Low Heng Leon Andy *v* Low Kian Beng Lawrence (administrator of the estate of Tan Ah Kng, deceased)
[2013] SGHC 101

Case Number : Suit No 252 of 2011 (Registrar's Appeal No 227 of 2011/M)

Decision Date : 10 May 2013

Tribunal/Court : High Court

Coram : Quentin Loh J

Counsel Name(s) : Gopinath S/O Pillai and Aloysius Tan (Tan Jin Hwee LLC) for the plaintiff; Tan Tian Luh (Chancery Law Corporation) for the defendant.

Parties : Low Heng Leon Andy — Low Kian Beng Lawrence (administrator of the estate of Tan Ah Kng, deceased)

Civil Procedure – Striking Out

Equity – Estoppel – Proprietary Estoppel

Res Judicata – Issue Estoppel

Land – Housing Development Act

10 May 2013 Judgment reserved.

Quentin Loh J:

1 This is an appeal against the decision of the learned assistant registrar below ("the Assistant Registrar"), dismissing the striking out application made by Low Kian Beng Lawrence, ("the Defendant") pursuant to O 18 r 19 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("Rules of Court") against the claim by Low Heng Leon Andy ("the Plaintiff").

The parties and brief facts

2 The Plaintiff and the Defendant are cousins. Their dispute involved a flat situated at Block 306 Hougang Avenue 5, #02-355 Singapore 530306 ("the Flat"). For the purposes of this appeal, the parties have submitted an agreed statement of facts, which I now summarise below.

3 The Flat was solely owned by their common grandmother, Tan Ah Kng ("the Deceased"), who passed away on 28 November 2008. The Flat was left behind as part of her estate. The Plaintiff was staying in the Flat with the Deceased and continued staying there after her passing. The Defendant is the administrator of the Deceased's estate and was issued the Grant of Letter of Administration on 28 April 2009. Pursuant to the Intestate Succession Act (Cap 146, 1985 Rev Ed) ("ISA"), the beneficiaries of the estate were the five surviving children of the Deceased, and the Plaintiff was therefore not a beneficiary of the estate.

4 Sometime in or about early January 2009, the Defendant gave notice to the Plaintiff to vacate the Flat, after informing the Plaintiff that he had been granted Letters of Administration and the Deceased's estate was the legal and beneficial owner of the assets of the Deceased. A letter of demand was also issued by the Defendant's solicitors, Chancery Law Corporation, to the Plaintiff

dated 25 May 2009, asserting that the Plaintiff had no legal right to stay in the flat.

5 The Defendant subsequently commenced Originating Summons No 213 of 2009 in the District Court ("the O 81 Application"), for immediate possession of the Flat as well as costs for the legal proceedings. From 13 July 2009, correspondence passed between the parties, negotiating the terms of a possible settlement. On or about 24 July 2009, the Plaintiff and the Defendant entered into a consent order ("the Consent Order"). The terms of the Consent Order were as follows:

(a) The [Defendant] be given immediate possession of the [Flat];

(b) The [Plaintiff] shall deliver vacant possession of the Flat to the [Defendant] by 31 July 2009;

(c) [P]rovided the [Plaintiff] vacates the Flat by 31 July 2009, the [Estate] shall agree to abandon any claims by the [Estate] against the [Plaintiff] arising from the [Plaintiff's] occupation of the Flat in respect of trespass and unlawful occupation; and

(d) That there be no order as to costs.

6 The Plaintiff is now claiming for the monies expended in taking care of the Deceased during her lifetime, as well as equitable "damages", or more correctly equitable compensation, for loss of opportunity to reside in the Flat. In support of this claim, the Plaintiff submits the following facts which the Defendant is prepared to accept solely for the purposes of this appeal:

(a) The Plaintiff has stayed in the Flat since he was born.

(b) The Deceased moved back to the Flat in 2005 and stayed with the Plaintiff.

(c) The Plaintiff and Deceased had maintained a very good relationship with each other.

(d) The Plaintiff took care of the Deceased when she was ill.

(e) Apart from the Deceased, the Plaintiff had also taken care of one of his aunts ("the Aunt") who had contracted cancer and looked after her since 2005, and in particular for a year prior to her demise.

(f) During the Deceased's lifetime, the Deceased had always emphasised to the Plaintiff and his brother that the Flat was not to be sold and was meant to be a home to house herself and the Plaintiff. This was mentioned on many occasions, including times where the Deceased's relatives and their family doctor, known as Dr Lew, were present:

(i) The Aunt, who was the co-owner of the Flat, also confirmed that the Flat was to be for the use of the Plaintiff and the Deceased, in the event that the Aunt passed away.

(ii) Both the Aunt and the Deceased had expressed their wish to demise the Flat to the Plaintiff in the event of their death.

(iii) The Deceased had told the Plaintiff on several occasions, both before and after the death of the Aunt, that the Flat should not be sold, and that the Plaintiff was to stay in the Flat for as long as he wished to.

(iv) The Deceased had also told the Plaintiff that the Deceased would also be leaving

everything in the Flat to the Plaintiff in the event of her death.

(g) In reliance upon these statements, the Plaintiff spent monies in payment of items for and on behalf of the Deceased.

The Plaintiff's claim and the Defendant's application to strike out

7 The Plaintiff commenced this action against the Defendant on 9 February 2010. The claim is based on proprietary estoppel, and the remedy sought by the Plaintiff is limited to monetary compensation. I also note that the Plaintiff was given leave to amend his statement of claim by the Assistant Registrar after the case was first heard in chambers.

8 The Defendant applied to strike out the claim, although the relevant grounds for the application were not made clear. This was the case despite two sets of written submissions being filed by the Defendant. I proceed on the basis that the application is based on the ground that the claim discloses no reasonable cause of action.

9 For the purposes of this appeal, the Defendant is prepared to accept that the Plaintiff is able to show that the elements of proprietary estoppel are satisfied. It is common ground that the Plaintiff is ineligible to own an HDB flat. The Defendant makes the following submissions in support of his application:

(a) Since the Plaintiff is an ineligible person under the conditions as set by the Housing and Development Board ("HDB") for the purposes of owning a HDB flat, his claim in proprietary estoppel is precluded by s 51 of the Housing and Development Act (Cap 129, 2004 Rev Ed) ("HDA").

(b) The Plaintiff's claim in proprietary estoppel overrides the ISA, and should not be allowed.

(c) The Plaintiff's claim in proprietary estoppel is precluded on the principles of issue estoppel or abuse of process.

The law on striking out

10 The standard which must be satisfied before pleadings can be struck out was clearly set out in the Court of Appeal case of *Gabriel Peter & Partners (suing as a firm) v Wee Chong Jin and others* [1997] 3 SLR(R) 649 at [18]:

> In general, it is only in plain and obvious cases that the power of striking out should be invoked. This was the view taken by Lindley MR in *Hubbuck & Sons v Wilkinson, Heywood and Clark* [1899] 1 QB 86 at p 91. It should not be exercised by a minute and protracted examination of the documents and facts of the case in order to see if the Plaintiff really has a cause of action. The practice of the courts has been that, where an application for striking out involves a lengthy and serious argument, the court should decline to proceed with the argument unless, not only does it have doubts as to the soundness of the pleading but, in addition, it is satisfied that striking out will obviate the necessity for a trial or reduce the burden of preparing for a trial.

11 In *The Osprey* [1999] 3 SLR(R) 1099, it was also held that the court's power to strike out any pleading and dismiss actions under O 18 r 19(1) would only be exercised in "plain and obvious" cases. G P Selvam JC in *Tan Eng Khiam v Ultra Realty Pte Ltd* [1991] 1 SLR(R) 844 at [31], provides further explanation for the court's reluctance to summarily strike out a claim:

> … This is anchored on the judicial policy to afford a litigant the right to institute a bona fide claim before the courts and to prosecute it in the usual way. Whenever possible the courts will let the Plaintiff proceed with the action unless his case is wholly and clearly unarguable …

12 In the course of deciding whether the Plaintiff's claim was a "plain and obvious" case which was "wholly and clearly unarguable", the following issues have to be addressed:

(a) Whether the Plaintiff's claim in proprietary estoppel is precluded by s 51(10) of the HDA as a result of his ineligibility to own a HDB flat.

(b) Whether the Plaintiff's claim in proprietary estoppel can override the ISA.

(c) Whether the Plaintiff's claim in proprietary estoppel is precluded on the principles of issue estoppel or abuse of process.

Analysis

Whether a claim in proprietary estoppel by an ineligible person is precluded by s 51(10) of the HDA

13 Counsel for the Defendant submits that s 51(10) of the HDA prevents ineligible persons under the HDA from taking an interest in HDB flats. As such, a claim in proprietary estoppel, which is contingent on the Plaintiff having an interest in the flat, is precluded by s 51(10) of the HDA, which necessarily means that the application to strike out the claim must succeed.

14 This submission raises a number of issues which need to be examined carefully. The first, being the objective of s 51(10) of the HDA. The second, being how s 51(10) of the HDA operates to achieve this objective. The third, being whether the nature of a claim in proprietary estoppel means that it would be precluded by s 51(10) of the HDA in light of how the first two issues are decided.

The objective of s 51(10) of the HDA

15 Section 51(10) of the HDA reads:

> No person shall become entitled to any protected property (or any interest in such property) under any resulting trust or constructive trust whensoever created or arising.

This provision was amended to its current wording in 2010, with the words "or arising" being included at the end of the provision. The previous equivalent provision, which is s 51(6) of the then HDA, read:

> No person shall become entitled to any such flat, house or other building under any resulting trust or constructive trust, whensoever created.

16 In *Koh Cheong Heng v Ho Yee Fong* [2011] 3 SLR 125 ("*Koh Cheong Heng*"), Prakash J explained at [56] that this amendment did not change the effect of the provision but only served to clarify that "a 'resulting trust' or a 'constructive trust' may be more properly said to arise by operation of law, rather than by the creation of parties".

17 As such, the Ministerial Statement that was read at the second reading of the Bill in 2005 in relation to the previous s 51(6) is relevant for understanding the objectives lying behind s 51(10) (see *Singapore Parliamentary Debates, Official Report* (15 August 2005) vol 80 at col 1252 (Mah Bow Tan,

Minister for National Development)). The relevant portion is reproduced accordingly:

> Clause 6 of the Bill amends section 51 to make it clear that, in addition to prohibiting the voluntary creation of trusts over an HDB flat, the Act also prohibits any person from becoming entitled to a HDB flat under a resulting trust or a constructive trust. This will help to prevent a situation where a person who is ineligible to own an HDB flat may become entitled to own one, for example, by paying the purchase price of the flat on behalf of the owner.

18 In *Tan Chui Lian v Neo Liew Eng* [2007] 1 SLR(R) 265 ("*Tan Chui Lian*"), Menon JC (as he then was) interpreted this to mean that a blanket prohibition of resulting or constructive trusts was therefore not the objective of s 51(6) of the then HDA. Rather, the object of the provision was to prevent ineligible persons from owning HDB flats by way of resulting or constructive trust (see *Tan Chui Lian* at [10]):

> It becomes clear when one has regard to that statement that Parliament's intention was *not* to prevent any interest in an HDB flat arising under a resulting trust or a constructive trust regardless of the circumstances, but rather to prevent any entitlement to own an HDB flat arising in favour of a person by virtue of the law implying a resulting or constructive trust, where that person would otherwise have been ineligible to acquire such an interest.[emphasis in original]

The same conclusion was arrived at in relation to s 51(10) of the HDA in *Koh Cheong Heng*, where Prakash J held (at [56]), that "the law regarding creation of trusts over HDB property remains as stated in *Tan Chui Lian*".

19 The Defendant seeks to rely on *Tan Chui Lian* to suggest that the object of s 51(10) of the HDA is to prevent ineligible persons from taking an interest in HDB flats. Although a strict reading of the case would show that the decision was made in relation to whether a resulting or constructive trust could arise to give an interest in a flat to parties who are eligible persons under the HDA, a necessary implication of arriving at such a decision would be that the objective of s 51(10) of the HDA must be to prevent ineligible persons from taking an interest in HDB flats, and it is on this basis upon which I proceed.

How s 51(10) of the HDA operates to achieve this objective

20 It would seem that there are two ways in which s 51(10) of the HDA could operate to prevent ineligible persons from taking an interest in HDB flats. The first is to render any transaction or transfer which might lead to such an interest arising void *ab initio*. The second would be to prevent an ineligible person from taking an interest in the flat as a result of any transaction or transfer which might purport to do so. The first way addresses the cause for the interest which arises, while the second addresses the effect of the interest which arises. Section 51(10) of the HDA operates in the second way.

21 On a plain reading of s 51(10) of the HDA, it states that no "person shall become entitled to any protected property (or any interest in such property) under any resulting trust or constructive trust". The use of the words "become entitled" would suggest that ineligible persons who were not allowed to have an interest in HDB flats in the first place, could not have such an interest just because they are beneficiaries under a resulting or constructive trust. This suggests that the effect of conferring an entitlement or interest in protected property by way of resulting or constructive trust is disallowed, although any resulting or constructive trust that confers such an interest is not rendered void.

22 This interpretation of the operation of s 51(10) is also consistent with other situations which arise with regards to HDB flats and ineligible persons. One such situation is when ineligible persons under the HDA inherit HDB flats. They are not allowed to keep the flats, but are entitled to the sale proceeds. The underlying transaction or transfer is not void although the effect of allowing ineligible persons to take interest in HDB flats is prevented. Likewise, s 51(10) in preventing ineligible persons from taking an interest in HDB flats does not void the underlying transfer or transaction but operates to prevent an interest in the flat from arising.

Whether a claim in proprietary estoppel is necessarily precluded by s 51(10) of the HDA

23 Taking into account the objective of s 51(10) of the HDA and its operation in achieving this objective, the question is whether proprietary estoppel as a cause of action is precluded by the statutory provision. What is clear is that the cause of action is not rendered void *ab initio* by s 51(10) of the HDA, although the cause of action cannot result in an ineligible person taking an interest in a HDB flat. In order to assess whether such a claim is precluded by s 51(10) of the HDA, the nature of a proprietary estoppel claim needs to be understood.

(1) The nature of a proprietary estoppel claim

24 As stated in *Tan Sook Yee's Principles of Singapore Land Law* (SY Tan, H W Tang & K Low eds) (LexisNexis, 2009) ("*Tan Sook Yee*") at p 153:

> **E. Proprietary Estoppel**
>
> 7.68 The principle of proprietary estoppel may be summed up as follows: where an owner of land permits the claimant to have, or encourages him in his belief that he has, some right or interest in the land, and the claimant acts on this belief to his detriment, then the owner of the land cannot insist on his strict legal rights if to do so would be inconsistent with the claimant's belief. The claimant may have an equity based on estoppel.

25 Therefore, where the circumstances giving rise to a proprietary estoppel claim occur, an equity arises in favour of the claimant. To be more exact, an inchoate estoppel equity is raised, and the claimant is entitled to remedial relief in order to satisfy that equity: see Gray and Gray, *Elements of Land Law* (Oxford University Press, 5th Ed, 2009) ("*Gray and Gray*") at pp 1234–1237. The court then has the discretion to decide what remedy is appropriate in the circumstances to satisfy the equity raised.

26 The principle adopted by the courts in deciding on the appropriate remedy is to award the minimum right or interest necessary to do justice between the parties (*Goh Swee Fang v Tiah Juah Kim* [1994] 3 SLR(R) 556). The court's primary function in doing so is not to ascertain proprietary rights, but to rectify the unconscionability which arose due to the detrimental reliance by the plaintiff on the defendant's representation in a proportionate manner (*Sledmore v Darby* (1996) 72 P & CR 196).

27 As such, a trust may be imposed over the property if it is required as the minimum right necessary to do justice between the parties, but this is not necessarily the case. The minimum interest necessary to do justice between the parties could also take the form of monetary compensation (*Khew Ah Bah v Hong Ah Mye* [1971–1973] SLR(R) 107), or the equity could even be held to be extinguished, which means that no remedy is necessary (*Chiam Heng Luan v Chiam Heng Hsien* [2007] 4 SLR(R) 305).

28 This is one of the main differences between proprietary estoppel and constructive trusts, as stated in *Tan Sook Yee* at p 153:

> The most important difference between the two lies in the remedies available to a claimant. Where a constructive trust is claimed, the successful claimant will obtain an equitable interest in the property whereas the successful claimant to a proprietary estoppel obtains such relief as the court in its discretion would direct.

The difference between proprietary estoppel and constructive trusts is further illustrated in Pearce, Stevens & Barr, *The Law of Trusts and Equitable Obligations*, (Oxford University Press, 2010, 5th Ed) at p 339-340:

> Proprietary estoppel is an entirely different equitable device from either the constructive or resulting trust, because it does not operate by recognising the existence of a beneficial interest already created by the parties themselves, as is the case with express, resulting, and constructive trusts. Instead, it provides an equitable remedy, even though the remedy may allow a party to acquire an interest in the property.

29 Therefore, it should be clear that a claim in proprietary estoppel is based on an equity which may be satisfied by various means, including ways by which an interest in the land need not be part of the remedy.

(2) The proprietary estoppel claim in relation to s 51(10) of the HDA

30 Based on the nature of proprietary estoppel and assuming that the elements of the proprietary estoppel claim are satisfied, the following analysis would apply:

(a) A mere inchoate equity will arise in favour of the claimant as a result of the unconscionability of the defendant.

(b) The court needs to determine the remedial relief in order to satisfy the equity.

(c) In doing so, the court will only award the claimant the minimum interest necessary to do justice between the parties.

(d) The court does not necessarily have to award an interest in the land to the claimant. Monetary compensation for the detriment suffered is a possible remedy.

(e) Section 51(10) of the HDA, in achieving its objective, does not operate by nullifying the underlying right which may result in an ineligible person having an interest in a HDB flat. Instead, it only prevents an interest in a HDB flat from arising in favour of ineligible persons.

(f) A proprietary estoppel claim is therefore not extinguished from the outset. Furthermore, as long as a proprietary estoppel claim does not give rise to an interest in the land, it should not be affected by s 51(10) of the HDA.

31 Therefore, I am of the view that s 51(10) of the HDA does not necessarily preclude a claim in proprietary estoppel.

The claim in proprietary estoppel on the present facts

32 On the present facts, the Plaintiff's claim is for equitable compensation, *ie*, a monetary claim, and not for any interest in the Flat. Therefore, the proprietary estoppel claim will not give rise to an interest in the Flat, and should not be precluded by s 51(10) of the HDA.

33 In response, the Defendant submits that by allowing a cause of action to survive by limiting a claim to one in equitable compensation, *ie*, monetary compensation, and not asking for proprietary relief is to assume that proprietary estoppel has been proven. The Defendant further submits that the proprietary estoppel claim itself has to be in reference to a particular piece of property and is a proprietary claim by the Plaintiff. This proprietary claim should fail because the Plaintiff is an ineligible person. In support of these submissions, the Defendant relies on *obiter dicta* by Lord Scott of Foscote in the House of Lords decision in *Cobbe v Yeoman's Row Management Ltd* [2008] 1 WLR 1752 ("*Yeoman's Row*") at [16]:

> My Lords, unconscionability of conduct may well lead to a remedy but, in my opinion, proprietary estoppel cannot be the route to it unless the ingredients for a proprietary estoppel are present. These ingredients should include, in principle, a proprietary claim made by a claimant and an answer to that claim based on some fact, or some point of mixed fact and law, that the person against whom the claim is made can be estopped from asserting. To treat a "proprietary estoppel equity" as requiring neither a proprietary claim by the claimant nor an estoppel against the defendant but simply unconscionable behaviour is, in my respectful opinion, a recipe for confusion.

34 With respect, the Defendant's submission is incorrect. The Defendant's submission makes the assumption that a proprietary claim must result in a proprietary remedy. However, the nature of a claim in proprietary estoppel is such that a personal remedy can be awarded. Furthermore, the *dicta* by Lord Scott in *Yeoman's Row* only makes clear that the elements of proprietary estoppel need to be proved in order to establish a claim in proprietary estoppel, and unconscionable behaviour alone would not suffice. This does not support the Defendant's submission in any way.

35 Also, whether proprietary estoppel is a proprietary claim or not, is strictly irrelevant in the present case. What is dispositive here, is that s 51(10) of the HDA does not preclude a cause of action unless it necessarily leads to an ineligible person taking an interest in a HDB flat. The Defendant in suggesting that limiting a claim to one of equitable compensation (not damages, which lies in law), *ie*, monetary compensation, allows a claim in proprietary estoppel to survive when it ordinarily would not, misses the point that s 51(10) of the HDA does not operate to extinguish claims in proprietary estoppel right from the outset, but only to prevent the claim from leading to an ineligible person taking an interest in a HDB flat.

Further considerations

36 This matter was also considered by Professor Tang Hang Wu in his article, *Housing Development Board Flats, Trust and other Equitable Doctrines* (2012) 24 SAcLJ 470 at p 494, who also raises a further difficulty in relation to this issue. The difficulty is this: "if the minimum needed to satisfy the equity is a proprietary interest, what would be the outcome if the claimant is an ineligible person?" Professor Tang further questions whether a court will be "obliged to deny the proprietary interest on the basis of public policy or 'illegality' and order a monetary award in lieu of the proprietary interest". He then puts forward two responses (at p 494–495):

> First, as a matter of strategy, lawyers who are advising a claimant who is ineligible to own a HDB flat must be very careful in asking for the appropriate prayers. It is suggested that as a matter of prudence, such a claimant should ask for a monetary award instead of a proprietary interest.

> Second, even if an ineligible claimant asked for a proprietary interest, it is contended that such a claimant should not [be] precluded from being granted a monetary award. Such a monetary award is meant to satisfy an equity that has been raised due to a representation made by the defendant to the claimant. Unlike *PP v Intra Group (Holdings) Co Inc* [1991] 1 SLR(R) 154, where an award of a monetary remedy would have the effect of undermining the Residential Property Act (Cap 274, 2009 Rev Ed), the underlying policy of the HDA is not compromised by a monetary award in the context of [a] proprietary estoppel claim.

37 The first is a matter of practical advice, and I need make no further mention of it. I focus, instead, on the second response. The law of proprietary estoppel is that the court has the discretion to award compensation when the circumstances suggest that such a remedy would do justice between the parties. This proposition also finds support from *Snell's Equity* (John McGhee gen ed) (Sweet & Maxwell, 2010) at para 12-028, which states that, "the court now also recognises that compensation can be used as a complementary remedy when expectations cannot be fulfilled, wholly or in part, in specie". This is also noted by the authors of *Gray and Gray* at para 9.2.95:

> ... [I]n deciding how to reinforce or concretise the estoppel claimant's inchoate equity, the court can go much further. The upholding of a claim of proprietary estoppel opens up the court's jurisdiction to fashion new rights for relevant parties. The general principle of relief was stated over a century ago in *Plimmer v Mayor etc of Wellington* (1884) 9 App Cas 699 at 714. Here the Judicial Committee of the Privy Council held that when an equity of estoppel has been raised, 'the Court must look at the circumstances in each case to decide in what way the equity can be satisfied'. The court has an extremely wide discretion to formulate an appropriate remedy.

38 Therefore, if the circumstances of the case prevent the award of an interest in a HDB flat due to ineligibility of the claimant, it should follow that monetary compensation can always be awarded instead. To suggest that s 51(10) of the HDA would prevent the courts from making such an award would be an overly broad application of the statutory provision.

39 For the reasons stated above (at [23]–[35]), it cannot be the case that the Plaintiff's claim is obviously unsustainable or wrong based on s 51(10) of the HDA.

Whether a claim in proprietary estoppel can override the ISA

40 Counsel for the Defendant submitted that apart from the HDA, the Plaintiff had not explained why proprietary estoppel overrides the ISA. Unfortunately, counsel for the Defendant did not elaborate on this submission, making reference only to s 5 of the ISA which is a provision relating mainly to whether either movable and immovable property or just immovable property belonging to the deceased is to be distributed. Section 5 of the ISA is reproduced below:

> **Property of an intestate to be distributed**
>
> 5. If a person dies intestate after the commencement of this Act, he being at the time of his death —
>
> (*a*) domiciled in Singapore and possessed beneficially of property, whether movable or immovable, or both, situated in Singapore, or
>
> (*b*) domiciled outside Singapore and possessed beneficially of immovable property situated in Singapore,

that property or the proceeds thereof, after payment thereout of the expenses of due administration as prescribed by the Probate and Administration Act [Cap. 251] shall be distributed among the persons entitled to succeed beneficially thereto.

41 The issue the court needs to address is simply whether a claim in proprietary estoppel has any effect on what constitutes property of the estate which can be distributed to entitled persons under the ISA.

42 Before considering how the Plaintiff's claim in proprietary estoppel bears in relation to intestacy succession, I wish to highlight two instances in England where a claim in proprietary estoppel has succeeded notwithstanding that the representator had passed away intestate. The first was the decision by the House of Lords in *Thorner v Major* [2009] 1 WLR 776, where the claimant in that case, worked unpaid on an older relative's farm for almost 30 years. There were indirect statements made and conduct by the relative to encourage the claimant's expectation that he would eventually inherit the farm. Another case where a claim in proprietary estoppel succeeded against the estate of the representor who died intestate is *Jennings v Rice* [2003] 1 P & CR 8. Here the claimant was a general helper and part-time gardener of representor for many years and from the 1980s, the representor stopped paying the claimant. In the three years preceding the representor's death, the claimant slept on the representor's couch every night. The representor had assured the claimant that he would see him right. The English Court of Appeal allowed the claim and granted the claimant £200,000 in satisfaction of the equity that had arisen in his favour.

43 It is trite that the duties of the administrator of an estate comprise, amongst other things, the settling of lawful debts of the deceased. The law provides for the settlement of such debts depending on whether the estate was solvent or insolvent: see Probate and Administration Act (Cap 251, 2000 Rev Ed) s 57. *Halsbury's Laws of Singapore* vol 15 (LexisNexis, 2006) at para 190.094, is instructive of what constitutes a debt provable against an estate:

> **[190.094] Debts that are provable against an estate**
>
> Debts can arise from a breach of contract, a tortious act, a breach of trust or any other breach *which is actionable against the deceased for a liquidated sum or otherwise, future, certain or contingent upon the happening of an event*. Only those debts which are lawful and enforceable are provable against an estate and these include debts wherever contracted and liable to be paid including debts incurred in a foreign country and which were secured upon property in that country. [emphasis added]

44 As stated above at [30], the Plaintiff only has a mere inchoate equity in the Flat prior to any order made by the court, which will be crystallised upon the granting of a remedy. Therefore, if a court after hearing the merits of the Plaintiff's claim at trial awards the Plaintiff monetary compensation, this would constitute a debt which is provable against the estate. The settlement of such a debt by the administrator of the estate is merely part of the process of intestate succession, and therefore cannot be said to override the ISA.

Whether the claim in proprietary estoppel is precluded on the principles of issue estoppel or abuse of process

45 The Defendant submits that when O 81 proceedings are brought, the plaintiff's claims in such proceedings would be defeated if the defendants have an equitable interest in land. Therefore, the Plaintiff in the present case should have raised the fact that he had an equitable interest in the Flat when faced with the O 81 Application. The Defendant further submits that since the Plaintiff's case in

the current proceedings is based upon having an equitable interest in the Flat, the issue is *res judicata* founded on either issue estoppel or abuse of process.

46 An O 81 application is for summary proceedings for possession of land. As held by Chan Seng Onn J in *Ong Beng Chong v Goh Kim Thong* [2010] SGHC 195 ("*Ong Beng Chong*") (at [6]), "[t]he legal position with respect to recovery of possession in such cases is clear." Chan J referred to two cases regarding equitable estoppel and recovery of possession of land.

47 The first case was that of *Khew Ah Bah v Hong Ah Mye* [1971–1973] SLR(R) 107, where Choor Singh J held (at [12]) that the defendant had certain rights in equity which the landowner must satisfy before he could recover possession:

> It is quite plain from these authorities that, if the owner of land requires another, or indeed, allows another to expend money on the land under an expectation created or encouraged by the landlord that he will be able to remain there, that raises an equity in the licensee such as to enable him to stay there. And the case of a tenant who is paying ground rent for the use of the land on which he has been allowed to erect a dwelling house is even stronger. He has a tenancy coupled with an equity. In such a case the landlord cannot recover possession of his land by merely terminating the tenancy; he must also satisfy the equity.

The second case was the Court of Appeal decision of *Lee Suat Hong v Teo Lye* [1987] SLR(R) 70, where it was held at [13] that:

> In our view, in cases such as this where the defendant raises equitable estoppel to restrict the plaintiff from exercising his legal rights as landowner, the proper approach is to inquire first, whether any equitable estoppel exists, and if so, the extent of the equity established by the estoppel, before next considering how best that equity may be satisfied.

48 Therefore, before a plaintiff in O 81 proceedings is able to recover possession of his land, he must first satisfy any equity in favour of the defendant which arises by way of estoppel. As such, a claim in proprietary estoppel was a relevant issue for the Plaintiff in the present case to have raised in the O 81 Application. Notwithstanding this, either issue estoppel or abuse of process must apply to the present case in order for the claim in proprietary estoppel to be considered *res judicata*, and it is to this issue which I now turn to address.

Issue Estoppel

49 In *Goh Nellie v Goh Lian* Teck [2007] 1 SLR(R) 453 ("*Goh Nellie*"), Sundaresh Menon JC (as he then was), set out at [26] the requirements which had to be met in order to establish an issue estoppel as laid down by the Court of Appeal in *Lee Tat Development Pte Ltd v MSCT Plan No 301* [2005] 3 SLR(R) 157 ("*Lee Tat*"):

> [T]he Court of Appeal held at [14]–[15] that the following requirements had to be met to establish an issue estoppel:
>
> (a) there must be a final and conclusive judgment on the merits;
>
> (b) that judgment must be of a court of competent jurisdiction;
>
> (c) there must be identity between the parties to the two actions that are being compared; and

(d) there must be an identity of subject matter in the two proceedings.

The only requirement that is in issue in the present case is whether the Consent Order was a final and conclusive judgment on the merits of the O 81 Application.

50 The Assistant Registrar in his decision below was of the view that the Consent Order being a contractual consent order was not capable of founding an issue estoppel. This was because a contractual consent order was not final and conclusive on the merits of an issue. Both parties do not dispute the fact that the Consent Order was a contractual consent order.

51 The Defendant in his submissions before this court addresses this issue by relying on the following passage in *Khan v Golecha International Ltd* [1980] 1 WLR 1482 ("*Khan*") at 1490F:

> The judge decided that there was a lending of money within the meaning of the Act. The plaintiff appealed. The Court of Appeal gave judgment dismissing the appeal. The judgment was given by consent and the consent was given because the company claimed, and the plaintiff accepted, that there was no lending of money. In my view, that admission by the plaintiff, given to the court and founding the judgment by consent, was just as efficacious for the purpose of issue estoppel as a judicial decision by the court after argument founding a similar judgment.

Although this passage seems to support the Defendant's position at first glance, a proper analysis of the facts of *Khan* reveals that this is not so. The earlier Court of Appeal judgment made by consent, referred to in *Khan*, was only done because the plaintiff in the earlier hearing thought that his case was unsustainable after the defendant had brought to his notice a case analogous to the matter and "threw in his hand". Essentially, the plaintiff in *Khan* conceded on the issue in the earlier proceedings, and it was on that basis that the Court of Appeal made the judgment. This is markedly different from a consent order entered into by agreement between the parties.

52 In *Goh Nellie* at [28], Menon JC stated that the concept of "finality" involved a declaration or determination of a party's liability and/or his rights or obligations leaving nothing else to be judicially determined. To ascertain this, the judge's intention could be gathered from the relevant filed documents, orders made and notes of evidence taken or arguments made.

53 In this case, the Defendant's counsel wrote to the Plaintiff's counsel on 13 July 2009, offering to settle the O 81 Application. After the exchange of correspondence between the parties, negotiations were finally concluded when counsel for the Plaintiff wrote to the Defendant's counsel on 22 July 2009 with a draft consent order attached in the letter. This draft was then amended for organisation and to comply with the standard form for Orders of Court, with the substantive terms of the order remaining unaltered by the Deputy Registrar.

54 Therefore, the Deputy Registrar in making the Consent Order could not be said to have applied his mind to the case to ascertain whether the application or the prayers sought should be granted. He was merely recording the terms agreed upon by parties in the form of a Consent Order, and this must mean that no final decision on the merits of the O 81 Application was made. Furthermore, in relation to contractual consent orders, whether an issue is allowed to be re-litigated is determined by the appropriate remedy to be granted based on principles of contract law rather than issue estoppel. In *Woo Koon Chee v Scandinavian Boiler Service (Asia) Pte Ltd and others* [2010] 4 SLR 1213 ("*Woo Koon Chee*"), the Court of Appeal held that the contractual consent order made in earlier proceedings had the effect of superseding and merging with the cause of action in those earlier proceedings. Also, in *Indian Overseas Bank v Motorcycle Industries (1973) Pte Ltd and others* [1992] 3 SLR(R) 841 ("*IOB v Motorcycle Industries*"), the Court of Appeal relied on the following passage in *Halsbury's Laws of*

England vol 37 (Butterworths, 4th Ed) at para 391 to explain the effect of "a settlement or compromise agreement":

> … Where the parties settle or compromise pending proceedings, whether before, at or during the trial, the settlement or compromise constitutes at a new and independent agreement between them made for good consideration. *Its effects are (1) to put an end to the proceedings, for they are thereby spent and exhausted; (2) to preclude the parties from taking any further steps in the action, except where they have provided for liberty to apply to enforce the agreed terms; and (3) to supersede the original cause of action altogether …*
>
> *An agreement for a compromise may be enforced or set aside on the same grounds and in the same way as any other contract …*
>
> [emphasis added]

55 Therefore, where a consent order made by agreement is breached, parties enforce the agreement based on principles of contract law in a separate set of proceedings. In the present case, even if the terms of the Consent Order did preclude the Plaintiff from bringing the present claim, this is not a matter to be decided on grounds of issue estoppel.

56 Therefore, I find that the Plaintiff is not precluded from bringing his claim on the basis of issue estoppel as a result of the Consent Order made in relation to the O 81 Application.

Abuse of Process

57 As a matter of public policy, the legal system does not generally permit the litigation of matters which ought to have been resolved in earlier proceedings. In the absence of clearly justified reasons, proceedings which have been brought to determine an issue which should have been litigated in previous proceedings will constitute an abuse of process: see Jeffrey Pinsler, *Principles of Civil Procedure* (Academy Publishing, 2013) at para 09.017. This is also known as the rule in *Henderson v Henderson* (1843) 3 Hare 100 at 115–116, formulated by Sir James Wigram V-C:

> [W]here a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. *The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.* [emphasis added]

58 This rule was considered by Menon JC in *Goh Nellie*, who held at [53] that a court should determine whether there is an abuse of process by looking at all the circumstances of the case, including:

> (a) whether the later proceedings in substance is nothing more than a collateral attack upon the previous decision;
>
> (b) whether there is fresh evidence that might warrant re-litigation;

(c) whether there are bona fide reasons why an issue that ought to have been raised in the earlier action was not; and

(d) whether there are some other special circumstances that might justify allowing the case to proceed.

Menon JC then elaborated on the application of these various factors:

> The absence or existence of these enumerated factors (which are not intended to be exhaustive) is not decisive. In determining whether the ambient circumstances of the case give rise to an abuse of process, the court should not adopt an inflexible or unyielding attitude but should remain guided by the balance to be found in the tension between the demands of ensuring that a litigant who has a genuine claim is allowed to press his case in court and recognising that there is a point beyond which repeated litigation would be unduly oppressive to the defendant. In the context of cases such as the present, the inquiry is directed not at the theoretical possibility that the issue raised in the later proceedings could conceivably have been taken in the earlier but rather at whether, *having regard to the substance and reality of the earlier action, it reasonably ought to have been*. In my judgment, the answer to that in the present case is plainly no. [emphasis added]

59 As established earlier at [48], a relevant issue for the Plaintiff to have raised in the O 81 Application, would be that he had a valid claim in proprietary estoppel in relation to the Flat. The key issue to be decided would, therefore, be whether having regard to the substance and reality of the earlier action, the Plaintiff should have brought up the fact that he had a valid claim in proprietary estoppel in relation to the Flat as a challenge to the O 81 Application. Unfortunately, parties have not made submissions expressly on this point.

60 In light of the settlement offer made to the Plaintiff by the Defendant which eventually resulted in the Consent Order, I find that it was reasonable that the O 81 Application was not challenged by the Plaintiff at that time by establishing a claim in proprietary estoppel. Furthermore, as seen from the correspondence between the parties leading up to the agreed Consent Order, it would have been clear to both parties that disputes over the Flat were not over and the Plaintiff might possibly bring further claims against the Defendant.

61 Taking into account these various factors, I find that in balancing between the need to allow genuine claims to be brought forward by litigants and the need to ensure defendants are not unduly oppressed by repeated litigation, the present claim in proprietary estoppel is not an abuse of process.

62 Therefore, the Defendant's appeal against the refusal to strike out the claim under *res judicata* must fail.

Conclusion

63 For the reasons as stated above, I dismiss the appeal. This case has to proceed to trial for the trial judge to consider whether an equity has arisen, and if it has, how that equity should be satisfied. As this is within a familial context, which is usually a "non-bargain" context as contrasted to a "bargain" context, the court may look to the maximum (expectation) equity but award the minimum to do justice in this case. I see no difficulty in awarding equitable compensation in a monetary amount.

64 Costs must follow the event, to be taxed if not agreed.