

Kay Swee Pin v Ng Kong Yeam
[2019] SGHC 223

Case Number : Suit No 643 of 2018
Decision Date : 20 September 2019
Tribunal/Court : High Court
Coram : Choo Han Teck J
Counsel Name(s) : Clement Ong Ziying and Joni Khoo Shufen (Damodara Hazra LLP) for the plaintiff;
Luo Ling Ling, Nandhu and Timothy Yeo Zhi Wen (RHT Law Taylor Wessing LLP)
for the defendant.
Parties : Kay Swee Pin — Ng Kong Yeam

Restitution – Unjust enrichment – Necessity

Restitution – Unjust enrichment – Legal compulsion

20 September 2019

Judgment reserved.

Choo Han Teck J:

1 Mdm Kay Swee Pin (“Kay”) filed this suit against her former partner, Mr Ng Kong Yeam (“Ng”), for reimbursement of money that she paid on his behalf. As Ng is *non compos mentis*, his son Mr Ng Chun San, also known as Gabriel (“Gabriel”), appeared as his litigation representative.

2 Kay claims she should be reimbursed for two items: first, a sum of S\$36,792.98 that she paid to the Inland Revenue Authority of Singapore (“IRAS”) on behalf of Ng for his 2013 taxes; second, legal fees amounting to HK\$1,416,395 in relation to a Hong Kong lawsuit that Ng initiated in December 2011, for which she was appointed his “next friend”, the equivalent of a litigation representative, in August 2013.

3 Ms Luo Ling Ling, counsel for Ng, submits that there is insufficient evidence that Kay had paid the IRAS tax bill and in any event, she did so voluntarily. As for the legal fees, Ms Luo submits that there was no evidence that Kay paid the fees or that Kay had incurred the expenses herself.

4 Ng’s IRAS Notice of Assessment dated 10 July 2013 indicated that tax of S\$36,792.98 was due on 10 August 2013. Kay produced an extract of her bank statements showing a cheque withdrawal of S\$36,792.98 on 6 August 2013. After the trial, Mr Clement Ong, counsel for Kay, sought leave to adduce a copy of a cheque for S\$36,792.98 written by Kay in favour of IRAS. I granted leave to produce this.

5 The evidence shows that Kay paid Ng’s taxes on his behalf. The cheque drawn from Kay’s account specifies the same amount due in the Notice of Assessment, down to the exact cent. Ng’s taxes were paid as IRAS never pursued the matter, and Gabriel has no knowledge as to who paid for it. The question then is whether there is a legal basis for Kay to be reimbursed.

6 Mr Ong submits that Kay is entitled to the sum on the basis of “indebtedness/reimbursement”. Reimbursement is not a freestanding claim, but a remedy aimed at preventing the unjust enrichment of a defendant (*SHC Capital Ltd v NTUC Income Insurance Co-operative Ltd* [2010] 4 SLR 965 at

[38]). Mr Ong also submits that Kay is entitled to the sum on the basis of unjust enrichment. A claim in unjust enrichment requires (a) the enrichment of the defendant, (b) at the expense of the plaintiff, and (c) circumstances which make the enrichment unjust (*Benzline Auto Pte Ltd v Supercars Lorinser Pte Ltd and another* [2018] 1 SLR 239 at [45]). Here, the key dispute is over the third element, and Kay must show that she had acted out of legal compulsion or necessity in a way that renders Ng's enrichment unjust.

7 Kay did not tell Ng's family about the IRAS Notice and also admitted in cross-examination that there was no legal obligation on her part to pay Ng's taxes. She insisted that she had acted to protect Ng's interests. At the material time, Kay and her daughter were Ng's donees under a Lasting Power of Attorney dated 28 December 2011 ("the LPA"). The LPA was subsequently cancelled on 31 October 2014, when it was discovered that Kay had forged Ng's signature on the document.

8 Legal compulsion was addressed in *Cosmic Insurance Corp Ltd v Ong Kah Hoe (trading as Ong Kah Hoe Industrial Supplies) and another* [1997] 3 SLR(R) 1 at [30], where the High Court held that for a plaintiff to recover any payment that discharges a defendant's debt to a third party on the grounds of legal compulsion, the plaintiff must show that:

- (a) he has been compelled or was compellable by law to make the payment;
- (b) he did not officiously expose himself to the liability to make the payment; and
- (c) his payment discharged a liability of the defendant.

9 In the present case, Kay was not compellable by law because, as she conceded, IRAS had no claim against her. Kay may have been Ng's donee under the LPA, but she had forged Ng's signature on the document.

10 Alternatively, Mr Ong submits that it was necessary for Kay to pay Ng's taxes. The common law does not, outside of cases involving emergencies, permit recovery for expenses incurred in the unsolicited management of the affairs of another (*Higgins, Danial Patrick v Mulacek, Philippe Emanuel and others and another suit* [2016] 5 SLR 848 at [59]). There must be an element of urgency in the situation.

11 I find that there was urgency in the present case. The cheque in question was dated 6 August 2013, merely four days before the taxes were due. Although Kay had relinquished the responsibility of caregiving for Ng by July 2013, Ng and his family were based in Malaysia and may not have made payment by the deadline. I find that, in the circumstances and given Kay and Ng's prior relationship, she had acted reasonably by paying his taxes in compliance with IRAS' instructions. Ng would clearly be unjustly enriched if Kay was not reimbursed the S\$36,792.98.

12 I next deal with the Hong Kong legal fees, which Ms Luo divides into four categories:

- (a) Category 1: HK\$118,000 paid by Tsang Ming Chu ("Tsang");
- (b) Category 2: HK\$100,000 paid out of an account jointly held by Kay and Ng ("the Joint Account");
- (c) Category 3: HK\$677,475 paid out of Kay's personal account from 9 October 2013 to 15 January 2016; and

(d) Category 4: HK\$495,420 paid out of Kay's personal account after 15 December 2015.

Although Kay claims she paid a total of HK\$1,416,395, Ms Luo submits, and I accept, that there was a refund of HK\$25,500 on 20 February 2017, and so the actual figure is HK\$1,390,895.

13 Kay claims that Tsang, a friend, paid the Category 1 sum first on Kay's request and Kay then repaid Tsang. Tsang was not called as a witness and there was no evidence of any communication between Kay and Tsang. The payment was made on 26 June 2012, and the first medical report on Ng's mental capacity is dated 5 October 2012. Ng may have paid Tsang back himself, and Gabriel, as Ng's litigation representative, will naturally have no knowledge of this. Evidence from Tsang would have supported Kay's claim, and I do not accept Kay's bare assertion that she had paid Tsang since it would not have been difficult for her to find some corroborative evidence.

14 Ms Luo submits that the money used to pay the Category 2 sum belonged to Ng as it was paid out of the Joint Account. Kay claimed the money belonged solely to her and Ng was merely a signatory. Joint bank account holders are each entitled to all the moneys in a joint account, and so the money legally belonged to both Ng and Kay. Kay's bare assertion that it belonged solely to her, with no documentary proof, is untenable, and I agree with Ms Luo that the Category 2 sum was not paid at Kay's expense.

15 As for the Category 3 sum, Ms Luo submits that S\$90,000 was moved from the Joint Account to Kay's personal account on 19 August 2013 for the purpose of bearing the legal fees, and therefore the money used to pay the sum belonged to Ng as well. Kay denied transferring the money for this purpose, and claimed that she regularly transferred money between her accounts for her own convenience. I find it unlikely that payments from 9 October 2013 to 15 January 2016 amounting to HK\$677,475 can be traced back to a single transfer in August 2013. I accept Kay's explanation that she regularly moved money between her accounts and given that the Category 3 sum was paid from her personal account, I accept that it was paid at her expense.

16 Litigation representatives are ordinarily entitled to an indemnity from the estate of the person that they represent (*Hsu Ann Mei Amy (personal representative of the estate of Hwang Cheng Tsu Hsu, deceased) v Oversea-Chinese Banking Corp Ltd* [2011] 2 SLR 178 ("*Hsu Ann Mei Amy*") at [40]). The bills produced by Kay show that the Category 3 legal costs would have been incurred by Ng in the conduct of the Hong Kong suit in any event, and were duly paid by Kay in her capacity as his next friend. As Gabriel did not dispute the quantum of expenses, Kay should be reimbursed for the sum of HK\$677,475.

17 Ms Luo concedes that Kay paid the Category 4 sum but submits that Kay had already been ordered to bear this personally in a decision of the Hong Kong court by Recorder Jason Pow, SC, and is attempting to relitigate the matter. On 19 August 2015, Gabriel applied to replace Kay as Ng's next friend in the Hong Kong suit. Kay contested the application. The court ruled in favour of Gabriel, a decision upheld on appeal by Recorder Pow. The relevant part of his judgment is at [47]:

I have concluded, on the basis of the evidence produced that [Kay] is not a suitable person on whom this court can repose trust and confidence. The 2nd affirmation of [Gabriel] was filed on 15 December 2015. Thereafter, [Kay] did not seek to file further affirmation to challenge the various matters contained in [Gabriel's] 2nd affirmation which reflected badly on her character and integrity. She nonetheless continued to oppose the application for removal and substitution. [Kay] was then still in the position of [Ng's] next friend and should place the interest of [Ng] at the forefront. If she had placed the interest of [Ng] at the forefront, I cannot see how she can

conclude, *bona fide*, that it is in the interest of [Ng] to continue to spend legal costs in further resisting the summons. I am of the view that her action was motivated by her self-interest, self-esteem or emotion which is similarly borne out in the array of unmeritorious litigations [Kay] waged against the family members of [Ng]. In my view, it is not just and fair that [Ng] should end up bearing the unnecessarily incurred legal costs due to [Kay's] obstinate conduct. I do not accept [Kay's counsel's] submission that [Kay] was acting *bona fide* in the interest of protecting and safeguarding [Ng]. In my judgment, it is in the interest of justice that [Kay] should be ordered to personally bear the costs of the summons after 15 December 2015 including the hearing before Master M Wong on 1 February 2016.

Kay did not appeal against this decision. Mr Ong submits that Recorder Pow's judgment is irrelevant as it related only to party-and-party costs for the application before him.

18 I do not think Recorder Pow's decision went so far as to order that all costs, including solicitor-and-client costs, should be personally borne by Kay. For example, the decision explicitly leaves the issue of costs of the appeal before him for a later time. The Category 4 sum consists of items related to her contest of Gabriel's application. For example, Kay admitted in cross-examination that the item labelled "Settlement of Costs Order" in the bill dated 29 September 2016 was part of the costs ordered against her in Recorder Pow's decision. In fact, in the three bills in question, the only items that relate to the conduct of the actual suit appear to be 53 minutes of correspondence with the solicitors of the Hong Kong defendant. Most of the items were costs incurred by Kay's decision to contest Gabriel's application.

19 In light of Recorder Pow's decision, Ng cannot be said to have been enriched at Kay's expense when it was Kay who had unreasonably incurred the expenses herself, and there is no basis for her claim in unjust enrichment. Mr Ong submits that Kay is entitled to an indemnity from Ng's estate as his litigation representative, relying on *Hsu Ann Mei Amy*, but *Hsu Ann Mei Amy* involved indemnity for costs incurred in the main suit. In the present case, Kay incurred costs in an ancillary matter that would not have been incurred had she acted in Ng's best interests, and there is therefore no reason for her to be indemnified.

20 In the circumstances, I grant Kay's claim for reimbursement of S\$36,792.98 and HK\$677,475 and I dismiss her claim for reimbursement of the rest of the Hong Kong legal fees.

21 Kay succeeded in just over half the amount claimed, and the issues raised at trial do not justify any award other than half costs. The amount of costs submitted by both sides were roughly the same, and both were slightly on the high side. In my view, the amount of costs to be awarded to Kay should be half of S\$100,000 plus reasonable disbursements, and I so order.