

Ching Chew Weng Paul v Ching Pui Sim and Others
[2009] SGHC 277

Case Number : Suit 594/2008
Decision Date : 04 December 2009
Tribunal/Court : High Court
Coram : Steven Chong JC
Counsel Name(s) : Hri Kumar Nair SC/Wendell Wong/Wilson Wong (Drew & Napier LC) for the plaintiff; Sivakumar Murugaiyan (Madhavan Partnership) for the third defendant; Chan Hian Young/Ramesh Kumar (Allen & Gledhill LLP) for the fourth defendant
Parties : Ching Chew Weng Paul — Ching Pui Sim; Ching Kwong Yew (And also as Executor and Trustee of the estate of Ching Kwong Kuen, deceased); Ching Kwong Kee (As Executor and Trustee of the estate of Ching Kwong Kuen, deceased); Ching Siew Ying; Yim Chee Tong; Ching Chiew Leong; Ching Lai Yee; Ching Chiew Wai; Ching Lai Ping

Trusts

Revenue Law

4 December 2009

Judgment reserved.

Steven Chong JC:

Introduction

1 This case concerns the unfortunate quest of the plaintiff to recover assets which his father, the late Ching Kwong Kuen ("K K Ching") had intended to leave behind for him when he reached the age of 30. In 1982, K K Ching transferred shares in various companies to his relatives pursuant to several oral trust arrangements to hold on trust for him. None of them was documented in any form whatsoever. In 1984, after K K Ching was diagnosed with terminal cancer, he gave oral instructions to his trustees to hold the assets on behalf of his son, the plaintiff instead. One of the companies, National Aerated Water Singapore Pte Ltd, was best known for bottling "Sinalco" and "Kickapoo". K K Ching passed away in 1985 when the plaintiff was only 14 years old. After his death, the estate was embroiled in a litany of legal proceedings involving, *inter alia*, his divorced wife (OS 1144 of 1989), his elder son, the plaintiff's brother (OS 246 of 1996) and the Commissioner of Estate Duty (OS 1240 of 1988). The extent of K K Ching's wealth was expectedly the focal point in each of those proceedings.

2 Shortly before the plaintiff reached the age of 30, he began to take steps to recover the assets which he believed to be rightfully his. Unfortunately, he faced difficulties in the process, though not because any of the trustees were claiming ownership of the assets for themselves. As the trust arrangements were all made orally some years ago, there was some uncertainty whether the assets were held on trust for the estate of K K Ching or for the plaintiff.

3 I say that this case is unfortunate and perhaps even somewhat tragic because the plaintiff eventually had no choice but to commence the present proceedings against his cousin (the first defendant), his uncle (the second defendant) who passed away in October 2008 after the commencement of the proceedings, another uncle (the third defendant) who became blind in 1963 and his aunt (the fourth defendant) who was diagnosed with early stages of dementia in 2005. This observation is not intended to be a criticism of the plaintiff's conduct in commencing the proceedings

against his relatives. He was compelled to do so after exploring other avenues.

4 Such problems can of course be avoided if the wishes of a testator/settlor are properly documented and expressed in clear language. Otherwise litigation is almost inevitable. Instead of inheriting the wealth, the next generation will be “inheriting” unnecessary and traumatic litigation.

Background Facts

5 The plaintiff is the youngest son of the late K K Ching. The first defendant is the plaintiff’s first cousin. The second defendant is the plaintiff’s paternal uncle. He was one of the two executors of K K Ching’s estate. He passed away on 21 October 2008 after this action was commenced. Initially, he was represented in these proceedings. In fact, a defence was filed on his behalf. The defence was a bare denial which merely put the plaintiff to strict proof of his claim. After his death, the plaintiff applied for the fifth to ninth defendants to be substituted as parties for the purposes of the action against the estate of the second defendant. The fifth defendant is the wife of the second defendant while the sixth to ninth defendants are his children. The third defendant is also the plaintiff’s paternal uncle. He is the only remaining executor of K K Ching’s estate. The fourth defendant is the plaintiff’s paternal aunt.

6 The plaintiff commenced the present suit for, *inter alia*, recovery of property that he alleged was held on trust for him as beneficiary or in the alternative, on trust for his father’s estate of which he is a beneficiary under the Will executed by K K Ching on 24 November 1984 (“the Will”).

7 It is the plaintiff’s case that in or around 1982, K K Ching asked the first, second and fourth defendants, and they agreed, to hold shares in various companies on trust for K K Ching. At that time, the plaintiff was only 11 years old. Pursuant to this, K K Ching transferred the shares in the following companies to the first defendant in 1982 (“Trust Assets (A)”):

Company	Number of shares	Percentage of total issued shares
K K Holdings (Pte) Ltd (“KK Holdings”)	2	50.00%
National Aerated Water Singapore Pte Ltd	72,270	5.16%
National Aerated Water Co Sdn Bhd	233,700	5.19%
Kwong Soon Engineering Company Pte Ltd (“Kwong Soon Engineering”)	240,000	20.00%
Kheng Cheong & Co Pte Ltd	100,000	20.00%
Kheng Cheong & Co Sdn Bhd	10,000	20.00%
Siong Heng Realty Pte Ltd (“Siong Heng Realty”)	100 ^{[note: 1]}	20.00%

Seng Realty & Development Pte Ltd	765,000 ^[note: 2]	1.34%
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8 K K Ching transferred a sum of \$1m and the shares in the following companies to the second defendant in 1982 ("Trust Assets (B)"):

Company	Number of shares	Percentage of total issued shares
KK Holdings	1	25.00%
National Aerated Water Singapore Pte Ltd	117,374	8.38%
Seng Heng Realty Pte Ltd	32,000 ^[note: 3]	20.00%

9 K K Ching also transferred one share in K K Holdings to the fourth defendant in 1982 ("Trust Asset (C)"). Trust Assets (A), (B) and (C) are collectively referred to as the "Trust Assets". The oral trusts created by K K Ching in 1982 are referred to collectively as the "1982 Trusts", and each as the "1982 Trust".

10 In or around late 1984, K K Ching learnt that he was suffering from terminal cancer. He executed the Will on 24 November 1984. He made specific bequests of cash to the plaintiff's sister. He made further specific bequests of cash to the plaintiff and all his siblings to be held on trust for their education and maintenance. 90% of K K Ching's residuary estate was left to the plaintiff when he reached the age of 30 while the other 10% was left to the plaintiff's elder brother when he reached the age of 30. The Trust Assets were not included in the Will. On 27 August 2008, the plaintiff's brother assigned his 10% share to the plaintiff. It is the plaintiff's case that around the time K K Ching executed the Will, he informed the first, second and fourth defendants that he was terminating the 1982 Trusts and was creating new oral trusts under which the first, second and fourth defendants would hold the Trust Assets solely for the plaintiff's benefit until he reached the age of 30 after which the Trust Assets were to be transferred to the plaintiff. The oral trusts created by K K Ching in 1984 to replace the 1982 Trusts are referred to collectively as the "1984 Trusts", and each as the "1984 Trust".

11 K K Ching passed away on 23 August 1985. Probate was granted to the second and third defendants on 18 April 1986.

12 In the current action, the plaintiff seeks the following orders if the court upholds the 1984 Trusts:

- (a) an order that the Trust Assets be transferred to the plaintiff by the first, second and fourth defendants;

(b) an order that the first, second and/or fourth defendants provide to the plaintiff an account of all dividends, income, interests, and/or other payments arising from their respective portions of those Trust Assets; and

(c) an order for all sums found to be due to the plaintiff upon the taking of such account to be paid to the plaintiff.

13 Alternatively, the plaintiff seeks the following orders if the court upholds the 1982 Trusts:

(a) an order that the Trust Assets be transferred to the estate of K K Ching by the first, second and fourth defendants;

(b) an order that the first, second and/or fourth defendants provide to the estate of K K Ching an account of all dividends, income, interests, and/or payments arising from their respective portions of those Trust Assets;

(c) an order that the third defendant, as executor of the estate of K K Ching, administer the assets received into the estate in accordance with the Will including but not limited to declaring the same to the tax authorities for purposes of estate duty and paying any estate duty that may be levied on the same; and

(d) alternatively, an order that the third defendant be removed as executor of the estate of K K Ching and the plaintiff, or a person nominated by the plaintiff, be appointed in the third defendant's place.

14 In addition, the plaintiff also seeks an order against the second and third defendants as executors and alternatively against the first, second and fourth defendants as trustees that they indemnify the estate of K K Ching against any penalties and/or interest for late settlement of estate duty in respect of the Trust Assets.

Creation of the 1982 Trusts

15 The first defendant has admitted that Trust Assets (A) were transferred to her in 1982 to be held on trust for K K Ching. The first defendant and the plaintiff both testified that the second defendant had admitted on various occasions that Trust Assets (B) were also transferred to him in 1982 to be held on trust for K K Ching. This was not challenged by the fifth to ninth defendants following the death of the second defendant. As for Trust Asset (C), it is the fourth defendant's case that it was transferred to her in 1982 to be held on trust for K K Ching.

16 In the light of the evidence, it is indisputable that the 1982 Trusts were created in respect of the Trust Assets and I so find. The main factual dispute in the present suit is whether K K Ching gave oral instructions to the trustees in 1984 to substitute the trusts in favour of the plaintiff.

Were the 1982 Trusts replaced by the 1984 Trusts

17 Before examining the evidence in relation to this issue, it is perhaps relevant to bear the following in mind:

(a) There were in fact three separate 1982 Trusts. The first, second and fourth defendants were appointed separately by K K Ching to hold different shares/assets on trust for him. Likewise, in determining whether the 1982 Trusts were replaced by the 1984 Trusts, it is necessary to examine the evidence in relation to each of the three defendants. In other words, a finding that one of the 1982 Trusts was replaced by a 1984 Trust does not *ipso facto* follow that the rest were similarly replaced in relation to the other defendants.

(b) A finding whether the Trust Assets are held under the 1982 Trusts or the 1984 Trusts has no direct financial impact on the plaintiff as he is the sole remaining beneficiary under the late K K Ching's Will. In either event, it is common ground that estate duty is payable in relation to the Trust Assets.

(c) A finding whether the Trust Assets are held under the 1982 Trusts or 1984 Trusts may have a material bearing on the issue of liability on the executors or trustees for delay in settling the estate duty and the costs of the action. In this regard, it is to be noted that the defendants are being sued in different capacities. The second and third defendants are being sued in their capacity as executors of K K Ching's Will whilst the first, second and fourth defendants are being sued as trustees for the plaintiff under the 1984 Trusts. The second defendant is therefore being sued in both capacities.

18 With the above observations in mind, I will now proceed to examine the evidence as to whether the 1982 Trusts were replaced by the 1984 Trusts in relation to each of the defendants.

Plaintiff's evidence

19 Counsel for the fourth defendant submitted that the evidence of the plaintiff on proof of the 1984 Trusts is both unsatisfactory and contradictory:

(a) In his Affidavit Evidence-in-Chief ("AEIC"), the plaintiff initially claimed that he only came to learn about the 1984 Trusts after his father's death in 1985. On the witness stand, he corrected his AEIC to the effect that he was aware of the trust arrangements all along. The plaintiff claimed that he knew about the trust arrangements because his father and the first defendant had on various occasions spoken about the trusts in his presence.

(b) Next, the fourth defendant refers to the correspondence which the plaintiff wrote to the various defendants prior to the commencement of the legal proceedings. The plaintiff wrote ten letters dated 7 March 2008 to each of the defendants in relation to the different shares/assets. With the exception of one letter, in each of the other nine letters, the plaintiff consistently maintained that the Trust Assets are held on trust for him and enquired when the company and/or trustees would transfer the shares to him. In the letter addressed to the second defendant in relation to a cash sum of \$1 m, the plaintiff in para 1, asserted that the cash is held on trust for him. However in para 5, he requested the second defendant (who was also the

executor) to transfer the sum to him as beneficiary under his father's Will.

(c) The fourth defendant also attached significance to a letter written by Drew & Napier LLC ("Drew & Napier") dated 19 June 2009 on behalf of the plaintiff. The letter stated that the plaintiff only came to know about the 1984 Trusts "recently" and therefore he could not have known about them all along. This was corrected by Drew & Napier in a subsequent letter.

20 In my view, while the plaintiff may well have been told that his father was planning to leave his assets to him upon his death, it is highly unlikely that the plaintiff at the tender age of 11 (in 1982) would have understood the nature or implication of the trust arrangements. As such, the inconsistency in sub-para (a) above is neither here nor there. By the plaintiff's own admission, references to the 1982 or 1984 Trusts were only used for the first time after the institution of the action. With regard to sub-para (b) I do not think that a single letter which, at best, was ambivalent could undermine the rest of the correspondence written on the same day which speaks of the trust for the plaintiff. As for sub-para (c), the fact remains that it was the plaintiff's pleaded case all along, which preceded the correspondence, that the termination of the 1982 Trusts and the creation of the replacement 1984 Trusts were discussed in the presence of the plaintiff.

21 Ultimately the issue of whether the 1982 Trusts were replaced by the 1984 Trusts must be examined in the light of the objective evidence before me.

First defendant

22 The first defendant gave evidence on behalf of the plaintiff. She stated in her AEIC that sometime in late 1984, K K Ching was diagnosed to be suffering from advance thoracic cancer. Shortly thereafter, K K Ching verbally instructed the first defendant that the 1982 Trust under which Trust Assets (A) were held by her for him was replaced with a new 1984 Trust to hold the same assets solely for the benefit of the plaintiff. Consistent with the 1984 Trust, the first defendant transferred shares in Kwong Soon Engineering and Siong Heng Realty to the plaintiff in 2006 and 2007. These shares were previously transferred by K K Ching to the first defendant in 1982 to be held on trust for him. The transfers to the plaintiff were effected prior to the commencement of the present proceedings. The first defendant explained that she has not transferred the rest of Trust Assets (A) to the plaintiff due to "tardiness and procrastination" on her part. More significantly, she testified that she has not transferred the other trust assets to the plaintiff because she was concerned that it would upset the other seniors in the family, in particular the second defendant who at that time was reluctant to effect the transfer as he wanted to retain control over the companies. As the second defendant was a director of some of the companies, the transfer to the plaintiff would require his approval as director.

23 The third and fourth defendants do not challenge the first defendant's evidence that she holds Trust Assets (A) under the 1984 Trust. It follows that as regards the first defendant, there is no issue that Trust Assets (A) held previously under the 1982 Trust was replaced by the 1984 Trust. It is the third defendant's case based on what he was told by the first defendant and the plaintiff after K K Ching's death that all the Trust Assets are held on trust for the plaintiff under the 1984 Trusts. There is evidently some self-interest for the third defendant to maintain this position. If they are held under the 1984 Trusts and therefore not on trust for the estate, he believed that he would have no responsibility in relation to the Trust Assets as executor. The fourth defendant's case is that the first defendant's evidence in relation to Trust Assets (A) does not prove whether K K Ching had given similar instructions to her in 1984 to hold Trust Asset (C) on behalf of the plaintiff. This will be considered and dealt with separately in relation to the fourth defendant.

24 On the evidence before me, I find that the first defendant did receive instructions from K K Ching in 1984 to hold Trust Assets (A) on behalf of the plaintiff. In this connection, it is relevant to point out that her evidence is actually adverse to her self-interest as it would mean that she may be accountable as trustee for the delay, if any, in transferring Trust Assets (A) to the plaintiff.

Second defendant

25 The writ together with the statement of claim was served on the fifth to the ninth defendants in February 2009 following the death of the second defendant. By Order of Court dated 28 January 2008, the proceedings were ordered to be continued against the fifth to ninth defendants (representing the estate of the second defendant) as if they had been substituted for the estate of the second defendant. They failed to enter appearance. Neither have they filed any amended defence on behalf of the estate of the second defendant. Copies of all subsequent pleadings have been duly served on the fifth to the ninth defendants. The fifth to ninth defendants are aware of the present proceedings and the allegations made against the second defendant but have elected not to participate at all despite having been added as parties to the proceedings.

26 The first defendant testified that she was aware that K K Ching had transferred the above shares to the second defendant because she had actively assisted K K Ching in managing his business and companies. Her responsibility would include updating the register of shareholders after the transfers were effected. K K Holdings was initially solely owned by K K Ching. In 1982, one out of four shares in K K Holdings was transferred to the second defendant. As regards Seng Heng Realty, the company was initially started by the second defendant and his brother, Ching Kwong Lum. Subsequently, the other three Ching brothers, K K Ching, Ching Kwong Hoong and the third defendant joined the company. Apart from the second defendant and Ching Kwong Lum (who were allotted one additional share each as founders), each of the Ching brothers was allotted 32,000 shares. According to the company records, 64,001 shares are currently held by the second defendant. His original shareholding in Seng Heng Realty was only 32,001 shares. The balance 32,000 shares belonging to K K Ching were transferred to the second defendant to be held on trust for him in 1982.

27 Both the first defendant and the plaintiff testified that between 1999 to 2007, they met several times with the second defendant to recover Trust Assets (B). On those occasions, the second defendant acknowledged the existence of both the 1982 Trust and the 1984 Trust in relation to Trust Assets (B). The second defendant acknowledged his obligation under the 1984 Trust but said that he would transfer Trust Assets (B) back to the plaintiff when he was ready without ever explaining when that would be accomplished.

28 In the light of the unchallenged evidence, I am satisfied that the second defendant was instructed by K K Ching in 1984 to hold Trust Assets (B) (previously held on trust for K K Ching under the 1982 Trust) on behalf of the plaintiff. This is also consistent with the evidence of the first defendant that she was likewise instructed to hold Trust Assets (A) initially on trust for K K Ching in 1982 and subsequently for the plaintiff in 1984.

Third defendant

29 The third defendant became blind in 1963 following an industrial accident. He only learned of his appointment as executor of the estate after the death of his brother, K K Ching. He is now the sole remaining executor after the joint executor, the second defendant, passed away in October 2008.

30 Initially, the third defendant was joined only as a nominal defendant "for the purposes of making any judgment that may be obtained by the plaintiff binding on him: see para 4 of the Statement of

Claim dated 25 August 2008. While the third defendant acknowledged that he was aware that K K Ching had transferred some shares to the other defendants, he denied both the details of the transfers as well as any knowledge of the trust arrangements under both the 1982 and 1984 Trusts. Prior to the institution of the proceedings, no claim or demand was ever made against the third defendant as executor of the estate. This is to be contrasted with the fact that the plaintiff instructed his solicitors to issue several letters of demand against the first, second and fourth defendants in their capacity as trustees.

31 He testified that the first defendant had informed him that she and the second defendant were holding Trust Assets (A) and (B) for the plaintiff. The plaintiff and the first defendant did approach the third defendant for assistance to recover the Trust Assets. However, it is not disputed that his assistance was sought as an elder of the family and not as the executor of the estate.

32 Accordingly, the third defendant was not able to offer any cogent evidence to substantiate the 1982 or 1984 Trusts. What the third defendant knows is based on what he was told by the first defendant and the plaintiff after K K Ching's death.

Fourth defendant

33 The issue in relation to the fourth defendant is less straightforward compared to the first and second defendants. By the time the matter came for trial before me, the fourth defendant was diagnosed to be suffering from early stages of dementia, a condition which has afflicted her since 2005. It was apparent to me during her cross-examination that she had considerable difficulty recalling details of the trust arrangement. She was, however, able to read various documents when asked to do so on the witness stand. When she was referred to an email dated 28 April 2008 from the plaintiff to her husband, her attention was directed to Ms Laura Liong who was copied on that email. On two occasions during the cross-examination, she mistakenly thought Laura Liong to be her niece when she is in fact her own daughter. Her obvious mistake only serves to highlight the extent of her confusion.

34 She was only diagnosed with dementia in 2005. I agree with counsel for the plaintiff that while her present medical condition would have a material bearing on her evidence in her AEIC as well as her answers in cross-examination, it should not have any significant bearing on her conduct prior to 2005. Nonetheless, the plaintiff sought to rely on some answers which the fourth defendant gave in cross-examination that it is possible for K K Ching to have given her instructions in 1984 to hold Trust Asset (C) for the plaintiff. In the light of her current medical condition, it would be unsafe to place any weight on those answers.

35 It bears highlighting that the fourth defendant was at one time the Assistant Accountant General of Singapore. After she retired from the office, she became a remisier. She does not dispute that Trust Asset (C) comprising one share in K K Holdings was transferred to her in 1982 to be held on trust for K K Ching. However, in her pleadings and AEIC, she denied any knowledge that K K Ching had instructed her in 1984 to hold the same share, i.e. Trust Asset (C), on trust for the plaintiff. Although the first defendant claimed in her AEIC that it "was very likely" that the fourth defendant would have received similar instructions, she admitted on the witness stand that she was not present when instructions were allegedly given to the fourth defendant. Therefore she could not offer any evidence to prove the substitution of the trust arrangement. This issue would, therefore, have to be resolved by reference to objective evidence before me:

- (a) It is not disputed that K K Ching did give similar instructions to the first, second and fourth defendants to hold various shares/assets on trust for him in 1982. After he was diagnosed with

terminal cancer in 1984, as explained at [22]–[28] above, I have found that K K Ching did give instructions to the first and second defendants to hold the same assets on trust for the plaintiff. I accept the plaintiff's submission that it is highly improbable that K K Ching would not have given similar instructions to the fourth defendant.

(b) The plaintiff reached the age of 30 in 2001. In 2000, the plaintiff approached the fourth defendant to provide him with a written acknowledgment that she holds Trust Asset (C) on trust for him. To that end, the fourth defendant executed a Trust Deed dated 17 March 2000 acknowledging that she holds Trust Asset (C) on behalf of the plaintiff. This was signed in the presence of a solicitor and well before her dementia had set in. In addition, the fourth defendant executed an undated share transfer form in respect of Trust Asset (C) in favour of the plaintiff also in the presence of a solicitor. As she was a remiser at that time, there can be no doubt that she was aware of the effect and nature of the share transfer form. The plaintiff testified that the share transfer form was not lodged at the request of the fourth defendant as she was concerned that the transfer would upset the second defendant who was then the *de facto* head of the family. Having secured the share transfer form, there would be no reason for the plaintiff not to register the transfer unless he was indeed requested not to do so by the fourth defendant.

36 It was pointed out by counsel for the fourth defendant that the terms of the Trust Deed were not consistent with the existence of the 1984 Trust. This is because the recital in the Trust Deed stipulated that the transfer was made to the fourth defendant as a nominee of the plaintiff. This was strictly incorrect since the transfer was effected in 1982 and was to be held initially by the fourth defendant for K K Ching and not the plaintiff. While I agree that the recital may appear inconsistent with the existence of the 1984 Trust, I cannot overlook the fact that the Trust Deed was nonetheless an acknowledgement by the fourth defendant that she holds Trust Asset (C) on trust for the plaintiff. There is no evidence that in 2000 when she signed both the Trust Deed and the share transfer form that her mental condition was in any way impaired. In fact, the evidence is to the contrary since her early stage of dementia was only diagnosed in 2005. In 2000, the fourth defendant would have understood the difference between holding Trust Asset (C) on trust for the estate of K K Ching and the plaintiff. She would not have signed the Trust Deed and/or the share transfer form if she believed in 2000 that Trust Asset (C) was held on trust for the estate.

37 If, in fact, the fourth defendant believed that she held Trust Asset (C) on behalf of K K Ching, she should have taken some steps to inform the executors between 1985 to 2000. Having signed the Trust Deed and the share transfer form in 2000 in relation to Trust Asset (C), it would be inconsistent for the fourth defendant to claim at the trial of this action that she holds Trust Asset (C) on behalf of the estate instead. The submission by the fourth defendant that the 1984 Trust in relation to Trust Asset (C) is a concoction by the plaintiff is plainly against the weight of her own evidence.

38 In the premises, I am satisfied that K K Ching did instruct the fourth defendant in 1984 to hold Trust Asset (C) on behalf of the plaintiff in the same way as he did in relation to the first and second defendants for Trust Assets (A) and (B) respectively.

Are the 1984 Trusts void by reason of s 9 of the Statute of Frauds

39 It is the fourth defendant's pleaded case that even if the 1984 Trust is proved against her, it is invalid and unenforceable as it was not in writing in breach of s 7(2) of the Civil Law Act (Cap 43, 1999 Rev Ed) ("CLA) which provides as follows:

A disposition of an equitable interest of trust subsisting at the time of the disposition must be in writing signed by the person disposing of the same or by his agent lawfully authorised in writing or

by will.

40 Both the fourth defendant and the plaintiff had proceeded on the basis that s 7(2) of the CLA was the correct provision to be considered. Under the Application of English Law Act (Cap 7A), the Civil Law Act (Cap 43, 1988 Rev Ed) was amended to introduce a new s 6B(2) which was the predecessor of the current s 7(2) of the CLA. However, s 6B(2) only came into effect on 12 November 1993 and therefore is not the correct provision to govern the 1984 Trusts. A similar observation was made by Woo J in *Ong Siew Lay v Ong Boon Chuan* [2009] SGHC 99 ("*Ong Siew Lay*") where the court dealt with an oral disposition also made in 1984. As astutely observed by Woo J in *Ong Siew Lay*, the correct provision to be considered would be s 9 of the English Statute of Frauds 1677 ("the Statute of Frauds") which states as follows:

IX. And be it further enacted, That all Grants and Assignments of any Trust or Confidence shall likewise be in Writing, signed by the Party granting or assigning the same, or by such Last Will or Devise, or else shall likewise be utterly void and of none Effect.

There is a slight difference in the wording between s 9 of the Statute of Frauds and s 7(2) of the CLA. Section 9 of the Statute of Frauds refers to "grants and assignments" whereas s 7(2) of the CLA refers to "disposition". In *Ong Siew Lay* at [56]–[60], they were effectively treated as having the same effect.

41 Although this defence is only pleaded by the fourth defendant, it would apply to all the 1984 Trusts if upheld. The plaintiff's case is that all the 1982 Trusts were replaced by the 1984 Trusts when K K Ching gave oral instructions separately to the first, second and fourth defendants to hold the Trust Assets for the plaintiff. After the Trust Assets were first transferred in 1982 to the first, second and fourth defendants, K K Ching thereafter only retained the beneficial interest. Accordingly, when he gave oral instructions in 1984 to hold the same Trust Assets for the plaintiff, it would have constituted a grant or assignment of his beneficial interest in the Trust Assets to the plaintiff. The oral instructions by K K Ching in 1984 therefore amounted to a grant or assignment of his equitable interest and, hence, unenforceable under s 9 of the Statute of Frauds. In support of this proposition, counsel for the fourth defendant cited the decision of the House of Lords in *Grey v Inland Revenue Commissioners* [1960] 2 AC 291 ("*Grey*"). In that case, the settlor had transferred 18,000 shares in the company to his nominees to be held on trust for him. Seventeen days thereafter, the settlor directed his nominees to hold the shares on trust for his grandchildren. The House of Lords held that the oral direction amounted to disposition of the equitable interest and accordingly found the trust in favour of the settlor's grandchildren to be void by reason of s 53(1)(c) of the UK Law of Property Act 1925 ("UK Law of Property Act") which is in *pari materia* with s 7(2) of the CLA. The facts are therefore very similar to the present case.

42 I should add that in *Grey*, an observation was made whether "disposition" under s 53(1)(c) of the UK Law of Property Act is equivalent to "grant and assignments" under s 9 of the Statute of Frauds. However, on the facts of that case, it was not necessary to decide the issue since they had determined that the oral direction amounted to disposition within the meaning of s 53(1)(c) of the UK Law of Property Act. Nevertheless, the House of Lords at p 16 did indicate their view that it was likely they had the same legal effect:

But it does not necessarily follow from that that such a direction, if the effect of it was to determine completely or pro tanto the subsisting equitable interest of the maker of the direction, was not also a grant or assignment for the purposes of section 9 and therefore required writing for its validity. Something had to happen to that equitable interest in order to displace it in favour of the new interests created by the direction: and it would be at any rate logical to treat the

direction as being an assignment of the subsisting interest to the new beneficiary or beneficiaries or, in other cases, a release or surrender of it to the trustee.

43 Initially, counsel for the plaintiff disputed that the 1984 Trusts were in breach of s 7(2) of the CLA (or s 9 of the Statute of Frauds). During Closing Submissions, after the force of the argument made by counsel for the fourth defendant, the plaintiff decided, quite correctly, not to pursue the point. It is the mark of a good advocate to abandon points which are no longer meritorious. Instead, counsel for the plaintiff submitted that he is entitled to invoke the doctrine of part performance to preclude the fourth defendant from denying the validity of the 1984 Trust.

Doctrine of part performance

44 To mitigate against the rigours of the strict requirement of writing, the courts have developed the doctrine of part performance to prevent a statute to be used as an instrument of fraud: see *Midland Development Pte Ltd v The Stansfield Group Pte Ltd* [2004] 4 SLR 258 ("*Midland Development*") at [66] and *Re Estate of Tan Kow Quee* [2007] 2 SLR 417 at [15].

It is clear that equity will *only* intervene to "... thwart unconscionable behaviour" so as to prevent "unscrupulous conduct to flourish". [emphasis added]

The plaintiff relies entirely on the execution of the Trust Deed and the share transfer form in 2000 as evidence of part performance by the fourth defendant. The plaintiff submits that "there is no clearer evidence of part performance" and that it will be wholly unconscionable for the fourth defendant to hide behind s 7(2) of the CLA (or s 9 of the Statute of Frauds) to deny the 1984 Trust in relation to Trust Asset (C). Before examining whether these acts would constitute sufficient part performance by the fourth defendant, it should be highlighted that the issue is equally relevant to Trust Assets (A) and (B) held by the first and second defendants even though this point was only raised by the fourth defendant.

45 At first blush, the submission by the plaintiff appears quite compelling. However, the inquiry is not merely to determine whether there were acts of part performance which are referable to the 1984 Trusts *per se*. As equity only intervenes to "thwart unconscionable behaviour", the inquiry is instead focussed on the consequence of invalidating the 1984 Trust and whether the ensuing result is unconscionable. This is implicit from the plaintiff's submission that the part performance must render it unconscionable for the fourth defendant to challenge the validity of the 1984 Trust.

46 Recently the Court of Appeal in *Joseph Mathew v Singh Chiranjeev* [2009] SGCA 51 took the opportunity to review the applicability of the doctrine of part performance in Singapore. The Court of Appeal observed that the doctrine was previously assumed to apply in cases such as *Midland Development*. After examining the history of the enactment and the UK equivalent of s 40(2) of the UK Law of Property Act, the Court of Appeal arrived at the conclusion that the doctrine continues to be part of Singapore law.

47 Accordingly, to constitute part performance to warrant equity's intervention, the plaintiff would need to prove the following:

- (a) that the defendants had taken steps which are referable to the existence of the 1984 Trusts; and

(b) having acknowledged the existence of the 1984 Trusts by reason of the steps so taken, it would be unconscionable for the defendants to rely on s 9 of the Statute of Frauds to deny their enforcement.

48 In my view, the execution of the Trust Deed and the share transfer by the fourth defendant do not constitute sufficient part performance to avoid the application of s 9 of the Statute of Frauds for the following reasons:

(a) First, the fourth defendant is not seeking to invalidate the 1984 Trust so as to claim Trust Asset (C) for herself. She accepts that Trust Asset (C) is held on trust for the estate. As such, this court is not concerned with the type of unconscionable conduct as was found in *Re Estate of Tan Kow Quee* where the defendant had occupied the property without challenge or interruption for at least 46 years and had incurred expenses to renovate the property. Further, the court in that case also found that there had in fact been some distribution of the estate. Equally in *Midland Development*, the court found that it would be unconscionable for the landlord to deny the oral agreement to renew the lease given that the tenant had paid and the landlord had accepted the adjusted rent and deposit.

(b) Secondly, while equity will intervene to prevent unscrupulous claims, it is also trite that equity will not act in vain. In this regard, it is the plaintiff's consistent evidence that it does not matter to him whether the Trust Assets are held under the 1982 or 1984 Trusts. In either event, he will eventually be entitled to all the Trust Assets. That explains why in both his contemporaneous correspondence and during his cross-examination, he candidly admitted that he made no distinction between the 1982 and 1984 Trusts. This is also consistent with the plaintiff's position which was addressed during the Opening [\[note: 4\]](#).

We invite your Honour to make a ruling on either the 1982 or 1984—it doesn't really matter to us. The shares will ultimately come back to us...

This was repeated in the plaintiff's Closing Submissions that "it does not matter under which trust the Trust Assets were held, as the same will ultimately be his" [\[note: 5\]](#). In the premises, it seems to me that it will serve no useful purpose to invoke equity's intervention under the doctrine of part performance to enforce the 1984 Trusts.

49 As regards the second defendant, there is no suggestion that he had partially performed the 1984 Trust other than his acknowledgements of the trust arrangements to the plaintiff. In fact, it is the plaintiff's case that the second defendant had dragged his feet to effect the transfer.

50 Finally, as for the first defendant, it could be said that the transfer of the shares in Kwong Soon Engineering and Siong Heng Realty to the plaintiff in 2006 and 2007 respectively may be referable to the 1984 Trust. To be fair, this point was not developed by the plaintiff because the defence was not raised by either the first or second defendant. However, it would suffer from the same difficulties in that there is nothing unconscionable to invalidate the 1984 Trust even in relation to the first defendant since the first defendant also does not dispute the 1982 Trust as regards Trust Assets (A).

51 The rationale of s 7(2) of the CLA and also s 9 of the Statute of Frauds is to prevent secret oral trust arrangements thereby making it difficult for the trustees to determine the true beneficiaries. In *Vandervell v Inland Revenue Commissioner* [1967] 2 AC 291 at 311, the House of Lords held:

Those words were applied in *Grey and Oughtred* to cases where the legal estate remained outstanding in a trustee and the beneficial owner was dealing and dealing only with the equitable estate. That is understandable; the object of the section, as was the object of the Old Statute of Frauds, is to prevent hidden oral transactions in equitable interests in fraud of those truly entitled, and making it difficult, if not impossible, for the trustees to ascertain who are in truth his beneficiaries. [emphasis added]

In this particular case, there is no practical financial difference to the plaintiff whether the Trust Assets are held under the 1982 or 1984 Trusts. If the beneficiary under the 1984 Trusts had been someone other than the plaintiff, I have no doubt that the plaintiff would himself be seeking to invoke s 7(2) of the CLA or rather s 9 of the Statute of Frauds to invalidate the oral 1984 Trusts to claim the Trust Assets under the Will.

52 It seems to me that the principal purpose for the plaintiff to enforce the 1984 Trusts is not to claim the Trust Assets but to make the first, second and fourth defendants as trustees accountable for the alleged delay in settling the estate duty and perhaps on the question of costs. I will deal with these issues separately below. For the moment, I do not think that equity should intervene to facilitate such a purpose.

53 I therefore determine that the 1984 Trusts are void by reason of s 9 of the Statute of Frauds. In the circumstances, I find that the Trust Assets are held on trust for the estate of K K Ching under the 1982 Trusts.

Whether the plaintiff has *locus standi* to sue under the 1982 Trusts

54 The fourth defendant claimed that the plaintiff has no *locus standi* to sue on behalf of the executors of K K Ching's estate as he has not obtained any court order entitling him to act in place of the executors. The fourth defendant argued that the plaintiff was only able to seek a declaration that the first, second and fourth defendants held the Trust Assets on trust for K K Ching's estate. The plaintiff is not entitled to seek a transfer of the shares to him on the basis that he is the beneficiary under the Will. The plaintiff cannot sue for his benefit as the beneficiary as opposed to the benefit of the estate.

55 In *Wong Moy v Soo Ah Choy* [1996] 3 SLR 398 ("*Wong Moy*"), the appellant had commenced an action seeking a declaration that certain property which was in the name of the respondent, was held on trust by the respondent for the deceased (the appellant's husband). The properties had been sold and the claim was directed at the proceeds of sale. The respondent claimed that the appellant lacked *locus standi* since she had yet to extract the letters of administration. The appellant's claim was struck out by the High Court. The Court of Appeal allowed the appeal and held that as beneficiary of the estate, the appellant had no equitable or beneficial interest in any particular asset comprised in that estate, which was yet unadministered. However, it did not follow that a beneficiary of an estate which was unadministered or under administration had no remedy. He or she could in certain circumstances institute action to recover assets of the estate. Special circumstances were not confined solely to cases where the personal representative had defaulted in acting to recover the property. The Court of Appeal found that such a rule would be too inflexible and may lead to injustice. All the circumstances of the cases should be considered, including the nature of the assets, the position of the personal representative and the reason for the personal representative's default.

56 The Court of Appeal referred to the decision of Chao Hick Tin J in *Omar Ali bin Mohd v Syed Jafaralsadeg bin Abdulkadir Alhadad* [1995] 3 SLR 388 ("*Omar Ali*"). There, the plaintiffs were beneficiaries of the estate of an intestate who was entitled to the unexpired term of the leasehold

interest in a property. The trustees of the estate of the owner of the reversion purported to sell the property including the unexpired term of the leasehold interest to the purchaser and the beneficiaries thereupon initiated proceedings against the trustee and the purchaser seeking declarations that the unexpired term of the leasehold interest vested in the estate of the intestate and that the purported sale by the trustees was null and void. One of the questions before Chao Hick Tin J was whether the plaintiffs could sue as beneficiaries of the estate for the declaration to protect the property of the estate and to prevent the sale of the property. Chao Hick Tin J held that the plaintiffs had *locus standi* to bring the action. He said, at p 395:

Here the plaintiffs are not in the position of residual legatees. Neither are they suing in a representative capacity. They come as beneficiaries of the estate of the intestate seeking a declaration that the property (the unexpired term of the leasehold interest) belongs to the estate. *They do not seek to claim any asset for themselves.* [emphasis added]

57 Chao Hick Tin J referred to the decision of the Supreme Court of Victoria in *Re Atkinson* [1971] VR 612. He quoted with approval the following passage from Gillard J:

The interest of any one beneficiary in property the subject of a trust which would be constituted on completion of the administration surely cannot be defeated by the personal representative's inactivity. *I repeat that, in my view, any beneficiary would be entitled to the remedy in a court of equity to which the estate was entitled.* Whether one calls it a mere 'equity' or to use earlier Australian definition an 'equitable interest', I think, is immaterial for the purposes of this case. [emphasis added]

58 What these two cases establish is that the beneficiary is not confined to declaratory reliefs. They are able to claim any reliefs on behalf of the estate. Therefore, the beneficiary in *Omar Ali* could seek an order of court to prevent the sale of the property while the beneficiary in *Wong Moy* could seek an order of court requiring the respondent to file an affidavit disclosing the properties held on trust for the deceased. The plaintiff here is therefore not confined to seeking a declaration that the Trust Assets are held on trust for the estate. The prohibition is that the plaintiff is not entitled to recover the asset for himself which is not the case here.

59 I, therefore, determine that the plaintiff has the *locus standi* to seek an order that the Trust Assets be transferred to the estate and the consequential orders to account for dividends, income, interest and other payments, if any, to the estate.

Time bar and laches

60 The fourth defendant relied on laches to prevent the plaintiff from enforcing the 1984 Trust in relation to Trust Asset (C). The first and second defendants have not pleaded this defence. It is the fourth defendant's case that it is inequitable for the plaintiff to enforce the 1984 Trust because the delay has resulted in the "destruction or loss of evidence" to rebut the claim. The fourth defendant relies on the loss of her memory and cognitive faculties as tantamount to "destruction or loss of evidence". As I have already found the 1984 Trusts to be invalid, this issue is now strictly moot. However, as the parties have made submissions on this point, I will briefly explain why laches would not have applied in any event.

61 The action by the plaintiff is strictly not time barred because of s 22(1)(b) of the Limitation Act (Cap 163, 1996 Rev Ed) ("Limitation Act") which provides that:

22. —(1) No period of limitation prescribed by this Act shall apply to an action by a beneficiary

under a trust, being an action _

(b) to recover from the trustee trust property or the proceeds thereof in the possession of the trustee, or previously received by the trustee and converted to his use.

62 However, this does not mean that delay in bringing the action cannot bar a claim by the plaintiff. Section 32 of the Limitation Act provides as follows:

32. Nothing in this Act shall affect any equitable jurisdiction to refuse relief on the ground of acquiescence, laches or otherwise.

This passage suggests a confluence of two factors: delay and the existence of circumstances that make it inequitable to enforce the claim. A claimant in equity is bound to pursue his claim without undue delay. Equity, it is said, aids the vigilant and not the indolent. This stems from the fact that as much as equity is found in flexible applications of the law designed to secure a just result, it is apt to seek recourse in equity when the conscience is pricked and where no other innocent interest is affected. The longer the delay, the less likely are these considerations to be valid. The basis for the equitable intervention of the court is ultimately found in unconscionability.

63 In *Cytec Industries Pte Ltd v APP Chemicals International (Mau) Ltd* [2009] SGHC 177, Andrew Ang J made the following observations on the doctrine of laches at [46]:

Laches is a doctrine of equity. It is properly invoked where essentially there has been a substantial lapse of time coupled with circumstances where it would be practically unjust to give a remedy either because the party has by his conduct done that which might fairly be regarded as equivalent to a waiver thereof; or, where by his conduct and neglect he had, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him, if the remedy were afterwards to be asserted (*Sukhpreet Kaur Bajaj d/o Manjit Singh v Paramjit Singh Bajaj* [2008] SGHC 207 at [23]; *Re Estate of Tan Kow Quee* [2007] 2 SLR 417 at [32]). This is a broad-based inquiry and it would be relevant to consider the length of delay before the claim was brought, the nature of the prejudice said to be suffered by the defendant, as well as any element of unconscionability in allowing the claim to be enforced (*Re Estate of Tan Kow Quee* at [38]).

64 In *Re Estate of Tan Kow Quee*, Sundaresh Menon JC held that the doctrine of laches prevented the plaintiff from seeking any relief. He noted that the action concerned the administration of the estate of a person who passed away some 50 years ago. The delay was, therefore, considerable. The plaintiff had not taken steps to assert any interest in the property. Additionally, for the past 46 years, the defendants had occupied the property which was the subject matter of the claim. The defendants were also hampered in their efforts to rebut the claim. Therefore, it was unconscionable for the plaintiff in that case to assert any right.

65 It is obvious that the facts in the present case are very different. In my opinion, the doctrine of laches would not have barred the plaintiff's enforcement of the 1984 Trusts if they were upheld. First, there was no undue delay on the part of the plaintiff. He could not have brought an action until he attained the age of 30, which was on 31 January 2001. Secondly, just before he reached the age of 30, he approached the fourth defendant to provide the Trust Deed and the share transfer form. Oddly, by signing the Trust Deed and the share transfer form, the fourth defendant was in fact "preserving" her own recollection that she held Trust Asset (C) for the plaintiff. Accordingly I find that it was not inequitable for the plaintiff to enforce the 1984 Trusts which would have been upheld but for the operation of s 9 of the Statute of Frauds.

Were the 1984 Trusts created as a scheme to evade estate duty

66 Like many of the other defences, this was also only raised by the fourth defendant. It is not disputed that equity will not recognise a trust created in aid of an illegal purpose: see *Suntoso Jacob v Kong Miao Ming* [1986] SLR 59. The burden is on the fourth defendant to prove that the 1984 Trusts were so designed to evade estate duty. However, not only has the fourth defendant failed to adduce any evidence to prove the illegal purpose, her own evidence contradicts the defence. Any such scheme would have required the fourth defendant's concurrence. She, however, testified that she would never have agreed to be part of any illegal purpose to evade estate duty. Further, it is common ground that estate duty is payable in respect of the Trust Assets even under the 1984 Trusts. This is because the disposition of the Trust Assets by K K Ching to the plaintiff was effected *inter vivos* within five years preceding his death and hence attracts estate duty: see s 7(1) (c) of the Estate Duty Act (Cap 96, 2005 Rev Ed) ("EDA"). As such, the 1984 Trusts could not have evaded estate duty. This may explain why the fourth defendant in their Closing Submissions did not seek to address this defence other than to state the relevant legal principle. I therefore reject this defence raised by the fourth defendant.

Indemnity to penalties for late payment of estate duty

67 The plaintiff has also sought an order against the second and third defendants (as executors) and, alternatively, against the first, second and fourth defendants (as trustees) that they indemnify K K Ching's estate for any penalties and/or interest that may be levied in respect of estate duty payable on the Trust Assets.

68 During the Opening address^[note: 6], counsel for the plaintiff clarified the indemnity claims against the executors and, alternatively, against the trustees:

COURT: If it's the 1982 trust, the plaintiff's position is that the penalty, if any, for estate duty would be payable by the executors?

A. Yes.

COURT: And if it's the 1984 trust, then the penalty, if any, would be payable by the 4th defendant as trustee?

MR KUMAR: That's right.

69 It would, therefore, appear that the plaintiff's indemnity claims against the executors only arise if the 1982 Trusts are upheld and, alternatively, against the trustees if the 1984 Trusts are upheld.

Were the second and third defendants as executors accountable for the delay

70 As I have determined that the Trust Assets are held for the estate under the 1982 Trusts, I shall consider whether the second and third defendants as executors are accountable for the delay.

71 The plaintiff's pleaded case for the indemnity against the second and third defendants as executors is premised on the following:

(b) the 2nd and 3rd Defendants' neglect, refusal and/or failure to call in and receive the Trust Assets; and/or

(c) the 2nd and 3rd Defendants' failure, neglect, and/or refusal, as executors of the Estate of KK Ching, to pay the estate duty on the Trust Assets or any of them timeously, or at all.

see para 40(b) and (c) of the Statement of Claim (Amendment No 3).

72 Under s 35(1) of the EDA, the executor has to file an account of all property of the deceased to the best of his knowledge. Section 35(1) is reproduced below:

35. —(1) The executor of every deceased person shall, within 6 months after the date of the death of the deceased, *specify to the best of his knowledge and belief*, in appropriate accounts annexed to an estate duty return to be delivered to the Commissioner, a full and true statement of particulars relating to all the property of the deceased, including the value thereof, in respect of which estate duty is payable upon the death of the deceased; and together with such estate duty return he shall deliver to the Commissioner a certified copy of the will, if any, of the deceased. [emphasis added]

73 In *AG v Ching Kwong Yew* [1993] 2 SLR 225 ("*Ching Kwong Yew*"), the Court of Appeal made the following observations on the scope of an executor's duties in respect of the estate of K K Ching at 226:

The executor, including in this context an administrator, of a deceased person has the responsibility amongst other things to take possession of all the property of the deceased and to pay out therefrom the debts of the deceased and of his estate, including the estate duty leviable under the Act for which the executor is the accountable person. Although an executor is the accountable person to the Commissioner for that duty under s 2, it is the estate which bears the burden of the duty and not the executor. *In the discharge of his responsibility as the accountable person, however, the executor must necessarily act with due diligence to take possession of all the property of the deceased, and to account for any property in respect of which possession has not been possible.* He has assumed a responsibility which he must discharge with due diligence, by making the fullest enquiries and by taking all such steps as are necessary and reasonable to ascertain the total value of the deceased's estate. In particular, in respect of the liability of the estate for the payment of estate duty, the estate will not be able to avoid liability if he has been less diligent than would be expected of a person in his office. If such were the case, the estate would remain liable to estate duty on property which, but for his own neglect or default, he would have received: ss 30 and 35(7). [emphasis added]

74 By s 36 of the EDA, simple interest at the rates specified in the Sixth Schedule shall be payable upon all estate duty, and shall be recoverable in the same manner as if it were part of the duty. The question which now arises is whether the estate should bear the interest, if any, on the unpaid estate duty, or whether the estate is entitled to be indemnified by either the executors or the trustees or both.

75 *Ching Kwong Yew* imposes a duty on the executor to exercise due diligence to take possession of all the property of the deceased, and to account for any property in respect of which possession has not been possible. If the executor fails to do that, the estate would be liable for estate duty and any interest and penalty. However, *Ching Kwong Yew* does not go further to say that if the executor fails to take possession and account for all property, he would be personally liable for any interest and penalty.

76 In *Williams, Mortimer And Sunnucks, Executors, Administrators and Probate* (John Ross Martyn and Nicholas Caddick gen ed)(Sweet & Maxwell, 19th Ed, 2008) at p 805:

A representative may become personally liable or accountable from his own assets if he violates or neglects his duties in respect of the estate. This species of misconduct is called in law a *devastavit*: that is, a wasting of the assets. It has been defined as

"... a mismanagement of the estate and effects of the deceased, in squandering and misapplying the assets contrary to the duty imposed on them, for which executors or administrators must answer out of their own pockets, as far as they had, or might have had, assets of the deceased".

...

A representative must duly administer and distribute the estate of the deceased. For these purposes, he owes duties to preserve the assets, to deal properly with them, and to apply them in due course of administration for the benefit of those interested according to that course. A representative who breaches any of these duties is guilty of a *devastavit* and may be personally liable to make good the loss caused to the estate.

77 It should be pointed out that under s 35(1) of the EDA, the executor's duty is to disclose the property of the deceased to "the best of his knowledge and belief". In *Ching Kwong Yew*, there was no issue that the executors were aware that the sale proceeds of the shares of the two companies which was the subject matter of the OS belonged to the estate. In fact, it was duly disclosed by the executors in the Schedule of Assets. The dispute was whether the executors had to account for them for estate duty purposes.

78 It is clear that liability for indemnity against executors is premised on a breach or neglect of their duties which has resulted in a loss to the estate. The plaintiff's pleaded case for the indemnity against the second and third defendants as executors is, however, limited to their neglect, refusal or failure to call in the Trust Assets for the purposes of estate duty.

79 On the evidence before me, I find that there was no such neglect, refusal and/or fault on the part of the second and third defendants *qua* executors:

(a) The first defendant in her AEIC stated that she had informed the second and the third defendants that Trust Assets (A) are held in trust for the plaintiff and not for the estate. The first defendant also stated in her AEIC that the second defendant likewise informed the third defendant that Trust Assets (B) are held on trust for the plaintiff in accordance with oral instructions from K K Ching. There is no evidence whether the second or third defendants were told that Trust Asset (C) is held by the fourth defendant on trust for K K Ching. Having been advised by the first defendant, who is described by the plaintiff as K K Ching's trusted lieutenant, that the Trust Assets do not form part of the estate, it is untenable to claim that the second and third defendants as executors had failed to call in the Trust Assets for estate duty purposes.

(b) My finding that the Trust Assets are held on trust for the estate under the 1982 Trusts is a consequence of my determination that the 1984 Trusts are unenforceable by operation of law, i.e. s 9 of the Statute of Frauds. It follows that until the present determination, the second and third defendants as executors would not have known that the Trust Assets are to be held in trust for the estate of K K Ching as they had all along been advised that the same was held on trust for the plaintiff. Consequently, in complying with their duties under s 35(1) of the EDA, the second and third defendants did not include the Trust Assets in the Schedule of Assets disclosed to the Commissioner of Estate Duty.

(c) Furthermore, some of the steps taken by K K Ching in relation to the Trust Assets appear to be inconsistent with a trust arrangement and more akin to a sale. Although the shares in Kwong Soon Engineering Co Ltd and National Aerated Water Pte Ltd were supposed to be part of Trust Assets (A) to be held by the first defendant, they were transferred to her pursuant to the share transfer forms which stated a total price of \$302,250 purportedly paid by the first defendant. These sale proceeds were disclosed in the Schedule of Assets by the executors and became the subject matter of the dispute between the executors and the Commissioner of Estate Duty in OS 1240 of 1988. The executors successfully claimed in the High Court that since they were not able to trace the sale proceeds, estate duty should not be levied on them. However, the Court of Appeal in *Ching Kwong Yew* reversed the decision of the court below and held that estate duty was payable because the executors had failed to prove that the sale proceeds ceased to be part of the estate. It is far from clear why the sale proceeds were disclosed in the Schedule of Assets since such a sale would clearly be incompatible with either the 1982 or 1984 Trusts. Presumably they were disclosed by the executors because on the face of the share transfer forms, the shares were sold to the first defendant at a total consideration of \$302,250. That may explain why the executors did not claim in OS 1240 of 1988 that the shares in the two companies were part of Trust Assets to be held by the first defendant on trust for either K K Ching or the plaintiff. Having created these inconsistencies with his own oral trust arrangements, it seems to me that it would be harsh to impose liability on the second and third defendants as executors for their alleged failure to "call in" the Trust Assets for estate duty purposes. For the reasons which I will elaborate upon below, K K Ching was effectively the cause of the delay in the payment of estate duty. The loss, if any, should be borne by the estate and not the executors nor even the trustees.

Were the first, second and fourth defendants as trustees accountable for the delay

80 I have understood the plaintiff's case that the indemnity is only claimed against the trustees if the 1984 Trusts are upheld. As I have held otherwise, this issue no longer arises for determination. For completeness, I shall nevertheless address the alternative case against the trustees even under the 1982 Trusts in case it is still relevant.

81 The plaintiff's pleaded case for indemnity, as against the first, second and fourth defendants as trustees, is based solely on their "neglect, refusal and/or failure to notify the executors of the Estate of K K Ching that they hold the Trust Assets as trustees under the 1984 Trusts, alternatively the 1982 Trusts." see para 40(a) of the Statement of Claim (Amendment No 3) dated 2 October 2009.

82 However, it is the plaintiff's own pleaded case that the second and third defendants, as executors, were aware of the 1982 and 1984 Trusts at all material times: see para 21(d), (f), (h), (i) and (j) of the Statement of Claim (Amendment No 3) dated 2 October 2009. Therefore, there cannot be any actionable fault on the part of the first, second and fourth defendants for their alleged failure to notify the executors on matters which they already knew.

83 Under the 1982 Trusts, the first, second and fourth defendants were bare trustees and accordingly can only act on the instructions of the beneficial owner i.e. K K Ching or his executors. Such a trust does not impose any active duty or powers of management on the trustee. The trustee's sole duty is to obey any direction the beneficiary may give as to how the property should be disposed of: see John McGhee, *Snell's Equity* (Sweet & Maxwell, 31st Ed, 2005) at p 470, *Halsbury's Laws of Singapore* Vol 9(2) (Lexis Nexis, 2003 issue) at [110.744] The second and third defendants as executors were informed of the 1984 Trusts in favour of the plaintiff. Consequently, the second and third defendants understandably did not take steps to take possession of the Trust Assets from the first, second and fourth defendants on behalf of the estate.

84 In the result, the plaintiff's claim for an indemnity against the defendants is dismissed. The plaintiff submits that it would be unfair for the estate to bear the penalty and/or interest, if any, for the late payment of estate duty since ultimately as the sole remaining beneficiary, he will effectively be bearing it.

85 Such an outcome is not unfair:

(a) The claim for an indemnity against the defendants as executors and/or trustees is fault-based. If there is no actionable fault by reference to the plaintiff's pleaded case, which I have found to be the case, liability cannot be imposed on them simply because the inevitable result would be "unfair" to the plaintiff.

(b) As a consequence of my order, any liability for penalty and/or interest would have to be borne by the estate. As beneficiary, the plaintiff's entitlement must necessarily be subject to the liabilities of the estate. The plaintiff cannot have better rights against the defendant than K K Ching and, consequently, his estate.

(c) The issue of penalty and/or interest arises in this case because K K Ching chose not to bequeath all his assets under the Will. Instead, K K Ching resorted to not just one set but two sets of oral trusts to deal with his main assets by appointing the first, second and fourth defendants to hold different shares/assets for him and subsequently for the plaintiff. In passing, I should mention that it is no mere coincidence that when the 1982 Trusts were first created, K K Ching had commenced divorce proceedings against his wife. The wife filed a cross-petition and eventually a decree nisi was made in her cross-petition. The divorce proceedings were clearly acrimonious. K K Ching strenuously denied that he was ever married to the wife. In OS 1144 of 1989, K K Ching's ex-wife brought an action to claim for reasonable maintenance against the second and third defendants as executors and the plaintiff and his elder brother as beneficiaries under the Will. The ex-wife alleged that the assets of K K Ching disclosed in the Schedule of Assets was not a true indication of his wealth and that K K Ching had transferred various assets (which included some of the Trust Assets) to his relatives in an endeavour to reduce her claim. In granting the ex-wife maintenance which was back-dated to the date of K K Ching's death, Chua J found that "The Plaintiff has satisfied me that the assets of the deceased as disclosed in the Schedule of Assets is not a true indication of the deceased's real wealth." (p 9 of the unreported decision in OS 1144 of 1989). By resorting to such oral trusts compounded by inconsistent share transfers for valuable considerations which led to his assets not being fully disclosed in the Schedule of Assets, K K Ching was therefore effectively the author of the current problems. It is therefore neither unfair nor unreasonable for his estate to bear the loss, if any.

Whether the third defendant should be replaced by the plaintiff's nominee to act as the executor of the estate

86 Upon the demise of the second defendant, the third defendant became the sole executor of the estate. He has been blind since 1963 and had to rely on others including the first defendant to assist him to handle the estate matters.

87 It is far from ideal for someone like the third defendant to act as an executor let alone the sole executor. It therefore came as no surprise to me that the third defendant during cross-examination confirmed that he is agreeable to be replaced by the plaintiff's nominee to act as executor in his place. He said that given his advanced age and his health, he would rather be replaced.

88 The plaintiff nominated Mr Shane Khoh Chen Yeh ("Mr Khoh") to act as the executor in place of

the third defendant. As the plaintiff is the sole remaining beneficiary under the Will, I can see no prejudice in appointing his nominee to administer the Will. At my suggestion, I directed the plaintiff to obtain Mr Khoh's consent in writing to act as executor. A Consent to Act as Executor was filed by Mr Khoh on 19 November 2009.

89 Accordingly, I order the third defendant to be removed by consent as executor and to appoint Mr Khoh as executor of K K Ching's Will in his place.

Conclusion and costs

90 In conclusion, I find that the Trust Assets are held on trust for the estate of K K Ching. In connection with this finding, I make the following orders:

(a) the Trust Assets be transferred to the estate of K K Ching by the first, fourth and fifth to ninth (representing the estate of the second defendant) defendants;

(b) the first, fourth and fifth to ninth (representing the estate of the second defendant) defendants provide to the estate of K K Ching an account of all dividends, income, interests and/or payments arising from their respective portions of those Trust Assets, if any;

(c) if any of the first, fourth and fifth to ninth (representing the estate of the second defendant) defendants fail to transfer or procure the transfer of any of the Trust Assets within 21 days from the date hereof, save for the sum of \$1m and a further sum of \$2,113,398.18 which was distributed to the second defendant following the dissolution of Seng Heng Realty Pte Ltd (part of Trust Assets (B)), the Registrar of the Supreme Court shall be authorised to, pursuant to s 14 of the Supreme Court of Judicature Act (Cap 322, 1999 Rev Ed), execute all documents necessary to effect the transfer to the estate of K K Ching;

(d) there will be no execution against the fifth to ninth defendants (representing the estate of the second defendant) in respect of any orders made herein without leave of court; and

(e) the third defendant, by consent, is removed as executor of the estate of K K Ching and Mr Shane Khoh Chen Yeh is appointed jointly with the plaintiff in his place as executors to administer the Trust Assets received into the estate of K K Ching in accordance with the Will including but not limited to declaring the same to the Commissioner of Estate Duty for the purposes of estate duty and paying any estate duty that may be levied on them.

91 In the light of the above, I would award costs on the following basis:

(a) As for the third defendant, he should not have been added as a substantive defendant. He should have remained a nominal defendant as was the case when the plaintiff first commenced the present suit. Prior to the institution of the proceedings, no claim was asserted against him.

When the plaintiff and the first defendant requested for his assistance to speak to the second and fourth defendants to recover the Trust Assets, he willingly acceded to their request in his capacity as an elder of the Ching family. According to the plaintiff's own evidence, the third defendant was advised that the Trust Assets do not form part of the K K Ching estate. He was not a trustee for any of the Trust Assets. He was added as a substantive defendant to account for the delay in settling the estate duty for the Trust Assets. The claim for indemnity against him is dismissed. I therefore order the estate to bear the costs of the third defendant which I fix at \$20,000 given his limited involvement in the proceedings.

(b) As against the first defendant, she cooperated with the plaintiff and in fact gave evidence on his behalf. The claim for indemnity against her is also dismissed. She was not represented by counsel in the proceedings. It is fair that I make no order as to costs against the first defendant.

(c) As against the second defendant, there is a temptation to hold him liable for the costs since he appeared to have been the main stumbling block in the recovery of the Trust Assets. The plaintiff and the other defendants did not take precipitate steps to recover the Trust Assets because they were concerned it would upset the second defendant. I do not think that steps which were restrained on account of fear or respect in this case could translate into liability on the part of the person who was revered or feared. The second defendant merely filed a bare defence. After his death, the fifth to nine defendants were added but they elected not to contest the proceedings. The claim for indemnity as against the second defendant is also dismissed. I will therefore make no order as to costs against the second defendant.

(d) As for the fourth defendant, although the plaintiff did succeed to prove that she held Trust Asset (C) under the 1984 Trust in his favour, I have also accepted the fourth defendant's submission that it is unenforceable as it violates s 9 of the Statute of Frauds. I further determined that the doctrine of part performance is not available to assist the plaintiff to enforce the 1984 Trusts. I have also rejected the other pleaded defences by the fourth defendant. However, they were not seriously pursued. I have also dismissed the plaintiff's claim for indemnity against the fourth defendant. In the circumstances, I will order the plaintiff and the fourth defendant to bear their own costs.

92 The plaintiff also submitted that he did nothing wrong in commencing the present proceedings. He referred to various proposals which were made while the proceedings were pending to show that he had tried his best to resolve the matters amicably with the defendants. For these reasons, he submitted that "it would be grossly unfair to penalize the Plaintiff on costs". Save for the third defendant, I have not made any cost order against the plaintiff. I agree with the plaintiff's submission that he had no choice but to commence the proceedings. However, the proceedings became inevitable, not because of the conduct of the defendants, but rather because of the manner in which K K Ching had gone about to "bequeath" his assets to the plaintiff. The plaintiff, in particular, referred to two exchanges of open correspondence relating to settlement proposals:-

(a) On 4 March 2009, Drew & Napier wrote to Allen & Gledhill LLP ("Allen & Gledhill") to seek the fourth defendant's consent to lodge the share transfer form for Trust Asset (C) which was signed in 2000. The reason why it was not lodged earlier was because the fourth defendant had requested the plaintiff not to do so as she was concerned that it would upset the second defendant. By this time, the second defendant had passed away and therefore there was no longer any emotional impediment to restrain the plaintiff from lodging the share transfer form. In response, Allen & Gledhill confirmed that the fourth defendant was agreeable subject to the provision of a suitably worded indemnity to protect against claims by third parties including the executors and any other beneficiary. The parties disputed over the indemnity. No agreement was

reached and the proceedings continued.

(b) On 19 June 2009, Drew & Napier wrote to both Allen & Gledhill and Madhavan Partnership representing the third defendant. The letter proposed that the third defendant direct the fourth defendant to transfer Trust Asset (C) to the plaintiff and repeated the requirement for the fourth defendant to confirm in writing that she had no objection to the lodgement of the share transfer form. Both the third and fourth defendant did not accept this proposal. By then, the third defendant had already been informed that all the Trust Assets including Trust Asset (C) are to be held for the plaintiff and not the estate. Under these circumstances, it is quite understandable for him not to have responded. Why should he direct the third defendant to effect the transfer to the plaintiff when the transfer does not concern the estate?

93 It was not unreasonable for the third and fourth defendants not to have agreed to the plaintiff's overtures as regards the transfer of Trust Asset (C). The plaintiff would still need an order of court as against the first and the second defendants in respect of Trust Assets (A) and (B). In other words, the action would have proceeded to court for hearing in any event. Ultimately, in the light of unusual trust arrangements, all the parties, in particular the defendants, wanted the comfort of a court order to deal with the Trust Assets. It was sensible and not unreasonable for the parties to do so. Accordingly, I see no reason to change any of my cost orders on account of the attempts by the plaintiff to resolve the dispute with the third and fourth defendants.

Concluding remarks

94 I am grateful to counsel for all the parties for their expeditious conduct of the trial. At the close of the trial, I identified the issues which I wanted the parties to address. I also directed the parties to file and exchange their written submissions within 24 hours and to appear before me for oral submissions the next day. In spite of the time constraints, the parties met the tight timelines. I found the exchange with counsel during the oral submissions to be very engaging and useful. It assisted me in dealing with the relevant issues and to formulate and arrive at my eventual decision.

[\[note: 1\]](#)Initially only 1 share in Siong Heng Realty Pte Ltd was transferred to the 1st defendant to be held on trust. Subsequently, after KK Ching's death, that one share was increased to 100 shares.

[\[note: 2\]](#)The 765,000 shares in Seng Realty & Development Pte Ltd were distributed to the 1st defendant after KK Ching's death on account of her being a registered shareholder of National Aerated Water Singapore Pte Ltd which she held on trust for KK Ching under the 1982 trust.

[\[note: 3\]](#)Seng Heng Realty Pte Ltd was voluntarily wound up on or about 1996 pursuant to which the 2nd defendant received a sum of \$2,113,398.18. Therefore, the 2nd defendant held this sum on trust instead.

[\[note: 4\]](#)Transcript of 2.11.09 at p 40 L 13-15

[\[note: 5\]](#)Para 14 of the plaintiff's closing submissions

[\[note: 6\]](#)Transcript of 2.11.2009 at p 41 L 3-9