ADG (executor and trustee of the estate of B (alias C), deceased) v ADH and another (D and others, interveners)
[2009] SGHC 220

Case Number : OS 687/2008

Decision Date : 28 September 2009

Tribunal/Court : High Court

Coram : Belinda Ang Saw Ean J

Counsel Name(s) : Kelvin Tan and Daniel Chia (Drew & Napier LLC) for the plaintiff; T P B Menon and Vincent Yeoh (Wee Swee Teow & Co) for the defendants; G Raman (G R Law Corporation) for the 1st intervener; Alvin Yeo SC and Sim Bok Eng (WongPartnership LLP) for the 2nd and 3rd interveners; Deborah Barker SC (KhattarWong) for the 4th intervener

Parties : ADG (executor and trustee of the estate of B (alias C), deceased) — ADH and another (D and others, interveners)

Succession and Wills – Construction

Succession and Wills – Lapse

28 September 2009 Judgment reserved.

Belinda Ang Saw Ean J:

1 This Amended Originating Summons is brought to construe the last will and testament of [B] also known as [C] ("the testator"). The applicant is the [ADG], the executor and trustee of the estate of the testator.

2 The facts of this case are not in dispute. The testator died on 28 January 2006 surviving him three sons, [D], [E] and [F] (hereinafter collectively referred to as "the brothers") and a daughter, [G]. The eldest son, [H], also known as [J], predeceased the testator; he tragically died in a car accident on 18 December 2004.

3 The applicant is represented by Mr Kelvin Tan. Mr TPB Menon appeared for the defendants, [ADH] and [K] alias [L]. The defendants are the executors of [J]'s estate. Representing the interveners who are named beneficiaries in the testator's last will and testament dated 29 November 1996 ("the Will") are: Dr G Raman who acts for [D], Mr Alvin Yeo SC and Ms Sim Bock Eng appear on behalf of [E] and [F], and Ms Deborah Barker acts for [J].

4 My attention was drawn to the testator's direction in cl 13 of the Will which states that if any beneficiary should challenge the Will, the challenger's share would be forfeited. With that clause in mind, Mr Yeo explained that his clients' intervention in the proceedings was to assist the court in construing cl 9 of the Will; it was not their intention to challenge the Will. The same position was adopted by Ms Barker, Dr Raman and Mr Menon. In that regard, the defendants and interveners urged the court to take cognisance of the observations of their legal representatives.

Clause 9 of the Will

5 The issue in this Amended Originating Summons turns upon the true construction of cl 9 of the Will. Clause 9 reads:

> I GIVE DEVISE and BEQUEATH all the rest and residue of my property both real and personal

of whatsoever nature and wheresoever situate to which I am or may hereafter become entitled in possession or reversion unto the Company (hereinafter referred to as "my Trustees") UPON TRUST to sell call in and convert into money all such parts of my real and personal estate as shall not consist of money with power at my Trustees' absolute discretion to postpone for such period as they may think fit the sale calling in and conversion of the whole or any part or parts thereof and at their absolute discretion to retain the same or any part thereof in the state or upon the investments in or upon which the same shall be at the time of my death without being responsible for any loss which may be incurred by their so doing and my Trustees shall stand possessed of the said moneys and the investments for the time being representing the residue of my estate (hereinafter called "my residuary estate") UPON TRUST:-

a) To purchase an annuity in the annual sum of Singapore Dollars Fifteen thousand (S$15,000) for the benefit of my sister [M] provided she shall survive me for a period of one month.

b) As to the sum of Singapore Dollars Two million five hundred thousand ($2,500,000) for my daughter [G] to pay the same together with any accumulations of income thereon upon the expiry of one year after the date of the death of my former wife [N]. If my said daughter [G] shall marry with the consent of my Trustees and my eldest son [H] also known as [J] provided he shall then be living whom I require to be satisfied that the marriage is for her happiness and not primarily for the purpose of inheriting this bequest then I give and bequeath to her the sum of Singapore Dollars One hundred thousand (S$100,000) which gift shall be in addition to and not as part of the said bequest of Singapore Dollars Two million five hundred thousand (S$2,500,000). I further direct that the said gift of Singapore Dollars One hundred thousand (S$100,000) shall be paid on my said daughter entering into her first lawful monogamous marriage. I further declare that if my said daughter [G] shall give my Trustees and my eldest son [H] also known as [J] her written undertaking that she intends to remain a spinster for the remainder of her life then I give and bequeath to her the sum of Singapore Dollars One hundred thousand (S$100,000) in lieu of the gift payable to her on marriage. If my said daughter [G] shall fail to survive my former wife [N] by the period of one year as aforesaid the capital shall belong to the estate of my said daughter [G] and she shall have a general power of appointment over the same.

c) As to the sum of Singapore Dollars One million (S$1,000,000) for my second son [D] to pay the same together with all accumulations of income thereon upon the expiry of one year after the date of the death of my former wife [N]. If [D] shall fail to survive my former wife [N] by the period of one year as aforesaid the capital shall belong to the state of my said son [D] and he shall have a general power of appointment over the same.

d) As to the sum of Singapore Dollars One million (S$1,000,000) for my third son [E] to pay the same together with all accumulations of income thereon upon the expiry of one year after the date of the death of my former wife [N]. If [E] shall fail to survive my former wife [N] by the period of one year as aforesaid the capital shall belong to the estate of my said son [E] and he shall have a general power of appointment over the same.

e) As to the sum of Singapore Dollars One million (S$1,000,000) for my fourth son [F] at present care of [address redacted] to pay the same with all accumulation of income thereon upon the expiry of one year after the death of my former wife [N]. If [F] shall fail to survive my former wife [N] by the period of one year as aforesaid the capital shall belong to the estate of my said son [F] and he shall have a general power of appointment over the same.

If my said son [F] shall at the date of my death be the father of a legitimate child either born or en ventre sa mere I GIVE and BEQUEATH to my said son [F] the sum of Singapore Dollars Five hundred thousand (S$500,000) in addition to and not by way of deduction from the said gift of Singapore Dollars One million ($1,000,000).

f) As to the sum of Singapore Dollars One million (S$1,000,000) jointly for my two grand-sons [P] and [Q] the children of my son [H], also known as [J] to pay the same equally to or to the survivor of my said grand-children upon each of them attaining the age of twenty one (21) years. If either of my said grand-sons shall fail to survive and attain the age of twenty one (21) years then the gift to such grand-child shall lapse and be paid to the surviving grand-child.

g) As to the sum of Singapore Dollars Five hundred thousand (S$500,000) to my grand-son [R] the child of my son [E] to pay the same together with all accumulations of income thereon to my said grand-child upon his attaining the age of twenty one (21) years.

h) As to the sum of Singapore Dollars Five hundred thousand (S$500,000) equally to my grand-daughters [S] and [T] the daughters of my son [D] upon their attaining the age of 21 years.

During the lives of each of my said daughter, sons and grand-children who are pecuniary beneficiaries and until each shall have attained a vested interest in his her or their respective bequests my Trustees shall pay the income arising upon each gift or part thereof to each of my said beneficiaries and in the case of any beneficiary below the age of twenty one (21) years to the parents or guardian of such beneficiary for use in the maintenance and education of such beneficiary. In the case of the gifts to my grand-sons [P] [Q] [R] my grand-daughters [S] and [T] and any other grand-child of mine referred to in the foregoing bequests, my Trustees may make advances from capital provided the sums shall be laid out in the fees and expenses of attending any course of education it being my express wish that my said grand-children shall be properly educated during their minority.

Upon each of my said grand-children attaining the age of twenty one (21) years my Trustees shall pay to such grand-child the whole of the portion of the pecuniary bequest held for such grand-child and any accumulations of income thereon for his or her own absolute use and benefit.

j) As to one half of my residuary estate after payment of my just debts, funeral and testamentary expenses and the pecuniary bequests hereinbefore listed to my son [H] also known as [J] at the expiration of one year after the death of the said [N]. If [H]. shall fail to survive my former wife [N] by the period of one year as aforesaid the capital shall belong to the estate of my said son [H]. and he shall have a general power of appointment over the same. I have made my son [H]. also known as [J] my substantial heir as I believe he will be able to assist his brothers and sisters and nephews and nieces in the event of any family difficulties arising. However, this expression is not to create any binding trust or commitment on the part of [H] also known as [J] to make any payments advances or gifts from his inheritance.

k) As to the remaining one half of my residuary estate after payment of my just debts, funeral and testamentary expenses and the pecuniary bequests hereinbefore listed equally among my three sons [D], [E] and [F] at the expiration of one year after the death of my former wife [N]. If any of [D], [E] and [F] shall fail to survive my former wife [N] by the

period of one year as aforesaid the capital shall belong to the estate or estates of the survivor or survivors of my said sons [D], [E] and [F] and he or them shall have a general power of appointment over the same.

If any of my said children shall die before me then the share of such child so dying shall lapse and fall into residue.

The issues

6 The question for determination upon a true construction of cl 9 of the Will is as follows:

(a) Whether the gift of one-half of the residuary estate under cl 9(j) of the Will to the testator's son [J] lapsed as [J] predeceased the testator ("the cl 9(j) gift").

(b) If the cl 9(j) gift lapsed, whether

(i) the estate of [J] would be entitled to the cl 9(j) gift, or

(ii) the other three residuary legatees mentioned in cl 9(k) of the Will would be entitled to the cl 9(j) gift in equal shares, or

(iii) there would be an intestacy in respect of the cl 9(j) gift.

7 The applicant's position on construction of cl 9 can be summarised quite shortly. Mr Tan contends that as [J] predeceased the testator, the cl 9(j) gift had clearly lapsed and fell into residue. Consequently, the testator's residuary estate in its entirety is to be shared equally amongst [D], [E] and [F] as the other residuary legatees named in cl 9(k) of the Will.

8 Whilst Ms Barker agreed with Mr Tan, Mr Yeo and Dr Raman that the cl 9(j) gift had lapsed since [J] predeceased the testator, she disagreed that the lapsed cl 9(j) gift fell into residue. The second possibility raised by the 4th Intervener's construction of cl 9 is that the lapsed cl 9(j) gift passes as on an intestacy and it ought to be distributed in accordance with the provisions of the Intestate Succession Act (Cap 146, 1985 Rev Ed).

9 The third possibility was raised by Mr Menon. His contention was that the cl 9(j) gift did not lapse relying on s 26 of the Wills Act (Cap 352, 1996 Rev Ed) ("the Act") on gifts to children who leave issue living at the testator's death. Simply put, [J] predeceased the testator leaving issue living at the testator's death, and by virtue of s 26 of the Act, the cl 9(j) gift would take effect as if [J] died immediately after the testator. As such, [J]'s sons acquired a vested interest in the cl 9(j) gift. Mr Menon argued that the proviso to cl 9 is inapplicable because it speaks of the "children" of the testator not surviving him; not the "issue" of the testator's children. Neither does the condition in cl 9(j) apply as it speaks of [J] surviving his mother, [N], and not [J]'s "issue". Mr Menon emphasised that the Will was professionally drafted, and it did not contain any contrary intention to oust the operation of s 26. In other words, the doctrine of lapse had been displaced by the express provisions of s 26.

Discussions on the construction questions

10 In construing the Will, the court ascertains the intention of the testator by looking at the language used in the context of the document as a whole and in the light of the relevant background

known to that person at the relevant time. In addition, the principles discussed in the cases have to some extent become formalised so that the use of familiar expressions and provisions in a will is likely to mean that the testator has chosen to adopt an established vocabulary. That said the court has still to scrutinise the will for any contrary indications in the remainder of the instrument that would jettison the established meaning. The result of the present case turns on whether the use of a familiar expression in a particular clause in the Will – "lapse and fall into residue" – and in the context of the Will as a whole on construction has the established meaning as chosen by the testator, or a completely different meaning.

11 The starting point is the general rule that the devisee or legatee must survive the testator in order that he may have the benefit of the gift, devise or legacy. Specific dispositions which fail from any cause, as a general rule, fall into residue. This general rule governing a failed specific bequest from an ineffectual disposition in the will is subject to there being a general residuary clause and to any contrary indications there might be in the will. In contrast to specific dispositions, if a *gift of residue* lapses (*ie*, when the disposition of the residue itself fail), the property in question devolves as on an intestacy. There are exceptions to this principle. Of relevance here are the exceptions where: (i) s 26 of the Act applies; (ii) the testator makes provisions in substitution in the will; and (iii) the will provides for a contrary intention to exclude the operation of the principle.

12 It is not disputed that the present case concerns a gift of residue. The exceptions outlined in [11] above will be discussed in turn.

Did the cl 9(j) gift lapse

13 It is a convenient to begin with s 26 of the Act, and the defendants' contentions that the cl 9(j) gift had not lapsed because of s 26 which reads as follows:

> Where any person being a child or other issue of the testator to whom any real or personal estate shall be devised or bequeathed for any estate or interest not determinable at or before the death of that person shall die in the lifetime of the testator leaving issue, and any such issue of that person shall be living at the time of the death of the testator, that devise or bequest shall not lapse, but shall take effect as if the death of that person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will.

14 Section 26 provides rights in substitution for the issue of children who predecease the testator. Of relevance to the present case is the question whether cl 6 of the Will expresses a "contrary intention" within the meaning of s 26 thereby ousting its operation.

15 Clause 6 of the Will reads as follows:

> I HEREBY DIRECT AND DECLARE that none of the gifts, devises and bequests given hereafter shall take effect unless the beneficiary or beneficiaries shall survive me for a period of one month. The share of any beneficiary who fails to survive me for the said period of one month shall pass as if he had predeceased me.

16 Mr Menon referred the court to *Re Will of Loke Soh Lui* [1999] 3 SLR 370. In that case, the testatrix had three sons and four daughters. Her second son, Chua Boon Unn, a beneficiary under her will predeceased the testatrix. Chan Seng Onn JC (as he then was) held that s 26 of the Act applied to one clause of the will, but not the other because a contrary intention had been expressed therein to prevent the application of the section. In relation to a specific bequest of jewellery to the two

sons and daughter of the testatrix, the particular bequest took effect and did not lapse even though one son, Chua Boon Unn had predeceased the testatrix, as the court found no contrary intention in the Will. The other bequest for the residuary estate to be divided amongst the testatrix's children "or such of them as shall survive [the testatrix] in equal shares" was held to contain the requisite contrary intention so as to prevent the application of s 26 of the Act.

17 Mr Menon argued that the express wording of cl 6 could not be construed as conveying a contrary intention in the Will for the purposes of s 26. The second sentence of cl 6, Mr Menon submitted, brought into play s 26 as [J] died leaving issue living at the time of the death of the testator, namely [J]'s sons, [P] and [O]. The applicant and the interveners subscribed to the opposite view arguing that cl 6 evinced the testator's intention that bequests would *not* fall to be distributed to the estate of any beneficiary that predeceased the testator.

18 Section 26 operates to avoid the lapse of a gift by the fiction that the devisee or legatee died *immediately* after the death of the testator. By virtue of the statutory fiction, the gift would form part of the beneficiary's estate. Section 26 of the Act, in my judgment, does not assist the defendants. Whilst s 26 presumes that [J] died immediately after the death of the testator, the operation of statutory provision is not sufficient to ensure that the cl 9(j) gift takes effect under the Will for the reasons below.

19 Clause 6 is a typical survivorship clause designed to overcome the prospect of paying estate duty twice, once on property passing on the death of the testator, and again if the beneficiary dies immediately after the testator. An explanation of a survivorship clause is found in *The Encyclopaedia of Forms and Precedents*, Vol 42(1), 5th Ed, Butterworths, 2007 Reissue, para 267.1. The survival of a beneficiary for a stated period as in cl 6 was the devise used by the testator to prevent the possibility of double estate duty in those days. (Estate duty is now abolished.) In any case, regardless of the thinking behind the clause, the upshot of the imposition of a stated period in cl 6 is that it negates the operation of s 26 of the Act. Clause 6 requires [J] to survive the testator for a period of one month in order for the cl 9(j) gift to take effect (see also cl 9(a) for a similar direction). The first sentence of cl 6 states that "none of the gifts" shall "take effect" unless the beneficiary "shall survive me [the testator] for a period of one month". Should the beneficiary "fail to survive [the testator]" for the said period of one month, the second sentence of cl 6 states that the share of any beneficiary "shall pass" as "if he had predeceased" the testator.

20 Contrary to Mr Menon's submissions, the second sentence in cl 6 does not contradict the first sentence. In my view, cl 6 caters for two situations that are different from the one intended in s 26, and as such the situations in cl 6 amount to a "contrary intention" within the meaning of s 26 of the Act. Both sentences have to be read together for their full effect. The second sentence restates the position that in not surviving the testator within the stated period, the beneficiary gets *no* benefit of the gift as the second sentence directs that the gift devolves in the same manner as if the beneficiary died in the lifetime of the testator. The usual result, if there is no residuary gift, is that the failed or lapsed gift passes as on an intestacy unless there is a contrary intention elsewhere in the Will (see *Williams on Wills* (Francis Barlow et al eds) (LexisNexis Butterworths, 9th Ed, 2008) ("*Williams*") at Vol 1, para 47.6). Indeed, the testator had given directions in the Will as to what would happen to bequests to [J] in the event he as beneficiary should die in the lifetime of the testator. In particular, cl 8 of the Will provides that the surviving brothers are to takeover [J]'s share. Clause 8 reads:

> 8. I GIVE DEVISE and BEQUEATH to my four sons [H]. also known as [J], [D], [E] and [F] all my right title and interest in the two Malaysian properties formerly owned by my late father one being known as [U] Sdn Bhd, [address redacted] and the other being the house "[xxx]" and the surrounding lands in the [address redacted] which properties have been transferred to a company [V] Sdn Bhd whose shares were distributed to the beneficiaries of my late father's will. I desire my said shares shall be given to my said four sons equally. *If any of my said four sons fail to survive me then the survivor or survivors of my said four sons shall take their deceased brother's share*. [emphasis added]

21 Clause 8 is similar in structure to cl 7 which also evinces a contrary intention for the purposes of s 26 of the Act. Clause 7 reads:

> 7. I DEVISE and BEQUEATH to my three sons [D], [E] and [F] my shares in Sebros Properties Sdn Bhd at present held in safe custody at [Bank 1]. I ALSO GIVE DEVISE AND BEQUEATH to my said three sons [D], [E] and [F] all my right title and interest in my properties [address redacted] the title deeds for which are now in my safe deposit box at the [Bank 2]. *If any of my said three sons fail to survive me then the survivor or survivors of my said three sons shall take their deceased brother's share*. [emphasis added]

22 The phrase used in cll 7 and 8 is "if any of my said … sons fail to survive me, then the survivor or survivors of my said … sons shall take their deceased brother's share". From the wording used in cll 7 and 8, the testator expressly indicated survival of the beneficiary as a condition of his entitlement. It was clearly a matter at the forefront of his mind such that a beneficiary who did not survive him could not benefit in any way, but rather the surviving beneficiary or beneficiaries were to take the share of the non surviving beneficiary.

23 Specific to the cl 9(j) gift and s 26 of the Act is the proviso coming at the end of cl 9. The proviso expresses the testator's clear intention in the Will should [J] predecease the testator. The testator did not intend the cl 9(j) gift to pass to [J]'s estate if [J] died in the lifetime of the testator. The proviso, which I repeat, states:

> If any of my said children shall die before me then *the share* of such child so dying *shall lapse and fall into residue*. [emphasis added]

24 I agree with Mr Tan and Mr Yeo (and Dr Raman associated himself with Mr Yeo's arguments) that the proviso to cl 9(j) as well as cl 9(k) clearly indicated a "contrary intention" within the meaning of s 26 of the Act.

25 Mr Menon argued that the proviso was not meant to apply to the residuary estate because

> (a) there was express provision in cl 9(j) that the estate of [J] shall inherit if he did not survive the testator's former wife;
>
> (b) there was express provision in cl 9(k) that the estates of the testator's other sons would inherit if they did not survive the testator's former wife.

26 By reason of those two sub-clauses, Mr Menon argued that the proviso had been displaced by the express intention of the testator to benefit the estates of his four sons. Accordingly, the estate of [J] was entitled to one-half of the testator's residuary estate pursuant to cl 9(j) of the Will.

27 Mr Menon's construction of the proviso is untenable. First, the proviso does not apply to the whole of cl 9. The proviso makes reference to "my said children". It is clear that the proviso is not applicable to the pecuniary legacies to the testator's sister (sub-clause (a)) and the grandchildren (sub-clauses (f), (g) and (h)). It applies to sub-clauses (b), (c), (d), (e), (j) and (k). Sub-clauses (b) to (e) are pecuniary legacies to the testator's children and sub-clauses (j) and (k) are the residuary legacies which are subject to the pecuniary legacies in cl 9. The proviso is clear in its meaning and intent and it is indicative of a contrary intention for the purposes of s 26 of the Act. Furthermore, the gift over in sub-clauses (j) and (k) of cl 9 only operates if the proviso is not engaged. In other words, the proviso is the overriding provision. It governs, as Mr Tan correctly pointed out, the situation where [J] fails to survive the testator, with the consequence that the cl 9(j) gift lapses and falls into residue.

Does the lapsed cl 9(j) gift passes as on an intestacy or fall into residue

28 The next issue which arises is the meaning intended by the testator when he states in the proviso that the share of such child "shall lapse and fall into residue".

29 Ms Barker argued that the general rule is that the failed or lapsed gift of a share of residue passes as on an intestacy relying on the cases of *Skrymsher v Northcote* (1818) 1 Swans 565 ("*Skrymsher*") and *Green v Pertwee* (1846) 5 Hare 249 on the general interpretation of the word "residue". In *Skrymsher*, the court held (at 509):

> It seems clear on the authorities, that a part of the residue of which the disposition fails, will not accrue in augmentation of the remaining parts, as a residue of residue; but instead of resuming the nature of residue, devolves as undisposed of. Residue means all of which no effectual disposition is made by the will, other than the residuary clause; but when the disposition of the residue itself fails, to the extent to which it fails, the will is inoperative.

30 In *Skrymsher*, the question was who was entitled to the sum of £500 (part of residuary estate) which the testator had originally made a specific disposition to his daughter, Hannah, but later erased. The court held (at 508):

> In this respect a residuary bequest differs from every other. A specific or pecuniary legacy being revoked, or, from whatever cause, failing, becomes a part of the residue for the benefit of the residuary legatee; but if a gift of some portion of the residue itself fails, the residue being given as in this instance, in distinct shares, the share so failing will not accrue to the remaining shares, but belongs as undisposed of to the next of kin.

31 In *Green v Pertwee*, the testator gave the residue of his estate in ten equal shares. He decided that if the residue exceeds £10,000, then the money shall go to his nieces and nephews in equal share. The estate exceeded £10,000 and one tenth of the share lapsed but the court held that it did not pass to the other residuary legatee but went into intestacy. The court held that the word "residue" could be given a wide interpretation to mean everything that is undisposed of, or a restricted interpretation. In the context of that particular will, a restrictive interpretation was given to the word "residue" so that the money passed into intestacy. In the present case, the word "residue" on the facts should be interpreted in the context of the Will (see [38] and [39] below).

32 Ms Barker further argued that the facts of the present case are analogous to the situation in *Skrymsher* in that the testator failed to give any indication as to who [J]'s share should go to, just as the testator in *Skrymsher* who removed £500 out of the residue and failed to express any intention as

to who should be the beneficiary of the £500. In the absence of any such provision, the intestacy rules apply.

33 In response, Mr Tan argued that *Green v Pertwee* had been doubted in *Theobald on Wills* (John G Ross Martyn, Stuart Bridge & Mika Oldham) (Sweet & Maxwell, 16th Ed, 2001) and *Williams*. Furthermore, *Skrymsher* would not assist the 4th Intervener's contention because:

(i) It has been indirectly overruled by *In re Palmer* [1893] 3 Ch 369,

(ii) *In re Parker* [1901] 1 Ch 408, the court there doubted *Skrymsher*, and

(iii) *Re Parnell* [1944] 1 Ch 107 states that *Skrymsher* is not now regarded as authority.

34 Therefore, Mr Tan submitted that the direction that the share of such child "shall lapse and fall into residue" after sub-clauses (j) and (k) should be read so that the lapsed share should be distributed amongst the three surviving brothers as residuary legatees following *Re Rhoades* [1885] 29 Ch D 142 and *Re Whiting* [1913] 2 Ch 1. Similarly, Mr Yeo and Dr Raman also conclude that the cl 9(j) gift "falls into residue" upon lapsing; it becomes part of the residuary estate as defined and the brothers are entitled to share it equally amongst themselves.

35 In *Re Rhoades*, the testator bequeathed the residue of his personal estate to four persons in equal share and stated that if his sister died unmarried within his wife's lifetime, her one-fourth share would "fall into the residue". Bacon VC felt bound by *Humble v Shore* (1847) 7 Hare 247, but distinguished it on the grounds that in that case, the property passed to the residuary legatees because the testator directed an equal division of property, therefore there would be no fixed share. On Ms Barker's reasoning, the case of *Re Rhoades* may be distinguished because there was no direction as to equal division as between the brothers and the testator stipulated that half his residuary estate would go to [J] and the remaining half of his residuary estate would go to the three brothers under sub-clauses (j) and (k) of cl 9 of the Will.

36 In *Re Whiting*, the testator devised all the rest and residue of his real and personal estate to be divided equally between 46 persons. The testator then revoked the gift to two persons and confirmed his will in all other respects. Joyce J held that on construction of the will, the revoked gifts did not fall into intestacy. Again, on Ms Barker's reasoning, the case of *Re Whiting* may be distinguished on the grounds that there was a direction to divide the rest and residue of the real and personal estate equally among the beneficiaries, whereas this is absent under the present Will.

37 Mr Tan further submitted that *Skrymsher* and *Green v Pertwee* are, in any case, distinguishable on the facts. In those cases, there was no direction that failed or lapsed share would fall into residue. Following *Re Palmer*, the testator's direction that the cl 9(j) gift should "lapse and fall into residue" is sufficient to dispose of that residuary share to the remaining legatees in equal share.

38 Looking at the plain words of cl 9 of the Will, the testator defined the residue as follows:

> I GIVE DEVISE AND BEQUEATH all the rest and residue of my property both real and personal of whatsoever nature and wheresoever situate … my Trustees shall stand possessed of the said moneys and the investments for the time being representing the residue of my estate (hereinafter called "my residuary estate"). …

39 Having termed the residue as "my residuary estate", he referred to "my residuary estate" in

sub-clauses (j) and (k) of cl 9, and again in cl 11. The testator defined "my residuary estate" very widely and the definition is capable of including the cl 9(j) gift which failed to take effect since [J] died in the lifetime of the testator. The testator intended the word "residue" in the phrase "fall into residue" in the proviso to mean his "residuary estate". The proviso also uses the word "lapse". Technically, the term "lapse" is used where the beneficiary has died in the testator's lifetime. In the context of the proviso, the failure of the testamentary gift is confined to the death of the beneficiary during the lifetime of the testator and not a failure of the testamentary gift in any other way.

40 With the wide definition of the residue in mind, I turn to the applicable general principles which differentiate between the lapse of a specific gift and a residuary gift. *Williams* at para 47.6 states that

> A lapsed specific devise or specific bequest falls into residue. A lapsed gift of residue or a share of residue or a lapsed general gift of property passes as on an intestacy.

41 In the case of specific gifts, the general rule is that lapsed or void legacies fall into residue unless it is disposed of by a contrary provision in the will. To illustrate, in *Blight v Hartnoll* (1883) 23 Ch 218, a testatrix bequeathed all her personal property to her sister with the exception of a debt and a leasehold wharf. The testatrix made a specific disposition of the wharf upon trusts which unfortunately failed. The court held that the gift of "all my personal property" was residuary and that the wharf passed under it.

42 Where the disposition of the *residue itself lapses*, as was the case here, the principle is that a gift of residue which lapses passes as on an intestacy. This is the usual result unless the testator gives directions in the will to the contrary. *Williams* confirms the principle at para 38.13:

> Where the gift of a share in residue fails, *prima facie* the lapsed share does not go to increase the other shares of residue but passes on an intestacy; *but the will may direct that any such share*, whether lapsed or revoked, *shall fall into residue and such direction operates as a gift of that share to the other residuary legatees*, or the will may direct that all are to receive an equal participation in the property. [emphasis added]

43 The same commentary is made by Roger Kerridge in *Hawkins on Construction of Wills* (Sweet & Maxwell, 5th Ed, 2000) ("*Hawkins*") at 9-08. The rule may be excluded as *Hawkins* noted at para 9-09:

> *It is, of course, open to a testator who is disposing of his residuary estate in shares to exclude the operation of the rule stated above by directing that that a share the disposition of which may fail or has failed shall accrue to the others. In several cases the testator*, instead of expressly directing that such accruer shall take place, *has simply provided that a share the original gift of which has failed shall fall into the residuary estate*. Language of this kind is strictly appropriate only where the gift in question is specific or pecuniary; and thus, where a testator directs that a share of residue, the original disposition of which has failed for some reason shall fall into residue, *the question arises whether that direction can properly be construed as tantamount to an accruer clause, ie, as showing an intention to exclude the general rule, under which the share of residue in question would go as on intestacy*. [emphasis added]

44 Therefore, the question is whether the words "fall into residue" in the proviso are sufficient to qualify as words of contrary intention to exclude the principle. This phrase – "shall lapse and fall into residue" - was held in *In Re Palmer* [1893] 3 Ch 369 to be a direction that a share of residue is to fall

into residue to sufficiently prevent a share of residue, which would otherwise be undisposed of, from going into intestacy (see *Hawkins* paras 9-10 & 9-11). *In re Palmer*, the testator gave "all the residue of his real and personal estate" to various parties and in default of any of his children or their issue becoming entitled, he gave his residuary real and personal estate to his wife absolutely. He then executed a codicil so that one daughter received a life interest and directed that upon her death "the same shall fall into and form part of my residuary estate". The court held that the remainder expectant on the death of the daughter would go to the residuary legatees. The court did not have to interpret the phrase "fall into residue" in that case since the testator specifically stated in the codicil that the "same shall fall into and form part of his residuary estate" and in the original will, he gave his residuary estate to his wife absolutely.

45 Lindley LJ in *Re Palmer* criticised the court's interpretation of the phrase "fall into residue" in *Humble v Shore*. Lindley LJ stated (at 372-373):

> The reasoning of Vice-Chancellor Wigram is in my opinion very unsatisfactory. He treats the direction that the share shall fall into the residue, as expressing no intention as to its ultimate destination; he treats such a direction as amounting to no more than the law would imply. I cannot myself adopt this view. If a testator, after bequeathing his residuary estate in shares, simply revokes a gift of one of those shares, he takes that share out of the residue, and, that share being taken out of it, must, unless otherwise disposed of, be treated as undisposed of. … This I follow; but when a testator revokes a gift of a share of the residue, alters the gift, and subject to that alteration, directs the share to fall again into his residue he does not mean that such share shall be treated as ultimately out of the residue, but as ultimately in it, and to go as part of it to those whom he leaves it. To ascertain who are to take the residue, not only the will, but also the codicils, must be attended to; but according to *Humble v Shore*, although a testator has disposed of his residuary estate, including a particular part of it, that part cannot be considered as going with the rest. I confess I cannot follow this. The case with which we have to deal is in some respects weaker than *Humble v Shore*, because we have not got "and be disposed of accordingly." But these words do not, in my opinion, make any real difference.

46 In *Crawshaw v Craswshaw* (1880) 14 Ch D 817, the phrase "shall fall into and become part of my residuary personal estate" did not amount to intestacy because it was followed by the phrase "and be paid and applied according to the trusts of my will." There was an express direction as to the disposal of the residuary estate. There was also an express direction as to the disposal of the residuary estate in *In re Judkin's Trust* (1884) 25 Ch D 743 because the testator specifically stated that the "rest and residue of his residuary estate" should go to X and Y. Therefore, there was no intestacy. The testator on the present facts could easily have done the same by stipulating directly the disposal of the residue. However, Lindley LJ in *In re Palmer* is of the view that the phrase "fall into residue" is clear enough without an express direction as to the disposal of the residuary estate to indicate that lapsed gift of residue should be distributed as between the residuary legatees. *In re Palmer* was followed in *In re Allan* [1903] 1 Ch 276.

47 There was no intestacy in *In re Parker* because the testator defined the residuary estate, directed that the lapsed gift would form part of his residuary estate and he used the phrase "remaining part" which was interpreted so that the remaining property went to the residuary legatees.

48 The danger of following cases that construe similar wills in a similar way is acknowledged by the courts for that approach could miss the true intention of the testator. In construing this Will, I have scrutinized the Will for other provisions that might point to a contrary intention and found none, and as such I am satisfied in upholding the established meaning of the phrase "shall lapse and fall into

residue".

49 Clause 9(k) provides for the disposal of "the remaining one half of my residuary estate … among my three sons", [D], [E] and [F]. It was argued that cl 9(k) provided for the distribution of half, and not the whole of the testator's residuary estate. If that construction is accepted, the cl9(j) gift passes as on an intestacy which is a result that does not give effect to the testator's intention that the lapsed gift is to fall into the residuary estate.

50 I have already indicated that the word "residue" is defined in cl 9 as "my residuary estate". In the present case, the testator used in the proviso the phrase "fall into residue" over the defined phrase "my residuary estate" in cl 9 of his Will. The intention is obvious as this phrase "fall into residue" is familiar to lawyers who draft wills, and according to Mr Menon and Dr Raman, the Will was drafted by an experienced senior lawyer. In any case, the word "residue" is a variant of "residuary estate", and they mean the same thing. Having directed that the lapsed share is to fall into the residue, it cannot be the testator's manifest intention to take the lapsed share out of the residuary estate and for it to pass as on an intestacy just because there was no other express direction in the Will. As stated, the Will was drafted by a senior lawyer who must be taken to have been aware of the established meaning of "fall into residue" which renders, upon the event happening, another division of the residue. In the circumstances, it is not necessary to expressly state that the lapsed share be disposed of to the remaining residuary legatees, which is the likely intention of the testator who wanted his sons to inherit the residuary estate. The word phrase "remaining one half of my residuary estate" in cl 9(k) is not ambiguous. It is merely descriptive and not limiting in intent and effect.

51 I agree with Mr Tan, Mr Yeo and Dr Raman that on the whole, the way the clauses were drafted evinced that testator's intention that no part of his estate would fall into intestacy. As stated, the testator specifically provided how the legacy in each case should be dealt with if the legacy, whether specific or residuary, lapsed because the beneficiary died in the lifetime of the testator. A final point on the testator's manifest intention that no part of his estate would fall into intestacy is as Mr Tan pointed out, cl 13(wrongly numbered) which deals with what is to happen to the forfeited share of beneficiary who challenged the Will. The testator provided for the share to go to charity.

52 Based on the language and structure of the Will as a whole, the phrase "fall into residue" retains its established meaning sufficient enough to exclude the general rule. There are no indications in the rest of the Will to jettison the established meaning which gives effect to the intention of the testator that the surviving sons should inherit the residuary estate as defined in the Will. I therefore answer the applicant's question by declaring that upon the death of [J], the lapsed cl 9(j) gift falls into the residuary estate and it becomes divisible into thirds, and that one third to [D], another third to [E] and the remaining third to [F]. The applicant's costs of the proceedings are to be paid out of the estate. The defendants and interveners are to bear their own costs.