**IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE**

**[2020] SGHC 124**

Suit No 904 of 2017

Between

Tan Wei Leong (Chen Weilong)

… *Plaintiff*

And

(1) Tan Lee Chin (Chen Lijin)
(2) Tan Wan Fen
(3) Estate of Lai See Moi @ Lai Meow Ching

… *Defendants*

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# JUDGMENT

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[Probate and Administration] — [Distribution of assets]
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# v
# Tan Lee Chin and others

## [2020] SGHC 124

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Andrew Ang SJ
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17 June 2020 Judgment reserved.

**Andrew Ang SJ:**

1 It is uncontested between the parties that the instant dispute centres on a Deed of Family Arrangement signed in May 2012 (the "DFA") and whether there is basis for that DFA to be set aside. The plaintiff seeks a declaration that the DFA is valid and binding, while the two living defendants (the "defendants") argue that it ought to be set aside. In this regard, it is appropriate to begin with the broad definition of a family arrangement set out by Sundaresh Menon CJ in *Kuek Siang Wei and another v Kuek Siew Chew* [2015] 5 SLR 357 ("*Kuek Siang Wei*") at [45]:

> … There does not appear to be a precise definition of this term; but in our judgment, stated broadly, it refers to an agreement between members of the same family which is intended to be generally and reasonably for the *benefit of the family* … The parties to a family arrangement act not just out of self-interest, but also in furtherance of the interest of the family unit to which they belong. Often, this means that one or more of them might

> sacrifice their own interests for what they perceive to be the greater good of the family. [emphasis in original]

2 The plaintiff is the younger brother of the two living defendants. Notwithstanding the lofty references to self-sacrifice and the furtherance of the interest of the family unit in the definition above, it is difficult to see how the living litigants have conducted themselves in line with such ideals. The DFA has been quarrelled over in a manner more akin to squabbling, and it is in many senses regrettable that an instrument supposed to create harmony has instead engendered such bitterness.

3 Given that the instant dispute is situated in the family context, there is unsurprisingly an absence of comprehensive documentation as to the parties' intentions. In other words, documents-wise there is no proverbial smoking gun which is able at a stroke to illuminate the truth or falsity of the matter. This is unsurprising; as observed by the court in *Pek Nam Kee and another v Peh Lam Kong and another* [1994] 2 SLR(R) 750 at [108], family arrangements are often "founded on sentiment rather than commerce". Given the absence of clear and reliable documentation from which the parties' intentions can be gleaned, much will turn on the circumstantial evidence and the credibility of the parties' accounts.

## Background

4 A brief outline of the relevant facts is as follows.

5 The plaintiff, Tan Wei Leong, is the youngest of three siblings. The first defendant, Tan Lee Chin, is the second sibling, and the second defendant, Tan

Wan Fen, is the oldest of the three.[1] Their father is the late Tan Seng @ Tan Chit Boh ("Mr Tan"), and their mother is the late Lai See Moi @ Lai Meow Ching ("Mdm Lai"). Mr Tan passed away on 8 February 2012, while Mdm Lai passed away on 10 October 2016. Both Mr Tan and Mdm Lai passed away intestate. Mr Tan and Mdm Lai were each other's only spouses, and the plaintiff, first defendant, and second defendant were their only children.

6 During his life, Mr Tan was a successful businessman. He accumulated assets in China, Malaysia, and Singapore. The assets in China (collectively, the "Chinese Assets") included two housing units in Xiamen and an 88% shareholding in Marco Polo Food (Xiamen) Co, Ltd, a company registered under the laws of the People's Republic of China.[2]

7 Mdm Lai was a housewife for most of her life. She was financially supported by Mr Tan.[3]

8 Shortly after Mr Tan's death, it came to light that Mr Tan had instructed Mr William Ong of Allen & Gledhill LLP ("Allen & Gledhill") ("Mr Ong") to prepare a will.[4] The first meeting between Mr Tan and Mr Ong had taken place on 10 January 2011. A series of drafts had been prepared. At the time of Mr Tan's passing, none of the drafts, including the most recent (Version 4a), had been executed by Mr Tan. In fact, it was Mr Ong's uncontested evidence

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1 Affidavit of evidence-in-chief ("AEIC") of Tan Wei Leong dated 2 October 2019 ("TWL") at [3].

2 TWL at [14] to [16].

3 Transcript of 28 Nov 2019, Page 44, Lines 12 to 17.

4 TWL at [9] to [18] and [24] to [32].

that Mr Tan had not even seen the last version of the draft will before he was admitted to the hospital for the final time prior to his death.

9 That draft will provided, *inter alia*:[5]

(a) that the plaintiff was to be the "sole Executor and Trustee" of the will; and

(b) that the trustee of Mr Tan's estate would "sell call in and convert into money all such parts of the same as shall not consists of money", and "divide the net proceeds of such sale … into twelve (12) equal parts and to hold the same IN TRUST as follows" [emphasis in original]:

(i) six such parts for the plaintiff absolutely;

(ii) two such parts for Mdm Lai;

(iii) two such parts for the first defendant; and

(iv) two such parts for the second defendant.

10 Following Mr Tan's passing but prior to the release of his draft will by Mr Ong, the DFA came into existence. The parties to the DFA were the plaintiff, the first defendant, the second defendant, and Mdm Lai. The salient terms of the DFA included the following:[6]

> … Although none of the Parties have seen or have a copy of the Draft Will, the Parties nevertheless believe that the Draft Will sufficiently and accurately contains and sets out the Deceased's testamentary wishes, and they wish to give effect … to the Draft Will.

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5 TWL from [9] to [18].

6 TWL from [11] to [12], TWL p 85.

> …
>
> [I]nsofar as the Draft Will provides for any bequest, devise, legacy, appointments or other testamentary disposition of any property or asset which forms part of the Deceased's Estate in favour of any of the Parties hereto, all Parties shall be bound by the provisions of the Draft Will, and the Parties undertake to comply with and perform the Draft Will …
>
> …
>
> Madam Lai shall, unless she decides otherwise, be the sole applicant to apply to the court or courts having the necessary jurisdiction to issue grant of letters of administration (or the equivalent court order in such jurisdiction) for the issue of the necessary grant in her favour to be the administratrix of the Deceased's Estate.

11 Ms Lisa Sam of Lisa Sam & Company ("Ms Sam") was initially approached to prepare the DFA. She prepared a first draft. Subsequently, Mr Goh Kok Yeow of De Souza Lim & Goh LLP ("Mr Goh") prepared the final draft.[7]

12 The plaintiff, second defendant, and Mdm Lai signed the DFA on 18 May 2012, while the first defendant signed it on 24 May 2012. The signing on 18 May 2012 was witnessed by Mr Goh and Mr Cedric Tay, an advocate and solicitor of the Supreme Court of Singapore who translated the contents of the DFA to Mdm Lai.[8] The signing on 24 May 2012 was witnessed by Mr Goh.

13 Following the signing of the DFA, two supplemental deeds were entered into. Their details are as follows:[9]

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7 Transcript of 25 November 2019, Page 11, Lines 4 to 23.

8 TWL at [17].

9 TWL from [13] to [16].

(a) The first supplemental deed dated 27 September 2012 related to the holding of the net sale proceeds of a condominium unit at Blue Horizon by Mdm Lai on trust for the beneficiaries according to the draft will.

(b) The second supplemental deed dated 25 June 2014 related to the distribution of Mr Tan's Chinese Assets. Under the terms of the second supplemental deed, the living litigants expressly agreed to waive their inheritance rights to the Chinese Assets. This was done so that legal title to the Chinese Assets would be transferred into Mdm Lai's sole name for distribution under the terms of the draft will thereafter.

14 A copy of the draft will was disclosed by Mr Goh to Mdm Lai about two years later on 23 May 2014 even though he had received the same much earlier on 19 November 2012.[10] It is uncontested that on 23 May 2014, Mr Goh showed only Mdm Lai a copy of the draft will and explained the terms to her.[11] Mr Goh's uncontested evidence was that he had not shown a copy of the draft will to any of the living litigants.

15 On 10 October 2016, Mdm Lai passed away. In May 2017, the first defendant commenced legal proceedings in China ("the China proceedings") for the distribution of one-third of the Chinese Assets to himself. On 29 September 2017, this suit was commenced by the plaintiff with the second defendant initially as co-plaintiff.[12] Their pleadings sought declaratory relief to the effect

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10 4AB at p 1262.

11 Transcript of 25 November 2019, Page 43, Lines 21 to 25.

12 See Statement of Claim from [1] to [9].

that, *inter alia*, the DFA constituted a valid and binding family arrangement between the three siblings in relation to all of Mr Tan's assets.

16 On 3 August 2018, the draft will was disclosed to the second defendant (at that point the second plaintiff). Thereafter, she had herself removed as co-plaintiff and added as the second defendant instead. On 8 February 2019, Mdm Lai's estate was added as third defendant to the suit.

## The applicable law

### *The DFA*

17 The primary legal framework which arises on these facts is that of the family arrangement. The nature of the family arrangement has already been set out by the Court of Appeal in *Kuek Siang Wei* ([1] *supra*), and I do not propose to elaborate further on the topic. Suffice it to say that it is clear that the instant facts concern precisely the situation envisaged at [55] of *Kuek Siang Wei*, that:

> Yet another category of agreements which are generally treated as family arrangements are those entered into between the surviving descendants of a deceased person to give effect to testamentary wishes which the deceased expressed before his death in a manner that is not and cannot take effect as a will.

18 Having accepted that the instant case concerns a family arrangement, I note also Menon CJ's further observation in *Kuek Siang Wei* at [59] – [62] that:

> At the outset, it should be noted that there are strong public policy considerations in favour of encouraging family arrangements as they go towards preserving peace, harmony and unity in families. One effect which flows from this is that an agreement which is found to be a family agreement, assuming it is reduced into writing, will not be interpreted with an excessive degree of formalism. Rather, the court will apply the rules of construction to ascertain the parties' intentions and, so far as possible, endeavour to give effect to them …

> …
>
> In essence, it may be said that the most important effect which flows from holding that an agreement is a family arrangement is that the agreement will generally be upheld provided it has been entered into fairly, 'without concealment or imposition on either side, with no suppression of what is true, or suggestion of what is false' …

It bears emphasis from this extract that the identification of an agreement as a family arrangement has two related aspects. First, in determining whether a family arrangement should be enforced and deemed to be binding, the court will generally uphold the arrangement provided none of the grounds to set aside are established. Second, and in addition, the court will not insist on excessive formalism when interpreting the terms of the arrangement. The second aspect goes towards the question of *construction*, whereas the first goes towards the issue of the arrangement's *validity*. This conceptual distinction should not be elided.

19 The effect of the living litigants' execution of the DFA is also clear. The longstanding English authority of *L'Estrange v F Graucob Limited* [1934] 2 KB 394 ("*L'Estrange*") was recently endorsed by the Court of Appeal in *Bintai Kindenko Pte Ltd v Samsung C&T Corp and another* [2019] 2 SLR 295 at [58] thus: "It is a well-established principle that in the absence of fraud or misrepresentation, a party is bound by all the terms of a contract that it signs, even if that party did not read or understand those terms".

20 The *L'Estrange* principle has clear application in the context of family arrangements as well. As long ago as the 19th century, Lord Eldon LC observed in *Gordon v Gordon* (1821) 36 ER 910 at 917 that:

> [W]here family agreements have been fairly entered into, … then, although the parties may have greatly misunderstood

> their situation, and mistaken their rights, a court of equity will not disturb the quiet …

This observation was endorsed by Menon CJ in *Kuek Siang Wei* at [61]:

> As long as the agreement was fairly and freely entered into without any concealment or unfair pressure, and provided there is no question of a plea of *non est factum* being successfully taken, the court will uphold the agreement even though the parties may have misunderstood the true state of their legal rights prior to entering into the agreement.

21 It is clear from *Kuek Siang Wei* at [60] – [66] that there are a number of clearly established bases for setting aside a family arrangement. These include:

(a) where there has been non-disclosure of a material fact;

(b) where there is unfair pressure, which may take the form of undue influence, duress, and/or misrepresentation; and

(c) where a plea of *non est factum* is successfully taken.

As a plea of *non est factum* does not appear to have been raised, I will thus focus on the first two bases.

***Non-disclosure of a material fact***

22 Turning first to the non-disclosure of a material fact, three points bear note.

23 First, it is not necessary for the non-disclosure of a material fact to have been dishonest: *Kuek Siang Wei* at [65]. All that is required for a family arrangement to be set aside is for one party to the arrangement to have material information in his possession which, even without any dishonest intention, he does not communicate to the others before the arrangement is entered into. As

was observed by Turner LJ in *Greenwood v Greenwood* (1863) 46 ER 285 at 290, "the parties must be upon an equal footing, and there must be a full and fair communication of all the circumstances affecting the question which forms the subject of the arrangement". Turner LJ's holding was expressly approved at [65] of *Kuek Siang Wei*.

24 Second, a "material fact" refers to one which "may reasonably affect the parties' determination of whether they will enter into the agreement in question": *Kuek Siang Wei* at [62]. The threshold is therefore simply whether there is a reasonable possibility that the fact may affect a party's decision to sign the arrangement. I emphasise that this is not a high threshold, and that there is no need for specific evidence to show that the non-disclosed material fact *would* have had an effect on the parties' decisions to enter into the family arrangement.

25 Third, as an extension from the definition of a material fact above, non-disclosure of mere suspicions will typically not suffice to constitute "non-disclosure of a material fact". Of course, this will be a fact-specific determination in every case, but the reliance on mere suspicion without more will typically not suffice to vitiate a family arrangement. There are three reasons in support of this:

(a) First, requiring the disclosure of even mere suspicions as "material facts" would be unduly onerous. If a party to a family arrangement had an unfounded suspicion or a suspicion he could point to no viable evidence for, and non-disclosure of that would *ipso facto* vitiate a family arrangement, that would give rise to a remarkably broad disclosure obligation. While the duty to disclose material facts in a family arrangement is no doubt a rigorous one, I am not satisfied that mere suspicions fall within the ambit of that duty.

(b) Second, the very definition of "material fact" appears to exclude mere suspicions. For a fact to be material for present purposes, it must be one which may reasonably affect the parties' decision on whether or not to enter into the family arrangement. It will only be in fairly exceptional circumstances that a mere suspicion, without more, may reasonably affect the parties' decisions in this regard.

(c) Third, and tying the two strands of argument in (a) and (b) together, rendering family arrangements open to a multitude of challenges simply because a family member had failed to disclose a mere suspicion runs counter to the "strong public policy considerations in favour of encouraging family arrangements": *Kuek Siang Wei* at [59].

***Unfair pressure***

26 The second basis for setting aside a family arrangement is where "unfair pressure" has been exercised. This is a broad umbrella covering the various bases on which ordinary contracts may be set aside, and includes undue influence, duress, and misrepresentation.

*Undue influence*

27 The categorisation of classes of undue influence is fairly well-established. Three main categories of undue influence have been identified in Singapore law, and the framework on undue influence has been clearly set out by a five-judge *coram* of the Court of Appeal at [101] of *BOM v BOK and another appeal* [2019] 1 SLR 349 ("*BOM*"). I do not propose to go through this in detail, but the relevant parts of [101] of *BOM* may be usefully reproduced (*sans* references) below:

> (a) "Class 1" undue influence is also known as actual undue influence. Here, the plaintiff has to demonstrate that he entered into the impugned transaction because of the undue influence exerted upon him by the defendant. To do this, the plaintiff has to demonstrate that (i) the defendant had the capacity to influence him; (ii) the influence was exercised; (iii) its exercise was undue; and (iv) its exercise brought about the transaction.
>
> (b) "Class 2" undue influence is also known as presumed undue influence. Under this class of undue influence, the plaintiff is not required to prove actual undue influence. It suffices for the plaintiff to demonstrate (i) that there was a relationship of trust and confidence between him and the defendant; (ii) that the relationship was such that it could be presumed that the defendant abused the plaintiff's trust and confidence in influencing the plaintiff to enter into the impugned transaction; and (iii) that the transaction was one that calls for an explanation. This class of undue influence is further divided into "Class 2A" and "Class 2B" undue influence, as follows:
>
> > (i) Under "Class 2A" undue influence, there are relationships that the law *irrebuttably* presumes to give rise to a relationship of trust and confidence. Such relationships include solicitor-client relationships, but exclude husband-wife relationships. Once the plaintiff shows that his relationship with the wrongdoer triggers the presumption and that the impugned transaction calls for an explanation, there is a *rebuttable* presumption that the wrongdoer has exerted undue influence.
> >
> > (ii) Under "Class 2B" undue influence, the plaintiff must prove that there is a relationship of trust and confidence. If it is shown that there was such a relationship and that the transaction calls for an explanation, then there is a *rebuttable* presumption of undue influence.

*Duress*

28 As is the situation in relation to undue influence, the law on duress in Singapore is fairly clear. In order to establish duress, a party would have to prove that (a) there was the exertion of illegitimate pressure and (b) such pressure amounted to the compulsion of the victim's will: *Tjong Very Sumito and others v Chan Sing En and others* [2012] 3 SLR 953 at [247].

*Misrepresentation*

29 The elements of fraudulent misrepresentation are once again clear. The Court of Appeal observed in *Panatron Pte Ltd and another v Lee Cheow Lee and another* [2001] 2 SLR(R) 435 at [14] that (a) there must be a representation of fact, made with the intention that it should be acted upon by the plaintiff; (b) the plaintiff must have acted upon the false representation of fact and suffered loss by doing so; and (c) the representation must have been made with the knowledge that it was false, or at least in the absence of any genuine belief that it was true. This formulation has been repeatedly affirmed, not least in *Ochroid Trading Ltd and another v Chua Siok Lui (trading as VIE Import & Export) and another* [2018] 1 SLR 363 at [238].

30 In view of the background facts and applicable law, the relevant issues herein centre on whether or not any of the bases to set aside the DFA applies. Having perused the pleadings and all the arguments raised by the defendants against the DFA, there appear to be three main issues for my determination:

(a) Did either Mdm Lai or the plaintiff fail to disclose material facts in relation to the DFA?

(b) Assuming neither Mdm Lai nor the plaintiff failed to do so, was there unfair pressure operating on any of the parties to the DFA?

(c) Is there any other reason to warrant the setting aside of the DFA?

I would emphasise that so long as, on the balance of probabilities, *any* of the bases for setting aside the DFA is established on the evidence, the plaintiff cannot seek to rely on the DFA for the declaratory relief he seeks. Conversely,

if there is no basis established for setting aside the DFA, I see no reason why the defendants should not be bound by its terms.

**Application of the law to the facts**

31 As alluded to above at [3], the family context in which this dispute arose translates to a paucity of clear documentary evidence. My findings accordingly turn on the totality of the evidence, much of which will be circumstantial. I underscore that the assessment of the overall credibility of the parties' cases is a holistic one.

32 In brief, my findings are as follows: I accept on the balance of probabilities that Mdm Lai knew the contents of the draft will, and that she failed to disclose what she knew. Although this finding by itself would suffice, I also accept that, on the balance of probabilities, the plaintiff knew the contents of the draft will, but failed to disclose what he knew. Accordingly, I accept that the DFA should be set aside. I disagree with the plaintiff's rearguard argument that the defendants' pleadings are fatal to these findings.

33 Following from the findings above, there is no need for me to consider whether unfair pressure had been exerted on any of the signatories to the DFA. Accordingly, I decline to make any findings in relation to the other arguments raised by the defendants to set aside the DFA.

34 I should add that my findings should not in any way be construed as condonation of the defendants' behaviour, or of how they have conducted their legal cases. In fact, the defendants vacillated in several of their positions and made some inexplicable claims which appear untrue. Be that as it may, the law

on the grounds for setting aside a family arrangement is clear, and I elaborate on my reasoning below.

***Mdm Lai failed to disclose material facts***

35 I am of the view that, on the balance of probabilities, the evidence shows that Mdm Lai knew the division of assets the draft will directed. I accept that this knowledge is a material fact, *ie*, one which was reasonably likely to affect the parties' determination whether to sign the DFA. Accordingly, I conclude that Mdm Lai's failure to disclose this material fact is a ground for setting aside the DFA.

*Mdm Lai knew the division of assets the will directed*

36 There are three reasons why I have arrived at the conclusion that Mdm Lai knew the division of assets under the draft will.

37 First, and most critically, Mdm Lai had expressly informed Mr Goh that she knew the contents of the draft will. The evidence Mr Goh provided at trial clearly showed that prior to the signing of the DFA, Mdm Lai had been aware of Mr Tan's intentions in relation to the distribution under the draft will. The extract below is illuminating in this regard:

> Notes of Evidence, 25 November 2019 at pp 43 – 44
>
> Goh: Well, I showed [the draft will] to [Mdm Lai] on 23 May 2014. That was the day she signed the second supplemental DFA regarding the China properties, the China assets –
>
> Court: So you showed it to her?
>
> Goh: On 23 May 2014.
>
> Court: 23 May.
>
> Goh: I can remember the date, your Honour, because it's my birthday also.

> Court: Okay.
>
> Goh: Sorry for that extra information, but she came to my office to sign the second supplemental deed of family arrangement and I then told her, "Look, I want to show you the draft will. We can't wait anymore." So when I showed her and explained to her, she said that she knew because she and her husband had discussed this before he died. She had – she said her husband had told her Wei Leong is to be the executor and how he intends to divide it. So when I explained to her what the draft will actually said, she wasn't surprised.

38 Mr Goh repeatedly confirmed in response to questions from the court and under cross-examination that Mdm Lai had in fact told him that she knew Mr Tan's intended distribution under the draft will, and by extension, the contents of the draft will. The following extracts make that point fairly clearly:

> Notes of Evidence, 25 November 2019, pp 69 to 70
>
> Goh: I could sense because – she gave me the impression that she knew, but she was very, very secretive, because I think she did not want her children to know that she knew, and that was why subsequently after getting – after the DFA has signed, she exhibited no curiosity, no keenness to get – to even know the contents that I had in my hand.
>
> Court: But she outright admitted that she had actually discussed with her husband only later on – if I'm not mistaken – the 23rd, am I right, when the second supplemental –
>
> Goh: Correct, on 23 May.
>
> Court: Yes, 23 May 2014, when the second supplemental deed was signed.
>
> Goh: That's right.
>
> Court: That was when she told you very clearly that, actually she knew.
>
> Goh: That's right
>
> Court: Because she and her husband had discussed?
>
> Goh: That's right.
>
> Notes of Evidence, 25 November 2019, p 71

> Mr Gurbani: Following up from the last few questions here, at least at the time when the second supplemental deed was signed, she informed you that she knew the terms of the will?
>
> Goh: When I read it out to her and she said yes, she knew. Your Honour, may I just add that when we met on 23 May, it was actually with the intention of signing the second supplemental deed, not for the purpose of my reading out the will to her.

> Notes of Evidence, 25 November 2019, p 78
>
> Mr Gurbani: So on that day that you met her, which is 23 May 2014, you showed her the will?
>
> Goh: Yes, I did.
>
> Mr Gurbani: She wasn't surprised by it. She said she had already discussed and if the apportionment was made clear to her, she wasn't surprised because she said she'd already discussed this with her husband??
>
> Goh: Correct, yes.

39 Second, not only was Mr Goh's acknowledgment of Mdm Lai's knowledge repeatedly reaffirmed, it is also borne out by the contemporaneous documentary evidence. Mr Goh's attendance note of 23 May 2014 of his meeting with Mdm Lai and the plaintiff makes clear that towards the end of the meeting, the plaintiff left the room. While Mr Goh was alone with Mdm Lai, he informed her about the will before being told by Mdm Lai that she already knew. In fact, the extent of Mdm Lai's knowledge is confirmed by the attendance note itself:

> … Will provided TWL [the plaintiff] to be sole executor. Estate divided 12 shares: 6 shares to TWL, 2 to LSM [Mdm Lai], 2 to TLC [the first defendant], 2 to TWF [the second defendant].
>
> LSM said that this was what she and TS [Mr Tan] had discussed before he died. TS trusted TWL as he was the most capable and trustworthy child.

The contemporaneous evidence from May 2014 thus illustrates that Mdm Lai made clear that she knew the very division of assets which the will directed. This knowledge stemmed from her discussions with her husband, Mr Tan.

40 An email from the plaintiff to Mr Goh dated 23 March 2012 lends support in that it shows there had been discussion(s) between Mdm Lai and Mr Tan as to his testamentary disposition. However, by itself the email would fall short of proving the extent of Mdm Lai's knowledge. The email reads as follows:

> However, I need to note that, (1) … , and (2) my mom [Mdm Lai] says that she herself had told my dad in the past to make a will, and that she indicated to him that I should be the one to "run" it (my Mom is a little vague about how things operate, especially in the legal sense, but she is clear about the distinction between "division of assets" and "making things so" as per a will, so I think she knows what she is talking about).

41 The email is useful in confirming that:

(a) Mdm Lai had previously had discussions with Mr Tan on his making a will;

(b) they had discussed who the executor should be; and

(c) Mdm Lai was aware of the notion of a division of assets within a will.

42 Third, a strong suggestion that Mdm Lai was aware of the contents of the draft will arises from a conversation between Mdm Lai and Ms Sam who was then acting for her in regard to the DFA before Mr Goh's appointment. When giving evidence on her communications with Mdm Lai, Ms Sam was clear that Mdm Lai was "fifty-fifty" and "in two minds" about whether or not

to sign the DFA. The explanation for this indecision is found in the extract below when she was cross-examined by Mr Chan:

> Notes of Evidence, 29 November 2019, p 27
>
> Mr Chan: When you told the court earlier that the mother confided in you that she wanted to give more to the other two children, that was to be stated in the DFA?
>
> Ms Sam: No. No. She made it as a comment.
>
> Mr Chan: Just a comment?
>
> Ms Sam: Like, "Oh, actually, I want to give more to the two children but I'm also worried that, you know", yes, so it is just a statement that she said during our conversation.
>
> Court: Can you complete that sentence? But she's also afraid?
>
> Ms Sam: Okay. And she's also afraid that she would not get the help of Wei Leong in whatever that she needs to do for the issues that they're facing.

43 It is clear that Mdm Lai said she wanted to give more to the first and second defendants. What could she have meant? Before we endeavour to answer the question, it is important to know the context in which the conversation took place.

44 It took place at the second meeting between Mdm Lai and Ms Sam when the latter was going through a draft of the DFA with Mdm Lai. The draft had been prepared based on instructions given by the plaintiff on behalf of Mdm Lai at the first meeting. According to Ms Sam, she had dealt with the plaintiff on the preparation of the draft. She therefore arranged for a second meeting with Mdm Lai to go through all the details to make sure Mdm Lai accepted the draft before it was sent out to the parties. The plaintiff had accompanied Mdm Lai to the second meeting but stepped out at the request of Ms Sam.

45 Mdm Lai and Ms Sam spoke softly because the plaintiff was just outside the room and Ms Sam had assured her that she would not tell anyone, including the plaintiff, whatever Mdm Lai told her.[13]

46 Ms Sam told Mdm Lai that she acted only for Mdm Lai notwithstanding that the plaintiff was authorised by her to give instructions to Ms Sam. She also told Mdm Lai that if she was not comfortable, she did not need to sign the DFA and she was free to change her mind at any time as the DFA was only in draft.

47 Mdm Lai then told her that actually, she wanted to give more to the first and second defendants, but she needed the plaintiff to help her in the things that needed to be done.[14]

48 First, could Mdm Lai have meant that she wanted to give more to the first and second defendants under the DFA? Ms Sam's evidence was that Mdm Lai was not seeking to give them more under the DFA, contrary to what the plaintiff's counsel Mr Chan appeared to suggest. Indeed, the purpose of the DFA being to honour the deceased Mr Tan by giving effect to his wishes under the draft will, there was no way that more could have been given to them under the DFA without destroying the DFA's *raison d'etre*.

49 Second, could Mdm Lai have meant that she wanted to give more to the defendants under her own will? Mr Chan also broached this question when he suggested:

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13 Transcript of 29 November 2019, Page 23, Line 25 to Page 24, Line 3.

14 Transcript of 29 November 2019, Page 27, Lines 16 to 24.

> Potentially, she might want to engage you for a will that she may want to do in the future?[15]

50 Ms Sam's reply was that she did not have the impression that Mdm Lai was going to ask her to do a will because if that was the case, she would have given Mdm Lai a checklist. Moreover, in my view, if indeed that was the case, such a remark would have been a *non sequitur* in the context of a discussion regarding the DFA.

51 Third, could she have meant that she wanted the first and second defendants to have more by her simply not signing the DFA and allowing them to inherit under Mr Tan's intestacy instead? That again does not comport with the facts. If, as Mr Goh testified, she knew the division of assets under the draft will, she would have known that the first and second defendants would inherit exactly the same share of Mr Tan's estate under his intestacy as under the draft will. On the other hand, if we were to assume for the moment that she did not know the contents of the draft will, it would have made no sense for her to say that by not signing the DFA, she would be giving them more.

52 There is yet another possibility. If, as Mr Goh testified, Mdm Lai knew the division of assets under the draft will, she would have known that she would only have two shares just like each of the first and second defendants while the plaintiff would have three times as much as any of them. She also knew from the plaintiff that under Mr Tan's intestacy, she would inherit half of his estate.[16] Therefore, if she did not sign the DFA, she would inherit more and that being the case, she would have more in her estate to leave to the three children. She

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15 Transcript of 29 November 2019, Page 28, Line 7.

16 Transcript of 28 November 2019, Page 45, Lines 15 to 17.

did not necessarily have to execute a will to achieve that result. Even under her intestacy the defendants would inherit more than if she signed the DFA.

53 This, I believe, is what Mdm Lai probably meant. Useful as the foregoing analysis is (as to what Mdm Lai might have meant), to stop there is to risk missing the wood for the trees. Mdm Lai's statement that she wanted to give more to the first and second defendants, in the context of a discussion regarding the DFA, must surely imply knowledge of the division of assets under the draft will.

54 I conclude therefore that on the balance of probabilities, Mdm Lai's statement showed she knew the division of assets under Mr Tan's draft will.

55 I pause to note that I found Ms Sam's evidence to be credible and reliable. While the plaintiff attempted to cast doubt on the relevance of her evidence, I am of the view that such attack is unwarranted. Ms Sam's evidence is relevant on multiple bases: through the plaintiff she was made aware of the purpose of the DFA, she had been spoken to in confidence by Mdm Lai, and she knew the scope and extent of the plaintiff's involvement in the DFA drafting process. I am therefore unable to accept the plaintiff's claims that her evidence is irrelevant.

56 I also do not accept that Ms Sam was in any way biased against the plaintiff by reason of the termination of her retainer. In the course of the plaintiff's evidence, he testified that his relationship with Ms Sam had "deteriorated significantly" and that he had accused her of malpractice and of

being "actively dangerous to [her] own clients".[17] The plaintiff claimed that Ms Sam hung up the phone on him after he accused her of being a danger to her own clients. I understood this to be the plaintiff indicating that Ms Sam's evidence may therefore be tainted by bias against him. However, I have two difficulties with the conclusion the plaintiff appears to be inviting me to draw.

57 First, I was surprised at the harsh words the plaintiff had allegedly directed towards Ms Sam. In particular, I was taken aback that he would have spoken with her so roughly over what appeared to be a relatively minor matter of her having sent out the draft DFA without his prior authorisation. The DFA, after all, would eventually have to be agreed to by the first and second defendants. I therefore wondered whether the plaintiff's testimony of his alleged response was credible. My doubt was confirmed when, in answer to my question to Ms Sam on whether there had been any unpleasantness between her and the plaintiff in that telephone conversation, she said she was unaware of any as it was a short conversation in which she had "looked" for Mdm Lai and he said she was not around.

58 In any event, the plaintiff has not expressly asserted that Ms Sam was in any way biased against him. In cross-examination, Mr Chan did not suggest to her that she was. When asked by the court whether there was any "unpleasantness" between her and the plaintiff in that telephone conversation, Ms Sam looked genuinely puzzled. It was clear that there had been none.

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17 Transcript of 28 November 2019 at Page 37, Lines 13 to 19.

59 I am of the view that these arguments, along with the totality of the evidence, show on the balance of probabilities that Mdm Lai knew the intended distribution of assets in the draft will.

60 I now turn to address the arguments by the plaintiff to suggest that Mdm Lai did not know the contents of the draft will.

61 The plaintiff's first argument in this regard is that neither the plaintiff nor Mdm Lai could have known about the contents of the draft will prior to the signing of the DFA because *neither* Mr Ong nor Mr Goh divulged any details about the draft will. The plaintiff makes the following points:[18]

(a) Mr Ong made clear that the draft will was not shown to Mr Tan in his lifetime, and that Mr Tan himself would not have known the contents of the draft will. As such, the only person from whom anybody could have learned the contents of the draft will was Mr Ong.

(b) Mr Ong has confirmed that he has not divulged the draft will to any member of the Tan family. The only person he sent a copy of the draft will to was Mr Goh.

(c) Mr Goh also confirmed that after he received the draft will from Mr Ong on 19 November 2012, he did not show the draft will or divulge its contents to any member of the Tan family prior to the DFA being signed. Mdm Lai was only shown the draft will on 23 May 2014, *after* the signing of the DFA.

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[18] Plaintiff's Written Submissions ("PWS") at [41] to [46].

Accordingly, the plaintiff invites the court to draw the conclusion that neither Mdm Lai nor the plaintiff *could* have known the contents of the draft will.

62 The plaintiff's second argument is that there is insufficient evidential basis that definitively points to Mdm Lai having known Mr Tan's intended distribution under the draft will. In this regard, the plaintiff makes the following points:[19]

(a) First, the plaintiff argues that Mr Goh never explicitly stated that Mdm Lai knew the division of assets contained in the draft will even before the DFA was signed. The plaintiff relies on the fact that Mr Goh's attendance note of 23 May 2014 does not expressly state that Mdm Lai knew the division of assets.

(b) Second, the plaintiff highlights that there are difficulties in contextualising *when* the discussion between Mdm Lai and Mr Tan might have taken place. In particular, the plaintiff suggests that such discussions might have been held long before 2011, prior to Mr Tan first instructing Mr Ong to prepare the draft will.

(c) Third, the plaintiff argues that Ms Sam's evidence should not be relied upon given the absence of a contemporaneous attendance note, and because Mdm Lai's supposed desire to give more to the first and second defendants was merely expressed "as a comment" made "by-the-way" to Ms Sam.[20]

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19 PWS from [67] to [78].

20 Transcript of 29 November 2019 at Page 28, Line 19.

63 I am unable to accept the plaintiff's arguments on the extent of Mdm Lai's knowledge. Turning to the plaintiff's first argument at [61] above, that argument rests on the fundamental and flawed assumption that *only* Mr Ong could have disclosed any knowledge about the draft will. The argument by the plaintiff does not allow for the possibility that Mr Tan could have disclosed what he intended to put in the will or what he had instructed Mr Ong. In fact, the plaintiff expressly forecloses that possibility, alleging that "Mr Tan himself would not have known the contents of the Draft Will". I am unable to accept this assertion. Even though the draft will was not shown to Mr Tan before he died, the draft will would have been prepared based on his instructions to Mr Ong. In fact, the plaintiff himself accepts that the draft will was an accurate representation of Mr Tan's testamentary wishes; it was the *sine qua non* of the DFA. It therefore strikes me as odd that the plaintiff can in one breath argue that the draft will accurately reflects Mr Tan's wishes, but in the next suggest that Mr Tan would not have known the contents of the draft will.

64 Granted that Mr Tan might not have been aware of all the specific provisions of the draft will, which might have depended on Mr Ong's precise drafting, I nevertheless see no basis to accept that Mr Tan would not have known the division of assets under the draft will. In fact, if the draft will did not represent Mr Tan's wishes, that would be a very serious allegation against Mr Ong. Accordingly, since Mr Tan *would* have known the contents of the draft will, he would have been able to tell Mdm Lai (or anyone he pleased) about them. It therefore follows that I am unable to accept the plaintiff's first argument. The mere fact that neither Mr Ong nor Mr Goh divulged details about the will to the Tan siblings and/or Mdm Lai does not preclude someone else (in this case Mr Tan) from having done so.

65 Turning to the plaintiff's second argument as outlined at [62] above, I am similarly unable to accept this argument. I make the following observations:

(a) First, while I accept that the precise date and context of Mdm Lai's discussions with her husband are not known, the fact that the details of the final draft will cohere entirely with her expectations is fairly telling. There was no suggestion by Mdm Lai that she was in any way surprised by any aspect of the draft will. In fact, Mr Goh's evidence is that she appeared to have been completely unsurprised. This would suggest that Mdm Lai had fairly up-to-date insight into what Mr Tan intended, especially since the distribution of assets in the draft will had been amended as recently as 17 August 2011. When Mr Ong first met Mr Tan on 10 January 2011, Mr Tan directed that half the assets were to go to the plaintiff while the other half was to be divided equally between the first and second defendants. However, on 17 August 2011, Mr Tan's instructions changed such that half the assets were to go to the plaintiff while the other half was to be divided equally *between Mdm Lai and the first and second defendants*. Thus, according to Mr Ong's attendance notes, the final distribution reflected in the draft will was only determined on 17 August 2011. For Mdm Lai to have known the final distribution (where she would get a share as well), her discussions with Mr Tan must have taken place on or after 17 August 2011. Otherwise, she would only be cognizant of the *prior* distribution where she would not get a share of the assets. Given that the final version of the draft will, Version 4a, was prepared by 3 October 2011, it would appear that Mdm Lai's knowledge of the draft will was in fact fairly up-to-date. Thus, while I accept that Mr Goh was unable to pinpoint the precise dates of Mdm Lai's discussions with her husband, I am satisfied that the

state of her knowledge indicated that her discussions were fairly recent and were in line with the eventual draft of Mr Tan's will. Accordingly, Mdm Lai knew the distribution of assets directed by the draft will even before signing the DFA.

(b) Second, Mr Goh made clear that Mdm Lai knew the distribution of the assets and the contents of the draft will. While he did not say so expressly, and indicated that it might merely be his "suspicions", I am not convinced by that description. It appears fairly clear to me that after Mdm Lai was informed of the contents of the draft will by Mr Goh, she revealed that she already knew what the draft will would say. Mr Goh himself accepted that, at the very least, the revelation of the draft will "confirmed" what she already knew.[21] This would suggest that what she knew of the draft will from her discussions with Mr Tan formed a firm basis for her knowledge of the draft will's contents.

(c) Third, as I earlier noted, although Mr Goh received a copy of the draft will from Mr Ong on 19 Nov 2012, Mdm Lai did not see it until Mr Goh showed her on 23 May 2014. If she had asked to see it earlier Mr Goh could not have refused. Such total lack of curiosity on her part pointed to her having already known what the draft will provided.

(d) Fourth, while I accept that there is no contemporaneous attendance note which might provide corroboration for Ms Sam's oral evidence, I underscore that the observations I have made above at [37]–[59] present a coherent and cogent account showing Mdm Lai's

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[21] Transcript of 25 November 2019, Page 77, Lines 3 to 25.

knowledge of the contents of the draft will. Ms Sam's recollections fit in and are entirely consistent with that account.

(e) Finally, I emphasise that none of Mdm Lai, Mr Goh, or Ms Sam had any reason to lie or misrepresent their interactions with Mr Tan or Mdm Lai (as the case may be).

66 Overall, I am satisfied on the balance of probabilities that Mdm Lai knew the contents of the draft will prior to the signing of the DFA. In particular, she already knew the division of assets directed in the draft will through her discussions with her late husband, Mr Tan, while he was still alive.

*The division of assets directed in the draft will is a material fact*

67 As stated above at [24], a "material fact" refers to one which "may reasonably affect the parties' determination whether they will enter into the agreement in question". I accept that Mdm Lai's knowledge of the division of assets directed by the draft will is a material fact. Had the first and second defendants been aware of Mdm Lai's knowledge, it may have affected their willingness to enter into the DFA, and reasonably so.

68 In particular, I would emphasise that had the first and second defendants known of Mdm Lai's knowledge of the division of assets, they would most likely have asked her about it. They might not have signed the DFA until their questions were addressed. Once they learnt about the division, they would probably not have signed the DFA. Either way, the test for the materiality of a non-disclosed fact is only whether it "*may* reasonably" affect the parties' determination, and I am satisfied that on the instant facts, Mdm Lai's knowledge of the division of assets meets that threshold.

69 The effect of my findings on this point is that the DFA should be set aside. Mdm Lai, as a signatory to the DFA, had failed to disclose a material fact and *Kuek Siang Wei* ([1] *supra*) is clear on the strict nature of the duty of disclosure. Thus, regardless of my findings *vis-à-vis* the plaintiff's own knowledge, my findings as regards Mdm Lai's knowledge would suffice in and of themselves to require me to set aside the DFA and dismiss the plaintiff's claim.

70 For completeness, I note one argument which was not canvassed before me but which I believe might be useful to address. An argument might be made that:

(a) Applying the law of intestate succession to Mr Tan's estate, Mdm Lai would have received half of the assets as his spouse.

(b) However, under the draft will, Mdm Lai would merely receive one-sixth of the assets.

(c) If Mdm Lai knew the terms of the draft will, she must have consented to inheriting less.

(d) The elder siblings would inherit the same shares under the draft will as under the intestacy.

As such, it might be argued that since Mdm Lai was the only one suffering a detriment under the DFA, but had nevertheless consented to it, there is no reason to set aside the DFA.

71 I am unable to agree with this reasoning. Among other considerations, the first and second defendants cannot be said to have consented to the overall

arrangement even if Mdm Lai was consenting. In particular, they may not have been willing to accept that (a) the plaintiff should receive a share so much larger than theirs, and (b) that Mdm Lai's share should be so low especially since what Mdm Lai received would eventually be divided once again (and possibly to the first and second defendants) on Mdm Lai's passing. I see no reason why Mdm Lai's consent to the division of assets should *ipso facto* bind the other signatories to the DFA. The very basis of the DFA – and the fundamental basis of the parties' agreement – was that none of the parties knew the terms of the draft will. Overall, I reiterate that *Kuek Wei Siang* and the disclosure obligation espoused therein is clear. On the facts, Mdm Lai's non-disclosure of a material fact is sufficient to warrant the setting aside of the DFA.

***The plaintiff failed to disclose material facts***

72 I am also of the view that, on the balance of probabilities, the plaintiff also knew the contents of the draft will. I accept that this knowledge is a material fact. Accordingly, I conclude that the plaintiff's failure to disclose this material fact is another ground for setting aside the DFA.

*The plaintiff knew that he would be advantaged by the draft will*

73 From the totality of the evidence before me, I am satisfied on the balance of probabilities that the plaintiff knew that he would be advantaged by the division of assets in accordance with the draft will. This conclusion is reached by a holistic assessment of the evidence before me. The reasons for my conclusion are as follows.

74 First, the plaintiff was oddly evasive in stating when he came to know of the draft will's existence. I highlight below the evolution of the plaintiff's position in this regard:

(a) In his affidavit of evidence-in-chief ("AEIC") at para 28, the plaintiff stated: "Throughout my Father's engagement with A&G [Allen & Gledhill, Mr Ong's firm], I was never, at any point, aware that my Father had a Draft Will eventually drawn up…" The closest that the plaintiff came to knowing about a draft will was, according to [29] of the plaintiff's AEIC, when "Mr Ong and my Father exited their meeting and asked me (in my Father's presence) if I would be prepared to be an executor of my Father's will". The plaintiff's position in his AEIC is thus that he was never aware that a draft will was eventually drawn up.

(b) While being cross-examined on 28 November 2019, the plaintiff maintained: "I really cannot recall an instance in time when, suddenly, I knew anything about a draft will".[22] The plaintiff's position at that point was that he simply did not know when he knew that a draft will existed.

(c) Later on in the day on 28 November 2019, while still under cross-examination, the plaintiff stated that he learned of the existence of the draft will *after* his father's passing, and that he "definitely knew" of the draft will after his father's passing, "[m]aybe not immediately after the passing", but at any rate within a few days.[23] Perplexingly, almost immediately thereafter, the plaintiff sought to back-pedal from his

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22 Transcript of 28 November 2019, Page 8, Lines 12 to 18.

23 Transcript of 28 November 2019, Page 16, Lines 3 to 9.

position; from one where he "definitely knew" of the draft will after his father's passing to merely that the position was "what [he] believe[d]".[24]

(d) The plaintiff shifted his position yet again after being confronted with an attendance note dated 14 February 2012 prepared by Mr Ong in which Mr Ong had recorded: "When Mr Tan was [re]covering at home, Wei Leong did not want to rush him to sign the will as it did not look nice". After having had sight of that attendance note, the plaintiff admitted that he knew of the existence of the draft will *before* Mr Tan passed away.[25] This contradicted [28] of his AEIC, and his evidence given at (a), (b) and (c) above.

(e) The plaintiff initially sought to claim that it was Mdm Lai who had told him about the existence of the draft will after Mr Tan's death, but later admitted:

> [I]t must have been my father instructing me to drive him to the office, to A&G for something and I concluded therefore, that there was a draft will. That must have been it.[26]

In sum, instead of it having been Mdm Lai who told him about the existence of the draft will *after* Mr Tan's death, the plaintiff's final position was that he inferred the existence of the draft will *prior* to Mr Tan's death by virtue of Mr Tan's instructions to drive him to Allen & Gledhill. When confronted with the inconsistency between this latter

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24 Transcript of 28 November 2019, Page 16, Lines 13 to 20.

25 Transcript of 28 November 2019, Page 22, Lines 1 to 18.

26 Transcript of 28 November 2019, Page 28, Lines 6 to 11.

position and [28] of his AEIC, the plaintiff acknowledged that it "must be" that his AEIC was inaccurate.[27]

(f) Paragraph [29] of the plaintiff's AEIC was also untrue in part. It repeated substantially what he had deposed at para 17 of his earlier affidavit of 4 March 2019 where he claimed that on 17 August 2011, his father and Mr Ong had come out of the meeting room in Allen & Gledhill where they had been speaking and that Mr Ong had asked him (the plaintiff) if he would be prepared to be the executor of his father's will. This attempt to foster the impression that he was not at any time present in the meeting room with Mr Tan and Mr Ong was foiled by Mr Ong's attendance notes for the 17 August 2011 meeting, where Mr Ong specifically recorded that he had called the plaintiff into the meeting room. Upon having had sight of Mr Ong's records, the plaintiff then changed his account at [30(b)] of his AEIC and acknowledged that he had "recalled wrongly". Given his previous insistence that he had not been in the meeting room, I have difficulty accepting that this error was due to a mere memory lapse. The idea that Mr Tan was wheeled out of the meeting room seemed contrived. Why would Mr Ong have brought the wheel-chair bound Mr Tan out instead of simply asking the plaintiff to join the meeting even if it was only for a moment?

75 The plaintiff's prevarication about how he came to know about the draft will did not end there. He specifically claimed that the fact that Mr Tan had asked him to be the executor of his estate did not necessarily lead to the conclusion that a draft will would have been prepared. The plaintiff explained

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[27] Transcript of 28 November 2019, Page 23, Lines 3 to 7.

this on the basis that Mr Tan might have been testing him. However, just a day after making that claim, the plaintiff sought to explain: "[M]y knowledge of any draft will being drawn up would have been a result of my having been asked to be an executor and not because of my father telling me".[28] The plaintiff appeared to have completely abandoned his earlier position that it was Mdm Lai who had told him about the existence of the draft will or that he had concluded that there was a draft will by virtue of Mr Tan having asked him to drive Mr Tan to Allen & Gledhill.

76 Put simply, I am unable to undertake the mental gymnastics it will require to follow the plaintiff's chameleon-like accounts of how he came to know about the draft will. Given the centrality of the draft will to the DFA, it is puzzling how the plaintiff shifted so dramatically in fundamental details concerning his knowledge of it. The way he answered simple questions on how and when he came to know about the draft will suggests an attempt to create the impression that he was unaware of the existence and therefore of the contents of the draft will. Precisely *why* he would seek to create such an impression lends itself to the point I am making – that he was probably trying to conceal the actual state of his knowledge.

77 The second reason why I believe the plaintiff knew that the draft will favoured him is derived from the testimony of Ms Sam. Ms Sam gave clear evidence (as addressed above at [42] – [59]) that Mdm Lai was in two minds whether to sign the DFA and had said that actually she wanted "to give more to the [other] two children" but that she was "afraid that she would not get the help of [the plaintiff] in whatever that she needs to do for the issues that they were

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[28] Transcript of 28 November 2019, Page 26, Lines 12 to 18. See also Lines 2 to 11.

facing". This suggests that she knew the plaintiff wanted her to sign the DFA. If so, this in turn suggests that he knew that the draft will favoured him.

78 Third, I note the plaintiff's seeming inability to explain how the idea of a DFA came about, and the discrepancies in his account of its genesis. I make the following observations in this regard:

(a) The plaintiff denied that he was the one who came up with the idea of a DFA, claiming that he was incapable of coming up with such an idea.[29] Instead, the plaintiff explained that the idea of a DFA had arisen from advice he had obtained from "a lot of people" or his "law school friends" about his "problems".[30]

(b) When the court sought clarification as to what the "problems" were, the plaintiff acknowledged that he must have raised the existence of a draft will, and indicated that the "problem" which he sought to resolve was the fighting within the family.[31] However, the plaintiff was unable to explain satisfactorily how a DFA would resolve the fighting, especially since reliance upon the rules of intestate succession would offer at least as good a prospect of resolving any disagreements between them as an agreement to abide by a draft will which they had not had sight of. It is telling that the plaintiff's own email of 30 March 2012 to Mr Goh stated that Mdm Lai was prepared to accept the "inevitable

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29 Transcript of 27 November 2019, Page 71, Lines 24 to 25.

30 Transcript of 27 November 2019, Page 67, Lines 9 to 15.

31 Transcript of 28 November 2019, Page 147, Lines 8 to 22.

fighting" if the beneficiaries learnt about each other's share of Mr Tan's estate once the draft will was revealed.[32]

(c) The explanation the plaintiff gave was that he and Mdm Lai both believed that in the draft will Mr Tan would have divided his assets according to geographical territories with the beneficiaries inheriting distinct territories such that they would not have to work together. Hence, fighting within the family could be avoided. This explanation is difficult to believe. Since the plaintiff denied any knowledge of the contents of the draft will, what was the basis for his belief? More perplexingly, given that Mdm Lai knew the division of assets under the draft will, how could she possibly have entertained the belief which the plaintiff claimed she had? (For completeness, I should add that from Mr Goh's evidence, Mdm Lai had told him that the DFA was important to preserve family harmony. I find this to be neither here nor there because no reason is provided as to why Mdm Lai said that. One possible reason is that she had been hoping to rely on a provision of the DFA which would preclude the children from knowing more about the draft will's terms beyond their own entitlement, but this point is speculative and little turns on it in any event.)

(d) Returning to the genesis of the DFA, I find it difficult to believe that the plaintiff could not have come up with the simple idea of a DFA and that he had to have help from law school friends. After all, not only did he graduate from the National University of Singapore with a law degree, he also passed the bar examinations for admission to the New

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32 Bundle of AEICs vol 2, p 318

> York Bar and the California Bar to boot. Even if he did confide in his law school friends (which I do not believe he did), it is far more plausible that the plaintiff's alleged "problem" would simply have been how to give effect to the draft will. This would once again suggest that the plaintiff was aware that the draft will favoured him. Even if the plaintiff attempts to explain that he merely wished to give effect to Mr Tan's wishes in the draft will, it does not explain why he needed to have the parties agree *not* to have sight of the draft will first. More likely than not, he *knew* that upon having sight of the draft will, the first and second defendants would be unwilling to sign the DFA.

79 The plaintiff's other conflicting accounts of how the DFA came about are also unconvincing.

> (a) First, the plaintiff claimed that although the DFA had initially been his suggestion (after he learned of it from his law school friends), it was in fact Mdm Lai's idea to proceed with the DFA. Admittedly, Mdm Lai must ultimately have decided to sign the DFA. However, the claim that it was Mdm Lai's idea to proceed with the DFA is not entirely consistent with Ms Sam's account of Mdm Lai having been conflicted and "in two minds" as to whether or not to enter into the DFA. It also contradicts Ms Sam's evidence that Mdm Lai had said that she actually wanted to give more to the first and second defendants but that she was afraid that the plaintiff would be uncooperative should she not sign the DFA. A fair inference from this is that the plaintiff did not merely suggest the DFA but must at least have urged Mdm Lai to sign the DFA.
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> (b) In the same vein, the plaintiff claimed in his eighth affidavit filed on 4 March 2019 at [32] that his mother, Mdm Lai, "had made an

independent decision to draw up the DFA based on the legal advice she received from Mr Goh". This was his rebuttal against the second defendant's allegation that he had pressured and manipulated Mdm Lai into signing the DFA. His statement probably meant that Mr Goh was the one who advised Mdm Lai to sign the DFA. But again that would be untrue. Paragraph [63] of the plaintiff's AEIC recounts a letter of authorisation and confirmation prepared by Mr Goh for Mdm Lai's signature, para 5 of which was Mdm Lai's acknowledgment that he had advised her not to sign the DFA until and unless she knew the contents of the draft will. Mr Goh cautioned her that Mr Tan might have given her less under the draft will than the half share she would be entitled to under his intestacy. This is yet another instance of the plaintiff attempting to distance himself from involvement in the development of the DFA.

(c) Next, the plaintiff claimed during re-examination that he had in fact *not* been the one who had proposed the idea of a DFA to the family. Rather, he believed that the idea of the DFA had come from Gurbani & Co LLC, the second defendant's solicitors, during a meeting at their office on 20 February 2012. The assertion that the idea of a DFA had come from Gurbani & Co LLC clearly contradicts the plaintiff's averment that the idea had originated from his law school friends. The plaintiff, to be fair, admitted that there was a discrepancy after this was pointed out to him, but sought to explain it away on the basis that he "really [could not] recall details".[33]

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33 Transcript of 28 November 2019, Page 147, Lines 1 to 3.

80 Fourth, I am also troubled by what can only be described as a sustained and oftentimes contrived effort by the plaintiff to distance himself from the draft will and DFA at multiple points in his evidence. Throughout his evidence, the plaintiff sought to distance himself from anything that might even *suggest* that he knew of the existence of Mr Tan's draft will, the genesis of the DFA, or the extent of influence he had over the drafting of the DFA. In regard to the drafting of the DFA, the plaintiff averred that he was a mere conduit for conveying Mdm Lai's instructions to Mr Goh. Thus at [49] and [50] of his AEIC he asserted that:

> 49. … I made it a point to not be involved in the meetings between Mr Goh and my Mother. I would step out of meetings if and when confidential matters were to be discussed between my Mother and Mr Goh. My Mother would sometimes ask me questions about Mr Goh's emails on the matter when she did not want to bother Mr Goh and I would even engage Mr Goh on some of the points raised in his emails (although it was strictly for the purpose of facilitating the discussion between *my Mother and Mr Goh*). I would tell my Mother that she must confirm matters with Mr Goh as I was not legally qualified in Singapore. And it was also always my expectation that Mr Goh would himself verify my Mother's instructions on the matter (and if need be they should communicate directly).
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> 50. As such, at all times, the engagement was **exclusively** between my Mother and Mr Goh. This was made clear from the inception of Mr Goh's engagement and is evident in my introductory email to Mr Goh dated 20 March 2012, where I expressly informed Mr Goh that the engagement would be solely between my Mother and him. ….. [The] preparation of the DFA was [a] matter that was solely between my Mother and Mr Goh …

This denial of involvement on his part with the drafting of the DFA turned out to be untrue. After Mr Goh had been re-examined, the court asked him whether the plaintiff's role was only as a conduit. Mr Goh told the court: "[I]n hindsight,

he was also acting for himself. I mean he was also speaking on his own behalf."[34] In particular, Mr Goh confirmed that the plaintiff in his email of 30 March 2012 at 12.06pm gave his own input regarding clauses 2.3 and 2.4 as they then appeared in the draft DFA. We shall examine the email correspondence more closely below.

81 Fifth, certain email exchanges the plaintiff had with Mr Goh in the course of drafting of the DFA also suggest that he was aware of the contents of the draft will. For ease of reference, I set out below the relevant email in chronological order:

(a) Mr Goh's email of 29 March 2012:

> On Thu, Mar 29, 2012 at 5:46 PM, Goh Kok Yeow <kygoh@desouza.com.sg> wrote:
>
> > Hi Wei Leong
> >
> > I attach a revamped draft DFA for your mother's consideration. If this is ok, please let me know.

(b) The plaintiff's reply on 30 March 2012 at 12.06pm:

> On 30/03/2012 12:06 PM, Wei Leong Tan wrote:
>
> Hi Mr. Goh,
>
> I have gone through the document with my mom - can we arrange a meeting?
>
> I am prepared to sign the document as it is; only last 2 queries on -
>
> (1) re: 2.3, so it is indeed better to not explicitly state that "you are only entitled to know what you got and not what anybody else got", and leave everything implied?
>
> (2) re: 2.4, we have been thinking about the poison pill provision, and though it would be nice to have, am starting to worry if it's a "bridge too far". Additionally, it's not something that can be added and then removed later upon objection (that would make it worse, in that it's almost an "anticipation of litigation" kind of thing).
>
> I think we can talk about it at the meeting and come to a decision on the spot, and then we would be good to go.
>
> Thank you.

(c) Mr Goh's response on the same day at 7.02pm:

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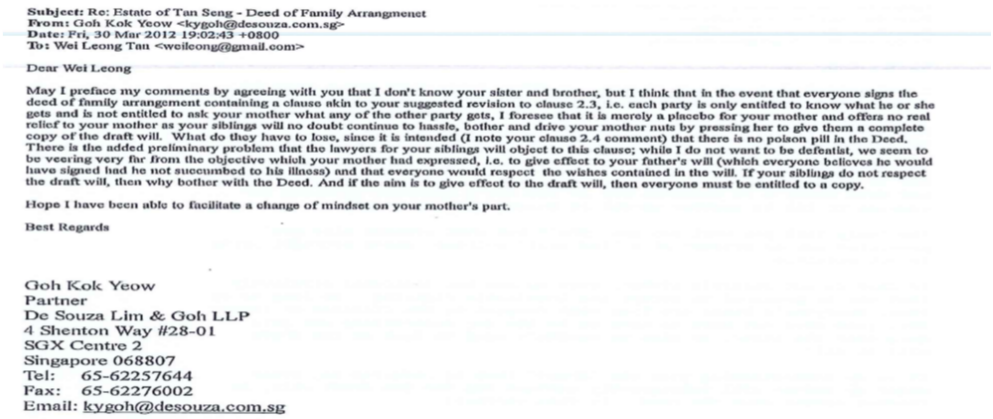
[34] Transcript of 26 November 2019, Page 73, Lines 8 to 12.



**Subject:** Re: Estate of Tan Seng - Deed of Family Arrangmenet
**From:** Goh Kok Yeow <kygoh@desouza.com.sg>
**Date:** Fri, 30 Mar 2012 19:02:43 +0800
**To:** Wei Leong Tan <weileong@gmail.com>

Dear Wei Leong

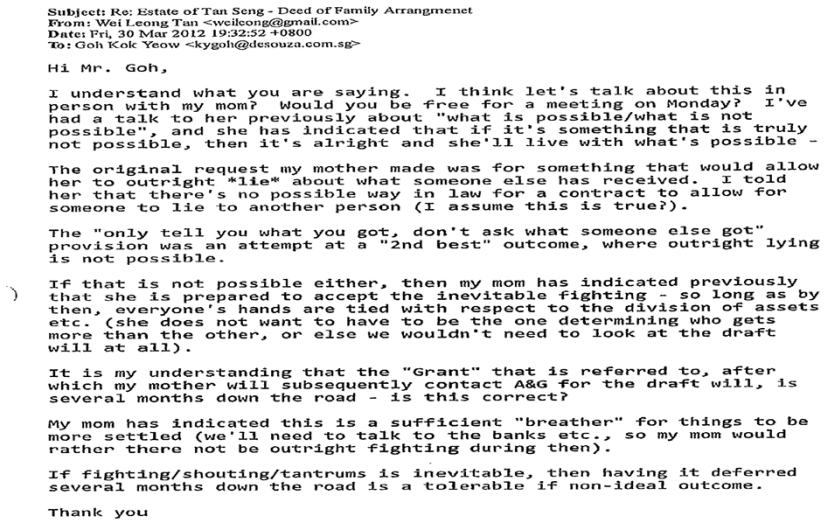
May I preface my comments by agreeing with you that I don't know your sister and brother, but I think that in the event that everyone signs the deed of family arrangement containing a clause akin to your suggested revision to clause 2.3, i.e. each party is only entitled to know what he or she gets and is not entitled to ask your mother what any of the other party gets, I foresee that it is merely a placebo for your mother and offers no real relief to your mother as your siblings will no doubt continue to hassle, bother and drive your mother nuts by pressing her to give them a complete copy of the draft will. What do they have to lose, since it is intended (I note your clause 2.4 comment) that there is no poison pill in the Deed. There is the added preliminary problem that the lawyers for your siblings will object to this clause; while I do not want to be defeatist, we seem to be veering very far from the objective which your mother had expressed, i.e. to give effect to your father's will (which everyone believes he would have signed had he not succumbed to his illness) and that everyone would respect the wishes contained in the will. If your siblings do not respect the draft will, then why bother with the Deed. And if the aim is to give effect to the draft will, then everyone must be entitled to a copy.

Hope I have been able to facilitate a change of mindset on your mother's part.

Best Regards

Goh Kok Yeow
Partner
De Souza Lim & Goh LLP
4 Shenton Way #28-01
SGX Centre 2
Singapore 068807
Tel: 65-62257644
Fax: 65-62276002
Email: kygoh@desouza.com.sg

(d) The plaintiff's response about half an hour later at 7:32pm:



**Subject:** Re: Estate of Tan Seng - Deed of Family Arrangmenet
**From:** Wei Leong Tan <weileong@gmail.com>
**Date:** Fri, 30 Mar 2012 19:32:52 +0800
**To:** Goh Kok Yeow <kygoh@desouza.com.sg>

Hi Mr. Goh,

I understand what you are saying. I think let's talk about this in person with my mom? Would you be free for a meeting on Monday? I've had a talk to her previously about "what is possible/what is not possible", and she has indicated that if it's something that is truly not possible, then it's alright and she'll live with what's possible -

The original request my mother made was for something that would allow her to outright *lie* about what someone else has received. I told her that there's no possible way in law for a contract to allow for someone to lie to another person (I assume this is true?).

The "only tell you what you got, don't ask what someone else got" provision was an attempt at a "2nd best" outcome, where outright lying is not possible.

If that is not possible either, then my mom has indicated previously that she is prepared to accept the inevitable fighting - so long as by then, everyone's hands are tied with respect to the division of assets etc. (she does not want to have to be the one determining who gets more than the other, or else we wouldn't need to look at the draft will at all).

It is my understanding that the "Grant" that is referred to, after which my mother will subsequently contact A&G for the draft will, is several months down the road - is this correct?

My mom has indicated this is a sufficient "breather" for things to be more settled (we'll need to talk to the banks etc., so my mom would rather there not be outright fighting during then).

If fighting/shouting/tantrums is inevitable, then having it deferred several months down the road is a tolerable if non-ideal outcome.

Thank you

82 From the above emails, we can surmise that the plaintiff had earlier suggested to Mr Goh that clause 2.3 provide that each beneficiary (other than Mdm Lai) be "only entitled to know what [he] got and not what anybody else [had] got[ten]".

(a) Mr Goh's draft DFA attached to his email at [81(a)] above did not incorporate the plaintiff's suggestion but (as can be seen from the

finalised DFA) sought to achieve the same result, albeit in a less draconian way, by providing that apart from Mdm Lai, none of the parties could communicate with Allen & Gledhill to obtain a copy of the draft will or for disclosure of its contents.

(b) While in the email at [81(b)]above the plaintiff indicated that he was prepared to sign the document as drafted, the plaintiff nevertheless sought confirmation from Mr Goh that with regard to clause 2.3:

> [I]t is indeed better to not explicitly state that 'you are only entitled to know what you got and not what anybody else got', and leave everything implied?

Mr Goh's response later that day in the email at [81(c)] above showed that he understood the plaintiff's purpose to be to deny the first and second defendants knowledge of the dispositions under the draft will beyond their own entitlement. However he cautioned that lawyers for the first and second defendants would object to such a clause.

(c) The plaintiff's response in the email at [81(d)] above half an hour later is illuminating. He explained that Mdm Lai's original request was to be able "to outright *lie*" about what someone else has received but that he had told her that was not possible. She could not have been proposing to lie to him. His suggestion via his proposed clause 2.3 was an attempt at a "'2nd best' outcome". He then went on to say that if the latter was not possible either, then Mdm Lai had indicated previously that she was prepared to accept the "inevitable fighting – so long as by then, everyone's hands are tied with respect to the division of assets etc.". Why "inevitable fighting"? The obvious inference is that Mdm Lai knew the uneven dispositions under the draft will. But more than that, it also reveals that the plaintiff was privy to her expectation of fighting.

If the plaintiff did not know that he would be favoured under the draft will, I find it unlikely that he would have so assiduously searched for a way to limit what a beneficiary could know about the draft will.

83 A final observation in regard to the email at [81(d)] above is that the plaintiff was seeking confirmation from Mr Goh that the grant of letters of administration would take several months "after which [Mdm Lai] will … contact A&G for the draft will". He said Mdm Lai had indicated that the time would be a "sufficient 'breather' for things to be more settled" (see in particular "we'll need to talk to the banks etc., so my mom would rather there not be outright fighting during then"). The plaintiff ended with the following: "If fighting/shouting/tantrums is inevitable, then having it deferred several months down the road is a tolerable if non-ideal outcome." Presumably, the plaintiff was not referring to himself, but expected that such histrionics would come from his siblings.

84 I observe from consideration of the email correspondence that the plaintiff's chief concern was that the first and second defendants should not discover what he and Mdm Lai got. He did not seem to be at all interested to know what they got. He also appeared to share Mdm Lai's wish to delay obtaining the draft will for months. In fact, Mr Goh testified that although the grant of the letters of administration was in July 2012, Mdm Lai did not give him the "go-ahead" to write to Allen & Gledhill for the draft will until November of that year.[35] I have already found that Mdm Lai already knew what the draft will provided, but what about the plaintiff? Unless he knew as well,

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35 Transcript of 25 November 2019 at Page 40, Lines 7 to 24.

such utter lack of interest in what the draft will provided would be difficult to understand.

85 Yet another instance of the plaintiff being evasive is evident from the contrast between his affidavit evidence and his oral evidence as to what it was Mdm Lai had purportedly told him about the contents of Mr Tan's will after Mr Goh had received a copy. At [23] of the plaintiff's AEIC, he categorically stated: "It was only in or around 2014 when my Mother told me in broad terms the contents [of the] Draft Will (i.e. that I was my Father's intended largest beneficiary)". However, this claim that he had only been informed "in broad terms" shifted under cross-examination when the plaintiff testified that Mdm Lai had instead told him, *specifically*, that he "got half" of the assets.[36] In fact, having shied away from specifying in his AEIC what he had been told by Mdm Lai, the plaintiff was suddenly able to remember the precise phrase Mdm Lai had told him in Mandarin.[37] This highlights that his claim in his AEIC that Mdm Lai had only told him the contents of the draft will "in broad terms" is clearly suspect. In fact, given my finding that he knew of his inheritance before he signed the DFA, both versions are probably untrue. I have brought up this instance only to show another of the plaintiff's attempts to conceal the precise extent of his knowledge about the draft will. Additionally, in the light of the foregoing paragraph, the statement at [19] of his eighth affidavit filed on 4 March 2019 is obviously false. There, he had deposed: "I neither knew about the contents of nor had sight of the Draft Will until my China lawyers … received a copy of the Draft Will from DSLG on 30 July 2018". According to

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36 Transcript of 27 November 2019 at Page 105, Lines 11 to 23.

37 Transcript of 27 November 2019 at Page 105, Lines 20 to 23.

para 23 of his AEIC, Mdm Lai had told him about the draft will in or around 2014. This resolute distancing effort by the plaintiff did his credibility little good.

86 The cumulative effect of the foregoing instances of obfuscation and subterfuge in order to distance himself from knowledge of the existence of the draft will and the conceptualisation of the DFA, together with his participation in the drafting of the DFA, lends itself to the inference that he knew at the least that the draft will favoured him.

87 Unsurprisingly, the plaintiff strenuously rejects this conclusion. His broad argument is that the bases for such a conclusion are purely speculative, and he makes the following specific points:

(a) The uncertainty as to how the plaintiff came to know about the draft will is explicable on the basis that the plaintiff had simply inferred and assumed that there could have been a draft.

(b) The plaintiff was merely seeking to give effect to Mr Tan's will, and all of the claims by the defendants were circular in that they assumed that which they needed to prove.

Overall, the plaintiff contends that there is insufficient evidence for me to find that he knew the contents of the draft will.

88 I am unable to agree with the plaintiff. While the evidence in relation to his knowledge, and in particular the precise *extent* of his knowledge, is not as clear as in the case of Mdm Lai, the *corpus* of evidence, circumstantial though it be, still speaks with one voice. In particular:

(a) I am perplexed by the plaintiff's several shifts as to when he came to know about the draft will (see [74] – [76] above). For such a significant piece of information, the plaintiff's mental gyrations suggested either an infirm memory or an intention to obfuscate. For a person his age, the former is unlikely, to say the least. Nor would an infirm memory of itself engender the wild swings in his evidence.

(b) The plaintiff's inconsistency as to the origin of the DFA is again highly suspect. If anything, it evidences an intent to conceal the precise genesis of the DFA. This subterfuge is explicable on the basis that the plaintiff sought to distance himself from the DFA and portray himself as merely another signatory to it. His lack of credibility as a witness and the evidence showing his participation (despite his emphatic protestations otherwise) in the drafting of parts of the DFA suggested to me that he had some knowledge of the contents of the draft will. If the plaintiff was merely seeking to give effect to Mr Tan's testamentary intentions without knowledge at all of what was in the draft will, why did he resort to being untruthful in so many instances?

89 I pause to address the plaintiff's final point, that the fact that both Mr Ong and Mr Goh had indicated that they had not disclosed the contents of the draft will somehow acts as a hermetic seal precluding the plaintiff (and Mdm Lai) from knowing its contents. I have dealt with this argument above at [60] – [66], but suffice it to say that the plaintiff could have learned the contents of the draft will from *either* Mr Tan *or* Mdm Lai. Even if, as the plaintiff contends, Mr Tan would not have shared with the plaintiff the intended distribution of his assets, Mdm Lai could have done so.

90 From the foregoing analysis of the evidence, I am driven ineluctably to the conclusion that the plaintiff knew enough of the contents of the draft will to know that it favoured him. I believe that the idea of the DFA originated with him and that he urged Mdm Lai to join in executing the same. I also find that he did not act exclusively as a conduit for Mdm Lai's instructions to Mr Goh but also in his own behalf, particularly in suggesting provisions to be incorporated in the DFA whereby the defendants would be precluded from discovering his share of the assets under the draft will. This, and his apparent sharing of Mdm Lai's desire to delay the obtaining of a copy of the draft will (if the defendants could not be prevented from discovery of its contents), together with his reference to the "inevitable fighting" that would follow, belie his insistence that he did not know the draft will's disposition of Mr Tan's estate. I am also satisfied that the first and second defendants were unaware that he knew of the same.

*The plaintiff's knowledge of the contents of the draft will is a material fact*

91 The plaintiff's knowledge of the division of Mr Tan's estate under the draft will clearly constitutes a material fact. Had the first and second defendants been aware of the plaintiff's knowledge at the time the DFA was signed, it is unlikely they would have agreed to enter into the DFA. In particular, given the fraught family relations, I would be surprised if the first and second defendants would have proceeded further without disclosure of the draft will's contents.

92 Accordingly, I find that the plaintiff failed to disclose a material fact before the signing of the DFA. This constitutes an independent ground for setting aside the DFA, in addition to that arising from Mdm Lai's non-disclosure.

***The defendants' pleadings are not fatal to my findings***

93 The plaintiff raises two broad arguments in relation to pleadings in a rearguard attempt to prevent the non-disclosure of material facts by Mdm Lai and/or the plaintiff resulting in the DFA being set aside:[38]

(a) First, the plaintiff argues that the first and second defendants have sought to pursue points which are unpleaded, and that they should be bound by their pleadings. The plaintiff further contends that it is impermissible for the defendants to mount new and unpleaded cases: *Panachand & Co (Pte) Ltd v Riko International Pte Ltd* [1985-1986] SLR(R) 311 at [7].

(b) Second, the plaintiff maintains that the new cases raised by the first and second defendants are fatally inconsistent with their own originally-pleaded case and version of facts. The plaintiff contends that the two inconsistent cases run by each of the first and second defendants offend common sense, relying on *Ng Chee Weng v Lim Jit Ming Bryan and another* [2012] 1 SLR 457 at [36]. Accordingly, *per* the plaintiff, the new cases raised should be rejected: *Chandra Winata Lie v Citibank NA* [2015] 1 SLR 875 ("*Chandra Winata*") and *Pollmann, Christian Joachim v Ye Xianrong* [2017] SGHC 229 ("*Pollmann*") at [90] – [92]. The inconsistency the plaintiff relies on is that the second defendant's initial case centred on the plaintiff allegedly having told Mdm Lai that she had to sign the DFA to be shown the draft will. This was further alleged to have placed undue pressure on Mdm Lai. However, in the

[38] PWS from [80] to [95].

> second defendant's subsequent case, Mdm Lai *already knew* the contents of the draft will because of her prior conversations with Mr Tan. This, it was submitted, was at tension with the notion that she did not know the draft will and believed that she had to sign the DFA in order to see the draft will. The plaintiff argues that this inconsistency in the second defendant's cases is fatal and should suffice for me to dismiss the second defendant's amended case.

94 I am not persuaded by either of the arguments outlined above. In addressing the plaintiff's first argument in this regard, I note that the plaintiff has merely asserted at [3] of his reply submissions that the first and second defendants have sought to pursue points which are unpleaded *without specifying precisely what those unpleaded submissions are*. The plaintiff in fact makes only a broad and generic reference to the second defendant having accused the plaintiff of knowing what the draft will provided on grounds which were not pleaded. There is not much substance to the point. At the time of filing the defence, the defendants might not have been able to descend to particulars as to how the plaintiff came by his knowledge. However, the defendants are not thereby precluded from pleading that he knew while they wait for evidence of the same to emerge from interrogatories, discovery or cross-examination. It cannot be said that for lack of particulars the plaintiff did not know the case he had to meet, as his state of mind is best known to himself.

95 While it is true that the second defendant did not plead that Mdm Lai knew the division of assets under the draft will, in my view that omission is not an absolute bar to the second defendant raising Mdm Lai's said knowledge as a defence. The Court of Appeal in *OMG Holdings Pte Ltd v Pos Ad Sdn Bhd* [2012] 4 SLR 231 at [18] made clear that "[i]t is trite law that the court may

permit an unpleaded point to be raised if no injustice or irreparable prejudice (that cannot be compensated by costs) will be occasioned to the other party". Similarly, in *V Nithia (co-administratrix of the estate of Ponnusamy Sivapakiam, deceased) v Buthmanaban s/o Vaithilingam and another* [2015] 5 SLR 1422, the Court of Appeal held at [40] that:

> [T]he law permits the departure from the general rule [that parties are bound by their pleadings] in limited circumstances, where no prejudice is caused to the other party in the trial or where it would be clearly unjust for the court not to do so.

The upshot of both these cases is that the fact that a point had not been pleaded does not *ipso facto* render it unarguable. Rather, a fact-specific assessment of the unpleaded point is necessary. In the present case, I am not persuaded that the failure to plead knowledge on the part of Mdm Lai precludes each defendant's reliance on such knowledge to submit that the DFA should be set aside. It cannot be said that the plaintiff was surprised by the second defendant's reliance (in her closing submissions) on Mdm Lai's said knowledge as a ground for setting aside the DFA. At [101] of his own AEIC, he had referred to Mr Goh's attendance note of 23 May 2014 wherein Mr Goh had recorded Mdm Lai as stating that the division of Mr Tan's estate under the draft will was what she and Mr Tan had discussed before he died. Together with Mr Goh's testimony (see [37] – [41] above), it was unsurprising that the second defendant would in her closing submissions add Mdm Lai's knowledge as a ground for setting aside the DFA. The plaintiff clearly anticipated this. That is why his closing submissions, which were prepared without sight of those of the defendants, devoted almost four pages to rebuttal of the same. No injustice is occasioned to the plaintiff by allowing the second defendant to rely on Mdm Lai's failure to disclose material facts despite the second defendant's failure to plead the fact of such knowledge. On the contrary, to preclude the

second defendant from pursuing this ground despite clear evidence at trial of Mdm Lai's knowledge would be patently unjust.

96 Moving on to the plaintiff's second argument, three observations may be made:

(a) First, the second defendant has sought to argue that her amended case is not fatally inconsistent with her initial case. In particular, the second defendant argues that the fact that Mdm Lai had knowledge of the contents of the draft will does not preclude her wanting to have sight of the same. The second defendant also seeks to argue that *actual* knowledge of the falsity is necessary before an alternative plea is disregarded. In my opinion, Mdm Lai's knowledge of the contents of the draft is *at least at tension with* her being so eager to see the draft will for herself that she would rely on the plaintiff's representations that she had to sign the DFA in order to see the draft will. Further, *Chandra Winata* makes clear that a party's actual knowledge of the falsity of its inconsistent case is merely *an archetypal situation* where common sense finds itself offended. There is no strict *need* for actual knowledge before an inconsistent case is found to contravene common sense.

(b) That said, while there is a logical tension between (i) Mdm Lai knowing the contents of the draft will and (ii) her being so eager to see the draft will for herself that she would rely on the plaintiff's representations that she had to sign the DFA in order to see it, I am not satisfied that this goes so far as to offend common sense. It is clear that until Mr Goh's revelations, the second defendant had no knowledge let alone *actual knowledge* that Mdm Lai knew the contents of the draft will. Further, while Mdm Lai's desire to see the draft will is likely to be

diminished by her knowledge of the division of assets thereunder, it does not offend common sense that she might still wish to see the document for its precise terms in full. After all, as was earlier stated, whether Mdm Lai knew or did not know about the draft will is not "a factual issue which is or was within the pleader's knowledge": *Chandra Winata* at [74]. Accordingly, I am unable to accept the plaintiff's argument in this regard.

(c) Even assuming I am mistaken at (b) above, I am not satisfied that the authorities cited by the plaintiff *require* me to reject the entirety of the second defendant's case that Mdm Lai knew the distribution of assets in the draft will. I see no reason why the latter case should not be preferred over the pleaded case of *misrepresentation.* Moreover, I am satisfied that the court retains a discretion on whether or not to reject an alternative claim altogether – the court in *Pollmann* was willing to engage with the merits of an alternative case which was found to offend common sense and could therefore have been rejected on that ground alone. On the facts, I am not satisfied that any of the parties has been taken by surprise. Far from being taken by surprise, the plaintiff had in his AEIC and oral testimony anticipated the importance of prior knowledge of the terms of the draft will and assiduously sought to distance himself from it. I am also not persuaded that it would be just for me to ignore the second defendant's reasoning on Mdm Lai's non-disclosure of a material fact altogether.

I accordingly reject the plaintiff's argument at [93(b)] above.

97 In sum, the plaintiff's arguments on pleadings are not fatal to the defendants' case. I am of the view that it would be wholly unjust for the court

to blind itself to the truth of the matter as has been assayed over the fire of cross-examination. I do not see why the fact that the defendants had not amended their pleadings, even at the end of trial, should necessarily be fatal to their cases. Accordingly, I reiterate my finding that whether on the basis of Mdm Lai's non-disclosure of a material fact or the plaintiff's non-disclosure of a material fact, the DFA ought to be set aside. The pleadings by both the first and second defendant do not prevent me from reaching such a conclusion. It follows that it is not open to the plaintiff to rely on the DFA to bind the other signatories.

98 Having established that the defendants' pleadings are not fatal to their cases, I emphasise that so long as *either* Mdm Lai or the plaintiff failed to disclose a material fact, that would warrant the setting aside of the DFA. In this case, *both* individuals appear to have failed to do so. Given the ample basis for setting aside the DFA, it is not necessary for me to enquire into the other grounds the defendants raised to set aside the DFA. I therefore make no findings on those arguments.

**Miscellaneous issues**

99 While I agree with the first and second defendants that the DFA should be set aside, I feel constrained to recount the manner in which they have conducted themselves in the lead-up to and in the course of this litigation. To my mind, the first and second defendants appear to have, *inter alia*, misstated various claims and *conveniently* omitted to admit certain points. I pause here to highlight the more significant of these.

100 In relation to the first defendant, a number of instances where he appears to have lied stand out:

(a) The first defendant appears to have lied when he gave evidence that he had "never been to Mr Gurbani's office" when asked about a meeting with Ms Loke of Gurbani & Co on 20 February 2012. The first defendant repeatedly maintained "I did not attend" and that he had "never" attended any such meeting. This was shown to be false by the attendance note taken by Mr Ong dated 20 February 2012.

(b) Second, the first defendant appears to have conjured up a claim that the plaintiff had told Mdm Lai that she had to sign the DFA so that a mistress Mr Tan *purportedly* kept in Malaysia would not be able to get part of the assets. The first defendant averred that he agreed to sign the DFA only because his mother, Mdm Lai, was pleading with him to sign lest the mistress got part of Mr Tan's assets. The plaintiff denied that he ever said that his father had any such mistress. The first defendant was unable to name this alleged mistress, nor did he provide any detail about her. Beyond claiming that the plaintiff had told Mdm Lai about this alleged mistress, the first defendant provided *no evidence whatsoever* that the plaintiff had indeed made such a statement or that Mr Tan had any such mistress. In fact, the first defendant himself appears to have accepted that even without the DFA, under intestacy *none* of Mr Tan's assets would go to the alleged mistress. The conclusion that follows is that the first defendant appears to have fabricated the allegation that his *own father* had a mistress just so that he could advance his own claim in misrepresentation.

(c) Perhaps the most egregious example of the first defendant's lack of regard for the truth is his reliance in the China proceedings on what appears to have been a forged power of attorney, dated 1 March 2017.

An expert forensic report prepared by one Lim Chin Chin, a handwriting expert, concludes that it is "highly unlikely" that the purported signatures of the plaintiff and *the second defendant* on the power of attorney relied on by the first defendant are genuine. Lim Chin Chin's report was not challenged by either the first or second defendant. In fact, all parties agreed to admit Lim Chin Chin's AEIC enclosing her forensic report *without* the need to examine her further on the stand. In the absence of evidence to the contrary, and given the first defendant's failure to refute the claim that the signatures were forged, I am left with the conclusion that the first defendant had somehow made or procured forgeries of the plaintiff and second defendant's signatures on the power of attorney he relied upon in the China proceedings.

101 In relation to the second defendant, I highlight the following:

(a) The second defendant categorically stated in her evidence that she was not present at the meeting at Gurbani & Co on 20 February 2012. This claim was reiterated at [111] of the second defendant's reply submissions, stating that "she was not present at the meeting at Gurbani & Co LLC office on 20 February 2012 as she did not seek any legal advice immediately after Mr Tan's death". However, the second defendant's claim in this regard is plainly inconsistent with her *own* email of 21 February 2012 to Mr Prem Gurbani thanking him for the time taken "to see us yesterday". The second defendant's evidence in relation to the 20 February 2012 meeting is therefore clearly false.

(b) Second, when the second defendant was asked whether she had had sight of a letter from Mr Goh dated 30 April 2012, she confirmed that she had received the letter. Suddenly and inexplicably thereafter,

she denied ever having received the letter, despite the letter having been expressly addressed to her and her siblings. This was not the only letter addressed to the second defendant which somehow was not received by her; the letter from Mr Goh of 11 May 2012 was somehow also not received. Even email to the second defendant was allegedly not received. Two such email containing advice from Sphere Logic Partners dated 7 February 2014 and 11 March 2014 were copied to the second defendant, but she claimed that she had *once again* failed to receive the same. The sheer volume of documents which the second defendant *maintained* simply not to have received – whether by post or by email – is telling. I note also that no explanation whatsoever was provided as to why none of this correspondence was received.

(c) Third, the second defendant's bold assertion that the plaintiff had falsely represented to Mdm Lai that she would only be able to see the draft will if a family arrangement was signed appears, to my mind, unconvincing. Beyond that, her suggestion that Mdm Lai wanted to sign the DFA because only then would she be able to see the draft will is clearly at tension with the fact that Mdm Lai *already knew* the contents of the draft will. Further, it does not sit comfortably with Ms Sam's evidence that Mdm Lai was in two minds as to whether or not to sign the DFA because she would have preferred to give the first and second defendants more of the assets. I am of the view that the second defendant's assertion in this regard is simply untenable.

Based on the foregoing, it appears to me that the second defendant has herself been economical with the truth.

**Conclusion**

102 In the result, for the reason that Mdm Lai and the plaintiff both had knowledge of dispositions of Mr Tan's estate under the draft will (although it is unclear whether the plaintiff knew as much as Mdm Lai) and because such knowledge was a material fact not disclosed to the first and second defendants when the DFA was signed, the DFA must be set aside.

103 The plaintiff's claim is therefore dismissed with costs. However, on account of the dishonest nature of the first defendant's conduct of the litigation, the plaintiff shall bear only two-thirds of the first defendant's costs.

Andrew Ang
Senior Judge

Chan Kia Pheng, Chan Junhao, Justin (Chen Junhao), Leo Zhi Wei (Liang Zhiwei) and Yong Walter (LVM Law Chambers LLC) for the plaintiff;
Choh Thian Chee Irving, Kor Wan Wen, Melissa and Wong Chooi Teng, Sarah (Optimus Chambers LLC) for the first defendant;
Gurbani Prem Kumar (Prem Gurbani) (instructed) and Lim Min, Isabel (Gurbani & Co LLC) for the second defendant;
The third defendant unrepresented.