

Rajaratnam Kumar (alias Rajaratnam Vairamuthu) v Estate of Rajaratnam Saravana Muthu
(deceased) and another and another suit
[2010] SGHC 164

Case Number : Suit Nos 438 of 2008 and 440 of 2008
Decision Date : 26 May 2010
Tribunal/Court : High Court
Coram : Tan Lee Meng J
Counsel Name(s) : Nandwani Manoj Prakash and Renganathan Shankar (Gabriel Law Corporation) for the plaintiff; Tan Kah Hin (Choo Hin & Partners) for the 1st defendant; 2nd defendant in person.
Parties : —

Succession and Wills

26 May 2010

Judgment reserved.

Tan Lee Meng J:

1 The two consolidated suits in the present proceedings have their roots in an extremely bitter feud between the plaintiff, Mr Kumar Rajaratnam @ Vairamuthu Rajaratnam ("Kumar"), and his elder brother, the second defendant, Dr Bala Saravanamuthu Rajaratnam ("Bala").

2 In Suit No 438 of 2008, Kumar sought to have his deceased parents' fourth mutual wills ("the fourth wills"), which were executed on 3 November 2003, set aside. In Suit No 440 of 2008, Kumar sued Bala and the first defendant, Mr Tan Kah Hin ("Mr Tan"), who is the executor of their late father's estate. He sought a declaration that the fourth wills are null and void and that the defendants give full accounts of the estate of his late father.

3 In his Defence and Counterclaim, Bala sought a declaration invalidating his parents' third mutual wills ("the third wills"), which were executed on 28 August 2003, around nine weeks before the fourth wills were executed.

4 Both brothers also accused each other of exerting undue influence on their parents and of misappropriating their parents' money.

Background

5 The late Mr Saravana Muthu Rajaratnam ("father") ran a business, Raja Limb Centre (FE) Pte Ltd, which specialised in artificial limbs, hearing aids and orthopaedic equipment. He was married to the late Mdm Parameswari d/o Vairamuthu ("mother"), who helped him in the administration of his business. The couple ("the parents") had two children namely, Bala and Kumar.

6 Bala was born in 1956 while Kumar was born in 1958. Both of them were sent to Australia for tertiary education in 1980. Bala obtained a degree in Physiotherapy while Kumar obtained a degree in Prosthetics and Orthotics and another degree in Physiotherapy. While Bala returned to Singapore in 1983, Kumar remained in Australia and became a permanent resident there.

7 The parents befriended one of their clients, Mr Tan, a lawyer who handled their personal and business legal matters.

8 On 20 July 2001, the parents executed mutual wills, which were prepared by Mr Tan. The parents had made earlier wills but for convenience, as the wills executed on 20 July 2001 were referred to by the brothers as the "first mutual wills", they will be referred to as the "first wills" in this judgment. Under the first wills, Bala and Kumar were bequeathed only \$500 each and each grandchild was bequeathed \$2,000. The balance of the estate of the surviving parent went to a number of named charities.

9 The first wills were revoked on 12 October 2001 when the parents made their second mutual wills ("second wills"), which were also prepared by Mr Tan. What was different about the second wills was that the executor named in the first wills was not appointed the executor in the second wills and the list of charities that were to benefit was changed.

10 The year 2003 proved to be a particularly tumultuous year for the parents as they had major differences with both their sons over financial matters. By then, the father was a frail man, aged 82, who was suffering from diabetes, hypertension and ischemia. The mother, who was almost 70 years old, had been suffering from Alzheimer's dementia since 2002. She also had breast cancer.

11 On 8 March 2003, the father made a police report after discovering that \$500 had been withdrawn under suspicious circumstances from a DBS Bank account operated by him, his wife and Bala. The father stated in his police report that he had no suspects in mind. All the same, Bala, who suspected that someone else had taken the money, was upset enough over the missing \$500 to write to his parents on 21 March 2003 as follows:

With great regret, I write this letter to you to indicate that *I wish not to be involved in any of your affairs in future.*

The recent incident over a misplaced \$500 has highlighted that all my efforts to assist both of you seem to be viewed as negative. This is not the first time and I guess I have lost the energy to continue helping both of you....

May be it's because I don't know how to communicate with both of you, Kumar and your friends. *I do not require any materialistic gain from both of you but peace of mind. I humbly ask you to release me from any responsibilities concerning both of you.*

[emphasis added]

12 Bala had also tried to warn his father about what he perceived as unhealthy influence exercised by some of his father's friends. On 29 March 2003, his enraged father wrote to him as follows:

Please stop all this nonsense and do not interfere in my financial affairs and my relationship with my friends. *I have since terminated the account with you as joint partners which I never endorsed in the first place. Your name was included without my permission.*

I made the police report on the missing \$500 when you refused to accept responsibility for this when you were questioned by me

[emphasis added]

13 The father forwarded a copy of the above letter to DBS Bank. Why he chose to embarrass his own son by doing this when he had already terminated the account in question cannot be readily understood.

14 The parents also had their share of problems with Kumar. In 1997, the parents had sought the return of \$200,000 that Kumar borrowed from them. Kumar insisted that it was not the right time for his parents to take the money out of Australia and that he had better plans to help his parents invest the money. The parents instructed Mr Tan to write to Kumar on 16 July 1997 to demand immediate repayment of the \$200,000. The dispute between Kumar and his parents dragged on and on 6 July 1998, Mr Tan wrote to Kumar to say that the parents would like to manage their own retirement funds and that Kumar should refund the \$200,000.

15 In 2003, Kumar's lawyers in Melbourne were apparently preparing legal documents for his parents to sign. It appeared that Kumar's parents still did not trust him fully as Mr Tan, wrote to Kumar on 22 July 2003 on their instructions as follows:

We are instructed that you have instructed your Melbourne solicitors, Messrs Battern Sacks Lawyers, to prepare various legal papers for our clients to sign.

We are further instructed to notify you that all legal documents are to be forwarded to us to review and study so that your parents will have proper legal advice thereon.

16 Despite the above evidence of the parents' serious differences with Bala and Kumar in the first half of 2003, both brothers now claim to have won their trust completely at different times between 28 August to 3 November 2003.

17 When Kumar was with them on 28 August 2003, the parents executed a Power of Attorney to allow him to manage their financial affairs ("the Power of Attorney"). Simultaneously, the parents revoked their second wills and executed the third wills, which clearly favoured Kumar's children. Kumar then brought his parents to live with him in Melbourne for a few weeks. In October 2003, the parents left Australia for Kuala Lumpur. Kumar arranged for them to stay in a rented house there and an Indian maid was hired for them. Two of the parents' relatives lived nearby and Kumar entrusted his parents' passports to a cousin.

18 Bala was quite obviously concerned that his parents had executed the Power of Attorney. On 24 September 2003, his then solicitors, ML Mayeh & Co, wrote to Mr Tan as follows:

We understand that both our client's parents had executed a Power of Attorney in favour of their other son [Kumar].

Kindly confirm if ... both our client's parents had sought or taken any legal advice from you on the said Power of Attorney which was lodged on or about 28 August 2003.

Furthermore, we would also be grateful if you could confirm from your own personal observation whether [the parents] were in the capacity to understand and appreciate such documents on their own if such documents were put before them for their due execution.

19 On 25 September 2003, Mr Tan replied as follows:

We have NO knowledge of the Power of Attorney in favour of their son, Kumar. We have not seen this instrument. We were not consulted thereon.

Both parents as far as we can observe are mentally alert and can comprehend our verbal advice and questions. *As for their capacity to understand and appreciate a document, we are in no position to advise. We never tested them nor are professionally qualified to do so.*

[emphasis added]

20 On 30 October 2003, Bala went to Kuala Lumpur and managed to escort his parents back to Singapore even though they had no passports with them. The immigration authorities were informed that the parents had lost their passports. Bala checked his parents into St Luke's Hospital for the Elderly ("St Luke's Hospital"). On their admission, basic tests were conducted on the parents at the hospital. In relation to the Abbreviated Mental Test ("AMT"), which is a 10-item cognitive screening instrument intended to identify cognitive impairment, the father's score was 7/10 while the mother's score was only 4/10. It is pertinent to note that the medical summary from St Luke's Hospital showed that no formal neuropsychological tests were carried out and that both parents could handle most of their basic activities of daily living.

21 On 3 November 2003, just a few days after the parents had checked into St Luke's hospital, Bala took them to Mr Tan's office for them to revoke the Power of Attorney and to sign their fourth wills, which gave the bulk of the surviving parent's estate equally to both Bala and Kumar. Mr Tan was named as the executor in the fourth wills.

22 Alarmed by the turn of events, Kumar threatened Bala in a most unbrotherly fashion in an e-mail on 3 November 2003 as follows:

I slammed the phone down on you several time as you were meddling and we just wanted to get them to a secure home with us and settle [the parents] down. You could have called them from Singapore but everybody knows you are a cheap skate. You have not bought them a stitch of clothing or a meal. I really feel sorry for you but unfortunately you are my brother and whilst they are alive, I will work with you to keep you honest. You step out of line and you will see my wrath! Now that is a threat and print that out and keep it. ... [D]on't ever lie to me or take 1 red cent out of their account or assist them in selling or purchasing properties or changing their will. It will be the last thing you will do before I make your life totally 100% miserable. That I can guarantee you.

23 Bala continued to take care of the parents in Singapore while Kumar, who remained in Australia, complained that Bala was ill-treating his parents.

24 In 2004, the parents' jointly-owned major assets, a flat at Block 5000D Marine Parade Road #02-13 Singapore 449287 ("Laguna flat") and another flat at Block 20 Chai Chee Road #09-12 Singapore 461020 ("Chai Chee flat"), were sold. The Chai Chee flat was sold on 9 February 2004 for \$164,000 and the sale was completed on 16 April 2004. The Laguna flat was sold on 20 October 2004 for \$355,000 and the sale was completed on 12 January 2005. Bala liaised with the property agents and the bulk of the proceeds of sale were transferred by Bala to himself, allegedly on the father's instructions. Bala said that the hefty expenses incurred for the upkeep of his parents, including the rental of a flat, the hiring of a maid, food and medical expenses, were paid for by the money he had taken.

25 On 17 January 2005, the father, then around 84 years old, was appointed the Committee of the Person and Estate of the mother by an Order of Court, which also authorised the father to sell the Laguna flat and required the proceeds of sale to be banked into a specified Maybank account jointly operated by the parents ("the Maybank account"). The court was not informed that the Laguna flat

had already been sold and that the proceeds of sale of the Laguna flat had already been banked into a POSB joint account operated by Bala and his mother ("POSB account"). Bala, who knew about the Order of Court, did not place the proceeds of sale of the Laguna flat into the Maybank account. He claimed that he acted on his father's instructions.

26 Although the father had no authority under the Order of Court to give away the mother's money to anyone, Bala claimed that his father sent Kumar a typewritten letter dated 4 February 2005, in which he informed Kumar that he gave \$500,000 to Bala and his wife, Mdm Mythili. Part of the said letter is as follows:

With the completion of the earlier sale of Chai Chee for \$163,000 & last month, Laguna for \$342,449.88, I have gifted Bala with \$350,000 for the care of his special need son while Mythili received \$150,000 for being a good daughter-in-law and taking care of us all these years....

This transaction is witness today... Take your *father advise*, focus on being honest to everybody especially Bala's family and us. Everybody *known* that you have the potential to cause trouble even after receiving all this money.

(Signed)

[S Rajaratnam]

Witnesses

(signed)

(signed)

.....

.....

[Maid]

[Bala]

[emphasis added]

27 A number of points must be noted in relation to the said typewritten letter of 4 February 2005. First, it is evident from the father's numerous handwritten letters that he had an excellent command of the English language and he would not have made the large number of grammatical errors and spelling mistakes, which are italicised in the paragraph above. Secondly, the father does not know how to type. Bala agreed that someone must have typed the letter for his father, who was by then, so frail that he died four months later. Bala denied that he had typed the letter himself but he could give no indication as to who might have typed the letter. Thirdly, if this was a letter to Kumar, why was there a need to have witnesses sign the letter? Interestingly enough, the two witnesses of these large gifts to Bala and his wife were Bala himself and the parents' foreign maid, Mdm Nurhidayah.

28 Four months later, on 7 June 2005, the father passed away in Tan Tock Seng Hospital. Mr Tan, the executor of the father's fourth will, filed the Petition of Grant of Probate of the said will. The Grant was made on 29 August 2005. On 16 September 2005, Kumar filed a caveat in the probate proceedings. Instead of following the procedure for contested probate proceedings, on 20 September 2005, Kumar commenced proceedings in the Subordinate Courts to challenge the validity of the fourth wills.

29 Following the death of the father, both brothers were involved in an acrimonious tussle to be appointed the sole committee of the estate and person of their mother. The High Court dismissed Kumar's application to handle his mother's affairs and appointed Bala as the sole committee of his

mother. Kumar was ordered to pay costs to Bala.

30 On 28 July 2005, Kumar came to Singapore and went to his mother's flat but was denied entry by his mother's maid. According to Kumar, he held his mother's hands through the locked metal gate of the flat. Bala's version was that his mother was shocked that Kumar had come to her flat and he was called to the scene. When Bala arrived, there was a scuffle between him and his brother. The police were called and both Bala and Kumar filed complaints in the magistrate's court against each other. On 1 March 2006, both brothers agreed in the presence of the magistrate to refrain from instituting any criminal or civil proceedings in respect of incident at their mother's flat on 28 July 2005.

31 On 14 October 2005, the mother was admitted to the Orange Valley Nursing Home, Clementi branch.

32 On 18 July 2006, the feud between the brothers took a new turn when Kumar sued Bala for defaming him in an e-mail to their relatives. After one and a half years, Kumar discontinued the claim.

33 Kumar also filed Summons No 3038 of 2006, alleging that Bala was ill-treating their mother. On 4 August 2006, VK Rajah J asked for an update on the mother's medical condition. Kumar's allegations against Bala proved to be absolutely untrue. In the nursing home's report to the judge on 10 August 2006, Dr Edwin Lee ("Dr Lee") stated that Bala "cares for [his mother] well and provides for all her needs" and that Bala took her for all her hospital specialist appointments promptly. He added that Bala and his family visited the mother frequently and supplemented her meals with additional food that they believed would be more palatable to her. Dr Lee also said that it was not uncommon to see Bala walking his mother around and outside the nursing home to keep her physically and mentally active and oriented to her surroundings. On 22 August 2006, the judge noted that Kumar had made unsubstantiated allegations against Bala. Kumar's counsel then withdrew the application against Bala.

34 In August 2007, the mother passed away.

35 What is rather alarming is that there is nothing left in the mother's estate as all her money had been taken away from her before her death.

Whether the fourth mutual wills are valid

36 Kumar's case is as follows:

- (i) His parents were of sound mind when he arranged for them to execute their third wills on 28 August 2003;
- (ii) However, just nine weeks later on 3 November 2003, when the parents executed their fourth wills, they had both lost their mental capacity to execute any will and his mother had suddenly become "partially insane";
- (iii) The third wills executed by his parents on 28 August 2003 contained a provision that the said wills could not be revoked and since his mother was partially insane and had no mental capacity to make a will on 3 November 2003, the mother's third will had not been validly revoked.

37 The criterion for testamentary capacity was outlined by Cockburn CJ in *Banks v Goodfellow* (1869-70) LR 5 QB 549 at 565 ("Banks") as follows:

It is essential to the exercise of such a power that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties—that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made.

38 The question of onus of proof of testamentary capacity was outlined by the Court of Appeal in *R Mahendran and another v R Arumuganathan* [1999] 2 SLR(R) 166 as follows at [15]:

It is a well-settled principle of law stated as far back as 1838 by Baron Parke in *Barry v Butlin* (1838) 2 Moo 480 at 482 and 484; 12 ER 1089 that the legal burden of propounding a will, the *onus probandi*, lies in every case upon the party propounding the will, "and he must satisfy the conscience of the court that the instrument so propounded is the last will of a free and capable Testator. ... it is in general discharged by proof of capacity, and the fact of execution, from which the knowledge of and assent to the contents of the instrument are assumed." The proposition is framed by *Theobald on Wills* (15th Ed, 2001) at pp 35 to 38 in these terms:

Burden of proof. The legal (or persuasive) burden of proof always lies upon the person propounding a will to prove that the testator knew and approved of its contents at the relevant time. He must 'satisfy the conscience of the court that the instrument so propounded is the last Will of a free and capable Testator'.

(a) Presumption in ordinary circumstances. On proof that the testator was of testamentary capacity and that he duly executed the will, in ordinary circumstances a rebuttable presumption arises that he knew and approved of its contents at the time of execution. The evidential burden of proof then shifts to the person opposing the will to rebut this presumption. If he does so, or if due to the particular circumstances the presumption is not applicable, the person propounding the will must produce affirmative proof of the testator's knowledge and approval so as to satisfy the legal burden of proof.

...

(c) Suspicious circumstances. If a will was prepared and executed under circumstances which raise a well-grounded suspicion that the will (or some provision in it, such as the residuary gift) did not express the mind of the testator, the will (or that provision) is not admissible to probate unless that suspicion is removed by affirmative proof of the testator's knowledge and approval. A classic instance of suspicious circumstances is where the will was prepared by a person who takes a substantial benefit under it. Another instance is where a person was active in procuring the execution of a will under which he takes a substantial benefit by, for instance, suggesting the terms of the will to the testator and instructing a solicitor chosen by that person.

However circumstances can only raise a suspicion of want of knowledge and approval if they are 'circumstances attending, or at least relevant to, the preparation and execution of the will itself.'

39 In the present case, Kumar alleged that there were suspicious circumstances as Bala's handwriting may be found in a draft of the will. However, what is relevant is whether there are suspicious circumstances attending, or at least relevant to, the preparation and execution of the will itself. It is noteworthy that Mr Tan testified that he had discussed the contents of the fourth will with the parents without Bala being present almost a year before the execution of the said will. On the day the will was executed, Mr Tan spoke to the parents when Bala was not in his room. In fact, apart from his secretary, Mr Tan was the only person who attended to the parents when they executed the fourth will. I thus find that there were no suspicious circumstances attending, or at least relevant to, the preparation and execution of the will itself.

40 Undoubtedly, it would have been prudent for Mr Tan to have had the testamentary capacity of the parents assessed by an appropriate medical practitioner before proceeding with the execution of the fourth will in November 2003. Although this was not done, it does not, without more, mean that the fourth will is invalid. The function of the court is to decide whether the parents had testamentary capacity at the relevant time, *which is 3 November 2003*. This involves making a finding of fact by applying the law to the evidence: see *George Abraham Vadakathu v Jacob George* [2009] 3 SLR(R) 631 at [64].

41 When considering the parents' mental capacity to execute the fourth will on 3 November 2003, it must be noted at the outset that on 24 August 2003, two days before the third will was executed, Kumar took his parents to Tay Clinic to be examined by Dr Tay Tiong Hum ("Dr Tay"), who stated in his report as follows:

I have examined the above mentioned couple to-day and I find that they are of sound minds. They understand and are able to respond appropriately.

42 Kumar listed Dr Tay as one of his witnesses. Dr Tay was a crucial witness as he could have explained why he regarded the parents as being of sound mind on 24 August 2003 and whether, on the basis of his diagnosis, the parents were likely to have lost their mental capacity only *nine weeks* after his diagnosis and whether the mother could have, as alleged by Kumar, become partially insane within nine weeks. However, Kumar changed his mind and decided not to call Dr Tay to testify at the trial. No good reason for Kumar's failure to call Dr Tay was furnished and one might ask whether Kumar was afraid that Dr Tay's evidence might not advance his case that his parents had no mental capacity to execute their fourth will some nine weeks after they had been certified as being of sound mind. The fact that Dr Tay was not called to testify allows the court to draw an adverse inference against the party who had listed him as a witness: see *Teng Ah Kow and Another v Ho Sek Shiu and Others* [1993] 3 SLR(R) 43. I therefore do so in this case.

43 Apart from Dr Tay who examined both parents, Kumar's counsel had also indicated to the Deputy Registrar that he would be calling a number of other doctors to testify at the trial. The witnesses included Dr Yap Keng Bee, a consultant in geriatric medicine at the Alexandra Hospital as well as St Luke Hospital's two doctors, Dr Colin Ngeow ("Dr Ngeow") and Dr Fong Ngan Phoon ("Dr Fong"). Dr Yap would have been a useful witness as he examined the mother and issued the following report on 20 September 2004, more than 10 months *after* the fourth will had been executed:

The [mother] was first brought to see me on 24th May 2004 by her husband.

....

During the clinical examination on 24th May 2004, the patient was noted to be quiet She had

problems with word finding and had trouble expressing herself. *There was evidence of marked cognitive impairment and she scored 2 out of 10 on the Elderly Cognitive Assessment Questionnaire.*

...

The patient saw me on 3 subsequent visits on 25th June, 23rd July and 6th September as she needed medications to control her restless behaviour.

In summary, the patient has very obvious features of dementia, probably from Alzheimer's disease. Her dementia is *moderately advanced* and is slowly progressing to the late stage of the disease. She is not capable of making informed decisions of her own due to global impairment of her mental functions.

[emphasis added]

44 Regrettably, Kumar again changed his mind and did not call Dr Yap to testify at the trial. He also did not call St Luke Hospital's Dr Ngeow and Dr Fong. Why Kumar did not call these doctors was not explained to the court.

45 Instead of relying on the testimony of doctors who had treated his parents, Kumar chose to call Dr Ko Soo Meng ("Dr Ko"), a consultant psychiatrist at Mount Alvernia Medical Centre and an Adjunct Associate Professor with the Department of Psychological Medicine at the National University of Singapore as a witness. As Dr Ko had not treated the parents, he could only speculate on what could have been the mental capacity of the parents on 3 November 2003 on the basis of the clinical notes and medical reports submitted to him.

46 Dr Ko considered the admission medical report of St Luke's Hospital, which was compiled a few days before the fourth will was executed. He noted that the hospital's report had stated that the father had a score of 7 out of 10 in an AMT test, which is generally acceptable although he expected a higher score as the father was a Colombo Plan scholar. As for the mother, her AMT score was only 4/10, which Dr Ko considered rather low. In his closing submissions, Kumar laid much emphasis on the fact that the mother's AMT score was 4/10. However, the AMT is a rather simple test that is easy to perform and score, and while it is one of the best known tests used in general hospitals, there is some controversy as to its intrinsic value. When cross-examined by Bala, Dr Ko accepted that the AMT score gives very basic information about memory and orientation and that it is merely a screening test that is not a diagnosis of a person's mental capacity. He also explained that ideally, there should have been a variety of tests, including the Elderly Cognitive Assessment Questionnaire and a "mini mental state examination". There is no evidence that such other tests had been conducted on the parents.

47 In his expert assessment report, Dr Ko summed up his findings on the mother as follows:

9 Dr Ngeow's report of the mother's admission to St Luke's Hospital in November 2003 stated that she suffered from Alzheimer's Dementia and that she had been on follow-up with the Memory Clinic at Tan Tock Seng Hospital

10 From Dr Yap Keng Bee's report on [the mother], it is obvious that she suffered from dementia.

...

12 I concur with Dr Ngeow's and Dr Yap's reports that [the mother] was suffering from dementia.

In her 2003 admission to St Luke's Hospital, she was still able to handle her activities of daily living despite her AMT score of only 4/10....

...

- 14 Alzheimer's dementia is a progressive, declining condition affecting global mental functions like memory, orientation, judgment, executive function and personality. *Already in a moderately advanced stage of her illness by September 2004, [the mother's] condition could only go downhill.*

[emphasis added]

48 While Dr Ko said that the mother's condition could only go downhill *after* September 2004, what is relevant is whether or not the mother had the requisite mental capacity more than 10 months earlier, on 3 November 2003, to execute her fourth will and not the mother's condition after September 2004. Referring to Dr Tay's report on 24 August 2003 that the parents were of sound mind, Dr Ko stated, "I cannot comment because I really don't know".

49 Of course, Bala claimed that his parents were capable of executing the wills but his credibility was dented by his testimony and I prefer to look elsewhere for confirmation that the parents had testamentary capacity on 3 November 2003.

50 In these circumstances, Mr Tan's evidence is crucial. He was an old friend of the parents and he had been their legal adviser for more than 20 years. He had nothing to gain under the will and he appeared quite saddened by the continuing feud between the children of two of his old friends. He took an even-handed approach with regard to the two brothers and I found him to be a very credible witness.

51 It may be recalled that the first two sets of wills prepared by Mr Tan for the parents primarily benefited charities. Apparently, as time passed, the parents had second thoughts and wanted to bequeath their assets to their two sons. Mr Tan testified that the question of changing the wills to benefit Bala and Kumar had been brought up by the parents themselves long before the fourth wills were executed.

52 According to Mr Tan, when the parents met him on 23 November 2002, almost a year before the fourth wills were executed and some nine months *before* Dr Tay certified that they were of sound mind on 24 August 2003, the father was keen to make a new will to provide for Bala and Kumar. However, the mother hesitated as she wanted to consider the matter further.

53 Subsequently, the parents called on him on 11 January 2003 to make new wills to provide for their two sons. However, as they did not have their sons' identity card numbers, the new wills were not executed on that day.

54 On 3 November 2003, the father called Mr Tan to make an appointment to make the long-delayed wills to provide for Bala and Kumar. The fourth wills were executed on that day.

55 Mr Tan testified that even if the parents suffered cognitive impairment in November 2003, he was satisfied that the parents were lucid and understood the contents of the fourth wills, which were in line with the previous discussions between Mr Tan and them on 23 November 2002 and 11 January 2003. As such, there was no sudden change of intention with respect to the beneficiaries under the fourth wills.

56 When cross-examined by Kumar's counsel, Mr Shankar, Mr Tan reiterated that he had spoken to *both* the parents on 3 November 2003 and that he found that they were not confused [\[note: 1\]](#) and that they gave him clear instructions. [\[note: 2\]](#) When asked why he did not send the parents to a doctor to determine their mental capacity, and especially so since he had stated in his letter to Bala's former solicitor on 25 September 2003 that he was not professionally qualified to judge whether the parents could understand documents, Mr Tan replied [\[note: 3\]](#) as follows:

[I]t was at the back of mind. You must realise that when they came to see me on the 3rd November, right, *it was not the first time that they actually raised the issue of changing the will in favour of the two children*. So I knew that all along. And so when they came I said, "Look, is this what you wanted?" They said "Yes"... So I said, "Look, how about the charities?" And they said, "We have peace in the family – we will do it"

[emphasis added]

57 When cross-examined by Mr Tan, Dr Ko accepted that while he had doubts about the mental capacity of the mother, the fact that there had been *previous* discussions between the parents and Mr Tan about changing their previous wills to provide for the two sons may be material for the purpose of determining whether the parents understood what they were doing when they executed their fourth wills although this is a matter of speculation. [\[note: 4\]](#)

58 After taking all circumstances into account, I accept Mr Tan's evidence that despite their medical problems, the parents understood what they were doing as well as the terms of the fourth wills when they signed the said wills. After all, the contents of the said wills were not complicated as they essentially involved giving the surviving parent's property in equal shares to both Bala and Kumar. As such, I hold that the fourth wills were validly executed by the parents.

59 It is also pertinent to note that the fourth wills are, in any case, valid on the ground that they were prepared in accordance with instructions given by a testator when he or she was of sound mind. In *Parker and Another v Felgate and Tilly* (1883) 8 PD 171, Sir James Hannen explained at 173 as follows:

If a person has given instructions to a solicitor to make a will, and the solicitor prepares it in accordance with those instructions, all that is necessary to make it a good will, if executed by the testator, is that he should be able to think thus far, "I gave my solicitor instructions to prepare a will making a certain disposition of my property. I have no doubt that he has given effect to my intention, and I accept the document which is put before me as carrying it out."

60 In *Perera and Others v Perera and Another* [1901] AC 354 ("*Perera*"), the Privy Council endorsed Sir James Hannen's rule at 362 and regarded it as "good law and good sense".

61 In *Perera*, a will was prepared on the basis of instructions given by the testator when he was of sound mind but it was alleged that when the will was read clause by clause to him before it was executed, he was not able to understand its provisions. The Privy Council accepted that the testator was of sound mind when he executed the will. However, it added that since the will had been prepared in accordance with the testator's instructions when he was of sound mind, it could not be set aside even if the testator was unable to follow all the provisions of his will when it was read over to him before he signed it.

62 In the present case, the parents gave their instructions to Mr Tan, long before they were

certified on 24 August 2003 as being of sound mind by Dr Tay. The instructions of the parents were simple enough and entailed bequeathing very small sums to their grandchildren and the remainder of the surviving parent's estate to both Bala and Kumar in equal shares. Mr Tan prepared the will in accordance with those instructions. I accept that both the parents clearly understood that they were giving effect to their earlier instructions to Mr Tan regarding the disposition of their property when they executed the fourth wills. The only change in the instructions was that the parents now wanted Mr Tan, who did not benefit under the wills, to be appointed the executor. This appointment had nothing to do with the disposition of the parents' property and I find that the parents, who had appointed executors under their previous wills, fully understood what they were doing when they asked Mr Tan to be the executor.

63 For the reasons stated, the rule in *Perera* is applicable and is another basis for holding that the fourth wills are valid.

Undue influence

64 I will now consider Kumar's allegation that Bala exercised undue influence on their parents to persuade them to execute the fourth wills. He asserted that Bala controlled the parents' minds and knew that in view of their age and deteriorating mental health, his presence would influence them in an undue manner and displace their testamentary intention.

65 In contract law, undue influence falls under two categories. The first is actual undue influence while the second is presumed undue influence. The second type of undue influence arises in the case of certain specific relationships, such as between parent and child, doctor and patient, and solicitor and client. Where actual undue influence is alleged, the person who makes the allegation has to prove his case but in the case of presumed undue influence, the person who benefits must rebut the presumption of undue influence. However, in the context of wills, Lord Cranworth explained in *Boyse v Rossborough* (1857) 6 HL Cas 2 at 49 that "once it has been proved that a will has been executed with due solemnities by a person of competent understanding, and apparently a free agent, the [burden] of proving that it was executed under undue influence is on the party who alleges it". In short, where a will is concerned, undue influence may not be presumed.

66 As for what amounts to undue influence in relation to the execution of a will, the decision of Sir JP Wilde in *Hall v Hall* (1868) LR 1 P & D 481 is taken to stand for the following proposition:

Persuasion is not unlawful, but pressure of whatever character if so exerted as to overpower the volition without convincing the judgment of the testator, will constitute undue influence, though no force is either used or threatened.

67 In *Wingrove v Wingrove and Others* (1885) 11 PD 81, Sir James Hannen stated at 82 that "[it] is only when the will of the person who becomes a testator is coerced into doing that which he or she does not desire to do, that it is undue influence". He added, at 83, that if the testator's act is shown to be the result of his wish and will at the material time, then, in the absence of fraud, "though you may condemn any person who has endeavoured to persuade and has succeeded in persuading the testator to adopt that view – still it is not undue influence".

68 In the present case, Kumar alleged that Bala had a hand in the fourth wills as his handwriting was found on a draft of the said wills. What must be established, however, is that Bala dominated his parents to such an extent that their independence of decision in relation to the execution of the fourth wills was so undermined that his domination caused them to execute the said wills. This is not easy to prove as undue influence in the making of a will is usually proven by the testimony of

witnesses present at the execution of the wills or by forensic analysis.

69 It cannot be overlooked that before the execution of the fourth wills on 3 November 2003, the parents had on 23 November 2002 and on 11 January 2003 discussed with Mr Tan the question of making of new wills to provide for their sons. The fourth wills are uncomplicated and their terms are simple enough for the elderly parents to understand. According to Mr Tan, who made it clear that Bala was not with the parents when he spoke to them about the fourth wills, the parents knew what they were doing and they wanted to change their wills to bequeath their property in equal shares to their two sons for the sake of "peace in the family".

70 After considering all the evidence, I find that the parents had not been unduly influenced by Bala to execute the fourth wills.

Whether the third wills are valid

71 As I have found that the parents' fourth wills are valid, it follows that their third wills, even if validly executed, had been revoked.

72 For the sake of completeness, I will consider whether the third wills were validly executed if the parents' fourth wills are invalid because they lacked the mental capacity to execute those wills on 3 November 2003.

73 It is rather astounding that Kumar, who asserted so very strongly that his parents lacked testamentary capacity on 3 November 2003 when they executed their fourth wills, could simultaneously insist that they had testamentary capacity around nine weeks earlier when they executed their third wills on 28 August 2003 not in the office of their lawyer, Mr Tan, but in the office of a new lawyer, who, more likely than not, was introduced to them by Kumar. If the third wills are valid, one-third of the surviving parent's estate would be given to charity and Kumar's children would inherit three-quarters of the balance of the estate.

74 Like Bala, Kumar's credibility was dented during the trial. Furthermore, as mentioned, Kumar changed his mind about calling crucial witnesses, namely Dr Tay and other doctors who had examined his parents, to testify. What is noteworthy is that his expert witness, Dr Ko, agreed that if a person with Alzheimer's dementia lacked testamentary capacity to execute a will on a particular date, he would be "more inclined to believe" that that person did not have the testamentary capacity to execute a previous will some two months before the later will. [\[note: 5\]](#) He added that he "would be very reluctant" to conclude otherwise. [\[note: 6\]](#)

75 I therefore find that if the parents, and especially the mother, had no mental capacity to execute the fourth wills on 3 November 2003, they also had no mental capacity to execute the third wills around nine weeks earlier on 28 August 2003.

Kumar's application for the furnishing of accounts to him

76 Kumar applied for both Mr Tan and Bala to furnish him with accounts of the parents' properties. During the trial, his counsel confirmed that no accounts will be sought at this juncture from Mr Tan. As for Kumar's application for Bala to furnish him with accounts and documents pertaining to the estate of the father, this need not be considered further as it is for Mr Tan, as executor of the parents' wills, to take steps to ensure that money and property that rightly belong to the parents are returned and he must be given sufficient time to consider his position.

Costs

77 Bala is entitled to costs. As for Mr Tan, he indicated to the court that he did not require an order for costs to be paid to him.

[\[note: 1\]](#) NE, 11 March 2010, p 24.

[\[note: 2\]](#) NE, 11 March 2010, p 26.

[\[note: 3\]](#) NE, 11 March 2010, p 22.

[\[note: 4\]](#) NE, 10 March 2010, pp 51-52.

[\[note: 5\]](#) NE, 10 March 2010, p 57.

[\[note: 6\]](#) NE, 10 March 2010, p 58.

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