IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2021] SGCA 33

Civil Appeal No 63 of 2020

Between

Chan Yun Cheong (Trustee of the Will of the Testator)

… *Appellant*

And

Chan Chi Cheong (Trustee of the Will of the Testator)

… *Respondent*

In the matter of Originating Summons No 703 of 2019

In the matter of Section 14 of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed)

And

In the matter of the Will of Chan Wing alias Chan Min Sang alias Chan Chung Sui alias Chan Chun Wing (hereinafter called the Testator)

And

In the matter of the Trustees Act (Cap 337, 2005 Rev Ed)

And

In the matter of Order 80 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed)

Between

Chan Chi Cheong (Trustee of
the Will of the Testator)

… *Plaintiff*

And

Chan Yun Cheong (Trustee of
the Will of the Testator)

… *Defendant*

JUDGMENT

[Trusts] — [Trustees] — [Retirement]

Chan Yun Cheong (trustee of the will of the testator)
v
Chan Chi Cheong (trustee of the will of the testator)

[2021] SGCA 33

Court of Appeal — Civil Appeal No 63 of 2020
Judith Prakash JCA, Chao Hick Tin SJ and Belinda Ang Saw Ean JAD
20 November 2020

9 April 2021 Judgment reserved.

Judith Prakash JCA (delivering the judgment of the court):

1 Trusteeship is a serious appointment that comes with responsibilities. Once a person takes up a trusteeship, he cannot simply relinquish his duties at will, but is only able to do so in accordance with the law and the terms of the trust instrument.

2 The appellant and respondent were appointed in 2017 as two out of three trustees of a trust arising out of the will of their late grandfather. Each of them says that he has validly retired and no longer holds the position of trustee. It is common ground that if either of them has validly retired the other would be unable to retire from the trust unless a replacement trustee can be found. The respondent sought to retire as a trustee pursuant to s 40 of the Trustees Act (Cap 337, 2005 Rev Ed) ("the Trustees Act") (s 40 being hereafter called "s 40 TA"), which provides that such retirement can only be effective if it is by deed and the remaining trustees consent, also by deed, to his discharge. The

appellant refused to give his consent to the respondent's deed of retirement but instead sought himself to resign by way of a letter of resignation, claiming that such mode of retirement was authorised by the terms of the will.

3 This dispute raised the question of whether the conditions prescribed by s 40 TA have to be met where a trustee seeks to retire pursuant to an express power in the trust instrument. The High Court Judge ("Judge") held that the conditions applied and ordered the appellant to give his consent to the respondent's retirement. He also ordered the appellant to execute a deed to confirm that an earlier trustee had retired. The reasons for the decision can be found in *Chan Chi Cheong (trustee of the will of the testator) v Chan Yun Cheong (trustee of the will of the testator)* [2020] SGHC 43 ("Judgment"). The appellant appeals against the entirety of the Judgment.

Background facts

4 The material facts are straightforward and undisputed. The appellant is Chan Yun Cheong. The respondent is Chan Chi Cheong, the plaintiff in the originating summons action (HC/OS 703/2019 ("OS 703")) out of which this appeal arises.

5 The trust instrument is a will dated 5 February 1947 ("Will") executed by their late grandfather, Chan Wing ("Testator"). The Testator passed away a few weeks later, whereupon a number of his sons became trustees of his estate which mainly comprised assets in Malaya and Singapore. Over time, some trustees died or retired and replacement appointments were made. Around 1973, one of the Testator's sons, Chan Kat Cheung, purported to retire as trustee by way of a letter of resignation. There was no evidence that he ever executed a

deed of retirement. However, it appears that the remaining trustees accepted the letter as a valid method of retiring from the trust.

6 By June 2003, the trust had only three trustees, *viz*, Chan Chee Chiu ("CCC"), Chan See Chuen and Chan Fatt Cheung ("CFC"). In March 2009, CFC resigned as trustee. Again, no deed of retirement was executed. In April 2017, Chan See Chuen passed away. In June 2017, the only remaining trustee, CCC, appointed the respondent and appellant as co-trustees pursuant to a deed of appointment, thereby restoring the number of trustees to three.

7 Thereafter, disagreements arose among the trustees relating to the stewardship of the assets of the trust. On 10 January 2019, the respondent's solicitors wrote to CCC's solicitors informing them of the respondent's intention to retire as a trustee and attaching an unsigned draft deed of retirement ("Draft Deed"). On 15 January 2019, CCC's solicitors advised the respondent that CCC had no objections to the retirement and they returned the Draft Deed with CCC's signature appended thereto. The following day, the respondent's solicitors wrote to the appellant, informing him of the respondent's intention to retire as a trustee and attaching CCC's solicitor's e-mail of 15 January 2019 as well as an unsigned copy of the Draft Deed. They asked the appellant to consent to the respondent's retirement. The appellant did not sign the Draft Deed. Instead, on 1 February 2019, the appellant wrote a letter ("Resignation Letter") to the respondent and CCC, stating that he thereby resigned as trustee with immediate effect, and that his resignation was prompted by his inability to effectively discharge his duties as a trustee due to certain areas of concern. The appellant set out these areas of concern in the Resignation Letter and, in particular, cited a disagreement concerning a certain fund transfer which had allegedly happened without his authorisation.

8 On 19 February 2019, the respondent's solicitors replied, asserting that the appellant was still a trustee and would remain so until a proper deed of retirement was executed. On 22 February 2019, the appellant replied contesting this; he cited an express provision in the Will which he claimed allowed him to resign without a deed of retirement, and also cited the example of CFC who had retired without such a deed. The portion of the Will (cl 3) cited by the appellant states:

> … Upon the death or retirement of any Trustee, the person appointed as his successor in office shall nevertheless be my male descendant through a male line.
>
> If any of my Trustees disagree with the others or have to attend to other business, he is at liberty to resign and the vacancy thereby created shall be filled accordingly.

9 On 6 March 2019, the respondent executed the Draft Deed, even though the appellant had yet to give his consent. About two months later, in May 2019, the respondent's solicitors informed the appellant that CFC had signed a Deed of Retirement and Confirmation ("Confirmation Deed") on 25 April 2019, which confirmed that he had retired as a trustee with effect from March 2009. The respondent's solicitors also attached the Confirmation Deed which had been executed by CFC, CCC, and the respondent. They requested the appellant to sign the Draft Deed and the Confirmation Deed (collectively, "the Deeds"), When the appellant refused, the respondent filed OS 703, asking the court to order the appellant to sign the Deeds.

Summary of arguments below

Respondent's arguments

10 The respondent argued that the court had power to compel the appellant to consent to the Deeds, pursuant to s 18 of the Supreme Court of Judicature

Act (Cap 322, 2007 Rev Ed) ("SCJA") read with item 14 of the First Schedule thereof, or by virtue of the inherent powers of the court found in O 92 r 4 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("ROC"). The order should be granted as the appellant should not be allowed to refuse/withhold his consent unreasonably. Alternatively, the court should direct the Registrar of the Supreme Court ("RSC") to execute the Deeds on behalf of the appellant, pursuant to s 14(1) of the SCJA.

11 The respondent's position was that the appellant could sign the Deeds as he remained a trustee. His attempt to resign as trustee by way of letter was not valid, as the only way a trustee can resign is in accordance with s 40 TA, *ie*, through a duly executed deed of retirement. The provisions of the Will dealing with resignation do not make sense when read without incorporating the requirements of s 40 TA as the Will is silent as to: (i) the mode of resignation; (ii) whether the consent of the other trustees should be obtained; (iii) whether the trust assets should be transferred to the continuing trustees; and (iv) whether there should be at least two remaining trustees. Further, the estate held substantial assets, which could not be transferred to the continuing trustees by way of a simple letter of resignation.

Appellant's arguments

12 The appellant argued that he was no longer a trustee and could no longer provide his consent, as he had resigned effectively via the Resignation Letter, since cl 3 of the Will allowed him to resign without any formalities and without the consent of the other trustees. The effectiveness of the appellant's resignation was independent of any vesting of the trust assets in the continuing trustees as the vesting was a matter of implementation that would arise only after the

discharge of a trustee was deemed effective. The respondent was also estopped from asserting that the appellant was unable to resign by way of letter as the respondent and CCC had accepted CFC's resignation, which constituted a representation to the appellant that resignation by letter was effective, and the appellant had relied on this to his detriment.

13 Alternatively, even if the Resignation Letter was not effective and the appellant was still a trustee, there was no basis upon which the court could compel him to sign the Deeds.

Decision below

14 The Judge framed the issues as follows (Judgment at [20]):

(a) whether cl 3 of the Will or s 40 TA was the operative mode for a trustee under the Will to resign or retire; and

(b) whether the appellant could be compelled to provide his consent to the Deeds.

15 The Judge held in relation to the first issue that a trustee seeking to retire had to comply with s 40 TA. Section 2(2) of the Trustees Act provided that the powers conferred by that Act on trustees would apply in so far as the trust instrument did not express a contrary intention (Judgment at [32]). Section 40 TA constituted a "power" and would apply unless the Will expressed a contrary intention (Judgment at [35] to [39]). A contrary intention need not be express, as long as on a fair reading of the trust instrument, the power would be inconsistent with the purport of the trust instrument (Judgment at [40] to [41]). On an objective reading of cl 3, nothing in that clause implied that the Testator intended to void the application of s 40 TA; that section thus applied (Judgment

at [42]). Further, the appellant was still a trustee as he had not met the conditions prescribed by that section (Judgment at [51]).

16 Although CFC's resignation in 2009 also did not comply with s 40 TA, all parties, including the appellant, had acted on the basis that CFC was no longer a trustee from the time of his resignation and, hence, his resignation could be considered valid for all intents and purposes (Judgment at [79] to [80]). Nevertheless, the acceptance of CFC's resignation by letter was not a representation to the appellant that resignation by letter would be effective. This was because the appellant and respondent had both relied on the validity of that resignation when they were appointed trustees and, in any case, CFC's erroneous resignation by letter did not make that the correct mode of leaving his trusteeship (Judgment at [81]).

17 Even assuming *arguendo* that resignation by letter was effective, the respondent had resigned prior to the appellant, by way of the respondent's solicitor's letter to CCC on 10 January 2019 and the letter to the appellant on 16 January 2019; this meant that the appellant remained as a trustee since he was one of two remaining trustees and had to find a replacement before he could resign (Judgment at [47] to [50]).

18 In relation to the second issue, s 14 of the SCJA gave the court the power to order the appellant to execute the Deeds (Judgment at [53] to [57], [63]). Alternatively, s 18 of the SCJA and O 92 r 4 ROC provide the court with the power to make such an order (Judgment at [64] to [78]). The exercise of this power was justified as the appellant had acted unfairly, illogically and unreasonably by refusing to consent to the respondent's retirement (Judgment at [59] to [62]). There was also no basis for the appellant to object to regularising

the retirement of CFC by way of the Confirmation Deed (Judgment at [80]). The court ordered the appellant to sign the Deeds within 14 days, failing which the RSC was directed to execute the Deeds on the appellant's behalf (Judgment at [62]).

Arguments on appeal

Appellant's case

19 The appellant argues that he had effectively retired as a trustee by way of his Resignation Letter, as this was allowed pursuant to cl 3 of the Will. The Judge erred in finding that the appellant was still a trustee on the ground that he failed to comply with s 40 TA, as that section does not apply to the exclusion of the express power given to the trustee under the trust instrument allowing him to discharge himself. Alternatively, the doctrines of estoppel by representation and estoppel by convention apply to estop the respondent from asserting that the appellant cannot resign by way of letter. In any case, the Judge erred in compelling the appellant to consent to the respondent's retirement.

Respondent's case

20 The respondent argues that the appellant remains as a trustee because he failed to comply with s 40 TA, as the conditions set out therein must be met for an effective resignation. Both estoppel by representation and estoppel by convention are not made out in the present case. The Judge also did not err in compelling the appellant to consent.

Issues before this court

21 The only remedies sought in OS 703 were orders to compel the appellant to sign the Deeds. As such, the only issue before this court is whether the Judge erred in compelling the appellant to consent to the Deeds.

22 It is hence not strictly necessary for this court to decide on the trusteeship status of the appellant, the respondent and CFC. However, as the Judge had made findings on this point and these issues have also been thoroughly argued before us, we will decide these issues as well. These are important decisions which will determine the future administration of the trust. They require us to decide:

(a) In general, whether the conditions in s 40 TA must also be met before a trustee can validly retire via an express power to retire found in the trust instrument; and

(b) In the present case, the conditions that must be met before a trustee can retire pursuant to cl 3 of the Will.

Decision

Whether the Judge erred in compelling the appellant to consent to the Deeds

Parties' arguments

23 The appellant argues as follows. The Judge erred in compelling the appellant to consent to the respondent's retirement as the plain text of s 40 TA shows that the co-trustees have a discretion as to whether to consent to the proposed retirement. There was also no basis to compel consent as a matter of statutory interpretation of s 40, as "consent" by coercion is not "consent". The

Judge provided no authority or justification for imposing a requirement that the appellant should act reasonably in refusing to grant consent. In any event, it was reasonable for the appellant to withhold consent. Further, compelling consent is not necessary because the existing legal framework provides alternative ways for a trustee to retire even without the co-trustees' consent.

24 The respondent disagrees, arguing as follows. The Judge did not err in compelling consent. It is implied in s 40 TA that the consent of co-trustees to the discharge of a trustee cannot be withheld unreasonably. The appellant had acted unreasonably in withholding consent, in particular as the only reason for him to do so was to prevent the respondent from retiring before he himself did. There is a high threshold to be met before this court should overturn the Judge's decision on this point. Finally, the appellant had misinterpreted the law in contending that compelling consent was unnecessary under the legal framework.

Our decision

25 We agree with the appellant that the court has no legal basis upon which it can compel him to consent to the Deeds.

Section 14 of the SCJA

26 The appellant in his submissions before the Judge argued that s 14 of the SCJA does *not* give the court the power to compel consent. While the appellant did not revive this argument before us, it is necessary to address whether s 14 grants the court power to compel a party to exercise a statutorily endowed power of consent.

27 To begin, with respect, the Judge seems to have misinterpreted the respondent's arguments below because the respondent was *not* relying on s 14 of the SCJA as the basis to compel consent. It is clear from the respondent's written *and* oral submissions below that the respondent was *only* relying on s 18 read with item 14 of the First Schedule of the SCJA, and in the alternative O 92 r 4 of the ROC, as the bases for compelling consent. The respondent cited s 14 of the SCJA *not* as the basis for compelling the *appellant's* consent, but as the basis for directing the RSC to execute the Deeds, if the appellant were to fail to comply with an earlier order from the court which required *him* to consent to the Deeds by signing them. However, it seems that the Judge had mischaracterised the respondent's submissions, when he stated that (Judgment at [16]):

> … The [respondent] submits that the power of the court to compel the [*appellant*] to provide his consent lies either in **s 14** or s 18 of the Supreme Court of Judicature Act … or under the inherent powers of the court pursuant to O 92 r 4 …
>
> [emphasis added in bold and underline]

Pursuant to this misinterpretation of the respondent's submissions, the Judge then went on to find that s 14 provided the court with a basis to compel consent.

28 With respect, s 14 of the SCJA does *not* empower the court to compel the appellant to consent. Section 14 provides:

> **Execution of deed or indorsement of negotiable instrument**
>
> **14.**—(1) If a **judgment or order** is for the execution of a deed, or signing of a document, or for the indorsement of a negotiable instrument, and the **party ordered** to execute, sign or indorse such instrument is absent, or neglects or refuses to do so, any party interested in having the same executed, signed or indorsed, may prepare a deed, or document, or indorsement of the instrument in accordance with the terms of the judgment or order, and tender the same to the court for execution upon the proper stamp, if any is required by law, and the signature

> thereof by the Registrar, by order of the court, shall have the same effect as the execution, signing or indorsement thereof by the party ordered to execute.
>
> [emphasis added in bold]

29 There is nothing in the text of s 14 of the SCJA which gives the court the power to compel the appellant to consent to the Deeds. Instead, as the appellant rightly argued before the Judge, the plain text (in particular, the words in bold) makes clear that s 14 only operates *after* the relevant party had already been ordered to sign the instrument and had not done so. In that event, the signature of the RSC on the instrument affixed with the authority of an order of the court would then have the same effect as if the party had himself or herself signed the instrument.

30 The Judge quoted portions of two cases which, with respect, do not assist him. They instead go *against* his proposition (Judgment at [55] to [57]). The Judge's findings are set out here:

> 55 In *Yeo Guan Chye Terence and another v Lau Siew Kim* [2007] 2 SLR(R) 1 … Lai Siu Chiu J (as she then was) stated at [75]:
>
> > … The **defendant is required to execute instruments** of transfer for both the properties in favour of the estate's interest within 30 days of today's date, **failing which the Registrar is hereby empowered under s 14(1) of the Supreme Court of Judicature Act** (Cap **322, 1999 Rev Ed) to do so on her behalf.** I further give the plaintiffs liberty to apply. …
>
> 56 Similarly, in *AQR v AQS* [2011] SGHC 139 … Lai J (as she then was) stated at [2]:
>
> > 2 … **I made the following orders**:
> >
> > (a) **The wife was to transfer to the husband** all her rights, title and interest in the property at Bayshore Road, Singapore ("the matrimonial flat") as well as her rights, title and interest in two Australia properties (see [9(d)] below without

> consideration. … **In the event the wife failed or refused** to execute the transfer of the matrimonial flat within seven days of a request in writing from the husband's solicitors, **the Registrar of the Supreme Court was empowered to do so on her behalf pursuant to s 14 of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed).**
>
> …
>
> 57 The court in the above cases exercised its power under s 14 of the SCJA and ordered the defaulting parties to execute a transfer of assets when there was no pre-existing order or judgment, failing which the Registrar of the Supreme Court was empowered to do so.
>
> [emphasis added in bold]

31 The quoted sections show that in both cases the court had made two orders: (1) an original order directing transfer of assets; and (2) a backup order empowering the RSC to execute the transfer instrument on behalf of the transferor, if the transferor failed to comply with the original order. The backup order was based on s 14 of the SCJA, but the original order was not. In the first case relied on by the Judge, *Yeo Guan Chye Terence and another v Lau Siew Kim* [2007] 2 SLR(R) 1, the court found that the defendant held properties on a resulting trust for the deceased's estate and ordered the defendant to transfer it to the deceased's estate (at [62], [75]). Equity is part of the law of the land. A court in the exercise of its equitable jurisdiction may order the restoration of property that has been misapplied or misappropriated. In the second case relied on by the Judge, *AQR v AQS* [2011] SGHC 139, a divorce case concerning division of matrimonial assets, the court ordered the wife to transfer matrimonial assets to the husband pursuant to its powers under s 112 of the Women's Charter (Cap 353, 2009 Rev Ed) (at [2], [41] to [42]). In neither case did the source of power for the original order come from s 14 of the SCJA.

Further, the two cases were not relevant to the issue of a court's power to compel a co-trustee to consent to retirement of another trustee.

32 For these reasons, s 14 of the SCJA does *not* grant the court the power to compel a co-trustee to consent to a trustee's retirement, and we respectfully overrule the Judge's decision on this point.

Section 18 of the SCJA

33 Next, the Judge opined, as an alternative basis, that s 18 read with item 14 of the First Schedule of the SCJA gives the court the power to compel a co-trustee to consent to a trustee's retirement. The entirety of the Judge's reasoning on this point is found in a single paragraph (Judgment at [65]):

> 65 Under the First Schedule to the SCJA, to which s 18(2) refers, the 'Additional Powers of the High Court' include the '**[p]ower to issue to any person or authority any direction, order or writ for the enforcement of any right conferred by any written law or for any other purpose …**' This provision empowers the court to order an individual to execute a trust deed, while simultaneously directing the Registrar of the Supreme Court to execute the deed on his behalf should he fail to do so.
>
> [emphasis added in bold]

34 We agree with the Judge that this power set out in the First Schedule is wide ranging and can *theoretically* encompass the power to compel a co-trustee to consent to a trustee's retirement. However, the court's powers must be exercised in accordance with law. The Judge cited no authority to show that this power has ever been exercised to compel consent (Judgment at [64] to [66]) in a situation in which it was clear that the decision to give consent was wholly discretionary. The Judge also cited no authority, and gave no explanation, for imposing a "reasonableness test" (Judgment at [59] to [62]):

> *Is the [appellant]* ***reasonable*** *in refusing to grant his consent?*
>
> …
>
> … the refusal of the [appellant] to grant his consent for the [respondent] to retire is illogical and **unreasonable** …
>
> For the above reasons, there are sufficient justifications for the court to invoke its powers under s 14 of the SCJA …
>
> [emphasis added in bold; italics in original]

35 Before we discuss this point further, it would be helpful to bear the provisions of s 40 TA in mind. This section provides:

> **Retirement of trustee without a new appointment**
>
> 40. – (1) Where a trustee is desirous of being discharged from the trust, and after his discharge there will be either a trust corporation or at least 2 individuals to act as trustees to perform the trust, then –
>
> (a) if such trustee by deed declares that he is desirous of being discharged from the trust; and
>
> (b) if his co-trustees and such other person, if any, as is empowered to appoint trustees, by deed consent to the discharge of the trustee, and to the vesting in the co-trustees alone of the trust property.
>
> the trustee desirous of being discharged shall be deemed to have retired from the trust, and shall, by the deed, be discharged therefrom under this Act, without any new trustee being appointed in his place.
>
> (2) Any assurance or thing requisite for vesting the trust property in the continuing trustees alone shall be executed or done.

36 It would be noted from s 40 TA that for a trustee to be deemed to have retired from his position without the appointment of a replacement trustee, three conditions have to be met. The first condition is that after the discharge of the retiring trustee, there will be either a trust corporation or at least two individuals who remain as trustees of the trust. The second is that the retiring trustee must execute a deed in which he declares his desire to retire and the third condition

is that the remaining trustees must consent by deed to his retirement and to the vesting in them alone of the trust property. Thus, the consent of the co-trustees to the proposed retirement is an essential element for an effective discharge. Section 40 TA does not direct the co-trustees as to how their decision to give or withhold consent should be made: it is a decision that is wholly within their discretion. On a plain reading of the statute, there is no basis for imposing any form of limitation on the required consent, to reduce it to being anything less than purely discretionary. We also agree with the appellant that there is no basis, as a matter of statutory interpretation of s 40 TA, for consent to be subject to a reasonableness test, *ie*, for "consent" to be compelled if it is unreasonable not to consent. Further, nothing in this provision or in any other section of the Trustees Act confers power on the court to compel such consent. With respect, we do not think that the court's power under s 18 of the SCJA can or should be exercised to compel the appellant's consent to the respondent's retirement. As the appellant rightly pointed out, compulsion is the antithesis of consent.

Inherent power under O 92 r 4 of ROC

37 Further, in our view, the court cannot compel consent under O 92 r 4 of the ROC. In order for the court to exercise its inherent power, two conditions must be met (*Cheong Wei Chang v Lee Hsien Loong and another matter* [2019] 3 SLR 326 at [66]): (1) there must be no statutory exclusion of the inherent power; and (2) there must be exceptional circumstances where there is need for the court to use its inherent powers in order for justice to be done or injustice to be averted.

38 Here, neither condition has been met. First, compelling consent is contrary to the proper statutory interpretation of s 40 TA ([36] above). Second,

there are no exceptional circumstances in the present case which require compelling consent to avoid injustice as the situation here is the very situation contemplated by and provided for by the Trustees Act. No trustee has the right to retire except in accordance with the law.

39 For these reasons, we set aside the Judge's orders compelling the appellant to consent to the Deeds. The appeal must be allowed.

The trusteeship status of the appellant, respondent and CFC

40 We now turn to discuss the trusteeship status of the appellant, the respondent and CFC. In our view, the appellant and the respondent are both still trustees of the trust, but CFC is not.

The relationship between s 40 TA and an express power of retirement

41 This discussion requires us to first understand the proper relationship between s 40 TA and an express power of retirement found in a trust instrument. As mentioned in [36] above, s 40 TA grants all trustees a statutory power to retire without the appointment of a replacement trustee, if three conditions are met. There are two angles which must be considered in evaluating the relationship between s 40 TA and the express power of retirement. First, one must ask whether on a proper statutory interpretation of s 40 TA, the three conditions are meant to apply to an express power of retirement in *all* trust instruments. Second, one must ask whether on proper interpretation of the *specific* trust instrument in question, the settlor intended to incorporate the three requirements of s 40 TA into the trust instrument.

42 This section deals with the first question, and we deal with the second question at [60] below. The appellant argues that the conditions do not have to be met as the statutory power to retire is a separate scheme from the express power to retire. On the other hand, the respondent argues that the conditions in s 40 TA are universal conditions which must be met unless the trust instrument manifests a contrary intention.

43 We agree with the appellant that in general, the conditions in s 40 TA do *not* have to be met if a trustee can use a retirement mode provided by the trust instrument (unless of course, the settlor incorporates the requirements of s 40 TA into the trust instrument).

44 The statutory power to retire under s 40 TA is not the only power of retirement that trustees have, but is merely "in addition" to any express power to retire conferred under the trust instrument, as shown by s 2(2) of the Trustees Act:

> The **powers conferred by this Act** on trustees are **in addition** to the **powers conferred by the instrument**, if any, creating the trust, but those powers, unless otherwise stated, apply if and so far only as a contrary intention is not expressed in the instrument, if any, creating the trust, and have effect subject to the terms of that instrument.
>
> [emphasis added in bold and underline]

These two alternative powers (statutory and express) if present serve as two independent and alternative schemes under which a trustee can retire. The plain wording of s 40 TA shows that the three conditions in the section are prerequisites of the specific *statutory* power to retire, such that s 40 TA can only be invoked when these three conditions are met. The plain wording of the

section does *not* provide that these three conditions are universal conditions which apply to *all* powers to retire.

45 The fact that the three conditions in s 40 TA are *specific* only to the statutory power to retire, and are *not universal* conditions, is supported by s 38(1)(*c*) of the Trustees Act which reads:

> 38.—(1) On the appointment of a trustee for the whole or any part of trust property —
>
> …
>
> (*c*) it shall not be obligatory, except as hereinafter provided, to appoint more than one new trustee where only one trustee was originally appointed, or to fill up the original number of trustees where more than 2 trustees were originally appointed, but, except where only one trustee was originally appointed, and a sole trustee when appointed will be able to give valid receipts for all capital money, **a trustee shall not be discharged from his trust unless there will be either a trust corporation or at least 2 individuals to act as trustees to perform the trust**; …
>
> [emphasis added in bold]

46 Section 38(1)(*c*) sets out the condition that a trustee may only be discharged from the trust if there are at least two trustees or a trust corporation remaining. This is a universal condition which applies to the retirement of every trustee (save for an exception discussed below) because it states in imperative terms that "a trustee shall not be discharged … unless …". Notably, this is the same condition that is found in s 40(1). Two important points follow from this observation. First, if this particular condition in s 40 is interpreted as a universal condition which applies even to an express power to retire, s 38(1)(*c*) is rendered *otiose* because there is no need to set out the same universal condition twice in the Trustees Act. Second, and more importantly, if this requirement in s 40 is interpreted as a universal condition, it would be *inconsistent* with

s 38(1)(*c*) because the former is absolute whereas the latter provides for an exception. Under s 38(1)(*c*), it is *not* necessary to have at least two trustees or a trust corporation remaining, if only one trustee was originally appointed and that sole trustee will be able to give valid receipts for all capital money; on the other hand, s 40 does not provide for such an exception. Let us illustrate with an example. A settlor creates a trust with one original trustee, who is given the power to give valid receipts for all capital money. The original trustee then subsequently appoints a second trustee. Under s 38(1)(*c*), the original trustee will be able to retire pursuant to an express power to retire under the trust, without a replacement, notwithstanding that the subsequent trustee will be the only trustee remaining. However, if the three conditions in s 40 are read as universal conditions, the original trustee cannot retire pursuant to the express power to retire, because there would be fewer than two trustees remaining. This results in an inherent contradiction between s 38(1)(*c*) and s 40. The conclusion must be that the three conditions in s 40 are *not* universal conditions but are only specific to the situation where in order to retire a trustee has to rely on the statutory power to retire conferred by that provision. This accords with case law which has recognised that the power to retire is exercisable in accordance with the retirement provisions, if any, or the replacement provisions in the trust instrument: see *Halsbury's Laws of Singapore* vol 9(4) (LexisNexis, 2021) at para 110.740.

47 The Judge relied on *Rajabali Jumabhoy and others v Ameerali R Jumabhoy and others* [1997] 2 SLR(R) 296 ("*Rajabali HC*") to suggest that the conditions in s 40 TA are universal conditions which must be met even when a trustee retires pursuant to an express power to retire (Judgment at [46]). However, *Rajabali HC* does not stand for this proposition. The trustees in that case had to comply with requirements in s 43(1) of the Trustees Act (Cap 337,

1985 Rev Ed) (the equivalent of s 40 TA) because they had been relying on the statutory power to retire, and not an express power to retire (as presumed from the fact that no express power to retire was mentioned in the decision).

48 For these reasons, in general, a trustee seeking to retire under an express power to retire in a trust instrument need not comply with the conditions in s 40 TA, although he must meet the condition in s 38(1)(*c*), and also meet any conditions stipulated in the trust instrument as being necessary to invoke the express power to retire.

The express power to retire in cl 3 of the Will

49 The appellant, respondent and CFC would have validly retired if they had fulfilled the substantive and procedural requirements of the express power to retire found in cl 3 of the Will. This requires a proper construction of cl 3 and, in doing so, the overriding aim of the court is to give effect to the testamentary intention as expressed by the testator: *Foo Jee Seng and others v Foo Jhee Tuang and another* [2012] 4 SLR 339 at [17].

50 The relevant portion of cl 3 is set out here once more for ease of reference:

> … Upon the death or retirement of any Trustee, the person appointed as his successor in office shall nevertheless be my male descendant through a male line.
>
> If any of my Trustees disagree with the others or have to attend to other business, he is at liberty to resign and the vacancy thereby created shall be filled accordingly.

51 We will discuss the substantive and procedural conditions for retirement in turn.

(1) Substantive conditions for retirement

52 The appellant argues that cl 3 provides trustees with the power to resign if there is a disagreement or if the trustee wants to attend to other business. The term "other business" is vague and does not restrict the trustee's freedom to retire in any way since practically any activity can be classified as "any business". This low threshold must have been set so that a trustee could resign easily if he chose to do so.

53 The respondent accepts this, but in addition argues that since cl 3 does not provide the *procedure* for retirement, *all* three conditions set out in s 40 TA should apply, including the requirement that the retiring trustee obtain the consent of all co-trustees.

54 The Judge accepted the respondent's argument and held that the failure of the Testator to provide a procedure did not obviate a need for one, and hence that all three conditions set out in s 40 TA should apply (Judgment at [44]).

55 In our view, the express words of cl 3 make it clear that the Testator intended that any of his Trustees could retire if he wanted to *and* if there was a replacement trustee who was the Testator's male descendant through a male line.

56 As the substantive requirement for a suitable replacement was not raised by either party, we probed the parties on this point during the oral hearing. The respondent raised no objection to it but the appellant disagreed, arguing that the phrases "Upon the … retirement" and "the vacancy thereby created" show that a trustee is able to retire without a replacement, creating a vacancy, and that the vacancy need only be subsequently filled by appointing a replacement.

57 However, with respect, this is a pedantic reading of the words. Wills should be interpreted purposively based on their express words, and not literally (John G. Ross Martyn *et al*, *Theobald on Wills* (Sweet & Maxwell, 18th Ed, 2016) ("*Ross*") at para 13-001). The testator's intention is to be ascertained from an examination of the whole of the will, with the aid of all admissible extrinsic evidence (*Ross* at para 13-034). In particular, the facts and surrounding circumstances known or assumed by the testator at the time of executing the will are admissible to aid the construction of the will (*Ross* at para 13-039).

58 Here, the Testator had appointed no fewer than five of his sons to be the original trustees. This shows that it was important to him to have several trustees to help manage the trust assets. It could not have been his intention to allow the trustees to simply retire one by one and not have to find a replacement, leaving vacancies behind. In addition, the Testator likely did not envisage any difficulty with finding a replacement trustee because he had at least 12 sons who fulfilled the condition of being a "male descendant through a male line" and he obviously anticipated that at least some of those sons would have sons of their own. In addition, cl 3 of the Will specifically mentions that the retiring trustee is to have a successor, and that the retiring trustee's position is to be filled.

59 Hence, on a purposive reading, we find that the Testator intended that the retiring trustee would have to find a replacement trustee before he would be allowed to retire.

60 With respect, we disagree with the Judge that s 40 TA applies where a trustee seeks to retire under cl 3. First, as explained above at [44] in relation to the first question, the statutory power of retirement is a separate scheme from the express power to retire and in general, where a trustee relies on the express

power to retire, there is no need to meet the conditions of retirement in s 40 TA. Second, in relation to the second question (see [41] above), we find that on a proper interpretation of cl 3, the Testator did not intend to incorporate the requirements in s 40 TA. Section 40 is titled "Retirement of trustee *without* a new appointment" [emphasis added], and therefore is inapplicable to retirement under cl 3 because the latter involves retirement *with* a replacement trustee. The Testator's failure to explicitly state a *procedure* for retirement in cl 3 is no reason for the court to find that the *substantive* conditions in s 40 (in particular, the requirement that the retiring trustee must obtain the co-trustees' consent) should apply to cl 3. The latter does not help in overcoming the omission of the Testator.

(2) Procedural conditions for retirement

61 The appellant argues that cl 3 provides for *resignation* as a mode of *retirement*, and although there is no specifically prescribed mode of *resignation*, a trustee can *resign* in any manner as long as the intention to resign is clear and has been communicated to the other trustees.

62 The respondent disagrees that a trustee can resign in any manner, arguing that it cannot be the case that a simple phone call or an oral announcement would be a valid retirement. The respondent argues that retirement under cl 3 has to comply with s 40 TA and be by deed.

63 It is not in doubt that the Testator could have specified the mode of resignation; for example, if the Will had stated that to retire a trustee had to declare so by writing under his hand, such writing would be an effective discharge, provided the other condition of the appointment of a replacement trustee had been met. As the Testator did not do so, we infer that he was content

for the method of resignation to be that prescribed by the law for the time being in force. Such an inference is not simply a matter of logic. It follows also as a matter of interpretation because the provisions of cl 3 of the Will dovetail with the statutory provisions regarding replacement of a retiring trustee. We are referring here for convenience to the provision which is currently in force, *ie*, s 37(1) of the Trustees Act As will be seen from the discussion below, the forerunner of s 37(1) was in substance, albeit not form, the same as the current provision.

64 Section 37 of the Trustees Act provides that, among other things, when a trustee wants to be discharged (*ie*, retire) and has found a replacement, then the continuing trustee (among other specified persons) may by writing appoint the replacement as trustee in place of the retiring trustee and the replacement trustee thereupon has all the powers of a trustee originally appointed under the will or the settlement. It reads in material part:

> **Power of appointing new or additional trustees**
>
> 37. — (1) *Where a trustee*, either original or substituted, and whether appointed by a court or otherwise —
>
> (a) is dead;
>
> (b) remains out of Singapore for more than 12 months;
>
> (c) *desires to be discharged from all or any of the trusts or powers reposed in or conferred on him;*
>
> (d) refuses or is unfit to act therein;
>
> (e) is incapable of acting therein; or
>
> (f) is an infant,
>
> *Then,* subject to the restrictions imposed by this Act on the number of trustees —

> (i) the person or persons nominated for the purpose of appointing new trustees by the instrument, if any, creating the trust; or
>
> (ii) if there is no such person, or no such person able and willing to act, then *the surviving or continuing trustees or trustee for the time being,* or the personal representatives of the last surviving or continuing trustee,
>
> …
>
> *may, by writing, appoint one or more other persons* (whether or not being the persons exercising the power) *to be trustee or trustees in the place of the trustee* so deceased, remaining out of Singapore, *desiring to be discharged*, refusing, or being unfit or being incapable or being an infant.
>
> …
>
> (8) Every new trustee appointed under this section, as well before as after all the trust property becomes by law, or by assurance, or otherwise, vested in him, shall have the same powers, authorities and discretions, and may in all respects act as if he had been originally appointed a trustee by the instrument, if any, creating the trust.
>
> …
>
> [emphasis added]

65 The Will was executed in Singapore in 1947. At that time the relevant legislation governing trusts was the Trustees Ordinance (Cap 59, 1936 Rev Ed) ("Trustees Ordinance") and it contained a s 37(1) which, according to the marginal note, dealt with "Power of appointing new or additional trustees". The relevant portions of s 37(1) of the Trustees Ordinance stated:

> 37. — (1) **Where a trustee**, either original or substituted, and whether appointed by a Court or otherwise, is dead, or remains out of the Colony for more than twelve months, or desires to be discharged from all or any of the trusts or powers reposed in or conferred on him, or refuses or is unfit to act therein, or is incapable of acting therein, or is an infant, then, subject to the

> restrictions imposed by this Ordinance on the number of trustees —
>
> > (*a*) the person or persons nominated for the purpose of appointing new trustees by the instrument, if any, creating the trust; or
> >
> > (*b*) if there is no such person, or no such person able and willing to act, then **the surviving or continuing trustees** or trustee for the time being, or the personal representatives of the last surviving or continuing trustee,
>
> **may, by writing, appoint one or more other persons** (whether or not being the persons exercising the power) to be a trustee or trustees **in the place of the trustee** so deceased, remaining out of the Colony, **desiring to be discharged**, refusing, or being unfit or being incapable, or being an infant, as aforesaid.
>
> [emphasis added in bold]

66 It can be seen from the foregoing that the substance of the current s 37(1) of the Trustees Act is practically identical to the substance of the equivalent provision in the Trustees Ordinance. We will therefore continue to use the provisions of the current s 37(1) of the Trustees Act in our analysis. What the section does (and what the equivalent provision in the Trustees Ordinance did) is to provide for the situation where a sitting trustee wants to retire but can only do so if a replacement trustee is appointed, which is exactly the situation contemplated by cl 3 of the Will. In that case, the continuing trustee or trustees (as there must be at least one such trustee since otherwise s 38(1)(*c*) of the Trustees Act would in most situations operate to prevent any trustee retiring), may by writing under his or their hands appoint the replacement trustee to the trust and, by virtue of s 37(8) of the Trustees Act, the new appointee will have all the same powers, authorities, *etc*, as if he had been appointed by the Will.

67 To be clear, the appointment in writing under s 37(1) of the Trustees Act does not merely *appoint* the new trustee, but also *removes* the outgoing trustee. This must necessarily be the case because s 37 allows the continuing trustees to appoint a new trustee *in the place* of a trustee who, among other things: (1) has remained out of the country for more than twelve months; (2) is a minor; or (3) is incapable of acting. Trustees falling into any of the foregoing categories would likely not be able to issue a deed of retirement or a resignation letter. Hence, s 37 must logically be construed as granting the continuing trustees the power to *replace* the outgoing trustee with the new trustee (appointing the new trustee and removing the outgoing trustee), without any action on the part of the outgoing trustee.

68 Thus, in order to retire in accordance with cl 3 of the Will, the appellant should have found a male descendant of the Testator (from a male line) to act as his replacement and requested the respondent and CCC to appoint such replacement as trustee by writing under their hands in accordance with s 37(1) of the Trustees Act. If he or they were unable to find a qualified and acceptable relative to act as replacement trustee, then the appellant could not have recourse to the retirement option provided by cl 3. In that event, the only way for the appellant to retire would be in accordance with s 40 TA (*ie*, retirement without the appointment of a replacement) which would mean all the conditions of that section would have to be met. The appellant's Resignation Letter was, thus, of no effect. By a parity of reasoning, the respondent's attempt to resign through his solicitors' letter was equally ineffective.

69 Our decision on what the Testator intended when he drafted cl 3 is further fortified by consideration of the law in force in Kuala Lumpur ("KL") at the material time. The Testator had his permanent residence in KL at the time

he executed his will in February 1947, though the actual execution took place in Singapore. The original trustees of the Will also resided in KL. Probate was eventually granted in KL and the trustees appointed in KL. The grant was later re-sealed in Singapore. The applicable law in KL in 1947 was the Trustee Enactment (Cap 61, Act 36 of 1933) (Federated Malay States) ("Federal Trustee Enactment"). The Federal Trustee Enactment provided two ways for a trustee to retire: either *without* a replacement, or *with* a replacement, but both could occur by writing.

70 A trustee could retire *without* a replacement pursuant to s 40(i) of the Federal Trustee Enactment, which provided:

> Where a trustee is desirous of being discharged from the trust, and after his discharge there will be either a trust corporation or at least two individuals to act as trustees to perform the trust, then, if such trustee as aforesaid declares **in writing** that he is desirous of being discharged from the trust, and if his co-trustees and such other person, if any, as is empowered to appoint trustees, consent **in writing** to the discharge of the trustee, and to the vesting in the co-trustees alone of the trust property, the trustee desirous of being discharged shall be deemed to have retired from the trust and shall, by the instrument, be discharged therefrom under this Enactment, without any new trustee being appointed in his place.

As can be seen, the provision was similar in all material respects to s 40 TA except that a trustee could retire by writing instead of by deed. This remains the case in Malaysia even today (see s 43(1) of the Trustee Act 1949 (Act 208 of 1978) (Malaysia)).

71 Alternatively, a trustee could have retired *with* a replacement trustee pursuant to s 37(i) of the Federal Trustee Enactment, which allowed the continuing trustees to appoint a new trustee *in the place of* the retiring trustee, by writing. This section was in *pari materia* with s 37(1) of the Trustees

Ordinance that applied in Singapore in 1947 as can been seen from the text which reads:

> 37. — (i) **Where a trustee**, either original or substituted, and whether appointed by a Court or otherwise is dead, or remains out of the Federated Malay States for more than twelve months, or desires to be discharged from all or any of the trusts or powers reposed in or conferred on him, or refuses or is unfit to act therein, or is incapable of acting therein, or is a minor, then, subject to the restrictions imposed by this Enactment on the number of trustees —
>
> > (*a*) the person or persons nominated for the purpose of appointing new trustees by the instrument, if any, creating the trust; or
> >
> > (*b*) if there is no such person, or no such person able and willing to act, then **the surviving or continuing trustees** or trustee for the time being, or the personal representatives of the last surviving or continuing trustee,
>
> **may, by writing, appoint one or more other persons** (whether or not being the persons exercising the power) to be a trustee or trustees **in the place of the trustee** so deceased, remaining out of the Federated Malay States, **desiring to be discharged**, refusing, or being unfit or being incapable, or being a minor, as aforesaid.
>
> [emphasis added in bold and underline]

It can be seen that ss 37(i) and 40(i) of the Federal Trustee Enactment applicable in KL at the time that probate of the Will was granted were in substance identical to s 37(1) of the Trustees Act and s 40 TA respectively. As long as the trust was governed by the Federal Trustee Enactment, the only formal and valid way one of the trustees could have retired would have been by the appointment of a replacement in writing by the continuing trustees or by the retiring trustee making a declaration in writing with the written consent of the continuing trustees.

72 Accordingly, both in Malaya and Singapore, the primary places where the Testator had assets and the trust would need to be administered, the law applicable to the trust for the time being provided the same method whereby a retiring trustee could be discharged upon the appointment of a replacement trustee. The Testator must be taken to have been aware of the law in force in Singapore where his Will was executed and intended to operate and to have drafted his Will with that in mind. It is very likely that he was also aware that the position in Malaya was the same as that in Singapore. There was therefore no need for him to provide a specific mode of retirement.

(3) Resignation as a mode of retirement

73 For completeness, we will also explain why we have rejected the appellant's and respondent's arguments.

74 We disagree with the appellant (see [61] above) that resignation is a mode of retirement. In our view, this argument splits hairs between resignation and retirement because, in the context of trusts, the two concepts bear no material difference – they both involve the trustee's voluntary termination of his role as trustee. The appellant provides no authority to show that the two concepts are different in the context of trustees, and does not explain what the difference is, if any.

75 We also disagree with the appellant's suggestion that a trustee can resign in any manner as long as the intention to resign is clear and has been communicated to the other trustees. The Testator could not possibly have intended this as it is far too wide and uncertain, potentially including even a phone call or an oral face to face conversation. Accepting the appellant's

suggestion could result in evidential difficulties in the event of a subsequent dispute as to whether a trustee had retired or not.

Estoppel and the position of CFC

76 Given our holding that the appellant cannot in any event be compelled by the court to sign the Deeds, the appellant's argument that the respondent is estopped from arguing that retirement must be by deed is moot and need not be dealt with here.

77 We will, however, say a few words on the position of CFC although this point is not directly before us. We have held that retirement pursuant to cl 3 has to be done in conjunction with a new appointment pursuant to s 37(1) of the Trustees Act as explained in [68] above. Thus, neither the appellant's nor the respondent's purported retirement was valid as neither s 37(1) nor s 40 TA was complied with in either case. It could be contended that CFC's retirement was also invalid for lack of a replacement trustee.

78 However, the appellant, the respondent and CCC may very well be estopped from contending that CFC is still a trustee as, since 2009 (in the case of CCC) and June 2017 (in the case of the appellant and the respondent), the trustees have administered the trust and acted as if CFC's retirement was valid and he had been discharged as a trustee. It is clear from the facts that the appellant, the respondent and CCC acted on a shared assumption that CFC was no longer a trustee. Indeed, albeit for a different purpose, the appellant gave several examples of how the trustees had made various decisions without involving CFC, and referred to certain circulars, accounts and documents which showed that CFC had retired and was no longer a trustee.

79 We agree with the Judge that CFC should be treated as having validly retired from the date of his letter of resignation (Judgment at [79] to [80]) as it would be inequitable for the current trustees to assert that CFC was still a trustee during all the years between 2009 and the date this action commenced. For completeness, it is the substantial length of time and the consistent conduct of the parties in treating CFC as having resigned which would estop them from insisting that CFC's resignation was invalid. This should be treated as the exception rather than the norm, and trustees who retire improperly in subsequent cases should not expect to be entitled to retrospective validation.

Conclusion

80 The appeal is allowed, and the orders made below are set aside. The Judge had also ordered the appellant to pay the respondent costs of $5,000 and disbursements and we set aside this order as well. Accordingly, we direct the parties to make written submissions to us on the costs of the appeal and the costs below. The submissions are to be limited to five pages and shall be filed within seven working days of the date of this decision.

Judith Prakash
Justice of the Court of Appeal

Chao Hick Tin
Senior Judge

Belinda Ang Saw Ean
Judge of the Appellate Division

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