

Shiraz Abidally Husain and Another (executors of the estate of Abidally Abdul Husain,
deceased) v Husain Safdar Abidally and Others
[2009] SGHC 130

Case Number : OS 1440/2008
Decision Date : 27 May 2009
Tribunal/Court : High Court
Coram : Tan Lee Meng J
Counsel Name(s) : Mirza Namazie and Chua Boon Beng (Mallal & Namazie) for the plaintiffs; Gopalan Raman (G Raman Law Corporation) for the defendants
Parties : Shiraz Abidally Husain and Another (executors of the estate of Abidally Abdul Husain, deceased) — Husain Safdar Abidally; Ashraf Safdar Husain; Soraya Safdar Husain; Husain Safdar Abidally as Guardian of; Farah Safdar Husain and Hanna Safdar Husain; Sakina Yusuf Kagda; Fareed Husain Yusuf Kagda; Falaq Yusuf Kagda

Probate and Administration – Executors – Principles for awarding commission – Whether professional assistance should affect quantum of commission

27 May 2009

Tan Lee Meng J:

1 The plaintiffs, Mr Shiraz Abidally Husain (“Mr Shiraz”), and his sister, Mrs Salma Moiz nee Salma d/o Abidally Abdul Husain (“Mrs Salma”), are the executor and executrix respectively of the estate of their late father, Mr Abidally Abdul Husain (“the deceased”). They claimed a commission of \$60,000 from the estate for administering the estate, which is worth more than \$6,000,000, for more than 5 years. The first defendant, Mr Husain Safdar Abidally (“Mr Safdar”), the plaintiffs’ sibling and the father of the 2nd to 4th defendants, asserted that the plaintiffs should not be paid any commission. After hearing the parties, who are all beneficiaries of the estate, I allowed the plaintiffs’ claim and now give the reasons for my decision.

2 The deceased, a Muslim, died in Singapore on 16 May 2003. He was survived by 2 sons, 4 daughters and a number of grandchildren. Under clause 3(a) of his will, he bequeathed one-third of his estate to his grandchildren in equal shares, to be distributed 5 years after his death. Under clause 3(b) of his will, he directed that the remaining two-thirds of his estate was to be held on trust for 5 years, after which it was to be distributed to his children.

3 A claim by an executor of an estate for a commission is governed by s 66(1) of the Probate and Administration Act (Cap 251, 2000 Rev Ed), which provides as follows:

The court or a judge may in its or his discretion allow the executors or administrators a commission *not exceeding 5% on the value of the assets collected by them*, but in the allowance or disallowance of such commission the court or judge shall be guided by its or his approval or otherwise of their conduct in the administration of the estate.

[emphasis added]

4 The plaintiffs, who pointed out that their claim for a commission of \$60,000 is less than 1% of the value of the estate, contended that they were entitled to the sum claimed because they had

conducted the administration of the estate in a proper manner for more than 5 years. It was the deceased's instructions that his assets be distributed among his beneficiaries 5 years after his death.

5 In *Tan Soo Lock v Tan Jiak Cho and Anor* [1930] SSLR 38 ("*Tan Soo Lock*"), a decision of the Straits Settlements Supreme Court, Murison CJ stressed that the payment of commission to those involved in the administration of estates is at the discretion of the court. He pointed out that the commission payable varies according to the nature of the estate administered and the work done by the executor. Furthermore, the commission should be less where considerable costs have been incurred by the estate for professional assistance.

6 The plaintiffs asserted that apart from routine duties connected with the administration of the estate for five years, they had to manage two of the deceased's properties, namely, No 28 Fernwood Terrace #14-33 and No 3 Haigville Drive. The Fernwood Terrace property was initially tenanted but the tenants disappeared without giving proper notice. Subsequently, the plaintiffs had to arrange for the sale of both properties. Furthermore, the deceased's will provided that pending the distribution of one-third of the estate to the grandchildren in equal shares 5 years after his death, the income earned on that one-third share of the estate was to be expended on the education and maintenance of the grandchildren. Monitoring the claims for such expenses was not an altogether easy task as there were serious disputes regarding the entitlement of the grandchildren to the funds set aside for their education and maintenance.

7 The defendants' reasons for denying the plaintiffs a commission cannot be countenanced. To begin with, Mr Safdar contended that the testator did not intend to pay the plaintiffs any commission. However, at the hearing, it was common ground that there was no credible evidence before the court that the deceased did not wish to give any commission to the plaintiffs. As such, this contention need not be further considered.

8 As for the plaintiffs' conduct in administering the estate, which is a factor to be taken into account by the court in determining how much commission an executor is entitled to receive, Mr Safdar had a litany of complaints about the way in which the estate had been administered. However, these complaints were not substantiated.

9 Mr Safdar complained that the estate's resources had been wasted by the plaintiffs when they tried to determine whether or not the deceased had a 14th grandchild. He, of all persons, should not have made this complaint as he was the alleged father of the 14th grandchild. In 1972, he was sued by one Ms Tan Poh Ee ("*Ms Tan*") for breach of a promise to marry. In that suit, Ms Tan alleged that Mr Safdar had induced her to have a sexual relationship by promising to marry her and she claimed that their child was born on 19 August 1971. In his defence, Mr Safdar denied that that he was the child's father. The suit was presumably settled as Ms Tan filed a Notice of Discontinuance soon after she commenced the suit. In his affidavit filed on 7 November 2008, the first plaintiff, Mr Shiraz, pointed out that whether there was a 14th grandchild and whether the child was legitimate and alive at the time of the deceased's death is important because this affected the shares of the deceased's grandchildren.

10 In a letter dated 17 August 2005, the estate's lawyers, Mallal & Namazie, wrote to Mr Safdar's lawyer, Mr G Raman, to request the latter to furnish a statutory declaration clarifying whether or not he fathered Ms Tan's child and if so, to state whether or not the child was legitimate and alive at the time of the deceased's death. Mr Raman replied that his client would not be providing the information requested. As such, the executor and executrix of the estate filed Originating Summons 2108 of 2005 to compel Mr Safdar to furnish the information in question. Mr Safdar managed to persuade the court to strike out the Originating Summons. The plaintiffs then placed an advertisement in the *Straits*

Times to invite the 14th grandchild to make a claim within 2 months of the advertisement on 12 March 2008. No one came forward to make the claim and the plaintiffs undertook an interim distribution to the deceased's 13 grandchildren in June 2008.

11 Undoubtedly, Mr Safdar's complaint about the time and resources wasted for the purpose of determining whether there was a 14th grandchild is groundless because the plaintiffs had a duty to determine who were the deceased's grandchildren and they were entitled to take steps to determine once and for all whether, for the purposes of administering the estate, the child in question was indeed Mr Safdar's son. Admittedly, the plaintiffs' application in Originating Summons 2108 of 2005 was struck out but this, without more, does not necessarily affect their claim for a commission. The true test for the calculation of what remuneration an executor or administrator ought to get is, as Murison CJ put it in *Re Chew Joo Chiat Deceased* [1933] MLJ 187, whether or not the executor or administrator has done his duty according to law. Mr Safdar could have saved the estate all the trouble or expense by being more co-operative as far as the determination of the existence and legitimacy of the 14th grandchild was concerned.

12 Mr Safdar's next complaint concerned the conduct of the plaintiffs with respect to the disposal of the sale of No 3 Haigville Drive. Counsel for the plaintiffs, Mr Mirza Namazie, explained that the key to understanding the plaintiffs' conduct is that under Muslim law, the trust of 5 years under clause 3(b) of the deceased's will was void and unenforceable but if all the affected beneficiaries agreed, clause 3(b) could be applied on a consensual basis, in which case it would be valid under Muslim law. He added that the plaintiffs had thought that Mr Safdar would agree with his siblings to respect the deceased's wishes and enforce clause 3(b) in respect of the said sale proceeds. However, when it became clear that he would not, the plaintiffs took steps quickly to distribute the sale proceeds. As such, I accept Mr Namazie's assertion that the plaintiffs' conduct with regard to the disposal of the sale proceeds of No 3 Haigville Drive cannot be faulted.

13 Mr Safdar also contended that if the executors are entitled to a commission, it should be reduced because the estate had incurred legal fees by instructing a law firm to act on its behalf. Admittedly, where much money has been incurred for hiring professionals, an executor may be said to have passed on some of his work to the professional. This was accepted in *Syed Ahmad, deceased v Syed Hussain* [1915-23] 15 SSLR 236 ("*Syed Ahmad*"), where Barrett-Lennard J said that this rule was required to check the well-known English practice "of handing over all the really responsible work in connection with an estate to courts of justice or professional gentlemen whose fees often absorb so appreciable a portion of funds". Furthermore, in *Tan Soo Lock (supra, [5])*, Murison CJ said, while referring to *Syed Ahmad*, that "this proposition does not go much further than the principle that commission is paid for pain and trouble necessarily taken by the executor". In the present case, the plaintiffs asserted that they were only claiming a commission based on the work actually done by them.

14 After taking all the circumstances into account, I allowed the plaintiffs' claim for a commission of \$60,000.