IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2019] SGCA 61

Civil Appeal No 178 of 2017

Between

Ong Wui Teck (As personal representative of the estate of Chew Chen Chin)

… *Appellant*

And

(1) Ong Wui Swoon
(2) Ong Wui Jin

… *Respondents*

Civil Appeal No 31 of 2019

Between

Ong Wui Teck (As personal representative of the estate of Chew Chen Chin)

… *Appellant*

And

(1) Ong Wui Swoon
(2) Ong Wui Jin

… *Respondents*

In the Matter of Originating Summons No 763 of 2014

In the matter of Section 56 of the Trustees Act
(Cap. 337)

And

In the matter of Order 80, Rule 2 of the Rules
of Court (Cap. 322, Rule 5)

And

In the matter of the Estate of Chew Chen Chin

Between

Ong Wui Teck (As personal representative of the estate of Chew Chen Chin)

… *Applicant*

And

(1) Ong Wui Jin
(2) Ong Wui Leng
(3) Ong Wui Yong
(4) Ong Wui Swoon

… *Respondents*

JUDGMENT

[Probate and Administration] — [Administration of assets] — [Payments of debts presently due]
[Probate and Administration] — [Personal representatives] — [Remuneration]
[Contract] — [Intention to create legal relations]

TABLE OF CONTENTS

Ong Wui Teck (personal representative of the estate of Chew Chen Chin, deceased)
v
Ong Wui Swoon and another and another appeal

[2019] SGCA 61

Court of Appeal — Civil Appeals Nos 178 of 2017 and 31 of 2019
Andrew Phang Boon Leong JA, Steven Chong JA and Quentin Loh J
12 September 2019

8 November 2019 Judgment reserved.

Andrew Phang Boon Leong JA (delivering the judgment of the court):

Introduction

1 The present appeals are the latest instalment in the long running dispute between the Ong siblings over their deceased mother, Madam Chew Chen Chin's ("the Deceased") will and estate. The appellant, Mr Ong Wui Teck ("the Appellant"), is the eldest son of the Deceased and the sole executor and trustee of the Deceased's will ("the Will"). The Appellant acts in these appeals as the personal representative of the Deceased's estate ("the Estate"). The respondents are also the children of the Deceased and beneficiaries under the Will. The first respondent, Ms Ong Wui Swoon ("the First Respondent"), is the Deceased's daughter; the second respondent, Mr Ong Wui Jin ("the Second Respondent"), is the Deceased's son (collectively, "the Respondents").

2 The underlying application from which these appeals arise is Originating Summons No 763 of 2014 ("OS 763"), which was originally commenced by the Appellant against the Respondents and their two other siblings, in order to recover certain sums of money which they allegedly owed to the Estate. However, in the course of the proceedings, the High Court judge ("the Judge") invited the Respondents to make any claims they had against the Estate as counterclaims in OS 763, with the intention of deciding all outstanding claims against the Estate once and for all.

3 Subsequently, the Respondents made counterclaims against the Estate for, *inter alia*, $20,000 which was allegedly promised to each of them by the Deceased ("the $20,000 Claims"), as well as medical expenses that the First Respondent had incurred on behalf of the Deceased ("the Medical Expenses Claim"). Sometime after, the Appellant made a further claim against the Estate for accounting and legal costs that he had incurred on behalf of the Estate, in part due to having to defend against the Respondents' counterclaims on the Estate's behalf ("the Administration Costs Claims").

4 The Judge allowed the Respondents' counterclaims *viz*, the $20,000 Claims and the Medical Expenses Claim, but dismissed the Appellant's Administration Costs Claims. Dissatisfied with the Judge's decision, the Appellant brought Civil Appeal No 178 of 2017 ("CA 178") to appeal against the Judge's decision to grant the Respondents' counterclaims, and Civil Appeal No 31 of 2019 ("CA 31") to appeal against the Judge's dismissal of his Administration Costs Claims. We note that the total sum in dispute amounts to less than $80,000, and it was somewhat fortuitous that the counterclaims originated in the High Court, thereby giving the Appellant one level of appeal to the Court of Appeal.

5 Having considered the evidence as well as the parties' submissions, we are satisfied that the Judge's decision to grant the Respondents' counterclaims should be reversed. However, we do not find any merit in the Appellant's contention that he should be entitled to further costs in the administration of the Estate. Therefore, we allow CA 178 in part and dismiss CA 31. We elaborate on the reasons for our decision below.

Procedural history and background facts

The Will

6 Given that the present dispute has its genesis in the Will, we set out the relevant portions as follows:

> 1 I REVOKE all former Wills … previously made by me.
>
> 2 I APPOINT my son [the Appellant] to be the sole Executor and Trustee of this my Will.
>
> 3 Subject to payment of my debts, funeral and testamentary expenses, I give devise and bequeath all my … property … unto my Trustee upon trust to sell call in and convert into cash … AND TO DIVIDE AND DISTRIBUTE the net proceeds of such sale, calling in and conversion and all ready monies … to the following persons in accordance with the specified manner, that is to say:
>
> 3.1 To return the sum of $50,000.00 to my son [the Appellant];
>
> 3.2 To divide the remaining … net proceeds of my estate into five (5) equal … shares and to distribute the … shares among my five surviving children in equal shares, absolutely …
>
> IN WITNESS WHEREOF, I, [the Deceased] have hereunto set my hand to this my last Will and Testament on this 3rd day of January 2005.
>
> The Right Hand Thumb Print of [the Deceased] was affixed in our presence and by us in hers, the [Deceased] being unable to understand the English language but understanding Mandarin and the Hokkien dialect, the Will having been translated into the Mandarin and/or the Hokkien dialect by Lin Xiaoli who is fully conversant with the Mandarin and/or the Hokkien dialect

> and the English language before the execution as stated above when the [Deceased] appeared thoroughly to be of sound mind, memory and to understand and have knowledge of the Will.

7 The Will was executed by the Deceased on 3 January 2005, while she was warded in the Singapore General Hospital. The Deceased subsequently passed away on 8 January 2005. Apart from the Appellant and the Respondents, the Deceased has two other children who are beneficiaries under the Will but are not parties to the present appeals.

The challenge to the validity of the Will

8 Upon the Deceased's passing, the Appellant commenced District Court Suit No 2260 of 2005 ("DC 2260") to apply for a grant of probate in respect of the Will. The Respondents and their other two siblings (collectively, "the Four Siblings") sought to challenge the validity of the Will. In *Ong Wui Teck v Ong Wui Jin and others* [2008] SGDC 103 ("the Validity Decision (DC)"), District Judge James Leong ("DJ Leong") found that the Will was validly executed by the Deceased and granted probate of the same to the Appellant. DJ Leong's decision was subsequently upheld on appeal by Chan Sek Keong CJ in *Ong Wui Jin and others v Ong Wui Teck* [2009] SGHC 50 ("the Validity Decision (HC)").

9 One of the issues relevant to these appeals, specifically the $20,000 Claims, that was heavily contested before both DJ Leong and Chan CJ was in relation to $50,000 that was bequeathed to the Appellant pursuant to cl 3.1 of the Will. The Four Siblings argued before DJ Leong and Chan CJ that the Deceased could not have intended to execute the Will with cl 3.1 in it, because it went against her intention to divide the Estate equally among her five children. Chan CJ observed that the attendance note of Ms Spring Tan ("Ms Tan"), an advocate and solicitor who was present at the signing of the

Will, indicated that the Deceased was aware of the terms of the Will when she executed it: the Validity Decision (HC) at [28]. Of particular significance is the following portion from the said attendance note, which alludes to the circumstances under which the Respondents had broached the topic of the $50,000 that was bequeathed to the Appellant. It also shows how the Respondents had relied on the fact that the Appellant was being given an additional $50,000 to ask the Deceased for an additional $20,000 each for themselves:

> On arrival, one other son [the Second Respondent] was sitting by bedside & talking to [the Deceased].
>
> He was questioning [the Deceased] when [the Appellant] gave $50k, in cash, in cheque, bank into A/C, can trace?
>
> [The Appellant] was trying to explain.
>
> When other son insist that I witness *that [the Deceased] appear to agree to give him $20k*, told him that I'm here to witness her will.
>
> [The Appellant] told [the Second Respondent] the $50k is in repayment of the monthly $800 that [the Appellant] had been giving to his mum. [The Second Respondent] then said since he gave $300 a month to his mother, he should be entitled to $20k.
>
> …
>
> 15 mins later, [the Appellant and the Second Respondent] agreed in the Conference Rm that the will [should] be as drafted and [the Second Respondent] will get $20k from his mother directly after she leave the hospital.
>
> While waiting with interpreter to read will, [the First Respondent] also arrived & also disputing the will. [The Respondents] then proceeded to Conference Rm to discuss.
>
> After 15 mins, they came out & we proceed to see [the Deceased]. [The Deceased's] back was turned away from [the First Respondent] & face[d] us, the interpreter & me.
>
> [The First and Second Respondents] insisted on being present, [the Appellant] not around. [The First Respondent] said its just a will, can be contested anytime. [The Deceased] [confirmed] her name & add[ress] at Marine Parade. As later read will, 1st para,

> [the Deceased] interrupted & said she has no previous will, and that this is her 1st.
>
> …
>
> As [the interpreter] read [cl] 3.1, I asked [the Deceased] [through the interpreter] whether there is anyone else she wants to give too. She said no. I asked her how about [the Respondents] who have come forward.
>
> She looked at them and [the First Respondent] said "Mum, I looked after you last time, you should give me salary." Then [the Deceased] said "OK $20k for you". She also said $20k to [the Second Respondent]. I asked her if she wants to add that to her will. She said "No, I will give myself". She said she's leaving hospital the next day and will [give] herself.
>
> …
>
> [emphasis added]

Originating Summons No 365 of 2014

10 On 16 April 2014, the Appellant filed Originating Summons No 365 of 2014 ("OS 365") for an application that he, as executor of the Estate, be allowed a commission of $75,000, for work done by him and his wife in the administration of the Estate. The Judge allowed the Appellant's claim in full. This will be relevant to our decision on the Administration Costs Claims.

The underlying application

11 On 7 August 2014, the Appellant filed the underlying application, OS 763, claiming, *inter alia*, various sums which were allegedly unaccounted for by the Respondents on behalf of the Estate. The Judge heard OS 763 for the first time on 29 December 2016. He conclusively dealt with most of the prayers in OS 763, and adjourned the matter to consider the remaining prayers. At this hearing, the First Respondent raised the issue of the Deceased's medical expenses that she had allegedly paid for on the Deceased's behalf using her Central Provident Fund's Medisave account moneys and her American Express

credit card. The Appellant denied these claims on the basis that the Deceased had paid for her own medical expenses while she was alive. The Judge held that the First Respondent's claim for the medical expenses that she had incurred on the Deceased's behalf was a claim for a debt as a creditor of the Estate, and that she should make a claim with the Appellant for this debt. The Judge further stated that if the Appellant did not admit to the debt, the First Respondent would then have the option of commencing legal proceedings to make a claim for the debt.

12 At the next hearing which took place on 4 January 2017, the Judge dealt with the remaining prayers save for two, which related to the setting aside of moneys for the payment of the Estate's storage costs and to provide for possible future claims by the beneficiaries. The Judge decided that the best way forward would be to allow the Respondents to raise any claims they had against the Estate as counterclaims in OS 763, so that all possible claims could be dealt with at once thus making it unnecessary to set aside any sum of money as a contingency for future claims. The Judge adjourned the matter for the Respondents to file further affidavits in support of any counterclaims they may have against the Estate.

The Respondents' counterclaims

13 On 31 January 2017, the First Respondent filed an affidavit stating that she wished to make a claim against the Estate for, *inter alia*:

(a) $20,000 that was promised to her by the Deceased; and

(b) reimbursement for the Deceased's cancer medication expenses which she paid for with her American Express credit card and moneys from her Medisave account, including interest on those amounts.

14 On 3 February 2017, the Second Respondent filed an affidavit stating that he too wished to make a claim for the $20,000 that was also promised to him by the Deceased. The Respondents both relied on the fact that Ms Tan had witnessed the Deceased making the promise to give them $20,000 each in support of their claims.

The Appellant's claim for administration costs

15 On 18 September 2017, the Appellant filed further submissions claiming various administration costs from the Estate *ie*, the Administration Costs Claims. His claims comprised three components, namely:

(a) "accounting costs" for accountancy services provided by the Appellant's wife in the administration of the Estate in the sum of $10,000 ("the Accounting Costs Claim");

(b) work done by the Appellant as a litigant-in-person representing the Estate in the sum of $20,000 ("the Litigation Costs Claim"); and

(c) costs for storage and archiving of the Estate's records in the sum of $5,000. Given that the Judge had allowed this head of claim on a reimbursement basis, and since no appeal has been filed against this aspect of the Judge's decision, we will say no more on this.

Parties' cases below

16 In so far as the $20,000 Claims were concerned, the Respondents claimed that the Deceased had promised them $20,000 each as repayment for the monthly allowances that they had given her. In the First Respondent's case, the $20,000 was also in return for her effort in caring for the Deceased in her final days. The Respondents further argued that the $20,000 Claims should be

characterised as a repayment of a debt, given that the Appellant had admitted that the $50,000 bequeathed to him in the Will was meant as *repayment* for the monthly allowances that he had given the Deceased, and further that the word "return" was used in cl 3.1 of the Will.

17 In response, the Appellant argued that the $20,000 which the Deceased had promised to give each of the Respondents were meant to be gifts, and not repayments for a debt. Therefore, given that these gifts were not perfected in the Deceased's lifetime, they could no longer be enforced. The Appellant suggested in the alternative that the Deceased could have already paid the Respondents, given that there was evidence to show that the Deceased had made significant cash withdrawals prior to her passing.

18 As for the Medical Expenses Claim, the First Respondent was able to produce her American Express credit card and Medisave statements to prove that she had made payments to the Singapore General Hospital and the National Cancer Centre for the Deceased's medical expenses. The First Respondent admitted that most of the Deceased's medical expenses were paid for by the Deceased herself, but stated that she would use her American Express credit card to pay for the Deceased whenever the Deceased forgot to bring money with her. The First Respondent further admitted that some of these medical expenses had already been reimbursed to her by the Deceased.

19 The Appellant argued that all the medical expenses that the First Respondent incurred on behalf of the Deceased had already been reimbursed. The Appellant relied on evidence of withdrawals from the Deceased's bank accounts from 14 January 2004 to 21 August 2004 amounting to a sum of around $72,000 to argue that these moneys must have been used to reimburse the First Respondent for the medical expenses that she had incurred on the

Deceased's behalf. In response, the First Respondent contended that the $72,000 was withdrawn for the Deceased's own use.

20 In relation to the Accounting Costs Claim, the Appellant set out a list of accounting services that his wife had provided in relation to the administration of the Estate in 2017, which amounted to a total of $10,000.

21 As for the Litigation Costs Claim, the Appellant argued that the Respondents' counterclaims required his involvement not just as the personal representative of the Estate but also as a litigant-in-person. He relied on O 59 r 18A of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("O 59 r 18A") to argue that he should be entitled to costs that would reasonably compensate him for the time that he had spent on the matter, as well as all expenses that he had reasonably incurred. He claimed that in order to defend against the counterclaims, he had to prepare numerous affidavits and submissions in addition to legal research and forensic examination of the documents. On that basis, he sought to claim $20,000 from the Estate. He further claimed that this amount was only one-third of what the Estate would have had to bear if external professionals had been engaged.

Decision below

22 At the hearing of 10 April 2017, the Judge allowed the $20,000 Claims. The Judge held that at the point in time when the Deceased was making the Will, she acknowledged that she did owe money to her children and that she should return the moneys she had previously received from them. The Judge further relied on the specific use of the word "return" in cl 3.1 of the Will, in relation to the $50,000 bequeathed to the Appellant, as an indication that the Deceased had treated the sum as a repayment of a debt. The Judge cited [31] of

the Validity Decision (HC), where Chan CJ noted that the Deceased had "agreed to *return* $20,000" [emphasis added] to the Respondents when they pressed her on the $50,000 that she was giving the Appellant. The Judge concluded that the Deceased owed a debt of $20,000 to each of the Respondents and allowed their counterclaims on that basis. The Judge further noted that there was no evidence that this debt had been repaid by the Deceased.

23 The Judge rejected the Appellant's argument that DJ Leong and Chan CJ had both characterised the $50,000 and $20,000 as gifts in their respective decisions. The Judge held that those decisions were concerned primarily with the validity of the Will, and therefore he was not bound by the remarks made in relation to the legal characterisation of the $50,000 and $20,000.

24 At the hearing of 17 July 2017, the Judge allowed the Medical Expenses Claim in the amount of $13,597.10. The Judge found that there was sufficient evidence, in the form of the First Respondent's American Express credit card statements and Medisave statements, to prove that she had actually incurred medical expenses on the Deceased's behalf. The Judge further noted that "there was a pattern of conduct by the [Deceased], when she was alive, to repay [the First Respondent] the medical expenses incurred by the [First Respondent] on the [Deceased's] behalf". Therefore, the question in his view was not whether there was an agreement for reimbursement, but rather, whether there were sums outstanding that had not yet been reimbursed. However, there was no evidence to show that the First Respondent had been reimbursed for these expenses incurred by her. The Judge rejected the Appellant's contention that the withdrawals amounting to $72,000 from the Deceased's account were used to reimburse the First Respondent for the medical expenses, because there was no clear explanation for what those withdrawals were for.

25 On balance, the Judge found that there was some credibility in the First Respondent's story. In particular, he noted that the First Respondent was not claiming *all* the medical expenses she had incurred on the Deceased's behalf. He further stated that the items that she had admitted to being reimbursed for were not minor items at all. However, the Judge rejected the First Respondent's claim for interest on the payments that she had made on the Deceased's behalf, on the basis that there was no evidence to prove that she had in fact incurred interest on the sums paid.

26 Finally, at the hearing of 31 January 2019, the Judge dismissed the Accounting Costs Claim and the Litigation Costs Claim. The Judge held that the claim for accounting services provided by the Appellant's wife and the Appellant's own time costs as a litigant-in-person representing the Estate were in effect claims for executor's remuneration and commission. With regard to the Accounting Costs Claim, the Judge found that the Appellant's wife was "assisting the [Appellant] voluntarily and gratuitously in her personal capacity", and that she was "not running a business as an accountant and [was] not engaged by the [Appellant] as an arms-length service supplier to the Estate".

27 As for the Litigation Costs Claim, the Judge stated that the starting point in dealing with executor's claims for remuneration is the "fundamental rule in equity that no one who has a duty to perform shall place himself in a situation to have his interests conflict with that duty". A consequence of this rule is that, while an executor is allowed to claim out-of-pocket expenses, he is not entitled to remuneration for personal trouble and loss of time in the execution of his duties. The Judge cited *Re Barber* (1886) 34 Ch D 77 and *Forster v Williams Deacon's Bank Ltd* [1935] Ch 359 as authorities for this proposition. The Judge further cited *Re Worthington* [1954] 1 WLR 526, which held that even a

professional lawyer acting as a personal representative cannot claim his legal fees as remuneration from the estate.

28 The Judge went on to state that in Singapore, the exception to this rule is a statutory one, and can be found in s 66 of the Probate and Administration Act (Cap 251, 2000 Rev Ed) ("PAA"). Section 66 of the PAA ("s 66") provides that a court may in its discretion allow the executor a commission not exceeding 5% of the value of the assets collected by them. The Judge had, in OS 365 which also involved the administration of the Estate, allowed the Appellant's claim for a commission of $75,000, and this amounted to the maximum commission allowed under s 66. The Judge held that the court has no further discretion to allow a commission above the statutory limit, even if the executor incurs further costs after the commission has been paid. The Judge stated that O 59 r 18A refers to costs which a litigant-in-person may claim from the other party in litigation and has no application to the situation of an executor claiming compensation from the Estate.

Parties' cases on appeal

29 On 27 September 2017, the Appellant filed a Notice of Appeal for CA 178, setting out the following grounds of appeal:

(a) appeal against the Judge's "award of non-testamentary cash gifts" *ie*, in relation to the $20,000 Claims;

(b) appeal against the legitimacy of the "medical claim" *ie*, in relation to the Medical Expenses Claim; and

(c) "[c]osts issues, amongst which are that the executor's costs, including professional accounting costs are to have priority in accordance with pecking order of payment".

30 In relation to ground (c) above, the Judge sought clarification from the Appellant at the hearing on 2 November 2017 as to what exactly the Appellant intended to appeal against. The Appellant stated that he wished to apply to the Court of Appeal for the First Respondent to return the moneys that the Judge had awarded her as reimbursement for the medical expenses she incurred on the Deceased's behalf, because that amount was not paid out in accordance with the "pecking order of payment". The Appellant argued that according to the PAA, professional costs should be paid first, followed by debts, then the residual estate. The Judge told the Appellant that he had made no order in relation to the issue set out in ground (c), and therefore that there was nothing to appeal against. The Judge stated that he had not been asked to decide which amount should be paid *first*. His decision was only that the amount *should* be paid.

31 On 20 February 2019, the Appellant filed a Notice of Appeal for CA 31. The appeal was against the Judge's decision on 31 January 2019 to dismiss the Appellant's claim for compensation/remuneration for work done in having to conduct litigation on behalf of the Estate against the Respondents' counterclaims, and to dismiss the claim for accounting costs/expenses/remuneration on behalf of the Appellant's wife for the provision of accounting services for the counterclaims and the Estate *ie*, the Litigation Costs Claim and the Accounting Costs Claim, respectively.

The $20,000 Claims

32 With regard to his appeal against the Judge's decision to allow the $20,000 Claims, the Appellant's main contention is that the $20,000 which was promised by the Deceased to each of the Respondents were meant to be gifts and are therefore unenforceable. The Appellant points to the Validity Decision (DC) at [26] (which was reproduced in the Validity Decision (HC) at [27]), where DJ Leong referred to the $20,000 promised to each of the Respondents as "cash gifts". Given that these gifts were not completed during the Deceased's lifetime, they cannot now be enforced. The Appellant further argues that there cannot be any intention to create legal relations when children give contributions and allowances to their mother, and therefore there is no binding debtor-creditor relationship between the Deceased and the Respondents in relation to the monthly allowances that they had given her. The Appellant also contends that the use of the word "return" in cl 3.1 of the Will does not mean that the $50,000 bequest was meant for the repayment of a debt. Rather, it was simply a testamentary gift. Finally, the Appellant suggests that the Deceased could already have given the respondents the $20,000, or could have simply changed her mind about giving them the gift.

33 The Respondents argue that there was an agreement for the Deceased to compensate the First Respondent for the salary that she had foregone because she had been the Deceased's primary caregiver, and that this was witnessed by Ms Tan during the execution of the Will. We note that the Second Respondent had not made any submissions in support of his claim to the $20,000.

Medical Expenses Claim

34 In relation to the Medical Expenses Claim, the Appellant similarly argues that in the absence of a binding contract or agreement, any payment that

the First Respondent made on the Deceased's behalf should be regarded as a gift to the Deceased for which reimbursement cannot be claimed. The Appellant points out that the Deceased's other children had also paid for the Deceased's medical expenses, and none of them expected to be reimbursed. Even if the First Respondent was entitled to be reimbursed, the Appellant contends that $37,000 was withdrawn from the Deceased's bank account and given to the First Respondent as a cash float to attend to the Deceased's various needs and expenses, and that this would have been sufficient to reimburse the First Respondent for any medical expenses that she would have incurred on the Deceased's behalf. Further, the Deceased had a significant amount of funds available in her various bank accounts, which she could have used to top up this cash float if it ran out.

35 In response, the Respondents allege that when the Appellant found out about the $20,000, he took steps to freeze the Deceased's bank account, which prevented the Deceased from reimbursing the First Respondent for the medical expenses that she had incurred.

36 As for the contention that the Judge had violated the statutorily mandated pecking order of payment by ordering that the Medical Expenses Claim be paid out by a certain date, the Appellant argues that the Judge should not have made such an order given that he was not the final arbiter of the matter. This was especially since the assets of the Estate were depleted and there would be insufficient funds left to ensure that the executor's costs and expenses would be reimbursed, which had to take priority over any other payments out of the Estate.

Administration Costs Claims

37 In relation to the Accounting Costs Claim, the Appellant cited ss 41B, 41C and 41T of the Trustees Act (Cap 337, 2005 Rev Ed) ("Trustees Act") to assert that a trustee may authorise and remunerate any person to perform any act required in the execution of the trust or in the administration of the Estate. He further states that there is no requirement in the Trustees Act requiring the accountant *ie*, the Appellant's wife, to be running a business to enable her to charge for her services. Therefore, the accounting costs payable to the Appellant's wife should properly be regarded as an expense of the Estate.

38 As for the Litigation Costs Claim, the Appellant points out that the sum of $75,000 which he was awarded in OS 365 included claims for administrative expenses, such as the fees for the accounting services provided by his wife. Therefore, the Judge had erred by regarding the entire amount of $75,000 as executor's commission. The Appellant further contends that s 66 only applies to executorship and administratorship. Upon the collection of assets, executorship evolves into trusteeship which is governed by the Trustees Act. Section 43 of the Trustees Act allows the court to grant a trustee such remuneration for his services as the court deems fit, and is not restricted to 5% of the Estate. The Appellant also relies on O 59 r 18A to assert that he should be entitled to costs as a litigant-in-person as would reasonably compensate him for the time expended by him as well as all expenses reasonably incurred, and that these costs should be paid by the Respondents, or otherwise, the Estate. The Appellant set out the work that he and his wife had done on behalf of the Estate in extensive detail, to justify the amount that he was claiming. The Appellant claims that compensation for work done by him as the personal representative of the Estate, exclusive of professional accounting work done by his wife, would amount to only 1% of the Estate. Together with the 2.3% that was awarded

previously in OS 365, this would amount to only 3.3% of the Estate, which is well below the maximum threshold of 5% pursuant to s 66.

39 The Respondents contend that the Appellant's claims are bogus and are an attempt to siphon money from the Estate. The Respondents also point out that the Appellant's claim for administration costs is not being made on a reimbursement basis, and there are no proper payment vouchers to match the invoices that were issued.

Preliminary issue: whether leave to appeal is required

40 Before delving into the substantive merits of the appeals, a preliminary issue that arises for our consideration is whether leave of court was required for these appeals to be brought before us, given that the sum in dispute is less than $250,000. The Judge expressed his tentative view that the Appellant would require leave, but ultimately stated that it would be for this court to decide whether leave was necessary, and if so, whether leave should be granted.

41 Notwithstanding that the amount in dispute may be less than $250,000, we do not think that the Appellant requires leave of court to bring the present appeals. Section 34(2)(*a*) of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) ("SCJA") states that any case where the amount in dispute, or the value of the subject-matter, at the hearing before the High Court (excluding interests and costs) does not exceed $250,000 can be appealed to the Court of Appeal only with the leave of the High Court or the Court of Appeal, *unless otherwise provided in the Fifth Schedule*. Significantly, para 3(*d*) of the Fifth Schedule to the SCJA states that s 34(2)(*a*) of the SCJA *does not* apply to contentious probate proceedings commenced in the High Court *before 1 January 2015* and heard and determined by the High Court in the exercise of

its original jurisdiction. The underlying application, OS 763, was commenced at first instance in the High Court on 7 August 2014. Therefore, s 34(2)(*a*) of the SCJA would not apply to any appeals arising from OS 763, and leave to appeal is not required even though the amount in dispute is less than $250,000.

Our decision

42 We agree with the Appellant that the $20,000 which was promised to each of the Respondents were intended to be gifts as opposed to repayments for debts owed by the Deceased, and are therefore unenforceable. Similarly, given the familial relationship between the Deceased and the First Respondent, there is a presumption that the medical expenses which the First Respondent incurred on behalf of the Deceased were also meant to be gifts, and there was insufficient evidence to prove that there was a binding agreement for the First Respondent to be reimbursed. As for the Accounting Costs Claim and Litigation Costs Claim, we agree with the Judge that these were essentially claims for executor's commission. Given that the Appellant had previously been awarded $75,000 as executor's commission in OS 365, no further sums by way of executor's commissions can be awarded pursuant to s 66. As for the Appellant's contention that the Judge had violated the "pecking order" of payment, given that we have found that no further amounts in executor's commission are to be paid out of the Estate, there is no danger that the pecking order for payment will be violated. We therefore allow CA 178 in relation to the $20,000 Claims and the Medical Expenses Claim and dismiss CA 31. Let us now elaborate on the detailed grounds for our decision.

The $20,000 Claims

43 The Judge's decision to allow the $20,000 Claims essentially hinged on his characterisation of the sums as repayments for debts that the Deceased

acknowledged she owed to the Respondents. The bases for these alleged debts were the monthly allowances that the Respondents had given her while she was alive, and additionally in the case of the First Respondent, the effort that she had expended in looking after the Deceased. The Judge also relied heavily on the use of the word "return", in both cl 3.1 of the Will in relation to the $50,000 bequest to the Appellant as well as in [31] of the Validity Decision (HC) where Chan CJ stated that the Deceased had agreed to "return" the money to the Respondents. In the Judge's view, the use of the word "return" was deliberate, and an indication that the moneys were intended for the repayment of a debt.

44 With respect, we consider that the Judge had erred in finding that there was a binding and enforceable debt between the Deceased and the Respondents, and that the $20,000 was meant as repayment for this debt. At the outset, we should state that claims for repayment of debts made against deceased persons should be supported by compelling evidence, given that the deceased persons would be unable to rebut such claims posthumously. We agree with the English High Court decision of *In re Gonin, decd* [1977] 3 WLR 379 at 392 cited by the Appellant, where Walton J observed as follows:

> Now it is common sense that all claims against the estate of a deceased person which had not been put forward whilst they were still living fall to be scrutinised with considerable care, for the obvious reason that the other party to the agreement is in the nature of things unable to give his or her version of events.

Therefore, the burden falls squarely on the Respondents to adduce compelling evidence to show that there was in fact a valid and binding debt owed to them by the Deceased.

45 In the present case, the Respondents were unable to adduce any evidence to show that by promising to give them $20,000 each, the Deceased had intended to create a binding and enforceable agreement between them. Apart

from the requirements of offer, acceptance and consideration, there must also be an intention to create legal relations on the part of the parties concerned in order for a binding and enforceable agreement to arise: see the decision of this court in *Gay Choon Ing v Loh Sze Ti Terence Peter and another appeal* [2009] 2 SLR(R) 332 ("*Gay Choon Ing*") at [71]; reference may also be made to *The Law of Contract in Singapore* (Academy Publishing, 2012) ("*The Law of Contract in Singapore*") at para 05.004. Specifically, where an arrangement is made in the domestic or social context, there is a *presumption* that the parties *do not* intend for legal consequences to follow, that is, there is *no* intention to create legal relations: see *Gay Choon Ing* at [72]. In the seminal English Court of Appeal decision of *Balfour v Balfour* [1919] 2 KB 571 ("*Balfour*"), the court rejected a wife's claim to enforce a promise made by her husband that he would pay her a sum of money each month until she eventually joined him on his overseas assignment. Atkin LJ (as he then was), in his oft-cited judgment, explained the rationale behind the presumption that in the domestic context there is generally no intention to create legal relations (at 579):

> They are not sued upon, not because the parties are reluctant to enforce their legal rights when the agreement is broken, but because the parties, in the inception of the arrangement, never intended that they should be sued upon. Agreements such as these are outside the realm of contracts altogether. The common law does not regulate the form of agreements between spouses. Their promises are not sealed with seals and sealing wax. *The consideration that really obtains for them is that natural love and affection which counts for so little in these cold Courts.* The terms may be repudiated, varied or renewed as performance proceeds or as disagreements develop, and the principles of the common law as to exoneration and discharge and accord and satisfaction are such as find no place in the domestic code. The parties themselves are advocates, judges, Courts, sheriff's officer and reporter. In respect of these promises each house is a domain into which the King's writ does not seek to run, and to which his officers do not seek to be admitted. [emphasis added]

The presumption in *Balfour* is not restricted only to arrangements between husbands and wives, but applies also to other types of familial relationships, such as those involving parent and child, or between siblings: see *The Law of Contract in Singapore* at para 05.015.

46 However, this does not mean that agreements made in the domestic or social context are *never* capable of constituting legally binding obligations. We must emphasise that arrangements made in the domestic or social context merely give rise to a *presumption* that parties do not intend to create legal relations, which puts the burden of proof on the party seeking to enforce the agreement to prove that parties did in fact intend for their arrangement to have legal consequences. As Tay Yong Kwang JC (as he then was) observed in the Singapore High Court decision of *Hongkong & Shanghai Banking Corp Ltd v Jurong Engineering Ltd* [2000] 1 SLR(R) 204 at [43] (albeit in the context that there is a presumption that the parties intend to create legal relations if an agreement is made in a commercial context):

> [T]he operation of the presumption does not detract the court from its fundamental task, which is to ascertain the true bargain between the parties, to seek the substance and reality of the transaction and to ascertain what common intentions should be ascribed to the parties.

For example, where there is evidence that an agreement was made between family members in a business context, the presumption may not apply or may be easily rebutted. The presumption may also be inappropriate where parties are estranged notwithstanding their family ties, because they can no longer be assumed to trust the other to fulfil his or her promise on the basis of their natural love and affection. The fact that one party to the arrangement relied on the promise to his or her detriment may also constitute sufficient evidence to rebut

the presumption that there was no intention to create legal relations: see *The Law of Contract in Singapore* at paras 05.013, 05.016 and 05.017.

47 In our judgment, there was simply nothing on the evidence before us to rebut the presumption that there was no intention to create legal relations. In fact, the circumstances under which the promise was made, as evident from the contemporaneous attendance note of Ms Tan (see [9] above), seemed to us to suggest otherwise. The Deceased was lying on a hospital bed when the Second Respondent arrived and began questioning her about the $50,000 that was allegedly being "returned" to the Appellant pursuant to the Will. When the Appellant explained that this was in "repayment" for the $800 monthly allowances that the Appellant had given the Deceased throughout the years, the Second Respondent argued that he should be entitled to at least $20,000 given that he had also given the Deceased an allowance of $300 per month. It was only as a result of the Second Respondent's complaint that the Deceased agreed to give him $20,000 after she was discharged from hospital. Subsequently, as Ms Tan was going through cl 3.1 of the Will with the Deceased, she asked the Deceased if there was anyone else she wanted to give money to. The Deceased initially said no, but Ms Tan reminded her about the Respondents who had come forward, and the First Respondent told the Deceased that she deserved a salary for looking after the Deceased. The Deceased relented and agreed to give $20,000 to both Respondents. Crucially, however, when Ms Tan asked the Deceased if she wanted to include these amounts in the Will, the Deceased declined and said that she would give the money to the Respondents herself after she was discharged.

48 If the Deceased had truly intended for her promise of $20,000 to have legal effect, there was no reason for her not to include it in the Will. Further, if she had intended for the moneys to be in repayment for a debt owed to the

Respondents, there was no reason for her to insist that she make payment herself after she was discharged from the hospital. Yet further, there would at least have been some attempt on her part to determine the exact amount that was due. Instead, the Deceased decided to give the *same* lump sum figure of $20,000 to each of the Respondents, despite them having different bases for their claims. Given the sequence of events leading up to the making of the promise, we find the Deceased's behaviour to be more consistent with a mother attempting to pacify her children for their complaints of being treated unfairly, as opposed to someone who genuinely believed that she owed a legal debt to her children and who had wanted to repay them.

49 Additionally, we do not think that the bases upon which the Respondents founded these alleged debts were even valid to begin with. The Respondents contend that the $20,000 was in repayment for the monthly allowances that the Respondents had given the Deceased. It is presumed that monthly payments made by children to their aged mother are intended to be gratuitous contributions to their mother's living expenses. Indeed, the fact that the Respondents themselves had referred to these payments as "allowances" indicates that they too intended for these to be gratuitous payments. No evidence was adduced to show that these monthly allowances were intended, instead, to be loans which had to be repaid. As for the First Respondent's contention that the $20,000 was also to repay her for the effort that she had expended in looking after the Deceased, the presumption is that the First Respondent was looking after the Deceased because of the love and affection that she had for her mother. There was similarly no evidence to show that the First Respondent had intended to provide a service to the Deceased for which she expected to be remunerated.

50 For completeness, we also deal with the Judge's reliance on the word "return" in cl 3.1 of the Will in finding that the $50,000 was meant as repayment

for a debt, and therefore that the $20,000 were also meant as repayments for debts owed to the Respondents. With respect, we do not think that the Judge should have placed so much reliance on just the use of the word "return". First, the use of the word "return" does not *necessarily* lead to the inference that the $50,000 was intended to be repayment for a debt. There could potentially be multiple interpretations of the word "return" depending on the context in which it is used. Indeed, the $50,000 could have been given to the Appellant by the Deceased out of goodwill, in "return" for the Appellant providing for and caring for the Deceased. We find this to be a more reasonable interpretation given the mother-son relationship between the parties. In any event, the use of the word "return" is irrelevant to the legal character of the $50,000. Given that it was a gift made pursuant to a will, it is regarded as a testamentary bequest. In other words, the reason why the $50,000 can be enforced against the Estate has nothing to do with whether it is for the repayment of a debt. It is enforceable solely because it is a testamentary bequest. Second, the Judge's reasoning presupposes that the legal character of the $50,000 is indicative of the legal character of the $20,000. However, the Deceased's refusal to include the $20,000 payments in the Will clearly demonstrates that the Deceased had intended to treat the $20,000 *differently* from the $50,000. Therefore, even if the Deceased had intended to treat the $50,000 as repayment of a debt to the Appellant, the same cannot necessarily be said of the $20,000 that was promised to the Respondents.

51 As for the Judge's reliance on Chan CJ's use of the word "return" in relation to the $20,000 at [31] of the Validity Decision (HC), the Judge himself had noted at the hearing of 25 September 2017 that DJ Leong and Chan CJ's decisions were concerned primarily with determining whether the Will was valid, and not with the legal nature or characterisation of the $50,000 and

$20,000. Therefore, any observations that were made in DJ Leong's and Chan CJ's judgments should not be taken as their *findings* in relation to the *legal nature* of these sums. As the Appellant points out, the Validity Decision (HC) itself is internally contradictory as to whether the $20,000 should be characterised as a gift or a repayment of a debt. At [27] of the Validity Decision (HC), Chan CJ reproduces the parts of DJ Leong's judgment which refers to the $20,000 as "cash gifts", without expressing any disagreement with DJ Leong's characterisation of the $20,000. Chan CJ then goes on at [31] to state that the Deceased had agreed to "return" $20,000 to the Respondents. This apparent inconsistency shows that Chan CJ was probably not applying his mind to the issue of how the $20,000 should be properly characterised or the significance of the word "return". Indeed, given that he was concerned with the validity of the Will, there would have been no need for him to be concerned with a payment which the Deceased had expressly intended to be made outside the Will.

52 We are therefore satisfied that the $20,000 which the Deceased had said that she would give the Respondents were intended to be gifts and are not legally enforceable. In the circumstances, we set aside the Judge's decision to allow the $20,000 Claims.

The Medical Expenses Claims

53 Turning next to the Medical Expenses Claim, there are two main prongs to the Appellant's argument. First, he argues that in the absence of a binding contract or agreement, any payment that the First Respondent made on behalf of the Deceased should be regarded as a gift to the Deceased on account of their familial relationship. Second, even if the First Respondent was meant to be reimbursed for the medical expenses that she had incurred on the Deceased's

behalf, she would already have been fully reimbursed and there would be no further sums left for her to claim from the Estate.

54 The First Respondent was able to adduce evidence in the form of her American Express credit card statements, as well as her Medisave statements, to show that she had made certain payments to the Singapore General Hospital and the National Cancer Centre. We agree with the Judge that these documents were sufficient to prove that the First Respondent had actually incurred medical expenses on behalf of the Deceased. In fact, the First Respondent's Medisave statements expressly state that the deductions from her account were for payment of hospital charges incurred by the Deceased at the National Cancer Centre.

55 However, we agree with the Appellant that given the mother-daughter relationship between the Deceased and the First Respondent, there is a presumption that any payments made by the latter on the former's behalf were intended to be gratuitous payments for which she did not expect to be reimbursed. In other words, there is a presumption that there was no intention to create legal relations when the First Respondent made payments for medical expenses on the Deceased's behalf.

56 Further, we are satisfied that there was insufficient evidence for this presumption to be displaced in the present case. We reiterate the observations that we made at [44] above, that compelling evidence is generally required to establish claims against a deceased person who is unable to rebut such claims posthumously. First, as the Judge had himself noted, there was a complete lack of documentary evidence to prove that the First Respondent had in fact been reimbursed by the Deceased, let alone that there was an *agreement* for her to be reimbursed. The Judge relied solely on the First Respondent's bare (albeit

unchallenged) assertion to find that "there was a *pattern of conduct* by the [Deceased], when she was alive, to repay the [First Respondent] the medical expenses incurred by the [First Respondent] on the [Deceased's] behalf" [emphasis added]. Be that as it may, the mere fact that there was a "pattern of conduct" by which the Deceased reimbursed the First Respondent does not in and of itself mean that there was an *agreement* for the First Respondent to be reimbursed. While a contract may in certain cases be implied from a course of conduct or dealings between the parties, such a contract must satisfy all the elements necessary for the formation of a contract, including offer and acceptance, consideration, intention to create legal relations, and certainty of terms: see the decision of this court in *Cooperatieve Centrale Raiffeisen-Boerenleenbank BA (trading as Rabobank International), Singapore Branch v Motorola Electronics Pte Ltd* [2011] 2 SLR 63 at [46] and [50]. While the First Respondent's evidence shows that the Deceased would habitually reimburse the First Respondent for any medical expenses incurred, it does *not* go so far as to show that this was done pursuant to *a binding and enforceable agreement* between the parties. Given the familial relationship between the parties, it is presumed that the medical expenses incurred by the First Respondent on the Deceased's behalf, and the reimbursement that she would subsequently receive, were made out of *goodwill* as opposed to a legal obligation.

57 Secondly, the First Respondent's own evidence was that she was reimbursed for some of the medical expenses she incurred on the Deceased's behalf but not for others. In other words, there was no *systematic* pattern of reimbursement between the Deceased and the First Respondent. This runs counter to any suggestion that there was an agreement for the First Respondent to be reimbursed whenever she paid for the Deceased's medical expenses on her behalf.

58 Thirdly, if there was in fact an agreement for the First Respondent to be reimbursed, we find it puzzling that she did not seek reimbursement while the Deceased was still alive, or at the very latest at the hospital as the Will was being drafted. In this regard, the First Respondent alleged that she had in fact broached the topic of the Deceased's medical expenses together with her claim for lost income at the meeting for the drafting of the Will, and that Ms Tan had heard her make these claims. The Second Respondent stated that he could not "really recall", but that he thought that the First Respondent did mention the issue of medical expenses and salaries to Ms Tan. The Judge appeared to have accepted this evidence. However, we must respectfully disagree. In particular, we consider that the attendance note of Ms Tan seems to paint a very different picture. It was recorded in the attendance note that as Ms Tan was reading out cl 3.1 of the Will, she asked the Deceased whether there was anyone else that she wished to bequeath further sums to. The Deceased had initially responded in the negative, but when Ms Tan reminded her about the Respondents who had come forward with their claims, the issue of the $20,000 was then raised. It is significant that the attendance note made no mention of the medical expenses that the Deceased allegedly owed the First Respondent. If there were indeed outstanding sums that the First Respondent had yet to be reimbursed for at the time, there should have at least been some mention or record of this in the attendance note. If it was the usual practice for the First Respondent to be reimbursed by the Deceased, there was no reason for her not to have brought this up with the Deceased, and if she had in fact brought it up, there was no reason for her request to be denied. Further, the corroborative value of the Second Respondent's evidence as to what transpired during the meeting for the drafting of the Will should also be limited, given his own admission that he could not quite recall what had happened. Therefore, we consider it more likely that the First Respondent had not broached the topic of the Deceased's medical

expenses during the drafting of the Will, and that the first time such a claim was made was sometime in 2012 or 2013, seven or eight years after the Deceased had passed away. To this end, we disagree with the Judge's holding that even if the claim was made for the first time in 2012 and 2013, it would not have prejudiced the Estate's ability to dispute the claim. The fact is that the claims were only made *after* the Deceased had passed away, which made it impossible for the only person who would have had personal knowledge of the matter to defend against the claim. Therefore, contrary to what the Judge had found, we consider that the Estate was irreparably prejudiced by the Medical Expenses Claim being made only after the Deceased had passed away.

59 In the circumstances, we do not think that the First Respondent's bare assertion that she would be habitually reimbursed by the Deceased is sufficient evidence of a binding and enforceable agreement for reimbursement that would be sufficient to displace the presumption that there was no intention to create legal relations. In fact, all the evidence seems to point towards the opposite conclusion. We are therefore of the respectful view that the Judge had erred in allowing the Medical Expenses Claim.

Administration Costs Claims

60 Finally, we turn to the Administration Costs Claims. To recapitulate, the Judge dismissed the Appellant's Accounting Costs Claim and Litigation Costs Claim, on the basis that these were essentially claims for executor's commission. The Judge relied on s 66, which provides that the court may in its discretion allow executors or administrators a commission not exceeding 5% of the value of the assets collected by them. The Judge held that since he had already awarded the Appellant $75,000 in executor's commission in OS 365,

which amounted to about 5% of the assets collected, he was statutorily prevented from awarding any further sums.

61 The main thrust of the Appellant's argument is that having collected the assets of the Estate, he is no longer an executor and administrator but is instead a trustee of the Will. Therefore, it is the Trustees Act, and not the PAA, which should govern his and his wife's entitlement to remuneration for services provided on behalf of the Estate. In any event, $40,000 out of the $75,000 which was awarded in OS 365 was remuneration for the accounting services provided by the Appellant's wife, which should be regarded as an administration expense and not executor's commission. Therefore, even if s 66 was applicable, the court still had the discretion to grant further sums in executor's commission.

62 We are unable to agree with the Appellant. We are satisfied that the Accounting Costs Claim and the Litigation Costs Claim, when properly characterised, are merely claims for executor's commission. By parity of reasoning, the $40,000 awarded in OS 365 should also be regarded as a portion of the executor's commission and not as an administrative expense of the Estate. Therefore, given that the statutory limit for executor's commission has been reached, there is no basis to award any further sums.

63 In cases such as the present, a personal representative of an estate can be appointed as both the executor and the trustee of the will. Indeed, cl 2 of the Will states that the Appellant is appointed as both executor and trustee of the Will. The question that then arises is, *at what point does the personal representative cease to be an executor and start to be a trustee*? Indeed, this is an important distinction to make, given that an executor and a trustee have different duties and powers. The need for this distinction is also highlighted in

the present case, where the capacity of the personal representative determines which statutory provision will govern his entitlement to remuneration.

64 In our judgment, a personal representative ceases to be an executor and administrator only after all the assets of the estate have been vested in the personal representative, and the estate has been fully administered: see G Raman, *Probate and Administration in Singapore and Malaysia* (LexisNexis, 4th Ed, 2018) at para 12.19. This involves, *inter alia*, getting in all the assets of the estate, paying for any funeral, testamentary and administrative expenses, and satisfying all outstanding debts against the estate. As trustee, the personal representative then becomes concerned with the problems of distribution of the administered estate among the persons entitled: see *Williams, Mortimer and Sunnucks on Executors, Administrators and Probate* (Alexander Learmonth *et al* gen eds) (Sweet & Maxwell, 21st Ed, 2018) ("*Williams, Mortimer and Sunnucks*") at para 65-05. We note that this also accords with the terms of the Will in the present case, which provides at cl 3 that all of the Deceased's property is bequeathed upon her trustee *ie*, the Appellant, *subject to payment of the Deceased's debts, funeral and testamentary expenses*.

65 Once an executor decides that he no longer requires the estate's assets for the satisfaction of the liabilities of the estate, he should then "assent" to the legacy. This is explained by the learned authors of *Williams, Mortimer and Sunnucks* at para 76-01 (see also Arthur Dean, "When Does an Executor become a Trustee?" (1935-1938) 1 Res Judicatae 92 at p 93):

> An assent has been described as an acknowledgment by a personal representative that an asset is no longer required for the payment of the debts, funeral expenses or general pecuniary legacies.
>
> As has been shown all real and personal property to which a deceased person was entitled for an interest not ceasing on his death, now devolves upon his representatives. They are

> responsible for the satisfaction of the deceased's debts to the extent of the whole estate, even though the testator may have directed that a portion of it should be applied to other purposes. In view of this liability they should not distribute any portion of the deceased's estate until satisfied that such debts have been actually paid or are adequately secured, or can be paid without recourse to that portion of the estate. The personal representatives are protected against competing claims by the principle that the beneficiaries' title to the deceased's property, whether devisees, legatees or persons entitled on intestacy, is not complete until some act of the representatives themselves makes it so. This act, according to the circumstances, is either an assent or a conveyance, and until it has taken place the administration continues.

66 It follows that before the debts and liabilities of the estate have been fully settled, the beneficiaries to the will cannot claim to have a beneficial interest in the assets of the estate, since some of the assets may have to be used in satisfaction of the said debts and liabilities. Therefore, if the beneficiaries do not have an equitable interest in the assets of the Estate, the personal representative cannot be regarded as a trustee over those assets. This was also the view of Asher J in the New Zealand High Court decision of *Re Maguire (deceased)* [2010] 2 NZLR 845 (at [18] and [20]):

> [18] It is well understood that *a beneficiary of an unadministered estate does not have a proprietary interest in the estate's assets until the debts are paid, and it is not possible to identify the assets to which the beneficiary is entitled*: *Lord Sudeley v Attorney-General* [1897] AC 11. The nature of an executor's duty to residuary beneficiaries was considered in *Dr Barnardo's Homes v Commissioners for Special Purposes of the Income Tax Acts* [[1921] 2 AC 1]. Viscount Finlay said in the House of Lords:
>
> > … the legatee of a share in the residue has no interest in any of the property of the testator until the residue has been ascertained. His right is to have the estate properly administered and applied for his benefit when the administration is complete.
>
> …
>
> [20] … residuary legatees such as the Rauchs, have no interest in the nature of a property interest, whether legal or

> equitable, in the unadministered estate. The corpus of the estate and any income from it was the property of the executors until their administration role was complete. *Until the will maker's debts are paid and the specific legacies met, it is not possible to identify the assets to which beneficiaries are entitled. And until that point, there is no need to distinguish between the legal and equitable estate.* That is not to say that the residuary legatees are without rights in relation to the administration of the estate. The executors owed the residuary legatees a fiduciary duty to carry out their administration tasks honestly and diligently, and the residuary beneficiaries would have remedies against the executors should they fail to carry out those duties.
>
> [emphasis added]

67 Given that the Litigation Costs Claim and the Accounting Costs Claim were claims for expenses allegedly incurred in the *administration* of the Estate, it is clear that these were claims made by the Appellant in his capacity as *executor* of the Estate. Indeed, the Appellant claims that the Litigation Costs Claim and the Accounting Costs Claim were necessitated by the costs incurred in defending against the Respondents' counterclaims in OS 763. The legal proceedings that resulted from the counterclaims were, in effect, to fully determine the outstanding debts and liabilities of the Estate. Therefore, in defending against these counterclaims on behalf of the Estate, the Appellant was clearly acting in his capacity as executor and administrator of the Estate. Accordingly, the appropriate statutory provision which governs the duties, rights and powers of the Appellant *qua* executor is the PAA.

68 We add for completeness that in a case such as the present where the alleged creditors of the Estate are also the beneficiaries under the Will, it is necessary to draw a distinction between the Appellant in his capacity as executor *vis-à-vis* the Respondents as creditors of the Estate, and the Appellant in his capacity as trustee of the Estate *vis-à-vis* the Respondents as beneficiaries

under the Will. In so far as the counterclaims in OS 763 are concerned, it is the former relationship that is more appropriate.

69 Accordingly, we do not find any merit in the suggestion that the Appellant is authorised to appoint and remunerate his wife for providing accounting services in the execution of the trust pursuant to ss 41B, 41C and 41T of the Trustees Act. In any event, s 41T(2) of that Act states that trustees may only remunerate agents out of the trust funds for services if the agent is engaged *on terms entitling him to be remunerated for those services*. As the Judge noted, the Appellant's wife was merely providing a gratuitous service to assist her husband in the administration of the Estate. There was no evidence adduced to show that she was providing an arm's length service as a professional accountant on terms entitling her to be remunerated for those services. We therefore dismiss the Appellant's appeal in relation to the Accounting Costs Claim. We note that the same analysis would apply to the $40,000 that was claimed in OS 365. Therefore, we reject the Appellant's contention that only $35,000 in executor's commission has been paid out thus far.

70 Similarly, s 43 of the Trustees Act does not apply to govern the Appellant's remuneration for services that he had allegedly rendered to the Estate as a litigant-in-person in defending against the Respondents' counterclaims. Therefore, since the Appellant had previously been awarded executor's commission amounting to 5% of the assets collected, he is statutorily barred from being awarded further sums by virtue of s 66.

71 In any event, even if s 43 of the Trustees Act were applicable, the discretion to award remuneration for services rendered as a trustee of the Estate vests solely in the court. Personal representatives are bound by the rule in equity

that no one who has a duty to perform shall place himself in a situation to have his interests conflicting with that duty. It is a part of this rule that a personal representative is not entitled to profit from his position as representative. Thus, while the personal representative is entitled to out of pocket expenses, he is not (unless the will provides otherwise) entitled to remuneration for personal trouble and loss of time in the execution of his duties: see *Williams, Mortimer and Sunnucks* at para 51-02. As observed by the learned authors of *Lewin on Trusts* (Lynton Tucker, Nicholas Le Poidevin, James Brightwell gen eds) (Sweet & Maxwell, 19th Ed, 2015) at paras 20-240 and 20-242 and 20-243:

> The court will … not exercise the jurisdiction unless it is satisfied having regard to the nature of the trust, the experience and skill of a particular trustee, the amounts which he seeks to charge when compared with what other trustees might require to be paid for their services, and to all the other circumstances of the case, that it would be in the interests of the good administration of the trust, and therefore of the beneficiaries, to award or increase remuneration. Remuneration may, for example, be awarded if that is necessary in order to secure the services of a particular trustee whose services are of special value to the trust, …
>
> …
>
> *Awards of remuneration for work done are typically made in cases where work of an exceptional character is performed …*
>
> …
>
> There may … be an additional principle which is relevant in such cases, namely that *remuneration might be awarded if a trustee has performed services of an exceptionally onerous character which can properly be regarded as wholly outside the scope of any duties which could reasonably have been expected to be rendered by trustees in the normal course of their duties*, and have resulted in financial gain to the trust, and for which recompense should be made, not on the basis that there is an implied contract to pay remuneration, but on the basis that the trustees cannot be reasonably expected to have acted as they did without remuneration and the beneficiaries would be unjustly enriched if no remuneration were paid, or that he who seeks equity must do equity. But as the office of trustee is, as such, gratuitous, it will never suffice merely to show that a

> trustee, even a professional trustee, has acted properly and done work which had to be done …
>
> [emphasis added]

72 It was further noted in *Williams, Mortimer and Sunnucks* at para 51-09 that in determining when to exercise its discretion to grant remuneration to the trustee, the task of the court is "to balance competing equities; on the one hand, the equity which seeks to discourage conflicts of interest in trustees and executors and, on the other hand, the idea that in certain circumstances it would be inequitable for beneficiaries to step in and take the benefit of the representative's efforts without paying for the skill and labour which produced it".

73 In the present case, we do not think that the services rendered by the Appellant in the administration of the Estate were particularly exceptional or onerous. There is also no evidence to suggest that the Estate had appreciated in value as a result of his administration. In other words, the Appellant had not done anything beyond what he was expected to do as an administrator and trustee of the Estate that would warrant remuneration. Therefore, even if the Appellant were to be regarded as a trustee and s 43 of the Trustees Act were to apply, we can see no reason to exercise our discretion to award him with remuneration.

74 As a final point, we note that the Appellant had relied on O 59 r 18A to assert that he should be awarded costs for acting as a litigant-in-person on behalf of the Estate. O 59 r 18 A provides that on a taxation of the costs of a litigant-in-person, there *may* be allowed such costs as would reasonably compensate the litigant for the time expended by him, together with all expenses reasonably incurred. However, it does not entitle the litigant-in-person to costs *as of right*. The fundamental principle that costs follow the event is not displaced by

O 59 r 18A. In any event, even if the Appellant were entitled to costs following from these appeals, these costs should rightfully belong to the Estate given that the Appellant acts in these appeals as the personal representative of the Estate.

Conclusion

75 For the foregoing reasons, we allow CA 178 in part, in relation to the $20,000 Claims and the Medical Expenses Claim, and dismiss CA 31. Given that both parties have partially succeeded, we make no order as to costs. All other consequential orders are to apply. We hope that this decision will bring some finality to the parties so that they may finally move on from this bitter and unhappy episode of their lives.

Andrew Phang Boon Leong Judge of Appeal	Steven Chong Judge of Appeal	Quentin Loh Judge

The appellant in person;
The first and second respondents in person.
