**IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE**

**[2026] SGCA 45**

Court of Appeal / Civil Appeal No 49 of 2025

Between

Peter Kwee Seng Chio

… *Appellant*

And

Lai Seng Kwoon

… *Respondent*

In the matter of Originating Claim No 257 of 2022

Between

Peter Kwee Seng Chio

… *Claimant*

And

Lai Seng Kwoon

… *Defendant*

In the matter of Suit No 373 of 2022

Between

Low Kai Yang

… *Plaintiff*

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And

(1) Lai Seng Kwoon
(2) Peter Kwee Seng Chio

… *Defendants*

In the matter of Counterclaim of 2nd Defendant

Between

Peter Kwee Seng Chio

… *Plaintiff in Counterclaim*

And

(1) Low Kai Yang
(2) Lai Seng Kwoon

… *Defendants in Counterclaim*

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# JUDGMENT

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[Trusts — Constructive trusts — Common intention constructive trust]
[Equity — Maxims]
[Equity — Illegality]

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# Kwee Seng Chio Peter
# v
# Lai Seng Kwoon

**[2026] SGCA 45**

Court of Appeal — Civil Appeal No 49 of 2025
Ang Cheng Hock JCA, Hri Kumar Nair JCA and Andrew Phang Boon Leong SJ
3 August 2026

18 November 2026 Judgment reserved.

**Andrew Phang Boon Leong SJ (delivering the judgment of the court):**

## Introduction

1 The present appeal raises issues of both granular *fact* ***as well as*** broader (and significant) rules and principles of *law*.

2 The ***former*** arises as a result of the *findings of* ***fact*** by the trial judge ("Judge") that the appellant, Mr Kwee Seng Chio Peter ("Mr Kwee"), had made a gift of several properties ("Properties") to his daughter, Ms Kwee Hui Ling Karen ("Ms Kwee"), and that the rental proceeds from the Properties, which constitute the bulk of the moneys in several bank accounts ("Bank Accounts"), consequently belong to Ms Kwee. In particular, in this appeal, Mr Kwee argues, instead, that he retains the beneficial interest in the Properties and the moneys in the Bank Accounts by virtue of the law of trusts. The respondent, Ms Kwee's private trustee in bankruptcy, Mr Lai Seng Kwoon ("Mr Lai"), on the other

hand, maintains that the findings of the Judge ought to be affirmed and therefore the Properties and the moneys in the Bank Accounts can be attached accordingly as a result of Ms Kwee's bankruptcy.

3 For the reasons set out below, we find the Judge's findings of *fact* to be, with respect, against the weight of the evidence. In our view, the Properties were not gifts to Ms Kwee and were instead the subject of a trust in favour of Mr Kwee. However, as we explain in detail below, we would affirm the decision of the Judge to dismiss Mr Kwee's claims, albeit for *different* reasons.

4 Turning to the ***latter***, Mr Lai has a *second* string to his bow, which raises broader principles of ***law***. He argues that even if Mr Kwee intended to retain the beneficial interest in the Properties, the trust alleged to effect this is void and unenforceable as being illegal and contrary to public policy.

5 This turns, in particular, on an issue of law that has hitherto not been definitively decided by this Court: ***whether a trust set up by a beneficiary for the purpose of concealing his or her assets from creditors is void and unenforceable as being illegal and contrary to public policy***. It should be noted at the outset that the nature of such a trust has – at its root – dishonest as well as fraudulent intent. It would therefore appear, at first blush, that such a trust would indeed be illegal and contrary to public policy and therefore void and unenforceable without more. This is, in fact, wholly consistent with the law in general and the rules, principles, as well as spirit of equity in particular. Indeed, we explain below why we hold that this ***ought to be – and, indeed, is – the law***. As we find the trust over the Properties in favour of Mr Kwee to be precisely of this kind, Mr Kwee's claims in respect of the Properties and the moneys in the



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Bank Accounts should not be allowed. The result is that the present appeal is therefore dismissed albeit on a *different* ground.

6 We should also observe that Mr Lai has a possible *third* string to his bow inasmuch as he also argues that the trust was also set up by Mr Kwee to conceal his beneficial ownership of the Properties from the tax authorities and thereby evade estate duty. As we explain below, it is not necessary to arrive at a conclusive decision on whether such a trust is also void and unenforceable as being illegal and contrary to public policy, since the trust in the present case is already illegal and contrary to public policy having been set up by Mr Kwee for the purpose of concealing the Properties from his creditors.

7 With this brief overview of the appeal, let us now turn to the specific facts of this case.

**Background facts**

8 We briefly set out the context of how this appeal came before us. To understand the chronology of events, it is necessary to situate them alongside the perspectives of Mr Kwee and Ms Kwee, though we are cognisant that the narratives put forth by them are disputed by Mr Lai.

9 Mr Kwee is an entrepreneur who has been in the business of buying and investing in properties for many decades. He takes care of his family (comprising his wife, his son and his daughter, Ms Kwee) and provides for them financially. He has a practice of purchasing properties and placing them under his family members' names. According to him, he had a "name placing agreement" with his family members where he would tell them:

(a) "I want to buy property. I put under your name."



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(b) "You don't need to pay anything; is I buy and I will pay for everything."

(c) "It is mine. I will manage the property. You just do what I say."

(d) "After I die already, it is yours. I will see how to split assets within the family."

We refer to the last of these statements as the "after I die" statement. Mr Kwee claims that his family members trusted his decisions and planning, and so they agreed to the name placing agreement and this became their normal practice over the years.

10 The properties which Mr Kwee bought and registered in Ms Kwee's sole name include: (a) "Baffin Court", "9901 Whistler", "West Georgia" and "Lord Stanley" in Canada; (b) "Claymore", "King's Drive" and "Teneriffe" in Singapore; and (c) "Spyglass Grove" in Australia. The five Properties in dispute in this appeal are West Georgia, Lord Stanley, King's Drive, Teneriffe and Spyglass Grove. They were all purchased between 1995 and 2000.

11 Alongside the Properties are the Bank Accounts which comprise: (a) an Oversea-Chinese Banking Corporation Ltd account in the joint names of Mr Kwee and Ms Kwee ("OCBC Account"); (b) a United Overseas Bank Ltd account in the joint names of Mr Kwee and Ms Kwee ("UOB Account"); and (c) a Bank of Montreal account in the sole name of Ms Kwee ("Montreal Account"). According to Mr Kwee, the OCBC Account was used to receive the rental proceeds from King's Drive, the UOB Account was used to receive the rental proceeds from Teneriffe, and the Montreal Account was used to receive the rental proceeds from West Georgia and Lord Stanley.



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12 On 27 February 2020, Ms Kwee and her ex-husband, Mr Ou Chung Yew Daniel ("Mr Ou") entered into an agreement ("Loan Agreement") to borrow $4.1m from Mr Thomas Woo ("Mr Woo") and Mr Paul Jonathan Grange ("Mr Grange"). According to Ms Kwee, she was forced and misled by Mr Ou into signing the Loan Agreement and did not read its contents when signing it. As Ms Kwee and Mr Ou failed to make payments under the Loan Agreement, Mr Woo and Mr Grange commenced arbitration proceedings which led to an award being granted against Ms Kwee and Mr Ou. After obtaining the court's permission to enforce the award, Mr Woo and Mr Grange served a statutory demand against Ms Kwee on 12 May 2022. As she was unable to make payment, she was adjudged bankrupt on 6 October 2022. Mr Lai was appointed as her private trustee in bankruptcy on 24 February 2023.

13 Separately, on 18 September 2020, Ms Kwee signed an option to purchase for the sale of King's Drive ("King's Drive OTP") to Mr Low Kai Yang ("Mr Low"). According to Ms Kwee, Mr Ou wanted a loan from Mr Low and pressured her into signing the King's Drive OTP. Mr Ou told her that the King's Drive OTP had no legal effect and was just "for show". She felt pressured and decided to trust Mr Ou as he was still her husband then. Ms Kwee initially did not inform Mr Kwee about the King's Drive OTP. She claims that she "dare not tell" him because "if it's not going to happen, he will not know".

14 Subsequently, on 20 October 2020, Ms Kwee received a letter from the Singapore Land Authority informing her that a caveat had been lodged against King's Drive by Mr Low on 16 October 2020. According to Ms Kwee, Mr Ou told her to ignore it as he was paying off the loan to Mr Low and there was no real sale. In the subsequent months as their marriage broke down, Ms Kwee suspected that Mr Ou was not in fact making any repayments to Mr Low.



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Ms Kwee eventually informed Mr Kwee about the King's Drive OTP in March 2021. Mr Kwee and Ms Kwee then tried to resolve the issue of the King's Drive OTP by speaking to Mr Ou and Mr Low separately.

15 As the issue of the King's Drive OTP remained unresolved, Mr Kwee and Ms Kwee decided to meet Mr Low on 9 August 2021 ("9 Aug 2021 Meeting"). There was a further meeting between Ms Kwee and Mr Low on 14 September 2021 ("14 Sep 2021 Meeting"). However, the parties were still unable to resolve the matter of the King's Drive OTP. The meetings were recorded on Ms Kwee's phone, and transcripts have been put into evidence.

16 On 12 January 2022, Mr Low commenced HC/S 373/2022 ("S 373") against Ms Kwee, seeking a declaration that the King's Drive OTP is valid and binding. On 20 May 2022, Mr Kwee lodged caveats against King's Drive and Teneriffe. On 25 May 2022, he applied to be added as a defendant in S 373. The application was allowed on 15 July 2022. He then brought a counterclaim against Mr Low for a declaration that he is the true beneficial owner of King's Drive. After Ms Kwee's bankruptcy, Mr Lai was substituted in her place on 23 June 2023. Mr Kwee then extended his counterclaim against Mr Low to Mr Lai. On 25 September 2024, Mr Low wholly discontinued his claim while Mr Kwee discontinued his counterclaim against Mr Low. This left only Mr Kwee's counterclaim against Mr Lai to be resolved in S 373.

17 Separately, on 13 September 2022, Mr Kwee commenced HC/OC 257/2022 ("OC 257") against Ms Kwee, seeking declarations that Ms Kwee holds the Properties (excluding King's Drive) and the moneys in the Bank Accounts on trust for him. On 12 December 2023, Mr Lai was substituted for Ms Kwee in OC 257.



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18 The Judge heard S 373 and OC 257 together across a four-day trial in February 2025.

**The parties' cases below**

19 Before the Judge, Mr Kwee's case centred around the alleged name placing agreement. He argued that the agreement showed that he had no intention to benefit Ms Kwee with the Properties, and that this was also established through the documentary evidence and their conduct. He also argued that he had contributed the entire purchase price of the Properties.

20 As to the nature of the alleged trust over the Properties, Mr Kwee's case shifted through the course of the proceedings. His original pleaded case was that there was either a resulting trust or a common intention constructive trust under which he retained the *full beneficial interest*. However, in his closing and oral submissions, he put forth the notion that his intention was to retain only a *life interest* in the Properties and to gift the remainder to Ms Kwee upon his death. We explore the implications of this shift later, but it suffices to note at this juncture that the notion of a life interest was never mentioned by Mr Kwee in his pleadings, affidavit of evidence-in-chief ("AEIC"), evidence on the stand, nor was it put to Mr Lai in cross-examination.

21 As for the Bank Accounts, Mr Kwee argued that the moneys therein were held on a resulting trust for his benefit as he retained full control over them, deposited his own moneys in the accounts, and the rental proceeds from the Properties deposited in the accounts should be attributed to him.

22 Conversely, Mr Lai argued that the evidence demonstrated that Mr Kwee intended to gift the Properties and the moneys in the Bank Accounts



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to Ms Kwee. In addition, there was insufficient evidence to rebut the presumption of advancement, and insufficient evidence of Mr Kwee's financial contributions to raise the presumption of resulting trust.

**The decision below**

23 The Judge dismissed Mr Kwee's counterclaim in S 373 and his claim in OC 257 (*Kwee Seng Chio Peter v Lai Seng Kwoon* [2025] SGHC 46 ("Judgment") at [43]). In gist, the Judge found that Ms Kwee was the beneficial owner of the Properties and had made the bulk of the contributions to the Bank Accounts through the rental proceeds from the Properties.

24 We pause to note that, during the trial, Mr Kwee gave evidence that his purpose for the name placing agreement was, among other objectives, to avoid estate duty and shield the Properties from his creditors. As we will elaborate on below, this became a key aspect in the Judge's reasoning for his decision.

25 In relation to the source of funds used to purchase the Properties and fund the Bank Accounts, the Judge found as follows:

(a) Mr Kwee was the ultimate source of funds used to purchase the Properties, other than the rental proceeds from the Properties used to service the mortgage loans (Judgment at [16]). Whether the rental proceeds were Mr Kwee's or Ms Kwee's contributions would depend on who the beneficial owner of the relevant property was (Judgment at [15]).

(b) Mr Kwee was also the ultimate source of the funds in the Bank Accounts, other than the moneys attributable to Ms Kwee's salary and the rental proceeds from the Properties (Judgment at [19]). These rental



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proceeds constituted the bulk of the moneys in the Bank Accounts. However, the question remained as to whom these rental proceeds should be attributed (Judgment at [20]).

26 As for the relationship between Mr Kwee and Ms Kwee, the Judge found that Mr Kwee acted as the family patriarch. He took care of his family and provided for them financially. Ms Kwee was dependent on Mr Kwee by choice but not necessity – she continued living in houses bought by him even after starting her own family, and she was employed in his companies since her twenties and did not have any other independent income. However, Mr Kwee also expected Ms Kwee to be filial and to do what he asked (Judgment at [22]).

27 In so far as Mr Kwee's intention regarding the Properties was concerned, the Judge examined Mr Kwee's and Ms Kwee's arrangements and conduct. The Judge's analysis of their arrangements was as follows:

(a) The Judge accepted Mr Kwee's evidence that he purchased properties in his family members' names as a matter of "business strategy", "wealth planning" and "risk management". While he was alive, he would manage the properties, and if he told the person in whose name the property was to sell it, they were expected to do as he said. The properties were therefore part of a family portfolio which he had control over (Judgment at [26]).

(b) The Judge accepted that Mr Kwee made the "after I die" statement to his family members, the import of which was that the property would belong to the person in whose name it was after he died. There would therefore be no need for Mr Kwee to gift that property in



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his will. This finding was reinforced by Mr Kwee's testimony about wanting to avoid estate duty (Judgment at [27]–[28]).

(c) In trial, Mr Kwee explained that "business strategy" and "risk management" was a reference to his personal financial risk, and that King's Drive was registered in Ms Kwee's name so that his creditors could not go after it. The Judge reasoned that Mr Kwee intended to give King's Drive to Ms Kwee as his creditors would be able to go after it if it belonged to him beneficially (Judgment at [29]).

(d) The Judge was of the view that Mr Kwee's dominance and control over the family portfolio of properties was not inconsistent with a gift to Ms Kwee. Ms Kwee had chosen to depend on her father. She trusted him to make decisions for her welfare. It was therefore unsurprising that Mr Kwee also handled matters relating to the Properties (Judgment at [30]).

(e) The Judge found that the same arrangement applied to all the Properties. This was for Ms Kwee to have the property when Mr Kwee passed away without any further act (such as a will), but while Mr Kwee was alive, he would manage the Properties. This arrangement meant that Ms Kwee was the beneficial owner of all the Properties. As such, they were beyond the reach of Mr Kwee's creditors (Judgment at [31]).

28 In relation to Mr Kwee's and Ms Kwee's conduct, the Judge noted that Mr Kwee did not assert beneficial ownership over the Properties until 20 May 2022 when he lodged caveats against King's Drive and Teneriffe, which was over 20 years after their purchase. While Mr Kwee explained that he lodged the caveats to protect the two properties from Ms Kwee's creditors, this was



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approximately a year after Mr Kwee first knew about Ms Kwee's financial troubles. During the intervening period, neither mentioned Mr Kwee's purported beneficial interest when they would have been expected to do so (Judgment at [32]). The Judge cited three examples:

(a) First, when Ms Kwee signed the King's Drive OTP, she did so without informing Mr Kwee or seeking his permission. She thus acted as if she was the owner, reflecting her belief that the property was hers to sell. The Judge disbelieved Ms Kwee's explanation that Mr Ou had pressured her into signing the King's Drive OTP and had tricked her with his assurances that the King's Drive OTP was only "for show". Given her relationship with Mr Kwee, she would not have executed the King's Drive OTP if she believed that King's Drive belonged to Mr Kwee as doing so would have earned his anger and condemnation (Judgment at [33]).

(b) Second, Mr Kwee did not tell Mr Low that he was the true owner of King's Drive at the first opportunity during the 9 Aug 2021 Meeting. If Mr Kwee was the beneficial owner, saying so would have been the best way to make progress at the meeting, as it would have made clear to Mr Low that Ms Kwee had signed the King's Drive OTP without authority (Judgment at [34]).

(c) Third, during an attempted sale of King's Drive in 2021, Mr Kwee, Ms Kwee and one of the property agents involved, Ms Yeo Jun Ying Evonne ("Ms Yeo"), proceeded on the basis that Ms Kwee was both its legal and beneficial owner. Mr Kwee's role was secondary and akin to a parent advising Ms Kwee. This finding was based on the text messages between the parties where, for instance, Ms Yeo took



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significant instructions from Ms Kwee on the sale price and merely informed Mr Kwee after the fact (Judgment at [35]–[39]).

29 The Judge concluded that the legal effect of Mr Kwee's and Ms Kwee's conversations prior to the purchase of the Properties was that they were gifts to her. The discussion that the Properties would be hers when he died without any need for a will indicated that she became the beneficial owner of the Properties from the start. The fact that Mr Kwee expected Ms Kwee to do as he might say on matters relating to the Properties, and that Ms Kwee generally acquiesced to him on such matters, did not change the fact that she was the beneficial owner (Judgment at [41]).

30 As for the Bank Accounts, the bulk of the moneys consisted of rental proceeds from the Properties. As Ms Kwee was the beneficial owner of the Properties, it followed that the bulk of the contributions were hers. Thus, Mr Kwee had not shown that all the moneys in the Bank Accounts were his (Judgment at [42]).

**The parties' cases before the Appellate Division of the High Court**

31 Mr Kwee initially filed an appeal to the Appellate Division of the High Court ("Appellate Division"). In the Appellant's Case and Appellant's Reply, Mr Kwee submitted that the Judge erred in inferring a donative intention on his part. He submitted that, based on the name placing agreement and the parties' conduct, his intention was to retain a *life interest* in the Properties under a resulting trust, and to gift the remainder to Ms Kwee upon his death.

32 In relation to his intention to avoid estate duty, Mr Kwee cited *Shi Fang v Koh Pee Huat* [1996] 1 SLR(R) 906 ("*Shi Fang*") and *Yeo Kia Yong v Yeo*



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*Kia Hock* [1998] 2 SLR(R) 602 ("*Yeo Kia Yong*") as cases where patriarchs similarly placed properties in their family members' names to avoid estate duty, and the courts were prepared to find a trust in their favour. In relation to his intention to shield the Properties from his creditors, Mr Kwee submitted that he "had sought to conceal the real ownership of the Properties by registering legal title in in [*sic*] Ms Kwee's name through the name placing agreements".

33 As for the moneys in the Bank Accounts, Mr Kwee submitted that, since he was the beneficial owner of the Properties, the rental proceeds deposited in the Bank Accounts should be attributed to him. He also submitted that he had transferred his own personal funds into the Bank Accounts.

34 Conversely, in the Respondent's Case, Mr Lai aligned himself with the Judge's reasons for finding that Mr Kwee intended to gift the Properties to Ms Kwee. As Mr Kwee was not the beneficial owner of the Properties, Mr Lai submitted that the rental proceeds in the Bank Accounts were not attributable to him either.

**The Independent Counsel's opinion**

35 After reviewing the Judgment and the parties' submissions on appeal, it became clear that the appeal raised several important issues of law which were more appropriate for the Court of Appeal to determine. Thus, the appeal was transferred to this Court pursuant to s 29D(1)(*a*) of the Supreme Court of Judicature Act 1969 (2020 Rev Ed). Prof Tang Hang Wu ("Prof Tang") was also appointed as Independent Counsel to address this Court on the following issues:

> **Question 1 The "Illegality Issue":** Would a party whose intention was an illegal one be prohibited by the doctrine of



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> illegality from relying on evidence of that intention to substantiate his claim? What is the proper application of the illegality doctrine in the trusts context following *Ochroid Trading Ltd and another v Chua Siok Lui (trading as VIE Import & Export) and another* [2018] 1 SLR 363 ("*Ochroid*")? In this connection, do the cases of *Shi Fang v Koh Pee Huat* [1996] 1 SLR(R) 906 and *Yeo Kia Yong and others v Yeo Kia Hock* [1998] 2 SLR(R) 602 remain good law following *Ochroid*?
>
> **Question 2 The "Equity Issue":** In view of the maxim that "he who comes to seek equity must do so with clean hands", would a party be disentitled by his conduct from seeking equitable relief under a trust? Is this maxim a free-standing substantive legal rule or principle or must it be part of (and/or the rationale underlying) a separate and independent rule or principle recognised under the law?
>
> **Question 3 The "Life Interest Issue":** In *Khoo Phaik Ean Patricia and another v Khoo Phaik Eng Katherine and others* [2025] 1 SLR 758 (at [60] and [66]–[76]), the Court of Appeal made some tentative observations on the situation where "*A* gratuitously transfers property to *A* and *B*'s joint names in law for no consideration" and "the evidence establishes that *A* did not intend to benefit *B* immediately but intended that *B* will inherit whatever is left in the estate when *A* dies". The Court of Appeal's observations suggested that such an arrangement was permissible. Do the Court of Appeal's tentative observations extend to a situation where *A* acquires the property in the sole name of *B* with the intention that the beneficial ownership will pass to *B* upon *A*'s death, and *A* is the sole beneficial owner of the property during his lifetime?

36 In relation to the "Illegality Issue", Prof Tang submits that a claimant is not precluded from relying on an illegal intention to establish the constituent elements of her trust claim. In this regard, the decisions in *Shi Fang* and *Yeo Kia Yong* are no longer good law after *Ochroid Trading Ltd v Chua Siok Lui* [2018] 1 SLR 363 ("*Ochroid*") to the extent that they rest on the "reliance principle".

37 Prof Tang also proposes a framework for the illegality doctrine in the trusts context, drawing on the framework set out in *Ochroid* and largely aligned with the framework set out by Goh Yihan JC (as he then was) in *Lau Sheng Jan*



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*Alistair v Lau Cheok Joo Richard* [2023] 5 SLR 1703 ("*Alistair Lau*"), albeit with some proposed modifications.

38 In relation to the "Equity Issue", Prof Tang submits that the equitable maxim "he who comes to seek equity must do so with clean hands" (for brevity, the "clean hands" maxim) is not a freestanding legal rule or principle. While there is considerable overlap between the "clean hands" maxim and the illegality doctrine, the gravamen of the objection to the enforceability of the trust in the present case is illegality, and no distinct misconduct falling short of illegality has been identified. A separate inquiry into the "clean hands" maxim would add little to the analysis.

39 In relation to the "Life Interest Issue", Prof Tang submits that the situation discussed in *Khoo Phaik Ean Patricia v Khoo Phaik Eng Katherine* [2025] 1 SLR 758 ("*Patricia Khoo*"), where *A* transfers property into the joint names of *A* and *B* while intending for the beneficial interest to pass to *B* only upon *A*'s death ("Joint Name Life Interest Scenario"), may potentially be rationalised on four bases: (a) a resulting trust analysis; (b) a life interest and remainderman analysis; (c) a gift of the right of survivorship analysis; and (d) a joint tenancy as a will-substitute analysis. Prof Tang submits that the most persuasive explanations are either the life interest and remainderman analysis or the joint tenancy as a will-substitute analysis. As between the two, he submits that the latter captures the practical and functional reality of *A*'s intention in a more direct and coherent manner, but in substance, both analyses are not materially different, and that the latter is best understood as a concise and functional description of the former.



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40 Prof Tang further submits that the observations in *Patricia Khoo* on the Joint Name Life Interest Scenario may extend to a situation where *A* acquires property in *B*'s sole name with the intention that *A* will be the sole beneficial owner during his lifetime but the beneficial ownership will pass to *B* upon *A*'s death ("Sole Name Life Interest Scenario"). In this context, only the life interest and remainderman analysis can apply as there is no joint tenancy. However, there remain legal and evidential difficulties in relation to formalities, the revocability of *B*'s interest, and proof. In this regard, Prof Tang submits that the best explanation of the Sole Name Life Interest Scenario is through recognising a constructive trust arising from the acquisition of property subject to a condition ("acquisition constructive trust"), coupled with a reserved power of revocation.

41 We pause at this juncture to note that the above is only a brief summary of Prof Tang's submissions which were characteristically detailed and comprehensive. We engage with his submissions in greater detail in our analysis below.

**The parties' submissions in response to the Independent Counsel's opinion**

42 Before us, the parties rely on their written submissions filed before the Appellate Division, but they were also given an opportunity to file further written submissions in response to Prof Tang's opinion. In these further written submissions, Mr Kwee's case on the nature of his intention, and the trust alleged to have arisen, shifted once again. Mr Kwee now puts forth three alternative cases. His primary case is that he holds the *full beneficial interest* in the Properties pursuant to a resulting trust, and that the "after I die" statement was merely a non-binding expression of his future intention with no legal effect. In



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the alternative, he submits that he holds either the *full beneficial interest*, or at least a *life interest*, in the Properties under a common intention constructive trust. Further, and in the alternative, he submits that he holds a *life interest* in the Properties under an acquisition constructive trust. In this regard, Mr Kwee submits that the concept of acquisition constructive trusts is consistent with the decision in *Patricia Khoo* and Singapore law's approach to institutional constructive trusts.

43 On the implications of the illegality doctrine, Mr Kwee accepts Prof Tang's proposed framework. He also admits that his trust interest is tainted by illegality but submits that it is disproportionate to deny enforcement of the trust. He reserves his position on whether he has an alternative cause of action against Ms Kwee. He further agrees with Prof Tang that the "clean hands" maxim is not a freestanding legal rule or principle.

44 In contrast, Mr Lai maintains his case that the Judge was correct to find that Mr Kwee intended to gift the Properties to Ms Kwee. However, if this Court finds that Mr Kwee intended to retain a life interest in the Properties, Mr Lai submits that the acquisition constructive trust should not be recognised under Singapore law. Instead, the only viable juridical basis for such an arrangement is a common intention constructive trust, but Mr Kwee can no longer claim such a trust as he does not refer to it in his Appellant's Case or Appellant's Reply.

45 On the issue of the illegality doctrine, Mr Lai also accepts Prof Tang's proposed framework, but he submits that the trust is not enforceable on the facts. He submits that the trust is prohibited in equity as it is akin to a contract to commit a fraud. Even if the trust was merely tainted by illegality, he submits that it is proportionate to deny enforcement of the trust. Additionally, he submits



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that the "clean hands" maxim stands as a substantive legal doctrine and that Mr Kwee's claims must be denied on its proper application.

**Issues to be determined**

46 The beneficial ownership of the Properties is the central issue in this appeal. That would determine who owns the rental proceeds from the Properties and thereby the bulk of the moneys in the Bank Accounts. As such, there are three main questions to be addressed:

(a) Were the Properties the subject of a gift or trust?

(b) Is the trust over the Properties (if any) void and unenforceable as being illegal and contrary to public policy?

(c) Who owns the moneys in the Bank Accounts?

**Our decision**

47 Before we turn to our analysis of the issues in the present appeal, we first set out the law on the doctrine of illegality and public policy in the context of the law of trusts.

***The doctrine of illegality and public policy in the context of the law of trusts***

*Revisiting the* Ochroid *framework in the context of the law of contract*

48 It is imperative that the doctrine of illegality and public policy operates in a clear and certain manner. As we noted in *Ochroid* at [20]:

> … any approach … needs … to be as straightforward as possible. Indeed, if the general approach is unclear and/or engenders uncertainty, the existing difficulties will only be exacerbated, which will not conduce towards the ultimate aim of the courts in achieving justice and fairness in the case at



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> hand while upholding the integrity of the legal system. … What is required, in our view, is a legal framework that is not only as comprehensible as is possible but also practically workable. …

49 Indeed, it was precisely because the majority's approach in the UK Supreme Court's decision in *Patel v Mirza* [2017] AC 467 ("*Patel*") was felt to introduce further uncertainty into the analytical process by superimposing an additional inquiry based on the "range of factors" test (under which the court would conduct a balancing exercise based on a broad "range of factors" to determine the enforceability of the illegal contract) across the board to all situations of common law illegality that it was rejected in the Singapore context. In particular, we noted in *Ochroid* that such an approach was undesirable as it created an unprincipled distinction between the principles which applied to statutory illegality and those which governed common law illegality (the majority in *Patel* having laid down the "range of factors" test for situations of common law illegality *only*). The "range of factors" test was also unnecessary to achieve remedial justice in the Singapore context given the flexibility of the principles that had hitherto been laid down by this Court in its previous decision in *Ting Siew May v Boon Lay Choo* [2014] 3 SLR 609 ("*Ting Siew May*"), which would also allow restitutionary recovery even if the contract concerned was an illegal one and therefore void and unenforceable (*Ochroid* at [125]). We therefore decided, in *Ochroid*, to *reject* the "range of factors" test and set out the following legal framework instead (*Ochroid* at [64]–[65]):

> 64 The court will first ascertain whether ***the contract*** is ***prohibited*** either pursuant to a *statute* (expressly or impliedly) and/or *an established head of common law public policy*. This is the ***first*** *stage* of the inquiry and, if the contract is indeed thus prohibited, there can be ***no recovery*** *pursuant to the (illegal) contract*. This is subject to the *caveat* that, in the general common law category of contracts which are not unlawful *per se* but entered into with the object of committing an illegal act (and ***only*** *in this category*), the proportionality principle laid



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> down in *Ting Siew May* … ought to be applied to determine if the contract is enforceable.
>
> 65 *However*, that may not be the end to the matter as a party who has transferred benefits pursuant to the illegal contract *might* be able to recover those benefits on a ***restitutionary*** *basis* (*as opposed to* recovery of *full contractual damages*). This is the ***second*** stage of the inquiry. We saw that there were at least *three* possible legal avenues for such recovery – all of which have been summarised above (at [43]−[60]).
>
> [emphasis in original]

50 As already noted, the above framework was set out in the context of the law of *contract*. The issue that now arises is whether or not that framework can be adapted in the context of the law of ***trusts***.

*Is the* Ochroid *framework applicable in the context of the law of trusts?*

51 In *Alistair Lau*, Goh JC, sitting in the General Division of the High Court ("General Division"), was of the view that the *Ochroid* framework should broadly apply in the trusts context with appropriate modifications (at [67]–[69]). Based on Goh JC's proposed approach, the question to be asked at the first stage is whether the trust in question is enforceable (at [76]). This could be resolved into three further questions: (a) whether the trust in question is prohibited; (b) if the trust in question is not prohibited but was created for an illegal purpose or arose as an incidental consequence of the illegal purpose, whether the trust should nonetheless be unenforceable, by considering the proportionality factors in *Ting Siew May*; and (c) if the trust in question is unenforceable, whether the party seeking to enforce the trust can nonetheless establish an alternative basis for enforcing a proprietary interest by the operation of trust law, subject to the principle of stultification (at [78]–[79]).



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52 In so far as the second stage was concerned, Goh JC was of the view that it should not apply where the claim is for the enforcement of a proprietary interest. This is because, in the trusts context, the claimant is seeking the enforcement of his proprietary interest, and therefore the question of restitutionary recovery would not readily apply. Additionally, in the learned judge's view, not every case of a trust involves the payment or transfer of a benefit from one party to the other. Goh JC referred to an example of an express trust where the settlor, trustee and beneficiary were distinct persons. In such a situation, while the beneficiary may seek to enforce the trust, he would not have contributed any property to the trust (at [77]–[78]). Nonetheless, Goh JC left open the possibility that the second stage 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, subject to the principle of stultification (at [79]).

53 In *Wong Mei Lee Millie v Ngor Shing Rong Jake* [2026] 1 SLR 600, the parties had purchased and registered a property in a 99:1 ratio in favour of the appellant even though the respondent provided the majority of the financial contributions to the purchase price. This Court rejected the respondent's claim based on a resulting trust, finding that the respondent had not discharged his burden of proving that he did not intend to benefit the appellant with his financial contributions to the property (at [90]–[91]). However, assuming that there was a resulting trust over the property, this Court was of the view, albeit only by way of *obiter dicta*, that the trust would have been illegal and unenforceable (at [132]). In coming to this view, this Court applied the *Alistair Lau* framework because it was applied by the trial judge and neither party disputed its application (at [94]).



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54 As alluded to at [37] above, Prof Tang proposes a modified *Ochroid* framework for the doctrine of illegality and public policy in the trusts context, which substantially accords with the *Alistair Lau* framework, albeit with some proposed modifications. We broadly agree with Prof Tang that the *Ochroid* framework should also apply in the context of the law of trusts. Our analysis below is structured by reference to the two stages of the *Ochroid* framework but situated in the context of the law of trusts: (a) under the first stage, when is a trust void and unenforceable as being illegal and contrary to public policy; and (b) under the second stage, when can there nevertheless be restitutionary recovery, assuming that the trust is indeed void and unenforceable as being illegal and contrary to public policy?

(1) When is a trust void and unenforceable as being illegal and contrary to public policy?

55 In *Alistair Lau*, Goh JC summarised his proposed approach in relation to the first stage as follows (at [81]):

> 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;



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> (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.

56 We agree with Goh JC that, much like the *Ochroid* framework (reproduced at [49] above), the analysis under the first stage should begin with the question of whether the trust is illegal *in itself* as being prohibited by statute or an established head of public policy in equity. In the decision of the General Division in *Ngor Shing Rong Jake v Wong Mei Lee Millie* [2025] SGHC 119 at [69], Lee Sieu Kin SJ suggested that this inquiry does not typically apply to trusts arising by operation of law such as resulting trusts. However, as Prof Tang correctly points out, statutory prohibitions on trusts, such as those pursuant to s 23(2) of the Residential Property Act 1976 (2020 Rev Ed) and s 58(10) of the Housing and Development Act 1959 (2020 Rev Ed), are not necessarily limited to express trusts and can apply to trusts arising by operation of law as well. We would also not rule out the possibility that a trust arising by operation of law may be prohibited in equity as falling into an established category that is contrary to public policy.

57 Next, we would follow the *Ochroid* framework ***even more closely*** than was the case in *Alistair Lau*. In particular, we would not emphasise – as Goh JC did in *Alistair Lau* – the principle of proportionality by placing it in a separate



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sub-paragraph (see [55] above). In fairness to the learned judge, we do not think that that was his intention. It appears that he had done this in order to engender more clarity in the presentation of the overall formulation. With respect, however, this might, in fact, be an instance where form might impact perception of substance. Let us elaborate.

58 It is important to emphasise that the principle of proportionality was only intended – in both *Ting Siew May* and *Ochroid* – to deal with a ***residuary*** category of contracts *only*. As we noted in *Ochroid* at [39]–[40]:

> 39 As is clear from the above passage, whilst the Court in *Ting Siew May did* apply a *balancing* exercise (based on ***proportionality***), it was ***only*** confined to *a* ***very limited*** sphere, namely, ***the general category of contracts which are not unlawful* per se*, but entered into with the object of committing an illegal act***. Therefore, such an approach would ***not*** apply to situations where the ***contract*** is ***prohibited*** (either expressly or impliedly by statute or because it falls foul of one of the established heads of common law public policy). Hence, while the decision in *Ting Siew May* developed and clarified the law on common law illegality, the case does ***not*** stand for the *wide* proposition that, in Singapore, a discretionary approach based on the proportionality principle has displaced the traditional approach under which, if the *contract* is held to be *prohibited*, then there can be *no recovery whatsoever pursuant to the (illegal) contract …*
>
> 40 This point is important for the present appeal because, as we shall see, the majority in *Patel* … was prepared to apply a *balancing* exercise ***across the board in all cases of illegality at common law (albeit not in relation to statutory illegality)***. To reiterate, the Court in *Ting Siew May* applied ***the principle of proportionality in only a very limited sphere – in relation to common law illegality and only to the category of contracts which are not prohibited* per se*, but entered into with the object of committing an illegal act. As the law in Singapore presently stands, the principle does not apply where there has been statutory illegality that prohibits the contract concerned and/or a situation under common law illegality where the contract is prohibited under any of the established heads of common law public policy***. If a ***contract*** were to be ***prohibited*** in such



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> a manner, then *the contract would be rendered* ***void and unenforceable*** *and* ***no*** *recovery* ***pursuant to the contract*** would be permitted (although ***restitutionary recovery*** might be possible under one or more of the situations that are briefly set out in the next part of this judgment).
>
> [emphasis in original]

59 Indeed, any *overemphasis* on the principle of proportionality would mean at least shifting closer to (if not ultimately encompassing) the "range of factors" test in *Patel* – which would be the ***precise opposite*** of what was intended in *Ochroid* itself. Goh Yihan J (as he then was) himself noted extrajudicially that the exercise of judicial discretion as to the effects of illegality must remain limited to avoid excessive uncertainty (see Goh Yihan, "The 35th Singapore Law Review Annual Lecture: The Effect of Illegality in Private Law Claims" (2024) 41 Sing L Rev 1 ("The Effect of Illegality in Private Law Claims") at 17 and 20).

60 We would therefore prefer to incorporate – as we did in *Ochroid* – the principle of proportionality at the ***first*** stage which focuses on the key inquiry as to whether or not the trust concerned is prohibited either under statute (or regulations) or in equity ***and***, if not (*ie*, if the trust itself is not unlawful *per se*), to then apply the principle of proportionality in order to ascertain whether the trust, in (*and only in*) situations where the trust has been entered into for the purpose of committing an illegal act, ought to be void and unenforceable.

61 However, perhaps some further elaboration on the distinction drawn between trusts or contracts that are unlawful *per se* on the one hand and trusts or contracts that are not unlawful *per se* but are entered into with the object of committing an illegal act on the other hand might be appropriate. Whilst it is true that trusts or contracts that are unlawful *per se* could ***also (and***



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***simultaneously) be characterised as*** trusts or contracts that are set up or entered into for the purpose of committing an illegal act, ***the unlawfulness involved*** in respect of the ***former*** (*ie*, trusts or contracts that are *unlawful* **per se**) is such that ***the relevant public policy requires*** such trusts or contracts to be considered as being – ***as a distinct category*** – illegal and contrary to public policy and ***therefore rendered void and unenforceable without more (thus precluding any application of the principle of proportionality)***. This might, for example, be the case when *a statute (or regulation)* either expressly or impliedly prohibits a particular type of trust or contract. This might *also* be the case where either the common law or equity has established a *general head of public policy* that prohibits a particular type of contract or trust.

62 However, there may be a myriad of ***other*** instances where a trust or contract might have as its object the commission of an illegal act which does ***not*** justify a draconian characterisation as a trust or contract that is unlawful *per se*, and it is ***only*** in this ***residuary*** category that the principle of proportionality applies in order to enable the court concerned to ascertain whether that particular trust or contract ought to be rendered void and unenforceable.

63 It might – in theory at least – be argued that the line between trusts or contracts that are unlawful *per se* on the one hand and trusts or contracts that are not unlawful *per se* but are entered into for the purpose of committing an illegal act on the other hand is a fine one. However, that is only true because the former overlaps with the latter in the manner explained at [61] above. In ***practical*** *terms*, the distinction is in fact ***much clearer*** inasmuch as the ***former (*ie, *trusts or contracts that are unlawful* per se*)*** would only obtain *where, **first**, this is clear from the **statutory** context or, **secondly**, where (absent a statutory context) **the courts are satisfied that certain types or categories of trusts or***



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***contracts ought to be classified as being illegal and contrary to public policy and therefore rendered void and unenforceable***.

64 There is one additional point of clarification to be made regarding the principle of proportionality, and this relates to the doctrines of *locus poenitentiae* and a party not being *in pari delicto*. In the present appeal, Prof Tang suggests that the considerations traditionally associated with these doctrines may be subsumed within the principle of proportionality. In our view, the ***concepts*** of repentance and relative blameworthiness (as opposed to the ***doctrines*** of *locus poenitentiae* and a party not being *in pari delicto*) can be incorporated in the principle of proportionality as this principle takes into account *all* relevant factors. This would be the case whether the court is applying the principle of proportionality in the context of the law of contract or the law of trusts. *However*, we would respectfully differ from Prof Tang inasmuch as these doctrines are *also* possibly relevant at the *second* stage (which deals with *restitutionary* recovery) as is presently the case under the *Ochroid* framework in the sphere of contractual illegality. We elaborate on the operation of these doctrines at the second stage later.

65 Separately, we observe that Goh JC in *Alistair Lau* included a third and final sub-paragraph under the first stage, where the court considers if the party seeking to enforce the trust can nonetheless establish an alternative basis for enforcing a proprietary interest by the operation of trusts law, subject to the principle of stultification. Goh JC raised the example where a party, whose primary claim for an express trust fails as it is found to be illegal, may bring a secondary claim for a resulting trust (see [55] above and The Effect of Illegality in Private Law Claims at 23). In this regard, the learned judge seemed to have in mind the case of *Baker, Michael A v BCS Business Consulting Services Pte*



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*Ltd* [2020] 4 SLR 85 ("*Baker*"). In that case, the Singapore International Commercial Court ("SICC") applied the *Ochroid* framework and found that the plaintiff's claim for an express trust should be allowed as the trust agreement was not rendered unenforceable at the first stage (at [258]–[269]). However, the court went on to comment in *obiter dicta* that if the trust agreement was unenforceable, the plaintiff would still have an independent cause of action under a resulting trust at the second stage (at [270]–[275]).

66 With respect, to the extent a party has a secondary *trust* claim, the enforceability of this secondary *trust* should be determined by applying the entire illegality framework in the context of the law of *trusts* from start to end, including *both* its stages. Depending on the specific facts of the case, it is conceivable that the trust in the secondary claim might be, in the same manner as the trust in the primary claim, prohibited by statute or an established head of public policy in equity, or unenforceable by virtue of the principle of proportionality. It cannot be assumed that the enforceability of the trust in the secondary claim should only be evaluated at the second stage and/or with reference to only the principle of stultification.

67 Finally, we make *a general observation* regarding the *consequences* that ensue when either a contract or a trust is found to be illegal and contrary to public policy at the first stage. The reader might have noticed that we have utilised the rubric "void and unenforceable". Whilst we do not wish to descend into unnecessary technicality or pedantry, broadly speaking, an illegal contract or trust is, *ex hypothesi*, *void* inasmuch as there can be no recovery thereunder. Looked at in this light, an illegal contract or trust must necessarily also be *unenforceable*. *However*, as we elaborate below, there may be exceptional situations where the courts might permit *restitutionary recovery* at the second



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stage. In such situations, it must be emphasised that the court concerned is in no way enforcing the illegal *contract* or *trust*. Hence, for example, in a situation of contractual illegality, *expectation loss* under the *contract* ***cannot*** be recovered even if there would otherwise have been a clear breach of the contract concerned, although as already mentioned, *restitution* of funds previously transferred might be recovered under limited circumstances at the second stage. As we will elaborate upon below, in the *trusts* context, *restitution* of the proprietary interest might also be permitted under limited circumstances and we would *not rule out* the recovery of funds transferred in appropriate circumstances as well. However, we emphasise that the availability of a *restitutionary remedy* at the *second stage* in no way detracts from the finding at the *first stage* that the trust or contract is *void and unenforceable* as being illegal and contrary to public policy.

(2) When can there nevertheless be restitutionary recovery?

68 Where the trust is void and unenforceable as being illegal and contrary to public policy at the first stage, the court proceeds to consider, at the second stage, whether the party may nevertheless obtain *restitutionary recovery*.

69 In *Ochroid*, we observed that there were at least three possible avenues of restitutionary recovery at the second stage in the context of contractual illegality. These were the doctrines of *locus poenitentiae*, a party not being *in pari delicto*, and an independent cause of action (at [42]–[62]). In our judgment, we see no reason in principle why these avenues cannot similarly apply to permit restitutionary recovery at the second stage in the trusts context.

70 In so far as Goh JC was suggesting in *Alistair Lau* that the *second stage* in the *Ochroid* framework (reproduced at [49] above) should not apply in the



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trusts context because any claim would typically be for the enforcement of a proprietary interest (see also The Effect of Illegality in Private Law Claims at 22), we would, with respect, ***differ*** from that approach. We would not rule out completely the second stage in the trusts context. In this regard, Goh JC had observed in *Alistair Lau* as follows (at [77]–[79]):

> 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



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> 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.
>
> [emphasis in original]

71 In fairness, Goh JC did leave open the possibility of the second stage of the *Ochroid* framework applying in the trusts context, where the party seeking to enforce the trust can make out his claim by some other independent cause of action. Nevertheless, to the extent Goh JC was suggesting that there can be *no restitutionary recovery of funds transferred* at the second stage in the trusts context, we would respectfully disagree. In this regard, we agree with Prof Tang that it would ***not invariably*** be the case that a ***restitutionary*** claim for ***funds transferred*** (*eg*, an independent cause of action in *unjust enrichment*) would ***never*** be available, although we accept Goh JC's point that, in the usual course of events in the trusts context, a claimant seeking to enforce an illegal trust would often be more concerned with obtaining a *proprietary remedy as opposed to the recovery of funds transferred*.

72 In this regard, the differences between restitutionary recovery in contract and in trust must be appreciated. The second stage in the *Ochroid* framework focuses on *restitutionary* recovery of *funds transferred*. It must, however, be



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borne in mind that *Ochroid* related to the issue of *contractual* illegality whereas we are here concerned with illegality in the context of *trusts*. Looked at in this light, the second stage might need to be modified in the context of the law of trusts in order to accommodate restitutionary claims not only in relation to the recovery of *funds transferred* (as is typically the case in the context of contractual illegality) but also in relation to the restoration of a *proprietary interest*. Here, we use the word "restitution" not in the narrow sense of a *personal* remedy for a *sum of money*, but in the broader sense of a remedy that restores the parties' positions (including their *proprietary interests*) prior to the constitution of the illegal trust. The exact mechanism by which restitution of a proprietary interest at the second stage can be given effect to is best determined when the precise issue arises for consideration by a court. However, it must be reiterated that in permitting such restitutionary recovery at the second stage, the court is in no way enforcing the illegal trust (see our analysis at [67] above). As we observed in *Ochroid* at [42], albeit in the *contractual* context, the relief accorded by the court at the second stage does not allow the plaintiff to enforce or profit from the illegal contract itself. This observation applies with equal force in the context of an illegal trust.

73 We note, however, that there is a powerful line of legal thought to the effect that a *proprietary* interest cannot be the subject of recovery in a *cause of action* premised on *unjust enrichment* (see, *eg*, the decisions of the General Division in *Zaiton bte Adom v Nafsiah bte Wagiman* [2023] 3 SLR 533 at [201]–[212], *Ho Dat Khoon v Chan Wei Leen* [2023] SGHC 326 at [69]–[74] and *Ng Chee Tian v Ng Chee Pong* [2025] 3 SLR 235 at [70]–[79]). Hence, the proposition that an independent cause of action might be available, which permits the restitutionary recovery of a *proprietary* interest, might need to be examined more closely in a future case, at least in so far as it relates to such



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*recovery* being premised on *a cause of action* in *unjust enrichment*. *However*, in so far as the doctrines of *locus poenitentiae* and a party not being *in pari delicto* are concerned, we are of the view that these doctrines constitute a set of legal principles in the context of the doctrine of illegality and public policy in which restitutionary *recovery* of either funds transferred or a proprietary interest may be permitted *in spite of* the illegality. Although we have characterised the *recovery* as being *restitutionary*, the *cause of action* is *not* premised on *unjust enrichment* as such. In the context of the doctrine of *locus poenitentiae*, for example, one possibility is that that doctrine might operate to enable the court to disregard the illegality concerned should an action be mounted in the trusts context. However, in so far as the precise legal mechanism is concerned, this would be best dealt with by the court on a future occasion when the issue arises squarely for consideration (see [72] above). As for the *more general* issue as to whether the restitutionary recovery of a *proprietary* interest ought to be legally recognised, even where the cause of action is premised on *unjust enrichment,* that is an issue that may need to be resolved when an appropriate case comes before the courts.

74 We observe, further, that regardless of whether the restitutionary claim at the second stage is one for *funds transferred* or a *proprietary interest*, and regardless of whether the restitutionary claim is premised on the doctrines of *locus poenitentiae*, a party not being *in pari delicto*, or an independent cause of action, such a claim would be ***subject to the principle of stultification*** (as first set out in *Ochroid* at [143]−[168]). In other words, if allowing the claim at the second stage would result in defeating or frustrating the fundamental policy that rendered the trust concerned illegal in the first place, then that claim would not be allowed at the second stage.



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75 It would be appropriate at this juncture to ***summarise*** the overall legal framework that ought to apply to the law of trusts in the Singapore context.

*A summary of the overall legal framework in the context of the law of trusts*

76 The governing legal framework for the doctrine of illegality and public policy in the context of the law of trusts is similar to that which obtains in the context of the law of contract as set out in *Ochroid* (see [49] above).

77 The court will first ascertain whether ***the trust*** is ***prohibited*** either pursuant to a *statute* (expressly or impliedly) and/or *an established head of public policy*. This is the ***first*** *stage* of the inquiry and, if the trust is indeed thus prohibited, there can be ***no recovery*** *pursuant to the (illegal) trust*. This is subject to the *caveat* that, in the general category of trusts which are not unlawful *per se* but are entered into with the object of committing an illegal act (and ***only*** *in this category*), the principle of proportionality laid down in *Ting Siew May* and *Ochroid* ought to be applied to determine if the trust is void and unenforceable.

78 There is no reason in principle why, *even assuming* that the trust concerned is *void and unenforceable* pursuant to the first stage of the inquiry, there might not be ***restitutionary*** recovery of *funds transferred* under the second stage. This may be premised on the doctrines of ***locus poenitentiae*** or a party not being ***in pari delicto*** or ***an independent cause of action***. In so far as the ***restitutionary*** *recovery* of a ***proprietary*** *interest* is concerned, this may be permitted where the doctrines of ***locus poenitentiae*** and a party not being ***in pari delicto*** apply, but the availability of such a remedy based on an ***independent cause of action*** (in particular, a cause of action in *unjust enrichment*) is best determined when the facts of a future case squarely present



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the question for determination by the courts. All of this is subject to the qualification that the restitutionary claim can be established successfully based on the relevant law and the facts ***and*** giving effect to the claim would *not* result in defeating or frustrating the fundamental policy that rendered the trust concerned illegal in the first place pursuant to ***the principle of stultification***.

*The scope of the doctrine of* locus poenitentiae

79 The overall legal framework set out above has alluded to the doctrine of *locus poenitentiae* in two distinct parts. First, the *concept* of repentance is relevant in the first stage inasmuch as it is a factor to be considered in applying the principle of proportionality. Second, the *doctrine* of *locus poenitentiae* is relevant at the second stage as a basis for restitutionary recovery of either funds transferred or a proprietary interest. We now deal with the more specific question of the proper ***scope*** of this doctrine.

80 In *Ochroid*, we expressed the provisional view that for the doctrine of *locus poenitentiae* to apply, there must be *genuine and voluntary* withdrawal by the plaintiff from the illegal enterprise, and that it would not apply in cases where the illegal purpose was frustrated by circumstances beyond the plaintiff's control or was simply no longer needed. Ultimately, however, we declined to make a definitive pronouncement on the issue in *Ochroid* (at [44]–[49], [171]–[175] and [176(b)(ii)]).

81 The development of the doctrine of *locus poenitentiae* was examined in *Ochroid* at [45]–[47] and we do not propose to reprise that discussion here. Instead, we begin our analysis with the England and Wales Court of Appeal decision of *Tribe v Tribe* [1996] Ch 107 ("*Tribe*"), which appears to represent the prevailing position in the UK.



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(1) The doctrine of *locus poenitentiae* as espoused in *Tribe*

82 In *Tribe*, the plaintiff was a tenant of two leasehold premises occupied by his company as a licensee. As the company was faced with substantial claims for dilapidation of the premises, the plaintiff was concerned that he might be forced to sell his shares in the company in order to meet the landlord's claim for repairs. To safeguard his shares, he transferred them to his son for consideration that was not paid and, in any case, not intended to be paid. The intention behind this transfer was to deceive his creditors. When the plaintiff eventually reached an arrangement with his landlord and the anticipated claim did not materialise, he requested that his son retransfer the shares back to him. His son refused to do so, and the plaintiff sought a declaration that he was entitled to the entire beneficial interest in the shares and an order that his son transfer them into his name. The trial judge allowed the plaintiff's claim, and this was upheld by the England and Wales Court of Appeal. In arriving at this decision, the court permitted the plaintiff to rely on the doctrine of *locus poenitentiae*. The court took the view that in a situation where the illegal scheme was simply no longer needed, the plaintiff's voluntary withdrawal from the illegal transaction was sufficient and that genuine repentance was not necessary. In the words of Millett LJ (at 135D–F):

> … But I would hold that genuine repentance is not required. Justice is not a reward for merit; restitution should not be confined to the penitent. I would also hold that voluntary withdrawal from an illegal transaction when it has ceased to be needed is sufficient. It is true that this is not necessary to encourage withdrawal, but a rule to the opposite effect could lead to bizarre results. Suppose, for example, that in *Bigos v. Bousted* … exchange control had been abolished before the foreign currency was made available: it is absurd to suppose that the plaintiff should have been denied restitution. …



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83 As noted in *Ochroid* at [49], the majority in *Patel* did not consider it necessary to discuss the question of *locus poenitentiae*. However, the rest of the *coram* did consider the doctrine and endorsed the approach adopted in *Tribe*, and in fact advocated for that doctrine to be *further liberalised* in order to allow recovery not just in cases where there is no genuine repentance, but even in instances where the illegal contract has been fully executed, as long as *restitutio in integrum* could be achieved in practical terms.

(2) Criticisms of *Tribe*

84 In *Ochroid*, we expressed doubts about the specific conception of the doctrine of *locus poenitentiae* as adopted in *Tribe*. In particular, we queried whether the equities in a situation where the illegal purpose was frustrated or no longer needed would be such as to tilt the decision against recovery, inasmuch as the rationale of the doctrine is to encourage timely withdrawal from the illegal enterprise (*Ochroid* at [47]). We also expressed concerns with the broader conception of the doctrine of *locus poenitentiae* as suggested by the minority in *Patel* (*Ochroid* at [172]–[173]):

> 172 *First*, if it is accepted that the *locus poenitentiae* doctrine is as broad as suggested in *Patel*, then we find it difficult to identify any distinct rationale or justification for the doctrine that can distinguish it from a claim in unjust enrichment. In fact, such a broad principle would *undermine* the need for the plaintiff to establish the ordinary requirements of a claim in unjust enrichment, particularly the necessity to identify an "unjust factor", before being entitled to recovery of the benefits he conferred under the illegal contract (see [139] above). A broad and unrestrained doctrine of *locus poenitentiae* could also potentially allow a plaintiff to circumvent the restraining principle of stultification which would apply to a claim in unjust enrichment. With respect, this cannot be accepted.
>
> 173 *Second*, the broad conception of the *locus poenitentiae* doctrine suggested in *Patel* is also incompatible with the traditional justification for the doctrine, which is to encourage



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> timely withdrawal from the illegal enterprise. We alluded to this point earlier when we discussed the cases of *Bigos* … and *Tribe* …, and the controversy over whether, in order for the *locus poenitentiae* doctrine to apply, the plaintiff needs to have genuinely repented of his or her illegality, or whether the doctrine would also apply even in circumstances where the illegal purpose has been frustrated by circumstances beyond the plaintiff's control or is simply no longer needed (see [45]–[48] above). The traditional rationale *supports* the narrower position adopted in *Bigos* – a plaintiff who "voluntarily" withdraws from an illegal transaction which has ceased to be needed needs no encouragement to do so; nor should he be given any credit for having withdrawn from an illegal agreement which, *ex hypothesi*, is simply no longer necessary. This reasoning applies *a fortiori* to a situation where the illegal contract has been frustrated by circumstances beyond the plaintiff's control or has been fully executed. In fact, as the learned authors of *Goff & Jones* have observed, awarding restitution in situations where the only reason for the plaintiff's abandonment of the illegal enterprise is that a change in circumstances has rendered the scheme unnecessary or impossible 'does not promote withdrawal, and *may even encourage those who contemplate entry into an illegal transactio*n by providing them with a safety net if they find that there is no longer anything to be gained from it' [emphasis added] (*Goff & Jones 2016* at para 25-30).
>
> [emphasis in original]

85 In our judgment, the decision in *Tribe* ***unnecessarily extended*** the doctrine of *locus poenitentiae*. In order to understand why this was the case and, indeed, might have been *necessary* ***at that particular point in time***, an understanding of the ***context*** in which that case was decided is necessary. In particular, it should be recalled that *Tribe* was decided at a time when *Tinsley v Milligan* [1994] 1 AC 340 ("*Tinsley*") was the governing law and, hence, the doctrine of *locus poenitentiae* was a valuable legal tool to get around the arbitrariness and unfairness that *Tinsley* might (depending on the fact situation concerned) engender. The fact situation in *Tribe* was in fact perceived by the court to be one such case. As recovery was not permitted under the reliance principle in the formal and procedural sense ("formal reliance principle") set



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out in *Tinsley*, the court in *Tribe* proceeded to apply the doctrine of *locus poenitentiae* instead. This explains, in our respectful view, why *Tribe* marked a high (and, in particular, *liberal*) legal watermark in the law relating to the doctrine of *locus poenitentiae* (see also Nelson Enonchong, "Illegality and the Presumption of Advancement" (1996) 4 RLR 78 at 87). Indeed, Prof Iris Samet suggests that the court in *Tribe* "felt compelled to bend and distort" the doctrine of *locus poenitentiae* to "escape from the injustices produced by" the formal reliance principle (Iris Samet, "*Locus Poenitentiae*: Repentance, Withdrawal and Luck" in Ch 12 of *Constructive and Resulting Trusts* (Charles Mitchell ed) (Hart Publishing, 2013) ("Samet") at p 337). Prof Paul S Davies also observes that "*Tribe* highlights a certain level of dissatisfaction with the rigid approach in *Tinsley*" (Paul S Davies, "Ramifications of *Patel v Mirza* in the Law of Trusts" in Ch 11 of *Illegality after Patel v Mirza* (Sarah Green & Alan Bogg eds) (Bloomsbury Publishing, 2018) ("Davies") at p 292). We discuss *Tinsley* and the reliance principle in greater detail at [128]–[132] below, but it suffices to observe at this juncture that, in so far as the formal reliance principle set out in *Tinsley* is not part of Singapore law, there is no impetus for us to adopt the overly broad approach in *Tribe*.

86 Indeed, it may well be the case that, on the *actual facts* of *Tribe* itself, the court, with respect, might have adopted a liberal approach towards the doctrine of *locus poenitentiae* that was contrary to the underlying spirit of that doctrine itself. As Prof Nelson Enonchong argues, the position in *Tribe* does nothing to discourage the plaintiff from entering into the illegal transaction in the first place. He explains as follows (see Nelson Enonchong, *Illegal Transactions* (LLP, 1998) at p 339):

> … The plaintiff has nothing to lose: if the anticipated events occur the illegal plan will go ahead and, for example, creditors



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> will be defrauded; if the events do not occur and the danger passes, so that there is no need to defraud anyone, the plaintiff will get his property back. Either way he ends up with his property.

87 Another leading scholar in the field, Prof Francis D Rose, made the following observation of the decision in *Tribe* (see F D Rose, "Gratuitous Transfers and Illegal Purposes" (1996) 112 LQR 386 at 390):

> … withdrawal can suppress the defence of illegality, allow an otherwise valid action in restitution to proceed, and provide an independent, policy-motivated ground for restitution.
>
> The Court of Appeal [in *Tribe*] took two steps beyond this. First, it remarked that, as events turned out, the plaintiff had no need to deceive his creditors. ***But by the same token he had not withdrawn while that possibility existed. The court's decision neither deterred illegality nor protected creditors but, in reformulating the law to enable him to recover his shares after the danger had passed, positively assisted him to achieve the exact illegal purpose he intended.***
>
> [emphasis added in bold italics]

This is a powerful and persuasive critique with which we associate. Reference may also be made to *Chitty on Contracts* vol 1 (H G Beale gen ed) (Sweet & Maxwell, 36th Ed, 2025), especially at para 19-200 (where, in fact, Prof Rose's article, above, is also cited with approval).

88 In the same vein, yet another leading scholar in the field, Prof Graham Virgo, proffered the following analysis which we refer to *in extenso* (see Graham Virgo, "Withdrawal from Illegal Transactions – A Matter for Consideration" [1996] CLJ 23 at 24–26):

> Whilst the result in *Tribe* v. *Tribe* appears to be just in that the son did not deserve to retain the shares, as the judges acknowledged, the application of the newly-defined principle to the facts of the case ***is fraught with difficulty. First, did the father really withdraw from the transaction? If withdrawal is defined in terms of a voluntary decision not***



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> ***to have anything more to do with the transaction, clearly he did not withdraw. However, the Court's decision that he withdrew suggests that all that is needed now to withdraw is that the claimant makes a claim for restitution of the property. For this is all that the father did, once he had realised that the danger of creditors seizing his assets had passed.***
>
> ***Secondly, is it correct to assert that the illegal purpose was not carried into effect in any way? The Court's decision that it was not carried into effect assumes that the illegal purpose was to deceive creditors. But this is difficult to justify, since surely the father's purpose was, at least in part, to make it appear that he did not own shares, by transferring them to his son. Although nobody was actually deceived the father had done all he could do to carry his purpose into effect. Therefore, the Court should have concluded that his purpose had been partly carried into effect.***
>
> ***Thirdly, why should withdrawal from an illegal transaction operate as an exception to the general rule in* Holman v. Johnson*? The supposed policy behind the principle is that it encourages participants in such transactions to change their minds about proceeding with the transaction before any part of the illegal purpose has been fulfilled. But the very facts of* Tribe *show that this policy may not be achieved. The father did not 'withdraw' because of any change of mind, but simply because the transaction proved unnecessary. Rejection of the requirement of repentance has removed any remaining justification for maintaining an independent withdrawal principle.***
>
> …
>
> ***Whether the withdrawal principle or the principle of total failure of consideration*** [the latter of which Prof Virgo preferred instead] ***is adopted, the result in* Tribe *is difficult to justify. The real criticism should be aimed at the interpretation of the rule in* Holman v. Johnson *and the arbitrary effects of the presumption of advancement. But it is much better to resolve the inadequacies of the law openly rather than to do so under the guise of vague and meaningless principles such as withdrawal. For a principle which can be manipulated by the courts to allow restitution where there is in fact no voluntary withdrawal and where there has been a partial fulfilment of an illegal purpose is a fiction encouraging the exercise of the court's***



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> ***discretion. This is the road to uncertainty which should be avoided*.**
>
> [emphasis added in bold italics and bold underlined italics]

We also associate ourselves with the above critique of *Tribe* by Prof Virgo. Like Prof Rose's critique that was considered in the preceding paragraph, it, too, is powerful and persuasive. Indeed, it should be borne in mind that there ought to be a distinction drawn between the illegal *purpose* and its *effects*. This is not to state that the latter is unimportant for both purpose and effects often interact with each other. *However*, to focus only on the effects – and in a very *literal* manner as well – would, as Prof Virgo perceptively points out, *undermine* the very *raison d'être* of the doctrine of *locus poenitentiae* itself.

89 Indeed, a yet similar critique was proffered by yet another learned author, Prof Mark Pawlowski, who observed thus (see Mark Pawlowski, "Constructive Trusts, Illegal Purpose and *Locus Poenitentiae*" (2009) 2 Conv 145 at 150):

> Despite its apparent merits, the approach taken by Millett L.J. [in *Tribe*] has been the subject of academic criticism, not least because it is unclear at what point the transaction has been carried into effect so as to prevent a withdrawal. The notion that a withdrawal can take place before the illegal purpose has been only *partly* carried into effect only adds to this uncertainty and confusion. Moreover, the superficiality of seeking to draw a distinction between the *transaction*, on the one hand, and the *purpose* on the other, inevitably leads to fine and artificial distinctions. ***Surely, in* Tribe*, the illegal purpose had, in every sense, been carried out once the shares had been transferred to the son. After all, this had the effect of divesting the father of all interest in the shares. As Virgo has observed*** [in Graham Virgo, "Withdrawal from Illegal Transactions – A Matter for Consideration" [1996] CLJ 23 at 25 (also referred to above at [88])]***, the Court of Appeal's decision is based on the fundamental premise that the illegal purpose was to deceive creditors, but an equally plausible interpretation is that the father's purpose was to make it look as if he no longer owned the shares by transferring***



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> ***them to his son. Although there was no deception, the point here is that the father had clearly fulfilled that purpose.***
>
> [emphasis in original in italics; emphasis added in bold italics]

90 Similar concerns were raised by Prof Davies, who argued that the illegal purpose in *Tribe* had been carried out, as the father's shares were hidden with his son for a given period, exactly as intended. The father had effectively used the process of the courts to both achieve his fraudulent purpose and also to get his property back (see Davies at p 292).

91 A related criticism was made by Prof Samet, who argued that the father's decision in *Tribe* to withdraw from the illegal scheme can be seen as one that was not "voluntary" (see Samet at p 352):

> … Once an illegal scheme has become completely pointless, an act of withdrawal from the scheme becomes a mere formality. Indeed, it is not even clear in what sense the claimant in *Tribe* repudiated the arrangement with his son—the whole purpose of the transfer was to shelter the property while it was at risk, so that once it was no longer at risk, the shares would be returned to the father. In asking for the shares to be reassigned to him the father can therefore be seen as asking the son to perform his part of the deal, rather than abandoning it. There was no space in which he could have chosen otherwise, so as to render his decision 'voluntary'. …

92 We see much force in these criticisms of *Tribe*. In our judgment, the understanding of the doctrine of *locus poenitentiae* in *Tribe* would effectively allow a party to maintain an illegal arrangement for as long as it remains convenient to do so, only to rely on a supposed "repentance" when external circumstances have rendered the illegal arrangement unnecessary or impossible to maintain. This, with respect, cannot be correct. Indeed, such an approach would risk creating a perverse incentive. A party contemplating an illegal arrangement would know that he may conveniently withdraw from it should the



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arrangement cease to be necessary or become impossible to carry out. Far from discouraging illegal arrangements, such an approach would in effect furnish parties with a safety net, encouraging them to enter into illegal transactions in the knowledge that they may extricate themselves from the consequences with ease whenever it suits them to do so. The underlying rationale of the doctrine to encourage genuine and voluntary withdrawal from illegal arrangements would thereby be wholly undermined.

(3) The proper scope of the doctrine of *locus poenitentiae* in Singapore

93 For the reasons set out above, we take this opportunity to endorse the scope of the doctrine of *locus poenitentiae* as previously set out in *Ochroid* at [176(b)(ii)]. In our view, the repentance must be both genuine *and* voluntary. What constitutes "voluntary" repentance (in addition to "genuine" repentance) would of course depend on the precise facts and circumstances of the case. What *is* clear, however, is that an individual who has *no choice but to* back out or withdraw from the illegal purpose will generally not be permitted to rely on the doctrine; simply put, the attempted withdrawal is, in substance, *involuntary* in nature.

94 It might be useful at this juncture to emphasise that by "genuine" repentance (in addition to "voluntary" repentance), we are ***not*** advocating a ***subjective (still less, moral) exercise***. Indeed, such an exercise would be neither realistic nor practical. We observed as much (albeit by way of *obiter dicta*) in our decision in *Aqua Art Pte Ltd v Goodman Development (S) Pte Ltd* [2011] 2 SLR 865, as follows (at [31]):

> 31. The other major controversy centres around the issue as to whether in order for 'repentance' to be successful, it must be both *genuine and voluntary*, with the result that, where the



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> contracting party concerned had no choice but to repent because the fulfilment of the illegal purpose was no longer possible owing to external circumstances beyond the control of the parties, the doctrine will not apply (see the leading English decision of *Bigos v Bousted* [1951] 1 All ER 92 ("*Bigos*")). *However*, in the more recent English Court of Appeal decision of *Tribe*, only voluntariness – as opposed to the genuineness – of repentance was emphasised (for a comprehensive discussion of the arguments for as well as against such an approach, see [Nelson Enonchong, *Illegal Transactions* (LLP, 1998) ("*Enonchong*")] at pp 337–338). ***There may well be an overlap between – or even coincidence of – these two elements, depending on the fact situation concerned. Indeed, if*** the relevant legal proposition is that the concept of genuineness is unnecessary in so far as it connotes a *subjective* feeling of *remorse* on the part of the party concerned (and *cf* [Lord Goff of Chieveley and Gareth Jones], *The Law of Restitution* (Sweet & Maxwell, 7th Ed, 2007) at para 24-008), ***there may well be no practical difficulties inasmuch as*** the concept of voluntariness means that, on the facts of cases such as *Bigos*, the ***result*** would be ***the same*** (see *Enonchong* at p 339; but *cf per* Millett LJ in *Tribe* at 135).
>
> [emphasis in original in italics; emphasis added in bold italics]

95 As the above passage makes clear, the concept of genuineness, properly understood, does not connote a *subjective* feeling of *remorse* on the part of the party concerned. Indeed, that would – to reiterate an important point – be both unrealistic as well as impractical. To the extent that the decision in *Bigos v Bousted* [1951] 1 All ER 92 supports the requirement of a subjective feeling of remorse, we would respectfully disagree with it. We are nevertheless of the view that on the *actual facts* of that particular case, the correct decision was arrived at. *What we* ***do*** *endorse is the view that,* ***regardless of the precise language used (and here we must be wary of an overindulgence in linguistic analysis for its own sake), if a party seeks to avail itself of the doctrine of*** **locus poenitentiae** ***when it has no choice but to do so, for example, if the illegal scheme it perpetrated has been found out, then it would not be able to rely on the aforementioned doctrine. Indeed, in the example just mentioned, if the party***



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***concerned had <u>not</u> been found out, it would have proceeded to consummate its illegal scheme. There is therefore no reason in both principle or policy why such a party should be permitted to avail itself of the doctrine of* locus poenitentiae *when it finds itself painted into a corner, so to speak*.** We reiterate that to suggest otherwise would be inconsistent with the underlying rationale for the doctrine, which is to encourage parties to back out of illegal arrangements (see *Ochroid* at [44]; see also Yip Man, "The Restitutionary Aftermath of Contractual Illegality" (2015) 23 RLR 106 at 124).

96 Indeed, we find support for our approach to the doctrine of *locus poenitentiae* from the England and Wales Court of Appeal decision in *Collier v Collier* (2002) 6 ITELR 270 ("*Collier*"). In that case, a father, confronted with financial difficulties, granted his daughter a lease over two commercial properties. He then mortgaged the two properties without informing the mortgagees that the lease provided the daughter an option to purchase the two properties. Subsequently, the daughter duly exercised the option to purchase, with majority of the purchase price being provided by the father. The father also continued to operate the businesses on the properties as he had before. This transfer to the daughter was done with the object of sheltering the properties from the father's creditors (in particular the mortgagees) and from inheritance tax. Subsequently, a dispute arose between the father and the daughter regarding the profits from the businesses on the properties. The father sought a declaration that the daughter held the two properties on trust for him. The court applied the formal reliance principle such that the father could not rely on his own illegality to prove the terms of his alleged trust. The father sought to rely on the doctrine of *locus poenitentiae* as an exception to the formal reliance principle, claiming that he had voluntarily withdrawn from his illegal purpose which had not been carried out. However, the court rejected this contention, finding instead that he



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had given effect to his dishonest intention by directing his daughter to exercise the option to purchase under the leases and that he had benefitted from the possibility that inheritance tax would be evaded. Thus, the father could not enforce the alleged trust (at [46]–[48], [80]–[83], [105] and [108]–[109]). In our view, the father's repentance could not be described as genuine or voluntary. He had come clean about his illegal purpose only in the course of the action and only because it suited him to do so at that juncture. Indeed, as the court rightly noted, the fraud against the mortgagees had already been perpetuated. Given that the minority in *Patel* had approved of the approach in *Tribe*, it is perhaps unsurprising that they also expressed dissatisfaction with the result in *Collier* (see*, eg*, *Patel* at [187] and [200] per Lord Mance JSC). Nonetheless, for the reasons expressed above, we take a contrary view.

97 It might be observed, parenthetically, that in the context of the UK at least, there is no longer the need for a liberal approach towards the doctrine of *locus poenitentiae* after *Patel*, which no longer follows the formal reliance principle in *Tinsley* and adopts a much broader and general "range of factors" test. As already mentioned (at [49] above), however, the legal position in *Singapore* is *quite different*.

98 Indeed, as we have already noted (at [69]–[74] above), there is scope (if it is thought necessary) for the court concerned to arrive at a just and fair result at the second stage of the *Ochroid* framework. This would include, for example, claims by way of an independent cause of action and/or the invocation of the doctrines of *locus poenitentiae* and/or a party not being *in pari delicto*. However (and consistent with the aforementioned framework), any such claim would still be subject to the concept of *stultification*.



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99 Returning to the doctrine of *locus poenitentiae*, as we have emphasised (at [95] above), whether or not the concepts of genuineness and/or voluntariness are used, the main point to note (particularly from the perspective of not mere form but also *substance*) is that where a party has ***no choice but to repent or withdraw from the illegal purpose, that would be neither genuine nor voluntary*** and, hence, the doctrine ***cannot*** be invoked successfully. ***Much would of course turn, in the final analysis, on the precise facts and circumstances of the case itself.*** Indeed, it might be said that where the repentance or withdrawal is neither genuine nor voluntary, the concept of *stultification* would probably also be engaged in any event.

100 It should also be borne in mind that even if the doctrine of *locus poenitentiae* does not apply on the facts, it might be possible to mount a claim at the second stage of the framework on an *alternative* legal basis, for example, by way of an independent cause of action. Whilst it might be argued that the concept of *stultification* might likewise result in the rejection of the claim, we would ***not*** be prepared to state that there is a ***complete*** *coincidence* in the *ultimate result* inasmuch as the rejection of a claim pursuant to the doctrine of *locus poenitentiae* would not *necessarily and automatically also* result in the rejection of a claim pursuant to an independent cause of action because of the application of the concept of stultification. ***As always, much would depend on the precise facts and circumstances of the case – and, in particular, whether or not the underlying public policy is in fact stultified.***

(4) The relevance of the decisions in *Shi Fang* and *Yeo Kia Yong*

101 We turn next to address the case of *Shi Fang* where this Court, prior to *Ting Siew May* and *Ochroid*, endorsed and applied *Tribe*. In *Shi Fang*, the



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respondent husband ("Koh") and the appellant wife ("Shi") lived in a property registered in Koh's name but purchased using funds provided by Koh's father. No consideration was given or intended to be given by Koh as the father's purpose in making this arrangement was to evade estate duty payable on the house on his death. Subsequently, the marriage broke down, and Shi lodged a caveat claiming an interest in the house. Koh then commenced an action seeking a declaration that the house was held by him on trust for the father, and an order that the caveat be removed.

102 On the issue of whether the property belonged to Koh or his father, the trial judge observed that as the funds had been provided by the father, there was a presumption of resulting trust in favour of the father. However, this was displaced by the presumption of advancement in favour of Koh. The presumption of advancement could not be rebutted by virtue of the formal reliance principle as the father would have had to rely on evidence of the illegal purpose for which the property had been registered in Koh's name. The trial judge thus held that the property belonged to Koh. On appeal, this Court observed, albeit by way of *obiter dicta*, that this conclusion was incorrect. This Court explained that even though the father had registered the property in Koh's name for an illegal purpose – namely, to conceal it from the tax authorities so as to evade estate duty – that purpose had not been achieved or carried into effect, and the authorities had not been deceived, because the question of payment of estate duty had not yet arisen. Relying on the decision of *Tribe*, this Court observed that the doctrine of *locus poenitentiae* applied, and that the father could rely on the evidence as to the illegal purpose to rebut the presumption of advancement (at [25]).



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103 With respect, we are unable to agree with the conclusion in *Shi Fang*. The fundamental difficulty with the analysis in *Shi Fang* is that Koh and his father had *no choice* but to withdraw from the illegal purpose because Shi had lodged a caveat asserting an interest in the property. There was, in other words, nothing *genuine* or *voluntary* about their purported withdrawal from the illegal purpose – it was precipitated entirely by external circumstances beyond their control. In such circumstances, for the reasons articulated above, the doctrine of *locus poenitentiae* simply had no application. As such, we respectfully decline to follow *Shi Fang* on this point in so far as it suggests that the doctrine of *locus poenitentiae* may apply in circumstances where an individual has *no choice* but to back out or withdraw from the illegal purpose. To the extent that *Yeo Kia Yong* applied *Shi Fang* (see *Yeo Kia Yong* at [113]), we would also respectfully disagree with the reasoning and conclusion in that case.

*The legal status of a trust set up by a beneficiary for the purpose of concealing his or her assets from creditors*

104 As alluded to at [5] above, a trust set up by a beneficiary for the purpose of concealing his or her assets from creditors is, in our view, ***illegal and contrary to public policy***. Indeed, such a trust would have – at its root – a dishonest as well as fraudulent intent. If so, then it would, in our view, be quintessentially a category of trusts that would be anathema to the spirit of equity. Indeed, as Prof Alastair Hudson observes (see Alastair Hudson, *Equity and Trusts* (Routledge, 11th Ed, 2025) at para 1.4.18):

> It would not be an exaggeration to suggest that many of the principles of equity are aimed at the avoidance of fraud, or the avoidance of the results of fraud. Many of the doctrines considered in this book will be orientated around the avoidance of fraud … The notion of fraud here is different from that under, for example, the tort of deceit. This indicates the increasing breadth of equitable fraud beyond the category simply of straightforward fraud. …



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105 Such a trust would be the analogue in the context of the law of contract to a contract to commit a fraud. Indeed, contracts to commit a fraud fall under an established category of contracts that is contrary to public policy under the common law (*Ting Siew May* at [37]–[41]; *Ochroid* at [29]).

106 The conclusion arrived at in the preceding paragraphs is also supported by at least one of the leading textbooks on equity. In Jamie Glister & James Lee, *Hanbury and Martin: Modern Equity* (Sweet & Maxwell, 23rd Ed, 2024) ("Hanbury and Martin") at para 14-002, it is observed as follows:

> … Trusts for the furtherance of illegal or immoral activities, such as, for example, terrorism or prostitution, would also fail. Likewise *a trust for a* ***fraudulent purpose***, such as placing money with a company in order to give it the false appearance of a credit balance. The Law Commission regarded an "illegal trust" as including the following: a trust which it would be legally wrongful to create or impose; *a trust which is created* ***to facilitate fraud*** *or some other legal wrong*; a trust which is created in return for the commission of a legal wrong; a trust which requires a trustee or beneficiary to create a legal wrong; and a trust which is otherwise contrary to public policy at common law.
>
> [emphasis added in italics and bold italics]

107 It is appropriate at this juncture to also refer to the analysis in *Ting Siew May* which discussed the seminal article by Prof Furmston (see M P Furmston, "The Analysis of Illegal Contracts" (1965–1966) 16 U Toronto LJ 267) and his comments on the case of *Alexander v Rayson* [1936] 1 KB 169 ("*Alexander*"). It will be recalled that *Alexander* was a case where the plaintiff had leased a flat to the defendant using two documents – first, a lease of the flat with the benefit of certain services at a rent of £450 per annum, and second, an agreement for the provision of various services for £750 per annum. Except for the provision and maintenance of a refrigerator, the services to be provided under both documents were practically the same. This was done to give the impression that



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the true rent was £450 per annum so as to reduce the tax payable by the plaintiff. The court in *Alexander* found the contract to be illegal and void. While *Alexander* is often cited as an example of a contract to defraud the revenue, Prof Furmston took a contrary view as follows (at 287):

> It is apparent that the contract did not require either party to do anything which involved a fraud on the revenue and that the contract could have been performed without any such fraud. The factor which caused the Court of Appeal to hold the contract illegal was the plaintiff's unrevealed intention to use the contractual documents to assist in misleading the local assessment committee. It may well be that this decision is correct but it is important to analyse it correctly. *The contract was not one to do an act contrary to the policy of the law (defrauding the revenue) but one to do an act in itself legal but intended by one of the parties to provide a setting for an act contrary to the policy of law (defrauding the revenue).* …
>
> [emphasis added]

108 While we approved of Prof Furmston's analysis of *Alexander* in *Ting Siew May* at [52]–[53], we pause to note, parenthetically, that his observation must not be taken too far, and that they should be taken more as advice not to classify contracts as illegal and contrary to public policy where the facts and circumstances do not justify it. More specifically, the concept of a contract not being illegal in itself should not be applied in too literal a manner such that it fails to appreciate the ***substance*** of the transaction. It could be said of most illegal contracts, including contracts to commit a fraud, that the legal structure of a contract is not in and of itself unlawful. However, it is the *intent and purpose* which renders such contracts contrary to public policy, and the ***same*** may be said of *trusts* that are contrary to public policy. If the *intent and purpose* for which the trust is set up is *contrary to an established head of public policy*, then it follows that the trust which constitutes the legal vehicle, so to speak, is similarly contrary to public policy and hence void and unenforceable. Looked at in this light, it is clear, in our view, that a trust set up by a beneficiary for the



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purpose of *concealing* his or her assets from creditors, thereby *dishonestly as well as fraudulently* frustrating the creditors' potential rights to the assets, *must be contrary to public policy*.

109 Given that it is the *intent and purpose* of concealing assets from creditors which renders such a trust contrary to public policy, one may understandably take the view that such trusts will typically be *express trusts* where evidence of the said intent and purpose is available. That raises the question of whether our preceding analysis applies to trusts that arise by operation of law. We answer this question in the affirmative for the simple reason that, even though certain trusts arise by operation of law, depending on the facts of each case, the evidence may also demonstrate that the beneficiary had the *intent and purpose* of using the said trust structure to conceal his or her beneficial ownership from creditors. For example, a common intention constructive trust arises when there is a common intention between the parties as to how the beneficial title is to be held and the beneficiary relies on the common intention to his or her detriment. If the evidence demonstrates that the beneficiary's *intent and purpose* was to use the trust structure to conceal his or her beneficial ownership from creditors, there is no reason in principle why such an implied trust should not similarly be treated as one contrary to public policy. Likewise, while a resulting trust arises in response to a party's lack of intention to benefit the other party with his or her financial contributions, we would not foreclose the possibility that a resulting trust could similarly be contrary to public policy, if the evidence demonstrates that the former party's *intent and purpose* was to use the trust structure to conceal his or her beneficial ownership from creditors.

110 We pause at this juncture to consider two possible objections to the proposition that a trust set up by a beneficiary for the purpose of concealing his



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or her assets from creditors ought to be treated as unlawful *per* se without more as opposed to being subject to the principle of proportionality.

111 The *first* possible objection is that there are very few – if any – prior precedents, and our approach appears to diverge from the current position under UK law in so far as it has yet to recognise a category of public policy in equity prohibiting a trust set up by a beneficiary for the purpose of concealing his or her assets from creditors and rendering such a trust unlawful *per se* without more.

112 However, the fact that there is no prior precedent is neither here nor there. *Every* legal rule would have had to be laid down for the *very first time* by the court. In other words, there must, *ex hypothesi*, be ***a starting point*** for *every* ***new*** *legal doctrine*. Whilst it is true that new rules and principles at common law and in equity are often developed incrementally – and historically – from past precedent, there are surely occasions when the relevant rule or principle has *no* prior precedent (for example, when a new doctrine is formulated for *the very first time*). This may well be one of those occasions. What *is* crucial, however, is that the new rule or principle *must* be *justified on proper logic and principle*. In the situation where a trust is set up by a beneficiary for the purpose of concealing his or her assets from creditors, it is clear that to countenance such a legal device would be to sanction fraud and dishonesty – the very *antithesis* of the spirit and substance of equity itself.

113 As for the apparent divergence from the legal position in the UK, this should not be exaggerated given that the *Ochroid* framework already diverges from the "range of factors" test in *Patel*, at least in the context of the law of contract. Indeed, the precise disagreement this Court in *Ochroid* had with the



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majority's approach in *Patel* lay in the fact that, under the "range of factors" test, established heads of common law public policy would no longer have independent bite outside of the principle of proportionality. Thus, our recognition of a new head of public policy in equity rendering trusts set up by a beneficiary to conceal his or her assets from creditors illegal is entirely consistent with this Court's view in *Ting Siew May* and *Ochroid* that the principle of proportionality should only play a limited and residual function.

114 Our attention has been drawn to the cases of *Tribe*, *Collier* and *Knight v Knight* [2019] EWHC 1545 (Ch) ("*Knight*") where the trusts in question fell into precisely the category we are concerned with presently. In our view, the correct analysis in these cases ought to be that the trusts were void and unenforceable as being illegal and contrary to an established head of public policy in equity. Inasmuch as the analysis in *Tribe* and *Collier* was premised on the formal reliance principle, that is no longer the correct way to look at these cases (as explained at [132] below). *Knight* merits further comment as, having been decided after *Patel*, it was resolved on an application of the "range of factors" test. In that case, a person who was facing the prospect of bankruptcy purported to sell a property to his friend on the agreement that the property would be transferred back to him after the risk of bankruptcy passed or when he got out of bankruptcy. However, the person continued living in the property during this period. Following the person's passing, the administrators of the estate brought a claim in respect of the property. The England and Wales High Court found that the deceased person and his friend had intended the former to remain the beneficial owner of the property and thus found an express trust in favour of the estate (at [89]), with an alternative finding that there was a resulting trust if there had in fact been no express trust (at [90]). However, as the purpose of the trust was to shield the property from the deceased person's



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creditors and the Official Receiver, the court applied the "range of factors" test and concluded that it would be a disproportionate response to hold the trust unenforceable. This was because, after the deceased person's bankruptcy, all his creditors were fully paid, and the Official Receiver had notice of the purported sale of the property to the deceased person's friend but took no action against it (at [109]–[110]). In our view, however, the correct analysis, at least under Singapore law, ought to be that the trust in *Knight* ran afoul of an established head of public policy in equity and was thus void and unenforceable. We leave open the question of whether a *restitutionary remedy* at the second stage would have been available on the facts of *Knight*.

115 The *second* possible objection is that a strict legal rule that would render a trust set up by a beneficiary for the purpose of concealing his or her assets from creditors illegal *without more* might be *too blunt*, thus resulting in possibly harsh results or consequences. This is, in fact, the view taken by Prof Tang who therefore advocates the use of the principle of proportionality instead. With respect, we are unable to accept Prof Tang's characterisation as well as approach. Let us elaborate.

116 If the enforceability of such a trust is to be governed by the principle of proportionality, it would be extremely difficult to conceive of trusts that would be *themselves* illegal and contrary to public policy (*ie*, trusts that are unlawful *per se*). There are, admittedly, established categories of trusts that are already expressed to be, in themselves, illegal and contrary to public policy in the leading textbooks. Nevertheless, if Prof Tang's approach is adopted, there would be no reason in principle why even ***those*** trusts should not come within the purview of the principle of proportionality instead (see our analysis at [108] above). If so, the ***overall*** legal position in Singapore in the context of the law of



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trusts would – in ***substance*** at least – be ***similar*** to the "range of factors" test in *Patel* that was in fact ***rejected*** by this Court in *Ochroid* in relation to illegal contracts. Indeed, it is important to reiterate that the principle of proportionality set out by this Court in both *Ting Siew May* and *Ochroid* was intended to have a ***subsidiary*** *role only* (see our analysis at [58]–[59] above).

117 More specifically, where there is a head of public policy that results in harsh consequences, whilst it might indeed be characterised as being blunt, that is *precisely what is intended*. Put simply, where *fraud and dishonesty* are involved, there is no injustice or unfairness in *generally* permitting the loss to lie where it falls. In other words, *public policy* generally *trumps* individual rights and considerations.

118 We have used the word "generally" in the preceding paragraph because – as in the law of contractual illegality – there may indeed be situations where an exception might be made, although any exception must (in the nature of things) be kept within strict and narrow parameters. So, for example, we have alluded to the application of the doctrine of *locus poenitentiae* in the trusts context to obtain restitutionary recovery (see [72]–[73] above). Hence, in a situation where a beneficiary sets up a trust for the purpose of concealing his or her assets from creditors, there can be no recovery under the trust which is void and unenforceable, but the beneficiary may possibly obtain restitutionary recovery of either funds transferred or a proprietary interest if he repents and withdraws from the illegal purpose before it is effected. As already explained, such repentance must, in our view, be both *genuine and voluntary*, and would not include situations where the beneficiary had *no choice but to withdraw* from the illegal purpose (see [93], [95] and [99] above).



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119 However, counsel for Mr Kwee, Mr Vikram Nair ("Mr Nair"), argued that the formulation of a category of public policy that renders a trust set up by a beneficiary for the purpose of concealing his or her assets from creditors illegal and contrary to public policy might produce anomalous results inasmuch as it works to the *detriment* of *the beneficiary's creditors* themselves. If, for instance, the beneficiary of such a trust becomes bankrupt, then the finding that the trust is void and unenforceable would entail that the Official Assignee or private trustee in bankruptcy would not be able to attach the assets for the benefit of the beneficiary's creditors, resulting in the very mischief the rule was meant to guard against.

120 Whilst this argument appears attractive at first blush, it is, with respect, fundamentally flawed as a matter of both principle as well as logic. Let us elaborate.

121 In *Ochroid* at [43], we explained that the first avenue of restitutionary recovery at the second stage applies where the parties are **not *in pari delicto*** (*ie*, where the plaintiff is less blameworthy than the defendant). One of the established categories in which the *in pari delicto* doctrine operates is where the relevant legislation which prohibits the contract is a class protection statute that is intended to protect the class of persons to whom the plaintiff belongs. We are of the view that the underlying rationale behind class protection statutes applies with equal force where the illegality arises not from a statute but from a head of public policy in common law or equity.

122 It must be borne in mind that the category of public policy we are concerned with here has the fundamental aim of ensuring that *the beneficiary's* ***creditors*** are not dishonestly or fraudulently kept from attaching the



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beneficiary's assets. They are ***the very class of persons whom this legal rule and principle is supposed to protect***. Thus, the rationale and principles behind class protection statutes ought to apply with equal force to this particular category of public policy in equity, such that the beneficiary's creditors will often not be *in pari delicto* compared to the trustee of the asset in question. The result is that – ***contrary*** to Mr Nair's argument – the Official Assignee or the private trustee in bankruptcy may be able to obtain restitutionary recovery of funds transferred or a proprietary interest at the second stage on behalf of the beneficiary's creditors, notwithstanding that the trust is void and unenforceable at the first stage.

123 For the reasons set out above, we are of the view that a trust set up by a beneficiary for the purpose of concealing his or her assets from creditors is illegal and contrary to public policy *in itself* and therefore void and unenforceable. This is not necessarily the end of the matter for, as noted at [118] and [122] above, the doctrines of *locus poenitentiae* and a party not being *in pari delicto* might apply at the second stage of the framework.

*The legal status of a trust set up by a beneficiary for the purpose of evading estate duty*

124 It should also be noted that one of the other issues this case raises is whether a trust set up by a beneficiary for the purpose of evading estate duty is illegal and contrary to public policy. The estate duty regime in Singapore was inherited from the British during the colonial period. However, it was abolished by Parliament with effect from 15 February 2008 by way of the Estate Duty (Abolition) Act 2008 (No 13 of 2008).



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125 It could be argued that, by analogy to our analysis in the preceding section, a trust set up by a beneficiary for the purpose of evading estate duty has, at its root, a dishonest and fraudulent intent to conceal assets from the tax authorities. It would thus seem attractive to conclude that such trusts are similarly antithetical to the rules, principles and spirit of equity, and therefore illegal and contrary to public policy *in themselves*. Indeed, *Shi Fang* and *Yeo Kia Yong* were cases where the trusts in question were set up for the purpose of evading estate duty and where the enforceability of the trusts had to be determined by the court at a time when the estate duty regime was still in force. While the cases applied the formal reliance principle, it could be argued that the correct analysis in hindsight ought to be that the trusts were unlawful *per se*. For completeness, we have addressed the non-applicability of the doctrine of *locus poenitentiae* to the cases of *Shi Fang* and *Yeo Kia Yong* in our analysis at [103] above.

126 However, where the enforceability of a trust set up by a beneficiary for the purpose of evading estate duty is to be determined by the court *after* the estate duty regime had been abolished, the difficult question arises as to whether the enforceability of the trust should be ascertained at the time the trust was created or at the time of determination by the court. On the one hand, there is an argument to be made that the fraudulent intent tainted the trust *from its very inception*, and a trust that was void and unenforceable from the outset cannot gain a second life simply because the relevant public policy has changed. On the other hand, an argument may also be made that the court, in applying the doctrine of illegality and public policy, is primarily concerned with whether giving *prospective* legal effect to the trust would be compatible with public policy, in which case it is the public policy of present day (*ie*, that estate duty has been abolished) that is relevant.



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127 In the present case, it is unnecessary for us to come to a conclusive view on the legal status of a trust set up by a beneficiary for the purpose of evading estate duty. As we explain below, our analysis in the preceding section that a trust set up by a beneficiary for the purpose of concealing his or her assets from creditors is unlawful *per se* is sufficient to dispose of the present case.

*A note on* Tinsley *and the formal reliance principle*

128 We have thus far alluded to *Tinsley* and the formal reliance principle. As we noted in *Ochroid* at [57]–[58], *Tinsley* has been the subject of much criticism and, indeed, has been departed from in Australia (in the High Court of Australia decision of *Nelson v Nelson* (1995) 184 CLR 538) and in the UK (by the majority in *Patel*). However, we nevertheless also acknowledged that *Tinsley* had been endorsed and applied in Singapore (*Ochroid* at [59]) and did not come to a definitive conclusion on whether *Tinsley* should be overruled (*Ochroid* at [166]).

129 In *Baker*, the SICC, observing that this Court in *Ochroid* left open the question of whether *Tinsley* should be departed from, appeared to apply *Tinsley* in recognising a resulting trust (at [273]), although as noted at [65] above, this was seemingly treated as an independent cause of action at the second stage of the *Ochroid* framework and was only *obiter dicta*. In *Alistair Lau*, Goh JC was of the firm view that the formal reliance principle from *Tinsley* should not apply in the context of the law of trusts (at [55]).

130 In the present appeal, Prof Tang strongly urges this Court to overrule *Tinsley* in the Singapore context. Whilst such a suggestion appears persuasive at first blush, some caution is necessary. Let us elaborate.



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131 It should be noted that *Tinsley* was specifically overruled by the majority in *Patel* because the latter decision adopted the "range of factors" test to which reference has been made earlier in this judgment. However, it should also be noted that this Court in *Ochroid* ***rejected*** the "range of factors" test. Hence, the approach that Singapore courts ought to adopt in relation to *Tinsley* must be one that is consistent with the framework set out above for the doctrine of illegality and public policy in the context of the law of trusts ***and*** *must* ***not*** *(whether in form and/or substance) endorse the "range of factors" test that had been* ***rejected*** *in* Ochroid.

132 We return, then, to what, in our view, ought now to be the legal position in the Singapore context in so far as *Tinsley* is concerned. In *Ochroid*, we drew the important distinction between the formal reliance principle (which is triggered whenever the claimant has to assert, whether by way of pleading or evidence, the illegal acts and therefore literally rely on the illegal contract or trust) and reliance as a normative and substantive principle (which is only engaged when a claimant seeks to enforce, and thereby profit from, the illegal contract or trust through his claim) ("normative reliance principle") (at [128]). In so far as *Tinsley* only stands for the formal reliance principle, there is no impediment to this Court formally overruling it. Indeed, this Court in *Ochroid* unequivocally rejected the formal reliance principle (at [127]–[138]). The question that remains, however, is whether there are elements of the reasoning in *Tinsley* which in fact stand for the normative reliance principle. While we do not exclude that possibility, it suffices to note that the overall framework we have set out above for the doctrine of illegality and public policy in the context of the law of trusts adequately incorporates the normative reliance principle inasmuch as it ensures that ***no*** *claimant can* ***enforce and profit*** *from an illegal trust*. The same can be said of the *Ochroid* framework in the context of



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contractual illegality. Therefore, we take this opportunity to affirm that the courts should apply the legal framework set out above, and not *Tinsley*, where issues of illegality afflicting trusts arise in future cases.

*The relevance of the "clean hands" maxim*

133 Having set out the applicable framework for the doctrine of illegality and public policy in the context of the law of trusts, there remains a final question to be considered, that is the relevance (if any) of the "clean hands" maxim. Put simply, the issue that arises in this regard is whether the "clean hands" maxim is a freestanding doctrine, especially when viewed in the context of the doctrine of illegality and public policy. If so, then it might be potentially applicable in the context of the present appeal.

134 The general academic opinion appears to be that it is not. For example, it was observed in a comprehensive article on the equitable maxims as far back as 1949 as follows (see Zechariah Chafee Jr, "Coming Into Equity With Clean Hands" (1949) 47 Michigan L Rev 877 at 878):

> Although it is a pity to take this beautiful statue off its lofty pedestal, I propose to show that the clean hands doctrine does not definitely govern anything, that it is a rather recent growth, that it ought not to be called a maxim of equity because it is by no means confined to equity, that its supposed unity is very tenuous and it is really a bundle of rules relating to quite diverse subjects, that insofar as it is a principle it is not very helpful but is at times capable of causing considerable harm.

135 And, in commenting upon the status of maxims generally, Prof William Swadling not only referred to their use as "mere rhetorical devices" but also proceeded to observe thus (see William Swadling, "The Mischief of Maxims" in Ch 5 of *Equity Today: 150 Years after the Judicature Reforms* (Ben



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McFarlane and Steven Elliott gen eds) (Hart Publishing, 2023) ("Swadling") at p 90):

> The word 'maxim' is often used in common parlance to describe simple and memorable rules or guides for living. They are usually pedagogical and involve specific actions. The following definition of a proverb can also be applied to maxims: a 'short, generally known sentence of the folk which contains wisdom, truth, morals and traditional views in a metaphorical, fixed and memorisable form and which is handed down from generation to generation', 'an aphoristic expression of an ostensible general rule of science'. … There are hundreds, if not thousands of maxims, and they appear in most language systems.

136 Yet another learned author notes that equitable maxims "possess a peculiarly Delphic quality, wrapped as they are in metaphor, grandly unqualified, and acknowledging no authority but transcendent wisdom" (see Simon Gardner, "Two Maxims of Equity" [1995] CLJ 60 at 60).

137 And in a leading textbook on equity, it has been observed thus (see *Snell's Equity* (Steven Elliott gen ed) (Sweet & Maxwell, 35th Ed, 2025) ("Snell") at para 5-001):

> A maxim of equity is 'not a specific rule or principle of law. It is a summary statement of a broad theme which underlies equitable concepts and principles' [citing *Corin v Patton* (1990) 169 CLR 540 at 557, per Mason CJ and McHugh J]. As a result, the utility of equitable maxims is limited. A party cannot, for example, seek to rely directly on such a maxim in order to circumvent well-established rules or principles:
>
> …
>
> ***Further, maxims are by their nature stated in general terms, and as such may be capable of misleading when applied in particular contexts.*** …
>
> …
>
> As a result of the limited utility of maxims, their treatment here is shorter than in some previous editions. Some consideration is still required, however, as equitable maxims continue to feature in judgments and may provide some assistance to



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> courts in two broad types of situation. The first is when there is some uncertainty as to the scope of a particular rule or principle, and a court has to fall back on more basic principles to resolve that uncertainty. The second is when a court is exercising an equitable discretion, and seeks to structure that exercise by referring to broader, underlying principles. …
>
> [emphasis added in bold italics]

138 In the same vein, in Hanbury and Martin at para 1-025, the learned authors observe as follows:

> The "maxims" of equity embody the general principles which evolved in the Court of Chancery. ***They are not rules which must be rigorously applied in every case, but are more in the nature of general guidelines illustrating the way in which equitable jurisdiction is exercised.*** …
>
> [emphasis added in bold italics]

139 It appears that equitable maxims have not fared much better in so far as the ***case law*** is concerned. Hence, for example, in *Patel* itself, Lord Toulson JSC (with whom Baroness Hale of Richmond DPSC, Lord Kerr of Tonaghmore, Lord Wilson and Lord Hodge JJSC agreed) observed thus (at [95]):

> 95 In *Yarmouth v France* (1887) 19 QBD 647, 653, Lord Esher MR said:
>
> > '… I detest the attempt to fetter the law by maxims. They are almost invariably misleading: they are for the most part so large and general in their language that they always include something which really is not intended to be included in them.'
>
> In *Lissenden v C A V Bosch Ltd* [1940] AC 412, 435, Lord Wright quoted Lord Esher's words and added:
>
> > 'Indeed these general formulae are found in experience often to distract the court's mind from the actual exigencies of the case, and to induce the court to quote them as offering a ready made solution.'



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140 And, in the New South Wales Court of Appeal decision of *Kation Pty Ltd v Lamru Pty Ltd* (2009) 257 ALR 336, Basten JA observed as follows (at [148]):

> **[148]** At trial his Honour held that the relief sought by Lamru was equitable in nature and hence subject to equitable defences: that point is no longer in contention. The defence said to preclude relief on the part of Lamru with respect to the stock misappropriations was that it came with "unclean hands". ***To describe this phrase as a maxim or aphorism is overly generous: without a detailed understanding of the circumstances in which it operates, it is a colourful but imprecise label***: compare *Corin v Patton* (1990) 169 CLR 540 at 557; 92 ALR 1 at 12–13; [1990] HCA 12 per Mason CJ and McHugh J. Historically, many of the cases have arisen in circumstances which no longer have social resonance or which are now covered by the expanding blanket of statutory regulation. As the trial judge noted, the circumstances of its application were helpfully summarised by Campbell J in *Black Uhlans Inc v New South Wales Crime Commission* (2002) 12 BPR 22,421; [2002] NSWSC 1060 at [157]–[185] (*Black Uhlans*).
>
> [emphasis added in bold italics]

141 In our view, there is much truth to the above views (in both the relevant legal literature as well as case law), which are also broadly consistent with the views of Prof Tang as well (see [38] above). Indeed, looked at in practical terms, maxims in general and equitable maxims in particular are pitched at *too general a level of abstraction* to constitute specific as well as workable rules or principles in and of themselves (see also generally the decision of this Court in *Mühlbauer AG v Manufacturing Integration Technology Ltd* [2010] 2 SLR 724 at [40]–[43] on the dangers of over-abstraction and the need to balance the general with the specific). As Prof Swadling quite picturesquely puts it, "maxims have a tendency to snare things never intended to be caught, much as fishermen sometimes catch dolphins when fishing for cod" (see Swadling at p 92). However, as we shall elaborate upon below, this does not mean, as some



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academics have argued, that they constitute mere rhetoric. In the first place, they do, on occasion at least, describe the *underlying rationale* for certain rules or principles. Secondly, they may actually be invoked in a limited manner, especially in the equitable sphere, when courts exercise their *discretion* in a remedial context.

142 Turning to the specific context of *the present appeal*, we observe, first, that the very *nature* of the doctrine of illegality and public policy itself suggests that it is coterminous with the "clean hands" maxim and that, therefore, the latter is (looked at from the perspective of substance as opposed merely to form) redundant inasmuch as it does not add anything to the substance of the former (see also Snell at para 5-011).

143 Correlatively, doctrines such as that relating to *locus poenitentiae* suggest, by their very nature once again, that the party who is entitled to rely upon them has "clean hands" and that, therefore, the "clean hands" maxim has no further independent application. Conversely, if a party seeking restitutionary recovery at the second stage is precluded from doing so pursuant to the principle of stultification, then it might be said that the principle of stultification is itself a more concrete embodiment of the "clean hands" maxim.

144 Given its high level of generality and abstraction, it would rarely – if ever – be the case that the "clean hands" maxim could apply, in and of itself, as a *freestanding* doctrine. Nevertheless, this does ***not*** mean that the "clean hands" maxim is *necessarily and/or always* legally redundant either.

145 It would appear that the "clean hands" maxim applies more often than not in a *remedial* context in the equitable sphere in which *the court* possesses



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the *discretion*, based on *the precise facts and circumstances* of the case concerned, to apply that maxim in order to determine whether to grant the specific equitable *remedy* in question (see, *eg*, Graham Virgo, *The Principles of Equity & Trusts* (Oxford University Press, 5th Ed, 2023) at pp 37–38, Hanbury and Martin at para 1-029, and Snell at para 5-011). Put simply, the maxim is still at least potentially relevant in the context of *the exercise of discretion* in relation to *equitable remedies* (such as specific performance or injunctions). Indeed, a learned author has argued that even in the context of illegality, the "clean hands" maxim would nevertheless have a role to play provided that the remedy sought is supererogatory in nature (and would therefore not bring the law into disrepute if it was indeed awarded) (see, generally, Nicholas J McBride, "The Future of Clean Hands" in Ch 13 of *Defences in Equity* (Paul S Davies, Simon Douglas & James Goudkamp eds) (Hart Publishing, 2018)). It has also been suggested (more generally) that equitable maxims may be useful "when there is some uncertainty as to the scope of a particular rule or principle, and a court has to fall back on more basic principles to resolve that uncertainty" (see Snell at para 5-001 (also quoted at [137] above)).

146 Returning to the facts of the present appeal, it would appear, however, that the "clean hands" maxim would *not* have a separate and substantive role to play as such. For the reasons canvassed at [142]–[143] above, we consider that the "clean hands" maxim has no separate substantive role where the legal framework for the doctrine of illegality and public policy is applied to a trust. As already noted, the maxim might continue to be useful in other limited contexts, in particular, where the relief sought by the claimant is supererogatory in nature. However, there is no suggestion that the reliefs sought in the present case are of that nature.



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147 Having set out the law, we turn to consider its application to the facts of the present case.

***The present case***

*Issue 1: Were the Properties the subject of a gift or trust?*

(1) What was Mr Kwee's intention in relation to the Properties?

148 In the course of these proceedings, three possible explanations of Mr Kwee's intention in relation to the Properties have been canvassed for our consideration:

(a) Mr Kwee intended to gift the Properties to Ms Kwee.

(b) Mr Kwee intended to retain a life interest in the Properties and to gift the remainder to Ms Kwee upon his death.

(c) Mr Kwee intended to retain the full beneficial interest in the Properties.

149 The first explanation was what the Judge found on the facts and what Mr Lai urges this Court to uphold. However, for the reasons set out below, we find, with respect, this explanation to be against the weight of the evidence.

150 Mr Kwee's case, on the other hand, has constantly shifted between the second and third explanations. This has made the appeal unnecessarily confusing, not least because both explanations are mutually exclusive. In any event, the evidence clearly establishes that Mr Kwee's intention was to retain the *full* beneficial interest in the Properties. To explain our finding, we address the following categories of evidence in turn: (a) the "after I die" statement; (b)



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the purposes of the name placing agreement; and (c) the parties' control over the Properties.

(A) THE "AFTER I DIE" STATEMENT

151 We first dispose of the notion that Mr Kwee's intention was to retain a *life* interest in the Properties and to gift the remainder to Ms Kwee upon his death. In our view, there is no merit to this contention.

152 First, as alluded to at [20] above, the notion of a life interest was never mentioned by Mr Kwee in his pleadings or evidence, nor was it put to Mr Lai in cross-examination. It was brought up for the first time only in closing submissions. Indeed, when counsel for Mr Kwee in the proceedings below pursued this line of argument before the Judge in oral submissions, the Judge astutely queried whether this was in fact Mr Kwee's pleaded case. It seems to us that the notion of a life interest was contrived by Mr Kwee to retrospectively make sense of the "after I die" statement and his testimony during trial that one of the purposes of the name placing agreement was to avoid estate duty, which we address in detail below. For present purposes, it suffices to conclude that Mr Kwee is bound by his pleaded case, and he is precluded from advancing the life interest argument (see the decision of this Court in *V Nithia v Buthmanaban s/o Vaithilingam* [2015] 5 SLR 1422 at [38]).

153 Second, the primary, if not only, evidence Mr Kwee relies on to pursue the life interest argument is his "after I die" statement. As mentioned at [27(b)] above, the Judge found that Mr Kwee made this statement to his family members, and that it meant that the property would belong to the person in whose name it was after Mr Kwee died. The Judge also found this to be supported by Mr Kwee's testimony about wanting to avoid estate duty



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(Judgment at [27]–[28]). According to Mr Kwee, the correct interpretation of this statement is that his intention was to retain the beneficial ownership of the Properties during his lifetime, with such beneficial ownership immediately passing to Ms Kwee upon his death without forming part of his estate, thereby avoiding any liability for estate duty.

154 However, a close reading of the record of appeal shows that the original "after I die" statement as stated in Mr Kwee's AEIC (see [9(d)] above) had transmuted in the proceedings below. It appears that when the parties and the Judge referred to the "after I die" statement during trial and in submissions, they only referred to the first half of the statement (*ie*, "[a]fter I die already, it is yours") and omitted to consider the second half of the statement (*ie*, "I will see how to split assets within the family"). The second half of the statement clearly suggests that even though a property may be registered in a particular family member's name, that was not meant to be writ in stone, and that Mr Kwee intended to retain a discretion to redistribute his assets. Such an arrangement is only explicable by an intention to retain the *full* beneficial interest. The second half of the "after I die" statement contradicts both the Judge's finding that the Properties were gifted to Ms Kwee and Mr Kwee's submission that he intended to retain only a life interest in them. Instead, it supports our finding that Mr Kwee's intention was to retain the full beneficial interest in the Properties.

(B) THE PURPOSES OF THE NAME PLACING AGREEMENT

155 We deal next with the purposes of the name placing agreement. In this regard, it is necessary to understand how Mr Kwee's explanation of these purposes evolved in the proceedings below. In his pleadings, Mr Kwee said that he began to register properties in Ms Kwee's name for "tax and estate planning purposes". Later, in his AEIC, he said that the name placing agreement was



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made for "business strategy", "wealth planning" and "risk management" purposes. These, however, were highly ambiguous, and so counsel for Mr Lai, Mr Fong Zhiwei Daryl ("Mr Fong"), pressed Mr Kwee on what these phrases meant during cross-examination. In the course of that exchange, Mr Kwee identified several purposes for the name placing agreement: (a) avoiding disputes between his children; (b) to assist him in managing the Properties; (c) avoiding estate duty; and (d) shielding the Properties from his creditors.

156 At the hearing before us, Mr Nair brought us through the transcript in great detail to demonstrate that Mr Kwee had initially denied that one of the purposes of the name placing agreement was to shield the Properties from his creditors, and that he had only conceded this as a purpose on a single isolated instance. This was, with respect, a surprising submission given that Mr Kwee had conceded in his Appellant's Case, Appellant's Reply and in his written submissions in response to Prof Tang's opinion that this was in fact one of his purposes. Mr Nair later clarified that his submission was merely that the shielding of the Properties from creditors was one of many other purposes. However, this is an instance where qualitative findings trump quantitative considerations. Apart from avoiding estate duty and shielding the Properties from his creditors, there are no other obvious purposes for the name placing agreement which fit Mr Kwee's own description of "business strategy" and "risk management".

157 The purposes of avoiding estate duty and shielding the Properties from creditors were central to the Judge's reasoning. He was of the view that these two purposes indicated that the Properties were gifted to Ms Kwee. This is because if the Properties were so gifted, they would not be subject to estate duty as they would not fall within Mr Kwee's estate, and Mr Kwee's creditors would



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not be able to go after them as he would not have a beneficial interest in them (Judgment at [29] and [31]). We respectfully disagree with the Judge's analysis. In our view, the weight of the evidence indicates that Mr Kwee intended to achieve the two purposes by *concealing* his beneficial interest in the Properties. Let us elaborate.

158 A close examination of Mr Kwee's cross-examination shows that Mr Kwee at most stated the *objectives* of avoiding estate duty and shielding the Properties from his creditors, but he never explained the *mechanism* by which those purposes would be achieved. In the course of these proceedings, three possible explanations of the mechanism intended by Mr Kwee were canvassed for our consideration:

(a) Mr Kwee intended to gift the Properties to Ms Kwee and so they would not form part of his estate in death or bankruptcy ("gift mechanism").

(b) Mr Kwee intended to retain the beneficial interest in the Properties but conceal it from the tax authorities and his creditors ("concealment mechanism").

(c) Mr Kwee intended to retain the beneficial interest in the Properties but erroneously believed that registering legal title with Ms Kwee would achieve the two purposes lawfully ("legal title mechanism").

159 We can quickly dispose of the legal title mechanism. In his Appellant's Reply and written submissions in response to Prof Tang's opinion, Mr Kwee claims to be a layperson and implies that he did not understand the concept of



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beneficial interests or that his creditors would go after his beneficial ownership even if legal title was registered in Ms Kwee's name. He claims to have been under the erroneous belief that registering the Properties in Ms Kwee's name would be adequate to achieve both objectives whilst remaining the beneficial owner. We find this belated assertion wholly unconvincing. Mr Kwee never pleaded or gave evidence that he believed that registering legal title with Ms Kwee was sufficient to achieve the two purposes whilst remaining the beneficial owner. It is also unbelievable that someone who claims to have been "in the business of buying and investing in properties … for many decades" would not know of the concept of beneficial interests and would not know that it is the beneficial ownership that is subject to estate duty and creditor action. Indeed, Mr Fong noted at the hearing before us that Mr Kwee had executed a declaration of trust over certain funds in favour of his granddaughter sometime in 2016, and while this was some years after the purchase of the Properties, it nonetheless suggests that Mr Kwee is no babe in the woods when it comes to the distinction between legal and equitable title. Further, as discussed at [161] below, Mr Kwee concedes elsewhere in his written submissions that he intended to conceal his beneficial interest in the Properties, which detracts from the notion that he was labouring under a mistaken understanding of the law.

160 That leaves us with the gift mechanism and the concealment mechanism. It appears that the Judge assumed without explanation that it was more probable than not that Mr Kwee intended the gift mechanism as opposed to the concealment mechanism. To be fair, during oral submissions, the Judge appeared to contemplate the possibility of the concealment mechanism but rejected it because Mr Kwee never expressly endorsed it in his evidence. However, Mr Kwee equally never expressly endorsed the gift mechanism in his



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evidence either. In fact, Mr Kwee expressly denies the gift mechanism as he fundamentally rejects the notion of a gift of the Properties to Ms Kwee.

161 Given that Mr Kwee simultaneously takes the position that he intended to retain the beneficial interest in the Properties as well as avoid estate duty and shield the Properties from his creditors, the only logical inference that squares both these propositions is the concealment mechanism, *ie*, that he intended to conceal his beneficial interest from the tax authorities and his creditors should the risk of estate duty or creditor action materialise. This finding is supported by the fact that Mr Kwee expressly concedes in his Appellant's Reply that he "sought to conceal the real ownership of the Properties by registering legal title in in [*sic*] Ms Kwee's name through the name placing agreement". He further concedes in his written submissions in response to Prof Tang's opinion that the arrangement may be tainted by illegality.

162 For the above reasons, we are of the view that Mr Kwee intended to avoid estate duty and shield the Properties from his creditors by *concealing* his beneficial interest in them. In this regard, the purpose of "avoiding" estate duty is perhaps more accurately described as "evading" estate duty, as the fraudulent concealment of assets from tax authorities is a classic instance of tax evasion. We will discuss the implications of this fraudulent intention *vis-à-vis* the doctrine of illegality and public policy later in this judgment. For present purposes, it bears emphasis that such an intention is, contrary to the Judge's analysis, consistent with an intention to retain the beneficial interest in the Properties. We would also add, for completeness, that there is no bar to relying on the said fraudulent intention as evidence of the existence (as opposed to enforceability) of a trust, for such reliance operates only in the formal and



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procedural sense, and does not run afoul of the normative reliance principle (see the discussion at [132] above).

(C) THE PARTIES' CONTROL OVER THE PROPERTIES

*(I) MR KWEE'S CONTROL OVER THE PROPERTIES*

163 Finally, we turn last to the parties' control over the Properties. The Judge accepted that Mr Kwee exercised significant control over them. He also accepted that such control could, in the right circumstances, indicate that beneficial ownership remained with the person exerting it. However, since Ms Kwee depended on Mr Kwee and trusted him to make decisions for her welfare, the Judge considered it unsurprising that Mr Kwee also handled matters concerning the Properties. In the Judge's view, such control was not inconsistent with a gift to Ms Kwee, was in fact consistent with Mr Kwee's arrangements in providing for her, and did not negate the donative intention on Mr Kwee's part (Judgment at [30]).

164 We respectfully disagree with the Judge's analysis. We accept that Mr Kwee's control over the Properties could be explained on the basis that he was a controlling patriarch. However, such control could also be explained on the basis that he was the true beneficial owner. In fact, both these propositions could be simultaneously true – Mr Kwee could have exercised control both in his capacities as a controlling patriarch and as the true beneficial owner. The Judge did not, with respect, explain why Mr Kwee's control should be attributed *solely* to his position as a controlling patriarch *to the exclusion* of the possibility that he was the true beneficial owner.



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165 In our view, significant control over assets (especially on the scope and scale of that exercised by Mr Kwee which we detail below) should be an indicator of ownership by the person exercising control. While such control may not be conclusive, and while it may be rebutted by other evidence indicating that beneficial ownership resided elsewhere, it should at least be a factor in favour of finding that the person exercising control intended to retain the beneficial interest. The Judge gave insufficient weight to the fact that Mr Kwee's control over the Properties was a strong factor indicating his intention to retain the beneficial interest in them.

166 Our view is supported by the scope and scale of Mr Kwee's control over the Properties. In this regard, we highlight a few salient aspects:

(a) First, the evidence shows that it was Mr Kwee who decided when to purchase properties in Ms Kwee's name and which properties to purchase. It was also Mr Kwee who negotiated the mortgage loans and handled the re-financing of the properties. There is no evidence that Ms Kwee was involved in these processes save that she signed the relevant documents on Mr Kwee's instructions. Indeed, Ms Kwee's evidence was that she would simply sign the papers without reading them.

(b) Second, save for the rental proceeds from the Properties which were used to service the mortgage loans, Mr Kwee funded the purchase of the Properties whereas Ms Kwee did not make any financial contributions. The Judge accepted that Mr Kwee was the ultimate source of funds used to purchase the Properties (including payments made from Mr Kwee's company and from bank accounts jointly held with his family members) and Ms Kwee did not contribute any significant funds



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of her own (Judgment at [12]–[16]). This is not disputed on appeal. There is also evidence that the mortgage loans were in part serviced by Mr Kwee's personal funds. In our view, Mr Kwee's financial contributions constitute a factor indicating his intention to retain the beneficial interest in the Properties. It is established law that in determining the common intention of parties for the purposes of a common intention constructive trust, direct financial contributions to the purchase price constitute a relevant factor (see the decision of this Court in *Chan Yuen Lan v See Fong Mun* [2014] 3 SLR 1048 at [97]), and in many cases, "the focus remains very much on the financial contributions of the parties" (see the decision of this Court in *Geok Hong Co Pte Ltd v Koh Ai Gek* [2019] 1 SLR 908 ("*Geok Hong*") at [80]).

(c) Third, apart from the rental proceeds from the Properties, Mr Kwee used his own funds to pay the property taxes for King's Drive and Teneriffe. In contrast, there is no evidence that Ms Kwee contributed any funds to the payment of property tax.

(d) Fourth, when Ms Kong Lee Hwa, one of Mr Kwee's employees, assisted him in taking stock of his financial needs and plans on or around 17 December 2004, King's Drive and Teneriffe were included in the calculations. It is worth noting that this exercise took place at around the time the Properties were purchased, and the temporal proximity renders it probative of Mr Kwee's intention at the time.

(e) Fifth, Mr Kwee's evidence was that he used the Properties for personal purposes. For example, in 2005, he negotiated a higher loan amount from Citibank NA for the mortgage of Teneriffe as he was in a tight financial situation and his businesses were not doing well following



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> the Asian Financial Crisis and the SARS pandemic. Similarly, in 2009, Mr Kwee instructed Ms Kwee to take a second mortgage on Spyglass Grove following the Lehman Brothers Crisis and he drew on the loan for his own business use. Mr Kwee initially used Spyglass Grove as his Australian residence and as a holiday home for his family. The rental proceeds from Spyglass Grove were also credited into Mr Kwee's company account in Australia.

167 An analogy can be drawn with the case of *Geok Hong*. In that case, a property was registered in the name of a company. The company was managed by a patriarch and subsequently his son. The property was used as a home by the family members of the son. After the son's passing, his wife commenced a suit against the company seeking a declaration that the beneficial ownership of the property vested in the son's estate on the basis of, among others, a common intention constructive trust. The trial judge found that there was an express common intention for the company to hold the property on trust for the son. In rejecting the trial judge's finding, this Court observed that the company had consistently treated the property as an asset of its own, with the knowledge and consent of the son. The company had recorded the property as an asset on its balance sheet, had mortgaged the property to secure banking facilities for its own benefit, and had paid the insurance premiums and property taxes levied on the property at all material times. These were acts consistent with its ownership interest in the property (at [76]–[78]). The comparison with the present case is clear – Mr Kwee had exhibited many of the same acts of control in relation to the Properties and this was done with Ms Kwee's knowledge and consent. Such control indicates Mr Kwee's intention to retain the beneficial interest in the Properties.



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168 In this regard, a comparison can also be made with how Mr Kwee dealt with Baffin Court and Claymore. These two properties were also registered in Ms Kwee's sole name, and Mr Kwee exerted a similar level of control over them as with the Properties in dispute. Nonetheless, when Baffin Court and Claymore were sold, it was Mr Kwee who made use of the proceeds. Specifically, Baffin Court was intended to be Mr Kwee's home in Canada and Ms Kwee moved in when she was studying in Canada. After Ms Kwee graduated, Mr Kwee sold Baffin Court and kept the sale proceeds for his business use. As Mr Kwee was facing financial difficulties in 2010, he also sold Claymore and used the proceeds to, among other things, redeem mortgage loans over properties not registered in Ms Kwee's name and to discharge his banker's guarantees whilst keeping the remainder. The beneficial ownership of these two properties clearly resided with Mr Kwee. There is no basis to differentiate these two properties from the other Properties in dispute for they were all treated similarly by Mr Kwee in the family portfolio of Properties. The Judge failed to give weight to Mr Kwee's treatment of Baffin Court and Claymore in his Judgment.

*(II) THE PARTIES' OMISSION TO ASSERT MR KWEE'S BENEFICIAL INTEREST IN THE PROPERTIES*

169 In coming to his finding that Mr Kwee intended to gift the Properties to Ms Kwee, the Judge relied on the fact that Mr Kwee only lodged caveats against King's Drive and Teneriffe belatedly on 20 May 2022. The Judge also highlighted three instances where Mr Kwee and Ms Kwee failed to mention Mr Kwee's alleged beneficial interest when they would have been expected to do so: (a) when Ms Kwee signed the King's Drive OTP; (b) during the 9 Aug 2021 Meeting between Mr Kwee, Ms Kwee and Mr Low; and (c) during the attempted sale of King's Drive in 2021 (Judgment at [32]–[39]). We are unable



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to agree with the Judge's analysis. Before we address the individual points, we make some general observations.

170 First, even if the Judge was correct in finding that Ms Kwee had acted as owner of King's Drive when signing the King's Drive OTP and during its attempted sale, and that Mr Kwee had failed to act as owner by not lodging the caveats earlier and not asserting his beneficial interest during the 9 Aug 2021 Meeting, these examples are, in the grander scheme of things, isolated instances which pertain to only a sliver of the parties' overall management of King's Drive, let alone all the Properties. Additionally, all the examples highlighted by the Judge are relatively recent and therefore quite far removed from the parties' intentions at the time the Properties were acquired. The Judge, with respect, erred in giving no weight to Mr Kwee's long-standing, consistent and extensive control over the Properties while giving significant weight to these apparent aberrations in the parties' conduct.

171 Second, to the extent the Judge found it suspicious that Mr Kwee omitted to assert his beneficial interest in not lodging the caveats earlier and in not mentioning it at the 9 Aug 2021 Meeting, this is explicable on the basis that, if Mr Kwee's intention was to conceal his beneficial interest in the Properties from the tax authorities and his creditors (see [162] above), he would naturally be hesitant to publicly disclose his beneficial interest to third parties.

172 We now turn to address the specific points raised by the Judge.

(a) The belated lodging of the caveats

173 The Judge noted that Mr Kwee only lodged caveats against King's Drive and Teneriffe on 20 May 2022, which was over 20 years after their purchase,



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and while Mr Kwee explained that he had lodged the caveats to protect the properties from Ms Kwee's creditors, this was about a year after Mr Kwee first knew about Ms Kwee's financial troubles (Judgment at [32]).

174 In our view, it cannot be inferred from the timing of the lodging of the caveats that Mr Kwee did not regard himself as the true beneficial owner of the Properties. There is no suggestion that Mr Kwee was under a legal obligation to lodge them earlier, nor did he have any incentive to do so if his intention was to conceal his beneficial interest. On Mr Kwee's own case, there was initially no need to lodge the caveats because his family members had all agreed to the name placing agreement, and the caveats were only prompted by the need to protect his beneficial interest in King's Drive and Teneriffe when Ms Kwee started facing financial difficulties. The caveats were lodged only eight days after the statutory demand was served on Ms Kwee, which suggests that they were lodged swiftly once the threat of Ms Kwee's bankruptcy became imminent.

(b) The signing of the King's Drive OTP

175 The Judge was of the view that, by signing the King's Drive OTP without informing Mr Kwee, Ms Kwee acted as the owner of King's Drive, thereby reflecting her belief that the property was hers to sell. The Judge disbelieved Ms Kwee's explanation that Mr Ou had pressured her into signing the King's Drive OTP and had tricked her with his assurances that the King's Drive OTP was only "for show". The Judge reasoned that Ms Kwee would not have executed the King's Drive OTP if she believed King's Drive belonged to Mr Kwee as doing so would have earned his anger and condemnation (Judgment at [33]).



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176 In our view, Ms Kwee's conduct in relation to the King's Drive OTP did not reflect her perception that she was the true beneficial owner of King's Drive. The Judge was too dismissive of Ms Kwee's explanations of how she was pressured by Mr Ou into signing the King's Drive OTP. It is undisputed that Ms Kwee deferred all matters relating to the Properties to Mr Kwee and so, regardless of who Ms Kwee perceived to be the true owner of King's Drive, it was out of character for her to sign something as important as the King's Drive OTP without informing Mr Kwee. In light of this, and given that Ms Kwee has always relied on Mr Kwee to deal with her major financial matters, it is not unbelievable that she was naïve enough to trust Mr Ou's false assurances. Indeed, during the 14 Sep 2021 Meeting, Mr Low candidly admitted that "this guy [*ie*, Mr Ou] we all know. All… is all a pack of lies lah", and when Ms Kwee said she "wasn't given a choice", Mr Low said "Yeah lah, that one I agree". To be fair, neither Mr Ou nor Mr Low was subpoenaed by Mr Kwee to testify that Ms Kwee was coerced into signing the King's Drive OTP, but there is equally nothing to suggest that Ms Kwee's explanations were unbelievable. The fact that Ms Kwee testified that she "dare not tell" Mr Kwee about the King's Drive OTP and waited around six months before informing Mr Kwee about it in March 2021 is also consistent with the notion that she realised she did something wrong – she would not have acted in this way if she genuinely believed she was entitled to sell King's Drive as its owner. In our view, Ms Kwee's signing of the King's Drive OTP was an exception that proved the rule – she made a gullible mistake by acting without Mr Kwee's permission, but this only reinforces the fact that Mr Kwee had decision-making authority as the true beneficial owner.



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(c) The 9 Aug 2021 Meeting

177 The Judge reasoned that Mr Kwee's omission to tell Mr Low at the 9 Aug 2021 Meeting that he was the true owner of King's Drive undercut his case, for doing so would have been the best way to make progress at the meeting by making clear to Mr Low that Ms Kwee had signed the King's Drive OTP without authority (Judgment at [34]).

178 On appeal, Mr Kwee provides a lengthy explanation as to why he omitted to assert his beneficial interest in King's Drive at the 9 Aug 2021 Meeting. When Ms Kwee informed him about the King's Drive OTP in March 2021, he initially spoke to Mr Ou who assured him that the King's Drive OTP would not have any effect because Mr Low was already aware that he was the real owner of King's Drive, and the King's Drive OTP was simply a pretext for Mr Low to advance moneys to Mr Ou and would be voided upon those moneys being returned. However, as the situation remained unresolved, Mr Kwee decided to meet Mr Low on 9 August 2021. At the time, Mr Kwee was still under the impression that Mr Ou would make good on his promise to repay Mr Low, and it was in that context that Mr Kwee asked Mr Low for an extension of the King's Drive OTP. To Mr Kwee, there was no need to reassert his beneficial ownership since he believed that Mr Low was already aware that he was the true owner, and he was also trying to resolve the dispute in an amicable manner.

179 We accept that Mr Kwee's omission to mention his beneficial interest in King's Drive at the 9 Aug 2021 Meeting is a strong point against his case. If he truly believed that Mr Ou had told Mr Low that he was the true owner of King's Drive, he could have subpoenaed either of them to testify as such, but he did not



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do so. Even then, in our view, this singular point does not shift the needle materially in the overall analysis, and we repeat our analysis at [170]–[171] above.

(d) The attempted sale of King's Drive

180 Sometime in 2021, Mr Kwee and Ms Kwee attempted to sell King's Drive. Ms Yeo was one of the property agents involved. Mr Kwee also instructed Ms Kwee to approach another property agent she was familiar with, "Alice", for assistance.

181 The Judge analysed the text messages between Ms Yeo, Ms Kwee and Mr Kwee. He found that Ms Kwee had conducted herself as owner of King's Drive and Ms Yeo treated her as such, whereas Mr Kwee's role was secondary and akin to a parent advising Ms Kwee. Among other examples, the Judge noted that Ms Yeo took significant instructions from Ms Kwee on the sale price and merely informed Mr Kwee after the fact. In the Judge's view, Ms Yeo acted on the sole instructions of Ms Kwee in relation to the sale price, which was a central aspect of the sale negotiations (Judgment at [36]).

182 On appeal, Mr Kwee claims that he dealt with the bigger picture in relation to the Properties whereas Ms Kwee was simply dealing with the property agents on his behalf. Where Ms Yeo appeared to take instructions from Ms Kwee, that was because Mr Kwee had already instructed Ms Kwee to liaise with the property agents. Mr Kwee was kept abreast of these developments as he was the true owner.

183 In addition, Mr Kwee points to other text messages with Ms Yeo which indicate that he had decision-making authority in relation to the sale price.



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Further, Mr Kwee points to text messages between Ms Kwee and Alice as also evidencing that he was the ultimate decision-maker.

184 In response, Mr Lai refutes Mr Kwee's interpretation of these text messages and points to even more text messages to bolster his case that Ms Kwee had acted as the true owner in the attempted sale of King's Drive.

185 In our view, this text message war of attrition is unpersuasive. It appears to us that the text messages have been cherry-picked out of context to portray either Mr Kwee or Ms Kwee to be the true owner. In truth, Ms Yeo appeared to take instructions from either Mr Kwee or Ms Kwee at different points in time, but this is entirely explicable on the basis that, from her perspective, she was dealing with the Kwee family as a single unit. The circumstances of the attempted sale of King's Drive are neutral at best, and little can be inferred from it as to who was regarded as the true beneficial owner.

### (D) MR KWEE INTENDED TO RETAIN THE FULL BENEFICIAL INTEREST IN THE PROPERTIES

186 We summarise our findings on Mr Kwee's intention in relation to the Properties by referring back to the three possible explanations canvassed at [148] above. There is no question of Mr Kwee intending to retain a life interest as this contention was not pleaded. On a proper reading of Mr Kwee's "after I die" statement, and taking into account his significant control over the Properties for many years, the weight of the evidence points towards his intention to retain the full beneficial interest in the Properties as opposed to making a gift of them to Ms Kwee. As for his stated purposes of avoiding estate duty and shielding the Properties from his creditors, the only logical inference is that Mr Kwee intended to conceal his beneficial interest from the tax



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authorities and his creditors, which reinforces our finding that he intended to retain the full beneficial interest in the Properties.

(2) What is the proper legal characterisation of Mr Kwee's intention in relation to the Properties?

187 Having established that Mr Kwee's intention was to retain the full beneficial interest in the Properties, we turn next to the proper legal characterisation of this intention.

188 In our view, a *common intention constructive trust* arose over the Properties under which Mr Kwee held the full beneficial interest. In the proceedings below, Mr Kwee and Ms Kwee gave substantively identical evidence as to the arrangement between them. Mr Kwee's intention to retain the full beneficial interest in the Properties was shared with Ms Kwee by way of the name placing agreement, which she accepted. There was therefore a common intention that Mr Kwee would retain the beneficial interest in the Properties. Mr Kwee also relied on this common intention to his detriment: the purchase price, mortgage payments and property tax were paid for in part by Mr Kwee's personal funds, and he also handled the management of the Properties, the servicing of the mortgage loans, and the refinancing of the Properties (see, by way of analogy, the decision of the Appellate Division in *Tia Sock Kiu Sally v Tia Oon Lai* [2026] 1 SLR 453 at [96]).

189 We note that Prof Tang observes that the common intention constructive trust is typically invoked where a common intention as to beneficial ownership is formed in relation to a property that has already been acquired, and one party thereafter acts to his or her detriment in reliance on that common intention. Therefore, a party's contributions to the purchase price may not constitute



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detrimental reliance if it precedes the formation of the common intention. We do not consider this to be an issue in the present case. First, it is not clear to us that the trust is typically invoked where the common intention is formed after the acquisition of the property. It is equally possible that the common intention is formed prior to or contemporaneously with the acquisition of the property concerned. Indeed, the present case is such an instance since Mr Kwee's and Ms Kwee's evidence is that they discussed the name placing agreement prior to the purchase of each of the Properties. Therefore, Mr Kwee's contributions to the purchase price do constitute detrimental reliance as they took place either at the same time or after the formation of the common intention. In any event, Mr Kwee's detrimental reliance is not limited to his contribution to the purchase price. As noted at [188] above, Mr Kwee dealt with the mortgage payments, property tax and refinancing of the Properties post-acquisition as well.

190 In Mr Lai's written submissions in response to Prof Tang's opinion, he asserts that Mr Kwee can no longer claim a common intention constructive trust as that no longer represents his case on appeal. Mr Lai appears to be alluding to the fact that the Appellant's Case and Appellant's Reply only referred to a resulting trust but not a common intention constructive trust, whereas O 19 r 31(5) of the Rules of Court 2021 ("ROC") stipulates that the parties' cases and reply must contain everything that they intend to put forward at the appeal. This technical argument raised by Mr Lai is unmeritorious as it fails to appreciate the unique procedural history of this case. The stipulation in O 19 r 31(5) does not take into account a situation where, after the filing of the Appellant's Case and Appellant's Reply, the appeal is transferred to a different appellate court, and an independent counsel is appointed to provide an opinion, for which the parties may file written submissions in response. The fact of the matter is that Mr Kwee



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did plead the common intention constructive trust, and so it cannot be said that Mr Lai has been taken by surprise.

191 For completeness, it is clear to us that Mr Kwee's case cannot succeed on a resulting trust. Mr Kwee's case is that he holds the full beneficial interest in the Properties. To establish such beneficial ownership under a resulting trust, he must prove that he contributed all the purchase money for the Properties. However, it is undisputed that a portion of the purchase money came from the mortgage loans which were serviced in part by the rental proceeds from the Properties. Those rental proceeds cannot simply be attributed to Mr Kwee because, as the Judge rightly noted, that would be circular (Judgment at [15]).

192 In the circumstances, we find that Ms Kwee holds the Properties for Mr Kwee's benefit pursuant to a common intention constructive trust. As it is unnecessary for us to consider the Life Interest Issue, in particular the juridical bases for the Joint Name Life Interest Scenario and the Sole Name Life Interest Scenario, as well as the question of whether the acquisition constructive trust should be recognised under Singapore law, we make no comment on those issues. Nonetheless, we record our appreciation to Prof Tang for his detailed and comprehensive submissions, which will certainly be of interest and use to a future court which has to decide on these issues squarely.

*Issue 2: Is the trust over the Properties (if any) void and unenforceable as being illegal and contrary to public policy?*

193 As Mr Kwee's intention was to conceal his beneficial interest in the Properties from his creditors (see our analysis at [161]–[162] above), it follows that the common intention constructive trust which we have found on the facts was one that was set up by Mr Kwee for the purpose of concealing his assets



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from creditors. This would render the trust unlawful *per se* and thereby void and unenforceable as it falls within a category of trusts that is contrary to public policy (see our analysis at [104]–[123] above). While Mr Kwee's intention was also to conceal his beneficial interest in the Properties from the tax authorities, thereby making the trust one set up for the purpose of evading estate duty, it is (as alluded to at [127] above) unnecessary for us to determine whether this is an independent basis for finding the trust to be void and unenforceable.

194 The question that remains is whether Mr Kwee may obtain restitutionary recovery at the second stage of the framework. In this regard, Mr Nair submitted at the hearing before us that the doctrine of *locus poenitentiae* applied in the present case. He analogised the present case to that in *Shi Fang* and argued that Mr Kwee had demonstrated repentance: (a) when he sold Claymore and used the proceeds to alleviate his financial difficulties in or around 2010 (see [168] above); and (b) by disclosing his trust interest in the Properties through the course of these proceedings.

195 In our view, there is no merit to this contention. Mr Nair's reliance on *Shi Fang* did not assist his argument given our analysis above that the application of the doctrine of *locus poenitentiae* in that case was misconceived as it was premised on the broad approach taken in *Tribe* (see [103] above). Mr Kwee's selling of Claymore and his use of the sale proceeds to pay off some of his creditors did not constitute *genuine* and *voluntary* withdrawal from his illegal purpose. This example pertains to a single property that is not even in dispute in these proceedings. There is also no evidence that Mr Kwee had disclosed to his creditors that Claymore (or the other Properties) were beneficially owned by him. Most importantly, given Mr Kwee's financial difficulties at the time, the sale of Claymore and the application of its proceeds



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towards his debts was driven primarily by financial *necessity* rather than any genuine intention to resile from his illegal purpose. Likewise, Mr Kwee was *compelled* to disclose his trust interest in the Properties in these proceedings only because of Ms Kwee's bankruptcy. There is no evidence to show that, had Ms Kwee remained solvent, Mr Kwee would have withdrawn from his illegal purpose. If anything, the available evidence suggests that Mr Kwee would have continued to perpetuate the fraud against his creditors by giving them the impression that the Properties belonged to Ms Kwee and not himself. Therefore, there is simply no question of the doctrine of *locus poenitentiae* applying on these facts.

196 We note also that Mr Kwee, in his written submissions in response to Prof Tang's opinion, purports to reserve his position as to whether he has an independent claim against Ms Kwee (or, more accurately, her estate in bankruptcy) for restitution, equitable lien, account or equitable compensation at the second stage of the framework. We see no basis for this contention as he has not pleaded any alternative cause of action. There is therefore no basis for any restitutionary recovery at the second stage.

*Issue 3: Who owns the moneys in the Bank Accounts?*

197 As mentioned at [25(b)] above, the Judge found that Mr Kwee was the ultimate source of the funds in the Bank Accounts, other than the moneys attributable to Ms Kwee's salary and the rental proceeds from the Properties. While neither party identified a specific amount of the moneys in the Bank Accounts that could be traced to the rental proceeds, it was clear that the bulk of the moneys came from the rental proceeds (Judgment at [19]–[20]). This is not disputed on appeal.



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198 Given that the common intention constructive trust over the Properties is void and unenforceable, the rental proceeds and thereby the bulk of the moneys in the Bank Accounts belong to Ms Kwee. Having failed to establish that the majority, let alone all, of the moneys in the Bank Accounts belong to him, there is no basis for Mr Kwee to seek a declaration that the moneys are held on trust for him.

**Conclusion**

199 For the reasons set out above, the appeal is dismissed. Although we did not agree with the Judge that the Properties were the subject of a gift, we find that as the trust was set up by Mr Kwee for the purpose of concealing the Properties from his creditors, it is void and unenforceable as being illegal and contrary to public policy. It follows that the rental proceeds from the Properties, which constitute the bulk of the moneys in the Bank Accounts, should not be attributed to him. There is therefore no basis for any of the declarations he has sought in these proceedings.

200 As the successful party in this appeal, costs should be ordered in Mr Lai's favour (O 21 r 3(2) of the ROC). Bearing in mind that Mr Kwee has succeeded in overturning the Judge's findings of fact but is ultimately unsuccessful on the issue of illegality, which was not addressed by the Judge below, we fix the costs of this appeal at $80,000 (all-in) payable by Mr Kwee to Mr Lai. The usual consequential orders follow.

201 Finally, we would like to express our deep appreciation and gratitude to Prof Tang. Although we did not agree with all the points he made, his written



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views and responses to issues that troubled us during the hearing, as well as his expertise and erudition, assisted us greatly in this appeal.

Ang Cheng Hock
Justice of the Court of Appeal

Hri Kumar Nair
Justice of the Court of Appeal

Andrew Phang Boon Leong
Senior Judge

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