**DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR**
**(BAHAGIAN SIVIL)**
**[GUAMAN SIVIL NO: S-22-183-2010]**

**ANTARA**

**CHAN KAM KEW** **... PLAINTIF**
(No. K/P: 741026-14-5805)

**DAN**

**1. CHAN SEE CHUEN**
(No. K/P: 420417-71-5185)

**2. CHAN FATT CHEUNG**
(No. K/P Singapura: S1843847-Z)

**3. CHAN CHAN CHEE CHIU** **... DEFENDAN-DEFENDAN**
(No. K/P Singapura: S1269448-B)

Didakwa sebagai Pemegang Amanah kepada Estet Chan Wing atau Chan Ming Sang atau Chan Sui atau Chan Chun Wing, Simati

**GROUNDS OF DECISION**

**Background facts**

**1.** The Plaintiff's claim against the Defendants is for breach of trust and, *inter alia,* for an order for declaration that the Plaintiff will be recognised and acknowledged as one of the beneficiary under the

Estate of Chan Wing and that the Defendants jointly and/or severally pay the Plaintiff the sums of USD229,043.44, SGD82,196.94, HKD484,506.22 or the equivalent in Malaysian Ringgit as at the date of payment and RM281,300.81 for the Plaintiff's entitlement for the Annual Income Distribution under the said Estate from 1975 until 2008.

**2.** The late Chan Wing or Chan Ming Sang or Chan Sui or Chan Chun Wing ('Chan Wing') had migrated from China to Malaysia as early as 1889. He had accumulated his wealth and established a substantial part of his business empire in Malaysia.

**3.** Chan Wing passed away on 24/2/1947 leaving a will dated 5/2/1947 ('the Will') (Bundle B/1-6).

3.1. The Grant of Probate (Bundle B/7-12) for the Will was granted by the Supreme Court of Malaya in Kuala Lumpur on 24/4/1949 and the first 4 Trustees appointed were Chan Hin Cheung, Chan Tak Cheung, Chan Kat Cheung and Chan Ting Cheung.

3.2. The 1st Defendant is named as Trustee in the Will and was appointed as the Trustee for the Estate of Chan Wing on 1/1/1973.

The 2nd and 3rd Defendants were appointed as the Trustees for the Estate of Chan Wing on 5/1/2004 till to date.

**4.** Dr. Chan Chin Cheung @ Dr. Mubarak Chan Chin Cheung ('Dr. Chan') is the son of Chan Wing and is a beneficiary of the Estate of Chan Wing.

4.1. Dr. Chan married Lee Mo Yin in London on 5/7/1958 and remains so to date.

**5.** The Plaintiff, Chan Kam Kew was born on 26/10/1974 and is the son of Dr. Chan and Jameela Chan Ah Mooi ('Chan Ah Mooi').

**6.** The Plaintiff through Dr. Chan issued a letter of demand dated 1/3/2002 (Bundle B/56) to the then Trustees of the Estate of Chan Wing enclosing the Plaintiff's claim on the Estate of Chan Wing under clauses 14(4) and 14(6) of the Will and demanded payment of monies from the date of his birth, ie, 26/10/1974.

**7.** Clauses 14(4) and 14(6) of the Will read as follows:

> "(a) Clause 14(4): "My Trustees shall pay all necessary expenses of educating all my grandsons in the male line …"; and
>
> (b) Clause 14(6): "And the balance of the income of the said remaining shares in my Estate shall be divided among my sons and grandsons in the male line then living …"."

**8.** Pursuant to a Consent Order dated 2/10/2012 (Bundle B/96-100) the parties have agreed that the full trial of this matter be confined to only 2 issues:-

> "(a) Whether Mubarak Chan Chin Cheung possessed the legal capacity to contract a second marriage with Jameela Chan Ah Mooi when his first marriage with Lee Mo Yin was still valid and subsisting ("**1st issue**"); and
>
> (b) Whether the Will of the late Chan Wing excludes an illegitimate grandson from inheriting a share of the residuary assets of the Estate of Chan Wing ("**2nd issue**")."

8.1. The aforesaid Consent Order was reached arising from the Defendants' Notice of Application dated 1/8/2012 for summary disposal of this matter under O. 33 Rules of Court 2012 ('the RC').

**Findings**

**9.** Before I turn to the 2 issues agreed by the parties, I shall address the Defendants' contention that the Plaintiff's claim is time barred pursuant to s. 6 of the Limitation Act 1953 on account of the following factors:

> "(a) Dr. Chan was aware of the provisions of the Will, being a beneficiary since 1960. It was incumbent upon him to notify the Trustees of any of his legitimate male issue(s);
>
> (b) The Plaintiff was alleged to be born in 1974. However, Dr. Chan chose not to make any formal demand until 28 years later on 1/3/2002;
>
> (c) The Plaintiff said under cross-examination that he was aware that Chan Wing was his grandfather since he was a little boy [see Notes of Evidence, page 18, line 20]. Despite this, he never made any claims against the ECW until his letter of 1/3/2002."

**10.** The Plaintiff commenced the present Suit against the Defendants on 4/3/2010. The 2nd Defendant resigned as Trustee on 9/3/2009 which is evident from his resignation letter dated 9/3/2009 and a letter dated 3/4/2009 from the 1st and 3rd Defendants, the remaining Trustees circulated to all the beneficiaries, including Dr. Chan informing of the 2nd Defendant's resignation as Trustee (D/4-4A). The fact of the 2nd Defendant's resignation as Trustee in March 2009 is undisputed as it was part of the Plaintiff's pleaded case. Hence I agreed with the Defendant's submission that the 2nd

Defendant ought not to be made a party to this action and the Plaintiff's claim against him is dismissed in this regard.

**11.** Reverting to the point on whether the Plaintiff's action is time barred, with respect I am of the view that there is no merit in the Defendants' contention and it is a non starter for 2 reasons. First, the Defendants had on its own motion confined the trial to the determination of the 2 issues referred to in para 8-8.1 above. Hence I agreed with the Plaintiff's submission that the Defendants have by their own motion waived their right to raise the issue of the Plaintiff's action being time barred and they are estopped from raising the same now.

11.1. Secondly, I also agreed with the Plaintiff's submission that the trust itself is a running account of which the Trustees will distribute to all beneficiaries of the Estate of Chan Wing their entitlement and shares annually. Hence whether the Plaintiff is entitled as a beneficiary to the Estate of Chan Wing is dependent on the 2 issues agreed between the parties alluded to earlier.

**Whether Dr. Chan possessed legal capacity to contact a second marriage - 1st issue**

**12.** The Plaintiff submits that the 2nd marriage between Dr. Chan and Chan Ah Mooi is a valid marriage and legally recognised in Malaysia irrespective that the 1st marriage between Dr. Chan and Lee Mo Yin is subsisting when the 2nd marriage was contracted for the following reasons:

(a) "Premised on s. 3(1) Civil Law Act 1956, the Court "shall apply the common law of England as administered of England on the given dates **PROVIDED THAT NO** provision has been made or may hereafter be made by any written law in force in Malaysia. Even then, it is qualified that it is applicable 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."

(b) "In Malaysia, we have enacted the Law Reform (Marriage & Divorce) Act 1976 which provides that customary marriages though polygamous, are recognised as valid marriages among non-Muslims if these marriages are contracted on or before 1/3/1982 and the Act should be applicable now as this case is within the Malaysian Jurisdiction."

(c) "Dr. Chan and Jameela Chan Ah Moi were married on 21/10/1969 according to the traditional Chinese Custom and this marriage is therefore valid although polygamous pursuant to Section 4(1) and 4(2) and 5 of the Law Reform (Marriage & Divorce) Act 1976. … This marriage is legally recognised by the National Registration Department of Malaysia."

(d) "It is undisputed that according to Common Law of English and Wales, a marriage should be monogamous. However, if we were to read Section 11(d) and 14(1)(a) of the Matrimonial Causes Act 1973. …, it shows that the English Law Makers recognise and respect the solemnity of foreign law and when there is a conflict of laws in regards of marriages, a foreign law must be applied instead of English Law."

**13.** With respect, I am unable to accept the Plaintiff's contention. Firstly, Dr. Chan had categorically admitted under cross-examination that his marriage with Lee Mo Yin on 5/7/1958 was a monogamous marriage. Further the fact that the 1st marriage is monogamous is supported by the Affidavit of Rhiannon Lewis dated 28/9/2012, a family law solicitor whose opinion was sought by the Trustees on the marriage registered under s. 45 of the UK Marriage Act 1949 and held the view that *"under the law of England and Wales, the marriage was*

*monogamous*", citing the case of *Hyde v. Hyde and Woodmansee* [1866] LIP & D130 that "*Common law marriages described as the voluntary union between a man and a woman for life to the exclusion of all others.*"

13.1. In my judgment the legal effect of Dr. Chan contracting the first monogamous marriage is that he had lost his right under personal law to take a secondary wife under Chinese custom or otherwise. In other words, Dr. Chan lacked the legal capacity to contract the 2nd marriage with Chan Ah Mooi, whether under Chinese custom or otherwise and whether the 1st monogamous marriage was solemnised in Malaysia or elsewhere. This is borne out by the following opinions:

(a) Affidavit of Rhiannon Lewis (B/101-104);

(b) Opinion of Miss. Mehrun Siraj dated 11/3/1995 (D/7-12) obtained by the Defendants' Singapore solicitors, Messrs. Lee & Lee and forwarded to the Defendants on 13/3/1995 (D/13). In the said opinion, the facts were the will of Chan Wing, deceased provides that "*all his male grandsons in the male line*" are entitled to a share of the residuary estate. Chan Sing Cheung (CSC), a son of Chan Wing, deceased was married to Fan Pui Ying (Fan) on 17/11/1948 at the office of the Registrar of Marriage at Victoria in Hong Kong in accordance with the Hong Kong Ordinance No.7 of 1875. The said marriage was subsequently registered in Kuala Lumpur on 28/7/1958 under the Registration of Marriages Ordinance 1952. CSC went through a Chinese customary marriage with

> Har Pooi Kheng (Har) sometime in 1958 and Chan Fook Kong (CFK) was born on 1/1/1964. The main issue is whether CFK is a legitimate grandson as he is the son of CSC by a secondary wife Har. Ms Mehrun stated the answer depends on whether the purported marriage between CSC and Har is valid and she held that (i) "No, *CSC cannot contract a valid marriage with Har, if his first marriage with Fan is monogamous and is still subsisting at the time of the purported second marriage"; (ii) "The right to marry polygamously accorded by personal law applies only when the first marriage is not monogamous. Where the first marriage is solemnised under a law that provides for monogamy, the man has no capacity to enter into another marriage whether a customary marriage or otherwise ... The situation is the same whether the first monogamous marriage was solemnised in Malaysia or elsewhere."*

13.2. The legal position expressed by the family law expert, Miss Mehrun is fortified by authorities, 2 of which relied on by her are:

(a) *Public Prosecutor v. David John White alias Abdul Rahman* [1940)] 9 MLJ 214

In this case the accused, David John White claimed trial to a charge of bigamy. He married a Christian lady at Taiping in 1918 according to the rites and ceremonies of the Church of England. In 1936, while his marriage was subsisting he married another Christian lady according to Mohammedan law after they both converted to the

Mohammedan religion. The Court at p.215 held the accused had committed the offence of bigamy based on the principle that:-

> "[A] man who enters into a marriage relationship with a woman according to monogamous rites takes upon himself all the obligations springing from a monogamous relationship and acquires by law the status of "husband" in a monogamous marriage. He cannot, therefore, whatever his religion may be, during the subsistence of that monogamous marriage marry or go through a legally recognised form of marriage with another woman."

(b) *Rex v. S.R.J. Devendra* [1920] 1 MC 51 (followed by *P.P. v. David John White*) where the accused, a Hindu had married monogamously under s. 34(2) Ceylon Marriage Registration Ordinance 1907 and upon conversion to Christianity married another woman in the Straits Settlements was convicted of bigamy as his first marriage was still in existence and which cannot be dissolved except by judgment of divorce.

(c) *Hue Chooi Yin (P) v. Chew Pit King* (Divorce Petition No.S8-33-691-2002) in the High Court in Malaya at Kuala Lumpur (Family Division) dated 28/9/2010.

Hue Chooi Yin (petitioner) alleged that on 5/5/79 she was married to the late Chew Choon Ming (CCM) according to the Chinese customary marriage rites in the presence of the petitioner's family members including the petitioner's mother, eldest sister at the Yung Ting Association, Perak. This alleged customary marriage to CCM was not registered as a marriage under the Civil Marriage Ordinance 1952 (CMO) nor under the Law Reform (Marriage and Divorce Act 1976 (LRA). The petitioner alleged she and CCM cohabited since the date of the marriage in 1979 and had 2 children. Chew Pit King (respondent) alleged at the time of the alleged customary marriage,

his father, CCM was married to his mother, Soo Poi Eng (Soo). The petitioner sought a declaration:-

(i) that she is the lawful wife of CCM as the earlier marriage between CCM and Soo on the demise of Soo on 8/3/1997 was dissolved by s. 6(a) of the CMO and by the fact that she and CCM cohabited and had 2 children and lived together as husband and wife without interruption for more than 22 years until CCM died on 5/6/2000;

(ii) that the marriage celebrated on 5/5/1979 between the petitioner and CCM in accordance with Chinese customary rites in Ipoh, Perak be declared to be a valid and subsisting marriage for all intents and purposes.

On the issue of if assuming there was a customary marriage, whether such marriage is valid under the CMO and the LRA, Justice Yeoh Wee Siam (now HCJ) opined -

> "Assuming that there was a customary marriage between the Petitioner and the late CCM on 5/5/1979, the customary marriage would not be valid or registrable under the CMO at the material time because the late CCM had no legal capacity to marry a second time. This is because on 5/5/1979, the late CCM was still married to the late Soo Poi Eng. The CMO only provides for and recognizes monogamous marriages.
>
> …
>
> Thus, at the time when the CMO was still in force, and Soo Poi Eng was still alive and married to CCM, **CCM had no legal capacity to marry a third person, namely, the Petitioner, even if the Petitioner was his secondary wife or concubine. If CCM were to marry the Petitioner, whether under the CMO or under a customary marriage during the lifetime of his late wife, Soo Poi Eng, it would tantamount to committing bigamy**, which is an offence."
> (Emphasis added)
>
> (pp.26-28 of the Judgment) and sections 4(1), 5, 6 & 33(1) CMO & s.494 Penal Code were cited).

(d) *Pang Kwee Yin v. Teh Sew Wan* [2012] 5 MLJ 225 where Yeoh Wee Siam J followed her earlier decision of **Hue Chooi Yin** (*supra*) and held:-

> "(1) For so long as the marriage between the petitioner and WYL was valid and not dissolved during WYL's lifetime, then under s. 4(1) of the CMO, WYL was incapable during the continuance of such marriage to contract a valid marriage with any third person including the respondent (see paragraph 31)."

13.3. The same principles are echoed in the persuasive authorities of the Singapore Courts:-

(a) *In the Estate of Pang Soo Ho, Decd.* [1982] 2 MLJ 147, 148 where the High Court held:-

> "A male Chinese Christian who chooses to have his marriage solemnised in accordance with the provisions of the Christian Marriage Ordinance is incapable during the continuance of such marriage of contracting a valid marriage with any third person whether as principal or secondary wife."

(b) *Re Estate of Liu Sinn Minn, Decd.* [1975] 1 MLJ 145 [I left] where the Court of Appeal held:-

> "Although as a Chinese by race his personal law entitled him to practise polygamy, the operation of section 4(1) of the Civil Marriage Ordinance made him "incapable, during the continuance of such marriage, of contracting a valid marriage with any third person, whether as principal or secondary wife."

**14.** Based on the legal opinions which are supported by the statutory provisions and the authorities and the factual circumstances of this case, it is my judgment that as the 1st marriage has been established to be monogamous, Dr. Chan thus lacked the legal capacity to contract a 2nd marriage with Chan Ah Mooi, whether by custom or otherwise.

**Whether there was a customary marriage solemnised prior to 1/3/1982**

**15.** In the event I err in the aforesaid finding, I shall now address the issue of whether there was a customary marriage solemnised between Dr. Chan and Chan Ah Mooi on 21/10/1969.

**16.** The Plaintiff submits "*In short, customary marriages though polygamous, are recognised by the Malaysian Law as valid marriages among non-Muslims if these marriages were contracted before 1/3/1982*" and cites the case of *Chia Siew Li v. Liew Khey Cheong & Anor* [2010] 4 CLJ 36.

16.1. With respect I find the statement of the Plaintiff is inaccurate. It appears to me that the Plaintiff has based that statement on para 83 of Chia Siew Li's case. However if para 83 is quoted *in toto*, His Lordship TS Nathan states -

> "[83] In my view, the status of any person claiming to be a spouse of the deceased intestate under the 1958 [Distribution] Act will have to be determined under the law applicable to his or her marriage to the deceased. **If under that law the marriage is recognized as a valid one, then he or she will qualify to be recognized as a spouse under the 1958 Act. For example**, customary as well as polygamous marriages, g**enerally speaking**, were recognized as valid marriages among non-Muslims prior to the coming into force of the 1976 Act. In those circumstances, the parties to those marriages would be recognized as spouses for the purposes of the 1958 Act."
> (Emphasis added)

16.2. The statement was made the context of determining the status of any person claiming to be a spouse under the Distribution Act. His Lordship held the view that it is determined under the law applicable to his or marriage to the deceased. Underpinning it is the requirement

that the marriage must be recognised to be valid under the law governing the marriage for the person to qualify as a spouse under the 1958 Act. Further His Lordship qualified his statement by stating "For example" and "generally speaking".

**17.** My point on the importance of the validity of the marriage under the law under which the marriage was solemnised is driven home by particularly s. 4(2) of the LRA. The LRA came into force on 1/3/1982 throughout Malaysia. S4 of the LRA states:-

> **"Subsisting valid marriages deemed to be registered under this Act and dissoluble only under this Act**
>
> 4. (1) Nothing in this Act shall affect the validity of any marriage solemnized under any law, religion, custom or usage prior to the appointed date.
>
> (2) Such marriage, if valid under the law, religion, custom or usage under which it was solemnized, shall be deemed to be registered under this Act.
>
> (3) Every such marriage, unless void under the law, religion, custom or usage under which it was solemnized, shall continue until dissolved:-
>
> (a) by the death of one of the parties;
>
> (b) by order of a court of competent jurisdiction; or
>
> (c) by a decree of nullity made by a court of competent jurisdiction."

**18.** The Plaintiff cited the case of S*abrina Loo Cheng Suan v. Eugene Khoo Oon Jin* [1995] 1 CLJ 875 where His Lordship Vincent Ng (as he then was) held:-

> "[1] The evidence showed that the parties had undergone a Chinese customary tea ceremony of marriage in 1973. Chinese customary

> marriages entered into before 1 March 1982 were valid although polygamous. Therefore, the plaintiff's marriage to the defendant was valid under s. 4(1) & (2) of the Law Reform (Marriage & Divorce) Act 1976."

18.1. As the Defendants correctly submit *Sabrina Loo Cheng Suan's* case can be distinguished as in the instant case there is no evidence of a tea ceremony with witnesses (the plaintiff's aunt, her younger sister and her mother) who attended the same.

**19.** In *Hue Chooi Yin's* case on the issue of whether there was a customary marriage between the petitioner and the late CCM on 5/5/1979, Justice Yeoh Wee Siam made the findings out of the 7 witnesses (including the petitioner), only the petitioner's elder sister claimed to be an eyewitness of the customary marriage on 5/5/1979 and stated that CCM and the petitioner served tea to the petitioner's mother; the petitioner's mother did not attend Court as a witness and her statutory declaration was not accepted as evidence; the Court believed no photographs were taken of the customary marriage ceremony because the petitioner did not marry CCM on 5/5/1979 rather than the petitioner's and her sister's evidence that at that time CCM was very poor and did not have a camera to take photographs; the other witnesses for the petitioner were not eye witnesses of the customary marriage ceremony but were only told by CCM that he married the petitioner on 5/5/1979. On the other hand the respondent produced evidence there was no such Chinese customary ceremony as the CCM's 2 elder bothers testified they were not invited to the ceremony and the evidence of income tax returns where CCM declared he was married to Soo and recorded as a widower when

Soo died. What is significant is the Court dismissed the petitioner's petition on the sole ground that "*there was no such customary marriage between the Petitioner and the (sic) CCM on 5/5/1979, and therefore no marriage at all in the first place, it would not be proper or legally right for the Court to grant the Petitioner the declarations sought in her Petition.*"(p.24 of the Judgment).

**20.** In the present case I find there is no evidence of any customary marriage at all as there is no evidence of any tea ceremony with witnesses who attended. In fact there is no proof of the alleged marriage. Dr. Chan (PW3), the Plaintiff (PW4) merely referred to the wedding photo claiming that Chan Ah Mooi and Dr. Chan were married on 21/10/1969 according to traditional Chinese custom and out of the marriage, the Plaintiff was born on 26/10/1974 (B/58). The alleged wedding photo (IDP4, B/107) and the sepia photocopy (IDP4A) were not admissible as evidence as the maker was not called.

20.1. In fact Dr. Chan under cross-examination testified:-

"(a) Save for his mother (the late Mdm Chan Lee Lai Heng), the rest of his family members were unaware of the alleged "marriage".

(b) When Dr. Chan's late mother Mdm Chan Lee Lai Heng passed away on 31/1/1983, Chan Ah Mooi's and the Plaintiff's names were NOT mentioned in her Obituary under the list of "daughters-in-law" or "grandsons" respectively.

(c) In this regard, until 1/3/2002, Dr. Chan agreed that he had never mentioned or publicised his alleged relationship with Chan Ah Mooi in addition to not mentioning the birth of his alleged son, the Plaintiff to the Trustees of the ECW (Estate of Chan Wing) or any family member of the ECW. DW1 had confirmed that Chan Ah Mooi and the Plaintiff never accompanied Dr. Chan to any family gatherings."

20.2. The fact that the marriage was not publicly known was confirmed by the Plaintiff who in cross-examination stated:-

> "(a) He had never met any of the other family members of Chan Wing as listed in Mdm Chan Lee Lai Heng's obituary to date;
>
> (b) He admitted that he was unsure whether he had met Mdm Chan Lee Lai Heng, as he only remembers meeting "an old lady"."

**21.** On a balance of probabilities I find the Plaintiff has failed to prove that any Chinese customary marriage has been contracted between Dr. Chan and Chan Ah Mooi on 21/10/1969. At best, Chan Ah Mooi was merely his partner or companion. Therefore I find there was no valid Chinese customary marriage solemnised between Dr. Chan and Chan Ah Mooi prior to 1982 which can be deemed to be registered under s. 4(2) of the LRA.

**Whether the Will excludes an illegitimate grandson - 2nd issue**

**22.** The Plaintiff submits that he is entitled to benefit from the Estate of Chan Wing as:-

(a) he is the son of Dr. Chan and the grandson of Chan Wing and is therefore one of the beneficiaries of the Estate of Chan Wing based on Dr. Chan's testimony, his birth certificate stating that he was born on 26/10/1974 and the son of Dr. Chan and Chan Ah Mooi and the DNA report from the DNA Profiling Laboratory Centre for Forensic Science, Singapore dated 23/8/2001(B/60-62) and the DNA report from the Department of Chemistry Malaysia dated 22/8/2011 (exh.P2, B/112-113);

(b) based on clauses 14(4) and 14(6) of the Will with emphasis on the phrases "*my grandson in the male line"* (cl.14(4)) and "*male line*" (cl.14(6) of the Will (see para 7 above) and the Plaintiff is the grandson in the male line of Chan Wing; and

(c) the Court ought to take into account the circumstances and environment in which the Will was made in that it was made by Chan Wing on 5/2/1947 wherein among the Chinese, the men are permitted to enter into polygamous union with another woman at the material time. The case of *Tay Seck Loong & Ors. v. Teh Chor Chen & Ors* [2005] 8 CLJ 686, 690-691 was cited where His Lordship Low Hop Bing J (as he then was) held:-

"1. The duty of the court in construing a will is to ascertain if possible what the testator meant, without preconceived ideas as to his meaning and to give effect as far as possible to his intention as declared in the will: per Chang Min Tat J (later FJ) in *Re Chin Sem Lin's Settlement Yong Tet Foong & Anor. v. Chin Thin Lee & Ors* [1971] 2 MLJ 2 MLJ 152, 154 E-F left column, referring to a paragraph in *Smidmore v. Smidmore* [1905] 3 CLR 344, 354;

2. *The object of interpreting a will is to give effect to the intention of the testator that is expressed in the words of the will and such words are to be read in the light of the circumstances in which the will was made* (*Hsu Yik Chai v. Hsu Yaw Tang & Anor*. [1982] 2 MLJ 227 at p.230 (FC) per Lee Hun Hoe CJ (Borneo) (as he then was);

3. A will should be so construed as to give effect to the intention of the testator, to be gathered from the language of the will read in the light of the circumstances in which the will was made, and the court is entitled to sit in the testator's armchair, but not entitled to make a fresh will for the testator merely because it strongly suspects that the testator did not

> mean what he has plainly said: per Lord Romer in *Perrin v. Morgan* [1943] AC 399 at p.420; and…"

(Emphasis is that of the Plaintiff's)

**23.** In my judgment the fact that the 2 DNA reports state that the probability of paternity is 99.99% (Singapore DNA report) and 99.9978% (Chemistry Department DNA report, Malaysia) does not detract from my finding that Dr. Chan lacked the legal capacity to contract a 2nd marriage with Chan Ah Mooi, whether by custom or otherwise as the 1st marriage to Lee Mo Yin has been established to be monogamous. This is supported by the legal opinion of Miss Mehrun Siraj wherein she stated that the legitimacy of whether CFK is a legitimate grandson as he is the son of CSC by a secondary wife Har depended on whether the purported marriage between CSC and Har is valid (see **para 13.1 (b) above**).

23.1. Further, even if I were to err on the aforesaid finding, on a balance of probabilities I still find the Plaintiff has failed to prove that any Chinese customary marriage has been contracted between Dr. Chan and Chan Ah Mooi on 21/10/1969 and hence there is no valid Chinese customary marriage solemnised between Dr. Chan and Chan Ah Mooi prior to 1982 which can be deemed to be registered under s. 4(2) of the LRA.

**24.** Now I shall turn to the construction of the Will. The common denominator appearing in clauses 14(4) and 14(6) of the Will is the phrase "*my grandsons in the male line*". With respect I agreed with the Defendants' submission that "grandsons" referred to in the Will

mean only "legitimate grandsons" unless there are clear words stated to the contrary. I draw support and guidance from the approach adopted in the following authorities on the construction of wills which are persuasive.

**25.** The Defendants had relied on the definition of "child" in s. 3 of the Distribution Act 1958 which includes *"a legitimate child"* to support their contention that the expression *"my grandsons in the male line"* in the will means "legitimate grandsons".

25.1. I am persuaded by this argument as s. 3 of the Distribution Act defines *"child" to mean "a legitimate child and where the deceased is permitted by his personal law a plurality of wives includes a child by any of such wives."*

**26.** In *Wong Kai Woon & Anor v. Wong Kong Hom & Ors* [1991] 2 MLJ 469, the plaintiffs were trustees of the will of one Wong Yoon Fee (testator) appointed under a Court order. The plaintiffs applied under the construction summons for determination of several questions, including the question whether illegitimate children have a right to share in the residuary estate. At p.472 [B-C], the Singapore High Court considered the interpretation of the phrase "lawful natural and/or adopted sons" appearing in "Clause 13 of the will which provides that the residuary estate is to be divided among the 'lawful natural and/or adopted sons' of the testator's sons." The Court ruled that it was the testator's intention that only legitimate children were to share in the residuary estate because "[T]he word 'lawful' qualified the words 'natural and/or adopted sons' and that the word 'natural'

had been used by the testator in contradistinction to the word 'adopted'.

**27.** In *In the Matter of the Estate of Seah Eu Chin, Deceased. Seah Liang Seah v. Seah Eng Kiat And Others 4 SSLR 22*. Seah Eng Kiat and Seah Eng Koon (the defendants) appealed against the decision that Seah Eng Yeak and Seah Eng Lok are entitled as themselves to a proportionate share of the share of profits given to the father, Seah Cheo Seah by the will.

27.1. On appeal the question to be determined is whether Seah Eng Yeak and Seah Eng Lok are entitled to a share in certain property left by Seah Eu Chin (the testator) to Seah Cheo Seah or whether the words "male issue" used by the testator are to be held to include legitimate *male issue* only. The testator left property to his 4 sons, 1 of whom is Seah Cheo Seah, the father of the defendants and Seah Eng Yeak and Seah Eng Lok. The will provided in clause 29 that upon the decease of any of the sons of the testator his share in certain property should be divided amongst his "male issue" in equal shares etc, Seah Cheo Seah, the elder brother of Seah Liang Seah (the plaintiff) and the eldest son of the testator died in 1885 leaving 2 legitimate sons (the defendants) and 2 illegitimate sons, Seah Eng Yeak and Seah Eng Lok.

27.2. The Court of Appeal allowed the appeal. Law J at pp.31-33 after distinguishing the case of *Barlow v. Orde* [L.R. 3 P.C. 164] relied on by the trial judge (where in that case it was decided by the principles of natural justice, equity and good conscience and that the technical rule of English law did not apply), stated:-

> "The present case, however, seems to me to be on a different footing, as **the testator Seah Eu Chin was domiciled in this Colony. Certain evidence was given in the Court below as to the position and status in the family accorded to Seah Eng Yeak and Seah Eng Lok. Had the effect of that evidence been to show that by Chinese custom Seah Eng Yeak and Seah Eng Lok would be in just the same position in all respects as the Appellants the legitimate sons of the father**. I think the evidence might have had material bearing upon the decision to be arrived at in this case. The evidence too might no doubt I think have been of some importance if it had clearly disclosed that the testator himself treated Seah Eng Yeak and Seah Eng Lok in all respects in the same way as his legitimate grandsons and regarded them as being in all respects on the same footing as legitimate grandsons (see *Hill v. Crook L.R*. 6 H.L. 265). As it is, it does not seem to me the evidence given helps the case of Seah Eng Yeak and Seah Eng Lok very much, though I think the testator must have known that they were the illegitimate sons of their father by a concubine."
> (Emphasis added)

27.3. Then Law J at pp.33-34, stated:-

> **"I think that, as the rule is that prima facie 'children' in a will means only legitimate children, so the rule must be that 'male issue' *prima facie* only means legitimate male issue**. It has been argued that the fact that in clause 32 of the will Seah Eng Yeak and Seah Eng Lok as well as the Appellants are described as grandsons of the testator shows that the testator regarded them all as on the same footing and that therefore the words 'male issue' in clause 29 of the will must be held to include illegitimate as well as legitimate male issue, but in *In re Hall*: *Branston v. Weightman* [L.R.35 Ch.D.551], the case which perhaps most resembles this case of those that have been cited to us, Kay, J. held that the description of one Richard Weightman as the nephew of the testator in an earlier part of the will was not sufficient to include him in another part of the will amongst the children of Jane Weightman, the sister of the testator, and in *Megson v. Hindle* [L.R.15 Ch. D.201] the Master of the Rolls held that the fact that the testator made a bequest to his 'grandson James', as he called him, who was an illegitimate child of his daughter did not necessarily imply that the testator intended he should participate in a gift to the children of his, the testator's, daughter.
>
> Again clause 32 of the will is not a clause in which any benefit is conferred; and further than this in clause 32 the grand-daughters of the testator who take no benefit under the will are referred to by name and mentioned as his grand-daughters.

> It must also be noticed that in clauses 36 and 39 of the will the testator speaks of grandsons, the issue in tail male of his sons; but, as I understand, the words 'issue in tail male' can only apply to legitimate issue, and therefore the wording of clauses 36 and 39 seems to me to afford, if anything, an argument rather for excluding Seah Eng Yeak and Seah Eng Lok from the operation of these clauses than for construing the words 'male issue' in clause 29 to refer to illegitimate grandsons. It should also not be forgotten that these clauses 36 and 39 deal with the appointment of trustees and executors and are not clauses conferring benefits upon any persons.
>
> I am also of opinion that the use of the words 'male issue' in clause 29 of the will and of the words 'persons' in clause 33 shows an intention on the part of the testator to benefit classes rather than particular individuals.
>
> **To sum up, there is to my mind no such evidence either of Chinese customs or of the ideas and conduct, etc. of the testator as would justify us in holding that in the words 'male issue' he intended to include illegitimate as well as legitimate 'male issue'; nor can I find that the testator has supplied us with a 'dictionary' to use the words employed by *Lord Cairns in Hill v. Crook* [L.R. 6 H.L.265], from which it is clear that when he used the words 'male issue' in clause 29 of the will he intended to include illegitimate as well as legitimate male issue.** We may perhaps be able to form conjectures as to what the testator intended, but that is not the question: **for on the principle laid down in *Hill v. Crook and Megson v. Hindle* we are not, I think, entitled to say that the words 'male issue' include illegitimate grandsons unless there is such a strong probability of the testator's intending to include illegitimate grandsons that a contrary intention cannot be imputed to him."**
>
> (Emphasis added)

**28.** Following *Seah Liang Seah's* case (*supra*), in my humble view, the core considerations which can be distilled in construing a will are:-

(a) "the rule is that *prima facie* 'children' in a will means only legitimate children, so the rule must be that 'male issue' prima facie only means legitimate male issue";

(b) the law applicable at the place of domicile of the testator eg, the customs or the ideas and conduct etc. of the testator; and

(c) in the examination of the will, unless there are clear words stated or employed by the testator in the will, a contrary intention cannot be imputed to the testator.

28.1. The Court should also give heed to the principles of construction of a will propounded in *Tay Seck Loong & Ors.* (*supra*).

**29.** In the present case, I find on a perusal of the Will, the testator has made careful mention of the following persons:

(a) 5 of his sons by names who are his trustees in cl.3;
(b) his son-in-law by name and his nephew by name in cl.7 who managed his properties in Bangkok;
(c) his 11 daughters by name and the portion bequeathed to them in cl.8;
(d) his 7 wives by name and "my wife called Chan Ng Swee Fun" as to the monthly amount to be paid to them by the trustees in cls.11-12; and
(e) his 11 sons by name and the amounts to be apportioned to them by the trustees in cl.13.

29.1. I observe that in so far as his grandchildren are concerned the testator, Chan Wing only made provision for the "*grandsons in the male line*" without specifically mentioning any names as per cls.14(4) and 14(6).

29.2. As alluded to earlier there is no specific reference of Chan Ah Mooi or the Plaintiff whatsoever by Chan Wing or recognition of them as Dr. Chan's wife or his grandson respectively in the Will.

29.3. Since the testator has specifically made mention of persons by name and even expressly stated "*In the event of any of my said wives re-marrying or becoming unfaithful to me, I direct that the monthly sum hereinbefore given to her shall cease*" in cl.12;

29.4. The evidence of Dr. Chan that the names of Chan Ah Mooi and the Plaintiff were not mentioned in the obituary under the list of 'daugther-in- law' and 'grandson' when his late mother passed away on 31/1/1983.

29.5. Having regard to the principles in *Tay Seck Loong* (*supra*) as to the intention of the testator in drawing the Will, it is my humble view that in using the words "*grandsons in the male line*" in cls.14(4) and 14(6) of the Will, the testator intended that **only legitimate grandsons will benefit from the Estate of Chan Wing.**

**30.** Similarly in *In re Teo Soo Piah deceased; Teo Lye Seng v. Wee Guat Lan (w) And Anor*. [1950] 16 MLJ 176, the plaintiff *vide* an originating summons asked for determination of the question whether "children" in clause 2 of the will of Teo Soo Piah (deceased) includes adopted children. Clause 2 of the will read as follows: "I direct my trustees to stand possessed of all my property of whatsoever nature and wheresoever situate upon trust to keep the same until my youngest son Teo Beng Teng attains the age of thirty (30 years) and in the meantime to collect the income therefrom and after payment of the monthly allowances and for the maintenance

and upkeep of my children to invest the same as hereinafter mentioned". In arriving at its conclusion that "children" does not include adopted children in clause 2 of the will, the Singapore High Court at p.178 left column, held:-

> "The applicant's argument is based on an assumption in his own favour as to what the intention of the testator was. The intention of the testator must however be deduced from the very words of the Will itself. This is an English Will carefully drawn by a Solicitor and showing throughout a recognition of the distinction between natural and adopted children and using language carefully selected to indicate which of these are intended. Wherever an adopted child is intended or included that word is used, and this is so even in clause 18 when he is dealing with remainders over and speaks of adopted child. On the other hand when he is referring to his natural sons he uses the word "son" and omits the word "natural". Reading the Will and construing it as a whole it would I think be quite wrong for me to read into clause 2 before the word "children" the words "natural or adopted" which the testator has himself inserted wherever it may be supposed intended both classes of children to be included."

30.1. The testator of the Will is no country yokel but an astute businessman who had engaged the services of a firm of solicitors to draw up a detailed Will even to the extent of providing for "*an heir adopted in writing (being a son of one of the brothers abovementioned of the deceased)"* in cl.13(2). In my view this again is proof as to the intention of the testator that in using the words "*grandsons in the male line*" in cls.14(4) and 14(6) of the Will, the testator intended that **only legitimate grandsons will benefit from the Estate of Chan Wing**.

**Conclusion**

**31.** For the reasons stated I find the Plaintiff has failed to prove its claim on a balance of probabilities in respect of the 2 issues.

Accordingly I dismissed the Plaintiff's claim with costs fixed at RM60,000.00.

**Dated:** 30 APRIL 2014

**(LAU BEE LAN)**

Judge

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