IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2017] SGCA 1

Civil Appeal No 35 of 2015

Between

CHIANG SHIRLEY

… Appellant

And

CHIANG DONG PHENG

… Respondent

GROUNDS OF DECISION

[Civil Procedure] — [Judgments and Orders]

Chiang Shirley
v
Chiang Dong Pheng

[2017] SGCA 1

Court of Appeal — Civil Appeal No 35 of 2015
Sundaresh Menon CJ, Chao Hick Tin JA and Chan Sek Keong SJ
30 November 2016

5 January 2017

Sundaresh Menon CJ (delivering the grounds of decision of the court):

1 Chiang Shirley ("the Appellant") and Chiang Dong Pheng ("the Respondent") are siblings. Since their late father passed away in 2009, the parties have been embroiled in a dispute regarding the administration of his estate ("the Estate"). The present appeal arose out of a consent judgment that was entered in connection with the distribution of the Estate. Specifically, the Appellant was dissatisfied with the fact that the Judicial Commissioner who heard the matter ("the Judge") purported to exercise an "administrative" power to vary the deadline for the Respondent to comply with one of the payment obligations incumbent upon him under the terms of the consent judgment.

2 It is well-established that the court does not readily interfere with a consent judgment which the parties have agreed to. The issue that arose in this appeal was whether the Judge had the power to vary the deadline for

complying with a payment obligation that was contained in the consent judgment on the basis, among other things, that the time for the performance of that obligation was not of the essence. After hearing the parties, we allowed the appeal. We found that the Judge had erred in varying the deadline for payment which all parties had agreed to. We granted the Appellant interest at a rate of 5.33% per annum on the sum due to her from 3 January 2015, being the date on which payment ought to have been made, until the actual date of payment. Given that the appeal raised an important point of law regarding the court's powers in respect of consent judgments, we have decided to set out the grounds of our decision.

Background facts

3 Civil Appeal No 35 of 2015 ("CA 35/2015") arose from Suit No 820 of 2012 ("S 820/2012"), which was commenced by the executrix of the Estate to seek orders in relation to the distribution of the Estate. The five beneficiaries, namely, the Appellant, the Respondent, their sister Currie Chiang ("the third defendant"), the parties' late mother ("the fourth defendant"), and the late father's mistress ("the fifth defendant"), were defendants to the suit.

4 S 820/2012 was heard in two tranches. The first tranche was heard before the Judge from 7 to 16 January 2014. On 16 January 2014, the parties reached a settlement on the issues relating to the fifth defendant's entitlement under the late father's will ("the Will") and entered into the first consent order ("the First Consent Order"). The fifth defendant's interest was premised on clause 5 of the Will, under which the late father bequeathed the property situated at 33 Merryn Road to her. Under the First Consent Order, the parties agreed that clause 5 of the Will was valid and that the property situated at 33

Merryn Road would be transferred to the fifth defendant. Importantly, the parties agreed at paragraph 7 of the First Consent Order that "[t]here be no order as to costs with respect to issue of Clause 5 of the Will". A significant part of the litigation in the first tranche related to clause 5 of the Will, and the Appellant, the Respondent and the third and fourth defendants had all taken the common position that clause 5 of the Will was invalid.

5 On 1 and 2 July 2014, the second tranche proceeded for hearing without the involvement of the fifth defendant. On 2 July 2014, the remaining parties (namely, the Appellant, the Respondent, the third and the fourth defendants) reached a settlement on all the outstanding matters and entered into a consent judgment ("the Consent Judgment"). The parties agreed, among other things, that:

(a) The Respondent, as the surviving account holder of RHB Bank (L) Limited Account Number [redacted], was to divide the remainder balance of US$659,449.29 in the said account between the Appellant, the Respondent and the third defendant equally within six months of the Consent Judgment (paragraph 3 ("Para 3")).

(b) Costs were to be reserved to the Judge (paragraph 9).

(c) Parties were at liberty to apply (paragraph 10).

6 It is clear that under Para 3, the Respondent was obliged to pay the Appellant a third of the balance of US$659,449.29 within six months of 2 July 2014. The parties all agreed that this meant that payment was to be made by the Respondent on or before 3 January 2015. That date came and went, but the Respondent made no such payment. On 8 January 2015, the Appellant wrote to the Respondent's counsel demanding that the Respondent comply with Para

3, and threatening legal proceedings if the sum of US$219,816.43 (being a third of the total sum of US$659,449.29) was not paid to her by 9 January 2015 at 5pm. After receiving the Appellant's letter, the Respondent's counsel wrote to the court on the same day urgently asking for "further directions and/or consequential orders pursuant to prayer 10 of [the Consent Judgment] that distribution under [Para 3] be effected after the taxation and payment of costs ordered thereunder by the [Appellant] to the Plaintiff and 2nd to 4th Defendants".

7 In a series of letters dated 9, 12 and 13 January 2015 sent in reply to the Respondent's letter, the Judge confirmed that "distribution under [Para 3] of [the Consent Judgment] be effected after taxation and payment of costs ordered thereunder by [the Appellant]". On 10 February 2015, the Judge sent a final letter to the parties confirming the decision he communicated earlier, and stating that he would not entertain any further correspondence. Unhappy with the Judge's decision, the Appellant filed CA 35/2015 on 17 February 2015 against the Judge's decision "on 10 February 2015 in relation to the variation of [the Consent Judgment]".

8 Separately, by the time CA 35/2015 came before us, costs between the parties had been decided and taxed by the Judge. We briefly set out the events leading to the eventual taxation of costs:

(a) On 21 July 2014, the Judge heard the parties on costs pursuant to paragraph 9 of the Consent Judgment (see [5(b)] above). He ordered, among other things, that the Appellant was to pay 70% of the Respondent's and the third and fourth defendants' costs on a standard basis.

(b) On 18 August 2015, the Judge clarified that his 21 July 2014 costs order included the costs the Respondent and the third and fourth defendants incurred in relation to the litigation over clause 5 of the Will. He further stated that paragraph 7 of the First Consent Order (see [4] above) did *not* extend to costs incurred by parties other than the fifth defendant in relation to the clause 5 dispute.

(c) On 25 January 2016, the Judge reviewed the assistant registrar's taxation order and increased the Respondent's and the third and fourth defendants' Section 1 costs to $280,000. The Appellant was thus ordered to pay the Respondent and the third and fourth defendants 70% of $280,000.

9 The Appellant sought leave to appeal against the Judge's decision to award the Respondent and the third and fourth defendants the costs they incurred in relation to clause 5 of the will in Civil Appeal No 16 of 2016 ("CA 16/2016"). She submitted that pursuant to paragraph 7 of the First Consent Order, the parties had agreed that there was to be no order as to costs with respect to the dispute over clause 5 of the Will. The Judge had therefore erred in awarding the Respondent and the third and fourth defendants the costs they incurred in relation to clause 5 of the Will. Following the Judge's refusal to grant leave to appeal, the Appellant sought and obtained leave from the Court of Appeal to appeal against this part of the Judge's decision on costs.

10 As it transpired, by the time CA 35/2015 came before us, the appeal had been almost entirely overtaken by the fact that the quantum of costs owed by the Appellant had been determined and could be set off against the sum owed to the Appellant, as eventually directed by the Judge. Indeed, the Respondent's position at the appeal was that he no longer owed anything to

the Appellant under Para 3 as he had (a) set off the sum he owed to the Appellant against the costs the Appellant had to pay him; and (b) paid the balance due to the Appellant under Para 3 to the plaintiff in S 820/2012, to set off the costs the Appellant owed the plaintiff.

11 CA 35/2015 and CA 16/2016 were heard on the same day. Having heard the parties, we were persuaded that the Judge had erred in awarding costs in relation to clause 5 of the Will to the Respondent and the third and fourth defendants. Paragraph 7 of the First Consent Order expressly stated that there was to be no order as to costs with respect to the issue of clause 5 of the Will. There was no basis for the Judge to have construed this as not extending to the costs as between the Appellant and the other parties. We note in this regard that the other parties had taken a largely common stand with the Appellant on this issue. We therefore reduced the costs award against the Appellant by half, from 70% of $280,000 to 70% of $140,000. We also ordered the Respondent to pay the Appellant interest at 5.33% per annum on the sum of $219,816.43 from 3 January 2015 until the date of set-off or payment (see [22] below).

The decision below

12 In his grounds of decision, which is reported as *Ong Chai Hong (sole executrix of the estate of Chiang Chia Ling, deceased) v Chiang Shirley and others* [2015] 3 SLR 1088 ("the GD"), the Judge explained at [9] that his order varying the terms of Para 3 was "administrative in nature... [and not] a consequential order or a direction pursuant to the "liberty to apply" provision". He added that in making the 21 July 2014 costs order, he had intended for payment under Para 3 to be effected *after* costs were agreed or taxed.

13 He explained as follows (at [10] and [11]):

> 10 I had in mind as to the practical course of things as applied to the context of the Consent Judgment and the Costs Order. The Consent Judgment provided for a fixed sum to be paid to the first defendant within six months. It also reserved costs to the trial judge. In my subsequent Costs Order, I required the first defendant to pay most of the costs of both the Plaintiff and the other defendants. Therefore, it made practical sense that the payment sequence was for payment to the first defendant to be made after the costs were determined. This would facilitate "netting off", which is appropriate in a situation where there are multiple payments moving in different directions between acrimonious parties. Netting off also minimises the risk of dissipation, thus ensuring that the costs orders will not be rendered nugatory.
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> 11 …I did not think that the time period was of the essence in construing the terms of the Consent Judgment. Most importantly, I took the view that the first defendant was not prejudiced as her entitlement to the proceeds of distribution, which was to me, the crux of the Distribution Term, would always remain.

In short, the Judge justified his decision on the basis that (a) there was practical sense in re-ordering the payment sequence where there are multiple payments moving in different directions between acrimonious parties; (b) the risk of dissipation should be minimised; (c) time was not of the essence in the Consent Judgment; and (d) the Appellant was not prejudiced by the direction as her entitlement to the proceeds remained.

14 The Judge then held that even if his confirmation amounted to "a consequential order or further direction pursuant to the "liberty to apply" proviso in the Consent Judgment", it did not affect the substance of the Consent Judgment and merely supplemented the main orders in "form and convenience" (the GD at [12]).

The appeal

15 The Appellant submitted that the parties never intended for the Respondent's payment obligation under Para 3 to be dependent upon her payment of costs. The Judge's decision amounted to a variation of the Respondent's payment obligation under Para 3 and there were no exceptional circumstances justifying such a variation. Further, the Appellant submitted that the sums owed to her by the Respondent should not have been used to offset the costs she owed the Respondent, the third and fourth defendants, or the Plaintiff.

16 The Respondent on the other hand relied on the Judge's reasoning that his decision was "purely administrative in nature" and that it did not amount to a substantive variation of the Consent Judgment because the Appellant remained entitled to the same sum of money. The Respondent also submitted that the Judge's direction only served to clarify the payment sequence and was consistent with the overall intent and purpose of the Consent Judgment. Finally, the Respondent submitted that the Appellant had not been prejudiced by the Judge's direction given that her entitlement to payment under Para 3 remained.

Our reasons for allowing the appeal

17 First, it was abundantly clear to us that the Judge was neither clarifying nor merely confirming the import of Para 3; rather, the Judge had *varied* the Respondent's payment obligation under Para 3. The language of Para 3 was clear and unequivocal. Para 3 expressly stipulated that the Respondent was to distribute the sum of US$659,449.29 *within six months of 2 July 2014*. Nothing about the "context" of the Consent Judgment justified or supported a different interpretation of the deadline for compliance in Para 3. Specifically,

there was nothing to suggest that the Respondent's obligation to distribute the sums in the bank account in question was dependent on or subject to the prior determination or payment of costs by the Appellant. The Respondent was also unable to produce any correspondence to the effect that the parties all understood that Para 3 was only to be complied with after costs had been determined. Thus, in the face of the clear language of Para 3, the Judge's decision to allow the Respondent to perform his distribution obligation in Para 3 only after costs had been taxed was, in our view, clearly and unequivocally a variation of the Consent Judgment.

18 Second, following from this, we were satisfied that the Judge did not have any "administrative" power to vary the Consent Judgment as he did. In this regard, we found no legal basis for the Judge's invocation and exercise of a purported "administrative" power to vary the Consent Judgment. No statutory provision or case authority was cited in support of such an "administrative" power. The court's jurisdiction to interfere with consent judgments is, generally, a very limited one. In *Poh Huat Heng Corp Pte Ltd and others v Hafizul Islam Kofil Uddin* [2012] 3 SLR 1003 at [18], we held that "[a] consent judgment or consent order is binding and cannot be set aside save for exceptional reasons". These exceptional reasons included "grounds that would justify the setting aside of a contract" (*Wiltopps (Asia) Ltd v Drew & Napier and another* [1999] 1 SLR(R) 252 at [27]) and "fraud" (*Bakery Mart Pte Ltd v Ng Wei Teck Michael and others* [2005] 1 SLR(R) 28 at [11]). Recognising an "administrative" power to vary the Consent Judgment, as the Judge did, would impermissibly extend the court's jurisdiction to interfere with consent orders. For completeness, we would also add that the direction that the Respondent did not have to comply with his payment obligation by early January 2015 as stipulated in the Consent Judgment had a *substantive*

impact on *when* the Appellant would receive her money and such a direction could not be characterised as merely *administrative*.

19 Third, even leaving aside the court's jurisdictional limitations in relation to consent judgments, the substantive justifications the Judge provided for deciding as he did (see [13] above) were ill-conceived. In particular, we note the following:

(a) there was no evidence or suggestion by the parties of a *risk of dissipation* on the Appellant's part;

(b) there was no basis to find that *time was not of the essence* given that timelines for payment had been stipulated and are often important to parties, and it was clearly a matter of importance to the Appellant in this case who had written to seek payment once the deadline had passed; and

(c) the Appellant was undoubtedly *prejudiced* by the Respondent's delayed distribution of the sum due to her since she did not have use of the money at a time when she was entitled to it.

While the Judge's decision may well have made "practical sense", this, in our view, afforded no basis to vary a distribution obligation that the parties had agreed to.

20 Fourth, insofar as the Judge's direction was purportedly issued pursuant to the "liberty to apply" proviso in the Consent Judgment, it was, in our judgment, erroneously issued. It is "settled law that the "liberty to apply" order is only intended to supplement the main orders of the court in form and convenience so that the main orders may be carried out and may not be used to

vary the order of the court" (*APE v APF* [2015] 5 SLR 783 at [12] [emphasis omitted]). The Judge's decision to waive compliance with the timeline stipulated in Para 3 of the Consent Judgment could not be considered a mere "supplement" to the main orders "in form and convenience"; it was, as we explained, a *variation* of the Respondent's deadline for complying with his obligation under Para 3.

21 Finally, for completeness, we found that there were neither grounds that would justify the setting aside of a contract, nor was there fraud (see [18] above). The Judge therefore had no power to *vary* the Consent Judgment.

Conclusion

22 While we found that the Judge had erred in allowing the Respondent to ignore the deadline for compliance in Para 3, by the time the appeal came before us, costs between the parties had already been determined and at least after our disposal of CA 16/2016, a set-off was possible. We agreed that allowing the Respondent to set-off the costs the Appellant owed to him was a sensible way to proceed. In this regard, the Respondent's counsel clarified that while the costs award was technically made in favour of the Respondent and the third and fourth defendants, it could, in substance, be treated as an award made in favour of the Respondent alone because he had borne all the costs of the litigation incurred by himself and the third and fourth defendants. We therefore ordered that the Respondent was to pay the Appellant the remaining sum due to her after setting off the costs the Appellant was to pay the Respondent and the third and fourth defendants. Additionally, we ordered the Respondent to pay the Appellant interest at 5.33% per annum on the sum of $219,816.43 from 3 January 2015 to the date he either set-off or paid the Appellant the sums due to her.

23 For the avoidance of doubt, we did not think that the Respondent was *entitled* to set-off the costs the Appellant was ordered to pay the plaintiff against the remaining sum that the Respondent was required to pay the Appellant under Para 3, save to the extent he can demonstrate that the Appellant has agreed to this. Absent such agreement, that would be a matter between the Appellant and the plaintiff.

24 In the circumstances, we also awarded the Appellant her reasonable disbursements in connection with these matters and made the usual consequential order for the payment out of the security for the costs of the appeal.

Sundaresh Menon Chief Justice	Chao Hick Tin Judge of Appeal	Chan Sek Keong Senior Judge

The appellant in person;
Ernest Balasubramaniam and Bernadette Chen (Unilegal LLC) for the respondent.