

Zulaikha Bee Binte Mohideen Abdul Kadir v Quek Chek Kiang and others  
[2014] SGHC 168

**Case Number** : Suit No 636 of 2011  
**Decision Date** : 25 August 2014  
**Tribunal/Court** : High Court  
**Coram** : Tan Siong Thye JC  
**Counsel Name(s)** : Adrian Tan and Lim Siok Khoo (Stamford Law Corporation) for the plaintiff;  
Rajan Nair (Messrs Rajan Nair & Partners) for the defendants.  
**Parties** : Zulaikha Bee Binte Mohideen Abdul Kadir — Quek Chek Kiang and others

*Trusts – Express Trusts*

*Equity – Defences – Laches*

*Evidence – Admissibility of Evidence*

25 August 2014

Judgment reserved.

**Tan Siong Thye J:**

**Introduction**

1 This case concerns an unfortunate family dispute as to the beneficial ownership over a plot of land, Lot MK26-9739M, at Joo Chiat, Singapore (“the Land”). The fourth defendant, the estate of the late Fatimah Binte Sultan Ibrahim (“Fatimah”), holds the legal title to the Land. Fatimah is the mother of the plaintiff, Ms Zulaikha Bee Binte Mohideen Abdul Kader, and the third defendant, Ms Ummuhani Umma Binte Mydin Abdul Kader. There are three houses on the Land which has an area of 688.7 square meters or 7413 square feet. The Land has not been subdivided. The addresses of these three houses are:

- (a) 261 Joo Chiat Place (“261 JCP”);
- (b) 261A Joo Chiat Place (“261A JCP”); and
- (c) 263 Joo Chiat Place (“263 JCP”).

2 The first defendant, Madam Quek Chek Kiang was not involved in these proceedings as she had already been dealt with. The plaintiff had obtained judgement in default of appearance against her on 6 February 2013. Therefore the plaintiff’s action is against the remaining three defendants who have counter-claimed against the plaintiff.

3 During the course of the trial, both the plaintiff and the defendants agreed that 263 JCP is beneficially owned by Mr Haji Mohamed Abdul Kader (“Abdul Kader”), the brother-in-law of the plaintiff and the third defendant. In the course of the trial the parties agreed that the plaintiff is the beneficial owner of 261 JCP. However, in the defendants’ reply to the plaintiff’s closing submissions it seems that the defendants have had a change of heart. Therefore, this court takes it that the dispute relates to the beneficial ownership of 261 and 261A JCP.

4 The plaintiff seeks to establish her beneficial ownership over 261 JCP and 261A JCP by way of a trust deed executed by the plaintiff and Fatimah on 7 June 1971 ("the 1971 Trust Deed"). In the trust deed, Fatimah declared that she was to hold the Land as trustee for the plaintiff, the beneficiary. The defendants resist the plaintiff's claim by alleging that the 1971 Trust Deed is invalid on several grounds. Furthermore, even if the 1971 Trust Deed is valid, they argued that the plaintiff is barred by the doctrine of laches and the Limitation Act (Cap 163, 1996 Rev Ed) ("the Limitation Act") from enforcing the 1971 Trust Deed. Lastly, they also argued that the document embodying the 1971 Trust Deed is inadmissible as evidence of an express trust in favour of the plaintiff because of the failure to register the 1971 Trust Deed.

5 The second and third defendants also counterclaim for the beneficial interest in 261A JCP. They allege that Fatimah had orally promised to give 261A JCP to the third defendant.

## **Facts**

### ***Background***

6 The Land was first purchased by Mr Mohamed Hidayatullah Sahib ("Sahib"), the late husband of the plaintiff, on 13 April 1956 for \$9,200. [\[note: 1\]](#) On 13 April 1960, Sahib conveyed the Land to Fatimah for \$11,000 by way of a deed of conveyance ("the 1960 Conveyance"). [\[note: 2\]](#) Fatimah mortgaged the Land to Sahib for \$10,000 on the same day. [\[note: 3\]](#)

7 Fatimah then leased 261A JCP to Mr K A Abdul Razak ("Razak"), the husband and father of the third defendant and second defendant respectively, on 20 September 1981 for \$50 per month. [\[note: 4\]](#) Razak paid rent to Fatimah initially. According to the third defendant, a few years thereafter Fatimah told Razak to give the rent monies to her instead and Razak stopped paying rent to Fatimah. [\[note: 5\]](#) On 15 January 1962 Razak subleased 261A JCP to Mr Toh Chong Kim ("Toh"), the late husband of the first defendant, for \$50 per month. [\[note: 6\]](#) The third defendant alleged that Razak was responsible for the payment of the property tax from 1961 onwards. [\[note: 7\]](#)

8 On 27 February 1967, Fatimah executed a trust deed *vis-à-vis* 263 JCP ("the 1967 Trust Deed") in the presence of an advocate and solicitor, Mr Doraisamy Ramasamy. She declared that she was to hold 263 JCP as trustee for Abdul Kader, the beneficiary. PW1, Mr Ebrahim Marican Bin Esmail Sahib, a friend of Sahib, and Mr Mohamed Yousoff signed off as witnesses of the execution of the 1967 Trust Deed. [\[note: 8\]](#) The 1967 Trust Deed was registered with the Registry of Deeds on the same day. [\[note: 9\]](#) The parties do not dispute the 1967 Trust Deed and thus agree that Abdul Kader is the beneficial owner of 263 JCP.

### ***The 1971 Trust Deed***

9 The 1971 Trust Deed was executed on 7 June 1971 in the presence of another advocate and solicitor, DW2, Madam Wu Eng Eng Jeanne. Fatimah's right thumb print was affixed to the 1971 Trust Deed. PW1 also signed off as a witness of the 1971 Trust Deed together with DW2's clerk, Mr Seah Kheng Hock ("Seah"). [\[note: 10\]](#) In the 1971 Trust Deed, Fatimah declared that she was to hold the Land on trust for the benefit of the plaintiff. The 1971 Trust Deed was not registered.

10 On the same day Fatimah also mortgaged the Land to Mr Wee Keng Kiat ("Wee") for \$8,000. The indenture of statutory mortgage was also executed in the presence of DW2 ("the 1971

Mortgage”). [\[note: 11\]](#) The 1971 Mortgage was registered with the Registry of Deeds on 13 August 1971. [\[note: 12\]](#)

### ***The state of affairs of 261A JCP after the execution of the 1971 Trust Deed***

11 The state of affairs regarding the occupation of 261A JCP did not change after the execution of the 1971 Trust Deed. Toh continued to stay at 261A JCP and paid rent to Razak who kept the rental monies. After Toh passed away, his family continued to reside at 261A JCP and paid rent to Razak. Razak also continued to pay for the property tax up till 2006. [\[note: 13\]](#) Neither the plaintiff nor Fatimah took issue with such an arrangement.

12 The state of affairs persisted after Sahib passed away in 1992. In 1996 Fatimah passed away. In 2001 the plaintiff started to assert her interest over 261A JCP.

### ***Initial attempts by the plaintiff to recover 261A JCP***

13 On 28 March 2001, PW2, Mr Mohamed Mohidin Habibullah Bin Hidayathullah (“Habibullah”), the plaintiff’s son, issued a notice to quit to Razak demanding that 261A JCP be vacated by 30 April 2001. [\[note: 14\]](#) PW2 took this action after the Control of Rent Act (Cap 58, 1985 Rev Ed) (“the Control of Rent Act”) was repealed on 1 April 2001. 261A JCP was still subleased to the first defendant. At that time Razak was in poor health and his affairs were managed by the second and third defendants.

14 261A JCP was not vacated by 30 April 2001. PW2 then entered into a separate tenancy agreement with the first defendant to lease 261A JCP from 1 August 2001 to 31 July 2003 at a rent of \$900 per month. There was also an option to renew the lease for a period of one year at a revised rent. [\[note: 15\]](#) Thereafter, the first defendant stopped paying rent to Razak.

15 The Land was brought under the Torrens system on 20 February 2002 and Fatimah was registered as the proprietor of the Land. [\[note: 16\]](#)

### ***Countermeasures undertaken by the second defendant***

16 The second defendant, acting on behalf of Razak, then commenced proceedings against the first defendant on 14 July 2003 to recover arrears of rent and possession of 261A JCP. [\[note: 17\]](#) The plaintiff was not made a party in the proceedings. The first defendant entered an appearance in the proceedings on 20 August 2003 and filed a defence on 4 November 2003. Razak passed away on 25 April 2004 and the second defendant was made a party to proceedings on 16 November 2004 to continue the action against the first defendant. [\[note: 18\]](#)

17 On 24 June 2005, the first defendant and the second defendant entered into a settlement agreement. The first defendant agreed to surrender possession of the premises to the second defendant. She also agreed to pay a sum of \$3,000 to the second defendant as settlement for the arrears of rent. The second defendant then entered into a tenancy agreement with the first defendant on the same day to lease 261A JCP to the first defendant from 1 July 2005 to 30 December 2005.

18 Prior to the settlement agreement PW2 had entered into an oral lease agreement on a month to month basis for \$800 per month regarding 261A JCP. [\[note: 19\]](#) However, as a result of the proceedings between the first defendant and the second defendant, the first defendant stopped paying rent to

PW2 on 16 January 2005. [\[note: 20\]](#)

19 Upon the expiry of the tenancy agreement, the first defendant gave vacant possession of 261A JCP to the second defendant on 20 December 2005. [\[note: 21\]](#)

### ***The proceedings leading up to this dispute***

20 On 10 May 2006, the plaintiff and PW2 commenced proceedings in the District Court against the first defendant and the second defendant to recover possession of 261A JCP and arrears of rent ("DC 1722/2006"). The claim was dismissed on 4 December 2010 on the grounds that the District Court did not have jurisdiction to hear the matter and that the proceedings should have been commenced in the High Court. [\[note: 22\]](#)

21 The plaintiff, thereafter, commenced the present suit in the High Court against the defendants. Only the second, third and fourth defendants participated in the proceedings. The first defendant had already vacated possession of 261A JCP to the second defendant on 31 December 2005. She no longer resided at 261A JCP and did not enter an appearance in this suit. A default judgment was accordingly entered against the first defendant.

### ***The witnesses***

22 PW1 and PW2 were witnesses for the plaintiff. The second defendant, the third defendant and DW2 were witnesses for the defendants. The defendants also sought to call the plaintiff as a defence witness. The plaintiff's counsel objected to this application as she had been diagnosed by Dr Adrian Wang, a consultant psychiatrist at Gleneagles Medical Centre, to be suffering from dementia which impairs her cognitive functions. [\[note: 23\]](#) She no longer has the mental capacity to retain or understand relevant information related to the suit and would not have been able to follow court proceedings or advise counsel. She is therefore unfit to appear as witness. This is the reason why PW2 was appointed as the litigation representative for the plaintiff on 18 December 2012. For these reasons the plaintiff's counsel did not call the plaintiff as part of the plaintiff's case.

23 The defendants' counsel accepted the findings and diagnosis of Dr Wang. Hence the defence did not have a medical report to rebut Dr Wang's prognosis. Despite the plaintiff's medical condition the defendants' counsel urged the court to call her as a witness. The defendants' counsel cited s 120 of the Evidence Act (Cap 97, 1997 Rev Ed) ("the Evidence Act") to support his application:

#### **Who may testify**

**120.** All persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them or from giving rational answers to those questions by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind.

*Explanation*—A lunatic is not incompetent to testify unless he is prevented by his lunacy from understanding the questions put to him and giving rational answers to them.

24 According to Dr Wang's report the plaintiff is also wheelchair bound, elderly and frail. In view of her dementia and other mental conditions the court is of the opinion that her evidence would be unreliable as she would not be able to appreciate and understand the questions put to her. Hence I disallowed the defendants' counsel's application to call the plaintiff.

## **The issues**

25 There are several issues in this case:

- (a) What is the effect of non-registration of the 1971 Trust Deed on its legality?
- (b) Is the 1971 Trust Deed inherently valid?
- (c) Is this action time barred under the Limitation Act?
- (d) Does the defence of laches apply in this case?

26 The most important and pivotal issue is on the validity of the 1971 Trust Deed. The plaintiff's case hinges on this issue. The other issues are the defendants' grounds against the plaintiff's case. Both parties are competing for 261A JCP for different reasons. This explains the defendants' counterclaims, which I shall deal with later.

### ***What is the effect of non-registration of the 1971 Trust Deed on its legality?***

27 It is not disputed that the most important document in this trial, the 1971 Trust Deed, was not registered. What is the effect of non-registration of the 1971 Trust Deed on its legality? The defendants submitted that s 4 of the Registration of Deeds Act (Cap 269, 1989 Rev Ed) ("RODA") renders the 1971 Trust Deed inadmissible as a result of its non-registration. The plaintiff argued that it is not a requirement to register a trust deed although a trust deed must be in writing as prescribed under s 7 of the Civil Law Act (Cap 43, 1999 Rev Ed) ("the Civil Law Act").

28 In addressing this issue I shall refer to s 4 of the RODA to ascertain whether the defendants' submissions that non-registration of trust deed render it inadmissible. The basic determination is whether s 4 of the RODA applies to a trust deed. This provision states:

#### **All instruments affecting land may be registered**

**4.** Subject to this Act and the rules, all assurances executed or made, and all probates and letters of administration granted, before or after 30th November 1988 by which any land within Singapore is affected and which have not been registered under any repealed enactment, may be registered in such manner as is hereinafter directed, and unless so registered shall not be admissible in any court as evidence of title to such land.

29 Section 4 of the RODA does not seem to apply to trust deeds. However, it refers to "assurance" which is defined in s 2(1) of the RODA as follows:

... "assurance" includes any conveyance, memorandum of charge or discharge, deed of consent to the discharge of a trustee, private Act, order of court or certificate of appointment of trustee in bankruptcy ...

30 Under this definition, a reference is made to "conveyance" which is defined as follows:

... "conveyance" includes any assignment, appointment, lease or settlement made by deed on a sale, mortgage, demise or settlement of any land or appointment of a new trustee in respect thereof which has been executed by one or more of the parties by whom any interest in the land is thereby conveyed ...

31 The definitions of “assurance” and “conveyance” also do not seem to include trust deeds. However, the defendants’ counsel relied on two cases that dealt with trust deeds that were not registered under the RODA as authority that a declaration of trust is an “assurance” or “conveyance” which must be registered under s 4 of the RODA. These cases were considered extensively by MPH Rubin J in *Chong Poh Siew v Chong Poh Heng* [1994] 3 SLR(R) 188 (“*Chong Poh Siew*”) and he observed at [42]–[45]:

42 The foregoing commentary aside, the applicability of s 4 of the Act as respects unregistered documents came up for discussion in at least two decided cases in Singapore. The principles enunciated in the cases are extremely instructive and provide useful guidelines and assistance to the resolution of issues raised in the case at hand. In *A P Ismail Saiboo v Quah Beng Kay and N R M N Raman Chitty* [1895] 3 SSLR 23, the plaintiff therein claimed that the property in question was held in trust for him and another. The trust was not registered on the Register of Deeds. Leach J, in holding that an unregistered declaration of trust will not, in the absence of special circumstances, hold good against the legal estate acquired by a subsequent equitable mortgagee (under a foreclosure decree obtained by him without any knowledge of trust and duly registered), observed at 27:

... it is a principle of natural equity universally applicable that where one man allows another to hold himself out as the owner of an estate and a third person *purchases it for value from the apparent owner in the belief that he is the real owner, the man who so allows the other to hold himself out shall not be permitted to recover upon his secret title unless he can overthrow that of the purchaser by showing that he had direct notice or something that amounts to constructive notice of the real title*, or that there existed circumstances which ought to have put him upon an enquiry which, if prosecuted, would have led to the discovery of it.

... The principle that as between equitable interests he who has the better equity is entitled to priority seems to be involved in the universal principle ...

[emphasis added]

43 He further observed at 28:

He [the plaintiff] took no steps when the purchase was effected nor subsequently to get his interest in the property placed on the Register of Deeds and only in this year does he reveal his secret title. ... The plaintiff has acted in a careless, unbusinesslike manner. The legislature has provided machinery whereby he could, if he had chosen, have preserved evidence of his title and he has failed to make use of it.

44 In another Straits Settlement case of *Lim Seng Keang v Lim Ah Chan* [1928] SSLR 241, a settlor executed a deed purporting to convey certain lands in consideration of love and affection. The deed was not registered in the Registry of Deeds. The settlor subsequently executed another deed which was duly registered. By his originating summons the plaintiff prayed, *inter alia*, for a declaration that the unregistered deed of 15 January 1908 created a good and valid trust and that the registered deed of 27 December 1915 by the same grantor in respect of the same land is null and void. The court held that the registered conveyance had priority over the unregistered one and that a person claiming under an unregistered deed gains no priority by being permitted to put his deed in evidence.

45 The foregoing cases enunciate the principle that *in the absence of special*

*circumstances* an unregistered declaration of trust will not hold good against a *legal estate acquired subsequently* ...

32 Rubin J proceeded to hold at [50]–[51] that:

50 ... [it is] a cardinal principle that courts will not hesitate to rectify the register in proper cases to do justice particularly when the issue relates to the obligation of a trustee *vis-à-vis* the beneficiary.

51 The dispute at hand does not involve any third party nor an innocent purchaser for value without notice of any trust. Neither does it involve a legal estate acquired subsequently. Here the dispute relates to two documents executed at about the same time. The issue in this case concerns the core of the trust itself. Inasmuch as the said document had been admitted by both parties as having been executed and placed before the court in the agreed bundle to decide on its true purport, any endeavour by the plaintiff to seek protection behind the registration provisions of the Act so as to prevent the court from inquiring into the actual nature of the transaction between the plaintiff and Mdm Chong, cannot be countenanced since the issue for resolution is whether there was in fact a trust and whether the trustee is trying to avoid his obligation under the trust. The authorities referred to do not decide otherwise and the special circumstances of the case do require the court to go behind the register and arrive at a finding as to the true nature of the transaction between Mdm Chong and the plaintiff.

33 Thus in *Chong Poh Siew* Rubin J recognised the trust deed as valid albeit not registered. It is therefore clear that as between the registered proprietor who is the trustee and the beneficiary, s 4 of the RODA “is no bar to a proper vindication of the true proprietary relationship between them”: *Halsbury’s Laws of Singapore* vol 9(3) (LexisNexis, 2012 Reissue) at para 110.448. To do so will be to allow the trustee a convenient escape to obligations which he or she clearly undertook to observe under the trust.

34 In this case, the plaintiff is seeking to exercise her rights as a beneficiary against Fatimah, the trustee and the registered proprietor of the Land. There is no issue of a subsequent acquisition of legal title by another party. The first defendant is also no longer a tenant at 261A JCP. In the circumstances, I find that the 1971 Trust Deed is admissible as evidence notwithstanding its non-registration so as to achieve a “proper vindication” of the “true proprietary relationship” between the plaintiff and the fourth defendant.

35 In any event, I would also like to add that I am not convinced that trusts are registrable under s 4 of the RODA. It is questionable whether a declaration of trust falls under the definitions of “assurance” and “conveyance” under s 2(1) of the RODA. As was observed in Frederick Guy Stevens, *The Registration of Deeds Ordinance* (Kelly & Walsh, 1922), at p 61:

It may perhaps be mentioned here that the Ordinance does not appear to have any effect on trusts, express or implied, as to which the ordinary law prevails. A declaration of trust, it seems, not being within the normal or extended meaning of the words “assurance” and “conveyance” is not a registrable document.

36 This passage dealt with the predecessor to the RODA and has interpretative value *vis-à-vis* the RODA. Furthermore, as seen in *Chong Poh Siew* and the cases discussed therein, courts have always been more concerned with the particular circumstances of the case than with s 4 of the RODA (or other equivalent provisions) when dealing with unregistered trusts. Furthermore, it would appear rather curious that trusts must still be registered under s 4 of the RODA even though they are “kept

off the register" *vis-à-vis* the Land Titles Act (Cap 157, 2004 Rev Ed) ("the Land Titles Act"): Tan Sook Yee, Tang Hang Wu & Kelvin FK Low, *Tan Sook Yee's Principles of Singapore Land Law* (LexisNexis, 3rd Ed, 2009) at para 14.88.

37 At the time the 1971 Trust Deed was executed the Land was under the RODA. Now the applicable statute is the Land Titles Act. I am of the view that the non-registration of the 1971 Trust Deed *per se* does not make it inadmissible as evidence and it also does not affect its validity.

### ***Is the 1971 Trust Deed inherently valid?***

38 The defendants did not allege that the 1971 Trust Deed was a forgery. Nevertheless, they alleged that it is not valid on three grounds. They first contended that Fatimah did not sign the 1971 Trust Deed. Secondly, they submitted that Fatimah did not understand the document that she signed. Thirdly, the 1971 Trust Deed was a sham document that was not intended to be a legal and enforceable document as it was poorly drafted and not registered.

39 The plaintiff's case is that the 1971 Trust Deed is a legal document that was executed by Fatimah and the plaintiff before an advocate and solicitor DW2. This document was interpreted and explained to Fatimah before she appended her thumb print on the 1971 Trust Deed.

### ***Whether Fatimah append her right thumb print on the 1971 Trust Deed***

40 It was the defendants' position at the start of the trial in their opening statement that Fatimah did not sign the 1971 Trust Deed. However, in the course of the proceedings they did not pursue strongly with this ground. On this issue, it is apposite to refer to s 92 of the Evidence Act which provides that:

#### **Presumption as to documents 30 years old**

**92.** Where any document purporting or proved to be 30 years old is produced from any custody which the court in the particular case considers proper, the court may presume that the signature and every other part of such document which purports to be in the handwriting of any particular person is in that person's handwriting, and in the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested.

41 Section 92 applies to documents that are not less than 30 years old. The 1971 Trust Deed is about 43 years old. The document was produced from the custody of the plaintiff. The defendants are not alleging that the 1971 Trust Deed is a forgery. Therefore, there is nothing on the face of it to give rise to any suspicion as to its authenticity. The 1971 Trust Deed must hence be presumed to be genuine and duly executed unless proven otherwise. The burden would then lie on the defendants to show that Fatimah's right thumb print affixed to the 1971 Trust Deed is a forgery. They could not do so and it is not surprising that they hardly pursued this line of argument in this trial.

42 Therefore s 92 of the Evidence Act presumed that the 1971 Trust Deed was duly and properly executed and attested by Fatimah.

### ***Whether Fatimah understood the 1971 Trust Deed***

43 Notwithstanding the presumption under s 92 of the Evidence Act it is prudent for the court to nevertheless ascertain whether Fatimah understood the 1971 Trust Deed when she attested her right



thumb print on it. This is critical when this ground was strenuously contested by the defendants.

44 The defendants contended that Fatimah was unable to read and write English. This is not disputed by the plaintiff. The defendants argued that Fatimah would not be able to read and understand the contents of the 1971 Trust Deed when she signed it because no one interpreted it to her. A document can only be duly executed if the party understands the contents of the document. As explained above s 92 of the Evidence Act presumes that Fatimah understood the contents of the 1971 Trust Deed. The burden of proof therefore lies on the defendants to show that Fatimah did not understand the contents of the 1971 Trust Deed. In this regard, it is the plaintiff's position that the contents of the 1971 Trust Deed were interpreted to Fatimah by both PW1 and Seah who also signed as witnesses to the execution of the 1971 Trust Deed.

#### *Whether PW1 interpreted the 1971 Trust Deed to Fatimah*

45 PW1 testified that he interpreted the contents of the 1971 Trust Deed to Fatimah twice. He first interpreted a draft of the 1971 Trust Deed to Fatimah two to three weeks before the 1971 Trust Deed was executed. He then interpreted the 1971 Trust Deed to Fatimah on the day it was executed at DW2's office. The defendants submitted that PW1's testimony cannot be relied upon due to the many inconsistencies with his testimony in DC 1722/2006. Furthermore, the defendants submitted that PW1's inability to recall details of the events he testified to makes his testimony unsafe. For example, PW1 took inconsistent positions as to whether he had interpreted the 1971 Mortgage to Fatimah. He also failed to mention his interpretation of the draft of the 1971 Trust Deed to Fatimah in DC 1722/2006. What was most glaring was the many inconsistencies between his two testimonies *vis-à-vis* the background facts leading up to the 1971 Trust Deed, such as the reasons behind Sahib conveying the Land to Fatimah.

46 I note that PW1 is 81 years old and that, for a man of such an old age, recalling events that occurred more than 43 years ago is not an easy task. There are therefore bound to be inconsistencies between his testimonies in the two suits. In this regard, I also bear in mind the observation made by Abdul Hamid J in *Chean Siong Guat v Public Prosecutor* [1969] 2 MLJ 63 at 63-64 which was approved by the Court of Appeal in *Osman bin Din v Public Prosecutor* [1995] 1 SLR(R) 419 at [41] :

Discrepancies may, in my view, be found in any case for the simple reason that no two persons can describe the same thing in exactly the same way. Sometimes what may appear to be discrepancies are in reality different ways of describing the same thing, or it may happen that the witnesses who are describing the same thing might have seen it in different ways and at different times and that is how discrepancies are likely to arise. These discrepancies may either be minor or serious discrepancies. Absolute truth is I think beyond human perception and conflicting versions of an incident, even by honest and disinterested witnesses, is a common experience. In weighing the testimony of witnesses, human fallibility in observation, retention and recollection are often recognized by the court. Being a question of fact, what a magistrate need do is to consider the discrepancies. ... On the other hand, if the magistrate finds that the discrepancies do not detract from the value of the testimony of the witness or witnesses, it would then be proper for him to regard the discrepancies as trivial and ignore them. On the other hand, if the magistrate finds that the discrepancies relate to a material point which would seriously affect the value of the testimony of the witness or witnesses then it would be his duty to weigh the evidence carefully in arriving at the truth ...

47 There were indeed, many inconsistencies in PW1's testimony. A certain degree of latitude must be given in light of "human fallibility in observation, retention and recollection" particularly in this case

which focuses on events occurring more than four decades ago. Be that as it may, I agree with the defendants that there are many discrepancies in PW1's testimony. It is therefore necessary to regard PW1's evidence with great caution. I should not take the easy way out and jettison his entire testimony, as suggested by the defendants, on the ground that there are many inconsistencies. It is the duty of this court to "sift the grain from the chaff": *Public Prosecutor v Tan Kok Siong Robin* [2004] SGDC 224 at [201] citing *Abdul Gani v State of Madhya Pradesh* [1954] AIR (SC) 31 at 34-35. The inconsistencies in relation to the background facts are not material to his interpretation of the 1971 Trust Deed to Fatimah. Moreover, much of what PW1 testified regarding the background and reasons for the 1971 Trust Deed was hearsay, such as his conversation with Sahib who later died in 1992. This is therefore inadmissible evidence.

48 This court must remain focused on the fundamental issue of whether Fatimah understood the 1971 Trust Deed before she appended her right thumb print on the Trust Deed. PW1's testimony as to how he interpreted the 1971 Trust Deed to Fatimah at DW2's office is consistent with that in DC 1722/2006. Parts of his testimony were also corroborated by DW2. For example, his account of how the 1971 Trust Deed was executed at DW2's office on 7 June 1971 and the parties' presence is largely similar to DW2's account.

49 I also note that during the course of the trial, the defendants' counsel made PW1 demonstrate how he interpreted the 1971 Trust Deed to Fatimah by interpreting 1971 Trust Deed to the court Malay interpreter paragraph by paragraph. The latter confirmed that PW1 had interpreted the 1971 Trust Deed correctly and properly. This showed that PW1 was proficient to adequately interpret and explain the 1971 Trust Deed to Fatimah. I am aware that this demonstration is with the benefit of hindsight. However, if PW1 "failed" this test then it shows that in all probability he may not have been able to interpret to Fatimah unless he has a good explanation.

50 The defendants also raised the issue that according to PW1's testimony, Fatimah did not ask any questions when the 1971 Trust Deed was interpreted to her. They argued that it is impossible that Fatimah did not ask any questions when the interpretation concerned such a convoluted document. This argument may not necessarily be logical as this was not the first time Fatimah had executed a trust deed. She had previously executed the 1967 Trust Deed that was just as convoluted as the 1971 Trust Deed. Therefore, Fatimah was already familiar with the nature of the 1971 Trust Deed when it was executed since she could draw upon her experience when she executed the 1967 Trust Deed. PW1 was also one of the witnesses for the 1967 Trust Deed. Fatimah had also executed other legal documents such as an indenture of mortgage in 1960 and a power of attorney in 1989. I notice that the defendants did not take any issue with other legal documents executed by Fatimah.

51 The 1971 Trust Deed may appear convoluted but if PW1 was able to interpret and explain it simply so that Fatimah could understand there might not be any question from her especially when she knew and agreed to the purpose of the 1971 Trust Deed. Despite PW1's inconsistencies I am of the view that it is safe to accept PW1's evidence that he interpreted and explained the 1971 Trust Deed to Fatimah.

#### *Whether Seah interpreted the 1971 Trust Deed to Fatimah*

52 Seah was a staff of DW2 who interpreted the 1971 Trust Deed to Fatimah on the day she was in DW2's office to append her right thumb print on the 1971 Trust Deed. However, Seah could not be found and was therefore, not called as a witness. It is pertinent to note that DW2 was called by the defendants to testify as regarding the execution of the 1971 Trust Deed. According to DW2, Seah was her former conveyancing clerk who was very well conversant with the Malay language. She also

confirmed that he was accustomed to interpreting conveyancing documents and could be relied upon to interpret them. [\[note: 24\]](#)

53 However, DW2 also testified that she could not remember the specific facts surrounding the execution of the 1971 Trust Deed. This is understandable as this event took place about 43 years ago. She could only testify that her usual practice was to have Seah interpret the document to parties who understood the Malay language but were unable to understand English. The interpretation would be done in her presence. DW2 in her affidavit of evidence-in-chief filed in DC 1722/2006 stated that "I can say that the contents of the Trust Deed were read over to both the Trustee and the Purchaser in Malay by Seah Kheng Hock and understood by them before they signed". DW2 further testified in DC 1722/2006 that "[w]hen my clerk is explaining the contents of a Deed to the client, I would be seated there. The Trust Deed was explained to the Trustee and the beneficiary while I was seated there". [\[note: 25\]](#) She would then ask the parties if they understood the document and she would only have them sign the document if they gave an affirmative response. [\[note: 26\]](#)

54 The defendants argued that DW2's testimony is not capable of proving the fact that Seah had interpreted the 1971 Trust Deed to Fatimah since there is no guarantee that her usual practice was adopted *vis-à-vis* the execution of the 1971 Trust Deed. There is no evidence or basis for the defendants to make such serious allegation against their own witness. There is not an iota of evidence to suggest that DW2 did not follow the usual practice in this case. DW2's testimony to my queries in court indicated clearly that both Fatimah and the plaintiff understood the 1971 Trust Deed: [\[note: 27\]](#)

Court: Ms Wu, I'll like to bring you to the time when they---when the two ladies---the two Malay ladies, one is Fatimah and one is Zulaikha---

Witness: Mm.

Court: ---where they have appended their signatures into this trust deed.

Witness: Yes, Your Honour.

Court: Okay? Now bring yourself to that day. Did these two ladies give you any indication that they may not have understood the trust deed at all before they pen their signatures?

Witness: Well, I---we have this Mr Seah.

Court: I know you have Mr Seah as interpreter.

Witness: Yes, and then he explained---explained to her---

Court: Right.

Witness: ---to them and the---I did ask them whether they understood or not; they said "yes" then we signed it. In normal cases, I'll ask any---whether they understood the explanation; and if there is anything, you can ask.

Court: And in this particular case, they understood?

Witness: Yes. In every cases, Your Honour, and explained in this case.

55 Furthermore DW2 testified that Seah was an experienced conveyancing clerk who was accustomed to interpreting conveyancing documents to clients: [\[note: 28\]](#)

Q Roughly, how long had Mr Seah been with the firm of R Ramason?

A He was with us for several years. But before that, he was the conveyancing clerk somewhere else. I can't remember where---where he came from. But he was working for us for several years as at 1971.

Q Would you say Mr Seah was an experienced conveyancing clerk?

A Yes, he was.

Q Mr Seah was accustomed to interpreting conveyancing documents?

A Yes.

Q Mr Seah could be relied upon to interpret conveyancing documents?

A Yes.

56 DW2 is an impartial, independent as well as a reliable and creditable witness. I am therefore satisfied that DW2 had ensured Seah interpreted the 1971 Trust Deed to Fatimah and that she understood the contents of the 1971 Trust Deed.

57 It is interesting to note that the defendants accepted the validity of the 1971 Mortgage as they have not challenged it. This would mean that they accept that Fatimah understood the contents of the 1971 Mortgage, which was also in English and is convoluted. The 1971 Mortgage was executed on the same day as the 1971 Trust Deed at DW2's office. Both PW1 and Seah signed off as witnesses of the 1971 Mortgage. Since they accept the fact that Fatimah understood the 1971 Mortgage, I find their objection to the 1971 Trust Deed on the ground that Seah and/or PW1 did not interpret the 1971 Trust Deed baseless. If this is so, then there is no rational explanation for why the 1971 Mortgage was interpreted to Fatimah but not the 1971 Trust Deed. It is unwise for the defendants to cherry pick. If they accept the fact that Fatimah understood the 1971 Mortgage, then, in the absence of strong reasons to the contrary, they must also accept the fact that she understood the 1971 Trust Deed. For these reasons, I find that Fatimah understood the contents of the 1971 Trust Deed when she executed it.

#### *Whether the 1971 Trust Deed is a sham*

58 The position in relation to sham documents was summarised by Lai Siu Chiu J in the recent decision of *Belfield International (Hong Kong) Ltd v Sheagar s/o T M Veloo* [2014] 1 SLR 24 at [33]–[34]:

33 A document is a sham if all the parties thereto have a common intention that the document was not to create the legal rights and obligations which it gives the appearance of creating: *Snook v London and West Riding Investments Ltd* [1967] 2 QB 786 at 802; *Raffles Town Club Pte Ltd v Lim Eng Hock Peter* [2010] SGHC 163 at [112]. In other words, a sham transaction is one which is good in form but false in fact: *TKM (Singapore) Pte Ltd v Export Credit Insurance Corp of Singapore Ltd* [1992] 2 SLR(R) 858 at [41].

34 The person alleging that a document is a sham has the burden of proving that the parties intended the document to be a pretence, and there is a very strong presumption that the parties intended to be bound by the provisions of the agreements which they entered into: *Chng Bee Kheng v Chng Eng Chye* [2013] 2 SLR 715 at [51]; *National Westminster Bank plc v Jones* [2001] 1 BCLC 98 at [59].

59 In the case of a trust the court will refuse to enforce a trust that appears to be validly created if it was intended to be a “sham” and that the owner had no real intention to subject his or her property to a trust. The burden of proof is on the defendants to show that Fatimah did not intend to hold 261 JCP and 261 A JCP on trust for the plaintiff despite executing the 1971 Trust Deed.

60 Much emphasis was placed by the defendants on the second and third paragraphs of the 1971 Trust Deed where it was stated that: [\[note: 29\]](#)

WHEREAS by an Indenture of Conveyance (hereinafter called “the Conveyance”) dated the 13<sup>th</sup> day of April, 1960 (Registered in Volume 1374 No. 174) and made between Hidayatullah Sahib (s/o Mohamed Mohideen Alim Sahib) of the one part and the Trustee of the other part in consideration of the sum of \$11,000/- paid by the Trustee as therein mentioned the freehold land and premises described in the Schedule hereto was conveyed to the Trustee in fee simple.

AND WHEREAS the purchase price of \$11,000.00 was provided by the Purchaser [the plaintiff] and the said property was conveyed to the Trustee [Fatimah] as trustee for the Purchaser as the Trustee hereby admits and acknowledges.

61 The purchase price of \$11,000 referred to here is the purchase price purportedly paid by Fatimah to Sahib under the 1960 Conveyance. These paragraphs state that the \$11,000 was actually paid by the plaintiff and not Fatimah and that Fatimah had actually received the Land under the 1960 Conveyance as trustee for the plaintiff.

62 According to PW1, after Sahib purchased the Land in 1956, he and his brother who ran a business together were involved in disputes. To keep the Land out of his brother’s hands, Sahib and Fatimah executed the 1960 Conveyance. Fatimah did not pay the purchase price of \$11,000 and always regarded herself as simply lending her name to the Land. As a result of this arrangement, everything Fatimah did with the Land was upon Sahib’s instructions. This would include the 1967 Trust Deed. Most of this version of the events came from PW1’s testimony, which, as I have mentioned above (at [47]), is riddled with inconsistencies and appears to be hearsay.

63 The defendants contend that this is untrue and that Fatimah had the means to pay the \$11,000 herself. This is a bare assertion, speculative and also appears to be hearsay. On this premise the defendants argued that the basis for executing the 1971 Trust Deed as stated in the second paragraph would be false. The 1971 Trust Deed must then be a sham.

64 Unfortunately, both the plaintiff’s and the defendants’ versions of events cannot be properly and reliably verified with acceptable evidence. Both parties had also introduced conjecture, speculation and opinion not based on admissible evidence in the course of the proceedings as key witnesses were not available, eg, Fatimah, Sahib, Seah, plaintiff, etc. Nonetheless, the burden rests on the defendants to prove their case that the 1971 Trust Deed is a sham and not the plaintiff. As I have earlier explained that the contents of the 1971 Trust Deed were interpreted and explained to Fatimah she must have accepted the truth of its contents therein otherwise she would not have appended her right thumb print on this document. Thus the contents of the 1971 Trust Deed are, on

a balance of probabilities, true. The onus is on the defendants to prove the lack of intention on the part of Fatimah to hold the Land on trust for the plaintiff and they have failed to prove this. I am therefore of the view that the 1971 Trust Deed is not a sham.

65 The defendants also rely on the non-registration of the 1971 Trust Deed as evidence of it being a sham. They argued that unlike the 1967 Trust Deed and the 1971 Mortgage that were registered, the 1971 Trust Deed was not registered because it was not intended to be enforced. I do not agree. Non-registration *per se* is not conclusive evidence that the 1971 Trust Deed is a sham. There are many reasons why the 1971 Trust Deed was not registered that do not point towards it being a sham. For example, it could have been a result of plain oversight. DW2 also was unable to explain why the 1971 Trust Deed was not registered. This does not mean that the parties did not intend to have it executed to create a valid express trust. Non-registration does not render a trust invalid.

66 Moreover, DW2 maintained that the 1971 Trust Deed was intended to be a legally enforceable trust deed: [\[note: 30\]](#)

Q Do you agree that there was always the intention to have a legally enforceable trust deed?

A Of course.

Q Of course. If someone were to say to you that this trust deed was meant to be a sham--- would you have played any part in that?

A No---definitely not.

Q So as far as you are concerned, this was a perfectly routine conveyancing matter.

A Yes.

Q Sorry, you have to speak up.

A Yes.

Q Do you know how many copies of the original signed trust deed there were? Do you know how many copies of this deed were signed?

A Blank.

Q No, the actual signed trust deed. How many?

A No. I have no idea.

Q No idea. Look at page 22, the top right-hand corner. You will see two stamps from the stamp office including that this deed was stamped on the 22nd of June 1971, correct?

A Yes.

Q That would lend support to your belief that this was meant to be a legally enforceable trust deed.

A I agree with you, yes.

67 On the face of the 1971 Trust Deed which was duly stamped, it does not appear to be a sham document. I am, therefore, of the opinion that the 1971 Trust Deed is a valid document that creates an express trust over 261 JCP and 261A JCP with Fatimah being the trustee and the plaintiff being the beneficiary. The plaintiff, therefore, owns the beneficial interest in 261 JCP and 261A JCP.

68 I shall now deal with the defendants' other grounds against this suit.

***Is this action time barred under the Limitation Act?***

69 The defendants argued that this action is time barred on the basis of s 6(1)(a) or s 22(2) of the Limitation Act. Section 6(1)(a) reads:

**Limitation of actions of contract and tort and certain other actions**

**6.—(1)** Subject to this Act, the following actions shall not be brought after the expiration of 6 years from the date on which the cause of action accrued:

(a) actions founded on a contract or on tort;

...

70 This suit is not an action on contract or on tort. Thus this provision is not applicable.

71 The defendants also pleaded s 22(2) as its defence which states:

...

(2) Subject to subsection (1), an action by a beneficiary to recover trust property or in respect of any breach of trust, not being an action for which a period of limitation is prescribed by any other provision of this Act, shall not be brought after the expiration of 6 years from the date on which the right of action accrued.

...

72 For s 22(2) to apply there must be a date for the right of action to accrue so that the parties can determine whether the action is brought within the limitation period of six years. The 1971 Trust Deed does not have a start point for the plaintiff, the beneficiary, to exercise her rights. It is sufficient for me to say that s 22(2) is, therefore, also not applicable. I shall deal with this issue in greater detail when I discuss the doctrine of laches below.

73 Moreover, s 22(2) is also subject to s 22(1) of the Limitation Act which states:

**Limitations of actions in respect of trust property**

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

(a) in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or

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

...

74 The 1971 Trust Deed creates an express trust and the plaintiff, as the beneficiary, is seeking to enforce such an express trust. The defendants' counsel accepts that if the court comes to this finding no period of limitation applies by virtue of s 22(1)(b) of the Limitation Act.

75 The only issue that remains is whether the plaintiff is nonetheless barred by the doctrine of laches.

***Does the defence of laches apply in this case?***

76 The doctrine of laches was comprehensively analysed in *Re Estate of Tan Kow Quee (alias Tan Kow Kwee)* [2007] 2 SLR(R) 417 ("*Re Estate of Tan Kow Quee*"). Sundaresh Menon JC (as he then was) held at [33]–[34] that:

33 [The doctrine of laches reflects] a confluence of two factors: delay and the existence of circumstances that make it inequitable to enforce the claim. A claimant in equity is bound to pursue his claim without undue delay. Equity, it is said, aids the vigilant and not the indolent. This stems from the fact that as much as equity is found in flexible applications of the law designed to secure a just result, it is apt to seek recourse in equity when the conscience is pricked and where no other innocent interest is affected. The longer the delay, the less likely are these considerations to be valid. The basis for the equitable intervention of the court is ultimately found in unconscionability. The following passage from the judgment in *Green v Gaul* at [42] is instructive:

The modern approach to the defences of laches, acquiescence and estoppel was considered by this Court in *Frawley v Neill* ([2002] CP Reports 20, but otherwise unreported, 1 March 1999), to which reference was made in the judgement of Mummery LJ in *Patel v Shah* [see [29] *supra* at 32]. After reviewing the earlier authorities - and, in particular, observations in *Lindsay Petroleum v Hurd* (1874) LR 5 PC 221, 229 and *Erlanger v New Sombrero Phosphate Co* (1878) 3 App Cas 1218, 1279 - Aldous LJ (with whom the other members of the court agreed) said:

"In my view the more modern approach should not require an inquiry as to whether the circumstances can be fitted within the confines of a preconceived formula derived from earlier cases. The inquiry should require a broad approach, directed to ascertaining whether it would in all the circumstances be unconscionable for a party to be permitted to assert his beneficial right. No doubt the circumstances which gave rise to a particular result in the decided cases are relevant to the question whether or not it would be conscionable or unconscionable for the relief to be asserted, but each case has to be decided on its facts applying the broad approach."

34 In addition, I would refer to the following extracts from the judgment of Mummery LJ in *Patel v Shah* at [30], [31], [33] and [34].

30 I do not doubt that, in the general run of claims by a beneficiary against a trustee for the recovery of a beneficial interest in trust property, Mr Hodge's [counsel for the claimants] analysis is apposite. The key question is whether it applies to the trusts affecting the properties in this case, bearing in mind that these trusts arose, and are sought to be enforced, in a commercial context, not in the donative context of orthodox *inter vivos* and testamentary trusts, in which a beneficiary is not expected by anyone to do anything other than to receive the gift.



31 As I have indicated, the deputy judge applied the principle stated by Lord Lindley in paragraph 23-20 in *Lindley and Banks on Partnership*, 18th ed. That principle is stated in a commercial setting: that of a partnership, the carrying on of a business with a view to profit. The deputy judge said it was applicable with equal force to the series of joint ventures of the kind undertaken between Greetflow [the claimants' predecessor in title] and the defendants.

...

33 ... In the case of an ordinary trust by way of gift to trustees for the benefit of the beneficiaries, where the beneficiary is not required or expected to do more than receive what has been given for his benefit, it will obviously be extremely rare for laches and delay on the part of the beneficiary to make it unconscionable for that beneficiary to assert his claim to the beneficiary interest, or for the trustee to claim that he has been released from the equitable obligations that bind his conscience.

34 The general commercial setting of the particular facts of this case make it, in my view, a different kind of case from that of a beneficiary under a gift trust.

77 The instant case falls under that of "an ordinary trust by way of gift to trustees for the benefit of the beneficiaries" where the beneficiary had nothing more to do than to receive the gift. I can understand the rationale why the doctrine of laches is generally not applicable to ordinary trusts like in this case. Delay is defined by *Black's Law Dictionary* (Bryan Garner editor-in-chief) (WEST, 9th Ed, 2009) at p 491 to mean, *inter alia*: [t]he act of postponing or slowing; the period during which something is postponed or slowed. Thus delay is tardiness, a prolonged wait or the postponement of an action. For there to be delay there must be a start point to determine the duration of the inaction so as to ascertain whether or not there is any delay in the commencement of the cause of action. In other words, there must be a commencement time for a cause of action to accrue. Thereafter there must be a prolonged period of procrastination before the party starts to enforce his legal right before one can be accused of delay. In this case the 1971 Trust Deed does not indicate when the beneficiary, namely the plaintiff, can exercise her rights under this Trust Deed. The relevant provision in the 1971 Trust Deed is as follows: [\[note: 31\]](#)

NOW THIS DEED WITNESSETH that the Trustee hereby declares that she holds the said property in trust for the Purchaser in fee simple subject to the said mortgage and that she will at the request and cost of the Purchaser convey the said property described in the Schedule hereto to such person or persons *at such time or times and in such manner or otherwise deal with the same as the Purchaser shall direct or appoint.*

[emphasis added]

78 This provision in the 1971 Trust Deed clearly allows the plaintiff to decide at any time to convey the said property to any person that she decides. Thus the concept of delay does not exist in the 1971 Trust Deed. In the circumstances it cannot be argued that there is a long delay because the 1971 Trust Deed was 43 years old. This alone will demolish the defence of laches as this doctrine is premised on delay. For this doctrine to come into operation there must be delay. Thereafter, there must be detriment to the defendant arising from the delay as this is an equitable remedy.

79 Although it would be extremely rare for the doctrine of laches to apply to an ordinary trust, I shall nonetheless ascertain all the circumstances of the case and consider if there is any unconscionability involved. This would involve examining the length of the "delay", the nature of the prejudice said to be suffered by the defendants, as well as any element of unconscionability in

allowing the claim to be enforced: *Re Estate of Tan Kow Quee* at [38].

80 In this case the plaintiff decided to exercise her rights under the 1971 Trust Deed after more than 30 years. As a result, certain key witnesses such as Fatimah and Sahib have passed away. Seah may no longer be located. The Plaintiff is mentally challenged. There has also been a blurring of memories on the part of the other witnesses such as PW1, DW2 and the third defendant. This is to be expected because the events took place more than 43 years ago. These are common factors that affect both the defendants as much as they affect the plaintiff. These are challenges faced by the court to arrive at a fair and just outcome. It is certainly not a basis to reject the plaintiff's case on the ground of unconscionability.

81 Fortunately, even though the recollection of the witnesses may have diminished over time, there is no lack of important documentary evidence, which is usually more reliable than oral evidence. The 1971 Trust Deed is also unambiguous and clearly states that Fatimah is to hold the Land as trustee for the plaintiff's benefit.

82 I am also of the view that the defendants were not prejudiced by the purported "delay". This is not a case where most of the key witnesses have passed away, such as in *Quek Hung Heong v Tan Bee Hoon (executrix for estate of Quek Cher Choi, deceased) and others and another suit* [2014] SGHC 17; PW1 and DW2 are key witnesses that are able to shed light on the execution of the 1971 Trust Deed. Their testimonies indicated that Fatimah understood the contents of the 1971 Trust Deed. I wish to reiterate that DW2 was called as a witness for the defendants and yet her evidence is in favour of the plaintiff.

83 It is understandable that both parties started to show interest over 261A JCP in 2001. This was soon after the Control of Rent Act was repealed and the value of the property and the rent was suddenly enhanced substantially. Prior to this there was little interest in 261A JCP as the rental monies were negligible. The defendants failed to show prejudice by this action commenced by the plaintiff. The second and third defendants clearly have no legal rights to 261A JCP and cannot be prejudiced. There has also been no suggestion as to how the fourth defendant will be prejudiced.

84 For the foregoing reasons, I am of the opinion that the doctrine of laches cannot apply in this case. The defendants have also failed to show that they are prejudiced. It is not unconscionable to allow for a declaration that the plaintiff is the beneficial owner of 261 JCP and 261A JCP.

### **Other orders sought by the plaintiff**

#### ***Specific performance***

85 The plaintiff seeks an order of specific performance under the fifth paragraph of the 1971 Trust Deed (reproduced above at [77]) for the fourth defendant to convey the "said property" to her. The "said property" being the Land. This application may not be appropriate as both parties have agreed and accepted that Abdul Kader is the beneficial owner of 263 JCP. Therefore this action should confine to the plaintiff's beneficial interests in 261 JCP and 261A JCP. The plaintiff should seek a subdivision of the Land for them to exercise their beneficial ownership over 261 JCP and 261A JCP and allow Abdul Kader to retain 263 JCP.

86 It is also for this reason that I am unwilling to declare that the plaintiff is the legal owner of the Land. The legal title still remains with the fourth defendant and the plaintiff only has beneficial interest in 261 JCP and 261A JCP. I also decline to order that the plaintiff be entitled to recover possession of the Land as well. The Land has to be sub-divided for my order to be effected *vis-à-vis*

261 and 261A JCP.

### ***Rental proceeds***

87 The plaintiff claims from the first defendant rent at a rate of \$800 per month since 16 January 2005 in respect of the first defendant's occupation of 261A JCP. She claims from the second and third defendants the rental proceeds received by them from the first defendant or Toh for the occupation of 261A JCP. She also claims for *mesne* profits from 16 January 2005 until possession of 261A JCP is returned to her.

88 I am not inclined to grant the plaintiff's claim to the *mesne* profits arising from the rent of 261A JCP as she was not the legal owner at the relevant period. I accordingly make no order in relation to the rental proceeds associated with 261A JCP.

89 I shall now deal with the third defendant's counterclaim.

### ***The third defendant's counterclaim***

90 It is alleged by the second and third defendants that long before Fatimah's demise, Fatimah had told the third defendant that she would give 261A JCP to her and 261 to the plaintiff. However, even if such a gift was made, a purported oral declaration of trust over land is unenforceable. Section 7(1) of the Civil Law Act clearly requires a declaration of trust to be in writing:

#### **Trusts respecting immovable property and disposition of equitable interest**

**7.—(1)** A declaration of trust respecting any immovable property or any interest in such property must be manifested and proved by some writing signed by some person who is able to declare such trust or by his will.

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

(3) This section does not affect the creation or operation of resulting, implied or constructive trusts.

91 Section 7 of the Civil Law Act was previously s 6B of the Civil Law Act (Cap 43, 1994 Rev Ed) which took effect in 1994. For trusts before that date the applicable provision would be s 9 of the English Statute of Frauds 1677 (c 3) (UK) ("the Statute of Frauds"): *Ong Siew Lay v Ong Boon Chuan* [2009] SGHC 99 at [52]–[54]; *Ching Chew Weng Paul v Ching Pui Sim and others* [2010] 2 SLR 76 at [40]. Section 9 of the English Statute of Frauds 1677 states:

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

92 Section 9 of the Statute of Frauds is more apposite to the facts of this case as the third defendant alleged that Fatimah told her that she would give her 261A JCP sometime in 1967. Later she mentioned another date in 1989. Both these dates were governed by s 9 of the Statute of Frauds which requires the trust to be in writing otherwise it would be void and have not effect.

### ***Did Fatimah really say that she would give 261A JCP to the third defendant?***

93 The third defendant's testimony regarding the oral gift of 261A JCP by Fatimah is unreliable. She could not remember when the oral promise was made and there were inconsistencies in her oral testimony and what was stated in her amended Defence and Counterclaim. During cross-examination, she claimed that Fatimah promised her 261A JCP at the same time she gave 263 JCP to Abdul Kader: [\[note: 32\]](#)

Q. ... At the same time that your mother sold 263, she gave you 261A?

A. I think that is so because it has been a long time ago.

Q. Can you recall the year?

A. I cannot remember which year.

Q. Can you recall the decade?

A. I'm afraid I might be confused because it's too long ago.

Q. Just to help you, in 1967, your mother declared a trust over 263 in favour of Haji Abdulkader. So are you saying that in 1967, your mother also gave you 261A?

A. I cannot recall the year. I only remembered that my mother gave instruction to divide the land.

Q. Who did she give instruction to?

A. ... Mohammed Habibullah.

94 The third defendant claimed that she was promised 261A JCP when the 1967 Trust Deed was executed. She could not remember the year this happened, nor could she recall the decade. She also claimed that this was at the same time Fatimah instructed Habibullah to subdivide the land. However, in her amended defence and counterclaim, it is stated that Habibullah was only instructed to subdivide the land in 1989, [\[note: 33\]](#) 22 years after the 1967 Trust Deed was executed. Such a large discrepancy renders her testimony unsafe to rely on.

95 Furthermore, the third defendant alleged that Fatimah gave her 261A JCP in 1967 which she later said in 1989. Whichever the date the third defendant said her husband treated Fatimah as the landlady until his death in 2004. If the third defendant was the owner why did Razak continue to pay rent to Fatimah? Later she changed her evidence and said that Razak, her husband, paid rent of \$80 to her instead of Fatimah as she was the owner. I noticed that when the third defendant was cross-examined on this topic she had a few very long pauses and had to be pressed for an answer.

96 The plaintiff also argued that the third defendant did not make a claim to 261A JCP in the earlier action in DC 1722/2006. This claim is only made in her defence and counterclaim in this suit. This claim is solely premised on the testimony of the third defendant. Her testimony is also not convincing. There is no documentary evidence to substantiate this allegation.

97 For the above reasons I am not prepared to accept the third defendant's testimony that Fatimah gave her 261A JCP. The second and third defendants' counterclaim is therefore not made out. Accordingly, I declare that they have no legal interest in 261A JCP nor any other part of the

Land. Thus their counterclaim is therefore dismissed with costs.

## **Conclusion**

98 For the reasons given above, I hereby declare that the plaintiff is the beneficial owner of 261 JCP and 261A JCP. I would like the parties to address me on the issue of costs. I understand the plaintiff is not seeking costs against the estate, the fourth defendants.

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[\[note: 1\]](#) Plaintiff's Bundle of AEIC, Tab MH-2, pp 29–33.

[\[note: 2\]](#) Plaintiff's Bundle of AEIC, Tab MH-3, pp 35–37.

[\[note: 3\]](#) Plaintiff's Bundle of AEIC, Tab 1, pp 30–34.

[\[note: 4\]](#) Plaintiff's Bundle of AEIC, Tab 2, pp 27–28.

[\[note: 5\]](#) Plaintiff's Bundle of AEIC, Tab 2, p 3, para 9.

[\[note: 6\]](#) Plaintiff's Bundle of AEIC, Tab 2, p 79.

[\[note: 7\]](#) Plaintiff's Bundle of AEIC, Tab 2, pp 29–68.

[\[note: 8\]](#) Plaintiff's Bundle of AEIC, Tab 1, pp 22–23.

[\[note: 9\]](#) Plaintiff's Bundle of AEIC, Tab 1, p 21.

[\[note: 10\]](#) Plaintiff's Bundle of AEIC, Tab 1, pp 10–12.

[\[note: 11\]](#) Plaintiff's Bundle of AEIC, Tab 1, pp 39–43.

[\[note: 12\]](#) Plaintiff's Bundle of AEIC, Tab 1, p 38.

[\[note: 13\]](#) Plaintiff's Bundle of AEIC, Tab 2, pp 29–68.

[\[note: 14\]](#) Plaintiff's Bundle of AEIC, Tab 1, p 18.

[\[note: 15\]](#) Plaintiff's Bundle of AEIC, Tab 4, pp 24–26.

[\[note: 16\]](#) Defendant's Bundle of Documents, Vol 1, pp 1–4.

[\[note: 17\]](#) Plaintiff's Bundle of AEIC, Tab 1, pp 7–8, para 25.

[\[note: 18\]](#) Plaintiff's Bundle of AEIC, Tab 1, pp 7–8, para 25.

[\[note: 19\]](#) Plaintiff's Bundle of AEIC, Tab 4, p 5, para 16.

[\[note: 20\]](#) Plaintiff's Bundle of AEIC, Tab 4, p 5, para 17.

[\[note: 21\]](#) Plaintiff's Bundle of AEIC, Tab 1, p 8, paras 26– 27.

[\[note: 22\]](#) Plaintiff's Bundle of AEIC, Tab 4, p 5, paras 19– 20.

[\[note: 23\]](#) Plaintiff's Bundle of AEIC, Tab MH-1, p 27.

[\[note: 24\]](#) Notes of Evidence, 18 March 2014, p 54.

[\[note: 25\]](#) Plaintiff's Bundle of Documents, Vol 1, p 59.

[\[note: 26\]](#) Notes of Evidence, 18 March 2014, pp 63–64

[\[note: 27\]](#) Notes of Evidence, 18 March 2015, pp 63–64.

[\[note: 28\]](#) Notes of Evidence, 18 March 2015, p 54

[\[note: 29\]](#) Plaintiff's Bundle of AEIC, Tab 1, p 10.

[\[note: 30\]](#) Notes of Evidence, 18 March 2015, pp 60–61.

[\[note: 31\]](#) Plaintiff's Bundle of AEIC, Tab 1, pp 10–11.

[\[note: 32\]](#) Notes of Evidence, 18 March 2014, p 74.

[\[note: 33\]](#) Defence and Counterclaim of 2<sup>nd</sup> and 3<sup>rd</sup> Defendants (2<sup>nd</sup> Amendment), para 13(d).

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