IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2022] SGHC 245

Originating Summons No 288 of 2022
(Summons No 2621 of 2022)

Between

British and Malayan Trustees Limited

… *Applicant*

And

(1) Ameen Ali Salim Talib
(2) Helmi Bin Ali Bin Talib
(3) Murtada Ali Salem Talib
(4) Saadaldeen Ali Salim Talib
(5) Shawqi Ali Salem Talib
(6) Lutfi Salim bin Talib
(7) Zayed bin Abdul Aziz Talib

… *Respondents*

JUDGMENT

[Civil Procedure] — [Parties] — [Representation of interested persons] — [Whether interested persons should be represented pursuant to O 15 r 13(2)(*c*) of the Rules of Court 2014]

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British and Malayan Trustees Ltd
v
Ameen Ali Salim Talib and others

[2022] SGHC 245

High Court — Originating Summons No 288 of 2022 (Summons No 2621 of 2022)
Vincent Hoong J
23 September 2022

30 September 2022 Judgment reserved.

Vincent Hoong J:

1 In the 1930s, a wealthy Yemenese trader ("the Settlor") made provisions to distribute the income from his large portfolio of immovable properties in Singapore amongst his family members and their offspring ("the Settlement"). Under the Settlement, each son and daughter of the Settlor would receive two and one portion of the net income of the Settlement respectively, which portion(s) would be passed on to their offspring in a 2:1 ratio that favours male offspring. Each portion would continue being passed on to subsequent offspring within each beneficiary's lineage unless the beneficiary dies without an offspring or marries out of the Muslim faith.

2 In the last two decades, four beneficiaries have had their lineages broken in the following manner:[1]

(a) Hana Bte Salem Taleb ("Hana"), who was married to a non-Muslim at the time of her father's passing in 2001, and who was thus deemed to have died without offspring under the Settlement;

(b) Noor Bte Ali Bin Sallim Bin Talib ("Noor"), who passed away in 2003 without any offspring;

(c) Salleh Bin Amir Talib ("Salleh"), who passed away in 2008 without any offspring; and

(d) Shafeeq bin Salim Talib ("Shafeeq"), who passed away in 2014 without any offspring.

3 How should the interests of beneficiaries who died without offspring be distributed? After obtaining legal advice, the British and Malayan Trustees Ltd ("the Trustee") decided to divide and hold the shares of the four beneficiaries (see [2] above) amongst all the surviving income beneficiaries under the Settlement ("the *pari passu* interpretation").[2] However, upon Shafeeq's death in 2014, questions began arising as regards the correctness of the *pari passu* interpretation.

4 Being unable to resolve the issue of the proper interpretation under the Settlement, the Trustee took out Originating Summons No 163 of 2019 ("OS 163"). After considering the conflicting legal opinions put forth by the parties, I held that the *pari passu* interpretation was incorrect. Instead, where a

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1 Affidavit of Ngiam Hai Peng (28 March 2022) ("NHP-1") at [22] and [31]–[49].

2 NHP-1 at [16].

beneficiary like Shafeeq passes away without offspring, his or her share ought to accrue to other beneficiaries who own shares under the same lineage (or portion) ("the branch interpretation"). In other words, Shafeeq's share under the Settlement ought to remain within his mother Aisha's portion, in the sense that it ought to accrue to his siblings, who were the surviving beneficiaries under Aisha's lineage, rather than split amongst *all* beneficiaries under the Settlement (see *British Malayan Trustees v Lutfi Salim bin Talib and others* [2019] SGHC 270 at [51]).

5 My decision in OS 163 was not appealed against. As such, owing to the incorrect application of the *pari passu* interpretation in respect of Hana's, Noor's, Salleh's, and Shafeeq's shares, most beneficiaries have been overpaid, while some beneficiaries (*eg,* Shafeeq's siblings) have been underpaid over the years. After some accounting, the extent of overpayment (and concomitant underpayment) to the beneficiaries between November 2001 and November 2019 amounted to $2,959,842.[3]

6 Given the extent of overpayment and underpayment, the Trustee has taken out the present Originating Summons ("OS 288"), seeking directions on whether they may "exercise the [T]rustee's right of equitable recoupment in relation to the past distributions of income … paid to the beneficiaries under a mistaken construction of the terms of the Settlement, … and, if so, the terms on which such said recoupment is to be exercised".

7 In this judgment, I deal with an interlocutory application by five overpaid beneficiaries, namely the 1st to 5th Respondents ("the Group 1 Respondents"), pursuant to O 15 r 13(2)(*c*) of the Rules of Court 2014

3 NHP-1 at [70].

("ROC 2014").[4] The rule provides that the Court may allow certain persons to represent any person or class if "it appears to the Court *expedient* (regard being had to all the circumstances, including the amount at stake and the degree of difficulty of the point to be determined) to exercise the power *for the purpose of saving expense*" [emphasis added].

8 According to the Group 1 Respondents, the application should be granted for parity with OS 163, where a similar application was granted by consent. The prior consent, it is said, leads to "the natural inference" that the present application is necessary "for the purpose of saving expenses" as the present OS follows from my decision in OS 163.[5] This is subject to the caveat that the Group 1 Respondents are agreeable for one Mr Mustafa bin Mohsin bin Salim Talib ("Mr Mustafa") to be excluded from the list of beneficiaries whom they will be representing. Mr Mustafa is an overpaid beneficiary pursuant to the incorrect application of the *pari passu* interpretation, but he supports the proposal of repayment to the underpaid beneficiaries from 2014, being the date when the Shafeeq's siblings first challenged the *pari passu* interpretation, which had gone unchallenged until then.[6]

9 Having carefully considered the parties submissions and affidavits, I only allow the application in part to order that the Group 1 Respondents be appointed the representatives of the 15 (of the 77) non-Respondent beneficiaries who have given their written consent. I do so for the following reasons.

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4 1st to 5th Respondents' Written Submissions (1RWS) at [14].

5 1RWS at [24].

6 NHP-1 at p 251.

10 First, unlike OS 163, where it was not difficult to distinguish between the two groups (*ie,* those advocating for the *pari passu* interpretation and those advocating for the branch interpretation), I agree with the Trustee that it is not clear in OS 288 whether the "interests and positions of all the beneficiaries can be clearly delineated".[7] Even if it is held that the Trustee can exercise its right of equitable recoupment, and even if such right can be practically exercised as against all overpaid beneficiaries (*ie,* all beneficiaries under the *pari passu* interpretation), it cannot be said that all overpaid beneficiaries will adopt a similar stance as regards the recoupment. There are at least three classes of overpaid beneficiaries, namely:

(a) beneficiaries who resist the recoupment entirely;

(b) beneficiaries like Mr Mustafa who may be agreeable to some recoupment, for example up to 2014, when the *pari passu* method of distribution was first challenged;[8] and

(c) beneficiaries who do not resist the recoupment at all, whether because of reasons of equity and fairness or otherwise.

11 Differences may also occur within the above sub-classes. For example, beneficiaries who are agreeable to some recoupment may differ as to the time in which such recoupment should be cut-off. For this reason, it is not possible to interpret the lack of response by the remaining non-Respondent beneficiaries as intimating consent to whatever position that the Group 1 Respondents will be taking. This is particularly so as the position to be taken by the Group 1 Respondents has not been finalised and may be changed upon deeper research

7 Applicant's Written Submissions ("AWS") at [28].

8 NHP's 4th Affidavit at [11] and pp 249 to 251.

of the relevant authorities as regards the issue of equitable recoupment. Given this, sub-divisions may also form within the Group 1 Respondents at a later stage.

12 Furthermore, since Hana's, Noor's, Salleh's, and Shafeeq's shares were all incorrectly distributed pursuant to the *pari passu* interpretation, it is reasonable to infer that at least *some* of the remaining 77 non-Respondent beneficiaries will be underpaid, rather than overpaid, beneficiaries. Accordingly, it is likelier that such underpaid beneficiaries would have positions that align closer to those of the 6th and 7th Respondents ("the Group 2 Respondents"), which includes Lutfi Salim bin Talib, Shafeeq's brother. In addition, sub-groups may also arise amongst the underpaid beneficiaries, for instance as to the appropriate start date for the repayment (if any). It may be envisaged in this regard that beneficiaries sharing Hana's lineage would advocate for a start date of 2001, when she was deemed to have passed without offspring, while Shafeeq's siblings would be content to have a start date of 2014, when Shafeeq passed, since an earlier date would have no practical impact on them.

13 Secondly, it is significant to note that all beneficiaries have been alerted to these proceedings even before it was initiated. Prior to taking out this OS, the Trustee gave all the beneficiaries notice of its intention to do so by way of a Trustee's Circular.[9] Any beneficiary who was interested to be heard in this OS could inform the Trustee, and the Trustee would facilitate the same. After this OS was filed on 28 March 2022, the Trustee then issued another Trustee's Circular, inviting interested beneficiaries to review the filed application and affidavit, while also requesting beneficiaries who wished to be heard by the

9 See NHP-1 at [132]–[137].

Court or participate in the proceedings to inform them accordingly.[10] Following this, on 4 and 5 April 2022 respectively, the Group 2 and Group 1 Respondents wrote to the Trustee through their solicitors, informing the Trustee that they wanted to be heard and to participate in OS 288. On 8 April 2022, the Trustee issued a further Trustee's Circular inviting any other beneficiary to notify them of their intention to be heard in these proceedings. No further responses were received, and on the Trustee's application and by an order of court dated 21 June 2022, the 1st to 7th Respondents were added as respondents to this OS.[11]

14 Put simply, there was more than ample opportunity for interested beneficiaries to be added as Respondents in this OS. Against this, the Group 1 Respondents submit that the majority of beneficiaries are located in Singapore and Yemen, and due to the ongoing conflict and civil war in Yemen, the Trustee has experienced difficulty in communicating with the beneficiaries located there. This may have hindered the ability of certain beneficiaries to contact the Trustee to indicate their intention to participate in these proceedings.[12]

15 In my view, this is entirely speculative. As the Group 2 Respondents submit, the present OS emanates from OS 163, which was initiated more than three years ago. Since then, there have been numerous correspondence between the Trustee and the beneficiaries by way of Trustee's Circulars. No evidence has been tendered by the Group 1 Respondents supporting the assertion that because of the war, these beneficiaries have not been able to participate in the present proceedings. If these beneficiaries were unable to stay in contact with Trustee due to the Yemeni war, this begs the question as to how they have been

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10 Ngiam Hai Peng's affidavit of 27 May 2022 at [7].

11 HC/ORC 3204/2022.

12 1RWS at [16] – [18].

able to receive payments from the Trustee under the Settlement during the same period. It is reasonable to surmise that such payments would not have been insignificant and that notwithstanding the war, at least some of the beneficiaries based in Yemen would have reached out to the Trustee if they stopped receiving such payments. Furthermore, as the Group 1 Respondents accept, the majority of beneficiaries are located in Yemen *and Singapore*. If so, why have the beneficiaries who are not based in Yemen not indicated their intention to participate in these proceedings, notwithstanding repeated notices from the Trustee? The simpler and more obvious answer must be that they have no intention to participate in the present OS, whether for time and costs considerations or otherwise.

16 To this, the Group 1 Respondents submit that the non-Respondent beneficiaries "may not be comfortable with [the Trustee] representing their interests in OS 288".[13] Again, this is entirely speculative, and goes against the grain of the Trustee Circulars sent by the Trustee, which explained that the Trustee was not seeking to represent the interests of the beneficiaries. Rather, by the circulars, interested beneficiaries were invited to indicate their interest so that they may be added as Respondents to OS 288 and to provide their viewpoints for the Court's consideration.

17 Thirdly, and related to the above, it appears improper for the Group 1 Respondents to purport to represent all remaining beneficiaries in the present OS. O 80 r 3 of ROC 2014 provides the mechanism for interested beneficiaries to be added to the OS, and this was the basis by which the Group 1 and 2 Respondents were joined to these proceedings. It also does not appear necessary, nor is it "expedient … for the purpose of saving expense"

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13 1RWS at [37(b)], see also Helmi's First Affidavit at [28].

(O 15 r 13(2)(*c*) of ROC 2014) for the remaining beneficiaries to be added as respondents to OS 288. The present OS has been taken out pursuant to O 80 r 2 of ROC 2014, for a determination of an issue pertaining to the administration of the Settlement. This is significant, because whereas O 15 r 4(2) of ROC 2014 provides that "[w]here the plaintiff in any action claims any relief to which any other person is entitled jointly with him, all persons so entitled must … be parties to the action and any of them who does not consent to being joined as a plaintiff must … be made a defendant", O 80 r 3(2) provides an exception to this general rule:

> (2) *Notwithstanding anything in Order 15, Rule 4(2),* and without prejudice to the powers of the Court under that Order, ***all the persons having a beneficial interest in or claim against the estate or having a beneficial interest under the trust***, as the case may be, to which such an action as is mentioned in paragraph (1) relates ***need not be parties to the action***; but the plaintiff may make such of those persons, whether all or any one or more of them, parties as, having regard to the nature of the relief or remedy claimed in the action, he thinks fit. [emphasis added in italics and bold italics]

18 In other words, for the purposes of the present OS, there is no necessity for the remaining beneficiaries to be added as parties to the action. The mechanism is also clearly in place for any interested beneficiary to be added as a respondent and to provide his or her viewpoint. Despite this and notwithstanding multiple notices by the Trustee for interested beneficiaries to indicate their interest, only the seven Respondents have indicated their interest to being added as parties to this action.

19 For the above reasons, I do not think it expedient for the purpose of saving expense to allow the Group 1 Respondents to represent the interests of all remaining beneficiaries, in particular given that these beneficiaries may diverge into any of the sub-groups discussed at [10]–[12] above and adopt contrasting positions later on. This may complicate the matter further, and it is

improper, by this summons, to dissect and concretise the positions of *all* beneficiaries to the positions to be taken by the Group 1 and Group 2 Respondents only. Accordingly, I allow the summons only in part, in that I will make an order allowing the Group 1 Respondents to act as representatives of the 15 beneficiaries who have provided their express written consent to have their interests represented by the Group 1 Respondents. I note in this regard that neither the Trustee nor the Group 2 Respondents have raised any concerns on the legitimacy of the consent provided by these 15 beneficiaries.[14]

20 I should make it clear that my order does not prejudice any subsequent application by other non-Respondent beneficiaries, such as Mr Mustafa, who wish to be added as respondents; if such applications are made in the future, they will be considered by reference to the applicable principles and will not be foreclosed simply because of the present application.

[14] See 6th and 7th Respondent's Written Submissions at [23]

21 Finally, on the issue of costs, parties are to file their written submissions on costs and disbursements limited to ten pages within 14 days of the date of this judgment, with a right of reply within seven days thereafter, limited to five pages. I will then make my decision on costs.

Vincent Hoong
Judge of the High Court

Mak Wei Munn, Daryl Xu and Rebecca Chia (Allen & Gledhill LLP) for the applicant;
Lem Jit Min Andy and Ng Hua Meng, Marcus (Harry Elias Partnership) for the first to fifth respondents;
Chen Jie'An Jared (Drew & Napier LLC) for the sixth and seventh respondents.