IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2017] SGHC 95

Suit No 651 of 2016

Between

Ong Teck Soon (executor of the estate of Ong Kim Nang, deceased)

… *Plaintiff*

And

(1) Ong Teck Seng
(2) Ong Hwe Leng

… *Defendants*

JUDGMENT

[Tort] — [Conversion]

[Restitution] — [Unjust enrichment]

[Limitation of actions] — [Particular causes of action] — [Tort]

[Civil Procedure] — [Damages] — [Interest]

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v
Ong Teck Seng and another

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14, 15 February; 13 March 2017

5 May 2017 Judgment reserved.

Steven Chong JA:

Introduction

1 This is a claim brought by one of the two executors of the will of the late Ong Kim Nang ("the Testator") against the first defendant for the unauthorised issuance of two cheques which resulted in the withdrawals of moneys from the Testator's OCBC Bank Account No XXX-XXXXXX-001 ("the OCBC account"). The second defendant is the other executor of the said will ("the Will") and was added as a necessary party as she was unwilling to provide her consent to be added as a plaintiff. All the parties in this action are siblings and children of the Testator. It should be stated at the outset that there is no dispute as regards the validity of the Will.

2 Under the Will, the Testator made specific provisions for the distribution of his estate to his wife, Mdm Tan Ai Cheng ("Mdm Tan"), and his seven children, including the parties to this action. In particular, he left all

the moneys in his bank accounts to Mdm Tan absolutely. The first defendant claimed that *three days* before the Testator's passing, the Testator, "in contemplation of his impending death", instructed him to use pre-signed cheques to draw a cheque of $500,000 ("the gift cheque") to himself as a gift and a further cheque of $613,000 ("the trust cheque") to be held on trust for Mdm Tan's expenses and for the upkeep of the family property at No 9 Guok Avenue, Singapore 119639 ("the family property"). These two cheques effectively emptied the OCBC account, save for a token balance of about $5,000.

3 The pivotal issue is whether the burden is on the first defendant to *prove* that the two cheques were authorised by the Testator or on the plaintiff to *disprove* otherwise. As the withdrawals were made more than six years *prior* to the institution of the proceedings, there is a further question whether the claims are time-barred in any event, which in turn depends on whether the period of limitation should not begin to run until after discovery of the concealed fraud, if any.

Background facts

4 The Testator passed away on 28 May 2010. Under his Will dated 28 October 2003, the Testator gave all moneys held in his thirteen bank accounts and time deposits to Mdm Tan absolutely (subject to the right of survivorship operating in favour of any joint account holders).[1] These moneys amounted to $2,606,077.19 in total, of which the moneys under the gift cheque and the trust cheque comprised about half.[2]

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1 Agreed Bundle ("AB"), pp 22–23.

2 Affidavit of Evidence-in-Chief ("AEIC") of Ong Teck Soon ("P's AEIC"), para 5.

5 The Testator also gave life interests in the family property to Mdm Tan and the second defendant. Along with the first defendant's family, they were living in the family property at the time of the Testator's death. The interest in the remainder of the family property was to be divided equally among the plaintiff, the first defendant and the Testator's sixth child, Ong Teck Huat. The residue of his estate, including shares in various Singapore and Malaysia listed companies, was also to be divided equally among the plaintiff, the first defendant and Ong Teck Huat.

6 Mdm Tan passed away on 25 November 2013.[3] Under Mdm Tan's will, the residue of her estate (including the moneys inherited from the Testator) is to be distributed equally among the plaintiff, the first defendant and Ong Teck Huat.[4] It is undisputed that if the plaintiff prevails in this action, the sums will be restored to the Testator's estate, paid into Mdm Tan's estate and subsequently distributed to the beneficiaries under Mdm Tan's will.

7 In this action, the plaintiff claims that the first defendant made unauthorised disposals of the following assets belonging to the Testator's estate:

(a) The gift cheque of $500,000;

(b) The trust cheque of $613,000; and

(c) Two Rolex Oyster watches, one "half-gold" and one "full-gold" ("the two Rolex watches").

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3 P's AEIC, para 16.

4 AB, pp 25–26.

The two cheques

8 There is no dispute that the two cheques were drawn on the Testator's OCBC account on 31 May 2010. It is also not disputed that the identity of the payees and the sums for the two cheques were filled in by the first defendant. The gift cheque was made out as a cash cheque and was dated 25 May 2010. It was encashed and deposited into the first defendant's POSB Savings Account No XXX-XXX84-0 ("the first defendant's POSB savings account") at first instance. The trust cheque was made payable to Mdm Tan and was likewise dated 25 May 2010. It was initially deposited into DBS Bank Account No XXX-X-XXX320 which was jointly held by Mdm Tan and the first defendant's wife ("Mdm Tan's joint account"). On or about 9 July 2010, the sum of $615,000 was withdrawn from Mdm Tan's joint account and deposited into POSB Bank Account No XXX-XXX51-0 belonging to the first defendant and his wife.

9 The only disputed factual issue in relation to the two cheques is whether the issuance of the two cheques and the withdrawals thereunder were authorised by the Testator as claimed by the first defendant. According to the first defendant, the Testator's instructions were conveyed to him orally at the hospital on 25 May 2010 and he had prepared the cheques on those instructions in the Testator's presence, without any other witnesses. The second defendant claims to have no personal knowledge of the Testator's instructions even though she visited the Testator at the hospital daily during his last days.

10 The plaintiff commenced this suit after he discovered in November 2014 that the moneys under both cheques had been deposited into the first defendant's POSB savings account and Mdm Tan's joint account in May 2010. According to him, he found out about the withdrawals only sometime in

May 2011 when the estate's solicitors, Wee Swee Teow & Co, was preparing the schedule of assets for the Testator's estate ("the Schedule of Assets"). The matter was revisited in 2014 when the family was preparing to apply for a grant of probate for Mdm Tan's estate. It was then that the plaintiff obtained images of the two cheques upon the advice of the estate's solicitors. It is worth noting that this account expressly contradicts the defendants' narrative, namely that the first defendant had informed all his siblings of the Testator's instructions at the Testator's funeral on 2 June 2010.[5] More will be said about this alleged disclosure below.

Rolex watches

11 In addition to the moneys withdrawn under the two cheques, the plaintiff also seeks delivery up of the two Rolex watches. This claim was introduced pursuant to Amendment No 1 to the statement of claim. Under the Will, the two Rolex watches form part of the residue of the estate which is to be distributed equally among the plaintiff, the first defendant and Ong Teck Huat. The first defendant accepts that *prima facie*, both watches belonged to the Testator.[6] The issue here is whether the two Rolex watches were gifted to the first defendant during the Testator's lifetime, such that the watches did not form part of the estate at the point of the Testator's death. This claim was introduced late in the day because the plaintiff only learned of the first defendant's gift allegation on or about 24 July 2016.[7]

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5 Reply, para 4.

6 First defendant's Closing Submissions ("D1 Submissions"), para 85.

7 Reply, para 3.

Abandoned claim for the cheque of $20,000

12 A claim for an additional cheque of $20,000 was initially pleaded but was withdrawn by the plaintiff at the start of the trial *after* speaking to his uncle, Mr Oan Chim Seng ("Mr Oan"). This cheque was payable in cash and, according to the images of the cheque, was deposited into the first defendant's account.[8] According to the first defendant, the Testator had issued a cheque of $20,000 in *April 2010* (when he was still alive) to reimburse Mr Oan in respect of his agreed contribution for the funeral expenses of a relative in China.[9] For some unknown reason, that cheque was dishonoured. The Testator purportedly instructed the first defendant on 25 May 2010 to issue a fresh cheque for $20,000 to Mr Oan to reimburse him.[10]

13 It is common ground that when the first defendant allegedly prepared the $20,000 cheque on 25 May 2010, he had intended to deposit this cheque into his own personal account and would thereafter issue his own personal cheque to reimburse Mr Oan for the $20,000.[11] From Mr Oan's affidavit of evidence-in-chief ("AEIC"), this was in fact how he received the $20,000 – through a personal cheque issued from the first defendant's account.[12]

14 The plaintiff dropped the claim in respect of this $20,000 cheque only after obtaining independent verification that $20,000 was in fact received by Mr Oan.[13] It is necessary to emphasise that the plaintiff *did not* concede that

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8 AB pp 14–15; Statement of Claim (Amendment No 1) ("SOC-1")), para 16.

9 AEIC of Ong Teck Seng ("D1 AEIC"), paras 44–45; AEIC of Oan Chim Seng ("Oan AEIC"), paras 4–7; NE 14/02/2017, p 38:3–8.

10 First defendant's Defence (Amendment No 3) ("Defence-3"), para 10(j)(iii); D1 AEIC para 46.

11 Notes of Evidence ("NE") 14/02/17, p 79:9–26.

12 Oan AEIC, para 8.

13 NE 14/02/17, pp 35:1–36:28.

the Testator had instructed the first defendant to prepare the $20,000 cheque for Mr Oan on 25 May 2010. This has not been suggested by the first defendant in any event. All that the plaintiff has accepted is that $20,000 was in fact paid to Mr Oan, and therefore this payment was legitimate.

Cause of action

15 The plaintiff's claim in relation to the two cheques is based on the tort of conversion and/or an action for unjust enrichment. Initially, the plaintiff's AEIC alleged that the issuance of the cheques was "unauthorised and *in breach of trust* as pleaded"[14] and the first defendant had taken the sums of $500,000 and $613,000 out of the Testator's account in "*breach of trust*"[15] [emphasis added]. However, counsel for the plaintiff, Mr Andrew Hanam, confirmed at the start of the trial that there is in fact no pleaded claim for breach of trust.[16] Another allegation initially pursued for forgery of the cheques was also abandoned after the plaintiff accepted that the signatures on the cheques were indeed the Testator's.[17]

16 The essence of the plaintiff's case is encapsulated in one terse pleading in the statement of claim: "the withdrawals of monies on the [two] cheques were made by the [first] [d]efendant and were unauthorized [*sic*]".[18] On this basis, the plaintiff seeks "[r]estitution" of the $1,113,000 paid under the two cheques.[19] As the Court of Appeal clarified in *Alwie Handoyo v Tjong Very Sumito and another and another appeal* [2013] 4 SLR 308 ("*Alwie Handoyo*")

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14 P's AEIC, para 7.

15 P's AEIC, paras 14 and 23.

16 NE 14/02/17, p 34:15–20.

17 P's AEIC, para 7.

18 SOC-1, para 11.

19 SOC-1, para 21(b).

at [126], restitution is a response to an event; different causes of action may give rise to the same remedy of restitution. In this case, the remedy sought is either for a wrong (*ie*, conversion) or to reverse an unjust enrichment gained by the first defendant at the plaintiff's expense.

17 As I have stated at the outset, the question of whether the cheques were issued with the Testator's authorisation is the only factual issue in dispute. Thus, it makes sense to first address the legal significance of establishing this fact. In other words, if the court finds that the withdrawals were not authorised, would that be sufficient to establish the plaintiff's claims in conversion and/or unjust enrichment? In the course of examining this, I will consider whether these causes of action have been sufficiently pleaded by the plaintiff.

Conversion

18 An act of conversion occurs when there is an unauthorised dealing with the plaintiff's chattel so as to question or deny his title to it; the gist of the action lies in the *inconsistency* between the manner of dealing by the defendant and the plaintiff's title: *Tat Seng Machine Movers Pte Ltd v Orix Leasing Singapore Ltd* [2009] 4 SLR(R) 1101 ("*Tat Seng Machine Movers*") at [45]. Since conversion is regarded as a wrong against the plaintiff's possessory title, it must be shown that the plaintiff has possession or a right to immediate possession of the chattel: *Tat Seng Machine Movers* at [49], citing *The Cherry* [2003] 1 SLR(R) 471 at [58]. Although the tort of conversion principally protects rights in tangible property, there is a well-established exception in respect of documentary intangibles and negotiable instruments such as cheques: see *Alwie Handoyo* at [131].

19 In the first defendant's closing submissions, his counsel, Mr Kasi Ramalingam, contended that the plaintiff's claim for conversion had not been sufficiently pleaded. He, however, did not elaborate what was lacking in the particulars of the pleadings. In the course of the oral closing submissions, when probed as to what particulars were lacking beyond the pleaded fact that the withdrawals under the two cheques were unauthorised, Mr Ramalingam acknowledged that he was not able to identify what more the plaintiff was required to plead in support of the claim in conversion. Eventually, Mr Ramalingam accepted that if the withdrawals were adjudged to be unauthorised, the claim in conversion would be made out.

20 In my judgment, the facts constituting the cause of action in conversion have been sufficiently pleaded. The withdrawals under the two cheques without the Testator's authority would amount to an unauthorised dealing with the Testator's cheques for the purposes of a claim in conversion. There is no need for the word "conversion" to be expressly pleaded.

21 Further, if it is proven that the Testator did not authorise the withdrawals, the claim in conversion would be made out. In respect of the requisite *possessory title*, the Testator has the right to immediate possession of the cheques even though his cheque book was kept in the first defendant's custody on his behalf.[20] The person entitled to immediate possession of a cheque, also described as the true owner of a cheque, is the person entitled to the money represented by the cheque or obtainable under it: *Paget's Law of Banking* (Ali Malek QC & John Odgers QC (gen eds)) (LexisNexis, 14th Ed, 2014) at para 27.4. Where a drawer has not delivered the cheque to a payee, there is longstanding English authority in *Morison v London County and Westminster Bank, Limited* [1914] 3 KB 356 ("*Morison*") that the immediate

[20] SOC-1, para 10; D1 AEIC, paras 32–33.

right of possession to the cheque remains with the drawer. In *Morison*, an agent misused his authority by fraudulently drawing, on his principal's account, cheques payable to his own order and arranged for their collection to his personal account with another bank. The English Court of Appeal found the collecting bank liable to the principal in conversion. Lord Reading CJ found (at 364) that the "cheques were at all times, until issued, the property of the plaintiff", who was the "true owner" even though the cheques "came into existence as cheques … by [the agent's] fraud". Phillimore LJ likewise was of the view that the "cheques were the plaintiff's instruments till he chose … to issue them to some outside person" (at 378). In the present case, the right to immediate possession to the pre-signed cheques remains with the Testator (and correspondingly, his estate) until such time when the cheques are issued or delivered to an authorised payee.

22 As regards the *act* of conversion, a peculiarity on the facts is that the cheques were pre-signed but had not been issued to named payees for particular amounts until the first defendant's interference. Hence, the purported acts of conversion were not merely the acts of misappropriating the cheques or banking them in to the benefit of someone other than an authorised payee; they also consisted of *inserting the face value and payees* into the pre-signed cheques. The claim thus treads a fine line between dealing with the physical cheque and dealing with the chose in action represented thereunder. Nevertheless, as the Court of Appeal noted in *Tat Seng Machine Movers* at [45], due to the "piecemeal" development of the case law on conversion, "the acts or circumstances which constitute, or do not constitute conversion have not been defined with hard-edged precision". Would the first defendant's act in issuing the cheques constitute an act of conversion? If a cheque can be converted by misappropriation, there is no reason why filling in the details of a pre-signed cheque without authorisation should not constitute an interference

with the account holder's title to the cheque and the chose in action represented thereunder. This act is a clear exercise of dominion over the cheque, dealing with it as one's own property. This is consistent with *Morison* where subsequent dealings with the cheques issued without authority were found to constitute conversion. Therefore, if it is found that the withdrawals under both cheques were not authorised, the plaintiff's claim in conversion would be established.

Unjust enrichment

23 To maintain a claim in unjust enrichment, the plaintiff must show that: (a) the first defendant has been enriched; (b) the enrichment was at the expense of the plaintiff; (c) the enrichment was unjust; and (d) there are no defences available to the first defendant (*Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd and another and another appeal* [2011] 3 SLR 540 at [110]). It was emphasised by the Court of Appeal in *Wee Chiaw Sek Anna v Ng Li-Ann Genevieve (sole executrix of the estate of Ng Hock Seng, deceased) and another* [2013] 3 SLR 801 at [134] that "there is no freestanding claim in unjust enrichment on the abstract basis that it is 'unjust' for the defendant to retain the benefit – there must be a particular recognised unjust factor or event which gives rise to a claim." The plaintiff did not plead any specific unjust factor underlying his claim in unjust enrichment in his statement of claim or closing submissions. As mentioned, the plaintiff's case rests entirely on the pleading that the withdrawals were unauthorised and the "monies belong to the estate".

24 While the plaintiff's claim is worded in terms of a lack of authority (which was rejected as an unjust factor in *Alwie Handoyo* at [111]), it appears that the essence of the claim is not that the first defendant has exceeded his authority as an agent, but rather that the Testator's estate has title to the

moneys withdrawn, which have been acquired by the first defendant without the Testator's knowledge or consent. A plausible argument could be made that the unjust factor of ignorance or lack of consent was available on the facts. The status of ignorance or lack of consent as an unjust factor was left open in *Anna Wee* (see [139] and [166]–[168]) after the Court of Appeal noted the academic debate surrounding its recognition. More recently, lack of consent was applied as an unjust factor in *AAHG, LLC v Hong Hin Kay Albert* [2016] SGHC 274 ("*Albert Hong*") at [74]–[75], thus establishing a claim for unjust of enrichment by procuring a transfer of shares without the shareholder's consent. Given that the claim in conversion would be established if the Testator had not authorised the withdrawals under the two cheques (as stated at [20]–[22] above), it is not necessary for me to decide whether to recognise lack of consent as an unjust factor in principle and on the facts, especially without the benefit of full arguments from counsel on this novel issue.

25 Finally, I note in passing that in the alternative, a claim in proprietary restitution could have been pursued, given that the plaintiff's claim rests on the estate's title. The very existence of proprietary restitution as a freestanding cause of action is a difficult and unsettled issue which was deferred for future consideration in *Alwie Handoyo* (see [115]–[121]). That having been said, this argument was not canvassed before me in this case.

Burden of proof

26 The key legal issue for determination is whether the burden is on the first defendant to *prove* that (a) the first defendant's disposal of the two cheques was authorised by the Testator and (b) the two Rolex watches were gifts to the first defendant, or on the plaintiff to *disprove* otherwise.

27 We are concerned here with the *legal* burden of proof, as distinct from the *evidential* burden of proof. It is well established that the legal burden of proof "describes the obligation to persuade the trier of fact that, in view of the evidence, the fact in dispute exists": *Britestone Pte Ltd v Smith & Associates Far East, Ltd* [2007] 4 SLR(R) 855 ("*Britestone*") at [58]. Once it is established on whom this obligation rests, this obligation never shifts in respect of any fact in the course of the trial. In contrast, the evidential burden – the need of the party to adduce evidence to discharge his legal burden or to prevent the other party from discharging his legal burden – may shift from one party to the other depending on the evidence adduced by either side: *Britestone* at [59] and Jeffrey Pinsler SC, *Evidence and the Litigation Process* (LexisNexis, 5th Ed, 2015) at para 12.007.

28 In determining where the legal burden lies, the pleadings are invariably the first port of call: *SCT Technologies Pte Ltd v Western Copper Co Ltd* [2016] 1 SLR 1471 ("*SCT Technologies*") at [17] and [21]. It is from the pleadings that the court may glean the material facts asserted by each party to establish its claim or defence. Sections 103 and 105 of the Evidence Act (Cap 97, 1997 Rev Ed) place the burden of proving a fact on the party who asserts the existence of any fact in issue or relevant fact, respectively.

29 In my view, the legal burden as regards the fundamental question of whether the withdrawals were authorised by the Testator lies squarely on the first defendant, for the following reasons:

(a) The Testator had already made full provision in the Will for the disposal of his assets, the particulars of which were pleaded in the statement of claim. On the face of the gift and trust cheques, the purposes of the two cheques were contrary to the Testator's declared intentions under the Will. On this basis, the plaintiff's case is that the

first defendant utilised the two cheques to make "unauthorised withdrawals" of moneys properly belonging to the estate.

(b) It is not in dispute that the two cheques were pre-signed by the Testator and that the details of the cheques were filled in by the first defendant, *ie*, that he dealt with the cheques by assigning their value and the destination of the moneys paid under them. That being the case, it stands to reason that it is for the first defendant to prove that the details which he had admittedly filled in on the two pre-signed cheques were inserted on the *express* instructions of the Testator. After all, it is the first defendant's positive case that the Testator did in fact give him those express instructions. A perusal of the defence will demonstrate so, as the defence pleads:[21]

> On 25 May 2010, in contemplation of his impending death, [the Testator] orally instructed the [first] [d]efendant, *inter alia*, as follows:-
>
> i. [The Testator] asked the [first] [d]efendant to prepare a cash cheque the sum of SGD 500,000 using one of the pre-signed cheques, being the amount that he had always intended to give to the [first] [d]efendant when he passed away.
>
> ii. [The Testator] also asked the [first] [d]efendant to prepare a cheque in the sum of SGD 613,000.00 to be issued to [Mdm Tan] using one of the pre-signed cheques. [The Testator] informed the [first] [d]efendant that this amount was to be used for the maintenance of [Mdm Tan] and the [family property].
>
> …
>
> iv. The cheques for the sum of … SGD 500,000 and SGD 613,000 were prepared by the [first] [d]efendant using the pre-signed cheques in front of [the Testator] at the hospital.

These are the first defendant's positive averments to meet the plaintiff's claim. Since no other witness was present when the

[21] Defence-3, para 10(j).

purported instructions were given, these statements also represent facts within the first defendant's peculiar knowledge, the burden of which is on him to prove: s 108 of the Evidence Act.

30 In this respect, this case is not unlike *SCT Technologies* which was relied upon by the plaintiff. In *SCT Technologies*, the appellant sued the respondent for repayment of debts under three invoices. In its defence, the respondent implicitly acknowledged the existence of the debts, but pleaded discharge of the debts by payment. Given the state of the pleadings, the respondent had the legal burden of proving all the material facts it relied on to prove discharge, *ie*, not only that moneys were paid to the appellant but also that they were paid in order to discharge the debt on the three invoices and not for other purposes (*SCT Technologies* at [22] and [31]). This was treated as a case of "confession and avoidance", where the defendant expressly or impliedly "confesses" to the truth of what is alleged against him but proceeds to "avoid" the effect of this allegation, in which case it is for the defendant to prove the positive facts relied upon by him to "avoid" the liability (at [23]). Similarly, the first defendant here acknowledges that he dealt with pre-signed cheques for the Testator's bank account but pleads that his dealings were authorised by the Testator.

31 Consistent with the above analysis, the first defendant's counsel accepts, at least for the two cheques, that the *legal burden* rests on the first defendant to prove on a balance of probabilities that the two cheques were in fact authorised by the Testator through the oral instructions given prior to his death.[22] If he fails to discharge this burden, it must follow that the first defendant converted the two cheques. If, however, the first defendant adduces some (not inherently incredible) evidence of the Testator's instructions, only

22 D1 Submissions, para 25.

then would the evidential burden shift to the plaintiff to rebut or counter the evidence of the first defendant so as to prove that the withdrawals were unauthorised (see *Britestone* at [60]).

32 I should add that since both cheques were issued on the same day and under the same set of circumstances, it is highly improbable for the Testator to have given instructions to the first defendant in respect of the gift cheque but not for the trust cheque and vice versa. In short, the fates of the two cheques are likely to stand or fall together.

33 Finally, in relation to the two Rolex watches, the plaintiff has pleaded that the watches have been taken and retained by the first defendant "without legal basis". It is not denied by the first defendant that the two Rolex watches belonged to the Testator before he took them into his possession. Although actual possession now lies with the first defendant, it is disputed whether the watches had been delivered by the Testator to the first defendant prior to the Testator's death (thus perfecting the lifetime gift) or were surreptitiously taken by the first defendant without the Testator's knowledge. Since the Testator has passed on, the first defendant is better placed to lead evidence about the circumstances of the alleged gifts to him. Hence, the burden rests on the first defendant to prove his defence that the watches were given to him as gifts from the Testator.

The two cheques

General observations

34 Having established the burden of proof, the question to which I now turn is whether the first defendant has discharged the burden of proving on a balance of probabilities that his disposal of the two cheques was authorised by the Testator. I begin with some general observations, applicable to both

cheques, regarding the absence of witnesses and the circumstances under which the Testator's instructions were purportedly relayed to the family. Both these aspects of the evidence contribute to the inherent implausibility and unreliability of the first defendant's case.

35 It is common ground that the alleged instructions from the Testator for both the gift and trust cheques were not recorded in writing or witnessed by anyone.[23] The first defendant claimed that both cheques were allegedly authorised by the Testator during his stay in hospital. When confronted with the fact that it was not every day that the Testator would give instructions to issue cheques for sums in excess of $1 million and the suggestion that such instructions should therefore be in writing, all that the first defendant could say was that he "[never] thought of that". Further, inconsistent with his defence which asserts that the Testator's instructions for the two cheques were given "in contemplation of his impending death", the first defendant testified orally that the Testator was "not [in a] critical condition" and was "still healthy" on 25 May 2010.[24]

36 According to the first defendant, he worked at the Laguna National Golf and Country Club at that time and would visit the Testator at the hospital after office hours.[25] The second defendant testified that she visited the Testator almost *every day* after office hours during the Testator's stay in hospital prior to his demise and she was typically the first family member to arrive at the hospital.[26] The plaintiff testified that he also visited the Testator almost every day during his hospital stay.[27] I find it extremely odd that neither the plaintiff

23 NE 14/02/2017, pp 88:24–89:22.

24 NE 14/02/2017, p 90:7-21.

25 NE 14/02/2017, pp 89:9; 91:1–7.

26 NE 14/02/2017, p 136:15–19.

27 NE 14/02/2017, p 46:27–28.

nor the second defendant personally witnessed the Testator giving such instructions to the first defendant *during his hospital stay* on 25 May 2010.

37 Another significant fact is that the Testator made no mention of his instructions to any other children despite their regular presence at the hospital during the relevant period. The second defendant agreed under cross-examination that throughout the Testator's stay in hospital, the Testator never once mentioned to her that he had given instructions to the first defendant for the gift and trust cheques.[28] My impression, which is confirmed by the second defendant's evidence, [29] is that the second defendant enjoyed a close relationship with the Testator. If he had given those alleged instructions, particularly the instructions to set aside a fund for the upkeep of the family property, one would reasonably expect that he would have informed the second defendant during her regular visits to the hospital since he had provided her with a life interest in the family property under the Will. Likewise, I would have expected the Testator to inform the plaintiff as the co-executor of the Will of his instructions to the first defendant in respect of the two cheques if he had in fact given those instructions. That none of the other children has personal knowledge of the Testator's directions casts serious doubt on the first defendant's account.

38 Prior to the cross-examination of the first defendant, both the pleadings as well as the AEICs of the first and second defendants were conspicuously silent as to *when* (if at all) the first defendant first informed his family members that the Testator had given express instructions in respect of the two cheques. In fact, the question arose from an observation I made during the first defendant's opening. If the Testator had indeed given those instructions

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[28] NE 14/02/2017, p 136:22–29.

[29] AEIC of Ong Hwe Leng ("D2 AEIC"), para 9.

legitimately, it is only natural to expect the first defendant to inform his family members at the first available opportunity.

39 Under cross-examination, the first defendant claimed for the first time that he had informed all the family members (including the plaintiff and the second defendant) of the Testator's instructions for the gift and trust cheques during the Testator's wake on or about 1 or 2 June 2010.[30] There are several reasons why I do not accept the first defendant's testimony that he did so:

(a) If the first defendant had informed the family members at the wake, this is such a significant fact which, if true, should have found its way into both the pleadings and the AEICs. Yet this was *not* deposed to in the first or second defendant's AEICs. The first defendant has offered no explanation for this glaring omission.

(b) On the contrary, in the second defendant's AEIC, she claimed instead that she has *no knowledge* of the two cheques. Her purported corroboration of the first defendant's evidence *on the witness stand*[31] directly contradicts her AEIC and is therefore too convenient to be true. She was in court when I raised the question and when the first defendant testified that he had informed his family members at the Testator's wake.

(c) Notably, the first defendant claimed that the plaintiff was also informed during the wake. This was never put to the plaintiff. This is because it was only raised by the first defendant *after* the close of the plaintiff's case. The first defendant's omission to do so is all the more stunning since it is the plaintiff's pleaded case that he only discovered

30 NE 14/02/2017, pp 71:4–16; 72:8–12.

31 NE 14/02/2017, p 130:3–9.

the "fraud", *ie*, the *fact* of the withdrawals, in May 2011.[32] The plaintiff also asserted in his supplementary AEIC that after he found out from OCBC bank in October 2014 that the gift cheque had been deposited into the first defendant's POSB savings account and the trust cheque had been deposited into Mdm Tan's joint account, he sent an email to the second defendant to query about the withdrawals but she did not respond. Again, this was not challenged. The plaintiff's query is entirely consistent with the fact that he was evidently not aware of the two withdrawals and the subsequent deposits prior to obtaining the cheque images from OCBC bank in October 2014.

(d) Furthermore, the first defendant's explanation was clearly contrived, considering the context in which he reportedly conveyed the Testator's instructions to his family. He claimed that the subject matter of the withdrawals by the two cheques came up during the wake when his eldest sister queried about the funds in the Testator's bank account. The flaw in this is that on that day, the latest bank statement of the Testator's account would not have recorded these two withdrawals. The withdrawals were only made on or about 31 May 2010. As at 1 or 2 June 2010, the bank statement for the month of May 2010 would not have been generated by the bank. There was therefore no reason why anyone in the family would have raised the issue of the withdrawals during the period of bereavement. Further, this discussion was also not stated in the AEIC of the first or second defendant. In truth, all the family members were kept in the dark about these two withdrawals until much later.

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32 Supplementary AEIC of Ong Teck Soon ("P's Supplementary AEIC"), paras 4 and 7.

(e) Finally, the first defendant admitted that a copy of the Schedule of Assets was furnished to him after the grant of probate was extracted in or about June 2011.[33] This was more than a year after the alleged disclosure to the family members at the wake. On the face of the Schedule of Assets, the moneys withdrawn under both the gift and trust cheques were still reflected as part of the Testator's estate.[34] If the first defendant is to be believed, he would have reacted to the Schedule of Assets to highlight the error. Yet he did not do so. He claimed he did not read it carefully. This demonstrates two points. First, the plaintiff clearly did not know how the first defendant had dealt with the moneys under the two cheques when the Schedule of Assets was prepared, *ie*, as of June 2011. Second, it proves that the first defendant could not have informed his family members, including the plaintiff, about the Testator's instructions in relation to the two cheques at the wake as he had claimed.

40 Once the first defendant's account of informing his family members of the Testator's instructions for the two cheques is rejected, it follows that the first time the first defendant claimed that the two cheques were expressly authorised by the Testator was *after* the commencement of the proceedings. It is incongruous for the first defendant to have withheld the information as regards the purposes of the two cheques if they were indeed issued on the express instructions of the Testator. The irresistible inference is that the first defendant had concealed the two withdrawals in the hope that he would get away with it. This explains why the alleged authorisation of the two cheques by the Testator only surfaced after the commencement of the proceedings.

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33 D1 AEIC, para 42; NE 14/02/2017, pp 101:29–102:14.

34 P's AEIC, p 19.

41 This attempt by the first defendant to conceal the two withdrawals is supported by the manner in which the cheque payments were recorded. In the cheque book, the payee for both cheques was recorded as Mdm Tan – "[t]o bank into Tan Ai Cheng account".[35] This is patently false because the gift cheque was made out to "Cash" and subsequently deposited into the first defendant's personal account. Under cross-examination, the first defendant claimed that Mdm Tan was recorded as payee only for the trust cheque and the payee details recorded for the trust cheque simply overran to the next row.[36] This is contrived because the symbol "}" next to both cheque numbers clearly indicated that the payee details were meant to apply to both cheques. If the first defendant's explanation is to be believed, it would mean that no details were recorded for the gift cheque, which appears to be out of the ordinary practice for cheques drawn on the Testator's account, all of which always stated the identity of the payee for *each* cheque. The first defendant's explanation is false and it is to be inferred that the payee in the cheque book was recorded as Mdm Tan in order to mask the true purposes of the two cheques.

42 In examining the inherent unreliability of the first defendant's evidence, it is important to emphasise that such last minute withdrawals from the Testator's account were likely to be challenged or at least controversial. It is unbelievable that the first defendant would not have wanted anyone to witness such instructions from the Testator. This is especially glaring as the family members, including the plaintiff and the second defendant, visited the Testator almost every day during his hospital stay. The fact that the first defendant did not inform any of his family members of the Testator's alleged instructions *prior* to the proceedings is consistent with the true position that no

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35 P's AEIC, p 28.

36 NE 14/02/2017, p 114:1–24.

such instructions were ever given by the Testator and the first defendant had fabricated the purported disclosure at the wake in order to legitimise his unauthorised withdrawals. Having made these general observations, I turn my attention to deal with the material facts peculiar to each of the two cheques.

Gift cheque

43 The first defendant's case is that the Testator had "always intended" to give him the sum of $500,000 when he passed on, and the gift cheque was a fulfilment of that intention. Ironically, he seeks to rely on the plaintiff's evidence to support his case that the Testator had manifested such an intention. In his AEIC, the plaintiff stated that some years before the Testator's passing, he found a bag of cash in excess of $1 million hidden in the false ceiling of the family property.[37] Under cross-examination, he agreed that this incident would have occurred sometime between 1992 and 1994 while both the Testator and the plaintiff were living in the family property.[38] The discovery was made while the plaintiff was repairing the water heater. He claimed that from the discovered cash, the Testator gave the plaintiff and the first defendant $500,000 each and since the first defendant had already received $500,000 from the Testator prior to making his Will in 2003, there was no reason for the Testator to give the first defendant a further $500,000 three days before his passing, especially since he had made specific provision in the Will to leave the money to Mdm Tan.

44 The plaintiff testified that he had accompanied the Testator, Mdm Tan and the first defendant to UOB bank to deposit the cash. Subsequently, the plaintiff arranged for a banker from Citibank to visit the family property to discuss the management of the Testator's funds which were then placed into

37 P's AEIC, para 8.

38 NE 14/02/2017, pp 17:23–18:6; 18:30–19:1.

several joint accounts with Citibank. On that occasion, $500,000 was transferred into a joint account between the plaintiff and the Testator.[39] The plaintiff claimed that $500,000 was also deposited into another joint account between the Testator and the first defendant. While the plaintiff was able to identify his joint account with the Testator into which his share of $500,000 was deposited, he acknowledged that he was unable to identify the joint account of the Testator with the first defendant or confirm whether the sum of $500,000 was ever deposited into any such joint account.[40]

45 In my view, while it is inconclusive whether the Testator had deposited $500,000 from the discovered cash into a joint account of the Testator and the first defendant, it should be highlighted that the plaintiff's evidence as regards the discovery of the cash, the deposit of the cash with UOB, the opening of several Citibank accounts or his receipt of $500,000 from the Testator was never challenged by the first or second defendant. My impression is that the plaintiff was truthful on these points. He had no reason to conjure up this episode.

46 Having said that, ultimately the plaintiff's account of this episode is not material to the issues before this court. Specifically, it does not assist the first defendant in the discharge of his burden of proof at all. The first defendant relies on it to substantiate the fact that the Testator had *intended* to give $500,000 to the first defendant. First, it is incorrect that the plaintiff had accepted that it was the Testator's *intention* to give the first defendant a sum of $500,000. All that he stated in his AEIC was that the Testator had, as a matter of fact, *given* the first defendant a sum of $500,000. He was repeatedly cross-examined on this point by Mr Ramalingam and he maintained his position

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39 NE 14/02/2017, p 13:1-17.

40 NE 14/02/2017, pp 13:18–23; 14:6–8; 16:1-3; 20:22–21:9.

consistently that he was not aware that the Testator had such an *intention* "but the fact is he [the first defendant] had already *got* the $500,000" [emphasis added]. If a person expresses *an intention* to give another person a sum of money, normally such an intention will be carried out at a subsequent point in time. Here, the plaintiff merely stated that from the discovered cash, the Testator *gave* him and the first defendant $500,000 each.

47 Second, even if the Testator had intended to give the first defendant a sum of $500,000, whether for business or share trading (as contended),[41] it does not prove that the Testator had in fact given the express authorisation for the two cheques on 25 May 2010 – a lapse of almost 20 years between the discovery of the cash and the alleged authorisation by the Testator. Third, it is not disputed that the Testator did indeed open several bank accounts with the first defendant and/or his wife in which a total sum of about $1.4 million was deposited:[42]

S/N	Account	Joint account holders (besides Testator)	Amount
1	Maybank XXXXXXXX705	First defendant's wife	$423,789.62
2	Maybank XXXXXXXX751	First defendant	$107,989.52
3	Maybank XXXXXXXX959	First defendant	$50,000.00
4	Maybank XXXXXXXX972	First defendant	$79,000.00

41 D1 AEIC, paras 50–51 and 59.

42 P's AEIC, paras 5 and 9.

5	Maybank XXXXXXXX989	First defendant	$60,000.00
6	Maybank XXXXXXXX749	First defendant's wife	$333,856.38
7	Maybank XXXXXXXX824	Mdm Tan First defendant	$340,229.65
8	Citibank X-XXXXXX-028	First defendant	$0.00

The funds in the joint accounts were vested in the first defendant or his wife pursuant to the right of survivorship. It is common ground that most of the funds in these joint accounts came from the Testator. The first defendant testified that these accounts contained "part of [his] money inside, and [his] wife's money", but agreed that the "bulk" and "majority of the money" was given to them by the Testator to invest in shares and their business.[43] In response to a question from the court as to whether it is possible that the $500,000 which the Testator had purportedly intended to give to the first defendant was already deposited into one of these joint accounts, he did not directly address the question and instead gave a most unconvincing explanation that the Testator "mentioned … that … he want[ed] to give it".[44]

48 In deciding whether the first defendant has discharged his burden of proof, it is necessary and most relevant to examine the circumstances at the time when the authorisation was allegedly given by the Testator, *ie*, 25 May 2010. Once the inquiry is focused on this relevant time frame, it will be apparent that the first defendant is way off the mark.

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43 NE 14/02/2017, pp 75:30–77:9.

44 NE 14/02/2017, pp 104:23–105:3.

49 If the gift cheque was intended as a gift to the first defendant, there is no conceivable reason why the cheque was made out to "Cash". If the Testator had given the alleged gift instructions, there is every reason for the first defendant, who was the person who actually filled in the cheque details, to insert his own name as the payee. This is especially so since it was the first defendant's intention to deposit the gift cheque into his own personal account, as he in fact did. Second, there is also no plausible reason for the first defendant to have recorded the payee for this gift cheque as Mdm Tan, if the cheque was intended as a gift to himself. These two steps by the first defendant, *ie*, the issuing of the cash cheque and the false entry in the cheque book, were clearly intended to conceal the unauthorised withdrawal in respect of the gift cheque. The first defendant submitted that he had no such intention to conceal the withdrawal since he had inserted his name, NRIC number and mobile phone on the reverse of the gift cheque. This is a *non sequitur*. The filling in of such information on the reverse of cheques for the purposes of cheque deposits is an administrative requirement of banks in general.

50 Under the Will, the funds in the Testator's bank account would have gone to Mdm Tan. Since the Testator had already amply provided for the first defendant and his wife, there is no credible reason, in the absence of actual proof to the contrary, for him to provide a *further* gift to the first defendant *in substitution* of his own wife, Mdm Tan, three days prior to his demise – or as the first defendant has put it, "in contemplation of his impending death".

51 In the light of the above, not only has the first defendant failed to discharge his burden of proof, the objective evidence is to the contrary.

Trust cheque

52 The first defendant claimed that the trust cheque was also issued on the express instructions of the Testator to be held on trust for the specific purpose of providing for Mdm Tan and for the upkeep of the family property. The first defendant relies on the fact that Mdm Tan and the second defendant were both given life interests in the family property and it is "therefore, not entirely improbable for the [Testator] to consider and decide a financial arrangement for the maintenance" of Mdm Tan and for the upkeep of the family property.[45] The mere fact that it may be "not entirely improbable" is plainly insufficient to discharge the burden of proof that the trust cheque was specifically authorised by the Testator.

53 The second defendant's testimony in court that the Testator had informed her in "[a]round 2009 to 2010" that he had "arranged" for the maintenance of the family property does not help the first defendant either.[46] According to the first defendant's case, the Testator only gave him instructions for the trust cheque on 25 May 2010. Clearly, contrary to the second defendant's testimony, the Testator had not made any arrangement for the upkeep of the family property prior to 25 May 2010. Even if her account were true, she testified that the Testator had intended to leave the money *in* the OCBC account for the maintenance of the house, and not that the first defendant was authorised to deal with the moneys separately.[47] Consistent with this impression, the second defendant approached the plaintiff to pay for the family property's property tax in 2014 and 2015 from the *estate* account.[48] It appears that the estate account was the same OCBC account from which the

45 D1 Submissions, para 53.

46 NE 14/02/2017, p 140:11–23.

47 NE 14/02/2017, p 140:11–23.

48 AB, p 5.

withdrawals were made, as it was the only bank account in the Testator's sole name that contained more than a nominal value. The second defendant did not tap on the $613,000 supposedly managed by the first defendant on trust. She explained that this was because "that was [the Testator's] instructions, that the money [in the OCBC account] goes to the maintenance of the house".[49] Clearly, she was not acting on the premise that a *separate* trust fund had been created for the maintenance of the family property.

54 Furthermore, if the Testator had in fact given those instructions to the first defendant on 25 May 2010, there would be no reason for the Testator not to have informed the second defendant of the arrangement around the time it was supposedly made. There would also be no reason for the first defendant not to have disclosed it to the second defendant. Equally, it is curious why the Testator did not inform the plaintiff and/or the second defendant as the executors of the Will.

55 In my view, this is a fallacious explanation by both the first and second defendants. First, it does not make any sense for the Testator to have given instructions to the first defendant to issue the trust cheque to provide for Mdm Tan when under the Will, *all* of the funds in his bank account would have gone to her in any event. It also does not make any sense for the Testator to have given instructions to the first defendant to deposit the trust cheque into Mdm Tan's joint account knowing that she was suffering from dementia at that time.

56 Second, through successive transfers, Mdm Tan was completely displaced as the purported beneficiary of the trust cheque. The trust cheque was initially deposited into Mdm Tan's joint account with the first defendant's

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[49] NE 14/02/2017, p 145:10–17.

wife on 31 May 2010 and then transferred, some six weeks later, to another joint account belonging to the first defendant and his wife with POSB bank which prior to this only had a balance of $1,185.66.[50] Between January 2011 and March 2016, the first defendant utilised the $613,000 to set up 15 separate time deposits, fixed deposits and savings deposits. It appears from his evidence that upon maturity, the principal sum and interest were consistently repaid to the same joint account held with his wife or otherwise reinvested. Eventually, on 26 September 2016, *ie*, after the commencement of these proceedings, $400,000 of this sum was transferred to a joint account between the first and second defendants with CIMB bank. The remainder forms part of two time deposits of $150,000 each set up by the first defendant and his wife with CIMB bank in January 2016.[51]

57 It must be underscored that all these movements of the funds under the trust cheque were decided *unilaterally* by the first defendant without any authority. He had no such right to do so. The first defendant has by these successive transfers entirely supplanted Mdm Tan as the purported beneficiary of the trust cheque and yet according to the first defendant, the trust cheque was, *inter alia*, to provide for Mdm Tan. I agree with the plaintiff that the purpose behind the successive transfers, and the purpose of making the cheque payable to Mdm Tan, was to prevent the discovery of the eventual destination of the trust cheque.

58 Third, there is simply no evidence whatsoever that the funds from the trust cheque were ever used for their intended purposes, *ie,* to provide for Mdm Tan and/or the upkeep of the family property. The first defendant admitted in his answers to interrogatories that the sum of $613,000 "has not

[50] Ong Teck Seng's Discovery Affidavit dated 24 November 2016 ("D1 Discovery Affidavit"), para 6 and p 50.

[51] D1 AEIC, para 69 and pp 85–87.

been utilised yet to pay for the expenses of [Mdm Tan] and/or the Property".[52] This state of affairs must be examined in juxtaposition with the first defendant's evidence that the family property required a lot of maintenance.[53] For the first defendant's explanation to even be remotely plausible, one would have expected the funds from the trust cheque to be used periodically since the time of the Testator's death for the maintenance of the family property. However, the evidence is to the contrary. Instead, the first defendant confirmed that the funds *have remained intact* since the issuance of the trust cheque and are now sitting in fixed deposits and a savings account in the joint names of the first defendant together with his wife and the second defendant respectively. In the first defendant's own words, they "never use[d] it" at all even when repairs were effected to the family property.[54] The proceedings were only commenced by the plaintiff in June 2016. Yet throughout the period from 25 May 2010 to June 2016, it is an irrefutable fact that the funds from the trust cheque were, by the first defendant's own admission, never used for their intended purposes. In my judgment, this conduct clearly establishes that the Testator did not give any instructions for the trust cheque.

59 Further, when the family property needed repairs, the second defendant asked the plaintiff as executor of the Testator's estate to pay for the expenses from the *estate* account.[55] Yet if the second defendant had known that the $613,000 under the trust cheque was earmarked for the maintenance of the family property, she would have asked the first defendant to cover such expenses out of that fund. In other words, the fact that the trust cheque was never authorised by the Testator ostensibly for the upkeep of the family

52 Answers to interrogatories served pursuant to request dated 5 September 2016, para 2.

53 D1 AEIC, para 65.

54 NE 14/02/2017, p 116:12–17.

55 AB, p 9.

property is borne out by the conduct of the first and second defendants. If it were otherwise, the first defendant would have utilised the funds from the trust cheque for the upkeep of the family property. I do not accept the first defendant's contrived explanation that the Testator had intended for the funds from the trust cheque to be utilised only when there was "no more money in the [OCBC] account",[56] *ie*, that the funds in the OCBC account should be depleted first. No such qualification was stated in his AEIC. Further, if a designated fund had been set aside, it makes no sense to deplete the estate moneys first when these moneys were to devolve to Mdm Tan under the Will, and subsequently be shared equally among three sons under Mdm Tan's will.

60 The inference is thus irresistible that the first defendant had always intended to misappropriate the funds from the trust cheque for himself. When asked whether the balance of the $613,000 would be returned to the estate if they were not used for the upkeep of the family property, the first defendant testified that it is up to the next generation to take over and maintain the family property.[57] This is an astonishing response since Mdm Tan and the second defendant only have a life interest in the family property and upon their death, the family property is to be sold and the proceeds divided equally among the plaintiff, the first defendant and another brother, Ong Teck Huat. There is hence no *next generation* to speak of in relation to the family property.

61 For the foregoing reasons, I am of the view that the Testator did not authorise the first defendant to issue both the gift cheque and the trust cheque. Consequently, the first defendant converted both cheques and the estate is entitled to restitution of the sums paid thereunder.

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[56] NE 14/02/2017, p 95:1–9.

[57] NE 14/02/2017, pp 96:4–97-9.

Rolex watches

62 In relation to the two Rolex watches, the basis of the claim is that the two Rolex watches belong to the estate and that they are now in the possession of the first defendant "without legal basis". It is not disputed that the two Rolex watches were owned by the Testator and that they are now in the possession of the first defendant.

63 The defence is that the two Rolex watches were gifts made by the Testator during his "lifetime" with no specific pleading as to the dates of the alleged gifts. It emerged from the first defendant's AEIC that the Testator offered the full-gold Rolex watch to him at a family meeting sometime in 2005 involving the Testator, Mdm Tan, the first and second defendants and two other brothers. The first defendant accepted the full-gold Rolex after his brother, Ong Teck Huat, turned it down. The plaintiff was not present at this meeting and did not lead evidence challenging what transpired on this occasion. The first defendant's account regarding the full-gold Rolex watch is corroborated by the second defendant's AEIC.[58] As for the half-gold Rolex watch, the first defendant's evidence was that the Testator gave it to him on an unspecified occasion before his passing in 2010.[59] Under cross-examination, this date was narrowed to around 2009 but no further elaboration was given.[60]

64 The plaintiff, on the other hand, contends that this alleged gift is a contrived account that only emerged on 24 July 2016 in the course of distributing the assets in the Testator's safe under Mdm Tan's Will. The first defendant did not specifically challenge how and when the plaintiff came to know about the alleged gifts. The plaintiff pleaded in his reply that when the

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58 D2 AEIC, para 16.

59 D1 AEIC, paras 72–73.

60 NE 14/02/17, p 121.

Testator's safe was opened during a family meeting in *June 2010*, the first defendant stated that the two Rolex watches were not in the safe because they had been sent for servicing. He did not claim that the watches had been gifted to him. The plaintiff's evidence of this exchange in June 2010 was not challenged by the first defendant. I accept that the first defendant's reticence on this occasion is suspect, because if the watches had been legitimately gifted to him, it was odd for him not to have candidly said so.

65 It should be stated upfront that it is immaterial that the two Rolex watches were not listed in the Schedule of Assets as they would be covered under the residue clause which encompasses "all the rest and residue of [the Testator's] properties not herein specifically mentioned", including personal property.

66 Insofar as the full-gold Rolex watch is concerned, the plaintiff and first defendant have given contrary evidence which has not been specifically challenged by either side. On balance, it is likely that the 2005 family meeting took place. The circumstances in which the full-gold Rolex was offered to the first defendant was described in sufficient detail. Neither side called other family members to testify about this meeting, but it was corroborated by the second defendant's AEIC. No evidence was adduced by the plaintiff to rebut the first defendant's assertion that the full-gold watch has been in his possession since 2005; it was not clearly established whether the Rolex watch adorned by the Testator at his 80th birthday celebration (which post-dated the 2005 family meeting) was the full-gold or half-gold one. In view of this, the first defendant's reticence when queried in June 2010 is equivocal at best.

67 Insofar as the half-gold Rolex watch is concerned, I am not satisfied that the first defendant has discharged his burden of proof. His evidence is vague and he has not been able to specify the time period in which this gift

was made, let alone a date or an occasion. This is unpersuasive as gifts of such nature are typically given to mark an occasion or for some notable reason. Thus, I am ordering delivery up of the half-gold Rolex watch to the Testator's estate.

Time Bar

68 I turn now to the defence of limitation. The relevant limitation period for the cause of action in conversion is found in s 6(1)(*a*) of the Limitation Act (Cap 163, 1996 Rev Ed) which provides that actions founded on tort shall not be brought after the expiration of six years from the date on which the cause of action had accrued. It is not necessary to deal with the limitation period for the claim in unjust enrichment since it has been ruled out. On 3 February 2017, 11 days before the start of the trial, the first defendant was granted leave to include a new defence of limitation. On the basis of s 6(1)(*a*), the first defendant contended that the plaintiff's claim was time-barred as the writ was filed more than six years after the two cheques were issued and drawn on 25 and 31 May 2010 respectively.

69 For the purposes of the limitation defence, the material dates are as follows:

(a) 25 and 31 May 2010 – the dates on which the unauthorised cheques were issued and drawn respectively;

(b) May 2011 – when the plaintiff allegedly first learnt of the fact of the withdrawals;

(c) October 2014 – when the plaintiff allegedly learnt that the withdrawals were unauthorised; and

(d) 23 June 2016 – the date of filing of the writ.

70 In his reply, the plaintiff claimed that he first discovered the fact of the withdrawals under the two cheques only around May 2011 when the solicitors for the estate, Wee Swee Teow & Co, were preparing the Schedule of Assets for the grant of probate.[61] He pleaded that the first defendant had "concealed his fraud" in respect of the withdrawals until he was confronted by the plaintiff in May 2011. The plaintiff seeks to rely on s 29(1)(*b*) of the Limitation Act, which reads as follows:

> **Postponement of limitation period in case of fraud or mistake**
>
> **29.** — (1) Where, in the case of any action for which a period of limitation is prescribed by this Act —
>
> **…**
>
> (*b*) the right of action is concealed by the fraud of any such person as foresaid;
>
> …
>
> the period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake, as the case may be, or could with reasonable diligence have discovered it.

71 In order to rely on s 29(1), the plaintiff has to show that the first defendant fraudulently concealed his right of action. The period of limitation would begin to run at the point when the deception could have been discovered with reasonable diligence. The definition of fraudulent concealment in s 29(1) was neatly summarised in *Chua Teck Chew Robert v Goh Eng Wah* [2009] 4 SLR(R) 716 at [27] in the following manner:

> It is clear that fraudulent concealment is not limited to the common law sense of fraud or deceit. It includes unconscionability in the form of a deliberate act of concealment of a right of action by the wrongdoer or if he or she had knowingly or recklessly committed a wrongdoing in secret without telling the aggrieved party (see *Bank of America National Trust and Savings Association v Herman Iskandar* [1998] 1 SLR(R) 848 at [73]–[75]).

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61 Reply, para 5; P's Supplementary AEIC, paras 4 and 11.

As explained by Lord Denning MR in *King v Victor Parsons & Co (A Firm)* [1973] 1 WLR 29 at 33, "fraud" in this context "is used in the equitable sense to denote conduct by the defendant … such that it would be 'against conscience' for him to avail himself of the lapse of time." In *Eddis and Another v Chichester Constable and Others* [1969] 3 WLR 48, the equivalent section in the Limitation Act 1939 (c 21) (UK) was applied to postpone the limitation period for an action in conversion in favour of the trustees of a family property. The tenant for life had sold an heirloom belonging to the trust for his personal benefit. It was sufficient that the wrongful sale was fraudulent and he had concealed it from the trustees.

72 The pleading in the reply that the first defendant "concealed his fraud" is thus sufficient to engage s 29(1) of the Limitation Act. The plaintiff's pleaded case in his reply – that he found out about the withdrawals only in *May 2011* – is his worst case for the reckoning of time for limitation purposes and consequently the best case for the first defendant. As at May 2011, while the plaintiff came to learn about the withdrawals, he did not know at that time that they were *unauthorised* so as to ground a claim in conversion. When he queried the first defendant about the withdrawals in May 2011, he was told without elaboration that the Testator had given instructions about the moneys.[62] The plaintiff assumed that they had been placed in a fixed deposit in Mdm Tan's name and did not revisit the matter until 2014 when the family was preparing to apply for a grant of probate for Mdm Tan's estate. According to him, he only appreciated that the withdrawals were *unauthorised* after obtaining images of the two cheques from OCBC bank in October 2014 upon the advice of the estate's solicitors.[63] The cheque images revealed that the sums under the gift and trust cheques had been deposited into the first

62 P's Supplementary AEIC, para 5.

63 P's Supplementary AEIC, paras 6, 8 and 10.

defendant's POSB savings account and Mdm Tan's joint account respectively, contrary to the Will. It bears noting that the plaintiff's evidence in this regard was not challenged and significantly, no alternative date was put to the plaintiff. It was not argued that the plaintiff should have, with reasonable diligence, pursued the matter to its end earlier in May 2011 and not only in October 2014.

73 Proceeding with the plaintiff's worst case as pleaded in the reply, I find that the plaintiff's right of action was concealed by the first defendant such that time would only have started to run from May 2011 when the plaintiff first came to know about the withdrawals *per se*. At [39]–[40] above, I discredited the first defendant's testimony that he had informed his family members about the Testator's instructions with respect to the two cheques at the wake in June 2010. I also found that the first defendant acted in a manner aimed at concealing the unauthorised dealings with both cheques (see [43] and [49] above).

74 Could the concealed fraud have been discovered by the plaintiff earlier than May 2011 with reasonable diligence? The first defendant did not challenge the plaintiff's evidence that he only learnt of the withdrawals around May 2011. The Schedule of Assets was prepared around May 2011 by the estate's solicitors on the basis that the funds which were paid under the gift and trust cheques still belonged to Testator's estate. In relation to the OCBC account, the "market value as at the date of [the Testator's] death" was stated as $1,138,083.10.[64] This was based on documents received from the banks stating the value of assets as at the date of the Testator's passing. This was accompanied by a note stating "current balance: $5865.38", indicating the

64 AB, p 31.

balance when the Schedule of Assets was filed. On its face, this discrepancy in values between the Testator's death and May 2011 called for an explanation.

75 The plaintiff's evidence of confronting the first defendant for the first time with the discrepancy in May 2011 was unchallenged. As a consequence, it was never put to the plaintiff that he could have discovered the withdrawals prior to May 2011 or that he learnt about it at the Testator's wake in June 2010. Having regard to the rule in *Browne v Dunn* (1893) 6 R 67 ("*Browne v Dunn*"), it was not open to the first defendant to assert that the plaintiff could have discovered the withdrawals earlier. While the rule in *Browne v Dunn* is not rigid (see *Lo Sook Ling Adela v Au Mei Yin Christina and another* [2002] 1 SLR(R) 326 at [40]), this fact goes to the heart of the limitation issue and should have been put to the plaintiff if the first defendant were minded to assert otherwise. In any event, the first defendant's account that he had informed the family members of the Testator's instructions in June 2010 is to be disbelieved for reasons already explained.

76 Moreover, when the Schedule of Assets was provided to the first defendant in June 2011, he did not mention that it was incorrect to include the full sum of $1,138,083.10 as part of the Testator's estate, as would be the case if the Testator had indeed given the alleged instructions.[65] Without being disabused of this impression, the plaintiff could not have discovered any earlier with reasonable diligence that the discrepancy was due to the first defendant's unauthorised dealings with the two cheques.

77 Having found that time only began to run in May 2011 *at the earliest*, the writ was filed within the six-year limitation period and the defence of limitation should therefore be rejected.

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65 NE 14/02/17, p 102:3–19.

Interest

78 Under s 12(1) of the Civil Law Act (Cap 43, 1999 Rev Ed), the court has the discretion to order that interest be paid between the date the cause of action arose and the date of judgment. The Court of Appeal recently examined the law on pre-judgment interest in *Grains and Industrial Products Trading Pte Ltd v Bank of India and another* [2016] 3 SLR 1308 ("*GRIPT*") and summarised the position as follows at [137]–[138]:

> 137 Pre-judgment interest connotes the compensation awarded to a successful claimant for the time value of money the use of which was lost between the date on which the claimant's cause of action arose and the date of the judgment (*Sempra Metals Ltd (formerly Metallgesellschaft Ltd) v Inland Revenue Commissioners* [2006] QB 37 at [46]). The basis for the award lies in the fact that the unsuccessful defendant had wrongfully kept the successful claimant out of moneys to which he has been shown to be entitled, during which time, the defendant instead had the use of it (*Harbutt's "Plasticine" Ltd v Wayne Tank and Pump Co Ltd* [1970] 1 QB 447 at 468; see also *Lee Soon Beng v Wee Tiam Seng* [1985-1986] SLR(R) 799 at [7]). …
>
> …
>
> 138 As a plain reading of [s 12 of the Civil Law Act] would suggest, interest is not awarded as of right. While the recoverability of interest is a matter of the court's discretion, we held in *Robertson Quay Investment Pte Ltd v Steen Consultants Pte Ltd* [2008] 2 SLR(R) 623 ("*Robertson Quay Investment*") at [100]–[103] that as a *general rule*, damages should commence from the date of accrual of loss. As a matter of principle, claimants who have been kept out of pocket without basis should be able to recover interest on money that is found to have been owed to them from the date of their entitlement until the date it is paid. The object of leaving it to judicial discretion as opposed to laying down a fixed rule making interest payable as of right is to enable the courts to achieve justice across the infinite range of factual permutations that may confront the court by tailoring the award to fit the unique circumstances of each case. Such discretion would extend to a determination of whether to award interest at all; what the relevant rate of interest should be; what proportion of the sum should bear interest; and the period for which interest should be awarded (Harvey

> McGregor, *McGregor on Damages* (Sweet & Maxwell, 19th Ed, 2014) at para 18-031).
>
> [emphasis in original]

79 The Court of Appeal indicated (at [140]) a non-exhaustive list of factors capable of influencing the court's discretion to award interest: (a) in the absence of a prescribed rate, what rate of interest would be appropriate to the relevant period(s); (b) whether the claimant was dilatory in the bringing and conduct of the proceedings; (c) whether the claimant had received compensation for the loss suffered from a source other than the defendant; (d) whether the claimant had sought and been awarded damages which include damages for the loss of the use of money; (e) whether the debt is paid immediately after proceedings are commenced; and (f) whether the parties have agreed that pre-judgment interest should not be recoverable. On the facts, the Court of Appeal awarded the default interest rate of 5.33% per annum from the date that the cause of action arose (*ie*, the date on which the defendant bank was liable to honour the letter of credit), "since the parties did not offer any reason for [the court] to depart from" it. In other words, no other rate was suggested in lieu of the default rate.

80 In the present case, it was common ground that interest should be awarded at the default interest rate of 5.33% per annum from the date of the writ until the date of judgment (Supreme Court Practice Direction No 1 of 2007). It was not disputed that the plaintiff should, in addition, be entitled to interest from the date of withdrawal (*ie*, the date of accrual of the cause of action). As regards the rate of interest applicable from the date of withdrawal to the date of the writ, it was disputed whether this was calculable according to:

(a) the default interest rate of 5.33% per annum;

(b) the interest at the actual rates earned on the fixed and/or time deposits in which the sums under the two cheques were placed; or

(c) the interest rate on the OCBC account at the time of withdrawal.

81 The first defendant tendered calculations of the interest earned on the sums of $613,000 under the trust cheque and $300,000 out of $500,000 under the gift cheque which had been placed in various fixed and/or time deposits upon withdrawal (*ie*, [80(b)] above). Mr Hanam had no objections to these calculations except that interest had not been computed for the remaining $200,000 of the $500,000 that was utilised by the first defendant to purchase shares and not placed in fixed or time deposits. The parties were hence directed to reach an agreement on the interest payable on the outstanding $200,000 on the basis that it had remained in the first defendant's POSB savings account and was not utilised to purchase shares.

82 Mr Hanam's primary argument, however, was for the default interest rate of 5.33% per annum to apply from the date of withdrawal (*ie*, [80(a)] above). He relied on *Albert Hong*, in which the court awarded interest of 5.33% per annum on the value of the converted shares from the date on which the defendant received payment for the purported share transfer to a third party (*ie*, the date when the wrongful act of conversion was completed).

83 The other authorities relied upon by the plaintiff offer no guidance on the applicable rate of interest to pre-writ interest awards. The plaintiff argued that interest of 5.33% per annum was payable on the basis of the compensation principle explained in *ACES System Development Pte Ltd v Yenty Lily (trading as Access International Services* [2013] 4 SLR 1317 ("*ACES*"). However, the extensive discussion in *ACES* on whether damages was to be awarded on the

basis of the compensation principle or the user principle had *no bearing* on the interest award, which was not the subject of appeal. The High Court judge had awarded interest of 2.665% per annum (*ie*, half the default rate) on damages for wrongful detention for the period of wrongful detention and at the usual rate of 5.33% per annum from the date that the chattels were returned (see *Yenty Lily (trading as Access International Services) v ACES System Development Pte Ltd* [2013] 1 SLR 577 at [80] and [81(e)]). Significantly, both these time periods *post*-dated the filing of the writ.

84 *Ng Swee Hua v Auston International Group Ltd and another* [2012] 1 SLR 1, also cited by the plaintiff, does not assist him either. The investment agreement provided for interest on convertible bonds to be payable biannually at 3% per annum and for all interest accrued from the last payment date to be forfeited upon conversion into shares. In breach of the investment agreement, the defendants failed to act on the plaintiff's conversion notice. Damages were assessed as the difference between the price of purchasing the shares on the market at the relevant date and the consideration already advanced under the investment agreement. In respect of the "pre-judgment interest", Tay Yong Kwang J (as he then was) did not interfere with the assistant registrar's award of default interest rate at 5.33% on the damages award from the date of the last amendment of the statement of claim (see [15]–[16] and [27]). Mr Hanam's point was that the court awarded interest at 5.33% even though the contractual rate "lost" was only 3%. However, this conflation between the contractual rate (to which the plaintiff was entitled *as his loss* until the date of forfeiture) and interest awarded *on damages* was addressed by the judge (see [27]). This case did not deal with the court's discretion to apply the default interest rate (or otherwise) to a backdated interest award.

85 Section 12 of the Civil Law Act grants the court a wide discretion as to the relevant rate of interest, as the Court of Appeal noted in *GRIPT* at [138]. In the light of the calculations tendered by the first defendant, an award of the default rate of interest would, in my view, overcompensate the estate for the loss of time value of the moneys. The plaintiff has not shown that the estate would have invested the money or has had to borrow money at a commercial rate. The evidence in fact suggests otherwise in that the plaintiff, after confronting the first defendant about the withdrawals in May 2011, was under the impression that the funds had been deposited into Mdm Tan's account (see [72] above) and was evidently quite content for the funds to remain in her account. I therefore award the plaintiff interest at the actual rates earned on the various fixed and/or time deposits in which the sums under the two cheques were placed after their withdrawal from the Testator's OCBC account (see [81] above), which were significantly lower than the default rate. Based on the first defendant's calculations, to which the plaintiff had no objections, the actual interest earned came up to $29,662 on the $613,000 under the trust cheque and $18,804 on $300,000 out of the $500,000 under the gift cheque. As for the remaining $200,000 from the gift cheque that was utilised by the first defendant to purchase shares, the rate of interest earned on the $300,000 under the fixed deposits with Maybank and RHB bank would also apply. Based on Mr Ramalingam's computations, interest at these rates on the sum of $200,000 would yield $14,570. In total, the pre-writ interest award amounts to $63,036. I should mention that there is no evidence that the rate of interest which the funds would have continued to earn in the OCBC account but for the withdrawals is different from the actual rates earned on the fixed and/or time deposits.

Conclusion

86 For all of the reasons stated above, my orders are as follows:

(a) Restitution of the sum of $1,113,000 by the first defendant to the Testator's estate;

(b) Delivery up of the half-gold Rolex watch to the Testator's estate;

(c) Interest on the sum of $1,113,000: (i) at the actual rates earned on the fixed and/or time deposits in which the sum was placed between 31 May 2010 and 22 June 2016, yielding a total interest of $63,036 for this period; and (ii) at the rate of 5.33% per annum between 23 June 2016 to the date of judgment; and

(d) Costs of $100,000 inclusive of disbursements to be paid by the first defendant to the plaintiff.

Steven Chong
Judge of Appeal

Andrew John Hanam (Andrew LLC) for the plaintiff;
Kasi Ramalingam (Raj Kumar & Rama) for the first defendant;
The second defendant in person.