IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2023] SGHC 196

Originating Application No 492 of 2022

In the matter of Section 18(2) of the
Supreme Court of Judicature Act 1969

Between

Lau Sheng Jan, Alistair

… *Applicant*

And

(1) Lau Cheok Joo Richard
(2) Sng Gek Hong Cynthia

… *Respondents*

JUDGMENT

[Trusts — Unlawful trusts — Whether trust is unenforceable for illegality]
[Trusts — Unlawful trusts — Whether trust is a sham trust]

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Lau Sheng Jan Alistair
v
Lau Cheok Joo Richard and another

[2023] SGHC 196

General Division of the High Court —Originating Application No 492 of 2022
Goh Yihan JC
1, 29 March, 19 April 2023

21 July 2023 Judgment reserved.

Goh Yihan JC:

1 This is the applicant's application for a declaration that the Trust Deed dated 27 July 2020 ("the Trust") be terminated and for a property which is the subject matter of the Trust ("the Property") to be transferred from the joint trustee respondents to the applicant. The respondents are the applicant's parents. They have since separated. While the second respondent has no objections to the Trust being terminated, the first respondent has objected to the present application. As such, the first respondent stands in opposition to both the applicant and the second respondent.

2 The main issue in this application is whether, following the established rule in *Saunders v Vautier* (1841) 4 Beav 115 ("the rule in *Saunders v Vautier*"), the applicant can rely on his right as a sole beneficiary to terminate the Trust and vest the absolute interest of the Property in him. While the issue is easy to state, this application is complicated by disputes of fact. These disputes

primarily concern whether the Trust was to truly benefit the applicant or whether it was to avoid Additional Buyer's Stamp Duty ("ABSD") in relation to the Property. Due to these disputes of fact, I directed for the cross-examination of the parties to take place. The resolution of these disputes of fact will answer the further questions of (a) whether the Trust Deed is a sham and should therefore be declared invalid, and (b) whether, and how, the doctrine of illegality affects the rights of the applicant under the Trust.

Background

The parties

3 The applicant is a 26-year-old Singaporean. The first and second respondents are the father and mother of the applicant, respectively. The applicant resides at the Property with the second respondent and his sister. The first respondent resides in another property at Block 141 Lorong Ah Soo ("the Lorong Ah Soo Flat").

4 The background to the purchase of the Property and the creation of the Trust are as follows. It is undisputed that on 13 July 2020, the respondents entered into an option to purchase the Property for a total consideration of $4.925m. At that time, the respondents were in their mid-50s, and the first respondent had retired. As such, the respondents raised the purchase sum through various loans. The loans were eventually repaid through the sale of three other properties and by liquidating some of the respondents' personal assets.

Events leading to the execution of the Trust

5 It is also undisputed that, subsequently in July 2020, the respondents jointly engaged solicitors from Lee & Lee to draft and execute the Trust by way of a deed. Pursuant to the Trust, the respondents were to hold the Property, or alternatively, the net proceeds of the sale of the Property, on trust as joint trustees for the applicant's sole benefit. More specifically, the respondents met with Ms Sharon Tay ("Ms Tay"), a solicitor from Lee & Lee, for advice on the conveyancing process and to prepare the Trust Deed.

6 Crucially, however, the parties dispute the purpose of the Trust. The applicant and the second respondent say that the Trust was created to gift the applicant, the respondents' elder child and only son, a legacy property while the respondents were still alive. In contrast, the first respondent alleges the Trust Deed was created to avoid the payment of ABSD and that it was a sham instrument. According to him, the Trust was created because the respondents thought that it would be better for the applicant to beneficially own the Property so that the respondents could "buy" time to dispose of their other assets and avoid the hefty ABSD that they could not afford.

7 Moreover, the respondents dispute between themselves what transpired during the meeting with Ms Tay. Specifically, while the respondents agree that Ms Tay advised them that the Trust could be "collapsed", the respondents differ on what she meant by that. According to the first respondent, Ms Tay allegedly advised the respondents that the Trust could easily be "collapse[d]" after the "[ABSD] period" ended in four years' time, and that the respondents could then "take back" the property if they decided to.[1] In respect of the four-year period,

[1] Lau Cheok Joo Richard's Second Reply Affidavit dated 30 January 2023 at para 3.

it was likely that, instead of ABSD, the first respondent was referring to Seller's Stamp Duty ("SSD") which is payable if the Property was acquired and disposed of within a specified number of years.

8 In response, the second respondent alleges that Ms Tay said that it is the *applicant* who can legally ask for the Property to be transferred to *him* before the age of 40 years despite cl 7 of the Trust. In this regard, this clause provides that if the Property is not sold, then upon the applicant attaining the age of 40 years old, the legal title of the Property shall vest in him on his request:[2]

> 7. Dealing in the Property
>
> The Trustees declare that in the event that the Property is not sold, then the Trustees shall at the request and cost of the Beneficiary [*ie*, the applicant] transfer the legal estate or title of the Property to the Beneficiary upon the Beneficiary attaining the age of 40 years old.
>
> [underlined in original]

The alleged Loan Agreement

9 After the execution of the Trust, the first respondent alleged that a loan agreement ("the Loan Agreement") dated 4 August 2020 was signed by the applicant and the respondents. By the terms of the Loan Agreement, the respondents agreed to loan the applicant the sum of $4.925m to purchase the Property. However, the applicant and the second respondent dispute (a) whether the Loan Agreement was signed to begin with, and (b) the effect and purpose of the Loan Agreement. Regarding the issue of whether the Loan Agreement was signed, the applicant and the second respondent both deny that the applicant had ever signed the Loan Agreement. As such, by their account, there was no agreement reached between the parties at all.

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[2] Affidavit of Lau Sheng Jan, Alistair dated 26 August 2022 at p 11.

10 As for the effect and purpose of the Loan Agreement, the first respondent originally took the position that it was intended to protect the applicant in the long term. In particular, the first respondent explained that he and the second respondent were concerned that should the applicant's marriage with his future wife end in a divorce, his future wife may make a claim on the Property. However, the first respondent later changed tack. He now claims that the Loan Agreement was to protect him and the second respondent, and not the applicant.[3] By the first respondent's latest account, the Property was the respondents' sole asset after disposing of all their other properties. Therefore, it was necessary to protect himself and the second respondent in case they were left with nothing. In contrast, the applicant and the second respondent take the position that the Loan Agreement was to "protect" the capital sum of $4.925m in case the applicant's future wife attempted to assert any rights over the Property in the event of the applicant's divorce. In essence, the applicant and the second respondent reaffirm the position initially taken by the first respondent that the Loan Agreement was intended to protect the applicant in the long term.

The respondents' divorce and the applicant's intention to terminate the Trust

11 Sometime in 2021, the relationship between the respondents became rocky. The second respondent commenced divorce proceedings against the first respondent, who had moved out to stay at the Lorong Ah Soo Flat. In light of this development, the applicant now wishes to terminate the Trust in order to have the Property vest in him immediately. According to him, this is to prevent any more disputes between the respondents, and to ensure that the second

[3] Lau Cheok Joo Richard's Reply Affidavit dated 2 November 2022 at para 9.

respondent, his sister, and him will have a place to stay after the divorce proceedings between the respondents are finalised.

12 To that end, the applicant instructed his solicitors to write to the respondents to inform them of his intention to terminate the Trust and to seek their agreement for the legal title of the Property to be transferred to him immediately upon such termination. The second respondent replied on 5 August 2022 to state that she was agreeable to the applicant's proposal. The first respondent replied by way of email on 6 August 2022 to state that he wished to let the court decide on the application. However, on 6 October 2022, the first respondent filed a reply affidavit objecting to the application.

The parties' arguments

13 As I mentioned at the outset, the applicant relies on the rule in *Saunders v Vautier* to terminate the Trust on the basis that he is a sole beneficiary who has reached full age and does not suffer from any mental disability. This would have been a simple application of the rule in *Saunders v Vautier*. However, the first respondent argues that there was no intention to give the Property to the applicant as a gift, considering that the Property was allegedly the respondents' matrimonial home. Rather, as I alluded to above, the first respondent says that the Trust Deed was a sham instrument to avoid paying ABSD. In essence, the first respondent seeks to defeat the applicant's reliance on the rule in *Saunders v Vautier* by arguing that the Trust Deed is either a sham and therefore invalid, or that the Trust is illegal and therefore unenforceable.

14 In response to the first respondent's arguments, the applicant makes three submissions. First, he says that the Trust was not entered into for the illegal purpose of evading any ABSD. Secondly, he submits that even if the court finds

that the Trust was entered into for the illegal purpose of avoiding ABSD, the applicant does not need to rely on the illegal purpose of the Trust in order to terminate the Trust. Thirdly, he repeats his entitlement to terminate the Trust and have the Property vest in him immediately pursuant to the rule in *Saunders v Vautier* as he is of full age, suffers from no mental disability, and is absolutely entitled to the Property as the sole beneficiary of the Trust.

15 In a similar vein, the second respondent argues that the Trust Deed was not a sham and that the respondents genuinely intended to benefit the applicant by setting up the Trust. That the arrangement had the added benefit of allowing the respondents to move into a larger house while saving on ABSD is a completely incidental benefit that does not detract from the respondents' intention to gift the applicant, "their elder child and only son", a legacy property while the both of them were still alive. Moreover, the second respondent argues the first respondent's drafting of the Loan Agreement after the signing of the Trust deed showed that he intended for the beneficial interest in the Property to remain with the applicant.

The relevant issues

16 In the light of the parties' arguments, there are two broad issues to be determined in the present case:

(a) first, whether the applicant has made out a *prima facie* case for the termination of the Trust pursuant to the rule in *Saunders v Vautier*; and

(b) second, if the applicant has made out such a *prima facie* case, whether his entitlement to terminate the Trust is defeated by: (i) the Trust Deed being invalidated on the basis that it is a sham instrument, or

(ii) the Trust being unenforceable on the basis that it was created illegally or for an illegal purpose.

17 In setting out these issues, I recognise that the first respondent is a self-represented party. As such, while he has argued in his submissions that the Trust Deed is a "sham", I will also consider the related but different argument that tangentially arises from his submissions, which is that the Trust should be unenforceable for being illegal or having been created for an illegal purpose. Indeed, I note that while the second respondent has focused on addressing the argument that the Trust Deed is a sham instrument, the applicant has instead focused on rebutting the argument that the Trust should be unenforceable for being illegal.

Whether the applicant has established a *prima facie* case for the termination of the Trust pursuant to the rule in *Saunders v Vautier*

18 To begin with, I find that the applicant has established a *prima facie* case for the termination of the Trust pursuant to the rule in *Saunders v Vautier*. In the High Court decision of *Re Singapore Symphonia Co Ltd & others* [2013] SGHC 261 ("*Re SSO*"), the rule in *Saunders v Vautier* was stated to consist of the following elements (at [4]):

> … that the beneficiaries of the trust, if together entitled to the whole beneficial interest, can if *sui juris* put an end to the trust and direct the trustees to hand over the trust property as they direct …

19 The facts of *Re SSO* illustrate the application of the rule in *Saunders v Vautier*. In that case, the settlor of the trust, the Tote Board, had settled a capital sum of $25m on trust, with the income to be distributed from time to time to the Singapore Symphonic Orchestra ("the SSO"), with any loss or shortfall to be made good before the income was paid out. The trust was to end on the 21st year

from the death of the last surviving of the four original trustees. During the financial crisis in 2008, the trust fund fell below $25m. Income could not be paid out of the trust. As a result, the SSO was in deficit. The SSO and the Tote Board agreed to donate the remaining money in the trust to the SSO's endowment fund, but this required the termination of the trust. Hence, the applicants sought the court's declaration on the beneficiaries to the trust and for the beneficiaries to exercise their rights under the rule in *Saunders v Vautier* to terminate the trust. This would have resulted in the remaining trust money to be paid to the SSO's endowment fund. The High Court held that this was a fixed trust and not one where more beneficiaries could be added, or one in which that discretion could be exercised in anyone's favour. The court therefore granted the application on the basis that the SSO and the Tote Board, being the only beneficiaries under the trust, were entitled to exercise their rights pursuant to the rule in *Saunders v Vautier* to call in and dispose of the trust property (at [5]).

20 Similarly, in the High Court decision of *Neoh Raymond Dennis v Liew Leong Wan and another* [2011] SGHC 179, the court held that unless the trust itself was illegal and unenforceable, the rule in *Saunders v Vautier* applied, such that the sole beneficiary was entitled to ask the trustee to transfer the objects of the trust to him. In that case, the plaintiff, Mr Raymond Dennis Neoh, played an instrumental role in setting up and incorporating the second defendant, Alternative Content Distribution Network Pte Ltd ("ACDN"). The first defendant, Mr Liew Leong Wan, was the Chief Technology Officer of ACDN from 1 July 2009 and a shareholder and director of ACDN from 24 July 2009. The plaintiff sought a declaration from the court that the first defendant held shares in ACDN on trust for the plaintiff, and an order that the shares be transferred to and registered in the name of the plaintiff. The first defendant had become the registered owner after they were transferred to him by a former

employee of ACDN under the plaintiff's instruction. That former employee had held the shares by virtue of a trust deed executed by that former employee stating that the former employee held the shares on trust for the plaintiff.

21 The High Court found that "there can be no question that [the first defendant] holds [the shares] on trust for [the plaintiff], unless the trust is illegal and unenforceable" (at [10]). The court reached this conclusion based on, among others, a transfer form with the former employee as the transferor and the first defendant as the transferee. In particular, this transfer form had stated that the transfer was subject to the conditions that the shares were held in the same manner prior to the execution of the transfer form (*ie*, on trust for the plaintiff), and that a declaration of trust had to be executed by the first defendant that he held the shares on trust for plaintiff. Correspondence also showed that the first defendant knew that he was taking the shares as trustee. As such, the court further held that the plaintiff was entitled to an order for the first defendant to transfer the shares to the plaintiff under the rule in *Saunders v Vautier*.

22 On the facts of the present case, it is clear that the applicant is *prima facie* entitled to terminate the Trust as he fulfils the legal requirements of the rule in *Saunders v Vautier* to do so. First, he is 26 years old and is therefore an adult of full age. Second, he has undergone a medical check-up before a registered psychiatrist, who has certified that he does not suffer from any mental disability. Third, he is absolutely entitled to the Property under the Trust as he is the sole beneficiary of the same. Thus, the applicant's entitlement to have the Property transferred to him will only be defeated if the first respondent's arguments that the Trust is a sham instrument or illegal succeed. I turn to consider these arguments now.

Whether the Trust Deed should be invalidated for being a sham instrument

The applicable law

23 Turning to the first issue, I begin with the general concept of a sham trust, which was discussed by Chan Seng Onn J in the High Court decision of *Chng Bee Kheng and another (executrixes and trustees of the estate of Fock Poh Kum, deceased) v Chng Eng Chye* [2013] 2 SLR 715 ("*Chng Bee Kheng*"). The learned judge adopted at [50] Lord Diplock's formulation in the English Court of Appeal decision in *Snook v London and West Riding Investments Ltd* [1967] 2 QB 786 at 802:

> … I apprehend that, if it has any meaning in law, it means acts done or documents executed by the parties to the 'sham' which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create. …

To similar effect, Patten LJ held as follows in the English Court of Appeal decision of *Pankhania v Chandegra (by her litigation friend, Ronald Andrew Eagle)* [2013] 1 P & CR 238 at [20]:

> The question of what constitutes a sham trust has been the subject of considerable discussion in recent years, particularly in the context of attempts to shield assets from the claims of divorced spouses or creditors. But what is, I think, clear is that it must be shown both that the parties to the trust deed (in this case, the claimant and the defendant) *never intended to create a trust and that they did intend to give that false impression to third parties or to the court …*
>
> [emphasis added]

24 With these remarks in mind, it is appropriate, in assessing whether the parties "intended to create a trust", to have reference to what a trust *is*. In this

regard, a trust has been defined as such (see Patrick Parkinson, "Reconceptualising the Express Trust" (2001) 61 CLJ 657 at 683):

> An express trust is an equitable obligation binding a person ('the trustee') to deal with identifiable property to which he or she has legal title for the *benefit of others* to whom he or she is in some way accountable. Such obligations may either be for the benefit of persons who have proprietary rights in equity, of whom he or she may be one, or for the furtherance of a sufficiently certain purpose which can be enforced by someone intended to have a right of enforcement under the terms of the trust or by operation of law.
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> [footnotes omitted; emphasis added]

Reading the two extracts together, it can therefore be concluded that a trust deed is a sham where it was never intended by the settlors to create an arrangement for them to divest themselves of the aspects of *beneficial ownership* in the manner that is provided for in the trust, while intending to give that false impression to third parties or to the court.

25 From the above, it is also clear that the crux of a sham trust is a common intention to mislead, with the relevant common intention generally being that of the settlor *and* the trustee (see *Chng Bee Kheng* at [56]). In ascertaining this intention, a *subjective* test is used. In this regard, I agree with Professor Matthew Conaglen's argument that a subjective test flows from the fact that the very purpose of a sham transaction is to mislead third parties (see Matthew Conaglen, "Sham Trusts" (2008) 67(1) CLJ 176 at 186). Thus, it is only where the objective appearance of a transaction is of a certain type will the courts need a justification to look behind the objective appearance in order to get at the truth of the matter.

26 I pause to note that some academic commentators such as Professor Simon Douglas and Professor Ben MacFarlane have made the

counterargument that the focus should always be on the objective intent of the settlor, and therefore the sham trust doctrine does not need to be distinct from the question of certainty of intention (see *Modern Studies in Property Law* vol 9 (Heather Conway and Robin Hickey eds) (Hart Publishing, 2017)). However, I think that the difference between the two views may not be as great in practice. Indeed, an objective interpretation of the evidence presented will inevitably be required to determine the true subjective intention. As such, the better view is that, in order to establish a sham, it is crucial to ascertain on the available evidence what the settlor truly intended, which is in line with the approach expressed in *Equity & Trusts: Text, Cases, and Materials* (Paul S Davies and Graham Virgo eds) (Oxford University Press, 3rd Ed, 2019) at pp 69–70).

27 In applying the subjective test to determine whether a trust deed in question is a sham, two further points may be made. First, the person alleging that a document is a sham has the burden of proving that the parties intended the document to be a pretence. Second, there is a very strong presumption that the parties intend to be bound by the provisions of the agreements which they entered into (see *Chng Bee Kheng* at [51]). In this connection, Neuberger J (as he then was) explained in *National Westminster Bank plc v Jones and others* [2001] 1 BCLC 98 at [59]:

> … Because a finding of sham carries with it a finding of dishonesty, because innocent third parties may often rely upon the genuineness of a provision or an agreement, and because the court places great weight on the existence and provisions of a formally signed document, there is a strong and natural presumption against holding a provision or document a sham.

My decision: the Trust Deed is not a sham

28 In my judgment, the Trust Deed is not a sham. The evidence shows that the Trust was set up by the respondents to transfer beneficial interest in the

Property to the applicant. As such, the Trust Deed functioned exactly as the respondents intended it to. In this regard, the fact that the trust arrangement additionally allowed the respondents to save on ABSD is an incidental benefit that does not detract from their overall intention to gift their elder child and only son a legacy property while the both of them were still living. I elaborate on these broad points below.

The respondents intended to benefit the applicant by the Trust

29 First, I find that there was no common intention between the settlors and trustees, *ie,* the respondents, to commit to a sham trust. I accept the second respondent's evidence that both respondents, especially her, had at all material times intended for the Property to be purchased for the applicant's benefit. In my judgment, the respondents' circumstances, at the time the Property was purchased in 2020, point to this conclusion. In particular, at the time the Property was purchased in 2020, the respondents were already in their mid-50s. The first respondent had in fact retired by then. It is therefore entirely believable that, at that stage of their lives, with their children either already past the age of majority or about to reach majority, the respondents made provisions for their children. Accordingly, there was a clear reason for why the Trust was intended to benefit the applicant.

30 Second, as to the alternative reason advanced by the first respondent, *ie*, that the Trust was created to avoid ABSD, I find that there is no credible evidence that the respondents would have been unable to afford the ABSD, had they truly wished to retain beneficial interest in the Property. Indeed, even if I were to take the first respondent's case at its highest, that does not show that the respondents were unable to afford the ABSD, but only that they required more time to raise the funds. Indeed, the evidence shows that the respondents owned

another three properties at that time, including a terrace house that the first respondent indicated was sold very shortly after 5 December 2020, rendering profits of $2.2m. The first respondent also indicated that another property was sold very shortly after on 7 January 2021. Apart from these properties, the respondents still had their Mount Sophia apartment to liquidate. They both also had substantial personal funds, with the first respondent indicating that he contributed a total of $1.1m from his personal savings after liquidating his Oceanus shares in the stock market.

31 Third, I find that the respondents knew that the Trust could be collapsed by the applicant for his own benefit and nevertheless proceeded to execute the Trust. This suggests that the respondents intended to benefit the applicant by way of the Trust. As for the respondents' competing versions of what Ms Tay specifically said about the possibility of the Trust being "collapsed" (see [7]–[8] above), I prefer the second respondent's version of events. In my judgment, the first respondent's version, that Ms Tay had advised the respondents that the Trust could easily be "collapsed" after the ABSD (or, more likely, SSD) period ended in four years' time, and that the respondents could then "buy back" the property, is not believable. To begin with, the Trust Deed was drafted as an irrevocable trust. Ms Tay, as an experienced real estate lawyer, would have known that the Trust could not be "collapsed" by the respondents given its status as an irrevocable trust. In contrast, I find that it is far more probable that when Ms Tay advised on the "collapsing" of the Trust, she was referring to *the applicant* having the legal right to do so, just as the second respondent has described. More broadly, it is not believable that Ms Tay would fail to advise on the rule in *Saunders v Vautier* and also erroneously advise that an irrevocable trust could be easily collapsed by the respondents.

32 Further, the second respondent's version of events is supported by the letter dated 24 July 2020 from Ms Tay's firm to both respondents, which states that "we explained to you in detail the contents of the Documents and the legal consequences arising out of your execution of the same".[4] Further, Ms Tay's contemporaneous attendance note unequivocally states that she advised the Respondents that "[the applicant] can collapse trust before 40 by instructing trustee".[5] There is no reason for Ms Tay to side with one side or the other, and I regard this note to be crucial evidence in favour of the second respondent's account of events. While the first respondent has argued that this attendance note is inadmissible hearsay evidence, I find that it is so admissible by virtue of s 32(1)(*b*)(iv) of the Evidence Act 1893 (2020 Rev Ed) as it is a record of Ms Tay's own advice.

33 In sum, I find that the respondents had intended for the Trust Deed to function as it was meant to, that is, to transfer the beneficial interest in the Property to the applicant.

The Loan Agreement supports the Trust Deed being a bona fide *instrument*

34 Moreover, the Loan Agreement further supports the Trust Deed being a *bona fide* instrument. While the Loan Agreement was never executed, both respondents agree that its terms were otherwise complete. In my view, the Loan Agreement proves that the first respondent – who prepared the Loan Agreement – understood that the applicant held onto the beneficial interest of the Property and would continue to do so well into the future. Indeed, before the first respondent changed his position, the respondents had agreed that the purpose of

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4 Sng Gek Hong Cynthia's 2nd Affidavit dated 22 Dec 2022 at p 6.

5 Sng Gek Hong Cynthia's 2nd Affidavit dated 22 Dec 2022 at p 8.

the Loan Agreement, had it been executed, would have been to "divorce-proof" the Property should the applicant's potential future marriage run into trouble. If so, then the mechanism of the Loan Agreement would only make sense if the applicant held the beneficial interest in the property.

35 Moreover, the Loan Agreement designates the respondents as "Lender[s]" and the Applicant as "Borrower".[6] Under cl 5.1, "the whole of the Indebtedness shall immediately be repaid by the Borrower to the Lender upon demand by the Lender".[7] Since there is no other repayment schedule stated in the Loan Agreement, this indicates that the respondents intended for the loan sum of $4.925m to be repaid only at their demand sometime in the future. As such, it can be surmised that the first respondent's intention in preparing the Loan Agreement was to reduce the net value of the Property as a matrimonial asset by $4.925m if the applicant were to be embroiled in divorce proceedings in the future. This sum would then become a matrimonial liability that would have to be returned to the respondents first before any balance could be divided between the applicant and his future wife. However, by the first respondent's account, he would have called on the loan amount in just four years. This does not make sense because the applicant was only 24 years old as of August 2020, and still an undergraduate. He had only dated his girlfriend for one year at that time. Thus, if the first respondent truly believed that the Trust was only to last for the SSD period, it meant that he would also have to believe that the applicant would marry and divorce within the same four years despite being only 24 years old and not contemplating marriage at that stage in life.

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6 Lau Cheok Joo Richard's Reply Affidavit dated 6 October 2022 at Exhibit ALRL-2.

7 Lau Cheok Joo Richard's Reply Affidavit dated 6 October 2022 at Exhibit ALRL-2.

36 For all these reasons, I conclude that the Trust Deed is not a sham instrument and should not be invalidated on this basis.

Whether the Trust should be unenforceable for illegality

37 I turn now to consider the issue of whether, assuming the Trust is valid, it is unenforceable because it was constituted for an illegal purpose. Since the legal principles in the context where the illegality defence is raised against a claim to enforce a trust are not settled, I take this opportunity to set out the applicable law.

The applicable law

The formal reliance principle in Tinsley v Milligan *as previously applied in local decisions*

38 To consider how the doctrine of illegality affects claims in the law of trusts, I begin with the earlier authorities in Singapore where the courts adopted the rule in the House of Lords decision of *Tinsley v Milligan* [1994] 1 AC 340 ("*Tinsley*"). This rule is that a plaintiff who asserts a claim founded on an illegality will be refused the court's assistance if he must rely on the illegality to maintain his claim. More specifically, to "rely" on the illegality means that the plaintiff has to plead the facts of the illegality (see *Tinsley* at 376). The rule in *Tinsley* can be termed as the "formal reliance principle" (in contrast to the "substantive reliance principle") which, for convenience, I will adopt in the subsequent analysis.

39 In *Tinsley* itself, the parties purchased a house which was registered in the sole name of the appellant, one Ms Tinsley. This was done so that the respondent, one Ms Milligan, could make false claims for social security benefits to the Department of Social Security. When the parties fell out, the

respondent claimed an equitable interest in the house on the basis of a resulting trust and commenced an action seeking possession of the house. In that action, Lord Browne-Wilkinson held that the respondent was entitled to recover if she was not forced to plead or rely on the illegality, even if it emerged that the title on which she relied was acquired in the course of carrying through an illegal transaction (at 376E). Thus, on the facts, the respondent established a resulting trust by showing that she had contributed to the purchase price of the house and that there was a common understanding between her and the appellant that they owned the house equally. To establish her claim, the respondent did not need to allege or prove why the house was conveyed in the name of the appellant alone, since that fact was irrelevant to her claim. It was enough to show that the house was in fact vested in the appellant alone (at 376E–376F).

40 In Singapore, the formal reliance principle was applied by the High Court in *Public Prosecutor v Intra Group (Holdings) Co Inc* [1999] 1 SLR(R) 154. There, the managing director of the respondent (which was a company) directed an employee of the company to purchase a residential property in Singapore in the employee's own name, but as trustee for the respondent. This was illegal since the respondent could not acquire a proprietary interest in the property or the sale proceeds under an express trust or a resulting trust as this was specifically prohibited by the Residential Properties Act (Cap 274, 1985 Rev Ed). Subsequently, the property was sold, and the question was whether the respondent had any proprietary claim in the sale proceeds by way of a constructive trust. Yong Pung How CJ held that there was no such proprietary claim. More importantly, even if there was, the proprietary claim would be obstructed by the doctrine of illegality (at [58]). This is because the respondent would have to rely on the underlying illegal transaction, which was the acquisition of the property on trust for itself to assert its proprietary claim. In

other words, its claim would be "entirely contingent" upon the assertion that the property in question was held on trust for the respondent (at [62]).

Departing from the formal reliance principle

41 While the formal reliance principle in *Tinsley* might have been the prevailing position for some time, other jurisdictions have now departed from this rule.

(1) The present approaches in other jurisdictions

(A) THE UK

42 Under English law, the formal reliance principle is no longer good law and has now been replaced with the "range of factors" test in the UK Supreme Court decision of *Patel v Mirza* [2017] AC 467 ("*Patel*") in the context of common law illegality. In *Patel*, the claimant paid a large sum of money to the defendant pursuant to an agreement that he would use it to bet on the movement of shares on the basis of inside information. This agreement contravened the prohibition on insider dealing in the UK, which was governed by s 53 of the Criminal Justice Act 1993 (c 36) (UK). However, this agreement could not be carried out because the expected insider information was not forthcoming. The claimant brought a claim against the defendant for the repayment of the money.

43 At first instance, the English High Court dismissed the claim on the basis of the formal reliance principle, holding that (a) the claimant's case relied on the illegal agreement, since in order to make good his case, the claimant had to prove the illegal purpose for which he had paid the money to the defendant; and (b) although the claimant would not have been barred from relief if he had voluntarily withdrawn from the illegal agreement before it had been performed, he was so barred because the agreement had been frustrated. On appeal, the

English Court of Appeal allowed the claimant's appeal on the basis that a party who had withdrawn from an illegal agreement, that could no longer be performed, was not prevented by public policy from relying on the agreement, provided that no part of it had been carried into effect.

44 The defendant appealed against the English Court of Appeal's decision to the UK Supreme Court. The court unanimously dismissed the appeal. However, the majority (comprising five members of the *coram*) and the minority (of four) disagreed as to the reasoning to reach that outcome. Lord Toulson JSC, who delivered the majority decision, had to decide whether the formal reliance principle, as set out in cases like *Tinsley* and *Bowmakers Ltd v Barnet Instruments Ltd* [1945] KB 45 ("*Bowmakers*"), continued to apply in the context of contractual illegality in common law. After a comparative review of the authorities as well as the academic scholarship in this regard, he concluded that there are two broad discernible policy reasons for the common law doctrine of illegality as a defence to a civil claim: (a) first, a person should not be allowed to profit from his own wrongdoing; and (b) second, the law should be coherent and not self-defeating, condoning illegality by giving with the left hand what it takes with the right hand (see *Patel* at [99]).

45 In elaborating on these two reasons, Lord Toulson JSC adopted the reasoning in the Canadian decision of *Hall v Hebert* [1993] 2 SCR 159, in which McLachlin J opined that the question is not whether the claimant is "getting something" out of the wrongdoing. Rather, the question is whether allowing recovery for something which was illegal would produce "inconsistency and disharmony in the law, and so cause damage to the integrity of the legal system" (see *Patel* at [100]). As regards the question of what "inconsistency" means, Lord Toulson JSC opined that the court must: (a) consider the underlying purpose of the prohibition which has been transgressed; (b) consider conversely

any other relevant public policies which may be rendered ineffective or less effective by the denial of the claim; and (c) keep in mind the possibility of overkill unless the law is applied with a due sense of proportionality (see *Patel* at [101]). Specifically, on proportionality, Lord Toulson JSC adopted a "range of factors" approach and opined that Professor Andrew Burrows' proposed list in *Restatement of the English Law of Contract* (Oxford University Press, 2016) was helpful but not exhaustive. Potentially relevant factors include the seriousness of the conduct, its centrality to the contract, and whether there was marked disparity in the parties' respective culpability (see *Patel* at [107]). In the round, rather than asking whether the contract should be regarded as tainted by illegality, the question is whether the relief claimed should be granted (see *Patel* at [109]).

46 Accordingly, having regard to the principles expressed above, Lord Toulson JSC opined that the formal reliance principle as laid down in *Tinsley* and *Bowmakers* should no longer be followed (see *Patel* at [110]). On the facts of *Patel*, the learned judge agreed with the reasoning of Gloster LJ in the English Court of Appeal below, who had asked herself correctly "whether the policy underlying the rule which made the contract between Mr Patel [the claimant] and Mr Mirza [the defendant] illegal would be stultified if Mr Patel's clam in unjust enrichment were allowed". In this regard, Lord Toulson JSC also agreed with Gloster LJ that there was no logical basis why considerations of public policy should require the claimant to forfeit the moneys which he paid into the defendant's account, and which were never used for the purpose for which they were paid. To bar the claimant's claim would, in the circumstances, not be a just and proportionate response to the illegality (see *Patel* at [115]).

47 In my view, while the facts of *Patel* concerned unlawful *contracts*, it "will undoubtedly have an impact upon the law of trusts" (see Paul S Davies,

"Ramifications of *Patel v Mirza* in the Law of Trusts" in *Illegality after Patel v Mirza* (Sarah Green and Alan Bogg eds) (Hart Publishing, 2018) ch 11 at p 256). Indeed, the "range of factors" approach has been applied by the lower courts in the *trusts* context (see, *eg*, the English High Court decisions of *Kliers v Schmerler and another* [2018] EWHC 1350 (Ch) at [81]–[109] and *Al-Dowaisan and another v Al-Salam and others* [2019] 2 BCLC 328 at [224]–[235]). It is also telling that, in arriving at their decision, the majority in *Patel* had expressly rejected *Tinsley*, which concerned a *resulting trust*. By rejecting the rule in *Tinsley*, the majority must have contemplated that the formal reliance principle should, in principle, similarly not be applicable in the trusts context.

(B) AUSTRALIA

48 Likewise, in the trusts context, the formal reliance principle has been rejected by the High Court of Australia in *Nelson and another v Nelson and others* [1995] 132 ALR 133 ("*Nelson*"). In that case, Mrs Nelson, the first appellant, was eligible under the Defence Service Homes Act 1918 (Cth) ("DSHA") for a subsidy to buy a house because she was a widow of a mariner who had served in World War I. She provided the purchase money for a first house which was transferred into the names of her adult children, Elizabeth and Peter. Even with the transfer, their common intention was that Mrs Nelson should be the beneficial owner of that house. The purpose of this arrangement was to enable Mrs Nelson, should she subsequently wish to purchase another house for herself, to obtain the aforementioned subsidy. She would not have been eligible for the subsidy if she were the owner of another house.

49 Subsequently, Mrs Nelson purchased another house for herself. She applied for a subsidy, falsely declaring that she did not own or have a financial interest in a house other than the house for which the advance was sought, even

though, on her case, she claimed to have a beneficial interest in the first house. By the time the first house was sold, the relationship between the parties had broken down, and a dispute arose as to who was entitled to the sale proceeds of the first house. Mrs Nelson and Peter, as the claimants, sought a declaration that the sale proceeds were held on trust for Mrs Nelson, and an order that those proceeds, together with interest, be paid to her. Elizabeth commenced a cross-claim where she sought various reliefs including a declaration that she had a beneficial interest in the proceeds of sale.

50 At first instance, this issue was dealt with by a Master in the Equity Division of the Supreme Court of New South Wales. The Master held that the relationship between Mrs Nelson and her children, Elizabeth and Peter, gave rise to the presumption of advancement. Evidence had to be led to rebut the presumption. The Master found that Mrs Nelson had no intention to confer any beneficial interest in the first house or in its proceeds of sale on her children, and that the first house was purchased in the names of Elizabeth and Peter to preserve Mrs Nelson's eligibility for a subsidy. The Master found that this was not in itself illegal. However, he held that Mrs Nelson and Peter, as the claimants, knew of the illegality involved in making a false declaration when applying for a subsidy in respect of the second house, and intentionally went ahead with the application. In this regard, the Master found that the making of the false statement was sufficient for the purpose of showing illegality. Accordingly, the Master held that Mrs Nelson's case to rebut the presumption of advancement failed and that a declaration was granted that Elizabeth had a beneficial interest in the proceeds of sale of the first house.

51 The Court of Appeal of New South Wales dismissed Mrs Nelson's appeal. In doing so, the Court of Appeal held, among others, that the presumption of advancement applied as against Mrs Nelson in favour of

Elizabeth and Peter in respect of the first house. Further, Mrs Nelson could not rebut that presumption because she had to rely upon the illegal purpose of obtaining a subsidy on the purchase of the second house.

52 Mrs Nelson then brought a further appeal to the High Court of Australia, which allowed her appeal. To begin with, it is significant that the court unanimously rejected the formal reliance principle in *Tinsley*. For instance, Toohey J observed that the formal reliance principle is open to the criticism that it "represents a triumph of procedure over substance" and "pays no regard to the nature of seriousness of the illegality" (at 176). In this regard, as the illegality defence is rooted in considerations of public policy, to allow the result of a case to be determined by the formal reliance principle, which is concerned with the procedural aspects of the claim, is "at odds with the broad considerations necessarily involved in question of public policy" (at 179). Similarly, McHugh J opined that the formal reliance principle is "too extreme and inflexible to represent sound legal policy" (at 191).

53 While the High Court of Australia unanimously agreed that relief should be granted in favour of Mrs Nelson, the judges differed in their approach in ascertaining the appropriate relief that should be granted. What is significant for present purposes is the decision of the majority, comprising Deane, McHugh, and Gummow JJ, which departed from the traditional all-or-nothing approach of the illegality defence that would have resulted in the claimants either succeeding in their claim, or failing entirely. Instead, the majority held that the question of illegality was bound up with the underlying policy of the DSHA, which was to provide public moneys to facilitate the purchase of housing by eligible persons, but on the footing that the eligible person was not to own another dwelling. The purpose of the DSHA was sufficiently served by the penalties it provided. As such, the denial of a resulting trust would cause

prejudice to Mrs Nelson without furthering the objects of the DSHA (at 158, *per* Deane and Gummow JJ; at 195, *per* McHugh J). However, as the price of obtaining the relief she sought, for the recognition and enforcement of a resulting trust in respect of the whole of the balance of the proceeds of sale of the first house, Mrs Nelson had to take steps to satisfy the demands of the underlying policy of the DSHA. This required her to pay to the Commonwealth the benefit in respect of the purchase of the second house which she had obtained by her unlawful conduct (at 159, *per* Deane and Gummow JJ; at 195, *per* McHugh J). Accordingly, *Nelson* represented a departure from the formal reliance principle in *Tinsley* towards an approach which gives a court the discretion to calibrate the appropriate relief to be granted instead (see further, Man Yip, "The Restitutionary Aftermath of Contractual Illegality" [2015] RLR 106).

(2) The formal reliance principle should not be applied in the present case

54 From the foregoing authorities, it is clear that the formal reliance principle in *Tinsley* has been the subject of strong judicial disapproval. In this regard, the Law Commission of England and Wales ("Law Commission"), after comprehensively reviewing the law of illegality in 1999, concluded that the formal reliance principle is "far from easy to apply" and that its rationale is difficult to locate (see *Illegal Transactions: The Effect of Illegality on Contracts and Trusts* (LCCP No 154, 1999) ("*1999 Report*") at para 3.19). As the Law Commission rightly observed, "[w]hether it renders a property interest under a trust enforceable or unenforceable depends on whether it is possible for the claimant to establish his or her entitlement without leading evidence of the illegality". Therefore, it "presents the risk that the principle may operate to bar the enforcement of a proprietary interest *and* that it will do so in an arbitrary manner" [emphasis in original]. Ultimately, the reason why it operates in an

arbitrary manner is because it "turns on matters of form and not of substance" (see *1999 Report* at para 3.21).

55 In light of the above, I do not think that the formal reliance principle should be applied in the present case. Indeed, the difficulties of applying *Tinsley* may be illustrated here. Assuming that the Trust is affected by illegality, then it might be said, on the one hand, that the application is founded on the Trust, which in turn relies on the illegal purpose of the respondents in constituting the Trust. This would, assuming that the illegality is made out, defeat the application. On the other hand, it might also be argued that the applicant does not need to plead the illegality *per se* to establish his claim. Indeed, as the applicant has argued, his application is founded on his status as beneficiary of the Trust, and in making good his application, it is unnecessary for him to plead that the Trust was constituted for an illegal purpose. On this view, his application should not be barred by the formal reliance principle. Yet, there seems to be no justifiable reason why, if a Trust is affected by illegality, the application should turn on whether the applicant needs to formally rely on the illegality in question. This shows how the application of the formal reliance principle may give rise to artificiality and possible arbitrariness.

Developments to the illegality defence in Singapore

56 If the formal reliance principle does not apply, it remains to be considered what the appropriate test is in relation to the application of the doctrine of illegality in the trusts context. To begin with, the Court of Appeal has rejected the formal reliance principle in the *contractual* context (see the Court of Appeal decisions of *Ting Siew May v Boon Lay Choo and another* [2014] 3 SLR 609 ("*Ting Siew May*") and *Ochroid Trading Ltd and another v Chua Siok Lui (trading as VIE Import & Export) and another* [2018]

1 SLR 363 ("*Ochroid Trading*")). In those decisions, the Court of Appeal laid down a framework that clarified the application of the illegality defence in the contractual context, as well as the principles governing the restitution of benefits conferred under the impugned contract. While these decisions are not strictly binding on me because the Court of Appeal in *Ochroid Trading* expressly reserved its position on the applicability of the reliance principle for claims in torts or trusts (see, *eg*, *Ochroid Trading* at [167]–[168]), they are obviously strongly persuasive. For reasons which I will explain, I am of the respectful view that the same framework should apply, albeit with some modifications.

(1) *Ting Siew May*'s rejection of the formal reliance principle and reformulation of the illegality defence in the contractual context

57 Before discussing the illegality defence in the trusts context, it is helpful first to set out the principles in the decisions of *Ting Siew May* and *Ochroid Trading*. In *Ting Siew May*, the appellant granted an option to purchase a property to the respondents. The option was backdated to 4 October 2012 at the respondents' request, so that the respondents could obtain a bank loan for the purchase on more favourable terms before changes were issued by the Monetary Authority of Singapore on 5 October 2012. Subsequently, the appellant withdrew her offer as stated in the option, stating that she did not want to be a party to any illegality. The respondents applied to the High Court for a declaration that the option was valid and binding on the appellant and consequently for certain reliefs.

58 The High Court held that the option was valid and binding on the appellant and granted the respondents an order for specific performance of the option. The court found that there was no statutory illegality since there was no express or implied legislative intention that the backdating of the option would

render it unenforceable. The High Court also held that the option was not void and unenforceable for illegality at common law since the illegal manner in which the respondents intended to procure financing was too remote from the contract. The respondents also did not need to rely on the backdating to found their claim against the appellant.

59 On appeal, the respondents argued that, in so far as the issue of illegality at common law was concerned, they did not have to rely on the backdating of the option to found their claim against the appellant as their claim did not depend on them pleading that the option was backdated (at [125]). In effect, the respondents' argument was premised on the formal reliance principle. Andrew Phang Boon Leong JA, who delivered the seminal decision of the Court of Appeal, rejected this argument. On this point, Phang JA took the view that applying the formal reliance principle in the contractual context would "undermine (in a significant manner) the very rationale which the doctrine of illegality and public policy is premised on, which is the wider public interest". It would create "enormous uncertainty" as parties would then seek to "characterise (or, more accurately, 'dress up') the facts in order to make the argument" (at [128]). Instead of asking whether a party had to plead the illegality, Phang JA opined that the question that should be asked was whether the claimant was seeking to, in *substance*, enforce an illegal contract (at [127]). In other words, he was of the view that if the reliance principle applied at all, it should be a *substantive reliance principle* which is "not merely literal or descriptive in nature" (at [127]). As such, the Court of Appeal precluded the application of the formal reliance principle as the test for the illegality defence in the contractual context.

60 Instead of applying the formal reliance principle, Phang JA laid down the following framework for applying the illegality defence in the contractual

context. As a threshold point, the court recognised that there are different categories of scenarios where the illegality defence could operate in the contractual context. First, there is the category of statutory illegality, where the contract is expressly or impliedly prohibited by statute. Second, another category is that of common law illegality, where the contract falls foul of one of the established heads of common law public policy. Third, apart from the two aforementioned categories is the category of contracts entered into with the object of committing an illegal act. In relation to the third category, the court opined that the general approach is to examine the relevant policy considerations so as to produce a proportionate response to the illegality in each case. The factors for assessing proportionality in this context include: (a) whether allowing the claim would undermine the purpose of the prohibiting rule; (b) the nature and gravity of the illegality; (c) the remoteness or centrality of the illegality to the contract; (d) the object, intent, and conduct of the parties; and (e) the consequences of denying the claim (at [70]). These are not a conclusive list of factors and they "should not be applied in a rigid or mechanistic fashion" (at [71]). Ultimately, the nature of the inquiry is fact centric.

(2) The two-stage framework in *Ochroid Trading* in the contractual context

61 Against the backdrop of *Ting Siew May*, the Court of Appeal in *Ochroid Trading* elaborated on the principles governing the illegality defence in the contractual context. In *addition* to this, Phang JA (who delivered the judgment of the Court of Appeal) also clarified the principles governing the restitution of benefits conferred under the impugned contract. This resulted in a two-stage conceptual framework.

62 I begin with the facts of *Ochroid Trading*. That case concerned certain moneylending agreements, and the primary issue was whether the agreements were illegal moneylending contracts which were prohibited (and hence unenforceable) under the Moneylenders Act (Cap 188, 1985 Rev Ed). If these agreements were unenforceable, the secondary issue arose as to whether the alternative claim in unjust enrichment for the restitutionary recovery of the principal sums lent ought to be allowed.

63 To resolve these issues, Phang JA laid down a two-stage framework on which I now elaborate. As regards the first stage, there are two broad categories of illegality to consider: the first being statutory illegality and the second being illegality at common law. More specifically, within the broad category of illegality at common law, there is a recognised subcategory of contracts which are not unlawful *in themselves*, but which were entered into with the object of committing an illegal act. In such cases, the proportionality principle laid down in *Ting Siew May* ought to be applied to determine if the contract is enforceable (see *Ochroid Trading* at [64]). The factors to consider include: (a) whether allowing the claim would undermine the purpose of the prohibiting rule; (b) the nature and gravity of the illegality; (c) the remoteness or centrality of the illegality to the contract; (d) the object, intent, and conduct of the parties; and (e) the consequences of denying the claim (see *Ting Siew May* at [70]).

64 Next, at the second stage, Phang JA held that there are at least three possible avenues for restitutionary recovery: (a) where the parties are not *in pari delicto*; (b) where a party to an illegal contract genuinely repents in time before the illegal purpose is effected; (c) where the restitutionary recovery is premised on recovery through an independent cause of action. While Phang JA explained each of these avenues at length, it is not necessary for me to do so at this juncture.

65 Instead, in relation to the second stage, what is important for present purposes are two key points. The first is that Phang JA in *Ochroid Trading* endorsed the principle of stultification, which asks the question of whether allowing the claim would undermine the fundamental policy that rendered the underlying contract void and unenforceable in the first place (at [159]). The rationale of the principle of stultification is that the court should not allow the claim if to do so would "make a mockery or nonsense of the law that rendered the contract void and unenforceable to begin with" [emphasis in original omitted] (at [148]).

66 The second and related point is that Phang JA expressed the tentative view that the principle of stultification might apply to other independent causes of action in tort and the law of trusts (at [161] and [168]). When these two points are considered together, it is clear that the principle of stultification is not of narrow application. Indeed, as Phang JA indicated, it is a principle that is *generally applicable* to the illegality defence across the different areas of private law. In my view, to rationalise the principle of stultification in this manner is consistent with its *very definition*, which was outlined in Professor Peter Birks's influential article (see Peter Birks, "Recovering Value Transferred Under an Illegal Contract" (2000) 1 Theoretical Inquiries in Law 155 at 160, cited with approval in *Ochroid Trading* at [147]):

> … 'To stultify' is to 'make a fool of' or 'to make nonsense of'. It is important that *the law as stated in one area should not make nonsense of the law as stated in another*. …
>
> [emphasis added]

Applying this definition, in order to achieve the end result that the law as stated in any *one* area does not make nonsense of the law as stated in *another*, this means that the illegality defence in *all* areas of law must be subject to the same principle of stultification.

(3) A modified *Ochroid Trading* framework should apply in the trusts context

67 With the notion of *coherence* in mind, I turn to consider whether these principles should similarly apply in the *trusts* context, with which the present case is concerned. In my view, the question should be answered in the affirmative. I am therefore of the view that the *Ochroid Trading* framework should broadly apply in the trusts context with the appropriate modifications. I say this for the following reasons.

68 First, as a matter of principle, the illegality defences between the trusts context and the contractual context should be broadly consistent with each other. Were it otherwise, its effect would be to encourage parties who contemplate illegal conduct to simply structure their legal arrangements differently in order to get around the rule that does not favour them. This result would go against the tenor of *Ting Siew May* and *Ochroid Trading*, where the Court of Appeal sought to avoid the possibility that the illegality defence could operate artificially and arbitrarily, depending on technical factors that have nothing to do with the public interest in discouraging illegal conduct (see, *eg*, *Ting Siew May* at [127] and *Ochroid Trading* at [132]).

69 Second, the *Ochroid Trading* framework is consistent with the view that the court, in applying the illegality defence in the trusts context, should look to matters of *substance* and not *form* (see [54]–[55] above). As I explained above, Phang JA in *Ting Siew May* had rejected the reliance principle as being merely "literal or descriptive in nature" and instead adopted what is effectively a *substantive reliance principle* (see [59] above). The statements of Phang JA in *Ting Siew May* were in turn elaborated on in *Ochroid Trading*. While the substantive reliance principle in *Ting Siew May* was originally expressed in the

context of what is now the first stage of the *Ochroid Trading* framework, the Court of Appeal in *Ochroid Trading* at [131]–[132] subsequently also alluded to the idea that this principle extends to the second stage of the framework.

The modified Ochroid Trading *framework in the trusts context*

70 I turn now to explain how the *Ochroid Trading* framework, with modifications to cater for differences between the contractual and trusts contexts, should apply where the illegality defence is raised in the trusts context. In my view, this modified framework should apply where a claimant seeks to enforce his rights under a trust arising in his favour, whether the trust was constituted through an express intent (such as in the case of an express trust) or by operation of law (such as in the case of constructive and resulting trusts, *etc*).

(1) The first stage: is the trust enforceable?

(A) TRUSTS THAT ARE PROHIBITED

71 At the first stage, a court should first consider whether the trust in question is prohibited, whether by statute (expressly or impliedly) or where it falls into an established category of trusts which have historically been held to be void and unenforceable. These include trusts which are adverse to religion and morality (see the English High Court decision of *In re Watson, decd* [1973] 1 WLR 1472), trusts contrary to succession law (see the English decision of *Attorney-General v Pearson* (1817) 3 Mer 353), and trusts which impose a condition divesting the interest of a devisee or legatee if he enters into the naval or military services of the country (see the English High Court decision of *In re Beard* [1908] 1 Ch 383). Prohibited trusts also include trusts which are expressly or impliedly prohibited by statute. In such cases, the formation of the

trust itself would be illegal, the result of which is that the trust would be void and unenforceable.

(B) TRUSTS CREATED FOR AN ILLEGAL PURPOSE, OR WHICH ARISE AS AN INCIDENTAL CONSEQUENCE OF THE ILLEGAL PURPOSE

72 Apart from such situations, there is also a category of trusts which *in themselves* are not illegal, but which are created for an illegal purpose, or which arise as an incidental consequence of the illegal purpose. An example of such a trust can be found in the facts of *Knight and another v Knight and others* [2019] 2 P & CR D33 ("*Knight*"). In that case, a deceased person was the sole owner of a property for a period of time until he faced the prospect of bankruptcy. Fearing that he would be made a bankrupt and lose the property, which was his home, the deceased arranged with his friend whereby he would purport to sell the property to his friend for market value. However, the arrangement was that when the risk of bankruptcy passed or when the deceased got out of bankruptcy, the property would be transferred back to the deceased. The illegal purpose was to shield the property from the deceased's bankruptcy. Despite this, the English High Court found that, subject to a mortgage which the deceased's friend took out to purchase the property, the deceased was intended to and remained the beneficial owner of the property. In other words, the friend held the property on an express trust for the benefit of the deceased. Significantly, the court regarded the issue of whether the trust was enforceable as *separate* from the question of whether there was a valid trust in the first place. For completeness, the court ultimately concluded, applying the range of factors approach in *Patel*, that the trust was enforceable after considering that the deceased's creditors were fully paid, and that the Officer Receiver in bankruptcy had notice of the sale of the property and had taken no action.

73 Similarly, a resulting trust that arises by operation of law, which was itself not illegal, could have arisen incidentally as a consequence of an illegal purpose. In this case, the question is whether one is allowed to enforce the equitable interest. An illustration of this situation can be seen in the facts of the High Court of Australia decision of *Nelson*. It will be recalled that the court unanimously rejected the formal reliance principle, the effect of which was that Mrs Nelson was free to rebut the presumption of advancement in favour of her children and therefore prove that her children held the sale proceeds of a house on resulting trust for her. However, this did not mean that she was automatically entitled to the declaratory relief that she sought. Indeed, the majority in *Nelson* granted the declaratory relief on the condition that Mrs Nelson pay to the Commonwealth the benefit in respect of the purchase of the second house for which she obtained a subsidy as a result of her unlawful conduct.

74 In my view, in these categories of trusts which are in themselves not illegal, but which are constituted for an illegal purpose, or which arise incidentally as a consequence of the illegal purpose, the court could adopt the proportionality analysis in the first stage of the *Ochroid Trading* framework. This is because not all forms of illegality are equally serious, as the Law Reform Committee of the Singapore Academy of Law observed in *Relief from Unenforceability of Illegal Contracts and Trusts* (5 July 2002) at para 7.7. Indeed, if the law assumes that all forms of illegality are equally serious, the illegality doctrine may operate too harshly.

75 Therefore, the consequence of illegality should be attenuated accordingly where the trust in question does not fall into an established situation that automatically renders it void. As the Court of Appeal in *Ting Siew May* observed at [46], there might be legal wrongs intended to be committed by one or more parties which are relatively trivial, and it would be disproportionate to

render a contract void and unenforceable in such situations. In my view, this observation applies even more strongly in the *trusts* context, where the rights of third parties who are not part of the illegality may be affected as well. In this regard, the factors articulated in *Ting Siew May* at [70] would be helpful in ascertaining whether rendering the trust unenforceable would be a proportionate response to the illegality. To recapitulate, these factors are: (a) whether allowing the claim would undermine the purpose of the prohibiting rule, (b) the nature and gravity of the illegality, (c) the remoteness or centrality of the illegality to the trust, (d) the object, intent, and conduct of the parties, and (e) the consequences of denying the claim.

76 In sum, at the first stage of this framework, the question to be asked is whether the trust in question is enforceable. In answering this question, the court should have regard to whether the trust falls into an established category of trusts which are prohibited, and are therefore void and unenforceable, or whether the trust is valid but might nevertheless be unenforceable because it was created either for an illegal purpose or arose as an incidental consequence of the illegal purpose. Where the latter situation applies, the court should apply the principle of proportionality in assessing whether to enforce the trust, having regard to the factors in *Ting Siew May*. If the court decides, at the first stage of the framework, that the trust should be unenforceable, it remains to be considered if the second stage of the *Ochroid Trading* framework should apply.

(2) The second stage: if the trust is not enforceable, can there nevertheless be restitutionary recovery?

77 In my view, the second stage should *not* apply where the claim is for the enforcement of a proprietary interest. While the *Ochroid Trading* framework applies well in the contractual context, the trusts context is quite different. In so

far as the second stage of the *Ochroid Trading* framework asks if *restitutionary* recovery is possible, this would not readily apply in the trusts context because the claimant here is not asking for repayment of the money under a contract. Instead, the claimant is seeking the enforcement of his proprietary interest. Also, it is not in every case that there has been a payment or transfer of a benefit from one party to the other. This can be illustrated by looking at the express trust situation which involves the settlor, trustee, and beneficiary relationship. In that situation, the only person entitled to "enforce" a trust is the beneficiary. As the beneficiary is not the settlor and has not contributed any property to the trust, there is nothing restitutionary about the claim at all. Even in the case of a presumption of resulting trust – for example, where the beneficiary has made direct contribution to the purchase of the property – the beneficiary is trying to enforce his or her equitable interest in the property and not seeking to recover the payment that has been made. Nor does the court consider the resulting trust to be a vehicle for proprietary restitution. The claim will be for breaches of duty or, as in this case, to determine the trust under *Saunders v Vautier*. This is why there cannot have been a restitutionary claim.

78 As such, the second stage of the *Ochroid Trading* framework should *not* apply in the trusts context where the claim is for the enforcement of a proprietary interest, in which it would not make sense to ask whether there can be restitutionary recovery. In such a situation, the *Ochroid Trading* framework, as applied in the context of trusts, comprises only the first stage. In so far as this stage is concerned, it can be resolved into three questions: (a) whether the trust in question is prohibited, (b) if not, whether the trust in question should nonetheless be enforceable, by considering the proportionality factors in *Ting Siew May*, and (c) if not, whether the party seeking to enforce the trust in question can nonetheless establish an alternative basis for enforcing a

proprietary interest by the operation of trusts law, such as by a resulting trust if his claim to enforce an express trust fails because the express trust is found to be unenforceable.

79 In relation to (c), the principle of stultification should apply to determine if, in allowing the claim, the fundamental policy that prohibited the trust in question in the first place would be undermined (see the Singapore International Commercial Court decision of *Baker, Michael A (executor of the estate of Chantal Burnison, deceased) v BCS Business Consulting Services Pte Ltd and others* [2020] 4 SLR 85 at [274]). In saying this, I leave open the possibility that the second stage of the *Ochroid Trading* framework could still apply in the trusts context, where the party seeking to enforce the trust can make out his claim by some other independent cause of action. In that case, the principle of stultification should again apply in the manner described above.

(3) Summary

80 To summarise the above discussion, the applicable principles in the modified *Ochroid Trading* framework as applied in the trusts context should be as follows:

81 As to the first stage:

(a) First, the court should consider whether the trust in question is illegal in itself and therefore void and unenforceable; a trust is illegal in itself when it is expressly or impliedly prohibited by statute or falls within an established category of situations that renders it void and unenforceable.

(b) Second, if the trust is not illegal in itself, the court should then consider whether the trust concerned is created for an illegal purpose, or which arose as an incidental consequence of the illegal purpose. If so, the proportionality analysis applies to determine a proportionate response to the illegality, and the factors to be considered include (i) whether allowing the claim would undermine the purpose of the prohibiting rule; (ii) the nature and gravity of the illegality; (iii) the remoteness or centrality of the illegality to the trust; (iv) the object, intent, and conduct of the parties; and (v) the consequences of denying the claim.

(c) Third, if the court decides that the trust was created for an illegal purpose and should not be enforceable, the court may consider if the party seeking to enforce the trust in question can nonetheless establish an alternative basis for enforcing a proprietary interest by the operation of trusts law, such as by a resulting trust if his claim to enforce an express trust fails because the express trust is found to be unenforceable. In considering this, the court should apply the principle of stultification to determine if, in allowing the claim, the fundamental policy that prohibited the trust in question in the first place would be undermined.

My decision: the Trust was not constituted for an illegal purpose

82 Applying the framework above, I turn to the present case. First, in considering whether the Trust is illegal in itself, I conclude that, apart from the question of statutory illegality, this situation does not fall into any established categories that would render the Trust illegal in itself. In examining the question of statutory illegality, I turn to the relevant parts of the Stamp Duties Act 1929 (Cap 312, 2006 Rev Ed) ("SDA"). Section 4(1)(*a*) of the SDA read with

Art 3(*bf*)(iii) of the First Schedule to the SDA provide for the relevant obligation to pay ABSD if the respondents had owned the beneficial interest of the Property. Section 4(1)(*a*) of the SDA states:

> **Instruments chargeable with duty**
>
> **4.**—(1) Subject to the provisions of this Act and any other written law, every instrument mentioned in the First Schedule, being an instrument —
>
> (*a*) which, not having been previously executed by any person, is executed in Singapore; or
>
> …
>
> shall be chargeable with duty of the amount specified in that Schedule as the proper duty for that instrument.

And Art 3(*bf*)(iii) of the First Schedule to the SDA states:

> (*bf*) on sale of residential property (whether or not any other type of property is also conveyed, transferred or assigned under the same instrument), executed on or after 12 January 2013
>
> …
>
> (iii) if —
>
> (A) the grantee, transferee or lessee is a Singapore citizen owning 2 or more properties or a Singapore permanent resident owning property, or any of 2 or more joint grantees, transferees or lessees is a Singapore citizen owning 2 or more properties or a Singapore permanent resident owning property, and none of the other joint grantees, transferees or lessees is a foreigner or an entity; and
>
> (*a*) 10% of the amount or the total amount of consideration of the residential property or properties that is or are conveyed, assigned or transferred, if the instrument is executed before 6 July 2018; or
>
> (*b*) 15% of the amount or the total amount of consideration of the residential property or properties that is or are conveyed, assigned or transferred, if the instrument is executed on or after 6 July 2018

> (B) one or more residential properties is or are conveyed, transferred or assigned under the instrument

As the respondents are Singaporeans and owned more than two properties at the time of the purchase of the Property (which was after 6 July 2018), the ABSD rate of 15% of the total consideration of $4.925m for the Property was payable by the respondents. This amounted to $738,750 which the respondents did not pay as a result of the creation of the Trust.

83 However, from these provisions, there is no express prohibition of trusts created to avoid ABSD obligations. From the provisions themselves, it is also difficult to conclude that there was a necessary inference or clear implication that such trusts are illegal (see *Ting Siew May* at [110] and [111]).

84 Second, following from my conclusions above that the Trust Deed is not a sham instrument, I also find that the Trust was also not created for an illegal purpose, which was to avoid ABSD. I had earlier explained why I do not think this is the case here and there is no need to repeat those findings here.

Conclusion

85 In summary, I first find that the applicant has established a *prima facie* case for the termination of the Trust pursuant to the rule in *Saunders v Vautier*. I do not find any reason to refute this *prima facie* case because (a) I do not think that the Trust deed should be invalidated for being a sham instrument, and (b) I also do not think that the Trust should be unenforceable for illegality. In essence, my reasons for finding centre on my conclusion that the Trust is a *bona fide* instrument that was meant to benefit the applicant and not to avoid ABSD.

86 For all these reasons, I allow the applicant's application for a declaration that the Trust be terminated and for the Property to be transferred from the respondents to the applicant.

87 Unless the parties are able to agree on costs within 14 days of this decision, they are to write in with their submissions on the appropriate costs order, limited to 7 pages each.

Goh Yihan
Judicial Commissioner

Lim Kim Hong and Lim Teng Jie (Kim & Co) for the applicant;
The first respondent in person;
Chan Yu Xin and Andrea Ang Si Min (WongPartnership LLP)
for the second respondent.