Lee Hiok Tng (in her personal capacity) v Lee Hiok Tng and another (executors and trustees fo the estate of Lee Wee Nam, deceased) and Others
[2001] SGCA 26

Case Number : CA 135/2000

Decision Date : 18 April 2001

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; L P Thean JA; Yong Pung How CJ

Counsel Name(s) : Foo Say Tun and Yang Tze Ching Valerie (Wee, Tay & Lim) for the appellant; Lim Kian Leng Malcolm (Tan & Lim) for the first and second respondents

Parties : Lee Hiok Tng (in her personal capacity) — Lee Hiok Tng and another (executors and trustees fo the estate of Lee Wee Nam, deceased)

Res Judicata – Action against executors of estate for deceased's breaches of trust in respect of partnership assets – Court deciding certain shares belonged to partnership and not deceased personally -Subsequent action by executors/sons of deceased to seek court's determination of two questions – Son claiming deceased transfering shares to him as gift – Son seeking reimbursement from estate for expenditure to take up rights issues in respect of shares – Beneficiaries of estate objecting issues already decided upon in earlier action – Whether condition of identity of parties satisfied – Whether res judicata in wider sense applies to estop raising of gift question – Whether res judicata in strict sense applies to estop raising of reimbursement question

Evidence – Proof of evidence – Presumptions – Presumption of advancement – Application of presumption in context of husband and wife diminishing in recent years – Whether similar shift in judicial attitude towards presumption in context of father and son

Gifts – Avoidance – Son claiming father transfering shares to him as gift – Court declaring shares belonged to partnership and not father personally – Whether gift valid – Whether gift effective to convey portion of shares beneficially belonging to father

death of Kheng. The judgment was upheld on appeal by the Court of Appeal ([1993] 3 SLR 148) and finally by the Privy Council ([1996] 2 SLR 297).

The issue in the present appeal concerns only the one lot of 27 Overseas Union Bank (OUB) shares. At the trial of the consolidated action, it was established, that all the movable properties (including stocks and shares) in Singapore belonging to the Kongsi were registered in the name of Nam.

However, on 30 April 1962, Nam purported to give the 27 shares to Tng as a gift by way of transfer. Following the transfer, Tng had taken up and paid for the rights issues originating from the 27 shares. OUB had also issued bonus shares. Through the splitting of the par value of each share from $100 to $1, and through the declaration of bonus shares and rights issue over the years, the 27 shares had become 125,564 shares, each of $1 par value.

Based on the intention on the part of Nam to give Tng the 27 shares, Tng advanced the argument that the appropriate portion of the 27 shares which beneficially belonged to Nam (by virtue of his 8/21 shareholding in the Kongsi and a share in STTCK) should be treated as having been given to Tng.

In April 1999, Tng and Woon, in their capacity as the executors and trustees of Nam, instituted an Originating Summons to seek the court's determination of two questions: (a) the rights of the parties with respect to the gift of the 27 shares from Nam to on 30 April 1962 and more particularly the portion of the gift that Nam held a beneficial interest through the Kongsi and STTCK (the gift question); (b) whether Tng is entitled to an indemnity and/or contribution in respect of all costs and expenses incurred by him pertaining to the 27 shares from the estate of Nam (the reimbursement

question).

The defendant was Tng, in his personal capacity. Three beneficiaries of the estate of Nam intervened in the proceedings, and objected to the application on the ground that it amounts to an abuse of the process of court as the issues had already been decided upon by the High Court in the consolidated action. As the High Court had ordered that the executors and trustees of the estate of Nam restore, inter alia, the 27 shares back to the Kongsi, the three interveners submitted that the doctrine of *res judicata* should apply to restrain this re-litigation. For this Originating Summons, the High Court agreed that the doctrine of *res judicata* in the wider sense applied in the circumstances and ruled that Tng was precluded from re-litigating the issues sought.

Tng appealed, in his personal capacity, that in relation to the gift question two issues be addressed: (a) whether the gift from Nam to Tng of the 27 shares, which belonged to the Kongsi, were effective to convey to Tng the portion of those 27 shares owned by Nam through his interest in the Kongsi; and (b) whether the transfer of the 27 shares by Nam to Tng raises the presumption of advancement.

As to costs, the interveners, in their case, challenged that the High Court was wrong in not granting costs to Tng and Woon in their representative capacity. The interveners contended that, the costs of Tng and Woon in their representative capacity, should be paid by Tng personally as the proceeding was brought by Tng pursuant to his personal interest. Further, the effect of the order that there be no order on costs in favour of Tng and Woon in their representative capacity would mean that such costs would have to be borne ultimately by the beneficiaries of the estate. However, the interveners did not file any notice of appeal against such order of costs, and merely stated their challenges in their Case and submission.

Held

, dismissing the appeal:

> (1) The true basis for the doctrine of *res judicata* in the wider sense is to be found in the concept of abuse of process of the court. It is not in the public interest that in relation to a single matter there could be multiplicity of proceedings (see 22-25); *Henderson v Henderson* [1843] All ER 378, *Talbot v Berkshire County Council* [1994] QB 290 at 296, *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd & Anor* [1975] AC 581, *Ng Chee Chong v Toh Kouw* [1999] 4 SLR 45, *Ching Mun Fong v Liu Cho Chit* [2000] 1 SLR 51, *Greenhalgh v Mallard* [1947] 2 All ER 255 at 257 followed.
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> (2) However, in determining whether a case falls within the scope of *res judicata* in the wider sense, great care should be exercised as it would amount to shutting out a subject of litigation (see 26); *Ng Chee Chong v Toh Kouw* [1999] 4 SLR 45, *Lawlor v Gray* [1984] 3 All ER 345 at 352 followed.
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> (3) As to the gift question, for the application of the doctrine of *res judicata*, the condition of the similar identity of the parties was fulfilled. As to the condition of the similar identity of the subject matter, the doctrine of *res judicata* in the strict sense cannot apply. The issues which Tng now in his personal capacity wishes to put before the court were clearly not before the court in the consolidated action (see 28-30).

(4) As to the gift question, the doctrine of *res judicata* in the wider sense does not apply, as it concerns only the beneficiaries of the estate of Nam. It would not be appropriate to raise it in the consolidated action (see 31).

(5) When Nam transferred the 27 shares to Tng, Nam was under the impression that the 27 shares were his beneficially. With the 1992 High Court judgment declaring that the 27 shares did not belong to Nam but to the Kongsi, and that Nam acted in breach of trust when he transferred the 27 shares to Tng, the 27 shares were not Nams to give to Tng. As it was Nams intention to give away all the 27 shares, the court could not infer from that that Nam would also have the intention to give away to Tng only that part which beneficially belonged to Nam (see 34-35).

(6) For there to be a gift, two elements must be present: the intent to give and the precise subject matter to be given, to be followed by proper conveyance. Here, both the elements are missing (see 35).

(7) As to the reimbursement question, the 1992 High Court judgment had made an order that an account be taken of all bonus and rights issues which had been declared in respect of the 27 shares and all moneys expended to take up the shares. The doctrine of *res judicata* in the strict sense applied to estop Tng from pursuing the matter against the estate of Nam. In any event, there is no basis upon which Tng could make a claim against the estate of Nam on account of expenditures incurred on behalf of the Kongsi. Further, there is no evidence that Tng had expended his own personal resources to take up the rights issues of the 27 shares (see 42-44).

(8) As to costs, as the interveners had raised the defence of the doctrine of *res judicata* in relation to the gift question, and failed, they should thus be given only costs (see 45).

(9) With regard to the costs of Tng and Woon in their representative capacity, as the interveners have not filed any notice of appeal against the order of costs, preceded by an application for leave as required by s 34(2)(b) of the Supreme Court of Judicature Act, the court was unable to consider their contentions. However, for this appeal, Tng and Woon, as executors and trustees of the estate of Nam are entitled to the costs thereof, to be paid by Tng personally (see 46-47).

Per curiam

In the context of husband and wife, the current approach is to treat the presumption of advancement as an evidential instrument of last resort where there is no direct evidence as to the intention of the parties, rather than as an oft-applied rule of the thumb. However, the court left open the question of whether the presumption of advancement in the context of father and son has similarly been weakened, and thus is readily rebutted by comparatively slight evidence (see 36-37) *Teo Siew Har v Lee Kuan Yew* [1999] 4 SLR 560, *Pettitt v Pettitt* [1970] AC 777 followed, *Shephard v Cartwright* [1955] AC 431 and *McGrath v Wallis* [1995] 2 FLR 114 referred.

Case(s) referred to

:

Ching Mun Fong v Liu Cho Chit

[2000] 1 SLR 51 (folld)

Greenhalgh v Mallard

[1947] 2 All ER 255 at 257 (folld)

Henderson v Henderson

[1843] All ER 378 (folld)

Lawlor v Gray

[1984] 3 All ER 345 at 352 (folld)

McGrath v Wallis

[1995] 2 FLR 114 (refd)

Ng Chee Chong v Toh Kouw

[1999] 4 SLR 45 (folld)

Pettitt v Pettitt

[1970] AC 777 (folld)

Shephard v Cartwright

[1955] AC 431 (refd)

Talbot v Berkshire County Council

[1994] QB 290 at 296 (folld)

Teo Siew Har v Lee Kuan Yew

[1999] 4 SLR 560 (folld)

Yat Tung Investment Co Ltd v Dao Heng Bank Ltd & Anor

[1975] AC 581 (folld)

Legislation referred to

Supreme Court of Judicature Act (Cap 322) s 34(2)(b)

JUDGMENT:

Cur Adv Vult

1. This is an appeal by the plaintiff (Tng) against a decision of Amerjeet Singh JC, dismissing the plaintiffs claim in relation to a lot of 27 Overseas Union Bank (OUB) shares, hereinafter referred to as "the 27 shares". The learned judge was of the view that the plaintiff was barred from bringing the present Originating Summons (OS) on the ground of *res judicata* in the wider sense.

2. The circumstances giving rise to the plea of *res judicata* are primarily based on a judgment (unreported) given by the High Court in the consolidated action (S 1401/73 and S 2457/81), which judgment was upheld on appeal by this Court ([1993] 3 SLR 148) and finally by the Privy Council ([1996] 2 SLR 297).

Essential facts

3. In order to better appreciate the issues in the present proceeding, there is a need to set out in brief the essential facts relating to the earlier consolidated action. The story began at the end of the nineteen century when three brothers, Lee Wee Kheng (Kheng), Lee Wee Nam (Nam) and Lee Wee Kiat (Kiat) left their village in Canton, China to seek their fortune here. Their father, Lee Hum Chye, came to Singapore in 1917 and in the following year he gave his savings to the three sons and also set up a family fund called "Sze Teck Tng Chye Kee" (STTCK). Lee Hum Chye died shortly thereafter. The businesses of the three sons prospered. In 1927, Kheng, Nam and Kiat decided to pool their resources and established a partnership, Wee Kee Kongsi (the Kongsi). STTCK was given a share in the Kongsi. Later in the same year, Kiat died. The business of the Kongsi continued to prosper. In October 1940, the estate of Kiat relinguished its interest in the Kongsi by way of a deed of release. After the death of Kiat, the shares in the Kongsi were redistributed in the following proportions:-

Kheng 9/21

Nam 8/21

STTCK 4/21

We should add that even after the deed of release, his estate was treated as having an equal share in STTCK, as the deed did not relate to anything due to Kiat under STTCK. However, for the purposes of the present proceeding, nothing on that is pertinent.

4. In February 1950, Kheng and Nam incorporated a company, Lee Brothers (Wee Kee) Ltd (Lee Brothers). All the immovable properties of the Kongsi and STTCK were transferred to Lee Brothers.

5. In July 1962, Kheng died. In his Will, he appointed his two sons, Lee Hiok Kher (Kher) and Lee Hiok Hwee (Hwee) as his executors. We should add that long before he died, Kheng spent much of his time in Bangkok. The businesses in Singapore of the Kongsi, as well as those of Lee Brothers, were managed by Nam.

6. After the death of Kheng, the businesses of the Kongsi and Lee Brothers continued as before. In January 1964, Nam died, having appointed his two sons, Lee Hiok Tng (Tng) and Lee Hiok Woon (Woon) as his executors.

7. Neither Nam, before his death, nor his executors, after his death, rendered any account to the executors and trustees of Kheng in relation to the assets of the Kongsi. However, it is clear that in law, upon the death of Kheng, the partnership in the Kongsi was dissolved. The surviving partner or partners should wind up the affairs of the partnership and distribute its assets to those who were entitled thereto. Indeed, the records would show that Nams executors and trustees were not even helpful towards Khengs executors and trustees, who were then seeking to ascertain the assets of the Kongsi.

8. As a result, two actions (S 1401/73 and S 2457/81) were commenced by some of the beneficiaries of the Kheng estate (sons and grandsons of Kheng hereinafter referred to as the "S & G of Kheng") against the executors and trustees of the Kheng estate as well as of the Nam estate. Eventually, both the actions were consolidated and tried together.

9. In the consolidated action, the S & G of Kheng sued Tng and Woon as the executors and trustees of the estate of Nam for breaches of trust committed by Nam after the death of Kheng in, inter alia, failing to wind up the partnership business, and in failing to give an account of the partnership business to the estate of Kheng. The S & G of Kheng also sued Kwee and Kher as the executors and trustees of the Kheng estate for failing to get in the assets belonging to the Kheng estate. During the course of the trial of the consolidated action, the plaintiffs and the executors and trustees of the estate of Kheng reached a settlement and, accordingly, no further reliefs were sought against the executors and trustees of Kheng. So what remained of the consolidated action for which the High Court had to decide were, in the main,

> (i) whether Nam had acted in breach of trust upon the death of Kheng, in respect of the partnership assets; and whether upon the death of Nam, the latters executors and trustees had similarly acted in breach of trust;
>
> (ii) whether the executors and trustees of the Nam estate were liable to restore to the Kongsi certain specified shares, including 12,240 OCBC shares, three lots of 125, 27 and 125 shares in OUB (at $100 par value each) and 378,000 UOB shares (hereinafter referred to collectively as the "undisclosed shares").

10. We should add that in the consolidated action, the estate of Kheng had also made a counterclaim against the estate of Nam relating to the undisclosed shares.

11. In the course of the trial of the consolidated action, the estate of Nam conceded that the 378,000 UOB shares and one of the two 125 lots of OUB shares belonged to the Kongsi. As regards the other three lots of undisclosed shares, the High Court in a judgment delivered in January 1992 (the 1992 judgment) held that they belonged to the Kongsi and the estate of Nam must account for the same. The court also held that Nam, as well as his executors and trustees, had committed breaches of trust and ordered that an account be taken of the assets of the Kongsi in respect of the period after the death of Kheng.

Issues in the present action

12. The issues in the present OS concerns only the one lot of 27 OUB shares. At the trial of the consolidated action, it was established, and also not disputed, that all the movable properties (including stocks and shares) in Singapore belonging to the Kongsi were registered in the name of Nam. It would appear that on 30 April 1962, Nam purported to give the 27 shares to Tng as a gift by way of transfer. However, by virtue of the 1992 judgment, the executors and trustees of Nam had to restore those 27 shares to the Kongsi. Nevertheless, based on the intention on the part of Nam to give Tng the 27 shares, Tng advanced the argument that the appropriate portion of the 27 shares which beneficially belonged to Nam (by virtue of his 8/21 shareholding in the Kongsi and a share in STTCK) should be treated as having been given to Tng. Therefore, in April 1999, Tng and Woon, in their capacity as the executors/trustees of Nam, instituted the present OS to seek the court's determination of the following two questions:-

> 1. The determination of the rights of the parties with respect to the gift of the 27 Overseas Union Bank ("OUB") shares from Lee Wee Nam to Lee Hiok Tng on or about 30th April 1962 and more particularly the portion of the gift that Lee Wee Nam held a beneficial interest through Wee Kee Kongsi and Sze Teck Tng Chye Kee.
>
> 2. That it may be determined whether Lee Hiok Tng is entitled to an indemnity

> and/or contribution in respect of all costs and expenses incurred by him pertaining to the said 27 OUB shares from the Estate of Lee Wee Nam.

The defendant to the OS is Tng, in his personal capacity. For ease of reference, prayer 1 will be referred to as "the gift question" and prayer 2 "the reimbursement question".

13. Subsequently, in February 2000, Lee Siew Choon (Choon), Lee Siew Hong (Hong) and Lee Siew Ngung (Ngung), three beneficiaries of the Nam estate (hereinafter collectively referred to as CHN) applied to intervene in the proceeding. They objected to the application made by Nams executors and trustees on the ground that the application amounts to an abuse of the process of court as the issues had already been decided upon by the High Court in the consolidated action.

14. As presented by counsel for Tng to the court below, the court needed to address and decide on the following issues on the gift question:-

> (i) whether the gift from Nam to Tng of the 27 shares, which belonged to the Kongsi, were effective to convey to Tng the portion of those 27 shares owned by Nam through his interest in the Kongsi.
>
> (ii) whether the transfer of the 27 shares by Nam to Tng raises the presumption of advancement.

15. In an affidavit, filed in his personal capacity, Tng deposed that his father, Nam, transferred the 27 shares to him as a gift and that his offer to pay his father for the 27 shares was declined. He said he believed his father gave him those shares as an expression of his appreciation for all the assistance rendered by Tng to his fathers business in the previous thirty years. Following the transfer to him of those shares, Tng had taken up and paid for the rights issues originating from the 27 shares. OUB had also issued bonus shares. It would appear that the original 27 shares, through the splitting of the par value of each share from $100 to $1, and through the declaration of bonus shares and rights issue over the years, had become 125,564 shares, each of $1 par value.

16. On the other hand, CHN argued, inter alia, that by virtue of the High Court decision in the consolidated action declaring that the 27 shares belonged to the Kongsi, Nam was holding those shares in trust for the Kongsi. CHN also pointed out that while in the consolidated action, Tng did file a defence, he failed to turn up and testify to claim for the 27 shares. Similarly, Woon too, did not elect to testify at that trial. In any event, any purported transfer of the 27 shares would have been in breach of trust. In the light of the courts order that the executors and trustees of the Nam estate restore, inter alia, the 27 shares back to the Kongsi, CHN submitted that the principle of *res judicata* or estoppel should apply to restrain this re-litigation.

Decision below

17. The judge below agreed with CHN and ruled that Tng was precluded from re-litigating the issues sought in the OS. He said (though at times without clearly separating Tngs personal capacity from his representative capacity):-

> "Having considered the Affidavit evidence and all the submissions and the Counsel of the 1st and 2nd Plaintiffs having conceded by agreeing that the 27 OUB shares formed part of the assets of Wee Kee Kongsi and the 1st and 2nd Plaintiffs having accepted the decision of Chao J on the issue of the ownership of the 27 OUB shares, there was no doubt in my mind that the Defendant (in his personal capacity but the alter ego of the 1st Plaintiff) was attempting to re-litigate the matter to the entitlement of the 27 OUB shares. The Defendant had failed to pursue his claim in the trial before Chao J after filing his defence by

> testifying and subjecting himself to cross-examination concerning his claim or claims which Plaintiffs Counsel was now articulating."

18. After referring to the reasons given by the High Court, the Court of Appeal and the Privy Council in the consolidated action on why the 27 shares belonged to the Kongsi, the judge below concluded (at 18):-

> "In my opinion therefore, the Defendant could not reassert his claim to the 27 OUB shares to say that the several issues defined by the 1st and 2nd Plaintiffs Counsel as set out earlier had not arisen in the Consolidated Suit and claim that there was as such no re-litigation of the issues here. The truth is the 1st Plaintiff (the Defendant) and the 2nd Plaintiff could and should have raised the issue there as they were Defendants to the Suit. They chose not to. The judgment of Chao J upheld by the Court of Appeal and the Privy Council touching on the issue of the 27 OUB shares therefore operated both as an estoppel by record and as an issue estoppel against the Defendant. Such judgment prevented both the 1st Plaintiff who is also the Defendant and the 2nd Plaintiff from denying or re-agitating the facts on which it is based. The only exception when a judgment does not operate as such is when it is obtained by fraud or collusion which is plainly not the case here. The proceeding by the 1st and 2nd Plaintiffs and the claim by the Defendant was an abuse of the process of court."

19. The judge held that as the 27 shares belonged to the Kongsi as a composite whole, there was no question of the lot of shares being split up although Nams estate would, in accordance with the partnership agreement, get 8/21 share of the 27 shares and Tngs interest in the said share was only in his capacity as one of the beneficiaries of Nams estate.

20. As for the alternative remedy which Tng sought for reimbursement on the ground that he had expended money to take up rights issues in the belief that the 27 shares were a gift to him and with no knowledge that the gift was in breach of trust, the court nevertheless held that that application must also fail. The judge felt that Tng and Woon, having failed to explain the position in the consolidated action, were bound by the decision in that action.

Res judicata

21. The main question that arises for consideration in this appeal is whether the doctrine of *res judicata* in the wider sense applied in the circumstances of this case.

22. The *locus classicus* on *res judicata* in the wider sense may be found in the speech of Wigram V-C in *Henderson v Henderson* [1843] All ER 378 where he expounded the following principles:-

> where 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 matters 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).

23. In *Talbot v Berkshire County Council* [1994] QB 290 at 296 Stuart-Smith LJ clarified the two situations where *res judicata* arises as follows:-

> The first relates to those points which were actually decided by the court; this is *res judicata* in the strict sense. Secondly, those which might have been brought forward at the time, but were not. The second is not a true case of *res judicata* but rather is founded upon the principle of public policy in preventing multiplicity of actions, it being in the public interest that there should be an end to litigation; the court will stay or strike out the subsequent action as an abuse of process.

24. The two senses of *res judicata* expounded by Wigram V-C was accepted by the Privy Council in the Hong Kong case *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd & Anor* [1975] AC 581 and by this court in *Ng Chee Chong v Toh Kouw* [1999] 4 SLR 45 and *Ching Mun Fong v Liu Cho Chit* [2000] 1 SLR 51. In *Yat Tung Investment*, Lord Kilbrandon in referring to the extended sense of *res judicata*, adopted very much the same language as that of Wigram V-C:-

> where 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 ."

25. It is clear that the true basis for the extended sense of the doctrine of *res judicata* is to be found in the concept of abuse of process of the court. It is not in the public interest that in relation to a single matter there could be multiplicity of proceedings. In *Ching Mun Fong*, this Court endorsed the following passage of Somervell LJ in *Greenhalgh v Mallard* [1947] 2 All ER 255 at 257:-

> *res judicata*

for this purpose is not confined to the issues which the court is actually asked to decide, but it covers issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them.

26. But in determining whether a case falls within the scope of *res judicata* in the extended sense, this Court in *Ng Chee Chong* noted that great care should be exercised as it would amount to shutting out a subject of litigation. There, this court relied in particular, the following sentiments of Gibson J in *Lawlor v Gray* [1984] 3 All ER 345 at 352.

> The words of the Vice Chancellor (in *Henderson v Henderson*) ought not to be treated like the words of a statute and no doubt it is right to construe them in a non-technical common sense way. But it should always be borne in mind that what is sought by the party claiming the estoppel is the shutting out of a matter not previously pronounced on expressly in the earlier litigation from the determination of the court.

27. Before us, Tng made it clear at the outset that by raising the gift question in the OS he is not seeking to go behind the 1992 judgment, which was upheld by this Court and the Privy Council. He emphasised that what was basically decided in the 1992 judgment related to certain assets of the Kongsi, and, in the process, the court had to determine whether Nam, and later his executors and trustees, had committed breaches of trust. The true object of the consolidated action was to determine the extent

of the assets of the Kongsi. Having decided that, the court had to make a number of consequential orders.

28. One of the essential conditions, which must be satisfied before *res judicata* can arise is that there should be identity of parties. It would be clear from the background given above that there were three sets of parties in the consolidated action. First, there were the S & G of Kheng, beneficiaries under the Kheng estate, who instituted the two actions which were consolidated. Second, there were Tng and Woon, both being sued in their representatives, as well as in their personal, capacities. Third, there were Kwee and Kher also being sued in both their representative and personal capacities. Though originally the S & G of Kheng had sued Kwee and Kher for failing in their duties as executors/trustees of the Kheng estate, by the time the trial of the consolidated action came on, the two sides had resolved their differences and the S & G of Kheng had abandoned their claim against Kwee and Kher. Thereafter, they stood on the same side as Kwee and Kher, who were parties to the action, both in their representative as well as their personal capacities. The battle lines drawn was between the Kheng estate on the one side and the Nam estate on the other.

29. In the instant OS, the plaintiffs are Tng and Woon in their capacity as executors and trustees of the Nam estate. The defendant is Tng in his personal capacity. The interveners, CHN, are the beneficiaries under the Nam estate. While CHN were not parties to the consolidated action, Tng and Woon, in their representative capacity, were. As CHN claim their interest through Tng and Woon in their representative capacity, CHN will be deemed to be privy to the consolidated action. Thus, the condition of identity of parties is fulfilled.

30. We now turn to consider whether the condition relating to the identity of subject matter is satisfied in this case. There can be no doubt that *res judicata* in the strict sense cannot apply. The question is whether *res judicata* in the extended sense could. The issues which Tng now in his personal capacity wishes to put before the court were clearly not before the court in the consolidated action. The only question that remains is whether these issues can be considered to be issues which "belonged to the subject of litigation" in the consolidated action. We would reiterate that the primary issue in the consolidated action was in determining whether certain shares, including the 27 shares, belonged to the Kongsi or to Nam personally. In passing, we would add that the court there had also decided the question relating to the scope of a particular settlement reached between the S & P of Kheng and the Nam estate. However, this aspect of the decision has no bearing whatsoever to the present OS.

31. To determine whether *res judicata* in the extended sense applies to this OS, there is a need to consider the two questions raised therein, the gift question and the reimbursement question, separately, as the answers to both may not be the same. We shall first deal only with the gift question. Does that question, as now formulated by Tng, falls within "the subject of litigation" in the consolidated action? In our opinion, the answer is a clear negative. The gift question would concern only the beneficiaries of the Nam estate. It would not be appropriate to raise it in the consolidated action. Indeed the gift question would only arise if the court, as it did, ruled that the 27 shares belonged to the Kongsi rather than to Nam personally. In our judgment, it would not facilitate the orderly disposal of the consolidated action if the gift question was raised then. It would be premature. There is no question of multiplicity of action by allowing Tng to raise the gift question at this stage.

32. In the result we hold that *res judicata* in the wider sense has no application to estop Tng from raising the gift question.

Gift question on merits

33. We now turn to consider the gift question on its merits. This can be disposed of fairly briefly. Tng contends that when his father Nam transferred the 27 shares to him, Nam intended that transfer as a gift. Nam refused his payment for those shares. Tng said that although there was no written document under the hand of Nam evidencing that intention, it was clear from all the background circumstances.

34. Even if we assume that what Tng now asserts is true, that Nam intended the transfer as a gift, we still do not see how it could help Tngs claim. Obviously when Nam transferred the 27 shares to Tng, Nam was under the impression that the 27 shares were his beneficially. With the 1992 judgment declaring that the 27 shares did not belong to Nam but to the Kongsi, and that

Nam acted in breach of trust when he transferred the 27 shares to Tng, the 27 shares were not Nams to give. Indeed, the 1992 judgment declared that the 27 shares should be restored to the Kongsi. The purported gift to Tng accordingly failed. In a portion of Tngs Case, he seemed to be asking this Court to uphold his claim that the whole of 27 shares were a valid gift to him. We are unable to see how that contention could be made when the 27 shares did not even belong to Nam.

35. It seems to us that what Tng now seeks to argue is that although Nam could not give to Tng all the 27 shares, but as Nam was the beneficial owner of some of the 27 shares (by virtue of 8/21 share in the Kongsi and indirectly through STTCK), Nam must have also intended to give to Tng that portion of the 27 shares which beneficially belonged to Nam in line with Nams share in the Kongsi. What Tng wants us to rule is that even though Nam was in no position to give away the 27 shares to Tng as they belonged to the Kongsi, we could construe from such a purported gift of the 27 shares that there must have been an intention on the part of Nam to give to Tng that part of the 27 shares which beneficially belonged to Nam. We do not think it would be justified at all to make such an inference. As we view it, the two intentions are not consistent. As it was Nams intention to give away all the 27 shares, one cannot infer from that that Nam would also have the intention to give away only that part which beneficially belonged to Nam. This second scenario could not have entered into Nams mind. For there to be a gift, two elements must be present: the intent to give and the precise subject matter to be given, to be followed by proper conveyance (e.g., land by deed and chattels by delivery). Here, both the elements are missing.

Presumption of Advancement

36. We ought to mention that Tng has also made an argument based on the presumption of advancement in view of the fact that there is no documentary proof of a gift. This presumption is essentially an evidential rule, based on relationship (e.g., husband and wife, father and son), to rebut the opposing presumption of a resulting trust where a transfer of property is made by one person to another without consideration. In *Teo Siew Har v Lee Kuan Yew* [1999] 4 SLR 560, this Court, after considering *Pettitt v Pettitt* [1970] AC 777, observed that, in the context of husband and wife, the application of this presumption has diminished in recent years in line with changing social norms. It also noted that the current approach is to treat the presumption "as an evidential instrument of last resort where there is no direct evidence as to the intention of the parties rather than as an oft-applied rule of the thumb".

37. An interesting question is whether the current approach towards the presumption in the context of husband and wife should also be applied to the context of father and son. We note that in *Shephard v Cartwright* [1955] AC 431, a case where shares acquired by a father was registered in the name of a child, Viscount Simonds said that:-

> Where a man purchases shares and they are registered in the name of a stranger there is a resulting trust in favour of the purchaser; on the other hand, if they are registered in the name of a child or one to whom the purchaser then stood in loco parentis, there is no such resulting trust but a presumption of advancement. Equally it is clear that the presumption may be rebutted but should not, as Lord Eldon said, give way to slight circumstances: *Finch v Finch.*

38. But in *McGrath v Wallis* [1995] 2 FLR 114, the Court of Appeal extended the views of Lord Upjohn in *Pettitt v Pettitt (supra),* namely, that the presumption of advancement in the context of husband and wife was readily rebutted by comparatively slight evidence, and applied it to the context of father and son. This could be viewed as a further shift in judicial attitude in the light of changing social conditions. However, for the purposes of this case, there is no need for us to go further into that as we are of the view that whichever way the presumption is applied, it will not be of any assistance to Tng, as the problems here are not those related to the question of resulting trust but to problems of identification of the intention of the giver (Nam) and the objects which are the subject of that intention.

39. In the result, prayer 1 of the OS must fail.

Reimbursement Question

40. We now turn to consider the second issue raised in the OS, namely, that Tng should be entitled to be reimbursed by the Nam estate in respect of "all costs and expenses incurred by him" pertaining to the 27 shares or that the Nam estate should make a contribution in relation thereto. The judge below ruled that Tng was barred from seeking reimbursement or contribution by reason of *res judicata* in the extended sense.

41. In this regard, Tng relied upon *Rowley v Ginnever* [1897] 2 Ch 503 where it was held that a constructive trustee of property who expended money in improving what he *bona fidely* believed to be his own property, was held to be entitled to be recouped of his expenditure, to the extent of the improved value.

42. On this reimbursement question we need to go back to the 1992 judgment. There, the court besides declaring that the 27 shares belonged to the Kongsi, also made an order in these terms:-

> "6. An account of all bonus and rights issues which had been declared in respect of the shares specified in paragraph 5 (which includes the 27 OUB shares) and all moneys expended to take up the shares."

43. This order was made obviously in recognition of the fact that moneys had been expended to take up additional OUB shares pursuant to rights issues (based on the 27 shares). The matter had been decided upon and that was really it. If Tng, who was a party to the consolidated action in his personal as well as his representative capacities, had complied with that order he would have been reimbursed. But he did not, though he was bound by that order. In our judgment, *res judicata* in the strict sense applied to estop Tng from pursuing the matter against the Nam estate of which he is an executor and trustee. In any event, there is no basis upon which he may make a claim against the Nam estate on account of expenditures incurred on behalf of the Kongsi.

44. In passing we would like to observe that there is one further difficulty in the way of this claim by Tng. There is no evidence that Tng had expended his own personal resources to take up the OUB rights issues.

Judgment and costs

45. In the result, the appeal of Tng is dismissed with costs to the 3rd to 5th respondents. However, as CHN have raised the defence of *res judicata* in relation to prayer 1 of the OS and that has been held by us to be inapplicable, CHN should not be awarded costs for work done in relation thereto. Taking a broad view, we hold that CHN should only be given costs.

46. With regard to the costs of Tng and Woon in their representative capacity (1st and 2nd respondents), we note that the court below did not grant them any costs. No appeal on that was lodged by Tng and Woon. However, CHN, in their Case, challenged the correctness of that order. They argued that the costs of Tng and Woon in their representative capacity should be paid by Tng personally, as the whole proceeding was brought about by Tng pursuant to his personal interest. While there are some merits in this point, as the personal interest of Tng is different from that of Tng and Woon in their representative capacity, and as the effect of the order that there be no order on costs in favour of Tng and Woon in their representative capacity would mean that such costs would have to be borne ultimately by the beneficiaries, we are nevertheless unable to consider this argument because CHN have not filed any notice of appeal, preceded by an application for leave as required by s 34(2)(b) of the Supreme Court of Judicature Act, against that order on costs.

47. However, for this appeal, Tng and Woon, as executors and trustees of the Nam estate shall be entitled to the costs thereof, to be paid by Tng personally. Of course, the actual quantum of the costs to be allowed to Tng and Woon in this capacity would

have to be assessed by the Registrar, taking into account the work done in relation thereto.

Yong Pung How	L P Thean	Chao Hick Tin
Chief Justice	Judge of Appeal	Judge of Appeal