

A Al Rashidy bin Kassim & Ors v Rosman bin Roslan

B FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02-16 OF 2005(B)
ABDUL HAMID MOHAMAD, ARIFIN ZAKARIA AND AUGUSTINE PAUL
FCJJ
27 APRIL 2007

C *Land Law — Transfer — Estate land — Beneficiaries of deceased's estate sought declaration that transfer null and void on ground of fraud allegedly committed by respondent — Whether beneficiary entitled to possession — Whether beneficiary had locus standi to bring action to protect interest in estate*

D *Succession — Action for possession of land — Estate land of deceased transferred to respondent — Whether beneficiary entitled to possession — Whether beneficiary had locus standi to bring action to protect interest in estate — Whether beneficiary entitled to damages for wrongful possession*

E Hj Abu Bakar was the registered owner of a half undivided share of land in Rawang, Selangor. The plaintiffs were the grandchildren of Hj Abu Bakar, since deceased, and the lawful beneficiaries of his estate. The first defendant had, by statutory declaration, claimed that the issue document of title of the said land had been lost from his custody. Based on a power of attorney, dated 1986 and purportedly signed by the said

F Hj Abu Bakar, the first defendant had the half share in the said land transferred to himself. The plaintiffs challenged the validity of the transfer to the first defendant. The plaintiffs alleged that the transfer was obtained by the first defendant through fraudulent means since Hj Abu Bakar had passed away in Indonesia in 1937.

G They brought the present action seeking, inter alia, a declaration that the transfer to the first defendant was null and void and illegal on the grounds of fraud allegedly committed by the first defendant. They also sought damages and costs. The trial judge found that the title to the said land had been obtained by the respondent through fraud. He declared that the transfer of the land to the respondent was null and void and ordered the land to be transferred to the plaintiffs. The first defendant

H appealed to the Court of Appeal. The Court of Appeal agreed with the finding of the High Court, that the respondent had obtained the title to the land through fraudulent means. However the Court of Appeal felt constrained by the decision in *Deraman & Ors v Mek Yam* [1977] 1 MLJ 52, to find that the plaintiffs, qua beneficiaries, had no locus standi to bring this action without first obtaining a grant of letters of administration to the estate of Hj Abu Bakar. The Court of Appeal thus

I ordered the land to be re-transferred to the respondent, but in the mean time ordered that a registrar's caveat be lodged against the said land pending disposal of a fresh suit to be filed by the plaintiffs. The plaintiffs did not file a fresh suit but appealed to the Federal Court. Two questions were formulated for the decision of the Federal Court, namely: (i) whether beneficiaries of a deceased person had locus standi to commence

an action to regain and to protect land which had been fraudulently obtained by an outsider without first obtaining letters of administration; and (ii) after confirming a finding of fraud, whether a court could direct the registration of the land to a party who had committed the fraud.

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Held, answering the first question in the affirmative, and allowing the appeal, with costs, in part:

- (1) The Court of Appeal allowed the first defendant's appeal on the sole ground that the plaintiffs as beneficiaries had no locus standi to bring this action without first obtaining the grant of the letters of administration to the estate of the deceased. The Court of Appeal felt constrained by the decision in *Deraman & Ors v Mek Yam* [1977] 1 MLJ 52 to decide otherwise. However, what *Deraman* decided was that plaintiffs qua beneficiaries had no locus standi to apply to have their names registered as owners of the undivided share in the land (see paras 7, 9).
- (2) In deciding whether the plaintiffs had the locus standi or not in instituting the present action, it was necessary to determine the nature of their claim. The special circumstances which entitled a beneficiary to commence an action against a third party should not be confined solely to cases where a personal representative had defaulted in recovering the property of the estate. All the circumstances of the case ought to be considered by the court in arriving at a just result (see paras 9, 18); *Wong Moy (Administratrix of the Estate of Theng Chee Khim, (deceased) v Soo Ah Choy* [1996] 3 SLR 398 and *Joseph Hayim Hayim & Anor v Citibank NA & Anor* [1987] AC 730 referred.
- (3) The suit sought a declaration that the respondent had obtained the title to the land through fraud. The question that the court ought to ask itself was whether the appellants had locus standi to institute an action seeking such declaratory relief. The action sought to regain land from a party who had by fraudulent means transferred the land to himself. The respondent had also entered upon the land and damaged the property. If the land is sold to a third party the land may be lost forever. The appellants had to act fast in order to protect and preserve the estate of the deceased. Thus there existed special circumstances for the plaintiffs qua beneficiaries to commence a legal action against the respondent for the purpose of protecting and preserving the assets of the estate (see paras 11, 19–20).
- (4) The beneficiaries in the present case had at least an equity in the estate of the deceased to entitle them to seek a declaratory judgment. The appellants had the locus standi to commence this action at least for the limited purpose of protecting and preserving the asset of the estate. An order that the land be re-transferred to the deceased would serve this purpose. However, qua beneficiaries, the appellants would not be entitled to a claim for damages (see paras 20–22); *Re Atkinson* (1971) VR 612 and *Omar Ali bin Mohd. & Ors v Syed Jajaralsadeq bin Abdulkadir Alhadad & Ors* [1995] 3 SLR 388 referred.

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A [Bahasa Malaysia summary]

Hj Abu Bakar adalah pemilik berdaftar ½ daripada tanah yang tidak dibahagikan di Rawang, Selangor. Plaintif-plaintif adalah cucu kepada Hj Abu Bakar, yang kini telah meninggal dunia, dan benefisiari sah kepada harta pusakanya. Defendan pertama telah, melalui deklarasi statutori, mendakwa bahawa dokumen hak milik keluaran tanah tersebut bukan lagi dalam penjagaannya. Berdasarkan surat kuasa wakil, bertarikh 1986 dan dikatakan telah ditandatangani oleh Hj Abu Bakar, defendan pertama mendapat ½ bahagian daripada tanah yang dipindahmilik kepadanya. Plaintif-plaintif mencabar kesahan pindahmilik tersebut kepada defendan pertama. Plaintif-plaintif mengatakan bahawa pindah milik diperoleh oleh defendan pertama secara fraud memandangkan Hj Abu Bakar telah meninggal dunia di Indonesia dalam tahun 1937. Mereka telah memulakan tindakan ini memohon, antara lain, satu deklarasi bahawa pindah milik kepada defendan pertama adalah terbatal dan tidak sah dan menyalahi undang-undang atas alasan fraud yang dikatakan telah dilakukan oleh defendan pertama. Mereka juga memohon ganti rugi dan kos. Hakim perbicaraan mendapati bahawa hak milik kepada tanah tersebut telahpun diperoleh oleh responden melalui fraud. Beliau mengesahkan bahawa pindah milik tanah tersebut kepada responden adalah terbatal dan tidak sah dan memerintahkan tanah itu dipindah milik kepada plaintif-plaintif. Defendan pertama telah merayu ke Mahkamah Rayuan. Mahkamah Rayuan bersetuju dengan keputusan Mahkamah Tinggi, bahawa responden telah memperoleh hak milik ke atas tanah tersebut melalui sumber fraud. Namun Mahkamah Rayuan berasa tersekat dengan keputusan dalam *Deraman & Ors v Mek Yam* [1977] 1 MLJ 52, untuk mendapati plaintif-plaintif, yang merupakan benefisiari-benefisiari, tiada locus standi untuk memulakan tindakan ini tanpa terlebih dahulu mendapatkan kebenaran surat-surat pentadbiran ke atas harta pusakan Hj Abu Bakar. Mahkamah Tinggi oleh itu telah memerintahkan agar tanah tersebut dipindah milik semula kepada responden, namun pada masa yang sama memerintahkan satu kaveat pendaftar dimasukkan ke atas tanah tersebut sementara menunggu selesainya satu guaman baru difailkan oleh plaintif-plaintif. Plaintif-plaintif tidak memfailkan satu guaman baru tetapi telah merayu ke Mahkamah Persekutuan. Terdapat dua persoalan untuk keputusan Mahkamah Persekutuan, iaitu: (i) sama ada benefisiari-benefisiari si mati mempunyai locus standi untuk memulakan satu tindakan untuk mendapat balik dan untuk melindungi tanah yang telah diperoleh secara fraud oleh orang luar tanpa terlebih dahulu mendapat surat-surat pentadbiran; dan (ii) setelah mengesahkan satu keputusan terdapatnya fraud, sama ada mahkamah boleh mengarahkan pendaftaran tanah itu kepada pihak yang telah melakukan fraud tersebut.

Diputuskan, bersetuju dengan persoalan pertama, dan membenarkan sebahagian daripada rayuan dengan kos:

- I** (1) Mahkamah Rayuan telah membenarkan rayuan defendan pertama atas satu alasan semata-mata bahawa plaintif-plaintif yang merupakan benefisiari-benefisiari tiada locus standi untuk memulakan tindakan ini tanpa terlebih dahulu mendapat kebenaran surat-surat pentadbiran ke atas harta pusaka si mati. Mahkamah Rayuan berasa tersekat dengan keputusan dalam *Deraman & Ors v Mek Yam* [1977] 1 MLJ 52 untuk memutuskan sebaliknya.

- Namun, apa yang diputuskan oleh *Deraman* adalah bahawa plaintif-plaintif yang juga benefisiari-benefisiari tiada locus standi untuk memohon agar nama mereka didaftarkan sebagai pemilik-pemilik bahagian yang tidak berbahagi dalam tanah itu (lihat perenggan 7, 9). A
- (2) Dalam memutuskan sama ada plaintif-plaintif mempunyai locus standi atau tidak untuk memulakan tindakan semasa, adalah perlu untuk menentukan sifat tuntutan mereka. Keadaan istimewa yang memberi hak kepada benefisiari memulakan tindakan terhadap pihak ketiga tidak sepatutnya terbatas hanya kepada kes-kes di mana wakil peribadi telah gagal untuk mendapat balik hartanah harta pusaka itu. Kesemua keadaan kes sepatutnya dipertimbangkan oleh mahkamah dalam membuat keputusan yang adil (lihat perenggan 9, 18); *Wong Moy (Administratrix of the Estate of Theng Chee Khim, (deceased) v Soo Ah Choy* [1996] 3 SLR 398 dan *Joseph Hayim Hayim & Anor v Citibank NA & Anor* [1987] AC 730 dirujuk. B
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- (3) Guaman itu memohon satu deklarasikan bahawa responden telah memperoleh hak milik tanah tersebut secara fraud. Persoalan yang mahkamah patut tanay adalah sama ada perayu-perayu mempunyai locus standi untuk memulakan satu tindakan memohon relif deklarasikan sedemikian. Tindakan yang dipohon adalah untuk mendapat balik tanah tersebut daripada satu pihak yang telah secara fraud memindah milik tanah tersebut kepada dirinya sendiri. Responden juga telah memasuki tanah itu dan merosakkan hartanah itu. Sekiranya tanah itu dijual kepada pihak ketiga tanah itu mungkin akan lenyap selamanya. Perayu-perayu perlu bertindak segera bagi tujuan melindungi dan mengekalkan harta pusaka si mati. Oleh itu wujud keadaan istimewa untuk plaintif-plaintif yang juga benefisiari-benefisiari untuk memulakan satu tindakan undang-undang terhadap responden bagi tujuan melindungi dan mengekalkan aset-aset harta pusaka itu (lihat perenggan 11, 19–20). D
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- (4) Benefisiari-benefisiari dalam kes ini sekurang-kurangnya mempunyai ekuiti dalam harta pusaka si mati untuk melayakkan mereka memohon satu penghakiman deklarasikan. Perayu-perayu mempunyai locus standi untuk memulakan tindakan ini untuk tujuan terhad bagi melindungi dan mengekalkan aset harta pusaka itu. Suatu perintah bahawa tanah itu dipindah milik semula kepada si mati akan menyempurnakan tujuan ini. Namun sebagai benefisiari-benefisiari, perayu-perayu tidak berhak untuk menuntut ganti rugi (lihat perenggan 20–22); *Re Atkinson* (1971) VR 612 dan *Omar Ali bin Mohd & Ors v Syed Jajaralsadeq bin Abdulkadir Alhadad & Ors* [1995] 3 SLR 388 dirujuk.] G
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Notes

For a case on action for possession of land, see 11 *Mallal's Digest* (4th Ed, 2002 Reissue) para 1987.

For cases on estate land, see 8(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 4596–4597. I

Cases referred to

Adorna Properties Sdn. Bhd v Boonsom Boonyamit @ Sun Yok Eng [2001] 1 MLJ 241
Atkinson, Re (1971) VR 612 (refd)

- A** *Deraman & Ors v Mek Yam* [1977] 1 MLJ 52 (refd)
Hj Ali Omar & Anor v Lim Kian Lee & Ors [2002] 8 CLJ 443 (refd)
Joseph Hayim Hayim & Anor v Citibank NA & Anor [1987] AC 730 (refd)
Ng Thau Shing v George Justine & Other cases [2005] 6 CLJ 80 (refd)
Omar Ali bin Mohd. & Ors v Syed Jajaralsadeq bin Abdulkadir Alhadad & Ors [1995] 3 SLR 388 (refd)
- B** *Ooi Jim & Anor v Ai Eit & Ors* [1977] 2 MLJ 105 (refd)
Wong Moy (Administratrix of the Estate of Theng Chee Khim (deceased) v Soo Ah Choy [1996] 3 SLR 398 (refd)

Legislation referred to

- C** Kelantan Land Settlement Ordinance 1955 s 10(1)(a)
National Land Code s 320(1)(a)

Appeal from: Civil Appeal No B-02-566 of 2004 (Court of Appeal, Putrajaya)

- D** *Murad Ali bin Abdullah (Ahmad Tarmizi bin Shariff and Chitra Devi Mutusamy with him) (Tarmizi Marzuki & Sulaiman) for the appellant.*
T Santhakumari (Gurcharan Singh Sohan with him (Mann & Associates) for the respondent.

- E** **Arifin Zakaria FCJ (delivering judgment of the court):**

BACKGROUND

- F** [1] This is an appeal against the decision of the Court of Appeal reversing the decision of the High Court. Leave was granted by this court on two questions of law which read as follows:

- G** (i) whether the beneficiaries of the deceased person without first obtaining the letters of administration have a locus standi to commence an action to protect and to regain the land which has been fraudulently obtained by an outsider; and
- (ii) after confirming the finding of fraud, whether the court can direct the registration of the said land to the party who had committed the fraud.

- H** [2] The subject matter of the dispute is a ½ undivided share in a piece of land situate at Batu 17 ¾, Kuang, Rawang, Selangor held under the Issue Document of Title EMR 2900, Lot 2439, Mukim Rawang, Selangor Darul Ehsan ('the said land'). Hj Abu Bakar bin Hj Sulaiman ('deceased') was the registered owner of the said land until it was transferred to Rosman bin Roslan, the respondent in the present case. The validity of the said transfer was challenged by the appellants who alleged that the transfer was obtained by the respondent through fraudulent means.
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[3] The appellants claim that they, as the grandchildren of the deceased, are the lawful beneficiaries of the deceased's estate. Having discovered that the respondent

had trespassed into the said land they brought this action against the respondent asking the respondent to vacate the said land and for damages. A

THE FINDINGS OF THE HIGH COURT

[4] On the evidence before the court, the High Court found that: B

- (i) the appellants were the lawful grandchildren of the deceased;
- (ii) the deceased had passed away in Indonesia in the year 1937;
- (iii) the respondent by a statutory declaration claimed that the issue document of title of the said land had been lost from his custody; C
- (iv) in view of the fact that the deceased had passed away in 1937 the Power of Attorney (exh D-1) dated 4 March 1986 could not have been executed by him; and
- (v) the respondent had entered upon the said land and cut fruit trees and demolished the houses on the said land. D

[5] On the above premise the learned High Court judge came to his decision that the appellants had on balance of probabilities proven their case against the respondent and entered judgment in favour of the appellants in terms of prayers (c), (d), (e) and (f) of the claim. The court also awarded damages and costs in favour of the appellants. E

THE FINDINGS OF THE COURT OF APPEAL

[6] On appeal to the Court of Appeal, the order of the High Court was set aside and it was ordered that the memorial in the issue document of title and register document of title in favour of the appellants be cancelled and a memorial in favour of the respondent be entered in respect of the said land. It is further ordered that the Registrar of Land Gombak do enter a Registrar's caveat against the said land under s 320(1)(a) of the National Land Code (the land code). The appellants are, however, given the liberty to file a fresh suit against the respondent within 30 days from the date of the order and the registrar's caveat shall remain in force until disposal of the suit to be filed by the appellants. F G

THE ISSUES BEFORE THIS COURT

[7] For completeness, I need to state that the appellants did not commence a fresh suit as suggested by the Court of Appeal but instead filed an appeal against the whole decision of the Court of Appeal. As I said earlier, two issues were framed by the leave court for our determination as set out in the opening part of this judgment. The Court of Appeal in its judgment delivered by Nik Hashim JCA (as he then was) allowed the appeal on the ground that the appellants as beneficiaries have no locus standi to bring this action without first obtaining the grant of the letters of administration of the estate of the deceased. He stated that the court was constrained by the decision of this court in *Deraman & Ors v Mek Yam* [1977] 1 MLJ 52 to H I

A decide otherwise. In that case, after a Land Scheme Enquiry, the land in dispute was ordered to be registered in the name of the defendant under a possessory title. The plaintiffs who were the children of the original owner did not appeal from that decision but they brought an action purportedly under s 10(1)(a) of the Kelantan Land Settlement Ordinance 1955 claiming that they were entitled to a share in the land. The trial judge dismissed the application and the plaintiffs appealed to this court. The plaintiffs in that case had not taken out letters of administration to the estate of their father. In a majority judgment this court dismissed the appeal. The ground relied upon by the majority was that the plaintiffs/appellants had no locus standi to institute the action as they had not taken out letters of administration of the estate of their father.

C [8] It should however be pointed out that the plaintiffs in that case prayed for an order that the undivided share in the land be registered in their names as lawful beneficiaries of the estate of their father. As Ali FJ in his judgment categorically stated:

D ... the appellants have no legal title. They never had. They are only beneficiaries of their father's estate. The only person who could have legal title after their father's death would be the legal representatives of the estate.... The action ought to have been dismissed as the appellants have no right or cause of action.

E [9] In that case what the court said was that the plaintiffs as beneficiaries have no locus to apply to have their names registered as the registered owner of the undivided share in the land. Thus in deciding whether the appellants have the locus standi or not in instituting this action, it is necessary to determine what is the nature of the appellants' claim. The appellants pleaded case was that the respondent who is the registered proprietor of ½ share in the said land had obtained the said title through fraudulent means. After a full trial, the High Court found that the appellants had proven their case in that the respondent had obtained his title through fraud. This finding of the trial court was upheld by the Court of Appeal. This explains why the Court of Appeal having allowed the appeal by the respondent then ordered that the registrar's caveat be entered against the said land pending disposal of a fresh suit to be filed by the appellants.

G [10] In the present case one of the orders prayed for by the appellants reads as follows:

H (c) perisytiharan bahawa pindahtanah tanah tersebut kepada Defendan Pertama adalah batal dan tidak sah di atas alasan fraud yang dilakukan oleh Defendan Pertama di dalam memperolehi pindahtanah tanah kepada Defendan Pertama;...

I [11] In short the appellants were asking for a declaration that the transfer of the ½ undivided share in the said land to the respondents was null and void and illegal on the ground of fraud allegedly committed by the respondent. That was the matter at the heart of the appellants' case. Looking at the pleading the first question that the court ought to ask itself is, 'has the appellants the locus standi to institute an action seeking such a declaratory relief?'

[12] The answer to this issue, as we see it, could not be derived from the decision in *Deraman & Ors v Mek Yam*. In that case the appellants/plaintiffs were asking for an order that the 5/10 undivided share in the land be registered in their names as lawful beneficiaries of the estate of Din bin Salleh. This court held that the beneficiaries had no locus standi to bring such a proceeding to have the title in the said land registered in their names. They held that the only person who could do so is the legal representatives of the estate and not the beneficiaries. This we think is in accord with the probate and administration law prevailing in this country.

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[13] In the present case the only issue that needs to be addressed by the court is whether the appellants, as the beneficiaries of the estate of the deceased have the locus standi to seek the declaratory relief as per prayer (c) of the claim. In our view the case on point is the case of *Ooi Jim & Anor v Ai Eit & Ors* [1977] 2 MLJ 105. In that case the first appellant had applied for a declaration that her husband was the lawful adopted son of Jaw Ing who had died intestate. The application was dismissed as it was held that she should first obtain letters of administration of her husband's estate. She then appealed to this court. Allowing the appeal, this court held that it was not necessary for the first appellant to take out letters of administration to bring the action which was primarily an action for a declaration as to the status of her husband. The court stated that the question of taking out letters of administration would only arise when it became necessary for her to claim her share in the estate of the intestate. No authority was cited by the court in support of its decision. But the following cases seem to support the finding of this court in *Ooi Jim*. First, the Singapore case of *Omar Ali bin Mohd. & Ors v Syed Jajaralsadeq bin Abdulkadir Alhadad & Ors* [1995]3 SLR 388, which was cited to us by learned counsel for the appellants. In that case the plaintiffs sought declarations that the unexpired residue of the leasehold interest of 999 years in a property vested in the estate of the father of the plaintiffs (the intestate) and that the purported sale of the property by the first four defendants (who are the trustees of the estate of the holder of the reversion to the property) to the fifth defendant, in so far as it included the leasehold interest of the intestate's estate, was null and void. The first four defendants applied for security for costs on the ground that the plaintiffs were ordinarily resident out of jurisdiction. They claimed, inter alia, that the plaintiffs had no legal authority whatsoever to institute the present action; no one had the legal authority to act on behalf of the estate of the intestate until he or she had applied to the court for a grant of letters of administration. The learned assistant registrar allowed the application. Chao Hick Tin J, allowed the appeal by the plaintiffs holding, inter alia, that the plaintiffs were not suing on behalf of the estate. They were suing in their own capacity as beneficiaries of the estate for a declaration to protect the property of the estate and to prevent the sale of the property to the fifth defendant from going through. This they had the locus standi to do as they had at least an equity in the estate of the intestate. In coming to his decision the learned judge adopted the view expressed by Gillard J in *Re Atkinson* (1971) VR 612, where Gillard J held that where there were competing claims then the trustee company was not bound to use its own fund to vindicate the testator's rights, if any. If it had obtained an indemnity from the beneficiaries, other considerations might well have applied. On the issue of whether the beneficiaries and, in particular, the son, would have the necessary standing to bring an action against the widow to vindicate the testator's interest, he expressed the view that the beneficiaries had at least 'an equity' to entitle him to seek on behalf of the estate in

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A a court of equity the remedy of a declaratory judgment; and ‘an equity’ means a right to a remedy in a court of equity. Chao Hick Tin J then went on to say that:

B Of course in the present case no letters of administration to the estate of the intestate have yet been granted to any one. But I do not think this difference was in any way material; neither did I think this difference made any less applicable the views of Gillard J. Thus I felt that there was no merit in the arguments of the first four defendants based on lack of locus standi, which was their main plank on their request for further arguments.

C [14] In the local case of *Hj Ali Omar & Anor v Lim Kian Lee & Ors* [2002] 8 CLJ 443, the plaintiffs applied for a declaration that the transfer of the deceased’s property to the defendants was null and void and for the re-transfer of the property to the deceased’s name. At the time of making the application the letters of administration in respect of the estate had not been extracted. The issue was whether the plaintiffs had the locus standi to bring and maintain the suit. The learned JC following *Ooi Jim* held that the declaratory relief sought for is not confined to the declaration of status alone. Thus the court granted the declaration sought by the plaintiffs that the transfer of the land, the deceased’s property, to the defendant was null and void. The court held that, the plaintiffs, as the beneficiaries of the estate of the deceased, are seised with the locus to protect and preserve the property of the estate. It further held that the right of preservation of the estate is distinguishable from the right, over an interest to share in the property of the deceased. This is the right recognizable in equity to invoke the equitable remedy for fraud, mistake and the like.

F [15] In *Ng Thau Shing v George Justine & Other cases* [2005] 6 CLJ 80, the locus standi of the plaintiff (Ungot) in the third action was challenged by the defendants. The actions in that case which were heard together concerned disputes arising out of land alienation applications cum purported sale transactions. A preliminary objection was raised contending that Ungot had no locus standi since he had commenced the action without first obtaining the ‘Jadual Tiga’ which is the equivalent of the letters of administration. Richard Malanjum J (as he then was) following *Ooi Jim* ruled that Ungot had the locus standi to commence the action. The reason given by the learned judge was that Ungot is only seeking for a declaration on the status of the signature of the deceased with the consequential relief sought for in that the title deed issued pursuant to the Power of Attorney, if the signature is declared forged, should be cancelled.

H [16] In *Joseph Hayim Hayim & Anor v Citibank NA & Anor* [1987] AC 730, the Privy Council speaks of the special circumstances which entitle a beneficiary to commence action against a third party. At p 748, Lord Templeman stated: ‘These authorities demonstrate that a beneficiary has no cause of action against a third party save in special circumstances which embrace a failure, excusable or inexcusable, by the trustees in the performance of the duty owned by the trustees to the beneficiary to protect the trust estate or to protect the interest of the beneficiary in the trust estate’. The Singapore Court of Appeal in *Wong Moy (Administratrix of the Estate of Theng Chee Khim (deceased) v Soo Ah Choy* [1996] 3 SLR 398 applied the principles set out in *Hayim*. The facts as stated in the headnotes are as follows:

The appellant claimed to be the lawful widow of one Theng Chee Khim (Theng). They were married in 1952 according to Chinese customary rites and they had six children. In 1964, Theng purported to marry the respondent at the Registry of Marriages and thereafter set up home with the respondent. He remained with her and his children by her until he passed away in June 1995. The appellant obtained a grant of letters of administration to Theng's estate. She then commenced an action seeking, inter alia, a declaration that certain immovable property which had once stood in the name of the respondent was held on trust by the respondent for Theng. She also sought an enquiry and account as regards the properties, had been sold and the claim was principally directed at the proceeds of sale. She succeeded in obtaining an ex parte interim injunction restraining the respondent from disposing of or dealing with her assets within Singapore up to a value of \$3.5m. The respondent in turn filed a caveat against the appellant's grant of the letters of administration.

The respondent subsequently applied to the High Court to discharge the injunction and also to strike out the appellant's writ of summons and statement of claim. She alleged that the appellant lacked the capacity to sue as she had not extracted the grant of letters of administration. As such, the writ was a nullity. The appellant then applied to amend her writ and statement of claim to specify that her action was brought in her alternative capacity as a beneficiary of the estate, and on behalf of her six children as beneficiaries. The High Court dismissed this application. The judge was of the view that the appellant's inability to extract the grant of letters of administration and the consequential delay in extracting the grant would not constitute special circumstances which might enable the appellant to commence an action qua a beneficiary. Consequently, the appellant's writ and statement of claim were struck out and the injunction was discharged. The appellant appealed, contending that there were special circumstances which enable her to maintain the action.

[17] In allowing the appeal, the court held that:

- (i) As beneficiaries of the estate of Theng, the appellant and her children had no equitable or beneficial interest in any particular asset comprised in that estate, which was yet unadministered. It did not follow from this that a beneficiary of an estate which was unadministered or under administration had no legal remedy. He may institute an action to recover the assets of the estate where special circumstances could be shown to exist.
- (ii) Special circumstances were not confined solely to cases where the personal representative had defaulted in acting to recover the property. All the circumstances of the case should be considered, including the nature of the assets, the question of the personal representative and the reason for the default of the personal representative.
- (iii) In that case the failure to extract the letters of administrations of the estate was due to the inability of the appellant to obtain necessary clearance from the Commissioner of Estate Duty. The court held that the crucial consideration was that as the administratrix she was prevented by circumstances not within her control from taking action against the respondent as the grant of administration could not be extracted. That was sufficient to show that special circumstance existed to enable her to bring the action qua a beneficiary and on behalf of her children as beneficiaries of the estate of Theng.

OUR FINDINGS

[18] We agree with the view expressed by the Singapore Court of Appeal in that the special circumstances should not be confined solely to cases where the personal

A representative had defaulted in recovering the property of the estate. We are of the view that all the circumstances of the case ought to be considered by the court in arriving at a just result. Secondly, following *Re Atkinson* and *Omar Ali bin Mohd*, we think the beneficiary has at least an equity in the estate of the deceased to entitle the beneficiary to seek on behalf of the estate the remedy of a declaratory judgment.

B [19] In the present case the action was commenced by the beneficiaries of the estate in order to regain the said land from the respondent whom they alleged had by fraudulent means transferred the land to himself. The respondent had also entered upon the land and damaged the fruit trees and demolished buildings found on the said land. Further, the said land is liable to be sold by the respondent to a third party.

C In that event the said land may be lost forever. This becomes more urgent in view of the decision of this court in *Adorna Properties Sdn. Bhd v Boonsom Boonyamit @ Sun Yok Eng* [2001] 1 MLJ 241, which confers immediate indefeasible title to a purchaser in good faith for valuable consideration.

D [20] Thus, the appellants have had to act fast in order to protect and preserve the estate of the deceased. Therefore, on the facts of this case, we find, there exist special circumstances for the beneficiaries to commence legal action against the respondent qua beneficiaries for the purpose of protecting and preserving the asset of the estate. Quite apart from that we also hold that the beneficiaries in the present case have at least an equity in the estate of the deceased to entitle them to seek a declaratory judgment. Thus, on the above grounds are agree with the learned counsel for the appellants that the appellants in this case had the locus standi to commence this action at least for the limited purpose of protecting and preserving the asset of the estate.

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F [21] In the present case the High Court found that the title to the said land was obtained by the respondent through fraud and declared that the transfer of the said land to the respondent was null and void. The court ordered the respondent to transfer or cause to be transferred the said land to the appellants. The Court of Appeal agreed with the finding of the High Court that the respondent had obtained the title to the said land through fraudulent means but because of lack of locus standi ordered the said land to be re-transferred to the respondent, but in the mean time ordered that a registrar's caveat be lodged against the said land pending disposal of the suit to be filed by the appellants.

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H [22] Now, in view of our finding that the appellants do have the locus standi to commence legal proceeding to protect and preserve the asset of the estate we hold that the appellants are entitled to the order as prayed for in prayer (c) of the claim. But as beneficiaries, we hold that the appellants are not entitled to claim for general and special damages on behalf of the estate; such a claim can only be made by the legal representative of the estate.

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CONCLUSION

[23] In the result we order that the memorial in favour of the respondent in the issue document of title and the register document of title be deleted and a memorial

in favour of the deceased be reinstated therein. The orders of the High Court and the Court of Appeal are accordingly set aside. The appellants shall have their costs here and in the courts below. Deposit to be refunded to the appellants.

Appeal allowed with costs in part.

Reported by Sivapragasam Kumaran

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