IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2017] SGHC 316

Suit No 1217 of 2015

Between

BOK

… *Plaintiff*

And

(1) BOL
(2) BOM

… *Defendants*

JUDGMENT

[Deeds and other instruments] — [Deeds] — [Misrepresentation]
[Equity] — [Mistake] — [Mistake of law]
[Equity] — [Unconscionable transactions]
[Equity] — [Undue influence] — [Actual]
[Equity] — [Undue influence] — [Presumed]
[Trusts] — [Express trusts] — [Certainties]
[Trusts] — [Express trusts] — [Constitution] — [Future property]

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BOK
v
BOL and another

[2017] SGHC 316

High Court — Suit No 1217 of 2015
Valerie Thean J
17–21, 25 July, 18 September; 29 September 2017

11 December 2017 Judgment reserved.

Valerie Thean J:

1 Three days after his mother's funeral, a 29-year-old signed a declaration of trust ("DOT") which purported to constitute him and his wife, the second defendant, as joint trustees of all his assets for the sole benefit of their infant son, the first defendant. He now brings this action to set aside that DOT. For the reasons that I shall explain, I set it aside.

Background

2 Prior to the commencement of trial, I granted under s 8(2) of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) the first defendant's application for these proceedings to be heard in camera.[1] This was expedient in the interests of justice because this suit is intertwined with an ongoing divorce suit between the plaintiff and the second defendant, which is being heard in

[1] First defendant's Opening Statement dated 12 July 2017 at para 5.

camera under s 10(1) of the Family Justice Act 2014 (No 27 of 2014) as a matter of course. That suit commenced on 25 November 2015, before this action began, and involves their two minor children. Interim judgment was granted on 26 September 2016 and ancillary matters are to be dealt with after the completion of this suit. Exercising my discretion under O 42 r 2 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed), I have therefore also published this judgment on the terms that the parties' names and details are to be redacted.

The parties' background

3 The plaintiff is now 33 years old. He is an oil and gas trader and holds the office of managing director in an energy company.[2] His parents were divorced and his father passed away early in his life. Through his father's inheritance, he was already a man of substantial means with two apartments in the Marina Bay Sands area before he started working. He shared a close relationship with his late mother. The second defendant is his wife. She is 37 years old and has been unemployed since 2012.[3] She was a practising lawyer for four years before spending two years in the banking industry.[4]

4 The plaintiff and the second defendant were childhood friends through the acquaintance of his mother and her parents. Their romantic relationship began in November 2011.[5] In April 2012, the second defendant became pregnant with his child.[6] His mother became aware of their relationship in the middle of 2012 and she strongly disapproved of it.[7] As a result, she and the second defendants' family became estranged.

2 Plaintiff's Affidavit of Evidence-in-Chief dated 12 May 2017 at para 3.

3 Second defendant's Affidavit of Evidence-in-Chief dated 16 May 2017 at para 7.

4 Second defendant's Affidavit of Evidence-in-Chief dated 16 May 2017 at para 7.

5 Plaintiff's Affidavit of Evidence-in-Chief dated 12 May 2017 at para 16.

6 Plaintiff's Affidavit of Evidence-in-Chief dated 12 May 2017 at para 17.

5 Despite opposition from the plaintiff's mother, the plaintiff and the second defendant married in August 2012.[8] After they married, the plaintiff continued living with his mother at one of her properties, which I shall call the Holland Road property. This was with the exception of a short period between October and November 2012, during which the plaintiff stayed with the second defendant and her parents at their family home,[9] which I shall call the Stevens Road property.

6 In December 2012, the first defendant was born to the couple. The relationship between the plaintiff's mother and the second defendant continued to be strained and the plaintiff's mother did not acknowledge the first defendant as the plaintiff's son. She continued to maintain in public that the plaintiff was not married.[10]

7 In the following months, the plaintiff became occupied with his work, for which he travelled overseas frequently. While he remained in telephone contact with the second defendant twice a week, he would see the defendants only two or three times a month.[11] This was a difficult period for the couple. They each have differing accounts of an incident in the middle of 2013 in which the second defendant allegedly created a scene at the plaintiff's office with their son and a friend.[12] By January 2014, however, they had begun to discuss setting up a home of their own.[13] They had found an apartment which they planned to make their family home. I shall it call the Scotts Road apartment.

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7 Plaintiff's Affidavit of Evidence-in-Chief dated 12 May 2017 at para 19.

8 Plaintiff's Affidavit of Evidence-in-Chief dated 12 May 2017 at para 20.

9 Plaintiff's Affidavit of Evidence-in-Chief dated 12 May 2017 at para 23.

10 Plaintiff's Affidavit of Evidence-in-Chief dated 12 May 2017 at para 26.

11 Plaintiff's Affidavit of Evidence-in-Chief dated 12 May 2017 at para 23.

12 Plaintiff's Affidavit of Evidence-in-Chief dated 12 May 2017 at para 24; Certified Transcript, 20 July 2017, p 40 at line 19 to p 41 at line 3.

The plaintiff's mother is killed

8 Tragedy struck on 19 March 2014. The plaintiff's mother was killed at her home.[14] At that time, she and the plaintiff were living at the Holland Road property because her usual residence, which I shall call the Bukit Timah property, was under renovation.[15] The plaintiff was on a business trip the day he received news of her death, and he flew back to Singapore that very day.[16] When he arrived at the Holland Road property, he saw that the police had cordoned it off. He accepted the second defendant's invitation to stay with her family at the Stevens Road property.[17]

9 The plaintiff's mother's funeral was held on 23 March 2014.[18] On the morning of 26 March 2014, the plaintiff and his sister went to see their late mother's lawyers to read their mother's will.[19] It turned out that their mother had created a testamentary trust over her assets, which were valued at about $54m.[20] Two landed properties contributed to the bulk of that value, namely, the Holland Road property and the Bukit Timah property. She had appointed the plaintiff and his sister as the executors and trustees of her will, and they were to sell the properties only after the twenty-fifth anniversary of her death. Until that date, they were each permitted to withdraw a sum not exceeding $10,000 per month from the estate.[21]

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13 Second defendant's Affidavit of Evidence-in-Chief dated 16 May 2017 at para 47.

14 Plaintiff's Affidavit of Evidence-in-Chief dated 12 May 2017 at para 28.

15 Certified Transcript, 17 July 2017, p 91 at lines 1-5.

16 Plaintiff's Affidavit of Evidence-in-Chief dated 12 May 2017 at para 29.

17 Plaintiff's Affidavit of Evidence-in-Chief dated 12 May 2017 at para 30; Defendant's Affidavit of Evidence-in-Chief dated 16 May 2017 at para 50.

18 Plaintiff's Affidavit of Evidence-in-Chief dated 12 May 2017 at para 32.

19 Plaintiff's Affidavit of Evidence-in-Chief dated 12 May 2017 at para 33.

20 Plaintiff's Affidavit of Evidence-in-Chief dated 12 May 2017 at p 61.

10 After they had read the will, they went to the Stevens Road property for lunch with the second defendant and her mother. The plaintiff and his sister agreed not to reveal the contents of the will to the second defendant.[22] At lunch, therefore, the plaintiff tried not to mention the will. The second defendant knew that they had gone to see their mother's lawyers, however, and she asked them about the will. The plaintiff lied to her that his mother had left all her property to charity.[23] Also discussed at the table was the idea of converting the Bukit Timah property into an art gallery in remembrance of the plaintiff's mother, who had lived there for many years. The extent and role of this idea in the lunch conversation is disputed.

The plaintiff signs the DOT of 26 March 2014

11 After lunch, the plaintiff and his sister left the Stevens Road property.[24] While they were out of the house, the second defendant began drawing up a DOT by hand. When the plaintiff returned in the evening, the second defendant asked him into her bedroom to sign the handwritten DOT, which reads:[25]

> TRUST DEED
>
> DATE: 26 MARCH 2014
>
> By this Trust Deed, I, [the plaintiff], NRIC No. [xxx] of [xxx], hereby unconditionally and irrevocably declare that all assets, both personal and immoveable, owned by me, whether legally or beneficially, shall be held in trust by me and [the second defendant], NRIC No. [xxx] of [xxx], as joint trustees for the sole benefit of our son [the first defendant], Birth Certificate number [xxx].

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21 Plaintiff's Affidavit of Evidence-in-Chief dated 12 May 2017, p 58 at cl 3(b).

22 Plaintiff's Affidavit of Evidence-in-Chief dated 12 May 2017 at para 35.

23 Certified Transcript, 21 July 2017, p 24 at lines 6 to 11.

24 Plaintiff's Affidavit of Evidence-in-Chief dated 12 May 2017 at para 37.

25 Plaintiff's Affidavit of Evidence-in-Chief dated 12 May 2017 at p 43.

> It is also hereby declared that either I or [the second defendant] shall be authorised to take any and all steps to protect and safeguard the beneficial interest of the Beneficiary [the first defendant], Birth Certificate number [xxx].

Below the text, there was space for the signatures of the plaintiff and second defendant with the description that the DOT was "Signed, Sealed and Delivered" by each of them "on the date abovementioned".

12 The plaintiff refused to sign the document initially.[26] This led to an argument between the plaintiff and the second defendant.[27] The subject of the argument is, again, a matter of dispute. So too is the role of the second defendant's father, a senior lawyer, in the couple's argument. Eventually, however, the plaintiff signed the DOT. The second defendant did so too, and she then placed it in her safe.[28]

Events after the DOT is signed

13 Shortly after the DOT was signed, the plaintiff in early April 2014 told the second defendant that he and his sister had inherited their mother's assets. This was the effect, he told the second defendant, of a new will belonging to his mother which had just been found.[29] In fact, the plaintiff's story about finding a new will was another lie.

14 In the event, Mr David Mitchell of Hin Tat Augustine & Partners was appointed as the solicitor for the administration of the plaintiff's mother's estate.

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26 Plaintiff's Affidavit of Evidence-in-Chief dated 12 May 2017 at para 39.

27 Plaintiff's Affidavit of Evidence-in-Chief dated 12 May 2017 at paras 37 and 40; Second defendant's Affidavit of Evidence-in-Chief dated 16 May 2017 at paras 70 and 72.

28 Defendant's Affidavit of Evidence-in-Chief dated 16 May 2017 at para 76.

29 Certified Transcript, 19 July 2017, p 18 at lines 10–13.

The plaintiff and his sister decided to exercise their right under *Saunders v Vautier* (1841) 49 ER 282, as beneficiaries under their mother's will who were of age and of sound mind, to call in the assets under the will and to apportion them between themselves. They initially disagreed over how the estate should be divided between them.[30] The plaintiff sought the second defendant's advice on resolving that disagreement and more generally on the drafting of the necessary papers for calling in the assets.[31]

15 Mr Mitchell was also engaged to assist the plaintiff in the purchase of the Scotts Road apartment,[32] which the couple intended to use as their family home.[33] On 9 May 2014, the plaintiff signed a DOT by which he declared that the Scotts Road apartment was to be held by him on trust for the first defendant.[34] The reason he did this is disputed: the plaintiff says that he signed it to avoid Additional Buyer's Stamp Duty as he already owned two apartments, whereas the defendants say that he signed it out of love and affection for the first defendant.

16 Towards the end of that month, the couple went on a holiday in France which the plaintiff had planned:[35] they had decided to start their relationship afresh. In the plaintiff's words, he and the second defendant agreed to "try and reset the relationship after the death of [his] mother".[36] They also started to plan for a second child.

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30 Certified Transcript, 19 July 2017, p 23 at lines 5–6.

31 Certified Transcript, 19 July 2017, p 22 at lines 7–13.

32 Certified Transcript, 19 July 2017, p 72 at lines 20–25.

33 Certified Transcript, 19 July 2017, p 86 at lines 2–3.

34 Plaintiff's Affidavit of Evidence-in-Chief dated 12 May 2017 at pp 45–54.

35 Second defendant's Affidavit of Evidence-in-Chief dated 16 May 2017 at para 87 and pp 78–80; Certified Transcript, 21 July 2017, p 7 at lines 5–7.

36 Certified Transcript, 19 July 2017, p 24 at lines 2–4.

17 In June 2014, the second defendant enclosed a copy of the DOT in two e-mails to Mr Mitchell.[37] She told Mr Mitchell in those e-mails to take note of the DOT in relation to any property under the plaintiff's mother's will that would vest in the plaintiff's name. The plaintiff was not copied in those e-mails. The second defendant's e-mail to him dated 14 June 2014 reads:

> Before the property from the will vests in [the plaintiff] and his sister in name I thought you needed to know of this document. I dont [*sic*] know if [the plaintiff] told you about its existence but his sister is not involved in this. So he may not have mentioned in front of her. Pls do the necessary and give me a call if you need any further info.

The second defendant sent Mr Mitchell another e-mail on 17 June 2014 to similar effect. The e-mail was acknowledged by Mr Mitchell on the same day.[38]

18 About a month later, the second defendant became pregnant with the plaintiff's second child, who is not a party to these proceedings.

19 The plaintiff and his sister then entered into a deed of family arrangement on 9 July 2014.[39] Under that deed, they agreed to exercise their right under *Saunders v Vautier* and to apportion and distribute their respective entitlements under their mother's will. In November 2014, the High Court allowed their application to terminate their mother's testamentary trust and distribute the assets according to the deed.[40] It is sufficient to note for now that the defendants claim that these assets, to which the plaintiff is entitled under the deed, are covered by the trust created by the DOT of 26 March 2014.[41] The assets are as follows:[42]

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37 Second defendant's Affidavit of Evidence-in-Chief dated 16 May 2017 at pp 227–228 and pp 230–231.

38 Defendant's Affidavit of Evidence-in-Chief dated 16 May 2017 at p 233.

39 Plaintiff's Affidavit of Evidence-in-Chief dated 12 May 2017 at pp 82–89.

40 Plaintiff's Affidavit of Evidence-in-Chief dated 12 May 2017 at pp 122–123.

(a) the Holland Road property;

(b) cash, shares, stocks, bonds and investments held in various financial institutions; and

(c) all the plaintiff's mother's porcelain art pieces other than those allocated to the plaintiff's sister under the deed of family arrangement.

20 On 10 December 2014, the second defendant forwarded the e-mail dated 14 June 2014 to Mr Mitchell:[43] see [17] above. Mr Mitchell acknowledged the e-mail on the same day. On 17 December 2014, she wrote to Mr Mitchell again, telling him that "[b]y virtue of the [DOT of 26 March 2014], everything which passes to [the plaintiff] based on his mother's will is [the first defendant's] beneficial entitlement".[44] She asked to be kept informed "as to when land titles, cash etc are ready to be passed". Mr Mitchell replied on 18 December 2014 to say that the matter would be best handled by his colleague who specialises in trusts law.[45] He also copied this reply to the plaintiff.

The relationship breaks down

21 After the plaintiff received the copy of Mr Mitchell's e-mail in December 2014, the plaintiff sought legal advice on the DOT of 26 March 2014. At that time, he and the defendants were residing at the Stevens Road property.

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41 Defence and Counterclaim (Amendment No 1) dated 6 April 2016 at para 45(b); Second defendant's Closing Submissions dated 28 August 2017 at para 26.

42 Plaintiff's Affidavit of Evidence-in-Chief dated 12 May 2017 at p 87.

43 Plaintiff's Affidavit of Evidence-in-Chief dated 12 May 2017 at p 131.

44 Second defendant's Affidavit of Evidence-in-Chief dated 16 May 2017 at p 246.

45 Second defendant's Affidavit of Evidence-in-Chief dated 16 May 2017 at p 249.

22 In February 2015, he resolved to leave the property. He wrote a letter to tell the second defendant that he wished to be on his own to sort out his thoughts on the future of their relationship. In it, he said that he would not have signed the DOT if he had been properly advised on it. And he claimed that it was only when he saw Mr Mitchell's e-mail that he realised that she had intended to "treat the DOT as a legal document".[46]

23 He then went to the Stevens Road property on 12 February 2015 to deliver the letter to the second defendant. He attempted to leave the letter with the second defendant's mother outside the house, but the second defendant came out to meet him as her mother had called to her. A heated confrontation arose between him on one side and the second defendant and her mother on the other. The plaintiff secretly made a voice recording of their exchange and has adduced a transcript of the recording as evidence.[47] The parties do not object to its admissibility.

24 In March 2015, the couple's second child was born. In April 2015, the plaintiff's solicitors wrote to the second defendant, asking the second defendant to deliver up the DOT within seven days for it to be destroyed. The second defendant's solicitors replied to say that the DOT was a valid and binding instrument.[48] The second defendant then lodged a caveat on the Holland Road property, but in November 2015 the caveat was expunged.[49] She then filed for divorce on 25 November 2015. On 30 November 2015, the plaintiff commenced this suit to set aside the DOT.[50]

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46 Plaintiff's Affidavit of Evidence-in-Chief dated 12 May 2017 at pp 140–141.

47 Plaintiff's Affidavit of Evidence-in-Chief dated 12 May 2017 at pp 145–200.

48 Plaintiff's Affidavit of Evidence-in-Chief dated 12 May 2017 at paras 73–74.

49 Second defendant's Affidavit of Evidence-in-Chief dated 16 May 2017 at para 147.

50 Writ of Summons in S 1217/2015 dated 30 November 2015.

Parties' cases

The plaintiff's case

25 The plaintiff's case is that he signed the DOT on the evening of 26 March 2014 for two main reasons. First is that the second defendant and her father persuaded him that by doing so, he would provide for and protect the defendants, and that this was the right thing to do.[51] Second is that the second defendant misled him on the DOT's true legal effect. He was taken by surprise by the second defendant's request for him to sign the DOT that evening. At first he refused to sign it because he did not intend to gift his all his assets to the first defendant, which is what he understood to be the DOT's effect,[52] but the words and conduct of the second defendant and her father changed that understanding in his mind.

26 First, she told him that the DOT was a "safeguard", in the sense that it was intended simply to make financial provision for the defendants should anything untoward happen to him. Accordingly, she falsely represented to him that the DOT would take effect only upon his death. Until then, she said, he was "free to deal with his money and assets as he deemed fit".[53] She also told him that the DOT was simply to be left with her for "safekeeping" in case anything happened to him.[54] Second, the second defendant's father was with them that evening in her bedroom, and he assured the plaintiff that the DOT was a "standard document" and that he himself would sign it if he had been in the plaintiff's shoes.[55] The plaintiff accepted their representations because he felt

51 Statement of Claim (Amendment No 2) dated 23 March 2016 at para 5.19.

52 Statement of Claim (Amendment No 2) dated 23 March 2016 at paras 5.9-5.10.

53 Statement of Claim (Amendment No 2) dated 23 March 2016 at para 5.11.

54 Statement of Claim (Amendment No 2) dated 23 March 2016 at para 5.11.

55 Statement of Claim (Amendment No 2) dated 23 March 2016 at para 5.14.

pressured by them. He was susceptible to their influence as he was grieving over his mother's death and thus emotionally vulnerable, and he did not have the benefit of independent legal advice.[56] He was in a "flustered state of mind and mood".[57] As a result, he was induced to sign the DOT under the second defendant's misrepresentation and undue influence, and under a mistake as to the DOT's legal effect. In addition, he contends that the DOT is an unconscionable transaction.[58] He argues that the DOT should be set aside on the ground of any of these vitiating factors.

27 Even if these vitiating factors are not made out, the DOT is void, the plaintiff says, because it fails to define the trust property with sufficient certainty. Further, even if the DOT is valid, the trust it establishes does not extend to the plaintiff's interest in his late mother's estate because that interest constitutes future property.[59] And even if the trust does so extend, it extends only to the plaintiff's right to withdraw $10,000 a month until his late mother's twenty-fifth death anniversary.[60] Finally, if the DOT is found to have the effect for which the defendants contend, the plaintiff claims damages in contract and tort from the second defendant for her breach of an implied retainer in failing properly to advise the plaintiff on the effect of the DOT.[61]

The defendants' case

28 The first and second defendants' cases are aligned. Their overall case is that the plaintiff conceived this suit because he had a "change of heart".[62] Having

56 Statement of Claim (Amendment No 2) dated 23 March 2016 at para 5.20.

57 Statement of Claim (Amendment No 2) dated 23 March 2016 at para 5.9.

58 Statement of Claim (Amendment No 2) dated 23 March 2016 at para 11A.

59 Statement of Claim (Amendment No 2) dated 23 March 2016 at para 4.

60 Statement of Claim (Amendment No 2) dated 23 March 2016 at para 4A.

61 Statement of Claim (Amendment No 2) dated 23 March 2016 at para 12C.

successfully terminated his late mother's testamentary trust and obtaining assets in the value of $25m to $30m, he "did not want to risk his tremendous windfall being part of the DOT".[63] They contend that "[h]is greed trumped all" and he "[could not] accept being hoisted by his own petard", namely, the DOT which he signed himself.[64]

29 The second defendant pleads that in the wake of the plaintiff's mother's death, the plaintiff expressed a desire to give everything he had to the first defendant. At the same time, he was concerned that his relatives would attempt to stake a claim over his mother's assets as well as his assets "should something happen to him".[65] The second defendant pleads that she understood this to mean that he intended to create a trust over his assets in favour of the first defendant, and for that reasons, she drew up the DOT, essentially at his request.[66]

30 She also accepts that the plaintiff initially refused to sign the DOT on the evening of 26 March 2014.[67] However, she claims that he changed his mind and signed the DOT "[o]n his own accord".[68] The second defendant denies that she falsely represented to the plaintiff that the DOT would take effect only upon his death or that he was free to deal with his assets until then. She also denies that her father had any role to play in influencing the plaintiff to sign the DOT. She denies that the plaintiff was in acute grief: while the plaintiff "seemed sad"

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62 First defendant's Closing Submissions dated 28 August 2017 at para 133.

63 First defendant's Closing Submissions dated 28 August 2017 at para 133.

64 First defendant's Closing Submissions dated 28 August 2017 at para 133.

65 Defence and Counterclaim (Amendment No 1) dated 6 April 2016 at para 13.

66 Defence and Counterclaim (Amendment No 1) dated 6 April 2016 at para 20.

67 Defence and Counterclaim (Amendment No 1) dated 6 April 2016 at para 21.

68 Defence and Counterclaim (Amendment No 1) dated 6 April 2016 at para 26.

and his mother's death, he appeared "lucid" and behaved normally in his interactions with the second defendant and others.[69]

31 The defendants contend that the DOT creates a trust over all the assets held by the plaintiff at the date the DOT was executed, including the assets bequeathed to him by his late mother, but not assets that he acquired after that date.[70] They say that the subject matter of the trust established by the DOT is certain because the DOT "properly defined" the trust property.[71] They also argue that the plaintiff's interest in his mother's estate is not future property because it was at the time the DOT was executed an existing interest. By way of counterclaim, the defendants ask for, among other things, a declaration that the DOT is valid and for the plaintiff to be removed as trustee under the DOT.[72]

Issues to be determined

32 The parties' cases raise two primary issues:

(a) First, why did the plaintiff sign the DOT of 26 March 2014? This issue of fact lies at the heart of this case. In essence, it will require me to consider the plaintiff's state of mind at the time he signed the DOT and whether he was influenced by the conduct of the second defendant and her father into signing it.

(b) Second, should the DOT be set aside because of the circumstances in which the plaintiff signed it? This issue requires me to consider whether the DOT should be set aside because it was procured

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69 Defence and Counterclaim (Amendment No 1) dated 6 April 2016 at para 11.

70 Second defendant's Opening Submissions dated 10 July 2017 at paras 5(ii)-5(iii).

71 Second defendant's Closing Submissions dated 28 August 2017 at para 8.

72 Defence and Counterclaim (Amendment No 1) dated 6 April 2016 at para 45(d).

as a result of misrepresentation, mistake, undue influence or because it was an unconscionable transaction.

33 For the reasons detailed below, my view is that at the time the plaintiff signed the DOT, he was labouring under a misunderstanding of the DOT's true legal effect, on which he had been misled by the second defendant's false representations. I am also of the opinion that all four vitiating factors on which the plaintiff relies as the primary grounds for the invalidity of the DOT are made out.

34 A separate set of issues is raised by the plaintiff's position on the validity of the DOT as a legal instrument, regardless of whether the vitiating factors he relies on are made out. This may be regarded as the plaintiff's secondary case, in the sense that he has focused his case on attempting to set aside the DOT on the four vitiating factors. His secondary case raises the following issues:

(a) Does the DOT define the trust property with reasonable certainty?

(b) If it does, does the trust property extend to the plaintiff's interest under his mother's will, and if so, what is the scope of that interest which is trust property?

35 In brief, my view is that the DOT defines the trust property with reasonable certainty and includes, at the very least, the assets the plaintiff owned and the annuity his mother's will provided him with. As I explain at [142] below, it is not necessary for me to consider whether it extends to the assets he obtained later by the deed of family arrangement he concluded with his sister.

36 Finally, in the event that the plaintiff's primary and secondary cases are rejected, the plaintiff's alternative case is that the second defendant is liable to him in damages in tort and contract for failing properly to advise him on the DOT. As I have decided in the plaintiff's favour on his primary case, I need not consider whether his alternative case is made out. I also need not consider the defendants' counterclaims.

Issue 1: Why did the plaintiff sign the DOT?

Five principal factual issues

37 Having regard to the parties' pleaded cases and the evidence, I consider that there are five principal factual issues that I must determine to decide why the plaintiff signed the DOT:

(a) First, prior to 26 March 2014, did the plaintiff intend to create a DOT like the one the second defendant presented to him that day?

(b) Second, what was the plaintiff's state of mind on 26 March 2014? In particular, was he suffering from grief to a degree that made him susceptible to the second defendant's influence?

(c) Third, how did the second defendant act towards the plaintiff on the evening of 26 March 2014? In particular, what representations, if any, did she make to the plaintiff before he signed the DOT?

(d) Fourth, was the second defendant's father with the plaintiff at or before the time he signed the DOT on 26 March 2014? If he was, what representations, if any, did he make to the plaintiff before he signed the DOT?

(e) Fifth, what was the plaintiff's understanding of the effect of his signing the DOT on 26 March 2014 at the time he signed it, and how did he come to have that understanding?

38 I will deal with each of these issues in turn.

(1) Did the plaintiff intend to create a DOT before 26 March 2014?

39 In my view, the first step to discerning why the plaintiff signed the DOT is to understand his state of mind that evening. An important aspect of that state of mind is whether he had ever wanted to draw up a DOT like the one he signed. The defendants contend that he did, and that the second defendant had, on her understanding of such a wish, drafted the DOT. The plaintiff, on his part, says that he was "totally caught by surprise" when, upon his return to the Stevens Road property, she asked him to her bedroom, gave him the DOT, and simply told him to "sign this".[73]

40 It is therefore important to assess the evidence that the defendants adduce in support of their case that the plaintiff wished to set up a trust and asked the second defendant to draft a trust document. For the reasons that follow, I find the evidence both inadequate and irrelevant:

(a) The first defendant submits that the plaintiff "had for some time been contemplating making provisions for [the first defendant]", and that he decided to do so by signing the DOT.[74] I reject this submission. A declaration of trust on all of one's existing assets, objectively speaking, is not an obvious or rational mechanism by which to provide for one's child. It does not comport with common sense that a young

73 Plaintiff's Affidavit of Evidence-in-Chief dated 12 May 2017 at paras 37-38.

74 First defendant's Closing Submissions dated 28 August 2017 at para 100.

father who is still building his career would wish to divest himself of all his assets to provide for his son, when he can do so by other less drastic means, such as making a will; creating a trust which is more limited in scope, like the trust of the Scotts Road apartment; or maintaining an insurance policy which names the first defendant as a beneficiary.

(b) There is no evidence, aside from the second defendant's bare allegation, that the plaintiff told the second defendant that he wanted a DOT. The second defendant's evidence is that the plaintiff personally "reassured [her] that he would structure a plan so that no matter what happened to either [the plaintiff] or [the second defendant], [the first defendant] would not have to worry about finances".[75] But as I will highlight at [57(a)] below, the second defendant admitted on the stand that she did not recall the plaintiff ever saying that he wished to draw up a trust of all his assets.

(c) The defendants rely on a diary entry belonging to the plaintiff in which he wrote: "What do I want out of life? To bring up good kids properly. To give them a future. Create a $10bn fortune & put into a trust".[76] However, there is no date on this entry. A voucher on the opposite page in the diary suggests that it was written on or around 12 February 2015. Hence, the entry sheds no light on the plaintiff's state of mind at or around 26 March 2014 when he signed the DOT. Furthermore, the plaintiff's stated desire to put a $10bn fortune into a trust for his children in fact suggests that he did not intend to put his assets into a trust for his children until he had acquired $10bn worth of

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75 Second defendant's Affidavit of Evidence-in-Chief dated 16 May 2017 at para 45.

76 First defendant's Closing Submissions dated 28 August 2017 at para 13; Second defendant's Affidavit of Evidence-in-Chief dated 16 May 2017 at p 120.

assets. This is also consistent with his evidence in cross-examination that he had in mind the kind of trust used by families "like the Rothschilds".[77] The entry therefore lends no support to the suggestion that he had on 26 March 2014 the desire to divest himself of all his assets for the sole benefit of his first son.

(d) Finally, the defendants rely on the fact that in the preamble to the DOT for the Scotts Road apartment, the plaintiff states that he "has agreed to purchase [the Scotts Road apartment] and out of natural love and affection for [the first defendant] has agreed to declare that [the Scotts Road apartment] is to be held in trust for [the first defendant] upon the terms and conditions set out herein".[78] I accept that the plaintiff means what he says in this DOT as he received legal advice on its drafting. But it does not follow that he possessed the same intent regarding the DOT of 26 March 2014, for which there is no similar preamble.

41 Therefore, I accept the plaintiff's case that prior to 26 March 2017, he had "at no time ever requested [the second defendant] to draw up the Declaration of Trust or any other document for any trust in favour of [the first defendant]".[79] I find that he was taken by surprise by the second defendant's asking him to sign the DOT on the evening of 26 March 2017.

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77 Certified Transcript, 18 July 2017, p 116 at lines 6–8.

78 First defendant's Closing Submissions dated 28 August 2017 at para 36; Plaintiff's Affidavit of Evidence-in-Chief dated 12 May 2017, p 46 at cl 3.

79 Plaintiff's Affidavit of Evidence-in-Chief dated 12 May 2017 at para 38.

(2) Was the plaintiff suffering from grief to a degree that made him susceptible to influence?

42 The second principal aspect of the plaintiff's state of mind is his grief over his mother's death. I will deal with the evidence on his relationship with his mother, which will shed light on the plausibility of the extent to which he allegedly grieved over her death, before addressing the expert evidence on his grief.

43 It is important to note that the plaintiff's evidence on his relationship with his mother was unchallenged. The defendants did not question any aspect of it during his cross-examination. I therefore have no reason to disbelieve it. The plaintiff's evidence is that he was "very close" to his mother because she raised him singlehandedly.[80] She had, in his words, a "super strong personality".[81] They would go on holiday together once or twice a year, and most of his personal trips abroad were with his mother.[82] He also entrusted to her his late father's inheritance for safekeeping, and she would manage and invest it on his behalf.[83] It is clear that the plaintiff had every reason to grieve over his mother's sudden and brutal death.

44 I turn now to the expert evidence. Both experts, Dr Ung Eng Khean (for the plaintiff) and Dr Calvin Fones (for the defendants) agree that at the time the plaintiff signed the DOT, the plaintiff was experiencing acute grief and exhibiting symptoms of PTSD and depressive disorder. Dr Fones also agreed during his cross-examination that "[d]epression and depressed-like states may be accompanied with poor judgment (hence the common advice to patients not

80 Plaintiff's Affidavit of Evidence-in-Chief dated 12 May 2017 at para 10.

81 Defendant's Affidavit of Evidence-in-Chief dated 16 May 2017 at p 64.

82 Plaintiff's Affidavit of Evidence-in-Chief dated 12 May 2017 at para 11.

83 Plaintiff's Affidavit of Evidence-in-Chief dated 12 May 2017 at para 12.

to make any major decision when depressed), compounding the effects of bereavement".[84]

45 Where the expert evidence diverges is that while Dr Ung says that the plaintiff's grief made him more susceptible to influence, Dr Fones says that it did not.[85] On this issue, three aspects of their evidence are of particular significance. The first aspect concerns their assessment of why the plaintiff, having initially refused to sign the DOT on the evening of 26 March 2014, changed his mind and decided to sign it. Their views are as follows:

(a) Dr Ung observed that the plaintiff was initially trying to "hide his assets" by lying to the second defendant at lunch about his mother's will, but he later changed his mind in the evening and agreed to hold his assets on trust for the second defendant. Dr Ung opined, "from a psychiatric perspective", that these facts indicated that the plaintiff was vulnerable to influence.[86] Dr Ung did however qualify that if it could be shown that if the plaintiff, prior to the DOT, "had in mind [*sic*] to give away all he had to the family", then there would have been "no acting out of character".[87] In other words, Dr Ung suggested that the plaintiff's erratic behaviour could mean that he was vulnerable to influence or that he was operating under stress.[88]

(b) Dr Fones said that the plaintiff was "unlike a hapless person that was just obeying the will of someone else".[89] He did not read the

84 Certified Transcript, 25 July 2017, p 32 at line 18 to p 33 at line 1.

85 Certified Transcript, 25 July 2017, p 7 at lines 2–4.

86 Certified Transcript, 25 July 2017, p 36 at lines 14–18.

87 Certified Transcript, 25 July 2017, p 36 at lines 18–22.

88 Certified Transcript, 25 July 2017, p 28 at lines 5–7.

89 Certified Transcript, 25 July 2017, p 37 at lines 21–22.

> plaintiff's behaviour as erratic. Instead, he thought that the plaintiff had a desire to "make some urgent and important decisions … because of his concern that he needed to sequester or to protect the estate, given … this news that he was now having to look after this inheritance".[90]

46 It is significant that both experts were of the view that the plaintiff should not be regarded as having acted erratically by changing his mind that evening *if* he had intended to create an instrument like the DOT all along. I have found that the plaintiff did not in fact have any such intention: see [40]–[41] above. Contrary to Dr Fones' suggestion that that the plaintiff possibly wished to protect the estate for the defendants, the plaintiff's initial thinking was to respect his mother's wish not to benefit the defendants through her will.[91] That is why he lied to the second defendant that he received nothing under the will. I therefore accept Dr Ung's opinion that the plaintiff's decision to change his mind was a decision out of character and a sign that he was vulnerable to influence.

47 The second significant aspect of the expert evidence relates to the fact that the plaintiff was able to carry out his daily responsibilities. He was able to go back to work, and he was otherwise sensible and rational. Dr Fones relied heavily on these facts to say that the plaintiff's grief did not make him vulnerable to influence. However, Dr Fones also accepted during cross-examination that the plaintiff's case contained a number of "red flags". These refer to stress indicators which increase the degree of vulnerability experienced by the patient.[92] The red flags in this case included the plaintiff's close relationship with his mother, the horrific circumstances of her death, and the

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90 Certified Transcript, 25 July 2017, p 38 at lines 8–15.

91 Statement of Claim (Amendment No 2) dated 30 November 2015 at para 5.7

92 Certified Transcript, 25 July 2017, p 21 at lines 11–15.

relationship of confidence he had with the second defendant. The important point is that Dr Fones accepted that the plaintiff would have experienced a degree of stress that was "above average"[93] due to the presence of these red flags, which meant that he would have been relatively more vulnerable to influence.

48 The third significant aspect of the experts' evidence concerns the fact that the plaintiff was an isolated individual. Dr Fones opined that an isolated individual, that is, an individual whose world revolves around only a small number of individuals with whom he shares a strong relationship, is likely to render him vulnerable to their influence.[94] There appear to be elements of this in the plaintiff's life: after his mother died, the only family he had was that of the second defendant. He was not close to his sister as he was much younger than her and she had lived abroad since he was young. The plaintiff's sense of isolation was unwittingly revealed by the second defendant herself during her cross-examination:[95]

> Q. … I asked you: having regard to all that had happened in the last few days, with the qualifications you made, was it an opportune time for you to present to him such an important document? "Yes" or "no".
>
> A. I think that also given that he had said we were having a fresh start for our family, we were the only family he had left, et cetera, et cetera, bearing that in mind as well, which he said throughout, it was.

49 In my judgment, the second defendant deepened his sense of isolation when she told the plaintiff that he should leave the Stevens Road property if he did not wish to sign the DOT. It is not disputed that she threatened to kick him

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93 Certified Transcript, 25 July 2017, p 22 at lines 15–20.

94 Certified Transcript, 25 July 2017, p 30 at lines 11–15.

95 Certified Transcript, 20 July 2017, p 58 at lines 3–14.

out of the house on the evening of 26 March 2014. Thus, at the confrontation of 12 February 2015 (see [23] above), when he asked her why she had told him to leave, she admitted, "I didn't want you. I didn't want you around".[96] In my judgment, her threat in all likelihood deepened his sense of isolation, which in turn would have contributed to his susceptibility to her influence.

50 My final observation on the plaintiff's grief is that the evidence shows that even the second defendant thought that the plaintiff was not in a good state of mind on the evening of 26 March 2014. At the confrontation of 12 February 2015, the plaintiff asked her why she did not ask him to draw up a will instead of a DOT. Her reply is telling: "You were not in any state to write a will. You were just angry."[97] During cross-examination, she confirmed that this was in fact her impression of his state of mind.[98] In my judgment, if he was not in an appropriate state of mind to make a will – which can be changed any time before he dies – surely he could not have been in an appropriate state of mind to make an immediate divestment of all his assets through a declaration of trust.

51 Having regard to all the circumstances, I find that the plaintiff has established on a balance of probabilities that on the evening of 26 March 2014, his grief over his mother's death and the circumstances of his life after her passing rendered him susceptible to be influenced by the second defendant.

(3) How did the second defendant act towards the plaintiff on the evening of 26 March 2014?

52 I turn now to the issue of the second defendant's conduct that evening. The plaintiff claims that the second defendant told him on the evening of 26

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96 Plaintiff's Affidavit of Evidence-in-Chief dated 12 May 2017, p 154 at line 276.

97 Plaintiff's Affidavit of Evidence-in-Chief dated 12 May 2017, p 152 at line 237.

98 Certified Transcript, 20 July 2017, p 97 at line 25 to p 98 at line 6.

March 2014 that the DOT was intended as a safeguard. She then misrepresented to him that the DOT would take effect only upon his death, and that he would be free, until then, to deal with his assets as he wished: see [26] above. In my judgment, the plaintiff has proved on a balance of probabilities that she made such a misrepresentation to him. I also agree with the plaintiff that the second defendant's motive for making that misrepresentation to procure his signature on the DOT was to create an instrument by which she could exert control on the plaintiff and his assets in the event that their relationship turned sour.[99] My reasons are as follows.

53 First, the second defendant's account of how the plaintiff signed the DOT is incredible. It is not disputed that the plaintiff initially refused to sign the DOT on the evening of 26 March 2014 because he did not wish to gift his assets in their entirety to his son. What is in dispute is why he changed his mind. The plaintiff's account – that he was pressured into signing it and was misled on its legal effect – is at least plausible. The second defendant's account is not. Having denied that she forced him to make an uninformed decision, her explanation is that the plaintiff, left to himself for a moment, simply decided voluntarily to sign the DOT. This was allegedly because, having argued with her about whether he should take on a project to convert the Bukit Timah property into an art gallery for his mother, he "saw the light" and decided not to pursue that project and instead resolved to spend more time with the second defendant.[100]

54 This is not a plausible explanation for the plaintiff's change of mind. The substance of the second defendant's complaint concerning the art gallery proposal is that taking charge of the proposal would prevent the plaintiff from spending time with her and with their son. This complaint, however, does not

[99] Plaintiff's Reply Submissions dated 8 September 2017 at para 14.

[100] Certified Transcript, 20 July 2017, p 126 at lines 14–18.

address the plaintiff's concern over the DOT, namely, why he should gift all his assets to their infant child. The only plausible assurance for that concern would have been a response to the effect that the DOT would have no effect on how the plaintiff could deal with his assets. That would have been a false assurance, of course, but that is the assurance, I find, that the second defendant gave him that evening.

55 Second, the second defendant, in my judgment, suspected on 26 March 2014 that the plaintiff's mother had left him something under her will. The second defendant admitted in cross-examination that she knew by noon that day that the plaintiff had read his mother's last will. At lunch, the contents of that will were discussed. It is common ground that this discussion led the plaintiff and his sister, as they had agreed to do, to lie to the second defendant that their mother had willed all her assets to charity. The plaintiff avers that he told this lie because the second defendant was interrogating him about the contents of his mother's will. He also did not want her to know the size of his inheritance out of fear that she might covet it to support her extravagant lifestyle.[101] The second defendant denies asking him about the will, but I reject this assertion and accept that plaintiff's evidence that she did ask him about the will. If the second defendant did not raise the topic of the will, the plaintiff and his sister would not have discussed the will on their own accord given their prior decision.

56 I find, next, that the second defendant acted on her suspicion that the plaintiff had lied to her by drafting the DOT and asking the plaintiff to sign it. Significant to me in this regard is the fact that she was unable to give consistent accounts of what she knew about the will:

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101 Plaintiff's Affidavit of Evidence-in-Chief dated 12 May 2017 at paras 34–35.

(a) In her pleadings, she averred that she had no knowledge of any will until sometime after 26 March 2014 and that the plaintiff did not mention his mother's will at lunch that day.[102] However, in her affidavit of evidence-in-chief ("AEIC"), she stated that at that lunch, the plaintiff and his sister told her that their late mother had left her property to charity[103] – which would have entailed their mention of a will.

(b) Next, her evidence on the art gallery proposal is also inconsistent with her assertion that she did not know about "any will" at lunch that day. During cross-examination, she initially said that she did not know that the plaintiff was going for the reading of his mother's will, but simply that he was "seeing his mother's lawyers".[104] Upon further cross-examination, she conceded she knew that the plaintiff was to be trustee of his mother's will or estate and eventually, that by lunchtime, she would have realised that the mother's will had been read to the plaintiff and his sister.[105] When it was highlighted to her that this was inconsistent with her pleadings, she blamed her lawyers for failing to amend them when she had asked them to.[106]

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102 Defence and Counterclaim (Amendment No 1) dated 6 April 2016 at para 28(h)(i).

103 Second defendant's Affidavit of Evidence-in-Chief dated 16 May 2017 at para 63.

104 Certified Transcript, 20 July 2017, p 89 at line 13.

105 Certified Transcript, 20 July 2017, p 91 at line 12.

106 Certified Transcript, 20 July 2017, p 118 at lines 8–20.

57 In addition, I find that in drawing up the DOT, the second defendant knew that the plaintiff was in a particularly vulnerable mental state, and she intended to use that to her advantage. Her knowledge and her intention to take advantage of the plaintiff in this respect may be inferred from the circumstances under which the DOT was drawn up – which indicate an inexplicable sense of urgency in the second defendant to have the plaintiff sign a document with serious implications – and also from the second defendant's conduct after 26 March 2014:

(a) The second defendant had no good reason for preparing the DOT. She claims to have done so because she understood from the plaintiff that he had intended to draw up a trust of his assets in favour of their son. As I have found (see [40]–[41] above), he had no such intent. Moreover, she admitted during cross-examination that she did not recall the plaintiff mentioning the word "trust" to her in relation to that intention.[107] When she was asked why she did not clarify with the plaintiff whether a trust was what he had in mind, she avoided the question and said that the plaintiff, having been presented with the DOT that evening, could decide for himself whether he wanted to sign it.[108] I do not accept this explanation. If an instrument as drastic in effect as the DOT was what the plaintiff had specifically intended, the second defendant would have (i) simply said that it was the plaintiff who wanted an instrument like the DOT or (ii) produced evidence to prove that he had such a specific wish. But she did not.

(b) The second defendant also had no good reason for asking the plaintiff to sign a DOT just seven days after his mother's death. When

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107 Certified Transcript, 20 July 2017, p 79 at line 22.

108 Certified Transcript, 20 July 2017, p 79 at line 25 to p 80 at line 7.

asked during cross-examination whether that was a suitable time for the plaintiff to sign such a document, she demurred and said that the plaintiff's "giving away all his assets" was something they had been talking about for months.[109] But this is inconsistent with the plaintiff's undisputed evidence that he initially refused to sign the DOT that evening precisely because that he did not wish to part with all his assets: see [66] above.

(c) The second defendant also claimed that in preparing the DOT, she was furthering the plaintiff's intention to protect his assets from his relatives, of whom he was suspicious and who may stake a claim on his assets when he dies.[110] I do not understand this explanation. I accept the plaintiff's argument that the second defendant, as a trained lawyer who was capable of drafting a trust deed, would have known that the laws of intestacy or the mechanism of a will would have afforded the plaintiff more than sufficient protection.[111] When confronted with this point during cross-examination, she conjured for the first time the possibility that those relatives could draft a "fake will" and make a claim under that will for a share of his assets on his death.[112] The defendants have in their submissions omitted entirely to refer to this aspect of the second defendant's evidence, and I reject it as a mere afterthought.

(d) The second defendant drafted the DOT by hand and presented it for signature to the defendant on the same day she drafted it. This may be contrasted with how she facilitated the drafting and signing of the

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109 Certified Transcript, 20 July 2017, p 57 at line 22 to p 58 at line 2.

110 Second defendant's Affidavit of Evidence-in-Chief dated 16 May 2017 at para 67.

111 Plaintiff's Closing Submissions dated 28 August 2017 at para 31.

112 Certified Transcript, 20 July 2017, p 66 at line 25.

DOT for the Scotts Road apartment, which involved (i) ensuring that the plaintiff received advice on it from a solicitor, Mr Mitchell, (ii) preparing a typewritten copy of the DOT, and (iii) inserting an appropriate carve-out in the DOT to allow the plaintiff to profit from the property until their child turns 21. No such care was taken in relation to the DOT signed on 26 March 2014, which is striking given that the DOT was more drastic in effect in that it covered a far wider range of assets than did the DOT for the Scotts Road apartment.

(e) After obtaining the plaintiff's signature on the DOT and appending to it her own, she kept the DOT in a safe,[113] to which the plaintiff did not have access. She did not give the plaintiff a copy of the DOT. She also did not attempt to ensure that the plaintiff abided by his duties as a trustee under the DOT. During cross-examination, she claimed that she did not know that the plaintiff, after signing the DOT, did not set aside the assets that had purportedly been caught by the trust it created and had instead continued to deal freely with them.[114] These facts support the plaintiff's case that the second defendant was not concerned about the immediate effect of the DOT, but was simply keeping it as a safeguard to exert control over the plaintiff's assets in the event he walked out on her.

(f) The second defendant as early as June 2014 began asking Mr Mitchell via e-mail for a list of the plaintiff's assets for the purposes of the trust created under the DOT. She also told Mr Mitchell that the DOT was "[s]omething to note I guess re any property that will vest in [the plaintiff's] name".[115] Her evidence is that she kept the plaintiff informed

113 Second defendant's Affidavit of Evidence-in-Chief dated 16 May 2017 at para 76.

114 Certified Transcript, 20 July 2017, p 141 at lines 16–21.

of these communications, but the objective evidence shows otherwise: the plaintiff was not copied in these e-mails. At the confrontation of 12 February 2015, the second defendant did not deny the plaintiff's assertion that Mr Mitchell forwarded him the second defendant's e-mails only in December 2014 and not earlier.[116] In my view, there can be no reason for such covert behaviour on the part of the second defendant unless her intention was to conceal from the plaintiff her attempts to crystallise what she would be able to control under the DOT as a trustee.

(g) Finally, she did not explain the DOT to the plaintiff. Her evidence was that when she gave the plaintiff the DOT to sign, she told him that it was written in "simple, plain English", and that there was nothing for her to explain.[117] At the 12 February 2015 confrontation, when the plaintiff asked her why she did not explain the "legal ramifications" of the DOT to him, she replied, "What are these legal ramifications? How – was it not written in plain English?"[118] This was, in my judgment, an insincere and cynical response. As the plaintiff correctly submits, the DOT contained many features which a trained lawyer, such as the second defendant, would have known required explanation.[119] These features include (i) the scope of the assets the plaintiff was settling; (ii) the irrevocability of the DOT; (iii) the fact that

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115 Second defendant's Affidavit of Evidence-in-Chief dated 16 May 2017 at p 230.

116 Plaintiff's Affidavit of Evidence-in-Chief dated 12 May 2017, p 150 at lines 162–165.

117 Plaintiff's Affidavit of Evidence-in-Chief dated 12 May 2017 at para 38; Second defendant's Affidavit of Evidence-in-Chief dated 16 May 2017 at para 71; Certified Transcript, 19 July 2017, p 104 at lines 6–9.

118 Plaintiff's Affidavit of Evidence-in-Chief dated 12 May 2017, p 166 at line 663.

119 Plaintiff's Opening Statement dated 17 July 2017 at para 36.

the DOT would take immediate effect; and (iv) the plaintiff's and the second defendant's powers and responsibilities as joint trustees.

58 For the reasons above, I find that the plaintiff has proved on a balance of probabilities that on the evening of 26 March 2014, the second defendant told him that the DOT was intended as a safeguard and misrepresented to him that it would take effect only upon his death and that he would be free to deal with his assets until then. I also find that in doing so, she was aware of his vulnerable mental state and took advantage of him by pressuring him to sign the DOT.

(4) Was the second defendant's father present, and if so, what representations, if any, did he make?

59 The plaintiff contends that the second defendant's father was with him and the second defendant in her bedroom when the second defendant made the representations I have found her to have made. The second defendant's father denies that he was present in the room. The defendants' case is that the second defendant went to her parents' bedroom to inform them that the plaintiff was leaving the house, but her father did not go into her bedroom. The plaintiff subsequently signed the document by himself. In my judgment, the second defendant's father was in fact with them in the bedroom when the second defendant made her representations.

60 I begin with the observation that it is clear from the second defendant's father's defensive behaviour on the stand that his central aim during the trial was to distance himself from the affairs of the second defendant and the plaintiff. To that end, he denied any involvement in the preparation and signing of the DOT. I give two examples this behaviour.

61 The first is his inexplicable refusal to answer the question whether the DOT in his view was a standard document:[120]

> Q. Have you read the DOT, the declaration of trust?
>
> A. Declaration of trust?
>
> Q. Have you read it? No, I'm not asking you to read it now, but have you read it?
>
> A. Oh, yes, I have read it.
>
> Q. In your opinion, is that a standard document?
>
> A. Can I look at the document?
>
> Q. Oh, sure. It's in 1AB-26.
>
> A. Yes.
>
> Q. Have a look at page 26, the trust deed that we are talking about.
>
> A. Yes.
>
> Q. My question to you is: is this a standard document?
>
> A. I don't know.
>
> Q. Okay. Next question.
>
> A. Yes.
>
> Q. Is it a usual document, from your experience?
>
> A. I don't know.
>
> Q. That a 29-year-old man –
>
> A. Sorry?
>
> Q. That a 29-year-old man would sign such a document, create a trust giving away all his properties, his assets, on trust, to his infant son who was then only about one and a half years old?
>
> A. So what are you asking me?
>
> Q. I'm asking you whether it's usual, in your view.
>
> A. I'm here to give evidence of facts, not my opinion.
>
> Q. You refuse –

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120 Certified Transcript, 21 July 2017, p 58 at line 10 to p 59 at line 22.

> A. I know that experts and all that are there for opinion evidence but I'm here to give, as far as I know, your Honour, evidence as to what factually transpired. Now, he's asking for my legal opinion. I don't think that's what I'm here for.
>
> Q. Would you sign a document like that yourself?
>
> A. Again, it's an opinion. Whether I would sign or not sign is not an issue here.

62 It can be seen from this exchange that his initial response was to say that he did not know whether the document was a standard document. I find his claim of ignorance to be unbelievable, given that he is a senior lawyer. When counsel for the plaintiff persisted in that line of questioning, he retreated by declining to give his opinion on the basis that he was present only as a witness of fact. That appeared to me to be unnecessarily defensive and evasive. In cross-examination, it is a common and accepted practice to ask witnesses of fact for their opinion on a certain matter in order to establish whether they hold that opinion, not in order to establish whether that opinion is true. As a lawyer himself, the second defendant's father must have known that the plaintiff's counsel clearly intended the former and not the latter because it was the plaintiff's very case that the DOT was not a standard document.

63 The second example is that during cross-examination, the second defendant's father insisted that he and his wife had no reaction to the second defendant's telling them that the plaintiff was leaving the Stevens Road property. I find this indifference surprising, given that the plaintiff was, after all, their son-in-law. Simple concern would have been apposite, but the second defendant's father gave no reason for his equanimity. Again, this gave me the impression that he was trying to distance himself from the plaintiff's affairs.

64 Next, a key piece of evidence of his presence in the second defendant's bedroom on the evening of 26 March 2014 comes from the transcript of the

confrontation of 12 February 2015. During the confrontation, the plaintiff said to the defendant, "You even got your dad to read through it and to force me to sign it."[121] The second defendant responded by denying the fact that anyone had "forced" the plaintiff to sign the DOT. She is recorded as having said, "No one forced you. (chuckles) I don't know why you keep saying someone force you. How can any of us force you?"[122] Thus, she did not deny that she had asked her father to read the DOT. Indeed, she appeared to accept, by her use of the word "us", that someone other than her was involved in the plaintiff's signing of the will.

65 In my view, this evidence corroborates the plaintiff's evidence, which I accept, that the second defendant's father legitimised the second defendant's attempt to ask the plaintiff to sign the DOT.[123] I find that the plaintiff has established on the balance of probabilities that the second defendant's father was at some point in the evening of 26 March 2014 in the second defendant's bedroom with the second defendant when she was trying to persuade the plaintiff to sign the DOT. The father conceded in cross-examination that he and the plaintiff shared a relationship of mutual respect. As the father lent a degree of legitimacy to the second defendant's request, and as the plaintiff trusted the father, the plaintiff was willing to go along with her plan. I therefore accept the plaintiff's case that he signed the DOT on the father's assurance, "when he did not contradict anything that [the second defendant] said", that the plaintiff was free to deal with his assets until he passed away, and that that the DOT was, in his words, "just a safekeeping".[124] The plaintiff described the father's reassurance as the "carrot" and the second defendant's threat to sign it or leave

121 Plaintiff's Affidavit of Evidence-in-Chief dated 12 May 2017 at p 153 at line 272.

122 Plaintiff's Affidavit of Evidence-in-Chief dated 12 May 2017 at p 154 at line 273–274.

123 Certified Transcript, 19 July 2017, p 101 at lines 24–25.

124 Certified Transcript, 18 July 2017, p 108 at lines 8–11.

the house as the "stick".[125] He also stated that he signed the document "just to give [the second defendant] some assurance and to get her off [his] back". In the light of his mental state, this account is believable, and I accept it.

(5) What was the plaintiff's understanding of the DOT at the time he signed it, and how did he come to have that understanding?

66 I find that the plaintiff appreciated that the DOT covered all the assets he owned. That was the very reason, he avers in his AEIC and also on the stand, for initially refusing to sign the DOT on the evening of 26 March 2014. In his AEIC, he said, "As I had no intention of giving away my assets to the 1st Defendant, I refused to sign the Declaration of Trust."[126] Likewise, his testimony during cross-examination was that in the evening of 26 March 2014, when the second defendant called him into her room and asked him to sign the DOT, he "refused to" and told her that "[he] was not prepared to give all my assets to [the first defendant]".[127]

67 Also, I find that the plaintiff knew that if he signed the DOT, he would create "some sort of trust" over the assets. Again, that is the language he used in his AEIC.[128] It is also reasonable to expect the plaintiff to at least have discerned from the DOT, which plainly bore the title "Trust Deed" (see [11] above), that he was by signing the deed creating a "trust".

68 Why then did he change his mind and sign the DOT? That is because the plaintiff was led by the second defendant to believe that he would be able freely to deal with the assets which he holds under that trust for his own benefit.

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125 Certified Transcript, 18 July 2017, p 108 at lines 1–5.

126 Plaintiff's Affidavit of Evidence-in-Chief dated 12 May 2017 at para 39.

127 Certified Transcript, 18 July 2017, p 106 at lines 15–17.

128 Plaintiff's Affidavit of Evidence-in-Chief dated 12 May 2017 at para 39.

While this may not be a correct conception of a trust as a matter of law, the important point is that it is the concept of the trust that the plaintiff had at the time he signed the DOT.

69 In this context, I gather the threads of my findings on the factual issues which I have already examined. First, the second defendant told the plaintiff on the evening of 26 March 2014 that (i) the DOT was in plain and simple English; (ii) the plaintiff could leave the Stevens Road property if he did not wish to sign the DOT; (iii) the DOT was simply a safeguard in the event that anything untoward happens to the plaintiff; and (iv) the legal effect of the DOT was that the plaintiff would be free to deal with his assets until his death. Second, the second defendant's father was present when these assertions were made. He did not contradict them and thus lent weight to them. Third, the plaintiff accepted these assertions as true because (i) he was in a state of acute grief; (ii) he wanted to give the second defendant some reassurance so that she would stop hounding him; and (iii) he thought that the second defendant's father legitimised his daughter's assertions.

70 It is undisputed that after he had signed the DOT, he continued to spend his monies for his own benefit, even taking the second defendant on holiday to France.[129] While he may well have done so using monies he obtained after he had signed the DOT, the point is that he used his assets for his personal benefit without drawing a distinction between assets which were beneficially his and assets which he and the second defendant held on trust for their son under the DOT. The DOT simply had no effect on the plaintiff's understanding as to how he was to handle his assets. I infer from this that he must have considered that, after signing the DOT, he was free to deal with his assets as he pleased.

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129 Plaintiff's Opening Statement dated 17 July 2017 at para 42.

71 The second defendant argues that the plaintiff must have known the effect of the DOT as early as 9 May 2014, when he made a second DOT in respect of the Scotts Road apartment.[130] It is undisputed that the plaintiff was properly advised on this matter and that he signed the DOT for the Scotts Road apartment willingly. He understood that its effect was to vest immediately his interest in the Scotts Road apartment into his son's name. But this was subject to a proviso that he would retain certain rights in the property, one of which is the right to collect rent on the property for his own benefit until his son was 21 years of age. The defendants say that the plaintiff, with the benefit of being properly advised on how a trust operates, would have realised how the DOT he signed in March was intended to operate. Therefore, his decision not to challenge that DOT until February the following year shows that he did so as an afterthought.

72 I do not agree. This is because the DOT for the Scotts Road apartment and the DOT of 26 March 2014 are very different documents. The DOT for the Scotts Road apartment was plainly a legally binding document, drafted by appointed solicitors, and it obviously took effect from the time he signed it. By contrast, the DOT of 26 March 2014 was a handwritten document which for a long time did not even see the light of day. The second defendant told him that it was simply a safeguard in the event that he dies unexpectedly. Therefore, nothing on the face of these documents and nothing about the circumstances in which they were signed would have readily suggested to the plaintiff that they would operate in the same way.

73 The defendants' remaining contention on the plaintiff's understanding of the DOT on 26 March 2014 is that he must have known how a trust operated

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130 Certified Transcript, 18 September 2017, p 11 at lines 6–7.

because he holds a Masters of Law or LLM in corporate and commercial law from University College London. I reject this contention. First, it is against the weight of the evidence above. Second, as the plaintiff says, his LLM was earned through distance learning some six to eight years ago, when he was performing National Service.[131] There is no evidence that he passed the module on corporate equity and trusts which he took for that course.[132] Accordingly, the mere fact that he has an LLM makes no difference to my assessment of his understanding of the DOT of 26 March 2014 at the time he signed it.

74 One may nevertheless ask: Why did the plaintiff not attempt to ascertain or at least clarify the true effect of the DOT of 26 March 2014 earlier? This issue concerns the plaintiff's conduct after 26 March 2014. The issue is crucial because it impacts upon the plaintiff's credibility and his narrative of what happened that night. This requires me to consider the plaintiff's perspective.

75 The evidence suggests that after the stormy night of 26 March, the couple settled into a new status quo. The DOT had been stored away in her safe, and neither of them referred to it again. The plaintiff was unaware that the second defendant had sent it to Mr Mitchell. He relied upon her advice to settle issues with his sister, and to deal with the Scotts Road apartment. In May 2014, the plaintiff and the second defendant decided to give their relationship a fresh start and soon, a second child was expected. It is likely that that after the parties reconciled, the plaintiff did not wish to jeopardise their relationship's new footing and the second defendant's second pregnancy.

76 It was only in December 2014 when Mr Mitchell copied him in an email that the plaintiff focused on the DOT: see [20]–[21] above. It was then that he

131 See Plaintiff's Affidavit of Evidence-in-Chief dated 12 May 2017 at para 3.

132 Plaintiff's Closing Submissions dated 28 August 2017 at para 113.

realised that he ought to seek legal advice on the DOT, which he did from his current solicitors. He testified that he was very upset when he learned of its true effect, but he decided not to confront the second defendant about it: he did not want to agitate her in her last trimester and he wanted the baby to be safely delivered.[133] I accept his explanation as truthful. After considering legal advice, he prepared a parting letter which he delivered to the second defendant on 12 February 2015. He told her then, for the first time, that he would not have signed the DOT if he had been properly advised on it. When they quarrelled on 12 February 2015, he asked her why she had not advised him to make a will. This was another demonstration that until December 2014, he understood that the DOT was to take effect upon his death, like a will. When the second defendant asked why the deed was at that point "suddenly an issue", he explained, "Because I have *only come* to realize that" [emphasis added], "that" referring to his earlier statement in the quarrel that he "disagree[s] with the whole premise of [the DOT]".[134]

77 In coming to these findings, I accept that the plaintiff is essentially a truthful witness. On the stand, he gave his answers in a forthright and honest manner. He also readily accepted that he lied to the second defendant twice, once at the lunch and then, when the question arose in his cross-examination, he conceded that he had lied again when he told her that a new will had been found in which he inherited half his mother's estate: see [13] above.

Conclusion on the first issue

78 Accordingly, I find on the first issue that on 26 March 2014, the second defendant did falsely represent to the plaintiff that the DOT would take effect

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133 Certified Transcript, 18 July 2017, p 12 at lines 1–11.

134 Plaintiff's Affidavit of Evidence-in-Chief dated 12 May 2017, p 155 at lines 303–305.

only upon his death, and that until then, he was entitled to deal freely with all his assets. I find that the plaintiff believed this representation because he was assured of its truth by the physical presence of the second defendant's father, who did not contradict his daughter, and because he was suffering from acute grief following the death of his mother, which made him vulnerable to the second defendant's influence.

Issue 2: Should the DOT be set aside because of the circumstances in which the plaintiff signed it?

79 I turn now to the second broad issue in this case, which is whether the DOT should be set aside on the ground of misrepresentation, mistake, undue influence and unconscionability. I consider each of these vitiating factors in turn.

Misrepresentation

80 The elements of misrepresentation are well-established. As the Court of Appeal held in *Panatron Pte Ltd and another v Lee Cheow Lee and another* [2001] 2 SLR(R) 435 at [14], the plaintiff must establish five elements to succeed in a claim on misrepresentation:

(a) First, there must be a representation of fact made by words or conduct.

(b) Second, the representation must be made with the intention that it should be acted upon by the plaintiff or by a class or persons which includes the plaintiff.

(c) Third, it must be proved that the plaintiff has acted upon the false statement.

(d) Fourth, it must be proved that the plaintiff suffered damage by so doing.

(e) Fifth, the representation must be made with the knowledge that it is false; it must be wilfully false, or at least made in the absence of any genuine belief that it is true.

81 The first and fifth elements are made out. The defendant made a representation of fact by words in telling the plaintiff that the DOT would leave him free to deal with the assets which were caught under the DOT until his death. This was a false representation. The DOT – if it is valid – had effect from the moment it was signed by the plaintiff and the second defendant, as the defendants now contend and as I have observed at [57(g)] above. And the second defendant knew, at the time she made the false representation, that it was false. She does not deny that she knew exactly how the DOT was to operate. Indeed, having drafted it herself, she must have known its true legal effect.

82 The second and third elements are also made out. The second defendant made this false representation with the intention of persuading the plaintiff to sign the DOT, as I have found. Indeed, she admitted at the confrontation on 12 February 2015 that she wanted the plaintiff to sign the DOT.[135] He had initially refused to sign the DOT because he did not want to give away all his assets, so she allayed this concern by lying to him that the DOT would take effect only upon his death. The plaintiff relied on this misrepresentation. That is why he changed his mind and decided to sign the DOT. And that is why he acted, in the months after he signed the DOT, as if the DOT had no effect.

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135 Plaintiff's Affidavit of Evidence-in-Chief dated 12 May 2017, p 153 at line 258.

83 Finally, the fourth element is made out. As a result of signing the DOT, the plaintiff has suffered damage in the form of losing his beneficial interest in all the assets he owned as at 26 March 2014. As I will explain below at [136] and [142], that is the true effect of the DOT.

84 For these reasons, the DOT should be rescinded on the ground of misrepresentation.

Mistake

85 The leading English case on setting aside a voluntary disposition on the ground of mistake is *Pitt and another v Holt and another* [2013] 2 AC 108 ("*Pitt v Holt*"). The principles in that case were adopted and applied by the Singapore High Court in *BMM v BMN and another matter* [2017] 4 SLR 1315 at [94]. A useful summary of those principles is found in *Kennedy v Kennedy* [2014] EWHC 4129 (Ch) at [36]:

> (a) There must be a distinct mistake as distinguished from mere ignorance or inadvertence or misprediction relating to some possible future event. Forgetfulness, inadvertence or ignorance can lead to a false belief or assumption which the court will recognise as a legally relevant mistake.
>
> (b) A mistake may still be a relevant mistake even if it was due to carelessness on the part of the person making the disposition, unless the circumstances are such as to show that he or she deliberately ran the risk, or must be taken to have run the risk, of being wrong.
>
> (c) The causative mistake must be sufficiently grave as to make it unconscionable on the part of the donee to retain the property. That test will normally be satisfied only where there is a mistake either as to the

legal character or nature of a transaction or as to some matter of fact or law which is basic to the transaction.

(d) The injustice of leaving a mistaken disposition uncorrected must be evaluated objectively but with an intense focus on the facts of the particular case. The court must consider in the round the existence of a distinct mistake, its degree of centrality to the transaction in question and the seriousness of its consequences, and make an evaluative judgment whether it would be unconscionable, or unjust, to leave the mistake uncorrected.

86 In my judgment, because of the second defendant's conduct, the plaintiff made the mistake that the effect of the DOT was that until the time of his death, he remained free to deal with his assets. This was the operative mistake of sufficient gravity which satisfies the test in *Pitt v Holt*. This mistake was not brought about by carelessness on his part but, as I have found, by the second defendant's misrepresentation, which he believed because of his altered mental state. It is a mistake of sufficient gravity because it strikes at the heart of the DOT, whose purpose is precisely to divest the plaintiff of his right to use his assets according to his wishes and vest that power in him and the second defendant jointly to be applied for the benefit of their son. It is also a causative mistake because, as I have found, had he not held this belief, he would not have signed the DOT. I consider that the seriousness of this mistake makes it unconscionable for the disposition not to be corrected because it is a disposition of serious consequence: the plaintiff has been deprived of a significant portion of his assets.

87 I should make clear that the above is the mistake which I find the plaintiff made *on the evening of 26 March*, when he was in a precarious mental

state. I should make clear that I have taken into consideration that his 11 February letter alludes to a mistake as to her intent: "It was only when David Mitchell told me that you have sent him a copy of the document last December that I realized that you intended to treat this as a legal document." If there was a mistake as to her intent, it may be regarded as a misprediction and not a mistake: see *Pitt v Holt* at [109]–[114]. I am of the view, taking into account the various factual findings which I have summarised at [69], that because of his acute grief, he did not on 26 March 2014 have any clarity of mind as to how or why it was exactly that the DOT did not have immediate legal effect. He genuinely accepted and believed, as he was told, that signing the DOT would leave him free to deal with his assets until his untimely death, whenever that might happen. I find that this was the mistake that was operative in his mind at the time he made the decision.

88 For the reasons above, I am persuaded that the plaintiff has made out his case on mistake, and that it is an independent ground upon which to set aside the DOT.

Undue influence

89 The law on undue influence is well-settled. In essence, there are two broad ways for a plaintiff to establish undue influence. First, the plaintiff may attempt to prove that the defendant has in fact exercised undue influence on him in procuring the transaction he seeks to set aside. This is known as "Class 1" undue influence. Second, the plaintiff may attempt to raise a presumption that the defendant has exercised undue influence. This requires proof of two requirements: (i) that there is a particular relationship which enabled one party to influence the decisions of the other; and (ii) the resulting transaction was manifestly disadvantageous to the other, *ie*, one that calls for an explanation:

Rajabali Jumabhoy and others v Ameerali R Jumabhoy and others [1997] 2 SLR(R) 296 ("*Rajabali*") at [184]; *Royal Bank of Scotland plc v Etridge (No 2)* [2002] 2 AC 773 ("*Etridge*") at [21]. Once these elements are proved, the burden of proof shifts to the defendant to show that he did not exercise undue influence on the plaintiff.

90 As regards the first requirement under presumed undue influence, a plaintiff may attempt to raise an irrebuttable presumption of a relationship of trust and confidence by showing that his relationship with the defendant falls under one of the legally recognised categories of relationships of trust and confidence. These include solicitor and client, parent and child, and doctor and patient; they are the functional equivalent in equity of the common law concept of *res ipsa loquitor*. This form of presumed undue influence is known as "Class 2A" undue influence: *Oversea-Chinese Banking Corp Ltd v Tan Teck Khong and another (committee of the estate of Pang Jong Wan, mentally disordered) and others* [2005] 2 SLR(R) 694 ("*Tan Teck Khong*") at [34]. It is also well-established that husband and wife is not one of the relationships to which the Class 2A principle applies: *Etridge* at [19]. Next, the plaintiff may also furnish actual proof that a relationship of trust and confidence exists. This form of presumed undue influence is known as "Class 2B" undue influence: *Tan Teck Khong* at [34]. In the present case, the plaintiff relies only on "Class 1" and "Class 2A" to establish undue influence, so I shall deal only with them below.

(1) "Class 1" undue influence

91 The requirements for actual undue influence are well-established. As Judith Prakash J (as she then was) explained in *Rajabali* at [186], in order to establish a plea of actual undue influence, a plaintiff must show that:

(a) the other party to the transaction (or someone who induced the transaction for his own benefit) had the capacity to influence the plaintiff;

(b) the influence was exercised;

(c) its exercise was undue; and

(d) its exercise brought about the transaction.

92 In my view, the second defendant had the capacity to influence the plaintiff for a number of reasons. First, she was his wife. Although he did not trust her enough to disclose to her the contents of his mother's will, she had previously advised him on matters of law: see [98] below. Second, he was in a state of grief and isolation, and thus susceptible to influence. She was aware of this, and acted with great urgency to take advantage of that susceptibility and of her capacity to influence him. Third, her attempt to persuade the plaintiff was legitimised by her father, who is a senior lawyer whom he respected and who was in their presence on the evening of 26 March 2014.

93 The second defendant exercised the influence she had by persistently asking him to sign the DOT and by misrepresenting to him its true legal effect. The exercise was undue because the plaintiff was persuaded to sign the DOT based on a lie that he would remain free to deal with his assets. In this regard, it is well-established that undue influence may arise from misrepresentation: *Etridge* at [103]. Furthermore, the plaintiff did not have the benefit of independent legal advice before signing the DOT. In these circumstances, it is clear to me that the second defendant "twisted the mind" of the plaintiff to have him sign the DOT: see *Daniel v Drew* [2005] EWCA Civ 507 at [31]. Finally, the second defendant's influence caused the plaintiff to decide to sign the DOT.

For these reasons, the DOT should be set aside on the ground of actual undue influence.

(2) "Class 2A" undue influence

94 The plaintiff also seeks to establish an implied retainer existing between him and the second defendant, and him and the second defendant's father. I begin here by accepting that as a matter of principle, an implied retainer is capable of giving rise to a solicitor and client relationship. Such a relationship creates an irrebuttable presumption that there was a relationship of trust and confidence that brings the case under the Class 2A analysis. The parties do not dispute this proposition.

95 The test for the existence of an implied retainer was stated by the Court of Appeal in *Anwar Patrick Adrian and another v Ng Chong & Hue LLC and another* [2014] 3 SLR 761 ("*Anwar Patrick Adrian*") at [49]: a retainer might be implied where, on an objective consideration of all the circumstances, an intention to enter into such a contractual relationship ought fairly and properly to be imputed to all the parties. It is essential to take into account the putative client's perspective by asking whether he reasonably believed that a solicitor-client relationship had arisen: *Law Society of Singapore v Uthayasurian Sidambaram* [2009] 4 SLR(R) 674 at [41], citing Jeffery Pinsler, *Ethics and Professional Responsibility: A Code for the Advocate and Solicitor* (Academy Publishing, 2007) at para 14-005. Also, it is essential to take into account the putative solicitor's perspective and to inquire as to whether he must have known that he was acting as a solicitor: *CIFG Special Assets Capital I Ltd (formerly known as Diamond Kendall Ltd) v Polimet Pte Ltd and others* [2016] 1 SLR 1382 ("*CIFG Special Assets*") at [105]. This forms the general approach to identifying an implied retainer.

96 In *CIFG Special Assets*, George Wei J at [118] listed a number of circumstances, taken from the case law, in which an implied retainer was found. In these cases, the solicitor:

(a) provided advice to the alleged putative client without qualifying the answers or informing the latter to seek independent advice;

(b) failed to clarify that he was not acting for the alleged putative client;

(c) signed off as the solicitor for the alleged putative client on a legally important document;

(d) issued an invoice that included work done and services rendered to the alleged putative clients; or

(e) took instructions from the alleged putative client.

97 In the present case, the parties' submissions also invite an opinion on the significance of the fact that it is the putative solicitor (*ie*, the second defendant) who initiates the alleged solicitor-client relationship by offering the client advice and services (*ie*, by presenting the DOT to the plaintiff for his signature), and not the client who seeks advice or services. As a matter of principle, I do not think the cases lay down any rule on whether such a circumstance rules out the existence of an implied retainer. The question is simply whether on an objective view an intention to enter into an implied retainer may be imputed to the parties. The fact that it was the putative solicitor who initiated the relationship may point to one inference or the other, as the case may be. An objective analysis will have to consider the effect of all the circumstances.

98 In my judgment, there was an implied retainer between the plaintiff and the second defendant at the time the plaintiff signed the DOT. The context, as the plaintiff correctly observes,[136] is that the second defendant is in fact a trained lawyer. She was the one who drafted the DOT. And she has a demonstrable familiarity with the law on trusts as she advised the plaintiff on holding the Scotts Road property on trust to avoid Additional Buyer's Stamp Duty. It is clear that, while the plaintiff did regard her as his wife, he also relied upon her *because* she was a trained lawyer. In this regard, I accept the plaintiff's evidence that the second defendant had on many occasions prior to 26 March 2014 advised the plaintiff on legal matters.[137] Most importantly, as I have found, the second defendant prepared the DOT for the plaintiff to sign on the evening of 26 March 2014 essentially on her own accord, as he had never instructed her to draw up such a document: see [40]–[41] above. Given that he had a history of approaching her for legal advice, there is merit in the plaintiff's submission that on that evening, the second defendant was "proffering her legal work product to the Plaintiff and demanding that he sign it".[138] And she failed eminently to qualify her work or advice, preferring instead to assert misleadingly that the DOT had been written in "plain, simple English" and required no explanation: see [57] above. He relied upon her as his closest legal advisor, albeit also as a wife.

99 On these facts, and having regard to the five circumstances listed in *CIFG Assets*, I find that there was an implied retainer, on the specific facts of this case, between the plaintiff and the second defendant at the time the plaintiff signed the DOT on 26 March 2014. The upshot is that there is an irrebuttable

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136 Plaintiff's Reply Submissions dated 8 September 2017 at para 57.

137 Certified Transcript, 19 July 2017, p 14 at lines 3–16; Certified Transcript, 20 July 2017, p 54 at lines 8–18.

138 Plaintiff's Reply Submissions dated 8 September 2017 at para 57.

presumption of the Class 2A type raised in favour of the plaintiff that there was a relationship of trust and confidence between him and the second defendant. Next, it is clear also that the DOT was manifestly disadvantageous to him. It divested him of all his assets at the time he signed it for nothing in return. The burden thus falls on the second defendant to show that she did not exercise undue influence on him. For the reasons I have already given, she clearly has not discharged that burden. Therefore, the DOT ought to be set aside on the ground that Class 2A undue influence has been made out.

Unconscionability

100 Finally, I turn to the doctrine of unconscionability. This is a doctrine of uncertain scope and existence in Singapore law. It currently possesses a narrow remit in English law, although that has not always been the position. By contrast, it has enjoyed lively development and application in other Commonwealth jurisdictions, including Australia and New Zealand. In this case, the plaintiff invites me to adopt the modern Australian version of the doctrine. To evaluate this contention, I find it appropriate for me first to examine the doctrine's origin and development in England. I will then briefly describe the Australian position. Having taken these perspectives in account, I will then examine the local context.

(1) Origin of the doctrine

101 The English courts of equity intervened to relieve prospective heirs from the disposition of their expectant estates on unfavourable terms. They were considered by the courts to warrant protection as they had sold their "expectancy" or reversionary interest at an undervalue in order to raise funds to satisfy some real or imagined immediate need, and the other party to the transaction had taken advantage of them. The relief existed to protect families

and their estates from ruin (*Cole v Gibbons* (1734) 3 P Wms 290 Ch at 293 *per* Lord Talbot) and to protect expectant heirs from their own prodigality (*Gwynne v Heaton* (1778) 1 Bro CC 1 Ch at 9 *per* Lord Thurlow LC). In *Earl of Chesterfield and Others Executors of John Spencer v Sir Abraham Janssen* (1751) 2 Ves Sen 125 ("*Earl of Chesterfield*") at 155–157, Lord Hardwicke LC explained that the doctrine applied on proof of actual fraud on the part of the heir's counterparty or on a presumption of fraud, inferred from the unconscionability of the bargain, which the counterparty bore the burden of rebutting, failing which the transaction would be set aside.

102 As the doctrine developed, there came a point where a person who sold a reversionary interest could obtain relief by simply proving that the sale was at an undervalue: see *Peacock v Evans* (1809) 16 Ves Jr 512, where Grant MR set aside the transaction solely on the basis of its undervalue, noting that "there was nothing dishonourable or immoral in [the buyer's] conduct" (at 518); see also *Bowes v Heaps* (1814) 3 V & B 117 at 121. The law was then changed by the Sales of Reversions Act 1867 (UK), now re-enacted in s 174 of the Law of Property Act 1925 (c 20) (UK), which provided that no purchase of a reversionary interest made bona fide and without fraud was to be opened or set aside "merely on the ground of under-value".

103 The 1867 Act did not remove the court's equitable jurisdiction to set aside unconscionable transactions. That jurisdiction was re-asserted by the Court of Appeal in Chancery in *Earl of Aylesford v Morris* [1861-73] All ER 300 ("*Earl of Aylesford*"). In that case, the plaintiff, soon after he came of age and while his father was alive, borrowed from the defendant a large sum. As security he gave the defendant bills which, with interest and discount, together exceeded 60% of the principal. The bills were renewed and, after the death of the plaintiff's father, the defendant sued the plaintiff for payment on the bills.

The plaintiff then applied for an injunction to restrain that action. The court granted the injunction. It held that his being an actual tenant in tail in remainder, instead of being merely an expectant heir, made no difference. Lord Selborne LC affirmed at 303 in the following terms the principle laid down by Lord Hardwicke (in *Earl of Chesterfield* at 157):

> These changes of the law [*ie*, the 1867 Act] have in no degree whatever altered the onus probandi in these case which, according to the language of Lord Hardwicke,
>
> > from the circumstances or conditions of the parties contracting – Weakness on one side, extortion and advantage taken of that weakness on the other
>
> – raise a presumption of fraud. Fraud does not here mean deceit or circumvention; it means an unconscientious use of the power arising out of these circumstances and conditions; and when the relative position of the parties is such as prima facie to raise this presumption, the transaction cannot stand unless the person claiming the benefit of it is able to repel the presumption by contrary evidence, proving it to have been in point of fact fair, just, and reasonable. …
>
> … [I]t is sufficient for the application of the principle, if the parties meet under such circumstances as to give the stronger party dominion over the weaker, in the particular transaction; and such power and influence are generally possessed, in every transaction of this kind, by those who trade on the follies and vices of unprotected youth, inexperience, and moral imbecility.

104 Lord Selborne's main statement of principle was approved by the House of Lords in *Hugh O'Rorke v John Joseph Bolingbroke* (1876-77) LR 2 App Cas 814. Notably, his Lordship also observed that a common feature of catching bargains with expectant heirs was that the heir would have entered into the transaction without parental or professional advice (at 303).

105 In *Fry v Lane* (1888) 40 Ch D 312, the plaintiffs were impoverished and uneducated workers – a plumber and a laundryman earning £1 a week – who sold the reversionary interests in their uncle's estate to the defendant for £170 and £270 respectively. They were advised on the sale by an inexperienced

solicitor. When their aunt died in 1886, the interests were each worth £730, and in 1878 when they sold them to the defendant, the interests were said to have been worth £475. Upon discovering this they brought an action for the sale to be set aside. Kay J gave them judgment and held that the principle in *Earl of Aylesford* applied. He analysed the cases and stated the law as follows (at 322):

> The result of the decisions is that where a purchase is made from a poor and ignorant man at a considerable undervalue, the vendor having no independent advice, a Court of Equity will set aside the transaction.
>
> …
>
> The circumstances of poverty and ignorance of the vendor, absence of independent advice, throw upon the purchaser, when the transaction is impeached, the onus of proving, in Lord Selborne's words, that the purchase was "fair, just and reasonable".

106 The plaintiffs in *Fry v Lane* were therefore not accorded the law's protection on account of their being expectant heirs but because they were, in Kay J's words, "poor, ignorant men, to whom the temptation of the immediate possession of £100 would be very great" (at 323).

(2) Developments in England and Australia

107 Subsequently, the doctrine of unconscionability in England, according to Dr David Capper, "effectively went into hibernation" for nearly 90 years between *Fry v Lane* in 1889 and *Cresswell v Potter* [1978] 1 WLR 255 ("*Cresswell*") in 1978: David Capper, "The unconscionable bargain in the common law world" (2010) 126 LQR 403 at 403 ("*Capper*"). Nevertheless, when the doctrine first resurfaced in England, it retained the essence of Kay J's and Lord Selborne's statements of principle. In *Cresswell*, the plaintiff was a divorcing wife who had transferred her half interest in the parties' matrimonial

home to the defendant husband in return for an indemnity against the liabilities under the mortgage on the home but for no other consideration. The defendant later sold the home, and the plaintiff claimed an entitlement to half the sale proceeds. Megarry J adopted a modern interpretation of *Fry v Lane*, and explained the law in terms of three main requirements, which together constitute a non-exhaustive example of a circumstance of "oppression or abuse of confidence which will invoke the aid of equity" (at 257G–H):

> The judge [*ie*, Kay J in *Fry v Lane*] thus laid down three requirements. What has to be considered is, first, whether the plaintiff is poor and ignorant; second, whether the sale was a considerable undervalue; and third, whether the vendor had independent advice. I am not, of course, suggesting that these are the only circumstances which will suffice; thus there may be circumstances of oppression or abuse of confidence which will invoke the aid of equity. …
>
> … Eighty years ago, when *Fry v. Lane* was decided, social conditions were very different from those which exist today. I do not, however, think that the principle has changed, even though the euphemisms of the 20th century may require the word "poor" to be replaced by "a member of the lower income group" or the like, and the word "ignorant" by "less highly educated." …

Megarry J went on to find that the plaintiff had fulfilled all three of the main requirements, and that the defendant failed to discharge his burden of proving that the transaction was "fair, just and reasonable" (at 259H). He therefore held that the plaintiff was entitled to half of the sale proceeds. *Cresswell* was applied to similar facts in *Backhouse v Backhouse* [1978] 1 WLR 243.

108 Subsequent English cases narrowed the position in *Cresswell* by embracing the requirement that the defendant must have "imposed the objectionable terms in a morally reprehensible manner, that is to say, in a way which affects his conscience": *Multiservice Bookbinding Ltd and others v Marden* [1979] Ch 84 ("*Marden*") *per* Browne-Wilkinson J (as he then was).

This *dictum* was approved by the Privy Council in *Boustany v Pigott* [1995] 69 P & CR 298. In that case, Lord Templeman took the view that unconscionability relates not just to the terms of the bargain but to the behaviour of the stronger party, which must be characterised by some moral culpability (at 303).

109 Elsewhere in the Commonwealth exist broader approaches to the doctrine. For example, in Australia, the leading High Court decision in *The Commercial Bank of Australia Ltd v Amadio and another* (1983) 151 CLR 447 ("*Amadio*") lays down the principle for setting aside an unconscionable transaction, "which may be invoked whenever one party by reason of some condition or circumstance is placed at a special disadvantage vis-à-vis another and unfair or unconscientious advantage is then taken of the opportunity thereby created" (at 462 *per* Mason J). Significantly, no overt unconscionable conduct or morally reprehensible behaviour is said to be required. Instead, in applying the *Amadio* principle, the court's task is to determine "whether the whole course of dealing between the parties has been such that, as between the parties, responsibility for the plaintiff's loss should be ascribed to unconscientious conduct on the part of the defendant": *Kakavas v Crown Melbourne Limited* [2013] HCA 25 at [18]. This is the approach the plaintiff suggests.

(3) The position in Singapore

110 I turn now to consider the position in Singapore. In this regard, the learned authors of *The Law of Contract in Singapore* (Andrew Phang Boon Leong gen ed) (Academy Publishing, 2012) ("*The Law of Contract*") say at para 12.219 that "[t]he Singapore position [on unconscionability] is not wholly clear. The only certainty might be that the doctrine of unconscionability is still in its formative stages of development." It is at least clear, however, that a broad and distinct doctrine of unconscionability, like that in *Amadio*, has not taken root in

Singapore, as the Court of Appeal observed in *Chua Chian Ya v Music & Movements (S) Pte* Ltd [2010] 1 SLR 607 at [17] and [24]. It is instructive, nevertheless, to examine the cases that have dealt with unconscionability.

111 In *Fong Whye Koon v Chan Ah Thong* [1996] 1 SLR(R) 801 ("*Fong Whye Koon*"), Warren Khoo J quoted approvingly from the decision of the High Court of Australia in *Blomley v Ryan* (1956) 99 CLR 362 ("*Blomley*"). In *Blomley*, Fullagar J at 405 observed that the circumstances adversely affecting a party who needs the aid of equity to set aside a transaction cannot be "satisfactorily classified", but their common characteristic is that they have the effect of "placing one party at a serious disadvantage vis-à-vis the other". Relying on Fullagar J's statement, Khoo J said that although the principle on unconscionable bargains originated to protect young expectant heirs from being swindled of their inheritance, now it "has been extended to all cases in which the parties contracting do not meet on equal terms" (at [7]).

112 Two subsequent High Court cases, where *Fong Whye Koon* was not considered, take the view that *Cresswell* represents the law in Singapore: *Rajabali* ([89] *supra*) at [196] and *E C Investment v Ridout Residence Pte Ltd and another (Orion Oil Ltd and another, interveners)* [2011] 2 SLR 232 ("*E C Investment*") at [63]. In *Rajabali*, Prakash J declined to expand the first criterion in *Cresswell* from poverty and ignorance to a general form of "special disability" or "special disadvantage" in line with the *Amadio* principle (at [198]). In her view, this is because inequality of bargaining power is not a sufficient reason to set aside a transaction (at [198]). In *E C Investment*, Quentin Loh J agreed with Prakash J's rejection of *Amadio* principle and held at [66] that a doctrine of unconscionability, in that form, was not part of Singapore law. He opined that adopting such a doctrine would "inject unacceptable uncertainty in commercial contracts and in the expectations of men of commerce".

113 In this case, the plaintiff's counsel encourages me to embrace the *Amadio* principle, at least in the area of voluntary dispositions, the DOT being such a disposition.

114 In evaluating this submission, I first record my agreement with the point made in *Rajabali* and *E C Investment* that inequality of bargaining power is not a sufficient reason to set aside a contract. An approach based purely on inequality of bargaining power would undermine the certainty which is critical to commercial transactions. The *Amadio* principle is not, of course, based purely on such inequality. However, neither does it require overt unconscionable conduct. Instead, the court undertakes a broad inquiry to determine whether fault can be ascribed to the defendant's unconscientious conduct. In my view, this breadth of this inquiry would promote too much uncertainty. Furthermore, the exclusion of a requirement for overt unconscionable conduct would appear to undermine the historical fraudulent basis of the doctrine: see [103] above. In my view, these reasons militate in favour of applying the test in *Cresswell*.

115 Should the doctrine of unconscionability take a different approach along the lines of the *Amadio* principle for voluntary dispositions, as the plaintiff suggests? It is clear that such a disposition would not attract the importance of ensuring commercial certainty, which *Rajabali* and *EC Investments* emphasises. Indeed, the law's interest in protecting bargains, and in the security of contracts, is not engaged in the case of a gift, even if made by deed: *Pitt v Holt* ([85] *supra*) at [114] *per* Lord Walker, citing with approval Dominic O'Sullivan, Steven Ballantyne Elliott & Rafal Zakrzewski, *The Law of Rescission* (Oxford University Press, 2008) at para 29.22. The law recognises a distinction between voluntary dispositions and dispositions supported by consideration. An example of this distinction is the rule that if the promise to create a trust is contained in a deed unsupported by consideration, it will be unenforceable by an equitable

decree for specific performance since equity will not assist a volunteer: *Sheares Betty Hang Kiu v Chow Kwok Chi and others* [2006] 2 SLR(R) 285 ("*Sheares Betty*") at [24], citing Underhill & Hayton, *Law Relating to Trusts and Trustees* (Butterworths, 15th Ed, 1995) at p 7.

116 Nevertheless, in my view, the mere fact that a transaction is a voluntary disposition should not make it more likely that it was procured by unconscionable conduct. Such dispositions are made for a wide variety of reasons, and in the family context, many a voluntary disposition may appear unduly generous even if legitimate. Of course, neither should one deny the existence of room for abuse in that context. But the *Cresswell* test already takes that into account: it requires the transaction to be at an undervalue.

117 With that in mind, I turn to the *Cresswell* criteria. The three primary requirements are: first, the plaintiff must be poor and ignorant, in the sense that he is of a lower income group and is less well educated (Megarry J's gloss on Kay J's original first requirement); second, the transaction must be at an undervalue; and third, the plaintiff must not have received independent legal advice. Alternatively, "there may be circumstances of oppression or abuse of confidence which will invoke the aid of equity": *Cresswell* at 257F. As *Cresswell* concerned the three primary requirements, Megarry J did not give the alternative limb of oppression or abuse of confidence any further consideration. It is important, however, to bear in mind the fact that the three requirements are, taken together, only a non-exhaustive example of a circumstance of oppression or abuse of confidence, as I have mentioned at [107] above.

118 In the present case, the first limb of *Cresswell* is clearly not made out because the plaintiff is not of low income and is well-educated. Oppression or abuse of confidence is therefore the limb under the *Cresswell* test with which I

am concerned. The issue of principle at hand, therefore, is the true content of this limb. In this connection, I begin by noting the historical characteristics of the expectant heir involved in a catching bargain. The heir was in financial need, often because he was put on a thin allowance. He felt unable to reveal his financial need to his family because he was afraid to endanger his expectancy. Unable to communicate with his family, he was left with his inexperience and without proper advice. He was therefore easily tempted to trade his future inheritance for money up front, which might in turn lead him to a dissolute life: Catherine MacMillan, "*Earl of Aylesford v Morris*" in *Landmark Cases in Equity* (Charles Mitchell and Paul Mitchell eds) (Hart Publishing 2014) at p 332. So to a degree, the expectant heir was poor and ignorant, though not in the sense of being of a lower income group and being uneducated.

119 Importantly however, Lord Hardwicke, in deciding such a case in *Earl of Chesterfield*, did not restrict the doctrine to those circumstances. His Lordship's general principle was that equitable fraud which vitiates a transaction may be presumed "from the circumstances or conditions of the parties contracting: weakness on one side, usury on the other, or extortion and advantage taken of that weakness" (at 157). In my view, this is the principle that Megarry J must have sought to preserve under the test of "oppression and abuse of confidence" in *Cresswell*. Crucially, under that test, the requirements of undervalue and lack of independent advice do not lose significance. They remain important because they were the very factors present in the early cases decided by Lord Hardwicke and Lord Selborne which led to the finding of equitable fraud in the first place.

120 Thus, returning to the words of Lord Hardwicke in *Earl of Chesterfield*, it is possible to formulate two requirements for what amounts to oppression or abuse of confidence. First, there must be weakness on one side. Such weakness

could arise from poverty, ignorance or other circumstances, like acute grief in this case. Lack of independent advice would almost always deepen the weakness. Second, there must be exploitation, extortion or advantage taken of that weakness. A transaction at an undervalue would be a necessary component of this requirement.

121 In formulating these two criteria, I am aware that in *Rajabali*, Prakash J declined to expand the first primary criterion in *Cresswell* from poverty and ignorance to a general form of "special disability" or "special disadvantage" in line with the *Amadio* principle (at [198]). Her comments were in the context of adopting the whole of the *Amadio* principle. In the case at hand, while I have suggested weakness as one of two requirements for establishing oppression or abuse of confidence, I have also set out a second requirement of exploitation, extortion or advantage taken. In other words, the test retains the need for overt unconscionable conduct which *Amadio* does not. This second criteria is narrow and meets the concern that inequality of bargaining power, in itself, cannot vitiate a transaction. It also meets the concern expressed in the 1867 Act not to set aside transactions "merely on the ground of under-value".

122 Finally, once these two elements are established, it will be for the defendant to show that the transaction was, in the words of Lord Selborne in *Earl of Aylesford*, "fair, just and reasonable" (at 303): *Cresswell* at 259H; *Chitty on Contracts* (Hugh Beale gen ed) (Sweet & Maxwell, 32nd Ed, 2015) at para 8-139. If he is unable to do so, then the transaction is liable to be set aside on the ground of unconscionability.

(4) Decision

123 Turning to the facts of this case, I find that the first element is made out. The plaintiff was in a state of weakness at the time he signed the DOT due to his grief and isolation, his relationship with the second defendant, his lack of independent legal advice, and his trust in her ability as a lawyer. These circumstances created a window of opportunity for oppression. The second element is also made out. The second defendant deepened that window of opportunity by asking him to leave. Misrepresenting to him that the DOT would take effect only upon his death, she took advantage of his emotionally vulnerable state in order to persuade him to part with the entirety of his assets, which were substantial. Lastly, the DOT, being made voluntarily, was undoubtedly a transaction at an undervalue.

124 These two elements having been established, it falls on the second defendant to persuade me that the DOT is fair, just and reasonable. I have no doubt that it was not. The plain effect of the DOT, as the plaintiff emphasised to the second defendant on 12 February 2015, was to make him a pauper on the day he signed it, because it had the effect of stripping him of his beneficial entitlement to all his assets. The DOT was not a fair and reasonable means by which he was to provide for his family and must be set aside on the ground of unconscionability.

125 Before leaving this section, I highlight that in adopting and adapting the *Cresswell* test, I have deliberately avoided the somewhat narrower present English limitation requiring morally reprehensible conduct on the defendant's part. The rationale for my doing so may be explained by reference to the case of *Credit Lyonnais Bank Nederland NV v Burch* [1997] 1 All ER 144 ("*Burch*"). In that case, the defendant was procured by her employer to mortgage her flat

as a security without limit for an increase in his company's overdraft. She did so without legal advice and without knowledge of the company's indebtedness to the bank. After the company became insolvent, the bank issued proceedings to possess her flat. The English Court of Appeal held that she was presumed to have mortgaged her flat under her employer's undue influence because the transaction was manifestly disadvantageous to her. It held also that the bank had failed reasonably to avoid being fixed with constructive notice of that undue influence, with the result that the legal charge on the flat was set aside.

126 Unconscionability was not pleaded. Millett LJ suggested that the case could have been run on that ground, but if so, the plaintiff would have had to show additionally that the defendant was "morally reprehensible" in procuring the transaction (at 153*a*). As a matter of principle, it seems to me that the frame, "morally reprehensible", is more appropriately regarded as a characterisation of the facts, rather than as an element to be proved. Moral reprehensibility would be present in most cases where a plaintiff has been exploited or taken advantage of, but the label perhaps overemphasises the need for subjective, high moral judgment. By imposing it as an additional requirement, the English courts may have introduced a gloss that could have been perceived by the defendant's counsel in *Burch* to be more restrictive than intended, which in turn may be why he did not rely on it. Yet on the facts of that case, it is not clear whether the court had any reason apart from the manifestly disadvantageous transaction itself to infer that undue influence had been exercised. Millett LJ concluded that "[n]o court of equity could allow such a transaction to stand", being a transaction "which, in the traditional phrase, 'shocks the conscience of the court'" (152*g*–*h*). There was no direct evidence of a relationship of trust and confidence between the defendant and her employer in that case. Millett LJ inferred the relationship simply from the improvidence of the transaction. In my view, *Burch*

may have been more satisfactorily dealt with under the revised *Cresswell* criteria adopted in the present case. Indeed, as Nourse LJ said in *Burch* at 151*b*–*f*, it was "very well arguable that [the defendant] could, directly against the bank, have had the legal charge set aside as an unconscionable bargain" on the authority of *Earl of Aylesford*, *Fry v Lane* and *Cresswell*.

Conclusion on the second issue

127 I have, in this case, considered four equitable remedies. I close by outlining the factual findings that are foundational to the plaintiff's success on each of them.

128 First, misrepresentation is essentially the making of a false statement by a defendant which induces a plaintiff to do a certain act. In the present case, as I have summarised at [69], the plaintiff relied on the second defendant's misrepresentation that the DOT takes effect only upon his death, and his reliance on that misrepresentation in signing the DOT, are the critical facts.

129 Next, the doctrine of mistake, for the purpose of setting aside voluntary transactions, focuses simply on whether the party entering that transaction by reason of a mistake of sufficient gravity. In the present case, the factual matrix of the second defendant's misrepresentation explains the cause of the plaintiff's mistake. That mistake, which is the critical fact for his claim on mistake, is his is mistaken belief at the time he signed the DOT that the DOT would take effect only upon his death.

130 Undue influence is principally concerned with pressure exercised by virtue of a relationship: *The Law of Contract* ([110] *supra*) at para 12.096. Thus, in the present case, the critical facts on the Class 2A form of this remedy concern (i) the circumstances under which the DOT was signed which go towards

establishing an implied retainer between the plaintiff and the second defendant and (ii) the fact that the DOT is manifestly disadvantageous to him. The fact of misrepresentation is strictly not necessary this analysis because the burden falls on the second defendant to show that she did not exercise undue influence. The critical facts on Class 1, on the other hand, concern the second defendant's exercise of influence on the plaintiff, and therefore overlap with the facts which go towards unconscionability.

131 Unconscionability is concerned with overt unconscionable conduct on the defendant's part. In the present case, the critical facts on this doctrine are the plaintiff's weakness, constituted among other things by his acute grief and sense of isolation, and also the second defendant's exploitation of that weakness by way of misrepresentation and exertion of pressure. In this context, it is not surprising that Class 1 undue influence and unconscionability depend on the same facts to be established. The overlap between the doctrines of undue influence and unconscionability is well-documented, and it has been asked whether there is any distinction between the two: see *eg*, Andrew Phang, "Undue Influence – methodology, sources and linkages" [1995] JBL 552; *Capper* at p 418. Nevertheless, Professor Phang (as he then was) accepted at p 569 of his article that "a situation of unconscionability need not (unlike one pertaining to undue influence) necessarily entail a fiduciary relationship". Moreover, cases like *Burch* suggest that it remains important to preserve an independent life for the ancient remedy of unconscionability to police transactions which reflect manifest exploitation.

132 Fundamentally, where a case plainly presents the facts of weakness in one party being exploited by another, those facts deserve to be confronted directly by the court, to whom the more specific hurdles of undue influence may justifiably appear less important or perhaps less suited to the analysis. In the

present case, the court is faced with a trust over "all assets, both personal and immoveable, owned by [the plaintiff], whether legally or beneficially" on a completely voluntary basis. This is sufficiently onerous to cry out for an explanation. There is no doubt that the second defendant's exploitation of the plaintiff's grief, isolation and lack of independent advice to lay claim to all he owns is properly to be described as an act of oppression and abuse of confidence that shocks the conscience of the court.

Issue 3: Should the DOT be set aside because it is a legally defective instrument?

133 I will turn now to analyse whether the DOT is a legally valid instrument on its own. The following issues are raised by the parties' submissions, and I consider them in sequence:

(a) Is the DOT void because it does not define the trust property with reasonable certainty?

(b) Does the trust property extend to the plaintiff's interest under his mother's will, and if so, what is the scope of that interest?

Does the DOT define the trust property with reasonable certainty?

134 The plaintiff contends that the DOT is void because the trust property is not indicated with sufficient certainty. The test for voidness for uncertainty was described by the House of Lords in *Whishaw and another v Stephens and others, In re Gulbenkian's Settlement* [1970] 1 AC 508. While the uncertainty in that case concerned the class of beneficiaries to which the trust applied, their Lordships opined in general terms on the language necessary to create a trust for persons. Thus, Lord Reid observed at 517F that "[a] client must not be penalised for his lawyer's slovenly drafting", and that the court's task was to

consider whether underlying the words used any reasonably clear intention can be discerned. Lord Upjohn at 522B-D gave further guidance on the court's approach:

> There is no doubt that the first task is to try to ascertain the settlor's intention, so to speak, without regard to the consequences, and then, having construed the document, apply the test. The court, whose task it is to discover that intention, starts by applying the usual canons of construction; words must be given their usual meaning, the clause should be read literally and in accordance with the ordinary rules of grammar. But very frequently, whether it be in wills, settlements or commercial agreements, the application of such fundamental canons leads nowhere, the draftsman has used words wrongly, his sentences border on the illiterate and his grammar may be appalling. It is then the duty of the court by the exercise of its judicial knowledge and experience in the relevant matter, innate common sense and desire to make sense of the settlor's or parties' expressed intentions, however obscure and ambiguous the language that may have been used, to give a reasonable meaning to that language if it can do so without doing complete violence to it. The fact that the court has to see whether the clause is "certain" for a particular purpose does not disentitle the court from doing otherwise than, in the first place, try to make sense of it.

135 In the present case, the clause in the DOT that the plaintiff impugns for uncertainty reads: "… all assets, both personal and immoveable, owned by me, whether legally or beneficially …". In particular, the plaintiff's counsel argues that the word "owned by me" is ambiguous because it is capable of being combined with a number of auxiliary verbs to read, for example, "which are owned", "which are and shall be owned" or "which may be owned".[139] As the latter two interpretations cover future property, which cannot be the subject of a trust, and as the DOT does not contain a severability clause which preserves the validity of the DOT as to trust property defined with reasonable certainty, the entire DOT should be invalidated.[140]

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139 Certified Transcript, 17 July 2017, p 110 at lines 16-24.

140 Certified Transcript, 17 July 2017, p 111 at lines 9-17.

136 I do not accept this submission. Bearing Lord Upjohn's guidance in mind, I consider that on a plain reading, the clause provides that all the assets the plaintiff "owned" (in the past simple tense) at the time he signed the DOT would become the subject of the trust created by the DOT. No one before the start of the trial ever suggested that the clause be read in any other way. The plaintiff himself understood that to be meaning of the clause: that is why he resisted signing the DOT initially. And that is why after being advised on the DOT he later claimed that the second defendant, by procuring his signature on it, had made him a "pauper".[141] The defendants do not suggest that the DOT covers future property. Their argument is that the plaintiff's interest in his late mother's estate subsisted at the time he signed the DOT, not that it accrued to him after he signed the DOT but was caught by the DOT's language. The nature of that interest, and whether it has the effect for which the defendants contend, is a separate matter which I shall consider below. The DOT expresses with reasonable certainty that the trust it created was intended to extend to all the plaintiff's assets as at 26 March 2014.

Does the trust property extend to the plaintiff's interest under his mother's will, and if so, what is the scope of that interest?

137 The plaintiff argues that any inheritance obtained from his mother's will is future property. Relying on *Wong Moy (administratrix of the estate of Theng Chee Khim (decd) v Soo Ah Choy* [1995] 3 SLR(R) 822, he argues that he had no interest in her estate at the time, as the estate was still under administration.[142] The defendants, on the other hand, argue that as at the time of the DOT, the plaintiff already had a right to enforce the proper administration of his late mother's will. That right was a chose in action, and the plaintiff by the DOT

141 Plaintiff's Affidavit of Evidence-in-Chief dated 12 May 2017, p 156 at line 355.

142 Plaintiff's Opening Statement dated 17 July 2017, paras 156–161.

created a trust over it. The trust has also since captured the fruits of the plaintiff's exercise of that chose in action, which comprise the assets he has been apportioned under the deed of family arrangement after terminating with his sister the testamentary trust under his late mother's will.

138 It is well-established that a beneficiary of a will has an equitable right or a chose in action to have the deceased estate properly administered, and such a right may be the subject of a settlement: *Sheares Betty* ([115] *supra*) at [38]. In *In Re Maye* [2008] 1 WLR 315, Lord Scott of Foscote, citing the well-known case of *Commissioner of Stamp Duties (Queensland) v Hugh Duncan Livingston* [1965] AC 694 at 708 and *Lord Sudeley and others v The Attorney-General (on behalf of Her Majesty)* [1897] AC 11 at 18, held that the residuary legatee's interest under an unadministered will was a "proprietary interest capable of assignment by its proprietor, of devolution as an asset of her estate on her death and of any other incidents of proprietary choses in action" (at [16]).

139 In addition, even though the interest may at the time of its disposition be only a chose in action, the disponee will be regarded as entitled to the property which the exercise of the chose in action would have granted the disponor. Thus Buckley J said in *In re Leigh's Will Trusts* [1970] 1 Ch 277 at 282B, "[i]f a person entitled to such a chose in action can transmit or assign it, such transmission or assignment must carry with it the right to receive the fruits of the chose in action when they mature." This proposition was approved by Lord Templeman in *Marshall (Inspector of Taxes) v Kerr* [1994] 1 AC 148 at 158A.

140 This being the case, the plaintiff argues that even if the trust created by the DOT extends in any way to the plaintiff's interest under his mother's will, it extends only to his right to withdraw an allowance of $10,000 from his mother's estate every month:[143] see [9] above. This is because the plaintiff

obtained his share of his late mother's estate not by exercising his right to have the estate administered properly. He did it by (i) entering into a deed of family arrangement with his sister concerning how the assets of the estate should be apportioned between them, (ii) exercising his right under *Saunders v Vautier*, with his sister as co-beneficiary of their late mother's will, to terminate their mother's testamentary trust, and then (iii) dividing the assets according to the agreement contained in the deed of family arrangement. Qualitatively therefore, the plaintiff by choosing this course of action was not exercising his right to enforce the proper administration of his mother's estate. In fact, he could not plausibly be regarded to have exercised that right: the will prescribes the division of the estate into "equal shares" as between the plaintiff and his sister, whereas the division agreed under deed of family agreement was unequal in terms of both number and value of the assets under the estate. What the plaintiff did was to exercise, jointly with his sister, his right under *Saunders v Vautier* to terminate their mother's testamentary trust, and then contractually to apportion between themselves the assets under that trust by way of the deed of family arrangement.

141 The defendants contend that the DOT covers the plaintiff's share of the estate as settled under the deed of family arrangement. They argue that the *Saunders v Vautier* principle confirms that the beneficiaries collectively have the beneficial interest in the property and have the right to bring the trust to an end.[144] This right, on the part of the plaintiff, would have existed at the time the DOT was signed. Under the DOT, the plaintiff purported to place "all" his assets on trust for the first defendant, and that could be read as including his right under *Saunders v Vautier* to terminate his mother's testamentary trust. This last point is a complex point that would have benefited from full arguments, which were

143 Plaintiff's Closing Submissions dated 28 August 2017 at para 148.

not made, in part because the plaintiff responded substantively to the point in his late written reply. The plaintiff's response is to highlight that the apportionment of the estate's assets was not a given, but was contingent on (i) a contractual arrangement with his sister; and (ii) his sister's decision to exercise her right under *Saunders v Vautier* jointly with him. Having not responded to this argument, however, the defendants may simply have taken the view that the plaintiff, having held his *Saunders v Vautier* right on trust under the DOT, and having exercised that right with his sister, exercised it in keeping with his fiduciary duty to the first defendant under the DOT. On this hypothesis, the fruits of his exercise of the right still comprise the part of his mother's estate which he was apportioned and which he continues to hold on trust for the first defendant under the DOT.

142 I did not pursue these points with counsel and I highlight them only briefly here because it is not strictly necessary for me to decide the issue. My findings on the plaintiff's primary case and my conclusion that the DOT defines the trust property with sufficient certainty are sufficient to dispose of this case. To the extent that actionable damage is required to establish misrepresentation, the plaintiff was already a man of substantial means at the time he signed the DOT, with two apartments in the Marina Bay Sands area. These assets are within the scope of the DOT. The points discussed here are perhaps more relevant to the claim on unconscionability, as they make clear the possible extent of the voluntary disposition. Even in that regard, nevertheless, the specific extent of the plaintiff's wealth is less important than the fact that the second defendant intended to secure its fullest possible measure. Her attempt to do so – in the plaintiff's moment of vulnerability – is that which shocks the conscience of the court.

Judgment

143 In the result, the DOT of 26 March 2014 is set aside. I shall hear parties on costs.

Valerie Thean
Judge

Dr Michael Hwang SC and Derric Yeoh (Michael Hwang Chambers LLC) (instructed) and Anthony Lee, Loh Wai Mooi and Wang Liansheng (Bih Li & Lee LLP) for the plaintiff;
Kenneth Tan SC (Kenneth Tan Partnership) for the first defendant;
Suresh s/o Damodara and Clement Ong (Damodara Hazra LLP) for the second defendant.