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CACV 227/2004

**IN THE HIGH COURT OF THE  
HONG KONG SPECIAL ADMINISTRATIVE REGION  
COURT OF APPEAL**

**CIVIL APPEAL NO. 227 OF 2004**

**(ON APPEAL FROM NON-CONTENTIOUS APPLICATION FOR  
GRANT NO. 566 OF 2000)**

**BETWEEN**

**IN THE ESTATE of YIP HO (葉好),  
late of No.5 Stanfford Road, Kowloon,  
widow, deceased**

**AND**

**IN THE MATTER of Rule 62 of the  
Non-Contentious Probate Rules,  
Cap. 10A**

**Before: Hon Cheung, Tang JJA and Chung J in Court**

**Date of Hearing: 26 October 2005**

**Date of Judgment: 9 November 2005**

**J U D G M E N T**

**Hon Tang JA (giving the judgment of the Court):**

1. This appeal arose out of the order of Probate Master J Wong dated 18 March 2004 when he directed that “requisition 4(i) raised by the

Probate Registry shall be complied with.” That requisition is in the following terms:

“4. Please amend (1):-

(i) Paras. 1 and 6 – to include Kan Woon Cheung who survived the deceased though since deceased.”

2. The deceased, Yip Ho, died intestate on 17 June 1997, aged 92. Her husband had long predeceased her.

3. She was survived by 8 children, one of whom, Kan Woon Cheung, subsequently died on 6 November 1997.

4. In the affirmation filed on 19 January 2000, paras. 1, 6 and 7 were in the following terms:-

“1. The abovenamed and described deceased late of the above address died at the Baptist Hospital, Kowloon, Hong Kong, on the 17<sup>th</sup> June 1997, intestate, leaving her surviving the following persons being the only persons entitled to share in her estate :-

- a. KAN MOON CHEUNG ALLAN (簡滿章) her natural and lawful son, now aged 69 years;
- b. KAN BING CHEUNG LARRY (簡炳章) her natural and lawful son, now aged 66 years;
- c. KAN KI CHEUNG JONATHAN (簡祺章) her natural and lawful son, now aged 59 years;
- d. KAN WING CHEUNG KENNETH (簡榮章) his natural and lawful son, now aged 56 years;
- e. KAN HUNG CHEUNG (簡鴻章) her natural and lawful son, now aged 49 years.
- f. LEUNG KAN KING CHUN (梁簡琮珍) her natural and lawful daughter, now aged 62 years; and
- g. KAN MAN PING WINNIE (簡曼萍) her natural and lawful daughter, now aged 53 years.

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The deceased was domiciled in Hong Kong.

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6. The said deceased died and leaving her surviving the following issue :-

a. KAN MOON CHEUNG ALLAN (簡滿章) her natural and lawful son, now aged 69 years;

b. KAN BING CHEUNG LARRY (簡炳章) her natural and lawful son, now aged 66 years;

c. KAN KI CHEUNG JONATHAN (簡祺章) her natural and lawful son, now aged 59 years;

d. KAN WING CHEUNG KENNETH (簡榮章) her natural and lawful son, now aged 56 years;

e. KAN HUNG CHEUNG (簡鴻章) her natural and lawful son, now aged 49 years.

f. LEUNG KAN KING CHUN (梁簡琮珍) her natural and lawful daughter, now aged 62 years; and

g. KAN MAN PING WINNIE (簡曼萍) her natural and lawful daughter, now aged 53 years.

The said deceased had no other lawful children or issue either surviving or predeceasing her than the said Kan Moon Cheung Allan, Kan Bing Cheung Larry, Kan Ki Cheung Jonathan, Kan Wing Cheung Kenneth, Kan Hung Cheung, Leung Kan King Chun and Kan Man Ping Winnie. The aforesaid issues were begotten by the said deceased to the said Kan Shing (or Sing) Ho alias Kan Yik (or Yick) Wan.

7. The deceased's natural and lawful son KAN WOON CHEUNG (簡煥章) died on the 6th day of November 1997 at the age of 69 years. A copy death certificate of the said Kan Woon Cheung is filed herein."

5. Pursuant to requisitions raised, the affirmation was amended and refiled on 23 August 2000 where relevant as follows:

"6. The said deceased died and leaving her surviving the following issue :-

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- a. KAN MOON CHEUNG ALLAN (簡滿章) her natural and lawful son, now aged 69 years;
- b. KAN BING CHEUNG LARRY (簡炳章) her natural and lawful son, now aged 66 years;
- c. KAN KI CHEUNG JONATHAN (簡祺章) her natural and lawful son, now aged 59 years;
- d. KAN WING CHEUNG KENNETH (簡榮章) her natural and lawful son, now aged 56 years;
- e. KAN HUNG CHEUNG (簡鴻章) her natural and lawful son, now aged 49 years.
- f. LEUNG KAN KING CHUN (梁簡琮珍) her natural and lawful daughter, now aged 62 years; and
- g. KAN MAN PING WINNIE (簡曼萍) her natural and lawful daughter, now aged 53 years.

The said deceased had no other lawful children or issue either surviving or predeceasing her than the said Kan Moon Cheung Allan, Kan Bing Cheung Larry, Kan Ki Cheung Jonathan, Kan Wing Cheung Kenneth, Kan Hung Cheung, Leung Kan King and the late said Kan Woon Cheung. Chun, and Kan Man Ping Winnie ∠ The aforesaid issues were begotten by the said deceased to the said Kan Shing (or Sing) Ho alias Kan Yik (or Yick) Wan.

6A. ~~7.~~ The deceased's natural and lawful son KAN WOON CHEUNG (簡煥章) died on the 6<sup>th</sup> day of November 1997 at the ∠ A certified true copy ∠ ~~A copy~~ death certificate of the said Kan Woon Cheung is filed herein."

6. Probate Registry subsequently raised further requisitions by letter dated 5 September 2000. The only outstanding requisition is para. 4(i). Essentially, the Registrar was not satisfied that para. 1 has not been amended by including the name of Kan Woon Cheung. As it stands, para. 1 could be read as saying that Kan Woon Cheung was not entitled to share in the estate. Secondly, the Registrar was not satisfied that the information contained in para. 6A was not included in para. 6.

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7. The applicant was dissatisfied with the order of 18 March 2004.

8. By summons under Rule 62 of the Non-Contentious Probate Rules, Cap. 10 (“the Rules”), he applied to the probate judge, Andrew Cheung J, for an order that:

- “(a) The decision of Probate Master J. Wong on 6<sup>th</sup> March 2004 be set aside;
- (b) The requirement for the Applicant to comply with any requisitions sought by the Probate Registrar be dispensed with; and
- (c) The Letters of Administration in respect of the above estate be granted to the Applicant.”

Andrew Cheung J affirmed the order of the Probate Master and the applicant has appealed to us.

9. This appeal requires us to consider some of the provisions of the Rules. These Rules were made by the Chief Justice pursuant to section 72 of the Probate and Administration Ordinance, Cap. 10 (“the Ordinance”):

“(1) ... for regulating the practice and procedure of the court and the Registry with respect to non-contentious or common form probate business and generally for the better carrying out of the provisions of this Ordinance.”

The relevant rules are:

“2A. Forms

(1) The Registrar may by general notice published in the Gazette specify the forms for use in connection with these rules.

(2) The specified form shall be adhered to with such variations or additions as circumstances may require.

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5(1) The Registrar shall not allow any grant to issue until all inquiries which he may see fit to make have been answered to his satisfaction.”

6. Oath in support of grant

(1) Every application for a grant shall be supported by an oath in the specified form applicable to the circumstances of the case, which shall be contained in an affidavit sworn by the applicant, and by such other papers as the Registrar may require. (L.N. 33 of 1992)

(2) On an application for a grant of administration the oath shall state whether, and if so, in what manner, persons having a prior right to a grant in accordance with the provisions contained in rule 21 have been cleared off, and whether any minority or life interest arises under the will or intestacy.

(3) Where the deceased died domiciled outside Hong Kong, the oath shall state where the deceased died domiciled.

(4) If the oath states where the deceased died domiciled (whether in or outside Hong Kong) a statement as to the country in which he died domiciled may be included in the grant.”

10. We are indebted to both Mr Chua SC who appeared for the applicant, and Mr Chow SC, who appeared as *amicus curiae*, for their helpful written and oral submissions.

11. Both Mr Chua and Mr Chow agreed that the proper approach to the interpretation of statutory provision is the modern approach. In other words, the court should not decide whether the statutory requirements were intended to be “imperative /mandatory” or merely “directory”. It was also agreed that the statutory requirement could be considered as fulfilled if there has been substantial compliance. However, they disagree on whether there has been substantial compliance in this case.

12. Mr Chua has taken us to some of the leading authorities on the topic, the latest of which is *R v Soneji* [2005] 3 WLR 303, a decision of the House of Lords. But having regard to the counsel's agreement on the correct test, it is unnecessary for us to go into the principles which are well settled in Hong Kong.

13. This appeal arose out of an order made under Rule 5. We have to consider first whether the inquiry was one which the Registrar could properly make and one which unless answered to his satisfaction would entitle the Registrar not to allow any grant to issue.

14. Next, we have to consider whether the Registrar could insist that the answer be provided by an amendment to the oath in support of grant.

15. The probate jurisdiction is inquisitorial. The Registrar is entitled to require the information so that he can decide whether or not to exercise his discretion. Under Rule 60, the Registrar has power to require an application to be made by summons to him or "otherwise, to be brought before a judge by summons or before the court on motion."

16. We believe that in deciding whether the statutory requirements have been substantially complied with, one is not simply concerned with whether enough of the required information has been supplied, but also the manner of compliance. Thus, if an applicant has supplied all the information required but have re-arranged the paragraphs of the specified form at random, it cannot be said that because all the information have been supplied there has been substantial compliance.

17. That accords with the view of Millett LJ (as he then was) in *Petch v Gurney (Inspector of Taxes)* [1994] 3 All ER 731 (C.A.) at 738c-d, where he said:

“In such a case the statutory requirement can be treated as substantially complied with if the act is done in a manner which is not less satisfactory having regard to the purpose of the legislature in imposing the requirement.”

18. We are of the view that compliance is required to be in a manner which is not less satisfactory having regard to the purpose of the legislation in imposing the requirement.

19. The use of standard form facilitates processing as well as understanding by laymen. Obviously it must be in the public interest that grants are made as soon as possible. Reducing time required for processing and misunderstanding must be in the public interest and consistent with the purpose of the rules which are made “... generally for the better carrying out of the provisions of this Ordinance”, section 72(1) of the Ordinance. There is likely to be delay if applicants are free to modify the specified form as they please.

20. Here, the fact that Kan Woon Cheung’s name has been omitted from para. 1 may well lead to misunderstanding. No doubt as the judge thought, a lawyer reading the application would realise that Kan Woon Cheung was entitled to share in the estate of the deceased, but, a layman reading the application might not know that. We see no reason why the Probate Master is not entitled to enquire and require that the answer be given by way of an amendment to para. 1. Para. 6A is less likely to cause confusion but we do not consider this variation or addition is required or justified by the circumstance of the case, so the Probate



Master was acting within his discretion when he required compliance with the specified form.

21. Mr Chua submitted that the Probate Master was not entitled to enquire or insist on an answer to either question. He submitted that first that there has been substantial compliance. Secondly that in any event, they should not affect the validity of the application for a grant.

22. For the reasons given above, we are of the view that there has not been substantial compliance.

23. For his second submission, he relied on *R v Immigration Appeal Tribunal (IAT), ex parte Jeyeanthan* [1999] 3 All ER 231. There, Rule 13(3) of Asylum Appeals (Procedure) Rules 1993 required the Secretary of State who sought to challenge the decision in the Immigration Appeal Tribunal to submit the prescribed application form for leave to appeal, including a declaration of truth. The Secretary of State applied for leave by letters which contained all the relevant information required by the prescribed form save for the declaration of truth. The IAT allowed the Secretary's appeal. On judicial review the judge overturned IAT's decisions and held that the Secretary had failed to substantially comply with the prescribed form and that it was a nullity. The Court of Appeal allowed the appeal.

24. Mr Chua relied on this as authority that even absent substantial compliance, the application was not necessarily a nullity. At p. 242 of Lord Woolf MR said:

"If in these appeals you concentrate on what the rules intend should be the just *consequence* of non-compliance with

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the statutory requirements as to the contents of an application for leave to appeal I would suggest the answer to these appeals is obvious. Neither J nor R have in any way been affected by the omission. It was as far as they were concerned a pure technicality. Other than to discipline the Secretary of State there could be no reason well after the event to treat his successful applications for leave as a nullity.

Judge LJ agreeing said at p. 245:

“Rule 45 does not carry the additional consequence that an application for leave made within the prescribed time, but which fails substantially to comply with the prescribed form is a nullity. Rather it is indeed an ‘irregularity’, and the IAT has power to cure it.

In my judgment notwithstanding the failure of the letter from the Secretary of State substantially to comply with the requirements of the prescribed form, the notice of application for leave to appeal was not a nullity, but an irregularity, which was capable of being cured by the IAT. As to the exercise of its discretion to do so, no basis for interference has been show.”

Rules 38 of the IAT provided:

“*Irregularities*

38. Any irregularity resulting from failure to comply with these Rules before an appellate authority has reached its decision shall not by itself render the proceedings void, but the appellate authority may, and shall if it considers that any person may have been prejudiced, take such steps as it thinks fit before reaching its decision to cure the irregularity, whether by amendment of any document, the giving of any notice or otherwise.”

25. But we do not agree that that decision provided the answer which Mr Chua wanted. That was not a decision that the IAT could not have required the Secretary to use the prescribed form, or that, on the Secretary’s refusal to do, it must exercise its discretion to waive compliance.

26. The fact that, in suitable circumstances, the court may waive failure to comply with statutory requirements does not mean that an

applicant may treat the statutory requirements as optional to be complied with or not as he pleased.

27. If there are good reasons, the Probate Master would, no doubt, waive compliance. Here, the Probate Master did not see fit to waive compliance. We cannot say that such exercise of discretion was wrong.

28. Mr Chua has rightly conceded that he does not challenge the vires of the rules or forms made under them. We do not believe that there is any room for challenge.

29. For the above reasons, the appeal is dismissed.

30. As the judge has indicated in para. 63 of his judgment, and we have been told, the appeals have been conducted at the expense of the solicitors and not the clients, because the points raised in the appeals are important to probate practice in Hong Kong. Accordingly, we make no order as to costs.

(Peter Cheung)  
Justice of Appeal

(Robert Tang)  
Justice of Appeal

(Andrew Chung)  
Judge of the Court of First  
Instance, High Court

Mr Chua Guan Hock, SC, instructed by Messrs Lau, Wong & Chan, for  
the Applicant (Appellant)

Mr Anderson Chow, SC as amicus curiae