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## **BROKEN KINSHIP: FAMILY PROPERTY DISPUTES AND THE COMMON INTENTION CONSTRUCTIVE TRUST IN SINGAPORE**

Tang Hang Wu\*

### **Abstract**

*There has been a proliferation of common intention constructive trust claims in Singapore. The main reason is that families have acquired real estate using their collective earning power without explicitly considering the individual entitlement of each family member. When a dispute arises, the claim is often pleaded as a common intention constructive trust. The complication with applying the law on the common intention constructive trust is that this is an English doctrine developed to deal with a different social context i.e. the breakdown of the relationship between cohabiting couples. In Singapore, the common intention constructive trust applies primarily in a different situation namely in the breakdown of kinship between parents and offsprings or between siblings. These relationships are often difficult to unpack because they are imbued with informal familial and cultural norms. Doctrinal complexity is also presented since the common intention constructive trust is often pleaded together with other doctrines such as resulting trusts and gifts. This article proposes that it is time to take Occam's razor to the often cited six-steps framework in Chan Yuen Lan v See Fong Mun to a simplified three-stage analysis.*

### **I. INTRODUCTION**

In recent years, there has been a proliferation of common intention constructive trust claims in Singapore. The main reason is that family members have acquired real estate<sup>1</sup> using their collective earning power without explicitly considering the individual entitlement of each family member. In these disputes, the property is usually registered in the name of the patriarch or matriarch or one of the siblings or the family business with an informal understanding that it is held for members of the family.<sup>2</sup> When the relationship between family members breakdown, there is often a dispute

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<sup>1</sup> There has also been disputes on company shares and bank accounts. See *Chng Heow Ho (alias Victor Chng) v Chng Choon Ming Roger* [2023] SGHC 325; *Ng Hwee Phong v Thum Sow Chan* [2022] SGHC 145; *Ong Bee Dee (executor of the estate of Ong Tuan Seng, deceased) v Ong Bee Chew* [2017] 3 SLR 579.

<sup>2</sup> A review of the key cases may be found in M. Yip, 'Comparing Family Property Disputes in English and Singapore law: "Context" is Everything' (2021) 41 *Legal Studies* 474; M. Yip and H.W. Tang, 'Crazy Rich Families in Singapore[:] Property, Trust and Business Disputes, and the Incompatibility of English Principles' in R. Nolan, M. Yip and H.W. Tang (eds), *Trusts and Private Wealth Management: Developments and Directions* (Cambridge: Cambridge University Press, 2022) 108; M. Yip, 'Resulting and Constructive Trusts in the Contemporary Singaporean

about the beneficial ownership of the real estate and one of the usual claims pleaded is the common intention constructive trust along with other equitable claims such as resulting trusts and proprietary estoppel.

The emphasis of this article is to discover the way the English doctrine of the common intention constructive trust has been articulated, used and adapted in Singapore. A major complication with applying the common intention constructive trust is that this is an English doctrine developed to deal with a different social context i.e. the breakdown of the relationship between cohabiting couples.<sup>3</sup> In Singapore, the common intention constructive trust applies primarily in a different situation namely in the breakdown of kinship<sup>4</sup> between parents and offsprings or between siblings. By kinship, I am not referring to consanguinity *per se* but a family relationship commonly attributed to Confucianism known for *inter alia* its family-centeredness and filial piety.<sup>5</sup> These relationships are often difficult to unpack because they are imbued with informal familial and cultural norms far removed from the original context in which the common intention constructive trust was developed. One of the arguments of this article is that the proliferation of such common intention constructive trust claims is due to the breakdown of the moral order which governs many families. Another thesis of this article is that the current framework in relation to the common intention constructive trust in Singapore which begins with an analysis of the resulting trust is unnecessarily complicated and confusing. This tiered analysis which starts with the resulting trust was meant to give effect to Lord Neuberger's dissenting opinion in *Stack v Dowden*<sup>6</sup> which preferred the resulting trust over the common intention constructive trust. However, in the context of Singapore, this is unnecessary given that Singapore has adopted a stricter test in relation to inferred common intention as compared to England. This article seeks to clear the ground in relation to claims involving the common intention constructive trust and advance a principled framework for analysing such claims.

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Family Context' in Y.K. Liew and Y.C. Wu (eds), *Asia Pacific Trusts Law Volume 2: Adaption in Context* (Hart Publishing, 2022) 15.

<sup>3</sup> This is not to say there are no cases on the common intention constructive trust outside cohabiting couples in England. See e.g. *Adekunle v Ritchie* [2007] WTLR 1505; *Laskar v Laskar* [2008] 1 WLR 2695; *Amin v Amin* [2020] EWHC 2675. An interesting observation is that the names of the parties in these cases suggest that these are families from African and South Asian ethnic backgrounds.

<sup>4</sup> I am grateful to Professor Lusina Ho for making this observation during a presentation of an earlier iteration of this paper.

<sup>5</sup> See G.D.D. Santos, 'The Anthropology of Chinese Kinship. A Critical Overview' (2006) 5 *European Journal of East Asian Studies* 275. Another way of looking at kinship is the intimacy and interdependence of the network of the primary kin of parents, children and siblings. See E. Kuo, 'Confucianism and the Chinese Family in Singapore: Continuities and Changes' in W.H. Slote and G.A. De Vos (eds), *Confucianism and the Family* (New York: SUNY Press, 1998), 231, 242 – 243.

<sup>6</sup> [2007] 2 AC 432.

## II. WHY ARE THERE SO MANY FAMILY PROPERTY DISPUTES?

There has been a proliferation in the number of common intention constructive trust cases in Singapore. A search on Lawnet, the leading legal database, with the exact phrase “common intention constructive trust”, yielded 86 cases.<sup>7</sup> When a Boolean search with the terms “common intention” and “constructive trust” was conducted, it generated 133 cases.<sup>8</sup> The common features in these cases involve long-simmering familial tensions either between spouses or siblings which is precipitated by a catastrophic event, usually the demise of the family’s patriarch or matriarch. From a sociological perspective, the interesting question is this: why are there so many broken kinships claims involving property disputes in Singapore?

Legal scholars have noticed similar familial property disputes occurring elsewhere in Hong Kong,<sup>9</sup> Malaysia<sup>10</sup> and among Chinese immigrants in New Zealand.<sup>11</sup> The common denominator explaining why these disputes are happening, I believe, is how some families are organized. In some families, in the not-too-distant past, the family was the core societal unit. Family members do not think of themselves individually but have a collective identity as a family. In other words, the fortunes of the family members are tied to their families. Property and businesses were acquired as ‘family property’ without precise consideration of each family member’s individual entitlement. As Alvin Hung observes:

...in Confucian-dominated ancient China where family was the core societal unit, property was recognized...for their collective value as ‘family property’ belonging to the whole familial community and lineage, and property ownership was structured in network ties of human relationships as a practice to sustain collective identity and preserve filial-piety-based moral order.<sup>12</sup>

While modern Singapore is far removed from ancient China, it is suggested that there are some families which subscribe to norm of collective identity and there is a communitarian attitude towards family assets and the family business.<sup>13</sup> The governing structure of these families is the

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<sup>7</sup> The search was conducted on 21 June 2024. The cases with the term “common intention constructive trust” started in 2011. While these numbers may not seem to be a lot to readers from large jurisdictions, it should be remembered that Singapore is a small jurisdiction with a 5 million population.

<sup>8</sup> Ibid.

<sup>9</sup> A.H. Hung, ‘Filial Piety Across Legal Systems: Analysing the Influence of Traditional Chinese Legal Culture of Property in Hong Kong, Taiwan and China’ (2023) 18 *Asian Journal of Comparative Law* 137.

<sup>10</sup> H.W. Tang, ‘Equitable Doctrines And Familial Property Disputes: The Express, Common Intention and Resulting Trust in Malaysia’ in Y.K. Liew and M. Tamaruya (eds), *Asia Pacific Trusts Law Volume 3: Boundaries in Context* (Oxford: Hart Publishing, forthcoming).

<sup>11</sup> Z.L. Liao, ‘Decoding the Puzzle: Chinese Culture, Familial Transfers, and Disputes in Western Courts’ (2022) 36 *International Journal of Law, Policy and the Family* 1.

<sup>12</sup> Hung (n 9) at 139.

<sup>13</sup> See also Yip and Tang (n 2).

moral order based on filial piety and obedience to parents.<sup>14</sup> As the governing moral order loses its salience in the modern age, we begin to see more and more family property disputes. Certainly, this explains why these disputes happen when the patriarch and matriarch pass away<sup>15</sup> because the essential thread that holds these families together i.e. filial piety and the offsprings obedience to their parents disappears. Further, as family members come into their own with their own nuclear families, they begin to question this idea of collective identity and stress their individual entitlements.

### III. **TAKING OCCAM'S RAZOR TO CHAN YUEN LAN: FROM SIX-STEPS TO THREE-STEPS**

Moving away from the sociological perspective of family property disputes, we turn now to legal doctrine. Most cases start with a ritual incantation of the well-known six-step framework laid down by VK Rajah in *Chan Yuen Lan v See Fong Mun* (“*Chan Yuen Lan*”),<sup>16</sup> the leading case in Singapore. The following passages in *Chan Yuen Lan* are worth quoting *in extenso*:

a property dispute involving parties who have contributed unequal amounts towards the purchase price of a property and who have not executed a declaration of trust as to how the beneficial interest in the property is to be apportioned can be *broadly* analysed using the following steps in relation to the available evidence:

(a) Is there sufficient evidence of the parties’ respective financial contributions to the purchase price of the property? If the answer is “yes”, it will be presumed that the parties hold the beneficial interest in the property in proportion to their respective contributions to the purchase price (*ie*, the presumption of resulting trust arises). If the answer is “no”, it will be presumed that the parties hold the beneficial interest in the same manner as that in which the legal interest is held.

(b) Regardless of whether the answer to (a) is “yes” or “no”, is there sufficient evidence of an express or an inferred common intention that the parties should hold the beneficial interest in the property in a proportion which is different from that set out in (a)? If the answer is “yes”, the parties will hold the beneficial interest in

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<sup>14</sup> See V.C. Phua and J. Loh, ‘Filial Piety and Intergenerational Co-residence: The Case of Chinese Singaporeans’ (2008) 36 *Asian Journal of Social Science* 659, 671 who observe that filial piety ‘serves as the ‘glue’ that binds the family together’.

<sup>15</sup> See e.g. *Ong Bee Dee (executor of the estate of Ong Tuan Seng, deceased) v Ong Bee Chew* [2017] 3 SLR 579; *Chng Heow Ho (alias Victor Chng) v Chng Choon Ming Roger* [2023] SGHC 325; *Ong Chai Soon v Ong Chai Koon* [2022] 2 SLR 457.

<sup>16</sup> [2014] 3 SLR 1048 at [160] (noted R. Leow and T. Liau, ‘Resulting Trusts: A Victory for Unjust Enrichment’ (2014) 73 *Cambridge Law Journal* 500; H.W. Tang, ‘A Dispute in Chancery Lane: Reconsidering the Resulting and Common Intention Constructive Trust’ [2015] *The Conveyancer and Property Lawyer* 169; J. Muk, ‘Proposed Improvements to the Division of Parties’ Beneficial Interests Beyond the Women’s Charter’ (2015) 27 *Singapore Academy of Law Journal* 230).

accordance with that common intention instead, and not in the manner set out in (a). In this regard, the court may not impute a common intention to the parties where one did not in fact exist.

(c) If the answer to both (a) and (b) is “no”, the parties will hold the beneficial interest in the property in the same manner as the manner in which they hold the legal interest.

(d) If the answer to (a) is “yes” but the answer to (b) is “no”, is there nevertheless sufficient evidence that the party who paid a larger part of the purchase price of the property (“X”) intended to benefit the other party (“Y”) with the entire amount which he or she paid? If the answer is “yes”, then X would be considered to have made a gift to Y of that larger sum and Y will be entitled to the entire beneficial interest in the property.

(e) If the answer to (d) is “no”, does the presumption of advancement nevertheless operate to rebut the presumption of resulting trust in (a)? If the answer is “yes”, then: (i) there will be no resulting trust on the facts where the property is registered in Y’s sole name (*ie*, Y will be entitled to the property absolutely); and (ii) the parties will hold the beneficial interest in the property jointly where the property is registered in their joint names. If the answer is “no”, the parties will hold the beneficial interest in the property in proportion to their respective contributions to the purchase price.

(f) Notwithstanding the situation at the time the property was acquired, is there sufficient and compelling evidence of a subsequent express or inferred common intention that the parties should hold the beneficial interest in a proportion which is different from that in which the beneficial interest was held at the time of acquisition of the property? If the answer is “yes”, the parties will hold the beneficial interest in accordance with the subsequent altered proportion. If the answer is “no”, the parties will hold the beneficial interest in one of the modes set out at (b)–(e) above, depending on which is applicable.

The framework was structured deliberately to give primacy to the doctrine of resulting trust, which was seen to be more certain, over the common intention constructive trust following Lord Neuberger’s dissenting judgment in *Stack v Dowden*.<sup>17</sup>

The framework is flawed by beginning the analysis with a focus on unequal contribution of purchase price and the presumption of a resulting trust before concentrating on the actual intention

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<sup>17</sup> [2007] 2 AC 432. See C. Hare and V. Ooi, *Singapore Trusts Law* (LexisNexis, 2021) 431 - 435.

of the party who contributed to the purchase price.<sup>18</sup> It is suggested that the actual intention of the parties should be the central inquiry and the first stage of the analysis. After all, if the actual intention of the relevant party is clear, then there is simply no room for the presumption of resulting trust to operate. For example, if there is unequal contribution of purchase price towards a property registered as joint tenants but there is evidence that the party who paid more intended a gift to the other owner, then there is no need for a resulting trust analysis. In other words, the six-step framework is redundant in this context by requiring a foray into the presumption of resulting trust and presumption of advancement in steps (a) to (c) before landing on the inquiry of whether a gift was intended. A more straightforward analysis would be to focus on the actual intention of the parties and in this context whether a gift was intended. As Lord Upjohn said in *Vandervell v Inland Revenue Commissioners* “[i]n reality the so-called presumption of a resulting trust is no more than a long stop to provide the answer when the relevant facts and circumstances fail to yield a solution.”<sup>19</sup>

Recognizing that the actual intention of the parties should be the primary inquiry means that it does not make sense to put the examination whether a gift was intended, or a common intention constructive trust is established in the later part of the framework in parts (b), (d) and (f) respectively. Instead, the actual intention of the parties should be the starting point of the inquiry. The *Chan Yuen Lan* framework has also encouraged litigation in this area because it did not explicitly mention that detrimental reliance was required to establish the common intention constructive trust.<sup>20</sup>

A possible defence of the *Chan Yuen Lan* six-step framework is that it establishes the primacy of the resulting trust as the default analytical tool over the common intention constructive in the context of cohabitation cases.<sup>21</sup> Upon closer reflection, this defence does not hold up to scrutiny. One of the reasons given for preferring the resulting trust over the common intention constructive trust is that the resulting trust approach prevents the court from imputing to the parties an intention they never had with respect to the beneficial interest in the property.<sup>22</sup> However, a strict adherence to the six-step approach is unnecessary to counter this fear of finding common intention too easily because Singapore law prescribes a higher threshold in relation to proof of common intention<sup>23</sup> as

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<sup>18</sup> Cf. See the contrasting argument that presumptions can serve as a useful starting point in M. George and B. Sloan, ‘Presuming too Little about Resulting and Constructive Trusts?’ (2017) *Conveyancer and Property Lawyer* 303.

<sup>19</sup> [1967] 2 AC 291, 313. See also the analysis of E. Simpson ‘On The Nature of Resulting Trusts: The *Vandervell* Legislation Revisited’ in P Birks and F Rose (eds ) *Restitution and Equity: vol I: Resulting Trusts and Equitable Compensation*, (London: LLP, 2000) 1.

<sup>20</sup> This point is developed below.

<sup>21</sup> [2014] 3 SLR 1048 at [158].

<sup>22</sup> *Ibid* at [156].

<sup>23</sup> *Su Emmanuel v Emmanuel Priya Ethel Anne and another* [2014] 3 SLR 1048 at [83].

compared to English law.<sup>24</sup> This issue will be the subject of analysis in the next section. Therefore, even if the common intention constructive trust is analysed first, there is no danger of finding a common intention too easily.

On reflection, the strategy of giving primacy to the doctrine of resulting trust over the common intention constructive trust, by constructing a tiered framework leads to an unwieldy application of the law. The time has come to recognize that the six-step framework is unnecessarily complicated and can lead to redundancies and confusion. In the spirit of Occam's Razor, the inquiry may be simplified into three stages. First, what were the actual intentions of the parties? Part of the inquiry in the first stage may be whether a gift was intended by the donor or whether the parties intended a common intention constructive trust. Another possibility is whether an express trust was intended.<sup>25</sup> If a gift or common intention constructive trust or express trust is established, then there is no need to proceed with the resulting trust analysis. Second, if the intention of the parties was unclear, is there unequal contribution to the purchase price which would then lead to a presumption of resulting trust? Finally, if the presumption of resulting trust applies, is it displaced by a countervailing presumption of advancement?

**A. *The First Stage on Actual Intentions: Was a Gift or Express Trust Intended by the Donor?***

*Soemarto Sulistio v Stukan Yetty Fang*<sup>26</sup> is an illustration of how the *Chan Yuen Lan* framework has the potential to obfuscate the analysis. In this case, Sulistio, and his wife, Soemiati, jointly owned 122 gold bars represented in gold certificates issued by UOB Bank which were registered in joint names. On 17 April 2016, Sulistio signed the section titled "Delivery Instructions" of the gold certificates with the "transferee" section left blank. Soemiati's name was then filled out as a transferee. She cancelled the original gold certificates and got UOB Bank to issue new gold certificates in her sole name. Sulistio brought legal proceedings claiming beneficial ownership of the new gold certificates. Valerie Thean J, after quoting the *Chan Yuen Lan* framework said:

the change in legal ownership in 2016 must be considered as part of, and together with other evidence on, the question whether under step (f) of the *Chan Yuen Lan* analysis, there was sufficient and compelling evidence of a change in operative agreement between Mr Sulistio and Mdam Soemiati.<sup>27</sup>

On appeal, Belinda Ang JAD (as she then was) observed:

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<sup>24</sup> *Stack v Dowden* [2007] 2 AC 432 at [69].

<sup>25</sup> See *Ho Soo Tong and others v Ho Soo Fong and others* [2023] SGHC 90.

<sup>26</sup> [2021] SGHC 4.

<sup>27</sup> *Ibid*, [27].



We also accept that that dispute need not have been resolved by applying the *Chan Yuen Lan* framework, as the transfer of the gold bars in 2016 concerned an *inter vivos* gift and it had nothing to do with the parties' financial contribution.<sup>28</sup>

While the Appellate Division upheld Thean J's judgment, the point is that the inquiry into whether there was a common intention of a change in the agreement between the parties or an intention to make a gift is a different line of investigation even though the conclusion might or might not converge. In the former analysis, the focus is on the common intention of the parties whereas the examination of whether a gift was intended concentrates solely on the donor's subjective intent.<sup>29</sup> To put it in another way, the pertinent analysis is whether the donor intended a gift to the donee. If the donor intended a gift to the donee, then logically the common intention constructive trust is simply a red herring in this context. Similarly, if there is evidence of a valid gift, then the gift stands and there is simply no room for an assertion of an express or resulting or common intention constructive trust.<sup>30</sup>

### ***B. The First Stage on Actual Intention: Was there a Common Intention Constructive Trust?***

Besides gifts, there is also growing body of case law albeit at the High Court level, which has subtly departed from the six-step framework. In *Ng So Hang v Wong Sang Woo*, Aedit Abdullah J said:

While the approach in *Chan Yuen Lan* starts its analysis with the purchase price resulting trust, in practice the foremost claim that is put forward is usually the common intention constructive trust, with an alternative basis relied upon of a proprietary estoppel; the resulting trust is usually the backstop claim.<sup>31</sup>

Abdullah J's approach has proved to be influential and has been endorsed in numerous High Court cases including *Koh Lian Chye and another v Koh Ah Leng and another*<sup>32</sup> *Ong Chai Koon and*

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<sup>28</sup> [2021] SGHC(A) 5, [5]. See also *Djony Gunawan v Christina Lesmana* [2024] SGHC(A) 14 at [19] – [20] where Belinda Ang JCA observed that in a claim for a resulting trust the entire *Chan Yuen Lan* framework may not be applicable. On the law of resulting trust in Singapore see R. Yeo, 'The Presumptions of Resulting Trust and Advancement in Singapore: Unfairness to the Woman?' (2010) 24 *International Journal of Law, Policy and the Family* 123.

<sup>29</sup> *Toh Eng Tiah v Jiang Angelina and another* [2021] 1 SLR 1176, [52].

<sup>30</sup> See *Ho Woon Chun (administratrix of the estate of Ho Fook Tuck, deceased) v Wang Kai Qing* [2023] SGHC 115; *Xu Zhigang v Wang Fang* [2020] SGHC 254. See also *Mak Saw Ching v Yam Hui Min, Barbara Rebecca* [2014] SGHC 212 where a plea of an express trust was inconsistent with the finding of a gift. Cf *Lim Choo Hin (as the sole executrix of the estate of Lim Guan Heong, deceased) v Lim Sai Ing Peggy* [2022] 1 SLR 873 where the Appellate Division did not find there was an intention to make a gift.

<sup>31</sup> [2018] SGHC 162 at [24].

<sup>32</sup> [2020] SGHC 131.

*others v Ong Chai Soon*<sup>33</sup> and *Er Kok Yong v Tan Cheng Cheng (as co-administratrix of the estate of Spencer Tuppani, deceased) and others*.<sup>34</sup> Like the gift analysis, a claim for common intention constructive trust does not have to be analysed only after a resulting trust analysis. The initial analysis is focused on the actual intention of the parties i.e. did the parties share a common intention to share the property. This approach is consistent with the thesis advanced i.e. that the actual intention of the parties is the central inquiry in most of these disputes.

#### IV. DIVINING THE INFERRED COMMON INTENTION IN SINGAPORE

The current six-step framework was meant to establish the primacy of the resulting trust as the default analytical tool over the common intention constructive in the context of cohabitation. In particular, Rajah JA in *Chan Yuen Lan* felt that recent English case law has adopted a too liberal test in finding an inferred common intention. As will be shown in this section, the six-step framework is unnecessary given that Singapore jurisprudence has a stricter test in divining the inferred common intention. Previously, English jurisprudence set an exacting standard for evidence to establish an inferred common intention. Lord Bridge in *Lloyds Bank plc v Rosset*<sup>35</sup> (“*Lloyds Bank plc v Rosset*”) said that the common intention must be based on evidence of express discussions “however imperfectly remembered and however imprecise their terms may have been.”<sup>36</sup> Where there is no express discussions the court would only infer a common intention to share the property beneficially if there is direct financial contributions to the purchase price, whether initially or by payment of mortgage instalments.<sup>37</sup> Lord Bridge said, “it is...extremely doubtful whether anything less will do.”<sup>38</sup> Since *Stack v Dowden*,<sup>39</sup> English law has abandoned the strict approach and developed an expansive approach to divining the inferred common intention of the parties. Baroness Hale in *Stack v Dowden* was prepared to consider diverse factors such as the purpose for which the home was acquired, the nature of the parties’ relationship and whether they had children. Such an approach is understandable as the English courts are using the common intention constructive trust as a doctrinal tool to deal with the proprietary entitlements of cohabitants in a breakdown of their relationship. The scale of cohabitation in England and Wales cannot be overstated. As Baroness Hale pointed out in *Stack v Dowden* the 2001 Census recorded

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<sup>33</sup> [2021] SGHC 76.

<sup>34</sup> [2023] SGHC 58.

<sup>35</sup> [1991] 1 AC 107.

<sup>36</sup> *Ibid*, 132.

<sup>37</sup> *Ibid*, 133.

<sup>38</sup> *Ibid*.

<sup>39</sup> [2007] 2 AC 432. For an excellent overview of the development of English law see B. Sloan, ‘Keeping Up with the *Jones* Case: Establishing Constructive Trusts in ‘Sole Legal Owner’ Scenarios’ (2015) 35 *Legal Studies* 226. However, Sloan suggests that English law might not have moved on from *Lloyds Bank v Rosset*. Cf. M. Dixon, *Modern Land Law* (Milton Park: Routledge, 2023) 179.

that in England and Wales there were over 2 million cohabitating couples with over 1.25 million children between these couples.<sup>40</sup> Given the magnitude of cohabitation and legislative inattention to enacting relevant laws, Baroness Hale thought the solution would have to come from the courts rather than Parliament.<sup>41</sup> Thus, the common intention constructive trust was essentially used as a doctrinal mechanism to provide relief in dealing with the breakdown of these relationships which has far reaching social ramifications.<sup>42</sup>

In contrast to England and Wales, there are very few Singapore decisions on common intention trusts involving cohabitants.<sup>43</sup> A possible explanation is that cohabitation is not as prevalent in Singapore as compared to England. There are no official statistics on the frequency of cohabitation among Singaporeans although some sociologists have speculated that this may not be rare in practice.<sup>44</sup> The paucity of legal cases in Singapore leads this author to surmise that while the practice of cohabitation may not be infrequent, *long-term cohabitation* where property is acquired is relatively rare. It is likely that couples in Singapore who cohabit would rent their homes instead of buying real estate. Thus, if their relationship breaks down, the courts are not faced with a common intention constructive trust claim. The reason for this is a combination of economics and the result of government policies which nudge couples into marriage. Given that the price of real estate in Singapore is prohibitively steep, most couples who wish to live together would have to stay in public housing.<sup>45</sup> Public housing is governed by the Housing and Development Board and one of their most well-known policies is that young couples who wish to buy a flat would have to

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<sup>40</sup> Ibid, 44.

<sup>41</sup> Ibid, 46.

<sup>42</sup> See A. Hayward, 'Family Property and the Process of 'Familialisation' of Property Law' (2012) 23 *Child and Family Law Quarterly* 284; M. Harding, 'Defending *Stack v Dowden*' (2009) *Conveyancer and Property Lawyer* 309.

<sup>43</sup> The cases on cohabitation are *Tan Thiam Loke v Woon Swee Kheng Christina* [1991] 2 SLR(R) 595; *Chia Kum Fatt Rolfston v Lim Lay Choo* [1993] 2 SLR(R)793; *Ng So Hang v Wong Sang Woo* [2018] SGHC 162; *Xu Zhigang v Wang Fang* [2020] SGHC 254; *Ng Hwee Phong v Thum Sow Chan* [2022] SGHC 145. These are merely 5 cases out of a total of 133 cases representing 3.7 % of the cases. See text accompanying footnotes 7 and 8. In Singapore, the paradigm of the recent cases usually arises between a married man and his unmarried partner. See also *Vishnumangalam Chandrasekharan Renuka v Yeow Jen Ai Susan and another* [2022] 1 SLR 1016 which a case between a married man and his friend. Other cases on common intention constructive trust involved married couples who for reasons unexplained do not seek a divorce or are in the process of getting divorced. See e.g. *PQR v STR* [1992] 3 SLR(R) 744; *Tan Poh Soon v Phua Sin Yin* [1995] 2 SLR(R) 583; *Chan Yuen Lan v See Fong Mun* [2014] 3 SLR 1048; *Pereira Dennis John Sunny v Faridah bte V Abdul Latif* [2017] 5 SLR 529.

<sup>44</sup> G.W. Jones, Y. Zhang and P.C.P.Z, Chia, 'Understanding High Levels of Singlehood in Singapore' (2012) 43 *Journal of Comparative Family Studies* 732. See also T. Leung, 'Property Rights of Cohabitants: A Comparison of Four Jurisdictions' (2018) 48 *Hong Kong Law Journal* 837.

<sup>45</sup> See C. Tan, "'We are Registered': Actual Processes and the Law of Marriage in Singapore' (1999) 13 *International Journal of Law Family and Policy* 1; K. Low, 'Victoria Meets Confucius in Singapore: Implied Trusts of Residential Property' in Y.K. Liew and M. Harding (ed) *Asia-Pacific Trusts Law Volume I Theory and Practice in Context*, (Hart Publishing: Oxford, 2021) 97.

be married or be in the process of getting married.<sup>46</sup> Therefore, this policy motivates parties to get married if they wish to acquire public housing. This might explain the lack of common intention constructive trust claims among cohabitants in Singapore because parties would have gotten married to qualify for public housing. Hence, the parties' proprietary entitlements would be dealt with under marriage law instead of the common intention constructive trust.

Most of the common intention constructive trust claims in Singapore involves the broken kinship scenario i.e. property claims between family members such as parent and adult offsprings or between siblings. Singapore judges have explicitly rejected Baroness Hale's expansive approach to divining the common intention of the parties. VK Rajah JA in *Chan Yuen Lan* thought that the English position was too uncertain and increased the risk of litigation and hinted that the *Stack v Dowden* approach was tantamount to foisting upon the parties an intention they never had to achieve a fair result.<sup>47</sup> Instead, Singapore law sets the threshold for finding a common intention only where there is "sufficient and compelling evidence of the express or inferred common intention."<sup>48</sup> In 2019, Steven Chong JA in *Geok Hong Co Pte Ltd v Koh Ai Gek*<sup>49</sup> ("*Geok Hong Co*") articulated an even more restrictive view to inferring common intention as follows:

This court stated in *Chan Yuen Lan*...that an inferred common intention can arise from direct financial contributions towards the *purchase price of the property* by the person claiming a beneficial interest. Although this court did state that an inferred common intention may arise from other forms of conduct in "exceptional situations", the focus remains very much on the financial contributions of the parties...

Therefore, in finding an inferred common intention, the emphasis should be directed at the direct financial contribution to the purchase price by the person claiming the beneficial interest.<sup>50</sup> (emphasis in the original)

This decision led various commentators observing that Singapore jurisprudence has returned to the *Lloyds Bank plc v Rosset* approach which focuses mainly on financial contribution.<sup>51</sup> This

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<sup>46</sup> On Housing and Development Board policies see H.W. Tang, 'The Legal Representation of the Singaporean Home and the Influence of the Common Law' (2007) 37 *Hong Kong Law Journal* 81.

<sup>47</sup> *Chan Yuen Lan v See Fong Mun* [2014] 3 SLR 1048, [152] – [156].

<sup>48</sup> *Ibid* at [160(f)]. See also *Su Emmanuel v Emmanuel Priya Ethel Anne and another* [2014] 3 SLR 1048 at [83].

<sup>49</sup> [2019] 1 SLR 908.

<sup>50</sup> *Ibid*, [80] – [81].

<sup>51</sup> See e.g. H.W. Tang and Y.S. Tay, 'Equity and Trusts' (2019) 20 SAL Ann Rev 455 at 15.12; M.M.H. Ng, 'The Common Intention Constructive Trust: Eight Years On' [2022] SAL Prac 14; R. Leow, 'The Death of *Stack* in Singapore' (2019) 135 LQR 535.

observation has been proven wrong in *Ong Chai Soon v Ong Chai Koon*<sup>52</sup> (“*Ong Chai Soon*”), which was a dispute over a shophouse, where Andrew Phang JCA said:

More importantly, as a matter of *law*, the appellant’s fixation on direct financial contributions to the purchase price of the Property takes *too narrow* a view of the common intention constructive trust analysis...Instead, the court is ultimately concerned with identifying whether the parties shared a *common intention* as to the beneficial interest in the property. Although direct financial contributions to the purchase price of that property are an important consideration, they are not the only basis upon which the court may infer such a common intention. (emphasis in the original)

Two questions arise in relation to the inquiry on the inferred common intention. What accounts for the stricter approach in finding an inferred common intention in Singapore as compared to England? What was the impetus for the retrenchment of the direct financial contribution approach in relation to inferred common intention in a short span of three years? Professor Kelvin Low has suggested that Singapore law reflects Confucian family values. Low hypothesizes that the “government’s commitment to the [traditional] family unit” has influenced the court not to “judicially cultivate an alternative regime for the division of family assets that would be regarded as undermining the traditional state-endorsed family”.<sup>53</sup> In other words, the common intention constructive trust operates in a complex and conflicted site of family law and its growth in Singapore was stunted by judges who were unwilling to use it for unmarried cohabitants and thereby restricted the test for inferred common intention. With respect, this cannot be the explanation for the difference in both jurisdictions. The point is that there are hardly any Singapore cases on the common intention trust claims brought by unmarried cohabitants.<sup>54</sup> In Singapore, the leading Court of Appeal cases which set out the law on common intention constructive trust have been decisions involving a married couple<sup>55</sup> or between siblings. <sup>56</sup> As argued above, long term unmarried cohabitation where the couple acquires real estate is rare in Singapore due to a combination of economics and state policies related to eligibility in acquiring public housing. Thus, the difference in the law cannot be explained on the ground that Singapore judges are implicitly endorsing Confucian family values of the traditional family.

Professor Yip Man has suggested another explanation for the difference between English and Singapore law. According to Yip, “the Singapore seminal judgments are underlaid by contests between children over their parents’ property” which raises “questions as to the parties’ true intentions and the legal techniques to determine that”.<sup>57</sup> Building on Yip’s thesis, I suggest that

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<sup>52</sup> [2022] 2 SLR 457.

<sup>53</sup> K. Low (n 45) 97.

<sup>54</sup> See footnote 43.

<sup>55</sup> *Chan Yuen Lan v See Fong Mun* [2014] 3 SLR 1048. See also footnote 43.

<sup>56</sup> See e.g. *Geok Hong Co Pte Ltd v Koh Ai Gek* [2019] 1 SLR 908

<sup>57</sup> Yip, “‘Context’ is Everything” (n 2) 475.

the Singapore cases arise not just in relation to disputes between children over their parents' property but in a wider variety of familial contexts which may include property contests between married spouses and siblings. These relationships are fraught with unspoken norms and vaguely articulated familial expectations about individual proprietary entitlements. My explanation for the difference in approaches between England and Singapore is that Singapore judges are deeply uncomfortable with enforcing imprecise familial expectations in the context of broken kinship scenarios and, hence, insist on "sufficient and compelling evidence of the express or inferred common intention."<sup>58</sup> Furthermore, the statements relied on to establish the common intention are often made several decades ago by parties who may have passed away.<sup>59</sup> My hypothesis for the Singapore judges' attitude towards these vaguely articulated familial expectations stems from the judges' adherence to the principles of the law of evidence rather than a desire to uphold the traditional Confucian family of a married man and woman. Various judges have expressed discomfort with claims based on slender evidence of common intention. For example, Aedit Abdullah J in *Ng So Hang v Wong Sang Woo*<sup>60</sup> lamented that the defendant did not provide specificity to the common intention. Similarly, Valerie Thean J in *UJT v UJR*<sup>61</sup> complained that "nothing is pleaded about any discussion, statement or action...which forms the basis of...any common intention".<sup>62</sup> Further, Aedit Abdullah J in *Moh Tai Siang v Moh Tai Tong*<sup>63</sup> appears to be highly skeptical of alleged family customs and practices based on what was said by deceased family members.

The answer to the second question about the retreat in *Ong Chai Soon* from an insistence on direct financial contribution to accepting other evidence for inferred common intention is harder to explain. A possible explanation is that *Ong Chai Soon* is unique in that it reveals a financially communal relationship between the family members. My interpretation of *Ong Chai Soon* is that the existence of a family fund was powerful evidence of an inferred common intention within the Ong family. The family fund was where the matriarch kept the compensation she received from the government when her land was acquired and where the earnings of the family run hair salon went into. Tellingly, the family fund paid for the Ong siblings' and their families' holidays, the mortgage on the shophouse, the medical and funeral expenses of the Ong matriarch and patriarch. In other words, the family fund evidenced their unspoken collective intention that their finances were inextricably tied together and how the Ong family was organized. In another case from

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<sup>58</sup> *Chan Yuen Lan v See Fong Mun* [2014] 3 SLR 1048 at [160(f)].

<sup>59</sup> See e.g. *Geok Hong Co Pte Ltd v Koh Ai Gek* [2019] 1 SLR 908; *Moh Tai Siang v Moh Tai Tong* [2018] SGHC 280 at [49].

<sup>60</sup> [2018] SGHC 162 at [143].

<sup>61</sup> [2018] 4 SLR 931.

<sup>62</sup> *Ibid*, [50].

<sup>63</sup> [2018] SGHC 280 at [49].

Malaysia, a Chinese family kept an iron safe where their money was pooled to fund various property investments, and this convinced the judge that this was a traditional Chinese family who had collective ownership of their business assets.<sup>64</sup> On reflection, the emphasis placed on a collective family fund is like the English cases which have placed great importance on whether cohabiting couples pooled their resources together in a joint bank account.<sup>65</sup> Outside the *Ong Chai Soon* scenario, common intention constructive trusts are often pleaded but rarely succeeds.

## V. THE IMPORTANCE OF ESTABLISHING DETRIMENTAL RELIANCE

One of the criticisms of the six-step framework is that it does not mention detrimental reliance. It is suggested that the six-step framework should be abandoned as it detracts from the importance of establishing detrimental reliance in a common intention constructive trust claim. Immediately post-*Chan Yuen Lan*, there was some uncertainty as to whether detrimental reliance was still required. This was compounded by the state of uncertainty in relation to English law between single name cases and joint name cases.<sup>66</sup> This supposed distinction between joint-names and single-name cases was recently swept away by *Hudson v Hathway*<sup>67</sup> which held that detrimental reliance must be established in all cases.

In Singapore, the case law does not to make a distinction between joint-names and single-name cases and require detrimental reliance in both circumstances.<sup>68</sup> In *Ong Chai Soon*, Phang JCA stressed that detrimental reliance is necessary to establish a claim for a common intention constructive trust. The relevant detrimental reliance in *Ong Chai Soon* was that the Ong sisters worked at the family hair salon for 28 years for a relatively meagre salaries, one of the Ong brothers did the renovation, fitting-out and carpentry work for the family hair salon and the Ong siblings consented to the hair salon's earnings being used to service the mortgage instalments. In contrast, Steven Chong JA in *Geok Hong Co*<sup>69</sup> held that even though the claimant undertook various renovation works, the equity that had arisen was extinguished by the fact that he and his family had fully occupied the property rent-free for many years. If this strict perspective on detrimental

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<sup>64</sup> *Tneu Beh v Tanjong Kelapa Sawit Sdn Bhd* [1995] 1 CLJ 741.

<sup>65</sup> See the analysis of S. Gardner, 'Problems in Family Property' (2013) 72 *Cambridge Law Journal* 301.

<sup>66</sup> See e.g. Kerr J's judgment in *Hudson v Hathway* [2022] EWHC 631 (QB) (noted B. Sloan, 'A Detrimental Decision on Ownership of the Family Home' (2022) 44 *Journal of Social Welfare and Family Law* 421). This was overturned in [2022] EWCA Civ 1648.

<sup>67</sup> [2022] EWCA Civ 1648 (noted M. Dixon, 'Dispositions, Constructive Trusts and Co-Ownership' (2023) 82 *Cambridge Law Journal* 212; B. Sloan, 'Detrimental Reliance and the Family Home: Orthodoxy Restored?' (2023) 45 *Journal of Social Welfare and Family Law* 181).

<sup>68</sup> *Ng So Hang v Wong Sang Woo* [2018] SGHC 162 was a joint-names case which was dismissed on the *inter alia* the ground that there was no detrimental reliance.

<sup>69</sup> [2019] 1 SLR 908 at [92]. This case was argued based on a common intention constructive trust and/or proprietary estoppel.

reliance endures in Singapore this means that claims based on vague familial expectations which do not induce adverse changes of behaviour are bound to fail. Conduct motivated by filial piety, obedience or a sense of familial obligations would most likely not be regarded as detrimental reliance unless it is totally out of the norm.

## VI. BEYOND THE COMMON INTENTION CONSTRUCTIVE TRUSTS

Due to the initial lack of emphasis of detrimental reliance in the six-step framework in *Chan Yuen Lan*, the common intention constructive trust appears to be overused in familial property disputes in Singapore. For lawyers advising on family property disputes, it is important to advance the proper causes of action instead of reflexively pleading a common intention constructive trust. Since every claim involves unique facts, the appropriate equitable doctrine should be pleaded to fit the relevant factual situation. For example, frustrated promises of inheritance which resulted in the claimant's detrimental reliance are better pleaded as a proprietary estoppel claim. Abdullah J made this point in *Sumoi Paramesvaeri v Fleury Jeffrey Gerard*<sup>70</sup> perceptively observing:

It is important to note that proprietary estoppel has a different juridical basis from a common intention constructive trust: it does not act on the property immediately and the discretion of the court can be exercised to better craft a remedy that addresses third party rights or other circumstances of the case. Thus, even where proprietary estoppel is made out, the court may decide to order compensation rather than giving a claimant a share in the property, if that will suffice to satisfy the equity.<sup>71</sup>

In contrast to proprietary estoppel claims which deal with testamentary promises, “a common intention is for the purposes of a constructive trust: it is a present commitment, concerning the present holding of property.”<sup>72</sup> Thus, if the facts reveal that the defendant had made a promise as to the future instead of a present commitment to share the property, the claim is better analysed using the doctrine of proprietary estoppel. An interesting difference between England and Singapore is that in the former jurisdiction the locus of familial disputes has taken place in the context of family farms involving a plea of proprietary estoppel.<sup>73</sup> This development is unsurprising given that most farms in Britain are family farms in the sense that they are run by families.<sup>74</sup> As Professor Martin Dixon remarked these are disputes about land comprised in a

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<sup>70</sup> [2016] 5 SLR 302.

<sup>71</sup> *Ibid* at [70].

<sup>72</sup> *Ibid* at [60]. See also *BUE v TZQ* [2019] 3 SLR 1022 where the common intention constructive trust was dismissed because it was held that the father intended for the right of survivorship to accrue after his demise instead of an immediate beneficial interest vesting in the sons.

<sup>73</sup> See cases referred in M. Dixon, ‘Proprietary Estoppel: The Law of Farms and Families’ (2019) *Conveyancer and Property Lawyer* 89.

<sup>74</sup> R. Gasson, ‘Family Farming in Britain’ in B. Galeski and E. Wilkenning (eds) *Family Farming in Europe and America*, (Taylor & Francis Group, 2020) Ch 2.



family business because families do not put things in writing and often make and break promises.<sup>75</sup> No doubt this rich body of case law would be useful to the Singapore courts in unpacking the thorny issue of frustrated promises of inheritance.<sup>76</sup>

Sometimes one family member would transfer property to another family member on the understanding that the transferee holds the property subject to certain conditions.<sup>77</sup> An illustration of this is a father transferring real estate to a son on the condition that the son holds the property beneficially for all his four sons equally.<sup>78</sup> Such claims are better pleaded as a constructive trust arising on receipt of property *sub conditione*.<sup>79</sup> These involve cases where a constructive trust was declared in circumstances where the transferor conveys property to the transferee on the condition that the transferee would recognize certain rights of third parties or the transferor.<sup>80</sup>

## VII. EQUITY IN THE AGE OF STATUTES: THE COMMON INTENTION CONSTRUCTIVE TRUST AND STATUTES

A tricky aspect of common intention constructive trust claims in Singapore is that this doctrine often operates in the realm which is heavily regulated by statutes. Thus, the courts must deal with the complex relationship of equity and statutes. Professor Sarah Worthington points out that equity “cannot simply ignore statutory provisions and arrogate to itself law-making power in defiance of Parliament”.<sup>81</sup> The question the court is faced with is this: when is it legitimate to apply equitable doctrines when there is a governing statute?<sup>82</sup> It is suggested that there are broadly three categories of cases when the court is considering the application of equitable doctrines in the context of a

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<sup>75</sup> M. Dixon, ‘Proprietary Estoppel: The Law of Farms and Families’ (2019) *Conveyancer and Property Lawyer* 89.

<sup>76</sup> See e.g. *Low Heng Leon Andy v Low Kian Beng Lawrence* [2018] 2 SLR 799. The major disadvantage of pleading a claim based on proprietary estoppel is that the Singapore court’s remedial approach is about achieving proportionality and doing the minimum to do justice between the parties. It remains to be seen whether the Singapore courts would be influenced by the UK Supreme Court’s decision in *Guest v Guest* [2022] 3 WLR 911 (noted B. Sloan, ‘Proprietary Estoppel in the Supreme Court: Banquo’s Ghost’ (2023) 82 *Cambridge Law Journal* 13) which has apparently moved away from this position.

<sup>77</sup> The intentions of such transfers are often murky in the familial context. See the perceptive analysis of Z.L. Liao (n 8).

<sup>78</sup> *Yeo Kia Yong and others v Yeo Kia Hock* [1998] 2 SLR(R) 602.

<sup>79</sup> B. McFarlane, ‘Constructive Trusts Arising on a Receipt of Property *Sub Conditione*’ (2004) 120 *Law Quarterly Review* 667.

<sup>80</sup> See cases like *Rochefoucauld v Boustead* [1897] Ch 196; *Binions v Evans* [1972] Ch 359.

<sup>81</sup> S. Worthington, *Equity*, (Oxford: Clarendon, 2006) at 203.

<sup>82</sup> See generally H.W. Tang, ‘Equity in the Age of Statutes’ (2015) 9 *Journal of Equity* 214.

statute.<sup>83</sup> First, the statute may explicitly or implicitly prohibit the application of a relevant equitable doctrine in certain contexts. In this case, the relevant equitable doctrine should not be used because this would undermine the legislative intent of the statute. The Residential Property Act 1976 has been held to be under this first category in relation to the common intention constructive trust.<sup>84</sup> Since the statute bars foreign persons from acquiring an interest in certain types of residential property under a trust, this must mean that a common intention constructive trust where a foreign person has an interest must similarly be prohibited. Second, the statute may expressly incorporate equitable concepts. Finally, the statute is equivocal about the application of equitable doctrines. In these cases, the courts should first determine the purpose of the statute and assess whether the application of the relevant equitable doctrine would undermine the purpose of the statute. If the purpose of the statute is not undermined, the courts should be able to resort to equitable doctrines to resolve the dispute.

An area of controversy is whether the common intention constructive trust may operate over public housing in light of the Housing and Development Act 1959 (“HDA”).<sup>85</sup> There is a contest as to whether the relevant provisions of the HDA completely proscribes the application of the common intention constructive trust or whether such a claim is still allowed if it is in favour of persons who are eligible to own a Housing and Development Board (“HDB”) flat. Under the HDA, the HDB is empowered to make rules about a myriad of matters concerning the HDB flat<sup>86</sup> which includes the right to dictate conditions pertaining to the acquisition of the flat.<sup>87</sup> The overarching philosophy is that public housing is meant for Singaporeans who do not own private housing and subject to an income ceiling, and in limited circumstances, Singapore permanent residents.

The jurisprudence surrounding constructive and resulting trusts over HDB flats has a chequered history spanning several decades.<sup>88</sup> Numerous legislative changes have been made to the relevant provisions and yet the Singapore courts have consistently interpreted these amendments as *not* completely ruling out the operation of constructive and resulting trusts. For present purposes, it is sufficient to concentrate on the difference of opinion between the High Court and Court of Appeal

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<sup>83</sup> See generally M. Leeming, ‘Theories and Principles Underlying the Development of the Common Law – The Statutory Elephant in the Room’ (2013) 36(3) *University of New South Wales Law Journal* 1002, 1008- 1010; J.F. Burrows, ‘The Interrelation Between Common Law and Statute’ (1976) 3 *Otago Law Review* 583, 589 - 597.

<sup>84</sup> *Chee Yin Meh v Ong Kian Guan* [2023] 2 SLR 495.

<sup>85</sup> See generally H.W. Tang, ‘Housing and Development Board Flats, Trust and Other Equitable Doctrines’ (2012) 24 *Singapore Academy Law Journal* 470.

<sup>86</sup> Section 74 of the Housing and Development Act 1959. See also D. Ong, ‘HDB Policies: Shaping Family Practice’ [2000] *Singapore Journal of Legal Studies* 110.

<sup>87</sup> See H.W. Tang (n 46).

<sup>88</sup> The history is outlined in H.W. Tang (n 86).

in *Ong Chai Soon* which captures the debate with sharp focus. The court in *Ong Chai Soon* was tasked with interpreting section 51(10) of the HDA<sup>89</sup> which read:

No person shall become entitled to any protected property (or any interest in such property) under any resulting trust or constructive trust whensoever created or arising.

There are two contested interpretations of this section. First, this section only bars ineligible persons from becoming entitled to any interest in HDB property under a resulting or constructive trust (“eligibility interpretation”).<sup>90</sup> Second, this section bars all persons from becoming entitled to an interest in HDB property under a resulting or constructive trust if they do not already have an entitlement to the property in question (“the pre-existing interest interpretation”).<sup>91</sup> In the High Court in *Ong Chai Soon*, Ang Cheng Hock J thought the text and legislative intent supported the pre-existing interest interpretation.<sup>92</sup> In contrast, Andrew Phang JA in the Court of Appeal, took a deep dive into the legislative policies of the HDA, and concluded that the overarching legislative purpose was to prevent ineligible persons from owning a HDB flat. Hence, the Court of Appeal held that a common intention constructive trust may arise in favour of a person who is eligible to be an owner of a HDB flat.

While I am sympathetic to the eligibility interpretation, the decision of the Court of Appeal in *Ong Chai Soon* arguably did not convincingly address the specific issue of the various legislative amendments to the original provision in the HDA. According to this argument, these legislative enactments must be seen as Parliament’s intent to curtail the constructive and resulting trust for *all* persons, eligible or otherwise, unless they have a pre-existing interest. It is suggested that the subsequent legislative amendments cannot be construed as extinguishing constructive and resulting trusts for eligible persons. The central reason for this view is that Hansard was *silent* about the purpose of the amendments. In fact, section 51(10) of the HDA was modified together with amendments to matters relating to caveats and moneylenders and all the discussion in Parliament was about the issue of moneylenders caveating HDB flats. Hence, it cannot be assumed that by silence, Parliament intended to overturn the current judicial interpretation of the law.<sup>93</sup>

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<sup>89</sup>(Cap 129, 2004 Rev Ed) (as amended by the Housing and Development (Amendment) Act 2010 (Act 18 of 2010)).

<sup>90</sup> See *Tan Chui Lian v Neo Liew Eng* [2007] 1 SLR(R) 265; *Koh Cheong Heng v Ho Yee Fong* [2011] 3 SLR 125 at [56]; *Philip Anthony Jeyaretnam and another v Kulandaivelu Malayaperumal and others* [2020] 3 SLR 738; *Low Heng Leon Andy v Low Kian Beng Lawrence (administrator of the estate of Tan Ah Kng, deceased)* [2013] 3 SLR 710

<sup>91</sup> This was the interpretation adopted by Andre Maniam JC (as he then was) *Lim Kieu Huat and another v Lim Teck Leng* [2020] SGHC 181 which was preferred by Ang Cheng Hock J in *Ong Chai Koon v Ong Chai Soon* [2021] SGHC 76.

<sup>92</sup> Applying the principles of statutory interpretation *Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850. See the analysis of T.W.X. Chan, ‘Resulting and Constructive Trusts Over Public Housing - Recent Developments and the Way Forward’ [2022] Singapore Journal of Legal Studies 1.

<sup>93</sup> At the time of the amendment in 2010, there was already a High Court decision endorsing the eligibility interpretation. See *Tan Chui Lian v Neo Liew Eng* [2007] 1 SLR(R) 265.

Instead, the amendments may be seen as Parliament ‘tidying’ up the provision without intending to change the interpretation of the courts. Otherwise, if a change was intended but not articulated, this would constitute lawmaking by stealth.

Importantly, the subsequent amendments did not address two major points raised by Menon JC (as he then was) in *Tan Chui Lian v Neo Liew Eng* (“*Tan Chui Lian*”).<sup>94</sup> First, Menon JC reasoned by relying on the phrase “no person shall become entitled” that this only prevented a resulting or constructive trust arising in favour of an ineligible person. If Parliament wanted to statutorily overturn this interpretation, it could have removed that phrase or added the words “whether eligible or otherwise” immediately after that phrase. Second, as Menon JC pointed out in *Tan Chui Lian*, resulting and constructive trusts are *accrued* property rights. Any retrospective deprivation of accrued property rights is a grave matter which must at least be debated and seriously considered in Parliament. There is simply no trace of such a debate. Therefore, it is suggested that it could not be Parliament’s intention to deprive eligible owners of accrued property rights. It has been suggested to me that the eligibility interpretation raises a multitude of formidable issues such as: (a) the timing of the claimants’ eligibility i.e. whether it is at the time the claim is filed or when the cause of action crystallised; and (b) the difficulties of proving eligibility.<sup>95</sup> While I believe that these are indeed difficult practical issues, the answers may be worked out by the courts in subsequent litigation.

Taking a step back from the intricacies of the HDA, one must ask the larger question of why the policymakers would not want resulting or constructive trusts over public housing? There is the argument that it should be for the State to decide who receives public housing rather than private individuals.<sup>96</sup> If this argument is accepted, then this is fatal to the eligibility interpretation. A partial answer to this argument is to reframe the issue by focusing on the potential abuse of public housing if an equitable claim is allowed. If there is no abuse, then a denial of the equitable claim is too harsh. In Hong Kong, a similar debate arose in relation to the Home Ownership Scheme and families pooling their resources to acquire a home. Lord Hoffmann NPJ in *Cheuk Shu Yin v Yip So Wan & Another*<sup>97</sup> carefully went through the possibility of abuses and said:

“as against these...imaginary abuses, the denial of a remedy to a person who paid all or part of the purchase price on the understanding that he would acquire a beneficial interest can be very unjust”.<sup>98</sup>

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<sup>94</sup> [2007] 1 SLR(R) 265.

<sup>95</sup> I am grateful to Ang Cheng Hock, S.C. for these points.

<sup>96</sup> I am grateful to the anonymous reviewer for this point.

<sup>97</sup> [2012] HKCU 2300 at [35].

<sup>98</sup> *Ibid* at [35].

Putting aside eligibility considerations, a possible reason is that the policymakers may want to protect the integrity of the register by not having unregistered interests.<sup>99</sup> If this is indeed the rationale, then this reasoning is entirely unpersuasive. Even in the context of the Torrens register where certainty is a prized value, resulting and constructive trust claims are not barred.<sup>100</sup> In fact, certainty of the land register is a non-issue since third-party rights are not at stake because these equitable claims have never been brought against a subsequent purchaser for value. The only plausible remaining justification is that unregistered interests should not be allowed because of administrative ease. But this justification is counterbalanced with the aim of achieving fairness between private parties. Certainly, the *Ong Chai Soon* decision demonstrates this tension between administrative ease in relation to the land register and doing justice between the parties starkly. Is it fair to deprive the Ong siblings from equitable relief given that they have suffered almost three decades of detrimental reliance on the ground of administrative ease by not having unregistered interests encumber the land register?<sup>101</sup>

## VIII. CONCLUSION

This article has examined common intention constructive trust claims in Singapore and demonstrated that unlike England where the doctrine has been used in primarily the cohabitation context, the common intention constructive trust in Singapore operates primarily in the broken kinship scenario i.e. familial contests over proprietary entitlement among parents and their offsprings, spouses or sibling disputes. While Singapore law has developed a six-step approach to analysing familial property contests by starting the reasoning with reference to the resulting trust, the thesis advanced here is that a conceptually sounder approach is a three-step analysis with the inquiry beginning with a consideration of the actual intention of the parties. Further, Singapore law differs from English law in that Singapore judges have adopted a stricter approach to inferring common intention. The hypothesis advanced to account for this difference is because Singapore

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<sup>99</sup> This could also be the justification for pre-existing interest interpretation i.e. that the land register would reflect all the owners of the HDB flat even though their percentages may be different from the register.

<sup>100</sup> For an overview of how the Torrens system deal with constructive and resulting trusts see K.F. Low, 'The Story of 'Personal Equities' in Singapore: Thus Far and Beyond' [2009] *Sing JLS* 161; H.W. Tang, 'Beyond the Torrens Mirror" A Framework of the *In Personam* Exception to Indefeasibility' (2008) 32 *Melbourne University Law Review* 672. See also A. See, 'The Torrens System in Singapore: 75 Years from Conception to Commencement' (2022) 62 *American Journal of Legal History* 66.

<sup>101</sup> In the High Court in *Ong Chai Soon*, even though Ang Cheng Hock J preferred the pre-existing interpretation, he was willing to give the Ong siblings relief over the proceeds of the sale of the shophouse by borrowing from proprietary estoppel jurisprudence and the remedial flexibility associated with that body of law. With respect, it is suggested that this is an unwelcome development as it would destabilize the law on the common intention constructive trust and proprietary estoppel and introduce too much uncertainty. See the Court of Appeal in *Ong Chai Soon* [2022] 2 SLR at [120] – [124].

judges are deeply skeptical about evidence in relation to family practices and customs derived from self-serving statements or hearsay utterance of family members who have long passed away.