A

LIONEL LAU SIANG KOK

v.

DATUK SERI PANGLIMA LAU CHON KUN

B

COURT OF APPEAL, PUTRAJAYA
LOW HOP BING JCA
BALIA YUSOF WAHI JCA
MOHTARUDIN BAKI JCA
[CIVIL APPEAL NO: W-02(IM)-1999-10]

C

25 JUNE 2012

SUCCESSION: *Probate - Copy of last will - Order to bring in will - Plaintiff as son of deceased seeking order for defendant to produce copy of last will and testament of deceased - Whether plaintiff a person interested*

D

under s. 41 of the Probate and Administration Act 1959 - Whether plaintiff has reasonable cause of action and locus standi - Whether plaintiff required to submit himself to a DNA test - Whether plaintiff had genuine grievance against deceased's estate

E

CIVIL PROCEDURE: *Striking out - Originating summons - Appeal against - Whether issues should be ventilated at full hearing - Whether plaintiff's claim frivolous or vexatious - Whether disclosed a reasonable cause of action - Whether an abuse of process of court - Whether originating summons eminently unsuitable for striking out*

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CIVIL PROCEDURE: *Originating summons - Striking out - Appeal against - Whether issues should be ventilated at full hearing - Whether plaintiff's claim frivolous or vexatious - Whether disclosed a reasonable cause of action - Whether an abuse of process of court - Whether originating summons eminently unsuitable for striking out*

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On 4 April 2008, the deceased passed away, allegedly testate, appointing the defendant as the executor of his estate. The plaintiff claimed that he is the natural son of the deceased. The facts showed that the plaintiff had made repeated requests to the

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defendant to furnish the plaintiff with the deceased's alleged will ('the alleged will') but such requests were ignored by the defendant. It was not disputed that more than four years had elapsed since the deceased's demise, but the defendant had yet to prove the alleged will or renounce probate in Malaysia or in any

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other jurisdiction, despite the deceased leaving a financial empire worth more than HK$6 billion. The plaintiff filed an originating summons (OS) seeking an order that pursuant to s. 41 of the Probate and Administration Act 1959 (s. 41), the defendant shall

produce to the plaintiff a copy of the last will and testament of the deceased, the trust settlement and any other related testamentary documents pertaining to the deceased's estate within seven days of the pronouncement of the order. However, the High Court allowed the defendant's application to strike out the plaintiff's OS under O. 18 r. 19(1)(a), (b), (c) or (d) of the Rules of the High Court 1980. Hence, this appeal. The issues that arose herein were (i) whether upon a true construction of s. 41, the plaintiff's claim as a natural son of the deceased disentitled him from filing the OS when defendant had not presented any petition for the grant of probate of the deceased's will in Malaysia or any other jurisdiction; (ii) whether s. 41 required an applicant such as the plaintiff to undergo a DNA test.

Held (allowing the appeal; setting aside order of High Court) Per Low Hop Bing JCA delivering the judgment of the court:

(1) The plaintiff's claim as the deceased's natural son was accompanied by *prima facie* evidence. The plaintiff's claim was not frivolous or vexatious. The onus of proof was cast on the defendant to disprove this claim so that e.g the issue of birth under s. 33(1) of the Births and Deaths Registration Act 1957 could be ventilated at a full hearing of the OS. (para 28)

(2) The expression "person interested" in s. 41 incorporates a novel area of law which has not been specifically defined in the Act. Further argument on this novel point of law was necessary, thereby rendering the OS eminently unsuitable for striking out. (para 29)

(3) The defendant's own admission that further legal arguments were required was sufficient by itself to defeat the defendant's application to strike out the plaintiff's OS under O. 18 r. 19(1). Thus, the plaintiff's OS clearly disclosed a reasonable cause of action under s. 41, irrespective whether the defendant had probated the deceased's alleged will. The plaintiff's OS revealed, more specifically, the plaintiff's claim as a natural son of the deceased. (para 33)

(4) Section 41 does not either expressly or by necessary implication require an applicant such as the plaintiff to submit himself to a DNA test. This court was not at liberty to add words to s. 41 as that was the legislative function and power of Parliament. The court's duty and power is to interpret the

law as it is and not what as it ought to be. Herein, the plaintiff's refusal to submit to a DNA could not be construed as constituting a ground under O. 18 r. 19(1)(a), (b), (c) or (d). (paras 38 & 41)

(5) The OS did not constitute an abuse of the process of the court. The mere fact that the plaintiff had sighted the alleged will did not prevent the plaintiff from seeking a remedy under s. 41 so as to put in place his rights, if any, under the law. The plaintiff's claim as a natural son of the deceased means that he had a genuine grievance against the deceased's estate, and that claim was neither illusory nor imaginary. (para 42)

[Plaintiff's OS be remitted to the High Court to be heard before another judge.]

Bahasa Malaysia *Translation Of Headnotes*

Pada 4 April 2008, simati telah meninggal dunia, didakwa berwasiat, di mana defendan telah dilantik sebagai wasi pusakanya. Plaintif mendakwa bahawa beliau adalah anak kandung simati. Fakta-fakta menunjukkan bahawa plaintif telah membuat beberapa permintaan kepada defendan untuk memberikan wasiat simati ('wasiat') tetapi permintaan-permintaan itu tidak dilayan oleh defendan. Ia tidak dipertikaikan bahawa lebih daripada empat tahun telah berlalu sejak kematian simati tetapi defendan masih tidak membuktikan wasiat itu atau meninggalkan probet di Malaysia atau dalam mana-mana bidangkuasa, walaupun simati telah meninggalkan empayar kewangan melebihi HK$6 bilion. Plaintif memfailkan saman pemula ('SP') memohon perintah bahawa di bawah s. 41 Akta Probet dan Pentadbiran 1959 (s. 41), defendan perlu mengemukakan kepada plaintif satu salinan wasiat terakhir simati, penyelesaian amanah dan mana-mana dokumen wasiat lain yang berkaitan dengan harta pusaka simati dalam tempoh tujuh hari dari pengeluaran perintah itu. Tetapi, Mahkamah Tinggi telah membenarkan permohonan defendan untuk mengenepikan SP plaintif di bawah A. 18 k. 19(1)(a), (b), (c) atau (d) Kaedah-kaedah Mahkamah Tinggi 1980. Oleh itu, rayuan ini. Isu-isu yang timbul di sini adalah (i) sama ada mengikut pentafsiran sebenar s. 41, tuntutan plaintif sebagai anak kandung simati membuatkannya tiada hak untuk memfailkan SP apabila defendan tidak membentangkan apa-apa petisyen bagi pemberian probet wasiat simati di Malaysia atau di mana-mana bidangkuasa; (ii) sama ada s. 41 memerlukan pemohon seperti plaintiff menjalani ujian DNA.

Diputuskan (membenarkan rayuan; mengenepikan perintah Mahkamah Tinggi)
Oleh Low Hop Bing HMR menyampaikan penghakiman mahkamah:

(1) Tuntutan plaintif sebagai anak kandung simati telah disertai dengan keterangan *prima facie*. Tuntutan plaintif bukanlah remeh atau menyusahkan. Beban pembuktian diletakkan atas pihak defendan untuk menyangkal pendakwaan ini supaya, contohnya isu kelahiran di bawah s. 33(1) Akta Pendaftaran Kelahiran dan Kematian 1957, boleh ditangani di perbicaraan penuh SP.

(2) Ungkapan "person interested" di dalam s. 41 menggabungkan persoalan undang-undang yang masih baru yang telah tidak ditakrifkan secara khusus di dalam Akta. Hujahan selanjutnya mengenai sudut undang-undang diperlukan, sekaligus menjadikan SP nyata tidak sesuai untuk diketepikan.

(3) Pengakuan defendan sendiri bahawa hujahan undang-undang lanjutan diperlukan adalah memadai untuk mengalahkan permohonan defendan untuk mengenepikan SP plaintif di bawah A. 18 k. 19(1). Oleh itu, SP plaintiff dengan jelasnya mendedahkan kausa tindakan yang munasabah di bawah s. 41, tanpa mengira sama ada defendan telah memprobet wasiat simati. SP plaintif mendedahkan, secara khusus, dakwaan plaintif sebagai anak kandung simati.

(4) Seksyen 41 tidak sama ada secara nyata atau implikasi memerlukan pemohon seperti plaintif untuk menjalani ujian DNA. Mahkamah ini tidak mempunyai hak untuk menambah perkataan pada s. 41 kerana itu adalah fungsi badan perundangan dan kuasa Parlimen. Kewajipan dan kuasa mahkamah adalah untuk mentafsir undang-undang yang seadanya dan bukan apa yang sepatutnya. Di sini, keengganan plaintif untuk menjalani ujian DNA tidak boleh ditafsirkan sebagai suatu alasan di bawah A. 18 k. 19(1)(a), (b), (c) atau (d).

(5) SP bukan satu penyalahgunaan proses mahkamah. Fakta bahawa plaintif telah melihat wasiat yang didakwa itu tidak menghalangnya daripada memohon remedi di bawah s. 41 bagi menegakkan hak-haknya, jika ada, di bawah undang-undang.

A Tuntutan plaintif sebagai anak kandung simati bermakna bahawa beliau mempunyai tuntutan tulen terhadap estet simati, dan tuntutan itu bukanlah satu ilusi atau khayalan.

[SP plaintiff diremit ke Mahkamah Tinggi untuk diperbicarakan di
B *hadapan hakim yang lain.]*

Case(s) referred to:

Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ***(refd)***

Boey Oi Leng v. Trans Resources Corporation Sdn Bhd [2002] 1 CLJ 405
C *HC* ***(refd)***

Gabriel Peter & Partners (Suing as a Firm) v. Wee Chong Jin [1988] 1 SLR 374 ***(refd)***

Hashim Din v. Sato Kogyo Co Ltd [1987] 2 CLJ 438; [1987] CLJ (Rep) 628 HC ***(refd)***

Indah Desa Saujana Corporation Sdn Bhd & Ors v. James Foong Cheng Yuen
D *& Anor [2008] 1 CLJ 651 CA* ***(refd)***

Jasa Keramat Sdn Bhd & Anor v. Monatech (M) Sdn Bhd [1999] 4 CLJ 533 CA ***(refd)***

New Straits Times (Malaysia) Bhd v. Kumpulan Kertas Niaga Sdn Bhd & Anor [1985] 1 LNS 1 FC ***(refd)***

E *Ng Chian Perng v. Ng Ho Peng [1998] 2 CLJ Supp 277 HC* ***(refd)***

Oh, Thevesa v. Sia Hok Chai [1992] 1 CLJ 170; [1992] 3 CLJ (Rep) 148 HC ***(refd)***

Peter James Binsted v. Jevencia Autor Partosa [2000] 2 CLJ 906 HC ***(refd)***

Sim Kie Chon v. Superintendent of Pudu Prison & Ors [1985] 2 CLJ 449;
F *[1985] CLJ (Rep) 293 SC* ***(refd)***

Technointan Holding Sdn Bhd v. Tetuan Tan Kim Siong & Teh Hong Jet [2006] 7 CLJ 541 HC ***(refd)***

Tractors Malaysia Bhd v. Tio Chee Hing [1975] 1 LNS 133 PC ***(refd)***

Legislation referred to:

G Births & Deaths Registration Act 1957, s. 33(1)

Probate and Administration Act 1959, s. 41

Rules of the High Court 1980, O. 18 r. 19(1)(a), (b), (c), (d), O. 71 r. 45

For the plaintiff/appellant - Goh Siu Lin; M/s Shook Lin & Bok

H *For the defendant/respondent - Tan Sri Cecil Abraham (Idza Hajar Ahmad Idzam with him); M/s Zul Rafique & Partners*

[Appeal from High Court, Kuala Lumpur; Originating Summons No: S-24-1561-2009]

I *Reported by Suhainah Wahiduddin*

JUDGMENT

Low Hop Bing JCA:

Appeal

[1] The appellant's (the plaintiff's) appeal arises from the learned High Court judge's decision in allowing the respondent's (the defendant's) application to strike out the plaintiff's originating summons (the OS) under O. 18 r. 19(1)(a), (b), (c) or (d) of the Rules of the High Court 1980.

(A reference hereinafter to an order and a rule is a reference to that order and rule in the Rules of the High Court 1980).

[2] In the OS, the plaintiff sought an order that pursuant to s. 41 of the Probate and Administration Act 1959 (s. 41), the defendant, his servants and/or agents shall within seven days of the pronouncement of the order, produce to the plaintiff a copy of the last will and testament of the late Tan Sri Lau Gek Poh ("the deceased") and the trust settlement and any other related testamentary documents pertaining to the deceased's estate.

Factual Background

[3] On 4 April 2008, the deceased passed away, allegedly testate, appointing the defendant as the executor of his estate.

[4] The plaintiff claims that he is the natural son of the deceased and one Mdm Lum Sook Chan @ Lam Sook Chan. According to his Singapore birth certificate, the plaintiff was born in Singapore on 4 December 1973.

[5] The deceased had applied for a Malaysian birth certificate and passport for the plaintiff, as evidence of the deceased's natural relationship with the plaintiff.

[6] *Vide* Hong Kong Special Administrative Region High Court No. 29 of 2010, sub nom In The Estate of Tan Sri Datuk Lau Gek Poh @ Lau Gek Poh, deceased, the learned trial judge Suffiad J held in para. 76 of his judgment that the Malaysian birth certificate and passport of the respondent (the plaintiff herein) in the Malaysian proceedings is a matter not disputed nor denied by the applicant (the defendant herein). In para. 78 therein, the learned judge is of the view that the respondent (the plaintiff herein) has shown at least *prima facie* evidence that he is the natural son of the deceased and that Lum Sook Chun @ Lam

Sook Chan was the same person. He also had no hesitation in accepting the difference in spelling in the surname "Lau" and "Liew" in the plaintiff's Singapore and Malaysian birth certificate respectively, being the difference in "dialectic pronunciation" of the Chinese surname in Singapore and Malaysia.

[7] The deceased's Malaysian National Registration Identity Card (NRIC) number is stated in both the plaintiff's Singapore and Malaysian birth certificates, in which the deceased was known as "Lau Gek Poh" @ "Liew Gek Poh". This is also evidenced in the National Registration Department's letter together with an extract of the deceased's Malaysian NRIC records.

[8] The plaintiff's Singapore and Malaysian birth certificates show that the plaintiff's late mother, Lum Sook Chan @ Lam Sook Chan held Singapore IC No. 0033973.

[9] The deceased had introduced the plaintiff to the defendant as his (the deceased's) natural son on 14 January 1997 in Hong Kong. The defendant was fully aware that the plaintiff was the deceased's natural son, as clearly stated in para. 45 of the judgment of the Hong Kong High Court judge.

[10] The plaintiff had made repeated requests to the defendant to furnish the plaintiff with the deceased's alleged will ("the alleged will") but such requests were ignored by the defendant.

[11] On 17 February 2009, on a without prejudice basis, the plaintiff and the defendant met in Hong Kong where the defendant allowed the plaintiff to have sight of the alleged will. The plaintiff was well-known to the defendant as having a close connection with the deceased. However, the plaintiff was not permitted by the defendant to make any copy of the alleged will to enable the plaintiff to seek independent legal advice on, *inter alia*, the contents and legality thereof.

[12] The plaintiff had no avenue to verify whether there is a residuary legatee in the alleged will or whether there are earlier trusts or wills executed by the deceased pre-dating the alleged will, if the alleged will was successfully challenged.

[13] It is not disputed that more than four years have elapsed since the deceased's demise but the defendant, for reasons best known to himself, has yet to prove the alleged will or renounce probate in Malaysia or in any other jurisdiction, despite the deceased leaving a financial empire worth more than HK$ 6 billion.

[14] On 31 July 2009, the plaintiff filed the OS. A

[15] On the defendant's application, the High Court struck out the OS on 7 June 2010.

Order 18 r. 19(1)(a), (b), (c) Or (d): Governing Principles B

[16] The defendant's application made under O. 18 r. 19(1)(a), (b), (c) or (d) would require a discussion of the governing principles. In our view, in order to sustain an application under O. 18 r. 19(1)(a), (b), (c) or (d), the defendant must establish that the plaintiff's OS is plainly and obviously unsustainable: See eg, C *Sim Kie Chon v. Superintendent of Pudu Prison & Ors* [1985] 2 CLJ 449; [1985] CLJ (Rep) 293 SC, per Abdul Hamid CJ(M); *Oh, Thevesa v. Sia Hok Chai* [1992] 1 CLJ 170; [1992] 3 CLJ (Rep) 148 HC, per Lim Beng Choon J (as he then was); and *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking* D *Corporation Bhd* [1993] 4 CLJ 7 SC.

[17] In *Tractors Malaysia Bhd v. Tio Chee Hing* [1975] 1 LNS 133; [1975] 2 MLJ 1, the Privy Council, in a speech delivered by Lord Diplock, stressed at p. 1 paras. D-E right column that: E

> The power to dismiss an action summarily without permitting the plaintiff to proceed to trial is a drastic power. It should be exercised with the utmost caution but not ... where some of the claims raise questions of law that were sufficiently arguable to justify proceeding to trial ... F

Ground (a): No Reasonable Cause Of Action

[18] Order 18 r. 19(2) provides that "No evidence shall be admissible on an application under para. (1)(a)": See eg, *Hashim Din v. Sato Kogyo Co Ltd* [1987] 2 CLJ 438; [1987] CLJ (Rep) G 628 HC; and *New Straits Times (Malaysia) Bhd v. Kumpulan Kertas Niaga Sdn Bhd & Anor* [1985] 1 LNS 1 FC. Hence, in the instant appeal, it is sufficient for the court to scrutinise only the averments in the plaintiff's OS.

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Ground (b): Scandalous, Frivolous Or Vexatious

[19] In *Technointan Holding Sdn Bhd v. Tetuan Tan Kim Siong & Teh Hong Jet* [2006] 7 CLJ 541; [2007] 1 MLJ 163 HC, paras. 26 to 31; and *Boey Oi Leng v. Trans Resources Corporation* I *Sdn Bhd* [2002] 1 CLJ 405 HC p. 410 paras. d-g, while on the

A High Court Bench, I have had the privilege of considering the meaning of these words. Having the advantage of examining a plethora authorities, my conclusion is as follows:

- 'scandalous' means 'wholly unnecessary and irrelevant'; and

B - 'frivolous or vexatious' means 'obviously unsustainable';

Ground (c): Prejudice, Embarrass Or Delay The Fair Trial Of The Action

C **[20]** This is fact-based. The defendant must establish facts in order to bring this application within the legal basis on which the defendant relies.

[21] Ground (d): An Abuse Of The Process Of The Court

D (1) In *Gabriel Peter & Partners (Suing as a Firm) v. Wee Chong Jin* [1988] 1 SLR 374 at 384 in para. 22, the Singapore Court of Appeal illuminated as follows:

> The term 'abuse of the process of the court', in O. 18 r. 19(1)(d) has been given a wide interpretation by the courts. It includes considerations of public policy and the interests of justice. This term signifies that the process of the court must be used *bona fide* and properly and must not be abused. The court will prevent the improper use of its machinery. It will prevent the judicial process from being used as a means of vexation and oppression in the process of litigation. The categories of conduct rendering a claim frivolous, vexatious or an abuse of process are not closed and will depend on all relevant circumstances of the case; per Yong Pung How CJ (as he then was).

G (2) In *Jasa Keramat Sdn Bhd & Anor v. Monatech (M) Sdn Bhd* [1999] 4 CLJ 533, at p. 541, this court speaking through Gopal Sri Ram JCA (later FCJ) opined: "Since the circumstances in which the court's process may be abused are varied and numerous, the categories of such cases are therefore not closed. Whether the institution of an action or its continuation or a step taken therein amounts to an abuse of process depends upon particular and individual circumstances.

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(3) I share a similar sentiment in my judgment delivered for this court in *Indah Desa Saujana Corporation Sdn Bhd & Ors v. James Foong Cheng Yuen & Anor* [2008] 1 CLJ 651; [2008] 2 MLJ 11 CA at pp. 31-33 paras. [82] to [84]).

[22] Having examined the foregoing governing principles, we shall now consider the questions raised in learned counsel's submissions.

"Person Interested"

[23] Learned counsel Ms Goh Siu Lin submitted for the plaintiff that the plaintiff's claim as the deceased's natural son makes the plaintiff a person interested under s. 41 and so the plaintiff has a reasonable cause of action as well as the necessary *locus standi* to file the OS under s. 41.

[24] Tan Sri Cecil Abraham (Ms Idza Hajar Ahmad Idzam with him) responded that the plaintiff is not entitled to seek any relief under s. 41 as the defendant has not filed any application for the grant of probate of the deceased's alleged will in Malaysia or any other jurisdictions.

[25] The above submissions would require our consideration of the following question:

> Upon a true construction of s. 41, does the Plaintiff's claim as a natural son of the Deceased disentitle him from filing the OS when Defendant has not presented any petition for the grant of probate of the Deceased's will in Malaysia or any other jurisdictions?

[26] In considering the plaintiff's OS, it is essential for us to take cognizance of s. 41 which reads:

> Order to bring in will, etc
>
> 41. The Court may, on the application of any person interested, if it appears that there is reason to believe that any will or other testamentary document of a deceased person is in the possession or under the control of any person, or that any person has knowledge of the existence of such a will or document, order that that person do, within a time named, produce the will or document at the Registry, or attend at a time named before a Court, for the purpose of being examined in relation to the will or document.

[27] The procedural vehicle for filing an application under s. 41 is set out in O. 71 r. 45 in the following words:

> 45. Application for order to bring in a will or to attend for examination (O. 71 r. 45)
>
> An application under section 41 of the Act, for an order requiring a person to bring in a will or to attend for examination must be made to a Judge by summons, which must be served on every such person as aforesaid.

[28] It is significant to note that the plaintiff's claim as the deceased's natural son is accompanied by *prima facie* evidence. This claim by the plaintiff is not frivolous or vexatious. That being the case, evidence in rebuttal is called for. The onus of proof is cast on the defendant to disprove this claim so that eg, the issue of birth under s. 33(1) of the Births & Deaths Registration Act 1957 can be ventilated at a full hearing of the OS.

[29] The expression "person interested" in s. 41 incorporates a novel area of the law which has not been specifically defined in the Act. To the best of our knowledge, there is no Malaysian case on this point. Further argument on this novel point of law is necessary, thereby rendering the OS eminently unsuitable for striking out under any of the four paras. in O. 18 r. 19(1): See eg, *Tractors Malaysia Bhd*, *supra*.

[30] Further the defendant has in para. 9(d) of his affidavit, filed in support of his application for security for costs for the sum of RM500,000, admitted as follows:

> The Plaintiff's Application for the Production of the Will is made pursuant to Section 41 of the Probate and Administration Act 1959, a provision of the law that has not been previously ventilated by the Malaysian courts. As such, much time and effort will be expended in researching this area of law in preparing to oppose this action on the merits ...

[31] The defendant added in para. 9(e) thereof that "The issues of law relating purely to the interpretation of s. 41 of the Probate and Administration Act 1959 are somewhat complex".

[32] The defendant's own admission that further legal arguments would be required is sufficient by itself to defeat the defendant's application to strike out the plaintiff's OS under O. 18 r. 19(1).

[33] In our view, the plaintiff's OS clearly discloses a reasonable cause of action under s. 41, irrespective whether the defendant has probated the deceased's alleged will. Our perusal of the plaintiff's OS reveals, more specifically, the plaintiff's claim as a natural son of the deceased.

[34] Moreover, the plaintiff's OS cannot be said to be wholly unnecessary or irrelevant; or obviously unsustainable, and so the defendant's reliance on ground (b) is devoid of merits.

Deoxyribonucleic Acid (DNA) Test

[35] The defendant insisted that the plaintiff ought to have acceded to the defendant's request for a DNA test.

[36] The plaintiff's contention is that there is no legal requirement for the plaintiff (as an applicant for an order under s. 41) to undergo a DNA test and that the defendant's insistence is a red herring.

[37] The above submissions call for the determination of the following question:

> Does s. 41 require an applicant such as the Plaintiff to undergo a DNA test?

[38] So far as we are aware, prior to this appeal, this court has no opportunity to address this question although our High Courts have dealt with the issue of DNA test under other statutory provisions. There is no common law rule that empowers our courts to order a party to submit himself or herself to a DNA test. In our view, s. 41 does not either expressly or by necessary implication require an applicant such as the plaintiff to submit himself to a DNA test. This court is not at liberty to add words to s. 41 as that is the legislative function and power of Parliament. Our duty and power is to interpret the law as it is and not what as it ought to be.

[39] As alluded to above, our High Courts have considered this issue previously. By way of analogy, under other statutory provisions, this issue arose in *Peter James Binsted v. Jevencia Autor Partosa* [2000] 2 CLJ 906 HC. There was an application for maintenance in the Magistrate's Court. The learned Magistrate

allowed an application praying for an order that the respondent and the child undergo a DNA test. On appeal, KC Vohrah J (as he then was) set aside the Magistrate's order and held that:

> It is clear that there is no general power under legislation or through common law for any court in Malaysia to order any person to undergo a DNA test to ascertain paternity. If a person refuses to submit himself to such a testing, he is perfectly entitled to do so; a person cannot be subject to hurt within the meaning of s. 319 of the Penal Code against his will … a court cannot, in the absence of a specific legislative provision, order such person to submit himself to an unlawful act to be committed on his person.

[40] In *Ng Chian Perng v. Ng Ho Peng* [1998] 2 CLJ Supp 277 HC, the issue relates to the maintenance of a child. An application for the respondent to undergo a DNA test was refused by the learned Magistrate. On appeal, it was affirmed by the High Court. At p. 232 Abdul Kadir Sulaiman J (later FCJ) said ... the learned Magistrate was right in not addressing this issue of the refusal of the respondent to subject himself to the DNA test. The onus is on the appellant to prove that the subject child is illegitimate ...

[41] In the instant appeal, we take the view that the plaintiff's refusal to submit to a DNA cannot be construed as constituting a ground under O. 18 r. 19(1)(a), (b), (c) or (d).

[42] More specifically, the OS also does not constitute an abuse of the process of the court under ground (d). The mere fact that the plaintiff has sighted the alleged will does not prevent the plaintiff from seeking a remedy under s. 41 so as to put in place his rights, if any, under the law. The plaintiff's claim as a natural son of the deceased means that he has a genuine grievance against the deceased's estate, and that claim is neither illusory nor imaginary.

Conclusion

[43] By reason of the above, we allow this appeal, set aside the order of the High Court and substitute it with an order that the plaintiff's OS be remitted to the High Court to be heard before another judge. Costs of RM10,000 to the plaintiff. Deposit to be refunded to the plaintiff (appellant).