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SINGAPORE UNIVERSITY OF SOCIAL SCIENCES

LEGAL SCRIBES

An online publication of the School of Law, Singapore University of Social Sciences

ISSN: 26304538
[2024] Vol.2 [pages 1-21]

CONTENTS

Legal Scribes is an online publication that aims to include case notes, commentaries, legislative updates and succinct articles on contemporary issues relating to the law and legal community.

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Editor's Foreword

1. This issue of Legal Scribes features two commentaries on cases of interest.

2. Mr Joshua Chua Ze En (who is a student on the LLB Programme) has written an article on when spousal intentions can transform gifts and inheritance into matrimonial assets to be included into the matrimonial pool subject to division by the court during divorce proceedings.

3. Associate Professor Yap Ji Lian has written an article on the duty of directors to consider the interests of creditors in certain circumstances.

4. Finally, Mr Alex Woon (who is a Lecturer at the School of Law) offers his insight into how mental illness is relevant in criminal law.

5. We are most grateful to our Dean, Professor Leslie Chew, SC, for his review of and comments on this edition of Legal Scribes.

6. We hope you enjoy reading this latest issue of Legal Scribes.

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Article

Intention to Share: Transforming Gifts and Inheritance into Matrimonial Assets

CLC v CLB [2023] SGCA 10

I. Introduction

1. The judgment of the Court of Appeal ("**CA**") in *CLC v CLB* [2023] SGCA 10 ("***CLC***") concerns the identification of matrimonial assets ("**MA**"). The two main issues the CA had to determine were as follows: (i) first, the application of property law principles in the context of assets falling outside s 112(10) of the Women's Charter 1961 (2020 Rev Ed) ("**WC**"); and (ii) second, the requirements to trace money in a bank account to an asset that is acquired by gift or inheritance[1].

2. This is an appeal by the appellant wife against the respondent husband. The case started from the Family Division of the High Court ("**Family Division**").[2] The final verdict of the Family Division was a 50:50 split of the Matrimonial Pool ("**MP**") between the parties. The case was then brought before the Appellate Division of the High Court ("**Appellate Division**") after the husband appealed against the decision of the Family Division. The Appellate Division overturned the decision of the Family Division by excluding certain key assets from the MP in favour of the husband. As a result, the newly recalculated split of the reduced MP was 58:42 in favour of the wife.[3] The wife then applied and was granted leave to appeal to the CA in respect of the two abovementioned issues.

3. This article will also address the following related issues considered by the CA: (i) whether s 112(10) WC precludes the court from giving effect to the intention of a donee spouse to include a non-MA into the MP; (ii) how an asset acquired by gift or inheritance is identified; and (iii) how the CA came to the decision that the gifts received by the husband constituted part of the MP.

[1] *CLC v CLB* [2023] SGCA 10 at [3]
[2] *CLB v CLC* [2021] SGHCF 17
[3] *CLB v CLC* [2021] SGHC(A) 19

II. The Facts

4. The facts were as follows. The parties were married for 16 years.[4] They married in September 2003 and were granted an interim judgment of divorce in July 2019. In January 2021, the court heard the ancillary matters ("**AM Hearing**") relating to the division of the parties' MAs before orders were delivered on 23 March 2021.

5. The husband alleged that his late father had given him, by way of gift or inheritance, assets in the form of money in six different bank accounts in his sole name and investment portfolios ("**the Disputed Assets**"), totalling $3,801,862,53 as at the date of the AM Hearing.[5] The husband claims that the Disputed Assets should be excluded from the MP of assets given their nature as gifts/inheritance.

6. According to the husband, the Disputed Assets comprised of money from: his father's Australian will ("**the Australian Inheritance**"), the winding up of a company, G Inc ("**the Company Money**"), and the sales of shares of a company ("**the Shares Money**") (collectively known as the "**Gifted Monies**"). It is also notable that the husband received money in a bank account and a share in a Cairnhill Road property from his father's Singapore will ("**the Singaporean Inheritance**"), although it was not argued that the Singaporean Inheritance formed part of the Disputed Assets (monies from these four sources collectively known as the "**Inheritance Monies**", amounting to $5,024,886.35).[6]

7. The husband also alleged that another Australian bank account in his sole name ("**ABA**"), containing S$10,602.11, should be excluded from the MP since it was a pre-marriage asset and contained monies derived from the Australian Inheritance.[7]

III. The Parties' Arguments

The Australian Inheritance

8. The husband claimed to have inherited 12.5% of the residuary estate in Australia and trusteeship over another 12.5% for his children pursuant to the Australian Inheritance, amounting to $132,693.42 in total for both entitlements. These monies then became mixed

[4] *CLC v CLB* [2023] SGCA 10 at [4]
[5] *CLC v CLB* [2023] SGCA 10 at [5]
[6] *CLC v CLB* [2023] SGCA 10 at [6]
[7] *CLC v CLB* [2023] SGCA 10 at [9]

with funds in ABA and the Disputed Assets. Monies from ABA was spent for family trips to Australia.[8]

9. The wife did not dispute the husband's claim. However, she argued that between December 2018 to April 2019, the husband transferred US$900,000 out of their joint bank accounts in Malaysia into his personal bank accounts in Australia, including, *inter alia*, ABA.[9]

10. It is also notable that the husband had argued for several other accounts or investments ("**Other Investments**") to be excluded from the MP since they were either pre-marriage assets or derived from gifts or inheritance.[10]

The Company Money

11. The husband testified that his father gave him shares in G Inc before his marriage, which were reflected by his shareholding being listed as separate property in the pre-nuptial agreement ("**PNA**") he had with his wife in September 2003.[11] When G Inc was liquidated, the Company Money was credited into an account (DBS-3) that was also listed as separate property to be excluded from the MP based on the PNA. Additionally, part of the money was used to fund the purchase of another property (registered in the wife's sole name) during marriage. Another part of it was placed in several accounts (including the Disputed Assets).[12]

12. On the other hand, the wife chose to deal with the Company Money as part of the Singaporean Inheritance. The wife accepted before the Appellate Division that the Company Money was not deposited in the Disputed Assets but rather in DBS-3, which meant that the Company Money could not be traced to the Disputed Assets. However, she argued that on top of depositing $28,000 into DBS-3 from 2007 to 2015, the Company Money had also been mixed with other funds used for family expenses. Her argument was based on the Husband's assertion that money from DBS-3 was spent on their family and matrimonial properties, therefore rendering it no longer separately identifiable.[13]

[8] *CLC v CLB* [2023] SGCA 10 at [9]
[9] *CLC v CLB* [2023] SGCA 10 at [10]
[10] *CLC v CLB* [2023] SGCA 10 at [11]
[11] *CLC v CLB* [2023] SGCA 10 at [9]
[12] *CLC v CLB* [2023] SGCA 10 at [12]
[13] *CLC v CLB* [2023] SGCA 10 at [13] – [14]

The Shares Money

13. The husband testified that he received the Shares Money, *viz*, S$3,541,240.77, over several tranches from February 2010 to June 2015 following his father's death. The entire sum was deposited into two different joint accounts (collectively, "**UOB Joint Account**") that he had with his wife. The husband then argued that the money in the UOB Joint Account was merely a contingency for his wife and children to tap into if any mishaps happened to him, and that it was not mixed with the wife's own money throughout the entire marriage (despite being used during the marriage). Parts of the money were subsequently deposited into the Other Investments and used to acquire other assets, *inter alia*, the Disputed Assets.[14]

14. The wife argued that the husband had every intention to share the Shares Money with her based on his act of using part of the Shares Money he deposited in a joint UOB account on their family holiday in Malaysia. He also deposited it into other joint accounts that he had with her, where it remained up until late 2018 when their marriage broke down. The husband then attempted to transform the nature of the Shares Money back to being his "inherited money" by transferring it to his sole bank accounts in Singapore, Malaysia and Australia.[15]

15. She also argued that the Shares Money could not be traced into the Disputed Assets since only two deposits came from the Inheritance Monies. The Shares Money remained in their UOB Joint Account up until their marriage broke down in 2018, when the husband transferred some of the money into the Disputed Assets. The wife then argued that it would be impossible to determine whether the funds that entered the Disputed Assets came entirely from the Inherited Monies, since the Disputed Assets consisted of a mix between funds from their UOB Joint Account and her husband's personal investments between 2009 to 2018.[16]

[14] *CLC v CLB* [2023] SGCA 10 at [14] – [15]
[15] *CLC v CLB* [2023] SGCA 10 at [17]
[16] *CLC v CLB* [2023] SGCA 10 at [18]

IV. The Family Division Decision

16. The decision of the Family Division[17] was as follows:
    a) The Disputed Assets were to be included in the MP since the source of the monies was "not clear";[18]
    b) The Company Money was not substantially improved by the wife as stipulated under s 112(10)(a)(ii) WC;[19]
    c) The husband's deposition of the Shares Money into a joint account is still insufficient to establish a "real and unambiguous" intention to include it into the MP;[20]
    d) The balance sum in DBS-3 is part of the MP, based on the husband's intention to use it for the family;[21]
    e) The husband's Other Investments are to be excluded from the MP since they were acquired by the Company and Shares Money and retained their character as gifts;[22] and
    f) ABA was a MA since the husband had the intention to use it for the family. Tracing the original source of the monies was unnecessary since the monies from various sources were co-mingled.[23]

V. The Appellate Division Decision

17. The husband appealed against the decision of the Family Division. On appeal, the Appellate Division overturned the decision of the Family Division and held that the Disputed Assets and ABA were to be excluded from the MP. The Appellate Division decided as follows[24]:

    a) The evidence supported the husband's claim that the Disputed Assets were derived from gifts and inheritance from his father. After receiving S$5,024,886.35 in Inheritance Money, the husband had a substantial amount of money left after using part of the Company Money and Shares Money on the Other Investments. Based on the amount of money in the Disputed Assets and ABA, the remainder of the Inheritance Money could only have gone into them;[25]

[17] *CLB v CLC* [2021] SGHCF 17
[18] *CLB v CLC* [2021] SGHCF 17 at [64]
[19] *CLB v CLC* [2021] SGHCF 17 at [20]
[20] *CLB v CLC* [2021] SGHCF 17 at [20]
[21] *CLB v CLC* [2021] SGHCF 17 at [21]
[22] *CLB v CLC* [2021] SGHCF 17 at [21]
[23] *CLB v CLC* [2021] SGHCF 17 at [23]
[24] *CLB v CLC* [2022] 1 SLR 658
[25] *CLB v CLC* [2022] 1 SLR 658 at [25]

b) Contrary to the Family Division's ruling, the Australian Inheritance did not lose its character as an inheritance. Since ABA did not fulfil the requirement of ordinary usage under s 112(10)(a)(i) WC to be transformed into a MA, the mere deposition of the Australian Inheritance into ABA could not form the basis of said transformation;[26]

c) Nothing in the WC suggested that co-mingling transforms Inheritance Monies into MAs. It also contradicted the judge's finding that initially depositing the Company Money into DBS-3 (found to be a MA) did not preclude a finding that those investments were not MAs;[27] and

d) Even if the Family Division held the view that it was unclear where the Inheritance Monies went due to co-mingling, it was irrelevant given the finding that the Inheritance Monies went into the Disputed Assets. Hence, the Disputed Assets should have been excluded from the MP.[28]

VI. The Court of Appeal Decision

18. The CA granted the wife leave to appeal, with the following two issues being the crux of the appeal:[29]

a) How the statutory purpose and language of s 112(10) WC relates to the intention of a donee spouse *vis-à-vis* the determination of whether an asset or inheritance acquired by said spouse lost its character as such and becomes a MA[30]; and

b) What are the requirements to trace asset money in a bank account back to an asset acquired by gift and inheritance; and which party bears the burden of proof ("**BOP**") that the asset money which remains in the account is traceable to the gift or inheritance in question when there has been a co-mingling of said money with funds from other sources[31].

[26] *CLB v CLC* [2022] 1 SLR 658 at [27]
[27] *CLB v CLC* [2022] 1 SLR 658 at [28]
[28] *CLB v CLC* [2022] 1 SLR 658 at [28]
[29] *CLC v CLB* [2023] SGCA 10 at [29]
[30] *CLC v CLB* [2023] SGCA 10 at [36]
[31] *CLC v CLB* [2023] SGCA 10 at [65]

19. In summary, the CA decided that:

    a) S 112(10) WC does not preclude spousal intentions from being an additional way to convert non-MAs into MAs and allows the court to give effect to the spouse's intention based on property law principles;[32]
    b) The identifiability of an asset that is alleged to be acquired by gift or inheritance is based on evidence. The party that is making the claim that an asset is *not* a MA by virtue of its acquisition as a gift or inheritance bears the BOP on a balance of probabilities;[33] and
    c) Where a spouse transfers monies derived from non-MAs into a joint account separately operable by the transferor spouse and the other spouse, a rebuttable presumption arises that the former intended to share the said monies with the latter.[34]

20. Hence, the CA's final decision was that the Disputed Assets and ABA should be included as MAs. This was due to the husband's clear intention to treat the Inheritance Monies (which were now partly in the Disputed Assets and ABA) as part of the family's assets.[35] In the end, the final ratio of division was found to be 50:50, with the total sum of S$12,670,096.88 to be divided equally between them.[36] This was the same ratio of division as previously ruled by the Family Division, albeit with the value of the MP being different.

VII. S 112(10) WC does not preclude the court from giving effect to a donee spouse's intention to bring an asset that was initially acquired by gift or inheritance into the MP

21. The CA began by adopting a purposive approach to analyse the wording of s 112(10) WC and the legislative purpose behind its enactment.[37]

22. The CA noted that s 112(10) WC only expressly outlines two ways in which an asset acquired by gift or inheritance can be transformed into an MA: substantial improvement

[32] *CLC v CLB* [2023] SGCA 10 at [36]
[33] *CLC v CLB* [2023] SGCA 10 at [65]
[34] *CLC v CLB* [2023] SGCA 10 at [92]
[35] *CLC v CLB* [2023] SGCA 10 at [97]
[36] *CLC v CLB* [2023] SGCA 10 at [98]
[37] *CLC v CLB* [2023] SGCA 10 at [38]

and usage as a matrimonial home. However, it is silent on whether a donee spouse's intention could also cause a gift or inheritance to become an MA.[38]

23. Additionally, the parliamentary debates surrounding s 112(10) WC also do not address the intention of a donee spouse.[39] However, the CA discussed two relevant cases that predated the WC's May 1997 amendments: *Hoong Khai Soon v Cheng Kwee Eng and another appeal* [1993] 1 SLR(R) 823 ("***Hoong***") and *Yeo Gim Tong Michael v Tianzon Lolita* [1996] 1 SLR(R) 633 ("***Yeo***"):

    a) In *Hoong*, the court held that the usage or enjoyment of gifts and inheritance is not itself sufficient as a reason to include it as a MA;[40] and
    b) In *Yeo*, the court cited the case of *Wang Shi Huah Karen v Wong King Cheung Kevin* [1992] 2 SLR(R) 172 ("***Wang***") and held that a gift originating from a third party fell outside of the scope of s106 WC.[41]

24. The CA then proceeded to make three observations:

    a) The 1997 amendment (which replaced the former s 106 of the 1985 WC with the current s 112 WC) enlarged the circumstances which the court may consider in determining a "just and equitable" division of MA. Hence, the consideration of the intention of a donee spouse in determining whether a gift or inheritance should be included in the MAs is not inconsistent with what is "just and equitable";[42]
    b) The fundamental principle that undergirds s 112 WC is that a marriage is an equal cooperative partnership of efforts as per s 46 WC;[43] and
    c) Similar to how a court may give effect to the act of a party re-gifting a gift they received from a third party to their spouse as a transfer of interest in the said gift to the other spouse, the court may also give effect to the intention of a party to bring a gifted property into the pool of MAs.[44]

25. The CA subsequently clarified that the courts may take into account the intention of a spouse when determining whether an asset acquired by gift or inheritance should be: (a) considered as a gift to the donee spouse and excluded from the MA; (b) a regift from the

[38] *CLC v CLB* [2023] SGCA 10 at [40]
[39] *CLC v CLB* [2023] SGCA 10 at [41]
[40] *CLC v CLB* [2023] SGCA 10 at [43]
[41] *CLC v CLB* [2023] SGCA 10 at [45]
[42] *CLC v CLB* [2023] SGCA 10 at [47]
[43] *CLC v CLB* [2023] SGCA 10 at [48]
[44] *CLC v CLB* [2023] SGCA 10 at [49]

donee spouse to the other spouse and similarly excluded from the MA; or (c) having entirely lost its character as a gift and included in the MA.[45]

26. Finally, the CA also analysed the case of *Chen Siew Hwee v Low Kee Guan (Wong Yong Yee, co-respondent)* [2006] 4 SLR(R) 605 ("***Chen***") and concluded that there are two aspects that must be examined in determining whether an asset acquired by gift or inheritance has retained its character as such:

    a) Whether the new asset is traceable to the assets constituting the original gift; and
    b) If traceable, whether the donee spouse evinced a real and unambiguous intention for the new asset to constitute part of the MA pool.[46]

27. The CA then discussed the cases of *AAE v AAF* [2009] 3 SLR(R) 827 ("***AAE***") and the more recent *TQU v TQT* [2020] SGCA 8 ("***TQU***"). The courts in both those cases cited *Chen* in their decisions when they referred to the facts of the cases in evincing a clear intention on the part of the donee spouse to bring a gift or inheritance into the pool of MA.[47]

28. Hence, the CA concluded that it is not inconsistent with s 112 WC for the courts to give effect to an intention by the donee spouse to bring an asset into the family estate as it is a matter of applying ordinary property law principles.[48]

VIII. Requirement of tracing asset to one acquired by gift or inheritance

29. The CA stated that tracing is a matter of evidence and that the BOP is on the party asserting that an asset that has been acquired by gift or inheritance is *not* part of the MA.

30. The CA agreed with the wife's argument that the test for tracing in *Lee Yong Chuan Edwin v Tan Soan Lian* [2000] 3 SLR(R) 867 ("***Lee***") of whether the "true nature of the gift remains intact", should continue to apply.[49]

[45] *CLC v CLB* [2023] SGCA 10 at [51]
[46] *CLC v CLB* [2023] SGCA 10 at [62]
[47] *CLC v CLB* [2023] SGCA 10 at [63]
[48] *CLC v CLB* [2023] SGCA 10 at [64]
[49] *CLC v CLB* [2023] SGCA 10 at [71]

IX. Conclusion

31. The CA concluded that the Disputed Assets and ABA were part of the MA pool since the husband had evinced a "clear and unambiguous intention"[50] to treat the Disputed Assets and ABA as part of the MP. This finding was based on a series of correspondence between the husband and wife by way of email and WhatsApp messages, where the husband mentioned that the assets he inherited as gifts and inheritance were part of the couple's collective wealth rather than individual wealth.[51] The husband depositing part of the Shares Money into a joint UOB account that was independently operable by the wife[52] also gave rise to the presumption that he intended the Shares Money to be part of the family estate.

32. Applying the structured approach set out in *ANJ v ANK* [2015] 4 SLR 1043, the ratio of direct contributions was found to be 57:43 in favour of the husband, whereas the ratio of indirect contributions was found to be 55:45 in favour of the wife. The final ratio worked out to be 50:50 and the pool of MA valued at S$12,670,096.88 was divided equally between both parties.[53]

33. *CLC* is a significant case which illustrates how spousal intentions can transform gifts and inheritance into MAs to be included into the MP (despite the fact that the wording of s 112 WC does not expressly provide for it). The judgment embodies a bold purposive interpretation of s 112 WC which will serve as a precedent for similar future cases where spousal intentions *vis-à-vis* MAs are called into question.

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[50] *CLC v CLB* [2023] SGCA 10 at [1]
[51] *CLC v CLB* [2023] SGCA 10 at [88] – [90]
[52] *CLC v CLB* [2023] SGCA 10 at [91]
[53] *CLC v CLB* [2023] SGCA 10 at [98]

Article

Duty of Directors to Consider the Interests of Creditors

Foo Kian Beng v OP3 International Pte Ltd (in liquidation) [2024] 1 SLR 361

I. Introduction

1. The circumstances under which directors of companies should consider the interests of creditors was recently considered in the Singapore Court of Appeal case of *Foo Kian Beng v OP3 International Pte Ltd (in liquidation)* [2024] 1 SLR 361. In that case, the Singapore Court of Appeal set out a detailed framework that provides useful guidance in this complex area of law.

2. The Court of Appeal referred to the duty of directors to consider the interests of creditors in certain circumstances as the "Creditor Duty".[1] The Court of Appeal emphasized that "the Creditor Duty is a fiduciary duty that directors owe to the *company*...".[2] The Court of Appeal stated that the Creditor Duty is not one that the directors owe directly to creditors and therefore, creditors cannot sue directors for breach of the Creditor Duty. The Court of Appeal stated that "the proper plaintiff in an action for breach of the Creditor Duty is presumptively the company."[3]

II. The Rationale for the Creditor Duty

3. The Court of Appeal considered the rationale for the Creditor Duty, which lay "in the shift in who may be said to be the main economic stakeholder of the company as the company approaches insolvency".[4] The Court of Appeal further elaborated on the rationale for the Creditor Duty, as follows:

> ...whereas shareholders are the primary bearers of the risk of loss arising from the manner in which directors exercise their powers when the company is

[1] *Foo Kian Beng v OP3 International Pte Ltd (in liquidation)* [2024] 1 SLR 361 at [4]
[2] *Foo Kian Beng v OP3 International Pte Ltd (in liquidation)* [2024] 1 SLR 361 at [60]
[3] *Foo Kian Beng v OP3 International Pte Ltd (in liquidation)* [2024] 1 SLR 361 at [60]
[4] *Foo Kian Beng v OP3 International Pte Ltd (in liquidation)* [2024] 1 SLR 361 at [72]

> solvent…, creditors displace them from this position when the company is insolvent because an insolvent company effectively trades and conducts its business with its creditors' money… And even as creditors bear the risks of continued corporate trading in such a situation, they generally have no control over the conduct of the company's business… There is consequently a need to constrain directors from externalising the risks of continued trading onto creditors, bearing in mind that shareholders usually have nothing to lose and everything to gain, and creditors, contrastingly, have everything to lose and nothing to gain by the continued trading of a company which is on the cusp of insolvency… In essence, the law responds to the misalignment of incentives between those running the company and those bearing the consequences of actions undertaken by a financially distressed company by enjoining directors of such firms to take corporate decisions with the interests of creditors in mind. [5]

III. Legal Framework for the Creditor Duty

4. In establishing a framework in relation to the Creditor Duty, the Court of Appeal categorized three financial stages that a company might be in at the time that the relevant transaction was entered into, or that was likely to arise as a result of the company entering into the relevant transaction.

5. Category One is "where all things, including the contemplated transaction, having been considered, the company is solvent and able to discharge its debts."[6] In such circumstances, the Court of Appeal observed that "a director typically does not need to do anything more than act in the best interests of the shareholders to comply with his fiduciary duty to act in the best interests of the company…. In short, the Creditor Duty does not arise as a discrete consideration in these circumstances." However, the Court of Appeal emphasized that "acts that a director undertakes to defraud creditors will suffice to ground a breach of his duty to act in the best interests of the company even at this juncture."[7]

[5] *Foo Kian Beng v OP3 International Pte Ltd (in liquidation)* [2024] 1 SLR 361 at [72]
[6] *Foo Kian Beng v OP3 International Pte Ltd (in liquidation)* [2024] 1 SLR 361 at [105]
[7] *Foo Kian Beng v OP3 International Pte Ltd (in liquidation)* [2024] 1 SLR 361 at [106]

6. Category Two is "where a company is imminently likely to be unable to discharge its debts."[8] The court noted that this category included cases "where a director ought reasonably to apprehend that the contemplated transaction is going to render it imminently likely that the company will not be able to discharge its debts"[9]. The Court of Appeal observed that it was "no excuse for a director to claim that he did not appreciate how dire the company's financial state was if he ought reasonably to have done so."[10]

7. The Court of Appeal stated that in Category Two, "the court will scrutinise the subjective bona fides of the director with reference to the potential benefits and risks that the relevant transaction might bring to the company."[11] The Court of Appeal added that it would be "slow to second-guess the honest, good faith commercial decisions made by a director to afford the company the best possible chances of revitalising its fortunes"[12]. The Court of Appeal went on to observe that "if a director considers in good faith that he can and should take action to promote the continued viability of the company, and that there is a way out of the company's financial difficulties which will benefit shareholders and creditors, he is not obliged to treat creditors' interests as the exclusive or primary determining factor in determining what the company should do next."[13]

8. Conversely, the Court of Appeal observed that transactions undertaken at the Category Two stage which appeared to exclusively benefit shareholders or directors would attract heightened scrutiny.[14]

9. Category Three is "where corporate insolvency proceedings are inevitable."[15] The Court of Appeal observed that at Category Three, "there is a clear shift in the economic interests in the company (from the shareholders to the creditors as the main economic stakeholders of the company) because the assets of the company at this stage would be insufficient to satisfy the claims of creditors."[16] The Court of Appeal noted that in liquidation in such circumstances, the shareholders as residual claimants would recover little or nothing. Therefore, the Creditor Duty at this stage prohibited directors "from authorising corporate

[8] *Foo Kian Beng v OP3 International Pte Ltd (in liquidation)* [2024] 1 SLR 361 at [105]
[9] *Foo Kian Beng v OP3 International Pte Ltd (in liquidation)* [2024] 1 SLR 361 at [105]
[10] *Foo Kian Beng v OP3 International Pte Ltd. (in liquidation)* [2024] 1 SLR 361 at [105]
[11] *Foo Kian Beng v OP3 International Pte Ltd. (in liquidation)* [2024] 1 SLR 361 at [106]
[12] *Foo Kian Beng v OP3 International Pte Ltd (in liquidation)*[2024] 1 SLR 361 at [106]
[13] *Foo Kian Beng v OP3 International Pte Ltd. (in liquidation)* [2024] 1 SLR 361 at [106]
[14] *Foo Kian Beng v OP3 International Pte Ltd. (in liquidation)* [2024] 1 SLR 361 at [106]
[15] *Foo Kian Beng v OP3 International Pte Ltd. (in liquidation)* [2024] 1 SLR 361 at [105]
[16] *Foo Kian Beng v OP3 International Pte Ltd. (in liquidation)* [2024] 1 SLR 361 at [106]

transactions that have the exclusive effect of benefiting shareholders or themselves at the expense of the company's creditors, such as the payment of dividends."[17]

IV. Conclusion

10. It has been observed that "creditors' interests potentially impacting directors' duties during the "twilight zone" of insolvency has been a subject of interest."[18] The legal framework for the Creditor Duty as set out by the Court of Appeal in *Foo Kian Beng v OP3 International Pte Ltd* [2024] 1 SLR 361 thus provides welcome guidance and clarity in this commercially significant area of law.

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[17] *Foo Kian Beng v OP3 International Pte Ltd (in liquidation)* [2024] 1 SLR 361 at [106]
[18] P.S. De Carvalho & B.V. Reddy, "Credit where credit's due: The Supreme Court take on director's duties and creditors' interests." CLJ 2023, 82(1), 17-20

Explainer

Explainer: How is mental illness relevant in criminal law?

SINGAPORE — Recently, a man wielding a sword allegedly attacked some cars and a pedestrian along Buangkok Crescent. He has since been charged and remanded for psychiatric observation.

This means that he is held in a psychiatric institution so that doctors can determine whether he is of sound mind and capable of making his defence against the charge.

This is not uncommon. For example, Phoon Chiu Yoke, known as the “badge lady” because she refused to wear masks and demanded to see a Safe Distancing Ambassador’s badge, was also remanded for psychiatric observation last year.

In such cases, it is important for the court to establish whether the accused is mentally sound because it may affect either conviction, whether the accused is guilty of the offence, or sentencing, determining the severity of a guilty offender’s punishment.

It is a misconception of popular culture that “pleading insanity” allows an offender to get off scot-free.

WHAT HAPPENS WHEN AN ACCUSED PERSON IS SUSPECTED OF MENTAL ILLNESS?

If an accused person displays signs of mental illness, whether this be waving a sword around or making bizarre allegations, it is the court’s duty, under the Criminal Procedure Code, to investigate whether the accused is of sound mind.

This can happen in two ways. First, the prosecution may apply to the court for the accused to be remanded for psychiatric observation.

Second, even if the prosecution does not raise the issue, if the judge is not satisfied that the accused is capable of defending himself, the judge must postpone the proceedings and order the accused remanded for psychiatric observation.

In either case, the period of remand cannot exceed one month.

After the observation period, a medical report will be provided to the court, stating the doctor's conclusions and diagnoses, if any.

The court then makes the final decision. The accused may be found to be of sound mind, in which case court proceedings will resume, or of unsound mind and incapable of making his defence, in which case court proceedings may be stayed — which means put on hold.

To be found to be of "sound mind" does not mean that the accused does not have a mental condition.

It is merely an assessment of the accused's fitness to stand trial — the accused may have a mental condition but it may not be sufficiently serious or of such a nature that it prevents the accused from defending himself.

HOW IS MENTAL ILLNESS RELEVANT TO CONVICTION?

If the accused is capable of defending himself, any mental condition he has may nonetheless be relevant to conviction.

First, the mental condition could mean that the mental element of the offence is not satisfied. Every offence is made up of "elements" — things that the prosecution need to prove for the accused to be found guilty and convicted.

Generally, there are both physical and mental elements to an offence. The physical element refers to what the accused did. For example, in a murder charge, killing the victim.

The mental element refers to the accused's state of mind at the time the physical element occurred. For example, in a murder charge, the prosecution may need to prove that the accused intended to kill the victim.

If the accused has a mental condition that prevents him from being able to properly form intention, the mental element of the charge would not be made out and he would be acquitted.

Other common mental elements include whether the accused had knowledge of certain facts, or was rash, reckless or negligent.

Which mental element is required is defined by the offence in question. A mental condition that prevents that accused from being able to form the relevant mental element would result in an acquittal.

An extreme version of this is “automatism”: The accused was literally unable to control his actions or was unaware of what he was doing.

For example, if an epileptic lashes out during a fit and hits someone. This is however very rare.

Second, there is a defence of insanity in the Penal Code.

The accused may prove, on the balance of probabilities, that he is of unsound mind. If he does so, he will be acquitted.

This defence is only available where the accused is (i) incapable of knowing the nature of the act, (ii) incapable of knowing what he is doing is wrong or (iii) completely deprived of any power to control his actions.

Insanity is rarely invoked, contrary to popular culture.

Under the Criminal Procedure Code, if an accused person committed the offence but is acquitted only because of insanity, he will be confined in a psychiatric institution, prison or other safe place “during the President’s pleasure” — which means for an indefinite duration.

This may be worse for the offender than if he were simply sentenced to a fixed term of imprisonment.

Third, for murder charges only, there is a special exception for persons with “diminished responsibility”: Where the offender has an abnormality of mind that substantially impairs his capacity to understand the nature of his acts or whether such acts were wrong, or impairs his power to control his acts.

In such situations, the offender is not entitled to an acquittal, but the charge is downgraded from murder to culpable homicide — meaning the offender is no longer eligible for the death penalty.

For example, in the case of Ahmed Salim, the defence tried to establish diminished responsibility so that the accused could avoid execution.

The accused was convicted of murdering his Indonesian girlfriend in 2018. He had adjustment disorder, which is a recognised mental disorder, but the key issue was whether the disorder substantially impaired his mental responsibility for the killing.

On appeal, the court found that it did not and the sentence of mandatory death penalty was upheld.

HOW IS MENTAL ILLNESS RELEVANT TO SENTENCING?

A mental condition may not affect conviction at all, if it has no bearing on the offender's ability to form the required mental element. It may, however, be relevant to sentencing.

The severity of an offender's sentence is determined primarily by the harm caused by the offence and the offender's culpability (how responsible he can be held for his offending).

Some mental conditions, like kleptomania (the recurrent urge to steal), may not affect conviction but may reduce the offender's culpability, thus reducing his sentence.

This is what happened in the case of Goh Lee Yin, a serial shoplifter who suffered from kleptomania. The courts took her condition into account and sentenced her to probation for her first few offences of shoplifting.

Not all mental conditions automatically reduce culpability. There must be some contributory or causal link with the offending conduct.

If the mental condition does not have any relationship to the offending, it does not reduce the offender's culpability and therefore is irrelevant to sentencing.

For example, kleptomania is likely to be a relevant factor if the accused is charged with theft, but unlikely to be relevant if the accused is charged with murder.

The mental capacity of an accused person is therefore a key issue and this is why courts are willing to put proceedings on hold until an accused person suspected of mental issues can be properly examined by medical experts.

It is a matter of fundamental fairness that people are punished only for that for which they are responsible.

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