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TIT CHEOK SU WEN AS EXECUTRIX OF THE ESTATE OF TYE KEAN LIN @ TAI  
KIEN, DECEASED v. TYE TEK LEEK & 2 ORS  
HIGH COURT, PULAU PINANG  
ABDUL HAMID MOHAMED J  
CIVIL SUIT NO. 22-623-82  
18 OCTOBER 1995  
[1995] 1 LNS 44

*SUCCESSION - Will - Trust and Trustees - breach - misappropriation - declaratory relief*

**Counsel:**

*For the plaintiff - R.K. Sharma; M/s. Sharma & Co.*

*For the defendant - Lim Kean Chye; M/s. Lim Kean Chye & Co.*

**JUDGMENT**

Abdul Hamid Mohamed J:

As the writ of summons and the statement of claim were amended a number of times, I shall refer to the re-amended writ of summons and statement of claim filed pursuant to the order made on 5 October 1992 - bundle B p. 1.

According to the statement of claim, plaintiff sues as one of the executors of the estate of Tye Kean Lin who died on 26 February 1967 (the said deceased). The first and second defendants are sued in their capacity as trustees of the properties and the assets held in trust for Tye Kean Lin (the said deceased) pursuant to clause 13 of the last will and testament of Tye Kee Yoon (testator) dated 30 January 1912 and the order of the High Court dated 4 December 1958 ("the said will"). The third defendant is the co-executrix. She was made a defendant because she refused to be one of the plaintiffs.

By Clause 12 of the said will, Tai Tsz Ten, one of the sons of Tye Kee Yoon was bequeathed 20 shares pursuant to the terms of the said will whereby the said deceased (Tye Kean Lin) inherited a beneficial interest in the estate and assets under the said will being a male child of the said Tai Tsz Ten.

Pursuant to clause 13, of the said will, 5 shares under the said will were given to the said deceased (Tye Kean Lin) in terms thereof.

By an order made in consolidated suits No. 90 and 162 of 1956 in the High Court at Penang it was *inter alia* ordered that certain properties belonging to the estate of the said Tye Kee Yoon (testator) be transferred to the first and second defendants and another (since deceased) by the estate of Tye Kee Yoon or on its behalf to be held upon trust set out in clause 13 of the

said will. Further, the assets or properties to be held in trust by the said defendants and another (since deceased) were to be held in trust as to 10% in value thereof to apply the income thereof during the charitable trust period to the purposes described in Clause 9 of the said will and thereafter upon trust therein the said will set out regarding the remaining 90% and as to the said remaining 90% in value thereof upon trust set out in clause 13 of the said will. Subsequently, on diverse occasions various properties and funds were transferred to the said defendants and another (since deceased) to be held on trust hereinbefore set out.

The plaintiff claims, that the estate of the said deceased (Tye Kean Lin) is entitled to in law and has interest in the said properties held in trust by the first and second defendants which enables the estate of the said deceased (Tye Kean Lin) to claim reliefs hereinafter mentioned against the first and second defendants upon true construction of the said will and said order of Court dated 4 December 1958.

Plaintiff also alleges that in the course of the administration of the said trust the said first and second defendants have wrongfully and in breach of trust disposed off properties held by them under the said trust to the detriment of the estate of the said deceased (Tye Kean Lin) whereby the estate of the said deceased suffered loss and damage. The plaintiff also avers that the first and second defendants have not rendered proper accounts of the administration of the said trust. The plaintiff provided three particulars which, according to her was all that she could provide. They relate to:

- (1) Holding No. 194 T.S. 18, N.E.D Penang
- (2) Holding No. 280(1) T.S. 19, N.E.D. Penang
- (3) Lot Nos. 44(1), 44(2), and 44(3) T.S. 23, N.E.D. Penang.

The plaintiff also avers that the first defendant has committed a further breach of trust by wrongfully appropriating 1/4 share to himself of proceeds of sale of lot Nos. 610 and 636 both T.S. 13 N.E.D. Penang which the first defendant, as trustee is not entitled to the benefit from trust.

The plaintiff prays for the following orders:

- (1) A declaration that the first and second defendants have committed breaches of trust of the properties and assets transferred to one or both of them as trustees under clause 13 of the said will dated 30 January 1912 of Tai Hi Yoon, deceased.
- (2) Restoration of all properties wrongfully appropriated pursuant to aforesaid breaches of trust or alternatively; damages for breaches of trust so committed of all assets and properties as may be found due upon proper accounts and inquiries including the aforesaid properties hereinbefore particularised.
- (3) Accounts and inquiries in respect of properties held in trust by the first and second defendants as aforesaid on the basis of wilful default by trustees.
- (4) An order that the first and second defendants do deliver to the plaintiff proper a detailed accounts of all the properties that have come to their hands in

connection with the said trust under the said will.

(5) Payment into Court of all the sums of monies found to be due in the hands of the first and second defendants as trustees.

(6) Such further or other orders as the Honourable Court may deem expedient.

(7) The first and second defendants do personally pay the costs of and incidental to the proceedings herein to be taxed.

In the re-amended defence, the defendants say that the order of Court dated 4 December 1958 embodied and gave effect to a scheme for decision of the estate of Tye Kee Yoon (the testator). The trustees appointed by the said order of 4 December 1958 for certain properties were the deceased (Tye Kean Lin), himself and the first and second defendants. The first defendant says that there are no properties left for the executors to have an interest in. He further says that if the plaintiff means by "properties" those set out in the indentures of 22 May 1961 and 31 July 1961, the plaintiff has no interest as claimed. The first defendant denies any breach of trust and went on to say that:

(a) Holding No. 194 was sold on 1 September 1961 by the deceased (Tye Kean Lin) himself and the proceeds were paid to him;

(b) Holding No. 280(c) was transferred to the other executrix (Leong Kwai Yoong - other widow of Tye Kean Lin),

(c) Lot 44(1), 44(2) and 44(3) were also transferred to the other executrix (Leong Kwai Yoong) on 13 July 1961.

The defendants say that all these acts were done at the direction of the deceased (Tye Kean Lin) with the knowledge and consent of the plaintiff.

The defendant say that as the deceased (Tye Kean Lin) died without male sons he was therefore the sole beneficiary of the trust. Further, even though the deceased (Tye Kean Lin) was treated as sole beneficiary, the legal position is that he was never the beneficiary as claimed but upon failure of male sons there was a resulting trust to the estate of Tye Kee Yoon (the testator).

Regarding lots 610 and 636, the defendants say that by order of Court of 12 May 1978 in originating summons No. 204 of 1961, the said lots were vested in the plaintiff, the other executrix (Leong Kwai Yoong) and the daughter of the deceased, Tye Poh Poh. Thereafter the first defendant ceased to be a trustee. When the said lots were sold in 1979 by the plaintiffs and the other owners he gave the first defendant a gift of some (1/4) of the proceeds and he received the gift as a relative and not as a trustee.

The defendants also plead the Limitation Act 1953.

The defendants also plead acquiescence and laches, particulars of which are given: that the plaintiff received a distribution from Kennedy Burkill in respect of sale of property belonging to the estate of Tye Kee Yoon (testator). They knew and participated in the sale of property belonging to what they alleged to be the property of the deceased's (Tye Kean Lin) estate and

even gave the first defendant a gift from the sale of No. 12 Arratoon Road. The plaintiff knew the state of affairs of the estate of the deceased (Tye Kean Lin) as well as the estate of the testator (Tye Kee Yoon) and did nothing for years until after the death of Mr. Ong Huck Lim (an advocate and solicitor) who was *de factor* in charge of the affairs of the two estates when records were not longer available. As a result the first defendant was made to believe that no advice would be taken and the first defendant has been prejudiced.

The plaintiff filed an amended reply to the reamended defence of the first defendant. This amended reply runs into 27 pages I will not reproduce it.

As I understand it, the plaintiff's contention is that upon the true construction of clause 13 of the will, Tye Kean Lin obtained 5/120 shares as vested in interest in him owing to the fact that he survived the testator but subject to the same being divested by way of substitution if he left male children on his death surviving him. However he died leaving no male children. So Mr.Sharma's contention was that, upon true interpretation of the will of the testator and the Court order dated 4 December 1958, that 5/120 share enured for the benefit of his estate.

On the other hand, Mr. Lim's contention was that Tye Kean Lim only had a life interest. And since he died leaving no sons surviving him, there was a resulting trust to the estate of Tye Kee Yoon not to the estate of Tye Kean Lin.

In this respect, first we have to consider the wording of clause 13. It says:

13. To each of my grandchildren Tan Shu Lin, **Tai Kien Lien** (also known as Tye Kean Lin, deceased - added), Tai Shu Tsoh and Tai Kien Ling **I give five shares** (emphasis added). The shares entitled by a deceased grandchild shall go to and be divided among his male children in equal shares.

The order dated 4 December 1958 is a lengthy and complicated order. The relevant part is:

(iii) one such share to the said Tye Kean Lin, Tye Tet Fu and Tye Tet Keek to be held by them upon trust as to 10% in value thereof to apply the income thereof during the charitable trust period to the purposes described in clause 9 of the testator's will and thereafter upon the trusts hereinafter set out regarding the remaining 90% and as to the remaining 90% in value thereof upon the trusts set out in clause 13 of the testator's will relating to the 5 shares of the testator's estate bequeath to the said Tye Kean Lin and his male children.

Mr. Sharma argued that the trust in respect of Tye Kean Lin and his male children was the same as contained in clause 13 of the will and should be interpreted accordingly.

That much I agree.

Still, the question is whether the effect of will, in particular Clause 13 is to give Tye Kean Lin an absolute gift with a subsequent gift in derogation or whether it is a mere life interest with subsequent limitation which may be determined if there is interposition of trustees.

A number of Old English authorities were referred to me. I shall only refer to some of them in this judgment. In *Charles Hoare and Others and George Byne & Others* [1884] 10 CL & FIN 508 a testator left all his personal estate, subject to legacies to his wife for life, and

afterwards... to his sister, for her life and then to the eldest son of G.B., and afterwards to G.B.'s second, third or any later he might have by the testator's niece A... It was held that the eldest son of G.B. took the personal estate absolutely subject to the prior life estates to the legacies and annuities given by the will and codicils.

In *Re Percy* [1883] 24 Ch. 616, the testator, by his will, made the following dispositions: "I give to my wife... ten thousand ringgit (RM10,000), after words to go to the understated residuary legatee Edward Josceline...". It was held that the legacy of RM1,000 was given to her absolutely.

In *Audsley v. Horn* 26 Beav. 200 referred to by Counsel for the defendants, it was a "bequest of leaseholders to A for life, and after her death, to B and her children, but if they should die without issue to C". B had no children at the death of the testator or in the life of A. It was held that B took for life, with remainder to her children.

In *Ward v. Grey* 26 Beav. 485, also referred to by Mr. Lim there was a bequest "to A and her children". However, in another part of the will it was expressed to as a gift "to A and her family". It was held that A took it for a life.

In this case the words used are: "To each of my grandchildren... (including) Tye Kean Lin... I give five shares. The share entitled to by a deceased grandchild shall go to and be divided among his male children in equal shares".

The words used in the order of 4 December 1958 are "to the said Tye Kean Lin and his male children".

Reading the will and the said order, I am inclined to agree with Mr. Lim Kean Chye that Tye Kean Lin only had a life interest. Indeed, that was the view taken by the solicitor who in his life time was handling the "affairs of the estate".

As an example the indenture dated 31 July 1961 (bundle C p. 110) used the words "To hold the same unto the purchasers in trust for the said Tye Kean Lin alias Tai Kien Lien **for life and thereafter for his male children**".

The list of assets of Tye Kean Lin attached to grant of probate for Tye Kean Lin's estate (petition No. 64 of 1967) did not include the properties in question - see bundle C pp. 175-179.

Furthermore, it is clear that the intention of the testator (Tye Kee Yoon) was to bequeath his properties to his male descendants. If, as argued by Mr. Sharma, upon the death of Tye Kean Lin, leaving no male children surviving him, the properties go to his estate which in turn will be enjoyed by his heirs who are not his male children, then the intention of the testator embodied in his will is defeated.

In the circumstances, I agree with Mr. Lim's submission that Tye Kean Lin only had a life interest in the properties and upon his death leaving no male children, there was resulting trust back to Tye Kee Yoon's estate. From that point onwards, my view is that the first defendant is no longer a trustee because the trust has failed: Tye Kean Lin had died and he left no male children surviving him.

In the circumstances, in my judgment, the suit should be dismissed.

Assuming I am wrong here, should I order the first defendant to render accounts of the trust property (again assuming that the plaintiff is entitled to it as an executrix of Tye Kean Lin's estate, which in my judgment, there is not)?

The first defendant gave evidence that he was appointed trustee "of a certain property". He was 27 years old then. He did not know the property. When the deceased (Tai Kean Lin) asked him to sign he signed. He did not keep any accounts. Ong Huck Lin's firm (solicitors) kept the accounts. He did not receive any money from the estate. At that time whenever his uncle (Tye Kean Lin) asked him to sign, he signed. "It was not my money". Asked about the four properties he said he had no idea whose properties they were. He thought it was his uncle's (Tye Kean Lin) properties. He did not know which properties he was holding as one of the trustees.

Having considered all the evidence and in the circumstances of this case, I am of the view that during the lifetime of Tye Kean Lin, the first defendant was really a "passenger". He took instructions from Tye Kean Lin. He signed whenever he was asked to sign. Tye Kean Lin (together with the first defendant) in his lifetime, had obtained Court orders for leave to sell some of the properties and for moneys to be paid out. All the applications were made by the same solicitors when they were managing the estate.

This said solicitor had died. He was the person who had the records as he was the one who also kept the accounts.

Of course the first defendant as the surviving trustee is duty-bound to keep records of the property under trust and to maintain proper accounts. But at least for what had happened during the lifetime of Tye Kean Lin himself, I do not think it is fair for the Court to, now, so many years later, hold the first defendant, being the sole surviving trustee, to account for all that has been done. He was a young man of 27 when appointed one of the trustees. His uncle, Tye Kean Lin (husband of the plaintiff and father of PW2) who was himself the sole beneficiary who clearly was in need of money to support himself and his family (including the plaintiff and PW3) was the one who was and did call the shots. Whatever property sold and moneys paid out were made in application by the solicitor who we must accept know more about the trust than any of us here, and with order of Court. Besides being unfair to the first defendant, it would be an exercise in futility. It is just impossible for him to now account for what had been done during the period.

Of course, after the death of Tye Kean Lin, the Arraton Road property was sold and some moneys were paid out. The Arraton Road property was sold under "Court Order applied for by the defendant". According to PW2 himself, the idea came from one Uncle Chong, who had also died. It appears that the first defendant was reluctant at first until it was agreed that he be given shares. So he applied for and obtained a Court order. The property was sold. The proceeds was divided into four. Plaintiff and PW2 themselves received their 1/4 share. What plaintiff and PW2 are not happy about is that the first defendant took 1/4 share.

Having considered the evidence, my judgment is that the plaintiff and PW3 did not voluntarily agree to give that 1/4 share to the first defendant as a gift. As a trustee ( and if he still was) he was not entitled to it. However, following my decision, even the plaintiff and

PW2 are not entitled to it either. So I will not make any order in respect thereof in this suit.

The same applies to the amount of RM374 taken by the first defendant.

In the circumstances I dismiss this suit with costs.