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16. EQUITY AND TRUSTS

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I. Express trust

16.1 *La Dolce Vita Fine Dining Co Ltd v Zhang Lan*[1] is an important case where assets of an express trust were held to be beneficially owned by the settlor.[2] The plaintiff was La Dolce Vita Fine Dining Co Ltd, a company incorporated in the Cayman Islands and a judgment creditor of the first, second and third defendants pursuant to two Hong Kong judgments dated 20 May 2020. Zhang, a well-known restaurateur, was the first defendant. The second and third defendants were companies incorporated in the British Virgin Islands and wholly owned by Zhang. The fourth defendant, Success Elegant Trading Ltd ("Success Elegant"), was a company incorporated in the British Virgin Islands and was originally owned by Zhang. On 4 June 2014, Zhang transferred the sole share of Success Elegant to AsiaTrust Limited – trustee of the "Success Elegant Trust", a family trust settled by Zhang on 3 June 2014 for the benefit of her son and his children and remoter children. Zhang remained the sole director of Success Elegant until she was replaced by an affiliate of AsiaTrust Limited on 3 March 2015.

16.2 In the present case, the plaintiff obtained registration orders based on the Hong Kong judgments and filed an application pursuant to the order seeking the appointment of receivers in relation to two bank accounts in Success Elegant's name. These two accounts were respectively in Credit Suisse AG and Deutsche Bank AG ("Deutsche Bank"). The basis of the receivership application was that the money in these bank accounts was beneficially owned by Zhang by reason of a resulting trust. Philip Jeyaretnam J held that Zhang retained the beneficial interest in

1 [2022] SGHC 278.
2 See generally Tang Hang Wu, "An Impregnable Fortress? Possible Attacks on the Singapore Trust" (2011) 25 *Trust Law International* 66.

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the bank accounts based on the following factors: (a) Zhang as the sole signatory of the bank accounts had transferred money out of the relevant bank accounts after the Success Elegant Trust was set up; (b) Zhang had transferred money out of the Deutsche Bank account after she had notice of freezing orders made against her in Hong Kong and Singapore; and (c) Zhang's lawyers, Reed Smith, confirmed on her behalf that she "maintained" the Deutsche Bank account in the wake of a Singapore freezing order. Jeyaretnam J said:[3]

> It could be said that she intended to execute whatever documents she was advised to execute so as to hinder the plaintiffs from having recourse to her assets, while at the same time retaining full control over those assets so that she could deal freely with them for her own benefit. In the words of Reed Smith, this indeed meant that notwithstanding the Bank Accounts being in SETL's name, she maintained them.

16.3 In the circumstances, Jeyaretnam J allowed the application to appoint the receiver. For those in the trust and wealth management industry, this case illustrates the importance of ensuring assets are properly transferred into the trust with corresponding documentation, limiting the control of the settlor in dealing with trust assets, and reflecting the beneficial ownership in the relevant banking and corporate documents to signify that the assets have been settled on trust.

16.4 *Siraj Ansari bin Mohamed Shariff v Juliana bte Bahadin*[4] is a case which dealt with an express trust executed for the benefit of a minor over real estate.[5] The plaintiff, Siraj, was the husband of the first defendant, Juliana, and the father of the second defendant, Mirza. Siraj and Juliana executed a trust deed over a property at Saint Patrick's Road on 2 March 2015 where they were appointed the trustees for the benefit of Mirza. Subsequently, Siraj sought to set aside the trust deed on the following grounds: (a) Juliana's misrepresentation; (b) mistake; (c) Juliana's undue influence; (d) Juliana's unconscionable conduct and/or the trust was an unconscionable transaction; and (e) the trust was a sham instrument executed to evade the payment of Additional Buyer's Stamp Duty ("ABSD"). Juliana and Mirza resisted this plea and counterclaimed for Siraj to be removed as the trustee.

16.5 In analysing the parties' case, Kannan Ramesh J reasoned that all of Siraj's grounds to set aside the trust centred on a common question – whether the trust was a *bona fide* instrument executed to purchase real

3 *La Dolce Vita Fine Dining Co Ltd v Zhang Lan* [2022] SGHC 278 at [55].
4 [2022] SGHC 186.
5 See generally Alvin See, "Dealing with a Minor's Land in Singapore" (2022) 22 OUCLJ 46 on trusts over real estate for minors.

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estate on trust for Mirza or a sham instrument executed for the purpose of evading ABSD. Ramesh J succinctly expressed the test for sham as follows:[6]

> At its core, the inquiry is directed at whether there was a common intention between the parties that the document in question is not to create the legal rights and obligations which it gives the appearance of creating: *Chng Bee Kheng* at [50]. As the 'inquiry is one into the subjective intentions of the parties, the court is not restricted to the usual rules governing the interpretation of documents' and 'may have regard to a wider category of evidence, such as the parties' subsequent conduct': *Chng Bee Kheng* at [55]. The court may therefore consider the subsequent actions of parties to determine whether or not parts of the agreements are a sham in the sense that they were intended merely as 'dressing up' and not as provisions to which any effect should be given: *AG Securities v Vaughan* [1990] 1 AC 417 and cited with approval in *Chng Bee Kheng* at [55].

16.6 On the facts, the learned judge found that the option to purchase, sale and purchase agreement, declaration form to the Inland Revenue Authority of Singapore and various tenancy agreements were consistent with the express trust. Further, Siraj's and Juliana's communications with their property agent and their lawyer at the time of acquisition were consistent with the trust being a *bona fide* instrument. Siraj had also, through his lawyers, acknowledged the existence of the trust in several letters to Juliana when their relationship broke down before divorce proceedings were filed. It was only after divorce proceedings were commenced that Siraj challenged the existence of the trust. Hence, Ramesh J dismissed Siraj's claim and allowed Juliana's and Mirza's counterclaim.

II. Resulting trust

16.7 The facts of *Zaiton bte Adom v Nafsiah bte Wagiman*[7] are narrated in the part on constructive trust.[8] For the purposes of resulting trust, it should be noted that the claim was dismissed because the judge found that the plaintiff's alternative case that there was a common intention that the plaintiff and second defendant would return the money to the plaintiff in some unspecified way and at some unspecified time in the future contradicted a plea for a resulting trust over the Housing and Development Board ("HDB") flat.

6 *Siraj Ansari bin Mohamed Shariff v Juliana bte Bahadin* [2022] SGHC 186 at [40].
7 [2023] 3 SLR 533.
8 See paras 16.15–16.29 below.

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16.8 *Tay Yak Ping v Tay Nguang Kee Serene*[9] is a notable case because of the court's observation albeit in *obiter dicta* that ancillary costs associated with purchasing a property may be factored in a resulting trust claim. In an important passage, Belinda Ang Saw Ean JAD said:[10]

> It seems to us to be at least arguable that … monetary contributions towards stamp duty *should* be included by the court in determining the parties' respective beneficial shares under a resulting trust. … [T]he classic description of the purchase money resulting trusts in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 at 708 refers to a presumption of resulting trust arising where one party 'pays (wholly or in part) *for the purchase of property* which is vested either in [the other party] alone or in the joint names of [both parties]' [emphasis added]. On this formulation of the doctrine of purchase money resulting trusts, the analysis is not limited to the *purchase price* of the property, but is instead broad enough to encompass stamp duty payable on the purchase of the property in question. Moreover, we find quite persuasive McLelland J's reasoning in *Currie* that what matters is the *cost to the purchasers* of acquiring the property (which would include not only the purchase price, but also necessary ancillary costs such as stamp duty), rather than the benefit to the vendor (which is limited to the purchase price) … We add that it is often fortuitous whether the money of one person or another is used to pay the purchase price or the stamp duty (or even the legal expenses). The broader approach may also commend itself to the practical importance of this issue bearing in mind the stamp duty regime in Singapore. [emphasis in original]

16.9 *Lau Yaw Ben v Lau Wee Hion*[11] involved a family dispute over whether a resulting trust arose over the sale proceeds in respect of two properties. In this case, the plaintiff-father had transferred sale proceeds from two properties, Units 473 and 473A (collectively known as "the Sums"), to his son, who was the defendant. The father claimed that the son held the sale proceeds on an express or resulting trust for him.

16.10 On the law of resulting trusts, Audrey Lim J reaffirmed the principles set out by the Court of Appeal in *Koh Lian Chye v Koh Ah Leng*,[12] *viz*, that where the transfer of an interest in a property occurs in the context of recognised categories of relationships (for example, between parents and children), the presumption of advancement ("POA") operates to rebut the presumption of resulting trust ("PRT").[13]

9 [2022] 2 SLR 641.
10 *Tay Yak Ping v Tay Nguang Kee Serene* [2022] 2 SLR 641 at [68].
11 [2022] SGHC 130.
12 [2021] SGCA 69 at [23]–[26].
13 *Lau Yaw Ben v Lau Wee Hion* [2022] SGHC 130 at [23]. See generally Yip Man, "The Presumptions of Resulting Trust and Advancement Under Singapore Law: Localisation, Nationalism and Beyond" in *Divergences in Private Law* (Andrew Robertson & Michael Tilbury gen eds) (Oxford & Portland, Oregon: Hart Publishing,
(cont'd on the next page)

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Conversely, where there is no such relationship (for the POA to apply), the law presumes that the transferor intends to retain[14] the beneficial interest in the property (by operation of the PRT).

16.11 In this case, the court held that no resulting trust arose in respect of the sale proceeds of the properties in favour of the father. In relation to one of the properties, Unit 473, the court considered two key facts in support of its finding that the father had intended to divest the beneficial interest in the property. First, the father had transferred Unit 473 to the son to put it out of reach of the father's creditors.[15] Second, the sale proceeds from Unit 473 ("the Unit 473 Moneys") were comingled with the son's bank account, and these moneys were used by the son for personal and family expenses.[16]

16.12 Both the plaintiff-father and defendant-son attempted to rely on the proposition in *R v Clowes (No 2)*[17] cited in *Hinckley Singapore Trading Pte Ltd v Sogo Department Stores (S) Pte Ltd*[18] in support of their respective positions. In that case, it was held that the mere mingling of funds is not necessarily fatal to a trust. However, Lim J was of the view that there was no trust in the present case as there were no indicators of a trust; importantly, the son had used a substantial part of the moneys for his personal and family benefit.[19] There was no evidence that the son needed or sought the father's consent to use the Unit 473 Moneys.[20]

16.13 In relation to the sale proceeds of Unit 473A ("the Unit 473A Moneys"), Lim J applied a similar analysis (as that adopted for Unit 473)

2016) ch 13 and Kelvin Low, "Presumption of Advancement: A Renaissance" (2007) 123 LQR 347.

14 The history of the retention analysis is traced in John Mee, "'Automatic' Resulting Trusts: Retention, Restitution, or Reposing Trust?" in *Constructive and Resulting Trusts* (Charles Mitchell ed) (Oxford and Portland, Oregon: Hart Publishing, 2009) ch 7 and John Mee, "The Past, Present, And Future of Resulting Trusts" (2017) 70 CLP 189. For criticisms, see Robert Chambers, *Resulting Trusts* (Clarendon Press, 1997) at p 52 and William Swadling, "Explaining Resulting Trusts" (2008) 124 LQR 78 at 99. A defence of the retention analysis may be found in James Penner, "Resulting Trusts and Unjust Enrichment: Three Controversies" in *Constructive and Resulting Trusts* (Charles Mitchell ed) (Oxford and Portland, Oregon: Hart Publishing, 2009) ch 8.

15 *Lau Yaw Ben v Lau Wee Hion* [2022] SGHC 130 at [30].

16 *Lau Yaw Ben v Lau Wee Hion* [2022] SGHC 130 at [32].

17 [1994] 2 All ER 316.

18 [2001] 3 SLR(R) 119 at [28]–[29], citing *R v Clowes (No 2)* [1994] 2 All ER 316 at 325.

19 *Lau Yaw Ben v Lau Wee Hion* [2022] SGHC 130 at [34].

20 *Lau Yaw Ben v Lau Wee Hion* [2022] SGHC 130 at [34].

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and held that no resulting trust arose in respect of the Unit 473A Moneys in favour of the father.[21]

16.14 In conclusion, Lim J held that a POA arose in favour of the son based on two essential facts, namely: (a) that the transfer of properties by the father to the son was for the purpose of protecting his assets from his creditors; and (b) the son's conduct of treating the Sums as his own to use (which the father did not object to or seek to prohibit). In a way, it can be said that the father did not seek to ring-fence the sale proceeds of Unit 473 or 473A from the son, and that omission possibly led to the failure of the father's trust arguments.

III. Constructive trust

16.15 The facts of *Ong Chai Soon v Ong Chai Koon*[22] closely track the Singapore story of residents transitioning from *kampong* life to HDB living. The Ong family originally stayed in a *kampong* where their land was eventually compulsorily acquired by the Government. Compensation sums were paid to the Ong matriarch who managed the money. As a testament of the Ong family's determination and resilience in pulling themselves up by their own bootstraps, the Ong family managed to acquire two HDB flats and a two-storey HDB shophouse. The central dispute was over the HDB shophouse where a common intention constructive trust was asserted over it by some of the Ong siblings. The HDB shophouse was acquired in 1989 and registered in the name of the eldest son, Chai Soon. Part of the shophouse was occupied by a hairdressing salon known as Red Point, which was a sole proprietorship registered in Chai Soon's name. The Ong sisters, Sor Kim, Sor Mui and Kim Geok, worked at Red Point until 2018. Chai Soon, Sor Kim, Sor Mui and the Ong matriarch stayed on the second floor of the HDB shophouse. The Ong siblings asserted that Chai Soon held the HDB shophouse on a common intention constructive trust for each of the siblings who were entitled to equal beneficial shares. The High Court judge found the claim based on a common intention constructive trust to be valid. Chai Soon appealed the High Court's decision.

16.16 While most of the appellate court's decision dealt with the Housing and Development Act 1959,[23] the judgment of *Ong Chai Soon v Ong Chai Koon* on the common intention constructive trust is likely to be influential in the future development of the law in this area. In an

21 *Lau Yaw Ben v Lau Wee Hion* [2022] SGHC 130 at [43].
22 [2022] 2 SLR 457.
23 2020 Rev Ed.

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earlier review the present authors[24] in 2019 and other commentators[25] predicted that, post the Court of Appeal's decision in *Geok Hong Co Pte Ltd v Koh Ai Gek*,[26] a restrictive approach to an inferred common intention constructive trust will be adopted in Singapore, which focuses mainly on direct financial contribution to the purchase price. In fact, the present authors suggested that "this means that the inferred common intention may only succeed in Singapore if the plaintiff is able to show some form of financial contribution".[27] This suggestion has been proven wrong in *Ong Chai Soon v Ong Chai Koon*. In *Ong Chai Soon v Ong Chai Koon*, Chai Soon's counsel argued on appeal that the other Ong siblings could not prove direct financial contribution to the purchase price, and this was fatal to their claim for a common intention constructive trust. Andrew Phang Boon Leong JCA, who delivered the judgment of the Court of Appeal, rejected this contention on two grounds. First, the rental proceeds of the shophouse and earnings of Red Point were used to pay the mortgage instalments. Since these belonged to the Ong siblings in equal shares, this was sufficient to demonstrate a direct financial contribution. Second, the learned judge criticised counsel's preoccupation with direct financial contribution in inferring a common intention constructive trust. Phang JCA said:[28]

> More importantly, as a matter of *law*, the appellant's fixation on direct financial contributions to the purchase price of the Property takes *too narrow* a view of the common intention constructive trust analysis. … Instead, the court is ultimately concerned with identifying whether the parties shared a *common intention* as to the beneficial interest in the property. Although direct financial contributions to the purchase price of that property are an important consideration, they are not the only basis upon which the court may infer such a common intention. [emphasis in original]

16.17 Phang JCA pointed out that the present case was an exceptional situation where all the Ong siblings could not prove direct financial contributions in the form of money being paid from bank accounts or Central Provident Fund ("CPF") accounts. The High Court's finding of the common intention was therefore upheld. In the High Court, Ang Cheng Hock J had found the relevant common intention on, *inter alia*, the following grounds:

24 (2019) 20 SAL Ann Rev 455 at 461, para 15.12.
25 See, *eg*, Michael M H Ng, "The Common Intention Constructive Trust: Eight Years on" [2022] SAL Prac 14 and Rachel Leow, "The Death of Stack in Singapore" (2019) 135 LQR 535.
26 [2019] 1 SLR 908.
27 (2019) 20 SAL Ann Rev 455 at 461, para 15.12.
28 *Ong Chai Soon v Ong Chai Koon* [2022] 2 SLR 457 at [34].

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(a) the Ong matriarch telling Kim Geok not to work for anyone else and to work for Red Point. The matriarch advised the Ong siblings to use Red Point's funds as the Ong siblings' pension funds;

(b) the Ong matriarch's intention that when the Ong siblings grew old, they could sell the HDB shophouse and use the proceeds as their pension funds;

(c) that Kim Geok was the *de facto* "boss" of Red Point even though it was a sole proprietorship registered in Chai Soon's name. In particular, she operated Red Point's bank account and decided the salaries of the other sisters;

(d) the funds of Red Point being used as part of the Ong family funds to pay for family expenses such as holidays for the siblings and their families, the medical expenses of the Ong matriarch and patriarch, and the funeral expenses of the Ong patriarch;

(e) the Ong sisters having worked for 28 years at Red Point taking relatively meagre salaries of between $600 and $1,200. The High Court found that the Ong sisters did this because they regarded Red Point as a family business where they owned the HDB shophouse as a family asset; and

(f) Chai Koon helping with the renovation and fitting out of Red Point.

These factors are significant because they demonstrate that an inferred common intention may be found in the context of a family business quite apart from direct financial contribution.

16.18 Another notable part of this decision was Phang JCA's affirmation that detrimental reliance is necessary to establish a claim under a common intention constructive trust. The relevant detrimental reliance was the Ong sisters working at Red Point for 28 years for a relatively meagre salary, Chai Koon doing renovation, fitting-out and carpentry work for Red Point and the Ong siblings consenting to Red Point's earnings being used to service the mortgage instalments for the HDB shop house.

16.19 In summary, *Ong Chai Soon v Ong Chai Koon* is a landmark decision in relation to the common intention constructive for two reasons. First, this judgment demonstrates that in establishing a common intention, parties are not confined strictly to financial contributions. In appropriate circumstances, especially in the context of a family business, the intention of members of the family (including the matriarch, who was deceased) could be relevant to establishing the common intention.

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Second, *Ong Chai Soon v Ong Chai Koon* reaffirms the importance of establishing detrimental reliance in establishing a claim in common intention constructive trust. Finally, this case reveals that it is imprudent for counsel and commentators to generalise on the state of the law on the common intention constructive from past cases. In awarding the appropriate remedy, the court seemed to respond to the factual situation in each case as to how the parties had conducted themselves through the years and the extent of unpaid familial labour which has been expended.[29]

16.20 *Zaiton bte Adom v Nafsiah bte Wagiman*[30] is a valuable case on constructive trusts as it laid down useful general principles. Considerable scepticism was also expressed about the remedial constructive trust by the learned judge. In this case, the plaintiff sought to recover a sum of around S$200,000 from the defendants. This matter arose from complicated romantic entanglements between three parties. The plaintiff was the second wife of the second defendant. The plaintiff and second defendant were already in a prior romantic relationship even though the second defendant was still married to the first defendant. The relationship between the first and second defendants was not a happy marriage. In 2013, the second defendant entered an "unregistered marriage" with the plaintiff. It was only in 2018 that the second defendant formally divorced the first defendant; he married the plaintiff in 2019.

16.21 The dispute revolved around a HDB flat. In 2002, the defendants purchased a HDB flat as joint tenants, to be their matrimonial home at a price of S$298,000. They paid the purchase price by taking up a HDB loan ("the HDB Loan") and using moneys from their CPF accounts. The second defendant contributed a sum of S$23,000 for the downpayment and thereafter, the first defendant serviced the HDB Loan virtually alone. In 2015, the second defendant procured slightly over S$200,000 from the plaintiff pursuant to a plan whereby he would hand the money to the first defendant who would deposit the money "into the 1st Defendant's CPF funds such as to allow the 2nd Defendant to buy over the Flat".[31] This was done, and the money was deposited into the first defendant's CPF account. After depositing the money into her CPF account, the first defendant withdrew S$125,717.15 from her CPF Ordinary Account to repay the HDB Loan in full. When the money was given to the first

29 See generally Yip Man, "Comparing Family Property Disputes in English and Singapore Law: 'Context' is Everything" (2021) 41 Legal Stud 474 and Yip Man & Tang Hang Wu, "Crazy Rich Families in Singapore: Property, Trust and Business Disputes, and the Incompatibility of English Principles" in *Trusts and Private Wealth Management* (Richard Nolan, Yip Man & Tang Hang Wu eds) (Cambridge University Press, 2022) at p 108.

30 See para 16.7 above.

31 *Zaiton bte Adom v Nafsiah bte Wagiman* [2023] 3 SLR 533 at [11].

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defendant, she did not know the source of the funds and only found out about it later.

16.22 The plaintiff sought to recover the sum of over S$200,000 from either or both defendants under various heads of relief, including: (a) an institutional constructive trust; (b) remedial constructive trust; (c) resulting trust; and (d) a *Quistclose* trust.

16.23 The plaintiff's case on the institutional constructive trust was based on, *inter alia*, the following propositions: that (a) "[t]he foundation of an institutional constructive trust lies in unconscionability"; and (b) "[t]he knowledge which a recipient must have to make her unconscionable and to give rise to an institutional constructive may be acquired either before or after the recipient receives the property".[32] Vinodh Coomaraswamy J rejected the argument based on unconscionability as misconceived. According to the learned judge, "[u]nconscionability in … [a] general sense is a necessary but not a sufficient condition for a constructive trust to arise".[33] Coomaraswamy J said:[34]

> T holds her rights in property on constructive trust for B if and only if, a set of circumstances have transpired in relation to those rights which equity recognizes by accretion of judicial decision are sufficient to render it unconscionable for T to exercise those rights as she sees fit, disregarding B. Equity responds to the unconscionability by burdening T's rights in property with a set of equitable duties to B.

16.24 Coomaraswamy J held that a non-exhaustive list of institutional constructive trusts includes the following situations:[35]

> (a) fraud;
>
> (b) the retention of property acquired as a result of a crime causing death;
>
> (c) a profit in breach of a fiduciary duty;
>
> (d) the retention of property by a vendor after the vendor had entered into a specifically enforceable contract to sell the property;
>
> (e) the changing of a will by the survivor of two persons who had entered into a contract to execute wills in a common form;

32 *Zaiton bte Adom v Nafsiah bte Wagiman* [2023] 3 SLR 533 at [92].

33 *Zaiton bte Adom v Nafsiah bte Wagiman* [2023] 3 SLR 533 at [104]. See generally Tang Hang Wu, "The Constructive Trust in Singapore: Five Persistent Puzzles" (2010) 22 SAcLJ 136.

34 *Zaiton bte Adom v Nafsiah bte Wagiman* [2023] 3 SLR 533 at [105].

35 *Zaiton bte Adom v Nafsiah bte Wagiman* [2023] 3 SLR 533 at [107].

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(f) the acquisition of land expressly subject to the interests of a third party; and

(g) the assertion of full entitlement to property after a common intention to share property had been formed (also known as a common intention constructive trust).

While this list is not closed and capable of development, it is to be developed incrementally, by analogy to the existing cases within the category. The learned judge warned that:[36]

> Equity does not develop or add to these categories in an unprincipled and *ad hoc* way, turning on a particular judge's subjective opinion in a particular case as to whether T has engaged in conduct which is or is not unconscionable in some general sense of the word.

16.25 On the facts, Coomaraswamy J found that the first defendant was not within any recognised category where an institutional constructive trust arose.

16.26 The learned judge also dismissed the argument based on the well-known case of *Chase Manhattan Bank NA v Israel-British Bank (London) Ltd*.[37] According to Coomaraswamy J, this case stood for the proposition that:[38]

> … [i]f B transfers property to T under a factual mistake and T knows of the mistake but retains the property, T will be a constructive trustee of the property for B …

16.27 The plaintiff could not rely on this case for two reasons. First, the plaintiff did not make any payment to the first defendant. Second, even if the second defendant could be treated as the plaintiff's agent, the plaintiff was not labouring under any mistake when she handed the cashier's order to the second defendant. The judge found that the plaintiff paid the money to the second defendant believing that the second defendant would return her the money by some unspecified means at some unspecified time in future.

16.28 In relation to the claim based on the remedial constructive trust, Coomaraswamy J expressed reservations about whether a remedial

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36 *Zaiton bte Adom v Nafsiah bte Wagiman* [2023] 3 SLR 533 at [108].

37 [1981] 1 Ch 105. See generally Tang Hang Wu, *The Principles of the Law of Restitution in Singapore* (Academy Publishing, 2019) at pp 401–405.

38 *Zaiton bte Adom v Nafsiah bte Wagiman* [2023] 3 SLR 533 at [131].

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constructive trust forms part of or should form part of Singapore law. The learned judge said:[39]

> The remedial constructive trust allows the court to create and destroy property rights by decree. That undermines the policy imperative for rights in property to be stable and for the law to allocate and alter those rights only in a manner which is transparent, consistent and predictable: see *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175 at 1247–1248. Once a system of law recognises a power to impose a remedial constructive trust – at least, if the remedial constructive trust is not kept within very strict constraints – it has the capacity to subvert this policy imperative.

16.29 Nevertheless, the learned judge recognised that the Court of Appeal in *Wee Chiaw Sek Anna v Ng Li-Ann Genevieve*[40] accepted, albeit in *obiter dicta*, that the Singapore court had the power to declare a remedial constructive trust. In any case, proceeding on the assumption that the remedial constructive trust formed part of Singapore law, Coomaraswamy J declined to declare a remedial constructive trust on the first defendant's property. Notably, his Honour held that:[41]

> … [t]o secure a remedial constructive trust, it is not sufficient for a plaintiff to show merely that a defendant has behaved unconscionably or that a defendant's conscience is affected by her conduct in a past transfer of property. The plaintiff must first establish a cause of action against a defendant, *ie*, a confluence of facts recognised by law as capable of yielding a remedy. Only then can the court even begin to consider whether a remedial constructive trust is the appropriate remedy to award the plaintiff on the facts of a particular case.

On the facts, the judge held that the plaintiff had not established any recognised causes of action against the first defendant in equity, contract or unjust enrichment.

IV. *Quistclose* trust

16.30 The court held in *Zaiton bte Adom v Nafsiah bte Wagiman*[42] that a *Quistclose* trust did not arise when the plaintiff handed the two cashiers' orders to the second defendant. Citing Lord Millet in *Twinsectra v*

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39 *Zaiton bte Adom v Nafsiah bte Wagiman* [2023] 3 SLR 533 at [145]. Similar scepticisms are expressed in Tang Hang Wu, "The Constructive Trust in Singapore: Five Persistent Puzzles" (2010) 22 SAcLJ 136. On remedial constructive trusts, see generally Tang Hang Wu, *The Principles of the Law of Restitution in Singapore* (Academy Publishing, 2019) at pp 390–400. See also Yip Man, "Singapore's Remedial Constructive Trust: Lessons from Australia?" (2014) 8 J Eq 77.

40 [2013] 3 SLR 801.

41 *Zaiton bte Adom v Nafsiah bte Wagiman* [2023] 3 SLR 533 at [150].

42 On the *Quistclose* trust, see Alvin See, "The *Quistclose* Trust in Singapore" (2014) 20 T&T 362.

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Yardley,[43] "a *Quistclose* trust does not arise merely because money is paid for a particular purpose. Rather, the determinative question is whether the parties intended the money to be at the free disposal of the recipient".[44] In this case, the court found that "no *Quistclose* trust arose in the plaintiff's favour because the plaintiff intended the proceeds of the two cashier's orders to be at the free disposal of the second defendant".[45] Furthermore, "the plaintiff and the second defendant did not intend to segregate the proceeds of the two cashiers' orders from their general assets".[46]

16.31 *Wei Ho-Hung v Lyu Jun*[47] dealt with the evidential threshold for establishing *Quistclose* trusts in the context of a romantic relationship. This was a more unusual factual context, as the original *Quistclose* trust arose on the facts of a commercial loan extended by a bank (Barclays Bank in the UK) for the borrower's specific business purposes.[48] In this case, there were transfers of moneys made from one Lyu to one Wei during their relationship as an unmarried couple. Lyu transferred these moneys ("the Transferred Moneys") to Wei for the purposes of paying for several items in Wei's name, including, *inter alia*, a clinic investment, surrogacy and an apartment, for the purposes of building their life together as a married couple in the future.[49] Subsequently, their relationship came to an end and Lyu sought to assert a *Quistclose* trust in respect of the Transferred Moneys.

16.32 Belinda Ang Saw Ean JAD recognised that, while the notions of a "specific purpose", "exclusivity" and the absence of "free disposal" are clear indicators of a trust, they still present ambiguity in respect of the *amount* and *quality* of evidence required by a plaintiff who asserts a *Quistclose* trust. Instead, Ang JAD was of the view that the evidential threshold required to assert a *Quistclose* trust depends much on the facts and circumstances of the case, and by requiring less or more evidence of a higher or lower quality, the court can circumscribe or expand the applicability of the *Quistclose* trust doctrine.[50]

16.33 In relation to commercial cases, Ang JAD observed that the evidential threshold to which commercial cases have been subjected has in fact not been uniformly high even though these cases may be viewed with a certain scepticism as attempts to circumvent ordinary

43 [2002] 2 AC 164 at [73] and [74].
44 *Zaiton bte Adom v Nafsiah bte Wagiman* [2023] 3 SLR 533 at [172].
45 *Zaiton bte Adom v Nafsiah bte Wagiman* [2023] 3 SLR 533 at [180].
46 *Zaiton bte Adom v Nafsiah bte Wagiman* [2023] 3 SLR 533 at [180].
47 [2022] 2 SLR 1066.
48 *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567 at 579–580 and 582.
49 *Wei Ho-Hung v Lyu Jun* [2022] 2 SLR 1066 at [6].
50 *Wei Ho-Hung v Lyu Jun* [2022] 2 SLR 1066 at [51].

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priority rules in insolvency. Accordingly, the evidential threshold for non-commercial cases (voluntary transfers between individuals in a private non-commercial setting) should necessarily be less rigorous.[51] On the facts, Ang JAD found that Lyu had discharged the evidential burden in asserting a *Quistclose* trust. The contents of Lyu's and Wei's communications prior to the transfers were sufficient to establish that they were made with a view to be used exclusively for specified purposes and were not to be at the free disposal of Wei. For example, in one of her text messages to Lyu, Wei had explicitly asked Lyu to transfer to her a sum of S$1.4m which would be spent on the following three items: (a) the clinic investment; (b) the surrogacy; and (c) the apartment.[52] Whilst Lyu initially expressed his concern that the sum of S$1.4m was excessive, he eventually agreed to transfer Wei a sum of S$800,000. When viewed as a whole, this was sufficient to establish the intention on the part of Lyu that the sum of S$800,000 he had transferred to Wei was to be used only for the acquisition of the three items as stated above and requested by Wei.[53]

V. Trusts and Housing and Development Act

16.34 *Ong Chai Soon v Ong Chai Koon*[54] resolved a lingering uncertainty in relation to whether a resulting or constructive trust may be asserted over HDB property.[55] Prior to this decision, there were two conflicting interpretations of the law found in the High Court. First, in *Tan Chui Lian v Neo Liew Eng*,[56] Sundaresh Menon JC took the position that the relevant provision in the Housing and Development Act[57] only barred *ineligible* persons from becoming entitled to any interest in HDB property under a resulting trust or constructive trust ("the Eligibility Interpretation"). Second, in *Lim Kieuh Huat v Lim Teck Leng*,[58] Andre Maniam JC expressed a preference for the construction that the relevant Housing and Development Act provisions bar all persons (including eligible persons) from becoming entitled to an interest in HDB property under a resulting or constructive trust if they did not already have an

51 *Wei Ho-Hung v Lyu Jun* [2022] 2 SLR 1066 at [52].
52 *Wei Ho-Hung v Lyu Jun* [2022] 2 SLR 1066 at [53].
53 *Wei Ho-Hung v Lyu Jun* [2022] 2 SLR 1066 at [56].
54 See para 16.15 above.
55 See generally Tang Hang Wu, "Housing and Development Board Flats, Trust and Other Equitable Doctrines" (2012) 24 SAcLJ 470 and Timothy Chan, "Resulting and Constructive Trusts over Public Housing – Recent Developments and the Way Forward" [2022] Sing JLS 1.
56 [2007] 1 SLR(R) 265.
57 The learned judge was interpreting s 51(6) of the Housing and Development Act (Cap 129, 2004 Rev Ed).
58 [2020] SGHC 181.

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entitlement to the property in question ("the Pre-Existing Interest Interpretation").[59]

16.35 Phang JCA, in a carefully reasoned and comprehensive judgment, held that based on a purposive and contextual approach to s 51(10) of the Housing and Development Act,[60] as amended by the Housing and Development (Amendment) Act 2010[61] ("the amended Housing and Development Act") the Eligibility Interpretation is correct and should be preferred over the Pre-Existing Interest Interpretation. Several reasons were given for this holding. First, on an ordinary reading of the word "entitled" found in the provision, a person may be said to "become entitled" to an interest which he could not have obtained before (due to his ineligibility to obtain such an interest) or which he did not have before. Reading the requirement of eligibility into s 51(10) of the amended Housing and Development Act would therefore not stretch its words beyond their natural and ordinary meaning.[62] Second, the view that the Eligibility Interpretation is not only a possible but a plausible interpretation of s 51(10) of the amended Housing and Development Act is further supported by the broader statutory scheme. The word "entitled" is used in several other amended Housing and Development Act provisions without carrying the meaning of "having an interest in property" or "acquiring an interest in property", and indeed is used in a sense much more closely correlated with the concept of eligibility.[63]

16.36 Further, the court held that the various parliamentary statements that had been made over the years revealed that the specific legislative intent behind s 51(10) of the amended Housing and Development Act was to prevent persons who were ineligible to own HDB flats from becoming entitled to such property under a resulting or constructive trust, when they would not have been permitted to own an HDB flat directly or outright. The purpose of s 51(10) was not to prevent all persons without a pre-existing interest from acquiring an entitlement to HDB property. This view of Parliament's intention was consistent with the language of s 51(10) and its statutory context, as well as the observations made by the courts over the years.[64] Phang JCA reasoned that it was evident

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59 *Lim Kieuh Huat v Lim Teck Leng* [2020] SGHC 181. Andre Maniam JC was interpreting s 51(1) of the Housing and Development Act (Cap 129, 2004 Rev Ed) (as amended by the Housing and Development (Amendment) Act 2010 (Act 18 of 2010)).

60 Cap 129, 2004 Rev Ed (as amended by the Housing and Development (Amendment) Act 2010 (Act 18 of 2010)).

61 Act 18 of 2010.

62 *Ong Chai Soon v Ong Chai Koon* [2022] 2 SLR 457 at [88].

63 *Ong Chai Soon v Ong Chai Koon* [2022] 2 SLR 457 at [89].

64 *Ong Chai Soon v Ong Chai Koon* [2022] 2 SLR 457 at [91] and [102].

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that the Eligibility Interpretation better furthers its legislative purpose by directing the inquiry specifically towards the question of eligibility. In contrast, the Pre-Existing Interest Interpretation is over-inclusive, preventing even eligible beneficial owners from asserting their interests in HDB property even where they had not purported to "create" the trust through some connivance or intentional nominee arrangement. Further, the practical effect of the Pre-Existing Interest Interpretation is that s 51(10) of the Housing and Development Act would allow a claim to a resulting or constructive trust over an HDB property only in cases where both parties were already registered owners of the property under a joint tenancy or tenancy in common, and one party sought to argue that their respective beneficial shares in the property should not follow the proportions of their legal shares. There is no basis in the legislative purpose of s 51(10) or in the parliamentary material for circumscribing the operation of resulting or constructive trusts over HDB property this narrowly to preclude eligible but unregistered beneficial owners from claiming an equitable interests in HDB property.[65]

VI. Trustee's duty to account

16.37 *Baker, Michael A v BCS Business Consulting Services Pte Ltd*[66] emphasised the importance of a trustee's duty to be constantly ready with his account and contained observations on the level of documentation a trustee should provide to discharge this duty.

16.38 In this case, the beneficiaries sought to "falsify"[67] numerous expenses reflected in the trustees' account of trust assets. The Singapore International Commercial Court ("SICC") found substantially in favour of the beneficiaries but declined to falsify two deductions of US$340,000 and US$50,000 (collectively known as "the Deductions") on the basis that the trustees' explanations for them were reasonable.[68] On appeal to the Court of Appeal, the beneficiaries argued that the SICC failed to consider

65 *Ong Chai Soon v Ong Chai Koon* [2022] 2 SLR 457 at [107].

66 [2023] 1 SLR 35.

67 "Falsify" here carries a technical meaning. When a trustee provides an account which discloses what the beneficiary considers to be discrepancies, the beneficiary may choose to "falsify" a wrongful expense or loss charged to the account, which would then require the expense or loss to be deleted or disallowed. When a beneficiary "falsifies" an entry in the account, the beneficiary is challenging or disputing the alleged use of funds. If the court allows falsification by a beneficiary, the burden then lies on the *trustee* to prove that the disbursement was authorised (see *Cheong Soh Chin v Eng Chiet Shoong* [2019] 4 SLR 714 at [78]; *UVJ v UVH* [2020] 2 SLR 336 at [28]; *Dextra Partners Pte Ltd v Lavrentiadis, Lavrentios* [2021] SGCA 24 at [46]).

68 *Baker, Michael A v BCS Business Consulting Services Pte Ltd* [2023] 1 SLR 35 at [2].

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the lack of documentary evidence supporting the Deductions, which amounted to a failure by the trustees to discharge their burden of proof.[69]

16.39 Regarding the level of documentation required by the trustees to discharge their burden of proof, the Court of Appeal held that "the trustees' obligation to account is not satisfied by merely giving particulars of payments made by them, but extends to providing copies of the trust accounts and information as to the investments which represent the trust fund".[70]

16.40 When documenting "expenses" of the trust, a trustee (whether a professional trustee or lay trustee) "is expected to provide an explanation for the breakdown of expenses and to substantiate the same with sufficient supporting evidence, oral or documentary depending on the nature and quantum of such expenses".[71] While allowances may be given to non-professional trustees, they should minimally furnish documentation on the *fact* and *quantum* of expenses.[72] The court also noted that where documentation of expenses is not available, oral evidence may suffice but a trustee should still have other cogent evidence to corroborate his oral account.[73] Ultimately, the court will take a practical view in assessing whether documentary evidence in supporting certain expenses might exist or otherwise cannot be obtained.[74]

16.41 It is well established in law that where a beneficiary falsifies (that is, challenges or disputes) an entry in the account, the burden of proof lies on the trustee to prove that the disbursement was authorised.[75] However, the court cited *Exus Travel Ltd v Turner*[76] ("*Exus*") in taking a practical view that while the legal burden is on the accounting party to justify payments made for the benefit of the beneficiary, how that burden is discharged will vary from case to case.[77]

16.42 Applying the above principles, the court held that the trustee did not discharge his burden of proof. This was a case where no documentation was provided whatsoever to support the Deductions, unlike *Chan Fuk*

69 *Baker, Michael A v BCS Business Consulting Services Pte Ltd* [2023] 1 SLR 35 at [20].
70 *Baker, Michael A v BCS Business Consulting Services Pte Ltd* [2023] 1 SLR 35 at [28].
71 *Baker, Michael A v BCS Business Consulting Services Pte Ltd* [2023] 1 SLR 35 at [30].
72 *Baker, Michael A v BCS Business Consulting Services Pte Ltd* [2023] 1 SLR 35 at [32].
73 *Baker, Michael A v BCS Business Consulting Services Pte Ltd* [2023] 1 SLR 35 at [33].
74 *Baker, Michael A v BCS Business Consulting Services Pte Ltd* [2023] 1 SLR 35 at [36].
75 *Cheong Soh Ching v Eng Cheit Shoong* [2019] 4 SLR 714 at [78]. See also *Dextra Partners Pte Ltd v Lavrentiadis, Lavrentios* [2021] SGCA 24 at [46].
76 [2014] EWCA Civ 1331 at [42].
77 *Baker, Michael A v BCS Business Consulting Services Pte Ltd* [2023] 1 SLR 35 at [36].

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Tai v Chan Wai Ming[78] ("*Chan Fuk Tai*") and *Exus*. In those cases, there was merely incomplete documentation of expenses which was supported with reasonable explanations.[79]

16.43 The Court of Appeal further distinguished *Chan Fuk Tai* and highlighted that in cases where the expenses are significant sums of money (such as the US$340,000 expense in this case), there should minimally be some backing documentation to support the expense.[80]

VII. Equity and gifts

16.44 It is a well-established maxim that equity will not assist a volunteer. *WDS v WDT*[81] contains valuable observations on the application of the exceptions to the general maxim established in the trio of English authorities: *In re Rose v Inland Revenue Commissioners*[82] ("*Re Rose*"), *T Choithram International SA v Pagarani*[83] ("*Choithram*") and *Pennington v Waine*[84] ("*Pennington*").

16.45 In this case, the defendant-daughter of the deceased ("the Deceased") alleged that a gift of US$1.5m had been made to her by the Deceased during the Deceased's lifetime. However, the Deceased passed away before transferring the US$1.5m to her. The daughter mainly relied on a letter dated 14 September 2016 signed by the Deceased ("the 14 September 2016 Letter"), which purported to instruct the Deceased's lawyers and bankers to execute all necessary fund transfers to make a further cash gift to the daughter.

16.46 On the application of *Re Rose*, the court clarified that the test is not whether the settlor had done all that he or she "thought" she needed to do. Instead, the test is whether the settlor had "done all within [his or her] power to procure the transfer" of the property.[85] On the facts, the 14 September 2016 Letter was insufficient to satisfy the applicable test in *Re Rose* as the Deceased did not (a) take steps to bring it to her lawyers or bankers; and (b) specify the accounts from which the US$1.5m was to

78 [2020] HKCU 1567.
79 See *Chan Fuk Tai v Chan Wai Ming* [2020] HKCU 1567 at [48]–[55]; see also *Exus Travel Ltd v Turner* [2014] EWCA Civ 1331 at [57]–[59].
80 *Baker, Michael A v BCS Business Consulting Services Pte Ltd* [2023] 1 SLR 35 at [40].
81 [2022] SGHCF 12.
82 [1952] Ch 499.
83 [2001] 2 All ER 492.
84 [2002] 1 WLR 2075. See generally Tham Chee Ho, "Careless Share Giving" (2006) 70 Conv 411.
85 *WDS v WDT* [2022] SGHCF 12 at [29].

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be withdrawn.[86] These steps were necessary for a transfer of the property (the sum of US$1.5m), but had not been done.

16.47 The court distinguished the facts of *Choithram*.[87] The court noted the importance of the "novel" context in *Choithram*, where the donor had made an oral declaration to make a gift of all his wealth associated with his companies to a foundation which he was intending to set up.[88] The donor had also signed a deed setting up the foundation whereby he and six other persons would be the trustees. Given that the foundation had yet to come into existence, it was fair to construe the donor's words as amounting to a self-declaration of a trust. However, on the facts of *WDS v WDT*, there were no specific words written by the Deceased which could be fairly construed as words declaring a trust over the US$1.5m in favour of her daughter.[89]

16.48 In relation to *Pennington*,[90] the court clarified that it stood for the following proposition: that an imperfect gift can be treated as completely constituted if the circumstances are unconscionable for the donor to recall the gift. The court was of the view that to invoke the exception in *Pennington*, the circumstances of the case would likely have to be similar to the unique factual matrix of *Pennington* itself. In *Pennington*, the donee had knowledge of the intended gift of shares in a company from the donor and had subsequently relied on this by becoming a director of the company. On the facts, *Pennington* was not applicable as the donee-daughter was not aware of the intended gift of US$1.5m prior to the Deceased's death and thus could not have relied on it.

VIII. Fiduciary relationships

16.49 *Tan Teck Kee v Ratan Kumar Rai*[91] ("*Tan Teck Kee*") is a significant decision which demonstrates that the mere existence of a formal fiduciary relationship between a fiduciary and his principal does not preclude the arising of concurrent fiduciary relationships between that same fiduciary and third parties.

16.50 In this case, a group of close friends, including the plaintiff, Rai, the first defendant, Seah, and the second defendant, Tan (collectively "the Investors"), decided to jointly invest in various plots of land in

86 *WDS v WDT* [2022] SGHCF 12 at [33].
87 See para 16.43 above.
88 *WDS v WDT* [2022] SGHCF 12 at [35].
89 *WDS v WDT* [2022] SGHCF 12 at [37].
90 See para 16.43 above.
91 [2022] 2 SLR 1250.

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Cambodia ("the Venture"). By virtue of their close relationship, there was no written agreement. Instead, the discussions on the Venture culminated in an oral agreement between the Investors ("the Oral Understanding"). Under this Oral Understanding, Seah agreed to act as "custodian" of the invested "funds", and Tan was to "assist" Seah in his custodian duties.[92] Thereafter, the Investors used Worldbridgeland (Cambodia) Co Ltd ("WBL"), a Cambodian company, to acquire a plot of land in Cambodia. Subsequently, when the Venture became profitable, Rai sought information from Seah and Tan on their investment. When such information was not forthcoming, Rai commenced an action against them seeking an account.

16.51 At the Court of Appeal, a key issue was whether Tan, an appointed director of WBL, could concurrently owe fiduciary duties to Rai, one of the Investors in the Venture. Tan accepted that, as a director of WBL, he owed fiduciary duties (director's duties) to WBL as a corporate entity, but he denied owing any fiduciary duties to Rai.

16.52 On the law of fiduciary relationships, the Court of Appeal affirmed the "open-ended" approach in *Tan Yok Koon v Tan Choo Suan*.[93] Under this approach, the relevant inquiry was whether the "putative fiduciary had voluntarily place[d] himself in a position where the law can objectively impute an intention on his … part to undertake [fiduciary duties]".[94] Importantly, the Court of Appeal did not adopt the "narrow" approach proffered by Sarah Worthington and Len Sealy.[95] Under this "narrow" approach, fiduciary relationships arise where there are "legally significant facts"; for example, where the putative fiduciary "has control of another's property or has undertaken to act on another's behalf and for the other's benefit".[96] Whilst the narrow approach could provide a desirable guide to situations giving rise to fiduciary relationships, the court was of the view that the open-ended approach was more appropriate. Implicit in the court's reasoning was that the narrow approach may unduly restrict the degree of flexibility afforded to the courts when determining if a fiduciary relationship arises. Furthermore, the Court of Appeal rejected that the test for fiduciary is "predicated on a wholly subjective inquiry from the perspective of the putative fiduciary, *ie*, whether Mr Tan would have undertaken to act exclusively in the interests of Mr Rai".[97] Steven

92 *Tan Teck Kee v Ratan Kumar Rai* [2022] 2 SLR 1250 at [7].
93 [2017] 1 SLR 654.
94 *Tan Yok Koon v Tan Choo Suan* [2017] 1 SLR 654 at [194].
95 *Tan Teck Kee v Ratan Kumar Rai* [2022] 2 SLR 1250 at [77].
96 *Tan Teck Kee v Ratan Kumar Rai* [2022] 2 SLR 1250 at [74].
97 *Tan Teck Kee v Ratan Kumar Rai* [2022] 2 SLR 1250 at [72]. See Tan Weiming, "Negotiating New Curves along Chancery Lane: Four More Questions on Fiduciaries" (2021) 35(4) *Trust Law International* 197.

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Chong JCA said that "it is sufficient that the putative fiduciary is *seen* to have given such an undertaking, that necessarily requires some degree of objectivity in the analysis" [emphasis in original].[98]

16.53 On the facts, the Court of Appeal held that Tan could owe fiduciary obligations to the Investors as an *ad hoc* fiduciary, notwithstanding that he concurrently owed fiduciary obligations to WBL as a director of WBL.[99] In this regard, the court was of the view that the circumstances were such that Tan should be imputed with the intention to undertake fiduciary obligations to the Investors as the position which he voluntarily undertook possessed a high degree of control in protecting their interests in the Venture. Further, the Court of Appeal pointed out that the Investors were vulnerable to Tan's exercise of power.

16.54 Moving forward, this case is clear that the open-ended approach is the appropriate approach when determining whether a fiduciary relationship arises. Whilst the Court of Appeal recognised that this approach may engender some uncertainty in its application, the open-ended approach is preferred as it affords a higher degree of flexibility, especially in situations like the facts of *Tan Teck Kee* which do not fit neatly into traditional categories of fiduciary relationships like those between a company director and the company. Therefore, in line with the open-ended approach, it appears that courts are more likely to place greater emphasis on whether the *circumstances objectively* demonstrate an undertaking by the putative fiduciary to act for another, rather than the formal positions held by the putative fiduciary.

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98 *Tan Teck Kee v Ratan Kumar Rai* [2022] 2 SLR 1250 at [76].
99 *Tan Teck Kee v Ratan Kumar Rai* [2022] 2 SLR 1250 at [78]–[79].

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