Chin Huat Yean @ Chin Chun Yean & Anor
v
Chin Jhin Thien & Anor

Court of Appeal – Civil Appeal No. P-02(NCvC)(W)-2300-11/2017
Hamid Sultan Abu Backer, Abang lskandar Abang Hashim and Kamaludin Md Said JJCA

October 4, 2018

Probate and administration *– Grant of probate – Setting aside – Appeal against – Whether requirements for formality of valid will satisfied – Plea of secret trust – Whether High Court misdirected itself in combining issue of secret trust with that of testamentary capacity – Whether High Court erred in law and in fact in finding that deceased lacked testamentary capacity – Wills Act 1959*

The defendants ("the appellants") claim that pursuant to a secret trust created by one Chin Joo Negan ("the deceased"), they are the trustees of the deceased's estate for the benefit of the second wife of the deceased and their children. The instant appeal by the appellants is against the High Court's decision, allowing the plaintiffs' ("the respondents") suit to set aside the grant of probate. The appellants submitted that the High Court had erred in law and fact in finding inter alia that the last will is invalid despite the testimony of the witnesses to the will namely DW1 (who was the advocate and solicitor who prepared the will) and DW2; by equating the bodily ill-health of the deceased with the defendant having no testamentary capacity; and in finding that the deceased lacked the testamentary capacity to make the will by preferring/accepting the testimony of the first respondent which is in contradiction with the testimonies of five other witnesses.

Issue

Whether the High Court had erred in law and in fact in finding that the deceased lacked testamentary capacity.

Held, allowing the appeal with no order as to costs and setting aside the order of the High Court; grant of probate, sustained

1. All the requirements for the formality of a valid will had been satisfied in this instance. In principle, the court's endorsement of a secret trust does not breach the Wills Act 1959 or any other statutory law. It only goes to show bona fide and the true intention of the testator if the plea of the secret trust succeeds. As a general rule the only instance when the probate can be set aside is where it is established that the testator did not have testamentary capacity to execute the will. The High Court in this instance had

misdirected itself in combining the issue of secret trust with that of testamentary capacity. The law does not permit that. Testamentary capacity is related to medical evidence or related credible evidence and has nothing to do with a story related to secret trust. [*see p 434 para 11 - p 435 para 11*]

2. PW1 who was the urologist who treated the deceased, was an important witness and who the High Court did not have the benefit of hearing his evidence and/or seeing his demeanor. No compromise could have been made by accepting hearsay evidence from notes of evidence in the issue relating to testamentary capacity. It is a serious misdirection which compromises the integrity of the decision making process related to testamentary capacity. PW1's witness statement does not in a definitive form assert that the deceased lacked testamentary capacity and based on the said statement, it can be argued that the threshold to establish that the deceased did not have testamentary capacity is not in favour of the respondents. In contrast, based on the witness statement of DW1 and DW2 as well the cross-examination questions and answers, there is no reason why it should not believed or at least for the limited purpose to say that the formalities of a valid will had been duly satisfied. [*see p 435 para 13 - p 437 para 15*]

3. The court does not strike out a secret trust argument based on illegality or public policy. There is nothing cynical or wrong even if it is meant for private trust or charitable trust etc. In this instance, the respondents had failed to demolish the defence of secret trust. There is good nexus on the side of the deceased to the beneficiaries of the secret trust to dispel any mala fide on the part of the appellants. [*see p 437 para 16*]

Cases referred to by the court

Low Fong Mei & Anor v Ko Teck Siang & Ors [1989] 2 CLJ (Rep) 1015, HC (Sing) *(ref)*
Manuel Louis Kunha v Juana Coelho & Ors (1908) 18 MLJ 158, HC (India) *(ref)*
Pathma d/o Naganather & Anor v Nivedita d/o Naganather [2006] 2 AMR 318; [2003] 8 CLJ 457, CA *(ref)*
Sarjit Singh a/l Kesar Singh v Harjindar Kaur a/p Koondan Singh [2016] 6 AMR 529; [2016] 12 MLJ 27, CA *(ref)*

Legislation referred to by the court

Malaysia
Evidence Act 1950, ss 32(1)(f), 100
Wills Act 1959

Other references

Bailey, *The Law of Wills*, 7th edn, 1973
J Andrew Strahan, *The Law of Wills*, 1908

Lee Chooi Peng and Lin Pei Sin (Justin Yoon Chooi & Wing) for appellants
John Khoo Boo Lai (Ong & Associates) for respondents

Appeal from High Court, Penang – Suit No. BA-24-970-09/2016

Judgment received: November 26, 2018

Hamid Sultan Abu Backer JCA *(delivering the judgment of the court)*

[1] The appellants/executors and beneficiaries of a will, appeal to the court against the decision of the learned trial judge who allowed the respondents' suit to set aside the grant of probate. It must be noted that the first appellant is the elder brother of the deceased and the second appellant is the son of the first appellant.

[2] The focus of the appellants' appeal in the instant case is related to the pleaded defence of a secret trust as well as the evidence in the trial. In fact, the learned counsel for the appellants had placed on record that the appellants are not the beneficiaries of the will as they are holding it in trust for the children of the deceased in relation to a marriage which was not duly registered according to law.

[3] The two main issues dealt by the trial judge were:

(i) Whether the deceased had a testamentary capacity to make the will dated December 18, 2013.

(ii) Whether the defendants had dispelled all suspicious circumstances surrounding the making of the will.

[4] The learned judge had written a meticulous judgment on the facts and law but without much appreciation to the concept of secret trust and in consequence, the integrity of the decision making process is severely compromised, warranting appellate intervention to set aside the order in limine. (See s 32(1)(f) and s 100 of the Evidence Act 1950.)

[5] In addition, the learned judge had failed to take note that the expert witness evidence PW5 was only relevant to question the testamentary capacity of the deceased but was not sufficient to dispel the issues related to "suspicious circumstances" in the light of plea of the secret trust as well as strong evidence of the appellants to resist the respondents' case.

Brief facts

[6] This judgment must be read together with the judgment of the learned trial judge to appreciate the facts and/or law in the proper perspective. The learned judge had summarised the facts as follows:

Background facts

1. The deceased was an engineer by profession and he had three wives, namely:

   (i) Chan Cheng Lian (first wife);

   (ii) Chan Cheng Geok (second wife); and

   (iii) Yeoh Bee Leng, Katherine (third wife).

2. Out of the three marriages, only his marriage with the first wife was registered. The plaintiffs are the children of the deceased from his marriage with Chan Cheng Lian. With the second wife, the deceased had four children. There was no child with the third wife.

3. The second wife, Chan Cheng Geok ("DW4") is the elder sister of Chan Cheng Lian ("PW5"). During the subsisting of the first marriage, DW4 had a marital affair with the deceased. Unable to accept the fact that her own sister had stolen her husband, PW5 filed for divorce. Decree nisi was granted but was not made absolute.

4. The first plaintiff had a cordial relationship with the deceased during his childhood day up to adulthood. The first plaintiff who works as a sub-contractor always deal with the deceased in their works related matters.

5. In the meantime, the deceased married his business partner, Yeoh Bee Leng, Katherine. Katherine was not called as a witness. But, there were wedding photographs tendered to show she is married to the deceased.

6. Vide Kuala Lumpur High Court Originating Summons No. S-32 NCvC-95-01/2014, the defendants obtained the grant of probate on February 12, 2014.

7. The plaintiffs' pleaded case is the defendants had manipulated, unduly influenced and cheated the deceased to make the will.

[7] The memorandum of appeal read as follows:

l. The Honourable High Court Judge had erred in law and facts in allowing the Respondents'/Plaintiffs' claim and *inter alia* ordered that the last Will of Chin Joo Negan, Deceased dated 18/12/2013 is invalid when both witnesses to the said Will (DW1 and DW2) testified that the Deceased was fully conscious, of sound mind, memory and understanding as well as lucid

when the Deceased signed the Will on 18/12/2013 and the Deceased had a legal consultation with DW1 in private prior to the making and signing of the Will dated 18/12/2013.

2. The Honourable High Court Judge had erred in law and facts in her decision in deciding that the Deceased did not have testamentary capacity to make the Will dated 18/12/2013 by wrongly relying on the phrase "... *still having trouble to cope with the disease, mentally and physically*" stated by PW1 i.e. Dr. Git Kah Ann in his letter dated 13/12/2013 (PI) and without taking into consideration that PW1 had already clarified that on the date of the said letter i.e. on 13/12/2013, the Deceased was of sound mind, lucid and conscious when PW1 met with the Deceased.

3. The Honourable High Court Judge had also erred in law and facts in her decision by equating the bodily ill-health of the Deceased as having no testamentary capacity.

4. The Honourable High Court Judge had erred in law and facts in her decision that the Deceased had no testamentary capacity to make a will on 18/12/2013 by accepting the oral testimony of the 1st Respondent (PW6) of his purported meeting with the 1st Deceased on 18/12/2013 when such material fact/issue about the Respondent meeting/seeing the Deceased on 18/12/2013 was not pleaded nor mentioned in his witness statement and surfaced for the first time orally during trial.

5. The Honourable High Court Judge had erred in law and facts in her decision by preferring/accepting the testimony of the 1st Respondent which is in contradiction with the testimonies of 5 other witnesses, in respect of the Deceased's condition on 18/12/2013.

6. The Honourable High Court Judge had erred in law and facts in her decision that the Will dated 18/12/2013 is invalid because there was no certification by any medical practitioner as to the mental capacity of the Deceased on 18/12/2013 when there is no mandatory requirement for such certification.

7. The Honourable High Court Judge had also erred in law and facts in her decision by believing and accepting the testimony of the 1st Respondent (PW6) in toto when:

   (a) the1st Respondent was caught lying a few times to the Court;

   (b) the 1st Respondent's statements were sharply conflicting, inconsistent and not credible; and

   (c) the 1st Respondent (PW6) and his mother (PW4) are interested witnesses.

8. The Honourable High Court Judge had also erred in law and facts in her decision by preferring/accepting the testimony of PW4, Dr. Balavendrian

Anthony in toto and did not give any weight to/failed to take into account the correct context of the testimony of DW6, Dr. Azlan bin Husin, in respect of the effect of the medication prescribed to the Deceased, when PW4's testimony were proven to be inconsistent with the medical materials that was provided by him as well as in sharp contradiction with the testimonies of PW1 and DW6.

9. The Honourable High Court Judge had also erred in law and facts in her decision that there were suspicious circumstances and undue influence when the Deceased had obtained independent legal advice prior to the making and signing of the Will elated 18/12/2013 and the Appellants had dispelled all suspicious circumstances raised.

10. The Honourable High Court Judge had also erred inlaw and facts in her decision that there were suspicious circumstances just because the 1st Respondent did not know about the Will dated 18/12/2013 before the Deceased passed away when the Deceased had no intention to leave anything to the 1st Respondent and the 1st Respondent had not been in contact with the Deceased for many years.

11. The Honourable High Court Judge had also erred in law and facts in her decision that DW1 did not bother to know about the mental capacity of the Deceased when DW1 had testified that he had interviewed the Deceased and found that the Deceased was of sound mind, memory and understanding as well as lucid before drafting the Will dated 18/12/2013 and attending to the Deceased signing the said Will on 18/12/2013.

12. The Honourable High Court Judge had also erred in law and facts in her decision that the Will dated 18/12/2013 could not have been done by the Deceased just because the said Will was simple and short when the said Will was signed in the perfect form in compliance with the Wills Act 1959.

13. The Honourable High Court Judge had also erred in law and facts in her decision that there was fraud and undue influence by the Appellants on the Deceased when no evidence of fraud nor undue influence was adduced at the trial.

14. The Honourable High Court Judge had also erred in law and facts in her decision that secret trust was not proven when:

    (a) Whether there is a secret trust or not is not an issue to be tried in this case;

    (b) It is not for the Respondents to dispute the existence of a secret trust when the Appellants as trustees and DW4 as one of the beneficiaries of the secret trust had confirmed the existence of the secret trust; and

    (c) DW1 had also confirmed that the Deceased had informed him that the Deceased had instructed the 1st Appellant and the 1st Appellant knew what to do with the Deceased's assets.

15. The Honourable High Court Judge had also erred in law and facts in her decision that "*if the purpose of the secret trust is to give the deceased's properties to the deceased's second wife and her children, it* is *much easier for the deceased to say so expressly in the will*" when a full secret trust is not disclosed on the face of the will.

16. The Honourable High Court Judge had also erred in law and facts in her decision that the Appellants had unduly influenced, manipulated and cheated the Deceased to give all his properties to the Appellants when the Appellants had already pleaded that they are not the true beneficiaries of the estate of the Deceased but are trustees under a secret trust where the true beneficiaries are the Deceased's 2nd wife Chan Cheng Geok and her 4 children, especially the younger 2 who were still studying.

17. The Honourable High Court Judge had also erred in law and facts in her decision by not giving any weight to the evidence furnished by the Appellants and by not giving clue weight and importance to the facts established from the totality of the evidence.

18. The Honourable High Court Judge had also erred in law and facts in her decision that the businesses of Jujur Cipta Sdn Bhd, Democipta Sdn Bhd and Borneo Triangle Sdn Bhd are family assets and trust assets for the children of the Deceased when the Deceased owned only a portion of the shares in those companies and do not owned the assets of the companies and there was also no evidence adduced to prove that those businesses were family assets or trust assets.

19. The Honourable High Court Judge had also erred in law and facts in her decision that the businesses of Jujur Cipta Sdn Bhd, Democipta Sdn Bhd and Borneo Triangle Sdn Bhd be returned to the estate of the Deceased when the businesses of those companies belong to the companies and not the Deceased who owned only a portion of the shares in those companies.

20. The Honourable High Court Judge had also erred in law and facts in her decision to grant exemplary damages of RM25,000 against the Appellants and in her decision that the Appellants were getting all the assets and properties of the Deceased to be given to them to make a profit for themselves and thereafter to dissipate and transfer the proceeds of the sales to Australia, when there was no such evidence adduced/not proven in the trial.

21. The Honourable High Court Judge had also erred in law and facts in her decision that Chan Cheng Geok is not the legal wife of the Deceased and all of her children i.e. Chin Jhin Leung, Chin Jhin Cheung, Chin J. Anne dan Chin Jhin Yeong, are illegitimate children when the issue of the validity of marriage between the Deceased and Chan Cheng Geok was not pleaded by the Respondents in the Statement of Claim and was not an issue to be tried in this case.

22. The Honourable High Court Judge had also erred in law and facts in her decision in allowing evidence of the marriage between the Deceased and Chan Cheng Lian to be adduced at trial on the basis that it is a background fact but wrongly rejected the fact that the Deceased and Chan Cheng Lian had officially divorced just because the Decree Nisi Absolute was not produced in Court and wrongly rejected the letter dated 28/9/2017 from Jabatan Pendaftaran Negara Malaysia which confirmed the registration of the said divorce.

23. The Honourable High Court Judge had also erred in law and facts in her decision in allowing the Respondents to adduce at the trial the affidavits of one Yeoh Bee Leng ("Katherine") in Suit 22NCVC-143-10/2014 which are irrelevant, not pleaded by the Respondents and contained disputed facts:

    (a) without taking into account that Yeoh Bee Leng did not give evidence in the trial and hence no consideration ought to be given to her affidavits;

    (b) having considered Yeoh Bee Leng's affidavits but failed to give any weight to the rebuttal affidavits filed by the Appellants in Suit 22NCVC-143-10/2014;

    (c) without taking into consideration that the said Yeoh Bee Leng's claim in Suit 22NCVC-143-10/201 4 had been dismissed by the High Court; and

    (d) without taking into consideration that all averments in the affidavits of Yeoh Bee Leng are disputed facts.

24. The Honourable High Court Judge had also erred in law and facts in her decision and her perception that the Appellants' witnesses were lying when no evidence of contradiction with contemporaneous documents was established and when the Appellants' witnesses' testimonies were consistent with the totality of the evidence adduced at trial.

25. The Honourable High Court Judge had also erred in law and facts in her decision which is against the weight of the evidence and against the. principles of law in relation to testamentary capacity/validity of a will.

26. The Honourable High Court Judge had erred in law and facts in her decision for not taking into account the relevant facts and law and/or for taking into account the irrelevant facts and/or law.

27. There was insufficient judicial appreciation by the Honourable High Court Judge in respect of the evidence and facts adduced at trial.

28. Wherefore, the Appellants pray for the Appeal to be allowed with costs herein and below.

Jurisprudence related to secret trust and setting aside probate

[8] It is well settled that a secret trust is enforceable in law provided the criteria set out in common law cases are satisfied. For example, *The Law of Wills* by J Andrew Strahan, published as early as in 1908, on secret trust had this to say:

> The third cause of the difficulty of drafting wills arises from *the desire of testators to avoid publicity*. A will on the death of the testator becomes a public document. As we shall see, it is deposited at Somerset House, where anybody can get a look at it for a shilling. Now many testators and still more testatrixes object to the world knowing what they have done with their property, and so they endeavour to dispose of it without letting the real dispositions appear in the will. And in spite of the Wills Act,1837, enacting that all the dispositions must be in writing, this can be done by means of what are called *secret trusts*, that is, by the ostensible legatees in the will becoming secretly trustees of the legacy for persons or purposes not mentioned in the will.
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> SECRET TRUSTS – Where it is desired to dispose of property in this way the draftsman should remember two points.
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> The first is, that in drafting the will he should make *the gift to the secret trustees on the face of it beneficial.* If he declares them to be trustees of the gift, then unless the trusts are also set out in the will, they will fail and the legatees will become trustees for the residuary legatee or next-of-kin of the testator, as the case may be, notwithstanding any secret agreement with the testator which they may have entered into as to the use which was to be made of the legacy.
>
> In the second place, he should make sure that *all the secret trustees should during the testator's life undertake in writing to hold the legacy on the trusts intended.* The reasons are these. These secret trusts are enforced by the Court merely to prevent frauds on testators. Accordingly, if none of the intended trustees are told of the trusts none are bound by them, since none of them are guilty of fraud. If some only are told of them, then if those who were told of them were told before the will was made, they will all be bound, since the will will be taken to have been made on the faith of their undertaking; but if they were told only after the will was made, then those who were not told will not be bound, and their shares will be their own property. Lastly, it is not necessary to reduce the undertaking into writing, but if it is not so reduced it is hard to prove it.
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> IMPERFECT INSTRUCTIONS. – Another difficulty arising through testator's objection to publicity is that not infrequently he fails to disclose to the solicitor who takes his instructions the true state of his family and circumstances. Every person, it is said, has a skeleton in his cupboard, and this certainly is very true of testators; and they often fear to open that cupboard even to their advisers, with the result that after their death the skeleton dances a *pas seul* before the whole world on the boards of the Chancery Division. The most frequent skeleton is illegitimacy-the testator's parents never were legally married or the testator himself was never legally married. Since the passing of the Deceased Wife's

Sister's Marriage Act, 1907, which renders legal not merely marriages with deceased wives' sisters contracted since but also those contracted before the Act, this is not likely to be so common as heretofore. Still as long as humanity is subject to human frailties it will occur sufficiently often to make it desirable for draftsmen when possible to describe relatives of the testators not merely as "children", "brothers", "nephews", or in other such terms, which *prirna facie* indicate legitimate relationship only, *but also by their individual names.* When this is done the question of the legitimacy of their relationship to the testator or to anybody else does not arise.

Another point on which testators frequently are reticent is as to their title to the property which they describe as their own. Not infrequently on investigation it will be found that such property belongs really to their wives or their children, and that they have merely the administration of it, or a life interest in it, or a special power of appointment over it. If this turns out to be the case and the will is drafted on the assumption that the property is the absolute property of the testator, all sorts of difficulties are certain to arise-difficulties as to whether the power has been exercised, and as to election between gifts of the testator's own property and the property of the wife or child which the will purports to transfer to other persons ('). The only mode of preventing this is by making it clear to the testator that any information about his affairs which he gives will be treated as strictly confidential, and that if full information is not given his intentions will be probably defeated, and much of his estate will certainly be spent in the (to his family) unsatisfactory form of legal expenses.

[9] Similarly, Bailey on *The Law of Wills*, 7th edn published in 1973, had this to say:

A person to whom property is devised or bequeathed is usually entitled, after the personal representatives have assented to the gift, to enjoy it for his own benefit. If the testator desires him to hold the property upon trust for other persons, the will should say so, otherwise those persons have usually no means of compelling him to recognise their claims. This rule follows from the provisions of the Wills Act 1837, whereby testamentary dispositions must be in the form required by law. Accordingly, persons who claim that a legatee was intended to hold his legacy upon trust for them have no standing, as a rule, unless the benefits which they claim were expressed by the testator in his will.

The Court of Chancery, however, was always particularly anxious to prevent cases of fraud, and a legatee (or devisee) is, undoubtedly, fraudulent who, having obtained his legacy by promising the testator to hold it upon trust for certain persons, refuses to do so after the testator's death. It is true that he has the support of the Wills Act 1837, for he can truthfully say that the testamentary intentions of the testator are not legally effective unless they were expressed in the form of a will. But the Court of Chancery decided that the Wills Act must not be used as a cloak for fraud. Accordingly, a person to whom a will gives property *ostensibly for his own benefit* will be compelled to hold it upon trust for other persons, provided that the testator during his lifetime communicated this trust to him, and that he

undertook either expressly or by implication to observe it. [This trust may be called "fully secret," since the will does not mention it at all.]

It is obvious that a legatee or devisee to whom the will gives property *"on trust"* cannot keep it for himself. But a difficulty may arise if the will does not state for whom he is to be trustee-Le. to whom the real benefit of the property is to be given. One would naturally expect that the beneficiary in such a case must be the person to whom the testator has left the residue of his property-or failing him the persons entitled thereto by the intestacy rules; for we are faced again with the general rule that persons cannot claim a benefit under a will unless the will states that they are to have it. In fact, this is precisely the view which the courts take of such a case in normal circumstances. But if the donee to whom the property is left "on trust", simply, promised the testator *before the will was made* or *at the time of making it* that he would hold for certain other persons, those persons can enforce the trust against him, and in these circumstances the persons entitled to the residue of the testator's property are excluded. [Here the trust may be called "half secret", since the Mali frankly imposes a trust but does not reveal the beneficiary.]

This was finally decided by the House of Lords in *Blackwell v Blackwell* (1929), where a testator bequeathed certain property to his solicitor and others "on trust for the purposes indicated by me to them". Before he executed the codicil which made this bequest, he outlined to them the proposed trusts and they accepted them: moreover the details of it were embodied in an informal written document signed by the solicitor. It should be noticed that this informal document was no part of his will; for it was not executed in the manner required by the Wills Act; nor did the will incorporate it by reference, for the will contained no allusion to the document in question. Indeed, the main purpose of these trusts (whether fully or half secret) would be defeated in normal cases were they incorporated openly in the testator's will; for the system isused as a means of providing for illegitimate relations or other persons whom the testator desires to benefit without exposing his aff airs to the world at large.

Indeed, unless litigation ensues, the trustees and the secret beneficiary are the only persons likely to know the destination of the property.

Re Colin Cooper (1939), is a more recent illustration. The testator bequeathed £5000 to A and B "upon the trusts which I have already communicated to them". In fact, before signing this will, he had informed A of the trusts, but not B: but it is sufficient to inform *one* of the proposed trustees in time. A month later he fell ill, while on a big-game shooting expedition in Africa, and made a further will on his death-bed whereby the legacy to A and B was "increased to £10,000, they knowing my wishes regarding this sum". *Held* (C.A.): although the secret trust was effective as to the first £5000 it did not attach to the additional £5000: for the testator had made this addition without the knowledge and concurrence of either of the trustees.

Note. In each of the cited cases on "half secret" trusts (and in *Re Fleetwood* (1880) which *Blackwell v Blackwell* followed and approved) the legacy said not only "on

trust" but also some other words to the effect that the testator had already duly revealed the intended trusts to the trustees. Seemingly those extra words, though desirable, are not essential: for the court can receive parol evidence of such facts.

The striking feature about these secret trusts, of course, is that they enable beneficial interests to be given in an informal manner which "gives the go-by" to the Wills Act. The beneficiary under a *valid* secret trust is regarded as taking not by virtue of the testator's will but by virtue of special rules of equity. Accordingly, though he die before the testator or attest the testator's will, his rights are not affected.

The Family Provision Act 1966 seems to have aimed at simplifying the Court's task by modifying and omitting some of the former rules and provisos. Formerly the Court could not order maintenance, wholly or in part, by way of a lump sum payment unless the net estate's value was less than £5,000. This restriction has been lifted, and the Court can now do so "whenever it sees fit".

On the other hand, as was held in *Re Bateman's Will Trusts* (1970), where a testator's will had required his three executor-trustees to set aside a substantial sum and pay its income "to such persons and in such proportions as shall be stated by me in a sealed letter addressed to my trustees", this was an attempt to enable him to dispose of the money (as from his death) by making a future document which would not be a proper testamentary instrument complying with the Wills Act 1837.

For a fuller treatment of this subject it is necessary to refer to the standard textbooks on the Law of Trusts.' The foregoing summary of the leading principles of the matter omits some of the more technical decisions in this branch of the law – e.g. the rule, for *joint* legatees, that a promise by one of them, made *before* the will, may bind the others. See *Be Stead* (1900).

[10] The position in India is that despite law on will is placed under a statutory regime like Malaysia, the common law concept of "secret trust" is still recognised by the courts. For example, in the case of *Manuel Louis Kunha v Juana Coelho & Ors* (1908) 18 MLJ 158 (see Indian Kanoon on secret trust), the court had this to say:

1. This is an appeal from the judgment of the District Judge of South Canara dismissing the appellant's petition for grant of letters of administration of the estate of Revd AJ Coelho, a Roman Catholic priest, with the will annexed by which the petitioner was made residuary legatee. A caveat was put in by one of the next-of-kin alleging in effect that the testator had bequeathed the estate to the petitioner subject to certain instructions as to how the property should be disposed of and that the petitioner had fraudulently suppressed the private instructions left by the testator in order to claim the estate for himself. The second issue raised was, whether the bequest was really intended for religious and charitable purposes and the fourth, whether the will had become uncertain and incapable of execution by reason of the plaintiff having suppressed the private instructions, if any, given him by the testator. The fifth issue was, whether the will had become null and void on the above grounds and the sixth to what relief is the

plaintiff entitled. On these issues the district judge has found that the will did not really express the intentions of the testator as the plaintiff undertook to dispose of the property in other ways explained to him by the testator. This finding is contested in appeal, but is, in my opinion, borne out by the evidence. The plaintiff was the only witness on his own side and his evidence is unsatisfactory and in some important matters is at variance with the evidence previously given by him in a suit relating to the same matter. On the other hand I see no reason for refusing to accept the evidence given by the two witnesses for the defence, the Revd MP Collaco, another priest, and SB Mascarenhas who is translator to the district court and had been educated and started in life by the deceased. According to the last witness the decision of the testator to leave his money to some one with private instructions as to how it was to be disposed of was arrived at after the decision of the High Court against the legality of bequests for Masses. This was *Colgan v Administrator General of Madras* (1892) ILR 15 M 424, decided in March 1892. The will in the plaintiff 's favour is dated the October 8, 1894 and the testator died on the February 7, 1901. The petition for letters of administration which has become the plaint in this suit was not filed until the nth October 1904 after a suit had been filed against the plaintiff to compel him to give effect to the alleged secret trusts of the will. Although the defence evidence points to the plaintiff having been informed from the first of the intention of the testator in making this will in his favour, yet there is no direct evidence that he was so informed. But assuming that he was not so informed at the time when the will was executed, there is evidence that he was informed subsequently during the lif etime of the testator and that his conduct was such as to lead the testator to believe that he was prepared to carry out the instructions communicated to him by the testator. The Revd MP Collaco who attested the will states that he was aware from the first of the testator's intention that, the property should be disposed of according to his instructions, and that in August 1895 when the testator was ill the plaintiff told the witness that the instructions had not been completed – this shows that he was then aware of the testator's intentions – and that the witness in the plaintiff 's presence took certain instructions and made a memorandum of them in his note-book, exh II, but did nothing further as Mascarenhas, the defence second witness, arrived and the matter was left in his hands. Mascarenhas says that he spoke to the plaintiff about these instructions, that subsequently at the testator's request he took down his instructions in Canarese and communicated them to the plaintiff who was put in possession of the written instructions.

And inter alia the court held:

19. Thus the instructions are not treated or enforced as a part of the will. The instructions after acceptance create an obligation on the devisee and confer title on the beneficiaries dehors the will. Lord Westbury said in *Cullen v Attorney-General for Ireland* (1866) 1 HL at 198 "Where there is a secret trust or where there is a trust created by a personal confidence reposed by a testator in any individual, the breach of which confidence would amount to a fraud, the title of the party claiming under the secret trust or claiming by virtue of that personal confidence, is a title dehors the will, and which cannot be correctly termed testamentary". See also *In re Maddock Llewelyn v Washington* (1902) 2 Ch 220. For this reason a test is

pointed out by Lord Cairns in *Fones v Badley* (1885) 2 K and J 313 to consider the case as unaffected by the Statute of Wills. Thus the trust, if any, in the case before us not being created by any instrument of a testamentary character is unaff ected by the provisions of the *Indian Succession Act*.

[11] We have read the appeal records and the able submissions of the parties. After giving much consideration to the submission of the learned counsel for the respondents, we take the view that the appeal must be allowed. Our reasons inter alia are as follows:

(a) It is elementary knowledge that a testator can bequeath his estate to any person. The heirs of the deceased cannot complain. However, if the deceased has no testamentary capacity and/or the executors of the will when challenged had not dispelled all the suspicious circumstances, etc. surrounding the making of the will, the grant of probate will be set aside. The law relating to setting aside of the will had been extensively dealt in the case of *Sarjit Singh a/l Kesar Singh v Harjindar Kaur a/p Koondan Singh* [2016] 6 AMR 529; [2016] 12 MLJ 27 – the coram members were Hamid Sultan bin Abu Backer JCA, Ahmadi Asnawi JCA and Mary Lim JCA. We do not wish to repeat the principles stated therein.

(b) In the instant case, all the requirements for the formality of a valid will has been satisfied. The appellants' defence is simple and straight forward and they had pleaded secret trust.

(c) In principle, the court's endorsement of the secret trust does not breach the Wills Act or any other statutory law. (See *Low Fong Mei & Anor v Ko Teck Siang & Ors* [1989] 2 CLJ (Rep) 1015; *Pathma d/o Naganather & Anor v Nivedita d/o Naganather* [2006] 2 AMR 318; [2003] 8 CLJ 457.) It only goes to show bona fide and the true intention of the testator, if the plea of the secret trust succeeds. Thus, as a general rule, the only instance the probate can be set aside is in a case, if the respondent had established that the testator did not have testamentary capacity to execute the said will.

(d) In the instant case, the learned judge had misdirected herself on the issue of testamentary capacity when her Ladyship combined the issue of secret trust with that of testamentary capacity. The law does not permit that. Testamentary capacity is related to medical evidence or related credible evidence, and has nothing to do with a story related to secret trust. That part of the judgment read as follows:

> Therefore, *Lee Ing Chin*'s case is distinguishable from the present case. I was of the view that each case is to be decided based on its own set of facts. In this case, there is no doubt that DW3, DW4 and DWS are interested witnesses. They wanted to grab the deceased's property. Believing there was a secret trust in her favour, DW4 sided the defendants to the extent she is lying when she says on December 18, 2013, the deceased told her he had

made a will. Their evidence are shrouded with suspicious. I treat them with cautious. With regard to DWl's testimony, he seems not to know anything about the deceased's medical background and mental capacity. Of course DW1 had to say the deceased is of sound mind to protect his reputation. This leave me with the medical evidence of PW1, PW4 and DW6. All three witnesses agree that in the case of the deceased who is terminally ill, compliance with the golden rule is the best practice. Which was not done in this case because DW1 was not aware about the golden rule. Although the English cases cited by the defendants appears to suggest that non-compliance with the golden rule does not mean the deceased had no testamentary capacity, but at the same time PW1, PW4 and DW6 also agreed that the deceased's condition deteriorated with the passing of time. PW1's statement in P1 that the deceased had trouble to cope with cancer physically and mentally shows the deceased was depressed as he knew there is no cure and death is coming. The deceased was sent to hospice, waiting to die. Given the circumstances, surely P1 must carry some weight. The first plaintiff ("PW6") has testified that when he saw the deceased on December 18, 2013, the deceased cannot talk and cannot recognised him. I am inclined to believe PW6's testimony because it was not the deceased who called PW6 to come and see him. From the manner the will was made, it is clear to me that the deceased cannot talk. That all communication was done by DW3. The deceased was merely a puppet. For those reasons, I hold the deceased did not have a testamentary capacity to make the will on December 18, 2013.

[12] Her Ladyship in finding so did not give much weight to the evidence of the appellants in the judgment which forms the basis of the complaint in the memorandum of appeal. The appellants' case as summarised by the learned counsel for the appellant inter alia read as follows:

> 8. The Appellants claimed that whilst they are named the beneficiaries in the Will, they are not the true beneficiaries of the deceased's estate because of a secret trust created by the deceased. Pursuant to the secret trust, the Appellants are trustees of the Deceased's estate for the benefit of the Deceased's 2nd wife named Chan Cheng Geok (DW4) and their children, especially the 2 younger children who were still studying at that time and the youngest was still a minor then.

[13] In the instant case, DW1 was an advocate and solicitor who prepared the will. His evidence was not discredited neither was the evidence of DW2 who also witnessed the will. It is important to note that two judges have heard the case. The first was his Lordship Dato' Azmi Ariffin and he heard the evidence of PW1 and thereaf ter it was heard by the learned judge. PW1 was an important witness as he was a urologist who treated the deceased. Her Ladyship had no benefit of hearing his evidence and/or seeing the demeanor. It is a crucial evidence related to testamentary capacity. No compromise could have been made by accepting hearsay evidence from notes of evidence in the issue relating to testamentary capacity. Itis a serious misdirection which compromises the integrity of decision making process related to testamentary capacity.

[14] The witness statement of PW1 also does not, in a definitive form assert that the deceased lacked testamentary capacity. Purely based on the witness statement of PW1, it can be argued that the threshold to establish that the deceased did not have testamentary capacity is not in the plaintiff 's favour. The said witness statement read as follows:

WITNESS STATEMENT (DR. GIT KAH ANN)

Q1: Dr. Git, what do you specialise in?

A1: I am a consultant urologist with 9 years of experience and now attached to Pantai Hospital Penang.

Q2: Do you know a patient by the name of Chin Joo Negan?

Al: Yes.

Q3: Doctor, I refer you to a short letter dated 13-12-2013 you wrote to to Dr. Yoon Chee Kin. This is at page 2 of the Plaintiffs' Further Bundle of Documents. Do you recall this letter?

A3: Yes.

Q4: Can you briefly describe the patient's illness?

A4: Yes. Mr. Chin Joo Negan had cancer as stated in the report. As mentioned the CTU showed a large renal tumour with renal vein thrombus, tumour extension to ureter, large para-aortic/para-caval lymph nodes and liver metastases.

Q5: What was Mr. Chin's condition?

A5: To put it simply, he was suffering from terminal cancer and his condition was not good and he found *it* hard to cope mentally and physically.

Q6: Generally, doctor if a patient of this condition, how would it affect him or her mentally?

A6: The patient would be under tremendous stress as the cancer overtakes the patient's life and the patient knows death is coming and undergoes a lot of mental problem, coping with a situation like this. He or she would normally be depressed.

Q7: Do you agree your above description do apply to Mr. Chin?

A7: Yes.

Q8: Doctor you wrote in your report Mr. Chin had difficulty to cope with his condition mentally. Can you elaborate?

A8: It is just like what I said just now the patient would be depressed, having to cope with the extreme situation and the anticipation and possibility of

death. In addition the pain and medication can cause him to be not in the right frame of mind.

Q9: Doctor, your letter is dated 13-12-2013 and the patient passed away on 24-12-2013. Would you say a few days from his death, the patient would be a very disturbed person?

A9: I would say so.

Q10: Doctor, on the 18-12-2013 the patient made a will. Would you say he had mental capacity?

A10: I cannot comment on his condition 5 days after seeing him. He has a terminal cancer which could deteriorate rapidly. He would need a medical practitioner who can certify on his mental capacity.

[15] In contrast, we have looked at the witness statement of DW1 as well as DW2, inclusive of the cross-examination questions and answers. We do not see any reason why it should not be disbelieved or at least for the limited purpose to say the formalities of a valid will had been duly satisfied.

[16] Further, the law of secret trust was developed to assist the testator's purported "sins" or what is often said "skeleton in the cupboard" for just and equitable reason to benefit his genes or acquaintance, whether lawful or otherwise to provide some form of security to his beloved ones. The law on secret trust has developed in a manner to close its eyes on public policy or breach of rule of law related to monogamous or polygamous marriage inclusive of polyandry or relationship of cohabitee, etc. The court does not strike out secret trust argument based on illegality or public policy. In addition, there is nothing cynical or wrong even if it is meant for private trust or charitable trust, etc. In the instant case, the respondents were not able to demolish the defence of secret trust and there is good nexus on the side of the deceased to the beneficiaries of the secret trust to dispel any mala fide on the part of the appellants

[17] For reasons stated above, we take the view that this is a fit and proper case to allow the appeal with no order as to costs. The order of the High Court is set aside and the grant of probate is sustained.

We hereby order so.