

Ng Foong Yin v Koh Thong Sam
[2013] SGHC 87

Case Number : Suit No 426 of 2011
Decision Date : 25 April 2013
Tribunal/Court : High Court
Coram : Judith Prakash J
Counsel Name(s) : Ng Chin Foong Charles, Edwin Lee Peng Khoon and Lai Yan Ting (Eldan Law LLP) for the plaintiff; Lim Hong Kian (Lim & Bangras) for the defendant.
Parties : Ng Foong Yin — Koh Thong Sam

Probate and administration – distribution of assets

25 April 2013

Judgment reserved.

Judith Prakash J:

Introduction and parties

1 This is a claim made by a beneficiary of an estate for the executor and trustee of that estate to provide an account of the estate taken on the basis of wilful default.

2 The estate in question is that of Mdm Tan Tian Kwee ("Mdm Tan") who died in Singapore on 14 May 2010 at the age of 97. Mdm Tan left a will in which she appointed the defendant, Koh Thong Sam, sole executor and trustee. Mdm Tan was one of the two wives of the defendant's father and there were altogether nine children in the family. Whilst technically the defendant was Mdm Tan's stepson, she treated him and his full siblings as her own children and was treated by them as their own mother. Probate of Mdm Tan's will was granted to the defendant by this court on 22 July 2010.

3 The plaintiff, Mdm Ng Foong Yin, was Mdm Tan's daughter-in-law, by virtue of her marriage to the defendant's twin brother, Koh Thong Chye ("Thong Chye"). Thong Chye died in 2006.

4 Mdm Tan made her will on 26 March 2007. In it, after making certain specific bequests, she devised and bequeathed her residuary estate to her trustee, the defendant, upon trust. By cl 7, the trustee was directed to realise all her assets and pay her debts out of the realisation sums and whatever ready money the estate possessed. The remainder of the estate was to be divided into 26 equal shares which were to be distributed among the following persons in the shares and proportions set opposite their respective names:

- | | | |
|-----|--|-----------------|
| (a) | Her son, Koh Thong Sam (the defendant) | Five (5) shares |
| (b) | Her son, Koh Thong Meng | Five (5) shares |
| (c) | Her son, Koh Thong Hong | Five (5) shares |
| (d) | Her daughter, Shi Shue Ching @ Koh Sock Kheng Two (2) shares | |
| (e) | Her daughter-in-law, Ng Foong Yin (the plaintiff) | Two (2) shares |

(f)	Her grandson, Kenneth Koh Yu Yin	One (1) share
(g)	Her granddaughter, Karen Koh Shern Li	One (1) share
(h)	Her granddaughter, Kathy Koh Ming Li	One (1) share
(i)	Her daughter-in-law, Lou Siew Chin	One (1) share
(j)	Her grandson, Koh Yew Boi	One (1) share
(k)	Her grandson, Koh Tse Boi	One (1) share
(l)	Her grandson, Koh Siew Boi	One (1) share

5 Two other clauses should be mentioned. By cl 4, Mdm Tan declared that the moneys in joint accounts with any bank or financial institution were to be given to the joint account holder(s) absolutely. Further, by cl 8, Mdm Tan directed that in the event her sons Koh Thong Meng ("Thong Meng") and Koh Thong Hong ("Thong Hong") predeceased her or died unmarried, his or their shares would be given to the defendant absolutely. Thong Meng died on 8 June 2009, about a year before his mother.

6 Apart from the plaintiff's husband, Thong Chye, and Thong Meng, one other son of Mdm Tan predeceased his mother. This was Koh Thong Tee ("Thong Tee"). He died on 21 March 2007, only a few days before Mdm Tan made her will. Under Thong Tee's will, the defendant was appointed the sole executor and trustee of Thong Tee's estate. Probate of the will was granted to the defendant by this court on 6 March 2008. The default which the plaintiff alleges the defendant to have committed arises out of a debt which Thong Tee owed Mdm Tan at the date of his death and which the defendant took steps to recover from Thong Tee's estate on behalf of Mdm Tan. It is the plaintiff's position that the proceeds of this debt should have been included as part of Mdm Tan's estate on the latter's death and should have formed part of her residuary estate to be divided among the beneficiaries named in cl 7 of the will in the shares specified there.

The claim and the defence

7 The statement of claim is rather lengthy but it may be helpful if I summarise the more pertinent portions. The plaintiff makes the following averments:

(a) In para 7, that in "the Declaration of the Schedule of Assets of [Thong Tee's] estate under Section 41(2) of the then Estate Duty Act (Cap. 96)" the defendant as the sole executor of the same had acknowledged and declared to the Commissioner of Estate Duties ("the Commissioner") that Thong Tee was at the date of his death indebted to Mdm Tan in the aggregate sum of \$3,240,050. [It should be noted that para 3 of the Declaration states that the first part of Schedule 1 contains a true list of "the debts due from the deceased at the date of his death to persons resident within Singapore ..."; and that in Schedule 1, the name of Mdm Tan is given as the name of the creditor and then particulars of the debt are set out.]

(b) In para 9, that, as the defendant well knew, the debt of \$3,240,050 became due and owing from Thong Tee's estate to Mdm Tan's estate immediately upon the issue, on 20 February 2008, of the certificate from the Commissioner stating that certified that estate duty on Thong Tee's estate had been paid, and the defendant was bound to pay the said debt to Mdm Tan within a reasonable time. However, the defendant refused and/or failed to pay the sum or any part thereof to Mdm Tan or to her estate.

(c) In para 11, that on several occasions, Mdm Tan had told the plaintiff that she had previously given Thong Tee more than \$3m for the purpose of providing funds which Thong Tee could use to pay for the expenses of his brother, Thong Meng, who was mentally unstable. In para 13, after Thong Tee died, Mdm Tan had asked the defendant to claim the said sum from Thong Tee's estate and return it to her. Mdm Tan told the plaintiff that the defendant had assured her that he would return the money after he had completed liquidating the assets of Thong Tee's estate.

(d) In para 17, that the defendant was guilty of wilful default because he had failed to include and declare certain properties including the said sum of \$3,240,050 in the Schedule of Assets of the estate of Mdm Tan which was filed in this court on 1 July 2010.

(e) In para 18, that if the said sum of \$3,240,050 had been disclosed in the said Schedule of Assets of Mdm Tan's estate, the same would have comprised an additional part of Mdm Tan's residuary estate and the plaintiff would be lawfully entitled to receive, as one of the named beneficiaries of Mdm Tan's will, a sum equal to 2/26th shares thereof.

(f) The plaintiff claimed:

(i) A full and complete account by the defendant of his administration of the estate of Mdm Tan, including an account of what is due and owing to her estate from the estate of Thong Tee;

(ii) An order for an account of the personal estate of Mdm Tan taken on the footing of wilful default, and/or to have the same administered by an administrator to be appointed by the court; and

(iii) Payment to the plaintiff of such sums of money as may be found due to her as one of the beneficiaries of Mdm Tan's estate.

8 The defendant resisted the plaintiff's claim. In the material portions of his defence he asserted:

(a) By para 7, that the Declaration of Assets in the estate of Thong Tee was true and correct and that during the lifetime of Thong Tee, Mdm Tan had entrusted the following personal properties to Thong Tee to be held in trust for her absolutely:

(i) OCBC shares (particulars were given in a table).

(ii) The said shares were originally purchased by Mdm Tan and registered in her name. Subsequently, they were transferred to Thong Tee to be sold on Mdm Tan's behalf and the proceeds thereof amounting to \$2,640,050.40 were held in trust for Mdm Tan in Thong Tee's bank account. In the course of his lifetime, Thong Tee used these proceeds to buy and sell other shares and also re-deposited the moneys in several accounts.

(iii) Mdm Tan handed Thong Tee a sum of \$600,000 with specific instructions for him to hold it in trust for her.

(b) By para 10, the Declaration of Assets in respect of Thong Tee's estate that Thong Tee was indebted to Mdm Tan in the aggregate sum of \$3,240,050 was made to show the residuary legatees that there was no residuary estate to be distributed to them. All the shares and cash less the expenses listed in Annexure 1 to the defence ("Annexure 1") were given by Mdm Tan to

the defendant *inter vivos*.

(c) By para 18, the defendant quoted a letter dated 7 February 2011 from his solicitor (see [28] below).

(d) By para 19, that by reason of cl 4 of Mdm Tan's will, whatever moneys Mdm Tan had jointly with the defendant in any bank of financial institution belonged absolutely to the defendant.

(e) By para 20, that by a letter dated 9 September 2010, the defendant's lawyer forwarded to the plaintiff a statement of account in respect of Mdm Tan's estate enclosing a cheque for the sum of \$443,291.68 payable to the plaintiff being the plaintiff's share in the residuary estate and the statement clearly spelt out how this amount was arrived at. Similar accounts were forwarded to the other 11 beneficiaries together with their respective entitlements.

(f) By para 21, that in February 2011, the plaintiff was given a further sum of \$395,568.75 being her share in the proceeds of sale of a property that belonged to the estate.

(g) By para 22, that it was not true for the plaintiff to allege that the defendant had refused to provide the plaintiff with "an account of the defendant's administration of the estate of [Mdm Tan]".

9 Annexure 1 set out the defendant's calculation of the assets and expenses of the estate of Thong Tee.

10 Essentially, therefore, the defendant's response to the plaintiff's claim is that all assets representing the debt which the estate of Thong Tee owed Mdm Tan were collected by him in the course of his administration of Thong Tee's estate and, after payment of expenses, the balance was given to him by Mdm Tan. Accordingly, when Mdm Tan died, these assets belonged to him and were not part of her residuary estate.

11 In his closing submissions, the defendant states that the Schedule of Assets filed on 1 July 2010 disclosed all the assets that were in his mother's name when she died on 14 May 2010. There was no other asset whether residuary or otherwise to be realised for administration of her estate. The sum of \$3,240,050 referred to in the estate duty form for the estate of Thong Tee was recovered by Mdm Tan from the estate of Thong Tee and dealt with during Mdm Tan's lifetime. There was therefore no debt due and owing to Mdm Tan by the estate of Thong Tee as at the time of her death. The defendant had rendered full accounts to the plaintiff insofar as her rights and entitlements under Mdm Tan's will were concerned.

Issues

12 There are two main issues that arise: one is factual and the other is legal. The factual issue is whether the debt that the estate of Thong Tee owed Mdm Tan was recovered in her lifetime and if so whether it was all disposed of during that lifetime so that it no longer formed part of her assets upon her death. The legal issue is one raised by the defendant which is whether the plaintiff is entitled to bring this action on her own or whether her failure to comply with O 15 r 2 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("the Rules") is fatal to her claim. It is convenient to deal with the legal issue first.

Procedural issues

13 The plaintiff brought this action against the defendant in her capacity as a beneficiary of the estate of Mdm Tan. She sued on her own behalf alone. She did not join any other beneficiary of Mdm Tan's estate or of Thong Tee's estate as a party to the action. The defendant's position is that the failure to do so makes her claim untenable.

14 Order 15 r 4(2) of the Rules states:

Where the plaintiff in any action claims any relief to which any other person is **entitled jointly** with him, all persons so entitled **must**, subject to the provisions of any written law and unless the Court gives leave to the contrary, be parties to the action and any of them who does not consent to being joined as a plaintiff must, subject to any order made by the Court on an application for leave under this paragraph, be made a defendant. [Emphasis added]

15 The defendant submits that because the plaintiff did not join any other beneficiary of the two estates as parties to the action the court should not entertain her claim. He emphasises that the plaintiff "must" make all persons who are jointly, severally or alternatively, entitled to the relief claimed by her, parties to the action. The word "must" imposes a burden on the plaintiff to comply and indicates that her compliance is mandatory. The plaintiff's attention was drawn to her non-compliance earlier in the proceedings and since she has chosen not to respond positively by adding the necessary parties, the court should not entertain her claim.

16 The defendant points out that among the pleaded reliefs sought by the plaintiff are the following:

- (a) A full and complete account by the defendant of his administration of the estate of Mdm Tan including an account of what is due and owing to the estate of Mdm Tan by the estate of Thong Tee; and
- (b) A declaration that any moneys and shares transferred to the defendant by Mdm Tan or taken by the defendant during Mdm Tan's lifetime are held on trust for Mdm Tan's estate.

The defendant submits that if such reliefs were granted, the rights and interests of all beneficiaries of the estate of Mdm Tan and of the estate of Thong Tee would be affected. Therefore all these beneficiaries must be before the court before it delivers its decision. In making this submission the defendant is relying not only on the provisions of O15 r 4(2) but also, in relation to the second relief, on the principles governing the granting of declaratory relief.

17 In response, the plaintiff makes four arguments. First, it is argued that the defendant has failed to show how the co-beneficiaries would be "jointly entitled" to the reliefs sought for. Secondly, it is argued that the defendant should be precluded from making further submissions on this issue since I had already heard parties' submissions on this matter prior to the second tranche of the trial on 25 July 2012 and had then directed the trial to continue. Thirdly, relying on *Regenthill Properties Pte Ltd v MCST Plan No. 2192* [2002] 2 SLR(R) 359, the plaintiff argues that the defendant must be regarded as having waived the irregularity since the latter has chosen to take fresh steps in the proceedings. Fourthly, the plaintiff submits that the non-joinder of the other beneficiaries who are jointly entitled to the reliefs is "not necessarily fatal to the plaintiff's claim" as O 15 r 6(1) states that "[n]o cause or matter shall be defeated by reason of the misjoinder or nonjoinder of any party". The plaintiff also cites the cases of *Oh Chun Moy & Ors v Oh Bee Bee* [2012] 1 SLR 105, and *Ong Wui Swoon v Ong Wui Teck* [2012] 1 SLR 733 where the merits of the respective cases were decided even though other beneficiaries who were entitled to the remedies granted were not joined in the respective proceedings.

18 I deal first with the plaintiff's claim for an account of administration of Mdm Tan's estate from the defendant. The essence of O 15 r 4(2) is that a person who makes a claim to a relief to which he is "jointly entitled" with one or other persons must join those other person(s) to the proceedings. I note here that "jointly entitled" does not encompass entitlement that are several or alternative. It is true that all beneficiaries to the estate of Mdm Tan are entitled to ask the defendant as executor and trustee of that estate to give an account of his administration. This entitlement, however, is one that enures to each beneficiary individually by virtue of his or her interest in the estate. It is not an entitlement that is conferred upon all of them jointly so that they have act together. In *Underhill and Hayton Law Relating to Trusts and Trustees* (LexisNexis, 18th Ed) it is stated at para 56.2 that the rights of a beneficiary to monitor and protect his interest by obtaining accounts from the trustee so that they can then be falsified or surcharged is at the very core of the trust concept. This statement is based on the judgment of Millett LJ in *Armitage v Nurse* [1998] Ch 241 and para 56.3 also quotes directly the statement of Millett LJ in the same judgment that "[e]very beneficiary is entitled to see the trust accounts, whether his interest is in possession or not". This is to enable the beneficiary to discover whether there has been a breach of trust which can be remedied. Accordingly, the plaintiff was entitled to act severally in bringing this action for the accounts for which she asks and there is no requirement for her to join the other beneficiaries in order to proceed with the action.

19 It is noteworthy that O 80 r 3 of the Rules which is entitled "Administration and similar actions" provides:

(1) All the personal representatives to which an administration or such an action as is referred to in Rule 2 relates must be parties to the action, and where the action is brought by personal representatives, any of them who does not consent to being joined as a plaintiff must be made a defendant.

(2) Notwithstanding anything in Order 15, Rule 4(2), and without prejudice to the powers of the Court under that Order, *all the persons having a beneficial interest in or claim against the estate or having a beneficial interest under the trust, as the case may be, to which such an action as is mentioned in paragraph (1) relates need not be parties to the action*; but the plaintiff may make such of those persons, whether all or any one or more of them, parties as having regard to the nature of the relief or remedy claimed in the action, he thinks fit.

[Emphasis in italics and underline added]

20 Thus, in an administration action, while every personal representative should be joined, there is no similar requirement to join all other persons having a beneficial interest in the estate. Whether or not they should be joined depends on the nature of the relief or remedy claimed. So, even in an administration action, when the claim is for proper particulars and accounts, there is no need for every beneficiary to be joined. It would be incongruous if in the present case, which is not an administration action but asks for one of the types of relief that can be obtained in such an action, I was to hold that all the beneficiaries must be joined before the plaintiff could obtain her relief.

21 I turn next to the defendant's objection to the plaintiff's claim for a declaration. One of the requirements that must be satisfied before the court grants a declaratory relief is that "any person whose interests might be affected by the declaration should be before the court": *Karaha Bodas Co LLC v Pertamina Energy Trading Ltd and Another Appeal* [2006] 1 SLR 112 ("*Karada Bodas*") at [14].

22 The rationale for this requirement was enunciated in *London Passenger Transport Board v Moscrop* [1942] AC 332 at 345:

I also think it desirable to mention the point as to parties in cases where a declaration is sought. The present appellants were not directly prejudiced by the declaration and it might even have been thought to be an advantage to them to submit to the declaration, but, on the other hand, the persons really interested were not before the court, for not a single member of the Transport Union was, nor was that union itself, joined as a defendant in the action. It is true that in their absence they were not strictly bound by the declaration, but *the courts have always recognised that persons interested are or may be indirectly prejudiced by a declaration made by the court in their absence, and that, except in very special circumstances, all persons interested should be made parties, whether by representation orders or otherwise, before a declaration by its terms affecting their rights is made.* [Emphasis added]

23 It can be seen that the true rationale for requiring all interested parties to be before the court is that a declaration may, albeit indirectly, prejudice them. The defendant argues that the declaration prayed for might indirectly prejudice the beneficiaries of Thong Tee's estate because it assumes that the sum of \$3,240,050 (that was paid out of Thong Tee's estate to Mdm Tan) was in fact a debt owed to Mdm Tan and was correctly paid out of Thong Tee's estate. It should be noted that in his will Thong Tee left his residuary estate to two charities. As a result of Mdm Tan's claim to and recovery of the alleged debt from Thong Tee's estate, this residuary bequest could not be satisfied. If it turned out that Mdm Tan's claim was unfounded or inflated, the residuary beneficiaries of Thong Tee's estate might have a claim for breach of trust against the defendant. It is arguable that such a claim could be prejudiced by a declaration that that all moneys he recovered on Mdm Tan's behalf from Thong Tee's estate are held in trust for the beneficiaries of Mdm Tan's estate.

24 The plaintiff's response is that the defendant is estopped from raising this argument. This is because the defendant had the opportunity to raise the issue when the plaintiff applied to amend her statement of claim but did not do so then. I do not accept this argument. The defendant could have raised the argument earlier but that omission cannot stop him from raising it now. Ultimately, it is for the plaintiff to prove at the end of the trial that she has satisfied all the six requirements laid down in *Karaha Bodas* for the grant of declaratory relief and the defendant cannot be estopped from contending that any or all of the requirements are not made out on the facts.

25 I accept the defendant's contention and hold that the plaintiff cannot ask for the declaration to be made if the defendant's defence that all the assets recovered by Mdm Tan from Thong Tee's estate were either spent or given to him does not succeed. In any case, it is my view that such a declaration would be redundant. As matters stand at present, if the defendant is found to be holding any assets which by right belong to the estate of Mdm Tan, he would *prima facie* be holding those assets for the benefit of the beneficiaries of Mdm Tan's estate and would have to distribute the assets among the same in accordance with their respective entitlements. He is already trustee of the estate and there is no need to make a further declaration in that regard which could possibly indirectly prejudice other parties.

Factual issues

The law in relation to an account of administration on the basis of wilful default

26 The law in relation to an account of administration on the basis of wilful default was succinctly laid down in *Glazier v Australian Men's Health (No 2)* [2001] NSWSC 6 ("the *Glazier* case") (which was cited in *Ong Jane Rebecca v Lim Lie Hoa and Others* [2005] SGCA 4 at [55] as an authority showing the difference between a common account and an account on the basis of wilful default):

Order for an account of administration on basis of wilful default

39 Sometimes the Court orders that accounts be taken on the basis of wilful default (or in the earlier cases, wilful neglect or default). The order is 'entirely grounded on misconduct', the defendant being required to account not only for what he or she has received, but also for what he or she might have received had it not been for the default: *Partington v Reynolds* [1858] EngR 461; (1858) 4 Drew 253, 255-6; [1858] EngR 461; 62 ER 98, 98-9. To obtain an order for the taking of accounts in common form against an executor, for example, the plaintiff need only show that the defendant is the executor, and need not show anything about the defendant's dealings with the estate; whereas to obtain an order on the basis of wilful default the plaintiff must allege and prove 'that there is some part of the deceased's personal estate which ought to have been and might have been received by the defendant, and which he has omitted to receive by his own wilful neglect or default': *Partington v Reynolds*, at 256 (ER at 99).

...

41 As will be seen, the court may make an order that general accounts be taken on the footing of wilful default **if at least one instance of wilful default has been proved**. However the court has a discretion whether to make such an order. **The test is this: 'is the past conduct of the trustees such as to give rise to a reasonable prima facie inference that other breaches of trust not yet known to the plaintiff or the court have occurred?'** (*Re Tebbs* [1976] 1 All ER 858, 863; see also *Russell v Russell* (1891) 17 VLR 729).

42 An order for accounts based on wilful default has the effect of casting a much more substantial burden of proof on the accounting party than applies in the case of common accounts. On a falsification, the onus is on the accounting party to justify the account, unless the account is a settled account (not relevant in the present case): *Parker*, p 269; *Daniell's Practice of the High Court of Chancery* (5th ed, 1871), p 1120ff, p 575ff; *Seton's Forms of Judgment and Orders* (6th ed, 1901), Vol II, p 1356ff, p 1382ff; and note the forms of falsification and surcharge in *Miller and Horsell's Equity Forms and Precedents* (1934), p 195-196; and as to settled accounts, see *Pit v Cholmondeley* [1754] EngR 174; (1754) 2 Ves 565, 28 ER 360. An accounting on the footing of wilful default leads to an order requiring the defendant to replenish funds wrongfully depleted by him or her and in that sense to make restitution for the benefit of the plaintiff.

...

Must at least one act of wilful default be established, and if so, is that requirement satisfied here?

74 By the time of Lord Eldon, Chancery had developed the rule that in order to obtain an inquiry, or the taking of accounts, on the basis of wilful neglect and default against an executor or trustee, it was necessary for the plaintiff to allege and prove at least one act of wilful neglect or default. It was for the plaintiff to fix upon any item he may choose, but having done so, it was then up to him to adduce proper evidence to show that but for the wilful neglect or default of the defendant, that item might have been received: *Sleight v Lawson* [1857] Eng R 462; (1857) 3 K & J 292, 298[1857] Eng R 462; , 69 ER 1119, 1121-2. In *Coope v Carter* (1852) 2 De G McN & G 297; [1852] Eng R 495; 42 ER 884 the rule was relaxed to the extent that, **if wilful neglect or default was alleged in the plaintiff's bill but the facts only raised a case of suspicion in the mind of the Court without proving any instance of such default, the Court could direct a preliminary inquiry to clarify the particular facts alleged. If that preliminary inquiry established one or more instances of wilful neglect or default, the Court might then order the remainder of the inquiry to proceed on the basis of wealth [sic] neglect or default.**

75 In *Sleight v Lawson* the executors of the will of a deceased person prepared an inventory shortly after his death, showing that the deceased had assets with a value of 28,665 pounds. When a bill was filed for accounts, the executors said that 20,800 pounds was expended in paying charges on the testator's estates but that they could not answer for the rest. The plaintiff contended, relying on *Coope v Carter*, that there should be an inquiry as to wilful neglect and default with respect to the items shown by the accounts not to have been realised. Page Wood V-C disagreed, holding that ***the plaintiff should have fixed upon an item shown not to have been realised, and should have adduced evidence to show that, but for wilful neglect or default by the defendant, that item might have been received. If a conflict of evidence emerged with respect to that item, sufficient to make out a case of suspicion in the mind of the Court that wilful neglect or default may have been committed, the Court could then direct an inquiry.*** But Lord Eldon's rule prevented the plaintiff from having an inquiry as to wilful neglect or default simply on the ground that the executors had admitted to assets of the estate that had not been realised.

76 In my view *Sleight v Lawson* still represents the law on this point. In *Gava v Grljusich* Kennedy J cited it as authority for 'the well-established rule' that 'a plaintiff, in order to be entitled to an account on the basis of wilful default must ... prove at least one example of wilful default on the part of the defendant' (at paragraph 27).

[Emphasis in italics in original; emphasis in bold added]

The plaintiff's case

27 The plaintiff's pleaded case on the defendant's wilful default focuses entirely on the alleged debt of \$3,240,050 which was declared to be due and owing from Thong Tee's estate to Mdm Tan. In relation to this claim, the factual issues that arise relate entirely to the defendant's evidence. The defendant complained of inconsistencies in the plaintiff's account of what Mdm Tan told her and when she did so in relation to Thong Tee's indebtedness to Mdm Tan. Those inconsistencies are not damaging to the plaintiff's case because the defendant himself does not dispute the existence of the debt. Whilst the plaintiff was not able to say exactly how much was owed (she said at one point that Mdm Tan stated that she had given \$3m to Thong Tee to look after his brother Thong Meng but in other evidence asserted Mdm Tan to have described the amount given to Thong Tee to be a little over \$3m), the defendant fixed the amount at \$3,240,050 in the declaration that he made to the Estate Duty Office under the provisions of the Estate Duty Act (Cap 96, 2005 Rev Ed) ("the Act") in respect of Thong Tee's assets and liabilities. Further, it was the defendant who asserted that the money had been collected from Thong Tee's estate during Mdm Tan's lifetime and expended either in meeting expenses or in gifts made to him by his mother. So, what the plaintiff has to prove, *viz*, the existence of the asset and the fact that it has not been dealt with as part of Mdm Tan's estate, has in fact been established from the evidence though the plaintiff was not able to prove the exact amount thereof. The onus now lies on the defendant to show on a balance of probabilities that this asset was no longer part of Mdm Tan's estate as at the date of her death.

The defendant's case and his affidavit evidence

28 I summarise the defendant's evidence from his affidavit of evidence-in-chief as follows. First, the defendant relied on his lawyer's explanation to the plaintiff on 7 February 2011 as to what had happened to the debt. The material portions of this letter (which were also quoted in the defence) are as follows:

3. Whatever our client's mother, the late Tan Tian Kwee did during her lifetime with her money

whether these were inherited from the estate of Koh Thong Tee or otherwise, would fall outside the scope and rights and/or interest of your clients absolutely.

4. The assets of the late Koh Thong Tee comprised 20,000 shares in DBS Bank Ltd, 15,000 shares in OCBC Bank, 30,000 shares in Singapore Press Holdings Ltd, 20,000 shares in UOB Ltd, and 20,000 shares in Venture Ltd, and several accounts with DBS Bank Ltd. The estate duty was paid from the DBS Bank account of the late Koh Thong Tee. When the Grant of Probate was extracted, the bank accounts were realised. After paying out the bequest, income tax, donations to various parties, legal, testamentary and funeral expenses, the balance amount was deposited by our client's mother, the late Tan Tian Kee, into the joint account of our client and his late mother. All her household, personal and medical expenses were paid from this joint account. She had wanted to give the balance of the money to our client and had stated so in her Last Will that the monies in the joint accounts with any bank or financial institution shall be given to the joint account holder absolutely. Some of the shares were sold and the money was deposited into the joint account. The rest of the shares were given by the late Tan Tian Kwee to our client.

5. Further, both of your clients are well aware that in 2005, our client's mother had also given the following monies, *inter vivos*:

- (a) S\$600,000.00 to the late Koh Thong Tee;
- (b) S\$600,000.00 to the late Koh Thong Chye;
- (c) S\$600,000.00 to the late Koh Thong Wai; and
- (d) S\$600,000.00 to our client.

6. The sum of S\$2,640,000.00 was arrived at based on the amount of OCBC shares earlier given and sold by the late Koh Thong Tee.

7. The claim by the late Tan Tian Kwee for the sums of S\$600,000.00 and S\$2,640,000.00 was made simply to show the residuary legatees that there was no residuary estate to be given to them.

29 Apart from adopting the contents of the above letter as stating what had happened to the debt, the defendant repeated his explanation regarding the sum of \$3,240,050. In the course of this repetition, he said:

(a) Mdm Tan had made a statutory declaration dated 31 July 2007 ("the SD") to confirm, among other things, that the OCBC shares amounting to \$2,640,050 were originally purchased by her and registered in her name. The same were subsequently transferred to Thong Tee to be sold by him on Mdm Tan's behalf. The proceeds thereof amounting to \$2,640,050 were being held in trust for Mdm Tan absolutely in Thong Tee's account with DBS Bank.

(b) In addition, Mdm Tan handed Thong Tee a sum of \$600,000 with specific instructions for him to deposit the same into his DBS Bank account to be held in trust for Mdm Tan absolutely.

(c) During the lifetimes of both Thong Tee and Mdm Tan, the shares mentioned below were acquired by Thong Tee using the proceeds of sale of the OCBC shares. The subsequently acquired shares remained registered in Thong Tee's name as at the date of his death. Those shares were later re-registered in the defendant's name on 7 April 2008 after the same were

recovered and taken back by Mdm Tan from Thong Tee's estate and given to the defendant by his mother *inter vivos*:

- (i) 15,000 shares in DBS
- (ii) 15,000 shares in OCBC
- (iii) 20,000 shares in UOB
- (iv) 20,000 shares in Venture
- (v) 30,000 shares in SPH.

(It should be noted that in court, the defendant corrected the above evidence by amending the number of DBS shares from 15,000 to 20,000 and stating that the 15,000 OCBC shares had not been purchased by Thong Tee but represented the unsold balance of 171,120 OCBC shares which Mdm Tan had given to Thong Tee on trust.)

(d) The defendant sold portions of the shares so registered in his name in May 2008. The details are as follows:

- (i) 30,000 SPG @ \$4.41 each \$132,300.00
- (ii) 12,000 OCBC @ \$9.00 each \$108,000.00

The total amount received, \$240,300, was deposited by the defendant in the joint account which he held with Mdm Tan.

(e) After he sold the shares mentioned in (d) above, the defendant had the following shares in his name (as the same had been given to him *inter vivos* by his mother):

- (i) 15,000 shares in DBS
- (ii) 3,000 shares in OCBC
- (iii) 20,000 shares in UOB
- (iv) 20,000 in Venture

30 As regards the moneys held in Thong Tee's DBS accounts which Mdm Tan had referred to in her statutory declaration, the defendant gave details thereof as follows:

Name/Type of Accounts	Balance
1. Autosave Account No. [xxx]	\$445,200.33 as at 31 March 2007
2. Fixed Deposit Account No. [xxx]	\$1,250,000.00 as at 31 March 2007
3. Surf A Account No. [xxx]	\$183,680.00 as at 23 April 2008
4. Dynamic Account No. [xxx]	\$278,370.00 as at 23 April 2008

5. DBS Shenton Twin City	\$223,632.50 as at 4 April 2008
6. DBS High Notes	\$194,000.00 as at 4 April 2008
Total	\$2,574,902.83

31 The defendant repeated that after Mdm Tan had recovered and taken back the shares and cash from Thong Tee's estate, all the shares and the cash less the expenses listed in Annexure 1 were given by his mother to him *inter vivos*. Annexure 1 sets out these expenses as follows:

Expenses related to Koh Thong Tee's (KTT) Assets

1. KTT's estate duty	\$140,143.00
2. KTT's funeral expenses	\$7,000.00
3. KTT's income tax	\$5,024.00
4. Tan Tian Kwee's Statutory Declaration	\$1,650.00
5. Catholic Welfare Services	\$100,000.00
6. Society of St. Vincent de Paul	\$100,000.00
7. Gift to buy car	\$150,000.00
8. Bethesda Pasir Ris Church	\$70,000.00
9. Lawyer's fees	\$45,000.00
10. Household expenses (maid, marketing, medical etc)	\$126,000.00
11. TTK's hospitalisation	\$14,568.00
12. TTK's funeral expenses	\$10,000.00
13. PUB	\$7,200.00
14. Property tax	\$3,000.00
15. Pest control	\$1,000.00
16. House insurance	\$1,000.00
Total	\$781,585.00

32 The defendant stated that the above sum of \$781,585 was paid from the total of \$2,574,902.83 which was in Thong Tee's bank and unit trust investments. Further, deductions were made from this amount to meet two bequests under Thong Tee's will, *viz*, \$1m to Thong Meng and \$100,000 to Thong Hong. The balance recovered from Thong Tee's estate which the defendant calculated as being \$933,617.83 was given *inter vivos* to him by Mdm Tan. This amount was re-deposited by him into the UOB Bank account in the joint names of himself and Mdm Tan ("UOB joint account"). All of Thong Tee's accounts were subsequently closed by the defendant. It should be noted that the amount of cash left over after payment of the listed expenses and the bequests was only \$693,317.83 and that the defendant had to add the sum of \$240,300 derived from the sale of Thong Tee's shares to the cash in order to obtain the stated amount of \$933,617.83 which he said he

deposited into the UOB joint account.

33 The defendant stated specifically that he wished to highlight that under the terms of para 4 of Mdm Tan's will, all moneys in joint accounts which he held jointly with his mother were to be given to him absolutely.

34 Before I discuss the defendant's affidavit evidence and his further evidence under cross-examination, it may be helpful if I summarise the contents of Thong Tee's will and the SD.

35 By his will, Thong Tee made the following gifts:

(a) He gave \$100,000 to his trustee upon trust to pay any lump sum therefrom or any monthly amount as the trustee determined in his discretion for the upkeep and maintenance of his brother, Thong Hong, and after the death of Thong Hong, to pay the residue thereof to the defendant absolutely.

(b) He gave \$1m to his trustee upon trust to pay any lump sum or any monthly amount as the trustee determined in his discretion for the upkeep and maintenance of his brother, Thong Meng, and after the death of Thong Meng, to pay the residue thereof to the defendant absolutely.

(c) Subject to the specific bequests described above, he gave all his properties to his trustee upon trust to convert the same into money and to use such proceeds to pay Thong Tee's debts and funeral expenses and then to divide the net balance into two equal shares and distribute such shares between the Society of St Vincent De Paul (National Council of Singapore) and Catholic Welfare Services (Singapore).

36 It was subsequently determined that as at the date of his death, Thong Tee's estate was worth approximately \$4m. This was insufficient to pay all his debts (including the debt to Mdm Tan) and meet the specific bequests as well. There would have been no money at all left over for the residuary legatees. In the event, what the defendant did (he said at the direction of Mdm Tan) was to pay the two residuary legatees the sum of \$100,000 each as a donation from Mdm Tan. It was explained to them that because of the amount that Thong Tee held on trust for his mother, there was no residue left in the estate to distribute to them.

37 The SD was made on 31 July 2007. In it Mdm Tan first stated that Thong Tee was one of her nine lawful children and that he had died on 21 March 2007. In para 3 she said that during Thong Tee's lifetime she had entrusted "the following personal properties to him to be held in trust for me absolutely". This statement was followed by the following table ("the Table"):

PARTICULARS OF OCBC SHARES HELD IN TRUST BY MY SON KOH THONG TEE (DECEASED)

<i>DATE</i>	<i>SOLD</i>	<i>PURCHASE</i>	<i>AMOUNT</i>	<i>SALES PROCEED</i>
01/01/1998			171120	
13/01/1998	6000x\$8.15		165120	\$48,900.00
18/10/1999		8256	173376	
03/01/2000	5000x\$15.80		168376	\$79,000.00

30/01/2002	25000x\$12.80		143376	\$320,000.00
31/01/2002	376x\$12.90		143000	\$4,850.40
01/02/2002	8000x\$13.30		135000	\$106,400.00
01/02/2002	25000x\$13.30		110000	\$332,500.00
06/02/2002	20000x\$13.20		90000	\$264,000.00
02/04/2002	10000X\$13.80		80000	\$138,000.00
19/07/2005		16000	96000	
08/08/2005		[Share split]	192000	
31/10/2006	20000x\$7.00		172000	\$140,000.00
21/11/2006	20000x\$7.30		152000	\$146,000.00
21/11/2006	20000x\$7.30		132000	\$146,000.00
21/11/2006	20000x\$7.30		112000	\$146,000.00
08/12/2006	22000x\$7.45		90000	\$163,900.00
25/01/2007	20000x\$7.90		50000	\$158,000.00
06/02/2007	20000x\$8.45		30000	\$169,000.00
27/02/2007	15000x\$8.70		15000	\$130,500.00
				\$2,640,050.40

I will hereafter refer to these OCBC shares totalling 171,120 shares as "the Trust Shares".

38 In para 4 of the SD, Mdm Tan said that the Trust Shares were originally purchased by her and registered in her name. The same were subsequently transferred to Thong Tee to be sold by him on her behalf. The proceeds thereof amounting to \$2,640,050.40 were still being held in trust for her absolutely in Thong Tee's account with DBS Bank. In para 5, she stated that at that date, there was a balance of 15,000 OCBC shares being held by Thong Tee in his account with Central Depository (Pte) Ltd ("CDP") and that the same were being held in trust for her absolutely.

39 In para 6 of the SD, Mdm Tan stated that, in addition, she had handed to Thong Tee a sum of \$600,000 with specific instructions for him to deposit the same into his DBS account to be held in trust for her absolutely.

40 The evidence was that the SD was prepared for the purpose of supporting the assertion in the estate duty documents filed for Thong Tee's estate that the estate was indebted to Mdm Tan in the amount of \$3,240,050.40. A copy of the SD was duly provided to the Commissioner. The Schedule subsequently issued by the Commissioner under s 41(2) of the Act valued Thong Tee's estate at \$4,013,392.50. This figure comprised (i) \$1,399,250 being the aggregate valuation amount of Thong Tee's holdings in five share counters, (ii) \$2,609,534.50 being the aggregate value of his cash balances and unit trust investments and (iii) \$4,608 being his credit balance with the Comptroller of Income Tax.

Examination of the defendant's evidence

41 I should say at the outset that a consideration of the defendant's testimony as a whole together with the documentary evidence has caused me to harbour great doubts regarding the truthfulness of the SD and the claim that at his death Thong Tee either owed Mdm Tan \$3,240,050.40 or held assets amounting to that value on trust for her. I am not saying that there may not have been a trust. What I am saying is that even assuming that Mdm Tan gave Thong Tee the Trust Shares some time on or before 1 January 1998, if those shares were given to him on trust for her but with authority for him to trade in them as he saw fit, then, at the end of the day, what he held for her would be the shares that he purchased with the proceeds of the Trust Shares and any sums in his bank account that were derived from the sale of any portion of the Trust Shares. At no time was there a sum of \$2,640,050.40 representing the proceeds of the Trust Shares in Thong Tee's bank accounts and the defendant's repeated assertions to that effect were not true. Even after Thong Tee died, only a portion of his share portfolio was sold so the defendant never realised a total sum of \$2,640,050.04 from the Trust Shares.

42 The defendant's duty as the executor of Thong Tee's estate was to carry out a tracing exercise as far as he could to determine what shares Mdm Tan had given Thong Tee and then distribute to Mdm Tan those remaining 15,000 Trust Shares and all other shares and investments representing the original Trust Shares which had been sold. It may be that the tracing exercise would have resulted in Mdm Tan being entitled to all Thong Tee's share counters, cash and other investments, but this is not the point. In order to administer Thong Tee's estate properly, this exercise had to be carried out and in its absence, there are doubts as to whether Thong Tee's estate has been properly administered and also doubts as to whether Mdm Tan's estate has been properly administered.

43 There are various difficulties with the SD. I take first the assertion in para 6 of the SD that Mdm Tan gave Thong Tee \$600,000 to hold on trust for her. This payment was made by cheque. The defendant said that the cheque was handed to Thong Tee on 19 October 2005 and he explained how it came to be given to Thong Tee as follows:

That was after my other brother Koh Thong Chiang, also a bachelor died in 2004, that time he had shares given to ... entrusted to him by my mother and cash and it amounted to over \$3 million and I was also the trustee of that estate. He died without a will. So I was the trustee, and my mother already told me to distribute to sell the shares and distribute the money to four people. So within 2 weeks of the probate in 2005, that was October, I sold his shares ... and distributed the \$600,000.00 to KTT who was a bachelor.

44 It should be noted that it was common ground that on or about 19 October 2005, Mdm Tan signed four cheques, each in the sum of \$600,000. These cheques were made out in favour of four of her sons, viz, Thong Tee, Thong Chye, Koh Thong Wai and the defendant. It was also undisputed that as far as three of the recipients went, viz, Thong Chye, Thong Wai and the defendant, the money was given to them as outright gifts. It is the plaintiff's position that Thong Tee too received a cheque for \$600,000 as a gift. It is the defendant who asserts that in the case of Thong Tee, the money was not meant as a gift but was to be held in trust for Mdm Tan. I asked him to explain why there was such a distinction drawn between Thong Tee and his brothers. The following is an extract from the evidence:

Court: So in October 2005, the \$2.4 million which was given out came from the estate of your then deceased brother right?

Witness : Yes, your Honour.

Court: And your mother decided that the four brothers should get this money, yes?

Witness: Yes, your Honour.

Court: So that was a gift?

Witness: Except for Koh Thong Tee.

Court: Oh, why except for him?

Witness: Because he was a bachelor and my mother expected him to return the money to her when he died. The others have families.

...

Court: ... if your mother thought that her son, the bachelor, didn't need the money, because he had no family, why did she instruct that money be given to him? ... So he did not need the money ...

Witness : Yes.

Court: ... for himself. So she said he must hold the money in trust for her.

Witness: Yes.

Court: Correct. Why didn't she just keep the money instead of distributing it to him?

Witness: I don't know, your Honour. I don't know.

Court: Okay. Now when you send [*sic*] the cheque to your brother, Koh Thong Tee, what did you tell him the money was for?

Witness: No, your Honour. My mother was the one who signed the cheques and my mother gave him the ... cheque.

45 It can be seen from the above extract that the defendant had no personal knowledge of what happened when Mdm Tan gave Thong Tee \$600,000. He cannot confirm that when she did so, she told Thong Tee that the money was not a gift but was to be held in trust for her. So his evidence that this was her intention is, at the most, hearsay. Further, as the plaintiff submits, it is peculiar that Mdm Tan would give \$600,000 to three of her sons but request that the fourth recipient Thong Tee should hold the money in trust for her simply because he was a bachelor. It was also odd to expect Thong Tee to return the money to her at an unspecified time in the future without giving him any directions as to how the money was to be used. Mdm Tan had her own bank accounts, both sole and joint accounts, and she was obviously a woman who was used to handling money. If she wanted the money for herself, she could very well have kept it in her own bank accounts until she needed it. Giving it to Thong Tee on trust would only make sense if she wanted him to use it for a particular purpose, for example, an investment in a specified product so that he could handle that investment on her behalf. Simply transferring the money to him and telling him to hold it on trust for her does not make sense.

46 The defendant then tried to explain that Mdm Tan wanted the \$600,000 returned to her because she wanted to use it to meet her household expenses. He said that these expenses were her "personal expenses" incurred for marketing, taking care of the house and her medical needs and she also wanted to pay the expenses of Thong Tee and Thong Meng. This explanation, however, was not convincing. The evidence showed that Mdm Tan had been housing Thong Tee and Thong Meng (who were both bachelors) for many years and had been paying their expenses from the UOB joint account.

At first, this account was in the joint names of Mdm Tan and Koh Thong Chiang. After the latter's death in 2004, the defendant became the joint accountholder. In October 2005 when Mdm Tan gave away the \$2.4m that she had inherited from Koh Thong Chiang, she had more than \$130,000 in the UOB joint account. Over the next few years, the account balance never fell below that amount and, at times, was considerably more. Obviously, in October 2005, Mdm Tan would not have anticipated that she would need to ask for the return of the \$600,000 from Thong Tee in order to meet her expenses and those of her bachelor sons. I put the question directly to the defendant as to whether Mdm Tan needed \$600,000 from the estate of Thong Tee to meet her household expenses. The defendant answered "No".

47 It is my finding, on a balance of probabilities, that when Mdm Tan gave Thong Tee a cheque for \$600,000 in October 2005, she did so in order to make a gift to him of that money. She did not ask him to hold the money in trust for her and did not expect to get it back later.

48 I turn to the Trust Shares. First, there is a difficulty with the Table. The total amount of sales proceeds noted there is "\$2,640,050.40". This is wrong arithmetically. The total should be \$2,493,050.40. Secondly, the Table is incomplete in that a sale of 20,000 OCBC shares at \$7.75 each effected on 26 December 2006 is not shown there. This transaction was, however, added to the table set out in para 7(a) of the defence which gives particulars of the Trust Shares. The proceeds of this transaction amounted to \$155,000 and when this sum is added to \$2,493,050.40 you get \$2,648,050.40, not \$2,640,050.40.

49 Second, in his further and better particulars filed on 12 September 2011, the defendant had stated that Mdm Tan had told him that the Trust Shares were originally purchased by her a long time previously and at various times. He testified that she transferred the Trust Shares to Thong Tee on or before 1 January 1998 to hold on trust for her. On further questioning, he confirmed that he did not know exactly when the transfer took place and that the Table was based on a statement issued by the CDP entitled "Securities Account Movement (01Jan1998 To 28Feb2007)" regarding Thong Tee's shareholdings. This statement showed that as at 1 January 1998 Thong Tee held 171,120 OCBC shares in his CDP account. The defendant also said that the terms of the trust which Mdm Tan imparted to Thong Tee was that he was to sell the Trust Shares on her behalf and then deposit the sale proceeds into Thong Tee's own bank account with DBS Bank and hold them there in trust for her. The defendant was not present at any of the discussions between Mdm Tan and Thong Tee and his evidence on these terms was, at best, based on hearsay.

50 The plaintiff submits that there was no reason why Mdm Tan would have transferred shares to Thong Tee on trust for him to sell such shares for her. Mdm Tan owned a number of share counters and in 1998 she was still capable of trading shares in her own name. The plaintiff gave evidence that from time to time when she visited Mdm Tan after 1998, Mdm Tan received statements about her own share trades. As Mdm Tan was illiterate, the plaintiff had had to read the statements to her. Since Mdm Tan was a regular investor, there would have been no need for her to transfer the Trust Shares to Thong Tee for him to trade on her behalf.

51 Further, the defendant had not produced full documentation to show what share transactions Thong Tee had carried out himself before 1 January 1998. Thong Tee had been an investor in the stock market and the CDP statement showed that, on 1 January 1998, quite apart from the Trust Shares, Thong Tee owned shares in Rotary Engineering, F&N and Semcorp. The CDP statement described all these shares as having been "brought forward" which means that they existed in the account before that date. This indicates that Thong Tee had been engaged in share trading. The plaintiff submits that some of the OCBC shares which had been designated as Trust Shares could very well have been purchased by Thong Tee himself. As the executor of Thong Tee's estate, the

defendant should have been able to get statements showing the status of Thong Tee's account with CDP in the years prior to 1 January 1998. Such statements would have shown whether Mdm Tan did in fact transfer one complete lot of 171,120 OCBC shares to Thong Tee on a single occasion in order to establish the trust that the defendant relied on. The absence of such evidence, the plaintiff says, should be read against the defendant. I agree.

52 The defendant had maintained that Mdm Tan had provided him with the information pleaded in para 7 of the defence and stated in para 3 of the SD. The plaintiff submits that Mdm Tan could not have given all these details to the defendant as she was illiterate. There were no witnesses at the time when Mdm Tan had allegedly verbally created the trust over the Trust Shares and there was no documentary evidence to help her remember the terms of the trust and the details of the transactions. It is noteworthy that the defendant himself admitted that Mdm Tan could not remember how many shares she had transferred and entrusted to Thong Tee or the date or dates on which such transfers had been made. In the light of this evidence, all the assertions made in the cited paras of the defence and SD must have been based on information gathered by the defendant and his probate lawyer from the CDP itself. The only evidence that Mdm Tan was aware of this information is the fact that she signed the SD. How much she understood of it is, however, a moot point as I discuss below.

53 The plaintiff further submits that the defendant did not have any basis to state that the Trust Shares were all held on trust for Mdm Tan or were the only shares held on trust for her. This submission is supported by the following evidence:

Q: Dr Koh, you have no basis to state that the 171,120 OCBC shares remaining in [Thong Tee's] CDP account on 1st January 1998 were shares held on behalf of your mother?

A: No, I do not have any basis except that my mother had a lot of OCBC shares, were entrusted to Koh Thong Tee.

The defendant also had to concede that Mdm Tan had not given him the exact number of shares that she had entrusted to Thong Tee. All that she had told him was "a lot". She had not given him a number because she could not remember what it was as the transfer had taken many years previously. Under questioning, the defendant then decided that "a lot" could mean "couple of hundred thousand" and then he embroidered that answer further by saying:

Witness: She says she [sic] that she gave --- she entrusted Koh Thong Tee with the --- a lot of her OCBC shares which were then at least a couple of hundred thousand dollars --- hundred shares at least.

...

Witness: A couple of hundred thous --- two hundred thousand shares at least.

...

Q: She said 200,000 shares at least?

A: Yah, could be more, could be less, I don't know, something around there. I --- I don't know because she herself cannot remember the exact figure.

54 In the light of evidence such as the above, it is not possible for me to find that all the Trust Shares were in fact entrusted to Thong Tee by Mdm Tan. Further, there was no coherent reason

given for Mdm Tan to create a trust of shares simply so that Thong Tee could trade those shares and hold the proceeds on her behalf. Mdm Tan may have given Thong Tee shares or cash to keep as a fund to support his mentally unstable brother but it is difficult to believe she would have created a trust simply for share trading to be carried out by Thong Tee on her behalf. If, as the defendant asserted, the proceeds of sale of the Trust Shares were to be returned to Mdm Tan for her personal use and maintenance of the household, it would have made more sense for her to sell them herself as and when she needed funds and then receive the proceeds directly. Transferring the Trust Shares to Thong Tee meant incurring unnecessary stamp fees. If Mdm Tan wanted the money for her expenses, it also made no sense that she should ask Thong Tee to keep the sale proceeds in his account and allow him to re-invest them instead of remitting the money to her upon receipt.

55 The defendant was asked to explain why Mdm Tan would create a trust of which she herself was the beneficiary when she could have kept the shares herself. He gave the following explanation:

My mother has always believed in having shares and not selling those shares because she always [sic] that money get smaller and smaller. So she doesn't believe in selling the shares, getting the money and that money getting smaller. So she believed in continue to hold the shares, entrust the shares to [Thong Tee] to deal with the shares and not to sell the shares, convert to money, money gets smaller. And that is my mother's belief all the time.

56 In the light of that evidence, it is not surprising that the plaintiff submits that if indeed it was Mdm Tan's philosophy that buying and owning shares was a remedy for inflation and a reason to keep the shares rather than sell them, it did not make sense for her to create a trust whereunder Thong Tee was required to sell the Trust Shares. This was a fundamental flaw in the defendant's story. I agree.

57 My findings necessarily mean that I do not accept the SD as being truthful. It was based on information extracted from the CDP statement and not directly on what Mdm Tan remembered. Plainly her statement in para 4 thereof that Thong Tee was holding in his bank accounts \$2,640,050.40 being the sale proceeds of the Trust Shares was untrue, even if I disregard the inaccuracy of the Table itself (see [48] above). The Commissioner for Oaths ("the Commissioner") who witnessed the SD did not testify. He did not include an endorsement on the SD stating that it had been translated into Chinese (specifically Teochew) for Mdm Tan who did not speak or read English. In the absence of this statement and of any evidence from the Commissioner or any one else who was present as to what occurred before she signed it and how much of its contents was explained to her, I cannot tell whether Mdm Tan was fully aware of what she signed and signed it knowing that it was at least partially inaccurate or whether she did not understand it at all and simply signed it as a means to assist in recovery of money from Thong Tee's estate.

58 The defendant's evidence was that three persons attended Mdm Tan in relation to the signing of the SD: an interpreter, the defendant's probate lawyer and the Commissioner. However, although he was with Mdm Tan when these persons arrived, he says he did not know and could not hear what was spoken between all of them as he was not within hearing distance. The defendant was unable to throw any light on the circumstances surrounding the making of the SD and he appears to have distanced himself from its making.

59 The plaintiff submits that as the defendant refused to call any of persons who were present when Mdm Tan made the SD to testify on the preparation, making and interpretation of the SD, an adverse inference ought to be drawn to the effect that such evidence would have been adverse to the defendant's case. I agree that in the absence of evidence showing that Mdm Tan completely understood what she was signing and agreed that it was the truth, it is unsafe to rely on the SD as

supporting the defendant's case.

60 The plaintiff also submits that as trustee of Mdm Tan's estate, the defendant failed to determine the true nature and extent of the debt that was owed by Thong Tee's estate to her as he failed to ascertain whether and what shares ought to have formed part of the debt due. In this respect the plaintiff is referring to the shares listed in [29(c)] above. The plaintiff points out that the 15,000 OCBC shares referred to there were the shares remaining after 156,120 of the original Trust Shares had been sold. They were not purchased with the proceeds of the Trust Shares. Secondly, the other shares mentioned could have been bought with the proceeds of sale of Thong Tee's own portfolio rather than with the proceeds of the Trust Shares. The defendant admitted in evidence that his probate lawyer was trying:

to trace the other shares to make up for what he [*i e* Thong Tee] ... what, er, he could have got from the sale of the OCBC shares. If there would have been other shares, it will have been excluded if it exceeds that amount, you know, your Honour. It's just to make up for that amount, I presume. I don't know what was his --- my --- when he did the thing.

61 It really behoved the defendant as trustee of Thong Tee's estate to give a better explanation than that and to be familiar with exactly what had been received by Thong Tee from the sale of his own portfolio and how he had applied it so that the defendant could have differentiated those proceeds from the proceeds of sale of the Trust Shares. I agree that the defendant did not determine the true nature and extent of the debt which Thong Tee owed Mdm Tan.

62 The defendant's case is that what he recovered for Mdm Tan from Thong Tee's estate were the following:

- (a) \$2,640,050.40 being the proceeds of sale of the Trust Shares; and
- (b) \$600,000 being the moneys held on trust.

In fact, the plaintiff points out, the total sales proceeds set out in para 7(a) of the defence amount to \$2,648,050.40 in the aggregate rather than \$2,640,050.40 so there is a plain arithmetical error to begin with. Further, Thong Tee spent \$80,000 in July 2005 to acquire 16,000 shares consequent upon a rights issue entitling OCBC shareholders to buy one share at \$5 for every five shares held. This sum of \$80,000 should be deducted from the sales proceeds and when this is done, the total sales proceeds would be only \$2,568,050.40.

63 The plaintiff submits that in claiming both the money in Thong Tee's accounts with DBS Bank and all the shares that Thong Tee held at the time of his death, the defendant had failed to account for the cost of purchasing these shares. He had therefore double-counted. The plaintiff calculates the cost of these share purchases (based on the market prices at the time of purchase) as being \$1,263,800 and says this amount ought to have been deducted from the sales proceeds.

64 Based on the defendant's own case and accounts, the plaintiff submits that the value of the debt owed by Thong Tee's estate to Mdm Tan after the grant of probate would not have been \$3,240,050.40 as alleged by the defendant but would have been \$3,306,800.40. The plaintiff arrived at this figure of \$3,306,800.40 by the calculations shown below:

Description	Value (\$)
1. Proceeds from sale of 156,120 OCBC shares	2,568,050.40

2. (Less) Cost of purchasing further shares (Gross) 1,263,800.00

1,304,250.40

3. (Add) Proceeds from sale of SPH shares (Gross) 132,300.00

4. (Add) Proceeds from sale of OCBC shares 108,000.00
(Gross)

5. (Add) Value of 3,000 remaining OCBC shares

(at \$8.75 per share)* 26,250.00

6. (Add) Value of DBS shares* 432,000.00

7. (Add) Value of UOB shares* 412,000.00

8. (Add) Value of Venture shares* 292,000.00

9. (Add) Cheque given by Mdm Tan to [Thong Tee] __600,000.00

Total 3,306,800.40

*As valued by the Commissioner on 20 February 2008

65 The plaintiff's calculations show that even on his own case, the defendant has not calculated the debt owing to Mdm Tan correctly. In saying this, I am not accepting the plaintiff's calculations as showing what the true debt was or should have been. As stated above, there is insufficient evidence to establish that the sum of \$600,000 was transferred to Thong Tee on trust for Mdm Tan. All the circumstances of the transfer indicate that it was an outright gift. That \$600,000 therefore has to be deducted from the debt. As for the other component of the debt which was the Trust Shares, the evidence has not established that all of the Trust Shares in Thong Tee's CDP portfolio in January 1998 actually came from Mdm Tan. The defendant has to do two exercises: he must first trace the various transfers of shares from Mdm Tan to Thong Tee and secondly, he must trace how Thong Tee dealt with those shares and what became of the proceeds. It is clear from the CDP statement that on 1 January 1998, Thong Tee had shares other than the Trust Shares. It will have to be determined which part of his assets on his death emanated from the Trust Shares and which emanated from his own shares. The defendant did not do that exercise.

66 The other factual issue that arises is even if the money and shares recovered from Thong Tee's estate and transferred to Mdm Tan were actually properly so transferred, whether the same still formed part of her property when she died. The defendant says that nothing remained because it was either spent or given to him during Mdm Tan's lifetime. Has he proved this assertion?

67 First, dealing with the expenses relating to the administration of Thong Tee's estate, the value given to the estate by the Commissioner was \$4,008,784.50. On the basis that, as the defendant calculated, Thong Tee owed Mdm Tan \$3,240,050.40 there would, at least notionally, have been \$768,734.10 remaining to pay the other debts and testamentary bequests. In these circumstances, the defendant's first duty was to realise all the assets and then pay off the creditors (including Mdm Tan) and funeral expenses and then, if the balance in hand was insufficient to fund the specific bequests in full, to distribute it to the trusts for these beneficiaries on a pro-rata basis.

68 The defendant, however, did not sell all the assets. Instead, in early April 2008, soon after probate was issued for Thong Tee's estate, he transferred to himself *in specie* a substantial portion of

the shares remaining in Thong Tee's CDP account, viz, 20,000 DBS shares, 3,000 OCBC shares, 20,000 UOB shares and 20,000 Venture shares. His evidence was that he did this because his mother gave him those shares *inter vivos*. Apart from the defendant's bare assertion, there was no evidence supporting such a gift. It was also a breach of his duty as Thong Tee's executor to take over the shares in that way no matter what Mdm Tan said unless he had established independently that they represented the Trust Shares alone and had not been funded by Thong Tee's own money. He subsequently sold 30,000 SPH shares and 12,000 OCBC shares and said that the sale proceeds of \$239,535.06 were deposited into the UOB joint account. However, a scrutiny of the passbook for that account does not show this deposit. There is no evidence as to where that money actually went.

69 The defendant said that Mdm Tan also gave him the cash that was recovered from Thong Tee's estate. It turned out, when the defendant was being pressed on how much money his mother had given him altogether, that the money had been put into the UOB joint account. When he was asked how that constituted a gift to him, he replied that it was "a gift in the sense that ... in the will she said when she dies, all the money will go to the joint accountholder". He then confirmed that he considered all money from Thong Tee's estate that was put into the UOB joint account, to be a gift to him. He estimated this at being about \$1.2m in total.

70 The defendant's assertion that he considered all money put into the UOB joint account to be a gift to him was at odds with other evidence that he gave. He was asked about the specific bequests of \$100,000 and \$1m for the upkeep of Thong Hong and Thong Meng respectively. He said that although the value of the estate was not sufficient to establish these funds in full, he paid the \$1m meant for Thong Hong's upkeep to the UOB joint account. He was asked how he was able to do this when the balance of the estate was only worth about \$700,000. His response was that his mother had told him to take out the cash first in order to take care of her two sons. He had achieved this aim by transferring the sums of \$700,000 and \$520,000 from Thong Tee's estate into the UOB joint account on 9 May 2008 and 10 September 2008 respectively. After giving evidence that:

"my mother told me to take out the money for me first to take care of their [*sic*] two children. My mother herself was the one told me to take out the money first to take care of them."

he said a few minutes later:

She said --- can I clarify all over again? She said that "whatever money is recovered – cash from Koh Thong Tee's estate is to be put into joint account; and when I die, the joint account for them to take and this money will be for you."

71 So, did Mdm Tan give the money to the defendant outright or did she ask him to put it aside in the UOB joint account so that he could apply it to the upkeep of Thong Meng and Thong Hong as Thong Tee had wished? The defendant's evidence is hopelessly confused. In any event, the defendant undermined his own case that the cash put into the UOB joint account was an *inter vivos* gift to him by saying that he knew he would get it under his mother's will because of the provision that upon her death, all money in any joint account would go to the joint accountholder. That concession implies that Mdm Tan never indicated to the defendant that he was to have the money during her lifetime. She retained the right to spend it or make an *inter vivos* gift of it to anyone else whom she chose to give it to.

72 There is perhaps a case for saying that if Mdm Tan was willing to fund the trusts that Thong Tee's will established for Thong Meng and Thong Hong out of the moneys she recovered from his estate, the balance of the estate was available for the residuary legatees and nothing needed to be kept aside for Thong Meng and Thong Hong. The defendant does not appear to have considered this.

73 The plaintiff makes various points on the defendant's account of the expenses listed in Annexure 1. She submits that many of these expenses could not have been incurred by Mdm Tan or attributed to her and the money that was repaid to Mdm Tan by Thong Tee's estate should certainly not have been disbursed in this manner. On the last point, I disagree to an extent. If Mdm Tan incurred expenses after Thong Tee died, she was at liberty to use any part of her funds to pay the same. She did not have to simply use the money she had in hand before she recovered the debt Thong Tee owed her. However, and here is where I agree with the plaintiff, once she recovered money from Thong Tee, it became part of her general funds and it is odd for her daily household expenses, hospitalisation and funeral expenses now to be specifically attributed as "Expenses related to Koh Thong Tee's (KTT) Assets" as was done in Annexure 1. Apart from items 1, 2 and 3 under the heading "Expenses related to Koh Thong Tee's (KTT) Assets" in Annexure 1, none of the items were expenses that actually related to Thong Tee's estate.

74 The same point can be made in respect of item 8 on the list which is "Bethesda Pasir Ris Church \$70,000.00". The defendant pleaded that before Mdm Tan passed away she told the defendant to donate \$70,000 to the church which would be appointed to conduct her funeral service. The service was conducted by the Bethesda Pasir Ris Church and, in May 2010, it received the \$70,000 donation. There is no good reason why that donation should be specifically allocated to the funds recovered from Thong Tee's estate. It seems to me that the defendant drew up Annexure 1 in an attempt to justify his assertion that all moneys recovered from Thong Tee's estate had been spent. In fact, the \$70,000 was spent after Mdm Tan's death and therefore should have been accounted for as part of her assets upon her death.

75 Secondly, the Commissioner issued a certificate for the release of \$170,000 from Thong Tee's bank account for the payment of estate duty. The amount of estate duty payable was \$140,413 and therefore the balance of \$29,587 was returned to the defendant as executor of the estate. This amount has not been reflected in the bank statements of the account opened for Thong Tee's estate ("TT's estate account"). Nor was it shown in the passbooks of the UOB joint account. It has not been accounted for.

76 Thirdly, the plaintiff takes issue with various small discrepancies relating to funeral expenses, pest control expenses and insurance costs for Mdm Tan. Further, the defendant had not provided documentary support for his assertions that he had paid Thong Tee's income tax, the cost of the SD, Mdm Tan's household expenses and hospitalisation bills. All in all, the accounts do not seem to have been fully and accurately drawn up.

77 Fourthly, one of the items that appeared in Annexure 1 as expenses of Thong Tee's estate was the sum of \$150,000 described as "Gift to buy car". In a pleading, the defendant stated the following:

When the Defendant informed [Mdm Tan] that the 2 churches had agreed to the fact that there was no residuary estate to be distributed to them, [Mdm Tan] instructed the Defendant to donate a sum of \$100,000.00 each to the 2 churches, and to give a sum of \$500,000.00 to the Defendant. The Defendant told [Mdm Tan] that he only wanted a sum of \$150,000.00 to buy a new car. [Mdm Tan] agreed to give the Defendant a sum of \$150,000.00 to buy a new car instead of \$500,000.00. The Defendant then went to Cycle & Carriage and told the sales executive that he wanted to buy a C200 Mercedes Benz. The Defendant also told the sales executive that his mother was paying for the car.

When the defendant was asked about this in court and pressed for documentary evidence of his car purchase, he said that he had not actually bought a car for himself but had bought one for his daughter. He then said that he did not have the log book or any documents for the car and that it

was registered in the name of his daughter. Subsequently, between the first and second tranche of the trial, the defendant produced the purchase documents establishing that the car had been purchased in his daughter's name. I find it odd that the defendant did not plead this from the beginning and that he had to be pressed in court for the car's papers before he came clean as to what had actually occurred.

78 It is also noteworthy that the defendant was reluctant to make full discovery of relevant bank statements. He was ordered in Summons 5787 of 2011 to produce certain documents including bank statements for Thong Tee's DBS autosave account from January 1998 to its closure in 2007. At the start of the trial, the defendant had only produced statements for the months of December 2006 and January 2007 and a summary statement from March 2007. He maintained that he did not have the other bank statements issued during the relevant period. He agreed, during cross-examination, that he could have written to the bank to obtain these statements but was not able to explain why he had not taken this simple course of action to comply with the court order. He was also asked about the statements for TT's estate account. He said that he did not file these statements because as soon as money recovered for Thong Tee's estate was put into the estate account, it was taken out again and put into the UOB joint account. He agreed that even though the money went in and out so quickly, there would have been bank statements issued from TT's estate account. Yet, these were not produced. In the light of the defendant's refusal to give full disclosure of documents that are plainly relevant and which are in his power to obtain as he is the sole executor and trustee of Thong Tee's estate, I can only infer that such documents contain material that is adverse to his case.

79 I conclude that the defendant's evidence on how he administered both Thong Tee's and Mdm Tan's estates is not reliable. His accounts of the gifts given to him are suspect. I am not satisfied that the moneys which were recovered from Thong Tee's estate were properly recovered or that such moneys as were recovered have been properly accounted for as part of Mdm Tan's estate. I do not accept that Mdm Tan made *inter vivos* gifts of shares and cash to the defendant. The defendant has to draw up proper accounts and account adequately to the plaintiff for his administration of Mdm Tan's estate. The defendant has not been able to prove his defence on a balance of probabilities. There is more than sufficient evidence showing that the defendant was in wilful default of his duties as trustee for Mdm Tan's estate.

Conclusion

80 For the reasons given above, I make the following orders:

- (a) The defendant shall provide a full and complete account of his administration of the estate of Mdm Tan Tian Kwee including an account of what is due and owing to the estate of Mdm Tan by the estate of Koh Thong Tee.
- (b) The account of the estate of Mdm Tan Tian Kwee shall be taken on the footing of wilful default on the part of the defendant.
- (c) The defendant shall pay the plaintiff all such sums of money as may be found on the taking of such account to be due to the plaintiff under the terms of the will of Mdm Tan Tian Kwee.
- (d) There shall be liberty to apply in relation to the orders made above.
- (e) The defendant shall personally pay the plaintiff's costs of this action and shall not be entitled to recover them from the estate of Mdm Tan Tian Kwee.