

Re Will and Codicil of Tan Tye, deceased (No 2)
[2004] SGHC 103

Case Number : OS 1210/1992
Decision Date : 21 May 2004
Tribunal/Court : High Court
Coram : Kan Ting Chiu J
Counsel Name(s) : Morris John (Drew and Napier LLC) for applicants; T P B Menon (Wee Swee Teow and Co); Joseph Hoo Chun Hee (Tang and Tan); Peter Madhavan (Madhavan Partnership); Kenneth Michael Tan Wee Kheng SC (Kenneth Tan Partnership) and Joan Lim Pheck Hoon (Chan Kam Foo and Associates) for claimants
Parties : —

Res Judicata – Whether earlier judgment appearing to rule on similar issue precluded further determination of present issue

Succession and Wills – Construction – True meaning of "male issue (not including adopted male) as shall then be living" – Whether certain classes of people and claimants to corpus of deceased's estate entitled to share in distribution of corpus

21 May 2004

Judgment reserved.

Kan Ting Chiu J:

1 Tan Tye, a trader and timber merchant, died on 22 July 1898. He left a will dated 13 May 1896 which was probably prepared by a solicitor as it was executed in the presence of a solicitor and a solicitor's clerk. In the will, he set up a trust whereby members of his family would benefit from the income from his estate, and he directed that the distribution of the *corpus* of his estate be deferred till 21 years from the death of the survivor of his children, grandchildren and nephews living at the time of his death.

2 On 30 June 1994, on the application of the applicants who are the trustees of the will, Warren L H Khoo J ruled that the trusts created in the will expired on 11 January 2003, and that the *corpus* of the estate was distributable on that day.

3 Khoo J deferred deciding on the second part of the application to determine the true meaning of the words "male issue (not including adopted male) as shall then be living" when Tan Tye directed his trustees:

to apply my property and the income thereof upon the trusts aforesaid, until the expiration of the period of twenty one years from the decease of the survivor of such of my children and grandchildren, and my abovenamed nephews, as shall be living at my decease. At the expiration of which period, subject to the trusts aforesaid I direct my trustees or trustee to divide the whole of any property, among all such of my male issue (not including adopted male) as shall then be living, in equal shares, per capita.

4 The trustees applied for a determination on whether the following classes of people:

(a) grandsons and remoter male issue in the exclusively male line for the time being living of the testator;

- (b) male issue of adopted sons of the testator;
- (c) adopted sons of the natural male issue of the testator;
- (d) grandsons and/or remoter male issue of the testator claiming through daughters or remoter female issue of the testator; and
- (e) persons *en ventre sa mere* on the distribution date;

are entitled to share in the *corpus* of Tan Tye's estate, and the application came before me after Khoo J had ruled on the date of distribution.

5 Tan Tye had five sons. Three of them, Tan Lian Swee, Tan Cha Boh and Tan Lian Chye were natural sons. The other two, Tan Seng Chong and Tan Lian Kwee were adopted sons.

6 The claimants to the *corpus* fall into four classes:

- (a) male persons in the exclusively male line,
- (b) male persons of the exclusively male line tracing from Tan Kiok Poh, an adopted son of Tan Lian Swee,
- (c) male persons claiming through the daughters of Tan Lian Chye, and
- (d) the estate of the said Tan Lian Chye, who died before the date of distribution.

7 It is useful to start by ascertaining the meaning of the term "male issue". Counsel did not produce authorities on the meaning of the term existing when Tan Tye made his will in 1896.

8 Assistance was available from other cases. In *Lywood v Kimber* (1860) 29 Beav 38; 54 ER 539, Sir John Romilly MR held that "issue male" means issue male claiming through males. "Male issue" was considered in a Singapore decision, *Re Alkaff's Settlements* [1928] SSLR 188, where Sproule ACJ held that it refers to the male descendants of males. The same term was considered by the High Court of Australia in *Allen v Crane* (1953) 89 CLR 152 where Dixon CJ found at 161 that:

[I]n common with analogous expressions like "male descendants", "issue male", "heirs male", and "male heirs", the words "male issue" are to be understood, unless the contrary appears from the context or circumstances, as referring to descendants in the male line.

In England, Pennycuick J held in *In re du Cros' Settlement Trusts* [1961] 1 WLR 1252 at 1256 that:

[T]he expression "issue male" has a recognised meaning as a term of art, and means male descendants through the exclusively male line. I do not think that it would be legitimate to make any distinction for this purpose between the expression "issue male" and the expression contained in this settlement "male issue".

9 There is nothing in the last three cases to suggest that the state of the law described in them had changed between 1896 and the date of the decisions. Equally significantly, no cases decided either before or after 1896, or authorities which gave "male issue" and "issue male" different meanings, were cited. I accept that male issue are the male descendants of males.

10 None of the claimants disputed that Tan Tye's male descendants in the exclusively male line are his male issue, and are entitled to share in the *corpus* if they are living on the date of distribution.

11 I shall now refer to the claims from parties outside of the definition.

12 The first class are parties claiming through the daughters of Tan Lian Chye. Ms Joan Lim Pheck Hoon who acts for them submitted that:

[T]he testator, by not using the words "issue male" which was (by 1896) a term of art to describe the male descendants to benefit from the corpus of his estate, had meant all his issue who are male, irrespective of whether they trace their relation to the testator through the male or female line. In 1896 there were no clear legal authorities that 'male issue' had by then become a term of art;

and:

[I]f the court is inclined to hold that the words 'male issue' is a term of art, then in the context of the will of Tan Tye, the words 'male issue' would yield to the meaning of male descendants through both the male line and the female line. The testator chose not to use the legal term of art 'issue male', which words would clearly mean male descendants of the exclusively male line and excluded adopted male children. Instead he took the effort to avoid legalistic English terms which are difficult to interpret to Chinese and set out what he really meant by using the words "male issue (not including adopted male)", which is all his male descendants related to him by blood, whether by their father or their mother.

13 The arguments supposed that the person who prepared the will intended the term "male issue" to bear a meaning different from "issue male" as defined in *Lywood v Kimber*, but that person did not define the term, or distinguish it from "issue male". The arguments also supposed that Tan Tye, a Chinese patriarch of the 19th century who differentiated between his male and female descendants, and his natural and adopted descendants, would ignore the male descendants' positions in his family tree, whether they carry his surname or not. I do not accept these arguments and I find that the term "male issue" in the will bears the same meaning as "issue male", which is the male descendants in the male line.

14 The next claim is from the estate of Tan Lian Chye who died on 22 September 1971, after Tan Tye's death but before the date of distribution. Ms Lim submitted that:

The class of male issue begins from the date of death of the testator and closes on 11 January 2003. Tan Lian Chye is a male issue (not including adopted male) of the testator. He takes an immediate vested interest upon the death of the testator. His vested share cannot be divested and passes to his personal representatives.

15 Ms Lim cited *In re Philips' Will* (1869) LR 7 Eq 151 as authority. In that case the testator provided that on his death his widow should have the use of the interest of £1,400, and upon her death the money was to be divided between "my children than [*sic*] living, or there [*sic*] heirs". The testator had seven children. Two had died before the will, one leaving a son and the other without issue.

16 The question to be determined there was whether the heirs of the deceased were included and, if so, whether the heirs of all the children were let in to the *corpus* when the widow died. Lord Romilly MR held at 153:

[T]he word "or" is to be taken conjunctively, and that, therefore, the gift includes the *heirs of deceased children*. That being so, I think it includes the heirs of all deceased children, and that it is impossible to make a distinction with reference to those who died in the lifetime of the testator. I think he intended all to take, or he would have made some distinction. [emphasis added]

17 Ms Lim submitted:

[T]he words "then living" are words of limitation. The class must necessarily include those who are living as at the date of distribution, but does not include those who are not born as at the date of distribution. The words do not import a meaning that the beneficiary must survive the perpetuity period.

18 *In re Philp's Will* does not support the submission. The judge did not deal with the words "then living". He found that there were two classes of beneficiaries, the children and their heirs, and that not all the heirs would benefit but only those of deceased children, whether the children died before or after the testator. His ruling did not touch on the term "then living" which referred to the time of the death of the testator's widow, and not the testator's death. After the two classes of beneficiaries were determined, I think the limiting words "then living" would be applied so that only those children and heirs of the deceased children living at the time of the death of the widow shared in the estate.

19 Tan Tye's gift was to his "male issue (not including adopted male) as shall then be living". There is only one class, the male issue then living on the date of distribution. Any issue who was not then living does not get any share of the *corpus*, and nothing vested in Tan Lian Chye's estate.

20 The third class of claimants are male persons of the exclusively male line tracing from Tan Kiok Poh, the adopted son of Tan Lian Swee (a natural son of Tan Tye). Mr Kenneth Tan SC, who acts for these claimants, argued that Tan Tye had intended that his adopted male issue receive shares in the distribution of the *corpus* of his estate. He submitted that a critical distinction be made between the male issue, natural or adopted, of Tan Tye's natural sons, and the male issue, natural or adopted, of Tan Tye's adopted sons.

21 The basis of the argument is that the term "male issue" as understood in 1896, before the enactment of adoption legislation in Singapore, would have excluded male issue who are adopted, and therefore the words "not including adopted male" after the term "male issue" were superfluous if Tan Tye wanted to exclude all male issue who are adopted.

22 The argument continues, that:

Tan Tye, in the critical sentence says "among all *such* of my male issue as shall then be living". The word "such" is recognized as a device for securing economy of words. Shortly before the critical sentence to be construed, Tan Tye had for the purposes of distributing shares in the income from his estate, listed the names of his five sons – two adopted sons and three natural sons. Tan Tye used the word "such" to obviate the need of repeating the names of his five sons whom he had listed shortly before. By using "such", the Testator was referring to the male issue of his five sons, ie his two adopted and three natural sons." [emphasis in original]

23 He then moved to the interaction between those words and the limiting words "not including adopted male". He argued that those words excluded the male issue of the two adopted sons, so that

“the full phrase is a reference to the male issue of Tan Tye’s sons whether adopted or natural, except for the male issue of his adopted sons whether adopted or natural” and that “the parenthesis read in context, selectively excludes only the male issue of Tan Tye’s two adopted sons”.

24 Tan Tye wanted to exclude adopted males from the male issue who would inherit the *corpus* of his estate. The will was specific in stating “not including adopted male”. It did not limit the classes of adopted males to be excluded, and it clearly did not point only to the male issue of the adopted sons. The words used excluded all adopted males. Anyone who is adopted as well as his issue, natural or adopted, are excluded. There is no reason to restrict the exclusion in the way counsel submitted.

25 Having examined the positions taken by the trustees and the claimants, I rule on the question raised in [4] herein that the male issue of Tan Tye in the exclusively male line living on the date of distribution in class (a) are entitled to share in the *corpus* (but not his grandsons as they would be dead for at least 21 years on the date of distribution), but not the persons in classes (b), (c) and (d), nor the estate of Tan Lian Chye, nor the male descendants of Tan Kiok Poh.

26 With regard to class (e), persons *en ventre sa mere* on the distribution date, the trustees have ascertained that there are no such persons, and no claims have been made by anyone on this basis. The question can be treated as being withdrawn by the applicants, or to have lapsed in so far as it assumed that there are such persons when in fact there are no such persons.

27 Nevertheless, as it was raised, I shall respond to it by referring to the decision of the House of Lords in *Elliot v Lord Joicey* [1935] AC 209 where Lord Russell of Killowen set out at 233–234 the following rules which are to be applied, subject to the special context of the document to be construed:

First, words referring to children or issue “born” before, or “living” at, or (as I think we must add) “surviving,” a particular point of time or event, will not in their ordinary or natural meaning include a child *en ventre sa mère* at the relevant date.

Secondly, the ordinary or natural meaning of the words may be departed from, and a fictional construction applied to them so as to include therein a child *en ventre sa mère* at the relevant date and subsequently born alive if, but only if, that fictional construction will secure to the child a benefit to which it would have been entitled if it had been actually born at the relevant date.

Thirdly, the only reason and the only justification for applying such a fictional construction is that where a person makes a gift to a class of children or issue described as “born” before or “living” at or “surviving” a particular point of time or event, a child *en ventre sa mère* must necessarily be within the reason and motive of the gift.

Fourthly, that being the only reason and the only justification for applying the fictional construction, it follows that, if the person who uses the words under consideration confers no gift on the children or issue described as above mentioned, but confers the gift on some one else, it is impossible (except in the light of subsequent events) to affirm either that the fictional construction will secure to the child *en ventre sa mère* a benefit to which if born it would be entitled, or that the child *en ventre sa mère* must necessarily be within the reason and motive of the gift made. In these circumstances the words used must bear their ordinary or natural meaning.

28 According to the second and third rules, any person coming within class (e) is entitled to a share of the distribution of the *corpus*.

29 There is another matter I should refer to. There is a judgment dated 7 April 1926 by Sir James William Murison CJ in *Tan Lian Boh v Yap Lian Neo* (Suit No 147 of 1925) on several issues arising from Tan Tye's will, *inter alia*, that:

[T]he words "All such of my male issue" in the ultimate gifts of the corpus of the residue of the estate of the said Tan Tye deceased contained in his said Will means male issue claiming through males in the male line of descent only.

30 At first sight the judgment may prevent further determination of this issue on the ground of issue estoppel or *res judicata*. When further thought is given to the matter, the judgment does not have that effect.

31 One of the issues before Murison CJ was the effect of the death of an income beneficiary, Tan Kye Teng, who died before Tan Tye. When Murison CJ decided on the issue, there was an earlier judgment on the same question in Suit No 456 of 1909, and the two judgments were in conflict.

32 In 1935, the trustees took the matter to court again in Originating Summons No 174 of 1935, reported as *In the Matter of the Trusts of the Will of Tan Tye deceased* [1936] MLJ 141; [1936] MLJ Rep 113 for a determination on which of the two judgments was binding on them.

33 The matter came before Adrian Clark J who ruled at [56] and [57] that "if a question has been decided as between the trustees and beneficiaries *that issue* no longer exists between them", and "once it is established before me that *the issue* between the parties was then non-existent, the judgment of 1926 on that issue must, in my opinion, be treated as being null and non-existent" [emphasis added].

34 Two points are to be noted. First, Clark J was referring to an issue that was adjudicated on the 1909 and 1925 actions, not the entire actions. He found that the effect of Tan Kye Teng's death on the distribution of the income from the estate was dealt with in the 1909 and 1925 actions. There was no reference to the duplication of the "male issue" question in the actions. There was nothing to suggest that it was dealt with in the 1909 action.

35 Secondly, the 1909 and 1925 actions dealt with the income of the trust. That must have been raised between the trustees and parties who were, or claimed to be, the income beneficiaries. The issue before me now relates to the distribution of the *corpus*, and the claimants are the *corpus* beneficiaries or those who claim to be *corpus* beneficiaries. They are not bound by decisions relating to the income which is separate and distinct from their interests or claimed interests in the *corpus*.

36 For these reasons the issue can be raised and considered without restriction from the 1926 judgment.

37 Having so decided, I will hear counsel on costs.

[1]See Appendix A.

Appendix A

Counsel and Claimants

Male persons in the exclusively male line:

| <u>Claimant</u> | <u>Counsel</u> |
|----------------------------------------------------------------|----------------|
| 1. Tan Thye } Huk | |
| 2. Tan Tye Choon, } Georgie | |
| 3. Tan Ann Sim } TPB Menon (Wee Swee Teow & Co) | |
| 4. Tan Tai Jin, Peter } | |
| 5. Tan Eng Wah } | |
| 6. Tan Yeng Chan } | |
| 7. Tan Yeng Chye, } Jimmy | |
| 8. Tan Yeng Kee } Joseph Hoo (Tang & Tan) | |
| 9. Tan Yeng Chuan, } Joe | |
| 10. Tan Ching Kiat, } Alex | |
| 11. Tan Ching Tiong, } Eric | |
| 12. Tan Tian Wah } | |
| 13. Tan Lip Jin, } Winfred | |
| 14. Tan Siew Jin } Peter Madhavan (Madhavan Partnership) | |
| 15. Tan Jun Dai, } Melvin | |

16. Tan Jun Wei, }
Kelvin

-

Male persons of the exclusively male line tracing from Tan Kiok Poh, an adopted son of Tan Lian Swee:

| <u>Claimant</u> | <u>Counsel</u> |
|------------------------------------------------------------------------|----------------|
| 17. Tan Siong Hin } | |
| 18. Tan Siong Guan } | |
| 19. Tam Siong Kiat } | |
| 20. Tan Siong Huat, } Alvin | |
| 21. Tan Ee Beng, Andy } Kenneth Tan SC (Kenneth Tan Partnership) | |
| 22. Nicholas Matthias } Tan | |
| 23. Tan Thian Beng, } Bryan | |
| 24. Tan Choon Hee, } Alston | |
| 25. Tan Choon Meng, } Aaron | |

Male persons claiming through the daughters of Tan Lian Chye:

| <u>Claimant</u> | <u>Counsel</u> |
|---------------------|----------------|
| 26. Tan Hock Kee } | |
| 27. Tan Hock Seng } | |
| 28. Tan Hock Chye } | |

29. Tan Hock Hoe }
30. Tan Junlie, Shannon }
31. Michael Low Kai } Joan Lim Pheck Hoon
Siong
32. Low Jun Bang, } (Chan Kam Foo &
Randal Associates)
33. Chua Thiam Hee, }
Bryan
34. Chua Kang Ean, }
Trevor
35. Fong Wing Hoe, }
Eugene
36. Wyatt Darren Yong }
Shun
38. Steven Alan Leong }
39. Raymond Edwin }
Leong
40. Edmund Calvin }
Leong
- Claimant Counsel
41. Rian Stone Marcum- }
Leong
42. Kevin Raymond }
Leong
43. Harry Goh }
44. David Ter-Wen Goh }
45. Jordan Harrison Goh } Joan Lim Pheck Hoon
46. Hunter David Goh } (Chan Kam Foo &
Associates)
47. Charlie Goh }

48. Charles Michael Goh }

49. Richard Patrick Goh }

50. James Robert Goh }

The estate of the said Tan Lian Chye, who died before the date of distribution:

Claimant

Counsel

37. Estate of Tan Lian } Joan Lim Pheck Hoon
Chye, Deceased

} (Chan Kam Foo &
Associates)

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