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15. EQUITY AND TRUSTS

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Express trusts

15.1 *BOK v BOL*[1] was a dispute on the circumstances which led to the signing of a trust deed and whether the trust could be vitiated. The plaintiff was 29 years old at the time when he signed a trust deed which made him and his wife, the second defendant, joint trustees of all his property in favour of their infant son, the first defendant. This trust deed was signed three days after the plaintiff's mother's funeral. The plaintiff's mother was killed at her home in Bukit Timah. It was the plaintiff's case that the second defendant, who was a lawyer, presented him with the trust deed and quarrelled with him when he refused to sign the trust deed. There was some evidence that the second defendant's father, who was a senior lawyer, was also present during this quarrel. Subsequently, the plaintiff filed the present lawsuit to vitiate the trust deed. The plaintiff claimed that the trust deed was vitiated due to the following: misrepresentation, mistake, unconscionable transaction and undue influence. Valerie Thean J allowed the claim on all these grounds. The misrepresentation claim succeeded because she found that the second defendant falsely represented to the plaintiff that the trust would only take effect upon his death and he was entitled to deal freely with all his assets. With regard to the claim based on mistake, Thean J held that the plaintiff was labouring under the mistake that trust deed only operated upon his death and he remained free to deal with his assets in the meantime. Applying *Pitt v Holt*,[2] the learned judge said that this was an operative mistake of sufficient gravity which was a ground to set aside the trust. Thean J also found undue influence on the present facts. Since the second defendant was a trained lawyer who drafted the trust deed, an implied retainer arose between the plaintiff and the second defendant. Therefore, there was an irrebuttable presumption that their relationship was one of trust and confidence. As the trust was manifestly disadvantageous to the plaintiff, the burden fell on the second defendant to demonstrate that she did not exercise undue influence on him. She failed to discharge this burden. With regard to unconscionability, Thean J applied the well-known case of *Cresswell v*

1 [2017] SGHC 316.
2 [2013] 2 AC 108.

Potter[3] ("*Cresswell*"), which consisted of three requirements: first, the plaintiff must be "poor and ignorant"; second, the transaction must be at an undervalue; and third, the plaintiff must not have received independent legal advice. The first limb posed a potential problem since the plaintiff was very highly educated and extremely wealthy. Despite this, Thean J was prepared to characterise the plaintiff as "poor and ignorant" because he was in a situation of an expectant heir. Thean J stressed on the fact that there was oppression and an abuse of confidence on the present facts due to the plaintiff's acute grief and the second defendant's conduct which amounted to exploitation, extortion or taking advantage of someone else. Therefore, the learned judge was prepared to adopt and adapt the *Cresswell* test unconscionability and apply it to the present case. It remains to be seen whether this signals a more liberal Singapore approach to construing unconscionability or whether *BOK v BOL* would be confined to its very unusual facts.

15.2 *Lalwani Shalini Gobind v Lalwani Ashok Bherumal*[4] is an important case which sets out the principles in relation to the law on accounts. Aedit Abdullah JC (as his Honour then was) observed that the accounting procedure serves the following primary purposes: (a) providing information to the beneficiaries; and (b) ascertaining maladministration which might give rise to personal liability on the fiduciary's part. Abdullah JC also endorsed the following propositions of law:

> (a) Beneficiaries have a *prima facie* right to take an account of the trust assets. This right is not contingent on any allegations of a breach of trust.
>
> (b) The duty to account is continuous and on demand. In the context of a deceased's estate, the right to account is not limited to the time of distribution of the trust assets.
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> (c) The *prima facie* right to take an account of trust assets is limited if it would be oppressive to require the trustee to account. For example, beneficiaries may not constantly demand an account without a reasonable interval or provide reasonable time for the trustee to furnish relevant information. In addition, if the trustee can provide evidence that a settlement had been entered with beneficiaries as regards the provision of the trust accounts, then the court will not order an account.
>
> (d) Trustees must provide a proper, complete and accurate justification with the supporting documentation for his actions as trustee. Information must be provided as to the current status

3 [1978] 1 WLR 255.
4 [2017] SGHC 90.

of, and past transactions of each constituent trust asset. If there are allegations of breach of trust, more information will likely be required. More will also be required in relation to a professional trustee as compared to a non-professional trustee.

(e) The taking of a common account is different from the taking of an account on a wilful default basis. In the latter, the trustee is required to account for what he has received, but also what he might have received had it not been for the default.

(f) The taking of a common account is distinct from an account of profits. An account of profits is the remedy when there is a breach of trust whereas the taking of accounts is only the first step in establishing a breach.

15.3 *Zhao Hui Fang v Commissioner of Stamp Duties*[5] dealt with the tricky issue of a charitable trust and the imposition of additional buyer's stamp duty ("ABSD"). In this case, there was a charitable trust for, *inter alia*, the promotion of medical research in Singapore and Malaysia. The settlor bequeathed a property, 37 Chee Hoon Avenue, for the following purposes: (a) to his wife Zhao Hui Fang ("Mdm Zhao") for her personal use during her lifetime or until she remarries, whichever is earlier; (b) if Mdm Zhao did not wish to use the property, then the property may be used by the settlor's daughter, Ms Chew Hwee Ming ("Ms Chew"), or Ms Chew's children as their personal residence; and (c) when Ms Chew's youngest surviving child becomes 30 years old and neither Ms Chew nor any of her children wish to use the property as their personal residence, the property may be leased or disposed and any income or proceeds will be paid to the charitable trust. Subsequently, an order of court was granted allowing the executors of the settlor's will to sell 37 Chee Hoon Avenue and purchase a property known as the Goodwood property as a substitute. The purchase of the Goodwood property was at the price of $6.56m. A dispute arose as to whether ABSD of 15% was payable on the acquisition of the Goodwood property. The relevant provision is Art 3(*bf*)(viii) of the First Schedule of the Stamp Duties Act,[6] which imposed a 15% ABSD on the total amount of consideration of the residential property "if the grantee, transferee or lessee … is a foreigner or an entity". Abdullah JC held that Mdm Zhao only had a personal licence, as opposed to a proprietary interest, in the Goodwood property. The Commissioner of Stamp Duties argued that ABSD was payable on three alternative arguments: (a) the persons factually benefiting from the charitable work of the trust are the beneficial owners of the Goodwood property. Since some of the beneficiaries would be foreigners, that is, Malaysian researchers, ABSD

5 [2017] 4 SLR 945.
6 Cap 312, 2006 Rev Ed.

is chargeable; or (b) the trustees are the beneficial owners and the trust is considered to be an "entity"; or (c) the public is the beneficial owner of the Goodwood property. Since members of the public would include an entity or a foreigner, ABSD is chargeable. Abdullah JC rejected all these arguments. The learned judicial commissioner held that there was no active or extant beneficial ownership in relation to the Goodwood property purchased by the charitable trust. Hence, ABSD was not payable.

15.4 In *MKC Associates Co Ltd v Kabushiki Kaisha Honjin*[7] ("*MKC Associates*"), Woo Bih Li J had to consider whether a trust arose in the context of an equitable mortgage of shares. This point was important because the plaintiff relied on the existence of a trust to ground claims in dishonest assistance and knowing receipt. Woo J rejected the argument that a trust arose over the shares by virtue of the equitable mortgage. The learned judge held that the mortgagee's interest in the mortgaged property is only co-extensive with his interest in the underlying debt obligation. In contrast, the existence of a trust is not dependent on the co-existence of an underlying debt obligation. The secured creditor (namely, the mortgagee) does not have a beneficial interest in the property in a similar manner as a beneficiary of an express trust. Rather, the mortgagee has priority in relation to the mortgaged property for the purposes of satisfying the underlying debt.

15.5 *Fong Wai Lyn Carolyn v Kao Chai-Chau Linda*[8] is part of a long running legal saga which has spawned many reported and unreported judgments. This present case was concerned with, *inter alia*, the interpretation of a trust deed and the issue as to who owned the beneficial interest of some company shares pursuant to a trust deed. Steven Chong JA found, as a matter of interpretation, that the beneficial interest of the shares vested in the estate of the late Peter Fong. The court then had to consider whether the trustee was obliged to comply with the direction of the executors of the estate of Peter Fong in relation to the exercise of the voting rights attached to the shares and the disposal of these shares. Chong JA held that since the trust deed provided for the trustee to vote according to the directions of the beneficiary, it follows that the trustee is obliged to comply with the direction from the executors of the estate.

7 [2017] SGHC 317.
8 [2017] 4 SLR 1018.

Resulting trusts

15.6 The case of *BMM v BMN*[9] dealt with very unusual facts. Mr Y purportedly married Ms X in 1999 and had twins with her in 2000. In 2001, Mr Y added Ms X as a joint tenant to a property which Mr Y bought before the marriage. Unfortunately, Mr Y subsequently discovered that the marriage was void because Ms X was not granted a decree absolute of her earlier marriage when Mr Y and Ms X "married". Therefore, Mr Y's and Ms X's marriage was void. It also turned out that the twins were not Mr Y's biological children. Their biological father was Ms X's former colleague. In this case, Mr Y sought a declaration that Ms X held the property on a resulting trust for him. Mr Y's case was that Ms X's name was added so that Mr Y could enjoy discounted interest mortgage rates with the bank because Ms X was a Singaporean and Mr Y was a foreigner. He was solely responsible for the mortgage payments and clarified to Ms X that he would remain the sole beneficial owner. Foo Tuat Yien JC applied *Chan Yuen Lan v See Fong Mun*[10] ("*Chan Yuen Lan*") to the present case. First, there is a presumption of resulting trust in favour of Mr Y because Mr Y made all financial contributions to the property. Second, the presumption of advancement was *prima facie* applicable in the present context. However, the presumption of advancement was inapplicable because there was sufficient evidence showing that Mr Y did not intend to benefit Ms X. It was crucial to note that Ms X had filed a declaration in the divorce proceedings in the US confirming Mr Y's version of events in relation to the property. Therefore, Foo JC allowed Mr Y's claim for a resulting trust. While the learned judge correctly applied the framework in *Chan Yuen Lan*, perhaps a more efficient way of analysing this case is to tackle the question whether there was direct evidence in support of the contention of an absence of intention by Mr Y to benefit Ms X rather than utilising the twin presumptions of resulting trust and advancement.

15.7 *Chia Kok Weng v Chia Kwok Yeo*[11] dealt with a family dispute with facts stretching back 40 years.[12] This is potentially a very significant case because of the introduction of the concept of a "family compact". In 1978, the patriarch and matriarch bought a house at 37 Jalan Kechubong and registered it as tenants-in-common in equal shares in the name of patriarch, matriarch and one of their sons, Weng. The patriarch obtained a bank loan to finance the purchase of the property. In 1984,

9 [2017] 4 SLR 1315.
10 [2014] 3 SLR 1048.
11 [2017] 2 SLR 964.
12 See Kelvin Low & Alvin See, "Recent Developments: Presumed Resulting Trusts, Vitiating Factors for Trusts, Interrupting Adverse Possession, and Abandonment of Leasehold Covenants" (2018) 7(2) *Property Law Review* 131.

the patriarch's business fell into financial difficulties. The patriarch transferred his one-third share in the property to another son, Yeo, for the stated purchase price of $150,000 in 1984. Yeo did not pay this sum to the patriarch but redeemed the pre-existing bank loan with a new bank loan in Yeo's name. Subsequently, in 1987, the matriarch transferred her one-third share to a daughter, Chia. Concurrently, Weng transferred his one-third share to Yeo. Neither Chia nor Yeo paid the stated purchase price in these transactions. Instead, they jointly discharged the bank loan in Yeo's name using their central provident fund ("CPF") and by taking up another fresh housing loan. In 1991, Yeo transferred one-third share to his wife, Mdm Ng. Mdm Ng did not pay the stated purchase price to Yeo but paid money to the bank using her CPF. Furthermore, Mdm Ng was added as a co-borrower and co-mortgagor in relation to the bank loan. Mdm Ng later provided money to rebuild the property from a one-storey bungalow to a three-storey bungalow in 1999. Subsequently, Chia sold her one-third share of the property to Yeo and Mdm Ng after a legal dispute in relation to rebuilding the property. Chia, in her capacity as administratrix of the patriarch's estate, sued Yeo, Mdm Ng and Weng and claimed that Mdm Ng and Yeo held two-thirds of the property on trust for the estate because (a) Yeo did not provide valuable consideration for the 1984 transfer, (b) Weng held the initial one-third share in the property on trust for the father, meaning there was a breach of trust by Weng when he transferred the one-third share to Yeo in 1987 and Yeo was a constructive trustee of that one-third share, and (c) Yeo's transfer of the one-third share to Mdm Ng was in breach of trust and so his wife received her one-third share as a constructive trustee. Weng also filed a claim and asserted that he held the one-third share in 1978 absolutely. Weng's case was that when he transferred his one-third share to Yeo in 1987, this gave rise to a trust; Yeo then breached the trust when he transferred the one-third share to Mdm Ng in 1991. The estate's and Weng's claims were both dismissed. Only Weng appealed. Therefore, the present appeal proceeded on the basis that Weng owned, absolutely, the one-third share in 1978 and Yeo held the one-third share transferred from the patriarch absolutely in 1984. The issue in contention in this appeal was the 1987 transfer from Weng to Yeo. In other words, was the presumption of resulting trust rebutted in relation to this transfer?

15.8 The Court of Appeal agreed with the trial judge's finding that there was a "family compact" between the family members. Judith Prakash JA said that the various transfers were not true sale and purchase transactions. Instead, "it seems that the parties were merely co-operating with each other so that funds could be raised for the Property to be kept within the family, without having any regard to who

were the actual owners of the Property".[13] The Court of Appeal found that the "family compact" was to save the property from foreclosure. Thus, the existence of the "family compact" is equivocal as to whether Weng intended to make a gift to Yeo or whether the true intention was for Yeo to hold the property on trust for Weng in relation to the 1987 transfer. Ultimately, Prakash JA held that Weng did not intend to make a gift to Yeo in 1987 because Weng was not earning much as a plumber. The learned judge said it was inconceivable for Weng to give away his most valuable asset given that Weng was in a financially difficult situation. Furthermore, a gift was improbable in light of the fact that Yeo was a freshly minted engineer with better career and financial prospects as compared to Weng.

15.9 There are several significant aspects about this decision. First, this case demonstrates that the existence of a "family compact" may be used to prove that certain transfers of property were not meant to be a gift. This may be extremely useful in families who transfer their properties or company shares to one another without giving much thought as to their individual beneficial entitlements. Second, this case is startling because the Court of Appeal allowed the resulting trust claim after close to 30 years. Coupled with the introduction of the concept of the "family compact", the present author predicts that this decision will be used in future litigation involving families and transfers of property. Third, the Court of Appeal downplayed the significance of Weng not disclosing any interest in private property to the relevant authority when he acquired a Housing and Development Board ("HDB") flat. Such a false declaration to HDB was implicitly not regarded as tainting the resulting trust claim. This is consistent with the Court of Appeal's judgment in *Cheong Kok Leong v Cheong Woon Weng*.[14] The Court of Appeal's liberal attitude in relation to the issue of "tainting" in this respect is somewhat surprising when contrasted with their stern view on illegality in *Ting Siew May v Boon Lay Choo*,[15] which involved a post-dated option to purchase. A possible rationalisation of this difference in attitude is that the assertion of a resulting trust is an independent property claim, which is not tainted by the illegality involving the false declaration to HDB. Further, the resulting trust claim would not stultify[16] the Housing and Development Act[17] because the relevant authorities could still take the necessary sanctions against the person who made the false declaration.

13 *Chia Kok Weng v Chia Kwok Yeo* [2017] 2 SLR 964 at [34].
14 [2017] SGCA 47.
15 [2014] 3 SLR 609.
16 On stultification, see *Ochroid Trading Ltd v Chua Siok Lui* [2018] 1 SLR 363.
17 Cap 129, 2004 Rev Ed.

15.10 *Tan Yok Koon v Tan Choo Suan*[18] ("*Tan Yok Koon*") is a messy family dispute involving shares in a company which was moved around within family members over a span of close to 50 years. The Court of Appeal held that in order to determine whether a gift was intended the court had to assess objectively the transferor's subjective intention at the time of the transfer. In this context, Andrew Phang Boon Leong JA held that the rule in *Shephard v Cartwright*[19] that subsequent evidence of the transferor's intention in the transferor's favour were inadmissible as evidence ought to be relaxed.[20] In other words, the court adopts a broad view of admissibility of evidence and ascribes the proper weight to the evidence rather than subscribes to a strict rule which bars subsequent evidence. The court also made several interesting observations about the fiduciary duties in relation to a resulting trustee. First, "[it] is certainly *not the case* that *every* resulting trustee is subject to a fiduciary relationship".[21] Second, "in the rare case, it may well be that the *facts and circumstances* leading to the imposition of a resulting trustee may also disclose an undertaking by the trustee – whether [*express or implied*] – to act in a certain way" [emphasis in original].[22] Third, "once the trustee is affected with *the knowledge* that he is not entitled to the beneficial interest in the property, his/her *conscience* is affected such that the equitable jurisdiction to enforce trusts *can* be invoked to impose *fiduciary duties* on him" [emphasis in original].[23]

15.11 *Pereira Dennis John Sunny v Faridah bte V Abdul Latiff*[24] ("*Pereira Dennis*") is a very significant case in this area. The plaintiff husband and defendant wife were married under Syariah law on 28 December 1995. They had a daughter and acquired four properties in joint names during the course of their marriage. The husband filed a suit against the wife seeking a determination of the parties' respective shares of the four properties in the High Court. Concurrently, divorce proceedings were happening in the Syariah Court. The present civil suit commenced on 6 November 2015, whereas the divorce proceeding in the Syariah Court started on 29 March 2016. An application to stay was taken out and denied by the court.[25] While it is technically correct that the civil courts in Singapore has the jurisdiction to deal with issues of

18 [2017] 1 SLR 654.
19 [1955] AC 431.
20 On this issue, see generally James Lee & Man Yip, "'Less Than Straightforward' People, Facts and Trusts: Reflections on Context" [2013] *The Conveyancer and Property Lawyer* 431.
21 *Tan Yok Koon v Tan Choo Suan* [2017] 1 SLR 654 at [196].
22 *Tan Yok Koon v Tan Choo Suan* [2017] 1 SLR 654 at [196].
23 *Tan Yok Koon v Tan Choo Suan* [2017] 1 SLR 654 at [198].
24 [2017] 5 SLR 529.
25 See *Pereira Dennis John Sunny v Faridah bte V Abdul Latiff* [2016] SGHCR 9 and *Pereira Dennis John Sunny v Faridah bte V Abdul Latiff* [2017] 5 SLR 529 at [15].

property ownership while the Syariah Court has the power to deal with divorce and division of matrimonial property of Muslims, it is extremely cost-inefficient for the parties to go through two rounds of civil litigation. In other words, under the approach of this case, the parties have to, first, litigate in the civil court to determine the proprietary entitlement of the parties; and second, litigate in the Syariah Court to divide the matrimonial property of the parties. There is a strong case for the position that it is more advantageous for the matter to be stayed and dealt with entirely in the Syariah Court. After all, the financial contribution of the parties may be taken as one of the factors in deciding on the issue of dividing the matrimonial property of the couple.

15.12 In determining the resulting trust issue, Chan Seng Onn J applied the principle articulated by the Court of Appeal in *Su Emmanuel v Emmanuel Priya Ethel Anne*[26] ("*Su Emmanuel*") that mortgage payments cannot be taken into account in calculating the shares of the parties unless they are referable to a prior agreement between the parties at the time the loan was obtained. The learned judge interpreted the recent Court of Appeal decision of *Tan Yok Koon*[27] as emphasising two factors: (a) the persons who took on the liability for the mortgage; and (b) the ultimate source of the funds that would be used to repay the loan. The learned judge interpreted previous case law as suggesting that the former factor is only one piece of the puzzle and the latter point as being more important. Chan J found that there was an agreement between the parties that in respect of the mortgage, the plaintiff would service all the mortgage instalments. According to the learned judge, this meant that the plaintiff should be taken to have contributed entirely to the acquisition of the four properties. Thus, there was *prima facie* a presumption of a resulting trust in favour of the plaintiff.

15.13 It is suggested that the point about an agreement between the parties in respect of the mortgage needs further unpacking in future cases. This point was first made in *Lau Siew Kim v Yeo Guan Chye Terence*[28] ("*Lau Siew Kim*") and endorsed subsequently in *Su Emmanuel*. It should be noted that the Court of Appeal in *Lau Siew Kim* referred to *Cowcher v Cowcher*[29] for the concept of the prior agreement in relation to mortgage payments. Therefore, it is apposite to refer to *Cowcher v Cowcher* in detail to understand this point. Bagnall J reasoned extensively as follows:[30]

26 [2016] 3 SLR 1222.
27 *Tan Yok Koon v Tan Choo Suan* [2017] 1 SLR 654 at [142].
28 [2008] 2 SLR(R) 108.
29 [1972] 1 WLR 425.
30 *Cowcher v Cowcher* [1972] 1 WLR 425 at 431.

> Suppose a conveyance to A for £24,000 with admittedly providing £8,000 out of his own free available moneys. The remaining £16,000 may be provided by B in a number of ways: (i) out of his own free available moneys; (ii) by loan from a third party; (iii) by loan from A; and (iv) by a loan secured by a mortgage on the freehold of the property. Cases (i) and (ii) are indistinguishable and will give B, if no contrary intention, a two-thirds interest under a resulting trust, leaving with one-third. In cases (iii) and (iv) A is involved because he either lends the money or it is raised on property in which he has an interest. In my judgment, in such a case prima facie B will also have a two-thirds interest because he or his obligation to repay a loan has been the source of £16,000 of the purchase money. But suppose that at the time A says that as between himself and B he, A, will be responsible for half of the mortgage repayments, a different result ensues. Though as between A and B and the vendor A has provided £8,000 and B £16,000, as between A and themselves A has provided £8,000 and made himself liable for the repayment of half the £16,000 mortgage namely a further £8,000, a total of £16,000; the resulting trust will therefore be as to two-thirds for A and one-third for B-the reverse of the former situation. It is significant to observe, particularly when one comes to consider the husband and wife cases, that A's agreement to share equally in the mortgage repayments has not produced overall equality, but has given A a larger share than B; overall equality would be produced if either A agreed to be responsible for one-third of the mortgage repayments, £4,000, or *A agreed to pay half those repayments and also to treat B as having provided half of A's contribution of £8,000 in effect a gift of £4,000 from A to B.* A similar equality would be produced if the 8,000, though nominally paid by A, in fact came from a common fund to which A and B were jointly entitled and, though B nominally raised the £16,000 on mortgage, A and B agreed as between themselves to be equally liable for this repayment. [emphasis added]

15.14 Bagnall J's words in italics above are crucial and appear to have been missed out in subsequent Singapore cases. While a prior agreement in relation to the mortgage is a prerequisite before payments to the mortgage may be taken into account in determining the parties' share under a resulting trust, there is a prior inquiry which was under-investigated in *Pereira Dennis*. It is a question of fact whether a co-owner who has agreed to pay for the mortgage payments had the intention of treating the other co-owner as providing the consideration. In other words, in some situations, the paying co-owner is making a gift of his contributions to the mortgage payments to the other co-owner. This inquiry mirrors the investigation into the applicability of presumption of advancement in the context of husband and wife. Thus, it should not be automatically assumed that if there was an agreement between the parties that one party would service a joint mortgage that a presumption of resulting trust would apply without considering the corresponding inquiry whether a gift was intended. This intention to

benefit the other co-owner analysis is also supported by Sundaresh Menon CJ's judgment in *Su Emmanuel*,[31] where his Honour made a similar point in relation to equitable accounting.

15.15 A possible counter-argument to the critique above is that the analysis is over-refined. It could be said that the same inquiry, that is, the intention to benefit the other co-owner is embedded in the investigation whether the presumption of advancement is applicable. However, it is suggested that there is a subtle yet important distinction between both inquiries. In the prior agreement on the mortgage repayment analysis, the inquiry focuses on whether the parties have reached a prior agreement in relation to the repayment of the mortgage. While the identity of the person paying the mortgage instalments is important in the agreement between the parties, this inquiry must necessarily take into account the follow-up issue, notwithstanding one party has undertaken to pay the mortgage, whether the paying co-owner intended to make a gift of the contribution to the other co-owner. If there was indeed such an intention, then the presumption of resulting trust and the corresponding presumption of advancement are not engaged at all. The property would therefore be held by the parties as joint tenants both in law and equity. The agreement as to the mortgage repayment is assessed at the time when the loan is undertaken. In contrast, the presumption-of-advancement analysis proceeds on the assumption that the paying co-owner has successfully invoked the presumption of resulting trust in his favour. The inquiry then proceeds on the presumption of advancement, which is centred on the issue of whether the co-owner intended to make a gift of the property to the other co-owner. This is a slightly different inquiry to the issue of whether the co-owner intended a gift of the contribution of the mortgage payment to the other co-owner.

15.16 In *Pereira Dennis*, since the plaintiff and defendant were married and had a good relationship, the presumption of advancement was held to be *prima facie* applicable. However, the learned judge held that the presumption of advancement was rebutted in relation to two of the properties which were investment properties. Chan J said that since the plaintiff husband collected all the rental proceeds and did not share the proceeds with the defendant wife, the plaintiff's intention was that these were his personal investments. Hence, the plaintiff's claim for resulting trusts succeeded with respect to the two investment properties. In contrast, the presumption of advancement in favour of the defendant applied to the two properties which were used as the couple's matrimonial home. With respect, Chan J's finding of fact that since the plaintiff kept all the rent in relation to the investment property meant

31 *Su Emmanuel v Emmanuel Priya Ethel Anne* [2016] 3 SLR 1222 at [105].

that the presumption of advancement did not apply should not be regarded as a general proposition to be applied across the board. In other contexts, it could very well be that there was a prior informal arrangement for the rent to be collected by the husband to service the mortgage which was jointly undertaken by the husband and wife. This would then lead to the inference that the mortgage sum should be attributed to both the husband and wife equally.[32] In fact, the defendant wife in *Pereira Dennis* asserted that the understanding was that the plaintiff would use the rental proceeds to discharge the mortgage.[33] However, Chan J said that the defendant did not bother or take steps to find out how the plaintiff managed the finances and rejected this contention.

15.17 It is possible to present a counter-narrative to the holding of *Pereira Dennis*. The husband and wife saw themselves as a family unit and divided the labour among themselves. As in many families, the division of labour is along traditional gender roles – the husband undertook the financial aspects of the family whereas the wife took care of the household matters including taking care of the children. Before their relationship became strained, they implicitly regarded the acquisitions of the various properties as belonging jointly to both of them. This explains why the properties were all registered in joint tenancies. While it is true that that the wife did not ask the husband about the rent, this did not mean that parties did not regard the properties to belong to them both jointly. It was an implicit assumption in the family that the rent would be used to discharge the mortgage and any additional contribution by the husband to the mortgage was a gift to the wife. To hold that the husband held the investment properties on resulting trusts simply because he handled the financial matters, collected the rent and did not share the rent with his wife is, with respect, to reward men for performing traditional gender roles while, at the same time, unfairly impoverishing women who discharge caretaking duties in the family. It is also interesting to contrast the case of *Pereira Dennis* with the recent Judicial Committee of the Privy Council's decision of *Marr v Collie*.[34] The Privy Council adopted the sensible starting point that joint legal ownership is joint beneficial ownership even where there is a commercial dimension to the acquisition of the property. Lord Kerr said that even though the properties were acquired as an investment, this did not mean that "the decision to have the legal ownership declared to be jointly shared is bereft of significance".[35]

32 See, *eg*, *Laskar v Laskar* [2008] 1 WLR 2695.
33 *Pereira Dennis John Sunny v Faridah bte V Abdul Latiff* [2017] 5 SLR 529 at [51].
34 [2017] 3 WLR 1507.
35 *Marr v Collie* [2017] 3 WLR 1507 at [40].

15.18 Another interesting aspect of *Pereira Dennis* is the rejection of the plaintiff's explanation that the property was registered in a joint tenancy because his intention was for the rule of survivorship to apply; it was not his intention to give the defendant any beneficial entitlement while he was still alive. Hence, the plaintiff argued that the presumption of advancement in favour of the defendant was rebutted. Chan J rejected this argument and said that it was not enough for the plaintiff to "merely assert that his intention was exclusively for the rule of survivorship to operate" to rebut the presumption of advancement. It is interesting to contrast, this holding with the cases of *Clelland v Clelland*[36] and *Neo Hui Ling v Ang Ah Sew*,[37] where an assertion that the property was registered in a joint tenancy simply for a right of survivorship to apply and hence triggering a presumption of resulting trust was accepted. Thus, there appears to be contradictory High Court decisions on this point.

Constructive trusts

15.19 There was also a discussion of the common intention constructive trust in *Pereira Dennis*. Chan J found that there was no sufficient and compelling evidence of a common intention constructive trust over all the four properties. In relation to the investment properties, the fact that the rental income was not shared with the defendant proved fatal to the claim for a common intention constructive trust.

15.20 In *Zhou Weidong v Liew Kai Lung*,[38] the plaintiff sued the first defendant and the third defendant for misrepresentation, breach of fiduciary duty, unjust enrichment, constructive trust and resulting trust for their investments which went awry. The plaintiff also sued the third defendant company on the basis that the investments were transferred to them. The fourth and fifth defendants, who were individuals, were also sued. One of the plaintiff's claim was pleaded on the basis of a remedial constructive trust. Audrey Lim JC dismissed this particular claim. The learned judicial commissioner said that in order to succeed, the plaintiff had to establish some proprietary link from the plaintiff's money via rules of following and tracing to a substitute property held by the defendant before the court may declare a remedial constructive trust. Since the money was dissipated, the claim for a remedial constructive trust failed. The fact that the money was already dissipated also proved fatal to the plaintiff's claim for a *Quistclose*[39] trust. Lim JC

36 [1945] 3 DLR 664.
37 [2012] 2 SLR 831.
38 [2018] 3 SLR 1236.
39 *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567.

held that for a *Quistclose* trust to exist, the property must still be identifiable in the hands of the recipient.

15.21 *CPIT Investments Ltd v Qilin World Capital Ltd*[40] dealt with an equitable mortgage of company shares. The mortgagee was found to be not entitled to sell the shares after a careful interpretation of the loan agreement and surrounding facts. A corresponding issue then arose as to what is the basis on which the equitable mortgagee held the proceeds of the sale of the company shares. After an exhaustive review of the cases, Vivian Ramsey J held that there is a constructive trust when an equitable mortgagee is in possession of the proceeds of the sale in excess to those needed to discharge the mortgage and expense of the sale. Further, it would be unconscionable for the mortgagee to assert a beneficial interest in the proceeds of the sale in excess of the loan. The element of unconscionability gave rise to fiduciary duties on the equitable mortgagee's part over the excess proceeds of the sale, which would, in turn, form the basis for the declaration of an institutional constructive trust.

Fiduciary relationships

15.22 The Court of Appeal made several important general observations on fiduciary law in *Tan Yok Koon*. First, "the hallmark of a fiduciary obligation is that the fiduciary is to act in the interests of another person".[41] Second, "the label of 'fiduciary' is a *conclusion* which is reached only once it is determined that particular duties are owed" [emphasis added by the Court of Appeal in *Tan Yok Koon*].[42] Third, "*fiduciary obligations* [*are voluntarily undertaken*] … the undertaking arises where the fiduciary *voluntarily places himself in a position* where the law can *objectively* impute an intention on his or her part to undertake those obligations" [emphasis in bold italics and/or italics in original].[43] Finally, "not every duty owed by a fiduciary is *necessarily* a fiduciary duty. However … the duty to perform a trust *honestly* and *in good faith for the benefit of the beneficiaries* is fiduciary in nature" [emphasis in original].[44]

40 [2017] 5 SLR 1.
41 *Tan Yok Koon v Tan Choo Suan* [2017] 1 SLR 654 at [192].
42 James Edelman, "When Do Fiduciary Duties Arise?" (2010) 126 LQR 302, endorsed by Andrew Phang Boon Leong JA in *Tan Yok Koon v Tan Choo Suan* [2017] 1 SLR 654 at [193].
43 *Tan Yok Koon v Tan Choo Suan* [2017] 1 SLR 654 at [194].
44 *Tan Yok Koon v Tan Choo Suan* [2017] 1 SLR 654 at [194].

15.23 *First Asia Capital Investments Ltd v Société Générale Bank & Trust*[45] confirmed the proposition that banks do not ordinarily owe fiduciary duties to its customers. Instead, the banker-and-customer relationship is primarily contractual in nature. In order for a bank to be a fiduciary, the bank must have undertaken, expressly or impliedly, to act as a fiduciary for its customers. On the facts, there was no fiduciary relationship. First, the accounts were execution-only accounts where the bank had to act on the customer's instructions. In other words, the bank did not have any discretion on how to deal with the customer's property. A discretion or power to deal with the principal's property is a key indicia of a fiduciary relationship. Second, the contractual documents clearly excluded the possibility of a fiduciary relationship.

15.24 *Nordic International Ltd v Morten Innhaug*[46] is a case where the plaintiff company sued its director, Morten, for breach of fiduciary duty. Chong JA allowed the claim as he found that Morten assigned a time charter to a related party so that he could earn fees. This was regarded as a form of self-dealing. Furthermore, by facilitating the assignment, Morten also stood to profit by gaining the option to purchase the ship at a discounted price after the completion of the charter period. In addition, Chong JA refused to grant Morten relief from liability under s 391 of the Companies Act[47] because Morten did not act honestly, reasonably and that it was unfair to excuse him for his default.

Unconscionable receipt and dishonest assistance

15.25 *MKC Associates* contains a useful summary of the law on dishonest assistance. According to Woo J:

> (a) "Dishonesty is established if the defendant has such knowledge of the irregular shortcomings of the transactions that ordinary honest people would consider it to be a breach of standards of honest conduct if he failed to adequately query them."[48]
>
> (b) "[Although] a dishonest state of mind is a subjective mental state, the standard by which the law determines whether it is dishonest is objective".[49]
>
> (c) "[Carelessness] is not dishonesty".[50]

45 [2017] SGHC 78.
46 [2017] 3 SLR 957.
47 Cap 50, 2006 Rev Ed.
48 *MKC Associates Co Ltd v Kabushiki Kaisha Honjin* [2017] SGHC 317 at [192].
49 *MKC Associates Co Ltd v Kabushiki Kaisha Honjin* [2017] SGHC 317 at [193].
50 *MKC Associates Co Ltd v Kabushiki Kaisha Honjin* [2017] SGHC 317 at [194].

(d) "[Acting] in reckless disregard of other's rights or possible rights could also be a tell-tale sign of dishonesty".[51]

(e) In deciding whether the defendant had acted honestly, "the court will look at all the circumstances known to the defendant at the time, and also have regard to his personal attributes such as his experience and intelligence, and the reason(s) why he acted as he did".[52]

15.26 *Von Roll Asia Pte Ltd v Goh Boon Gay*[53] is an important decision because it considered the remedies which may be granted for dishonest assistance.[54] In this case, the plaintiff company sued the first defendant who was its former Asian regional head of sales for, *inter alia*, paying unauthorised commissions and diverting the plaintiff's clients to the third-defendant company. In the alternative to its claim for losses, the plaintiff claimed for an account of profits against the third defendant. Chan J applied the English Court of Appeal's decision in *Novoship (UK) Ltd v Yuri Nikitin*[55] ("*Novoship*") and held that an account of profits may be ordered against a dishonest assistant. However, this remedy is limited by two principles. First, Chan J said, "a dishonest assistant will only be liable to account for profits gained as a result of a 'sufficiently direct causal link' to its assistance".[56] Second, the learned judge endorsed the approach in *Novoship* that an account of profits is not an automatic remedy. In other words, the account of profits would be withheld as a remedy if it was disproportionate in relation to the form and extent of the wrongdoing. On the facts, Chan J had no difficulty in holding that the unauthorised commissions and diversion of the plaintiff's clients to the third defendant had a sufficient causal link with the third defendant's misconduct in assisting the first defendant to breach his fiduciary duties. There was also no reason to exercise the discretion to withhold the remedy of account of profits against the third defendant since the third defendant was one of the corporate vehicles through which the breaches of fiduciary duties were committed.

51 *MKC Associates Co Ltd v Kabushiki Kaisha Honjin* [2017] SGHC 317 at [194].
52 *MKC Associates Co Ltd v Kabushiki Kaisha Honjin* [2017] SGHC 317 at [197].
53 [2017] SGHC 82.
54 On this issue, see generally Alvin W-L See, "Unauthorised Fiduciary Gains and the Constructive Trust" (2016) 28 SAcLJ 1014, Man Yip, "Third Parties' Liability for Receipt of Misapplied Corporate Assets: The Relevance of Knowing Receipt?" (2017) 11(3) *Journal of Equity* 293, Jamie Glister, "Diverting Fiduciary Gains to Companies" (2017) 40(1) *UNSW Law Journal* 4 and Joachim Dietrich & Pauline Ridge, *Accessories in Private Law* (Cambridge University Press, 2015) at pp 288–297.
55 [2015] 1 QB 499.
56 *Von Roll Asia Pte Ltd v Goh Boon Gay* [2017] SGHC 82 at [115].

Equitable compensation

15.27 *Low Heng Leon Andy v Low Kian Beng Lawrence*[57] was a case where the learned judge had to decide on the amount of equitable compensation payable to the plaintiff. The plaintiff successfully claimed against the defendant, the estate of his grandmother, in proprietary estoppel. His claim was that his grandmother had promised him that he could stay in the grandmother's flat for as long as he wished. In reliance on this promise, the plaintiff suffered various forms of detriment such as forgoing regular full-time employment to take care of his grandmother and spending various sums of money. Quentin Loh J said that the "fundamental consideration is proportionality between the expectation, the detriment and the remedy. The aim is to award the remedy which does the minimum necessary to satisfy the equity which has arisen".[58] After a careful consideration of all the evidence, Loh J awarded the plaintiff $100,000.

57 [2017] SGHC 200.

58 *Low Heng Leon Andy v Low Kian Beng Lawrence* [2017] SGHC 200 at [19].