IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2016] SGHC 109

Suit No 650 of 2011

Between

Kuntjoro Wibawa @ Wong Kin Tjong

… *Plaintiff*

And

(1) Harianty Wibawa
(2) Karjana Wibawa
(3) Tjandrawati Wibawa
(4) Purnawati Wibawa
(5) Sundari Wibawa
(6) Lindijasari Wibawa
(7) Bright Noble Prime Ltd
(8) BNP Paribas Jersey Trust Corporation Ltd
(9) BNP Paribas Wealth Management formerly known as BNP Paribas Private Bank Singapore Branch

… *Defendants*

JUDGMENT

[Trusts] — [Breach of Trusts] — [Defences]
[Trusts] — [Offshore Trusts] — [Wealth Protection]
[Probate and Administration] — [Executors]

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v
Harianty Wibawa and others

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1 June 2016 Judgment reserved.

Belinda Ang Saw Ean J:

Introduction

1 This action concerns a family dispute that pits an erstwhile trusted son, Kuntjoro Wibawa, the plaintiff ("Kuntjoro"), against his elderly mother, Harianty Wibawa, the first defendant ("D1"). Kuntjoro seeks to recover the inheritance which he ought to have received under the Last Will and Testament of his late father, Purnakarya Wibawa ("the deceased"), dated 13 February 1996 ("the 1996 Will"). Other defendants that were dragged into the inheritance dispute included his five siblings: Karjana Wibawa, the second defendant ("D2"), Tjandrawati Wibawa, the third defendant ("D3"), Purnawati Wibawa, the fourth defendant ("D4"), Sundari Wibawa, the fifth defendant ("D5") and Lindijasari Wibawa, the sixth defendant ("D6"). D2 to D6 are hereafter referred to collectively as "the Siblings". At the centre of the

inheritance dispute is an offshore trust set up by D1 with the assistance of BNP Paribas Wealth Management, the ninth defendant ("D9"). The offshore trust which D1 established in Jersey is the Pride Wise Trust. The Pride Wise Trust in turn holds the sole issued share in an offshore holding company, Bright Noble Prime Ltd, the seventh defendant ("D7"). The trustee of the Pride Wise Trust is BNP Paribas Jersey Trust Corporation Ltd, the eighth defendant ("D8") and the nominees of D8 sit on the board of D7. By suing these parties, Kuntjoro hopes to be able to somehow recover (directly or indirectly) his inheritance.

2 The trial of this action took place over 16 days in August and September 2015. The first few days of the trial dealt with the limitation defence raised by D9 and the other defendants as a preliminary issue, save for D1 who reserved her right to rely on the defence of limitation at the main trial. The limitation defence was that all the claims against the relevant defendants, ranging from knowing assistance in the setting up of the Pride Wise Trust, to wrongful transfers of assets to D7, and to withdrawals of certain sums of money from several bank accounts, did not accrue within six years prior to the commencement of the present action on 21 September 2011. On the preliminary issue, I found against Kuntjoro and the reasons for dismissing his claims as time-barred are made clear in the Record of Oral Judgment dated 19 August 2015.

3 As to the remainder of Kuntjoro's claims against the Siblings for wrongful withdrawals of sums of money that were not time-barred, respective counsel for the Siblings, at the close of Kuntjoro's case, submitted that there was no case to answer; Kuntjoro had not adduced evidence to show that the withdrawals in question were made by the defendants accused of the misdeed

and that the withdrawals *per se* were unlawful. I agreed with counsel and dismissed Kuntjoro's remaining claims against the Siblings. The reasons for the dismissal are found in the Record of Oral Judgment dated 4 September 2015.

4 This judgment is solely on Kuntjoro's case against D1. Hence, this judgment deals only with the facts and arguments that are relevant to his primary case against D1 as executrix of the 1996 Will and as constructive trustee of the assets transferred to D7. The primary complaint is that Kuntjoro has not received his inheritance and many years have passed since the deceased died in Jakarta on 30 January 2000. Kuntjoro claims against D1, who is the named executrix of the 1996 Will, for failing to apply for grant of probate despite his repeated demands made over the years, and for withholding his inheritance. More importantly, D1 had taken over the assets held in several jointly-held bank accounts as her own to set up the Pride Wise Trust and D8 had made distributions out of the Pride Wise Trust. Kuntjoro claims that, in so doing, D1 had deprived Kuntjoro of: (a) his inheritance as a beneficiary under the 1996 Will; or (b) his share of the assets as one of the account holders of seven jointly-held bank accounts. These seven bank accounts ("the 7 Accounts") are set out in Kuntjoro's pleadings and they are enumerated at [9] below. Not only does Kuntjoro want D1 to pay damages for breach of trust, he has asked for many declaratory orders. Kuntjoro's claims that the assets in the form of money and investments that were settled into the Pride Wise Trust were not owned by D1 as the settlor of that trust, and even though he is not asking for the Pride Wise Trust to be declared invalid from inception and for it to be revoked, he is nevertheless seeking, amongst other things, an order that the assets in the Pride Wise Trust be distributed in a manner consistent with his inheritance or his interest as joint account holder of

the 7 Accounts. It is Kuntjoro's case that he transferred the assets in the 7 Accounts to D1 who received the assets as constructive trustee and is accountable to him accordingly. To the extent that Kuntjoro has made broad claims for declarations against all the defendants, the court's decision on the substantive issues concerning D1 may impact D2 to D9 in a nominal sense.

5 D1 accepts that there was no distribution under the 1996 Will for the reason that the assets in the form of money and investments in the 7 Accounts did not form part of the deceased's residuary estate as they belonged to D1 and not to the deceased. Alternatively, if the assets in the 7 Accounts belonged to the residuary estate of the deceased ("estate assets"), the Wibawa children (*ie*, Kuntjoro and the Siblings) did not receive the inheritance to which they were entitled under the 1996 Will as they had gifted their inheritance to D1, who used the gift to set up the Pride Wise Trust. On either view of the ownership issue, Kuntjoro had all the time agreed to set up an offshore trust in Jersey with D7 as the underlying offshore company. With the exception of Kuntjoro, the Siblings have not disputed D1's ownership of the assets used to set up the Pride Wise Trust. Suffice to say for now that the setting up of the offshore trust to hold the assets was a strategy taken to protect the family wealth.

6 Even if the Pride Wise Trust was set up with estate assets, D1 argues that the relief sought by Kuntjoro should be refused on the ground that Kuntjoro had agreed to the asset-protection strategy which involved the use of an offshore trust (*ie*, the Pride Wise Trust) in conjunction with an underlying offshore company (*ie*, D7). Furthermore, the action against D1 should be dismissed even if she is adjudged to be in breach of duty as named executrix of the 1996 Will or as constructive trustee of the estate assets. D1 raises Kuntjoro's consent or concurrence as a defence to Kuntjoro's claim for breach

of trust. D1 also relies on Kuntjoro's knowledge and acquiescence, as demonstrated by his participation and affirmation in the creation of the Pride Wise Trust and by his further affirmations from his actions as protector of the same. Arguably, Kuntjoro did not object to the assets being used to set up the Pride Wise Trust until the relationship between the two sides deteriorated, and this acrimonious dispute has only arisen now that the two sides have fallen out. All in all, it is D1's case that Kuntjoro, having agreed to the setting up of the Pride Wise Trust and having acted as its protector (which involved him giving investment directions to D8), had waived his rights to the assets in the 7 Accounts and/or is estopped from contending otherwise and making the claims pleaded.

7 At the trial of the action against D1, Mr Syed Hassan Bin Syed Esa Almenoar ("Mr Almenoar"), who was assisted by Mr Ooi Oon Tat ("Mr Ooi"), represented Kuntjoro. Counsel for D1 was Mr Lek Siang Pheng ("Mr Lek"), who was assisted by Mr Koh Kia Jeng, Mr Tan Yee Siong and Mr Amogh Chakravarti.

Background facts

8 It is convenient to begin with an outline of some background facts which will provide a contextual framework to explain Kuntjoro's claims and D1's defences to these claims.

9 As stated, the 7 Accounts featured prominently in the present dispute. Kuntjoro's pleaded case is that on the date of the deceased's death on 30 January 2000, the assets in the 7 Accounts had a value of US$12,322,892.35. The table below sets out Kuntjoro's pleaded case on the details of the 7 Accounts, the names of the account holders and the asset value:

No.	Description of account	Account holders	Value of assets
1	BNP Paribas Private Bank Account No XX-16802 ("BNP 16802")	(1) Kuntjoro (2) D2 (3) D3	US$3,124,514.76
2	HSBC SA Bank Account No XXXX-XXX419 ("HSBC 419")	(1) Kuntjoro (2) D2 (3) D3 (4) D4 (5) D5 (6) D6	US$3,983,959.52
3	HSBC Select Bank Account No XXX-XXXXXX-XXX-XXXXXX-85	(1) Kuntjoro (2) D2 (3) D3 (4) D4 (5) D5 (6) D6	S$2,331,546.07 (equivalent to US$1,370,691.40)
4	Bank Brussels Lambert Account No XXX-XXXXXXX-XX-011	(1) Kuntjoro (2) D2 (3) D3 (4) D4 (5) D5 (6) D6	US$1,675,032.75
5	Merrill Lynch Account No XXX-21896	(1) Deceased (2) Kuntjoro (3) D1 (4) D2	US$1,073,666.00
6	Salomon Smith Barney Account No XXX-XXXXX-11	(1) Kuntjoro (2) D1 (3) D2	US$749,571.61
7	Bank of China Account Nos XXX-X-XXX545-6; XXX-XXX-XXXX458-4; andXXX-XXX-X-XXX313-4 / XXX819	(1) Kuntjoro (2) D2	US$234,093.84 HK$859,956.80 (equivalent to US$111,364.51)
		Total	US$12,322,892.35

10 As can be seen, the accounts were opened at different banks in the names of the deceased, Kuntjoro, D1 and the Siblings in different

combinations. D1 disputes some of the account numbers in her Affidavit of Evidence-in-Chief ("AEIC"). I also note, parenthetically, an arithmetical error in the table above. The total amount should be US$12,322,894.39 instead of US$12,322,892.35. However, nothing turns on this arithmetical error or the alleged inconsistencies with the account numbers.

11 During the trial, the court was informed that, as at 31 July 2015, the Pride Wise Trust had a total asset value of US$33,808,919. This figure does not appear to take into account distributions that had been made to the beneficiaries of the Pride Wise Trust prior to 31 July 2015.

12 The deceased was a successful businessman. He was the Indonesian distributor of sewing threads known by the brand name Coats. The business generated a substantial amount of funds which were placed in various bank accounts in Singapore that were opened during the deceased's lifetime. D1 says that she worked together in the business and had contributed to the success of the business. Moreover, there was the common understanding and intention between husband and wife that if either one of them were to pass on before the other, all the money and investments derived from the business and/or in the family's bank accounts would belong to the surviving spouse.

13 It is an undisputed fact that in respect of each of the 7 Accounts, the account holders granted both the deceased and D1 powers of attorney to operate any of the accounts alone. It is common ground that during the lifetime of the deceased, the account holders, for the most part, did not make any deposits into or withdrawals from these accounts for their own purposes.

The 1996 Will

14 As stated, the deceased passed away on 30 January 2000. According to D1, she was in mourning for several years. She did not disclose the 1996 Will to her children until 16 December 2003, on the occasion of a family dinner to celebrate her birthday. According to D1, this was the first time she had celebrated her birthday,[1] and the implication here is that she was able to recall the date of the celebration vividly. On that occasion, the 1996 Will was also read out. Kuntjoro, however, claims that the birthday dinner celebration was on 20 December 2003, which was two days after D1 established the Pride Wise Trust on 18 December 2003. As will be apparent later in the course of the judgment, the date of disclosure of the 1996 Will is not of real significance to the issues in dispute.

15 The 1996 Will provided, *inter alia*, that:[2]

> 2. **I HEREBY APPOINT** my wife **HARIANTY WIBAWA** … to be the Sole Executrix and Trustee … of this my Will.
>
> 3. As to the property at No. 80 Kim Seng Road, #03-02, Mirage Tower, Singapore … of which my wife **HARIANTY WIBAWA** and I are joint tenants, I make the following provisions:
>
> > (a) If there is in my lifetime a severance of joint tenancy then I **GIVE DEVISE AND BEQUEATH** all my share interest and title in the said property and the proceeds of sale thereof (if any) to my sons **KUNTJORO WIBAWA** and **KARJANA WIBAWA** as tenants-in-common in equal shares.
> >
> > (b) If there is no such severance and I survive the said **HARIANTY WIBAWA**, then I **GIVE DEVISE AND BEQUEATH** all my share interest and title in the property and the proceeds of sale thereof (if any) to my sons **KUNTJORO WIBAWA** and **KARJANA WIBAWA** as tenants-in-common in equal shares.

[1] Transcripts (28 August 2015, p 65).

[2] Harianty Wibawa's AEIC, pp 70–71.

> 4. Subject to payment of my just debts, funeral and testamentary expenses and estate duties (if any), I HEREBY **GIVE DEVISE AND BEQUEATH** all the rest and residue of my real and personal estate whatsoever and wheresoever situate which I may be possessed of or entitled to at the time of my death not hereby or by any codicil hereto specifically disposed off [*sic*] in the following manner:-
>
> (a) 50% to my wife, **HARIANTY WIBAWA**
>
> (b) 15% to my son, **KUNTJORO WIBAWA**
>
> (c) 15% to my son, **KARJANA WIBAWA**
>
> (d) 5% to my daughter, **PURNAWATI WIBAWA**
>
> (e) 5% to my daughter, **SUNDARI WIBAWA**
>
> (f) 5% to my daughter, **LINDIJASARI WIBAWA**
>
> (g) 5% to my daughter, **TJANDRAWATI WIBAWA**

16 D1's contention is that the 1996 Will was intended to deal only with the property referred to in clause 3 of the 1996 Will. No evidence was adduced to support her contention, nor was an explanation proffered to reconcile her position with the clear language of clause 4 which dealt with the residuary estate. More importantly, the common understanding and intention as pleaded is specific. In her Defence, D1 pleads as follows:

> It was the common understanding and intention between the [deceased] and [D1], as husband and wife, that the monies/investment from their business in Indonesia would devolve to the surviving spouse if one were to predecease the other.

D1's plea of a common understanding and intention clearly contradicts the plain wording of clause 4.

17 It is a convenient juncture to raise a related point. Exhibited in D1's AEIC is a document entitled "Clarification of Inheritance Rights". This document was signed on 21 April 2004 and D1 referred to it as a declaration

of inheritance rights in Indonesia ("the April 2004 declaration"). According to D1, the April 2004 declaration pertained to the deceased's assets in Indonesia and its purpose was to extend the lease on the family's Indonesian properties. Kuntjoro's evidence is largely consistent with this. Interestingly, D1, D4, D5 and Kuntjoro together with one Benny Prasetya, made several declarations before the Notary Public on 21 April 2004. The declaration that is relevant to this case reads:[3]

> The persons appearing before me, Notary Public, each acting for and on behalf of him/herself, firstly informed the following:
>
> …
>
> Whereas the [deceased] had never made any will or testament …

18 It is incontrovertible that by 21 April 2004, Kuntjoro was certainly aware that: (a) the deceased had made the 1996 Will; and (b) D1 had set up the Pride Wise Trust. Yet, in the April 2004 declaration, D1 and him, as well his two sisters, D4 and D5, signed a declaration to the effect that the deceased had never made a will or testament disposing of his Indonesian assets, which was factually untrue. Clause 4 of the 1996 Will is clear and it deals with the deceased's residuary estate wherever located (see [15] above). A reasonable inference to draw from what would otherwise be a blatant lie by the family members who signed the declaration is the existence of some informal understanding reached in respect of the 1996 Will. I will elaborate on this point later (see the discussion starting from [89] below).

[3] Harianty Wibawa's AEIC, p 94.

The Pride Wise Trust

19 The Pride Wise Trust was set up on 18 December 2003 as an irrevocable and discretionary trust. In this case, the trust structure involved the use of a trust (*ie*, the Pride Wise Trust) in conjunction with an underlying offshore company (*ie*, D7). The initial trust fund was US$100. Later on, D1's sole share in D7 was transferred to D8 as an addition to the assets of Pride Wise Trust. At the outset, it should be noted that D7 was a shell company when D1 took it over. The trust instrument named D1 as the settlor of the trust and Kuntjoro as its first protector. It also provided for Jersey law as the governing law. The beneficiaries of the trust were identified as D1, Kuntjoro and the Siblings.

What did Kuntjoro know about the Pride Wise Trust?

20 Kuntjoro's testimony at trial is that the Pride Wise Trust was D1's personal trust and that it was not the same offshore trust that he and Peter Finch, a wealth planner from D9 ("Finch"), had discussed. Kuntjoro met and consulted Finch and there was talk about setting up six trusts, one for each of the Wibawa children. Kuntjoro conceded at trial that there was nothing to his pleaded case of six trusts; it was just talk and "half-baked".[4] The present dispute concerns one offshore trust that was set up. As is the way with offshore discretionary trusts of this nature, D8, as the trustee, had the power to change the beneficiaries. Kuntjoro reasoned that he would not have agreed to a discretionary trust like the Pride Wise Trust where the trustee could exclude him as a beneficiary. Specifically, his pleaded case is that he was unaware of the terms of the trust instrument that D1 signed on 18 December 2003 as he was not present at the signing, and that he would not have signed various

[4] Transcripts (20 August 2015, pp 87–89).

documents prepared by Finch to transfer the assets in the 7 Accounts to D7 had he been informed that he could be excluded as a beneficiary.

21 I propose to deal with Kuntjoro's pleaded disclaimers now. The extent of his knowledge and involvement go to the heart of his primary case, and for D1, these answers would provide the material for the foundation of her defences. It is important to note that the documents for D9 disclosed in court are in English. D1 would rely on Kuntjoro to deal with and manage the documentation. She speaks Mandarin and does not read and speak English. Finch does not speak Mandarin. Jocelyne Koh ("Jocelyne"), a relationship manager from D9, was present at meetings between Finch and D1 and she acted as the translator and interpreter of documents in English. She was also present at meetings involving Kuntjoro. As to the level of trust D1 had placed on Kuntjoro, her answers during cross-examination by Mr Almenoar are revealing:[5]

> Q. … Can you remember how many documents you affixed your signature?
>
> A. I didn't count.
>
> Q. Can you remember what you were signing about?
>
> A. It's for the trust.
>
> Q. What about the trust?
>
> A. To set up the trust.
>
> Q. To set up the trust? What for to set up the trust?
>
> A. I was afraid that the tax authority would come checking on our assets.
>
> Q. And because the bank, Peter Finch, advised you, you carried on and signed documents. That's really all that you know?

[5] Transcripts (27 August 2015, pp 63–64)

> A. The plaintiff asked me to sign and I would sign. I don't understand the documents.
>
> …
>
> Q. Right, okay. Let's get this right. He was not present. How could he advise you what to sign? He doesn't even know what you were signing or what you were going to sign.
>
> A. What he told me was that Jocelyne Koh and Peter Finch will be arriving shortly to set up the trust, so if you see anything just sign the documents.
>
> Q. So, in fact, you trusted Peter Finch and Jocelyne Koh?
>
> A. It's not that I trust them; I trust my son. He told me to sign and I would sign.

22 On the evidence before this court, Kuntjoro's contention that the Pride Wise Trust was D1's private trust and that he was unaware of its terms (see [20] above) is untenable. His own testimony is riddled with untruths and half-truths and is contradicted by objective evidence. I find that Kuntjoro was fully aware that the Pride Wise Trust was the same offshore trust that he and Finch had discussed and that their discussions culminated in the Pride Wise Trust being set up to hold D1's sole share in D7 on trust as part of the Pride Wise Trust's assets. The objective evidence showed that the terms of a draft trust deed were brought to his attention in August 2003 and again in September 2003. Moreover, Finch's file note of a meeting with D1 held in Jakarta on 18 December 2003 ("the 18 December file note") recorded Finch confirming to D1 before she signed the trust deed that "all the clauses had been discussed in detail with [Kuntjoro]"[6]. Jocelyne was present at this meeting as well and her call report of the meeting also recorded the same confirmation.[7] The 18 December file note also referred to D1 being taken through page 20 of the

[6] 2 DCB 636.

[7] Koh Ee Leng's AEIC, Exhibit KOH-1, p 12.

trust deed. Page 20, which is Part C of the trust deed, has the very same information that is set out at [32] below. Put simply, I do not see how Kuntjoro's knowledge and participation is any lessened by his absence from the 18 December 2003 meeting when D1 signed the trust deed which has the same terms as the draft trust deed.

23 Kuntjoro made reference to a meeting held in Jakarta on 26 August 2003. His evidence on this meeting is, however, unsatisfactory. In his AEIC, Kuntjoro said that he did not see any of the four documents which Finch had, in one of his file notes of that meeting,[8] recorded as having been tabled. Neither did Finch explain those documents to him. In the witness box, Kuntjoro said that he did not attend the meeting.[9] At trial, Jocelyne corroborated Kuntjoro's testimony that he had only brought D1 to the meeting on 26 August 2003 but was not otherwise present at it.[10]

24 I now come to Kuntjoro's affidavit of 6 October 2011 filed in support of an injunction application *vide* Summons No 4502 of 2011 ("the 2011 injunction affidavit"). In the 2011 injunction affidavit, Kuntjoro told a different story about the meeting on 26 August 2003:

> 104. Later, on 26 August 2003, Finch and [Jocelyne] came to Jakarta and met [D1] and I at a café opposite a hotel. They asked me to leave, once I had introduced [D1] to them. They said they wanted to talk to [D1] alone. That was the first time [D1] had met Finch.
>
> 105. *I joined them later and they gave advice on the benefits of setting up a trust.*
>
> [emphasis added]

[8] 2 DCB 435–436.

[9] Transcripts (20 August 2015, pp 63–64).

[10] Transcripts (26 August 2015, pp 10–33).

When cross-examined on this paragraph, Kuntjoro claimed that he had made a mistake in paragraph 105 of the 2011 injunction affidavit.[11]

25 However, according to Finch's file notes, Kuntjoro was present at the 26 August 2003 meeting save for the part of the meeting concerning D1's Channel Islands will ("the Jersey Will"), which was confidential. The meeting on 26 August 2003 in Jakarta covered three topics, and it appears that each topic was discussed one after the other. The first topic was D7, and Finch's file note of that discussion was headed "Bright Noble Prime ("BNP")". The second topic that was discussed was the Jersey Will, which D1 signed at that meeting. Finch's file note of that discussion was headed "Harianty Wibawa". The third topic for discussion was the offshore trust that was given the working name "the Pride Wise Trust" by D9. Finch's file note of that discussion was headed "The Wibawa Family" and recorded that "[t]he purpose of the meeting was to discuss a possible trust structure for the family". The basic structure was for the trust to hold D7. Significantly, the third file note makes reference to Finch's explanation on the use of a trust in combination with an offshore company (*ie*, D7). From the third file note, four documents were handed over to Kuntjoro for him to study. I will refer to the three file notes as "the D7 file note", "the Harianty Wibawa file note" and "the Wibawa Family file note" respectively.

26 Jocelyne did not deny outright that the first two topics were discussed. By and large, she was did not dispute the D7 file note and the Harianty Wibawa file note. As for the Wibawa Family file note, her evidence is that the discussion on the trust was not as extensive as the file note suggested. As

[11] Transcripts (11 August 2015, pp 54–56).

mentioned earlier, her overall evidence is that Kuntjoro did not attend the meeting held on 26 August 2003.

27 Counsel for Kuntjoro, Mr Ooi, even put to Finch, a subpoenaed witness, that Finch had fabricated the Wibawa Family file note:[12]

> Q. I'm telling you that at this time he was talking about Pride Wise Trust as well as another trust set up.
>
> A. What trust?
>
> Q. Pride Wise Trust.
>
> A. Pride Wise Trust, yes.
>
> Q. As well as another trust to be set up.
>
> A. I have no idea.
>
> Q. I have to put to you that your file note of 26 August 2004, at CB 435 --
>
> A. 26 August 2004?
>
> Q. That's right. 2003.
>
> A. My file note?
>
> Q. 2003.
>
> A. Right.
>
> Q. Was a file note of a non-existent meeting.
>
> A. I disagree with you.
>
> Q. I'm putting it to you that the contents were made up subsequently by you.
>
> A. Totally incorrect.
>
> Q. I'm putting it to you that on 23 September 2003 was the first time [Kuntjoro] discussed trust with you in detail.
>
> A. No, incorrect.
>
> Q. I'm putting it to you that there was no confirmation arrived at at this meeting of 23 September 2003 as

[12] Transcripts (1 September 2015, pp 133–134).

> regards the way forward -- as regards the setting up of the trust.
>
> A. Incorrect.

28 Finch further maintained that the purpose of file notes was to record what took place at meetings and that file notes would be typically produced as soon as the meetings were concluded and he was back in the office.[13] He denied that the Wibawa Family file note was made up.[14] I prefer Finch's testimony over that of Kuntjoro and Jocelyne for the reason that their oral testimonies on the matter are incompatible and internally inconsistent with their respective affidavits and other contemporaneous documents that they do not dispute. Let me elaborate.

29 As I see it, Mr Ooi's contention that Finch made up the Wibawa Family file note was Kuntjoro's way of getting around the fact that the Wibawa Family file note recorded Finch as having handed Kuntjoro four different documents for him to study. That Kuntjoro was not present at that meeting was also Kuntjoro's way of getting around the fact that the D7 file note recorded Kuntjoro as having signed the letter appointing him the investment manager of D7. The lie in Kuntjoro and Jocelyne's evidence – that Kuntjoro was not present at the meeting to receive any documents – is exposed by other contemporaneous documents that are not disputed by Kuntjoro and Jocelyne. These documents also point to Kuntjoro's knowledge of the terms of a draft trust deed and a copy of the Trust Application Questionnaire. Significantly, both documents would connect Kuntjoro to the Pride Wise Trust from the outset. For the reasons explained below, I accept Finch's three file notes as accurate recordings of what was discussed at the

[13] Transcripts (1 September 2015, p 30).

[14] Transcripts (1 September 2015, p 133).

meeting held on 26 August 2003. As such, I find that Kuntjoro was present at the meeting save for the time he left the meeting when the Jersey Will was discussed and executed by D1.

30 The Wibawa Family file note recorded several matters, some of which were: (a) the creation of a Jersey trust to hold D7, an offshore entity owned by D1; (b) that the trust would need a name; and (c) that Finch had explained the discretionary nature of the Pride Wise Trust and the fact that beneficiaries could be added or excluded to Kuntjoro.[15] From the same file note, Kuntjoro was also informed that he would assume the role of protector. As protector, he would have the ability to issue investment directions and be able to remove the trustee. Significantly, the same two matters (a)–(b) were covered again in a meeting held on 23 September 2003 ("the 23 September meeting"). Interestingly, Kuntjoro is not disputing the file note of the 23 September meeting[16] ("the 23 September file note") and, by implication, the meeting itself. Mr Ooi's put question to Finch was that it was only at the 23 September meeting that Kuntjoro discussed the trust in detail with Finch (at [27] above). The 23 September file note reads:[17]

> It is noted that [Finch] has already provided the family with a draft trust deed. In this connection [Finch] tabled a summary of this document in simple English as prepared by Mourants. [Kuntjoro] acknowledged the document and will study the same. He will use this to study the deed and then he and [Finch] will meet together with [D1] and Jocelyne to conclude the matter. [Finch] reminded [Kuntjoro] that we required a name for the trust.
>
> [Kuntjoro] to also complete the trust questionnaire that has been passed to him.

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[15] 2 DCB 435–436.

[16] Transcripts (20 August 2015, p 81).

[17] 2 DCB 534.

31 Kuntjoro has not seriously disputed the file note of an earlier meeting held in Singapore on 19 September 2003 at D9's offices ("19 September meeting"). This was a meeting between Kuntjoro, Jocelyne and one Ng Bee Geok ("NBG") from D9. Significantly, this file note specifically referred to the meeting held in Jakarta on 26 August 2003. The purpose of the 19 September meeting was "to follow up on matters discussed during the previous meeting in Jakarta on 26th August 2003 … and also in relation to the banking facilities".[18] This file note is telling as it showed that at the meeting the discussions went into trust matters that Kuntjoro said were raised at the 26 August 2003 meeting. He was following up on them with NBG. Reading both the file note of the 19 September meeting and the 23 September file note in context, it seems to me that Kuntjoro was referring, at the 19 September meeting, to the summary of the draft trust deed which was eventually provided to him at the 23 September meeting.

32 I already mentioned that the Wibawa Family file note had recorded Finch advising Kuntjoro and D1 that the trust to be set up would need a name. In the 23 September meeting, and as the name for the trust was outstanding, Kuntjoro was reminded that D9 required a name for the trust. The point here is that D1 would have to come up with a name of her own for the trust if she wanted to use a different name. For the time being, the working name given to the offshore trust was the "Pride Wise Trust". This working name is found in Part C of the draft trust deed that was handed to Kuntjoro on 26 August 2003. The details in Part C included information such as the name of the settlor, the names of the beneficiaries and the name of the first protector. Crucially, against the name of the trust, "The Pride Wise Trust" appears.[19] As stated, this

[18] 2 DCB 530.

[19] 2DCB 463.

contemporaneous document is important as it directly connects the Jersey trust that would hold D7 to the "Pride Wise Trust" as at 26 August 2003. Moreover, printed on the cover page of the draft trust deed are the words:[20]

Instrument of trust

known as the

The Pride Wise Trust

33 In addition, "The Pride Wise Trust" also appears in the copy of the Trust Application Questionnaire, on its cover page as well as in section 12 which is titled "Name of Trust". Notably, the Wibawa Family file note recorded a "[t]rust questionnaire" as one of the four documents handed to Kuntjoro and, in my judgment, this clearly referred to the copy of the Trust Application Questionnaire. Again, at the 23 September meeting, Kuntjoro was reminded "to complete the trust questionnaire that has been passed to him".[21] Another document that connected the Jersey trust that would hold D7 to the "Pride Wise Trust" is D9's New Business Acceptance form that was signed by Finch and Jocelyne and submitted on 17 December 2003 to D9's New Business Acceptance Committee for approval. The words "The Pride Wise Trust" appear immediately under the words "New Business Acceptance" on the cover page of this document.[22] In addition, the summary of proposals in this document (which is set out in full at [46] below) is telling. The narrative there linked Kuntjoro to D7 and the Pride Wise Trust one day before D1 signed the trust deed on 18 December 2003.[23] The working name of the trust

[20] 2 DCB 444.

[21] 2 DCB 534.

[22] 2 DCB 622.

[23] 16 AB 13477.

was never changed and "Pride Wise Trust" ended up as the name of the trust created by D1 on 18 December 2003.

34 A summary of the draft trust deed was provided to Kuntjoro to assist in his understanding of the draft trust deed during the 23 September meeting. In so far as the beneficiary clauses are concerned, the summary of the draft trust deed stated the following:[24]

> A3. **Renunciation by and addition of beneficiaries** – Any of the Beneficiaries can decide to give up their interest in the Trust Fund if they wish to.
>
> The Trustees will have power, with the Settlor's consent, to add new members to the class of Beneficiaries.
>
> A4. **Exclusion of beneficiaries or other persons** – The Trustees also have the power, with the Settlor's consent, to exclude any person (including any Beneficiaries) from benefit under the Trust.
>
> …
>
> A6. **Appointment of trusts** – The Trustees have power at any time to create further trusts for some or all of the Beneficiaries. This power can be used for example to create life or other fixed interests for particular Beneficiaries, or to create sub funds for separate groups of Beneficiaries.
>
> **Payments, applications and accumulations** – The Trustees have discretion at any time to make distributions of capital or income of the Trust Fund to any of the Beneficiaries.
>
> Any income which is not distributed by the Trustees will be accumulated.

35 According to clause A4 of the summary, the trustee could exclude any person as a beneficiary with the settlor's consent only. In 2003, Kuntjoro was on good terms with his mother and she trusted him implicitly. In addition,

[24] 2 DCB 542.

Kuntjoro was appointed the first protector of the Pride Wise Trust from the outset and this is not a disputed fact. Whilst it is commonly within the powers of the trustees of a discretionary trust to appoint new or additional trustees or to remove trustees, in clause A9, the powers are reserved to the protector. The summary of the draft trust deed further provided:

> A9. **Change of Trustee** – The power to appoint new or additional trustees or to remove trustees is reserved in favour of the Protector.

36 Significantly, Kuntjoro's appointment as protector of the trust would enable him to have full control over the investment of the trust fund, *ie*, the assets in the 7 Accounts that were eventually transferred to D7's bank accounts. The same summary explains the protector's powers as follows:

> A16. **Directions as to investments –** the Protector has the power to direct the trustees to make or sell investments in accordance with his decisions, and this can include investments which the trustees themselves would not have chosen. This power includes an ability for the Protector to direct money to be borrowed for the purposes of investment and also the ability for the Protector to delegate his powers to others. The Trustees however are not responsible for any loss resulting from the exercise of these powers.

37 It is clear from the circumstances outlined at [35] and [36] above – Kuntjoro's good relationship with D1, whose consent was needed to exclude a beneficiary, as well as Kuntjoro's power as protector to remove the trustee – that there was hardly any need for Kuntjoro to object to the discretionary trust. Separately, as can be seen from the Wibawa Family file note, Finch had explained to Kuntjoro why he had provided for D1's consent to be required prior to the addition or exclusion of beneficiaries; it was to enable D1 to determine who would be able to benefit during her lifetime. The Wibawa

Family file note further states that Kuntjoro had confirmed that "this was something it was likely she would want".[25]

38 Thus, Kuntjoro's hindsight argument that he would not have agreed to a discretionary trust where he could be excluded as a beneficiary by the trustee is a non-starter. That he would not have signed various documents prepared by Finch to transfer the assets in the 7 Accounts to D7 had he been informed that he could be excluded as a beneficiary is incredulous and untrue. For the sake of completeness, I also note that, despite the ongoing dispute with D1, there has been no move to exclude him as a beneficiary of the Pride Wise Trust. In fact, he received some distribution from D8 in 2012 (see [101] below).

39 Kuntjoro's allegation that he did not know about the powers of a protector until very much later does not help his case. Whether or not Kuntjoro was aware of his powers as protector is not the point. More importantly, he was appointed as the first protector of the trust on 18 December 2003, and he was told about his appointment by Finch on the same day.

40 Kuntjoro's statement that the family did not want to be connected with the assets in the 7 Accounts is a further point that must not be forgotten. This was the *raison d'être* for setting up an offshore trust in a tax haven and Kuntjoro's claim that he was not privy to the terms of the Pride Wise Trust is arid. Suffice to say for now that he would not be adverse to a discretionary trust, as an offshore discretionary trust in a tax haven would achieve this very objective. As is the usual way with an offshore discretionary trust, the beneficiaries would not be regarded as having any direct legal rights over any particular portion of the trust fund; they only had a right to be considered

[25] 2 DCB 435.

when the trustees exercised their discretion. In such trusts, the paramount desire and expectation is for financial information to be kept private and confidential. The use of a discretionary trust in conjunction with an underlying company was designed to protect assets in a tax haven. This combination would interpose an additional layer of confidentiality in the chain of ownership of the trust fund. Put simply, the whole point of D1 setting up a Jersey trust was to protect the family wealth, and Kuntjoro was all for the setting up of such a trust.

41 I now turn to consider how the concerns over the assets in the 7 Accounts came about and what Kuntjoro and D1 agreed to do, and did eventually do, to protect the family wealth.

Circumstances giving rise to the creation of a Jersey trust

42 It is common ground that sometime in the middle of 2003, letters were received from the Indonesian tax authorities inviting Kuntjoro, D1 and D2 to attend at their offices in Jakarta to discuss their US$-denominated assets. Kuntjoro said in the 2011 injunction affidavit that he and D1 were worried by this development. In her testimony, D1 confirmed her worry. Kuntjoro went on to explain that he and D1 formed the view that the assets in the form of money and investments in the 7 Accounts might be at risk and for that reason, the strategy was for Kuntjoro to look into the viability of an arrangement to distance the assets in the 7 Accounts from the family. It was this decision to protect the family wealth that eventually led to the creation of the offshore trust to hold D7, which was where the assets from the 7 Accounts went into, and I so hold.

43 Kuntjoro approached various banks in Singapore to ask for their advice. He described his efforts in the 2011 injunction affidavit as follows:

> 90. [After receiving the letters from the Indonesian tax authorities], [b]oth of us, [D1] and I were worried about what the tax or other authorities in Indonesia would do next. We were afraid that they would seize the money in the Singapore bank accounts.
>
> 91. [D1] then asked me to find out *where we could put the monies and investments in the 7 Accounts, where they could not be connected to us*.
>
> **Setting up of the Trust**
>
> 92. After that, I went to Singapore and met the Relationship Managers of HSBC and Merrill Lynch and asked them for advice. I also met with Finch and asked for his advice.
>
> 93. After I had heard from the 3 banks about their different trust structures, *I discussed the matter with [D1] and recommended what Finch had advised me. Initially she was reluctant to use a trust to hold the investments. She did not fully understand the concept of a trust. In Indonesia, there is no such thing as a trust.*
>
> 94. *Sometime later*, she had a discussion with my uncle Darmawan who told her that he had set up a trust to hold his investments. After that, *she agreed that we should proceed with a trust to hold all the bank accounts*.
>
> 95. [D1] and I decided to use BNP to set up the trust because the structure they offered was an "umbrella" trust, i.e. the trust could hold separate bank accounts or accounts in different banks. This was in view of the fact that our investments were then held in 7 different banks.
>
> [emphasis added]

44 Kuntjoro said in his Statement of Claim and AEIC that he informed Finch of the following matters:

> (a) There were then seven bank accounts with seven different banks, in the names of the various account holders (*ie*, the 7 Accounts).

(b) All the assets in the 7 Accounts belonged to the deceased and the account holders were his nominees.

(c) The deceased died in Jakarta in January 2000.

(d) The deceased did not leave a will and administration to the deceased's estate on intestacy had not been applied for, either in Indonesia or in Singapore.

(e) The family was worried as a result of the Indonesia tax authorities having called Kuntjoro, D1 and D2 for an interview regarding the 7 Accounts.

(f) The family wished to place the money somewhere safe in an account which could not be traced to them.

(g) Kuntjoro's grandfather died with assets standing in his name which caused much difficulties and much dispute between Kuntjoro's father and his siblings, including questions of estate duty.

(h) Kuntjoro's main concern was that each of the six children of the deceased should receive his or her share of the assets left by the deceased without any dispute amongst them and D1.

(i) Kuntjoro wanted a simple structure for the trust to cover the above concerns, including a clause to avoid dispute amongst the members of the family.

45 According to Kuntjoro, Finch advised him that:

(a) A family trust should be set up in Jersey to hold the assets in the 7 Accounts.

(b) All the assets in the 7 Accounts should be transferred to a company incorporated in Jersey, which company would be owned by the trust.

(c) It would take time to incorporate another Jersey company. For expediency, D7, an offshore company that was already incorporated, should be used to hold the assets from the 7 Accounts.

(d) Initially, all the assets in the 7 Accounts should be transferred to BNP 16802.

(e) After the assets in the 7 Accounts had been received into BNP 16802, the assets should be transferred to D7's BNP account (BNP Paribas Private Bank Account No XX-XX688) ("BNP 688") and recorded in D7's accounts as a loan.

(f) Finch would do all that was necessary for setting up the trust and would draft the necessary letters and send them to Kuntjoro, for those involved to sign, to put into effect what Finch had advised.

(g) D9's trust corporation in Jersey would invest and manage the family's assets.

(h) Six companies and six trusts should be established so that there could be no dispute amongst the members of the family.

(i) There was no point in getting lawyers to advise because when lawyers are involved, they increase the costs of setting up the trusts and only the lawyers benefitted.

(j) Once D1 agreed to the establishment of a trust, Finch would travel to Jakarta with the documents for her signature to set up the trusts.

46 As stated, Jocelyne was the relationship manager assigned to look after the accounts opened with D9. She was involved with Finch in assisting Kuntjoro and D1 in setting up the Pride Wise Trust. D9's file notes bear out this state of affairs. For present purposes, before D1 signed the trust papers, a New Business Acceptance form was signed by both Finch and Jocelyne and was submitted on 17 December 2003 to D9's New Business Acceptance Committee for approval. In the form's summary of proposals, it is stated:[26]

> The Pride Wise Trust, an irrevocable discretionary trust … established with power reserved in favour of the Protector. The purpose will be to provide privacy, protection and succession of assets for the benefit of the family of the Settlor. The protector will be the Settlor's son. The Protector would like to reserve the power to direct the management of the investments and to appoint and remove new and existing trustees. The consent of the Settlor will be required prior to the implementation by the Trustee of any changes to the class of beneficiaries. An underlying company, Bright Noble Prime Limited incorporated in Jersey has been established to hold the trust assets.
>
> [original emphasis omitted]

The New Business Acceptance Committee gave its approval on the same date.

[26] 2 DCB 624.

47 Kuntjoro denies that he was instrumental in setting up the Pride Wise Trust. The objective evidence before this court paints a different picture. There is overwhelming evidence, and I find that Kuntjoro was instrumental in setting up the Pride Wise Trust in that he saw through the decision to set up an offshore trust to protect the family wealth and D1 followed suit willingly. I agree with Mr Lek's point that, in so far as the Pride Wise Trust was concerned, if Kuntjoro was not the prime mover within the family, then no one else was. D1's evidence generally, which I accept, is that it was Kuntjoro (and not her or the Siblings) who directed everything to do with the Pride Wise Trust.

48 Kuntjoro's oral testimony did not support his pleaded case, and it contradicted his AEIC. In addition, what Kuntjoro was saying in the witness box was also quite different from the position taken in the 2011 injunction affidavit. During the trial, the court queried Mr Ooi as to whether there was a need to amend the Statement of Claim given the apparent shift in the pleaded case arising from Kuntjoro's oral testimony. Details of the "new case" are set out at [103] below. As it turned out, no application to amend was made.

49 It is thus not surprising that the impression given at the trial is that Kuntjoro was trying very hard in cross-examination to disassociate himself from the Pride Wise Trust despite overwhelming evidence of his knowledge, role and participation in setting it up. Kuntjoro's denial that he did not know anything about this offshore trust since it was his mother's private trust and was not privy to the terms of the trust deed that D1 signed on 18 December 2003 is untrue. Whilst he was not present at the signing, it was Kuntjoro who had arranged for D1 to meet Finch and Jocelyne who had travelled to Jakarta for the purpose of getting D1 to sign the trust deed for the Pride Wise Trust.

Prior to that, he was already apprised of the terms of the trust deed on the occasions and for the reasons recounted at [20]–[40] above. In addition, after the signing was over, Kuntjoro joined the group for lunch and was informed by Finch that he was appointed as protector of the Pride Wise Trust.[27] This appointment was something planned back in August and September 2003 and it was consistent with the discussions of the offshore trust structure. Plainly, the shift in the version of the events was a manifestation of Kuntjoro's attempt to disassociate himself from the Pride Wise Trust, and I so hold. Whilst inconsistencies in his testimony could be due to memory lapses since the matters happened more than ten years ago, it was certainly not the sole reason. I view his inconsistencies as the result of his tendency to orientate his evidence in a way which might perhaps have been of assistance to him.

Trust structure: Use of an offshore trust in conjunction with an underlying company

50 Counsel for D1 asked Finch to explain the use of a trust in combination with an underlying company to create the necessary debt and equity funding for the trust. Kuntjoro and D1's objective to protect the family trust was achieved by approaching it as estate planning for D1 and the offshore trust would hold D7:[28]

> Q. You said that mother would use the company as part of her estate planning.
>
> A. Yes.
>
> Q. Can you explain how this estate planning would work, based on your discussions in August 2003?
>
> A. Sure. The -- there were various assets belonging to mother that were held in the names of family

[27] Transcripts (25 August 2015, pp 7–8).

[28] Transcripts (1 September 2015, pp 13–15).

members, so the approach was that those assets would be transferred from the various accounts to a joint account held at BNP Paribas in the name of three people: the plaintiff, his brother and his sister. That was done.

And also mother would establish a trust with a nominal amount of $100 as part of the overall structuring of the arrangement. That -- it was necessary in order to receive assets of mother that were to be settled. So the trust was established with $100 as to be the ultimate recipient of the value of the assets.

Assets that were held in the various accounts in the family names were transferred to the joint account in BNP Paribas in the three names. Then the assets were then transferred from the BNP Paribas account to the account of Bright Noble Prime, and paperwork was then signed at that stage which confirmed that the transfer of the assets from the joint account in the three names to that of the account of Bright Noble Prime was to be treated as a payment to the mother, and a loan was to be recognised between the company, Bright Noble Prime, and the mother, equal to the value of the assets transferred.

A deed of indebtedness was documented in that regard, and then at a later point in time, which was on 31 August 2004, that deed -- that loan was then assigned by mother to the trustee of the trust that had been established in anticipation of that assignment. And that was the mechanism whereby the value of the assets were settled into the trust. And then mother, towards the end of 2004, transferred the equity that she held in Bright Noble Prime to the trust.

So then the trust was fully constituted.

Q. I see. Why was the trust structured in such a way?

A. The trust was structured in such a way -- why was the trust planned and structured in those steps?

Q. Yes. Why was the trust planned and structured in these steps?

A. Yes, because assets were held in names of children, and all assets belonged to mother. So the idea was to collect the assets into one account and then to transfer them into Bright Noble Prime. And so you bring some

> efficiency and some order to her affairs, and a means by which she could then achieve her estate planning objectives with succession plan, asset protection, privacy, avoiding probate -- in an efficient way.

*D7 (*ie*, Bright Noble Prime)*

51 As stated, D7 was used in conjunction with the intended trust out of convenience (instead of incorporating another Jersey company). D7 was incorporated in 2002 by Kuntjoro's wife, Laniwati Hardjono ("Laniwati"). The sole share in D7 was registered in the name of BNP Paribas Jersey Nominee Company Ltd ("the Nominee"). Originally, the Nominee held the sole share for the benefit of Laniwati. D7 was a shell company as the couple did not inject any assets into it. D1 formally took over Laniwati's share in D7 on 9 September 2003. Earlier, the Nominee received Laniwati's letter dated 12 August 2003 directing the Nominee to, *inter alia*, hold the sole share to the order of and upon trust for D1.

52 As the new beneficial owner of D7, D1 signed three documents on 26 August 2003. This is apparent from the D7 file note. The first document is the "Company Management Application Questionnaire (Bright Noble Prime Limited)".[29] This was an application to appoint D8 to manage D7. At section 5 of the form, the beneficial owner of the share in D7 was stated as D1. The declaration of beneficial ownership in section 11 of the form is as follows:

> **Declaration of beneficial ownership**
>
> I confirm that I am the sole owner of the assets which are being settled and that no third party rights exist thereon.

53 The second document that was signed on 26 August 2003 was a document titled "Form 3".[30] It appointed D8 to manage D7. The third

[29] 2 DCB 428.

document is a letter appointing Kuntjoro as the investment manager of D7.[31] This letter appeared to have been amended for Finch subsequently asked for a new letter to be signed by D1 and Kuntjoro on 2 September 2003.[32] Nothing turns on this development except that it testifies to the fact that Kuntjoro was at least at the meeting held on 26 August 2003 when the first letter of appointment was signed.

54 Before moving on, I pause here to make two points. First, the declaration of beneficial ownership at [52] above is in language exactly the same as the declaration of beneficial ownership in the Trust Application Questionnaire. Second, Kuntjoro was at the meeting (see my finding at [29] above) when this declaration in the Company Management Application Questionnaire was signed and he would have known that this declaration of beneficial ownership concerned assets that would be transferred as a loan to D7. In addition, as Mr Lek pointed out, the trust structure was predicated upon D1 being the beneficial owner of the assets loaned to D7. D7 was a shell company when D1 took it over and Kuntjoro knew that the same assets would be settled in D7 as he was going to be the investment manager of D7. All in all, I find that Kuntjoro was content to allow that declaration to be made, whether or not it was accurate. More pertinently, D7 was the underlying company that was to be used in conjunction with the offshore trust for the protection of the family wealth.

55 D7 has two bank accounts:

(a) BNP 688; and

[30] 1 DCB 68.

[31] 1 DCB 109.

[32] 2 DCB 486.

(b) HSBC SA Bank Account No XXXX-XXX555-0001 ("HSBC 555").

56 As Finch explained, the approach was for assets held in the various bank accounts to be transferred to BNP 16802, which was held in the names of Kuntjoro, D2 and D3, and thereafter for the same account holders to transfer the assets to BNP 688. Paperwork was then prepared and signed at that stage for the transfer. The paperwork confirmed that the transfer of the assets from BNP 16802 to D7 was to be treated as a payment to Dl and a loan between D1 and D7. The letters in question are set out at [61] below.

57 By an agreement dated 26 August 2004 between D1 and D7, the transfer was recorded as a loan from D1 to D7 and thus recognised in D7's books of accounts. On 31 August 2004, D1, D7 and D8 executed a Deed of Assignment under which D1 assigned all of her rights and benefits in the loan to D8 to hold subject to the Pride Wise Trust. On or about 27 December 2004, D1 transferred her ownership of the sole share in D7 to D8 to be held subject to the terms of the Pride Wise Trust. In other words, D8 was to hold the sole share in D7 on trust as part of the assets of Pride Wise Trust. D8 accepted the sole share in D7 as an addition to the assets of the Pride Wise Trust on 29 December 2004.

58 The transfer of the assets from the 7 Accounts took place around September 2003 to October 2004. According to David Shute ("Shute"), a director of D8, there were two other injections totalling US$143,000 in 2006. First, on 6 February 2006, a sum of US$114,500 was transferred to D7 from a joint account held in the names of Kuntjoro and D2 to D6. This seems to be from HSBC 419. Second, on 2 March 2006, a sum of $28,500 was transferred

to D7 by D4. On 14 March 2006, a further Deed of Assignment was entered into between D1, D7 and D8. This deed was to assign an additional amount of US$109,053.29 of debt owed by D7 to D1. This represented the balance of the interest accrued on the loan that had been omitted from the valuation of the loan in the earlier Deed of Assignment.

Paperwork

59 I now turn to the relevant paperwork that Finch talked about in order to set up the trust structure with the necessary debt and equity funding (see [50] above). I propose to refer to three categories of documents. The first category comprises the letters prepared by Finch. The second category comprises the Trust Application Questionnaire that contained D1's declaration of beneficial ownership of the assets. The third category comprises the Jersey Will.

60 I begin with the first category which is a series of letters required as a precursor to the debt and equity funding that Finch had talked about. The plan was for assets in the various jointly-held bank accounts to be deposited in BNP 16802 initially and thereafter transferred to D7. The discussion was recorded in the Wibawa Family file note in the following manner:[33]

> The following additional comments are of relevance:
>
> ….
>
> b. Discussion took place on the order of funding the trust structure. [Finch] confirmed the optimum way to proceed would be to transfer the portfolios with BNP Paribas, Coutts, HSBC and RBC to [D7] initially. Thereafter [D1] would transfer her interest in [D7] to the trust.
>
> [Finch] explained how the funding would be accounted for in the books of [D7] and the trust and how a

[33] 2 DCB 435–436.

> shareholders loan would arise that would be assigned to [D8] by [D1]. In addition to this assignment [D1] will also transfer her shares.
>
> The significance of the debt and equity funding was explained.
>
> [Kuntjoro] understood the approach.
>
> On funding [D7] we will need to document the asset transfers with an appropriate loan note. Point to KIV.

61 The letters are as follows:

(a) The first letter is undated and addressed to D9 and purportedly signed by Kuntjoro, D2 and D3. It directed D9 to transfer all assets and liabilities in BNP 16802 to D7's BNP 688.[34]

(b) The second letter is dated 12 August 2003 and addressed to D7 and purportedly signed by Kuntjoro, D2 and D3. The letter directed D7 to treat the transfer of monies from BNP 16802 as a payment to D1, to treat such payment as a loan in the books of D7, and to evidence such loan with an appropriate deed of indebtedness.[35]

(c) The third letter is undated and addressed to D7 and purportedly signed by Kuntjoro, D2 and D3 and is substantially similar to the second letter. It directed D7 to treat the transfer of all assets and liabilities from BNP 16802 as a payment to D1, to treat such payment as a loan in the books of D7, and to evidence such loan with an appropriate deed of indebtedness.[36]

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[34] Kuntjoro Wibawa's AEIC, Exhibit KW, p 75.

[35] Kuntjoro Wibawa's AEIC, Exhibit KW, p 72.

[36] Kuntjoro Wibawa's AEIC, Exhibit KW, p 74.

(d) The fourth letter is a letter dated 12 August 2003 and addressed to the Nominee and purportedly signed by Laniwati. The letter instructed the Nominee to hold the sole share in D7 on trust for D1 and to issue a new declaration of trust of this share in favour of D1.[37]

(e) The fifth letter is an undated letter addressed to D9 and purportedly signed by D1. This letter appears to have been faxed on 13 August 2003. It transferred "free of payment all the equities and bonds" in BNP 16802 to D7's BNP 688.[38]

62 Shute explained in his affidavit filed in proceedings in Jersey the reason for the third letter which is substantially similar to the second letter. It seems that the third letter had to be signed by Kuntjoro, D2 and D3 due to the fact that the second letter may have been signed prior to the transfer of the beneficial ownership of D7 from Laniwati to D1. D9's file note of a meeting of 14 July 2006 intimates broadly the same thing.[39]

63 As Shute explained in his AEIC, D8 received by fax a copy of the third letter on 8 October 2003. As intended, there was no actual payment to D1 or payment in turn by D1 to D7. I have already mentioned at [57] above the loan agreement between D1 and D7 and the deed that assigned the indebtedness to D8. I should mention here that the loan agreement dated 26 August 2004 was for the principal sum of US$27,842,430.24.[40] This represented the amount transferred from BNP 16802 to D7's BNP 688 alone. Separately, other transfers were also made or alleged to be made (see [64] below).

[37] Kuntjoro Wibawa's AEIC, Exhibit KW, p 73.

[38] 1 DCB 67; 2 DCB 420.

[39] 17 AB 14623.

[40] 3 DCB 761.

64 Kuntjoro's Statement of Claim states that between August 2003 and 2004, the accounts with HSBC Select Bank, Bank Brussels Lambert, Merrill Lynch and Salomon Smith Barney (*ie*, S/Nos 3-6 in the table at [9] above) were closed and their assets in the form of money and investments were transferred to BNP 16802. All the assets in BNP 16802 were then transferred to D7's BNP 688. The value of this transfer was approximately US$27,842.430.24. In or around September 2003, assets in the form of money and investments in HSBC 419 (*ie*, S/No 2 in the table at [9] above) were transferred to D7's HSBC 555. The value of the assets transferred was approximately US$5,821,934.80. This transfer does not appear to be disputed by D1. In addition, Kuntjoro also pleads that there were transfer(s) made from the Bank of China accounts (*ie*, S/No 7 in the table at [9] above).

65 I now come to the second category which is the Trust Application Questionnaire for the Pride Wise Trust which contained the following declaration:[41]

> **Declaration of beneficial ownership**
>
> I confirm that I am the sole owner of the assets which are being settled and that no third party rights exist thereon.

66 This declaration of beneficial ownership is a big issue in this dispute. Kuntjoro argues that this declaration is false as D1 does not own the assets that were settled in the Pride Wise Trust. D1 has taken a contrary position. For present purposes, it is my view that, at the material time on 18 December 2003 when D1 signed the Trust Application Questionnaire, Kuntjoro was content to allow that declaration to be made, whether or not it was accurate. As I see it, this declaration of beneficial ownership was the means to the end which was

[41] Harianty Wibawa's AEIC, p 116.

the protection of the family wealth. The treatment to be applied to the transfer was a payment by the joint account holders to D1, who was giving a loan to D7. As lender, she had all the rights attaching to the loan. Consistent with Kuntjoro being content with this declaration is Finch's evidence that Kuntjoro had gave him the understanding that the assets belonged to D1.[42] I also note that in D9's file note of a meeting that had taken place on 14 July 2006, it is recorded, in the context of matters which I need not, for present purposes, be concerned with, that Kuntjoro had previously represented to D2 that the assets in BNP 16802 belonged to D1.

67 Notably, Kuntjoro was or ought to have been aware of the declaration of beneficial ownership as it was worded in the same manner as the declaration in the Company Management Application Questionnaire D1 signed on 26 August 2003 (see [52] above). Furthermore, the declaration of beneficial ownership in the Trust Application Questionnaire was not a last minute inclusion that Kuntjoro knew nothing about even though he was not present at the signing of the Trust Application Questionnaire on 18 December 2003. The point here is that on 26 August 2003, he was given a copy of the Trust Application Questionnaire to study. This copy contained the same declaration of beneficial ownership as the version that D1 signed on 18 December 2003. I also mentioned earlier that at the 23 September meeting, Kuntjoro was reminded "to complete the trust questionnaire that has been passed to him".[43] Moreover, I also note that section 6(b) of the Trust Application Questionnaire and the copy thereof refer to "[t]he entire interest of [D1] in [D7]".[44] Likewise, section 9 of both documents state that "[D7] has been established and will be settled into the trust".[45]

[42] Transcripts (1 September 2015, p 58).

[43] 2 DCB 534.

68 I now come to the third category which is the Jersey Will. This was executed on 26 August 2003 to dispose of assets situated in Jersey.[46] Kuntjoro knew about the Jersey Will from Jocelyne and from the lawyer's bill rendered for work done in relation to the preparation of the Jersey Will. He knew why the Jersey Will was needed as the assets in the 7 Accounts would be transferred to D7 and D1 was to be the owner of D7. At the meeting of 26 August 2003, Finch first dealt with D1's ownership of D7. After that was over, Finch next moved on to deal with the Jersey Will. The Harianty Wibawa file note recorded that this part of the meeting on 26 August 2003 was to deal with the Jersey Will "as the same relates to [D1's] interest in [D7]".[47] Simply put, the Jersey Will was a stop-gap measure to deal with the interim period before the Pride Wise Trust was perfected. As Finch explained at trial, the purpose of the Jersey Will was to deal with the contingency of D1 passing on before assigning her interest in D7 to the Pride Wise Trust.[48] Although Kuntjoro was not privy to the terms of the Jersey Will, he was aware of its purpose, and I so hold.

69 Subsequently, the Jersey Will was the basic document that Finch used to prepare D1's letter of wishes. This is evident from his file note for the 18 December 2003 meeting, and the relevant text is set out at [100] below.

70 The different paperwork represented the many components of the trust structure such as D1 taking over D7, the change of the ownership of D7 from

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[44] Harianty Wibawa's AEIC, p 113; 2 DCB 439.

[45] Harianty Wibawa's AEIC, p 114; 2 DCB 440.

[46] 2 DCB 467.

[47] 2 DCB 434.

[48] Transcripts (1 September 2015, pp 22–23).

Laniwati to D1, the requisite debt and equity funding for the trust fund and finally the establishment of the trust to hold D7. Conceptually, the use of the offshore trust in conjunction with D7 was for the objective of protecting the family wealth. Both Kuntjoro and D1 agreed to and participated in each step of the process. Mr Lek's argument is that the 1996 Will is irrelevant to the present case. Kuntjoro, having agreed to set up an offshore trust, should not be allowed to sue D1 in a multifaceted way to recover his inheritance under the 1996 Will. Indeed, this is really what this case is about. To use a simple analogy, two persons agreed to take cash out from one "drawer" to put it into another "drawer" that is under the lock and key of a third party who has the discretion to decide as and when to unlock the drawer to make payment. Can there be recourse by one against the other for putting the cash in the second drawer? Mr Lek says say no.

71 The administration of the Pride Wise Trust went on smoothly. Kuntjoro as the first protector of the Pride Wise Trust made investment decisions on behalf of the Pride Wise Trust. He was also the investment manager of D7. Prior to late 2005, he did not take issue with the ownership of the funds used to settle the Pride Wise Trust. Cracks in the relationship between Kuntjoro and D1 began appearing in late 2005. It has been said that he fell out with D1 over investment matters. There could have been other reasons but I need not concern myself with the cause(s) of the breakdown in the relationship. Suffice it to say that the serious fallout is not disputed. Kuntjoro left the Wibawa family home in Indonesia in late 2005. He subsequently relocated to Singapore in March 2006 and he continues to reside here. He has been estranged from D1 since late 2005.

72 It is not necessary to go into the details of what each side did after the fallout. As an illustration of the state of affairs, in September 2005, Kuntjoro made general inquires as to what implications there would be where the existence of a will was withheld; and in October 2005, D1 wanted Kuntjoro to be removed as the protector of the Pride Wise Trust. D8 learnt of the family's dispute towards the end of October 2005. In November 2005, Kuntjoro started asking D9 about the identity of the beneficial owners of BNP 16802. He wrote to D9 on 7 November 2005 and D9 replied on the same day saying that "the account holders (beneficiaries) of [BNP 16802] are [Kuntjoro], [D3] and [D2]".[49]

73 As a result, D8 stopped making distributions from the Pride Wise Trust. The family dispute could not be resolved amicably and in 2010, D8 applied to the Royal Court of Jersey for declarations concerning the administration of the Pride Wise Trust, including the removal or suspension of Kuntjoro as protector of the Pride Wise Trust. The Royal Court of Jersey ordered that unless Kuntjoro brought proceedings in Jersey within six months of the date of the order seeking to set aside all or part of the original transfers into the Pride Wise Trust, D8 would be entitled to administer the Pride Wise Trust free and clear of all and any claims that Kuntjoro might have or purport to have *vis-à-vis* the Pride Wise Trust (save as beneficiary). Kuntjoro did not commence any action in the Royal Court of Jersey within the time stipulated in the order. D8 thus adopted the view that it was entitled to administer the Pride Wise Trust free from Kuntjoro's claims, and distributions totalling US$7.95m were made to D1 as one of the beneficiaries in June and July 2011. According to D1, neither Kuntjoro nor the Siblings received any part of this US$7.95m.[50]

[49] 3 DCB 914; Kuntjoro Wibawa's AEIC, Exhibit KW, p 217.

74 Kuntjoro commenced the present suit on 21 September 2011 against D1, the Siblings, and D7 to D9.

Kuntjoro's position in this action

75 Kuntjoro's primary case is that the assets in the 7 Accounts belonged to the deceased as the source of funds originated exclusively from his business. The account holders jointly-held the assets for the benefit of the deceased during the deceased's lifetime. After the deceased's death, the assets (*ie*, estate assets) continued to be held by the account holders on trust for the estate until the estate assets were transferred to D7. D1's declaration of beneficial ownership of the assets was untrue; D1 had made used of estate assets that did not belong to her to set up the Pride Wise Trust. In so doing, D1 acted for her own personal advantage in breach of her duty as executrix and constructive trustee. Kuntjoro's claims that D7 to D9 had knowingly assisted in these breaches.

76 Kuntjoro's alternative position is that the account holders held the assets in the 7 Accounts on trust for themselves in equal shares ("the Account Holders' Trust").

77 To this end, Kuntjoro has tabulated two alternative methods of division:

Table 1: Division pursuant to the 1996 Will

Party	Percentage (%)
Kuntjoro	15
D1	50

[50] Transcripts (28 August 2015, p 86).

D2	15
D3	5
D4	5
D5	5
D6	5
Total	100

Table 2: Division pursuant to the Account Holders' Trust

Party	**Percentage (%)**
Kuntjoro	24.29
D1	4.93
D2	24.29
D3	17.96
D4	9.51
D5	9.51
D6	9.51
Total	100

78 Kuntjoro is also pursuing other miscellaneous claims such as the return of a US$35,000 investment and an account and inquiry pursuant to the wrongful closure of bank accounts. He also alleges that four disparate sums of money were dissipated by D1 in breach of trust:

(a) AUD$403,968.97 on 16 July 2004 from HSBC 419;

(b) US$424,880.91 on 14 July 2005 from BNP 688;

(c) US$35,000 on 7 October 2005 from HSBC 419; and

(d) US$136,102.87 on 14 November 2005 from HSBC 419.

79 Finally, Kuntjoro has asked for a whole host of declaratory orders.

The Account Holders' Trust

80 I propose to deal with Kuntjoro's alternative position first as it is easily disposed of. Kuntjoro has not put forward the basis, legal and factual, for his assertion that the account holders held the assets in the form of money and investments in the 7 Accounts on trust for each other. As such, he is unable to substantiate his claim. The accounts with which this contention is concerned were in the joint names of the deceased, Kuntjoro, D1 and the Siblings. It is Kuntjoro's case that the funds in these accounts were provided exclusively by the deceased from his business. Assuming that to be so, Kuntjoro still has to establish that the banking arrangement (*ie*, the jointly-held bank accounts) manifested the deceased's intention to give the assets to the account holders in equal shares. Notably, Kuntjoro proffered no reasons for the joint names of these bank accounts. D1, however, explained that it was necessary to have funds outside of Indonesia because of the socio-political situation in those days. For prudence and for the sake of convenience, the thinking then was for the Wibawa children to have access to the assets in the accounts in Singapore should the parents be unable to leave Indonesia or should something untoward happen to the parents.

81 Even though the account opening documents declared the account holders as the beneficial owners of the bank accounts, the position is rebutted by countervailing evidence to the contrary. First, it is a question of the intention of the deceased in providing the funds whether the account holders were to take the funds beneficially or on trust, and if on trust, what type of

trust. There is no evidence that the deceased during his lifetime gave away his beneficial interest in the assets in the proportion that accorded with the number of account holders to each bank account. Neither is there evidence to even suggest that the deceased, *via* the jointly-held bank accounts, created a settlement or trust of the nature pleaded by Kuntjoro (*ie*, a "constructive / implied / bare trust"). Second, Kuntjoro did not raise any presumption of advancement in his pleadings. Third, the countervailing evidence is that the deceased and D1 retained control of these accounts through the powers of attorney granted to them. The undisputed evidence is that the named account holders did not, for the most part, operate the accounts for their own purposes. Kuntjoro's own evidence is that at all material times during the deceased's lifetime, all withdrawals from the accounts were made by and for the benefit of the deceased alone.

82 On Kuntjoro's case that the funds for these accounts were provided exclusively by the deceased from his business, there is, as regards the assets held in these accounts, a presumption of a resulting trust in favour of the provider of the assets. This resulting trust which arises by operation of law is not displaced in this case. As I said, a presumption of advancement has never been and is not Kuntjoro's pleaded case. On the law on resulting trusts and the presumption of advancement, see generally *Chan Yuen Lan v See Fong Mun* [2014] 3 SLR 1048; *Lau Siew Kim v Yeo Guan Chye Terence and another* [2008] 2 SLR(R) 108; and, more recently, *Su Emmanuel v Emmanuel Priya Ethel Anne and another* [2016] SGCA 30.

83 I now turn to Kuntjoro's primary case that the assets in the 7 Accounts were estate assets.

Kuntjoro's primary case on estate assets

84 Kuntjoro claims that the assets in the 7 Accounts were held by the account holders on trust for the deceased during his lifetime and that, on the deceased's death, the assets were held by the account holders on trust for the deceased's estate. The trust averred to in his pleadings was a "constructive / implied / bare trust" for the benefit of the deceased and/or his estate. In my view, the characterisation of the trust in the pleadings as a constructive trust, implied trust or bare trust is unsubstantiated. There is nothing in the pleadings and Kuntjoro's AEIC that could suggest that by having the 7 Accounts in the names of his family members, the deceased had consciously sought to establish the type of trust alleged. On principle, the type of trust that could arise by operation of law is a resulting trust in favour of the provider of the funds.

Origin of the funds

85 As stated, Kuntjoro's position is that the origin of the funds was derived exclusively from the deceased's business as a sole proprietor, and as such, the assets in the 7 Accounts belonged to the deceased during his lifetime. Kuntjoro called Jocelyne to testify as to the ownership of the assets. In this regard, Jocelyne's evidence was that she was the deceased's relationship manager and had dealt with him through the years in respect of his business transactions. From their past association, she formed the view that the assets in BNP 16802 belonged to the deceased.

86 In contrast, Mr Lek submits that the assets were beneficially owned by both the deceased and D1 as evidenced by the powers of attorney that were given to them to operate the bank accounts by the account holders. This

arrangement was on the basis that D1 had contributed to the deceased's business, which was referred to as a "partnership" between the deceased and D1. I have no doubt that D1 would have assisted the deceased in the sewing thread distributorship business. Besides D1's testimony on her involvement in the business, Kuntjoro conceded that D1 had helped the deceased in the deceased's business, notwithstanding that she did not always work full time in the business throughout the marriage.

87 Mr Lek's use of the word "partnership" seeks to convey a sense of joint and close cooperation between the spouses in the business. No legal connotation was intended since the deceased's business, PD Ampuh, was a sole proprietorship.[51] More to the point on the joint cooperation that was akin to a partnership between spouses, Firma Ampuh – an entity in which the deceased and D1 were joint managing partners – carried on an import and export business whereas PD Ampuh was in retail sales. From this perspective, I do not regard Mr Lek as intending to go so far as to elevate D1's case to one of a partnership in the legal sense, such that it would entitle D1 to half the share of the partnership assets if it was an equal partnership (*eg*, under s 24(1) of the Partnership Act (Cap 391, 1994 Rev Ed)). It is worth nothing that D1's pleaded case of a "common understanding and intention" and the rights claimed pursuant thereto is only triggered upon the deceased's death and that is quite the opposite of the notion of partnership in the legal sense of the word. Besides, D1's pleaded case is untenable. First, the legal basis of the alleged common understanding and intention was not proffered. Second, what was said about how and where this common understanding came about was vague and uncertain.[52] If this common understanding was reached before the 1996

[51] Transcripts (2 September 2015, p 93).

[52] Transcripts (27 August 2015, pp 48–49).

Will, why was it not manifested in the 1996 Will? Instead, clause 4 deals which with assets wherever located was included in the 1996 Will. For these reasons, I hold that there was no common understanding or intention as claimed. Despite this conclusion, however, there is, at the very least, D1's explanation as to why the jointly-held accounts were opened (see [80] above), and that assists the court in reaching the conclusion that the funds for these accounts were derived from the business as a whole. Significantly, it is not D1's case that she is entitled to a share of the funds. Her case under the alleged common understanding and intention is that she would take everything upon the deceased's death.

88 Accordingly, I find, on the balance of probabilities, that the assets in the 7 Accounts were estate assets. However, this conclusion does not decidedly put to an end to the disputes in this action in favour of either Kuntjoro or D1. The intervening events in 2003 are pivotal and I have covered some of the material evidence and have made findings of fact earlier in this judgment. I now address the legal and factual consequences of the parties' actions. Essentially, I will examine how the parties' decision and actions impacted the rights and obligations of D1 and what new rights and obligations have come about, in particular, whether the parties appreciated or knew that distribution to the beneficiaries would be from the trustee of the Pride Wise Trust. D1 has dealt with these changes as part of her defences to Kuntjoro's claims against her as executrix of the 1996 Will and as constructive trustee of the assets transferred.

Settlement of estate assets in a Jersey trust

89 D1's pleaded case is that Kuntjoro agreed to the setting up of the Pride Wise Trust; he was instrumental in setting up the Pride Wise Trust and was the

person who had proposed to D1 the structure of the offshore trust narrated at [50] to [70] above. D1 had accepted Kuntjoro's proposal and went ahead and signed all the paperwork needed to set up the Jersey trust to hold D7 (*ie*, the Pride Wise Trust). It is also D1's case that after Pride Wise Trust was set up by D1 as settlor, Kuntjoro carried out his appointment as the protector of the Pride Wise Trust without protest and that he only took issue with the assets in D7 after the breakdown of his relationship with D1.

90 I will refer to the whole exercise, with Finch as the wealth planner, as "the protection-of-the-family-wealth initiative". It is common ground that D1 was in mourning for a long period of time after the deceased's death. Thus, the question of ownership or distribution of the assets held in the various bank accounts in Singapore was not brought up by anyone in the family. During the period of mourning, the 1996 Will was not disclosed by D1 and any expectation of inheritance would be on intestacy. The next major development was the decision to protect the family wealth (*ie*, the protection-of-the-family-wealth initiative). Once the decision was made to go ahead, positive steps were taken to place the assets in a tax haven and to set up an offshore trust. Broadly speaking, the implementation of the protection-of-the-family-wealth initiative saw D1 taking over the ownership of D7, the creation of debt and equity funding for the Jersey trust that involved the series of letters to transfer the assets in the 7 Accounts to D7 and the signing of these letters by Kuntjoro, D2 and D3. Significantly, Kuntjoro does not disavow the transfers and his counsel, Mr Ooi, clarified at the trial that Kuntjoro accepts the transfer instructions signed in August and October 2003 and that Kuntjoro has no quarrel with those transfers which were described as "perfect".[53] Kuntjoro's approach in separating the transfers to D7 from the Pride Wise Trust

[53] Transcripts (18 August 2015, pp 17–18).

contradicts the overwhelming evidence before this court. The entire approach was to use the offshore trust in conjunction with an underlying offshore company to protect the family wealth, and Kuntjoro and D1 agreed to and did set up the Pride Wise Trust.

91 The upshot of implementing the protection-of-the-family-wealth initiative, which was, at all material times, the overarching consideration of Kuntjoro and D1, is that any distribution of the family wealth would come from D8 as the trustee of the trust settled by D1 (*ie*, the Pride Wise Trust) rather than by the rules of intestacy or by the 1996 Will. It is significant that D1's other children have not asked for D1 to administer the 1996 Will and make distributions thereunder as executrix. I find that Kuntjoro appreciated that by setting up the offshore trust with assets from the 7 Accounts, henceforth, distributions to beneficiaries would be from the trustee of the offshore trust. Furthermore, Kuntjoro accepted the position from the outset until he fell out with D1. Let me elaborate.

92 It is clear from the evidence discussed in this judgment that the steps taken by Kuntjoro and D1 to protect the family wealth were consensual, and I so hold. I further find that D1's conduct throughout 2003 was consistent with settling the family wealth to a trust where D1 was the settlor such that any distribution of the family wealth would have to come from the trustee of the trust settled by D1 rather than from D1 as executrix. This was the obvious consequence of protecting the family wealth in a Jersey trust. There is contemporaneous documentary evidence that shows D1's state of mind at the material time. I find that her state of mind was consistent with her belief that once the Pride Wise Trust was set up, distributions to the beneficiaries, moving forward, would be from the trustee. The contemporaneous documents

are important as they are indicative of her wish to benefit the Wibawa children *via* the discretionary trust. On Kuntjoro's part, he would know, as the investment manager of D7 and protector of the Pride Wise Trust, that his management of the investments was to preserve and grow the trust assets and that the likely view must be to distribute the assets to beneficiaries over time as opposed to immediately. Furthermore, distribution to the beneficiaries would be from the trustee under the terms of the Pride Wise Trust and no longer from D1 under the 1996 Will.

93 Before turning to the contemporaneous documents, I want to deal with Kuntjoro's argument that D1 had admitted in cross-examination that the deceased left behind estate assets and that she had not made distributions out of the estate. In reply, Mr Lek argues that the cross-examination questions were premised on the applicability of the 1996 Will and he further argues that in D1's mind, the assets belonged to her. But one must be astute when reading D1's overall testimony. In my view, her evidence has to be understood in the context of the state of affairs that had evolved as a consequence of the implementation of the protection-of-the-family-wealth initiative. With the creation of the Pride Wise Trust, an irrevocable offshore discretionary trust, D1 would no longer have been in a position to administer the 1996 Will and to discharge her duty as executrix. Decidedly, D1 and her children would have to look to the trustee for distribution of the family wealth.

94 D1's answers to Mr Almenoar's questions understood in their proper context make ample sense and they were consistent with the contemporaneous documentary evidence. In particular, I refer to the following answers of D1 in cross-examination:[54]

[54] Transcripts (27 August 2015, pp 37–38).

Q. Are you trying to say, witness, that everything that is his -- you know he's a wealthy man -- everything that is his when he passes on will be yours, is that what you are trying to tell the court?

A. Yes.

Q. You are also saying then that his six children would not get any of his assets?

A. That's not the case.

Q. Okay. What is the case then?

A. What?

Q. You said that is not the case. I asked you: are you saying that the children are not going to get any of his assets, you said that's not the case, so I'm asking what is the case?

A. I would definitely distribute to them.

Q. You would definitely distribute to your six children the assets which your husband left behind, is that correct?

A. Yes.

Q. And for the time being, madam, you just want to control the position, is that right?

A. Yes.

Q. So that means your children will not get anything unless you say so?

A. Yes.

Q. But, you see, madam, when the assets are your late husband's assets, when he passes on his properties or his assets will devolve under the rules of intestacy or under his will. You understand that, right?

A. I understand.

Q. So since he has passed away in 2000, up to today you have not distributed his assets to the family, is that right?

A. Yes.

Q. When are you going to distribute?

A. I don't know.

> Q. Okay, I have to be a bit rude. You mean to say you distribute according to your whims and fancy, is that right?
>
> A. That's not the case.
>
> Q. Okay, I have to ask you again. What then is the case? When do you distribute this?
>
> A. I had originally wanted to give them in 2005. However, Kuntjoro messed things up.
>
> Q. Two points there. You wanted to give them in 2005. Please tell the court, how were you going to distribute the assets belonging to your late husband?
>
> A. According to the father's wishes.

95 I make two points. First, D1's references to the year 2005 and Kuntjoro having "messed things up" are significant. It has to do with his bad investment decisions, their falling out and his challenge to the ownership of the assets settled in the Pride Wise Trust. All these events caused D1 to put her decision on hold. Second, her answer regarding the distribution to the children according to the deceased's wishes can only make sense in the context of distributions from the Pride Wise Trust. As I alluded earlier, her letter of wishes to the trustee of Pride Wise Trust in December 2003 mirrored the terms of the Jersey Will. By these two documents, she had sought to honour the deceased's wishes by keeping to the proportions stipulated in the 1996 Will. Bearing in mind the purpose of the discretionary trust, distribution would be from the trustee to the children who are beneficiaries of the trust. D1's wishes in this trust arrangement were never to deprive her children (including Kuntjoro) of their share in the family wealth, as represented by the estate assets. The imposition of a trust arrangement to protect the family wealth was the primary objective and any attendant consequence on the 1996 Will that came with the setting up of the trust would not be D1's doing. There is no

evidence of any intention or attempt on the part of D1 to "short-change" her children.

96 I now return to the contemporaneous documents that are indicative of D1's state of mind and her thoughts and wishes. As stated at [92] above, D1's state of mind was consistent with the belief that any distribution, moving forward, will be from the trustee once the Pride Wise Trust was set up.

97 First, I return to the Jersey Will, which I had earlier mentioned at [68] above. Although D1 in her AEIC stated that she did not recall signing the Jersey Will and that she did not request for it, this is however not the evidence derived from the contemporaneous documents. Moreover, the Harianty Wibawa file note recorded that D1 had executed the Jersey Will on 26 August 2003 and that Finch and Jocelyne had witnessed her signature.

98 Significantly, clause 5 of the Jersey Will states as follows:

> **5. Trusts for my children:**
>
> My Executors shall hold the capital and income of the Trust Fund upon trust to divide the same into 10 shares of equal value and shall hold such shares upon trust for my children who are named below in this Clause and who are living at my death and who shall in that event receive the share or shares set opposite their respective names below in this Clause
>
> | **Name** | **Share(s)** |
> |---|---|
> | **PURNAWATI WIBAWA** | **1** |
> | **SUNDARI WIBAWA** | **1** |
> | **LINDIJASARI WIBAWA** | **1** |
> | **KUNTJORO WIBAWA** | **3** |
> | **TJANDRAWATI WIBAWA** | **1** |
> | **KARJANA WIBAWA** | **3** |

> PROVIDED THAT if any one or more of my said children shall predecease me and shall leave a child or children living at my death who shall attain the age of 21 years then such child or children shall take and if more than one equally the share or shares of the capital and income of the Trust Fund which his her or their deceased parent would otherwise have received.

What is immediately evident is that the beneficial interest of Kuntjoro and the Siblings to D1's assets under the Jersey Will was proportional to their respective beneficial interest under the 1996 Will (see [15] above). In absolute terms, the beneficial interests of Kuntjoro and the Siblings under the Jersey Will would have been double that under the 1996 Will, since D1 had effectively added into the "pool" her own 50% share under the 1996 Will.

99 As mentioned earlier, the Jersey Will was a stop-gap measure to deal with the interim period before the Pride Wise Trust was set up. As Finch explained at trial, the purpose of the Jersey Will was to deal with the contingency of D1 passing on before assigning her interest in D7 to the Pride Wise Trust.[55]

100 The second document I refer to is the Trust Application Questionnaire and, specifically, section 14 which is headed "Letter of Wishes". This pertains to the letter of wishes from the settlor (*ie*, D1). Admittedly, D1's letter of wishes, which is confidential, is not in evidence, but the point that is being made here is that her letter of wishes appeared to have mirrored the Jersey Will and this pattern of conduct is consistent with D1's understanding that distribution of the family wealth would be from the settled trust. Finch, in his file note of 18 December 2003, explained what happened at the meeting upon going through the Trust Application Questionnaire with D1:[56]

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[55] Transcripts (1 September 2015, pp 22–23).

> 4. Letter of Wishes
>
> > [Finch] tabled the attached draft letter and discussed each clause with [D1]. [Finch] also tabled the will that governs the devolution of the existing interests of [D1] in [D7]. The rationale for this was to demonstrate to [D1] that the *terms of the letter of wishes mirrored the terms that exist in the will of [D1]*. It is noted that the will was drafted by Mr Mark Lea of Messrs Lea & White. [D1] confirmed that the letter of wishes was correct and the document was signed in the presence of [Finch] and [Jocelyne].
>
> [emphasis added]

101 It is clear from the surrounding context that "the will" which Finch was referring to was the Jersey Will. Notably, the Jersey Will disposes only D1's assets in Jersey and it was prepared by Lea & White. It therefore satisfies the description provided by Finch. The letter of wishes provided for the situation after the Pride Wise Trust was set up. The letter of wishes is not binding on D8 but it is usually treated as a guide to the trustee as to how the trustee might exercise its discretionary powers. For completeness, I should mention that sometime in 2006, no doubt furious with Kuntjoro, D1 expressed a desire to change the terms of the letter of wishes, but there does not appear to be any information before the court of any change actually taking place. In fact, despite the ongoing dispute, Kuntjoro remains a beneficiary and he was able to and did receive an equal share of a distribution of S$3m from the Pride Wise Trust in 2012. This S$3m was divided evenly amongst the six Wibawa children.

102 Third, I turn to the April 2004 declaration referred to at [17]. As stated, Kuntjoro, D1 and other family members declared before a notary public on 21 April 2004 that the deceased never had a will. This declaration is evidence of

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[56] 2 DCB 636.

conduct that is consistent with the parties' implementation of the protection-of-family-wealth initiative.

103 At trial, Kuntjoro came up what appears to be a completely new case that materially departed from his pleadings and his affidavit evidence. In essence, this new case comprised the following features:

(a) Finch's advice to Kuntjoro comprised two pieces of advice.

(b) The first piece of advice was for the assets to be transferred to D7. Kuntjoro referred to this as the "first layer" of the transaction, and he did not disavow it. Kuntjoro claimed that this first layer was completed and sufficient to abate the situation concerning the Indonesian tax authorities. Hence, he did not instruct Finch on the "second layer".

(c) The second piece of advice was to set up an offshore trust. Kuntjoro referred to this as the "second layer" of the transaction, and alleges that Finch's advice on it only commenced in September 2003 and was never completed. In this regard, he alleges that there was no meeting on 26 August 2003 to discuss the setting up of a Jersey trust. Kuntjoro claimed that there was no subsequent need to follow up with D9 on this as the situation concerning the Indonesian tax authorities had been resolved.

(d) Kuntjoro had thought that D1's meetings with Finch and finally the meeting held on 18 December 2003 were for the purposes of setting up D1's own private trust.

(e) Kuntjoro did not know what assets constituted and/or were settled into the Pride Wise Trust until 2010.

104 For the reasons stated earlier in this judgment, Kuntjoro's new case is disingenuous. What he is now saying is in fact contradicted by the objective evidence and I have made findings of fact where required earlier on in this judgment.

105 As stated, there was a meeting on 26 August 2003 in Jakarta and Kuntjoro was present at the meeting save for the time D1 was left alone with Finch and Jocelyne to sort out the Jersey Will. Significantly, the file notes of the 26 August 2003 meeting made no reference whatsoever to a "two-layer" arrangement.

106 Earlier, I pointed out that Pride Wise Trust was the working name given to the trust but it was kept since D1 and Kuntjoro did not revert with a name. The draft trust deed and a copy of the Trust Application Questionnaire connected Kuntjoro to the "Pride Wise Trust" as early as 26 August 2003. As the basic structure was for Pride Wise Trust to hold D7, Kuntjoro was made fully aware that the assets in the 7 Accounts were intended to be transferred to D7 *vide* the various letters. Similarly, the 23 September file note states that "[t]he purpose of the meeting was to discuss various aspects relating to a proposed new trust structure". Although Kuntjoro abandoned his pleaded case on having six trusts, I note that clause A6 of the summary of the terms of the trust deed on "Appointment of trusts" provided for the trustee to have the power set up separate trusts for each beneficiary (see [34] above).

107 Importantly, the 23 September file note states that "[Kuntjoro] had been *the person who had proposed* the *trust structure* to [D1]" [emphasis

added] and that "[Kuntjoro] advised that the family would like a simple structure and one that is designed to mitigate the level of disagreement within the family".

108 Apart from the file notes, the letter from Kuntjoro to D8's lawyers dated 3 January 2007 is helpful.[57] In that letter, Kuntjoro complained about the time it took for the assets to be settled into the Pride Wise Trust and how this compromised the entire intent of the trust (*viz*, the concern over the Indonesian tax authorities). Plainly, Kuntjoro's understanding of the use of the trust in conjunction with D7 completely discredits his "two-layer" conception and his claim that the first layer was sufficient to resolve the situation concerning the Indonesian tax authorities.

109 All in all, Kuntjoro's new case was made up in the witness box and was nothing more than an obvious attempt to distance himself from the Pride Wise Trust. For the reasons stated, the reality is quite the opposite.

110 Returning to the letters referred to at [61] above, the account holders of BNP 16802 who held the assets on a resulting trust in favour of the deceased would have acted in breach of trust by so transferring the assets to D1 to give a loan to D7. At that time, and having regard to his stance that the assets in the bank accounts were estate assets, Kuntjoro would surely not have wanted to act in breach of the resulting trust. Logically, he must have been comfortable and confident that the transfer from BNP 16802 was a step needed to safeguard the family wealth in an offshore trust. As I have reasoned in this judgment, the declaration of beneficial ownership by D1 was the means to

[57] 18 AB 15280.

achieve the objective of placing the assets in a tax haven and for the assets to be settled in a discretionary trust with D1 as the settlor of the trust.

111 Kuntjoro effected the transfer from BNP 16802 by being a signatory to the first, second and third letters (see [61] above). What is crucial in the present case is that Kuntjoro had, by the letters, in effect, transferred to D1 the assets in the form of money and investments in BNP 16802 so that she could make a loan to D7. In other words, the assets in BNP 16802 were clearly given or loaned to D1 in her personal capacity. This transfer would have arguably constituted a breach of trust of estate assets by Kuntjoro as it was essentially a dissipation of the estate assets that was subject to a resulting trust. I would add that whether or not the 1996 Will had been disclosed by the time of these letters was, in this regard, inconsequential. The fact is that the transfer from BNP 16802 was made to D1 in her personal capacity, and this remains the case whether the deceased's estate was to be administered in accordance with a will or the rules of intestacy.

112 After D1 disclosed the 1996 Will, Kuntjoro did nothing to stop the implementation of the protection-of-the-family-wealth initiative. I pause here to point out that plainly, Kuntjoro's version (*viz*, that the 1996 Will was disclosed on 20 December 2003) was an attempt to make it seem as though he could not have done anything by that time, as the Pride Wise Trust had already been set up on 18 December 2003. I disagree. Even if I had accepted Kuntjoro's version that 1996 Will was disclosed on 20 December 2003, it was not too late for him to stop the implementation of the protection-of-the-family-wealth initiative. There was still time and opportunity to question the ownership of the assets that were being settled into the Pride Wise Trust. In particular, the transfer of assets from the 7 Accounts to D7 was only

completed around October 2004 (see [58] above). Likewise, it was only on 29 December 2004 that the sole share in D7 was accepted as additional asset of the Pride Wise Trust. I note that: (a) the loan agreement between D1 and D7 was dated 26 August 2004; (b) the Deed of Assignment whereby D1 assigned all her rights and benefits in the loan was dated 31 August 2004; and (c) D1's transfer of her sole share in D7 was on or about 27 December 2004. Therefore, at any time before 29 December 2004, Kuntjoro could have raised the issue of the ownership of the assets and that would have stopped D8 from accepting the sole share in D7 as an addition to the assets of the Pride Wise Trust. He did not do so until late 2005.

113 What also happened during this time period was that Kuntjoro was directing the management of the assets in D7 pursuant to his appointment as investment manager of D7 and his role as the protector of the Pride Wise Trust. As a reminder, by D1's letter dated 2 September 2003 to the directors of D7, she appointed Kuntjoro to be the investment manager of D7.[58] On 18 December 2003, D1 appointed Kuntjoro the protector of the Pride Wise Trust with powers to make investments. His appointment as protector was subsequently suspended on 14 June 2010 by the Royal Court of Jersey.

114 In his Reply to D1's pleadings, Kuntjoro accepted that he was appointed the protector of the Pride Wise Trust and that he had given investment advice. However, at trial, and as part of his new case, he claimed that he knew only that he was a protector of a trust, but that he did not ask about the role of a protector until September 2005.[59] He claimed that he had no reason to enquire about what the duties and obligations of a protector were.[60]

[58] 2 DCB 488.

[59] Transcripts (11 August 2015, pp 81–84).

In my view, these claims flew in the face of all sense and reason. If what he claimed were true, Kuntjoro would have been derelict in his role as protector indeed. I do not think that he can so easily dodge his role with a claim that what he did was under his appointment as investment manager of D7. In my view, both roles were discharged in tandem. Again, it appears to me that these incredulous claims were nothing more than an obvious attempt by Kuntjoro to distance himself from the Pride Wise Trust.

115 The Wibawa Family file note indicated that Finch had explained that Kuntjoro would assume the role of protector of the Pride Wise Trust, and that, in this capacity, he would have the ability to issue investment directions and remove and replace a trustee. In a similar vein, the 23 September file note stated that Finch had tabled a schematic of the proposed trust structure (which indicated that Kuntjoro was the protector) and that he had explained the role of the parties. The file notes therefore make it patently clear that Finch had explained the role of the protector to Kuntjoro. In my view, it matters not to the outcome of this action that Kuntjoro had no knowledge of the exact role and powers of the protector. What is important is the fact that he acted as investment manager of D7 and as protector of the Pride Wise Trust.

116 Another piece of objective evidence which is to the same effect is the transcript of a conference call between Kuntjoro, Finch and Jocelyne on 30 August 2004.[61] Two issues were discussed in this call. The first issue concerns Kuntjoro's unhappiness over D8's treatment of D1's recent withdrawal of S$40,435.02, while the second issue concerned fees. I agreed with D1's submission that it is clear that the parties to this call were all talking about the

[60] Transcripts (11 August 2015, p 82, lines 9–13).

[61] 3 DCB 768–802.

Pride Wise Trust. Kuntjoro's attempts at trial to suggest that the conversation concerned D7's accounts *in vacuo* were simply spurious and an obvious attempt to buttress his new case. D1 submits that Kuntjoro's negotiation over the fees with Finch and Jocelyne in this conversation could only have been done pursuant to Kuntjoro's role as protector of the Pride Wise Trust. In my view, there was merit to this argument.

117 I now come to one last point that supports D1's case that Kuntjoro had agreed to the setting up of the offshore trust with assets from the 7 Accounts and that he continued to support the offshore trust even after D1 had disclosed the 1996 Will in December 2003. In fact, in January 2004, Kuntjoro had an opportunity to stop the implementation of the protection-of-the-family-wealth initiative but he did not do so as he saw the advantages of a trust. On 12 January 2004, a list of questions on the role of an executor was faxed to D9. Finch's file note dated 14 January 2004 showed that he and Jocelyne met Kuntjoro and the latter was given the responses that had been provided by D9's legal department. What is relevant to this judgment is Kuntjoro's comments as recorded by Finch:[62]

> Various points relating to executors were discussed at length with [Kuntjoro]. He was of the view that the position of the executor was onerous and he thought the use of trust structures to achieve succession plans was the optimal way forward. This is of particular relevance as a trust structure avoids the need for a will. He advised that his father had acted as executor to certain family assets the consequence being that a dispute had arisen in Hong Kong as it was a Hong Kong probate that resulted in difficulties for the ensuing 17 years.

118 Kuntjoro's comments showed his knowledge of a trust and that it provided an efficient vehicle for the transfer of beneficial ownership interests

[62] 2 DCB 664

on the death of a settlor without the need to obtain a grant of probate or similar formalities. His comments also showed his appreciation of a discretionary trust where a beneficiary can avoid estate duty on death. It naturally follows from his comments that he was aware that distribution would be from the trustee of the Pride Wise Trust.

Conclusion on Kuntjoro's primary case on estate assets

119 In conclusion, to protect the family wealth, Kuntjoro and D1 set up the Pride Wise Trust. The upshot of establishing this trust to hold the estate assets is that any distribution of the same would devolve to the trustee of the trust settled by D1 and upon the terms of that trust rather than be done by D1 as the executrix of the 1996 Will. Undoubtedly, Kuntjoro changed his tune after the fallout with D1. He now turns around to sue D1 after giving his concurrence to the setting up of Pride Wise Trust. Regrettably, Kuntjoro sought to rewrite evidence of his concurrence with untruths. For all the reasons stated in this judgment, Kuntjoro has not proved his case against D1 for breach of duty as executrix of the 1996 Will or as constructive trustee of the estate assets transferred to D7 and settled in the Pride Wise Trust. It follows from this that the declaratory orders sought by him are moot. In the circumstances, Kuntjoro cannot complain that D1 acted in wilful breach of trust concerning any act done in accordance with the terms of the Pride Wise Trust. This includes, *inter alia*, Kuntjoro's complaint that D1 acted in breach of trust by instructing D8 to effect a transfer of "the fixed deposit of US$424,880.91 plus interest" to D4 "for [D4's] personal investment purpose" on 14 July 2005 (see [78(b)] above).

D1's other defences

120 There are other reasons for dismissing Kuntjoro's claims against D1. D1's defences will arise if D1 is found to have been in breach of trust or of duty (which is not the case here for the reasons stated above). For completeness, I will deal with the defences as the same findings of fact do support the defences, and my comments relate to the application of the law to the findings of fact. I will deal with each defence in turn.

121 Given my conclusions on all the claims against D1, it is not necessary to deal with D1's alternative submissions that Kuntjoro had waived his rights or interests to the assets in the 7 Accounts or that the defence of limitation applied.

Kuntjoro's concurrence

122 By its nature, consent or concurrence is a positive defence to a claim for breach of trust. D1's averment in her Defence to Kuntjoro's agreement to set up the Pride Wise Trust with the assets from the 7 Accounts is akin to Kuntjoro's consent or concurrence of the events that happened and that are particularised in her pleadings. In my view, the defence of concurrence is on the face of the pleadings available to D1. Central to her defence of consent or concurrence is the contention that Kuntjoro had agreed to the setting up of the Pride Wise Trust.

123 I begin with Kuntjoro's pleaded case that D1 was a constructive trustee of the estate assets settled into the Pride Wise Trust. Once again, this argument runs into difficulty as Kuntjoro arguably would himself be in breach of resulting trust for transferring the assets out of the 7 Accounts. Kuntjoro had

always taken the position that he and the other account holders were trustees of the deceased's estate. Moreover, even if D1 was a constructive trustee, it is not clear when the alleged breach occurred. At trial, Mr Ooi for Kuntjoro suggested a "combination" approach to this question which was both unhelpful and confusing. The suggestion was that everything from the setting up of the Pride Wise Trust to the settling of the assets therein constituted a breach of trust.[63]

124 Be that as it may, and even if, for the sake of argument, D1 held the assets as constructive trustee after it was transferred from the 7 Accounts and she subsequently used the estate assets to make a loan to D7, Kuntjoro had concurred in this breach. D1 does not deny that she is the settlor of the Pride Wise Trust and that the assets from the 7 Accounts were injected into the Pride Wise Trust. But the point that I make is that everything that had happened was with the concurrence of Kuntjoro, every step of the way.

125 Lynton Tucker *et al*, *Lewin on Trusts* (Sweet & Maxwell, 19th Ed, 2015) helpfully states (at para 39-107) that "[i]f a beneficiary, not being subject to any legal incapacity such as minority, concurs in a breach of trust, he is forever estopped from proceeding against the trustee for the consequences of the act". As regards the degree of knowledge required, the test is as set out by Wilberforce J in *Re Pauling's Settlement Trusts* [1962] 1 WLR 86 (at 108):

> … the court has to consider all the circumstances in which the concurrence of the cestui que trust was given with a view to seeing *whether it is fair and equitable that, having given his concurrence, he should afterwards turn round and sue the trustees*: that subject to this, it is not necessary that he should know that what he is concurring in is a breach of

[63] Transcripts (18 August 2015, p 23, lines 6–16).

> trust, provided that he fully understands what he is concurring in, and that it is not necessary that he should himself have directly benefitted by the breach of trust.
>
> [emphasis added]

Wilberforce J's proposition has since been accepted as the applicable test in so far as the knowledge of the concurring beneficiary is concerned (see, for instance, *Lewin on Trusts* at para 39-123; Robert Pearce, John Stevens and Warren Barr, *The Law of Trusts and Equitable Obligations* (Oxford University Press, 5th Ed, 2010) ("*Pearce, Stevens and Barr*") at p 893).

126 Concurrence is also discussed in *Pearce, Stevens and Barr* in the following terms: that "[a] beneficiary cannot complain of a breach of trust by a trustee to which he consented, or in which he actively concurred or passively acquiesced" (at p 891). To this end, five requirements for relief from liability are posited (at pp 892-893):

(a) the beneficiary must be of age;

(b) the beneficiary must not have consented while under any other incapacity;

(c) the beneficiary must have freely given consent;

(d) the beneficiary must have given an informed consent; and

(e) the beneficiary need not have benefited from the breach of trust.

In this case, requirement (d) is relevant. Notably, consent is only a *prima facie* defence. The court must consider all the circumstances in order to determine

whether it would be fair and equitable for the plaintiff-beneficiary to be permitted to complain of the breach of trust.

127 The findings of fact in this judgment are that Kuntjoro was instrumental in setting up the Pride Wise Trust and that he knowingly transferred the estate assets, which represented the family wealth, to D7 to enable D1 to set up the Pride Wise Trust. The question here is whether he had the requisite degree of knowledge for the defence of concurrence to succeed.

128 That there must be informed consent is a clear requirement of the defence of concurrence. I am of the view that the requirement of informed consent is satisfied. Kuntjoro's contention that he was not told that he could be excluded as a beneficiary by the trustee of a discretionary trust is not made out for the reasons stated in this judgment. He knew about the discretionary trust and the trustee's power to exclude a beneficiary as early as 26 August 2003. I have also held in this judgment that Kuntjoro went ahead with the implementation of the protection-of-the-family-wealth initiative after D1 disclosed the 1996 Will. It made no difference to the outcome whether the 1996 Will was disclosed on 16 December 2003 or 20 December 2003. Bearing in mind that the whole point of D1 setting up a Jersey trust was to protect the family wealth represented by the assets in the 7 Accounts, and that Kuntjoro was all for the setting up of the Jersey trust in conjunction with an underlying offshore company, the disclosure of the 1996 Will would not have made any difference to the decision.

129 Furthermore, in January 2004, Kuntjoro had an opportunity to stop the implementation of the protection-of-the-family-wealth initiative if he wanted to but he did not do so. He saw the advantages of an offshore trust and this is

evident from his comments at a meeting held on 14 January 2004 with Finch and Jocelyne to discuss his list of questions on the role of an executor (see [117] above). I then held at [118] that his appreciation of the benefits of a discretionary trust was evidence indicative of an awareness that distribution would be from the settlor's trust.

130 In the circumstances, it cannot be fair and equitable that, having given his concurrence, Kuntjoro should now turn round and sue D1. By the defence of concurrence, he is forever estopped from claiming against D1 for settling the estate assets in the Pride Wise Trust. Given the overlap in the factual matrix, Kuntjoro's concurrence would logically also extend to D1's alleged breach of her duty as executrix of the 1996 Will.

Kuntjoro's acquiescence

131 I am also of the view that apart from the defence of concurrence, Kuntjoro had also acquiesced in D1's handling of the estate assets. The distinction between concurrence and acquiescence is the date the relevant act or conduct took place since acquiescence is used in cases where the relevant act or conduct occurs after the date of the breach. As for the date(s) of the breach, I had earlier mentioned that Mr Ooi suggested a "combination" approach to this question which was both unhelpful and confusing. To repeat, his suggestion was that everything from the setting up of the Pride Wise Trust to the settling of the assets therein constituted a breach of trust. In my view, and as regards Kuntjoro's acquiescence, the examination would have to be in relation to his conduct after the 1996 Will was disclosed.

132 *Lewin on Trusts* states (at para 39-112) that "[a] beneficiary, though he did not concur at the time, may debar himself from relief by subsequent

acquiescence in the breach of trust". As in the case of concurrence, the beneficiary must be of full age and capacity (at para 39-122). The beneficiary must also have the requisite degree of knowledge (at para 39-122), which is the same as that required for concurrence (*ie*, per the test set out by Wilberforce J in *Re Pauling's Settlement Trusts*) (at para 39-123).

133 In *Pearce, Stevens and Barr*, acquiescence is described as condonation. Thus, "[a] trustee is … protected from liability if, after a breach has been committed, the beneficiaries condone it" (at p 893). The principle is said to be subject to the same requirements as that for concurrence: the condoning beneficiary must be of age; the condoning beneficiary must not be under any other incapacity; the beneficiary must freely condone the breach; and the beneficiary must have known what he was condoning (at p 893).

134 I have dealt with the various things Kuntjoro did after he learned about the 1996 Will (see [112]-[118] above). The short point is that he did not detract from the objective to protect the family wealth in an offshore trust with D1 as settlor of the trust. After the Pride Wise Trust was set up, he acted as the protector of the trust and together with the powers granted to him as investment manager of D7, he made investment decisions in relation to the assets that were settled in the trust. The evidence is consistent with conduct condoning D1's settlement of the trust with estate assets. Consequently, it would not be fair and equitable that, having acquiesced, Kuntjoro should now turn round and sue D1. The defence of acquiescence therefore applies and Kuntjoro cannot now claim against D1 for any alleged breach of trust over the estate assets. Once again, given the overlap in the factual matrix, Kuntjoro's acquiescence would logically also extend to D1's alleged breach of her duty as executrix of the 1996 Will.

Kuntjoro is estopped by convention

135 I now come to the defence of estoppel by convention. The *locus classicus* in this regard is *Amalgamated Investment & Property Co. Ltd. (In Liquidation) v Texas Commerce International Bank Ltd.* [1982] 1 QB 84. In that case, Lord Denning MR held (at 122):

> When the parties to a transaction proceed on the basis of an underlying assumption – either of fact or of law – whether due to misrepresentation or mistake makes no difference – on which they have conducted the dealings between them – neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so.

136 Estoppel by convention is not confined to the interpretation of a contract (*Candid Water Cooler Pte Ltd v United Overseas Bank Ltd* [2006] 3 SLR(R) 216 at [43]). In *Travista Development Pte Ltd v Tan Kim Swee Augustine and others* [2008] 2 SLR(R) 474 ("*Travista*"), the Court of Appeal set out the elements of estoppel by convention as follows (at [31]):

> (a) The parties must have acted on an assumed and incorrect state of fact or law in their course of dealing.
>
> (b) The assumption must be either shared by both parties pursuant to an agreement or something akin to an agreement, or made by one party and acquiesced to by the other.
>
> (c) It must be unjust or unconscionable to allow the parties (or one of them) to go back on that assumption.

137 In relation to requirement (a), I note that while the Court of Appeal in *Travista* had stated that the assumed state of fact or law must be incorrect, this position was clarified in *ABN AMRO Bank NV, Singapore Branch v CWT*

Commodities (SEA) Pte Ltd [2011] 2 SLR 891, where Woo Bih Li J held (at [46]):

> As regards the first element, I do not read the Court of Appeal's judgment in [*Travista*] as laying down a rule that the party seeking to invoke the estoppel also has to *prove* that the assumed state of fact or law is incorrect. The doctrine of estoppel by convention operates to preclude a party from denying the truth of an assumed state of affairs if it would be unjust or unconscionable to allow him to go back on it: *Singapore Telecommunications Ltd v Starhub Cable Vision* Ltd [2006] 2 SLR(R) 195 at [28]. *Although the assumed state of affairs would usually turn out to be incorrect in most cases, the actual veracity or falsity of the assumption is irrelevant because the estopped party is simply barred from putting it in issue.* The parties' rights are regulated "not by the real state of facts, but by that conventional state of facts which the two parties agree to make the basis of their action": *Burkinshaw v Nicolls* (1878) 3 App Cas 1004 at 1026 *per* Lord Blackburn. There is thus no need for the Bank to prove that the assumption in this case was false in order to invoke estoppel by convention.
>
> [emphasis added]

138 I have alluded to the protection-of-the-family-wealth initiative engendered by inquiries made by the Indonesian tax authorities. Kuntjoro took advice and proposed the setting up of an offshore trust to protect the family wealth to D1. D1 accepted and acted on the proposal to set up an offshore trust to protect the family wealth. The approach taken was to *treat* the family wealth as D1's as she was to be the settlor of the trust. From this perspective, the argument that the assets were gifted to D1 is misguided. Notably, this strategy to protect the family wealth was shared by both Kuntjoro and D1 and it came about after inquiries made by the Indonesian tax authorities. In addition, D1's belief was that distribution of the family wealth would be from the settled trust. The assumption arising from these matters forms the basis of an estoppel by convention. This action demonstrates that allowing Kuntjoro to back track on the implementation of the protection-of-the-family-wealth

initiative would cause D1 to be potentially liable for the way she had dealt with the estate assets pursuant to the initiative. At the same time, D1 had given up her *own* guaranteed entitlement in the estate assets by setting up the *irrevocable* Pride Wise Trust and settling the estate assets therein. As highlighted by D1 in her closing submissions, as beneficiary of the discretionary trust, she can only issue requests for distribution. The present case therefore falls squarely within the following passage from *Credit Suisse v Borough Council of Allerdale* [1995] 1 Lloyd's Rep 315 (at 367), which was cited with approval by Andrew Ang J in *Lim Suat Hua v Singapore HealthPartners Pte Ltd* [2012] 2 SLR 805 (at [51]):

> The basis for that unconscionability is that the party said to be estopped would otherwise be allowed to adopt a position which was inconsistent with that which he had previously led the other party to believe was common ground. There would therefore be both inconsistency of conduct and potential prejudice from that inconsistency which is the essence of estoppel by whatever name it is known: See *Amalgamated Investment & Property Co. Ltd.*, sup., at p. 121 per Lord Denning, M.R.

139 In these premises, estoppel by convention would apply to stop Kuntjoro from going back on the assumption that the Pride Wise Trust was to be set up and the assets settled therein to protect the family wealth, and that distribution of the family wealth would be from the trustee under the terms of the Pride Wise Trust and not from D1 as executrix under the 1996 Will. It follows from this that Kuntjoro cannot complain about anything to do with this assumption, including D1's alleged breach of duties as constructive trustee or as executrix under the 1996 Will.

140 To summarise, the inexorable corollary that flows from the creation of an irrevocable discretionary trust is that the estate assets are settled in the Pride Wise Trust and distribution to beneficiaries of the Pride Wise Trust

would be from the trustee of the Pride Wise Trust and not from D1 in her capacity as executrix of the 1996 Will. The distribution would be based on the terms of the Pride Wise Trust. Kuntjoro thus cannot complain that D1 acted in wilful breach of trust concerning any act done in accordance with the terms of the Pride Wise Trust.

Miscellaneous claims

141 As I had mentioned earlier, Kuntjoro is also pursuing other miscellaneous claims such as the return of an investment of US$35,000 and an account and inquiry pursuant to the wrongful closure of bank accounts. He also alleges that four disparate sums of money were withdrawn by D1 in breach of trust:

(a) AUD$403,968.97 on 16 July 2004 from HSBC 419;

(b) US$424,880.91 on 14 July 2005 from BNP 688;

(c) US$35,000 on 7 October 2005 from HSBC 419; and

(d) US$136,102.87 on 14 November 2005 from HSBC 419.

I have already dealt with (b) at [119] above. This leaves me with the remainder of Kuntjoro's miscellaneous claims.

The US$35,000 investment

142 Kuntjoro claims the return of an investment in the sum of US$35,000. His contention is that he had invested a sum of US$35,000 in a fund with the Dresdner Bank Private Bank, and that this investment was subsequently liquidated and re-invested in bonds with HSBC SA. According to Kuntjoro,

this investment was held in HSBC 419 and D1 to D6 knew about this. He therefore alleges that when the assets in the form of money and investments in HSBC 419 were transferred to D7's HSBC 555, this constituted a breach of trust.

143 I dealt with Kuntjoro's claim against D2 to D6 in my Record of Oral Judgment dated 19 August 2015. Therein, I mentioned that Kuntjoro stated that he had no documentary evidence of the alleged investment and that, to that extent, Kuntjoro's assertion that the transfer of US$35,000 was made in breach of trust was unsubstantiated. Furthermore, if his case was that the sum of US$35,000 had always been beneficially owned by him, such that the account holders of HSBC 419 were holding these funds as trustees for him, this assertion was never pleaded. In the premises, I held that Kuntjoro had not shown that his cause of action accrued within the limitation period.

144 It is to be recalled that D1 was not an account holder of HSBC 419. Presumably, Kuntjoro's claim against D1 would be based on the fact that D1 had the power of attorney to operate the jointly-held account. However, he has still not proved his contention that: (a) he made such an investment; (b) this investment was held in HSBC 419; and (c) D1 knew about this. Neither has he proved this particular investment was transferred to D7's HSBC 555. In the premises, Kuntjoro has failed to prove this aspect of his claim.

The wrongful closure of bank accounts

145 Kuntjoro's claim for the wrongful closure of bank accounts concerns the three Bank of China accounts at S/No 7 in the table at [9] above. His allegation is that D1 had closed the first two accounts and, in respect of the third account, withdrew all monies apart from a sum of S$1,003.58.

146 With respect to the closure of the first two accounts, in my Record of Oral Judgment dated 19 August 2015, I held that Kuntjoro did not prove that these accounts were indeed closed. This applies with equal force here.

147 As for the withdrawal of monies from the third account, Kuntjoro's claim was vague and unsatisfactory. The account statement exhibited by Kuntjoro in support of his claim showed an opening balance of S$24,265.96 in August 2009 and a balance of S$1,003.58 as at 23 September 2011. The statement also showed a series of withdrawals and deposits of varying amounts. Notably, most of the withdrawals were of monies that were deposited into the account and then withdrawn shortly after. The statement revealed that the account was being operated in that manner. In some instances, the withdrawals were of small sums over a period of time. In other cases, there were a number of deposits before the amounts equivalent to those deposits were withdrawn at one go. In short, the sources of the funds for the various deposits were unknown.

148 D1 was not an account holder of the Bank of China accounts, and Kuntjoro's claim would, once again and presumably, be based on the fact that D1 had the power of attorney to operate the account. I have held at [80]–[82] above that Kuntjoro's case concerning the account holders' trust is untenable as a matter of fact and law. Thus, Kuntjoro's case against D1 concerning the wrongful withdrawals of the monies from the third account at Bank of China could only be based on Kuntjoro's assertion at para 63 of the Statement of Claim that the funds in the Bank of China account were estate assets. However, given the sparse evidence led by Kuntjoro, it was not possible to tell, even on a *prima facie* basis, that the funds in the Bank of China account, which Kuntjoro complains were wrongfully withdrawn sometime prior to

2011, originated from the deceased's estate. Indeed, while Kuntjoro alleges that D1 was wrong in depleting the third account at the Bank of China, he does not specify *when* the depletion took place, or the *amount* that was allegedly depleted. In the result, Kuntjoro has clearly not proven his case in respect of the three Bank of China accounts.

The withdrawals from HSBC 419

149 As stated, Kuntjoro alleges that there were three withdrawals from HSBC 419. The withdrawals on 16 July 2004, 7 October 2005 and 14 November 2005 were allegedly made by D1 in breach of trust. Once again, Kuntjoro's case against D1 may only be based on the premise that the funds in HSBC 419 formed part of the estate assets, and that these withdrawals had been wrongfully made or authorised by D1 under the power of attorney, thus constituting a breach of trust. However, there is no evidence that: (a) the sums of money allegedly withdrawn on those dates could be said to have originated from the deceased; and (b) D1 made or authorised the withdrawals.

150 In connection with point (a), it should be noted that after approximately US$5,821,934.80 was transferred from HSBC 419 to D7's HSBC 555 in September 2003, no evidence was led that there was money left in HSBC 419; and how much of this money belonged to the deceased's estate. The alleged withdrawals were in July 2004 and in October and November 2005. It is difficult to accept Kuntjoro's unsubstantiated position that at the time of D1's alleged breaches, the monies in HSBC 419 *all* originated from the deceased such that a withdrawal of these amounts constituted a breach of trust. Additionally, as regards point (b), Kuntjoro stated in the witness box that he did not know who instructed the withdrawals or the purpose of the withdrawals.[64]

Conclusion

151 For the reasons stated, Kuntjoro's action against D1 is dismissed with costs to be taxed if not agreed.

152 This decision is not likely to put an end to litigation. It is an emotional matter, as all family disputes are. However, it is hoped that Kuntjoro would take time to reflect on this decision and, from there, realise that this unfortunate family dispute could have been avoided and he only has himself to blame for his misfortune and bad judgment. The sad part is that he hauled his elderly mother to court to complain about something that he started, drove through and completed. D1 but followed willingly and relied on him at every turn of the way to set up the Pride Wise Trust. With new clarity, a fresh round of mediation between the parties at the Singapore Mediation Centre may well bring about positive and harmonious outcomes for the entire Wibawa family.

153 If necessary, I will hear Kuntjoro or any of the defendants on matters consequential to this judgment, including the form of the order, if any.

Belinda Ang Saw Ean
Judge

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[64] Transcripts (12 August 2015, pp 97-99; 19 August 2015, pp 2-3).

Ooi Oon Tat (Judy Cheng & Co) (instructed), Syed Hassan Bin Syed Esa Almenoar (R Ramason & Almenoar) for the plaintiff;
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Glenn Jeyasingam Knight (Glenn Knight) for the second defendant;
Susan Jacob (Susan Jacob) for the third, fourth, fifth and sixth defendants;
Sim Kwan Kiat and Nigel Desmond Pereira (Rajah & Tann Singapore LLP) for the seventh and eighth defendants;
K Muralidharan Pillai, Luo Qinghui, Huang Jieyang, Mark Foo (Rajah & Tann Singapore LLP) for the ninth defendant.
