IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2016] SGCA 30

Civil Appeal No 67 of 2015

Between

SU EMMANUEL

… Appellant

And

(1) EMMANUEL PRIYA ETHEL ANNE
(2) EMMANUEL SATISH PHILIP IGNATIUS

… Respondents

JUDGMENT

[Equity]—[Equitable Accounting]
[Land]—[Tenancy in Common]—[Sale in lieu of partition]
[Trusts]—[Resulting Trusts]—[Presumed resulting trusts]
[Trusts]—[Constructive Trusts]—[Common intention constructive trusts]

Su Emmanuel
v
Emmanuel Priya Ethel Anne and another

[2016] SGCA 30

Court of Appeal — Civil Appeal No 67 of 2015
Sundaresh Menon CJ, Chao Hick Tin JA, Chan Sek Keong SJ
18 January 2016

19 May 2016 Judgment reserved.

Sundaresh Menon CJ (delivering the judgment of the court):

Introduction

1 In 1995, a married couple purchased a property and registered it in their joint names. The husband paid the purchase price and serviced the mortgage. The wife was a homemaker. In 2002, the husband lost his job and ran into financial difficulties. By then, the couple were also estranged though they had not commenced divorce proceedings and continued to live in the same house. In 2004, in an effort to help the couple, the husband's sister bought a share of the property. Specifically, she purchased 49% of the property from the husband, who at that time held 50% of the same. At the same time, a fresh mortgage was executed over the property to redeem the original mortgage. All three of them undertook liability to repay the new loan. However, the sister almost single-handedly redeemed the fresh mortgage by paying the instalments. She now faces bankruptcy proceedings and has come

to court seeking an order for the sale of the property and a declaration that she owns a beneficial interest in proportion to her actual contributions towards the purchase of the property.

2 Two issues arise in this appeal: (a) whether the court should order a sale of the property; and (b) the extent of the sister's beneficial interest in the property. On the first issue, the High Court judge ("the Judge") ordered that the property be sold in the open market pursuant to s 18(2) read with the First Schedule of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) ("the SCJA"). On the second issue, the Judge held that the sister was beneficially entitled to 70% of the property as compared to the 49% interest that she held as legal owner: see *Emmanuel Priya Ethel Anne v Su Emmanuel and Another* [2015] SGHC 172 ("the GD"). On appeal, the wife contends that the Judge erred on both counts.

3 For reasons which we will shortly detail, we allow the appeal in part. We uphold the Judge's orders in respect of the sale of the property. In our judgment, however, the sister is not beneficially entitled to 70% of the property. Her absolute interest in the property stands at 49%. We therefore allow this part of the appeal. Nonetheless, we hold that the sister is entitled, by virtue of the doctrine of equitable accounting, to recover from the couple a portion of the mortgage repayments that she has made in respect of the property.

Facts

Parties to the dispute

4 The parties are part of an extended family. The first respondent ("Priya") is the younger sister of the second respondent ("Philip"). Philip is

married to the appellant ("Su"). Although they remained married, Philip and Su have been estranged since 2001.

5 Priya is 60 years old, unemployed and lives in a rented flat. She and Su have not been on speaking terms for more than a decade. Priya currently faces bankruptcy proceedings commenced by Hong Kong and Shanghai Banking Corporation ("HSBC"). The bankruptcy proceedings have been stayed pending the resolution of this dispute.

Subject matter of the dispute

6 The dispute centres on a property situated at Block 10D Braddell Hill ("the Property"). As it currently stands, the Property is held by all three parties as tenants in common. Su holds 50% of the Property while Priya and Philip hold 49% and 1%, respectively. Su, Philip and their four children (who were aged 28, 26, 20 and 16, respectively, when the matter was heard before the Judge) currently occupy the Property.

Purchase of the Property by Su and Philip

7 On 28 April 1995, about ten years into their marriage, Su and Philip jointly purchased the Property for a sum of $628,000. They held the Property as joint tenants.

8 To finance the purchase, the Property was mortgaged to Oversea-Chinese Banking Corporation Limited ("OCBC") ("the 1995 mortgage"). Su and Philip were both liable to repay the loan. Although the evidence in relation to the making of mortgage payments is not complete, Su has confirmed that she did not make any payments towards the initial acquisition of the Property or the servicing of the 1995 mortgage.

Philip runs into financial difficulty

9 In April or May 2002, Philip lost his job and as a result started falling behind on mortgage repayments. This exposed the couple to the possibility of losing their home should OCBC decide to foreclose on the 1995 mortgage. Philip then raised with Su the prospect of selling the Property to unlock its value.

10 In the meantime, Priya came to learn of her brother's financial plight. She had some funds in her Central Provident Fund ("CPF") account and was prepared to assist her brother. With the assistance of solicitors, the siblings began exploring the ways in which Priya could assist.

Discussions for Priya to buy an interest in the Property

11 According to Priya, between October 2002 and March 2003, the following possibilities were explored:

(a) Priya to buy 60% of the Property with Philip owning the remaining 40%.

(b) Priya to buy 50% of the Property from Philip and 1% from Su.

(c) Priya to buy 50% of the Property from Su and 1% from Philip.

(d) Priya to buy 50% of the Property from Philip with Su retaining the remaining 50%.

None of these proposals were approved by the CPF Board.

12 Su has a slightly different account of the various proposals that were discussed. While she acknowledges

that she was not involved in the discussions between Priya and Philip, she claims to have had sight of four draft agreements arising out of those discussions. The essence of the four draft agreements may be summarised as follows:

(a) The first draft agreement: Philip and Priya were each to hold a 50% share in the Property. This agreement was to be between all three parties. Su did not produce a copy of this draft in the proceedings.

(b) The second draft agreement: Priya would buy Philip's half-share of the Property as well as 1% from Su. This corresponds to proposal (b) outlined in the previous paragraph. Again all three parties were to sign this agreement. Su, however, refused to sign it unless certain changes were made. She produced a marked-up copy of the agreement in her affidavit. One of the proposed changes was the inclusion of a new clause which in essence provided that Su and her children would not be evicted from the Property by Priya.

(c) The third draft agreement: Priya would buy Philip's entire half-share of the Property. This corresponds to proposal (d) in the previous paragraph. Unlike the first two draft agreements, the third draft agreement only named Priya and Philip as parties. This draft also included a clause providing that Su and her children would not be evicted from the Property by Priya. Su claims that this clause was included at her insistence.

(d) The fourth draft agreement: This agreement eventually became the sale and purchase agreement between Philip and Priya ("the SPA"). We discuss its terms in greater detail below.

Priya purchases 49% of the Property

The SPA and the transfer

13 On 24 April 2003, the parties applied to the CPF Board for approval for Priya to purchase 49% of the Property from Philip, leaving him with 1% and Su with 50% of the Property. This was approved by the CPF Board subsequently. At that time, the Property was valued at $530,000, an amount significantly less than what Su and Philip had paid for it in 1995. The SPA between Priya and Philip, executed on 27 May 2003, provided that Philip would sell Priya the bulk of his interest, specifically a 49% share in the Property, for $259,700.

14 The clause that had first been inserted by Su into the second draft agreement (see [12(b)] above) found its way into the SPA. Clauses 10 and 11 of the SPA read as follows:

> 10. Su Emmanuel and her children will not be removed or evacuated by any means (legally and forcefully) by the Purchaser or by the direction of the Purchaser as the house is the place of dwelling of Su Emmanuel and her children.
>
> 11. Other than Clause 10, a person who is not a party to this Agreement has no rights under the Contracts (Rights of Third Parties) Act 2001 to enforce any term of this Agreement.

Clause 10 was the subject of much attention at the hearing before us. We will return to it later, since it is relevant to the issue of whether the court should order a sale of the Property.

15 On 20 April 2004, 49% of the Property was transferred from Philip to Priya for $259,700. The transfer was subsequently registered on 28 June 2004.

The outstanding loan, CPF charge and refinancing arrangements

16 For the purchase of her 49% share, Priya paid $25,970 (10% of the purchase price) in cash and used the monies in her CPF account to settle the remaining $233,730.

17 At the time the SPA was executed, the outstanding amount due on the 1995 mortgage was $345,726.03. The purchase price of $259,700 paid by Priya was insufficient to fully redeem this mortgage. The money paid by Priya from her CPF account (amounting to $233,730) was applied to redeem part of the 1995 mortgage, leaving a sum of $111,996.03 outstanding. OCBC then offered to refinance the property by extending a new loan to the parties secured by a fresh mortgage over the Property (referred to hereinafter as "the new loan" or "the second mortgage"). The following is a brief summary of the terms of the new loan as set out in OCBC's Letter of Offer dated 14 August 2003:

(a) All three parties were named as the mortgagors. The purpose of the loan was stated as being to redeem the 1995 mortgage and to finance Priya's purchase of the 49% share of the Property from Philip.

(b) For this purchase, Priya had to withdraw $233,730 from her CPF Account.

(c) The loan amount was limited to $165,000 and its duration was a term of ten years.

(d) The monthly instalment payable was $1,481.56. The bank also agreed to allow payments to be made from the mortgagors' CPF accounts.

18 A surplus of $53,003.97 remained after the outstanding amount under the 1995 mortgage ($111,996.03) was deducted from the amount disbursed under the new loan ($165,000). This was used in part to pay legal fees for the transfer before an amount of $42,608.83 was disbursed to Philip. Philip claims to have returned $20,000 to Priya. The use of these monies is not relevant to the present dispute.

19 At the time the SPA was executed, the CPF Board had a charge over the Property for the sums Philip had withdrawn from his CPF account to purchase the Property or pay for the instalments under the 1995 mortgage. As no money was repaid into Philip's CPF account, the Property was again charged to the CPF Board to secure the monies used by both Philip and Priya from their respective CPF accounts.

Contributions and alleged representations

Priya

20 According to Priya, Philip had given her the impression that he intended to repay her as soon as he could secure employment. She believed that the arrangement they had entered into for her to purchase a share of the Property was to remain in place for only a relatively short time to enable Philip to get back on his feet. Things did not turn out as she expected.

21 From September 2004 until December 2010, Priya serviced the new loan entirely on her own. She first paid $6,199.36 and then made monthly payments of between $1,572.60 and $1,671.60 from her CPF account. Priya says that she always knew that she could not make monthly payments out of her disposable income and only agreed to purchase a share of the Property if she could service the loan using monies from her CPF account.

22 When Priya turned 55 years old in December 2010, she could no longer use her CPF monies to service the instalments. She had to make cash payments as and when these fell due. In all, she claims to have paid $20,000 in cash towards the discharge of the new loan. In total, she claims to have paid $525,579.10 ($434,782.50 excluding interest accrued on her CPF withdrawals). The breakdown of her contributions is set out in the GD (at [16]):

(a)	Payment of 10% of purchase price	$25,970.00
(b)	Payment from her CPF account for 49% of the Property	$233,730.00
(c)	Instalments on the loan paid from her CPF account	$155,082.50
(d)	Interest accrued on her CPF withdrawals	$ 90,796.60
(e)	Cash top-up on repayments of the loan	$ 20,000.00
	Total	$525,579.10

Philip

23 Philip admits that he had difficulties servicing the 1995 mortgage after losing his job. He also does not dispute the quantum of Priya's contributions but he contends that she knew from the outset that her CPF monies would be insufficient to purchase the 49% share *and* redeem the 1995 mortgage and therefore that it would be necessary to obtain a fresh bank loan. Philip also accepts that he had intended to repay Priya her instalment payments as soon as he secured a job although he never did.

24 Priya does not deny that Philip's son had paid $21,032.94 and Philip himself had paid $8,977.88 towards the outstanding mortgage as at April 2013 (a total of $30,010.82). As it now stands, the new loan has been fully repaid.

25 All in all, Philip claims to have contributed $490,803.83 from the time the Property was first purchased in 1995. As was noted by the Judge (at [25] of the GD), his assertions are largely unsubstantiated.

26 What is clear, however, is that Philip paid a total of $240,803.36 from his CPF account towards the initial purchase of the Property and the servicing of the mortgage repayments. This sum, together with any accrued interest, is to be refunded to Philip's CPF account if and when the Property is sold. As at August 2014, the total accrued interest on the principal sum is $155,625.21. This means that a sum of at least $396,428.57 will have to be returned to Philip's CPF account if and when the Property is sold and this is secured by the CPF charge over the Property. Incidentally, the same applies to Priya's contributions to her purchase of 49% of the Property and subsequent mortgage repayments made from monies from her CPF account, which too will have to be refunded to her CPF account together with accrued interest.

Su

27 It is common ground that Su made no financial contribution towards the initial purchase of the Property in 1995 or to subsequent mortgage repayments. However, Su contends that various representations were made to her prior to the execution of the SPA which eventually persuaded her to acquiesce in the arrangements that Philip and Priya devised. The representations were described by the Judge in the GD as follows (at [33]):

> … [Su] asserted that [Priya] and [Philip] assured her that:
>
> (a) based on the SPA, her position and that of her children was secured as none of them would lose the right to live in the property;
>
> (b) she need not worry about repayment of the [new] mortgage loan as the plaintiff would utilise her CPF funds to pay for the property as well as take a

> small bank loan to cover some portion of the 49% share's price as well as whatever amounts that were outstanding under the original loan. [Priya] was a joint borrower (with her and [Philip]) of the loan and [Priya] knew that neither [Su] nor [Philip] were in a position to make the loan repayments;
>
> (c) the property would be split into ownership according to the parties' shares and [Su] would retain 50% ownership so that as a majority owner, she could override any attempts to sell the property;
>
> (d) [Priya] and [Philip] were in any event expecting to receive a large sum of money shortly due to certain investments which meant that the property would be paid up before long.

28 As for the payments, Su does not dispute the figures provided by Priya. Nor does she deny that Priya repaid the new loan almost single-handedly. Her position is simply that Priya had never asked her to make any repayments. Su also avers that Priya was aware at the material time that neither Philip nor she was in any position to service the loan. Ultimately, Su takes the position that Priya made a bad bargain with her brother and this has nothing to do with her.

Priya's financial difficulty and the attempts to sell the Property

29 From 2011 onwards, Priya faced difficulties meeting the loan repayments because she could no longer use the monies in her CPF account to pay the instalments on the new loan. She found herself caught up in a vicious cycle of borrowing from one moneylender or financial institution to pay off existing debts owed to other moneylenders and financial institutions. She also repeatedly informed Philip, who was still unemployed, that she could no longer manage payment of the instalments.

30 Sometime in September or October 2012, Priya asked Philip to speak to Su to consider the possibility of obtaining an overdraft facility secured against the Property in order to tide

them over the difficult situation that they were facing. She also asked about the possibility of selling the Property. Philip told Priya that he had no say in the matter because he held only 1% of the Property, but he agreed to speak to Su. As it turned out, Su did not agree to the overdraft, though she did agree to the possible sale of the Property at a price of $1.6m, which was a price she believed her housing agent could secure. Priya acceded to this suggestion and she signed an exclusive estate agency agreement in October 2012. According to Priya, it was also agreed that the proceeds of any sale would be distributed in accordance with the parties' registered interests in the Property after refunding the relevant amounts to Philip's and Priya's CPF accounts. The parties were unable to find any buyers for the Property at the price of $1.6m.

31 In March 2013, after further inquiries were made by Priya's solicitors, Su indicated that she was agreeable to the sale of the Property provided Priya only recouped the CPF monies which she had used in the purchase of her 49% share as well as in servicing the repayments under the second mortgage. Priya rejected this proposal.

32 In August 2014, a privatisation exercise affecting the Property was carried out. In September 2014, Su offered Priya $490,000 for her 49% share in the Property. Priya rejected this as she considered it an unreasonable offer. She then commenced legal proceedings by way of Originating Summons No 1124 of 2014 ("the OS").

33 The open market value of the Property as at 17 February 2015, according to a valuation report obtained by Priya, was $1.25m. To complete the picture in relation to Priya's present predicament, HSBC has commenced bankruptcy proceedings against her for a debt of $28,684.29. In addition, Priya

owes debts to seven other banks. Her total indebtedness at the time of the hearing below stood at $188,681.96.

Prayers in the OS

34 Priya filed the OS naming Su and Philip as first and second defendants, respectively. In summary, Priya seeks the following reliefs in the OS:

(a) that the title of the Property be severed and apportioned according to the respective contributions of Priya, Su and Philip;

(b) that Priya, having contributed approximately 70% of the value of the Property, be declared entitled to a 70% share of the Property;

(c) that the Property be sold in the open market and Priya be entitled to receive 70% of the proceeds of sale and Philip and Su be entitled to the remaining 30%; and

(d) that Philip's CPF monies withdrawn for the purchase of the Property not be refunded to his CPF account considering that he is now more than 62 years old, or alternatively that the refund, if required, be effected by Philip and Su.

The Judge's decision

35 After hearing the parties, the Judge granted orders in terms of (a)–(c) above. She also ordered that if a refund of the monies into Philip's CPF account was required, this was to be effected by Su or Philip. Additionally, the Judge ordered that in the event Philip or Su wished to buy over Priya's 70% share of the Property, such election was to be made within ten days of the date of the order and the sale was to be completed within 60 days of the date of the

hearing. The Judge also clarified that while there was no need to sever the tenancies under the first prayer in the OS (see [34(a)] above) because the Property was held by the parties as tenants in common, "there was a need to apportion the equitable or beneficial ownership *vis a vis* the legal ownership" (the GD at [3]).

36 The Judge noted that it was difficult to sift through the many allegations and cross-allegations to ascertain the veracity of each side's version of events apart from what was reflected in the documents. Turning to the representations set out at [27] above, the Judge pointed out that Priya seemed to have abided by representations (a)–(c). The Judge found that representation (d) was unlikely to have been made given the financial positions of Philip, who was unemployed, and Priya, who had an occupation which afforded modest means at the material time.

37 The Judge found that it was unlikely that Priya knew the full implications of cl 10 of the SPA when she signed the SPA or even later when the proceedings were commenced. The Judge also pointed out that when it suited her purpose, Su seemed willing not to enforce whatever rights she thought she had under cl 10 (such as when she agreed to sell the Property at $1.6m (see [30] above) and when there was a possibility of an *en-bloc* sale (see [32] above)). To the Judge, this spoke volumes of the lack of *bona fides* in Su's claim that she had both an *entitlement* and a *need* to continue to reside at the Property indefinitely.

38 The Judge also thought that it would have been highly unjust to Priya if it were found that she had no remedy by reason of cl 10 of the SPA. Proceeding on the basis of the maxim "equity will not suffer a wrong to be without a remedy", the Judge found

that the law would assist Priya for four reasons. First, Priya could not, without the consent of Su and Philip, sell the Property to recoup her purchase price and other monies expended despite having a 49% interest. Second, even if Priya could sell the Property, she was precluded from evicting Su and her children from the Property by cl 10 of the SPA. Third, Priya did not ask to occupy the Property despite Philip's claim to the contrary. Even if such a request had been made, it would have certainly been denied by Philip or Su. Finally, if the Property was not sold, Priya would be adjudged a bankrupt. For these reasons, the Judge granted most of the prayers in the OS.

Arguments of the parties

39 We turn to the parties' arguments, concentrating on those that received the greatest attention during the hearing of the appeal.

40 We pause to note that although Philip appeared before the court, as he was both a respondent in the appeal and a defendant in the proceedings below, he was not represented and he did not canvass any arguments before us. We therefore consider only the submissions made on behalf of Su and Priya.

Su's arguments

41 Arguing that the Judge erred in ordering a sale of the Property, Su contends that she has an enforceable contractual right, by virtue of cl 10 of the SPA, to stay in the Property indefinitely. According to her, when cl 10 is properly construed, it becomes evident that the parties to the SPA intended to confer on Su and her children an enforceable right to remain in the Property and not be evicted. The Judge should therefore not have ordered the sale as this was neither necessary nor expedient. As an alternative, Su relies on the doctrine of promissory estoppel. She says that Philip and Priya had

represented to her that neither she nor her children would be denied their right to live in the Property. She allegedly relied on this representation and did not attempt to work to achieve economic independence. Thus, Priya and Philip are estopped from seeking an order for the sale of the Property which will inevitably have the effect of evicting Su and her children from the Property.

42 As to Priya's beneficial interest in the Property, Su argues that the Judge erred in finding that Priya was beneficially entitled to a 70% share of the Property. No purchase price resulting trust arises because Priya was not an original co-purchaser of the Property in 1995. Further, Su argues that her interest in the Property is indefeasible by virtue of s 46 of the Land Titles Act (Cap 157, 2004 Rev Ed) ("the LTA"). Any common intention constructive trust, she says, cannot defeat her indefeasible title.

Priya's arguments

43 Priya argues that it is necessary or expedient for the Property to be sold. She argues that cl 10 of the SPA is void for being a total restraint on alienation of her share of the Property. She also raises the defence of *non est factum*, claiming not to have understood the clause in the manner which Su now seeks to have it applied. She further argues that cl 10 should be construed narrowly such that it only applies to prevent her from seeking to evict Su and her children from the premises so long as Su retains her interest in the Property. It should not be interpreted to prohibit Priya from selling her interest or from applying to court for the sale of the Property for as long as Su and her children wish to occupy it.

44 As to the parties' beneficial interest in the Property, Priya argues that a resulting trust arises in her favour because she contributed substantially to the

purchase price of the Property. In the alternative, she relies on a common intention constructive trust as a basis for her contention that she is beneficially entitled to 70% of the Property.

Further arguments

45 At the hearing, we raised the applicability of the remedy of equitable accounting in the context of the present facts. Priya had referred to the remedy in her written submissions when discussing the case of *Chan Yuen Lan v See Fong Mun* [2014] 3 SLR 1048 ("*Chan Yuen Lan*"), which we will return to later. After we reserved judgment, Su's counsel sought leave to file further arguments on the remedy of equitable accounting. We granted leave to both parties to file further written submissions on the question of whether equitable accounting is available as a remedy on the facts of the case and they subsequently did so.

Our decision

Sale in lieu of partition

46 We begin with the first issue in the appeal: whether an order should be made for sale of the Property. Priya applies for such an order pursuant to s 18(2) read with the First Schedule to the SCJA ("the First Schedule"). Section 18(2) of the SCJA provides that the High Court shall have the powers set out in the First Schedule. Paragraph 2 of the First Schedule reads as follows:

> Power to partition land and to direct a sale instead of partition in any action for partition of land; and in any cause or matter relating to land, where it appears necessary or expedient, to order the land or any part of it to be sold, and to give all necessary and consequential directions.

47 In *Abu Bakar v Jawahir and others* [1993] 1 SLR(R) 865 ("*Abu Bakar*"), S Rajendran J allowed an application for sale of a property pursuant to s 18(2)(*c*) of the Supreme Court of Judicature Act (Cap 322, 1985 Rev Ed) ("the 1985 SCJA"), which is materially similar in terms to para 2 of the First Schedule. In *Abu Bakar*, members of the same family held unequal shares in a property located in Singapore. The plaintiff, who had a share, had moved out and wanted to settle down in Malaysia. He tried without success to persuade the other co-owners to purchase his share in the property. The defendants opposed the sale on the basis that they (and the plaintiff, if he wished) had a right to reside in the "family home" and any sale would cause them considerable inconvenience and hardship.

48 Rajendran J reviewed the history behind the court's power to order a partition of land and to order a sale in lieu of partition (at [7]–[16]). He began with the position in the United Kingdom ("UK"). In essence, there was, at common law, no right for co-owners to compel partition save for an exception that was carved out for joint heirs. But, by the Partition Act 1539 (c 1) (UK) and the Partition Act 1540 (c 32) (UK) ("the Partition Acts 1539 and 1540"), a statutory right to compel partition was conferred upon joint tenants as well as tenants in common. Further legislation in 1868 and 1876 (namely, the Partition Act 1868 (c 40) (UK) and the Partition Act 1876 (c 17) (UK) ("the Partition Acts 1868 and 1876")) allowed the court to order a sale in lieu of partition where the nature of the property or the interest of the parties rendered that more convenient.

49 Rajendran J went on to trace how these pieces of UK legislation took hold in Singapore law and concluded (correctly, in our view) that a court was "no longer bound by the provisions of the Partition Acts of 1868 and 1876 and was free to exercise this jurisdiction whenever it appeared necessary or expedient for the court to do so" (at [17]). This state of the law then came to be reflected in s 18(2)(*c*) of the 1985 SCJA and is currently the position in Singapore law pursuant to s 18(2) of the SCJA read with para 2 of the First Schedule.

50 On the facts before him, Rajendran J concluded that partition of such a small family house amongst several co-owners was practically impossible. While the best solution would have been for the defendants to buy out the plaintiff's interest, this was not possible. In the circumstances and he ordered a sale in lieu of partition, being satisfied that this was necessary and expedient in the circumstances. Perceived hardship and inconvenience to the other co-owners were not in themselves sufficient to prevent the sale order from being made.

51 The analysis in *Abu Bakar* was adopted by the High Court in *Toh Tian Sze v Han Kim Wah* [2012] 3 SLR 682. There, the parties agreed to partition the land on particular terms but approval from the competent authority was not forthcoming. Lee Seiu Kin J ordered a sale of the property instead because the parties had difficulties in their relationship and an order for partition as opposed to sale would have required them to work together despite these difficulties. He was also satisfied that there would be no substantial prejudice to the defendant as she had not been residing in the property and had only been deriving rent from it.

52 In *Chiam Heng Luan and others v Chiam Heng Hsien and others* [2007] 4 SLR(R) 305, Judith Prakash J granted an order for the sale of a property in lieu of partition. Almost all the parties wished to have the property sold. It was found that the exercise by the resisting co-owners' of their right to joint possession did not serve any practical purpose but would instead aggravate the existing tensions among them. Furthermore, the property was not in a good state of repair. Prakash J was also satisfied that no serious prejudice would be caused by a sale.

53 In *Neo Hui Ling v Ang Ah Sew* [2010] SGHC 328, a sale was ordered because it was impossible to expect the parties to act jointly on matters relating to the property given the state of their relationship. Lai Siu Chiu J also took into account the fact that the plaintiff could no longer service the housing loan, and it was possible that all parties would lose the property should the bank decide to foreclose on the mortgage. On the other hand, no undue hardship would be visited on the defendant if the property was sold; see also the decision of this court in *Abdul Razak Valibhoy and another v Abdul Rahim Valibhoy and others* [1995] 1 SLR(R) 441 at [19] where this court stated that it was relevant to consider the potential prejudice to the party resisting an order of sale in deciding if a sale ought to be ordered.

54 Unlike these cases, the court in *Nora Chia v Muthukrishnan Christopher Pillay* [1998] SGHC 96 ("*Nora Chia*") declined to order a sale of the property. Su places much reliance on this decision. Tay Yong Kwang JC (as he then was) declined to make an order for sale of the property where the parties, after divorce, had consented to orders in the decree *nisi* for the (former) matrimonial home to remain in their joint names. He noted that the orders in the decree *nisi* had been made in terms sought by the plaintiff, who was now seeking the sale. As Tay JC

put it, the terms "had been forged by the hammer of intensive negotiations, with both parties having legal advice" (at [53]). Furthermore, the terms of the decree *nisi* suggested that the defendant would remain in exclusive possession of the flat and *would be the only one to decide whether to keep the flat or sell it* (at [54]). Tay JC considered that a forced sale in these circumstances would entail a variation of the consent orders when the court had no grounds for doing so. He also considered the fact that the plaintiff had moved to England while the defendant, who had remarried, had been living in the house with his wife for more than 12 years. While both parties could no longer buy a flat from the Housing Development Board ("HDB") as a result of their joint ownership of the former matrimonial home, this had a greater impact on the defendant who was the only one currently residing in Singapore whereas the plaintiff was unlikely to return.

55 It is evident from Tay JC's analysis in *Nora Chia* that (a) he was mindful that the parties had agreed on terms as to whether and in what circumstances the property could or would be sold; and (b) he balanced the prejudice to each party in the alternative scenarios where an order for sale was made and where it was not.

56 In connection with the first of these two points, namely the relevance of any agreement between the parties, we find it helpful to have regard to the decision of the English Court of Appeal in *In re Buchanan-Wollaston's Conveyance; Curtis v Buchanan-Wollaston* [1939] 1 Ch 738 ("*Curtis v Buchanan-Wollaston*"). In that case, the co-owners of a piece of land agreed, pursuant to a deed of covenant, that transactions concerning the northern part of the land required the parties' *unanimous agreement* while transactions affecting the southern part of the land would be determined by *majority vote*. In a subsequent application brought by

one of the parties for an order of sale contrary to what had expressly been provided for in the deed, the court explained that "a person who had contracted … as to the way in which questions relating to this land should be dealt with, could not come to the Court and ask the Court to act in a way inconsistent with his own contractual obligation" (at 745). Although the court in that case was concerned with a somewhat different statutory provision, it seems to us that the underlying principle remains relevant. The short point is that the court should not ordinarily make an order which would effectively override or modify the terms of an agreement that has been struck between the parties on the very issue that the court is asked to determine. Hence, where a co-owner seeks an order for sale of a property in circumstances where this would be contrary to terms that the parties had already agreed on, the existence of such an agreement must *at least* be a weighty consideration for the court in determining whether a sale ought to be granted.

57 In our judgment, the following points may be distilled from the foregoing discussion of the authorities:

(a) In deciding whether it is necessary or expedient for a sale to be ordered in lieu of partition, the court conducts a balancing exercise of various factors, including (i) the state of the relationship between the parties (which would be indicative of whether they are likely to be able to co-operate in the future); (ii) the state of the property; and (iii) the prospect of the relationship between the parties deteriorating if a sale was not granted such that a "clean-break" would be preferable.

(b) Regard should be had to the potential prejudice that the various co-owners might face in each of the possible scenarios, namely, if a sale is granted and if it is not granted.

(c) A sale would not generally be ordered if to do so would violate a prior agreement between the co-owners concerning the manner in which the land may be disposed of.

58 We turn to the present case in the light of these principles, placing, for the moment, cl 10 of the SPA to one side. On this basis, it is clear to us that Priya is *prima facie* entitled to an order for sale of the Property. There was a clear impasse between the parties. Priya and Su have not been on speaking terms for more than a decade, making it difficult to see how the parties would be able to cooperate if they were to remain co-owners of the Property. Most of the discussions on the issues concerning the Property have been conducted through Philip who is himself estranged from his own wife, Su. The already difficult relationship between the parties will only deteriorate further if Priya is adjudged bankrupt as a consequence of Su's refusal to cooperate either in selling the Property or otherwise addressing the prevailing situation.

59 The prejudice Priya would suffer as a result of the Property not being sold also significantly outweighs the prejudice that Su would suffer if the Property were sold. Priya has expended a significant amount of her income and savings on the Property and her interest in the Property is at least 49%. Indeed, the Property appears to be Priya's principal asset. Su, on the other hand, accepts that she has made no financial contribution to the Property. If Priya is unable to realise any value from the Property, she would almost certainly be adjudged bankrupt. Furthermore, despite making the mortgage repayments under the second mortgage, she has not enjoyed occupation of the Property. She continues to reside in a rented HDB apartment.

60 In our judgment, Su does not stand to suffer comparable prejudice. Although she has four children, her

youngest is at least 16 years old and her older two children have already started working. In the event of a sale, she would be able to realise her value in the Property and look for alternative accommodation. Su's counsel highlighted that a significant amount of the sale proceeds would have to be credited into Philip's CPF account and there would be no guarantee that Su would receive her proceeds of sale. We deal with this point below at [117]–[119]. In our judgment, even if Su may be prejudiced, she may be able to get help from her children who are working. But, in any case, this does not, in our judgment, outweigh the potential prejudice to Priya who stands to be made bankrupt and lose almost her entire savings if a sale is not ordered. We are strengthened in this view by the fact that Su had, in the past, agreed to sell the Property. It therefore appears that Su's objection to the sale is more a matter of money than of principle.

61 For these reasons, we are satisfied, leaving cl 10 of the SPA to one side, that Priya is *prima facie* entitled to an order for the sale of the Property. We next consider whether cl 10 of the SPA amounts to an agreement between the co-owners concerning the manner in which the Property would be disposed of, in which case we should be slow to make an order for sale of the Property (see [57(c)] above).

Proper interpretation of cl 10 of the SPA

62 In our judgment, cl 10 of the SPA, properly construed, is *not* an agreement between the co-owners concerning the circumstances or manner in which the Property may be disposed of. The context surrounding the execution of the SPA and the insertion of cl 10 is pivotal to understanding its purpose.

63 Su says in her affidavit that she was keen to retain her 50% interest in the Property when negotiations were being conducted for Priya to acquire a share. Su's objective in retaining a 50% share of the Property may be discerned from the representations that Su claims were made to her at that time (see [27] above). One of the alleged representations was that by retaining a 50% interest, she would be able to prevent the sale of the Property. But if this was the reason for Su's insistence on retaining a 50% interest in the Property, what then was the reason for inserting cl 10, which was evidently inserted at Su's insistence as a proposed amendment into the second draft agreement (see [12(b)] above)? It remained in subsequent iterations of the draft agreement and was retained in the SPA. We are satisfied that cl 10 was drafted and inserted into the SPA, not to address any question of the *sale* of the Property, but rather to assuage Su's fear that Priya would attempt to *evict* her and her children from the Property and attempt to take possession of it once Priya became a co-owner. Consistent with this, Su in fact argues in her written submissions that cl 10 was inserted to guard against this very possibility of Priya evicting her and her children from the Property. In short, cl 10 is concerned with the separate question as between Su and Priya of the *occupation* of the Property by Su and her children and not with its *sale*.

64 In keeping with this, it may be noted that cl 10 says nothing about whether Su may sell her interest in the Property. Instead, it only refers to Su being evicted by Priya, and not by anyone else. Had Priya sold her interest in the Property back to Philip (or to anyone else for that matter), there would be nothing to prevent Philip (or the new proprietor) seeking an order for the sale of the Property. In our judgment, cl 10 was specifically targeted at Priya only and this was put in place because of the unhappy state of the relationship between Su and Priya. If cl 10 was intended as an agreement between the co-

owners concerning the disposal of the Property, we would have expected that Philip would also have been named in the clause. Su's interpretation of the clause would have the effect of preventing *only* Priya from seeking an order for the sale of the Property. We are unable to accept this.

65 Clause 10 may also be contrasted with the specific arrangements that were in place in *Curtis v Buchanan-Wollaston* where the parties detailed in a deed of covenant the level of agreement required between the parties (unanimously in one situation, or by majority in another) before *dealings with the land* were permitted under the deed (see [56] above). Similarly, in *Nora Chia*, Tay JC found that it was implied in the terms of the decree *nisi* that the parties had agreed that the defendant would remain in exclusive possession of the flat and would be the only one to decide whether to *keep* the flat or *sell* it (see [54] above). In our judgment, cl 10 on its terms does not and cannot have a similar effect.

66 In our judgment, cl 10 might have precluded Priya from evicting Su and her children from the Property as long as Priya remained the owner of 49% of the Property. But that is as far as it goes. Any other conclusion would entail holding that Su, at her option, could remain in occupation of the Property for as long as she wished without having to pay anything; and concomitantly, that Priya had an obligation to keep her assets frozen indefinitely in a property that she could not herself occupy. We find this an improbable scenario especially in the absence of language in the clearest terms having this effect. In the circumstances, we are satisfied that Priya would not be acting in a manner inconsistent with her contractual obligations by seeking an order for sale.

67 Finally, we also consider that Su may well have believed that by her insistence on holding a half-share of the Property, she would be able to block any sale of the Property. But Su's mistaken belief in this regard is not relevant to the exercise of our discretion as to whether we should grant a sale in lieu of partition. Priya was before us, as a co-owner, seeking an order for sale. This was an issue to be determined in accordance with the principles we have outlined above and Su's subjective (and mistaken) belief as to what rights she may have had cannot affect this.

Promissory estoppel

68 There remains the question of Su's reliance on the doctrine of promissory estoppel by reason of which she contends that Priya is estopped from seeking an order for sale. In *Cupid Jewels Pte Ltd v Orchard Central Pte Ltd and another appeal* [2014] 2 SLR 156 ("*Cupid Jewels*") we recognised that promissory estoppel *could* in principle prevent the exercise of a statutorily conferred right (at [37]). In the present case, Priya did not contend that estoppel would be inapplicable in principle. We therefore consider the matter on the substance of the argument.

69 The substantive requirements of estoppel – representation, reliance and detriment – are well established (see *Cupid Jewels* at [35]; *Oriental Investments (SH) Pte Ltd v Catalla Investments Pte Ltd* [2013] 1 SLR 1182 at [83]; *Aero-Gate Pte Ltd v Engen Marine Engineering Pte Ltd* [2013] 4 SLR 409 at [37]). Su avers that Priya and Philip represented to her that she would not be evicted from the Property and that she would not have to worry about making mortgage repayments (see [27] above). She goes on to say that she relied on the representations when she consented to Philip selling 49% of the Property to Priya and also when she undertook joint liability for the new loan.

Even if we were prepared to assume that these two elements are satisfied, we consider that Su cannot invoke promissory estoppel because she is unable to show that she suffered any detriment.

70 Su says she suffered detriment because she left the responsibility for making the mortgage repayments to Priya and did not look for employment or find any other means of obtaining finance. She claims that she was willing to seek gainful employment to secure her financial position at the time Priya bought a share of the Property. She avers that she did not do so because of the representations. We do not accept these submissions for three reasons. First, Su has been unemployed, by choice, since 1996. She did not contribute to the purchase of the Property in 1995 even when she was employed. To claim that she would have returned to the workforce almost a decade later in order to manage the mortgage repayments under the second mortgage was simply not credible. Further, having regard to the strained state of her relationship with Priya, if her claim was true, we would have expected Su to have taken this course in preference to finding herself a co-owner of the Property with Priya. To put it simply, if Su had truly contemplated being gainfully employed, there would have been no need for Priya to buy a share in the Property or, as it transpired, to provide a monthly allowance of $500 to Su's family. Second, Su has not adduced any evidence to demonstrate that she would have been in a position to draw a steady income that was sufficient to enable her to support her and her four children and meet the mortgage payments while Philip remained unemployed. Third, her claim that she did not enter the workforce because of the alleged representations are contradicted by the evidence in her affidavit where she states that she wanted to return to the workforce but feared for her children if they were left alone with Philip. Therefore, whatever might

have been Su's reasons for not seeking employment, we do not consider them to have had anything to do with the alleged representations.

71 In our judgment, Su was perfectly content for Priya to step in to assist because she and Philip would, in all likelihood, have lost the Property to the bank if not for Priya's assistance. On the whole, we consider that Su greatly benefited from the magnanimity of Priya who had allowed Su and her family to continue living in the Property despite the fact that she alone was paying the instalments under the second mortgage.

Conclusion on whether the Property should be sold

72 In the premises, we are satisfied that the Judge did not err in ordering a sale of the Property.

73 We also leave undisturbed the Judge's order giving Philip or Su the option of purchasing Priya's interest, at a value to be determined. This option may be exercised within 14 days of the date of this judgment and any sale is to be completed within a further period of 42 days. This remains a way forward for the parties if Su truly wishes to continue occupying the Property.

74 Finally, we observe that if no order for sale was made and Priya were to be adjudged a bankrupt, it would likely be the Official Assignee who would be seeking an order for the sale of the Property in order to meet the claims of Priya's creditors. In that situation, we fail to see how cl 10, ***even on the basis of Su's interpretation***, could possibly have stood in the way of the Official Assignee. At the hearing, we highlighted this possibility to the parties and even afforded them a two-week window in order for them to come to a consensual agreement on selling the Property. No agreement was reached,

further illustrating the reality that if no order for sale were made, the parties would simply not be able to cooperate with each other.

Priya's beneficial interest in the Property

75 We turn to the other issue in this appeal, which is the ascertainment of Priya's beneficial interest in the Property. The Judge held that Priya was beneficially entitled to 70% of the Property. The arguments before us focused on whether Priya had a beneficial interest in the Property greater than her legal interest of 49% either on the basis of a resulting trust or a common intention constructive trust.

76 While there was some mention of the Property being the matrimonial home of Su and Philip, it is not disputed that the usual common law principles apply to determine Priya's beneficial share in the Property. Su and Philip have not initiated matrimonial proceedings and so the court's power to divide matrimonial assets in a manner that is just and equitable under s 112(1) of the Women's Charter (Cap 353, 2009 Rev Ed) is not relevant. More pertinently, Priya acquired her interest pursuant to a sale and the court has no power to divide the Property between Priya and either Su or Philip otherwise than in accordance with their true interests at law. At its core, Priya's argument is that the extent of her beneficial ownership in the Property, by the operation of equitable principles, should reflect the fact that she had paid most of the purchase money and the mortgage repayments for the Property.

Resulting trust

77 In *Chan Yuen Lan*, we revisited the law on resulting trusts in relation to disputes over the beneficial ownership of property which is used by parties in a marital, quasi-marital, familial or other intimate relationship. Citing our

earlier decision in *Lau Siew Kim v Yeo Guan Chye Terence and another* [2008] 2 SLR(R) 108 ("*Lau Siew Kim*"), we stated (*Chan Yuen Lan* at [36]):

> [In *Lau Siew Kim*, this court] approved of the view that a presumption of resulting trust arose when a person made a voluntary payment to another person or paid (wholly or in part) for the purchase of property which was vested in the other person …

78 We also considered, in *Chan Yuen Lan*, that the doctrinal basis for the presumption of resulting trust is that an intention on the part of the payor of the purchase price to benefit the recipient (who receives property in his legal name but who has not paid for the property) will not be readily inferred (at [43]–[44]; see also *Lau Siew Kim* at [35]). Put simply, a resulting trust arises by operation of law unless the court is satisfied that there was indeed an intention on the part of the person paying the purchase price for the property to benefit the recipient of the legal title (*Chan Yuen Lan* at [38]).

79 Where the presumption of a resulting trust is invoked, it is the lack of intention to benefit the recipient of the property that is being *inferred*. It follows that the presumption of resulting trust (and the opposite presumption of advancement) will be not called in aid when the evidence that is before the court adequately reveals the true intention of the transferor. After all, if the evidence before the court directly reveals the actual intentions of the transferor it will *not be necessary* to draw the inference of a lack of intention to benefit the recipient. This was a point that we had made in *Lau Siew Kim* (at [36] and [59]) and reiterated in *Chan Yuen Lan* (at [51]–[52]).

80 Having set out in brief these general principles, we turn to the facts before us. We consider that no presumption of resulting trust can possibly arise in this case because it was not possible for Priya to have *purchased* more than 49% of the Property. Simply put,

only 49% of the Property was up for sale, and therefore, it was not possible for Priya to have acquired more than 49% of the Property, whether legally or beneficially.

81 At the most basic level, Priya's contention requires her to demonstrate that because she paid the equivalent of 70% of the cost of acquiring the Property, she should be taken to have intended to acquire 70% of the Property; yet she chose to register only a 49% interest in her name, leaving the remaining 51% vested in the names of Su and Philip. The facts, however, are wholly inconsistent with this. At the time Priya bought her share of the Property in 2004, it had *already* been registered in Philip's and Su's names as joint tenants and it was not disputed that Philip and Su held the Property as legal and beneficial joint tenants at the time they acquired it. When Philip sold his share, the joint tenancy was severed into a tenancy in common under which Su and Philip each beneficially held 50% of the Property (see the judgment of Sir Page Wood VC in *Williams v Hensman* (1861) 1 J & H 546 at 556 which was referred to by this court in *Jack Chia-MPH Ltd v Malayan Credit Ltd* [1983-1984] SLR(R) 420 at [2]; *Diaz Priscillia v Diaz Angela* [1997] 3 SLR(R) 759 at [19]; *Sivakolunthu Kumarasamy v Shanmugam Nagaiah and another* [1987] SLR(R) 702 at [11]). It is clear that at the time the SPA was executed in 2004, Priya had only *purchased* 49% of the Property *from Philip*. Priya never dealt with Su's interest at all. Indeed, Su was not even a party to the SPA. Furthermore, Su clearly intended to retain her interest (see [63] and [67] above). Priya only acquired 49% of the Property from Philip, leaving him with a share of 1% of the Property. In other words, the severance of the joint tenancy and the sale of a portion of Philip's interest in the Property to Priya did *not* affect Su's legal and beneficial interest in 50% of the Property. Without Su having dealt with any part of her share in the Property,

Priya cannot be said to have beneficially acquired any part of her interest in the Property. Moreover, the fact that the sale and purchase of Philip's share was on terms that he retained an interest of 1% similarly precludes any finding of an intention that Priya was to acquire this as well. The fact that Priya later contributed to the mortgage repayments could not alter the beneficial interest which she had obtained at the time of her purchase of a share in the Property in 2004 (see [87] and [92] below). For this reason alone, a resulting trust cannot arise in the circumstances to confer on Priya a beneficial interest greater than her legal interest of 49%.

82 This segues neatly into the second and related point, which is that Priya's intention was only to purchase 49% of the Property from Philip in 2004. In the light of Priya's actual intention to purchase 49%, and Su's and Philip's actual intention to sell only 49% of the Property, there can be no room for any presumption of a resulting trust to arise.

Common intention constructive trust

83 We turn to the alternative argument advanced by Priya which rests on a common intention constructive trust. This is a remedy applied where it is clear that there is a common intention among the parties as to how their beneficial interests are to be held. In *Chan Yuen Lan*, we surveyed the law on the common intention constructive trust in the UK, Australia and Canada. It is not necessary to retrace the comprehensive discussion in *Chan Yuen Lan* (at [95]–[161]), save to restate a few principles. First, in the absence of any evidence of a common intention between the parties as to how the beneficial interest in the property concerned is to be held, the resulting trust remains the default analysis (*Chan Yuen Lan* at [158]). Second, to successfully invoke the common intention constructive trust, the common intention (which may

subsist either at, or subsequent to, the time the property was acquired) between the parties may either be express or inferred. Third, there must be *sufficient and compelling* evidence of the express or inferred common intention (see *Chan Yuen Lan* at [160(b)] and [160(f)]).

84 The evidence in this case unequivocally militates against the finding of any common intention between the parties that Priya was to have more than a 49% interest in the Property for the reasons we have set out at [80]–[82] above. Nor is there any basis to find a *subsequent* common intention to *vary* the beneficial interests in the Property from the proportions held by the parties when Priya entered the picture in 2004. Priya argues that there was a common intention to vary the beneficial interest when it became evident that she alone was making the mortgage repayments under the second mortgage. Even if we assume that Priya believed all along that *her* beneficial interest in the Property would be increased by virtue of her repayment of the second mortgage, for a common intention constructive trust to be found, the intention to vary the beneficial interest must in fact be *common* to all the parties involved. Yet it is clear in this case that Su *never* intended to reduce her interest in the Property from that which vested in her in 2004. In fact, as we have noted, Su had wished to retain her 50% interest in the Property in the belief that she would, as a result of this, be in a position to block any intended sale. In the light of this, we are satisfied that no common intention constructive trust can arise. It may also be noted that when the parties contemplated selling the Property for $1.6m, Priya's position, as noted at [30] above was that the net proceeds would be shared in the proportions in which they held the Property.

85 In the premises, it is unnecessary for us to consider Su's arguments based on indefeasibility and s 46 of the LTA. We thus allow this part of the appeal and set aside the Judge's

declaration that Priya is entitled to 70% of the Property. As no resulting trust or common intention constructive trust arises, Priya is both legally and beneficially entitled to 49% of the Property.

Mortgage repayments and liability under a mortgage

86 Priya's submissions focussed on the fact that she had paid almost all of the mortgage instalments, and the parties analysed the mortgage payments made by Priya principally under the rubric of either the resulting trust or the common intention constructive trust. We have dismissed both of these on the ground that, having regard to the facts before us, it was plain that there was never in fact any intention for Priya to hold anything more than a 49% interest. However, as arguments were raised on this point, we make some observations on the difference in the treatment of undertaking the *liability* for a mortgage on the one hand, and actually making mortgage *repayments* on the other and how each of these should be treated for the purpose of determining each party's contributions to the acquisition of a property. For the avoidance of doubt, these observations are not germane to the analysis of direct or indirect financial contributions that is undertaken in the context of a division of assets in matrimonial proceedings.

87 In *Lau Siew Kim*, we addressed the question of whether subsequent mortgage payments could amount to a direct contribution to the purchase price for the purpose of establishing a resulting trust. We adopted (at [112]–[113]) the orthodox conception of the resulting trust as a trust which crystallises at the time the property is acquired. On this basis, we concluded (at [117]) that the extent of the parties' beneficial interests under a resulting trust must be determined at the time the property is purchased because that is when the trust arises. In line with this approach, we held in *Lau Siew Kim* that subsequent

mortgage payments may only be taken into account *if* there was a prior agreement between the parties at the time the mortgage was obtained as to who would repay the mortgage. If, however, there was no such agreement, then subsequent mortgage payments would not count as direct contributions. In short, the critical question is whether the parties were in agreement, at the time of the acquisition of the property, as to what liability each party would undertake in respect of the mortgage.

88 It has to be said, however, that the distinction between undertaking the liability for the mortgage and actually making mortgage repayments did not receive much attention in *Lau Siew Kim*. There we applied *Curley v Parkes* [2004] EWCA Civ 1515 ("*Curley v Parkes*") and on this basis, attributed half the loan amount to each of the two parties because both of them had assumed liability for the loan jointly (see *Lau Siew Kim* at [119] and [123]).

89 In our judgment, it is correct to analyse the position by reference to the responsibility that is undertaken by each party for loan repayments at the time the property is acquired. When a mortgage is taken out, the crucial consideration are the parties' intentions, at the time the property is acquired, as to the ultimate source of the funds for purchase of that property (see *Lau Siew Kim* at [116] and *Bertei v Feher* [2000] WASCA 165 at [44]). Actual mortgage payments made at a later time would therefore only count as direct contributions to the purchase price where these are referable to, and in keeping with, a prior agreement between the parties as to who would be liable to repay the loan. It is, as we have said earlier, the parties' agreement at the time of acquisition that is critical.

90 Many factors are engaged in the determination of the precise agreement or understanding between

the parties as to who would repay the mortgage. The focus should not lie exclusively on who took on *liability* for the mortgage as against the bank. Often such liability will be joint because the bank would like to have the widest choice of the parties against whom it can enforce the liability under the mortgage. Rather, the question will turn on what the operating agreement was between the co-owning parties at the time the loan was taken out. In this regard, subsequent conduct may be relevant to the extent that it sheds light on such an agreement (if any) between the co-owners. Thus, in *Chan Yuen Lan*, despite the fact that liability for the loan fell on the wife, the court found that the agreement between the parties was for the husband to repay the loan and therefore the loan amount of $400,000 was attributed to the husband as his direct contribution to the acquisition of the property (at [81]–[87]).

91 In most cases, the context in which the loan was taken out would show what the understanding between the parties was. For example, if a couple in a spousal relation obtained a joint loan for purchase of a property as their matrimonial home where both spouses are gainfully employed, it would usually follow, in the absence of any other contrary indication, that the understanding between them was that each would do their utmost to assist and contribute to the cost of servicing the mortgage. If, on the other hand, only one spouse is working at the time, then the inferred understanding will likely be that the working spouse would be the one to pay off the loan. These examples are merely illustrative of the importance of context in discerning the understanding and agreement between the parties at the time the loan is obtained. However, in a case where there is no evidence of what the operating agreement was between the parties as to who would repay the mortgage, then each party may be attributed a portion of the loan amount in accordance with the liability assumed to the bank as was done in *Curley v Parkes*.

92 In contrast, actual repayments that are not referable to the parties' agreement as to how they intend to service the mortgage should not be taken into account for determining the ownership interest on a resulting trust analysis because, as we have said, the interest under a resulting trust crystallises at the time of purchase. If such subsequent payments were computed as part of the parties' contributions to the purchase price, it would mean that the parties' interests under the resulting trust are in a state of flux, increasing or decreasing as the case may be when one party makes repayment of the mortgage. In our judgment, this would be wrong in principle.

93 We have reviewed this point, even though it is not necessary for the purpose of our decision, because of the arguments made by Priya which centred on her actual repayments and also because of the prevalence of parties in Singapore who purchase properties using bank loans secured by mortgages. In the present case, the mortgage repayments could have been relevant for the resulting trust analysis if there had been an agreement at the time of the 1995 mortgage that Priya alone would bear all the mortgage payments under the 1995 mortgage. This was never on the cards because Priya had not yet entered the fray in 1995. As we have also explained, there is no room to apply the resulting trust analysis when Priya acquired 49% of the Property in 2004 given the express intentions with which the transaction was entered into, as set out at [80]–[82] above.

Equitable accounting as a tool for retrospective adjustment

94 However, our holding above does not mean that the amounts paid by Priya towards the repayment of the mortgage are irrelevant or that she has no remedy in respect of these repayments. In our judgment, the facts of the present case do engage the doctrine of equitable accounting. We raised this

with the parties at the hearing and as we have already noted, they then made further submissions on this issue. We first consider the principles of equitable accounting before turning to consider whether Priya is entitled to an account in equity.

Principles of equitable accounting

95 Equitable accounting between co-owners of land finds its origins in the Partition Acts of old (see [48] above). By the Partition Acts of 1868 and 1876, the English court was empowered to order a sale in lieu of partition. In partition actions, the Courts of Chancery would often direct an inquiry into the financial position as between co-owners at the time of sale and on this basis make appropriate adjustments to the proceeds each party would receive upon the sale depending on the circumstances (see Williams and Guthrie-Smith, *Daniell's Chancery Practice* (Steven and Sons, 8th Ed, 1914) at p 1186). It is from this practice that equitable accounting between co-owners, as it is now known, emerged. While it remains an exercise in accounting, equitable accounting should not be understood as a rigid process. Indeed, it has been described as a process where the court endeavours to do "broad justice or equity as between co-owners" (at *Byford v Butler* [2003] EWHC 1267 (Ch) at [40]).

96 In *Snell's Equity* (John McGhee gen ed) (Sweet & Maxwell, 33rd Ed, 2015) ("*Snell's Equity*"), equitable accounting between co-owners of land is said to be "the process by which the financial burdens and benefits of land shared by co-owners are adjusted between them" (at para 20–080). Classic statements of this principle can be traced back to *Leigh and another v Dickeson* (1884) 15 QBD 60 ("*Leigh v Dickeson*"), where Cotton LJ said as

follows in the context of repairs made to property by one tenant in common (at 67):

> …[I]n a suit for a partition it is usual to have an inquiry as to those expenses of which nothing could be recovered so long as the parties enjoyed their property in common; *when it is desired to put an end to that state of things, it is then necessary to consider what has been expended in improvements or repairs: the property held in common has been increased in value by the improvements and repairs; and whether the property is divided or sold by the decree of the Court, one party cannot take the increase in value, without making an allowance for what has been expended in order to obtain that increased value; in fact, the execution of the repairs and improvements is adopted and sanctioned by accepting the increased value.* There is, therefore, a mode by which money expended by one tenant in common for repairs can be recovered, but the procedure is confined to suits for partition.
>
> [emphasis added]

97 Equitable accounting has been applied in a variety of contexts to take account of such things as mortgage repayments, improvements and repairs to the property and rents and profits derived. In Kevin Gray & Susan Francis Gray, *Elements of Land Law* (Oxford University Press, 5th Ed, 2009), it is observed (at para 7.4.38) that the traditional rules of equitable accounting were "detailed and complex" but have been overtaken in the UK by a jurisdiction conferred on the court by the Trusts of Land and Appointment of Trustees Act 1996 (c 47) (UK) ("the 1996 UK Act"). Although the results yielded by either process may not materially differ, it is equitable accounting, as it was applied prior to the legislative changes in the UK, and in the specific context of mortgage payments, that is the most relevant for our purposes. In this regard, we also observe that the process of equitable accounting had been consistently applied by the English courts to account for mortgage payments in the context of cases involving a property dispute after a breakdown of a relationship (see for example, *Bernard v Josephs* [1982] 1 Ch 391; *In re Pavlou (a Bankrupt)*

[1993] 1 WLR 1046 ("*In re Pavlou*"); *Davis v Vale* [1971] 2 All ER 1021; *Leake (formerly Bruzzi) v Bruzzi* [1974] 2 All ER 1196; *Marsh v Von Sternberg* [1986] 1 FLR 526; *In re Gorman (a Bankrupt)* [1990] 1 WLR 616 ("*In re Gorman*")).

98 In *Cowcher v Cowcher* [1972] 1 WLR 425 ("*Cowcher*"), Bagnall J outlined the following hypothetical to illustrate how equitable accounting would operate in relation to mortgage payments (at 432–433):

> Suppose land be conveyed to A for £24,000 B providing in cash £8,000 and A raising on mortgage of the property the remaining £16,000; suppose A has paid off £5,000 of the mortgage and B (though under no obligation) has paid off a further £2,000 leaving £9,000 outstanding: finally, suppose the property to be sold for £60,000. The shares under the resulting trust are one-third to B and two-thirds to A; but A must account for the outstanding mortgage of £9,000 and B is entitled to be reimbursed the £2,000 paid by him in part discharge of the mortgage. Thus out of £60,000 realised £9,000 goes to the mortgagee, B takes £22,000, his one-third share of £20,000 together with £2,000 paid off the mortgage, and A takes £29,000, that is his two-thirds share of £40,000 less £9,000 outstanding on the mortgage and £2,000 repayable to B. …

99 Bagnall J noted that this flows from the well-settled principle that he who discharges another's secured obligation is entitled to be repaid out of the security the amount paid by him. In *Muschinski v Dodds* (1985) 62 ALR 429 ("*Muschinski*"), Gibbs CJ of the High Court of Australia considered the application and basis of equitable accounting as follows (at 437–438):

> What appears to have been overlooked in the proceedings up to, and including, the argument in this court is the fact that the appellant and the respondent were made by the contract jointly and severally liable to pay the price for the purchase of the Picton land. *They were under a common obligation to pay the debt, and the case therefore fell within the general principle applicable both in law and equity which obliged them to bear the burden equally with the consequence that, if one discharged more than his or her proper share, he or she could call upon the*

> *other for contribution.* The principle is stated succinctly in *Chitty on Contracts* (General Principles) 25th ed (1983), para 1213, as follows: "Joint and joint and several debtors have a quasi-contractual right of contribution among themselves: that is to say, if one has paid more than his share of the debt, he can recover the excess from the others in equal shares, subject to any agreement to the contrary" …
>
> [emphasis added]

100 Gibbs CJ in *Muschinski* and Bagnall J in *Cowcher* evidently viewed equitable accounting as a remedy arising from the right of contribution which is an incident of one discharging another's obligation. However, this is not the only basis proffered for equitable accounting. In *In re Pavlou*, Millett J (as he then was) said (at 1048–1049):

> On a partition suit or an order for sale adjustments could be made between the co-owners, the guiding principle being that neither party could take the benefit of an increase in the value of the property without making an allowance for what had been expended by the other in order to obtain it … The guiding principle of the Court of Equity is that the proportions in which the entirety should be divided between former co-owners must have regard to any increase in its value which has been brought about by means of expenditure by one of them.
>
> … The wife will be entitled, as against the trustee in bankruptcy, to credit only for one half of the lesser of the actual expenditure and any increase in the value realised thereby.
>
> The same applies in my judgment to any capital element in the repayment of mortgage instalments. The repayment of the capital element in each instalment increases the value of the equity of redemption which inures to the benefit of both joint tenants. Accordingly, the wife is entitled to credit for one half of the *increase in value of the equity of redemption* which results from the capital element of the mortgage payments…
>
> [emphasis added]

101 Millett J saw equitable accounting as resting on the basis that a co-owner should not take the benefit of an increase in the value of the property without making an allowance for what

had been expended by the other co-owner (citing *Leigh v Dickeson*). In this context, mortgage payments can be seen as improving the equity of redemption. Whether equitable accounting rests on the right of contribution or on the principle of *Leigh v Dickeson* could have a bearing on whether the court may order an account for the interest element in mortgage repayments. It has been suggested in this regard that if equitable accounting is justified on the basis of *Leigh v Dickeson*, then it does not adequately account for the interest element of mortgage payments since these payments do not directly enhance the equity of redemption (see Elizabeth Cooke, "Equitable Accounting" [1995] CPL 391). On the other hand, if equitable accounting was justified on the right of contribution, then mortgage payments that go towards the capital element as well as the interest element should be taken into account.

102 In our judgment, there is no reason to draw a distinction between mortgage payments which go towards capital and those which go towards interest. It may be noted that in *In re Pavlou*, Millett J thought that the wife was also entitled to a contribution in respect of the interest element in the mortgage (at 1050). In previous cases, courts have also allowed the recovery of the interest element of mortgage payments but would often apply a set-off against any occupation rent chargeable for sole occupation by the co-owner paying the mortgage (*Suttill v Graham* [1977] 1 WLR 819 per Ormrod LJ at 824). As explained by Vinelott J in *In re Gorman* (at 626), this practice was not a rule of law but a rule of convenience. Vinelott J then continued (at 626–627):

> Moreover, although the practice as recorded in *Suttill v Graham* [1977] 1 W.L.R. 819 is to set the interest element in mortgage instalments against a notional occupation rent, leaving the party paying the mortgage instalments free to charge a due proportion of any capital repayments against the share of the other, I can see no reason why, if an account is taken, the party paying the instalments should not be entitled

> to set a due proportion of the whole of the instalments paid against the share of the other party. The mortgagee will normally have a charge on the property for principal and interest and a right to possession and sale to enforce his charge. The payment of instalments due under the mortgage operates to relieve the property from the charge and gives rise to an equitable right of contribution by the co-owner who has not paid his due proportion of the instalments. I do not understand Stamp L.J., when he referred in *Suttill v. Graham* to the fact that the attention of the court in *Cracknell v Cracknell* [1971] P. 356 was not drawn to the distinction between the payments of capital which do, and the payment of interest which does not increase the value of the equity, to advance any contrary view. In the subsequent decision of the Court of Appeal in *Bernard v. Josephs* [1982] Ch. 391 (where *Suttill v. Graham* [1977] 1 W.L.R. 819 however, was not cited), Lord Denning M.R. clearly thought that an appropriate share of the actual instalments paid should be brought into account.

103 We agree with this. No distinction should be drawn between payments of capital and of interest because both these payments ultimately preserve or enhance the equity of redemption and accordingly there will generally be a right of contribution as between co-owners. This approach also takes into account the reality of mortgage payments. It is generally the case that amortisation schedules are such that a greater proportion of mortgage repayments made at the beginning of the mortgage will be applied towards the payment of interest while over time, more of the payment will go towards capital repayment. If a distinction were drawn between payment of capital and of interest, the party who makes repayments at the beginning may end up worse off than a party who pays at a later stage. There is no justification in principle for this if equitable accounting is meant to achieve broad justice between co-owners.

104 We next consider if there are circumstances in which equitable accounting may not be called in aid. In *Muschinski*, Gibbs CJ thought that a right to equitable accounting may be excluded by express or implied

agreement and also that it would not apply if it would be contrary to the intentions of the parties at the time when the joint obligation was undertaken. This stands to reason because if the parties agree at the outset as to how the mortgage will be repaid, then, as we have noted above, this will likely affect their beneficial interest in the property and there would be usually no further need to consider equitable accounting. *A fortiori*, when parties agree at the outset that there should be no accounting between them even for mortgage payments in excess of their respective shares, equitable accounting would not come into play. Thus, as Jonathan Parker LJ observed in the English Court of Appeal decision of *Wilcox v Tate* [2006] EWCA Civ 1867 (though in the context of the 1996 UK Act), equitable accounting will be "fact sensitive" (at [64]).

105 In our judgment, the extent to which each party is expected to contribute to mortgage repayments will largely depend on the common understanding or agreement between the parties at the time the mortgage is taken out. As we have noted above, this will usually affect the beneficial interests of the parties. If there is a *material* departure from that common understanding, and one party repays more of the mortgage than was initially envisaged, then equitable accounting may be brought into play, unless it is shown that at the time the mortgage repayments were made, *the payor had the intention to benefit the other co-owners*. This follows from the fact that the basis underlying the remedy of equitable accounting is a notional request to contribute so as to restore the parties to what had been their common understanding at the time the mortgage was taken out; but if the evidence is that the payor intended to benefit the other co-owners, there would be no room for any such notional request for contribution to be inferred. In these circumstances, equity will not require a co-owner to contribute.

Whether Priya entitled to an account in equity

(1) Preliminary observations

106 Against that background, we turn to consider whether Priya has a right to an account in equity. As a preliminary point, Su argues that Priya cannot invoke any such right, because she did not argue the point. In the Respondent's Case, Priya only refers to equitable accounting in the context of discussing *Chan Yuen Lan*. However, at the end of Priya's written submissions, she does seek repayment of all monies that were paid towards the discharge of the second mortgage over the Property.

107 In our judgment, Su's objection can be disposed of readily. As we have noted, after we reserved judgment, we allowed the parties to make further submissions specifically on the remedy of equitable accounting. Furthermore, all the facts that are relevant to ascertain whether the remedy is available are before us. We therefore find that there would be no prejudice occasioned to Su if Priya is allowed to take the point.

(2) Application of the law to the facts

108 Having ascertained that the legal *and* beneficial interests of Su, Priya and Philip in the Property are 50%, 49% and 1%, respectively, the first question that arises is what the common understanding was between the parties as to the repayment of the second mortgage at the time it was obtained.

109 The new loan was jointly taken out by all three parties, who knew that its purpose was to redeem the 1995 mortgage. Priya also says that while she was repaying the new loan, she understood that Philip would pay her back and believed this would happen fairly soon. Priya claims that she assisted only as a

short-term measure because she expected that Philip would be able, by recovering returns from some investments, to repay her promptly. She contends that she *never* expected to bear the entire burden of the second mortgage on her own. Philip largely confirms this. We are satisfied that while the hope that Philip would somehow turn his situation around and come into enough funds to repay *promptly* was, on hindsight, somewhat optimistic, Priya was not looking at the prospect of purchasing an interest in the Property as a purely commercial proposition. She was largely motivated by the desire to help her brother at a time of need.

110 In our judgment, the understanding between all three parties was that both Philip and Priya would attempt to pay off the second mortgage as soon as their circumstances permitted it. As far as Su was concerned, as between her and Philip, Philip would be responsible for the mortgage repayments. It is true that Philip was unemployed at that time but this was not expected to continue indefinitely (see [20] and [23] above). In any case, we find it impossible to accept that the parties were proceeding on the basis that Philip would never work again and hence that he and Su would make no contributions at all. The fact that it worked out in this way for much of the period in question, with the consequence that Priya ended up making most of the mortgage repayments, does not necessarily mean that this was what was originally intended. It is not believable that Priya agreed unconditionally to accept sole responsibility for the second mortgage. In keeping with this, when Su initially agreed to sell the Property at a price of $1.6m, she had no objections to Priya recouping all her CPF monies spent on the Property *before* sharing rateably in the surplus from the proceeds of sale in accordance with the parties' legal interests (see [30] above). This serves to demonstrate that Su too believed that Priya was not to be solely responsible for the new loan. We thus hold that the common

understanding at the time of the new loan was that each party would contribute according to their beneficial share in the Property, though as between Philip and Su, Philip was to be responsible for making the payments. As a concession to her brother, Priya agreed to meet all the payments until Philip secured employment.

111 Su submits that the fact that Priya consistently paid the mortgage over a period of more than six years from September 2004 to December 2010 without making any effort to seek payment from her or Philip suggests that she intended to benefit both of them. Further, Priya must have intended to benefit Su as she knew all along that Su was not in a position to make the mortgage repayments.

112 We disagree. From September 2004 to December 2010, Priya had been making loan repayments from her CPF account. The monies that she used to repay the bank were not coming out of her disposable income. In these circumstances, we do not consider the fact that Priya did not demand repayment evidences any intention on her part to benefit Su and Philip. Once Priya was no longer able to make repayments from her CPF account in 2011, she repeatedly informed Philip that she could no longer afford the repayments and sought alternative arrangements (see [29] above). In these circumstances, Priya's failure to press Philip or Su for payment is, at best, equivocal.

113 We accept that Priya believed that Philip would be able, in due course, to begin contributing to the mortgage repayments. This never happened. While Priya's belief can be said to be fanciful or even foolish (given the length of time Philip remained unemployed), it does not translate to an intention on her part to underwrite virtually the entirety of the mortgage repayments. Moreover, the state of the relationship

between Priya and Su, even at the time Priya bought her interest in the Property, was not amicable, and we note further that they have not been on speaking terms for more than a decade. In these circumstances, it is implausible that Priya intended to benefit Su by paying substantially the whole mortgage.

114 For these reasons we find that Priya is entitled to call in aid the doctrine of equitable accounting.

115 Priya's actual repayment of the mortgage was plainly at variance with common understanding we have set out at [110] above. Priya paid a total of $175,082.50 ($155,082.50 + $20,000) (see [22] above). The evidence also reveals that Philip paid $8,977.88 and Su's son paid $21,032.94 (see [24] above). On the basis of our analysis as to what we consider the expectations of the parties were at the time of the new loan, out of the total sum of $205,093.32 paid towards the discharge of the mortgage, Priya ought to have only paid $100,495.73 (49% of $205,093.32). Philip and Su, on the other hand, ought to have paid $2,050.93 (1% of $205,093.32) and $102,546.66 (50% of $205,093.32), respectively. Since it does not seem to be disputed that the monies paid by Su and Philip's son are to be attributed to them, Su can be said to have paid a total of $27,959.89 (with Philip having paid his share of $2,050.93 and the remainder attributed to Su). From this, it can readily be seen that Priya paid more than 85% of the mortgage repayments and this was plainly a *material* departure from the parties' understanding at the time the new loan was obtained.

116 In the circumstances, Priya is entitled to be reimbursed a sum of $74,586.77 from Su's proceeds of sale as reimbursement for the mortgage payments made by Priya on Su's behalf.

CPF charge for Philip's contributions

117 The only issue that remains pertains to the consequential orders for the sale, specifically in relation to the CPF charge. The Judge ordered that any reimbursement into Philip's CPF account is to be effected by Philip and Su. Su raises concerns as to the possibility of her not getting any money back from Philip. Even though they remain married, they are estranged and there is no guarantee that Philip would apply the proceeds of sale that are paid into his CPF account in favour of Su and the children in order to enable them to get a new home.

118 In our judgment, the order made by the Judge should not be disturbed. The proceeds are to be refunded to the CPF accounts in question. Su will have to pursue her remedies against Philip separately if this is necessary. In any event, Priya cannot be prejudiced by having these consequences visited upon her.

119 Any reimbursement into Priya's CPF account will come from her own share of the proceeds of sale.

Conclusion

120 In conclusion, we allow the appeal in part. The Judge's orders in relation to the sale of the Property including the refunds into Philip's CPF account are to remain.

121 The Judge's orders in relation to the beneficial interest of Priya in the Property are set aside. Priya is only entitled to 49% of the Property, with Su and Philip entitled to 50% and 1%, respectively. From the proceeds of sale of the Property, Su is to account to Priya in the amount of $74,586.77 as

reimbursement for Priya's payments on Su's behalf towards the discharge of the second mortgage over the Property.

122 As for costs, given the nature of the dispute we see no reason to visit costs of the appeal on either party. We therefore make no order as to costs.

Sundaresh Menon	Chao Hick Tin	Chan Sek Keong
Chief Justice	Judge of Appeal	Senior Judge

Harish Kumar and Jeremy Gan Eng Tong (Rajah & Tann Singapore LLP) for the appellant;
Bhargavan Sujatha and R Dilip Kumar (Gavan Law Practice LLC) for the first respondent;
The second respondent in person.