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Foo Jee Seng and others
v
Foo Jhee Tuang and another

[2012] SGCA 41

Court of Appeal — Civil Appeal No 70 of 2011
Chao Hick Tin JA, Andrew Phang Boon Leong JA and VK Rajah JA
29 February 2012

Succession and Wills
Trusts

7 August 2012 Judgment reserved.

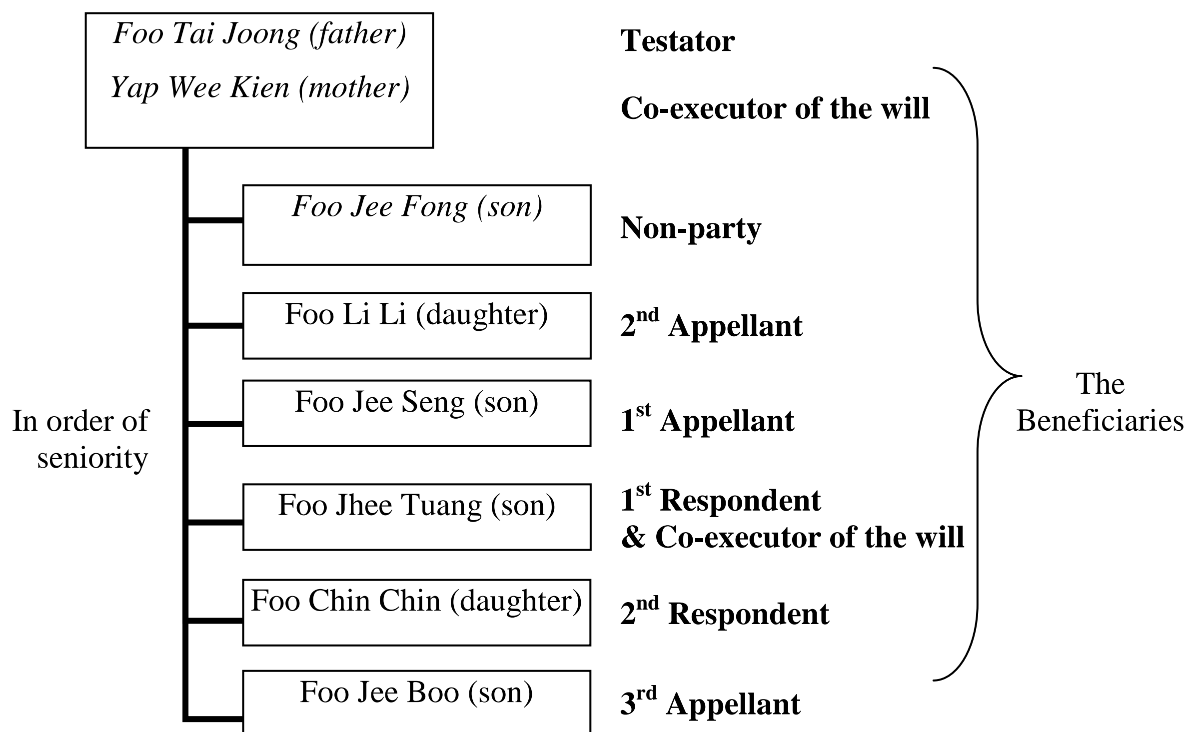
Chao Hick Tin JA (delivering the judgment of the court):

Introduction

1 This is an appeal from a decision of a High Court Judge ("the Judge") made in Originating Summons No. 909 of 2010/W ("OS 909") dismissing the application of the appellants for the sale of a real property in Singapore known as No 39 Lorong Marzuki ("the Property") and the consequential division of the proceeds of sale. The issue in this appeal concerns the effect of an express trust for sale which was created in a will with powers conferred upon the executors and trustees to postpone the sale of the Property as they in their discretion deem fit.

Background

2 The parties to OS 909 are all siblings. The Property belonged to one Foo Tai Joong ("the Testator"), who was the father of the parties. The Testator and his wife, Madam Yap Wee Kien, have four sons and two daughters. The diagram below shows the entire family's members and their roles in the present proceedings:



Note: italicised names indicate deceased persons.

3 By his Will dated 8 May 1975, the Testator appointed his Wife, Mdm Yap, and the 1st Respondent, as executors and trustees (collectively "the trustees"), to hold the Property on trust for the beneficiaries of the Will. The relevant parts of the Will are in these terms:[1]

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[1] Record of Appeal Vol. 3 Part A, p 13.

> 1. I APPOINT my wife YAP WEE KIEN and my son FOO JHEE TUANG if and when he attains the age of 21 years to be my Executrix and Executor and Trustees of this my Will (Hereinafter called "my Trustees").
>
> 2. I GIVE and DEVISE my property known as No. 39, Lorong Marzuki, Singapore, unto my Trustees UPON TRUST to sell call in and convert the same into money with power to postpone the sale calling in and conversion thereof so long as they shall in their absolute discretion think fit without being liable for loss and to hold the net proceeds of the said sale and conversion upon the following trusts:-
>
> (a) Upon trust to invest in their names in any investments authorised by law and to stand possessed of such investments and the said property if unsold.
>
> (b) Upon trust to divide the net income from the said investments or the net rent and profits from the said property equally to my wife and children namely the said YAP WEE KIEN, FOO JEE FONG, FOO LEE LEE, FOO JEE SENG, FOO JHEE TUANG, FOO CHIN CHIN AND FOO JEE BOO.
>
> (c) Upon trust to hold the said property or the net proceeds of sale and conversion thereof and any investments therefrom in trust to divide the same to my wife and the said children in equal shares.

4 The Testator passed away on 5 May 1979. Probate was obtained by Mdm Yap on 30 November 1979 as the sole executor of the Will as the 1st Respondent (the other named executor) was still a minor, being 18 years of age. Leave was reserved to the 1st Respondent to come in and prove the Will when he attained the age of 21 years. The Property was then registered in Mdm Yap's sole name as trustee.

5 After the Testator's death, Mdm Yap and all her children continued to reside at the Property. The Property has ten rooms[2]. To obtain additional income, rooms were rented out. Mdm Yap passed away on 25 July 2005. In

[2] Appellant's Core Bundle Vol. 1 p 10.

the meantime, the 1st and 2nd Appellants, and the 1st and 2nd Respondents left the Property after they began working or got married to establish their own homes. Subsequently, the eldest son, Foo Jee Fong, died on 19 July 2007. The 3rd Appellant continued to reside at the Property until 8 August 2008 when he obtained a job in Qatar. As of the date on which OS 909 was instituted, none of the children (*ie*, the beneficiaries) was residing in the Property.

6 Mdm Yap left a will, made on 18 May 2002, appointing the 3rd Appellant and the 1st Respondent to be her executors. In her will, Mdm Yap gave her assets to the following children (with shares indicated):

3rd Appellant	2 shares, 50%
1st Appellant	1 share, 25%
1st Respondent	1 share, 25%

7 It would appear that after Mdm Yap passed away, rent collection from tenants was, for a period, undertaken by the 1st and 3rd Appellants. At some point, the 1st Respondent took over this task from the 1st and 3rd Appellants, although there is a dispute as to the exact point in time when the 1st Respondent started to do so. He claims to have done so only from September 2009, whereas the Appellants say that he took over in 2008. We do not think anything significant turns on this.

8 The net rent income from the Property was not high, ranging from $1,130.00 in September 2009 to $200.00 in September 2010. However, over the years, the value of the Property has appreciated significantly, from about $60,000.00 in 1979 to about $4 million in 2010. The Property has been described as a "single storey old wooden zinc roof landed home" which is

currently in a "dilapidated state" (see *Foo Jee Seng and others v Foo Jhee Tuang and another* [2012] 1 SLR 211 ("the GD") at [6]).

9 After Foo Jee Fong died (see [5] above), the parties met to discuss the Property, but could not come to an agreement on what to do with it. The Appellants wanted the Property to be sold but the 1st Respondent refused to do so. Subsequently, on 4 March 2010, the 1st Respondent received a grant of double probate to the Testator's estate. The 2nd Respondent was cited as a party to these proceedings apparently because the Appellants could not contact her to ascertain her stand on this matter. To date, she has not taken any active part in the proceedings.

10 Relations between the parties to these proceedings started to get fractious when they separately engaged lawyers to deal with their differences. On 6 December 2009, the 1st Respondent filed Summons No. 5672 of 2010/S seeking, *inter alia*, a declaration that he was the sole surviving executor and trustee of the Testator's estate. The order was granted on 21 March 2010, and the Property became registered in the 1st Respondent's sole name. On 2 September 2010, the Appellants filed OS 909 for an order to compel the 1st Respondent to sell the Property and that the sale be effected by the Appellants.

Decision Below

11 The Judge accepted the 1st Respondent's arguments and declined to order a sale of the Property. She said this was a trust for sale with a power given to the trustees to postpone the sale indefinitely. According to the Judge, a proper construction of the Will revealed that the Testator's intention was for the trustees to "hold the Property until they thought fit to sell it, and in the meanwhile distribute the rental income derived from the Property amongst the Beneficiaries" (see the GD at [42]). In choosing to devise the Property by way

of trust as opposed to a settlement, the Testator might have wanted to preserve the land within the family's ownership and create successive interests in the land, but had "drafted this in the form of a trust for sale to facilitate the management of the tenancies of the Property" (*ibid*). The Judge was of the view that the trust was possibly a "device with utility beyond the plain meaning of its words" (*ibid*).

12 The Judge was unable to accept the Appellants' submission that in the light of the fact that the rental income generated from the Property was so meagre, it was no longer reasonable to withhold sale, especially when the siblings are all now adults living separately on their own. The Judge's basic point was that there was nothing in the Will which suggested that the Testator intended that the financial provisions for the family members should cease at any particular stage. In her opinion, the 1st Respondent, as the sole surviving trustee, has the sole discretion to decide when to dispose of the Property and the court should not be too ready to intervene in the trustee's exercise of his discretion. Moreover, there was no allegation that the 1st Respondent had acted *mala fide*.

13 On a related question, the Judge also found that the 1st Respondent did not have to give an account of the rent and profits from the Property as an account of profits was a remedy that could be granted against the holder of fiduciary duties where a breach of those duties had been established. As there were no allegations that the 1st Respondent had breached any fiduciary duties, this relief was also not granted.

Issues before this Court

14 The issues before this court are the following:

(a) What are the principles governing the construction of wills?

(b) What is a trust for sale?

(c) To what extent should the court supervise a trustee's exercise of the discretion not to effect a sale?

(d) What was the Testator's intention in creating the trust for sale in favour of his wife and children and whether the court should intervene in the decision of the 1st Respondent not to sell the Property?

(e) Whether the 1st Respondent has a duty to account for all rents received by him.

Principles governing the construction of wills

15 We will begin the consideration of this issue with the question as to how a court should construe a will. In *Leo Teng Choy v Leo Teng Kit and others* [2000] 3 SLR(R) 636 ("*Leo Teng Choy*") at [26], this court said:

> It is a general principle of construction of a will that the court should ascertain the intention of the testator from the will as a whole in the light of any extrinsic evidence admissible for the purpose of its construction. … The following passage of Knight Bruce LJ in *Key v Key* (1853) 4 De G M & G 73 at 84-85 explained why a strict literal construction must, in appropriate circumstances, give way to a construction which is in accord with the broad objective of the testator:
>
> > In common with all men, I must acknowledge that there are many cases upon the construction of documents, in which the spirit is strong enough to overcome the letter; cases in which it is impossible for a reasonable being, upon a careful perusal of an instrument, not to be satisfied from its contents that a literal, a strict, or an ordinary interpretation given to particular passages, would disappoint and defeat the intention with which the instrument, read as a whole, persuades and convinces him that it was framed. A

> man so convinced is authorised and bound to construe the writing accordingly.

16 In the later case of *Low Ah Cheow and others v Ng Hock Guan* [2009] 3 SLR(R) 1079 this court again had the occasion to address this issue and *Williams on Wills* (Francis Barlow *et al* eds) (LexisNexis Butterworths, 9th Ed, 2008) ("*Williams on Wills*") (at vol 1, paras 49.1 – 49.2) was cited and relied upon (at [19]):

> **General principle.** The first and great rule to which all others must bend is that effect must be given to the intention of the testator; but *the intention here in question is not the intention in the mind of the testator at the time he made his will, but that declared and apparent in his will.* The application of the rule resolves itself into two questions of construction: first, what is the intention of the testator disclosed by the will; and secondly, how can effect be given to that intention.
>
> **Ascertaining the intention of the testator**. The court of construction must ascertain the language of the will, read the words used and ascertain the intention of the testator from them. *The court's duty is not to ascertain what the [testator's] actual mental intentions were. The only question for the court of construction is what is the meaning of the words used, and the expressed intention in all cases is considered to be [the] actual intention*; the court cannot give effect to any intention which is not expressed or employed in the will …
>
> [emphasis in original]

17 It is clear that the overriding aim of the court in construing a will is to seek and give effect to the testamentary intention as expressed by the testator. This intention must predominantly be derived from the wording of the will itself, although the circumstances prevailing at the time the will was executed may be taken into account. Where a strict literal construction of the will would give rise to an effect which is clearly out of sync with the general intention of the testator as derived from the will as a whole, such a reading should give

way to a more purposive interpretation. Hence, there exists a presumption that effect should be given to every word of the will, and the court should not discount any part of the will if there can be some meaning that is not contrary to the express intention that could be ascribed to it. As the High Court remarked in *Goh Nellie v Goh Lian Teck and others* [2007] 1 SLR(R) 453 ("*Nellie Goh*") at [62], "A testator, in other words, does not will in vain".

Trust for sale

18 We have in [3] above set out the entire operative part of the Will of the Testator, the most crucial clause is, and we quote again:

> 2. I GIVE and DEVISE my property … unto my Trustees UPON TRUST to sell call in and convert the same into money with power to postpone the sale calling in and conversion thereof so long as they shall *in their absolute discretion think fit* without being liable for loss … [emphasis added]

19 We note that these words followed very closely the language of a very commonly used precedent for creating trusts for conversion. In *Williams on Wills*, the following precedent is given at para 214.16:

> I direct my trustees to sell call in and convert into money all such parts of my said real and personal estate as shall not consist of money [or investments of the kinds hereinafter authorised]/[or investments authorised by law for the investment of trust funds] with power to postpone such sale calling in and conversion for such time as my trustees in their absolute discretion and without being liable to account shall think fit.

20 In *The Law of Real Property* (R Megarry and W Wade) (Sweet & Maxwell, 8th Ed, 2012) at para 10-007("*Megarry & Wade*") defines the trust for sale as:

> A trust for sale was a trust which directed the trustees to sell the trust property, invest the proceeds, and hold the resulting fund upon the trusts declared by the settlor. Its objects and

> operation were therefore quite different from those of a strict settlement. Instead of aiming to preserve a family estate intact, as did the old strict settlement, the trust for sale set out by treating the property as so much potential money. Dividing it among the family was therefore easy …

21 As the Judge correctly observed, the trust for sale "was used to achieve specific objectives and, at common law, was informed by its own set of principles" (see the GD at [16]). There has been a wealth of case law on the interpretation of wills based on the precedent given in *Williams on Wills*, especially with regard to the power to postpone conversion. Trusts for conversion are generally made in the context of residuary gifts, where a trustee would have to exercise his discretion in dealing with both the life interest and residuary legatees. In that context, the trustee's discretion exists in deciding whether or not to convert, depending on whose interests he chooses to protect. The rule established in *Howe v Dartmouth* (1802) 7 Ves 137; 32 ER 56 required a trustee to hold an even hand between the beneficiaries entitled to the life interest and those whose interest lay in the remainder. The trustee must ensure that the power to convert, and the discretion therein, was exercised in a way which would secure that the interests of both the residuary legatee and the life legatee were balanced. Thus when considering precedents we need to bear in mind that in the present case there is no life interest involved. One common thread that runs through the cases is their sensitivity to the facts, in particular the beneficiaries' interests and the testator's intention. This is not to say that those principles may not be analogously applied to a case like the present where no life interest is involved.

English origins and subsequent developments

22 The device of a trust for sale rests on the operation of the doctrine of conversion. This is based on the maxim "equity looks on that as done which ought to be done". Hence if there is a trust for sale of land (realty), equity

notionally regards that land as money (personalty) from the moment the trust instrument takes effect; in the case of a will, that is the date of the testator's death. As a result, the land will devolve as personalty irrespective of the time of sale. The original function behind this doctrine was to prevent the injustice of beneficial interests being altered due to a trustee's failure to execute his duty to sell, especially during the period prior to the English Law of Property Act 1925 (c 20) ("LPA 1925") coming into effect when different rules applied to the devolution of personalty and realty.

23 It must be made clear that a trust for sale is distinct from a power of sale. The trust for sale produces an immediate notional conversion, whereas a mere power does not. Hence where powers of sale are concerned, the property changes in nature only upon sale, unlike the trust for sale. A trust for sale is mandatory, and imposes upon the trustee a duty to sell and convert, whereas a power of sale is a discretion which allows the donee of the power to decide when best to sell. Very often, differentiating the two is not easy (exacerbated by the tendency of textbooks and judgments to use both terms interchangeably: see S J Bailey, "Trusts and Titles" (1942) 8 Cambridge Law Journal 36 at 39), and it is a matter of construction of the trust instrument to ascertain if a duty to sell exists. Yet, even with a duty to sell, the trust for sale often contains a power for trustees to postpone sale, a common feature in express trusts for sale.

24 The trust for sale grew in its usage in 19th century England amongst landowners who had the desire to simply bestow the widest possible benefit on their families. Such testators had no interest in continuing the possession of family estates through primogeniture, which was largely done through strict settlements. There were great advantages in using trusts for sale: all sorts of property could be brought under a single trust, and trustees holding the legal

estate could choose to sell or retain the land with the beneficiaries' interests in mind. Thus the trustee for sale was not bound to make an immediate sale of the land; very often trustees were given the widest discretion as to the time at which they should sell with a power to postpone the sale for so long as they thought fit. Accordingly, a postponement of a sale did not amount to a breach of trust.

25 Eventually, the property legislation of 1925 came into effect and introduced a dual system where successive interests in land could be effected either as a settlement under the English Settled Lands Act 1925 (c 18) ("SLA 1925") or as an interest taking effect behind a trust for sale under the LPA 1925. The trust for sale was given statutory definition under s 205 of the LPA 1925 as an immediate binding trust, with a power of postponement implied in all such trusts under s 25 of the LPA 1925. The court mostly did not interfere with the decision of trustees who exercised their discretion under the power to postpone a sale. However, in cases of dispute where a beneficiary wanted to effect the sale while a trustee refused to, an application under s 30 of the LPA 1925 could be made to the court for an order directing that a proposed transaction be carried out, and the court would make such order as it thought fit.

26 Applications under s 30 of the LPA 1925 happened most frequently in the context of co-ownership in which there was either a statutory or implied trust for sale. The defects of the trust for sale regime gradually became apparent. The courts, while noting the existence of an immediate binding trust for sale, soon developed a jurisprudence relating to determining what was the object of the trust and whether the object or purpose of the trust had been carried out.

27 Orders for sale were refused where it was *found that the main purpose of the acquisition of the land was* still subsisting (see *In re Buchanan-Wollaston's Conveyance* [1939] Ch 738, *Hayward v Hayward* (1974) 237 Est Gaz 577, *Charlton v Lester* (1976) 238 Est Gaz 115, *Jones v Jones* [1977] 1 WLR 438, *Re Evers' Trust* [1980] 1 WLR 1327). For instance, in the case of *Stevens v Hutchinson* [1953] Ch 299 where the property was acquired for the purpose of providing a matrimonial home, it was held that neither party had a right to demand the sale while that purpose still existed; otherwise the object behind the trust would be defeated.

28 Conversely, orders for sale were made whenever it was found that the main purpose for which the land was acquired had ceased to exist (*Rawlings v Rawlings* [1964] P 398, *Jackson v Jackson* [1971] 1 WLR 1539, *Cousins v Dzosens* (1981) The Times, December 12 and *Bernard v Josephs* [1982] 1 Ch 391). This occurred most frequently when a marriage had dissolved and hence a matrimonial home no longer served that original purpose, as in *Jones v Challenger* [1961] 1 QB 176 ("*Jones v Challenger*"). In the case of *Barclay v Barclay* [1970] 2 QB 677, the Court of Appeal held that the trustee was entitled to sell the property and divide the proceeds as the prime object of the trust was that the house should be sold, notwithstanding the fact that one of the beneficiaries had subsequently moved into the house. This may be contrasted with the case of *Bull v Bull* [1955] 1 QB 234 where a house was acquired for the purpose of providing a home for a mother and son and the son, who was the trustee, sought to eject his mother. As the mother was still residing in the home, the purpose was held not to have ended yet. In *Jones v Challenger* at 184, Devlin LJ explained the approach of the court:

> … Let it be granted that the court must look into all the circumstances; if when the examination is complete, it finds that there is no inequity in selling the property, then it must be sold. The test is not what is reasonable. It is reasonable for

> the husband to want to go on living in the house, and reasonable for the wife to want her share of the trust property in cash. … The conversion of the property into a form in which both parties can enjoy their rights equally is the prime object of the trust; the preservation of the house as a home for one of them singly is not an object at all. If the true object of the trust is made paramount, as it should be, there is only one order that can be made.

29 Eventually, in 1996, England abolished prospectively the trust for sale (and the entire doctrine of conversion) by enacting the Trust of Land and Appointment of Trustees Act 1996 (c 47) ("TLATA 1996") and introducing a general "trust of land" scheme. Yet, it would be evident from the immediate preceding paragraphs that even before the enactment of TLATA 1996 the courts had already begun the process of moulding the traditional concept of the trust for sale to fit the reality of each situation in order that justice would be achieved in each instance. However, as Singapore has not followed suit in enacting the legislative changes brought about by TLATA 1996, the principles developed in the English cases relating to the trust for sale, in particular the courts' approach in exercising their discretion under s 30 of the LPA 1925, would still be relevant for the determination of this case.

Australian approach

30 Just for comparison, we now turn to look at the position in Australia. Generally, in Australia, trusts for sale are commonly regarded as fictional devices to avoid the Settled Lands Act (not unlike the views taken by the Judge in the present case) so as to obtain the advantages of the powers which those devices give to the life tenant to sell the land. Trustees of a trust for sale have as their *primary duty* the sale of the land. However, land was allowed to be retained for reasons such as awaiting a more favourable market, or if the beneficiaries preferred to enjoy the land and not the monetary value of the land.

31 Like the English LPA 1925, trustee legislation in the Australian Capital Territory, New South Wales and Victoria provide that a power to postpone sale is implied in all trusts for sale unless a contrary intention appears (see Trustee Act 1925 (NSW), s 27B(1); Trustee Act 1958 (Vic), s 13(5)). In Queensland and Western Australia, all trustees have a power to postpone sale with some exceptions (see Trusts Act 1973 (Qld), s 32(1)(c); Trustees Act 1962 (WA), s 27(1)(c)).

32 While the trustee has the power to postpone sale, the duty remains to sell at a fair price within a reasonable time. What is reasonable is determined by the trustee's interpretation of the settlor's intention. This discretion must be exercised in good faith, taking into account all relevant factors, which may include economic reasons, the beneficiaries' rights and difficulties in sale. However, crucially the power of postponement belonging to the trustee "does not mean that the property may be retained indefinitely" (Adrian J Bradbrook *et al*, *Australian Real Property Law* (Thomson Reuters Australia, 4th Ed, 2007) at para 11.47-11.49). In *Re Morish* [1939] SASR 305, the trustees had received court authorisation to postpone the sale of the business under the trust until the end of 1926. However they did not try to locate a buyer thereafter because they assumed no one would buy the business. As a result, they were held to have breached their duty to seek a purchaser within a reasonable time. Explaining that trustees could not postpone the realisation for an unlimited period even if they had a power of postponement, Murray CJ stated at 314-315:

> The general rule in the case of a will such as that of the testator giving power to postpone realization but no power to carry on a business, is that the trustees must realize the estate within a reasonable time (*In re Chancellor, Chancellor v. Brown,* (1884) 26 Ch. D. 42; *In re Smith, Arnold v. Smith,* [1896] 1 Ch. 171). The case of *In re Crowther, Midgeley v. Crowther,* [1895] 2 Ch. 56, in which Chitty J. held that the

> power to postpone necessarily implied the power to carry on a business included in the assets for so long as the trustees might think fit has been explained as defensible only on the ground that mention was made in the will of a business which was to be transferred to one of the beneficiaries at a future date. There is nothing of that kind in the present will. The settled rule now is that the *trustees cannot postpone realization for an unlimited time, but must convert the estate within a reasonable time*.
>
> [emphasis added]

33 While a court may still respect a postponement that prejudices a particular beneficiary, this is always balanced against the dominant consideration that the trustee's main duty is to sell (see *Ward v Trustees, Executors & Agency Co Ltd* (1893) 14 ALT 274; *Cain v Watson* [1910] VLR 256; *Perpetual Trustee Co Ltd v Noyes* (1925) 25 SR (NSW) 226). Such a postponement would be more likely to be valid if the trustee is explicitly protected by the trust instrument itself to the effect that he will not be held liable for breach by reason of the decision to postpone, unless he is in conscious default.

34 In short, it is evident that the Australian courts have held that in a trust for sale the trustee's duty is to sell the property and this must be done within a reasonable time.

Canadian approach

35 The Canadian cases are also instructive, and they show that the courts there are prepared to intervene and impose a requirement of reasonableness on the exercise of the trustee's discretion. In the Ontario case of *Re McLaren* (1921) 69 DLR 599 at 601, Ferguson JA specifically referred to the trustee having to "exercise the powers and discretions honestly, reasonably, and in good faith" in order for the court not to interfere. Similarly, in the recent Supreme Court of British Columbia decision of *Hriczu v Mackey Estate*

[2011] BCSC 454, where the property in question had seen a ten-fold increase in value since the testator's death, the court reiterated at [16] that the trustee's discretion must be exercised "honestly, reasonably, intelligently, and in good faith" and not in such a way "as to defeat the purpose of the testator". However, the court also added at [17] that "[s]o long as [the trustee] has a *bona fide* intention to perform his obligation to convert and distribute, the exercise of his discretion should not be interfered with by this court" (italics in original). All considered, the court eventually refused to intervene in the trustee's exercise of his discretion because it was satisfied that the trustee had acted in accordance with the will, by converting only when he felt that it would be advantageous to do so.

36 The Canadian courts have also explicitly singled out manifest prejudice to the interests of beneficiaries as something that they would take into account in assessing whether or not to intervene with a trustee's discretion. In *Re Blow* (1977) 18 OR (2d) 516 ("*Re Blow*"), it was held that a court's jurisdiction to intervene in a trustee's exercise of discretion may be founded upon the following grounds:

> (a) A mala fide exercise of such a discretion; or
>
> (b) A failure to exercise such a discretion; or
>
> (c) A deadlock between trustees as to the exercise of such a discretion.

37 There, the court also emphasised that even though the court could intervene on either one of the above grounds, that jurisdiction was itself discretionary in nature and should not be exercised unless failure to do so would be *manifestly prejudicial to the beneficiaries' interests*.

38 Similarly, in *Re Price* (1977) 5 ETR 194, the court (applying *Re Blow*) held that judicial intervention in trustee discretion would be justified whenever a failure to intervene would be manifestly prejudicial to the interest of the beneficiaries.

39 What these Canadian cases illustrate is that the courts there, in deciding whether to intervene or otherwise, adopt the test of reasonableness as well as a protective approach towards the interests of the beneficiaries. There is much to be said in favour of the Canadian approach which gives due consideration to the wishes of the beneficiaries.

Singapore cases

40 There is a dearth of local cases on the device of a trust for sale. The Judge had carefully traced the history of the instrument of trust for sale in the GD at [13]-[23]. The Judge concluded that because of the doctrine of conversion, the instrument of trust for sale was used as an alternative to creating a settlement of land which would otherwise be governed by the Settled Estates Act (Cap 39, 1970 Rev Ed) ("SEA 1970"). The advantage of a trust for sale is that it is much more flexible and the land would not be subject to the various constraints prescribed in the SEA 1970. In the GD at [22], the Judge stated:

> … Undoubtedly, it could be a laborious task for beneficiaries and trustees to deal with land under a settlement, since their ability to do so depended on the discretion of the court, with all the attendant procedural requirements and costs [*ie*, consequences of being caught by the SEA 1970]. This was in sharp contrast to the ease with which trustees under a trust for sale of land could deal with the land… they could sell and lease the land with far greater autonomy.

Extent of intervention in trust for sale

41 The Judge clearly felt that while the SEA 1970, unlike the English SLA 1925, did not contain an express provision to the effect that it would not apply to trusts for sale of land, it nevertheless expressly limited its ambit to "settlements which relate to estates or interests in immovable property" (see the GD at [20]), and therefore a trust for sale, which would implicitly incorporate the doctrine of conversion, would not come within the purview of the SEA 1970.

42 As elaborated in [22]-[29] above, even prior to the enactment of TLATA 1996, the courts in the UK had become increasingly hesitant to apply the doctrine of conversion relentlessly, even though that doctrine was then still on the statute book. This was due to the harshness that would occur if the doctrine were to be rigidly applied. Hence the courts began to adopt a more flexible approach in applying the doctrine. In other words, the courts displayed a willingness to ensure that the justice of each case was not unduly denied by a rigid adherence to the doctrine of conversion in ascertaining what the testator's true intention was.

43 Following from this general fact-sensitive approach taken by the English courts, it would not make sense to insist on a strict application of that doctrine here in Singapore. Given that the doctrine of conversion had been perceived in England as so defective that it was eventually abolished by the TLATA 1996, it would even make lesser sense for us to continue to be constrained by a doctrine that no longer serves its original purpose (as explained in [24] above, the doctrine operated to simplify the conveyance process for 19th century England where the trust for sale was a choice form of settlement for easy division of proceeds among family members).

44 At this juncture, it may be appropriate to make a comparison. As mentioned in [40] above, the instrument of a trust for sale is a much more flexible instrument than if an immovable property were to constitute a settlement under the SEA 1970. Yet under the SEA 1970, the court is vested with jurisdiction to intervene even against the express terms of a settlement. Section 2 of SEA 1970 defines a settlement in these terms:

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

45 Next, ss 4(1) and 12 of SEA 1970 provide:

> **4.**—(1) The court or a judge, if it is considered proper and consistent with due regard for the interests of all parties entitled under the settlement, may from time to time authorise a sale of the whole or any part of any settled estates, to be conducted and confirmed in the same manner as a sale of lands sold under a judgment of the court.
>
> …
>
> **12.**—(1) An order may be made upon any application notwithstanding that the concurrence or consent of any such person as aforesaid has not been obtained, or has been refused.
>
> (2) The court or a judge, in considering the application, shall have regard to the numbers of persons who concur in or consent to the application, and who dissent therefrom, or who submit, or are to be deemed to submit their rights or interests to be dealt with by the court or judge, and to the estates or interests which such persons, respectively, have or claim to have in the estates as to which the application is made.
>
> (3) Every order of the court made upon such application shall have the same effect as if all such persons had been consenting parties thereto.

46 It can be seen that even in respect of an immovable property which is subject to a settlement under the SEA 1970, the court could, after taking into

account *inter alia* the interests of all parties, order a sale of that property. It is not necessary that there should be consent from all the beneficiaries of the settlement before the court could order a sale. It seems to us that logically, if an instrument as rigid as a settlement could be approved for sale by the court, we find it incongruous that a flexible instrument like a trust for sale, even though it confers what appears to be unfettered discretion on the trustees, should not be subject to the right of intervention by the court in appropriate circumstances. The Australian and the Canadian cases (see [30]-[39] above), and even English cases (see [22]-[29] above), in their restrained and focused manner have shown the path as to how the courts in Singapore could nevertheless exercise some control over the trustees' exercise of discretion.

Extent of discretion

47 We will now first examine the extent of the discretion conferred upon the trustees by the Testator in his Will by the use of the expression that the trustees may postpone the sale for so long as they shall "in their absolute discretion think fit without being liable for loss" (see [3] above). As one of the trustees, Mdm Yap, had already passed away and there is only one remaining trustee (*ie*, the 1st Respondent), we will refer to the remaining trustee as "the surviving trustee". The point emphasised by the Appellants here is that the expression "absolute discretion" cannot and should not be taken at face value, and has to be read in the context of the Will as a whole. When so viewed, they contend that the Testator's overriding intention was to provide for the beneficiaries, protect them and pay out the income from the Property or the

proceeds of sale to them.[3] The Appellants also argue that the expression "think fit" necessarily means that the surviving trustee is required to:

(a) give proper thoughts to the matter; and

(b) ensure that his thoughts and considerations "fit" the overall objective of the Testator (*ie*, to benefit the beneficiaries).[4]

48 Admittedly, cl 2 of the Will appears to give the surviving trustee unrestricted discretion as far as postponing the sale is concerned. This discretion, which appears to be unqualified, is for the surviving trustee alone to exercise and not by anybody else. In this regard, the 1st Respondent argues that it is a rule of construction that effect must be given to every word of a will as far as possible, relying on *William on Wills* at para 50.16:

> A will must be so construed that effect is given to every word. The court has no right to disregard a word provided some meaning can be given to it, and that meaning is not contrary to some intention plainly expressed in other parts of the will. The court does not as a rule import to the testator that he uses additional words without some additional purpose or without any purpose at all.

49 The 1st Respondent also contends that there is an "investment theme" running through the Will and that there was a concurrent intention on the part of the Testator that the Property should be used as an ancestral home. His argument on the "investment theme" is based on the fact that cl 2 of the Will mandates the trustees to postpone sale, thereby indicating that the Testator expected the trustees to rent out the premises and to use it as a home for the family. In the event that the trustees should decide to sell the Property, they

[3] Appellants' Case, [55].

[4] Appellants' Case, [70].

are empowered to invest the proceeds of sale for the benefit of the beneficiaries. Bearing in mind that at the time the Testator made the Will, and also at the time of his death, Mdm Yap was still alive and the children were still young, we have no difficulty with the contention that the Testator intended the Property as a home for the family as well as to provide for them, if he should pass away. But the assertion that the Testator also intended the Property to be an ancestral home is inconsistent with the Testator's mandate to the trustees to sell the Property and to re-invest the proceeds at an appropriate time. How could a requirement that a property be sold be consistent with the object of retaining it as an ancestral home? Moreover, the Testator had four sons and two daughters. Is it realistic to say that he intended all of them, even after they have started families of their own, to live under the same roof? Therefore, the critical question is, could it reasonably be said that the surviving trustee would be acting within the intent and spirit of cl 2 of the Will if he were to postpone sale of the Property indefinitely, whatever the prevailing circumstances might be?

50 Two factors apparently weighed heavily on the mind of the Judge when she decided not to disturb the decision of the 1st Respondent in refusing to sell the Property. First is the fact that during the Testator's lifetime, the Property was generating substantial rental income from up to ten tenants at any one time. Second is the fact that the Testator had selected, through the advice of an experienced solicitor, the device of a trust for sale to give effect to his intention and this constituted a "strong indication" that the Testator wished to have greater administrative flexibility in managing the Property and, in turn, the tenancies of the Property (see the GD at [23]).

51 We do not dispute that it is the sole right and discretion of a testator to determine, through his will, how his assets are to be managed or disposed of

on his death. It is not for the court to rewrite his will: see *Nellie Goh* at [64]. That is not the question here. Not even the Appellants are seeking to do that. As a general proposition, even in relation to a will like the present, the discretion exercised by the trustees should, as a rule, be respected.

52 However, there appears to be a corresponding rule that where discretion is vested in a trustee, that duty has to be exercised properly. The court cannot intervene unless the discretion is either improperly exercised, or not exercised at all – see *Tempest v Lord Camoys* (1882) 21 Ch D 571 where Jessel MR stated (at 578):

> … It is settled law that when a [settlor] has given a pure discretion to trustees as to the exercise of a power, the Court does not enforce the exercise of the power against the wish of the trustees, but it does prevent them from exercising it improperly. …

53 In the same case, Cotton LJ also stated (at 580) that the court had the power to intervene if a trustee should attempt to exercise the discretion "in any way which is wrong or unreasonable".

54 Admittedly, beneficiaries cannot dictate the way a trustee should exercise his discretion. In *Re Brockbank* [1948] Ch 206, the court declined to compel a trustee to appoint a new professional trustee to act in his place as demanded by the beneficiaries of that trust. The discretion was that of the trustee and there was no obligation to consult the beneficiaries before exercising that discretion. There was also no obligation to follow the beneficiaries' wishes, even if they were expressed and made known to the trustee. However, this was not to say that the beneficiaries' wishes, their objective *needs* and *interests,* could be completely disregarded by the trustee in making his decision.

When is the exercise of discretion improper?

55 We move next to consider under what circumstances an exercise of discretion by a trustee would be regarded as improper. Generally, it seems that the court's supervision will be confined to the "honesty, integrity, and fairness with which the deliberation has been conducted, and will not be extended to the accuracy of the conclusion arrived at" (see *Re Beloved Wilkes' Charity* (1851) 3 Mac & G 440; 42 ER 330). Quite clearly, if there was an absence of good faith that would *ipso facto* be a ground to intervene. More controversial is the question as to whether there exists a higher threshold than that of mere lack of good faith and case law seems to be divided on that. What is clear is that trustees do not have absolute discretion (see *Dundee General Hospital Board of Management v Walker* [1952] 1 All ER 896 "*Dundee General Hospital*")). In Robert Pearce *et al*, *The Law of Trusts and Equitable Obligations* (Oxford University Press, 5th Ed, 2010) ("*The Law of Trusts and Equitable Obligations*") at p 829, it is stated that "certain formulations of the circumstances in which the courts will intervene suggest that there will be occasions when the facts may speak for themselves". The authors of *The Law of Trusts and Equitable Obligations* also cite instances where the courts would intervene:

> It was recognized in *McPhail v Doulton* that there were various ways in which the courts could secure the performance of discretionary trusts, and those methods may be equally applicable to fiduciary powers. They include directing the trustees to act in a particular way. For instance in *Klug v Klug* the court ordered a payment to be made to a beneficiary despite the improper refusal of one trustee to concur in the decision; and in *Mettoy Pension Trustees Ltd v Evans* Warner J was prepared to exercise a fiduciary power himself where there was no other person able to do so by reason of a conflict of interest. Also, in *Bridge Trustees Ltd v Noel Penny Turbines* Pule, QC felt able to invoke the court's inherent jurisdiction to replace an ex-trustee of a pension trust for failure to exercise a fiduciary power to distribute surplus assets vested in him under the terms of the pension scheme.

56 Some older cases would appear to indicate that there is a wider jurisdiction on the part of the courts to intervene, as long as the trustee has "not exercised a sound discretion" (see *Re Roper's Trust* (1879) 11 Ch D 272, *per* Fry J) – a phrase that is suitably vague and amorphous. Similarly, in *Re Hodges* (1878) 7 Ch D 754, Malins VC stated (at 761) that "if the discretion of the trustees is ... improperly exercised, the Court will control that improper exercise". He further said (at 762) that despite "[p]aying every respect ... to the discretion of the trustees", he still had to exercise his own judgment and take the course for the wards which *he* thought most for their benefit, which in essence was him substituting the trustee's discretion with his own.

57 Such an expansive approach was narrowed down by the mid 20th century, where the courts started to retreat to the much lower standard of the exercise of discretion having to be in good faith. Lord Normand explicitly doubted if reasonableness could be an appropriate benchmark in the House of Lords case of *Dundee General Hospital*. He concluded (at 901):

> It is one thing to say that the trustees must honestly discharge their trust and keep within the bounds of the powers and duties entrusted to them, and quite another to say that they must not fall into errors which other persons, including a court of law, might consider unreasonable.

58 This was reiterated in a later House of Lords decision, *Whishaw v Stephens* [1970] AC 508, *per* Lord Reid (at 518):

> … They are given an absolute discretion. So if they decide in good faith at appropriate times to give none of the income to any of the beneficiaries the court cannot pronounce their reasons to be bad. And similarly if they decide to give some or all of the income to a particular beneficiary the court will not review their decision. …

Reasonableness

59 By the turn of the present century, the English courts began to show an increasing willingness to intervene on the basis of reasonableness, interestingly even invoking analogous principles in public law. In *Scott v National Trust* [1998] 2 All ER 705, Robert Walker J first broached the possibility of bringing in public law concepts by suggesting that the concept of legitimate expectation might be potentially relevant. Soon after, Park J in *Breadner v Granville-Grossman* [2001] Ch 523 continued to draw parallels, citing (at [58]) "obvious affinities to the much more developed area of the principles which the courts will apply when judicially reviewing the exercises of statutory powers by public authorities". In *Edge v Pensions Ombudsman* [1998] 1 Ch 512, Scott VC went so far as to invoke the language of *Wednesbury* unreasonableness (see *Associated Provincial Picture House v Wednesbury Corporation* [1948] 1 KB 223) when speaking of the reasonableness required of a trustee's exercise of discretion (at 534):

> … The judge may disagree with the manner in which trustees have exercised their discretion but, unless they can be seen to have taken into account irrelevant, improper or irrational factors, or unless their decision can be said to be *one that no reasonable body of trustees properly directing themselves could have reached*, the judge cannot interfere. … [emphasis added]

60 Yet Scott VC was careful to draw limits to the analogy by reaffirming that the court would not go so far as to apply an objective test of fairness on the exercise of discretion (at [535]):

> … They certainly had a duty to exercise their discretionary power honestly and for the purpose for which the power was given and not so as to accomplish any ulterior purposes. But they were the judges of whether or not their exercise of the power was fair as between the benefited beneficiaries and the other beneficiaries. *Their exercise of the discretionary power cannot be set aside simply because a judge...thinks it was not fair.* [emphasis added]

61 Understandably, this extension of public law concepts or principles into the area of trust has not been without criticism (see, *eg*, David Hayton and Charles Mitchell, *Hayton & Marshall: Commentary and Cases on the Law of Trusts & Equitable Remedies* (Sweet & Maxwell, 12th Ed, 2005) at pp 656-657). The considerations which are applicable in the area of public law are hardly the same as those which apply to the duties of trustees and how the trustees should exercise the discretion vested in him. The danger of such extension could be many-fold. For present purposes we need only point out one instance. Would it mean that principles which are sacrosanct in the public law domain, for example, the *audi alteram partem* rule, could eventually also find its way into trust law? This, among other similar questions, no doubt deserves further mature consideration. As of now, we do not think we need go further than what we have just observed.

The Hastings-Bass *principle*

62 Finally, we need to refer to the *Hastings-Bass* principle which is relied upon by the Appellants to advance the argument that the 1st Respondent had failed in his duty to make an informed decision. The case itself was really litigation on tax and whether a failure on the part of the trustees to take into account the tax implication would render the disposition made by the trustees void or voidable. The principle enunciated by Buckley LJ in the case of *Re Hastings-Bass* [1975] 1 Ch 25 ("*Re Hastings-Bass*") was in these terms (at 41):

> …where… a trustee is given a discretion as to some matter under which he acts in good faith, the court should not interfere with his action notwithstanding that it does not have the full effect which he intended, unless (1) what he has achieved is unauthorised by the power conferred upon him, or (2) it is clear that he would not have acted as he did (a) had he not taken into account considerations which he should not have taken into account, or (b) had he not failed to take into

> account considerations which he ought to have taken into account. …

63 We find it hard to draw parallels between the situations in *Re Hastings-Bass*, where the main issue was the trustees' misunderstanding of the effect of the rule against perpetuities in exercising a power of advancement to resettle the trust property which resulted in certain tax consequences, and our current case, where there is no such misunderstanding on the trustee's part. Even in the subsequent cases which further developed the *Hastings-Bass* principle, the situations were mainly that of trustees either not obtaining or obtaining the wrong advice or information, resulting in an exercise of discretion which the courts could later intervene. In the recent case of *Pitt v Holt* [2012] Ch 132 ("*Pitt v Holt*"), the English Court of Appeal clarified the *Hastings-Bass* principle as follows (at [94], *per* Lloyd LJ)):

> … It has been said that *In re Hastings-Bass, decd* did not involve applying what has come to be called the Hastings-Bass rule at all. As it seems to me, that rule was first created by Warner J in *Mettoy Pension Trustees Ltd v Evans* [1990] 1 WLR 1587, derived from Buckley LJ's summary in *In re Hastings-Bass, decd* [1975] Ch 25, 41 which, as I have said already, does not in my judgment form any part of the ratio of *In re Hastings-Bass, decd* itself.

As such, it is not necessary for the purposes of this appeal to address the parties' submissions on this point.

Our views

64 In the light of the review above, we are unable to accept the 1st Respondent's assertion that where, as is the case here, a testator has given absolute discretion to the trustee to decide on the question of postponement of sale, his decision cannot be challenged in a court of law. Firstly, we must bear in mind that the trust for sale is a peculiar instrument that was created for a specific purpose in 19th century England; it has since outlived the original

circumstances under which it was developed and should not be confined to the principles which governed it then. Subsequent developments in Commonwealth jurisdictions like Australia and Canada have also shown a willingness on the part of the courts to put restraints on the trustee's discretion in such cases. Secondly, while the *Wednesbury* principle may seem attractive, we would caution against extending it to the area of trust law. What we do acknowledge is that if exercise of statutory powers, even if there is no bad faith, could be subject to judicial review, it does seem strange that a trustee's exercise of discretion would fall outside the purview of the court unless bad faith is shown.

Our assessment of the Testator's intention

65 We now turn to examine the circumstances of the present case. More than 30 years have elapsed since the Testator's death. The beneficiaries are getting on in years and none of them is living in the Property. Indeed, each of them is living separately with his/her own family. The Property is in a dilapidated state and the rental income which is currently obtained from tenants is meagre. The 1st Respondent has no plans at all as to what he proposes to do with the Property. Finally, and what is most important, except for the 1st Respondent, the greater majority of the beneficiaries under the Testator's Will are in favour of selling the Property so that they may enjoy their inheritance for the remaining period of their lives. We would, at this juncture, remind ourselves that the eldest son had died. The youngest sibling, the 2nd Respondent, is not taking a position in this dispute. The single beneficiary who is objecting to a sale now is the 1st Respondent, who is also the surviving trustee and who holds only 17.86 % interest in the Property. The table below shows the parties respective positions in this regard:

S/N	Beneficiary	% Interest in property			For sale	Against sale	No position on sale
		Under Father's estate	Under Mother's estate	Total interest			
1.	Chen Yu	14.29	0	14.29			✓
2.	2nd Appellant	14.29	0	14.29	✓		
3.	1st Appellant	14.29	3.57	17.86	✓		
4.	1st Respondent	14.29	3.57	17.86		✓	
5.	2nd Respondent	14.29	0	14.28			✓
6.	3rd Appellant	14.29	7.14	21.43	✓		
Total interest:				100	53.6	17.8	14.3 (unknown) 14.3 (neutral)

66 Given the current state of the Property and the dismal rental income that it is generating (especially in contrast to its $4 million estimated market value), it is hard to see how, in the absence of any rebuilding or substantial renovation plans, any reasonable person will make the choice of collecting the paltry rental proceeds instead of selling the property and receiving a much larger sum (which could probably be further invested to earn much higher returns). Considering that the beneficiaries are all getting on in years, and none of them (including the 1st Respondent) is staying at the Property, it is all the more baffling to understand why the 1st Respondent could come to the view that it would be in the interest of all the beneficiaries to retain the Property. We, of course, appreciate that age does not determine life expectancy. Nevertheless, we also recognise that the only thing certain about life is its

uncertainty. It cannot be disputed that the longer the sale is postponed, the less time the beneficiaries will have to enjoy the benefits which they are entitled to under the Will. Moreover, there is also the risk that the longer the sale is postponed, one or more beneficiaries may not even live to enjoy their inheritance. We witness this already in the case of the eldest son who died in 2007. At this point, we set out the ages of the members of the family:

Beneficiaries	MdmYap	Foo Jee Fong	Foo Li Li	Foo Jee Seng	Foo Jhee Tuang	Foo Chin Chin	Foo Jee Boo
	-	-	2nd Appellant	1st Appellant	1st Respondent	2nd Respondent	3rd Appellant
Age	deceased	deceased	53	52	51	48	41

67 We have in [49] above explained why we could not accept the 1st Respondent's contention that the Testator intended the Property to be the ancestral home. In any event, if the 1st Respondent had seriously thought that the Testator intended the Property to be the ancestral home, how is it that even he did not choose to live there? Instead, he has set up his home elsewhere. In our opinion, nothing speaks louder than the fact that none of the family members is residing there. In a case like the present, where the testator has only one property with six children, the sale of it and the ultimate division of proceeds must be the only sensible way forward. The object of the discretion granted to the trustees by the Testator to postpone sale was really to ensure that the sale would be effected at an appropriate moment so that maximum benefit could be obtained for the beneficiaries. In our judgment, we think that the 1st Respondent has failed to take into account, in arriving at his decision not to effect the sale of the Property at this time, considerations which he should have taken into account and/or he has taken into account considerations

which he should not have taken into account (*eg*, it was the Testator's intention to retain the Property as an ancestral home – see [49] above).

68 In resisting the Appellants' argument that the court should intervene to set aside the decision of the Judge, the 1st Respondent relied on *Re Kipping* [1914] 1 Ch 62 ("*Re Kipping*"), a case where the facts were, however, very different from the present case. There the testator bequeathed all his residuary real and personal estate to a trustee upon trust for sale and conversion with power to the trustee to postpone sale or conversion. At the testator's death, he left seven children who were all under 21 years of age. One of the children, upon attaining the age of 21 (there was also another child who at the time had attained majority but did not join in the application), asked to be paid one-seventh of the residuary estate, or to have his share appropriated to him. The application was refused. We would underscore the fact that there, the plaintiff was only one out of seven beneficiaries who on attaining the age of majority (with five of the beneficiaries still minors) had asked for his share in the estate to be vested in him, whereas all the beneficiaries in our present case already have their interests vested and have asked that the Property be sold, so that they could get their respective share of the inheritance; the only objector to the sale being the 1st Respondent. Vaughan Williams LJ in *Re Kipping* took the view (at 66) that it would not be correct for the plaintiff in that case to claim a right "to insist upon his share of the residuary estate being realised at once, even though such realisation may damage the interests of the other beneficiaries." Clearly the interests of the rest of the beneficiaries who were still minors weighed very much in the mind of the court. In the present case, none of the beneficiaries is a minor and none of them requires the Property to live in.

69 On the other hand, the Appellants contend that the approach taken by the Judge below, as evinced by the Judge's reasoning reproduced below (see [29] of the GD), is "unduly narrow":[5]

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

70 In this regard, the Appellants cite the case of *In re Marshall* [1914] 1 Ch 192 which involved a trust for sale with a power to postpone in the trustees' absolute discretion and without being liable for loss arising thereby. Although that case involved a life interest as well as a residuary interest, which is unlike the present case, what is pertinent about that case is that the English Court of Appeal held that notwithstanding such wide discretion granted to the trustees to postpone sale, the trustees could only postpone the sale for a reasonable period and not indefinitely.

71 Another case relied upon by the Appellants is the Australian case of *Cox v Archer* (1964) 110 CLR 1 which was not a simple trust for sale case as it involved a joint life interest of the testator and testatrix, who were husband and wife. The testator and testatrix had a son and a daughter. There, the testator and the testatrix each owned one half share of the property in question. It was held that where the life interest had been extinguished (on the death of both the testator and the testatrix), the power to postpone sale ceased to be exercisable. The trustees' power to postpone was hence a mere "machinery power" which existed for the convenient distribution of the sale proceeds

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[5] Appellants' Case, [108].

among the beneficiaries. Since the power of postponement was given for the purposes of the trust only, the power was not intended to be exercisable after those purposes should come to an end, that is, when all the beneficial interests become vested in possession in persons *sui juris*. From that point onwards, the power of sale must be exercised within a reasonable period. We should also add that there was one other unusual feature in that case. There, the testator and testatrix expressly required the trustees to first offer the property to the son at the fixed price of Australian Pounds 9,000 (with the price of one-half of the property being fixed at 4,500). On this point, the court ruled that the trustees must comply with this requirement before offering the property for sale to a third party.

72 In any case, the Appellants argue that the ground of *mala fide* for intervention by the court is too nebulous and hardly provides a sufficient basis to protect the interests of the beneficiaries as it accords the trustees just too much leeway in exercising their discretion. The Appellants also say it is part of the court's inherent jurisdiction to supervise, and if it thought necessary, to intervene in the administration of trusts, relying on Lord Walker's judgment in *Schmidt v Rosewood Trust Ltd* [2003] 2 AC 709 at [51]. Reference was also made to Maurice Cullity, "Judicial Control of Trustees' Discretions" (1975) 25(2) University of Toronto Law Journal 99 at 106 which similarly advocates that the court takes the "true position" that exists between the extremes of placing the trustee beyond the court's jurisdiction and the court's inherent jurisdiction to supervise more intensely.

73 To demonstrate the point that the court should have the flexibility to deal with a case apart from allegations of bad faith, the Appellants cited the local case of *Leo Teng Choy* (see [15] above) to illustrate the court's willingness to give effect to the purpose of a trust, even to the extent of going

against the wording of the trust. In that case, despite the will having specified that the property "shall not be sold, rented out or in any way converted into cash unless and until unanimously agreed upon by [the testator's] sons", this court found that the testator's intention, construed based on the entire will, was not to prohibit the sale, but to ensure an equitable distribution of the sale proceeds if and when it was sold. Given that each of the beneficiaries in that case then had their own family and one house was no longer sufficient to house all of them, in addition to the friction between the families, the purpose of the trust could no longer be fulfilled. Hence, the court in reliance on the powers under s 56(1) of the Trustees Act (Cap 337, 1999 Rev Ed), sanctioned the sale of the property.

74 It seems necessary for us to look closely at *Leo Teng Choy,* a case which appears relevant and instructive. There (at [9]), the relevant clauses in the will read:

> 2 I give and devise my land and house No 42, Phillips Avenue, Singapore unto my trustees upon trust to stand possessed of the same and to allow my wife Heng Took Kin and my sons Leo Teng Kit, Leoh Teng Hee, Leo Teng Choy and Leo Tang Foh to reside therein free of rent provided each of my said sons shall pay one-fourth share of all rates, taxes, charges, and expenses on repairs as shall from time to time be incurred.
>
> 3 I direct that my said land and house No 42 Phillips Avenue, Singapore, shall not be sold, rented out or in any way converted into cash unless and until unanimously agreed upon by my said sons Leo Teng Kit, Leo Teng Hee, Leo Teng Choy and Leo Tang Foh in which event the net proceeds of sale from the said land and house shall be distributed to my said sons in equal share.

75 It seems clear that pursuant to cl 2, it was the intention of the testator that his wife and sons should continue to reside in the property and that the trustees were to hold it for the beneficiaries in that regard. The only obligation

imposed on the sons was that they should bear equally the taxes due in respect of the property and the expenses incurred to maintain it. Clause 3 explicitly prohibited any sale of the property unless all the four sons agreed. At first instance, the High Court held that cll 2 and 3 of the will created a trust for sale, and that cl 3 merely postponed the sale. On appeal, this holding was not accepted by this court which instead held that only an ordinary trust was created, not a trust for sale (see *Leo Teng Choy* at [15]). Having examined the will as a whole, this court came to the conclusion that the overriding intention of the testator was to grant to each beneficiary the equal right to the proceeds of sale. It is of interest to note the way in which the court came to this view and here we quote the following (see *Leo Teng Choy* at [25]-[28]):

> The argument of the appellant is that reading cll 2 and 3 together, it is clear that the testator had directed that the property not be sold until and unless all the four sons agreed. Thus, it may be appropriate to determine what was the overriding intention of the testator. For that purpose, it is necessary for the court to look not only at cll 2 and 3 but also other clauses of the will: *Re Evan's Settlement* [1967] 3 All ER 343; [1967] 1WLR 1294. Clauses 2 gives the four beneficiaries and their mother the right to reside therein. Clause 3 authorises a sale if all the four beneficiaries agree and in the event of a sale, the proceeds are to be shared equally. While the clause also states that the property "shall not be sold … or in any way converted into cash", the object is not to prohibit sale but rather that the beneficiaries should act jointly. Clause 4 provides that if a beneficiary should die, his share would devolve to his children but if he should be without children, his shares would go to the surviving beneficiaries equally. Clause 6 provides that the residue of the estate shall be shared equally among the beneficiaries.
>
> … The picture that emerged clearly from these clauses is that of a testator who wanted to treat his four sons evenly. Each son is to have the same rights to reside therein and to share in the proceeds. The overriding consideration was not so much to prohibit the sale of the property but to ensure that they shall benefit equally from his estate. …
>
> The plan of the testator, which was the basis upon which he wrote his will, was that all the four sons and their wives (and children) should share the same roof in harmony. That was

> his basic premise. Therefore, in cl 2, he provided that each son has to bear one-fourth share of all rates, taxes, charges and expenses on repairs. He did not anticipate a situation where one son might not be residing there. What then would be the position of a son who has moved out? Is he obliged to contribute? While any fair-minded person would naturally have said that in that situation that son would not be required to contribute, the absence of a provision to that effect merely underscores what was primarily in the mind of the testator, namely, that all the four sons should share the same roof. He would not contemplate otherwise.
>
> In our opinion, the court in sanctioning the sale would not only not be acting contrary to the directions expressed in the will, but would, in fact, be carrying out the overriding intention of the testator. Indeed, to allow the appellant to enjoy the property solely would run counter to what was the basic intention implicit in his will. …

76 While it is true that the wording of the operative clauses in the will in *Leo Teng Choy* is different from that in the present case, the one common feature is that both involved a father who owned one property and who wished to provide for his children using that property. In both instances the children were ultimately to receive an equal share from the property. Whereas in *Leo Teng Choy* the trustees were not to sell the property unless all the beneficiaries agreed, here the trustees were accorded a seemingly full discretion to withhold sale and his decision to withhold sale would not give rise to any liability on his part.

77 While the specific issues raised in the two cases appear different, both raised issues of construction as to the intentions of the testators. Was it the intention of the Testator when he granted the trustees the absolute discretion to postpone sale without liability and that the trustees' decision cannot be disturbed by a court under any circumstances? As stated in *Leo Teng Choy* (see [75] above), a will should be construed as a whole in the light of the circumstances prevailing when it was made. At the time when the Testator made his Will in 1975, his wife, Mdm Yap, and the children (some of whom

were still minors) were all living as a family under the same roof (*ie,* the Property). It is perfectly understandable why in those circumstances the Testator gave an absolute discretion to the trustees to postpone the sale of the Property. Unless such discretion to postpone sale was accorded to the trustees, the needs and interests of members of the family (especially those who were still minors) would or could be adversely affected. The trustees would be required to sell even though the family members would still require a roof over their heads or the trustees would be required to sell even when the market was poor. In granting the discretion to the trustees to postpone sale, the Testator could not have intended the discretion to be exercised even in the situation where the wife has passed away and the children are all grown up and living separately in their own homes with their respective families. With the current enhanced value of the Property, each of the beneficiaries would receive an appreciable amount from the inheritance. Moreover, the 1st Respondent does not appear to have any idea as to how postponing the sale would actually benefit the beneficiaries.

78 In the circumstances, to postpone the sale of the Property any longer would amount to depriving the beneficiaries of their just entitlement under the Will. There is no hint of any intention on the part of the Testator that his children should not enjoy their inheritance during their lifetime, the Property should be retained for an indefinite period, and that the beneficiaries should only enjoy the rental derived from the Property. As stated in [66] above, the beneficiaries are now all in their forties and fifties. Moreover, life is fragile.

79 Taking the same approach adopted in *Leo Teng Choy*, we hold that it was not the intention of the Testator that the trustees should withhold sale of the Property indefinitely even to the detriment of the beneficiaries. It is trite law that the 1st Respondent has the fiduciary duty to act, and to exercise his

discretionary powers, in the best interests of the beneficiaries. In *Ng Eng Ghee and others v Mamata Kapildev Dave and others (Horizon Partners Pte Ltd, intervener) and another appeal* [2009] 3 SLR(R) 109, this court held at [153] that:

> … It is the paramount duty of trustees "to exercise their powers in the best interests of [all] beneficiaries of the trust" (*Crown v Scargill* [1985] Ch 270 *per* Sir Robert Megarry VC at 286-287). The relevant circumstances must be assessed in deciding whether the appropriate standard of care has been observed.

80 In the result, we would reiterate that the 1st Respondent, in refusing to sell the Property, had taken into account an irrelevant consideration, namely, that the Testator had intended the Property to be an ancestral home, and had also failed to take into account a relevant consideration, namely the fact that the continued holding of the Property would no longer be of benefit to the beneficiaries of the Testator's estate (see [49] and [66] above). Bearing in mind the circumstances alluded to in [65] to [67] above, the decision of the 1st Respondent to refuse to sell the Property is one which baffles the mind. Accordingly, we hold that the 1st Respondent was in breach of his fiduciary duties as the surviving trustee when he persisted in refusing to sell the Property and divide the inheritance among those beneficiaries entitled thereto under the Will. In maintaining that stand now, he is in continuing breach of those duties.

Remoteness of vesting and rule against inalienability

81 We now turn to touch briefly on the point raised by the Appellants which relates to the rule against perpetuities. Common law requires that gifts of property vest within the perpetuity period, which is life in being plus 21 years. This effectively means that the gift must not vest outside of the period of 21 years after the lifetime of a human being living at the date of the creation

of the interest, in this case the death of the Testator. Unless a gift is so vested, it would be void. The rule against remoteness of vesting and the rule against inalienability are defined in *The Law of Trusts and Equitable Obligations* at pp 487-488 as follows:

> The law requires that gifts of property vest within a certain period of time, the perpetuity period. This prevents property being tied up, and hence kept outside the economy for long periods. At common law, if the property might vest outside of the perpetuity period, the gift would be void…
>
> As well as the rule against remoteness of vesting for reasons of public policy, the law does not allow property to be tied up, and hence become inalienable forever

82 We would hasten to add that in England, the rule against perpetuities has been reformed by the Perpetuities and Accumulations Act 2009 (c 18), under which perpetuity periods are statutorily determined to be 125 years, and no other length.

83 However, in the light of our construction of the Will above, there is no need for this court to address the question as to whether the trust created by the Will offended against the rule against perpetuity. Indeed, on the basis of our construction of the Will there can be no question of the rule against perpetuities being infringed here.

Does the 1st Respondent have a duty to account for rents?

84 We now turn to deal with the final ancillary issue. In OS 909, the Appellants have also prayed for an order that the 1st Respondent be required to furnish proper particulars and accounts of the net rent and profits from the Property which had come into his hands as a trustee. The Judge refused to grant the prayer on the ground that (see the GD at [45]):

> An account of profits is a remedy that can be granted against the holder of fiduciary duties when a breach of these duties has been established. The plaintiffs' prayer for such account of profits did not allege a breach of fiduciary duties by the first defendant in their submissions, and did not provide any evidence of the same. …

85 The Appellants submit that the Judge had erred in her reasoning. They claim that, as beneficiaries, they are entitled to see the accounts given that the furnishing of such accounts by a trustee is an obligation owed by a trustee to the beneficiaries (see *Armitage v Nurse* [1998] 1 Ch 241 at 261). The making of such a request does not necessarily depend on there being a breach of fiduciary duties on the part of the trustee.

86 It is trite law that trustees are under a duty to keep account of the trusts and to allow the beneficiaries to inspect them as requested. In *Pearse v Green* (1819) 1 Jac & W 135; 37 ER 327, Plumer MR said:

> It is the first duty of an accounting party, whether an agent, trustee, a receiver or executor … to be constantly ready with his accounts.

87 Beneficiaries are entitled, within proper bounds, to be furnished with an account of the funds in the trust. There is no necessity to allege any breach of fiduciary duties on the part of the trustees. Of course, if there is such a breach, they would all the more be entitled to an account and if the trust were to suffer any loss on account of such breach, the trustees would be obliged to make good the same.

88 Accordingly, we hold that the 1st Respondent should furnish proper accounts of the rent and profits from the Property received by him as trustee.

Conclusion

89 In the result, we allow the appeal and direct that the 1st Respondent should take steps to sell the Property and distribute the sale proceeds to the beneficiaries according to their respective entitlements under the Will. The sale of the Property shall be effected no later than six months from the date of this judgment. The solicitors for the Appellants and the 1st Respondent shall jointly appoint a valuer/agent and a solicitor to effect the sale. In the meantime, the 1st Respondent shall, within three months hereof, furnish an account of the trust to all the beneficiaries.

90 On the question of costs, parties are requested to file their submissions within two weeks hereof.

Chao Hick Tin	Andrew Phang Boon Leong	V K Rajah
Judge of Appeal	Judge of Appeal	Judge of Appeal

Ms Molly Lim, SC, Ms Hwa Hoong Luan and Mr Ang Hou Fu (Wong Tan & Molly Lim LLC) for the appellants;
Mr Tan Hee Liang and Mr Tan Hee Jock (Tan See Swan & Co) for the respondents.