Lau Tyng Tyng *v* Lau Boon Wee
[2014] SGHC 114

Case Number : Originating Summons No 1249 of 2013
Decision Date : 10 June 2014
Tribunal/Court : High Court
Coram : Edmund Leow JC
Counsel Name(s) : Edmond Pereira (Edmond Pereira Law Corporation) for the applicant; Johnson Loo (Drew & Napier LLC) for the respondent.
Parties : Lau Tyng Tyng — Lau Boon Wee

Gifts – conditions attached

Succession and Wills – conditions

10 June 2014

Edmund Leow JC:

1 The Applicant and the Respondent were named as the joint executors and trustees in the Will of their late father ("the Testator"). The Applicant has come to court to determine the true construction of cl 4 of the Will. The Respondent, her older brother, does not agree with her interpretation and opposes her application. Counsel for the parties appeared before me on 21 May 2014. After considering their arguments, I dismissed the application. I now give my reasons.

Background

2 The Testator was a businessman who was the sole shareholder and director of Lau Loon Seng Holdings Pte Ltd ("the Company"). The Company was a holding company and wholly owned four subsidiary companies ("the Subsidiaries"). Three of the Subsidiaries were incorporated in Malaysia, while Southern Printing & Publishing Co Pte Ltd ("SPPCPL") was incorporated in Singapore. [note: 1] SPPCPL is in the business of printing and publishing periodicals, books and magazines, as well as brochures, musical books and other publications. [note: 2]

3 The Testator had set up the business together with his ex-wife, Madam Sia Peck Eng. Madam Sia was initially the sole proprietor of the business but the Testator later became sole proprietor in place of his wife. The couple divorced in 1998. All these facts were set out by Kan Ting Chiu J in *Lau Loon Seng v Sia Peck Eng* [1999] 2 SLR(R) 688 at [2]–[5]. Madam Sia, who is now 80 years old, has survived him. [note: 3]

4 In the last years of the Testator's life, the Applicant was the only one among his three children who was actively assisting him in managing the business. [note: 4] The Applicant was a director of SPPCPL, and she also contributed financially to the business. [note: 5] She claimed to have been involved in the management of the Company and SPPCPL for more than 20 years. [note: 6] She sought to give the impression that the Respondent and their youngest brother, Lau Boon Kai ("Samuel"), never contributed to the business of the Company, [note: 7] but in fact the Respondent had helped to

build up the business of SPPCPL and Samuel had helped to expand the business into Malaysia. [note: 8] It was also not disputed that the shares in the Company comprised the bulk of the Testator's assets.

5 It was in this context that the Will was made. On or about 26 October 2010, the Testator executed the Will in the presence of Mr Foo Say Tun and Mr Teo Jin Huang, who were lawyers practicing at Messrs Wee, Tay & Lim LLP ("WTL LLP") at the material time. The Will was drafted by the solicitors of WTL LLP. As the Testator was not literate in English, he instructed Mr Foo in Mandarin. The contents of the Will were interpreted in Mandarin by Mr Foo to the Testator before the Testator executed the Will. [note: 9]

The relevant terms of the Will

6 Under cl 3 of the Will, the Testator gave, devised and bequeathed all his shares in the Company to the following beneficiaries in the following proportions absolutely (except with regard to any grandchildren below 21 as their shares are to be held by their respective fathers until they turn 21): [note: 10]

(a)	Respondent	-	20%
(b)	Applicant	-	20%
(c)	Samuel	-	20%
(d)	Madam Sia	-	10%
(e)	Grandchild A	-	10%
(f)	Grandchild B	-	10%
(g)	Grandchild C	-	10%

7 Cl 4 of the Will states:

> It is my wish and strong desire that my beneficiaries will not sell or otherwise part with the shares of Lau Loon Seng Holdings Pte Ltd ("the Company"). The Company is the sole shareholder of Southern Printing & Publishing Co Pte Ltd, which was founded and built up by me through many years of hard work and toil. It is also my desire that my children will work together, hand in hand, to continue to grow the business of Southern Printing & Publishing Co Pte Ltd. Otherwise, I entrust the business to my daughter, **LAU TYNG TYNG**.

8 In addition, Cl 5 directed the trustees of the Will to distribute all of the Testator's personal assets to the trustees to be held on trust for the benefit of the education of all his living grandchildren, and if necessary, to procure such funds as are necessary from the Company or SPPCPL for the benefit of the education of all his living grandchildren. Cl 6 gave the trustees the absolute discretion to decide and act on all matters of his estate which he had not specifically dealt with in the Will, and clarified that it was his intention that there should be no other beneficiaries who are entitled to any part of his estate apart from the beneficiaries named in the Will.

9 The Testator died on 17 February 2013. [note: 11] There were allegations on both sides as to improper behaviour from the other and I do not intend to go into them. What was clear was that the Applicant was uncooperative, which delayed the process of taking out a Grant of Probate. [note: 12]

Indeed, as of the time of the hearing, the Grant of Probate has not been extracted. [note: 13]

What was the Testator's intention?

10 The issue before me was to determine the Testator's intention as stated in cl 4 of the Will.

11 The Applicant submitted that the gifts of the shares in cl 3 were subject to the conditions set out in cl 4 of the Will, namely that (a) the beneficiaries must not part with or dispose of their gifts, and (b) the Testator's children must work together in the operation and management of SPPCPL. If the conditions in cl 4 of the Will are not met, then the "business" will be "entrusted" to the Applicant. [note: 14] In other words, cl 4 was a *condition subsequent* to cl 3.

12 I did not agree with the Applicant's contention. I agree with the Respondent and I find that cl 4 was merely an expression of the Testator's wishes and desires; it was not intended to be valid or enforceable at law.

13 In *Foo Jee Seng and others v Foo Jhee Tuang and another* [2012] 4 SLR 339 at [17], the Court of Appeal summarised the principles governing the construction of wills as follows:

> It is clear that the overriding aim of the court in construing a will is to seek and give effect to the testamentary intention as expressed by the testator. This intention must predominantly be derived from the wording of the will itself, although the circumstances prevailing at the time the will was executed may be taken into account. Where a strict literal construction of the will would give rise to an effect which is clearly out of sync with the general intention of the testator as derived from the will as a whole, such a reading should give way to a more purposive interpretation. Hence, there exists a presumption that effect should be given to every word of the will, and the court should not discount any part of the will if there can be some meaning that is not contrary to the express intention that could be ascribed to it. As the High Court remarked in *Goh Nellie v Goh Lian Teck* [2007] 1 SLR(R) 453 ("*Nellie Goh*") at [62], "A testator, in other words, does not will in vain".

14 In appropriate circumstances, the court might admit relevant extrinsic evidence in ascertaining the testator's intention as expressed in the will. In *Low Ah Cheow and others v Ng Hock Guan* [2009] 3 SLR(R) 1079 ("*Low Ah Cheow*") at [33], the testator's alleged instructions on the drafting of the will and the manner in which the will was explained to the testator were considered to be relevant admissible extrinsic evidence in that case.

15 This was a situation where any evidence from the lawyer who assisted in the drafting and execution of the Will would have been highly relevant. It is undisputed that cl 4 of the Will was ambiguously drafted. The evidence of the lawyer would have very helpful in determining what the Testator really meant. There was some indication that the Applicant was going to speak to the Testator's lawyer to check on the interpretation of cl 4 of the Will, but it is unclear if she did. [note: 15] In any event, the court did not have the benefit of such evidence.

16 I now turn to cl 4 itself. First of all, the use of precatory words ("wish and strong desire") indicated that it is no more than an expression of desire that his children keep his business in the family and that they work together to grow the business of SPPCPL, yet the last line contains what appears to be a *direction* that if the children fail to do so, the "business" is to be "entrusted" to the Applicant. It was not clear what "business" meant, but I agree with the Applicant's counsel, Mr Edmond Pereira, that the word did not refer to the shares themselves.

17 As for the word "entrust", Mr Pereira contended that the testator had intended by the use of the word to create an actual trust over the "business". To me, that seemed extremely unlikely. How was a trust to be created over the "business" when the shares in the Company have already been distributed? Moreover, it is difficult to see how this could be possible when the "business" is actually owned by the Subsidiaries and all the Company owns are shares in the Subsidiaries.

18 Such a "trust" would also contradict cl 3, where the Testator has gifted all the shares in the Company to his beneficiaries *absolutely*, leaving no room for a trust. As cl 3 is unambiguous, I am of the view that cl 4 ought to be construed in a manner that is harmonious with cl 3.

19 Even if it is assumed that the entrustment of the business only means that the Applicant was to be given control over the Company and its Subsidiaries, how would such control be given to her, a mere 20% shareholder, when the remaining shares are not going to be transferred to her? Giving legal effect to such an interpretation would be a complicated affair, involving issues of company law. Would the other beneficiaries be compelled to amend the constitution of the Company in her favour when the conditions are triggered? Moreover, the Will was drafted by a lawyer who would in all likelihood have advised the Testator that such a provision is difficult to enforce, and this lends support to my view that the Testator never intended for cl 4 to have legal effect.

20 I also took into account the fact that the Applicant's interpretation of cl 4 would lead to a harsh result. While a testator is entitled to be capricious, it was astutely noted by the Court of Appeal in *Low Ah Cheow* at [60] that:

> … if a particular interpretation of a will which is *ambiguous on its face* leads to a result that is irrational and capricious, the court will prefer an alternative interpretation that leads to a fair, rational and reasonable disposition and distribution of the testator's estate. [emphasis in original]

21 In the present case, the harshness does not merely lie in the fact that the beneficiaries of the shares would be prevented from dealing freely with their shares under the Applicant's interpretation of the clause. It is also the fact that the breach by one beneficiary trying to sell his or her shares, or the inability of the three siblings to cooperate, would cause *every beneficiary* to lose substantially the rights embodied in their shares, which of course included the right to decide who should have control over the Company. It seems remarkably unfair that everyone else is punished for the breach of one or a few. Furthermore, what would happen if it was the *Applicant* herself who sought to sell her shares, refused to cooperate with her siblings or decided not to run the business for whatever reason?

22 Ultimately, whether or not her brothers cooperated with the Applicant, the reality underlying such an interpretation is that the Applicant would always have control – because if they dared to disagree with her, she could simply invoke cl 4 and take control of the business of the Company.

23 That said, I do accept the Applicant's evidence that the Testator would not have wanted to have his business destroyed by his beneficiaries. [note: 16] However, I do not think that she has successfully demonstrated that the Testator was more concerned with his business than the welfare of his family as a whole. The fact that the Testator included his ex-wife in his Will, despite their divorce having happened many years ago, said much about his priorities. While the Applicant did assist the Testator in his business in the final years of his life, her brothers and Madam Sia played a pivotal role in building up the business as well.

24 Therefore, on a balance of probabilities, I find that cl 4 is precatory in nature and cl 3 operates unconditionally. It is true that a court will not lightly find that a testator intended for a part of his will

to be ineffectual. However, it is also true that testators do often say things which they realise may have no legal effect. It may just represent a last wish to their descendants. In the end, it all depends on what the testator intended. If a plain reading of the clause suggests that the testator intended to do no more than express a non-legally binding desire for a certain future state of affairs, and a full and contextual examination of the will does not indicate that the testator intended anything more than that, a court should also not strain to construe the clause as to give it an imperative character. Giving legal effect to words which are meant to do no more than to appeal to the conscience of the beneficiaries defeats the intention of a testator just the same.

25 Finally, there were other issues in the Will, which was, with respect, poorly drafted. For example, it is not clear whether the Will contained a residuary gift or not. As for cl 5, it is also difficult to understand how the trustees (namely, the Applicant and the Respondent) could possibly procure funds from the Company and SPPCPL for the benefit of the Testator's living grandchildren when the shares in the Company had already been distributed to the beneficiaries absolutely. It seemed to me that it was impossible to reconcile cll 3, 4 and 5 if they were all intended to have legal effect. However, these issues were not argued before me and I make no finding on them.

26 For the above reasons, I dismissed the application.

Even if the Testator intended cl 4 as a condition, it was void

27 My finding above that the Testator had intended cl 4 to be a mere expression of his wishes and not legally binding was sufficient to conclude the matter. However, as there were some issues of law that counsel has raised to me, I will briefly comment on them as well.

Cl 4 is void as a restraint upon alienation

28 I find that, even assuming that the Testator had intended cl 4 as a condition subsequent to the gifts of shares in cl 3, it would nevertheless be invalid or unenforceable at law for being void as a restraint upon the alienation. The first sentence of cl 4 states that the beneficiaries "will not sell or otherwise part with the shares" in the Company. Such a restriction is repugnant to the incidents of ownership which necessarily attach to an absolute gift, as one of the basic rights of an owner is the freedom to sell or dispose of his or her property.

29 I saw no reason why the rule against restraints on alienation, which typically apply to real property, should not also apply to personalty. This was also the view held in John G Ross Martyn *et al*, *Theobald on Wills* (Sweet & Maxwell, 17th Ed, 2010) at para 29-016. Indeed, *Bradley v Peixoto* (1797) 3 Ves 324, one of the earliest cases dealing with this rule, did not involve land. It involved a testator who gave his son bank stock, subject to the condition that he would forfeit his interest if he should attempt to dispose of all or any part of the stock. Sir R P Arden MR held (at 1035) that:

> I have looked into the cases, that have been mentioned; and find it laid down as a rule long ago established, that where there is a gift with a condition inconsistent with and repugnant to such gift, the condition is wholly void.

Cl 4 is void for conceptual uncertainty

30 Furthermore, the rest of cl 4 is too conceptually uncertain to be valid. As stated in *Toh Eng Lan v Foong Fook Yue and another appeal* [1998] 3 SLR(R) 833 at [26]:

> ... Another way of testing the matter would be to ask whether (in the case of a condition

subsequent) the court is able to see from the beginning precisely and distinctly upon the happening of what event the preceding vested interest is to determine: *per* Lord Russell of Killowen in *Clayton v Ramsden* [1943] AC 320 at 326. Alternatively, it has been said that whether the condition has or has not taken effect must be capable of ascertainment at any given moment of time: *per* Fry J in *In re Viscount Exmouth; Viscount Exmouth v Praed* (1883) 23 Ch D 158 at 164. In the present case, one might postulate that the condition subsequent would have taken place if Ms Foong either did not allow the younger daughter and the son to stay in the property or Miss Toh to do so where necessary. However it would not be possible to come to this conclusion without first answering the *a priori* question of the meaning of the term "stay". As such, it was not possible to envisage when or how Ms Foong's absolute interest in the property would determine. We were therefore compelled to hold that the direction in cl 2 of the will was void for uncertainty.

31 For convenience, I bolded the words in cl 4 which I thought rendered the clause conceptually uncertain as follows:

> … It is also my desire that my children will **work together**, **hand in hand**, to continue to **grow** the business of [SPPCPL]. Otherwise, I **entrust the business** to my daughter, [the Applicant].

32 I agreed with the Respondent that it was not ascertainable to determine whether or not, at any given point in time, that the children have "worked together", or what it means to "grow the business". It is also unclear what "entrust the business" means when the shares in the Company have already been distributed, as I have already mentioned. Moreover, there is also the question of what happens if it is the Applicant herself who is unable to work with her brothers. Would she be allowed to invoke the clause despite her own default? The operation of the clause was full of difficulty. Indeed, the Applicant herself (quite rightly) admitted that cl 4 as drafted is ambiguous and unlikely to be enforceable. [note: 17]

Costs

33 I awarded costs of $6,000 inclusive of disbursements to be paid by the Applicant to the Respondent. I ordered that the Applicant was to bear her own costs and that she may not recover from the Testator's estate.

[note: 1] Applicant's affidavit, paras 12–13.

[note: 2] Applicant's submissions, paras 14–15.

[note: 3] Respondent's affidavit, para 7.

[note: 4] Respondent's affidavit, para 39.

[note: 5] Applicant's affidavit, para 17.

[note: 6] Applicant's affidavit, para 15.

[note: 7] Applicant's affidavit, para 23.

[note: 8] Respondent's affidavit, paras 34–38

[note: 9] Applicant’s affidavit, paras 5–6; Applicant’s submissions, paras 17.

[note: 10] Applicant’s affidavit, pp 16–20.

[note: 11] Respondent’s submissions, para 1.

[note: 12] Respondent’s submissions, paras 6 and 8.

[note: 13] Respondent’s submissions, para 29.

[note: 14] Applicant’s submission, para 61; see also para 59.

[note: 15] Respondent’s affidavit, p 36.

[note: 16] Applicant’s affidavit, para 10.

[note: 17] Applicant’s affidavit, para 10(a).