
JEREMY SWEE TECK HEANNE & ANOR

v.

LOW HAN NEO & ORS

High Court Malaya, Kuala Lumpur
SM Komathy Suppiah JC
[Civil Suit No: S21-223-2010]
22 April 2014

Case(s) referred to:

Juahir Sadikon v. Perbadanan Kemajuan Ekonomi Negeri Johor [1996] 1 MLRA 448; [1996] 3 MLJ 627; [1996] 4 CLJ 1; [1996] 3 AMR 2984 (refd)

Legislation referred to:

Evidence Act 1950, ss 101, 102, 103, 114(g)

Counsel:

*For the plaintiff: Nair (K Subashini with her); M/s S N Nair & Partners
For the 1st and 2nd defendant: Ringo Low; M/s Ringo Low & Associates
For the 3rd defendant: Afifi Ahmad; M/s Azrul Afifi & Azuan*

[Dismissed the plaintiffs claim against the defendants with costs.]

JUDGMENT

SM Komathy Suppiah JC:

Introduction

[1] This claim arises out of an allegation that the second defendant, Collin Swee Lay Keong, had forged the signature and thumbprint of his elder brother Dr James Swee Lee Kong ("the deceased") in an Employment Provident Fund ("EPF") nomination form and letter of authorisation which were submitted to EPF on 19 May 2010. Pursuant to the nomination form, the deceased's mother ("the first defendant") became the sole beneficiary of the monies standing to the credit of the deceased in account no. 71185896.

[2] The first and second plaintiffs, Jonathan and James are the sons and only children of the deceased. Datin Tam Siu Yan ("Datin Tam"), is their mother and wife of the deceased. At the material time, the deceased and Datin Tam were having matrimonial problems.

The Salient Facts

[3] The plaintiffs were named as the sole beneficiaries of the estate of the deceased in a Will and Testament dated 25 September 2009. In his Will, the deceased, *inter alia*, bequeathed all monies in his EPF account to his sons in equal shares, and appointed Collin as the sole executor and trustee of his Will.



[4] On 13 March 2010, the deceased was admitted to Sime Darby Medical Centre and was diagnosed with acute myeloid leukaemia, a form of cancer. He did not respond well to the treatment given at the said hospital.

[5] On 15 April 2010, the deceased was taken to and admitted to Gleneagles Hospital in Singapore for further treatment. On 27 April, he developed respiratory distress and was transferred to the Intensive Care Unit. He was intubated and put on ventilator support, and sedated. About 2 weeks later, to be specific on 14 May 2010, just as he was about to be extubated, he developed intracerebral haemorrhage and slipped into a coma.

[6] On 19 May 2010, Collin submitted to EPF a nomination form and letter of authorisation dated 28 April 2010 (hereinafter referred to as "the disputed documents"), both purportedly signed by the deceased. The nomination form carried a thumbprint which purported to belong to the deceased. Pursuant to the nomination form, the first defendant was appointed as the sole beneficiary of the EPF monies in the account of the deceased. The nomination form was received and processed by EPF, and the first defendant was accordingly, registered as the appointed nominee to the monies.

[7] The deceased passed away on 29 May 2010 at Gleneagles Hospital without regaining consciousness.

[8] On 18 June 2010, Datin Tam lodged a police report alleging that the deceased was heavily sedated at the material time, and thus it was improbable that he could have signed the disputed documents. She alleged that the signature of the deceased on the nomination form and letter of authorisation had been forged. Her report stated:

"Tam Siu Yan with I.C. (651031-93-5028), address: No. 3, Jln Perintis Satu, U1/9A, Glenmarie Court 40150 Shah Alam, am the lawful wife of the late Dato Dr James SWEE Lee Kong who passed away on the 29th of May 2010, as a result of Acute Myeloid Leukaemia. Upon my husband's death it has come to my attention that all of my husband's estate, both movable and immovable have been bequeathed to my children namely, Jonathan SWEE Teck Jeanne; age 17, and Jeremy SWEE Teck Heanne; aged 11.

Today the 18th of June 2010, I went to the EPF Office at Jln Gasing to enquire about my late husband's EPF savings, and while going through the documents shown to me by the officer in charge of my husband's file in EPF, I have discovered that the beneficiary to my late husband's EPF has been unlawfully and illegally and fraudulently changed on the 19th of May 2010. My late husband was admitted to the Gleneagles Hospital Singapore on the 14th of April 2010 and he was kept heavily sedated as a result of the pain he was experiencing and also because he was breathless. My late husband was in the ICU for most of the period in hospital prior to his death.



Now I've discovered from EPF that my late husband supposedly nominated a beneficiary to his account on the 19th of May 2010 which would have been impossible as he was already in coma by then.

Furthermore having been my late husband's wife for the last 18 years, I am confident and certain that the signature on the EPF document is a forgery.

I now make this report as a criminal breach of trust has been perpetuated against the estate of my late husband and the action with regard to his EPF savings also amount to theft. The witness of the EPF document is one Mr Collin SWEE Lay Keong.

[9] Both the plaintiffs and the defendants sent the signatures on the disputed documents to their respective forensic document examiners for analysis. The two examiners arrived at conflicting views. Lim Yok Shaw, the examiner engaged by the plaintiffs concluded that the signatures did not belong to the deceased, whilst William Pang who was engaged by the Madam Low and Collin, concluded otherwise.

[10] On 30 August 2010, the plaintiffs commenced this action against the first defendant, Collin and EPF for a declaration that the nomination form was null and void and for it be set aside, and the monies to be paid to the estate. In addition, they sought damages for the losses suffered arising from the fraud and/or forgery and/or falsification in the submission of forged documents to EPF.

[11] Madam Low made a statutory declaration on 6 November 2013 stating that she was not interested in the monies and would hold it for the benefit of Jonathan and Jeremy.

Issues

[12] The issues to be tried between the plaintiffs and the first and second defendants is firstly, whether the deceased indeed signed and/or was capable of signing or affirming the documents on 28 April 2010; and, secondly, if the answer to the first issue is in the affirmative, whether the plaintiffs have proven that they suffered loss and damages as a result of the purported fraud.

[13] The issues between the plaintiffs and EPF is whether the latter was negligent in accepting the registering the nomination form without first ascertaining whether the signature and thumb print was in fact that of the deceased. If the answer is in the affirmative, whether the plaintiffs have proven that they suffered loss and damages as a result of the negligence of EPF.

Case Of Respective Parties

[14] It is the plaintiffs case that the deceased was in the Intensive Care Unit of Gleneagles Hospital in Singapore on 27 April 2010 and fell into a state of



comatose from 14 May 2010 until his passing on 29 May 2010 and therefore he was physically and mentally incapable of signing and/or affirming the documents.

[15] The first and second defendants, on the other hand, contend that the documents were prepared on the instructions of the deceased to Collin when he was first admitted to Gleneagles Hospital in Singapore sometime in April 2010 and that he had wished for the EPF monies to be given to his mother, the first defendant. Pursuant to those instructions, Collin proceeded to prepare the documents by enlisting the help of his wife and niece. The documents were subsequently prepared and/or filled up in advance in Malaysia before they were passed on to the deceased to be signed and affirmed on 28 April 2010 in Singapore.

Witnesses

[16] The plaintiff called 2 witnesses and the defendants called 4 witnesses in support of their respective cases. Datin Tam and Jonathan testified in support of the plaintiffs case, whilst Collin testified for himself and Madam Low, who was unable to testify on account of her ill health. EPF called one Suri binti Rosmani.

[17] The plaintiffs in their evidence disputed that the deceased was in a condition to have signed and affixed his thumb print on the disputed documents. They testified that he was on a ventilator and was heavily sedated during the material time, and further, he had no reason to change the terms of the Will appointing them as the sole beneficiaries to these monies.

[18] On the other hand, Collin asserted that sometime in April 2009, the deceased had expressed to him his desire to nominate their mother as the beneficiary of his EPF monies, as he was concerned about her health problems and medical fees and instructed him to do the needful. Collin added that as he was not familiar with these matters, he had sought his wife's assistance to prepare the letter of authorisation and his niece, a lawyer, to obtain the nomination form for him from EPF.

[19] According to him, on 28 April 2009, he made a trip to Singapore to visit the deceased and brought together with him the disputed documents. His brother was conscious and had complained to him about the tubes inserted into him, and had asked for the tubes be removed and for him to be taken out of ICU. Collin maintained that his brother was conscious and had affixed his thumb print and signatures on the disputed documents.

[20] The EPF officer testified that upon receiving the disputed documents, they had scanned the thumbprint on the nomination form and upon verifying it belonged to the deceased, they had proceeded to register Madam Low as the appointed nominee. It was done in accordance with office procedure.

Whether Signatures And Thumb Print On Disputed Documents Was That Of The Deceased



[21] The parties to this action have starkly different interpretations of the medical condition of the deceased on 28 April 2010.

[22] The plaintiffs case is premised on the fact that it was improbable that the deceased could have signed or affixed his thumbprint on the disputed documents in view of his impaired level of consciousness as a result of being heavily sedated, intubated and put on ventilator support. Neither Jonathan nor Datin Tam had any personal knowledge of the deceased's condition on 28 April 2010 as they had not visited him at the hospital on the said date. The plaintiffs case is essentially based on 2 medical reports dated 4 October 2010 and 15 October 2010 from Gleneagles Hospital.

[23] The defendants accepted the contents of the two reports. But, Collin disputed that the plaintiffs evidence that the deceased was heavily sedated and lacked consciousness to sign and thumbprint the disputed documents.

[24] I turn now to the medical reports that the plaintiffs rely on to establish the medical condition of the deceased. The report dated 4 October 2010 stated,

"His overall condition became worse and he developed respiratory distress. He required intubation and ventilator support from 27th April 2010."

[25] The second medical report was as follows:

"He was transferred to the Intensive Care Unit on 27th April 2010 when he developed severe pneumonia. He required intubations and mechanical ventilation at that point in time. He had to be sedated also."

[26] It is imperative to note that the reports do not state that the deceased was heavily sedated and there is no mention of his level of consciousness on 28 April 2009. It was in evidence that the deceased was under the care and management of Dr Teo Cheng Peng ("Dr Teo") in Gleneagles Hospital at all material times. Dr Teo was not called as a witness, although he was listed as a witness in the plaintiffs list of witnesses. The plaintiffs took the position that the medical reports were sufficient to establish their case and proffered no explanation for their omission to call Dr Teo. Clearly, Dr Teo was a witness with knowledge of the material facts in this case, and could have testified on the level of consciousness of the deceased on 28 April 2009.

[27] The defendants argued that the failure to call Dr Teo, called for the invocation of an adverse inference against the plaintiff under s 114(g) of the Evidence Act 1950. On the other hand, the plaintiffs argued that the obligation was on the defendants to call him as it was their case that the deceased was conscious and was able to sign and thumbprint the disputed documents.

[28] Section 103 of the Evidence Act 1950 states the burden of proving a fact is on the party that wishes the court to believe its existence. In the present case, it



is the plaintiffs who assert that the deceased was heavily sedated and thus it was improbable that he could have signed the disputed documents. The burden is thus on the plaintiffs to establish this fact. The duty of a litigant is to lead the best evidence in his possession which could throw light on the issue of controversy in the case. In this context, the best evidence to establish the consciousness level of the deceased on 28 April 2009, would be the evidence of Dr Teo as his attending doctor. It is common knowledge that the consciousness level of all patients in the ICU are recorded at regular intervals by hospital staff.

[29] The Court of Appeal in *Juahir Sadikon v. Perbadanan Kemajuan Ekonomi Negeri Johor* [1996] 1 MLRA 448; [1996] 3 MLJ 627; [1996] 4 CLJ 1; [1996] 3 AMR 2984 had occasion to consider ss 101, 102 and 103 of the Evidence Act 1950 which deal with the issue of which party bears the burden of proof. In that case, the plaintiff/appellant claimed that the defendant/ respondent through one Tan Sri Dato' Haji Basir Basir had made an offer to sell the land to the appellant at the price of RM7,000-RM8,000. He applied for specific performance of the agreement. This was denied by the defence. Tan Sri Basir was not called as a witness to prove that an offer was made. In drawing an adverse inference against the plaintiff for not calling him as a witness, Siti Norma Yaakub JCA said (at 635):

"He who alleges must prove such allegation and the onus is on the appellant to do so. See s 103 of the Act. Thus, it is incumbent upon the appellant to produce Tan Sri Basir as his witness to prove the allegation. The fact that the appellant was unable to secure the attendance of Tan Sri Basir as a witness does not shift the burden to the respondent to produce the witness and testify as to what he had uttered, as firstly, the respondent never raised such an allegation and, secondly, has denied even making one. For this very reason, the adverse inference under s 114(g) of the Act relied upon by the appellant cannot be accepted as establishing that if the witness had been produced, his evidence would work against the respondent. There is no obligation in law for the respondent to produce the witness as that obligation rests with the appellant, the party who alleges, and the fact that the appellant was unable to do so is fatal to his case. For this very reason too, the adverse inference under s 114(g) is invoked against the appellant."

In the same case, Mokhtar Sidin JCA added (at 638 and 639);

"The other issue before us was whether there was such an offer. It is clear that it was the appellant who asserted that Tan Sri Basir made the offer. Thus, the onus is on the appellant to satisfy the court that such an offer was ever made. This is clearly provided for by ss 101 and 103 of the Evidence Act 1950 ('the Act'). The sections read as follows:

.....

It is clear from the above provisions on whom the onus lies. In the



present case, it is the appellant who had asserted the existence of a particular fact, viz that there was an offer to sell the said land at the price between RM7,000-RM8,000. The onus is on the appellant to satisfy the court that there was such an offer.

The law in respect on whom the onus of burden of proof is in s 102 of the Act which states:

102. On whom burden of proof lies

The burden of proof in a suit or proceeding lies on that person which would fail if no evidence at all were given on either side.

Thus, when the appellant failed to produce Tan Sri Basir to give evidence in support, the appellant has failed to discharge the burden on him to satisfy the court that there was already an agreement to sell the said land at the price of RM7,000-RM8,000.

[30] The above decision illustrates that it was the plaintiffs who bore the burden of calling Dr Teo. The failure to call him, despite his name been on the witness list, justifies the drawing of an adverse inference, that if called, Dr Teo would have supported Collin's version of the facts. In my judgment, the failure to call him, was a serious gap in the plaintiffs case which seriously undermined the plaintiffs case. By not calling Dr Teo, the plaintiffs have failed to discharge the burden on them to show that the deceased did not possess the level of consciousness that was needed to sign and thumbprint the disputed documents. It also deprived this court of the best evidence to decide the true facts.

Claim Against EPF

[31] The claim against EPF is premised on the fact that the signatures and thumbprint in the disputed documents have been forged. In light of my conclusion, that the plaintiffs have failed to prove that the signatures and thumbprint on the disputed documents is false and or a forgery, the claim against EPF must fall.

Other Points

[32] There is one other point I need to address. It has arisen as a result of Collin's testimony that his wife had prepared the letter of authorisation. The plaintiffs argued that s 114(g) Evidence Act 1950 must be invoked against Collin for not calling his wife to testify on this aspect of the case. I find no merit in this submission. The crucial issue in this case was whether the signature and thumbprint on the nomination form belonged to the deceased ie, was the deceased rendered unconscious by the sedation administered to him. Collin's wife is not a material witness as there is no evidence she was present when the nomination form was signed and thumb printed by the deceased.



Conclusion

[33] The plaintiffs have failed, to prove, on a balance of probabilities, that the signatures and thumbprint on the disputed documents did not belong to the deceased. Accordingly, the plaintiffs claim against the defendants is dismissed with costs of RM10,000.00 to first defendant, and RM15,000.00 to second and third defendants.

