Cheo Yeoh & Associates LLC and another *v* AEL and others
[2015] SGCA 29

Case Number	: Civil Appeal No 114 of 2014
Decision Date	: 26 May 2015
Tribunal/Court	: Court of Appeal
Coram	: Chao Hick Tin JA; Andrew Phang Boon Leong JA; Quentin Loh J
Counsel Name(s)	: Chandra Mohan, Jonathan Cheong and Tan Ruo Yu (Rajah & Tann Singapore LLP) for the appellants; Andrew Ho Yew Cheng (Engelin Teh Practice LLC) for the respondents.
Parties	: Cheo Yeoh & Associates LLC and another — AEL and others

Tort – negligence – causation

Succession and wills – revocation – conditional

Succession and wills – construction

26 May 2015 Judgment reserved.

Chao Hick Tin JA (delivering the judgment of the court):

Introduction

1 This is an appeal against the decision of the High Court in *AEL and others v Cheo Yeoh & Associates LLC and another* [2014] 3 SLR 1231 ("the Judgment"). It concerns a claim in professional negligence against a firm of solicitors in which the trial judge ("the Judge") ruled in favour of the client. At the conclusion of the oral hearing, we reserved judgment.

The facts

2 [X] ("the Testator") was an Indonesian businessman. He was married to [Y]. He died in 2010, and is survived by six children (four sons, [S], [M], [D] and AEN, and two daughters, AEL and AEM) and fifteen grandchildren. AEL, AEM and AEN are the first three plaintiffs in the action and the first three respondents in this appeal. During his lifetime, the Testator made two wills for the distribution of his and [Y]'s assets in Singapore ("the Singapore Estate"). The first will was made together with [Y] on 16 November 1990 and shall be called the "Old Will". After the passing of [Y] on 29 January 2005, the Testator sought the help of Mr Johnny Cheo Chai Beng ("Cheo"), the 2nd appellant, to draft a second will. This will be called the "New Will".

3 The Testator passed away on 24 November 2010 and AEL communicated the news to Cheo on 2 December 2010 (the Judgment at [16]). [note: 1] Upon hearing the news, Cheo advised AEL to file for a grant of probate on the New Will and AEL did so on 22 March 2011. However the application was rejected as the New Will was executed only before a single witness (*ie*, Cheo only) when under s 6(2) of the Wills Act (Cap 352, 1996 Rev Ed) ("Wills Act") two or more witnesses are required to be present at the execution of a will for it to be valid.

4 On 5 May 2011, Cheo informed AEL via email of the rejection of the application for probate on

the New Will and also advised her to apply for letters of administration: [note: 2]

> The Court has just pointed out that your father's signature in his Will was witnessed by 1 person instead of 2 persons. This is contrary to Section 6 of the Wills Act in Singapore. As such you cannot rely on the Will.
>
> From my recollection at that time, I had prepared the Will and the arrangement was for your late father to sign this at the offices of Citibank in Singapore. He was to have procured a Citibank officer to sign as his second witness to the Will. I left Citibank's offices earlier as I had another engagement. Apparently he did not get the bank officer to also witness his signature.
>
> Nonetheless, your present options are as follows:
>
> 1) to rely on the Indonesian Will if it covers all properties. In this respect could we have [a] copy of the Indonesian Will to see if it covers all assets/properties, although you have said that the Indonesian Will only covers the Indonesian properties.
>
> 2) otherwise we can apply to the Singapore Court for Grant of Letters of Administration (instead of probate) on the basis that no Will was made. Instead of an executor (if there is a Will), an administrator will be appointed to handle the distribution. The distribution will then be subject to Indonesian law. Nonetheless, the person entitled to the property/assets under Indonesian law can file a Notice of Disclaimer to say that they decline their entitled share and instead want to give their share to the intended beneficiaries under the Will. In this way, effect will be given to your late father's Will.
>
> The Administrator(s) can then distribute accordingly.

5 On 9 May 2011, AEL was advised by Cheo to obtain an affidavit from Indonesian lawyers to confirm that (a) the Testator was domiciled in Indonesia; (b) his children are entitled under Indonesian law to apply for the Grant of the Letters of Administration; and (c) the distribution can be made under Indonesian law. [note: 3] AEL obtained the legal advice from Sura & Kantor Hukum Associates ("the Indonesian lawyers") at a cost of 50m rupiah. Subsequently, she and AEN hired a new solicitor, Mr Siaw Kheng Boon ("Mr Siaw"), who applied for the letters of administration on their behalf. This was granted by the Singapore High Court on 7 September 2011 (the Judgment at [19]).

6 The Singapore Estate, which comprised solely of money with a value of A$1,798,888.12, was distributed to the Testator's children according to the Intestate Succession Act (Cap 146, 1985 Rev Ed) ("the ISA"). The result of this was that [M] and [D], who would not have received anything under the New Will ("the Unintended Beneficiaries"), inherited money under intestacy because the New Will was invalid. As for [S], he received more under intestacy than he would have received under the New Will. On the other hand, AEL, AEM, AEN (*ie*, the first three Respondents) and the 4th to 18th Respondents ("the Grandchildren"), who were the intended beneficiaries under the New Will, suffered varying degrees of losses – the first three Respondents obtained a lesser amount than they would have received under the New Will, and the Grandchildren got nothing. The sums that the various parties would have inherited under the Old Will, the New Will and the ISA are set out hereunder in a comparison chart for convenience:

	New Will	**Old Will**	**Intestacy**
[M]	0%	10%	16.67%

[D]	0%	10%	16.67%
[S]	10%	10%	16.67%
AEL (1st Respondent)	20%	10%	16.67%
AEM (2nd Respondent)	20%	10%	16.67%
AEN (3rd Respondent)	20%	20%	16.67%
Grandchildren (4th to 18th Respondent)	30%	30%	0%

7 As can be seen, the Respondents inherited in total 50.01% of the Singapore Estate under intestacy as compared to 90%, which was what they would have got under the New Will. Their loss would have been just 20% if probate had been obtained in relation to the Old Will. This latter scenario will be relevant when we come to consider the Appellants' case that the Respondents should have obtained probate under the Old Will and thus mitigated their losses (see [38]–[46] below).

The decision below

8 The Respondents sued the Appellants (the 2nd Appellant being Cheo and the 1st Appellant being the firm in which Cheo was then a partner) in the High Court for negligence which they claimed led to their losses. Their case was that Cheo owed them a duty of care in supervising the execution of the New Will and he had breached that duty when there was only one witness to the execution of the New Will instead of two or more as required by law. Alternatively, the Respondents alleged that Cheo also breached his duty of care by drafting the New Will without expressly appointing AEL and AEN as executors and instead only naming them as "trustees". In the Respondents' view, Cheo's breaches of duty caused them to lose 39.99% of the Singapore Estate which they would otherwise have inherited. In addition, they also sought to be reimbursed by Cheo in respect of the sum of 50m rupiah which they had incurred in engaging the Indonesian lawyers consequent to the invalid New Will.

9 In defence, the Appellants contended in their pleadings that:

(a) Cheo had only been engaged to assist in drafting the New Will and not executing it. Accordingly, Cheo only owed a duty of care to the Testator and not the beneficiaries of the New Will since the latter were third parties to the solicitor-client relationship and no proximity existed between them and Cheo under the framework enunciated by this court in *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100 ("*Spandeck*"). Moreover, policy considerations also militated against imposing a duty of care on Cheo in the circumstances.

(b) The New Will's invalidity did not mean that the Singapore Estate had to be distributed according to the ISA and the Respondents could still have, amongst themselves, distribute the Singapore Estate in accordance with the New Will. Alternatively, the Respondents could have obtained probate on the basis of the Old Will which they were able to produce in the proceedings and hence mitigated their losses.

10 The Appellants also disputed that they should be held responsible for the 50m rupiah incurred in hiring the Indonesian lawyers.

11 The Judge found that the Appellants were liable for all the losses suffered by the Respondents. First, he held that the Appellants owed a duty of care to the Respondents, relying on the Court of Appeal's decision in *Anwar Patrick Adrian and another v Ng Chong & Hue LLC and another* [2014] 3 SLR 761 ("*Anwar*") where it was observed that solicitors *could* owe duties to beneficiaries in appropriate cases (the Judgment at [58]–[100]). Second, he found that the Appellants had breached their duty of care as Cheo had failed to properly supervise the execution of the New Will (the Judgment at [106]). Third, he also found that Cheo's negligence had caused the Respondents' loss as the Respondents had tried and failed to obtain probate on the New Will and could not have obtained probate based on the Old Will (the Judgment at [122]–[157]). The Appellants were thus held to be liable to the Respondents for the difference for what they would have inherited under the New Will as compared with their entitlement under intestacy, plus the 50m rupiah spent on the Indonesian lawyers (the Judgment at [158] and [166]). The Appellants appealed and some interesting points of law have been raised thereby touching on the presumption of revocation, the presumption against intestacy, and the doctrine of conditional revocation (also known as the doctrine of dependent relative revocation) and on how these concepts interact with each other.

The parties' cases

12 In this appeal, the Appellants' points of contention are that:

(a) the Respondents and the Unintended Beneficiaries had collaborated to manufacture a claim against them;

(b) the Respondents could have mitigated their losses by voluntarily distributing the Singapore Estate according to the division spelt out in the New Will or obtaining probate on the Old Will; and

(c) the Judgment should be set aside vis-à-vis the 4th, 5th, 6th and 17th Respondents ("the Absent Respondents") as they had failed to turn up for trial to testify in the High Court.

13 The Respondents' case is that:

(a) their claim against the Appellants is a *bona fide* and genuine one;

(b) they had tried to obtain the cooperation of the Unintended Beneficiaries to distribute the Singapore Estate according to the division spelt out in the New Will but failed;

(c) probate could not be obtained on the Old Will; and

(d) the judgment granted in favour of the Absent Respondents should stand.

The issues

14 Based on the arguments advanced by the parties, the following are the issues which arise for our consideration:

(a) whether the Respondents and the Unintended Beneficiaries had collaborated to manufacture a claim against the Appellants;

(b) whether the Respondents could have mitigated their losses by:

(i) distributing the Singapore Estate according to the division set out in the New Will by

getting the agreement of the Unintended Beneficiaries; or

(ii) obtaining probate on the Old Will; and

(c) whether the parts of the Judgment in favour of the Absent Respondents should be set aside on the ground that they had failed to attend court at the trial below.

15 We will consider each of these issues in turn, with a brief reference to the parties' submissions, followed by our views on it.

The manufactured claim issue

The Appellants' submissions

16 On this issue, the crux of the Appellants' submission is that the Respondents and the Unintended Beneficiaries collaborated to manufacture a claim against them. They submit that the courts have always been wary of manufactured claims by close-knit families and have never allowed recovery against solicitors in such cases as the families could always work together to give effect to a testator's intentions under an invalid will. [note: 4] Here, they submit that the Respondents deliberately chose not to give effect to the New Will. They say this for two reasons.

17 First, the Appellants submit that it is inexplicable for the Unintended Beneficiaries to insist on their strict legal rights in relation to the Singapore Estate when the Testator's children admitted to being a close-knit and loving family, often meeting for meals and being generous with each other even after the Testator's death; [note: 5] they also viewed the Testator's wishes as paramount and said that they would give effect to his intentions even though they were not legally obliged to do so, as evidenced by how they gave effect to his intentions in respect of the distribution of his Indonesian assets. In particular, the Appellants raise the following example: AEL was not an Indonesian citizen and could not own Indonesian property. As such, she had to renounce her share of the Testator's Indonesian estate. Her siblings never insisted on their strict legal rights and were content to take a smaller share than what they would have been legally entitled to so that AEL could also obtain a share of the Testator's Indonesian estate. Therefore the Appellants submit that it is inexplicable for the Unintended Beneficiaries to insist on their strict legal rights in relation to the Singapore Estate.

18 Second, the Appellants submit that the Judge erred in finding that the Respondents had, at a meeting in May 2011 ("the Meeting"), asked the Unintended Beneficiaries to renounce their windfall and they had refused. [note: 6] They say that this assertion cannot be true for the following reasons:

(a) The Respondents' account was contradicted by the testimonies of both [M] and [D]. [M] had said that he was only told that the New Will was invalid whereas [D] had said that he was only asked to give up his windfall after he had received his share of the Singapore Estate in October 2011. [note: 7]

(b) There was no record of the debts allegedly owing to AEL from [M] and [D] [note: 8] and the evidence also showed that they were not insistent on their strict legal rights as they took no steps to ensure that AEL was not short-changing them. [note: 9] That militated against the Respondents' characterisation of [M] and [D] as being calculative.

(c) [M] said that he would have returned his windfall to his siblings if he had the money and thus it was inexplicable why he would have refused to give up his windfall at the Meeting. [note:

10]

19 The Appellants also submit that it was impossible that the Singapore Estate had been distributed to the Unintended Beneficiaries on an intestate basis as:

(a) No bank accounts were opened for the Unintended Beneficiaries to receive the money that they were to inherit.

(b) AEM as the sole administrator of the Singapore Estate did not explain why she distributed the proceeds of the Singapore Estate in the manner that she did. [note: 11]

(c) The handwritten notes tendered to show that the Unintended Beneficiaries had received their shares of the Singapore Estate were produced without reference to source documents and AEL had admitted that those documents were created to reconcile the sums paid to the Unintended Beneficiaries with the cheques. [note: 12]

(d) AEL was unconvincing when she said that [M] and [D] had received their shares entirely in cash and brought the money back to Indonesia – there were no records of money being deposited into any bank accounts, no records of what happened to the money distributed to [M] and [D], and no records of the money being taken out of Singapore. Furthermore, there was no evidence provided by [M] that he had gambled away the money and no evidence provided by [D] that he had used the money to pay off his creditors. [note: 13]

20 Third, the Appellants submit that the Unintended Beneficiaries blatantly assisted the Respondents to manufacture their claim. According to them, AEL had admitted that all the Testator's children had agreed to give the same evidence and the Unintended Beneficiaries were only glad to assist, [note: 14] and it was clear that the siblings had manufactured the negligence claim in order to double the value of the Singapore Estate. [note: 15]

The Respondents' submissions

21 The Respondents first make the point that, in so far as the Appellants are seeking to challenge findings of fact made by the Judge, *Thorben Langvad Linneberg v Leong Mei Kuen* [2013] 1 SLR 207 at [13]–[14] clearly stood for the proposition that a trial judge is generally better placed to assess the truthfulness and credibility of witnesses, especially where oral evidence is concerned. As regards the Appellants' allegations that the claim in negligence was not genuine but manufactured, the Respondents, besides denying it, also submit that:

(a) *Anwar* stands for the proposition that *White v Jones* [1995] 2 AC 207 can apply in Singapore in so far as it is consistent with *Spandeck* and this has not been refuted by the Appellants. In fact, it is against public policy to allow the negligent Appellants to escape the consequences of their negligence.

(b) The cases cited by the Appellants in support of their position concerned the English situation where rectification is available as a remedy for a defective will. Singapore has no equivalent of that remedy and the only way in which they could obtain relief would be to seek remedy under the tort of negligence.

22 Second, the Respondents submit that the Judge was correct when he found that they had attempted at the Meeting to convince the Unintended Beneficiaries to give up their share under

intestacy but failed to achieve what they had hoped for and that the Unintended Beneficiaries had already received their share of the inheritance in cash. They rely on the following:

(a) AEL had testified that she had tried to convince the Unintended Beneficiaries at the Meeting to agree to distribute the Singapore Estate according to the proportions specified in the New Will, but two of the Unintended Beneficiaries did not agree and insisted on applying the laws of intestacy.

(b) The Appellants' argument in relation to the distribution of the Singapore Estate ignored the documentary evidence, *viz*, (a) the bank statements of the Testator's Citibank bank accounts; (b) the oral evidence of Ms Lim Mui Chin, a vice-president of Citibank who was subpoenaed to attend the trial; (c) the testimonies of the first three Respondents; (d) the passport entries of [M] and [D]; and (e) the cheques written by the 1st Respondent and her bank statements corroborating the Respondents' account of the events. Specifically with respect to [M] and [D], the Appellants had not raised any issue as to how [M] and [D] had handled their respective shares of the inherited wealth or put to them that they had never received their respective shares of the Singapore Estate.

23 Third, the Respondents submit that their claim is *bona fide* as it is undisputable that the Appellants were negligent and that there was no legal recourse available to the Respondents against the Unintended Beneficiaries since the latter had refused to agree to the distribution of the Singapore Estate in accordance with the New Will.

Our decision

24 We have reviewed the evidence and are satisfied that the decision of the Judge should be upheld. As can be seen from the submissions, the Appellants' case hinges on two key factual points, *viz*, the holding of the Meeting and the distribution of the Singapore Estate to the Unintended Beneficiaries. Their case is seemingly bolstered by the fact that the family is a close-knit one. However, as we will elaborate below, there are serious flaws in their assertion.

The parties' close relationship

25 First, the fact that there is a close relationship between the Respondents and the Unintended Beneficiaries does not necessarily point towards there being a collusion among them to manufacture a claim against the Appellants. The inherent assumption in the Appellants' submission is that there is no good claim which the Respondents' have against the Appellants; yet in the Appellants' case, the Appellants do not dispute that the invalidity of the New Will was "due to their failure to properly supervise its execution". As we see it, it is precisely because the Respondents and the Unintended Beneficiaries were close to each other that when the Appellants' negligence was discovered, the Unintended Beneficiaries unsurprisingly decided to assist the Respondents in recovering damages from the Appellants. Therefore, a close relationship between the parties does not *per se* suggest collusion to manufacture a claim against the Appellants. There is a leap in logic in the argument.

26 In their submissions, the Appellants seek to persuade us that under the second limb of *Spandeck*, policy concerns militate against the court's process being misused to advance manufactured claims where claimants collude with unintended beneficiaries *deliberately* so as not to give effect to an invalid will. They cite *Walker v Geo H Medlicott & Son (a firm)* [1999] 1 All ER 685 ("*Walker*") for the proposition that the courts have always been alive to the possibility of abuse in such cases and the risk of families manufacturing claims against solicitors so as to enhance the value of the estate. Therefore they contend that the court should be alive to the need to "guard against

manufactured claims made by purportedly disappointed beneficiaries to enlarge the size of the testator's estate at the expense of solicitors (or their insurers)". [note: 16]

27 We would observe that the comments in *Walker*, which warn against manufactured claims, were made in the context of the English position where the remedy of rectification is available. No such remedy is available in Singapore. Moreover, the comments there were not made in relation to the question of liability for negligence but pertained rather to the quantum of damages due to a failure to mitigate. In *Walker*, the facts concerned a plaintiff who inherited a one-sixth share of the testatrix's house. Contending that the testatrix led him to believe that the house would be devised to him, the plaintiff sued the solicitors saying that they were negligent in effecting the testatrix's instructions. The English Court of Appeal upheld the decision of the trial judge (who dismissed the claim) on two grounds.

28 First, the English Court of Appeal held that the plaintiff had failed to adduce convincing evidence as to how the will did not properly record the testatrix's intentions. The will drafted by the solicitor substantially reflected the contents of his attendance note concerning the testatrix (at 691) and it was established that the solicitor had a habit of only noting down the final instruction as to what was to go into the will, not the discussion between him and his client (at 694). The available evidence pointed towards a miscommunication between the plaintiff and the testatrix and that was insufficient to find that the lawyer was negligent (at 696).

29 Second, the English Court of Appeal held that had the lawyer been negligent, the plaintiff failed to mitigate his damage by bringing proceedings under s 20(1) of the Administration of Justice Act 1982 (c 53) (UK). It was in this context that the comments relied on by the Appellants were made by Simon Brown LJ (at 702):

> … there is always the risk of a family manufacturing a negligence claim in order to enhance the value of the estate from which the family will benefit at the expense of the solicitor, the court is justified in requiring the plaintiff instead to pursue his remedy of rectification. I hasten to say that there has been no suggestion whatever in the present case that this plaintiff or his witnesses have been guilty of any such deceit. I make the point merely to indicate why the situation here is … so very different from the norm.
>
> … this case is exceptionally *one in which the plaintiff should properly be required first to have taken the risk of claiming rectification*, assuming he wished to risk litigation at all.
>
> [emphasis added]

30 In our view, if the Appellants were relying on *Walker* as a proposition that guarding against manufactured claims is a relevant policy consideration under the second stage of *Spandeck*, as appears to be the case, they were in error as Simon Brown LJ's comments were made in the English context where rectification is available as a remedy and concerned a party's failure to mitigate his losses rather than the issue of whether a party is legally liable for the losses.

The Meeting

31 The next issue which the Appellants raise is that the Judge erred when he found that the Meeting took place. In our view, this submission has to fail for two reasons.

32 First, as the Respondents rightly pointed out, the trial judge bears the primary responsibility of finding facts and unless he has erred by making a finding against the weight of the evidence or has

made an inference of facts from the available evidence and where the appellate court will be in as good a position as the trial judge to make the inference, the findings of the trial judge should not be readily disturbed: *Goh Sin Huat Electrical Pte Ltd v Ho See Jui (trading as Xuanhua Art Gallery) and another* [2012] 3 SLR 1038 ("*Goh Sin Huat*") at [49]–[55]. At [55], *Goh Sin Huat* held that "the principal objective of the appellate process must be to do justice by correcting plainly wrong decisions." With this in mind, we are of the view that the Judge had weighed the accounts of both the Appellants and the Respondents and found that it was more probable than not that the Meeting took place. There is no cogent reason for us to disturb this finding of the Judge since the evidence on which the Appellants rely to dispute this finding of fact revolves around the testimonies of the Unintended Beneficiaries and the first three Respondents, and which the Judge had considered when he made his finding that the Meeting took place. [note: 17]

33 Second, we find that on the evidence, the Judge made no error. In our view, the testimonies of the Unintended Beneficiaries on which the Appellants seek to rely to build their case appear unconvincing and did not corroborate each other. This was conceded by the Appellants even on their own case, where they stated that: [note: 18]

(a) [D] stated that he was only told at the Meeting that the New Will was invalid and nothing else; and

(b) [M] stated that he was never asked to give up his windfall but later changed his evidence to say that he was asked only in October 2011 to give up his share.

34 We observe that the accounts of [M] and [D] were inconsistent with each other in so far as one said that he was asked to give up his share and the other was not and that [M]'s changing of the account of events undermined his own credibility. Moreover, a perusal of the Notes of Evidence shows that [D]'s recollection of the events was not as definite as the Appellants made it to be. We set out the portion of the evidence of [D] relied on by the Appellants: [note: 19]

Q	… [AEL] told this Court that there was a Chinese New Year eve dinner when you and … most of the siblings were there where he told everyone present that you and [M] would not get anything. You don't recall that happening at all?
A	I can't recall.
Q	Okay. Now, when was the first time you found out that you were going to get a share in the … monies in the Singapore bank account? When did you first find out?
A	After the information about this will is invalid (*sic*). That's all.
Q	Who told you this?
A	[AEL] and [AEN].
Q	What did they tell you exactly?
A	They told me this is not valid. …
Q	What else did they say?
A	That's all they told me, nothing else.

Q	So what does this mean for you? I mean, they say the will is not valid. Did you ask what is the implication for you?
A	I only waiting for the result.
Q	What result are you waiting for? They told you that the will is invalid, then … the two of them tell you this. You say nothing and then you're waiting for the result. Mr [D], it doesn't make sense. What result are you waiting for?
Interpreter:	The answer is this, Your Honour: "The Singapore money will be taken so I got no share but the grandchildren will get and then---if the will is not valid, then it will be divided by six."
Q	Who told you this?
A	From [AEL].
Q	Okay. Was this all said to you in the same conversation, the will in Singapore is defective; something is wrong; therefore you will get one-sixth? Is that what she said to you?
…	
A	We leave everything to [AEL] and [AEN]. We wouldn't know what happened, how many conversation, all these, we wouldn't know.
Q	Okay. But you recall being told that the will is invalid and because it is invalid, you will get a one-sixth share? You recall that being told to you?
A	Yes.
Q	Okay. *Can you recall anything else they told you in respect of this one-sixth share?*
…	
A	*No.*

[emphasis added]

35 As can be seen from the Notes of Evidence set out above, [D]'s evidence was not premised upon a definitive recollection that he was told nothing else – the best one can say about his evidence is that he could not remember if he had been told anything else by AEL. In our view, there is therefore nothing persuasive about the evidence from [M] and [D] that warrants a reversal of the Judge's factual finding and we affirm his finding that the Meeting did take place.

The distribution of the Singapore Estate to the Unintended Beneficiaries

36 Third, the Appellants seek to convince us that the Singapore Estate had in fact not been distributed to the Unintended Beneficiaries. The main issues raised by the Appellants in this respect concern (a) the fact that no bank accounts had been opened by the Unintended Beneficiaries for them to receive their shares of the Singapore Estate; and (b) the veracity of the handwritten notes which purported to record the debts which [M] and [D] owed to AEL.

37 In our view, there is once again no sufficient reason for us to disturb the Judge's findings.

Indeed, as pointed out by the Respondents' counsel, Mr Andrew Ho Yew Cheng ("Mr Ho"), the Appellants' case disregards the documentary evidence which points in favour of the Respondents' position, *viz*, the bank records, [note: 20] the passport records of [M] and [D], [note: 21] and the cheques written by the 1st Respondent (*ie*, AEL) to [M] and [D]. [note: 22] Furthermore, a perusal of the trial record also shows that the Judge had considered and was aware of the shortcomings in the Respondents' evidence in making his finding – he was aware that the handwritten note which was produced to show the debts of the [M] and [D] to AEL was done retrospectively. As the Judge had arrived at his factual finding after considering the evidence adduced before him, we see no reason to disturb his conclusion that the Unintended Beneficiaries had indeed received their shares of the Singapore Estate.

The mitigation of losses issue

38 We move next to the Appellants' submission on mitigation where they allege that the Respondents could have mitigated their losses by either (a) distributing the Singapore Estate in accordance with the New Will; or (b) obtaining probate on the Old Will. Before we examine the validity of each of these points we would make one observation. In their submission, they also seem to be saying that because of these failures on the part of the Appellants, the chain of causation was broken and thus no claim can be made by the Respondents against them. Causation and mitigation are, however, clearly distinct concepts and the submission seems to have conflated the two. It is indisputable that the New Will is invalid because of the negligence of Cheo and it is trite law that a plaintiff (in this case, the Respondents) must mitigate his loss (see Martyn Frost, Penelope Reed and Mark Baxter, *Risk and Negligence in Wills, Estates, and Trusts* (Oxford University Press, 2nd Ed, 2014) ("*Risk and Negligence*") at paras 23.01–23.09). This duty was exemplified in two English cases which involved solicitor's negligence in relation to wills, namely, *Walker* at 702 and *Horsfall and Powell v Haywards (a firm)* [1999] PNLR 583 ("*Horsfall*") at 589–590. It was held in these cases that in the event that the remedy of rectification was available to the claimant, he was obliged to avail himself of it before proceeding on a claim for damages against the solicitor. The extent of this duty, in the context of the English statutory framework, was restated in *Horsfall* as follows (at 588):

> (1) The plaintiffs were under a duty to take all reasonable steps to mitigate the loss suffered by them consequent on the breach of duty by the solicitors. They are not entitled to claim any part of the damage which is due to their neglect to take such steps. The question is: what would a reasonable plaintiff have done in the circumstances?
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> (2) As a general rule it is not the duty of the injured party "to embark on litigation in order to mitigate the damage suffered", even if a solvent defendant offers an adequate indemnity against the costs of enforcing a good *prima facie* right of action by proceedings of complexity and difficulty against a third party …
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> …
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> (3) This court held in *Walker v. Medlicott* [1999] 1 All E.R. 685 that, notwithstanding the general rule in *Pilkington v, Wood* (supra), the courts can reasonably expect, in a case of alleged negligent drafting of a will,
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> > "… the plaintiff to mitigate his damage by bringing proceedings for rectification of the will, if available, and to exhaust that remedy before considering bringing proceedings for negligence against the solicitor …" *per* Sir Christopher Slade.
>
> In his concurring judgment Simon Brown L.J. discussed the "powerful considerations" which make

it reasonable to require the plaintiff who claims to have been injured by the negligent drafting of a will initially to mitigate his loss by pursuing a claim for rectification and "to sue his solicitor only as a last resort".

(4) It is obvious that the application of the standard of reasonableness to steps to be taken in mitigation is capable of producing different outcomes according to the circumstances of the particular case. A general rule as to what are reasonable steps to be taken in mitigation should hold good for most cases. But no general rule, judicial or legislative, can reasonably be expected to cover all possible cases. …

39 With respect to the Unintended Beneficiaries, we find that the Respondents had acted reasonably, in the circumstances, when they sought to mitigate their losses by asking the Unintended Beneficiaries to give up their windfall. That said, we would emphasise that the Respondents are under *no duty* to ensure that the Unintended Beneficiaries would cooperate or would have the ability to cooperate. As the Judge rightly pointed out at [125] of the Judgment, all that can be said is that if the Unintended Beneficiaries are willing to give up their windfall, that would be most helpful. Nevertheless, it is also perfectly within their right to act in a self-interested manner by refusing to do so and they are not obliged to give up their windfall. Having considered the legal principles governing mitigation of loss in the context of defective wills, we now turn to look at the facts of the present case.

Could the Respondents have distributed the Singapore Estate according to the New Will?

40 The Appellants refer to five cases (*Whittingham v Crease & Co* (1978) 88 DLR (3d) 353; *White*; *Wilhelm v Hickson* [2000] 4 WWR 363; *Carr-Glynn v Frearsons (a firm)* [1999] Ch 326 and *Horsfall*) for the proposition that when "disappointed beneficiaries were successful in recovering money against solicitors for their lost inheritance, it was always impossible for them to redistribute the testator's estate according to the defective will in question." [note: 23] The point which the Appellants are trying to make is that as the Respondents were, at all material times, close to the Unintended Beneficiaries and this was shown by the fact that the siblings had cooperated with each other by refraining from insisting on their strict legal rights in relation to the Indonesian assets in order to give effect to the testator's intentions, [note: 24] it was implausible that the Unintended Beneficiaries would insist on their strict legal rights in relation to the Singapore Estate and refuse to distribute the Singapore Estate according to the New Will. They submit that, in the circumstances, the evidential burden should shift to the Respondents to show that they had tried to but could not give effect to the New Will.

41 In this regard, we think that the Appellants have conflated two distinct concepts when they purport to draw a cause and effect relationship between solicitors' liability to disappointed beneficiaries and the possibility of redistributing a testator's estate according to the specifications of a defective will. A perusal of the cases reveals that the solicitors were liable not because there was no way to redistribute the testator's assets according to the defective will but because the solicitors were negligent and the disappointed beneficiaries were in a proximate enough relationship to the solicitors to warrant a finding of liability against the solicitors.

42 Turning to the facts of the instant case, the Judge found that the Meeting did take place and at the Meeting, the Unintended Beneficiaries were asked to agree to distribute the Singapore Estate according to the New Will but declined to do so. We do not see any sufficient basis for us to disturb that finding. Next, with regard to the argument that, as the Unintended Beneficiaries did not insist on their strict legal rights as far as the Indonesian assets were concerned, that goes to show that the claim instituted in this action is not genuine but an attempt to enlarge the Singapore Estate at the

expense of the negligent solicitors, we have much difficulty in accepting this submission.

43 First, the Appellants concede that they are seeking to draw an inference from the close ties which the Respondents have with the Unintended Beneficiaries that the Respondents have deliberately chose not to give effect to the New Will. Their case on this was not based on any direct evidence. The relevant passages of the Appellants' case are as follows: [note: 25]

> 87. In the defective wills cases set out above, the courts have allowed recovery for disappointed beneficiaries who were genuinely unable to effect a redistribution of the testator's estate due to uncooperative unintended beneficiaries.
>
> 88. This is not the case here. The Testator's Children are a close-knit and cooperative family. They have always been willing to ignore legal formalities, and can sit down, discuss, and agree to distribute their father's assets amongst themselves. They are content to sacrifice their strict legal rights for each other, and have shown that they are keen and willing to give effect to their father's wishes in the absence of any legal requirement compelling them to do so, even if this would be financially detrimental to them.
>
> 89. The irresistible inference from the evidence is that the Respondents and the Unintended Beneficiaries deliberately chose not to give effect to the New Will.
>
> [emphasis in original]

44 We are of the view, however, the fact that the family is close and are sacrificial towards one another is not, *ipso facto*, conclusive as to whether they *deliberately* chose not to give effect to the New Will but colluded to manufacture a claim against the Appellants instead. We reiterate that in paras 88–89 of the Appellants' case (reproduced above at [43]), the Appellants' counsel, Mr Chandra Mohan ("Mr Mohan"), has again conflated two things, *viz*, the fact that the siblings were close-knit and the fact that the Unintended Beneficiaries were uncooperative in regard to distributing the Singapore Estate in accordance with the New Will. His argument appears to us to be that since the Unintended Beneficiaries were close to the Respondents, they would have cooperated to give effect to the Testator's intentions under the New Will. In our opinion, that is a conclusion built on mere conjecture – people can have close relationships and yet hold different opinions on and decline to cooperate on many other things, especially where money is concerned. Accordingly, we also decline to hold that the burden of proof shifts when one can show that a family is close-knit and has a history of family members desisting from insisting on their strict legal rights – indeed, public policy reasons may militate against such a holding given that a reversal of the burden of proof would at the same time prejudice families which have carefully nurtured strong ties with one another. Why should the law hold against families with strong familial bonds? Burden of proof must be determined in accordance with established law.

45 Second, there is again no basis for the Appellants to seek to draw a parallel between the foreign cases in which the claimants failed to avail themselves of the remedy of rectification and the present case in which the Respondents allegedly failed to obtain the cooperation of the Unintended Beneficiaries in giving effect to the New Will. What a person is legally obliged to do is distinct from what *might* be the *moral* thing to do. While in the English and Canadian cases the remedy of rectification was available to the claimants at law, the recourse of obtaining cooperation from the Unintended Beneficiaries in the present case is hardly of the same nature as the relief of rectification which is available in those jurisdictions. Here, all that the Respondents could do as a matter of mitigating their losses would be to put in a request to the Unintended Beneficiaries to cooperate with them in giving effect to the New Will. But there was no obligation on the part of the Unintended

Beneficiaries to cooperate and accede to the request. Since the Judge had found, and we have affirmed, that the Meeting did take place and at the Meeting, the Unintended Beneficiaries were asked to give up their windfall gains but declined to do so, we are of the view that the Respondents could not have distributed the Singapore Estate according to the division spelt out in the New Will.

46 For the above reasons, we hold that the Respondents have fulfilled their duty to mitigate their losses. The fact that they failed to achieve their objective because the Unintended Beneficiaries refused to cooperate does not mean that they have not mitigated.

Could the Respondents have obtained probate on the Old Will?

47 The Appellants' second submission on the Respondents' alleged failure to mitigate their losses depends on whether the Old Will was valid and whether the Respondents could have obtained probate on it. The parties' submissions centre mainly on whether the Old Will was still valid by virtue of the doctrine of conditional revocation, also known as the doctrine of dependent relative revocation. In this regard, there is a need for us to consider the interactions between the presumption of revocation, the presumption against intestacy, and the doctrine of conditional revocation.

The law on the revocation of wills

48 We will begin our analysis with s 15 of the Wills Act, which reads:

> **Revocation of will or codicil**
>
> **15**. No will or codicil, or any part thereof, shall be revoked otherwise than —
>
> …
>
> (c) by some writing declaring an intention to revoke it, and executed in the manner in which a will is by this Act required to be executed; or
>
> (d) 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*.
>
> [emphasis added]

49 It is often with respect to ascertaining whether the testator had an intention of revoking an earlier will that litigation ensues since the mere act of tearing or destroying the will is insufficient to show an intention to revoke the same. In *In re Jones, decd* [1976] 1 Ch 200 ("*Re Jones*") at 206, Buckley LJ held that:

> The fact that at the time of the mutilation or destruction the testator intended or contemplated making a new will, is not … conclusive of the question as to whether his intention to revoke was dependent upon his subsequently making a new will. A testator who has made a will in favour of A may become disenchanted with A and decide not to benefit him. He may well at the same time decide that in these circumstances he will benefit B instead of A. It does not by any means follow that his intention to disinherit A will be dependent on his benefiting B, or making a will under which B could take.
>
> If he were told that for some reason B could not or would not benefit under his new will, would the testator say, "In that case, I want my gift to A to stand," or would he say, "Well, even so, I do not wish A to benefit"? In the former case, his *animus revocandi* at the time of the

destruction or mutilation of his will could properly be regarded as dependent on the execution of a new will, but not in the latter.

It is consequently necessary to pay attention to the circumstances surrounding the mutilation or destruction of the will to discover whether any intention that the testator then had of revoking the will was absolute or qualified, and if qualified, in what way it was qualified.

[emphasis added]

(1) The presumption of revocation

50 Given that the subject of ascertaining a testator's intention always involves ascertaining the intention of the dead, the law developed the presumption of revocation in order to provide some certainty and aid in the quest to ascertain a testator's intention. According to the learned authors of John G Ross Martyn *et al*, *Theobald on Wills* (Sweet & Maxwell, 17th Ed, 2010) at paras 8–035 to 8–036, the presumption of revocation manifests itself in two situations:

Will missing at death

8–035 A will or codicil last known to be in the testator's possession but which cannot be found at his death is presumed to have been destroyed by the testator with the intention of revoking it. The strength of the presumption varies according to the security of the testator's custody of the will—the safer the security, the stronger the presumption. The presumption may be rebutted by evidence of non-revocation, such as evidence that the will was destroyed by enemy action or accident, or ***evidence showing the testator's continuing goodwill towards the beneficiaries and his intention to adhere to the will.*** On the other hand the presumption may be supported by evidence showing, for instance, the testator's intention not to adhere to the will. ***The court decides on the balance of probabilities, having regard to all the evidence, whether the testator destroyed the will with the intention of revoking it: the party propounding the will is not bound to establish an explanation as to why the will was missing at death.***

…

Will mutilated at death

8–036 A will which has been in the testator's possession but which is found to be torn or mutilated at his death is presumed to have been torn or mutilated by the testator with the intention of revoking it in whole or in part. Again this presumption may be rebutted by evidence of non-revocation. …

[emphasis added in bold italics]

51 The same position is taken in *Williams, Mortimer and Sunnucks on Executors, Administrators and Probate* (John G Ross Martyn and Nicholas Caddick, gen eds) (Sweet & Maxwell, 20th Ed, 2013) ("*Williams, Mortimer and Sunnucks*") at para 14–28 where the learned authors state that a presumption arises that the testator destroyed the will *animo revocandi* if a will or codicil is last traced into the testator's possession and is not forthcoming at his death after reasonable searches and inquiry has been done. This is founded on the reason that the law presumes that a document as important as a will would be "carefully preserved" in a safe place and would not be lost or stolen (see *Welch v Phillips* (1836) 1 Moo PC 299).

52 The Canadian position is also similar to the English position as seen from the comments in Thomas G Fenney, *The Canadian Law of Wills* vol 1 (Butterworths, 3rd Ed, 1987) at p 143, where it is stated that "there are two situations in which the law presumes a destruction *animo revocandi*: (a) where a destroyed or mutilated will is found among the testator's papers, and (b) where the testator's will is lost and cannot be found." At pp 134–135, the learned author comments (in relation to the situation where the testator's will is lost and cannot be found) that:

> The same presumption, that of destruction *animo revocandi*, … arises also when it is shown that the testator's will was last traced to his possession but cannot be found on his death. The presumption is well recognized in Canadian case law, but the fullest inquiries for the lost will must be shown to have been made for a court to apply the presumption in the first place. The presumption is often rebutted either by the circumstances tending to show a contrary conclusion or by declarations made by the testator showing that he regarded the lost will as valid and subsisting. However, strong evidence is usually needed to rebut the presumption.
>
> When the presumption is rebutted, probate may be granted of the contents of the lost will after proof of due execution, on such secondary evidence as a copy or a draft or solicitor's notes or any other written evidence, and indeed, if it is sufficiently clear, even oral testimony may be probated. In weighing parol evidence of the contents of a lost will, there would seem to be no good reason for a court applying any higher standard than the ordinary standard of proof in civil cases …

53 This presumption of destruction *animo revocandi*, however, is not an immutable one and in *In the Estate of Botting* [1951] 2 All ER 997 ("*Botting*") at 998, Havers J held that the presumption is capable of being rebutted by the doctrine of conditional revocation. However Mr Ho, counsel for the Respondent, submits that the doctrine of conditional revocation can have no application in Singapore by virtue of ss 17(1) and 15(*d*) of the Wills Act. It is to this doctrine of conditional revocation that we will now turn.

(2) The doctrine of conditional revocation

(A) Does the doctrine of conditional revocation apply in Singapore?

54 Mr Ho submits that the Appellants' argument that the doctrine of conditional revocation applies ignores s 17(1) of the Wills Act which provides that a revoked will, in this case the Old Will, can only be revived by re-execution; that provision, read together with s 15(*d*) of the Wills Act, would suggest that the doctrine of conditional revocation is inapplicable in Singapore. [note: 26] Mr Ho also submits that a copy of the Old Will cannot be admitted into probate as the original Old Will had been revoked by the Testator. [note: 27]

55 Mr Mohan, on the other hand, submits that s 17(1) is perfectly consistent with the doctrine of conditional revocation for two reasons. First, if the will was never revoked, s 17(1) would not come into operation and is inapplicable to begin with. Second, in other Commonwealth jurisdictions where provisions *in pari materia* with s 17(1) are in force, the applicability of the doctrine of conditional revocation in those jurisdictions has never been doubted. In particular, he cites *Williams, Mortimer and Sunnucks* at para 14–41 which states that the doctrine of conditional revocation qualifies the express provisions of statute law, in support of his contention.

56 In our view, Mr Mohan's position is correct. We observe that in his submissions, Mr Ho concedes that his position is based on "first principles". [note: 28] However, we note that the Wills Act takes

reference primarily from the English position and mirrors extensively the provisions in the laws of other Commonwealth countries which are *in pari materia* to s 17(1) – the doctrine exists in: (a) Canada (see, *eg*, *Bolton and Hess v Toronto General Trusts Corporation* (1961) 29 DLR (2d) 173 ("*Bolton*")); (b) Australia (see, *eg*, *Re Lindrea (decd)* [1953] VLR 168); (c) New Zealand (see, *eg*, *Gordon and another v Beere and others* [1962] NZLR 257); and (d) Malaysia (see Mahinder Singh Sidhu, *The Law of Wills, Probate Administration and Succession in Malaysia and Singapore* (International Law Book Services, 1998) at p 65). The existence of the doctrine in Singapore is also acknowledged in *Halsbury's Laws of Singapore* vol 15 (Butterworths Asia, 2013 Reissue) at para 190.237, which states that:

> If there is an absolute intention to revoke, the revocation takes place immediately but if the revocation is intended by the testator to take effect only upon the fulfilment of a condition, the revocation is conditional. Thus if the condition is unfulfilled, the revocation does not take effect and the will is still operative. ...

The same is acknowledged in G Raman, *Probate and Administration in Singapore and Malaysia* (LexisNexis, 3rd Ed, 2012) at p 35. We, therefore, agree with Mr Mohan that the doctrine of conditional revocation applies in Singapore. We would only add that underlying the doctrine of conditional revocation would appear to be the presumption against intestacy, because intestacy will follow unless a prior revoked will is rendered still valid by the doctrine of conditional revocation.

57 Moreover, we observe that the Appellants' case never engaged s 17(1) of the Wills Act and to that extent, we fail to see the relevance of s 17(1), which speaks of how wills or codicils if revoked cannot be revived unless there is a re-execution of the will or codicil with an intention for the revival to take place. The Appellants' case is that the Old Will had *never been revoked* since the revocation of the Old Will is, in their view, conditional on the validity of the New Will and that the Old Will had, in the present action, been withheld by the Respondents deliberately in order to enlarge the Singapore Estate through these proceedings (the Judgment at [127]).

(B) How should the doctrine of conditional revocation apply?

58 Having held that the doctrine of conditional revocation exists in Singapore, the next question pertains to the manner in which the doctrine should apply. In this regard, the Judge held that the doctrine of conditional revocation cannot be relied upon unless there is proof of actual destruction of the Old Will by the Testator (the Judgment at [153]), citing *Homerton v Hewett* (1872) 25 LT 854 ("*Homerton*") at 855 in support of his holding. We observe, however, that in a subsequent paragraph, the Judge proceeded to qualify *Homerton* by stating that the party seeking to rely on the doctrine of conditional revocation could prove destruction by showing "*some* evidence which is sufficient to satisfy the court that the will had been destroyed" (the Judgment at [155], citing *In the Estate of Bridgewater, decd* [1965] 1 WLR 416 at 418). As there is some controversy over the threshold of proof which is needed before the doctrine of conditional revocation can be invoked, we will now address that issue.

(I) Must there be actual destruction of a will before the doctrine of conditional revocation can be invoked?

59 *Homerton* was a case in which the testator had died in January 1871. Before his death, he had executed a will in 1870 ("the 1870 Will") in which he left a hospital a sum of money and appointed his nephew as his residuary legatee. He also revoked all the other wills prior to the 1870 Will. The 1870 Will could not be found after his death despite searching through all his repositories and the issue was whether the doctrine of conditional revocation could apply such that an earlier will dated March 1867

was valid.

60 In that case, the court held that the doctrine of conditional revocation did not apply as it could only be applied when there was actual proof that the 1870 Will had been destroyed. In cases where the last will of the testator could not be found, the court held that the will might be presumed *destroyed* but the doctrine of conditional revocation could not apply as there was *in fact* no destruction proved. Therefore, since on the facts of *Homerton* there was no proof of actual destruction of the will, the doctrine of conditional revocation could not apply (at 855):

> … But then it is said that if this will has been destroyed it was for the purpose of setting up the codicil, and the case therefore comes within the principle of dependent relative revocation. But the force of that is destroyed by this remark, that the court has never been in the habit of applying that doctrine to any case in which there was not proof of the destruction of the 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. In both the cases cited there was evidence of destruction and in all cases before it applies the principle of dependent relative revocation the court must have some of such evidence. …

6 1 *Homerton* was subsequently the subject of discussion in *Botting*. In the latter case, the testator had passed away with his last will dated 11 June 1949 being invalid due to a want of formalities. The plaintiff asserted that the testator's earlier will dated 14 February 1947 should be valid and the issue was whether the doctrine of conditional revocation could nevertheless apply even if the last will (that of 1947) was not forthcoming on the testator's death to rebut the presumption of revocation. Havers J held that even if the testator's last will was not forthcoming on his death, the doctrine of conditional revocation *could still apply* although no actual destruction of the will was shown. He dealt with Lord Penzance's decision in *Homerton* in this manner (at 1001–1002):

> … It was also argued that, in considering the question whether the doctrine of dependent relative revocation applies, I am not entitled to presume the fact of destruction or to draw the inference from the evidence that the testator did destroy the will. If I am satisfied on the whole of the evidence that the destruction was conditional on another will being made, then the doctrine of dependent relative revocation applies, and, if it turns out that this later instrument is invalid because it has not been properly attested and executed by the testator, the result is that the will of 1947 has not been revoked by that destruction because the testator did not have any *animus revocandi*. *The passage in the judgment of Lord Penzance in Homerton v Hewett created great difficulties in my mind on the question whether, on the facts of this case, I should apply the doctrine of dependent relative revocation, but I do not think that Lord Penzance meant that it was necessary to call some witness who could say: "I saw the testator burn, or otherwise destroy, the document." There are various ways in which the fact of destruction or the time of destruction can be proved. The evidence before me is such that I feel that the proper inference to draw from it is that the will was destroyed by the testator conditionally and that I am able to put an approximate time and date when its destruction took place.* If so, it seems to me that that would be consistent with the decision of Lord Penzance. I think there is sufficient evidence to satisfy me that the will was destroyed by the testator shortly before June 11, 1949, when he made this document, which I find, he thought and intended to be a new will. In those circumstances I do not think the decision of Lord Penzance in *Homerton v Hewett* precludes me from applying the doctrine of dependent relative revocation, and I hold that it does apply. … [emphasis added]

62 It was also observed by D W G S, "Will—Dependent Relavtive Revocation—(a) Missing will—Presumed destruction *animo revocandi* rebutted—Evidence of destruction—(b) Mutilated Will—Whether destruction contemporaneous with unfulfilled intention to alter will" (1952) 11 CLJ 304 at p 305 that Lord Penzance's remarks seemed "broad" since there was significant authority for the position that if the possession of a missing will can be traced to the testator, the presumption that it was destroyed by the testator must prevail until rebutted. Similarly, *Williams, Mortimer and Sunnucks* observed at para 14–50 that:

> The doctrine has been applied ... in order to rebut the presumption of revocation where a known will was not forthcoming on the death of the testator …

63 On the views that have been expressed by Havers J, we agree that no actual destruction of the Old Will has to be shown before one could invoke the doctrine of conditional revocation in the present case. The position also makes eminent sense when one considers the relationship between the act of destroying a will and the arising of the presumption of revocation – if the will or codicil can be traced into the testator's possession and is not forthcoming on his death after reasonable effort has been made to search and inquire about it, the presumption arises that he has destroyed it with the intention of revoking it: *Williams, Mortimer and Sunnucks* at para 14–28. That being the case, it would also only be fair if a person who seeks to invoke the doctrine of conditional revocation be allowed to do so as long as he can show sufficient evidence to suggest that the will was destroyed. The battle line is then drawn on the basis of which party's case is more probable in light of the surrounding evidence.

(II) Must one show that the revocatory act is wholly and solely referable to an intention to set up another will?

64 The question that next arises is this: what does a person have to show in order to rebut the presumption of revocation when he seeks to rely on the doctrine of conditional revocation? In this regard, *Powell v Powell* (1866) LR 1 P&D 209 ("*Powell*") is instructive and stands for the proposition that in cases of conditional revocation, the revocatory act must be "referable, wholly and solely", to the intention of setting up some other testamentary paper. We set out the relevant portions of the judgment in full (at 212–213):

> What, then, if the act of destruction be done with the ***sole intention*** of setting up and establishing some other testamentary paper, for which the destruction of the paper in question was only designed to make way? It is clear that in such case the "animus revocandi" had only a conditional existence, the condition being the validity of the paper intended to be substituted, and such has been the course of decision in the various cases quoted in argument. But then it is said, that this method of reasoning has only hitherto been applied to cases in which the destruction of the script has accompanied the execution of the instrument intended in substitution; and that no decided case can be found in which the instrument intended to be established has been a long previously executed paper. But I fail to perceive a distinction in principle between the two cases. For what does it matter whether a testator were to say, "I tear this will of 1860 because I have this day (1st of January, 1861) executed another designed to replace it;" or, "I tear this will of 1860 because I desire and expect that the effect of my so doing will be to set up my old will of 1840?" *In either case, the revocatory act is based on a condition, which the testator imagines is fulfilled. In both cases the act is referable, not to any abstract intention to revoke, but to an intention to validate another paper; and as in neither case is the* ***sole condition*** *upon which revocation was intended fulfilled, in neither is the "animus revocandi" present.* … [emphasis added in italics and bold italics]

65 The above quote must be read and understood in the context of the unique facts of *Powell*. In *Powell*, a testator had executed a will in 1864 ("the 1864 Will") revoking all his former wills and this will was subsequently destroyed in 1865 with an expressed intention that he wished to substitute it with an *earlier* will which was made in 1862 ("the 1862 Will"). This is the unique aspect of the case, as typically testators seek to replace earlier wills with later ones, not the other way round. The issue was whether the doctrine of conditional revocation applied to revoke the 1864 Will upon the validity of the 1862 Will. It was held that since the revocation of the 1864 Will could be referable *solely* to the testator's intention to validate the 1862 Will, and as the 1862 Will remained invalid, the 1864 Will was not revoked. In the normal case, like the present, the presumption of revocation will therefore be rebutted if the person seeking to rely on the doctrine of conditional revocation shows sufficient proof that the revocation of the earlier will is *wholly and solely* attributable to the validity of a later will.

Our decision

66 In our view, the facts before us (*ie*, the Old Will could not be found after a thorough search) are sufficient to give rise to the presumption of revocation, which the Appellants have failed to rebut by adducing sufficient evidence to invoke the doctrine of conditional revocation and hence the presumption against intestacy. Let us explain.

67 The Appellants' first submission is that the Respondents had deliberately concealed a copy of the Old Will which they had in their possession and should have produced it so that probate could be obtained on it (by virtue of s 9 of the Probate and Administration Act (Cap 251, 2000 Rev Ed) ("the Probate Act")) and the Respondents' losses could as a result be reduced. Since the Respondents did not, they themselves had caused the additional losses which they suffered and the Appellants should not be held liable for those additional losses. We would pause here to observe that this submission of the Appellants is dependent upon the factual question as to whether the Old Will had been revoked. If the Old Will had been revoked, s 9 of the Probate Act would not apply. [note: 29] Consequently, even if the Respondents possessed a copy of the Old Will, they would not be able to obtain probate on it as the Old Will would be invalid.

68 To address this factual question as to the revocation of the Old Will, the Appellants rely on the doctrine of conditional revocation, [note: 30] arguing that clearly the Testator's revocation of the Old Will was conditional on the validity of the New Will. [note: 31] They submit that in construing wills, the default position is a presumption against intestacy and here, the Testator must be presumed to have revoked the Old Will conditionally as it would be insensible to apply the ISA rather than the Old Will – both [M] and [D] would receive 6.67% more under intestacy than what each of them would receive had probate been taken out under the Old Will and that could not have been what the Testator intended. [note: 32] On the other hand, the Respondents highlight that the doctrine of conditional revocation cannot apply here as the Testator's intentions were to disinherit [M] and [D] absolutely. [note: 33]

(1) Was the Old Will revoked absolutely by the Testator?

69 Having considered all the circumstances of the case, we find that it is not entirely clear whether the Testator's intention was for the Unintended Beneficiaries to be disinherited absolutely or conditionally. The New Will's revocation clause read as follows: [note: 34]

> I hereby revoke all wills and testamentary dispositions heretofore made by me with regard to My Singapore Assets including the Joint Will that I had made on 16 November 1990 with my late wife,

[Y]. I declare this to be my Last Will and Testament with regard to My Singapore Assets.

70 The Respondents' submission is dependent wholly on AEL's testimony in cross-examination. In summary, AEL said that the Testator was very upset with [M] and [D] and hence did not want to leave them any money; [note: 35] it was only due to the fact that their mother loved them unconditionally that they were named in the Old Will. In AEL's view, the Testator's absolute desire to disinherit them by revoking the Old Will was clear as after [Y] (the Testator's wife and their mother) passed away, he went about setting up the New Will in which he disinherited [M] and [D] completely. [note: 36]

71 In our opinion, the extent of proof required in order to establish an absolute intention to revoke the Old Will is a high one as evidenced from the various cases in which such an absolute intention was found. In *Bolton*, the court found that there was an absolute intention to revoke the will as the testator had burnt the will on his kitchen stove (at [1]) and it was only after more than two years had passed before he started making his new will (at [6]). Even when he eventually did, he mentioned it in a chat with his solicitor (at [6]); it was only under such circumstances that an absolute intention to revoke was found. The proof required in *In the Goods of Gentry* (1873) LR 3 P&D 80 also appear to be significant as in that case, the testator had burnt a later will and declared his earlier will to be valid. The later will was found to have been revoked absolutely as the testator had expressly said that he desired to cancel the later will. To add that it was conditional upon the validity of the earlier will was to give his declaration an unnatural reading (at 83). In view of the significant extent of proof that is needed to show that the Testator had a revocatory intent that was absolute, we are unpersuaded that he had such an intention based on AEL's testimony regarding the Testator's bad relationship with [M] and [D]. The evidence before the court of such an intention on the part of the Testator to absolutely disinherit [M] and [D] is a mere inference drawn from what AEL said which we do not think is sufficiently definitive.

(2) Does the presumption of revocation arise in this case?

72 However, we find that in relation to the Old Will there is sufficient evidence to raise the presumption of revocation. It is undisputed that Cheo was only given a copy of the Old Will by the Testator (the Judgment at [147]) and there is no evidence as to where the original copy of the Old Will is. On the Testator's death, the Old Will could not be found – it was neither in the safe deposit box that he had maintained with the Indonesian outfit of the Hong Kong and Shanghai Bank in which he kept the New Will and a couple of handwritten notes, nor could it be found when the members of the Testator's family searched for it on Mr Siaw's instructions. Moreover, Mr Mohan also concedes that the original Old Will was never found. Accordingly, we find that sufficient evidence was shown by the Respondents to invoke the presumption of revocation. The Old Will is thus presumed revoked unless rebutted by the doctrine of conditional revocation.

(3) Can the Appellants succeed in invoking the doctrine of conditional revocation?

73 The Appellants submit that in the construction of wills, the starting point is that of a presumption against intestacy and they rely on Lord Esher MR's judgment in *In re Harrison* (1885) 30 Ch D 390 ("*Re Harrison*") for the rationale that one ought to presume that a testator who has executed a will "did not intend to die intestate when he has gone through the form of making a will." [note: 37] They submit that when the presumption against intestacy is applied to the present case, the Testator must be presumed to have revoked the Old Will conditionally and in any case, the presumption against intestacy comports with the facts as it would be insensible to apply the ISA rather than the Old Will since the Unintended Beneficiaries would obtain larger shares of the Singapore

Estate under the ISA than the Old Will. [note: 38] On the other hand, the Respondents submit that the doctrine of conditional revocation (undergirded by the presumption against intestacy) does not apply as the Appellants have failed to adduce any evidence to invoke it. [note: 39] As the presumption against intestacy featured prominently in the Appellants' submission on this point, we will now discuss how the presumption against intestacy should interact with the presumption of revocation and the doctrine of conditional revocation.

(A) The parties' submissions on the presumption against intestacy

74 Mr Mohan tendered to us the decisions of *Dwyer v Irish* (1985) 20 ETR 98 ("*Dwyer (HC)*") and *Dwyer v Irish* (1986) 23 ETR 1 ("*Dwyer (CA)*") (collectively, the two judgments are referred to as "*Dwyer*"). He submits that they are persuasive authority as the facts in *Dwyer* are highly similar to the facts before us. Mr Mohan also points us to [19]–[22] of *Dwyer (HC)*, which referred to the presumption against intestacy in the context of applying the doctrine of conditional revocation. Both these decisions in *Dwyer* raise interesting questions about the scope and extent of application of the presumption against intestacy.

7 5 *Dwyer* was a case in which the plaintiff was both the executor and the beneficiary of the testator's will. The defendants were the next of kin of the testator, who executed her last will on 5 March 1980 ("the 1980 Will"). That will was contained in an envelope which had the hand-written words "This is cancelled as of June 30 '84". This will and the envelope were put into a larger envelope upon which was written "This will has been cancelled as of June 30/84 in favour of a later (illegible word) Mabel C. Cobb". Subsequently, another typewritten will dated 4 October 1984 was found. It was signed by Ms Cobb but unwitnessed. Hence it was invalid and the issue before the court was whether the 1980 Will was valid by virtue of the doctrine of conditional revocation. Goodridge J in *Dwyer (HC)* held that the 1980 Will was valid:

> 19 The trend of the jurisprudence appears to be *that where there is a revocation of a will conditional upon some other instrument and that instrument fails or does not exist, then the revocation itself is void.* Where a testator purports to revoke a will in contemplation that another instrument has taken its place or will take its place and that has not happened or does not happen, then the revocation will generally be void. It is, however, a question of fact.
>
> 20 Upon the facts, *it must be found that the revocation was dependent upon an instrument specifically referred to and because that instrument was not shown to have validity or for that matter existence, the revocation fails.*
>
> 21 … The facts do not indicate any particular conclusion apart from what one may deduct from the actual handwriting of the deceased itself. The onus of proof lies on the party seeking to prove that a will has been effectively revoked. In this case that onus lies on the defendants. They have failed to discharge the onus. They have produced a conditional revocation but have failed to establish that the condition validating the revocation exists.
>
> 22 *That onus is not lightly discharged for there is a presumption against intestacy.*
>
> 23 Upon these findings the will of the deceased, dated March 5, 1980, is declared to be valid and may be admitted to probate …
>
> [emphasis added]

76 This first instance decision in *Dwyer (HC)* was upheld by the Newfoundland Court of Appeal in

Dwyer (CA). At this juncture, we will set out the arguments of Mr Ho – he submits that the facts in *Dwyer (HC)* are dissimilar to the facts in the present case – in *Dwyer (HC)*, it was clear that the testator intended to revoke her will on the basis that some other instrument would be executed; the present facts do not show such an intention on the part of the Testator. Additionally, he submits that the facts of *Bolton* (a landmark decision which was largely relied upon in *Dwyer (HC)*) are more alike the facts in the present case since in *Bolton*, the testator had destroyed his will by burning it and expressing an intention to make a new will. Unfortunately, he died before he could do so. The Manitoba Court of Appeal held that the doctrine of conditional revocation did not apply as the act of burning the will was done *clearly and consciously* and did not support the finding of a conditional revocation (at [5]).

(B) Our views on the presumption against intestacy vis-à-vis the presumption against revocation and the doctrine of conditional revocation

77 In our view, the presumption against intestacy is a rule of construction used in ascertaining a testator's ambiguous intention under a valid will and this is clear from a survey of the textbooks attesting to the same. *Williams on Wills* vol 1 (Francis Barlow *et al*, eds) (LexisNexis, 10th Ed, 2014) ("*Williams on Wills*") at para 51.1 comments that:

> **Doubtful cases.** A testator may well intend to die partly intestate; and, when he makes a will, he is testate only so far as he has expressed himself in his will. *Where, however, the construction of the will is doubtful, the court acts on the presumption that the testator did not intend to die either totally or partly intestate, provided that on a fair and reasonable construction there is no ground for a contrary conclusion.* In pursuance of an intention to avoid intestacy found in a will, or in pursuance of this presumption, the court does not give an unnatural meaning to a word or construe plain words otherwise than according to their plain meaning. *The application of the presumption is dependent on the context and the circumstances.* [emphasis added]

78 The presumption against intestacy has been applied in the context of the doctrine of conditional revocation. *Williams, Mortimer and Sunnucks* comments at para 14–49 that:

> **Evidence—presumption against intestacy**
>
> All the circumstances surrounding the apparent revocation must be examined to see whether the testator's intention when revoking his will was absolute or qualified. It is a matter of drawing the proper inference from those circumstances, and no particular burden lies on the party alleging that the revocation was conditional. *However, the usual presumption against intestacy applies in cases where an intestacy would result if the [doctrine of conditional revocation] were not applied. There is a* ***golden rule of construction*** *that where a testator has executed a will in solemn form you must assume that he did not intend to make it a solemn farce.* In this context it has to be remembered that at the time of the earlier cases there was no such presumption. The heir was the "darling of the law" and the courts were not so reluctant to upset a will which displaced the heir. Thus the earlier cases in which the doctrine was applied should perhaps be given even greater force than later cases where the presumption against intestacy reinforced the doctrine. Even where there is no evidence about the act of revocation at all, as where the revocation is presumed from the fact that the will was last seen in the testator's possession but was not found on his death, the court may nevertheless draw the necessary inference from the known facts. … [emphasis added in italics and bold italics]

79 Local and English case law have also applied the presumption against intestacy as a rule of

construction and we refer to three cases in this regard. The first case is *In re Edwards* [1906] 1 Ch 570 at 574, where Romer LJ held that:

> … It is said that the Court leans against an intestacy. *I do not know whether that expression at the present day means anything more than this, that in cases of ambiguity you may … gather an intention that the testator did not intend to die intestate, but it cannot be that, merely with a view to avoiding intestacy, you are to do otherwise than construe plain words according to their plain meaning.* A testator may well intend to die intestate. When he makes a will he intends to die testate only so far as he has expressed himself in his will. … [emphasis added]

80 The second case is *Re Harrison*, a case in which the testatrix's will was incompletely filled in. It was disputed as to whether she intended to die intestate or bequeath her property to her niece. Lord Esher MR applied the presumption against intestacy and held that when a testatrix has executed a will in solemn form, it must be assumed that she did not intend for it to make it a solemn farce. Since it was possible to read the will as gifting the estate to the niece, the court applied the presumption against intestacy and gave effect to the will, even though it was incompletely filled in.

81 The third case is *Re Lee Chew Kuen, deceased* [1965–1967] SLR(R) 809 in which the testator perished together with his wife and two daughters while on their way to Europe. The case was brought by the trustees of his will to ascertain whether his wife's estate was entitled to a share of his estate as his will provided only for two scenarios: (a) where his wife survived him for more than 30 days from his death; and (b) where his wife predeceased him. Neither scenario eventuated, hence necessitating the lawsuit in which it was held that there was a presumption against intestacy in such cases (at [9]) and the general tenor of the testator's will suggested that it was never the testator's intention for intestacy to result. Therefore the court construed a particular clause in the testator's will as providing for the scenario where the testator's wife *did not* survive him for more than 30 days and on that footing, the court held that the clause's construction revealed that the testator did not intend for his wife to inherit any share of his estate should she not survive him for more than 30 days. The point that this case makes is therefore that the court will always seek to read a will in a manner that avoids intestacy.

82 To recapitulate, we are of the view that the presumption against intestacy is a rule of construction in the interpretation of wills where there is ambiguity as to the meaning of the will or the intention of a testator (and where the presumption of revocation is not invoked), and to the extent that the issue turns on an interpretation which could result in intestacy, the presumption against intestacy will operate such that the will is read in a manner that seeks to avoid intestacy. In this regard, it is also important to take cognisance of the limits within which the presumption against intestacy operates. *Williams on Wills* at para 51.3 comments that:

> **Limits of the presumption.** This presumption … gives no assistance to the court where the contest is not between testacy and intestacy, but between two gifts in the same will. It is not enough to satisfy the court that intestacy was not intended. To oust the title of the persons claiming on intestacy it must be distinctly shown that there are words in the will sufficient to constitute a gift of property in question, expressly or by implication to some particular donee, and the burden of proof is on the alleged donee to that extent. It is a rule of law and not merely a rule of construction that those entitled on intestacy are not to be deprived of their statutory rights otherwise than by express words or necessary implication in the will. That is to say, the will must clearly and unambiguously show the intention of the testator to leave his property to someone else and in such a way that there is certainty both in the subjects and the objects of the gifts, and in the manner in which the gift takes effect. A gift uncertain in any of these respects is void.

83 Returning to the submissions of the counsel for the parties, we note that in *Dwyer (HC)* the presumption against intestacy was mentioned but in *Bolton* neither the presumption of revocation nor the presumption against intestacy was mentioned. In our view, the facts of *Dwyer (HC)* appear to be sufficient to trigger the presumption against intestacy as the facts were such that the will sought to be relied on had been found in an envelope within a larger envelope upon which it was written "This will has been cancelled as of June 30/84 in favour of a later (illegible word)". The court in *Dwyer (CA)* held that it was incumbent on the party seeking to show revocation to prove it (at [8]) and on the words contained in the will, it was "impossible" to arrive at any other conclusion than that the testator's revocatory intention was not absolute (at [8]). This was also the view of the judge in *Dwyer (HC)* who mentioned the presumption against intestacy at [20]–[22] in the following context which we quote again for ease of reference:

> 20 Upon the facts, it *must be found that the revocation was dependent upon an instrument specifically referred to and because that instrument was not shown to have validity or for that matter existence, the revocation fails.*
>
> 21 There might well be a postscript to this finding. The facts do not indicate any particular conclusion apart from what one may deduct from the actual handwriting of the deceased itself. The onus of proof lies on the party seeking to prove that a will has been effectively revoked. In this case that onus lies on the defendants. They have failed to discharge that onus. They have produced a conditional revocation but have failed to establish that the condition validating the revocation exists.
>
> 22 That onus is not lightly discharged for there is a presumption against intestacy.
>
> [emphasis added]

84 In *Bolton*, the Manitoba Court of Appeal did not need rely on the presumption of revocation – the testator in that case had burnt the will and the court found that in the circumstances, it was clear that he had an intention to revoke the will.

85 We would state the legal position in relation to the presumption of revocation, the presumption against intestacy and the doctrine of conditional revocation as follows:

> (a) First, in the absence of affirmative evidence showing that the testator intended to revoke a will, the court should examine the facts to see if the presumption of revocation is attracted. The presumption of revocation will be triggered if (i) the will is burnt, torn or otherwise destroyed; or (ii) the will is not forthcoming upon the testator's death despite reasonable efforts to locate it. Once triggered, the presumption is a rebuttable one and it is for the person seeking to rebut the presumption to prove his case.
>
> (b) Second, if the presumption of revocation is triggered, then where a person seeks to rely on the doctrine of conditional revocation to rebut the presumption of revocation, it is for him to (i) show some evidence that the will has been destroyed; (ii) prove the existence of the condition upon which revocation was *wholly and solely* premised; and (iii) the non-fulfilment of that condition such that the will he is seeking to rely on is still valid.
>
> (c) Third, the presumption against intestacy operates as a rule of construction in a case where the testator's intention is ambiguous and the presumption of revocation has not arisen or been rebutted by the doctrine of conditional revocation.

(C) The Appellants have failed to prove that the doctrine of conditional revocation should apply

(C) The Appellants have failed to prove that the doctrine of conditional revocation should apply

86 As we have found that the presumption of revocation applies, it is for the Appellants to rebut it and persuade us that the doctrine of conditional revocation should apply (see *Re Surridge* (1970) 114 SJ 208). On this count, we find that they have failed. In order for the Appellants to successfully raise the doctrine of conditional revocation, they must be able to show this court that (a) there is some evidence to suggest that the Old Will was destroyed; (b) there is a condition upon which revocation is *wholly and solely* premised upon; and (c) that condition failed. In their submissions however, they have made no effort to rebut the presumption of revocation which had arisen; what they have done is to contend that the validity of the Old Will is a matter of construction and a rule concerning the construction of wills is the presumption against intestacy. It is on that basis that they seek to persuade us that the Testator must have intended for the Old Will to be revoked conditionally upon the New Will's validity. [note: 40] That is only to be expected, for their case is also that the Old Will is deliberately withheld by the Respondents in order to enlarge the Singapore Estate. However, as rightly noted in the Judgment at [156], it is also this submission that is ultimately fatal to their argument that the doctrine of conditional revocation should apply – if it is their case that the Old Will is deliberately withheld, it cannot also be their position that there is sufficient evidence of the Old Will's destruction.

87 It is evident that the difficulty with the Appellant's position is that they have not adduced any evidence to rebut the presumption of revocation of the Old Will. Moreover, we observe that the words of the Testator in the New Will (see [69] above) seem to indicate the reverse situation, *ie*, that he wished to revoke the Old Will first before entering into the New Will. Be that as it may, as we hold that the presumption of revocation applies due to the inability of the Respondents to find the original copy of the Old Will, the Appellants' reliance on the presumption against intestacy pursuant to the doctrine of conditional revocation is consequently misconceived; before relying on the presumption against intestacy, the Appellants must first rebut the presumption of revocation which arose due to the missing Old Will by showing sufficient evidence to invoke the doctrine of conditional revocation. They have failed to do so. Indeed, they have not even pleaded the doctrine of conditional revocation. Ironically, it was the Appellants who by their email of 5 May 2011 advised the Respondents to apply for letters of administration on the basis of intestacy even though they themselves then had a copy of the Old Will and had at no time advised the Respondents of its existence.

88 Additionally, the Appellants argue that it would make more sense for probate to be obtained on the Old Will than under the ISA and this indicates that the Testator must have intended to revoke the Old Will conditionally. [note: 41] However, the Appellants are not able to point to anything, either spoken or done by the Testator, to indicate that the Testator's revocation of the Old Will was conditional. Therefore the fact that it might make more sense (and this sense is only from the limited angle of mitigation of damages) for probate to be obtained on the Old Will rather than applying for letters of administration under the ISA, does not take the Appellants argument very far. The question of limiting the extent of liability of the solicitor who was to ensure that the New Will executed was in accordance with the law (and who was however negligent in that regard) could not have been something within the contemplation of the Testator.

89 Finally, and in any event, the Appellants' actions also militate against their own contention. Although they held a copy of the Old Will (the Respondents did not), they failed to advise the Respondents to obtain probate under the Old Will in their 5 May 2011 email (see [87] above). Why did they omit to so advise the Respondents, if they genuinely believed that the Testator had revoked the Old Will conditionally on the New Will being valid and they clearly knew then that the New Will was invalid? In our view, their actions show their lack of belief in the validity of the Old Will and goes against their case theory in this present appeal (quite apart from the fact that the doctrine of

conditional revocation was not even pleaded by the Appellants).

90 The Appellants have failed to rebut the presumption of revocation via the doctrine of conditional revocation and the Old Will is presumed revoked. There is consequently no question of ascertaining the intention of the Testator under the Old Will or the application of the presumption against intestacy. In the circumstances, their appeal must fail.

The Absent Respondents issue

91 This last issue can be dealt with briefly. The Appellants submit that under O 38 r 2(1) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed), the court's leave is necessary for admitting an absent party's Affidavit of Evidence in Chief ("AEIC"). It reads:

> Without prejudice to the generality of Rule 1, and unless otherwise provided by any written law or by these Rules, at the trial of an action commenced by writ, evidence-in-chief of a witness shall be given by way of affidavit and, unless the Court otherwise orders or the parties to the action otherwise agree, *such a witness shall attend trial for cross-examination and, in default of his attendance, his affidavit shall not be received in evidence except with the leave of the Court*. [emphasis added]

92 The Appellants point out that the Absent Respondents had failed to turn up at trial. Since leave of court was not obtained, the Appellants argued that the Absent Respondents' AEICs should not constitute part of the evidence and consequently their claims are not made out.

93 In our view, O 38 r 2(1) must, as stated in the sub-rule itself (which provides "without prejudice to the generality of rule 1"), be read together with O 38 r 1, which states:

> Subject to these Rules *and the Evidence Act (Cap. 97)*, and any other written law relating to evidence, any fact required to be proved at the trial of any action begun by writ by the evidence of witnesses shall be proved by the examination of the witnesses in open Court. [emphasis added]

94 To this end, ss 32(1)(*j*)(iii) and 32(3) of the Evidence Act (Cap 97, 2008 Rev Ed) ("the Evidence Act") are relevant and they state:

> **Cases in which statement of relevant fact by person who is dead or cannot be found, etc., is relevant**
>
> **32.—(1)** Subject to subsections (2) and (3), statements of relevant facts made by a person (whether orally, in a document or otherwise), are themselves relevant facts in the following cases:
>
> ...
>
> **or is made by person who is dead or who cannot be produced as witness;**
>
> (j) when the statement is made by a person in respect of whom it is shown —
>
> ...
>
> (iii) that he is outside Singapore and it is not practicable to secure his attendance.

…

(3) A statement which is otherwise relevant under subsection (1) shall not be relevant if the court is of the view that it would not be in the interests of justice to treat it as relevant.

95 The Absent Respondents were outside Singapore and according to AEL, it was not practical to secure their attendance for the following reasons:

(a) The 4th and 5th Respondents were taking care of their children in Jakarta which was then badly affected by flood;

(b) The 6th Respondent was unable to obtain a passport extension to come to Singapore as the floods in Jakarta had cut off the electricity to the immigration office; and

(c) The 17th Respondent was unable to take time off her studies in the USA to travel to Singapore for the trial.

96 The Appellants contend that the reasons given by the Absent Respondents were "feeble" and their unavailability was only known on the final day of trial. [note: 42] However, the fact is that the Judge had the final say as to the evidence's admissibility under s 32(3) of the Evidence Act and he found it unnecessary to find that "it would not be in the interests of justice to treat [the Absent Respondents' evidence in their AEIC] as relevant".

97 In any event, we found this argument by the Appellants to be extremely technical as the Respondents' claims all arose from the same set of facts. There was nothing extra that the Absent Respondents needed to prove in order to succeed. Indeed, the Absent Respondents' AEIC were part of a joint AEIC prepared by the 4th to the 18th Respondents (save for the 9th Respondent). That being the case, there was nothing to prevent the court from making a finding of fact on the basis of another Respondent's evidence and accepting it in favour of the Absent Respondents and which was what the Judge did. We thus dismiss the Appellants' appeal in relation to the Absent Respondents.

Conclusion

98 In the result, we dismiss the Appellants' appeal with costs and the usual consequential orders.

[note: 1] Record of Appeal ("ROA") vol 5(1) at p 93.

[note: 2] ROA vol 5(1) at p 180.

[note: 3] ROA vol 5(1) at p 183.

[note: 4] Appellants' Skeletal Submissions ("ASS") at para 3(a).

[note: 5] ASS at para 7.

[note: 6] ASS at para 18.

[note: 7] ASS at para 19.

[note: 8] ASS at para 21.

[note: 9] ASS at para 22.

[note: 10] ASS at para 23.

[note: 11] ASS at paras 28–29.

[note: 12] ASS at paras 34–35.

[note: 13] ASS at para 31.

[note: 14] ASS at para 42.

[note: 15] ASS at para 44.

[note: 16] Appellants' case ("AC") at para 78.

[note: 17] AC at paras 54–55.

[note: 18] AC at para 55.

[note: 19] Core Bundle ("CB"), Vol 2 at pp 92–93.

[note: 20] Respondents' Supplementary Core Bundle ("RSCB") at pp 122 & 134.

[note: 21] RSCB at pp 162–163.

[note: 22] CB at p 124.

[note: 23] AC at para 80.

[note: 24] ASS at para 13.

[note: 25] AC at paras 87–89.

[note: 26] Respondents' Skeletal Submissions ("RSS") at para 14.

[note: 27] RSS at para 15.

[note: 28] ASS at para 17.

[note: 29] AC at para 187.

[note: 30] ASS at p 15.

[note: 31] ASS at para 59.

[note: 32] ASS at paras 61–62.

[note: 33] RSS at para 17.

[note: 34] ROA vol 5(1) at p 74.

[note: 35] RSCB at p 116.

[note: 36] RSCB at p 117.

[note: 37] AC at para 169.

[note: 38] AC at para 172.

[note: 39] RSS at para 16.

[note: 40] ASS at para 61.

[note: 41] ASS at paras 61–62.

[note: 42] AC at paras 243–244.

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