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

[2024] SGHC 53

Originating Claim No 233 of 2022

Between

Julian Frederick Yu Lim

… *Claimant*

And

(1) Lim Peng On
(in his capacity as executor and trustee of the estate of Lim Koon Yew @ Lim Kuen Yew, deceased)

(2) Lim Toong Cheng Thomas
(in his capacity as executor and trustee of the estate of Lim Koon Yew @ Lim Kuen Yew, deceased)

… *Defendants*

JUDGMENT

[Succession and Wills — Codicils — Conditions for grandsons to qualify as beneficiaries under a will]
[Succession and Wills — Conditions — Grandsons who remain within the custody, care and control of the testator's sons]
[Succession and Wills — Construction — Meaning of "surviving grandsons born … within twenty-one (21) years of my death"]

[Succession and Wills — Construction — Meaning of “custody, care and control”]

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Lim Julian Frederick Yu
v
Lim Peng On (as executor and trustee of the estate of Lim Koon Yew (alias Lim Kuen Yew), deceased) and another

[2024] SGHC 53

General Division of the High Court — Originating Claim No 233 of 2022
Philip Jeyaretnam J
23–25, 30 January, 1 February 2024

27 February 2024 Judgment reserved.

Philip Jeyaretnam J:

Introduction

1 This case concerns interpretation of a will, specifically the subset of grandsons that the late Lim Koon Yew (alias Lim Kuen Yew) ("the Testator") sought to benefit. The claimant argues that he is the sole beneficiary entitled to 20% of the Testator's estate ("the Estate"), pursuant to his last will and testament dated 9 June 1992 ("the Will"). The Will bequeathed 20% of the Estate to a subset of the Testator's grandsons, namely those sired by his sons but not his daughters. The Testator's codicil dated 20 October 1992 ("the Codicil") then imposed two further limitations, one of which was the qualification that the grandson be in the custody, care and control of his father. The second defendant contends first that the category of patrilineal grandsons was further limited to those born after the Testator's death (thus excluding the

claimant, who was born during the Testator's lifetime) and second that the claimant was not in his father's custody, care and control and is thus disqualified.

2 I find that the claimant is not a qualifying beneficiary under the Will. While I hold that the claimant is a "surviving grandson" of the Testator falling within the intended class of beneficiaries under Clause 5 of the Will, I find that the claimant does not satisfy the condition in Clause 1(i) of the Codicil that he must have been in the custody, care and control of his father.

3 Consequently, the claimant is not entitled to 20% of the Estate under the Will read with the Codicil. I now provide my reasons for these conclusions.

Facts

The parties

4 The claimant is Julian Frederick Yu Lim ("Julian"), a grandson of the Testator.[1] Julian was born on 25 November 1981.[2]

5 Julian's father, Lim Peng On ("Peng On"), is the first defendant in this case,[3] and Julian's half-uncle, Lim Toong Cheng Thomas ("Thomas"), is the second defendant.[4]

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1 Affidavit of Evidence-in-Chief of Julian Frederick Yu Lim affirmed on 20 October 2023 ("JFYL") at paras 3 and 7.

2 Affidavit of Evidence-in-Chief of Lim Peng On affirmed on 25 October 2023 ("LPO") at p 24 (Exhibit LPO-1: Certificate of Live Birth for Julian Frederick Yu Lim dated 18 December 2017).

3 JFYL at para 3; LPO at paras 1–2.

4 JFYL at para 6(b); LPO at paras 6–7.

6 Peng On and Thomas are both sons of the Testator but are only half-brothers, having been born to different mothers who were married to the Testator by way of Chinese customary marriages.[5]

7 Peng On and Thomas are the executors and trustees of the Estate appointed by the Testator under Clause 1 of the Will.[6]

Background to the dispute

8 In January 1992, Peng On left Japan and moved to Singapore. Julian and his mother – who was married to Peng On at the time – remained in Japan.[7]

9 After Peng On had relocated to Singapore, the Testator arranged a lunch meeting in February 1992 ("the February 1992 Lunch"). Present at the February 1992 Lunch were the following six persons – the Testator, Peng On, Thomas, Thomas's mother Mdm Kwok Kwai Yin, and Thomas's sisters Violet Lim Gee Quan and Grace Lim Gee Heng (Lin Ziqing).[8]

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5 Affidavit of Evidence-in-Chief of Lim Toong Cheng Thomas affirmed on 23 October 2023 ("LTCT") at paras 6–9; LPO at paras 6–7.

6 JFYL at p 55 (Exhibit JFYL-62: Last Will and Testament of Lim Koon Yew @ Lim Kuen Yew dated 9 June 1992 at cl 1).

7 JFYL at paras 10–11; Hearing Transcript for HC/OC 233/2022 dated 23 January 2024 ("Day 1 Transcript") at p 68 lines 20–24 and p 69 lines 3–5; LPO at paras 15–16.

8 LTCT at paras 13–14; Affidavit of Evidence-in-Chief of Kwok Kwai Yin affirmed on 23 October 2023 ("KKY") at para 3; Affidavit of Evidence-in-Chief of Violet Lim Gee Quan affirmed on 23 October 2023 ("VLGQ") at para 3; Affidavit of Evidence-in-Chief of Grace Lim Gee Heng (Lin Ziqing) affirmed on 23 October 2023 ("GLGH") at para 3; Day 1 Transcript at p 84 lines 4–16, p 85 lines 11–25 and p 86 lines 1–13.

10 In March 1992, the Testator had a cardiothoracic aneurysm for which his surgeon recommended surgery to replace the aneurysm with a prosthetic graft. This was an elective operation which the Testator agreed to undergo.[9]

11 In or around June 1992, the Testator's solicitor, Mr Prabhakaran s/o Narayanan Nair ("Mr Nair"), took instructions from the Testator and drafted the Will for him.[10]

12 The Testator signed the Will on 9 June 1992. Clause 5 of the Will included the following wording: "[t]he balance 20% of my estate I bequeath to all my surviving grandsons born of my sons (the male hereditary line) within twenty-one (21) years of my death to be shared equally by them" ("the Grandson Gift Clause").[11]

13 At the time of the making of the Will, Peng On was between 40 and 41 years of age while Thomas was between 24 and 25 years of age.[12] The Testator was between 75 and 76 years of age.[13]

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9 LTCT at p 78 (Exhibit LTCT-5: Letter from Dr Lim Yew Cheng, Consultant Cardiothoracic Surgeon, Department of Cardiothoracic Surgery, Singapore General Hospital to Ong Tan Nair & Kwek, Advocates & Solicitors dated 3 March 1992); Hearing Transcript for HC/OC 233/2022 dated 25 January 2024 ("Day 3 Transcript") at p 51 lines 6–19.

10 Hearing Transcript for HC/OC 233/2022 dated 24 January 2024 ("Day 2 Transcript") at p 15 lines 5–8.

11 JFYL at p 57 (Exhibit JFYL-62: Last Will and Testament of Lim Koon Yew @ Lim Kuen Yew dated 9 June 1992 at cl 5).

12 Exhibit P1 (Agreed Family Tree of Lim Koon Yew @ Lim Kuen Yew); Day 3 Transcript at p 2 lines 2–18.

13 LPO at p 48 (Exhibit LPO-8: Certificate of Extract from Register of Deaths for Lim Koon Yew @ Lim Kuen Yew dated 4 May 1999); LTCT at p 93 (Exhibit LTCT-5: Certificate of Extract from Register of Deaths for Lim Koon Yew @ Lim Kuen Yew dated 4 May 1999).

14 In or around September 1992, Mr Nair took further instructions from the Testator who wished to make a codicil to clarify the meaning of a qualifying "grandson" under the Grandson Gift Clause.[14] Mr Nair drafted the Codicil in accordance with the Testator's instructions.

15 On 20 October 1992, the Testator signed the Codicil at the hospital shortly before his surgical operation.[15] Clause 1(i) of the Codicil provided that the qualifying class of beneficiaries under the Grandson Gift Clause "should be restricted to only those grandsons who are in the custody, care and control of my sons and does not include those grandsons who are no longer in the custody, care and control of my sons" ("the Custody Care and Control Requirement").[16]

16 The Testator passed away on 21 October 1992 at the hospital.[17] On 12 February 1993, the High Court granted probate of the Estate to Peng On and Thomas.[18]

17 In December 1993, Julian's mother left Japan to live in Hong Kong while Julian remained behind in Japan.[19] On 10 May 1999, Julian's mother filed

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14 Day 2 Transcript at p 18 lines 15–21, p 19 lines 4–18, p 21 lines 19–25 and p 22 lines 1–21.

15 Day 2 Transcript at p 18 lines 4–14 and p 60 lines 1–9.

16 JFYL at p 60 (Exhibit JFYL-63: Codicil of Lim Koon Yew @ Lim Kuen Yew dated 20 October 1992 at cl 1(i)).

17 LPO at p 48 (Exhibit LPO-8: Certificate of Extract from Register of Deaths for Lim Koon Yew @ Lim Kuen Yew dated 4 May 1999); LTCT at p 85 (Exhibit LTCT-5: Certificate of Registration of Death for Lim Koon Yew @ Lim Kuen Yew dated 22 October 1992).

18 LTCT at p 86 (Exhibit LTCT-5: Grant of Probate in High Court Probate No 1969 of 1992 dated 12 February 1993 issued 5 November 1996).

19 JFYL at para 12.

a petition for divorce against Peng On in the Hong Kong District Court ("the Hong Kong Matrimonial Proceedings").[20]

18 On 22 October 1999, the Judge of the Hong Kong District Court granted a divorce decree *nisi* which ordered that Julian would be in the custody of his mother, with reasonable access granted to Peng On.[21] That decree *nisi* was made absolute on 9 December 1999.[22]

Procedural history

19 On 31 August 2022, Julian instituted his suit in HC/OC 233/2022 ("OC 233") against the executors of the Estate, Peng On and Thomas.[23] Julian sought orders for the executors to transfer to him the properties representing 20% of the Estate, on the basis that he was the sole beneficiary under the Grandson Gift Clause.[24]

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20 LPO at pp 50–53 (Exhibit LPO-9: Wife's Petition in the District Court of the Hong Kong Special Administrative Region dated 6 May 1999 filed 10 May 1999).

21 LPO at pp 78–80 (Exhibit LPO-17: Order of the Judge of the District Court of the Hong Kong Special Administrative Region dated 22 October 1999 filed 8 November 1999).

22 LPO at p 85 (Exhibit LPO-19: Form 6 Certificate of Making Decree Nisi Absolute (Divorce) in the District Court of the Hong Kong Special Administrative Region dated 9 December 1999).

23 Originating Claim of Julian Frederick Yu Lim in HC/OC 233/2022 filed 31 August 2022.

24 Statement of Claim (Amendment No. 1) of Julian Frederick Yu Lim in HC/OC 233/2022 redated 30 January 2024 ("SOC(A1)") at paras 12–14 and prayers (B)–(D) & (F)–(G).

20 Peng On did not file a Notice of Intention to Contest or Not Contest as he supports Julian's OC 233.[25] Thomas contests OC 233 and alleges that Julian is not a qualifying beneficiary under the Grandson Gift Clause.[26]

21 On 17 January 2023, Julian filed an application for summary judgment against Thomas in HC/SUM 147/2023.[27] On 3 April 2023, I granted Thomas unconditional leave to defend OC 233 with costs of HC/SUM 147/2023 to be in the cause (see the order in HC/ORC 1595/2023).[28]

22 On the third day of trial, 25 January 2024, I asked Thomas's counsel if he was intending to rely on the statements of Julian's mother in her divorce petition in the Hong Kong Matrimonial Proceedings for the truth of their contents.[29] As statements of relevant facts, rather than the relevant facts themselves, they were *prima facie* inadmissible under the Evidence Act 1893 (2020 Rev Ed) ("EA 1893") (see *Roy S Selvarajah v Public Prosecutor* [1998] 3 SLR(R) 119 at [40] and *Lee Chez Kee v Public Prosecutor* [2008] 3 SLR(R) 447 ("*Lee Chez Kee*") at [66]–[70] and [75]) unless they fell within a statutory exception: *eg*, s 32(1), EA 1893 (see *Keimfarben GmbH & Co KG v Soo Nam Yuen* [2004] 3 SLR(R) 534 at [14]–[15] and *Haw Wan Sin David and another v Kwek Siang Ling Wendy and others* [2023] SGHC 171 at [164]). I invited Julian

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25 LPO at paras 2–3.

26 Defence (Merits) (Amendment No. 1) of Lim Toong Cheng Thomas in HC/OC 233/2022 redated 11 November 2022 ("Defence(A1)") at paras 10, 14 and 20.

27 Summons for Summary Judgment of Julian Frederick Yu Lim in HC/OC 233/2022 and HC/SUM 147/2023 filed 17 January 2023.

28 Order of Court numbered HC/ORC 1595/2023 in HC/OC 233/2022 and HC/SUM 147/2023 dated 3 April 2023 filed 11 April 2023.

29 Day 3 Transcript at p 87 lines 5–14.

and Thomas ("the Parties") to make submissions on this point in their closing arguments.[30]

23 On the fourth day of trial, 30 January 2024, Julian's counsel made an oral application to amend the statement of claim by including a prayer for declaratory relief to the effect that Julian is a qualifying beneficiary under the Will.[31]

24 Thomas's counsel objected to the proposed amendment on the basis that O 9 r 14(3) of the Rules of Court 2021 ("ROC 2021") provides that the court may only allow pleadings to be amended less than 14 days before the start of the trial "in a special case".[32]

25 I allowed the amendment given that it would not occasion any prejudice to Thomas.[33] The amendment sought by Julian was a clarificatory one which did not change his case in the middle of trial. Julian's case had always been that he is a qualifying beneficiary under the Will. Indeed, the original relief he prayed for was premised on precisely that assertion.[34] Likewise, Thomas's case in his defence had always been that Julian is not a qualifying beneficiary under the Will read with the Codicil.[35]

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30 Day 3 Transcript at p 90 line 25, p 91 lines 1–2, p 92 line 25 and p 93 lines 1–12.

31 Hearing Transcript for HC/OC 233/2022 dated 30 January 2024 ("Day 4 Transcript") at p 1 lines 7–17, p 2 lines 16–25 and p 3 lines 1–4; SOC(A1) at prayer (A).

32 Day 4 Transcript at p 5 lines 1–2 and p 7 lines 6–17.

33 Day 4 Transcript at p 9 lines 11–25 and p 10 lines 1–4 and 16–21.

34 SOC(A1) at paras 13 and 20(a) and prayers (B)–(D) & (F).

35 Defence(A1) at paras 10, 13–14 and 20.

26 In my view, merely clarificatory amendments such as this fall within the ambit of a "special case" for the purpose of O 9 r 14(3) of ROC 2021. It did not involve fresh evidence, additional witnesses or new arguments. Hence, I allowed Julian's amendment to his statement of claim.

27 On that same day, the Parties admitted by consent evidence of the attempts made by Thomas's counsel to secure the attendance of Julian's mother at trial, and her reply by email ("Exhibit D3").[36]

28 Exhibit D3 includes a letter from Thomas's counsel to court dated 29 January 2024, copying Julian's counsel.[37] This indicated Thomas's intention to admit Julian's mother's out-of-court statements on the basis of his efforts to secure her attendance at court and her unavailability at trial due to her being outside Singapore (see s 32(1)(*j*)(iii), EA 1893).

29 On the last day of trial, 1 February 2024, after the Parties had already closed their cases, Thomas's counsel made an application for an extension of time to serve the notice required under O 15 r 16(7) of ROC 2021. That notice concerned Thomas's intention to rely on Julian's mother's out-of-court statements for the truth of the matters therein, based on the statutory exception in s 32 of the EA 1893.[38]

30 Per O 15 r 16(7) of ROC 2021, this 's 32 notice' ought to have been given to Julian on 31 October 2023 when Thomas's affidavit of evidence-in-

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36 Day 4 Transcript at p 47 lines 19–25 and p 48 lines 1–19.

37 Exhibit D3 at pp 1–3.

38 Hearing Transcript for HC/OC 233/2022 dated 1 February 2024 ("Day 5 Transcript") at p 62 lines 14–25, p 63 lines 1–25, p 64 lines 1–25 and p 65 lines 1–14.

chief containing the relevant out-of-court statements was served.[39] Thomas's counsel sought an extension until 29 January 2024. This was the date when Exhibit D3, which was relied on as, in substance, the 's 32 notice' was sent to court.[40] I indicated to Parties that I would address that application in my judgment.[41]

The parties' cases

Julian's case

31 Julian submits that he is a qualifying beneficiary under the Will because he falls within the Grandson Gift Clause and satisfies the Custody Care and Control Requirement.

32 I summarise his arguments as follows. The class of beneficiaries falling within the Grandson Gift Clause only includes grandsons born to the Testator's sons in the 21 years *before* the death of the Testator. Clause 8 of the Will requires that the Estate be distributed within 18 years of the Testator's death; hence, the words "born … within twenty-one (21) years of my death" in Clause 5 of the Will cannot refer to grandsons born within 21 years *after* the Testator's death.[42] As Julian was born on 25 November 1981, he was born within the 21-year period preceding the Testator's death on 21 October 1992.

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39 LTCT at pp 138–141 and 144–146 (Exhibit LTCT-5: Wife's Petition in the District Court of the Hong Kong Special Administrative Region dated 6 May 1999 filed 10 May 1999 and Wife's Statement as to Arrangements for Child in the District Court of the Hong Kong Special Administrative Region dated 6 May 1999); Day 5 Transcript at p 63 lines 14–21.

40 Day 5 Transcript at p 64 lines 18–24.

41 Day 5 Transcript at p 67 lines 22–25 and p 68 lines 1–11.

42 Day 5 Transcript at p 3 lines 12–19 and p 4 lines 14–22.

33 Since the class of beneficiaries closes on the Testator's death, the date to adjudge whether a potential beneficiary meets the Custody Care and Control Requirement must also be the date of the Testator's death, namely, 21 October 1992.[43]

34 On that date, Julian was within Peng On's custody, care and control. The concepts of "custody" and "care and control" are legal constructs that require a formal legal determination. In the absence of a court order depriving Peng On of "custody" or "care and control", the default position is that Julian remains within Peng On's custody and care and control. As the divorce decree *nisi* (which granted sole custody to Julian's mother) was only made in the Hong Kong Matrimonial Proceedings on 22 October 1999, Peng On retained custody, care and control over Julian on the date of the Testator's death (*ie*, 21 October 1992).[44]

35 In the alternative, the Custody Care and Control Requirement can have no application to an adult beneficiary such as Julian, for an adult with full legal capacity to act on their own behalf is incapable of being in anyone's custody or care and control.[45]

36 Finally, Julian objects to the admissibility of the out-of-court statements of Julian's mother made in her divorce petition in the Hong Kong Matrimonial Proceedings. Thomas's counsel failed to give the requisite 's 32 notice' in O 15

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43 Day 5 Transcript at p 4 lines 23–25, p 5 lines 1–10 and p 8 lines 11–20.

44 Day 5 Transcript at p 8 lines 20–25, p 9 line 1, p 21 lines 18–25, p 27 lines 8–17, p 28 lines 5–10, p 31 line 25 and p 32 lines 1–17.

45 Day 5 Transcript at p 5 lines 18–25, p 6 lines 1–13 and p 16 lines 7–13.

r 16(7) of ROC 2021. In any event, the statements do not qualify for any of the statutory exceptions in s 32(1) of the EA 1893.[46]

Thomas's case

37 Thomas submits that Julian is not a qualifying beneficiary under the Will as he does not fall within the class of beneficiaries in the Grandson Gift Clause and fails to satisfy the Custody Care and Control Requirement.

38 I summarise his arguments as follows. The words "born … within twenty-one (21) years of my death" in Clause 5 of the Will refer to grandsons born within 21 years *after* the Testator's death. They do not embrace pre-existing grandsons surviving at the time of the Testator's death. The phrase "surviving grandsons" thus refers to grandsons who are born within the 21 years after the Testator's death and who are still alive at the end of that period.[47]

39 Moreover, the Custody Care and Control Requirement is a continuing requirement to be satisfied by a would-be recipient of the Estate. Thomas argues that the date to determine a beneficiary's satisfaction of that requirement is the date of distribution to that beneficiary from the Estate. This means that the Custody Care and Control Requirement must be fulfilled at the time when a beneficiary is about to receive their distribution from the Estate. Thomas accepts, in the alternative, that it makes no difference to his case if the date to adjudge a beneficiary's satisfaction of that requirement is 21 years after the

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46 Day 5 Transcript at p 31 lines 8–13, p 32 lines 24–25, p 33 lines 1–25 and p 34 lines 1–12.

47 Day 5 Transcript at p 42 lines 4–15.

Testator's death when the full class of beneficiaries is capable of being ascertained.[48]

40 Accordingly, an adult beneficiary such as Julian must have remained in Peng On's custody, care and control until he attained his majority during the period prior to 21 October 2013, which is 21 years after the Testator's death.[49] This requirement is not met. Once the divorce decree *nisi* in the Hong Kong Matrimonial Proceedings was rendered on 22 October 1999, Peng On at the least ceased to have legal custody of Julian.[50]

41 Thomas submits in the alternative that Julian was not in Peng On's custody, care and control at the date of the Testator's death (*ie*, 21 October 1992).[51]

42 In support of the latter argument, Thomas seeks to admit the statements of Julian's mother within her divorce petition in the Hong Kong Matrimonial Proceedings. They would be tendered to prove the truth of two matters: first, an agreement to separate made in November 1991 with Peng On; and second, their arrangements for Julian to live with her thereafter, with Peng On being given reasonable access to Julian.[52] Thomas argues that an extension of time should be granted under O 3 r 4 of ROC 2021 to comply with the giving of the 's 32

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48 Day 5 Transcript at p 53 lines 15–25, p 54 lines 1–25, p 55 lines 1–25 and p 56 lines 1–25.

49 Day 5 Transcript at p 42 lines 15–19 and p 58 lines 5–21.

50 Day 5 Transcript at p 56 lines 17–25 and p 58 lines 5–25.

51 Day 5 Transcript at p 59 lines 4–25 and p 60 line 1.

52 LTCT at pp 138–141 and 144–146 (Exhibit LTCT-5: Wife's Petition in the District Court of the Hong Kong Special Administrative Region dated 6 May 1999 filed 10 May 1999 and Wife's Statement as to Arrangements for Child in the District Court of the Hong Kong Special Administrative Region dated 6 May 1999).

notice'. Given the materiality of the evidence, it would be in the interest of justice for the court to admit and consider it.[53]

43 Thomas also submits that Julian's mother's out-of-court statements are admissible under the exceptions in s 32(1)(*e*) (statements relating to the existence of relationships including marriage) and s 32(1)(*j*)(iii) (statements of witnesses outside Singapore where it is not practicable to secure their attendance at trial) of the EA 1893.[54]

Issues to be determined

44 The central issue in dispute is whether Julian is a qualifying beneficiary under the Will read together with the Codicil. To that end, I proceed to consider the following two questions –

(a) First, whether Julian falls within the class of beneficiaries under the Grandson Gift Clause of the Will; and

(b) Second, whether Julian satisfies the Custody Care and Control Requirement in the Codicil, which I divide into the following three sub-issues:

(i) the meaning of the words "custody, care and control" in the Codicil;

(ii) the date on which a qualifying beneficiary must satisfy the Custody Care and Control Requirement; and

53 Day 5 Transcript at p 63 lines 1–25 and p 64 lines 1–4 and 17–24.

54 Day 5 Transcript at p 65 lines 14–25, p 66 lines 1–8 and 21–25 and p 67 lines 1–13.

(iii) whether, on the evidence before me, Julian satisfied the Custody Care and Control Requirement on the applicable date.

Issue 1: Julian falls within the class of beneficiaries under the Grandson Gift Clause, which includes both pre-existing grandsons and grandsons born within 21 years after the Testator's death

45 First, I must decide whether Julian falls within the class of beneficiaries under the Grandson Gift Clause of the Will.

46 On this issue, I find that Julian does fall within that class of "surviving grandsons born of my sons … within twenty-one (21) years of my death". On a proper construction, the Grandson Gift Clause embraces pre-existing grandsons surviving at the time of the Testator's death, such as Julian, *as well as* future grandsons born within 21 years after the Testator's death. I now provide my reasons for finding in favour of this interpretation.

47 I start with Lord Romer's famous description in *Perrin and others v Morgan and others* [1943] AC 399 at 420 ("*Perrin*") of the task undertaken by the court in construing a will:

> … I take it to be a cardinal rule of construction that a will should be so construed as to give effect to the intention of the testator, such intention being gathered from the language of the will read in the light of the circumstances in which the will was made. To understand the language employed the court is entitled, to use a familiar expression, to sit in the testator's armchair. When seated there, however, the court is not entitled to make a fresh will for the testator merely because it strongly suspects that the testator did not mean what he has plainly said …

48 As explained by the Court of Appeal in *Foo Jee Seng and others v Foo Jhee Tuang and another* [2012] 4 SLR 339 at [17], the testator's intention "must predominantly be derived from the wording of the will itself, although the

circumstances prevailing at the time the will was executed may be taken into account".

49 The armchair principle, or a survey of the prevailing circumstances known to the Testator, is an intrinsic part of the exercise of interpretation. The identity and circumstances of the person making a statement are inherent to our understanding of what they are saying *by that statement*. However, the armchair principle does not mandate a factual inquiry into what the testator's real intention might have been, separate from the words used, nor does it in any way permit the substitution of a speculated intention for the expressed intention.

50 With this principle in mind, I turn to the Grandson Gift Clause (see at [12] above). Looking at it as a matter of abstract logic, there are four logically possible constructions of that provision:

(a) First, "surviving grandsons born of my sons … within twenty-one (21) years of my death" means grandsons born within the 21 years *after* the Testator's death, and still surviving at the end of that period. This is the interpretation favoured by Thomas.

(b) Second, that wording could also mean grandsons surviving the Testator at the time of his death and born within the 21 years *before* his death. This is the interpretation favoured by Julian.

(c) Third, that wording could mean grandsons born within 21 years *both before and after* the Testator's death and surviving at the close of that 42-year period.

(d) Lastly, the phrase "surviving grandsons" could mean grandsons surviving the Testator at the time of his death, with the words "born …

within twenty-one (21) years of my death" providing an outer limit or a final deadline within which any future grandsons may be born to qualify as a beneficiary under this class.

51 These readings are all logically possible. Grandsons form a single class, which is itself a subset of the broader class of grandchildren. The text plainly excludes granddaughters. It also plainly excludes sons of the Testator's daughters. Adopting the armchair principle, in considering whether and how the class is to be further narrowed, the court has regard to the then prevailing circumstances known to the Testator. What was visible to the Testator from his armchair may strengthen or weaken the plausibility of any of these interpretations. In particular, the first and second interpretations each poses different difficulties or concerns, namely why the Testator would want to exclude existing grandsons (under the first interpretation) or future grandsons (under the second interpretation). Consider the textual exclusion of grandsons by the Testator's daughters: this gels with the objective facts about the Testator's own concerns about grandsons inheriting from his Estate despite their having been brought up within the separate household of their mother,[55] and his patrilineal view of the world, as evidenced by the textual emphasis of the Grandson Gift Clause on grandsons who are in his "male hereditary line".[56] Additionally, his emphasis on patrilineal descent is further demonstrated by his making larger bequests to his sons (Peng On and Thomas) than to his wife and daughters.[57] A further indication, although one to which I would accord less weight, is that the Testator chose sons as his executors and trustees, rather than

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55 Day 2 Transcript at p 22 lines 3–11, p 23 lines 16–19 and p 24 lines 1–7.

56 JFYL at p 57 (Exhibit JFYL-62: Last Will and Testament of Lim Koon Yew @ Lim Kuen Yew dated 9 June 1992 at cl 5).

57 JFYL at p 56 (Exhibit JFYL-62: Last Will and Testament of Lim Koon Yew @ Lim Kuen Yew dated 9 June 1992 at cll 3 & 4).

his daughters.[58] But it is hard to discern a logical reason for wanting to benefit only existing grandsons or only future grandsons in the absence of some compelling circumstance.

52 Julian's counsel argues that the Grandson Gift Clause is clear on its face and that the second interpretation is unambiguously the correct one. Hence, there is no scope for reliance upon extrinsic evidence. I do not agree. There are several textual points from other parts of the Will that militate against the second interpretation.

53 First, I accept that the word "within", in its ordinary meaning, when applied to a period of time, means something that is enclosed in the bounds or confines of the prescribed time period. Accordingly, in respect of the Grandson Gift Clause, this could mean a period of 21 years before the Testator's death, a period of 21 years after his death, or both such periods. However, in other clauses of the Will, the word "within" is only ever employed to mean 'after'. Clause 8 states that "[m]y estate shall be distributed within 18 years of my death", which must obviously mean '18 years after my death' and not before.[59]

54 Clause 6 provides for moneys to be given to any other children of the Testator "provided such claims is [*sic*] made known to the Trustees in writing within one year of my death".[60] Again, this can only sensibly mean 'within one year after my death' and not before.

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58 JFYL at p 55 (Exhibit JFYL-62: Last Will and Testament of Lim Koon Yew @ Lim Kuen Yew dated 9 June 1992 at cl 1).

59 LTCT at p 82 (Exhibit LTCT-5: Last Will and Testament of Lim Koon Yew @ Lim Kuen Yew dated 9 June 1992 at cl 8).

60 LTCT at p 81 (Exhibit LTCT-5: Last Will and Testament of Lim Koon Yew @ Lim Kuen Yew dated 9 June 1992 at cl 6).

55 The use of the word "within" in Clauses 6 and 8 to mean 'after' cannot be disregarded. The "court should compare and contrast identical words used in different parts of the will so as to elucidate the most complete meaning or intention that should be ascribed to the words used": *Goh Nellie v Goh Lian Teck and others* [2007] 1 SLR(R) 453 ("*Nellie Goh*") at [61].

56 Second, the lines preceding the Grandson Gift Clause in Clause 5 of the Will lend further support for the view that "within twenty-one (21) years" was intended to mean 21 years 'after' the Testator's death and not before. Clause 5 provides for a portion of the Estate to be dedicated to providing monthly maintenance to the Testator's wife during her lifetime and to maintaining the Testator's grave "for a period of twenty-five years after my death"; then, "[u]pon the expiry of the said twenty-five years", the moneys may be distributed amongst certain named beneficiaries.[61]

57 As these are the lines *immediately* preceding the Grandson Gift Clause in Clause 5, they provide contextual support for the view that all the time periods stipulated in Clause 5 were contemplated to run from the date of the Testator's death onwards. These are part of "the overall architecture of the will, meaning the structural placement of certain words and phrases. If certain clauses are found in one area of the will but not another, this cannot readily be dismissed as being without significance, unless the context indicates otherwise": *Nellie Goh* at [61].

58 Lastly, I consider Julian's argument that it would conflict with Clause 8 to interpret the Grandson Gift Clause to include grandsons born within 21 years *after* the Testator's death. Clause 8 requires the Estate to be distributed within

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[61] LTCT at pp 80–81 (Exhibit LTCT-5: Last Will and Testament of Lim Koon Yew @ Lim Kuen Yew dated 9 June 1992 at cl 5).

18 years of his death (see at [32] above). In my view, this argument does not take Julian's case very far. As mentioned, Clause 5 provides for a portion of the Estate to be applied to the monthly maintenance of the Testator's wife during her lifetime and the maintenance of his grave for a minimum period of 25 years after his death. For this reason alone, the 18-year deadline in Clause 8 would not operate to override all contrary timelines prescribed in the Will's specific bequests.

59 Coming back to the armchair principle, I find that there were five important circumstances prevailing at the time of the making of the Will in June 1992, namely that:

(a) The Testator learnt of his grandson Julian in or about February 1992 from Peng On, a discovery that made him happy such that he wanted to meet Julian.[62]

(b) Peng On told the Testator that he was separated from his wife and that Julian was not residing in Singapore.[63]

(c) The Testator desired to meet Julian and expressed this to Peng On.[64]

(d) At the time of the making of the Will, Peng On was between 40 and 41 years of age while Thomas was between 24 and 25 years of age; hence, both had the potential to father sons subsequent to that date.[65]

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62 LTCT at paras 15–17; KKY at para 5; GLGH at para 5; VLGQ at para 5.

63 LTCT at para 15; KKY at para 4; GLGH at para 4; VLGQ at para 4.

64 LTCT at para 16; KKY at para 5; GLGH at para 5; VLGQ at para 5.

65 Exhibit P1 (Agreed Family Tree of Lim Koon Yew @ Lim Kuen Yew).

(e) Finally, the Testator was between 75 and 76 years old at the time he made the Will.[66]

60 By the time of the making of the Codicil in October 1992, two additional circumstances existed, namely that:

(a) Peng On had not brought Julian to Singapore to meet the Testator, despite the Testator's repeated requests.[67]

(b) The Testator was about to go for surgery for his cardiothoracic aneurysm that entailed some risks, although I do not find that he believed he was likely to pass away at the time of the surgery.[68] Mr Nair gave clear evidence that the Testator expected to survive his operation.[69]

61 The extrinsic facts in [59(a)]–[59(c)] and [60(a)] above are established by the evidence of Thomas, as well as the evidence of his sisters and mother on the February 1992 Lunch. I note that Peng On's evidence disputed some of these facts. Nonetheless, he accepted that he had informed the Testator that he had a son, which made the Testator very happy.[70] Peng On also accepted that he never brought Julian to meet the Testator before his death.[71] However, Peng On disagreed that he informed the Testator at the February 1992 Lunch that he had

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66 Exhibit P1 (Agreed Family Tree of Lim Koon Yew @ Lim Kuen Yew); LTCT at p 85 (Exhibit LTCT-5: Certificate of Registration of Death for Lim Koon Yew @ Lim Kuen Yew dated 22 October 1992).

67 LTCT at paras 17–19; KKY at paras 6–7; GLGH at paras 6–7; VLGQ at paras 6–7.

68 Day 2 Transcript at p 17 lines 9–13.

69 Day 2 Transcript at p 17 lines 4–25 and p 18 lines 1–3.

70 Day 1 Transcript at p 86 lines 1–4.

71 Day 1 Transcript at p 102 lines 17–25, p 103 lines 1–16 and 23–25 and p 104 lines 1–6.

separated from Julian's mother.[72] He also disagreed that he been asked by the Testator at the February 1992 Lunch to bring Julian to meet him in Singapore.[73] Peng On also denied that the Testator made repeated requests to see Julian but accepted that such a request had been made at some point.[74]

62 On these disputed facts, I prefer the evidence of Thomas and that of his sisters and mother over the contrary evidence of Peng On. Their evidence is consistent with Mr Nair's evidence. Mr Nair gave evidence that the Testator relayed to him sometime in 1992 that Peng On had separated from his wife,[75] and that he was looking forward to meeting Peng On's son and felt frustrated at not having met him in person.[76]

63 I accept Mr Nair's evidence as credible. He is a neutral witness who is not aligned with the interests of either of the Parties. He has no personal interest in the outcome of the proceeding and has no reason to give evidence favouring either of the Parties' cases. Moreover, I consider that Mr Nair's evidence corroborated the evidence of Thomas and that of his sisters and mother while casting doubt on Peng On's evidence to the contrary. Thus, I accept the evidence of Thomas and that of his sisters and mother that, at the February 1992 Lunch, Peng On told the Testator that he was separated from his wife, and that the Testator requested that Peng On bring Julian to meet him in Singapore and subsequently felt disappointed at not having met Julian.

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72 Day 1 Transcript at p 95 lines 14–18.

73 Day 1 Transcript at p 102 lines 1–6.

74 Day 1 Transcript at p 116 lines 2–5.

75 Day 2 Transcript at p 22 lines 3–5, p 60 lines 17–22 and p 66 lines 20–22.

76 Day 2 Transcript at p 24 lines 8–17, p 32 lines 11–14 and p 60 lines 17–22.

64 I should add that Mr Nair also testified that the Testator's instructions were for the Grandson Gift Clause to apply to both pre-existing grandsons at the time of the Testator's death and grandsons who are born within 21 years of his death.[77] I caution myself that the armchair principle does not permit admission of the Testator's intention in this way, and I exclude Mr Nair's evidence on this point from my consideration.

65 The prevailing circumstances at [59]–[60] above offer no support to any construction excluding either grandsons born before the Testator's death or grandsons born after his death. To the contrary, putting myself in the Testator's armchair, I find that the fact that the Testator had come to know that Peng On had a son supports the inclusion of existing grandsons. At the same time, the age gap between the Testator and Thomas of more than fifty years supports the inclusion of grandsons born after the Testator's death, given that Thomas was in his early twenties and not yet married, while the Testator was in his mid-seventies. This is because it was likely to have been within the Testator's contemplation that Thomas might father sons *after* his own death.

66 For all these reasons, I find that the testamentary intention expressed in the Grandson Gift Clause was for the class of beneficiaries to include existing grandsons born before the Testator's death (*ie*, "surviving grandsons") and future grandsons born within 21 years *after* the Testator's death.

67 I reject Julian's argument that this is a textually untenable reading of the Grandson Gift Clause. I disagree with his submission that this interpretation is only viable if the clause had included the following words in bold and brackets: "[t]he balance 20% of my estate I bequeath to all my surviving grandsons born

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[77] Day 2 Transcript at p 35 lines 8–14.

of my sons (the male hereditary line) **[and/or]** within twenty-one (21) years of my death". That would be an overly semantic reading of the clause. Wills should be construed purposively and not literally and pedantically (see *Chan Yun Cheong (trustee of the will of the testator) v Chan Chi Cheong (trustee of the will of the testator)* [2021] 2 SLR 67 at [57]).

68 Moreover, applying the ordinary meaning of the word "within" (see at [53] above), the reference to "within twenty-one (21) years" could just as easily be intended to impose a hard outer limit or the latest date by which any eligible grandsons may be born. That would have the effect of including any grandsons born before the latest possible date (*ie*, 21 years after the Testator's death) as eligible members of the class.

69 I also reject Thomas's argument that the words "surviving grandsons" can be read to mean 'surviving at the end of the 21-year period *after* the death of the Testator'. The natural meaning of the word "surviving" in the context of this clause is in relation to the Testator, meaning surviving *him*. This happened upon his death. This interpretation also coheres with the ambulatory nature of a will, which should be construed to speak and take effect as if it had been executed immediately before a testator's death, unless a contrary intention appears in the will (see s 19, Wills Act 1838 (2020 Rev Ed)).

70 On my reading of the Grandson Gift Clause, the fourth interpretation (see at [50(d)] above) is the most plausible one. The clause covers (a) grandsons born *before* the Testator's death who survive the Testator (whether born before or after the making of the Will) and (b) grandsons born *after* his death but within 21 years thereafter.

71 I should add that the introduction of the Custody Care and Control Requirement makes the most sense against the background that Peng On's son *could* qualify as a beneficiary under the Will and could stand to inherit from the Estate *even if* he was no longer in Peng On's custody, care and control – hence the fears expressed by the Testator about this to Mr Nair and his desire to add that limitation into the Codicil.[78] This militates against Thomas's interpretation that the clause was *only* intended to apply to grandsons born within 21 years after the Testator's death. If that had been the Testator's intention all along, there would have been no reason for him to worry that Julian might stand to inherit under the Will even if he was in his mother's sole custody, care and control.

72 Thus, I find that on a proper construction of the Grandson Gift Clause, it includes a beneficiary like Julian, who was born to the Testator's son (Peng On) and is a "surviving grandson" born prior to, and still living at, the Testator's death.

Issue 2: Julian does not satisfy the Custody Care and Control Requirement

The meaning of the Custody Care and Control Requirement in the Codicil

73 The next issue I must decide is whether Julian satisfies the Custody Care and Control Requirement in Clause 1(i) of the Codicil. To do that, I must first determine the meaning of the words "custody, care and control".

74 As a preliminary point, Parties agree that there are no material differences between Hong Kong law and Singapore law on the terms "custody,

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78 Day 2 Transcript at p 22 lines 3–21.

care and control", and that Singapore law should be applied in the construction of those terms.[79]

75 The two terms "custody" and "care and control" are straightforward ones. "Custody" refers to the parental right and responsibility to decide longer-term and more significant matters affecting the child's welfare and upbringing, while "care and control" refers to the parental right and responsibility to make shorter-term day-to-day decisions for the child (see *CX v CY (minor: custody and access)* [2005] 3 SLR(R) 690 at [31]–[33]). For this reason, the parent with "care and control" is also generally the parent that the child primarily lives with and who is the child's primary caregiver (see *AQL v AQM* [2012] 1 SLR 840 at [6]–[8] and *TAU v TAT* [2018] 5 SLR 1089 at [11]).

76 Julian argues that "custody" and "care and control" are legal constructs referring to legal rights and powers. Therefore, a parent can only be said to lose custody or care and control once a legal act – such as a court order – formally deprives them of such rights.

77 I accept that "custody" and "care and control" are legal constructs in relation to parental arrangements for their children (see *VJM v VJL and another appeal* [2021] 5 SLR 1233 at [18] and *VET v VEU* [2020] 4 SLR 1120 at [50]).

78 However, I do not accept Julian's view that a parent cannot be said to have lost "custody" or "care and control" over their child in the absence of a formal legal determination. A parent can give up "custody" or "care and control" by agreement with the other parent. These matters are often dealt with in formal separation deeds, but there is no reason why they may not equally be

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[79] Day 1 Transcript at p 44 lines 16–25 and p 45 lines 1–9; Day 2 Transcript at p 1 lines 11–22.

dealt with by an oral agreement between parents or even impliedly by their conduct.

79 It is helpful to recall the Testator's concern as reflected in Mr Nair's evidence.[80] Mr Nair put the Testator's concern in the following terms:[81]

> He said "I heard that Lim Peng On is separated from his wife. What if the son inherits the share and then it goes to the lady, Peng On's wife", he didn't want that happening. So he said, "I only want my grandsons who are with my sons in terms of custody, care and control to inherit. Once they lose custody, care and control, they are not to inherit the share." …

80 Mr Nair also testified that "what he said was the son ***must have the child with him*** so that the child will inherit the money and not go to the mother of the child [emphasis in bold and italics added]" to "benefit [her] indirectly through the son".[82]

81 The Testator had not yet met Julian despite his requests to do so, and this raised the question that Peng On might not have custody, care and control over his son, Julian.[83] Indeed, this concern is consistent with the Testator's apparent preference for succession by the male line, evinced in the Grandson Gift Clause, which was drafted in terms of the "male hereditary line" (see at [51] above). This belief system is of a piece with thinking that a grandson who is not brought up by one's son is effectively lost to one's patrilineal family.

82 For these reasons, I do not accept Julian's submission that for the purpose of the Custody Care and Control Requirement, Peng On had custody

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80 Day 2 Transcript at p 21 lines 19–25 and p 22 lines 1–19.

81 Day 2 Transcript at p 22 lines 3–11.

82 Day 2 Transcript at p 23 lines 16–18 and p 24 line 7.

83 Day 2 Transcript at p 21 lines 19–25 and p 22 lines 1–21.

and care and control over him unless and until a formal legal determination was made otherwise. If Peng On had agreed with Julian's mother that he would no longer have custody or care and control over Julian, that would mean that Julian does not satisfy that requirement. Such an agreement could have been made expressly or it could be implied from the conduct of the parents in terms of their arrangements for the child.

The date on which the Custody Care and Control Requirement must be satisfied is 21 years after the Testator's death

83 The next question is the date on which Julian must have satisfied the Custody Care and Control Requirement. As I have held that the Grandson Gift Clause must be construed to include in the class of eligible beneficiaries all pre-existing grandsons surviving the Testator and all grandsons born within 21 years of his death, it follows that any property interests and shares of the beneficiaries can only be ascertained at the date when the full class of beneficiaries may be determined – *ie*, 21 years after the Testator's death, which is 21 October 2013.

84 Julian argues instead that the date to adjudge whether he was in Peng On's custody, care and control is the date of the Testator's death. This would be correct if he was also correct that only grandsons born prior to the Testator's death were included. However, he is not correct on that latter point. As the class includes grandsons born within 21 years after the Testator's death, that class could not have closed upon the Testator's death.

85 Nor do I consider that the date of adjudgment can be fixed at the date of the Testator's death for pre-existing "surviving grandsons" but fixed at the end of the 21-year period for future grandsons born in that time period. This would mean that a pre-existing grandson who was in the custody and care and control of the Testator's son at the time of the Testator's death, but subsequently

removed from that son's custody and care and control, would remain eligible to inherit under the Grandson Gift Clause. Such a result would frustrate the testamentary intention behind the Custody Care and Control Requirement.

86 For completeness, I also reject Thomas's submission that the Custody Care and Control Requirement is a continuing one which must be satisfied by the beneficiary as and when distribution of the Estate takes place, even *beyond* the 21-year period after the Testator's death. That would not make sense. Property rights cannot be left perpetually in suspended animation or in limbo. There must be a definite date when a proprietary entitlement vests. Logically, that date must be when the complete class of qualifying beneficiaries can be drawn-up to ascertain the aliquot share of each beneficiary in the subject-matter of the Grandson Gift Clause (*ie*, 20% of the Estate).

87 Thomas's view that the Custody Care and Control Requirement continues to run beyond the 21-year period after the Testator's death would mean that, even at that date, a purported beneficiary's entitlement (and, by extension, the relative share of every other beneficiary) would remain indeterminable and contingent upon potential future events (*ie*, the possible loss of custody or care and control). Moreover, if this were the case, then the date for adjudging whether the Custody Care and Control Requirement was satisfied would be left to the efficiency or otherwise of the executors. It would be a floating date. That cannot be the case. There must be a definite date when a proprietary right is ascertained and then vests. It is on that date that the validity of each purported beneficiary's proprietary entitlement stands to be determined.

88 Thus, Julian bears the burden of proving that he satisfied the Custody Care and Control Requirement as of 21 October 2013, being 21 years after the death of the Testator.

The evidence shows that Julian does not satisfy the Custody Care and Control Requirement

Julian did not satisfy the Custody Care and Control Requirement 21 years after the Testator's death

89 Before 21 October 2013, Peng On had lost both custody and care and control over Julian. It is clear on the face of the divorce decree *nisi* rendered by the District Court in the Hong Kong Matrimonial Proceedings that custody of Julian was awarded to Julian's mother on 22 October 1999 with reasonable access accorded to Peng On.[84] At that time, Julian was between 17 and 18 years old. Thus, during Julian's minority, Peng On ceased to have both custody and care and control over him. At the least, from 22 October 1999 onwards, his parental right (and responsibility) was limited to reasonable access. The decree of the Hong Kong District Court is relevant and indeed conclusive concerning the legal character of sole custody of Julian being granted to Julian's mother as of the date of the decree: see s 43(2), EA 1893.

90 Julian argues that the Custody Care and Control Requirement does not apply to him as of 21 October 2013 because by then he had attained his majority. Thus, on that date, he as an adult could not have been in either parent's custody or care and control. I do not agree that this is the right approach.

91 It simply cannot be reconciled with the text of the Custody Care and Control Requirement, which restricts the class of grandsons who qualify under the Grandson Gift Clause to "only those grandsons who are in the custody, care

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[84] LPO at pp 78–79 (Exhibit LPO-17: Order of the Judge of the District Court of the Hong Kong Special Administrative Region dated 22 October 1999); LTCT at pp 130–131 (Exhibit LTCT-5: Order of the Judge of the District Court of the Hong Kong Special Administrative Region dated 22 October 1999).

and control of my sons and does not include those grandsons who are no longer in the custody, care and control of my sons".[85]

92 The purpose behind the Custody Care and Control Requirement is to exclude grandsons who *do not remain* in the custody, care and control of the Testator's sons when that parental relationship is relevant, namely during the child's minority. That much is clear from the express negative phrasing that the class "does not include" grandsons who are "no longer in" such custody, care and control. To put that requirement another way, it requires positively that adult male-line grandsons, to be eligible to inherit, must have *remained* in the custody and care and control of the Testator's sons during their minority.

93 I do not read the Custody Care and Control Requirement as providing, for example, that a grandson who was raised under his mother's sole custody and care and control for his entire minority is ineligible to inherit if the 21-year period ended while he was still a minor but is eligible to inherit if the 21-year period ended after he attained majority. That would not be a sensible reading of the Custody Care and Control Requirement and would not accord with the Testator's intention as expressed in the Will and Codicil – *ie*, that a grandson who was not raised by his son is lost to his patrilineal household (see at [81] above) and his "male hereditary line" (see at [51] above).

94 Accordingly, I find that, in respect of an adult beneficiary such as Julian, the Custody Care and Control Requirement means that, during his minority, he must have been in the custody, care and control of the Testator's son. As of 21 October 2013, this condition was not met, as Julian had been removed from

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[85] JFYL at p 60 (Exhibit JFYL-63: Codicil of Lim Koon Yew @ Lim Kuen Yew dated 20 October 1992 at cl 1(i)).

Peng On's custody, care and control no later than when the divorce decree *nisi* was rendered on 22 October 1999.

95 Hence, I find that Julian is not a qualifying beneficiary under the Will as he does not satisfy the Custody Care and Control Requirement in the Codicil. For completeness, I proceed to consider in the alternative whether Julian would qualify if the date of determination is not 21 years after the Testator's death (21 October 2013), but instead the date of the Testator's death (21 October 1992).

In the alternative, Julian did not satisfy the Custody Care and Control Requirement at the time of the Testator's death

(1) The out-of-court statements of Julian's mother are inadmissible as evidence as no notice was provided of Thomas's intention to rely on s 32(1) of the EA 1893

96 Thomas seeks to rely on the out-of-court statements of Julian's mother made in the course of the Hong Kong Matrimonial Proceedings for the truth of the matters set out therein (see [42] above).

97 The EA 1893 established an inclusionary regime. Evidence may not be admitted unless it satisfies the test for admissibility under s 5 of the EA 1893. This court is only permitted to admit evidence which falls within the scope of s 5 "and of no others". While relevant facts are admissible into evidence, statements of relevant facts (the making of which are not *in themselves* relevant) are not (*Lee Chez Kee* at [67]–[69] and [96]).

98 It follows that, under the EA 1893, I cannot admit and consider Julian's mother's statements made in the Hong Kong Matrimonial Proceedings for the truth of the matters alleged therein unless a statutory exception applies – *eg*, those found in s 32(1) of the EA 1893.

99 For Thomas to invoke the s 32 exceptions, however, he had to comply with O 15 r 16(7) of ROC 2021 by giving a 's 32 notice' to Julian at the time that Thomas's affidavit of evidence-in-chief was served on Julian's counsel, namely, 31 October 2023 (see s 32(4)(*b*), EA 1893).[86] This was not done.

100 Thomas's counsel made a belated application for an extension of time to comply with O 15 r 16(7) of ROC 2021 by 29 January 2024. This was when the letter (copying Julian's counsel) in Exhibit D3 was sent to the Supreme Court Registry, effectively amounting to a 's 32 notice'. As noted at [29] above, this oral application was made on the last day of trial in the middle of the Parties' closing submissions after the Parties had closed their cases.

101 In exercising my discretion to grant an extension of time under O 3 r 4 of ROC 2021, I must consider the Ideals in O 3 r 1(2) and seek to achieve the Ideals in all my orders and directions (see O 3 r 1(3), ROC 2021). Given the serious prejudice that would be occasioned to Julian in the preparation of his case if this extension of time were granted at such a late stage of the proceedings, I deny the application.

102 The purpose of requiring a party to provide notice of their intention to invoke s 32(1) of the EA 1893 is to give their party-opponent early warning of their intent to rely on hearsay evidence. The party-opponent will then have more time to consider their position properly and to make arguments on whether the s 32(1) exception is satisfied or not. This prevents a 'trial by ambush' scenario where the party-opponent is caught by surprise on a material evidentiary issue on the day of the trial itself.

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86 Day 5 Transcript at p 63 lines 18–20.

103 Here, by failing to give a 's 32 notice' to Julian, Julian was deprived of the opportunity to consider how to rebut the truth of the hearsay facts alleged by Julian's mother in her divorce petition filed in the Hong Kong Matrimonial Proceedings. Steps could have been taken, including contacting Julian's mother during the case preparation stage to ask for her position on the truth of those out-of-court statements and admit her evidence if need be. None of these steps was possible since the 's 32 notice' was not given on time. By the time the extension of time was sought, it was too late for Julian to take such steps.

104 I do not agree with Thomas that this grave prejudice to Julian's right to be heard and to make his case with fair warning of Thomas's case is cured or mitigated by the fact that the divorce petition was included within Thomas's affidavit of evidence-in-chief and had been provided to Thomas by Julian on 1 August 2023 pursuant to a disclosure order (see the order in HC/ORC 3292/2023 dated 19 July 2023).[87]

105 There is a legal distinction between relying on the divorce petition to prove the *fact* that the Hong Kong Matrimonial Proceedings occurred, versus relying on Julian's mother's statements in the petition for the truth of the matters therein. This is a distinction that is central to the inclusionary scheme of the EA 1893. It is the difference between a fact which is *in itself* relevant – and hence, admissible under s 5 – as opposed to statements of relevant facts which are irrelevant and inadmissible thereunder (save for the exceptions in s 32) (see *Lee Chez Kee* at [67]).

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87 Order of Court numbered HC/ORC 3292/2023 in HC/OC 233/2022 and HC/SUM 1519/2023 dated 19 July 2023 filed 23 July 2023; Affidavit of Julian Frederick Yu Lim affirmed on 8 August 2023 at pp 4–6 (Exhibit JFYL-47: Claimant's Supplementary List of Documents dated 1 August 2023); Day 1 Transcript at p 56 lines 20–25, p 109 lines 15–25 and p 110 lines 1–2.

106 Julian was deprived of fair notice of Thomas's intent to rely on Julian's mother's out-of-court statements for the truth of the matters therein. Julian had already closed his case by the time the 's 32 notice' was served on him on 29 January 2024 and the extension of time was sought on 1 February 2024. The prejudice to his right to be heard and to make his case was incurable by that stage of the proceedings, at least not without disproportionate and prejudicial delay to the resolution of this matter. Hence, I deny Thomas's extension of time application, to accord "fair access to justice" to Julian (O 3 r 1(2)(*a*), ROC 2021) and advance "fair and practical results suited to the needs of the parties" (O 3 r 1(2)(*e*), ROC 2021).

107 The result is that Thomas has not fulfilled O 15 r 16(7) of ROC 2021. It is for this court to determine the consequences of any non–compliance with ROC 2021 (see O 3 r 2(4), ROC 2021). The guiding consideration is the extent to which non-compliance with the notice requirement caused prejudice to the opposing party, such that it would be unfair for the non-compliance to be waived (*Gimpex Ltd v Unity Holdings Business Ltd and others and another appeal* [2015] 2 SLR 686 at [137]–[139]). In my view, it is not appropriate to cure the non-compliance by an exercise of the court's discretion. To do so would be unfair to Julian, as the failure to provide the requisite notice prejudiced his ability to prepare his case.

108 Thus, I do not allow Thomas to invoke the statutory exception under s 32(1) of the EA 1893 for non-compliance with the notice requirement in O 15 r 16(7). It follows that Julian's mother's out-of-court statements are inadmissible under s 5 of the EA 1893. I disregard them entirely in arriving at my findings.

(2) Julian has not discharged his burden of proof of showing, on the balance of probabilities, that he was in Peng On's custody and care and control at the time of the Testator's death

109 Nonetheless, I find that Julian has not discharged his burden of proof of showing on the balance of probabilities that he satisfied the Custody Care and Control Requirement at the time of the Testator's death (see s 103(1), EA 1893), which was 21 October 1992.

110 It is clear that the Custody Care and Control Requirement is *conjunctive* – *ie*, Julian must show that Peng On had *both* custody *and* care and control at the appropriate date. The phrasing of the requirement supports this interpretation: it frames the need for the Testator's son to have "custody, care and control" as one composite element. Julian's counsel accepted this in his closing submissions.[88]

111 On the totality of the evidence before me – disregarding the inadmissible evidence in Julian's mother's statements – I find that Julian has failed to show, on a balance of probabilities, that he was in Peng On's care and control as of 21 October 1992.

112 It is not disputed that after January 1992, Peng On ceased to reside with Julian and his mother in Japan.[89]

113 Moreover, Julian resided with his mother in Japan until she left for Hong Kong in December 1993, and thereafter Julian remained in Japan with his family

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88 Day 5 Transcript at p 8 lines 8–10.

89 JFYL at para 11; LPO at para 16; Day 1 Transcript at p 35 lines 23–25, p 36 lines 1–12, p 68 lines 23–24, p 69 lines 3–5, p 102 lines 17–25 and p 103 lines 1–16.

friend.[90] Hence, when the Testator passed away on 21 October 1992, Julian was residing with his mother in Japan, while Peng On was residing in Singapore away from both Julian and his mother. This was not a fleeting or transitory arrangement, such as a short-term overseas vacation. From January 1992 to December 1993, for nearly two years, Julian lived *solely* with his mother and not Peng On. It was not a situation where both parents, while separated from each other, lived in the same premises with the child or even nearby. Nor was it a situation where Julian shuttled regularly between his mother's home and Peng On's home. Neither Julian nor Peng On provided material on which I could find that Peng On was asserting or exercising any form of care and control over Julian as of 21 October 1992.

114 Thus, Julian's care arrangements from January 1992 to December 1993 were such that one parent lived with and had sole care and control over him, while the parent without care and control lived overseas. That Julian kept in touch with Peng On through periodic phone calls does not change this fact.[91] That would prove only that Peng On had access to Julian but not care and control over him.

115 For completeness, I note that Julian gave evidence that he would travel to Hong Kong to visit his mother and to Singapore to visit his father during academic term breaks. Other times, he would visit both parents in Hong Kong.[92] This arrangement only began after Julian's mother left Japan for Hong Kong in December 1993 and Julian began studying in England in 1994.[93] Hence, at the

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90 JFYL at para 12.

91 JFYL at para 11; LPO at para 16; Day 1 Transcript at p 71 lines 13–25.

92 JFYL at para 12; Day 1 Transcript at p 72 lines 11–25 and p 73 lines 1–9.

93 JFYL at para 12; Day 1 Transcript at p 37 lines 4–24.

time of the Testator's death (*ie*, 21 October 1992), when Julian was still living in Japan with his mother, he only spoke to Peng On over the telephone on a biweekly basis, with no mention of Julian visiting him in Singapore periodically.[94] Indeed, it was precisely Peng On's failure to arrange for Julian to come to Singapore prior to the Testator's death that had caused frustration to the Testator.[95] Peng On admitted on the stand that Julian did not come to Singapore prior to the Testator's death.[96]

116 Peng On also gave evidence that his reason for leaving Japan in January 1992 was not because he had ended his relationship with Julian's mother but for work-related reasons only.[97] I do not accept Peng On's evidence that his leaving Japan and ceasing to reside with Julian and his mother in Japan in January 1992 had nothing to do with the state of his relationship with Julian's mother. I have found that he told his father that he was separated, a finding supported by a neutral witness, Mr Nair, who gave clear evidence of the Testator's instructions that he had heard in 1992 that Peng On was "separated" from his wife and was concerned about Peng On not having custody, care and control over his son.[98]

117 I find that Peng On would not have described himself as "separated" if all he had meant was that he was living in a different country from his wife for work-related reasons. I clarified with Thomas's mother, Mdm Kwok Kwai Yin, the language she would use to speak with the Testator and the language she and the Testator would use to speak with their children. She replied that the Testator

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94 JFYL at para 11; Day 1 Transcript at p 71 lines 17–25.

95 Day 2 Transcript at p 24 lines 8–14.

96 Day 1 Transcript at p 102 lines 19–25, p 103 lines 1–3 and 23–25, p 104 lines 1–25 and p 105 lines 1–23.

97 LPO at para 16; Day 1 Transcript at p 87 lines 15–25 and p 88 lines 1–3.

98 Day 2 Transcript at p 21 lines 1–25, p 22 lines 1–21 and p 60 lines 15–22.

would use Cantonese.[99] As Mdm Kwok had given evidence that Peng On told the Testator at the February 1992 Lunch that he and his wife were "separated", I asked Mdm Kwok if she could recall the exact words Peng On used at the time. She gave evidence that Peng On spoke to the Testator in Cantonese and used the words '*fan hoi zoh*', "which means 'parted their ways'".[100] I consider Mdm Kwok's evidence to lend further corroboration to my inference that Peng On did not cease to live with Julian and his mother in 1992 for work-related reasons but rather his moving to Singapore represented a parting of ways. Her evidence on this point was supported by the testimony of her daughter, Grace, that Peng On told the Testator he and his wife were "separated" in Cantonese.[101]

118 An additional point which undermines Peng On's testimony that he was merely living in a different country for work related reasons is the fact that Peng On and Julian's mother at no time resumed living together after January 1992 (when he left Japan for Singapore).

119 I am also not able to accept Peng On's testimony on points where there is no supporting evidence. This is because he had previously made a sweeping assertion on the question of custody, care and control at the time of the summary judgment application which turned out to be untrue. I infer that he was ready to brush the truth under the carpet in the expectation that no one would look beneath it. Peng On averred in his statutory declaration dated 30 November 2022 (in support of Julian's summary judgment application in HC/SUM 147/2023) that he was "surprised" by Thomas's allegations that Julian did not satisfy the Custody Care and Control Requirement "because although Julian's

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99 Day 4 Transcript at p 23 lines 20–25 and p 24 lines 1–7.

100 Day 4 Transcript at p 24 lines 8–22.

101 Day 4 Transcript at p 30 lines 13–14.

mother … and I divorced in 1999, Julian, our son, was and remained in, throughout his first 21 years, my custody, care and control".[102] This was simply not true, as the later disclosure of the divorce decree *nisi* dated 22 October 1999 proved. I am not able to accept that Peng On did not know the true position concerning custody when he made the statutory declaration.

120 Accordingly, I find that on the date of the Testator's death (21 October 1992), Peng On did not have care and control over Julian, who was in the sole care and control of his mother. Hence, Julian does not satisfy the Custody Care and Control Requirement *even if* the applicable date is the date of the death of the Testator and not – as I have found earlier – 21 years thereafter.

121 As for whether Peng On had custody of Julian together with Julian's mother at that date, there was really no evidence at all of this fact other than Peng On's assertion that he had merely come to Singapore for work and was only at that time physically separated from his wife, so that there had been, as of that time, no agreement or order to displace his default joint custody as a parent.

122 Overall, I find Peng On's evidence to be unsatisfactory. In addition to my earlier reasons for finding Peng On not to be a credible witness (see at [119] above), other aspects of his evidence left much to be desired. During cross-examination, he made broad statements and exhibited pre-emptive exasperation with the cross-examiner that suggested he was either unable or unwilling to descend into proper details that would substantiate his bare assertions of his continuous custody, care and control over Julian. He kept repeating this stock

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102 Affidavit of Julian Frederick Yu Lim in HC/OC 233/2022 and HC/SUM 147/2023 affirmed on 12 January 2023 at p 41 (Exhibit JFYL-23: Statutory Declaration of Lim Peng On declared on 30 November 2022 at para 4).

phrase even in response to cross-examination questions concerning entirely different points.[103] In the absence of objective evidence of his participation in major decisions for Julian at that time, I am not able to find that he continued to have custody of Julian after he left the matrimonial home in January 1992. I have found that Peng On told his father at the February 1992 Lunch that he was separated from his wife and was not living in a different country for work reasons only (see at [63] and [116]–[117] above), contrary to what he has claimed in his evidence.[104] As my assessment of Peng On's credibility is such that I do not accord weight to his testimony that he continued to have joint custody of Julian, I hold that Julian has also not discharged his burden of proof even on the question of custody as of 21 October 1992.

Additional Issues

123 As Julian is not a beneficiary under the Will read with the Codicil and has thus failed in his claim, I also dismiss his claims for an account of the administration of the Estate and for equitable compensation for breaches of fiduciary duty.[105] In relation to the latter claim, I should add that there was no basis for such relief even if he were a beneficiary. Either he was entitled to his share or he was not. There was no evidence of any breach of trust on the part of either executor.

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103 Day 1 Transcript at p 89 lines 1–4 and 20–25, p 90 lines 1–3 and 21–24, p 91 lines 16–23, p 93 lines 15–18, p 94 lines 2–4, 9–11 and 15–21, p 95 line 13, p 96 lines 4–13, p 97 lines 4–9, p 98 lines 9–11, p 99 lines 21–25, p 102 lines 1–19, p 108 lines 12–17, p 132 lines 7–8 and 25, p 133 lines 3–17 and 23–24 and p 134 lines 7–14 and 22–25.

104 LPO at para 16; Day 1 Transcript at p 83 lines 22–25, p 84 lines 1–3, p 87 lines 19–25 and p 88 lines 1–3.

105 SOC(A1) at prayers (E) & (H).

124 Before I conclude, I should briefly mention an issue that I raised to the Parties. I asked whether Parties had considered the potential entitlement of the minor son of Thomas, who was born on 19 January 2012 (within the 21-year period after the Testator's death) and who may have been in the custody and care and control of Thomas at the close of the 21-year period after the Testator's death on 21 October 2013.[106]

125 This issue concerned me as the relief sought by Julian was premised on the assumption that he is the *sole* qualifying beneficiary under the Grandson Gift Clause and therefore entitled to the *whole* of the 20% share of the Estate. I cannot adjudge the validity of Thomas's son's proprietary entitlement as he is a non-party to these proceedings and has not made arguments before me. If I had found Julian to be a qualifying beneficiary, the question would have arisen on how to deal with the potential claim of Thomas's son.

126 However, as I am of the view that Julian is not entitled to inherit under the Will read with the Codicil, this question does not arise.

Conclusion

127 In conclusion:

(a) Julian is a "surviving grandson" who falls within the class of beneficiaries under Clause 5 of the Will because that clause embraces both surviving male-line grandsons born before the death of the Testator and male-line grandsons born within the 21 years thereafter; but

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106 Affidavit of Lim Toong Cheng Thomas affirmed on 27 March 2023 at para 4; Day 3 Transcript at p 71 lines 10–22, p 93 lines 20–25, p 94 lines 1–25 and p 95 lines 1–14.

(b) Julian is not a qualifying beneficiary because he does not satisfy the requirement in Clause 1(i) of the Codicil, as:

(i) Clause 1(i) requires that the grandson remain both in the custody and in the care and control of the Testator's son during his minority;

(ii) The relevant date to determine whether a beneficiary qualifies is 21 years after the death of the Testator, which was 21 October 2013; and,

(iii) Prior to 21 October 2013, Julian had ceased to be in Peng On's custody, care and control as his mother had been granted sole custody of him during his minority.

128 Consequently, Julian is not a qualifying beneficiary as he does not fulfil the condition in Clause 1(i) of the Codicil. Accordingly, I dismiss his claim. I will hear Parties on costs, and Parties may write in to appear before me for directions concerning the determination of this issue.

Philip Jeyaretnam
Judge of the High Court

Seah Yong Quan Terence, Wong Ying Joleen and Joavan Christopher Pereira (JWS Asia Law Corporation) for the claimant;
First defendant in person;
Tng Soon Chye (Tng Soon Chye & Co) for the second defendant.
