

# THE COMMON INTENTION CONSTRUCTIVE TRUST: EIGHT YEARS ON

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## I. Introduction

1 In 2014, the Court of Appeal in *Chan Yuen Lan v See Fong Mun*<sup>1</sup> (“*Chan Yuen Lan*”) set out a general six-step framework for determining how the beneficial interest in property is to be apportioned between parties. It also adopted Lord Neuberger’s minority approach in *Stack v Dowden*<sup>2</sup> as the appropriate approach to determining whether there is sufficient and compelling evidence<sup>3</sup> for a common intention constructive trust (“CICT”) to arise.<sup>4</sup>

2 Since *Chan Yuen Lan*, litigants in cases concerning the apportionment of beneficial interests in property have frequently advanced CICT claims. Indeed, several judges have noted that despite the structure of the *Chan Yuen Lan* approach:<sup>5</sup>

... in practice the foremost claim that is put forward is usually the common intention constructive trust, with an alternative basis relied upon of a proprietary estoppel; the resulting trust is usually the backstop claim.

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1 [2014] 3 SLR 1048 at [161].

2 [2007] 2 AC 432.

3 *Su Emmanuel v Emmanuel Priya Ethel Anne* [2016] 3 SLR 1222 at [83].

4 *Chan Yuen Lan v See Fong Mun* [2014] 3 SLR 1048 at [153]–[158].

5 *Ng So Hang v Wong Sang Woo* [2018] SGHC 162 at [24], cited with approval in *Koh Lian Chye v Koh Ah Leng* [2020] SGHC 131 at [28].

3 Despite the frequency of CICT claims being made, until 2021, they have been uniformly unsuccessful before the Supreme Court,<sup>6</sup> save for one doubtful exception.<sup>7</sup> Further, because the approach in *Chan Yuen Lan* towards CICTs entailed a rejection of the majority approach in *Stack v Dowden* in favour of Lord Neuberger’s minority approach,<sup>8</sup> developments in England will have limited persuasive value for Singapore. As a result, until the decisions in *Ong Chai Koon v Ong Chai Soon*<sup>9</sup> (“*Ong Chai Koon*”) and *Yeow Jen Ai Susan v Ravindaranath Kalyana Ramasamy*<sup>10</sup> (“*Susan Yeow*”), there were no reliable examples of how the test for making out a CICT can be satisfied.

4 This article seeks to shed further light on how a CICT can be established by looking at *Susan Yeow* and *Ong Chai Koon* in further detail.

## II. Test for a common intention constructive trust

5 After the trilogy of the Court of Appeal decisions in *Chan Yuen Lan*, *Su Emmanuel v Emmanuel Priya Ethel Anne*<sup>11</sup> and *Geok Hong Co Pte Ltd v Koh Ai Gek*<sup>12</sup> (“*Geok Hong Co*”), it appears that the test for establishing a CICT is as follows:

- (a) There continues to be a distinction between
  - (i) whether there is a common intention for both parties

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6 *Buthmanaban s/o Vaithilingam v Krishnavanny d/o Vaithilingam* [2015] SGHC 35 (reversed on appeal on other grounds in *V Nithia v Buthmanaban s/o Vaithilingam* [2015] 5 SLR 1422); *Su Emmanuel v Emmanuel Priya Ethel Anne* [2016] 3 SLR 1222; *Sumoi Paramesvaeri v Fleury, Jeffrey Gerard* [2016] 5 SLR 302; *Chia Hang Kiu v Chia Kwok Yeo* [2016] SGHC 198 (reversed on appeal on other grounds in *Chia Kok Weng v Chia Kwok Yeo* [2017] 2 SLR 964); *BMM v BMN* [2017] 4 SLR 1315; *Pereira Dennis John Sunny v Faridah bte V Abdul Latiff* [2017] 5 SLR 529; *UJT v UJR* [2018] 4 SLR 931; *Ng So Hang v Wong Sang Woo* [2018] SGHC 162; *BUE v TZQ* [2019] 3 SLR 1022; *Geok Hong Co Pte Ltd v Koh Ai Gek* [2019] 1 SLR 908; *Koh Lian Chye v Koh Ah Leng* [2020] SGHC 131; *Lim Kieuh Huat v Lim Teck Leng* [2020] SGHC 181 (affirmed on appeal in *Lim Kieuh Huat v Lim Teck Leng* [2021] 1 SLR 1328).

7 *BMM v BMN* [2017] 4 SLR 1315.

8 *Chan Yuen Lan v See Fong Mun* [2014] 3 SLR 1048 at [153]–[158].

9 *Ong Chai Koon v Ong Chai Soon* [2021] SGHC 76.

10 *Yeow Jen Ai Susan v Ravindaranath Kalyana Ramasamy* [2021] SGHC 94 (albeit only at first instance).

11 [2016] 3 SLR 1222.

12 [2019] 1 SLR 908.

to have some beneficial interest in the property (the “First Question”) and (ii) the common intention of the parties as to each party’s respective shares in the property (the “Second Question”).<sup>13</sup>

This is borne out in particular by the Court of Appeal’s observation in *Geok Hong Co* that “a party would *first have to acquire a beneficial interest*, either by way of an express common intention or generally a direct financial contribution to the purchase price”<sup>14</sup> [emphasis added]. This passage draws from Lord Bridge’s dictum in *Lloyd’s Bank plc v Rosset*<sup>15</sup> (“*Rosset*”). Indeed, just before this passage, the Court of Appeal turned to a passage in *Chan Yuen Lan* where it had referred to both *Rosset* and an earlier Court of Appeal decision, *Tan Thiam Loke v Woon Swee Kheng Christina*<sup>16</sup> (“*Tan Thiam Loke*”), which followed *Rosset*.

(b) Further, in line with the passage above, to answer the First Question, the party making the claim would be required to show either an express common intention or an inferred common intention. An inferred common intention would in general only be found if there are “direct” financial contributions to the purchase price, which in the case of CICTs can include contributions to mortgage repayments.<sup>17</sup> This approach in *Geok Hong Co*, however, appears to be in conflict with a passage in *Chan Yuen Lan*.<sup>18</sup>

(c) As for the Second Question, the claiming party must show a common intention for the property to be shared “in a certain proportion”.<sup>19</sup> In other words, if the common intention does not crystallise into specific

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13 The labels for these two aspects of the inquiry into whether a common intention constructive trust is established were drawn from *Stack v Dowden* [2007] 1 AC 432 at [17] (*per* Baroness Hale), and were also adopted in Lord Neuberger’s minority judgment at [97].

14 *Geok Hong Co Pte Ltd v Koh Ai Gek* [2019] 1 SLR 908 at [83].

15 *Lloyds Bank plc v Rosset* [1991] 1 AC 107 at 132–133.

16 [1991] 2 SLR(R) 595.

17 [1991] 1 AC 107 at 133.

18 *Chan Yuen Lan v See Fong Mun* [2014] 3 SLR 1048 at [112]. This conflict will be discussed later in the article.

19 *UJT v UJR* [2018] 4 SLR 931 at [45].

proportions, it will not be recognised.<sup>20</sup> Evidence of the parties' intentions as to the quantification or their respective shares will usually be done by examining their actions, discussions and statements in relation to the ownership of the property, with the whole course of their dealings as background.<sup>21</sup>

(d) Evidence of the parties' common intention as a whole must be "sufficient and compelling".<sup>22</sup>

(e) At the risk of stating the obvious, the inquiry is into the parties' common intentions, and not any one party's unilateral intentions.<sup>23</sup>

6 What the above cases do not address, however, is what "discussions, statements or actions" would be "sufficient and compelling" to establish a CICT. It is to this question that this article now turns.

### III. When is there sufficient and compelling evidence?

#### A. Difficulties with *BMM v BMN*

7 *BMM v BMN*<sup>24</sup> was a decision of the High Court in 2017. Unfortunately, this decision provides limited guidance for the question of when a CICT is established because the approach adopted by the court is difficult to reconcile with the Court of Appeal's decision in *Chan Yuen Lan*.

8 The facts of the case are rather novel, arising out of the dissolution of a marriage that turned out to be invalid. The purported wife ("W") married the purported husband ("H") in the United States after a Singapore decree *nisi* had been granted but before a decree absolute had been granted.<sup>25</sup> As a result, the

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20 See below at [54]–[65].

21 *Stack v Dowden* [2007] 2 AC 432 at [145], *per* Lord Neuberger.

22 *Su Emmanuel v Emmanuel Priya Ethel Anne* [2016] 3 SLR 1222 at [83].

23 *Su Emmanuel v Emmanuel Priya Ethel Anne* [2016] 3 SLR 1222 at [84].

24 [2017] 4 SLR 1315.

25 *BMM v BMN* [2017] 4 SLR 1315 at [6].

parties' respective shares in a piece of property in Singapore fell to be determined in equity rather than under the Women's Charter.

9 After setting out the *Chan Yuen Lan* framework,<sup>26</sup> the trial judge then proceeded to examine the presumption of resulting trust under step (a), followed by the presumption of advancement under step (e), then the common intention constructive trust under step (b) and direct evidence of the intentions of the party who made a contribution greater than his or her legal share under step (d) of the *Chan Yuen Lan* framework.<sup>27</sup> At the outset, it is apparent that this is neither the sequence in *Chan Yuen Lan* itself nor the usual manner in which claims are advanced as observed in *Ng So Hang*.

10 The parties held the property as joint tenants in law. On step (a), the trial judge found a presumption of resulting trust arising in favour of H, who had made all the payments for the property.<sup>28</sup> However, the trial judge also held that W had made some direct financial contributions because the addition of her name to the loan allowed the couple to obtain a lower interest rate from the bank.<sup>29</sup> Thus, at the end of step (a), W "would have a beneficial interest in the Property in the proportion of the interest saved by [H] to the purchase price of the Property had there been no savings on interest".<sup>30</sup>

11 The trial judge then considered step (e) and held that there was a strong presumption of advancement because the parties thought they were in a marriage, W was financially dependent on H, and they were in a close and loving relationship at the time H transferred the property into the parties' joint names.<sup>31</sup> Leaving aside the disrupted order of the steps, the result at the end of step (e) would then have been that a presumption of advancement arose that H intended to gift W with half the beneficial interest in the property.

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26 *BMM v BMN* [2017] 4 SLR 1315 at [26].

27 *BMM v BMN* [2017] 4 SLR 1315 at [27].

28 *BMM v BMN* [2017] 4 SLR 1315 at [28].

29 *BMM v BMN* [2017] 4 SLR 1315 at [30].

30 *BMM v BMN* [2017] 4 SLR 1315 at [30].

31 *BMM v BMN* [2017] 4 SLR 1315 at [32].

12 Then, the trial judge considered step (b)<sup>32</sup> and the rebuttal stage of step (e) together.<sup>33</sup> With respect, the consolidation of the reasoning for these two steps – step (b) concerning the CICT and step (e) concerning direct evidence to rebut the presumption of advancement – likely gave rise to the difficulties in the trial judge’s reasoning in this case.

13 This is because the intention element at these two stages are conceptually distinct. The presumption of resulting trust and the countervailing presumption of advancement are presumptions in relation to the unilateral intentions of the alleged giving party, in this case H. Specifically, the presumption of resulting trust presumes the absence of H’s intention to benefit W, and is rebutted directly by evidence of an intention to benefit W.<sup>34</sup> In similar vein, the presumption of advancement presumes the reverse unilateral intention on H’s part to benefit W, and is therefore rebutted by evidence of H’s unilateral intentions not to benefit W.

14 In step (b) on the other hand, the inquiry is into whether the parties had a common intention for the beneficial interest in the property to be divided differently from the result in step (a). This intention has to be common to all the parties involved.<sup>35</sup>

15 The final conclusion reached by the trial judge was that H was the sole beneficial owner of the property.<sup>36</sup> To reach this outcome, it would not be enough for H to successfully rebut the presumption of advancement in step (e). That would only take the analysis back to step (a), with the concomitant need to quantify W’s beneficial interest arising out of the reduction in interest rates. The trial judge’s conclusion therefore had to be premised on the CICT in step (b).

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32 That the trial judge analysed the matter at the time of transfer is borne out in *BMM v BMN* [2017] 4 SLR 1315 at [86].

33 *BMM v BMN* [2017] 4 SLR 1315 at [47].

34 *Chia Kok Weng v Chia Kwok Yeo* [2017] 2 SLR 964 at [46]–[48].

35 *Su Emmanuel v Emmanuel Priya Ethel Anne* [2016] 3 SLR 1222 at [84].

36 *BMM v BMN* [2017] 4 SLR 1315 at [97].

16 Yet, the trial judge’s analysis of the facts was focused on the unilateral intentions of H:

(a) H’s awareness of the proprietary consequences of transferring the property into the parties’ joint names.<sup>37</sup>

(b) The parties’ separate finances were considered as a factor rebutting the presumption of advancement.<sup>38</sup>

(c) Other direct evidence “suggest[ing] that [H] did not intend [W] to have any real interest in the property”<sup>39</sup> that the trial judge examined in detail<sup>40</sup> with especial attention given to H’s statements made in US divorce proceedings,<sup>41</sup> before concluding that “the parties’ statements and declarations do not show that [H] intended to give [W] a half-share of the Property”.<sup>42</sup>

17 There is immediately thereafter a leap from the trial judge’s conclusions on H’s intentions to the parties’ common intentions that H would be the sole beneficial owner of the property,<sup>43</sup> thereby divesting W of the limited extent of her direct financial contribution.<sup>44</sup> Further, in considering whether W’s indirect contributions could give rise to a CICT, the trial judge rather confusingly cited a passage from the 2006 edition of Pearce & Stevens<sup>45</sup> which represented the law as it stood before *Stack v Dowden* and *Chan Yuen Lan*.

18 For these reasons, it is respectfully submitted that the reasoning in *BMM v BMN* should be confined to its facts and provides limited guidance for when a CICT can be established.

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37 *BMM v BMN* [2017] 4 SLR 1315 at [49].

38 *BMM v BMN* [2017] 4 SLR 1315 at [50].

39 *BMM v BMN* [2017] 4 SLR 1315 at [54].

40 *BMM v BMN* [2017] 4 SLR 1315 at [55]–[85].

41 *BMM v BMN* [2017] 4 SLR 1315 at [67].

42 *BMM v BMN* [2017] 4 SLR 1315 at [73].

43 *BMM v BMN* [2017] 4 SLR 1315 at [73].

44 *BMM v BMN* [2017] 4 SLR 1315 at [86].

45 Robert Pearce & John Stevens, *The Law of Trusts and Equitable Obligations* (Oxford University Press, 4th Ed, 2006) at p 243.

## IV. Meeting the sufficient and compelling evidence standard

### A. Only success story

19 There is a single case where a plaintiff successfully proved a common intention constructive trust. *Ong Chai Koon* concerned a dispute between the Ong siblings over the ownership of a HDB shophouse in Hougang.<sup>46</sup> The shophouse was registered in the sole name of the defendant Ong Chai Soon<sup>47</sup> (“OCS”). The claim was brought against OCS by all his five siblings collectively.<sup>48</sup>

20 The circumstances leading to the acquisition of the shophouse were thus. The Ong siblings grew up and entered the workforce in a kampong in Lorong Gemilap.<sup>49</sup> During that time, the Ong family ran several family businesses on their kampong land,<sup>50</sup> including a hairdressing salon run by Ong Sor Kim<sup>51</sup> (“OSK”). Another sister, Ong Kim Geok (“OKG”) learnt hairdressing at a vocational institute and went on to work at another hair salon.<sup>52</sup> According to the plaintiffs, their earnings were handed over to their mother, Mdm Ang, who would manage the family’s finances from a communal family fund.<sup>53</sup> OCS, on the other hand, claimed that he kept whatever his father paid him for helping in the poultry slaughtering business.<sup>54</sup> It should be noted that, taking OCS’ case at its highest, this meant that OCS made no contributions to the communal family fund.

21 The family’s kampong land was compulsorily acquired in 1988, and compensation for the acquisition was paid to their father, Mr Ong, and Mdm Ang.<sup>55</sup> The family then moved to two HDB flats in Yishun, Units 172 and 174. It was not disputed that (a) Unit 172 was bought in the parents’ joint names and

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46 *Ong Chai Koon v Ong Chai Soon* [2021] SGHC 76 at [1].

47 *Ong Chai Koon v Ong Chai Soon* [2021] SGHC 76 at [1].

48 *Ong Chai Koon v Ong Chai Soon* [2021] SGHC 76 at [3].

49 *Ong Chai Koon v Ong Chai Soon* [2021] SGHC 76 at [4].

50 *Ong Chai Koon v Ong Chai Soon* [2021] SGHC 76 at [4]–[6] and [52].

51 *Ong Chai Koon v Ong Chai Soon* [2021] SGHC 76 at [6].

52 *Ong Chai Koon v Ong Chai Soon* [2021] SGHC 76 at [5].

53 *Ong Chai Koon v Ong Chai Soon* [2021] SGHC 76 at [8].

54 *Ong Chai Koon v Ong Chai Soon* [2021] SGHC 76 at [8].

55 *Ong Chai Koon v Ong Chai Soon* [2021] SGHC 76 at [9].



paid for in full from the compensation moneys,<sup>56</sup> and (b) Unit 174 was bought with a 100% loan from the HDB in the joint names of OCS and Ong Chai Koon (“OCK”). It was undisputed that OCS did not make any contributions towards repaying the HDB loan.<sup>57</sup> Further, OKG’s unchallenged evidence was that the loan instalments were paid for by Mdm Ang over time using the compensation moneys.<sup>58</sup>

22 Over time, there were changes to the legal ownership of the Yishan flats when Mr Ong and Mdm Ang passed away, and when OCK acquired a flat of his own.<sup>59</sup> By 2016, Ong Sor Mui (“OSM”) had become the sole legal owner of Unit 172, and the joint legal owners of Unit 174 were OCS and OSK.<sup>60</sup> Until the dispute arose, all the Ong siblings had moved out of the Yishun flats and were either living in flats of their own or in the second storey of the shophouse.<sup>61</sup> The Yishun flats were then rented out and the proceeds used to pay for various family expenses.<sup>62</sup> There was no dispute between the siblings that both flats are owned by the siblings in equal shares.<sup>63</sup>

23 How OCS first came to enter into a lease for the shophouse and eventually acquire the same in his sole name were also in dispute.<sup>64</sup> On both these issues, the judge found for the plaintiffs.

24 OKG’s evidence was that the payments for the tender and initial rental of the shophouse<sup>65</sup> and for the setting up of the hairdressing business at the shophouse called Red Point<sup>66</sup> came from the communal family fund managed at the time by Mdm Ang. OCS’s evidence was that he came up with the funds from his own savings and borrowing from Mdm Ang.<sup>67</sup> The judge

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56 *Ong Chai Koon v Ong Chai Soon* [2021] SGHC 76 at [10].

57 *Ong Chai Koon v Ong Chai Soon* [2021] SGHC 76 at [10].

58 *Ong Chai Koon v Ong Chai Soon* [2021] SGHC 76 at [90].

59 *Ong Chai Koon v Ong Chai Soon* [2021] SGHC 76 at [14]–[17].

60 *Ong Chai Koon v Ong Chai Soon* [2021] SGHC 76 at [15]–[17].

61 *Ong Chai Koon v Ong Chai Soon* [2021] SGHC 76 at [18].

62 *Ong Chai Koon v Ong Chai Soon* [2021] SGHC 76 at [17].

63 *Ong Chai Koon v Ong Chai Soon* [2021] SGHC 76 at [89]–[90].

64 *Ong Chai Koon v Ong Chai Soon* [2021] SGHC 76 at [11] and [68]–[70].

65 *Ong Chai Koon v Ong Chai Soon* [2021] SGHC 76 at [56]–[57].

66 *Ong Chai Koon v Ong Chai Soon* [2021] SGHC 76 at [58].

67 *Ong Chai Koon v Ong Chai Soon* [2021] SGHC 76 at [59].

found against OCS because he gave erroneous details on several significant aspects of the tenancy,<sup>68</sup> and even asserted the wrong name for the hairdressing business.<sup>69</sup> It likely also weighed on the judge's mind that (a) OCS could not explain why he would tender for a HDB shophouse lease to run a hairdressing business when he knew nothing about hairdressing,<sup>70</sup> and (b) OCS admitted that he got on poorly with his siblings, in particular OSM, making it improbable that OSM would work for him in his hairdressing business.<sup>71</sup> The judge also gave weight to the fact that OKG, OSK and OSM all worked at the hairdressing business for 28 years for meagre salaries, which suggested that they considered it a family business.<sup>72</sup>

25 OCS could not furnish sufficient evidence that he had the funds to start the hairdressing business.<sup>73</sup> He also lied in his oral evidence, concocting a verbal revenue-sharing arrangement with OKG, OSK and OSM. Further, he was never involved in managing the hairdressing business or the shophouse.<sup>74</sup> The judge therefore considered OCS's "claim to be the sole owner of Red Point business was so lacking in credibility and substance that I have no hesitation in rejecting it".<sup>75</sup>

26 The shophouse was acquired with a loan for the whole of the purchase price from Hong Leong Finance<sup>76</sup> ("HLF"). The competing cases were as follows. OCS asserted that he made a unilateral decision to acquire the shophouse,<sup>77</sup> but at the same time did not seriously challenge OKG's evidence as to how the loan from HLF was repaid.<sup>78</sup> The judge had difficulty believing

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68 Such as (a) the manner of providing the security deposit to the HDB as landlord, (b) the amount of rent payable to the HDB, (c) when the lease commenced, or (d) how long the tenancy had been in place before the HDB offered to sell the shophouse to him: *Ong Chai Koon v Ong Chai Soon* [2021] SGHC 76 at [61]–[64].

69 *Ong Chai Koon v Ong Chai Soon* [2021] SGHC 76 at [63].

70 *Ong Chai Koon v Ong Chai Soon* [2021] SGHC 76 at [53] and [95].

71 *Ong Chai Koon v Ong Chai Soon* [2021] SGHC 76 at [53].

72 *Ong Chai Koon v Ong Chai Soon* [2021] SGHC 76 at [101].

73 *Ong Chai Koon v Ong Chai Soon* [2021] SGHC 76 at [65].

74 *Ong Chai Koon v Ong Chai Soon* [2021] SGHC 76 at [105].

75 *Ong Chai Koon v Ong Chai Soon* [2021] SGHC 76 at [93].

76 *Ong Chai Koon v Ong Chai Soon* [2021] SGHC 76 at [13] and [69].

77 *Ong Chai Koon v Ong Chai Soon* [2021] SGHC 76 at [70].

78 *Ong Chai Koon v Ong Chai Soon* [2021] SGHC 76 at [83].

OCS because he had misstated crucial details such as the year of purchase and the purchase price in an affidavit in earlier proceedings.<sup>79</sup>

27 OKG's evidence, on the other hand, was that (a) the purchase of the shophouse was a collective decision, (b) she was the one who corresponded with the HDB and filled up the application forms, even signing on behalf of OCS, (c) she paid the application fee from her personal funds, and (d) she arranged for the financing from HLF on her own.<sup>80</sup> In this respect, the judge again preferred OKG's evidence because of the deficiencies in OCS's evidence.

28 Finally, in relation to the mortgage instalment payments, OKG's unchallenged evidence<sup>81</sup> was that the funds came from income generated by the hairdressing business in the shophouse<sup>82</sup> and rent from sub-tenants of the commercial space on the ground floor of the shophouse that had been subdivided.<sup>83</sup> She was in charge of procuring sub-tenants<sup>84</sup> and collecting rent from them.<sup>85</sup> OKG was also responsible for making the mortgage repayments and was able to produce the receipts.<sup>86</sup> She also arranged to refinance the mortgage with OCBC on her own initiative in 2010.<sup>87</sup> By contrast, OCS did not even know that OKG had started an audio equipment business in the commercial space used by the hairdressing business without paying rent.<sup>88</sup>

29 Overall, the judge preferred the evidence of OKG and the other Ong siblings and held that there was sufficient and compelling evidence of a common intention for the shophouse to be owned by all the siblings in equal shares.<sup>89</sup>

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79 *Ong Chai Koon v Ong Chai Soon* [2021] SGHC 76 at [70].

80 *Ong Chai Koon v Ong Chai Soon* [2021] SGHC 76 at [68]–[69].

81 *Ong Chai Koon v Ong Chai Soon* [2021] SGHC 76 at [83].

82 *Ong Chai Koon v Ong Chai Soon* [2021] SGHC 76 at [75].

83 *Ong Chai Koon v Ong Chai Soon* [2021] SGHC 76 at [12].

84 *Ong Chai Koon v Ong Chai Soon* [2021] SGHC 76 at [76].

85 *Ong Chai Koon v Ong Chai Soon* [2021] SGHC 76 at [77].

86 *Ong Chai Koon v Ong Chai Soon* [2021] SGHC 76 at [78].

87 *Ong Chai Koon v Ong Chai Soon* [2021] SGHC 76 at [80].

88 *Ong Chai Koon v Ong Chai Soon* [2021] SGHC 76 at [106].

89 *Ong Chai Koon v Ong Chai Soon* [2021] SGHC 76 at [86]–[87].

**B. A claim overturned on appeal**

30 A final case involved a plaintiff who was successful at first instance, but the decision was overturned on appeal. In *Susan Yeow*, RKR and VCR were a married couple in ongoing divorce proceedings. RKR and YJA were classmates in an MBA programme who bought an investment property in RKR's sole name. The action was commenced by YJA in an originating summons seeking an order that YJA had a beneficial interest in the investment property. RKR, the nominal defendant in the claim, agreed with YJA's claim. VCR intervened, claiming a beneficial interest on the basis that the sales proceeds from a former matrimonial home was used to pay for the investment property. VCR claimed a beneficial interest on that basis, and also resisted YJA's claims.

31 The case is a little complex because it was not apparent what the substance of YJA's claim was from her supporting affidavit.<sup>90</sup> The judge took the view that the claim was for a CICT.<sup>91</sup> This is logical as YJA's claim involved an alleged agreement with RKR that would take into account financial contributions that are not relevant in step (a) of *Chan Yuen Lan* in computing their respective beneficial interests.<sup>92</sup>

32 YJA's claim for a common intention constructive trust succeeded at first instance. The claim was based on an alleged oral agreement between YJA and RKR, which the first instance judge accepted on the basis of documentary evidence in the form of banking records showing her financial contributions,<sup>93</sup> as well as RKR's corroborating testimony. The Appellate Division, on the other hand, took a different view of the evidence.<sup>94</sup> It paid particular attention to inconsistencies between RKR's evidence

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90 *Yeow Jen Ai Susan v Ravindaranath Kalyana Ramasamy* [2021] SGHC 94 at [21].  
91 *Yeow Jen Ai Susan v Ravindaranath Kalyana Ramasamy* [2021] SGHC 94 at [23].  
92 *Yeow Jen Ai Susan v Ravindaranath Kalyana Ramasamy* [2021] SGHC 94 at [11]–[15].  
93 *Yeow Jen Ai Susan v Ravindaranath Kalyana Ramasamy* [2021] SGHC 94 at [33].  
94 *Vishnumangalam Chandrasekharan Renuka v Yeow Jen Ai Susan* [2021] SGHC(A) 25 at [24]–[63].

in YJA's claim and his affidavit on evidence in his divorce,<sup>95</sup> and reaching the opposite conclusion on the alleged oral agreement.

### **C. Lessons learnt**

33 In the light of the above cases, Lord Neuberger's prescient dictum in *Stack v Dowden* at [129] bears repeating:

It is hard to identify, particularly in the abstract, the factors which can be taken into account to infer an agreement or understanding, and the effect of such factors. *Each case will be highly fact-sensitive*, and what is relevant, and how, may be contentious, whether one is considering actions, discussions or statements, even where there is no dispute as to what was done or said. [emphasis added]

34 What lessons, then, can be drawn from the above cases about how to successfully establish a CICT on the sufficient and compelling evidence standard?

35 First, both cases illustrate the importance of consistency of testimony with documentary evidence. In *Susan Yeow*, YJA was able to adduce "extensive documentary evidence showing (a) the transfer of S\$30,000 to the respondent for the payment of the balance down payment, (b) the monthly transfers of sums (approximately S\$7,000 to S\$10,000) from her bank account to the respondent's bank account and (c) the transfer of sums by the respondent to OCBC Bank for mortgage loan repayments"<sup>96</sup> mainly in the form of bank records. By contrast, the intervener's case that the sums transferred by the applicant to the respondent were for the respondent's trading losses were "weakly supported, if at all".<sup>97</sup>

36 Similarly, in *Ong Chai Koon*, it was OKG who was able to produce copies of the application forms of the shophouse in her handwriting and the receipts from HLF for mortgage instalment repayments. By contrast, OCS as the legal owner did

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95 *Vishnumangalam Chandrasekharan Renuka v Yeow Jen Ai Susan* [2021] SGHC(A) 25 at [38]–[51].

96 *Yeow Jen Ai Susan v Ravindaranath Kalyana Ramasamy* [2021] SGHC 94 at [33].

97 *Yeow Jen Ai Susan v Ravindaranath Kalyana Ramasamy* [2021] SGHC 94 at [36].

not have copies of these documents, and even asserted facts that contradicted the documents.

37 This places an emphasis on the importance of internal discovery ahead of pleading a case for a CICT or resisting such a claim. In *Ong Chai Koon*, in a previous affidavit in support of a personal protection order application, OCS made many assertions that were inconsistent with facts readily ascertainable from conveyancing documents that could be obtained from the Land Titles Registry, such as the date of purchase and the purchase price. The failure to verify such facts can significantly impair the witness's credibility.

38 As the court observed in *Ong Chai Koon*:<sup>98</sup>

66 Viewed in its totality, I find the evidence of the defendant in this regard to be rather confusing and unsatisfactory. On the other hand, the plaintiffs gave a coherent and consistent account that the set up of the business and the initial payments for the Hougang shophouse was paid for from their mother's funds. KG's evidence is particularly credible because she was able to provide some documentation to show that she was involved in the process of the tender of the tenancy for the Hougang shophouse, and the payments for the issuance of the bank guarantee as security and the initial rental payment to HDB.

39 Second, witnesses need to be warned not to lie in testimony like OCS in *Ong Chai Koon*, only to be caught in cross-examination for making up an oral revenue-sharing arrangement. Such lies to shore up a poor case only serve to diminish the witness's credibility further. In this regard, it should be borne in mind that lawyers are under an ethical duty in r 10(2)(a) of the Legal Profession (Professional Conduct) Rules 2015<sup>99</sup> to "inform the client of the client's responsibilities to the court ... including the client's duties — (a) to be truthful towards the court". Clients and witnesses should be prepared to give their evidence truthfully. At the same time, lawyers should avoid supplanting the witness's evidence.<sup>100</sup>

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98 *Ong Chai Koon v Ong Chai Soon* [2021] SGHC 76 at [66].

99 S 706/2015.

100 *Ernest Ferdinand Perez De La Sala v Compañia De Navegación Palomar, SA* [2018] 1 SLR 894.

40 Third, specific to the issue of common intention, it does appear that there is strength in numbers. While the court is alive to the risk of collusion,<sup>101</sup> it is not a coincidence that the five plaintiff siblings were all in agreement in *Ong Chai Koon*.

41 Fourth, especially in disputes where there are related matrimonial proceedings, parties should be careful about evidence given in earlier affidavits. The alleged oral agreement in *Susan Yeow* was rejected on appeal because it was inconsistent with RKR's affidavit evidence in his matrimonial proceedings with VCR.

42 Finally, especially when documentary evidence is not available due to the effluxion of time,<sup>102</sup> the court will be sensitive to the inherent probabilities in a case as to whether an intention would be common to all the parties involved. Parties' assertions of fact therefore need to be carefully assessed in context. After all, a property investment arrangement to avoid the potential incidence of additional duties that the government may impose in future is believable.<sup>103</sup> Renting premises to start a hairdressing business when one knows nothing about hairdressing,<sup>104</sup> and then paying no attention to either the business or the premises,<sup>105</sup> is inherently incredible, as is the idea that one sibling would work for another for a meagre salary<sup>106</sup> when their relationship was strained.<sup>107</sup>

43 For counsel mounting or resisting a CICT claim, a careful examination of the evidence gathered internally will therefore be critical in shaping the case theory.

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101 *Yeow Jen Ai Susan v Ravindaranath Kalyana Ramasamy* [2021] SGHC 94 at [43].

102 *Ong Chai Koon v Ong Chai Soon* [2021] SGHC 76 at [52].

103 *Yeow Jen Ai Susan v Ravindaranath Kalyana Ramasamy* [2021] SGHC 94 at [12].

104 *Ong Chai Koon v Ong Chai Soon* [2021] SGHC 76 at [53] and [95].

105 *Ong Chai Koon v Ong Chai Soon* [2021] SGHC 76 at [106].

106 *Ong Chai Koon v Ong Chai Soon* [2021] SGHC 76 at [101].

107 *Ong Chai Koon v Ong Chai Soon* [2021] SGHC 76 at [19].

## V. Unresolved questions

44 *Susan Yeow and Ong Chai Koon* provide some much needed positive guidance on what to look out for in establishing a CICT claim. There remain, however, two outstanding issues on the law concerning CICTs that will merit future judicial consideration.

### A. **Relevance of indirect and/or non-financial contributions to establishing common intention**

45 Issue 1 concerns the breadth of the factors that can be taken into consideration in determining whether parties have a common intention that each is to have a beneficial interest in the property. Specifically, the question is whether non-financial contributions alone can ever be sufficient to show a common intention for each party to have *some* share in the property, even when one party made all the direct contributions under the presumption of resulting trust in step (a). Prior to *Chan Yuen Lan*, under the approach in *Rosset* that was approved by the Court of Appeal in *Tan Thiam Loke*,<sup>108</sup> non-financial contributions were categorically treated as irrelevant. In *Rosset*, Lord Bridge, when considering the question of whether a party who made no financial contributions has a share in the property under a CICT, famously expressed the view that:<sup>109</sup>

... direct contributions to the purchase price by the partner ... whether initially or by payment of mortgage instalments, will readily justify the inference necessary to the creation of a constructive trust. But ... it is at least extremely doubtful whether anything less will do.

This passage was directed to a common intention that each party should have *some* share, with consideration of what the parties' *respective shares* should be deferred to a later stage. In other words, the approach in *Rosset* divides the inquiry with respect to CICTs into two stages. The requirement of some financial contribution is said to be part of the first step. As a result, the

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108 *Tan Thiam Loke v Woon Swee Kheng Christina* [1991] 2 SLR(R) 595.

109 *Lloyds Bank plc v Rosset* [1991] 1 AC 107 at 132–133.



absence of a financial contribution categorically closes the door on a claimant at the first stage.

46 Even before *Rosset*, there was weighty judicial disquiet about such a position. In *Gissing v Gissing*, Lord Reid expressed disapproval by drawing a comparison between a wife who contributes directly to mortgage repayments and a wife who contributes to the household expenses, thereby enabling the husband to make the mortgage repayments on his own.<sup>110</sup> His Lordship opined, astutely in this author’s view, that there is “no good reason for this distinction and I think that in many cases it would be unworkable”.<sup>111</sup> As Lord Diplock pointed out in *Gissing v Gissing*, “[i]t may be no more than a matter of convenience which spouse pays particular household accounts, particularly when both are earning”.

47 Beyond questions over which expenses each partner paid for, there also appears to be no legitimate reason to give no recognition to entirely non-financial contributions. An equally forceful argument can be made that one partner undertakes the household chores personally, obviating the need to hire a third party to do that work, thereby enabling the other to make the mortgage payments. Put another way, it is a contribution in kind rather than in cash.

48 Thus, in Lord Neuberger’s minority opinion in *Stack v Dowden* (in the Court of Appeal’s words), his Lordship “nevertheless appeared willing to adopt a broader approach than that adopted in *Rosset* ([96] *supra*) as to the factors which could be taken into account when discerning the parties’ common intention”.<sup>112</sup> This directly confronted the restrictive approach taken in *Rosset*.<sup>113</sup>

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110 *Gissing v Gissing* [1971] AC 886 at 896A.

111 *Gissing v Gissing* [1971] AC 886 at 896G.

112 *Chan Yuen Lan v See Fong Mun* [2014] 3 SLR 1048 at [112].

113 *Chan Yuen Lan v See Fong Mun* [2014] 3 SLR 1048 at [98].

49 However, a differently constituted Court of Appeal in *Geok Hong Co* reverted to the *Rosset* formulation citing an earlier passage in *Chan Yuen Lan*, stating:<sup>114</sup>

In other words, a party would first have to acquire a beneficial interest, either by way of an express common intention or generally a direct financial contribution to the purchase price. Only thereafter would undertaking significant improvements to the property result in an alteration of the proportion of that beneficial interest. [emphasis added]

50 It will likely take a fourth Court of Appeal decision to clarify the amount of flexibility at the First Question stage of the CICT analysis. Neither *Susan Yeow* nor *Ong Chai Koon* shed any light on this question because there was financial contribution towards the purchase of the property by all the claiming parties in both cases. Indeed, both parties made financial contributions in *Chan Yuen Lan* itself as well.

51 This author's view is that Lord Bridge's approach departs too far from the reality of how households manage their mortgage and other expenses. These criticisms were forcefully made by the minority in *Gissing*, and remained unaddressed by Lord Bridge in *Rosset*. Inasmuch as commercial law should rarely depart from the expectations of honest commercial men, the law of property when applied in the joint equitable ownership of homes equally should not depart from the usual manner in which couples manage the household expenses.

52 Further, in principle, since the search is for the actual albeit unexpressed common intention of the parties, there is no reason to restrict the inquiry to a narrow category of conduct, *ie*, financial contributions from which the court can permissibly infer a common intention to share in different proportions from the presumption of resulting trust. How strong an inference is from a non-financial contribution is a matter of weight and there is no need for an exclusionary rule at this stage.

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114 *Geok Hong Co Pte Ltd v Koh Ai Gek* [2019] 1 SLR 908 at [83].

53 Finally, it has been repeatedly said that there are close parallels between a constructive trust and proprietary estoppel.<sup>115</sup> If conduct other than financial contributions is sufficient to establish both a representation relating to property and detrimental reliance on that representation, such that the equity created could only be satisfied by declaring a constructive trust over land in favour of the claimant,<sup>116</sup> it would be aberrant if conduct other than financial contributions could not similarly amount to an inferred common intention.

### **B. Honestly incomplete intentions**

54 Issue 2 concerns the “incomplete” common intention to share differently from the proportions arising out of the presumption of resulting trust. Take for instance the following hypothetical situation. An unmarried heterosexual couple<sup>117</sup> obtain a home in the sole name of the man. All the direct contributions to the purchase price were made by the man. As a result, under a presumption of resulting trust analysis, the man is the presumed sole beneficial owner of the property. However, on the evidence, the parties had reached an agreement that the woman was to have some share in the property, but not on their exact respective shares.<sup>118</sup>

55 Indeed, the court may not need to make findings on the evidence that there is such an “incomplete” common intention. Honest parties would say as much in evidence. Adapting from Lord Reid’s the example of honest litigants in *Gissing v Gissing*,<sup>119</sup> the man would say truthfully that he understood that the woman

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115 See, for instance, *Yaxley v Gotts* [2000] Ch 162 at 176; Susan Barkehall Thomas, “Proprietary Estoppel and Common Intention Constructive Trusts: Is it Time to Abandon the Distinction?” [2014] Sing JLS 168.

116 *Thorne v Major* [2009] UKHL 18.

117 The analysis is agnostic to the precise parameters of the couple. The same reasoning applies if the couple were homosexual, or even if they were married so long as there is no divorce, as was the case in *Chan Yuen Lan v See Fong Mun* [2014] 3 SLR 1048.

118 See, for example, Robert Pearce & John Stevens, *The Law of Trusts and Equitable Obligations* (Oxford University Press, 4th Ed, 2006) at p 298; *Cox v Jones* [2004] EWHC 1486 (Ch) at [66]–[68] and [79]–[80]; *Pinfield v Eagles* [2005] EWHC 477 (Ch) at [37]–[38].

119 *Gissing v Gissing* [1971] AC 886 at 897D.

was to have a share in the property, but it did not occur to him to consider the exact amount of that share. Similarly, the woman would say candidly and honestly that the couple had reached a mutual understanding that she would have some share in the property, but she too never thought about what the amount of that share should be.

56 The common intention of the parties in such a situation is in a sense incomplete in that there is a common intention to depart from the presumed outcome from step (a) of *Chan Yuen Lan*, but no common intention as to what their respective shares should be, *ie*, exactly how the outcome from step (a) should be departed from. Should parties in such a situation then be “beyond the pale of equity’s assistance”?<sup>120</sup>

57 Before *Chan Yuen Lan*, the court was arguably able to quantify the parties’ respective shares in the property based on what the court considered “fair having regard to the whole course of dealing between them in relation to the property”.<sup>121</sup> However, this approach was specifically criticised by Lord Neuberger in *Stack v Dowden*,<sup>122</sup> and consequently rejected by the Court of Appeal in *Chan Yuen Lan* as “a smokescreen for the courts to effect ‘palm tree’ justice in an unprincipled and arbitrary manner”.<sup>123</sup>

58 After *Chan Yuen Lan*, it is no longer open for the court to impute an intention to the parties that they did not in fact have.<sup>124</sup> It follows that it is further not open for the court to consider what the parties might have agreed on as their respective shares if they had given thought to the matter.<sup>125</sup> Further, on one reading of *Chan Yuen Lan*, all gap-filling options are foreclosed to the parties. In *UJT v UJR*, Valerie Thean J opined:<sup>126</sup>

To establish a common intention constructive trust in the context of two parties who have contributed unequal amounts

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120 *Midland Bank v Cooke* [1995] 4 All ER 562 at 575.

121 *Oxley v Hiscock* [2004] 3 WLR 715 at [69].

122 *Stack v Dowden* [2007] 2 AC 432 at [144].

123 *Chan Yuen Lan v See Fong Mun* [2014] 3 SLR 1048 at [156].

124 [2014] 3 SLR 1048 at [156] and [160(b)].

125 *Gissing v Gissing* [1971] AC 886 at 904F.

126 *UJT v UJR* [2018] 4 SLR 931 at [45].

towards the purchase price of a property, *it must be shown that the parties had a common intention*, which may subsist at or arise subsequent to the time the property was acquired, *that the property would be held (a) on trust for both parties **and** (b) in a certain proportion*. Such an intention may be expressed or inferred, but it may not be imputed. Evidence of such intention must be sufficient and compelling. [emphasis added]

59 It does not appear, however, that whether there are gap-filling mechanisms that do not amount to imputing an intention to the parties was considered by the Court of Appeal in *Chan Yuen Lan* or in *UJT v UJR* itself.

60 This final option for filling the gaps can arise only in limited situations – where the court can infer an actual intention of the parties that their respective shares are to be quantified based on what the court considers fair. As Lord Diplock put the matter in *Gissing v Gissing*:<sup>127</sup>

... there is nothing inherently improbable in their acting on the understanding that the wife should be entitled to a share which was not to be quantified immediately upon the acquisition of the home but should be left to be determined when the mortgage was repaid or the property disposed of, on the basis of what would be fair having regard to the total contributions, direct or indirect, which each spouse had made by that date.

61 This final option does not involve imputing an intention to the parties. Instead, it involves giving effect to the parties' actual intentions, express or inferred. This can be tested by an analogy with contract law. Where a term is implied into a contract, the parties did not actually consider the issue. The term is implied based on what the parties, as reasonable people, would have agreed to had the issue been discussed, provided that it is necessary to give the contract business efficacy.<sup>128</sup> By contrast, a different situation arises where parties fail to agree on an essential term of the contract. In general, such a contract is incomplete and unenforceable despite the parties' intentions to enter into a contract. However, where the parties expressly leave a certain essential element to be determined by what is

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127 *Gissing v Gissing* [1971] AC 886 at 909D.

128 *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193.

fair or reasonable, *eg*, “fair specification” for timber, that allows the court to determine *ex post* what a reasonable specification is in the circumstances<sup>129</sup> in order to give effect to the reasonable expectations of honest men<sup>130</sup> as set out in the express terms of their contract. The court, here, is not considered to be imputing an intention to the parties.

62 The difficulty with such a limited gap-filling mechanism, however, is determining when the parties have actually arrived at a common intention that each is to have a share in the property and that their respective shares should be determined by the court based on what is fair in all the circumstances. Although the mechanism differs conceptually from an imputation of intention to the parties, it nevertheless treads dangerously close to the *Oxley v Hiscock*<sup>131</sup> formulation that was expressly rejected by the Court of Appeal in *Chan Yuen Lan*. There is a real risk that the imputation of intention approach will be reintroduced through the back door, unless the line between when parties have reached an agreement for the court to determine their shares based on what is fair or reasonable and when they have not can be clearly drawn.

63 The trouble is that there does not appear to be a good way to draw this line. What needs to be demarcated is the border between (a) parties having a common intention for each to have a share, but not having given any thought at all as to their respective shares and (b) parties having a common intention for each to have a share and a common intention for their shares to be quantified by the court on the basis of what is fair. Apart from a claimant asserting an express agreement to the effect of situation (b), it is difficult to see on what factual basis such an agreement could be inferred. Further, an assertion that the parties expressly agreed for the court to determine their shares based on what is fair must be approached with some scepticism. If the parties’ discussions had in fact reached the question of the

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129 *WN Hillas & Co Ltd v Arcos Ltd* [1932] All ER Rep 494.

130 Lord Steyn, “Contract Law: Fulfilling the Reasonable Expectations of Honest Men” (1997) 113 LQR 433 at 441.

131 [2004] 3 WLR 715.

quantification of their respective shares, but they could not agree between themselves on what each one's share should be, how likely are they to agree to leave it to the court? Yet, any legally advised claimant would be advised to advance a primary case for a specific division, and an alternative case that the parties agreed for the court to determine their shares on the basis of what is fair.

64 Another concern is that if this mechanism is made available, given the unclear border between situation (a) above when imputation is prohibited where imputation of any intention is prohibited and situation (b) where a similar result can be reached, there is a possible risk of hard cases making bad law. Judges are human, and may feel the lure to blur the border between situations (a) and (b) to do justice in particular cases. And the less clear the border becomes, the more likely that the law on common intention constructive trusts could revert to a smokescreen for “palm tree” justice.<sup>132</sup>

65 It is therefore submitted that this final option should also be rejected if it is ever raised before the Court of Appeal. Incomplete common intentions will have to be unenforceable common intentions.

## **VI. Conclusion**

66 In the eight years since the Court of Appeal first sought to clarify the law on CICTs in Singapore in *Chan Yuen Lan*, there is now greater clarity on how the sufficient and compelling evidence test is to be implied. There, however, remain significant doctrinal questions that need answers before Singapore's autochthonous doctrine of CICTs can be considered complete.

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<sup>132</sup> *Chan Yuen Lan v See Fong Mun* [2014] 3 SLR 1048 at [156].