

Eligibility as a bar to beneficial interest in HDB Properties? Clarifying the scope of section 51(10) of the HDA

Ong Chai Soon v Ong Chai Koon and others [2022] SGCA 36

I. Executive summary

In Singapore, Housing and Development Board (“**HDB**”) properties play an important role in providing affordable housing. As such, ownership of HDB properties is tightly controlled with a general prohibition on Singapore Citizens or Permanent Residents from purchasing any additional flat, house, or other living accommodation from the HDB if either the person or his or her spouse already owns such a flat, house or other living accommodation.

As a way to get around this strict prohibition, parties often enter into a trust arrangement over HDB properties. Under such trust arrangements, legal title to the HDB property is held by one party, while the benefit of the property is enjoyed by another person, who thereby holds “beneficial interest”¹ in the property. Generally, there are two common categories of trusts used here: express trusts, and trusts arising by operation of law. The first category refers to trusts which are expressly (i.e. intentionally) created by a party or parties. The second category refers to trusts which are imposed in circumstances in which the law feels it is just to do so.

It is relatively easy to set up a trust in Singapore, including those with “hidden” beneficial owners. As such, in order to safeguard the integrity of the HDB home ownership regime, Parliament has enacted strict rules on how trusts may operate under the Housing Development Act (Cap 129, 2004 Rev Ed) (the “**2004 HDA**”). In this regard, section 51(10) of the 2004 HDA states that “[n]o person shall become entitled to protected property (or any interest in such property) under any resulting trust or constructive trust whensoever created or arising”.² The term “protected property” refers to “any flat, house or other building that has been sold by the [HDB]”.³

However, there were two competing interpretations of section 51(10): the first is that the provision only bars ineligible persons from becoming entitled to any interest in HDB property under a resulting or constructive trust (the “**Eligibility Interpretation**”), while the second is that the provision bars *all* persons (including eligible persons)⁴ from becoming entitled to an beneficial 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**”).

In *Ong Chai Soon v Ong Chai Koon and others* [2022] SGCA 36 (“**Ong Chai Soon**”), the Court of Appeal (“**CA**”) endorsed the Eligibility Interpretation and rejected the Pre-Existing Interest Interpretation of section 51(10) of the 2004 HDA. Further, the CA indicated that the Eligibility Interpretation would equally apply to section 58(11) of the Housing and Development Act 1959 (2020 Rev Ed) (“**2020 HDA**”), which is the equivalent, albeit with some minor differences, of section 51(10) of the 2004 HDA.

II. Material facts

¹ Generally, having a beneficial interest in a property (including a trust) means having the right to receive the benefits from such property, despite not having legal ownership of the property. For a more comprehensive discussion, see Graham Virgo, *The Principles of Equity and Trusts* (OUP, 2020).

² A resulting trust is a trust that arises to vest beneficial interest back in the transferor whenever a property is transferred to the recipient without the parties making an express provision for the allocation of beneficial interest. A constructive trust, on the other hand, is a trust which arises by operation of law without regard to the intention of the parties.

³ Section 51(11) of the 2004 HDA.

⁴ *Eligibility* refers to a person’s eligibility to own a HDB flat, house or other living accommodation under the provisions of the 2004 HDA. For instance, a person who already owns one HDB residential flat is not eligible to own another HDB residential flat.

A. Background

The case involved a dispute between six siblings over a two-storey HDB shophouse (the “**Property**”). The siblings were: Mr Ong Chai Soon (“**CS**”), who was the appellant; Ms Ong Sor Kim (“**SK**”); Ms Ong Soh Ai (“**SA**”); Ms Ong Sor Mui (“**SM**”); Mr Ong Chai Koon (“**CK**”); and Ms Ong Kim Geok (“**KG**”) (SK, SA, SM, CK, and KG collectively the “**Respondents**”).

In 1988, the kampong land on which the Ong family was then living was compulsorily acquired by the government. A significant sum was paid to them in compensation (the “**Compensation**”). This sum was kept and managed by the siblings’ mother. To assist in their resettlement, the family was also offered the opportunity to buy two adjoining HDB flats in Yishun (“**Yishun Flats**”), which they took up.

In 1989, a tender for the Property was successfully made in CS’s name. In 1995, HDB offered to sell the Property to CS. CS took up this offer and was registered as the sole owner of the Property. The purchase price was wholly financed by a bank loan. The Property consisted of a commercial space on the ground floor and a residential unit on the second floor. The commercial space was sub-divided into four spaces and let to various sub-tenants. One of the sub-divided spaces was used to operate a hairdressing salon known as “Red Point Hair Beauty and Trading” (“**Red Point**”) which was registered in CS’ name. SK, SM, and KG worked at Red Point from its inception until 2018, when the siblings’ dispute arose. During the 28 years when they worked at Red Point, SK, SM, and KG drew meagre salaries.

Over the years, the registered ownership of the Yishun Flats and the Property changed several times, but the properties remained in the names of one or more of the siblings, and/or their parents.

The relationship between CS and the Respondents had always been quite strained. Following their mother’s death in 2016, CS began acting in a way which caused the Respondents to believe that CS would attempt to claim beneficial ownership over the Property. Conversely, the Respondents believed that there was a common intention, shared by all the siblings, that the Property was to be acquired as a “retirement fund” for the benefit of all the siblings. The siblings had a fractious family meeting, leading eventually to the Respondents filing proceedings in the High Court (“**HC**”) against CS. They sought (among other things) an order that the Property be sold and the sale proceeds divided equally among all six siblings.

The Respondents claimed that although the Property was registered in CS’s sole name, there was a common intention to acquire the Property as an income-generating family asset. Pursuant to this common intention, a “common intention constructive trust”⁵ arose over the Property, such that the Property was held in equal shares in favour of all six siblings. CS rejected their claim and argued that there was no evidence of such common intention. His position was that he had both the legal and beneficial ownership of the Property.

B. Proceedings below

The HC agreed with the Respondents that the Property and its sale proceeds were subject to a common intention constructive trust, such that the true beneficial owners were all the siblings in six equal shares. Although there was no documentary evidence to support either position, the oral evidence of the Respondents in this regard was more consistent with the circumstances at the time. In so holding, the HC considered the following evidence:

- the mortgage instalments for the loan taken out to finance the purchase of the Property were paid for out of a mixed fund which comprised mostly the sub-tenancy rental proceeds and the earnings from Red Point’s business;

⁵ Generally, this is a type of trust imposed to give effect to any agreement between the parties that the property in question is to be shared beneficially.

- Red Point itself was set up using funds from the siblings' mother and the Compensation, and that the siblings' intention was always that it was a family business operated for the benefit of all the siblings, such that the profits it generated belonged to the siblings in equal shares;
- the Compensation was treated by the family as a family fund to pay for the family's expenses and to set up businesses for the family's benefit; in fact, the family had treated the Yishun Flats (which were acquired mainly using the Compensation) as assets that would ultimately be shared by all the Ong siblings; and
- the siblings' conduct in relation to the Property was consistent with a common intention that it was to be shared beneficially by all of them and that, at some later stage, the Property would be sold and the sale proceeds shared equally by them.

However, adopting the Pre-Existing Interest Interpretation, the HC held that section 51(10) of the 2004 HDA barred the Respondents from becoming entitled to beneficial interest in the Property, as they were not registered owners of the Property. The HC nonetheless held that an equity⁶ arose in the Respondents' favour in relation to the Property, which compelled CS to act in a manner consistent with the siblings' common intention that they had equal beneficial shares in the Property and its sale proceeds. To satisfy this equity, the HC considered it necessary and expedient to order that the Property be sold by CS within 12 months and that the net sale proceeds be divided among all six siblings in equal shares. CS appealed the HC's decision to the CA.

III. Issues on appeal

On appeal, the CA considered three main issues:

- (a) whether the HC had erred in finding that the siblings had a common intention to acquire the Property as a family asset which would eventually be sold, and the sales proceeds of which shared equally amongst the siblings;
- (b) whether the doctrine of laches barred the Respondents' claim; and
- (c) whether section 51(10) of the 2004 HDA barred the Respondents' claim.

A. Common intention

CS argued that the Respondents' failure to show that they had made direct financial contributions to the purchase price of the Property was fatal to their common intention constructive trust claim. However, the CA held that the use of Red Point's earnings to pay the mortgage instalments for the Property amounted to a direct financial contribution by the Respondents to the purchase of the Property. More importantly, although direct financial contributions to the purchase price of a property are an important consideration, it is not the only basis upon which the court may infer a common intention. The present case was exceptional because neither CS nor the Respondents made any direct financial contributions to the purchase price of the Property, in the typical manner of using moneys from their personal bank accounts to make mortgage payments. Instead, the mortgage instalments were primarily paid using the sub-tenancy rental proceeds and Red Point's earnings. In these circumstances, focusing on the siblings' direct financial contributions would not be appropriate. Instead, it could be inferred from the *totality of the evidence* that the siblings' common intention was for each sibling to have an equal beneficial share in the Property and its sale proceeds.

The CA also rejected CS's argument that the HC had failed to appreciate that the Respondents had not discharged their burden of proving that a common intention constructive trust existed over the Property. The HC had considered the evidence presented before it in meticulous detail before arriving at its conclusions.

⁶ The HC was referring to the freestanding concept of equity affecting the conscience of CS which compelled him to honour and give effect to the common intention constructive trust. On appeal, however, the CA disagreed with the HC's reasoning on this point as such a concept of "equity" is not a recognised equitable right, obligation or doctrine, and to apply the concept in this manner would stretch the existing jurisprudence too far.

Finally, the CA rejected CS's argument that detrimental reliance (i.e. when a party is reasonably induced to rely on a representation made by another party, and suffers a detriment because that representation turns out to be false) had not been made out. Detrimental reliance is indeed necessary to establish a claim of a common intention constructive trust, and there was in fact detrimental reliance here by the Respondents. Though the HC had not couched its analysis in the express language of detrimental reliance, it had considered how the Respondents had conducted themselves in reliance on the siblings' common intention regarding the Property. Specifically, it found that KG, SK, and SM had worked at Red Point for 28 years taking relatively meagre salaries because they regarded Red Point as a family business. The HC also stated that CK had performed renovation and carpentry work for free in the space that Red Point occupied, because he regarded Red Point and the Property as family assets. In this regard, the CA further noted that the Respondents also consented to Red Point's earnings (which belonged beneficially to all of them) being used to pay the mortgage instalments for the Property. All these acts were carried out in reliance on the common intention that the Red Point business and the Property were family assets, of which the siblings each owned a part.

Thus, the CA found that the siblings shared a common intention for the Property to be a family asset, the sale proceeds of which would be shared equally amongst the siblings.

B. Doctrine of laches

The CA rejected CS's argument that it was unconscionable for the Respondents not to have asserted their beneficial interest in the Property while the siblings' mother was still alive. The doctrine of laches is "properly invoked where essentially there has been a substantial lapse of time coupled with circumstances where it would be practically unjust to give a remedy either because the party has by his conduct done that which might fairly be regarded as equivalent to a waiver thereof". However, in the present case, it was only after the death of the siblings' mother in 2016 that CS started acting in a way which caused the Respondents to believe that CS would attempt to claim beneficial ownership over the Property. As such, it cannot be said that there was a substantial lapse of time before the Respondents commenced proceedings against him. These facts also provided a reasonable explanation for the Respondents asserting their beneficial interest in the Property only after their mother had passed on. Further, there were no circumstances that would make it practically unjust for the Respondents to be granted a remedy. This is particularly so because the siblings' mother was not the only witness who could give evidence on the siblings' common intention regarding the Property. Thus, the CA rejected CS's submission on the doctrine of laches.

C. Section 51(10) of the 2004 HDA

(1) Two competing interpretations of section 51(10) of the 2004 HDA

Section 51(10) of the 2004 HDA states that "[n]o 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" [emphasis added]. As noted above, two competing interpretations of this provision had been adopted prior to *Ong Chai Soon*.

Under the Eligibility Interpretation, section 51(10) would only bar *ineligible* persons from becoming entitled to an interest in HDB property under a resulting or constructive trust, regardless of whether such persons had an existing interest in the HDB property in question. The critical issue here is whether the person in question is eligible or ineligible to acquire the HDB property in question. The question of whether an eligible person has a pre-existing interest in the property is immaterial, except in so far as it may evidence his eligibility.

In contrast, under the Pre-Existing Interest Interpretation, section 51(10) would bar *all* persons (including otherwise eligible persons) who did not already have an existing interest in the HDB property in question from becoming entitled to said property under a resulting or constructive trust.

The critical issue here is whether the person in question already has an interest in the HDB property in question. On this approach, section 51(10) would apply regardless of the person's eligibility to acquire the property. The HC adopted the Pre-Existing Interest Interpretation, resulting in the Respondents being barred from acquiring a beneficial interest in the Property.

The CA noted that the HC found it difficult to adopt the Eligibility Interpretation. The HC reasoned that section 51(10) did not use the wording "entitled to become eligible to own" an interest in HDB property, and remarked that the meaning of the term "entitled" could not be equated with the meaning of the term "eligible to own" without stretching the words of section 51(10) beyond their natural and ordinary meaning. On the natural reading of section 51(10), it could not be said that eligible persons did not "become entitled" to the HDB property because of the resulting or constructive trust. Following from such a reading, section 51(10) would prevent any person from *acquiring an interest* in HDB property under a resulting or constructive trust if that person *did not already have an interest* in the property in question.

The CA, however, disagreed with the HC's interpretation. The CA noted that the phrase "become entitled" should not be read so restrictively. On an ordinary reading of the word "entitled", a person may be said to "become entitled" to an interest which he could not have obtained before (due to his or her ineligibility to obtain such an interest – i.e. the Eligibility Interpretation), or may "become entitled" to an interest which he did not have before (i.e. the Pre-Existing Interest Interpretation). Reading the requirement of eligibility into section 51(10) would not be stretching its words "beyond their natural and ordinary meaning".

The CA also noted that the plausibility of applying the Eligibility Interpretation is further supported by an examination of the provision in the broader statutory scheme of the 2004 HDA. In particular, the word "entitled" is used in several other provisions of the 2004 HDA without carrying the meaning of "having an interest in property" or "acquiring an interest in property"; it is used instead in a sense more closely correlated with the concept of eligibility. The word "entitled" in the statutory context of the 2004 HDA has "a unique meaning that is strongly linked to eligibility", and "[d]issociating eligibility from entitlement under section 51(10) only does not appear to be justified". Thus, when the wording of section 51(10) is considered in the context of the 2004 HDA as a whole, the Eligibility Interpretation is an entirely tenable reading of that particular provision.

(2) Legislative purpose or object

An examination of the various Parliamentary statements that have been made over the years also revealed that the purpose of section 51(10) is to prevent **ineligible** persons from acquiring an entitlement to the HDB property, and **not** to prevent *all persons without a pre-existing interest* from doing so. More holistically, a consideration of the broader contextual developments and legislative history of section 51 of the 2004 HDA reveals that Parliament's consistent policy concern was to prevent the abuse of the privilege of subsidised public housing. This is because those who, under the prevailing regulatory schemes, were ineligible to enjoy the benefits of such subsidised public housing may nevertheless become entitled to an interest in such property under a trust. This concern has been reiterated on numerous occasions since the inception of the Home Ownership Scheme in 1964.

Based on this view of Parliament's intention behind section 51(10) of the 2004 HDA, the CA held that the Eligibility Interpretation better furthers its legislative purpose. Under the Eligibility Interpretation, the critical issue is whether the person is **eligible or ineligible** to acquire the HDB property in question. The question of whether an eligible person has a pre-existing interest in the property is immaterial, except in so far as it may **evidence** his eligibility. The Eligibility Interpretation thus dovetails neatly with Parliament's object of preventing ineligible persons from becoming entitled to HDB property and thereby circumventing the regulatory restrictions. In contrast, by being applicable to all persons regardless of eligibility, the Pre-Existing Interest Interpretation would be

over-inclusive, depriving even eligible beneficial owners from asserting their interests in HDB property even where they have not purported to “create” a trust through some connivance or other arrangement.

D. Application of the Eligibility Interpretation

There was no dispute before the HC regarding the Respondents’ eligibility to own the Property; thus the HC accepted that they were in fact so eligible. On appeal, however, CS sought to persuade the CA that the Respondents’ claim should fail as they had not discharged their burden of showing why they would be eligible to own the Property.

The CA disagreed with CS’s position, holding that it was incumbent on CS, as the party seeking to rely on section 51(10) of the 2004 HDA, to produce some evidence of the Respondents’ ineligibility to own the Property. Since CS had entirely failed to do this, the CA did not see any basis for disturbing the HC’s factual finding that the Respondents were indeed eligible persons.

CS also sought to argue that the HDB’s consent is required to fulfil the requirement of eligibility in accordance with sections 50(1) and 47(8) of the 2004 HDA. The CA, however, observed that section 50(1) applies where HDB property is sold, leased, mortgaged, or disposed of without the prior written consent of the HDB, while section 47(8) allows the HDB to sell or lease property to any person notwithstanding that that person has (with the HDB’s prior written consent) purchased or acquired commercial property below a particular value, for business purposes. Neither of the provisions was engaged in the present case, which only concerned whether the Respondents had acquired a beneficial interest in the Property under a common intention constructive trust.

E. Rewording and renumbering of the HDA provisions

Section 51(10) of the 2004 HDA has now been renumbered as section 58(11) of the 2020 HDA, and the words “shall become entitled” in section 51(10) of the 2004 HDA has been replaced with “is entitled” in section 58(11) of the 2020 HDA. The CA observed that the change in words used is merely editorial, in view of the general legislative drafting policy behind the 2020 Revised Editions of minimising the use of the word “shall” and instead using “is” to denote declaratory provisions.⁷ Thus, although section 58(11) of the 2020 HDA was not the legislative provision being contemplated by the CA in the present case, the CA expressed its indicative view that the Eligibility Interpretation should apply equally to s 58(11) of the 2020 HDA.

IV. Lessons learnt

Two key takeaways can be gleaned from this case. *First*, the CA has provided an important clarification to the operation of scope of section 51(10) of the 2004 HDA (now reworded and renumbered to section 58(11) of the 2020 HDA) which seeks to *only bar ineligible individuals*, in contrast to all individuals who did not have a pre-existing interest, from obtaining an interest in HDB properties by virtue of a resulting or constructive trust. Parties should thus bear in mind that holding sole legal title of a HDB property does not, itself, foreclose the possibility of claims of beneficial ownership by other parties who are eligible to own a HDB property pursuant to HDB’s policies. This is especially so in the familial context where there may be discussions and agreements to acquire HDB property for the benefit of the entire family.

Second, the case of *Ong Chai Soon* serves as a timely reminder that direct financial contributions to the purchase price of a property are not the sole basis on which a common intention constructive trust may be found. The CA in *Ong Chai Soon* reiterated its holding in *Chan Yuen Lan v See Fong Mun* [2014] 3 SLR 1048 that: “a common intention may: (a) arise from an express discussion; or (b) take the form of an inferred common intention, as evidenced by direct financial contributions by X to the

⁷ Law Revision Unit, Legislation Division, Attorney-General’s Chambers, *Guide to the 2020 Revised Edition of Acts* (31 December 2021).

purchase price of the property; or (c) in exceptional situations, arise from other conduct by X which gives rise to an implied common intention.” In such exceptional situations, as was the case in *Ong Chai Soon*, the court will consider the *totality of the evidence* to identify whether there was a common intention.

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