15. EQUITY AND TRUSTS

TANG Hang Wu
PhD, LLM (Cambridge), LLB (National University of Singapore);
Advocate and Solicitor (Singapore);
Professor, School of Law, Singapore Management University.

TAY Yong Seng
MA, BCL (Oxford);
Advocate and Solicitor (Singapore);
Partner, Allen & Gledhill LLP, Singapore.

Express trust

15.1 *Lakshmi Prataprai Bhojwani v Moti Harkishindas Bhojwani*[1] contains valuable observations with respect to a trustee's duties *vis-à-vis* discretionary beneficiaries. In this case, the testator settled a discretionary trust which named members of his family as the potential discretionary beneficiaries. One of the discretionary beneficiaries asked the executor of the will for an account of the estate. George Wei J observed that there are two types of discretionary trusts. The first type of trust involved named beneficiaries whose benefits are to be decided at the discretion of the trustee. The second type of discretionary trust posits a large number of possible beneficiaries, namely, anyone in the world. Wei J held that the former type of discretionary beneficiary would be entitled to an account, whereas the latter discretionary beneficiary would have no such right. In this judgment, Wei J noted there is conflicting characterisation of the discretionary beneficiary's interest in the trust property. Without ultimately deciding this issue, Wei J held that a named discretionary beneficiary in the first type of trust is *prima facie* entitled to an account of the estate.

15.2 *Cheong Soh Chin v Eng Chiet Shoong*[2] dealt with, *inter alia*, a trustee's right to indemnity from the trust assets. Vinodh Coomaraswamy J endorsed the analysis in *Lewin on Trusts*[3] that the general principle is trustees have a right to be indemnified out of the trust property for expenses properly incurred in the course of their office. However, corollary to this general principle is that a trustee is not entitled to be indemnified for costs and expenses incurred without

1 [2019] 3 SLR 356.
2 [2018] SGHC 131.
3 *Lewin on Trusts* (Lynton Tucker, Nicholas Le Poidevin & James Brightwell eds) (Sweet & Maxwell, 19th Ed, 2015) at paras 21-003–21-004.

authority, either in the trust instrument or from the other beneficiaries. An exception to the corollary principle is that:[4]

> … a trustee may nevertheless be entitled to claim an indemnity out of the trust property for unauthorised transactions which benefit the trust estate and which the trustee incurred in good faith.

Coomaraswamy J's view was that this exception is not a matter of right but within the province of the court's discretion. In other words, this discretion is exercised in light of the totality of the trustee's conduct. On the facts, the learned judge found that the trustee had behaved egregiously in several instances and, therefore, the unauthorised transactions were disallowed.

15.3 The 2017 Ann Rev covered the High Court decision of *BOK v BOL*.[5] That case was significant because it dealt with various vitiating factors that the court found to set aside a deed of trust executed by the settlor ("the Settlor") in a state of acute grief, just days after the loss of his mother. The court considered the application and interplay of the following vitiating factors to set aside a trust: misrepresentation, mistake, undue influence and unconscionability. To recap, the Settlor, a wealthy young man, suffered the loss of his mother due to tragic circumstances. Shortly after, the Settlor's wife ("the Wife") (who was a lawyer) persuaded the Settlor to sign a trust deed, making the Settlor and herself joint trustees of all of the Settlor's assets in favour of their infant son. Subsequently, the marriage fell apart. The Settlor then brought an action to set aside the trust deed on the grounds of misrepresentation, mistake, undue influence and unconscionability. The High Court set aside the trust deed on all four grounds.

15.4 *BOK v BOL* went on appeal in 2018, and was heard by a five-judge panel of the Court of Appeal in *BOM v BOK*.[6] The Court of Appeal dismissed the appeal against the High Court's decision. With regard to misrepresentation, the Court of Appeal agreed with the High Court's findings that the Settlor had no intention to execute a trust, as the Wife had falsely represented to the Settlor that trust deed only took effect after his death. Similarly, the mistake claim succeeded as the misrepresentation by the Wife and the seriousness of the consequences ("which effectively renders him a pauper" [7]) warranted the vitiation of the trust deed. On undue influence, the Court of Appeal agreed with the High Court that there had been "Class 1" undue influence exerted by the Wife on the Settlor. Class 1 undue influence, also known as actual

4 *Cheong Soh Chin v Eng Chiet Shoong* [2018] SGHC 131 at [64].
5 [2017] SGHC 316.
6 [2019] 1 SLR 349.
7 *BOM v BOK* [2019] 1 SLR 349 at [1].

undue influence, impugned a transaction because of the undue influence exerted upon the plaintiff by the defendant. To do this, the plaintiff has to demonstrate that: (a) the defendant had the capacity to influence him; (b) the influence was exercised; (c) its exercise was undue; and (d) its exercise brought about the transaction.[8] The Court of Appeal recognised that the Settlor's acute grief as well as his sense of loneliness following his mother's death placed him in a position of susceptibility to this form of undue influence. However, the Court of Appeal disagreed with the High Court's finding that there was an implied solicitor–client retainer between the Settlor and the Wife, giving rise to an irrebuttable presumption of a relationship of a trust and confidence for Class 2A undue influence. Under Class 2A undue influence, there are relationships that the law irrebuttably presumes to give rise to a relationship of trust and confidence. Such relationships include solicitor–client relationships but exclude husband–wife relationships. Once the plaintiff shows that his relationship with the wrongdoer triggers the presumption and that the impugned transaction calls for an explanation, there is a rebuttable presumption that the wrongdoer has exerted undue influence.[9] The Court of Appeal preferred to use the contractual analysis framework of a putative solicitor and client relationship in *Anwar Patrick Adrian v Ng Chong Hue LLC*[10] to determine if there was Class 2A undue influence. On the facts, the Court of Appeal found that there was no such retainer. Although the Settlor looked to the Wife for her legal knowledge, that did not necessarily mean he reasonably considered her as his solicitor. The Court of Appeal also cautioned that a court should be slow to impose contractual obligations in marital arrangements between husband and wife, citing *Balfour v Balfour*.[11] Nevertheless, the court noted that although rare, it was not impossible to find an implied retainer between spouses.

15.5 Finally, the Court of Appeal agreed that the trust deed was vitiated on the ground of unconscionability. The Court of Appeal held that a broad doctrine of unconscionability (such as in *The Commercial Bank of Australia Ltd v Amadio*[12] or *Alec Lobb (Garages) Ltd v Total Oil Great Britain Ltd*)[13] was too uncertain and subjective to be a substantive legal doctrine and should be rejected. Nonetheless, unconscionability had a place in Singapore law if distilled into a very limited form of a "narrow doctrine of unconscionability", modified from the English

8 *BOM v BOK* [2019] 1 SLR 349 at [101(a)].
9 *BOM v BOK* [2019] 1 SLR 349 at [101(b)].
10 [2014] 3 SLR 761.
11 [1919] 2 KB 571.
12 (1983) 151 CLR 447.
13 [1983] 1 WLR 87.

approach of improvident transactions in *Fry v Lane*[14] ("*Fry*") and *Cresswell v Porter*[15] ("*Cresswell*"). The contours of the narrow doctrine of unconscionability in the Singapore context were outlined by the Court of Appeal as follows:

> (a) A situation where the plaintiff is poor or ignorant or suffering from other forms of infirmities whether physical, mental or emotional in nature. This is an intensely fact-sensitive inquiry. The infirmity that the plaintiff was suffering from must have had sufficient gravity to acutely affect the plaintiff's ability to conserve his own interests, adopting the High Court of Australia's reasoning in *Blomley v Ryan*.[16] Such infirmity must also have been, or ought to have been, evident to the other party procuring the transaction. Thus, the Court of Appeal affirmed the High Court's expansion of situations that could be considered "unconscionable" beyond the traditional approach of poverty and ignorance in *Fry* and *Cresswell*.
>
> (b) If the sale is at a considerable undervalue, this would be an important (though not mandatory) factor in determining unconscionability.
>
> (c) If the vendor of the transaction did not have independent advice at the time of the transaction, this would be an important factor in determining unconscionability. Again, this lack of independent advice is not a mandatory requirement but would weigh heavily in favour of a finding of unconscionability. Although not mandatory, requirements (b) and (c) will often underscore and highlight the exploitation of an infirmity that renders a transaction improvident.
>
> (d) Once the plaintiff proves that he or she was suffering from such an infirmity that the other party exploited in procuring the transaction, the burden of proof moves to the defendant to prove the transaction is fair, just and reasonable.

15.6 The Court of Appeal recognised that the degree of overlap between the narrow doctrine of unconscionability with the doctrine of Class 1 undue influence was extensive, as to result in both doctrines being virtually coincident with or identical to each other. Where Class 1 undue influence (actual undue influence) is successfully pleaded, there is necessarily unconscionable conduct. Nevertheless, the Court of Appeal maintained the narrow doctrine of unconscionability as a separate and independent vitiating factor in Singapore law due to the

14 [1888] 40 Ch D 312.
15 [1978] 1 WLR 255.
16 (1956) 99 CLR 362 at 381.

myriad of possible fact situations which may come before the courts. In a coda to the judgment, the Court of Appeal considered whether duress, undue influence and unconscionability should be merged under an umbrella doctrine of unconscionability (assuming the legal viability of the broad doctrine of unconscionability, which had been rejected earlier in the judgment). Ultimately, the Court of Appeal decided that such an approach should be rejected for being practically unworkable. *BOM v BOK* is certainly a landmark review of vitiating factors in the law of express trusts. It underscores the willingness of the courts to apply different vitiating factors to meet the requirements of different factual scenarios (including applying the "narrow" doctrine unconscionability), as opposed to sweeping all the vitiating factors into a simple umbrella doctrine of "unconscionability" to try to achieve "broad brush justice".

15.7 In *BTB v BTD*[17] ("*BTB*"), a father ("the Father") with terminal stage cancer sent a series of WhatsApp messages to his ex-wife ("the Mother") about the use of his Central Provident Fund ("CPF") moneys in favour of his sons ("the Sons"). The Father then applied to withdraw his CPF moneys on medical grounds, obtaining a medical certificate from his doctor certifying his terminal cancer. Before the CPF moneys were transferred to the Mother, the Father passed away. The key issue before the court was whether the Father had created a valid trust over his CPF moneys in favour of the Sons, and specifically, whether such intention to create a trust had been established through the WhatsApp messages. The court also had to consider whether the equitable maxim of "equity treats as done that which ought to be done" should be applied in favour of the trust, as the Father had applied to withdraw his CPF funds and had asked his doctors to certify his illness as grounds for the CPF withdrawal. Valerie Thean J held that a valid trust had not been constituted as there was insufficient intention on the part of the Father to create a trust. Rather, the Father had simply intended to withdraw his CPF moneys. *Paul v Constance*[18] (a case where a trust was found simply by a man saying to a woman he was co-habiting with that "the money is as much yours as mine") could not be relied on. Looking at the wider context of the father's WhatsApp messages and the surrounding circumstances, the learned judge held that the Father's intention to create a trust could not be inferred. Thean J found that his intention was merely to withdraw the CPF moneys to give himself flexibility to make provision for sons – but this vague intention to make provision was not sufficient to give rise to a specific gift or trust.[19] Thean J in *BTB* also found that the alleged trust in the present case was not properly constituted. The equitable maxim –

17 [2018] SGHC 203.
18 [1977] 1 WLR 527.
19 *BTB v BTD* [2018] SGHC 203 at [26], [27], [31] and [41].

that equity treats as done that which ought to be done – was not applicable. The so-called "last step doctrine" from the line of cases following *Re Rose*,[20] *Blackett v Darcy*[21] and *T Choithram International SA v Pagrani*[22] did not apply. The actions taken by the settlor in those cases were effective to procure a transfer of the property to the recipient, while in the present case, the Father had only taken steps to transfer the CPF moneys to himself, but not to the Sons. Even that preparatory step of the Father was not successful as he had failed to obtain the CPF moneys in his own hands. Not having obtained the CPF moneys, the Father did not have any power to transfer the moneys at all.[23]

15.8 *Ho Yew Kong v ERC Holdings Pte Ltd*[24] is part of a long-running corporate legal dispute involving a well-known sushi restaurant. In the present case, the dispute concerns one million shares of Gryphon Real Estate Investment Corporation Pte Ltd ("GREIC") held by the plaintiff, Ho Yew Kong. The issue was whether a valid express trust had been settled for the benefit of second defendant. After carefully reviewing the evidence, Valerie Thean J held that a trust had indeed been created in favour of the second defendant. The next issue before the learned judge was whether the trust had been effectively disclaimed by the second defendant. Thean J summarised the law on disclaimer of beneficial interests as follows:[25]

> A beneficiary may only renounce his interest if he is in possession of the full facts and circumstances of his actions. Nevertheless, once the beneficiary has sufficient knowledge of the relevant facts, his statements stating that he has no interest would be sufficient to effect a disclaimer.

15.9 On the present facts, Thean J interpreted certain statements by the controlling mind of the second defendant as amounting to an effective disclaimer of the beneficial interest of the shares.

15.10 *Moh Tah Siang v Moh Tai Tong*[26] involved a dispute between the members of the Moh family, who ran the famous Swee Kee Chicken Rice & Restaurant. The dispute centred over their respective interests in the family home located at Branksome Road. The plaintiff, Moh Tai Siang, asserted that he had a one-quarter interest over the family home which was sold in December 2015 for $16.3m. Initially, the plaintiff and

20 [1952] Ch 499.
21 [2005] NSWSC 65.
22 [2001] 1 WLR 1.
23 *BTB v BTD* [2018] SGHC 203 at [26] and [27].
24 [2018] SGHC 258.
25 *Ho Yew Kong v ERC Holdings Pte Ltd* [2018] SGHC 258 at [37].
26 [2018] SGHC 280.

his three brothers each had a registered one-quarter share in the family home. In 1974, there was a document stating that the defendants (who are two of the plaintiff's brothers) gave $200,000 to the plaintiff for his interest in the family home. The plaintiff's share was then duly transferred to his brothers. However, the plaintiff argued against the literal words of the document stating that the true purpose of the transfer was to have the defendants hold his share of the house on trust for him. The plaintiff's case was that the consideration of $200,000 was never paid to him. In order to prove the plaintiff's claim, the plaintiff asserted that the Moh family was a close-knit family who was dominated by the matriarch and their eldest brother. It was also the plaintiff's case that the family had the practice of transferring property among family members to protect their assets from creditors. The plaintiff's case was that his interest was transferred to his two brothers to protect it from creditors. Aedit Abdullah J pointed out several difficulties with the plaintiff's case. First, many of the family members had passed away. Thus, it was difficult to prove the alleged family practice or custom. Second, "[i]f there exists a document, evidence of custom or practice have to be particularly cogent to overcome the documentary evidence".[27] On the facts, Abdullah J held that the existence of the alleged trust (express or resulting) was not established in light of the transfer document.

Resulting trusts

15.11 In *Ng So Hang v Wong Sang Woo*,[28] a co-habiting couple had a dispute over a St Martin's Drive property which was registered as a joint tenancy. When their relationship broke down, the plaintiff claimed sole beneficial ownership over the property since she paid for the entire purchase price, while the defendant alleged that a presumption of advancement operated in his favour. The defendant's plea failed as Aedit Abdullah J, relying on *Lau Siew Kim v Yeo Guan Chye, Terence*,[29] said he was doubtful that the presumption of advancement should extend to unmarried co-habiting couples. Hence, Abdullah J held that the plaintiff had sole beneficial ownership over the property under a resulting trust as she had made all of the contributions to the purchase of the property.

15.12 *BUE v TZQ*[30] dealt with the tricky interplay between the Women's Charter[31] and claims by third parties in relation to property

27 *Moh Tah Siang v Moh Tai Tong* [2018] SGHC 280 at [49].
28 [2018] SGHC 162.
29 [2008] 2 SLR 108 at [114].
30 [2019] 3 SLR 1022.
31 Cap 353, 2009 Rev Ed.

belonging to one of the spouses. In this case, a man and woman got married on 10 July 2003. At the time of this marriage, the man owned a Housing and Development Board ("HDB") flat in his sole name. Unfortunately, the marriage broke down sometime in 2012 and the woman ceased staying with the man. Later that year, the man added his two sons from an earlier marriage as joint tenants to the property. This transaction was registered as a gift and some of his sons' CPF was used to discharge the outstanding mortgage on the HDB property. The resultant position was that the parties contributed in unequal proportions to discharge the mortgage over the HDB flat, with the man contributing over 87% and his sons contributing the balance. In 2014, the man commenced divorce proceedings against the woman. The sons each claimed a one-third share of the property, asserting that they were joint owners with their father holding the property in equal shares. The woman claimed that the transfer was intended to dilute her share of the matrimonial property in light of the breakdown of the marriage. In response, the man's evidence was that he did not deliberately mean to dilute the pool of matrimonial assets. Instead, the man's evidence was that at the material time he had discovered he was suffering from stage 4 cancer. The addition of his sons as joint tenants was to leave the HDB flat to them "upon his passing and [to] instil a sense of responsibility in them by giving them the opportunity to own a share in their home".[32] This assertion proved fatal to his sons' claim for equal beneficial interest. Tan Puay Boon JC reasoned that he did not intend to give his sons a one-third share during his lifetime. As a result, Tan JC determined the parties' beneficial interests in proportion to their relative contributions to the cost of acquisition in relation to the mortgage.

15.13 *UJT v UJR*[33] dealt with a resulting trust claim over a two-storey terraced house. In this case, the plaintiff's primary case was that she was entitled to 60.3% of the beneficial interest in the house because she contributed to the purchase price of the house in 1967. Unfortunately, she did not have any documentary evidence to prove these contributions. Hence, Valerie Thean J dismissed the claim based on the purchase price resulting trust.

15.14 *Lim Ah Leh v Heng Fock Lin*[34] contains valuable observations on the nature of resulting trusts, resulting trustee's duties and corresponding time bar in relation to such claims. Vinodh Coomaraswamy J adopted a fact-centric approach to determine the existence and content of fiduciary duties in relation to a resulting

32 *BUE v TZQ* [2019] 3 SLR 1022 at [25].
33 [2018] 4 SLR 931; [2018] SGHCF 6.
34 [2018] SGHC 156.

trustee. According to Coomaraswamy J, the existence and content of any fiduciary duties to which the resulting trustee is subject depend on his or her conduct and especially his or her state of mind.[35] On the facts, the learned judge found that the defendant implicitly undertook, and therefore owed, a number of fiduciary duties to the plaintiff, which included: (a) the duty to account for the money received; (b) the duty to act honestly and in good faith; (c) the duty not to profit from trust property; and (d) the duty not to place herself in a position of conflict of interests. However, Coomaraswamy J held that the action for an account was time barred by virtue of s 6(2) of the Limitation Act[36] which stipulates that "[a]n action for an account shall not be brought in respect of any matter which arose more than 6 years before the commencement of the action". The learned judge reasoned that if a resulting trustee voluntarily undertakes the fiduciary duties of an express trustee, it would be unjust to treat such a resulting trustee differently from an express trustee in terms of the limitation period. Coomaraswamy J also held that s 22(1) of the Limitation Act, which disapplies the limitation period, was not engaged in the present case because the trustee's breach of duty account was not a fraudulent breach of trust. In addition to the technical points in relation to the Limitation Act, the learned judge also said that he would have exercised his discretion against ordering the defendant to provide an account because this matter dated back to more than 24 years ago. The account would be a protracted, costly and laborious undertaking. Furthermore, there is no evidence that there is possible fraudulent dealing with the trust money that such an account might uncover.

Constructive trust

15.15 *Ng So Hang v Wong Sang Woo*[37] is an important case on the common intention constructive trust in Singapore. Specifically, this case analysed the significance of a decision to register the property as joint tenants in relation to an assertion of a common intention constructive trust. Aedit Abdullah J rejected the plea that there was a common intention between the parties in this case simply on the strength of the manner in which the property was registered (the parties were registered as co-owners). The learned judge criticised the claimant's case in that there was no specificity in relation to the alleged common intention between the parties. For example, the details of the alleged common intention such as when the intention was discussed

35 *Lim Ah Leh v Heng Fock Lin* [2018] SGHC 156 at [145].
36 Cap 163, 1996 Rev Ed.
37 [2018] SGHC 162.

and formed was not established.[38] Abdullah J held that adding a person as a joint owner does not by itself support a finding of a common intention to share the beneficial interest equally or in a proportion different from the parties' respective contributions to the purchase. In this regard, the learned judge's analysis of the operation of the principle of survivorship is instructive. According to Abdullah J, adding a party as joint tenant only disclosed an intent for the survivor to be entitled to the property under the principle of survivorship in the event of death of the other joint owner. Survivorship only determined property entitlement after death, and did not shed light on the *inter vivos* beneficial interests of the parties when they are still alive. In contrast, Chan Seng Onn J in *Pereira Dennis John Sunny v Fariday bte V Abdul Latiff*,[39] a case reviewed last year, and not discussed by Abdullah J, rejected the plaintiff's explanation that the property was registered in a joint tenancy because his intention was merely for the rule of survivorship to apply. Interestingly, Chan J rejected the plaintiff's assertion that it was not his intention to give the defendant any beneficial entitlement while he was still alive. According to Chan J, 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.[40]

15.16 The decision of *UJT v UJR*[41] stressed on the importance of pleading the common intention constructive trust with sufficient particularity and clarity. In this case, Valerie Thean J criticised the pleadings on the following grounds. First, Thean J said that the substance of the alleged common intention was not properly fleshed out. Second, "nothing is pleaded about any discussion, statement or action … which forms the basis of … any common intention".[42] Third, the pleadings asserted the common intention arose "by reason of the matters set out". On reading the pleadings, the learned judge said that this was a vague and unhelpful assertion. After reviewing the evidence, Thean J did not find that the relevant parties had formed a common intention that the plaintiff would have a share in the property.

15.17 The tragic case of *Ng Yok v Ng Geok Lan*[43] dealt with a messy family dispute. In this case, the patriarch, Ng Soh ("Mr Ng"), committed suicide in 2016 at the age of 89 after two disputes tore his family apart. Kannan Ramesh J found that the defendant, Ng Geok Lan

38 *Ng So Hang v Wong Sang Woo* [2018] SGHC 162 at [43].
39 [2017] 5 SLR 529.
40 *Pereira Dennis John Sunny v Fariday bte V Abdul Latiff* [2017] 5 SLR 529 at [59].
41 See para 15.13 above.
42 *UJT v UJR* [2018] 4 SLR 931 at [50].
43 [2018] SGHC 48.

("Ms Ng"), who was Mr Ng's daughter, had hatched a scheme to appropriate Mr Ng's money. The defendant procured Mr Ng to hand over $1.6m to her. It was found that the defendant used the money to buy a house in her name. Mr Ng had only agreed for the house to be purchased in his sole name. Furthermore, Ramesh J also found that Ms Ng had, without Mr Ng's authorisation, obtained a sum of money to carry out renovation works in the new house. Relying on Millett LJ's (as he then was) observation in *Paragon Finance plc v DB Thakerar & Co*[44] that a constructive trust arises where it would be unconscionable for the owner of property to assert his own beneficial interest in the property and deny the beneficial interest of another, Ramesh J held that Ms Ng held the moneys appropriated from Mr Ng on constructive trust for Mr Ng's estate. While this holding is no doubt correct in light of Ms Ng's conduct, perhaps a better rationalisation of this case is that Ms Ng was a fiduciary of Mr Ng due to the fact that their relationship had evolved to a situation where there was an undertaking to act. Since Ms Ng abused her fiduciary obligation, a constructive trust arose in respect of the house. Without looking at the pleadings in detail, it is impossible to determine whether this analysis was open to the learned judge.

15.18 *Lee Boon Teow v Shi Guojun*[45] was a case where a claim for a constructive trust failed. In this case, the plaintiff claimed that he gave the defendant, a Buddhist monk, a sum of money for the sole purpose of funding the defendant's doctoral studies. Since the defendant did not pursue further studies, the plaintiff asserted, *inter alia*, that a constructive trust arose over the sum of money. On the facts, Woo Bih Li J did not accept the plaintiff's case that the money was paid for the particular purpose of enabling the defendant to pursue a doctoral degree. Instead, the money was at the free disposal of the defendant. With that finding of fact, Woo J dismissed the claim for a constructive trust.

Fiduciary relationships

15.19 The issue of when a fiduciary relationship arises was considered in *Sabyasachi Mukherjee v Pradeepto Kumar Biswas*.[46] That case involved a defendant who assisted with the plaintiff's investments. Belinda Ang Saw Ean J held that the defendant was indeed a fiduciary. The court considered the nature of the transactions, and the character of the parties to the transactions. In particular, the court took into

44 [1999] 1 All ER 400 at 409.
45 [2018] SGHC 110.
46 [2018] SGHC 271.

account the fact that the principals had conferred a degree of control over their affairs to the defendant and had relied on the defendant's good faith to introduce them to suitable investment opportunities. Their vulnerability to the defendant's disloyalty and reliance on his good faith meant that fiduciary obligations were appropriately foisted on the defendant.

15.20 Apart from investment relationships, fiduciary duties were found in the context of joint venture partners in *Tongbao (Singapore) Shipping Pte Ltd v Woon Swee Huat*.[47] In that case, the plaintiff and defendant were joint venture partners involved in the construction of a vessel. Audrey Lim JC found that the defendant, as the key decisionmaker and responsible party for supervising the vessel's construction, owed fiduciary duties to act honestly and in good faith for the best interest of the joint venture.[48] It is noteworthy that in this case, the joint venture agreement was oral.[49] The court accepted that although the presence of a joint venture relationship can create fiduciary obligations, it was not always necessarily so. Where there was an underlying contractual relationship between the parties, the extent and nature of any fiduciary obligations owed in any particular case would be informed by the terms of the underlying contract. Given the prevalence of written joint venture agreements and the presence of the "no fiduciary obligation" clause in such agreements excluding the imposition of fiduciary obligations on each other, it remains to be seen in Singapore whether and to what extent such clauses will be given effect.[50]

15.21 *Cheong Soh Chin v Eng Chiet Shoong*[51] is destined to be essential reading on the law of taking of accounts. Vinodh Coomaraswamy J explained the general principles in relation to the law in this area with admirable clarity. The learned judge observed that there are two categories of account: (a) a general or common account where no misconduct is alleged; and (b) an account where there is wilful default by the fiduciary. Coomaraswamy J made the following remarks in relation to the common account:

47 [2018] SGHC 165.

48 *Tongbao (Singapore) Shipping Pte Ltd v Woon Swee Huat* [2018] SGHC 165 at [89]–[95].

49 *Tongbao (Singapore) Shipping Pte Ltd v Woon Swee Huat* [2018] SGHC 165 at [23].

50 Such a clause may read: "Nothing in this agreement is intended to constitute a fiduciary relationship, or an agency, partnership or trust." See also the High Court of Australia's decision in *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd* [2010] HCA 19.

51 See para 15.2 above.

(a) A beneficiary is entitled as of right to a common account as part of the trustee's stewardship of trust assets.

(b) There are three phases to taking an account. First, the claimant must have a right to an account. Second, the taking of the account. Finally, the court grants consequential relief.

(c) The duty to account is continuous. However, the court has the discretion not to order an account if it is oppressive to require the trustee to do so, or for some other good reason.

(d) If there are discrepancies in the trustee's account, the beneficiary may falsify an entry or to surcharge the account. Falsifying an entry means that the beneficiary disclaims any interest in the property bought by the trust fund. In other words, the trustee is not given credit for that entry. However, this is at the option of a beneficiary as the beneficiary may choose to adopt the transaction and treat the investment as trust property. Where a beneficiary seeks to surcharge a common account, the beneficiary is claiming that the trustee has received more than the account records.

15.22 In contrast, an account taken on wilful default basis presupposes the trustee has committed some sort of misconduct. Coomaraswamy J made the following remarks in relation to an account taken on wilful default:

(a) The trustee has to account not only for what was actually received, but also for what he might have received had it not been for the default.

(b) The trustee will be required to explain any suspect transactions, even if the transaction has not been complained of by the beneficiary.

Equitable compensation

15.23 The relationship between equitable compensation and the burden and level of proof that the plaintiff needs to show when claiming equitable compensation was explored in *Tongbao (Singapore) Shipping Pte Ltd v Woon Swee Huat*.[52] In the present case, Audrey Lim JC applied the "but-for" causation test and found that this did not pose any difficulty for the plaintiffs. It is also significant to note that Lim JC also held that for a claim against a dishonest assister of a breach of fiduciary duty, the dishonest assister is liable to pay equitable compensation for

52 See para 15.20 above.

the plaintiff's loss caused by the breach of fiduciary duty. This liability is joint and several with the fiduciary's liability. Furthermore, there is no need to show a precise causal link between the assistance and the loss. All the plaintiff needs to succeed against the dishonest assister was to demonstrate that the loss was caused by the breach of fiduciary duty.

15.24 In *Winsta Holding v Sim Poh Ping*,[53] Chua Lee Ming J made the following observations:[54]

> Equitable compensation for breach of trusts aims to provide pecuniary equivalent of performance of the trust … It should not matter whether a fiduciary belongs to a well-established category of fiduciaries or not, or whether the breach is of a core duty or is innocent. If there is a breach of fiduciary duty, as a matter of principle, the beneficiary should be compensated for the loss suffered as a result of that breach and no more. Justice demands that the law does not punish the wrongdoer by making him liable for loss not causally lined to his breach.

15.25 Chua J also observed in *Winsta Holding v Sim Poh Ping*:[55]

> There is also no reason in principle why the evidential burden on causation should shift to the fiduciary on the mere ground that the principal proves that the breach 'is in some way connected' to the loss. If (as I have decided) the principal has to prove but-for causation, the legal burden of proof remains squarely on the principal to prove that his loss is causally linked to the fiduciary's breach of duties. The principal's evidential burden is to adduce evidence of loss that is causally linked to the breach. Simply proving that the breach 'is in some way connected' to the loss does not discharge the principal's evidential burden and is, in my view, insufficient to shift the evidential burden to the fiduciary.

15.26 Thus, *Winsta Holding v Sim Poh Ping* represents a different approach from the schema of causation proposed by Vinodh Coomaraswamy J in *Then Khek Koon v Arjun Pemanand Samtani*.[56] Therefore, there is a need for clarification from the Court of Appeal as to which approach to causation in relation equitable compensation is applicable in Singapore.

15.27 *Low Heng Leon Andy v Low Kian Beng Lawrence*[57] represents the close of a long running dispute in relation to a proprietary estoppel claim. Andrew Phang Boon Leong JA made several important

53 [2018] SGHC 239.
54 *Winsta Holding v Sim Poh Ping* [2018] SGHC 239 at [193].
55 *Winsta Holding v Sim Poh Ping* [2018] SGHC 239 at [194].
56 [2014] 1 SLR 245.
57 [2018] 2 SLR 799.

observations in relation to the correct approach in determining the appropriate remedy to satisfy the equity which has arisen in a proprietary estoppel claim. Phang JA said:

> [T]he exercise … is an intensely fact-specific one … [which is guided] by twin lodestars of achieving proportionality between the expectation, the detriment and the remedy as well as doing the minimum required to satisfy the maximum extent of the equity and do justice between the parties. [emphasis in original omitted]

15.28 The learned judge considered the following factors: (a) the feeble state of evidence in terms of medical and household expenses allegedly borne by the plaintiff; (b) the lack of evidence of foregone full-time employment opportunities; and (c) the assistance of a domestic helper as lessening the detriment suffered by the plaintiff. In favour of the claim is the plaintiff's constant fear of contracting tuberculosis from the representor and the plaintiff's sacrifice of his social life to take care of the representor. In light of this, the Court of Appeal awarded the plaintiff a sum of $140,000 which was quantified based on the loss of a licence to occupy the premises for ten years.

Quistclose trust

15.29 *Ho Yew Kong v ERC Holdings Pte Ltd*[58] also considered a claim that a *Quistclose* trust was created by the parties. In relation to a *Quistclose* trust, Valerie Thean J observed:

> The mere fact that a lender inquires about the purpose of a loan is insufficient. In each case, the question is 'whether the parties intended the money to be at the free disposal of the recipient' (*Twinsectra* at [74]).

On the facts, Thean J did not find that there was a *Quistclose* trust. There was no evidence that the loan was to be used for a specific purpose and the lender had the intention of retaining beneficial interest. Instead, the evidence shows that the money was at absolute and free disposal of the borrower. Hence, the claim for a *Quistclose* trust failed.

58 See para 15.8 above.