Mohamed Ismail bin Ibrahim and Another v Mohammad Taha bin Ibrahim [2004] SGHC 210

Case Number : OS 601221/2001

Decision Date : 22 September 2004

Tribunal/Court : High Court

Coram : MPH Rubin J

Counsel Name(s) : Mohd Muzammil (Muzammil Nizam and Partners) for plaintiffs; Mirza Namazie and Chua Boon Beng (Mallal and Namazie) for defendant

Parties : Mohamed Ismail bin Ibrahim; Hasnah binti Ibrahim — Mohammad Taha bin Ibrahim

Muslim Law – Majlis ugama islam (MUIS) – Issuance of fatwa dividing testator's estate – Whether division correct

Muslim Law – Majlis ugama islam (MUIS) – Testator's will giving one-third of estate as nuzriah to certain beneficiaries – Concept of nuzriah – Muis ratifying nuzriah segment of will -Validity of nuzriah segment of will – Whether nuzriah contravening principles of Muslim law

Muslim Law – Majlis ugama islam (MUIS) – Validator and witness of testator's will subsequently on Fatwa Committee that deliberated on validity of nuzriah segment of will – Whether validator and witness could and should have excused themselves from deliberations

22 September 2004 *Judgment reserved.*

MPH Rubin J:

Introduction

1 This case concerns the validity of a will made by Haji Ibrahim bin Abdul Samad ("the testator"), a Malay Muslim from Singapore. He passed away on 14 September 1997, having made his last will and testament on 9 December 1996, leaving behind a wife, three sons and seven daughters. The first and second plaintiffs are two of the children of the testator. The defendant is another son who is the executor of the testator's estate. The plaintiffs are challenging parts of the will.

2 The general issue in this action is whether certain parts of the declarations and bequests contained in the will accord with the principles of Muslim law applicable to Muslims of the Shafii school of law to which the testator and his heirs belong.

3 A specific issue that falls for determination concerns an aspect called "*nuzriah*". The term "*nuzriah*" does not appear or feature in any of the treatises, writings or books published by or attributed to any Muslim scholars or jurists. However, the court was informed by the expert witness who appeared for the defendant that the word "*nuzriah*" is derived from the word "*nazar*", that it is a minor *nazar* and that both terms connote the same concept. The term *nazar* means "vow or a solemn pledge" and is defined in s 2 of the Administration of Muslim Law Act (Cap 3, 1999 Rev Ed) ("AMLA") as an expressed vow to do any act or to dedicate property for any purpose allowed by Muslim law.

4 Another issue relates to the correctness or otherwise of the division of the property of the estate of the testator by the Legal or Fatwa Committee of the Singapore Islamic Council (Majlis Ugama Islam Singapura) ("Muis").

Sources of Muslim law

5 Briefly stated, there are four sources of Muslim law. In so far as the Sunni Muslims are concerned, they are: The Quran (the Holy Book), *Hadis* or *Hadith* (the traditions of the Prophet, *viz* the oral precepts delivered from time to time by the prophet and references to the daily mode of his life as handed down to posterity by his immediate followers), *Ijmaa* (consensus amongst highly qualified legal scholars), and *Qiyas* (reasoning by analogy or analogical deduction).

Muslim law of inheritance – a brief perspective

6 Muslim law and rules for dealing with the distribution of a dead person's property differ greatly from Western or other secular law. Muslim law or Sharia is derived from the Quran and the words and traditions of Prophet Muhammad himself, and is therefore believed to be of divine inspiration and not man-made.

7 Muslim jurisprudence imposes two principal restrictions on testamentary power. The first restriction concerns the quantum of bequests, where the rule is that a person may not dispose by will more than one-third of his property. The second limitation upon testamentary power (recognised by all four schools of the Sunni Muslims, the Shafii school being one amongst them) is that a testator may not make a bequest in favour of any of his legal heirs. In other words, a Muslim cannot by a testamentary disposition reduce or enlarge the shares of those who by law are entitled to inherit (see N J Coulson, *Succession in the Muslim Family*, (Cambridge University Press, 1971) at p 213; Asaf A A Fyzee, *Outlines of Muhammadan Law* (3rd Ed, 1964) at p 351 and Syed Ameer Ali, *Mohammedan Law* (6th Ed, 1965) Vol II, p 20. "Legal heir", in the Islamic context, is a term which is properly applied only to those relatives upon whom property devolves, after the demise of the owner, by operation of law. In Singapore, under s 111(1) of the AMLA, no Muslim domiciled in Singapore can now dispose of his property by will except in accordance with the provisions and subject to the restrictions imposed by the school of Muslim law professed by him. Under s 115 of the AMLA, the Syariah Court of Singapore is vested with the authority to issue the requisite inheritance certificate, setting out the names of the legal heirs and their respective shares in the estate of the deceased. Without a doubt, a legacy in favour of a legal or legitimate heir can only take effect with the unanimous consent of the co-heirs (see Dr Ahmad Ibrahim, *Islamic Law in Malaya*, (Malaysian Sociological Research Institute Ltd, 1965) at p 264).

8 Coulson comments (at p 214) that Sunni jurisprudence sees the essence of succession law to lie in protecting the interests of the legal heirs and preserving the balance between their claims as established under the sacrosanct scheme of inheritance. Bequests, however meritorious their purpose – in providing for cases of particular hardship, in fulfilling a charitable purpose or in performing what the testator conceived to be a personal duty left outstanding during his lifetime – are not allowed to defeat the entitlement of the legal heirs to at least two-thirds of the estate.

9 Further, s 60 of the AMLA specifically provides:

> 60.—(1) Whether or not made by way of will or death-bed gift, *no* wakaf or *nazar made after 1st July 1968 and involving more than one-third of the property of the person making the same shall be valid in respect of the excess beyond such one-third.*
>
> (2) Every wakaf khas or nazar made after 1st July 1968 shall be null and void unless —
>
> (a) the President shall have expressly sanctioned and validated or ratified the same in writing in accordance with the Muslim law; or

(b) it was made during a serious illness from which the maker subsequently died and was made in writing by an instrument executed by him and witnessed by 2 adult Muslims one of whom shall be a Kadi or Naib Kadi.

(3) If no Kadi or Naib Kadi is available as described in subsection (2)(b), any other adult Muslim who would not have been entitled to any beneficial interests in the maker's estate had the maker died intestate shall be a competent witness.

(4) This section shall not operate to render valid any will, death-bed gift, wakaf or nazar which is invalid under the provisions of the Muslim law or of any written law.

[emphasis added]

The will

10 The will, a subject matter of dispute before the court, was made in the Malay language and headed in the original with the word "*wasiat*", meaning "will". In so far as is material, the said will, translated in English and produced in court, reads as follows:

Will

In the name of Allah, The Most Gracious and Most Merciful.

Praise be to Allah, Lord of the Universe. Salutations and peace be upon our Prophet, Muhammad, his family and all his companions.

I, Haji Ibrahim bin Abdul Samad (S 0257773 I) sincerely bear witness that there is no God but Allah and Muhammad is His Messenger, in a state of good health and of sound mind hereby willingly and without coercion from anyone divide my property into three parts and they are as follows:

One third of my property has already been given in a manner known as NUZRIAH (Vow). That is, my bequeath [*sic*] shall come into force three days before my death if it is due to illness, or one hour before my death if it is sudden, to the names mentioned below in accordance with the percentages explained thus:

1. My son Mohamad Taha ……..……. 15%

2. My daughter Nyaros …… 10%

3. My daughter Apon ……. 10%

4. My daughter Zainun …… 10%

5. My daughter Amida …… 10%

6. My grandson Fakharuddin Arrazi Bin Mohammad Ismail .. 5%

7. My grandson Saiful Bahari ……..… 5%

8. My wife Jenab Bte Samat ……. 35%

Another one third is bequeathed as charities to two mosques equally and which names are mentioned below:

1. Ba Alawi Mosque … Luis Road … Bukit Timah … Singapore

2. Muhajirin Mosque … Braddell Road … Singapore

Another one third is divided in accordance with the Faraid law (Islamic Law of Inheritance) to all my beneficiaries including those whom I have given in a manner known as Nuzriah during my lifetime.

I hereby remind my children, wife and all my family to be devout towards Allah and to pray to Allah to forgive me. I give my consent for them to pay my fasting "fidiah" (monetary payment in lieu of obligatory fasting) through their "Ihsan" (goodwill) and perform the Pilgrimage as well as the Minor Pilgrimage or perform the Sacrificial Rites (Qurban). The handling of my body for the purpose of burial shall be carried out in accordance with the obligatory and customary rites in Islam.

I hereby appoint: Mr Mohammad Taha Bin Ibrahim to be my executor (administrator of my will). My instruction in this will is pronounced willingly by me before two witnesses whose names and signatures appeared at the bottom.

Pronounced by:

Signed

Haji Ibrahim Bin Abdul Samad

1. Witness: Syed Abdillah Aljufri signature: signed

2. Witness: Abdul Rahim Saleh signature: signed

Dated: 9th December 1996 in accordance with 28th Rajab 1417.

Witnessed and certified by me, Syed Isa Mohd Bin Semait.

Signed

Syed Isa Mohamed Bin Semait
Mufti of Singapore

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11 Since the word "bequeath", appearing in the second line of the third paragraph of the will, seemed syntactically out of tune, the court asked the counsel whether the right word should have been "bequest". On this, the court was informed by the court interpreter, with the concurrence of both counsel, that the correct word should have been "gift".

12 It must also be remarked at this juncture that the execution of the will by the testator on 9 December 1996 was witnessed by one Syed Abdillah Aljufri (since deceased) and one Abdul Rahim Salleh. The will was also certified and validated by the Mufti of Singapore, Tuan Syed Isa Mohd bin

Smith (the name "Smith" sometimes spelt as "Semait") ("Tuan Syed Isa") on the very date of its execution. It was said that the late Syed Abdillah Aljufri and the Mufti were two of the five members of the Fatwa Committee of Muis that considered the validity of the will and issued a ruling subsequently on 23 February 1998. Tuan Syed Isa, who appeared in this case as the defendant's expert, is still the Mufti and the chairman of the said Committee.

Chronology of events

13 Following the demise of the testator on 14 September 1997, the defendant, who is the executor and trustee named in the will, engaged the legal firm of M/s Mallal & Namazie with a view to obtaining probate. The plaintiffs, on their part, engaged another firm of solicitors, M/s Palakrishnan & Partners, who after lodging a caveat against the estate in the Registry of the Subordinate Courts, notified the other side on 17 December 1997 of their clients' intention to contest the will on the ground that the said will contravenes Muslim law, in that it purports to distribute only one-third and not two-thirds of the properties left behind by the testator. What happened next was that the defendant's solicitors wrote to the Fatwa Committee of Muis for an opinion. Admittedly, neither the plaintiffs nor their solicitors were consulted on the text of the request. The request was also not copied to the plaintiffs. In so far as is material, the said request reads as follows:

> 23rd January 1998
>
> We act for Mohammad Taha bin Ibrahim one of the lawful sons and the executor of the Will of the abovenamed deceased who died on 14th September 1997.
>
> We enclose herewith a copy of the deceased's Will and a certified translation thereof. You will note from the deceased's Will that same is broken up into three parts namely:-
>
> (a) A nazar which relates to 1/3rd of the deceased's estate;
>
> (b) A charitable bequest which relates to 1/3rd of the deceased's estate; and
>
> (c) The balance 1/3rd to be distributed in accordance with "Faraid".
>
> We write requesting you to let us have your views as to whether or not the nazar is a valid nazar having regard to the fact that :-
>
> 1. Same has been duly witnessed by two persons and certified by the Mufti; and
>
> 2. The deceased died [*sic*] after suffering renal impairment and advanced prostrate [*sic*] cancer (he was diagnosed as suffering from prostrate [*sic*] cancer in 1996) which the deceased was aware of at the time of making the Will which was made 9 months prior to his death. Some time in May 1997 4 months before the deceased['s] death he informed his executor about his nazar and his Will and handed him the original Will for his retention.
>
> Alternatively has there been any compliance with section 60 (2) (a) of the Administration of Muslim Law Act in that sanction, validation or ratification of the nazar has been made by the President, Majlis Ugama Islam Singapura.
>
> We also write requesting you to let us have your opinion as to whether in the event the nazar is valid the gift to the two mosques relates to 1/3rd of the entire property of the estate or 1/3rd of

the remaining two-third share therein of the estate having regard to the limit of the testamentary disposition to a 1/3rd share in Muslim estates.

In this event 2/3rd share in the remaining 2/3rd of the estate would be distributed in accordance with Faraid.

Your urgent response would be appreciated.

14 The defendant's solicitors on 23 February 1998 also wrote to the Syariah Court for the requisite inheritance certificate and obtained the same on 2 March 1998. In the said certificate, it was stated by the Syariah Court that the estate of the deceased should be divided into 104 shares and be apportioned as to 13 shares to the deceased's wife, 14 shares each to the three sons, and seven shares each to the seven daughters. This certificate is not a subject of debate before the court.

15 In the event, a *fatwa* was issued on 23 February 1998 and transmitted to the defendant's solicitors thereafter. On 6 April 1998, the defendant's solicitors forwarded to the plaintiffs' solicitors the said *fatwa* together with a copy of the testator's last will and the certificate issued by the Syariah Court. In their letter which enclosed all the aforesaid documents, the defendant's solicitors estimated the value of the testator's estate to be in the region of $2.1m.

16 The *fatwa* issued by Muis (as translated into English) reads as follows:

1. The firm of Mallal & Namazie forwarded a copy of the will made on 9th December, 1996 by the deceased, Haji Ibrahim Bin Abdul Samad. In the will, the deceased divided his estate into 3 parts, ie, 1/3 as nuzriah; 1/3 bequest for two mosques as stated therein and 1/3 according to faraid law.

2. They queried whether the nazar made in the will is valid or not and the part of the will for the two mosques is 1/3 of the whole estate or from the balance after distribution of nuzriah?

3. The Fatwa Committee opines that the nazar made in the will is valid. The 1/3 for the two mosques is from the balance after distribution of nuzriah. Or to make the picture clearer, the estate of the deceased is divided into 27 parts as follows:

nuzriah	9 parts
legacy for the two mosques	6 parts
beneficiaries (distribution according to faraid)	12 parts
Total	27 parts

MUIS's translation of para 3:

(The Fatwa Committee is of the opinion that according to Islam Law the nazar is valid. The gift by wasiat to the two mosques relates to 1/3 of the remaining two-third share therein of the estate. That is, the estate should be distributed as follows

nazar (sic?)	9 parts

the charitable bequest to the two mosques 6 parts

beneficiaries according to faraid 12 parts

Total 27 parts)

Sgd

Syed Isa Mohd B Semait
Mufti of Singapore
Chairman Fatwa Committee
Majlis Ugama Islam Singapura.
Dated: 23rd February, 1998

17 The plaintiffs did not accept the advice contained in the *fatwa*. In the meantime, two of the children of the testator, Apon bte Ibrahim and Amida bte Ibrahim, both beneficiaries under the *nuzriah* segment as well as the legal heirs segment, renounced their purported shares under the *nuzriah* segment and made statutory declarations to confirm their renunciation. Although solicitors for the plaintiffs wrote to Muis expressing their clients' protests over the *fatwa* whilst bringing to its attention the said renunciations, it was to no avail. In a letter dated 28 September 1999, Muis informed the plaintiffs' solicitors in the following terms:

We refer to your letter of 1 Jun 99. We would like to apologise for the late reply.

2 Your question was referred to the Mufti who is also the Chairman of the Fatwa Committee. Nuzriah and Will differs in the sense that the latter only take effect after the deceased death. The former, however, is legally effective in Islamic Law upon the time mentioned in the Nuzriah.

3 Nuzriah does not constitute a Will or form part of a Will, which rightfully should be allocated 1/3 of the whole estate and not more. Nuzriah, on the other hand, has no maximum limit. Drawing up a Nuzriah and a Will at the same time from one particular person does not contravene the Islamic Law, even if the total shares exceeded 1/3 of the total estate.

4 Our Fatwa issued on 3 Aug 98, clearly stated that the Nuzriah is still valid despite a party or the whole parties' disclaim over the Nuzriah's shares. Thus, despite her statutory declaration, the person Apon Binte Ibrahim is still considered as the rightful and legal owner of the shares mentioned in the Nuzriah and if she wishes to disclaim it, she may give the shares to any party that she wishes to.

18 As the events unfolded, the plaintiffs filed this originating summons on 24 August 2001. The application was amended on 11 September 2001 seeking the following orders:

1. a declaration that the Will of Haji Ibrahim bin Abdul Samad alias Nordin bin Samat, deceased, dated 9th December 1996 is valid only according to Islamic law of inheritance (Faraid) as regards the bequeaths [*sic*] to the 2 mosques stated therein as it is within one-third of the estate of the testator but the remaining two-thirds share would be divided amongst the lawful beneficiaries of the deceased in accordance with the Certificate of Inheritance issued by the Syariah Court of Singapore dated 2nd March 1998;

2. further, a declaration that paragraph 3 of the Will purporting to bequeath on the

Testator's property before his death in a manner known as NUZRIAH, be void;

3. that the Defendant shall not distribute the assets of the estate to those listed in para 3 of the said Will of Haji Ibrahim bin Abdul Samad alias Nordin bin Samat, deceased;

4. costs for the Plaintiffs;

5. any other orders or directions as deemed fit by the Honourable Court.

19 There is one further detail that requires mention here. On 5 April 2002, Haji Maarof bin Haji Salleh, the then President of Muis, issued a belated ratification of the *nuzriah* segment of the will. The said letter, exhibited in the affidavit of the defendant filed on 9 April 2002, reads as follows:

I have read the copy of the document attached hereto entitled "WASIAT" which was executed by the Deceased on 9 Dec 1996.

The said document contains a "Nuzriah" over 1/3rd of the Deceased's assets.

I hereby sanction, validate and/or ratify the said "Nuzriah" in accordance with section 60(2)(a) of the Administration of Muslim Law Act (Chapter 3, 1999 Revised Edition).

Evidence and arguments

20 As could be seen from the foregoing will, there are three segments: the first concerns the much contested *nuzriah*, the second pertains to two named mosques and the third deals with the purported shares of the legal heirs. Although there were a number of affidavits filed by the parties to this litigation raising a number of disputed facts, oral and cross-examination, by choice, were confined only to one expert each. The expert for the plaintiffs is Dr Ismail bin Mohd (alias Abu Hassan), an Assistant Professor from the International Islamic University of Malaysia. His opinion is contained in three affidavits filed by him, on 22 October 2001, 3 June 2002 and 20 January 2003. The defendant's expert is Tuan Syed Isa. He is none other than the Mufti of Singapore, the one who had validated the will of the testator on the day it was made and the one who presided over the Fatwa Committee later and gave a view in favour of the defendant. His opinion is contained in three affidavits filed by him on 8 April 2002, 3 October 2002 and 24 April 2004 respectively. Both witnesses testified in person and were questioned extensively. The significant aspects of their evidence can be recapitulated as follows.

Plaintiffs' expert's evidence

21 In Dr Ismail's opinion, the *nuzriah* segment, whereby the testator purported to give one-third of his estate to a number of legal heirs, is invalid under the laws of Islam. Dr Ismail said that the term "*nuzriah*" could not be found in any of the books or treatises published by Muslim jurists. However, the word "*nazar*" (vow) appears in several textbooks and foremost amongst them is Nawawi's *Minhaj et Talibin (A Manual of Muhammadan Law According to the School of Shafii)* (W Thacker & Co, 1914). According to Nawawi (see pp 495–499), and annotated in Dr Ahmad Ibrahim's *Islamic Law in Malaya* ([7] *supra* at pp 281–282):

Vows are of two kinds—

1. A vow with a penalty, consisting, *eg*, in the following words:— "If I speak to him I engage before God to fast," or "to enfranchise a slave." If not kept this vow obliges the person

formulating it to accomplish the expiation prescribed for perjury, or, according to one authority, to accomplish the expiatory action promised. A single authority gives the person who owes expiation a choice between the expiation for perjury and the expiatory act promised. [It is to this latter doctrine I give the preference, as do the jurists of Irak.] On the other hand, a person who says, "If I enter such-and-such a house I engage to perform the expiation prescribed for perjury["], need only undergo the expiation for perjury.

2. A vow of gratitude, consisting in an engagement towards God to acquit oneself of some good work in the hope of obtaining from Him some favour or of avoiding some calamity. This vow may be formulated, for example, in the following terms:— "If God heals my sickness I engage to accomplish before Him such-and-such an act," or "I engage to perform such-and-such an action." A promise such as this should be accomplished if the event hoped for takes place, *ie* if the condition is fulfilled. The accomplishment of the promise is obligatory even where it is not made dependent upon a condition, for example, if one says, "I engage before God to fast."

A vow may not have for its object an action that is unjust or that is already obligatory. A person who vows to perform some indifferent action, or to abstain from it, need not keep his engagement, provided he acquits himself of the expiation for perjury, at least according to the theory which is to be preferred.

22 According to Dr Ismail, the portion purportedly given away by the testator under the name "*nuzriah*" does not seem to fit, even in the least, the examples and illustrations cited by Nawawi and Ahmad Ibrahim in their books, nor does the term conform or accord with the principles underlying the doctrine of *nazar* expounded in those writings. He said that, to the best of his knowledge and research, this *nuzriah*, as it is characterised by the defendant's expert, is not known nor practised in Indonesia, Malaysia or any part of the Muslim world of the Shafii school. After dealing with the general principles of the Muslim law of inheritance and some unique features of Muslim jurisprudence relating to (a) "*wakaf*" (sometimes spelt as "*waqf*") which means a permanent dedication by a Muslim of any movable or immovable property for any purpose recognised by Muslim law as pious, religious or charitable, (b) "*wasiyyah*" (sometimes spelt as "*wasiyya*", "*wasiyyat*" or "*wasiat*"), meaning bequest or will, and (c) "*hibah*" or "*hiba*", meaning gift, Dr Ismail said (see paras 29 to 32 of his opinion, referred to in the plaintiffs' affidavit of 22 October 2001):

29. … A Muslim who leaves heirs cannot dispose by will of more than one-third of what remains of his estate after payment of funeral expenses and debts. The remaining two-thirds of the estate are distributed according to the inheritance law among his heirs.

30. It is clear that the Will made by Haji Ibrahim as to limit one third of his property to be divided according to the system of *faraid* is in contradiction to the principle of *faraid*. (See para 29). The legal heirs will take their portion of inheritance according to their quantum of entitlement only after the settlement of all necessary rights as previously mentioned. The remainder can either be less or more than one third of the whole estate.

31. It can be noticed that Haji Ibrahim' Will, to some extent, disregards the Muhammadan Law and offends it by purporting to bequest his estate by way of *nuzriyyah*, *waqf* or charitable bequest (*sadaqah*), and limiting one third to be divided according to *faraid*. The fact is that the Will is void to the extent of its inconsistency with the tenets of *shariah* and to the extent of its *ultra vires* with the right of the legal heirs. Meaning to say that the bequeathable third is valid and any exceeding portion is invalid subject to the consent of the legal heirs. If someone bequeaths half or the whole property of his estate to the non-legal heir eg his adopted son, it may not render the will to be void, it is valid to the bequeathable third only. Any exceeding

amount, which is *ultra vires* to the legal heirs, is subject to their consent. But, if he bequeaths that one of his son [*sic*] should be excluded from the entitlement of inheritance, the will is void since the son is the legal heir. Therefore, the Will of Haji Ibrahim, cannot in any way to be said *void ab initio*, as we have to scrutinize it since the *shariah* has drawn a way to harmonize the wish of the proprietor (the deceased) and the welfare of the legal heirs.

32. In the light of the above analysis, it is hereby submitted that the gift (*hibah*) made in the Will by way of *nuzriyyah* does not comply with the principles of gift (*hibah*), nor does it consistent [*sic*] to the principles of *nazar* or *nuzriyyah*. It is covered and should be regulated by the principle of bequest whereby only two persons who are non legal heirs may entitle for the portion. The waqf or charitable bequest (sadaqah) is valid but subject to the principle of bequest (wasiyyah). Therefore, both the *nuzriyyah* and the *waqf* or charitable bequest (*sadaqah*) should subject to the principle of the bequeathable third. The Will as to divide the remainder (1/3) purported by the testator according to *faraid* is tantamount to the principle of *faraid* itself and bequest, and therefore should be disregarded.

Defendant's expert's evidence

23 Tuan Syed Isa's opinion, in so far as is material, as contained in his first affidavit filed on 9 April 2002, is as follows:

6. Firstly, I wish to state that nuzriahs are practised among Muslims of the Shafei sect. Nuzriahs actually originate from nazars and can be considered to be a form of nazars.

7. Secondly, although the document executed by the Deceased is entitled "Wasiat", which roughly means "Bequest", the Nuzriah created by the Deceased is supposed to take effect 3 days before the Deceased's death, or 1 hour before his death in the case of a sudden death. The Nuzriah is therefore a transaction made during the life of the Deceased, and it cannot be classified as a bequest, ie wasiyyah. Accordingly, the Muslim law of bequests, ie Wasiat, cannot apply to the Nuzriah.

8. Since the Nuzriah was made during the life of the Deceased, it follows that the Muslim law of succession, i.e. faraid, is not applicable to the Nuzriah.

9. Furthermore, a nuzriah must be distinguished from a hiba, i.e. gift. Conceptually, a nuzriah is distinct from a hiba. Therefore, the Muslim law concerning hibas cannot be applied to nuzriahs.

10. According to the opinion of Imam Nawawi, one may make a nazar to perform any work, provided that it is not obligatory upon him, such as looking after a sick person, accompanying a funeral to the grave or making a salutation.

11. Both of the Plaintiffs' experts are of the opinion that the Nuzriah created by the Deceased by his will dated 9 December 1996 is invalid under Muslim law. In the case of Asst Professor Dr Ismail bin Mohd, the objections raised by him to the Nuzriah can be summarised as follows:

a. The Deceased had already bequeathed 1/3rd of his assets to the mosques. To allow him to bequeath any further part of his assets by way of the Nuzriah would infringe the 1/3rd rule and be contrary to faraid (see paras 30-31 of his Opinion).

b. As a bequest ("wasiat"), the Nuzriah would infringe the rule that prohibits a bequest to legal heirs beyond their entitlement under faraid (see para 11 of his Opinion).

c. As a gift ("hiba"), the Nuzriah would infringe the rule that a gift must be completed by transfer of title or ownership to the donees. It is invalid except for 2 donees (see paras 10, 15 of his Opinion). Also, it infringes the rule that the gift must treat close relatives equally (see para 14 of his Opinion).

d. The Nuzriah per se does not fulfil the requirements for a nazar and does not fall within the divisions mentioned or clarified by Nawawi (see para 13 of his Opinion).

12. Based on the principles I have mentioned above, my response to Asst Professor Dr Ismail bin Mohd's opinion is as follows:

a. Since the Nuzriah is a transaction made during the life of the Deceased, the 1/3rd rule is not applicable. The Nuzriah is not part of the distribution of the Deceased's estate upon his death.

b. Since the Nuzriah is a transaction made during the life of the Deceased, it cannot be treated as a bequest. The rule that prohibits a bequest to legal heirs beyond their entitlement under faraid is therefore not applicable.

c. The Nuzriah is not a hiba and must not be treated as one. It follows that the rules of hiba are not applicable.

d. There is no basis for saying that the Nuzriah does not fall within the divisions mentioned or clarified by Nawawi.

24 In his testimony, Tuan Syed Isa maintained that the giving away of property by an individual by way of *nuzriah*, as was done in the will of the testator, is not new to Singapore; Muis has registered 36 such *nuzriah* since 1997 and the practice is at least 500 years old. In this regard, reference was made by him to an Arabic compilation with the title *Bugyat ul Mustarsyideen (The Aspiration of the Seekers of Guidance)*, put together by a much respected Mufti of Hadramout, Sayyid Abdul Rahman bin Muhammad bin Hussain bin Umar Al Masyhuur Ba'alawie. This work is reported to contain the differing viewpoints of two well-known religious scholars and the summary of some edicts by Ibn Ziyad. The extracts referred to the court by Tuan Syed Isa will be referred to later in this judgment.

25 Tuan Syed Isa said that the doctrine of *Nazar* is rooted in a verse from the Quran (Sura 76: verse 7 (*Dahr*, or Time, or *Insan*, or Man), reproduced in Yusuf Ali's *The Glorious Quran – Translation and Commentary*, (2nd Ed, 1977) which reads:

> They perform (their) vows,
> And they fear a Day
> Whose evil flies far and wide.

26 Tuan Syed Isa, in his testimony, said that the property, delineated as *nuzriah* by the testator, should not be regarded as a bequest and consequently did not offend the laws of inheritance under Muslim law because the said segment was given away during the testator's lifetime, although it was to take effect three days before the death of the testator in case of illness, or one hour before death, if death were to occur suddenly. Tuan Syed Isa also expressed his view that the

portion ear-marked as *nuzriah* by the testator could not be regarded under Muslim law as *hiba* (gift) because of the absence of actual delivery by the donor and acceptance by the donees of the subject matter. He further claimed that the *nuzriah* portion became vested in the beneficiaries named under the said segment on 9 December 1996 itself, the very day the will was executed.

27 Tuan Syed Isa was asked why the testator was still seen to be holding on to the property said to be divested if the *nuzriah* portion was indeed divested by the testator as on 9 December 1996 by declaring that "my bequeath [*sic*] [gift] shall come into force three days before my death if it is due to illness, or one hour before my death if it is sudden". Tuan Syed Isa replied, "Actually your Honour, when *nazar* is made, he [the testator] should implement it right away, immediately … Yes, it should be given physically."[1] Another highlight in his testimony was that although the testator had under his will divided his estate into three equal parts, the distribution in equal parts to all three segments would offend the Muslim law of inheritance, hence resulting in the Fatwa Committee's apportionment of the estate as to nine parts to the *nuzriah* segment, six parts to the mosques segment and 12 parts to the legal heirs segment.[2]

28 Tuan Syed Isa mentioned further that, on 9 December 1996, when the testator appeared at the Muis offices for his will to be witnessed and consequently to be certified, Tuan Syed Isa's conversation with the testator was brief and there was no discussion or inquiry concerning why the testator was demarcating a portion of his estate by way of *nuzriah*. He disclosed that although there were several such *nuzriah* registered with Muis, this was the first case where a *fatwa* was requested. He also disclosed that the deliberation by the Fatwa Committee lasted for about 30 minutes.[3] In relation to the implications of s 60 of the AMLA ([9] *supra*), the court could not get much input from Tuan Syed Isa, since counsel for the defendant rose to say that Tuan Syed Isa was called to court to testify only in relation to Muslim law and he would be ill-equipped to handle questions on statutory provisions.[4] This was most unfortunate, since a *fatwa* issued without an understanding of s 60 of the AMLA which, amongst other things specifically deals with *nazar*, is, in my view, bound to be deficient as we shall see later. Tuan Syed Isa, however, conceded that there was no agreed view amongst scholars concerning the particular practice of *nazar* or *nuzriah*.[5]

29 Tuan Syed Isa also stated that even if a person were to give away his entire estate by way of *nuzriah* to any of his preferred legal heirs, it was lawful and valid according to Muslim law.[6] This view is a reiteration of a statement contained in the letter dated 28 September 1999 ([17] *supra*) from Muis addressed to the plaintiffs' solicitors, which reads:

> Nuzriah, on the other hand, has no maximum limit. Drawing up a Nuzriah and a Will at the same time from one particular person does not contravene the Islamic Law, even if the total shares exceeded 1/3 of the total estate.

Arguments in a nutshell

30 Lengthy arguments were presented by both counsel, contending for the opposites. I do not propose to rehearse them here at length and they will be referred to later in this judgment, if need be. In essence, the argument by the plaintiffs' counsel was that the *nuzriah* segment is invalid; it is repugnant to the principles of Muslim law and the apportionment attempted by the Fatwa Committee is not consonant with the plain language of the will, which calls for equal portions to all three segments. Counsel for the defendant, on the other hand, contended that the *nuzriah* is well entrenched in Singapore; the wording of the will is such that the said segment cannot be regarded as a bequest; and the division re-done by the Fatwa Committee was to give effect to the principles of Muslim law. Defendant's counsel further submitted that the issue whether the *nuzriah* is valid or not had been considered by the Fatwa Committee and, although the ruling is not binding on this court, it

must, nonetheless, be accorded the weight it deserves. He added further that in the event the court were to hold that the *nuzriah* is invalid, no issue of apportionment between the *nuzriah* and the mosques segment arises and that the mosques segment should receive the entire one-third share.[7]

Decision

31 A principal restriction in Muslim law, as has been declared in all the authoritative works and treatises, and referred to in s 114 of the AMLA, is that a testator is not entitled to dispose of more than one-third of the property belonging to him at the time of death, and that the residue of his property must descend in fixed proportions to his legal heirs unless consent is given by all legal heirs to any deviation from the rule. In Singapore, under s 115 of the AMLA, the Syariah Court is charged with the responsibility of issuing the requisite inheritance certificate setting out the said fixed proportion of each heir.

32 The principles stated above have been consistently re-affirmed in several reported cases in Singapore and Malaysia, both before and after the coming into force of the AMLA.

33 In *Shaik Abdul Latif v Shaik Elias Bux* (1915) 1 FMSLR 204, the appeal court held (as stated in the headnote of the report):

> [U]nder Mohammedan Law a testator has the power to dispose of not more than one-third of the property belonging to him at the time of death; and that the residue of such property must descend in fixed proportions to those declared by Mohammedan Law to be his heirs unless the heirs consent to a deviation from this rule …

34 The foregoing view was amplified in *Siti binti Yatim v Mohamed Nor bin Bujai* (1928) 6 FMSLR 135, where the High Court held that the will of a Muslim which attempts to prefer one heir by giving him a larger share of the estate than he is entitled to by Muslim law is wholly invalid as to such bequest without the consent of the other heirs.

35 The High Court in Singapore also has affirmed the above-stated principles in a number of cases (see: *Re Fatimah Binte Mohamed Bin Ali Al Tway, Deceased* [1933] 1 MLJ 211 ("*Re Fatimah*"); *Abdul Jabbar v M Mohamed Abubacker* [1940] 1 MLJ 286 – although this case involved a Hanafi, the applicable principles are nonetheless the same in relation to bequests; and *Re Estate of Siti bte Naydeen* [1984–1985] SLR 468). I shall revert to *Re Fatimah* later in this judgment.

36 Returning to the issues before this court, the first question relates to whether the property purportedly given away by the testator as *nuzriah* is a bequest, gift or a valid *nazar*. The plaintiffs' contention is that it is a bequest that offends the Muslim law on inheritance. The defendant, whilst saying that it is not a gift, maintains that it is a *nuzriah*, which is something given during the life of the testator.

37 It must be remarked at the outset that the phraseology used by the testator in the will, particularly in relation to the *nuzriah* segment, lends itself to much difficulty and confusion. First, the document is headed as "*wasiat*", meaning "will". Next, the document, as translated and produced to the court, appears on the face of it to present itself either as a bequest or a gift. The operative words are: "my bequeath [*sic*]". The word "bequeath" is plainly a wrong rendering of the relevant Malay word in the original document. It is either "bequest", "bequeathal" or some other word. The court interpreter said that the correct translation is "gift". The defendant's side, not surprisingly, shies away from both the words, for if, indeed, it is a bequest, the said segment substantially becomes void, unless consented to by all the legal heirs; if it is, on the other hand, a gift, there is no

running away from the fact that in the absence of delivery and acceptance, the segment also fails. So the question is: Could this be a valid *nazar*?

38 The concept of *nazar*, as described by Nawawi and other writers, is of two kinds: a vow with a penalty or a vow of gratitude. The *nazar* or *nuzriah* as mentioned in the will, is certainly not one of penalty. Is it then a vow of gratitude? The defendant's expert, Tuan Syed Isa, claims that the present *nuzriah* is one of good deed or charity,[8] implying that it is more akin to a vow of gratitude. But where is the evidence to underpin such a claim? As it stands, the will is unhelpful and silent as to the backdrop of any such vow. Tuan Syed Isa, who attended to the testator at the time the will was executed, was also unable to throw any light on the background since he neither inquired nor was told by the testator of the reasons why this *nuzriah* was made.

39 Tuan Syed Isa, in his evidence, said that *nuzriah* is a minor *nazar* and the concept of *nazar* is anchored in the Quranic verse (Sura 76, verse 7, [25] *supra*). In this regard, it is instructive to make reference to p 1656 of Yusuf Ali's *The Glorious Quran — Translation and Commentary* ([25] *supra*), where the author appends a footnote to the said verse (n 5837), which reads as follows:

> The vows must be vows of spiritual service, which of course includes service to humanity, such as is mentioned in the next verse [Sura 76, verse 8]. They are Devotees of God, and they must perform all vows and contracts [Sura 5, verse 1 and n 682]. …

40 Looking at the will objectively, it is difficult to discern any content of spiritual service, service to humanity or any existing obligation to fulfil a contract in the *nuzriah* segment. On the face of it, it appears to be no more than a direction by the testator to give an additional portion of his estate to some of his children and grandchildren. It is clearly an expression of preference. If the portion delineated was given away during his lifetime by the testator to the named beneficiaries, it would have constituted a gift *inter vivos* and the plaintiffs would not have been in a position to challenge the said direction, for there is no legal impediment in Muslim law for a person to give away any amount of his wealth or assets during his lifetime. But in the case at hand, contrary to the assertion of the defendant's expert witness, the property is not divested by the testator on 9 December 1996, because of the testator's express stipulation that his "bequeath [*sic*]" or gift shall come into force only three days before his death in case of illness and one hour before his death if it is sudden.

41 In my evaluation, with the greatest respect to Tuan Syed Isa and his undoubted piety and sincerity, his analysis does not stand up to scrutiny. Let me elaborate.

42 Tuan Syed Isa mentioned that the *nuzriah* is not new to Singapore and it goes a long way back. In this regard, he also made reference to an anecdote cited as "case F" in *Bugyat ul Mustarsyideen* ([24] *supra*), of a person making a conditional "*nadzr*" (*nazar*) "in favour of his daughter to give her jewellery that [was] in her keeping and to give money to the rest of the children that is to take effect three days before his death if he dies of sickness and an hour before his death if he dies a sudden death". The said anecdote is immediately followed by the sentence: "Both the 'nadzrs' are valid."

43 Whilst I do not propose to second-guess the scholarship and erudition contained in the said commentary, it should be remarked at once that the cover of this commentary itself exhibits a caveat that the work contains not a single point of view but the differing viewpoints of two well-respected *shaiks* (leaders). In any event, the translation produced to the court is so mangled that it is very difficult to deduce any central principle with a measure of certainty.

44 Counsel for the defendant, through Tuan Syed Isa, invited the court's attention to yet

another Arabic treatise, *Syarh ul Yaquut un Nafees (Commentary on the Precious Ruby)* by Muhammad bin Ahmad Asy Syatiri. A translation of pp 432 to 434 from the third volume of the book, contains the following:

> A common scenario is a vow (nadzr) in favour of some children with the exclusion of others. This is an area of difference amongst the scholars but we must appreciate that a man may have a number of children and amongst them a small child and so he bequeaths part of his wealth by way of a nadzr in favour of the small child for he has already married off the older ones and this one he has not married him off or because he is unable to support himself. Is such a nadzr valid? They (scholars) have said that if he selected some beneficiaries and excluded others and he intends to deprive, there are strong differences in it. Ibn Hajr said that it is permissible outwardly even though he may intend to deprive but if he does not intend to deprive but rather that one of them (children) possesses excellence in knowledge or goodness or piety, is this nadzr valid? They (scholars) have said that it is valid but there are scholars who have ruled that it is invalid even in this scenario and amongst them is Ibn Ziyad and others from the scholars of Yemen but Ibn Hajr and others have ruled that it is valid. … However if there is a difference between the two categories like children and brethren, if one makes a nadzr in favour of his brothers and excludes his children, the nadzr is unanimously valid.

45 The passage cited above, in my view, shows that, at best, not all but a few hold the view that a vow in favour of some children over others may be valid in some exceptional circumstances such as necessity and want of support. Furthermore, that passage also underlines that there are strong differences amongst the scholars as regards the vow illustrated. There is no indication from the said passage that scholars have an agreed position to give validity to the vow. There is clearly an absence of consensus or *Ijmaa* and in the premises, the passage cited does not seem to advance the stand-point of the defendant.

Nuzriah: Bequest, gift or something else? When does it vest?

46 It is an uncontested position that if the first segment of the will, styled as a *nuzriah*, were to be regarded as a bequest, it would doubtless run counter to the principles of Muslim law concerning inheritance. The plaintiffs' position is that from whichever angle you look at the so-called *nuzriah*, it is nothing but a bequest. Counsel for the defendant argues, on the other hand, that it is neither a bequest nor a gift but a device of its own genre, practised over a long period of time and had presently received a stamp of approval from the Fatwa Committee. To recall the words of Tuan Syed Isa in paras 6 to 8 of his affidavit filed on 8 April 2002, it is a transaction made during the life of the testator; it cannot be classified as a bequest, nor could it be considered a gift. He also ventured to suggest that a Muslim could give away the entire portion of his estate by way of *nuzriah* to a preferred heir and that would be valid according to Muslim law.

47 Counsel for the plaintiffs invited my attention to *Re Fatimah* ([35] *supra*), a decision by the High Court of the Straits Settlements dealing with an Arabic document purporting to be a "*nasr*" (same as the present *nuzriah* or *nazar*). The judgment of Sproule ACJ at 211–212 bears reproduction almost in full. It reads thus:

> The position appears to be that Testatrix wished to make this gift but she or her relatives and advisers were doubtful whether by so doing she might not exceed the power of disposition of more than one third of her Estate without the consent of her heirs as required by Mohamedan Law. They appear to have hit upon the solution of a fiction *nasr* to save testatrix from all danger of disconforming from the law of Islam.

A *Nasr* is a kind of bargain with the Almighty. A donor vows, conditionally upon recovery from an illness, or the fulfilment of some other dear wish, that he will make a gift, it may be a sacrificial offering, it may be to charity or to some individual for the sake of God. If the heart's wish be granted then the vow in God's name becomes irrevocable by a devout Mohamedan.

In our case there is no evidence of any prayer for the granting of any dear wish, nor of the vouchsafing of that prayer. There is moreover no evidence of a vow, made in advance, to become binding conditionally upon the granting of any such prayer. There appear to be no more than the legal fiction of a *nasr* intended to ensure a devout Mohamedan from possibly infringing the restriction placed by the Islamic law upon disposition of *wasihat*.

The *nasr*, moreover appears to call for performance of the gift immediately, irrevocably and *inter vivos*. … The gift is to be deemed to be of effect three days before her death if natural one day before, if sudden.

It is very clear to me that in neither case could the gift actually take effect at all except after and by reason of the donor's death. …

For these reasons and upon the facts as I see them I hold that Testatrix really intended by this instrument to make a testamentary disposition, that her gift was revocable and that it is expressed and was intended only to take effect conditionally upon and by reason of and subsequent to her own death. I add that even in form it appears sufficiently to conform to our Wills Ordinance.

For these reasons I decide this issue in favour of Syed Sallim, and hold that here was a good Codicil and a good testamentary disposition. I give costs to both parties out of the general residue, to be taxed as between Solicitor and Client, I add that the fear of Testatrix's amateur legal advisers appears to be groundless and that her Will and Codicil together do not after all appear in fact or quantum to transgress the prohibition of Mohamedan Law against disposal by Will of more than one third of a Testator's Estate, although as I have stated the transgression in a case like ours of such a prohibition would not invalidate the Will.

I send the Petition back to the Registrar for formal proof of execution of the Codicil and a grant of Probate accordingly.

48 It is clear from the reasoning of Sproule ACJ that the "*nasr*" made by the deceased in *Re Fatimah* is a testamentary disposition and takes effect "after and by reason of the donor's death". This decision, no doubt, weakens the very foundation of the defendant's contention that the present *nuzriah* takes effect from the day it was made and that it cannot be regarded as a bequest.

49 Proceeding further, the testimony of Tuan Syed Isa, reaffirming a statement by the Fatwa Committee in its letter dated 28 September 1999 ([17] *supra*) that *nuzriah* has no maximum limit and drawing up a *nuzriah* and a will at the same time by one particular person does not contravene Muslim law even if the total shares exceeded one-third of the total estate, does not seem to cohere with the letter and spirit of s 60(1) of the AMLA, which states that whether or not made by way of will or death-bed gift, no *wakaf* or *nazar* made after 1 July 1968 and involving more than one-third of the property of the person making the same shall be valid in respect of the excess beyond such one-third.

50 Counsel for the defendant seems to suggest – although he is a little ambivalent in this regard[9] – that the restriction under s 60 of the AMLA applies only to "*nazar am*" (a *nazar* intended wholly or in part for the benefit of the Muslim community generally or part thereof as opposed to an

individual or individuals – see s 2 of the AMLA) and not to a private *nazar*. I must remark immediately that this submission is clearly erroneous.

51 In my view, s 60 of the AMLA does not make any distinction between private and public *nazar*. The argument that the legislature, by enacting the said section, merely intended to impose a one-third restriction to *nazar* of a public nature and not to private *nazar* is plainly unsustainable. There is absolutely no juridical basis for the legislature to put in place a one-third limit only to a *nazar* of a public nature and exempt the private *nazar* from such a limit. In my opinion, the language of s 60 of AMLA leaves no room for ambiguity. It was put in place to reinforce a fundamental Sharia doctrine that a Muslim can only give away, either by way of will or death-bed gift, one-third of his estate as *nazar* or *wakaf*. The doctrine of death-sickness and death-bed gift ("*mard al-maut*" or "*mardul-mawt*" or "*mar-zul maut*") is not in issue in this case. However, for the benefit of those who are not familiar with Muslim law, I should add that the doctrine of death-sickness or death-bed gift is concerned with the legal effect of transactions entered into by persons in their death-sickness (see Coulson, [7] *supra*, at p 259; Fyzee, [7] *supra*, at pp 363 and 364).

52 It is also ironic that the defendant, through his solicitors, applied to Muis and caused its former President, Haji Maarof Salleh, to ratify the present private *nazar* or *nuzriah* on 5 April 2002 under s 60 of the AMLA. If the said section is applicable, as is being contended now, only to public *nazar* or *nazar am*, why were steps taken by the plaintiffs to ratify a private *nazar*? The attempted explanation by counsel that it was an exercise in error[10] is found by me to be weak and contradictory.

53 Returning to the wording of the *nuzriah* segment in the will, although it reads that the "property has already been given", it was not in fact given away at the time of execution, since the testator qualifies the foregoing with a stipulation that his "bequeath [*sic*]" shall come into force three days before death in case of illness and one hour before death, if sudden. Death, no doubt, is the only certainty. But can any one predict beforehand with any degree of certainty that the death of someone will occur on a particular date and hour? The fiction devised, with great respect to its authors, poses a puzzle of epic proportions that no mere mortal can ever hope to solve. In this regard, I should commend Tuan Syed Isa for his candidness when he conceded that whatever property a person intends to give away by way of *nazar* should be given away immediately without any postponement.

54 There is one further point on this subject. In the course of his evidence, Tuan Syed Isa was asked whether invocation of the name of God was not an essential pre-requisite for any valid *nazar*. His attention in this respect was drawn to a passage at p 259 (n 5) of *A Digest of Moohummudan Law* (Smith Elder and Co, 1865) by Neil B E Baillie (one of the authoritative books commended in s 114 of the AMLA), which reads:

> The *nuzr* [*nazar*] is properly a vow taken for God's sake, to do something that is good, or abstain from something that is evil. A man has said, "If I recover from this sickness, I will sacrifice a sheep," and he does recover; yet nothing is incumbent on him, unless he had said, "If I recover, then for the sake of God I am under an obligation to sacrifice." *Fut Al*, vol ii p 92.

Baillie cites in this regard *Futuwa Alumgeere* (vol ii, p 92), a celebrated digest of Muslim law prepared by the command of the Emperor Aurung-zebe of India, during the Moghul period. Tuan Syed Isa's reply, in this regard, was that a formal invocation of God's name is not necessary to constitute a valid *nazar* or *nuzriah* by its maker and that the invocation is implicit in the very pronouncement of the word "*nazar*" or "*nuzriah*". Although the views expressed by Baillie in his book as well as by Sproule ACJ in *Re Fatimah* do not seem to sit well with the comments made by Tuan Syed Isa, I am of

the view that this is a matter eminently suitable for discussion by Muslim scholars at a later time and a ruling one way or the other is not crucial to the resolution of the dispute at hand.

Fatwa Committee deliberations

55 There are many troubling questions concerning the manner in which the will of the testator came to be certified, validated and subsequently ratified. Although no negative motive can be attributed to Tuan Syed Isa, his validation of the will on the day it was executed and his predisposition in favour of its construction should have effectively ruled him out from partaking in the deliberation of the Fatwa Committee that upheld its validity. It is an important principle of Western as well as Muslim jurisprudence that a person cannot be a judge in his own cause. Whilst I accept that Tuan Syed Isa has no interest to protect nor any axe to grind with any particular party, his chairing the Fatwa Committee and issuing a confirmatory ruling under his hand and seal later, in support of his earlier held view, indeed tend to present the process in a somewhat lesser light. In this connection, it is instructive to refer to a recent decision by the House of Lords in *Davidson v Scottish Ministers* [2004] UKHL 34, reported in *The Times* of 16 July 2004, where it was held that a risk of apparent bias was liable to arise where a judge who had participated in the drafting or promotion of a piece of legislation during the parliamentary process was called upon to rule judicially on the effect of the legislation.

56 When questioned why he and the late Abdillah Al Jufri, a witness to the will, could not have refrained from partaking in the deliberations of the Fatwa Committee which was to decide on the validity of the *nuzriah*, the reply was that the five official members of the Committee which included Tuan Syed Isa as the chairman and the late Abdillah Al Jufri were required by the AMLA to act unanimously. This is clearly wrong because ss 32(4) and 32(5) of the AMLA specifically provide for a mechanism when there is no unanimity in the Fatwa Committee. Secondly, under s 31(6) of the AMLA, the chairman (*ie*, the Mufti) and two other members of the Fatwa Committee, one of whom shall not be a member of Muis, shall form a quorum. Thirdly, under s 31(5) of the AMLA, the President of Singapore may appoint another person recommended by Muis to be the chairman of the Fatwa Committee, in the absence of the Mufti. Given the flexibility, both Tuan Syed Isa and the late Abdillah could and should have excused themselves from partaking in the said deliberations. It should be remarked at this stage that counsel for the defendant has quite correctly conceded in his Submission (paras 78 and 79) that the plain reading of ss 32(4) and 31(6) of the AMLA do not quite support the explanation offered.

Critique on the expert for the plaintiffs

57 Counsel for the defendant, whilst extolling the standing and the qualifications of Tuan Syed Isa, downplayed the expertise and experience of Dr Ismail. In my view, the critique is unjustified. The functions of expert witnesses were succinctly stated by Lord President Cooper in *Davie v Lord Provost, Magistrates and Councillors of the City of Edinburgh* [1953] SC 34 at 40, when he said:

> Their duty is to furnish the Judge or jury with the necessary scientific criteria for testing the accuracy of their conclusions, so as to enable the Judge or jury to form their own independent judgment by the application of these criteria to the facts proved in evidence.

58 It is a settled principle that when a case falls within the general rule requiring proof of foreign law (akin to the situation here where a secular court is to delve into non-secular law) by an expert, the witness must be properly qualified (see *Cross & Tapper on Evidence* (8th Ed, 1995) at p 784). Having reviewed the *curriculum vitae* and the list of achievements of Dr Ismail, I have no hesitation in concluding that he is well qualified in Muslim law to give evidence before this court. I found his

testimony, which was supported by a substantial body of learning, and the manner in which he answered the questions put to him, to be commendable and worthy of respect.

59 It might be appropriate at this stage to deal with one other evidentiary aspect. The plaintiffs initially obtained an opinion from one Haji Md Nor Haji Md Din ("Haji Md Nor"), who is described as a counsel in Islamic Law for the States of Malacca, Negeri Sembilan and Johor, to support their case. The translation of Haji Md Nor's opinion, from Malay to English, was in fact introduced in evidence by the defendant himself. Not only that, Tuan Syed Isa himself had made reference to the said opinion in his affidavit of 9 April 2002. Nevertheless, at the commencement of the hearing, counsel for the defendant took objection to its admission on the basis that the declarant was not available to give testimony and be cross-examined. I found the objection valid. However, for the sake of completeness and not otherwise, I ordered the said opinion to remain on record since the opinion had been referred to by the defendant's expert Tuan Syed Isa in his opinion, with the proviso that counsel for the defendant could submit to the court at the appropriate stage as to the weight to be given, if at all, to the said opinion. Surprisingly, however, when the hearing was reaching its end, counsel for the defendant sought to introduce in evidence a purported opinion (just about a page and a half in length) from the Mufti of Egypt touching upon the *nuzriah* before this court. Counsel for the plaintiffs objected to its admission in evidence, on the same grounds as those of the defendant raised earlier in relation to Haji Md Nor's opinion. Having been informed that the maker of the document would not be available to testify and be cross-examined, I upheld the objection and ruled that the said document was not to be admitted in evidence. In any event, the document tendered is more in the form of a pronouncement than an opinion and could not have assisted the court much without oral testimony and clarification.

Division of the three segments – Fatwa Committee re-adjusting the share proportions

60 Besides the foregoing, the ruling issued by the Fatwa Committee does not also seem to reflect the true intention of the testator as to the division of his estate. There are three segments in the will. The testator has directed that each segment is to receive one-third of his estate. The testator's wish to give three equal portions to the three named segments was confirmed by Tuan Syed Isa. However, realising belatedly after execution and validation of the will that such equal division would be in violation of the principles of Muslim law, the Fatwa Committee deemed it fit to apportion the estate as to nine parts to the *nuzriah* segment, six parts to the mosques and 12 parts to the legal heirs. For the purposes of calculation, the Committee notionally fixed the value of the entire estate to consist of a total of 27 units.

61 Tuan Syed Isa explained that after taking away the first one-third of the 27 notional units for *nuzriah* (which according to him had been given away by the testator during his life), there remained 18 units for distribution in respect of the testator's bequest. After allotting one-third of the said 18 units (*ie* six units) to the mosques, the rest (*ie* 12 units) accrued to the legal heirs.

62 The question is: If equal division, as desired and directed by the testator, would be contrary to Islamic law, did it not occur to those who witnessed the will and who validated the will at the time of its execution that such a provision mandating equal distribution would not be in consonance with the principles of Muslim law? Why was such an advice not proffered to the testator at that point in time and the *wasiat* corrected? The only reasonable inference is that not much attention was paid to the wording of the will nor was the testator fully apprised of the true implications of Muslim law at the time when he executed the will, as opposed to the claim that there is a general expectation that Muis would make corrections to the will, if it is found to contain errors or to be improper.[11]

63 In fact, when asked why there was any need to certify and validate the will containing the

nuzriah, as had been done in this case, Tuan Syed Isa erroneously relied on s 5(2)(d) of the AMLA[12] which deals with the powers of Muis and has little to do with wills or *nuzriah*. Counsel for the defendant, whilst conceding this error on the part of Tuan Syed Isa, went on to explain that Tuan Syed Isa is not legally trained in civil law and is called to testify only on Muslim law. To say the least, I was somewhat perplexed by this submission, for the AMLA is an essential statutory adjunct of Muslim law in Singapore.

Conclusion

64 Before concluding, I must say in all earnestness that I have the highest regard for Tuan Syed Isa. His sincerity, zeal and dedication to the office he holds in the service of the Muslim community in Singapore are worthy of praise. Similarly, I also hold the members of the Fatwa Committee in high esteem. However, reviewing all the learning referred to and the arguments presented, I am of the view that inasmuch as the property delineated for the purposes of the so-called *nuzriah* would not leave the control, possession and ownership of the testator until after his demise, the said *nuzriah* is no less than a bequest or testamentary disposition to convey an intended but invalid gift to the persons named (mostly legal heirs), and it plainly transgresses the restrictions imposed by Muslim law. The phraseology employed in the *nuzriah* segment of the will declaring that the property had already been given away to the proposed devisees three days or an hour before the death of the testator is a textual anachronism and does not convert a myth or fiction into reality, nor do the words referred to render the devise as that of a transaction completed during the testator's life. Further, in my view, it is most likely that if the Fatwa Committee's attention had been specifically drawn to the case of *Re Fatimah* or if the Committee had carefully considered the wider implications of the peculiar wording of the said *nuzriah*, it might well have paused and handed down a different advice.

65 After reviewing all the arguments and having asked myself the Hamlet questions, my conclusion is that the portion ear-marked as *nuzriah* is void not only on account of its discordance with the principles of Muslim law relating to inheritance but also because of the said segment's inherent uncertainty. Such uncertainty does not, however, render the mosques and legal heirs segments invalid. It follows then – as is being suggested by counsel for the defendant in para 138 of his Submission – that one-third of the entire estate of the testator shall go to the two mosques named and the remainder be distributed to the legal heirs according to their entitlement as stated in the inheritance certificate issued by the Syariah Court. All said, if the legal heirs wish to give effect to the general wishes of the testator, as stated in the will, it is a matter for the legal heirs to decide by unanimous consent and in this, let prudence be their guide.

66 In the premises, I grant an order in terms of prayers 1, 2 and 3 of the Amended Originating Summons. I shall hear parties on the question of costs.

Order accordingly.

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[1]Page 640 of the NE

[2]Pages 632 to 635 of the NE

[3]Page 567 of the NE.

[4]Page 584 of the NE.

[5]Page 610 of the NE

[6]Page 619 of the NE.

[7]Para 138 of the Defendant's Submission

[8]See p 578 to 579 of the NE.

[9]See para 127 of the Defendant's Submission.

[10]Page 590 of the NE.

[11]See p 376 of the NE.

[12]Pages 377 to 378 of the NE.