

**Sidambaram a/l Torosamy v Lok Bee Yeong (representative to
the estate of Soma Sundram a/l Doraiswamy)**

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO
B-02(NCVC)(W)-764-04 OF 2016
HAMID SULTAN, BADARIAH SAHAMID AND MARY LIM JJCA
2 JUNE 2017

*Land Law — Power of attorney ('PA') — Rights and interest on grant of
— Deceased owner of bungalow during his lifetime in consideration of monies lent
by appellant executed PA giving appellant absolute power to sell property and keep
proceeds of sale — Whether PA irrevocable in nature — Whether deceased's act of
selling bungalow without appellant's knowledge could not amount to conduct
revoking PA — Whether deceased never did any act which could constitute
revocation of PA — Whether deceased's unilateral act of selling bungalow
amounted to breach of contract/trust — Whether from time PA was executed
deceased divested himself of his interest in bungalow and held property as
constructive trustee for appellant — Whether deceased's estate liable to pay
appellant full proceeds of sale of bungalow*

The appellant was the elder brother of Soma Sundram a/l Doraiswamy ('the deceased') whose widow, the respondent, was the administrator of his estate. During the deceased's lifetime, the appellant had allegedly lent the deceased monies from time to time and had even paid the redemption sum for a bungalow ('the bungalow') that the deceased owned. As the deceased could not repay the advances, he gave the appellant the document of title to the bungalow and executed a power of attorney ('the PA') giving the appellant absolute power to sell the bungalow and keep the entire proceeds of sale. Some years after the PA was executed, the appellant realised that the leasehold tenure of the bungalow would expire in about 19 years. The appellant, who was then working overseas, requested the deceased (who was still the registered owner of the bungalow) to renew the lease for another 99 years and, for that purpose, arranged for the title to be handed back to the deceased and for all fees for the lease renewal application to be paid. When he returned to Malaysia, the appellant discovered that the deceased had sold the bungalow for RM1.45m and had credited only RM549,995 into the appellant's account. The deceased had used the balance of the proceeds of sale to pay off creditors and buy a double-storey terrace house ('the Sunway property'). The appellant claimed that before his death, the deceased had agreed to sell the Sunway property and use the proceeds to settle the balance RM900,005 he owed the appellant for the sale of the bungalow. The appellant also claimed that when the deceased later suffered a stroke, he sent him to India for medical treatment and paid for all the

- A medical and other expenses involved and when the deceased died there, he had the body flown back to Malaysia for burial and bore all the expenses involved right up to the burial. The appellant sued the respondent qua administrator in the High Court for, inter alia: (a) a declaration that under the PA he was entitled absolutely to the bungalow and the proceeds of its sale; (b) an order that the respondent pay him the balance RM900,005 due to him from the sale of the bungalow; and (c) the sum of RM900,005 to be paid to him out of the proceeds of sale of the Sunway property, together with a further RM141,936.30 he had incurred for medical, funeral and other related expenses for the deceased. The appellant contended that the deceased held the bungalow in trust for him because as from the date of the PA he had possession of the title deed to the property, paid the quit rent and assessment for more than ten years and also paid a substantial sum to have the leasehold tenure renewed. The respondent, on the other hand, denied that any trust relationship was created by the PA. Apart from granting the appellant RM14,950.43 (which was conceded by the respondent) and allowing him to recover the expenses he had incurred for the deceased's funeral — provided the appellant was able to produce receipts for the same in his name — the High Court dismissed all other claims of the appellant. The court held that the deceased had not committed any breach of trust or fraud in selling the bungalow without informing the appellant; that the PA was revocable in nature and by his actions the deceased had impliedly revoked it; and that there was no evidence of any monies advanced by the appellant to or on behalf of the deceased. The instant appeal was against the High Court's decision.
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- F **Held**, allowing the appeal in part:
- (1) The High Court's appreciation of the facts and law was perverse to the appellant considering that the deceased had voluntarily executed the PA giving the proceeds of sale of the bungalow to the appellant. Prima facie, in law and in equity, the deceased had divested himself of his interest in the bungalow to the appellant. The deceased's role after the execution of the PA was at most that of a constructive trustee. It was undisputed that the appellant had an interest in the proceeds of sale of the bungalow. Consequently, the PA fell within the jurisprudence and parameters of an irrevocable PA. As the power was never revoked during the deceased's lifetime, the terms stated in the PA stood valid, one of which was that the appellant was entitled to the proceeds of sale of the bungalow (see paras 5 & 23).
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- H
- I (2) Once a valid PA was given, it remained in full force until it was lawfully revoked, ie, the common law principles of revocation by conduct of the donor was not applicable. Section 5 of the Power of Attorney Act 1949 ('the PA 1949') set out the procedure for revocation. In the instant case, there was no revocation as per s 5 of the PA 1949. Even on the assumption the PA in the instant case was not irrevocable, the deceased

- could not have acted in law or in equity against the express terms contained in the PA itself without committing breach of contract, fraudulent breach of trust, etc (see paras 21 & 24). A
- (3) The respondent's pleaded defence to the 'bungalow issue' (ie: denying the existence of the PA and the appellant's claim to the bungalow and its sale proceeds and putting the appellant to strict proof thereof) was insufficient to displace the appellant's claim as the deceased had absolutely given the proceeds of sale to the appellant. In law, the PA corroborated the appellant's evidence. Very importantly, there was no challenge in the statement of defence to the PA itself. Any reasonable tribunal appraised with the pleadings, evidence and the law would have concluded that the appellant did advance money to the deceased which culminated in the PA and that the PA was irrevocable. In the instant case, only the appellant and the respondent (who had no knowledge of the events) had given evidence. The law only required the appellant to establish his case on a balance of probabilities. The High Court's evaluation of the facts and law on the 'bungalow issue' was misconceived and perverse and required appellate intervention (see paras 30–32). B C D
- (4) The appellant's claim in relation to the 'bungalow issue' had merits and was allowed. His other monetary claims, unrelated to the 'bungalow issue', concerned a finding of facts in respect of which this court deferred to the findings and conclusion of the trial judge and was not minded to disturb the same. However, it was not proper for the court below to make an order that the burial expenses were allowed provided the appellant produced receipts. Such an order on the facts would not bring finality to the court proceedings. As the record showed evidence of a total expenditure of RM13,261.40 and the documents were not challenged, the claim for that sum was allowed. The amount granted by the High Court was also sustained (see paras 36–38). E F G

[Bahasa Malaysia summary

Perayu adalah abang kepada Soma Sundran a/l Doraiswamy ('si mati') yang balunya, responden, adalah pentadbir estetnya. Semasa hidup si mati, perayu menyatakan telah meminjamkan si mati wang dari masa ke semasa dan turut membayar jumlah penebusan untuk sebuah banglo ('banglo') yang dimiliki oleh si mati. Oleh kerana si mati tidak boleh membayar semula pendahuluan, dia memberi perayu dokumen hakmilik banglo dan melaksanakan surat kuasa wakil ('SKW') memberikan perayu kuasa mutlak untuk menjual banglo dan menyimpan semua hasil jualan. Beberapa tahun selepas SKW dilaksanakan, perayu menyedari bahawa pajakan pemegangan banglo akan tamat tempoh dalam masa 19 tahun. Perayu, yang bekerja di luar negara, meminta si mati ('yang masih pemilik berdaftar banglo') memperbaharui pajakan untuk tempoh 99 tahun dan, bagi tujuan itu, mengatitkan untuk hakmilik diserahkan kembali kepada si mati dan semua fi untuk permohonan I

- A pembaharuan pajakan dibayar. Apabila dia pulang ke Malaysia, perayu mendapati bahawa si mati telah menjual banglo sebanyak RM1.45 juta dan hanya mengkreditkan RM549,995 ke dalam akaun perayu. Si mati telah menggunakan baki hasil jualan untuk membayar penghutang dan membeli rumah teres dua tingkat ('hartanah Sunway').
- B Perayu mendakwa bahawa sebelum kematiannya, si mati telah bersetuju untuk menjual hartanah Sunway dan menggunakan hasil itu untuk menyelesaikan baki RM900,005 yang terhutang kepada perayu untuk jualan banglo. Perayu mendakwa bahawa apabila si mati kemudian mengalami strok, dia telah menghantar si mati ke India untuk rawatan perubatan dan membayar semua perbelanjaan perubatan dan lain-lain yang berkaitan dan apabila si mati, meninggal di sana, dia telah menerbangkan mayat si mati pulang ke Malaysia untuk pengebumian dan menanggung semua perbelanjaan sehingga ke pengebumian. Perayu menyaman responden pentadbir qua di Mahkamah Tinggi untuk, antara lain:
- D (a) satu deklarası bahawa di bawah SKW dia berhak sepenuhnya terhadap banglo dan hasil jaluannya; (b) satu perintah bahawa responden membayar perayu baki RM900,005 yang terhutang kepadanya daripada jualan banglo; dan (c) jumlah sebanyak RM900,005 dibayar kepadanya dari hasil jualan hartanah Sunway, bersama RM141,936.30 yang ditanggung untuk perbelanjaan perubatan, pengebumian dan lain-lain berkaitan untuk si mati.
- E Perayu menghujahkan bahawa si mati memegang banglo dalam amanah untuknya kerana dari tarikh SKW dia memiliki surat hakmilik hartanah, membayar cukai pintu dan taksiran selama lebih sepuluh tahun dan juga membayar jumlah yang besar untuk memperbaharui pegangan pajakan.
- F Responden, sebaliknya, menafikan apa-apa hubungan amanah terbentuk oleh SKW. Selain daripada memberi perayu RM14,950.43 (yang mana diakui oleh responden) dan membenarkan perayu untuk mendapat semula perbelanjaan yang telah dia tanggung untuk pengebumian si mati — sekiranya perayu boleh mengemukakan resit untuk yang sama atas namanya — Mahkamah Tinggi
- G menolak semua tuntutan lain perayu. Mahkamah memutuskan bahawa si mati tidak melakukan apa-apa pelanggaran amanah atau fraud dengan menjual banglo tanpa memaklumkan perayu; bahawa SKW adalah boleh dibatalkan sifarnya dan melalui tindakannya si mati telah dan melalui tindakannya si mati telah membatalkannya secara tersirat; dan bahawa tiada keterangan apa-apa wang pendahuluan oleh perayu kepada atau bagi pihak si mati. Rayuan ini
- H adalah terhadap keputusan Mahkamah Tinggi.

Diputuskan, membenarkan sebahagian rayuan:

- I (1) Penilaian Mahkamah Tinggi terhadap fakta dan undang-undang adalah tidak berpatutan terhadap perayu mengambil kira bahawa si mati telah secara sukarela melaksanakan SKW memberikan hasil jualan banglo kepada perayu. Secara prima facie, dalam undang-undang dan ekuiti, si mati telah melucutkan dirinya daripada faedah dalam banglo kepada perayu. Peranan si mati selepas pelaksanaan SKW adalah sebagai

- pemegang amanah konstruktif. Tidak dipertikaikan bahawa perayu mempunyai faedah dalam hasil jualan banglo. Akibatnya, SKW terangkum dalam perundangan dan parameter SKW yang tidak boleh dibatalkan. Memandangkan kuasa itu tidak pernah dibatalkan sewaktu hayat si mati, terma di dalam SKW masih sah, satu yang mana perayu berhak kepada hasil jualan banglo (lihat perenggan 5 & 23). A B
- (2) Apabila satu SKW yang sah telah diberikan, ia kekal berkuat kuasa sehingga ia dibatalkan secara sah, iaitu, prinsip common law pembatalan melalui perbuatan pemberi tidak terpakai. Seksyen 5 Akta Surat Kuasa Wakil 1949 ('SKW 1949') menyatakan prosedur untuk pembatalan. Dalam kes ini, tiada pembatalan seperti s 5 SKW 1949. Walaupun pada anggapan SKW dalam kes ini tidak boleh dibatalkan, si mati tidak boleh bertindak dari segi undang-undang atau ekuiti terhadap terma yang terkandung dalam SKW sendiri tanpa melakukan pelanggaran kontrak, fraud pelanggaran amanah, dan lain-lain (lihat perenggan 21 & 24). C D
- (3) Responden memplidkan pembelaan terhadap 'bungalow issue' (iaitu menafikan kewujudan SKW dan tuntutan perayu terhadap banglo dan hasil jualan dan meletakkan perayu dengan bukti yang ketat) adalah tidak mencukupi untuk menggagalkan tuntutan perayu kerana si mati telah memberikan sepenuhnya hasil jualan kepada perayu. Dalam undang-undang, SKW menyokong keterangan perayu. Adalah sangat penting, tiada cabaran dalam kenyataan pembelaan terhadap SKW itu sendiri. Apa-apa tribunal munasabah yang dinilai dengan pliding, keterangan dan undang-undang akan menyimpulkan bahawa perayu mendahulukan wang kepada si mati yang berakhir dengan SKW dan SKW tidak boleh dibatalkan. Dalam kes ini, hanya perayu dan responden (yang mempunyai pengetahuan terhadap kejadian) telah memberi keterangan. Undang-undang hanya memerlukan perayu untuk membuktikan kesnya atas imbangan kebarangkalian. Penilaian Mahkamah Tinggi terhadap fakta dan undang-undang dalam 'bungalow issue' adalah terkhilaf dan tidak berpatutan dan memerlukan campur tangan rayuan (lihat perenggan 30–32). E F G
- (4) Tuntutan perayu berkaitan dengan 'bungalow issue' mempunyai merit dan dibenarkan. Lain-lain tuntutan wangnya, tidak berkaitan dengan 'bungalow issue', berkenaan suatu dapatan fakta yang berkenaan dengannya Mahkamah ini menangguh kepada dapatan dan kesimpulan hakim perbicaraan dan tidak keberatan untuk mengganggu yang sama. Walau bagaimanapun, adalah tidak wajar untuk mahkamah bawahan membuat satu perintah bahawa perbelanjaan pengebumian dibenarkan sekiranya perayu mengemukakan resit. Perintah sebegitu atas fakta tidak akan memberikan pengakhiran kepada prosiding mahkamah. Oleh kerana rekod menunjukkan keterangan keseluruhan perbelanjaan sebanyak RM13,261.40 dan dokumen itu tidak dicabar, tuntutan untuk I

- A jumlah itu dibenarkan. Jumlah yang diberikan oleh Mahkamah Tinggi juga dikekalkan (lihat perenggan 36–38).]

Notes

- B For a case on rights and interest on grant of power of attorney, see 8(3) *Mallal's Digest* (5th Ed, 2017 Reissue) para 4399.

Cases referred to

- APV Hill & Mills (M) Sdn Bhd v AQ-Pacific Wide Sdn Bhd & Anor* [2006] 3 MLJ 235, CA (refd)
- C *Abu Bakar bin Pangis & Ors v Tung Cheong Sawmill Sdn Bhd & Ors* [2014] 5 MLJ 384, CA (refd)
- Benmax v Austin Motor Co Ltd* [1955] AC 370, HL (refd)
- China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal* [1996] 2 MLJ 517, FC (refd)
- D *Clarke v Edinburgh and District Tramways Co* 1919 SC (HL) 35, HL (refd)
- Eng Mee Yong & Ors v V Letchumanan* [1979] 2 MLJ 212, PC (refd)
- Kyros International Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [2013] 2 MLJ 650, CA (refd)
- E *Pekan Nenas Industries Sdn Bhd v Chang Ching Chuen & Ors* [1998] 1 MLJ 465, FC (refd)
- Sidambaram Torosamy v Lok Bee Yeong (as Administrator of the Estate of Soma Sundaram Doraiswamy, deceased)* [2016] MLJU 1828; [2016] 8 CLJ 559, HC (refd)
- F *Smart v Sanders* [1843–60] All ER Rep 758 (refd)
- Watt (or Thomas) v Thomas* [1947] 1 All ER 582; [1947] AC 484, HL (refd)

Legislation referred to

- Contracts Act 1950 ss 155, 155(a), 158, 159
- Federal Constitution
- G Powers of Attorney Act 1949 ss 4, 5, 6, 7

Appeal from: Civil Suit No 22NCVC-106–03 of 2015 (High Court, Shah Alam)

- H *George Proctor (YS Woo & Proctor) for the appellants.*
Jasvinder Singh (C Leo Camoens with him) (Mazwan Pathma & Co) for the respondent.

Hamid Sultan JCA (delivering judgment of the court):

- I [1] The appellant/plaintiff's appeal is against part of the decision of the learned judicial commissioner who disallowed a substantial claim of the plaintiff against the estate of his brother ('the deceased') who is represented by the defendant who is the deceased's wife. In the instant case, evidence had been

adduced in court to show the relationship between the deceased and the wife had been estranged. **A**

[2] The primary facts supported by evidence in our own words are as follows:

- (a) the plaintiff has given financial assistance to the deceased on various occasions, and even after death; **B**
- (b) the deceased had given a power of attorney to the plaintiff to sell his bungalow house ('the bungalow') and take the proceeds absolutely;
- (c) the plaintiff had fully settled the deceased's outstanding loan in respect of the bungalow; **C**
- (d) the deceased had subsequently sold the bungalow and from the proceeds, he paid the plaintiff a sum of money and the balance was used to settle the deceased debts and to purchase a terrace house; **D**
- (e) the plaintiff had paid for medical expenses, etc for the deceased who died in india and also for transportation expenses to bring the deceased's body back to Malaysia; and
- (f) the plaintiff had given evidence supported by documentary evidence to show that the deceased was indebted to the plaintiff and that resulted in the execution of the power of attorney. **E**

[3] The plaintiff's cause of action is anchored on breach of trust, fraud and repayment of money advanced until the deceased's burial, etc. The prayers in the statement of claim read as follows: **F**

- (1) An Order and Declaration that the said SOMA SUNDARAM A/L DORAISWAMY (Deceased) had assigned his interest in the said Property held under No Pendaftaran 3208, Lot 152, Seksyen 6, Bandar Petaling Jaya, Daerah Kuala Lumpur, having a Postal Address No 11, Jalan 6/6, 46000 Petaling Jaya, Selangor to the Plaintiff vide a Power of Attorney dated 2-1-2004 and the Plaintiff was entitled absolutely under Clause 21 of the said Power of Attorney to the said Property and/or to all proceeds from the sale of the said Property. **G**
- (2) An Order and Declaration that the Defendant pays the Plaintiff the sum of RM900,005.00 being the Balance Proceeds received by the said SOMA SUNDARAM A/L DORAISWAMY (Deceased) from the sale of the said property. **H**
- (3) Further an Order and Declaration that upon the sale of the said Property Held under HS(M) 8507 PT 1458, Mukim Damansara, Bandar Sunway, Daerah Petaling, Negeri Selangor having a postal address at No 15, Jalan PJS 914, Bandar Sunway, 46150, Petaling Jaya, the sum of **I**

- A RM900,005.00 under Para 57 (2) above be deducted and paid to the Plaintiff together with the further sum RM141,936.30 stated at Para 54 above.
- (4) Further an Order and Declaration that the Plaintiff be authorised to execute the Sale & Purchase Agreement and Memorandum of Transfer and all other requisite documents for the sale of the property held under HS(M) 8507 PT 1458, Mukim Damansara, Bundar Sunway, Daerah Petaling, Negeri Selangor having a postal address at No. 15, Jalan PJS 914, Bandar Sunway, 46150, Petaling Jaya to the Intended Purchaser Teng Chuan Heng and/or any- other Intended Purchaser at a Purchase Price of RM790,000.00 or above (if possible).
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- C
- (5) An Order and Declaration that the Plaintiff be authorised to receive and retain the sum of RM1,041,947.30 from the sale of the land held under HS(M) 8507 PT 1458, Mukim Damansara, Bundar Sunway, Daerah Petaling, Negeri Selangor having a postal address at No 15, Jalan PJS 914, Bandar Sunway, 46150, Petaling Jaya from the Intended Purchaser Teng Chuan Heng and/or any other Intended Purchaser in settlement of the monies owing by the deceased to the Plaintiff.
- D
- (6) Costs be paid to the Plaintiff by the Defendant.

- E [4] The learned judicial commissioner only granted a small part of the claim and dismissed the claim related to breach of trust and/or fraud. The final draft order of the court as per the appeal record is as follows:

DERAF PERINTAH

- F *TUNTUTAN PLAINTIF* setelah dipanggil untuk keputusan pada hari ini dalam kehadiran En George C Proctor Peguamcara bagi Plaintiff dan En Jasvinder Singh Peguamcara bagi Defendan *DAN SETELAH MEMBACA* Hujahan Bertulis Plaintiff, Hujahan Bertulis Defendan, Balasan Hujahan Bertulis Plaintiff dan Balasan Hujahan Bertulis Defendan *DAN SETELAH MENDENGAR*
- G Peguamcara-Peguamcara tersebut *DAN MAKA ADALAH DIPERINTAHKAN BAHAWA*
1. Tuntutan Plaintiff sebanyak RM900,005.00 yang merupakan wang terhutang bagi penjualan Rumah Bungalow ditolak;
 2. Tuntutan Plaintiff sebanyak RM14,950.43 yang merupakan wang yang telah dibayar kepada Lembaga Hasil Dalam Negeri Shah Alam oleh Plaintiff bagi pihak si mati dibenarkan;
 3. Tuntutan Plaintiff sebanyak RM27,875.52 yang merupakan perbelanjaan pembelian tiket penerbangan pergi-balik ke India dan perbelanjaan penghantaran balik mayat dari India ke Malaysia ditolak;
 4. Tuntutan Plaintiff bagi perbelanjaan pengebumian yang dibayar oleh Plaintiff bagi si mati dibenarkan dengan syarat Plaintiff mempunyai resit-resit di atas namanya; dan
 5. Kos akan ditaksirkan dan akan dibayar oleh Defendan kepada Plaintiff.
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- I

JURISPRUDENCE RELATING TO PERVERSE DECISION

A

[5] The learned judicial commissioner had written a meticulous judgment setting out the facts and the law running to 42 pages. However, we find one thread which flowed throughout the judgment that is the appreciation of facts and law was perverse to the plaintiff, taking into consideration that the deceased had voluntarily executed a power of attorney and in that power of attorney the deceased had given the proceeds of the sale of the bungalow to the plaintiff. We also find the related legal principles were rightly identified by the learned judicial commissioner save that the application of the principles to the facts were misconceived. That is to say, prima facie in law and equity, the deceased had divested his interest in the property to the plaintiff. The deceased's role after the execution of the power of attorney at the most will be that of a constructive trustee. Powers of attorney of this nature where the owner of the property has given away his interest, whether as a consideration or compromise arrangement or assignment of interest, etc is often referred to as irrevocable power of attorney. The word irrevocable need not be stated so. It all depends on the surrounding circumstances which lead to the execution of the power of attorney. For example, it is not unusual in banking documents to find power of attorney given by a borrower to the bank giving full liberty to the bank to sell the charged property and utilise the proceeds of the sale.

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[6] It is well established that the appellate courts will not readily interfere with finding of facts and assessment of witnesses' evidence. There are a number of exceptions to this well known principle (see (i) *Pekan Nenas Industries Sdn Bhd v Chang Ching Chuen & Ors* [1998] 1 MLJ 465; (ii) *APV Hill & Mills (M) Sdn Bhd v AQ-Pacific Wide Sdn Bhd & Anor* [2006] 3 MLJ 235 (CA); (iii) *Eng Mee Yong & Ors v V Letchumanan* [1979] 2 MLJ 212; (iv) *Benmax v Austin Motor Co Ltd* [1955] AC 370; (v) *China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal* [1996] 2 MLJ 517; and (vi) *Abu Bakar bin Pangis & Ors v Tung Cheong Sawmill Sdn Bhd & Ors* [2014] 5 MLJ 384 (CA)).

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[7] It must be emphasised here that the appellate courts do not welcome perverse decisions of the trial courts. The reason being that such decisions undermine the integrity of the decision making process itself. The test to decide perversity is one materially related to common sense and miscarriage of justice. That is to say, the appellate court has to take into consideration the totality of the evidence, the law, pleading rules, etc; related to a particular issue dealt with by the trial judge and decide whether any reasonable tribunal appraised of the facts and law would have come to the same conclusion. A finding of the trial court will always remain perverse, if it is perverse to the totality of the evidence and/or law and/or rules of procedure and/or evidence, etc; sufficient to cause miscarriage of justice. If one factor or combination of factors had caused

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A miscarriage of justice, the appellate court is obliged to intervene. However, on the totality of the evidence and/or the law, the plaintiff's suit needs to be wholly or partly allowed or dismissed then the trial court's decision though perverse may not require appellate intervention as there may not be a case to say there was indeed miscarriage of justice.

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[8] The appellate court's function is to arrest miscarriage of justice based on sufficient grounds and in the process it is not necessary to go through each and every issue of fact and principle of law the trial court has erred or got it correct. Trying to go through in a fault finding mission of the trial court in all aspects will be sheer waste of judicial time of the appellate court, notwithstanding a grocery list of complaints are raised in the memorandum of appeal. In contrast, in arbitration, the arbitral tribunal is paid to answer all the questions posed by the parties. That is not the role of the trial courts or appellate courts. The courts' role is to deliver justice according to rule of law in line with the judges' oath of office to preserve, protect and defend the Federal Constitution and based on its own assessment of facts and law the parties have placed before the court.

C

D PRELIMINARIES

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[9] On the date of hearing of the appeal, we invited parties to submit on the meaning and scope of the power of attorney as well as the meaning of irrevocable power of attorney.

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[10] The judgment of the learned judicial commissioner has been reported and cited as *Sidambaram Torosamy v Lok Bee Yeong (as Administrator of the Estate of Soma Sundaram Doraiswamy, deceased)* [2016] MLJU 1828; [2016] 8 CLJ 559. To save the court's judicial time, we do not think it is necessary to go into any detail in respect of the facts and findings save to say this judgment must be read with that judgment to appreciate our grounds in the proper perspective.

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[11] The claim by the plaintiff can be split into two parts to deal with the issues effectively. They are as follows:

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- (a) evidence of money advanced by the plaintiff to the deceased which resulted in the power of attorney; and
- (b) money advanced by the plaintiff after the execution of the power of attorney until the burial.

I

BRIEF FACTS

[12] The brief facts of the case and the conclusion of the judicial commissioner which has been placed before us in a rudimentary manner read

as follows:

1. The plaintiff, Sidambaram is the elder brother of the deceased, Soma Sundaram ('Soma').
2. The defendant, Lok Bee Yeong, is the widow of Soma and also the administrator of his estate.
3. Sidambaram filed a writ action against Soma's estate alleging breach of trust and fraud for selling a bungalow belonging to Soma because Soma had prepared a power of attorney ('P/A') giving Sidambaram the power to sell the bungalow.
4. Sidambaram alleged that he had on many occasions given Soma numerous loans. One of the loans of RM120,000 was given for the purpose of redeeming the bungalow from the bank in which Soma promised to pay within six months.
5. Soma failed to repay Sidambaram. Soma then suggested that he makes an outright transfer of the bungalow to Sidambaram. However, this plan did not materialize.
6. Upon suggestion by his solicitor, Soma proposed the grant of power of attorney to Sidambaram. Two important terms to be inserted in the P/A will vest in Sidambaram the absolute power to sell the bungalow and that the whole of the proceeds of the sale was to be given to Sidambaram.
7. Sometime in 2007, while Sidambaram was in Tanzania, Soma informed him that the lease of the bungalow needs to be extended. Sidambaram requested Soma to make the application and paid all costs incidental to the application. As the title was needed for the renewal process, Sidambaram had asked Soma to collect it from his wife in Malaysia.
8. Upon returning to Malaysia, Sidambaram found that the title was still at the Land Office pending approval of the extension application. Sidambaram then left to Canada due to work.
9. When Sidambaram returned to Malaysia, Soma admitted that he had sold the bungalow for RM1.45m and credited only RM549,995 into Sidambaram's account.
10. The balance of the proceeds of sale were used to pay off his creditors and purchased a terrace house in Bandar Sunway.
11. Sidambaram claimed for:
 - a. RM900,005 — the balance proceeds of sale of the bungalow. Sidambaram claimed that by virtue of cll 9 and 21 in the power of attorney, Soma held the property on trust for him and he is entitled to the whole price; and
 - b. RM141,936.30 — Sidambaram claimed medical expenses, funeral expenses and other related expenses spent by Sidambaram for Soma, (from this sum, the defendant had conceded Sidambaram's claim of RM14,950.43).

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- A** 12. Sidambaram claimed from the proceeds of sale of the terrace house. It is the allegation of Sidambaram that prior to his death, Soma informed him that he would assign the terrace house as settlement of the RM900,005.
13. It is the contention of Sidambaram that:
- B** a. cl 9 of the PA — the deceased gave Sidambaran the right to sell the bungalow to any person;
- b. cl 21 stated that all proceeds from the sale of the bungalow shall go to Sidambaram;
- C** c. the power of attorney had created an implied trust in favour of Sidambaram;
- d. s 5 of the Power of Attorney Act 1959 protects not only third parties who deal with the attorney but also the donee's interest in the property; and
- D** e. s 5 also requires an express revocation or renunciation in writing.
14. The defendant contended that:
- a. there was no trust relationship which existed but a donor-donee relationship under the P/A; and
- E** b. there was insufficient evidence to reach a conclusion that a trust existed.
- [13]** The findings of the High Court are summarised as follows:
- F** (a) there was no breach of trust and fraud committed by Soma in selling the bungalow without informing Sidambaram;
- (b) the power of attorney is revocable in nature;
- G** (c) apart from his oral claim, there were no evidence adduced by Sidambaram on the issues of loan extended to the deceased;
- (d) though there was no written notice of the revocation of the power of attorney, Soma by his actions had impliedly revoked the power of attorney; and
- H** (e) Sidambaram's documentary evidence contradicted his oral evidence (IOU with Logama).
- [14]** After a full trial, the judge made the following orders:
- I** (a) Sidambaram's claim for the sum of RM900,005 was dismissed;
- (b) the sum of RM14,950.443 paid to LHDN on behalf of Soma was allowed;

- (c) the sum of RM27,875.52 as air tickets to India and expenses of bringing back Soma's body back to Malaysia was dismissed; A
- (d) the funeral expenses paid for by Sidambaram was allowed on condition he produces receipt; and
- (e) costs to be borne by parties. B

[15] Dissatisfied, Sidambaram appealed to the Court of Appeal.

[16] The memorandum of appeal reads as follows: C

1. The Learned Judge erred in law and fact in dismissing the Appellant's/Plaintiffs claim for the sum of RM900,005.00 owing to him by the Deceased Soma Sundaram A/L Doraiswamy and further holding that there was no breach of trust or fraud by the said Deceased. D
2. The Learned Judge erred in law and fact in failing to hold that the Deceased Soma Sundaram a/l Doraiswamy had held a Bungalow at No 11, Jalan 6/6, 46000 Petaling Jaya, Selangor (Pendaftaran 3208, Lot 152, Seksyen 6, Bandar Petaling Jaya, Daerah Kuala Lumpur) in Trust for the Appellant/Plaintiff pursuant to Clause 9 & 21 of the Power of Attorney dated 2-1-2004. E
3. The Learned Judge erred in law and fact in failing to hold that by virtue of Clause 9 & 21 of the said Power of Attorney dated 2-1-2004, and the fact that the Title Deed of the said Bungalow had been given by the Deceased to the Appellant/Plaintiff after the execution of the said Power of Attorney was clear evidence that the Bungalow had been assigned to the Appellant/Plaintiff and the Deceased was holding the said Bungalow in Trust for the Appellant/Plaintiff. In fact from 2-1-2004 the Appellant had paid all Quit Rent and Assessment for the said Bungalow. F
4. The Learned Judge failed to hold that by virtue of the Appellant/Plaintiff applying to extend the Lease of the said Bungalow for a further 99 years and paying the sum of RM195,776.32 to the Land Office for the said extension, about three (3) years after the Power of Attorney was executed, was clear evidence that the Bungalow had been assigned to the Appellant/Plaintiff by the Deceased. G
5. Further, the Learned Judge erred in law and fact in failing to hold that the Deceased had agreed to sell his double-storey terrace house at No 15, Jalan PJS 914, Bandar Sunway, 46150, Petaling Jaya (H.S.(M) 8507 PT 1458, Mukim Damansara, Bandar Sunway, Daerah Petaling, Negeri Selangor) and allow the Appellant/Plaintiff to receive the full sale proceeds and contra same against the sum of RM900,005 owing to the Appellant/Plaintiff by the Deceased. H
6. The Learned Judge erred in law and fact in refusing to accept the evidence of the Appellant/Plaintiff that the Deceased had held the said Bungalow in Trust for the Appellant and had agreed to allow the Appellant/Plaintiff to I

- A** receive the full monies from the sale of the said Terrace House, especially when the Respondent/Defendant Lok Bee Yeong had admitted that she had no personal knowledge of the dealings between the Appellant/Plaintiff especially as the Deceased and the Respondent had serious marital problems.
- B** 7. The Learned Judge failed to hold that since the Title Deed of the Terrace House and all sale documents for the said house had been given to the Appellant/Plaintiff by the Deceased and not to the Defendant, was clear evidence that the Deceased had intended that the Appellant/Plaintiff be entitled absolutely to the Sale Proceeds of the said Terrace House.
- C** 8. The Learned Judge erred in law and fact in failing to hold that the Deceased had fraudulently and in breach of trust, sold the said Bungalow without the consent and knowledge of the Appellant/Plaintiff.
- D** 9. The Learned Judge erred in law and fact in refusing to allow the Appellant/Plaintiff's claims at Para 54 (Item 6, 7, 8, 9, 10, 11, 12 & 13) of the Statement of Claim especially when these claims by the Appellant/Plaintiff were never challenged by the Respondent/ Defendant in Cross-Examination and the documents marked under Bahagian B of the Common Bundle of Documents.
- E** 10. The Learned Judge erred in law and fact when she stated that the said Power of Attorney dated 2-1-2004 had been impliedly revoked when there was no evidence that the Deceased had revoked same, as required by Section 5 of the Power of Attorney Act 1949 and Section 155 of the Contracts Act 1950.
- F** 11. In fact, there was clear evidence that the Deceased had at the request of the Appellant/Plaintiff, taken the Title Deed from the Appellant/ Plaintiff's family to renew the Lease for a further 99 years and then without the Appellant/Plaintiff's knowledge fraudulently and in breach of trust sold the property for RM1.45 Million.
- G** 12. The Learned Judge erred in law and fact in holding that an adverse inference should be drawn against the Appellant for failing to call his son as a Witness, to prove that the son had paid an additional sum of RM15,776.32 to renew the lease of the bungalow. The documents of payment by the Appellant's son were in Bundle B of the Common Bundle and there was no need to call the son especially when there was no dispute on the said payments to the Land Office or cross-examination by the Respondent/Defendant's solicitors on the said additional payments.
- H**
- I** 13. The learned Judge erred in law and fact in holding that there was insufficient consideration given by the Appellant to the deceased for the said Power of Attorney dated 2-1-2004 when there was clear evidence that the Appellant had paid the sum of RM119,985.00 on behalf of the Deceased to redeem the property from being sold by Public Auction by Standard Chartered Bank.

14. The Learned Judge failed to address her mind as to why the Appellant would renew the Lease for a further 99 years and pay the sum of RM195,776.32, unless the Bungalow had been assigned to him. **A**
15. The Learned Judge refused to accept and disbelieved the Appellant's evidence that he had given various loans to the Deceased prior to the execution of the Power of Attorney just because the Appellant due to lapse of time could not find the documents proving payment. **B**
16. The Learned Judge failed to note that there was clear evidence before the Court that the Appellant was very close to the Deceased and had in fact paid all his medical expenses, funeral expenses and income tax arrears including a further loan of RM50,000.00 given to the Deceased after the execution of the Power of Attorney. **C**

JURISPRUDENCE RELATING TO POWER OF ATTORNEY

[17] The law on Power of Attorney in Malaysia is not only subject to common law principles but also to Contracts Act 1950 ('the CA 1950') as well as Powers of Attorney Act 1949 ('the PA 1949') etc. The definition of power of attorney and/or irrevocable power of attorney cannot be read in isolation. **D**

[18] The parameters of what is termed as general Power of Attorney as opposed to irrevocable power of attorney is, inter alia, set out in *Halsbury's Laws of England* (4th Ed, Reissue) as follows: **E**

A power of attorney is a formal instrument by which one person, the donor of the power, confers on another, the donee, power to act on behalf of the donor in the performance of a specific act or classes of act or generally. By such a creation, the donor as principal shall be liable to a third party for the acts of the donee, his agent, if the donee has acted within the bounds of his authority or such acts of the donee being subsequently rectified by the donor. The law applicable under these circumstances between the donor and the donee is therefore that of principal and agent. **F**

[19] A power of attorney coupled with interest to the donee will normally be referred to as irrevocable power of attorney to at least give effect to the intention of the parties which may be expressed or implied within the four corners of the terms of the power of attorney itself. Learned authors, Berna Collier and Shannon Lindsay on *Power of Attorney in Australia and New Zealand* on irrevocable power of attorney had this to say: **H**

The principle that an authority coupled with an interest is irrevocable except with the donee's consent has been recognised for centuries. A good definition of an irrevocable power coupled with an interest may be found in the case of *CLERK v LAURIE* [1857] 2 H&N 199; 157 ER 83: **I**

What is meant by an authority coupled with an interest being irrevocable is this — that where an agreement is entered into on a sufficient consideration,

A whereby an authority is given for the purpose of securing some benefit to the donee of the authority, such an authority is irrevocable.

[20] Under our law, to create a valid power of attorney it must be executed as per s 3 and also deposited in the High Court as per s 4 of the PA 1949 (in this case, it was done so and in consequence we will not set out the section).

[21] Once a valid power of attorney is given, it remains in full force until it is lawfully revoked. That is to say, the common law principles of revocation by conduct by the donor will not be applicable. Section 5 of the PA 1949 sets out the procedure for revocation and the said section reads as follows:

5 Every instrument purporting to create a power of attorney of which a true copy or an office copy has been deposited in the office of the Registrar or a Senior Assistant Registrar in accordance with this Act or any law repealed by this Act whether before or after the commencement of this Act, shall, so far as the said instrument is valid and so far as may be compatible with the terms of the instrument, continue in force until notice in writing of the revocation thereof by the donor, or of the renunciation thereof by the donee, has been deposited in every office in which the office copy or true copy thereof has been so deposited, or either the donor or the donee has died or the donee has become of unsound mind, or the donor has been adjudged to be of unsound mind or a receiving order has been made against him in bankruptcy.

(In the instant case, there was no revocation as per s 5 of the PA 1949).

[22] Sections 6 and 7 of the PA 1949 deal with limited instances of an irrevocable power of attorney. That is to say, notwithstanding the ability of the donor to revoke a power of attorney, the power of attorney under the PA 1949 may not be revocable at all, relating to purchaser of the property.

[23] Sections 6 and 7 of the PA 1949 do not displace the common law position that an authority coupled with an interest is irrevocable except with the donee's consent. In the instant case, at least it cannot be disputed that the plaintiff has an interest in the sales proceeds of the sale of the bungalow. In consequence, the power of attorney in our view will fall within the jurisprudence and parameters of an irrevocable power of attorney. In addition, as the power was never revoked during the lifetime of the deceased, the terms stated in the power of attorney will stand valid. One of the terms will be the plaintiff's entitlement to the proceeds of the sale of the bungalow. In *Smart v Sandars* [1843–60] All ER Rep 758, Wilde CJ made the following observation:

Where an agreement is entered into on a sufficient consideration whereby an authority is given for the purpose of securing some benefit to the donee of the authority such an authority is irrevocable.

[24] Even on the assumption, it is not an irrevocable power of attorney, the deceased could not have acted in law or equity against the express terms contained in the power of attorney itself. If he does, it may amount to breach of contract, fraudulent breach of trust, etc. It will depend on the pleadings as well as the evidence adduced in court.

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[25] The law on agency which to some extent has nexus to the jurisprudence relating to power of attorney statutorily protects a donee who has an interest in the subject matter related to the power of attorney. Section 155 of the CA 1950 which specifically relates to agency principles states as follows:

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155 Where the agent has himself an interest in the property which forms the subject-matter of the agency, the agency cannot, in the absence of an express contract, be terminated to the prejudice of such interest.

ILLUSTRATIONS

- (a) A gives authority to B to sell A's land, and to pay himself, out of the proceeds, the debts due to him from A. A cannot revoke this authority, nor can it be terminated by his unsoundness of mind or death.
- (b) A consigns 1,000 bales of cotton to B, who has made advances to him on such cotton, and desires B to sell the cotton, and to repay himself out of the price the amount of his own advances. A cannot revoke this authority nor is it terminated by his unsoundness of mind or death.

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[26] Illustration (a) above clearly supports the proposition that the power of attorney is irrevocable. Sections 158–159 makes it clear if there is wrongful revocation damages will entail (see *Janab's Series to Law, Practice and Legal Remedies* (2005) at pp 272–275).

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Section 158 reads as follows:

158 Where there is an express or implied contract that the agency should be continued for any period of time, the principal must make compensation to the agent, or the agent to the principal, as the case may be, for any previous revocation or renunciation of the agency without sufficient cause.

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Section 159 reads as follows:

159 Reasonable notice must be given of such revocation or renunciation; otherwise the damage thereby resulting to the principal or the agent, as the case may be, must be made good to the one by the other.

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[27] In essence, if it is a revocable power of attorney, the law to some extent recognised the fact the donor is obliged to pay compensation. However, if it is irrevocable, then any conduct of the donor to the detriment of the donee will entail the donee to seek appropriate relief from the court not just limited to compensation alone. That is to say, whether revocable or irrevocable a wrongful act of the donor will lead to the donee having relief through the court.

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A PLEADINGS

[28] In the instant case, the plaintiff had pleaded from para 3 to at least para 18, in essence to say that he has constantly advanced money to the deceased which resulted in the execution of a power of attorney. Paragraphs 14–16 of the statement of claim anchor the plaintiff’s claim on the ‘bungalow’ issue. The said paras read as follows:

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14. Sometime in December 2003, the Deceased informed the Plaintiff that his Pub was not doing well. The Deceased was worried that he could not repay the monies owing by the Deceased to the Plaintiff and offered to assign the said Bungalow to the Plaintiff in consideration of the monies lent. The Plaintiff agreed to the deceased’s Assignment of the said Property to him.
15. On 2-1-2004, the Deceased as agreed executed a Power of Attorney in favour of the Plaintiff in regard the said Bungalow. By Clause 9 of the said Power of Attorney the Deceased authorised the Plaintiff to sell the said Bungalow to any person and execute all transfers or Land Registry Documents in regard he said Property.
16. By Clause 21 of the said Power of Attorney dated 2-1-2004, the Deceased agreed that all proceeds from the sale of the said Bungalow shall go to the Plaintiff absolutely.

[29] The statement of defence denies paras 14–16 and puts the plaintiff to strict proof. The said defence read as follows:

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Defendan tidak mempunyai sebarang pengetahuan mengenai perenggan-perenggan 14 hingga 17 Pernyataan Tuntutan dan meletakkan beban bukti kukuh atas Plaintiff untuk membuktikannya. Defendan juga menafikan bahawa terdapat sebarang perjanjian untuk menyerahkan hartanah bungalow tersebut kepada Plaintiff oleh si mati dan meletakkan beban bukti kukuh atas Plaintiff untuk membuktikannya.

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[30] This defence on the ‘bungalow’ issue as pleaded is not sufficient to displace the plaintiff’s claim as the deceased had absolutely given the proceeds of sale to the plaintiff. In addition, in law the power of attorney will corroborate the evidence of the plaintiff. Very importantly, there was no challenge in the statement of defence as to the power of attorney itself. This is captured in paras 10–11 of the judgment which read as follows:

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10. The defendant admits having no knowledge of the power of attorney but she attacks the veracity of the plaintiff’s claim. She contends that if the plaintiff’s allegations were true, the plaintiff ought to have instituted the action during the deceased’s life time when the deceased was able to contest the claim instead of timing it to after his demise.
11. On the other end of the spectrum, the plaintiff argues that the defendant is in no position to challenge his claim on two grounds. Firstly, the challenge

to the power of attorney was not pleaded in her statement of defence and secondly, she does not have personal knowledge of both the power of attorney and the trust. The power of attorney was executed before her marriage and she was not present when the deceased voiced his intention to transfer the terrace house to the plaintiff.

A

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[31] Any reasonable tribunal appraised with the pleadings, evidence and the law will come to the conclusion that the plaintiff did advance money to the deceased which culminated in the power of attorney and the power of attorney is irrevocable.

C

[32] In the instant case, only the plaintiff and the defendant (who had no knowledge of the events) gave evidence. The law only requires the plaintiff to establish the case on a balance of probabilities. We do not wish to go into detail in respect of the learned judicial commissioner's evaluation of facts and laws on the 'bungalow' issue, save to say it is misconceived, perverse and in law requires appellate intervention.

D

TRUST AND FRAUD ISSUE

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[33] Law and issues relating to trust and fraud are complicated in nature. Breach of contract may lead to breach of trust and breach of trust may lead to fraud, etc. Trust per se can be express, implied or constructive, etc. Ultimately, the relief will relate to specific performance or damages or aggravated damages, loss of profit, etc. On the facts of this case, the uncontradicted evidence is that the title to the 'bungalow' was given to the plaintiff by the deceased and subsequently the deceased got back the title to renew the lease and thereafter proceeded to sell the bungalow and paid part of the proceeds to the plaintiff only.

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[34] The learned counsel for the plaintiff had submitted on the trust and fraud issues at length. It will save much judicial time by reproducing part of the submission per se. The submission, inter alia, read as follows:

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5. During the Hearing on 22-3-2017, this Honourable Court rightly pointed out to the Respondent's Counsel that the deceased during his life time had divested all his interest in the said Bungalow as evidenced by the Power of Attorney dated 2-1-2004 and in particular Clause 9 & 21 therein. Further it was pointed out by this Honourable Court that the deceased had given the Title Deed for the Bungalow to the Perayu/ Plaintiff. We would add that from the date of the PA on 2-1-2004, the Perayu has been paying the Quit Rent & Assessment for the Bungalow including arrears for more than 10 years. (*See pp 315–318 of rekod rayuan Jld 4*).

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6. However, 3–4 years after the PA was executed, the Perayu noticed that the Lease on the Bungalow was due to expire in about 19 years on 12-9-2026 (*see p 115 of rekod rayuan Jld 3 (RR3)*).

- A** 7. Due to some incentives (discount/instalments) given by the Land Office for renewal of Leasehold properties, the Perayu requested the deceased to renew the lease for another 99 years. As the Bungalow was still in the name of the deceased, the Perayu had to request the deceased to apply for the renewal of the Lease.
- B** 8. This was where the problem started as the Perayu who was overseas in Tanzania with the UN had to request his family to hand the Title Deed to the deceased. The Land Office then approved the renewal of the Lease for 99 years and a sum of RM195,475.32 was paid by the Perayu through his son (see Official Receipt of Pejabat Tanah dated 18-10-2007 at page 141 of RR3).
- C** 9. Obviously after renewing the Lease for another 99 years, the value of the Bungalow would have increased substantially. The submission by the Respondent's Counsel that the Perayu had only lent about RM500,000 to the deceased and his claim for further RM900,005 was an unjust enrichment. This argument we respectfully submit is untenable as the property was sold (unlawfully) on 27-2-2009 for RM1.45 Million simply because the Perayu had paid and renewed the Lease for a further 99 years.
- D** 10. We rely on the case of *Koh Yat Chong & Anor v Koh Chin Lean Plantation Sdn Bhd & Ors* [2015] MLJU 379 (see pp 1-7 of the perayu's supplementary bundle of authorities) where the facts were as follows:
- E** — The Plaintiffs sued their father (2nd Defendant) claiming that he held 1 Million shares in the 1st Defendant Company in trust for them and in that in breach of trust, he had transferred the shares to the 3rd & 4th Defendants.
- F** — The 2nd Defendant denied the existence of any Trust and averred that the Transfer of the shares to the 3rd & 4th Defendant was valid.
- The main question at the Trial was whether the 2nd Defendant had declared himself a Trustee of the shares for the Plaintiff and also his intention when signing the transfer forms of the shares in favour of the Plaintiffs.
- G** — The issue at the Trial was whether that Constructive Trust came into existence in favour of the Plaintiffs when the 2nd Defendant signed the Shares Transfer Forms.
- H** — Reference was made in this case to the two (2) cases we cited earlier namely the *Court of Appeal* case of *ESPL (M) Sdn Bhd v Radio & General Engineering Sdn Bhd* [2005] 2 MLJ 422 & the *Federal Court* case of *Wan Naimah v Wan Mohamad Nawawai* [1974] 1 MLJ 41
- and where the court held:
- I** i. A trust can be established without the word 'trust' being used and the crucial question is whether a sufficient intention to create a trust has been demonstrated. (see para 27 at p 4 of the perayu's supplementary bundle of authorities)
- ii. A constructive trust came into existence upon the execution of the transfer form either by itself or coupled with delivery of the transfer

form by the 2nd Defendant to the Plaintiffs to apply for and obtain registration. A

- iii. The 2nd Defendant being the legal owner of the shares, until registration in the Plaintiff's name, held the legal interest in the shares as constructive trustee for the Plaintiffs. B

11. We submit that the deceased was fraudulent when he transfers the Bungalow to a 3rd Party via a Sale & Purchase Agreement dated 27-2-2009 for RM 1.45 Million. The Deceased was a Constructive Trustee under the said PA and committed a clear breach of trust when he sold the bungalow without the knowledge and consent of the Perayu. C

[35] In addition, the plaintiff submits:

8. This is a clear case of ceste qui trust. The Deceased was a bare trustee. The Deceased after confessing to the Perayu that he had defrauded him promised to pay the balance sum of RM900,005.00 owing to the Perayu when he sold the terrace house that the Deceased had purchased in Bandar Sunway. D

9. It is interesting to note that the Bandar Sunway terrace house belonged to the Respondent's (Lok Bee Yeong's) elder sister and was purchased for RM300,000.00. E

10. If the Respondent contends that this property was meant for her, why did the Deceased not register the property in her name?

11. Why did the Deceased hand over all original documents pertaining to the terrace house to the Perayu and not to the Respondent? F

12. We submit that the Deceased because of the breach of trust/fraud committed by him agreed that from the sale of the double storey terrace house, all proceeds could go to the Perayu in part settlement of the sum of RM900,005.00 owing by the Deceased. G

13. In his evidence, the Perayu stated that the Deceased had instructed the Perayu to transfer the terrace house to the Perayu and also to execute another PA. For some reason and perhaps due to the medical condition of the Deceased and the stroke suffered by the Deceased, this was not done. The Deceased due to the stroke could not sign any documents and his thumb print had to be used. H

14. In good faith the Perayu made arrangements to send the Deceased to India for the 2nd time for further treatment for his stroke. Alas the Deceased after being left in India for treatment suddenly passed away.

15. This Honourable Court will surely note that the Perayu was extremely fond of the Deceased, and despite the Deceased's unlawful actions, the Perayu still loved him and continued to provide money for his medical treatment in Malaysia and India. Even the funeral expenses to bring the body back and the burial in Tapah were paid for by the Perayu. I

A [36] We find that the plaintiff's submission has merits limited to the instant case only to grant prayers (1), (2) and part of prayer (3) (excluding the claim for the sum of RM141,936.30) of the statement of claim.

B [37] We have read the appeal record and the submissions of the parties in detail. After giving much consideration to the submission of learned counsel for the respondent, we take the view that the appeal should be partly allowed. Our reasons, inter alia, are as follows:

C (a) we have given reasons why prayers (1) and (2) and part of prayer (3) should be allowed. These prayers relate to the 'bungalow' issue;

D (b) in respect of other monetary claims not related to the 'bungalow' issue, we take the view that it is related to finding of facts. Appellate court must give great deference to the findings and conclusion of the trial judge (see *Kyros International Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [2013] 2 MLJ 650; *Watt (or Thomas) v Thomas* [1947] 1 All ER 582; [1947] AC 484; *Clarke v Edinburgh and District Tramways Co* 1919 SC (HL) 35); and

E (c) taking a holistic approach to the plaintiff's monetary claim which we have earlier stated as 'money advanced by the plaintiff after the execution of power of attorney' excluding the bungalow issue, will clearly fall within the domain of the learned judicial commissioner related to finding of facts. We are not minded to disturb those findings and decision. However, we do not think it is proper to make the order which says the burial expenses is to be allowed provided the plaintiff produces the receipt. Such an order on the facts will not bring finality to court proceeding. The law is clear to say that if the plaintiff does not prove his claim, it must be dismissed. There is however, evidence at pp 278–297 of total expenditure of RM13,261. Those documents were not challenged and the claim consequently should have been allowed. We therefore allow this claim of RM13,261.40.

H [38] In consequence, save for the sum of RM13,261.40 which is allowed, the amount (excluding the bungalow claim) granted by the learned judicial commissioner is sustained. The order (1) of the High Court which states:

1. Tuntutan Plaintiff sebanyak RM900,005.00 yang merupakan wang terhutang bagi penjualan Rumah Bungalow ditolak;

I is further to be varied to read as follows:

- (a) it is hereby declared that the said Soma Sundaram a/l Doraiswamy ('the deceased') had assigned his interest in the said property held under No Pendaftaran 3208, Lot 152, Seksyen 6, Bandar Petaling Jaya, Daerah Kuala Lumpur, having a Postal Address No 11, Jalan 6/6, 46000

Petaling Jaya, Selangor to the plaintiff vide a power of attorney dated 2 January 2004 and the plaintiff was entitled absolutely under cl 21 of the said power of attorney to the said property and/or to all proceeds from the sale of the said property;

- (b) it is hereby ordered that the defendant pays the plaintiff the sum of RM900,005 being the balance proceeds received by the said Soma Sundaram a/l Doraiswamy ('the deceased') from the sale of the said property; and
- (c) it is hereby ordered that upon the sale of the said property held under HS(M) 8507 PT 1458, Mukim Damansara, Bandar Sunway, Daerah Petaling, Negeri Selangor having a postal address at No 15, Jalan PJS 914, Bandar Sunway, 46150, Petaling Jaya, the sum of RM900,005 under para 57(2) above be deducted and paid to the plaintiff.

[39] We make no order as to costs for here and below. Deposit is to be refunded. Both parties are at liberty to seek direction from the High Court (if necessary) for the sale of the terrace house stated above.

We hereby order so.

Appeal allowed in part.

Reported by Ashok Kumar

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