Koh Cheong Heng *v* Ho Yee Fong
[2011] SGHC 48

Case Number : Originating Summons No 566 of 2010

Decision Date : 02 March 2011

Tribunal/Court : High Court

Coram : Judith Prakash J

Counsel Name(s) : Mr Lee Ee Yang (WongPartnership LLP) for the plaintiff; Ms Corinne Taylor (Legal Solutions LLC) for the Litigation Representative of the defendant

Parties : Koh Cheong Heng — Ho Yee Fong

Gifts

Trusts

2 March 2011

Judith Prakash J:

Introduction

1 The plaintiff in this action, Mr Koh Cheong Heng ("the plaintiff"), applied via Originating Summons No 566 of 2010 for an order to compel his wife, Mdm Ho Yee Fong ("the defendant"), to transfer all her right, title and interest in the property known as 168 Stirling Road #10-1185 Singapore 141168 ("the Property") to the plaintiff, to be held by the plaintiff absolutely. The defendant, acting through her litigation representative who was her niece, agreed to the order being made. On 14 January 2011, after considering the plaintiff's submissions, I made the order sought.

2 These written grounds of decision are being issued because the case raised interesting issues with regard to the doctrine of *donatio mortis causa*.

Facts

3 The plaintiff and the defendant have been married since 1970. They have no children. At the time of hearing, the defendant was 71 years old and the plaintiff was 69 years old. Neither party was employed.

4 The plaintiff purchased the Property in July 1972 and was registered as the sole owner. From about 1993, the plaintiff has been in ill health and has had several operations. In July 2006, the plaintiff was admitted to hospital with an infection. He remained there in a serious condition for more than two months. Upon his discharge, his mobility was extremely limited and he could only move around with the aid of a wheelchair. Because the defendant was herself advanced in age and found it difficult to attend to the plaintiff, the couple agreed in 2007 that the plaintiff be admitted to the Society For The Aged Sick ("the Home") so that he could be properly taken care of.

5 By a transfer document that was registered at the Registry of Titles on 3 November 2006 the plaintiff transferred his interest in the Property to the defendant and himself as joint tenants. As a result, each of the defendant and the plaintiff became the possessor of an undivided interest in the

whole of the Property. The transfer was made as a gift without any payment from the defendant because the plaintiff wanted to provide for his wife in case he predeceased her. The plaintiff explained that he had signed the transfer on 8 August 2006 while he was in hospital and thinking he would not recover, because he was concerned to ensure that his wife would own the flat in the event of his death. The execution of the transfer was witnessed by an officer from the Housing and Development Board ("the HDB") who had attended at the hospital expressly for that purpose. At the time, the plaintiff did not have a lawyer and had not received legal advice on the options open to him.

6 In 2008, the defendant suffered severe head injuries from a fall. The defendant underwent rehabilitation treatment from 2008 to 2009 but, after her discharge from hospital, she remained partially immobile, with very poor short term memory. She now requires assistance in her daily activities such as eating, hygiene and toilet needs. She is also not able to handle money or deal with assets. The defendant will probably not be able to bequeath the Property by will because, according to a Specialist Medical Report from Tan Tock Seng Hospital, she lacks testamentary capacity. Since 2009, the defendant too has been resident in the Home.

7 The Property is currently tenanted and the rent is used to cover the living and medical expenses of the parties, including their expenses at the Home.

8 Having regard to the state of the defendant's health, the plaintiff recently became concerned about predeceasing her with the result that she would become the sole owner of the Property. In that event, since the defendant is not able to make a will, on her death the Property will be distributed in accordance with the Intestate Succession Act (Cap 146, 1985 Rev Ed) and this means it will be shared equally amongst the children of her deceased brothers and sisters. The plaintiff was not happy about such an outcome as he had furnished the entire purchase price of the Property himself and had transferred an interest in the Property to the defendant in order to provide for her. He had not intended to benefit her relatives since he had relatives of his own.

9 Accordingly, the plaintiff sought to revoke his gift to the defendant by obtaining a re-transfer of the Property. The plaintiff has provided for the defendant, after the re-transfer of the Property, by stipulating in his will that the Property is not to be sold during the life-time of the defendant and, during such life-time, the rental proceeds of the Property are to be applied to take care of the defendant.

Issues before the court

10 At the hearing, Mr Lee Ee Yang, counsel for the plaintiff, argued that the plaintiff's gift to the defendant of a joint interest in the Property was revocable because it was a gift that was conditional upon death, *viz*, a *donatio mortis causa*. Citing *Snell's Equity* (John McGhee gen ed) (Sweet & Maxwell, 31st ed, 2005) at p 554 ("*Snell's Equity*"), Mr Lee contended that because the plaintiff was seeking to revoke the gift before his death, he was entitled to an order for the legal interest in the Property to be transferred back to him.

11 There were three issues that I had to resolve in making a decision as to whether the plaintiff was entitled to such an order, namely:

(a) First, whether there was a valid *donatio mortis causa* in the present case;

(b) Second, whether the operation of *donatio mortis causa* was precluded by the Wills Act (Cap 352, 1996 Rev Ed); and

(c) Third, whether the operation of *donatio mortis causa* was precluded by the Housing and Development Act (Cap 129, 2004 Rev Ed) ("the HDA").

First Issue: Whether there was a valid *donatio mortis causa* in the present case

The requirements of a valid donatio mortis causa

12 The *donatio mortis causa* recognised by English law was taken from Roman law: see Peter Sparkes, "Death-Bed Gifts of Land (1992) 43(1) N. Ireland Legal Quarterly 35 at p 37 ("*Sparkes*") and Andrew Borkowski, *Deathbed Gifts – The Law of Donatio Mortis Causa* (Blackstone Press, 1999) at pp 5-7 ("*Borkowski*"). Although three main kinds of *donatio mortis causa* were recognised in Roman law, only one of the three exists in English doctrine, *viz* the kind described by Justinian as a gift "where the donor so gives that if indeed he should die, the recipient is the owner of the thing: but, if he should survive or if the donee should predecease him, the donor may take the thing back" (*Sparkes* at p 38, citing *Institutes*, Title VII).

13 As established by English case precedents, three conditions must be made out before a valid *donatio mortis causa* arises. These three conditions are helpfully summarised in *Snell's Equity* at pp 551-555:

(a) First, a gift must have been made in contemplation of impending death;

(b) Second, the gift must have been made upon the condition that it is to be absolute and complete only on the donor's death. The condition need not be express, and will normally be implied from the fact that the gift was made when the donor was ill; and

(c) Third, there must have been delivery of the subject matter of the gift, or of something representing it, which the donee accepts. When the donor delivers the property, he must intend to part with dominion over it, rather than with mere physical possession.

Application to the present case

14 In the present case, the first condition was made out because the plaintiff was ill and in contemplation of death in the near future when he transferred the Property to be held in the joint names of the parties. I also found on the facts that the plaintiff had made the said transfer with the intention that it would be absolute only upon his death, thus fulfilling the second condition. This intention could also be inferred from the nature of the transfer *ie* the fact that it was made to the plaintiff and the defendant as joint tenants mandated that if the defendant were to predecease the plaintiff, the plaintiff would automatically recover his sole interest in the whole of the Property.

15 The third condition requires more analysis. In *Sen v Headley* [1991] 2 All ER 636 ("*Sen v Headley*"), the delivery of a key (that could open a box containing title deeds) was held to be sufficient for a *donatio mortis causa* of unregistered land. Reasoning from *Sen v Headley*, *a fortiori*, in the present case where there was in fact a legal conveyance of registered land, there was delivery of the Property to the defendant. It may be thought that the plaintiff had not parted with dominion over the Property given that he remained as a joint tenant. However, the plaintiff had executed a formal transfer of the Property and submitted it for registration so that the defendant would acquire a legal estate in the Property. In the light of these facts I considered that the plaintiff had parted sufficiently with dominion to satisfy the third condition.

16 Therefore, I decided that there was a valid *donatio mortis causa* when the plaintiff transferred

the Property to the defendant and himself, to be held in their joint names.

Second Issue: Whether the operation of *donatio mortis causa* is precluded by the Wills Act

17 The assertion of a *donatio mortis causa* is often made in situations which closely resemble an oral ("nuncupative") will. Accordingly, an issue arose as to whether the operation of *donatio mortis causa* was precluded by the Wills Act. This is because under s 6(1) of the Wills Act, no will is valid unless, *inter alia*, it is in writing. A nuncupative will is valid only where it is made by soldiers and mariners (see s 27 of the Wills Act).

18 Certainly, some aspects of a *donatio mortis causa* resemble a testamentary disposition (see *Snell's Equity* at p 555). For example, both *donatio mortis causa* and testamentary dispositions are conditional on, and revocable prior to, the donor's death (see *Borkowski* at pp 30-35).

19 In my view, however, a *donatio mortis causa* is not a nuncupative will. It is instead a *sui generis* category of property dealing which is neither completely *inter vivos* nor completely testamentary (see *eg Re Beaumont* [1902] 1 Ch 889 at 892 ("*Re Beaumont*")). *Snell's Equity* notes that there are at least four differences between a *donatio mortis causa* and a legacy (*Snell's Equity* at pp 554-555):

> (1) EFFECTIVE BEFORE DEATH. A *donatio mortis causa* takes effect conditionally from the date of the delivery, and therefore need not be proved as a testamentary act.
>
> (2) NO ASSENT. If often requires no asset or other act on the part of the personal representatives to perfect the title of the donee.
>
> (3) VALIDITY DEPENDS ON SITUS NOT DOMICILE. Its validity, if made here, depends upon English law, not on the law of the donor's foreign domicile. Thus a person domiciled in Russia can make a valid *donatio mortis causa* in this country of property situate here, even if such a gift would be ineffective by the law of Russia. However, it has been held that a person domiciled here can make a valid *donatio mortis causa* of property situate abroad even though the foreign law does not recognise such a gift, provided his acts constitute a parting with dominion according to the foreign law.
>
> (4) METHOD OF REVOCATION. It is revocable either automatically by the recovery of the donor, or expressly by his resuming possession and dominion over the property, but not by will.
>
> (Footnotes omitted)

20 I would add that, as noted by Lord Cowper LC in *Jones v Selby* (1710) Prec Ch 300 at 303, 24 ER 143 at 144, *donatio mortis causa* is "a gift *in praesenti* to take effect *in futuro*". The donor must have a *present intention* to give, and must immediately part with dominion over the property. This is fundamentally different from a testamentary disposition, where there is a mere intention to give *in the future* . Indeed, *In Re Patterson's Estate* (1864) 4 De G J & S 422, 46 ER 982 ("*Re Patterson*") provides direct authority that a *donatio mortis causa* is *not* a nuncupative will. In *Re Patterson*, the donor gave three promissory notes to his nephew saying that he wanted him to have them on the donor's death, but that until then the donor wished to be master of the notes. It was held that the transaction did not constitute a valid *donatio*. Instead, it was found to be no more than an attempt to make a testamentary gift, which failed because of non-compliance with the formalities of the Wills Act 1837.

21 In my judgment, the operation of *donatio mortis causa* is not precluded by the prohibition of nuncupative wills contained in s 6 of the Wills Act.

Third Issue: Whether the operation of *donatio mortis causa* is precluded by the Housing and Development Act

22 I finally turn to address the issue of whether the operation of *donatio mortis causa* is precluded by the HDA. Under s 51 of the HDA, certain types of trusts over protected property (including HDB flats) are rendered void. Accordingly, if *donatio mortis causa* involves the creation of a trust, the doctrine may not be applicable because the Property is a HDB flat.

23 The effect of a *donatio mortis causa* has to be considered at two different stages in time, *viz* (1) at the delivery of the subject-matter of the gift, and (2) at the death of the donor. At the first stage, the relevant parties are the donor and the donee, whereas at the second stage, the relevant parties are the donee and the administrators of the donor's estate. On the facts of the present case, given that the donor has not died, I was not concerned about the latter stage. It was necessary only for me to determine the effect of a *donatio* following delivery of the subject-matter.

24 There were two issues that had to be addressed. First, I had to determine the precise effect of a *donatio mortis causa* following delivery of the subject-matter. For the reasons given below, I concluded that upon delivery *donatio* involves a *gift* rather than constituting a *trust* although at a later stage a trust may arise in favour of either the donor or the donee. Second, I had to determine whether the HDA precludes the applicability of *donatio mortis causa* with regard to the Property. On this issue, I concluded that the HDA does not prevent a valid *donatio mortis causa* from arising in the present case.

The effect of a donatio mortis causa following delivery of the subject-matter

25 The first question related to the effect of a *donatio mortis causa* following delivery of the subject-matter. The law on this point is unclear because the numerous judicial pronouncements on the effect of delivery do not speak with one voice (see *Borkowski* at p 106).

26 One line of cases (*eg Agnew v Belfast Banking Co* [1896] 2 IR 204) appears to suggest that the donee does not acquire any title until the donor dies. A second line of cases is ambiguous as to the effect of a *donatio* upon delivery. As earlier cited, in *Jones v Selby* the court defined *donatio mortis causa* as a gift "*in praesenti* to take effect *in futuro* after death". In *Duffield v Elwes* (1827) 1 Bli NS 497 at 530, 4 ER 959 at 971, Lord Eldon held that "the title is not complete till he [the donor] is actually dead". Lord Eldon's statement has been interpreted to mean that the donee does not acquire full title until the donor dies. In *Re Beaumont*, Buckley J described a *donatio* as a gift "by which the donee is to have the absolute title to the subject of the gift not at once but if the donor dies". I note that the statements of Lord Eldon and Buckley J are ambiguous, because their references to "complete" or "absolute" title may plausibly refer to either the passing of title or to irrevocability (or "indefeasibility") of the gift (see *Sparkes* at p 42). Likewise, the *Jones v Selby* statement does not make clear what it means for a gift to take effect "*in futuro*", especially since the same statement emphasises that is a gift "*in praesenti*".

27 A third line of cases (*eg Walter v Hodge* (1818) 2 Swans 92 ("*Walter v Hodge*")) suggests that the effect of delivery is that the donee obtains full title to the subject-matter, but that the "gift" is in a defeasible state until death.

28 Given the lack of clarity in the law, the effect of a *donatio* following delivery cannot be

determined on the basis of English judicial precedent. In the absence of authoritative guidance, I proceeded to analyse the effect of delivery by reasoning from first principles. The decided cases and various treatises revealed two possible conceptions of the effect of delivery in a *donatio mortis causa* situation, *viz* (1) that a trust is created upon delivery ("the Trust Conception"); and (2) that a gift is made upon delivery ("the Gift Conception"). Broadly speaking, the first line of cases above cited supports the Trust Conception while the third line of cases supports the Gift Conception. The second line of cases, being ambiguous, could be cited in support of either conception.

The Trust Conception

29 Under the Trust Conception, at the time of delivery, legal title of the property passes to the donee while equitable title remains with the donor (see *eg Staniland v Willott* (1852) 3 Mac & G 664 ("*Staniland v Willott*"). The donee holds the property on trust for the donor, subject to a condition subsequent which extinguishes the trust on the donor's death. Therefore, the donee obtains full title to the property only upon death of the donor. The Trust Conception appears to be adopted by the learned author of *Snell's Equity*, at least in the context of gifts where legal title is transferred to the donee. *Snell's Equity* conceives of *donatio mortis causa* as creating a trust the moment the legal interest is transferred to the donee. The relevant passage is at p 553 para 22-20:

> If the transfer of the legal interest to the donee is complete, he will hold it on trust for the donor during his lifetime, subject to a condition subsequent which may take effect on the donor's death. The condition would operate to extinguish the trust so that the donee would hold his legal interest as beneficial owner. If, however, the donor revokes the gift before he dies, then the donee holds the legal interest in the property on bare trust for the donor absolutely.

30 Accepting for the moment that a trust indeed arises the moment the transfer of legal interest to the donee is complete, it is still necessary to further clarify the precise *nature* of the trust that is created upon delivery. There are at least two possible types of trusts created, *viz* (1) an express trust; or (2) an implied trust.

31 In my view, *donatio mortis causa* cannot be construed as creating an express trust upon delivery. It is well established that the donor's intention to create a trust must be clear on the facts of the case before an express trust can be constituted (*Hinckley Singapore Trading Pte Ltd v Sogo Department Stores (S) Pte Ltd (under judicial management)* [2001] 3 SLR(R) 119). A trust cannot be created if the words purporting to create a trust, objectively ascertained, do not evince an intention to create a trust: Robert Pearce, John Stevens & Warren Barr, *The Law of Trusts and Equitable Obligations* (Oxford, 5th ed, 2010) at p 188 ("*Pearce, Stevens & Barr*"). In the event that the court finds that there was no such intention, the transfer of legal title remains effective to transfer the property and the recipient acquires the property as a gift, *ie*, free of any trust, unless the court *implies* a trust in the circumstances.

32 The intention to make a *donatio mortis causa* is different from the intention to create a trust. For the latter, the requisite intention is that the donee shall be a trustee of the subject-matter and have no beneficial interest in the property whatsoever, whereas for the former, the intention is one of making some form of gift (*ie* so that the donee may use the subject-matter for his own benefit) which is perfected on the death of the donor. As Professor Hughes notes in his article, for the purposes of *donatio mortis causa*, "the intention to make a gift, or at least a special kind of voluntary transaction, must be shown" (Bob Hughes, "The Exception is the Rule: *Donatio Mortis Causa*" (2003) 7(2) Journal of South Pacific Law ("*Hughes*")). Professor Hughes further points out that it is traditionally accepted that *donatio mortis causa* involves a voluntary assignment of property, rather than one referable to any contractual basis.

33 Accordingly, the *donatio mortis causa* doctrine cannot possibly involve the creation of an express trust whether by declaration or otherwise, because it "involves no intention to create an express trust nor is there a trustee", and it is "regarded as in the nature of a gift or voluntary alienation which is conditional in nature" (see *Hughes*).

34 For the avoidance of doubt, I clarify that a dying man *can* still create an express trust over his property, for it is conceivable that a dying donor could make clear his intention for a donee to hold the subject-matter on trust. However, whether he makes an express trust or a *donatio mortis causa* must be objectively ascertained on the facts of each case.

35 I turn now to consider the possibility that an *implied* trust is created upon delivery. Two possible types of implied trusts may arise in a *donatio mortis causa* situation.

36 First, a *resulting trust* may arise on the facts. Resulting trusts are imposed to give effect to the implied intentions of the owner of the property. Where a transfer of property has occurred and the legal title has been transferred, but the transferor has failed to show an intention to divest himself fully of all his interest in that property, the transferee will not be permitted to receive the property absolutely for his own benefit; instead, he will hold it on trust for the transferor (see *Pearce, Stevens & Barr* at p 267). The resulting trust analysis is possible in the present case, notwithstanding that the presumption of advancement may arise from the plaintiff's and defendant's spousal relationship. The presumption of advancement can be rebutted by evidence that a transferor did not intend to make an unconditional gift. In the present case, the presumption of advancement is rebutted by evidence of the plaintiff's intention not to make an indefeasible and unqualified gift (as is required for the purposes of *donatio mortis causa*).

37 The second possible type of implied trust that may arise is an *institutional constructive trust*, where a constructive trust is implied to recognise a pre-existing equitable interest (see *Pearce, Stevens & Barr* at p 315). One species of such an institutional constructive trust is English law's *common intention constructive trust* ("CICT"). It is a requirement of *donatio mortis causa* that the transfer must have been made upon the condition that it is to be absolute and complete only on the donor's death, such a condition normally being implied from the fact that the gift was made when the donor was ill. It is accordingly possible for a court to find that the parties had a "common intention" that the transfer was made for the donee to hold the subject matter on trust for the donor, and that the donee would receive beneficial interest only upon the donor's death. One should note that the CICT was judicially developed in England in the context of shared homes (see generally *Pearce, Stevens & Barr* at pp 337, 360-391). In this regard, the CICT may be seen to be appropriate in the present case because the Property is a shared home. However, I am reluctant to hold that CICT properly describes the effect of delivery in all *donatio mortis causa* situations, since many of these situations do not involve a shared home. Furthermore, the CICT has been extensively criticised for involving an artificial search for common intention (see *Pearce, Stevens & Barr* at p 387, which cites many articles criticising CICTs). As Tipping J said in *Lankow v Rose* [1995] 1 NZLR 277 at 293, the English jurisprudence on CICTs is:

> unnecessarily artificial. It is better to acknowledge openly that a constructive trust is being imposed in equity without the consent, express, implied or imputed, of the constructive trustee. The trust is imposed because equity will not allow the legal owner to deny the claimant a beneficial interest.

The Gift Conception

38 Under the Gift Conception, at the time of delivery, the donee obtains a "gift" of *a t least*

equitable title to the subject matter. He may also obtain legal title, depending on the precise subject matter being transferred and the donor's compliance with the necessary formalities. However, although the "gift" vests in the donee immediately, it is subject to a condition that it may be revoked.

39 The Gift Conception is supported by a note to the report of *Walter v Hodge* at 554, which asserts clearly that a *donatio mortis causa* must first possess the requisites of a gift. Similarly, Meagher, Heydon and Leeming in *Meagher, Gummow and Lehane's Equity, Doctrines and Remedies* (Butterworths, 4th ed, 2002) at para 30-025, note that in the interim period between delivery and death of the donor, full (but not indefeasible) title vests in the donee. Such a gift is distinguished from an *inter vivos* gift by the existence of an obligation to retransfer the property on recovery by the donor, or if the donor revokes the gift before his death (*Sparkes* at p 39, citing *Edwards v Jones* (1836) 1 My & Cr 226 at 234, where Cottenham LC noted that a purported outright gift cannot be a *donatio mortis causa*). Although the gift is "perfect" in the sense that the donee can immediately use it as his own, it is subject to the condition that it will only become indefeasible in the event of the donor's death and should the donor not die the gift will be revoked.

40 Revocation of a *donatio mortis causa* may take place either expressly (by the donor's acts) or automatically through his recovery from illness (*Staniland v Willott*; and see *Snell's Equity* at p 554, para 22-21; Jill E Martin, *Hanbury & Martin: Modern Equity* (Sweet & Maxwell, 18th ed, 2009) at p 153, para 4-032 ("*Hanbury & Martin*")). In this case an automatic revocation could not be effective since legal title had passed and the plaintiff had to expressly revoke the gift. Since the defendant was not capable of responding to a demand for a re-transfer of her interest, the express revocation was constituted by the initiation of these proceedings to enable the plaintiff to regain dominion over the whole of the Property.

41 Where legal title is not vested in the donee, then the donor's power of revocation may be rationalised thus: equity will not assist the donee in perfecting the gift insofar as the donor has not passed away, since indefeasibility is only conferred upon the donor's death.

42 Where legal title has been vested in the donee, as Borkowski notes, the donee is in a curious position because he is the legal owner but in equity – for the purposes of the doctrine of *donatio mortis causa* – it is a title which is conditional on the death of the donor (*Borkowski*, at p 107). Borkowski suggests that where legal title has been vested in the donee, the donee should be regarded as a trustee for the donor, citing the authority of *Staniland v Willott*. In *Staniland v Willott*, the court held that the donee held the shares on trust for the donor because the legal transfer of shares had been made on the understanding that it was to have absolute effect only in the event of the donor's anticipated death. Insofar as Borkowski and *Staniland v Willott* observe that a trust mechanism arises at the time of revocation of the *donatio*, I agree. However, I emphasise that this should not be taken as a return to the Trust Conception, because here the trust is imposed *at the time of revocation* rather than *at the time of delivery*. What then, is the precise type of trust imposed?

43 In my view, the best explanation for the power of revocation in a situation where legal title has been vested in the donee is that a *remedial constructive trust* ("RCT") arises upon revocation. The essence of an RCT is well captured by Lord Denning MR in *Hussey v Palmer* [1972] 3 All ER 744 at 747 ("*Hussey v Palmer*"):

> [An RCT] is a trust imposed by law whenever justice and good conscience require it. It is a liberal process, founded on large principles of equity, to be applied in cases where the defendant cannot conscientiously keep the property for himself alone, but ought to allow another to have the property or a share in it. The trust may arise at the outset when the property is acquired, or

later on, as the circumstances may require. It is an equitable remedy by which the court can enable an aggrieved party to obtain restitution.

Pearce, Stevens & Barr notes at p 320 that Lord Denning's conception of an RCT was derived from the American model of constructive trusts, as stated in the Restatement of Restitution at para 16:

> Where a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it, a constructive trust arises.

44 Under the RCT approach, the court enjoys the discretion to determine whether or not a proprietary remedy should be awarded (*Pearce, Stevens & Barr* at p 315). If the court exercises its discretion to award a constructive trust, the resulting beneficial entitlement can be said to have been "imposed" by the court, which does not merely recognise a pre-existing proprietary interest (*ibid*). Therefore, the donor's equitable proprietary interest may not have to arise from the facts *per se*, but rather, from the exercise of the court's discretion to award such a remedy (*ibid*).

45 I acknowledge that notwithstanding Lord Denning's efforts in *Hussey v Palmer*, the RCT has not been formally established in England. However, it is significant that despite the rejection of the RCT in numerous decisions of the English Court of Appeal, Lord Browne-Wilkinson in *Westdeutsche Landesbank Girozentrale v Islington Borough Council* [1996] AC 669 took the opportunity to suggest that English law may one day decide to adopt the RCT. Furthermore, although the RCT was initially rejected in Australia and New Zealand, these jurisdictions subsequently adopted forms of constructive trust which are imposed as remedies to prevent unjust enrichment of donees (see *Pearce, Stevens & Barr* at pp 322 and 421 *et seq*).

46 The English reluctance to adopt RCT reasoning stems from the fear that the RCT would result in wide-ranging general judicial discretion to declare property rights. In *Cowcher v Cowcher* [1972] 1 WLR 425, Bagnall J considered that the RCT approach might create uncertainty *vis-à-vis* proprietary entitlements. While the professed fears of the English courts are certainly understandable, in my view, it would not be overly extending the law or generating uncertainty in proprietary rights to utilise the RCT analysis as the theoretical basis for the power of revocation in a *donatio mortis causa* situation. The conditions required for a valid *donatio mortis causa* are stringent, and there is no fear that adopting RCT analysis to explain part of the doctrine would result in the widespread uncertainty feared by English judges.

47 In summary, under the Gift Conception, pursuant to a *donatio mortis causa*, the donee obtains full equitable (and sometimes legal) title to the subject matter, but this gift remains defeasible until the death of the donor. The donor is entitled to revoke the *donatio* at any time before his death, in which case the court imposes an RCT over the subject-matter and the donee holds the subject-matter on trust for the donor.

Which conception best represents the effect of delivery?

48 The Trust and Gift Conceptions have their respective strengths and weaknesses *vis-à-vis* describing the effect of delivery in a *donatio mortis causa* situation. In the final analysis, I am of the view that the latter better represents the doctrine of *donatio mortis causa*, for two reasons.

49 First, as Professor Hughes points out, the doctrine of *donatio mortis causa* developed from the basis of a *gift*, rather than a *trust*. The gift-like nature of a *donatio* is in line with the term "*donatio*" itself. Indeed, the leading texts on this subject categorise *donatio mortis causa* as an exception to

the rule that equity will not assist a volunteer (*ie*, a recipient of a gift). The Trust Conception arguably brings the analysis of *donatio mortis causa* too far away from its starting point as a "gift".

50 Second, if the Trust Conception is adopted, it would only apply to cases where *legal* title was transferred to the donee (since it obviously could not apply if no legal title was so transferred). This would give rise to the anomaly that the effect of delivery in a *donatio mortis causa* situation differs depending on whether or not legal title was transferred. Borkowski considered the possibility that the *donatio mortis causa* analysis may differ depending on whether legal title was passed upon delivery, but cautioned that no distinction appeared to be intended (or even considered) by the various cases (*Borkowski* at p 106). In my view, the Gift Conception provides for a more coherent analysis of the *donatio mortis causa* doctrine, at least insofar as it is not contingent on whether delivery involved actual transference of legal title.

51 Before concluding my analysis on the conception that best represents the effect of delivery under *donatio mortis causa*, I must address one final issue that has been raised in academic circles. It has been argued that where legal title is transferred, there is no room for *donatio mortis causa* to operate, and instead, an ordinary trust is created. This argument runs directly against *Staniland v Willott* where a legal transfer of shares was found to amount to *donatio mortis causa*. Borkowski questions whether *Staniland v Willott* was really a case of *donatio*, because the donor parted with full legal title rather than just dominion (which is the requirement of a valid *donatio*), noting that the decision on the facts – that the donee held the shares on trust for the donor – could have been reached by the application of ordinary trust principles without resorting to the law of *donatio* (see *Borkowski* at p 90). I am inclined to disagree with Borkowski. First, as the court in *Staniland v Willott* noted, "it has never been held that, because the act of delivery is such as would in the case of a gift *inter vivos* confer a complete legal title, the gift cannot be a *donatio mortis causa*" (see *Staniland v Willott* at 420). Second, the law does not disqualify a transfer from being a gift simply because legal title was passed. Indeed, a "gift" in its most complete sense is one where full legal and equitable title is transferred to the donee. It would thus seem anomalous that only an "equitable" gift may attract the doctrine of *donatio mortis causa*, and that the mere transmission of legal title automatically disqualifies the application of this doctrine. Third, as Sparkes notes, while transfers of legal title may technically be a different species from the usual death-bed gift by mere delivery, transfers of legal title do display a close link with the requirement of valid delivery of the subject matter (*Sparkes* at p 50).

Whether the HDA precludes the applicability of donatio mortis causa with regard to HDB property

52 I had to consider the effect of the HDA because, even on the Gift conception, revocation by the plaintiff would not allow him to compel the defendant to re-transfer her interest in the Property unless, upon such revocation, a trust arose in his favour.

53 In *Tan Chui Lian v Neo Liew Eng* [2007] 1 SLR(R) 265 ("*Tan Chui Lian*"), Menon JC (as he then was) interpreted s 51(6) of the then-HDA, which provided:

> No person shall become entitled to any such flat, house or other building under any resulting trust or constructive trust, whensoever created.

54 Menon JC held that the then-HDA, s 51(6) did not prevent any interest in an HDB flat from arising under a resulting or constructive trust regardless of the circumstances. Rather, it prevented any entitlement to own an HDB flat arising in favour of a person by virtue of the law implying a resulting or constructive trust where that person would *otherwise have been ineligible* to acquire such

an interest (*Tan Chui Lian* at [10]). Having regard to the mischief underlying that section, Menon JC held that the section was not intended to have any application where the parties concerned were already entitled to some interest in the property and therefore no issue could arise as to their eligibility to such entitlement. It is important to note that Menon JC emphasised the terminology of "*become* entitled" (emphasis in original) in coming to such a conclusion (*ibid* at [10]-[11]).

55 This section of the HDA was amended in 2010, and the effects of the amendments have yet to be judicially determined. The 2010 provision that is equivalent to the then-HDA, s 51(6) is the present s 51(10), which provides:

> No person shall become entitled to any protected property (or any interest in such property) under any resulting trust or constructive trust whensoever created *or arising*.
>
> (Emphasis added)

56 Although the amended legislation includes the words "or arising" at the end of the relevant provision, in my opinion the addition of the words "or arising" only clarify that a "resulting trust" or a "constructive trust" may be more properly said to arise by operation of law, rather than by the creation of parties. It is neither evident from Hansard, nor from the plain reading of the provision, that Parliament was seeking to change the legal position as it stood in *Tan Chui Lian*. Indeed, if such a change was deemed necessary, Parliament could have said for instance, "No person shall become entitled, *regardless of eligibility*, …". This Parliament did not do. Furthermore, the words "become entitled", which formed the basis for Menon JC's judgment, were left unchanged by Parliament. As Menon JC expressly noted in his judgment, it would have been much "plainer and simpler" for Parliament to have said that no person shall "be entitled to any interest in" an HDB flat if Parliament were indeed minded to prohibit *all* trusts, regardless of the beneficiary's eligibility (*Tan Chui Lian* at [11]). Again, Parliament did not make such a change. Accordingly, in my view, the law regarding creation of trusts over HDB property remains as stated in *Tan Chui Lian*.

57 Therefore, I concluded that *donatio mortis causa* does not offend s 51(10) of the HDA. This is because resulting and constructive trusts are not precluded by the HDA if the beneficiary is eligible to own an HDB flat. In a case like the present it would be going too far to infer from the language of s 51(10) that the plaintiff who was the sole owner of the Property before August 2006 (and thus obviously an eligible person) was not entitled to make a conditional gift of the Property and, subsequently, to revoke his gift and thereby reacquire that sole interest. To come to such a conclusion would unfairly, and unnecessarily, impinge upon the rights of HDB flat owners to deal with their flats. It would also be inconsistent with the intention of Parliament in enacting s 51(10) of the HDA, *viz* to prevent ineligible persons from obtaining any interest in an HDB flat.