Low Ah Cheow and Others v Ng Hock Guan
[2009] SGCA 25

Case Number	: CA 150/2007, SUM 2086/2008, 2792/2008
Decision Date	: 24 June 2009
Tribunal/Court	: Court of Appeal
Coram	: Chan Sek Keong CJ; Andrew Phang Boon Leong JA; V K Rajah JA
Counsel Name(s)	: Lim Joo Toon and Joseph Tan (Joo Toon & Co) for the appellants; Ling Tien Wah and Koh Jiaying (Rodyk & Davidson LLP) for the respondent
Parties	: Low Ah Cheow; Ng Puay Guan; Ng Bee Eng; Ng Jian Wen; Nicholas Ng Zhi Kai — Ng Hock Guan

Succession and Wills – Construction – Testator's intention as expressed on face of will – Consideration of extrinsic evidence – Ambiguity leading to irrational and capricious result – Alternative interpretation leading to fair, rational and reasonable disposition and distribution of estate preferred

Succession and Wills – Testamentary trust – Sole trustee appointed sole beneficiary – Whether trust valid – Whether legal difficulties in terms purporting to create testamentary trust presented ambiguity in interpretation of will

24 June 2009 Judgment reserved.

V K Rajah JA (delivering the judgment of the court):

Introduction

1 This appeal centres on the construction of the will of the late Ng Teow Yhee ("the Testator"). The trial judge ("the Judge") held that the appellants had not proved that the Testator's residuary estate ("the Estate") was subject to secret trusts in their favour (see *Low Ah Cheow v Ng Hock Guan* [2007] SGHC 200 ("the Judgment")). He was of the view that, under the terms of the Testator's will ("the Will"), the whole of the Estate had been left to the respondent, Ng Hock Guan ("Sebastian"), absolutely for his sole benefit (see especially [11] and [194] of the Judgment). The appellants then filed the present appeal against the Judge's decision.

Background facts

2 The Testator, the patriarch of the Ng family, amassed his fortune in the shipping and stevedoring business over several decades. He passed away on 12 April 2001 at the age of 80, succumbing ultimately to cancer. On 27 November 2000, approximately four and a half months prior to his death, the Testator executed the Will appointing Sebastian, his third son, as his sole executor and trustee. *Ex facie*, by the Will, the Testator gave the whole of the Estate to Sebastian "*ON TRUST to be distributed to*" [emphasis added; underlining in original] (see cl 2(iii) of the Will (reproduced at [3] below)) Sebastian himself. The Testator also appointed Sebastian's wife, Mdm Ho Soh Peng ("Mdm Ho"), as the executrix in the event that Sebastian could not act as the executor. Alan Lee Soo Yuen ("Alan Lee"), the solicitor who took instructions from the Testator on the drafting of the Will, and one Lua Cheng Eng ("Lua") witnessed the execution of the Will.

3 The Will reads as follows:

I, NG TEOW YHEE (NRIC No. S0583304/C) of 1A Wiltshire Road, Singapore 466377 HEREBY REVOKE all former wills and testamentary dispositions made by me and declare this to be my last Will.

1. I APPOINT [SEBASTIAN] (Singapore NRIC No. S1260305/C) (hereinafter called "my Trustee" which expression shall, where … the context permits, include the trustee or trustees for the time being hereof, whether original, substituted or additional) to be the executor and trustee of this my Will. In the event that [Sebastian] predeceases me or for any reason whatsoever shall be unable to act as executor and trustee as aforesaid then I appoint [MDM HO] (Singapore NRIC No. S1249227/H) to be the executrix of this my Will.

2. I GIVE DEVISE AND BEQUEATH all my property of whatsoever nature and wheresoever situate (including any property over which I may have a power of appointment or disposition by will) to my Trustee:–

(i) to sell[,] call in and convert into money all such parts of the same as shall not consist of money but so that my Trustee shall have full power to postpone the sale[,] calling in and conversion for so long as he or she shall in his or her absolute discretion think fit without being liable for loss occasioned thereby;

(ii) out of the net moneys arising from such calling in and conversion and any ready money belonging to me at my death[,] to make payment of my debts[,] funeral and testamentary expenses including all estate duty and other taxes or duties payable on or by reason of my death in respect of my estate; and

(iii) to hold the net proceeds of such sale[,] calling in and conversion and any ready money belonging to me at my death and any property comprised in my estate for the time being remaining unconverted and after any payment thereout mentioned in Clause 2(ii) above (hereinafter called my "Residuary Estate") *ON TRUST* to be distributed to [Sebastian] (Singapore NRIC No. S1260305/C).

[emphasis added; underlining in original]

4 The Testator's assets are largely tied up in two family companies which he founded (referred to collectively as "the Family Companies"), namely, Ng Teow Yhee & Sons Holding Pte Ltd ("the Holding Company") and Ng Teow Yhee & Sons (Singapore) Pte Ltd ("the Subsidiary"). The Subsidiary is the operating arm of the family business. The Testator's surviving family members include the following:

	Name	Date of birth	Relationship with the Testator	Position in the Holding Company/ the Subsidiary	Shares held in the Holding Company at the time of the Testator's death
(a)	Low Ah Cheow ("Mdm Low")	Around 1924	Wife	Nil	33,320 (4.76%)

(b)	Ng Khim Guan ("Ricky")	11 September 1948	Son	Executive director of the Holding Company	253,340 (36.19%)
(c)	Ng Cheng Chuan ("Sunny")	3 December 1951	Son	Executive director of the Holding Company	93,320 (13.33%)
(d)	Ng Peck Eng ("Calista")	4 August 1954	Daughter	Secretary of the Subsidiary	Nil
(e)	Ng Bee Eng ("Angeline")	22 March 1956	Daughter	Secretary of the Subsidiary	Nil
(f)	Sebastian	1 April 1957	Son	Executive director of the Holding Company	66,640 (9.52%)
(g)	Ng Gui Eng ("Jenny")	9 July 1959	Daughter	Clerk	Nil
(h)	Ng Ah Luan ("Edwina")	7 July 1962	Daughter	Administrator of a branch office at Jurong Container Warehouse	Nil
(i)	Ng Puay Guan ("Raymond")	5 December 1966	Son	Non-executive director of the Subsidiary	Nil

The Testator held in his own name 253,380 shares (36.20% of the shareholding) in the Holding Company. He also held in his own name a property at No 1A Wiltshire Road ("1A Wiltshire"), which was the family home. His other assets included some shares in publicly listed companies in Singapore and Malaysia, Central Provident Fund savings, moneys kept in bank accounts and cash at his home.

The proceedings in the High Court

5 Sebastian applied for probate of the Will on 11 June 2001. For reasons that are not apparent to us, the grant of probate ("the Grant") was made only on 27 July 2005 after an unusually long lapse of time. The other family members of the Testator did not participate in the probate proceedings. On 20 February 2006, approximately seven months after the Grant was made, the appellants in this

appeal – namely, Mdm Low; Raymond; Angeline; Sunny's son, Ng Jian Wen ("Jian Wen"), suing by his parents; and Raymond's son, Nicholas Ng Zhi Kai ("Zhi Kai"), suing by his father – commenced Suit No 83 of 2006 ("the Suit") against Sebastian for, *inter alia*, the following reliefs:[note: 1]

> (a) A declaration that [Sebastian] is only a trustee of the [Testator] and is not a beneficiary of the trusts or the Estate;
>
> (b) A declaration that the Estate is subject to trusts in accordance with the [Testator's] wishes and which terms and beneficiaries are as follows:–
>
> i. [Mdm Low] is absolutely entitled to the whole of the property known as 1A Wiltshire …;
>
> ii. [Raymond] is entitled to a sum of $200,000;
>
> iii. [Angeline] is entitled to a sum of $90,000 and 33,320 of the shares registered in the [Testator's] name in the [Holding] Company;
>
> iv. [Sunny's] and Mdm Chou Li Lan's son, … Jian Wen, is entitled to a sum of $300,000;
>
> v. [Raymond's] son namely … Zhi Kai … is entitled to a sum of $100,000; and
>
> vi. The balance 186,740 of the shares registered in the [Testator's] name in the [Holding] Company are to be transferred to [Mdm Low] for her to deal with as she deem[s] fit.
>
> (c) *In the alternative, a declaration that the Estate is subject to trusts in accordance with such terms of the trusts created by the [Testator] to be determined by the Court* …
>
> [emphasis added]

It should be noted that, although Raymond's other son, Ng Zhi Hao ("Zhi Hao"), was neither named as a plaintiff in the Suit nor listed as one of the alleged beneficiaries in the above extract from the appellants' fourth amended statement of claim filed on 4 January 2007 ("the Statement of Claim"), it was pleaded that he (Zhi Hao) was entitled to a sum of $100,000 (see, *inter alia*, paras 4(h), 7.9(vii) and 7.10(ix) of the Statement of Claim). Indeed, the Judge noted in the Judgment (at [5]) that "[t]he substance of the Statement of Claim … discloses the claim for … Zhi Hao as well and it is not disputed that in substance, he is also a plaintiff".

6 In summary, the appellants' pleaded case was that Sebastian was merely an executor and trustee of the Will, and that the Estate was subject to the trusts set out in prayer (b) of the quotation from the Statement of Claim set out in the preceding paragraph ("the Pleaded Trusts"). *The fallback position of the appellants was that, if they were unable to establish the Pleaded Trusts, the court should then declare that the Estate was subject to such trusts created by the Testator as the court was able to determine* (see prayer (c) of the above-mentioned quotation). The Pleaded Trusts concerned the specific properties listed below (collectively, "the Trust Properties"):

> (a) in respect of Mdm Low (the first appellant), 1A Wiltshire and 186,740 of the Testator's shares in the Holding Company;
>
> (b) in respect of Raymond (the second appellant), a sum of $200,000;

(c) in respect of Angeline (the third appellant), a sum of $90,000 and 33,320 of the Testator's shares in the Holding Company;

(d) in respect of Sunny's son, Jian Wen (the fourth appellant), a sum of $300,000; and

(e) in respect of Raymond's two sons, Zhi Kai (the fifth appellant) and Zhi Hao, a sum of $100,000 for each son.

The Judge's decision

7 The Judge treated the appellants' pleaded case against Sebastian as being based exclusively on the doctrine of secret trusts (see the Judgment at [5]). As he saw it, the appellants' action rested on the premise that the Testator had communicated to Sebastian his wish that the Trust Properties be distributed to the specific beneficiaries outlined at [6] above, and that Sebastian had assented to the Testator's wish. The Judge held that the burden was on the appellants to establish the existence of the Pleaded Trusts (see the Judgment at [21]). He also found that the appellants had abandoned the argument that the Pleaded Trusts were half-secret trusts and had proceeded instead on the basis that they were fully secret trusts (see the Judgment at [10]). Examining the evidence adduced by the parties from that perspective (at [21]–[149] of the Judgment), the Judge concluded that the appellants had failed to discharge the burden of proving the existence of the Pleaded Trusts. The Judge also broadly considered the appellants' allegations concerning the preparation and the execution of the Will (see the Judgment at [150]–[161]) even though he found (at [150] of the Judgment) that the appellants had not directly challenged the validity of the Will. He held that all those allegations had no basis.

8 The Judge concluded as follows (see the Judgment at [193]–[194]):

> 1 9 3 *Although Sebastian has not been entirely truthful, neither have the [appellants] on whom the burden of proof lies. The [appellants'] evidence is fraught with inconsistencies and is unreliable.*
>
> 194 I am of the view that [the Testator] gave his entire estate to Sebastian in the expectation that Sebastian would do right by the other family members. *He left it entirely to Sebastian, whom he trusted, to decide what to do with his estate. Sebastian will have to be dictated by his conscience but there is no legal obligation on him*. The [appellants] have failed to prove their case and I dismiss their claims.
>
> [emphasis added]

Accordingly, the Judge dismissed all the claims of the appellants and held that Sebastian took the Estate absolutely.

9 The Judge's material findings and rulings in relation to the various claims of the appellants may be summarised as follows:

(a) The appellants' pleaded case was that the Testator had, *prior to* the execution of the Will on 27 November 2000, communicated to Sebastian his intention to create the Pleaded Trusts ("the relevant intention") and that Sebastian had assented to the Testator's wishes, likewise *before* the execution of the Will (see the Judgment at [13]–[14]). However, all the evidence of the appellants and their witnesses, even if accepted, showed that the Testator had communicated the relevant intention to Sebastian only *after* the execution of the Will.

(b) The appellants were bound by their pleadings. Thus, even if they could prove that the Testator had communicated the relevant intention to Sebastian after the execution of the Will and that Sebastian had assented to the Testator's wish, they were not entitled to rely on those facts in support of the reliefs claimed (see the Judgment at [14]).

(c) The appellants had failed to discharge the burden of proving that, "although on paper everything was given to Sebastian, that gift was … subject to specific oral gifts in favour of the [appellants, which oral gifts were] meant to be legally enforced against Sebastian if need be" (see the Judgment at [21]).

We should add that the Judge came to the conclusion set out in sub-para (c) above after a meticulous examination of the evidence before him (see the Judgment at [21]–[149]).

10 With respect to the appellants' allegations relating to the preparation and the execution of the Will, the Judge rejected all of them (see the Judgment at [152]–[161]), characterising them as "desperate and irresponsible" (see the Judgment at [159]). We note that one of the appellants' contentions in the court below was that "something was amiss because [the Testator] had executed the Will using his thumbprint" (see the Judgment at [152]). In this connection, the appellants adduced evidence that the Testator had never executed any document with his thumbprint before the execution of the Will and, after the execution of the Will, had continued to execute documents by signing his full name in Chinese. It appears, however, that the appellants' counsel was not able to make anything out of this fact and failed to convince the Judge of the implications of this evidence. Indeed, the Judge went so far as to express (at [161] of the Judgment) his dissatisfaction with the way in which counsel had conducted the case for the appellants. (We should point out that the appellants have engaged new counsel for this appeal.)

11 It would appear that the Judge accepted in its entirety the evidence of Alan Lee, the solicitor who took instructions from the Testator on the drafting of the Will (see [2] above). Although the Judge found that Alan Lee could not be said to be a "*completely independent* witness" [emphasis added] (see the Judgment at [157]), he was not inclined to question the latter's evidence as "the Will remained unchallenged" (*ibid*). As we, on the other hand, entertain serious doubts about the reliability of Alan Lee's evidence, it is necessary that we set out the Judge's summary of that evidence in full (see the Judgment at [151]):

> It was Alan Lee's evidence that in early November 2000, [the Testator] … called him to say that he wanted a will drawn up leaving everything to Sebastian. They spoke in Hokkien. *[The Testator] … asked whether it was necessary to list out all his assets but Alan Lee advised him [that] this was not necessary.* [The Testator] … instructed that Sebastian was to be the sole executor. When Alan Lee advised him that it was better to have another executor in case anything should happen to Sebastian, [the Testator] nominated Sebastian's wife to be the alternate executor. Alan Lee then instructed a junior solicitor to prepare the Will. [The Testator] subsequently contacted Alan Lee to find out if the Will was ready and he said [that] it was. [The Testator] mentioned that he was going to hospital on 27 November 2000 and wanted to execute the Will then. *As he was going to the hospital, Alan Lee suggested that [the Testator] should have a doctor present when he executed the Will. As [the Testator] mentioned that his hand was a little bit unsteady, Alan Lee said [that] he could execute the Will by using his right [thumbprint].* Subsequently, Alan Lee attended to [the Testator] in his hospital room in the afternoon of 27 November 2000. He interpreted the Will to [the Testator] although he did not go through it line by line with [the Testator]. *The other witness there also confirmed with [the Testator] that he was giving everything to Sebastian.* Sebastian was in the room until the time of execution when he left the room. [The Testator] executed two [w]ills. Alan Lee gave one to

> Sebastian and kept the other. Alan Lee received a certificate dated 27 November 2000 signed by two doctors certifying that [the Testator] was of sound mind when he signed the Will. The doctors had been present when Alan Lee was discussing the Will with [the Testator] in his hospital room. [emphasis added]

12 We would like to make some observations now on certain issues that have a material bearing on our views in relation to the Judge's interpretation of the Testator's intention as expressed by the words used in the Will. The *first* is that the Judge proceeded with his assessment of the evidence on the basis that the appellants were not challenging the validity of the Will (see the Judgment at [150] and [157]). While this is technically correct, this does not mean that the appellants agreed with Sebastian's interpretation of the Testator's intention as expressed by the words used in the Will (in particular, in cl 2(iii) thereof ("the Disposition Clause")). The *second* is that the junior solicitor who actually drafted the Will ("the Junior Solicitor") was not called to testify as a witness. In our view, this crucial omission was relevant to the determination of the Testator's intention as expressed in the Will. The *third* is that Lua, the other witness (apart from Alan Lee) to the execution of the Will, did not in fact testify that the Testator intended to leave the whole of the Estate to Sebastian. The Judge relied on the attendance note taken by Alan Lee of his meeting with the Testator on 27 November 2000 ("the 27 November attendance note"), the day on which the Will was executed, to find that "[Lua] … confirmed with [the Testator] that he was giving everything to Sebastian" (see the Judgment at [151]). However, Alan Lee's evidence (as set out in the 27 November attendance note) of Lua's alleged confirmation is, with respect, technically inadmissible hearsay evidence. We also note that the Will appears to be the very first testamentary instrument executed by the Testator. When the Testator purportedly instructed Alan Lee to draw up the Will, he (the Testator) was already suffering from an advanced stage of cancer. His rapidly declining health frequently required him to be hospitalised for lengthy periods in the months to come. Indeed, in the four and a half months between the execution of the Will and his demise, the Testator spent no less than 62 days warded in Mount Elizabeth Hospital (see [43] of the Judgment). The *fourth* is that it appears to us that the Judge did not consider in any detail the *ex facie* meaning of the Disposition Clause before coming to the conclusion that (at [10] of the Judgment):

> [The Disposition Clause] did not say explicitly that the … [E]state was to be distributed to Sebastian "beneficially" but it is clear to me that that is the correct interpretation.

We shall return to these points again later in this judgment (at, *inter alia*, [14], [33] and [40] below).

The appellants' applications to amend the Statement of Claim and introduce new legal arguments

13 On 12 May 2008, two days prior to the first hearing of this appeal before us, the appellants' counsel filed a summons seeking leave to amend the Statement of Claim ("SUM 2086/2008"). The reason given for this application was the desirability of aligning the Statement of Claim with the evidence adduced at the trial.

14 In the course of the hearing on 14 May 2008, we pointed out the unusual terminology employed in the Disposition Clause and commented that the Judge did not appear to have dealt with that provision adequately in concluding that the Testator had left the Estate to Sebastian absolutely, subject only to the latter's conscience to do the right thing. We also expressed some concerns about the way in which the Will had been prepared, explained to the Testator and then executed by him. In this connection, counsel for the appellants argued that the evidence adduced at the trial (specifically, Alan Lee's evidence) raised troubling questions about the circumstances surrounding the execution of the Will, the opacity of the Testator's intentions as well as the prevailing inconsistencies

in the testimonies of Sebastian's witnesses. The matters which were worrying, the appellants' counsel submitted, included the following:

(a) Alan Lee did not adequately explain the Will to the Testator before the latter executed the instrument;

(b) the Will was drafted by the Junior Solicitor, who was not present when Alan Lee took instructions from the Testator; and

(c) the notes of attendance/instructions produced by Alan Lee invited even more questions about the Testator's intentions at the material time.

Counsel for the appellants also contended that the wording of the Will was ambiguous and insufficient to vest the Estate in Sebastian absolutely as the sole beneficiary. Sebastian's counsel, Mr Ling Tien Wah ("Mr Ling"), sought an adjournment to prepare his response to these arguments, which we granted.

15 On 27 June 2008, the appellants filed another summons seeking leave to, *inter alia*, further amend the Statement of Claim ("SUM 2792/2008"). On 10 July 2008, the parties appeared before us again and made fresh submissions on the meaning of the Disposition Clause. Counsel for the appellants, taking the cue from our observations at the hearing on 14 May 2008 *vis-à-vis* (*inter alia*) the wording of this clause and the way in which the Will had been interpreted to the Testator, made the following submissions:

(a) Sebastian was an "established client"[note: 2] of Alan Lee in that Sebastian and his wife, Mdm Ho, had engaged Alan Lee to represent them in several property transactions prior to the execution of the
Will;

(b) the Will made no provision for Mdm Low, who was 77 years old at the time the Will was made and entirely dependent on the Testator;[note: 3]

(c) the Will made no express provision for the Testator's children, who were being supported, at the time of the Testator's death, by salaries paid by the Subsidiary;[note: 4]

(d) the Will was written in English, but the Testator was unable to read English,[note: 5] and the Will was not translated into Hokkien (the dialect which the Testator spoke) by an interpreter proficient in that dialect;[note: 6]

(e) Alan Lee did not inquire why the Testator was making a gift of the whole of the Estate to only one child (*viz*, Sebastian) without making any provision at all for, *inter alia*, Mdm Low;[note: 7]

(f) the Testator executed the Will by affixing his thumbprint to the instrument whereas he would usually execute documents by signing them;[note: 8]

(g) Alan Lee neither explained the words "ON TRUST" [underlining in original] in the Disposition Clause to the Testator nor translated them into Hokkien for the latter,[note: 9] with the result that it was unclear whether the Testator understood "the English law concept of a trust or the difference between giving enforceable [instructions] and [giving] unenforceable instructions to Sebastian as to what he was to do with the … [E]state";[note: 10]

(h) Sebastian's evidence at the trial was that the Testator had used the phrase "*wei tok*" (which means "entrust" in Hokkien) when talking to him about the Will, and this indicated that "[the Testator] was saying [that] he was *entrusting* his assets to Sebastian rather than making an outright gift of the assets to him"[note: 11] [emphasis added];

(i) the Will was drafted by the Junior Solicitor, who "did not personally take instructions from [the Testator] and was not present when the [Testator's] instructions were taken [by Alan Lee]";[note: 12] and

(j) the Testator had indicated to the appellants after the execution of the Will that he was going to make specific gifts to them, and what he had told the appellants then "indicate[d] that he did not in fact know and approve of the terms of the [W]ill".[note: 13]

16 Replying to these submissions, Sebastian's counsel, Mr Ling, reiterated that the appellants were precluded from raising many of these allegations and from making any new submissions on the validity of the Will at the appellate stage. Mr Ling emphasised that there was nothing suspicious about the Testator's bequest to Sebastian as he was the Testator's favourite son and the Testator had been unhappy with the rest of his family members when he made the Will. In respect of the wording used in the Disposition Clause, Mr Ling submitted that, after an executor completed the administration of an estate by paying off any outstanding debts, duties and expenses of the deceased, he would hold the residuary estate as a trustee. There was, therefore, nothing unusual about the terminology employed in the Disposition Clause (see further [28] below). Mr Ling did not, however, make any substantive arguments on the intent and purport of the words "to be distributed to [Sebastian]" in that clause other than to say that those words should be accorded their literal meaning.

17 We agreed with Mr Ling that the appellants' delay in filing SUM 2086/2008 and SUM 2792/2008 for leave to amend the Statement of Claim was inexcusable. Accordingly, we dismissed both applications. We saw no legal basis to entertain the appellants' request to radically remould the Statement of Claim at this late stage. However, we also informed the respective parties' counsel that, notwithstanding the appellants' procedural lapses, it remained open to this court to assess and determine, on the basis of the existing evidence on record, new *legal* arguments in relation to the substantive issue of whether the Testator's intention was to leave the Estate to Sebastian as the *sole beneficiary* or as a *trustee* to hold on trust for the benefit of the Testator's family members (see further [18] below).

The issues on appeal

18 In the court below, emphasis was placed on the reliefs which the appellants sought in prayer (b) of the Statement of Claim (as reproduced at [5] above), *ie*, the appellants' claim was treated as, in essence, a claim that the Estate was held by Sebastian subject to the Pleaded Trusts (see, *eg*, the Judgment at [5]). However, having regard to the pleadings, the arguments of counsel for the respective parties and the evidence adduced at the trial, we are of the view that, before determining whether the Estate was left to Sebastian subject to the Pleaded Trusts ("the Pleaded Trusts Question"), we must first address a prior (or threshold) issue, namely: Did the Testator intend to leave the whole of the Estate to Sebastian absolutely as the sole beneficiary, *or* did he intend the Estate to be held by Sebastian *qua* trustee for the benefit of his (the Testator's) family members ("the Threshold Question")? If we find that the Testator *did* indeed mean to leave the whole of the Estate to Sebastian as the sole beneficiary, then the Pleaded Trusts Question becomes otiose and the present appeal must be dismissed. In contrast, if we find that the Testator *did not* intend to leave the Estate to Sebastian absolutely, we would then have to ascertain what trusts the Testator

created over the Estate. Specifically, are these trusts the Pleaded Trusts as the appellants contend, or are they trusts clothed with some other attributes?

The Threshold Question

The relevant legal principles

19 The Threshold Question requires us to ascertain the Testator's intention *as expressed in the Will*. As stated in John G Ross Martyn, Stuart Bridge & Mika Oldham, *Theobald on Wills* (Sweet & Maxwell, 16th Ed, 2001) ("*Theobald*"):

> **17–01** In construing a will the object of the court is to ascertain the intention of the testator *as expressed in his will* when it is read as a whole in the light of any extrinsic evidence admissible for the purpose of its construction.
>
> …
>
> **17–02** The object is to ascertain the expressed intention of the testator, *i.e.* the intention which the will itself declares either expressly or by necessary implication. As Lord Simon L.C. put it in *Perrin v. Morgan* [[1943] AC 399]:
>
> > "The fundamental rule in construing the language of a will is to put on the words used the meaning which, having regard to the terms of the will, the testator intended. *The question is not, of course, what the testator meant to do when he made his will, but what the written words [which] he uses mean in the particular case* – what are the 'expressed intentions' of the testator."
>
> [emphasis added]

Similarly, *Williams on Wills* (Francis Barlow *et al* eds) (LexisNexis Butterworths, 9th Ed, 2008) ("*Williams*") states (at vol 1, paras 49.1–49.2):

> **General principle.** The first and great rule to which all others must bend is that effect must be given to the intention of the testator; but *the intention here in question is not the intention in the mind of the testator at the time he made his will, but that declared and apparent in his will*. The application of the rule resolves itself into two questions of construction: first, what is the intention of the testator disclosed by the will; and secondly, how can effect be given to that intention.
>
> **Ascertaining the intention of the testator.** The court of construction must ascertain the language of the will, read the words used and ascertain the intention of the testator from them. *The court's duty is not to ascertain what the [testator's] actual mental intentions were. The only question for the court of construction is what is the meaning of the words used, and the expressed intention in all cases is considered to be [the] actual intention*; the court cannot give effect to any intention which is not expressed or employed in the will. …
>
> [emphasis added]

20 In ascertaining the testator's intention as expressed in a will (which intention will also be referred to as the testator's "expressed intention" in this judgment), the words used in the will are "[p]rima facie … to be given their ordinary meaning" (see *Theobald* ([19] *supra*) at para 17–05), with

legal and technical words to be given their legal or technical meaning unless it clearly appears from the face of the will that they are intended to bear some other meaning (see *Williams* ([19] *supra*) at vol 1, para 50.7 and *Theobald* at para 1716). If the testator's expressed intention is clear from the words used in the will, then (see *Williams* at vol 1, para 49.4):

> … rules of construction will not in the ordinary case prevail to override that clear intention. Such rules are in general resorted to where the [testator's] intention is not clear upon the face of the will.

In contrast, if the testator's expressed intention is ambiguous on the face of the will, then the rules of construction will apply and the court may also admit relevant admissible extrinsic evidence as an aid to construction. It must be emphasised, however, that such extrinsic evidence is (see *Halsbury's Laws of Singapore* vol 10(2) (LexisNexis, 2006 Reissue, 2006) at para 120.329):

> … not admissible for the purpose of controlling, varying, or altering the written will of the testator, but is admitted simply for the purpose of enabling the Court to understand it, and to declare the intention of the testator according to the words [by] which that intention is expressed.

Whether the Testator's expressed intention is clear on the face of the Will

21 In the present case, the Will, as drafted, gives rise to a number of legal difficulties. These difficulties may be due to the incompetence or the inexperience of the Junior Solicitor, and/or the failure of Alan Lee to communicate the Testator's instructions fully and accurately to the Junior Solicitor. Whatever the true position might be, the fact remains that, if the Testator intended by the Will to leave the whole of the Estate to Sebastian as the sole beneficiary, then certain aspects of the Will, in our view, either make no sense or contradict that intention. We shall elaborate on this below.

22 First, if Sebastian were indeed to be the sole beneficiary of the whole of the Estate, why was he appointed as the sole "executor *and trustee*" [emphasis added] (*per* cl 1 of the Will)? It would have been simpler just to appoint him as the sole executor. It was not necessary to impose a trust on Sebastian for the sole purpose of ensuring the distribution of the Estate to himself (see Form 16.5 of Michael Waterworth, *Parker's Modern Wills Precedents* (Tottel Publishing, 6th Ed, 2009) at p 148; see also [29] below).

23 Second, why was it necessary to impose on Sebastian a duty to convert all of the Testator's assets into cash (see cl 2(i) of the Will) and then distribute the residue of the cash proceeds (*ie*, the Estate) to himself (see the Disposition Clause)? It would have been neater and simpler to allow Sebastian, if he were indeed meant to be the sole beneficiary under the Will, to deal with the assets in the Estate in whatever way he thought fit. It might be argued that conversion of these assets was necessary in order to pay the Testator's debts and other liabilities arising from the Testator's death (*eg*, funeral and testamentary expenses, as well as estate duty), but this contention is readily rebutted by the counter-argument that it would have been neater and simpler to allow Sebastian, as the sole beneficiary of the Estate, to determine which of the assets therein to convert into cash in order to discharge the Testator's liabilities.

24 Third, under cl 2(i) of the Will, Sebastian was given "full power to postpone the sale[,] calling in and conversion [of that part of the Estate which did not consist of money] for so long as he … in his … absolute discretion [thought] fit without being liable for loss occasioned thereby". In our view, if Sebastian were indeed the sole beneficiary under the Will, it was wholly unnecessary to protect him *qua* trustee from any loss occasioned by any postponement in converting the assets in the Estate

into cash.

25 Fourth, what role was Mdm Ho, who was appointed as the alternate executrix but *not* as the alternate executrix-*cum*-*trustee* (see cl 1 of the Will), to have in relation to the Will should Sebastian predecease the Testator? This question arises because, if the Will did indeed make a gift of the whole of the Estate to Sebastian absolutely, the gift would lapse if Sebastian (the beneficiary) were to die before the Testator. Mr Ling (counsel for Sebastian) contended that the provision for Mdm Ho to be appointed as the alternate executrix was intended to give effect to s 26 of the Wills Act (Cap 352, 1996 Rev Ed), which states (in essence) that, where a testator devises or bequeaths any property to his child and that child predeceases the testator but leaves behind issue living at the time of the testator's death, the devise or bequest "shall *not* lapse, but shall take effect as if the death of [the beneficiary] had happened immediately *after* the death of the testator, unless a contrary intention shall appear by the will" [emphasis added]. It is not clear, however, that s 26 of the Wills Act applies to a gift of the testator's entire residuary estate, which is the case in this appeal. Besides, it would have been neater and simpler for the Testator to make a new will had Sebastian predeceased him.

26 Fifth, by virtue of cl 1 of the Will, Sebastian was appointed as "the executor and trustee", and, by virtue of the Disposition Clause, he was to hold the Estate "ON TRUST to be distributed to [himself]" [underlining in original]. The words "on trust" have been intentionally capitalised and underlined in the Disposition Clause. We cannot ignore these words. They are not ordinary words. Instead, they are technical words to be construed according to their technical meaning. In our view, the use of the words "ON TRUST" [underlining in original] in the Disposition Clause is a strong indicator that the Testator intended to impose on Sebastian a legal obligation as trustee in dealing with the Estate.

27 Sixth, to whom does Sebastian owe the aforesaid legal obligation *qua* trustee? He cannot in any legal sense be said to be holding the Estate on trust for himself as, conceptually, *one cannot be a trustee for oneself* (see *Underhill and Hayton: Law relating to Trusts and Trustees* (David Hayton gen ed) (LexisNexis Butterworths, 17th Ed, 2007) at para 14.4 andA J Oakley, *Parker and Mellows: The Modern Law of Trusts* (Sweet & Maxwell, 9th Ed, 2008) at para 1[illegible]035). Mr Ling's contention that the Will, read as a whole, created a trust in favour of Sebastian is not correct as such a trust cannot exist in law.

28 When we pressed Mr Ling on this point, he argued that, once the executor completed the administration of the deceased's estate (which would include, *inter alia*, paying off the deceased's debts and testamentary expenses), the executor would stand in the position of a trustee in relation to the residuary estate (see also [16] above). In support of this proposition, Mr Ling cited the following passage from *Syed Ali Redha Alsagoff v Syed Salim Alhadad* [1996] 3 SLR 410, where Warren L H Khoo J said at 421, [38]:

> [W]hen an executor or an administrator has completed administration in the sense of having cleared the estate of debts and liabilities, he stands in the position of a trustee in relation to the residuary estate, and trustees can be appointed to act with him or in his place.

29 This is an unexceptional – indeed, a trite – legal principle. However, assuming that the Testator did indeed intend to appoint Sebastian as the executor-cum-sole beneficiary of the Estate, this legal principle does not explain the peculiar drafting adopted in the Will. There is, of course, nothing wrong in naming a sole beneficiary as, concurrently, the sole *executor* of a will. This is routinely done without any legal difficulty, even by solicitors equipped with only a rudimentary working knowledge of probate practice. In such situations, however, the sole beneficiary is appointed concurrently as *the executor only*, and *not* as the executor-*cum*-*trustee*. By way of illustration, we

need go no further than to refer to a drafting treatise often used by solicitors in Singapore, *viz*, *The Encyclopaedia of Forms and Precedents* vol 42(1) (Lord Millett ed) (LexisNexis Butterworths, 5th Ed, 2007 Reissue). There, it is suggested that the following drafting precedent be employed when the testator intends to leave all his assets to a single executor-cum-beneficiary (see Form 15 at p 277):

> **Will of a single person leaving everything to one adult absolutely and appointing that person as sole executor**
>
> I *(name)* of *(address)* revoke all former wills and testamentary dispositions made by me and declare this to be my last will and testament[.]
>
> I appoint (*name of sole executor)* to be sole executor of this will and I *give* to *(name of sole executor*) absolutely all my real and personal property whatsoever and wheresoever[.]
>
> IN WITNESS etc
>
> *(signatures, addresses and descriptions of testator and two witnesses)*
>
> [emphasis in original]

30 Seventh, the Disposition Clause contains the cryptic words "to be *distributed to* [Sebastian]" [emphasis added]. The words "distributed to" have an ordinary meaning that has been made insensible in the present context, in that the distribution envisaged in the Disposition Clause is *ex facie* a "distribution" to *one person* only. In contrast, *The Oxford English Dictionary* (J A Simpson & E S C Weiner eds) (Clarendon Press, 2nd Ed, 1989) defines "distribute" as, *inter alia* (at p 867):

> To deal out or bestow in portions or shares among *a number of recipients*; to allot or apportion as his share to *each person of a number*. [emphasis added]

The use of the words "to be *distributed to* [Sebastian]" [emphasis added] indicates that the Testator might well have intended (and, in our view, most likely intended, given the ordinary meaning of the word "distributed") the Estate to be distributed *by* Sebastian, the named trustee, to *a number of persons* and not to himself (*ie*, Sebastian) only.

31 Eighth, if the Testator intended to make an outright *gift* of the Estate to Sebastian absolutely as the sole beneficiary, why did he use the words "to be *distributed to*" [emphasis added] in the Disposition Clause? Why did he not simply use the word "give", which is the term ordinarily used in the context of a gift? Even a layperson, let alone a solicitor, would readily appreciate the differences inherent in these two very different words – *viz*, "distribute" and "give" – if the differences are properly explained.

32 In the court below, neither Sebastian nor Alan Lee (the solicitor who took instructions from the Testator on the drafting of the Will) gave a satisfactory explanation of the matters outlined at [22]–[31] above. These matters create uncertainty as to how the Testator's intention, as expressed in the Will, should be construed. It might be argued that, in the face of such ambiguity, the Will did not create a trust and the Testator's expressed intention ought to be interpreted as an intention to leave the Estate to Sebastian absolutely as the sole beneficiary. In our view, however, it can be said even more convincingly in the alternative that, given the peculiar drafting employed in the Will, there is in the present case clear and obvious *ambiguity* as to what the Testator's expressed intention is; therefore, the court should have regard to the appropriate rules of construction as well as the relevant admissible extrinsic evidence in ascertaining the Testator's expressed intention. The latter

approach seems to us to be preferable for the purposes of this appeal. In other words, *given the patent ambiguities embedded in the Will, this is a case where the Testator's expressed intention is not clear on the face of the Will. It is therefore appropriate for this court to apply the pertinent rules of construction and review all the relevant admissible extrinsic evidence for the purposes of construing the Testator's intention as manifested by the words used in the Will.* We now turn our attention to the relevant admissible extrinsic evidence.

The relevant admissible extrinsic evidence in the present case

33 As we mentioned earlier (at [12] above), the Judge held (at [10] of the Judgment):

> [The Disposition Clause] did not say explicitly that the [Estate] was to be distributed to Sebastian "beneficially" but it is clear to me that that is the correct interpretation.

We also pointed out (likewise at [12] above) that the Judge did not appear to have considered the *ex facie* meaning of the Disposition Clause before coming to this conclusion. Indeed, a closer study of the relevant passages in the Judgment shows that the Judge's reasoning, which is set out below, was rather elliptical (see the Judgment at [10]–[11]):

> 10 As can be seen, [the Disposition Clause] stated that the residuary estate [*ie*, the Estate] was to be held on trust to be distributed to Sebastian. That provision did not say explicitly that the residuary estate was to be distributed to Sebastian "beneficially" but it is clear to me that that is the correct interpretation. Furthermore, while paragraphs 6 and 8 of the [S]tatement of [C]laim relied on half-secret trusts, paragraphs 6 and 118 of the [appellants'] closing submissions ("PCS") stated that the [appellants] were relying on secret trusts and not half-secret trusts. Even then, paragraph 278 of PCS appeared to retain the spectre of half-secret trusts by stating:
>
> > 278. The [appellants] submit as follows:–
> >
> > a) The Will specifically refers to [Sebastian] as a "*Trustee*";
> >
> > b) The Will specifically refers to the Estate being given to [Sebastian] "*ON TRUST*";
> >
> > c) The Will does not refer to [Sebastian] as being a beneficiary of the Estate or being beneficially entitled
> >
> > to any part of the Estate. [*sic*]
>
> 11 It seems to me that the author of PCS had forgotten that he had abandoned the half-secret trusts argument. In any event, I reiterate that I find that Sebastian was given the entire residuary estate beneficially under the Will.
>
> [emphasis and underlining in original]

Does the relevant admissible extrinsic evidence support the Judge's ruling that the Testator expressed in the Will an intention that "the residuary estate [*ie*, the Estate] was to be distributed to Sebastian 'beneficially'" (see [10] of the Judgment)? In considering this issue, we shall analyse the relevant admissible extrinsic evidence under five different heads, as follows:

(a) the Testator's alleged instructions on the drafting of the Will;

(b) whether the Testator used the Hokkien expression "*wei tok*" or "*wei cheok*" when talking about the Will;

(c) the manner in which the Will was explained to the Testator;

(d) the relevance of the persons who were present when the Will was executed; and

(e) the relationship between the Testator and his family.

The Testator's alleged instructions on the drafting of the Will

34 At the trial, Alan Lee testified that, in early November 2000, the Testator telephoned him and instructed him to draw up a will leaving "everything"[note: 14] to Sebastian (it is common ground that the Testator had earlier been diagnosed with malignant lymphoma sometime in October 2000). The Testator and Alan Lee spoke in Hokkien on that occasion.[note: 15] The Testator asked whether it was necessary to list out all his assets, and was advised that that was not necessary since "everything was going to Sebastian".[note: 16] According to Alan Lee, the Testator then instructed him that Sebastian was also to be the sole executor of the Will. When Alan Lee advised him that it was preferable to have another executor in case something unexpected should befall Sebastian, the Testator immediately nominated Sebastian's wife, Mdm Ho, as the alternate executrix.[note: 17]

35 It appears to us, from our review of the record, that the above evidence is – surprisingly – the only "credible" evidence of the instructions which the Testator gave Alan Lee in early November 2000 *vis-à-vis* the drafting of the Will. Even Sebastian did not testify that the Testator had told him, prior to the execution of the Will, that he would be given the whole of the Estate *absolutely as the sole beneficiary*. Instead, Sebastian merely stated in his affidavit of evidence-in-chief that:[note: 18]

> Prior to his passing, my late father told me that he had made a will leaving everything to me. He added that he had appointed me as his only *executor* under his will and that should anything happen to me before his death, my wife [Mdm Ho] would take over as the executor. [emphasis added]

We also note that this extract from Sebastian's affidavit of evidence-in-chief asserts that Mdm Ho would take over as the executrix if "anything [were to] happen to [Sebastian]"[note: 19]before the Testator's demise, but does not explain who would get the beneficial interest in the Estate in that eventuality. The Judge accepted Alan Lee's evidence of the Testator's alleged instructions *vis-à-vis* the drafting of the Will (see [151] of the Judgment) even though, as mentioned at [11] above, he was aware that Alan Lee was not a completely independent witness.

36 It is necessary for us to pause now and briefly highlight certain aspects of Alan Lee's past relationship and dealings with the Testator and Sebastian. When the Will was executed, Alan Lee was a solicitor of some ten years' standing. He first met the Testator together with Sebastian sometime in 1990,[note: 20] the very year he commenced practice. *Alan Lee did not have any contact or dealings with any of the other family members of the Testator at any point in time.*[note: 21]Interestingly, when Alan Lee first met the Testator, it was apparently in relation to a personal matter involving Sebastian. Over the next decade, Alan Lee was instructed by both Sebastian and the Testator on a number of matters (according to Alan Lee, he did an equal amount of work for each of them), including property transactions for Sebastian. He also represented Mdm Ho in similar transactions. It is apparent to us, from the history of the course of dealings and the communications between Alan Lee and Sebastian prior to the execution of the Will, that the two had a *close* relationship. Alan Lee, we

also observe from the certified transcript of the notes of evidence ("the Notes of Evidence"), was anxious to play down the intimacy of his relationship with Sebastian. He appeared to be less than forthcoming when he was repeatedly pressed to disclose further details of the history of his dealings with Sebastian and the extent of his ongoing relationship with the latter (in this regard, we do not agree with the Judge's view as set out at [156] of the Judgment).

37 We return now to Alan Lee's evidence (as summarised at [34] above) of the Testator's alleged instructions as to how the Will was to be drawn up. It appears to us significant that a rather different picture of the Testator's instructions emerges from the attendance note that Alan Lee kept of his telephone conversation with the Testator in early November 2000 ("the early November attendance note"). That attendance note, which contains only the barest of details, reads as follows:[note: 22]

> Trustees -> Ng Hock Guan [*ie*, Sebastian] & Irene [*ie*, Mdm Ho]
>
> prop -> 1A Wiltshire -> Ng Hock Guan
>
> *balance* -> to Ng Hock Guan
>
> shares of Co. -> *to transfer to Sebastian?*
>
> [emphasis added]

38 In cases where the construction of the terms of a will is contested, it may be necessary to compare the testimony of the solicitor who drafted the will ("the drafting solicitor") with his attendance notes since those notes are (or at least should be) a contemporaneous record of the testator's instructions. A failure on the drafting solicitor's part to keep proper attendance notes and/or records may have adverse consequences. This omission could persuade the court to doubt the veracity of the drafting solicitor's testimony if a dispute arises as to the purport of the terms of the will; the court may even draw adverse inferences against the drafting solicitor (see *Lie Hendri Rusli v Wong Tan & Molly Lim* [2004] 4 SLR 594 at [63] and *Law Society of Singapore v Tan Phuay Khiang* [2007] 3 SLR 477 at [82]).

39 In the present case, the early November attendance note, regrettably, does not contain any meaningful details. Even the date and the time of the Testator's telephone conversation with Alan Lee are not recorded therein. More importantly, the contents of this attendance note are not self-explanatory and may even be considered internally inconsistent if the word "balance" is taken to mean the Estate as defined at [1] above (*ie*, the Testator's residuary estate). This is because, if the word "balance" does indeed denote the Estate, then the references in this attendance note to "1A Wiltshire" and "shares of Co.", with arrows linking these items to Sebastian's name, would have been unnecessary. Further, the early November attendance note does not support the terms of the Will in so far as the former makes no mention of the conversion of all the assets in the Estate into cash, whereas cl 2(i) of the Will expressly provides for such conversion. In addition, it bears mention that, curiously, the early November attendance note refers to Sebastian by both his English name (*ie*, "Sebastian") and his Chinese name (*ie*, "Ng Hock Guan"). There is also a question mark in Alan Lee's own handwriting after the reference to the Testator's shares, as follows: "shares of Co. " to transfer to Sebastian***?***" [emphasis added in bold italics]. Why? Were instructions on the drafting of the Will received on different occasions and/or from different persons? Alan Lee did not give any satisfactory explanation when he was queried on these points at the trial.

40 In the prevailing circumstances, we draw an adverse inference against Alan Lee for failing to

keep proper attendance notes recording fully and accurately the Testator's instructions as to how the Will was to be drawn up. Further, given the discrepancy between what the Testator allegedly told Alan Lee (*viz*, that Sebastian was to be given the whole of the Estate as the sole beneficiary) and the contents of the early November attendance note, coupled with the striking differences between the contents of that attendance note and the contents of the Will, it appears to us that either the early November attendance note was incomplete or Alan Lee failed to instruct the Junior Solicitor about the Testator's precise instructions. In this regard, it is pertinent that there was no written record of the instructions that Alan Lee gave the Junior Solicitor. We mentioned earlier (at [12] above) that the failure to call the Junior Solicitor to testify is an important factor that the Judge did not appear to have considered. Indeed, it would not be unreasonable for us to also draw the inference that, in the absence of testimony from the Junior Solicitor, there is no evidence (other than Alan Lee's testimony) to show either that what the Junior Solicitor drafted was what Alan Lee claimed he had instructed the Junior Solicitor to draft or that Alan Lee had communicated the Testator's instructions accurately and fully to the Junior Solicitor.

41 We are also troubled by the fact that the Will is, by any yardstick, unusual: It plainly does not adhere to the usual precedent used where the testator intends to leave his entire residuary estate to a single executor-cum-beneficiary (as to the usual precedent used for a will of this nature, see [29] above). When Alan Lee was cross-examined on the unusual nature of the Disposition Clause in particular, to fend off further questioning, he was quick to seek shelter by asserting that he had not drafted the Will. The Notes of Evidence show the following exchange between Alan Lee and the appellants' then counsel, Mr Andre Arul ("Mr Arul"):[note: 23]

> Q. … If Sebastian was a sole beneficiary, why did you ask for it [*ie*, the Estate] to be on trust to be distributed to him? Because normally, when drafting wills, if a certain person is a trustee, another person is beneficiary, then one would have the trustee hold [the testator's residuary estate] on trust to be distributed to certain people, but here [Sebastian]'s the trustee and the beneficiary, so why do you phrase it in this way?
>
> A. … *I didn't draft the [W]ill. I did approve the [W]ill.* It was drafted by my junior assistant, and *it's actually quite common also from what I've done previously in my early years, even though [the testator's residuary estate is] given actually to the trustee and beneficiary, they are the same person, to still use the words "on trust".* Effectively, it is still the same person.
>
> [emphasis added]

In our view, the answer given by Alan Lee to Mr Arul's question unmistakably shows that he was merely prevaricating when he claimed that the form of the Disposition Clause was "quite common … from what [he had] done previously".[note: 24] We find it rather surprising that Mr Arul did not challenge this statement by asking Alan Lee to produce some of his purported precedents to back up his statement.

42 In view of the factors outlined at [36]–[41] above, it is unsafe for this court to rely on Alan

Lee's evidence of the Testator's alleged instructions v*is-à-vis* the drafting of the Will as an aid in construing the Testator's intention as expressed in that instrument.

Whether the Testator used the words "wei tok" or "wei cheok" when talking about the Will

43 It is common ground between the parties that the term "*wei cheok*" means "will" in Hokkien, whereas "*wei tok*" means "entrust". As indicated earlier (see sub-para (h) of [15] above), Sebastian's evidence at the trial was that the Testator had used the term "*wei tok*" when talking about the Will. Sebastian, however, later prevaricated and said that the Testator might have used either "*wei tok*" or "*wei cheok*" because the two words "[were] quite close".[note: 25] Three of Sebastian's witnesses – namely, (a) a son of a cousin of the Testator ("Huang"); (b) an 89-year-old former bank employee who previously handled the Subsidiary's accounts and who retired 24 years ago ("Tai"); and (c) the Testator's personal driver and general office assistant ("Koon Ting"), who stopped working for the Testator in the 1980s due to health reasons – likewise testified that the Testator had used the term "*wei tok*" or other Hokkien words to a similar effect, *viz*, "*chu li*" and "*kao*". (Huang, Tai and Koon Ting also testified that the Testator had informed them at various points in time that he was going to leave the whole of the Estate to Sebastian.) In contrast, Alan Lee was "clear" (see [164] of the Judgment) that the Testator did not use the words "*wei tok*" when giving instructions in early November 2000 on the drafting of the Will. Alan Lee's evidence was as follows:[note: 26]

Q.	So can you tell us in what form the instructions came to you as regards the … [W]ill?
COURT:	What do you mean by "in what form"?
MR ARUL:	Was it a communication by [the Testator] to you personally or was there a letter written or how?
A.	No, he spoke to me.
…	
Q.	He spoke to you over the telephone?
A.	Yes.
…	
Q.	Yes, okay. And what did he say?
A.	He asked me to do his will and he gave me details and so on about his assets, you know, his property, his shares in the company, so I mentioned to him … that we don't need to go into specifics, since he was going to give everything and all that to Sebastian.
Q.	Now, in this communication he communicated with you in Hokkien?

A. That's correct.

Q. *Did he use the Hokkien word "wei tok"?*

A. *Wei cheok.*

Q. *No, did he use the Hokkien word "wei tok"?*

A. *No.*

Q. *Are you sure or not sure?*

A. *Sure.*

[emphasis added]

We should point out that the terms "*wei tok*" and "*wei cheok*" do not appear in either the early November attendance note or the 27 November attendance note.

44 Pertinently, the Judge, whilst noting that Sebastian had seemed unsure about whether the Testator had used the words "*wei tok*" or the words "*wei cheok*" when talking about the Will, ultimately preferred Sebastian's evidence on this issue to Alan Lee's evidence – *ie*, he accepted Sebastian's evidence that the Testator had used the words "*wei tok*" (see [165] of the Judgment). In coming to this conclusion, the Judge did not place any weight on the evidence of Huang, Tai and Koon Ting (see [185] of the Judgment), all of whom he found to be unreliable witnesses (see [171], [179] and [183] of the Judgment *vis-à-vis* the Judge's assessment of the credibility of, respectively, Huang, Tai and Koon Ting).

45 We see no reason to depart from the Judge's finding that the Testator had used the expression "*wei tok*" when talking about the Will. We disagree, however, with the Judge's ruling on the implications of this finding, which was as follows (see [165] of the Judgment):

> … I believe that [the Testator] had said "wei tok" to Sebastian but what would the consequence be? As I have mentioned, there must be more than a moral obligation. The words "wei tok" are consistent with an intention to entrust everything to Sebastian with a *moral* obligation to take care of family members as Sebastian thought fit. The words in themselves *would not* translate into a *legal* obligation to make specific gifts. [emphasis added]

46 With respect, the Judge failed to consider fully a vital nuance here. If, indeed, the phrase "*wei tok*" had been used, the Testator would have *entrusted* his assets to Sebastian for the benefit of other beneficiaries (such as the appellants) and not just for Sebastian's own benefit. *If*, contrary to the Judge's ruling at [165] of the Judgment (see the passage reproduced at [45] above), the words "*wei tok*" *can* form the basis of *a legal, rather than just a moral, obligation* (which, as will be seen below, is the view of this court), then it can be said that Sebastian was *not* intended to be the sole beneficiary of all of the Estate under the Will. Rather, he was only meant to be a *trustee* to ensure a just distribution of the assets in the Estate. Sebastian would, on this analysis, have legal responsibilities *qua* trustee to distribute those assets. A legal, as opposed to a moral, "*wei tok*" arrangement strikes at and undermines the very heart of the claim by Sebastian that he is entitled to the Estate *absolutely.* In this regard, it is highly significant that Alan Lee acknowledged during cross-examination that the words "*wei tok*" referred to a *legal* trust (specifically, "[a] trust as in holding on

trust"),[note: 27] and not merely "trust" (as a verb) in the sense of having confidence in the worthiness of the person being relied on. *As Alan Lee was Sebastian's witness and as no other meaning of the term "*wei tok*" has been suggested, we are of the view that the meaning proffered by Alan Lee is the correct meaning to be ascribed to this expression for the purposes of this appeal – ie*, the words "*wei tok*" denote a *legal* obligation (*contra* the Judge's ruling at [165] of the Judgment). It follows that the Testator's use of this term when talking about the Will militates against the Testator's intention (as expressed in this instrument) being construed as an intention to leave the whole of the Estate to Sebastian as the sole beneficiary.

The manner in which the Will was explained to the Testator

47 The Testator executed the Will on 27 November 2000 at Mount Elizabeth Hospital, where he was then hospitalised. Before he executed the Will, Alan Lee translated the document into Hokkien for him, but did not explain it in full line by line. Alan Lee's evidence on this point was as follows:[note: 28]

> Q. You say you went through the [W]ill; could you just explain what you mean by that.
>
> A. I explained in Hokkien to him [*ie*, the Testator], as in that this is his will. If he had any other wills, they would be of no use; [they] would be revoked. And I went through with him that the trustee would be Sebastian … and if anything happens to Sebastian, it would be [Mdm Ho]; that … [after] he passes away, all his assets … would actually be [used] to pay off the funeral expenses, to pay off estate duty, any debts; and whatever balance will be given to Sebastian.
>
> Q. Okay. So it was a general explanation?
>
> A. "General" as in the gist is there; that was the gist of it.
>
> …
>
> MR ARUL: … [Y]ou – you didn't take [the Testator] line by line through the [W]ill?
>
> A. Not line by line.
>
> Q. Okay. It was a gist, general explanation, as you have just given just now?
>
> A. Mm-hmm.

48 Significantly, Alan Lee did not explain the words "ON TRUST" [underlining in original] in the

Disposition Clause to the Testator. This emerged from the following exchange between Alan Lee and Mr Arul during cross-examination:[note: 29]

> Q. Now, what about the word[s] "on trust"? How would you have translated this, the meaning of "on trust"?
>
> A. *I didn't translate to [the Testator] the word[s] "on trust"* …
>
> Q. So how do you explain this part of it, again, Mr Lee?
>
> A. As I have mentioned, your Honour – Mr Arul, it's a drafting [*sic*]. You know, I've seen [it] before; it's been done even in forms and precedents, the trustee and beneficiaries being the same. *I didn't explain to [the Testator] "on trust"* because everything was given to Sebastian.
>
> [emphasis added]

It can also be seen from Alan Lee's evidence that the Testator was, on the whole, only given a very brief explanation of what being a trustee entailed, as follows:[note: 30]

> MR ARUL: Now, did you explain to or advise [the Testator] during the [telephone] conversation [in early November 2000] as to what the duties of a trustee are and what a beneficiary is?
>
> A. Definitely as in where the trustee was concerned, as in appointing Sebastian, I did explain to him that the trustee would actually apply to court, see the lawyers, as well as also get the probate and then subsequently … *distribute the assets*; that is the duty of a trustee.
>
> [emphasis added]

49 Three significant points emerge from Alan Lee's evidence as set out at [47]–[48] above. First, since Alan Lee did not take the Testator through the Will line by line, the latter effectively affixed his thumbprint to a document which he could not read (because it was written in English, a language in which he was illiterate) and whose meaning either had not or might not have been properly explained to him.

50 Second, at least where the Disposition Clause was concerned, Alan Lee did not give the Testator a proper explanation. Alan Lee's omission in this regard is especially significant because of the subtle but immensely important nuances between the words used in the Disposition Clause and the words ordinarily used in the context of a gift. We have already pointed out (at [31] above) that, if the Testator had intended to bequeath the Estate to Sebastian as the sole beneficiary, one would

have expected him to use the verb "give" rather than "distribute". The phrase "ON TRUST to be distributed to [Sebastian]" [underlining in original], as the Disposition Clause currently states, is arrant legal nonsense because: (a) a person cannot be a trustee for himself (see [27] above); and (b) it distorts the ordinary meaning of the word "distribute" (see [30] above). Suppose, for a moment, that the word "to" after the word "distributed" in the sixth line of the Disposition Clause were replaced with the word "by": The meaning of the Will would then be singularly different. The phrase "distributed *by*" has entirely different legal consequences from the phrase "distributed *to*". The former phrase would impose a *legal* obligation on Sebastian to distribute the Estate to other family members of the Testator.

51 Third, if Alan Lee had tried to give the Testator a proper explanation of the Disposition Clause, he (Alan Lee) would have realised that this clause (and the terms of the Will as a whole) did not make sense and might be called into question. More worryingly, if Alan Lee did not adequately explain to the Testator what was really the most important clause in the Will (*viz*, the Disposition Clause), would he have taken the trouble to explain the other less important parts of the Will?

52 In the court below, the Judge did not place much significance on Alan Lee's omission to explain the Will to the Testator line by line, commenting (see the Judgment at [158]):

> The [appellants] … submitted that [the Testator] was almost blind in the left eye from cataract and glaucoma and did not have his reading glasses on the day he signed the Will. However, it was not Alan Lee's evidence that [the Testator] was able to read the contents of the Will but that he [*ie*, Alan Lee] had interpreted the contents of the Will to [the Testator]. *The fact that [Alan Lee] did not do so line by line was irrelevant since the Will remained unchallenged*. In the circumstances, it was also not open to the [appellants] to suggest that [the Testator] was not in a position to confirm whether his wishes were correctly set out in the Will. [emphasis added]

53 It is clear from the appellants' pleadings and the evidence of the appellants' witnesses that the Judge was right to say that the appellants did not challenge the validity of the Will. However, given that the appellants' argument *vis-à-vis* the Threshold Question was that the Testator's intention (as expressed in the Will) should not be construed as an intention to leave the whole of the Estate to Sebastian as the sole beneficiary, the Judge should have given greater consideration to the way in which the Will was explained to the Testator. In our view, the obvious ambiguities in the wording of the Will as a whole and the Disposition Clause in particular (see [22]–[31] above), Alan Lee's failure to take the Testator through the Will line by line and the overall manner in which Alan Lee explained the Will to the Testator, taken together, indicate that the Testator might not have understood the crucial difference between creating a *trust* over the Estate and making an outright *gift* of the Estate to Sebastian (indeed, it appears from the evidence that the Testator did not receive any advice on this particular point). This in turn militates against construing the Testator's intention (as expressed in the Will) as an intention to leave the whole of the Estate to Sebastian as the sole beneficiary.

The relevance of the persons who were present when the Will was executed

54 At the actual moment when the Will was executed (in the sense of the Testator affixing his thumbprint to the instrument), Alan Lee and Lua, the two witnesses to the execution of the Will, were (obviously) present. Two doctors, Dr Ting Wen Chang ("Dr Ting") and Dr Teoh Peck Chua ("Dr Teoh"), were also present. (It appears from Alan Lee's evidence[note: 31] that Sebastian was *absent* at the time the Will was executed, although he had earlier been present while the document was being explained to the Testator.) Significantly, Lua, Dr Ting and Dr Teoh were all *not* called as witnesses at the trial. In our view, this has an impact on how the Testator's intention, as expressed in the Will,

should be construed.

55 We earlier mentioned (at [12] above) that the Judge relied on Alan Lee's evidence to find that "[Lua] … confirmed with [the Testator] that he was giving everything to Sebastian" (see [151] of the Judgment). Given that Alan Lee was not a completely independent witness (see [11] above), not least because of his close relationship with Sebastian, the amount of weight to be placed on Alan Lee's evidence of the events which took place on 27 November 2000 in relation to the explanation and the execution of the Will is a matter that requires very careful deliberation. If Lua had testified at the trial, his evidence could have been material in confirming Alan Lee's testimony. However, as we have just noted at [54] above, Sebastian did not call Lua as a witness. More importantly, there was no *satisfactory* explanation of why Lua was not called to testify. *Assuming that Lua, who resides in Singapore, was not well at the time of the trial, he could have been examined at his home.* There was no satisfactory medical evidence *on record* to show that he was *incapable*of testifying. Although we would not go so far as to draw an adverse inference against Sebastian under s 116 of the Evidence Act (Cap 97, 1997 Rev Ed) for omitting to adduce evidence from Lua, we are of the view that, since Lua's evidence could have been relevant admissible extrinsic evidence for the purposes of ascertaining the Testator's intention as expressed in the Will, Sebastian's omission to call Lua as a witness is another consideration that militates against our accepting Sebastian's interpretation of the Testator's expressed intention.

56 The same applies in respect of Sebastian's failure to call Dr Ting and Dr Teoh as witnesses. Sebastian had arranged for these two doctors to be present during the execution of the Will so as to attest to the Testator's competence to execute a will. Dr Ting and Dr Teoh subsequently issued a certificate dated 27 November 2000 stating that the Testator had been of sound mind when he executed the Will. This certificate, unfortunately, is of no assistance to us in determining the Threshold Question. If Dr Ting and Dr Teoh had been called as witnesses, they might have given material evidence of what transpired in the Testator's hospital room on 27 November 2000 prior to and during the execution of the Will (in particular, they might have given important evidence of how the Will was explained to the Testator before it was executed). Such evidence might, in turn, have supported the argument by Sebastian that the Testator manifested in the Will an intention to leave the Estate to him (Sebastian) as the sole beneficiary. From this perspective, the failure by Sebastian to call Dr Ting and Dr Teoh to testify on his behalf detracts, in our view, from his interpretation of the Testator's expressed intention.

The relationship between the Testator and his family

57 The Testator had eight children and a wife. The Judge penetratingly observed that "[i]t is unusual for a man to give his entire estate beneficially to only one child out of many children" (see the Judgment at [21]). Sebastian's position was that the Testator did so because he was disappointed with the rest of his children and his wife, Mdm Low. The Judge found that, at the time of the execution of the Will and likewise at the time of the Testator's demise, Sebastian was indeed the Testator's favourite child (see the Judgment at [23]) – a point which Sunny and Raymond conceded, albeit with some reluctance, during cross-examination. We accept that the Testator trusted Sebastian more than the rest of his children and Mdm Low because they had disappointed him. This, however, does not in itself offer any unequivocal pointers as to the terms on which the Estate was intended to be left to Sebastian.

58 Further, while it has been established that Sebastian was the Testator's favourite son and that the Testator was disappointed with the rest of his immediate family, it is more than significant that the Testator all along adequately provided for the rest of his immediate family by, *inter alia*, giving them homes and/or vehicles. For instance:

(a) Until his demise, the Testator continued to allow salaries to be paid by the Family Companies to his immediate family members. In this regard:

(i) Ricky, Sunny and Sebastian each received a basic salary of $10,000 per month;

(ii) Mdm Low received $10,000 per month;

(iii) Raymond received a basic salary of $3,000 per month;

(iv) Calista and Angeline each received a basic salary of $2,650 per month;

(v) Jenny was paid $1,500 per month; and

(vi) Edwina was paid $4,000 per month.

(b) The Testator continued to live and interact with Mdm Low, who was dependent on him, until his demise. The Judge found that the Testator "*felt responsible to care for [Mdm Low]*" [emphasis added] (see the Judgment at [65]). Indeed, as we shall show below, one can go further and say that the Testator loved Mdm Low. On her part, Mdm Low continued to manifest affection for the Testator. This can be seen from, *inter alia*, Sebastian's evidence during cross-examination that, while the Testator was ill, "[Mdm Low] would sit down by his side … *most of the time, to care for him*"[note: 32] [emphasis added].

(c) Until his demise, the Testator lived with Jenny, who is mentally challenged, and arranged for her to receive a monthly salary.

(d) Sebastian conceded during cross-examination that the Testator was concerned that Mdm Low should be adequately taken care of after his (the Testator's) demise. (Sebastian, however, also anxiously sought to limit the extent of the Testator's concern for Mdm Low to a "concern … to … [let Mdm Low] have a roof over her head"[note: 33]and to "let her stay".)[note: 34]

In addition, it is pertinent that Sebastian accepted that the Testator continued to love Mdm Low notwithstanding disagreements between the couple due to Mdm Low's many requests for financial assistance for their children. When asked by Mr Arul during cross-examination, "*Did your father love your mother?*"[note: 35][emphasis added], Sebastian responded, "*Of course*"[note: 36] [emphasis added]. As the Judge astutely observed, the Testator "*felt a sense of responsibility for the welfare of various immediate family members*" [emphasis added] (see the Judgment at [66]). He did not unambiguously evince by his conduct any prior intention to exclude Mdm Low and the rest of his children from the eventual distribution of the Estate.

59 If the Testator's intention as expressed in the Will were construed as an intention to bequeath the whole of the Estate, including 1A Wiltshire and a critical block of shares in the Holding Company, to Sebastian absolutely (which was Sebastian's pleaded position), Mdm Low and the rest of the Testator's children (especially those living with him at 1A Wiltshire) would effectively be left wholly at the mercy of Sebastian's whims. Even Mdm Low, who was 77 years old at the time of the Testator's death and entirely dependent on the Testator, would, on this interpretation of the Testator's expressed intention, be left with nothing.

60 The Testator was, of course, entitled to draw up a will of such a capricious nature. As stated in *Williams* ([19] *supra*) at vol 1, para 51.7:

> A testator has a right to be capricious if he chooses. If the words used by the testator are unambiguous in the context, the sense given to the words by the context cannot be departed from, and the court cannot put a meaning on them different from that which it judicially determines to be their meaning [because] of any difficulty or inconvenience in carrying out the [testator's] intention, or because they lead to consequences which are generally considered capricious, unusual, unjust, harsh or unreasonable.

However, *Williams* also points out that (at vol 1, para 51.8):

> Without some *clear intention* on the part of the testator, … the court does not attribute to him a capricious intention, or a whimsical or harsh result to his dispositions, where the words of the will can be read otherwise. [emphasis added]

Thus, if a particular interpretation of a will which is *ambiguous on its face* leads to a result that is irrational and capricious, the court will prefer an alternative interpretation that leads to a fair, rational and reasonable disposition and distribution of the testator's estate.

61 In the present case, as we noted at [58] above, the Testator did not, prior to his death, evince an unambiguous intention to exclude Mdm Low and the rest of his children from the distribution of the Estate. Indeed, if the multi-faceted relationship between the Testator and his immediate family members (other than Sebastian) had truly frayed beyond repair, there would have been no reason for the Testator to continue providing for those family members right until his demise; equally, there would have been no reason for him to continue residing with Mdm Low and some of his children, but not with Sebastian and Mdm Ho. This in turn indicates that it is *not* appropriate to construe the Testator's intention (as manifested in the Will) as an intention to effect the result outlined at [59] above. As Chan Seng Onn JC aptly stated in *Wong Kai Woon v Wong Kong Hom* [2000] 1 SLR 546 at [39]:

> If the testator's intention has not been clearly expressed and the language of the will admits of more than one construction, then the court will generally not adopt a construction that will lead to an irrational and capricious result, but select one that leads to a fair, rational and reasonable disposition and distribution of the estate.

62 We also observe with interest that, on 28 June 2001, shortly after the contents of the Will had been disclosed to the other members of the Testator's immediate family, Sebastian confirmed a handwritten note prepared by Sunny ("the Handwritten Note"), which stated:[note: 37]

(1) House (9) share [*sic*]

(2) For china girl $700 per month up to Primary six

(3) Mother $160,000

… For Ah Huat $100,000

Gold $60,000.

(4) China 1,000–2,000 per month

(5) Balance of money up to … [illegible]

[underlining in original]

63 The Handwritten Note contains a notation written by Lee Kok Leong, the general manager of the Subsidiary, stating "I confirm the above with Sunny and Sebastian on 28/6/01".[note: 38] Sebastian, when testifying, vigorously denied either having been involved in the preceding discussions leading up to the making of the Handwritten Note[note: 39] or having assented to this note, despite Lee Kok Leong's confirmation to the contrary effect. The Judge found against Sebastian on this point as he accepted Lee Kok Leong's testimony as truthful (see [141] of the Judgment). (In this regard, we note that Sebastian now no longer disputes that the Handwritten Note accurately records his confirmation given on 28 June 2001.)[note: 40] The Judge, however, did not attach much weight to the Handwritten Note as he was of the view that it was "not consistent with the [appellants'] claims [in relation to the Pleaded Trusts]" (see the Judgment at [142]). While the Judge was certainly right about the Handwritten Note being inconsistent with the appellants' case *vis-à-vis* the Pleaded Trusts, we would not lightly dismiss this document as being wholly irrelevant, not least because it is plain that, at the time the Handwritten Note was made, Sebastian appeared to accept that the Testator intended him (Sebastian) to share the Estate with his family members. Unfortunately, we cannot say for sure what Sebastian's precise motives for earlier confirming the Handwritten Note were. The issue of whether this note set out a binding arrangement between the parties was, regrettably, not explored in the court below and we do not propose to make a ruling on this now.

64 In view of the foregoing evidence of the relationship between the Testator and his immediate family, this much seems plain to us: The relationship between the Testator and his immediate family members was complex and multi-faceted, and has neither been clearly delineated nor fully explored. The Testator was clearly not alienated from the rest of his immediate family. He continued to live until his demise with Raymond, Jenny and Mdm Low at 1A Wiltshire, the family home (Edwina also stayed there from time to time to care of the Testator). In addition, he continued to have regular contact with Mdm Low and some of his children until his demise, and did not limit his contact with his family to contact with Sebastian exclusively even though, over time, he had indeed become dependent on Sebastian for business decisions. In the face of such evidence, it is *inappropriate* for this court to construe the Testator's intention (as expressed in the Will) as an intention to bequeath the whole of the Estate to Sebastian alone beneficially, with nothing to be left to the rest of the Testator's immediate family.

Our assessment of the relevant admissible extrinsic evidence

65 It will be apparent from the foregoing analysis (see [34]–[64] above) that this court is of the view that the relevant admissible extrinsic evidence in the present case militates against construing the Testator's expressed intention as an intention to bequeath the whole of the Estate to Sebastian as the sole beneficiary. The evidence that the Testator intended to make such a bequest by the Will consisted essentially of evidence from Sebastian himself and Alan Lee. Sebastian was, as the Judge found, "not … entirely truthful" (see [193] of the Judgment (reproduced at [8] above); in this regard, see also the shifting stance adopted by Sebastian as to whether or not he had confirmed the Handwritten Note (at [63] above)). As for Alan Lee, he was not a completely independent witness (see, *inter alia*, [36] above). We find his evidence of the Testator's alleged instructions on the drafting of the Will and of the execution of this instrument questionable because:

(a) he failed to keep proper attendance notes of the instructions which the Testator gave him;

(b) he did not draft the Will himself, even though he was the direct recipient of the Testator's instructions as to how that instrument should be drawn up;

(c) he could not explain why the Disposition Clause had been drafted in such an unusual manner (see [41] above);

(d) he did not interpret the Will to the Testator line by line (see [47] above) and generally failed to give the latter a proper explanation of the terms of the Will; and

(e) he claimed – improbably, in our view – that he had drafted clauses similar to the Disposition Clause previously (see the extract from the Notes of Evidence quoted at [41] above).

66 In essence, the supporting cast of witnesses who testified on Sebastian's behalf at the trial, apart from Sebastian himself (whom the Judge considered was "not … entirely truthful" (see the Judgment at [193])), comprised three persons who were found to be unreliable witnesses (*ie*, Huang, Tai and Koon Ting) and one witness who was regarded as not completely independent (*ie*, Alan Lee). While the Judge was plainly right to regard as dubious much of the appellants' evidence on the Pleaded Trusts (see, *eg*, [98]–[119] of the Judgment), it must at the same time be emphasised that the testimonies of Sebastian and his supporting witnesses likewise lacked a ring of truth where the bulk of the material points was concerned. In the circumstances, it is unsafe to rely on the testimonies of Sebastian and his witnesses as evidence that the Testator manifested in the Will an unequivocal intention to make an outright and absolute gift of the Estate to Sebastian as the sole beneficiary. On the contrary, it appears to us from the evidence of the relationship between the Testator and his immediate family members (see [57]–[64] above) that, on a balance of probabilities, in specifying in the Disposition Clause that the Estate was to be held by Sebastian "ON TRUST" [underlining in original], the Testator manifested an intention to make provision for Mdm Low and the rest of his children as well.

Our interpretation of the Testator's expressed intention

67 To reiterate, we are of the view that the Testator's intention as manifested by the words used in the Will is not clear on the face of that instrument because of the latent ambiguities therein. Further, the relevant admissible extrinsic evidence has raised in our minds grave and unalleviated concerns as to whether, by the Will, the Testator expressed an intention to appoint Sebastian as his sole beneficiary. In the result, we hold that the Testator's expressed intention *cannot* be construed as an intention to leave the Estate to Sebastian absolutely for his sole benefit. The Judge erred in holding that, when the Testator entrusted the Estate to Sebastian, he imposed on Sebastian merely "a *moral* obligation to take care of family members as Sebastian thought fit" [emphasis added] (see the Judgment at [165]), which obligation "*[did] not* translate into a *legal* obligation to make specific gifts" [emphasis added] (*ibid*). In our view, contrary to the Judge's ruling, the Will did impose a *legal* obligation on Sebastian *qua trustee* on behalf of all the other members of the Testator's immediate family. Sebastian is thus not the sole beneficiary of the Estate.

68 This in turn raises the question of whether Sebastian now holds the Estate subject to the Pleaded Trusts (*ie*, the Pleaded Trusts Question as defined at [18] above), or subject to some other trusts. Having read the pleadings, the Notes of Evidence, the written submissions of the parties and the Judgment, and having heard counsel's arguments, we find no justification to interfere with the Judge's decision on the Pleaded Trusts Question. The Judge painstakingly distilled with admirable diligence and patience the evidence tendered to him before ruling that the appellants had *not* established that the Estate was subject to the Pleaded Trusts; we affirm his decision on this point.

69 For whom then does Sebastian now hold the Estate on trust? In other words, what trust or trusts is the Estate currently subject to? Unfortunately, the Testator's intentions on the exact

manner of distribution of the Estate cannot now be established either by reference to the words used in the Will or by extrinsic evidence. We therefore declare, on a reasonable construction of the Will after taking into account the relevant admissible extrinsic evidence and the presumption that a testator does not intend to effect a capricious result by his will (see [60] above), that the Testator's intention, as expressed in the Will, is that Sebastian is to hold the Estate on trust for the Testator's immediate family, with the Estate to be distributed *by* – and (contrary to the words used in the Disposition Clause) *not* to – Sebastian in accordance with the rules on intestacy. *We thus rule in the appellants' favour where the Threshold Question is concerned* – ie*, by the words used in the Will, the Testator intended to leave the Estate to Sebastian on trust for those of the Testator's family members who are entitled to a share of the Estate pursuant to s 7, rr 2 and 3 of the Intestate Succession Act (Cap 146, 1985 Rev Ed).* The appellants are granted the declaratory relief pleaded in prayer (c) of the Statement of Claim (as reproduced at [5] above) on these terms. The appellants also have liberty to apply to this court to substitute Sebastian with a new trustee (or new trustees) if they are collectively unable to reach a consensus as to how they should henceforth proceed in distributing the Estate.

70 We should add that, in coming to this conclusion, we have taken into account the rule of construction that, where the language of the will is ambiguous and admits of more than one plausible construction, the court will generally adopt a construction which gives effect to the provisions of the will, rather than one that leads to intestacy, because "the court acts on the presumption that the testator did not intend to die either totally or partly intestate" (see *Williams* ([19] *supra*) at vol 1, para 51.1; and, for an example of the application of this presumption, see *Re Chionh Ke Hu Decd* [1964] MLJ 270, especially at 274 (*per* Winslow J)). This presumption must, however, always be applied in the context of both the will in question and any relevant admissible extrinsic evidence which sheds light on how the testator's expressed intention should be construed.

Conclusion

71 To summarise, we find, *vis-à-vis* the Threshold Question, that the Testator did not intend to leave the Estate to Sebastian absolutely as the sole beneficiary. To this extent, the present appeal is allowed. The appellants have not, however, succeeded in showing, *vis-à-vis* the Pleaded Trusts Question, that Sebastian holds the Estate subject to the Pleaded Trusts. In view of this, and in the light of the wholly unsatisfactory manner in which the appellants conducted the proceedings in the court below, the parties are to bear their own costs of the proceedings here and below. The usual consequential orders are to follow.

Some final observations

72 A will is one of the most important legal documents which an individual can execute. Often, it embraces assets which an individual may have taken a lifetime of effort to amass. It may also deal with properties that have not only immense monetary value, but also (and, perhaps, more importantly) incalculable sentimental or emotional attachment for both the testator and the family members or beneficiaries concerned. Almost invariably, a decision by a testator not to distribute his assets equitably among all the family members whom one would usually expect to be provided for under a will excites dissatisfaction, and is not infrequently a prelude to bitter legal squabbles. The present appeal is, of course, a paradigm example. In our view, there ought to be no room for even the slightest doubt (or the slightest possibility of a mistake) on the part of a solicitor in both *understanding* the testator's intention and *expressing* that intention in the will to be drawn up.

73 The preparation of a will involves serious professional responsibilities, which solicitors must uncompromisingly observe and discharge. Regrettably, it seems to us that, all too often nowadays,

solicitors appear to consider the preparation of a will to be no more than a routine exercise in form filling. This is *wrong*. Before preparing a will, the solicitor concerned ought to have a thorough discussion with the testator on all the possible legal issues and potential complications that might arise in the implementation of the terms of the will. The solicitor ought to painstakingly and accurately document his discussions with and his instructions from the testator. He should also confirm with the testator, prior to the execution of the will, that the contents of the will as drafted accurately express the latter's intention. A translation, if required, must be thoroughly and competently done. Half measures or the cutting of corners in the discharge of these serious professional responsibilities will not do.

74 In our view, the solicitor concerned should also conscientiously seek to avoid being in any situation where a potential conflict of interest may appear to exist. If the solicitor might be perceived as anything less than a completely independent adviser to the testator, he ought not, as a matter of good practice, to be involved in the explanation, the interpretation and the execution of the will. In particular, exceptional restraint and care are called for if the solicitor concerned has a pre-existing relationship and/or past dealings with the sole beneficiary under a will, and all the more so if the will has been prepared urgently and executed in unusual circumstances with that sole beneficiary's active involvement. When such a case occurs, the solicitor involved must be prepared to have his conduct microscopically scrutinised and, perhaps, even his motives called into question.

[note: 1]See the Statement of Claim (Amendment No 4) filed on 4 January 2007 at pp 14–15.

[note: 2]See the appellants' Further Written Submissions filed on 27 June 2008 at para 6.2.

[note: 3]*Id* at para 6.4.

[note: 4]*Id* at para 6.5.

[note: 5]*Id* at para 6.6.

[note: 6]*Id* at para 6.8.

[note: 7]*Id* at para 6.7.

[note: 8]*Id* at para 6.9.

[note: 9]*Id* at para 6.10.

[note: 10]*Id* at para 7.3.

[note: 11]*Id* at para 6.12.

[note: 12]*Id* at p 12.

[note: 13]*Id* at para 7.6.

[note: 14]See p 111 of the certified transcript of the notes of evidence ("the Notes of Evidence") for the hearing on 18 May 2007 (at Record of Appeal ("ROA") vol 3(J), p 3852).

[note: 15]*Ibid*.

[note: 16]See p 129 of the Notes of Evidence for the hearing on 18 May 2007 (at ROA vol 3(J), p 3870).

[note: 17]See p 130 of the Notes of Evidence for the hearing on 18 May 2007 (at ROA vol 3(J), p 3871).

[note: 18]See para 9 of Sebastian's affidavit of evidence-in-chief ("AEIC") filed on 22 September 2006 (at ROA vol 3(C), p 478).

[note: 19]*Ibid*.

[note: 20]See para 4 of Alan Lee's AEIC filed on 22 September 2006, as well as p 95 of the Notes of Evidence for the hearing on 18 May 2007 (at ROA vol 3(J), p 3836).

[note: 21]See p 62 of the Notes of Evidence for the hearing on 21 May 2007 (at ROA vol 3(K), p 4247).

[note: 22]See Exhibit "AL-3" of Alan Lee's supplementary AEIC filed on 8 February 2007.

[note: 23]See p 68 of the Notes of Evidence for the hearing on 21 May 2007 (at ROA vol 3(K), p 4253).

[note: 24]*Ibid*.

[note: 25]See p 16 of the Notes of Evidence for the hearing on 16 May 2007.

[note: 26]See pp 110–111 of the Notes of Evidence for the hearing on 18 May 2007 (at ROA vol 3(J), pp 3851–3852).

[note: 27]See p 136 of the Notes of Evidence for the hearing on 18 May 2007 (at ROA vol 3(J), p 3877).

[note: 28]See pp 152–155 of the Notes of Evidence for the hearing on 18 May 2007 (at ROA vol 3(J), p 3896.)

[note: 29]See p 77 of the Notes of Evidence for the hearing on 21 May 2007 (at ROA vol 3(K), p 4262).

[note: 30]See pp 131–132 of the Notes of Evidence for 18 May 2007 (at ROA vol 3(J), pp 3872–3873).

[note: 31]See p 157 of the Notes of Evidence for the hearing on 18 May 2007 (at ROA vol 3(J), p 3898).

[note: 32]See p 129 of the Notes of Evidence for the hearing on 15 May 2007 (at ROA vol 3(I), p 3703).

[note: 33]See p 128 of the Notes of Evidence for the hearing on 15 May 2007 (at ROA vol 3(I), p 3702).

[note: 34]See pp 129–130 of the Notes of Evidence for the hearing on 15 May 2007 (at ROA vol 3(I)

at pp 3703–3704).

[note: 35]See p 72 of the Notes of Evidence for the hearing on 19 April 2007 (at ROA vol 3(G)(ii), p 2810).

[note: 36]*Ibid*.

[note: 37]See ROA vol 5 at p 6051.

[note: 38]*Ibid*.

[note: 39]See p 48 of the Notes of Evidence for the hearing on 17 May 2007 (at ROA vol 3(J), p 3950).

[note: 40]See the Respondent's Case at paras 66–68.