

VGI v VGJ
[2020] SGHCF 5

Case Number : Registrar's Appeal No 53 of 2019
Decision Date : 13 February 2020
Tribunal/Court : High Court (Family Division)
Coram : Debbie Ong J
Counsel Name(s) : Chia Ti Lik (Instructed Counsel) (Chia Ngee Thuang & Co), Phang Fui Fern Eve Lyn (Archilex Law Corporation), and Tomoka Hasegawa (Foreign Counsel) (Vanilla Law LLC) for the appellant; Anand George (BR Law Corporation) for the respondent.
Parties : VGI — VGJ

Civil Procedure – Costs – Security

13 February 2020

Debbie Ong J (delivering the judgment of the court *ex tempore*):

Issue and Brief Facts

1 The primary issue in this appeal is whether the court has jurisdiction by virtue of r 459 of the Family Justice Rules 2014 (S 813/2014) (“FJR”) to order security for costs against the Plaintiff in the main probate proceedings between the parties.

2 The Plaintiff had lodged a caveat against any grant of probate in respect of a deceased person’s estate on the basis that he is the said deceased’s brother. The Defendant, who is the brother of the deceased’s late wife, subsequently sought a grant of probate based on a will (“Will”) which named him as the executor. The Plaintiff thereafter issued a writ seeking, *inter alia*, a declaration that the Will is invalid and that the deceased had died intestate.

3 In this appeal, the Plaintiff argues that the court has no jurisdiction to order security for costs against him by virtue of r 459 of the FJR which provides:

(1) Where, on the application of a defendant to an action or other proceeding in the Court, it appears to the Court —

(a) that the plaintiff is ordinarily resident out of the jurisdiction ...

then, if, having regard to all the circumstances of the case, the Court thinks it just to do so, it may order the plaintiff to give such security for the defendant’s costs of the action or other proceeding as it thinks just.

...

(6) The references in paragraphs (1) ... to a plaintiff and a defendant are to be construed as references to the person (howsoever described on the record) who is in the position of plaintiff or defendant, as the case may be, in the proceeding in question, including a proceeding on a

counterclaim.

4 The Plaintiff argues that he is not in the position of a plaintiff as he is merely a caveator and not the party who wishes to propound the Will to obtain a grant of probate. He submits that the Defendant, by having the burden to prove that the Will is valid, is in the position of the plaintiff.

Analysis

5 In order to obtain a grant of probate, it is necessary to make an application to the court – this is made by *ex parte* originating summons: see r 208 of the FJR. An application for the grant of probate in this regime is not a contentious litigation proceeding in the way that other civil proceedings are; the latter typically involves a plaintiff suing a defendant for breach of rights and making a claim based on that breach.

6 The regime for the application of the grant of probate requires the applicant to file an affidavit and provide the necessary documents, and so in that way, the applicant has the burden of showing that a grant is in order. This process is different from the litigious proceedings commenced by a plaintiff envisaged in r 459 of the FJR, which is *in pari materia* with O 23 r 1 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) (“ROC”). *Singapore Civil Procedure 2020, vol 1* (Paul Quan, gen ed) (Sweet & Maxwell Asia, 2019) at para 23/0/2 explains the rule in O 23: “The underlying rationale is that while it is up to the plaintiff to decide on whether to run the risk of suing a party who may not be good on costs, a defendant has no comparable choice”. Thus the “actor” or “mover” (or “aggressor”) is the one who brings the other party to court in litigious proceedings. The Defendant in the present case, by seeking only to obtain a grant of probate through a non-contentious regime, does not fit into this description.

7 The Plaintiff, through his counsel, submits that the applicant for the grant of probate can use such a non-contentious regime only if there is no caveat lodged. His submission is thus that if there is a caveat lodged, he must use contentious probate proceedings to prove the will. The Plaintiff cites the English cases of *In re Emery, Deceased* [1923] P 184 (“*Re Emery*”) and *Rose v Epstein and another* [1974] 1 WLR 1565 (“*Rose v Epstein*”), as well as the commentary on O 23 r 1 in *Singapore Civil Procedure 2018, vol 1* (Foo Chee Hock, gen ed) (Sweet & Maxwell, 2018) at para 23/3/27, which relies on these two cases for the statement that “A caveator cannot as such be ordered to give security for costs”.

8 The Defendant on the other hand submits that those two old English cases can be distinguished from the present case on the basis that, the caveator there did not institute proceedings and was not the plaintiff or substantively the “mover” or “actor” in the proceedings. Further, he submits that the relevant probate rules have since changed. The later provisions expand the purpose of a caveat to include the showing of cause against the grant, while the rules prevailing at the time of the two cases were narrower.

9 What is the correct lens with which to view who the “plaintiff” or “mover” is in these proceedings? The Defendant need not have been involved in these contentious probate proceedings in order to obtain the grant of probate but for the Plaintiff-caveator’s acts. The Defendant’s burden is to prove the will, at most in solemn form if the caveator insists on it. It is clear that where a caveator insists that the applicant proves the will in solemn form and wishes to cross-examine the witnesses, he will not be liable for costs: see r 855 of the FJR. This is the probate regime which sets out what the applicant’s burden is. Beyond this, if a caveator is not satisfied and still challenges the will, he becomes the “mover” who is responsible for starting the contentious probate proceedings.

10 The cited English cases of *Re Emery* and *Rose v Epstein* are not inconsistent with my views. The English cases interpret the effect of a caveat to be a notice to the Registrar rather than an act to commence proceedings, at least based on English law at that time. Even today, a caveator who only seeks to ensure that the applicant proves the will in solemn form or intends to cross-examine witnesses produced in support of the Will will not be similarly treated as a plaintiff for purposes of r 459 of the FJR. Thus not every caveator is treated as the plaintiff for the purposes of the aforementioned provision. A caveat is a notice to the court not to proceed with the grant of probate until the caveat is addressed. Whether a person who begins involvement as a caveator is in the position of the plaintiff depends on what the substantive effect of his acts are and not merely the fact that he had lodged a caveat earlier. The cases of *Re Emery* and *Rose v Epstein* should be understood in this light and on their own facts and the prevailing law then.

11 In my view, in the present case, it is the Plaintiff who is in the position of the plaintiff commencing the contentious proceedings for the purposes of r 459 of the FJR. Still, it does not necessarily mean that security for costs must be ordered just because r 459 of the FJR is invoked. In the next stage, the court will consider the circumstances and determine whether it is just to order security for costs and if so, in what quantum.

Decision

12 I remind parties that this is an issue on security for costs and is not a matter that affects the substance of the parties' respective cases. The Plaintiff is not precluded from pursuing his challenge to the will. Indeed if he succeeds in the proceedings, he will not have to pay costs but will instead be able to seek costs. If the Plaintiff has no intention to avoid paying costs should he fail in the case, there is no prejudice to him. The issue is whether ordering security for costs will stifle his ability to pursue the claim. He has not argued that he is impecunious or even that the quantum ordered is too high.

13 The circumstances militate in favour of ordering security for costs. The Defendant is now faced with contentious proceedings only because of the Plaintiff-caveator's actions. The Plaintiff is a foreign party. He has not shown impecuniosity such that he is unable to raise the sum ordered. He may not be claiming an interest now but his case, if allowed, enables him to have an interest in the estate based on intestacy laws.

14 The appeal is dismissed.