

IN THE PRIVY COUNCIL

No.43 of 1975

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O N A P P E A L

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FROM THE FEDERAL COURT OF MALAYSIA

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B E T W E E N :-

CHOW YEE WAH and  
THE KWONG YIK (SELANGOR) BANKING  
CORPORATION BHD.

Appellants

- and -

10 CHOO AH PAT, Administratrix of the  
Estate of LOKE YAIK HOE, alias  
LOKE YAUH HOH, alias LOKE YAUH HOE,  
deceased

Respondent

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CASE FOR THE APPELLANTS

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Record

1. This is an appeal from a judgment of the Federal Court of Malaysia (Gill C.J., Ali and Ong F.J.J.) dated the 20th January 1975, which allowed an appeal from a judgment of the High Court of Malaya (Abdul Hamid J.) dated the 26th November 1973, whereby a claim by the Respondent that the Appellants should refund on various grounds \$60,385 to the estate of Loke Yaik Hoe (hereinafter called "the deceased") was dismissed with costs. The Federal Court of Malaysia ordered that the Appellants should pay \$60,385 to the Respondent together with costs in both courts.

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2. The principal questions arising in the appeal are:-

- 30 (a) Whether there was a valid transfer on the 19th July 1967 by the deceased of the balance of his bank account at the main office of the Second Appellant to a joint account in the names of the deceased and the First Appellant; and
- (b) Whether, following upon such transfer an effective trust had been instituted relating to the amount transferred.

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ll 7-17

3. The deceased was the son of Loke Chow Kit deceased and the Respondent. The Respondent had become the second wife of Loke Chow Kit, who had by then had nine children by his first wife. One daughter had married the First Appellant. A nephew was called Kwan Mun Koh, who is an officer at the Pasar Road branch of the Second Appellants. Since 1961 the deceased had lived with Chan Yoke Ying, and although Hamid J. declined to make any finding as to whether they had been lawfully married, he held that she was considered as his wife, in particular by the deceased.

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4. The Statement of Claim was originally dated 26 June 1971 and, as re-amended, claimed a variety of relief. The Respondent, as administratrix of the estate of the deceased claimed that cheque no. A.043382 for \$60,384.80 purportedly drawn by the deceased on 18 July 1967 was invalid on the ground that at the material time the deceased was not of sound mind memory or understanding. It was alternatively claimed that execution of the cheque was obtained by the fraud of the First Appellant, and one Kwan Mun Koe, an employee of the Second Appellants. It was further claimed that authority for a new account given by the deceased was invalid by reason of his lack of mental capacity or alternatively the fraud of the First Appellant and the said employee of the Second Appellants. It was further claimed that execution of the said cheque and authority was obtained by undue influence. A further claim was that, even if the transaction impugned was valid, the death of the deceased gave rise to a resulting trust of the proceeds of the bank account in favour of the estate of the deceased.

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The Defences put all the material claims in issue.

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5. The hearing of the Action took place between 28 June 1972 and 4 July 1973, including several adjournments.

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The reserved judgment of Abdul Hamid J. was delivered on 26 November 1973. After referring to the issues raised on the pleadings, he stated the outline of the facts giving rise to the claims. The deceased was admitted to the General Hospital, Kuala Lumpur on 13 July 1967.

10 A few days before he died on 24 July a joint  
account between him and the First Appellant  
was opened at the Pasar Road branch of the  
Second Appellants. On 18 July 1967 the  
deceased drew a cheque in favour of the  
Second Appellants on his existing account no.  
4.267 with the Head Office for a sum of  
\$60,385. He also executed certain documents  
authorising the opening of the joint account.  
20 The amount was transferred to the joint  
account on 20 July 1967. The said cheque and  
the documents of authority had been signed  
by affixing the thumb print of the deceased.  
The learned judge held that the prints were  
those of the deceased, after they had been  
officially verified. There was no evidence  
that the prints had been affixed immediately  
before or immediately after death, as alleged  
by the Respondent, since the Bank records  
show that the cheque was cleared on 20 July  
and the proceeds transferred to the joint  
account on the same day. The only evidence,  
adduced by the Appellants, was that the  
thumb-prints were affixed on 18 July 1967.

30 6. The learned judge then considered at  
length the evidence of five doctors called  
by the Respondent on the issue of the  
deceased's mental capacity while in hospital.  
He held that on the facts of the case the  
burden was on the Respondent to establish lack  
of mental capacity at the material time.  
The medical evidence did not establish exactly  
what the deceased's state of mind was at the  
time when the documents were executed.  
Reviewing the medical evidence on this  
question the learned judge said that the  
deceased's condition was not static and  
concluded that the medical witnesses could not  
say whether or not the deceased was of  
40 sound mental capacity at the material time.  
He rejected the evidence of the Respondent  
herself that the deceased was unconscious  
the whole of the time he was in hospital.

50 The learned judge then considered the  
evidence called by the defence including that  
of the First Appellant, Kwan Mun Koh, manager  
of the branch of the Second Appellants, and  
Chan Yoke Ying, the deceased's common law  
wife. He held that the deceased had an  
earnest wish to make provision for Chan Yoke  
Ying; he had had no offspring, and disliked  
his mother, the Respondent, who in turn hated

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p.196 1.44

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11.18-34

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p.203 Chan Yoke Ying. Before the deceased had gone to hospital, he had made up his mind to open a joint account with the First Appellant in order to benefit Chan Yoke Ying after his death. The learned judge held that the only direct evidence as to the state of the deceased's mind at the time when the relevant documents were executed was that given by witnesses called by the defence, and after considering the evidence of those witnesses at length, he accepted that evidence and held that the deceased knew what he was doing when he executed the documents. 10

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ll 1-5

7. The learned judge held that there was no evidence that the documents had been executed as a result of undue influence or in consequence of fraud, as had also been alleged by the Respondent. There was no ground for holding that the authority had been revoked by any subsequent mental incapacity of the deceased. The learned judge held that he was satisfied as to the propriety of the transaction and of the fact that the deceased was fully aware that he was carrying out a course of conduct which he had decided upon before going into hospital. The authorities cited by counsel were consistent with these conclusions. The Respondent had argued that the death of the deceased had given rise to a resulting trust in favour of his estate since the only money credited to the account had been provided by the deceased. However that proposition was only a presumption affecting the burden of proof, and in this case there was specific evidence to a different effect. The learned judge held, after reviewing the evidence, that the deceased had throughout an intention to provide in his lifetime for his wife in the event of his death, even if the benefit was contingent on his death. The case of Russell v Scott 55 C.L.R. 440 supported the conclusion that there was a completely constituted trust, which was not a testamentary disposition. The Respondent's claim would accordingly be dismissed with costs. 20 30 40

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8. The Respondent's appeal to the Federal Court of Malaysia, which was heard between 24 April and 28 June 1974, was allowed with costs.

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The only reasoned judgment was given by Ali F.J. on 20 January 1975. He referred to the facts in outline, and to the two principal issues raised in the case, as to the mental capacity of the deceased and whether a valid trust 50

had been set up. He then considered the medical evidence led by the Respondent and said:

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ll. 7-11

"The (Respondent's) evidence considered as a whole reasonably supports a case of fraud as alleged by the (Respondent). It remains for consideration whether there is anything in the defence evidence to support a different conclusion".

10 The learned judge then reviewed evidence called for the defence as to the state of the deceased and the execution of the relevant documents. He commented on various parts of the evidence and concluded that various gaps in the evidence and the interest of Chan Yoke Ying in the outcome made it difficult for him to accept as true that the deceased had voluntarily thumb-printed the relevant documents. The defence evidence should not have been accepted without corroboration, and needless to say there was no corroboration. As regards the first question he respectfully differed from the trial judge by saying that the deceased was not in full possession of his mental faculties when his thumb-prints were affixed to the relevant documents.

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30 On the second question Ali F.J. summarised the conclusions of the trial judge and the authorities relied on by him. Since those cases did not cover the case where a beneficiary was not a surviving holder of a joint account, it was necessary to look at the evidence on the point. In view of Ali F.J. there was nothing in the defence evidence which pointed with reasonable certainty to the fact that the deceased intended to create a trust. Further there was no reasonable certainty as to the property which was to be held in trust. There was therefore no evidence of an express trust to rebut the presumption of a resulting trust. The appeal should be allowed and judgment given against both Appellants for \$60,385 with costs.

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Gill C.J. and Ong F.J. concurred.

9. The Appellants respectfully submit that the judgment of the Federal Court was wrong and should be reversed. A consistent series of decisions of the House of Lords has

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established that where the decision of a trial judge on a question of fact has depended on his estimation of witnesses who have given evidence before him, an appellate court will only interfere with that decision on certain limited grounds. In the present case no such grounds were present, and the Federal Court did not suggest that the decision of the trial judge was being reversed on any such ground. Since it is submitted that there was sufficient evidence to support the conclusions of the trial judge, and since he did not misdirect himself in law in arriving at those conclusions, they should not have been disturbed. In particular, it is submitted that the trial judge correctly directed himself as to the burden of proof in relation to whether the deceased was of sound mind at the relevant time. Ali F.J., by implication from the terms of his judgment, wrongly considered that such onus lay upon the Appellants. It is further submitted that in any event the learned trial judge did reach the correct conclusion, on the facts in evidence before him, that the deceased was of sound mind when he executed the relevant documents.

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10. It is further submitted that the Federal Court was wrong in concluding that there was no evidence that a valid trust had been set up in consequence of the execution of the relevant documents. It is respectfully submitted that the effect and relevance of Russell v Scott (supra) was not fully appreciated, and that that case was wrongly distinguished by the Federal Court. It is submitted that there was sufficient certainty of intention to create a trust and certainty of subject matter to support the conclusion of the trial judge.

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11. The Appellants therefore respectfully submit that this appeal should be allowed with costs, that the decision of the Federal Court should be set aside, and that the judgment of Abdul Hamid J. should be restored, for the following, among other

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R E A S O N S

1. BECAUSE there were no grounds on which the original judgment should have been reversed.

2. BECAUSE the Federal Court wrongly considered that it was entitled without restraint to reconsider all the issues of fact decided by the trial judge.
3. BECAUSE the Federal Court acted contrary to well established principles of law in reversing the trial judge upon questions of fact.
- 10 4. BECAUSE the Federal Court failed to apply the proper tests in considering whether to reverse findings of fact made by the trial judge.
5. BECAUSE the trial judge correctly held that the deceased was of sound mind when he executed the documents establishing the setting up of the joint account.
6. BECAUSE the trial judge correctly held that a valid trust had been set up.
- 20 7. BECAUSE of the other reasons in the judgment of Abdul Hamid J.

MERVYN HEALD

GEORGE NEWMAN

M. SHANKER

CHAN SIEW YOON

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