Hong Alvin *v* Chia Quee Khee
[2011] SGHC 249

Case Number : Suit No 423 of 2010 (Registrar's Appeal No 1 of 2011)

Decision Date : 18 November 2011

Tribunal/Court : High Court

Coram : Quentin Loh J

Counsel Name(s) : Lee Eng Beng SC and Lynette Koh (Rajah & Tann LLP) for the appellant; Ang Cheng Hock SC and Jason Chan (Allen & Gledhill LLP) for the respondent; Christopher Daniel (Advocatus Law LLP) for the second defendant; B Ganeshamoorthy (Cornerstone Law LLP) for the third defendant.

Parties : Hong Alvin — Chia Quee Khee

Civil Procedure

18 November 2011 Judgment reserved.

Quentin Loh J:

Introduction

1 This is an appeal by the 1st Defendant, Mr Alvin Hong against a dismissal by the Assistant Registrar ("AR") of his application in Summons No 4081 of 2010 to strike out the Respondent's Claim against him.

Background facts

2 The Respondent, an advocate and solicitor, is an executor and trustee appointed under the will dated 23 January 2007 ("the Will") of the deceased Mr Peter Fong ("the Testator"). The other three executors and trustees under the Will are the Appellant, Ms Linda Kao ("Linda", who is the 2nd Defendant in this action), and Ms Evelyn Ho ("Evelyn", who is the 3rd Defendant in this action). The Appellant is a medical doctor and a nephew of the Testator.

3 The Testator, who was also known as "Piti Kulkasetr", appears to have been a successful businessman. He set up Airtrust (Singapore) Ltd ("AT") in 1972 with dealings in the power, oil and gas industries. He held a majority of its issued and paid up share capital. The Testator's last will was made on 23 January 2007, (there is a codicil dated 21 March 2008 which is not relevant for the issues raised here). According to the Statement of Claim, he was diagnosed with cancer sometime in 2007 and passed away on 25 April 2008.

4 Almost 8 years before his death, on 13 May 2000, the Testator incorporated the Fong Foundation Ltd (which is the 4th Defendant in this action) ("the Fong Foundation"), a public company limited by guarantee to promote charitable, educational and cultural causes. These causes included:

> (a) charitable purposes of all kinds and in all aspects, to provide relief of human suffering, poverty and distress, to improve human living conditions and standards, to give and make financial assistance and other form of contributions towards medical treatment and care,

educational facilities, research, community and social welfare services for the benefit of all persons and members of all races including without limitation, the poor, needy, aged handicapped and mentally retarded, persons in need of moral of social rehabilitation or welfare, victims of fire, flood famine, war, pestilence or other calamity and such other persons as the Board of Directors shall deem to be suitable and worthy objects of such relief and assistance;

(b) the provision of financial assistance for the upkeep and maintenance of the Aviator Martyr's Memorial Monument in Nanjing, the People's Republic of China ("PRC");

(c) the provision of financial assistance for the upkeep and maintenance of the Fong ancestral village at Guan Xi Village, Hang Tang City, Hui An county, Fujian province, PRC; and

(d) the promotion, encouragement, fostering, development, improvement and advancement of education, art and culture, health, sports, recreational and other leisure pursuits and activities for the benefit of the public, including but not limited to the establishment of scholarships for and chairs at educational institutions, the patronage sponsorship and participation in exhibitions, social musical theatrical and other events and entertainments and for lectures and other purposes as the Board of Directors may deem suitable.

The original directors and members of the Fong Foundation comprised the Testator, the Appellant, Linda and Evelyn. The Testator's daughter, Ms Carolyn Fong ("Carolyn"), was appointed as a director during the Testator's lifetime on 25 January 2006 and therefore before he was diagnosed with cancer. In paragraph 10 of the Statement of Claim it is alleged that the Board of Directors ("the Board") followed all the Testator's instructions concerning how the Fong Foundation was to be operated and managed during the Testator's lifetime.

5 Sometime on or around 3 January 2006, *ie*, some two and a quarter years before he died, and before he was diagnosed with cancer, the Testator transferred 5,100,000 shares held by him in AT ("the AT Shares") to the Fong Foundation. These shares constitute 51% of the issued share capital of AT. Although the figures and percentages are not clear, this does not affect the issues in this case. The Testator still held some shares in AT after this transfer. There is a reference to 1,459,410 shares as well as a reference to the Testator holding 65.59% of AT's issued share capital before the AT Shares were transferred to Fong Foundation.

6 Linda is the incumbent Managing Director of AT, whilst AT's other directors are Carolyn, Anthony Craig Stiefel ("Stiefel"), Evelyn, Denis Atkinson ("Atkinson") and the Respondent. Evelyn was the Testator's personal assistant having started as a clerk in AT sometime around June 1974.

7 During the course of submissions, I was informed that a tussle for control has ensued amongst the directors of AT. Linda, Evelyn and the Respondent are on one side while Carolyn, the Appellant, Atkinson and Stiefel are on the other. I was told that the following proceedings are extant:

(a) Originating Summons No 505 of 2010 ("OS 505") taken out by Carolyn on 24 May 2010, seeking leave under section 216A of the Companies Act (Cap 50, 2006 Rev Ed) to commence a derivative action on behalf of AT against Linda for alleged breach of fiduciary duties. Prakash J handed down a judgment on 11 April 2011 granting leave for Carolyn to do so on some, but not all of her alleged complaints. Appeals from that decision were lodged. On 15 September 2011, the Court of Appeal dismissed the appeals against the decision of Prakash J, save for allowing one further complaint of Carolyn's with regard to a transaction relating to Wrangwell Ltd; this was in addition to those allowed earlier by Prakash J for KSCC International Pte Ltd, Ribands Pte Ltd and Mega-Bond Management Limited.

(b) On 1 June 2010, a notice was given to shareholders of AT for the convening of an Extraordinary General Meeting ("EGM") to remove Linda as AT's Managing Director and to appoint the Appellant as a director. Linda commenced Suit No 428 of 2010 on 11 June 2010 and obtained an interim injunction to prevent the holding of the EGM pending the resolution of OS 505.

(c) On 9 June 2010, the Respondent commenced the present suit, Suit No 423 of 2010 against the Appellant and the other defendants;

(d) On 13 July 2010, Carolyn launched Suit No 510 of 2010, claiming oppression and naming Linda, Evelyn, Atkinson and the Respondent as defendants.

The dispute

8 In his Statement of Claim, the Respondent alleged that the AT Shares were transferred to the Fong Foundation on trust for the specific purpose of carrying the Testator's intention that the Fong Foundation would control, operate and manage the business of AT and its subsidiary and associate companies after his death, through the directors of the Fong Foundation as appointed by the Testator. The Respondent pleads that it was the intention of the Testator that the Appellant would cease to be a director of the Fong Foundation after the Testator's death and that the Respondent would replace the Appellant as director in the Fong Foundation. The Respondent says this was told to the Respondent on a number of occasions by the Testator. The material terms of the alleged trust thus required the Appellant to step down as a director of the Fong Foundation upon the Testator's death and for the Respondent to be appointed in his stead. According to the Respondent, these terms were set out in Clauses 3 and 4 of the Will. Clauses 3 and 4, which are set out in paragraph 19 of the Statement of Claim, read as follows:

> 3.1 I give to the Fong Foundation Limited ("the Foundation"), a company incorporated by me in Singapore, fifty-one per cent (51%) of my shares (hereinafter called "My Shares") in Airtrust Singapore Pte Ltd, a company incorporated in Singapore ("the Company") and fifty-one percent (51%) of the shares held by the Company in all its subsidiaries and associated companies, wherever incorporated and/or situated (hereinafter tougher with the Company called "the Group") (and my interests in the business of the Group represented by my shares are hereinafter called "my business interests") to be held by them upon the following trusts and with the following powers.
>
> The reference to "fifty-one per cent (51%) of my Shares" ... in Airtrust Singapore Pte Ltd" above means 51% of the 100% shares in the Company and not 51% of my 65.59% shares held by me in the Company, and likewise 51% of the Company's shares in its subsidiaries and associated companies.
>
> [...]
>
> 3.2 It is my wish that My Shares given to the Foundation shall not ever be diluted in the future, and the Foundation will always, through the ownership of my Shares, retain control of the Company by owning the majority of the shares in the Company.
>
> [...]

4 I set up The Foundation for the following purposes, and it is my wish that these purposes be respected and followed after my lifetime –

a) [...]

b) to control, operate and manage the business of Airtrust and the Group. For this purpose, it is my wish that the Board of Directors of the Foundation, which presently comprises myself, Linda, Evelyn and Alvin, shall after my death, comprise a core of directors made up of the following –

i. Linda

ii. Evelyn

iii. my daughter Carolyn Fong Wai Lyn

iv. Chia and

v. my son Fong Wei Heng, after he has attained the age of twenty-one (21) years."

9 The Respondent's pleaded reliefs as against the Appellant are:

(a) an order that the Appellant, (as well as the Linda and Evelyn), carry out their duties as executors and/or trustees in accordance with the Testator's wishes as expressed in Clauses 3 and 4 of the Will (this order in effect sought the Court's endorsement that Clauses 3 and 4 of the Will were breached and the Court should order the executors and trustees to carry out its terms); and

(b) an order that the Appellant shall be removed as and cease to be a director of the Fong Foundation forthwith.

(c) a declaration that the Fong Foundation had breached the trust terms upon which it held the AT Shares;

(d) an order that the Respondent be appointed as a director of Fong Foundation forthwith;

(e) an order that the defendants take all steps to effect sub-paragraphs (b) and (d) above;

(f) costs; and

(g) such further and/or other relief as the Court sees fit.

10 In response, the Appellant applied to strike out the Statement of Claim under O 18 r 19(1)(a), (b) and (d) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("ROC"), *ie* as (i) disclosing no reasonable cause of action, (ii) being scandalous, frivolous or vexatious or (iii) constituting an abuse of process. In the alternative, the Appellant also applied under O 14 r 12 for determination of whether the AT shares were transferred by the Testator to the Fong Foundation on trust as alleged in the Statement of Claim. If this question were to be answered in the negative, then the Appellant sought the dismissal of the claim against him with costs. In this appeal, the Appellant did not pursue his alternative application.

Decision below

11 Based on the pleadings alone, the learned AR held that the Respondent had a reasonable cause of action and *locus standi* to maintain the claim. Though the Statement of Claim was lacking, the AR was mindful that claims should only be struck out in the most obvious of cases. In her view, it would be more appropriate to decide the matter at trial as, then, all the evidence would be available and the legal issues established by the facts. Finally, the AR considered the affidavit evidence before deciding that the Appellant had failed to show how the Respondent's claim was scandalous, frivolous or vexatious and/or an abuse of process. Accordingly, she dismissed the application.

The Appeal and Decision

12 In this appeal, counsel for the Appellant, Mr Lee Eng Beng SC ("Mr Lee SC") makes the following arguments to support striking out the Statement of Claim:

(a) There is no trust as alleged by the Respondent. The AT shares were transferred as a gift on 3 January 2006 so clauses 3 and 4 of the Will had no effect pursuant to s 3 of the Wills Act (Cap 352, 1996 Rev Ed) ("the Wills Act");

(b) Even if there is a trust, the Respondent is wrong to say that Clauses 3 and 4 of the Will require the Appellant to step down as a director of the Fong Foundation;

(c) Even if (a) and (b) are resolved against the Appellant, on the Respondent's own case he has no *locus standi* to enforce the terms of the trust; and

(d) If there was a trust, then the Respondent was pursuing his claim for breach of trust against the wrong defendant.

13 It is not immediately clear from the Appellant's arguments set out at [12] above which limb of O 18 r 19(1) each argument supports. This is not an unimportant distinction since O 18 r 19(2) states that in an application under r 19(1)(a), no evidence shall be admissible. Thus where the sole ground to strike out a claim or pleadings is that it discloses no reasonable cause of action or defence, conventional wisdom and practice dictates that a party stands or falls on his pleadings *per se* (*Singapore Civil Procedure* (Thomson Sweet & Maxwell, 2007) ("*Singapore Civil Procedure*") at para 18/19/5). No reference is made to the affidavits filed. On the other hand, if the allegations are based on or overlap into r 19(1)(b) and/or (c) and/or (d), then it is permissible for the court to use and consider affidavit evidence. I should also mention that, as O 92 r 4 reminds us, nothing in the

ROC shall be deemed to limit or affect the inherent jurisdiction of the Court to prevent injustice and an abuse of process.

14 Mr Ang Cheng Hock SC ("Mr Ang SC"), counsel for the Respondent, contends that the jurisdiction to strike out a claim or pleadings should only be exercised in plain and obvious cases. The Appellant has challenged the Respondent's pleaded case as to the intentions of the Testator and this dispute can only be resolved at a trial. This was an important part of the AR's decision below.

15 It is not doubted that the court should not be too quick to strike out claims, defences or pleadings; as Mr Ang SC rightly submitted, it is only in plain and obvious cases that resort should be had to this jurisdiction. As stated in *Singapore Civil Procedure* at para 18/19/6, the "claim must be obviously unsustainable, the pleadings unarguably bad and it must be impossible, just not improbable, for the claim to succeed before the court will strike it out." As long as the action discloses some cause of action or raises some question fit to be decided by the court, the mere fact that the plaintiff was unlikely to succeed at the trial is no ground for striking out: *Gabriel Peter & Partners (suing as a firm) v Wee Chong Jin and others* [1997] 3 SLR(R) 649.

16 Yet it equally cannot be denied that O 18 r 19(1) and the inherent jurisdiction of the court exist to protect a party from being harassed and put to the trouble and expense of preparing for a trial in certain cases, *eg*, where the case is frivolous, vexatious or hopeless. Lord Blackburn put it correctly when he said that a stay or dismissal of proceedings may "…often be required by the very essence of justice to be done…" (*Metropolitan Bank Ltd & Anor v Pooley* (1885) 10 App Cas 210 at 221, cited in *Singapore Civil Procedure* at para 18/19/6). The question here is: on which side of the line does this case fall?

Whether the issue of locus standi falls exclusively within r 19(1)(a)

17 Two Malaysian cases treated the issue of *locus standi* as falling squarely within r 19(1)(a). In *Karpal Singh v Sultan of Selangor* [1988] 1 MLJ 64, Abdul Hamid CJ explained that various approaches could be adopted by the court in deciding the question of *locus standi*, one of which was to ask whether the plaintiff has "a cause of action". Similarly, in *Abdul Razak Ahmad v Majlis Bandaraya Johor Bahru* [1995] 2 MLJ 287, when the court found the plaintiff lacked *locus standi* for failure to show infringement of his private right or special damage over and above his public rights, the court made reference to O 18 r 19(1)(a). I am of the view that we cannot straightjacket the characterisation of *locus standi* so rigidly. As Hamid CJ indicated, it was only *one* of the various approaches a court could adopt. Today, a party seldom relies only on r 19(1)(a); it is more often than not that r 19(1)(b) to (d) are also brought into the equation, as is the inherent jurisdiction of the court. Given the context and circumstances in which it arises, an issue of *locus standi* can also be one of the bases of striking out on the ground that the action is frivolous or vexatious or an abuse of the process. It has been noted that a cause of action contains two dimensions: "First, it means the legal basis which entitles the plaintiff to succeed. Next, it signifies the factual situation which entitles one person to obtain from the court a remedy against another person…" (*Phillip Morris Products Inc v Power Circle Sdn Bhd and others* [1999] 1 SLR(R) 964 at [5] *per* Selvam J; cited in *Singapore Civil Procedure* at para 18/19/6).

Is O 18 r 19(2) an absolute rule?

18 Although Mr Lee SC does not confine his case only to O 18 r 19(1)(a), he raises the interesting argument that there are limits to an approach that all allegations in the pleadings must be taken as true in a r 19(1)(a) situation. He argues, in particular that O 18 r 19(2) should be read as referring to evidence which does not have to be pleaded, rather than affidavit evidence that *clarifies* the

pleadings. Mr Lee SC argues that if a party files affidavits to clarify his position on his pleadings, the court must surely be entitled to consider those affidavits; otherwise, a party who advances a legally unsustainable claim can always avoid a striking out application under O 18 r 19(1)(a) by intentionally crafting his pleadings in a confusing, ambiguous and obscure manner. I tend to agree. In some cases, such affidavit evidence can be treated as voluntary particulars of pleadings. Otherwise in such cases, this would neither be conducive to the fair and expedient resolution of disputes, nor, I would add, to the principles referred to in [16] above.

19 As proof that the courts have looked beyond the pleadings when considering O 18 r 19(1)(a), Mr Lee SC relied on the case of *Standard Chartered Bank v Loh Chong Yong Thomas* [2010] 2 SLR 569 ("*Standard Chartered*"), where the Court of Appeal ("CA") accepted that the plaintiff was an undischarged bankrupt. Although this point was only raised in the affidavits and not in the pleadings, the CA proceeded to find that the plaintiff had no *locus standi* because the property in respect of which the suit was brought was vested in the Official Assignee and not the plaintiff. With respect, this seems to me correct on both principle and common sense because the capacity of a party to sue is *not* always found in his pleadings.

20 Apart from *Standard Chartered*, Mr Lee SC also cited the Malaysian case of *Parallel Media Group Plc & Anor v Asia PGA Bhd & Ors* [2004] 6 MLJ 1 ("*Parallel Media*") where the court had taken into account affidavit evidence despite r 19(2). In that case, the defendants had applied to strike out the plaintiff's statement of claim on the grounds that he had had no *locus standi*. Suriyadi J held at [21] that:

> Even though the defendants should be denied the right to allude to the evidence in the affidavits, but as I, for some good reason or other had allowed their usage from the earliest of stages, in the interest of justice I had decided to keep the practice. To even things out I had also permitted the plaintiffs to allude to the evidence. No doubt if the defendants had succeeded in disclosing disputable facts which neutralised the plaintiffs' case completely, or the issue of law was unsustainable or unarguable, then the striking out action would have been granted.

It should be noted that when the Suriyadi J referred to the "earliest of stages", he was alluding to an earlier *ex parte* application by the plaintiff for an injunction against the defendants which was decided on the basis of affidavits.

21 *Standard Chartered* and *Parallel Media* suggest that when it comes to capacity or title to sue or maintain a claim, in spite of O 18 r 19(2), the court can look beyond the pleadings. In *Standard Chartered*, the issue of *locus standi* swung on a single allegation of bankruptcy that the court was able to test the veracity of by looking at the affidavit evidence. In contrast, in *Parallel Media* the issue of *locus standi* was slightly more complex– the plaintiffs had to show that: (i) they had a nexus with the company on behalf of which they were bringing the derivative action, (ii) they were aggrieved parties, and (iii) they came within one of the exceptions to the rule in *Foss v Harbottle*. Nevertheless, each of these were addressed by the affidavit evidence that showed that (i) the plaintiffs were shareholders and directors of the company they were suing on behalf on, (ii) the plaintiffs would lose much through the company, and (iii) the defendants who initiated the striking out applications had committed fraud on the minority by abusing their position of *de facto* control.

22 In my view, in limited circumstances (such as in *Standard Chartered* and *Parallel Media*) where the party's capacity or title to sue can be easily and unequivocally demonstrated, the court is entitled to look beyond the pleadings. This includes looking at the affidavit evidence or other court records. If the plaintiff is an undischarged bankrupt, he is unlikely to plead that fact. The basis of going beyond the pleadings in such cases and dismissing the action must rest on the conclusive

nature and effect of a judgment. This is especially so for judgments *in rem*. Hence, where a court having the competent authority to make that adjudication pronouncement does so, then a judgment of that court is conclusive not just in those proceedings but against or with reference to all whom it might concern, or as against "all the world" unless of course it is subsequently lawfully discharged. This occurs, for example, when a person is adjudged a bankrupt by a court in Singapore. This person's status in law has changed. Again where a grant of probate has been made to A and B as executors of T's estate, so long as that grant is not revoked or amended, an action commenced by C as executor of T's estate is liable to be dismissed as C has no title to sue.

23 A distinguishing factor in cases of this nature is where a person has *no* cause of action as opposed to no *reasonable* cause of action. O 18 r 19(1)(a) addresses the latter type of cases, *eg*, the facts pleaded do not give rise to a cause of action. The former category is readily and unequivocally demonstrable whereas the latter requires argument and exposition in relation to the pleaded facts, which must then be taken as true, in order to show that there is no reasonable cause of action.

24 This was well put by Sir Sebag Shaw in *Ronex Properties Ltd v John Laing Construction Ltd & Ors* [1983] QB 398 ("*Ronex Properties*") at 408, as follows:

> As to striking out a writ or other initiating process on the ground that it discloses no reasonable cause of action, I would regard this power as properly exercisable only *when it is manifest that there is an answer immediately destructive of whatever claim to relief is made*, and that such answer can and will be effectively made. In such a case it would ... be a waste of time and money to allow the matter to be pursued so as to give rise to what would be an abuse of the process of the court. [emphasis added]

25 A striking out application based on limitation of actions must be considered carefully as there are some technical distinctions. First, one has to examine if the time bar is substantive or procedural in nature. For example, actions for damages for carriage of goods by air under the Warsaw Convention are, under Article 29, *extinguished* if they are not brought within 2 years from the date of arrival of the aircraft at the destination or from other factual deadlines. That is a *substantive* time bar. A party suing under the Warsaw Convention no longer has a cause of action once the 2 year period has passed as such a right has been extinguished. Such claims are liable to be struck out under r 19(1)(a) and regard can be had to facts outside the pleadings. This includes clear and unequivocal contractual provisions which provide that the effluxion of time eliminates the cause of action (see *Ronex Properties* at 404). However, under our Limitation Act (Cap 163 1996 Rev Ed) ("Limitation Act"), time bars are *procedural* in nature. The operative words under the statute – "…actions ... shall not be brought…"–prohibit the *bringing* of an action. They bar the remedy. As was aptly put by Donaldson LJ in *Ronex Properties* at 404: "…it is trite law that the English Limitation Acts bar the remedy and not the right; and furthermore they do not even have this effect unless and until pleaded." The latter part of Donaldson LJ's remark arises from the then equivalent English section to s 4 of the Limitation Act, which provides that nothing in the Limitation Act shall operate as a bar to an action unless the Limitation Act has been expressly pleaded as a defence thereto.

26 Secondly, if the time bar is procedural in nature, then the proper course in applying to strike out an action is to proceed on the other grounds set out in r 19(1)(b), (c) and/or (d) or on the inherent jurisdiction of the court. It is unsuitable to strike out an action under r 19(1)(a) on the ground that the claim is time-barred because s 4 of the Limitation Act requires the defence to be pleaded to have the effect and because the time bar is subject to exceptions. This is clear from *Ronex Properties Ltd* at 404:

> Authority apart, I would have that that it was absurd to contend that a writ of third party notice could be struck out as disclosing no cause of action, merely because the defendant may have a defence under the Limitation Acts.

and also at 405:

> Where it is thought to be clear that there is a defence under the Limitation Acts, the defendant can either plead that defence and seek the trial of a preliminary issue or, in a very clear case, he can seek to strike out the claim upon the ground that it is frivolous, vexatious and an abuse of the process of the court and support his application with evidence.

Similarly in *Riches v Director of Public Prosecutions* [1973] 1 WLR 1019 at 1027 (*per* Lawton LJ):

> One of the uncontested sets of facts which arises from time to time is when on the statement of claim it is clear that the cause of action is statute barred and the defendant tells the court that he proposes to plead the statute and, on the uncontested facts, there is no reason to think that the plaintiff can bring himself within the exceptions set out in the Limitation Act 1939. *In those circumstances it is pointless for the case to go on so that the defendant can deliver a defence. The delivery of the defence occupies time and wastes money; and even more useless and time consuming from the point of view of the proper administration of justice is that there should then have to be a summons for directions, and an order for an issue to be tried, and for that issue to be tried before the inevitable result is attained.* [emphasis added]

Following from these authorities, the following passage appears in *Singapore Civil Procedure* at para 18/19/10:

> Thus, where the statement of claim discloses that the cause of action arose outside the current period of limitation *and it is clear that the defendant intends to rely on the Limitation Act* (Cap. 163 , 1996 Ed.) and there is nothing before the court to suggest that the plaintiff could escape from that defence, the claim will be struck out as being frivolous, vexatious and an abuse of the process of the court.

27 There are exceptions to O 18 r 19(1)(a) and r 19(2), but they are limited to those very few situations set out above. Mr Lee SC however, relies on the other grounds of r 19(1) as well.

Clauses 3 and 4 of the Will

28 I now return to Mr Lee SC's first point – on the facts is that there is no trust as alleged by the Respondent – Clauses 3 and 4 of the Will can have no effect since the Testator did not own the AT shares at the time of his death having already disposed of them to the Fong Foundation on 3 January 2006. Mr Lee SC cites s 3 of the Wills Act. In support of this submission, Mr Lee SC referred me to various contemporaneous documents surrounding the transfer of the AT shares (collectively, "the Affidavit Exhibits", extracts of which are cited below) which record that the Testator made the transfer as an outright gift:

> (a) the share transfer form dated 3 January 2006 effecting the said transfer of the AT shares contained the following note at the bottom of the document:
>
> > We hereby confirm that no consideration had passed in respect of this transaction which is *merely a gift from the transferor to the transferee*.

(b) the board resolution from the Fong Foundation dated 3 January 2006 accepting the transfer of the AT shares stated;

> RESOLVED that Piti Kulkasetr @ Peter Fong transfers five million and one hundred thousand (5,100,000) ordinary shares, fully paid for, cash of $1.00 each to The Fong Foundation Ltd *in the form of a gift* and such shares shall rank pari pasu in all respects with the existing issued shares of Airtrust (Singapore) Pte Ltd.

(c) a memorandum of gift executed by the Testator on 23 March 2005 that was witnessed by the respondent stated:

> ...I the undersigned Peter Fong...have this 23rd day of March 2005 by divers instruments under my hand transferred to The Fong Foundation...the shares specified in the Schedule hereto, and that the said shares were so transferred by me *by way of gift to the intent that they should become and be the absolute property of The Fong Foundation Ltd*.

(d) a letter from the Testator to the Fong Foundation dated 5 January 2006 in which he described said transfer as a "donation":

> Dear Sir,
>
> *DONATION* OF 5,100,000 ORDINARY SHARES FROM AIRTRUST (SINGAPORE) PTE LTD TO THE FONG FOUNDATION LTD—TRANSFER DATED 03 JANUARY 2006
>
> I, PITI JULKASETR also known as PETER FONG...have *made a donation* by way of Five Million One Hundred Thousand (5,100,000) Ordinary Shares of $1/- each fully paid of Airtrust (Singapore) Pte Ltd to The Fong Foundation Ltd...
>
> The purpose of the aforementioned transfer is so that the dividend received from the said shares can be utilized for charitable purposes as seen fit by the Directors of The Fong Foundation Limited.
>
> That the aforementioned shares *are deliberately given* to The Fong Foundation Ltd for the purposes stated above instead of being willed to the heirs of the estate in the future.

I would add one more objective factor. Clause 3.2 of the Will clearly and unambiguously uses the phrase "...through the *ownership* of My Shares [*ie*, the AT shares]…" (emphasis added). That is certainly indicative that once the AT shares were transferred to the Fong Foundation, it was to become the owner of the AT shares.

29 In contrast, the Respondent's claim of a trust is a bare assertion unsupported by objective evidence. The contemporaneous documents referred to above all show an outright gift was made and confirmed more than once. In fact the Respondent drafted the memorandum of gift which was dated 23 March 2005 and signed that document as witness to the Testator's signature. If the Testator had intended for the Fong Foundation to hold the AT shares on trust, he could have easily inserted a qualification to this effect in the memorandum of gift or the letter to the Fong Foundation dated 5 January 2006. In addition, on the Respondent's own evidence, he was not only a close and trusted friend of the Testator, he had assisted the Testator as legal adviser for over 30 years. In these circumstances, it would appear to me highly improbable that the Testator would choose the word "gift" or use the words that he did in the above documents when he did not intend to make one. Mr Lee SC also pointed out that in his first affidavit filed on 4 October 2010 ("the Respondent's First

Affidavit"),at paragraphs 34 to 37, the Respondent deposed that when the Testator talked about transferring the AT shares to the Fong Foundation in 2005, the Respondent advised that the transfer could be by sale or gift and he prepared the draft Memorandum of Gift. The Respondent then went on to say that the act of asking for a draft Memorandum of Gift "...did not mean that the Testator had by that time decided to effect the transfer of his [AT] shares by gift…" (paragraph 35 of the Respondent's First Affidavit). The Respondent ended by saying that the Testator did not revert to him on the draft Memorandum of Gift. What the Respondent had forgotten was that subsequently the Testator had in fact signed the Memorandum of Gift before him and he witnessed the Testator's execution and it was dated 23 March 2005. The Respondent subsequently had to retract and admit his erroneous recollection in his First Affidavit.

30 I would go further to say that the objective facts also support the Appellant's case. The Testator incorporated Fong Foundation on 13 May 2000, some 7 years before he was diagnosed with cancer in 2007, almost 7 years before he made his last will on 23 January 2007 and almost 8 years before he died on 25 April 2008. The objects clauses in the Memorandum of Association of the Fong Foundation broadly encompass the same charitable causes set out in his Will. The Testator went on to appoint his daughter, Carolyn, to the board of Fong Foundation within his lifetime, on 25 January 2006, and about one year before he made the Will (which was his last will). Strangely, he did not do the same for the Respondent. All this points to his having set up his charitable causes, close to his heart, well before his death. The reason for the transfer of the AT shares is in fact given by the Respondent himself. In paragraph 34 of the Respondent's First Affidavit, the Respondent deposed that the Testator wanted to avoid estate duty that would have been payable then: "it was a subject of concern to [the Testator]…". It will be remembered that in Clause 3.3 of the Will, the Fong Foundation would have to bear any estate duty that was levied on the AT shares. I also accept Mr Lee SC's submission, which I think the Respondent, being an executor of the Will, can hardly dispute, *vis*, that the Schedule of Assets filed for the grant of probate for the Testator's estate makes no mention of the AT shares.

31 Those who practice in estates and trusts will say that ademption, or more correctly, an ademption and satisfaction, has taken place. Ademption is derived from the Latin word "adimere" which implies that the legacy has been taken away. A devise of property under a Will may be adeemed or revoked by a subsequent disposition of the property by the testator during his life time. When the testator by deed or other act subsequent to the Will conveys or transfers the property to the beneficiary in the Will, that is described as ademption and satisfaction. **Jarman on Wills** (8th Edition) says this out at page 1136:

> "The word ademption (from the Latin adimere) implies that the legacy has been taken away. Thus there are two kinds of ademption: the one where the testator gives a specific chattel or fund, and the legacy fails because the chattel or fund has ceased to be part of the testator's assets; the other, where the testator gives a general legacy, and the legacy is held not to be payable because the intended bounty has already been satisfied by the testator: that is, there is an implied revocation of the gift of the legacy."

Similarly, **Williams on Wills** (8th Edition – 2002) at para 41.1 (page 459) sets out the nature of ademption in the following terms:

> "**Nature of ademption**. A specific gift may be adeemed by the subject matter of the gift, between the date of the will and that of the testator's death, ceasing to the part of his estate or ceasing to the subject to his right of disposition or ceasing to conform to the description by which it is given. This may result from the testator's own disposition or change of investment or

other events subsequent to the will and prior to the death of the testator. A gift is also said to be adeemed where the testator during his lifetime and subsequent to the execution of the will gives the donee by gift inter vivos what he would obtain under the will. This is dealt with under the heading of satisfaction.

32 Farwell J's approach in Re Newman [1930]2 Ch 417 is apt:

> "If the testator uses languages that can only be construed as a devise of real estate, and, notwithstanding the imposition of the statutory trusts, he dies without altering or confirming his will, the conversion effected by the statutory trusts *adeems the devise, because there is nothing left for that devise to operate on..."*
>
> *I have therefore to determine the true construction of the testator's language in the present case.* It is in my judgment not apt to pass anything but a moiety or real estate, and as there is no real estate left the devise does not operate. It may well be that this result is not in accordance with what the testator would have intended if he had considered the matter, but I am not concerned with that. *I am only concerned with his language, i.e., his expressed intention.* The whole devise therefore fails." [emphasis added]

It is plain beyond argument that the Testator intended to and did transfer the AT shares to the Fong Foundation as an outright gift in January 2006.

Term requiring removal of the appellant as director

33 The Respondent's statement of claim also asks that the Appellant be removed as, and cease to be, a director of the Fong Foundation. The claim to this relief is based on Clauses 3 and 4 of the Will.

34 Unfortunately Clauses 3 and 4 do not support the Respondent's contention at all. As noted above, Clause 3.2 provides that the AT shares "given" to the Fong Foundation should not ever be diluted in the future and that the Fong Foundation will always, "through the ownership of the AT shares", retain control of AT by owning the majority of its shares. Clause 4(b) provides that the Board, "…shall after [the Testator's] death, comprise of a core of directors made up of the following – (i) Linda (ii) Evelyn (iii) [the Testator's] daughter Carolyn Fong Wai Lyn (iv) [the Respondent] and (v) [the Testator's] son Fong Weng Heng, after he has attained the age of twenty-one (21) years..." There is nothing in the Will or these clauses which specifically require or even imply that the Appellant should be removed as a director of the Fong Foundation. The Will only states that there be a "core of directors" including the Respondent. The definition of the word "core" is the central or innermost part of something and by its very meaning entails something around it that does not comprise the core and is outside the core or non-core. By contrast, in the preceding words in Clause 4(b), the Testator expresses the wish "…that the Board of Directors of the Foundation, *which* presently *comprises* myself, Linda, Evelyn and [the Appellant], shall after my death…" (emphasis added). If the Testator meant the 5 named persons to be the *only* directors, he could easily have so expressed himself as he did in the preceding lines. The undeniable fact remains that the Testator used the phrase "…comprise a core of directors..." Just because the Appellant was not named a *core* director does not mean he cannot remain *a* director after the Testator's demise. In fact, in trying to make out his case, the Respondent himself deposes that the Testator said that the Appellant, a doctor, had "no time". This, if true, makes perfect sense since the busy Appellant, who says he was very close to his uncle, may not have the time to be present at *all* Board meetings (and thus was not a *core* director).

35 The Respondent also relied on the affidavit evidence of Linda and Evelyn as well as his personal dealings with the Testator. The Respondent avers that Linda and Evelyn's affidavit evidence

corroborates his assertion that Clauses 3 and 4 of the Will should be read as intending to remove the Appellant as a director of the Fong Foundation following the Testator's demise. The first and most obvious point to make is that if the words of the Will are clear, then we should not be looking at how other people read the Will to construe it. Less still should we be taking into account what the Testator allegedly told them, *ie*, to read into the Will a provision which is not there. A reading of Linda and Evelyn's affidavits does not quite support the Respondent's contentions.

(a) Linda's short affidavit dated 27 September 2010 makes no direct reference to the Will; instead she "confirms" that during the Testator's lifetime, he told her that his plan for the Fong Foundation upon his death was to have the Respondent, Evelyn and herself on the Board, and later his son Fong Weng Heng once he reached the age of 21 years. She does not say when this or these conversations with the Testator took place and she stops short of categorically saying the Testator said that the Appellant should no longer be on the Board after his death. She then follows this by deposing that "I was *under the impression* that when [the Respondent] was ready to take over from [the Appellant]..." (emphasis added), the Appellant would "…comply with [the Testator's] intentions as expressed in his Will. I had not anticipated that [the Appellant] would simply refuse to comply with the express terms of [the Testator's] Will and more importantly, with [the Testator's] known wishes." The words she uses speak for themselves.

(b) Evelyn's equally short affidavit dated 20 October 2010 says largely the same thing in the same words in paragraphs 4(b) and (c) as Linda said in her affidavit at paragraph 3(2) and (3) (as referred to above). Paragraph 3(3) similarly states: "...I was *under the impression* that when [the Respondent] was ready to take over from [the Appellant], [the Appellant] would go along with [the Testator's] intentions..." (emphasis added). Evelyn also does not give particulars as to when this or these conversations with the Testator took place and deposes to the Appellant's refusal "...to go along with the express terms of [the Testator's] Will and with [the Testator's] wishes..." without identifying the express words of the Will.

36 The Respondent also relies on his evidence: that he was told by the Testator on 7 December 2003 that the Appellant was to be removed as a director since he had "no time". In the Respondent's First Affidavit, he has exhibited, at page 74, (Exhibit "CQK-4"), an email quoting the Testator's alleged instructions to him on 7 December 2003. This included the instruction that once the AT shares are transferred directly to the Fong Foundation, then: "...to take [the Appellant] out as trustee of the [Fong Foundation] and to put [the Respondent] in as trustee of the [Fong Foundation]". The Respondent additionally relies on the Appellant's response to his letter requesting the latter's resignation. In his reply, the Appellant said:

> No. I do not wish to resign.
>
> [...]
>
> My understanding is the will was not valid as the Foundation had already been set up, *and Uncle Peter no longer had any control in how it is run.*
>
> [emphasis added]

The Respondent avers that "it is telling to note that the [Appellant] never said it was [the Testator's] intention that he should remain as a director of the [Fong] Foundation. He simply refused to resign because he believed that there was nothing that anyone could do about his continued presence in the [Fong] Foundation".

37 What the Respondent does not address is the fact that he, the Respondent, had drafted and amended the Will over the years: see paragraphs 5 to14 of the Respondent's First Affidavit. At paragraph 12, the Respondent describes how the Testator would change his will. Typically the Testator would give instructions over coffee, and thereafter, the Respondent would draft the amendments and send them for the Testator's perusal. This would be followed by a meeting where the Respondent would run through the changes. Sometimes the Testator would make yet more changes. The Respondent would then prepare another draft for the Testator's review. If the changes were minor, the Respondent would engross the will, attend the Testator, run through the changes once more with him before the Testator signed the new will. Evelyn would then return the old will to the Respondent for destruction and she would keep the new will. The Respondent prepared the Will (which was the last will). A codicil was made on 21 March 2008. Yet, if what the Respondent says is correct, he never altered Clause 4(b) to make clear that the Appellant was to leave the Board once the Testator passed away. In paragraph 31 of the Respondent's First Affidavit, the Respondent says that he drafted Clause 4(b) on 6 April 2005, pursuant to the Testator's instructions and that wording was retained up to the final Will. There could be nothing simpler or clearer than just providing that after the Testator's death, the Board would comprise the persons whose names were set out in the Will. This is therefore not a case where after making his will, a testator changes his mind, tells others of his change of mind and dies before the change is effected by a new will.

38 Finally, the Respondent does not address the fact that Carolyn was made a director of the Fong Foundation in the Testator's lifetime. She was appointed on 25 January 2006, some three weeks after the Testator transferred the AT shares to Fong Foundation and approximately two years before the Testator died and his Will came into effect. Also, the Appellant was not removed as a director of Fong Foundation upon the transfer of the AT shares to the Fong Foundation and the Respondent made a director in the Appellant's place. The Testator executed his last Will on 23 January 2007. At the time of the execution of his Will, Carolyn had been a director of the Foundation for about one year. The first part of Clause 4(b) naming the current Board as "comprising" the Testator, Linda, Evelyn and the Appellant was no longer correct as Carolyn was already a director. But none of these factual inaccuracies was ever amended. The Respondent does not offer any explanation for that. As I mentioned earlier, Carolyn was appointed a director of the Fong Foundation in the Testator's lifetime but the Respondent was not. The AT shares were transferred to the Fong Foundation during the Testator's lifetime and not under the Will.

39 It is clear on the face of Clause 4(b) of the Will, and giving Clause 4(b) its plain and ordinary meaning, that the Will does not state, whether expressly or impliedly, that the Appellant was to be removed as a director of the Fong Foundation after the Testator's death. Further, the somewhat guarded allegations of Evelyn and Linda in their affidavits and the Respondent's allegations in her affidavit cannot be used to amend or insert a provision into the Will that is not there. If the Respondent says he was expressly told by the Testator that the Appellant was to be removed as a director after his death, then I find it surprising that the Respondent used the language that he did when he drafted Clause 4(b). The Respondent cannot place any reliance on *Low Ah Cheow v Ng Hock Guan* [2009] 3 SLR(R) 1079 ("*Low Ah Cheow*") because as the following passage itself makes clear, first there must be an ambiguity before one can use extrinsic evidence to help resolve the ambiguity (*Low Ah Cheow* at [20]):

> *[I]f 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 evidence as an aid to construction. *It must be emphasised, however, that such extrinsic evidence is … 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. [emphasis added]

See also *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 and s 94 of the Evidence Act (Cap 97, 1990 Rev Ed).

Locus standi

40 Mr Lee SC's next contention is that even if one accepts that there is a trust of the AT shares, the terms of which include a prohibition against the Appellant being a director of the Fong Foundation, the Respondent does not have the *locus standi* to sue for breach of trust. Mr Lee SC argues, with some force, that if the Testator was the settler of the trust, then it is established law that a settler lacks the *locus standi* to enforce a trust that he has settled (see *Lewin on Trusts* (Sweet & Maxwell, 18th Ed, 2008) at para 39-67). In *Bradshaw v University College of Wales* [1988] 1 WLR 190 ("*Bradshaw*"), a settlor had given some farmland to the college on charitable trusts, and her executors later commenced proceedings alleging a breach of trust. The college successfully struck out the proceedings on the ground that the executors lacked the *locus standi* to do so. The executors argued that as representatives of the founder of the charity, they must have an interest in seeing that the charity was administered in accordance with the trusts imposed by the conveyance to which she had been a party. Hoffman J, as he then was, disagreed and said (*Bradshaw* at 192 and 194):

> In my judgment, it is plain that the executors have no interest in this charity. Neither they nor the estate of Miss Lewis [the settlor] could in any sense be regarded as beneficiaries under any of the charitable purposes, nor could the land comprised in the conveyance in any circumstances revert to Miss Lewis's estate. The executors, therefore, have no more interest in the charity than any other member of the public.
>
> …
>
> Even assuming, which, as I have said, I do not accept, that the settlor could have been a "person interested" on the ground that she would wish to see the trusts of the charity enforced, I do not see how an interest of this kind could be transmitted to the plaintiffs. Executors succeed to the property of the deceased, not to her spirit or disembodied wishes.

Hoffman J's decision was affirmed by the English Court of Appeal in *In re Hampton Fuel Allotment Charity* [1988] 3 WLR 513, at 519E-F.

41 The principle therefore is that once a settlor transfers property to trustees, the settler has no rights left in respect of the trust property. Unlike beneficiaries in whom are vested the equitable interest, the settlor does not have any proprietary rights to give him *locus standi* to sue for enforcement. The executors and trustees of the settlor's estate can be in no better position.

42 In response, Mr Ang SC, relying on *Rajabali Jumabhoy v Ameerali R Jumabhoy* [1997] 2 SLR(R) 296, submits that the Testator (and therefore, necessarily, his executors) retained the beneficial interest in the AT shares which were transferred to the Fong Foundation through one of two ways. First, by transferring the AT shares but not intending to relinquish control over AT to the Fong Foundation until after his death, as evidenced by the fact he was the *de facto* controlling mind of the Fong Foundation until his death, the Testator had created an *inter vivos* trust benefitting himself. Secondly, and in the alternative, Mr Ang SC argued that a resulting trust arose from the circumstances of the share transfer since there was no consideration paid for it and no presumption of advancement applied. In both situations, Mr Ang SC argues that the beneficial interest remains with the estate until the executors assent to the administration of the Testator's assets, and so, all

the Fong Foundation has at present is an inchoate right to the beneficial interest in the AT shares. In respect of the second proposition, Mr Ang SC conceded that the pleadings did not expressly state that a resulting trust had been established over the AT shares in 2006, but asked the court to allow the defective Statement of Claim to be amended rather than struck out under the well known practice, and if necessary, the authority of *Ching Mun Fong v Liu Cho Chit* [2000] 1 SLR(R) 53.

43 Before even going into the feasibility of the Respondent's propositions at [42], this issue of *locus standi* may be dealt with by deciding, even at this interlocutory stage, if the facts are clear and unambiguous as to whether the Testator intended to create a trust or make a gift of the AT shares. If he intended to make a gift, then everything the Respondent said at [42] is moot. In this regard, the Respondent avers the Testator's intentions are better assessed in the course of trial when the court is able to fully assess the relevant witnesses and evidence. I unfortunately disagree. In my view, the contemporaneous documents relating to the share transfer as set out in [28] all clearly show the making of a gift. The only question that remains is whether this is an appropriate case for the court to exercise its inherent jurisdiction to look at the affidavit evidence to establish if a reasonable cause of action exists. I bear in mind that I should not be making an examination of the minute facts, details and contentions and usurping the function of a trial judge at an interlocutory stage. However, as is evident from the foregoing, the relevant facts and documents necessary to dispose of these issues are within a fairly narrow compass and few in number. The relevant documents and facts are not really disputed. What is in contention is what they mean. There is no need to go into minutiae, a large body of facts or through voluminous documents or oral evidence to make detailed findings of fact.

44 In my view, in the circumstances of this case, I am entitled to look at the pleadings and evidence as it stands and come to a decision. As in the case of *Standard Chartered*, the Respondent's entire claim is premised on the validity of one fact and one fact alone: that the Testator intended to create a trust. Once this is found to be clearly non-existent, the Respondent no longer has a claim or the *locus standi* to bring it.

45 Turning back to the Affidavit Exhibits, and leaving aside the transfer of the AT shares to the Foundation two and a quarter years before the Testator's death, on the Respondent's own case, the AT shares were transferred to the Fong Foundation on trust in accordance with the terms of the Testator's will (paragraphs 13 and 19 of the Statement of Claim). On the language used in the Will, the AT shares were held by the Fong Foundation, upon trust. The AT shares were not to be held by the executors and trustees of the Testator's estate. The structure of the Will also clearly shows the distinction between the Testator's AT shares dealt with in Part I of the Will, with which we are concerned, and those under Part II along with the Testator's other assets and personal estate, which are not relevant to this case. Under Clause 10, the Testator stated clearly that the AT shares referred to earlier, were not to form part of his personal estate under Part II. Under Clause 6.1, the income from the AT shares were to be applied for certain charitable causes and objects and institutions, none of which refers to the Testator's estate. These factors, coupled with the evidence already referred to above, including the Schedule of Assets of the Testator filed in the probate proceedings, clearly show the Testator's estate never retained any beneficial interest in the AT shares at the time this action was commenced.

46 Mr Ang SC also contended that the "beneficial interest" in the AT shares remained with the Testator's executors until its transfer to the Foundation has been properly assented to. I must confess, despite Mr Ang SC's able arguments, that I had difficulty following the argument. It seems to be contrary to the undisputed facts. Moreover, as Mr Lee SC points out, if the transfer to the Fong Foundation is somehow inchoate because there has been no such assent, then the trust has not been constituted and if so, I cannot see how it has been breached.

47 Against these overwhelming factors, the Respondent tries to contend otherwise because of what the Testator said to him, which did not find expression in the Will the drafting of which was, on his own evidence, entrusted to him, and the contemporaneous documents and the "impression[s]" of Linda and Evelyn. The burden of proof is on the Respondent since he contends that the clear words in the Will and the contemporaneous documentary evidence do not mean what they state. With respect, he has clearly not discharged the same. It is clear to me, and beyond peradventure, that the Respondent does not have the *locus standi* to sue.

48 The Respondent also prays for an order that Alvin and the other executors and trustees carry out their duties as expressed in clauses 3 and 4 of the Will and appoint him as a director of Fong Foundation. I can see no legal basis upon which the Respondent can compel Alvin, Linda, Evelyn and Carolyn, whether individually or collectively, as directors of Fong Foundation to do so; (I assume Carolyn is also a shareholder and it makes no difference whether she is or is not a shareholder). There is nothing in the memorandum and articles of association of Fong Foundation to compel them to appoint the Respondent as a director. As far as Alvin is concerned, neither does the Will impose any legally enforceable obligation upon him. Although not decisive, I note that under clause 4(b), the words used are not, eg., "... I direct ..." but "... it is *my wish* that...", (emphasis added). Also, as mentioned above, Carolyn was appointed a director of Fong Foundation before the Testator died, but the Respondent was not.

The wrong defendant

49 Mr Lee SC submits that even if it were to be found that the terms of the alleged trust required the Appellant's removal as director of the Fong Foundation, the Respondent has brought his claim against the wrong party. In response, Mr Ang SC argues that the Appellant is a proper defendant to the suit under O 80 r 3(1). This is a puzzling submission as that provision deals with personal representatives of an estate who refuse to join as claimants and are made defendants so they are parties to the suit. The reason for doing so is *merely procedural* and the unconsenting party does not incur any liability as a result, unlike the Appellant's position in this case.

50 As Mr Lee SC rightly contends, the Respondent's claim, if at all, can only be against the trustees for breach of the trust terms. Looking at the Respondent's theory of a resulting trust or an express trust (see [42]), in both circumstances the Fong Foundation is the rightful trustee and not the Appellant, who is only a fellow executor and trustee of the Estate and a director of the Fong Foundation.

Scandalous, frivolous, vexatious or constituting an abuse of process

51 Finally, Mr Lee SC submits that the timing of the present action is no coincidence: it was launched as a tactical move by the Respondent to gain control of the Fong Foundation, and in turn, of AT as the Fong Foundation holds 51% of AT's total issued capital. Up to this point, the Fong Foundation's Board (comprising the Appellant, Carolyn, Linda and Evelyn) are evenly divided. Neither side can push a resolution through. This would change once the Appellant is removed and replaced by the Respondent, as he, Evelyn and Linda would form the majority on the board. Mr Lee SC also suggests that the Appellant was targeted as he was, at the material time, the corporate representative of the Fong Foundation at AT's meetings.

52 Looking at all the circumstances I have set out above, I find the Appellant's theory compelling. The Appellant too claims he was very close to the Testator and there is evidence to support this claim. I mention another undeniable fact – the Appellant was made an executor of the Will and the Appellant was also one of the founder shareholders and founder director of Fong Foundation. In fact,

when the Respondent sent an email on 25 September 2009 to the Appellant asking him to resign as a director and the Appellant refused, the Respondent said, in an email dated 30 October 2009, "If you choose not to resign, I have no intention of evicting you by legal means. I have no interest in the matter, except to respect the wishes of Peter." I have set out the relevant dates surrounding the various legal proceedings at [7] above. However, since Mr Lee SC said he was not going to rely on any allegation of a collateral motive on the part of the Respondent in launching this suit, I say no more, other than to say that if I had to make a finding, I would have found this action to be vexatious and an abuse of process on this ground as well.

Conclusion

53 For the reasons set out above, I allow the appeal and strike out the Respondent's Statement of Claim as against the Appellant in Suit 423 of 2010. The order for costs below is set aside.

54 I will hear the parties on costs.