one witness, *viz*, Cheo himself. [note: 32] This did not comply with s 6(2) of the Wills Act which prescribes that, to be valid, a will must be executed before two or more witnesses present at the same time.

18 Cheo duly informed AEL of the rejected application on 5 May 2011 before advising her on her options. [note: 33] This included applying for letters of administration and Cheo subsequently set out the necessary steps for such an application in his email of 9 May 2011. [note: 34] In particular, one of the steps which Cheo included in his advice was that an affidavit of foreign law by Indonesian solicitors was required for a variety of reasons. [note: 35] The plaintiffs claim that, acting upon this advice, AEN then engaged an Indonesian law firm, Messrs Sura & Kantor Hukum Associates ("the Indonesian Firm"), which charged a total of 50m rupiah for its services. [note: 36]

The successful application for letters of administration

19 Cheo's evidence is that he ceased acting for AEL and AEN on or around 20 May 2011 as they had gone on to engage a new solicitor for the application of letters of administration. [note: 37] The new solicitor in question is one Siaw Kheng Boon ("Siaw") who testified under subpoena that he had applied for letters of administration since the New Will was invalid. [note: 38] Subsequently, this application was granted by the High Court of Singapore on 7 September 2011 in Originating Summons Probate No P265 of 2011/X. [note: 39]

Distribution of the Testator's estate

20 The Testator's estate in Singapore, comprising solely of monies in his Citibank accounts, totalled AUD$1,798,888.12 at his death. [note: 40] According to the plaintiffs, this entire sum has since been withdrawn and distributed in accordance with the ISA. Accordingly, the Testator's children have each received an equal one-sixth share or, in percentage terms, 16.67% of the Testator's estate. The Testator's grandchildren, on the other hand, received nothing from the intestate distribution. The result of this distribution is that, when compared to the terms of the New Will, [M], [D] and [S] (collectively "the Unintended Beneficiaries") experience a windfall, whereas their plaintiff siblings (ie, the 1st to 3rd plaintiffs) and the Testator's grandchildren (ie, the 4th to 18th plaintiffs) suffer loss of varying degrees which total 39.99% of the Testator's estate. This is reflected in the table below:

	Testator's children						Testator's grandchildren
	[M]	**[D]**	**[S]**	**AEL (1st Pf)**	**AEM (2nd Pf)**	**AEN (3rd Pf)**	**4th to 18th Pfs**
New Will	0%	0%	10%	20%	20%	20%	30%
ISA	16.67%	16.67%	16.67%	16.67%	16.67%	16.67%	0%
+/-	+16.67%	+16.67%	+6.67%	-3.33%	-3.33%	-3.33%	-30%
				Total loss of Pfs = 39.99%			

21 The plaintiffs' claim for the loss of 39.99% of the Testator's estate amounts to AUD$719,375.36.

The parties' cases

22 At this juncture, it is appropriate to set out the parties' respective cases in sufficient detail so as to identify the issues that have to be contended with.

The plaintiffs' case

23 The plaintiffs' case lies exclusively in the tort of negligence. It begins with the claim that Cheo owes them a duty of care supervising the New Will's execution. In this regard, the plaintiffs urge me to follow various other jurisdictions which have recognised that a solicitor who is responsible for preparing a will does owe a duty to the beneficiaries to take reasonable care in discharging his duties towards the testator client.

24 Next, the plaintiffs submit that this duty has clearly been breached here since the New Will was not executed before two or more witnesses as required under the Wills Act. [note: 41] Alternatively, the plaintiffs allege that Cheo has also breached this duty by drafting the New Will without explicitly appointing AEL and AEN as executors but naming them as "trustees" instead. [note: 42] These breaches, it is claimed, has caused the plaintiffs their loss of 39.99% of the Testator's estate.

25 Finally, the plaintiffs also seek reimbursement of the sum of 50m rupiah since it would have been unnecessary to engage the Indonesian Firm had the New Will been validly executed in the first place. [note: 43]

The defendants' case

26 The defendants dispute the plaintiffs' claim on two main grounds.

27 First, the defendants deny that Cheo's retainer with the Testator extends to ensuring the proper *execution* of the New Will. Cheo claims that he had been engaged only to assist in *drafting* the New Will. In any event, the defendants argue that Cheo should be recognised as owing a duty of care only to the Testator with whom he had a retainer but not to the plaintiffs who stand as third parties to that solicitor-client relationship. The defendants acknowledge that they are advocating a contrary position to what other jurisdictions have preferred but stress that those decisions have now to be

analysed within the two-stage framework for approaching the duty question as formulated by the Court of Appeal in *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100 ("*Spandeck*"). In that regard, it is submitted that no proximity subsists between Cheo and the plaintiffs since Cheo dealt only with the Testator and not the plaintiffs. Moreover, pertinent policy considerations as suitably exemplified by this case also negates a *prima facie* duty even if it does arise. [note: 44]

28 Second, the defendants submit that the New Will's invalidity does not inexorably mean that the Testator's estate then has to be distributed in strict accordance with the rules of intestacy. The plaintiffs can come to an agreement amongst themselves to distribute the Testator's estate according to *the New Will* despite the intervention of intestate law. [note: 45] In that event, no loss will be suffered. Alternatively, the plaintiffs can avoid the operation of intestacy altogether by admitting into probate a copy of *the Old Will* [note: 46] which the plaintiffs are themselves able to produce in these proceedings. In that event, the plaintiffs' loss will only be a fraction of the sum that is claimed in this action.

29 As for the further claim of 50m rupiah, the defendants deny liability for this alleged loss. [note: 47]

Issues

30 It is trite that a claimant can succeed in a negligence action only if he is able to establish that (a) the defendant owes him a duty of care; (b) the defendant has breached that duty; and (c) such breach has caused loss which is not too remote. In the present case, there are issues which emerge for my consideration under each of these elements of the tort as is clear from the parties' respective submissions. These issues may be categorised as follows:

(a) *Duty of care*: Whether Cheo's retainer with the Testator extends to ensuring the proper *execution* of the New Will and, if so, whether Cheo owes a duty to *the plaintiffs* to take reasonable care in supervising such execution.

(b) *Breach*: Whether Cheo has breached this duty by allowing the New Will to be executed in the presence of only one witness and/or by drafting it without explicitly appointing executors.

(c) *Causation*: Whether the plaintiffs' loss is caused by their own failure to distribute the Testator's estate according to the New Will or the Old Will.

(d) *Loss*: Whether the plaintiffs can claim for the loss of 50m rupiah incurred in hiring the Indonesian Firm.

31 I propose to deal with these issues in turn.

Duty of care

The scope of the duty of care

The scope of the duty must be determined by reference to the scope of Cheo's retainer with the Testator

32 Before considering the legal question whether Cheo owes a duty of care to the plaintiffs, the

precise *scope* of that duty must first be delineated as a matter of fact. On this latter point, both parties here proceed on the basis that reference must be had to the scope of Cheo's retainer with the Testator. In other words, the parties impliedly agree that Cheo cannot be made liable towards the plaintiffs for the negligent performance of certain tasks if Cheo had not been engaged by the Testator to perform those tasks in the first place.

33 I begin by noting that such an approach towards defining the possible duty of care which a solicitor owes to a third party has been described by the Court of Appeal as making "eminent sense" in the recent decision of *Anwar Patrick Adrian and another v Ng Chong & Hue LLC and another* [2014] SGCA 34 ("*Anwar*"). This appears from the following passage of *Anwar* where Andrew Phang Boon Leong JA, delivering the judgment of the court, stated as follows (at [119]):

> … *[T]he solicitor's duty to the third party in these situations is to take reasonable care in performing his original undertakings to the client. It is, in other words, the same duty of care that the solicitor owed to their client. This makes eminent sense for it is the solicitor's failure to carry out his client's instructions, or to perform his undertakings with care, that results in the harm to the third party.* The only expectation that the third party can reasonably have as against the solicitor is for the latter to take reasonable care in carrying out his duties owed to the client. *Put simply, the* ***content*** *of the duty of care owed by the solicitor to the third party must – in the absence of an express or implied retainer between them – necessarily be ascertained by reference to the duty of care which the solicitor owes to the client itself* …
>
> [emphasis added in italics; original emphasis in bold italics]

3 4 *Anwar* is significant not only for the above observation but also for several others which, as will become apparent, greatly inform the duty of care analysis which is undertaken below. I will therefore revert to *Anwar* in much greater detail in due course. However, I take the opportunity at this point to mention that *Anwar* was released only after the parties had tendered their closing submissions and replies. Arguments relating to the impact of *Anwar* on the present case were thus not canvassed before me, but I do not see a need to request for further submissions to assist me on this point.

The scope of the duty extends to the proper execution of the New Will

35 While the parties agree that the scope of Cheo's duty to the plaintiffs is coterminous with the scope of Cheo's retainer with the Testator, they diverge in their arguments as to what precisely Cheo had been engaged to perform. In this connection, the plaintiffs argue that Cheo was engaged to draft *and* execute the New Will whereas the defendants assert that Cheo was engaged *only* to draft the New Will. If the defendants' assertion is correct, then they will escape liability for the defective execution which occurred here.

36 I am not convinced by the defendants as their assertion does not seem to accord with one's ordinary conceptions of the solicitor-client relationship in the context of will-making. To my mind, when a layperson engages a solicitor for the purpose of preparing a will, his foremost concern is on the end-product—a will that properly records down his or her testamentary intentions and which is fully valid in the eyes of the law—rather than on the precise tasks which the solicitor has to perform to achieve that end. Though the testator client may be able to appreciate that the solicitor performs a series of discrete tasks in respect of the will's preparation—*eg*, conducting meetings with the client, understanding fully the client's instructions, advising the client on the implications of making the will, examining relevant documents, drafting the will, checking with the client if the contents of the will as drafted accords with the client's testamentary intentions, and finally executing the will—the client's

central concern with the end-product means that he is not likely to view all these various aspects of the solicitor's work as distinct but, rather, as constituting a bundle of services, the holistic discharge of which is necessary for proper and effective will-making. That, however, is not to say that it is impossible for a testator to instruct the solicitor to discharge only certain specific obligations. After all, the scope of a solicitor's duty to his client will vary from one factual matrix to another (see *Anwar* at [127]). All that I intend to convey is that a scenario whereby the solicitor is only engaged to draft a will but not see to its valid execution does not appear to be one that will often occur in light of the realities of will-making that I have just described.

37 Even if the general view which I have just expressed is mistaken, I am nevertheless convinced by several salient facts in the present case which sufficiently bear out that Cheo had been engaged to assist not only in drafting the New Will but also in ensuring its proper execution.

38 First, Cheo confirms on cross-examination that he had rendered an invoice of $340 to the Testator only *after* witnessing the execution of the New Will and, further, that this amount was charged for all work done up to that point. [note: 48] This is a clear indication to me that Cheo was, and indeed understood himself to be, retained by the Testator not only to draft the New Will but also to ensure that it was properly executed. Otherwise, there would have been no need for Cheo to attend the execution of the New Will and seek payment only after this had occurred.

39 Second, I also find the contents of the invoice rendered by Cheo to be helpful in revealing the scope of his retainer with the Testator. In particular, the invoice states that the first defendant's professional charges in respect of the Testator's matter included, *inter alia*, "attendances" and "all incidental work necessary for carrying out the business entrusted to us". It is conceded by Cheo during cross-examination that these terms as they appear in the invoice include the witnessing and execution of the New Will. [note: 49]

40 Third, I also note that after the execution of the New Will, Cheo proceeded to notify the relevant authorities about this despite not having received any instructions from the Testator to do so. He took this further step of his own initiative. Cheo explains that this is "normally" done "as part of the service … when someone makes a will". [note: 50] This explanation given by Cheo suggests that he himself is of the view that there is nothing exceptional in his engagement by the Testator and that he thus set out to discharge the normal suite of services which are provided to will-making clients. As I have sought to explain, such services are not ordinarily confined only to the drafting of a will and, indeed, Cheo's attendance during the New Will's execution and subsequent notification of the relevant authorities support this view. Cheo's claim that he had been instructed *only* in respect of the drafting of the New Will is therefore contradicted by his own acts and explanations.

41 In light of the above, I find that Cheo's retainer with the Testator includes the proper drafting *and* execution of the New Will.

The imposition of the duty of care

42 Having determined the precise *scope* of Cheo's retainer, I now consider whether it is justified as a matter of law to impose a duty of care in drafting and executing the New Will which is owed not only to the Testator but also to the plaintiffs, as third parties and beneficiaries under the New Will. Once again, the parties are agreed on the proper approach towards determining this latter issue. There is rightly no dispute that an analysis of whether such a duty of care should be imposed must be conducted within the two-stage framework set out in *Spandeck*. This approach proceeds first with an inquiry into proximity and then calls for a consideration of relevant policy considerations. As a

threshold matter, though, both stages are preceded by an assessment of factual foreseeability (see *Spandeck* at [73]).

Factual foreseeability

43 In my view, the threshold of factual foreseeability is easily overcome in the present case. Cheo is engaged for the proper drafting and execution of the New Will. The New Will is the instrument used by the Testator to bequeath his assets in Singapore to the plaintiffs. If this instrument is invalid and measures can no longer be taken to rectify it, then, it is clear that the bequests will fail, thereby resulting in financial loss to the plaintiffs. The Court of Appeal's following observation in *Anwar* (at [142]) is most apposite:

> It is patently foreseeable that a solicitor's failure to take reasonable care in performing instructions under a retainer which, if performed properly would provide a benefit or negative a detriment to a third party, will result in harm to the third party. The connection between the undertaking and the third party is so direct and strong that a failure to perform the undertaking with care would in most, if not all, cases some form of harm to the third party.

44 In my judgment, therefore, it is clearly unarguable that a reasonable solicitor in Cheo's position will have foreseen the possibility of loss being suffered by the plaintiffs due to the negligent discharge of his undertaking to the Testator.

Proximity

45 My attention now turns to the nub of the dispute in the present case, which is whether sufficient proximity exists between Cheo and the plaintiffs such as to give rise to a *prima facie* duty of care under the first stage of *Spandeck*. In this respect, the plaintiffs place much reliance, among other authorities, on the seminal English case of *White and another v Jones and another* [1995] 2 AC 207 ("*White (HL)*") where it was held that a solicitor did owe a duty of care towards the disappointed beneficiaries of a will. The defendants, however, contend that the *outcome* in *White (HL)* should not be followed as the *reasoning* adopted there cannot be accommodated within the *Spandeck* two-stage framework. As the decision in *White (HL)* has since been the subject of thorough scrutiny by the Court of Appeal in *Anwar*, the parties' submissions must, accordingly, be dealt with in light of this new judicial development.

46 Despite the unquestionable importance of *Anwar*, I defer my discussion on it to a later part of this judgment as I consider it beneficial to first set out the decision in *White (HL)* and the parties' respective submissions in greater detail. This will, I hope, allow for a better appreciation of how the Court of Appeal's observations in *Anwar* impact upon the current dispute.

(1) The House of Lords' decision in *White v Jones*

47 The facts in *White (HL)* do not, like the present case, involve the defective execution of a will. Rather, *White (HL)* concerned the dilatory implementation of a testator's instructions in drawing up a will. Nothing, however, turns upon this factual distinction. In both cases, the intentions of the testator client were not carried into effect because of some fault on the part of solicitors whose assistance was engaged for that purpose. And, in both cases, the disappointed beneficiaries claimed that they suffered loss which resulted in a negligence action being brought against the solicitor to recover the same.

48 In *White (HL)*, a testator made a will disinheriting two of his daughters after a family quarrel.

Subsequently, he reconciled with them and instructed the defendant solicitors to prepare a new will under which each daughter would be bequeathed £9,000. The defendants, however, delayed carrying out the testator's instructions and the testator subsequently died without the new will being made. The unrevoked old will thus governed the distribution of the testator's estate and his two daughters received nothing. The two daughters, accordingly, sued the defendant solicitors to recover the total loss of £18,000. The House of Lords held by a bare majority of 3 to 2 that the defendants did owe a duty of care to the disappointed beneficiaries and allowed recovery of the total loss claimed.

49 Lord Goff of Chieveley, who delivered the leading majority judgment, encountered no little difficulty in reaching the conclusion that a duty of care did exist. He noted (at 257A and 261B–C) that the case at hand involved a claim for pure economic loss which was generally not recoverable unless there was shown to be an assumption of responsibility by the defendant and, concomitantly, reliance by the claimant, twin principles which were embraced in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] 1 AC 465 ("*Hedley Byrne*") in the context of establishing liability for negligent misstatements. Lord Goff thus disagreed with Sir Robert Megarry VC who—though similarly finding in the earlier case of *Ross v Caunters* [1980] 1 Ch 297 ("*Ross*") that a duty of care was owed by a solicitor to a disappointed beneficiary under a defective will—had reached that destination via a different route. In *Ross*, Megarry VC preferred to base his finding of a duty of care on a direct application of the test for physical loss established by Lord Atkin in *M'Alister (or Donoghue) (Pauper) v Stevenson* [1932] AC 562 ("*Donoghue v Stevenson*"), concluding (at 322H–323A) that liability may be imposed upon a solicitor based upon the mere foreseeability of harm to a beneficiary that might result from his negligence. That, however, was described by Lord Goff in *White (HL)* to be an insufficient control mechanism for imposing liability (at 257E–F; see also *Anwar* at [67] and [74]).

50 Although Lord Goff was clear in his mind that the relevant principles to be applied in *White (HL)* emanated from *Hedley Byrne* rather than *Donoghue v Stevenson*, the problem is, as the Court of Appeal noted in *Anwar* (at [70]), that *Hedley Byrne* is "not directly engaged on the facts". This is because it bordered on artificiality to assert that a solicitor had assumed responsibility towards beneficiaries with whom he ordinarily would have had no direct contact or, conversely, to claim that those same beneficiaries had relied upon the proper discharge of professional obligations by a solicitor whom they ordinarily would have no knowledge of (see *White (HL)* at 262B–D).

51 However, notwithstanding Lord Goff's recognition that the factual matrix before him stood beyond the reach of the principles in *Hedley Byrne*, he was unwilling to leave the two daughters in that case without a meaningful remedy. He was influenced by what he perceived to be a "lacuna" in the law which he succinctly described thus (at 259H–260A):

> In the forefront stands the extraordinary fact that, if such a duty is not recognised, the only persons who might have a valid claim (i.e., the testator and his estate) have suffered no loss, and the only person who has suffered a loss (i.e., the disappointed beneficiary) has no claim … It can therefore be said that, if the solicitor owes no duty to the intended beneficiaries, there is a lacuna in the law which needs to be filled. This I regard as being a point of cardinal importance in the present case.

52 This "lacuna" in the law was considered together with other wider considerations, such as the significance of legacies to citizens and the role of solicitors in society, to give rise to what Lord Goff described (at 260B–G) as the "strong impulse for practical justice". This impulse for practical justice loomed large in Lord Goff's judgment and it appeared, ultimately, to drive him to "fashion" (at 260G) a remedy in tort for the disappointed beneficiaries. This remedy was devised through an "extension" of the *Hedley Byrne* principles in this way (at 268D):

> … In my opinion … your Lordships' House should in cases such as these extend to the intended beneficiary a remedy under the *Hedley Byrne* principle by holding that the assumption of responsibility by the solicitor towards his client should be held in law to extend to the intended beneficiary who (as the solicitor can reasonably foresee) may, as a result of the solicitor's negligence, be deprived of his intended legacy in circumstances in which neither the testator nor his estate will have a remedy against the solicitor. …

(2) The parties' submissions regarding *White (HL)*

53 The plaintiffs in the present case naturally urge me to endorse the decision in *White (HL)*. They point to the justice of the outcome reached there [note: 51] and also emphasise a passage in Lord Goff's judgment (at 255A–E) where the weight of authority across various common and civil law jurisdictions—*eg*, New Zealand, Canada, the United States of America, Germany, France and the Netherlands—was surveyed and found to show a clear trend towards the imposition of liability on solicitors in similar circumstances. [note: 52] In fact, to that list of jurisdictions may now be added Australia as the High Court there has since ruled in favour of imposing liability on solicitors in the important case of *Hill (trading as R F Hill & Associates) v Van Erp* (1997) 142 ALR 687 ("*Van Erp*") which will be discussed below (see [87]–[89]).

54 However, as alluded to earlier (at [45] above), the defendants urge me to look beyond simply the outcome in *White (HL)* and to inspect its reasoning. The defendants submit that, in this regard, it is clear from Lord Goff's judgment that English law has been developed along a path carved out through the sheer force of *policy* imperatives. [note: 53] Lord Goff himself had openly struggled with the applicability of conventional principles, seemingly unable to rationalise how a solicitor (such as Cheo) could be said to stand in a sufficiently proximate relationship *vis-à-vis* the beneficiaries under a will (such as the plaintiffs). The crux of the defendants' argument, therefore, is that the policy-driven approach adopted by Lord Goff sits uncomfortably with the *Spandeck* two-stage framework which requires the duty question in Singapore to be answered by *first* inquiring into whether the claimant and the alleged tortfeasor are in a sufficiently proximate relationship, and *only if* this is answered affirmatively can policy considerations then come into play at the *second* stage of the analysis for the purpose of negating a *prima facie* duty of care. [note: 54] Put simply, the defendants argue that there is good reason not to follow the trend in England and in other jurisdictions because approaching the duty question from the perspective of policy as the driver in the analysis effectively puts the cart before the horse insofar as the *Spandeck* test is concerned.

55 In order to preserve the integrity of *Spandeck's* analytical framework, the defendants then submit that this court should refrain from turning it on its head just so that the exceptional policy-based reasoning in *White (HL)* can be accommodated. Proximity should take centre stage at the first stage of the inquiry and, in this regard, the defendants argue that the twin criteria of assumption of responsibility and reliance must necessarily be resorted to, this being a case involving pure economic loss. Adopting that approach, one runs into the same difficulties which Lord Goff encountered in strictly applying the *Hedley Byrne* principle. However, shorn of the policy reasoning which Lord Goff had availed himself of in *White (HL)*, the defendants argue that this court is constrained to deny that there is sufficient proximity on the facts here.

56 The defendants' submissions as set out above clearly raise interesting questions of law. I am able to distil two which, logically, flow in this manner:

(a) First, whether, policy considerations may, exceptionally, drive the imposition of a duty of care under the *Spandeck* framework.

(b) If not, then whether Lord Goff's recognition of an "extended" assumption of responsibility for imposing liability on solicitors towards third parties in *White (HL)* was indeed founded solely upon considerations of *policy* (with the result that it *cannot* be accommodated under the *Spandeck* framework) or, alternatively, whether it can properly be rationalised as embodying notions of *proximity* (with the result that it *can* be reasoned within the *Spandeck* framework).

57 Both of these issues were considered to varying degrees by the Court of Appeal in *Anwar* and so it is timely to now turn to consider that decision.

(3) The Court of Appeal's decision in *Anwar*

5 8 *Anwar* did not involve a solicitor's failure to carry into effect his client's testamentary intentions which then resulted in a claim by disappointed beneficiaries. In that specifically defined sense, *Anwar* presented a different factual scenario from that which gave rise to *White v Jones (HL)* and this dispute. However, on a somewhat broader and more abstracted plane, *Anwar* is no different from these "wills cases" because the facts there also directly raise the same issues of whether, and if so when, a solicitor can be said to owe a duty to third parties to take reasonable care when discharging obligations towards his client. The discussion of these issues in *Anwar* is therefore directly relevant to the present dispute despite there being an observable difference in factual matrices at a more granular level. With that in mind, I proceed to set out the facts in *Anwar*.

59 In *Anwar*, one Agus had pledged certain shares with a bank as part of a credit facility but, when the stock markets crashed, the value of his collateral likewise crashed. The bank later sold off some of the pledged shares but this still left a significant shortfall. The bank thus demanded that Agus either make payment of this shortfall or provide collateral of the same value. It was at this point that Agus then approached the defendant solicitor, Ng, to act for him.

60 Negotiations subsequently took place between Ng and the bank's solicitors, Allen & Gledhill LLP ("A&G"). The bank's initial proposal was for Agus to procure mortgages over four properties. Two of these properties were each held by Agus's two young sons, Adrian and Francis, who were the claimants in the dispute. The remaining two properties were held by companies of which Adrian was the sole shareholder and director. As a further aspect of the bank's initial proposal, the respective owners of the four properties were each required to provide personal and corporate guarantees. On Agus's instructions, Ng informed A&G that Agus was agreeable to this proposal, *except* for the condition that required his two sons to provide personal guarantees. In A&G's reply, the bank agreed to put this requirement for personal guarantees on hold provided that Agus satisfied other requirements. However, he did not, and the bank proceeded to demand repayment.

61 In light of the bank's renewed demand, Agus offered a further proposal. The bank deemed this proposal inadequate but made a counter-proposal involving the provision of additional security and which, significantly, did not require Agus's sons to provide personal guarantees. A forbearance agreement drafted on the basis of this counter-proposal was thus sent by A&G to Ng for execution by Agus, his two sons, and the companies which owned the properties that were to be mortgaged. However, two of the relevant accompanying documents—which concerned the mortgage of the properties held personally by Agus's two sons—contained a *personal guarantee clause*. This clause provided that the mortgagor of the property shall pay the bank on demand all sums due and owed to the bank by Agus.

62 Ng did not advise Agus or his sons on the presence and implication of the personal guarantee clause before the relevant documents were signed by them. It was Ng's failure to do so which formed the subject of the negligence action by Agus's sons against him in *Anwar*. This action was brought

because Agus was still not able to meet his obligations to the bank even after the provision of additional security and his two sons, who were sued on the personal guarantee clause, had to settle the claim against them for $1m.

63 The claim against Ng by Agus's two sons proceeded both in contract and in tort. First, they argued that there was, in contract, an implied retainer between themselves and Ng which was breached by Ng's failure to advise them on the personal guarantee clause. Second, they argued that Ng owed them a duty of care in tort and that his conduct was in breach of that duty. Both arguments failed at first instance in the High Court (see *Anwar Patrick Adrian and another v Ng Chong & Hue LLC and another* [2013] SGHC 202 at [12]).

64 The appeal by Agus's sons, however, was allowed. The Court of Appeal first considered the contractual argument and observed (at [51]–[61]) that even though Ng had not directly advised Agus's sons, the circumstances were such that it was fair to hold that an implied retainer had arisen between them. The Court of Appeal therefore allowed the appeal on the basis that this implied retainer had been breached but, recognising (at [61]) that the alternative argument in tort presented "novel and intricate issues of law in the Singapore context", the court went on to consider "what the situation would be if there had been no implied retainer". In particular, the key issue framed there (at [64]) was "whether there can be a duty of care in tort owing by Ng to the Appellants that is *independent of* any implied retainer" [original emphasis].

65 It is the Court of Appeal's observations in this latter context that is of immediate relevance to the present case which is similarly concerned with whether a solicitor (Cheo) can owe a duty of care to third parties (the plaintiffs) in the absence of an underlying contractual relationship. Ultimately, the Court of Appeal held in *Anwar* that such a duty can be owed. However, it is manner by which the court arrived at this pronouncement which is most illuminating. The Court of Appeal in its detailed analysis of *White (HL)* was able to rationalise Lord Goff's decision within the first-stage of the *Spandeck* framework, and went on to elucidate the proximity factors which are relevant in assessing the relationship between solicitors and third parties. In so doing, the Court of Appeal squarely considered the questions of law raised by the defendants' submissions here. What follows, therefore, is a point-by-point identification of the salient observations made by the Court of Appeal in *Anwar* and a discussion of how these observations relate to the present case.

(4) The Court of Appeal's observations in *Anwar*

(A) IT IS INADVISABLE FOR POLICY TO DRIVE THE ANALYSIS IN *SPANDECK*

66 As outlined above (at [56]), the first question which the defendants' submissions raised is whether the *Spandeck* framework is malleable enough to allow policy considerations to drive the duty analysis even though it ordinarily belongs at the second stage of the inquiry. To this, the Court of Appeal specifically stated in *Anwar* (at [92]) that "*it is inadvisable (given its very nature) to focus on policy in the first instance*, although it still has a role to play under the second stage of the two-stage test in *Spandeck*" [emphasis added]. This led the Court of Appeal to comment that, even though the suggestion that *White (HL)* was a policy-based decision is "very interesting and not without force", it is preferable to rationalise that decision "along rather more conventional reasoning which focuses on the *first* stage of [*Spandeck*] instead (relating to *proximity* …)" [emphasis original].

67 I focus, for the moment, on the Court of Appeal's first observation, *viz*, that policy ought not to be the immediate focus in the *Spandeck* inquiry. I leave till later the question of how the Court of Appeal was able to rationalise *White (HL)* as a decision based on the principles of proximity.

68 In my view, the Court of Appeal's caution that it is "inadvisable" to treat policy as the focal point in the *Spandeck* inquiry is sound. In this regard, the court had parenthetically suggested that *the "very nature" of policy* made it unsuitable for this purpose. While the court did not elaborate on what it was alluding to, I note, nevertheless, that there is a clear statement in *Spandeck* itself (at [84]) which explicates the main deficiency with policy-driven reasoning thus: "[T]he obvious objection to utilising policy as the overarching determinant of liability is *its potential to result in arbitrary decisions*" [emphasis added].

69 The manifold reasons why policy-driven reasoning conduces towards arbitrariness have been canvassed by Christian Witting in his insightful article "Duty of Care: An Analytical Approach" (2005) 25(1) Oxford J Legal Studies 33. Witting therefore argues for the "priority of proximity" over policy in determining duty, the thrust of which is evident in the following passage (at p 62):

> ... *The reason for according priority to proximity is simple. It is based upon the relatively unequivocal nature of proximity factors.* The presence of such factors argues in favour of duty while the absence of such factors argues against duty. *By contrast, policy-based reasoning is comparatively unstable.* Where courts focus upon the likely effects of different legal rules upon parties other than the claimant and defendant, they necessarily encounter three problems. First, they encounter difficulty in predicting future behaviour. Secondly, they encounter the difficulty of justifying particular policy choices, given the relatively equivocal nature of policy. Policy goals often conflict with each other. Even when they do not, particular policy goals do not necessarily mandate particular means by which those goals might be achieved. And, thirdly, the tort mechanism is not a very satisfactory means of achieving distributive goals ... *A multi-factoral, policy-based approach to duty determinations is likely to leave lower and intermediate appellate courts with little effective guidance and is likely to lead to greater inconsistency in the determination of cases.* [emphasis added]

70 The *Spandeck* formulation should thus be applied sequentially in the order it is set out, *ie*, "proximity" before "policy". The next question which follows from the defendants' submissions, then, is whether *White (HL)* is truly a policy-based decision. If so, it is incompatible with the *Spandeck* approach as just clarified and thus cannot aid the plaintiffs' case.

(B) *WHITE (HL)* CAN BE RATIONALISED ON THE BASIS OF PROXIMITY RATHER THAN POLICY

71 As briefly alluded to above (at [65] and [67]), the Court of Appeal in *Anwar* had suggested that *White (HL)* could be rationalised as a decision which was focused on principles of *proximity*, notwithstanding the persuasive view that *policy* considerations were in fact predominant in Lord Goff's judgment.

72 The Court of Appeal commented in *Anwar* (at [91]) that Lord Goff's decision to "extend" the *Hedley Byrne* principle of assumption of responsibility *simply because* this was necessitated by the need to do practical justice was not satisfactory. This, it was said (at [89]), "ignored" the conceptual difficulties with accepting that there was any direct assumption of responsibility or reliance between the solicitor and third party respectively. It did not explain how, as Lord Goff seemed to suggest, a solicitor's assumption of responsibility towards his client could somehow be "transferred" to the third party.

73 I note that this criticism of *White (HL)* is shared by several commentators. Russell Brown, for example, comments in *Pure Economic Loss in Canadian Negligence Law* (LexisNexis, 2011) (at p 436) that Lord Goff's extension without explanation constitutes a "deeming" and is thus no more than a "fiction" (see also, Robert Stevens, *Torts and Rights* (Oxford University Press, 2007) at p 179; and

Peter Cane, *Tort Law and Economic Interests* (Clarendon Press, 2nd Ed, 1996) at p 185). As Brown writes:

> To say that the defendant's undertaking of responsibility to person A should be "held in law" to apply to person B tells us nothing about what wrong the defendant did to person B. Nor does it tell us what right in person B was injured by the negligence of the defendant. Any principled account of a solicitor's liability to a disappointed legatee must be able to supply those answers.

74 The Court of Appeal in *Anwar* thus attempted to supply Lord Goff's "extension" in *White (HL)* with the necessary explanatory force. In this regard, the Court of Appeal first accepted (at [89] and [159]) that a solicitor could not ordinarily be said to have assumed responsibility in a "direct or conventional" sense towards the third party given the conceptual difficulties surrounding this. The *Hedley Byrne* assumption of responsibility thus remains applicable as *a legal test* only for assessing the relationship between the solicitor and his *client*. It cannot, at the same time, serve, by way of an unexplained extension, as a legal test in and of itself for imposing a duty of care on solicitors *vis-a-vis third parties* (at [160] and [190]).

75 The fact that a solicitor had assumed responsibility towards his *client* was, nevertheless, observed by the Court of Appeal to be significant in shedding light on the closeness of the relationship between the solicitor and the relevant *third party* in appropriate circumstances. As the Court of Appeal described (at [155]), the solicitor's direct assumption of responsibility towards the client to perform the latter's instructions which are aimed at conferring a benefit or negating a detriment to a third party "sets the stage and creates the environment necessary" for there to be sufficient proximity with the third party. In this way, Lord Goff's "extended" assumption of responsibility can thus be rationalised as a relevant *factor* (though not a *legal test*) for determining whether there is sufficient *proximity* between the solicitor and the third party. To sum up, I reproduce the Court of Appeal's view on this matter which was stated as follows (at [161]):

> … Lord Goff's "extension" of the *Hedley Byrne* basis of liability which rests on the twin criteria of assumption of responsibility and reliance is therefore, in our view, better explained by an assumption of responsibility (to the client) that *provides the foundation for proximity* between the solicitor and the third party. … [emphasis added]

76 It is therefore clear from *Anwar* that *White (HL)* should not be understood simply as a policy-driven decision despite it outwardly appearing to be so. Lord Goff's notion of an "extended" assumption of responsibility in fact embeds proximity reasoning, hinting as it does at the closeness of the relationship between the solicitor and the third party.

(C) ASSUMPTION OF RESPONSIBILITY WAS NOT THE MAIN BASIS FOR IMPOSING LIABILITY IN *ANWAR*

77 However, because the assumption of responsibility by a solicitor is not *directly* towards the third party, the Court of Appeal in *Anwar* preferred to regard this merely as a factor which buttressed its finding of proximity that was in fact based on other grounds. Specifically, the Court of Appeal relied (at [147]–[150]) on the two concepts of *relational or circumstantial proximity* and *causal proximity* to establish proximity on the facts in *Anwar*.

78 Regarding the first concept of relational or circumstantial proximity, the Court of Appeal noted that Agus's instructions to his solicitor, Ng, were to ensure that the interests of his two sons were taken care of under the mortgage transaction and that this third party benefit could only be effected through Ng's careful discharge of his duties to Agus. The Court of Appeal thus stated (at [147]–

[148]) that it was "the nature of the instructions" from Agus that had brought Ng into a direct and close relationship with the third parties, as did Ng's "particular knowledge of the state of affairs at play".

79 As for the alternative concept which was relied on, the Court of Appeal pointed out (at [149]) that Ng was clearly in a position where his advice (or lack thereof) to Agus would have had "inevitable knock-on effects" on the interests of the third party claimants; hence causal proximity was established.

80 Besides the presence of relational or circumstantial proximity and causal proximity—which was considered to be "independently" capable of founding a duty of care in *Anwar* (at [150])—the Court of Appeal also referenced the concepts of "*control*" and "*vulnerability*" to further support its view that the relationship between Ng and Agus's sons was sufficiently proximate. The judicial application and refinement of these concepts in varying tort scenarios can be found more fully elaborated upon by David Tan and Goh Yihan in their article "The Promise of Universality: The *Spandeck* Formulation Half a Decade On" (2013) 25 SAcLJ 510 ("*Tan & Goh*"). In the specific context of *Anwar*, though, the Court of Appeal had little difficulty in finding (at [154]) that Ng, having overall charge of Agus's affairs with the bank, clearly had the "capacity … to control the situation that might give rise to the risk of harm" to Agus's sons. Agus's sons, in turn, were "relatively vulnerable" in that they "depended" on Ng to properly perform his duties towards Agus, in particular by advising the latter on the existence and implication of the personal guarantee clause.

81 The various indicia of "proximity" which were relied on by the Court of Appeal in *Anwar* will certainly be useful in my analysis here since, as I have earlier explained (at [58] above), there is no significant difference between the two fact patterns.

(5) The plaintiffs and Cheo are in a sufficiently proximate relationship

82 I find that the plaintiffs and Cheo stand in a sufficiently proximate relationship.

83 Cheo had no doubt assumed responsibility *towards the Testator* for the proper drafting and execution of the New Will since a contractual relationship subsisted between solicitor and client. That there was an assumption of responsibility in this direct sense, albeit not with the plaintiffs, cannot be clearer. However, the very objective of Cheo's retainer with the Testator is to enable the latter to confer a benefit on *the plaintiffs* through the transmission of property under a valid will. Cheo's assumption of responsibility towards the Testator to assist in the making of the New Will thus creates, as the Court of Appeal stated in *Anwar*, the "foundation for proximity" between him and the plaintiffs. Indeed, I go on to find that proximity does exist here based on the following considerations.

84 First, I find that there is relational or circumstantial proximity between the plaintiffs and Cheo. This is not merely because of the nature of the Testator's instructions but also because Cheo *knew* full well at that time that if those instructions were not properly carried out, the economic well-being of the plaintiffs would be adversely affected. The plaintiffs are therefore clearly in Cheo's direct contemplation even though he has no direct interaction with them (save for AEL). In this connection, I note that Megarry VC has also stated in *Ross* (at 308F–H) that the question of whether a negligent solicitor "ought" to have had the disappointed beneficiaries in his contemplation does not even arise in cases such as this. This is because the solicitor's contemplation of the beneficiaries is of such a close and immediate nature; it is "*contemplation by contract*" [emphasis added] though that contract was with the testator client. Therefore, it is this degree of knowledge which Cheo has of the plaintiffs and the surrounding circumstances which leaves me in no doubt that there is relational or circumstantial proximity between the parties.

85 I also find that there is causal proximity between Cheo and the plaintiffs. The plaintiffs' entitlement to the Testator's estate, in the shares which the Testator intended for them to receive, is wholly dependent on the New Will being effective. That task of making an effective will, in turn, was entrusted by the Testator to Cheo. It must thus have been plain to Cheo that if the New Will was defective, then that will lead inevitably, upon the death of the Testator, to economic loss suffered by the plaintiffs. Accordingly, causal proximity between the plaintiffs and Cheo is clearly evident.

86 Given the presence of circumstantial or relational proximity and causal proximity, I am able to conclude that Cheo does stand in a sufficiently proximate relationship with the plaintiffs. However, as with the Court of Appeal in *Anwar*, I also find that the further proximity factors of "control" and "vulnerability" are particularly relevant on the facts here and thus merit further discussion.

87 To begin with, I note that the proximity factors of "control" and "vulnerability" have already been considered by the High Court of Australia in the context of a claim by disappointed beneficiaries against a negligent solicitor. In *Van Erp*, the defendant solicitor, Mrs Hill, had been instructed by a testatrix to draw up a will which was intended to benefit her neighbour, Mrs Van Erp. During the execution of the will, the solicitor signed as one attesting witness and asked Mrs Van Erp's husband, who was the only other person present, to sign as the second attesting witness. Under the relevant Australian legislation, a will cannot be attested to by the spouse of an intended beneficiary and, for that reason, the testatrix's will was void. Mrs Van Erp sued the solicitor in tort and, by a majority of 5 to 1, the High Court of Australia held that the solicitor was liable.

88 The notion of a will-making solicitor's "control" over a beneficiary's entitlement featured strongly in Gaudron J's judgment and in fact formed the basis upon which she justified the imposition of liability. Gaudron J explained the importance of "control" in the following terms (at 716):

> The relationship in this case as between Mrs Hill and Mrs Van Erp is not one that is characterised either by the assumption of responsibility or reliance. Rather, *what is significant is that Mrs Hill was in a position of control over the testamentary wishes of her client and, thus, in a position to control whether Mrs Van Erp would have the right which the testatrix clearly intended her to have*, namely, the right to have her estate properly administered in accordance with the terms of her will. [emphasis added]

89 The element of control is usually considered together with "vulnerability" (*Tan & Goh* at para 34) and this will ordinarily be the position in which a beneficiary finds himself *vis-à-vis* the solicitor who has been engaged to prepare the testator's will. The reason for this was explained by Dawson J in *Van Erp* (at 706–707):

> … [T]he solicitor's mistake is not ordinarily discoverable by anyone other than the solicitor. In the ordinary course, the only persons who have access to a will are the solicitor and the client. A client can hardly be expected to review the will for regularity and even if he or she were to do so, could hardly be expected to discover its defects. Indeed, to do so would be to engage in the very task which the solicitor was retained to perform in the first place.
>
> Moreover, and this seems to me to be crucial, *in the normal course the solicitor's error only becomes apparent after the death of the client. Upon that event, the hitherto concealed error becomes irreversible. In this respect the intended beneficiary is particularly vulnerable* …
>
> [emphasis added]

90 The concepts of "control" and "vulnerability" as discussed in *Van Erp* certainly do add a further dimension from which the parties' present relationship may be evaluated. In that vein, I note that, as the solicitor responsible for preparing the New Will, Cheo is in complete control over whether the plaintiffs do or do not receive their respective shares in the Testator's estate. This, in turn, means that the plaintiffs are wholly and inescapably dependent on Cheo's proper discharge of his obligations to the Testator to receive their respective entitlements. In my view, the presence of "control" on the part of Cheo and "vulnerability" on the part of the plaintiffs serve to increase and strengthen the links between them. This buttresses my earlier finding that there is sufficient proximity in the present case.

Policy

91 At the second stage of the *Spandeck* formulation, the defendants submit that strong policy reasons exist which ought to negate the imposition of a duty of care. In particular, the defendants seek to impress upon me that allowing the plaintiffs' claim here effectively *enlarges* the Testator's estate. [note: 55] This is because even as the plaintiffs are now given what they ought to have received under the New Will, the Unintended Beneficiaries, *viz*, [M], [D] and [S] (see [20] above) will not be stripped of their windfall gains. The defendants therefore urge me to consider that awarding the plaintiffs damages here sends out the wrong signal to families which may possibly find themselves in similar circumstances in the future. [note: 56] Instead of encouraging such families to attempt a good faith redistribution of the deceased's estate according to the deceased's wishes, it incentivises them to sue the careless solicitor who, being backed by insurance, can always be made the source of a second fund. That, the defendants argue, will be an unseemly prospect for society as a whole, and one which the courts should be keen to avoid rather than endorse.

92 I am not persuaded by the defendants' argument. As a preliminary matter, I cannot comprehend the defendants' claimed connection between a successful action for damages here and an "enlargement" of the Testator's estate. In this regard, I share the views of Sir Donald Nicholls VC who (then sitting in the English Court of Appeal) stated the following when confronted with a similar argument in *White and another v Jones and others* [1993] 3 All ER 481 ("*White (CA)*") (at 491) (see also, John G Fleming, "The Solicitor and the Disappointed Beneficiary" (1993) 109 LQR 344 at 348):

> … [The defendants' solicitor] submitted … that to impose liability on the solicitor would be effectively to double the size of the client's estate. This is incorrect. The damages are payable to the disappointed intended beneficiary, not to the deceased's estate. Those entitled to the deceased's estate receive a windfall in the sense that the deceased did not intend the estate should go to them. But that does not assist the solicitor's case. That is the direct and foreseeable consequence of the solicitor's breach of his duty to his client. Because of his negligence the client's money did not reach the right pockets. The law is requiring him to put that right in the only way it can be done.

93 I am also unable to agree with the defendants' submission on a more fundamental point, which is that if the negligent solicitor is allowed to escape liability on the basis that the deceased's family should independently devise a means for redistributing his estate *inter se*, then it begs the question —*what is the point of the solicitor at all?* Here, Cheo is engaged to enable the Testator to direct his Singapore assets to the plaintiffs. However, through Cheo's negligence, a part of those assets has been misdirected to the Unintended Beneficiaries. Cheo now argues, however, that no liability ought to be imposed on him because the plaintiffs and the Unintended Beneficiaries can and should take the initiative (because of filial piety, familial ties or otherwise) to remedy the consequences of *his own wrong* by conducting a secondary distribution that honours the Testator's true intentions. In the event that they are unable to come to an agreement, the loss is the plaintiffs to bear.

94 That, to me, is a preposterous outcome. It implies, as Cooke J observed in *Gartside v Sheffield, Young & Ellis* [1983] NZLR 37 ("*Gartside*") (at 43), "a refusal to acknowledge the solicitor's professional role in the community" (see also *White (HL)* at 260F). The defendants' denial of liability here is, in essence, premised on an abdication of professional responsibility, and that I cannot accept to be right.

95 As a separate matter, I also note that the proposed imposition of liability here occurs in a novel area involving economic loss. I am thus minded to consider whether such a result may lead, as Cardozo CJ said in *Ultramares Corp v Touche, Niven & Co* 255 NY 170 (1931) at 179, to the imposition of "liability in an indeterminate amount for an indeterminate time to an indeterminate class". In my view, this perennial fear in the law of negligence is more apparent than real when a claim is brought by disappointed beneficiaries under a defective will. This is because, in general, the class of potential claimants is identified within the terms of the will, the solicitor's potential liability is limited by the size of the testator's estate, and the breach results in a one-off loss rather than a recurring one. I acknowledge, however, that there may be *exceptional* circumstances where the foregoing might not necessarily hold true; for example, the beneficiaries of a will may include unborn persons who are thus not specifically identified in the will (see also *Winfield and Jolowicz on Tort* (WVH Rogers ed) (Sweet & Maxwell, 18th Ed, 2010) at p 215). However, I note that both Lord Goff in *White (HL)* (at 269E–H) and Cooke J in *Gartside* (at 44) were content to leave such exceptional cases to be decided when they arise. In my view, that approach is both prudent and in keeping with the common law's tradition of deciding cases on an incremental basis.

96 Thus, no cogent policy reasons have been raised to negate the imposition of a duty of care on Cheo. Before moving on, however, I wish to add that there are in fact relevant policy considerations which operate to *affirm* a duty of care in cases such as the present (see *Animal Concerns Research & Education Society v Tan Boon Kwee* [2011] 2 SLR 146 at [77] for the legitimacy of using policy reasoning in this manner).

97 First, I note that if no remedy is extended to the third party beneficiaries, then the only claim which can be made against a negligent solicitor is that by the estate. The estate, however, has suffered no real loss and hence will be entitled to only nominal damages. The negligent solicitor, as Nicholls VC observed in *White (CA)* (at 490), thus goes off "scot-free" and can breach his professional duties "with impunity". That is certainly objectionable. In my view, therefore, the imposition of a duty on the solicitor to take reasonable care *towards third party beneficiaries* is desirable from the standpoint of policy because it serves, at the same time, to complement and thereby enhance the solicitor's duties *towards the testator client*. This point was succinctly made by Megarry VC in *Ross* (at 322C) where he stated that the recognition of a duty of care towards the third party, "far from diluting the solicitor's duty to his client, marches with it, and, if anything, strengthens it".

98 Relatedly, imposing a duty in such circumstances also has the beneficial effect of promoting the vigilance and competence of solicitors who advise in the context of will-making. In this regard, I echo the Court of Appeal's sentiment in *Anwar* (at [166]) that:

> … Upholding high standards of competence and diligence should be an ambition that a noble profession such as ours should strive towards and be proud of. The imposition of a duty on solicitors to exercise reasonable care even towards third parties in particular situations advances that desirable policy. …

99 I regard the latter point as being of particular relevance given the undeniable importance which society as a whole places on the act of will-making. This point was adverted to in *White (HL)* by Lord Goff who noted (at 260B) that:

> … legacies can be of great importance to individual citizens, providing very often the only opportunity for a citizen to acquire a significant capital sum; or to inherit a house, so providing a secure roof over the heads of himself and his family; or to make special provision for his or her old age. …

100 In my view, therefore, the policy considerations at play in these circumstances weigh in favour of the imposition of a duty of care rather than against it.

Breach

101 Having found that Cheo owes a duty of care to the plaintiffs, I now consider whether it has been breached. Here, the plaintiffs argue that Cheo has committed two relevant breaches, one relating to the New Will's *execution* and the other relating to its *drafting*.

Cheo has breached his duty to ensure the proper execution of the New Will

Cheo failed to ensure that the New Will was executed before two witnesses present at the same time

102 The alleged breach in the context of the New Will's execution relates to Cheo's failure to ensure that at least two witnesses were present at the material time which caused its invalidity. This requirement is found in s 6 of the Wills Act which reads as follows:

> 6—(1) *No will shall be valid unless it is in writing and executed in the manner mentioned in subsection (2).*
>
> (2) Every will shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction, and the signature shall be made or acknowledged by the testator as the signature to his will or codicil in the presence of two or more witnesses present at the same time, and those witnesses shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary.
>
> …
>
> [emphasis added]

103 It is undisputed that Cheo is the sole witness to the execution of the New Will. Accordingly, s 6(2) of the Wills Act has not been complied with. Given my earlier finding that the scope of Cheo's duty includes the proper *execution* of the New Will, it thus appears to be rather straightforward that Cheo is in breach of this duty. However, in this regard, I note that the defendants repeatedly stress in the pleadings that it was either AEL or the Testator, and not Cheo, who proposed getting one of the officers from Citibank to be a second witness of the New Will (see [12] above). [note: 57] The suggestion seems to be that the plaintiffs should therefore take responsibility for the fact that no one from Citibank was present as a second witness. If this is the argument being advanced by the defendants, then I find it to be wholly without merit.

104 I cannot see why it should matter if AEL or the Testator had proposed the identity of the second witness because this does not detract from Cheo's duty to ensure that there must, in any event, be at least two witnesses present at the time of execution. In other words, if the requisite number of witnesses are not present at the execution of a testator's will, the solicitor having conduct of the matter must be vigilant enough to advise the testator that purporting to execute a will in such

circumstances will be a fruitless exercise; this is regardless of whether the attendance of those witnesses is proposed or arranged by the testator. If, however, that solicitor continues to wave on the execution of the will without expressing any reservations, then he indubitably falls short of the general standard of care and skill which the law demands of him, which is that of a reasonably competent and diligent solicitor (see *Charlesworth & Percy on Negligence* (Sweet & Maxwell, 12th Ed, 2010) at para 9-232).

105 I am therefore of the view that Cheo ought to have alerted the Testator to the fact that the New Will was being executed in flawed circumstances. Instead, it appears that after witnessing the execution of the New Will on his own, Cheo was happy to leave the Testator to procure a second witness without informing him of the futility in doing so. This may be gleaned from an attendance note made by Cheo himself which recorded the events surrounding the New Will's execution: [note: 58]

> Client was to get bank officer to be 2nd witness. Client reviewed the will and signed. I could not wait for the bank officer and told client I had to leave.
>
> Client said that he would sort it out with the Bank and get the officer to witness.
>
> I took back the copy signed by me only.

106 Based on these circumstances as set out by Cheo, I find that Cheo is negligent in ensuring that the New Will is properly executed in accordance with the Wills Act.

Cheo was not aware that two witnesses had to be present at the time of execution

107 At this juncture, I am minded to make certain observations concerning *why* Cheo had omitted to ensure the presence of another witness at the execution of the New Will. In this regard, Cheo explains, in an effort to downplay his own culpability, that he knows that a will has to be subscribed by at least two witnesses but he had at that time merely "overlooked" the necessity of them doing so at the same time. [note: 59] I am, however, not convinced by this explanation. My own view is that Cheo's negligence here is not an instance of mere inadvertence or lapse of concentration but, more troublingly, stemmed from his ignorance of the statutory requirement that a will must be executed before at least two witnesses.

108 I am supported in my view by, first, the appearance of the New Will. In this regard, I find it striking that there is only *one* signature block at the foot of the New Will with Cheo's typed-in particulars such as his name, address, identity card number and occupation. A second signature block, however, is conspicuously absent. In other words, *space was created in the New Will for only one person to sign as a witness*. This is most telling because if Cheo knows, as he claims, that two witnesses have to subscribe on the New Will, then one will naturally expect him, as the draftsman of the New Will, to have included a second signature block. This would be so even if the identity of the second witness was not known at the time of drafting because, in that instance, the various fields for that unknown witness's particulars could simply have been left blank. Instead, a second signature block has been omitted in its entirety here. This certainly invites the inference that Cheo was in fact unaware at that time that at least one other witness had to subscribe on the New Will together with him.

109 I also consider a second piece of evidence to be relevant in shedding light on the level of Cheo's ignorance. This concerns his act of notifying the relevant authorities of the New Will's execution *without even first enquiring with the Testator* to check if the New Will had indeed been subscribed by a second witness. This indicates to me that Cheo was in fact labouring under the

mistaken belief that the New Will had been validly executed in his presence as the *sole* witness. This obliviousness to the need for two witnesses appears to be the only reasonable explanation for his bold step in informing the authorities of the New Will when its execution is patently defective. Otherwise, there is every reason to believe that he would have at least sought to confirm that a second witness had subscribed on the New Will before doing so. At trial, however, Cheo maintains that he knows that at least two witnesses have to be present during the execution. He explains that he is nevertheless willing to take the risk of informing the authorities of the New Will on the *assumption* that a second witness had subscribed on it. [note: 60] However, for the reasons which I have already given, I find this hard to believe.

110 Having considered the evidence before me, I find that, contrary to his assertions, Cheo was unaware of the basic requirement that a will's execution has to be witnessed by a statutory minimum of two persons. This explains why he allowed the Testator to execute the New Will in his presence alone despite it being obvious that such circumstances were less than adequate. In my judgment, this reflects a lack of competence on Cheo's part and I thus reject his attempt at characterising this case as one of negligence by careless oversight.

Cheo's failure to appoint "executors" did not cause the plaintiffs' loss

111 I now come to the second of Cheo's alleged breaches. The plaintiffs argue here that Cheo has been negligent in *drafting* the New Will as he failed to explicitly appoint "executors" therein. AEL and AEN's appointment as "trustees" is said to be insufficient for this purpose because the office of an executor is very different from that of a trustee.

112 Strictly speaking, I do not have to deal with this aspect of the plaintiffs' submissions since I have already found that Cheo is negligent in respect of the New Will's *execution*. Nevertheless, I consider it appropriate that I should do so in the interest of completeness.

113 In this regard, I begin by saying that I accept the plaintiffs' premise that trustees and executors are distinct in law (see *Syed Abbas bin Mohamed Alsagoff and another v Islamic Religious Council of Singapore (Majlis Ugama Islam Singapura)* [2010] 2 SLR 136 at [20]). However, I am of the view that *even if* this means that Cheo should have explicitly appointed executors when drafting the New Will, his failure to do so did not *cause* the plaintiffs' loss in and of itself. The plaintiffs' loss here arises because the Testator's estate has to be distributed under intestacy, and that in turn flows from the New Will's invalidity. In order for the plaintiffs' argument to have any force, then, it must at least be shown that the failure to explicitly appoint an executor—just like the failure to execute a will before two or more witnesses—impinges upon a will's validity. The law is clear, however, that it does not.

Letters of administration with the will annexed may be granted where no executor is appointed

114 Section 13(1)(*a*) of the Probate and Administration Act (Cap 251, 2000 Rev Ed) provides that where no executor is appointed by a will, letters of administration with the will annexed may be granted to such person or persons as the court considers the fittest to administer the estate. "Letters of administration with the will annexed" is in turn defined in s 2 of the same Act in the following manner:

> "letters of administration with the will annexed" means a grant under the seal of the court issuing the same, authorising the person or persons therein named to administer a testator's estate *in compliance with the directions contained in his will*, and in accordance with law ... [emphasis added]

115 These provisions in the Probate and Administration Act make it abundantly clear that in a situation where a testator leaves a will upon his death but fails to appoint an executor, the court can appoint someone to administer his estate in accordance with the provisions of the will (see Mahinder Singh Sidhu, *The Law of Wills, Probate Administration and Succession in Malaysia and Singapore* (International Law Book Services, 1998) at p 239). Contrary to what the plaintiffs' argument suggests, then, a will is not rendered invalid simply because no executor is appointed, and the deceased's testamentary wishes therein can still be given effect to.

116 Accordingly, I find that if the New Will had been properly executed in the presence of two witnesses, then it could have been used to apply for letters of administration with the will annexed notwithstanding that no executor had been explicitly appointed. The Testator's estate will then be administered according to its terms and not the rules of intestacy. In that event, no loss will have been caused to the plaintiffs.

AEL and AEN are in fact impliedly appointed as executors

117 The foregoing discussion proceeded on the basis that *no* executors had been appointed under the New Will at all. I am, however, of the view that even though AEL and AEN are not *explicitly* appointed as executors in the body of the New Will, their appointments as such can nevertheless be *implied* from a proper construction of the will (see, for example, *Williams, Mortimer and Sunnucks on Executors, Administrators and Probate* (John Ross Martyn and Nicholas Caddick QC gen eds) (Sweet & Maxwell, 20th Ed, 2013) ("*Williams, Mortimer and Sunnucks*") at para 8-12; *Halsbury's Laws of Singapore* vol 15 (LexisNexis, 2013 Reissue) ("*Halsbury's Singapore*") at para 190.005). Such persons are known in law as *executors according to the tenor* and probate may be granted on the will in such circumstances (see ss 8(1) and (2), Probate and Administration Act).

118 In order for a person to be constituted an executor according to the tenor of a will, it must appear from a reasonable construction of the will that he has been appointed to perform the essential duties of an executor, such as collecting the assets of the testator, paying off all debts and funeral expenses, and discharging the legacies contained in the will (see *In the Goods of Adamson* (1875) LR 3 P&D 253 at 254). In essence, the court's concern is with whether the person claiming to be impliedly appointed as an executor has indeed been appointed as such *in substance* (though not in form). Pertinently, this may occur where only "trustees" are appointed in a will (see RR D'Costa, JI Winegarten & T Synak, *Tristram and Coote's Probate Practice* (LexisNexis Butterworths, 13th Ed, 2006) at para 4.20). For example, "trustees" who were instructed to "carry out this will" or who were nominated for "the due execution of this my will" were held to be executors according to the tenor (see *In the Goods of Russell; In the Goods of Laird* [1892] P 380). In these instances, it could be sufficiently gathered from the expressions used by the testators that they had effectively wished for their named *trustees* to perform the functions of *executors*. If, however, it cannot be inferred from the will that the named trustee has the duties of an executor thrust upon him, then he will not be considered an executor according to the tenor merely because he is appointed as a trustee (see *In the Goods of Punchard* (1872) LR 2 P&D 369).

119 In the present case, I find that the New Will's terms clearly suggest that AEL and AEN are, in substance, vested with the duties of executors despite their explicit appointments as "trustees". The New Will obliges AEL and AEN to "assume sole responsibility and proceed to distribute" the Testator's estate (cl 3), empowers them with the absolute discretion to "sell call in and convert" the Testator's property into money (cl 4), and instructs them to use those monies to pay the Testator's "debts funeral and testamentary expenses and legacies and all estate duty" (cl 5). To my mind, this collection of responsibilities mirrors those of an executor. Thus I am satisfied that AEL and AEN are executors according to the tenor of the New Will. An application for probate on the New Will will thus

have been granted if not for its deficient execution and, had this been so, the plaintiffs will not have suffered the loss which they did.

120 I thus conclude that AEL and AEN are in fact impliedly appointed as executors under the New Will but, even if they had not been, the Testator's estate can still be distributed in accordance with the New Will pursuant to a grant of letters of administration with the will annexed. Accordingly, I find that there is no relevant nexus between Cheo's failure to explicitly appoint executors in the New Will and the plaintiffs' loss in this case.

Causation

121 I now turn to examine the defendants' arguments relating to causation. In essence, the defendants argue that even if Cheo's negligent supervision of the New Will's execution has caused its invalidity, this does not directly cause the plaintiffs' loss since it is still open to the plaintiffs to distribute the Testator's estate other than in accordance with the rules of intestate succession. Their election not to do so, accordingly, breaks the causal chain between Cheo's negligence and the loss which they have suffered upon intestate distribution.

The plaintiffs attempted to but could not distribute the Testator's estate according to the New Will

122 The defendants' first suggestion is that the plaintiffs could have avoided their loss completely by distributing the Testator's estate according to the New Will despite its invalidity. In this regard, the defendants submit that the plaintiffs should have urged the Unintended Beneficiaries to disclaim their windfall shares which they received via intestate distribution. This is so as to allow for the *re*distribution of the Testator's estate according to the New Will.

123 I am not persuaded by this argument. To begin with, I reject the defendants' claim that the plaintiffs have not made any sincere attempts at getting the Unintended Beneficiaries to disclaim their windfall shares. There is evidence of a family meeting attended by the Testator's children where they discussed the distribution of their father's estate after discovering that the New Will was invalid. I am satisfied that, at this meeting, the Unintended Beneficiaries were asked to give up their windfall entitlements but declined to do so. [note: 61] Of the three Unintended Beneficiaries, only [M] and [D] gave evidence at trial and I find that their reasons for refusing to disclaim their shares were candid and truthful. [M] was frank in stating that he did not feel constrained to give up his windfall since it was something "prepared by God" [note: 62] and he subsequently gambled it all away. [note: 63] As for [D], he stated that he counted his blessings at having received his windfall share as it enabled him to settle his debts. [note: 64]

124 In light of the above, I do not see what more the plaintiffs could have done to persuade the Unintended Beneficiaries to disclaim their respective windfalls. This is especially so when it is borne in mind that the Unintended Beneficiaries are, after all, legally entitled to the shares which they have received by operation of intestate law and cannot be compelled to disgorge the same. In this connection, I note that Gummow J had expressed in *Van Erp* (at 738) that the disappointed beneficiary there, *ie*, Mrs Van Erp, was correct *not* to sue the windfall recipients since the latter "bore no responsibility" for the solicitor's negligence. Gummow J took this position despite there being some academic support for the view that a disappointed beneficiary ought to have some recourse against windfall recipients, whether in an action for unjust enrichment or otherwise (see, for example, Paul Matthews, "Round and Round the Garden" [1996] LMCLQ 460; and Peter Cane, "Negligent Solicitors and Doubly Disappointed Beneficiaries" (1983) 99 LQR 346).

125 Therefore, all that may be said is that *if* the Unintended Beneficiaries are willing to forgo their respective windfalls, then this would have been "most helpful" in mitigating the claim against Cheo (see Martyn Frost, Penelope Reed QC and Mark Baxter, *Risk and Negligence in Wills, Estates, and Trusts* (Oxford University Press, 2009) at para 3.61). However, that is a choice for them to make. In my view, they are perfectly entitled to adopt a self-interested view of matters by refusing to hand over what had legally become theirs. Accordingly, I do not agree that the plaintiffs' claim should fail simply because they have not made more persistent or vigorous demands of the Unintended Beneficiaries to disclaim their shares.

126 I thus find that the plaintiffs have genuinely attempted to redistribute the Testator's estate according to the New Will. That they are prevented from doing so by the Unintended Beneficiaries' reticence should not be held against them.

The plaintiffs could not have applied for probate on the Old Will

127 The defendants' alternative argument is that the plaintiffs should have applied for letters of probate on a notarised copy of the Old Will which the latter *somehow* managed to produce during these proceedings. The defendants claim that the plaintiffs must have had this copy of the Old Will in their possession but deliberately refrained from proving it so as to enlarge the Testator's estate through this action for damages. [note: 65] If probate is granted on the Old Will, then the loss to the plaintiffs will be considerably reduced because the distribution of the Testator's estate contemplated therein is more favourable to the plaintiffs than that which took place under intestacy.

Preliminary observation

128 My preliminary observation is that the defendants are on firmer ground here than they are with their previous argument that the Testator's estate should have been redistributed according to the New Will. This is because while the law does not compel the Unintended Beneficiaries to disclaim their windfall to allow for redistribution, the law does provide that probate may be granted in respect of a *copy* of a will if the original will is lost, mislaid, or cannot for any sufficient reason be produced after the testator's death (see s 9, Probate and Administration Act).

129 Therefore, even though it is the plaintiffs' position that the *original* version of the Old Will cannot be found at the Testator's death, I agree with the defendants' submission that the plaintiffs are still obliged to bring forward and apply for probate on a *copy* of the same if they possessed it and they should not have applied at that time for letters of administration based on intestacy. However, I should add that the matter does not end here. The defendants' submission succeeds only if I am further satisfied that the Old Will indeed remains as the last valid will of the Testator. This is because if the Testator is shown to have in fact *revoked* the Old Will, then it would be wrong to apply for probate based on a revoked will. The plaintiffs will, accordingly, be correct in applying for letters of administration since the Testator would have died intestate.

130 In light of the above position, the questions which I have to determine are: (1) whether the plaintiffs did possess a copy of the Old Will at the time letters of administration were applied for; and (2) if so, whether the Old Will had been revoked by the Testator.

The plaintiffs have a copy of the Old Will but only because they obtained it from the defendants during discovery

131 In dealing with the first question, I begin by noting AEL's oral evidence that, prior to applying for letters of administration, Siaw had instructed her to search for the Old Will to ensure that the

Testator had not left a will. [note: 66] AEL stated that she interpreted this instruction to mean that she should look for the *original* Old Will [note: 67] and she duly did so together with her siblings. However, they were unable to find it. [note: 68] At this point, I note that AEL's evidence suggests that a search had been conducted only for the *original* Old Will. Nevertheless, I believe that if she had found a *copy* of the same, she would naturally have informed Siaw of such discovery at the very least or forwarded the document to him for his perusal and further advice. In that sense then, I find that the Testator's children searched for the Old Will without necessarily confining themselves to simply locating it in its original form, although that may have been how they understood Siaw's instructions. Ultimately, that search proved to be in vain as the Old Will was not surfaced either in its original or duplicate forms.

132 Given the above, it is somewhat intriguing that the plaintiffs have managed to include a notarised copy of the Old Will in their bundle of documents which were tendered to court. This is especially so as AEL could not provide a clear explanation for how this had come to pass. [note: 69] The defendants have, unsurprisingly, made much of her inability to do so, alleging that the plaintiffs and the Unintended Beneficiaries must have collaborated to withhold the Old Will so that—through a combination of intestate distribution (which benefits the Unintended Beneficiaries) and the damages claimed in this action (which compensates the plaintiffs for their loss)—they will *all* be better off than if distribution had taken place according to the Old Will. [note: 70]

133 I am unable to agree with the defendants. Their allegations of a conspiracy to suppress the Old Will are very grave, impugning as they do the integrity of the plaintiffs and the Unintended Beneficiaries in their handling of the Testator's estate. A high level of proof will have to be overcome in order to make out such allegations, albeit still on the balance of probabilities (see *Ferneley v Napier and others* [2010] EWHC 3345 (Ch) at [102]).

134 In my view, the documentary evidence before me far from supports the defendants' case. To the contrary, it provides a simple and innocuous explanation for how the plaintiffs came to be in possession of a copy of the Old Will, which is that this copy was in fact given by the defendants' solicitors to the plaintiffs' solicitors during the discovery process leading up to trial. This is borne out by the email correspondence between both sets of solicitors which I discuss below.

135 Before doing so, however, I should point out how *the defendants* had obtained possession of a copy of the Old Will in the first place. As I had earlier mentioned in my narration of the facts (see [11] above), a notarised copy of the Old Will was handed to Cheo by the Testator during their first face-to-face meeting at Citibank's office. The Testator did this so as to aid Cheo in the latter's drafting of the New Will. This is not disputed by the parties as an attendance note by Cheo clearly recorded that this had taken place during the meeting. [note: 71]

136 When Cheo learnt that probate on the New Will had been rejected, he did not inform AEL that he had a copy of the Old Will or advise her that such a copy could be admitted into probate. It was only much later when these proceedings had commenced and discovery was underway that the defendants' solicitors raised the existence of this copy of the Old Will for the first time. This was done by way of a letter to the plaintiffs' solicitors dated 3 November 2011, the material part of which reads as follows: [note: 72]

> … While the signed original of [the Old Will] might have been destroyed, this does not mean that there are no copies of [the Old Will] in existence. In fact, we are instructed that our client [*ie*, Cheo] has a copy of the previous will and that your clients [*ie*, the plaintiffs] have never inquired

> with our client if they had a copy of [the Old Will]. Evidently your clients have not made any effort to find out if copies of [the Old Will] exist.

137 The plaintiffs' solicitors replied with a letter dated 8 November 2011 wherein they requested for a copy of the Old Will. [note: 73] The defendants' solicitors duly acceded to this request the very next day. They did so by sending the plaintiffs' solicitors a letter with the Old Will enclosed. [note: 74]

138 In my view, the simple explanation for how the notarised copy of the Old Will had made its way into the plaintiffs' bundle of documents is that it was given by the defendants' solicitors to the plaintiffs' solicitors during discovery and the latter had, as they were obligated to do, tendered it as a relevant document in these proceedings. It comes as no surprise to me that AEL was unable to explain how this copy of the Old Will came to be produced by the plaintiffs when she was confronted with it during cross-examination because it was her solicitors who received this document and included it in the plaintiffs' bundle to be used at trial. I therefore see no basis for drawing an adverse inference from her inability to explain the origins of the copy of the Old Will. I accept that, insofar as she is concerned, efforts have been made to locate the Old Will but such efforts yielded nothing.

139 In light of the above, I find that the plaintiffs did not know of or possess a copy of the Old Will when they proceeded to apply for letters of administration on the basis of the Testator's intestacy and hence, they cannot be faulted for doing so.

140 In fact, I observe that since Cheo had a copy of the Old Will with him throughout, it is striking that he did not volunteer this information to AEL once he knew of the New Will's invalidity. This is even more so considering that it is the defendants' submission here that a copy of the Old Will should have been admitted into probate. Simply put, I find that it is Cheo's *inaction* that prevented the plaintiffs from pursuing precisely the course which the defendants now advocate should have been taken. Indeed, Cheo can even be said to have *actively* diverted the plaintiffs away from this proposed course. This is because not only did he make no mention of the Old Will's existence when advising AEL on her options in dealing with the Testators' estate, he actually advised her on how letters of administration may be obtained instead.

141 In all respects, therefore, I cannot see how any blame can be attributed to the plaintiffs for failing to admit into probate a copy of the Old Will. The chain of causation thus remains unbroken.

Even if the plaintiffs had a copy of the Old Will, they can rely on the presumption of revocation

142 I am further satisfied that, even if the plaintiffs did possess a copy of the Old Will at the Testator's death, it had been revoked by the Testator. This therefore validates their act of applying for letters of administration.

(1) The conditions for raising the presumption of revocation are present

143 Section 15 of the Wills Act provides the exclusive means by which a will may be revoked. In particular, s 15(*d*) of that Act provides that a will may be revoked:

> … by the burning, tearing, or otherwise destroying the will by the testator, or by some person in his presence and by his direction, with the intention of revoking it.

144 As is apparent from this provision, the party which asserts that there is revocation by destruction must not only *prove* that the will has been destroyed but also that this is accompanied by the testator's intention to revoke. Alternatively, that party may choose to rely on the *presumption* of

revocation *animo revocandi* at common law to establish both these physical and mental elements.

145 The presumption of revocation *animo revocandi* arises where a will is last known to be in the possession of the testator and cannot be found at his death (see *Halsbury's Singapore* at para 190.240). The rationale for this evidentiary presumption was elucidated by Parke B in *Ann Maria Welch v Nathaniel Philips* (1836) 1 Moo PCC 299 ("*Welch v Philips*") and endorsed by Belinda Ang JC (as she then was) in *Lim Boon Ming v Tiang Choo Yang* [2002] 1 SLR(R) 456 ("*Lim Boon Ming*") at [49]. As Parke B explained in *Welch v Philips* (at 301):

> Now the rule of the law of evidence on this subject ... is this: That if a Will, traced to the possession of the deceased, and last seen there, is not forthcoming on his death, it is presumed to have been destroyed by himself; and that presumption must have effect unless there is sufficient evidence to repel it. It is a presumption founded on good sense; for it is highly reasonable to suppose that an instrument of so much importance would be carefully preserved, by a person of ordinary caution, in some place of safety, and would not be either lost or stolen; and if on the death of the maker, it is not found in his usual repositories, or else where he resides, it is in a high degree probable, that the deceased himself has purposely destroyed it. But this presumption, like all others of fact, may be rebutted by others which raise a higher degree of probability to the contrary.

146 I agree with the plaintiffs' submission that the presumption arises in their favour here.

147 First, it is not disputed that the Testator had passed only a *copy* of the Old Will to Cheo at their first meeting. It can reasonably be inferred, therefore, that the Testator retained possession of the *original* Old Will from which such copy was made. As there is no evidence of any subsequent handling of the original Old Will, I find that the Testator must have possessed it as its final custodian.

148 Second, the original Old Will is also not forthcoming on the Testator's death. There is evidence that the Testator had maintained a safe deposit box with the Hongkong and Shanghai Bank in Indonesia. Of several documents contained in the safe, only the New Will and a handwritten note providing for the distribution of the Testator's assets in Singapore and in Indonesia respectively were found. [note: 75] The original Old Will was not there. Subsequently, a search for the original Old Will was conducted by members of the Testator's family on Siaw's instructions but it also could not be found. As stated earlier (at [131] above), a copy of the Old Will also could not be found since the Testator's children would in all likelihood have brought it to Siaw's attention if it emerged during the course of their search for the original.

149 Accordingly, I find that all the necessary ingredients are present for raising the presumption that the Testator destroyed the Old Will with the intention of revoking it.

(2) The presumption of revocation is not rebutted by the doctrine of conditional revocation

150 This presumption, however, may be rebutted if the defendants can adduce evidence which raises a higher probability to the contrary (see *Williams, Mortimer and Sunnucks* at para 14-30). In this respect, the ordinary civil standard of proof on a balance of probabilities applies (see *Lim Boon Ming* at [51]).

151 In the present case, the defendants sought to rebut this presumption by relying on the common law doctrine of conditional revocation, [note: 76] which is also known as dependent relative revocation (see, for example, *Halsbury's Singapore* at para 190.237). The application of this doctrine was described in both succinct and practical terms by Sir James Hannen in *Dancer v Crabb and*

Thompson (1873) LR 3 P&D 98 as follows (at 104–105):

> … [A]lthough the testator does an act which unexplained would be one of revocation, yet if it appear[s] that he did it only as a part of the means of setting up another will, if that end be not accomplished the former will is not revoked. Or, to state the proposition in different language, if the testator's act can be interpreted thus: "Whatever else I may do, I intend to cancel this as my will from this time forth," the will is revoked; but if his meaning is, "As I have made a fresh will my old one may now be destroyed," the old will is not revoked if the new one be not in fact made. …

152 Relying on this proposition of law, the defendants thus argue that the Testator's intention to revoke the Old Will is not an absolute one but is conditioned on the making of a fresh will, *viz*, the New Will. Since that condition is not fulfilled, *ie*, the New Will is invalid, the Testator cannot be held to have intended to revoke the Old Will.

153 I find that the defendants cannot succeed in this argument as they fail to establish an important preliminary fact. In this regard, I agree with the plaintiffs that the doctrine of conditional revocation cannot be relied on unless there is *proof* of actual destruction of the Old Will by the Testator. [note: 77] The defendants cannot merely rely for this purpose on a *presumption* that the Old Will had been destroyed.

154 This is made clear early on by Lord Penzance in *Homerton and another v Hewett* (1872) 25 LT 854 where he declined to apply the doctrine of conditional revocation after making the following observation (at 855):

> … [T]he court has never been in the habit of applying [the doctrine of conditional revocation] to any case in which there was not *proof* of the destruction of that document. Here there is no proof of the fact of destruction. It is merely a surmise of law, and we do not know when the testator destroyed it, or what he said or did when he destroyed it. It would be a dangerous thing to *surmise* a transaction, and build upon it some theory by which the effect of revocation could practically be destroyed. … [emphasis added]

155 The subsequent cases have clarified that although Lord Penzance did not mean that the will's destruction must be proven by *direct* evidence (see *In the Estate of Botting* [1951] 2 All ER 997 at 1001), the party seeking to rely on this doctrine must still at least point to *some* evidence which is sufficient to satisfy the court that the will had been destroyed (see *In the Estate of Bridgewater, decd* [1965] 1 WLR 416 at 418B–C).

156 In the present case, the defendants have not furnished *any* evidence whatsoever of the Old Will's destruction. That is unsurprising because their own case is *not* that the Old Will (or a copy thereof) had been destroyed but that it has in fact been withheld by the plaintiffs in an attempt to enlarge the Testator's estate through these proceedings. Therefore, although the defendants successfully avoids contradicting their own case, I find that this has caused them to be unable to establish the destruction of the Old Will, a preliminary fact which has to be proven before the doctrine of conditional revocation can be brought into operation.

157 In light of the above, I find that the plaintiffs are entitled to rely on the unrebutted presumption of revocation *animo revocandi* even if they are in possession of a copy of the Old Will. That merely reinforces my view that the plaintiffs cannot be faulted for applying for letters of administration on the basis of the Testator's intestacy. Cheo's negligent supervision of the New Will's execution, which caused its invalidity, is therefore a direct cause of the plaintiffs' loss.

Loss

158 What is clear, up to this point, is that Cheo's breach of his duty to properly supervise the execution of the New Will has caused the plaintiffs' loss amounting to the difference in distribution under the New Will and that under intestacy, *ie*, AUD$719,375.36.

159 In this final part of the judgment, I consider whether the plaintiffs are entitled to claim the additional loss of 50m rupiah which they allegedly suffered as a consequence of hiring the Indonesian Firm on Cheo's advice which, in turn, was given upon discovery of the New Will's invalidity.

The plaintiffs are entitled to claim the additional loss of 50m rupiah

160 I do not see any objections in principle against allowing the plaintiffs to recover this additional loss.

161 The relevant evidence in respect of this claim is that once Cheo learnt of the rejected application for letters of probate on the New Will, he informed AEL accordingly and they arranged for a meeting at the first defendant's office. [note: 78] The advice which Cheo rendered to AEL at this meeting is set out in his email of the same date. [note: 79] In this email, Cheo laid out the steps required for applying for letters of administration and, as earlier mentioned (at [18] above), one of those steps includes the need to obtain an affidavit from Indonesian solicitors for a variety of purposes.

162 There is no dispute as to the veracity of the defendants' advice and, thus, there is no need for me to comment on it. Taking the defendants' advice to be sound, then, I do not see how the plaintiffs can be said to have acted unreasonably by relying on it to engage the Indonesian Firm.

163 The defendants, however, point out that a lack of itemisation in the invoice rendered by the Indonesian Firm casts doubt on the purposes for which they had been hired. This invoice merely provides that 50m rupiah is payable to the Indonesian Firm as a "Service Fee for Notarial Deeds, Legal Advice and Legal Service (KUSNO ALI, Deceased)". [note: 80] Thus, it is not clear what work has been done by the Indonesian Firm and, in particular, whether it is connected to the application for letters of administration in Singapore.

164 I do not find the defendants' argument here particularly persuasive. While I agree that the scope of services rendered by the Indonesian Firm is worded broadly in the invoice, I find that it is still reasonably clear that those services are rendered in respect of the distribution of the Testator's assets since the Testator is explicitly named therein. The Indonesian Firm clearly has not been engaged for something which is wholly unrelated to this.

165 In fact, I find that, more specifically, it can also reasonably be inferred that the advice sought from the Indonesian Firm relates to the distribution of the Testator's *Singapore* estate. This is because, by the time Cheo advised the plaintiffs on applying for letters of administration in Singapore, which was sometime in May 2011, the distribution of the Testator's *Indonesian* assets is already a settled matter. This appears from a document titled "Statement of Inheritance" which was witnessed by a notary officer in Indonesia and dated 17 January 2011. [note: 81] This foreign document deals fairly comprehensively with the Testator's affairs in Indonesia, setting out, *inter alia*, that the Testator had died without leaving any registered wills for the distribution of his Indonesian property, [note: 82] and that each of his six children are entitled to a one-sixth share under Indonesian law.

[note: 83] Since there is no difficulty in distributing the Testator's Indonesian property, I see no reason to doubt that the Indonesian Firm is indeed hired in connection with their application for letters of administration in Singapore.

166 Therefore, I find that it is sufficiently clear from the manner in which events transpired that the plaintiffs' act of engaging the Indonesian Firm is pursuant to Cheo's advice; hence the plaintiffs are entitled to claim the 50m rupiah which they incurred in this respect.

Conclusion

167 In the premises, I am satisfied that the plaintiffs have made out their claim in negligence against the defendants and are, accordingly, entitled to their total claimed loss of AUD$719,375.36 and 50m rupiah.

168 Parties are to write in for further hearing if no agreement can be reached on costs.

[note: 1] Agreed Bundle vol 1 at pp 25–27

[note: 2] Notes of Evidence dated 15 January 2014, Day 1, at p 57 lines 15–32

[note: 3] Notes of Evidence dated 15 January 2014, Day 1, at p 58 lines 5–8

[note: 4] Notes of Evidence dated 15 January 2014, Day 1, at p 172 lines 15–17

[note: 5] Notes of Evidence dated 15 January 2014, Day 1, at p 75 lines 26–27

[note: 6] Court exhibit tendered as "P5" on 28 January 2014, Day 7

[note: 7] Joint Affidavit of Evidence-in-Chief of AEL, AEM, AEN, [S], [M] and [D] dated 20 June 2013 ("Joint AEIC")

[note: 8] Notes of Evidence dated 15 January 2014, Day 1, at p 14 line 10 – p 15 line 4

[note: 9] Notes of Evidence dated 15 January 2014, Day 1, at p 19 lines 24–29

[note: 10] Notes of Evidence dated 15 January 2014, Day 1, at p 19 lines 30–31

[note: 11] Notes of Evidence dated 15 January 2014, Day 1, at p 121 lines 10–12 and at p 131 lines 7–11

[note: 12] Agreed Bundle vol 1, at pp 47–49 and pp 51–53

[note: 13] Agreed Bundle vol 1 at p 60

[note: 14] Affidavit of Evidence-in-Chief of Johnny Cheo Chai Beng dated 28 June 2013 ("Cheo's 's Affidavit") at para 5

[note: 15] Cheo's Affidavit at para 6

[note: 16] Agreed Bundle vol 1 at pp 51–53

[note: 17] Cheo's Affidavit at para 8; Plaintiffs' Closing Submissions dated 12 March 2014 ("Plaintiffs' Closing Submissions") at para 11

[note: 18] Agreed Bundle vol 1 at pp 64–65

[note: 19] Cheo's Affidavit at para 15

[note: 20] Cheo's Affidavit at para 16

[note: 21] Plaintiffs' Lead Counsel Statement dated 22 November 2013 at p 7; Defendants' Lead Counsel Statement dated 22 November 2013 at p 7

[note: 22] Agreed Bundle vol 1 at p 77

[note: 23] Agreed Bundle vol 1 at p 81

[note: 24] Agreed Bundle vol 1 at pp 73–75

[note: 25] Cheo's Affidavit at para 24

[note: 26] Agreed Bundle vol 1 at p 83

[note: 27] Cheo's Affidavit at para 27

[note: 28] Agreed Bundle vol 1 at p 87

[note: 29] Agreed Bundle vol 1 at p 93

[note: 30] Agreed Bundle vol 1 at p 95

[note: 31] Agreed Bundle vol 1 at pp 148–171

[note: 32] Agreed Bundle vol 1 at p 164

[note: 33] Agreed Bundle vol 1 at p 180

[note: 34] Agreed Bundle vol 1 at p 183

[note: 35] Agreed Bundle vol 1 at p 183, para 5

[note: 36] Agreed Bundle vol 1 at pp 189–190

[note: 37] Cheo's Affidavit at para 49

[note: 38] Notes of Evidence dated 29 January 2014, Day 8, at p 3 line 28 – p 4 line 1

[note: 39] Agreed Bundle vol 1 at p 212

[note: 40] Plaintiffs' Bundle of Documents dated 7 June 2013 at pp 24–27

[note: 41] Plaintiffs' Closing Submissions at para 24(b)

[note: 42] Plaintiffs' Closing Submissions at para 24(a)

[note: 43] Plaintiffs' Closing Submissions at paras 102–103

[note: 44] Defendants' Closing Submissions dated 12 March 2014 ("Defendants' Closing Submissions") at pp 141–146

[note: 45] Defendants' Closing Submissions at paras 342–344

[note: 46] Defendants' Closing Submissions at paras 345–346

[note: 47] Defendants' Reply Submissions dated 16 April 2014 ("Defendants' Reply Submissions") at para 40

[note: 48] Notes of Evidence dated 29 January 2014, Day 8, at p 149 lines 10–14

[note: 49] Notes of Evidence dated 29 January 2014, Day 8, at p 150 line 4 – p 151 line 4

[note: 50] Notes of Evidence dated 29 January 2014, Day 8, at p 158 line 1

[note: 51] Plaintiffs' Closing Submissions at para 71

[note: 52] Plaintiffs' Closing Submissions at para 70

[note: 53] Defendants' Closing Submissions at para 269

[note: 54] Defendants' Closing Submissions at paras 302–305

[note: 55] Defendants' Closing Submissions at paras 326–327

[note: 56] Defendants' Closing Submissions at para 328

[note: 57] Defence (Amendment No 2) dated 18 April 2013 at paras 2(b), 4 and 8

[note: 58] Agreed Bundle vol 1 at p 79

[note: 59] Notes of Evidence dated 29 January 2014, Day 8, at p 147 line 23

[note: 60] Notes of Evidence dated 29 January 2014, Day 8, at p 161 line 7 – p 162 line 7

[note: 61] Joint AEIC at paras 21(2) and (3)

[note: 62] Notes of Evidence dated 21 January 2014, Day 4, at p 99 line 23

[note: 63] Notes of Evidence dated 21 January 2014, Day 4, at p 97 lines 12–14

[note: 64] Notes of Evidence dated 23 January 2014, Day 6, at p 32 lines 18–21

[note: 65] Defendants' Closing Submissions at paras 164–165

[note: 66] Notes of Evidence dated 15 January 2014, Day 1, at p 188 lines 27–32

[note: 67] Notes of Evidence dated 16 January 2014, Day 2, at p 45 lines 11–21

[note: 68] Notes of Evidence dated 15 January 2014, Day 1, at p 180 lines 18–25

[note: 69] Notes of Evidence dated 29 January 2014, Day 8, at p 78 line 25 – p 79 line 16

[note: 70] Defendants' Reply Submissions at paras 23–26

[note: 71] Agreed Bundle vol 1 at p 62

[note: 72] Agreed Bundle vol 2 at p 290

[note: 73] Agreed Bundle vol 2 at p 292

[note: 74] Agreed Bundle vol 2 at p 295

[note: 75] Notes of Evidence dated 28 January 2014, Day 7, at p 76 line 1 – p 77 line 6

[note: 76] Defendants' Closing Submissions at para 366

[note: 77] Plaintiffs' Reply Submissions dated 14 April 2014 at para 210

[note: 78] Cheo's Affidavit at para 45

[note: 79] Cheo's Affidavit at para 46

[note: 80] Agreed Bundle vol 1 at p 190

[note: 81] Agreed Bundle vol 1 at pp 203–210

[note: 82] Agreed Bundle vol 1 at p 207

[note: 83] Agreed Bundle vol 1 at p 208

Copyright © Government of Singapore.