

Leong Peng Yew and another (executors and trustees of the estate of Leong Swee Lim,
deceased) v Leong Kwong Lim
[2009] SGHC 14

Case Number : Suit 744/2007
Decision Date : 12 January 2009
Tribunal/Court : High Court
Coram : Choo Han Teck J
Counsel Name(s) : Benjamin Sim (instructed) and Looi Wan Hui (Looi & Co) for the plaintiffs; Basil Ong Kah Liang (PK Wong & Associates LLC) for the defendants
Parties : Leong Peng Yew and another (executors and trustees of the estate of Leong Swee Lim, deceased) — Leong Kwong Lim

Probate and Administration

12 January 2009

Judgment reserved

Choo Han Teck J:

1 The plaintiffs are the two elder sons of Leong Swee Lim, deceased. The first plaintiff was 25 years old at the time of the trial and was in his sixth and final year in the University of Tasmania reading for his medical degree. The second plaintiff was 23 years old at the time of the trial. He had just graduated from the University of Western Australia, having obtained a degree in commerce. They have a younger brother who attained 21 years of age in August 2008 and was reading law in Australia. Their father, Leong Swee Lim died on 29 July 2002. The defendants are Leong Swee Lim's brothers and sister and are also the executors and trustees of his estate under a will dated 5 March 1991. The sons were only 8, 6, and 3 years old when the will was executed, and 19, 17, and 14 years old when their father died.

2 During his lifetime, Leong Swee Lim made a substantial fortune from his food business carried on by Paramount Food Pte Ltd ("Paramount"). He was the majority shareholder. Out of 530,000 shares, Leong Swee Lim, deceased held 300,000 shares. One of his brothers, Leong Fook Lim, (not a party in these proceedings) held 154,000 shares. The third defendant held 60,000 shares. The remaining 16,000 shares were held by two other individuals who were not parties to these proceedings. The principal assets of the company consisted of a residential house at 33 Kingsmead Road and one at 22A Leedon Road, which was used as Leong Swee Lim's family home. This was where the plaintiffs and their younger brother grew up before they went to Australia for their studies.

3 22A Leedon Road was contracted to be sold in May 2004 and the sale was completed in September 2004 for \$10.4m and from the proceeds, the executors paid the United Overseas Bank \$2,915,500 in settlement of Paramount's debt. That debt arose from trust receipt facilities given by the bank to Paramount and secured by a mortgage of 22A Leedon Road as well as the personal guarantee of Leong Swee Lim and Leong Fook Lim. The plaintiffs claim in this action, a sum of \$857,500 which was loaned by the defendants from the assets of the estate to Paramount between 23 July 2003 and 23 August 2005. These loans were unsecured and were made notwithstanding Paramount was insolvent and did not appear able to pay its debts. After Leong Swee Lim died, Leong Fook Lim took over the management of Paramount, and eventually, when it became broke he abandoned it and started his own food catering business. The executors also loaned their youngest brother Philip Leong \$178,000, initially on the pretext that the money was borrowed by the plaintiffs'

90-year old grandfather for business purposes. This sum had been fully repaid since the commencement of this suit and the plaintiffs therefore have withdrawn their claim for this amount.

4 Third defendant was a shareholder and director of Paramount and to the extent that decisions had to be made as to whether they would benefit the estate or Paramount, she was clearly in conflict of interest. She was also nominee director/shareholder of Patent Properties Network Pte Ltd ("Patent") (owned by Philip Leong, her younger brother) and although she claimed that she did not receive any salary, she was clearly in position of conflict of interest. In this case, however, it did not appear that the commission paid to Patent was excessive, but that was not a material point where liability was concerned. The law of trusts obliged her to disclose her interests to the High Court when estate applied for leave to sell the properties. She did not make the requisite disclosure.

5 The duties and obligations of executors and trustees are embodied in the wishes of the testator. What were the wishes of Leong Swee Lim? He willed that

...

3. My trustees shall hold the said piece of land situate in Mukim No. IV, Singapore, being Lot No. 3108, together with a house thereon known as No 22A Leedon Road, Singapore 1026 upon trust for my such of my three sons Leong Peng Yew, Leong Peng Jun and Leong Peng Wei who shall survive me, as tenants-in-common in equal shares, subject to the condition that the said land and building thereon cannot be sold until the said Leong Peng Wei shall have attained the age of 21 years, or if he should be deceased before then, until the said Leong Peng Jun shall have attained the age of 21 years, or if he should be deceased before then, until the said Leong Peng Yew shall have attained the age of 21 years.

4. If any of my sons shall die in my lifetime or after my death under the age of twenty-one years, then the same shall be held for such of my surviving sons in equal shares.

5. My trustees shall hold the said piece of land situate in Mukim No. II, Singapore, being Lot No. 176, together with a house thereon known as 33 Kingsmead Road, Singapore 1026 upon trust and shall not sell the same until such of my parents who shall survive me shall have been deceased, unless before then, the Trustees shall in their absolute discretion consider it necessary, after the disposal of all my other assets in accordance with this my Will, to raise funds in order to finance the welfare and education of all my three sons Leong Peng Yew, Leong Peng Jun and Leong Peng Wei as shall survive me.

6. I HEREBY DIRECT the net proceeds of sale of the said piece of land situate in Mukim No. II, Singapore, being Lot No. 176, together with a house thereon known as 33 Kingsmead Road, Singapore 1026, if the same is not required to finance to welfare and education of my said three sons, Leong Peng Yew, Leong Peng Jun and Leong Peng Wei be distributed as follows:

a. As to ninety per centum (90%) thereof, to my said three sons Leong Peng Yew, Leong Peng Jun and Leong Peng Wei in equal shares.

b. As to the balance ten per centum (10%) thereof, to my sister Helen Leong Swee Lun five per centum (5%) thereof, to my sister Linda Leong Yoke Lun two and a half per centum (2½) thereof, and to my sister Margaret Leong Sow Lun two and a half per centum (2½) thereof.

7. I HEREBY DIRECT my trustees to sell all my shares and interests in Messrs Leong Tong Fook Pte

Ltd and Frambroite Pte Ltd and shares in such other company as I may from time to time acquire, and all my shares and interest in the partnership business of Swan & McLaren at the best obtainable value and shall hold the proceeds of such sale and all unsold property and my ready money upon the following trusts:

- (1) to pay my debts and funeral and testamentary expenses;
- (2) to pay all my expenditures, estate duty and my income tax liabilities;
- (3) to pay the property taxes and costs of repairs and maintenance of my real property;
- (4) as to ninety per centum (90%) of the balance of the proceeds of sale of the said shares, for my said three sons Leong Peng Yew, Leong Peng Jun and Leong Peng Wei in equal shares and if any of my said sons shall die in my lifetime then the same shall be held for such of my sons as shall survive me in equal shares.
- (5) as to ten per centum (10%) of the balance of the proceeds of sale of the said shares, to my brothers Dr Leong Kwong Lim, Leong Sheng Lim, James Leong Chuen Lim, Dr Daniel Leong Ying Lim, Leong Siak Lim, Leong Fook Lim and Philip Leong Chong Lim, and to my sisters Helen Leong Swee Lun, Linda Leong Yoke Lun and Margaret Leong Sow Lun in equal shares.

6. The defendants averred that their brother Leong Swee Lim had wanted the company to continue in business. That evidence was contrary to his testamentary will, and an executor and trustee of a will must comply with the directions under the will. The directions and testamentary terms in this case were absolutely clear. It was plain that the testator wanted to ensure that there was money left for his children, and that they were to continue living in 22A Leedon Road until the youngest son has attained the age of 21. They were not to sell 33 Kingsmead unless it was necessary to raise funds for his children's education. So the defendants were in breach in not selling Paramount and further in extending loans to the company. The defendants claimed that if loans were not made, Paramount would collapse. Leong Swee Lim did not direct them to carry on Paramount's business. In fact, he directed them to end it by selling the company. In this regard, the conflict of interests between the third defendant as a director and shareholder of Paramount and as executor and trustee of her brother's estate were irreconcilable. The first and second defendants were in dereliction of duty in not paying attention to their appointments as executors and trustees and they left too much to the control of the third defendant. The first defendant was a doctor and his evidence in summary was that he acted in good faith to preserve the assets of his deceased brother for the benefit of his nephews (the plaintiffs and their brother). He had never been an executor and trustee before, and he was busy with his own clinical practice. Furthermore, he testified that after his brother's death he was battling a resurgence of cancer. The second defendant, likewise, was a professional although he was semi-retired he was at the material times an architect and the sole proprietor of Swan & MacLaren. He also appeared to have left the important decisions to the third defendant. In one instance when she proposed to lend a sum of \$250,000 from the estate to Paramount he was in Shanghai and did not seem to have thought through the importance and significance of that loan to the estate and its beneficiaries. He was, probably in hindsight, aware of the conflict (he described it as "caught by two laws") between the obligations created by the testator and the banks concerning Paramount, and the need to preserve the assets of the estate. Much of this worry would have been resolved had he taken legal advice on it. It was not clear what advice he sought and what he was advised by the lawyers advising on the probate matters at the time.

7 The executors had consulted lawyers on at least two occasions when they applied to court for leave to sell the two properties, 33 Kingsmead and 22A Leedon Road. However, it appeared that there was no application for approval to let Paramount continue in business. When the application to court for approval to sell 22A Leedon Road, it was not disclosed that part of the proceeds of sale were to be loaned to Paramount. It might have been true that if Paramount did not settle its debts with the bank the latter might have gone after the two properties. While the problems of Paramount might have been difficult, the executors seemed to care more about their siblings, and in particular, Leong Fook Lim and Philip Leong than the beneficiaries of the estate to which they were trustees. The bank had the personal guarantee of Leong Fook Lim to enforce. It was probably the desire to save Leong Fook Lim that prevented the defendants from seeing their duty clearly. As the second defendant put it, "the whole family was very inter-dependant on one another". By that he meant that the siblings thus tended to help each other. That became a problem when the interests of the siblings came into conflict with the interests of their nephews.

8 It is now necessary to comment on the role of Leong Fook Lim. This sibling was not an executor or trustee of the estate, but he was a sibling of the plaintiffs' father. He was also a shareholder of Paramount and was running the business of Paramount at all material times. He was the voice that the third defendant listened to and she, in turn, was the voice the other two executors listened to. Leong Fook Lim was unable to produce a clear account of how the money borrowed by Paramount from the estate was utilised. He admitted that he had only a vague idea what the terms of the will permitted and what it prohibited. Leong Fook Lim and his wife were also owners of a food catering company called Unicater Pte Ltd ("Unicater") that got its supplies from Paramount. Leong Fook Lim testified in court that this was to give Paramount support, but it was not easy to determine whether it was just as accurate to say that Paramount was supporting Unicater. Critically, Paramount was created by Leong Fook Lim in 1993. According to him, it was losing money from the time it started. His brother, the plaintiffs' father joined in about a year later hoping to make it profitable but even his money couldn't help. By the time he died, Paramount owed him \$1.285m. Leong Fook Lim was the managing director of Paramount. It appeared that Unicater (his other company) took supplies from Paramount and did not fully pay for them.

9 For the reasons above, I find that the defendants were in breach of duty as executors and trustees of their brother's estate. I find that the sum of \$857,500 advanced as a loan to Paramount was made in breach of that duty. I am not satisfied, however, that the commissions paid to the housing agent in respect of the sales of the two property constituted a loss even though they were made in breach of their fiduciary duty. It was clear that a property agent would be required and the amount paid, even assuming it was higher than it would have had some other agent been engaged, might not be very significant and I do not think that I would order an assessment of damages. The plaintiffs could have obtained all the evidence necessary to prove the exact amount of loss in this regard but they did not. I would therefore disallow the claim in respect of the commissions. I now refer to the larger amount of money owed by Paramount to the estate; that accrued even before the testator died, and it seemed obvious from the evidence that Paramount was in no position to pay any of it. Although the defendants had a duty to try and recover the loan for the estate, it would have been a futile exercise. Indeed, that was the reason why the plaintiffs succeeded in the claim for the \$857,500, that is, that the defendants knowing the true circumstances ought not to have lent any money from the estate to that company.

10 I will hear arguments on costs at a later date if parties are unable to agree costs.