IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2019] SGHC 125

Suit No 872 of 2017

Between

Jocelyn Rita d/o Lawrence Stanley

… Plaintiff

And

Tan Gark Chong

… Defendant

JUDGMENT

[Deeds and Other Instruments] — [Deeds] — [Duress] — [Illegality]

[Trusts] — [Trustees] — [Duties] — [Duty to let trust property]

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Jocelyn Rita d/o Lawrence Stanley
v
Tan Gark Chong

[2019] SGHC 125

High Court — Suit No 872 of 2017
Audrey Lim JC
26, 27 February, 1, 5 March; 3 April 2019

14 May 2019 Judgment reserved.

Audrey Lim JC:

Introduction

1 The plaintiff ("Jocelyn") and the defendant ("Richard") were husband and wife. Jocelyn commenced this action against Richard alleging a breach of a declaration of trust executed on 17 April 2012 ("DOT") in which it was declared that Richard held two properties at Jalan Ampang ("the Ampang Property") and Jalan Wajek ("the Wajek Property") (collectively, "the Properties") on trust for Jocelyn. She alleged that Richard failed to rent out the Properties and failed to execute an option to purchase ("OTP") for the Ampang Property when she had found a buyer for it. She thus claimed, *inter alia*, for loss of rental income for the Properties and damages as a result of the diminution in value of the Ampang Property.

Background matters

2 The parties were married in 1965. Jocelyn was a Malaysian citizen who became a Singapore permanent resident in 1976 and then a Singapore citizen in February 2001.

3 In April or May 1990, the parties purchased the Ampang Property in their joint names, having obtained permission from the relevant authorities for Jocelyn to be registered as a co-owner as she was then not a Singapore citizen. Subsequently they decided to purchase the Wajek Property to live in and to rent out the Ampang Property. As Jocelyn did not receive approval from the authorities to rent out the Ampang Property, and the parties could not jointly purchase the Wajek Property, she transferred her interest in the Ampang Property to Richard in July 1998. In September 1999, the Wajek Property was purchased in Richard's name.

4 In early 2012, the parties' relationship took a turn for the worse. It was during this time that the DOT was executed and signed by the both of them on 17 April 2012. I set out the material terms of the DOT below:[1]

> THIS DECLARATION OF TRUST is made [17 April 2012] by [Richard] (hereinafter called "the Trustee").
>
> WHEREAS:-
>
> (1) This declaration is supplemental to the purchase of the properties known as [the Wajek Property] and [the Ampang Property] (hereinafter collectively called "the Properties")
>
> (2) The Trustee **hereby declare** [*sic*] that the purchase prices of the Properties said to have been paid by the Trustee … were in fact provided by [Jocelyn] (hereinafter called "the Beneficiary") and the Properties **has been held** [*sic*] by the Trustee as trustee for the Beneficiary as the Trustee hereby acknowledges.

[1] 1AB 17–18.

> NOW THIS DEED WITNESSETH that the Trustee **hereby declares that he holds** the Properties in trust for the Beneficiary absolutely and **hereby agree** [*sic*] that he will at the request and cost of the Beneficiary transfer the Properties to the Beneficiary or to such person or persons at such time and in such manner or otherwise deal with the same as the Beneficiary shall direct or appoint.
>
> The Trustee and the Beneficiary hereby covenant with each other as follows:
>
> (a) all income, rental and/or investment derived from the Properties shall be deposited in the joint bank account which the Trustee and the Beneficiary have with a Bank;
>
> (b) to pay or contribute all due proportion of all rates taxes premiums of insurance and other outgoings payable in respect of the Properties and all other expenses as may be paid for by the Beneficiary from the joint bank account;
>
> (c) to keep indemnified each other from all actions claims and demands incurred or to be incurred by such last mentioned party by reason for any default on the part of the covenanting party in performing his/her obligations under this clause …
>
> [emphasis added in bold]

5 In August 2013, Richard filed for divorce ("the First Divorce Proceedings") but this was withdrawn. He again filed for divorce in 2016 but this was also withdrawn. Richard filed the final divorce proceedings in 2017 leading to interim judgment being granted in May 2017, with the ancillary matters pending to be heard after this suit.

Plaintiff's case

6 Jocelyn claimed that the marriage broke down as Richard was having an affair, which she discovered in around February 2012.[2] Throughout their

[2] Jocelyn's Affidavit of Evidence-in-Chief ("AEIC"), paras 17 and 18; 26/2/19 Notes of

marriage, they had agreed to leave the family's wealth to their children and grandchildren. Worried that in the event of a divorce, Richard would get a share of the matrimonial assets and spend it rather than preserve it for future generations, she wanted him to transfer his beneficial interest in the Properties to her.

7 Hence in early April 2012, Jocelyn instructed Gabriel Law Corporation ("Gabriel Law") to prepare a draft trust deed for Richard to transfer the beneficial interest in the Properties to her. Richard refused to sign this trust deed as it did not stipulate that he was to receive any rental income from the Ampang Property. Jocelyn then instructed Mr Jeffrey Beh ("Beh"), a family friend and lawyer from Lee Bon Leong & Co, to prepare another trust deed to transfer the beneficial interest in the Properties to her and to provide for rental income from the Properties to be deposited into a joint bank account.[3] On 16 April 2012, Beh went to the matrimonial home (then the Wajek Property) and spoke to Richard about the trust deed. The next day Beh returned with the DOT which Richard signed.

8 On 24 October 2012, Richard moved out of the Wajek Property to stay with the parties' daughter Shona. Jocelyn remained at the Wajek Property until August 2013, when she moved to the Ampang Property.

9 Jocelyn alleged that there was an implied term in the DOT that the trustee (Richard) would rent out the Properties and deposit the income or rental into the parties' joint account to pay for outgoings related to the Properties for the beneficiary's (Jocelyn's) benefit. Richard failed in his duties to rent out the Properties after he moved out from the Wajek Property, and Jocelyn thus

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Evidence ("NE") 26.

[3] Jocelyn's AEIC, para 39; 26/2/19 NE 79.

claimed for loss of rental from the Properties. Further, in July 2013, Jocelyn found a buyer for the Ampang Property for $8.8m but Richard refused to sign the OTP for the intended sale. Consequently, the intended sale did not materialise and the Ampang Property has since diminished in value.

Defendant's case

10 Richard claimed that he signed the DOT under duress. He denied that he was having an affair but Jocelyn repeatedly harassed, nagged and ranted at him regarding the alleged affair. In early April 2012 (before the DOT was executed), he was also suffering from poor health. To obtain respite from Jocelyn's behaviour, he moved out to stay with Shona for three nights before moving back to the Wajek Property again.[4]

11 Richard confirmed that he was initially given a document prepared by Gabriel Law that Jocelyn wanted him to sign. He refused to sign the document as he disagreed with its terms, which stated that the Properties were acquired using Jocelyn's moneys. Richard denied that Beh, a mutual friend, had met him on 16 April 2012. However, he did sign the DOT on 17 April 2012 when Beh went to the matrimonial home with it. Richard was surprised by Beh's visit that day as he did not know that Jocelyn had asked Beh to prepare a trust deed. When Richard saw that the DOT stated that the Properties were purchased with Jocelyn's moneys and that he was all along a trustee of the Properties for her, he told Beh that he disagreed with the terms of the DOT as the Ampang Property was paid for partly with his CPF moneys. Nevertheless, because of the unpleasant situation at home, he felt compelled to sign the DOT in the hope that some peace and normalcy would return to his life. On 24 October 2012, Richard

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4 Richard's AEIC, para 39; 26/2/19 NE 54–55.

left the matrimonial home permanently to stay with Shona as Jocelyn continued to harass him.

12 Richard also claimed that the trust arrangement under the DOT was illegal, null, void and unenforceable under ss 3 and 23 of the Residential Property Act (Cap 274, 2009 Rev Ed) ("the RPA").[5] Even if the DOT was valid, Richard denied being in breach of his duties as a trustee under the DOT.

13 Richard also called Shona and Kelvin (the parties' son) to testify, and I will refer to their evidence in my findings below where necessary.

The issues

14 The main issues for consideration are as follows:

(a) whether the DOT was vitiated by duress or illegality due to contravention of the RPA; and

(b) if the DOT is valid and enforceable, whether Jocelyn can succeed in her claims for lost rental in respect of the Properties, and diminution in value due to the aborted sale of the Ampang Property.

Preliminary issue – Application for hearing *in camera*

15 At the outset, Richard's counsel (Mr Chiok) applied for the matter to be heard *in camera* pursuant to s 8(2) of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) ("the SCJA"), and relying on *BOK v BOL and another* [2017] SGHC 316 ("*BOK*"). This was a private dispute between family members and that the defendant's witnesses were the parties' children who were "prominent professionals". Also, there were ancillary matters in separate

[5] Defence, paras 6–10.

divorce proceedings between the parties. Finally, a hearing *in camera* would decrease the acrimony between the parties. Jocelyn objected to the application.

16 I disallowed the application because there was no reason to depart from the position that a civil matter is to be heard in open court under s 8(1) of the SCJA, and I was not satisfied that there was any sufficient reason to order the hearing to be *in camera*. In *BOK*, one of the defendants, who was a party to the suit, was an infant. Unlike in *BOK*, there were no minor children involved and the witnesses who Richard intended to call were adults. Moreover, the mere fact that the action concerned a dispute between family members was unexceptional and did not *per se* justify a hearing *in camera*, even if the same parties were embroiled in a pending matrimonial case. That the witnesses were professionals or family members did not mean that they should be afforded privacy from open court proceedings. Many civil proceedings involve disputes between family members, in which family members are called as witnesses. Finally, I was not convinced that a hearing *in camera* would decrease the acrimony between parties. It might even have had the converse effect of encouraging parties to vent their frustrations liberally and freely make allegations against each other under the cover of a private hearing.

Duress

17 I turn then to the issue on duress. A party alleging duress must show that there was pressure amounting to compulsion of his will and that the pressure exerted was illegitimate (*Tam Tak Chuen v Khairul bin Abdul Rahman and others* [2009] 2 SLR(R) 240 at [22]; *E C Investment Holding Pte Ltd v Ridout Residence Pte Ltd and another (Orion Oil Ltd and another, interveners)* [2011] 2 SLR 232 at [51]). I find that Richard has not been able to show that there was duress.

18 It is questionable whether Jocelyn's conduct rose to the level that constituted duress let alone whether any pressure exerted was illegitimate. I accept that Jocelyn did confront and badger Richard somewhat regarding his alleged affair with another woman ("the third party") and that Jocelyn and Richard quarrelled over this. There were messages between Richard and the third party. Jocelyn was upset and had showed the messages that she discovered on Richard's phone to him and spoke to him on numerous occasions to get his reassurance that there was nothing going on.[6] She was also suffering from depression at the material time.[7] As her counsel (Mr Yeo) put it, she was upset, quite desperate for Richard's attention, emotionally fragile, and dependant on Richard in April 2012.[8] The marriage had become rocky, with "frequent quarrels [and] outbursts", and Jocelyn had been crying and having nightmares.[9] It is thus unbelievable that she did not confront Richard regarding the alleged affair, particularly when she had confided in her three children and friends.[10]

19 Indeed, Richard would not have left the home in early 2012 to stay with Shona for a few days (shortly before the DOT was executed) unless he needed to get away from Jocelyn to obtain some peace and quiet. It was also undisputed that when he left the home to stay with Shona, he was suffering from pneumonia but was on the mend when he signed the DOT.[11] Even their children testified that Jocelyn was "very, very upset", that it was very tense in the house, and that Jocelyn was very angry with Richard and constantly confronted him about the alleged affair.[12] However, even when Jocelyn complained to him persistently

6 26/2/19 NE 26–29.

7 27/2/19 NE 36, 39, 49, 97.

8 27/2/19 NE 49, 52–53, 65.

9 Jocelyn's AEIC, para 54; 26/2/19 NE 51, 97.

10 26/2/19 NE 29–32.

11 26/2/19 NE 47, 96; 27/2/19 NE 77.

about the third party on previous occasions, she never threatened to attack him.[13] That Jocelyn might have previously threatened to commit suicide cannot be said to amount to illegitimate pressure amounting to a compulsion of Richard's will.

20 As to whether there was compulsion of the will, I find that Richard was not compelled to sign the DOT. First, Richard's own testimony militates against a finding of compulsion. He admitted that he signed the DOT voluntarily and that he could have walked away from signing it.[14] He also agreed that no one had threatened or forced him to sign the DOT. In fact when he signed the DOT, he was in the living room with Beh, and Jocelyn was outside at the patio.[15]

21 Second, the lack of compulsion is borne out by Richard's conduct on the day of signing the DOT. As Richard claimed, he had the presence of mind to register his objection regarding the terms of the DOT to Beh before he signed it.[16] This is all the more the case when considered together with Richard's previous refusal to sign the trust deed prepared by Gabriel Law. When he first saw that trust deed, he had the presence of mind and will to refuse to sign it despite suffering from pneumonia.[17] He could all the more have refused to sign the DOT because he was in better shape then.[18] That Richard had signed the DOT in the hope that Jocelyn would stop harassing him so he could get some peace and normalcy did not, in my view, amount to him signing the DOT under duress. He could have avoided Jocelyn and obtained peace by staying with

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12 1/3/19 NE 4, 8–10, 28, 30, 34.

13 27/2/19 NE 75.

14 27/2/19 NE 90–91.

15 27/2/19 NE 83.

16 Richard's AEIC, para 50.

17 27/2/19 NE 80.

18 27/2/19 NE 78.

Shona at any time,[19] which is what he did for a few days shortly before the DOT was executed and permanently some months thereafter.

22 Third, leaving aside Beh (whom Jocelyn had engaged to prepare the DOT), there was no shortage of opportunity for Richard to seek legal counsel before he signed the DOT. He knew Mr Harry Elias, a very senior lawyer who was a "very close friend", and his son Kelvin was also (and remains) a practising lawyer.[20] He was under no compulsion to sign the DOT on the very day that Beh brought it to him and could have put off deciding whether to sign it until he had obtained independent legal advice.

23 Finally, Richard's conduct after signing the DOT is also significant. A party's conduct following the entry into an agreement allegedly vitiated by duress can be material to shed light on whether there actually was duress (see *eg*, *Pao On v Lau Yiu Lon* [1980] AC 614 at 635; *Third World Development Ltd v Atang Latief* [1990] 1 SLR(R) 96 at [15]). Despite claiming that he signed the DOT under duress, Richard took no steps to set it aside.[21] This is even when he claimed in his affidavit filed in March 2015 (for the First Divorce Proceedings) that Jocelyn had "pressured" him to sign the DOT and even when his lawyers wrote to Jocelyn's lawyers on 9 October 2015 stating that Richard was "coerced" into executing the DOT.[22] And even when he first raised the issue of coercion or pressure, this was some three years after he signed the DOT and when Jocelyn was seeking to enforce its terms. I reject Richard's explanation for why he did not attempt to set aside the DOT despite Jocelyn having repeatedly reminded him of this trusteeship (see *eg*, correspondence at [66] to

19 27/2/19 NE 146.

20 27/2/19 NE 68–70.

21 27/2/19 NE 104.

22 1AB 102 and 526.

[69] below). He claimed that he was unfamiliar with the law and trusted his lawyers, that he was facing financial constraints, and that there was no need to set aside the DOT because it had no practical impact on his day-to-day life.[23] Even if he was unfamiliar with the law, there was nothing stopping him from seeking legal advice early on, and explaining to the lawyers what had transpired in relation to the DOT to obtain legal advice. As for his claim of facing financial constraints, this did not seem to have been an obstacle to Richard commencing divorce proceedings (thrice) and he also had access to funds from his children.[24] I also do not accept that repeatedly receiving letters from Jocelyn's lawyers regarding his alleged breach of trustee's duties constituted "no practical impact" on Richard's daily life.

24 Significantly, not only did Richard not take steps to set aside the DOT, he subsequently signed two powers of attorney ("POAs") in 2017 to enable Jocelyn to let the Properties. Even though the POAs were signed after the DOT was executed, this was cogent evidence that Richard did not, even in 2017, regard that he had signed the DOT involuntarily or under duress as he claimed. On the contrary, he admitted that *by signing the POAs he accepted that he was the trustee of the Properties, and if the DOT had been signed under duress he would not have continued to acknowledge in the POAs that he was the trustee*.[25]

25 Before leaving this issue it would be convenient to deal with the parties' failure to call Beh as a witness. Each party alleged that the other party's failure to do so weakened the latter's case.[26] In my view, this would not have made any difference to my eventual findings on the issue of duress. There was no dispute

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23 27/2/19 NE 104 and 150; Defendant's Closing Submissions ("DCS"), paras 29–30.

24 27/2/19 NE 104–105.

25 27/2/19 NE 107, 111–112.

26 DCS, para 28; Plaintiff's Closing Submissions ("PCS"), para 40

that Richard had signed the DOT, and if at all, the burden was on him to call Beh if he thought it supported his defence. Accordingly, I find that the DOT is not vitiated by duress.

26 Finally, I should add that I have thus far analysed the facts through the lens of duress because duress is what was pleaded by Richard,[27] and so that was the case Jocelyn had to meet. The parties' closing submissions were also framed in terms of duress. Unfortunately, there has been some confusion about what doctrine Richard was trying to invoke. His opening statement alluded to a defence of undue influence, though Mr Chiok confirmed that this point would not be pursued.[28] Subsequently, Richard's closing submissions (though made under the heading of "duress") at times veered into the terrain of unconscionability. Mr Chiok cited *BOM v BOK and another appeal* [2019] 1 SLR 349 ("*BOM v BOK*") for the proposition that the doctrine of duress is "one face" of the concept of unconscionability and purported to apply the test of sufficient gravity to acutely affect the plaintiff's ability to conserve his own interest.[29] However, *BOM v BOK* was not a case that dealt with duress, and the court, having held that the narrow doctrine of unconscionability applied in Singapore, declined to opine on the relationship among duress, undue influence and unconscionability (at [152]–[153]). In any case, the possibility of subsuming duress under the umbrella of unconscionability arises only under a broad doctrine of unconscionability, which the court rejected (at [175]). Hence, Richard's reliance on the abovementioned test for duress was misplaced.

27 Regardless, even assuming that Mr Chiok had sought to rely on the doctrine of unconscionability, the facts he cited in support of a finding of

[27] Defence, para 3.

[28] 26/2/19 NE 12–13.

[29] DCS at paras 7, 10.

unconscionability are the same as those I considered in coming to my finding that there was no duress, and I would have found that unconscionability was not made out. At the time of executing the DOT, Richard was neither poor nor ignorant, he was not suffering from infirmities that were grave enough to affect his ability to conserve his own interests, and he did not lack opportunity to seek independent legal advice.

Illegality

28 I turn next to Richard's argument that the DOT is illegal under the RPA. Richard claimed the DOT merely evidenced a *prior* trust arrangement between the parties, dating from before the DOT was executed, which was void under the RPA.[30] He relied on the preamble to the DOT which states that the Properties "has been held [*sic*]" by the Trustee for the Beneficiary, and Jocelyn's affidavits (in these and other proceedings) where she appeared to contradict her eventual position. Richard's case appears to be that the preamble purported to evince a *prior* trust of the *entire* beneficial interest in the Properties in Jocelyn's favour, *from the respective moment each of the Properties was purchased*; he pleaded that the "trust arrangement came into existence by virtue of [Jocelyn] allegedly providing the funds for the purchase of [the Properties]" and also stated that he read the DOT to mean that he was "all along" the trustee of the Properties for Jocelyn.[31]

29 Jocelyn claimed that the DOT was valid as it created a trust over the Properties in her favour *on the date of execution*, relying on the operative part of the DOT which states the Trustee "hereby declares that he holds" the Properties in trust for the Beneficiary absolutely and "hereby agree[s]" to

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30 Defence, para 7.

31 Defence, para 8; Richard's AEIC, para 49.

transfer them to the Beneficiary. There would be no illegality because by that time she was already a Singapore citizen.[32] Jocelyn also relied on the fact that $261,600 in stamp duty (excluding late penalty fees) was paid in 2016 when the DOT was stamped. If the DOT merely declared a pre-existing trust, the stamp duty payable under the Stamp Duties Act (Cap 312, 2006 Rev Ed) would be only $10.[33]

30 Counsel for both parties agreed that if the DOT created a trust on the day of its execution (17 April 2012), the trust would not be illegal, null or void under the RPA as Jocelyn would have become a Singapore citizen by then. But it would be illegal if the DOT was merely evidence of a prior trust over the Properties dating back to a time when Jocelyn was not a Singapore citizen.[34]

Interpretation of trust deeds

31 The issue of illegality turns on the interpretation of the DOT – that is, whether it merely *evidenced* a pre-existing trust or *created* a fresh trust at the date of signing.

32 In construing a trust deed, the court can have regard to both the text of the document and the relevant context. This includes any objective evidence of the settlor's intent, especially where the language of the trust deed is ambiguous (*Koh Lau Keow and others v Attorney-General* [2014] 2 SLR 1165 ("*Koh Lau Keow*") at [24]–[25]).

33 Further, as explained by the Court of Appeal in *Fong Wai Lyn Carolyn v Kao Chai-Chau Linda and others* [2017] 4 SLR 1018 ("*Carolyn Fong*") at

32 Reply, paras 6–7.

33 PCS, paras 81–83.

34 27/2/19 NE 121–123.

[51], a recital in a deed can only assist in the construction of the substantive terms of the deed. It cannot override or control the operation of the substantive terms where such terms are clear and unambiguous. The Court of Appeal also cited with approval *Ex parte Dawes; In re Moon* (1886) 17 QBD 275 at 286:

> Now there are three rules applicable to the construction of such an instrument. If the recitals are clear and the operative part is ambiguous, the recitals govern the construction. If the recitals are ambiguous, and the operative part is clear, the operative part must prevail. If both the recitals and the operative part are clear, but they are inconsistent with each other, the operative part is to be preferred.

Whether the DOT created a fresh trust or merely evidenced an existing trust

34 I find that the DOT created a fresh trust over the Properties for Jocelyn as beneficiary at the point of its execution.

35 The operative part of the DOT (relied on by Mr Yeo) is clear. It evinces the creation of a fresh trust when the DOT was executed. On the other hand, the preamble (relied on by Mr Chiok) is ambiguous. Whilst it suggests that a trust had been created before the execution of the DOT, it is unclear about *when* this trust was allegedly formed. Jocelyn had become a Singapore citizen in 2001, some *10 years* before the DOT was executed, and a trust formed at any time thereafter (and before the execution of the DOT) would not offend the RPA. I do not accept Mr Chiok's argument that Jocelyn's case is internally inconsistent in affirming, on the one hand, that "[t]he operative clauses of the [DOT] accurately described the parties' then intended legal and beneficial arrangement for the [Properties]"; and claiming, on the other, that the Properties were family assets for the children and grandchildren.[35] There is a difference between

[35] DCS, para 46; Reply, para 6.

whether a person holds a beneficial interest in a property as a matter of law, and how the person intends to treat or deal with the property.

36 The context also suggests that both parties (*ie*, including Richard as settlor) intended to create a trust at the point when the DOT was executed.

37 First, Richard's case (summarised at [28] above) is undermined by his own evidence, which does not show that he had, *prior to the DOT being executed*, ever agreed for Jocelyn alone to own all the beneficial interest in the Properties. Richard has consistently maintained that he had a beneficial interest in the Properties at the time of purchase because he contributed to their purchase price.[36] The Ampang Property was purchased for some $800,000 in both parties' names and it is not disputed that Richard contributed $136,926.30 in CPF moneys.[37] The Wajek Property was, on Richard's case, purchased with the sale proceeds of a separate property that was itself purchased as a result of the parties' joint efforts.[38] For completeness Jocelyn disputes this, claiming that she paid for the Wajek Property completely.[39] Consequently, when Richard signed the DOT, he clearly did not intend to evince a prior trust of the entire beneficial interest in the Properties in Jocelyn's favour from the time each of the Properties was purchased, given his position all along that he had a beneficial interest in them. I thus reject Richard's claim that, when he signed the DOT, he had read it to mean that he was "all along" the trustee of the Properties. Beh, to whom Richard had allegedly voiced his concerns regarding the DOT, and who Richard had allegedly informed that he did not agree with the terms of the DOT as drafted, was not called by Richard to support his assertion. As the Court of

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36 27/2/19 NE 145–146; Richard's AEIC, paras 20 and 50.

37 Jocelyn's AEIC, para 61; Richard's AEIC, para 16; 27/2/19 NE 144.

38 27/2/19 NE 144–145.

39 27/2/19 NE 144–145.

Appeal in *Koh Lau Keow* stated (at [25]), "[w]hile purely subjective and uncorroborated evidence by a settlor as to his intentions at the time the trust deed was drafted is inadmissible … objective evidence of the settlor's intent is highly relevant in construing a trust deed, especially in cases where its language is ambiguous".

38 Second, that Jocelyn had taken contradictory positions in her earlier affidavits is not fatal to her case. To take three examples of her inconsistency:[40]

(a) At paragraph [308] of her affidavit of 26 June 2015 filed in the First Divorce Proceedings ("June 2015 Affidavit"), she stated that:

> … Richard has alleged that these properties are matrimonial properties. This is entirely untrue. I am the sole beneficiary of both properties and Richard holds both properties on trust for me.

(b) At paragraph [485] of the June 2015 Affidavit, she stated that:

> … Richard knew I had wanted a trust deed drawn up to clarify the legal and beneficial ownership of the Ampang and Wajek Properties.

(c) At paragraph 7 of Jocelyn's affidavit of 10 November 2016 ("November 2016 Affidavit") filed in support of OS No 1248 of 2016 (which was eventually converted to the present action), she stated that:

> From the inception of the purchase, it was intended that [the Properties] were to belong solely to [Jocelyn]. For that reason, the title deeds to the property are in the custody of [Jocelyn]. Renovations on [the Properties] were also paid entirely by [Jocelyn].

39 Jocelyn could not offer a coherent explanation for the above when cross-examined. In relation to [38(a)] above, she equivocated and then stated that the properties "are still always matrimonial properties in the sense that, you know,

[40] 2AB 874 and 937; 1 Defendant's Bundle of Documents ("DB") 7.

whatever we had was always to be together".[41] In relation to [38(b)] above, when asked what there was to be clarified (given that the DOT was clear in terms of whom the Properties belonged to) Jocelyn's response was that the clarification was regarding how the Properties were to be given to the children and not kept by Richard for himself, even whilst accepting the proposition that it would not be a "true gift" to Richard if he could not do anything he wanted with it.[42] In relation to [38(c)] above, whilst accepting that she did make this statement, Jocelyn claimed that she did not know what "inception" meant and had merely glanced through the affidavit when she signed it.[43]

40 Be that as it may, Jocelyn's claims in the June 2015 Affidavit must be read in context. The trust (embodied in the DOT) to transfer the entire beneficial interest to Jocelyn came about because of the alleged affair and breakdown of the parties' relationship, and these developments would also explain Jocelyn's conduct in staking a claim on the entire beneficial interest in the Properties when the First Divorce Proceedings were filed. The June 2015 Affidavit was made in response to divorce proceedings initiated by Richard.[44] Jocelyn was naturally upset and, having felt that she contributed most of the purchase price of the Properties, wanted in the divorce proceedings to stake as large a claim as possible on them and other matrimonial assets. Because the June 2015 Affidavit and even the November 2016 Affidavit were made after the DOT was executed, and for a different reason, they carry less weight in assisting my interpretation of the DOT and parties' intent at the time the DOT was executed.

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41 26/2/19 NE 23–24.

42 26/2/19 NE 127–128; 27/2/19 NE 27.

43 27/2/19 NE 31–33.

44 26/2/19 NE 111.

41 I also deal with the point that Jocelyn herself accepted that, despite the contents of the DOT, the Properties are "matrimonial properties".[45] This does not change my finding that a fresh trust was created when the DOT was signed. The issue of whether a property is matrimonial property would become relevant in the division of assets in the divorce proceedings, and this remains the case regardless of who beneficially owned the property.

42 Third, it could not have been either party's intent for the DOT to merely evidence a prior trust dating back to the time the Properties were purchased, as they knew that this would have made no sense and would have defeated the point of executing the DOT. Richard knew that Jocelyn devised the trust to prevent the Properties from falling into the hands of the third party and to ensure that the Properties remained in the family for the benefit of their descendants.[46] I accept that Jocelyn did not ask for an outright transfer of the Properties to her in 2012 because she did not want Richard to "lose face" and feel as if everything was being taken away from him.[47] At that time, her main concern was to ensure that the Properties remained within the family. Both parties also knew that Jocelyn could not claim any beneficial interest in the Properties while she was not a Singapore citizen (which was why the Properties were held in Richard's sole name). It would be self-defeating to execute a DOT that merely evidenced a prior illegal trust arrangement.

43 Fourth, the quantum of stamp duty paid is objective evidence that sheds light on the parties' intention in entering into the DOT. I accept Mr Yeo's argument that the stamp duty payable would be only $10 and not $261,600 (excluding late payment penalty) as was actually paid, had the DOT merely

45 26/2/19 NE 189.

46 Jocelyn's AEIC, para 27; 26/2/19 NE 55–56; 27/2/19 NE 86–87.

47 26/2/19 NE 65–67.

evidenced a pre-existing trust rather than creating a fresh trust (which would have involved a transfer of beneficial interest and attracted *ad valorem* stamp duty). No doubt, the stamp duty was paid only sometime after the DOT was signed and paid by Jocelyn.[48] Nevertheless, there was nothing to show that Jocelyn had paid *ad valorem* stamp duty simply to bolster her case regarding when the trust was created. In any event the point about the stamp duty was not addressed in Mr Chiok's closing submissions, although the issue was brought to his attention during the course of the trial.[49]

44 Hence, I find that the trust in favour of Jocelyn was created at the date of executing the DOT. Even if the parties had originally intended for Jocelyn and Richard to share in the beneficial interest or treated the Properties as "theirs" (or Jocelyn claimed, hers), my conclusion would not change. While that would have been an illegal arrangement prohibited under s 23 of the RPA when Jocelyn was not a Singapore citizen, the upshot of the illegality is that Richard would be treated as the full beneficial (and legal) owner of the Properties. However, this would not have prevented a *fresh* trust (uninfected by the original illegality) from being declared over the Properties when the DOT was executed between them, and when Jocelyn was already a Singapore citizen.

45 At the end of the day, I find that the operative part of the DOT should prevail because it is clear, whilst the recital of the DOT is ambiguous. Even if the recital were clear, applying *Carolyn Fong*, the operative part of the DOT would still prevail because it is unambiguous. Further, I find that when the DOT was executed the parties had intended to create a fresh trust over the Properties in Jocelyn's favour, because they knew that Jocelyn could not stake a claim on

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48 PCS, para 81 and Annex A; 1AB 118.

49 1/3/19 NE 47–48; Agreed List of Issues dated 7 March 2019.

the Properties at the time when she was not a Singapore citizen and they both perceived that the DOT (which arose only after Jocelyn had become a Singapore citizen, the alleged affair had taken place and Richard had filed for a divorce) would be the best way to achieve the objective of preserving the Properties for their descendants.

46 Accordingly, the DOT does not contravene the RPA and is valid.

Claim for rental

47 Preliminarily, there is a difference between a claim that Richard breached his duty to let the Properties under the trust created by the DOT, and a claim that he breached the (express or implied) covenants or terms of a contract embodied in the DOT. This was not made clear in the pleadings and submissions. Jocelyn appeared to allude to this distinction in her pleadings where she claimed that Richard "[i]n breach of the said covenant and his duties as a trustee … failed and/or neglected to rent out any of the Properties and/or to pay for any outgoings of the Properties"[50]. However, Mr Yeo did not, at trial or in closing submissions, distinguish between causes of action in trust and contract. Richard denied, in his pleadings, that he had defaulted on his duties as a "trustee".[51] On the other hand, Mr Chiok in closing submissions stated that "the DOT does not contain any express term that the Defendant would rent out the properties. It follows that such a duty could only be implied, *whether by law or as a matter of contract*".[52]

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50 Statement of Claim, para 7.

51 Defence, paras 13 and 22.

52 DCS, para 49.

48 It is a question of interpretation whether the words of the DOT are capable of embodying a contract alongside creating a trust. This could potentially be the case as the clause creating a trust of the Properties is presented separately from the express covenants. Moreover, the covenants create bilateral obligations between the parties to them, whilst the typical duties of a trustee are owed by the trustee to the beneficiary. But I say no more about the possibility of obligations in contract because parties ultimately advanced their cases on the basis of trust law, and my eventual decision on Jocelyn's claims regarding the loss of rental in respect of the Properties and the diminution in value of the Ampang Property would be no different.

Express trustee's duty

49 The facts here involve an express trust. The issue is whether an express trustee who holds land on trust for an absolute beneficiary owes a duty at general law to let the trust property in order to derive income for the beneficiary, alternatively whether a duty can be imposed on the facts of the case.

50 Jocelyn claimed that there was an implied duty in the DOT that obligated Richard, as trustee, to rent out the Properties. She relied on a concession by Richard in cross-examination that he was subject to such an implied duty.[53] Mr Chiok, however, argued (citing *Tan Yok Koon v Tan Choo Suan and another and other appeals* [2017] 1 SLR 654) that while the parties were in a fiduciary relationship, the facts and context must be examined to evaluate whether it is possible for the fiduciary duties alleged to arise. The court should not find a duty to let the Properties because Richard had not voluntarily placed himself in a position where the law can objectively impute an intention on his part to undertake those obligations.[54]

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[53] PCS, paras 93 – 94; 27/2/19 NE 110.

51 That a duty to let property (particularly land) is one owed by trustees of express trusts generally is supported by *Byrnes v Kendle* (2011) 243 CLR 253 ("*Byrnes*"). In *Byrnes*, the respondent was the registered proprietor of a residential property. He was married to the second appellant. The respondent signed an acknowledgment of trust, declaring that he held one undivided half interest in the property as tenant in common upon trust for the second appellant. Subsequently, the respondent and second appellant separated. The second appellant then assigned her interest in the property to her son (the first appellant). The appellants later sued the respondent alleging breach of trust. They claimed that the respondent allowed his son to live in the property between 2002 and 2007 and took no steps to collect rent from him after the first fortnight.

52 The High Court of Australia held that the respondent was under a duty to let the property and collect rent. The rationale was that absent such a duty, the beneficiary would derive no benefit from the interest conferred upon her under the trust, and the trustee with the legal title was the only one who had the power to grant a lease of the property to another and thus derive income for the beneficiary (at [22]). The High Court held at [67] and [119] that "[a]s a general proposition, where the trust estate includes land, it is the duty of the trustee to render the land productive by leasing it, and this is so even if the trust instrument does not expressly so provide" and "[e]ven if there is no direction in the trust instrument that the trust property be invested". The duty to invest the trust property is subject to the limits permitted by statute and to any limits stated in the trust document. French CJ added that in any event, the nature of the trust in that case did not lend itself easily to characterisation as a bare trust. Heydon and

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[54] DCS, para 50.

Crennan JJ also held (at [119]) that the duty to let the property arose when the respondent and second appellant were no longer living in the property.

53 The English decision of *Brudenell-Bruce v Moore* [2014] EWHC 3679 (Ch) (at [88]) cited *Byrnes* for the proposition that trustees may be obliged to seek to generate income from land comprised in the trust, in the context of exercising the power of investment.

54 In *Lewin on Trusts* (Sweet & Maxwell, 19th Ed, 2015) at para [1-040], the learner authors stated thus:

> There are two potential explanations why a trustee holding property for a beneficiary absolutely entitled might have no duties other than a duty to transfer the property to the beneficiary or as he directs. The first explanation is that the position of such a trustee is so supine, being a mere repository, that he need do nothing whatever, save to effect the transfer. The other position is that, pending transfer, he has powers and hence with it, responsibility, of his own, and the exercise of the powers is up to him, not the beneficiary. The second explanation, to the extent that this is correct, militates against the view that a trustee for a beneficiary absolutely entitled has a passive role.

The learned authors further stated that "[a] trustee holding land on trust for an absolute beneficiary is not a mere cypher and has the powers of a beneficial owner in relation to the land. His role is therefore an active one".

55 I agree with *Byrnes*. A trustee of an express trust who holds land on trust for an absolute beneficiary is under a duty to let the property and generate income from it. This duty arises: (a) subject to any limits imposed by statute or the trust instrument; or (b) unless the facts and circumstances otherwise indicate that parties intended the trustee to be a mere repository for the trust property. Absent such a duty, the beneficiary would derive no benefit from the interest conferred on her under the trust. Such a duty may be held in abeyance if, for

instance, the beneficiary is occupying the property – in such a case, the beneficiary would have derived a benefit from her interest in the land.

56 In this case, Richard is thus under a duty to let the property and generate income from it, and that such a duty has not been limited or negated on the facts. To the contrary, the terms of the DOT and the facts and context support the imposition of such a duty and, for this same reason, I find that Richard would have been under a duty to let the Properties that arose *on the facts of the case*, even if a duty did not exist generally. The parties had consistently treated the Properties either as the matrimonial home or for letting to generate income. The Ampang Property was first purchased to live in, and rented out when the Wajek Property was purchased as the matrimonial home. It is undisputed that the last tenant of the Ampang Property vacated it around 13 July 2013. Shortly thereafter in August 2013, Jocelyn (who was then residing at the Wajek Property) moved to the Ampang Property and the Wajek Property became vacant as Richard was staying with Shona permanently. Consistent with the parties' intent, Jocelyn's lawyers had on 22 July 2014 informed Richard's lawyers of Jocelyn's wish to let the Wajek Property, as construction works next door to it (which began in May 2013) had been completed. Even the letter of 6 August 2014 from Richard's lawyers to Jocelyn's lawyers stated *Richard's* position that it made no sense for one of the Properties to be vacant and not rented out.[55] Indeed, Richard himself had in 2009 and again in 2011, expressed in writing to his children that the Properties should not be sold as they were for income purposes and should be rented out to obtain rental income.[56]

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55 3AB 1492.

56 1AB 37–40 and 44–48.

57 Thus when the DOT was executed, the parties would have intended that whichever of the Properties was unoccupied would be let. This is supported by the terms of the DOT whereby the parties covenanted to deposit all income, rental or investment derived from the Properties into a joint bank account. Indeed, *Richard himself admitted that he had a duty to rent out the Properties*.[57] Thus, he cannot be considered as a trustee with no duties other than to transfer the Properties to the beneficiary (Jocelyn) or as the beneficiary directs. At the end of the day, only Richard, the trustee, has legal title to the property and therefore only he is in a position to grant a lease to a third party. By refusing to exercise his power to do so, and particularly where Jocelyn had informed him of her desire to let the property, he was depriving her of income which could be derived from it.

58 Finally, I note that the following matters are at best neutral.[58] First, the existence of a covenant or an agreement in the DOT on how to treat income or rental cannot did not necessarily imply a duty on Richard to let the Properties. But the absence of an express provision in the DOT imposing a duty was also not dispositive of the question whether there was an implied duty because that begs the question. Second, the impetus for the DOT to preserve the family's assets is not inconsistent with imposing a duty on the trustee (Richard) to generate income from the Properties. Third, I did not place weight on Richard's view that the DOT would have "no effect" if the marriage stayed intact. There is no evidence that this would have been the case and his duties as a trustee are not dependent on the state of the marriage.

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57 27/2/19 NE 110–111.

58 DCS, para 53(1) to (4).

Whether Richard was in breach of his duty to let the Properties

59 Having found that Richard, as trustee, had a duty to let the Properties, I turn to whether he was in breach of such a duty. I begin with two preliminary points. First, Mr Yeo confirmed that Jocelyn is not claiming for any loss of rental or other expenses relating to the Properties from 17 August 2017, the date on which Richard granted her POAs over the Properties.[59] Second, Mr Yeo conceded that Jocelyn is not making a separate claim against Richard for outgoings incurred on the Properties as such outgoings are to be paid from the rental proceeds of the Properties pursuant to clause (b) of the express covenant in the DOT.[60]

60 For ease of understanding I set out a chronology of events regarding the Properties.

Date	Events
17 April 2012	DOT is executed. Parties residing at the Wajek Property.
24 October 2012	Richard moves out of the Wajek Property permanently to live with Shona.
May 2013	Construction works commence at properties adjacent to the Wajek Property.
13 July 2013	Tenant moves out of the Ampang Property.
August 2013	Jocelyn moves into the Ampang Property.
July 2014	Construction works at properties adjacent to the Wajek Property are completed.
17 August 2017	POAs executed for the Properties.

59 Agreed List of Issues dated 7 March 2019, para 5.

60 Agreed List of Issues dated 7 March 2019, para 4.

22 January 2019	Wajek Property is tenanted out.

The Ampang Property

61 In relation to the Ampang Property, I find that Richard is not liable for lost rental from about 14 July 2013 (after the last tenant moved out) to 16 August 2017. I will not deal with the period after 16 August 2017 as Jocelyn is not claiming for that period. Although Richard owed a duty to rent out the Ampang Property, I find that this was held in abeyance when Jocelyn moved into that property from August 2013 and obtained the benefit of her interest in the property. Her reasons as stated below do not change my finding in this regard.

62 Jocelyn claimed that she moved into the Ampang Property to "maintain [the Ampang Property] in a tenantable condition, and not let it become dilapidated", and that she would "have very willingly moved elsewhere" if a tenant was found. Also she did not want to live in the Ampang Property because it was too big.[61] However, there was no evidence that all these matters were conveyed to Richard. No doubt, sometime around 13 July 2013, Beh had contacted Richard about renting out the Ampang Property,[62] but there is no evidence as to what transpired thereafter. If at all, Jocelyn then moved into the Ampang Property. When asked whether she had told Richard in August 2013 that she wanted to move out from and rent out the Ampang Property, Jocelyn equivocated and simply claimed that Richard did not want to talk to her.[63] Apart from the above, there was also no correspondence with Richard, even when Jocelyn moved into the Ampang Property, to inform him that she did not wish to reside at the Ampang Property and to ask that he rent it out. This stands in

61 Jocelyn's AEIC, paras 83–84; 26/2/19 NE 137.

62 Agreed List of Issues dated 7 March 2019 (undisputed facts); 1AB 64.

63 26/2/19 NE 138.

contrast to how she had explicitly made known to Richard her intention to rent out the Wajek Property in 2014.[64] As Jocelyn was residing at the Ampang Property then and was entitled to do so as she herself claimed,[65] it behoves her to convey her intention clearly to Richard, since he could not be expected to know that she was there only in a caretaker capacity. Indeed his lack of understanding is reflected in how his lawyers wrote to Jocelyn's lawyers stating that "it is [Richard's] understanding that [Jocelyn] moved some furniture from the matrimonial home at [the Wajek Property] and stayed at [the Ampang Property] temporarily and had apparently changed her mind about the sale";[66] further that "[Richard] has been staying in a room in their daughter's home, while [Jocelyn] has been occupying a huge property at [the Ampang Property] with a swimming pool all to herself".[67]

63 Likewise, Jocelyn's claim that the Ampang Property was always ready for letting is also contradicted by her position that "[she] has never denied [Richard] a place to stay at 25 Jalan Ampang".[68] As late as 12 May 2014, her lawyers wrote to Richard's lawyers stating that "[o]ur client proposes that your client move back home. He can take up a room".[69] Jocelyn also maintained that the Ampang Property had an annex where Richard could have stayed.[70]

64 For completeness there was a short period of about half a month between the date when the tenant moved out of the Ampang Property on 13 July 2013

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64 26/2/19 NE 140; 2AB 767, 2AB 771.

65 1AB 105.

66 1AB 64.

67 3AB 1467.

68 2AB 771.

69 3AB 1461.

70 26/2/19 NE 157.

and when Jocelyn moved into it in August 2013. However, given that some time would have been required to find another tenant, I disallow Jocelyn's claim for rental for the remaining period in July 2013.

The Wajek Property

65 In relation to the Wajek Property, I find that Richard owed a duty to let the property (see [55]–[57] above) and from the point it became unoccupied in August 2013 until 16 August 2017 (Jocelyn does not claim rental for the period from 17 August 2017). Jocelyn's claim for rental for the earlier period of October 2012 to July 2013 is unsustainable as she was living at the Wajek Property then and only moved out around August 2013.

66 On 22 July 2014, Jocelyn's lawyers informed Richard's lawyers expressly that Jocelyn wanted to rent out the Wajek Property, and this message was repeated subsequently.[71] Having notice of this, it was incumbent on Richard, the trustee, to give effect to Jocelyn's directions or wishes, which he did not. Beh had also contacted Richard, on 13 July 2013, about renting out the Wajek Property.[72] Richard did not adduce evidence to the contrary as to why he should be relieved of his duty as a trustee to let the property for the period it remained unoccupied, *eg*, that Jocelyn had agreed not to let the property whilst there was construction work going on next door, or that he was unaware that it had remained empty since August 2013. On the contrary, a letter from his lawyers even on 2 October 2013 showed that Richard was aware that the Wajek Property was unoccupied. Jocelyn also testified that although it might have been difficult to rent out the Wajek Property, this could nevertheless have been done for less than market rate.[73]

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71 1AB 81, 83 and 99; 26/2/19 NE 140.

72 Agreed list of Issues dated 7 March 2019 (undisputed facts); 1AB 64.

67 Next, I am not persuaded that the reasons Richard raised to absolve himself of his duty to rent afford him any defence.

68 First, the construction at the property adjacent to the Wajek Property from May 2013 to July 2014 did not make Wajek un-tenantable as Richard alleged. His own lawyers had, on 6 August 2014, written to Jocelyn's lawyers stating that "despite the renovation works, properties along Jalan Wajek had been rented out by other owners and there was no reason for the Wajek Property to be left vacant for such a long time".[74] In court, Richard agreed that despite the construction works, the Wajek Property could still be rented out.[75] Given that Richard as trustee had a duty to let the property, it was incumbent on him to show that he had made some attempts to find a tenant, and there was no evidence that he did so. If he had genuinely attempted to do so but without success, I might have come to a different conclusion.

69 Second, Richard alleged that Jocelyn had locked up the Wajek Property and denied him access to it. On 30 December 2013, Richard's lawyers wrote to Jocelyn's lawyers stating that "Wajek is now empty and [Jocelyn] has refused to allow [Richard] entry to it".[76] However, this must be read in context. Richard's lawyers had earlier written to Jocelyn's lawyers requesting her to hand over the keys to him as the Wajek Property was not occupied by Jocelyn then, *as Richard intended to move into the Wajek Property*.[77] Jocelyn's lawyers then replied to say that Richard had no right to occupy the Wajek Property as it was not a matrimonial property but held on trust for Jocelyn.[78] Further,

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73 3AB 1395; 26/2/19 NE 179–180.

74 1AB 366.

75 27/2/19 NE 124.

76 1AB 74.

77 3AB 1395.

Richard's lawyers' letter of 30 December 2013 did not state that Jocelyn had refused to allow Richard entry into the Wajek Property *in order for Richard to rent it out* – this is unlike what the lawyers stated regarding the Ampang Property in the same letter.

70 Third, Richard alludes that it was Jocelyn who had acted unreasonably and "hindered" the rental of the Properties – he had agreed to let the Wajek Property but subject to the rental proceeds (after paying for related outgoings) being divided equally between them, but Jocelyn had not agreed to this.[79] However, Richard admitted during cross-examination that he was not entitled to impose the condition regarding the rental proceeds, as the DOT did not provide that he would have a half share them.[80] He therefore could not rely on the parties' failure to agree on the application of the rental income as a reason for failing or refusing to let the Wajek Property. Jocelyn, being the beneficial owner of the property pursuant to the DOT, could not be said to be unreasonable in not agreeing to share the rental proceeds with Richard. She was entitled to refuse to allow him to touch these funds, save for expenses relating to the upkeep of the property (the latter also being consistent with the DOT terms).

71 Fourth, Richard's financial means or lack thereof afford him no excuse. His assertion that he lacked the financial means to take steps to let the Wajek Property is at odds with his acceptance during cross-examination (albeit in the context of why he did not take steps to set aside the DOT) that he had the means to commence divorce proceedings. In fairness though, I note Jocelyn's acceptance that "just day-to-day survival" was an issue for Richard and that he would have had no means to make repairs to the Wajek Property.[81] But even if

78 3AB 1396.

79 DCS, paras 65–73; 1AB 102 and 105; Richard's AEIC, para 62.

80 27/2/19 NE 126–127; 3AB 1491.

Richard did lack financial means, there is no reason why he could not have taken other steps such as executing POAs *earlier* (which he eventually did on 17 August 2017), to resolve the problem of him needing to fork out money to take steps to let the Wajek Property. As early as 22 July 2014, Jocelyn's lawyers had written to Richard's lawyers stating that Jocelyn wanted Richard to grant her a POA to rent out the Wajek Property.[82] That suggestion was not taken up in further correspondence anytime soon after.[83]

72 In conclusion, I find that Richard breached his duty as a trustee to rent out the Wajek Property from August 2013 to 16 August 2017. He is therefore liable for loss of rental during this period.

Claim for diminution in value of the Ampang Property

73 Jocelyn pleaded that she suffered a diminution in value of the Ampang Property of $1.8m because in July 2013 Richard "failed neglected and/or refused to execute an [OTP] for the sale of [the Ampang Property]" for $8.8m notwithstanding that she anticipated a drop in property price.[84]

74 On 8 July 2013, Jocelyn' lawyers conveyed to Richard that Jocelyn had found a buyer for the Ampang Property for $8.8m, that Beh had been appointed to prepare an OTP, that Richard should confirm by 9 July 2013 that he would execute the OTP, and that the property market had softened and hence an urgent confirmation was necessary ("Jocelyn's 8 July 2013 letter").[85] On 12 July 2013, Richard's lawyers replied to say that Richard agreed to the sale of the property,

81 26/2/19 NE 184–185.

82 1AB 81.

83 1AB 83, 86, 365–367.

84 Statement of Claim, para 10.

85 1AB 51–52.

but that the sale proceeds should be divided equally between Jocelyn and Richard or held by a third party until an agreement could be reached or a court decision was obtained on the proceeds ("Richard's 12 July 2013 letter").[86] No doubt, as a trustee without a beneficial interest, he was not entitled to impose a condition that the sale proceeds be divided equally.

75 Jocelyn's 8 July 2013 letter did not attach a draft of the OTP for Richard's signature and there is no evidence that a draft OTP had even been prepared – in fact, the letter stated that "Messrs Jeffrey Beh had been appointed *to prepare* the Option for the Sale" [emphasis added]. Interestingly, a letter dated 20 July 2018 from Beh himself (which was disclosed by Jocelyn's lawyers pursuant to a discovery application in this suit) stated that Beh "did not receive any specific instructions to prepare an Option to Purchase for [the Ampang Property]".[87]

76 On 5 August 2013, Richard's lawyers put on record that Jocelyn's 8 July 2013 letter was sent to them at 5.13pm on 8 July 2013 (near the close of office hours) and they did not have sufficient time to take their client's instructions before the deadline to respond on 9 July 2013 ("Richard's 5 August 2013 letter").[88] I find that it would have been unreasonable to expect Richard's lawyers to advise their client and take his instructions within a one-day turnaround time. It is also telling, from Richard's 5 August 2013 letter, that the $8.8m offer for the Ampang Property came about sometime before Jocelyn's 8 July 2013 letter, yet Jocelyn's lawyers informed Richard's lawyers formally on 8 July 2013 about an OTP regarding which she expected a reply by the next day.

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86 1AB 54–55.

87 2DB 264; 26/2/19 NE 170–174.

88 1AB 63–64.

77 Even after Richard's 12 July 2013 letter, there was no word from Jocelyn's lawyers or even an OTP sent to Richard's lawyers. Then on 19 July 2013, Richard's lawyers wrote to Jocelyn's lawyers stating that Richard was keen to have the property sold for $8.8m and asked for the OTP to be forwarded for Richard's signature ("Richard's 19 July 2013 letter")[89] – this time, no conditions were attached by Richard. It was not until 23 July 2013, that Jocelyn's lawyers then replied, and stating for the first time that Richard was "required to sign" the OTP by 9 July 2013, and that the sale of the Ampang Property was not proceeded with ("Jocelyn's 23 July 2013 letter").[90]

78 On balance, I was not satisfied that Jocelyn had proved that the diminution in the value of the Ampang Property (if any) was attributed to Richard's failure or refusal to execute an OTP for its sale.

79 Jocelyn has not shown that Richard's failure to reply in a timely fashion (or, indeed, any conduct on Richard's part) *caused the abortion of the sale*. Jocelyn's 8 July 2013 letter had asked for a *confirmation* by 9 July 2013 that Richard would execute the OTP, not for Richard *to execute* the OTP by 9 July 2013. There was no evidence as to *when* the OTP had to be executed with the potential buyer, when the sale of the Ampang Property was scheduled to take place or when the sale was actually aborted. There is also no evidence as to whether the sale was aborted *because* Richard had failed to reply in a timely manner regarding the signing of the OTP. After all, if Jocelyn's case is that Richard should have signed the OTP by 9 July 2013 and his failure to do so had *caused* the sale to be aborted, there was strangely no evidence that this was conveyed to Richard (or his lawyers) *shortly after* 9 July 2013, or even when

89 1AB 57.

90 1AB 59.

Richard's 12 July 2013 letter was sent to Jocelyn's lawyers setting out his proposal for the treatment of the sale proceeds. Significantly, Kelvin's evidence was that the offer to purchase Ampang "was never a formal offer in the form of an option to purchase" as far has he could recall.[91]

80 More fundamentally, Jocelyn has not shown that there would have been an OTP available for Richard to execute. She admitted that no such OTP was attached to Jocelyn's 8 July 2013 letter, or even in Jocelyn's 23 July 2013 letter, for Richard's signature.[92] This was even after Richard's 19 July 2013 letter requesting for the OTP for him to sign. The draft OTP produced by Jocelyn in discovery which she claimed Beh had circulated to Richard's lawyers[93] does not support her case. It was a blank OTP that does not even refer to any property (let alone the Ampang Property). Jocelyn herself was not sure that *Beh (or his law firm)* had circulated the draft OTP to Richard or his lawyers, and there was in fact no evidence that this was done. To the contrary, Beh stated in his letter of 20 July 2018 that he never received specific instructions to prepare an OTP for the Ampang Property. Jocelyn did not call Beh to show otherwise.

81 Hence, I dismiss Jocelyn's claim for diminution in value of the Ampang Property.

82 In view of my conclusion above, there is strictly no need for me to deal with Richard's imposition of conditions for the sale, but I deal with Mr Chiok's arguments briefly for completeness. Mr Chiok contended that Jocelyn could have gone ahead with the sale since the condition Richard sought to impose (this being equal division of the sale proceeds, alternatively that the sale proceeds be

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91 1/3/19 NE 20.

92 27/2/19 NE 21–22.

93 2DB 268 and 279–283; 27/2/19 NE 11–13, 15.

held by a third party to be agreed between Richard and Jocelyn until they could agree on division or the court pronounced on division) did not obstruct the sale. Hence she should "[i]n mitigation of her loss" have accepted the sale and then worked out the distribution of proceeds with Richard or reserved her rights.[94] These arguments are a non-starter because, as explained above at [74], Richard as trustee with no beneficial interest in the property had no right to impose additional conditions of this nature in the first place.

Conclusion

83 In conclusion, I find the DOT to be valid. Jocelyn is entitled to claim from Richard the loss of rental for the Wajek Property from August 2013 to 16 August 2017 with the quantum to be assessed. However, her claim for loss of rental for, and diminution in value of, the Ampang Property are dismissed. The costs of the trial are to be reserved for determination after the assessment of the loss of rental for the Wajek Property.

84 I add that any loss in rental proceeds subsequently assessed and recovered are to be deposited into the joint bank account and can be used to pay for matters relating to the Properties, in accordance with the terms of the DOT.

Audrey Lim
Judicial Commissioner

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94 DCS at para 86; 1AB 54.

Nichol Yeo Lai Hock, Nicholas Narayanan, Chan Bi Qing (JLC Advisors LLP) for the plaintiff;
Andy Chiok Beng Piow (JHT Law Corporation) for the defendant.
