

Ong Jane Rebecca v Lim Lie Hoa and Others
[2005] SGCA 4

Case Number : CA 58/2004
Decision Date : 19 January 2005
Tribunal/Court : Court of Appeal
Coram : Lai Kew Chai J; Judith Prakash J; Yong Pung How CJ
Counsel Name(s) : Andre Arul (Arul Chew and Partners) for appellant; Khoo Boo Jin and Daniel Tan (Wee Swee Teow and Co) for first respondent; Vinodh S Coomaraswamy and Chua Sui Tong (Shook Lin and Bok) for third and fourth respondents
Parties : Ong Jane Rebecca — Lim Lie Hoa

Civil Procedure – Appeals – Inquiry into assets of estate – Whether assistant registrar gave appellant opportunity to put forward best case – Whether assistant registrar erred in excluding various assets as part of estate

Probate and Administration – Account – Difference between common account and account on basis of wilful default – Whether present account was common account or account on basis of wilful default – Whether unrealised assets could be included in common account – Whether beneficiary could pick and choose in common account when trustee used money from mixed fund – Whether undervalue was relevant in common account

Trusts – Breach of trust – Identification of trust property – Administrator mixed estate funds with personal funds in bank account – Effect of mixing trust funds with trustee's personal funds – Whether assistant registrar erred in refusing to include entire account as part of estate

19 January 2005

Judgment reserved.

Judith Prakash J:

1 This appeal is one of three arising out of an inquiry conducted by Assistant Registrar Phang Hsiao Chung ("AR Phang") into the assets of the estate of Ong Seng King (also known as Ong Seng Keng, Ong Keng Seng, Ong King Seng and Arief Husni) ("the deceased"). The parties participating in the inquiry are all beneficiaries of the estate of the deceased. Before the High Court, AR Phang's findings were contested: see [2003] SGHC 126. Those appeals were, however, dismissed by Choo Han Teck J ([2004] SGHC 131) and the parties have now appealed further.

Background

2 The deceased was a wealthy Indonesian businessman. He was married to Lim Lie Hoa (also known as Lim Le Hoa and Lily Arief Husni) ("Mdm Lim"). The couple had three sons, the youngest of whom, Ong Keng Tong ("K T Ong"), was born after the death of the deceased. The eldest son is Sjamsudin Husni (also known as Ong Siau Tjoan) ("S T Ong") and the second son is Ong Siau Ping ("S P Ong").

3 The deceased died intestate in October 1974, leaving substantial assets in a number of jurisdictions. Initially Mdm Lim and her sister were respectively the administrator and co-administrator of the estate. In July 1978, fresh letters of administration were granted to Mdm Lim as administrator and S T Ong as co-administrator as by then S T Ong had turned 21. Mdm Lim, however, continued to wield sole control over the estate.

4 In October 1982, S T Ong married in England. His wife, now known as Jane Rebecca Ong ("Jane Ong"), petitioned for divorce in March 1988 by which time the couple had had three children. Soon after, S T Ong left England for Singapore. When Jane Ong discovered that her husband was a beneficiary of the deceased's estate, she commenced maintenance proceedings in Singapore.

5 In June 1989, S T Ong executed a deed of release whereby he acknowledged receipt of £1,018,000 and US\$150,000 in full and final settlement of his interest in the deceased's estate. However, after a quarrel with Mdm Lim, sometime during the last quarter of 1990, S T Ong decided to co-operate with Jane Ong to recover his share of the estate from Mdm Lim. In August 1991, he executed a deed of assignment whereby he assigned to Jane Ong "one-half of all his entitlement to the distributive share of the residuary estate of [the deceased] and all other rights (if any) in or to the said Estate". S T Ong also executed an irrevocable power of attorney giving Jane Ong the power to demand and sue for his share in the residuary estate.

6 On 21 September 1991, an Originating Summons (OS 939/1991) was filed in which S T Ong was named as the plaintiff and Mdm Lim as the defendant. These proceedings sought, *inter alia*, accounts and enquiries to be taken of the estate. Two months later, S T Ong switched his allegiance back to his mother, Mdm Lim, and Jane Ong then applied to be added as the plaintiff in the action and to make S T Ong the second defendant. Thereafter the proceedings were ordered to be continued as if the matter had been begun by writ.

The decision in OS 939/1991

7 The action was heard by Chao Hick Tin J (as he then was). In his judgment of 16 July 1996 ([1996] SGHC 140), Chao J found that the deed of release by which S T Ong had relinquished his rights to the estate was void and unenforceable as Mdm Lim had used undue influence in order to procure its execution. The deed of assignment in favour of Jane Ong was found to be valid and it was determined that she was, accordingly, entitled to a half-share of S T Ong's interest in the estate. Chao J then directed that an enquiry be held to determine:

- (a) the assets of the estate and their whereabouts;
- (b) the extent of S T Ong's share in the estate;
- (c) the amounts that had been received by S T Ong from the estate;
- (d) the amounts still due to S T Ong from the estate as at 29 August 1991 (the date of the deed of assignment); and
- (e) the quantum of Jane Ong's share under the deed of assignment.

8 Both Mdm Lim and S T Ong appealed against Chao J's findings. By a written judgment dated 16 April 1997 (reported as *Lim Lie Hoa v Ong Jane Rebecca* [1997] 2 SLR 320), the Court of Appeal dismissed these appeals. Subsequently, in February 2002, Mdm Lim's younger sons, S P Ong and K T Ong, applied successfully to be added as the third and fourth defendants to OS 939/1991, as, being beneficiaries of the estate, they had an interest in the inquiry to be conducted into the assets of the estate and the amounts received by their elder brother.

The inquiry and AR Phang's decision

9 The inquiry commenced in October 2002. It was held over 23 days. By the time of the

inquiry, S T Ong had made another about-turn and during the inquiry and the appeal to Choo J, he was supporting Jane Ong again and fighting Mdm Lim instead.

10 AR Phang addressed the issues raised in the inquiry as follows. First, all the assets belonging to the deceased at the time of his death were ascertained and valued. The legitimate debts of the deceased and the estate expenses were then deducted from the estate, and this allowed AR Phang to arrive at the notional value available for distribution on 29 August 1991. AR Phang held that the distribution of the estate was governed by the Intestate Succession Act (Cap 146, 1985 Rev Ed) of Singapore. On this basis, Mdm Lim was entitled to a half-share of the notional value of the estate, while the deceased's three sons were entitled to one-sixth each.

11 The amounts that the estate had already distributed to S T Ong by 29 August 1991 were then determined. This was important because although S T Ong had assigned to Jane Ong half of his entitlement to the estate (and not just half of what remained undistributed), her share was necessarily limited by the extent of his remaining interest in the estate. Jane Ong was therefore entitled to one-twelfth of the notional value of the estate, subject to a cap representing S T Ong's remaining interest in the estate as of the date of the assignment.

12 In ascertaining what assets had belonged to the deceased at the date of his death, AR Phang considered not only assets in the name of the deceased but also assets in the name of Mdm Lim that Jane Ong and S T Ong asserted should be counted as part of the estate's assets. He made many findings in respect of these assets and dealt with them in detail in his 185-page judgment. Some of his findings were challenged before Choo J and those findings were also challenged before us. It is therefore necessary in this judgment to deal with those findings that are still in issue although this is a rather lengthy process.

Singapore assets

13 AR Phang assessed the net value of the deceased's estate in Singapore at \$11,872,574.21 after deducting legitimate estate expenses. In arriving at this figure, AR Phang rejected Jane Ong's claims that the following assets should be included as part of the estate:

(a) Properties purchased prior to the deceased's death in Mdm Lim's name (collectively referred to as the "Class A assets"), namely:

- (i) 31 Ford Avenue;
- (ii) 17 Leng Kee Road;
- (iii) 251 Tanglin Road;
- (iv) 73N Cairnhill Mansion;
- (v) 69 Cairnhill Mansion;
- (vi) 16 East Sussex Lane; and
- (vii) 20D Norfolk Road.

(b) Properties purchased after the deceased's death in the name of Mdm Lim or "parties related to her" (collectively referred to as the "Class B assets"), namely:

- (i) #10-02 Lucky Tower;
- (ii) Unit 30D Block A, Leonie Towers;
- (iii) #07-02 The Claymore, 27 Claymore Road;
- (iv) #18-01 East Tower, Horizon Towers; and
- (v) #17-02 Beverly Hills.

Class A assets

14 AR Phang acknowledged that Mdm Lim had been unable to provide documentary evidence to prove that she had used her personal funds to purchase the Class A assets. However, given that they had been acquired more than 20 years previously, no adverse inference could reasonably be drawn against her on this account. AR Phang noted that Mdm Lim was more than capable of accumulating substantial savings of her own and using them to purchase these properties, because the deceased had made generous financial gifts to her throughout their marriage. While she had admittedly used money from the estate to pay income and property tax and other expenses relating to these properties, this did not necessarily indicate that the properties formed part of the deceased's estate, as she could simply have misapplied estate funds for her personal expenses. Most notably, the deceased had never asserted an interest in any of the properties, even though they were purchased at least three years before his death. In the circumstances, AR Phang concluded that the Class A assets did not belong to the estate.

Class B assets

15 As for the Class B assets, all of which were purchased after the deceased's death, AR Phang found that there was no substantive evidence to support Jane Ong's contention that they were purchased with estate moneys. Given the lapse of time, it was understandable why Mdm Lim could not adduce documentary evidence to explain the sources of her funds for acquiring these properties. Although a credit advice showed that \$49,999.90 of the purchase price of #17-02 Beverly Hills came from the estate's Hong Kong bank account with Sin Hua Trust Savings & Commercial Bank ("Sin Hua Trust Bank"), AR Phang emphasised that Mdm Lim was not merely a trustee but also a beneficiary of the deceased's estate. This \$49,999.90 was, in all probability, part of her personal entitlement to the estate.

Conclusion

16 Excluding the disputed Class A and Class B assets, the deceased's assets in Singapore, comprising various deposits, bank accounts and shares as well as the properties 45/47 Robinson Road and 4 Chatsworth Park, had a net worth of \$11,872,574.21.

Hong Kong assets

17 The deceased's undisputed assets in Hong Kong, including bank accounts, shares and properties, were valued at HK\$18,686,098.75 after deducting estate expenses. At the inquiry, Jane Ong contended that the figure should be higher, as the following three properties had been sold at an undervalue:

- (a) 17 Shouson Hill Road West – sold on 23 June 1980 for HK\$4m;

(b) 24 Ice House Street – sold on 9 May 1981 for HK\$13.7m; and

(c) Flat B on the first floor of Yuet Wah Mansion, 53 Yuet Wah Street – sold on or about 3 April 1978 for HK\$125,000.

17 Shouson Hill Road West

18 Jane Ong's expert, Paul Varty ("Varty"), gave evidence that the sale price of HK\$4m was "significantly below the value which should have been achieved at that time". Using the residual valuation method of property valuation, which took into account the development potential of the property, Varty claimed that it was worth between HK\$10.5m and HK\$15.75m at the time of the sale. AR Phang disagreed as he found Varty's valuation "unduly optimistic". Given the fluctuations in property prices at the time and the existing encumbrances, including the estate's potential obligation to the tenant to rectify the defects in the property, AR Phang took the view that the sale price of HK\$4m was not an undervalue.

24 Ice House Street

19 Mdm Lim contracted to sell 24 Ice House Street to Wild Fast Investment Company Limited ("Wild Fast") for HK\$13.7m on 9 May 1981. By a sale and purchase agreement dated 16 May 1981, Wild Fast sold the property on to Koledo Company Limited ("Koledo") for HK\$28m. Jane Ong submitted that the property must have been sold to Wild Fast at an undervalue, as the latter managed to sell the property to Koledo for more than twice the price just a week later. AR Phang doubted, however, that Wild Fast's sub-sale to Koledo was an arm's-length transaction, since it far exceeded the prices of the adjacent properties during the same period, and even Varty could not justify valuing the property at HK\$28m. Given the average sale prices of similar properties at the time, AR Phang found that Mdm Lim had not sold the property to Wild Fast at an undervalue.

Flat B on the first floor of Yuet Wah Mansion, 53 Yuet Wah Street

20 Jane Ong's contention that the flat was sold at an undervalue was summarily dismissed by AR Phang as she could not provide any evidence of the market value of the property at the time when it was sold. Varty had conceded in court that he did not carry out any valuation of the property, but had merely given his opinion that, based on official statistics, the average purchase price of similar property would have been between HK\$140,000 and HK\$205,000. His evidence was clearly an insufficient basis on which to arrive at any accurate market value of the flat.

21 As AR Phang found that none of the properties were sold at an undervalue, the value of the deceased's undisputed assets in Hong Kong remained unchanged.

Sin Hua Trust Bank accounts

22 Jane Ong also alleged that funds in two bank accounts with Sin Hua Trust Bank belonged to the estate. AR Phang found no basis for Jane Ong's assertion that account no 031-349-020456-8 contained estate moneys. The status of the second account, account no 031-349-5756545 ("the second Sin Hua account"), was less clear. The second Sin Hua account was a one-month fixed deposit for NZ\$2,308,869.07 in Mdm Lim's name, and she claimed ownership of the entire sum. However, Mdm Lim also contended that NZ\$447,000 that was transferred from this second Sin Hua account to S T Ong was a distribution from the estate, which implied that the NZ\$447,000, and possibly the entire account, belonged to the estate.

23 Balancing Mdm Lim's implicit admission against the fact that there was no evidence that the other funds originated from the estate, AR Phang held that NZ\$447,000 in the second Sin Hua account belonged to the estate, while the remaining NZ\$1,861,869.07 belonged to Mdm Lim personally. Taking into account the interest that the NZ\$447,000 would have earned, AR Phang valued the estate's share of the funds in the second Sin Hua bank account at NZ\$451,935.37.

Assets held by Grand Trading Company

24 Mdm Lim conceded that the deceased had had an interest in the Hong-Kong-registered Grand Trading Company. Jane Ong alleged that the following assets held by Grand Trading Company also formed part of the estate:

- (a) DM5,713,772.28 standing in the account of "Grand Trading Company Ltd" with Bank Mees & Hope NV as of 21 November 1974 plus interest.
- (b) £2,933,178 earned from various sale transactions carried out by Grand Trading Company.
- (c) an irrevocable letter of credit opened in favour of Grand Trading Company by Marine Midland Bank with a balance of £105,061.70 as of 19 January 1976.

25 AR Phang rejected all of Jane Ong's contentions. Although there was a bank statement from Bank Mees & Hope NV that reflected a balance of DM5,713,772.28, the same statement also indicated that DM6,000,000 was withdrawn on 25 November 1974. Since Mdm Lim had not obtained a grant of letters of administration at this time, AR Phang surmised that the money was probably withdrawn by the deceased's partner in Grand Trading Company, one Batara Pane Alamsjah ("Alamsjah"). As there was no evidence that Alamsjah had paid this money over to the estate, it could not be included in the valuation. There was similarly no evidence that the estate ever realised the remaining sums of £2,933,178 (profits from sales) and £105,061.70 (letter of credit with Marine Midland Bank).

26 Grand Trading Company also held accounts with United Commercial Bank and Banque Nationale de Paris plc. The account with United Commercial Bank was already accounted for as part of the deceased's undisputed assets, leaving the account with Banque Nationale de Paris plc (valued at £1,430.34 after deductions) to be added to the pool of assets.

Conclusion

27 The net value of the deceased's estate in Hong Kong was therefore found to be HK\$18,686,098.75, NZ\$451,935.37 and £1,430.34.

Malaysian assets

28 The deceased's assets in Malaysia, assessed at S\$485,528, were largely undisputed.

Indonesian assets

29 The deceased's undisputed assets, comprising shares in two Indonesian companies, were valued at S\$3,566,667. AR Phang also accepted Jane Ong's argument that a house registered in Mdm Lim's name at Jalan Batu Tulis 2, Jakarta, was beneficially owned by the deceased. After the proceeds of this house were added, the deceased's assets in Indonesia were valued at S\$3,616,667. AR Phang further found that the deceased had had an interest in two properties: a piece of land in Cibenong and a jute plantation in Lampung. As the properties had yet to be identified or realised, they

could not be included in the valuation. However, AR Phang declared that Jane Ong was entitled to a one-twelfth share of each of them.

European assets

30 Jane Ong also claimed that funds in a number of European bank accounts belonged to the deceased's estate.

Bank Mees & Hope NV

31 Mdm Lim admitted that the estate held the following accounts with Bank Mees & Hope NV:

- (a) a deposit of US\$1.5m;
- (b) a current account with a credit balance of US\$76,772.40; and
- (c) a current account with a debit balance of £7,970.17.

Based on the exchange rate prevailing in May 1975, the net value of these accounts was US\$1,558,277.86. According to Mdm Lim, these accounts were later closed and the moneys transferred to Midland Bank Trust Corporation (Jersey) Limited ("Midland Bank").

32 Jane Ong maintained that these undisputed accounts ought to have earned additional interest amounting to US\$152,504. However, AR Phang reasoned that any interest earned would have been subsumed under the current account credit balance of US\$76,772.40 (account (b) in [31] above).

33 Jane Ong also claimed that the deceased had a deposit of US\$3m with Bank Mee & Hope NV. Although correspondence from the administrators' lawyers to the bank indicated that the administrators believed there was such a deposit, the bank firmly denied its existence. As the administrators' belief did not, in itself, translate into a liability on the part of the bank, AR Phang found that there was no additional US\$3m deposit.

Midland Bank

34 Sometime in 1976, the entire sum of US\$1,558,277.86 from Bank Mees & Hope NV was deposited into Mdm Lim's bank accounts with Midland Bank. Mdm Lim asserted that she also deposited her personal funds into these accounts, although she failed to provide details of the exact amount of personal funds deposited, when they were deposited or which account they were deposited into.

35 Ordinarily, when a trustee mixes trust funds with her own funds, the law assumes that the whole is subject to the trust: *Caltong (Australia) Pty Ltd v Tong Tien See Construction Pte Ltd* [2002] 3 SLR 241 ("*Caltong*"). In the absence of any proper accounting of the funds in the accounts from Mdm Lim, AR Phang held that all the funds in the accounts belonged to the estate. However, this did not mean that the entire credit balance of US\$1,299,691.04 should be added to the pool of assets. Since the principal sum was derived from the US\$1,558,277.86 credit in Bank Mees & Hope NV which had already been included in the valuation, any addition of the principal sum in the Midland Bank accounts would result in double-counting. The only amount that could be added from the Midland Bank funds was the interest earned between 1976 and 4 November 1985, which AR Phang assessed at DM2,708,472.40, £331,043.46 and US\$8,752.90.

Standard Chartered Bank (CI) Limited ("Standard Chartered Bank")

36 When the Midland Bank accounts were closed on 4 November 1985, the balance sum of US\$1,299,691.04 was deposited into Mdm Lim's account with Standard Chartered Bank. At this time, Mdm Lim's account with Standard Chartered Bank already had a personal credit balance of US\$2,705,634.42.

37 On 20 December 1985, US\$1,203,143.75 or £837,500 was debited from the account to pay for the property known as 39 Sheldon Avenue, Highgate, London, which was registered in Mdm Lim's name but intended to be the residence of S T Ong and his family. Mdm Lim initially claimed that US\$862,066 of this sum should be treated as a distribution from the estate to S T Ong. She subsequently changed her story and maintained that 39 Sheldon Avenue was acquired with some \$5m that she transferred from Singapore. AR Phang did not believe this new version of events. Instead, he found that 39 Sheldon Avenue was acquired from funds in the Standard Chartered account, which contained Mdm Lim's personal moneys mixed with estate funds. Applying the rule in *In re Hallett's Estate* (1880) 13 Ch D 696 and taking into account the fact that the property was registered in Mdm Lim's name, AR Phang held that Mdm Lim must be presumed to have drawn on her own funds first. As 39 Sheldon Avenue was purchased with Mdm Lim's personal funds, the estate's money continued to earn interest in the account, amounting to US\$560,499.52.

Conclusion

38 AR Phang found no evidence to suggest that any additional amounts in other European bank accounts should be included as part of the deceased's estate. He therefore valued the deceased's estate in Europe at US\$2,127,530.28, DM2,708,472.40 and £331,043.46, comprising funds in the accounts with Bank Mees & Hope NV and interest accrued on the accounts in Midland Bank and Standard Chartered Bank.

Miscellaneous assets

39 Jane Ong also insisted that various miscellaneous assets belonged to the estate. AR Phang rejected her assertions except in respect of a bank account in the United States. In the absence of any evidence as to the value of the account or whether it was realised, he simply declared that Jane Ong would be entitled to a one-twelfth share of the deceased's interest in the account.

Payments to S T Ong

40 It was not disputed that S T Ong had received numerous amounts from Mdm Lim between the deceased's death and 29 August 1991. The question was whether these payments should be characterised as distributions from the estate or gifts or advances from Mdm Lim personally. In AR Phang's opinion, before a particular payment to S T Ong could be treated as a distribution, it was incumbent on Mdm Lim to inform S T Ong that it was to be treated as such. On the evidence, it was clear that neither Mdm Lim nor S T Ong had applied their minds to consider the proper characterisation of most of the payments.

41 On that basis, the only payments that could legitimately be characterised as distributions were payments of \$475,000 and \$242,255 from the sale proceeds of 4 Chatsworth Park, an undisputed asset of the estate in Singapore. S T Ong had been informed that these payments were distributions from the estate, and he confirmed that he had received the full sum of \$717,255. As for the rest of the payments made by Mdm Lim to S T Ong on various occasions, AR Phang held that they were most likely allowances from Mdm Lim personally, and not distributions from the estate. He therefore concluded that as of 29 August 1991, S T Ong had received only \$717,255 in distributions

from the deceased's estate.

Jane Ong's share in the estate

42 On the basis of the findings made by AR Phang, the amounts still due to S T Ong, and Jane Ong's share in the estate, can be summarised as follows:

Location of assets	S T Ong's remaining interest	Jane Ong's share in the estate
Singapore	S\$1,261,507.37	S\$989,381.19
Hong Kong	HK\$3,114,349.79 NZ\$75,322.56 £238.39	HK\$1,557,174.90 NZ\$37,661.28 £119.20
Malaysia	S\$80,921.33	S\$40,460.67
Indonesia	S\$602,777.83 One-sixth share of estate's interest in land in Cibenong and Lampung	S\$301,388.91 One-twelfth share of estate's interest in land
Europe	US\$354,588.38 DM451,412.07 £55,173.91	US\$177,294.19 DM225,706.04 £27,586.96
United States	One-sixth share of estate's interest in bank account	One-twelfth share of estate's interest in bank account

43 Converting the value of the entire estate to Singapore dollars, AR Phang ordered that Jane Ong should have final judgment against Mdm Lim for the sum of \$2,321,770.27 plus interest as well as a one-twelfth share of the deceased's interests in a piece of land in Cibenong, a jute plantation in Lampung and a bank account in the United States. Setting off the judgment sum against the interim payments Jane Ong had already received from Mdm Lim, AR Phang determined that Jane Ong was entitled to a further payment of \$37,493.67 plus interest.

Costs

44 AR Phang dealt with the issue of costs in a further judgment dated 30 June 2003: see [2003] SGHC 143. Applying the general rule that costs should follow the event, since Jane Ong had

obtained judgment for a substantial sum of money as well as declarations that she was entitled to a share in certain assets, AR Phang ordered Mdm Lim to pay Jane Ong's costs of inquiry. He, however, excluded from this order certain sums that he considered had been unnecessarily and unreasonably incurred. Mdm Lim was also ordered to bear the costs of S T Ong (subject to the exclusion of certain unnecessary and unreasonable costs), S P Ong and K T Ong, as the inquiry was necessitated by her default in administering the estate and they had had to participate in it to protect their respective interests. In addition, S T Ong was also a necessary party to the action as he was a signatory of the deed of release, the deed of assignment and the power of attorney.

The appeals to the High Court

45 The outcome of the inquiry was not wholly satisfactory to any of the parties. Each of them appealed to the High Court but against different findings. Jane Ong and S T Ong appealed against AR Phang's findings on the value of the estate and S T Ong's share therein in Registrar's Appeals Nos 600022 and 600023 of 2003, while Mdm Lim, S P Ong and K T Ong appealed against his determination of the amount already distributed to S T Ong from the estate in Registrar's Appeals Nos 600024 and 600025 of 2003. They also contested the costs orders made. None of the appeals succeeded.

46 Choo Han Teck J noted that the substratum of Jane Ong's appeal was the contention that AR Phang had wrongly placed on Jane Ong the onerous burden of having to prove that disputed assets belonged to the estate. Choo J rejected that contention. He emphasised that unlike a proper trial where there is both a legal and evidential burden to discharge, the notion of a legal burden does not exist in an inquiry as, conceptually, there is no partisan party to prove a cause. There is only an evidential burden of proof, which lies on the person making the assertions. Therefore, it was incumbent on Jane Ong to prove that the disputed assets did belong to the estate. Mdm Lim, as the administrator, was obliged to produce the estate's accounts, but an assertion by any other party had to be proved by that party.

47 Jane Ong claimed that AR Phang had erred when he refused to find that Mdm Lim was in breach of trust, even though the evidence indicated that she had used money from the deceased's estate to pay income and property tax and other expenses relating to her personal properties. On this point, Choo J upheld AR Phang's decision. In Choo J's view, the alleged breaches of trust were serious allegations that would have required the initiation of a writ action in which the particulars were properly set out for Mdm Lim to respond. AR Phang's responsibilities in the inquiry were simply to determine the extent of the deceased's estate and S T Ong's and Jane Ong's shares therein. A decision on the thorny issue of breach of trust was strictly outside his purview.

48 Jane Ong also argued that AR Phang had wrongly excluded various documents seized from Mdm Lim during the execution of two Anton Piller orders on 23 December 1999. On 21 October 2002, the first day of inquiry, Jane Ong had sought to tender one set of the documents as well as six CDs containing soft copies to the court. AR Phang refused to admit them and, on the afternoon of 24 October 2002, ordered that the documents be compiled into a single bundle to be made available by 9.00am the next day. This was, according to Jane Ong, unfair as she was a lay person with limited resources. However, Choo J found any insinuations of a miscarriage of justice to be entirely unfounded. Jane Ong was represented by counsel at the material time. Given the history of the saga and her counsel's intimate knowledge of the case, AR Phang's order could not be considered unfair.

49 Jane Ong further claimed that AR Phang had failed to give her sufficient time to cross-examine the witnesses and had relied unduly on the rule in *Browne v Dunn* (1893) 6 R 67 to disregard any evidence not specifically put to Mdm Lim. The rule in *Browne v Dunn* provides that any matter

upon which it is proposed to contradict the evidence-in-chief given by a witness must generally be put to him so that he may have an opportunity to explain the contradiction. As Jane Ong had failed to put many of her assertions to Mdm Lim during cross-examination, AR Phang discounted Jane Ong's assertions on these issues.

50 After reviewing Jane Ong's allegations, Choo J was in entire agreement with the manner in which AR Phang had applied the rule in *Browne v Dunn*. AR Phang had correctly observed that the rule did not entail having to put every point to a witness. He had rejected only the contentions that went to "the heart of the matter", and which Jane Ong failed to put to Mdm Lim: see *Dr Lo Sook Ling Adela v Au Mei Yin Christina* [2002] 1 SLR 408. Such an approach was eminently reasonable.

51 As for Jane Ong's contentions against AR Phang's substantive findings on the assets of the estate and their respective valuations, Choo J found that AR Phang had "weighed all the evidence and given credit where it was due, and did not appear to have accepted the evidence lightly, or rejected any carelessly". Choo J considered that AR Phang's findings were justified by the evidence and he therefore did not disturb AR Phang's valuation of the deceased's estate.

The appeal to the Court of Appeal

52 All the parties except S T Ong (who has run out of funds) have appealed against Choo J's decision. Their arguments remain broadly similar to those canvassed in the court below. Jane Ong's appeal concerns AR Phang's conduct of the inquiry and his findings in respect of the assets of the estate.

53 Jane Ong's position was the same before us as it was before Choo J. She contended that AR Phang erred in his valuation of the estate in that:

- (a) the scope of the inquiry was wrongly restricted because AR Phang excluded the issue of the breaches of trust committed by Mdm Lim while she administered the estate and therefore he disregarded the depletion of the assets of the estate that resulted from such breaches;
- (b) he did not give Jane Ong the opportunity to put forward her best case at the inquiry;
- (c) he undervalued a number of assets belonging to the estate; and
- (d) he refused to include various assets as part of the estate.

Scope of the inquiry

54 Jane Ong accepted that the scope of every proceeding is determined by reference to the pleadings in that proceeding as these documents set out the issues which the parties wish the court to adjudicate on. Her counsel argued that right from the start of OS 939/1991, it had been Jane Ong's case that Mdm Lim had committed numerous breaches of trust in her administration of the estate. He contended that Jane Ong had requested that the inquiry be held on the basis that Mdm Lim was a trustee in default and that findings of fact made by Chao J had confirmed breach of trust on the part of Mdm Lim. Counsel contended that although Chao J did not specify whether the inquiry he ordered was to be on the standard basis or on the footing of wilful default, in the light of the judge's finding that Mdm Lim had procured a deed of release from S T Ong while exercising undue influence on him, the judge could not have intended for the inquiry to be restricted to an accounting on the standard basis. Accordingly, Choo J's refusal to even consider the evidence to determine whether or not Mdm Lim had committed breaches of trust was a grave error.

55 The significance of Jane Ong's argument is that where an inquiry is being conducted into the value of a trust estate, how that value would be arrived at will vary depending on the basis of the inquiry. In a common or standard account, such as the one conducted by AR Phang, the trustee need only account for what was actually received and his disbursement and distribution of it. In an account on the basis of wilful default, the trustee is not only required to account for what he has received, but also for what he might have received had it not been for the default. In the latter case, the accounting party also carries a much more substantial burden of proof than that which applies to him in the case of a common account: see *Glazier v Australian Men's Health (No 2)* [2001] NSWSC 6.

56 The problem that Jane Ong faces in propounding this argument is that it is not supported by her own pleadings in OS 939/1991. Choo J considered that it would have been a "folly" had the Registrar embarked on a trial as to whether there were indeed breaches of trust by Mdm Lim as no proper pleadings had been filed. A close perusal of the Statement of Claim filed by Jane Ong reveals that almost all of the allegations of breach of trust that she made were directed to the contention that the deed of release was invalid. Further, nowhere in that pleading did Jane Ong expressly pray for any specific relief in respect of Mdm Lim's purported breaches of trust. Her request for an account of the assets also made no reference to an account on the basis of wilful default. These omissions are all the more glaring in view of the provisions of O 18 r 15(1) of the Rules of Court (Cap 322, R 5, 1990 Rev Ed) to the effect that a statement of claim must state specifically the relief or remedy which the plaintiff claims.

57 Further, it was wrong for Jane Ong to claim that her pleadings should have determined the scope of the inquiry. Her pleadings shaped the substantive hearing but the inquiry was an ancillary proceeding conducted pursuant to the orders made on conclusion of the substantive hearing. As Choo J stated, the court in an inquiry is charged with the duty of inquiring into the evidence with the objective of addressing the specific terms of reference under which the inquiry is held. The terms of the inquiry here were therefore as set out in Chao J's judgment and reproduced by us in [7] above. On a plain reading of Chao J's directions, all that he ordered was a common inquiry and not one on the basis of wilful default. Indeed, Chao J could not have ordered an account on the basis of wilful default, as the specific allegations of breach of trust were never fully argued before him. Jane Ong herself conceded that the judge did not make any specific finding of breach of trust. The judgment did not indicate that the issues of breach of trust or other wrongdoing were to be decided during the inquiry. If, as Jane Ong claimed, Chao J had obviously intended for issues of breach of trust to be "impliedly reserved" to the inquiry, there was no reason for him to omit such a crucial reference in his judgment or his subsequent Order of Court dated 29 October 1996.

58 Counsel contended that it would be impractical and expensive for the issue of breaches of trust to be dealt with in separate proceedings as suggested below. He argued that the matter was already in issue by virtue of Jane Ong's pleadings at the trial and that this court ought to reassess the evidence and then order an account on the basis of wilful default.

59 It is of course open to us to order that an account be taken now on the basis of wilful default. If wilful default is charged and proved, accounts and inquiries on that footing may be directed at any stage of the proceedings: *Job v Job* (1877) 6 Ch D 562; *Mayer v Murray* (1878) 8 Ch D 424. In the case of *In re Symons* [1882] 21 Ch D 757 ("the *Symons* case"), which also concerned the administration of an estate, the plaintiff beneficiary had alleged in his statement of claim that the defendant executors were guilty of breaches of trust, but had only claimed for common accounts and inquiries. He accordingly received judgment for administration with a direction for ordinary accounts and inquiries to be taken. Subsequently he applied to court for further accounts to be taken and inquiries to be made on the footing of wilful default.

60 Fry J allowed the application. Although the statement of claim was not in terms for relief on the footing of wilful default, he took the view that the allegations of wilful default and breach of trust constituted a sufficient claim for relief on that footing. As the claim for relief on the basis of wilful default was never dismissed by the judge, it was open to the plaintiff to claim the relief he sought from Fry J.

61 On the face of it, the *Symons* case has obvious similarities with the present case. What Fry J failed to emphasise, however, was that before an inquiry on the basis of wilful default can be ordered, the plaintiff must allege and prove at least one act of wilful neglect or default: *Sleight v Lawson* (1857) 3 K & J 292; 69 ER 1119. In addition, in the *Symons* case, the party entitled to an account applied to add to the existing judgment a direction to take accounts on the footing of wilful default, and such a direction was granted. In the present case, Jane Ong has never made any application for an account to be taken on the footing of wilful default. Further, while Fry J may have found sufficient evidence of wilful default in the *Symons* case, this was not a finding made in these proceedings by the primary fact finder, Chao J, after hearing the evidence at first instance. It would have been difficult for him to make such a finding in any case since specific issues of breach of trust were never fully argued at any stage of the proceedings, even though Jane Ong levelled numerous allegations against Mdm Lim's administration of the deceased's estate. In the absence of proper legal arguments, and without the benefit of having seen or heard the witnesses, it would be unsafe for us to make a finding that wilful default had been proved on the facts. The fact finder at the inquiry, AR Phang, declined to make a finding of wilful default and rightly so. As Choo J explained at [14] in the court below ([1] *supra*):

[An] allegation of breach of trust is a serious allegation that normally requires the claimant to initiate a writ action in which the particulars of trust and the breaches of it are properly set out so that the defendant might answer the allegations. The inquiry in question was already a difficult one given the matters raised, the number of assets to be covered and all the myriad details that were being disputed. It would be to his folly had the AR embarked on a trial as to whether there were indeed such breaches of trust – a trial that would have, by necessity, to be conducted without proper pleadings.

62 In any case, what Jane Ong wants is not a fresh inquiry conducted on the basis of wilful default. Instead she would like this court to re-evaluate the evidence that has already been presented and look at it as if the inquiry had been conducted on the basis of wilful default. There is, however, absolutely no authority to support such a radical approach. In all the cases cited, the orders were simply to remit the case for further accounts and inquiries to be taken on the basis of wilful default. None of the judges attempted to circumvent a fresh inquiry by re-evaluating the existing evidence on a new basis. They could not do so because the nature of a common inquiry is completely different from that of an inquiry on the basis of wilful default. The issues involved in the latter are much more complex and the conduct of such an inquiry would take on an entirely different complexion.

63 It was submitted on Jane Ong's behalf that the alternative course, that of instituting a fresh action dealing specifically with the claims of breach of trust, was not desirable as it would lead to a waste of costs. We do not agree. It would depend on how the action is to be conducted. If it is focused exclusively on the alleged breaches of trust rather than on the entire spectrum of assets, costs could be saved and the court could make considered findings on the claims with the aid of proper pleadings and full evidence and argument. It is also worth noting that any investigation into alleged breaches of trust may involve not only the conduct of Mdm Lim but also that of S T Ong since he was a co-administrator of the estate and the beneficiaries may want to establish that they have a right of recovery against him as well as against Mdm Lim. Such investigation could not take place

within the framework of the present action.

No opportunity to put forward her best case

64 Jane Ong made a number of arguments under this head. First, she claimed that the documents she seized from Mdm Lim pursuant to the execution of the two Anton Piller orders were unfairly excluded by AR Phang. She had sought to adduce these documents, totalling more than 70,000 pages, during the inquiry, even though they were neither filed nor served, but simply arranged in bundles and stacked outside AR Phang's chambers. Six CDs containing soft copies of the documents were also tendered.

65 Counsel for S P Ong and K T Ong objected to the "mass" of Anton Piller documents on the afternoon of 24 October 2002, complaining that copies had not been given to the other parties. AR Phang therefore ordered Jane Ong and S T Ong to compile all the documents they wished to rely on into a single bundle to be made available by the start of hearing the next day. This was, according to Jane Ong, unfair for two reasons. First, in her view, AR Phang's directions directly contravened the terms of Chao J's order of court on 29 October 1996, which read:

The estate's books, vouchers, records and other documents shall be evidence of the matters contained therein with liberty to the parties to take such objections as they think fit.

66 We see no merit in that contention. In so far as Jane Ong suggested that Chao J intended for all the estate's books, vouchers and other documents to be "automatically admitted" as evidence in complete disregard of proper rules of civil procedure, this argument was entirely misconceived. Chao J was simply stating that these documents would be evidence "of the matters contained therein"; his order certainly did not sanction the wholesale admission of any and all documents that Jane Ong wished to tender at any time, without proper compliance with the rules of procedure.

67 Jane Ong also pointed out that she had been acting in person until the evening of 21 October 2002. The time frame specified by AR Phang was therefore unrealistic for her and her counsel, who was instructed only three days before the direction. However, she failed to explain why no effort was made to organise the documents before the inquiry, even though they were seized as early as 23 December 1999. Her submissions gave the impression that she had less than a day to sort through the documents, when in fact she had almost three years. In our view, she is not justified in criticising AR Phang's direction.

68 Moreover, an examination of AR Phang's conduct of the inquiry reveals that he had accommodated Jane Ong repeatedly. Before the commencement of the inquiry, she had already filed more than 90 bundles of documents totalling over 21,000 pages, and AR Phang had ruled that no more documents would be admitted without the consent of all parties. Notwithstanding this, he allowed Jane Ong to file the bundles of Anton Piller documents, including one bundle that was submitted on 31 October 2002, almost a week after the deadline. Having had ample opportunity to put forward all the relevant evidence she wished to rely on, any failure to put forward her best case could only be attributed to her own default.

69 The second complaint under this head was that Jane Ong and S T Ong were not given sufficient time to cross-examine or put all relevant documents and contentions to Mdm Lim. Examination of the record, however, shows that counsel for both these parties cross-examined Mdm Lim extensively over a total of more than four days. More time was taken with her than with any of the other ten witnesses who gave evidence. AR Phang's view was that much of the time taken for cross-examination of Mdm Lim was wasted as counsel had not been prepared to conduct the cross-

examination purposefully. Further, the notes of evidence indicate that counsel for Jane Ong had voluntarily concluded his cross-examination of Mdm Lim on 24 October 2002 when he informed the court that he had “no further ‘put’ questions”. Even then, on 28 November 2002, AR Phang allowed further cross-examination of Mdm Lim albeit in respect of a limited area.

70 The third and final complaint made was that AR Phang had misapplied the rule in *Browne v Dunn* ([49] *supra*) by requiring her to put each and every point to Mdm Lim. This complaint was made to Choo J as well. He gave it short shrift, stating at [8] ([1] *supra*):

How AR Phang actually applied the rule in *Browne v Dunn* was clearly explained in [83] and [84] of his judgment. I need not set out and comment on these passages because (lengthy as they are) they are clear. I would only quote one sentence which is relevant to a specific complaint by Mr Andre Arul that the plaintiff was being asked, effectively, to put each and every point to the witnesses in cross-examination. At [84], this was what [AR Phang] held:

[W]hile the rule [in *Browne v Dunn*] does not mean that every point should be put to a witness, if the point sought to be made goes to the heart of the matter, it should be put to the witness.

We entirely agree with Choo J’s observation and have nothing further to add on this point.

Assets of the estate

71 Turning to Jane Ong’s arguments against AR Phang’s substantive findings, she claimed that he erred in excluding the following assets from the deceased’s estate:

- (a) Assets in Singapore:
 - (i) The seven Class A assets;
 - (ii) The five Class B assets.
- (b) Assets in Hong Kong:
 - (i) Funds in the Sin Hua Trust Bank accounts;
 - (ii) Assets held by Grand Trading Company.
- (c) Assets in Europe: A deposit of US\$3m with Bank Mees & Hope NV.

Given that Jane Ong is essentially challenging findings of fact made by AR Phang, as an appellate court we must be slow to interfere with any such finding unless it is plainly wrong or against the weight of the evidence: *Peh Eng Leng v Pek Eng Leong* [1996] 2 SLR 305.

72 As regards the Class A assets, Jane Ong claimed that there was circumstantial evidence indicating that these seven properties, bought in Mdm Lim’s name prior to the deceased’s death, in fact belonged to the deceased. In particular, she pointed out that, firstly, Mdm Lim had adduced no evidence to show her source of funds for purchasing the properties, and secondly, expenses related to these properties had been paid with estate moneys.

73 All of the factors relied on by Jane Ong had been considered by AR Phang, who found that they did not adequately prove her assertions that the properties were beneficially owned by the

deceased. As he had noted, the properties had been purchased more than 20 years before the hearing. Mdm Lim's inability to produce any documentary evidence of her source of funds was therefore perfectly understandable. While the payment of the properties' expenses with estate funds was admittedly a relevant consideration, AR Phang had correctly balanced this fact against the rest of the evidence, which strongly suggested that the properties were beneficially owned by Mdm Lim. In the tax computations for the years of assessment 1967 to 1974, six of the seven Class A assets were consistently stated as belonging to Mdm Lim. The Commissioner of Estate Duties had also accepted that the properties did not belong to the deceased.

74 Most significantly, the deceased himself never asserted any interest in the properties during his lifetime, even though they were purchased at least three years before his death. Although Jane Ong suggested that rich businessmen frequently use their family members as nominees to hold properties and assets for one reason or another, to say that this was what occurred in this case would be pure conjecture. The fact that AR Phang had found that the house in Mdm Lim's name at Jalan Batu Tulis No 2, Jakarta, was beneficially owned by the deceased did not mean that all the properties that Mdm Lim held should automatically be considered part of the estate. Each property had to be individually considered, and the evidence and surrounding circumstances analysed, before the question of beneficial ownership could be answered. The use of blanket assertions and unsubstantiated allegations was no substitute for solid evidence.

75 Relying on a chart prepared by her accountants, PriceWaterhouseCoopers ("PWC"), Jane Ong also attempted to "trace" the funds used to purchase the Class A assets to estate moneys in the Sin Hua Trust Bank accounts. Choo J had, however, ordered on 26 August 2004 that all the PWC charts attached to her case be expunged from the record of appeal. This order was made because the PWC charts had not been produced before AR Phang during the inquiry and thereafter no application had been made to introduce new evidence. Choo J held that they could not be included for the purpose of the appeal before him. Despite that order, the same charts were annexed to the case filed for Jane Ong before this court. That was an incorrect course to take. The charts did not form part of the Record of Appeal and had no evidentiary value. Bearing in mind the circumstances, counsel should have known better than to make any reference to them. In any case, AR Phang had carefully considered all the alleged connections between the fund transfers before dismissing them. Jane Ong has not provided us with any basis on which to fault his conclusion.

76 As regards the Class B assets (itemised in sub-para (b) of [13] above), there is no evidence that establishes that funds from the estate were used to purchase these properties. Jane Ong's own accountants, PWC, declined to include the first three properties as part of the estate's assets due to lack of evidence. In respect of the fourth and fifth properties, PWC simply stated their belief that the purchase moneys "most likely" originated from the estate, whilst conceding that they could not establish the alleged movement of funds.

77 The next issue concerns the intermingling of trust moneys with personal moneys in relation to the Sin Hua Trust Bank accounts. When a trustee mixes trust funds with his own funds, the whole is subject to the trust, except so far as the trustee is able to distinguish what is his own: *Caltong* ([35], *supra*), following *Frith v Cartland* (1865) 2 H & M 417; 71 ER 525 and *In re Tilley's Will Trusts* [1967] 1 Ch 1179. While Mdm Lim did admit that she had intermingled trust moneys with her own personal funds in Sin Hua Trust Bank, it must be emphasised that each bank account is a separate and distinct asset. The fact that estate moneys may have been credited into one account does not necessarily mean that all the accounts were necessarily tainted with trust funds.

78 Mdm Lim had three accounts with Sin Hua Trust Bank: a current account no 14064, a deposit account no 031-349-020456-8 and a foreign deposit account no 031-349-5756545. Her admission on

intermingling was made only in respect of her current account no 14064. There is therefore no basis for applying the principle of mixing to the other two accounts. In any case, AR Phang found that the deposit account no 031-349-020456-8 did not contain estate funds, and Jane Ong has not been able to point to any evidence that would persuade us to overturn his finding. As for the foreign deposit account no 031-349-5756545, Mdm Lim asserted that all the money in that account had been transferred from her own Hong Kong dollar funds as the exchange rate between the Hong Kong dollar and the New Zealand dollar had been very favourable. She had also, however, asserted that a sum of NZ\$447,000 paid from this account to S T Ong was a distribution to him from the estate. AR Phang therefore found that she had implicitly admitted that that sum belonged to the estate. The question is whether AR Phang was correct in holding that only this sum of NZ\$447,000 (plus interest) belonged to the estate, or whether all the funds in the account ought to have been credited to the estate.

79 Following the principle enunciated in *Caltong*, it would appear at first glance that the entire account should have been included as part of the deceased's estate. Choo J was also initially inclined to the view that all the money in the account belonged to the estate. Nevertheless, recognising that AR Phang had considered all the objections and problems relating to the tracing and tracking of the estate's moneys, he ultimately chose to uphold AR Phang's finding. He explained at [18] of his judgment ([1] *supra*):

[G]iven the many factors that have to be taken into account (not all of which could possibly be set out because that would have involved the connection of all the factors and how they weighed in the fact-finder's mind in the context of his evaluation of the oral testimonies before him), I would not disturb the AR's finding that part of the money (NZ\$447,000) belonged to the Estate and the balance to [Mdm Lim].

We are in no better position than Choo J to interfere with a finding that AR Phang made after weighing all the relevant considerations. AR Phang was clearly aware of the principle in *Caltong* and he was also aware of the areas of difficulty in Mdm Lim's testimony. As his judgment demonstrates, AR Phang considered the evidence before him meticulously. He must have had good reason to hold that the *Caltong* principle should not be applied to the foreign deposit account. In any case, his conclusion that the remaining money in the account originated from Mdm Lim's personal funds can be supported. Mdm Lim was a woman of substantial means and keen business sense who frequently moved her funds between various banks to take advantage of favourable interest rates. In all likelihood, she put her own money into the foreign deposit account as well in order to maximise returns. Considering the totality of the evidence, and bearing in mind the advantages AR Phang as primary fact finder had in assessing the evidence, we are not inclined to set aside his finding on this issue.

80 Turning to the assets held by Grand Trading Company, AR Phang held that they should not be included as part of the estate as there was no evidence to suggest that the estate had ever realised these assets. It was argued for Jane Ong that this was a grave error as his role was "to value the Estate according to its true worth, not according to what has been recovered". That submission could only stand if it had been AR Phang's duty to conduct the inquiry on the basis of wilful default. Since the inquiry was conducted on the basis of a common account, Mdm Lim only needed to account for what was actually received and not for what she could have received had there been no default on her part. Quite apart from it not having been proved that it was a default on Mdm Lim's part not to have realised assets from Grand Trading Company, AR Phang was correct in only counting the assets received.

81 The next "asset" that was omitted from the account was the alleged deposit of US\$3m with Bank Mees & Hope NV. The administrators of the estate had written to the bank laying claim to "a

surplus of about US\$3m from various credits" with the bank. The bank's reply to this letter, however, simply acknowledged a deposit of US\$1.5m, a current account with a credit balance of US\$76,772.40 and an account with a debit balance of £7,970.17. The submission made was that Mdm Lim had fraudulently concealed the US\$3m. This submission was misconceived as it was the bank and not Mdm Lim who denied the existence of the alleged deposit. The bank had made no mention of any such deposit in its reply to the administrators' letter and there is no evidence that it ever paid the estate any more than the sums mentioned in its letter. Since there is no evidence of any fraud on the part of the bank, there can be no quarrel with AR Phang's conclusion that no such deposit existed.

82 We turn next to the submissions made in respect of 39 Sheldon Avenue. Jane Ong attacked AR Phang's conclusion that this property was a property purchased by Mdm Lim with her own personal funds. She contended that all parties were in agreement that the property was purchased using estate funds and was given to S T Ong as part of his beneficial interest in the estate. The property was always intended to be Jane Ong's and S T Ong's matrimonial home. It was submitted that by making a finding which was so clearly against something all the parties had agreed on, AR Phang had misconducted himself. Whilst the property had been purchased in Mdm Lim's name, this had only been done because the solicitors who acted in the conveyance of 39 Sheldon Avenue had suggested that a trust be set up to hold the property so as to protect it from S T Ong's then creditors as he was then being hounded to pay his debts. Mdm Lim had acted on this intention by instructing solicitors to prepare a trust deed that, *inter alia*, gave the property to S T Ong and his children and K T Ong. Whilst the deed was not signed as Mdm Lim later changed her mind, Jane Ong submitted that, nevertheless, its preparation showed Mdm Lim's intention that the property was not to be hers.

83 It should be noted that Jane Ong's position in this appeal in relation to 39 Sheldon Avenue is inconsistent with her position in Civil Appeal Nos 59 and 60 of 2004 where she maintained that AR Phang's decision on the amount distributed from the estate to S T Ong was correct and should not be disturbed. A finding by this court that 39 Sheldon Avenue was intended to belong to S T Ong would mean that we would also have to increase the amount distributed to S T Ong by the purchase price of the property, some £837,500.

84 Further, although Jane Ong asserted that the parties had agreed that the purchase of this property was part of a distribution to S T Ong, the pleadings and notes of evidence show that in fact there was never any agreement on this issue. Mdm Lim had first suggested that part of the purchase money was a distribution to S T Ong, but she retracted this suggestion later when she argued that all of the purchase money came from her personal funds. She also said that she liked the house a lot and wished to stay in it herself. It was only if she died that the property would be given to S T Ong, his three children and K T Ong. We note here that her intention that K T Ong and the three grandchildren should have shares in the property was not consistent with the assertion that its purchase was part of a distribution to S T Ong. S T Ong himself was ambivalent about the status of the property. When asked whether the purchase money was a distribution from the estate to him, he replied "I don't think so". In the circumstances, it was open to AR Phang to find that 39 Sheldon Avenue was not a distribution from the estate. In view of the facts that the property was bought in Mdm Lim's name, the trust deed was never executed (and even if it had been, it would not have been helpful to Jane Ong's case since it did not purport to create a trust over 39 Sheldon Avenue), no evidence was given by the English solicitors to support the assertion that the original intention had been for it to be beneficially owned by S T Ong and S T Ong himself took no position as to whether it was a distribution to himself, being content to leave it to the court to determine what the position was, it cannot be said that AR Phang's holding on this issue was plainly wrong.

85 Jane Ong also relied on the case of *Shalson v Russo* [2003] EWHC 1637 ("*Shalson*") to argue that, since Mdm Lim had used money from a mixed fund to pay for the property, S T Ong as a

beneficiary could “pick and choose” which particular sums were expended from estate moneys and which from Mdm Lim’s own funds. In *Shalson*, Rimer J had commented at [144] that:

This method is a “cherry picking” exercise, as Mr Smith (counsel) recognised. But in a case where the only contest is between the claimant seeking to trace ... and the wrongdoer ..., there is, he says, every reason why the latter’s interests should be subordinated to the claimant’s. Normally, it is presumed that if a trustee uses money from a fund in which he has mixed trust money with his own, he uses his own money first (*In re Hallett’s Estate* (1880) 13 Ch D 696). But Mr Smith submits that this is not an inflexible rule and that if the trustee can be shown to have made an early application of the mixed fund into an investment, the beneficiary is entitled to claim that for himself. He says, and I agree, that this is supported by *In re Oatway, Hertslet v Oatway* [1903] 2 Ch 356. The justice of this is that, if the beneficiary is not entitled to do this, the wrongdoing trustee may be left with all the cherries and the victim with nothing.

86 In our view, the principle in *In re Oatway* [1903] 2 Ch 356 and *Shalson* does not assist Jane Ong. It is premised on the fundamental tenet that a trustee should not profit from his own wrongdoing and therefore is not applicable to the present circumstances. As we have said, the inquiry was limited to a pure fact-finding exercise, and issues of breach of trust were expressly excluded. If we were to apply the principle to the purchase of 39 Sheldon Avenue, we would be presupposing that Mdm Lim was guilty of breach of trust, a finding that AR Phang and Choo J explicitly refused to make and, as we have said, rightly so.

87 Jane Ong also put forward lengthy submissions to support her submission that AR Phang had wrongly undervalued certain properties in Hong Kong, a deposit of US\$1.5m at Bank Mees & Hope NV and the contents of certain other European bank accounts. We do not find it necessary to deal with these submissions as they were premised on the wrong basis. We have held (in agreement with Choo J) that the inquiry ordered by Chao J was a common account and not one based on wilful default. The consequence of this holding is, we reiterate, that Mdm Lim was only liable to account for what the estate actually received and not what it should have received had it not been for her default. Consequently, she did not have to deal with the issue of whether the properties were sold at an undervalue or whether she should have received more from the various banks named. Whilst AR Phang did make findings on those issues after dealing with the evidence at length, for the purposes of the appeal they are irrelevant and we will not discuss them further.

Conclusion

88 For the reasons given above, we find no merit in any of the grounds of appeal raised by Jane Ong and, accordingly, we dismiss this appeal. As to costs, these must follow the event except that Jane Ong shall not bear the costs incurred in preparing the bundle of authorities filed on behalf of S P Ong and K T Ong. This bundle contained 55 authorities but only five were referred to in the case filed for these parties. Most of the other authorities had been relied on below but were not relied on before us. We do not think it would be right to make Jane Ong bear the costs of compiling a bundle of authorities that was largely irrelevant for the purposes of the appeal.

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