A **TAN BOON THIEN & ANOR v. TAN POH LEE & ORS (NO 2)**

COURT OF APPEAL, PUTRAJAYA
UMI KALTHUM ABDUL MAJID JCA
S NANTHA BALAN JCA
MOHD SOFIAN ABD RAZAK J
B [CIVIL APPEAL NO: W-02(1M)(NCVC)-2540-12-2018]
29 JUNE 2020

SUCCESSION: *Administration of estates – Appointment of administrator pendente lite – Scope of administrator pendente lite's jurisdiction – Preservation of disputed and undisputed assets of estate – Whether administrator pendente lite could only be appointed in respect of estate in ongoing probate action – Whether there was proper object or necessity to justify appointment – Whether High Court correct in exercising discretion to make order for appointment of administrator pendente lite*

D This was an appeal against the order of the High Court Judge ('HCJ') in appointing an administrator *pendente lite* for the estate of the deceased ('order'). The deceased had previously executed a will ('2008 will') which was prepared by one Che Phye Keat, the family's lawyer. There was, however, considerable litigation which was on going between the warring parties and a significant part of it pivoted on the validity of an alleged last E will and testament of the deceased ('impugned will') and an alleged deed of gift ('deed') and power of attorney ('PA'). The primary dispute in the probate action was essentially in relation to the validity of the impugned will, the deed and the PA. However, the appellant's case was that although the deceased had initially executed the 2008 will, he had subsequently executed F the impugned will wherein the first appellant was named as the sole executor. As such, according to the first appellant, the impugned will superseded the 2008 will. The sole beneficiaries of the impugned will were the first and second appellants. Thereafter, by way of the deed, the deceased allegedly made an *inter vivos* gift of shares, properties and monies in favour of the first G appellant and second appellant. The deceased passed away on 29 August 2019 in Bangkok and there was a great deal of controversy pertaining to the deceased being taken by the appellants to Bangkok. The first respondent contended that the deceased was taken to Bangkok so as to avoid a mental health assessment which was to be undertaken by the High Court in Kuala H Lumpur. The first appellant applied for probate based on the impugned will ('probate application') for the issuance of grant of probate. The first respondent filed a suit ('probate action') challenging the validity of the impugned will, the deed and the PA. The first respondent applied under s. 19 of the Probate and Administration Act 1959 ('PAA') for the appointment of one Lim Tian Huat ('LTH') as an administrator *pendente lite* I for the estate of the deceased. The application was allowed by the High Court and an order was made pursuant to the said section. Hence, this appeal. The appellants, in submitting that the HCJ erred in law and in fact when she

granted the order, argued that an administrator *pendente lite* could only be appointed in respect of the estate of the deceased in an ongoing probate action and that it must be shown that there was some proper object, some necessity, for making the appointment.

Held (dismissing appeal)
Per S Nantha Balan JCA delivering the judgment of the court:

(1) In the probate action, the first respondent was indisputably challenging the impugned will and the deed and PA as well. The first respondent was also seeking consequential reliefs for the restitution of the assets that were allegedly wrongfully transferred to the first appellant pursuant to the deed and the PA. Where there is a claim to title or ownership and restitutionary relief is sought, with respect to the assets which are allegedly said to form part of the estate, then the scope of the administrator *pendente lite's* jurisdiction would necessarily encompass these disputed assets as well, although they were at one time but which were no longer, in the name of the deceased. (paras 51 & 53)

(2) There was undoubtedly a spate of litigation and extreme animosity between the parties all arising out of and/or in connection with the impugned will, the deed or the PA. Obviously, it would be quite some time before the dust of litigation settled. Clearly, there was a need to preserve the assets of the estate (including those assets which were disputed as to their title and/or ownership or rights attached thereto) and such preservation would pre-eminently be achieved by the appointment of an administrator *pendente lite*. (paras 59 & 60)

(3) The HCJ was acutely mindful of the first appellant's stance, that some of the assets covered by the order have already been transferred to him or were purportedly being held in trust for him. The HCJ correctly held that the propriety of the transfers and/or the rights and entitlements of the parties were still being litigated and remain to be determined. Essentially, the HCJ was impelled to the view, without making a determination one way or the other as to who was telling the truth, that in light of the spate of litigation that was extant and given the deep animosity and venomous and vitriolic relationship that existed between the parties, the assets of the estate of the deceased (disputed and undisputed) had to be preserved and managed. (paras 62 & 63)

(4) Since the affairs of the estate such as payment of taxes, collection of rentals, renewal or termination of tenancies *etc* had to be handled, it was urgent, imperative and wholly necessary to appoint a third party neutral person to handle the assets and affairs of the estate of the deceased until such time that a determination is made one way or the other in the probate action with regard to the validity of the impugned will, the deed

A and the PA. On this analysis, there was no flaw or misdirection in the approach taken by the HCJ. There was no appealable error in the grounds of judgment of the High Court. The HCJ was not 'plainly wrong' in the exercise of her discretion to make the order for the appointment of the administrator *pendente lite*. (paras 64 & 65)

B **Case(s) referred to:**
Ishwardeo Narain Singh v. SM Kamta Devi & Ors AIR (1954) SC 280 ***(refd)***
Jasa Keramat Sdn Bhd & Anor v. Monatech (M) Sdn Bhd [1999] 4 CLJ 533 CA ***(refd)***
Jigarlal Kantilal Doshi v. Amanah Raya Bhd & Other Appeals [2014] 8 CLJ 704 CA ***(refd)***
Letchumanan Chettiar v. Palaniappa Chettiar [1977] 1 LNS 60 FC ***(refd)***
C *Mohideen Batcha v. Fatimah Bee Alias Batcha Ammal [1941] 1 LNS 44 HC* ***(refd)***
Teresa Terine Pereira & Anor v. Adrian Sasha Paul [2017] 1 LNS 946 HC ***(refd)***
Tomkinson v. Hersey [1983] 34 SASR 181 ***(refd)***
Vasudevan Vazhappulli Raman v. T Damodaran PV Raman & Anor [1981] CLJ 84; [1981] CLJ (Rep) 101 FC ***(refd)***

D **Legislation referred to:**
Probate and Administration Act 1959, ss. 2, 19, 59
Rules of Court 2012, O. 72 rr. 1(2), 20

Other source(s) referred to:
Kerr and Hunter on Receivers and Administrators, 12th edn, paras 2-13, pp 18-19

E *For the 1st appellant - Vijaya Segaran, Norazali Nordin, Alicia Lee & Teoh Kean Guan; M/s Lee & Assocs*
For the 2nd appellant - Gopal Sri Ram, Yasmeen Soh, Felix Saw, Hanan Kamal; M/s Arthur Wang, Lian & Assocs
For the 1st respondent - Michael Chow, Sunita Sankey, Wendy Yeong, Surachetth Jotsuwan; M/s Liza Khan & Sankey
F *For the 2nd & 3rd respondents - Ng Thiang Tuan, Keith Kwan Tjee Kin & Sarah Reshmi Felix; M/s Tuan, Mohd Zain & Co*
For the stakeholder - Nicole Wee & Ling Li Ching; M/s Chooi & Company + Cheang & Ariff
For the administrator pendente lite (Lim Tian Huat) - Renu Zachariah; M/s Rosley Zechariah

G *[Editor's note: Appeal from High Court, Kuala Lumpur; Suit No: WA-22NCVC-703-10-2018 (affirmed).]*

Reported by Suhainah Wahiduddin

H **JUDGMENT**

S Nantha Balan JCA:

Introduction

[1] This is an appeal against the order of the learned High Court Judge
I ("the learned judge") dated 7 December 2018 ("the order") in appointing an administrator *pendente lite* for the estate of Tan Kim Choo @ Tan Kim Choon ("the deceased") . On 30 January 2020 we unanimously dismissed the appeal. These are the reasons for our decision to dismiss the appeal.

[2] The appellants are Tan Boon Thien ("first appellant") and his wife, Low Chow Yeng ("second appellant"). They were the first and fifth defendants respectively in the proceedings in the High Court. The first appellant, Tan Poh Lee ("third respondent"), Tan Poh Hui ("second respondent") and Tan Poh Yee ("third respondent") are the children of the deceased.

[3] The proceedings in the High Court is a "probate action" as defined by O. 72 r. 1(2) of the Rules of Court 2012 ("ROC"). As per the definition, a "probate action" is "an action for the grant of probate of the will, or letters of administration of the estate, of a deceased person or for the revocation of such a grant or for a decree pronouncing for or against the validity of an alleged will, not being an action which is non-contentious".

[4] By a notice of application dated 8 November 2018 ("encl. 6"), the first respondent applied under s. 19 of the Probate and Administration Act 1959 ("PAA") for the appointment of Mr Lim Tian Huat ("LTH") of Messrs Rodgers Reidy & Co (chartered accountants) as an administrator *pendente lite* for the estate of the deceased.

[5] Section 19 of the PAA reads as follow:

> Letters of administration *pendente lite*
>
> 19. Pending any probate action, letters of administration may be granted to such person as the Court may appoint, limited so that the administrator shall not be empowered to distribute the estate, and shall be subject to such control by and direction of, the Court, as the Court deems fit: and subject to that limitation the administrator so appointed shall have all the rights and powers of a general administrator.

[6] In the present case, there is considerable litigation which is on-going between the warring parties and a significant part of it pivots on the validity of an alleged last will and testament of the deceased dated 8 June 2016 ("the impugned will") and an alleged deed of gift dated 27 September 2016 ("the deed") and power of attorney dated 27 September 2016 ("the PA"). There is no dispute that the deceased had previously executed a will dated 6 March 2008 ("the 2008 will") which was prepared by Mr Chew Phye Keat, a partner of the legal firm of Messrs Raja Darryl & Loh and who has been described by the first respondent as the deceased's trusted family lawyer of 25 years.

[7] The validity of the 2008 will is not disputed. The trust reposed by the deceased in Mr Chew Phye Keat may be gleaned from the fact he prepared the 2008 will, witnessed its execution by the deceased and was also named as the executor and trustee for the estate of the deceased.

[8] The primary dispute in the probate action is essentially in relation to the validity of the impugned will, the deed and the PA. However, the appellants' case is that although the deceased had initially executed the 2008

will, he had subsequently executed the impugned will where in the first appellant was named as the sole executor. As such, the impugned will superseded the 2008 will. The sole beneficiaries of the impugned will are the first and second appellants. Thereafter, by way of the deed, the deceased allegedly made an *inter vivos* gift of shares, properties and monies in favour of the first appellant and second appellant.

[9] The deceased died on 29 August 2018 in Bangkok, Thailand. There is a great deal of controversy pertaining to the deceased being taken by the appellants to Bangkok. The first respondent contends that the deceased was taken to Bangkok (by the appellants) so as to avoid a mental health assessment which was to be undertaken by the High Court in Kuala Lumpur.

[10] On 14 September 2018 the first appellant applied for probate based on the impugned will and duly filed Kuala Lumpur High Court application for Probate No. WA-32NCVC-1651-09-2018) ("the probate application") for the issuance of grant of probate.

[11] On 25 October 2018 the first respondent filed Suit No. WA-22NCVC-703-10-2018 ("the probate action") challenging the validity of the impugned will, the deed and the PA. The first appellant and the second appellant are the first and fifth defendants in the probate action whilst the second and third respondents are named as the third and fifth defendants respectively. It is relevant to note that in the probate action the first respondent is challenging not just the impugned will but also the deed and the PA. The pleadings in relation to the PA and the deed as per para. 54 the amended statement of claim dated 29 January 2019 ("ASOC") read as:

> Power of Attorney & Deed of Gifts
>
> 54. The Plaintiff will contend that the Power of Attorney ("PA") and or the Deed of Gifts ("DoG") respectively dated 29-9-2016 27-9-2016 are void by reason of duress and undue influence. The Plaintiff will rely on the above events for particulars of the duress and undue influence.

[12] The reliefs sought in the probate action as per the ASOC are as follows:

> (a) a declaration that the will dated 8th June 2016 be declared null and void:
>
> (aa) a declaration that the will dated 6th March 2008 is valid and is the Deceased's Last will and Testament:
>
> (b) an order that a grant of probate be issued to the 2nd Defendant as executor or in the alternative to the Plaintiff to carry out the terms of the will dated 6 March 2008:
>
> (c) a declaration that **the Deed of Gift** dated 27th September 2016 ("DoG") **be declared null and void**;
>
> (d) a declaration that **the Power of Attorney** dated 27th September 2016 ("PA") **be declared null and void**:

(e) an order that **all steps and actions taken under the PA and DoG by the 1st Defendant be declared invalid**;

(f) an order for **restitution of all properties under the DoG to be restored to the estate** of TKC by the 1st Defendant;

(g) damages to be assessed against the 1st Defendant;

(h) liberty to apply:

(i) costs;

(j) any further or other relief deemed fit. (emphasis added)

[13] As mentioned earlier, the order was made pursuant to s. 19 of the PAA. The relevant procedural rules in relation to the appointment of an administrator *pendente lite* is O. 72 r. 20 of the ROC which reads as follow:

Administration pending trial (O. 72 r. 20)

20. (1) An application under section 19 of the Probate and Administration Act 1959 for the grant of administration may be made to the Registrar by writ.

(2) An administrator to whom a grant is made under section 19 of the Act must, at the time when be begins proceedings for taxation of his costs, or at such other time as the Registrar may direct, produce at the Registry an account (verified by affidavit) of the moneys and other property received or paid or otherwise dealt with by him in his capacity as an administrator.

(3) Unless the Court otherwise directs, the account shall be referred to the Registrar for examination and the Registrar shall give such directions as may be necessary for examination of the administrator's costs.

(4) Except where the remuneration of the administrator has been fixed by a judge, the Registrar shall, on the completion of the examination of the administrator's account, and taxation of his costs, assess and provide for the administrator's remuneration.

[14] The order reads as follows:

1. Mr Lim Tian Huat ("LTH") of Messrs Rodgers Reidy & Co, Chartered Accountants (AF: 001974) ("RR & Co") be appointed, without giving security and/or an administration bond, as Administrator *Pendente Lite* of the estate of Tan Kim Choo @ Tan Kim Choon (NRIC No. 410628-14-5101) ("the estate") pending determination of the Probate Action above or until further order of this Court;

2. The following directions as to the Administration pending determination of the Probate action above be made to preserve the estate, namely that the Administrator *Pendente Lite*, his servants and/or his agents shall;

2.1. receive and manage the assets of the estate as set out in the Schedule A and B annexed, as listed in the respective will s dated 6 March 2008 and 8 June 2016, as contained in the Deed of Gift

coupled with a Power of Attorney dated 27 September 2016 ("DG") and as contained in the Power of Attorney dated 27 September 2016 ("PA");

2.2. identify and collect up all other assets (in whatever form) of the estate not stated above as may be situate in the jurisdiction of Malaysia and to receive and manage the same;

2.3. pay all lawful debts of the estate, including to identify all creditors of the estate and to enter into any compromise or settlement with the same out of the assets of the estate;

2.4. take steps to identify and recover and/or preserve and/or manage all assets of the estate in the hands of any third parties which may have been converted/dissipated under the DG by the 1st and/or 5th Defendants and/or under the PA by the 1st Defendant and/or by any other means after 3 August 2015.

3. the Administrator *Pendente Lite* do submit an account of his administration of the estate to this Court within one (1) month of the date of this order and thereafter at two (2) monthly intervals by way of Affidavit to be filed in these proceedings with a copy to be served on the Plaintiff's solicitors;

4. the remuneration of the Administrator *Pendente Lite* be determined and/or approved by the Court upon application by the Administrator *Pendente Lite* at the commencement of the Administration and from time to time thereafter following each interval of accounting as envisaged in paragraph 3 above or as may be expedient;

5. the Administrator *Pendente Lite* shall be indemnified for all outgoings incurred on behalf of the estate in the exercise of his powers and duties under this Order to be paid out of the assets of the estate with the approval of the Court;

6. the Administrator *Pendente Lite* shall be at liberty to apply to Court for such further orders and directions as may be appropriate or necessary;

7. costs in the cause;

8. liberty to apply.

SCHEDULE A

List of assets and properties

(i) Whole of undivided share held under No. Hakmilik GM 229, Lot 21776, Mukim Batu, Daerah Kuala Lumpur and bearing postal address of No. 15, Lorong Segambut Dalam, Taman Segambut, 51200 Kuala Lumpur.

(ii) Whole of undivided share held under No. Hakmilik GM6230, Lot 56235, Mukim Batu, Daerah Kuala Lumpur and bearing postal address of No. 19, Jalan Vethavanam, Batu 3½ Off Jalan lpoh, 51100 Kuala Lumpur;

(iii) Whole of undivided share held under No. Hakmilik HSM 10238, Lot 15666, Mukim Batu, Daerah Kuala Lumpur and bearing postal address of No. 19, Jalan Vethavanam, Batu 3½ Off Jalan lpoh, 51100 Kuala Lumpur;

(iv) Whole of undivided share held under No. Hakmilik HSD 55422, PT No. 7691, Mukim Batu, Wilayah Persekutuan and bearing postal address of Site 105, Batu, No. 57, Jalan 11/3A, Kepong Entrepreneurs' Park Off Jalan Kuching, 52100 Kuala Lumpur;

(v) Whole of undivided share held under No. Hakmilik PM 167, Lot 27991, Mukim Batu, Daerah Kuala Lumpur and bearing postal address of No. 40 & 40-1, Jalan 1/32, Jalan Kepong, Batu 6, 52000 Kuala Lumpur.

(vi) Whole of undivided share held under No. Hakmilik HS(M) 965, Lot PT 951, Mukim Ulu Kelang, Daerah Gombak and bearing postal address of No. 6, 6A & 6B, Jalan Rasmi 7, Taman Rasmi Jaya, 68000 Ampang. Selangor Darul Ehsan:

(vii) Whole of undivided share held under No. Hakmilik Strata PN(WP) 33134/Ml-D/1/484 and No. Hakmilik Strata PN(WP) 33134/M1-D/2/492 and No. Hakmilik Strata PN(WP) 33134/M1-D/3/500, Lot 59059 (previously known as PN 27166, Lot 55376), Mukim Batu, Daerah Kuala Lumpur and bearing postal address of No. 28, 28-1 & 28-2, Block B, Jalan Prima J, Vista Magna, Metro Prima, Jalan Kepong, 52100 Kuala Lumpur;

(viii) Whole of undivided share held under No. Hakmilik HSD 317170 (previously known as HSD 136281). PT 2791. Pekan Baru Sungai Buloh, Daerah Petaling, Selangor and bearing postal address of No. 1A, 1B, 1C, Jalan Uranus AG U5/AG, Sek U5, 40150 Shah Alam, Selangor Darul Ehsan;

(ix) Whole of undivided share held under No. Hakmilik Geran No. 64560, Lot 36977 and bearing postal address of No. 77, Jalan Kamaruddin Isa, Fair Park, 31400 Ipoh, Perak Darul Ridzuan;

(x) Whole of undivided share held under No. Hakmilik Geran No. 64561, Lot 36978 and bearing postal address of No. 77A, Jalan Kamaruddin Isa, Fair Park, 31400 Ipoh, Perak Darul Ridzuan;

(xi) Whole of undivided share held under No. Hakmilik HSD 85762, PT Lot No. 23802 (previously known a Hakmilik Induk 43473, PT 11070) and bearing postal address of Lot 306, No. 36, Jalan Tembaga SD 5/2H, 52200 Kepong, Selangor Darul Ehsan;

(xii) Whole of undivided share held under GRN 136100, Lot 46909 (previously known as HSD 16876), Mukim Batu, Daerah Gombak and bearing postal address of Lot 46909, Block E, Taman Perindustrian Selayang, Batu 8 ½, Jalan lpoh, Batu Caves, 68100 Selangor Darul Ehsan;

(xiii) Whole of undivided share held under GR 333754 (previously known as GR 279603), Lot 31269, Bandar Sri Damansara, Daerah Petaling. Selangor, Mukim Damansara.

SCHEDULE B

List of Bank Accounts

(a)	Bank name	: Public Bank Berhad
	Branch	: Jalan Ipoh, Kuala Lumpur
	Account No.	: 3143-7008-00
(b)	Bank Name	: RHB Bank Berhad
	Branch	: Jalan Tun Razak, Kuala Lumpur
	Account No.	: 614129-00011-298 (Multi-Currency Account)
	Account No.	: 214-129-0023-2164 (Current Account)
(c)	Bank Name	: United Overseas Bank (Malaysia) Berhad
	Account No.	: 195-301-757-7 (High Yield Account)
	Account No.	: 195-007-672-6 (High Yield Account)
	Account No.	: 195-900-676-3 (FCY Call Account)
	Account No.	: 195-900-677-1 (FCY Call Account)
	Account No.	: 195-900-679-8 (FCY Call Account)
	Account No.	: 195-002-427-0 (Time/Fixed Deposit Account)
	Account No.	: 195-006-756-5 (Time/Fixed Deposit Account)
(d)	Bank Name	: Malayan Banking Berhad
	Branch	: Jalan Pasir Putih, lpoh
	Account No.	: 558033-511949
(e)	Bank Name	: Alliance Bank Berhad
	Branch	: Segambut
	Account No.	: 140-640-010-019-174
(f)	Bank Name	: RHB Bank Berhad
	Branch	: Jalan Tun Razak, Kuala Lumpur
	Account No.	: 087-001-032-804-973
(g)	Bank Name	: United Overseas Bank (Malaysia) Berhad
	Branch	: Jalan Pudu, Kuala Lumpur
	Account No.	: 82000-16619
(h)	Bank Name	: CIMB Bank Berhad
	Branch	: Jalan Ipoh, Kuala Lumpur
	Account No.	: 70000-78331
(i)	Bank Name	: Public Bank Berhad
	Branch	: Jalan Ipoh, Kuala Lumpur
	Account No.	: 3082-3136-29

(j) Bank Name : RHB Investment Bank Berhad
Client Code : TA3538
Account No. : 0328-0497-3

(k) Bank Name : HSBC International Trustee Ltd
Account No. : 8212-3153-5800-01
Account No. : 8212-3427-1700-01
Account No. : 020-003-661-001
Account No. : 020-003-661-002

(l) Bank Name : DBS Bank
Branch : No. 202, Guangfu South Road, Da'an District, Taipei City Taiwan Province of China
Account No : 01000-4332201

Related Litigation

[15] As mentioned earlier, there are/were various legal proceedings between the parties. Before his death, the deceased was also a party to some of these actions. But the respondents contend that all suits purportedly filed by the deceased since he suffered stroke, were filed at a time when the deceased was not mentally capable to initiate or commence actions. It was alleged that first appellant was in a position to exert dominance and pressure over the deceased under the guise of taking care of him for his best interest and benefits. The legal proceedings are as follows:

(i) Kuala Lumpur High Court Originating Summons No. WA-24NCVC-137-01-2016 ("OS 137")

The deceased suffered massive stroke on 3 August 2015. On 22 January 2016 the beneficiaries under the 2006 will filed OS 137 pursuant to the Mental Health Act 2001 for a declaration that the deceased is mentally incapable to manage himself and his affairs and that a committee be appointed to manage him and his affairs.

(ii) Kuala Lumpur High Court Suit No. WA-22NCVC-383-11-2015

The deceased and the first appellant commenced suit against the beneficiaries under the 2008 will (shareholders dispute suit) claiming that the share held by the first respondent in Tan Kim Choo Holdings Sdn Bhd ("TKCH") were held on trust for the deceased and the first appellant. An injunction application to restrain the convening of extraordinary general meeting called up by the three beneficiaries was filed by the first appellant. The injunction was granted but was subsequently withdrawn.

(iii) Kuala Lumpur High Court Application for *Habeas Corpus* No. WA-44-135-10-2016

A writ of *habeas corpus* was re-filed by the three beneficiaries under the 2008 will for the release of deceased who was (allegedly) being "detained" by the first appellant. The High Court dismissed the

habeas corpus application. There was an earlier writ of *habeas corpus* filed by the three beneficiaries *via* Kuala Lumpur High Court application for *Habeas Corpus* No. WA 44-111-09-2016. However, on a technical objection raised, it was withdrawn with liberty to file afresh.

(iv) Kuala Lumpur High Court Winding Up Petition No. WA- 28NCC-173-01-2017

The first respondent filed a petition to wind up TKCH. A series of applications thereunder were filed by the first respondent and the first appellant.

(v) Kuala Lumpur High Court Suit No. WA-22NCVC-58-01-2017

The deceased filed a suit against the three beneficiaries (under the 2008 will), first appellant, second appellant and other family companies for orders or directions from the court for the administration and/or for the carrying into effect of the purported family trust.

(vi) Kuala Lumpur High Court Suit No. WA-22NCC-219-06-2017

The deceased filed a suit against the three beneficiaries (under the 2008 will), two family companies and a trust company *inter alia* seeking for a declaration that the transfer of the shares in the two family companies to the trust company is null and void.

(vii) Shah Alam High Court Suit No. BA-22NCVC-80-02-2018

Tan Poh Yee (the fourth defendant in Suit 703) filed a suit against the deceased and the first appellant in Shah Alam High Court *inter alia* to claim back the rights, interest and title of two properties which have previously been transferred and/or assigned to her pursuant to two deeds of assignment dated 28 January 2015. This suit was commenced premised on the unlawful transfer of the titles of the two properties to the first defendant on 12 October 2017 and 15 November 2017 respectively.

(viii) lpoh High Court Suit No. AA-22NCC-3-05-2018

The deceased filed a suit against the three beneficiaries (under the 2008 will), two family companies and a trust company in Ipoh High Court *vide* Suit No. ("the lpoh suit") which was premised on the same facts and pleadings of Suit 219. The deceased also filed an application for injunction similar to the injunction application in Suit 219. The first appellant affirmed an affidavit in support of the said injunction application which exhibits a purported irrevocable Power of Attorney by the deceased and claimed himself as the donee of the purported Power of Attorney.

(ix) Kuala Lumpur High Court Originating Summons No. WA-24NCVC-1650-08-2018 ("OS 1650")

OS 1650 is an application by the first appellant for a declaration that the deed and PA are valid, enforceable and binding. The three beneficiaries are defendants in OS 1650.

Appellants' Submissions

[16] The appellants contended that the learned judge erred in law and in fact when she granted the order in allowing the application to appoint the administrator *pendente lite*. It was argued for the court to appoint an administrator *pendente lite*, there must firstly be an ongoing probate action, and there must be some proper object or necessity for the making of such an appointment. Whilst the appellants did not dispute that there is an ongoing probate action before the High Court, they contended that there is no proper object or necessity to justify the appointment of an administrator *pendente lite*. The following reasons were advanced to support the argument.

[17] On 25 October 2018 the first appellant filed Kuala Lumpur High Court Suit No. WA-22NCVC-703-10-2018 ("Suit 703") for, *inter alia*, a declaration that the deed is valid. On 14 September 2018, the first appellant applied for probate of the impugned will. The probate was contested. As such, the first respondent filed the probate action. In the probate action, the first respondent, *inter alia*, sought a declaration that the impugned will and the deed be declared null and void.

[18] On 3 August 2018, the first respondent filed an application for the appointment of an administrator *pendente lite* pursuant to s. 19 of the PAA. The application was allowed by the High Court on 7 December 2018. On 21 February 2019, the order was stayed by the Court of Appeal on terms.

[19] It was argued that an administrator *pendente lite* can only be appointed in respect of the estate of the deceased in an ongoing probate action. (Ref: s. 19 of the PAA and O. 72 r. 1(2) of the ROC). And, in order to appoint an administrator *pendente lite*, it must be shown that there is some proper object, some necessity, for making the appointment. (See: *Mohideen Batcha v. Fatimah Bee alias Batcha Amma* [1941] 1 LNS 44; [1946] 1 MLJ 10, paras. 55 and 57).

[20] According to the appellant, a probate action is only concerned with the validity or otherwise of a will and not with the validity of the bequests. (See: *Letchumanan Chettiar v. Palaniappa Chettiar* [1977] 1 LNS 60; [1978] 1 MLJ 120 (FC) at p. 125, paras. F-H and p. 126 paras. A-C; and the case of *Ishwardeo Narain Singh v. SM Kamta Devi & Ors* AIR (1954) SC 280).

[21] In this case, the will under contest is the impugned will and the court hearing the probate action will have to determine the validity of the impugned will. There is also dispute over the deed which is currently pending in another High Court.

[22] All of the assets and properties listed in Schedules A and B annexed to the first respondent's application to appoint an administrator *pendente lite* form the subject matter of the deed.

[23] The deed can therefore be said to *adeem* (revoke) that portion of the impugned will which deals with properties, shares and monies which form the gifts in the deed.

[24] In fact, as at the date of the order appointing the administrator *pendente lite*, some of the assets in Schedules A and B had already been transferred and registered in the first appellant's name. The remaining assets and properties in Schedules A and B are therefore held on trust for the first and second appellants and do not form part of the estate of the deceased.

[25] It is the first appellant's submission that the validity of the deed has to be determined first in respect of the properties, assets and monies that are set out in Schedules A and B.

[26] It is argued that the learned judge did not even consider the argument predicated on the deed although it was a principal argument advanced by the first appellant.

[27] It was argued that whilst the learned judge correctly set out the principles as to when an administrator *pendente lite* ought to be appointed, she applied the wrong principles in the instant case.

[28] According to the appellants, a perusal of the grounds of judgment (paras. [17] to [21]) leaves no doubt that the learned judge took into account the "controversies", "tenaciously contested probate action", "the plethora of suits" to conclude that "the court does not have an iota of doubt that this case is indeed a just, proper and necessary case for an appointment of an administrator *pendente lite*".

[29] It was argued that the learned judge departed from the applicable principle that there "must be some proper object, some necessity, for making the appointment", and was rather influenced by "an undeniable need for neutrality and justice". More specifically, it is contended by the appellant that the learned judge did not appreciate that:

(i) the probate action is only concerned with the validity or otherwise of the will in question and not the bequest;

(ii) the probate action is only concerned with the estate of the deceased and not the other properties or assets already gifted or the subject matter of a trust;

(iii) due weight ought to have been given to the deed which was assets by two advocates and solicitors;

(iv) all of the assets, properties and monies listed in the deed are the assets, properties and monies listed in the order;

(v) the order intrudes into the conduct of proceedings which is in the control of another branch of the High Court. (See: *Jasa Keramat Sdn Bhd & Anor v. Monatech (M) Sdn Bhd* [1999] 4 CLJ 533; [1999] 4 MLJ 637 (CA));

(vi) the order impacts properties and assets which had already been transferred during the lifetime of the deceased;

(vii) It was contended that there is no necessity for an administrator *pendente lite* to be appointed as the first appellant has been appointed as the attorney *inter vivos* and later the executor upon the demise of the deceased;

(viii) finally, it is argued that the learned judge failed to appreciate that the administrator *pendente lite* is in a position to apply to be substituted as the personal representative of the deceased to pursue or defend any action brought by or against the deceased. (ss. 2, 19 and 59 of the PAA); and

(ix) Consequently, such a substitution would enable the administrator *pendente lite* to make decisions in respect of the deceased's rights and position in legal suits which involve the respondents, the appellants and the deceased, where the respondents had all along stood on the opposing side to the first appellant and the deceased, which decisions will be irreversible. According to the appellants, the *status quo* could therefore be jeopardised should the administrator *pendente lite* exercise his powers in favour of the respondents.

[30] The appellants drew our attention to the fact that the deceased and the first appellant had also previously objected to an earlier order dated 7 August 2018 obtained *ex parte* in Suit 137 ("the R&M application") appointing LTH as receiver and manager, ("the R&M order"). The R&M order was stayed by the High Court on 20 August 2018.

[31] According to the appellant, the effect of the order therefore is to permit the respondents to take a second bite of the proverbial cherry in using the very same reason as in the R&M application in Suit 137 and appointing the same person as the R&M to manage the estate of the deceased, something which they were unable to do during the lifetime of the deceased (due to the stay order dated 20 August 2018 in Suit 137).

[32] The order appointing the administrator *pendente lite* also directs him to submit an account of his administration of the estate to the court within one month from 7 December 2018 and thereafter at two monthly intervals by way of affidavit, with a copy to be served on the respondent's solicitors only.

[33] It was argued that such affidavit(s) should be served on all parties to the proceedings and not to the respondents only.

[34] The appellants also complained that the order also does not specify or define the qualifications of "servants and/or agents", who could well include any person or persons including the respondents.

[35] It was argued that an appointment of an administrator *pendente lite* and actions taken by such administrator would cause irreparable harm, which damage cannot be compensated by damages or costs, especially when the first respondent did not give any security and/or administration bond.

[36] In particular, it is alleged that the administrator can interfere with properties owned by third parties, which cannot be reversed and such damage definitely cannot be compensated with costs.

Respondents' Argument

[37] The application by first respondent in the High Court was made under s. 19 of the PAA read with O. 72 r. 20 of the ROC for the appointment of LTH as administrator *pendente lite*.

[38] The appointment of an administrator *pendente lite* is made pending the resolution of the probate action in the High Court which concerns the controversy amongst the parties as to which competing will s of the deceased shall prevail. It is a temporary order and gives no final decision on the matter in dispute. What is necessary to be shown is that there is some proper object, some necessity for making the appointment. Counsel referred to the decision of the Court of Appeal in *Jigarlal Kantilal Doshi v. Amanah Raya Bhd & Other Appeals* [2014] 8 CLJ 704; [2014] 6 MLJ 629 at paras. 16 to 17 per the judgment of Abdul Wahab Patail JCA:

> [16] The grant of letters of administration *pendente lite* is, in Malaysia, authorised by s. 19 of the Probate and Administration Act 1959 (Revised 1972) (Act 97) which provides as follows:
>
> > Pending any probate action, letters of administration may be granted to such person as the Court may appoint, limited so that the administrator shall not be empowered to distribute the estate, and shall subject to control by, and direction of, the Court, as the Court deems fit; and subject to that limitation the administrator so appointed shall have all the rights and powers of a general administrator.
>
> [17] In the United Kingdom, letter of administration *pendente lite* are generally granted under s. 117 of the Supreme Court Act 1981 and are issued where there is a dispute as to the validity of a will or of a person's right to administer. Although subject to the immediate control of the court, an administrator *pendente lite* will usually have all the rights, duties and powers of an administrator. It does not differ from the powers granted to an administrator *pendente lite* under s. 19 ...

[39] The respondents' counsel referred to the unreported judgment of Wan Ahmad Farid Wan Salleh JC in the case of *Teresa Terine Pereira & Anor v. Adrian Sasha Paul* [2017] 1 LNS 946 at paras. 5 and 6 of the judgment where it was stated:

> [5] It is effectively, an *administratio pendente lite*, which is granted pending the controversy respecting an alleged will or the right of appointment; see *Walker v. Woollaston* [1731] 2 P wms. 576. By definition, **it is a temporary**

order in nature and gives no final decision on the matters in dispute, let alone other properties that were not referred to in the application, though listed in the will.

[6] In another vintage case of *Mohideen Batcha v. Fatimah Bee Alias Batcha Ammal* [1946] 1 MLJ 10, it was held that for the Court to make an appointment of an administrator *pendente lite* it must be shown that there is some proper object, some necessity, for making the appointment.

(emphasis added)

[40] Counsel said that an application for the appointment of an administrator *pendente lite* should be entertained "as a matter of course" where there is no proper person to receive the assets of the estate. He referred to the following passage in *Kerr and Hunter on Receivers and Administrators* 12th edn, paras. 2 to 13 (pp. 18 to 19) which reads:

Formerly, during litigation in the Ecclesiastical Court as to probate or administration, the Court of Chancery would entertain a bill for the mere preservation of the property of the deceased until the litigation was determined, and would appoint a receiver, although the Ecclesiastical Court might itself, by appointing an administrator, have provided for the collection of the effects *pendente lite*.

It was, indeed, a matter of course, where no probate or administration had been granted, for the Court of Chancery to appoint a receiver, pending bona fide litigation in the Ecclesiastical Court to determine the right to probate or administration, unless a special case was made out for not doing so. *In cases where the representation was in contest, and no person had been appointed executor, or administrator, the court would interfere, not because of the contest but because there was no proper person to receive the assets. But the appointment was refused where the property was of trifling value or where no sufficient ground had been shown to warrant the interference of the court*. (emphasis added)

[41] In the present case, in making the order, the learned judge referred to *Tomkinson v. Hersey* [1983] 34 SASR 181 where it was held *inter alia*:

... it is hardly surprising that the textbooks and the few reported decisions on the question are generally opposed to the notion of appointing as an administrator *pendente lite* someone who is personally and actively involved in the list itself. The desirability of having the estate administered by someone who stands quite outside the litigious battle is obvious. The cases support the acting master's conclusion that as a general rule, a person unconnected with the action is the most suitable person to be appointed as administrator *pendente lite*.

Urgency And Risk

[42] In so far as urgency and risk is concerned, it was argued that the first respondent's application was initially moved *ex parte* given the concerns by the first respondent that if the first appellant has notice of the application, further steps would be taken by the first appellant to dissipate the assets of the deceased. However, the court instead fixed the application *inter partes*.

[43] The previous conduct of the first appellant demonstrates propensity, among others, the first appellant causing the deceased to be removed to Thailand from the jurisdiction of this Honourable Court after the Mental Health Court had ordered the deceased to be present in court to give directions for his assessment. The deceased passed away in Bangkok 14 days later.

[44] It was contended that the removal from jurisdiction of this Honourable Court of a frail, sick elderly man was designed to prevent an assessment as to the deceased's mental health.

[45] According to the respondent, there are objective events which point to the incapacity of the deceased. However, the first appellant was brazen enough to carry out the various acts of (alleged) dissipation and also produced the PA and the deed. Counsel described the sudden emergence of the PA and the deed as "suspicious" given their belated appearance in the proceedings as described in the chronology of events. The first appellant has, despite the passing of the deceased, continued to seek to rely on the PA in proceedings in Singapore to the extent of commencing those proceedings in his own name as attorney.

[46] According to counsel, the events which have sadly unfolded since the deceased's stroke in August 2015 and indeed since his death, pointed to an urgent need to appoint an administrator *pendente lite* and given the conduct of the first appellant and the propensity displayed by such previous conduct, there is clear justification for the first respondent to move the High Court and for the High Court to grant the order appointing the administrator in order to preserve the estate of the deceased.

[47] It was contended for the respondents that in light of all the facts and circumstances that were presented, the learned judge had correctly exercised her discretion to make the order.

[48] Counsel said that the learned judge's decision to grant the order was essentially an exercise of judicial discretion which ought not to be disturbed unless it was demonstrated that the discretion had been exercised on a wrong principle and should have been exercised in a contrary way or that there has been a miscarriage of justice.

[49] Reference was made to the case of *Vasudevan Vazhappulli Raman v. T Damodaran PV Raman & Anor* [1981] CLJ 84; [1981] CLJ (Rep) 101; [1981] 2 MLJ 150 (FC) where the Federal Court held:

> There is a catenation of cases on this point and it will suffice to cull and refer to a few which restate the well-settled principles. An appellate Court can review questions of discretion if it is clearly satisfied that the Judge was wrong but there is a presumption that the Judge has rightly exercised his discretion and the appellate Court must not reverse the Judge's decision on a mere "measuring cast" or on a bare balance as the mere idea

of discretion involves room for choice and for differences of opinion (*Charles Osenton & Co v. Johnston* [1942] AC 130, 148 at p. 148 per Lord Wright). The Privy Council held in *Ratnam v. Cumarasamy & Anor* [1965] 1 MLJ 228 that an appellate Court will not interfere with the discretion exercised by a lower Court unless it is clearly satisfied that the discretion had been exercised on a wrong principle and should have been exercised in a contrary way or that there has been a miscarriage of justice, referring to *Evans v. Bartlam* [1937] AIR AC 473.

The House of Lords, approving the decision of the English Court of Appeal in *Ward v. James* [1966] 1 QB 273 held to the same effect in *Birkett v. James* [1978] AC 297, 317, 326 (at pp. 317, 326). For good measure, we would refer to the felicitous expression of Goulding J, in *Re Reed (a debtor)* [1979] 2 All ER 22, 25 on this point (at p. 25):

> ... the duties of an appellate Court in such a matter as this are, in my judgment, confined to those normally exercisable where the lower Court has a discretion, that is to say, we are not justified in setting aside or varying an order simply because we may think we might have come to a different conclusion ourselves on similar material. We can only interfere if either we can see that the Court below has applied a wrong principle, or has taken into account matters that are in law irrelevant, or excluded matters that it ought to have taken into account, or otherwise that no Court, properly instructing itself in the law, could have come to the conclusion which in fact was arrived at.

Decision Of The Learned Judge

[50] The learned judge granted the first respondent's application for appointment of administrator *pendente lite*. The learned judge's basis for granting the order may be gleaned from the following paragraphs of the grounds of judgment:

> [16] It is very much settled law that this Court is vested with the power to appoint an administrator *Pendente Lite*. However, in exercising such power, it is incumbent for this Court to consider whether the Plaintiff has demonstrated that there is some necessity and some proper and appropriate object in applying for such appointment.
>
> [17] It is immensely obvious in the present case that the Plaintiff together with the 3rd and 4th Defendants and the 1st Defendant are in a deadlock in respect of their father's estate. TKC had executed the 2008 will wherein the named executor was the 2nd Defendant and the beneficiaries named under the 2008 will are the three beneficiaries. Subsequently, the 2016 will had surfaced. This 2016 will had named the 1st Defendant as the sole executor and named the 1st Defendant as a sole beneficiary. The Plaintiff had strongly disputed the 2016 will and had raised various allegations as to the execution of the 2016 will by TKC. These two competing wills undeniably had ignited controversies between the siblings who are parties in this tenaciously contested probate action.

A [18] The controversies and disputes between the parties pertaining TKC and his estate had also culminated the plethora of suits filed by the siblings against each other, wherein some of the suits are still pending determination and halted in view of TKC's death.

[19] Hence, against the backdrop of the factual circumstances surrounding
B all the properties and assets of TKC (inclusive of properties and assets still remaining under TKC's name, as well as numerous properties and assets previously held by TKC which later were transferred to the first defendant and the fifth defendant's names (wherein the execution of transfer is heavily challenged by the three beneficiaries) this Court does not have an iota of doubt that this case is indeed a just, proper and necessary case for
C an appointment of an administrator *pendente lite*.

[20] This Court also finds that that the factual scenario and the circumstances of this case are so compelling for the appointment of an Administrator *Pendente Lite*. There is an undeniable need for neutrality and justice. A need which can only be fulfilled by an independent and
D non-partisan party, which suitably would be the administrator *pendente lite*. Each parties' rights to the estate remains undetermined and vigorously litigated at this juncture and it is only just and proper that a neutral and non-partisan administrator *pendente lite* intervene for the best interest of all parties in preserving the deceased/TKC's estate until each parties' rights to the estate is determined in certainty.

E [21] Against the first and fifth Defendants' opposition against this Application, this Court is minded that some of the assets listed were already transferred to the 1st Defendant. Nonetheless, the propriety of the transfer is still being litigated and has yet to be determined. Similarly against the supposition of trust by the first and fifth Defendants, the same
F trust is also still being heavily litigated and has yet to be determined. At this uncertain juncture, all parties' interest notwithstanding the current possession or holding of the assets, are based on two competing will s of which both will s' validity is heavily litigated and has yet to be determined. None of the transfer or claims has been determined in finality of its propriety. Thus, none of the parties here can claim any portion of the
G estate in absolute certainty until and unless finally determined by the Court. And in the interim before the parties' rights are fully determined, it is of immense pertinence that the deceased's estate justly, and fairly be preserved and/or maintained.

[22] Based on abovementioned reasons, the Plaintiff's application in Enclosure 6 is allowed. The costs of the application shall be cost in the
H cause.

Decision Of This Court

[51] Clearly in the probate action, the first respondent is indisputably challenging the impugned will and the deed and PA as well. The first
I respondent is also seeking consequential reliefs for the restitution of the assets that were (from the first respondent's standpoint) wrongfully transferred to the first appellant pursuant to the deed and the PA.

[52] We do not disagree with the legal proposition that an administrator *pendente lite* has no power or authority over assets which do not form part of the estate of a deceased person for whom the administrator was appointed

[53] However, it is our view that where there is a claim to title or ownership and restitutionary relief is sought, with respect to the assets which are (allegedly) said to form part of the estate, then the scope of the administrator *pendente lite's* jurisdiction will necessarily encompass these disputed assets as well, although they were at one time but which are no longer in the name of the deceased.

[54] In the present case, the first appellant contends that the assets which have been transferred *inter vivos* during the lifetime of the deceased cannot fall within the administrator's jurisdiction as these are (allegedly) not property of the estate.

[55] But on the other hand, the first respondent contends that these assets were wrongfully transferred pursuant to the deed and the PA, both of which are being challenged in the probate action.

[56] The first appellant contended that some of the assets and properties listed in Schedules A and B have already been transferred to him. Therefore, he claims he is the legal owner of these assets and properties. Consequently, as these assets and properties belong to him, an administrator *pendente lite* cannot be given the power to receive and manage the same. If the administrator *pendente lite* is appointed, then he would be deprived of quiet enjoyment of his assets and properties.

[57] As for other asset/properties which are still under the name of the deceased, pursuant to the deed, these assets/properties are being held on trust for the first appellant. And as such, they do not form part of estate of the deceased.

[58] The principle that is applicable when a court is called upon to exercise its discretion to appoint an administrator *pendente lite* is whether it has been shown that there is some proper object, some necessity, for making the appointment. (See: *Mohideen Batcha v. Fatimah Bee Alias Batcha Ammal* [1941] 1 LNS 44; [1946] 1 MLJ 10 (HC). That burden naturally falls on the first respondent as the protagonist of the application (encl. 6).

[59] There is undoubtedly a spate of litigation and extreme animosity between the parties all arising out of and/or in connection with the impugned will, the deed or the PA. Obviously, it will be quite some time before the dust of litigation settles.

[60] In the meanwhile, it is clear that there is a need to preserve the assets of the estate (including those assets which are disputed as to their title and/or ownership or rights attached thereto) and such preservation will pre-eminently be achieved by the appointment of an administrator *pendente lite*.

[61] The administrator *pendente lite* is undoubtedly an officer of the court and is answerable for any omission or misconduct or wrongdoing, but that is a different matter altogether. The administrator is in fact subject to control of the court. If there is basis for contending that the appointee is unsuitable, the relevant party who has an issue is entitled to make the appropriate application and remove the appointee and have him/her replaced with another appointee.

[62] In the present case, the learned judge was acutely mindful of the first appellant's stance, that some of the assets covered by the order dated 7 December 2018 have already been transferred to him or are purportedly being held in trust for him. The learned judge held (correctly) that the propriety of the transfers and/or the rights and entitlements of the parties are still being litigated and remain to be determined.

[63] Essentially, the learned judge was impelled to the view, without making a determination one way or the other as to who was telling the truth, that in light of the spate of litigation that was extant and given the deep animosity and venomous and vitriolic relationship that exists between the parties, the assets of the estate of the deceased (disputed and undisputed) had to be preserved and managed.

[64] Since the affairs of the estate such as payment of taxes, collection of rentals, renewal or termination of tenancies etc, have to be handled, it was (is) urgent, imperative and wholly necessary to appoint a third party neutral person to handle the assets and affair of the estate of the deceased until such time that a determination is made one way or the other in the probate action with regard to the validity of the impugned will, the deed and the PA.

[65] On that analysis, we did not see any flaw or misdirection in the approach that was taken by the learned judge. We found no appealable error in the grounds of judgment of the learned judge and we were not satisfied that the learned judge was in any sense "plainly wrong" in the exercise of her discretion to make the order for the appointment of the administrator *pendente lite*.

[66] For the above reasons, we unanimously made the following orders:

(i) the appeal was dismissed and the decision of the learned judge dated 7 December 2018 was affirmed;

(ii) the stay granted by the Court of Appeal on 21 February 2019 had lapsed;

(iii) the appointment of Messrs Chooi & Company + Cheang & Ariff ("CCA") as stakeholder had lapsed forthwith;

(iv) all monies collected by CCA (including interest) is to be paid to the administrator *pendente lite* within 14 days of service of the sealed order of this court;

(v) the appellants are to pay costs of RM25,000 for each set of respondents (two sets, namely first respondent and the second/third respondents) subject to payment of allocator.

Order accordingly.