

RESULTING AND CONSTRUCTIVE TRUSTS OVER PUBLIC HOUSING—RECENT DEVELOPMENTS AND THE WAY FORWARD

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Inherent in any public housing system which seeks to provide subsidised housing for sale is the need to impose restrictions on ownership and alienation in order to prevent abuse by those who would seek to exploit those subsidies for profit. In Singapore, section 51(10) of the Housing and Development Act restricts the operation of resulting and constructive trusts over property sold by the Housing and Development Board (“HDB”). It has been accepted since the 2009 decision of *Tan Chui Lian v Neo Liew Eng* that under this provision, a person “ineligible” to acquire an interest in a HDB flat may not become entitled to a flat under a resulting or constructive trust. However, recent cases have questioned the focus on eligibility and cast doubt on the effect of section 51(10) on the underlying trust. This article examines these developments and proposes a framework for the reconciliation of common law equitable doctrines with the provisions of the Housing and Development Act.

I. INTRODUCTION

Public housing regimes aim to make public housing available to the general population at a subsidised rate in the pursuit of broader social objectives. The Housing Development Board (“HDB”) began offering public housing flats for sale in 1964 with the intention of making Singaporeans an “asset-owning class, with a stake in the nation’s prosperity”,¹ and to “encourage a property-owning democracy in Singapore”.² In Hong Kong, it has been said that the “underlying objectives” of the Home Ownership Scheme (“HOS”) (which is comparable to the HDB programme in Singapore) are to “enhance social stability by inculcating a sense of belonging, by improving the quality of living and by promoting formation of assets”.³

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¹ Housing and Development Board, *HDB Annual Report 2013/2014*, online: Housing and Development Board <<https://www20.hdb.gov.sg/fi10/fi10320p.nsf/ar2014/home-ownership.html>> [*HDB Annual Report 2013/14*].

² See Tan Sook Yee, *Private Ownership of Public Housing in Singapore* (Singapore: Times Academic Press, 1998) at 13 [Tan, *Private Ownership of Public Housing*]; Tan Sook Yee, Tang Hang Wu & Kelvin Low, *Tan Sook Yee’s Principles of Singapore Land Law*, 4th ed (Singapore: LexisNexis, 2019) at para 24.9 [Tan, Tang & Low, *Principles of Singapore Land Law*].

³ Malcom Merry, “Family Arrangements, Constructive Trusts, and the Home Ownership Scheme” (2014) 44 Hong Kong LJ 391 at 391, 392.



Given that public housing flats are offered subject to significant pricing subsidies, it is inevitable that restrictions must be imposed to prevent them from being exploited as vehicles for profit outside the objectives of the scheme. This raises the issue of whether, and to what extent, such restrictions displace the ordinary equitable doctrines of resulting and constructive trusts that would otherwise separate the legal and beneficial entitlement to those flats. In Hong Kong, for example, section 17B of the *Housing Ordinance*⁴ (“*HK Housing Ordinance*”) provides that if the purchaser of a Home Ownership Scheme (“HOS”) flat purports to mortgage, charge, assign or “otherwise alienate” the flat in breach of certain terms,⁵ such mortgage, charge, assignment or other alienation shall be void. There, however, case law has established that resulting and constructive trusts are able to co-exist alongside this legislative regime. The Hong Kong Court of Final Appeal held in *Cheuk Shu Yin v Yip So Wan*⁶ that the prohibition on “alienations” in section 17B did not prevent a purchase price resulting trust from arising, because an “alienation” required some positive act by the owner which had the effect of transferring or divesting his rights and interests in the flat.⁷

The position in Singapore is less settled. Until very recently, sections 51(8)–(10) of the *Housing and Development Act*⁸ (“HDA 2004”) set out the following restrictions on the operation of resulting and constructive trusts over property sold by the HDB:

Property not to be used as security or attached, etc., and no trust in respect thereof to be created without approval of Board

51.—

(8) No trust in respect of any protected property shall be created by the owner thereof without the prior written approval of the Board.

(9) Every trust which purports to be created in respect of any protected property without the prior written approval of the Board shall be null and void.

(10) 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.

With effect from 31 December 2021, these provisions were re-numbered sections 58(8)–(11) of the *Housing and Development Act 1959*⁹ (“HDA 2021”) and their

⁴ (Cap 283, 1973 Hong Kong) [*HK Housing Ordinance*].

⁵ The relevant terms are found in the Schedule to the *HK Housing Ordinance* and include a requirement that a period of 5 years must have elapsed since the original purchase of the flat from the Housing Authority: see *ibid*, the Schedule, para 1(a)(i).

⁶ [2013] 1 HKLRD 656 [*Cheuk Shu Yin*].

⁷ See *ibid* at paras 7, 8. For further discussion, see Malcolm Merry, “Family Arrangements, Constructive Trusts, and the Home Ownership Scheme” (2014) 44 Hong Kong LJ 391 and Alice Lee & Phoebe Woo, “Discrepancy between legal approaches and policy goals: A case study of subsidized housing in Hong Kong” in Nestor M Davidson & Geeta Tewari, *Global Perspectives in Urban Law: The Legal Power of Cities* (New York: Routledge, 2019).

⁸ (Cap 129, 2004 Rev Ed Sing) [*HDA 2004*].

⁹ (2020 Rev Ed Sing) [*HDA 2021*].



wording amended as part of a universal revision to Singapore's Acts of Parliament. The material provisions now read as follows:

Property not to be used as security or attached, etc., and no trust in respect thereof to be created without approval of Board

58.—

(9) No trust in respect of any protected property may be created by the owner thereof without the prior written approval of the Board.

(10) Every trust which purports to be created in respect of any protected property without the prior written approval of the Board is void.

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

This revision was not intended to, and could not, change the meaning of the original legislation: section 4(1) of the *Revised Edition of the Laws Act 1983*,¹⁰ pursuant to which the 2021 amendments were made, provides that the power of the commissioners to prepare revised editions does not include the power to change the meaning of any Act.¹¹ Given that the key cases discussed below all make reference to the *HDA 2004*, and turn on the precise wording used in that edition, this article continues to refer to the legislative numbering and wording used in the *HDA 2004*, save where otherwise stated.

Sections 51(8)–(10) of the *HDA 2004* contain two distinct restrictions over the operation of resulting and constructive trusts. First, where a resulting or constructive trust over HDB property can be said to have been “created”, it is caught by the prohibition in section 51(8) and is rendered null and void by section 51(9). This was established in *Cheong Yoke Kuen v Cheong Kwok Kiong*¹² (“*Cheong Yoke Kuen*”), where a HDB flat-owner had transferred his interest in the flat to another person but claimed that he had intended to retain a beneficial interest. While such a transfer would normally give rise to a resulting trust in equity, the Court of Appeal held that the trust would have been “created” by his actions and it therefore fell afoul of the predecessor provisions to sections 51(8) and (9) of the *HDA 2004*.¹³ It is, however, not always possible to describe a resulting or constructive trust as having been “created by the owner” of a HDB flat. Thus, some cases following *Cheong Yoke Kuen* have resisted applying sections 51(8) and (9) to purchase price resulting trusts¹⁴ and common intention construction trusts on the basis that such trusts are not “created” for the purposes of sections 51(8) and (9), but instead arise by operation of law.¹⁵

¹⁰ (2020 Rev Ed Sing).

¹¹ See also *Parliamentary Debates Singapore, Official Report*, vol 95 (5 January 2021), where Second Minister for Law Edwin Tong stated that “[i]n preparing a revised edition, the Commissioners can modernise and simplify the language of an Act or subsidiary legislation, provided that they do not change the meaning”.

¹² [1999] 1 SLR(R) 1126 (CA) [*Cheong Yoke Kuen*].

¹³ *Ibid* at paras 14, 21, 23.

¹⁴ See *Sitiawah Bee bte Kader v Rosiyah bte Abdullah* [1999] 3 SLR(R) 606 (HC) and *Neo Boh Tan v Ng Kim Whatt* [2000] SGHC 31.

¹⁵ *Cheong Yoke Kuen*, *supra* note 12 at para 17; *Tan Poh Soon v Phua Sin Yin* [1995] 2 SLR(R) 583 (HC). This position was endorsed in Tang Hang Wu, “Housing and Development Board Flats, Trust and Other



The position in Singapore under these subsections resembles that in Hong Kong; the same conclusion would probably be reached there on the basis that a transfer like the one in *Cheong Yoke Kuen* is a positive act of the sort that would constitute an “alienation” for the purposes of section 17B of the Housing Ordinance.

The second restriction is found in section 51(10), which deals directly with resulting and constructive trusts. No equivalent provision exists in the Hong Kong Housing Ordinance. This article focuses on the operation of this subsection, which is presently fraught with uncertainty. This uncertainty arises in two areas: first, when the subsection applies, and second, what effect it has on the underlying trust. As to the question of applicability, the conventional position since the 2007 decision of *Tan Chui Lian v Neo Liew Eng*¹⁶ (“*Tan Chui Lian*”) was that section 51(10) only prevents persons who are *ineligible* to hold the relevant HDB property from acquiring an interest under a constructive or resulting trust (referred to below as the “eligibility test”). But a number of recent decisions have challenged this position, taking the view that section 51(10) applies to any person who was not originally a registered owner of the disputed HDB property (regardless of eligibility).¹⁷ As to the second question relating to the effect of section 51(10), it has been recently held that the subsection does not bar a constructive trust from arising; rather, it only bars the granting of a remedy which would give the beneficiary ownership of, or an interest in, the HDB property.¹⁸ This allows the court, in an appropriate case, to order the property to be sold and the proceeds divided in the relevant proportions.¹⁹ It nevertheless remains unclear when the court is able to make such an order.²⁰

Given the ubiquity of public housing in Singapore, it is unfortunate that so much confusion remains over the operation of this subsection. It was observed by Sundaresh Menon JC in *Tan Chui Lian* itself that the proceedings before him were of “practical importance to many in this country”.²¹ The lack of clarity over when section 51(10) applies, and what its consequences are, makes it difficult for legal advisers to advise clients on their rights and in consequence is also likely to inflate costs in litigation. In addition, there has been little academic commentary on the operation of this section since Professor Tang Hang Wu authored an article titled “Housing And Development Board Flats, Trust And Other Equitable Doctrines” in 2012.²² This article seeks to review the intervening developments in the law, and explore in detail the two aspects of uncertainty surrounding the operation of section 51(10) highlighted in the previous paragraph. To this end, Part II will trace the genesis of the eligibility test and set out its rationale before discussing the recent challenges to its orthodoxy. It will argue that the better view is that the eligibility test should not be applied because it cannot be reconciled with the plain wording of

Equitable Doctrines” (2012) 24 Sing Ac LJ 470 at para 38 [Tang, “Housing and Development Board Flats”].

¹⁶ [2007] 1 SLR(R) 265 (HC) [*Tan Chui Lian*].

¹⁷ See *Ong Chai Koon and others v Ong Chai Soon* [2021] SGHC 76 at para 148 [*Ong Chai Koon*] and the discussion in Parts II and III below.

¹⁸ *Ong Chai Koon*, *ibid* at para 160.

¹⁹ *Ibid* at para 164.

²⁰ See the discussion in Part IV below.

²¹ *Tan Chui Lian*, *supra* note 16 at para 1.

²² Tang, “Housing and Development Board Flats”, *supra* note 15.



section 51(10). Nevertheless, given that the eligibility test prevails at present, Part III will examine a number of difficulties with the application of the eligibility test as it stands. Part IV then turns to address the important questions surrounding the effect of section 51(10) and argues that the recent view that section 51(10) does not render a resulting or constructive trust void should be preferred. It is hoped that the discussion in this article will identify and clarify the issues that must be addressed, which should be of particular interest to practitioners advising on disputes over HDB flats.

II. THE ELIGIBILITY TEST

A. *The Genesis of the Eligibility Test*

The eligibility test was introduced by Sundaresh Menon JC in 2007 in *Tan Chui Lian*. The facts of this case are straightforward. The plaintiff and his father held a HDB flat as tenants in common in equal shares. In his will, the father bequeathed his share of the flat to the defendant, who was his wife and the plaintiff's stepmother. Upon the father's death, the plaintiff claimed that he had contributed more than 50% of the purchase price and renovation expenses for the flat, and that a resulting trust arose in his favour in the relevant proportions. The evidence showed that the plaintiff had indeed made those contributions. The issue therefore was whether the then-section 51(6) of the *HDA 2004*²³ (the predecessor provision of section 51(10)) barred the resulting trust from arising.

Sundaresh Menon JC held that it did not. In his view, the subsection applied only where the person claiming an interest in HDB property under a resulting or constructive trust would "otherwise have been ineligible to acquire such an interest". The key passage is worth reproducing in full:

10 ... Parliament's intention was not to prevent any interest in an HDB flat arising under a resulting trust or a constructive trust regardless of the circumstances, but rather to prevent any entitlement to own an HDB flat arising in favour of a person by virtue of the law implying a resulting or constructive trust, *where that person would otherwise have been ineligible to acquire such an interest*. In my judgment, having regard to the mischief underlying the section, *the provision was not intended to have any application where the parties concerned were already entitled to some interest in the property and therefore no issue could arise as to their eligibility to such entitlement*. In such circumstances, the parties concerned would not be claiming to become entitled to own an interest in the flat by virtue of the implied trust and there would be no concern of their bypassing the eligibility criteria set by the HDB from time to time.²⁴

On the facts before him, there was no suggestion that the plaintiff was not eligible to own the flat. He therefore proceeded to determine the contributions made by

²³ *HDA 2004*, *supra* note 8.

²⁴ *Tan Chui Lian*, *supra* note 16 at para 10 [emphasis added].



the respective parties and ordered that the flat be sold, with the net proceeds to be divided accordingly.²⁵

A preliminary point that should be mentioned briefly is that it is worth considering how broad Menon JC intended his reasoning to be. In particular, on a close reading of *Tan Chui Lian*, it is not clear that Menon JC intended to comment on the position of persons who were eligible to acquire the interest, but did not already have an interest in the flat. As the plaintiff was already a registered co-owner of the disputed flat, there was strictly speaking no need for Menon JC to comment on the position of persons who were *not* registered co-owners. Nevertheless, *Tan Chui Lian* has been applied by subsequent decisions regardless of whether the claimant was a registered co-owner of the property at the material time.²⁶ Moreover, Sundaresh Menon CJ himself, in an *ex tempore* judgment in *Lim Kieuh Huat v Lim Teck Leng*²⁷ (“*Lim Kieuh Huat (CA)*”), noted in *obiter* that the existing authorities “hitherto focused on ineligibility as the central consideration in determining whether section 51(10) (or its equivalent in prior versions of the *HDA 2004*) precluded a claim”, citing his own judgment in *Tan Chui Lian* as authority for this proposition.²⁸ *Tan Chui Lian* can therefore safely be considered the genesis of the eligibility test.

In 2010, Parliament renumbered the subsection as section 51(10) and made slight amendments to the wording. It was nevertheless affirmed in the 2011 decision of *Koh Cheong Heng*²⁹ that the eligibility test continued to apply, because Parliament had not given any indication that it intended to change the legal position as it stood in *Tan Chui Lian*. Judith Prakash J therefore held, following *Tan Chui Lian*, that “resulting and constructive trusts are not precluded by the HDA if the beneficiary is eligible to own an HDB flat”.³⁰ Shortly thereafter, in *Low Heng Leon Andy*,³¹ Quentin Loh J reiterated the interpretation of section 51(10) set out in *Tan Chui Lian* and *Koh Cheong Heng* and proceeded on the basis that those cases set out the law.³² From 2013 to 2019, the only reported decision applying section 51(10) of the *HDA 2004* was *BWU and another v BWW and another matter*,³³ where Choo Han Teck J similarly cited *Tan Chui Lian* and stated that section 51(10) has the effect of “preventing ineligible persons from acquiring an interest in HDB flats via a resulting or constructive trust implied by law”.³⁴

²⁵ *Ibid* at para 35.

²⁶ *Koh Cheong Heng v Ho Yee Fong* [2011] 3 SLR 125 (HC) at paras 53-57 [*Koh Cheong Heng*]; *Low Heng Leon Andy v Low Kian Beng Lawrence (administrator of the estate of Tan Ah Kng, deceased)* [2013] 3 SLR 710 (HC) at paras 15-18 [*Low Heng Leon Andy*].

²⁷ [2021] 1 SLR 1328 (CA) [*Lim Kieuh Huat (CA)*].

²⁸ *Ibid* at para 13.

²⁹ *Koh Cheong Heng*, *supra* note 26.

³⁰ *Ibid* at para 57.

³¹ *Low Heng Leon Andy*, *supra* note 26.

³² *Ibid* at paras 15-19.

³³ [2019] SGHC 128 [*BWU*].

³⁴ *Ibid* at para 5.



B. *The Challenge to Orthodoxy*

Despite the widespread acceptance of the eligibility test in the cases that followed *Tan Chui Lian*, one must wonder whether it is consistent with the plain wording of section 51(10), which states that “[n]o person shall become entitled to any protected property... under any resulting trust or constructive trust”, with no reference to eligibility. This has troubled the High Court in a pair of recent cases. In *Lim Kieuh Huat v Lim Teck Leng*,³⁵ the plaintiffs (and later appellants) (the “Parents”) were the parents of the first defendant (the “Son”). A dispute arose over a HDB flat registered in the sole name of the Son, who had also provided the purchase price for the flat. The Parents contended that there was a common understanding with the Son that he would be their nominee, and that they should be regarded as having paid for the flat, because they had given him more than enough money to pay for it.³⁶ They said that the flat was only registered in the Son’s name to allow the Parents to avoid payment of a resale levy to the HDB, and for the Son to obtain a housing loan from the HDB (for which the Parents were not eligible).³⁷ The Son did not dispute this account of the facts.³⁸ It appears that this was because the Son was at the same time involved in a matrimonial dispute with his wife, in which his wife had obtained an ancillary order providing for the sale of the flat if the Son did not pay her a certain sum by a particular date.

At first instance, Andre Maniam JC held that the alleged nominee arrangement purported to create a trust over the flat (which Maniam JC seemed to regard as an express trust), and was therefore null and void pursuant to sections 51(8) and 51(9) of the *HDA 2004*.³⁹ However, even if the trust was characterised as a resulting or constructive trust, Maniam JC held that it fell afoul of section 51(10). In applying section 51(10), he observed that section 51(10) does not draw any distinction between eligible and ineligible persons,⁴⁰ and suggested that it would not merely bar ineligible owners from becoming entitled to a HDB flat under a resulting or constructive trust.⁴¹ Instead, it would prevent any person not *already* entitled to the flat from acquiring an interest under such a trust. Here, the Parents did not have any interest in the flat, and section 51(10) prohibited them from “becoming entitled” to the flat under the alleged trust.⁴² This approach represented a marked shift away from the eligibility test. Even on the conventional approach, however, the Parents were not eligible to purchase the flat (a) without payment of the resale levy; and (b) with the benefit of the HDB housing loan that had in fact been obtained.⁴³

³⁵ [2020] SGHC 181 (HC) [*Lim Kieuh Huat* (HC)]; *Lim Kieuh Huat* (CA), *supra* note 27.

³⁶ *Lim Kieuh Huat* (HC), *ibid* at para 5.

³⁷ *Ibid* at para 38.

³⁸ *Ibid* at para 41.

³⁹ Which, as set out above, provide that “[n]o trust in respect of any protected property shall be created by the owner thereof without the prior written approval of the Board” and further that any trust so created shall be void. An express trust clearly falls within the prohibition.

⁴⁰ *Lim Kieuh Huat* (HC), *supra* note 35 at para 80.

⁴¹ *Ibid* at para 86.

⁴² *Ibid* at para 85.

⁴³ *Ibid* at para 86.



So, regardless of which approach was adopted, the Parents' claim was barred by section 51(10) of the *HDA 2004*.

On appeal,⁴⁴ the Court of Appeal agreed that the alleged arrangement was a nominee arrangement which would have amounted to an express trust and been rendered null and void by section 51(9) of the *HDA 2004*.⁴⁵ The Court of Appeal also agreed with Maniam JC that the Parents were not eligible to purchase the flat.⁴⁶ But the Court of Appeal expressed reservations about Maniam JC's view that section 51(10) would prevent even an otherwise eligible owner from obtaining an interest under the trust if that person did not already have an interest in the flat in question, saying that this might "go further" than the existing authorities, which had hitherto focused on ineligibility.⁴⁷ Given the Court of Appeal's views on the Parents' ineligibility, it was not necessary to determine this question, and they did not do so.

Following the Court of Appeal decision in *Lim Kieuh Huat (CA)*, one might have thought that Maniam JC's observations were an aberration in an otherwise settled area of law. But soon afterwards, his views were endorsed by Ang Cheng Hock J in *Ong Chai Koon v Ong Chai Soon*⁴⁸ ("*Ong Chai Koon*"). This case concerned a dispute over a HDB shophouse registered in the name of the defendant, the oldest son of six siblings. His siblings, who were the plaintiffs in the action, contended that the conduct of the parties over the years demonstrated a common intention that the shophouse was intended to be their retirement fund. On the facts, Ang J found that the parties had shared a common intention that they would have equal beneficial shares in the shophouse and its sales proceeds.⁴⁹ The plaintiffs therefore successfully established a common intention constructive trust over the shophouse,⁵⁰ and the issue was whether section 51(10) of the *HDA 2004* nevertheless barred them from relief.

Ang J observed that two broad approaches had emerged from the case law,⁵¹ the first being the eligibility test (which he noted was the predominant approach adopted in the cases, and had been recently approved in *obiter* by the Court of Appeal in *Lim Kieuh Huat (CA)*) and the second being Andre Maniam JC's approach in *Lim Kieuh Huat (HC)*. Although Ang J declined to decide which approach should apply, he was tentatively inclined to agree with the approach adopted in *Lim Kieuh Huat (HC)*. He nevertheless proceeded to consider the appropriate outcome on both approaches. On the first approach, despite a paucity of evidence as to whether the eligibility test was satisfied, Ang J held that it appeared to be common ground between the parties that the plaintiffs were eligible, and section 51(10) therefore would not bar the plaintiffs' claim to be entitled to the shophouse.⁵² As for the second approach, given that the plaintiffs were not registered owners of the shophouse, section 51(10) would bar

⁴⁴ *Lim Kieuh Huat (CA)*, *supra* note 27.

⁴⁵ *Ibid* at para 11.

⁴⁶ *Ibid* at para 14.

⁴⁷ *Ibid* at para 13.

⁴⁸ [2021] SGHC 76 [*Ong Chai Koon*].

⁴⁹ See *ibid* at paras 87-108.

⁵⁰ *Ibid* at para 108.

⁵¹ *Ibid* at para 146.

⁵² *Ibid* at para 158.



the plaintiffs from becoming entitled to a beneficial interest in the shophouse.⁵³ Yet, as will be discussed in more detail below,⁵⁴ Ang J held that section 51(10) did not render the constructive trust void, with the consequence that he was therefore able to order the shophouse to be sold, with the proceeds divided among the parties in the relevant proportions.⁵⁵

C. Evaluating the Eligibility Test

As is evident from the foregoing, the question of how section 51(10) of the *HDA 2004* should be interpreted has recently been reopened by *Lim Kieuh Huat (HC)* and *Ong Chai Koon*. The correct approach has not been definitively settled in the courts. Indeed, in the very recent decision of *Lim Choo Hin v Lim Sai Ing Peggy*,⁵⁶ the Appellate Division of the High Court noted the conflicting High Court decisions of *Tan Chui Lian* and *Lim Kieuh Huat* but made no comment on which approach was preferable as it was not necessary to do so.⁵⁷ In this article, it is submitted that the preferable approach is that set out in *Lim Kieuh Huat (HC)* and *Ong Chai Koon*, under which section 51(10) bars any person who did not have an interest in the HDB property at the relevant time from acquiring an interest in the flat under a resulting or constructive trust. This follows from the plain wording of the section. It should be noted here that while this conclusion may appear to operate harshly in some cases, a finding that section 51(10) applies does not necessarily mean that the claimant will be without remedy. This depends on the effect that section 51(10) has, discussed in Part IV below. For now, we confine ourselves to a discussion of whether the eligibility test should continue to apply.

The strongest arguments in favour of the eligibility test were set out by Menon JC in *Tan Chui Lian*. The first prong of his argument was that his interpretation was consistent with both the plain wording of the statute and with Parliament's intention. As will be recalled, section 51(10) provides that no person shall "become entitled" to any flat under any resulting or constructive trust.⁵⁸ In Menon JC's view, Parliament did not by these words intend to impose a blanket prohibition on resulting or constructive trusts over HDB flats. Had Parliament intended that result, it could have used a simpler formulation, such as by saying that no person shall "be entitled to any interest in", or shall "acquire any interest in" a flat.⁵⁹ Instead, Parliament only intended to "prevent any entitlement to own an HDB flat arising in favour of a person by virtue of the law implying a resulting or constructive trust, where that person would otherwise have been ineligible to acquire

⁵³ *Ibid* at para 159.

⁵⁴ See Part VI below.

⁵⁵ *Ong Chai Koon*, *supra* note 48 at para 191.

⁵⁶ [2021] SGHC(A) 22 [*Lim Choo Hin*].

⁵⁷ In this case, the party in question had already possessed an interest in the flat before the relevant transfer, and therefore on either approach he would not be barred from acquiring an interest: *ibid* at para 28.

⁵⁸ Section 58(11) of the *HDA 2021* now states that no person "is entitled" to any HDB flat under any resulting trust or constructive trust. This does not reduce the force of Menon J's reasoning because, as explained above, the 2021 amendments do not affect the meaning of the provision.

⁵⁹ *Tan Chui Lian*, *supra* note 16 at para 11.



such an interest”.⁶⁰ Further, Menon JC concluded (by reference to the Ministerial Statement read at the second reading of the Bill) that this interpretation accorded with Parliament’s intention.⁶¹

This article respectfully differs from Menon JC and submits that the eligibility test cannot be reconciled with the plain wording of the provision. As Ang J stated in *Ong Chai Koon*, a modern interpretation of section 51(10) must follow the principles set out in *Tan Cheng Bock v Attorney-General*.⁶² The first step in that framework is to “ascertain the possible interpretations of the provision, having regard not just to the text of the provision but also to the context of that provision within the written law as a whole”.⁶³ The question (which Menon JC did not directly address in *Tan Chui Lian*) that must be asked is this: Is it possible to interpret section 51(10) as saying that a person who is eligible to own a HDB flat, but presently does not have any interest in the relevant flat, is not barred from acquiring an interest in that flat under a resulting or a constructive trust?

Ang J in *Ong Chai Koon* was of the view that such an interpretation is not tenable, and this author agrees. As Ang J correctly pointed out, section 51(10) applies unless the person claiming an interest is *already* “entitled to” the HDB flat. If not, the claimant will necessarily *become* entitled to the flat under the alleged resulting or constructive trust. It follows that the question is what it means to be “entitled to” a flat. The answer to this question must be that it means an entitlement to some recognised proprietary interest, not merely being eligible to purchase a flat. This is for several reasons. First, as a matter of substantive rights, entitlement and eligibility cannot be elided. In terms of Hohfeldian power-relations,⁶⁴ entitlement brings with it the rights, powers and privileges of a proprietary interest, while eligibility should probably be understood as a flat-owner’s immunity from any sanctions on the basis that they do not comply with the HDB’s prevailing conditions. Second, as a matter of plain meaning, the phrase “entitled to” must have a subject. One can be entitled to *purchase* a flat, or entitled to *become an owner* of a flat. But where the subject is the relevant property itself, “entitled to” must mean an entitlement to a property right in the flat. So, Jowitt’s Dictionary of English Law states that a person is “said to be entitled to property when he has a right to it”.⁶⁵ The words “become entitled to any protected property” in section 51(10) must therefore refer to a proprietary interest in the property, not just an entitlement to *acquire* such an interest. Third, the distinction between entitlement and eligibility is supported by the context of section 51(10) within the *HDA 2004* as a whole. The *HDA 2004* deploys the term “entitled to purchase” outside of section 51(10), such as in section 47⁶⁶ and in

⁶⁰ *Ibid* at para 10.

⁶¹ *Ibid*.

⁶² [2017] 2 SLR 850 (CA) [*Tan Cheng Bock*].

⁶³ *Ibid* at para 37.

⁶⁴ See Wesley Newcomb Hohfeld, “Some Fundamental Legal Conceptions as Applied in Judicial Reasoning” (1913) 23 Yale LJ 16.

⁶⁵ See Daniel Greenberg & Klara Banaszak, *Jowitt’s Dictionary of English Law*, 5th ed (London: Thomson Reuters, 2019) *sub verbo* “entitled”.

⁶⁶ *HDA 2004*, *supra* note 8, s 47, “No person shall be entitled to purchase any flat, house or other living accommodation sold subject to the provisions of this Part if...”



section 50A.⁶⁷ This demonstrates a syntactic use of the word “entitled” to describe an entitlement to purchase, as distinct from an entitlement to the property *simpliciter*. As used in section 51(10), if the word “entitled” had been intended only to prohibit persons from becoming “entitled to *own*” flats (*ie* to become eligible), then Parliament would have said so.

Given the above, it is suggested that Menon JC’s recourse to the Ministerial Statement in *Tan Chui Lian* should be treated with caution. The situations in which extraneous material may be used are set out in section 9A(2) of the *Interpretation Act 1965*.⁶⁸ As set out in *Attorney-General v Ting Choon Meng*,⁶⁹ the effect of this provision is that extraneous material may be considered only in the following circumstances: first, to confirm that the ordinary meaning is the correct and intended meaning; second, to ascertain the meaning of the text when the provision on its face is ambiguous or obscure; or third, to ascertain the meaning of the text where, considering the underlying object and purpose of the written law, the ordinary meaning of the text is absurd or unreasonable.⁷⁰ Moreover, in determining whether extraneous material should be considered at all (or the weight to be accorded to such material), the court is to have regard to the desirability of readers being able to “rely on the ordinary meaning conveyed by the text of the provision”.⁷¹ As set out above, the plain and ordinary meaning of section 51(10) is that any person not already entitled to HDB property cannot “become entitled” to it under a resulting or constructive trust. This interpretation is neither absurd nor unreasonable in context of the underlying object and purpose of the *HDA 2004*, in light of the HDB’s stated objectives of making Singaporeans an “asset-owning class”⁷² and to “encourage a property-owning democracy in Singapore”.⁷³ One should be cautious in invoking Parliamentary intention to contradict this reading.

Another argument that Menon JC put forward in *Tan Chui Lian* in favour of the eligibility test was based on the principle that Parliament does not retrospectively displace accrued property rights without clearly stating its intention to do so. This argument requires some brief unpacking. First, Menon JC assumed that the section has retrospective effect. That seems to be correct, given the words “whenever created” at the end of the provision. Second, he considered that on his interpretation, the provision merely codified the position which had been declared in the earlier Court of Appeal decision of *Cheong Yoke Kuen v Cheong Kwok Kiong*.⁷⁴

⁶⁷ *Ibid*, s 50A, “Notwithstanding section 47, the Minister may, by order published in the Gazette, declare any body corporate established by any written law to be entitled to purchase any flat, house or other living accommodation sold subject to the provisions of this Part”.

⁶⁸ (2020 Rev Ed Sing) [*Interpretation Act 1965*].

⁶⁹ [2017] 1 SLR 373 (CA) [*Ting Choon Meng*].

⁷⁰ *Ibid* at para 65.

⁷¹ See the *Interpretation Act 1965*, *supra* note 68, s 9A(4).

⁷² *HDB Annual Report 2013/14*, *supra* note 1.

⁷³ See Tan, *Private Ownership of Public Housing*, *supra* note 2 at 13; Tang & Low, *Principles of Singapore Land Law*, *supra* note 2 at para 24.9.

⁷⁴ *Cheong Yoke Kuen*, *supra* note 12. Menon JC interpreted this decision as holding that a person could not acquire an interest in an HDB flat through a constructive or resulting trust if he was ineligible to own such a flat; precisely the construction that Menon JC gave to s 51(6).



Third, if the provision were construed otherwise, it would mean that Parliament was retrospectively displacing accrued property rights. As there was no indication that Parliament had intended to do so,⁷⁵ Menon JC argued that his interpretation was to be preferred. It may be noted that Professor Tang has agreed with this reasoning, saying that the deprivation of accrued property rights is a “grave matter that must at least be debated and seriously considered in Parliament”.⁷⁶ He also observed that when the provision was amended in 2010 to become section 51(10), there was likewise nothing in the debate which suggested that Parliament intended to deprive eligible owners of their accrued rights.⁷⁷

While this argument based on accrued rights may seem intuitively persuasive, it is submitted that it is flawed. The principle that Parliament generally does not interfere with vested rights is merely a presumption.⁷⁸ It therefore only states that Parliament “would not have removed rights pre-existing in common law *if there was no express provision or clearly evinced intention to the effect*”.⁷⁹ In this case, the question must be whether section 51(10) in fact constitutes an “express provision” or “clearly evinced intention” to prevent persons from “becoming entitled” to HDB property under resulting or constructive trusts (even on a retrospective basis). On the argument advanced in this article, the plain wording of the provision clearly bars non-owners from acquiring an entitlement to HDB flats under a trust (regardless of their eligibility to do so). When coupled with the words “whenever created or arising”, the provision reflects a clearly evinced intention to affect even pre-existing interests under resulting and constructive trusts. The presumption that Parliament does not displace accrued rights therefore does not apply.

III. THE APPLICATION OF THE ELIGIBILITY TEST

The discussion above shows that it is far from clear how section 51(10) applies. Unless and until this is definitively clarified by the Court of Appeal, litigants seeking to assert resulting or constructive trusts in HDB property will have to deal with the eligibility test in their arguments. Further, given the observations of the Court of Appeal in *Lim Kieuh Huat (CA)*,⁸⁰ the court may prefer to retain the eligibility test. However, as will be shown below, some aspects of how the eligibility test operates are prone to create confusion. The discussion in this Part aims to clarify these issues.

The confusion as to the operation of the eligibility test arises because, despite applying it on numerous occasions, the courts have yet to enunciate clear guidelines to determine whether or not a person is “eligible” to purchase a flat. The closest that the courts have come to laying down a statement of principle is in the recent decision in *Lim Kieuh Huat (CA)*, where the Court of Appeal provided the following guidance:

⁷⁵ *Tan Chui Lian*, *supra* note 16 at paras 12-15.

⁷⁶ Tang, “Housing and Development Board Flats”, *supra* note 15 at para 31.

⁷⁷ *Ibid.*

⁷⁸ See *ABU v Comptroller of Income Tax* [2015] 2 SLR 420 (CA) at para 69.

⁷⁹ *Cupid Jewels Pte Ltd v Orchard Central Pte Ltd* [2014] 2 SLR 156 (CA) at para 68 [emphasis added].

⁸⁰ *Lim Kieuh Huat (CA)*, *supra* note 27.



The concept of ‘eligibility’ is not a merely notional one. It does not turn on whether a person could conceivably apply for an HDB flat, considered abstractly. *Instead, the question must be whether the particular person could purchase the particular flat, and what conditions must be met before that purchase would be approved.* Any other view would diminish the limitations that have been clearly set out in the authorities. In the present case, the Parents were not eligible to purchase the Kim Tian Flat without paying the resale levy. If the Parents were correct in their contentions, the entire subsidy scheme operated by the HDB would fall apart, as every purchaser would be able to get around paying the resale levy by entering into such an arrangement.⁸¹

This is but a general statement of principle, and it is necessary to further break down the eligibility assessment. There are three particular aspects that merit discussion. First, at what point in time is eligibility to be assessed? Second, what conditions are relevant for the assessment of eligibility? And third, who bears the burden of proving eligibility?

A. When Should Eligibility be Assessed?

Section 51(10) bars persons from “becoming entitled” to HDB property under a resulting or constructive trust. On its natural and ordinary meaning, the section operates at the time the plaintiff purports to “become entitled”. The relevant time should therefore be the time at which the alleged resulting or constructive trust arises (be it at the time of purchase or subsequently, as with an ambulatory common intention constructive trust).⁸²

The decision of the Court of Appeal in *Lim Kieuh Huat (CA)* is consistent with this approach. It will be recalled that the appellants in this case (the Parents) were ineligible to purchase the flat without paying a resale levy imposed by the HDB on second-time buyers of HDB flats. The Court of Appeal therefore held that they were ineligible and were barred by section 51(10) from acquiring an interest in the flat. The Court of Appeal thus assessed eligibility by considering whether the Parents would be eligible to purchase the flat *at the time it was purchased* (and subject to the same conditions of purchase that were enjoyed by the defendant). The Court of Appeal did not go further to explain why eligibility was assessed at the point of purchase and not some other time, such as the time of the hearing. But the Parents’ position was that the common intention had arisen at the time of the purchase, and the alleged constructive trust would therefore have been created at that time. The decision is therefore consistent with the suggestion that eligibility is to be assessed at the time when the alleged resulting or constructive trust arises.

This approach is also consistent with decisions holding that where the plaintiff was a registered owner of the flat at all material times (from the point of purchase to the time of the hearing) there will be no difficulty in finding that the plaintiff was

⁸¹ *Ibid* at para 14 [emphasis added].

⁸² See further the framework set out in *Chan Yuen Lan v See Fong Mun* [2014] 3 SLR 1048 (CA) at para 160.



eligible. Thus, in *Tan Chui Lian*⁸³ itself, the HDB flat was purchased by the parties as joint tenants and, at the time of the hearing, was owned by them as tenants-in-common. Menon JC observed that there was “no suggestion that either party before him was ineligible or did not already have some entitlement to the flat”.⁸⁴ Similarly, in *Koh Cheong Heng*,⁸⁵ the plaintiff had purchased the flat as sole owner. The plaintiff subsequently transferred the flat into his and his wife’s joint names as a gift. This was done when the plaintiff was in hospital, thinking that he would not recover. The plaintiff contended that the gift of the flat to his wife was a *donatio mortis causa* and therefore was revocable prior to his death. Prakash J concluded that the *donatio* did not offend section 51(10) of the *HDA 2004* because the plaintiff was the sole owner of the flat prior to the gift (and thus obviously an eligible person).⁸⁶

Harder to explain is the recent case of *Ong Swee Geok and another v Gee Ah Eng* (“*Ong Swee Geok*”),⁸⁷ which was decided by Andre Maniam JC after both the *Lim Kieuh Huat* litigation and *Ong Chai Koon*. This case, it is suggested, demonstrates the difficulties caused in practice by the lack of clarity over the relevant time for assessing eligibility. In this case, two sisters claimed the whole beneficial interest in a HDB flat registered in their mother’s sole name. They had at various earlier points in time been registered co-owners of the flat with their mother, and had paid the purchase price for the Flat, but they ceased to be registered co-owners when they each acquired another HDB flat. The flat was thereafter transferred to be held jointly by their parents, and became held solely by their mother after their father’s death. In these circumstances, the Court held that they were ineligible persons:

27 As Swee Geok and Swee Hwa own other HDB flats, they are ineligible to acquire the Flat, and under section 51(10) of the HDA they cannot obtain or become entitled to any interest in it by way of a resulting or constructive trust. Indeed, in their written submissions, they expressly accept that they “are not eligible within the meaning of section 47 [and section 51(10)] of the HDA as they are the owners of [other] HDB flats”. The payments relied upon to assert a resulting trust were those made by Swee Geok when she and Swee Hwa were ineligible persons.⁸⁸

It appears that the plaintiffs admitted that they were not eligible persons on the basis that they *were* the owners of other HDB flats—that is, because they were *presently* ineligible at the date of the hearing. But the court’s reasoning was slightly different than the plaintiffs’. The court relied instead on the fact that the payments made to assert the resulting trust were made when the plaintiffs were ineligible. Respectfully, it is odd that the court focused on the time the payments were made. It is well established that a resulting trust crystallises at the time the property is acquired, and the

⁸³ *Tan Chui Lian*, *supra* note 16.

⁸⁴ *Ibid* at para 17.

⁸⁵ *Koh Cheong Heng*, *supra* note 26.

⁸⁶ *Ibid* at para 57.

⁸⁷ [2021] 5 SLR 726 (HC) [*Ong Swee Geok*].

⁸⁸ *Ibid* at para 27.



extent of their beneficial interests must be determined at the time of purchase.⁸⁹ In *Su Emmanuel*,⁹⁰ the Court of Appeal held that where a party seeks to rely on subsequent mortgage payments to establish a resulting trust, such payments may only be taken into account if there was a prior agreement between the parties at the time the mortgage was obtained as to who would repay the mortgage. It is therefore unclear why the court in *Ong Swee Geok* focused on the time of the subsequent mortgage payments in assessing eligibility. It is suggested that insofar as a resulting trust was relied on in this case, the better approach would have been to focus on the eligibility requirements at the time the property was purchased.

B. What Factors are Taken into Account in Assessing Eligibility?

Apart from the timing of assessment, litigants need to know what factors the court will take into account for the eligibility assessment. It is well known that the HDB prescribes various requirements that must be met by applicants wishing to purchase property from the HDB. These requirements change from time to time and can be found on the HDB website.⁹¹ Stringent eligibility requirements are imposed on residential property in particular, with slight differences depending on the exact type of residential property in question.⁹² The present requirements include restrictions on citizenship, age and (except for resale flats) the income ceiling of the applicants and occupiers. The applicants must qualify under one of the eligibility schemes which are designed to encourage occupation of residential property by a “family nucleus”. Additionally, restrictions on concurrent property ownership apply: for example, a purchaser of a resale HDB flat who owns another HDB flat or any private property (either locally or overseas) must dispose of all private properties before or within six months of the resale flat purchase.⁹³

Where it is sought to transfer ownership of a HDB flat to another person, a separate set of eligibility requirements apply.⁹⁴ Here, the proposed owners must be an immediate family member of the existing owners, such as the spouse, parents, children, or siblings.⁹⁵ Further, the proposed owners (both remaining and incoming)

⁸⁹ *Su Emmanuel v Emmanuel Priya Ethel Anne* [2016] 3 SLR 1222 (CA) at para 87 [*Su Emmanuel*].

⁹⁰ *Ibid.*

⁹¹ Tan, Tang & Low, *Principles of Singapore Land Law*, *supra* note 2 at para 24.27.

⁹² Different eligibility requirements apply to new and resale HDB flats, flats built under the “2-Room Flexi Flats” scheme, flats built under the “Design, Build and Sell Scheme”, and executive condominiums: see Housing and Development Board, “Eligibility” online: Housing and Development Board <<https://www.hdb.gov.sg/residential/buying-a-flat/new/eligibility>> and Housing and Development Board, “Eligibility”, online: Housing and Development Board <<https://www.hdb.gov.sg/residential/buying-a-flat/resale/eligibility>> [Housing and Development Board, *Resale Eligibility*]. Further to recent developments, even amongst resale HDB flats, different rules will apply to flats built under the “Prime Location Public Housing” Model: see Housing and Development Board, “The Prime Location Public Housing (PLH) Model”, online: Housing and Development Board <<https://www.hdb.gov.sg/cs/infoweb/about-us/news-and-publications/press-releases/27102021-Prime-location-public-housing-model>>.

⁹³ See Housing and Development Board, *Resale Eligibility*, *ibid.*

⁹⁴ See Housing and Development Board, Residential, “Eligibility—Eligibility conditions for proposed flat owners”, online: Housing and Development Board <<https://www.hdb.gov.sg/cs/infoweb/residential/living-in-an-hdb-flat/changing-owners-occupiers/change-in-ownership/change-in-flat-ownership/eligibility>> [Housing and Development Board, *Eligibility conditions for proposed flat owners*].

⁹⁵ *Ibid.*



and occupiers staying in the flat must be able to take over ownership of the flat under one of the existing eligibility schemes for family nuclei.⁹⁶ Age and citizenship requirements apply.⁹⁷ The new owner also cannot be the existing owner or an essential occupier of another HDB flat, but owners of private property may take over the ownership of a HDB flat if the existing flat owner has fulfilled the requisite minimum occupation period (“MOP”).⁹⁸ Also, each flat may have a maximum of four owners.⁹⁹

As a starting point, it is self-evident that where a party fails to meet the age or citizenship requirements, that party must be considered ineligible for the purposes of section 51(10). Equally, it is clear that where a party owns other property at the relevant time, whether HDB or private property, that party will be ineligible. Thus, in cases such as *Ong Swee Geok*¹⁰⁰ and *BWU*,¹⁰¹ it was taken for granted that if the plaintiff owned other property, the plaintiff would be ineligible (although, as discussed above, there appears to have been some confusion as to when the relevant time was). The court similarly held in *Lim Young Ching v Lim Tai Ching*¹⁰² that the plaintiff’s ownership of another flat rendered him ineligible to have any interest in another flat under the provisions of the *HDA 2004*.¹⁰³

Other eligibility conditions may apply to purchasers of HDB flats. Second-time buyers of new HDB flats are obliged to pay a “resale levy”, the quantum of which depends on the size of the flat.¹⁰⁴ Further, HDB flats may be purchased subject to various housing grants and/or with the assistance of a HDB housing loan, each of which are subject to their own eligibility requirements.¹⁰⁵ In order to avoid the application of section 51(10), the parties seeking to assert a resulting or constructive trust must show that they were eligible to purchase the HDB property under the same conditions and benefits which applied when the flat was in fact acquired. In *Lim Kieuh Huat*, the appellant parents argued that they had placed the HDB flat in the name of their son in order to avoid paying a resale levy, and because their son could obtain an HDB housing loan which they would not have been eligible to take.

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*

⁹⁸ *Ibid.*

⁹⁹ See Housing and Development Board, Residential, “Change in Flat Ownership (Not Through a Sale)”, online: Housing and Development Board <<https://www.hdb.gov.sg/cs/infoweb/residential/living-in-an-hdb-flat/changing-owners-occupiers/change-in-ownership/change-in-flat-ownership>>.

¹⁰⁰ *Ong Swee Geok*, *supra* note 87.

¹⁰¹ *BWU*, *supra* note 33.

¹⁰² [2021] 3 SLR 793 (HC) [*Lim Young Ching*].

¹⁰³ *Ibid* at para 118.

¹⁰⁴ See Housing and Development Board, Residential, “Resale Levy”, online: Housing and Development Board <<https://www.hdb.gov.sg/residential/selling-a-flat/financing/computing-your-estimated-sale-proceeds/selling-a-flat-resale-levy>>.

¹⁰⁵ See Housing and Development Board, Residential, “Schemes and Grants”, online: Housing and Development Board <<https://www.hdb.gov.sg/cs/infoweb/residential/buying-a-flat/new/schemes-and-grants>> (grants available for the purchase of a new flat); Housing and Development Board, “CPF Housing Grants for Resale Flats”, online: Housing and Development Board <<https://www.hdb.gov.sg/residential/buying-a-flat/resale/financing/cpf-housing-grants>> (grants available for the purchase of resale flats); and Housing and Development Board, “Housing Loan from HDB”, online: Housing and Development Board <<https://www.hdb.gov.sg/cs/infoweb/residential/financing-a-flat-purchase/housing-loan-from-hdb>> (eligibility conditions for HDB housing loans).



At first instance, Maniam JC held that the parents were ineligible to purchase the flat under those conditions, and therefore were not eligible for the purposes of section 51(10). On appeal, the parents argued that the resale levy was only a “condition for purchase” and they would otherwise have been able to purchase an HDB flat of their own. The Court of Appeal rejected this argument, saying that the focus should be on “whether the particular person could purchase the particular flat, and *what conditions must be met before that purchase would be approved*”.¹⁰⁶ The court explained that this must be the case because otherwise “the entire subsidy scheme operated by the HDB would fall apart”.

It appears, therefore, that where the trust arises upon the purchase of the flat, the eligibility assessment will have regard to all the HDB’s prevailing conditions at the time. Thus, apart from the condition as to the resale levy which featured in *Lim Kieuh Huat*, if the plaintiff would not have formed the requisite family nucleus with the purchaser of the flat, then the plaintiff should be regarded as ineligible. Equally, if the flat was purchased with the aid of a HDB loan or HDB housing grants, which would not have been available had the plaintiff been a co-purchaser, then the plaintiff should be regarded as ineligible. In the same way, where a trust arises subsequent to the point of purchase (as may be the case where a common intention constructive trust is asserted), the relevant considerations should be all eligibility requirements applicable to a transfer of ownership at that time. All of these conditions go toward furthering the HDB’s social policies.¹⁰⁷ Were the court to disregard those conditions in the eligibility assessment, this would allow buyers to make a mockery of the HDB’s housing policies, an outcome which the Court of Appeal decried in *Lim Kieuh Huat*.

C. The Burden and Mode of Proving Eligibility

Finally, a short discussion is in order on the practical issue of the burden of proof. It is clear that the plaintiff bears the burden of providing that he is an eligible person such that section 51(10) does not apply. As Ang J explained in *Ong Chai Koon*, once it is demonstrated or accepted that the disputed property is “protected property” within the meaning of section 51(11), it falls within the scope of section 51(10), and it is the plaintiff who must prove that section 51(10) does *not* apply, since it is trite that the burden of proof lies on the party wishing to assert a particular fact.¹⁰⁸ Ang J also pointed out that “as a matter of common sense, this must be the case because it is only the plaintiffs who would have full knowledge of their own circumstances and whether they satisfy the eligibility criteria set by HDB.”¹⁰⁹

In this case, even though neither party adduced any evidence to prove (a) what the eligibility conditions were to own the relevant HDB shophouse; or (b) whether the plaintiffs were so eligible, Ang J found that it was clear from the parties’ submissions that the parties did not dispute the plaintiffs’ eligibility to own the

¹⁰⁶ *Lim Kieuh Huat* (CA), *supra* note 27 at para 14 [emphasis added].

¹⁰⁷ See Tan, Tang & Low, *Principles of Singapore Land Law*, *supra* note 2 at para 24.26.

¹⁰⁸ *Ong Chai Koon*, *supra* note 48 at para 156, citing the *Evidence Act* (Cap 97, 1997 Rev Ed Sing), s 103(1), 105.

¹⁰⁹ *Ong Chai Koon*, *ibid*.

shophouse.¹¹⁰ This was because the plaintiffs had highlighted in their submissions that the defendant had not asserted their ineligibility, and the defendant had not contradicted this point in reply submissions. Ang J drew an analogy with *Tan Chui Lian*, where Menon JC had proceeded on the basis that there was “no suggestion that either party before [him] was ineligible”, and found that the plaintiffs’ eligibility was undisputed. This appears to be a rather generous approach to the burden of proof. In *Tan Chui Lian* itself, the plaintiff was a co-owner of the HDB flat at the relevant time. This fact would have been sufficient to shift the evidential burden of proving ineligibility to the defendant, and in the absence of any attempt to do so, Menon JC was clearly justified in holding that the plaintiff’s eligibility was undisputed. In *Ong Chai Koon*, however, the plaintiff siblings were not co-owners at the relevant time. There was no evidence before Ang J as to their eligibility, or even the eligibility conditions. It is hard to see how the defendant’s failure to contradict a mere *negative* assertion in the plaintiffs’ submissions could amount to a concession that the plaintiffs were eligible. That said, little turned on this point given that Ang J proceeded to deal with the question of relief by making an order for sale in any event, a type of relief not barred by section 51(10).

The lesson to be drawn from *Ong Chai Koon* is that plaintiffs should be careful to put in issue and lead the necessary evidence on both (a) the prevailing eligibility requirements at the relevant time; and (b) the facts showing that the plaintiffs were so eligible. This exercise may be less simple than it appears. The plaintiff will first need to establish the relevant time for the eligibility assessment, which as demonstrated above is somewhat unclear. If it is correct that the relevant time is the time when the relevant resulting or constructive trust arose, the issue is further complicated by the fact that the parties’ common intention can change over time. A plaintiff might well contend that a constructive trust arose at several alternative points in time. It would appear that such a plaintiff would then be required to establish the HDB’s eligibility requirements at each point in time and demonstrate how the plaintiff fulfilled them.

The exercise is further complicated by the fact that the HDB’s historical eligibility requirements are not easily accessible. Section 65(1) of the *HDA 2004* states that the HDB may make rules with respect to, *inter alia*, the “terms and conditions for the sale of any flat, house or other building”¹¹¹ and that such rules are to be presented to Parliament as soon as possible after publication in the *Gazette*.¹¹² But this is not done in practice. Instead, they are set out from time to time by the HDB in its brochures, application forms, and are generally accessible on the HDB website.¹¹³ Therefore, it will not be a straightforward task to obtain direct evidence of the eligibility conditions at the relevant time. A likely practical solution would be for the plaintiff to write to the HDB to request copies of the prevailing eligibility conditions, and thereafter request that the defendant admit the relevant facts, thus obviating the need to call a HDB officer to give evidence at the trial.

¹¹⁰ *Ibid* at para 157.

¹¹¹ *HDA 2004*, *supra* note 8, s 65(1)(a).

¹¹² *Ibid*, s 65(2).

¹¹³ Tan, Tang & Low, *Principles of Singapore Land Law*, *supra* note 2 at para 24.27.

IV. THE EFFECT OF SECTION 51(10)

Regardless of whether and how the eligibility test applies, it is necessary to consider a further question: where section 51(10) does apply, what is its effect on the alleged resulting or constructive trust? The answer to this question has significant implications for the harshness with which the subsection operates. For example, if section 51(10) renders such trusts wholly void, this would have serious consequences for parties who have contributed financially to the purchase of HDB flats, who would otherwise be entitled to an interest under a resulting trust. Two sub-issues arise. First, does section 51(10) render resulting or constructive trusts void? And second, if section 51(10) does not render such trusts void, how does the section constrain the remedies that the court may grant? The following discussion seeks to address these questions.

A. Does Section 51(10) Render a Resulting or Constructive Trust Void?

In *Ong Chai Koon*, Ang J answered the first question by holding that section 51(10) merely bars the court from granting a remedy which would give the beneficiary ownership of, or an interest in, the HDB property. Crucially, it does not render an underlying constructive or resulting trust over the property void, and the relevant trust still arises.¹¹⁴ Ang J justified his conclusion on two grounds. First, his approach was similar to that adopted by Quentin Loh J in *Low Heng Leon Andy*, in holding that section 51(10) did not bar a proprietary estoppel claim. Second, upon contrasting the text of sections 51(9) and 51(10), it was “clear that Parliament did not intend for s 51(10) to have the same consequence as section 51(9) (*viz*, to render the constructive or resulting trust “null and void”)¹¹⁵

This article agrees with Ang J’s approach. In addition to the points that he made, further textual support may be found in the wording of section 51(10) itself. The use of the phrase “whenever created or arising” at the end of the provision seems to presuppose that the trust is indeed created or does arise, therefore indicating that the trust remains valid. Further, section 51(10) may be usefully contrasted with the prohibition on purchase or acquisition of residential property by foreign persons found in section 3(1) of the *Residential Property Act 1976*¹¹⁶ (“RPA”), which states that any acquisition of any estate or interest in residential property by any foreign person, unless otherwise permitted by the RPA, is “void”.¹¹⁷

Ang J’s approach also strikes the appropriate balance between Parliament’s intention to prevent ineligible persons from acquiring a beneficial interest in the HDB flat on the one hand, and the existing interests of such persons on the other.

¹¹⁴ *Ong Chai Koon*, *supra* note 48 at para 160. Ang J stated that the resulting or constructive trust would be “prevented by section 51(10) from taking effect”. Presumably this means that it would be prevented from taking effect *in relation to the disputed HDB property*, by way of a remedy which gives the beneficiary ownership of, or an interest in, the HDB property.

¹¹⁵ *Ibid* at para 163. Note that section 58(10) of the *HDA 2021*, *supra* note 9 which is the equivalent of section 51(9) of the *HDA 2004*, now employs the term “void” rather than “null and void”; this does not change the meaning of the section and does not affect the analysis.

¹¹⁶ (2020 Rev Ed Sing) [RPA].

¹¹⁷ *HDA 2021, ibid*, s 3(2). See also *ibid*, s 23(2).



This is consistent with HDB policy. In fact, in the slightly different situation where an ineligible person (for example a person who has acquired title to an interest in another property)¹¹⁸ becomes the registered owner of a HDB flat, one of the HDB's remedies is to compulsorily acquire the HDB flat. The HDB will in that event serve on the owner and any other interested persons a written notice, stating its intention to acquire, and indicating the compensation that it will pay.¹¹⁹ It has been said that the quantum of compensation payable is to be "based on either the original selling price, or the prevailing posted price of the flat, whichever is the higher, but in any event the sum must not exceed the market value of the flat".¹²⁰ It has also been reported that where the HDB compulsorily acquires resale flats, the HDB will buy them back at "90 per cent of [the flat's] open market value at the point of compulsory acquisition".¹²¹ All of this shows that the HDB's focus is on rectifying the situation of unauthorised concurrent ownership, rather than altogether destroying the proprietary interest of the unauthorised owner.¹²² In the situation involving concurrent ownership via a resulting or constructive trust, an order that the flat be sold, and the proceeds distributed among the parties, would equally achieve that objective of rectifying the situation, without operating unduly harshly as between the parties.

It must be noted that some decisions appear to support the contrary view that section 51(10) bars a resulting or constructive trust from arising altogether. That position was most expressly taken in *Philip Antony Jeyaretnam v Kulandaivelu Malayaperumal*¹²³ ("*Philip Jeyaretnam*") where Debbie Ong J agreed with the *amicus curiae*'s submissions that "HDB [p]roperty is simply incapable of being considered a trust asset due to the operation of section 51(10)" but did not explain her reasons for arriving at this view.¹²⁴ As a matter of authority, *Ong Chai Koon* should be preferred, as Ang J there provided a reasoned basis for his position. It is also worth noting that the *Philip Jeyaretnam* decision was considered in *Ong Chai Koon*, albeit not for this point.¹²⁵ Other cases which may suggest that section 51(10) renders such trusts void are less persuasive, because they involved situations where the decision was based, in the alternative, on sections 51(8) and (9) of the *HDA*

¹¹⁸ *HDA 2004*, *supra* note 8, s 56(1)(b).

¹¹⁹ *Ibid*, s 56(3).

¹²⁰ Tang & Low, *Principles of Singapore Land Law*, *supra* note 2 at para 24.117, citing as the source "[i]nformation acquired from the HDB" and *Parliamentary Debates Singapore, Official Report*, vol 61 at col 676 (13 October 1993). The Hansard reference appears to deal with the situation where the owner is unable to service the mortgage, as opposed to a situation where HDB exercises its right of compulsory acquisition for other reasons.

¹²¹ See Singapore Press Holdings Ltd, "News @ AsiaOne" (13 April 2011), online: Singapore Press Holdings Ltd <[https://www.asiaone.com/print/News/Latest+News/Business/Story/A1Story20110413-273393.html#:~:text=The%20Housing%20Development%20Board%20\(HDB,the%20sale%20of%20HDB%20flats.&text=For%20resale%20flats%2C%20HDB%20will,the%20point%20of%20compulsory%20acquisition](https://www.asiaone.com/print/News/Latest+News/Business/Story/A1Story20110413-273393.html#:~:text=The%20Housing%20Development%20Board%20(HDB,the%20sale%20of%20HDB%20flats.&text=For%20resale%20flats%2C%20HDB%20will,the%20point%20of%20compulsory%20acquisition)>.

¹²² It is also worth noting that in the slightly different situation where a testator bequeaths an interest in residential property to a foreign person, the *RPA* provides that no estate or interest shall pass to that foreign person, but the personal representatives of the deceased will be bound to sell the relevant interest in the residential property, and pay the proceeds thereof to the foreign person: *RPA*, *supra* note 116, s 3(3), (4).

¹²³ [2020] 3 SLR 738 (HC) [*Philip Jeyaretnam*].

¹²⁴ *Ibid* at para 26.

¹²⁵ See *Ong Chai Koon*, *supra* note 48 at para 147.



2004 (which do have the express effect of rendering a trust void). This was the case in both *Cheong Yoke Kuen*¹²⁶ and *Chong Sze Pak v Chong Ser Yoong*,¹²⁷ which Ang J distinguished in *Ong Chai Koon* on this basis.¹²⁸ Similarly, in *Lim Kieuh Huat*, the Court of Appeal held that the appellant parents were ineligible for the purposes of section 51(10) and observed that their case, even taken at its highest, could not succeed. This could suggest that their ineligibility under section 51(10) rendered them without remedy *even if* they could establish the factual basis for a constructive trust, which would in turn indicate that section 51(10) had the effect of voiding any such trust. But it should be recalled that the court's primary basis for dismissing the appeal was that the arrangement amounted to an express trust, which was barred by sections 51(8) and (9) of the *HDA 2004*.¹²⁹

B. *The Basis for an Order for Sale*

If it is correct that section 51(10) does not render a resulting or constructive trust void, the question then is what relief the court can grant. This point arose squarely on the facts of *Ong Chai Koon*. As will be recalled, Ang J held that but for the operation of section 51(10), a common intention constructive trust would have arisen in respect of the HDB shophouse. Notwithstanding section 51(10), Ang J held that he was able to order the shophouse to be sold and its proceeds divided between the siblings in equal shares. His jurisdiction to order a sale was founded in section 18(2) and para 2 of the First Schedule to the *Supreme Court of Judicature Act*¹³⁰ (“SCJA”) and Order 31 r 1 of the *Rules of Court*.¹³¹ Ang J considered that to justify the exercise of this power, he had to identify a “substantive legal basis”,¹³² but that could not be found in the plaintiffs’ claim to a beneficial interest in light of section 51(10). Ang J found a way around this problem by declaring that an “equity” arose in favour of the plaintiffs in relation to the shophouse.¹³³ This unconventional position appears to have been inspired primarily by an Australian Bar Review article¹³⁴ where the author argued that upon the breach of an equitable obligation, an “equity” arises in the person who is owed the obligation. Ang J also relied upon an Australian case, *Parianos v Melluish*,¹³⁵ where the court held that a common intention constructive trust, like a remedial constructive trust, also “create[s] a personal equity between the parties which may be defeated by competing claims”.¹³⁶

¹²⁶ *Cheong Yoke Kuen*, *supra* note 12.

¹²⁷ [2011] 3 SLR 80 (HC).

¹²⁸ *Ong Chai Koon*, *supra* note 48 at paras 161-163.

¹²⁹ *Lim Kieuh Huat* (CA), *supra* note 27 at para 11.

¹³⁰ (Cap 322, 2007 Rev Ed Sing) [SCJA].

¹³¹ (Cap 322, R 5, 2014 Rev Ed Sing).

¹³² *Ong Chai Koon*, *supra* note 48 at paras 181-183.

¹³³ *Ibid* at para 184.

¹³⁴ Joseph Campbell, “When and Why a Bribe is Held on a Constructive Trust: The Method of Reasoning Towards an Equitable Remedy” (2015) 39(3) Austl Bar Rev 320 [Campbell, “Bribe Held on Constructive Trust”].

¹³⁵ *Parianos v Melluish* (as trustee for the estate of the late George Parianos) (2003) 30 Fam LR 524 (FCA) [*Parianos*].

¹³⁶ *Ibid* at para 61.



There are difficulties with this approach. First, apart from the authorities cited by Ang J, there is no suggestion in the case law that an equity arises from a resulting or a constructive trust. It is unclear whether those authorities even support the position that an “equity” arises in response to a common intention constructive trust. Some of them concerned equities arising in different circumstances, such as upon the giving of bribes¹³⁷ and in context of a proprietary estoppel claim.¹³⁸ Ang J cited only one judicial decision involving a common intention constructive trust where the court held that a “personal equity” was created, but the reference in that case was made only in passing, and was not significant to the result.¹³⁹ In fact, the language used by Ang J suggests that he was inspired by the broad relief available to satisfy the equity that arises from a proprietary estoppel claim.¹⁴⁰ However, there is no precedent for transplanting this “equity” to a common intention constructive trust, and the word is certainly not typically used in the context of a resulting trust. Second, Ang J’s reasoning does not show how the “equity” arising could form the legal basis for an order for sale. Ang J noted that the term “an equity” may be used in two different senses: in the “narrow sense of referring to an immediate right to positive equitable relief”; or alternatively, the “broader and less precise sense to refer to any entitlement or obligation (“the equities”) of which a court of equity will take cognizance”.¹⁴¹ In his formulation of the rule, he said that “[a]s soon as there has been a breach of an equitable obligation, an equity—at the least one of the broader type—arises in the person who is owed the obligation, viz, the beneficiary plaintiff.”¹⁴² But this “broader” sense does not purport to represent any legal right or remedy: it is simply a turn of phrase used to describe a generic category of equitable claims. Consequently, there is a gap in the logical chain of reasoning, and Ang J’s resort to an “equity” arising from a constructive trust should be treated with caution. Third, even if there is a basis to hold that an “equity” arises from a constructive trust, the manner in which the rule was couched in the sentence quoted above suggests that an equity would arise upon the breach of *any* equitable obligation. Such a rule would clearly be too broad and would generate great uncertainty.

The courts need not and should not resort to finding that an “equity” arises in order to justify an order for sale. Ang J assumed that the requisite basis could not be found in the plaintiffs’ claim to a beneficial interest in the relevant shophouse because of the operation of section 51(10). However, it is hard to see why this should be the case. First, it is unclear whether the requirement of a “substantive legal basis” should be followed. This requirement was introduced in the 2014 decision of *Tan Poh Beng v Choo Lee Mei* (“*Tan Poh Beng*”).¹⁴³ But the court’s power to direct a sale is “usually invoked in cases involving joint ownership where the court considers if land should be sold in lieu of partition”.¹⁴⁴ Those cases usually assume that the existence of joint ownership is sufficient to invoke the court’s power without

¹³⁷ Campbell, “Bribe Held on Constructive Trust”, *supra* note 134.

¹³⁸ *Commonwealth of Australia v Verwayen* (1990) 95 ALR 321 (HCA).

¹³⁹ See *Parianos*, *supra* note 135 at para 61.

¹⁴⁰ See *Ong Chai Koon*, *supra* note 48 at paras 191, 192.

¹⁴¹ *Ibid* at para 188.

¹⁴² *Ibid*.

¹⁴³ [2014] 4 SLR 462 (HC) at para 19 [*Tan Poh Beng*].

¹⁴⁴ *BYX v BYY* [2020] 3 SLR 1074 (HC) at para 22.



requiring any further basis for the same.¹⁴⁵ It may be that *Tan Poh Beng* should be confined to its own unique facts (where the plaintiff was seeking to indirectly enforce a Malaysian court order for the partition of matrimonial assets),¹⁴⁶ although even then, it is difficult to see how the result can be justified. Secondly, and more fundamentally, even assuming that a “substantive legal basis” is indeed required, there is no reason why the existence of a resulting or constructive trust *per se* does not provide the requisite legal basis. It is well established that a beneficiary’s rights have a personal character *vis-à-vis* the trustee, in that they “derive from the trustee who owns the property and they are primarily enforceable against him.”¹⁴⁷ The beneficiary is entitled to “compel the trustee’s duty to administer the trust according to its terms and the general law”;¹⁴⁸ indeed, “a beneficiary’s remedy, historically and practically, is in the form of an action against the trustee; a right in personam.”¹⁴⁹ In *DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties (NSW)*,¹⁵⁰ the court explained that “the right of the beneficiary, although annexed to the land, is a right to compel the legal owner to hold and use the rights which the law gives him in accordance with the obligations which equity has imposed upon him.”¹⁵¹ It is also notable that in other cases involving claims in resulting and constructive trusts, once the beneficial interest is established, the courts have generally assumed that they are empowered to order the disputed property to be sold.¹⁵² It is submitted that the court is entitled to exercise its power under the *SCJA* to order a sale once it determines that a trust has arisen, even when the court is barred from declaring that a beneficial interest in the property arises in favour of the plaintiff(s). Returning to the language of paragraph two of the First Schedule to the *SCJA*, the action would certainly be a “cause or matter relating to land”, and it would be “necessary or expedient” for the court to order the land to be sold in order to give effect to the resulting or constructive trust.

One advantage of the suggested approach is that it applies equally to resulting and constructive trusts. If the court is required to find an “equity” before it is empowered to make an order for sale, this has the potential to give rise to undesirable inconsistencies between the approach to resulting and constructive trusts. *Ong Chai Koon* itself was a case involving a common intention constructive trust, and the authorities that Ang J relied on similarly all concerned “equities” arising

¹⁴⁵ See, for example, the comprehensive discussion by the Court of Appeal in *Su Emmanuel*, *supra* note 89 at paras 46-57.

¹⁴⁶ See *Tan Poh Beng*, *supra* note 143 at paras 2-5.

¹⁴⁷ John McGhee & Steven Elliott QC, eds, *Snell’s Equity*, 34th ed (London: Sweet & Maxwell, 2020) at para 2-002 [McGhee QC & Elliott QC, *Snell’s Equity*].

¹⁴⁸ *Ibid* at para 2-003.

¹⁴⁹ Jamie Glister & James Lee, *Hanbury & Martin on Modern Equity*, 21st ed (London: Sweet & Maxwell, 2018) at para 1-018.

¹⁵⁰ [1980] 1 NSWLR 510 (NSWCA) [*DKLR*].

¹⁵¹ *Ibid* at 519. Note that this comment was made in the context of an express trust, but it has been observed that there is no reason why it would not extend to implied trusts: Carmel McLure, “Specific Performance and the Constructive Trust” in Elise Bant & Michael Bryan, *Principles of Proprietary Remedies* (Sydney: Thomson Reuters, 2013) 127 at 136.

¹⁵² See *Tan Chui Lian*, *supra* note 16 itself; *Neo Hui Ling v Ang Ah Sew* [2010] SGHC 328; *Foo Jee Boo v Foo Jee Seng* [2016] SGHC 225; *Koh Lian Chye and another v Koh Ah Leng and another* [2020] SGHC 131 at para 106 (affirmed in [2021] SGCA 69 at para 47).



from constructive trusts. However, it is unclear whether an “equity” would similarly arise from a resulting trust. This question was considered and expressly left open by Maniam J in *Ong Swee Geok and another v Gee Ah Eng*. A consistent approach must be adopted to resulting and constructive trusts, given that on the same facts, parties often plead a purchase price resulting trust and a common intention constructive trust in the alternative.¹⁵³ It would be highly unsatisfactory if an “equity” arises from a common intention constructive trust notwithstanding section 51(10) of the *HDA 2004*, but no “equity” arises where a resulting trust is found. On the suggested approach, once a trust arises, whether resulting or constructive, the court is empowered to order a sale without any further need to find an “equity”.

V. CONCLUSION

This article has examined the interesting issues that arise from the interaction of resulting and constructive trusts with section 51(10) of the *HDA 2004*.¹⁵⁴ The thesis presented is that section 51(10) must be applicable to any individual who was not a registered co-owner of a flat at the time the trust is alleged to have come into existence. Yet, even when it applies, it does not render the underlying trust void. The court may order the flat to be sold and the proceeds divided among the parties in their respective shares. This approach does not offend the policy of the *HDA 2004*, which is concerned with regulating the registered ownership of HDB flats and with rectifying any deviations from those requirements.

One concern is whether this may allow parties to circumvent the HDB’s policies on eligibility to own HDB flats by creating situations in which a trust would arise by operation of law and, in the event of a dispute, claiming an interest in the sales proceeds. The courts are clearly aware of the risks of subverting HDB policy. In *Ong Chai Koon* itself, Ang J cautioned that his analysis was “not meant to be a convenient way for claimants in future to claim an indirect interest in HDB property under a constructive or resulting trust.”¹⁵⁵ It is suggested that the appropriate safeguard may be found in the doctrine of illegality. The law on the interaction of illegality with the law of trusts is still unsettled in Singapore and a detailed discussion is beyond the scope of this article, but the Court of Appeal has suggested that one approach would be to disallow the trust-based claim if allowing it would “stultify or undermine the fundamental policy that rendered the contract concerned illegal in the first place”.¹⁵⁶ In the present context, if allowing the trust to be enforced would stultify or undermine the fundamental policy of the *HDA 2004*, the trust would then

¹⁵³ Alvin See, Yip Man & Goh Yihan, *Property and Trust Law in Singapore* (The Netherlands: Kluwer Law International BV, 2018) at 403, 404.

¹⁵⁴ While the applicable provision now is section 58(11) of the *HDA 2021*, the analysis in this article is (as explained previously) unaffected by the amendments made in that revised edition.

¹⁵⁵ *Ong Chai Koon*, *supra* note 48 at para 192.

¹⁵⁶ *Ochroid Trading Ltd and another v Chua Siok Lui (trading as VIE Import & Export) and another* [2018] 1 SLR 363 (CA) at para 168. While these observations were made in a context where a contract was concurrently rendered unenforceable by the illegality at hand, there seems no reason why they would not apply to a trust claim independent of any contractual overlay.



be held to be unenforceable, stripping away the basis for an order that the property be sold.

As Professor Tang said in his 2012 article, “modern equitable concepts are not to be feared; properly used, these doctrines might achieve fine-tuned justice between parties”.¹⁵⁷ Legislation like the *HDA 2004* is ill-equipped to apportion equitable rights between parties. There is indeed no reason it should strive to do so, given that a system of rules for doing so already exists at common law. Looking back to the position in Hong Kong, which was briefly canvassed at the start of this article, it is notable that the Court of Final Appeal there saw no issues in holding that equitable interests could coexist with a statutory regime providing for restrictions on ownership of public housing. It is respectfully suggested that the underlying policy considerations are not so different in Singapore. It is to be hoped that when section 51(10) (or more accurately section 58(11) of the *HDA 2021*) next comes squarely before our Court of Appeal for decision, our courts will set out a clear and principled framework to govern this area of the law.

¹⁵⁷ Tang, “Housing and Development Board Flats”, *supra* note 15 at para 1.