CHIN JHIN THIEN & ANOR

v.

CHIN HUAT YEAN @ CHIN CHUN YEAN & ANOR

Federal Court, Putrajaya
Mohd Zawawi Salleh, Idrus Harun, Nallini Pathmanathan, Zaleha Yusof, Hasnah Mohammed Hashim, FCJJ
[Civil Appeal No: 02(f)-29-04-2019(P)]
7 July 2020

Succession: *Will — Validity — Plaintiffs challenged validity of will — Whether deceased had testamentary capacity — Whether secret trust applicable in case involving testamentary capacity of testator*

Trusts: *Creation of trust — Secret trust — Applicability — Whether secret trust applicable in this case — Whether secret trust contradictory to Wills Act 1959 and/or was against public policy*

This was an appeal by the plaintiffs from the judgment of the Court of Appeal which had allowed the appeal by the defendants against the judgment of the High Court. The High Court had earlier allowed the plaintiffs' claim, revoked the grant of probate issued to the defendants and, *inter alia*, declared that the will dated 18 December 2013 alleged to be the last will and testament of one Chin Joo Ngan ('the deceased') as invalid and that the deceased had died intestate. In this appeal, the issues to be determined were: (i) whether the concept of secret trust was applicable in Malaysia; (ii) whether secret trust was applicable in a case involving the issue of testamentary capacity of a testator; and (iii) whether the creation of a secret trust was contradictory to the Wills Act 1959 ("the Act") and/or was against public policy.

Held (dismissing the plaintiffs' appeal with costs):

(1) The definition of the word 'law' under art 160 of the Federal Constitution included '… written law, the common law in so far as it is in operation in the Federation or any part thereof'. Section 3 of the Interpretation Acts 1948 and 1967 further defined 'common law' as 'the common law of England'. The effect of the above definitions was that both written law and common law were sources of law in Malaysia. The common law would remain as a source of law, unless it had been abrogated, restricted and modified by written law, post-1956. Since its incorporation, the courts in Malaysia have also applied the law on trusts, the rules of equity and the common law of England. Hence, the concept of secret trust, which was part of the law of trust and was governed by the rules of equity and the common law of England, was applicable in Malaysia subject to the proviso to s 3(1) of the Civil Law Act 1956, unless there was an explicit abrogation, variation, restriction or modification by written law. (paras 34, 36, 37 & 39)

(2) The Act or other statutes or Acts of Parliament did not explicitly abrogate the application of a secret trust. In fact, the application of a secret trust was endorsed in the written law upon a reading of s 30 of the Act and s 100 of the Evidence Act 1950. By virtue of those provisions, the applicable law for the interpretation of a will made in Penang, as in the present appeal, which purported to create a secret trust was that of the English law and rules of equity. (paras 39-41)

(3) There was no cogent reason to 'abrogate' secret trust in Malaysia. There were circumstances in which a testator created 'secret trust' to facilitate the intention to provide for certain parties. In the instant appeal, the evidence revealed that the deceased intended to provide for his second wife's children as they were the only next of kin who were dependent on the deceased for financial support. The deceased trusted the 1st defendant (his brother) and the 2nd defendant (his nephew) to manage the estate wisely to take care of the second wife's children's needs. The plaintiffs on the other hand were working adults and had not been in contact with the deceased for more than seven years and were not on good terms with the deceased. In the circumstances, it was also in the interests of justice that the secret trust was upheld so that the deceased's estate was also not given to benefit the defendants, but to uphold the wishes of the deceased. (paras 44-47)

(4) On the factual matrix of the instant appeal, the High Court Judge had misapprehended the concept of secret trust and misdirected her mind in deciding that the deceased did not have the testamentary capacity to make the will dated 18 December 2013. Upon a perusal of the evidence on record, the defendants had adduced sufficient evidence at the trial to establish that the deceased had testamentary capacity to make the said will. (para 83)

(5) A secret trust, as a creature of common law, operated outside the formalities of the Wills Act 1959. Nevertheless, a secret trust was a form of an *inter vivos* express trust in which the testator and trustee mutually agreed to form a trust relationship for the lifetime of the testator. Thus, any inconsistency or contradiction between the doctrine of secret trust and the Wills Act 1959 was a non-starter. (paras 102 & 104)

Case(s) referred to:

Banks v. Goodfellow [1870] LR 5 QB 549 (refd)

Blackwell v. Blackwell [1929] AC 318 (folld)

Carmel Mary Soosai v. Josephine Lourdasamy Ratnavathy R Soosai & Ors [1987] 1 MLRH 125 (refd)

Choo Mooi Kooi v. Choo Choon Jin & Other Suits [2012] 5 MLRH 19 (refd)

Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 2 MLRA 1 (refd)

Hassan Kadir & Ors v. Mohamed Moidu Mohamed & Anor [2011] 1 MLRA 246 (refd)

In re Estate of Luce 21 ITELR 484 (No: 02-17-00097-CV, 2018 Tex App LEXIS 9341) (refd)

In the matter of the Estate of Eva Burns, deceased: Burns and Others v. Burn [2016] EWCA Civ 37 (refd)

Key & Anor v. Key & Anor [2010] EWHC 408 (Ch) (refd)

Khaw Cheng Bok & Ors v. Khaw Cheng Poon & Ors [1998] 8 MLRH 552 (refd)

Kishan Singh v. Nichhattar Singh [1983] AIR 373 (refd)

Lee Ing Chin & Ors v. Gan Yook Chin & Anor [2003] 1 MLRA 95 (refd)

Majlis Perbandaran Ampang Jaya v. Steven Phoa Cheng Loon & Ors [2006] 1 MLRA 166 (refd)

Nicholsan v. Knaggs [2009] VSC 64 (refd)

Ong Eng Hock & Anor v. Ong Cheng Guan & Anor [2018] 5 MLRA 89 (refd)

Ottaway v. Norman [1972] 2 WLR 50 (refd)

Pihak Berkuasa Tatatertib Majlis Perbandaran Seberang Perai & Anor v. Muziadi Mukhtar [2019] 6 MLRA 307 (refd)

Re Simpson, Deceased; Schaniel v. Simpson [1977] 121 SJ 224 (refd)

Re Snowden [1979] Ch 528 (refd)

Re Tan Soh Sim Deceased; Chan Lam Keong And 4 Ors v. Tan Saw Keow And 3 Ors [1951] 1 MLRA 31 (refd)

Re Young [1951] Ch 344 (refd)

Tan Cheu Kee v. Lim Siew Hwa [2016] MLRHU 1649 (refd)

Tho Yow Pew & Anor v. Chua Kooi Hean [2002] 2 MLRA 213 (refd)

Tony Pua Kiam Wee v. Government Of Malaysia & Another Appeal [2019] 6 MLRA 432 (refd)

Tsang Tat Hung & Anor v. Tsang Tat Wing [2017] HKCU 1165 (refd)

Udham Singh v. Indar Kaur [1971] 1 MLRA 459 (refd)

Legislation referred to:

Civil Law Act 1956, s 3(1)(a)

Evidence Act 1950, s 100

Federal Constitution, art 160

Interpretation Acts 1948 and 1967, s 3

Wills Act 1959, s 30

Other(s) referred to:

Alastair Hudson, *Equity and Trust,* Routledge, 2015, 8th edn, p 323

Halsbury's Laws of England, 4th edn, vol 17, para 898

Halsbury's Laws of England, Butterworths, London 2007 Reissue, 4th edn, para 672

Lewin on Trusts, Sweet & Maxwell, 18th edn, 2008, para 3-077

Nwudego Nkemakonam Chinwuba, *Filling The Gaps Between Colonial Legal Heritage And Prevailing Local Customs In Family Relations: The Place Of Secret Trust*

[2016] African Journal of International and Comparative Law, Vol 24(1), pp 45-63

Watt G, *Trusts and Equity*, Oxford University Press, 2010, 4th edn, p 180

Sarkar on Evidence, 14th edn, vol 2, p 1396

Secret Trusts and Testamentary Freedom in Trusts & Trustees [2019] Vol 25(7), pp 730-736

Sheridan, LA, *English and Irish Secret Trusts* [1951] 67 LQR 314

Snell's Equity, Sweet & Maxwell, 2015, 33rd edn, p 660, para 24-023, p 663, para 24-031

Tommy Cheung, *Secret Trusts and Testamentary Freedom in Trusts & Trustees* [2019] Vol 25(7), pp 730-736

Counsel:

For the appellants: John Khoo (Jason Ong & Navaneetha Krishnan with him); M/s Ong & Associates

For the respondents: Justin Voon Thiam Yu (Lee Chooi Peng & Lin Pei Sin with him); M/s Justin Voon Chooi & Wing

JUDGMENT

Mohd Zawawi Salleh FCJ:

Introduction

[1] This is an appeal from the judgment of the Court of Appeal dated 13 October 2018 in terms of which it allowed the appeal by the defendants against the judgment of the High Court at Pulau Pinang dated 24 October 2017. The High Court had allowed the plaintiffs' claim, revoked the grant of probate issued to the defendants and *inter alia* declared that the will dated 18 December 2013 alleged to be the last will and testament of one Chin Joo Ngan ("deceased") as invalid and the deceased had died intestate.

[2] The appeal was by leave granted by this court on 18 March 2019 on the following questions of law:

First Leave Question

i. Whether the concept of secret trust is applicable to Malaysia as there is no decision regarding the applicability of secret trust?

Second Leave Question

ii. Whether secret trust is applicable in a case involving the issue of testamentary capacity of a testator?

Third Leave Question

iii. Whether secret trust is contradictory to the Malaysian Wills Act 1959 and/or is against public policy as it can be abused?

[3] We heard the appeal on 24 February 2020 and at the conclusion of arguments of the parties, we dismissed the plaintiffs'/appellants' appeal with costs. We now give the detailed grounds for our decision.

[4] For convenience, we will refer to the parties by their designations at the High Court: the appellants as the plaintiffs and the respondents as the defendants.

Factual Background And Antecedents Proceedings

[5] The 1st plaintiff and the 2nd plaintiff are the lawful children of the deceased.

[6] The 1st defendant is the elder brother of the deceased and the 2nd defendant is the son of the 1st defendant and nephew of the deceased. Both of the defendants reside in Australia.

[7] The deceased by profession was an engineer and had three wives, namely:

i. Chan Cheng Lian (first wife);

ii. Chan Cheng Geok (second wife); and

iii. Yeoh Bee Leng @ Katherine (third wife).

[8] Only the marriage between the deceased and the first wife was registered. The deceased married the first wife on 14 July 1976. The remaining two marriages were not registered.

[9] The plaintiffs are the deceased's children from his first wife's marriage. The deceased had four children with the second wife, of whom two were still studying when the deceased died, and the youngest was still a minor at the time. The deceased and the third wife had no children.

[10] It is important to note that the second wife is the first wife's elder sister. The second wife had a marital affair with the deceased while the first marriage subsisted.

[11] Sometime in 1985, the first wife found out about her husband's affair with her sister. Unable to accept the mistrust and betrayal, the first wife eventually filed for divorce and was granted a decree nisi on 8 August 1991. The decree nisi, however, has not been made absolute.

[12] In the meantime, the deceased married his third wife who was also his business partner. His third wife was not called as a witness during the trial. Nevertheless, their wedding photographs were tendered to show that they went through a Chinese customary marriage ceremony.

[13] The deceased was diagnosed with fourth stage renal cancer/terminal cancer in 2013. In September 2013, the deceased underwent surgery to remove his kidney due to a growth and tumor.

[14] The family conflicts arise from the will made by the deceased dated 18 December 2013. The will was prepared by an advocate and solicitor named Peter Huang (DW1) who also witnessed the will together with his secretary, Lau Ean Nah (DW2), on 18 December 2013. Under this will, the deceased gave all his assets and properties to the defendants.

[15] The deceased died six days after the will was made, that is to say, on 24 December 2013. Coincidentally, the date of birth of the deceased is also on 24 December.

[16] The defendants later obtained the grant of probate on 12 February 2014 at the Kuala Lumpur High Court.

[17] Consequently, the plaintiffs filed a civil suit at the Pulau Pinang High Court and seeking, *inter alia*, for the following:

(a) an order that the grant of probate issued by the Kuala Lumpur High Court is declared null and void in law and is revoked and cancelled; and

(b) a declaration that the will dated 18 December 2013 alleged to be the last will and testament of the deceased is void under the law.

Proceedings Before The High Court

[18] At the High Court, the plaintiffs challenged the validity of the will on two main grounds:

(a) The deceased had no testamentary capacity to make the will as he was suffering from terminal cancer; and

(b) The defendants had cheated and unduly influenced the deceased.

[19] The suit was resisted by the defendants. They categorically disputed the allegations and averred that the deceased was mentally alert, lucid, and capable of making the will. The defendants also contended that they are not the true beneficiaries of the will as they are only trustees for the benefits of the deceased's second wife and her children. In the upshot, the defendants claim that a secret trust was created under the will.

[20] As we have alluded to earlier, on 24 October 2017, the learned High Court Judge allowed the plaintiffs' claim, revoked the grant of probate issued to the defendants and *inter alia* declared the will dated 18 December 2013 to be invalid and that the deceased had died intestate.

[21] The learned High Court Judge had considered all the central issues presented in the case. We can summarise the learned High Court's reasoning and conclusions as follows:

(i) The deceased did not have the testamentary capacity to make the will dated 18 December 2013 based on the following facts:

(a) Dr Git Kah Ann (PW1), the urologist who treated the deceased had stated in his letter dated 13 December 2013 that at the material time the deceased was still having trouble to cope with the disease, mentally and physically;

(b) there was no certification by any medical practitioner as to the mental capacity of the deceased on 18 December 2013. Reliance was placed on the case of *Re Simpson, Deceased; Schaniel v. Simpson* [1977] 121 SJ 224 where it was held that the making of a will by an old and infirm testator ought to be witnessed and approved by a medical practitioner who satisfies himself as to the capacity and understanding of the testator and makes a record of his examination and findings;

(c) Peter Huang (DW1), the lawyer who prepared the will and also witnessed the will together with his secretary on 18 December 2013 did not know anything about the deceased's medical background and mental capacity; and

(d) the oral testimony of the 1st plaintiff of his meeting with the deceased on 18 December 2013 reveals that his father cannot talk and unable to recognise him.

(ii) There were suspicious circumstances surrounding the making of the will and that the defendants had manipulated, unduly influenced and cheated the deceased to make the will to give all the assets to the defendants based on the following facts:

(a) suspicious circumstances were not denied by the defendants.

(b) established facts depict clearly that it was the 1st defendant who wanted to make the will. There is not much of a communication between the DW1, the lawyer who prepared the will and the deceased. It is only a formality that the deceased had to sign the will and all parties had to be present before the lawyer.

(c) there is a special relationship between the 1st defendant and the deceased.

(d) the deceased was under the control of the defendants from 17 December 2013 to 21 December 2013

(iii) Secret trust defence was not established on the grounds that:

(a) the whole idea of secret trust is an afterthought because the secret trust defence was only raised for the first time when the defendants amended their defence one year after the defence was filed;

(b) DW1 has not done a secret trust and does know about secret trust;

(c) the will itself did not mention a secret trust; and

(d) if the purpose of the secret trust is to give the deceased's properties to the deceased's second wife and her children, it would have been much easier for the deceased to say so expressly in the will.

[22] The learned judge also granted exemplary damages of RM25,000 to the plaintiffs because Her Ladyship was of the view that the defendants had acted in contumelious disregard of the plaintiffs' rights when the defendants acquired all the assets and properties of the deceased to make a profit for themselves and thereafter to dissipate and transfer the proceeds of the sales to Australia.

[23] Being dissatisfied with the decision of the High Court, the defendants appealed to the Court of Appeal.

Proceedings Before Court Of Appeal

[24] The Court of Appeal essentially allowed the appeal by the defendants and set aside the order of the High Court on the following grounds:

(i) Testamentary capacity

(a) It is trite that a testator could bequeath his estate to any person. The only instance the probate could be set aside is if the plaintiffs had established that the testator did not have testamentary capacity to execute the said will; and

(b) The learned judge had misdirected herself on the issue of testamentary capacity when Her Ladyship combined the issue of secret trust with that of testamentary capacity. The approach taken by the learned judge was wrong in law. Testamentary capacity was related to medical evidence or related to credible evidence and had nothing to do with the doctrine of secret trust.

(ii) Appreciation of the evidence

(a) The learned judge did not give much credence to the evidence of the defendants in the judgment. The learned judge had no

benefit of hearing the evidence or seeing the demeanor of urologist who treated the deceased, ie Dr Git Kah Ann (PW1) because PW1 gave evidence before YA Dato' Azmi Ariffin on 23 March .2017 who heard the case in part before he was transferred to another court. PW1's testimony was crucial evidence relating to testamentary capacity;

(b) PW1's witness statement does not in a definite form assert that the deceased lacked testamentary capacity; and

(c) The evidence of DW1, the lawyer who prepared the will was not discredited neither was the evidence of his secretary (DW2) who also witnessed the will. There is no cogent reason why their testimony should not be disbelieved or at least for the limited purpose to say the formalities of a valid will had been duly satisfied.

(iii) Defence of the secret trust

(a) The law on secret trust was developed to assist the testator's purported 'sins' for just and equitable reason to benefit his "genes or acquaintance" whether lawful or otherwise to provide some form of security to his beloved ones;

(b) The law on secret trust had developed in a manner to close its eyes on public policy or breach of the rule of law related to monogamous or polygamous marriage inclusive of polyandry or relationship of cohabitee. The court did not strike out the secret trust arguments based on illegality or public policy. There was nothing cynical or wrong even if it was meant for private trust or charitable trust;

(c) All the requirements for the formality of a valid will have been satisfied; and

(d) The plaintiffs were not able to demolish the defence of secret trust and there were good grounds to dispel any *mala fide* on the part of the defendants. The estate of the deceased will be used for the benefit of the deceased's second wife and their children and not for their own benefit.

Our Decision

[25] Before turning to the leave questions, perhaps it would be useful to discuss briefly the law on secret trusts.

[26] Secret trusts enable a testator to direct the disposition of his or her property upon his or her death without specifying the actual beneficiary in the will whereby the property is bequeathed to a 'legatee' who holds it as a trustee

for the secret beneficiary. The motivating factor behind this arrangement for anonymity varied. Watt writes that the secret trust may initially have been created in response to the worries of men wishing to make provisions for a mistress and illegitimate children [See Watt G, *Trusts and Equity* (4th edn, Oxford University Press, 2010) at p 180].

[27] *Snell's Equity*, (33rd edn, Sweet & Maxwell, 2015), para 24-023 at p 660 offers the following definition of secret trusts:

> "A secret trust gives effect to the express intentions of a testator which are not contained in a written document duly executed as a will. A will is a public document. The advantage of a secret trust is that the testator may use a will to implement his wish to establish a trust upon his death without disclosing the intended beneficiary or the terms under which he holds.
>
> Secret trusts are a device by which the express intention of a person to make a testamentary gift may be enforced despite the testator's failure to comply with the formalities for the execution of a will or testamentary disposition under the Wills Act 1837. They demonstrate the rationale of preventing the fraudulent reliance on the statutory formalities as a justification for denying the enforceability of the secret trustee's expressly undertaken obligations …"

[28] There are two types of secret trusts. A full secret trust is an obligation which is fully concealed on the face of the will. The obligation is communicated to the legatee during the lifetime of the testator and the will transfers the property to the legatee without the mention of the existence of a trust, ie the existence and the terms of the trust are fully concealed on the face of the instrument creating the trust, namely the will, for example a disposition by will "to A absolutely". Whereas a half secret trust is intended when the will indicates or acknowledges the existence of the trust but the terms are concealed from testators will. The trustee will take the property as communicated on the terms effected inter vivos, for example a deposition by will "to A on trust for the purpose communicated to him".

[29] By way of simple explanation, both types of secret trust essentially involve property being left in the will without actually naming person to whom the property is being left to. The property is held on trust by someone who made a promise to the testator to hold the property on trust for the eventual recipient.

Establishing The Existence Of Secret Trust

[30] In *Ottaway v. Norman* [1972] 2 WLR 50, Brightman J set out the requisite elements necessary to prove the existence of a fully secret trust which covers the components of intention, communication and acceptance as follows:

> "It will be convenient to call the person on whom such a trust is imposed the 'primary donee' and the beneficiary under that trust the 'secondary donee'. The essential elements which must be proved to exist are: (i) the intention of the testator to subject the primary donee to an obligation in favour of the secondary donee; (ii) communication of that intention to the primary

> donee; and (iii) the acceptance of that obligation by the primary donee either expressly or by acquiescence. It is immaterial whether these elements precede or succeed the will of the donor. I am informed that there is no recent reported case where the obligation imposed on the primary donee is an obligation to make a will in favour of the secondary donee as distinct from some form of *inter vivos* transfer. But it does not seem to me that that can really be a distinction which can validly be drawn on behalf of the defendant in the present case. The basis of the doctrine of a secret trust is the obligation imposed on the conscience of the primary donee and it does not seem to me that there is any materiality in the machinery by which the donor intends that that obligation shall be carried out."

[31] If it cannot be shown the testator had the intention to create a secret trust, or withdrew his/her intention to create trust before his/her death, the court will not uphold the secret trust. Where a secret trust fails, the trustee will be entitled to the trust property absolutely with no obligation to the beneficiary.

[32] The standard of proof for proving a secret trust or half secret trust is the ordinary civil standard of proof (ie balance of probabilities). In *Re Snowden* [1979] Ch 528, Sir Robert Megarry VC observed:

> "I therefore hold that in order to establish a secret trust where no question of fraud arises, the standard of proof is the ordinary civil standard of proof that is required to establish an ordinary trust. I am conscious that this does not accord with what was said in *Ottaway v. Norman* ([1971] 3 All ER 1325 at 1333, [1972] Ch 698 at 712), but I think the point was taken somewhat shortly there, and the judge does not seem to have had the advantage of having had cited to him the authorities that I have considered. For those reasons I have overcome my hesitation in differing from him."

[33] We now turn to the first leave question. The principal argument which learned counsel for the plaintiffs advances on this leave question is that there is no recognition of the doctrine of secret trust, whether in the Civil Law Act 1956, or other Acts of Parliament. Neither are there any decisions by the Federal Court endorsing and propounding the concept of secret trust in Malaysia. With respect, for the reasons set forth below, we disagree with the submission.

[34] The starting point to this question is the definition of the word 'law'. Article 160 of the Federal Constitution defines 'law' as to include '…written law, the common law in so far as it is in operation in the Federation or any part thereof'. Section 3 of the Interpretation Acts 1948 and 1967 (Act 388) further defines 'common law' as 'the common law of England'. The said section also defines the meaning of 'written law' which includes the Federal Constitution, Acts of the Federal Parliament, Emergency Ordinances by the Yang di-Pertuan Agong under art 150, Federal Subsidiary Legislation, 13 State Constitutions, Enactments and Ordinances of State Assemblies, State Subsidiary Legislations and local authority by-laws. The effect of these definitions is that both written law and common law are sources of law in Malaysia. The common law would

remain as a source of law, unless it has been abrogated, restricted and modified by written law, post-1956.

[35] Section 3(1) of the Civil Law Act 1956 provides that – "(1) Save so far as other provision has been made or may hereafter be made by any written law in force in Malaysia, the Court shall (a) In Peninsular Malaysia or any part thereof, apply the common law of England and the rules of equity as administered in England on the 7 April 1956; … (b) … (c) Provided always that the said common law, rules of equity and statutes of general application shall be applied so far only as the circumstances of the States of Malaysia and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary."

[36] Since its incorporation, our courts have also applied the law on trusts, the rules of equity and the common law of England in Malaysia. In the case of *Hassan Kadir & Ors v. Mohamed Moidu Mohamed & Anor* [2011] 1 MLRA 246, the Federal Court had affirmed the applicability of the law of trusts derived from the rules of equity in Malaysia by reason of the statutory application of s 3(1)(a) of the Civil Law Act 1956, as stated in para 24 of the Law Report:

> "[24] It is trite that the modified form of the Torrens System of registration of titles relating to alienated land as applied under the Code does not prevent the creation of beneficial interest in land whether under 'express trust', 'constructive trust' or 'resulting trust' arising out of the operation of law. This is derived from the rules of equity which is applicable in this country by virtue of the s 3 of the Civil Law Act 1956."

[37] Therefore, it follows that the concept of secret trust, which is part of the law of trust and is governed by the rules of equity and the common law of England, is applicable in Malaysia subject to the proviso to s 3(1) of the Civil Law Act 1956 unless there is an explicit abrogation, variation, restriction or modification by written law. In the case of *Majlis Perbandaran Ampang Jaya v. Steven Phoa Cheng Loon & Ors* [2006] 1 MLRA 166, Abdul Hamid Mohamad FCJ (as he then was) stated:

> "Strictly speaking, when faced with the situation whether a particular principle of common law of England is applicable, first the court has to determine whether there is any written law in force in Malaysia. If there is, the court does not have to look anywhere else. If there is none, then the court should determine what is the common law as administered in England on 7 April 1956, in the case of West Malaysia."

[38] In the recent Federal Court case of *Tony Pua Kiam Wee v. Government Of Malaysia & Another Appeal* [2019] 6 MLRA 432, Nallini Pathmanathan FCJ reiterated the principle of law that

> "[106] …for the common law position to be abrogated there must be specificity in terms of the written law altering irrevocably the common law position. …

> [108] There is a common law presumption that the common law shall continue to apply until and unless the Legislature passes law with the express intention of excluding it …"
>
> [See also *Pihak Berkuasa Tatatertib Majlis Perbandaran Seberang Perai & Anor v. Muziadi Mukhtar* [2019] 6 MLRA 307 (FC)].

[39] In the light of the foregoing provisions, the concept of secret trust is statutorily applicable in Malaysia. What is apparent is that the Malaysian Wills Act 1959 or other statutes or Acts of Parliament do not explicitly abrogate the application of secret trust. In fact, its application is endorsed in the written law. Section 30 of the Wills Act 1959 provides as follows:

> "30. Construction of wills
>
> (1) A will made in any of the States of Selangor, Perak, Negeri Sembilan or Pahang before the coming into force of this Act and a will made in either of the States of Penang and Malacca shall, if such will would immediately before the commencement of this Act have been construed in accordance with the Wills Enactment 1938 [F.M.S. 5 of 1938], of the Federated Malay States or the Wills Ordinance of the Straits Settlements [S.S. Cap. 53] respectively, continue to be construed in accordance with such provisions, notwithstanding any repeal of that Enactment or Ordinance.
>
> (2) For the purposes of subsection (1) a will re-executed, re-published or revived by a codicil shall be deemed to have been made at the time when it was so re-executed, re-published or revived.
>
> (3) Save as provided by subsection (1) and subject to this Act, s 100 of the Evidence Act 1950 [Act 56] shall apply to the construction of all wills required to be construed in accordance with the law of Malaysia as if the words "in the Settlements or either of them" appearing in such section had been omitted."

[40] Section 100 of the Evidence Act 1950 provides as follows:

> "100. Construction of wills
>
> Nothing in sections 91 to 99 shall affect the construction of wills, but in the States of Malacca, Penang, Sabah and Sarawak or any of them they shall, subject to any written law, be construed according to the rules of construction which would be applicable thereto if they were being construed in a Court of Justice in England."

[41] By virtue of these provisions, the applicable law for the interpretation of will made in Penang, as in the present appeal, which purport to create a secret trust is that of English law and rules of equity.

[42] The proviso to s 3(1)(a) of the Civil Law Act 1956 does not exclude the applicability of the law on trust and secret trust. This is because the court upholds secret trust to prevent fraud on a testator and the rules of equity are applied to compel the trustee under a will to fulfill his promises to the testator.

[43] Furthermore, secret trusts depend on the operation of equity to be effective. As *Snell* wrote:

> "Secret trusts are a device by which the express intention of a person to make a testamentary gift may be enforced despite the testator's failure to comply with the formalities for the execution of a will or testamentary disposition under the Wills Act 1837. They demonstrate the rationale of preventing the fraudulent reliance on the statutory formalities as a justification for denying the enforceability of the secret trustee's expressly undertaken obligation'. (See *Snell's Equity*, 32nd Ed Ch 24)."

[44] In our considered view, there is no cogent reason to 'abrogate' secret trust in Malaysia. There are circumstances in which a testator creates 'secret trust' to facilitate the intention to provide for certain parties.

[45] In this instant appeal, the evidence reveals that the deceased intended to provide for his second wife's children as they are the only next of kin who are dependent on the deceased for financial support and some of them are still studying at the material time. The deceased trusted the 1st defendant (his brother) and the 2nd defendant (his nephew) to manage the estate wisely to take care of the second wife's children's needs. The plaintiffs on the other hand are working adults, and had not been in contact with the deceased for more than seven years and were not on good terms with the deceased.

[46] Both the defendants gave evidence under oath that the estate of the deceased would be used for the benefit of the deceased's second wife and their children and not for their own benefit.

[47] In the circumstances of the case, it is also in the interests of justice that the secret trust is upheld so that the deceased's estate is also not given to benefit the defendants, but to uphold the wishes of the deceased.

[48] Therefore, the first leave question is answered in the affirmative.

The Second Leave Question

[49] At the outset, we note that the second leave question is not relevant to the determination of this instant appeal. It must be distinctly remembered that the plaintiffs' case is not related to the law on secret trust. The plaintiffs' case is anchored mainly on the ground that the deceased had no testamentary capacity to make the will or that there was undue influence exerted on the deceased. The defendants' case is that there was no undue influence exerted on the deceased because the defendants are not true beneficiaries but trustees under a secret trust who hold the property for the benefit of the deceased's second wife and their children. The elements to prove secret trust and testamentary capacity of a testator are different.

[50] In any event, we will deal with the second leave question as follows.

[51] We have dealt with the elements to prove a secret trust in paras 30 to 32 of this judgment.

Testamentary Capacity Of A Testator

[52] Generally speaking, testamentary capacity refers to the ability of a person to make a valid will. From the authorities, testamentary capacity is referred to as the 'sound disposing mind' of the testator. A testator is said to have testamentary capacity when the testator is fully conscious, has a sound mind, understands and approves the contents of the will.

[53] The meaning of testamentary capacity was explained by Cockburn CJ in *Banks v. Goodfellow* [1870] LR 5 QB 549, in the following words:

> "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
>
> …
>
> In deciding upon the **capacity of the testator to make his will, it is the soundness of the mind and not the particular state of bodily health, that is to be attended to; the latter may be in a state of extreme imbecility, and yet he may possess sufficient understanding to direct how his property shall be disposed of** …"
>
> [Emphasis Added]

[54] The case of *Banks v. Goodfellow (supra)* not only lay down the test for will-making capacity, but also made it clear that a partial unsoundness of mind, not affecting the person's general faculties and not operating on the person's mind in regard to a particular testamentary disposition, will not be sufficient to deprive the person of the power to dispose of their property in a will.

[55] The Federal Court in *Udham Singh v. Indar Kaur* [1971] 1 MLRA 459 and *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 2 MLRA 1 adopted and applied the meaning of testamentary capacity as enunciated by Chief Justice Cockburn in *Banks v. Goodfellow (supra)*.

[56] The term 'sound disposing mind' was further explained by Jeffry Tan J (as he then was) in *Khaw Cheng Bok & Ors v. Khaw Cheng Poon & Ors* [1998] 8 MLRH 552 in the following words:

> "… formal validity of a will is that **the testator's mind must go with his testamentary act**. It is necessary for the validity of a will that the testator

> **should be of sound mind, memory and understanding — words which have consistently been held to mean sound disposing mind**. It is essential that the testator should know and approve of its contents …"
>
> [Emphasis Added]

[57] His Lordship also referred to *Halsbury's Laws of England* (4th edn, vol 17) at para 898 to elaborate the term "sound disposing mind". The relevant excerpt of the judgment are as follows:

> "Halsbury's Laws of England (4th Ed) Vol 17 para 898 thus enunciated a sound disposing mind:
>
> > In order to be of sound disposing mind, **a testator must not only be able to understand that he is by his will giving his property to one or more objects of his regard, but he must also have capacity to comprehend and to recollect the extent of his property and the nature of the claims of others whom by his will he is excluding from participation in that property** … It is essential that **no disorder of the mind should poison his affections, pervert his sense of right or prevent the exercise of his natural faculties**, that no delusion should 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."
>
> [Emphasis Added]

[58] In summary, the will could only be valid if the testator has testamentary capacity. What is meant by testamentary capacity is that the testator must be fully conscious, have a sound mind, understand and approve the contents of the will.

[59] In this connection, we refer to the Federal Court's decision in *Gan Yook Chin (supra)* where His Lordship Steve Shim FC applied the testamentary capacity test as enunciated by Chief Justice Cockburn in *Banks v. Goodfellow (supra)* as cited at para 53 of this judgment.

[60] In the case of *Tan Cheu Kee v. Lim Siew Hwa* [2016] MLRHU 1649, the Court of Appeal adopted and applied the principle as set out in *Banks v. Goodfellow (supra)* as follows:

> "In applying these principles, and particularly the test in *Banks v. Goodfellow*, **I have focused my mind to the determination of whether the Deceased suffered from any "disease of the mind" and/or "insane delusion" when he executed the Will** and whether the circumstances leading to his act of committing suicide impairs testamentary capacity. Having sifted through the evidence, I do not find any evidence showing that the Deceased suffered from any disease of the mind nor was delusional to the extent of insanity. **The evidence of the witnesses who had interacted with the Deceased immediately prior to him executing the Will does not indicate any disease or infirmity of mind**. Neither do the circumstances that led to the suicide indicate unsoundness of mind. **There is absolutely no medical evidence to**

> **support the Defendant's contention that the Deceased was of unsound mind when he executed the Will**…
>
> …
>
> Thus, **considering the totality of evidence, and particularly the deceased's interactions with witnesses who testified at trial, I am convinced that in executing the Will, the Deceased understood the nature and effect of making a will as well as the extent of the property he was disposing and to whom he was disposing them to. And since the Deceased is shown to have testamentary capacity, the testator's will must be give effect to** ..."
>
> [Emphasis Added]

[61] In *Tho Yow Pew & Anor v. Chua Kooi Hean* [2002] 2 MLRA 213 Gopal Sri Ram JCA (as he then was) stated:

> "... Now, the law upon the subject of a testator's testamentary capacity, we find to be well settled. **The decided cases show quite clearly that very slight testamentary capacity is required for the making of a will. The cases in which wills have been held invalid for lack of testamentary capacity involve testators who were utterly insane either upon the finding of the probate court or by reason of an order appointing a committee on the ground of insanity of the testator**.
>
> …
>
> What the law requires to vitiate testamentary capacity is **an insane delusion existing at the time of making of the will. This will include insanity at the time of the making or giving instructions for the making of the will**. There are numerous authorities on the point. We find it quite unnecessary to deal with all of them here...."
>
> [Emphasis Added]

[62] Testamentary capacity cannot be equated with contractual capacity. In the words of His Lordship Gopal Sri Ram JCA (as he then was) in *Lee Ing Chin & Ors v. Gan Yook Chin & Anor* [2003] 1 MLRA 95:

> "Thus, it may be soon that testamentary capacity is not to be equated with contractual capacity. A person may lack the mental capacity to enter into a contract and yet may have sufficient testamentary capacity."

[63] We venture to suggest that this approach is consistent with the concept of task-specific capacity, that is, that a person's capacity to make a decision in one area or task (for example will-making) is distinct and separate, and therefore cannot be extrapolated from their capacity to perform another task (for example entering into a contract and making decision about finances etc.).

[64] It is also a well settled principle that to displace *prima facie* testamentary capacity and due execution, mere proof of serious illness is not sufficient. There must be clear evidence that the illness of the testator so affected his

mental faculties as to make the deceased unequal to the task of disposing of his property.

[65] This principle could be gleaned from a plethora of authorities. In *Lee Ing Chin & Ors v. Gan Yook Chin & Anor* [2003] 1 MLRA 95, His Lordship Gopal Sri Ram JCA (as he then was) held that medical evidence must support that the deceased lacked testamentary capacity on the day the will is executed. The relevant portions of the judgment are as follows:

> "**It may thus be seen that what the law primarily looks for as vitiating testamentary capacity is mental disorder or insane delusion. Mere bodily ill-health or imperfect memory is insufficient**.
>
> …
>
> **As we have said earlier, there was not a shred of evidence to show that the deceased lacked the mental capacity to make a will**. We have had the evidence of the relevant witnesses (in particular DW1) on the point read over to us several times during argument. **There is not a shred of evidence, medical or otherwise to show that the deceased lacked testamentary capacity on 16 April 1997**. Accordingly, the finding by the learned judge against the validity of the will on the ground of the deceased's alleged mental incapacity was based on no evidence and cannot stand. **Further, a close reading of the judgment of the learned judge shows that his finding of the lack of mental capacity based on the available medical evidence was a matter of pure speculation and conjecture. At the risk of repetition, we emphasize that the medical evidence does not support a conclusion that the deceased suffered from unsoundness of mind at any time, in particular at the date of the will.**"
>
> [Emphasis Added]

[66] In *Lee Ing Chin (supra)*, the deceased was 82 years old, suffering from terminal cancer and died less than two weeks after he made his last will. In this case, the testator was suffering from cancer of an aggressive nature where the testator's throat and oesophagus were affected and the testator was given intravenous drip and blood transfusion. Even so, the Court of Appeal upheld the will of the deceased and that decision was affirmed by the Federal Court. His Lordship Gopal Sri Ram JCA said:

> "The deceased was of course not in a state of perfect health because he was suffering from terminal cancer. **But on the authorities, perfect health is not a *sine qua non* of testamentary capacity**.
>
> …
>
> **The mere fact that the deceased was seriously ill with cancer or that the 1rst defendant being the propounder of the will was present at the execution of the will by the deceased does not in our judgment throw any doubt on the validity of the will.** In the present instance, there is ample evidence, already adverted to, which supports a finding in favour of the validity of the will."
>
> [Emphasis Added]

[67] In *Lee Ing Chin (supra)*, the Court of Appeal cited an Indian case, that is, *Kishan Singh v. Nichhattar Singh* [1983] AIR 373. In that case, a deaf and dumb person who was suffering from cancer of his back and head made a will. The Court ruled that the testator's will is valid and held that:

> "… **the mere fact that the deceased was having cancer of the back did not mean that he was not in a fit mental condition to make the will. A testator of a will does not have to be found to be in a perfect state of health to have his will declared valid**. The only criterion is that the testator was capable of understanding the nature of his act, which was fully proved in this case. Further, the mere fact that the propounder of the will was present at the time of the execution of the will alone is not sufficient to doubt the genuineness of the will."
>
> [Emphasis Added]

[68] Further, reference also can be made to the decision in *Carmel Mary Soosai v. Josephine Lourdasamy Ratnavathy R Soosai & Ors* [1987] 1 MLRH 125 where the Court opined:

> "... I now tum [turn] (*sic*) to the next allegation raised by the caveators, i.e., the deceased's lack of testamentary capacity due to ill-health.
>
> **It is not disputed that at the time of his death, the deceased was a chronic diabetic. He had already lost sight of his left eye and was slowly losing sight of the other.** The medical evidence shows that he had been a chronic diabetic for at least 5 years before his death and this had led to his undergoing an operation on 9 January 1982 to remove his prostate gland. Prior to that, on 27 November 1981, he had also undergone a cataract operation to correct his eye but this operation turned out to be unsuccessful as he had an irreversible damaged optic nerve which was already there before the operation. DW6, who provided the follow-up treatment after the operation, did not rule out of the possibility that the deceased's chronic diabetic condition could have caused the blindness to his left eye.
>
> The 3 doctors who examined and treated him of his various ailments, DW4 for his diabetic, DW5 who performed the prostate gland operation and DW6 who did the follow-up treatment of his left eye, **all agreed that they were not competent to testify to the deceased's mental capacity during the period the will was executed as they have no professional qualifications. However, a psychiatrist of 28 years' standing, DW1, was more than prepared to testify that every person who suffers diabetes suffers mental incapacity. The most significant aspect of DW1's evidence is that he never saw or examined the deceased, and that his conclusion was based largely on his vast experience in the field of psychiatric medicine** and on the medical report of DW4, DW5 and DW6 who examined and treated the deceased during the relevant period.
>
> The deceased was an accountant and he managed his own firm, assisted by 3 employees who were not professionals. There is also evidence to show that during the period of ill-health, apart from the time when the deceased had to be hospitalized and after his 2 operations, followed by a period of recovery, he continued working in his office, keeping to his regular hours from 10.00 until

> 5.00 p.m with a break for lunch. He continued doing so up to the day before his death ...
>
> ... **On the consideration of all evidence pertaining to the deceased's mental capacity, the opinion of DW1, who never saw or examined the deceased cannot carry any weight** ..."
>
> [Emphasis Added]

[69] In an English case, Re Simpson, Deceased; Schaniel v Simpson [1977] 121 SJ 224, the Court stated that the making of a will by an old and infirmed testator ought to be witnessed and approved by a medical practitioner who satisfies himself as to the capacity and understanding of the testator and makes a record of his examination and findings.

[70] However, it had been established by the Court of Appeal of England and other jurisdiction after *Re Simpson (supra)* that the principle stated in *Re Simpson (supra)* which is also known as 'Golden Rule' is merely guidance for solicitor and non-compliance did not mean that there was a lack of capacity. For an example in the case of *In the matter of the Estate of Eva Burns, deceased: Burns and Others v. Burn* [2016] EWCA Civ 37, it was held as follows:

> "The judge was also well aware of 'the golden rule' and Mr Welton's apparent ignorance of it. It has to be recalled, however that the 'rule' is a prudent guide for solicitors dealing with a will for an aged testator or one who has been seriously ill. As is pointed out in Williams Op. Cit. at para 4.21, however, **the rule does not constitute a rule of law but provides guidance as to a means of avoiding disputes; 'it is not a touchstone of validity or a substitute for established tests of capacity or knowledge and approval**'."
>
> [Emphasis Added]

[71] In *Key & Anor v. Key & Anor* [2010] EWHC 408 (Ch), Briggs J noted that the 'Golden Rule' was not a rule of law affecting the validity of a will, but a recommendation for good practice. He said:

> Compliance with the Golden Rule does not, of course, operate as a touchstone of the validity of a will, nor does non-compliance demonstrate its invalidity. Its purpose, as has repeatedly been emphasized, is to assist in the avoidance of disputes, or at least in the minimization of their scope. As the expert evidence in the present case confirms, persons with failing or impaired mental faculties may, for perfectly understandable reasons, seek to conceal what they regard as their embarrassing shortcomings from persons with whom they deal, so that a friend or professional person such as a solicitor may fail to detect defects in mental capacity which would be or become apparent to a trained and experienced medical examiner, to whom a proper description of the legal test for testamentary capacity had first been provided.

[72] Before concluding the issue under discussion, perhaps it would be useful to highlight a recent case decided in the United States of America which is of much relevance to the present case. The case is *In re Estate of Luce* 21 ITELR

484 (No: 02-17-00097-CV, 2018 Tex. App. LEXIS 9341). In this case, the Court of Appeal in Texas admitted a will where the testator had not personally signed the will and had merely communicated his wishes by blinking. The facts of the case are these: The testator was involved in a serious accident that left him in a quadriplegic condition. A week after he was admitted to the hospital, he was intubated, which made him unable to speak. Paralysed from the chest down and unable to move, the testator was only able to express by blinking his eyes to signify "yes" and "no". Through this blinking system, his lawyer was able to draft a will based on the testator's blinking answers to a series of essential queries, and through this blinking system, he instructed a notary to sign the will for him.

[73] The Texas Court of Appeal ruled that the testator had sufficient mental ability to understand he was making a will, the effect of making the will, and the general nature and extent of his property. This is because, the evidence showed that the testator did not suffer any brain injury from the accident. The medical records indicated that he was lucid.

[74] Further, according to the lawyer, the testator was of sound mind, and he had no concerns about the testator's capacity. The lawyer testified that he met the testator alone and had determined that they could communicate using the blinking system. The testator communicated that he wanted to make a new will disposing of his assets and property, who he wanted to inherit under the new will, and that he intended to revoke any prior wills. The lawyer also testified that the testator understood the nature and extent of his assets and knew who his family members were. The testator, who was in the midst of divorce proceedings with his wife, made it clear that he did not want his wife to take his assets under the new will.

[75] Moreover, two days after the will's execution, a doctor examined the testator who was still unable to speak because he was intubated, but they communicated by the testator nodding his head "yes" and "no" or by him casting his gaze at index cards labelled "yes" and "no." As a result of the examination, the doctor determined that the testator was fully competent and able to make his own decisions, including financial and medical decisions. Based on this evidence, the court affirmed the will of the testator.

[76] In the light of the authorities discussed above, the position in law on testamentary capacity is clear: if the testator is ill, it does not deprive his ability or capacity to execute it. There must be clear evidence to depict on insane delusion existing in the testator's mind at the time of making of the will. Essentially, it is sufficient for the testator, at the time the will is executed to have sufficient mental ability to understand he is making a will, the effect of making the will, and the general nature and extent of his property. The duty of the court is to give effect to the will of the testator and not deprive him of the right to select the beneficiaries based on his wish.

[77] Having said that, we must emphasis that testamentary capacity assessments are ultimately questions of fact to be determined by courts when the issue of a person's capacity arises in the course of legal proceedings. Therefore, the courts must scrutinise of all the relevant evidence that was presented at the trial before reaching a decision on the balance of probabilities. In *Nicholsan v. Knaggs* [2009] VSC 64, Vickery J of the Supreme Court of Victoria said:

> The proper approach of the court to the question whether a testator has testamentary capacity is clear. Although proof that a will was properly executed is *prima facie* evidence of testamentary capacity, where the evidence as whole is sufficient to throw a doubt upon the testator's competency, the court must decide against the validity of the will unless it is satisfied affirmatively that he was of sound mind, memory and understanding when he executed it or, if instructions for the will preceded its execution, when the instructions were given.

Burden Of Proving Testamentary Capacity

[78] The legal principle on burden of proving testamentary capacity is clear as well. The burden is on the party propounding the will. In the present case it is the defendants.

[79] This position was well explained by learned author *Sarkar on Evidence* (14th edn), vol 2 at p 1396. The relevant part of the passage is reproduced hereunder –

> "Wills. —The law has been thus stated in two well-known cases: "These rules are two; **first, that the onus probandi lies in every case upon the party propounding a 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**. The second is, that if a party writes or prepares a will, under which he takes a benefit, that is a circumstance that ought generally to excite suspicion of the court, and call upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed, and **it is judicially satisfied that the paper propounded does express the true will of the deceased** …
>
> **Those who propound a will must show that the will of which probate is sought is the will of the testator, and that the testator was a person of testamentary capacity. In ordinary cases, if there is no suggestion to the contrary, any man who is shown to have executed a will in ordinary form will be presumed to have testamentary capacity, but the moment the capacity is called in question, then at once the onus lies on those propounding the will to affirm positively the testamentary capacity.** Moreover, if a will is only proved in common and not in solemn form, the same rule applies even though the action is to attack a probate which has been granted long ago…
>
> **A propounder of the will has to prove its due and valid execution** and **if there are any suspicious circumstances he must remove them from the mind of the court** — Facts to be considered on the question of due execution of will."
>
> [Emphasis Added]

[80] On this issue, our Federal Court in *Gan Yook Chin (supra)* neatly summed up the law in the following terms:

> "As regards the burden of proof, the Court of Appeal quite rightly stated the settled law, ie that **where the validity of a will was challenged, the burden of proving testamentary capacity and due execution lay on the propounder of the will as well as dispelling any suspicious circumstances surrounding the making of the will**; that the onus of establishing any extraneous vitiating element such as undue influence, fraud or forgery lay with those who challenged the will. In this connection, we find the approach taken by the High Court of Australia in *William Henry Bailey & Ors v. Charles Lindsay Bailey & Ors* [1924] 34 CLR 558 to be instructive. Therein Isaacs J said *inter alia*:
>
> (1) **The onus of proving that an instrument is the will of the alleged testator lies on the party propounding it**; if this is not discharged, the court is bound to pronounce against the instrument.
>
> (2) This onus means the burden of establishing the issue. It continues during the whole case and must be determined upon the balance of the whole evidence.
>
> (3) The proponent's duty is, in the first place, discharged by establishing a prima facie case.
>
> (4) A *prima facie* case is one which, having regard to the circumstances so far established by the proponent's testimony, satisfies the court judicially that the will propounded is the last will of a free and capable testator.
>
> (5) A man may freely make his testament, howsoever old he may be; for it is not the integrity of the body, but of the mind, that is requisite in testaments.
>
> (6) The quantum of evidence sufficient to establish a testamentary paper must always depend upon the circumstances of each case, because the degree of vigilance to be exercised by the court varies with the circumstances.
>
> (7) As instances of such material circumstances may be mentioned: (a) the nature of the will itself regarded from the point of simplicity or complexity, or of its rational or irrational provisions, its exclusion or non-exclusion of beneficiaries; (b) the exclusion of persons naturally having a claim upon the testator; (c) extreme age, sickness, the fact of the drawer of the will or any person having motive and opportunity and exercising undue influence taking a substantial benefit.
>
> (8) **Once the proponent establishes a *prima facie* case of sound mind, memory and understanding with reference to the particular will, for capacity may be either absolute or relative, then the *onus probandi* lies upon the party impeaching the will to show that it ought not to be admitted to proof.**

(9) **To displace a *prima facie* case of capacity and due execution, mere proof of serious illness is not sufficient**: there must be clear evidence that undue influence was in fact exercised, or that the illness of the testator so affected his mental faculties as to make them unequal to the task of disposing his property.

(10) The opinion of witnesses as to the testamentary capacity of an alleged testator is usually for various reasons of little weight on the direct issue.

(11) While, for instance, the opinions of the attesting witnesses that the testator was competent are not without some weight, the court must judge from the facts they state and not from their opinions."

[Emphasis Added]

[81] The Federal Court in *Ong Eng Hock & Anor v. Ong Cheng Guan & Anor* [2018] 5 MLRA 89 held as follows:

"Leave question 1: Whether the probate rule that the burden of proving that the instrument so propounded is the last will and testament of the testator applies in a case where the impugned will has already been admitted into probate and a sealed grant of probate issued by the High Court?

Answer: "**Those who propound a will must show that the will of which probate is sought is the will of the testator… has to prove its due execution and valid execution and if there are any suspicious circumstances… remove them from the mind of the court…" But where a will has been admitted to probate, the person who seeks revocation of the probate has to establish sufficient cause**.

Question 2: Where the challenge to the impugned will is on grounds of forgery, and specifically that the executor had forged the will, whether the burden lies entirely on the challenger in proving forgery?

Answer: Where the will has been admitted to probate, the person who seeks revocation of the probate on the ground of forgery has the burden and initial onus to prove forgery. Where the will has not been admitted to probate, **it would appear from all cases decided that both propounder and challenger could not be absolutely freed from the burden and or onus of proof**."

[Emphasis Added]

[82] Reference is also made to *Choo Mooi Kooi v. Choo Choon Jin & Other Suits* [2012] 5 MLRH 19. In this case, Varghese George JC (as he then was) neatly summed up the law in the following terms:

"In a nutshell the guiding principles in this area of law that could be distilled from the said decisions (as also from various other cases considered in them) could be summarised as follows:

(a) where the validity of a will is challenged, the testamentary capacity of the testator must be first established;

(b) the burden of proving:

(i) testamentary capacity, and

(ii) due execution was on the propounded of the will, as was also the burden of

(iii) dispelling any suspicious circumstances that surrounded the making of the will.

(c) there must be evidence that the contents of the will had been read over to the deceased and the deceased understood the dispositions being made;

(d) the onus then shifted to the party challenging the validity of the will to establish to the satisfaction of the court on relevant and cogent evidence the existence of any vitiating circumstances;

(e) mere suspicions or conjectures are not ordinarily sufficient to dispense the validity of the signature or the contents of the will;

(f) the court will not concern itself with the fairness of the disposition in the will once satisfied that the testator understood the dispositions being made and the will in question was duly executed;

(g) whether the execution of the impugned will was a result of 'testamentary incapacity' (ie not of good health, sound mind, memory and understanding) was a specific finding of fact to be made on the totality of the evidence led before the court;

(h) the burden of proof often shifts about in the process of the cause according to the successive steps of the inquiry, before leading to the decisive inferences to be made … The propounded of the will still had the ultimate burden of dispelling any suspicious circumstances that may have surrounded the making of the will;

(i) the elements or ingredients to be established on evidence to successfully uphold the consideration of 'natural love and affection' as valid, included evidence of some spontaneous happening in the normal course of a relationship predicated by birth (natural) or a fondness or affection of mind (love) together with a measure of personal attachment or feeling for the other;

(j) a duly executed MOT could still be invalidated and any transfer thereby registered could be set aside under s 340(2)(b) of the National Land Code 1965 as having been obtained through a 'void or insufficient instrument', where it can on facts be shown that there was not exuberated any 'natural love and affection' as between the transferor and the transferee;

(k) the jurisdiction of the court to grant relief on an allegation that there was indeed 'undue influence' exerted, is as wide and as flexible as the exigency of the case demand. The court could hold that there was undue influence even without direct proof of any dominance over the will of a party to a transaction …

(l) even where undue influence may not have been definitely established on evidence, the court could still strike down a will or instrument that had been challenged on that count, under the inherent duty of the court to be vigilant against suspicious circumstances which could go to the root of the validity of any document before the court."

[83] On the factual matrix of the present appeal, we agree with the findings of the Court of Appeal that the learned High Court Judge had misapprehended the concept of secret trust and misdirected her mind in deciding that the deceased did not have the testamentary capacity to make the will dated 18 December 2013. We ourselves have perused the evidence on record and are satisfied that the defendants had adduced sufficient evidence at the trial to establish that the deceased had testamentary capacity to make the will on 18 December 2013. In our view, the learned High Court Judge had failed to appreciate adequately, properly or at all the following evidence:

(a) Although the deceased was suffering from terminal cancer of his kidney, it did not automatically mean that the deceased did not have the testamentary capacity on 18 December 2013 by reason of his cancer. It was sufficient for the deceased to have a sound mind on 18 December 2013.

(b) The evidence of DW1, the advocate who prepared the will and his secretary, DW2, who witnessed the execution of the will by the deceased on 18 December 2013 shows that the deceased was very clear in his mind when he gave instructions to DW1 on 18 December 2013 in the morning, and when he executed the will on 18 December 2013 in the afternoon. The deceased also gave specific instructions to DW1 in person and in private to name both the defendants as executors, after being informed by DW1 that there was a requirement to have two executors if he has minor children. This proves that the deceased was of sound mind, able to comprehend and had in his mind that his minor child with his second wife, who was still studying at that point in time, were the true beneficiaries of his estate. DW1 and DW2 are independent and disinterested witnesses.

(c) All the five witnesses who saw the deceased on 18 December 2013 affirmatively and consistently stated that the deceased was of sound mind, lucid, conscious, mentally alert and able to communicate on 18 December 2013.

(d) The plaintiffs called as their witness, PW1, a urologist and the only doctor who treated the deceased. A careful scrutiny of the testimony of PW1 reveals that the plaintiffs failed to establish that the deceased did not have testamentary capacity. PW1 did not see the deceased on 18 December 2013. Apart from that, PW1 testified that when he last saw the deceased on 13 December 2013,

although the deceased was disturbed, he was still lucid, conscious and of sound mind. Therefore, the phrase '… still having trouble to cope with the disease, mentally and physically' stated by PW1 in his letter dated 13 December 2013 could not be taken as evidence of a lack of testamentary capacity on 18 December 2013. PW1 did not see the deceased on the day the will was executed by the deceased, and when he last saw the deceased on 13 December 2013, he confirmed that the deceased was still lucid, conscious and of sound mind.

(e) The defendants also called Dr Azlan as their last witness who also was an expert witness. Dr Azlan's testimony on the medication prescribed to the deceased and the possibility of any side effects are consistent with PW1's testimony and observation that the deceased was lucid, conscious and of sound mind.

(f) There were also no independent medical evidence before the trial court to substantiate the plaintiffs' assertions that the deceased did not have testamentary capacity to execute the will which he executed on 18 December 2013. Thus, in our view, the issue of the deceased's allegedly impaired mental health was not proven at any point in time.

(g) The defendants established that the will is the last will of a free and capable testator. The defendants also established a *prima facie* case of a sound mind, memory and understanding with reference to the particular will.

[84] The learned High Court Judge failed to consider sufficiently or at all the above evidence and facts which are favorable to the defendants. It is trite that when a trial judge fails to properly analyse or analyse at all the entirety of the evidence adduced on record before the court, it is the duty of the appellate court to intervene and correct the decision. The Court of Appeal was right in interfering with the findings of fact by the learned High Court Judge on the issue of the deceased's testamentary capacity.

[85] Based on the aforesaid, it is our considered view that the second leave question is irrelevant. However, even if the question must be answered, it must be answered in the affirmative.

The Third Leave Question

[86] The argument most pressed and relied upon by the plaintiffs is that the doctrine of secret trust is against public policy because it is used to assist the testator's purported 'sins' or 'skeletons in the cupboard' to benefit his "genes or acquaintance".

[87] With respect, the submission is misconceived. The overriding purpose behind secret trusts is to enable property to be left in a will without explicitly

naming who the property is being left to, by a bequest to a person who has previously promised to hold that property as trustee for the intended recipient. As wills are, by nature, public documents open to scrutiny, the concealment of identity that a secret trust provides is vital for those desiring a degree of privacy in the final disposal of their estate. In one sense, it would indeed not be in 'good conscience' to deny a testator the ability to distribute their estate as they see fit.

[88] We find support in the following statement by Lord Sumner in the case of *Blackwell v. Blackwell* [1929] AC 318 as follows:

> "In itself the doctrine of equity, by which parol evidence is admissible to prove what is called "fraud" in connection with secret trusts, and effect is given to such trusts when established, would not seem to conflict with any of the Acts under which from time to time the Legislature has regulated the right of testamentary disposition."

[89] Tommy Cheung in his article *Secret Trusts and Testamentary Freedom in Trusts & Trustees* [2019] Vol 25(7), pp 730-736, had this to say:

> "An express trust is an 'act of a party', whereas a constructive trust 'arises by operation of law as from the date of the circumstances which give rise to it'. Equity enforces secret trusts because testators expressly create them. It would be unfair to the testator if the courts were to disallow his/her last wish based on a formality issue. Thus, equity looks to the substance rather than the form.
>
> When we look at s 9 of the Wills Act 1837, there are undeniably formal requirements attached to testamentary dispositions. However, they are only there to prevent the fraudulent or unconscionable acts of any individual. Importantly, they require substantial evidence to prove the intent of the testator. The formality promotes and protects the testator's freedom to dispose of his/her property as he/she wishes after death. The individual's right to control his/her property is part of the policy underlying the Wills Act 1837. It is a public policy in which equity aims to protect a testator's testamentary disposition and ensures that it runs according to his/her intent so long as it does not contradict other principles or policies."

[90] The concept of secret trust is consistent with the fundamental human right of privacy. Sheridan, L A in his article, *English and Irish Secret Trusts* [1951] 67 LQR 314 opined

> "… the desire of a testator for secrecy about his dispositions is just as much indulgeable as the desire of the State to ensure the existence of reasonable evidence of those dispositions. The trouble with the wills Act is that it tries to provide for the evidence without making allowance for the secrecy. Any new provision that may be enacted would have to endeavor to strike a balance between the need for evidence and the desire for secrecy."

[91] Nwudego Nkemakonam Chinwuba in his article *Filling The Gaps Between Colonial Legal Heritage And Prevailing Local Customs In Family Relations: The Place Of Secret Trust* [2016] African Journal of International and Comparative Law, Vol. 24(1), pp. 45-63 articulated:

> "The view that remains apposite is that it is a trust that has evolved with the 'face of common humanity' to uphold the private intentions of men or the last wishes of a dying human. The tension that arises from testacy and acceptance of the secret trust as a valid trust within a strict regime of testacy laws indicates that the recognition of the trust is not based on a right to property alone. For the right to property with its incident of free alienation, is steeped in limitations while the secret trust is a humanistic principle based on the good nature of earlier generations who made allowance for the evolutionary nature of wrong and right in the life of a human being."

[92] Further, the author noted as follows:

> "Thus one can assert that the secret trust is a legitimate legal tool that assures a person space. Against the interest of the settlor to dispose of his property privately is also the interest of the recipient."

[93] To deny the existence of an agreement between the testator and the intended trustee would be to commit a fraud, and, providing the trust complies with the requisite conditions, it is unrealistic to uphold a strict reading of statute to allow the trust to fail. The court may intervene if there is a risk of an unconscionable result, like the denial of a testator's wishes. Alastair Hudson, in *Understanding Equity & Trusts* (9th edn., Routledge, 2015) 70 notes that 'the purpose of equity is to introduce fairness in circumstances in which statute might permit unfairnesses'.

[94] Another justification of the enforcement of secret trusts is that it is made outside and independently of the will. This 'dehors the will' theory provides that the secret trust is not created by the will, but rather arises from the independent obligation accepted by the trustee. It was utilised and developed by the House of Lords in *Blackwell (supra)* and its overwhelming advantage is that it does not presuppose a contradiction between the enforcement of secret trusts and the English Wills Act 1837. The trustee/legatee promises to perform acts outside the will, and equity enforces these *inter vivos* promises as the testator desires because 'equity looks into the intent rather than the form', which always compliments the statues, but is not confined by them. Danckwerts J in *Re Young* [1951] Ch 344, 350, in holding a secret trust valid, stated that:

> "…[the person] does not take by virtue of the gift in the will, but by virtue of the secret trusts imposed upon the [trustee] who does in fact take under the will."

[95] The modern justification of the enforcement of secret trusts was neatly summarised by Megarry VC in *Re Snowden (supra)*:

> "… the whole basis of secret trusts, as I understand it, is that they operate outside the will, changing nothing that is written in it, and allowing it to operate according to its tenor, but then fastening a trust on to the property in the hands of the recipient. It is at least possible that very different standards of proof may be appropriate for cases where the words of a formal document have to be altered and for cases where there is no such alteration but merely a

question whether, when the document has been given effect to, there will be some trust of the property with which it dealt."

[96] There are passages to the like effect in *Lewin on Trusts* (18th edn, Sweet & Maxwell, 2008) and *Halsbury's Laws of England*, (4th edn, Butterworths, London 2007 Reissue). The editors in Lewin said in para 3-077 as follows:

"The competing explanation of secret trusts is that the statutory requirements of the Wills Act 1837 are entirely disregarded since the secondary donee does not take by virtue of the will."

[97] The editors in *Halsbury's Laws of England* explained in para 672:

"Creation of secret trusts. Secret trusts have commonly been regarded as a product of the principle that equity does not allow the statute which requires certain written formalities for the creation of interest in land to be used as an instrument of fraud. More recent cases, however, appear to establish that there is no conflict with the Wills Act 1837 since the trust operates outside as it is said, dehors the will. ... This trust is not regarded as a testamentary disposition coming within the Wills Act 1837 but as a trust within the ordinary equity jurisdiction."

[98] Alastair Hudson, in his book *Equity and Trust* (8th edn, Routledge 2015) at p 323 observes that secret trusts constitute an exception to the English Wills Act. The author had this to say:

"One further explanation of the operation of secret trusts would be, quite simply, that they constitute an exception to the Wills Act which defies straightforward definition … it does not correlate easily with the existing rules concerning trusts and therefore its difference ought to be recognised as much as the possibilities of its complying with more general principles of English trusts law. … it is only possible to correlate secret trusts with the broadest possible principles of the law of trusts: that is, that the conscience of the secret trustee will prevent that person from denying the office imposed on him once he receives a gift under the will."

[99] Similarly, *Snell's Equity* (33rd edn), para 24-031 at p 663 states as follows:

"The preferable theory is that secret trust operate outside the will. They rest on the simple principle of enforcing the equitable obligations binding a man's conscience, and do not depend on specific proof of fraudulent conduct by the trustee. The will is only relevant as far as it completes the constitution of the trust by vesting the property in the intended trustee. Accordingly, since the title of a beneficiary under a secret trust arise outside the will, he does not lose his benefits if he witnesses the will or predeceases the testator. On the other hand, if the secret trustee predeceases the testator the secret trust probably fails because there is a failure of the legacy upon which the trust was intended to operate."

[100] In that regard, the Court of Appeal had correctly observed at para 11(c) that:

"... the court's endorsement of the secret trust does not breach the Wills Act or any other statutory law. ... It only goes to show bona fide and the true intention of the testator, if the plea of the secret trust succeeds. Thus, as a general rule, the only instance the probate can be set aside is in a case, if the respondent had established the testator did not have testamentary capacity to execute the said will."

[Emphasis Added]

[101] Quite recently, the Hong Kong Court of Appeal in *Tsang Tat Hung & Anor v. Tsang Tat Wing* [2017] HKCU 1165 quoted with approval the following view:

"Principles of secret trusts 35.1.

The principles governing secret trusts have been set out in *Lewin on Trusts* 19th edn, para 3-076 as follows:

These are trusts outside a will that affect a beneficiary under a will [the 1st plaintiff]. Equity has engrafted on the above common law principles rules of its own, by which the primary donee taking under a will [the 1st plaintiff] may be compelled to hold the gift [the part share of the Property] on trust for a secondary donee [the 2nd plaintiff] under an arrangement with the testator [the Deceased] taking effect outside the will. Such trusts are called 'secret trusts' because one reason for creating them is to keep the ultimate beneficial interest out of the will, which is a public document. Secret trusts arise where a testator intends his gift to the primary donee to be employed as he, and not the primary donee, desires and tells the primary donee of his intention and (either by an express promise or by the tacit promise which is signified by acquiescence) the primary donee encourages the testator to bequeath his money in the belief that his intentions will be carried out. …"

35.2. Although that passage refers to "encouragement", it is clear that that is not essential to the creation of a secret trust as the editors of Lewin said in the following para (3-077): "The equitable rules seem originally to have been based upon there having been a fraudulent encouragement of the testator but the fraud theory has more recently been formulated in terms that equity fastens a trust on the primary donee under the will where his conscience is bound by the extraneous arrangement. The competing explanation of secret trusts is that the statutory requirements of the Wills Act 1837 are entirely disregarded since the secondary donee does not take by virtue of the will. Though the facts commonly involve immoral and selfish conduct on the part of the primary donee that is not a necessary element. This would seem to support the theory that secret trusts take effect outside the will, which is relevant only so far as it completes the constitution of the trust".

[102] What can be distilled from the above discussion is that a secret trust, as a creature of common law, operates outside the formalities of Will Act 1959. Nevertheless, a secret trust is a form of an *inter vivos* express trust in which the testator and trustee mutually agree to form a trust relationship for the lifetime of the testator. Once this is understood, one can also understand that secret

trusts are enforced to promote the main policy principle behind the Wills Act 1959: to protect the testamentary freedom of testators.

[103] In Malaysia, the testamentary freedom of a testator was recognised long before the Wills Act 1959 was enacted. Taylor J in *Re Tan Soh Sim Deceased; Chan Lam Keong And 4 Ors v. Tan Saw Keow And 3 Ors* [1951] 1 MLRA 31 observed as follows:

> "By the year 1930 a much higher proportion of the non-Malay population had become domiciled in the Malay States and the practical difficulty of administering a variety of personal laws, especially in relation to intestate succession, had greatly increased. This and other causes led to the passing of the Distribution Enactment (Now Cap. 71) which repealed the Recognition Order in Council and introduced the main provisions of the English Statute of Distribution, 22 & 23 Charles 11, Cap. 10, to govern succession to the estate of every intestate (other than a Moslem) who died locally domiciled. This was not in any sense an attack on Chinese custom or on any other personal law. **Testamentary freedom is absolute. The Chinese property-owning classes are accustomed to making wills and the practice is not uncommon among the Indian and other communities**. They were all put on the same basis and, granted a local domicil, there was no room for uncertainty. Everybody could give full effect by his will to his own personal views on family succession, customary or otherwise, and if he did not make a will, then the one statute applied irrespective of the community. But as regards other matters within the domain of the personal law, such as marriage, adoption and guardianship, the law of Perak reverted to the state in which it was before 1893 and the law of the other States remained in the same state as it had been in throughout-namely, that in the absence of any statutory provision, the Courts applied the personal law of the community concerned."
>
> [Emphasis Added]

[104] Thus elucidated, any inconsistency or contradiction between the doctrine of secret trust and the Malaysian Wills Act 1959 is a non-starter. In the premise, the third leave question is answered in the negative.

Conclusion

[105] We have given our anxious consideration to the submissions advanced on behalf of the plaintiffs/appellants but we do not find any merit in the appellants' submissions to justify interference with the Court of Appeal's judgment.

[106] In this instant appeal, in giving effect to the secret trust, the Court of Appeal took into consideration various factors which include:

(i) respect over the principle of testamentary freedom and the testator's last wish;

(ii) secret trust is an established principle of trusts law; and

(iii) the interest of society requires that a testator should make adequate provision for his surviving family.

[107] For those reasons, we affirmed the decision of the Court of Appeal and dismissed the appeal with costs. So ordered.

The Legal Review

The Definitive Alternative

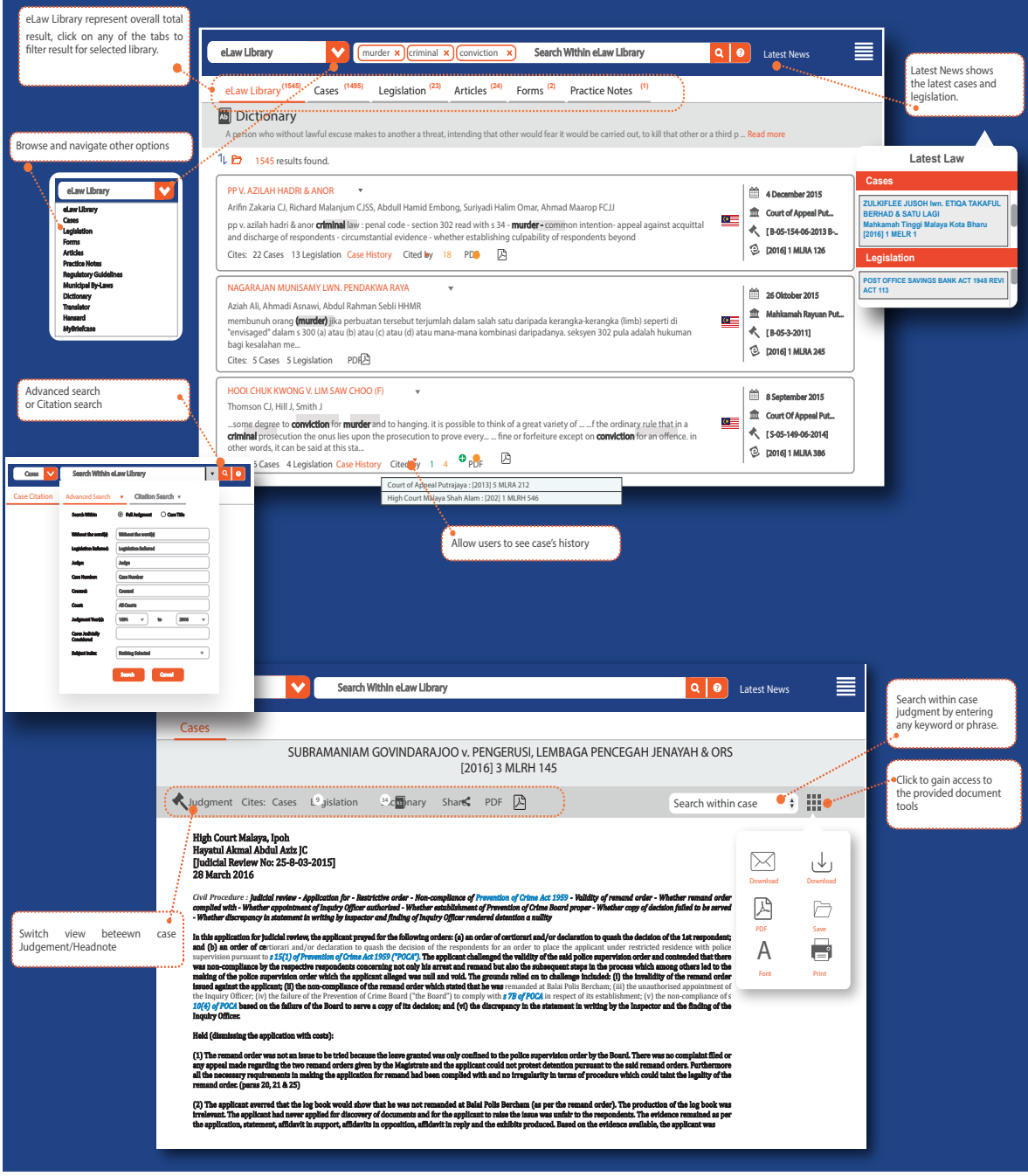
The Legal Review Sdn. Bhd. (961275-P)
B-5-8 Plaza Mont' Kiara,
No. 2 Jalan Mont' Kiara, Mont' Kiara,
50480 Kuala Lumpur, Malaysia
Phone: **+603 2775 7700** Fax: **+603 4108 3337**
www.malaysianlawreview.com

eLaw.my
The Digital Library

Introducing eLaw
Experience the difference today

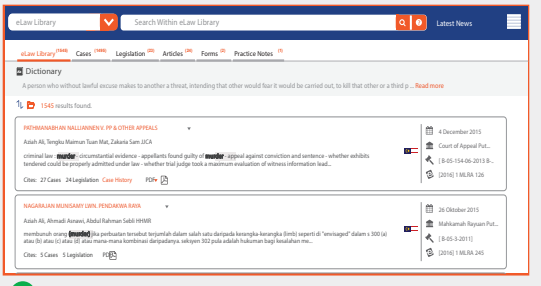
eLaw.my is Malaysia's largest database of court judgments and legislation, that can be cross-searched and mined by a feature-rich and user-friendly search engine – clearly the most efficient search tool for busy legal professionals like you.

A Snapshot of Highlights



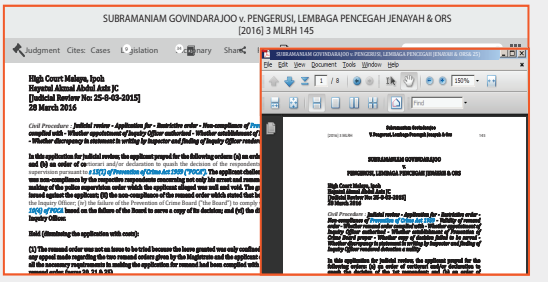
Our Features

Search Engine



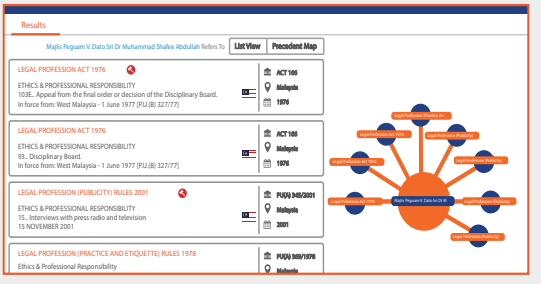
- Easier
- Smarter
- Faster Results.

Judgments Library



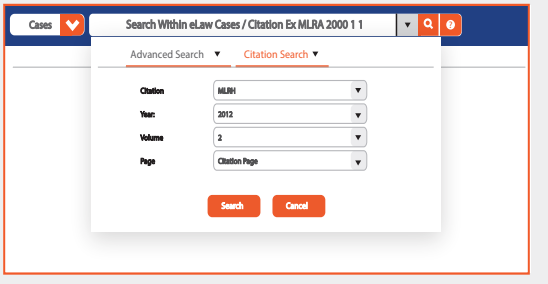
eLaw has more than 80,000 judgments from Federal/ Supreme Court, Court of Appeal, High Court, Industrial Court and Syariah Court, dating back to the 1900s.

Find Overruled Cases



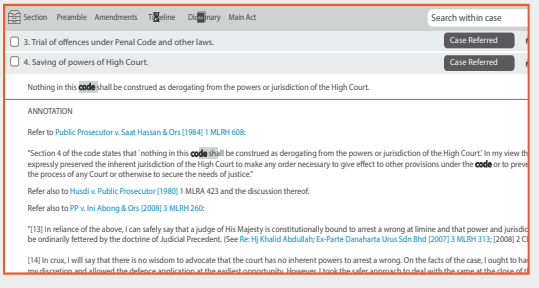
The relationships between referred cases can be viewed via precedent map diagram or a list — e.g. Followed, referred, distinguished or overruled.

Multi-Journal Case Citator



You can extract judgments based on the citations of the various local legal journals.*

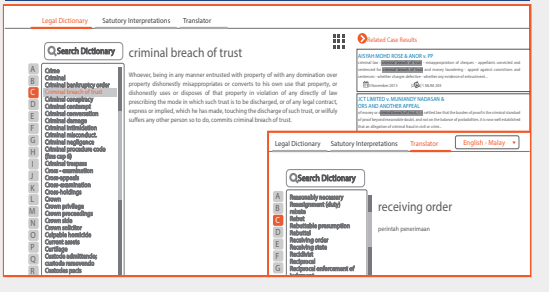
Legislation Library



You can cross-reference & print updated Federal and State Legislation including municipal by-laws and view amendments in a timeline format.

Main legislation are also annotated with explanations, cross-references, and cases.

Dictionary/Translator



eLaw has tools such as a law dictionary and a English - Malay translator to assist your research.

Clarification: Please note that eLaw's multi-journal case citator will retrieve the corresponding judgment for you, in the version and format of The Legal Review's publications, with an affixed MLR citation. No other publisher's version of the judgment will be retrieved & exhibited. The printed judgment in pdf from The Legal Review may then be submitted in Court, should you so require.

Please note that The Legal Review Sdn Bhd (is the content provider) and has no other business association with any other publisher.

Start searching today!

www.elaw.my

• *Malaysia* • *Singapore* • *United Kingdom*

The Legal Review
The Definitive Alternative

Uncompromised Quality At Unrivalled Prices

MLRA

The Malaysian Law Review (Appellate Courts) – a comprehensive collection of cases from the Court of Appeal and the Federal Court.

– 48 issues, 6 volumes annually

MLRH

The Malaysian Law Review (High Court) – a comprehensive collection of cases from the High Court.

– 48 issues, 6 volumes annually

MELR

The Malaysian Employment Law Review – the latest Employment Law cases from the Industrial Court, High Court, Court of Appeal and Federal Court.

– 24 issues, 3 volumes annually

TCLR

The Commonwealth Law Review – selected decisions from the apex courts of the Commonwealth including Australia, India, Singapore, United Kingdom and the Privy Council.

– 6 issues, 1 volume annually

Published by The Legal Review Publishing Pte Ltd, Singapore

SSLR

Sabah Sarawak Law Review – selected decisions from the courts of Sabah and Sarawak

– 12 issues, 2 volumes annually

- > 80,000 Cases
- Search Overruled Cases
- Federal & State Legislation
- Syariah Cases, Municipal Laws

eLaw.my is Malaysia's largest database of court judgments and legislation, that can be cross searched and mined by a feature-rich and user-friendly search engine – clearly the most efficient search tool for busy legal professionals like you.

Call **03 2775 7700**, email **marketing@malaysianlawreview.com**
or subscribe online at **www.malaysianlawreview.com**