

Khor Liang Ing Grace (executor of the estate of Tan See Wee, deceased) v Nie Jianmin
[2014] SGHC 202

Case Number : Case No P179 of 2014 (Summons No 2787 of 2014)
Decision Date : 13 October 2014
Tribunal/Court : High Court
Coram : Tan Siong Thye J
Counsel Name(s) : Ling Tien Wah (Rodyk & Davidson LLP) for the plaintiff; Goh Siong Pheck Francis and Chong Yimei (Harry Elias Partnership LLP) for the defendant.
Parties : Khor Liang Ing Grace (executor of the estate of Tan See Wee, deceased) — Nie Jianmin

Probate and administration – grant of probate

13 October 2014

Judgment reserved.

Tan Siong Thye J:

Introduction

1 This is an application by Khor Liang Ing Grace (“Ms Khor”), the executor of the estate of Tan See Wee, her deceased husband (“the deceased”). She seeks to remove a caveat filed by Nie Jianmin (“Ms Nie”) against a grant of probate for the purposes of executing the deceased’s will.

2 Ms Nie’s caveat was lodged on the basis of an alleged \$762,000 loan she had made to the deceased not long before his demise. She is claiming this sum from the deceased’s estate. I have to decide whether there was such a loan and also whether the caveat should be removed.

The facts

3 The deceased was a banker and fund manager working first as an investment manager with the Development Bank of Singapore. Later, he worked as a fund manager with Merrill Lynch Asset Managers. [\[note: 1\]](#) He died on 18 March 2014, [\[note: 2\]](#) leaving behind his will which named Ms Khor as the sole executor and trustee of his estate. [\[note: 3\]](#) There is no dispute about this.

The dispute

4 Soon after the deceased’s death, Ms Nie lodged a caveat against the grant of probate in respect of the deceased’s estate. This was filed on 26 March 2014. [\[note: 4\]](#) Ms Nie claims that she has an interest in the deceased’s estate as the deceased owed her \$762,000. [\[note: 5\]](#) Her version of the story is that she had lent money to the deceased, whom her husband, Tan Chau Chuang (“Mr Tan”), had described as a “reliable long term friend”. [\[note: 6\]](#) She claims that she had only lent the money on her husband’s assurance that the deceased was financially sound and would repay the money. Pursuant to this, she handed the deceased a cashier’s order for \$762,000 in the deceased’s name on 30 December 2013. [\[note: 7\]](#) Ms Nie thus claims that she lodged the caveat to protect her interest as a creditor. [\[note: 8\]](#)

5 Ms Khor's story is different. The sum was not a loan but rather an investment in the deceased's new project in Vietnam. The deceased told her that he had entered into an investment. She then found out that Mr Tan had invested his money into the deceased's new project as well. [\[note: 9\]](#) Her position therefore is that the \$762,000 was not a loan given to the deceased but an investment made by Mr Tan in a business venture with the deceased.

The present proceedings

6 Subsequently, Ms Khor made an application on 24 April 2014 in her capacity as the executor of the deceased's estate. She sought for probate to be granted to her. [\[note: 10\]](#) The next day, she filed her supporting affidavit pursuant to O 71 r 5 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("the ROC"). The supporting affidavit was filed together with an extract from the Register of Deaths (stating the cause of the deceased's death) and his last will. [\[note: 11\]](#) It was then that her lawyers informed her that a caveat had been lodged by Ms Nie against the grant of probate. As Ms Khor had always known Ms Nie as "Jessie", she did not know that they were the same person until later. It was only after speaking with Mr Tan and a friend, Teoh Teik Kee ("Mr Teoh"), that she drew the connection between the caveat that was filed by Ms Nie and the \$762,000 investment purportedly made by Mr Tan. [\[note: 12\]](#)

The meeting between Ms Khor and Mr Tan in the presence of Samuel Koh

7 In order to understand the circumstances surrounding the alleged debt of \$762,000, Ms Khor met Mr Tan on 23 May 2014 with a friend, Samuel Koh ("Mr Koh"). At the meeting, Mr Tan stated that the deceased had owed him US\$500,000. This sum was Mr Tan's investment in the deceased's Vietnam project. This was an investment in Tri Viet Media Corp ("TVM"), a Vietnamese media company. [\[note: 13\]](#)

8 As proof of Mr Tan's investment, Ms Khor was shown copies of the remittance advice to the deceased. She was also shown text messages sent through WhatsApp Messenger between Mr Tan and the deceased, indicating that the deceased had asked Mr Tan to prepare a *curriculum vitae* to be presented to a Vietnamese company with him as a potential investor. [\[note: 14\]](#)

9 Ms Khor later understood from the meeting that Mr Tan had subsequently borrowed money from Ms Nie to invest in TVM – he did not have the money to invest in the project then. As the deceased had passed away, Mr Tan sought a return of his investment and the caveat was filed to protect his investment interest. [\[note: 15\]](#)

The show cause action

10 On 26 May 2014, a notice was served on Ms Nie's solicitors. It warned her to appear within eight days of service to file a notice of appearance stating her interest in the estate of the deceased. If she had no contrary interest, then she had to show cause against the grant of probate to Ms Khor. The court would proceed to issue a grant of probate to the executor if she defaulted. [\[note: 16\]](#)

11 Ms Nie thus entered her appearance on 3 June 2014 showing cause against the grant of probate to Ms Khor. She alleged that she was a creditor of the deceased's estate. Therefore, the grant of probate should not be made unless her interests could be assured. On the other hand, Ms Khor requested that Ms Nie's caveat be expunged. [\[note: 17\]](#)

12 In addition to her objections against the grant of probate to Ms Khor, Ms Nie also requested that her claim be recognised and that the court make an order for Ms Khor to repay the debt to her. [\[note: 18\]](#)

The issues

13 On the above facts, the following issues are:

- (a) whether this court has the power under s 33 of the Probate and Administration Act (Cap 251, 1985 Rev Ed) ("PBA") to hear or grant Ms Nie's application for her debt claim to be recognised or to order that the debt be repaid to her; and
- (b) whether Ms Nie has a caveatable interest against the deceased's estate.

Does this court have the power under s 33 of the PBA to hear Ms Nie's debt claim or grant Ms Nie's application for her debt claim to be recognised or to order that the debt be repaid to her?

14 Section 33 of the PBA reads as follows:

Caveat

33. Any person having or claiming to have interest may, at any time after the death of a deceased person and before probate or letters of administration have been granted to his estate, enter a general caveat, so that no probate or letters of administration shall be granted without notice to the caveator, and after entry of any such caveat no such grant shall be made until the caveator has been given opportunity to contest the right of any petitioner to a grant.

15 Ms Khor submits that this court does not have the power under s 33 to hear or grant Ms Nie's application. This is because, in her view, the court neither has the power to recognise Ms Nie's debt claim of \$762,000, nor the power to order the executor to pay the alleged debt owed to Ms Nie when probate has yet to be granted. [\[note: 19\]](#) She also submits that this power is absent under O 71 r 37 of the ROC. [\[note: 20\]](#) Does this court have the power under s 33 of the PBA or O 71 r 37 of the ROC to adjudicate on Ms Nie's debt claim before the grant of probate? In order to determine this question, regard must be had to the purpose of s 33 of the PBA.

16 Section 33 allows one to lodge a caveat against the grant of probate. The person seeking the grant of probate will then be notified before the grant of probate is issued: *Halsbury's Laws of Singapore* vol 15 (LexisNexis, 2013 Reissue) ("*Halsbury's Laws of Singapore*") at para 190.015. The following passage from Jonathan Winegarten, Roland D' Costa & Terry Synak, *Tristram and Coote's Probate Practice* (LexisNexis, 30th Ed, 2013) at para 23.04 is instructive (see also G Raman, *Probate and Administration in Singapore and Malaysia* (LexisNexis, 3rd Ed, 2012) ("*Probate and Administration in Singapore and Malaysia*") at p 134):

The following are some of the purposes for which a caveat may be entered:

- (a) to give time to the caveator to make enquiries and to obtain such information as may enable him to determine whether or not there are grounds for his opposing the grant;
- (b) to give any person interested in the estate an opportunity of bringing any question arising in

respect of the grant before the court on summons; and

(c) as a step preliminary to a probate claim, or to the issuing of a citation ...

Once the caveat has been filed, the caveator has to show cause why the grant of probate should not be given. Typically, the show cause action would take place when the caveator wants some form of assurance that the deceased's estate would be administered in the interests of all the beneficiaries: *Probate and Administration in Singapore and Malaysia* at p 135.

17 Accordingly, I am of the view that this court does not have the power under s 33 of the PBA or O 71 r 37 of the ROC to decide on the merits of Ms Nie's debt claim. The power under s 33 of the PBA or O 71 r 37 of the ROC should *only* be invoked insofar as Ms Nie seeks to establish a contrary interest in the estate, which arises if she is claiming an interest either as an executor or beneficiary of the will: Ng Peng Hong, George Tan Keok Heng and Ho Hock Lai, *Atkin's Court Forms Singapore* (LexisNexis, 2007) at para 1004. The rights of a creditor should not be adjudicated at this stage. As Sir William Wynne in *Elme v Da Costa* (1791) 1 Phill Ecc 174 at 177 held:

The right of a creditor is only this; *he cannot be paid his debt till a representation to the deceased is made*; he can then call on all who have a right to administer; before an administration is granted if a will be produced, the creditor has no right to contradict or deny it; for if there is a will, or a next of kin claims the administration, then a person offers to make himself a representative, and the creditor gets all that he has a right to. [emphasis added]

18 It is clear that the caveat lodged by Ms Nie cannot circumvent the usual probate procedure. If she is alleging that she is a creditor of the deceased, she should wait for the executor to obtain the grant of probate before submitting her claim to the estate via the executor or administrator: *Halsbury's Laws of Singapore* at para 190.095. It is not for this court to adjudicate on her claim at this stage and find that she was owed a loan or make an order for its return.

19 Moreover, Ms Nie's position is that she does not object to Ms Khor administering the estate. She is only interested in recovering what she claims is owed to her. The filing of the caveat in this case is therefore misconceived, as there is no basis to withhold the grant of probate to Ms Khor. I agree with Ms Khor's submission that the court does not have the power to hear or grant Ms Nie's debt claim of \$762,000 under s 33 of the PBA or O 71 r 37 of the ROC. I shall now examine whether Ms Nie has a caveatable interest against the deceased's estate.

Does Ms Nie have a caveatable interest against the deceased's estate?

20 The parties' dispute is with respect to the nature of the sum and whether it constitutes a caveatable interest. Ms Nie submits that the \$762,000 is a loan which is due to her from the deceased. Ms Khor, on the other hand, submits that it is an investment, the sum being given pursuant an investment made by Mr Tan in TVM. A third view appears tenable as well from the evidence of Mr Tan. He is of the view that the sum had been lent to him by Ms Nie for his investment in TVM. While he has provided a third possible view, it is important to note that he is not party to the proceedings.

21 Which of the three versions is correct is, in my view, immaterial. I hold that none of them amounts to a caveatable interest in this case. In *Re Devoy; Fitzgerald v Fitzgerald* (1943) QSR 137 ("*Re Devoy*") at 144, it was held that:

... It is conceded that a person who merely had an interest or pretended interest in the estate could not, merely upon showing such an interest or pretended interest, oppose a will: he must

have been able to show that the grant of probate would affect some interest of his. It is also conceded that the law provided that no person could intervene in a probate action merely because he was interested in the estate: he must have shown that he was interested in the cause. ...

A person's interest arising under a loan or an investment is not such an interest.

Is a loan a caveatable interest?

22 Loans do not give rise to caveatable interests under s 33 of the PBA. This has been the position in the United Kingdom (*Burroughs v Griffiths and Hall* (1754) 1 Lee 544 ("*Burroughs*")), Hong Kong (*Re John Tung Chi Ying* [1987] HKCFI 57 ("*Re John Tung Chi Ying*")) and Australia (*Re Donald Keith Owen*, 21 August 1992 (unreported)). In fact, creditors who have lodged caveats have been criticised as abusing the caveat process. I agree.

23 I find the facts of *Re John Tung Chi Ying* germane to this case. In that case, John Tung passed away and left behind a will. His grandnephew asserted that he had loaned John Tung US\$11m which had remained unpaid. On that basis, the grandnephew lodged a caveat and subsequently, the executor of the will sought to expunge the caveat. The application to expunge the caveat was allowed. It was held that the grandnephew's actions were "inexplicable and unjustified". His interests were better protected and preserved after the grant of probate.

24 Parallels can be drawn between *Re John Tung Chi Ying* and the present case. Here, Ms Nie's caveat is premised on her assertion that the \$762,000 was a loan to the deceased. Her interest is for the return of the \$762,000 to her. This was apparent when she stated in the affidavit that she had lodged the caveat only to protect her own interests. She was willing to withdraw the caveat provided Ms Khor gave her some assurances with respect to the debt. I find no reason to maintain the caveat on the basis of a loan and hold that the caveat must be expunged from the register.

Is an investment a caveatable interest?

25 I also do not find that an interest pursuant to an investment can give rise to a caveatable interest under s 33 of the PBA. In *Re Devoy* at 145, it was held that:

... [A] person "interested" or "interested in the estate" cannot enforce the bringing of an action in which he can dispute the validity of the will, unless he can show an interest sufficient to entitle him to object to the grant applied for.

How is the sufficiency of that interest to be determined? I know of no other way than by reference to the general body of probate law; *and according to that law an interest sufficient to entitled a person to object to a grant must be some right of that person which will be affected by the grant.*

[emphasis added]

In my view, if the \$762,000 were an investment instead of a loan as Ms Khor contends, it is still not a caveatable interest as it is not a probate issue.

26 Here, the preliminary question would be whether Ms Nie even has any standing to bring an action against Ms Khor as the executor, since the investment was made by Mr Tan. She merely lent money to her husband; she would have no standing to make this application against Ms Khor. Second,

if the \$762,000 was an investment, Mr Tan's investment could be held by the deceased on trust for Mr Tan's benefit or could even be held legally by Mr Tan. If the former, Ms Nie's interest would be best taken care of if the grant of probate is given to Ms Khor. Mr Tan can then work with Ms Khor as the executor to realise his beneficial interest under the \$762,000. If the latter, Ms Nie's interest would be best taken care of between herself and Mr Tan. Ms Khor will not be involved. Therefore no caveatable interest can arise from an investment interest.

Is Ms Nie's claim on moneys had and received sustainable?

27 Finally, I wish to comment on Ms Nie's claim on the grounds of unjust enrichment. Ms Nie submits that her claim is one for monies had and received. She relies on *Tjong Very Sumito and others v Chan Sing En and others* [2012] 3 SLR 953 at [81] for the elements of unjust enrichment. She submits that it is *unjust* for the deceased's estate to retain the sum claimed for.

28 In *Alwie Handoyo v Tjong Very Sumito and another and another appeal* [2013] 4 SLR 308 at [125], the Court of Appeal held that:

... **Plaintiffs should be precise in elucidating the basis for their restitutionary claims.** Identifying the precise underlying cause of action for a restitutionary claim has practical consequences in terms of affecting what the plaintiff needs to show in order to establish the claim. We agree with the comment by the editors of *Goff & Jones (8th Ed)* ([101] *supra*) at para 1.29 that "[t]he old language of 'money had and received' ... conceals as much as it reveals about the nature of a claim". In our view, the underlying basis for the action for money had and received is now embraced under the rubric of *unjust enrichment*: see *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 at 710.

[original emphasis in italics; emphasis added in bold]

29 Ms Nie's bare assertion of an enrichment being unjust is insufficient if she seeks to establish her claim based on money had and received. The same point was noted by Judith Prakash J in *Lo Man Heng and another v UBS AG (Yap Loo Mien, third party)* [2014] SGHC 134 at [82]: that an unjust enrichment claim must be premised on an "unjust factor". Since Ms Nie has not shown that any such unjust factor exists, I hold that her claim based on moneys had and received can neither succeed nor form a basis for a caveatable interest.

30 There are material differences in the facts of *Tan Beng Tian v Teoh Hock Kooi* [2012] SGDC 268 which Ms Nie relied on to show that the court had ordered a refund of an investment sum. In that case, the defendant, who was the recipient of the money in question, had induced the plaintiff by stating that if the plaintiff remained unconvinced about the investment potential of a potential investment, the defendant would return the investment sum to the plaintiff. There was no evidence of such facts before me.

Is the sum claimed for an investment or loan?

31 The purpose of the \$762,000 is a hotly contested issue between the parties. It is not necessary for me to dwell on this issue as I have explained above that I have no power under s 33 of the PBA to recognise Ms Nie's claim or to make an order for the debt to be repaid to her. Neither does Ms Nie have a caveatable interest against the deceased's estate. Since the purpose of \$762,000 is central to this application, I shall therefore give my views on whether the \$762,000 is more likely to be a loan or an investment. However, I stress that my findings are only on the evidence before me. They are without prejudice to Ms Nie's right to subsequently bring a claim for the \$762,000 on the

basis that it is a loan if it is necessary for her to do so later.

The case for the \$762,000 being an investment

32 Ms Khor's position is that the \$762,000 was a sum of money which Ms Nie lent to Mr Tan for the purpose of investing with the deceased in TVM. Ms Nie and Mr Tan were aware that the deceased had an investment in TVM. According to Mr Tan's affidavit, it is undisputed that in December 2013, the deceased was keenly interested in TVM. At that time, the deceased required US\$2m for the first tranche of the investment.

33 The crucial issue is whether the deceased borrowed \$762,000 from Ms Nie for this investment or whether Mr Tan used this sum to invest together with the deceased. Mr Teoh, who knew the deceased, Ms Khor and Mr Tan, stated in his affidavit that the deceased had told him that Mr Tan and the deceased had invested in TVM through the deceased's investment vehicle ADAD Investments Pte Ltd. [\[note: 21\]](#) Mr Tan denied this. Mr Teoh also said that he was surprised to learn that Ms Nie extended a loan of \$762,000 to the deceased in December 2013. [\[note: 22\]](#)

34 Furthermore, Ms Khor said that when she met Mr Tan on 23 May 2013 together with Mr Koh, Mr Tan stated that the deceased owed him US\$500,000. This sum was Mr Tan's investment in TVM. This investment proposition is corroborated by a series of text messages sent through WhatsApp Messenger from Mr Tan to the deceased in January 2014. The messages are as follows: [\[note: 23\]](#)

Deceased:	Also, next step, pls prepare ur CV (as Investor - why they want u!), let me hv a look to provide feedback. Best sw.
Mr Tan:	Noted.... will do
Deceased:	Also, wld appreciate ur intro to the potential investor + provide me with the contact details to follow up..

Mr Tan also admitted that he had attended the annual dinner of TVM in Vietnam with the deceased and Mr Teoh on 24 January 2014. However, he alleged that his attendance was not in his capacity as an investor.

The case for the \$762,000 being a loan

35 Ms Nie's story was that the sum was a loan due to her from the deceased. However, there was no documentary evidence in either hardcopy or electronic form to indicate that it was a loan. As Ms Khor pointed out, all that Ms Nie had tendered in support of her claim was a remittance advice from her in favour of the deceased. [\[note: 24\]](#) The only other piece of evidence was the affidavit of Ms Nie's husband, Mr Tan, who echoed her assertion that the \$762,000 was a loan. If it were a loan, it lacked the essential characteristics of one. Was it a demand or term loan? If it was a term loan, what was the duration of that loan? Was it an interest free or interest chargeable loan? Those questions were left unanswered by the evidence before me.

36 It appears from Mr Tan's affidavit that "[b]ased on my understanding, [the deceased] had been prepared to pay interest of at least 4% per annum on the loan amount". [\[note: 25\]](#) The 4% is merely what Mr Tan thought should be the interest rate. There was no discussion or agreement between the deceased and Ms Nie or Mr Tan as to the interest rate and hence no indication whether the deceased agreed to the 4% per annum. I find it unusual for the lack of evidence as the sum loaned is not a

small figure. Even among the best of friends, at the very least, one would expect some evidence with respect to the interest rate for a loan figure of \$762,000.

37 Ms Nie's explanation is that the absence of any interest rate was due to the fact that the loan was taken out on an urgent basis. However I find that the evidence indicated otherwise. The purported loan was given on 30 December 2013 and the demise of the deceased was on 18 March 2014. For ten weeks, there had been no documentary or electronic correspondence on this loan. I find it incredible that parties as sophisticated as the deceased and Mr Tan, would have made the loan in this manner, even taking into account their friendship ties. Therefore, in my view, Ms Nie's contention that the sum was a loan is less convincing.

The case for the \$762,000 as an investment is stronger

38 The circumstances above thus seem to point towards the fact that the deceased and Mr Tan were investing in TVM. Ms Khor's version of the events was also corroborated by Mr Teoh's account. While Mr Tan filed an affidavit in support of Ms Nie's version of the events, it appears that Ms Khor's version is more likely having regard to the above facts. Ms Nie's evidence is mostly premised on bare assertions, with the only person corroborating her story being her husband, Mr Tan. I thus find that on the evidence before me it is more likely that the \$762,000 is an investment rather than a loan.

Conclusion

39 In my view the proceedings would have been expedited and Ms Nie would have been able to recover the \$762,000 sooner (if it was really a loan) had she not lodged the caveat and refused to take it off the register. The views of Sir George Lee in *Burroughs* at 551 are apposite:

... [A] creditor had only a right to have a constat of the deceased's estate, to see whether there were assets sufficient to pay the debts, but could not controvert the validity of a will, for it was indifferent whether he should receive his debt from an executor or an administrator, and if a creditor was admitted to dispute the validity of a will, it would create infinite trouble, expense and delay to executors ...

40 It is also pertinent to note that Ms Nie does not oppose the grant of probate to Ms Khor. Thus there is no issue with respect to the grant of probate. I therefore allow the application made by Ms Khor, the executor, and order that the caveat be struck off the register and the grant of probate to be issued. I also dismiss Ms Nie's application for the \$762,000 to be returned to her and will hear the parties on costs.

[\[note: 1\]](#) Caveator's bundle of documents ("CBOD") Tab 8, at para 5.

[\[note: 2\]](#) CBOD Tab 8, at para 4.

[\[note: 3\]](#) CBOD Tab 3, at p 8.

[\[note: 4\]](#) CBOD Tab 1.

[\[note: 5\]](#) CBOD Tab 1.

[\[note: 6\]](#) CBOD Tab 7, at para 7.

[\[note: 7\]](#) CBOD Tab 7, at para 6.

[\[note: 8\]](#) CBOD Tab 7, at para 9.

[\[note: 9\]](#) CBOD Tab 8, at para 18.

[\[note: 10\]](#) CBOD Tab 2.

[\[note: 11\]](#) CBOD Tab 3.

[\[note: 12\]](#) CBOD Tab 8, at paras 20– 21.

[\[note: 13\]](#) CBOD Tab 8, at para 22; CBOD Tab 9, at para 5.

[\[note: 14\]](#) CBOD Tab 8, at para 22.

[\[note: 15\]](#) CBOD Tab 8, at para 24.

[\[note: 16\]](#) CBOD Tab 4.

[\[note: 17\]](#) CBOD Tab 8, at para 7.

[\[note: 18\]](#) CBOD Tab 7, at para 19.

[\[note: 19\]](#) Applicant’s skeletal submissions (“AS”), at para 14.

[\[note: 20\]](#) AS, at para 15.

[\[note: 21\]](#) CBOD Tab 9, at p 3 para 9.

[\[note: 22\]](#) CBOD Tab 9, at p 3 para 10.

[\[note: 23\]](#) CBOD Tab 8, at p 11.

[\[note: 24\]](#) CBOD Tab 7, at p 7.

[\[note: 25\]](#) CBOD Tab 11, at p 5 para 7(f).

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