

Tan Poh Choo Joscelyn v Tan Poh Seng and another  
[2014] SGHC 22

**Case Number** : Suit No 536 of 2012  
**Decision Date** : 06 February 2014  
**Tribunal/Court** : High Court  
**Coram** : Judith Prakash J  
**Counsel Name(s)** : Michael Loh (Clifford Law LLP) for the plaintiff; S. Magintharan and James Liew (Essex LLC) for the first defendant; S Selvaraj (Myintsoe & Selvaraj) for the second defendant.  
**Parties** : Tan Poh Choo Joscelyn — Tan Poh Seng and another

*Trusts – Distribution of trust fund – Formalities – Whether disposition of shares was a gift or did legal owner hold shares on trust for beneficiaries*

6 February 2014

Judgment reserved.

**Judith Prakash J:**

**Introduction**

1 The plaintiff in this action holds a certain sum of money as a trustee and she has come to the court for a determination as to who the rightful beneficial owner of the money is. The two competing claimants are the first and second defendants to the action. All the parties are related, the first defendant being the elder brother of the plaintiff and the father of the second defendant. The trust funds are derived from certain shares that originally belonged to the plaintiff's mother, and the history of the competing claims goes back some 30 years. The story is therefore somewhat involved and due to the lapse of time and the loss of documents, there are many gaps.

**Background**

***Events from 1980 up to 1987***

2 In 1980, one Madam Yeo Siew Guat ("Mdm Yeo") was the owner of 950 shares in a company called Tai Seng Realty Co Pte Ltd ("TSR") and 10 shares in a company called General Sawmill Pte Ltd ("GSPL"). Both these companies were family businesses run by her husband. Mdm Yeo had nine children, namely (not in order of age):

- (a) Tan Lucy (now known by her married name of Lucy Lim) ("Lucy Lim")
- (b) Tan Chin Chye, Amy ("Amy Tan")
- (c) Tan Poh Choo, Joscelyn (the plaintiff)
- (d) Tan Pof Eng (formerly known as Tan Poh Eng and called Ali by the family) ("Pof Eng")
- (e) Tan Poh Wah, Nelly ("Nelly Tan")

- (f) Tan Poh Chuan (also called Eric by the family) ("Chuan")
- (g) Tan Poh Siong (also called Johnson by the family) ("Siong")
- (h) Tan Poh Seng, Robert (also known as Robert Tan), the first defendant; and
- (i) Tan Poh Lin ("Poh Lin").

3 In August 1980, Siong and Chuan incorporated a private limited company in Singapore called Hock Ann Holdings Pte Ltd ("HAPL") as an investment company. Siong and Chuan were the initial shareholders and directors of the company. On 2 May 1981, HAPL passed a directors' resolution by which it was resolved that the company would acquire 950 TSR shares from Mdm Yeo at a price of \$158,000. No similar resolution was produced in respect of the GSPL shares but subsequently (the exact date is not known), Mdm Yeo's TSR and GSPL shares were transferred from her into the ownership of HAPL. It is the evidence of Chuan that Mdm Yeo was paid \$168,000 for these two counters but there was no document adduced to support such testimony. The first defendant does not believe that any money was ever paid to Mdm Yeo.

4 At about the same time, again no dates have been furnished, a number of Mdm Yeo's children who also held shares in TSR transferred their shareholdings to HAPL. As a result, HAPL became the owner of 4,070 TSR shares.

5 The position of the plaintiff is that on the advice of Chuan, Mdm Yeo had decided to do some estate planning because in the 1980s estate duties were very high. She decided to make a gift ("the Gift") of her TSR and GSPL shares to her nine children equally and the shares were transferred to HAPL pursuant to this intention. The scheme was that the children would become shareholders of HAPL itself and would thereby secure their interests in the Gift.

6 The position of the first defendant is that Mdm Yeo transferred her shares to HAPL for the latter to hold the same on trust for Mdm Yeo for her lifetime and thereafter, on trust for distribution to her children in equal shares.

7 According to the plaintiff and her witnesses, the common intention was that each of the children was to receive 22,000 shares in HAPL. These 22,000 shares were to represent such child's interest in the shares that Mdm Yeo had transferred to HAPL. This scheme was not carried out completely in that not all the children became shareholders in HAPL. In the case of Poh Lin, he informed Chuan that he wanted to give his portion of the Gift to his elder brother, Pof Eng, and therefore he never became a shareholder in HAPL. Instead, Pof Eng was regarded being entitled to two shares of the Gift. As for the first defendant, it is the evidence of Chuan that the first defendant wanted his portion to be put in the name of his son, the second defendant, to be held by the latter on trust for himself and his sisters, who are named Arlette and Alena. The plaintiff's position is that for a long time, she was aware only that the first defendant wanted to pass on his share of the Gift to the second defendant. She was not told that the same was to be held on trust by the second defendant.

8 There is no document in court showing exactly how many shares in HAPL were allotted to Mdm Yeo's children in the 1980s. However, from a document dated 24 December 1988 ("the Deed") (a very important document about which I say more below), it appears that in December 1988, Lucy Lim, the plaintiff, Amy Tan, Nelly Tan and Pof Eng were among the registered shareholders of HAPL. These siblings held their shareholdings in part for themselves beneficially and in part for other siblings namely, Lucy Lim, Nelly Tan, Siong and Chuan. From the evidence, Siong and Chuan must also have

been registered shareholders as they had procured the incorporation of HAPL. There is no documentary evidence that either the first or second defendant was a shareholder of HAPL at any time. Chuan and Amy Tan, however, insisted in their testimony that the first defendant's intention was that the second defendant should be a shareholder in his place and Chuan at least was convinced that this intention had been effected and the second defendant had become a shareholder of HAPL.

9 The second defendant's evidence was that in late January or early February 1984, just before his 17<sup>th</sup> birthday, his parents visited him at his boarding school in England. During this visit, the first defendant told the second defendant that he did not want to accept the shares that Mdm Yeo had given him. He said that he had told his siblings that his 1/9<sup>th</sup> portion of the Gift was to be given to the second defendant. He also told the second defendant that this portion was meant for the second defendant alone and that his sisters had no share in it. The first defendant denies that any such conversation took place.

10 At the time that Mdm Yeo's shares were transferred to HAPL, her husband was still alive and he was maintaining her. The senior Mr Tan died in November 1983. Thereafter, Mdm Yeo was maintained for a number of years from her own funds and by some of her children.

11 In April 1988, Mdm Yeo executed her last will. She appointed Amy Tan and the plaintiff as her executors and trustees. By the will, she bequeathed the whole of her estate including her jewellery to her four daughters in equal shares.

### ***The Deed***

12 In December 1987, TSR was put into members' voluntary liquidation. The question then arose as to what HAPL should do. By that time, Chuan who had been managing HAPL, was no longer living in Singapore and neither was Siong. They were considering winding up HAPL and did not want the company to be responsible for the TSR shares which "belonged" to their siblings including the 950 TSR shares which had come from Mdm Yeo. It should be noted, though nothing turns on it, that in the event HAPL was only wound up in 2003.

13 It was decided, after various discussions amongst the siblings, that these shares should be taken out of HAPL. It was in these circumstances that the Deed was drawn up and executed. The actual dates of execution of the document by the various parties are not known but it was dated 24 December 1988. It should be noted that Mdm Yeo witnessed the signatures of the seven siblings who signed the Deed.

14 It may be helpful for me to set out the main provisions of the Deed at this point. There were three sets of parties to the Deed: the Vendors, the Purchasers and the company (HAPL). The Vendors were Lucy Lim, Amy Tan, Nelly Tan, the plaintiff and Pof Eng; the Purchasers were Siong and Chuan. The recitals to the Deed stated that the Vendors were the beneficial owners of 262,000 shares in HAPL and were also the registered owners of a further 814,000 shares which they held on trust for the Purchasers. It was also stated that the Vendors and the Purchasers were to purchase 1,600 TSR shares from HAPL.

15 In the main body of the Deed, the following were effected:

- (a) By cl (i), in consideration of the sum of \$681,200 paid by the Purchasers to the Vendors, the Vendors transferred a total of 538,000 shares to Siong and an identical number of shares to Chuan:

(b) By cl (ii), in consideration of the sum of \$660,800 paid to HAPL, the company sold to the Vendors and the Purchasers 1600 shares in TSR to be transferred to them as follows:

- (i) 140 TSR shares to each of Lucy Lim and the plaintiff;
- (ii) 280 TSR shares to Amy Tan;
- (iii) 90 TSR shares to Pof Eng; and
- (iv) a block of 950 TSR shares to be allocated in the following manner:
  - (A) 2/9<sup>th</sup> shares to Pof Eng;
  - (B) 1/9<sup>th</sup> share to Lucy Lim;
  - (C) 1/9<sup>th</sup> share to Amy Tan;
  - (D) 1/9<sup>th</sup> share to Nelly Tan;
  - (E) 1/9<sup>th</sup> share to the plaintiff;
  - (F) 1/9<sup>th</sup> share to Chuan;
  - (G) 1/9<sup>th</sup> share to Siong; and
  - (H) 1/9<sup>th</sup> share to the second defendant.

16 Clause (v) of the Deed is important and must be set out in full. It says:

The Vendors and the Purchasers further agree that the said 950 shares in Tai Sing Realty Co., (Pte) Ltd shall remain intact during the life time of Madam Yeo Siew Guat and that any dividends declared by the liquidator of Tai Sing Realty Co., (Pte) Ltd or assets distributed shall be applied to the maintenance and up keep of the said Madam Yeo Siew Guat in her lifetime.

17 As might be anticipated, the first defendant places a great deal of emphasis on cl (v) and says that it supports his stand that the 950 TSR shares were never given by Madam Yeo to her children but were instead put into a trust for her benefit during her lifetime. The plaintiff takes the position that the clause reflects the consensus among the siblings, excluding the first defendant, that whilst the 950 shares belonged to them absolutely, they had a moral obligation to support their mother and should therefore only use the proceeds of the same for this purpose during her lifetime and postpone distribution amongst themselves till after her death.

18 In this context, cl (iii) of the Deed cannot be overlooked. That clause stated that in the event the transfer of 1600 TSR shares to the various parties mentioned in cl (ii) was not effected, then HAPL was to hold the same in trust for the Vendors and the Purchasers "who shall retain the beneficial interest of the said shares" in the proportions stated in cl (ii).

### ***Events after the Deed***

19 There is no evidence exactly how the transfer of the 950 TSR shares contemplated by the Deed took place. It is however common ground that eventually assets representing these shares, mainly UOB shares and cash, were distributed by the liquidator of TSR to the plaintiff and Amy Tan who considered that they held the same on trust for the eight persons named in cl (ii) of the Deed. The parties referred to these assets as "the 950 account". In 1994, it was agreed that all the assets of the 950 account should be held by the plaintiff alone. However, even thereafter the siblings generally seem to have regarded both the plaintiff and Amy Tan as the trustees. By the time of Mdm Yeo's death in 2009, however, the plaintiff alone was acting as trustee.

20 It should be noted that the first defendant who was not a party to the Deed asserts that he was not aware of its existence in 1988 or 1989. The second defendant claims, however, that in March 1989 when he visited his mother's home in London, his father brought out a document and showed him a single page of the same: the page in which cl (ii) and the names of the various persons who were allocated portions of the 950 TSR shares were written. The first defendant showed the second defendant the latter's name in the clause and indicated that this evidenced the second defendant's share of the Gift.

### ***Events after the execution of the Deed***

21 The plaintiff's position is that after December 1988, the siblings (sometimes including the first defendant) would meet from time to time to discuss how the 950 account should be managed. She said that she acted at all times with the knowledge, information and consent of all siblings, including the first defendant, and of the second defendant. The 950 account itself was always independently audited so that she could report its net worth when the siblings held their meetings.

22 These meetings were not formal meetings but took place as family gatherings or reunions. One such meeting was in Bangkok in 1994. This gathering was partly to celebrate Mdm Yeo's birthday and partly to discuss the management of the 950 account. According to Lucy Lim, a few days prior to the meeting, the first defendant telephoned her and asked her to make a request to the meeting and to the other siblings and to the second defendant. He wanted the second defendant's 1/9<sup>th</sup> portion to be divided into three so that it would be held in equal shares by the second defendant, Arlette and Alena. His request was that the siblings or the second defendant should add Arlette's and Alena's names to the second defendant's name as beneficiaries of the 950 account. Lucy Lim then passed this request on to the plaintiff.

23 The Bangkok meeting was attended by all the siblings apart from the first defendant. The second defendant was also absent. Minutes were taken at the meeting and subsequently circulated to the siblings. The plaintiff and the siblings who testified on her behalf, ie. Chuan, Amy Tan and Lucy Lim, accepted the minutes as reflecting what had happened at the meeting. The topics discussed were the maintenance of Mdm Yeo and how the assets of the 950 account should be dealt with. Amongst other things, the attendees agreed on the following:

- (a) That \$2,500 a month should be paid for Mdm Yeo's rent;
- (b) All shares belonging to the 950 account would continue to be in the plaintiff's name and any shares in Amy Tan's name would be transferred to the plaintiff. The plaintiff would indicate in her will that the assets of the 950 account were held by her in trust for all; and
- (c) They were all happy with the management of the 950 account so far and the plaintiff and Amy Tan were to continue to be the trustees.

24 The minutes also noted that the first defendant had made a request through Lucy Lim that the second defendant's share in the 950 account should be placed in the names of the second defendant, Arlette and Alena. In this regard, it stated that Lucy Lim was to inform the first defendant that the legal advice received by the plaintiff was that since the portion was in the second defendant's name alone, the second defendant needed to write in to all the other beneficiaries to effect the change. According to Lucy Lim, the plaintiff told the meeting that the second defendant was not agreeable to adding his sisters' names to the 950 account. Lucy Lim was tasked with informing the first defendant about the requirement for the second defendant to consent to the change and that the second defendant had not agreed to do so.

25 The only other meeting at which minutes were taken and subsequently circulated was a meeting held in Malacca on 31 March 2005. This meeting started in the morning and continued to the night. Present were the plaintiff, Lucy Lim, Amy Tan, Nelly Tan, Pof Eng, Chuan, Siong, the first defendant and the second defendant. The defendants were not present in the morning but arrived in Malacca in time to attend the afternoon and evening sessions.

26 According to the minutes, in the morning the parties discussed the accounts and Mdm Yeo's condition. It was agreed that the plaintiff should continue to have the discretion to spend whatever was necessary for Mdm Yeo's care and maintenance. Pof Eng proposed that since the funds in the 950 account were more than sufficient for Mdm Yeo's maintenance, some distribution could be made to the beneficiaries. He had two proposals: (a) that the excess income after expenses be distributed; or (b) that the capital be halved. He believed that either way there would still be sufficient assets to provide for Mdm Yeo's care. It should be noted that according to the balance sheet of the 950 account, as at 31 December 2004, the total assets of the account amounted to \$13,497,347.28 of which \$2,048,391.48 was held in cash in two bank accounts. Further, for the year 2004, the expenses of the fund (basically the cost of looking after Mdm Yeo) had amounted to only \$139,575.82.

27 In the afternoon, the defendants were told about the proposals made by Pof Eng and the siblings and the second defendant then had a long discussion on these proposals. In this regard, para 15 of the minutes is significant. It is a paragraph on which the first defendant relies to support his case. It says:

All agreed that 950 was set up with [Mdm Yeo's] shares, and that she is the true owner although legally, the shares are held in [the plaintiff's] name (and the bank account in [Amy Tan's and the plaintiff's] names) in trust for the 8 "beneficiaries". The 950 fund was set up to be used for [Mdm Yeo's] care and maintenance, and that we were considering distributing some of it only because of extenuating circumstances.

28 The minutes also state that the first defendant was told that the second defendant was the named "beneficiary" and that any distribution had to be made directly to the second defendant only. The first defendant apparently said that he understood the situation and that he would like the siblings to impress on the second defendant that the first defendant's share was meant for his three children if the first defendant was no longer alive.

29 As regards the proposals made by Pof Eng, the second proposal was rejected. The first proposal was considered a possibility since it would leave the capital intact and available to take care of unforeseen problems. Chuan and Siong objected to the proposal outright. They felt it was a breach of trust to make any distribution. After dinner, everyone got together for a third proposal made by Siong. He suggested that all "the trustees" would be entitled to ask for a loan which would be their portion of the excess of the income of the trust over its expenses. Nominal interest would be

charged. The first defendant objected to the suggestion that interest be charged. It was agreed that for the sake of an unanimous agreement, the interest element would be dropped and interest-free loans offered. According to the minutes, all agreed to the third proposal as so modified.

30 After the Malacca meeting, distributions of the surplus income of the 950 account were made on an annual basis to each of the "beneficiaries". The second defendant as a named beneficiary was given his share of the distribution. According to the plaintiff, the first defendant never objected to this. The first defendant however asserted that he had objected in no uncertain terms to the plaintiff giving a share of the trust income to the second defendant.

### ***Mdm Yeo's death and subsequent events leading to these proceedings***

31 Mdm Yeo died on 2 September 2009. A meeting was held on Monday 7 September 2009 to read Mdm Yeo's Will and to agree on the distribution of the 950 account. This meeting was attended by the second defendant and all the siblings apart from Siong.

32 The plaintiff says that the meeting decided that, as the purpose of the 950 account had ended with Mdm Yeo's death, the 950 account would be liquidated and each beneficiary would be given his or her share in due course. The first defendant asked to read the Will himself and was given the document in order that he could do so. He did not raise any objections to the Will or to the decisions made during the meeting. He did not make any request for the 1/9<sup>th</sup> portion in the second defendant's name to be paid or to be given to him.

33 The plaintiff also says that to determine the transfer fee payable when she transferred the second defendant's 1/9<sup>th</sup> portion to him, she needed the birth certificate of the defendants to prove that the second defendant was the first defendant's son and that the first defendant was her brother. She asked both of them for these documents at the meeting. Subsequently, the first defendant told her that he had reminded the second defendant to pass over the birth certificate as soon as possible. There was no indication at this time that the first defendant was disputing the second defendant's entitlement to share in the distribution.

34 The position changed a few weeks later. On 22 October 2009, the first defendant, through his solicitors, sent a letter of demand to the plaintiff and Amy Tan. This letter stated that the first defendant was the beneficiary of Mdm Yeo under the Intestate Succession Act and that his "rightful 1/9 share in the estate should be distributed to and given only to him and in his personal name". Subsequently, lawyers for the plaintiff and Amy Tan responded to state that Mdm Yeo had not died intestate and that under her will, the only beneficiaries were her four daughters. On 5 November 2009, the first defendant through his lawyers changed his position again and made a claim for a 1/9 share in the 950 account. The plaintiff did not accept this. Her solicitors responded to the effect that when Mdm Yeo made the Gift, the first defendant had given instructions that his share of the same should be given to his son, the second defendant. Therefore if the first defendant wanted to retract his gift to his son, he would have to ask the latter to relinquish his rights.

35 Shortly thereafter the second defendant also appointed lawyers and correspondence subsequently ensued between all the parties. In February 2010, the second defendant took the position that there was no basis on which the first defendant could make a claim for a 1/9<sup>th</sup> share in the 950 account. He asked for that share to be paid to him forthwith. The first defendant did not withdraw his claim.

### **The proceedings**

36 The plaintiff commenced these proceedings by writ in June 2012. In her statement of claim, after setting out the facts and asserting that the dispute was between the first defendant and the second defendant, she stated the respective positions of the defendants as at the filing of the claim to be as follows:

- (a) The first defendant had maintained that it was his intent at all times that his portion of the Gift was to be eventually given to his three children, including the second defendant, equally; and
- (b) The second defendant had maintained that it was the intent of the first defendant that the first defendant's portion was to be given to the second defendant absolutely.

37 The plaintiff went on in para 5 of the statement of claim to formulate what she saw as the issues raised by the dispute between the defendants. Among these are:

- (a) When the first defendant initially placed his 1/9<sup>th</sup> share into the name of the second defendant was it an outright gift?
- (b) Did the first defendant have any rights or residual rights over the 1/9<sup>th</sup> share?
- (c) Was the second defendant to hold the 1/9<sup>th</sup> share for the benefit of all the first defendant's children in equal shares?
- (d) Which party is the lawful beneficiary of the 1/9<sup>th</sup> share?

38 The first defendant filed a long defence. At first he based his defence on the premise that Mdm Yeo had died intestate and as one of her children he was entitled to a 1/9<sup>th</sup> portion of the estate under the laws of intestacy. A copy of the will was then forwarded to his lawyers and the first defendant's defence was amended. The material averments of the amended defence can be summarised as follows:

- (a) At all material times, the assets of the 950 account were in law and fact beneficially owned by Mdm Yeo.
- (b) In about 1981, Mdm Yeo created a trust whereby her shares in TSR were to be held on trust for herself until her death and thereafter, the trust funds were to be distributed equally to her lawful children and none other.
- (c) Mdm Yeo had 9 lawful children including the first defendant; the second defendant who is the son of the first defendant was not a beneficiary of the 950 account.
- (d) The plaintiff was the trustee of the 950 account; she administered the account during Mdm Yeo's lifetime and upon Mdm Yeo's demise distributed 8/9<sup>th</sup> of the assets to the children of Mdm Yeo, including herself, but failed refused and neglected to distribute the 1/9<sup>th</sup> share due to the first defendant despite his demand on 22 October 2009.
- (e) As a result, the plaintiff is in breach of her duties as trustee of the 950 account.
- (f) HAPL was a limited company created solely for the purpose of receiving funds due to Mdm



Yeo and maintaining her from the dividends generated by her shares. All the assets of HAPL were held as trust assets for Mdm Yeo under the 950 account.

(g) The directors of HAPL had no right to transfer the assets of the 950 account to Mdm Yeo's children before her death.

(h) He denied that he had chosen to have his share transferred to the name of the second defendant and asserted that the directors of HAPL acted wrongfully in putting the share in the name of the second defendant who, at the material time, had no legal capacity or right to hold any shares in HAPL. In any event, any share held by the second defendant in HAPL was held as a nominee and on trust for the first defendant and was never intended to be given to the second defendant. As the second defendant was an infant at the material time, any share transfer to him would have been invalid in law.

(i) The dissolution of HAPL did not detract from its object and the beneficial interest in all the shares of HAPL was held on trust and for the sole benefit of Mdm Yeo in accordance with the 950 account. The purpose of the 950 account was to generate income for the maintenance of Mdm Yeo.

(j) The first defendant was not a party to the Deed and the alleged designation of the second defendant as the named owner of a 1/9<sup>th</sup> portion was invalid for, at all material times, the true owner was Mdm Yeo.

(k) The plaintiff by her conduct in seeking to divest the ownership of Mdm Yeo's assets during Mdm Yeo's lifetime had acted in breach of trust.

(l) On Mdm Yeo's death, her estate comprising the whole of the 950 account ought to have been distributed in accordance with her intention in equal shares to her beneficiaries who were her nine children.

(m) The plaintiff was in breach of her duties as trustee of the 950 account and had initiated unnecessary proceedings. The 950 account should not be penalised for costs and the plaintiff and/or the second defendant should be made to bear the legal costs of the proceedings on an indemnity basis.

39 I have set out the first defendant's pleadings in some detail so as to indicate the whole thrust of his case which the second defendant had to meet. The significance of this will be apparent later.

40 The second defendant put in a defence and counterclaim. He admitted most of the averments of the plaintiff in the Statement of Claim in relation to the origin and history of the 950 account. He noted that the plaintiff had confirmed in para 55 in the Statement of Claim that in 1983, the first defendant had asked her to put his 1/9<sup>th</sup> share of the 950 account in the name of the second defendant. He relied on the plaintiff's pleadings as to the relative positions of the first and second defendants in respect of the 950 account. Accordingly his position is:

(a) The plaintiff has failed in her duties as trustee of the 950 account by not adhering to the fact that a 1/9<sup>th</sup> share thereof has always been in the name of the second defendant and the plaintiff has no legal basis on which to withhold payment of this share to the second defendant;

(b) The plaintiff has breached her duties as trustee of the 950 account by not distributing to the second defendant the money to which he is entitled. The plaintiff had no need to apply to

the court for directions and it was for the second defendant to seek his remedy, if any, in the courts;

(c) The present proceedings are unnecessary and unreasonable and the plaintiff should not be entitled to recover costs on any basis.

41 In relation to the first defendant's defence, the second defendant denied the substantive claims of the first defendant. Essentially, he maintained that a gift had been made to him of the first defendant's interest in the 950 account. The main bases for this assertion were that:

(a) By giving instructions that the 1/9<sup>th</sup> share of the 950 account should be registered in the name of the second defendant, the first defendant made an absolute gift of the same to the second defendant.

(b) In the alternative, these instructions amounted to an advancement to the second defendant as the son of the first defendant.

42 In his counterclaim, the second defendant claims payment of the sum of money in the 950 account which represents his 1/9<sup>th</sup> share, interest and costs.

## **Issues**

43 The main issues arising from the pleadings are:

(a) When she transferred her 950 TSR shares to HAPL, was Mdm Yeo making a gift of the same to her children or was she setting up a trust for herself for her lifetime and thereafter for her children?

(b) If a gift was made, what happened to the first defendant's share in the gift?

(c) Was the plaintiff justified in commencing this lawsuit and can she be indemnified for costs?

## **Did Mdm Yeo make a gift or declare a trust?**

### ***The evidence***

44 The legal position regarding the effect of the legal transfer of property by one person to another free of any obligation on the part of the recipient to pay for the same is not in doubt. Whether the recipient becomes the legal and beneficial owner of the transferred property or becomes only the legal owner, holding the beneficial interest on trust for the transferor, depends on the intention of the transferor. This intention may be expressed orally or in writing or may be inferred from conduct and circumstances.

45 On behalf of the plaintiff, Chuan was the main witness as to Mdm Yeo's intentions in 1981. He testified that he and Siong set up HAPL as an investment holding company to manage Mdm Yeo's shareholdings in TSR and GSPL. He said that this arrangement arose out of his idea to do estate planning for his mother. Chuan thought estate planning would ensure a smooth transition of Mdm Yeo's TSR and GSPL shares which had the potential to become very valuable one day. He approached his mother and advised her that, for estate planning purposes, she should look into giving her shares away and asked her who she wanted to give them to. Mdm Yeo was receptive to estate planning and told him that she wanted to give the shares to her nine children equally. The purpose of the estate

planning was to effect an immediate distribution of the shares and not a distribution upon Mdm Yeo's death. Mdm Yeo knew this and was agreeable to the idea.

46 Chuan also advised his mother that the best way of disposing of her shares for estate planning purposes would be to set up a company which could buy over the shares and then the shareholders of the company would hold its shares in proportion to their interests in her gift. Chuan testified that Mdm Yeo had not told him anything about holding the shares in a trust. He subsequently informed some of his siblings, including the second defendant and Pof Eng, about Mdm Yeo's intentions and told them that their mother wanted to give each of them a 1/9th portion of her TSR and GSPL shares.

47 Chuan was the only child who spoke directly to Mdm Yeo about her intentions. Lucy Lim's evidence was that she was told contemporaneously by Chuan that her mother wanted to give her shares to all the nine children and that this gift would be effected by transferring the shares to HAPL and making the children shareholders of HAPL. At the time, Lucy Lim was living in the United States. She did not speak to her mother about the latter's intentions.

48 Whilst Amy Tan did not speak to Mdm Yeo about the shares, her testimony was that Chuan told her about Mdm Yeo's intention to make her children a gift of the shares and that he did so in their mother's presence. At that time Mdm Yeo was in her early sixties and was in good health. The plaintiff herself was not able to add any direct evidence on this point. All she could say was that at all times all of Mdm Yeo's children knew that it was their mother's intent to give away her shares in TSR and GS before her death.

49 In his affidavit, the first defendant asserted that it was always his late mother's intention throughout her lifetime right up to the date of her death that only her children surviving at her demise would be entitled to her shares in TSR and GSPL. He did not say in that affidavit how he knew what Mdm Yeo's intention was. When he was questioned about this in court, he said that until this case started, he did not know exactly whether his mother held shares in TSR and GSPL because she had not discussed the matter with him. All he knew was that his mother was very rich. His mother told him that she had so much money and that when she died she wanted to see that all her children would have one share of her money. However, she did not tell him what share counters she had. He also said that he assumed that Mdm Yeo would never give him anything whilst she was alive. That was more or less the sum total of his evidence on Mdm Yeo's intentions.

50 Pof Eng, who testified on behalf of the first defendant, asserted in his affidavit that Mdm Yeo created a trust of her TSR and GSPL shares so that the dividends arising from the shares would be accumulated and held on trust to maintain her during her lifetime and, after her demise, the accumulated proceeds would be divided equally amongst her nine children. In court, he elaborated that Mdm Yeo had told him this during her lifetime. She had said that she wanted her shares to be given to her children after her death. She also said that there was a company which was holding the shares for her and this company would pay for all her expenses throughout her years.

51 Apart from assertions as to what Mdm Yeo told her children, there are some other pieces of evidence that may assist in solving the puzzle. First, there is the fact that between 1981 and 1988 when the Deed was executed, no dividends were paid to HAPL in respect of the TSR and GSPL shares and HAPL did not maintain Mdm Yeo. Until his death in November 1983, Mdm Yeo's husband maintained her. After that, she was maintained out of her own funds and also by some of her children. Nothing was paid by HAPL. This evidence supports the plaintiff's position because if Mdm Yeo had no need of income from the TSR and GSPL shares in 1981 and, in any case, these counters were not income-producing then she would have had no cause to create a trust of the income for her own support. It was the undisputed evidence of the plaintiff that it was only sometime after 1988, when the liquidator

of TSR made a distribution in specie of UOB shares as representing contributories' holdings in TSR, that the 950 account started receiving dividend income.

52 The next piece of evidence relates to the manner in which the TSR and GSPL shares were transferred to HAPL. While it is the plaintiff's position that they were transferred to HAPL as a gift to her children, that company in fact passed a resolution to purchase the TSR shares for \$158,000. There was probably a similar resolution in respect of the GSPL shares but that was not produced in court. Chuan's evidence was that HAPL paid Mdm Yeo cash of \$168,000 for both counters and that he himself had financed this payment by selling his own publicly listed shares. Upon reflection I think that this evidence, if true, is by itself neutral vis a vis the parties' respective positions. The usual inference that is drawn when a company acquires an asset for value is that the company itself is the legal and beneficial owner of the asset. It does not hold that asset on trust for the vendor nor do its own shareholders have any interest in the asset. Thus, while a sale of the shares would militate against an intention to make a gift, it would also militate against the establishment of a trust in favour of Mdm Yeo herself.

53 There is, however, evidence from Lucy Lim as to why the transfer was structured as a purchase. She explained that there was a concern that unless valuable consideration was shown as having been paid, the authorities would not accept that Mdm Yeo had genuinely disposed of her assets and then the estate planning exercise would have failed. Lucy Lim also believed that the consideration paid was nominal and it was not until these proceedings started and she saw the resolution passed by HAPL that she changed her mind and accepted that a substantial sum had been paid. In fact, there is no evidence that this payment was anything more than a paper transaction. No document supported Chuan's assertion that he had sold his shares and that Mdm Yeo had received the full amount of \$168,000. It is significant that when it came to the Deed, although the same mentioned large sums of money as purchase consideration for the various transfers that took place pursuant to the Deed, the evidence of some of the parties to the Deed was that they had not paid anything to each other. Chuan himself was unable to say whether any money had changed hands in relation to the Deed. He said that he did not know about this and that, because by then he was no longer in charge of HAPL, he had relied on Siong who was "performing the mechanics" required to effect the transactions agreed to in the Deed.

54 Chuan testified that it was he who came up with the mechanism for the transfer of his mother's shares in order to give effect to her intention to gift them to her children. He invited his siblings to subscribe for shares in HAPL. His siblings agreed to this but not all of them took up the subscriptions in their own names. He also testified that they were each allotted 22,000 shares but he could not remember how many paid for the shares and how many did not. The first defendant criticised this evidence as being unsupported by documents or the testimony of the plaintiff, Lucy Lim and Amy Tan. Also the first defendant denied Chuan's assertion that he had paid for shares in HAPL. In my view, what was important in this arrangement was that the siblings took up shares in HAPL. No doubt if they paid for the shares that could be considered some indication that no gift was made. It could mean equally that HAPL was not intended to be a trustee as it would be odd for the siblings to pay for shares in a company which was going to hold a substantial portion of its assets on trust for Madam Yeo. The true import of their becoming shareholders was that this was consistent with an intention to make a gift of the shares to them, albeit through this mechanism their interests were indirect. If HAPL's purpose was only to manage Mdm Yeo's shares as trustee, Siong and Chuan could have remained its sole shareholders and there would have been no need to involve any other sibling as a shareholder. These two brothers would then have been able to manage the company without having to be accountable, even notionally, to anyone else.

55 The next piece of evidence is the Deed itself. This provides for 950 of HAPL's TSR shares to be

transferred to the eight persons named in cl (ii) and for one of these persons to receive 2/9<sup>ths</sup> of the 950 TSR shares while the other seven were to receive 1/9<sup>th</sup> each of the same corpus. In my view, the distribution of the 950 shares to eight persons was not consistent with the same being held on trust for Mdm Yeo. If that were the case, it would have been simpler to provide for the shares to be transferred to one sibling to be held on trust for Mdm Yeo during her lifetime. Instead there was this somewhat awkward arrangement of a declared transfer to all eight and then a provision whereby the parties to the Deed agreed to hold the shares intact during Mdm Yeo's lifetime. The fact that they had to make such an agreement also supports the inference that the 950 TSR shares no longer belonged to Mdm Yeo. This conclusion is reinforced by cl (iii) of the Deed which expressly provides in respect of the 1600 TSR shares "purchased" by the Purchasers and Vendors that in the event the transfer to them was not effected, they would nevertheless retain the beneficial ownership of the shares.

56 Next, I come to the parties' conduct after the execution of the Deed. The first defendant submitted that the conduct of the Plaintiff and her witnesses in keeping the 950 account "intact" during Mdm Yeo's lifetime and only distributing it on her death rebutted the plaintiff's claim that Mdm Yeo had given away the 950 TSR shares in her lifetime. He laid emphasis on the fact that the minutes of the Malacca meeting referred to all attendees agreeing "that 950 was set up with [Mdm Yeo's] shares, and that she is the true owner". He said that this reflected the true position of the 950 account.

57 Having considered all of the evidence of the parties' conduct after the establishment of the 950 trust, I am satisfied that the same reflected the common understanding of the siblings (except perhaps that of the first defendant) that Mdm Yeo had given away her shares to her children absolutely. Their conduct at the two meetings supports Chuan's evidence as to the original reason for the transfer of the shares to HAPL rather than the first defendant's assertions in this regard.

58 Chuan and Lucy Lim also testified that the reason why the Deed was executed was that many of the siblings wanted to take back control over the shares that they had injected into HAPL. At that time Mdm Yeo had her own money but the siblings generally thought that whatever she had given them might have to be used to support her as well. They felt it would be best to keep her gift intact and use it to support her as long as she lived. This was the reason why the 950 account was set up instead of making an immediate distribution of the Gift.

59 I accept the evidence that after 1988, the siblings met from time to time and continued to discuss how Mdm Yeo should be looked after. Generally they were happy with the way that the 950 trust was administered by the plaintiff and Amy Tan. The minutes of the Bangkok meeting in 1994 reflect some of these discussions in particular in relation to her accommodation. At that meeting, the attendees (who included Pof Eng) agreed that if the property market stabilised, a property should be purchased for Mdm Yeo and in the event of her death, that property should be sold by the beneficiaries entitled to it either under her will or under the intestate succession law and the sale proceeds should be distributed to the parties in accordance with their entitlements under the 950 account. This is significant because it meant that the proceeds of any property purchased for Mdm Yeo with the assets of the 950 account would go back to the beneficiaries of the 950 account and would not be distributed in accordance with her will or the laws of intestacy. Such an agreement was contrary to the first defendant's stand that upon Mdm Yeo's death, the proceeds of the 950 account were to be divided equally amongst her children. In this regard, I accept the testimony given for the plaintiff that the siblings regarded the second defendant as a beneficiary of the 950 account and that until this action was started no claim was made that it was the first defendant who was the true beneficiary in place of his son.

60 The minutes of the Bangkok meeting also noted that all shares belonging to the 950 account were to be put in the plaintiff's name and that she was to make a provision in her will that such shares were held in trust by her "for all". Further the plaintiff was to declare her proportion of dividends received from the shares belonging to the 950 account as her income and, again significantly, "everyone is advised to do likewise". All the siblings apart from the first defendant attended this meeting and these two agreements that I have referred to demonstrate their understanding that the 950 account belonged to them not Mdm Yeo.

61 Moving on to the minutes of the Malacca meeting in 2005, I deal first with the reference to Mdm Yeo being the true owner of the TSR shares. Lucy Lim took the minutes and she was asked why she had written this. Her response was that she had put it this way because she felt that the siblings were morally obliged to use the funds in the 950 account for their mother's benefit. This had come up because Pof Eng had asked for the funds to be distributed and the others felt, some strongly, some less so, that they should not touch the money in case Mdm Yeo needed it. However in the end it was agreed that some distribution should be made of the income. I accept this explanation and that Lucy Lim meant to indicate that Mdm Yeo was the original owner of the 950 TSR shares and not that she was the legal owner of the assets in the 950 account as at 2005.

62 Apart from the statement as to the "true ownership" of the trust funds, the discussion of the distribution of surplus funds as reflected in the Malacca minutes demonstrate the siblings' understanding that they were the beneficial owners of the assets of the 950 account. The proposal regarding distribution came from Pof Eng. He made two suggestions: distribute excess income after expenditure or, secondly, halve the capital. These suggestions were not consistent with the position he took in court that the assets belonged to Mdm Yeo for her lifetime and that the siblings' entitlement would only arise after her death. When he was asked in court how he could have made a proposal that was against Mdm Yeo's intent (as asserted by him) that the assets should belong to her for life, he said he did not see anything wrong in it. When pressed, his response was that the proposals would not harm her.

63 The meeting discussed Pof Eng's proposal and, as noted above, the eventual conclusion was that the capital had to be kept intact but that excess income could be distributed as loans. Pof Eng agreed in court that it had been decided at the meeting that the proposal to make a distribution would not be implemented unless there was unanimous agreement on the same. It was pointed out to him that the decision for unanimous agreement by the siblings and the second defendant would be inconsistent with his stand that the only trustees of the 950 account were Siong and Chuan (this was a position also taken by the first defendant). His reply was that the inconsistency had not occurred to him at the time. At a later point in his testimony, he maintained that when he made the proposal he was hoping that in the circumstances the siblings could utilise the surplus assets whether this course was right or wrong in respect to the fact that this account was a trust for Mdm Yeo. It can be seen that he was not able to rationalise his inconsistent positions.

64 It is worth noting that subsequent to this meeting, annual distributions of the surplus income were made to the eight persons named in the Deed and that Pof Eng received and kept 2/9<sup>ths</sup> of each such distribution. None of the recipients objected to the distributions. On 18 April 2007 Lucy Lim sent an email to each of the eight, including Pof Eng and the second defendant. She attached the final accounts of the 950 account for 2006 to the email. In its text, she said that based on the decision to distribute the excess of income over expenses, the distribution in 2007 would come to \$50,000 per 1/9<sup>th</sup> share. She asked for instructions on how each person wanted their distribution given to them and stated that objections should be raised by 29 April 2007. There was no evidence that Pof Eng, or for that matter anyone else, objected to the distribution whether by the stated date or thereafter.

65 I also find it significant that the first defendant had contributed to the discussion on distribution during the Malacca meeting. In relation to the proposal that it be by way of loan which could either be repaid at the option of the recipient or deducted from the final distribution, he objected to the suggestion that interest be charged. The minutes do not note any objection by him to distribution *per se* though they do state that Chuan and Siong felt such action would be a breach of trust.

66 On a consideration of all the evidence I am satisfied that it has been proved on a balance of probabilities that it was Mdm Yeo's intention in 1980 or 1981 to make an immediate gift of her shares to her children in equal shares. I accept Chuan's oral evidence as to how the Gift arose and that his mother had clearly expressed her intention to him. I also accept the evidence of the plaintiff and her sisters that the common understanding of all the siblings including the first defendant was that this was a gift and they were intended to be the absolute owners of their mother's shares. I do not accept Pof Eng's evidence that his mother told him something different. As I have pointed out above his conduct was inconsistent with such an understanding. In fact, his acceptance that he had a 2/9<sup>th</sup> interest in the 950 account was in itself contrary to his stand that the siblings' rights would only arise on Mdm Yeo's death. When he was questioned about this, he was not able to explain how Tan Poh Lim could have given him the extra 1/9<sup>th</sup> portion at the very beginning in 1981 or thereabouts when Mdm Yeo was still alive. Further, it did not make sense for Mdm Yeo to transfer her shares to HAPL if her intention was for the company to hold and use the shares for her benefit. Such an intention would mean that she had not relinquished all interest in the shares and would have risked nullifying the aim of taking the shares out of her estate so as to avoid estate duties on her death. The plaintiff's explanation that the shares were transferred to HAPL as the mechanism by which the Gift was effected is a more coherent explanation than the first defendant's explanation that the transfer was a way of setting up a trust for Mdm Yeo's benefit.

67 I should also state that I did not find the first defendant to be a credible witness. He was frequently evasive in his testimony and also prevaricated a great deal. Often he was not able to give coherent answers to the questions he was asked. His testimony on Mdm Yeo's intentions, in particular, appeared to be made up. He admitted that Mdm Yeo had never spoken to him about the shares and asserted that he did not even know that there were such shares. All his mother told him, he said was that she was a rich woman and wanted her money to go to her children on her death. If this is what Mdm Yeo told him, then it was far from establishing that she intended HAPL to hold the shares she transferred to it on trust for her during her lifetime. I think that the first defendant did not have any direct knowledge of Mdm Yeo's intention in relation to the shares and that whatever he said on this topic was fabricated. Some support for this conclusion also comes from the way he framed his case in the first place—as a claim for his entitlement in his mother's alleged intestacy. The claim was pleaded this way despite the fact that the first defendant had read Mdm Yeo's will shortly after her death and should have known that he inherited nothing under the will. I infer that the basis of the first defendant's claim only changed when he realised that his original cause of action was a non-starter.

68 I hold that Mdm Yeo's gift to her children was completed when she transferred her shares to HAPL. The 950 account was a fund that was set up in 1988 by the children as the owners of the Gift in order to have ready resources to maintain their mother. At that time Mdm Yeo had no beneficial interest in the Gift and no right to tell her children what to do with the 950 account.

#### **What happened to the first defendant's portion of Mdm Yeo's gift?**

69 The first defendant did not give any positive evidence as to what had happened to the 1/9<sup>th</sup> portion of the Gift that had been intended for him. He could not do so because his position was that

there was no gift that took effect in 1981 and that it was not until his mother's death in 2009 that her children became entitled to share in the assets of the 950 account. However, there was a great deal of evidence from the witnesses for the plaintiff as to what the first defendant had wanted to do and had done. Whilst the first defendant denied he had said what they testified to, there was also some documentary evidence supporting their testimony. This took the form of a letter written in 1988 and the minutes for the Bangkok and Malacca meetings. I am satisfied on the basis of all the evidence that the first defendant intended to give his portion of the gift to his three children in equal shares but that, equally, he had directed that it be put in the name of the second defendant. Some of this evidence is set out below.

70 Chuan testified that all nine children were to be allotted shares in HAPL equally in order to reflect Mdm Yeo's intention that the Gift was to be distributed equally amongst them. He remembered that the first defendant had told him and Siong that the first defendant's portion should be put in the second defendant's name for the second defendant to hold on behalf of himself and his sisters. Chuan did not recall whether he had told the other siblings about this. The plaintiff's testimony was that she knew that the first defendant had given his portion to the second defendant but did not know until after the start of these proceedings what the first defendant's intentions had been in 1983.

71 Amy Tan testified that after Mdm Yeo had decided to make the Gift, she had been present at a meeting in the family home amongst herself, Siong, Chuan, Pof Eng, Poh Lin and the first defendant. It was at this meeting that she heard the first defendant say that his portion of the Gift should be put in the second defendant's name.

72 Further, the plaintiff testified that in 1987 when she was living in Toronto, some of the siblings had visited her and discussed the 950 TSR shares. This was at a time when the siblings were considering taking the TSR shares out of HAPL. During this visit, the first defendant had stated that he still wanted his portion to remain in the second defendant's name. This testimony was given after Amy Tan produced a letter dated 3 January 1988 which the plaintiff had written to her to inform her about the Toronto discussions. The letter states that in the course of those meetings, the plaintiff herself heard the first defendant say that he wanted "Andrew's [that is the second defendant's] name down".

73 The other evidence of the first defendant's intentions comes from what he said in 1994 and 2005. In 1994, he asked Lucy Lim whether the portion of the 950 account in the second defendant's name could be put into his daughters' names as well. The plaintiff took legal advice on this query and informed the meeting that for this to be effected the second defendant had to agree. This outcome was conveyed to the first defendant. Then in 2005, according to the Malacca minutes, the first defendant was told that the second defendant was the "named 'beneficiary'" and that distribution could be made to the second defendant only. Changes could be effected only with the second defendant's consent. The minutes went on to record that the first defendant stated that he understood the situation and that he wanted the others to impress on the second defendant that the first defendant's original portion was meant for his three children in the event of his death.

74 Thus, I am satisfied that in or about 1983 when the issue came up about allotting shares in HAPL, the first defendant gave instructions that his portion should be put in the second defendant's name. There is no evidence that, following these instructions, HAPL shares were indeed allotted to the second defendant. However, there is no evidence that they were put in the first defendant's name either. Chuan did produce a document which he said showed the shareholders of HAPL from time to time. That was a handwritten document allegedly based on the records of HAPL. However, neither such records nor the maker of the document were produced. As such the document was hearsay and could not be relied on as evidence. Therefore it is only the appearance of the second defendant's



name in the Deed that shows how the first defendant's instructions were given effect to. I accept the evidence given for the plaintiff that the Deed was drafted in the way it was because the other siblings believed that the first defendant had given his share of the Gift to the second defendant and accordingly, that the second defendant had a 1/9<sup>th</sup> interest in the 950 TSR shares when they were transferred out of HAPL.

75 I should also say that I accept the second defendant's evidence that on two occasions in the 1980s the first defendant told him that he had given the second defendant his share of the Gift. I am not so sure that the first defendant also stated expressly that Arlette and Alena were not to have any share in the same as this evidence of the second defendant is rather self-serving and is also contradicted by the evidence of Chuan that he knew from 1983 that the first defendant wanted all his children to benefit equally. On the other hand, I am satisfied that the first defendant never told the second defendant that he was to hold the portion of the Gift for himself and his sisters. There was no evidence at all of such a declaration, least of all from the first defendant himself.

76 The question that arises is whether on the facts as I have found them, the first defendant made an effective gift to the second defendant. The first defendant submitted that even if he had asked Chuan to allot 22,000 HAPL shares to the second defendant instead of to himself, that instruction only related to HAPL shares and could not have in any way related or affected his portion of the Gift. If at all there was any gift from the first defendant to the second defendant, that gift was of HAPL shares only. In any event that could not have been a valid gift because as an infant the second defendant could not become the owner of shares. He also argued that since there was no documentary evidence of the gift to his son and he gave Chuan oral instructions only, in law, no valid gift could have been made. This was because under s 7(2) of the Civil Law Act (Cap 43, 1999 Rev Ed) ("the CLA") a disposition of an equitable interest must be made in writing signed by the person disposing of the same.

77 On the evidence, I do not accept that the first defendant's intentions were only that his son should have 22,000 HAPL shares and that intention did not relate to the Gift. The first defendant was aware that the way in which the Gift was to be completed was by the allotment of shares in HAPL and therefore that becoming shareholders of that company was the way in which the children would accept their mother's gift. In giving Chuan instructions to make the second defendant a shareholder of HAPL in his place, the first defendant knew and intended that this would in effect pass to the second defendant the first defendant's right to take up a 1/9<sup>th</sup> portion of the Gift in the designated manner. It is significant in this respect that in later years the first defendant did not assert a personal right to the Gift; rather his position was that his portion was to be shared equally amongst his children.

78 In relation to the second argument, it is not the law that as an infant the second defendant could not be the owner of shares in 1983. He could be allotted shares or become the owner of the same by legal transfer. Any such allotment or transfer of company shares to him during his infancy would be voidable but not void. The avoidance would have to be done by the second defendant himself on reaching his majority and a third party would have no standing to challenge the validity of the transaction. *Walter Woon on Company Law* at para 5.4 makes clear that an infant may repudiate such allotment or transfer within a reasonable time of reaching his majority but is bound by it if he affirms it after coming of age. The position is similar in Australia and England (see also: *Hamilton v Vaughan-Sherrin Electrical Co* [1894] 3 Ch 589). The second defendant never repudiated the Gift. The first defendant's second argument therefore fails.

79 It is the third argument that has given me some concern. Section 7(2) of the CLA was only enacted in 1993 but it was derived from the English Statute of Frauds 1677 and was accepted as part

of Singapore law before 1993. Thus the same requirement as to the manner in which equitable interests could be effectively disposed of or transferred applied here in 1983 and 1988. It is undisputed that the first defendant never made any writing in which he indicated his intention to make a gift of his portion of the Gift either to the second defendant alone or to his three children equally. This submission would therefore seem to be an absolute answer to the second defendant's claim.

80 I have, however, come to the conclusion that it is not. As would be apparent from the detailed summary of the first defendant's defence at [38] above, he did not plead s 7(2) or the preceding English legislation as a basis on which to invalidate the alleged gift. It is a basic principle of our system of civil litigation that a litigant must plead the material facts on which he relies so as to allow the opponent a chance to meet the case. Whilst in general legal principles need not be pleaded, this is not so when one is relying on a specific statutory provision such as the Limitation Act or the Statute of Frauds to found a defence. At the least, material facts should be pleaded so as to alert the opponent to the position that is being taken. The first defendant could have pleaded that any gift made to the second defendant was oral and therefore legally ineffective for want of compliance with the requisite formalities. He had no trouble pleading that the gift was not valid at law because of the second defendant's infancy at the material time but did not take the further step of pleading that the formalities required to complete the gift had not been taken. That he did not do so is perhaps not surprising since most of his defence was given over to his stand that Mdm Yeo had not made the Gift but had declared a trust under which he could only benefit upon her death. It is, however, a defect which prevents him from raising the argument now.

81 It is well established that a party is bound by his pleaded case. In *Abdul Latif Bin Mohammed Thahiar (trading as Canary Agencies) v Saeed Husain s/o Hakim Gulam Hohiudin (trading as United Limousine)* [2003] 2 SLR(R) 61, the plaintiff's solicitor had failed to amend the pleadings on appeal regarding the quantum of damages, even though the accountant's report in evidence had mentioned a higher sum than that awarded by the trial judge. On appeal, it was held that it is settled law that parties stand by their pleaded case and any defect in the pleadings could not be cured by averments in affidavits or references in counsel's closing speech.

82 In the present case, if the first defendant had pleaded the lack of formalities the second defendant would have had the opportunity to meet the case by pleading facts that could perhaps have established the applicability of the rule laid down in *Vandervell v Inland Revenue Commissioners* [1967] 2 A.C. 291 (which sets out the circumstances in which s 7(2) is inapplicable) or laid the foundation for a plea of estoppel or part performance as a rebuttal to the first defendant's position. Evidence could then have been led in support of the pleas. Whether the pleas would have succeeded is not the point; by failing to plead such a position, the first defendant indicated he was not taking the point and the second defendant was entitled to rely on its omission. For me to now allow the first defendant to deprive the second defendant of his interest in the 950 account on the basis of an unpleaded point would not only be unjust but would also undermine the importance of pleadings in civil litigation.

83 The first defendant also argued that even if the second defendant acquired an interest in the Gift, he held that interest on trust for the first defendant. I do not accept that argument. Apart from the fact that the second defendant was then an infant and thus unable to be a trustee, the presumption of advancement which the second defendant relied on would mean that the first defendant could only claw back his interest in the Gift from his son if he could prove that it was not his intention to make a gift. The evidence before me established plainly that at the material time the first defendant's intention was to give away his portion of the Gift. He gave directions for it to be put in his son's name with this intention and while he might have wanted the second defendant to hold it

for his sisters as well as himself, he did not tell the second defendant this. What he told his brother Chuan in this regard was not material to the manner in which the second defendant received the gift from the first defendant. Further, in reference to the second defendant, no attempt was made by the first defendant to impose a trust for the benefit of Arlette and Alena. Thus even if the second defendant's and his mother's evidence that the first defendant specifically told them that his interest in the Gift was being passed on only to the second defendant is not accepted, no trust for the sisters was constituted. I should point out that in any case due to the second defendant's lack of legal capacity in the early 1980s, he could not have been a trustee for his sisters.

84 I hold that the second defendant is entitled to receive the remaining undistributed 1/9<sup>th</sup> portion of the 950 account free from any claim of the first defendant.

### **Costs**

85 The plaintiff has asked to be indemnified in respect of the costs of these proceedings out of the trust monies in her hands. Her argument is that she had to commence these proceedings because she was faced with two competing and incompatible claims to the funds. She had done her best to get the defendants to meet and sort out the conundrum but they did not respond to her requests. Nor did either defendant take any step to obtain a court order so she was left with no choice but to start the present action.

86 The second defendant submitted that this litigation was unnecessary and it would not be reasonable to deduct the plaintiff's costs out of the remaining money in the 950 account before paying him the same. For 29 years the plaintiff had recognised the second defendant as the owner of 1/9<sup>th</sup> of the Gift and a beneficiary of the 950 account. She was given an indemnity in September 2009 by the second defendant in which he stated that he agreed to indemnify her "against all claims relating to the distribution". The plaintiff, said the second defendant, should just have carried out her duty as trustee and paid him the money instead of seeking a court order. Thus, the plaintiff should not be entitled to take her costs from the fund. If at all she was entitled to costs, she should recover them from the first defendant whose frivolous claim had caused her to initiate the action.

87 I consider that the plaintiff acted reasonably in starting this suit. There was clearly a considerable dispute of fact which had to be decided in a court of law. The plaintiff herself, although she believed that the second defendant was rightfully entitled to a 1/9<sup>th</sup> portion of the 950 account, could not have settled the dispute between the defendants without coming to court. The problem was that there were differing accounts, events took place many years ago and the parties did not document each step they took thoroughly. Further the law in this area is rather complicated and therefore the outcome was uncertain. If the plaintiff had paid the second defendant his portion of the 950 account in 2009 she would have laid herself open to a lawsuit from the first defendant. I cannot fault her for considering that to be an unattractive option, notwithstanding the existence of the second defendant's indemnity.

88 I hold that the first defendant must bear the costs of the second defendant on the standard basis and of the plaintiff on the indemnity basis. His actions led to this lawsuit. Having originally indicated his intention to divest himself of his interest in the Gift (whether to his son only or to all three children), he did an about turn when he found out that there was nothing for him to inherit in Mdm Yeo's intestacy and mounted a claim on a basis which undermined and called into question the very foundation on which all his siblings had been proceeding for decades. That meant that as many of the siblings as possible had to give evidence. If the first defendant had taken action simply in relation to the question of whether he or his son was the true beneficiary of the 950 account, the

case would have been shorter, less complicated and less expensive and the plaintiff need not have been involved at all except as a nominal defendant.

89 Having said that the first defendant is ultimately responsible for the costs of the plaintiff, I think it is fair to allow her to recover her costs, as taxed or agreed on an indemnity basis, from the remaining funds in the 950 account. The plaintiff should not be out of pocket in the event that the first defendant is unable to pay these costs. The first defendant shall reimburse the second defendant with the amount of any costs paid to the plaintiff in relation to these proceedings which are taken from the 950 account.

## **Conclusion**

90 For the reasons given above, I have found that the person who is entitled to the 1/9<sup>th</sup> portion of the Gift which was originally intended to be given to the first defendant, is the second defendant. The second defendant is entitled to be paid the remaining balance of the 950 account inclusive of any interest that has accrued thereon. The first defendant shall bear the costs of the plaintiff and the second defendant as stated in [88] above. However, the plaintiff shall be entitled, if she so desires, to recover her costs from the 950 account and in that event the first defendant shall reimburse the second defendant with the amount of the same. I shall see the parties to settle the wording of the orders made herein.

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