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Mak Chee Chong v Rockwills Trustee Bhd

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HIGH COURT (KOTA KINABALU) — CIVIL CASE NO BKI-24–91/10 OF 2014
RAVINTHRAN J
27 APRIL 2015

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Succession — Executors — Revocation of appointment — Defendant, a trust company appointed as executor and trustee of deceased's last will and testament — Plaintiff refused to pay defendant's fees — Grant of probate not applied by defendant — Whether defendant could be removed under ss 54 and 89 of the Probate and Administration Ordinance (Cap 109) — Whether 'sufficient cause' had been shown to remove executor

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Trusts and Trustees — Trustees — Removal — Defendant, trust company appointed as executor and trustee of deceased's last will and testament — Plaintiff refused to pay defendant's fees — Grant of probate not applied by defendant — Whether defendant could be removed under ss 54 and 89 of the Probate and Administration Ordinance (Cap 109) — Whether 'sufficient cause' had been shown to remove executor — Probate and Administration Ordinance (Cap 109) ss 54 & 89

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This was an application by the plaintiff to remove the defendant, a trust company that had been appointed as the executor and trustee of the estate of the deceased. The will was prepared by the defendant and the beneficiaries of the will were the two children of the deceased. The total value of the estate of the deceased was RM2,470,618. Since the death of the deceased, grant of probate had not been applied for as the plaintiff had refused to pay the fee demanded by the defendant. However, the defendant had refused to accede to the suggestion of the plaintiff to resign as executor and trustee and allow him to takeover. Under cl 30 of the will, the plaintiff as the 'protector' was given the power to replace the defendant as the trustee but was constrained by the said clause to appoint another trust company. The issue was whether the plaintiff could succeed in his application to remove the executor under ss 54 and 89 of the Probate and Administration Ordinance (Cap 109) ('the Ordinance'). The plaintiff submitted that s 54 of the Ordinance could be invoked to remove the defendant as executor because the defendant was based in Kuala Lumpur and would incurred unnecessary costs in administering the trust for the next 12 years. In reply, the defendant submitted that they have a branch office with a representative in Kota Kinabalu. With regard to the application under s 89 of the Ordinance, the court addressed the issue of whether 'sufficient cause' as

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provided under s 89 of the Ordinance had been shown to remove the executor.

Held, allowing the application with no order as to costs:

(1) Section 54 of the Ordinance could not be invoked to remove the defendant as this provision refers to individual as opposed to a corporation. In the instant case, the executor was a company with a branch office in Kota Kinabalu, thus, it could not be said that the executor was a resident outside of Sabah. Further, it could not be said that the defendant was not 'willing' or not 'competent' to act as executor. The senior manager of the defendant deposed that they were still willing and insisting to act as executor in order to respect the wishes of the deceased. The defendant was also a registered trust corporation, thus, it must be presumed that they were competent (see para 7).

(2) Based on decided cases, in considering 'sufficient cause', the welfare and the interests of the beneficiaries is the paramount criterion. The wishes of the deceased may be absolute and sacrosanct in respect of the distribution of the estate in accordance with the will, but, it is not absolute in the matter of administration of the estate. It must necessarily depend on the exigencies of the prevailing situation and the interests of the beneficiaries. In the instant case, there was deadlock situation as the defendant had not proceeded to apply for probate and if the stalemate continued, the beneficiaries would suffer prejudice and this was not the situation that the deceased would have wished for. The plaintiff also had locus standi to make this application as he was the lawful husband of the deceased and the father of the two beneficiaries of the will. The beneficiaries had also deposed affidavits to support the plaintiff's application to become the executor and trustee. Therefore, the plaintiff had demonstrated 'sufficient cause' under s 89 of the Ordinance (see para 10).

[Bahasa Malaysia summary

Ini adalah permohonan oleh plaintif untuk menyingkirkan defendan, syarikat pemegang amanah yang telah dilantik sebagai pentadbir dan pemegang amanah estet si mati. Wasiat telah disediakan oleh defendan dan benefisiari-benefisiari wasiat adalah dua anak si mati. Jumlah keseluruhan estet si mati adalah RM2,470,618. Semenjak kematian si mati, pemberian probet tidak dipohon kerana plaintif enggan membayar fi yang dituntut oleh defendan. Walau bagaimanapun, defendan enggan bersetuju kepada cadangan plaintif untuk meletakkan jawatan sebagai pentadbir dan pemegang amanah dan membenarkannya mengambil alih. Di bawah klausa 30 wasiat, plaintif sebagai 'protector' diberi kuasa untuk menggantikan defendan sebagai pemegang amanah tetapi dipaksa oleh klausa tersebut untuk melantik syarikat pemegang amanah yang lain. Isu adalah sama ada plaintif boleh berjaya dalam permohonannya untuk menyingkirkan pentadbir tersebut di bawah ss 54 dan 89 Ordinan Probet dan Pentadbiran (Cap 109) ('Ordinan'). Plaintif berhujah

bahawa s 54 Ordinan boleh dibangkitkan untuk menyingkirkan defendan sebagai pentadbir kerana defendan adalah berpusat di Kuala Lumpur dan akan menanggung kos tak perlu dalam mentadbir amanah bagi 12 tahun yang akan datang. Dalam menjawab, defendan berhujah bahawa mereka mempunyai pejabat cawangan dengan wakil di Kota Kinabalu. Berkaitan permohonan di bawah s 89 Ordinan, mahkamah mempertimbangkan isu sama ada 'sufficient cause' seperti yang diperuntukkan di bawah s 89 Ordinan telah ditunjukkan untuk menyingkirkan pentadbir.

Diputuskan, membenarkan permohonan tanpa perintah terhadap kos:

(1) Seksyen 54 Ordinan tidak dapat dibangkitkan untuk menyingkirkan defendan kerana peruntukan ini merujuk kepada individu bertentangan kepada perbadanan. Dalam kes ini, pentadbir adalah syarikat dengan pejabat cawangan di Kota Kinabalu, oleh itu, ia tidak dapat dikatakan bahawa pentadbir adalah penduduk di luar Sabah. Selanjutnya, ia tidak dapat dikatakan bahawa defendan bukan 'willing' atau tidak 'competent' untuk bertindak sebagai pentadbir. Pengurus kanan defendan mendepos bahawa mereka masih sanggup dan mendesak untuk bertindak sebagai pentadbir untuk menghormati permintaan si mati. Defendan juga adalah perbadanan pemegang amanah yang berdaftar, oleh itu, ia mesti dianggap yang mereka adalah kompeten (lihat perenggan 7).

(2) Berdasarkan kes-kes yang diputuskan, dalam mempertimbangkan 'sufficient cause', kebajikan dan kepentingan benefisiari-benefisiari adalah kriteria yang penting. Permintaan si mati adalah mutlak dan suci berkaitan pembahagian estet mengikut wasiat, tetapi, ia bukan mutlak dalam perkara pentadbiran estet. Ia mesti perlu bergantung ke atas keterdesakan keadaan mengatasi dan kepenting benefisiari-benefisiari. Dalam kes ini, terdapat keadaan jalan buntu kerana defendan tidak meneruskan untuk memohon bagi probet dan jika keadaan buntu berterusan, benefisiari-benefisiari akan mengalami prejudis dan ini bukan keadaan yang diminta oleh si mati. Plaintif juga mempunyai locus standi untuk membuat permohonan ini kerana dia adalah suami sah si mati dan bapa kepada kedua-dua benefisiari wasiat tersebut. Benefisiari-benefisiari juga mendeposkan afidavit-afidavit untuk menyokong permohonan plaintif untuk menjadi pentadbir dan pemegang amanah. Oleh itu, plaintif telah menunjukkan 'sufficient cause' di bawah s 89 Ordinan (lihat perenggan 10).]

Notes

For cases on removal of trustees, see 12(2) *Mallal's Digest* (5th Ed, 2015) paras 3385–3393.

For cases on revocation of appointment of executors, see 11(2) *Mallal's Digest* (5th Ed, 2015) paras 2660–2665.

Cases referred to

Guindarajoo a/l Vegadason v Satgunasingam a/l Balasingam [2010] 4 MLJ 842; [2010] 6 CLJ 954, HC (refd)
Phua Chui Har v Amanah Raya Bhd [2002] MLJU 512, HC (distd)

Legislation referred to

Probate and Administration Act 1959 s 34
Probate and Administration Ordinance ss 54, 54(1), 89, 90, 166
Trustee Act of 1949 s 40

Roland Cheng (Roland Cheng & Co) for the plaintiff.
Brendan Fabia (Jayasuriya Kah & Co) for the defendant.

Ravinthran J:

INTRODUCTION

[1] This is an application to remove a trust company ('the defendant') that had been appointed as the executor and trustee of the estate of the deceased. The application is made by the husband of the deceased. The first ground is that the scale of fees quoted by the trust company is too high. The other ground is that there is deadlock between the trust company and the plaintiff in respect of the probate application. The beneficiaries of the estate are the children of the deceased. They do not object to this application. However, the defendant has strenuously objected to this application.

BACKGROUND FACTS

[2] The deceased ('Sim Phaik Chin') died on 3 March 2014 in Kuala Lumpur. The deceased had appointed the defendant as the executor and trustee of her last will and testament. The will was prepared by the defendant. The beneficiaries of the will are the two children of the deceased. Both children have attained the age of majority. The will contains a trusteeship clause. The deceased appointed the defendant as the trustee of the estate for the benefit of the children until they attain the age of 35. The younger child was born in 1991 and that means that the trust established under the last will and testament of the deceased has to be maintained for 12 years. A similar will was executed by the plaintiff at the same time. In the affidavit in support, the plaintiff has stated that the value of the estate is RM2,470,618. However, when he enquired about the management fees, he was told by the defendant that the minimum annual fees payable was RM47,559.20 based on their scale of fees for management of the trust. The plaintiff was under the mistaken impression that the fee paid to the defendant when the will was prepared was sufficient. The plaintiff deposed that he never sought independent legal advice that time and that he would not have agreed to appoint the defendant as the executor and trustee. He was also

not aware that the fee for administering the trust was based on the value of the estate. Since, the death of the deceased a year ago, grant of probate had not been applied for as the plaintiff had refused to pay the fee demanded by the defendant. However, at the same time the defendant had refused to accede to the suggestion of the plaintiff to resign as executor and trustee and allow him to take over. In the intitulement to the instant originating summons, the plaintiff has cited ss 54, 89, 90 and 166 of the Probate and Administration Ordinance (Cap 109) of the . Under cl 30 of the will, the plaintiff was appointed as 'protector'. He was given the power to replace the defendant as the trustee but was constrained by the said clause to appoint another trust company. He also deposed that it is inconvenient to liaise with the trust company as it is based in Kuala Lumpur.

THE DEFENCE

[3] The affidavit in opposition was deposed by the Rockwills Trustee Bhd's Senior Manager who is based in Kuala Lumpur. He deposed that the plaintiff has failed to demonstrate that the defendant was unwilling to act as executor and trustee of the estate of the deceased. He stated categorically that the defendant is able and wiling to probate the will and perform its duties as executor and trustee. He said that the appointment form allows the defendant to deduct fees and disbursements from the funds of the estate. Section 4(2) of the appointment form reads as follows:

> RWT shall be entitled to deduct from the funds of the estate and/or trust, its fees and disbursements calculated in accordance with its published Scale of Fees as at the date of execution of the will and it shall be final and conclusive, unless it is subject to the terms and conditions of the Estate Administration Services Package (UPrepare).

[4] He deposed that the deceased understood the terms and conditions of the appointment form and signed it. He said that the rate of fees will not deplete the estate. In respect of the distance between Kuala Lumpur and Kota Kinabalu, the senior manager said that the trust company has an office in Kota Kinabalu. In respect of the power to remove by the plaintiff who is the 'protector' under cl 30, the senior manager deposed that the power to remove trustee can only be exercised after the properties are distributed to the trustee by the executor and after three months notice is given.

ISSUES

[5] The application of the plaintiff is grounded under ss 54, 89, 90 and 166 of the Probate and Administration Ordinance (Cap 109) of the Laws of Sabah. In the written submissions, counsel for the plaintiff abandoned ss 90 and 166 as the basis of the application. These provisions require the pre-existence of a

grant of probate before an application to remove the executor can be made. Initially, counsel for the plaintiff also referred to cl 30 of the will. It provides power to the plaintiff in his capacity as 'protector' to remove the trustee with three months notice. However, as pointed out by counsel for defendant, this clause can only be invoked after grant of probate. Therefore, I only need to address the question whether the plaintiff can succeed in his application to remove the executor under ss 54 and 89 of the Ordinance.

DECISION

[6] Sections 54(1) and 89 of the Probate and Administration Ordinance (Cap 109) of the Laws of Sabah read as follows:

> 54(1) When a person has died intestate, or leaving a will of which there is no executor willing and competent to act, or where the executor is, at the time of the death of such person, resident out of the Colony, and it appears to the Court to be necessary or convenient to appoint some person to administer the estate or any part thereof other than the person who under ordinary circumstances would be entitled to a grant of administration, the Court may in its discretion, having regard to consanguinity, amount of interest, the safety of the estate, and the probability that it will be properly administered, appoint such person as it thinks fit to be administrator.
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> 89 The Court may on application made to it and on sufficient cause being shown suspend, remove or discharge any executor or administrator and provide for the succession of another person to the office of any executor or administrator so suspended, removed or discharged and the vesting in such successor of any property belonging to the estate.

[7] Counsel for the plaintiff submitted that s 54 can be invoked to remove the defendant as executor because it is based in Kuala Lumpur and would incur unnecessary costs in administering the trust for the next 12 years. Counsel for the plaintiff argued that this case comes under the limb which refers to the executor being *resident out of the colony.* He also pointed out that for the will reading ceremony, a representative from Kuala Lumpur flew to Kota Kinabalu. The defendant countered this argument by submitting that they have a branch office with a representative in Kota Kinabalu. In my opinion, the argument of counsel for the plaintiff is not valid as s 54 refers to an individual as opposed to a corporation. This is the reason that the executor is referred to as 'some person' in s 54. Therefore if the executor is resident outside the colony, it becomes a ground to remove him as executor. However, in the instant case, the executor is a company and it is undisputed that it has a branch office in Kota Kinabalu. Therefore, it cannot be said that the executor is resident outside Sabah. I am also of the opinion that it cannot be said that the defendant is not 'willing' or not 'competent' to act as executor. The senior manager of the defendant has deposed that they are still willing to act executor. In fact they are insisting to act as executor purportedly in order to respect the wishes of the deceased. In

respect of competency, there is no material to hold that they are not competent. As they are a registered trust corporation, it must be presumed that they are competent.

[8] The next question that arises is whether the plaintiff can ground his application under s 89. Under this provision, 'sufficient cause' must be shown to remove an executor. Counsel for defendant cited the case of *Phua Chui Har v Amanah Raya Bhd* [2002] MLJU 512 and submitted that saving costs is not a sufficient to discharge the trustee and extinguish the trust. In that case, the deceased had appointed Amanah Raya Bhd as the executor in the will and had also appointed them the trustee of the trust that was created under the will. The sole ground of the application was to avoid fees due to Amanah Raya Bhd. In my opinion, the above mentioned case can be distinguished from the instant case. The application in *Phua Chui Har v Amanah Raya Bhd* was based under s 40 of the Trustee Act of 1949. The learned judge in that case noted that saving costs is not one of the grounds envisaged under s 40. Furthermore, the plaintiff in that case had applied to extinguish the trust created by the said will. The instant application is only concerned with the removal of the defendant as the executor and trustee. Therefore, the issue at hand must be addressed under s 89 of the Probate and Administration Ordinance (Cap 109) of the Laws of Sabah, ie whether sufficient cause had been shown to remove the executor. 'Sufficient cause' is not defined in Probate and Administration Ordinance (Cap 109) of the Laws of Sabah. Section 34 of the Probate and Administration Act 1959 (revised 1972) which applies in Peninsular Malaysia reads as follows:

> Any probate or letters of administration may be revoked or amended for any sufficient cause.

[9] 'Sufficient cause' is not defined in this legislation as well. In *Guindarajoo a/l Vegadason v Satgunasingam a/l Balasingam* [2010] 4 MLJ 842; [2010] 6 CLJ 954, the meaning of 'sufficient cause' was addressed as follows in paras 25 and 26:

> [25] And what is sufficient cause? The Court of Appeal in *Damayanti Kantilal Doshi & Ors v Jigarlal Kantilal Doshi & Ors* [1998] 4 MLJ 268; [1998] 4 CLJ 81 applied the test in the Federal Court case of *Re Khoo Boo Gong, Decd Khoo Teng Seong v Teoh Chooi Ghim & Ors* [1981] 2 MLJ 68; [1981] 1 LNS 78 and held (at the headnotes):
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> > Section 34 of the Act empowers the court to interfere if 'sufficient cause' is shown. The phrase 'sufficient cause' is not defined, but the courts have always considered the welfare and interests of the beneficiaries of an estate as the paramount criterion in deciding whether or not there is sufficient cause to interfere. This is strictly an objective test.
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> [26] On the same question of 'sufficient cause', Abdul Hamid Embong J (as he then was) in *Ligar Fernandez v Eric Claude Cooke* [2002] 5 MLJ 177; [2002] 6 CLJ 152 accepted that 'all that is needed is for the plaintiff to adduce sufficient evidence to

raise a strong suspicion of the defendant's inaction, want of diligence and honesty, or a conflict of interest situation or inability to act to invoke the court's jurisdiction under s 34 of the Probate and Administration Act 1959 and allow the reliefs sought'.

[10] Counsel for defendant pointed out that in the instant case, probate had not been obtained and administration of the estate or the trust has not commenced. In the premises, there can be no question of misconduct or irregularities or dishonesty on the part of the executor. I agree with him. However, it has been held that in considering 'sufficient cause', the welfare and the interests of the beneficiaries is the paramount criterion. In the instant case, it is common ground that since the death of the deceased about a year ago, the will of the deceased has yet to be probated. And the reason is simple. The defendant wants funds to be deposited by the plaintiff so that they can give instructions to solicitors to apply for probate. The plaintiff has refused. The plaintiff has deposed that the scale of fees is too high and would deplete the estate. The two beneficiaries prefer the plaintiff to become the executor as they do not wish the estate to be depleted. The defendant has refused to accede to their request but at the same has not taken the proactive step to apply for probate using corporate funds with a view of deducting from the funds of the estate at a later date. The unfortunate net result is a perfect deadlock or stalemate in respect of the matter of probate of the will of the deceased. It can also be inferred that this situation would have created unhappiness on the part of the plaintiff and the beneficiaries towards the defendant. Counsel for defendant has submitted that the wishes of the deceased must be respected and that this is the sole reason for the defendant to insist in administering the estate. In my view, while the wishes of the deceased may be absolute and sacrosanct in respect of the distribution of the estate in accordance with the will, it is not absolute in the matter of administration of the estate. It must necessarily depend on the exigencies of the prevailing situation and the interests of the beneficiaries. Otherwise, the law would not have empowered the court to remove the executor for sufficient cause. In the instant case, as I noted earlier, there is deadlock situation as the defendant had not proceeded to apply for probate for the reason that funds were not deposited with them. As I said earlier, they could have used their own funds first but did not. If the stalemate continues, the beneficiaries would suffer prejudice and it can be fairly said this is not a situation that the deceased would have wished for. It also can be said that the defendant would not suffer any financial loss if the application is allowed as they had not incurred any expense in administering the estate as probate had not been applied for. As for the expenses in connection with the execution of will, it is undisputed that the fees had been paid. Finally, I would observe that the plaintiff is a person who has locus standi to make this application. In *Guindarajoo a/l Vegadason v Satgunasingam a/l Balasingam,* the court said as follows in respect of the locus standi of the applicant:

But who is entitled to make the application for revocation? In the Indian case of

Sima Rani Mohanti v Puspa Rani Pal AIR [1978] Cal 140, it was held (at the headnotes):

> Any interest, however slight and even the bare possibility of an interest, is sufficient to entitle a person to make an application for revocation. Whether revocation will be granted or not is a different matter, for it would depend on the applicant's proving the will, which has been probated, to be genuine etc.

[11] The applicant is the lawful husband of the deceased and the father of the two beneficiaries of the will. The beneficiaries are in the early twenties and have deposed affidavits to support the application of their father to become the executor and trustee. For all the foregoing reasons, I am satisfied that the plaintiff has demonstrated 'sufficient cause' under s 89 of the Probate and Administration Ordinance (Cap 109) of the Laws of Sabah. In the premises, I shall allow the application with no order as to costs.

Application allowed with no order as to costs.

Reported by Dzulqarnain Ab Fatar