

**DALAM MAHKAMAH RAYUAN MALAYSIA
(BIDANGKUASA RAYUAN)
RAYUAN SIVIL NO. B – 02 – 686 – 2005**

ANTARA

SEE HOCK CHYE

... PERAYU

DAN

1. SEE SENG LAI
2. BUMIPUTRA COMMERCE BANK BHD ... RESPONDEN-
RESPONDEN

(Dalam perkara mengenai Guaman Sivil No. MT4-24-923-2003
Di dalam Mahkamah Tinggi Malaya di Shah Alam)

DIDENGAR BERSAMA

RAYUAN SIVIL NO. B – 02– 687– 2005

ANTARA

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DAN

1. SEE SENG LAI
2. HONG LEONG BANK BERHAD ... RESPONDEN-
RESPONDEN

(Dalam perkara mengenai Guaman Sivil No. MT4-24-924-2003
di dalam Mahkamah Tinggi Malaya di Shah Alam)

Coram: Gopal Sri Ram, F.C.J.
(sitting as a Judge of the Court of Appeal)
Sulong Matjeraie, J.C.A.
Ahmad bin Haji Maarop, J.C.A.

ORAL JUDGMENT

Gopal Sri Ram, F.C.J. delivering judgment:

1. This is the judgment of the Court.

2. This appeal is directed against the order of the High Court at Shah Alam granting certain declaration to the plaintiff. The facts central to this appeal lie within a very narrow compass. The plaintiff in the actions; and there are two of them; is the father of the 1st defendant in each of the suits. He filed the two actions in question to have himself declared as being entitled to withdraw the monies in several fixed deposit accounts held by two banks. One of the banks is Bumiputra Commerce Bhd. It is the 2nd defendant in one of the suits. The other is Hong Leong Bank which is the 2nd defendant in the other suit.

3. The main plank of the 1st defendant son's appeal to us this morning is wholly if not largely procedural in nature. His complaint is that there is a serious conflict about the facts alleged on either side necessitating a trial by witness action. He argues that the learned judge ought not to have acceded to the claim in the plaintiff's originating summons basing herself purely on the affidavits before her. The nature of the conflict relates, so the argument goes, as to the state of mind or mental competence of the plaintiff to deal with and dispose off his property. An additional argument is that the 1st defendant being the plaintiff's son, the monies in the two sets of fixed deposits should go to him by reason of the presumption of advancement. However in the same breath we have been told that the 1st defendant does not seek to claim the money for himself, a stance which is manifestly inconsistent with the assertion of a gift by advancement.

4. We have perused the affidavits in the appeal records and we find that apart from a cursory mention about the father's physical health, no material whatsoever was placed before the learned judge touching upon the plaintiff's mental capacity. So, in real terms, there was no evidential material before the High Court upon the very issue which the 1st defendant says should be tried *viva voce* by reason of a conflict of testimony.

5. We are of the view that all points taken in the appeals before us this morning are without merit. First, in relation to the procedural complaint, we accept the general principle stated by Thomson CJ in **Ng Wan Siew v Teoh Sin (1963) MLJ 103** as follows:

“Before departing from the case I should make one observation. I would have made it earlier had it not been of academic interest as far as this case is concerned by reason of the order as to cause made in the Court below. It is to the effect that these proceedings should have been started by writ and not by way of originating summons. Theoretically they could have been started earlier either by writ or by originating summons but it has been said again and again that when it is known there is going to be conflict of testimony and a necessity for taking parol evidence the proceedings should be commenced by writ and a plaintiff if successful may be deprived of any

additional costs caused by his having commenced proceedings by way of originating summons. ”

6. That observation clearly has no application to the facts of the instant appeals because this is not a case where there is apprehended a conflict of testimony. And that brings us to the second point which is this: the only material put before the High Court was the plaintiff’s physical disability caused by a stroke that he suffered. But the fact that a person suffered a stroke by itself himself bears no relation whatsoever to his mental capacity to undertake a transaction. As Cockburn CJ observed in **Banks v Goodfellow (1870) LR 5 QB 549**:

“In deciding upon the capacity of the testator to make his will, it is the soundness of the mind, and not the particular state of the bodily health, that is to be attended to; the latter part may be in a state of extreme imbecility, and yet he may possess sufficient understanding to direct how his property shall be disposed of.”

7. In a later passage Cockburn CJ said:

“But his memory may be very imperfect; it may be greatly impaired by age or disease; he may not be able at all times to recollect the names, the persons, or the families of those with whom he had been intimately acquainted; may at times ask idle questions, and repeat those which had before been asked and answered, and yet his

understanding may be sufficiently sound for many of the ordinary transactions of life.”

Although **Banks v Goodfellow** concerned testamentary capacity and has no direct bearing upon the present instance, it nevertheless contains some useful guidelines of general assistance.

8. We note that the last quoted observation was made in relation to man’s memory. The position in the present case is *a fortiori*. No attack has been made, as we have already said, on the mental or intellectual capacity of the plaintiff. As **Banks v Goodfellow** demonstrates, the fact that the plaintiff’s body may be in a state of physical decay is no reflection of his mental ability to deal with his property. The third point we will make is this. The 1st defendant’s reliance on the presumption of advancement, for the reasons earlier given, is puerile. In any event there is nothing in the evidence to suggest that the plaintiff’s father intended to give up his rights to the monies in the several fixed deposits that form the subject matter of the declarations sought. We are entirely in agreement with Mr. Lim Chee Wee of counsel for the plaintiff that this is a case in which the evidence goes all the one way with nothing traveling in the opposite direction from the 1st defendant.

8. For the reasons already given the appeals herein are dismissed. The respondents in both appeals will have their costs in this Court. The deposit in each appeal shall be paid out to the 1st respondent. The orders of the High Court are affirmed.

Judgment delivered in Open Court at the conclusion of arguments on 27 April 2009.

Rayuan Sivil No. B-02-686-2005

Counsel for the appellant: Yee Mei Wen
Solicitors for the appellant: Tetuan Shearn Delamore & Co.
Counsel for the 1st respondent: Lim Chee Wee (Selvamalar and L.H Lee with him)
Solicitors for the 1st respondent: Tetuan Skrine
Counsel for the 2nd respondent: Jasvindar
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Rayuan Sivil No. B-02-686-2005

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Solicitors for the 1st respondent: Tetuan Skrine
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Solicitors for the 2nd respondent: Tetuan Lim Kian Leong & Co.

Verified with Y.A. Gopal Sri Ram, F.C.J. and certified by me to be correct.