IN THE FAMILY JUSTICE COURTS OF THE REPUBLIC OF SINGAPORE

[2020] SGHCF 14

Suit No 4 of 2019
(Summons No 148 of 2020)

Between

(1) WHR
(2) WHS
(executors of the estate of LLT, deceased)

… *Plaintiffs*

And

(1) WHT
(2) WHU
(3) WHV
(4) WHW
(5) WHX
(6) WHY
(7) WHZ
(8) WIA
(9) WIB
(10) WIC
(11) WID
(12) WIF
(13) WIH
(14) WIG

… *Defendants*

JUDGMENT

[Civil Procedure] — [Discovery of documents]
[Civil Procedure] — [Interrogatories]

WHR and another
v
WHT and others

[2020] SGHCF 14

High Court (Family Division) — Suit No 4 of 2019 (Summons No 148 of 2020)
Choo Han Teck J
23 September 2020; 30 September 2020

2 October 2020 Judgment reserved.

Choo Han Teck J:

1 LLT was a businessman whose company dealt with luxury watches that, according to counsel for the plaintiffs, Mr Tan Teng Muan, might cost up to $1m a piece. LLT died on 13 March 2009 at the age of 92, shortly after suffering a heart attack while on a business trip in Hong Kong. He was accompanied on the trip by his nurse and the first plaintiff who is the younger of his two sons. The second plaintiff is the son of the first plaintiff. LLT also had five daughters who are defendants in this action.

2 LLT made a will ("the Will") in 1999 with the assistance of his solicitor Ms Ho Soo May Evelyn ("Evelyn Ho") of May & Co. On 6 August 2008, LLT appended a codicil ("the Codicil") to the Will. The Codicil was also prepared by Evelyn Ho on LLT's instructions. The plaintiffs are the named executors under the Will. Life for the family carried on as before, and, in spite of the

substantial estate, no probate action was taken until 2015. It was only when the first and second defendants gave notice that they would be applying for grant of letters of administration in LLT's estate that the first plaintiff informed the family of LLT's will. On 5 March 2015, a safe belonging to LLT in his office was opened by a supervising solicitor, Mr Mahendra Segeram, and the Will and Codicil was read out by Mr Segeram to all of LLT's children. Subsequently, the first and second defendants issued a citation and then filed an *ex parte* ad colligenda bona grant application. The plaintiffs commenced the present action shortly thereafter.

3 By this action, the plaintiffs seek to prove the Will and the Codicil. The third, fourth, fifth, seventh, eighth, ninth, tenth, 11th, 12th, 13th, and 14th defendants have filed their respective defences stating that they have no specific knowledge of the Will and Codicil and appear to accept the Will and Codicil as legally executed. Only the first, second, and sixth defendants do not admit that the Will and Codicil were legally made and authentic. None of these three defendants have made any specific claim that the Will or Codicil was not authentic or legally made. In fact, these three defendants have pleaded in their respective Defences that they are merely insisting upon the Will and Codicil being proven in solemn form of law, and only intend to cross-examine the witnesses produced in support of the Will and Codicil, pursuant to Rule 855(1) of the Family Justice Rules 2014 (S 813/2014) ("FJR"). In effect, their position is the same as that of all the other defendants who are prepared to let the probate action take its course.

4 The first and second defendants, however, have taken a step further by applying in Summons 148 of 2020. By this summons, the first and second defendants seek discovery of the documents kept by May & Co relating to the

Will and Codicil. Among the documents sought by them are drafts of the Will and Codicil, as well as communication between LLT and his solicitors and documents of May & Co's evaluation of LLT's mental capacity.

5 In the same Summons 148, the first and second defendants also seek interrogatories against Evelyn Ho, requiring her to give details of the instructions given to the Will and Codicil. They wish to question Evelyn Ho regarding how LLT gave instructions, what instructions he gave, and how he gave them. They also wish to know how LLT understood the process, as well as his intentions in respect of which he sought advice on the Codicil.

6 Ms Molly Lim SC, counsel for May & Co, submitted that her clients will testify as required at the appropriate stage, namely at the hearing of the claim for proving the Will.

7 Mr William Ong, counsel for the first and second defendants, referred me to several authorities, beginning with a passage from a textbook, *Williams, Mortimer and Sunnucks on Executors, Administrators and Probate* (Alexander Learmonth *et al* gen eds) (Sweet & Maxwell, 21st Ed, 2018) that led counsel to argue that the case cited therein, *Re Moss, Larke v Nugus* [2000] WTLR 1033 ("*Larke v Nugus*"), supported the proposition that beneficiaries may, before a probate claim is commenced, issue to the solicitors who prepared a will, a request for the kind of information that the first and second defendants here seek.

8 *Larke v Nugus* — a 1979 case that was only reported many years thereafter — does not support the proposition that Mr Ong believes it stands for. In *Larke v Nugus*, the plaintiffs made an application for a grant of probate and

the defendants objected on two grounds, namely (a) undue influence and (b) lack of knowledge and approval. Prior to the trial, the defendants made a request that Mr Larke, the solicitor who prepared the testator's will, provide "a statement of his evidence regarding the execution of the will and the circumstances surrounding it". This request was refused. When the matter was heard at first instance, Browne-Wilkinson J granted probate in solemn form. In exercising his discretion as to costs, the learned judge noted that while there was no basis for the plea of undue influence, the circumstances surrounding the will "raise[d] a suspicion" that there had been a want of knowledge and approval, and that Mr Larke had failed to dispel that suspicion by providing the information the defendants had requested for. Accordingly, the appropriate order was no order as to costs. On appeal, the English Court of Appeal upheld Browne-Wilkinson J's decision and noted, in *obiter*, that solicitors who are involved in the preparation of a will must "give full and frank information to those who might have an interest in attacking the will as to how the will came to be made" (at 1044D–E) ("the *Larke v Nugus* obligations").

9 Thus, *Larke v Nugus* does not assist Mr Ong. First, it was primarily a decision on costs, not disclosure. Second, the English Court of Appeal had relied on a practice note issued by the Law Society of England and Wales stating, *inter alia*, that solicitors involved in the preparation of a will must make available a statement of their evidence regarding the execution of the will and the circumstances surrounding it to anyone challenging the will "where a serious dispute arises as to the validity of the will". However, that practice note has since been revised to state that it is unclear whether the *Larke v Nugus* obligations apply in the context where a solicitor is a will preparer but not also an executor (as in the present case). Third, unlike in *Larke v Nugus*, there

appears to be no serious dispute as to the validity of the Will and Codicil in this case.

10 Counsel also relied on the Canadian case of *Geffen v Goodman Estate* [1991] 2 SCR 353 ("*Geffen*"), which concerned a challenge to the admissibility of the evidence of a solicitor who had drafted a trust agreement specifying how a deceased woman's property would be distributed upon her death. In that case, the Supreme Court of Canada held (at 384) that the law permits solicitors to give evidence on the circumstances surrounding the execution or contents of a will in probate cases. However, *Geffen* can be distinguished from the present case as it concerned a specific allegation of undue influence, and the solicitor's testimony was only heard during the trial. The court did not comment on whether the solicitor's evidence ought to have been disclosed prior to the commencement of the trial.

11 The only directly applicable law is s 128(1) of the Evidence Act (Cap 97, 1997 Rev Ed) ("EA"). It is so clear that I need only set it out verbatim:

> **Professional communications**
>
> **128.—**(1) No advocate or solicitor shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such advocate or solicitor by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given him to his client in the course and for the purpose of such employment.

The only exceptions are found in subsection (2) which provides:

> (2) Nothing in this section shall protect from disclosure –
>
> > (a) any such communication made in furtherance of any illegal purpose;
> >
> > (b) any fact observed by any advocate or solicitor in the course of his employment as such showing that any crime or fraud has been committed since the commencement of his employment.

12 In my view, the communications between LLT and Evelyn Ho are clearly privileged under s 128(1) of the EA. The first and second defendants do not suggest that the exceptions under s 128(2) are made out. Nor have the plaintiffs conducted themselves in such a manner as to expressly or impliedly waive LLT's privilege. The mere fact that the plaintiffs have disclosed some drafts and records in respect of the Will does not mean that they had waived LLT's privilege in respect of all the privileged documents and information the first and second defendants seek. In any event, the issue of waiver of privilege is one that should be addressed at trial when counsel is under cross-examination.

13 Furthermore, counsel's reliance on Orders 24 r 6(2) and 26A r 1(2) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) and Rules 467(2) and 495(2) of the FJR is unhelpful. These provisions refer to the court's jurisdiction to make orders for discovery and interrogatories against a non-party if the documents and information sought are (a) relevant, (b) within the possession, custody and power of the non-party, and (c) necessary either for disposing fairly of the matter or for saving costs. In my view, it is clearly not necessary for the documents and information sought by the first and second defendants to be disclosed at this early stage of the proceedings. There is an orderly schedule of interlocutory proceedings to allow the time for the issues to be established. In this case, pleadings have just been closed. There will be a time for general discovery and interrogatories. If the documents sought by the first and second defendants are

not disclosed then, they could apply for non-party discovery or non-party interrogatories at the appropriate juncture. They could also wait until the trial of the matter to cross-examine the relevant witnesses (including Evelyn Ho). At the present stage, there is no basis for the non-party, a firm of solicitors, to divulge documents and information which are evidently privileged under s 128(1) of the EA.

14 If the first and second defendants are right, then anyone claiming to be the beneficiary of a will, including charities and sundry beneficiaries on which a testator might wish to confer testamentary gifts, may also apply to inspect the confidential files of the testator's solicitors. It cannot be the intention of any testator to invite such scrutiny of his private intentions and instructions.

15 This action is to prove the Will and the Codicil. There has been no specific allegation of undue influence or any other cause that might impugn the Will. Even the first and second defendants are not going that far. As Mr Tan pointed out, the first and second defendants have made no specific case of their own save to leave to the plaintiffs to prove probate as they have to do in any event. There is no clearer indication of a party fishing for evidence it does not have than an application in such circumstances. Thus, there is no reason why this action to prove the Will and Codicil should not proceed in according to the normal order of proceedings.

16 Counsel for the first and second defendants also submitted that the plaintiffs be put to election in that if they wish to claim privilege, they must expunge the references to communication between LLT and May & Co. As with the issue on waiver of privilege, this issue is best left for the pleaded defence and the plaintiffs' reply, and should be dealt with at trial.

17 Summons 148 of 2020 is thus dismissed. I will hear arguments on costs at a later date.

- Sgd -
Choo Han Teck
Judge

Tan Teng Muan and Loh Li Qin (Mallal & Namazie) for the plaintiffs;
William Ong, Tan Xeauwei and Wong Shu Yi Racheal (instructed), Goh Kok Yeow and Lim Huiling Naomi (De Souza Lim & Goh LLP) for the first and second defendants;
Oei Ai Hoea Anna, Yap Yi Ping Deannie and Heng Chye Ming Friedrich (Tan, Oei & Oei LLC) for the third and fifth defendants;
Sarbjit Singh Chopra and Thomas Ang Ze Xi (Selvam LLC) for the fourth and seventh to 14th defendants;
Hee Theng Fong, Poon Pui Yee and Zhuang Changzhong (Harry Elias Partnership LLP) for the sixth defendant;
Molly Lim SC, Cheng Lynn and Gladys Yeo (Wong Tan & Molly Lim LLC) for the non-party.