Sheares Betty Hang Kiu v Chow Kwok Chi and Others
[2006] SGHC 34

Case Number : OS 863/2004

Decision Date : 28 February 2006

Tribunal/Court : High Court

Coram : V K Rajah J

Counsel Name(s) : Tan Kok Quan SC and Ang Wee Tiong (Tan Kok Quan Partnership) for the plaintiff; Kenny Chooi and Kelvin Fong (Yeo-Leong and Peh LLC) for the first and second defendants; Tan Siah Yong (Piah Tan and Partners) for the third defendant

Parties : Sheares Betty Hang Kiu — Chow Kwok Chi; Chow Kwok Chuen; Chow Kwok Ching

Trusts – Express trusts – Constitution – Whether deed of family arrangement and deed of trust constituting testamentary disposition or perfectly constituted trust

Trusts – Trust estate – Whether settlor's interest in testator's estate before testator's estate administered capable of being subject of trust constituted by settlor

28 February 2006

V K Rajah J:

1 Chow Cho Pon ("the Testator") died on 3 August 1997 leaving a will dated 12 January 1994 ("the Testator's Will"). Under the terms of the Testator's Will, his wife Grace Chow ("the Settlor") and a senior lawyer (collectively "the Original Trustees") were appointed as executors and trustees. After assigning a sum of $1,000 to his daughter (the plaintiff), the Testator devised and bequeathed:

(a) his half share in 35 Ridout Road, Singapore to the Settlor free of all debts and all estate and other duties; and

(b) his residuary estate whatsoever and wheresoever other than and excluding property in Australia but including 217 and 217A Queens Road Central, Hong Kong and 42 Jervois Street, Hong Kong to the following persons in the shares as apportioned below:

(i) Grace Chow (wife) – 2 shares

(ii) Chow Kwok Chi (son) – 2 shares

(iii) Chow Kwok Chuen (son) – 1 share

(iv) Chow Kwok Ching (son) – 2 shares

2 On 29 September 1997, the High Court granted probate of the Testator's Will to the Original Trustees. It appears that the Testator's Will engendered both friction and dissatisfaction among the Testator's children. As a result, the Original Trustees were unable to obtain a clear mandate from the children on how to proceed and were consequently unable to complete the administration of the Testator's estate. The Settlor, an astute businesswoman in her own right, thereupon decided to make fresh arrangements to redistribute her share of the Testator's estate as well as some of her own assets.

3 On or about 10 September 2000, a deed of family arrangement ("DFA") was entered into

between the Settlor on the one part and her four children as listed below on the other:

(a) Betty Hang Kiu Sheares (the plaintiff);

(b) Chow Kwok Chi (the first defendant);

(c) Chow Kwok Chuen (the second defendant); and

(d) Chow Kwok Ching (the third defendant)

(collectively "the Beneficiaries").

Simultaneously, the Settlor also executed a deed of agreement dated 9 September 2000 ("the DOA") and a deed of trust dated 10 September 2000 ("the DOT") (collectively "the Deeds"). The DOA was entered into by the defendants, as shareholders of the family companies, and by the Settlor in her capacity as a shareholder and as administratrix of the Testator's estate. It is, *inter alia*, stipulated in the DOA that:

> 4. All the *personal properties* of Mrs Grace Chow including her jewelleries will be distributed on her death as follows:
>
> 30% each to the 3 sons and 10% to the daughter of Mrs Grace Chow.
>
> 5. All the overseas assets of Mrs Chow will be dealt with at a later date covenanting in a Trust to be formed outside Singapore.
>
> [emphasis added]

4 Pursuant to the DFA and the DOT, the Settlor declared herself to be trustee of all properties ("the Trust") that she had inherited from the estate of the Testator, as well as certain movable and immovable assets that she owned (collectively referred to as "the Assets"). The Assets settled in the Trust are expressly set out in the respective schedules to the DFA and the DOT ("the Schedules") as follows:

(a) Property known as 35 Ridout Road, Singapore 248431;

(b) Shares in public listed companies;

(c) Shares in private companies;

(d) Cash in banks;

(e) Jewellery, furniture, objets *d'art*; and

(f) Motor vehicle(s).

5 The DFA incorporates the following provisions:

(a) Recital 4

> The Beneficiaries are children of the Deceased and the Settlor and the Beneficiaries are also beneficiaries in the estate of the Deceased with the second and fourth named Beneficiaries

receiving two shares out of seven each in the estate of the Deceased, the third named Beneficiary receiving one share out of seven shares and the first named Beneficiary receiving only $1,000/;

(b) Recital 5

The Settlor is desirous of *providing for all the four Beneficiaries during her lifetime out of her share in the estate of the Deceased as well as out of the property both movable and immovable that the Settlor owns.* [emphasis added]

(c) Clause 1

The Settlor hereby *declares and confirms* that she shall hold *all assets set out in the Schedule* hereto as a Trustee for the Beneficiaries holding the said assets in trust for them. [emphasis added]

(d) Clause 3

The Settlor is executing a Deed of Trust simultaneously with this Deed of Family Arrangement in which she has set out the details on how the Trust that she is declaring herein *shall be administered*. [emphasis added]

(e) Clause 5

The Settlor shall reserve for herself 20% of the net income received from the assets for her maintenance and personal needs.

(f) Clause 6

The Beneficiaries hereby acknowledge that they have understood the terms of this Deed of Family Arrangement as well as the Trust Deed executed by the Settlor and hereby declare that the Deed herein as well as the Deed of Trust executed by the Settlor settles all claims, rights and interests that the Beneficiaries may have in the estate of the Deceased and declare that they have no claims against the Settlor or amongst or between themselves inter se.

6 The salient provisions of the DOT include:

(a) Recital 3

I have inherited two-sevenths of the residuary estate of the Deceased and the half-share of the property known as 35 Ridout Road, Singapore which the Deceased owned while the other half-share was owned by myself;

(b) Recital 4

I am desirous of *providing for my children born to me and the Deceased*, viz:

BETTY HANG KIU SHEARES

CHOW KWOK CHI

CHOW KWOK CHUEN and

CHOW KWOK CHING

(hereinafter called the Beneficiaries). [emphasis added]

(c) Clause 1

I hereby declare myself as Trustee of all the properties that I had inherited from the Deceased as well as all the assets that I own both movable and immovable *particulars of which are shown in the Schedule* attached hereto; [emphasis added]

(d) Clause 2

This Trust shall come into force on the day I have executed the same. I hereby declare myself as Trustee of the assets set out in the Schedule abovementioned.

(e) Clause 3

The income from the assets in the Schedule shall be appropriated to the Beneficiaries in the amount of 20% for each of them with the remaining 20% being allotted to me for my own maintenance and personal expenses.

(f) Clause 4

This Trust shall continue to be in force during the rest of my life.

(g) Clause 5

The amounts to be distributed to the Beneficiaries and to myself shall be paid out of the net income after deducting all outgoings, taxes, maintenance or service charges and any other expenses that may be incurred in the production of income and in replacing items which may need replacement and other related expenses.

(h) Clause 6

Upon my death my personal representative* [the following words "My 3 trustees" are inserted in her handwriting next to the asterisk and the asterisks following] shall convey to each of the Beneficiaries all the assets after paying any lawful debts, funeral and testamentary expenses in the shares shown against their names:

BETTY HANG KIU SHEARES 10%

CHOW KWOK CHI 30%

CHOW KWOK CHUEN 30%

CHOW KWOK CHING 30%

For the purpose of determining the fair value of the shares to be allotted to each of the beneficiaries my personal representative* shall be at liberty to convert and sell any of my assets with liberty to postpone such sale of my assets or any part thereof as my personal

representative* in his sole discretion shall deem fit.

7 Subsequently, the Settlor made at least three further wills. The last two wills were not prepared by the same solicitor who had prepared the Deeds. In her last known will dated 30 September 2002 ("the Settlor's Last Will"), prepared by the first and second defendants' present solicitors, she appointed as her personal representatives the first, second and third defendants. However, it is undisputed that these solicitors had neither any sight nor awareness of the Deeds when they prepared the Settlor's Last Will.

8 The Settlor died on 1 December 2002. On 28 October 2003, the surviving Original Trustee obtained a deed of discharge from the estate of the Testator, and the three defendants then became the executors of the Testator's Will. After the Settlor's demise, the defendants were unable to reach any consensus on how to administer the estates of both the Testator and the Settlor. The first and second defendants blamed the third defendant for the delay and he *vice versa*. The defendants however remain united on one issue: that the Deeds, and in particular the DOT, did not effectively transfer to the plaintiff any interest in the Settlor's estate.

The issues

9 In these proceedings the plaintiff seeks, *inter alia*, an order that the defendants provide "proper particulars" and an account of the Assets. She emphatically asserts that although the Testator passed away on 3 August 1997, some eight years earlier, and despite the fact that her mother, the Settlor, had also passed away some two years earlier, the defendants have completely failed to account to her or for that matter given her any information whatsoever in relation to the administration of the Trust.

10 The defendants on their part vigorously deny that a proper Trust has been constituted; they assert that the DOT, even if effective, is a mere testamentary disposition; the DOT, and in particular cl 6 thereof, had been superseded by the Settlor's Last Will, wherein she left all her property to them in equal shares except for the sum of $500,000 set aside for the plaintiff.

11 Prior to the hearing, the first and third defendants filed several lengthy affidavits contesting and taking issue with the very validity of the execution of the DOT and the DFA. They alleged, *inter alia*, that they were pressured into signing the Deeds and were in any event intoxicated and/or failed to understand the contents of the documents when they signed them. These rather remarkable contentions were however abandoned shortly before the hearing proper. Counsel then agreed that there were only three issues to determine in these proceedings:

(a) Are the DOT and the DFA valid and enforceable ("the enforceability issue")?

(b) If so, do they cover assets outside Singapore, such as in Australia, Hong Kong, Malaysia, China, the US and/or any other countries in the world?

(c) Do they cover the Settlor's own assets only or do they also cover assets which she had inherited under the Will as the plaintiff contends ("the asset issue")?

12 I decided the first and third issues affirmatively in the plaintiff's favour, and ruled negatively on the second issue. Given that the first and second defendants have appealed against my decision on the first and third issues, I now set out and explain my grounds of decision on those issues only.

The enforceability issue

13 The Settlor's intention to create a trust is unequivocal. She sought and received legal assistance in the preparation of the Deeds. There can be no doubt that the Settlor was at the material time aware of the distinction between trusts and wills. Indeed on 21 September 2000, a few days after signing the Deeds, she executed a will whereby she made the defendants her executors. This will apparently covered her remaining assets in Singapore. In addition, it made provision for the payment of $100,000 to each of her grandchildren. Provision was also made for her disposable assets to be divided among the same beneficiaries in the *very same proportions* stipulated in the DOT. Pertinently, this will was prepared by the same solicitor who prepared the DOT. The DFA and the DOT are the only known documents the Settlor executed during her lifetime that were intended to constitute a trust.

14 It is plain that the Settlor's intention in executing the DFA and the DOT was to provide for what was in her view a more equitable distribution of the family assets. More crucially, it was intended to terminate once and for all the apparent acrimony among the Beneficiaries over their various entitlements and to restore familial harmony so that the Testator's estate would finally be administered. This is evidenced by, *inter alia*, paras 4 and 5 of the recitals to the DFA as well as cl 6. Unfortunately, this was not to be. The three defendants continued with their contentious behaviour even after the Settlor's demise.

15 In questioning the efficacy of the DOT and the DFA, the defendants have taken a root and branch approach by raising a multitude of variegated and imaginative contentions. At the outset they boldly contend that the DOT and the DFA "suffer from the fundamental flaws of *inter alia* uncertainty of subject matter and lack certainty of objects".

16 It would be useful at this juncture, prior to addressing the defendants' contentions, to set out the legal position in relation to family arrangements. The term "family arrangement" is in itself a term of art that has a peculiar and particular legal significance. In *Halsbury's Laws of England* vol 18 (Butterworths, 4th Ed, 1997) at paras 301, 303, 304 and 312, it is stated:

> **301.** … *A family arrangement is an agreement between members of the same family, intended to be generally and reasonably for the benefit of the family either by compromising doubtful or disputed rights or by preserving the family property or the peace and security of the family by avoiding litigation or by saving its honour*.
>
> The agreement may be implied from a long course of dealing, but it is more usual to embody or to effectuate the agreement in a deed to which the term "family arrangement" is applied.
>
> **303.** … *The following arrangements for division of property have been supported as family arrangements*:
>
> (1) *an agreement* for the division of family property by way of compromise of a family quarrel or litigation about a disputed or lost will, or *even to prevent family friction*, where there is no question as to the devolution of the property nor any disputed right, there being some consideration for the arrangement other than love and affection, or any arrangement as to division of property where the construction of a will or other instrument under which the parties claim is doubtful …
>
> **304.** … Family arrangements are governed by principles which are not applicable to dealings between strangers. *When deciding the rights of parties under a family arrangement or a claim to upset such an arrangement, the court considers what in the broadest view of the matter is most in the interest of the family, and has regard to considerations which, in dealing with*

transactions between persons not members of the same family, would not be taken into account. Matters which would be fatal to the validity of similar transactions between strangers are not objections to the binding effect of family arrangements. Conversely, an intention to create a legally enforceable contract may be negatived more readily where the parties to an arrangement are members of the same family than where they are not.

312. … *Since the consideration for a family arrangement is partly value and partly love and affection, the pecuniary worth of the consideration is not regarded too closely. The court will not, as a general rule, inquire into the adequacy of the consideration*, but there is an equity to set aside a family arrangement where the inadequacy of the consideration is so gross as to lead to the conclusion that the party either did not understand what he was about, or was the victim of some imposition.

[emphasis added]

17 It can be concluded from these established principles of law and practice that the arrangement the Beneficiaries and the Settlor entered into was not a mere ordinary contractual or trust arrangement. Each and every one of them signed the DFA which in turn contemplated the execution of the DOT by the Settlor. It cannot be gainsaid that the Deeds ought to be interpreted harmoniously and cumulatively. Given the Settlor's and the Beneficiaries' manifest intentions at the material time, the Deeds should not be interpreted with an excessive degree of formalism. The task of the court in construing such documents is to resolve upon a fair reading of the documents what the Settlor's intention was, and to give effect to it. In doing so, the court will seek assistance from and apply established rules of construction. The crux of the matter is that these documents constitute a solemn family arrangement signed by all the *dramatis personae*. This is not an instance where the label "family arrangement" has been loosely affixed in an attempt to invoke special legal consideration. All the classic hallmarks of a family arrangement prevail in this case: a pre-existing family dispute, a clearly declared intention to resolve outstanding matters and a series of arrangements to address the outstanding matters.

18 The overarching principle of construction in this matter is set out in *Chitty on Contracts* (Sweet & Maxwell, 29th Ed, 2004) vol 1 at para 12-067 (quoting Fletcher Moulton LJ in *Manks v Whiteley* [1912] 1 Ch 735 at 754):

> Where several deeds form part of one transaction and are contemporaneously executed they have the same effect for all purposes such as are relevant to the case as if they were one deed.

19 Clause 3 of the DFA refers to the DOT being simultaneously executed and as containing details as to how the Trust is to be administered. These two documents must be construed as one transaction. The intention of the Settlor is to be gathered from the tenor of the Deeds as well as the relevant circumstances at the time the trust was created: *Yeap Cheah Neo v Ong Cheng Neo* (1875) LR 6 PC 381; 1 Ky 326. It is also a prosaic proposition that if a particular construction of a document would render it ineffectual thereby frustrating the apparent object of that document, while another construction *ex facie* less appropriate, looking at the words themselves, would produce a different effect, the latter interpretation is to be applied, if it can possibly be supported by anything in that document; *cf Chitty on Contracts* ([18] *supra*) at para 12-081.

20 Returning to the defendants' threshold objection, it is plain that the subject matter of the Trust is confined to and limited by the Schedules. The defendants' specious contention about an alleged variance between the term "all the assets I own" in the DOT and the subsequent particularisation of the assets is clearly to be resolved in favour of restricting the Trust to "all assets

set out in the Schedule" as stipulated in cl 1 of both the DFA and the DOT. There is no ambiguity. The Schedules in the DOT and the DFA are identical. In the course of the hearing, counsel accepted that the DFA was not intended to and does not cover other assets of the Settlor, extending to landed property, such as:

(a) 27K Amber Road;

(b) 26 Jalan Kechil #05-30, Eastern Mansion; and

(c) properties in Guangzhou.

21 The Settlor was at liberty at all material times to dispose of these and other assets not embraced by the Schedules by means of a testamentary disposition. Her subsequent wills were to that extent neither entirely bereft of substance nor of effect. It is abundantly clear that the Assets were meant to cover only the assets in Singapore that have been specifically identified. At any rate, this issue is not now the subject of any dispute or appeal.

22 The objects or beneficiaries of the Trust are clearly defined. Paragraph 5 of the recital of the DFA and cl 1 of the DFA declare and confirm that the Settlor held the assets in the Schedules "as a Trustee for all Beneficiaries holding the said assets in trust for them". Her intention and the objects of the Trust could not be more explicit or certain. The defendants' counsel's contentions on "uncertainty" are strained, tortuous and tantamount to legal nitpicking.

23 The defendants next argue that cl 4 of the DOT expressly confined and limited the length of the Trust to the lifetime of the Settlor. As such, they argue that any disposition of the property after her death was outside the scope of the "purported trust". Furthermore, they maintain that cl 6 amounted to a testamentary disposition and is void to the extent that it has failed to comply with the provisions of s 6(2) of the Wills Act (Cap 352, 1996 Rev Ed), which makes the formal requirement of two witnesses mandatory. In their final written submissions, counsel for the first and second defendants contend:

> It is clear what Mrs Chow intended to do by the Deed of Trust. Mrs Chow intended to create a trust by which she and her children would have the benefit of receiving a proportion of the income from the assets listed in the Schedule to the Deed of Trust, for the duration of her lifetime. The trust was clearly intended to end upon her death.
>
> Mrs Chow intended that after she died, the assets listed in the Schedule were to be dealt with by a testamentary disposition/Will (ie. a revocable disposition). Clause 6 of the Deed of Trust is worded in the terms of a Will. Mrs Chow would therefore have known and intended that it was revocable just like a Will. That Will may have been included as clause 6 of the Deed of Trust simply out of convenience.
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> [emphasis in original]

24 It is apparent from their final written submissions that counsel for the first and second defendants have accepted that a valid but "limited" trust had been created by the Settlor's declaration. When addressing such a contention, one must bear in mind that cl 2 of the DOT expressly declares that the Trust "shall come into force on the day" of its execution. The Settlor, while identifying the assets to be embraced by the DFA and the DOT, made no provision for its revocation. The Trust has been declared with the utmost clarity and precision and is a completely constituted trust. Once declared, the Settlor retained only the legal interest or the bare equitable title *mutatis*

mutandis and the beneficial interest in the Assets was conveyed to the Beneficiaries. It is trite law that like a gift, a completely constituted trust is immediately binding upon the Settlor and his personal representatives unless a power of revocation has been expressly reserved: see Underhill & Hayton, *Law Relating to Trusts and Trustees* (Butterworths, 15th Ed, 1995) at p 7:

> A trust is an equitable obligation which creates a proprietary interest in the beneficiaries capable of binding third parties. *No consideration is required for its validity: it is, perhaps, best regarded as the equitable equivalent of a common law gift and so leaves no right in the creator of the trust, known as the settlor, to enforce, vary or revoke the terms of the trust, unless such rights be expressly reserved at the time of the creation of the trust*. … It is the beneficiaries alone who can enforce the trust (or terminate the trust if unanimous and of full capacity).
>
> A person may enter into a contract to create a trust and the contract will be enforceable, whether specifically or in damages, so ensuring that property ultimately becomes vested in trustees upon trust for the beneficiaries, unless the contract related to an unascertained part of a larger fund and no money was set aside before the insolvency of the obligee. *Exceptionally, if the promise to create a trust is merely in a deed unsupported by valuable consideration it will be unenforceable by an equitable decree for specific performance since 'equity will not assist a volunteer'*, although equity will not prevent a covenantee who is also a beneficiary from suing at common law for damages on his own account.
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> [emphasis added]

25 Once a trust is validly constituted it can be enforced by even a volunteer who has given no consideration. While cl 4 of the DOT indeed states that it "shall continue to be in force during the rest of my life", this has also to be read in the context of the DFA. Recital 5 of the DFA declares that the Settlor "is desirous of providing for … the …Beneficiaries during her lifetime". Clause 6 of the DFA expressly declares that the Settlor and the Beneficiaries intended to *settle* all "claims, rights and interests" that the Beneficiaries had in the estate of the Testator (which had been the subject of prior contention among the Beneficiaries). Surely, it cannot be credibly contended, in the face of such an explicit declaration to resolve this very issue, that the Settlor had somehow intended to leave it at large? Was there then a slip between the cup and the lip? The term "continue to be in force" is not a term of art and case law arising in different factual matrices does not to that extent shed any illumination on the interpretation of the clauses in question. The question of "intention" is always factual and observations from other cases, even when the same words have been used, is quite irrelevant: see *In re Hamilton* [1895] 2 Ch 370 at 373 and *Halsbury's Laws of Singapore*, vol 9(2) (LexisNexis, 2003) at para 110.487. In this case, the context is paramount. The word "providing" appears in the recitals of both the DFA and the DOT. It means, *inter alia*, "[t]o see to it or take care beforehand; to make provision" (*Oxford English Dictionary* (Oxford University Press, 2004)). The manifest intention of the Settlor was to make all the necessary provisions during her lifetime to ensure that there would be no subsequent disputes either during or after her demise. Notwithstanding this intention, her carefully planned and crafted arrangements have obviously failed to deter the defendants from their captious conduct either before or after her demise.

26 Clauses 3 and 5 of the DOT spell out how the Trust income was to be distributed during the Settlor's life. Clause 6 of the DOT addresses the issue of what was to happen to the Trust when the Settlor no longer needed any income, that is to say, upon her demise. There is nothing objectionable about spelling out in a trust how and when assets are to be distributed and/or how the trust is to be dissolved upon the happening of some future event. Doing so does not by any means make a trust a testamentary disposition. That does not have the effect of affixing the arrangement with an ambulatory dimension. Counsel for the defendants rely on extracts from two leading texts to lend

some tangential support to their cause. First, they rely on *Parker and Mellows: The Modern Law of Trusts* (Sweet & Maxwell, 8th Ed, 2003) at p 305 which states:

> [I]f property is settled upon trust to pay the income to a life tenant and the instrument makes no provision for the destination of the property on the death of the life tenant, the trustee will prima facie hold the property on a resulting trust for the settlor or his estate. This occurred in *Re Cochrane*, where, apparently as a result of a blunder by the draftsman, a provision was left out of the instrument so that the funds were not effectively disposed of.

Secondly they invoke *Snell's Equity* (Sweet & Maxwell, 13th Ed, 2000) at para 9-03 which states:

> A common case of an implied or resulting trust arises where a settlor conveys property upon trusts which in the event do not exhaust the whole of the beneficial interest in the property, as where the trust is for A for life and then equally among his children, and A dies childless. Here the beneficial interest, so far as it is not effectually disposed of, results to the settlor, or, if he is dead, to his residuary devisee or legatee, or the persons entitled under his intestacy.

These references do not apply to or assist the defendants in any way. The trust in the instant scenario is not a partially expressed trust. Express and explicit guidance has been furnished on how the Trust is to be dissolved and distributed upon the Settlor's demise.

27 Does cl 6 amount to a stand-alone testamentary disposition that fails to comply with the Wills Act? Decidedly not. Clause 6 should not be read in isolation. It must be construed in the context of both the entire scheme as well as the DFA and the DOT. The Settlor was simply providing for the termination of income distribution upon her demise. The Assets were then to be distributed among the Beneficiaries in clearly stipulated proportions. In such a situation as observed by Pape J in *Beyer v Beyer* [1960] VR 126 at 128, 130–131:

> To say that the deed had no force or effect until the death … is to misconceive the situation. … Once it is realized that the parties here were concerned only with the actual shareholding at death, it is apparent that it is not correct to say that no obligations arose immediately on the execution of the deed … These covenants imposed immediate obligations upon them – obligations which were not to be performed, it is true, until the death of Guido Henry Beyer, but present obligations none the less, and there is nothing in the deed which enables them to avoid those obligations. …
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> …
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> The provision that the executors of Guido Henry Beyer are to transfer the shares to the plaintiffs is not a mere direction to personal representatives, which they are at liberty to disregard. … [Griffith CJ in *Re Sheppherd* (1893) 5 QLJ 116 at 117] said: "… In saying that death is the event that is to give effect to the instrument it is to be understood that the instrument does not become binding until after death, and not merely that the performance of the obligations or enjoyment of the benefits imposed or conferred by it, is postponed until after death. In other words, the instrument must be revocable. Whenever a question arises as to the testamentary character of a paper, an invariable test to be applied is whether the instrument is revocable. *In the Goods of Robinson* (1867), L.R. 1 P. & D. 384."
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> Later in the same year, his Honour decided *Re Reid* (1893), 5 Q.L.J. 120 and at p. 123 said: "*In order to hold the instruments to be testamentary, I must be satisfied that they were*

revocable", and because he was of opinion that they were not revocable, he held that they were not testamentary in character. The same view was taken by Wigram, V.C., in *Fletcher* v. *Fletcher* (1844), 4 Hare 67; 67 E.R. 564, and by Lord Campbell, L.C., in *Jeffries* v. *Alexander* (1860), 8 H.L.C. 594; 11 E.R. 562. In taking this view regarding the importance of revocability, his Honour anticipated what Hood, J., said in 1919 in *Re Fenton*, [1919] V.L.R. 740; 25 A.L.R. 424, where, at p. 744, he said: "It was argued that the real test was revocability. But this seems only putting the same test in another form. *If the document is not to operate until death it is revocable. If it is not revocable either by its terms or from any other reason it is not operative only on death, and is not a testamentary paper*." It was this idea that was, I think, behind Mr. Davern Wright's submission that because Guido Henry Beyer *could* have disposed of all his shares during his lifetime, he had in effect a power of revocation. But I do not think that this is so; the subject-matter of the agreement was, as I have said, such shares as Guido Henry Beyer should hold at his death, and *there is provided in this deed no means whereby Guido Henry Beyer can escape from or revoke his agreement to sell those shares.*

[emphasis added]

28 Quite clearly, the acid test as to whether an instrument possesses a testamentary character is whether the instrument is revocable. The arrangement in the instant scenario clearly fails that test. It is incorrect for the defendants to assert that the Settlor had retained residual control over the "remainder interest" of her assets that would arise upon her demise. That her intention was patently otherwise is more than amply evident from both the tenor of the DFA and the DOT as well as the unequivocal finality articulated in seeking to resolve all issues in relation to the Assets particularised in the Schedules. Section 6 of the Wills Act does not apply to the creation and administration of a trust. All the Settlor was required to do for the purposes of constituting a valid trust in this case was to furnish in writing provision for the disposal of land in accordance with s 7 of the Civil Law Act (Cap 43, 1999 Rev Ed). This was duly complied with.

29 The case of *Wonnacott v Loewen* (1990) 44 BCLR (2d) 23; 1990 CanLII 976 is instructive in this regard. There, the defendant moved in with the deceased in March 1988 and the two planned to marry when the defendant's divorce was granted. As the deceased wished to afford the defendant some financial security, irrespective of the outcome of the litigation with her husband, they consulted a solicitor. Certain documents were prepared and executed, including a transfer of estate in fee simple of the deceased's residence to the defendant, to be used in the event of the deceased's death. The terms governing the use of these documents were duly laid out in an "escrow agreement" which accorded the defendant an immediate right to live in the residence; it further provided that the deceased could take the transfer back in specified circumstances, in which he was required, *inter alia*, to pay the defendant $60,000. The defendant's divorce was delayed and she was not free to marry before the deceased died in August 1998. She obtained the transfer and had it registered, thereby obtaining title to the residence. The deceased's executor brought an action to set aside the conveyance on the ground that the agreements were testamentary and invalid to the extent they failed to comply with the Wills Act. The action was dismissed and the executor appealed.

30 It was held that whatever the form of a duly executed instrument, if the person making it intended that it should not take effect until after his death, it was entirely dependent on his death for its *vigour and effect*, and was to that extent testamentary. However, if the document created a gift *in praesenti*, albeit to be performed after the donor's death, it was not dependent on his death for its vigour and effect. In that case, though the documents when examined in isolation appeared to be testamentary, it was clear that they had life and vigour from the beginning. The documents conferred an interest on the defendant that had real value no matter what happened. They gave her an immediate interest in the property and were clearly not testamentary.

31 The court in *Wonnacott v Loewen* declared that the test as articulated in *Cock v Cooke* (1866) LR 1 P & D 241 at 243 is the correct yardstick to determine whether the disposition is of a testamentary disposition:

> It is undoubted law that whatever may be the form of a duly executed instrument, if the person executing it intends that it shall not take effect until after his death, and it is dependent upon his death for its vigour and effect, it is testamentary.

32 The court in *Wonnacott v Loewen* then explained that:

> For this case it is important that the test be explained, and the explanation of Frank Ford, J.A. in *Corlet v. Isle of Man Bank Limited et al.*, [1937] 2 W.W.R. 209 (Alta. S.C. A.D.), at p 211 is generally accepted:
>
> > The fallacy in the argument based upon the "oft quoted words" of Sir J.P. Wilde in *Cock v. Cooke* (1866) L.R. 1 P. 241, 36 L.J.P. 5, lies in a misunderstanding of what the words "vigour and effect" are applicable to. They are clearly applicable not to the result to be obtained by, or to the performance of, the terms of the instrument, but to the instrument itself. The question is whether the instrument has vigour to effect, and does effect, or is "consummate on execution" to effect, a gift or to create a trust. *If the document is "consummate" to create a trust in praesenti, though to be performed after the death of donor, it is not dependent upon his death for its vigour and effect*.
>
> The question to be decided here has been stated as succinctly as it can be stated by Frank Ford, J.A. in *Anderson (Administratrix of Costello Estate) v. Patton et al*, [1948] 1 W.W.R. 461 (Alta. S.C. A.D.), where he said (at p. 463):
>
> > The question of whether a document evidencing a voluntary settlement, either by way of gift, in the sense of transferring the property in question, or by way of the creation of a trust, is or is not testamentary, depends upon the intention of the settlor.
> >
> > If the document is not intended to have any operation until the settlor's death it is testamentary.
> >
> > If the document is intended to have and does have the effect of transferring the property or of setting up a trust thereof *in praesenti*, though to be performed after the settlor's death, it is not testamentary.
> >
> > The reservation of a power of revocation is not inconsistent with the creation of a valid trust and does not have the effect of making the document creating it testamentary.
>
> [emphasis added]

In this context the observations of Lord Oliver of Aylmerton in *Baird (Luvinia) v Baird (Dickson)* [1990] 2 AC 548 at 557 are also germane:

> So far as revocability is concerned, it is, of course, axiomatic that an essential characteristic of a will is that, during the lifetime of the testator, it is a mere declaration of his present intention and may be freely revoked or altered. *It does not follow that every document intended to operate on death and containing a power of revocation is necessarily testamentary in character*. [emphasis added]

33 Generally speaking, whenever a declarant identifies the objects, subject matter as well as the manner in which such subject matter shall be dealt with, he creates a trust unless he clearly reserves a right to revoke it. It is settled law that the Settlor's intention is everything. Was the "trust" in this case intended to have immediate vigour and effect or, put another way, to operate *in praesenti*? If the answer is in the affirmative it matters not if performance or some part thereof is to take place on or after the Settlor's death. In the present case it was clearly the Settlor's intention, as manifested by cl 2 of the DOT, for the DFA and the DOT to have immediate effect.

The asset issue

34 The defendants contend that the subject matter of the Trust cannot as a matter of law include assets inherited by the Settlor pursuant to the Testator's Will. As the Testator's estate had not been administered when the Trust was declared, the defendants claim that the Settlor had no valid interest that could be legally or equitably conveyed by or included in the purported Trust. They contend that such an interest if it exists is future property that cannot be conveyed by means of a trust without valuable consideration. The decision of *In Re Ellenborough* [1903] 1 Ch 697 is invoked as the first string to their bow. In that case it was *inter alia* stated (at 700):

> The question is whether a volunteer can enforce a contract made by deed to dispose of an expectancy. … [W]hen the assurance is not for value, a Court of Equity will not assist a volunteer. In *Meek* v. *Kettlewell* [(1842) 1 Hare 464; 66 ER 1114], affirmed by Lord Lyndhurst [(1843) 1 Ph 342; 41 ER 662], the exact point arose which I have here to decide, and it was held that a voluntary assignment of an expectancy, even though under seal, would not be enforced by a Court of Equity. "The assignment of an expectancy," says Lord Lyndhurst, "such as this is, cannot be supported unless made for a valuable consideration."

With respect, this objection by the defendants is misconceived. The Settlor's interest in the Testator's estate at the material time amounted to more than a bare expectancy. The Settlor was a named beneficiary in the Testator's Will and had a direct and real interest in his assets. This is not a case where the Settlor had hopefully or expectantly sought to assign or convey a mere hope of obtaining a benefit. She had already and actually obtained a benefit both in fact and in law in the Testator's estate upon his demise. Future property does not include existing vested or contingent rights to obtain property at some future time: see *Halsbury's Laws of Singapore* ([25] *supra*) at para 110.494.

35 As their fallback position, the defendants rely on the following observations made in *Commissioner of Stamp Duties (Queensland) v Livingston* [1965] AC 694 at 708:

> *The assets as a whole were in the hands of the executor, his property; and until administration was complete no one was in a position to say what items of property would need to be realised for the purposes of that administration or of what the residue, when ascertained, would consist or what its value would be.* …
>
> At the date of Mrs. Coulson's death, therefore, there was no trust fund consisting of Mr. Livingston's residuary estate in which she could be said to have any beneficial interest, because no trust had as yet come into existence to affect the assets of his estate … so Mr. Livingston's property in Queensland, real or personal, was vested in his executors in full right, and no beneficial property interest in any item of it belonged to Mrs. Coulson at the date of her death.
>
> [emphasis added]

36 This accurate but nevertheless spartan legal proposition does not take into account the issue of whether such an interest can be conveyed either in law or in equity. The Privy Council itself in that case emphasised that while the residuary legatee may not have equitable interest in any particular property, he does have an interest to ensure that the assets are properly dealt with and that the rights that will accrue are properly safeguarded; he "can be said, therefore, to have an interest in respect of the assets, or even a beneficial interest in the assets, so long as it is understood in what sense the word 'interest' is used" (at 713).

37 The legal position on disposing or assigning the rights possessed by a devisee or residuary legatee during this interim period is articulated with the utmost clarity in Underhill & Hayton, *Law Relating to Trust and Trustees*, (Butterworths, 16th Ed, 2003) at p 18:

> During the period of administration those interested under a will or intestacy only have an equitable right or chose in action to have the deceased's estate properly administered, *though this chose may be disposed of by will or inter vivos, whether expressly or by operation of law* upon the bankruptcy of the residuary legatee. Thus, while a devisee of land comprised in an unadministered estate cannot convey the land *in specie* until completion of the administration, he can validly contract to sell land before such completion. [emphasis added]

And at p 169:

> Just as money, shares or land may be the subject matter of a trust so may choses in action like a debt or the benefit of a contract or covenant to transfer specific shares or land or property materialising under a will or under the exercise of a power of appointment.

38 In *Marshall (Inspector of Taxes) v Kerr* [1995] 1 AC 148 at 158, the right of a beneficiary to have the estate properly administered was described as a chose in action that could be the subject of a settlement. It must also be pointed out that Buckley J incisively observed in *In re Leigh's Will Trusts* [1970] Ch 277 at 282:

> This transmissible or disposable interest can, I think, only consist of the chose in action in question with such rights and interests as it carries in gremio, that is to say, the right to which Lord Radcliffe refers in *Commissioner of Stamp Duties (Queensland)* v. *Livingston*, in his comment, at pp. 712, 713, on *McCaughey* v. *Commissioner of Stamp Duties* (1945) 46 S.R., N.S.W. 192. *If a person entitled to such a chose in action can transmit or assign it, such transmission or assignment must carry with it the right to receive the fruits of the chose in action when they mature. The chose in action itself may be incapable of severance, but I can see no reason why a person entitled to such a chose in action should not so dispose of it through the medium of a trustee in such a way that the right to participate in its fruits is given to several beneficiaries either in fractional shares or by any other method of division that a trustee or the court can carry out.* [emphasis added]

This rather accurately sums up the position. The Settlor's manifest intention was to transfer this right to the beneficiaries immediately upon the execution of the Trust. This right was to materialise in the apportioned shares of her estate once the administration was completed. In the circumstances, the Settlor was able to promptly and immediately convey to the Beneficiaries immediately upon execution of the DFA and the DOT all her interests and rights in the estate of the Testator. For completeness, I should add that even assuming *arguendo* that the Settlor's interest in the Testator's estate could not have been conveyed, the defendants have conveniently chosen to ignore the fact that the other Assets particularised in the Schedules were capable of being instantly conveyed by way of an *inter vivos* trust. The plaintiff was therefore entitled, at the very least, to an account for all the remaining

assets stated in the Schedules. The defendants had absolutely no basis to turn down any such request for particulars of their administration of the Settlor's estate.

Conclusion

39 The Settlor to all intents and purposes created a valid trust. It was by no means a mere agreement to create a trust that required consideration to be enforceable in equity. It was in any event executed by means of a series of deeds which would inevitably allow it to be enforced in law. Furthermore, as the Trust was part of a family arrangement, even if its scope was such that it embraced future property, the requirement for consideration ought to be viewed through more accommodating lenses. The Trust was unequivocal as to the Settlor's intention, its subject matter and objects. The trust was not a stand-alone arrangement; it was a solemn and integral part of a family arrangement that inexorably included and involved all the Beneficiaries; specifically it was intended to resolve with finality all outstanding issues and concerns arising from the Testator's Will as well as a portion of the Settlor's assets. Clause 6 of the DOT is not a severable part of the DOT that is tantamount to a testamentary disposition. It is an integral inseparable part of the entire scheme of the family arrangement. It also bears emphasis that the Trust clearly did not include *all* of the Settlor's assets. The defendants are really in no position to complain about the distribution of the Settlor's Assets in the manner prescribed by the Deeds. Through the DOA they explicitly contracted with the Settlor that all her personal properties would be distributed in precisely the same manner as prescribed in the DOT. They cannot possibly resile from this arrangement. The DFA and the DOT are in the final analysis to be construed as one single document. It is patently evident that when the Settlor signed the Deeds she intended and sought to resolve with resounding finality the distribution and disposal of the Assets. She was fully conscious of the distinction between a trust and a testamentary disposition or will. She wholeheartedly and expressly intended that the Trust should come into force immediately upon its execution and that it should be irrevocable in relation to the Assets.

40 In the circumstances the defendants *qua* trustees must immediately account to the plaintiff for the administration of the Settlor's estate and her legitimate interests. It is hornbook law that trustees are *obliged* to account to beneficiaries for all aspects of the administration of their trust as well as to keep proper and updated accounts. The defendants have in this case been both tardy and remiss in discharging their solemn obligations in their capacity as trustees. Both the Testator's and the Settlor's estates are nothing less than substantial; they are valued to be several tens of millions of dollars. It is both puzzling and disappointing that the first and second defendants, in particular, are persisting, with the same misplaced ardour, their legal wrangling almost a decade after the Testator's death. This dismaying turn of events and lamentable conduct must have been well beyond the imagination or contemplation of both the Testator and the Settlor in their twilight years.