IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2016] SGHC 63

HCF/District Court Appeal
No 62 of 2015

Between

TDA

… *Appellant*

And

(1) TCZ
(2) TDB
(3) TDC

… *Respondents*

In the matter of
FC/OSM No 12 of 2015

In the matter of
Section 23(1)(i) of the
Mental Capacity Act (Cap 177A)

and

In the matter of
P, a person alleged to lack capacity

Between

TCZ

… *Plaintiff*

And

(1) TDA
(2) TDB
(3) TDC

… *Defendants*

JUDGMENT

[Civil procedure] – [Appeals]

[Civil procedure] – [Originating processes]

[Mental disorders and treatment] – [Mental Capacity Act]

TDA
v
TCZ and others

[2016] SGHC 63

High Court — HCF/District Court Appeal No 62 of 2015
Judith Prakash J
15 February 2016

12 April 2016 Judgment reserved.

Judith Prakash J:

Introduction

1 This matter comes before me as an appeal against the decision of the District Judge (the "Judge") in Originating Summons (Family) No 12 of 2015 ("OSM 12/2015" or "the Application"). The Judge's grounds of decision were reported at *TCZ v TDA, TDB and TDC* [2015] SGFC 63.

2 The Application was filed in January 2015 as an originating summons in the Family Court. The purpose of the Application, which was made under s 23(1)(*i*) of the Mental Capacity Act (Cap 177A, 2010 Rev Ed) ("the MCA"), was to obtain court sanction to make and seal a statutory will on the part of P, a person who lacked testamentary capacity. The plaintiff (who is now the first

respondent, but whom I shall continue to refer to as "the plaintiff") was P's niece whilst the first defendant (now the appellant) was the main beneficiary of P's existing will made in December 2010 ("the 2010 Will"), the second defendant was P's sister, and the third defendant was P's close friend. The second and third defendants were made parties as they were intended beneficiaries under the statutory will.

3 The Application was heard by the Judge on 31 March 2015. It was opposed only by the appellant, the second and third defendants consenting to the same. A solicitor representing P sat in during the hearing. On 6 April 2015, the Judge granted the Application and approved the making of a statutory will in the terms of the draft will annexed to the Application except that the bequests in favour of the second and third defendants were reduced.

4 In coming to her decision on the substance of the Application, the Judge was cognisant that the quintessential nature and objective of the MCA was to protect P and that the court needed to act in P's best interests. In other words, the court was called upon to assess what would serve the best interests of P and not what the court believed P would have done had she possessed the required testamentary capacity. The Judge came to the conclusion, based on the affidavit evidence of several witnesses, that in executing the 2010 Will, P had acted under the undue influence of the appellant. She noted too that while in 2012 P had made a Lasting Power of Attorney in favour of the appellant, this Lasting Power of Attorney had since been revoked. The Judge concluded that the revocation signified P's position that she did not want the appellant to be in charge of herself and her assets. Considering all the evidence, the Judge held that it was in P's best interests to approve the

execution of the statutory will which would revoke the 2010 Will and substantially restore P's original desires.

The appeal

5 The appeal did not proceed on the basis that the decision below should be reversed and the Application dismissed. Instead, the appellant's position was that there had been a procedural failure in the course of the proceedings and that the decision of the Judge should therefore be set aside and the matter remitted to her for a retrial at which witnesses could be called and cross-examined. After that there could be a determination as to whether indeed undue influence had been exercised.

6 The appellant accordingly framed the issues in the appeal as follows:

(a) Whether the Judge was wrong to summarily determine that the first appellant had exercised undue influence over P without calling for the matter to proceed by trial, thereby denying the appellant the opportunity to call material witnesses or to test the evidence provided by the plaintiff's witnesses by cross-examination; and

(b) If the Judge was wrong in not ordering a trial, denying the appellant a chance to call his own witnesses and to cross-examine the plaintiff's witnesses, whether this error materially affected her decision as to what was in the best interests of P.

7 The appellant noted that at the hearing below, the plaintiff had taken the position that the statutory will was necessary to revoke the 2010 Will. The appellant should not be entitled to any share of P's estate because he had exercised undue influence over P, misappropriated her assets and had

manipulated and controlled her. From the appellant's perspective, these were unfounded allegations which he denied and which gave rise to substantial disputes of fact. Such disputes could not be decided in a summary way. Therefore, before the Judge the appellant had:

(a) Argued the Application should not be decided on a summary basis because it involved allegations of undue influence but should go to trial so that he could call witnesses of his own and test the evidence of the plaintiff's witnesses via cross-examination; and

(b) Applied to call two key witnesses, namely the lawyer ("G"), who had prepared the 2010 Will and a prior will in 2009 ("the 2009 Will") that also benefitted the appellant and the doctor ("Dr H") who had examined P before she executed either will and would have been able to testify as to her mental state and capacity at the time.

8 The appellant complained that the Judge denied both these applications and instead proceeded to decide the matter summarily. The Judge failed to appreciate the significance of G and Dr H who were key witnesses whom the appellant should have been allowed to call. They could testify to the circumstances in which P had made two wills in the appellant's favour. The appellant complained that he was not given the opportunity to rebut the undue influence argument when the Judge failed, refused to hold or consider that there was a substantial dispute of fact as to whether the appellant exercised undue influence on P in relation to the 2009 and 2010 Wills. The evidence from the three affidavits filed in the hearing below by the appellant and persons on his behalf were sufficient to show that a substantial dispute of fact existed on the issue of whether the appellant had exercised undue influence over P when she made her earlier wills. The appellant also complained that as

at all material times during the proceedings he had been held on remand, he had not had sufficient time to produce rebuttal evidence.

9 The fact that the appellant chose not to make an application to call witnesses or to cross-examine the respondent's witnesses could not, the appellant submitted, detract from the fact that at the first hearing of the Application, his counsel had made the submission that issues of fact should go to trial and the appellant should be entitled to call witnesses (some of whom had to be subpoenaed) and to cross-examine the respondent's witnesses. There was no election not to call witnesses or not to cross-examine. The only issue was when it was appropriate to make such an application. In this respect, the appellant submitted that at the first hearing of an originating summons, such as the Application, the question the court would have to consider was what evidence would be relevant and necessary to decide the issues raised by the Application. It would be in that context that the court would decide whether cross-examination was necessary and whether further witnesses had to be called. If there was an issue of fact to be decided, then the court at the first hearing of such an application should proceed to make proper directions for the trial of the matter. It was wrong of the Judge to hold that the appellant had waived or elected not to call or cross-examine witnesses. There had been failure of due process and the decision arrived at was unsafe and had to be set aside so that the matter could be re-tried in the proper manner.

10 It can be discerned from the arguments set out in the preceding paragraphs that the issues brought up by the appellant concerned whether the circumstances of this case merited it being treated as a writ action and, if so, whether the appellant had by his conduct elected not to pursue that course such that he was subsequently barred from changing his mind.

The Judge's reasons for disallowing the applications to cross-examine and call further witnesses

11 The Judge dealt with the procedure at [47] and [48] of her Grounds of Decision. She noted that under the MCA, an application has to be made by way of originating summons. In accordance with paras 46 and 57(1) of the FJC Practice Directions 2015 ("the Directions"), in such a matter, evidence is given by way of affidavit. The Judge pointed out that in this case, during the pre-trial conferences, the appellant had been given the opportunity to consider whether he wished to apply to cross-examine the plaintiff's witnesses. He decided not to take this course. However, at the hearing before the Judge, his counsel had apparently submitted that the court could and should on its own volition call G, Dr H and the plaintiff's witnesses who had alleged that the appellant had exercised undue influence over P. The Judge found it odd that despite being given the opportunity to make an application for cross-examination or to subpoena witnesses, the appellant had chosen to place this responsibility on the court. The Judge considered that in the context of the Application, and the defence presented, there was no reason to adjourn proceedings to call further witnesses.

My decision

The course of the proceedings

12 Before I go on to consider the legal position in regard to the conduct of proceedings commenced by originating summons and the obligations of the court in relation to the calling and cross-examination of witnesses, it may be helpful for me to give a fuller account of what happened at the various pre-trial conferences and the hearing below itself.

13 The Application was filed on 14 January 2015. Four pre-trial conferences were held, the first on 28 January 2015 and the last on 18 March 2015. The appellant was represented by his counsel at all of them. At the third pre-trial conference held on 4 March 2015, the plaintiff's counsel indicated to the district judge conducting the conference (the "PTC Judge") that the plaintiff was ready to proceed with the hearing of the Application. The appellant's counsel, Mr Zhu, informed the PTC Judge that the appellant wished to call five witnesses including G and Dr H. Mr Zhu indicated that G had not responded to a request to file an affidavit and he had not been able to contact the other potential witnesses. The plaintiff's counsel objected to the calling of these witnesses, asserting legal and medical privilege. The PTC Judge then gave the parties directions including the following:

> (1) PTC adjourned to 18/3/2015 10.00 am.
>
> (2) [defence] to give confirmed list of witnesses who are filing affidavits or giving evidence at next PTC.
>
> (3) counsel to confirm any need for cross-examination at next PTC.
>
> (4) counsel to be prepared to address [the court] on issue of witnesses with no affidavit in an OS chambers application.
>
> (5) parties to file formal application for cross-examination before next PTC.

14 The next pre-trial conference was held before the same PTC Judge on 18 March 2015. At that conference, Mr Zhu confirmed that the appellant would not be making any application to cross-examine the plaintiff's witnesses. He did not provide a list of witnesses who would be testifying for the appellant. In the course of informing the PTC Judge that the appellant had changed his mind in relation to the calling of witnesses, Mr Zhu stated:

> at this point, we have not filed any application for cross examination

> we note that 31/3/15 has been fixed for hearing of application for cross-examination
>
> we propose that 31/3/15 be used for hearing on OSM 12/2015
>
> *we feel that [the Judge] is best-placed to decide if cross-examination is required or whether can be decided based on affidavit*
>
> [emphasis added]

15 In order to clarify the position, the PTC Judge then put to Mr Zhu the following proposition:

> if I understand you correctly, [the defence]'s position is that OSM 12/2015 is ready for hearing ... & [the defence] is not applying to cross-examine anyone or for anyone to give oral evidence *but if [the Judge] feels cross-examination of anyone is needed [the defence] will go along with her decision* [emphasis added]

Mr Zhu affirmed that that was indeed the case. He gave no indication that the appellant intended to argue, on the day of the hearing, that the action should be converted to a writ action or that witnesses should be cross-examined. Indeed, such an indication would have been inconsistent with Mr Zhu's confirmation that "OSM 12/2015 [was] ready for hearing".

16 As stated previously, the Application came on for hearing on 31 March 2015. As is usual for hearings of originating summonses, the hearing of the Application was in chambers. Prior to the hearing the plaintiff had filed and served written submissions. The hearing commenced with the oral submissions of the plaintiff. Thereafter, Mr Liow, who appeared for the appellant at this hearing, addressed the court. In summary, Mr Liow submitted that it was not appropriate for the court to make a decision until evidence had been given as to circumstances in which the 2009 and 2010 Wills had been executed. In this respect, G had not responded to the first appellant's request

to testify. The Judge asked Mr Liow why it had not been appropriate to subpoena G, and the response was that he did not think it was necessary to do this unless the court thought so. Mr Liow then repeated that the accusations against the appellant could not be decided on a summary basis and that the appellant should be entitled to cross-examine the accusers. He indicated that until he had the evidence of G and Dr H he would not know what had happened in 2009 and 2010 and what P's true intentions had been. Therefore, the case could not be heard and decided that day. It must be pointed out here that these submissions constituted the appellant's reply to the plaintiff's case: they were not raised immediately as a preliminary point. They were also contrary to Mr Zhu's indication to the PTC Judge on 18 March 2015 that the Application was ready for hearing.

17 With that background, I turn to the legal position and to the question of whether the appellant can still complain about the way the hearing below was conducted.

The statutory framework

18 The Family Justice Rules 2014 (S 813/2014) ("the FJR") are the procedural rules governing the conduct of matters instituted under the MCA. The appellant relied primarily on r 512 of the FJR to support his stand that the hearing of the Application was procedurally improper. Rule 512 allows the court to order that a matter begun by originating summons be continued as if it had begun by writ, *ie*, by way of a hearing in open court at which all parties' witnesses could be cross-examined. In the words of the rule, such an order will be made if "it appears to the Court at any stage of the proceedings that the proceedings should, for any reason, be continued as if the cause or matter had been begun by writ".

19 Although not cited by the parties, r 590 of the FJR is also pertinent. It provides, in relevant part, that:

> (2) In any cause or matter begun by originating summons and on any application made by summons, evidence must be given by affidavit unless any provision of these Rules otherwise provides or the Court otherwise directs.
>
> (3) Despite paragraph (2), the Court may, on the application of any party, order a person making any such affidavit to attend for cross-examination.

20 Rule 512 addresses conversion to a writ action, whereas r 590(3) addresses cross-examination without conversion. It is clear on the face of both provisions that the court's powers here are discretionary, not mandatory, as indicated by the use of the phrases "appears to the Court … for any reason" and "may order". Thus, the Judge had the discretion to refuse to allow the appellant to call witnesses or to cross-examine the plaintiff's witnesses. The appellant's contention is that the Judge's refusal to allow the calling or cross-examination of witnesses was a wrongful exercise of that discretion.

The case law

21 Given the recent enactment of the FJR, there are as yet no written decisions concerning when an appellate court should interfere with a first instance court's exercise of discretion with regard to rr 512 and 590(3). It is necessary, therefore, to seek guidance from decisions concerning O 28 r 8 of the Rules of the Supreme Court ("ROC"), which is materially similar to r 512 of the FJR.

22 However, in applying the reasoning of these decisions, one should bear in mind the observations by the Court of Appeal in *Re BKR* [2015] 4 SLR 81

("*BKR*"), at [214], that a court hearing MCA proceedings plays a markedly different role from a court hearing an ordinary civil matter:

> … In MCA proceedings, the interests of P [the person alleged to lack capacity] are paramount; the court's role is a protective one and it should not shy away from taking control of MCA proceedings and directing parties on the evidence that it requires in order to reach its decision.

From this expanded role of the court in directing the proceedings, it appears to follow that a judge hearing an MCA matter should be accorded a greater degree of discretion than a judge hearing an ordinary civil matter in which the parties are, by and large, the masters of the litigation.

The general standard when reviewing a lower court's exercise of discretion

23 An instructive case on when an appellate court will interfere with a first instance decision not to order conversion to a writ action is *Tay Beng Chuan v Official Receiver and Liquidator of Kie Hock Shipping (1971) Pte Ltd* [1987] SLR(R) 123 ("*Tay Beng Chuan*"). In that case, the liquidator of a company had sued one of the company's directors, Tay Beng Chuan, for misfeasance and breach of duty. The judge at first instance summarily decided the dispute in favour of the receiver. Concerning the threshold for interfering with that decision, the Court of Appeal stated at [16]:

> It is well settled that, although it would only be in extraordinary circumstances, that the Court of Appeal would interfere with the discretionary decision of the judge in the conduct of the business in his own court, the Court of Appeal would interfere if clearly satisfied that the decision was wrong so as to defeat the rights of the parties altogether and would be an injustice to one or other of the parties.

This is an uncontroversial restatement of the general position on appellate interference with a first instance court's exercise of discretion set out in the

classic case of *Evans v Bartlam* [1937] AC 473 ("*Evans v Bartlam*"), which the Court of Appeal cited.

24 Applying the *Evans v Bartlam* standard to their facts, the court in *Tay Beng Chuan* found that the judge at first instance had indeed exercised his discretion wrongly. The only substantial evidence available to him had been a report prepared by inspectors appointed by the Minister of Finance to investigate the affairs of a company in winding-up. In deciding the case summarily in favour of the liquidator, the judge had ignored, and made findings of fact directly contrary to, two crucial findings by the inspectors as to Tay Beng Chuan's uncle's role within the company. The upshot was that the finding on the first point "was plainly wrong and [could not] be supported on any view of all the material before the court below" (at [23]), and the finding on the second point was, likewise, not supported by any evidence (at [25]). On this basis, the court was satisfied that the judge at first instance had exercised his discretion wrongly and had worked an injustice, in the circumstances, by denying Tay Beng Chuan an opportunity to put forth a full defence.

25 It can be seen from this case that the standard for overturning a judge's exercise of discretion is a high one, notwithstanding that the High Court and the Court of Appeal decide such appeals by way of rehearing.

The significance of allegations of undue influence or fraud

26 The appellant's position appears to be that simply because allegations of undue influence were made, the Application should have been carried on as a writ action with the calling and cross-examination of witnesses. It is correct that the authorities support the view that generally, in such situations, a writ

action is preferable. However, the nature of the allegations does not by itself determine the form of action.

27 The appellant highlighted the High Court case of *Kamla Lal Hiranand v Lal Hiranand* [2003] 3 SLR(R) 198 which, although it did not concern O 28 r 8 of the ROC or r 512 of the FJR, discussed the circumstances in which commencement of an action by writ would ordinarily be appropriate. In that case, Choo Han Teck J opined (at [7]) that "[d]uress and undue influence are hardly matters for a summons-in-chambers hearing". He went on to state that "where material facts are disputed, short cuts via the originating summons route should be avoided and parties ought properly to begin the action by writ".

28 Similar reasoning was applied, in the context of allegations of fraud, by the Court of Appeal in *Woon Brothers Investments Pte Ltd v MCST Plan No 461* [2011] 4 SLR 777 which observed at [30] that, due to the cogent evidence required to prove fraud, it is "usually more appropriate" to proceed by writ in such cases.

29 The appellant also cited the case of *Re Deadman* [1971] 1 WLR 426, in which the English High Court was asked to allow certain amendments to an originating summons, including an amendment which sought to add an allegation of undue influence. The judge held that the case ought to be continued as if the action had originally been commenced by writ because, as amended, the action would raise disputed questions of fact.

30 Notwithstanding the cases cited above, the rule is not automatically or mandatorily applied. For example, the Court of Appeal in *Cheong Kim Hock v Lin Securities (Pte) (in liquidation)* [1992] 1 SLR(R) 497 at [41] held that it

was not inappropriate for the action there to have been commenced by originating summons and to have not been converted to a writ action, despite the fact that undue influence was central to the dispute, because the facts relied on as establishing undue influence were not in dispute and could therefore be disposed of in the originating summons. Although the court did not elaborate on this conclusion, I would explain it on the basis that, that in order for conversion to a writ action to be appropriate, there should be controversy over the facts themselves as opposed to controversy over whether those facts are sufficient to establish undue influence (or fraud, as the case may be).

31 *Rainforest Trading Ltd and another v State Bank of India Singapore* [2012] 2 SLR 713 ("*Rainforest Trading*") was another case in which the Court of Appeal found insufficient grounds to insist on a conversion of the proceedings, despite the existence of allegations of fraud (which, for present purposes, are akin to allegations of undue influence) and disputes of fact. The court emphasised that such allegations would not invariably incline a court toward ordering conversion to a writ action. Instead, the court held at [42] that "alleged disputes of fact as well as allegations of fraud must be accompanied by the existence of at least a credible matrix of facts and must be relevant to the dispute at hand, which was not the case here". In that case, it was the party alleging fraud which had failed to establish "at least a credible matrix of facts", but as a matter of logic, it should not make a difference whether it is the party alleging fraud or the party denying fraud which fails to do so. Either way, bare assertions – or bare denials – would not warrant the additional inconvenience and expense which would be incurred by conversion to a writ action, especially in the context of proceedings under the MCA.

32 Finally, in *Tan Sock Hian v Eng Liat Kiang* [1995] 1 SLR(R) 730, which the plaintiff cited, I held that in the case of an application to cross-examine a witness without conversion to a writ action, it is necessary for the party seeking cross-examination to support their application with "contrary affidavit evidence showing that an issue of fact arose" (at [9]).

33 Taken together, the effect of the authorities is that allegations of undue influence or fraud will strongly incline a court toward ordering conversion to a writ provided there is, first, controversy concerning the facts *per se* and, second, at least a credible matrix of facts supporting the allegations or denials. Only then could a party be said to have raised a sufficient factual dispute to incline a court toward ordering conversion to a writ action.

The effect of a party's election

34 Although the nature of the dispute may indicate that a matter should be converted to a writ action, the authorities appear to indicate that a party can lose the ability to ask the court to order such a conversion. The plaintiff, arguing that this was such a case, relied on *LS Investment Pte Ltd v Majlis Ugama Islam Singapura* [1998] 3 SLR(R) 369 ("*LS Investment*").

35 *LS Investment* involved, *inter alia*, crucial factual disputes over the state of certain parties' knowledge as to a planned sale of property. It was, arguably, an appropriate case for conversion to a writ action under O 28 r 8 of the ROC. However, the Court of Appeal did not think it necessary even to consider whether the discretion of the first instance judge had been correctly exercised, because LS Investment had elected to forego the opportunity to present its full case. The court had this to say of LS Investment's conduct of the case, at [55]:

> We would observe that this originating summons was first heard before Warren L H Khoo J over two days. He then made certain directions. At no time was an application made to him to convert the originating summons into a writ action or to cross-examine witnesses. For reasons which were not apparent, the continued hearing of the originating summons was fixed before Judith Prakash J instead of being restored before Warren L H Khoo J. Counsel for the appellant did not apply to Judith Prakash J that there should be cross-examination of witnesses. It was clear to us that at all times the parties were prepared to let the matter be decided on the basis of the affidavit evidence.

The court concluded, on the basis of LS Investment's election, that there had been no "substantial wrong or miscarriage of justice" such as would warrant the ordering of a retrial.

36 The case of *Haco Far East Pte Ltd v Ong Heh Lai Francis* [1999] 3 SLR(R) 959 ("*Haco*") provides further confirmation of the reasoning discussed above. In that case, despite agreeing with Haco that the case was an appropriate one for conversion to a writ action, the Court of Appeal declined to order conversion, stating at [17] that:

> … While it is true that under O 28 r 8 the court could ordinarily give directions that the OS be continued as if it had begun by writ, Haco failed to take up the suggestion when given the opportunity and persisted in its stand that its commencement of the action by way of an OS was the appropriate process. Having taken such a stand in the court below, we felt it was too late now for Haco to change its stance. In the circumstances, the court below was entitled to have refused to exercise its discretion under O 28 r 8. There was no basis for us to disturb the discretion exercised by the court below. …

Although the court did not articulate its reasoning in terms of the *Evans v Bartlam* standard, the decision is consistent with that standard. Because it was Haco's own litigation strategy – much like that of LS Investment in the earlier case – that had caused Haco to lose the opportunity to present its full case, it

could not have been said that the trial judge's exercise of discretion had worked an injustice.

37 Finally, it should be noted that in determining whether a court's exercise of discretion had caused injustice to one party, it is necessary to consider not only whether that party had elected to forgo an opportunity to apply for conversion to a writ action, but also whether that party had elected to forgo an opportunity to call and cross-examine witnesses. The rationale is that any potential prejudice from non-conversion to a writ action could be prevented by allowing the calling and cross-examination of witnesses, even if there was no conversion.

Application of the law to the facts

38 To summarise the discussion above, it would appear that whether the Judge's exercise of her discretion to continue conducting the Application as an originating summons, rather than treating it as being converted to a writ and allowing the calling and cross-examination of witnesses, can be upset would depend on two things. One would be whether disputes of fact had been adequately raised and the other would be whether there had been any election on the part of the appellant to forgo the opportunity to call and cross-examine witnesses. In my view, the facts here allow only one conclusion on the second point: *ie*, that the appellant did so elect. I will deal with this point first.

The appellant had elected to forgo the opportunity to call and cross-examine witnesses

39 On this issue, the appellant argued that the Judge had denied him the opportunity to call witnesses and to cross-examine the respondents' witnesses. He argued that he had not made any election and that it would have been

premature to apply to call, cross-examine, or subpoena witnesses at the pre-trial stage.

40 The appellant's argument is unsustainable for two reasons. First, there is no basis for the appellant's submission that it would have been premature, at the pre-trial stage, to apply to convert the action to a writ action or to apply to call, cross-examine, or subpoena witnesses. Secondly, given that an election can be made at the pre-trial stage, it is clear on the facts that the appellant did make such an election.

41 On the first point, r 512 of the FJR makes it clear that a party may apply for, and a court may order, conversion to a writ action "at any stage of the proceedings". The same is true of O 28 r 8 of the ROC. For instance, the application in *Drydocks World LLC (formerly known as Dubai Drydocks World LLC) v Tan Boy Tee* [2010] SGHC 248 was taken out before the main hearing, although the application and suit were heard back-to-back. As for *Tay Beng Chuan*, the application there was made as a preliminary matter in the main hearing and the party had submitted written submissions on the issue in advance of the hearing. In neither case did the party seeking conversion remain silent as to its intentions only to spring the application on the day of the hearing. It should also be noted that at the time *Tay Beng Chuan* was decided, pre-trial conferences were not held and parties thus had no opportunity to apply for conversion until the hearing before the judge was fixed. Indeed, as cross-examination cannot be applied for before a dispute of facts has arisen, the application for conversion or cross-examination would likely not be made before the second or third hearing of the application when both parties had filed all their affidavits. In the present regime of case

management, however, parties have various opportunities to consider conversion prior to the fixing of the hearing date for the Application.

42 Furthermore, it can be inferred from *Haco* that, in determining whether a party has been put to election, a crucial factor is whether the party had earlier been invited to consider making the application. When a court has already directed that a party should consider making the application at whichever stage the proceedings are at, it is unacceptable and unreasonable for a party to refuse to make the application on the ground that it would, in the party's own view, be premature.

43 Turning to the second point, it is clear from the minutes taken by the PTC Judge, who presided over four pre-trial conferences regarding the Application, that the appellant was put to election and did elect not to call, cross-examine or subpoena witnesses.

44 At the hearing before the Judge, Mr Liow conceded that "[w]e were told by the [PTC Judge] that we could consider making cross-examination application". In fact, it is clear from the minutes reproduced above that the appellant was not merely "told … that [he] could consider" making the application. The appellant was *directed* to make the application by 31 March 2015 if, indeed, he intended to make any such application. There could not have been a clearer invitation to the appellant to make his case for why oral evidence, particularly cross-examination, was necessary.

45 The appellant chose to reject that invitation. The appellant's position as at the last PTC before the OS hearing can be summarised as follows:

(a) He did not intend to call any witnesses;

(b) He did not wish to apply to cross-examine any witnesses;

(c) He did not wish to apply to subpoena any witnesses;

(d) He wished to use the court date of 31 March 2015, which had been fixed for dealing with the application for cross-examination, for the hearing of OSM 12/2015 instead; and

(e) He was content to leave the decision of whether cross-examination was required in the Judge's good hands.

46 At the hearing on 31 March 2015 before the Judge, the appellant once again changed his tune. He gave no prior notice to the court or to the plaintiff, who was consequently ill-prepared to deal with the appellant's submissions. Mr Liow submitted that the case could not be properly decided without cross-examining the plaintiff's witnesses and calling G and Dr H. When asked why he had not subpoenaed G in order to procure her oral evidence, Mr Liow informed the Judge that he did not think it necessary unless the court thought it necessary.

47 Counsel's response to the Judge does not reflect the subpoena procedure as provided for in r 601 of the FJR. Sub-paragraph (1) of this rule provides that "[a] subpoena must be in form 123". This form is found in Annex A of the Directions and contains a line stating the name of the firm taking out the subpoena and the party for which they act. Sub-paragraph (3) provides that a subpoena may be revoked by the Registrar on his own motion (or on the application of any party), but it does not provide for the issuance of a subpoena on the Registrar's (or any court's) own motion. Taken together, the FJR and the Directions make it clear that only the parties may apply to subpoena witnesses; it is for the Registrar to decide, at first instance, whether

to allow the application. Thus, whether to apply to subpoena G was not a matter which the appellant should have left to the Judge at the hearing of the Application.

48 Ultimately, Mr Liow sought to invite the court – without making a formal application – to exercise its discretion to convert the action to a writ action so that the appellant could be given the chance to "test the evidence" adduced by the plaintiff. Given the unequivocal position expressed by the appellant at the pre-trial stage and the ample time which he had to consider that position, this option was no longer open to him. He had made his election and it cannot be said that the Judge was wrong to hold him to it.

49 The Judge's exercise of her discretion to refuse both conversion and the calling and cross-examining of witnesses is even more difficult to impugn given the stronger case management mandate given to the court when dealing with matters under the MCA (*BKR* at [214]).

The appellant had failed to raise a sufficient factual dispute

50 Turning to the question of whether the appellant had raised a sufficient factual dispute, the plaintiff contended that the appellant had not attempted to adduce evidence to rebut the allegations of undue influence and fraud. The appellant's disagreement with the allegations was phrased in vague terms which did not disclose a factual basis for his disagreement. For instance, in his affidavit contesting the Application, the appellant stated that:

> … many allegations have been raised against me in relation to my purported manipulation and control of P. I wish to state that my solicitors should be entitled to cross-examine each of these witnesses as the accusations made against me are serious.

51 Not only did this passage fail to go beyond a bare denial, it was not even an express denial. Nowhere in his affidavit did the appellant actually assert, for instance, that he had allowed P free choice in her decisions or that he had not attempted to bribe P's domestic helper to give favourable testimony at trial. Instead, the appellant's response in his affidavit was merely, in essence, that he wished to put his accusers to strict proof. At the hearing, the appellant's counsel made much the same response in his oral submissions. This was a surprising position to adopt, at any stage in the proceedings, in response to allegations which were both serious and specific.

52 In fairness to the appellant, he did state – and the Judge accepted, at [43] of the GD – that his being in remand made it more difficult for him to properly respond to the affidavits filed by the plaintiff's witnesses. However, the Judge went on to note, at [44] of the GD, that the time frame given to the appellant was quite generous, the affidavits which he had to respond to for the purposes of the Application were not as voluminous as he claimed, he was able to file extensive reply affidavits in the other related suits, and he was able to file his affidavit in the Application within eight days of his counsel informing him of the need to do so. In my view, those findings were reasonable and justified on the evidence before the Judge.

53 Here, as in *Rainforest Trading*, the party seeking conversion to a writ action failed to establish at least a credible matrix of facts supporting his position. There was therefore not a sufficient dispute of fact, and the Judge cannot be said to have wrongly exercised her discretion by declining to order conversion to a writ action.

The Judge did not exercise her discretion wrongly in declining to call witnesses under r 575 of the FJR

54 The appellant did not refer to r 575 of the FJR, which concerns the court's power to call witnesses. However, in his arguments before the Judge, there were traces of a suggestion that he was also seeking to have the court exercise its jurisdiction to call his witnesses and the respondents' witnesses. This led the Judge to observe (at [48] of the GD) that it was odd for the appellant to cast this responsibility on the court when he could have called the witnesses or applied to cross-examine them himself. Before me, Mr Liow again appeared to suggest that the Judge should have called the witnesses.

55 Rule 575 of the FJR provides:

> (1) Where the Judge hearing the action considers it necessary for the just, expeditious or economical disposal of the action, the Judge may order that a person specified by the Judge be called as a witness at the trial of the action.
>
> (2) The Judge may, when making an order under paragraph (1), give directions for —
>
> > (a) the filing of an affidavit by the specified person; and
> >
> > (b) the examination and cross-examination of the specified person.

56 This provision has no equivalent in the ROC and is an instance of the expanded case management powers conferred on judges hearing family matters, including matters under the MCA. As with r 512 of the FJR, r 575 confers a discretionary power. Because r 575 confers a discretionary power, the same reasoning set out earlier with regard to r 512 applies to r 575. Thus, in the light of the appellant's failure to establish at least a plausible factual matrix in support of his position, as well as his election not to call witnesses,

it cannot be said that the Judge exercised her discretion wrongly by not making an order under r 575 of the FJR.

Conclusion

57 For the reasons given above, I am unable to agree with the appellant that there was any procedural error or erroneous exercise of discretion in the way that the Judge conducted the hearing of the Application. This appeal must be dismissed with costs. I will hear the parties on the appropriate amount of costs.

Judith Prakash
Judge

Liow Wang Wu Joseph (Straits Law Practice LLC)
for the appellant;
Ramachandra Doraisamy Raghunath and
Lee Weiming Andrew (Selvam LLC) for first respondent.