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**DALAM MAHKAMAH RAYUAN MALAYSIA  
(BIDANGKUASA RAYUAN)**

**RAYUAN SIVIL NO: W-02-815-2004**

10

**ANTARA**

15

**ANTHONY KULANTHAI MARIE JOSEPH**

(mendakwa sebagai wakil estet Martin Raj

a/l Anthony Selvaraj, si mati)

...

**PEMOHON**

**DAN**

20

**MALAYSIAN ASSURANCE ALLIANCE BERHAD**

**RESPONDEN**

(Dalam perkara Saman Pemula No.S2-24-992-2003 di  
Mahkamah Tinggi Malaysia di Kuala Lumpur

25

Dalam Perkara Martin Raj a/l Anthony Selvaraj

Dalam Perkara Polis Insuran No. M922649094

Dalam Perkara Aturan 15 Kaedah 16 Kaedah-

Kaedah Mahkamah Tinggi 1980

Dalam Perkara Seksyen 41 Specific Relief Act

30

1950

**ANTARA**

35

**Anthony Kulanthai Marie Josep**

(mendakwa sebagai wakil estet Martin Raj

a/l Anthony Selvaraj, si mati)

...

**PLAINTIF**

40

**DAN**

**Malaysian Assurance Aliance Berhad**

...

**DEFENDAN**

5 **CORAM:**

**Y.A. DATO' ABDUL HAMID EMBONG, JCA**

**Y.A. DATO' NIHRUMALA SEGARA A/L M.K. PILLAY, JCA**

**Y.A. DATO' WIRA ABU SAMAH BIN NORDIN, JCA**

10

### **JUDGMENT**

Martin Raj A/L Anthony Selvaraj applied for a life insurance  
15 on his own life for the sum of RM50,000/- in a plan of  
insurance called EXECUTIVE MASTER PLAN with Malaysian  
Assurance Alliance Berhad (MAAB) on 10<sup>th</sup> June 1992. In his  
proposal form he named his wife Anthony Kolanthai Marie  
Joseph as his beneficiary. On 12<sup>th</sup> June 1992 (Policy Date)  
20 MAAB issued Policy No.M922849094 (policy) to the insured  
MARTIN RAJ A/L ANTHONY SELVARAJ with the Maturity  
Date/Expiry Date on 12<sup>th</sup> June 2052. On the policy  
information page the Applicant/Owner was expressed as  
MARTIN RAJ A/L ANTHONY SELVARAJ and the Face Amount  
25 was RM50, 000/-The TOTAL FIRST MONYHLY PREMIUM was  
RM166.53.

5 Premiums are payable on the Policy Date and every one month thereafter during the lifetime of the insured, as provided in the “Schedule of Benefits and Premiums” of the policy information page ( page 78 Rekod Rayuan).

ENDORSEMENT 1. of the policy reads, inter alia:

10 “ a. *This Policy is effected under “Section 23 of the Civil Law Ordinance of the Federation of Malaya” for the benefit of the beneficiary/beneficiaries as stated in the Application Form.*

15

*The insured hereby appoints himself or herself or the Trustees as stated in the “Appointment of Trustees” Form to be Trustees of all money payable hereunder.*

20

*b. It is hereby agreed that the provisions of this Policy under “Ownership Provisions” be cancelled in its entirety and shall be substituted by the following:*

25

*“All rights, privileges and options under this contract shall be reserved to the Trustees alone”*

5 The relevant provisions of the said sections of the Civil Law Act  
1956 (CLA) reads:

10 “ 23. (1) A policy of assurance effected by any man  
on his own life and expressed to be for the benefit of  
his wife or  
.....  
shall create a trust in favour of the objects therein  
named, and the moneys payable under any such  
policy shall not as long as any object of the trust  
15 remains unperformed form part of the estate of the  
insured.....

20 (3) **The insured may by the policy** or any  
memorandum under his or her hand **appoint a**  
**trustee** or trustees **of the moneys payable**  
**under the policy**, and from time to time  
appoint a new trustee or new trustees thereof,  
and may make provision for the appointment of  
25 a new trustee or new trustees thereof and for  
the investment of the moneys payable under  
any such policy.

30 (4) In default of any such appointment of a trustee  
the policy immediately on its being effected

5                    *shall vest in the insured and his or her legal  
personal representatives in trust for the  
purposes aforesaid.*”

10    There is no dispute that the policy of assurance M922849094  
effected by Martin Raj A/L Anthony Selvaraj (insured) on his  
own life and expressed to be for the benefit of his wife Anthony  
Kolanthai Marie Joseph was a policy of assurance falling  
squarely under s 23 (1) CLA which created a statutory trust in  
15    favour of the wife (cestui que trust).

The insured died on 2/3/1993 as a result of a “myocardial  
infraction.” By letter dated 24/7/95 MAAB wrote to solicitors,  
M/S Ganaendrah & Associates, that no claim can be admitted  
20    on the policy as the policy taken out on 12/6/92 had lapsed  
on 12/1/93 as the “*1<sup>st</sup> year 8<sup>th</sup> monthly premium of RM166.53  
had not been remitted to us.*” There was no evidence that the  
insured had been notified by MAAB that the policy had lapsed  
at any time before his death on 2/3/93. Upon being informed  
25    that no claim could be admitted on the policy on the purported  
ground that it had lapsed on 12/1/93, the wife caused

5 investigations to be made and based on the payment history  
 on the policy, supplied by computer print out, the last  
 installment payment received by MAAB was on 2/2/93. The  
 payment history revealed as follows:

	<u>Payment Dates</u>	<u>Due Dates</u>
10	a. 1/8/1992	12/8/1992
	b. 1/10/1992	12/9/1992
15	c. 24/10/1992	12/10/1992
	d. 24/12/1992	12/11/1992
20	e. 2/2/1993	12/12/1992

The policy, under the PREMIUM PROVISIONS in respect of  
 payment of premiums and grace period, provides, inter alia, as  
 25 follows:

30 ***“Default** – After payment of the first premium, failure  
 to pay a premium on or before its due date to the  
 Company will constitute a default in payment of the  
 premium.*

5           **Grace Period** – A Grace Period of thirty-one days  
from its due date will be allowed for payment of each  
premium after the first during which period this  
Policy will remain in force. If any premium remains  
10           unpaid at the end of its Grace Period, the Policy shall  
lapse and have no further value except as may be  
provided under the NON-FORFEITURE PROVISIONS.

**Deduction of Premiums at Death** – If this Policy  
becomes a claim by death of the insured, any unpaid  
15           balance of the premiums due for the full Policy Year  
in which death occurs shall be deducted from the  
proceeds payable under the Policy.”

20           Looking at the payment history above, it would appear that  
there was a failure by the insured to pay the premium on the  
due dates for the months of September, October, November  
and December 1992. The payment of the premium for the  
25           month of August 1992 was paid earlier than the due date of  
“12/8/1992” as it was paid on 1/8/1992. Nevertheless, in  
respect of the payment of the premium for the month of  
September 1992 and October 1992, it was paid within the  
“**Grace Period**”. The policy therefore remained in force until

5 the next premium due on 12/11/1992 **plus** another 31 days  
(for the **“Grace Period”**). However, the premium for the month  
of November 1992 paid on 24/12/1992 was clearly paid out of  
the **“Grace Period”**. The said premium ought not to have been  
received as the policy had lapsed. Nevertheless, since the said  
10 premium was received unconditionally, the policy must remain  
in force on 24/12/1992. The next payment was made on  
2/2/1993. Again, this payment was accepted unconditionally.  
Since it was accepted unconditionally it follows that MAAB has  
acknowledged, unequivocally, that the policy remained in force  
15 as at 2/2/1993.

MAAB, by accepting the payment of the premiums after the  
due date plus the grace period, in December 1992 and  
February 1993, had clearly waived the requirement of strict  
20 adherence to the payment terms, in particular, the terms as to  
the intervals within which payment of the premium is to be  
made. It is settled law, that acceptance of performance of a  
contract outside the time prescribed in the contract, renders  
time no longer to be the essence of the contract. Since MAAB

5 accepted the premium outside the grace period, time was no longer the essence of the contract. If MAAB wished to insist on the payment of premium within a period of time, then it ought to have given notice to the insured to reinstate time to be of the essence of the contract, after it had received the payment  
10 on 2/2/1993 from the insured. Since MAAB had by its conduct implicitly **elected** not to make **time the essence** of the contract at any period **between 2/2/1993** and the **date of death** of the insured **on 2/3/1993** and call for payment **all outstanding premiums as at 2/2/1993**, then MAAB's option  
15 would clearly be to exercise its rights, in the event the policy becomes a claim by death, under the provisions of the policy which reads:

20 *“Deduction of Premiums at Death – If this Policy becomes a claim by death of the insured, any unpaid balance of the premiums due for the full Policy Year in which death occurs shall be deducted from the proceeds payable under the Policy.”*

25 It is inequitable for MAAB to accept premium payments unconditionally from the insured during his lifetime, and then

5 after the death of the insured attempt to avoid the policy by  
contending the policy had lapsed, at the date of death, on the  
ground that the insured had defaulted in payment of a  
premium on or before its due date plus 31 days (grace period).

In the above circumstances, the wife of the deceased insured  
10 (plaintiff) applied to the High Court by Originating Summons  
dated 4/6/2003 seeking the following declaration and orders:

a) a declaration that the policy of life  
insurance No. 9228490094 taken out by  
15 Martin Raj a/l Anthony Selvaraj, the  
insured, was valid as at 2/3/1993;

b) a declaration that MAAB (defendant) is  
holding moneys payable under the  
20 insurance policy in trust for the plaintiff;

c) an order that the defendant do pay all  
moneys payable under the policy to the  
plaintiff.

5 The defendant denied the plaintiff's claim on the following grounds:

a) that the relevant insurance policy had  
lapsed owing to the insured's failure to  
pay his premium at the time prescribed  
10 under the terms of the policy;

b) that the plaintiff's action is time barred  
by virtue of the Limitation Act 1953  
(LA1953).

15

The learned High Court Judge found in favour of the  
defendant on both grounds and dismissed the plaintiff's  
originating summons and hence this present appeal before us  
by the plaintiff. For convenience, the appellant and respondent  
20 before us shall be referred to as, the plaintiff and defendant,  
respectively, in this judgment.

At the very outset of this appeal, counsel for the defendant  
conceded that the policy of insurance had not lapsed at the

5 date of death of the insured. Therefore, there was only one  
issue to be determined by this court, namely, whether the  
plaintiff's action had been time barred under LA1953. In this  
regard, the learned High Court Judge held in his grounds of  
Judgment:

10 *“Alasan utama saya menolak tuntutan Plaintiff itu  
ialah oleh sebab tindakan Plaintiff ini dimulakan  
selepas 6 tahun dari tarikh kematian simati iaitu  
tarikh bermulanya kuasa tindakan ini. Simati  
meninggal dunia pada 2/3/1993. Tindakan Plaintiff  
15 ini difailkan di Mahkamah pada 16/7/2004 lebih  
dari 11 tahun. Polisi insuran yang dibuat oleh simati  
dengan Defendan adalah merupakan satu jenis  
kontrak. Had masa untuk mengambil tindakan  
terhadap apa-apa kontrak ialah dalam masa 6  
20 tahun. Di dalam tindakan ini tindakan Plaintiff dibuat  
lebih dari 11 tahun. Tidak ada apa-apa alasan diberi  
oleh Plaintiff mengapa kelewatan dilakukan untuk  
memulakan tindakan. Di atas alasan ini sahaja  
tindakan Plaintiff wajar ditolak”*

25

The learned High Court Judge has seriously misdirected himself on the facts and the law when he held that the claim of the plaintiff was founded on contract, and was accordingly

5 time barred when her originating summons, dated 4/6/2003,  
 was filed in court more than 6 years after the date of death of  
 her husband. The learned judge had his mind focused on  
 section 6 (1) (a) of LA1953. He fell seriously in error in  
 assuming the claim was an action founded on a contract.

10 Section 6(1) (a) LA 1953 provides:

*“Save as hereinafter provided the following actions  
 shall not be brought after the expiration of six years  
 from the date on which the cause of action accrued,  
 15 that is to say –*

*(a) actions founded on a contract or on tort;*

*.....”*

He erred in failing to consider that the claim of the wife was, in  
 20 fact and in law, a claim by her as a beneficiary (cestui que  
 trust) of a policy effected under section 23 (1) CLA creating a  
 trust of the said policy of assurance immediately such a policy  
 is effected.

In this case, upon the death of the insured, the trust property  
 25 (the sum secured by the policy) was never at any time handed

5 over by the defendant to a trustee or trustees duly appointed  
under the provisions of section 23 CLA or in default of such  
appointment, to the legal personal representative. In such  
circumstances, in law and in fact, the trust property (the sum  
secured by the policy) remained in the hands of the defendant  
10 as a bare trustee right from the date of death of the insured.  
On the particular facts of this case, any action to recover the  
sum secured by the policy in the hands of the defendant as  
bare trustee, by the cestui que trust and/or personal  
representative of the insured, is not an action founded on  
15 contract.

The factual matrix of this case can also be looked at from  
another perspective. The defendant, for all intents and  
purposes, had declared itself a trustee of the policy. This is  
20 patent from a document that formed part of the insurance  
policy documents. The document was signed by both, the  
Chairman, as well as the General Manager/Registrar of the  
defendant (page 77 Rekod Rayuan).The document contains the  
following declaration:



5           *“The insured may by the  
policy.....appoint a trustee.....of the  
moneys payable under the policy,.....”*

The insured, having accepted the defendant’s declaration to  
10 pay the insurance moneys directly to the beneficiary, upon the  
death of the insured prior to the maturity date, the insured  
must be deemed unequivocally to have appointed the  
defendant as trustee. Such trustee would then be under an  
obligation to pay the insurance moneys (trust property) to the  
15 beneficiary upon the death of the insured. If the said trustee  
fails to do so, any action instituted by the beneficiary would  
not be a claim in contract but a claim by the beneficiary under  
the trust to recover from the trustee trust property, in the  
possession of the trustee. Under such circumstances, no  
20 period of limitation prescribed by the LA1953 shall apply to  
the said action by the beneficiary, consonant with the  
provisions of section 22 (1) (b) LA1953 which reads:

5           “22 (1) No period of limitation prescribed by this Act  
shall apply to an action by a beneficiary under a  
trust, being an action –

(a) .....

(b) to recover from the trustee trust property

10           or the proceeds thereof in the possession

of                           the                           trustee,

.....”

The plaintiff, in her capacity as the legal personal  
15 representative of the insured, as well as the cestui que trust of  
the policy pursuant to the provisions of section 23 CLA, had  
no alternative but to file the originating summons seeking the  
declarations and orders set out therein. It would be  
inequitable, unconscionable and a gross injustice to allow the  
20 defendant to extinguish the right of the cestui que trust of a  
section 23 CLA policy of insurance, by invoking the  
purported limitation, when none exists.

5 In the above circumstances, we are unanimous that this  
appeal is allowed in terms of prayer a), b) and c) of the  
originating summons dated 4/6/2003, that is:

- 10           “a.   *Suatu deklarası bahawa polisi insuran seumur  
hidup No.M922849094 yang diambil oleh  
Martin Raj a/l Anthony Selavaraj, simati,  
adalah sah pada 2-3-1993.*
- 15           b.   *Suatu deklarası bahawa Defendan memegang  
jumlah yang kena dibayar dibawah polisi  
insuran tersebut sebagai amanah bagi pihak  
estet simati dan/atau Plaintiff.*
- 20           c.   *Defendan membayar Plaintiff jumlah yang kena  
dibayar di bawah polisi insuran tersebut  
kepada Plaintiff bersama dengan faedah pada  
kadar 8% dari 2-3-1993 sehingga pembayaran  
penuh.”*

5 The plaintiff shall be entitled to the costs in the Court below.  
By consent the costs of the appeal to the plaintiff in the Court  
of Appeal is agreed at RM5,000/-. The deposit shall be  
refunded to the appellant.

10

( **DATO' NIHRUMALA SEGARA A/L M.K. PILLAY** )

Judge  
Court of Appeal  
PUTRAJAYA

15

**Reference**

Civil Law Act 1956 (CLA)

**Peguam Perayu**

1. En Murali Achan
- 20 2. En K Kulasekar  
Tetuan K.Kulasekar Achan & Associate  
Peguambela & Peguamcara  
Petaling Jaya, SELANGOR

25 **Peguam Responden**

En Ho Kee Tong  
Tetuan Gan, Ho & Razlan Hadri  
Peguambela & Peguamcara  
Jalan Pudu, KUALA LUMPUR

30

**21 NOVEMBER 2007**

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