Lee Koon (by her attorneys Seah Teong Kang and Seah Chiew Tee) v Seah Yong Chwan (executor of the estate of Seah Eng Teow, deceased)
[2013] SGHC 285

Case Number	: Originating Summons No 875 of 2013
Decision Date	: 30 December 2013
Tribunal/Court	: High Court
Coram	: Edmund Leow JC
Counsel Name(s)	: Earnest Lau and Tan Tian Luh (Chancery Law Corporation) for the plaintiff; Tay Yong Seng and Alexander Yeo (Allen & Gledhill LLP) for the defendant.
Parties	: Lee Koon (by her attorneys Seah Teong Kang and Seah Chiew Tee) — Seah Yong Chwan (executor of the estate of Seah Eng Teow, deceased)

Probate and administration – Distribution of assets

[LawNet Editorial Note: The appeal to this decision in Civil Appeal No 40 of 2014 was dismissed by the Court of Appeal on 10 September 2015. See [2015] SGCA 48.]

30 December 2013 Judgment reserved.

Edmund Leow JC:

Introduction

1 The issue in this case is whether a specific bequest of company shares made under a will was defeated by the winding up of that company so that the liquidation surplus paid out in relation to those shares falls into the residue of the estate. If so, the plaintiff is entitled to the entire surplus as she is the residuary beneficiary under the will, even though she was a specific legatee of only some of those shares.

2 On 7 November 2013, I heard arguments from the parties and thereafter reserved judgment. That same evening, solicitors for the defendant wrote to the Registry of the Supreme Court requesting leave to make further arguments. On 11 November 2013, solicitors for the plaintiff wrote to object to the defendant's request. I declined to hear further arguments and now give my judgment.

The facts

3 The plaintiff is the widow of one Seah Eng Teow ("the Deceased"). She is now 83 years old and is suing by her attorneys, her elder son Seah Teong Kang ("Teong Kang") and her daughter Seah Chiew Tee ("Chiew Tee"). The defendant is her younger son and executor of the Deceased's estate.

4 The Deceased owned 1.2 million shares ("the Shares") in Teow Aik Realty (S) Pte Ltd ("the Company"). The Company was incorporated on 2 March 1983 and had a paid up capital of $5m in the form of 5 million shares of $1 each. It was evidently a family owned and run company. The shareholders who were also the directors were:

(a) Teong Kang: 1.8 million shares

(b) Chiew Tee: 200,000 shares

(c) The Deceased: 1.2 million shares

(d) The defendant: 1.8 million shares

5 By way of a will dated 19 December 2007 ("the Will"), the Deceased bequeathed his 1.2 million Shares in the following manner: 1,000,000 to the defendant; 100,000 to the plaintiff and 100,000 to Chiew Tee. These were what I will term the "specific legatees" of the Shares. The plaintiff was also named the residuary beneficiary of the estate. There were other bequests that are not material.

6 On 17 December 2007, which I note was just two days *before* the execution of the Will, the Company's shareholders applied to put it into winding up. The High Court granted the application and ordered winding up on 22 July 2008; winding up was completed on 19 June 2013. There was a liquidation surplus to be distributed to the members of 15.488 cents per share. On 30 May 2012, a total of $177,550.95 ("the Sum") in surplus was paid to the estate of the Deceased as the Deceased had passed away earlier, on 2 March 2011. It was not disputed that the Shares were never transferred to the legatees at any time.

7 In June 2012, the defendant sent to the plaintiff and Chiew Tee each a cheque for $15,488, being the liquidation surplus received in respect of each of their entitlements to the Shares under the Will. The defendant claimed the remainder of the Sum. Neither the plaintiff nor Chiew Tee ever accepted the cheques. Instead the plaintiff demanded the entire Sum. She asserted her claim as the residual beneficiary. She said she had been willed Shares and so she could get only Shares; the surplus from liquidation was not the same as the Shares. All of this surplus should have fallen into the residuary estate of the Deceased and thereby have come to her in full.

8 Chiew Tee, who is currently living with and looking after the plaintiff, accepted that she was not entitled to any money, but said the entire Sum should be paid to the plaintiff to be used for her upkeep and medical expenses. She filed an affidavit to that effect. Her brother, Teong Kang, who together with her is looking after the plaintiff in her old age, also filed a brief affidavit in support.

9 The defendant filed an affidavit. He averred that the liquidation surplus from the Shares of 15.488 cents per share was a gross value, and after adjustments for sums due and from the estate, the net payment came to about 14.796 cents per share. Nevertheless he was willing to pay to the plaintiff and his sister Chiew Tee the gross value of their share of the Shares and did in fact send them cheques for that amount at 15.488 cents per share. He said that on 28 March 2013, he had received a letter of demand from the plaintiff stating that she was entitled to the entire Sum. The defendant said he disagreed and sent a fresh cheque for $15,488 as the previous one had been issued more than six months previously.

10 On 18 September 2013, the plaintiff filed this originating summons for a declaration that the Sum forms part of the residuary estate and for a consequential order that the defendant transfer the Sum to the plaintiff forthwith. On 26 September 2013, the defendant sent a third fresh cheque for $15,488 as both of the previous cheques had by then lapsed. None of the cheques were ever accepted.

The plaintiff's case

11 The plaintiff says that under cl 3(ii) of the Will the specified legatees were supposed to be given the Shares and not the moneys realised on liquidation that were paid out to shareholders in

their aliquot shares. Clause 3(ii) reads:

(ii) I give and bequeath my 1,200,000 shares in [the Company] to the persons set out below:-

(a) Seah Yong Chwan (son) – 1,000,000 shares

(b) Lee Koon (wife) – 100,000 shares

(c) Seah Chiew Tee (daughter) – 100,000 shares

12 The plaintiff says the defendant and executor could not pay over the liquidation surplus in lieu of the Shares themselves because the plaintiff and Chiew Tee were entitled to the Shares *in specie* and the liquidation surplus represented a distinct type of property to which they were not entitled. A shareholder in a winding up is not the legal or beneficial owner of the surplus funds in liquidation. He has no proprietary interest in them. Further, this surplus is not a debt or a chose in action but constitutes a type of property distinct from shares. The plaintiff relies on *Re Jiangshan Investment Consortium Ltd (in liquidation)* [2007] 3 SLR(R) 614 ("*Re Jiangshan*") at [25] and [29] as authority for this proposition:

25 There is an Australian decision that discusses the legal nature of a surplus that is held by a liquidator after all the debts of a wound up company have been settled. This decision adopts the principle in the *Spence* case and provides further support for the proposition that the liquidator in such a situation would not be the debtor of the contributories who are entitled to payment of that surplus and that there is no debt relationship between the two. In *Webb v The Federal Commissioner of Taxation* (1922) 30 CLR 450, a highly profitable no-liability company went into voluntary liquidation pursuant to a scheme of reconstruction, and a new limited liability company was incorporated. The court was invited, for the purposes of tax assessment to consider whether the shares allotted to the members of the old company were "profit or bonus credited or paid" by the old company to the members within the meaning of the relevant taxation statute. Although the ratio of the case is not relevant for our purposes, the court made observations on whether the nature of a surplus was such that it amounted to a debt between a company and its members. At 479–480 of its judgment, the court said:

> But, at all events, "profits credited or paid" are, as it seems to me, pointed to "profits" which have in some way been made a debt by the company to the shareholder, &c. In the case of a shareholder, that would be by a "dividend or bonus" — or even by "interest" used in the sense of distribution of profits. But the declaration of a "dividend" creates a debt ... Where there is no debt, or "debit", the word "credit" or the word "pay" in relation to profits is meaningless, for there is nothing calling for payment and there is no balance to be struck. And in its essence the distribution of surplus assets in winding up creates nothing in the nature of a debt by the company to anybody (see *Spence v Coleman*). Nor is it a payment. The debts owing by the company have been paid; the debts owing to the company are gathered in; the contributories' positions are equalized or are as agreed; and the property of the company falls to be divided, not by the corporation, but among the corporators, for the company has itself ceased to have any use for it since its undertaking is at an end ... and it is on the road to dissolution.

…

29 Mr Ng also made an argument to the effect that the Deed could be recognised as an equitable assignment in favour of the designated recipients. I think that there are difficulties with

this argument because the law, as stated above, is that the surplus in the hands of the liquidator is not a debt that he owes any of the contributories. If it is not a debt, it is not a chose in action and it seems to me would not be assignable. I do not have to decide this point, however, since I have already accepted that the Deed is an effective payment instruction in the same way as Form 52 would be.

13 The plaintiff says that as the surplus is neither a debt nor a chose in action, it follows that liquidation surplus funds have their own unique proprietary identity. The specific legatee, in order to become entitled to this surplus, must therefore already be either the legal or beneficial owner of the Shares at the point in time the surplus became available for distribution. But the specific legatees never become either legal or equitable owners of the Shares due to the operation of s 259 of the Companies Act (Cap 50, 2006 Rev Ed) ("CA") which reads:

> **Avoidance of dispositions of property, etc.**
>
> 259. Any disposition of the property of the company, including things in action, *and any transfer of shares* or alteration in the status of the members of the company made after the commencement of the winding up by the Court shall unless the Court otherwise orders be void. [emphasis added]

As no court order was ever obtained, no legal title could be or was transferred.

14 Nor could beneficial ownership pass to the specific legatees. The plaintiff relies on *Re Fry* [1946] Ch 312 ("*Re Fry*") for the proposition that where a transferor is required by statute to obtain prior approval before there can be a share transfer, no beneficial right to the shares can pass to the intended donee until such approval is obtained. This follows from the principle that equity will not perfect an imperfect gift. The plaintiff says that such approval was required under s 259 of the CA and this was not obtained. Therefore as a specific legatee under the will, she could not hold beneficial title to her share of the Shares under the rule in *Re Fry*. And because the plaintiff never obtained beneficial interest in the Shares, there was no interest that could be traced into the proceeds thereof.

15 The plaintiff says that while the Shares remained in the estate, she could not in any case have obtained legal or equitable title to them until executorial duties were completed and this could not be done until the executor had obtained a court order under s 259 CA. Until execution is complete, the plaintiff argues, the unadministered assets of an estate do not constitute a trust fund to be held by the executor for the beneficiaries.

16 For these reasons, the plaintiff says that the gift had failed and that the entire Sum therefore fell into the residuary estate of the Deceased. Under cl 4 of the Will, the rest and residue of the Deceased's properties was to be gathered in and sold and the net proceeds paid to the plaintiff. She is therefore the residuary beneficiary and entitled to the whole of the Sum.

The defendant's case

17 It seems that initially, the defendant was under the impression that the plaintiff's claim was that there had been an ademption of the gift of the Shares. This was on the basis that the plaintiff's letter of demand of 28 February 2013 to the defendant had stated: "In the premises, it would appear that there is an ademption of the shares."

18 In the hearing before me it was clarified that there was no issue of ademption. Ademption of a

specific gift occurs when the subject matter of a gift is disposed of or destroyed before the will takes effect, or when it ceases to conform to the description by which it is given, or when the nature of the gift has changed its character: see *Low Gim Har v Low Gim Siah* [1992] 1 SLR(R) 970 ("*Low Gim Har*") at [58]. The parties accepted that the Shares had not been adeemed because when the Deceased passed away on 2 March 2011, the Shares were still extant, albeit the Company was then in the process of winding up. But this did not destroy the Shares or change their nature or description.

19 On the plaintiff's substantive claim, the defendant says that the effect of the Company's winding up was to turn its shareholders into contributories who were entitled to participate in the liquidators' distribution of the surplus assets of the Company, after its assets have been gathered in and realised and all its debts and other liabilities, including the cost of winding up, have been discharged.

20 The defendant then relies on the case of *Low Gim Har* as being on all fours with the present case. The facts were as follows. The testator ("LYK") willed all his shares in a company ("HCKK") to certain beneficiaries and also willed that the residue of his estate was to be divided equally between his wife and sons. On 17 October 1983, the shareholders of HCKK passed a special resolution to wind up a company; this was a voluntary winding up. LYK became terminally ill and in May 1985 he entered into a shareholders' agreement with the other shareholders of HCKK to divide the immovable properties of HCKK in a specified manner. Certain of those properties were allocated to LYK but were not transferred to him before he died on 31 May 1985. The question before Chan Sek Keong J (as he then was) was whether those properties formed part of the shares specifically bequeathed (and therefore should go to the specific legatees thereof) or should fall instead into the residuary estate. In the event, it was held that the properties should go to the specific legatees of the shares. The passage on which the defendant places great reliance is at [60] which reads as follows:

> … Under s 18 of the Wills Act (Cap 352), a will speaks from the date of death and accordingly, the court must construe the will on the basis that when LYK bequeathed his shares in HCKK to the cl 9 beneficiaries, he must have intended to bequeath to them the shares with whatever rights that arise from or in connection with ownership of such shares. These rights of ownership included the right to call for the distribution of the immovable properties as the aliquot shares of the beneficial owners of the shares in the undistributed assets of HCKK at the date of LYK's death. …

21 Chan J therefore held that the properties should be transferred *in specie* to the specific legatees to whom the company's shares were bequeathed by will instead of falling into the residue of the estate.

My decision

22 I am satisfied that because of the operation of s 259 of the CA the specific legatees were never the legal or beneficial owners of the Shares. But I do not think it follows that the specific legatees did not have any kind of interest in the liquidation surplus distributed in relation to the Shares so that the gift should fail.

23 The first thing to establish is the nature of a shareholder's interest in the liquidation surplus. Section 121 of the CA provides that a share is movable and not immovable property. A share does not confer in the holder either legal or beneficial interest in the property of the company; what the shareholder gets instead is a bundle of rights: a right to participate in the company on the terms of its memorandum and articles of association while the company is a going concern; and if and when

the company is wound up, a right to participate in the distribution of the assets of the company after all its debts have been paid: see *Walter Woon on Company Law* (Tan Cheng Han gen ed) (Sweet & Maxwell, Rev 3rd Ed, 2009) at para 11.5.

24 In *Low Gim Har*, LYK's rights as a shareholder were identified as follows, at [55]–[56]:

> 55 In my view, until the immovable properties were actually distributed, the shareholders had the right to require the liquidator to do otherwise. It must therefore follow that since LYK's properties had not been transferred to him on 27 May 1985, he was entitled and was in a position to change his mind at any time before his death to accept the relevant properties *in specie*. The shareholders' agreement bound him to the other shareholders in respect of the properties allocated to each of them, but it did not bind him in respect of the properties allocated to him. He could have expressly directed TBH not to effect the transfers of the relevant properties. He could have indirectly frustrated the whole exercise by refusing to pay any calls by TBH or the equality money payable in respect of the properties.
>
> 56 In my view, that right of revocation remained as part of LYK's right of ownership of his shares at the date of his death. At the highest, there was a revocable trust in respect of the relevant properties. If that were the case, then the relevant properties were still in the disposal of LYK before he died. There is no authority that the doctrine of conversion operates in such a case. There is no principle of which I am aware which demands a conversion in these circumstances. There is no need for equity to call into existence any equitable rights in this situation between LYK and HCKK. As between them, the legal titles of the relevant properties remained vested in HCKK until they were actually and effectively distributed to LYK or his estate after his death. Until distribution, there was no need to distinguish between HCKK's legal and beneficial titles in them. The right to call for the transfers of the relevant properties subsisted. The right to direct the liquidator to sell them and distribute the proceeds of sale to them also subsisted. As was said by Lord Radcliffe in *Livingston*'s case ([35] supra), the court will control the liquidator in the use of his rights over the relevant properties.

25 What *Low Gim Har* did not discuss fully was the question of how "the right to call for the distribution of the immovable properties as the aliquot shares of the beneficial owners of the shares in the undistributed assets of HCKK at the date of LYK's death" (*Low Gim Har* at [60]) could result in the specific legatee of the shares becoming entitled to that property.

26 I think *Low Gim Har* implicitly assumed – which I think is correct – that because this right or chose in action necessarily carries with it the right to receive the fruits of the chose in action once ascertained, the holder of the chose in action obtains some kind of "interest" in the fruits of the chose in action once ascertained. This chose in action along with the "interest" then devolves in the normal way to the specific legatee under the will who thereby obtains an "interest" in the fruits of the chose in action notwithstanding that legal or beneficial ownership in the shares has not passed.

27 I find support for this conclusion in the case of *Re Leigh's Will Trusts* [1970] Ch 277 ("*Re Leigh*"). There a testatrix bequeathed to a legatee "all shares which I hold and any other interest or assets which I may have in Sheet Metal Prefabricators (Battersea) Ltd for his absolute use and benefit." The testatrix never had those shares, interests or assets but at the time of death was the sole beneficiary of her intestate late husband's unadministered estate, which did include 51 shares in that company as well as a debt due from the company. Buckley J at 281 held that those shares and the debt were properly disposed to the legatee by the testatrix's will and referred to *Commissioner of Stamp Duties (Queensland) v Livingston* [1965] AC 694 ("*Livingston*") as establishing the following four propositions:

(1) [T]he entire ownership of the property comprised in the estate of a deceased person which remains unadministered is in the deceased's legal personal representative for the purposes of administration without any differentiation between legal and equitable interests; (2) no residuary legato or person entitled upon the intestacy of the deceased has any proprietary interest in any particular asset comprised in the unadministered estate of the deceased; (3) each such legato or person so entitled is entitled to a chose in action, *viz*. a right to require the deceased's estate to be duly administered, whereby he can protect those rights to which he hopes to become entitled in possession in the due course of the administration of the deceased's estate; (4) each such legato or person so entitled has a transmissible interest in the estate, notwithstanding that it remains unadministered.

28 I do not think that these propositions are controversial. Buckley J then held, at 282:

This transmissible or disposable interest can, I think, only consist of the chose in action in question with such rights and interests as it carries in grimy, that is to say, the right to which Lord Radcliffe refers in [*Livingston*], in his comment, at pp. 712, 713, on *McCaughey v. Commissioner of Stamp Duties* (1945) 46 S.R., N.S.W. 192. If a person entitled to such a chose in action can transmit or assign it, *such transmission or assignment must carry with it the right to receive the fruits of the chose in action when they mature.* The chose in action itself may be incapable of severance, but I can see no reason why a person entitled to such a chose in action should not so dispose of it through the medium of a trustee in such a way that the right to participate in its fruits is given to several beneficiaries either in fractional shares or by any other method of division that a trustee or the court can carry out. [emphasis added]

29 I agree. The person to whom the choses in action were transmitted or assigned has the right also to receive the fruits of that chose in action. It can be said that arising from this right he has obtained some kind of "interest" in those fruits. The exact nature of that "interest" is not, I think, entirely clear but it is not an interest that rises to the level of a proprietary beneficial interest. In *Official Receiver In Bankruptcy v Schultz* (1990) CLR 306, the High Court of Australia approved *Re Leigh* and discussed such an "interest" in the following terms, at 313–314:

The right which any beneficiary has in an unadministered estate springs from the duty of the executor to administer the estate, to preserve the assets and to deal with them in the proper manner. Each beneficiary has an interest in seeing that the whole of the assets are treated in accordance with the executor's duties. In that sense, the beneficiaries as a class may be said to have an interest in the entire estate. But it does not follow that each piece of property which goes to make up the estate is held on a particular trust for the beneficiary named as its intended recipient upon completion of administration: *Horton v. Jones* [1935] HCA 7; (1935) 53 CLR 475, at p 486. Whether or not the estate is held on a trust for the beneficiaries as a class in the usual sense in which the word "trust" is used, so as to confer a specific proprietary interest, as distinct from a general, non-specific interest, upon all beneficiaries, is not something which arises for consideration in this case.

Nevertheless, Mrs Schultz acquired upon the death of Mrs Pereira a right to have the deceased estate administered in accordance with the duties of the executors. Though not the legal or equitable owner of the assets which were the subject of the devise and bequest in her favour, she had, by virtue of the chose in action created by that devise and bequest, an expectation that the assets would pass to her upon completion of the administration, subject to their being realized to meet any outstanding liabilities and to defray the costs of administration, and an interest in respect of those assets. *That interest was derived from and dependent upon the chose in action. The interest is of such a kind that, when a beneficiary transmits a chose in*

action (or part thereof), or that chose in action passes by operation of law, such as under the Bankruptcy Act, that transmission naturally encompasses not only the chose in action but also the expected fruits of that chose in action: *Horton v. Jones; In re Leigh's Will Trusts* (1970) Ch 277, at p 282.

[emphasis added]

30 In *Livingston*, Viscount Radcliffe lamented the failure of the legal language to develop the appropriate shades of meaning to include such a non-proprietary "interest" as I have described, at 712–713:

> Criticisms of this kind arise from the fact that the terminology of our legal system has not produced a sufficient variety of words to represent the various meanings which can be conveyed by the words "interest" and "property." Thus propositions are advanced or rebutted by the employment of terms that have not in themselves a common basis of definition. For instance, there are two passages quoted by the Chief Justice in his dissenting judgment in this case which illustrate the confusion. There is the remark of Jordan C.J. in *McCaughey*'s case, "The idea that beneficiaries in an unadministered or partially administered estate have no beneficial interest in the items which go to make up the estate is repugnant to elementary and fundamental principles of equity." If "by beneficial interest in the items" it is intended to suggest that such beneficiaries have any property right at all in any of those items, the proposition cannot be accepted as either elementary or fundamental. It is, as has been shown, contrary to the principles of equity. But, on the other hand, if the meaning is only that such beneficiaries are not without legal remedy during the course of administration to secure that the assets are properly dealt with and the rights that they hope will accrue to them in the future are safeguarded, the proposition is no doubt correct. *They can be said, therefore, to have an interest in respect of the assets, or even a beneficial interest in the assets, so long as it is understood in what sense the word "interest" is used in such a context.* [emphasis added]

31 In *Re Hemming* [2009] Ch 313, Mr Richard Snowdon QC, sitting as a Deputy Judge of the High Court ("HHJ Snowdon QC"), had to decide the issue of whether, if a sole residuary legatee under a will becomes bankrupt but is automatically discharged from bankruptcy before the completion of the administration of the estate of the testator, the money and assets which are thereafter ascertained to form the net residuary estate are payable to him or to his trustee in bankruptcy. This turned on whether the legacy could be said to have come to him before he was discharged from bankruptcy. HHJ Snowden QC followed *Re Leigh* and *Livingston* and ruled that the money and assets so ascertained vested in the trustee in bankruptcy, concluding, at [61], that:

> In summary, as I have indicated, the law has long recognised that a residuary legatee has an immediate "interest" of some kind in the assets that will in the future form the residuary estate of a testator. The precise nature of the interest is unclear, but at very least it must give the holder of the interest the right to receive the residue (if any) as and when ascertained.

32 If this is the correct position in the case where the assets or properties have yet to be ascertained, it must apply *a fortiori* where they have already been ascertained and paid to the executor.

33 In *Low Gim Har* this would mean that the allocated properties were to be distributed to the specific legatees of the HCKK shares on the basis that the specific legatees had an existing "interest" in the assets.

34 In the present case, what rights did the Deceased hold as a shareholder of the Company at the time of his death? In my judgment, the basic right was to participate in an aliquot share in the distribution of the liquidation surplus and this must include the right to compel the liquidator to pay out the ascertained surplus and consequently the right to receive the fruits of the distribution of this surplus in aliquot shares. Upon his death, these rights were transmitted to his personal representative. This is a transmission and not a transfer which would be blocked by the operation of s 259 of the CA. The position is stated in *Williams, Mortimer and Sunnucks on Executors, Administrators and Probate* (John Ross Martyn and Nicholas Caddick gen eds) (Sweet & Maxwell, 2008) at para 46–62:

> On the death of a shareholder, legal title to the shares devolves automatically to his representative (unless the shares are jointly held, in which case it passes to the surviving holder). Such "transmission" being by operation of law is not a "transfer" of shares by act of the parties, and so does not require a proper instrument of transfer. Further the articles of a company cannot circumvent this effect at law and purport to provide that some other party, such as the widow of a deceased member, is entitled to the shares. However, a company's articles can and commonly do confirm that a representative is the only person recognised by the company as having title to the deceased's interest.

35 That a devolution of shares can occur even without an instrument of transfer is statutorily embodied in s 126(1) of the CA, which is *in pari materia* with s 183(2) of the English Companies Act 1985 (c 6) which was referenced as a footnote to the relevant part of the passage cited above.

36 At the same time, the specific legatees of the Shares obtained, from the moment of the Deceased's passing, a right against the executor during the period of administration to have the estate properly administered. At this point, the executor held a chose in action against the liquidator of the Company to have the surplus assets of the Company ascertained and distributed. Through this chose in action, the executor obtained an "interest" in his aliquot share of the liquidation surplus of the Company. But this chose in action and the associated "interest" was not his to dispose of freely. It was subject to the terms of the Deceased's testamentary disposition. It is trite that a person may bequeath or devise by will all real and personal property to which he is entitled either at law or in equity at the time of his death: see s 3(1) of the Wills Act (Cap 352, 1996 Rev Ed) ("the Wills Act"). The will speaks from the death of the testator: see s 19 of the Wills Act. The Deceased passed away on 2 March 2011 and at that point in time, the Company was in the process of winding up. I am therefore constrained to infer that the Deceased meant to give to the legatees the Shares along with whatever rights that come with ownership thereof; and on the authority of *Re Leigh*, this must include his "interest" in the liquidation surplus. Indeed it would be meaningless to speak of shares in isolation without those rights and the fruits of those rights.

37 Therefore, the specific legatees, through their right to have the estate properly administered, obtained thereby an "interest" in the surplus once ascertained, even if they did not become the legal or equitable owners thereof. Further it is clear that this "interest" of the specific legatees' had attached to the liquidation surplus by the time it was paid out by the liquidator of the Company to the estate of the Deceased for the simple reason that the Deceased had passed away by the time the Sum was paid out on 30 May 2012. Since the surplus of the Shares was validly disposed of, the gift did not fail and it follows that the surplus does not fall into the residuary estate. Therefore the plaintiff's claim should be dismissed and I so order.

Conclusion and costs

38 I would add before closing a few observations on this case. I think the executor/defendant

acted properly in transferring, or attempting to transfer, by way of cheque, their shares of the liquidation surplus to the plaintiff and to Chiew Tee. He could have attempted, while the Company was still in the course of winding up, to apply to court pursuant to s 259 to have the Shares transferred to the specific legatees. The plaintiff's submission was that this was the only way to save the specific legacies, but I agree with the defendant that this would have been an unnecessary expense.

39 Conversely, I do not think the plaintiff, or perhaps in this case her attorneys, acted entirely properly in attempting to defeat the bequest made to her so as to be able to plunder a larger gain from the estate. Certainly it could not have been the Deceased's intention to permit her so to do. I have noted earlier (see above at [6]) that the application to put the Company into winding up was made on 17 December 2007, two days before the Will was executed. In the circumstances, it would be possible to read cl 3(ii) of the Will as devising to the specific legatees their aliquot shares to be paid in cash out of the liquidation surplus of the Company rather than a gift of the Shares *in specie*. Clearly at the time of death the Company was well on the road to liquidation being completed. The Shares had no worth other than their value in the winding up. But as neither party raised this point of interpretation I would not dwell on it any further.

40 I would further hold if necessary that the plaintiff and Chiew Tee (and naturally, the defendant) remain entitled to their aliquot shares in the liquidation surplus of the Company. There was some basis to say that at least Chiew Tee had disclaimed the gift by her refusal to accept the defendant's cheques, because in her affidavit of 17 September 2013 she made the following statement:

> I am advised that [the plaintiff] may be legally entitled to receive [the Sum] as declared in the Schedule of Assets filed by [the defendant] in his application for probate in the District Court. *I accept this position willingly and I understand this means that I have no share in the proceeds.* I hope that the Court would find in favour of my mother. [emphasis added]

41 But as disclaimer was not argued by the defendant I am not prepared to make any finding on this point.

42 Costs should follow the event and the plaintiff is herewith ordered to pay costs to the defendant as the executor of the estate to be taxed if not agreed. As the defendant has acted properly and reasonably as executor and also in the conduct of this action, he is entitled to have any excess in costs incurred paid out from the estate.