Poraviappan a/l Arunasalam Pillay (suing as administrator of estate of the late Nadarajah a/l Sithambaram Pillai) v Periasamy a/l Sithambaram Pillai & Ors (on behalf of personal representatives of the estate of Ponnamal a/p Ramasamy the deceased)

FEDERAL COURT — CIVIL SUIT NO 02(f)-6–02 OF 2013(A)
RAUS SHARIF PCA, ABDULL HAMID EMBONG, AHMAD MAAROP, HASAN LAH AND RAMLY ALI FCJJ
17 JUNE 2015

Civil Procedure — Parties — Action against estate of deceased — Plaintiff applied under O 15 r 6A(4)(a) of the Rules of the High Court 1980 ('RHC') to appoint person to represent deceaseds' estate for the purpose of originating summons proceedings — Whether provisions of O 15 r 6A properly complied with in circumstances of case — Whether person appointed to represent deceased's estate had authority to enter into consent order and bind estate — Whether Official Administrator although present at time consent order was recorded could not act as personal representative of deceased's estate as he had not been granted letters of administration — Whether interpleader summons filed in proceedings failed to fulfil criteria under O 17 r 1(a) of the RHC — Whether person who filed interpleader summons did not in fact seek interpleader relief but asked court to investigate and adjudicate certain allegations

Nadarajah s/o Dato' Sithambaram ('the deceased') entered into a sale and purchase agreement ('SPA') to sell a 306 acre piece of land to Ponnamal d/o Ramasamy ('Ponnamal') for RM3m. In the SPA, the deceased acknowledged receiving RM420,000 as deposit and part-payment of the purchase price. The completion date for the SPA was 10 months from the date of its execution. Four months before the completion date, the deceased died and a tussle ensued over who should manage his estate. The appellant, who was the brother-in-law of the deceased's nephew, applied for and was granted letters of administration ('LA') to the estate by the High Court. He was, however, prevented from extracting the grant of LA by a caveat lodged by the first respondent ('Periasamy') who was the deceased's brother and who claimed the deceased left a will appointing him as executor and sole beneficiary of the estate. Without disclosing to the High Court that the appellant had obtained LA to the estate, Periasamy applied for and obtained grant of probate to administer the deceased's estate. This caused the appellant to, inter alia, file an action to declare the will in respect of which probate was given a forgery and to revoke the grant of probate. Those prayers were ultimately granted by the Federal Court on appeal. Meanwhile, Ponnamal, receiving no replies to her letters to the

deceased and his immediate family members informing them of her readiness to pay the balance purchase price, applied to the High Court by way of originating summons ('OS') for specific performance of the SPA. To pursue with the OS, Ponnamal obtained an order appointing Periasamy to represent the deceased's estate. She also named as co-defendant, her former solicitor ('Seeralan') who had custody of the title to the land and the memorandum of transfer executed in her favour by the deceased. Seeralan, on being served with the OS, filed an interpleader summons asking the court to determine who was rightfully entitled to the title in his custody. He alleged the SPA was a sham to disguise an illegal money-lending transaction. At the hearing of the OS, the court was not informed of the existence of the interpleader summons and, unaware of it, the court approved a consent order between the parties under which Periasamy agreed to do all things necessary to transfer the land to Ponnamal or to her nominees. Seeralan was absent at the hearing but the assistant to the official administrator ('OA') was present and he did not object to the consent order. The appellant filed an action against Periasamy and Ponnamal to, inter alia, declare the consent order a nullity as having been obtained by deliberate non-disclosure of the interpleader summons to the court and by deception and fraud. He also sought a declaration that the SPA was void and unenforceable for being a sham, relying upon the averments made by Seeralan in his interpleader summons. The High Court dismissed the appellant's claim and allowed Ponnamal to execute the consent order ruling that (i) the appellant had failed to prove on balance of probabilities that the SPA was a sham to disguise an illegal money-lending transaction and (ii) the consent order was not a nullity because even if Periasamy had no authority to agree to the consent order on behalf of the estate, the OA had the authority to do so. The Court of Appeal ('COA') upheld the findings and decision of the High Court. In the instant appeal against the COA's decision, the Federal Court was asked to determine: (i) whether a purported executor of a will declared to be a forgery could validly consent to the sale of a deceased's property (ii) whether the OA could validly consent to the sale of a deceased's property under ss 39 and 60 of the Probate and Administration Act 1960 without a court order empowering him to do so and (iii) whether the High Court's approval of the consent order in the instant case was valid when the interpleader summons challenging the genuineness of the SPA was not brought to its attention.

Held, dismissing the appeal with costs and declining to answer any of the 'leave questions' posed to the court:

(1) Ponnamal was entitled to file the OS and having filed it she could not have prosecuted the action to judgment without complying with O 15 r 6A(4) of the Rules of the High Court 1980 ('RHC'). In compliance with that provision, she applied for an order appointing Periasamy to represent the deceased's estate for the purpose of the OS proceedings.

Non-compliance with O 15 r 6A(4) would have rendered her action a nullity as being badly constituted as a matter of substantive law for it was only in an action against the duly-appointed legal representative of the deceased's estate that a judgment could be obtained and be enforced against the estate (see para 54).

(2) It was clear from Ponnamal's application and affidavit that she did not seek an order that the personal representative of the deceased (pursuant to a grant of probate or administration) be made a party to the OS proceedings. She affirmed in her affidavit that because of a dispute among members of the deceased's family no person had yet taken out LA or probate in respect of the estate. Her application was therefore not under the second limb of O 15 r 6A(4)(a) of the RHC but for an order that Periasamy as the deceased's brother be appointed to represent the estate for the purpose of the OS proceedings. The basis for her application was neither the probate nor the will. In this case, the provisions under O 15 r 6A of the RHC were duly complied with. The consent order against the deceased's estate, which was properly represented by Periasamy as its duly-appointed legal representative, was properly obtained and was enforceable against the estate (see paras 53, 56 & 58).

(3) There was nothing to show that by the date of the consent order, the OA was issued with LA to the deceased's estate. Without the LA, it was not competent for the OA to act as the personal representative of the deceased's estate in the OS proceedings. As such, it could not be said that on the date of the consent order the OA had 'taken over' from Periasamy as administrator of the estate. Thus, on the date of the consent order Periasamy was still the duly-constituted representative of the deceased's estate when he assented to the consent order which was properly made and was enforceable (see paras 60–61).

(4) The so-called interpleader summons was not one which was properly before the High Court pursuant to O 17 of the RHC so as to clothe the court with jurisdiction to have considered that application first before it considered the OS. Seeralan failed to fulfil the pre-condition in a stakeholder's interpleader under O 17 r 1(a) of the RHC that he was being sued, or expected to be sued, by two or more persons making adverse claims to money, goods or chattels that he held in order to give the court jurisdiction to exercise discretion to grant relief. It was evident from Seeralan's application that he was not seeking interpleader relief. What he wanted was for the court to investigate and adjudicate whether the sale of the land was a mere money-lending transaction. That could not be a ground for an interpleader application. If Seeralan was serious about his allegation he should have pursued it in the OS proceeding itself but he did not do so and neither was he present at the hearing of the OS (see paras 65 & 68).

(5) The point raised by the appellant in his leave question, ie the non-disclosure of the interpleader summons as a ground to challenge the validity of the consent order was a specific ground which was not pleaded as a separate and/or alternative ground to nullify and set aside the consent order. Since this issue and the material facts to support it were not pleaded, the appellant could not be allowed to succeed and obtain judgment on it on appeal (see paras 70 & 72).

(6) This court affirmed the findings of the trial court and agreed with the COA that on the totality of the evidence the appellant failed to prove on balance of probabilities that the SPA was a sham and a cover-up for an illegal money-lending transaction (see paras 24–25)

[Bahasa Malaysia summary

Nadarajah a/l Dato' Sithambaram ('si mati') telah memasuki perjanjian jual beli ('PJB') untuk menjual 306 ekar bidang tanah kepada Ponnamal a/p Ramasamy ('Ponnamal') untuk RM3 juta. Dalam PJB itu, si mati mengakui penerimaan RM420,000 sebagai deposit dan sebahagian bayaran kepada harga belian. Tarikh siap untuk PJB itu adalah 10 bulan dari tarikh pelaksanaannya. Empat bulan sebelum tarikh siap itu, si mati telah meninggal dunia dan perbalahan berlaku tentang siapa yang patut menguruskan harta pusakanya. Perayu, yang merupakan abang ipar kepada anak saudara lelaki si mati, telah memohon untuk dan telah diberikan surat-surat pentadbiran ('ST') ke atas harta pusaka itu oleh Mahkamah Tinggi. Dia bagaimanapun, dihalang daripada mengeluarkan pemberian ST itu oleh kaveat yang dimasukkan oleh responden pertama ('Periasamy'), yang merupakan adik lelaki si mati dan yang mendakwa si mati telah meninggalkan wasiat melantiknya sebagai wasi dan benefisiari mutlak harta pusaka itu. Tanpa memberitahu Mahkamah Tinggi bahawa perayu telah memperoleh ST ke atas harta pusaka itu, Periasamy telah memohon untuk dan memperoleh pemberian probet untuk mentadbir harta pusaka si mati. Ini telah menyebabkan perayu untuk, antara lain, memfailkan tindakan bagi mengisytiharkan wasiat yang mana probet telah diberikan itu adalah satu pemalsuan dan bagi membatalkan pemberian probet itu. Permohonan-permohonan tersebut akhirnya telah diberikan oleh Mahkamah Persekutuan atas rayuan. Sementara itu, Ponnamal, yang tidak menerima jawapan surat-suratnya kepada si mati dan ahli keluarga terdekatnya telah memberitahu mereka tentang kesediaannya untuk membayar baki harga belian, telah memohon ke Mahkamah Tinggi melalui saman pemula ('SP') untuk pelaksanaan spesifik untuk PJB itu. Bagi meneruskan SP itu, Ponnamal telah memperoleh perintah melantik Periasamy untuk mewakili harta pusaka si mati. Dia juga telah menamakan sebagai defendan bersama, bekas peguam caranya ('Seeralan') yang mempunyai hak penjagaan hakmilik tanah itu dan memorandum pemindahan yang dilaksanakan menyebelahinya oleh si mati. Seeralan, setelah disampaikan SP itu, telah memfailkan saman interplider memohon mahkamah menentukan siap yang berhak sewajarnya ke atas hak

A milik dalam jagaannya. Dia mendakwa SJB itu adalah satu penipuan untuk menyembunyikan transaksi pinjaman wang secara haram. Dalam perbicaraan SP itu, mahkamah tidak diberitahu tentang kewujudan saman interplider itu dan, tanpa menyedari tentangnya, mahkamah telah membenarkan perintah persetujuan antara pihak-pihak di mana Periasamy telah bersetuju untuk B melakukan apa-apa yang perlu bagi pemindahan tanah itu kepada Ponnamal atau kepada penama-penamanya. Seeralan tidak hadir semasa perbicaraan tetapi penolong kepada Pegawai Pentadbir ('PP') telah hadir dan dia tidak membantah perintah persetujuan itu. Perayu telah memfailkan satu tindakan terhadap Periasamy dan Ponnamal untuk, antara lain, mengisytiharkan C perintah persetujuan itu terbatal kerana diperoleh tanpa mengemukakan dengan sengaja saman interplider kepada mahkamah dan melalui pemalsuan dan penipuan. Dia juga memohon satu deklarasi agar PJB itu dibatalkan dan tidak dikuatkuasakan kerana merupakan satu penipuan, dengan bergantung D kepada penegasan yang dibuat oleh Seeralan dalam saman interplidernya. Mahkamah Tinggi telah menolak tuntutan perayu dan membenarkan Ponnamal melaksanakan perintah persetujuan itu dengan memutuskan bahawa: (i) perayu telah gagal untuk membuktikan atas imbangan kebarangkalian bahawa PJB itu adalah satu penipuan untuk menyembunyikan E transaksi pinjaman wang secara haram; dan (ii) perintah persetujuan itu tidak terbatal kerana jika pun Periasamy tidak mempunyai kuasa untuk bersetuju dengan perintah persetujuan itu bagi pihak harta pusaka itu, SP itu mempunyai kuasa untuk berbuat demikian. Mahkamah Rayuan ('MR') telah mengekalkan penemuan dan keputusan Mahkamah Tinggi. Dalam rayuan ini F terhadap keputusan MR, Mahkamah Persekutuan dipohon untuk menentukan: (i) sama ada wasi yang dikatakan untuk suatu wasiat itu diisytiharkan sebagai satu pemalsuan itu boleh memberi persetujuan yang sah untuk jualan hartanah si mati; (ii) sama ada SP itu boleh memberi persetujuan secara sah kepada jualan hartanah si mati di bawah ss 39 dan 60 Akta Probet G dan Pentadbiran 1960 tanpa perintah mahkamah memberi kuasa kepadanya untuk berbuat demikian; dan (iii) sama ada kebenaran Mahkamah Tinggi terhadap perintah persetujuan dalam kes ini adalah sah apabila saman interplider yang mencabar kesahihan PJB itu tidak dibawa kepada perhatiannya.

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Diputuskan, menolak rayuan dengan kosdan tidak menjawab apa-apa 'persoalan-persoalan berhubung kebenaran' yang dikemukakan kepada mahkamah:

I (1) Ponnamal berhak untuk memfailkan SP itu dan dengan memfailkannya dia tidak boleh memulakan tindakan yang perlu penghakiman tanpa mematuhi A 15 k 6A(4) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Dalam mematuhi peruntukan tersebut, dia telah memohon untuk perintah melantik Periasamy mewakili harta pusaka si mati bagi tujuan prosiding SP. Ketidakpatuhan A 15 k 6A(4) akan menyebabkan

tindakannya terbatal kerana tidak membentuk sebagai perkara yang merupakan undang-undang substantif kerana hanya dalam tindakan terhadap wakil sah yang telah dilantik untuk harta pusaka si mati maka penghakiman boleh diperoleh dan dikuatkuasakan terhadap harta pusaka itu (lihat perenggan 54).

(2) Adalah jelas daripada permohonan Ponnamal dan afidavit bahawa dia tidak memohon perintah agar wakil peribadi si mati (menurut pemberian probet atau pentadbiran) dijadikan satu pihak kepada prosiding SP itu. Dia mengesahkan dalam afidavitnya bahawa disebabkan pertikaian antara ahli-ahli keluarga si mati tiada seorang pun yang telah mengeluarkan ST atau probet berkaitan harta pusaka itu. Permohonannya dengan itu bukan di bawah cabang kedua A 15 k 6A(4)(a) KMT tetapi untuk perintah agar Periasamy sebagai abang si mati dilantik untuk mewakili harta pusakan itu bagi tujuan prosiding SP. Asas untuk permohonannya bukan untuk probet atau wasiat. Dalam kes ini, peruntukan di bawah A 15 k 6A KMT telah pun dipatuhi. Perintah persetujuan terhadap harta pusaka si mati, yang telah diwakili sewajarnya oleh Periasamy sebagai wakil sah yang telah dilantiknya, telah diperoleh sewajarnya dan boleh dikuatkuasakan terhadap harta pusaka itu (lihat perenggan 53, 56 & 58).

(3) Tiada apa-apa yang menunjukkan bahawa berdasarkan tarikh perintah persetujuan itu, PP itu telah diberikan ST ke atas harta pusaka si mati. Tanpa ST itu, ia adalah tidak kompeten untuk PP bertindak sebagai wakil peribadi untuk harta pusaka si mati dalam prosiding SP itu. Oleh itu, tidak boleh dikatakan bahawa pada tarikh perintah persetujuan itu PP telah 'mengambil alih' daripada Periasamy sebagai pentadbir harta pusaka itu. Justeru, pada tarih perintah persetujuan itu Periasamy masih wakil yang telah dilantik untuk harta pusaka si mati apabila dia bersetuju terhadap perintah persetujuan yang telah dibuat sewajarnya dan boleh dikuatkuasakan (lihat perenggan 60–61).

(4) Saman interplider itu bukan suatu yang wajar dihadapkan ke Mahkamah Tinggi menurut A 17 KMT untuk memberi mahkamah bidang kuasa bagi mempertimbangkan permohonan tersebut sebelum ia mempertimbangkan SP itu. Seeralan telah gagal memenuhi prasyarat dalam interplider pihak berkepentingan di bawah A 17 k 1(a) KMT bahawa dia disaman, atau dijangka akan disaman, oleh dua atau lebih orang yang membuat tuntutan yang bertentangan untuk wang, barangan atau catel yang dipegangnya bagi tujuan memberi mahkamah bidang kuasa untuk melaksanakan budi bicara memberi relief. Adalah jelas daripada permohonan Seeralan bahawa dia tidak memohon relief interplider. Apa yang diinginkannya adalah untuk mahkamah menyiasat dan mengadili sama ada jualan tanah itu hanya transaksi pinjaman wang semata-mata. Ia bukan alasan untuk permohonan interplider. Jika

Seeralan serius tentang dakwaannya dia patut memulakannya dalam prosiding SP itu sendiri tetapi dia tidak berbuat demikian dan juga tidak hadir semasa perbicaraan SP itu (lihat perenggan 65 & 68).

(5) Perkara yang ditimbulkan oleh perayu dalam soalan berhubung kebenarannya, iaitu saman interplider yang tidak dikemukakan sebagai alasan untuk mencabar kesahihan perintah persetujuan adalah alasan spesifik yang tidak dipli sebagai alasan berasingan dan/atau alternatif bagi membatalkan dan mengetepikan perintah persetujuan itu. Oleh kerana isu ini dan fakta material untuk menyokongnya tidak dipli, perayu tidak boleh dibenarkan untuk berjaya dan memperoleh penghakiman berhubungnya atas rayuan (lihat perenggan 70 & 72).

(6) Mahkamah ini mengesahkan penemuan mahkamah bawahan dan bersetuju dengan MR bahawa berdasarkan keseluruhan keterangan perayu telah gagal membuktikan atas imbangan kebarangkalian bahawa PJB itu adalah penipuan dan perlindungan untuk transaksi pinjaman wang secara haram (lihat eprenggan 24–25).]

Notes

For cases on action against estate of deceased, see 2(3) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 6150–6151.

Cases referred to

AmBank (M) Bhd (formerly known as Arab-Malaysia Bank Bhd) v Luqman Kamil bin Mohd Don [2012] 3 MLJ 1, FC (refd)

Badiaddin bin Mohd Mahidin & Anor v Arab Malaysia Finance Bhd [1998] 1 MLJ 393, FC (refd)

Bauer (M) Sdn Bhd v Daewoo Corp [1999] 4 CLJ 665, CA (refd)

Birch v Birch [1902] P 130, CA (refd)

Canara Bank v Canada Sales Corporation and others AIR 1987 SC 1603, SC (refd)

Chan Kit San v Ho Fung Hang [1902] AC 257, PC (refd)

Chay Chong Hwa & Ors v Seah Mary [1987] 1 MLJ 173, PC (refd)

Chee Pok Choy & Ors v Scotch Leasing Sdn Bhd [2001] 4 MLJ 346, CA (refd)

Datuk M Kayveas v See Hong Chen & Sons Sdn Bhd & Ors [2014] 4 MLJ 64, FC (refd)

Dr Shanmuganathan v Periasamy s/o Sithambaram Pillai [1997] 3 MLJ 61, FC (refd)

Haji Osman bin Abu Bakar v Saiyed Noor bin Saiyed Mohamed [1952] 1 MLJ 37, CA (refd)

Jamaliah bte Hj Mahsudi (suing on her own behalf and as administratrix of the estate of Salamah Bte Hj Ali) v Sivam a/l Munsamy & Anor [1999] 5 MLJ 250, HC (refd)

Jigarlal Kantilal Doshi v Amanah Raya Berhad [2011] 9 CLJ 361, FC (refd)

KALRM Karuppan Chettiar v Subramaniam Chettiar, the Official Administrator,

FMS, Palaniappa Chettiar, Muthukaruppan Chettiar [1933] 2 MLJ 226 (refd)
Kerajaan Malaysia v Yong Siew Choon [2006] 1 MLJ 1; [2005] 4 CLJ 537, FC (refd)
Kersah La'Usin v Sikin Menan [1966] 2 MLJ 20 (refd)
Khaw Poh Chhuan v Ng Gaik Peng & Ors [1996] 1 MLJ 761, FC (refd)
Lai Yoke Ngan & Anor v Chin Teck Kwee & Anor [1997] 2 MLJ 565; [1997] 3 CLJ 305, FC (refd)
Lee Ah Chor v Southern Bank Bhd [1991] 1 MLJ 428, SC (refd)
Lim Cheng Kwang v Sivamalai d/o Sinnathambi & Anor [1994] 2 CLJ 59, HC (refd)
Meek v Fleming [1961] 3 All ER 148, CA (refd)
Owen Sim Liang Khui v Piasau Jaya Sdn Bhd & Anor [1996] 1 MLJ 113; [1996] 4 CLJ 716, FC (refd)
Pengarah Jabatan Pengangkutan Negeri Selangor & Ors v Sin Yoong Ming [2015] 1 MLJ 1, FC (refd)
Pundit Prayrag Raj v Goukaran Pershad Tewari 6 CWN 787 (refd)
SMKR Meyappa Chetty v S N Supramaniam Chetty [1916] 1 AC 603 PC, HC (refd)
SP Chengalvaraya Naidu v Jaganath 1994 AIR 853, SC (refd)
Selvarajah & Anor v Official Administrator & Anor [1978] 2 MLJ 108 (refd)
Sheriffa Shaikhah v Ban Hoe Seng & Co Ltd [1963] 1 MLJ 241 (refd)
Shripadgouda Venkangouda v Govindgouda Narayangouda AIR 1941 Bomb 77, HC (refd)
Tetuan Teh Kim Teh, Salina & Co (a firm) v Tan Kau Tiah @ Tan Ching Hai & Anor [2013] 4 MLJ 313; [2013] 5 CLJ 161, FC (refd)
Yong Siew Choon v Kerajaan Malaysia [2003] 2 MLJ 150, CA (refd)

Legislation referred to

Evidence Act 1950 ss 40, 41 , 42, 44
Probate and Administration Act 1960 ss 2, 39, 39(1), 60, 60(1), (4)
RHC 1980
Rules of the High Court 1980 O 15, O 15 r 6A, O 15 r 6A(4), O 15 r 6A(4)(a), O 15 r 6A(7), O 17, O 17 r 1(a)

Appeal from: Civil Appeal No A-02–981 of 2001 (Court of Appeal, Putrajaya)

Cyrus V Das (T Sudhar with him) (Shook Lin & Bok) for the appellant.
Bastian Vendargon (Annemarie Vendargon with him) (Dev Pillai & Co) for the first respondent.
Malik Imtiaz Sarwar (Pavendeep Singh, Ramesh a/l Kanapathy and Lee Sit Cheng with him) (Chellam Wong) for the second respondent.

Ahmad Maarop FCJ:

[1] For convenience, in this judgment the parties will be referred to as they were in the High Court.

[2] The background facts leading to the present appeal are these. On 18 February 1982, Nadarajah s/o Dato' Sithambaram (deceased) entered into a sale and purchase agreement ('the agreement') with one Mdm Ponnamal d/o Ramasamy to sell the land held under Grant No 12359 Lot 1631 Mukim Teluk Bharu, in the State of Perak, measuring approximately 306 acres ('the said land'). The purchase price of the said land stated in the agreement was RM3m out of which the deceased acknowledged receipt of RM420,000 as a deposit and part payment from Mdm Ponnamal. The completion date of the agreement was 18 December 1982 subject to the approval of the Foreign Investment Committee ('FIC').

[3] On 20 August 1982, the deceased passed away. He left behind an aged mother named Datin Sellayee Ammal, a brother (the first defendant), two sisters, and a nephew named Dr Shanmuganathan (Dr Shan). Dr Shan's father was the elder brother of the deceased who predeceased him. On 4 September 1982 and 5 September 1982, a family meeting was held to decide on the management of the affairs of the deceased's estate. The following persons attended the meeting:

(a) the first defendant;

(b) Mrs Thanaletchumi (one of the two sisters of the deceased);

(c) Mr Dorairaj (representing Mrs Kamalavathy, the other sister of the deceased);

(d) Dr Shan; and

(e) the plaintiff.

[4] The co-ordinator of the meeting was the plaintiff who also recorded the minutes of the meeting. The plaintiff was the brother-in-law of Dr Shan.

[5] According to item 2 of the minutes of the family meeting, since Datin Sellayee (the sole beneficiary of the estate of the deceased under the law) was old and was residing in India, she would be requested to renounce her entitlement to the said land in favour of the following persons:

(a) the first defendant;

(b) Mrs Kamalavathy;

(c) Mrs Thanaletchumi; and

(d) Dr Shan.

[6] Item 3 of the minutes of the meeting states that the plaintiff and Mr Dorairaj should administer the estate of the deceased. However, if the lawyers are of the opinion that only one administrator is sufficient then the plaintiff shall be the sole administrator.

[7] Item 4 of the minutes of the meeting states:

> 4. The properties that due to be administered are
>
> A) Kamachi Estate of about 129 Hactors consisting of 9 Grants. Of the 9 Grants the main one Lot No. 1631 of 306 acres has been transferred to Mr. Mooka Pillai, for an approximate sum of $3 million. He in turn has paid a sum of $420,000/- as deposit to late Mr. S. Nadarajah and the balance of sum 2.58 million is payable on or before December 18.
>
> It has been agreed that this property be sold and the monies obtained to be used to pay the loan detained from Overseas Union Trust, for the KL building bought by the Late Mr. Nadarajah and the balance to be kept to pay the death duty.

[8] According to the minutes of the meeting, the next family meeting would be on 9 October 1982. However, this did not take place as on 1 October 1982 Datin Sellayee died, and it seemed that in her last will and testament she left the entire estate to Dr Shan. The effect of her last will is that if it is proved, then the entire estate of the deceased will go to Dr Shan. This, according to the evidence, appeared to have triggered a number of courses of action taken with regard to the deceased's estate by certain persons who attended the family meeting; which courses of action were not in line with the direction of the course of action to be taken as recorded in the minutes of the family meeting.

[9] On 8 March 1983, the first defendant petitioned for letters of administration for the deceased estate. However this was not proceeded with. On the same date, acting on a power of attorney granted to him by Dr Shan, the plaintiff applied for letters of administration of the deceased's estate which was granted by the court on 16 August 1983. On 4 October 1983 a copy of the court order was served on the first defendant. However, when the plaintiff attempted to extract letters of administration, he was prevented from doing so by a caveat entered by the first defendant.

[10] On 12 March 1984 the first defendant applied for a grant of probate in the Ipoh High Court (case No 152/84) insisting that the deceased had left a will appointing him as the executor and sole beneficiary of the deceased's estate. The first defendant did not disclose to the court the grant of the letters of administration to the plaintiff. On 21 August 1984 the first defendant obtained an order for probate to the deceased's estate.

[11] On 10 October 1984, the plaintiff lodged a caveat against the grant of probate to the first defendant. In addition to that, on 15 October 1984 by way of an originating motion (F54/84) the plaintiff applied for in the Kuala Lumpur High Court and obtained an ex parte injunction against the first defendant preventing him from acting for the deceased's estate. The first defendant attempted to set aside that interim injunction. On 1 April 1985 LC Vohrah J (as he then was) ordered the ex parte injunction granted on 15 October 1984 to continue except:

> (a) that the applicant (first defendant) herein to continue acting as the representative of the estate of Nadarajah s/o Dato Sithambaram Pillai in the High Court Originating Summons No 267 of 1984 until the Official Administrator Malaysia takes over;
>
> (b) that the Official Administrator Malaysia to take charge of all the assets of the estate of Nadarajah s/o Dato Sithambaram Pillai.

The learned judge also ordered that this action be transferred and dealt with in the Ipoh High Court.

[12] On 26 November 1985 the plaintiff, (in the capacity as Dr Shan's attorney), filed a writ against the first defendant seeking for a declaration that the will which was relied upon by the first defendant to obtain the grant of probate in respect of the deceased's estate was a forgery and was null and void, and that the grant of probate to the first defendant be revoked. As will be seen later in this judgment, the outcome of this application as declared by the Federal Court eventually on appeal, became the main plank from which the plaintiff launched his challenge to the consent order dated 31 October 1985.

[13] Meanwhile, on the part of Mdm Ponnamal, on 16 December 1982 (ie two days before the date for the completion of the purchase of the said land), through his solicitor, Mr Seeralan, she wrote a letter to the deceased. Carbon copies of the letter were sent to the persons who attended or were represented at the family meeting on 4 September 1982 and 5 September 1982. In this letter Mdm Ponnamal stated that she was ready and willing to proceed with the purchase of the said land by paying the balance of the purchase price except that there should be deductions for certain matters concerning the said land which were not disclosed at the time of the agreement, the major one being the government acquisition of about 21 acres of the said land. After receiving no response, on 23 August 1983 Mdm Ponnamal, through her solicitors Messrs Nahappanpuri and Partners, wrote to the plaintiff's solicitor reiterating her desire to complete the purchase of the said land since the bank loan to finance it was in place.

[14] On 25 February 1984 Mdm Ponnamal filed Originating Summons No 267/84 ('OS 267/84') in the Ipoh High Court against the deceased's estate seeking for specific performance of the agreement. In that action, Mdm Ponnamal named her former solicitor, Mr Seeralan as the second defendant. The reason given for roping in Mr Seeralan was that he was the stakeholder of the document of title to the said land and the memorandum of transfer duly executed by the deceased at the time of the agreement which would be required to effect the transfer of the said land to Mdm Ponnamal or her nominees. For the purpose of the proceeding in OS 267/84, Mdm Ponnamal applied by way of a summons in chambers for an order that the first defendant be appointed to represent the deceased's estate which order was granted by Anuar Zainal Abidin J (as he then was) on 20 April 1984.

[15] Mdm Ponnamal proceeded with the hearing of OS 267/84. On 31 October 1985 at the hearing before Ajaib Singh J (as he then was), a consent order ('the consent order') was recorded. The order practically ordered the first defendant to execute all relevant transfer forms to transfer the said land to Mdm Ponnamal or her nominees, and upon registration of the transfer, the balance of the purchase price of RM2,370,135 (instead of RM2,760,000 as provided in the agreement) shall be paid by Mdm Ponnamal to the first defendant's solicitor who should then put it into a fixed deposit account in trust for the estate. The consent order is as follows:

> ORDER
>
> THIS ORIGINATING SUMMONS coming on this day for bearing in the presence of of Mr. A. Iruthaya Raj of Counsel for the plaintiff, Mr. N.T. Rajah of Counsel for the 1st defendant And Mr. Karunanithi, as Assistant Official Administrator and 2nd defendant being absent AND UPON READING the affidavits filed herein AND UPON HEARING 20 Counsel as aforesaid:
>
> BY CONSENT IT IS ORDERED that the 2nd defendant do forthwith deliver the title deed relating to Grant for Land No. 12359 for Lot No. 1631 in the Mukim of Teluk Bharu District of Lower Perak to the plaintiff's solicitors to be dealt with in accordance with the term of the order.
>
> AND IT IS ORDERED that the 1st defendant do forthwith execute a withdrawal of caveat Presentation No. 1142/84 lodged by him on 14th March 1984 and deliver the same to the plaintiff's solicitors to enable the registration of the transfer in favour of the plaintiff or her nominee or nominees.
>
> AND IT IS ORDERED that the 1st defendant do forthwith execute all relevant documents, forms and returns under the Real Property Gains Tax on behalf of the estate of Nadarajah s/o Sithambaram deceased and deliver the same to the plaintiff's solicitors.

AND IT IS ALSO ORDERED that the plaintiff be at liberty to present the transfer executed by the said Nadarajah s/o Sithambaram deceased on 18th February 1982 for registration within 3 months from date of this order and that the Registrar of Titles Perak do give effect to the said transfer by making necessary memorial of transfer.

AND IT IS ALSO ORDERED that upon registration of transfer as aforesaid the plaintiff do forthwith pay the sum of $2,370,135.00 to the 1st defendant's solicitors namely Messrs Maxwell, Kenion, Cowdy & Jones and that the receipt of the said sum by the said solicitors Messrs Maxwell, Kenion, Cowdy & Jones be a valid discharge and release to the plaintiff for payment of the said sum of $2,370,135.00 by the estate of Nadarajah s/o Sithambaram deceased.

AND IT IS ALSO ORDERED that the said Messrs Maxwell, Kenion, Cowdy & Jones shall place the said sum of $2,370,135.00 on fixed deposit in a Commercial Bank in trust for the estate of Nadarajah s/o Sithambaram deceased to be dealt with in accordance with the order of court.

AND IT IS ALSO ORERED that the dispute relating to the sum of $209,865.00 payable under the term of the agreement dated 18.2.82 be determined at the hearing of this matter or by a separate suit filed for that purpose.

AND IT ALSO ORDERED that the plaintiff shall go into occupation of the land upon payment of the said sum of $2,370,135.00 to the said solicitors Messrs Maxwell, Kenion, Cowdy & Jones and until then the estate of the deceased shall be entitled to all profits and income from the said land.

AND IT IS ALSO ORDERED that the parties be at liberty to apply. Given under my hand and the Seal of the Court this 31st day of October 1985.

[16] The plaintiff responded promptly by filing in the Ipoh High Court Civil Suit No 2087/85 against the first defendant and Mdm Ponnamal, praying for the following orders:

(1) A Declaration that the consent order of 31st October 1985 is a nullity and/or null and void;

(1A) A declaration that the purported Sale Agreement of 18 February, 1982 was a sham and in any event is void and unenforceable.

(1B) An Order that the defendants and any of them do surrender and deliver the title and the transfer documents in their possession relating to the said land.

(1C) An Order for removal of the caveat entered by Ponnamal d/o Ramasamy Pillai.

(1D) Damages for Fraud and Deception against the defendants.

(1E) Damages against the Estate of Ponnamal d/o Ramasamy Pillai for wrongful entry of caveat.

(2) An Injunction restraining the defendants and each of them from acting on the terms of the said Order;

(3) Such further or other relief; and

(4) Costs.

[17] The first defendant and Mdm Ponnamal filed their defences. Mdm Ponnamal also counterclaimed against the plaintiff for the following : (a) the injunction granted by LC Vohrah J be discharged; (b) the caveat entered by the plaintiff on the estate be removed; (c) she be at liberty to enforce and carry into execution the consent order; (d) an inquiry into damages.

[18] When Mdm Ponnamal passed away on 25 November 1988, her estate was represented by her two children and they were the second defendants in Civil Action 2087/85. It is this civil suit which eventually found its way to this court and become the subject of the present appeal.

[19] On 17 February 1997 the Federal Court declared that the will of the deceased upon which the first defendant obtained an order of probate on 21 August 1984 in the Ipoh High Court Petition No 152/84, was a forgery and was null and void. The Federal Court also ordered that the probate obtained from the Ipoh High Court vide Probate Petition No 152 of 1984 on 21 August 1984 be revoked (See *Dr Shanmuganathan v Periasamy s/o Sithambaram Pillai* [1997] 3 MLJ 61). The plaintiff then succeeded in extracting his letters of administration.

[20] On 29 October 2001, the High Court dismissed the plantiffs' claim (in the Civil Suit No 2087/85) with cost and allowed the second defendant's counterclaim as to prayers (a), (b), (c), (e), (f), and (g).

[21] The plaintiff appealed to the Court of Appeal. On 5 March 2010, the plaintiff's appeal was dismissed with cost. The orders made by the High Court were affirmed.

[22] On 7 February 2013 this court granted the plaintiff leave to appeal on the following questions ('the leave questions'):

(a) Can a valid consent be given for the sale of a deceased's property by an executor appointed under a will that is subsequently declared by the court to be a forgery?

(b) Whether the approval given by the court to a consent order for the sale of estate property is valid when pending interpleader summons challenging the genuineness of the sale was not brought to the attention of the court?

(c) Whether the Official Administrator could validly consent to the sale of deceased property under Section 39 and Section 60 of the Probate & Administration Act

1960 without an empowering court order?

[23] Based on the pleadings filed by the parties, two issues were raised for the determination of the High Court. The first was whether the agreement was a sham to cover-up a money lending transaction which was not enforceable since Mdm Ponnamal was not a licenced money lender. The second was whether the consent order was a nullity and ought to set aside.

[24] On the first issue, upon consideration of the evidence presented before it the High Court found that the plaintiff had failed to prove on the balance of probabilities that the agreement was a sham transaction and a cover-up of an illegal money lending transaction. The learned trial judge gave several reasons to support his findings. This is what the learned trial judge said in his judgment:

> 1. I do not find the terms and conditions stipulated in the S & P Agreement unusual to give rise to any suspicion that it was intended for a money lending transaction. Though the provision for payment of the balance of the purchase price is not within the period of 3 to 4 months after the date of execution of the agreement this is not extraordinarily uncommon. Such arrangement is often left to the parties to negotiate. In this case we are looking at a fairly large piece of estate land involving a sizeable consideration and the parties could have agreed to extend payment of the balance of the purchase beyond what is practiced in the purchase of a dwelling house.
>
> 2. As regards to the absence of a provision for specific performance in the event of the vendor refusing to complete the sale, I cannot comprehend how this can be used to infer a money lending transaction or that this transaction is not genuine sale and purchase of a landed property. By substituting this for specific performance the parties agreed to penalised the vendor when such a situation arise with a double payment ie pay back what the vendor had received plus an additional equivalent sum. If this had been a cover-up for a money lending deal I do not think that the borrower would agree to this provision since he would have to pay far too much to redeem his property especially when interest, as alleged, was already included in the initial deposit payment. This clause though providing an escape route to the vendor does not in itself reflects an arrangement where the borrower can have his property back by repaying the sum borrowed with interest. To me this penalty clause is more of a deterrent against a renegade vendor in a normal sale and purchase of property.
>
> 3. There is no evidence that the value of Kamatchy Estate was higher than what is stated in the S & P Agreement. Tan Sri Thamalingam is a respectable valuer and he prepared his report in 1982 long before these disputes between these parties to this suit began. His valuation of the market price of the property is comparable to the stated consideration in the S & P Agreement.

4. Seeralan's allegation is highly suspicious. Read in the light of other evidence, I do not consider it of any probative value. Madam Ponnamal had instantly denied this Seeralan's allegation in a sworn affidavit followed by her complaint to the Bar Council on Seeralan's conduct in this matter. Seeralan was disciplined by that professional body and had refused to attend court to press ahead with this allegation though being a party to the action. If Seeralan was committed to such allegation he would have defended it and not left unattended after asserting it, particularly when there was an avenue to verify its authenticity. Failure on Seeralan's part to do so gives Moorka Pillai's explanation on why Seeralan proceeded with such allegation much credit.

5. I do not have much regard for the evidence advanced by the plaintiff and PW3. Firstly PW3 is currently under the employment of the plaintiff. This could induce him to be on the side of the plaintiff. As for the plaintiff, I find his recollection of what the deceased told him is quite remarkable without having being spoken of this earlier or protesting to it at the family meeting. This is more significant when there is evidence of the deceased being a bachelor and went about his business in a quiet way. In evaluating the plaintiff's testimony one must not disregard that he holds a Power of Attorney for this brother-in-law Dr Shan, who, if the plaintiff is successful in this action would inherit the entire Kamatchy Estate. I view plaintiff's evidence with suspicion.

6. FIC was indeed obtained after the completion date. But failure to secure this before the completion date by itself and from the observations stated above cannot imply an existence that the transaction was a sham. Solicitors usually made such application on behalf of their client. In this case, Mooka Pillai had disclosed that Seeralan was instructed to carry this task. Now that Seeralan is dead, we are deprived of his reason for this delay. But given the circumstances at that time, with the death of the deceased so close to the completion date; the demise of the sole beneficiary — Datin Sellayee; and the competing interest in the deceased estate that followed, delay in this matters may be an acceptable excuse for reason of uncertainly. But there were other actions by Madam Ponnamal and Mooka Pillai to support the purchaser's earnest desire to proceed with the purchase. These are: application for a loan to finance the purchase; securing the services of a land valuer to give an opinion on the value of the property for the purpose of the said loan; and the writing of letters to the dead man and carbon copies to all interested and affected parties indicating continual interest in purchasing the said property.

[25] Having considered the evidence as available in the appeal record in this case ourselves, we agree with the Court of Appeal that the totality of the evidence in this case sufficiently supports the aforesaid findings of the learned trial judge. Indeed, in item four of the minutes of the family meeting it was clearly recorded by the plaintiff himself that the purchaser has paid to the deceased the deposit of RM420,000 and that the balance of RM2.58m was payable on or before December 18 as provided in paras 1 and 2 of the agreement. There is therefore no basis for appellate intervention and we affirm the findings of the learned trial judge on the first issue.

[26] On the second issue, the learned trial judge ruled that the consent order was not a nullity. The learned trial judge opined that although the first defendant was not technically wrong, equitably he should not have represented the deceased's estate in agreeing to the consent order. However, His Lordship held that even if the first defendant had no authority to consent, the Official Administrator (OA), by virtue of Justice LC Vohrah's order (made on 1 April 1985), had the authority to consent. This is what the learned trial judge said:

> Technically he is not wrong but equitably this defendant should not have represented the deceased estate in agreeing to the consent order. At that time he was aware that there was a contest to the Will by the plaintiff. Besides, he also knew that Letters of Administration had been granted to the plaintiff. In addition, the injunction, though permitting him to continue to act for the deceased estate this was only of a temporary and interim nature until the Official Administrator moves in. But he was not the only person who sanctioned this arrangement. In the consent order it is expressly declared that the Assistant Official Administrator, one Mr Karunanithi, obviously representing the Official Administrator, was also present at the hearing on the 31 October 1985. Even if the first defendant had no authority to give consent but surely, by virtue of Justice LC Vohrah's Order, the Official Administrator had.

[27] The Court of Appeal affirmed the decision of the learned trial judge. It held:

> Whether the consent order dated 31 October 1985 was a nullity
>
> The learned trial judge's findings on this issue as summarised by us in the earlier part or our judgment was in the negative. In holding that the consent order was not a nullity, we agree with appellant's counsel that the learned judge did not address the question on whether or not the consent given by the first defendant under a forged will was a nullity. However the failure of the judge to consider the same does not to our mind affect the correctness of the judge's conclusion that the consent order was not a nullity. We say so because in the factual context herein there was overwhelming evidence that the first defendant was not the only person who sanctioned the items of the consent order. The record shows that when the consent order was recorded before the court on 31 October 1985 there was present the Assistant Official Administrator whom the learned trial judge held had the requisite authority to give the relevant consent. He further found that the Official Administrator had been duly appraised of the factual matrix through the cause papers serves on him before he sanctioned the terms of the consent order.

[28] This brings us to the leave questions. In our view there is a link between the first and the third leave questions. This is necessarily so because although the High Court opined that the first defendant should not have represented the deceased in agreeing to the consent order, it nevertheless validated the consent order holding that even if the first defendant had no authority to give consent, the OA had the authority to do so by virtue of Justice LC Vohrah's order dated 1 April 1985. These two leave questions essentially bring into focus the role and

legal capacity of the first defendant and the OA in relation to the deceased's estate when they appeared in OS 267/84 when the consent order was recorded. The main thrust of the plaintiff's appeal appears to be based on these questions. We will deal with these two questions first.

SUBMISSIONS

The first leave question

(a) Can a valid consent be given for the sale of a deceased's property by an executor appointed under a will that is subsequently declared by the court to be a forgery?

[29] The thrust of the argument advanced on behalf of the plaintiff by his learned counsel is that a forged will is void ab initio and that the grant of probate and the title of the so-called executor was a nullity. The revocation of the will made the grant of probate void ab initio. Learned counsel relied on the Privy Council case of *Chan Kit San v Ho Fung Hang* [1902] AC 257 where Lord Davey, speaking for the Privy Council said:

> By the revocation *the grant of probate was made void ab* initio, for there was not in fact any will to be proved. It is now known that the apparent title of the so-called executor, ... was *founded on a fiction and a fraud*, and for the purposes of the present argument the probate must be treated as a nullity and *as never having had any real existence*. The court cannot be bound to take notice when the fact are known of an apparent right of action obtained by fraud

[30] Learned counsel for the plaintiff also contended that any act done by an executor under a title created by a forged will was a nullity. In support of his submission he cited *Pundit Prayrag Raj v Goukaran Pershad Tewari* 6 CWN 787 where the court held that it did not matter that the mortgage in that case was created by the executor before her probate was revoked. The court observed at p 791:

> And lastly we must observe that in this case the Will having been declared to be a forgery, and therefore void ab initio, any acts done by the lady under any title created by the Will must be held to be in law void (see in this connection Williams on Executors, 9th Ed p 501.

[31] Learned counsel also referred to *Sheriffa Shaikhah v Ban Hoe Seng & Co Ltd* [1963] 1 MLJ 241 and *Canara Bank v Canada Sales Corporation and others* AIR 1987 SC 1603. In *Sheriffa Shaikah* it was held that a forged power of attorney was a nullity and a mortgage deed created by the use of the forged power attorney was a nullity. In *Canara Bank* it was held that a forged cheque could give no mandate to the Bank.

[32] Learned counsel submitted that the cases he had cited were in line with the principle that a forged instrument could create no legal rights in third parties and was void ab initio. Citing *Birch v Birch* [1902] P 130 at pp 137–138 (per Cozens-Hardy LJ), learned counsel submitted that a forged will was bad against the whole world and not just the forger.

[33] Reverting to the present appeal, learned counsel submitted that the first defendant consented to the consent order to transfer the estate to the second defendant in his capacity as an executor under the forged will, and upon the will being declared a forgery it became void ab initio and all actions taken by the first defendant pursuant to the will was a nullity. He contended that an executor appointed by a forged will could not bind the estate because his appointment itself was void in the eyes of the law.

[34] Learned counsel submitted that the first leave question should be answered in the negative and that the consent order be declared a nullity.

The third leave question

(c) Whether the Official Administrator could validly consent to the sale of deceased property under s 39 and s 60 of the Probate and Administration Act 1960 without an empowering court order?

[35] According to the learned counsel for the plaintiff, the third leave question became important because the courts below opined that although the first defendant should not have given consent to the sale of the said land, the consent was nevertheless validated because of the presence of the OA at the proceedings.

[36] Learned counsel submitted that as a matter of law under the Probate and Administration Act 1959 ('the Probate Act'), the OA was not empowered to approve the sale of the said land without first being appointed administrator of the deceased's estate. By virtue of s 60(4) of the Probate Act, the OA then had to apply to court for permission to sell the said land. Learned counsel submitted that the mistake had come about as a result of failure to distinguish between a vesting order and an administrative order. A vesting order placed the OA in the same position as a receiver holding property in interim but an administration order would empower him to deal with the property. This, according to learned counsel was the distinction between s 39 and s 60 of the Probate Act. According to the learned counsel, Justice Vohrah's order dated 1 April 1985 vested the estate in the OA. Under s 39(1) of the Probate Act, the OA functioned only in an interim capacity like a receiver - he needed a further order to administrator the estate vested in him. *KALRM Karuppan Chettiar v Subramaniam Chettiar, the Official Administrator, FMS, Palaniappa Chettiar,*

Muthukaruppan Chettiar [1933] 2 MLJ 226, *Selvarajah & Anor v Official Administrator & Anor* [1978] 2 MLJ 108, *Lim Cheng Kwang v Sivamalai d/o Sinnathambi & Anor* [1994] 2 CLJ 59 and *Jamaliah bte Hj Mahsudi (suing on her own behalf and as administratrix of the estate of Salamah Bte Hj Ali) v Sivam a/l Munsamy & Anor* [1999] 5 MLJ 250 were cited in support of the submission.

[37] Learned counsel contended that under s 60, only an administrator may apply to sell intestate estate property, and thus, in the absence of a court order appointing him as the administrator of the estate, the OA could not have validly consented to the sale. Therefore his presence in the court proceedings could not in law be taken to be an assent because since he had not been appointed an administrator, he was not empowered to give any consent.

[38] Learned counsel for the first defendant submitted that the first leave question presupposed that only the first defendant granted consent on behalf of the deceased's estate which was not factually correct because when the first defendant gave consent as a representative of the deceased estate under O 15 of the RHC 1980, the OA was also present in court and participated in the proceedings when the consent order was recorded. According to the learned counsel, at the very least the OA had not opposed the order of specific performance of the agreement which was sought for.

[39] On the third leave question, learned counsel for the first defendant submitted that the present case is not a case of sale by the representative of a deceased's estate which could attract the application of s 39 and s 60 of the Probate Act. According to learned counsel, in this case the deceased executed the agreement during his lifetime. The representative of the deceased's estate consented merely to give effect to the transaction entered into by the deceased during his lifetime. The representative also had the benefit of the consensus of the beneficiaries of the deceased's estate in the form of the minutes of the meeting of the beneficiary, including the plaintiff. The first defendant's consent to a valid agreement which was a genuine bargain (as found by the trial court) should still stand. The first defendant was appointed by the court under O 15 r 6A of the Rules of the High Court 1980 ('RHC 1980'). It was the exclusive right of an administrator to decide whether to sell or not to sell any land in the course of his duty as administrator of the estate of the deceased's person. *Khaw Poh Chhuan v Ng Gaik Peng & Ors* [1996] 1 MLJ 761 (FC) was cited as the authority in support. Learned counsel submitted that the death of a seller/vendor did not vitiate a lawful agreement. *Haji Osman bin Abu Bakar v Saiyed Noor bin Saiyed Mohamed* [1952] 1 MLJ 37 and *Kersah La'Usin v Sikin Menan* [1966] 2 MLJ 20 were referred to in support of that submission.

[40] Learned counsel also submitted that setting aside of a perfected consent order can only be made on limited ground that it was null and void for illegality or lack of jurisdiction, and that the power to set aside should only be exercised judicially in exceptional cases where the defect was of such a serious nature that there was a real need to set aside the defective order to enable the court to do justice. *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysia Finance Bhd* [1998] 1 MLJ 393 at pp 409, 426 was relied upon in support of that submission.

[41] The thrust of the submission of learned counsel for the second defendant in defence of the consent order is as follows: The second defendant was at all material times a bone fide purchaser of the land. The first leave question was misleading and it presumed that the first defendant consented to the consent order as an executor of the deceased's estate which was not the case because the first defendant was vested with the power to bind the estate by the order of the High Court appointing the first defendant as the personal representative of the estate. The first defendant was never the executor of the estate.

[42] Learned counsel of the second defendant submitted that although the injunction order by LC Vohrah J dated 15 October 1984 provided that the first defendant would act as the representative of the estate for the purpose of OS 267/84 until the OA take over, (and the OA appeared to have taken over on or about 11 September 1985), the OA consented to the first defendant's continued involvement in the OS 267/84 and was in any event present at the hearing of OS 267/84 which culminated in the consent order. As such the deceased's estate was duly represented by the OA.

[43] Learned counsel further submitted that in any event, the plaintiff was estopped from taking issue with the consent order because he had not taken any positive step to intervene in OS 267/84, and had sat by and let events occured as they did. In fact, according to learned counsel, the plaintiff could even be described as having instigated these events. In this regard he said, by a letter dated 12 April 1985, the plaintiff's solicitors requested the OA to take over the assets which the latter did. In his letter dated 11 September 2005, the OA said:

> Dengan hormatnya ingin saya memaklumkan bahawa Pegawai Pentadbir Pusaka Malaysia sedang menguruskan harta pusaka simati.

Learned counsel contended that the OA agreed with the course of action which culminated in the granting of the consent order.

[44] With regard to the third leave question, the substance of the submission of learned counsel for the second defendant is as follows. The OA was appointed to take over as representative for the estate by way of the varied injunction and the plaintiff was content to accept the state of affairs contemplated by the said order. Therefore, the plaintiff was precluded from contending that the OA was not in a position to make such orders as were necessary for the purpose of OS 267/84. This, according to learned counsel, included the recording of the consent order which was the culmination of a process which involved not only the OA but the plaintiff, through solicitors. In fact, it was submitted that the OA took over representation of the estate on the urging of the plaintiff's solicitors. In this context, learned counsel submitted that it was self evident that the plaintiff was estopped from asserting a contravention of law in the manner which was attempted in this case. According to learned counsel, in the circumstances of the present case, estoppel applied. In support of his submission learned counsel relied on *Owen Sim Liang Khui v Piasau Jaya Sdn Bhd & Anor* [1996] 4 CLJ 716.

[45] Continuing his submission, learned counsel contended that in any event, ss 39 and 60 of the Probate Act did not apply. At the time OS 267/84 was commenced, and subsequently the varied injunction was granted, a letter of administration had been issued in the name of the plaintiff. Although the letter of administration was caveated by the first defendant, this state of affairs necessarily precluded the application of s 39 of the Probate Act, because it could not be said that administration had not been granted within the meaning of s 39.

[46] Learned counsel submitted that s 60 of the Probate Act also did not apply because it applies to 'personal representative' within the meaning of s 60(1) of the Probate Act which provides:

> In dealing with the property of the deceased his personal representative shall comply with this section.

[47] However, according to the learned counsel, the definition of 'personal representatives' under s 2 of the Probate Act only included, other than where liability for death duties were concerned, an executor or administrator. It was submitted that the fact pattern in this case was clearly outside the scope of the definition. According to the learned counsel, in this case, the first defendant was appointed pursuant to O 15 r 6A of the RHC 1980. The OA was then directed by the High Court to take over as representative of the estate by way of the varied injunction. This was not an order made pursuant to, or to give effect, to s 39 of the Probate Act, nor could it have been in the circumstances. The varied injunction did not have the effect of appointing the OA in law as the executor or the administrator of the deceased's estate.

[48] Further, learned counsel submitted that the definition under s 2 as aforesaid did not include the OA. Learned counsel submitted that in *Kerajaan Malaysia v Yong Siew Choon* [2005] 4 CLJ 537, this court observed that by virtue of s 39 of the Probate Act, the OA became the legal representative of the estate in question until such time as probate or legal administration was granted. Learned counsel submitted that the OA as such was not an 'executor' or 'administrator' as contemplated by the definition as a distinction was drawn between the two roles and a 'legal representative'.

DECISION OF THIS COURT

The first and the third leave questions

[49] To reiterate, the plaintiff challenged the consent order on the basis that the will of the deceased (upon which the first defendant obtained a probate on 21 August 1984) was declared by this court on 17 February 1997 to be a forgery and was therefore null and void. The court also ordered the probate to be revoked. It was submitted on behalf of the plaintiff that the first defendant had consented to the consent order to transfer the said land to the second defendant in his capacity as an *executor* under the forged will and upon the will being declared a forgery it became void ab initio and all actions taken by the first defendant pursuant to the will was a nullity. It was contended that an *executor* appointed by a forged will could not bind the said land because his appointment itself was void in the eyes of the law. On behalf of the first defendant on the other hand, it was contended inter alia, that the first defendant consented to the consent order as representative of the deceased under O 15 of the RHC 1980. In a similar vein, it was contended on behalf of the second defendant that the first defendant had not consented to the consent order as an executor but was vested with the power to bind the deceased's estate by the order of the High Court appointing the first defendant as the representative of the deceased's estate pursuant to O 15 r 6A of the RHC 1980. We agree. O 15 r 6A of the RHC 1980 provides:

> 6A Proceedings against estates (O 15 r 6A)
>
> (1) Where any person against whom an action would have lain has died but the cause of action survives, the action may, if no grant of probate or administration has been made, be brought against the estate of the deceased.
>
> (2) Without prejudice to the generality of paragraph (1), an action brought against 'the personal representatives of A.B. deceased' shall be treated, for the purposes of that paragraph, as having been brought against his estate.

(3) An action purporting to have been commenced against a person shall be treated, if he was dead at its commencement, as having been commenced against his estate in accordance with paragraph (1), whether or not a grant of probate or administration was made before its commencement.

(4) In any such action as is referred to in paragraph (1) or (3)-

(a) the plaintiff shall, during the period of validity for service of the writ or originating summons, *apply to the Court for an order appointing a person to represent the deceased's estate for the purpose of the proceedings* or, if a grant of probate or administration has been made for an order that the personal representative of the deceased be made a party to the proceedings, and in either case for an order that the proceedings be carried on against the person appointed or, as the case may be, against the personal representative, as if he had been substituted for the estate;

(b) the Court may, at any stage of the proceedings and on such terms as it thinks just and either of its own motion or an application, make any such order as is mentioned in subparagraph (a) and allow such amendments (if any) to be made and make such other order as the Court thinks necessary in order to ensure that all matters in dispute in the proceedings may be effectually and completely determined and adjudicated upon.

(5) Before making an order under paragraph (4) the Court may require notice to be given to any insurer of the deceased who has an interest in the proceedings and to such (if any) of the persons having an interest in the estate as it thinks fit.

(5A) Where an order is made under paragraph (4) appointing the Official Administrator to represent the deceased's estate, the appointment shall be limited to his accepting service of the writ or originating summons by which the action was begun unless, either on making such an order or on a subsequent application, the court, with the consent, of the Official Administrator, directs that the appointment shall extend to taking further steps in the proceedings.

(6) Where an order is made under paragraph (4), rules 7(4) and 8(3) and (4) shall apply as if the order had been made under rule 7 on the application of the plaintiff.

(7) *Where no grant of probate or administration has been made, any judgment or order given or made in the proceedings shall bind the estate to the same extent as it would have been bound if a grant had been made and a personal representative of the deceased had been a party to the proceedings.*

[50] Before the introduction of O 15 r 6A of the RHC 1980, a plaintiff could not commence an action against the estate of a deceased defendant until letters of administration were extracted. O 15 r 6A of the RHC 1980 enables a plaintiff to commence action against the estate of a deceased defendant, where no grant of probate or administration has been made in respect of the estate. The rule gives the plaintiff an advantage of commencing proceeding against a deceased defendant without first ascertaining the administrator or executor of the estate and obviates the risk of limitation setting in (see *Malaysian Civil Procedure 2013* p 159). In *Yong Siew Choon v Kerajaan Malaysia* [2003] 2 MLJ 150, after stating the legal position before the introduction of O 15 r 6A of the

RHC 1980, the Court of Appeal explained the scope of the rule. In this regard the following statement from the judgment of the Court of Appeal was approved by the Federal Court as excellent exegesis on O 5 r 6A of the RHC 1980 (see *Kerajaan Malaysia v Yong Siew Choon* [2006] 1 MLJ 1):

> Returning to the present case, we would observe that the respondent was perfectly entitled (by reason of O 15 r 6A) to commence the action in the manner intituled. *But having done so, it did nothing else save to prosecute the action to judgment. In other words, there was blatant non-compliance with O 15 r 6A(4).*
>
> It is our judgment that while O 15 r 6A is a remedial provision of adjectival law, it is important that a litigant who seeks to take advantage of it must comply with its terms before he or she may take advantage of any provision of substantive law. See, *Balachandran v Chew Man Chan* [1995] 4 MLJ 685, per Vincent Ng J; *Singapore Gems Co v The Personal Representives for Akber Ali (deceased)* . Non-compliance therefore renders the action more than a mere irregularity. The entire action is badly constituted as a matter of substantive law. *For, it is only in an action against the duly appointed legal representative of the estate of a deceased that a judgment may be obtained that may be enforced against the assets of the estate. That is why O 15 r 6A(7) of the RHC makes it abundantly clear that if the terms of O 15 r 6A of the RHC are complied with then an order or a judgment obtained in the action shall bind the estate of a deceased person. Conversely, therefore, if the provisions of O 15 r 6A of the RHC are not complied with then any order or judgment is useless as it would be wholly unenforceable against the estate of the deceased.*
>
> ...
>
> *To summarise, the rule of substantive law is that an action may be commenced and maintained by or against the estate of a deceased after, and only after, letters of representation have been extracted. Order 15 r 6A of the RHC provides a very limited exception to that substantive rule by permitting the commencement of an action against the estate of a deceased even before the extraction of letters of representation.* But it regulates the future prosecution of the action by requiring (in r 6A(4)) certain steps to be taken in that respect and specifying the time limited for the taking of such steps. Failure to observe the terms of r 6A(4) of O 15 will therefore deprive a plaintiff of the beneficial effect of r 6A and thereby activate the principal rule of substantive law governing such actions so as to render the action already commenced a nullity. As already stated in the preceding paragraph of this judgment that is what happened in the present case.
>
> The appeal is accordingly allowed. The order of the High Court is set aside. The plaintiff's action is dismissed with costs both in this court and in the court below. The deposit is to be refunded to the appellant.

[51] In explaining the object of O 15 r 6A of the RHC 1980 in *Kerajaan Malaysia v Yong Siew Choon* the Federal Court said at p 9:

The starting point for such a consideration is the object of O 15 r 6A which is described in the Malaysian High Court Practice (1998 Desk Edition) Vol 1 at p 361 in the following terms:

> *The purpose of this rule is to overcome the difficulties of suing the estate of a person who had died before the commencement of the action and in whose estate no grant of probate or of administration had been made. There is no person to sue.*

[9] In the case of *Re Amirteymour, Deceased* [1979] 1 WLR 63, Lord Diplock in explaining the object of their O 15 r 6A of the Rules of the Supreme Court, upon which our O 15 r 6A is based, said at p 66:

> It has already been pointed out that proceedings against the estate of a deceased person that are authorised by s 2 of the Proceedings Against Estates Act 1970 and O 15 r 6A take the form of actions in personam. They are neither actions in rem, which are peculiar to the Admiralty jurisdiction of the Court, nor are they actions against an abstraction - a form of proceeding unknown to English law. As in all actions in personam there must be in existence some person, natural or artificial and recognised by law, as a defendant against whom steps in the action can be taken. If and so long as there is no such person the action, though it may not abate, cannot be continued, as, for example, where a sole defendant to a subsisting action dies and no executor or administrator has yet been appointed against whom an order to continue the proceeding can be obtained under O 15 r 7.

[10] *Thus, the object of O 15 r 6A is to provide a remedy where there is no person in law who can be sued.* It is therefore superfluous to state that even where no grant of probate or of administration has been made to the estate of a deceased person O 15 r 6A will have no application if there is, in law, a person who can be sued. An executor de son tort is such a person. As *The Law of Wills, Probate Administration and Succession in Malaysia and Singapore* by Mahinder Singh Sidhu says at p 146:

> When an executor has accepted office as an executor, he shall not thereafter renounce it. Acceptance does not mean only those executors appointed by the Court or authorised by the probate Court, to serve in that capacity. It includes an executor de son tort who, without having been appointed executor, or without having taken out letters of administration, intermeddles with the goods of the deceased, or does any other act characteristic of the office of executor or administrator. He has all the liabilities and none of the privileges of an executor (*Coote v Whittington* (1873) LR 16 Eq 534).

[52] Returning to the appeal before us, on 25 February 1984 Mdm Ponnamal filed OS 267/84 in the Ipoh High Court against the deceased's estate (the first defendant) and one Mr Seerelan, her former solicitor (the second defendant), seeking for the following orders:

> (a) within two months from date of this order the applicant be at liberty to deposit the amount of $2,370,135 with this Honourable Court and upon deposit of the said sum of $2,370,135 the applicant be at liberty to proceed to register the transfer executed by the said Nadarajah s/o Sithambaram deceased in favour of Ponnamal

d/o Ramasamy Pillai on 18 Februarty 1982;

(b) the second defendant do immediately hand over the title deed relating to Grant No 12399 for Lot No 1631 Mukim of Teluk Bharu, Mukim of Lower Perak held by him as stakeholder to the applicant's solicitors upon the applicant's undertakings that the said transfer shall not be presented for registration until the balance of the purchase price is deposited in accordance with prayer (a);

(c) the parties be at liberty to apply and the costs of this application be provided for.

[53] The facts which form the basis of Mdm Ponnamal's application as disclosed in her affidavit are as follows. On 18 February 1982 she entered into the agreement with the deceased to purchase the said land for a total consideration of RM3,000,000 and that upon execution of the agreement she paid RM420,000 as a deposit and part-payment of the purchase price; the balance of which was to be paid on or before 18 December 1982 but subject to the approval of the Foreign Investment Committee (FIC) being obtained. Before completion of the purchase, on 20 August 1982 the deceased passed away. Mdm Ponnamal affirmed that as far as she knew, no person had taken out letters of administration in respect of the deceased's estate and that she understood that there was a dispute among members of the deceased's family, and that it would take some time before the dispute was resolved and letters of administration were granted. She affirmed that she had always been ready and willing to complete the purchase, but as there was no legal representative of the deceased's estate, she had not been able to pay the balance of the purchase price. She further affirmed that the FIC granted the approval for the purchase of the said land on 14 April 1983. According to her, pursuant to the agreement, the deceased had already executed a transfer in favour of her nominee, and the memorandum of transfer together with the document of title were deposited with the second defendant who was holding the same as stakeholders. After the execution of the agreement it had come to her knowledge that sometime in 1980, the Perak State Government had acquired an area of 21 a 1 r 25 p which formed part of the said land purchased by her. The deceased did not disclose this when the agreement was executed by the parties. She had been advised by her solicitors and she verily believed that in view of the said nondisclosure by the deceased, she was entitled to deduct from the balance of the purchase price, the value of the said land acquired by the government calculated according to the purchase price as stated in the agreement. The amount to be deducted was RM209,865. She had also made arrangement with the bank to obtain the necessary finance to complete the purchase and she was prepared to deposit the balance of the purchase price in court. She was advised by her solicitors and she verily believed that she should deposit the balance of the purchase price in the court and obtain the court order to proceed to register the transfer.

[54] In our view, Mdm Ponnamal was entitled to file OS 267/84. Having filed the OS, she could not have proceeded further to prosecute the action to

judgment without taking action to comply with the provision under O 15 r 6A(4) of the RHC 1980. Noncompliance with O 15 r 6A(4) would render the action filed a nullity. The entire action would have been badly constituted as a matter of substantive law. For it is only in an action against the duly appointed legal representative of the estate of a deceased that a judgment may be obtained which may be enforced against the estate. That is why O 15 r 6A of the RHC 1980 makes it abundantly clear that if the terms of that order are complied with, then an order or a judgment obtained in the action shall bind the estate of a deceased person (see the Court of Appeal judgment in *Yong Siew Choon v Kerajaan Malaysia* at p 156). Unlike the respondent plaintiff in *Yong Siew Choon v Kerajaan Malaysia* , where after having commenced the action against the estate of the deceased, it did nothing else save to prosecute the action to judgment, we find that in the present appeal, Mdm Ponnamal did comply with O 15 r 6A(4) of the RHC 1980. Having commenced her action in OS 267/84, she followed it up by filing the summons-in-chambers (pp 1632–1633, Jilid 16 of the appeal record) applying for a court order appointing a person (the first defendant) to represent the deceased's estate for the purpose of OS 267/84 as follows:

> (a) that Periasamy s/o Sithambaram Pillay of 5 Market Street, Teluk Intan, Perak, *be appointed to represent the estate of Nadarajah s/o Sithambaram Pillay deceased for the purpose of the proceedings herein and that the order given or made in the proceedings herein do bind the estate of Nadarajah s/o Sithambaram Pillay deceased.*
>
> (b) that the costs of the application be costs in the cause.

[55] O 15 r 6A(4)(a) of the RHC 1980 provides for the following two alternative situations:

> (i) the plaintiff shall apply to the Court for an order appointing a person to represent the deceased's estate for the purpose of the proceedings; *or*
>
> (ii) if a grant of probate or administration has been made, the Plaintiff shall apply for an order that *the personal representative of the deceased* be made a party to the proceeding.

[56] It is clear from the prayer in her application and her affidavit filed in support of that application that *she was not seeking* for an order that the *personal representative* of the deceased (pursuant to a grant of probate or administration) be made a party to the proceedings in OS 267/84. So, her application was not dependant on any probate. It is true that in her affidavit she mentioned about being informed by the first defendant about a will purportedly executed by the deceased on 7 April 1982 appointing the former as the executor of the deceased's estate. However, no probate had been obtained. In this regard she affirmed that steps were being taken by the first defendant to apply for probate. However, she said that as there were some problems among the members of the deceased's family, it would take some time before probate was obtained. It is

opportune to add at this juncture that although an executor derives his title and authority from the will of his testator and not from any grant of probate, the production of the probate is the only way in which he is allowed to prove his title (see *SMKR Meyappa Chetty v S N Supramaniam Chetty* [1916] 1 AC 603 PC, p 608, per Lord Parker of Waddington). So, without a probate the first defendant's title pursuant to the will was not proven. Thus, the will was not and could not have been the basis of Mdm Ponnamal's application. Her application was not under the second limb of O 15 r 6A(4)(a) of the RHC 1980. It is clear from the prayer in her application and the affidavit in support that she had applied to the court for an order appointing a person (the first defendant who was the deceased's brother) to represent the deceased's estate for the purpose of the proceedings in OS 267/84. In our view, under O 15 r 6A(4)(a) of the RHC 1980 for such a person to be appointed there is no requirement that a probate or letters of Administration have been granted. As we have explained, if probate or administration had been granted, the application should be under the second limb of O 15 r 6A(4) of the RHC 1980 for *the personal representative* of the deceased to be made a party to the proceedings. Indeed, in this case as evident from her affidavit in support of the application, Mdm Ponnamal made the application because no person had taken out letters of Administration in respect of the deceased's estate. That was the basis of her application. She affirmed that she understood steps were being taken by the first defendant to apply for probate. However, as there were some problems among the members of the deceased's family it would take some time before probate was eventually obtained. It was in those circumstances that on 20 April 1984, Annuar J (as he then was) allowed Mdm Ponnamal's application, and ordered the following:

> that Periasamy s/o Sithambaram Pillay of Market Street, Teluk Intan, Perak, *be appointed to represent the Estate of Nadarajah s/o Sithambaram Pillay deceased for the purpose of the proceedings herein (OS 267/84) and that the order given or made in the proceedings herein (OS 267/84) do bind the Estate of Nadarajah s/o Sithambaram Pillay deceased.*

[57] In our view, that order was properly made pursuant to O 15 r 6A(4)(a) of the RHC 1980 and it duly appointed the first defendant as the legal representative of the deceased's estate for the purpose of the proceedings in OS 267/84, and more importantly, pursuant to O 15 r 6A(7), the court ordered that the order given or made in OS 267/84 do bind the deceased's estate. In other words, since the first defendant had been duly appointed the legal representative of the deceased's estate, any judgment may be obtained and enforced against the deceased's estate. To recall what was held by the Court of Appeal in *Yong Siew Choon v Kerajaan Malaysia*:

> ... *It is only in an action against the duly appointed legal representative of the estate of a deceased that a judgment may be obtained that may be enforced against the assets of the estate. That is why O 15 r 6A(7) of the RHC makes it abundantly clear that if the terms of O 15 r 6A of the RHC are complied with then an order or a judgment obtained in the*

action shall bind the estate of a deceased person. Conversely, therefore, if the provisions of O 15 r 6A of the RHC are not complied with then any order or judgment is useless as it would be wholly unenforceable against the estate of the deceased.

[58] In our view, in the appeal before us, the provisions under O 15 r 6A of the RHC 1980 had been complied with. The consent order against the deceased's estate which was properly represented by the first defendant as the duly appointed legal representative of the deceased's estate was properly obtained and was enforceable against the deceased's estate.

[59] Indeed, even Vohrah J's ex parte injunction order granted on 1 April 1985 also appeared to have recognised and given effect to the court order appointing the first defendant as the representative of the deceased's estate when it ordered the first defendant '*to continue acting as representative of the estate of Nadarajah s/o Dato' Sithambaram Pillai in the High Court Originating Summons No. 267/84 until* the Official Administrator Malaysia *take over*; (b) that the Official Administrator Malaysia to *take charge* of all the assets of the Estate of Nadarajah s/o Dato' Sithambaram Pillai'.

[60] We have not lost sight of the fact that the first defendant was ordered 'to continue acting as representative of the deceased's estate *until* the OA takes over and that the OA was to take charge of all the assets of the deceased's estate'. The order must be read as a whole. The question is when did 'takes over' become effective to end the first defendant's role as legal representative of the estate? In our view, logically, 'takes over' in the order must be 'takes over' validly as administrator of the estate. In other words, until the OA 'takes over' validly as administrator of the estate, the first defendant was to continue acting as representative of the deceased's estate in the proceedings in OS 267/84. Thus, we are of the view that if that order was construed to be an order vesting all the assets of the deceased's estate in the OA, in line with s 39 of the Probate Act, mere vesting of the assets as such did not authorise the OA to deal with the assets of the deceased's estate. The OA must proceed to apply for and extract the grant of letters of administration, to administer the estate (see *Chay Chong Hwa & Ors v Seah Mary,* [1987] 1 MLJ 173 (PC), *KALRM Karuppan Chettiar v Subramaniam Chettiar, the Official Administrator, FMS, Palaniappa Chettiar, Muthukaruppan Chettiar* [1933] 2 MLJ 226, *Selvarajah & Anor v Official Administrator & Anor* [1978] 2 MLJ 108). Without the letters of administration, it was not competent for the OA to represent the deceased's estate in place of the first defendant. In this case there is nothing to show that by 31 October 1985, the OA had applied for letters of administration. Further, even if the order date 1 April 1985 could be construed to be an order appointing the OA as the administrator of the deceased's estate, it was not sufficient to clothe the OA with the title and authority to act as the personal representative of the estate. In this regard, in *Jigarlal Kantilal Doshi v Amanah*

Raya Berhad [2011] 9 CLJ 361, this court said at p 373:

> [17] With respect, we are in agreement with the submission of the appellant that the Court of Appeal had failed to appreciate the distinction between an *appointment and a grant. It is the grant that clothes the personal representative with a title upon its issue by the Registry under the seal of court. The administrator derives his title from the grant and cannot act until then.* We agree with what Ismail Khan J said in *P Govindasamy Pillay & Sons Ltd v Lok Seng Chai & Ors* [1961] 1 MLJ 89; [1961] 1 LNS 78 that *'it is only on extracting the grant of letters of administration that the petitioner can be said to be duly clothed with the representative character and to have acquired a title to the estate'*. The learned judge in that case also followed Lord Parker's observation in the case of *SMKR Meyappa Chetty v SN Supramaniam Chetty* [1957] 1 WLR 157, that: *An administrator on the other hand derives title solely under his grant and cannot, therefore, institute an action as* administrator before he gets his grant. The law on the point is well settled.

[61] In this case there is nothing to show that by 31 October 1985 the OA had been issued by the court registry under the seal of court, with letters of administration. Thus, he was not competent to act as personal representative of the deceased's estate in the proceedings in OS 267/84. That being the case it cannot be said that on 31 October 1985 the OA had taken over in place of the first defendant. In short, in either case, on 31 October 1985, the OA had not taken over from the first defendant. Thus, on 31 October 1985 the first defendant was still the duly constituted legal representative of the deceased's estate when he assented to the consent order which, in our view, was properly made and enforceable.

[62] In view of what we have said thus far, we find it unnecessary to answer the first and the third leave questions.

The second leave question

(b) Whether the approval given by the court to a consent order for the sale of estate property is valid when pending interpleader summons challenging the genuineness of the sale was not brought to the attention of the court?

[63] The thrust of the submission by learned counsel for the plaintiff in respect of the second leave question is as follows. The draft consent order which was settled between the solicitors for the first and the second defendants respectively, two days before the recording of the of the consent order. It was tendered before Ajaib Singh J for approval on 31 October 1985. It was recorded by the learned judge as if it was an uncontested matter without any controversy surrounding it. The attention of the learned judge was not brought to the interpleader summons taken out in the same proceedings (OS 267/84) by the solicitor, Mr Seeralan, or the affidavits filed by him in support of that

interpleader summons which challenged the agreement transacted between the deceased and Mdm Ponnamal as not being a genuine sale. The consent order records Mr Seeralan as being absent as if he had stayed away from the proceedings although served, whereas Mr Seeralan had notified the court and the solicitors for the first and the second defendants of his absence, and that he would 'abide by any decision of the court or to act under the directions of the court'. Mdm Ponnamal's solicitor was requested to mention on Mr Seeralan's behalf. Mr Seeralan (since deceased) was the former solicitor for Mdm Ponnamal, who drafted the agreement. Upon being served with the originating summons in OS267/84, Mr Seeralan through his solicitors took out an interpleader summons declaring that he had no personal interest in the property but asking the court to determine who was entitled to the title in his custody. In his supporting affidavit he alleged that the sale was in fact a disguise for a money lending transaction. Learned counsel for the plaintiff contended that it was obligatory for the first and second defendants to bring to the interpleader summons to the attention of the learned judge for him to decide on the interpleader. As that was not done, the consent order was made without the interpleader being decided on whether the sale was a genuine sale. Learned counsel for the plaintiff submitted that there was no explanation from both defendants as to why that interpleader summons was not disclosed to the court on 31 October 1985. It was contended that in the result, the Ipoh High Court approved the draft consent order without being informed of the Interpleader Summons and the affidavits impugning the sale. The interpleader summons was never adjudicated or dismissed. The High Court therefore did not adjudicate on the question whether the agreement was a genuine sale or a disguised money lending transaction. It was contended that it was obligatory for the first and second defendants to bring to the attention of the learned judge the interpleader summons for him to decide on it. As this was not done, the consent order was made without the interpleader being decided on whether the impugned sale was a genuine sale or a disguised money lending transaction. It was contended that the consent order was approved by the court without full disclosure of the relevant facts by the parties who obtained the order. It was also contended that the first and the second defendants had acted collusively with each other to obtain the order by keeping out the plaintiff, and without full disclosure. The consent order was therefore vitiated under s 44 of the Evidence Act 1950. It was submitted that where the Court was led into making an order without disclosure of all the facts, such an order could not stand. In support of that submission, learned counsel relied on *Chee Pok Choy & Ors v Scotch Leasing Sdn Bhd* [2001] 4 MLJ 346; *Shripadgouda Venkangouda v Govindgouda Narayangouda* AIR 1941 Bomb 77; and *Meek v Fleming* [1961] 3 All ER 148.

[64] For the first defendant, it was submitted that the second question was predicated on matters which had not been pleaded. Since the question was never in issue in the courts below, it should not be an issue before us. For the second defendant, it was submitted that the second question was misleading as

the interpleader summons was not made an issue by Mr Seeralan. According to the learned counsel for the second defendant, Mr Seeralan in fact left the matter to the court after having informed the registrar that he would abide by any order of the court. Had it been an important matter, Mr Seeralan would have taken issue with OS 267/84, which he failed to do. Learned counsel contended that therefore it was not open to the plaintiff to seek to do so in the High Court action (the Ipoh High Court Civil Suit No 2087/85) the decision in which is the subject matter of the instant appeal. Learned counsel also submitted that adjunct to this, was the undisputed fact that the plaintiff failed to take any active steps to intervene in OS 267/84. This, it was submitted, was an election to abandon any challenge to jurisdiction, and thus an implied acceptance of jurisdiction. It was argued that the plaintiff could not subsequently take an inconsistent position. In support of his submission learned counsel referred to *Bauer (M) Sdn Bhd v Daewoo Corp* [1999] 4 CLJ 665 and *Lai Yoke Ngan & Anor v Chin Teck Kwee & Anor* [1997] 2 MLJ 565; [1997] 3 CLJ 305.

[65] The second leave question makes specific reference to the pending interpleader summons. So, the starting point is to ask whether the pending interpleader summons (Seeralan's summons-in-chambers) (see pp 1642–1643, appeal record, vol 16) is in fact an interpleader summons? Interpleader summons as provided under O 17 r 1(a) of the RHC 1980, is the provision for what is styled as stakeholder's interpleader, which is the applicable provision in the context of the present case. The whole object of the interpleader provision is to enable a person in the position of a stakeholder to get relief from the court and get it decided as to which of the two or more claimants he has to account for the money, goods or chattels which he holds. So, as provided by O 17 r 1(a) RHC 1980, the state of being sued or the expectation to be sued in respect of those goods 'by two or more persons making adverse claims'. is the precondition which the applicant must fulfil to give the court the jurisdiction to exercise discretion to grant the relief, provided under O 17. There must be some real foundation for such expectation. In this regard, even a letter from one of the adverse parties containing a direction and warning to the interpleader not to release the contested documents of titles, for example, could not be construed as a claim from that party. This is clear from the judgment of this court in *Tetuan Teh Kim Teh, Salina & Co (a firm) v Tan Kau Tiah @ Tan Ching Hai & Anor* [2013] 4 MLJ 313; [2013] 5 CLJ 161, where the court said:

> [34] Order 17 r 1(a) RHC is the provision for what is known as stakeholder's interpleader. Under this provision a person who holds any money, goods or chattels which he does not claim, or is under liability for a debt *and he expects to be sued in respect of that money, goods or chattels by two or more persons, that person can protect himself from an action* and the costs of such an action by calling on these claimants to interplead, in other words, to claim against one another, so that the Court can decide to whom the money, goods or chattels belong. (*Mallal's Supreme Court Practice*, 2nd Ed Vol 1, 1983). The nature of an interpleader is lucidly explained in

De La Rue v Hernu, Peron & Stockwell Ltd [1936] 2 All ER 411(referred to by this court in *Chin Leong Soon & Anor* [1970] 2 MLJ 228. See also *Glencore International AG v Shell International Trading and Shipping Co Ltd and another* [1999] 2 All ER (Comm) 922)

...

[40] *The discretionary relief of interpleader (provided under O 17 r 1(a) RHC) will not be granted unless there appears to be some real foundation for expectation of a rival claim* (see *Watson v Park Royal (Caterers) Ltd* [1962] 2 All ER 346, *Chin Leong Soon & Ors v Len Chee Omnibus Co Ltd*). *It appears from its judgment that the Court of Appeal was not satisfied on the evidence, that the precondition that there must appear to be some real foundation for such expectation was made out.* In other words, the precondition that the plaintiff 'expects to be sued' in respect of the documents of titles 'by two or more persons making adverse claims thereto' required under O 17 r 1(a) had not been fulfilled, In its judgment the Court of Appeal said:

And a mere direction and warning' from the second respondent not to release the 18 original issue documents of titles cannot be construed as a claim against the first respondent. We will now reproduce the letter dated 10 May 2007 from the solicitors for the second respondent addressed directly to the first respondent and that letter will show that there was no 'direction or warning' from the solicitors of the second respondent but rather it was couched in general terms as a mere statement and nothing else. That letter was worded as follows (see pp 327 to 328 of Bahagian 'C' Jilid 3):

With regard to the demand for the return of the said titles, *please take note* of the following:

(i) our client Bintang Merdu has applied to the High Court to remove the Arbitrator in this matter on grounds of misconduct;

(ii) our client has also applied to amend the above application to set aside the interim 'Award' also for misconduct;

(iii) our client has also applied by summons for (an) injunction to restrain the arbitrator and the claimant Tan Kau Tiah from taking further steps in this matter, and this application is part heard before the Honourable Judge of the High Court; and

(iv) the 'interim Award' has not been registered, and it is our client's intention to vigorously oppose any application to do so.

It is our client's view that the titles should be held by you as (a) stakeholder until the dispute is resolved, which is not the case at present.

We trust (that) you will take into consideration the above matter in carrying (out) you duties as (a) stakeholder in this matter and in deciding the status of the said titles.

[41] We accept the finding that the letter dated 10 May 2007 was not a 'direction and warning' from the first defendant to the plaintiff, and that it did not amount to a claim by the first defendant to the title. The letter merely stated the first defendant's view that the plaintiff should continue to hold title until the dispute

between the first and second defendant was resolved.

[66] On the mode of the application under O 17 this court said:

> [42] O 17 r 3(3)(b) of RHC also requires that an interpleader summons must be supported by evidence that the applicant—
>
> (a) claims no interest in the subject matter in dispute other than for charges or costs;
>
> (b) does not collude with any of the claimant to that subjectmatter; and
>
> (c) is willing to pay or transfer that subject-matter into Court or to dispose of it as the Court may direct.

[67] In his affidavit in support of his purported interpleader application, Mr Seeralan stated that on 18 February 1982 Mdm Ponnamal's husband agreed to lend $300,000 to the deceased to be repaid on or before 18 December 1982. Out of the said sum, $120,000 represented interest. Mr Seeralan stated that he was instructed to draw up the relevant documents in the name of Mdm Ponnamal, and to include $120,000 claimed by way of interest in the principal sum thereby making a total of $420,000. To secure the loan, Mr Seeralan drew up a document purported to show that the deceased had agreed to sell to the plaintiff the said land for a sum of $3,000,000. According to Mr. Seeralan, the real value of the said land in 1982 exceeded $5,000,000. The deceased died on 20 August 1982 before the money lent was due for payment. Mr Seeralan then deposed the following:

> 8. The plaintiff now claims that she is entitled to complete the purchase of the said land under the said agreement and has instituted the proceedings herein.
>
> 9. *The claim against the first defendant in the present form interalia untenable as no Letters of Administration has to the best of my knowledge information and belief been extracted and as there are serious questions in dispute and Originating Summons is not an appropriate means of disposing the conflicting interests.*
>
> 10. The issue document relating to the said land was left with me as stakeholder and as security for the loan together with a signed document of transfer as stated in the Statement of Claim.
>
> 11. I have in the past done similar transaction for the plaintiff's husband.
>
> 12. I claim no interest in the said issued document of this title or the signed document of transfer or in any of the documents and chattels set one in the Statement of Claim and do not in any manner collude with the estate of the deceased who are described as the first defendant.

[68] Paragraph 9 of Mr Seeralan's affidavit is crucial. It is evident that Mr Seeralan was not seeking for interpleader relief as a person who was vexed by suits from two or more person making adverse claims. Paragraph 9 embodies

his real complaints. His first complaint was that Mdm Ponnamal's claim against the first defendant was untenable because he alleged that no letters of Administration has been extracted. This is not and cannot be a ground for an interpleader application. In any case this is not true because as alluded to earlier in this judgment, on 20 April 1984, the High Court had made an order appointing the first defendant to represent the estate under O 15 r 6A(4)(a) of RHC 1980. Mr Seeralan's other complaint was that according to him as there are serious questions in dispute, originating summons procedure was not an appropriate means of disposing the dispute. This is reinforced by his subsequent affidavit when he stated as follows:

> 5. What is in dispute is *not the ownership or the right to purchase any land* but whether the Court should not in view of the fact set out in the affidavit supporting my interpleader application go *beyond* the documents prepared and which said documents have been left in my custody as stakeholder and ascertain if the transaction was a mere money lending transaction or in fact a transaction involving the sale and purchase of a rubber estate.

He was not actually seeking for interpleader relief. That was not the purpose of his application. He himself agreed that the ownership of the land and the right to purchase was not in dispute. What he wanted the court to do was beyond that. He wanted the court to investigate and adjudicate whether the sale was mere money lending transaction. Again this is not and could not be a ground for an interpleader application. In any case, if he was serious about his allegation, since he was already made a party to OS 267/84, he should pursue his allegation in that proceeding itself, rather than leaving it to be questioned later by the plaintiff (who was not a party to OS 267/84). A party litigant cannot be indifferent and negligent in his duty to place the materials in support of his contention and afterwards seek to show that that the case of his opponent was false (see *SP Chengalvaraya Naidu v Jaganath* 1994 AIR 853, per Kuldip Singh J). As it transpired, Seeralan was not present in the proceeding on 31 October 1985 and was content to have Mdm Ponnamal's solicitor mention on his behalf. In our view, Mr Seeralan failed to fulfil the precondition under O 17 r 1(a) of the RHC that he was being sued or expected to be sued by two or more persons making adverse claims. Thus, the so called interpleader application was not properly before the court pursuant to O 17 of the RHC 1980 to clothe it with the jurisdiction to consider the interpleader application first before considering OS 267/84.

[69] Be that as it may the more important question which must be considered is whether the point raised in the second leave question was pleaded by the plaintiff? Although the challenge as to the genuineness of the sale (ie whether it was a disguised money lending transaction) was mentioned in the leave question, that is not the focus of the leave question. From the leave question what was not brought to the attention of the court (in other words not

disclosed to the court) was the pending interpleader summons. Thus, it is clear that the focus of the second leave question is the interpleader summons which it was alleged was not brought to the attention of the court. The question then raised is whether in such a case the consent order is valid? In the nutshell the contention of the plaintiff in respect of the second leave question is that Seeralan's interpleader summons must be disclosed by the first or the second defendants to the court. In other words, since it was an interpleader summons, it must first be decided by the court before it could consider OS 267/84. Failure to do so vitiated the consent order under s 44 of the Evidence Act 1950. That section provides that any party to a suit or other proceeding may show that *any judgment*, order or decree which is relevant under ss 40, 41 or 42 of the Evidence Act 1950, and which has been proved by the adverse party, (a) was delivered by a court not competent to deliver it, or (b) was obtained by fraud or collusion.

[70] In our view, the point raised by the plaintiff in the second leave question constitutes a specific ground of challenge on the validity of the consent order. This ground of challenge is separate and different from the grounds already pleaded by the plaintiff in his pleading in impugning the consent order and praying for it to be set aside. In forming such a view we have not lost sight of para 16 of the amended statement of claim which contains the following averment:

> By reason of the *matters aforesaid* the plaintiff avers and contends that the consent order of 31st October 1985 is a nullity and was obtained by *non-disclosure*, deception and fraud by the first defendant and Ponnal and ought to be set aside'.

[71] The *matters aforesaid* in the above paragraph are matters pleaded in para 1 to para 15 of the amended statement of claim (*Jilid 2*, Record Rayuan, pp 138–143). For completeness we set out those paragraphs below:

> 1. The Plaintiff is the Administrator of the Estate of Nadarajah s/o Dato Sithambaram Pillai (hereinafter referred to as 'the Deceased') by Order of Court made on 16th August, 1983 in Kuala Lumpur High Court Petition No. 369 of 1983. *Letters of Administration with Will annexed were extracted on 4th November, 1997.*
>
> 2. The 1st defendant had purported to be the executor, under an alleged Will of the Deceased *dated 7th February, 1982 ('the alleged Will')*, of the estate of the Deceased and in this regard had obtained an Order of probate from the Ipoh High Court vide Petition No. 152 of 1984, without disclosing to the Ipoh Court of the prior Grant of Letters of Administration (LA) to the Plaintiff. The 1st defendant's grant and the alleged Will are being impeached in proceedings brought by the Plaintiff vide Kuala Lumpur High Court Originating Motion No. F54 of 1984.
>
> 3. The 2nd defendants *are the Personal Representatives of the Estate of Ponnamal d/o Ramasamy Pillai (Deceased) ('Ponnamal'). Ponnamal* is the alleged purchaser of the land held under Grant No. 12359 for Lot No. 1631, Mukim of Teluk Bharu,

District of Lower Perak, (hereinafter referred to as 'the said land') under an alleged Sale and Purchase Agreement dated 18th February 1982 with the Deceased. *The said land was at all material times registered in the name of the Deceased who was the legal and beneficial owner thereof.*

4. The Plaintiff avers that upon the death of the Deceased on 20th August 1982 the said land vested in the estate of the Deceased *in intestacy.* It was accordingly the responsibility of the lawful administrator of the estate to decide on all claims made on the said land.

5. The Plaintiff and the 1st defendant *were* in dispute as to who *was* the lawful Administrator of the estate of the Deceased. In this respect the Plaintiff instituted proceedings vide Kuala Lumpur High Court Originating Motion No. F54 of 1984 to revoke the Grant to the 1st defendant as a nullity, and further that the alleged Will under which the 1st defendant purports to act is a forgery and that the 1st defendant was responsible for or/had complicity in the forgery.

6. By an interim Order *vide Kuala Lumpur High Court O.M. No. F- 54-1984* made on 1st April, 1985 the Kuala Lumpur High Court, inter alia, ordered that the 1st defendant continue acting as the representative of the estate of the Deceased in Ipoh High Court Originating Summons No. 267 of 1984 only until the Official Administrator Malaysia takes over.

7. In breach of the said Order and notwithstanding that the Official Administrator had taken over the assets of the Deceased the 1st defendant purported to represent the estate and consent to the Order of 31st October 1985.

8. The Plaintiff avers that the said consent of the 1st defendant is a nullity and the said Consent Order is in consequence a nullity.

9. The Plaintiff avers that the purported Sale Agreement of 18th February, 1982 was in reality a sham for a money lending transaction between the Deceased and one Mookapillai s/o Arumugam Pillai, the husband of the Ponnamal, wherein the said Mookapillai lent the Deceased a sum of $300,000 to be repaid with interest at $120,000 on or before 18th December 1982.

10. The real value of the said land in 1982 was $5,000,000 but it was deliberately undervalued as $3,000,000 in the alleged Sale Agreement.

11. Moreover, the alleged Sale Agreement made no mention of the acquisition of part of the land by the authorities. *Ponnamal* has purported unilaterally and without any authorisation to deduct from the purported sale price a sum equivalent to the value of the acquired land.

12. Further, notwithstanding that the alleged Sale contract had elapsed through non-completion by the completion date, and the death of the Deceased before completion, the Ponnamal purported to apply for Foreign Investment Committee F.I.C. approval and complete the alleged sale.

13. Notwithstanding the above matters and inspite of knowledge of the same the 1st defendant has purpoted to consent to the alleged sale *and/or the Order of 31st October 1985 made under the proceedings known as Ipoh High Court Originating Summons No. 267 of 1984*, thereby depriving the estate of the said land and

perpetrading a fraud on the beneficiaries and the estate. The *Plaintiff avers that the said consent of the 1st defendant is a nullity and the said Consent Order is in consequence a nullity.*

14. The Plaintiff further avers that there was collusion between the 1st defendant and *Ponnamal* to deprive the estate of the Deceased of the said land. The Plaintiff contends that this is fraud on the estate and the beneficiaries thereof.

15. The Plaintiff further avers that the procedure in the proceedings Ipoh High Court Originating Summons No. 267 of 1984 and the Orders sought thereunder amounted to a decree of specific performance of the alleged Sale Agreement and was clearly wrong. Notwithstanding the patently wrong procedure the 1st defendant purported to consent to the said application of *Ponnamal*. The said consent and the order thereon was a nullity.

15A. On 17 February, 1997 the Supreme Court gave judgment and pronounced against the alleged Will declaring the same to be a forgery. In the circumstances, all steps and actions taken by the 1st defendant under the alleged Will are a nullity including and in particularly his attendance in Court on 31 October 1985 through his Counsel to give consent to the purpoted sale in his capacity as Executor under the alleged Will.

15B. Further the Supreme Court by its Order of 17 February 1997 expressly revoked the Grant of Probate in favour of *the 1st defendant granted by the Ipoh High Court vide Probate Petition No. 152 of 1984 on 21 August 1984. Accordingly, all actions and sanctions or consents given or steps taken by the 1st defendant in his capacity as Executor under the said Grant of Probate is void and of no effect.*

15C. Further by reason of the judgment of the Supreme Court aforestated and the Orders made therein, the 1st defendant could not have validly represented the Estate of Nadarajah in any proceedings.

15D. In particular the Plaintiff says that the purported Order of 20 April 1984 appointing the 1st defendant who had held himself out as the Executor appointed under the alleged Will, to represent the Estate of Nadarajah was a nullity by reason of the said Will being declared a forgery. Further the Plaintiff will contend that the conduct of the 1st defendant in the said Will forgery proceedings in failing to give evidence on oath to deny the allegations against him and actively setting up a Will that was pronounced a forgery, shows his complicity in defrauding the Estate of Nadarajah and further that his involvement in the instant proceedings in purporting to represent the Estate and give consent and to receive payment from Ponnamal is part of a single scheme to defraud the Estate.

[72] Those paragraphs of the amended statement of claim amongst others, contain averments about the plaintiff and the defendant being in dispute as to who was the lawful administrator of the estate of the deceased, the plaintiff being the administrator of the estate vide the court order dated 16 August 1983, the first defendant purporting to be the executor of the deceased's estate and obtaining an order of probate in the High Court Petition No 152 of 84 relying on an alleged will of the deceased dated 7 February 1982 without disclosing to the High Court of the prior grant of letter of administrator (LA)

to the plaintiff, and the plaintiff's action to impeach the alleged will in originating motion No F 54 of 1984 culminating in the Federal Court order on 17 February 1997 declaring the alleged will to be a forgery. Consequently, it was averred by the plaintiff that the first defendant could not claim any right or justification for his action under the forged will, and accordingly, all actions and sanctions or consent given or steps taken by the first defendant in his capacity as executor under the said grant of probate was void. Clearly, that essentially is the pleaded case of the plaintiff in seeking to set aside the consent order as being a nullity/or null and void. Of course lest it be forgotten, the other material matter pleaded was that the agreement in reality was a sham money lending transaction. But as we have said earlier, the focus of the second leave question is not the averment that the sale was a sham money lending transaction itself, but the non-disclosure of the interpleader summons filed by Mr Seeralan. Indeed, the issue of whether the sale was a sham money lending transaction was adjudicated in the trial before the High Court which concluded (and in our view rightly) that the plaintiff had failed to prove on the balance of probability that the agreement was a sham transaction for the cover up of an illegal money lending transaction. In fact in arriving at that conclusion the learned High Court Judge had among other evidence, duly considered Mr Seeralan's allegation in his affidavit that the sale was a cover up for a money lending transaction (see paras 24–25 of this judgment). It appears to us that the non-disclosure of the interpleader summons as a ground of challenge to the validity of the consent order was an indirect way of reviving or relitigating the issue of whether the sale was a sham money lending transaction which had been decided by the High Court (and the decision of which was affirmed by the Court of Appeal). More importantly, we find that the non-disclosure of the interpleader summons filed by Mr Seeralan under O 17 r 1(a) of the RHC 1980 was never pleaded by the plaintiff as a separate and/or alternative ground in seeking to nullify and set aside the consent order. Since this issue and the material facts to support it were not pleaded by the plaintiff in his amended statement of claim, the plaintiff could not be allowed to succeed and obtain judgment on it on appeal. In the circumstances we do not find it necessary to answer the second question (see *AmBank (M) Bhd (formerly known as Arab-Malaysia Bank Bhd) v Luqman Kamil bin Mohd Don* [2012] 3 MLJ 1 (FC), *Lee Ah Chor v Southern Bank Bhd* [1991] 1 MLJ 428 (SC), *Pengarah Jabatan Pengangkutan Negeri Selangor & Ors v Sin Yoong Ming* [2015] 1 MLJ 1 (FC), *Datuk M Kayveas v See Hong Chen & Sons Sdn Bhd & Ors* [2014] 4 MLJ 64 (FC)).

[73] In the result and for the reasons we have given the plaintiff's appeal is dismissed with costs.

[74] The decisions and orders made by the courts below are affirmed.

Appeal dismissed with costs and answer to any of the 'leave questions' posed to the court declined.

Reported by Ashok Kumar