Tan Keaw Chong v Chua Tiong Guan and Another
[2009] SGHC 127

Case Number	: Suit 80/2008, SUM 1672/2009
Decision Date	: 26 May 2009
Tribunal/Court	: High Court
Coram	: Leo Zhen Wei Lionel AR
Counsel Name(s)	: Kelvin Tan (Gabriel Law Corporation) for the plaintiff; Tan Teng Muan (Mallal & Namazie) for the second defendant
Parties	: Tan Keaw Chong — Chua Tiong Guan; Chua Hui Khim as representative of Chua Tiong Guan (Deceased)

Civil Procedure

26 May 2009

AR Leo Zhen Wei Lionel:

Introduction

1 This is an application by Ms Chua Hui Khim ("the Second Defendant") for a setting aside of the order of court, dated 2 March 2009 ("the Order"), joining her as the representative of the estate of Mr Chua Tiong Guan ("the First Defendant"). After hearing the submissions of the respective parties, I dismissed the Second Defendant's application. I now give the reasons for my decision.

Background

2 In February 2008, Mr Tan Keaw Chong ("the Plaintiff") commenced Suit No 80 of 2008 ("the Suit") against the First Defendant for breach of an oral agreement, made around January or February 1997, that allegedly provided that they would have an equal share in the beneficial interest of a piece of property located at 6 Toh Tuck Road, #03-02 Rainbow Garden, Singapore 596680 ("the Property"). The Plaintiff also claimed to have made various payments, amounting to a sum of $225,800, towards the Property pursuant to this oral agreement. For these reasons, the Plaintiff claimed for the sum of $225,800, as well as for an account of his share in the profits generated from the sale of the Property, which had been sold en-bloc with the whole development in which it was situated.

3 On 8 January 2009, the First Defendant passed away. The Plaintiff then made an application, on 17 February 2009, for an order that the First Defendant's son, Mr Chua Wee Thye, be appointed to represent the estate of the First Defendant ("the application") pursuant to O 15 r 7 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed). At the hearing of 2 March 2009, the Plaintiff's solicitors orally applied to amend their summons to substitute the Second Defendant in place of Mr Chua Wee Thye. The Assistant Registrar ("the AR") allowed the amendment and granted the Plaintiff's amended application, ordering that the Second Defendant be made a party to the Suit as representative of the First Defendant's estate. On 11 April 2009, the Second Defendant filed the present summons, seeking a setting aside of the Order.

Preliminary matter

4 Before delving into the substance of whether the Order should be set aside, it is necessary

that I deal with one preliminary matter. At the hearing before me, the Plaintiff submitted that the issues raised in this application were *res judicata* and that the proper procedure for these issues to be revisited would be for the Second Defendant to appeal against the AR's decision. This argument was made on the basis that the Second Defendant had been represented at the hearing of 2 March 2009 ("the hearing") by Mr Bala Chandran ("Mr Bala") from Mallal & Namazie. Mr Bala denied having represented the Second Defendant at the hearing, asserting that he had appeared in his capacity as solicitor for the First Defendant, who had passed away. The Second Defendant similarly denied having instructed Mr Bala to act on her behalf.

5 The question of whether the Second Defendant was represented at the hearing is important because the setting aside of an order made on a summons-in-chambers is limited to specific circumstances, for example, as provided in O 32 r 6, where the application was made *ex parte*. The rationale underlying the specific provision, in O 32 r 6, for the setting aside of an *ex parte* order is that it is necessary, in the interest of justice, to allow the party who has not been heard to object to the order if he so wishes, especially since the court, in making the order, often relies entirely on the applicant's affidavit: see Jeffrey Pinsler, *Singapore Court Practice 2006* (LexisNexis, 2006) ("*Singapore Court Practice 2006*") at para 32/6/2. This rationale would be inapplicable if the Second Defendant had been represented at the hearing, since the AR would then have heard both parties on the issues, and would have made her decision based on the merits of what had been presented. In such a situation, should the Second Defendant be unwilling to accept the appointment as representative or be disagreeable to the findings of the AR, she should have appealed the AR's decision, rather than to apply to have the Order set aside. An examination of O 15 r 7(5) reinforces this conclusion, as it only makes mention of an application to discharge or vary an order that is made *ex parte*:

> **Change of parties by reason of death, etc. (O 15 r 7)**
>
> (5) Any application to the Court by a person served with an order made ex parte under this Rule for the discharge or variation of the order must be made within 14 days after the service of the order on that person.

In contrast, if the Second Defendant had not been represented at the hearing, then the proper procedure would be an application to set aside the Order before the registrar who made the *ex parte* order or before some other registrar: see *Singapore Court Practice 2006* at para 36/6/2; *Minister of Foreign Affairs Trade and Industry v Vehicles and Supplies* [1991] 4 All ER 65.

6 I accepted the Second Defendant's submission that Mr Bala had appeared at the hearing in his capacity as solicitor for the estate of the First Defendant, not as solicitor for the Second Defendant. The Plaintiff had served its application on Mallal & Namzie and Mr Chua Wee Thye. It appeared clear to me that Mr Chua Wee Thye was served as the Plaintiff sought to appoint him as representative, while Mallal & Namazie was served because Mr Bala had been the solicitor for the First Defendant. Since Mr Bala had been served in his capacity as solicitor for the First Defendant, it would be logical that he would attend the hearing in that capacity. Indeed, in her minute sheet, the AR had recorded Mr Bala as appearing "for D (who has passed away)". Further, the Plaintiff's application was initially for the appointment of Mr Chua Wee Thye as representative. Therefore, it was unlikely that the Second Defendant would have anticipated that she might be appointed representative instead, and have taken steps to instruct a solicitor. Although Mr Bala had resisted the Plaintiff's appointment of the Second Defendant as representative, he had not done so on the behalf of the Second Defendant. In all likelihood, Mr Bala was merely advancing the position that he considered to be most in line with his instructions from the First Defendant. In these circumstances, I was of the view that Mr Bala's appearance at the hearing was not a bar to a setting aside of the Order.

My decision

7 The Second Defendant was appointed representative of the estate of the First Defendant pursuant to O 15 r 7(2), which reads:

> **Change of parties by reason of death, etc. (O 15 r 7)**
>
> (2) Where at any stage of the proceedings in any cause or matter the interest or liability of any party is assigned or transmitted to or devolves upon some other person, the Court may, if it thinks it necessary in order to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon, order that other person be made a party to the cause of action or matter and the proceedings to be carried on as if he had been substituted for the first-mentioned party. An application for an order under this paragraph may be made ex parte.

The Second Defendant argued that her appointment had not been "necessary" for the effective and complete determination of all matters in dispute because the Plaintiff had been informed, at the time of the application, of her intention to apply for the relevant grant. The Second Defendant had not applied immediately for letters of administration as it was unclear whether the First Defendant had left a will. In order to ascertain whether there was a will, the Second Defendant had instructed her solicitors to make the relevant searches with the Wills Registry and the Law Society. After being informed by the Law Society that the notice on "Information of Wills" would be published in the March 2009 issue of the Law Gazette, the Second Defendant decided to wait until a reasonable time had lapsed after the advertisement had been published before applying for letters of administration. However, even before the advertisement was published in the Law Gazette, the Plaintiff took out the application to appoint her as representative.

8 In addition, the Second Defendant contended that the person appointed under O 15 r 7(2) should be the personal representative of the deceased's estate, and that she had accordingly be wrongly appointed. It is to this argument that I shall first turn.

Must the person appointed under O 15 r 7(2) be the personal representative of the deceased's estate?

9 When a defendant dies, a plaintiff usually applies for an order to carry on proceedings against the executor or administrator of the deceased's estate. The learned authors of G.P. Selvam, *Singapore Civil Procedure* (Sweet & Maxwell Asia, 2007) ("*Singapore Civil Procedure*") state at para 15/7/9 that:

> If a sole defendant dies and the cause of action is one that survives, the plaintiff may obtain an order to continue the proceedings as *against the executor or administrator* of the deceased defendant, or such executor or administrator may himself apply to be substituted or added as a defendant…
>
> Where a cause of action in tort survives, but the defendant dies intestate and there is *no personal representative against whom the action can be brought or continued*, the court may, on the application of the person seeking to sue or the plaintiff, appoint a nominee of the applicant as administrator…
>
> [emphasis added]

The above-quoted passage suggests that an application under O 15 r 7(2) should *normally* be for the appointment of the *executor* or *administrator* (*ie*, the personal representative) of the deceased's estate, and that it is only when there is no personal representative against whom the action can be brought or continued that the court may appoint another person.

10 Whilst it would normally be appropriate for the personal representative of the deceased's estate to be appointed representative under O 15 r 7(2), this does not mean that a person other than the personal representative of the deceased's estate *cannot* be appointed. In *Chern Chiow Yong v Cheng Chew Chin* [1998] 2 SLR 615 ("*Chern Chiow Yong*"), the plaintiffs applied to the court to allow the executors of the will of the defendant, who had died in the course of the action, to be substituted as defendants. The executors argued that the action ought to be stayed until the extraction of the grant of probate. The High Court disagreed and confirmed the decision of the assistant registrar allowing the executors to be substituted, stating at [6], [7] and [10] that:

> 6 The general rule is well established that any act which shows an intention on the executor's part to take upon himself the office of executor, constitutes acceptance of the office. Once he has accepted, he cannot renounce the office. It follows that he can be sued.
>
> 7 In this case, it is not disputed that the executors can be sued. If they can be sued, I see no reason why the proceedings should then be suspended until they have taken out the sealed grant of probate. Such a rule might lead to claims against the estates of a deceased persons being delayed or frustrated by the failure to obtain the sealed grant. This would be against the policy underlying the present Rules of Court allowing claims against deceased persons' estates to be proceeded with in the absence of a grant of probate or administration. See O 15 r 6A of the Rules of Court.
>
> …
>
> 10 I took the view, therefore, that the executors were properly substituted as persons upon whom the liability of the deceased defendant devolves within the meaning of O 15 r 7(2). I also held that the proceedings need not be stayed merely for the reason that the grant of probate had not been extracted. I therefore dismissed the appeal with costs.

The executors in *Chern Chiow Yong* had not been legally vested with authority as personal representatives of the deceased's estate since the grant of probate had not been extracted. In spite of this, the High Court held that they had been properly substituted pursuant to O 15 r 7(2).

11 Further, I was of the view that the use of the word "person" in O 15 r 7(2) shows that persons other than the personal representative of the deceased's estate can be appointed by the court to continue a pending case. If the legislature had intended that only personal representatives can be appointed under O 15 r 7(2), the draftsman would have used the words "personal representative" to avoid any ambiguity. This position is all the more evident when O 15 r 7(2) is read in the context of O 15 r 9(1), which states:

> **Failure to proceed after death of party (O 15 r 9)**
>
> (1) If after the death of a plaintiff or defendant in any action the cause of action survives, but no order under Rule 7 is made substituting as plaintiff any person in whom the cause of action vests or, as the case may be, the personal representatives of the deceased defendant, the defendant or, as the case may be, those representatives may apply to the Court for an order that unless the action is proceeded with within such time as may be specified in the order the

action shall be struck out as against the plaintiff or defendant, as the case may be, who has died; but where it is the plaintiff who has died, the Court shall not make an order under this Rule unless satisfied that due notice of the application has been given to the personal representatives (if any) of the deceased plaintiff and to any other interested persons who, in the opinion of the Court, shall be notified.

O15 r 9(1) uses the word "any person" to describe the person substituted under O15 r 7, but the word "personal representative" to describe the person who may make the application under O 15 r 9(1), clearly drawing a distinction between the two terms. The later part of O 15 r 9(1) also provides that "due notice of the application has been given to the *personal representatives* (if any) of the deceased plaintiff and to *any other interested persons*". This provides further support for the view that the draftsman had intended the two terms to mean different things, and that the term "any person" in O 15 r 7(2) was not meant to be restricted to the personal representatives of the deceased's estate.

12 Unfortunately, that is not the end of the matter. Although O 15 r 7(2) does not specifically require the personal representative of the deceased's estate to be appointed, it provides for the appointment of "*that* other person". It would be logical for the phrase "that other person" to refer to the words "some other persons" in the earlier part of the provision. Thus, a literal reading of O 15 r 7(2) could lead to an interpretation that only persons upon whom "the interest or liability of any party is assigned or transmitted or devolves" can be appointed.

13 In *Government of Malaysia v Taib bin Abdul Rahman* [1991] 2 MLJ 174 ("*Taib bin Abdul Rahman*"), the Supreme Court - Kuala Lumpur declined to give O 8 r 7(1) (which is *in pari materia* to O 15 r 7(2)) this literal meaning, holding that:

> In our opinion, in order to give effect to the principal object of the rule, which is to avoid delay in the disposal of cases, the word 'that' immediately preceeding the word 'other person' should be read merely as a relative or conjunctive adverb. In short, when the property or interest of an estate devolves or vests by virtue of s 39 in some other persons - in this case the Official Administrator, 'the Court may order that other person (ie. person other than the Official Administrator) to be made a party to the cause or matter'. It seems clear that the word 'that' should not be read as a demonstrative pronoun referring to the earlier mentioned 'some other person' upon whom the interest or liability of a party devolves or vests but should be read as mere conjunction introducing the words 'other person'.

I agree with the view expressed in *Taib bin Abdul Rahman* since a holding to the contrary would frustrate the object of O 15 r 7(2), which is to avoid delay in the disposal of cases where the interests or liabilities of any party to a pending proceeding had to vest temporarily in the Public Trustee. Such an interpretation of O 15 r 7(2) would also be in line with the High Court's decision in *Chern Chiow Yong*. In the circumstances, I did not think that the Second Defendant had been wrongly appointed simply because she was not the personal representative of the deceased's estate at the time of the application.

Was the Order "necessary" for the effective and complete determination of all matters in dispute?

14 It then fell to be considered whether the Order had been "necessary" for the effective and complete determination of all matters in dispute. In my view, there was some merit in the Second Defendant's submission that the Plaintiff's application had been made prematurely. The First Defendant had passed away on 8 January 2009. Just 11 days after his death, the Plaintiff's solicitors

wrote to the deceased’s son, Mr Chua Wee Thye, requesting that he make an application to court to appoint a personal representative for the estate within two weeks, failing which the Plaintiff would proceed to make the “necessary application” (*ie*, the application under O 15 r 7(2)).

15 In my view, the family of a deceased should be given some time to come to terms with the loss of their loved one, and to get a grip on managing his affairs. Although the family members should not be dilatory in taking out an application to appoint a personal representative, it also behoves a plaintiff to be sympathetic to the emotional hardship that the family members are going through, especially since they now have to be embroiled in a court action in the immediate aftermath of the deceased’s death. In the present case, I did not think that the family of the deceased had behaved unreasonably or in a dilatory manner. After receiving the Plaintiff’s letter, the deceased’s solicitors wrote, by letter dated 30 January 2009, to inform the Plaintiff that they were carrying out due diligence checks to ascertain the existence of any will that the deceased might have made, and that they would only be in a position to apply for the grant after the Law Society published the advertisement in the March 2009 issue of the Law Gazette. In spite of this letter, the Plaintiff filed the application on 17 February 2009. After the Plaintiff filed the application, the Second Defendant reiterated, on affidavit, that she intended to apply for letters of administration sometime in March 2009, and that she would be making the necessary application to represent the deceased’s estate if the grant was made in her favour. Nevertheless, the Plaintiff proceeded with the application, and obtained the Order at the hearing of 2 March 2009.

16 Since the deceased’s family members appeared to be taking genuine steps to ascertain the existence of a will and to obtain the letters of administration if no will was found to be in existence, I did not think that the Plaintiff’s application was, strictly speaking, “necessary” at the time it was filed. In my view, where there is doubt as to whether a deceased has made a will in his lifetime, an application under O 15 r 7(2) should generally be made only after a reasonable time has lapsed since the publishing of the advertisement in the Law Gazette, or after the grant of letters of administration. As stated in *Halsbury’s Laws of Singapore*, vol 15 (LexisNexis, 2006) at para 190.115, it is incumbent upon the administrator to ensure that all due enquiries have been made on whether the deceased may have left a will behind before he files an application for a grant of letters of administration. If a representative is appointed under O 15 r 7(2) before these due enquiries are completed, various complications may arise if a will is subsequently found which names another person as personal representative.

17 A personal representative is obliged to execute his duties in a manner which would benefit the esatate, and is precluded from exploiting his position as representative: *Re Boles and British Land Co’s Contract* [1902] 1 Ch 244; *Re Thompson’s Settlement, Thompson v Thompson* [1985] 2 All ER 720. Therefore, a personal representative is duty-bound to conduct litigation in the best interests of all the beneficiaries, and the estate of the deceased as a whole. In contrast, a representative appointed under O 15 r 7(2) is not similarly obligated, and if he is one of a pool of beneficiaries, might conduct the litigation in his own interest. Even if he conducts the litigation diligently in the estate’s best interest, the executor of the will (if one is found) or the other beneficiaries might still perceive that he had conducted the litigation in a biased or negligent manner. If a will is found, it may even be the case that the representative appointed under O 15 r 7(2) might have no interest in the estate of deceased! Although the term “other person” in O 15 r 7(2) should not be restricted to personal representatives of the deceased’s estate, it would, in my view, be going one step too far if this term could encompass persons who have no interest whatsoever in the deceased’s estate. In my view, the granting of an application under O 15 r 7(2) before it can be ascertained, with reasonable certainty, that a will is not in existence may well open up a Pandora’s box of undesirable litigation between the executors or beneficiaries of the deceased’s estate and the representative appointed under O 15 r 7(2).

18 That is not to say though that an application made at a time before the existence of a will is ascertained must necessarily fail. However, the applicant would have to show that exceptional circumstances exist which warrant the appointment of a representative notwithstanding the practical complications that could arise. In the present case, the only reason furnished by the Plaintiff in his affidavit was that "[a]s it is clear that [the solicitors for the deceased] are taking instructions from the estate of the deceased, there is no reason for the matter to be delayed further". I was of the view that this reason did not suffice to make the Plaintiff's application "necessary" for the effective and complete determination of all matters in dispute. In every case where a defendant dies, there will be some delay. In my view, where an application under O 15 r 7(2) is made before the existence of a will is ascertained, an applicant cannot simply state that some delay will result, but will have to go further and show, for example, that the delay was inordinate, was the result of unreasonable conduct, or that the applicant would suffer irreversible prejudice should the matter be delayed further. In contrast, if it can be shown that no will is likely to be in existence, or that probate or letters of administration have already been granted (but not extracted), then there may indeed be no reason for matters to be delayed further.

Whether the Order should be set aside

19 By the time I heard the Second Defendant's application to set aside the Order, the Second Defendant had already applied for, and been granted letters of administration on 7 April 2009. A reasonable time had also passed after the publishing of the advertisement in the Law Gazette. I was thus of the view that there was no real danger that any of the practical complications discussed at [17] would materialise. Moreover, since the Second Defendant would be appointed as the personal representative of the deceased in due course and had stated, in no uncertain terms, her intention to represent the deceased in the Suit, it would be an unnecessary waste of court time and resources for the Order to be set aside. If I were to set aside the Order, the Plaintiff would then have to make another application under O 15 r 7(2). This application would, in all likelihood, be granted since it falls squarely within the reasoning espoused by the High Court in *Chern Chiow Yong*. Therefore, the end result would be the same, save that this matter would be delayed further for no good reason, and precious court time and resources would be wasted.

20 The power to set aside an *ex parte* order in O 32 r 6 is a discretionary one. As held in *Karaha Bodas Co LLC v Perusahaan Pertambangan Minyak dan Gas Bumi Negara* [2006] 4 SLR 435 at [33], the court can consider "fresh material that might be directly relevant to either the continuance or the discharge of the order but which related to matters that transpired *after the order was made*." In my view, the passage of time after the publishing of the advertisement in the Law Gazette and the granting of the Second Defendant's application for letters of administration constituted fresh material which militated against the setting aside of the Order.

Conclusion

21 In these circumstances, I dismissed the Second Defendant's application to set aside the Order.

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