

IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2017] SGHC 96

Suit No 34 of 2016

Between

Ho Heng Leng (alias Foo Chee Kai)

... Plaintiff

And

Lodge, Kenneth George
(litigation representative and
administrator of the estate of Lodge, Vivien
(alias Vivien Tsuji), deceased)

... Defendant

And

Lim Soon Wah Thomas

... Third Party

JUDGMENT

[Probate and administration] — [Administration of assets] — [Payments of debts presently due]

[Restitution] — [Money had and received]

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Ho Heng Leng (alias Foo Chee Kai)

v

**Lodge, Kenneth George (litigation representative and
administrator of the estate of Lodge, Vivien (alias Vivien
Tsuji), deceased)
(Lim Soon Wah Thomas, third party)**

[2017] SGHC 96

High Court — Suit No 34 of 2016

Lai Siu Chiu SJ

30 November, 1, 2 December 2016; 3 February 2017.

28 April 2017 Judgment reserved.

Lai Siu Chiu SJ:

Introduction

1 In Suit No 34 of 2016 (“this action”), Ho Heng Leng, also known as Mrs Foo Chee Kai (“the plaintiff”), sued the estate of her late cousin Vivien Lodge, also known as Vivien Tsuji (“the Deceased”), for recovery of a friendly loan of \$308,308.15 (“the alleged loan”) made to the Deceased during her lifetime. The Deceased passed away on 30 May 2014 and is survived by her husband Kenneth George Lodge (“the defendant”) who is the administrator of her estate as well as her litigation representative.

2 The defendant has in turn joined as the third party to the action Lim Soon Wah Thomas (“Thomas”), who is a half-brother of the plaintiff. The plaintiff’s mother is Emily Tan Siew Moey (“Emily”). The plaintiff has two other siblings, namely a brother, Ho Kee Yan (“Kee Yan”), and a sister, Ho May Ling (“May Ling”). Thomas was the only child from Emily’s second marriage. The Deceased herself had one sibling, a brother Victor Chee Gee Seng (“Victor”), who predeceased her, passing away on 3 May 2014.

The facts

3 The plaintiff is a retired school principal. Her mother Emily was previously the owner of a property situated at No 59 Circuit Road, Singapore (“the Circuit Road property”). Upon Emily’s death on 21 March 2010, the Circuit Road property was transmitted to the plaintiff and Kee Yan as the executors of Emily’s estate. The beneficiaries of Emily’s estate were her four children, namely the plaintiff and her three siblings, and Emily’s grandson Mervin Lim Chee Kin (“Mervin”), who is the son of Thomas.

4 Emily and the Deceased’s mother Tan Kim Lai (“Kim Lai”) were sisters. Although she was only Emily’s niece, it appeared that the Deceased regarded Emily as her mother during Emily’s lifetime.¹ The Deceased was also very close to her cousins, namely the plaintiff and the plaintiff’s siblings.

5 The Deceased worked as a physiotherapist during her lifetime. She moved to Manchester, England after marrying the defendant on 28 October 1970.² Subsequently, after she and the defendant had retired, they relocated to the Isle of Harris in Scotland. Based on the defendant’s own evidence, it

¹ Bundle of AEICs, Tab C, para 12.

² Agreed Bundle of Documents (“ABOD”) Vol I, p 3.

appeared that the Deceased lived in Singapore for almost eight years after her marriage, namely from end 1970 to 1978.³ She again returned to Singapore to live and work between 1988 and 1992, in order to look after her mother Kim Lai, Emily and Victor.⁴ Again according to the defendant's affidavit of evidence-in-chief ("AEIC"), the Deceased shuttled between Singapore and England for many years between 1994 and 2014. The Deceased's last period of stay in Singapore was between 27 October 2013 and 9 April 2014.⁵

6 Victor suffered three strokes between 2003 and 2012, with the second stroke around 2011 rendering him almost completely immobile. It is common ground that the Deceased was devoted to Victor and during her lifetime she travelled often to Singapore to see Victor even for short two week durations as was the case in November 2011.⁶ She further helped to defray Victor's medical and living expenses.

7 According to the plaintiff, she was first approached by the Deceased in mid-November 2011 for a loan (initially of \$50,000) to help the Deceased to purchase a property in Scotland.⁷ The Deceased was diagnosed with stage three cancer in June 2010 and began her treatment shortly thereafter at a hospital in Inverness. In order to go for her cancer treatment, the Deceased had to drive and then fly to Inverness from the Isle of Harris. The defendant stated that the Deceased found these journeys tiring and therefore intended to purchase a property near Inverness to save travelling time.⁸

³ NE Day 2 p 11.

⁴ NE Day 3 pp 11-12.

⁵ Bundle of AEICs, Vol II, Tab C, para 40.

⁶ Bundle of AEICs, Vol II, Tab C, para 33.

⁷ NE Day 1 p 63 (lines 10-11).

⁸ Bundle of AEICs, Vol II, Tab C, para 55.

8 The plaintiff claimed that the Deceased informed the plaintiff she would repay the monies she borrowed once she had sold her property at No 32, Lorong 20 Geylang, Singapore 398748 (“the Geylang property”).⁹ The Geylang property was initially jointly owned by the Deceased and Victor but the Deceased bought over Victor’s share in or about July 2012 for \$900,000. A valuation report of the Geylang property dated 16 July 2012 had placed its value at \$2.2m with vacant possession.¹⁰

9 On 27 June 2012, after Victor’s second stroke, Thomas obtained an order of court appointing himself as Victor’s deputy pursuant to ss 19 and 20 of the Mental Capacity Act (Cap 177A, 2010 Rev Ed).¹¹

10 Between September and November 2012, the Deceased repeated her request for a loan (this time of \$300,000) from the plaintiff. The Deceased was aware that the plaintiff and Kee Yan were then planning to sell the Circuit Road property as executors of Emily’s estate. The two executors did not advance any monies to the Deceased as the Circuit Road property was not sold. In September 2012, the Deceased approached the plaintiff’s sister May Ling for a loan. May Ling advanced the requested sum of \$100,000 which the Deceased repaid on 17 March 2014.

11 In 2013, the plaintiff and Kee Yan finally sold the Circuit Road property for \$315,000 which sale was completed on 17 April 2013. The net sale proceeds amounting to \$308,308.15 were deposited into Emily’s estate account. The Deceased had allegedly telephoned the plaintiff on or about 17

⁹ Bundle of AEICs, Vol I, Tab A, para 10.

¹⁰ ABOD Vol I, p 104.

¹¹ Defendant’s Bundle of Documents (“DBOD”) p 95.

April 2013 repeating her request to borrow \$300,000 stating she would repay the amount when she sold the Geylang property.¹²

12 The plaintiff and her two beneficiary siblings claimed that they had initially intended to let the Deceased have the sale proceeds of the Circuit Road property as a gift. Two weeks prior to the completion of the sale of the Circuit Road property, they changed their minds. They became aware that the Deceased was taking steps to sell the Geylang property. That meant she would have substantial funds thereafter. They decided they would make her a loan instead.¹³

13 To that intent and purpose, the entire net sale proceeds of the Circuit Road property were deposited into the Deceased's bank account on 24 April 2013, as reflected in the deposit slip¹⁴ and the 30 April 2013 statement of the POSB joint savings account ("the Deceased's POSB savings account") that the Deceased maintained with her nephew Mervin.¹⁵ Although it was a joint account, it was Mervin's (unchallenged) evidence that the POSB account was used exclusively by the Deceased, although he transferred monies and monitored the transactions in the account on the Deceased's instructions.¹⁶

14 On or about 25 April 2013, Thomas claimed that the Deceased requested permission from Thomas to deposit \$258,000 into his Development Bank of Singapore ("DBS") account. Thomas agreed and the sum was so deposited. Subsequently in May 2013, the Deceased requested Thomas to

¹² Bundle of AEICs, Vol I, Tab A, para 18.

¹³ Bundle of AEICs, Vol I, Tab A, paras 15-16.

¹⁴ ABOD Vol I, p 151.

¹⁵ ABOD Vol I, p 154.

¹⁶ Bundle of AEICs, Vol I, Tab B, paras 51-61.

return \$58,000 to her which he did by way of cash on or about 7 May 2013.¹⁷ As they were very close, it was Thomas' evidence that he did not ask her to acknowledge the cash payment, although the cash withdrawal was reflected in his DBS statement for the month of May 2013.¹⁸

15 In June 2013, at the request of the Deceased, Thomas returned the balance of \$200,000 of the Deceased's monies to her. In lieu of cash that she requested, Thomas deposited the said amount into the Deceased's POSB account on 3 June 2013.¹⁹

16 On 1 August 2014, the Deceased entered into an exclusive estate agency agreement with Orangetee.com Pte Ltd to sell the Geylang property at an expected price of \$2.2m.²⁰ According to Thomas' email dated 21 May 2015 to Mervin, the Deceased rejected a prospective buyer's offer in October 2013 of \$1.9m (according to the plaintiff) as being too low. The Geylang property was not sold before the Deceased's demise in May 2014 nor was the alleged loan repaid. The Deceased died intestate and the defendant as her husband and next-of-kin, was granted letters of administration to her estate on or about 20 March 2015.²¹

17 On 3 September 2014, the plaintiff lodged a caveat on the Geylang property claiming an equitable interest based on a loan agreement dated 24 April 2013.²² On 15 April 2015, the defendant's solicitors requested for a

¹⁷ Bundle of AEICs, Vol III, Tab E, paras 15-17.

¹⁸ Bundle of AEICs, Vol III, Tab E, Annex E.

¹⁹ Bundle of AEICs, Vol III, Tab E, para 18.

²⁰ ABOD Vol II pp 198-204.

²¹ ABOD Vol II p 208.

²² ABOD Vol II pp 205-207.

copy of the alleged loan agreement but received no response. In addition, on 4 November 2015, the defendant’s solicitors demanded of the plaintiff *inter alia* the sale proceeds of the Circuit Road property on the basis that the Deceased “had reached an agreement with the other three beneficiaries [of Emily Tan’s estate] that the said sale proceeds would be given solely and entirely to the Deceased”.²³ Not surprisingly, this (and the defendant’s other claims) was rejected by the plaintiff’s solicitors.

18 On 30 November 2015, the defendant’s solicitors wrote to Thomas demanding (i) the gift of the sale proceeds of the Circuit Road property; (ii) \$30,000 in rental proceeds of the Geylang property that Thomas had collected for five months in 2014 and (iii) disclosure of any other assets that the Deceased may have had.²⁴ Thomas responded to the defendant’s demand on 7 December 2015 stating that: (i) he never had the sale proceeds of the Circuit Road property, (ii) the rental proceeds had either been handed to the Deceased or disbursed according to her instructions and (iii) he was unaware of any assets that the Deceased held either in her sole name or jointly with any other person.²⁵

19 On 10 May 2016, the defendant wrote to May Ling, the plaintiff’s sister, and demanded that she repay the \$100,000 that the Deceased had allegedly entrusted to May Ling in connection with the purchase of No 103 Bedok Reservoir Road #04-430, Singapore 470103 (“the Bedok Reservoir flat”) meant to house Victor and his helpers which purchase never

²³ ABOD Vol II pp 218-220.

²⁴ ABOD Vol II pp 222-224.

²⁵ ABOD Vol II p 234.

materialised.²⁶ I should point out that Thomas resides at the Bedok Reservoir flat.

20 May Ling replied to the defendant's letter on 25 May 2016 pointing out that the \$100,000 from the Deceased was repayment of May Ling's loan to the Deceased made on 17 September 2012. May Ling added that as a matter of goodwill, she and her siblings had allowed Victor and the Deceased to reside at the Bedok Reservoir flat.²⁷

The pleadings

21 The plaintiff commenced this action on 13 January 2016 when her demand of the defendant for repayment of the alleged loan was not met. In her (amended) statement of claim, the plaintiff alleged that the Deceased passed away before the Geylang property was sold, but the Deceased had promised the plaintiff that the sale proceeds from the Geylang property would be used to repay the alleged loan. In the alternative, the plaintiff's claim was premised on money had and received by the Deceased to the use of the plaintiff.

22 In his (amended) defence, the defendant admitted that the amount of \$308,308.15 was deposited into the Deceased's POSB account but denied the purpose alleged by the plaintiff. He averred that the source of the deposit was not the plaintiff's bank account. The defendant then asserted that prior to the completion of the sale of the Circuit Road property, the plaintiff and her siblings had intended to make a gift of their respective shares in the sale proceeds to the Deceased.

²⁶ ABOD Vol II p 235.

²⁷ ABOD Vol II p 237.

23 Further, the defendant alleged that the Deceased had on or about 25 April 2013 deposited a sum of \$258,000 into the bank account of Thomas. He alleged that Thomas had requested from the Deceased funds to foot the medical and living expenses of Victor. Although the \$258,000 was to be held on trust for Victor, the defendant claimed he had no knowledge of how the sum had been utilised by Thomas.

24 On 22 September 2016, the defendant issued a Third Party Notice against Thomas. In his (amended) third party statement of claim against Thomas, the defendant (after repeating the paragraphs in his defence to the plaintiff's statement of claim) pleaded that if any party should be liable for the plaintiff's claim, it should be Thomas against whom he claimed an indemnity and/or contribution for the plaintiff's claim. The defendant also claimed an account of any monies from the \$258,000 that Thomas had utilised towards the maintenance and upkeep of Victor between 25 April 2013 and 3 May 2014.

25 In his defence to the third party proceedings, Thomas denied the defendant's allegations regarding the \$258,000 allegedly paid to him by the Deceased. Thomas averred that the Deceased used his bank account to deposit the said amount and subsequently, he had returned the same to the Deceased by way of two withdrawals of \$58,000 and \$200,000 on 7 May 2013 and on 3 June 2013 respectively.

The evidence

26 The plaintiff and Mervin testified for the plaintiff's case while Kee Yan was subpoenaed as the defendant's witness. Thomas was the only witness for his own case.

(i) The plaintiff's case

27 The plaintiff's version of events in brief has been set out earlier in this judgment at [7] to [13]. I turn therefore to the evidence that was adduced from the plaintiff during cross-examination.

28 The plaintiff, her siblings and the Deceased were close as they grew up together living with their grandmother under the same roof. The Deceased was particularly close to Emily whom she regarded and addressed as a mother and who in turn treated the Deceased like a daughter. However, this did not mean that the Deceased was in fact Emily's child and the plaintiff's sibling (as counsel for the defendant sought to prove in cross-examination of Kee Yan). The Deceased's birth certificate clearly showed that Kim Lai was her mother. Moreover, this allegation was not pleaded in the defendant's defence. If indeed, there was any basis for this unfounded theory, Emily's Will would have included the Deceased as a beneficiary.

29 After his first stroke and until his demise, Victor lived first at the Circuit Road property and then at the Bedok Reservoir flat. It was Mervin and Thomas who took care of Victor in his later years. As the plaintiff so testified, it was compassion that prompted her and her siblings to allow Victor to live first at the Circuit Road property and then at the Bedok Reservoir flat.²⁸

30 The plaintiff consistently maintained her testimony that the net sale proceeds were given to the Deceased as a loan and not as a gift. She explained that lending \$300,000 to the Deceased as the latter had requested posed a problem. That would have meant that what was left from the net sale proceeds, being \$8,308.15 (\$308,308.15 - \$300,000), was difficult to divide amongst the

²⁸ NE Day 1 p 73 (line 29).

four beneficiaries of Emily’s estate. Hence, the siblings decided to let the Deceased have the entire net sale proceeds instead.²⁹

31 The plaintiff testified that she made it clear to the Deceased that the siblings were willing to help her to buy her Scottish property but they were not willing to give her the money outright, since the Deceased solely owned a private property worth \$2.2m with which sale proceeds she could repay their loan as the Deceased said she had intended to. Thomas described the Deceased as “asset-rich but cash poor”.³⁰

32 The plaintiff testified that she had also helped to look after Victor subsequent to Emily’s passing. She and her siblings were mindful that Victor’s health had deteriorated over the years after his retirement from the Singapore Armed Forces in 2003 and after his first stroke. At one stage, Victor even had to have one leg amputated.

33 With the consent of her siblings, the loan was deemed to be extended by the plaintiff to the Deceased in her personal capacity. In this regard, the plaintiff had explained that the Housing and Development Board (“HDB”) had credited the bank account of Emily’s estate with the sale proceeds of the Circuit Road property. She and Kee Yan then transferred the sale proceeds to the plaintiff’s bank account before the plaintiff in turn transferred the same to the Deceased’s POSB account.³¹

²⁹ NE Day 1 p 74 (lines 4-12).

³⁰ NE Day 3 p 20 (line 6).

³¹ NE Day 1 p 105 (lines 18-21).

34 It was clear from Mervin's testimony that he was estranged from Thomas whom he described as an absentee father when he was growing up. Mervin's mother was the first wife of Thomas. The parties were divorced in the 1970s when Mervin was in kindergarten. Mervin's mother had sole custody of him after the divorce. It would also appear from his testimony that Mervin was close to the Deceased during her lifetime.³²

35 Mervin helped to take care of Victor when Victor (and his maid) stayed with Mervin at his flat at No 620, Bedok Reservoir Road #03-1454 between August 2011 and August 2012, after Victor's second stroke. During that period, Mervin maintained a cash float for Victor's care and his/his maid's expenses. Monies for the cash float came from Thomas who was put in charge of the funds by the Deceased.³³ Besides the cash float, Mervin had access to funds of the Deceased by virtue of the two POSB accounts he had jointly opened with the Deceased, as well as another joint savings account that he and the Deceased maintained with OCBC Bank (this was closed sometime in 2014).³⁴

36 When the defendant came to Singapore in April 2015, he stayed with Mervin. Mervin accompanied the defendant on his visits to various government departments, banks and the Deceased's friends as well as to the Bedok Reservoir flat to meet Thomas.³⁵

³² Bundle of AEICs, Vol I, Tab B, para 8.

³³ Bundle of AEICs, Vol I, Tab B, paras 35-40.

³⁴ Bundle of AEICs, Vol I, Tab B, paras 48 and 54.

³⁵ Bundle of AEICs, Vol I, Tab B, paras 93-94.

(ii) *The defendant's case*

37 Kee Yan's testimony did not help the defendant's case at all. In fact, Kee Yan corroborated the plaintiff's evidence that she and her siblings had a change of heart and instead of a gift to the Deceased, they would and did advance her the loan.³⁶

38 As for the defendant, his testimony was hampered by the fact that he had no or very little personal knowledge of the facts and events that transpired. It was obvious from his AEIC that the defendant relied totally on records/documentation for his case. Save for his trip to Singapore (in November 2005) to attend Kim Lai's funeral, the defendant did not accompany the Deceased on her many visits to Singapore over a span of over 40 years. Consequently, the paragraphs in the defendant's AEIC were frequently prefaced by such remarks as "*from the Deceased's email records*", "*based on the account statements of the savings account*", "*I gathered from the Deceased's email records*" and "*I had understood from records that the Deceased left behind*".³⁷

39 The following paragraphs from the defendant's AEIC spoke volumes:-

26 During the Deceased's lifetime, I did not have access to the bank accounts nor did I have any personal knowledge of how the Deceased dealt with the monies in the bank accounts.

.....

73 However, I have no personal knowledge nor am I in charge of any records left behind by the Deceased that would assist this Honourable Court as to the source, nature of or reason for the deposit of \$200,000.00 in the savings account on 3 June 2013.

³⁶ NE Day 2 p 121 (lines 4-31) and p 128 (line 29) – p 130 (line 18).

³⁷ Bundle of AEICs, Vol II, Tab C, paras 15, 35, 37, and 38.

40 Despite paragraph 73 of his AEIC that he knew nothing regarding the \$200,000 deposited into the Deceased's POSB account by Thomas, the defendant instituted action against Thomas in the third party proceedings in relation to the \$258,000 deposited into Thomas' account by the Deceased of which the \$200,000 forms a part. I should add however that while he was being cross-examined by counsel for Thomas, the defendant agreed that the sum of \$200,000 had been returned to the Deceased by Thomas.³⁸ Yet, he made no move to withdraw this portion of his claim against Thomas.

41 Often times, the defendant's evidence was contradictory, speculative, irrelevant to his pleaded case and/or unsubstantiated. As examples, I refer to the following in the plaintiff's closing submissions:

(a) The defendant alleged that the Deceased was the real owner of the Circuit Road property and that Emily's name appeared in the title deeds because the Deceased owned a private property (the Geylang Property) which prohibited her from owning a public housing flat under Singapore law.³⁹ He could not elaborate on how the Deceased had "informally owned" the Circuit Road property, simply stating that he "[did not] know the details" and "[did not] involve [himself] with these matters". In any case, ss 58(8), 58(9) and 58(10) of the Housing and Development Act (Cap 129, 2004 Rev Ed) prohibit the creation of any trust in relation to any HDB property;

(b) The defendant also alleged that the plaintiff and her siblings wanted to give the Deceased the sale proceeds of the Circuit Road property in gratitude for the Deceased's taking care of Emily when

³⁸ NE Day 2 p 76 (lines 19-21) and 77 (lines 2-12).

³⁹ Plaintiff's closing submissions at paras 82-83.

Emily was ill. The plaintiff did not dispute that they had originally wanted to gift the monies to the Deceased. Her case is that they had changed their mind before the completion of the sale of the Circuit Road property as the Deceased had indicated that she only needed a loan, not a gift, and was intending to sell her Geylang property;⁴⁰ and

(c) The loan to the Deceased was meant for the purchase of the Bedok Reservoir flat. Indeed, at one stage, the defendant alleged that the Deceased intended the loan as the purchase price of the entire Bedok Reservoir flat. At another juncture, he claimed that the Deceased was purchasing one-third share therein with May Ling and May Ling's husband purchasing the remaining two-thirds and that the \$100,000 advanced by May Ling was actually given by the Deceased to May Ling as the purchase price for her $\frac{1}{3}$ share. It is noteworthy that the Bedok Reservoir flat was owned by the plaintiff and her husband. There was no evidence before the court that the plaintiff and/or her husband intended to sell the flat to the Deceased and/or to May Ling/May Ling's husband. It bears noting too that May Ling is married and lives in the United Kingdom. It would not make sense for her to purchase a public housing flat in Singapore even if she was eligible to do so.

(iii) The third party's case

42 The evidence of Thomas was consistent with his defence as pleaded. The Deceased requested permission to park her funds (\$258,000) in his DBS account and subsequently, at her request, he returned the entire sum to her in two tranches on 7 May and 3 June 2013.

⁴⁰ Plaintiff's closing submissions at para 91.

The issues

43 For this action, this court has to decide the following issues:

- (a) Does the plaintiff have the right to make this claim in her personal capacity rather than on behalf of the estate of Emily?
- (b) Was the alleged loan deposited into the Deceased's bank account by or on behalf of the plaintiff?
- (c) Did the alleged loan come from the sale proceeds of the Circuit Road property?
- (d) Was the money advanced to the Deceased a loan from the plaintiff (as the plaintiff and her siblings contended) or a gift (as the defendant asserted)?
- (e) Is Thomas liable to indemnify the defendant for the plaintiff's claim to the extent of \$258,000 or at all?

The findings

(i) The plaintiff's claim

44 It appears from the evidence that by all accounts, the plaintiff had the authority from her siblings to make this claim as the funds credited to the Deceased's account had come from the plaintiff's bank account. It was a matter between the plaintiff and her fellow beneficiaries of Emily's estate as to how she would account to them for the alleged loan if she succeeded in this claim. That had nothing to do with the defendant.

45 The court also finds that the plaintiff has proven her case on a balance of probabilities that the \$308,308.15 was advanced as a loan to the Deceased. She is entitled to be repaid the loan by the estate of the Deceased as the loan was extended to the Deceased on or about 24 April 2013.

46 The loan represented the net sale proceeds of the Circuit Road property that the plaintiff and Kee Yan sold as executors of the estate of their late mother Emily, who was the owner.

47 The court finds that prior to 24 April 2013, the plaintiff and her siblings did intend to make an outright gift to the Deceased of the sale proceeds of the Circuit Road property. However, they subsequently changed their minds (which they were entitled to). They realised there was no need for such generosity on their part as the four beneficiaries of Emily's estate had to share the sale proceeds of the Circuit Road property whereas the Deceased owned the private Geylang property that was estimated to be worth \$2.2m. Even after taking into account that the Deceased had paid Victor \$900,000 to buy over his interest in the Geylang property, the Deceased was still looking at a net gain of \$1.3m (\$2.2m less \$900,000) in the Geylang property as against \$308,308.15 from their combined inheritance, a difference of almost \$1m (\$991,691.85 to be exact).

48 The emails produced in court in the Agreed Bundle showed that the Deceased had specifically requested a loan from her cousins. That could not be disputed by the defendant who, by his own admission (see [39] above) was not privy to the Deceased's financial affairs in Singapore. It would also appear from the Deceased's email dated 29 March 2009 to Thomas that she did not want the defendant to know of her borrowings and financial affairs in Singapore. That email reads as follows:⁴¹

Hi Tom ,

Hope you read this while still in S'pore.

Besides visiting mom I have to return some dough to May so if you would could you put the rent that you set aside for me to the usual account so I can do transaction for her whilst I'm in S'pore.

Might need to borrow some money from mom's deposits too temporarily if I can't make up the sum.(with all the siblings permission of course).

I can't do transaction using uk funds as G is not to know..

Thanks.

x viv

49 The above email shows:

(a) Even in 2009, the Deceased had borrowed money from May Ling ("May" in the email);

(b) The Deceased was thinking of borrowing from Thomas' siblings; and

(c) The Deceased did not want the defendant ("G" in the email) to know for which reason she could not use her funds in the United Kingdom.

50 Whether the intention was first to give and later to lend to the Deceased the sales proceeds of the Circuit Road property, the purpose was to assist the Deceased to buy a property in Scotland. This was made clear in Kee Yan's evidence who disclosed that when the Deceased spent a year in Singapore in August 2012 (residing at the Circuit Road property), she had told him that she did not need money from Kee Yan's siblings. Consequently,

⁴¹ ABOD (Third Party) p 29A.

when she approached the plaintiff/Kee Yan's siblings subsequently for money, they took it that she was asking (and she did ask) for a loan.⁴²

51 In any case, the defendant offered no evidence whatsoever that the loan was meant to be a gift to the Deceased. The defendant contended in his submissions that the Deceased was not told of the change in intention by the plaintiff and her siblings from making her a gift to advancing her the Loan. There was no necessity to convey the change of intention to the Deceased when she was the one who requested the loan.

52 The plaintiff's alternative claim against the Deceased for the \$308,308.15, if I did not decide that it had been given to the Deceased as a loan, was based on money had and received. In her closing submissions, the plaintiff cited *Alwie Handoyo v Tjong Very Sumito* [2013] 4 SLR 308 in support of this alternative claim. The Court of Appeal in that case opined (at [110]) that where a defendant has lawfully received a benefit from a third party when the benefit was the unencumbered property of the third party, the defendant cannot be said to be unjustly enriched. The appellate court went on to say in the following paragraphs:

[125] ...We agree with the comment by the editors of *Goff & Jones (8th Ed)* ([101] *supra*) at para 1.29 that “[t]he old language of ‘money had and received’ conceals as much as it reveals about the nature of a claim”. In our view, the underlying basis for the action for money had and received is now embraced under the rubric of *unjust enrichment*: see *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 at 710.

[126] Third, building on the work of Prof Peter Birks, Prof Yeo also points out that in the context of *unjust enrichment*, the word *restitution* describe a response to an event. The event is the unjust enrichment of the defendant at the plaintiff's

⁴² NE Day 2 p 128 (line 29) – p 130 (line 18).

expense, and the response is to reverse the enrichment; Yeo Tiong Min, “Tracing and Three-Party Restitution” [1993] SJLS 452 at 453. We agree...

53 The plaintiff’s submissions (at paragraph 188) was that the defendant had been unjustly enriched at her expense, due to the non-repayment of the loan and the fact that the monies had eventually formed part of the Deceased’s estate, which had been inherited entirely by the defendant since the Deceased died intestate. I note that the plaintiff is not suing the defendant in his (the defendant’s) personal capacity, but as the administrator and litigation representative of the Deceased’s estate.⁴³ Therefore, it is not open to the plaintiff to argue that the defendant would be unjustly enriched in his personal capacity by inheriting everything within the Deceased’s estate. Hence, I will assume that the plaintiff’s claim is that the estate has been unjustly enriched, as opposed to the defendant in his personal capacity. Applying the passage from *Alwie Handoyo v Tjong Very Sumito* [2013] 4 SLR 308 at [126], it would appear that the Deceased’s estate would indeed be unjustly enriched if it was allowed to keep the loan instead of repaying it

54 The Deceased’s marriage to the defendant was odd to say the least. The couple spent years living apart as the Deceased stayed in Singapore for long periods after her marriage for one reason or another, including eight years almost immediately after the marriage and another year from August 2012 to August 2013. During her first eight years away from the defendant, the Deceased did not even write to or maintain contact with the defendant who testified that he had to seek the assistance of the British High Commission here to find her as she did not reply to his letters. In fact, according to the defendant’s AEIC, the Deceased spent about 16 of their 44 years of marriage

⁴³ Writ of Summons dated 13 January 2016.

living in Singapore, excluding her frequent trips spanning the periods 1979-1988, 1994-2005, 2009-July 2012 and August 2012-April 2014. Such long periods of living apart meant the court was somewhat sceptical of the defendant's claim that he "absolutely adored Vivien" and they "loved each other very much".⁴⁴

55 What was most telling was the defendant's conduct after the demise of the Deceased on 30 May 2014. On 4 November 2015, his solicitors demanded of the plaintiff the sale proceeds of the Circuit Road property. His solicitors followed up with a demand to Thomas on 30 November 2015 of the gift of the sale proceeds of the Circuit Road property, the rental proceeds of the Geylang Property and disclosure of any other assets that the Deceased may have had. For good measure, the defendant then wrote to May Ling on 10 May 2016 to demand that she repay the \$100,000 that the Deceased had supposedly entrusted to May Ling for the purchase of the Bedok Reservoir flat, when that sum was repayment of May Ling's loan to the Deceased advanced in September 2012. Such conduct reflected poorly on the defendant, especially his (baseless) demand of the gift of the sale proceeds of the Circuit Road property.

56 The defendant's conduct above not only belied his professed love of the Deceased but also showed that the defendant had no inkling of the Deceased's financial affairs in Singapore, let alone the loans she had taken from the plaintiff or the plaintiff's siblings over the years before her demise.

⁴⁴ NE Day 2 p 89 (lines 10 and 31).

(ii) *The third party proceedings*

57 The defendant’s claim against Thomas was based on Order 16 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) (“the Rules”). Order 16 rule 1(1) states:

- (1) Where in any action a defendant —
 - (a) claims against a person not already a party to the action any contribution or indemnity;
 - (b) claims against such a person any relief or remedy relating to or connected with the original subject-matter of the action and substantially the same as some relief or remedy claimed by the plaintiff; or
 - (c) requires that any question or issue relating to or connected with the original subject-matter of the action should be determined not only as between the plaintiff and the defendant but also as between either or both of them and a person not already a party to the action,

then, subject to paragraph (2), the defendant may, after having entered an appearance if required to do so under these Rules, issue a notice in Form 16 or 17, whichever is appropriate (referred to in this Order as a third party notice), containing a statement of the nature of the claim made against him and, as the case may be, either of the nature and grounds of the claim made by him or of the question or issue required to be determined.

58 In particular, the defendant pleaded that he was seeking an indemnity or contribution from the third party, *ie*, under O 16 r 1(1)(a). In this regard, I note that the defendant’s allegation at paragraph 19 of his statement of claim against Thomas states:

...if any party should be liable for the plaintiff’s claim, it should be the Third Party. Accordingly, the defendant claims an indemnity from the Third Party for the plaintiff’s claim, and/or a contribution from the Third Party to a partial or full extent of the plaintiff’s claim, and under paragraphs 16-18 hereof, an account of expenses towards which the said sum of \$258,000 had been utilized..

59 Nothing was said by the defendant as to the basis for linking the plaintiff's claim against the Deceased's estate for repayment of the loan to his own claim against Thomas for an account of the sum of \$258,000 allegedly given to Thomas by the Deceased. As was pointed out by Thomas at paragraphs 15 and 16 of his closing submissions (citing *Tan Juay Pah v Kimly Construction Pte Ltd* [2012] 2 SLR 549), the defendant should have pleaded but failed to plead the legal basis for seeking an "indemnity" from Thomas and of a lesser sum at that.

60 As for the defendant's entitlement to "contribution" from Thomas, the relevant law is to be found in s 15 of the Civil Law Act (Cap 43, 1999 Rev Ed) ("CLA") which states:

(1) Subject to subsections (2) to (5), any person liable in respect of any damage suffered by another person may recover contribution from any other person liable in respect of the same damage (whether jointly with him or otherwise).

(2) A person shall be entitled to recover contribution by virtue of subsection (1) notwithstanding that he has ceased to be liable in respect of the damage in question since the time when the damage occurred, provided that he was so liable immediately before he made or was ordered or agreed to make the payment in respect of which the contribution is sought.

(3) A person shall be liable to make contribution by virtue of subsection (1) notwithstanding that he has ceased to be liable in respect of the damage in question since the time when the damage occurred, unless he ceased to be liable by virtue of the expiry of a period of limitation or prescriptions which extinguished the right on which the claim against him in respect of the damage was based.

61 A plain reading of s 15(1) of the CLA shows that Thomas must be liable to the plaintiff on *her claim* against the Deceased for the loan *before* the defendant can seek a contribution from Thomas. However, it was never the plaintiff's case or the defendant's that Thomas was in any way liable for the loan. Indeed, in his opening statement (at paragraph 27), the defendant stated

that an issue to be determined in this action is whether the defendant is entitled to an indemnity from the third party for the sum of \$258,000.

62 My view is reinforced by the following extracts from the defendant's cross-examination by counsel for Thomas:⁴⁵-

Q: So essentially, the claim that you have in the third party proceedings against Thomas Lim is a different nature type of claims, the subject matter is very different from the plaintiff's claim, correct?

A: Er, well, as far as I'm concerned, it, er, is part of the same amount of money and because, er, Mr Lim failed to disclose the matters when asked, er _

Q: Well, it may well be –

A; Yes

Q: ...from the same amount of money.

.....

Q ...that's how you put it, but it's a different conception in terms of the .. its nature, correct?

A Well, of course, every...

Q Yes or no? Yes or no?

A Well, I mean it ..er, it isn't a straightforward question. The....any transaction in a statement, er, is ..is not really established unless it can be determined by the people who delivered it and received it.

Q But you have issued a third party notice....against Thomas Lim. So what is your case? What is your understanding is your case against Mr Thomas Lim?

A My case is that Thomas Lim returns the money.

Q All right. Because?

A Because it's a part of the, erm, er....the amount of money allocated for Victor's care which was not used.

Q All right. Because those monies belong to Vivien, correct?

⁴⁵ NE Day 2 pp 69-70.

A Correct.

Q And it..and this money did..wasn't a loan that was extended by the plaintiff to Vivien correct?

A That's correct. It's was, er.. it was part of er, the, er funds from, er, the sale of 59 Circuit Road

63 The above extracts of the defendant's testimony show that he had no basis for his third party proceedings against Thomas. The Deceased was never in any case the "informal" owner of the Circuit Road property as the defendant alleged. The flat was originally owned by Kim Lai and her sister Lily Tan. Upon the demise of Kim Lai, her share devolved to Lily Tan as the surviving joint tenant. In 2007, the flat was transferred to Lily Tan's daughter Blossom who transferred it in turn to Emily in 2008 for valuable consideration. It was then transmitted on 4 December 2012 to the plaintiff and Kee Yan as the executors of Emily's estate.

64 Under cross-examination by counsel for Thomas,⁴⁶ the defendant had admitted that \$200,000 of the \$258,000 that the Deceased deposited into Thomas' account had been returned to the Deceased. Therefore his claim against Thomas, if any, was only for the balance of \$58,000. Moreover, on a balance of probabilities, I find that it was more likely than not that Thomas had returned \$58,000 in cash to the Deceased on 7 May 2013.

65 The court further notes that there was no evidence that the Deceased owned or had a share in the Bedok Reservoir flat as the defendant alleged.

66 As pointed out at [28], despite the production in court of the Deceased's birth certificate which clearly stated that Kim Lai was the Deceased's mother, counsel for the defendant spent an inordinate amount of

⁴⁶ NE Day 2 p 77.

time cross-examining the plaintiff and Kee Yan on whether Emily was actually the Deceased's mother or she had been adopted by Emily, to raise the suggestion that the Deceased could have inherited a share of Emily's estate as her daughter.

Conclusion

67 All told, there was no evidence whatsoever from the defendant to rebut the plaintiff's case that the loan and not a gift had been given to the Deceased on 24 April 2013.

68 On the other hand, the defendant was unable to prove his case in the third party proceedings on the facts and on the law, that Thomas is liable to indemnify the estate of the Deceased for the plaintiff's claim or to the extent of \$258,000.

69 Consequently, the plaintiff is awarded judgment and costs on her claim for \$308,308.15 with interest at 5.33% per annum from 13 January 2016 (date of the writ) until judgment. The costs are to be taxed on a standard basis unless otherwise agreed.

70 The defendant's claim in the third party proceedings against Thomas (Lim Soon Wah) is similarly dismissed with costs.

71 The third party had submitted that costs should be awarded to him on an indemnity basis. For this submission, the third party relied on O 59 r 5 of the Rules as well as the United Kingdom case *Three Rivers District Council and Others v Governor and Company of the Bank of England* [2006] 5 Costs LR 714 ("*The Three Rivers*") and the local case of *Tan Chin Yew Joseph v Saxo Capital Markets Pte Ltd* [2013] SGHC 274 ("*Tan Chin Yew*").

72 Order 59 r 5 states:-

Special matters to be taken into account in exercising discretion

5. The Court in exercising its discretion as to costs shall, to such extent, if any, as may be appropriate in the circumstances, take into account —

(a) any payment of money into Court and the amount of such payment;

(b) the conduct of all the parties, including conduct before and during the proceedings;

(c) the parties' conduct in relation to any attempt at resolving the cause or matter by mediation or any other means of dispute resolution; and

(d) in particular, the extent to which the parties have followed any relevant pre-action protocol or practice direction for the time being issued by the Registrar.

73 Notwithstanding O 59 r 5, the award of costs on an indemnity basis (where there is no contractual provision) is an exception rather than the rule. In *Tan Chin Yew*, the court had cited this court's decision in *Wong Meng Cheong v Ling Ai Wah* [2012] 1 SLR 549 where indemnity costs were ordered in favour of the defendant from the two plaintiffs. At [199] of the judgment (as the court in *Tan Chin Yew* did at [98]), I had cited the following passage from Millet J's ancillary judgment on the award of costs in *Macmillan Inc v Bishopsgate Investment Trust plc (No 3)* [1995] 3 All ER 747:

The power to order taxation on an indemnity basis is not confined to cases which have been brought with an ulterior motive or for improper purposes. Litigants who conduct their cases in bad faith, or as a personal vendetta, or in an improper or oppressive manner, or who cause costs to be incurred irrationally or out of all proportion as to what is at stake, may also expect to be ordered to pay costs on an indemnity basis if they lose, and have part of their costs disallowed if they win. Nor are these necessarily the only situations where the jurisdiction may be exercised; the discretion is not to be fettered or circumscribed beyond the requirement that taxation on an indemnity basis must be 'appropriate'.

74 The court notes that it was ill-advised on the part of the defendant to have joined Thomas as the third party to the proceedings. However, that in itself does not entitle Thomas to indemnity costs from the defendant as a matter of course. The defendant's conduct has to be either egregious like the plaintiff(s) in *The Three Rivers* or in *Tan Chin Yew* or, he must have conducted his case in bad faith, or in an improper/oppressive manner or caused costs to be incurred irrationally or out of all proportion to what is at stake. Was that the case here? I think not. At best, the defendant was unreasonable in his pursuit of the third party proceedings.

75 The third party is therefore only entitled to costs from the defendant on a standard basis. However, to show the court's disapproval of the defendant's unreasonable conduct, the third party shall have all his reasonable disbursements reimbursed by the defendant in full. In addition, the third party shall have his costs on the higher end of the scale. In other words, the Registrar taxing the third party's bill of costs shall allow 10% to 15% more for each item that he taxes.

Lai Siu Chiu
Senior Judge

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