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NG KWOK SENG & ANOR

v.

MEI LING NG

B

HIGH COURT MALAYA, KUALA LUMPUR
LEE HENG CHEONG JC
[ORIGINATING SUMMONS NO: 24NCVC-633-03-2013]
10 FEBRUARY 2014

C ***SUCCESSION:*** *Will - Ademption - Principle of - Whether applicable - Presumption against double portions - Whether rebutted - Whether testator intended beneficiary to benefit from inter vivos and legacy under will*

D ***CIVIL PROCEDURE:*** *Action - Cause of action - Issue formed part of same subject matter of disposed litigation - Whether issue could have been raised in earlier proceedings - Whether abuse of process of court - Whether court adopted findings of earlier proceedings*

E The deceased, in his will dated 15 March 2007 ('the will'), left his entire estate to his three surviving children with half his estate to his daughter ('defendant') and the other half to be divided equally between his two sons. After the death of the deceased, the defendant contended that all the monies held in four joint accounts of the defendant and the deceased, in both Kuala
F Lumpur and Singapore, belonged to her solely as they had been 'gifted' to her *inter vivos* by the deceased shortly before he died. The plaintiffs' action for a declaration that the monies held in the Malaysian joint accounts in the names of the deceased and the defendant formed part of the estate of the deceased was settled
G *via* a consent order. A subsequent suit was filed by the plaintiffs in the Singapore High Court ('Singapore HC') seeking a declaration that the monies held in Singapore HSBC account formed part of the estate of the deceased ('Singapore suit'). The Singapore HC found that the monies in Singapore HSBC account
H were gifted by the deceased to the defendant and dismissed the suit. In the present action, the plaintiffs filed an application for a declaration that all monies held in the Singapore HSBC account be considered an ademption by satisfaction of part of the defendant's entitlement to the division of the estate of the
I deceased in accordance with the will by virtue of the common law

'presumption against double portions'. Thus, the issues before the court, based on the findings of the Singapore HC, was whether the defendant was obliged to account for the monies gifted to her *inter vivos* when sharing the assets of the estate with the plaintiffs.

Held (dismissing plaintiffs' application with costs):

(1) The principle of ademption by virtue of presumption against double portions was inapplicable in this case as the monies in the Singapore HSBC account was gifted to the defendant prior to the deceased's will dated 15 March 2007 and not after. (para 20)

(2) The deceased, at the time of executing the will, was perfectly aware that he was giving the defendant double portions. The deceased had intended the defendant to benefit from the *inter vivos* gift and his legacy under his will. Therefore, the presumption against double portions, if applicable to this case, had been successfully rebutted by the evidence that the deceased did in fact intend to give double portions to the defendant. (paras 24 & 25)

(3) The plaintiffs could have and should have raised the issue of ademption in the Singapore suit as it formed part of the same subject matter of the litigation and was located within the jurisdiction of Singapore. Further, it would be an abuse of the process of the court to allow the plaintiffs to file the proceedings on a piece-meal instalment basis. Since the plaintiffs had already put forward a similar argument before the Singapore HC and the same was rejected, the court should not permit the abuse of the court's process by the plaintiffs. The court accepted and adopted the findings of the Singapore HC that the monies in Singapore HSBC account were gifted by the deceased to the defendant. (paras 33 & 34)

Case(s) referred to:

Asia Commercial Finance (M) Berhad v. Kawal Teliti Sdn Bhd [1995] 3 CLJ 783 SC ***(refd)***

Kloosman (Executor of the will of the above named deceased) v. Aylen and Others [2013] EWHC 435 ***(refd)***

OCBC Bank (Malaysia) Bhd v. Kredin Sdn Bhd [1997] 2 CLJ 534 CA ***(refd)***

Re Vaux, Nicholson v. Vaux (No 2) [1938] 4 All ER 297 ***(refd)***

Showlag v. Mansour and others [1994] 2 All ER 129 ***(refd)***

Other source(s) referred to:
Halsbury's Laws of England, 4th edn, 2005 Reissue, vol 50, para 445
Jarman on Wills, 7th edn, vol II, p 211

For the plaintiff - Americk Singh Sidhu; M/s Americk Sidhu
For the defendant - Goh Siu Lin (Bong Ying Wei with her); M/s Shook Lin & Bok

Reported by S Barathi

JUDGMENT

Lee Heng Cheong JC:

Introduction

[1] In this action the plaintiffs claimed for the following:

(i) A declaration that all monies held in the Hong Kong and Shanghai Banking Corporation Limited Private Bank (Suisse) ("HSBC"), Singapore Account No: 8212-331217-0001, in the joint names of the defendant and the late Ng Cheong Choy ("deceased") be considered an ademption by satisfaction of part of the defendant's entitlement to the division of deceased's estate in accordance with the deceased's will dated 15 March 2007, by virtue of the common law "presumption against double portions".

[2] The following cause papers are referred to:

Date	Description	Enclosure No.
27.3.2013	Plaintiffs' Originating Summons	
27.3.2013	Plaintiffs' Affidavit affirmed by Ng Kwok Seng dated ("the Plaintiffs' 1st Affidavit");	
21.6.2013	Defendant's Affidavit-in-reply (1) affirmed by Mei Ling Ng ("the Defendant's 1st Affidavit");	
4.7.2013	Plaintiffs' Affidavit-in-reply (2) affirmed by Ng Kwok Seng ("the Plaintiffs' 2nd Affidavit");	

18.7.2013	Defendant's Affidavit-in-reply (2) affirmed by Mei Ling Ng ("the Defendant's 2nd Affidavit");
25.7.2013	Plaintiffs' Affidavit-in-reply (3) affirmed by Ng Kwok Seng ("the Plaintiffs' 3rd Affidavit").

Background Facts

[3] Mr Ng Cheong Choy ("deceased") was a banker by profession who has for offspring, three of whom currently survive him. They are the parties to this originating summons. The deceased's wife passed away in 1989 and the deceased's eldest son, Edwin, passed away in 2007. The deceased made his first will in 1982 on 10 February 1982. In this will, the deceased left his estate to his wife and four children in the manner set out therein (exh. WN2 AIS).

[4] After the deceased's wife passed away in 1989, the deceased prepared another will superseding the will prepared in 1982. In this 1989 will, the deceased left his entire estate to his four children in equal shares (exh. WN3 AIS).

[5] The deceased's eldest son Edwin, passed away in March 2007 and the deceased then execute another will, on the 15 March 2007, in which he left his entire estate to his three remaining children, except this time, the deceased gave half of his estate to his daughter, the defendant herein with the other half to be divided equally between his two surviving sons, Wilfred and Roy. A copy of the last will and testament of the deceased is displayed at (exh. WN1 AIS).

[6] On 12 March 2007, three days prior to the said will, the deceased instructed HSBC Private Bank (Suisse) to transfer the monies in HSBC account no: 8212-331280-0001 to the HSBC account no: 8212-331272-0001.

[7] The deceased's last will and testament was signed by the deceased on the 15 March 2007 and the deceased passed away on the 29 March 2007, exactly two weeks later.

[8] After the deceased's death, the defendant contended that all the monies held in four joint accounts in both Kuala Lumpur and Singapore, belonged to her solely as they had been 'gifted' to her

A *inter vivos* by the deceased shortly before he died, on the 14 March 2007 and one day before the deceased signed his last will and testament.

[9] The following relevant four bank accounts are as follows:

B (i) HSBC Singapore A/C No: 8212-331217-0001;

(ii) Public Bank KL A/C No: 3-106-58943-6;

(iii) HSBC KL A/C No: 203-283833; and

C (iv) Hong Leong Bank Singapore A/C No: 90-00-05244-4.

[10] On 4 April 2008, the plaintiffs filed a suit in the Kuala Lumpur High Court *vide* civil suit no: S6-22-411-2008 ("the KL suit"), seeking, *inter alia*, a declaration that the monies held in the D Malaysian joint accounts in the names of the deceased and the defendant (ie, the Public Bank account and the HSBC bank account), formed part of the deceased's estate. The KL suit was settled and a consent order dated 10 January 2012 was recorded.

E **[11]** On 8 April 2008, the plaintiffs filed a second suit in the Singapore High Court *vide* the civil suit no: 249 of 2008 ("the Singapore suit"), seeking a declaration that the monies held in the said HSBC account no: 8212-331272-0001 formed part of the deceased's estate.

F **[12]** On 29 September 2009, the Singapore High Court Judge, in delivering the judgment and found that the monies in the said HSBC account no: 8212-331272-0001 was gifted by the deceased to the defendant and dismissed the Singapore suit. The plaintiffs' appeal to the Singapore Court of Appeal was also dismissed.

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[13] Four years later, on 27 March 2013, the plaintiffs filed this application herein.

The Plaintiff's Case

H **[14]** The plaintiff contends in essence as follows:

(i) that the presumption against double portions applies. Equity presumes that an *inter vivos* gift of a portion of a deceased's estate, to any one or more of the beneficiaries, is considered I an advancement and has to be brought into account upon the distribution of that deceased's estate amongst all beneficiaries; and

(ii) that *res judicata*/issue estoppel is not applicable as the issue before the Singapore High Court was simply for a declaration that the monies held by the defendant herein belonged to the estate of the deceased. Inconsequential ancillary orders were prayed for. The Singapore Court held the monies belonged to the defendant herein Mei Ling as the deceased had given these to her. The issue before this court, based on the findings of the Singapore High Court, is whether the defendant herein is obliged to account for those monies gifted to her *inter vivos* when sharing the assets of the estate with the plaintiffs, her brothers and beneficiaries under the deceased's will.

The Defendant's Case

[15] The defendant contends in essence as follows:

(i) that the presumption against double portions does not apply to this case and if the presumption against double portions applies to this case, the said presumption has been rebutted by the express intention of the deceased; and

(ii) that this application by the plaintiffs is an abuse of the court's process; that the plaintiffs are estopped by the principles of *res judicata*/issue estoppel from raising this fresh issue of ademption by virtue of presumption of double portions.

Consideration Of The Contentions Raised

[16] The plaintiffs contend that the presumption against double portions applies and equity presumes that an *inter vivos* gift of a portion of a deceased's estate, to any one or more of the beneficiaries, is considered an advancement and has to be brought into account upon the distribution of that deceased's estate amongst all beneficiaries.

Whether The Presumption Against Double Portions Applies To This Case?

[17] In *Halsbury's Laws of England*, 4th edn. 2005 Reissue, vol. 50 at para. 445 states as follows:

> **Methods of ademption**
>
> A testamentary gift may be adeemed or taken away from the donee:

A (1) by a subsequent disposition by the testator of the subject matter of the gift;

(2) by a change in the ownership or nature of the property; and

B (3) **by the presumption that the testator does not intend to provide double portions for his children or other persons to whom he stands in *loco parentis*.**

(emphasis added)

C **[18]** In *Probate and The Administration of Estates: A Practical Guide*, (2nd edn. 1996) which referred to *Jarman on Wills* (7th edn. 1930) vol. II, at p. 211 and states as follows:

> The doctrine, then, which is fully established although some modern judges dislike it, depends upon two assumptions: **(1) that a**
> D **legacy to a child is intended to be a portion; (2) that a subsequent portion is intended to be in substitution for the legacy.** (emphasis added)

[19] In *Re Vaux, Nicholson v. Vaux (No 2)* [1938] 4 All ER 297,
E Lord Greene MR explained the presumption of ademption of a legacy by a portion as follows:

> The conception is that the testator having in his will given to his children that portion of the estate which he decides to give to them, when **after** making his will he confers upon a child a gift
> F of such a nature as to amount to a portion, then he is not to be presumed to have intended that that child should have both, the gift *inter vivos* being taken as being on account of the portion given by the will. (emphasis added)

G **[20]** Thus in the circumstances of this case, this court finds that the principle of ademption by virtue of presumption against double portions is inapplicable in this case as the monies in the said HSBC account no: 8212-331272-0001 was gifted to defendant on 13 March 2007, ie, prior to the deceased's said will dated
H 15 March 2007 and not after.

In The Event The Presumption Against Double Portions Applies To This Case, Whether The Said Presumption Has Been Rebutted?

[21] This court finds that even if the presumption against double
I portions is applicable to this case, it can be rebutted with evidence that the testator did in fact intend to give double portions to the donee.

[22] In *Kloosman (Executor of the will of the above named deceased) v. Aylen and Others* [2013] EWHC 435 (Ch), the court states *inter alia* as follows:

> [7] ... Where both the bequest in the will and the *inter vivos* gift are portions, the presumption will arise but **can be rebutted if there is evidence that the testator did in fact intend to give two portions to the donee.** (emphasis added)

[23] In the textbook, *Probate and The Administration of Estates: A Practical Guide*, (2nd edn. 1996) which referred to *Jarman on Wills* (7th edn. 1930) vol. II, at p. 211, which states as follows:

> The doctrine, then, which is fully established although some modern judges dislike it, depends upon two assumptions: **(1) that a legacy to a child is intended to be a portion; (2) that a subsequent portion is intended to be in substitution for the legacy**. It is not very easy to ascertain the precise import of the first of these propositions, for the word portion is not a term of art. But it seems to be something which is **given by the parent to establish a child in life or to make what is called provision for him**. The second proposition is merely a special case of the general rule of equity which presumes that a testator does not intend child to have a double portion. **This presumption is not a rule of law and may be rebutted**. (emphasis added)

[24] This court finds that the deceased did address his mind specifically to this issue in dispute and intended the defendant to benefit from the *inter vivos* gift and his legacy under his will. This is substantiated and evidenced by the followings:

(a) the letter dated 28 July 2008 from Dato' Dominic J Puthucheary of Messrs Puthucheary, Firoz & Mai. (See the said letter annexed to the defendant's first affidavit, exh. "MLN3", at p. 20);

(b) The fact that the monies from the said HSBC account no: 8212-331280-0001 were transferred to the said HSBC account no: 8212-331272-0001 prior to the deceased's execution of the said will dated 15 March 2007.

(c) Furthermore, this court noted that when the defendant asked the deceased what he wanted to do with the monies in the said HSBC account no: 8212-331272-0001, the deceased replied "Mei Ling, it's up to you". (See the letter at the defendant's first affidavit, exh. "MLN2", at p. 19);

(d) In the judgment of the Singapore Court in the Singapore suit, in particular pp. 31, 32 and 34 of the defendant's first affidavit, exh. "MLN4". At pp. 31 and 32, paras. 23, 24 and 25 states as follows:

> 23. *However this submission did not take into account the mindset and emotions at the material time, which was the period between Edwin's death and his own. Here was a man whose eldest son had just died and driven to contemplating his own mortality. Mr Ng's two sons were successful in their careers and their lives but he was severely disappointed at how they treated him. His daughter, who was single and lived with him, was not as capable as her brothers. He was fully aware that she would be quite alone in this world after his demise. It is in this context that I must consider whether it was so incredible that Mr Ng could, at that time, have acted in the manner that Meiling and Puthucheary had testified that he did. I certainly thought that it was entirely possible.*
>
> 24. **Indeed on the evidence before me, I found that in the remaining weeks of his life, Mr Ng had a change of mind regarding the distribution of his estate**. Certainly with respect to what Mr Ng had provided in the Will, there is ample evidence that he had a change of mind. In the two previous wills, the 1982 Will and 1989 Will, he had provided his four children with equal shares. Throughout the last decade of his life, the notes he left behind showed that they were to receive equal shares of his properties, except with provisions to ensure that Edwin would be taken care of. But when Edwin died, Mr Ng was severely affected. *And when it came to putting down his intentions in his last will and testament, he had clearly provided that Meiling would get a half share whereas the plaintiffs would only get a quarter each. This puts paid to the plaintiffs' contention that Mr Ng's past manifestations of intent in relation to distribution of his assets showed that he could not have intended to give Meiling more.*
>
> 25. There was a rather poignant event that I felt compelled to note. The plaintiffs and Puthucheary emphasised that at the 8 (or 9) March 2007 meeting, Mr Ng had declared to all present, namely Meiling, Roy, Puthucheary and Cheng that in his new will he would give each of his three children an equal share of his estate. *After that he had a tête-à-tête with Puthucheary in which he poured out his sorrows regarding his children and then told the lawyer that he wanted to make further instructions regarding his will, without*

> *specifying what these were*. Less than a week later, on 14 March 2007, Mr Ng instructed Puthucheary on the 50:25:25 distribution *after again ventilating his sorrows to his confidant. Puthucheary said that Mr Ng complained about his sons, but not Meiling. Mr Ng told Puthucheary that he was very disappointed in Roy and Wilfred, that they only called him about money and never inquired after his health. He told Puthucheary about the humiliation he had suffered from them and their wives* ...
>
> (emphasis added)

At p. 34, para. 27:

> 27. ... *This evidence was corroborated by the evidence of Puthucheary who said that Mr Ng had told him at the time he gave instructions on the Will that he was giving the moneys in the HSBC Account and other joint accounts with Meiling to her. The plaintiffs were in the difficult position of proving a negative* ... In my view, the combined evidence of Meiling and Puthucheary proved on a balance of probability that Mr Ng had given to Meiling the moneys in the HSBC Account and I so find.
>
> (emphasis added)

[25] Thus this court finds that the above showed that the deceased, at the time of executing his said will, was perfectly aware that he was giving the defendant, double portions. The deceased could have reduced the defendant's double entitlement under the said will, but intentionally chose not to do so. Thus this court finds that the presumption against double portions, if applicable to this case, has been successfully rebutted by the above evidence that the deceased did in fact intend to give double portions to the defendant.

Whether Res Judicata/Issue Estoppel Applies

[26] The plaintiffs contend that *res judicata*/issue estoppel is not applicable herein as the issue before the Singapore High Court in the Singapore suit, was simply for a declaration that the monies held by the defendant herein belonged to the estate of the deceased. The Singapore Court held the monies belonged to the defendant herein, as the deceased had given these to her whilst the issue before this court, based on the findings of the said Singapore High Court, is whether the defendant herein is obliged

A to account for those monies gifted to her *inter vivos* when sharing the assets of the estate with the plaintiffs, her brothers and beneficiaries under the deceased's said will.

[27] The defendant contends that this application by the plaintiffs
B is an abuse of the court's process and that the plaintiffs are estopped by the principles of *res judicata*/issue estoppel from raising this fresh issue of "ademption by virtue of presumption of double portions".

C **[28]** This court finds as follows:

[29] It is trite that a party is estopped from raising in a subsequent proceeding the causes of action or issues or facts, which are so clearly part of the subject matter of the earlier litigation, and so clearly could and should have been raised in the
D earlier proceeding. It is an abuse of the process of the court when a new proceeding is commenced on the causes of action or issues or facts which are so clearly part of the subject matter of the earlier litigation.

E **[30]** In *Asia Commercial Finance (M) Berhad v. Kawal Teliti Sdn Bhd* [1995] 3 CLJ 783, the Supreme Court *inter alia* held at p. 784 as follows:

> [1] The significance of *res judicata* lies in its effect of creating an *estoppel per rem judicatum*, which may take the form of
F either **cause of action estoppel or issue estoppel**. The cause of action estoppel arises when rights or liabilities involving a particular right to take a particular action in Court for a particular remedy are determined in a final judgment and such right of action, that is the cause of
G action, merges into the said final judgment. The issue estoppel, on the other hand, means simply an issue which a party is estopped from raising in a subsequent proceeding.
>
> [2] The doctrine of *res judicata* is not confined to causes of action or issues which the Court is actually asked to decide
H or has already decided. *It covers also causes of action or issues or facts which, though not already decided as a result of the same not being brought forward due to negligence, inadvertence or deliberately, are so clearly part of the subject matter of the litigation and so clearly could have been raised, that it would be an abuse of*
I *the process of the Court to allow a new proceeding to be started in respect of them.* (emphasis added)

[31] In *OCBC Bank (Malaysia) Bhd v. Kredin Sdn Bhd* [1997] 2 CLJ 534, the Court of Appeal held *inter alia* as follows: A

> The plea of *res judicata* encompasses two distinct forms of estoppel, ie, 'cause of action estoppel' and 'issue estoppel' …
>
> 'Issue estoppel' represents an extension of the doctrine of *res judicata* to include *a bar on the subsequent litigation not only of all decided issues whose resolution was essential to the determination of earlier proceedings but also "to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.*
>
> Thus 'issue estoppel' has been extended to cover not only the case where a particular point has been raised and specifically determined in the earlier proceedings, but also that where in the subsequent proceedings it is sought to raise a point which might have been but was not raised in the earlier". (emphasis added)

B C D

[32] In the Privy Council case of *Showlag v. Mansour and Others* [1994] 2 All ER 129, the court *inter alia* held: E

At p. 133, the court held:

> In *Owens Bank Ltd v. Bracco* [1992] 2 All ER 193 at p. 198, [1992] 2 AC 443 at 484 Lord Bridge of Harwich said:
>
> > A foreign judgment given by a court of competent jurisdiction over the defendant is treated by the common law as imposing a legal obligation on the judgment debtor which will be enforced in an action on the judgment by an English court in which the **defendant will not be permitted to reopen issues of either fact or law which have been decided against him by the foreign court**. (emphasis added)

F G

At p. 136, the court held: H

> … on ordinary principles a party **is not entitled to raise in a later proceeding a point which was open to him in an earlier one but which he did not take**. (emphasis added)

I

[33] This court finds that the plaintiffs could have and should have raised the issue of ademption in the Singapore suit as it formed part of the same subject matter of the litigation and is located within the jurisdiction of Singapore. Further it would be an abuse of the process of this court to allow the plaintiffs to file these proceedings on a piece-meal instalment basis.

[34] Since the plaintiffs had already put forward a similar argument before the Singapore Court and the same was rejected, this court thus shall not permit the abuse of the court's process by the plaintiffs.

[35] This court finds that the Singapore High Court had made clear findings of fact and law after a full trial and found that the monies in the said HSBC account no: 8212-331272-0001 were gifted by the deceased to defendant, in addition to her legacy under the said will. See the Singapore judgment at pp. 30 and 33 of the defendant's first affidavit, exh. "MLN4". At p. 30, para. 22 states as follows:

> ... the Plaintiffs contended, it could not have been possible that Mr. Ng, having given Meiling twice much as each of the other two sons, would gift to her practically half of his assets and after this, further give her the remainder.

At p. 33, para. 27 states as follows:

> ... Did he or did he not decide, in addition to giving Meiling half of his estate under the Will, to give to her while he was still alive, the moneys in the joint account? In this regards, Meiling's evidence was that Mr. Ng had told her that "it is up to you" when she asked him about the money in the HSBC account. This evidence was corroborated by the evidence of Puthucheary who said that Mr. Ng had told him at the time he gave instructions on the Will that he was giving the moneys in HSBC Account and other joint accounts with Meiling to her. The Plaintiffs were in the difficult position of proving a negative ... *In my view, the combined evidence of Meiling and Puthucheary proved on a balance of probability that Mr. Ng had given to Meiling the moneys in the HSBC Account and I so find.* (emphasis added)

[36] In the light of this court's above findings, this court thus accepts and adopts the findings of the Singapore Court as stated above.

Order

[37] In the light of the above findings, this court finds that there are no merits in the plaintiffs' application. In the premises this court dismisses the plaintiffs' application herein with costs of RM15,000.