Heow Mee Han and Others v Cheong Hock Kiam
[2008] SGHC 27

Case Number : Suit 335/2006, RA 240/2007

Decision Date : 26 February 2008

Tribunal/Court : High Court

Coram : Tay Yong Kwang J

Counsel Name(s) : Matthew Saw Seang Kuan (Lee & Lee) for plaintiff; Prabhakaran s/o Narayanan Nair (Ong Tan & Nair) for defendant

Parties : Heow Mee Han; Sia Kong Eng; Cheong Hok An; Cheong Hock Soon; Cheong Hock Theam; Cheong Hock Sze; Cheong Huei Lu; Cheong Hock Guan; Cheong Hui Yi (A minor suing by her next friend, Sia Kong Eng) — Cheong Hock Kiam

Civil Procedure

Succession and Wills

26 February 2008

Tay Yong Kwang J:

1 On 2 March 2002, Cheong Kee Teck ("the deceased"), who had two families in Malaysia and one in Singapore, died. The first and second plaintiffs in this action are the deceased's wives from the Malaysian families. The third to ninth plaintiffs are his children from Malaysia. The defendant is the deceased's daughter from the Singapore family.

2 By a will dated 3 May 1999, the deceased appointed the defendant as the executrix and trustee of the deceased's Singapore estate ("Singapore trustee") (see clause 1 of the will). The Singapore residuary estate was given to the Singapore family which includes the defendant. The third and eighth plaintiffs were appointed as the executors and trustees of the Malaysian estate ("Malaysian trustees") (see clause 5 of the will). The deceased gave his Malaysian residuary estate to the nine plaintiffs. The material portions of the will provided:

> 2 I DEVISE and BEQUEATH my house at No. 30 Jalan Mutiara, Singapore 670418 (hereinafter called "30 Jalan Mutiara")(should my wife Ong Mee Ngeo predecease me leaving me the sole proprietor of 30 Jalan Mutiara), to my son Cheong Leong Hock (Nric No. S2011160/G), my daughter Cheong Hock Kiam (Nric No. S1433289/H), my son Cheong Hock Peng (Nric No. S1499983/C) and my daughter Cheong Koh Chai (Nric No. S1666474/Z) as joint tenants or where one or more predeceases the other/s at the date of my death, then to the survivors absolutely PROVIDED ALWAYS that the strict condition must apply that 30 Jalan Mutiara shall not be sold for any reason whatsoever except for the following conditions arising:-
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> a where there is only one (1) survivor left; or
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> b where 30 Jalan Mutiara is earmarked or is part of a redevelopment programme or project in such event, it shall be sold to the best available price possible and the proceeds be divided between them in equal shares or where one or more predecease the other, then to the survivors in equal shares or where there is only one (1) survivor, then to that survivor absolutely.

3 I DEVISE and BEQUEATH all my shares in HOTEL GRAND CENTRAL SINGAPORE to my Singapore Trustees to be divided and distributed as follows:-

a Fifty Per Cent (50%) to my Singapore residuary estate as hereinafter provided; and

b Fifty Per Cent (50%) to my Malaysian residuary estate as hereinafter provided.

4 Subject to the payment of my just debts funeral expenses and testamentary expenses where such debts funeral and testamentary expenses arises in the Republic of Singapore, I DEVISE and BEQUEATH all my real and personal property whatsoever and wheresoever situate (including any property over which I may have a general power of appointment or disposition by will including but not limited to all my shares and bank accounts, insurance policies, CPF monies etc) only in the Republic of Singapore not specifically disposed of by this my will or any codicil hereto to my Singapore Trustees upon trust to sell call in and convert the same into money with power to postpone such sale calling in and conversion for so long as they shall in their absolute discretion think fit and to retain the same or any part thereof in its existing form of investment without being liable for loss and to stand possessed of the net proceeds of such sale calling in and conversion and my ready money (hereinafter called "my Singapore residuary estate") for the following persons in equal shares:-

(1) my wife Ong Mee Ngeo (Nric No. S0334492D)

(2) my son Cheong Leong Hock (Nric No. S2011160/G)

(3) my daughter Cheong Hock Kiam (Nric No S1433289/H)

(4) my son Cheong Hock Peng (Nric No. S1499983/C)

(5) my daughter Cheong Koh Chai (Nric No, S1666474/Z)

3 As the defendant did not distribute 50% of the deceased's Hotel Grand Central shares to the plaintiffs, they commenced this action in May 2006. On 30 August 2006, judgment was entered for the plaintiffs pursuant to O 14 r 3 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed). It was ordered that an account be taken of the plaintiffs' respective entitlement to the Hotel Grand Central shares and of the dividends paid in respect of the said shares since the death of the deceased. Directions were given by the court for the defendant to file and serve the account together with an affidavit verifying the same, annexing all documents in her possession, custody or power relating to the said account.

4 The account-taking was heard over two days before an assistant registrar of the Supreme Court ("the AR"). After hearing the parties, the AR made the following orders:

(a) the defendant is to transfer 6,031,292 Hotel Grand Central shares to the nine plaintiffs in equal shares within 14 days;

(b) the defendant is to pay the nine plaintiffs:

i the sum of $432,471.49 in equal shares

ii interest on the said sum at the rate of 5.33% per annum from the date of issue of the writ to the date of judgment, in equal shares

iii costs of the action and reasonable disbursements to be taxed or agreed.

The defendant then appealed to a judge against the AR's decision.

5 The deceased's estate owns 12,062,585 Hotel Grand Central shares. The total amount of dividends paid since the deceased's death was $1,560,953.68. The defendant, who was cross-examined at the hearing before the AR, agreed with these two figures. The defendant also accepted that it was her duty as trustee and executrix to account to the plaintiffs as beneficiaries their entitlement under the will.

6 During the hearing before the AR, the defendant testified while under cross-examination that there was a debt owed by the deceased to Grand City Development Pte Ltd ("Grand City"). However, the alleged debt was not mentioned in her affidavit verifying the account and neither was any document evidencing the debt exhibited in her affidavit. Grand City is a company incorporated in Singapore. Its directors and shareholders are the defendant, her three siblings and their mother, all members of the Singapore family and the beneficiaries of the Singapore residuary estate. The defendant agreed that the Singapore family was in total control of Grand City after the demise of the deceased. The defendant said that she would first pay up all the debts of the estate by using the available cash therein. If the cash in the estate was not sufficient to pay up its debts, she would sell the Hotel Grand Central shares to pay up the balance. She would then distribute to the plaintiffs half of whatever remained after the discharge of the said debts.

7 Before the AR, the defendant referred to two documents as evidence of the debt allegedly owing to Grand City. One was the estate duty certificate issued in July 2004 stating that the estate had debts amounting to slightly more than $11m but without specifying the persons to whom the debts were due. The other document was an extract from Grand City's financial statements for the year ending on 31 December 2002 stating that the "amount owing by directors" was some $10.5m. A footnote stated that the amount owing by directors was unsecured, interest-free and had no fixed term of repayment.

8 The AR held that it was for the defendant to prove her case that the director of Grand City who owed money to that company was the deceased and not the other directors. The AR found that the abovementioned documents indicated different figures and the defendant was unable to ascertain the exact amount of the debt allegedly owed by the estate to Grand City. Accordingly, the AR held that the defendant had not proved her case that the director who owed money to Grand City was the deceased.

9 The defendant argued before the AR that none of the plaintiffs' affidavits disputed the contents of the estate duty certificate and that it therefore followed that they accepted the $11m liability. The defendant also asserted that the single largest creditor that had a claim against the estate was Grand City. The plaintiffs countered by arguing that the defendant filed her affidavit some four months before the hearing without mentioning the alleged debt or exhibiting any document in support thereof. They also emphasized that Grand City was an entity totally owned and controlled by the Singapore family (including the defendant) and that the burden of proof should be on the defendant trustee to show that there was a real debt owed by the estate to her family's company. The AR agreed with the plaintiffs on this. She held that the evidence was scant and was therefore not persuaded that the debt was owed by the deceased to Grand City.

10 The next issue pertained to a sum of $5,095,673.20 in cash withdrawn from three accounts in the United Overseas Bank less than a week before the deceased passed away. The defendant asserted that the deceased had instructed her before his demise to withdraw the said sum for

distribution to the Singapore beneficiaries. The defendant claimed that the deceased "had a lawyer there and power of attorney done. I just did what he told me to do". She argued that as the cash amount had already been withdrawn and distributed by way of gift before the deceased's death, it would not constitute an asset in the estate that could be used to pay the deceased's debts.

11 The plaintiffs submitted that the estate duty certificate showed that the value of the assets in the estate was $12,538,073.29. The 5,193,850 Hotel Grand Central shares, valued at $2,142,463.13, should not be included in the total assets of the estate as they were excluded by the words "not specifically disposed of by this my will" in clause 4 of the will and could not therefore be sold and converted into cash for distribution to the Singapore beneficiaries. The total value of the assets in the estate, after deducting the value of the said shares, would be $10,395,610.16. Even if there was a debt of $10,562,213 owing from the estate to Grand City, the defendant still had almost enough to pay off that debt.

12 The AR noted that there was no documentary evidence or witness to prove the deceased's alleged instructions to the defendant regarding the cash in the three bank accounts. The power of attorney was not produced before the AR or before me as the defendant claimed that she did not have a copy of it. The AR was therefore not persuaded that there were such instructions from the deceased to the defendant.

13 Two weeks after the AR made her decision, the defendant filed another affidavit (on 10 September 2007) seeking to adduce new evidence pertaining to the alleged debt owing to Grand City at her appeal from the AR's decision. The new evidence took the form of a letter dated 3 February 2004 from the defendant's former solicitors to the Inland Revenue Authority of Singapore, extracts from the ledgers of Grand City and an audit confirmation requested by Grand City and signed by the defendant as executrix for the deceased on 10 September 2002, acknowledging a debt of $10,468,532.24 owing to Grand City as at 31 December 2001. In the affidavit, the defendant stated as follows:

> 2 I have filed an Appeal against the Decision of the Learned Assistant Registrar. My Appeal is mainly focussed on her finding that there is insufficient evidence before the Court to prove conclusively that my late father was indebted to [Grand City] in the sum of $10,858,485.00 at the time of his death.
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> 3 I have since the Decision was made gone through some documents and I have been able to locate some correspondence and papers which will show this Court that the deceased was indeed indebted to the Plaintiffs (*sic*) in the sum of $10,465,210.02 as at 31.12.2001. I annex hereto copies of these documents and mark them as CHK "6". I am unable at present to obtain the exact sum at the date of his death. However, in the General Ledger (Page 13) it shows that as at 1st March 2002, the amount is definitely an unpaid amount owed by the Estate to the Company.
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> 4 I apologise for not having shown these documents before as I was of the view that since the Commissioner of Estate Duties had already accepted the debt as a liability of the Estate, that would be sufficient evidence of the indebtedness. I pray that this Court takes this into consideration.

The plaintiffs objected to the admission of the new evidence. I refused the defendant leave to admit the new evidence at the appeal.

14 The defendant then proceeded with the appeal without the above affidavit. The defendant

argued that there was more than sufficient evidence to prove that the deceased was indebted to Grand City. She submitted that there was evidence of a debt due from the directors to Grand City in the company's annual returns. Those accounts were prepared by the company's auditors and signed by the deceased. If the accounting documents were read together with the estate duty certificate, it could be seen that the deceased had a debt of $11,059,654.95. It was further argued that the Commissioner of Estate Duties would not have allowed such a huge amount to be deducted as a liability if he was not convinced or persuaded that the debt was a genuine one. If the AR was correct in her decision, that would mean that the deceased did not owe Grand City a substantial amount and the said Commissioner would have been wrong to allow the debt to be deducted as a liability. The defendant reiterated that the debt of up to $11,059,654.95 must be paid first before any distribution could be made to the parties. The defendant wanted to settle the deceased's liability first and then distribute whatever was left. She further argued that although she and her family were the directors and shareholders of Grand City, the Singapore family members remained separate legal entities from Grand City, the creditor company, and that the AR was wrong to equate the family with the company.

15 Where the withdrawal of the sum of $5,095,673.20 from the bank accounts was concerned, the defendant maintained that the deceased had given her a power of attorney coupled with his instructions to withdraw the cash and distribute it when the deceased was still alive. The defendant argued it was for the plaintiffs to prove that she acted without the deceased's instructions and it was not for her to prove the said instructions.

16 The plaintiffs repeated their arguments made before the AR and further submitted that their earlier stand contained in their affidavit of 27 July 2006 was incorrect. There, the plaintiffs accepted that the Hotel Grand Central shares could be used to pay off the debts of the estate if the assets were insufficient for that purpose. They now argue that their portion of the said shares should not be used to pay off any alleged debt owing from the estate to Grand City.

17 The reasoning is as follows. Clause 6 of the will mirrors clause 4. Clause 6 confers the deceased's real and personal property in Malaysia on the Malaysian trustees for distribution (after payment of the Malaysian debts and expenses) among the members of the Malaysian families (the plaintiffs) in equal shares. Pursuant to clause 3, the Hotel Grand Central shares were entrusted to the defendant who is obliged to transfer 50% thereof to the Singapore residuary estate (i.e. the Singapore family) and the other 50% to the Malaysian residuary estate (i.e. the plaintiffs). Since Grand City is a Singapore company, any debt owed to it is a Singapore debt which must be paid out of the Singapore residuary estate. Accordingly, only the Hotel Grand Central shares due to the Singapore family should be used for this purpose. Even if the alleged debt had arisen in Malaysia, the defendant would still have to transfer the plaintiffs' 50% to the Malaysian residuary estate for the Malaysian trustees to deal with.

The decision of the court

18 In *Lassiter Ann Masters v To Keng Lam* [2004] 2 SLR 392 ("*Lassiter*"), the Court of Appeal drew a distinction between the adduction of fresh evidence in an appeal against a registrar's decision made on affidavit evidence alone (as in an interlocutory application) and in an appeal against a registrar's decision made after hearing oral testimony (such as an assessment of damages). For the latter category, the Court of Appeal adopted a modified version of the well-known three conditions set out in *Ladd v Marshall* [1954] 1 WLR 1489. In exercising the discretion whether or not to admit fresh evidence on appeal in a case in the latter category, the judge should bear in mind the following conditions:

(a) the party seeking to admit fresh evidence must show sufficiently strong reasons why that

evidence was not adduced at the assessment before the registrar.

(b) the fresh evidence must be such that, if given, it would probably have had an important influence on the result of the case, though it need not be decisive.

(c) the fresh evidence must be apparently credible, though it need not be incontrovertible.

The Court of Appeal also stated (at [26]):

In passing, we would add that we do not see any reason why these conditions should not also apply to other similar proceedings conducted by the Registrar, such as the taking of accounts or the making of inquiries.

19 It is therefore clear that the conditions set out by the Court of Appeal in [18] above apply to the present proceedings. The onus is on the defendant to persuade me that the evidence contained in her post-hearing affidavit of 10 September 2007 ought to be admitted.

20 The defendant has not denied that the three sets of documents in question were in her possession, custody or control at all material times. She certainly could not deny this as she was the managing director of Grand City and also the Singapore trustee of the deceased's estate. She took the position at the hearing below that the estate duty certificate was sufficient to prove the alleged indebtedness in respect of Grand City and therefore saw no need to produce other evidence to convince the AR.

21 In my view, this was not a sufficiently strong reason to admit the new evidence. The defendant was the accounting party. She should be acutely conscious of her duty to satisfy the court that all items in her account were properly documented. It was apparent that the estate duty certificate by itself would not prove a debt *owing to Grand City* especially since the amount did not even tally with the financial statements of Grand City. The financial statements were also hopelessly nebulous, bearing in mind that there were six directors (including the deceased) in Grand City at the relevant time. The plaintiffs' solicitors had also asked for further documentary proof of the alleged debt more than a year before the hearing below.

22 The defendant's lackadaisical attitude was shown by the fact that she only bothered to start looking for the documents after the AR gave her decision, which was 26 days after the conclusion of the hearing (see paragraph 3 of the defendant's affidavit of 10 September 2007 at [13]). Further, there were several months between the time that interlocutory judgment was entered against the defendant and the deadline for her to furnish the account. She could not therefore claim that she had insufficient time to locate the documents for the hearing below. As the Court of Appeal in *Lassiter* said (at [45] of the case), "Any party who comes to court seeking to play a "cat-and-mouse" game cannot expect sympathy or indulgence". The same applies to a party who waits for the court to decide, then seeks to augment its evidence with material in its possession when the ruling goes against it. Moreover, it is plain that admission of the new evidence would entail a re-hearing before the AR with further cross-examination and possibly the calling of more witnesses.

23 I accept that the new evidence, if admitted, could have an important bearing on the issues decided by the AR and that the documents were, on their face, genuine ones. I note also that the amount of the alleged debt was not consistent in the various documents produced before the AR and in the new evidence. However, as the defendant failed at the first threshold for the admission of fresh evidence, I disallowed the application to admit the documents in question.

24 On the substantive matters decided by the AR, I agree that the evidence before her fell far short of establishing the alleged debt to Grand City for the reasons already canvassed. This was especially so when the defendant here is the trustee of the estate and also one of the beneficiaries of any money that may eventually go to Grand City. She is effectively both the debtor and creditor and it is therefore incumbent on her to fulfil her role as trustee in a way that leaves no room to doubt her accounts.

25 As for the withdrawal of the sum of more than $5m from the bank accounts, it was for the defendant to furnish satisfactory evidence on the deceased's alleged instructions to her but she has failed to do so. Even if the withdrawal and distribution were not done by her in her capacity as the Singapore trustee (as the deceased would still be alive then), she would still be liable to account for the money as she claimed to have been given a power of attorney. Strangely, no power of attorney has been shown to the court and the defendant has not explained how and when $5m was distributed among the Singapore family within a matter of days. She has chosen not to call even one member of her family to testify that he/she did indeed receive a portion of the $5m. I therefore also agree that the defendant has failed to show that the $5m was not part of the estate's assets.

26 In any event, I agree with the plaintiffs' submissions (at [16] and [17] above). Whether or not there was a debt owed to Grand City and irrespective of the amount of assets left in the estate, the defendant still has to transfer 50% of the Hotel Grand Central shares to the plaintiffs. I am also of the view that the alleged debt would be a Singapore debt.

27 There was therefore no merit in the defendant's appeal. I dismissed it with costs to be taxed or agreed.