

Foo Jee Seng and others v Foo Jhee Tuang and another
[2011] SGHC 235

Case Number : Originating Summons No 909 of 2010
Decision Date : 28 October 2011
Tribunal/Court : High Court
Coram : Judith Prakash J
Counsel Name(s) : David De Souza and Kevin De Souza (De Souza Lim & Goh LLP) for the first and second plaintiffs; Vangadasalam Ramakrishnan (V Ramakrishnan & Co) for the third plaintiff; Tan Hee Liang and Tan Hee Joek (Tan See Swan & Co) for the first and second defendants.
Parties : Foo Jee Seng and others — Foo Jhee Tuang and another

Trusts

28 October 2011

Judith Prakash J:

1 At the centre of this controversy was the land and premises known as No 39 Lorong Marzuki, Singapore ("the Property"). It was the subject of an express trust contained in a will dated 8 May 1975 ("the Will") made by one Foo Tai Joong ("the testator"), who was the father of all the parties before this court. The plaintiffs, who were beneficiaries under the trust, by this action sought to compel the first defendant, as trustee, to sell the Property and distribute the proceeds of sale in accordance with the terms of the Will. On 18 May 2011, I dismissed the plaintiffs' application, and I now set out the grounds for my decision.

Background

2 The testator had sought by the Will to make provision for all the members of his family. The most significant asset in his estate was the Property and he devised the same to his wife, one Yap Wee Kien ("Mdm Yap"), and his son, the first defendant Foo Jhee Tuang, (together, "the Trustees"), to hold on trust for the named beneficiaries of the Will. These beneficiaries comprised the testator's wife and all six of his children ("the Beneficiaries"), and the Will provided for them in the following terms:

1. I APPOINT my wife YAP WEE KIEN and my son FOO JHEE TUANG if and when he attains the age of 21 years to be my Executrix and Executor and Trustees of this my Will (hereinafter called "my Trustees").

2. I GIVE and DEVISE my property known as No. 39, Lorong Marzuki, Singapore, unto my Trustees UPON TRUST to sell call in and convert the same into money with power to postpone the sale calling in and conversion thereof so long as they shall in their absolute discretion think fit without being liable for loss and to hold the net proceeds of the said sale and conversion upon the following trusts:-

(a) Upon trust to invest in their names in any investments authorised by law and to stand possessed of such investments and the said property if unsold.

(b) Upon trust to divide the net income from the said investments or the net rent and profits from the said property equally to my wife and children namely the said YAP WEE KIEN, FOO JEE FONG, FOO LEE LEE, FOO JEE SENG, FOO JHEE TUANG, FOO CHIN CHIN AND FOO JEE BOO.

(c) Upon trust to hold the said property or the net proceeds of sale and conversion thereof and any investments therefrom in trust to divide the same to my wife and the said children in equal shares.

3 The testator passed away on 5 May 1979, and Mdm Yap obtained a grant of probate on 30 November 1979 as one of the executors of the will. The first defendant was about 18 years old at the time of his father's death, and leave was reserved to him to come in and prove the Will when he attained the age of 21 years. As it turned out, the first defendant only did so much later, when he obtained a grant of double probate on 4 March 2010. It was the first defendant's position that as long as Mdm Yap was alive she administered the testator's estate. It was only in 2009 some four years after Mdm Yap's death in July 2005, that the first defendant learnt that he was entitled to act as executor of the testator's estate.

4 By Mdm Yap's will dated 18 May 2002 she bequeathed her share in the Property to three of her sons in the following proportions: two shares to the third plaintiff, and one share each to the first plaintiff and the first defendant. A title search conducted on 6 October 2010 revealed that the Property remained registered in Mdm Yap's name "in trust", and that there were three caveats lodged against the Property. The first was lodged on 11 March 2010 by the third plaintiff; the second was lodged on 19 March 2010 jointly by the first and second plaintiffs, and the third was lodged on 13 April 2010 by the second defendant who is a Beneficiary and the sister of the other parties. All the above caveats claimed an "Interest other than purchaser/mortgagee/charge".

5 By Summons No 5672/2010/S filed in these proceedings on 6 December 2010, the first defendant sought *inter alia* an order that he be declared the sole surviving executor and trustee of the testator, and an order that he was entitled to have the Property conveyed to him by Transmission on Death of Proprietor. Orders in terms of the foregoing were granted on 21 March 2011.

6 The Property is situated on about 5029 square feet of land in the eastern part of Singapore, and its value had apparently appreciated from about \$60,000 at the time of the testator's death in 1979 to about \$4 million in 2010. The current value of the Property belies its current shabby condition: it was described by the parties as a "single storey old wooden zinc roof landed home" in a "dilapidated state". The Property has been partitioned into as many as ten rooms, and these rooms were rented out to provide a source of rental income for the family. This enterprise began during the testator's lifetime and, after his death, continued under the oversight of Mdm Yap. After her death, it was continued by her sons, the first and third plaintiffs. Sometime after 2005, the first defendant took over the rent collection, although it is disputed as to when he did so. The plaintiffs alleged that the first defendant took over the rent collection in 2008, but the first defendant claimed that he only did so in September 2009. In any event, the amount of rent collected was not very high. According to the first defendant it ranged from \$1,130 in September 2009 to \$200 in September 2010. There was also the need to apply some of this rent toward the maintenance and upkeep of the Property, and after this was done the rental income did not amount to very much.

The proceedings

7 The plaintiffs Foo Jee Seng, Foo Li Li and Foo Jee Boo are, respectively, the testator's second son, eldest daughter and fourth son. The defendants Foo Jhee Tuang and Foo Chin Chin are the plaintiffs' siblings and, respectively, the testator's third son and second daughter. The parties had

another brother, one Foo Jee Fong (the testator's eldest child), who was also named in the Will as a beneficiary, but who died intestate on 19 July 2007.

8 In this Originating Summons filed on 2 September 2010, the plaintiffs prayed *inter alia* for orders that the Property be sold; that the sale be committed to the plaintiffs, and that the first defendant be made to furnish proper particulars and accounts of the rent and profits from the Property from 2008 to the present time.

9 It was clear that the plaintiffs had initiated these proceedings against the first defendant in his capacity as trustee of the Property. However, as against the second defendant, the plaintiffs claimed that they decided to include her as a defendant only because they had not managed to contact her in relation to the proposed action and were thus unaware of her position on this matter. The plaintiffs claimed that they had not received any reply to either of two letters sent by their solicitors to the second defendant. The first letter sent on 2 February 2010 requested that second defendant state her position on the matter, and the second letter sent on 11 May 2010 informed the second defendant of a meeting between the plaintiffs and the first defendant at which the parties would seek to resolve the matter. Though the second defendant allegedly failed to respond to the letters, she lodged a caveat against the Property in her name on 13 April 2010. The second defendant also filed an affidavit on 22 October 2010, in which she stated that she was taking a neutral position. She did not take any active part in the proceedings thereafter.

The parties' submissions

10 The thrust of the plaintiffs' case was that the Property should be sold because, on the true construction of the Will, the testator's intention was to provide for his wife and then infant children from the rental income of the Property. So long as the Property was generating a reasonable rental income, the Trustees could delay the sale of the Property. Counsel for the plaintiffs, Mr David De Souza, submitted that the rental income of the Property was no longer reasonable enough to justify withholding the sale of the Property any longer, and furthermore the children were now adults. Therefore, the Property should be sold and the sale proceeds distributed among the beneficiaries. To achieve this, Mr De Souza submitted that this court should order a sale of the Property pursuant to Order 80 Rule 2 of the Rules of Court (Cap 322, 2006 Rev Ed) ("ROC").

11 Counsel for the first defendant, Mr Tan Hee Liang, contended that it would be inappropriate for the court to grant relief under O 80 r 2, because it was merely a procedural provision, and jurisdiction to engage O 80 r 2 must first be founded in s 56(1) of the Trustees Act (Cap 337, 2005 Rev Ed). According to Mr Tan, s 56 (1) requires that there be a lack of power on the part in the powers of the trustee to deal with the trust property in a certain manner before the court can exercise its discretion to authorise such dealings. In the present case, the Will had specifically imposed on the Trustees the duty to sell the Property and the power to postpone the sale, therefore no jurisdiction could be grounded in s 56(1). Mr Tan submitted that on the proper construction of the Will, the Property was meant to be used as an investment property, and the plain words of the Will conferred a power on the first defendant to postpone the sale as he thought fit. Furthermore, there was no reason to compel a sale of the Property since rental income was still being generated, and the first defendant had exercised his discretion in a *bona fide* manner.

The issues

12 Five issues had to be resolved in deciding whether the plaintiffs were entitled to the orders that they sought:

- (a) whether the trust in the Will was in the nature of a trust for sale, and if so, how this device operated in the context of a will;
- (b) what the ambit of the court's power to supervise trustees in their exercise of their discretionary powers was;
- (c) what the relationship between O 80 r 2 and s 56 of the Trustees Act was;
- (d) what the proper construction of the Will was; and
- (e) whether the first defendant could be made to give an account of the rent from the Property.

The trust for sale

13 The Trustees' obligations are set out in cl 2 of the Will:

2. I GIVE and DEVISE my property known as No. 39, Lorong Marzuki, Singapore, unto my Trustees UPON TRUST to sell call in and convert the same into money with power to postpone the sale calling in and conversion thereof so long as they shall in their absolute discretion think fit without being liable for loss and to hold the net proceeds of the said sale and conversion upon the following trusts:-

14 Simply stated, this directs that the Trustees should hold the Property on trust, with a duty to sell the Property, but with a power to postpone the sale in their discretion. Should they decide to exercise their power of sale, then the proceeds of the sale may be applied to the following trusts listed in cl 2 (a)-(c). Clauses 2(b) and (c) set out the Beneficiaries' interests as follows:

(b) Upon trust to divide the net income from the said investments or the net rent and profits from the said property equally to my wife and children namely the said YAP WEE KIEN, FOO JEE FONG, FOO LEE LEE, FOO JEE SENG, FOO JHEE TUANG, FOO CHIN CHIN AND FOO JEE BOO.

(c) Upon trust to hold the said property or the net proceeds of sale and conversion thereof and any investments therefrom in trust to divide the same to my wife and the said children in equal shares.

15 Clause 2(b) directs that the Beneficiaries should be entitled to either the income resulting from the investments acquired with the proceeds of sale, or from the rent and profits accruing from the Property. Clause 2(c) directs that the Property or the sale proceeds including any investments acquired with the sale proceeds should be held in trust and divided equally among the Beneficiaries. Although it was not immediately apparent from the submissions, it was clear from this examination of the Will that the plaintiffs in their prayer for a sale of the Property sought to reap the benefits conferred on them by Clause 2(c).

16 The direction given to the Trustees in the Will although common is not entirely clear. What is the legal consequence of stating that the Trustees are under a duty to sell the Property, but have

the power to postpone the sale at their discretion? Some guidance is derived from Megarry and Wade, *The Law of Real Property* (Stevens & Sons Limited, 5th Ed, 1984) ("*Megarry and Wade*"), which states at p 314 that:

A trust for sale is a trust which directs the trustees to sell the trust property, invest the proceeds, and hold the resulting fund upon the trusts declared by the settlor.

On the next page, p 315:

In a trust for sale the legal estate was vested in the trustees upon trust to sell the land and hold the income until sale and the proceeds thereafter upon specified trusts for the beneficiaries. The trustees were usually given power to postpone sale in their discretion, and to manage the land until sale.

Thus the species of trust contained in the Will is a device known as a trust for sale, which was used to achieve specific objectives and, at common law, was informed by its own set of principles.

17 A trust for sale was a method of settling land, or, in other words, of creating successive interests in land. The trust for sale differed from the strict settlement in the following manner, *Megarry and Wade* 5th Ed p 314:

A trust for sale is a trust which directs the trustees to sell the trust property, invest the proceeds, and hold the resulting fund upon the trusts declared by the settlor. Its objects and operation are therefore quite different from those of a strict settlement. Instead of aiming to preserve a family estate against sales, mortgages or other vicissitudes, as did the old type of strict settlement, the trust for sale set out by treating the property as so much potential money. Dividing it among the family was therefore easy...

18 A trust for sale of land was a device which facilitated the distribution of trust property amongst the beneficiaries. It did so by requiring that the trustees sell the land so that the land was converted into money which was easily portioned out to beneficiaries. So long as the obligation on the trustees to sell was immediate and binding - notwithstanding that the sale had not taken place - the equitable maxim that "equity looks on that as done which ought to be done" would apply and deem the interests of the beneficiaries to be in the sales proceeds, rather than the land. In other words, the beneficiaries had interests in personalty, rather than realty. This was the ancient equitable doctrine of conversion, which had at its heart the thinking that the rights of those entitled to either realty or personalty should not depend on the time at which the duty to convert the property was fulfilled. The editors of *Snell's Equity* (Thomson Reuters (Legal) Limited, 32nd Ed, 2010) elaborate on this at p 135:

The trust for sale...directed the trustees to sell the land and invest its proceeds, holding the fund upon the trusts declared. Although trustees were usually given power to postpone sale, and the consent of beneficiaries entitled to possession was often required before sale could be effected, the imposition of a binding obligation to sell on the trustees triggered the doctrine of conversion. It followed that, even before the land was sold, the rights of beneficiaries were deemed to be rights in personalty as opposed to land.

19 The doctrine of conversion applied equally in Singapore upon the reception of English law in 1826. The editors of *Halsbury's Laws of Singapore Vol (9)2 Equity and Trusts* (LexisNexis Singapore, 2003) reiterated this at p115 [110.107]:

...so long as there is a duty to sell, it matters not that a discretion to postpone sale is attached.

The doctrine of conversion will still operate although as a result of exercise of the discretion to postpone sale, the sale eventuates many years later.

The doctrine of conversion was abolished in England in 1997. As Singapore has not followed suit so far, the doctrine of conversion continues to apply here.

20 Relevant in this context is local legislation based on the English Settled Land Act 1925. The relevant version of this is the Settled Estates Act 1970 (Cap 39) ("SEA 1970"), which was the law as it stood at the time the testator made the Will. Section 2 of the SEA 1970 contains the following definition of "settlement":

"settlement" means any statute, deed, agreement, will or other instrument, or any number of such instruments, under or by virtue of which any immovable property, or any estates or interests therein, stand limited to, or in trust for, any person or persons, by way of succession, including any such instruments affecting the estates of any one or more of such persons exclusively;...

Unlike the English Settled Land Act 1925, the SEA 1970 did not contain an express provision to the effect that it would not apply to trusts for sale of land. However, since the doctrine of conversion endures in Singapore, if an immediate binding trust for sale of land were created, then the interests of the beneficiaries would be in personalty, not realty. The SEA 1970 limits its own ambit to settlements which relate to estates or interests in immovable property, not personalty, and therefore the trust for sale of land would escape the SEA 1970's purview.

21 From the point of view of a drafter of wills, a trust for the sale of land could be used to evade the application of the SEA 1970 or its subsequent iterations. Indeed, this is the rather strongly expressed view taken by James Kessler QC and Chiwi Lee in *Drafting Trusts and Will Trusts*, (Sweet & Maxwell Asia, 2007) at p 215:

The trust for sale represents the nadir of English land law. In theory a trust for sale is a direction to trustees to sell trust property, the trustees, usually having a power to "postpone" the sale. The sale is then "postponed" indefinitely, so that – despite the trust for sale – no sale takes place. In reality the trust for sale is simply ignored.

And this is continued at p 219:

Care is needed to ensure that the trust remains an "immediate, binding trust for sale" efficacious for its purpose, which is to exclude the Settled Estates Act (Cap 293).

The trust for sale clause is often placed at the beginning of a settlement.... But the clause is no less effective if it is relegated to a schedule; and since the clause is a technicality and a legal fiction of the lowest order, that course is proposed.

22 What difficulties lurked in the SEA 1970 that could cause testators to avoid the application of this Act? One of the salient features of the SEA 1970 was that settled estates could only be sold, and could only be leased out, with the authorisation of the High Court. Section 7 provided that an application for sale or lease could be made by or on behalf of either the beneficiaries or the trustees; and s 8 provided that such application had to be taken out by way of summons, with supporting affidavits and evidence. Section 9 required that the consent of all the beneficiaries to the application be obtained, and s 10 required that notice of the application be served on all trustees of beneficiaries of the estate. Undoubtedly, it could be a laborious task for beneficiaries and trustees to deal with

land under a settlement, since their ability to do so depended on the discretion of the court, with all the attendant procedural requirements and costs. This was in sharp contrast to the ease with which trustees under a trust for sale of land could deal with the land; since legal title to the land was vested in their names, they could sell and lease the land with far greater autonomy.

23 In this case the testator may have created a trust for the sale of the Property as an alternative to creating a settlement of land. A strong indication of this is that the Property was rented out during the testator's lifetime, and the stream of rental income that resulted would have been known to him. The circumstances under which the Property was tenanted out are important: the Property was tenanted out to as many as ten tenants at one time, rather than one tenant who occupied the entire house. Up to ten leases were thus in operation at any one time, and the management of these would have required considerable powers of administration with great flexibility in their execution. In order to facilitate the continued tenancy of the rooms in the Property after the testator's death, it would make sense that the persons charged with the management of the Property be endowed with autonomy in their management of the Property. Those persons would have to be able to make and unmake leases with ease, and have control over the terms of the leases. Under these circumstances, the creation of a trust for the sale of the Property rather than a settlement would have been an attractive proposition.

The court's supervision of the exercise of discretionary powers by a trustee of a trust for sale

24 Trustees who held by virtue of a trust for the sale of land were duty bound to sell the land, although they may be also be accorded a power to postpone the sale at their discretion. It should be noted that in England, the Law of Property Act 1925 implied a power to postpone in all trusts for sale of land. The common law position in England was that if there was no explicit power to postpone, then the sale would have to take place within a reasonable time and if the trust was contained in a will, then the sale should take place within a year of the testator's passing. In contrast, if there was an explicit power to postpone the sale, then the court would assume that the exercise of discretion to postpone the sale was exercised properly, and refrain from interfering in a *bona fide* exercise of discretion. The court would be slow to order a sale where the trustees had in good faith decided that a sale should be postponed (see Sherrin, Barlow and Wallington, *Williams on Wills* (Butterworths, 7th Ed 1995) at p 1287) ("*Williams on Wills*").

25 The court does not perform the function of supervising the day-to-day exercise of discretion by trustees. Instead, the court is dependent on the beneficiaries of the trust to bring alleged instances of improper trustee behaviour to the court's attention. The ambit of the court's power to supervise trustees is limited to four distinct situations, as laid out in *Public Trustee v Cooper* [2001] WTLR 901:

- (1) where the issue is whether some proposed action is within the trustees' powers;
- (2) where the issue is whether the proposed course of action is a proper exercise of the trustees' powers;
- (3) where there is a surrender of discretion to the court; and
- (4) where the trustees have actually taken action and the action is attacked as being either outside their powers or an improper exercise of their powers.

In the first situation, the court considers questions such as the extent of the trustees' powers and the proper construction of the trust instrument. In the second situation, the trustees may seek to legitimise a proposed course of action by asking for the court's approval of this. The third situation

occurs when the trustees surrender the decision as to what course of action to proceed with to the court. The court may then act in the place of the trustees and act as a responsible trustee could be expected to act having regard to all material circumstances and in doing so the court is not bound by the wishes of the beneficiary. Crucially, the court has no greater powers than the trustees would have under the trust instrument or general law. The fourth situation is the most relevant one to the instant case, and this is where the trustees have exercised their power, and their exercise is challenged on the grounds that it was not *bona fide* and the trustees did not give genuine and responsible consideration to the same. This is the only ground upon which the court will review trustees' discretion where it has already been exercised, since it is not the court's function to hear appeals against trustees' decisions.

26 Should a complaint falling under the second and fourth situations be brought to the court, the question then arises as to the *extent* to which the court can control the trustees' exercise of discretion. Although the second and fourth situations differ insofar as the former involves a proposed course of action and the latter involves a course of action actually embarked upon; the same fundamental analysis applies to both. This analysis is primarily informed by the principle of non-intervention, which states that where the trustees have absolute discretion to do or refrain from doing a particular action, and if their conduct is informed, *bona fide* and free from the influence of improper motives, then the court will not interfere in the trustees' exercise of their powers. The principle of non-intervention is one of some longevity, dating back to at least the 19th century where in the 1880 case of the *Marquis Camden v Murray* 16 Ch D 161, Jessel MR was reluctant to substitute the trustees' discretion with that of the court's, in the absence of *mala fides*. This principle was furthered by Chitty J in *Tempest v Lord Camoys* (1882) 21 Ch. D. 571, who added that the court would also not interfere with the particular time and manner of the trustees' *bona fide* exercise of their power.

27 To be absolutely clear, the principle of non-intervention applies to instances where the trustees have absolute discretion in the exercise of their powers. If the exercise of trustee powers was made imperative in any way, this would effectively be a duty, the performance of which the court would be more willing to enforce.

28 The first defendant naturally submitted that the court should not interfere with his exercise of discretion. In support of this he relied on *In re Kipping* [1914] 1 Ch 62 for two propositions: (i) the beneficiary was not entitled to interfere with the *bona fide* exercise by the trustees of their discretion and to call upon them to sell the trust property; (ii) that this was because the beneficiary only had a distributive share of the income of the property prior to sale, and only after the sale was he entitled to a distributive share of the proceeds of sale. In my opinion the first proposition is correct, but I have my reservations about the second. If by the operation of the doctrine of conversion, the interests of the beneficiaries were converted from realty to personalty, then it is difficult to see why the beneficiaries should not be entitled to an interest in the sales proceeds. Of course it is a fiction to say that the beneficiaries had an interest in sales proceeds that did not yet exist, but that was precisely the manner in which the doctrine of conversion operated. Limiting the beneficiaries to an interest in the income only would mean that the beneficiaries had neither an interest in the real estate nor an interest in the sales proceeds, which would leave them with no interest in the capital value of the property at all.

29 In sum, where the power given to trustees is one that can be exercised in their absolute discretion, then the court shall not step in to compel an exercise of the power before the trustees have decided to act; and after they have decided to act the court shall not interfere to overturn the exercise of their powers. The only exception to this is where there is an allegation that the powers were exercised (or not exercised) in bad faith. The court does not hear appeals from the decisions of

trustees; and even if the court would not have acted as the trustees had or proposed to, this still is no ground for interfering in the trustees' powers. As was said in *Re Londonderry's Settlement* [1965] Ch 918, the settlor had chosen to entrust the powers to the trustees, not to the court. There is no reason for the court to assume these for itself.

30 In the present case it was clear that the first defendant had engaged his power as trustee and exercised his discretion to postpone the sale of the Property; yet the plaintiffs complained that he should not have exercised his discretion in this manner. On the face of it, this was a complaint which fell under the fourth situation described in [25]. Notwithstanding this, the plaintiffs neither alleged that he had exercised his discretion *mala fides*, nor did they say that he did not give genuine and responsible consideration to his power. If the only ground of bad faith upon which the court would potentially interfere with a trustee's exercise of discretion was not relied upon, what more could the plaintiffs use to support their application? The plaintiffs' complaints that it was more than 30 years since the testator died, that they were more than 50 years old and not in the pink of health and could use a distribution of sale proceeds for their medical and living expenses were not sufficient.

Order 80 Rule 2 of the Rules of Court and s 56(1) of the Trustees Act

31 The plaintiffs sought to rely on Order 80 of the Rules of Court, in particular O80 r 2(3)(c) and (e). These state that:

Determination of questions, etc., without administration (O80, r.2)

...

(3) Without prejudice to the generality of paragraph (1), an action may be brought for any of the following reliefs:

...

(c) an order directing a person to do or abstain from doing a particular act in his capacity as personal representative;

...

(e) an order directing any act to be done in the administration of the estate of a deceased person or in the execution of a trust which the Court could order to be done if the estate or trust were being administered or executed, as the case may be, under the direction of the Court.

32 Mr De Souza submitted that the specific provisions of O 80 excerpted above empowered this court to order a sale of the Property. This was supported by reference to s 18 of the Supreme Court of Judicature Act (Cap 322, 1998 Rev Ed) ("SCJA") read with the First Schedule of the same, which provides that the High Court shall have the power to direct a sale of land in any cause or matter relating to a piece of land. He added a third statutory buttress in the form of Order 9 Rule 4 ROC, which provides that the court shall have the inherent power to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the court.

33 I agreed with Mr De Souza to the extent that this court does indeed possess all the powers he submitted it does, but I could not see a reason as to why those powers *ought* to be exercised in this case. As explained above, the court will interfere in the trustees' exercise of discretionary powers if there is some allegation of *mala fides*, and in the absence of such allegation I found little reason to

consider the powers conferred by the statutes he has relied on.

34 Mr Tan submitted that O 80 r 2 was merely a procedural provision, and in the absence of jurisdiction founded in s 56(1) of the Trustees Act, it would be inappropriate for the court to grant relief. It should be noted that Mr De Souza at the hearing on 21 March 2011 expressly disclaimed any reliance by the plaintiffs on s 56(1) Trustees Act. He stated they only wished to proceed on O 80 r 2. Mr Tan's contention was, however, that if the plaintiffs wished to rely on O 80 r 2, they must first satisfy s 56(1). The relevant portion of s 56(1) states that:

Power of court to authorise dealings with trust property

56. – (1) Where in the management or administration of any property vested in trustees, any sale, lease, mortgage, surrender, release, or other disposition, or any purchase, investment, acquisition, expenditure, or other transaction, is in the opinion of the court expedient, but the same cannot be effected by reason of the absence of any power for that purpose vested in the trustees by the trust instrument, if any, or by law, the court may –

(a) by order confer upon the trustees, either generally or in any particular instance, the necessary power for the purpose, on such terms, and subject to such provisions and conditions, if any, as the court may think fit;...

35 Mr Tan was correct in saying that s 56(1) of the Trustees Act was irrelevant to the present case, since the section deals with the situation where there is the *absence* of a trustee power to manage the trust property, and the court finds that it is expedient to confer such power on the trustee. In contrast, the present case involved a will which by its language imposed a duty on the trustee to sell the Property and a power to postpone the sale. There was an imperative power on the trustee to effect the sale, and the application of s 56(1) was thus precluded. That is as far as I needed to go in relation to this argument, and in the light of my opinion that there was little impetus for the consideration of the O 80 r 2 powers, I did not need to decide if s 56(1) is indeed a jurisdictional pre-requisite to O 80 r 2.

The proper construction of the Will

36 The main reason that the plaintiffs used in support of their application was that a proper construction of the Will pointed towards the conclusion that the Property should be sold, and therefore the court should give effect to this intention. Mr De Souza relied on the case of *Leo Teng Choy v Leo Teng Kit and ors.* [2000] 3 SLR(R) 636 for the following propositions. First, it is a general principle of will construction that the court should ascertain the intention of the testator from the will as a whole, in the light of any extrinsic evidence admissible for the purpose of its construction. Second, a strict literal construction of the will can be made to step aside in favour of a construction which is in accord with the broad objective of the testator, under the appropriate circumstances.

37 The general principles of will construction can be stated very shortly. The overarching consideration is to give effect to the testator's intention at the time of the making of the will, as this intention was expressed in the words of the will. The intention must be derived from looking at the entire will, and (it is not a contradiction to say this) each and every part of the will is to be construed in the light of that intention. In this regard I refer to *Re Will of Loke Soh Lui* [1997] 3 SLR(R) 956 where Chan Seng Onn JC (as he then was) held:

[58] Plainly, one has to give effect to a will to accord with the testator's intention as disclosed by the will... One has to find the testator's intention in the words used in the will, given their

natural and grammatical meaning. However, that may be modified if it is necessary to conform with the real intention found by construing the will as a whole. Unexpressed intentions are clearly irrelevant. I adopt the position stated in para 371 of *Halsbury's Laws of England vol 50* (Butterworths, 4th Ed) that:

The expressed intention is in all cases taken as the actual intention, whatever the testator in fact intended, and as a general rule the court may not give effect to any intention which is not expressed or implied in the language of the will.

38 Also relevant is whether the Will had been drafted by a lawyer or by the testator himself, since a lawyer skilled in drafting testamentary instruments would be more comfortable with technical terms. Therefore, the accepted rules for the drafting of wills in existence at the time the will was drafted would also be relevant, since we must have an awareness of the rules that informed the draftsman's work.

39 The principles stated above are consistent with those in *Leo Teng Choy's* case which was relied on by the plaintiffs. That said, it should be noted that *Leo Teng Choy's* case did not concern a trust for sale, and the Court of Appeal in that case was construing the will for the purposes of deciding whether a sale under s 56(1) of the Trustees Act should be ordered.

40 On the plaintiffs' construction of the Will, the proper interpretation was that the testator intended that the Trustees could delay or withhold the sale only for as long as the Property could produce reasonable rental income. Since the rental income at the present time was meagre, the Property should be sold to realise its capital value. The first defendant construed the Will differently, and was of the opinion that an "investment theme" ran through the Will, and it was plain that the testator had meant to use the Property as an investment property. To the first defendant, this seemed to mean that the Property should be preserved, and the rental income from the Property distributed amongst the beneficiaries.

41 The Will is a short one, and the most relevant portion of the Will is Clauses 1 and 2 which have been reproduced at [\[2\]](#) above. The only other clause in the Will is Clause 3, which is a standard clause that simply makes provision for funeral and testamentary expenses, and the disposal of the residue.

42 To my mind, the words of the Will are clear in imposing a trust for sale on the Trustees, with a power to postpone the sale indefinitely. Having considered the Will in its entirety, I see no indication of a contrary intention, and it seems that the intention of the testator must have been simply that the Trustees should hold the Property until they thought fit to sell it, and in the meanwhile distribute the rental income derived from the Property amongst the Beneficiaries. I would not go as far as to say that the trust for sale was indeed a "legal fiction" as said by Kessler QC and Lee in *Drafting Trusts and Will Trusts* (see [\[21\]](#) above) but it is possible that the trust for sale was a device with utility beyond the plain meaning of its words. I have considered at [\[23\]](#) above that this trust for sale might have been created as an alternative to a settlement for the purposes of evading the provisions of the SEA 1970. What this could mean is that the testator might have had the intention of preserving the land within the ownership of the family and creating successive interests in the land, as is consistent with a settlement; but drafted this in the form of a trust for sale to facilitate the management of the tenancies of the Property. This interpretation draws strength from the fact that the Will was drafted by a lawyer, rather than by the testator himself, and the lawyer in all probability would have been familiar with the legislation in force, the drafting practices in use at that time and how to navigate these to achieve the result the testator wanted.

43 In 1975 when the Will was drafted, the testator's six children would have been fairly young, with the eldest child being about 18 years old and the two youngest children being only 10 and 4 years old respectively. Mdm Yap was then a homemaker with a small business of selling eggs from home-reared chickens. The testator's only asset of significant value was the Property, and the instinct to make financial provision for his widow and young family would have been strong. It was perhaps in this context that the plaintiffs advanced their interpretation of the Will, and since the Beneficiaries are now all well into their middle age, the plaintiffs contended that there is no need to make such provision anymore and the Property should thus be sold. It is true that the testator did make financial provision for his family by his Will, but even so, there is nothing in the Will to suggest that the testator intended any particular point at which this financial provision should cease. It would have been simple for the testator to manifest this intention; all he would have had to do was to include, for example, a provision to the effect that the Property should be sold when the last of his surviving children attained the age of 21, with another clause to make provision for his widow.

44 In any event, it is difficult to hold that the court should interfere with the trustees' discretion to exercise their powers just because the trust document should bear a certain interpretation. If the court is to interfere, it should be because the trust document should bear a certain interpretation, *and as a consequence of this*, the trustees had exercised or refrained from exercising their powers in a manner that was not *bona fide*.

Whether the first defendant could be made to give an account of the rent and profits from the Property

45 An account of profits is a remedy that can be granted against the holder of fiduciary duties when a breach of these duties has been established. The plaintiffs prayed for such account of profits but did not allege a breach of fiduciary duties by the first defendant in their submissions, and did not provide any evidence of the same. In the absence, and proof, of any such allegation, I could not grant this relief.

Conclusion

46 For the above reasons, I dismissed the plaintiffs' application.

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