Wee Chiaw Sek Anna *v* Ng Li-Ann Genevieve (sole executrix of the estate of Ng Hock Seng, deceased) and another
[2012] SGHC 197

Case Number : Suit No 1002 of 2009

Decision Date : 28 September 2012

Tribunal/Court : High Court

Coram : Lai Siu Chiu J

Counsel Name(s) : Indranee Rajah SC, Alex Toh and Angeline Tan (Drew & Napier LLC) for the plaintiff; Deborah Barker SC, Leon Le Lyn and Ushan Premaratne (KhattarWong LLP) for the first defendant; Edwin Tong, Tham Hsu Hsien and Nakul Dewan (Allen & Gledhill LLP) for the second defendant.

Parties : Wee Chiaw Sek Anna — Ng Li-Ann Genevieve (sole executrix of the estate of Ng Hock Seng, deceased) and another

Family Law – matrimonial assets – division

Equity – defences – laches

Restitution – unjust enrichment

Trusts – Constructive trusts

28 September 2012 Judgment reserved.

Lai Siu Chiu J:

1 This was an unusual case. An ex-wife Anna Wee Chiaw Sek ("the plaintiff") sued the estate of her former husband Ng Hock Seng ("the deceased") for the fraudulent misrepresentations he had allegedly made to her before they were divorced. The executrix of the deceased's estate is Ng Li-Ann Genevieve ("the first defendant") who is the daughter of the deceased by his first marriage. The plaintiff also sued BNP Paribas Jersey Trust Corporation Limited ("the second defendant") in its capacity as trustee of two trusts set up by the deceased during his lifetime. At stake in these proceedings are assets worth approximately S$28.8m that were amassed by the deceased during the course of his marriage to the plaintiff, which existence was unknown to her until after his demise (on 15 June 2004). It was the plaintiff's case that the deceased deceived her into thinking he was a man of little or no means and hence she did not apply for a division of matrimonial assets in 1999-2000 during the parties' divorce proceedings.

The facts

2 The plaintiff is an East Malaysian and comes from a wealthy Sarawak family; she is the niece of a prominent Singapore banker. The plaintiff met the deceased in 1986 and married him on 19 December 1988 in Singapore. The couple had two children, a son, Joshua Ng Wei Huong ("Joshua") born on 7 February 1989 and a daughter, Azura Ng Su-Ann ("Azura") born on 17 October 1990, now aged 23 and 21 respectively (collectively "the children"). Like the deceased, the plaintiff has a child (a son) named Shah Nassar from a previous marriage.

3 The deceased was a Singaporean. After the parties' marriage, they moved into a flat belonging to the plaintiff's family located at Trendale Tower Singapore ("the Trendale flat"). The deceased was then running his own company called Casablanca Pte Ltd ("Casablanca") which was in the business of distributing beauty products in Singapore and Malaysia. The deceased had a retail outlet in Singapore for his beauty products. However, he was not very successful in his business ventures. The deceased had difficulties paying the salaries of Casablanca's Malaysian employees and had to borrow from the plaintiff to meet his liabilities. Apart from the plaintiff's family members, the deceased apparently also borrowed money from his brother Ng Hock Leng ("the deceased's brother").

4 The plaintiff's father subsequently transferred the Trendale flat into the joint names of the deceased and the plaintiff on condition that the deceased took over servicing of the mortgage loan of the property which outstanding sum then approximated $600,000. The deceased encountered difficulties in keeping up with the mortgage payments shortly after the transfer of title. He and the plaintiff then decided to and did relocate to Kuching, Sarawak to live with the plaintiff's parents.

5 The couple lived with the plaintiff's parents from 1990 to 1993. In November 1992, the plaintiff purchased a house at Jalan Stampin, Sarawak ("the plaintiff's house") into which the couple moved in March/April 1993. Although he indicated he would, the deceased did not pay the mortgage instalments on the plaintiff's house after he had made the initial 10% deposit, again due to his financial difficulties.

6 The deceased was diagnosed with tongue cancer while the couple were still living with the plaintiff's parents. Instead of conventional treatment, the deceased opted for traditional Chinese medical treatment. To that end, the couple made several trips to China between 1993 and 1995. The plaintiff paid for the deceased's treatment and their trips.

7 By 1990, the plaintiff had started her own business called Equipage Sdn Bhd ("Equipage") which acted as a factory representative for an Australian company called Sebel which undertook turnkey projects for the supply and installation of institutional equipment and auditorium seats. Amongst the clients of Equipage were various statutory bodies as well as the Sarawak State government.

8 The plaintiff claimed that for the rest of their married life, she was the main provider for the family. She not only paid the family's living and travel expenses but also the deceased's medical expenses. She was also the children's primary care-giver. Further, she gave the deceased a supplementary credit card (as the deceased was unable to obtain credit cards due to his lack of income) and paid the charges that he incurred thereon. When the deceased adopted a macrobiotic diet after being diagnosed with cancer, the plaintiff also paid for the organic products that the deceased imported from Singapore as part of his diet. The plaintiff bore the travelling expenses that the deceased incurred for his trips to Brunei, Hong Kong, Germany and China to explore business opportunities. She also paid (through Equipage) for the first defendant's trips as well as those of the deceased's brother and mother when they came from Singapore to visit him.

9 During the period that the deceased was ill, he was only engaged in sporadic employment. The deceased had a room at the plaintiff's office where he brokered deals and handled business proposals. Apart from introducing him to people in business circles, the plaintiff played no role in the deceased's business affairs.

10 The plaintiff alleged that because of his violent disposition, the deceased frequently abused her verbally and occasionally physically as well. His behaviour together with his frequent absences from home took a toll on the parties' marriage. This eventually led to the plaintiff's filing of divorce proceedings in October 1998 on the ground that the marriage had broken down irretrievably.

11 Prior to her filing Divorce Petition No 4428 of 1998 ("the divorce proceedings"), the deceased had moved out of the plaintiff's house to a flat. However, he continued to come and go as he pleased at the plaintiff's house until an incident on 30 November 1998 when he allegedly turned violent. That was the proverbial last straw that broke the camel's back where the plaintiff was concerned. Following that incident, the parties entered into a separation agreement on or about 7 December 1998 ("the separation agreement") to regulate their relationship pending the divorce proceedings and to prevent the deceased from coming to the plaintiff's house without her consent.

12 Under the terms of the separation agreement, the plaintiff agreed to support herself (as the deceased said he had no means to do so) but he agreed to support the children and that the plaintiff would have their sole custody, care and control but with unlimited access to the deceased.

13 A supplementary memorandum dated 7 December 1998 ('the supplementary agreement") was added to the separation agreement. By the supplementary agreement, the deceased acknowledged he was indebted to the plaintiff in the sum of RM500,000 ("the agreed debt") for all the expenses that he had incurred during the marriage but which were borne by the plaintiff. The deceased further acknowledged that he was indebted to the plaintiff's father, brother and the plaintiff's cousin in the total sum of RM480,000. The deceased further agreed to partially discharge the agreed debt by paying the plaintiff RM100,000 in five equal monthly instalments commencing on 7 January 1999. According to the plaintiff, the deceased never paid but she did not press him for payment. She said she did not have the heart to do so because of the deceased's poor health. The plaintiff took steps to recover the agreed debt only after the demise of the deceased (see [44] below).

14 In the course of the divorce proceedings, the plaintiff sought (which the deceased resisted), maintenance for the children at RM3,750 per child per month from him. In his affidavit of means, the deceased deposed he was in no position to pay any maintenance as he was unemployed due to ill health and age and that he was supported by his siblings, friends and well wishers. He offered to pay RM1,200 per child per month instead as maintenance.

15 On 27 April 1999, the District Court ("the court") granted the plaintiff a decree *nisi*. On 28 February 2000, the court *inter alia* awarded the plaintiff sole custody, care and control of the children. The deceased was ordered to pay RM3,750 per child per month for the children's maintenance with effect from 1 February 2000, that he pay for their educational expenses up to tertiary level and that he procure medical insurance policies for them. It was the plaintiff's case that the deceased did not pay the maintenance ordered either promptly or fully.

16 On 6 October 2000, the decree *nisi* was made absolute. Believing that the deceased had no financial means to do so, the plaintiff did not apply for maintenance for herself at the determination of ancillaries for the divorce proceedings. Neither did she apply for a division of matrimonial assets as the deceased had consistently represented to her that he had little or no assets.

17 It was the plaintiff's case that while he was alive, the deceased had actively concealed his true financial position from her. Unbeknownst to her, the deceased had accumulated assets worth over US$20m during his lifetime which assets he had settled into trusts and offshore companies. Indeed, one such trust was established on 23 April 1999, four days before the decree *nisi* was granted.

18 After his demise, the plaintiff discovered that in his lifetime, the deceased had secured lucrative contracts from the Sarawak State government on behalf of two companies, one of which was Meissner & Wurst Sdn Bhd ("M&W"), part of the Meissner & Wurst group ("M&W group") of companies from Austria. The M&W group *inter alia* is involved in engineering, construction and project management as well as in chemicals and high technology infrastructure.

19 The second company that the deceased was involved in was Interconnect Sdn Bhd ("Interconnect") which was a joint venture between Interconnect Technology Incorporated (an American contract manufacturer in electronics) and the Sarawak Economic Development Corporation. Interconnect had a semiconductor facility and foundry in Kuching. Interconnect was subsequently renamed First Silicon (Malaysia) Sdn Bhd ("First Silicon").

20 The plaintiff asserted that at a dinner, her brother had introduced her to the managing-directors of M&W and Interconnect. In turn she had introduced the two gentlemen to the deceased in late 1996 or early 1997.

21 The plaintiff was unaware that the deceased had (before his demise) entered into business deals with both M&W and Interconnect consequent on her introductions. She subsequently discovered from the deceased's documents that he had entered into an agreement dated 24 April 1998 [note: 1] with M&W ("the first MW agreement") to act as the company's strategic business adviser in relation to the first silicon wafer fabrication project ("the project") at Kuching. M&W agreed to pay the deceased US$25m upon the signing of the contract between M&W and First Silicon for the project.

22 On or about 1 July 1998, the deceased entered into another agreement [note: 2] with M&W ("the second M&W agreement") again to act as its strategic business adviser to assist M&W to obtain a preferred contract price rate with favourable payment terms for the project. In consideration of the deceased's services, M&W agreed to pay the deceased RM900,000.

23 According to a press report in the New Straits Times dated 31 March 1999 [note: 3], M&W and M&W Zander Engineering Facility ("M&W Zander") signed contracts with First Silicon on 30 March 1999 ("the First Silicon contracts"). The actual contracts were not produced in court; presumably, the deceased was not given copies.

24 During his lifetime, the deceased allegedly kept his dealings with M&W and First Silicon secret from the plaintiff. The plaintiff only learnt of the existence of the two agreements in the process of discovery from the first defendant after she had commenced these proceedings. The payments received by the deceased from M&W were channelled to a British Virgin Islands ("BVI") company called Armanee Assets Limited ('Armanee") which was incorporated on 28 October 1998. The deceased procured two other BVI companies *viz* Prominent Market Investments Limited ("Prominent") incorporated on 10 March 1999 and South Sea International Ltd ("South Sea") incorporated on 8 June 1993, as vehicles for his personal investments. In addition, the deceased had two other offshore companies for his dealings and or investments *viz* Springdale Limited ("Springdale") and Woodsvale Ltd ("Woodsvale"). Woodsvale and Springdale were established under the Merrill Lynch Trust (see [30] below).

25 The deceased had first approached Paribas Asset Management Group Asia ("PAMGA") in December 1998 and became its client soon after according to a client acceptance form of PAMGA dated 4 January 1999 [note: 4]. It was through PAMGA that the deceased acquired Armanee. According to a declaration of trust dated 7 January 1999 made by a company called Emmanuel Services Limited ("Emmanuel"), the deceased was the beneficial owner of all the shares in Armanee. Subsequently, by another declaration of trust dated 23 April 1999, Emmanuel declared that it held the shares in Armanee on behalf of Banque Paribas International Trustee Limited ("BPITL") instead of the deceased.

26 By a discretionary trust deed dated 23 April 1999 made between the deceased as settler and

PAGMA as trustee, the first trust (under BVI law) was established (hereinafter referred to as "the 1999 BNP Trust"). The shares in Armanee and Prominent were settled into the 1999 BNP Trust. The beneficiaries of the 1999 BNP Trust were the children and the first defendant. The plaintiff was specifically named as an Excluded Person under Schedule 6 pursuant to cl 16 of the document.

27 Clause 16 of the 1999 BNP Trust states:

> Excluded Persons
>
> a No Excluded Person may benefit under these trusts and the Trustee shall not exercise any of its powers hereunder so as to confer any benefit upon any Excluded Person.
>
> b No Excluded Person may be a beneficiary or (except in the case of a person who is an Excluded Person only because he is a Protector)… a Trustee hereunder.

28 On 14 June 2002 [note: 5] the deceased established another trust this time in the Jersey Islands with the second defendant as the trustee ("the 2002 BNP Trust") and with the first defendant as the beneficiary. The shares in South Sea and thereby its assets were settled into the 2002 BNP Trust. The plaintiff asserted that as the assets of South Sea were acquired during her marriage to the deceased, she should have been entitled to a division thereof had it not been for the deceased's concealment of the same from her.

29 On 27 April 2004, the deceased executed his Last Will and Testament [note: 6]. The deceased appointed the first defendant as his sole executrix and made her the sole beneficiary of all his immovable and personal properties in Singapore.

30 On 28 April 2004 [note: 7], the deceased set up a third trust ("the ML Trust") (called the "Hock Trust" by the plaintiff) with Merrill Lynch Bank and Trust Company Cayman) Limited ("Merrill Lynch") as the trustee. The four beneficiaries of the ML Trust were the deceased, the children and Shah Nassar (the plaintiff's son see [2]). The assets held by the ML Trust were essentially those of Woodsvale.

31 The plaintiff alleged that the three trusts were a sham as assets/monies settled in the trusts were utilised by the deceased for his own use/investments during his lifetime. The deceased had during his lifetime taken various interest-free loans from Armanee totalling about S$1.61m. Further, the deceased borrowed S$3m from BNP Paribas Merchant Banking Asia ("BPMBA") on or about 29 June 2001 [note: 8] using the assets of Armanee as collateral. On the same day, Armanee borrowed US$6m from BPMBA for investment purposes which loan was secured by a pledge over Armanee's cash with BPMBA and its affiliates and guaranteed by BPITL. On the same day too, Prominent borrowed US$1m or S$5m (whichever was lower) from BPMBA to purchase No. 526 East Coast Road #13-03, Ocean Park, Colisa Block, Singapore 458968 ("the Ocean Park property"). Prominent took a second loan from BPMBA in June/July 2002 of another US$1m. Further, on the instructions of the deceased, BPITL transferred US$2m to Springdale's account with Merrill Lynch from the 1999 BNP Trust.

32 Prior to his demise in June 2004, the deceased was a tenant of the Ocean Park property pursuant to a tenancy agreement he had made with Prominent dated 1 July 2001 wherein he agreed to pay a monthly rent of S$2,000.00. The rent was never paid during the lifetime of the deceased and by the time of his demise, the rent arrears totalled S$71,000 which was equivalent to almost 36 months' rent. The second defendant did not press the deceased for payment of rent while he was alive. It was only in July 2005 that Prominent formally requested payment of the rent arrears from the

first defendant as the executrix of his estate.

33 After BNP Paribas Private Bank ("BNP Paribas") opened a Singapore branch in April 2002, and upon being informed that BPMBA would cease operations, the deceased transferred all the accounts and monies of Armanee and Prominent with BPMBA to BNP Paribas.

34 By a deed dated 12 September 2003, the second defendant replaced BPITL as trustees of the 1999 BNP Trust. At the request of the deceased, the second defendant passed a resolution on 14 October 2003 to make a capital distribution of US$300,000 to the first defendant from the 1999 BNP Trust.

35 According to the plaintiff, she was unaware that the deceased had invested in various properties in Singapore and Canada during his lifetime. Besides the Ocean Park property, there was another Singapore property situated at No 3, Tay Lian Teck Drive, Singapore ("the TLT property") purchased by the deceased. He also owned an Indonesian property.

36 The plaintiff complained that Armanee's directors had to write off as irrecoverable in August 2008, a loan of S$57,228.20 that had been extended to the deceased during his lifetime. This was after the first defendant's solicitors wrote to Armanee on 16 July 2008 to say that the administration of the decease's estate had been completed and the aforesaid loan was not acknowledged by the estate.

37 On or about 30 September 2004, the second defendant as trustee of the 2002 BNP Trust resolved to provide the first defendant with a quarterly allowance of US$12,500 with effect from the date of demise of the deceased. The children were not given a similar provision.

38 In August 2004, the plaintiff learnt for the first time that the deceased had established several trusts with the second defendant and with Merrill Lynch.

39 On 4 August 2004, the plaintiff was informed by Merrill Lynch of the ML Trust. She then received a letter dated 9 August 2004 from Merrill Lynch stating that the children were the beneficiaries of the ML Trust and as their legal guardian, she could request funds from the ML Trust for their living, educational, insurance and medical expenses. Later, she learnt that the value of the ML Trust was US$2.7m.

40 On 10 August 2004, the plaintiff was informed by Sharon Loo ('Sharon") (who had been the deceased's relationship manager), of the 1999 BNP Trust but no details were provided when she requested. Subsequently, on 3 September 2004, the plaintiff received an email from Sharon forwarding a letter from the trust manager and trust administrator of the 1999 BNP Trust informing her that the children were beneficiaries of the same and that the trust comprised of liquid assets as well as the Ocean Park property. The plaintiff was not satisfied with the answers to her inquiries.

41 It was only in October 2004 that the plaintiff received a copy of the 1999 BNP Trust from the second defendant. This was followed by a statement on 4 December 2004 from David Shute ("Shute"), a senior trust manager of the second defendant showing the value of the 1999 BNP Trust as US$7.2m [note: 9]. On 7 November 2005 after repeated requests and numerous exchange of correspondence, the plaintiff finally received for the first time, the financial statements of the 1999 BNP Trust from the second defendant.

42 Between December 2004 and December 2005, the plaintiff:

(a) discovered that Joshua was a beneficiary of the TLT property but that it had been sold for S$1.5m without consulting her as his guardian;

(b) commenced an action to recover the agreed debt that the deceased owed her;

(c) discovered that Michael Yu ("Yu"), the first defendant's stepfather had been appointed as the Protector under the 1999 BNP Trust and

(d) discovered that the Commissioner of Estate Duties had valued the deceased's estate at S$30.7m (which was subsequently reduced to S$28.8m).

43 The plaintiff said she had personally (as well as through her solicitors) written to the first defendant and then to the latter's solicitors to request that her claims (for maintenance and the agreed debt) should be taken into account in the grant of probate of the deceased's estate. There was no response to her requests.

44 In March 2005, the plaintiff commenced proceedings in the Subordinate Courts against the first defendant as executrix of the deceased's estate to recover the agreed debt (at [13]). Her claim was eventually settled out of court at RM350,000.

45 In June 2005, Shute flew to Kuching and met up with the plaintiff and the children. They were told of Yu's appointment as Protector as well as the assets and terms of the 1999 BNP Trust. The children were upset as they did not think Yu would act in their best interests being a virtual stranger to them. The plaintiff expressed her disagreement with Yu's appointment. (Yu had been appointed Protector of the 2002 BNP Trust and the Merrill Lynch Trust by the deceased).

46 By a letter dated 27 March 2006, the plaintiff's (former) solicitors were informed by the second defendant's solicitors that between 8 July 1999 and 5 May 2001, the deceased had settled US$10,409,320.61 into the 1999 BNP Trust on six occasions. Save for two sums of US$24,552 and US$2m that the deceased put into the said trust on 5 May 2001 and 20 September 2001 respectively, the other four settlements were made before the decree *nisi* was made absolute. On 27 March 2006, the second defendant's solicitors wrote to the plaintiff to formally inform her of the two BNP trusts.

47 The plaintiff alleged that on or about 29 July 2005, the Board of Directors of Prominent and Armanee had resolved to destroy all previous annual accounts of both companies on the basis of inaccuracies and redraft new profit and loss accounts and balance sheets as replacements. She surmised that since the destruction took place after she had requested Shute for copies of the financial statements of the 1999 BNP Trust, the destruction was suspicious and irregular. Shute had agreed to and did send the redrafted accounts to her on 17 October 2005 (after the previous accounting records had been destroyed).

48 As an aside, I should point out that the second defendant had commenced proceedings (known as *Beddoes* proceedings) in the Jersey courts in February 2010 on the 2002 BNP Trust. The second defendant applied for directions as to whether it should defend this suit. The Jersey courts directed that the second defendant was obliged to submit to the jurisdiction of the Singapore courts and to actively defend this suit until further directions. The second defendant's solicitors informed the plaintiff of the directions of the Jersey courts in May-June 2010. Subsequently, the second defendant reverted to the Jersey courts for further directions. On 12 September 2011, the Jersey courts *inter alia* ordered that the second defendant should continue to contest the plaintiff's claims but not the claim made against the deceased for fraudulent misrepresentation.

The pleadings

The pleadings

49 The plaintiff commenced this suit on 26 November 2009. In her 41 page statement of claim (amendment no. 2), the plaintiff detailed *in extenso* the facts set out earlier in this judgment. The plaintiff alleged that the deceased had substantial assets at the time he filed his affidavit of means on 13 January 2000 in the divorce proceedings. Yet, he had declared he had no financial means. She accused the deceased of deceit and fraudulent misrepresentation which induced her to enter into the separation agreement wherein she agreed to support and maintain herself.

50 As a further result of the deceased's conduct, the plaintiff alleged that she did not make a claim under s 112 of the Women's Charter (Cap 353, 2009 Rev Ed) ("the Women's Charter") on the deceased's assets in the division of matrimonial assets at the time ancillary matters were determined in the divorce proceedings. The plaintiff asserted that the deceased's assets had their genesis in the M&W agreements which the deceased entered into while she was still married to him and which assets the deceased settled into the 1999 and 2002 BNP Trusts before the decree *nisi* was made absolute. In particular, the plaintiff asserted that between 8 July and 5 November 1999, US$18.75m was transferred from the Commerzbank account of M&W Zander to the Hong Kong account of Armanee with BNP.

51 The plaintiff claimed against the first defendant as the executrix of his estate, damages for the fraud perpetrated on her by the deceased.

52 As for the second defendant, the plaintiff pleaded (see para 39(b)(iii) of her statement of claim (amendment no.2)) that no allegations of fraud and/or wrongdoing were levelled against the former. She considered the second defendant a nominal defendant and her claim against it as trustee was only for the imposition of a remedial constructive trust over the assets of the 1999 and 2002 BNP Trusts as well as a claim in restitution in respect of those assets. She alleged (at para 35(f) of her statement of claim (amendment no. 2)) that it would be "unconscionable or unjust of the second defendant to retain that part of the assets of the BNP Trusts which the plaintiff would have been entitled to receive had she applied for a division of matrimonial assets pursuant to s 112 of the Women's Charter".

53 The plaintiff pleaded in the alternative that "the BNP Trusts were unjustly enriched at the expense of the plaintiff in respect of that part of assets of the BNP Trusts which the plaintiff would have been entitled to receive had she applied for a division of matrimonial assets pursuant to s 112 of the Women's Charter". (It will be seen later that the plaintiff drastically changed her case against the second defendant in her closing submissions.)

54 The plaintiff criticised the second defendant as well as Merrill Lynch for their refusal to accede to her request for particulars of the 2002 BNP Trust and the ML Trust respectively. She further criticised the second defendant (in her pleadings and affidavit of evidence-in-chief ["AEIC"]) for not adopting a neutral stand in these proceedings as which result, unnecessary legal costs had been incurred. (In para 66 of her AEIC, the plaintiff deposed she had discussed the issues with her children (who were independently advised by local and Jersey lawyers) and they wanted her to have what was rightfully hers). The plaintiff prayed that all costs incurred and payable by the second defendant in this suit including costs to the plaintiff and/or the first defendant should be borne by the second defendant personally.

55 In her defence (amendment no. 3), the first defendant relied on the separation agreement to contend that the marriage between the plaintiff and the deceased had broken down prior to September 1995 when the parties agreed to live apart. The first defendant alleged that the marriage broke down because the plaintiff had an affair with another man (whom she identified) while still

married to the deceased. She disputed the plaintiff's contention that the plaintiff was the main financial provider for the family. The first defendant asserted that by the separation agreement, the plaintiff and the deceased entered into a settlement for valuable consideration of issues outstanding between them with respect to the then pending divorce proceedings.

56 The first defendant denied that the deceased made any fraudulent representations to the plaintiff as alleged or at all. She denied that the plaintiff was induced to enter into the separation agreement by the deceased's fraudulent representations pointing out that the deceased's affidavit of means was filed after the separation agreement was signed (on 7 December 1998). She contended that the plaintiff was aware of the deceased's business dealings and financial situation at all times.

57 The first defendant averred that it was with the benefit of legal advice that the plaintiff had decided not to apply for a division of matrimonial assets, so as to avoid disclosing her own assets to the deceased and to the court.

58 The first defendant asserted that the plaintiff was aware of the trusts by latest January 2004 as, prior to his demise, the deceased had informed the plaintiff of the trusts he had set up for the benefit of the children. The first defendant referred to a meeting on 7 November 2003 between the deceased and Sharon that was attended by Joshua at which there was mention that the value of assets settled into the 1999 BNP Trust was of the order of US$9m with loans of US$5.5m.

59 The first defendant pointed out that the ML Trust was set up long after the divorce proceedings between the plaintiff and the deceased while the monies he settled into the 1999 and 2002 BNP Trusts were after the date of the decree *nisi*. The first defendant averred that monies were remitted by M&W to the deceased in 1999 not 1998 *viz* on 8 July 1999, 17 August 1999, 1 September 1999 and 5 November 1999. Consequently, those assets were not liable for division in the divorce proceedings between the plaintiff and the deceased as the assets were not matrimonial assets.

60 The first defendant pleaded the defences of limitation and laches. She asserted that the plaintiff's claims wee barred by unreasonable delay – the plaintiff had admitted she discovered that the deceased had substantial assets in August 2004 (see [38]) and had received information in the letter dated 27 March 2006 (at [46]) from the second defendant's solicitors, of the amounts in the 1999 BNP Trust. Yet the plaintiff failed to take any action for five years and only commenced this suit in November 2009. In the interval, the first defendant had acted to her detriment and changed her position in her capacity as executrix as, she had settled all debts owed by the deceased (including paying the plaintiff RM350,000 on the agreed debt) and fully administered the estate. Consequently, the plaintiff had by her conduct waived any rights she may have had to claim a share of assets held by the deceased on the ground they were matrimonial assets. The first defendant pleaded that the plaintiff was estopped from making a claim against her.

61 In its defence (amendment no. 3), the second defendant asserted that the plaintiff was aware of the 1999 BNP Trust from as early as December 2003 and of the 2002 BNP Trust from July 2004. The second defendant explained it was unable to furnish particulars of the 2002 BNP Trust when requested by the plaintiff because she had no *locus standi*, her children not being beneficiaries of the trust.

62 The second defendant averred that Prominent was set up and owned by BPITL not the deceased. It put the plaintiff to strict proof that the monies in [50] remitted by M&W Zander into the Hong Kong account of Armanee with BNP were pursuant to the two agreements at [21] and [22] made by the deceased with M&W dated 24 April 1998 and 1 July 1998 respectively.

63 The second defendant contended that the assets settled into the two BNP Trusts were not the plaintiff's assets and she had no proprietary claim to them. The second defendant averred that it was unaware that the assets settled into those trusts were proceeds of fraud or in furtherance of any fraud or fraudulent misrepresentations made by the deceased to the plaintiff. It added that as the plaintiff was a woman of substance by her own admission (in her pleadings), her own assets would have been liable to division with the deceased under s 112 of the Women's Charter if she had applied for division of matrimonial assets. Like the first defendant, the second defendant alleged the plaintiff had an affair with another man while she was still married to the deceased.

64 The second defendant contended that even if the plaintiff established that she was entitled to the assets settled into the BNP Trusts, her entitlement/cause of action to make such a claim had been lost with the effluxion of time and/or co-mingling with the assets to which the plaintiff was not entitled; those *inter alia* included (a) bank borrowings by Armanee from BNP and companies in the BNP group, payments (US$1.5m) by South Sea to Armanee, dividends and other investment income received by Armanee, monies received by Armanee from the Commerzbank accounts of M&W Zander, assets settled by South Sea into the BNP 2002 Trust as well as the income/interest received from Prominent's portfolio of investments from 14 May 1999 to-date.

65 The two defendants relied on the plaintiff's Answers to Interrogatories (administered by the first defendant), to the effect that she had lived separate and apart from the deceased shortly after the execution of the Deed of Separation dated 7 December 1998 for their case. (However, her Answer was alleged to be untrue in the defendants' submissions [see [90] below.)

66 At this juncture, it is curious to note that the plaintiff was selective in her claim against the defendants – she only targeted the two BNP Trusts and not the ML Trust; her conduct prompted the second defendant in its closing submissions to question her motives.

The issues

67 A number of issues arise for determination in this action *viz*:-

(a) As against the first defendant:

(i) Did the deceased make any fraudulent representations to the plaintiff during his lifetime?

(ii) Was the plaintiff induced by any representations to refrain from seeking a division of the matrimonial assets after the decree *nisi* was granted?

(iii) Assuming fraudulent representations were made to the plaintiff, did she suffer any loss as a consequence?

(b) As against the second defendant:-

(i) Was there comingling of funds such that the plaintiff is not entitled to relief?

(ii) Should a RCT be imposed?

(iii) Is the second defendant liable for the deceased's actions that resulted in the BNP Trusts being allegedly unjustly enriched by reason of the deceased's actions?

(c) In relation to both defendants:

(i) is the plaintiff's time-barred and/or barred by laches and/or estopped?

(ii) have they changed their positions due to the plaintiff's inaction for so many years?

The evidence

68 There were four witnesses at the trial. The plaintiff and Shute testified for the plaintiff and the second defendant respectively. The first defendant was her own witness together with her stepfather Yu. The second defendant had procured an AEIC from Sharon (also known as Soo Hung Fah) but chose not to call her to the stand. Cross-examination of the plaintiff took two of the four days' trial.

The plaintiff's case

69 As the plaintiff's evidence as set out in her AEIC has largely been set out in the facts enumerated earlier, I shall move on to consider some aspects of her testimony that was adduced in the course of her cross-examination.

70 Counsel for both defendants posed a common question to the plaintiff – why did she not apply for division of matrimonial assets at the time ancillaries were determined by the court? The plaintiff's answer was, that it was due to the misrepresentations made to her by the deceased (and which she believed) that he had little or no means. However, as noted below (at [94]), the plaintiff's position shifted somewhat at the trial – she testified that the deceased's misrepresentations to her were made *before* he entered into the two agreements with M&W and which were the source of his hidden wealth.

71 The second point raised by both defendants was the plaintiff's delay in commencing these proceedings.

72 It is noteworthy (as pointed out by both defendants in their closing submissions), that the plaintiff relied on a draft of the first M&W agreement dated 24 April 1998 which contained handwritten notations and cancellations. (In their respective submissions, both defendants asserted that the first M&W agreement being a draft should be ignored). However, it should also be noted that notwithstanding the handwriting on the document, the same appeared to have been signed by M&W and the deceased. In any case, the terms contained therein made it a conditional contract (which the plaintiff conceded); it was conditional as the deceased would receive the consideration of US$25m only if a contract was concluded between M&W and First Silicon.

73 By parity of reasoning, the plaintiff (if she had a valid claim) only acquired the benefit of the first M&W agreement on 30 March 1999, when M&W and M&W Zander signed the First Silicon contracts (see [23]). However, by that date, the deceased and the plaintiff were already living apart and less than a month later (on 27 April 1999), the plaintiff obtained the decree *nisi* in the divorce proceedings.

74 In her oral testimony, the plaintiff admitted [note: 10] that the deceased did not say to her in so many words that he had no money and no assets. It was more her own surmise based on the fact that she had to procure a supplementary credit card for him which he asked her not to cancel (when she instructed the issuing bank to do so on 3 December 1998) and that she had to pay his charges on that credit card (including his and the children's holiday expenses). The deceased had also taken loans from her, her father, her brother Richard and the deceased's brother.

75 The plaintiff denied the defendants' allegation that she had had an affair with another (married) man during her marriage to the deceased. She claimed [note: 11] that she had known that person, who was a lawyer and her cousin, and his wife for a very long time. The plaintiff claimed that the defendants' allegation came as a surprise to her. The plaintiff's AEIC (at para 75) had deposed to an incident that took place on or about 30 November 1998 when the deceased allegedly assaulted her. Could it have anything to do with the alleged affair? Was it also the reason why the deceased named the plaintiff as an Excluded Person (see [26]) in the 1999 BNP Trust and repeated that instruction on his note dated 7 May 1999 [note: 12] to Kenneth Lee of BNP?

76 The second defendant had adduced evidence from a file note [note: 13] that the deceased and Joshua met two representatives of BNP (including Sharon) on 7 November 2003 ("the November 2003 meeting") where the 1999 BNP Trust was discussed as well as Armanee, Prominent and South Sea, that the worth of the deceased's assets was US$9m with loans of US$5.5m and that he had other assets in his personal name to the order of US$20m. It was recorded that Prominent owned the Ocean Park property at which the deceased resided. The benefit of a second trust was also discussed. The meeting concluded with a comment that the deceased's health was not good as he was suffering from cancer.

77 Cross-examined [note: 14], the plaintiff denied any knowledge of the November 2003 meeting. She pointed out that Joshua was then 14 years old and any adult let alone a child his age was unlikely to know or understand such things as trusts. She claimed that Joshua did not tell her about the meeting. However, the plaintiff's attention was drawn to a letter she had written to Merrill Lynch regarding Woodsvale on 10 September 2004 [note: 15]. She had there said (in para 4):

> …the settlor had, during his lifetime discussed with me his provisions for the maintenance and education of the beneficiaries, and again, he had not mentioned any conditions on "reimbursable basis". The settler loved his children dearly and during his lifetime, had constantly assured them that he had provided well for them both in their living and educational requirements and at every stage of their lives, namely when they graduate, marry, divorce etc.

78 Cross-examined [note: 16] on the above extract from her letter, the plaintiff claimed the above information came from Joshua who was apparently given the assurance by the deceased. The question then arises – when did Joshua tell her if not after the November 2003 meeting? I cannot imagine that Joshua who, like his sister, is very close to the plaintiff, would not have told his mother that his father took him to see some bank representatives even if Joshua could not fully understand the discussions that took place. It would only have been logical that the plaintiff would then have probed the deceased further (when she saw him a month later) on the November 2003 meeting if Joshua did not/could not give her any or sufficient details. One also wonders why the plaintiff did not call Joshua to testify. After all, he is now 23 years old.

79 It is further noted that in a subsequent letter dated 27 September 2004, Merrill Lynch had informed the plaintiff that Woodsvale's assets in the ML Trust were valued at US$2.7m as of 22 September 2004.

80 The plaintiff's conclusion that the deceased had no financial means is also at odds with a letter dated 22 October 1999 [note: 17] written by her solicitors to the deceased's then solicitors. Her solicitors had alleged (at para 6) that after the deceased moved out from the plaintiff's house in August 1998, he had been residing at a luxurious condominium and had hired an Indonesian maid and a driver; this was hardly the lifestyle of a man without means. Moreover, it was the plaintiff's own

testimony that the deceased repeatedly assured her and the children that he would take care of and make provision for their future.

81 It is equally noteworthy that in one of the prayers in the divorce proceedings, the plaintiff sought RM100,000 as lump sum maintenance from the deceased. Clearly, she could not have believed that the deceased was so lacking in means that it was pointless to ask the court to divide matrimonial assets between them as she claimed in this suit. After all, the deceased also came from a well-to-do family albeit not as wealthy as the plaintiff's family.

82 The plaintiff had also testified that it was the deceased who appointed solicitors to commence the divorce proceedings on her behalf and that he instructed her to see his lawyers to sign the necessary papers. She admitted however that she had given instructions to the deceased's solicitors. In any event, the plaintiff instructed new solicitors to act for her some time before 30 August 1999, when the solicitors who represented her in the divorce proceedings advised her to do so, after disagreements arose between the plaintiff and the deceased on the issue of ancillaries and the solicitors felt a conflict of interests had arisen and they could no longer continue to act for her.

83 I should point out that the plaintiff's testimony on the M&W contracts in the course of cross-examination was also unsatisfactory. At one stage [note: 18], she said the first M&W agreement was a private arrangement between the deceased and M&W's managing-director because they signed the document as individuals but later [note: 19], she said it was a valid agreement.

84 There was another aspect of the plaintiff's testimony that I should refer to, as it concerned the touchstone of her case *viz* that she was unaware of the deceased's true financial position during his lifetime. The plaintiff had testified [note: 20] that at the behest of the defendant, she had met up with him in or around December 2003. He had then assured her that he would make provision for the children's education and living expenses and he would set up an educational trust for them. Subsequently, at the funeral wake of the deceased's mother in early 2004, the deceased had repeated his assurances to her [note: 21].

85 Apparently the deceased had then asked the plaintiff for candidates to be appointed as custodian and the plaintiff had suggested the first defendant, her brother as well as the deceased's brother as possibilities. The plaintiff revealed that the deceased had voiced doubts on the suitability of the first defendant as a custodian because of her youth. Cross-examined by counsel for the first defendant, the plaintiff revealed that the deceased had used the words "custodian" and "trusts" in their discussion and had said that the custodian would liaise with the bank. Would such information not have alerted the plaintiff to the possibility of trusts having been established? After all, she had attended a correspondence course in law with a UK university albeit she did not complete it.

86 I do not believe it would serve any purpose to review the testimony of either the first defendant or that of Shute, the second defendant's representative. Neither witness was cognisant of the circumstances surrounding the setting-up of the 1999 and 2002 BNP Trusts by the deceased. (I should add that the first defendant has suffered from lupus since she was 15 years old. She is now married with a child).

87 One aspect of the first defendant's testimony however was significant. She corroborated the plaintiff's testimony at [84]. The first defendant said she had accompanied the deceased to Kuching to see the plaintiff in December 2003. The deceased by then was seriously ill; he had told the first defendant that he wanted to discuss with the plaintiff the trust he had set up for the children. At the meeting with the plaintiff, the deceased requested the first defendant (who complied) to leave the

room so that he could have a private discussion with the plaintiff. The first defendant asserted that even if the plaintiff was unaware that the deceased had settled substantial sums into the 1999 BNP Trust earlier, the plaintiff must have known by January 2004 from the discussions she had with the deceased.

88 Indeed, the December 2003 discussions were confirmed by the plaintiff's email to the first defendant on 25 November 2004 [note: 22]. She had said (under the heading "trust properties"):

> In your Dad's conversations with me in December 2003, April and May 2004, he assured me that he had taken care of all the children's needs and further informed me that he had organised for all his properties, namely, the Ocean Park, the Indon and the Tay Lian Teck properties to be vested in trust for the children and yourself.

Consequently, the first defendant asserted it was more likely than not that the plaintiff knew of the existence of the two BNP Trusts before the deceased passed away on 15 June 2004. As stated earlier (at [40]), the plaintiff was formally notified of the 1999 BNP Trust by Sharon in August 2004 followed by her receipt of a copy of the trust instrument from the second defendant in October 2004. The second defendant's solicitors had then written to her solicitors (see [46]) on 27 March 2006 setting out the dates when the deceased had settled monies into the 1999 BNP Trust. At no time after June 2004 (and before her present Singapore solicitors were appointed) did the plaintiff express surprise at the existence of the trusts. It bears noting that besides her current local solicitors, the plaintiff had appointed solicitors in the Cayman Islands, BVI and Jersey as well as accountants PricewaterhouseCoopers at one stage or another.

89 I should also state at this juncture that the plaintiff's claim that she learnt of the existence of the Ocean Park and the other two properties from documents left by the deceased is untrue. This is obvious from the extract of her email to the first defendant set out at [88]. Indeed, based on the email, it would appear that the deceased told her not once in December 2003 but twice later, in April and May 2004.

90 There were many other instances where the plaintiff's testimony did not stand up to scrutiny as it did not accord with the documents that were before the court. The second defendant pointed out that the plaintiff had admitted lying in her divorce proceedings as she had then stated that she had been separated from the deceased for more than three years (since September 1995) when the separation only started in August/September 1998. Other instances where the plaintiff's credibility was put in question are detailed in the closing submissions of both defendants.

91 Nothing turns on Yu's testimony. He is the Protector of all three trusts and his appointment was made at the behest of the deceased, notwithstanding Yu's initial reluctance to be appointed as Protector for the 1999 BNP Trust as the beneficiaries are the children and not his stepdaughter. Yu revealed that the deceased had left behind a letter dated 23 April 2004 (the letter of wishes) addressed to Merrill Lynch. In that letter, the deceased wanted his trustees to consider distributing 50% of the ML Trust funds equally to Joshua and Azura when they attained 35 years of age. Prior to their reaching 21 years of age, he wanted the children's education including tertiary education, living and other expenses to be paid on a reimbursement basis to their guardian (presumably the plaintiff). The deceased also wanted to give US$100,000 to his stepson *viz* Shah Nassar provided the latter had graduated from an accredited university or tertiary institution and was 30 years of age.

The findings

92 This was a case where the one person *viz* the deceased who could enlighten the court on the

material facts is no longer available as a witness. The main witnesses (including the plaintiff) relied heavily on documents for their evidence. Indeed, it was ironical that the plaintiff relied on documents given to her by the first defendant for her claim. These included the first M&W agreement and a deed between the deceased and the deceased's brother dated 18 August 2004 (wherein the latter agreed to hold the Tay Lian Teck property on trust for the children).

93 The evidence presented in court was at best secondary and at worse hearsay. Indeed, the first defendant had submitted that the court should place no weight whatsoever on the plaintiff's testimony regarding the two M&W agreements because it was based entirely on speculation and/or hearsay, pointing out that the plaintiff's own evidence confirmed she had no personal knowledge of the two agreements and she was not even aware of the signing ceremony on 30 March 1999 of the First Silicon contracts. Nor did the plaintiff see the press report on the event (at [23]).

94 As alluded to earlier (at [70]), in her opening statement and in the course of her oral testimony, the plaintiff's position shifted somewhat from that taken in her pleadings and AEIC. She no longer maintained that the deceased had fraudulently represented to her throughout their marriage that he had no or little assets; her new stance was that until the execution of the two M&W contracts, he represented to her that he had no or little assets. Such a stand must surely mean that whatever representations the deceased may have made to the plaintiff prior to the date (24 April 1998) of the first M&W agreement would no longer be relevant to her claim. In any case, it was the plaintiff's testimony that from the time they were married, she knew (based on his business failures) that the deceased was not a successful businessman or a man of means. She assumed therefore that he had no assets worth dividing at the time the ancillaries were determined in the divorce proceedings. There were no express representations to her by the deceased in that regard. It also bears noting that the plaintiff requested from the deceased and which the court granted, a sum of RM3,750 per child as maintenance or RM7,500 per month for the children and RM100,000 for herself by way of lump sum maintenance. Neither RM7,500 nor RM100,000 are small sums even in Malaysian ringgit. The deceased could not have been as impecunious as the plaintiff claimed in these proceedings.

95 I was also mindful of the fact that with the deceased gone, there was no one to contradict/rebut the plaintiff's testimony and the totally unflattering picture that she painted of her late husband, as someone who could not hold down a regular job or succeed in business and who sponged off her throughout their marriage. Yet, it was also the plaintiff's testimony that the deceased loved the children dearly, spent weekends and school holidays with them (and brought them to Singapore) after he moved out from the plaintiff's house and after the divorce. When they were with him, the deceased could afford to maintain the children in the lifestyle the plaintiff provided for them. Where did the plaintiff think the deceased's money came from during their marriage? It is also significant to note that the deceased was generous to the plaintiff's son by her first marriage – in the letter of wishes (at [91]), he gave Shah Nassar a bequest of US$100,000 from the ML Trust.

96 The deceased's conduct did not seem to me to be that of a man who would deny his loved ones of what he could afford to give them. There must therefore have been very strong reasons why the deceased not only did not name the plaintiff as a beneficiary in any of the three trusts he created but that he went to the extent of naming her as an "Excluded Person" in the 1999 BNP Trust (see [26]). Unfortunately, this court will never know the answer.

97 In their closing submission and in the plaintiff's cross-examination, the defendants pointed out that the plaintiff must have taken legal advice on the issue of division of matrimonial assets and decided not to make a claim so as to avoid having to disclose her own assets and have them taken into account in the division. Although the plaintiff vigorously denied the suggestion, I believe it is more probable than not that the plaintiff must have had this consideration in mind at the time when

ancillaries were determined by the court in 1999-2000. According to the affidavit of means that the plaintiff filed on 1 December 1999 for the ancillaries hearing n the divorce proceedings, the plaintiff owned (apart from the plaintiff's house), one unit in a shopping complex, a semi-detached house, a Mercedes Benz vehicle and stocks and shares in various companies while earning a monthly salary of RM6,500 from Sterling Hill Associates Sdn Bhd as its managing-director, excluding monthly allowances of another RM5,000.

The decision

The plaintiff's case against the first defendant

98 As of 31 December 2010 (according to paras 49 and 50 of Shute's AEIC), the net asset value of the 1999 BNP Trust was US$5,914,439 and that of the 2002 BNP Trust was US$1,544,969.

99 When Yu took the stand, he produced his own calculations (at exhibit D1) which differed from Shute's figures. Yu placed a value of $7,967,989.16 on the assets of the 1999 BNP Trust and $3,308,611.44 for those in the 2002 BNP Trust. Regardless of whose figures are the more accurate, it is obvious that the value of the 1999 BNP Trust (of which the children are beneficiaries) far exceeds that of the 2002 BNP Trust which beneficiary is only the first defendant.

100 I am of the view that the plaintiff could well have requested the children to give her a share of the 1999 BNP Trust without resorting to court proceedings. I doubt Joshua and/or Azura would have begrudged her. It is puzzling therefore why she chose to sue. Was her actual target the 2002 BNP Trust even though it has less assets? As noted earlier, the plaintiff did not sue Merrill Lynch on the ML Trust (which had a value of US$2.7m) of which her other son Shah Nassar is a beneficiary.

Fraudulent misrepresentations

101 As noted in [51], the plaintiff's claim against the first defendant was for the fraudulent misrepresentations purportedly made to her by the deceased during his lifetime.

102 For fraudulent misrepresentation to be actionable in the tort of deceit, the requirements in *Derry v Peek* (1889) 14 App Cas 337 (recently reaffirmed in *Raiffeisen Zentralbank Osterreich AG v Archer Daniels Midlands Co* [2007] 1 SLR(R) 196 and in *Panatron Pte Ltd v Lee Cheow Lee* [2001] 2 SLR(R) 435) must be met *viz*:

(a) There must be a false representation of fact made by words or conduct knowingly without belief in its truth or made recklessly careless whether it be true or false;

(b) The false representation must be made with the intention that it should be acted upon by the plaintiff;

(c) The plaintiff must have acted upon the false representation; and

(d) The plaintiff must have suffered damage as a result.

103 I had earlier commented at [94] that it was the plaintiff's own perception and conclusion that the deceased was a man of straw (with whom by her own evidence she hardly talked about money). That, coupled with the likelihood that the plaintiff was disinclined to have her own assets (see [97]) made available for distribution in the ancillary proceedings, makes it highly unlikely that any representations were made to the plaintiff by the deceased regarding his supposed impecunious state,

apart from what was stated in his affidavit of means.

104 I entertain strong doubts that the deceased actively concealed his assets from the plaintiff during his lifetime. In this regard, the plaintiff's AEIC had referred to an internal memorandum dated 4 May 1999 of BNP [note: 23], in which it was stated that the deceased had informed BNP that the plaintiff was not to be a beneficiary of the 1999 BNP Trust as she had agreed to accept a lump sum settlement from him at the time of the divorce. The plaintiff asserted that what the deceased then informed BNP was untrue – that he was extremely wealthy, his wealth was inherited from his father's estate and that he owned seven properties in Singapore, and as a customer of the private banking arm of BNP with Sharon as his relationship manager, he was wealthy. If what the deceased said of his wealth was untrue, then he did not deceive the plaintiff at all.

105 The court had obviously rejected the deceased's professed impecuniosity when he was ordered to pay RM3,750 per child per month as maintenance in the ancillary proceedings. The deceased had agreed to pay the plaintiff RM100,000 as a lump sum settlement and to pay the balance of the agreed debt by instalments. There is therefore no question of the plaintiff having been induced to act on any representations that the deceased may have made let alone that she suffered loss as a result. Consequently, the essential elements to found an action in fraudulent misrepresentation as set out in [102] are not made out. That being the case, the question of whether the plaintiff was induced to act on the representation to her detriment is moot.

106 There were other factors that militate against the alleged representations having been made. One obstacle that the plaintiff has to overcome has been alluded to earlier (at [59]). The monies that the deceased placed in the four or more companies that were settled into the three trusts were received by him in 1999, *after* the separation agreement was signed in December 1998 and *after* the decree *nisi* had been granted in April 1999. The assets were not acquired by the deceased in the course of and during the marriage; it was after.

107 Consequently, the assets do not come within the definition of "matrimonial assets" as defined under s 112(10) of the Women's Charter; the definition says:

> "matrimonial asset" means —
>
> any asset acquired before the marriage by one party or both parties to the marriage —
>
> (i) ordinarily used or enjoyed by both parties or one or more of their children while the parties are residing together for shelter or transportation or for household, education, recreational, social or aesthetic purposes; or
>
> (ii) which has been substantially improved during the marriage by the other party or by both parties to the marriage; and
>
> any other asset of any nature acquired during the marriage by one party or both parties to the marriage,
>
> but does not include any asset (not being a matrimonial home) that has been acquired by one party at any time by gift or inheritance and that has not been substantially improved during the marriage by the other party or by both parties to the marriage.

108 Section 112 of the Women's Charter states:

(1) The court shall have power, when granting or subsequent to the grant of a judgment of divorce, judicial separation or nullity of marriage, to order the division between the parties of any matrimonial asset or the sale of any such asset and the division between the parties of the proceeds of the sale of any such asset in such proportions as the court thinks just and equitable.

(2) It shall be the duty of the court in deciding whether to exercise its powers under subsection (1) and, if so, in what manner, to have regard to all the circumstances of the case, including the following matters:

(*a*) the extent of the contributions made by each party in money, property or work towards acquiring, improving or maintaining the matrimonial assets;

(*b*) any debt owing or obligation incurred or undertaken by either party for their joint benefit or for the benefit of any child of the marriage;

(*c*) the needs of the children (if any) of the marriage;

(*d*) the extent of the contributions made by each party to the welfare of the family, including looking after the home or caring for the family or any aged or infirm relative or dependant of either party;

(*e*) any agreement between the parties with respect to the ownership and division of the matrimonial assets made in contemplation of divorce;

(*f*) any period of rent-free occupation or other benefit enjoyed by one party in the matrimonial home to the exclusion of the other party;

(*g*) the giving of assistance or support by one party to the other party (whether or not of a material kind), including the giving of assistance or support which aids the other party in the carrying on of his or her occupation or business; and

(*h*) the matters referred to in section 114(1) so far as they are relevant.

109 Based on the definition of "matrimonial assets" and the guidelines set out in s 112(2) of the Women's Charter, I cannot see how on the facts as adduced from the plaintiff herself, the commissions earned by the deceased can be said to be "matrimonial assets" susceptible to division.

Is the plaintiff's claim barred by laches?

110 Both defendants made much of the plaintiff's delay in commencing these proceedings in support of their common contention that the plaintiff's claim was barred by laches. The sequence of the delay is set out below. Cross-examined by counsel for the first defendant [note: 24] as to why she waited until November 2009 to commence this suit, the plaintiff's excuse was that the trusts were governed by BVI law and she needed time to seek specialist legal advice.

111 I accept the second defendant's submission that the plaintiff's excuse is not credible given that she did not commence proceedings in the BVI but in Singapore, she had a team of legal advisers in Singapore as well as in the Cayman Islands at all times, and she lost no time in commencing proceedings in Singapore in DC Suit No. 779 of 2005 against the first defendant to recover the agreed debt (see [44]) owed by the deceased. Based on the evidence, the plaintiff's delay was:

(a) About 9 years from the time of the divorce, when she knew that the deceased was clearly able to provide for the children;

(b) From as early as December 2003 after she learnt of the November 2003 meeting from Joshua and was told by the deceased of the existence of the 1999 BNP Trust;

(c) From June 2004, based on the plaintiff's letter dated 25 June 2004 [note: 25] to Shute and one Fan Choi, where she referred to extensive discussions she had had with the deceased back in December 2003 on the appointment of a Protector;

(d) Throughout the first half of 2004 (prior to the deceased's passing) when the plaintiff and the children were repeatedly assured by the deceased that he had sufficient assets to provide for the latter's entire lives (as evidenced in an email sent by Joshua to Shute on 5 September 2009 [note: 26]; and

(e) from November 2004 when she wrote to the first defendant at [88] above.

112 It bears remembering that the plaintiff knew the values of the assets in the ML Trust and the 1999 BNP Trust by September and November 2004 respectively. Indeed, she was engaged in protracted correspondence with the respective trustees between mid-2004 and 2005 on such issues as advances from the two trusts for the maintenance and education of the children, and her interpretation of the Protector provisions in the 1999 BNP Trust. She had even asserted her rights as the children's guardian under trust law in her correspondence with Merrill Lynch. Therefore the plaintiff well knew her rights. Yet, she took no action against either defendant at any of the milestones set out in [111]. In such a scenario, the second defendant cited two English cases, *Stafford v Stafford* [1857] 44 ER 697 and *Allcard v Skinner* [1887] 36 Ch D 145 for the proposition that a presumption of knowledge of her rights arose against the plaintiff who knew enough relevant facts and could have/should have pursued her claim. If she failed to exercise her rights earlier than November 2009, she should not be granted any relief by this court.

113 Closer to home, there is the case of *Re Estate of Tan Kow Quee* [2007] 2 SLR(R) 417 where the plaintiff beneficiaries' claim was made in 2006, 50 years after the intestate passed away in 1956. By then, both the original administrators of the estate had passed away. Although the plaintiffs' claim was not time barred under ss 22(1)(b) and 23(a) of the Limitations Act (Cap 163, 1996 Rev Ed), Sunderash Menon JC nevertheless held that because of the considerable delay of 50 years and there had been partial distribution of the estate, it would be unconscionable to allow the claim to proceed.

114 Even though a claim may not be time barred, this court had held in *British and Malayan Trustees Ltd v Sindo Realty Pte Ltd* [1998] 1 SLR(R) 903 that it can still be defeated by laches. This would be so where as in this case, the first defendant has changed her position to her detriment. The Court of Appeal in *Tay Joo Sing v Ku Yu Sang* [1994] 1 SLR(R) 765 adopted the same view.

Has the first defendant changed her position due to the plaintiff's inaction for so many years?

115 Even if the plaintiff had made out her case on misrepresentation (which I found she had not), the first defendant argued that the plaintiff should be denied any relief because her inaction had caused prejudice to the first defendant. The first defendant had discharged her duties as executrix of the deceased's estate by settling the debts of the estate including paying the plaintiff RM350,000 on her claim for the agreed debt. It would be unconscionable and unjust if the plaintiff were allowed to pursue her claim in these proceedings when the plaintiff had misled the first defendant into paying her RM350,000. I accept on the facts that the first defendant has been prejudiced by the plaintiff's

inaction for five years after the deceased's passing in June 2004.

Has there been prejudice to the second defendant?

116 The first defendant's argument in [115] was similarly adopted by the second defendant. It was argued that the second defendant had been equally prejudiced by the plaintiff's delay in instituting these proceedings. Indeed, the prejudice was said to be substantial and irreparable. Prejudice caused to the second defendant (which I accept) was as follows:

(a) The first defendant had been drawing monies from the BNP 2002 Trust since October 2004; as of December 2009 (when distributions were frozen because of the plaintiff's claim), her withdrawals totalled US$304,026.75 (according to Shute);

(b) If the plaintiff succeeded in her claim, the beneficiaries' entitlement to both income and capital from the two trusts would be substantially reduced and may not last their lifetimes as the first defendant had historically been receiving US$50,000-US$80,000 per year (until 2009) while the children were told they would receive US$50,000 per year with annual increases;

(c) The second defendant could not give any meaningful account to the plaintiff if ordered by the court as there had been six years' worth of transactions which (further) mixed the funds in the two trusts and compounded the inability to identify specific assets which originated from the deceased, or those that came from draw downs of loans taken out by the deceased or funds that were generated from multiple commercial transactions undertaken by the second defendant or its predecessors while managing the trusts;

(d) Even if an account could be rendered by the second defendant of the funds settled into the trusts by the deceased, it would not be accurate because the plaintiff did not sue Merrill Lynch on the ML Trust;

(e) On the security of the monies settled into the two trusts and the proceeds from investing those assets, the second defendant had in good faith and without knowledge of any alleged fraud or claim by the plaintiff procured bank facilities for investments, made distributions and incurred other liabilities in the management of the two trusts to their detriment. It would be impossible to place the second defendant and the beneficiaries back in the position they would have been in if the plaintiff had taken out her claim earlier.

Has there been comingling of funds in the two BNP Trusts?

117 From [116(c)] it can be seen that one of the second defendant's key contentions (as well that of the first defendant) was that the funds in the two trusts had been comingled over the past twelve years and it is impossible to ascertain the source of the funds now. I have no doubt on the evidence that this is indeed the case and nothing further needs to be said on the point as it will be addressed in tandem with the next issue below.

Should a remedial constructive trust ("RCT") be imposed on the second defendant?

118 At the outset (as was rightly pointed out in the second defendant's closing submissions), it should be noted that a RCT is a restitutionary proprietary remedy and not a cause of action. The function of a court is to declare its creation once the facts for the creation of a RCT have occurred (see *Snell's Equity* (32nd Ed Sweet & Maxwell p 778 para 26-014). It is also a remedy of last resort failing other alternatives, which in the plaintiff's claim is not the case.

119 Citing *Ching Mun Fong v Liu Cho Chit* [2001] 3 SLR 10 ("*Ching Mun Fong*") the second defendant submitted that the lack of an identifiable fund on which the RCT could be imposed was fatal to the plaintiff's claim. In *Ching Mun Fong*, the Court of Appeal at [23] said:

> In order for a remedial constructive trust to arise, the payee's conscience must have been affected, while the moneys in question still remain with him. If, as was the situation in the Westdeutsche case (supra), the payee learns of the mistake only after the moneys have got mixed with other funds or dissipated, no constructive trust in respect of these moneys can arise. This is because there would no longer be an identifiable fund for the trust to bite.

120 The second defendant pointed to the fact that for the past twelve years or so since Armanee, Prominent and South Sea were incorporated by the deceased, there had been repeated inflows and outflows of funds and conversion of funds into securities and other investments activities, loan draw downs and loan repayments etc. The assets originally settled by the deceased into the three companies and then into the two BNP Trusts had been thoroughly mixed and were no longer recognisable. The mixing included revolving bank loans utilised by the deceased. As such, there was no longer an identifiable fund on which a RCT can be imposed. I agree.

121 What is equally fatal to the plaintiff's claim is her own inability to identify the assets that she contended would have formed part of the matrimonial assets to which she would have been entitled to receive a share had she applied for a division of matrimonial assets under s 112 of the Women's Charter. Her imprecise pleading was set out earlier at [52]. This flaw in the plaintiff's case leads to a related issue dealt with at [128] below.

122 Consequently, the plaintiff's reliance on such cases as *Koh Cheong Heng v Ho Yee Fong* [2011] 3 SLR 125 and *Ho Kon Kim v Lim Gek Kim* [2001] 3 SLR(R) 220 (for the proposition that the court has a discretion to impose a RCT where justice and good conscience demands even where there is no unjust enrichment or unconscionablility) does nothing to advance her case.

123 For completeness, I should add that the plaintiff could have resorted to other remedies before she sought a RCT. Such primary remedies included suing the first defendant as the personal representative of the deceased for his alleged fraud. There is no evidence before the court that a successful claim against the deceased's estate would not have been met bearing in mind that the first defendant settled the agreed debt owed to the plaintiff at RM350,000. Further, as was observed earlier at [66], the plaintiff chose not to sue Merrill Lynch on the ML Trust notwithstanding it has more assets than the BNP Trusts.

Does the court have the power now to identify and divide matrimonial assets for the plaintiff's claim?

124 It would appear from *Wong Yuk Fong Lily v Menzes Ignatius Augustine* [1992] 1 SLR(R) 252 that the answer is in the negative. In that case, Justice Chao Hick Tin held at [18] that the court no longer has the power to divide matrimonial assets once a party to the divorce is dead.

125 Leaving aside the issue of whether the plaintiff's claim is barred by laches or by the demise of the deceased, the ancillary question that arises is – can the court still deal with or divide, matrimonial assets after the decree absolute was issued in October 2000? I think not. In this regard, s 132 of the Women's Charter would not assist the plaintiff as more than three years have lapsed since the deceased created the BNP Trusts. The relevant extracts of the section state:

> **Power of court to set aside and prevent dispositions intended to defeat claims to**

maintenance

132.–(1) Where —

(*a*) ...

(*b*) an order has been made under section 112 and has not been complied with;

(*c*) an order for maintenance has been made under section 113 or 127 and has not been rescinded;

(*d*) maintenance is payable under any agreement to or for the benefit of a wife or former wife or child; or

(*e*) ...

the court shall have power on application —

(i) if it is satisfied that any disposition of property has been made by the husband or former husband or parent of the person by or on whose behalf the application is made, within the preceding 3 years, with the object on the part of the person making the disposition of reducing his or her means to pay maintenance or of depriving his wife or former wife of any rights in relation to that property, to set aside the disposition; and

(ii) ...

126 Even if the court can still divide matrimonial assets between the plaintiff and the deceased's estate at this late stage, I am disinclined to exercise such powers. I accept the second defendant's submission that it would be unfair and unjust to do so for the following reasons:-

(a) As stated earlier at [95], with the deceased gone, there is no evidence from the husband which the court should take into consideration in dividing matrimonial assets (which would include the plaintiff's assets). There is no one else who can refute the plaintiff's unilateral version of events in particular on what transpired during the parties' marriage;

(b) With the passage of time, key documents that would/could have been relevant to the determination of division of matrimonial assets are no longer available;

(c) Even if the deceased was alive today, the circumstances twelve years ago and now are so different that there can be no meaningful identification and division of matrimonial assets;

(d) The plaintiff chose not to sue Merrill Lynch on the ML Trust even though it was also a matrimonial asset.

Can the plaintiff claim in restitution and unjust enrichment against the second defendant?

127 Apart from the obstacles faced by the plaintiff in her claim for a RCT as set out at [119] to [121] above, she encounters similar difficulties for her other claims.

128 To succeed in her claim against the second defendant in unjust enrichment and consequentially for restitution, the plaintiff must show that the second defendant was a party to or knew of the fraudulent conduct of the deceased or, that there such a want of probity on the part of the second

defendant that it would be unconscionable for the latter to retain the assets that the deceased placed into the two BNP Trusts (see *Comboni Vincenzo & Anor v Shankar's Emporium (Pte) Ltd* [2007] 2 SLR(R) 1020 cited by both the plaintiff and the second defendant).

129 At this juncture, I can do no better than to refer to *Goff & Jones The Law of Restitution* (7th Ed 2007 Sweet & Maxwell) on the three requirements to found a successful claim in unjust enrichment. They are (at p 16 para 1-016):

(a) The defendant must have been enriched by the receipt of a benefit;

(b) The benefit must have been gained at the claimant's expense; and

(c) It would be unjust to allow the defendant to retain that benefit.

None of the three requirements are present in the plaintiff's claim against the second defendant.

130 The second defendant's submissions pointed out that not even the deceased could have reclaimed the assets that he settled into the BNP Trusts on the basis of some restitutionary claim. If the second defendant and its predecessors were not unjustly enriched at the expense of the plaintiff when the deceased settled his assets into the two BNP Trusts, then the plaintiff has no claim in restitution against the second defendant.

131 It bears remembering that the plaintiff had expressly disavowed any allegations of fraud and wrongdoing against the second defendant in her pleadings (as noted at [52] above).

132 However and here I need to digress, in her closing submissions as alluded to at [53], the plaintiff did a *volte face* and levelled fresh accusations against the second defendant that were not pleaded nor was evidence adduced at the trial in support thereof.

133 To elaborate, the plaintiff's closing submissions [note: 27] alleged *inter alia* that:

(a) The deceased was concealing assets from the plaintiff which was obvious to BPITL but that the latter wilfully shut its eyes to it and wilfully and recklessly failed to make inquiries which an honest and reasonable man would make in the circumstances and that the second defendant was in the same position as BPITL;

(b) That the second defendant independently knew what BPITL knew when it took over as trustee in September 2003 and also knowingly assisted the deceased in his dishonest endeavours thereafter by;

(i) The review it undertook when it became trustee of the 1999 BNP Trust in September 2003; and

(ii) The fact that it continued to treat the deceased as the real beneficiary of the 1999 BNP Trust and sought to cover up BPITL's wrongful act in (c) below by redrawing accounts and destroying the original accounts.

(c) The second defendant had breached its fiduciary duties when it covered up BPITL's transfer (on the deceased's instructions) of trust monies of US$2m to Springdale, which was not a beneficiary under the 1999 BNP Trust; and

(d) That the second defendant had actual knowledge of the deceased's fraud by 26 November 2009 when the plaintiff commenced this suit.

134 The above allegations run counter to the plaintiff's case that she was not making any allegations of fraud or wrongdoing against the second defendant. Indeed, she had amended her statement of claim in May 2010 to remove her original allegation that the second defendant was liable to account to her as an institutional constructive trustee on the grounds of knowing receipt of the assets that the deceased had settled into the 1999 BNP Trust.

135 That being the case, it would not even be necessary to consider the second defendant's reply submissions that the new allegations raised by the plaintiff had no merits in any event. The plaintiff had breached the fundamental rule that a party is bound by its pleadings. Therefore, any allegations and/or issues not pleaded are to be disregarded by this court. Further, under O 18 r 12(1) of the Rules of Court (Cap 322, R5, 2006 Rev Ed), allegations of fraud, negligence or misconduct have to be particularised. Otherwise, serious and irreparable prejudice would be caused to the second defendant at this late stage of the proceedings. Had the plaintiff's fresh allegations been pleaded or even put to Shute during cross-examination, the second defendant would at least have had an opportunity to respond to them in the course of the trial. Consequently, this court will ignore the plaintiff's submissions that went beyond her pleaded case.

136 The plaintiff's closing submissions [note: 28] also asserted that an adverse inference should be drawn against the second defendant for its failure to call Sharon to testify. I reject this submission outright as being completely unmeritorious. In this regard, I refer to the notes of evidence [note: 29] for the exchange between parties' counsel and the court on the last day of trial when counsel for the second defendant indicated that he would not be calling Sharon to the stand:

Tong: Your Honour, we have a Ms Sharon Loo who's filed an affidavit on the 8th of November.

Court: Yes.

Tong: We do not intend to call her as a witness and so we'll withdraw the affidavit.

Court: Oh. You close your case then?

Tong: Yes, your Honour.

Court: All right, we finish earlier than expected. Yes Ms Rajah.

Rajah: No. I just wanted to inquire whether she is available witness that they're just not calling?

Tong: She is available.

Rajah: Then that---that's all I wanted to establish.

Court: You want to cross-examine her, Ms Rajah?

Rajah: Well, I have prepared but no, I---I just wanted to know whether she was---because she's the 6th witness, she's got an affidavit.

Court: That's right.

Tong: She ---

Rajah: They're not calling her. That---that's fine. It's my learned friend's right not to call her. I just wanted to know whether if she was an available witness that they're not calling, that's all.

Tong: I can confirm she's available and in fact she was contactable by us until lunchtime before, yes, we came to Court.

Court: All right, you close your case. Submissions?

137 The plaintiff's submission was based on s 116 illustration (g) of the Evidence Act (Cap 97, 1997 Rev Ed) ("the Evidence Act") which states:

> **Court may presume existence of certain fact**
>
> 116 The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case.
>
> *Illustrations*
>
> The court may presume —
>
> ...
>
> ...
>
> (*g*) that evidence which could be and is not produced would if produced be unfavourable to the person who withholds it;

138 Section 116(g) of the Evidence Act can have no application here because counsel for the plaintiff was aware from Sharon's AEIC, of the evidence that Sharon would have given had she taken the stand. The fact that the second defendant did not wish to call her did not mean that counsel for the plaintiff could not have cross-examined Sharon; she was available as a witness as counsel for the second defendant informed the court at [136]. Indeed, the court had inquired specifically whether counsel for the plaintiff wanted to and she declined, to cross-examine Sharon. There was therefore no basis for the plaintiff's submission that an adverse inference should be drawn against the second defendant for not calling Sharon to testify.

139 There is even less merit in the plaintiff's pleaded contention that for these proceedings, the second defendant should be made to pay costs personally (including costs to the first defendant) and to pay the plaintiff's costs on an indemnity basis. The second defendant had defended the proceedings on the specific orders of the Jersey court as the 2002 BNP Trust was incorporated in the Jersey islands and subject to its laws. There was no basis for the plaintiff's contention that the second defendant should bear costs personally and pay her costs on an indemnity basis.

Conclusion

140 The plaintiff's claims were weak, based on suppositions and surmises and were essentially unfounded. In the result, I dismiss her claims with costs (one set each) to the two defendants to be taxed on a standard basis unless otherwise agreed. Subject to the approval of the Jersey courts, the second defendant's solicitors' costs (less costs recoverable from the plaintiff) shall be borne equally

by the 1999 and 2002 BNP Trusts.

[note: 1] 1 AB169

[note: 2] 1AB173

[note: 3] 3AB17

[note: 4] 1AB216

[note: 5] 1AB932

[note: 6] 1AB207

[note: 7] 1AB887

[note: 8] 1AB517

[note: 9] 1AB1106

[note: 10] N/E 52

[note: 11] N/E 31-32

[note: 12] 1AB285

[note: 13] 1AB850

[note: 14] N/E 145-146

[note: 15] 1AB1066

[note: 16] N/E 144

[note: 17] AB410-411

[note: 18] N/E 86

[note: 19] N/E 87

[note: 20] N/E 67

[note: 21] N/E 68

[note: 22] 1AB1100

[note: 23] 1AB271-272

[note: 24] N/E 77

[note: 25] 1AB1224

[note: 26] 1AB1687

[note: 27] Paras 404 to 431.

[note: 28] Para 432

[note: 29] N/E 344