IN THE FAMILY JUSTICE COURTS OF
THE REPUBLIC OF SINGAPORE

[2022] SGHCF 12

Originating Summons No 9 of 2021

Between

WDS

… *Plaintiff*

And

WDT

… *Defendant*

ORAL JUDGMENT

[Gifts — Incomplete]

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WDS
v
WDT

[2022] SGHCF 12

General Division of the High Court (Family Division) — Originating Summons No 9 of 2021
Mavis Chionh Sze Chyi J
4 March 2022

25 May 2022 Judgment reserved.

Mavis Chionh Sze Chyi J:

The application

1 The plaintiff is the sole executor and trustee of the last will and testament of the Deceased. The defendant, [WDT], alleges that a gift of US$1.5 million was made to her by the Deceased during the latter's lifetime and seeks to have this recognized by the plaintiff as a debt or a liability of the Deceased's estate which should be paid prior to the distribution of the estate.

2 The plaintiff's present application is made under Rule 786 of the Family Justice Rules 2014 ("FJR 2014") for the following prayers:

(a) A declaration that [WDT] does not have a valid claim for the sum of US$1.5 million as a creditor against the Deceased's estate;

(b) Further or alternatively, an order that the plaintiff be permitted to distribute the assets of the Deceased's estate in accordance with the Deceased's last Will and Testament without regard for [WDT]'s claim for the sum of US$1.5 million;

(c) An order that the costs of the plaintiff incurred in respect of this application be paid out of the estate in priority to the interests of the beneficiaries under the Will;

(d) Liberty to apply; and

(e) Such further or other relief as the Court deems fit.[1]

Background

3 By way of background, [WDT] is the youngest of the Deceased's four children.[2] The Deceased's son lives in Boston, USA, while the Deceased's other two daughters live in Toronto, Canada.[3] [WDT] lived with the Deceased (as well as [WDT]'s father before his passing in 2010) in Toronto, Canada as well.[4]

4 When it came to matters relating to her estate and the preparation of her will, the Deceased was advised by her lawyers WongPartnership LLP

1 Originating Summons HCF/OSP 9/2021 filed 29 September 2021.

2 Plaintiff's 1st affidavit at para 5; [WDT]'s 1st affidavit at paras 1 and 5.

3 [WDT]'s 1st affidavit at para 5.

4 [WDT]'s 1st affidavit at paras 6–9.

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("WongPartnership").[5] The Deceased's friend, [B], assisted her in liaising with her lawyers.[6]

5 On 6 December 2013, the Deceased executed her will. Before taking instructions from the Deceased about her Will in September 2013, WongPartnership arranged for her to see a psychiatrist in New York, one [Dr X], for a mental capacity assessment.[7] Following this mental capacity assessment, the Deceased executed on 6 December 2013 (a) her Will, (b) a Deed of Gift for a S$2.5 million cash gift to [WDT] ("the 2013 S$2.5 million Gift"), and (c) a letter to her beneficiaries.[8]

6 Under clause 7 of her Will, the Deceased gave all her personal belongings (including her jewellery, furniture and collectibles) to [WDT] absolutely. Under clause 9 of her Will, the Deceased gave the residuary of her estate to the plaintiff upon trust to distribute in the following manner:[9]

> (a) 30% to [WDT], to be given to her only five years after the date of the deceased's death – in other words, on 16 December 2021;
>
> (b) 30% to the Deceased's son, to be given to him to him only five years after the date of the Deceased's death – in other words, on 16 December 2021;
>
> (c) 20% each to the Deceased's other two daughters, to be given them to only six years and seven years respectively after the date of the

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5 [WDT]'s 1st affidavit at Tab 5 p 72.

6 [WDT]'s 1st affidavit at paras 10, 12–13.

7 [WDT]'s 1st affidavit at para 17.

8 [WDT]'s 1st affidavit at para 18 and [WDT]'s 2nd affidavit at p 34.

9 Plaintiff's 1st affidavit at paras 10–11, pp 19–24.

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Deceased's death – in other words, on 16 December 2022 and 16 December 2023 respectively.

7 Clause 5 of the Will set out the Deceased's intention that any gift she had made in her lifetime and any acquisition or purchase she had made in the name of others in her lifetime would belong to such person whom she had gifted or benefited.[10] Clauses 12 to 15 collectively provided for what was essentially a "no-contest" provision whereby the Deceased directed *inter alia* that the beneficiaries were not to challenge the validity of her Will and/or any gifts or transfers she had made in her lifetime. In the event of any challenge by any beneficiary to the validity of the Will and / or any gift or transfer made by the Deceased in her lifetime, all gifts and bequests to that beneficiary would be revoked, and he or she would cease to have any interest in or claim to the estate, while the gift or bequest which would have been given to such a beneficiary would be given instead to the Singapore Bible College for the setting up of a scholarship fund.

8 In March 2014, the Deceased underwent another psychiatric evaluation by a psychiatrist in Singapore, [Dr Y], when she further confirmed her Will, her Deed of Gift in respect of the 2013 S$2.5 million Gift, and her 6 December 2013 letter to her children. [Dr Y] concluded that her testamentary capacity was still intact.[11]

9 In January 2015 the Deceased suffered a serious stroke[12] and was bedridden.[13] She was discharged from hospital in April 2015 but several senior

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10 Plaintiff's 1st affidavit at para 14 and pp 19–24.

11 [WDT]'s 1st affidavit at para 19, Tab 4 pp 67–70.

12 [WDT]'s 1st affidavit at para 20.

13 [WDT]'s 1st affidavit at para 27.

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care homes declined to accept her into their care.[14] [WDT] took on the responsibility of caring for her mother at home for about a year.[15] Eventually, in May 2016, the Deceased was accepted into the care of a private senior care home in Toronto, Canada, together with [WDT] as a co-occupant in the same bedroom.[16]

10 Not long after this, [B] informed WongPartnership that the Deceased wished to make another cash gift to [WDT], this time involving a sum of US$1.5 million ("the US$1.5 million Gift").[17] On 25 August 2016, the Deceased confirmed this during a video call with WongPartnership.[18] WongPartnership advised the Deceased that to preclude such gift being challenged by her other children, it would be prudent for her to undergo a psychiatric assessment before executing a Deed of Gift.[19]

11 On 14 September 2016, the Deceased signed a letter which purported to instruct her "Bankers and Lawyers" to "execute all necessary fund transfers" to make a "further" cash gift of US$1.5 million to [WDT], to express her "deep appreciation of [WDT's] love" and the "very good care" which the latter had taken of her since her stroke ("the 14 September 2016 letter").[20] The letter was prepared and witnessed by [B]. It is not disputed that [B] kept the letter and did not notify anyone of it: it was only after the Deceased's death that she gave the letter to [WDT].

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14 [WDT]'s 1st affidavit at para 20.

15 [WDT]'s 1st affidavit at para 20.

16 [WDT]'s 1st affidavit at para 22.

17 [WDT]'s 1st affidavit at para 25.

18 [WDT]'s 1st affidavit at paras 25–26.

19 [WDT]'s 1st affidavit at Tab 6 p 113.

20 Plaintiff's 1st affidavit at p 31.

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12 In the meantime, various options for carrying out the Deceased's mental capacity assessment were explored by [B] and WongPartnership, against the backdrop of an upcoming journey from Canada to Singapore which the Deceased and [WDT] were intending to make. As informed by [B] to WongPartnership, the Deceased and [WDT] were scheduled to leave Toronto for New York on 12 December 2016, and then to leave New York for Singapore on 17 December 2016.[21] [B] and WongPartnership discussed the possibility of having the Deceased undergo a psychiatric assessment upon her return to Singapore,[22] but the former expressed concern that the long flight to Singapore might affect the Deceased's mental state.[23] WongPartnership then obtained the details of a psychiatrist in Toronto but [B] was not free to bring the Deceased to see this psychiatrist prior to the Deceased's departure on her trip.[24] [B] and WongPartnership also considered having the Deceased evaluated by [Dr X] in New York during her stop-over, but [Dr X] proved to be unavailable during the relevant period.[25] WongPartnership then suggested that the Deceased could consult another psychiatrist in New York, and also noted that if she preferred not to undergo a psychiatric assessment in New York, then they (the Deceased and [WDT]) had to "be prepared to bear the consequent risks", given [B]'s concern about the possible deterioration in the Deceased's mental state after the long flight to Singapore.[26] In response to [B]'s query, WongPartnership also stated that the Deed of Gift could not be executed in Singapore "based on [their 25 August 2016] Skype call with [the Deceased]", as the lawyers were not

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21 [WDT]'s 1st affidavit at Tab 6 p 96.

22 [WDT]'s 1st affidavit at Tab 6 pp 109–110, and 198

23 [WDT]'s 1st affidavit at Tab 6 p 107.

24 [WDT]'s 1st affidavit at Tab 6 p 97.

25 [WDT]'s 1st affidavit at Tab 6 p 95.

26 [WDT]'s 1st affidavit at Tab 6 pp 93–94.

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qualified psychiatrists and would not be able to assess whether she had the mental capacity required for making the gift of US$1.5 million.[27]

13 As it turned out, the Deceased passed away on 16 December 2016 in New York.[28]

14 Following the Deceased's death, the plaintiff's representatives met [WDT] on 7 March 2017 to introduce the plaintiff as the executor and trustee of the Deceased's estate.[29] By then, [WDT] had been given the 14 September 2016 letter by [B]. [WDT] informed the plaintiff of the US$1.5 million Gift and forwarded to it the 14 September 2016 letter.[30] As the plaintiff was not able to verify the authenticity of the letter, at the plaintiff's request,[31] [B] made a notarized statement on 6 September 2017[32] stating that the Deceased had expressed her intention to make the US$1.5 million Gift to [WDT] in or around June 2016. [B] stated that the Deceased had been advised by her lawyers – via a video conference call on 25 August 2016 – to undergo a psychiatric assessment before executing a Deed of Gift, so as to "avoid any potential dispute about this gift". Subsequently, in a telephone call with [B] on 7 September 2016, the Deceased had urged [B] to help her make the US$1.5 million Gift to [WDT] as soon as possible. [B] stated that she proceeded to prepare the 14 September 2016 letter, "loosely" following the language used in the 2013 Deed of Gift, and witnessed the Deceased signing this letter when [WDT] was not present in the

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27 Plaintiff's 1st affidavit at p 85.

28 [WDT]'s 1st affidavit at para 5; Plaintiff's 1st affidavit at para 18.

29 Plaintiff's 1st affidavit at para 20.

30 Plaintiff's 1st affidavit at paras 21–22.

31 Plaintiff's 1st affidavit at para 25.

32 Plaintiff's 1st affidavit at pp 34–36.

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room. [B] also confirmed in a statutory declaration of the same date[33] that she had prepared the 14 September 2016 letter on the Deceased's instructions; and that the Deceased had read and confirmed her acceptance of the contents of the letter before signing it in [B]'s presence.

15 After receiving [B]'s notarized statement and statutory declaration, the plaintiff sought legal advice from WongPartnership. On 21 February 2018, the plaintiff received WongPartnership's advice, and based on that advice, took the position that there was "no legal basis for the alleged gift to be recognised as a debt of the Estate".[34] On 6 March 2018, the plaintiff informed [WDT] – via correspondence from WongPartnership – of its position and informed her that she would have to apply to court if she wanted the court to determine the legal position of the US$1.5 million Gift.[35]

16 By then, [WDT] had engaged Withers KhattarWong ("KhattarWong") as her lawyers. On 26 March 2018, KhattarWong responded to WongPartnership on [WDT]'s behalf to put on record her disagreement with the plaintiff's position.[36] KhattarWong further stated that they took the view that there was "no necessity to apply to Court for the payment of US$1.5 million to [WDT]", and that it was the plaintiff who had to apply to court if they had "any doubts" or if they wanted "protection by way of an Order of Court".[37]

17 Further correspondence followed between the lawyers, with neither side yielding its position. On 27 May 2019, WongPartnership wrote on the plaintiff's

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33 Plaintiff's 1st affidavit at p 33.

34 Plaintiff's 1st affidavit at para 31.

35 Plaintiff's 1st affidavit at paras 31–33.

36 Plaintiff's 1st affidavit at paras 35 and 37.

37 Plaintiff's 1st affidavit at p 51.

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behalf to KhattarWong, stating that they had not "received a substantive response to [their] letters". WongPartnership stated that given that more than a year had elapsed since the grant of probate on 22 March 2018, the plaintiff "intends to make an application under s 786 of the Family Justice Rules 2014 to clarify the legal position of the Intended Gift". WongPartnership's letter informed KhattarWong that the plaintiff "would prefer" [WDT] to "be a co-applicant for this matter", but that in the absence of a response from her, it would "have no option but to make the application in its sole name and to name [WDT] as defendant". KhattarWong was asked to confirm "by 5.00 pm on 7 June 2019" whether they had instructions to accept service on [WDT]'s behalf.[38]

18 It appears that KhattarWong did not revert by the stated deadline – but the plaintiff did not file any application in court at that point. Instead, the plaintiff sought a second legal opinion from Dentons Rodyk & Davidson LLP ("Dentons").[39] Dentons' advice was consistent with WongPartnership's advice; and on 27 November 2019, the plaintiff's representatives met [WDT] to share with her Dentons' advice. At the meeting, [WDT] requested the plaintiff "to hold back the allocation of the US$1.5 million to the respective sub-accounts [under the estate]", which the plaintiff agreed to do for 3 weeks.[40] Several more months passed without any apparent follow-up from [WDT]. On 18 March 2020, the plaintiff informed [WDT] that it would be proceeding to allocate the US$1.5 million to the respective sub-accounts under the estate according to the percentages stated in the Will. [WDT] replied a week later, requesting once again that they "hold off" from doing so while she consulted her new lawyer. She also requested clarification on "how the legal costs on the US$1.5 million

38 Plaintiff's 1st affidavit at para 41, p 60.

39 Plaintiff's 1st affidavit at paras 44-45, pp 61–66.

40 Plaintiff's 1st affidavit at paras 47–53, pp 67–69.

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were to be charged to the estate and stated that these costs "should not be charged to her portion".[41]

19 On 16 April 2020, the plaintiff informed [WDT] that it intended not to hold off any longer the allocation of the US$1.5 million, and that "legal fees incurred in assessing whether [WDT's] claim [was] valid would be an expense to the Estate".[42] [WDT] replied through KhattarWong on 30 April 2020 saying she had been led to believe that the plaintiff would be applying to court under rule 786 of the Family Justice Rules 2014 and "was expecting service of the application". She requested once again that the plaintiff make "the necessary application in Court for a determination of the alleged gift".

20 There followed further correspondence between KhattarWong and WongPartnership before the present application was filed on 29 September 2021 (HCF/OSP 9/2021, "OSP 9"). According to the plaintiff, it "also received requests from the other beneficiaries" that it apply to "the Family Justice Courts for the Court's directions in relation to the alleged gift"; and it filed the present application "in order to obtain closure and… to eliminate the uncertainty of an action being brought by [WDT] at some potential in the future [*sic*] against the Estate or against the other beneficiaries after the relevant gifts [had] been distributed in accordance with clause 9 of the Will".[43] Prior to filing the application, the plaintiff obtained the other three beneficiaries' agreement to the making of the application and to the costs thereof being borne by the estate. The

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41 Plaintiff's 1st affidavit at paras 57–61, pp 97–102.

42 Plaintiff's 1st affidavit at para 62.

43 Plaintiff's 1st affidavit at para 70.

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consent forms signed by the other three beneficiaries also stated that they agreed that the alleged gift of US$1.5 million was not valid and did not bind the estate.[44]

21 [WDT] was named as the defendant in the present application; and written as well as oral submissions were made by counsel on her behalf.

The main issue for determination

22 The main issue for determination is whether – based on the circumstances of this case – [WDT] can claim any right to have the sum of US$1.5 million paid to her. A number of matters were agreed as between the parties – or were at least not the subject of any challenge. First, it was not disputed that no transfer of the sum of US$1.5 million to [WDT] ever took place.

23 Second, for the purposes of the hearing before me, the plaintiff did not challenge the authenticity of the 14 September 2016 letter.

24 Importantly, both parties were also agreed that the Deceased's intention was to make a gift of US$1.5 million to [WDT] and not to declare a trust over the sum.[45] Counsel for [WDT] acknowledged that "this is an outright gift"; "there was no declaration of trust by [the Deceased]"; and "(t)here's no express trust".[46] This was unsurprising, since the various instances of correspondence highlighted by [WDT],[47] taken together with the 14 September 2016 letter as well as [B]'s statutory declaration and notarized statement, showed clearly that the Deceased had intended all along to gift the sum of US$1.5 million in cash

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44 Plaintiff's 1st affidavit at paras 70 and 72, pp 175–178.

45 See transcript dated 4 March 2022 p 41 ln 28 to ln 31; Plaintiff's Skeletal Submissions dated 25 February 2022 at para 58.

46 See transcript dated 4 March 2022 p 42 ln 3 to ln 8.

47 Defendant's Skeletal Submissions dated 25 February 2022 at para 28.

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to [WDT]. In the 14 September 2016 letter, for example, the Deceased expressly stated her intention "to gift" [WDT] "a further cash gift of US$1.5 million now, in addition to the cash gift of S$1.5 million…already gifted her [sic] in December 2013".

25 Both parties were also agreed that given the Deceased's intention to gift the sum of US$1.5 million to [WDT], the starting-point in terms of the applicable legal principles should be as stated by Arden LJ in *Pennington & anor v Waine & ors* [2002] 1 WLR 2075 ("*Pennington*", at [52]):

> (W)here the transaction was purely voluntary, the principle that equity will not assist a volunteer must be applied and respected. This principle is to be found in *Milroy v Lord 4 De GF & J 264* and other cases... such as *Jones v Lock* LR 1 Ch App 25, *Warriner v Rogers* LR 16 Eq 340 and *Richards v Delbridge* LR 18 Eq 11... Accordingly the gift must be perfected, or "completely constituted".

26 In *Pennington*, Arden LJ noted (at [54]) that while the principle that equity would not assist a volunteer "at first sight [looked] like a hard-edged rule of law not permitting much argument or exception", equity had "tempered the wind to the shorn lamb (ie the donor)" in a number of instances, *via* a number of exceptions. In the hearing before me, [WDT] sought to rely on the exceptions established in a trio of English authorities – *In re Rose; Rose v Inland Revenue Commissioners* [1952] Ch 499 ("*Re. Rose*"), *T Choithram International SA & ors v Pagarani & ors* [2001] 2 All ER 492 ("*Choithram*"), and *Pennington* – for her alleged right to have the sum of US$1.5 million paid to her. I will deal with each of these authorities in turn.

Re. Rose

27 The first of the authorities which [WDT] relies on is *Re. Rose*. The exception it establishes to the maxim that equity will not assist a volunteer is

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pithily summarized by the High Court in *BTB & anor v BTD* [2019] 4 SLR 1289 ("*BTB*"): namely, that in a case where a settlor has done all that is necessary to transfer title to the donee but the transfer has not happened for reasons outside of his control, equity assumes the equitable interest to be in the donee.

28 In *Re. Rose*, the deceased transferred 10,000 shares in a company to his wife, and a further 10,000 shares to another party, using the forms required by the company's articles of association which authorised the directors to decline to register any transfer. The transfers were executed on 30 March 1943 and the forms were delivered to the company for registration, but it was only on 30 June 1943 that the transfers were registered in the books of the company. The deceased died on 16 February 1947. The Crown claimed estate duty on the shares on the ground that the gifts of the shares were not completed before 10 April 1943, the date which the parties agreed was the relevant date before which the gifts must have been completed to avoid duty under the combined effect of several statutory provisions. The first-instance court held that duty was not payable on the shares; and on appeal, the English Court of Appeal ("CA") upheld its decision. The CA held that the deceased had done everything in his power by executing the transfers to transfer to the transferees his legal and beneficial interest in the shares; that accordingly, the transferees had become beneficial owners of the shares; and that between the date of the execution of the transfers and the registrations of the transfers, the deceased could not have asserted any beneficial title by virtue of his position as registered holder. Having regard to the form and operation of the transfers, the nature of the property transferred and the necessity for registration in order to perfect the legal title, coupled with the discretionary power in the directors to withhold registration, pending registration the deceased was in the position of a trustee of the legal title in the shares for the transferees. In the circumstances, the gifts of the shares were held by the CA to have been completed on 30 March 1943; and

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on that date, *bona fide* possession and enjoyment of the shares had been assumed by the transferees to the entire exclusion of the deceased of any benefit to him by contract or otherwise. No estate duty therefore became payable in respect of the shares upon the deceased's death.

29 At the hearing before me, it was argued on behalf of [WDT] at one stage that by signing the 14 September 2016 letter which contained her "instructions" to her "Bankers and Lawyers", the Deceased had done all that she "thought" she needed to do.[48] When pressed, however, counsel for [WDT] conceded that the test was not whether the settlor had done all that she "thought" she needed to do: the principle of the *Re. Rose* cases actually required that the settlor should have "done all within [her] power to procure the transfer" of the property (*per* the English CA in *Kaye & ors v Zeitel & anor* [2010] 2 BCLC 1, "*Zeitel*"). In *Zeitel*, for example, the deceased had delivered to the intended transferee (one Stefka) of a share in a company the pre-signed stock transfer form, but had not delivered to Stefka the share certificate which was required for her to be registered as a member. It was not disputed that the whereabouts of the share certificate were unknown. Nevertheless, the CA held that there were various means by which the deceased could have procured the creation of a duplicate share certificate; that he had not equipped Stefka with the title documentation that she needed in order to be registered as a member of the company "whereas he could have done"; and that unlike the donors in *Re. Rose*, he "had not, therefore, done all in his own power to transfer to her, or to procure the transfer to her", of the said share.

30 [WDT]'s next argument was that in the present case, the Deceased had "clearly done all that she could" by giving instructions to WongPartnership

48 See transcript dated 4 March 2022 p 43 ln 27 to p 44 ln 3.

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during the video call on 25 August 2016 about her intention vis-à-vis the US$1.5 million cash gift".[49] However, this argument clearly could not be sustained in the face of the objective evidence of contemporaneous email exchanges between WongPartnership and [B],[50] which showed that the Deceased's instructions to the former were actually to draft a Deed of Gift for her approval and eventual signature. This was why, on 15 September 2016, WongPartnership emailed [B] a copy of the draft Deed of Gift for the Deceased's approval.[51] Tellingly, in the draft Deed sent in this email, WongPartnership evidently requested the Deceased's input in respect of "the time required for the funds transfer", to which [B] – who was then liaising with WongPartnership on the Deceased's behalf – responded by stating:[52]

> As for your question regarding the time required for the funds transfer, just like the last time providing the bank with the Deed of Gift and [the Deceased's] spoken instructions plus signature on the bank funds transfer form, there should not be any delay.

31 In other words, therefore, even after the 25 August 2016 video call, the Deceased still needed to review and approve the Deed of Gift drafted by WongPartnership, to provide the signed Deed of Gift to the bank, *and* critically, to give the necessary instructions to the bank for the funds transfer. I say this last item was critical because it is not disputed that up until the time of her death on 16 December 2016, the Deceased had yet to identify the specific bank account (or accounts) from which the funds for the intended US$1.5 million cash gift were to be transferred. Indeed, at the hearing before me, counsel for [WDT] conceded that she had no instructions as to how many bank accounts –

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49 [WDT]'s 1st affidavit at para 27.

50 Plaintiff's 1st affidavit at pp 75–85.

51 Plaintiff's 1st affidavit at p 76.

52 Plaintiff's 1st affidavit at p 77.

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or how many US$ bank accounts – the Deceased held prior to her death.[53] In the absence of instructions from the Deceased as to the specific bank account (or accounts) from which the funds for the US$1.5 million were to come, it would not have been possible for her lawyers and bankers to effect the intended cash gift – even with a signed Deed of Gift.

32 I add that since [B] was the one who brought up the need for instructions to be given to the bank for the funds transfer, and since it is not disputed that [B] was liaising with WongPartnership on the Deceased's behalf, the Deceased herself must have been aware of the need for instructions to be given to the relevant bank. As [B] noted in her email reply to WongPartnership, this was what had been done "the last time" the Deceased made a cash gift to [WDT].

33 At certain points in the submissions made on [WDT]'s behalf, the position taken by her counsel appeared to be that it was not necessary for the Deceased to execute a Deed of Gift in order to make the cash gift of US$1.5 million to [WDT] because the 14 September 2016 letter sufficed to make clear her intention to make the cash gift. However, even assuming for the sake of argument that the Deceased's intention did not need to be expressed in the form of a Deed of Gift, it is still not possible to conclude that by signing the 14 September 2016 letter, she had done "all within her power" to procure the transfer of the US$1.5 million to [WDT]. Firstly, I do not think it can be disputed that the Deceased never took any steps to ensure the 14 September 2016 letter was brought to the attention of her lawyers and / or her bankers: from [B]'s notarised statement,[54] it appears that the Deceased simply handed over the letter to [B] after signing it, without any further instructions to convey it to

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53 See transcript dated 4 March 2022 p 48 ln 28 to ln 30; p 49 ln 26 to p 50 ln 3.

54 Plaintiff's 1st affidavit at p 35 at para 15.

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WongPartnership – or anyone else, for that matter. Secondly, and even more critically, yet again no information at all was given in the 14 September 2016 letter as to the specific bank account (or accounts) from which the funds for the US$1.5 million were to come. As counsel for the plaintiff pointed out,[55] even if the letter had been forwarded to the Deceased's lawyers and / or her bankers, they would have required this further information from her before they could effect the cash gift in accordance with her stated intention.

34 For the reasons given above, therefore, I find that the *Re. Rose* exception has no application on the facts of the present case.

Choithram

35 I address next the applicability of the Privy Council's decision in *Choithram*. In her written submissions, counsel for [WDT] cited *Choithram* for Lord Browne-Wilkinson's remark in his judgment (at 501) that "(a)lthough equity will not aid a volunteer, it will not strive officiously to defeat a gift".[56] I do not see, however, that this remark in any way assists [WDT], especially when one considers the context in which it was made. In *Choithram*, the donor ("P") intended to leave much of his wealth to charity by setting up a foundation which would receive most of his assets when he died. To that end, he executed a trust deed setting up the foundation. The deed was expressed to be between P as the settlor and seven persons (including P himself) as the trustee. Upon signing this deed, P made an oral declaration of gift of all his wealth to the foundation. He also instructed the accountant of his companies to "transfer all [his] wealth with the companies to the Trust". After P's death, his first wife and her children brought proceedings against the companies and the trustees in the British Virgin

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[55] See the plaintiff's written submissions at para 100.

[56] Defendant's Skeletal Submissions dated 25 February 2022 at para 31.

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Islands, claiming that the gift to the foundation had been ineffective. They prevailed at first instance and on appeal to the CA of the British Virgin Islands, as it was held that there had been an imperfect gift which could not be enforced against P's estate. The companies and the trustees appealed to the Privy Council, who allowed their appeal. The Privy Council held that although the words used by P were those "normally appropriate to an outright gift", in light of the facts of the case, they were "essentially words of gift on trust". It must be noted that the in his judgment, Lord Browne-Wilkinson made it clear that the specific facts on which the Privy Council based this construction of P's words were "novel". It was in this context that Lord Browne-Wilkinson remarked that "(a)lthough equity will not aid a volunteer, it will not strive officiously to defeat a gift". Indeed, that remark was followed by the observation that –

> Although the words used by [P] are those normally appropriate to an outright gift – 'I give to X' – in the present context there is no breach of the principle in *Milroy v Lord* if the words of [P's] gift (to the foundation) are given their only possible meaning in this context. The foundation has no legal existence apart from the trust declared by the foundation and trust deed. Therefore the words 'I give to the foundation' can only mean 'I give to the trustees of the foundation trust deed to be held by them on the trusts of the foundation trust deed'.

36 In *Pennington*, Arden LJ noted (at [60]) that the decision in *Choithram* was an illustration of the manner in which "equity has tempered the wind [of the principle that equity will not assist a volunteer] to the shorn lamb [the done] by applying a benevolent construction to words of gift". As Arden LJ put it:

> (A)n imperfect gift is not saved by being treated as a declaration of trust. But where a court of equity is satisfied that the donor had an intention to make an immediate gift, the court will construe the words which the donor used as words effecting a gift or declaring a trust *if they can fairly bear that meaning* and otherwise the gift will fail.
>
> [emphasis added]

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37 The italicised words (above) are important. Plainly, not every case of an imperfect gift will be capable of being saved by the court construing the words of (apparent) gift as words "declaring a trust". In the present case, [WDT] has not pointed to any specific words of gift spoken or written by the Deceased which can fairly be construed as words declaring a trust over the amount of US$1.5 million. Most (if not all) of [WDT]'s case has been focused on the 14 September 2016 letter; and there is nothing in the letter which can fairly be said to amount to "words declaring a trust". Indeed, at one point in her oral submissions, counsel for [WDT] stated that the Deceased "*just wanted to give her daughter* [WDT] *the money*".[57]

38 Additionally, in *Choithram's* case, there was evidence identifying the assets which P intended to gift to the foundations as his credit balances with the companies and his shares in the companies (at 497). In fact, he had given instructions to the accountant of the companies to transfer all of his (P's) balances with the companies and all his shares in the companies to the trustees of the foundation; and prior to his death, the accountant had already altered the entries in the books of one of the companies by deleting P as the creditor and substituting the foundation. In other words, there was no doubt in *Choithram's* case as to the specific trust property being vested in the body of trustees (or more accurately, in P as one of the trustees of the trust he had established). This is to be contrasted with the present case, where there is no certainty at all as to the alleged trust property: as pointed out earlier, the Deceased never identified the specific bank account (or accounts) from which the funds for the US$1.5 million were to come.

57 See transcript dated 4 March 2022 p 42 ln 3 to ln 5.

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39 For the reasons given above, I find that the decision in *Choithram* has no application on the facts of the present case.

Pennington

40 I address next the applicability of the English CA's decision in *Pennington*. In the written submissions filed on [WDT]'s behalf, *Pennington* was cited for the proposition that "if [a gift] is made imperfect by a third party, once there is clear evidence of [the donor's] intention, the gift should be held perfected". However, counsel did not explain in her submissions which "third party" was alleged to have caused the Deceased's gift of US$1.5 million to be "made imperfect". Nor was this made clear in [WDT]'s affidavit evidence.

41 In any event, counsel did not cite the actual passage(s) in the judgments in *Pennington* from which she had gleaned the proposition that "if [a gift] is made imperfect by a third party, once there is clear evidence of [the donor's] intention, the gift should be held perfected"; and with respect, I do not think the decision in *Pennington* stands for any such proposition at all.

42 In *Pennington*, C intended to transfer 400 of her shares in a company to her nephew (H) and to make him a director in the company. To become a director, Harold was required under the company's articles of association to hold at least one share. C signed a share transfer form and gave it to the company's auditors, who wrote to H to inform him of the share transfer and asked that he complete a prescribed form of consent ("form 288A") to act as a director. H was informed that no further action was required on his part. In fact, the company's articles of association required certain steps to be followed before the shares could be transferred to H – but these steps were not taken. Instead, the share transfer form was retained by the company auditors; and neither C nor the auditors (nor H for that matter) took any further action on it

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prior to C's death. C died having made a will in which she made specific gifts of the balance of her shareholding but did not refer to the 400 shares. The issue before the court was whether the purported gift of the 400 shares to H amounted to an equitable assignment of the shared to H prior to C's death, or whether the shares fell into the residue of C's estate.

43 The first-instance judge held that C had – by executing the share transfer form – effected an equitable assignment of the beneficial interest in the shares. The appeal by the residuary beneficiaries of C's estate was dismissed by the English CA which upheld the finding that there had been an equitable assignment to H of the beneficial interest in the shares. Arden LJ – with whose reasoning Schiemann LJ agreed – pointed out that while there were a number of valid policy objectives behind the rule that equity would not assist a volunteer, there were "countervailing policy considerations which would militate in favour of holding a gift to be completely constituted". These included preventing the donor from acting in a manner which was unconscionable. In *Pennington*, Arden LJ proceeded "on the basis that a principle which animates the answer to the question whether an apparently incomplete gift [was] to be treated as completely constituted" was that a donor would "not be permitted to change his or her mind if it would be unconscionable, in the eyes of equity, vis-à-vis the donee to do so" (at [64]). Arden LJ noted that there was "no comprehensive list of factors" which would make it unconscionable for the donor to change his or her mind: it "must depend on the court's evaluation of all the relevant considerations". In *Pennington*, the relevant facts which went towards establishing the element of unconscionability were as follows. C had made the gift of her own free will; C had told H about the gift and signed a form of transfer which she delivered to the company's auditors for them to secure registration; and a partner in the company's auditors, acting as C's agent, had told H he need take no action. Additionally, H had agreed to become a director

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of the company without limit of time, which he could not do without shares being transferred to him. In Arden LJ's judgment (at [64]), if C had changed her mind (say) on 10 November 1998 (the date on which she executed her will), the court "could properly have concluded that it was too late for her to do this as by that date [H] signed the form 288A, the last of the events identified above, to occur".

44 In short, therefore, *Pennington* establishes the proposition that an apparently imperfect gift can be treated as completely constituted if the circumstances are such that it would be unconscionable for the donor to recall the gift. As counsel for the plaintiff has pointed out, it is clear from the judgments in *Pennington* that the element of unconscionability in that case arose from H's knowledge of the intended gift of shares (he was informed of it) - and his reliance on it (he became a director of the company, which he could not have done without the shares being transferred to him). In contrast, in the present case, there is no evidence that prior to the Deceased's death, [WDT] even knew of the intended gift of US$1.5 million – much less relied on it. [B] was the person who liaised with WongPartnership all along regarding the Deceased's intention to make the gift; and from [B]'s notarized statement, it would appear that [WDT] only came to know of the intended gift when [B] gave her the 14 September 2016 letter after the Deceased's death. Indeed, in oral submissions at the hearing, counsel for [WDT] acknowledged that there was no action by the Deceased in this case which could be said to make it unconscionable for her (or the estate) to resile from the intended gift.[58]

45 It should be added that in *Pennington,* Arden LJ held that there was a "further basis" on which the appeal could be dismissed. In gist, she was of the

58 See transcript dated 4 March 2022 p 47 ln 1 to ln 4.

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view that when the partner in the company's auditors wrote to H on C's instructions to inform him of the gift and to tell him there was no action that he needed to take, the words used by the partner "should be construed as meaning that [C] and, through her, [the partner] became agent for [H] for the purpose of submitting the share transfer to the company". As Arden LJ put it (at [67]):

> This is an application of the principle of benevolent construction to give effect to [C's] clear wishes. Only in that way could the result "This requires no action on your part" and an effective gift be achieved. [H] did not question this assurance and must be taken to have proceeded to act on the basis that it would be honoured.

46 I do not think this additional line of reasoning in the judgment is of any assistance to [WDT], since there is no evidence of [B] informing [WDT] about the intended gift prior to the Deceased's death and / or constituting herself [WDT]'s agent for the purpose of completing the transfer of the US$1.5 million.

47 Finally, and perhaps most fundamentally, the Deceased never identified the specific bank account (or accounts) from which the funds for the US$1.5 million were to come. This makes it impossible to say that there was an equitable assignment to [WDT] of the beneficial interest *in a specific asset*.

48 For the reasons given above, I find that the decision in *Pennington* has no application on the facts of the present case.

Donatio mortis causa

49 In the written submissions filed on behalf of the plaintiff, counsel sought to address potential arguments based on the doctrine of *donatio mortis causa* and that of proprietary estoppel, which – as it turned out – [WDT] elected not to pursue. In the interests of completeness, I should make it clear that I did

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consider the plaintiff's submissions and agreed with counsel that neither doctrine was of any aid to [WDT].

50 For a valid *donatio mortis causa* to arise, there are three requirements in law which must be fulfilled (*Koh Cheong Heng v Ho Yee Fong* [2011] 3 SLR 125 at [13]):

> (a) First, a gift must have been made in contemplation of impending death.
>
> (b) Second, the gift must have been made upon the condition that it is to be absolute and complete only on the donor's death. The condition need not be express and will normally be implied from the fact that the gift was made when the donor was ill.
>
> (c) Third, there must have been delivery of the subject matter of the gift, or of something representing it, which the donee accepts. When the donor delivers the property, he must intend to part with dominion over it, rather than with mere physical possession.

51 All three requirements were not made out in the present case. First, the gift was not made in contemplation of the Deceased's impending death, as the Deceased herself stated in her 14 September 2016 letter that she wanted to make this gift as an expression of gratitude for [WDT]'s love and the care shown towards her.

52 Second, from [B]'s description in her notarized statement of the Deceased's communications with her, it was clear that the Deceased intended the cash gift to take effect while she was still alive: it was not meant to be "absolute and complete" only upon her death. According to [B], the Deceased asked her on 7 September 2016 whether [WDT] had received the US$1.5

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million yet; and when she was told that the money had not been given yet, she "urged" [B] to "help her gift the sum of US$1.5 million as soon as possible".[59]

53 Third, there was no "delivery of the subject matter of the gift, or of something representing it", which [WDT] accepted. In *Koh Cheong Heng*, the presence of delivery was established through the execution of a formal transfer of the property which was then sent for registration (at [15]). In *Sen v Headley* [1999] 2 WLR 1308, the house was held to have been transferred to the plaintiff by way of *donatio causa mortis* as the deceased had told the plaintiff when she visited the deceased in hospital three days before his death, that the house was hers and that the key to a steel box containing deeds to the house were in her bag (at 1311). In contrast, in the present case there was no transfer of the sum of US$1.5 million or any part of it – nor was [WDT] given anything representing the gift (for example, completed documentation for the transfer of funds). In fact, [WDT] could not have accepted any delivery of the US$1.5 million Gift as she remained in the dark about the Deceased's intention to make the Gift until after the latter's death.

Proprietary estoppel

54 As for proprietary estoppel, this is usually the remedy resorted to in cases where the representations relied on relate to the acquisition by the representee of an immediate – or more or less immediate – interest in the property in question. In such cases, "the representor is estopped from denying that the representee has the proprietary interest that was promised by the representation in question": *Thorner v Major* [2009] 1 WLR 776 ("*Thorner v*

59 Plaintiff's 1st affidavit at p 35 at para 10.

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Major") at [20]. There are three elements which must be established for proprietary estoppel to be made out: *Thorner v Major* at [29]:

(a) A representation or assurance made to the claimant;

(b) Reliance on it by the claimant; and

(c) Detriment to the claimant in consequence of his (reasonable) reliance.

55 On the first element alone, it is clear that the doctrine of proprietary estoppel cannot apply in the present case: it is undisputed that [WDT] received no representation or assurance that the Deceased intended to make the US$1.5 million Gift to her.

56 In the interests of completeness, I will add that even assuming for the sake of argument that a representation had been made, the second element of reliance by [WDT] would also not be established. [WDT] herself has stated that:

> Between me and my Mother, there was never a question between gift or duty & filial piety because I simply could not imagine life without my Mother.[60]

57 Further, [WDT] accepts that the 14 September 2016 letter – which she has relied on as evidence of the Deceased's intention to make the US$1.5 million Gift – was read over and signed by the Deceased when [WDT] was not present. She only came to know of the 14 September 2016 letter when [B] gave it to her after the Deceased's death. There was no question, therefore, of [WDT] relying on any representation or assurance about the US$1.5 million Gift: all that [WDT] did for her mother was done independently of any thought of or

[60] [WDT]'s 2nd affidavit at para 85.

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reliance on recompense or reward. Since there was no reliance, there also could not be any question of consequential detriment (the third element).

On prayers 1 and 2 of OSP 9

58 For the reasons given above, I am satisfied that [WDT] does not have a valid claim against the Deceased's estate for the sum of US$1.5 million to be paid to her prior to the distribution of the estate. I therefore grant an order in terms of prayers 1 and 2 of OSP 9.

On prayer 3 of OSP 9 and on [WDT]'s claim for "legal costs incurred by her since March 2018"

59 In prayer 3 of OSP 9, the plaintiff has asked for the costs it incurred in respect of this application to be paid out of the estate in priority to the interests of the beneficiaries under the Will. Prior to the filing of OSP 9, the other three beneficiaries of the Will – who are [WDT]'s siblings – had already indicated their consent to the costs of the application being borne by the estate. [WDT]'s position on this issue appears to be somewhat more equivocal. She does not appear to have signed the same consent form that the other three beneficiaries did, but at the same time she has not presented any coherent arguments as to why the plaintiff's costs should not be paid out of the estate.

60 I do not think it can be doubted that OSP 9 was brought in order that a "question… which [had] arisen in the administration of the trusts" could be determined (*In re Buckton; Buckton v Buckton* [1907] 2 Ch 406, "*Buckton*", at 414): given [WDT]'s insistence on payment of the US$1.5 million, the plaintiff needed certainty as to whether this alleged gift of US$1.5 million constituted a debt or a liability of the estate which had to be paid before the distribution of

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the estate. In the circumstances, I regard the plaintiff's costs as "necessarily incurred for the benefit of the estate" and grant an order in terms of prayer 3.

61 In *Buckton*, Kekewich J held that where the trustees of a will or settlement "ask the Court to construe the instrument of trust for their guidance, and in order to ascertain the interests of the beneficiaries, or else ask to have some question determined which has arisen in the administration of the trusts", the "costs of all parties" should be regarded as "necessarily incurred for the benefit of the estate": in *Buckton*, Kekewich J ordered the costs of all parties to the application in that case to be taxed as between solicitor and client and paid out of the estate. Kekewich J also held that there could be cases where – for reasons of convenience – the application was made by some of the beneficiaries instead of the trustees, but the application was similarly "necessary for the administration of the trust": he regarded this second class of cases as differing in form but not in substance from the first, and held that in such cases, the costs of all parties would also be "necessarily incurred for the benefit of the estate regarded as a whole". There was, however, a "third class of cases differing in form and substance from the first, and in substance, though not in form, from the second" (*per* Kekewich J at 414):

> In this class the application is made by a beneficiary who makes a claim adverse to other beneficiaries, and really takes advantage of the convenient procedure by originating summons to get a question determined which, but for this procedure, would be the subject of an action commenced by writ, and would strictly fall within the description of litigation. It is often difficult to discriminate between cases of the second and third classes, but when once convinced that I am determining rights between adverse litigants I apply the rule which ought, I think, to be rigidly enforced in adverse litigation, and order the unsuccessful party to pay the costs. Whether he ought to be ordered to pay the costs of the trustees who are, of course, respondents, or not, is sometimes open to question, but with this possible exception the unsuccessful party bears the costs of all whom he has brought before the Court.

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62 The plaintiff contended that [WDT] was not entitled to have her costs of OSP 9 paid out from the estate because she had essentially taken an adverse interest against the estate for her own benefit: according to the plaintiff, [WDT]'s position was no different from the third class of cases described by Kekewich J in *Buckton*; and the court should "regard this form of cases as adverse litigation and follow the usual costs framework for civil cases".

63 I agree with the plaintiff's characterisation of [WDT]'s position in the present application. Her claim for payment of the US$1.5 million was made in her capacity as an alleged creditor of the estate; and it was certainly a claim which was adverse to the other beneficiaries, since she was asking that the amount of US$1.5 million be paid to her before any distribution of the estate to the beneficiaries could take place. But for the plaintiff's filing of OSP 9, [WDT]'s claim "would be the subject of an action commenced by writ, and would strictly fall within the description of litigation" (*per* Kekewich J at 415 of *Buckton*). As it was, following the plaintiff's filing of OSP 9, [WDT] continued to pursue in these proceedings her claim to be paid the sum of US$1.5 million prior to any distribution of the estate. I do not find it possible to say, in these circumstances, that [WDT]'s costs in OSP 9 were ""necessarily incurred for the benefit of the estate regarded as a whole" or that her costs should fall on the estate and thus the beneficiaries as a whole.

64 Given the plaintiff's submissions and given the view I take of [WDT]'s position in these proceedings, it would seem to follow that she should be ordered to pay the costs of this application now that she has failed in her claim to be paid the US$1.5 million ahead of any distribution of the estate. Somewhat surprisingly, however, despite arguing that [WDT] should be subject to "the usual costs framework applicable for civil cases", the plaintiff has not sought an order for [WDT] to pay its costs, but has simply submitted that she should not

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be entitled to have her costs paid by the estate. Since the plaintiff is not seeking costs from [WDT] personally, I will not make such an order. I order instead that [WDT] is to bear her own costs of OSP 9.

65 I note that [WDT] has actually asked not only for her costs in OSP 9 but "for legal costs incurred by [her] since March 2018", on the basis that these legal costs were incurred by her in "trying to get the Plaintiff to make this Application".[61] The submissions filed on [WDT]'s behalf do not state whom her costs should be paid by, but from [WDT]'s affidavit,[62] it appears that she believes it is the plaintiff who should pay her costs. Counsel's submissions did not elaborate on the legal basis for saying that the plaintiff should pay the legal costs incurred by [WDT] since March 2018; and I am unable to think of any plausible basis. From [WDT]'s affidavit,[63] it appears that her real complaint is that the plaintiff demonstrated "bad faith" in "reneging" on its "offer" on 27 May 2019 to make the application to court, and that the plaintiff's conduct in "reneging" on its "offer" caused her to incur "extensive legal costs" over the next "2.5 years" to "bring the plaintiff back to today's court application". If this is indeed [WDT]'s real complaint, however, then her claim for the recovery of monies spent on legal costs in the last "2.5 years" is really a claim for damages arising from some alleged breach by the plaintiff. I add that I use the term "breach" in a very loose sense because it is not at all clear from [WDT]'s affidavit – nor from her counsel's submissions – what rights of hers the plaintiff is supposed to have infringed or what obligations it is alleged to have disregarded. In any event, it is not permissible for [WDT] to circumvent the processes established by law for the pursuit of civil claims by seeking an order

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[61] Defendant's Skeletal Submissions dated 25 February 2022 at paras 35–37.

[62] [WDT]'s 1st affidavit at paras 98–113.

[63] [WDT]'s 1st affidavit at para 106.

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in OSP 9 for the payment of her legal costs for the last "2.5 years". I decline to make any such costs order in her favour.

Mavis Chionh Sze Chyi
Judge of the High Court

Wah Hsien-Wen, Terence and Mok Zi Cong (Dentons Rodyk & Davidson LLP) for the plaintiff;
Tan Spring (Withers KhattarWong LLP) for the defendant.

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