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LEGAL INSIGHTS

A SKRINE NEWSLETTER

MESSAGE FROM THE EDITOR-IN-CHIEF

The year has flown by and all too soon, the last quarter of 2016 will be over.

From the legal perspective, the coming year will be interesting for a number of reasons. First, the Companies Act 2016 is expected to come into operation sometime in early 2017 and will introduce far-reaching changes to company law in Malaysia.

Second, to add greater depth to the capital market and provide another avenue for SMEs to raise capital, Bursa Malaysia will be introducing a new securities market which will be accessible only to sophisticated investors. Third, the six parties that have been registered by the Securities Commission Malaysia to operate peer-to-peer (P2P) financing platforms are expected to commence operations in early 2017, thereby providing another source of funding for Malaysian businesses.

Fourth, the much anticipated appeal to the Federal Court in *Indira Gandhi v Muhammad Riduan Abdullah* on the question as to whether the consent of one or both parents is required for conversion of the religion of a minor child is likely to be heard, and hopefully determined, in 2017 as leave to appeal had been granted in May 2016.

Running in parallel with the *Indira Gandhi Case*, the Law Reform (Marriage and Divorce) (Amendment) Bill 2016 has been tabled in Parliament in November 2016. Amongst others, the Bill provides that where a party to a marriage has converted to Islam, a child of that marriage who has not attained the age of eighteen years may only be converted to Islam with the consent of both parents. This law, if passed, will resolve the issue of unilateral conversion. However, it is likely to be challenged as being unconstitutional unless the relevant provision of the Federal Constitution is amended.

In closing, I would like to extend my appreciation to the members of our Newsletter Editorial Committee and our writers for their unwavering dedication and support that has enabled us to continue publishing this newsletter on a regular basis for 12 consecutive years.

Best wishes for the New Year.

Kok Chee Kheong
Editor-in-Chief

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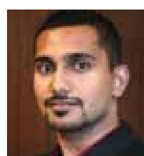
ANNOUNCEMENTS

SENIOR ASSOCIATES

The Partners are pleased to announce that Grace Teoh Wei Shan and Nimalan Devaraja have been promoted to Senior Associates.

Grace is a member of our Intellectual Property Division. She obtained her Bachelor of Laws from the University of Nottingham in 2010 and was admitted as an Advocate and Solicitor of the High Court of Malaya in November 2012.



Nimalan graduated from Kings College London in 2010 and was admitted as an Advocate and Solicitor of the High Court of Malaya in October 2012. He is a member of our Dispute Resolution Division.

We have no doubt that Grace and Nimalan will continue to make invaluable contributions to the Firm.

PAINT FOR DIGNITY

On 10 December 2016, fifteen of our lawyers and staff, armed with paint brushes and rollers, paint trays, bucket-loads of paint and other apparatus, gathered at the premises of the **Dignity for Children Foundation** and spent about half-a-day painting parts of the school's classrooms and other areas which needed a fresh coat of paint to provide a more conducive environment for the students.

The **Dignity for Children Foundation** is a non-profit organisation which seeks to help the urban poor to break the cycle of poverty by providing free education for under-privileged children, including refugees, from ages two to seventeen.

Many thanks to our Social Responsibility Unit for organising this project for a worthy cause.

CLIENTS' FEEDBACK

In an effort to enhance the quality of our legal service for our valued clients, we have created an email address namely: executivecommittee@skrine.com for our clients to provide feedback on matters undertaken by our lawyers. Clients are encouraged to use it to help our lawyers assist you better.

THE DEVELOPMENT OF STATUTORY

Jocelyn Lim examines some significant statutory adjudication

The Construction Industry Payment and Adjudication Act 2012 ("CIPAA") came into operation on 15 April 2014. Since then, the Malaysian courts have had the opportunity to consider various aspects of CIPAA on a number of occasions. This article examines some of the significant decisions that have been handed down by the courts in the past 2½ years and provides a 'snippet' on the legal principles laid down in these cases.

CIPAA APPLIES RETROSPECTIVELY

Prior to the coming into force of CIPAA, there was much discussion within the construction industry on the scope of its application. Questions as to whether CIPAA applies to construction contracts signed before its date of coming into force and whether payment disputes arising before the said date fall within the scope of CIPAA were foremost in the minds of industry players.

On 31 October 2014, Malaysia's first judicial pronouncement on matters involving CIPAA was made in *UDA Holdings Berhad v Bisraya Construction Sdn Bhd & Anor & another case* [2015] 11 MLJ 499. The High Court Judge Dato' Mary Lim (as she then was) had the opportunity to deal with the above questions which centred on the issue of the retrospective application of CIPAA. Her Ladyship's decision, which was subsequently upheld by the Court of Appeal (unreported), gave retrospective effect to CIPAA.

This means that all payment disputes under any construction contract, other than those which fell within the statutory exceptions in sections 3, 40 and 41 of CIPAA, can be referred for adjudication under the Act regardless of when the construction contract was executed or when the payment disputes arose.

EXPANSIVE vs RESTRICTIVE INTERPRETATION

Government Construction Contract

Similarly, there was much discussion as to what constitutes a "*Government construction contract*", a term used but not defined in the Construction Industry Payment & Adjudication (Exemption) Order 2014 ("2014 Exemption Order"). Questions arose as to whether the expression encompasses construction contracts entered by statutory bodies and government-linked companies; or is it to be limited to contracts entered into by the "*Government*", as defined in section 4 of CIPAA.

This question was dealt with in *Mudajaya Corporation Bhd v Leighton Contractors (M) Sdn Bhd* [2015] 5 CLJ 848, where the court held that for a construction contract to fall within the meaning of a "*Government construction contract*", it must be one where the government, be it the Federal or a State government, is a party to it.

Construction Consultancy Contract

The case of *Martego Sdn Bhd v Arkitek Meor & Chew Sdn Bhd & Another Case* [2017] 1 CLJ 101 ("*Martego*") considered an

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ADJUDICATION IN MALAYSIA

local cases since the inception of in Malaysia

interesting question: whether an architect rendering purely architectural services with respect to a construction project may claim his outstanding fees from his client under CIPAA.

The learned High Court Judge disagreed with the claimant's argument that "*construction consultancy contract*", as defined under section 4 of CIPAA, did not apply to contracts which provide purely consultancy services. His Lordship found that the word "*includes*" used in the definition was designed to give an expansive meaning and not an exhaustive one – the matters stated in the definition are more by way of examples, leaving the scope and ambit of the defined word open ended. This meant that CIPAA applies to consultancy contracts which provide purely consultancy services.

EXEMPTION FROM CIPAA

Although CIPAA's scope of application is intended to be wide and extensive, it is not without exceptions.

Section 41 provides that CIPAA shall not affect any proceedings relating to any payment dispute under a construction contract which had been commenced in any court or arbitration before CIPAA came into force. According to *View Esteem Sdn Bhd v Bina Puri Holdings Sdn Bhd* [2015] MLJU 695 (*"View Esteem"*), this means that the payment dispute referred to adjudication must be the same as the one that is pending in court or arbitration. If not, the particular payment dispute will fall within the ambit of CIPAA. The intention behind section 41 is to preserve the law on payment disputes which are already pending in court or arbitration when CIPAA came into force. For identical disputes which are already pending in court or arbitration, the law prior to 15 April 2014 will apply.

The other exemptions under CIPAA are contained in section 3 (buildings of less than four storeys intended for self-occupation) and section 40 (exemptions pursuant to Ministerial order, such as the 2014 Exemption Order) but these fall outside the scope of this article.

CONTRACTING OUT OF CIPAA?

The application of the statutory adjudication regime under CIPAA to every written construction contract where the construction work envisaged under such contract is to be carried out either wholly or partly in Malaysia was considered in *Ranhill E&C Sdn Bhd v Tioxide (Malaysia) Sdn Bhd and Another Case* [2015] 1 LNS 1435. It was held that a reading of the terms of CIPAA as a whole prohibits the parties from contracting out of its application, notwithstanding that there is no express term to such effect in the statute. Specific contractual arrangement for dispute resolution by the parties would not exclude the application of CIPAA which is meant to cater for an interim or provisional resolution of a payment dispute. As such, an agreement by the parties to arbitrate does not exclude the application of CIPAA. It merely means that the parties have chosen arbitration as final resolution of their dispute.

IS CLAUSE 25.4(d) OF PAM CONTRACT 2006 VOID?

The practice of having a conditional payment clause, be it a "*pay-when-paid*" or "*pay-if-paid*" or "*back-to-back*" clause, was pervasive and prevalent in the construction industry. It was a way for the main contractor to pass down the contractual chain the risk of not receiving payment from the employer when it is due and payable.

Section 35(1) of CIPAA prohibits conditional payment terms and provides that a conditional payment provision in a construction contract is void. Section 35(2) expressly declares that "*for the purposes of section 35(1)*", each of the following to be a conditional payment provision:

(a) when the obligation of one party to make payment is conditional upon that party having received payment from a third party; or

(b) when the obligation of one party to make payment is conditional upon the availability of funds or drawdown of financing facilities of that party.

Interestingly, what constitutes a "*conditional payment*" for the purposes of section 35(1) has been put to the test notwithstanding that section 35(2) suggests that it is to be limited to the two situations set out in that section of CIPAA.

BM City Realty & Construction Sdn Bhd v Merger Insight (M) Sdn Bhd [2016] AMEJ 1858 ("*BM City*") concerned the impact of section 35(1) on clause 25.4(d) of PAM Contract 2006. The plaintiff in its application to set aside an adjudication decision argued that it was not bound to make any further payment to the defendant until a final account is determined upon completion of the works as the contract had been terminated by the plaintiff. To support its contention, the plaintiff relied on clause 25.4(d) of PAM Contract 2006, which reads as follows:

"…. Until after the completion of the Works under cl. 25.4(a), the Employer shall not be bound by any provision in the Contract to make any further payment to the Contractor, including payments which have been certified but not yet paid when the employment of the Contractor was determined…."

In dismissing the plaintiff's application, the High Court Judge quoted his judgement in *Econpile (M) Sdn Bhd v IRDK Ventures*

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THE DEVELOPMENT OF STATUTORY ADJUDICATION IN MALAYSIA

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Sdn Bhd & Another Case [2016] 5 CLJ 882 (*"Econpile"*) and held that *"the terms of s35(1) CIPAA are clear in that it casts a wide net to cover "**Any** conditional payment provision in a construction contract in relation to payment under the construction contract" and it expressly declared it to be "void"."*

By giving an expansive meaning to *"conditional payment"*, the High Court has taken the view that the instances of conditional payment set out in section 35(2) are not exhaustive. The decision suggests that clause 25.4(d) of PAM Contract 2006 is void as it has the effect of postponing payment until final accounts are concluded thereby defeating the purpose of CIPAA.

At the time of writing, the appeal in *Econpile* to the Court of Appeal has been dismissed on the basis that it was within the adjudicator's jurisdiction to decide on the applicability of clause 25.4(d) and the Courts are not competent to review the correctness of that decision. The *BM City* appeal is presently pending in the Court of Appeal. It remains a moot point as to whether clause 25.4(d) of PAM Contract 2006 is void under CIPAA.

> **" It remains a moot point as to whether clause 25.4(d) of PAM Contract 2006 is void "**

ZERORISING AN UNPAID PARTY'S CLAIM

The Court in *Tenaga Poly Sdn Bhd v Crest Builder Sdn Bhd* (unreported) essentially declared that a successful defence based on liquidated and ascertained damages ("LAD") by a non-paying party will operate to zerorise an unpaid party's claim, but will not result in the unpaid party being ordered to pay the non-paying party. The learned Judge in this case also declared that an LAD claim is not a "payment claim" within the meaning of sections 4 and 5 of CIPAA. It seems to suggest that a party cannot initiate adjudication proceedings under CIPAA to recover LAD against another party. At the time of writing, the full judgment has yet to be published.

LACK OF PROGRESS OR INTERIM CERTIFICATION

In *Bina Puri Construction Sdn Bhd v Hing Nyit Enterprise Sdn Bhd* [2015] 8 CLJ 728 (*"Bina Puri"*), the applicant sought to set aside the adjudication decision. One of the arguments raised by the applicant was that the payment claim was premature as the interim claims by the respondent were not certified.

The Judge rejected the argument and held that the *"lack of certification of progress or interim claim is not a bar to the adjudication process. Section 5 does not require the existence of certified progress or interim claim before a payment claim can be issued."* The Judge concluded that the adjudicator's powers under sections 25(n) and 25(m) of CIPAA which entitle him to *"decide or declare on any matter notwithstanding no certificate has been issued"* and to *"review and revise any certificate issued or to be issued"* respectively simply means that even if the contractual agreement between the parties provides for issuance of a certified interim or progress claim, the absence of certification cannot deprive the unpaid party from availing the adjudication process.

SETTING ASIDE OF ADJUDICATION DECISION

Section 15 of CIPAA provides limited grounds on which an adjudication decision may be set aside, namely:

(a) The adjudication decision was improperly procured through fraud or bribery;
(b) There has been a denial of natural justice;
(c) The adjudicator has not acted independently or impartially; or
(d) The adjudicator has acted in excess of his jurisdiction.

The adjudication decision in *Bina Puri* was challenged on grounds of breach of natural justice and excess of jurisdiction. The Court held that the criticism of the adjudication decision by the applicant must *"clearly point to a breach of natural justice or a jurisdictional error in the adjudication process."*

In *ACFM Engineering & Construction Sdn Bhd v Esstar Vision Sdn Bhd & Another Case* [2015] 1 LNS 756, the Court found support and assistance in the principles set out in *Balfour Beatty Engineering Services (HY) Ltd v Shepherd Construction Ltd* [2009] EWHC 2218. Essentially, not any breach will allow for a setting aside of the adjudication decision. The breach must be *"either decisive or of considerable potential importance to the outcome and not peripheral or irrelevant"*; it must be a material breach which significantly affects the decision.

In *WRP Asia Pacific Sdn Bhd v NS Bluescope Lysaght Malaysia Sdn Bhd* [2016] 1 AMR 379, the unilateral communication of the adjudicator was found to be a material breach of natural justice. It is important that any communication must be made known to the parties to the adjudication so as to allow the parties a chance to respond. The adjudicator's duty to make known to the parties his communication to the other party is perhaps to ensure impartiality of the adjudicator by giving parties a fair opportunity to present its case.

The refusal to conduct oral hearing however does not necessarily amount to a breach of natural justice. It was held in *Martego* that an adjudicator is entitled to decide on the mode of hearing even if this is by way of documents and submissions only without the need to call witness.

STAY OF ADJUDICATION DECISION

The principles for an application for the stay of an adjudication decision were considered in detail in *Subang Skypark Sdn Bhd v Arcradius Sdn Bhd* [2015] 11 MLJ 818 ("*Subang Skypark*"). After considering a number of cases from other jurisdictions, it was held that the test for a stay to be granted under section 16 of CIPAA is whether there are "exceptional circumstances" and such circumstances must necessarily refer to the financial status of the other party. Cogent or credible evidence must be presented to show the probable inability of repayment of the adjudicated sum that may follow from concurrent court or arbitration proceedings. According to the learned Judge, the merits of the case before the arbitration or the court and the chances of success in setting aside the adjudication decision are not relevant considerations.

The Court in *Subang Skypark* emphasised that the grant of any stay must also be weighed against the primary object of CIPAA, which is to ensure speedy resolution of payment disputes and to inject much needed cashflow into the contractual arrangements between the parties. At all times, the Court retains the discretion as to whether or not to grant a stay.

PRE-QUALIFICATION FOR STAY

According to the Court in *Foster Wheeler E & C (Malaysia) Sdn Bhd v Arkema Thiochemicals Sdn Bhd & Another Case* [2015] 1 LNS 632, the expression "*pending final determination by arbitration or the court*", which is a condition for a stay of an adjudication decision under section 16(1)(b) of CIPAA, requires the parties to have already commenced arbitration or court proceedings. In that case, the contract provided for a multi-tiered dispute resolution. At the material time, parties were at the first stage of dispute resolution whereby negotiations were on-going but notice of arbitration had yet to be issued. In fact, any issuance of notice of arbitration prior to the completion of the negotiations would be regarded as pre-mature. In the circumstances, the Court held that there was no pending arbitration and that the applicant had failed to satisfy the requirements for a stay under section 16(1)(b). This decision will have an adverse impact on multi-tiered dispute resolution clauses.

LIMIT OF ADJUDICATOR'S JURISDICTION

An adjudicator's jurisdiction has been held to be limited only to matters referred to in the payment claim and payment response. This was decided in the High Court in *View Esteem* where the Judge held that such limitation is prescribed in section 27(1) of CIPAA. The process that take place after the payment claim and payment response, including the filing of the adjudication claim, adjudication response and adjudication reply are substantially formal manifestations of the dispute containing greater details of the claim, response, or reply, as the case may be, of the payment claim and payment response.

Similarly, in *Bina Puri*, the High Court Judge in considering the argument raised by the applicant that the adjudicator had committed an error in holding that he had no jurisdiction under CIPAA to decide on the applicant's counterclaim which was raised in its adjudication response but not in its payment response, concluded that section 27 of CIPAA clearly circumscribes the jurisdiction of the adjudicator which is limited to the disputes raised under sections 5 and 6 of CIPAA i.e. the payment claim and payment response. Any extension of the adjudicator's jurisdiction beyond matters in the payment claim and payment response will have to be by way of a written agreement pursuant to section 27(2) of CIPAA.

However, it is interesting to note that the Court of Appeal in *View Esteem Sdn Bhd v Bina Puri Holdings Sdn Bhd* [2016] 6 MLJ 717 seems to suggest that the adjudicator's jurisdiction in relation to matters not raised in a payment response can be regularised pursuant to section 26 of CIPAA, notwithstanding that there is no express agreement between the parties under section 27(2). This could mean that a party could avail itself of section 26 and raise new claims or defences in its adjudication claim or adjudication response by formally moving the adjudicator to invoke section 26. This however is not consistent with section 27(2) and the position in this regard remains uncertain.

PRINCIPAL TO MAKE DIRECT PAYMENT

As long as the necessary written request required under section 30 of CIPAA is issued to the principal, the principal is obliged to make payment to the party who obtained the adjudication decision in its favour. It is irrelevant if the principal is not a party to the adjudication proceedings or does not have knowledge of the adjudication proceedings. This was decided in *Murni Environmental Engineering Sdn Bhd v Eminent Ventures Sdn Bhd & Anor and Other Suits* [2016] MLJU 691.

CONCLUSION

Although statutory adjudication in Malaysia is still very much in its infancy, it is evident from the cases highlighted above that a body of local decisions is steadily being built up to assist in the interpretation of the provisions of CIPAA.

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REVAMPING THE BANKRUPTCY ACT 1967

Trevor Padasian provides an overview of the Bankruptcy (Amendment) Bill 2016

The Bankruptcy (Amendment) Bill 2016 ("the Bill") was tabled for its First Reading before the Dewan Rakyat of the Malaysian Parliament on 21 November 2016. The debate on the Bill will continue when Parliament reconvenes in March 2017. It is, arguably, the most drastic revamping of the Bankruptcy Act 1967 ("Act") since the Act came into force on 30 September 1967.

In the months leading up to the tabling of the Bill, it was reported in the local media (e.g. see articles published in *The Sun Daily*, 8 March 2016, 12 August 2016, 5 September 2016, 27 October 2016 and 14 November 2016) that the Government intended to amend the Act to provide greater protection for debtors. As reported, the Government's principal objectives in seeking to do so are to: (a) reduce the number of bankruptcy cases; (b) provide an opportunity for a debtor to rearrange his debts; (c) reduce the period before a bankrupt may be discharged from his bankruptcy; and (d) increase the minimum threshold for the presentation of a bankruptcy petition.

The objective of reducing the number of bankruptcy cases may have been triggered by alarming statistics which showed that a total of 95,799 debtors had been declared bankrupt between 2012 and August 2016 (*The Sun Daily*, 14 November 2016).

This article provides an overview of the major amendments which are to be introduced under the Bill. For the purpose of this article, the Bill will be referred to as "the Amendment Act".

CHANGE OF NAME

The name of the Act will be changed to the **Insolvency Act 1967**. It should be noted that unlike some other jurisdictions, such as the United Kingdom and New Zealand, where the Insolvency Acts deal with the insolvency of both individuals and companies, the Act will regulate only insolvency and bankruptcy of an individual and a firm. Insolvency of companies in Malaysia will continue to be regulated under the Companies Act 1965 (and in due course, the Companies Act 2016).

MINIMUM THRESHOLD INCREASED

The minimum threshold for presentation of a bankruptcy petition will be increased from RM30,000 to RM50,000 under the Amendment Act. Although no rationale is provided for the increase, it appears from media reports that it is to give "*protection to the people*" and is in line with the "debtor-centric" thrust of the amendments.

SINGLE ORDER BANKRUPTCY

The Amendment Act also introduces a single order for bankruptcy, i.e. the bankruptcy order, in place of the existing receiving and adjudication orders.

When a receiving order is made, the Director General of Insolvency ("DGI") becomes the receiver of the debtor's property. The receiving order protects the debtor's property from being dissipated but does not have the effect of making the debtor a bankrupt. The debtor is made a bankrupt only upon the issue of an adjudication order (*Hong Leong Bank Bhd v Khairulnizam Jamaludin* [2016] 7 CLJ 335 at para 33, page 346 FC).

Although the receiving and adjudication orders are usually made simultaneously, the making of an adjudication order does not necessarily follow the making of a receiving order. If the debtor satisfies the court that he is in a position to offer a composition or make a scheme of arrangement acceptable to his creditors, then an adjudication order will not be made (*Re: Tan Sri Kishu Tirathraj; ex parte Affin Bank Berhad* [2007] 2 MLJ 53 at para 28, pages 62-63). This existing flexibility may be removed by replacing the receiving and adjudication orders with a single bankruptcy order.

VOLUNTARY ARRANGEMENT

The Amendment Act introduces the concept of a "voluntary arrangement", a pre-bankruptcy rescue mechanism, which provides the debtor with the opportunity to rearrange his debts with his creditors before he is adjudged a bankrupt.

A debtor may initiate a voluntary arrangement with his creditors by: (a) appointing a nominee ("nominee"), who must be a registered chartered accountant, an advocate and solicitor or a person approved by the Minister upon the recommendation of the DGI, to supervise the implementation of the voluntary arrangement; and (b) applying to the court for an interim order of voluntary arrangement ("interim order").

The High Court will make an interim order upon receipt of an application for an interim order if there is no previous application for an interim order and the nominee is willing to act in relation to the proposal. An interim order operates to stay all bankruptcy and other legal proceedings against the debtor and is valid for 90 days, and may only be extended in limited circumstances for a further period of 30 days.

The debtor must submit a proposal ("proposal") for approval by his creditors during the subsistence of the interim order. The voluntary arrangement is subject to the approval by a majority in number and at least three-fourths in value of the creditors at a meeting of creditors, or in writing, and voting on the resolution. If the proposal is not approved by the creditors, the court may set aside the interim order.

If a debtor fails to comply with any of his obligations under a voluntary arrangement, any creditor who is bound by such arrangement may file or proceed with a bankruptcy petition against the debtor for the balance of the debt due to him.

The provision for an automatic issue of an interim order under the Amendment Act may be contrasted with the position under Section 48 of the Singapore *Bankruptcy Act (Cap. 20)* where the High Court, upon receipt of an application for an interim order, is required first to determine whether it would be appropriate for such an order to be made for the purpose of facilitating the consideration and implementation of the debtor's proposal.

TREVOR PADASIAN

Trevor is a Partner in SKRINE. His main practice areas are commercial litigation, family law and bankruptcy and insolvency law.

SUBSTITUTED SERVICE

The requirements under Rules 109 and 110 of the Bankruptcy Rules 1969 for a bankruptcy notice and creditor's petition to be served personally on a debtor will be expressly incorporated into the Act pursuant to the Amendment Act.

The Amendment Act introduces more specific provisions in relation to substituted service. The new provisions allow the court to grant an order for substituted service of a bankruptcy notice or a creditor's petition on a debtor if the creditor satisfies the court that the debtor, with intent to defeat, delay or evade personal service: (a) departs out of Malaysia or being out of Malaysia remains out of Malaysia; or (b) departs from his dwelling house or otherwise absents himself, or secludes himself in his house or closes his place of business.

ABSOLUTE PROTECTION FOR SOCIAL GUARANTOR

Currently, a creditor may commence a bankruptcy action against a "social guarantor", i.e. a person who provides, not for the purpose of making profit, a guarantee for: (a) a loan, scholarship or grant for educational or research purposes; or (b) a hire-purchase transaction of a vehicle for personal or non-business use; or (c) a housing loan transaction solely for personal dwelling, only if he satisfies the court that he has exhausted all avenues to recover the debts owed to him by the principal debtor.

The Amendment Act will **absolutely prohibit** bankruptcy proceedings against a social guarantor.

OTHER GUARANTORS

As a result of the amendments, other guarantors (not being social guarantors) will have the same protection currently accorded to social guarantors under the Act. A creditor must obtain leave of the court before commencing any bankruptcy action against a guarantor.

To obtain leave, the creditor must satisfy the court that he has exhausted all modes of execution and enforcement (including seizure and sale, judgment debtor summons, garnishment, bankruptcy or winding up proceedings) to recover the debts owed by the principal debtor. Based on current case law in relation to social guarantors, the application is by way of affidavit evidence and the court, after considering the contents of the affidavit, has a discretion to determine whether all avenues against the borrower have been exhausted (*Hong Leong Bank Bhd v Khairulnizam Jamaludin* [2016] 7 CLJ 335 at para 23, page 344 and para 35, page 346 FC).

This new requirement sets a high bar for the commencement of bankruptcy actions against non-social guarantors.

PROHIBITED OBJECTIONS TO DISCHARGE OF BANKRUPT

Currently, a bankrupt may be discharged if a certificate of discharge is issued by the DGI under Section 33 of the Act ("certificate of discharge") after five years from the date of the receiving and adjudication orders. A creditor may object to the issuance of such a certificate. The Amendment Act prohibits objections against the discharge of a bankrupt who: (a) was adjudged a bankrupt because he was a social guarantor; or (b) has a disability under the Persons with Disabilities Act 2008; or (c) who has passed away; or (d) is suffering from a serious illness certified by a Government Medical Officer. It is to be noted that the Amendment Act does not provide any guidance as to what constitutes "*serious illness*".

AUTOMATIC DISCHARGE

The Amendment Act introduces provisions for an **automatic discharge** of a bankrupt upon the expiry of **three years** from the date of submission of the statement of affairs by the bankrupt if he has: (a) achieved an amount of target contribution of his provable debt; and (b) complied with the requirement to render an account of moneys and property to the DGI.

The Amendment Act sets out the factors that the DGI may take into account in determining the target contribution. These factors include, amongst others, the amount of the provable debt of the bankrupt, the current monthly income of the bankrupt, his prospective monthly income over the duration of the bankruptcy, his educational and vocational qualifications, age and work experience, the effect of the bankruptcy on his earning capacity and the prevailing economic conditions.

Before an automatic discharge can be effected, the DGI must serve a notice of discharge on each of the bankrupt's creditors not less than six months before the expiry of three years from the submission of the statement of affairs, but not earlier than one year before the expiration of the aforesaid 3-year period.

A creditor may, within 21 days of being served with a notice of discharge, object to the automatic discharge by applying to the court to suspend the discharge only on one or more of the following grounds:

(a) the bankrupt has committed any offence under the Act or under certain provisions of the Penal Code relating to fraudulent disposition or concealment of property to prevent distribution to creditors;

(b) the discharge would prejudice the administration of the bankrupt's estate;

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OF PRIESTS, PRISONERS AND PETROL STATION ATTENDANTS

Lee Mei Hooi examines the recent developments in the law of vicarious liability in the United Kingdom

In *Majrowski v Guy's and St Thomas' NHS Trust* [2006] UKHL 34, Lord Nicholls described the principle of vicarious liability as one which is "*at odds with the general approach of the common law … that a person is liable only for his own acts*".

Vicarious liability is an artificial legal construct which seeks to impute liability on a third party for the tortious acts or omissions of another, by virtue of the existence of a special relationship between the third party and the tortfeasor. Generally, the question of vicarious liability arises where the victim of a tort seeks to make the employer of the tortfeasor liable for the damage suffered by the victim, although this is not the only category of vicarious liability. In this regard, the requirements that must be established are:

(1) the existence of an employer-employee relationship which is capable of giving rise to vicarious liability; and

(2) the tort must be committed in the course of, or within the scope of employment.

> **" their relationship was "sufficiently akin to that of an employer and an employee" to satisfy the first test of vicarious liability "**

In recent years, the English Courts have had several opportunities to re-consider both of the above requirements, ultimately leading to the expansion of the doctrine – a trend that is made clearer by the two recent landmark decisions of the English Supreme Court in *Cox v Ministry of Justice* [2016] UKSC 10 ("*Cox*") and *Mohamud v WM Morrison Supermarkets plc* [2016] UKSC 11 ("*Mohamud*").

PUSHING THE BOUNDARIES OF THE 'EMPLOYER-EMPLOYEE' RELATIONSHIP

It goes without saying that relationships within the traditional employment context where an employee enters into a contract of service with an employer for payment or reward would fulfil the first requirement to establish vicarious liability. The English Courts, however, have taken this one step further, holding that various types of 'quasi-employment' relationships may suffice to fulfil this first requirement.

Of priests and churches

In the English Court of Appeal case of *JGE v English Province of Our Lady of Charity and another* [2012] EWCA Civ 938 ("*JGE*"), the question arose as to whether the relationship between a priest and the Trustee of the Catholic Diocesan Trust could give rise to vicarious liability. There was no contract of employment between the priest and the Trust; neither could the priest be considered an employee of the Church. In fact, there was never any intent to create a legal relationship between them. However, the Court of Appeal nonetheless found that the Trust could be held vicariously liable for the tortious acts of a priest who had sexually abused the victim, on the basis that the relationship between the priest and the Trust was "*close enough and so akin to employer/employee as to make it just and fair to impose vicarious liability.*"

JGE was considered by the Supreme Court in *Catholic Child Welfare Society & Ors v Various Claimants* [2012] UKSC 56 ("*Christian Brothers*") – another case involving sexual abuse of children by clergymen, this time by brothers who taught at a school approved by the Institute of the Brothers of the Christian Schools. Following *JGE*, Lord Phillips found that the Institute was vicariously liable for the brothers' abuse despite the fact that it was not their employer. His Lordship then examined the policy reasons for finding vicarious liability within an employment relationship and set them out as follows:

> **" the prisoners were placed by the prison service in a position where … they may commit … negligent acts "**

"*i) The employer is more likely to have the means to compensate the victim than the employee and can be expected to have insured against that liability;*
ii) The tort will have been committed as a result of activity being taken by the employee on behalf of the employer;
iii) The employee's activity is likely to be part of the business activity of the employer;
iv) The employer, by employing the employee to carry on the activity will have created the risk of the tort committed by the employee;
v) The employee will, to a greater or lesser degree, have been under the control of the employer."

After considering the relationship between the brothers and the Institute in light of the afore-mentioned principles, Lord Phillips concluded that their relationship was "*sufficiently akin to that of an employer and an employee*" to satisfy the first test of vicarious liability.

Of prisoners and jailers

In the recent case of *Cox*, the Supreme Court again had the opportunity to consider what amounted to a relationship "akin to employment". In this case, one Mrs Cox worked as the catering manager at HM Prison Swansea. Whilst she was working in the prison kitchen alongside the prisoners assigned to kitchen work, a particular prisoner, Mr Inder, dropped a sack of rice onto her back, causing her injury. There was no question that Mr Inder was

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negligent. Mrs Cox therefore brought a claim against the Ministry of Justice that was in charge of running the prison, arguing that the prison service was vicariously liable for the negligence of Mr Inder.

In a unanimous judgment, the Supreme Court found that the prison service was vicariously liable for Mr Inder's negligence as there existed a quasi-employment relationship between the prison service and the prisoner. In coming to its conclusion, the Supreme Court examined in detail *Christian Brothers* and applied the five policy factors laid down by Lord Phillips, and found that:

(1) the prison service carried on activities in furtherance of its aims, and the fact that those aims were not commercially motivated was irrelevant; the fact that the prisoners were integrated into the operation of the prison and that the kitchen work assigned to them formed an integral part of the activities of the prison was sufficient;

(2) the prisoners were placed by the prison service in a position where there was a risk that they may commit a variety of negligent acts; and

(3) the prisoners worked under direction of the prison staff.

> **“ the second requirement for imposing vicarious liability … has similarly been extended in recent years ”**

The Supreme Court also noted that the fact that the prison service was under a statutory duty to provide prisoners with useful work was not incompatible with the imposition of vicarious liability. In fact, the Supreme Court stated that it was irrelevant as the prison service nonetheless had a "*meaningful power of selection*" in deciding whether or not to place a particular prisoner in the kitchen or in another position elsewhere in the prison.

EMPLOYED TO COMMIT VIOLENCE

The issue of quasi-employment relationships aside, the second requirement for imposing vicarious liability, namely that the tort must be committed "within the scope of employment" has similarly been extended in recent years.

The "*close connection*" test, as laid down by the House of Lords in the leading case of *Lister and others v Hesley Hall Ltd* [2001] UKHL 22 ("*Lister*"), requires the employee's torts to be "*so closely connected with his employment that it would be fair and just to hold the employers vicariously liable.*"

The question of whether any particular act would fall within the scope of employment is a fact-based test that differs in every case. Acts that have been found to fall within the scope of employment include fraud (*Dubai Aluminium Company Ltd v Salaam and others* [2002] UKHL 48), sexual abuse by priests or teachers (*JGE* and *Christian Brothers*) and outright racist violence in the most recent case of *Mohamud*.

In *Mohamud*, the plaintiff, Mr Mohamud, a man of Somali descent, had entered the defendant's petrol kiosk and requested the defendant's employee, one Mr Khan, to print some documents from his USB stick. Mr Khan responded to the request in an abusive, racist fashion.

Following the unpleasant exchange, Mr Mohamud returned to his vehicle only to be immediately followed by Mr Khan, who opened the front passenger door of the car and shouted violent abuse at him, including telling him to "*never come back*". When Mr Mohamud got out of the car, Mr Khan then subjected him to a "*brutal and unprovoked attack*".

The English Court of Appeal in a decision reported in [2014] EWCA Civ 116, found for the defendant and held that vicarious liability could not be established on an application of the *Lister* test. It noted that the employer would only be liable if the risk was one which was inherent in the nature of the business and mere contact between a sales assistant and a customer was insufficient.

The English Supreme Court, however, overturned the decision of the Court of Appeal, also on the application of the *Lister* test, and found that a sufficiently close connection existed between Mr Khan's actions and his employment. Lord Toulson stated that one had to first determine what functions or "field of activities" were entrusted by the employer to the employee, and secondly, whether there was sufficient connection between the position of employment and the employee's wrongful conduct to make it right for the employer to be held liable.

While it was acknowledged that Mr Khan was not given duties that involved a clear possibility of confrontation or placed in a situation where an outbreak of violence was likely, the Supreme Court nonetheless found a sufficient connection as, among others:

(1) it was Mr Khan's job to attend to customers and to respond to their enquiries; his conduct in answering the claimant's request with abusive language and ordering him to leave was inexcusable but still within the "field of activities" assigned to him;

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POWERS TO FORFEIT – A CIVIL STANDARD FOR CRIMINAL CONDUCT

Yap Yeong Hui explains the power of forfeiture under the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001

The power to forfeit properties under the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ("Act") is increasingly becoming a key tool of Malaysian enforcement agencies to tackle money laundering and corruption, and to recover the proceeds of crimes and counter terrorist financing. These powers are encapsulated in Sections 55 and 56 of the Act.

THE STARTING POINT – FREEZING AND SEIZURE OF PROPERTY

The groundwork leading to the exercise of the powers of forfeiture under Section 55 or Section 56 of the Act usually commences before a person is even prosecuted for any offence of money laundering or terrorism financing.

Section 44 of the Act permits an enforcement agency to issue an order to freeze any property of any person, or any terrorist property, as soon as an investigation into an unlawful activity has commenced against that person and the enforcement agency has reasonable grounds to suspect that (a) a money laundering or terrorism financing offence has been or is about to be committed by that person; or (b) the property is the proceeds of an unlawful activity or the instrumentalities of an offence.

> "Sections 55 and 56 … only require the prosecution to prove the requirements … on a balance of probabilities"

Similarly, an investigating officer who is investigating a money laundering or terrorism financing offence has the power under Section 45 of the Act to seize any moveable property which he has reasonable grounds to suspect is the subject matter of such offence or is terrorist property or the proceeds of an unlawful activity or the instrumentalities of an offence. The investigating officer is required to obtain the approval from an investigating officer who is senior in rank to him before exercising such powers of seizure.

FORFEITURE WHEN OFFENCE IS PROVED

Where an offence of money laundering or terrorism financing has been proven against an accused, Section 55(1) of the Act provides that a court shall make an order to forfeit any property which is proven to be:

(a) the subject-matter or evidence relating to the commission of such an offence;

(b) a terrorist property;

(c) the proceeds of an unlawful activity; or

(d) the instrumentalities of an offence.

Section 55(1) also allows a court to order the forfeiture of any such property even where the offence of money laundering or terrorism financing is not proven if the court is satisfied that the accused is not the true and lawful owner of the property and that no other person is entitled to the property as a purchaser in good faith for valuable consideration.

FORFEITURE WITHOUT PROSECUTION OR CONVICTION

Section 56 of the Act permits the Public Prosecutor to apply to the High Court within 12 months of the seizure or the date of a freezing order, for an order to forfeit the property which has been frozen or seized even where a person is not prosecuted or convicted for the offence of money laundering.

> "Section 55(1) also allows a court to order the forfeiture of … property even where the offence … is not proven"

The Judge hearing an application under Section 56 may issue a forfeiture order if he is satisfied that:

(a) the property is the subject-matter or evidence relating to the commission of a money laundering or terrorism financing offence, a terrorist property, the proceeds of an unlawful activity or the instrumentalities of an offence; and

(b) there is no purchaser in good faith for valuable consideration in respect of the property.

CONSEQUENCE OF FORFEITURE

Any property forfeited under the Act will be vested in the Government of Malaysia pursuant to Section 58 of the Act, without any transfer, conveyance, registration or other action being necessary. Where any registration by any authority is required, such authority shall effect the registration in the name of the public officer, authority, person or body specified by the Public Prosecutor.

GAZETTE NOTICE

The court making the order of forfeiture under Section 55, or the Judge to whom an application is made under Section 56, is required by Section 61(2) of the Act to cause a notice to be

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published in the *Gazette* calling upon third parties who claim to have any interest in the property to attend before the court on the date specified in the notice to show cause as to why the property should not be forfeited.

RECENT CASES

There has been an increase in the use by the enforcement agencies of the wide powers of forfeiture granted under Sections 55 and 56 of the Act. In 2016 itself, over thirty Section 61(2) notices were published in the *Gazette*. The Malaysian authorities understandably want to utilise these provisions to have properties forfeited, without the need to prove beyond reasonable doubt the commission of any criminal offence. For the properties to be forfeited, Sections 55 and 56 of the Act only require the prosecution to prove the requirements set out in those provisions on a balance of probabilities.

These powers of forfeiture were tested in several recent cases. In *PP v Mohd Bakri Samsu & Anor* [2016] 5 CLJ 824 and *PP v Billion Nova Sdn Bhd & Ors* [2015] 2 CLJ 763, the Public Prosecutor's applications for forfeiture under Section 56 were rejected by the courts. In another recent case, *Azmi bin Osman v PP* [2016] 3 MLJ 98, the Court found that the Public Prosecutor had satisfied the burden of proof required under Section 56.

The Court of Appeal in *Billion Nova* rejected the prosecution's forfeiture application as the prosecution had failed to prove on a balance of probabilities that a money laundering offence had been committed. In this case, the prosecution sought to forfeit monies in the respondents' bank accounts. The application for forfeiture was made on the basis that the monies were the subject matter of an offence of engaging in a transaction which involved proceeds of unlawful activities, a money laundering offence under Section 4 of the Act.

It was alleged that the respondents were selling duty free cigarettes outside of Labuan, a duty free area, which is an offence under the Customs Act 1967, and that the monies in the respondents' bank accounts were the proceeds of the sale of those cigarettes. However, the prosecution's sole evidence to support its allegation that the cigarettes were sold outside Labuan was that the monies were deposited into the respondents' Labuan bank account from outside of Labuan. The Court rightly rejected the submission that this was sufficient evidence to prove that the sale transaction had taken place outside a duty free area. In the circumstances, the prosecution failed to satisfy Section 56.

In *Mohd Bakri Samsu*, the properties sought to be forfeited were lands that the prosecution alleged were obtained through an illegal act. However, the Judge held that the prosecution failed to adduce sufficient proof to show how the properties sought to be forfeited were acquired and were proceeds from an illegal activity. According to the Judge, the fact that the properties were sold by the respondents to third parties at a time when there was some illegal activity committed by the accused was too remote and insufficient. There needed to be stronger evidence to connect the property with an illegal activity. The Judge alluded that what the prosecution needed to adduce was evidence in the form of tracing to show that the monies used to purchase the properties came from the illegal activity.

On the other hand, in a more straightforward case, the prosecution in *Azmi bin Osman* satisfied the High Court and the Court of Appeal that monies in the bank account of the accused were proceeds of illegal activities. The Courts accepted that the monies sought to be forfeited were proceeds from illegal gambling activities given to the accused, a policeman, in exchange for him giving protection to the gambling operators and were bribes given to him by the gambling operators which ought to be forfeited.

FINAL THOUGHTS

The above cases are of interest because they show that the prosecution are liberally applying to forfeit properties which they suspect are the subject matter of a money laundering offence or are proceeds of unlawful activities.

The cases also show that the Malaysian courts will exercise their discretion judiciously and require the prosecution to provide evidence that the assets which are sought to be forfeited are proceeds of, or connected with, an unlawful activity.

It is foreseeable that Sections 55 and 56 of the Act will continue to be used by enforcement agencies in Malaysia to tackle money laundering, fraud, corruption and terrorism. The anticipated increase in assets being forfeited as a consequence of such actions will not only deprive persons whose assets are forfeited from benefiting from their ill-gotten gains but will also provide additional revenue to the Government.

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A REMEDY FOR TRANSGRESSION – A GLOBAL DISCUSSION

Sara Lau considers the tort of misfeasance in public office

Imagine the following scenarios:

Scenario 1: A was the proprietor of a popular restaurant with a licence to sell liquor for the past 34 years. He was also a staunch believer in the Jehovah's Witnesses faith, and whilst not being personally involved in the distribution of Jehovah's Witnesses' publications to the general public (an act which the majority Roman Catholic population in the area found offensive), A had posted bail for numerous members of the Jehovah's Witnesses faith who had been arrested for the distribution of such publications, to the chagrin of the local authorities. The next thing A knew, his liquor license was permanently revoked by the Liquor Commission for no real reason. A's restaurant suffered such an immense loss of profit that he ultimately had to close it down within six months.

Scenario 2: Z was arrested for theft. The local police did not allow him to call his parents or his lawyer or tell anyone that he had been arrested or where he was. Pursuant to a 7-day remand order issued by the local Magistrate's Court, Z was held in custody at the police lock-up. Six days later, his family was informed of his death while in police custody. His body showed extensive injuries from beating and other severe physical trauma, but the Deputy Commissioner of the Police ("OCPD") and the Chief Police Officer ("CPO") said that he had collapsed and died after drinking a cup of water. Z was only 22 years old.

Do A and Z's estate have any recourse against the public authorities in law?

DEVELOPMENT OF THE TORT OF MISFEASANCE

The examples above are derived from real-life situations. In the event of a transgression by a public authority, plaintiffs have little choice – judicial review offers but a pyrrhic victory; a criminal investigation cannot be pursued personally. In any event, there is no remedy of damages in either recourse in most jurisdictions.

The emergence of the tort of misfeasance in public office offers some semblance of a solution for such situations: it affords an opportunity for plaintiffs to recover damages suffered as a result of a wilful and/or unlawful act on the part of a public authority, which would otherwise not be sufficient to constitute any other type of cause of action. Abuse of public authority can be redressed by a plaintiff through this tort, where otherwise he would be without recourse or remedy.

The tort of misfeasance is not a common cause of action although there have been semblance of its application across Commonwealth countries. The cases below, amongst others, have contributed to the development of different facets of the tort throughout the times:

Roncarelli v Duplessis (1959) 16 DLR (2d) 689: Scenario 1 was based on this Canadian case, where the combination of opinions by judges resulted in a unified stand regarding the tort of misfeasance in public office. It was held, *inter alia*, that "*an administration according to law is to be superseded by any action dictated by and according to the arbitrary likes, dislikes and irrelevant purposes of public officers acting beyond their duty, would signalize the beginning of disintegration of the rule of law …*" This case is the *locus classicus* of the tort.

Farrington v Thomson and Bridgland [1959] VR 286: This is the first important Australian case where the police had purported to use their statutory powers to close a hotel although there was no power to do so. The Australian court held that if a public officer committed an act which to his knowledge amounts to an abuse of office, an action in the tort of misfeasance in public office will lie against him.

Dunlop v Woollahra Municipal Council [1982] AC 158: This Privy Council appeal from New South Wales added that in the absence of malice, passing without knowledge of its invalidity, a resolution which is devoid of any legal effect is not conduct that is capable of amounting to 'misfeasance'. This case illustrates the conflict in relation to the mental element requirement of the tort.

Garrett v Attorney General [1997] 2 NZLR 332: In an action against the police force for purportedly failing to deal with her allegations that she had been raped by a police officer in a police station, the plaintiff claimed damages for loss of reputation and loss of her job as a result of being supposed to have made a false allegation of rape. On appeal, it was held that for the mental element of the tort to be established, there needed to be an actual appreciation of the consequences to the plaintiff, of the disregard of duty, or that at least, the official was recklessly indifferent to the consequences and could thus be taken to have been content for them to happen as they would.

Today, the English case of *Three Rivers District Council and Others v Governor and Company of the Bank of England* [2003] 2 AC 1 ("Three Rivers Case") largely remains the authoritative law on the tort of misfeasance in public office.

ELEMENTS OF THE TORT

The *Three Rivers Case* developed a three part test for the tort of misfeasance in public office. In other jurisdictions and other interpretations, the elements of this tort have been fashioned differently with different emphases but the core ingredients remain substantially the same.

According to the *Three Rivers Case*, the tort of misfeasance in public office involves three main questions:

(1) That the act complained of had been committed by a public officer purportedly pursuant to his exercise of public power;
(2) That the act committed must be done with malice or without honest belief that the act is lawful; and
(3) That there is proximity between the plaintiff and the defendant so as to confer on the plaintiff a legal standing to sue.

Finally, as the tort of misfeasance in public law is not actionable *per se*, it is necessary to prove damages suffered as a result of the misfeasance.

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These elements shall be discussed in turn.

Public Office

The essence of this tort is to bring, and to hold to accountability, members of public office who have used their position of influence and power to commit an unlawful act. Without such office, no action in this tort will lie.

Public office in this tort includes public bodies and public officers, local authorities, ministries, government departments, central banks and police officers. There is global consensus that the concept of public office is a broad one and there is little disagreement that it covers both natural persons and incorporated bodies.

What remains debatable in this element of the tort is the nature of the exercise of power – do private acts, such as the exercise of contractual rights by public officers or public bodies, disqualify the application of this tort?

The position in England according to *Jones v Swansea City Council* [1990] 3 All ER 737 suggests that the exercise of conduct in private law does not disqualify a cause of action in this tort. In that case, the Swansea City Council reversed its previous decision allowing a site to be used as a club. The plaintiff alleged that the Council had committed misfeasance in public office in reversing its decision, but the Council argued that the plaintiff could not succeed against it on such a cause of action as the Council was acting as the plaintiff's landlord under private law, for which no cause of action based on malice would lie.

In the Court of Appeal, Slade LJ disagreed and stated that *"it was not the juridical nature of the relevant power but the nature of the council's office which is the important consideration"*. Interestingly, this case suggests that the exercise of public power may include a public body's exercise of private law rights. Under such an interpretation, the tort covers a wide range of acts deemed committed in public office.

However, in the Canadian case of *Odhavji Estate v Metropolitan Toronto Police Force* (2000) 194 DLR (4th) 577, the defendant police officers failed to cooperate with an inquiry into a fatal shooting by them. The Court held that failure to cooperate did not give rise to misfeasance in public office as the police officers in failing to cooperate were not exercising any power in relation to the public.

The Mental Element

The mental element of this tort is perhaps the most crucial ingredient. Early development of this tort centred on the requirement of malice – the public officer must have committed an act or omitted to act in his public capacity with bad faith intention or with ill-will. A narrow definition such as this would have greatly limited the scope of the tort to only include cases where express malice could be proven.

In the development of the requirements of this tort, Lord Cottenham in the old English case of *Ferguson v Kinnoull* (1842) 8 ER 412, sought to rectify this. He found that malice in the context of this tort is not confined to personal spite but extends to a conscious violation of the law to the prejudice of another.

It was not until the *Three Rivers Case* that a distinction was drawn between malice and illegality of the act or omission. The House of Lords held that under the "targeted malice" limb, it must be shown that the public officer acted with an intention to harm the claimant or the class in which the claimant is a member. Anything short of this express intention does not suffice to qualify as malice.

Under the "illegality limb", it is now established that the public officer must be proven to have acted with knowledge that the act is unlawful or that there had been recklessness indifference to the same and there must have been foresight that such an act would cause harm.

Either of these elements would suffice to establish the mental element required of this tort.

In the Hong Kong case of *Tang Nin Mun v Secretary of Justice* [2000] HKCA 298, Ribeiro JA succinctly summarised the mental element as follows:

"… the plaintiff's claim … is only viable if he is in a position to allege and ultimately to establish that in abusing his … powers … the [defendant] either intended to injure the plaintiff or knew that such a conduct would in the ordinary course directly cause injury to the plaintiff of the type actually suffered … or that he was recklessly indifferent as to whether such injury would ensue."

Damages

The advantage of a cause of action under this tort is that a claimant is able to seek a remedy in monetary damages for the actual loss sustained.

However, as the tort of misfeasance in public office is not actionable *per se*, an odd situation may arise wherein a public officer may not be liable for any damages and will go unpunished in law, even if it is proven that he has committed misfeasance in public office if the act did not cause damage.

The issue of exemplary damages is also a live one under this tort. The English courts have shown some reluctance to impose exemplary damages, but the Australian courts advocate

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DON'T COVER UP, IT'LL BLOW YOUR COVER!

Peh Fern and Wen Shan discuss the changes to pre-contractual duty of disclosure for insurance contracts in United Kingdom and Malaysia

Ordinary contracts require no duty of disclosure in pre-contractual relations, only that a party must not misrepresent. However, contracts of insurance are traditionally an exception to this requirement in that they require the insured to disclose every material circumstance known to him and every circumstance which in the ordinary course of business ought to be known to him. A breach of this duty allows the insurer to repudiate liability on the contract of insurance.

The pre-contractual duty of disclosure mentioned above was first introduced under section 18 of the English Marine Insurance Act 1906 ("MIA") and has since become an accepted practice throughout the insurance industry.

THE SEISMIC SHIFT

The Consumer Insurance (Disclosure and Representations) Act 2012 ("CIA") and the Insurance Act 2015 ("IA") came into force in the United Kingdom on 8 March 2013 and 12 August 2016 respectively. This article will examine how the CIA and the IA have changed the traditional rules that govern the pre-contractual duty of disclosure in insurance contracts.

> " an insured … under a consumer insurance contract (must) take "reasonable care" not to make a misrepresentation "

The CIA

As evident from its title, the CIA only applies to a "consumer insurance contract", that is, an insurance contract between an insurer and an individual who enters into the contract mainly or wholly for the purposes which are unrelated to the individual's trade, business or profession.

Duty to take reasonable care

In relation to pre-contractual disclosure, the CIA replaces the duty of utmost good faith on the part of an insured ("consumer") under a consumer insurance contract with a duty to take "*reasonable care*" not to make a misrepresentation to the insurer.

The CIA does not define "reasonable care" but provides guidance to determine whether a consumer has discharged his duty to take such care. First, all relevant circumstances, such as the type of contract, its target market, any explanatory material produced by the insurer and how clear, and how specific, the insurer's questions were, are to be taken into account in determining whether a consumer has taken reasonable care. Second, the standard of care to be applied is that of a reasonable consumer. A misrepresentation made dishonestly by a consumer evinces a lack of reasonable care.

Qualifying misrepresentation

If a consumer has made a misrepresentation before entering into a consumer insurance contract, the insurer will have a remedy only if he proves that (a) the consumer has breached his duty to take reasonable care; and (b) without such misrepresentation, the insurer would not have entered into the contract or would have done so on different terms ("qualifying misrepresentation").

A qualifying misrepresentation may fall into two categories under the CIA, namely, one which is (a) deliberate or reckless; or (b) careless. A qualifying misrepresentation is deliberate or reckless if the consumer knows or did not care that (a) the misrepresentation was untrue or misleading; and (b) the matter was relevant to the insurer.

A qualifying misrepresentation is deemed careless if it is not proved to be deliberate or reckless. The CIA places the burden on the insurer to prove that a qualifying misrepresentation is deliberate or reckless.

> " A qualifying misrepresentation is deemed careless if it is not proved to be deliberate or reckless "

Remedies

If a qualifying misrepresentation is deliberate or reckless, the insurer may avoid the contract and refuse all claims. It need not return the premiums paid, except to the extent that it would be unfair to the consumer to retain them.

Where a qualifying misrepresentation is careless, the insurer's remedies would depend on what it would have done if the consumer had complied with its duty to take reasonable care. If the insurer would not have entered into the contract on any terms, it may avoid the contract and refuse all claims, but must return the premiums paid.

However, if the insurer would have entered into the contract, but on different terms (other than terms relating to premium), the contract is to be treated as if it had been entered into on those different terms, if the insurer so requires. Further, if the insurer would have charged a higher premium, it may reduce proportionately the amount payable on a claim based on the formula set out in the CIA.

If the insurer elects to vary the terms of the contract, the consumer

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may, upon being notified of the changes, terminate the contract by giving notice to the insurer.

The duties and remedies discussed above also apply to disclosures made by a consumer in the course of the variation of a consumer insurance contract.

The IA

Following on the introduction of the CIA, the IA came into force in the United Kingdom on 12 August 2016, about 3½ years after the CIA.

The IA introduces a new pre-contractual duty of disclosure for non-consumer insurance contracts. It defines a "*non-consumer insurance contract*" as a contract of insurance that is a not a consumer insurance contract as defined in the CIA and uses the expression "*insured*" to describe a party who is the insured under the contract of insurance, or would be if the contract had been entered into.

> **" an insured (must) provide the insurer with a fair presentation of the risk (for non-consumer insurance contracts) "**

Duty of fair presentation

The IA requires an insured to provide the insurer with a fair presentation of the risk. This duty is described in the IA as "*the duty of fair presentation*".

A fair presentation of the risk is one that satisfies the following requirements: (a) it discloses every material circumstance which the insured knows or ought to know, or failing that, gives the insurer sufficient information to put the insurer on notice that it needs to make further enquiries; (b) the disclosure is made in a manner which is reasonably clear and accessible to the insurer; and (c) every material representation of fact is substantially correct, and every material representation as to a matter of expectation or belief is made in good faith.

The IA clarifies that a circumstance or representation is "material" if it would influence the judgment of a prudent insurer in determining whether to take the risk, and if so, on what terms.

Knowledge

An insured who is an individual is deemed to know only what is known to him, and what is known to other individuals who are responsible for his insurance. Where the insured is not an individual, its knowledge is that which is known to individuals who are part of the insured's senior management or are responsible for its insurance.

The IA also provides that an insured ought to know what should have been revealed by a reasonable search of information available to him. Further, an individual's knowledge includes not only actual knowledge but also matters which he suspects, and would have known but for the fact that he deliberately refrained from confirming or enquiring about them.

Remedies

To be entitled to a remedy for a breach of the duty of fair presentation by the insured, the insurer must show that, but for the breach, the insurer (a) would not have entered into the contract of insurance; **or** (b) would have done so on different terms ("qualifying breach").

A qualifying breach may be either (a) deliberate or reckless, i.e. where the insured knew or did not care that it was in breach of the duty of fair presentation; or (b) neither deliberate nor reckless. The burden to prove that a qualifying breach is deliberate or reckless lies with the insurer.

The remedies available in respect of a qualifying breach under the IA are very similar to those available for a qualifying misrepresentation under the CIA. Where a qualifying breach is deliberate or reckless, the insurer may avoid the contract, refuse all claims and need not return any premiums paid.

If a qualifying breach is neither deliberate nor reckless, the insurer's remedies would depend on what it would have done in the absence of the qualifying breach. If the insurer would not have entered into the contract on any terms, it may avoid the contract and refuse all claims, but must return the premiums paid.

On the other hand, if the insurer would have entered into the contract, but on different terms (other than terms relating to premium), the contract is to be treated as if it had been entered into on those different terms, if the insurer so requires. In addition, if the insurer would have charged a higher premium, it may reduce proportionately the amount payable on a claim based on the formula set out in the IA.

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DON'T COVER UP, IT'LL BLOW YOUR COVER!

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Contracting out

The IA allows the parties to a non-consumer insurance contract to contract out of certain provisions of the IA, including those that relate to the insured's duty of fair presentation and the consequences thereof. The disadvantageous term must be clear and unambiguous as to its effect and the insurer is required to take sufficient steps to draw the insured's attention to the disadvantageous term before the contact is entered into.

As in the case of the CIA, the provisions relating to the duty of fair presentation and remedies also apply to disclosures made by an insured in the course of the variation of a non-consumer insurance contract.

THE POSITION IN MALAYSIA

The insurance industry and its equivalent under Islamic law, i.e. the takaful industry, in Malaysia are regulated by Bank Negara Malaysia ("BNM") under the Financial Services Act 2013 ("FSA") and the Islamic Financial Services Act 2013 ("IFSA") respectively.

The rights and obligations of the parties in relation to the pre-contractual duty of disclosure under a contract of insurance and a takaful contract are set out in Schedule 9 of the FSA and the IFSA respectively. The relevant provisions of both schedules came into operation on 1 January 2015.

The FSA

Schedule 9 of the FSA draws a distinction between pre-contractual duty of disclosure in relation to consumer insurance contracts and other contracts of insurance. For the purposes of Schedule 9 of the FSA, a "*consumer insurance contract*" refers to a contract of insurance entered into by an individual ("consumer") **wholly** for purposes unrelated to his trade, business or profession. It is to be noted that the definition of a consumer insurance contract under the FSA is narrower than that under the CIA.

Non-consumer insurance contract

Paragraph 4(1) of Schedule 9 of the FSA requires a person who proposes to enter into a non-consumer insurance contract to disclose to the insurer any matter which (a) the proposer knows to be relevant to the decision of the insurer on whether to accept the risk or not and the rate and terms to be applied; or (b) a reasonable person in the circumstances could be expected to know to be relevant.

Although the FSA does not set out the consequences of a breach of the pre-contractual duty of disclosure by a proposer for a non-consumer insurance contract, the similarity between Paragraphs 4(1) of Schedule 9 of the FSA and section 18 of the MIA suggests that the breach, however trifling, may allow the insurer to avoid liability on the contract.

Consumer insurance contract

Paragraph 5(1) of Schedule 9 of the FSA permits an insurer to request a consumer to answer specific questions which are relevant to the insurer's decision as to whether to accept the risk and the rates and terms to be applied in respect of a proposed consumer insurance contract. A duty is imposed on the consumer under Paragraph 5(2) to take reasonable care not to make a misrepresentation when he answers the questions posed by the insurer.

The failure or omission by an insurer to ask questions operates as a waiver by the insurer of the consumer's duty of disclosure. Further, an insurer is deemed to have waived the duty of disclosure if it does not follow up on incomplete or irrelevant answers provided by the proposer.

Subject to his duty under Paragraph 5(1) of Schedule 9 of the FSA, a consumer is also required to take reasonable care to disclose to the insurer any other matter that the consumer knows to be relevant to the decision of the insurer whether to accept the risk or not and the rates and terms to be applied.

As in the case of the CIA, the FSA does not define "reasonable care" but provides guidance which is substantially similar to the CIA to determine whether a consumer has discharged this duty. As in the case of the CIA, the standard of care is that of a reasonable consumer.

The remedies available to an insurer for a misrepresentation in respect of a pre-contractual disclosure for a consumer insurance contract are similar to those under the CIA and depends on whether the misrepresentation is (a) deliberate or reckless; or (b) careless; or (c) innocent.

A misrepresentation is deliberate or reckless if the consumer knew or did not care (a) whether the statement was untrue or misleading; and (b) that the matter to which the misrepresentation related was relevant to the insurer.

A dishonest misrepresentation is deemed to be deliberate or reckless whereas a careless or innocent misrepresentation is neither. The burden of proving that a misrepresentation is deliberate or reckless lies on the insurer and is based on a balance of probability.

The insurer's remedies for misrepresentation are set out in Division 2 of Schedule 9 of the FSA and replicate those in the CIA, save that in lieu of a prescribed formula, BNM is to determine the reduced amount to be paid in respect of a claim.

The IFSA

The rights and obligations in respect of a pre-contractual duty of disclosure for a consumer takaful contract, that is, a

contract of takaful entered into by an individual wholly for the purposes unrelated to his trade, business or profession, and a non-consumer takaful contract are set out in Schedule 9 of the IFSA. These duties and remedies are almost identical to those applicable to consumer insurance contracts and non-consumer insurance contracts under the FSA.

CONCLUSION

The rights and obligations arising from a pre-contractual duty of disclosure under the CIA and IA represent a radical shift from the position that existed before these statutes came into force, where even a minor breach could give the insurer the right to avoid the contract. The amendments represent a more equitable position and significantly improve the position of the insured.

The legal position relating to non-consumer insurance contracts and non-consumer takaful contracts appear to be stuck in the early-twentieth century and largely reflect the position under the MIA.

> “ the legal position in Malaysia with regard to consumer insurance contracts and consumer takaful contracts is substantially similar to that under the CIA ”

However, it is heartening to note that BNM had kept abreast of the developments in the law on the pre-contractual duty of disclosure for consumer insurance contracts and the legal position in Malaysia with regard to consumer insurance contracts and consumer takaful contracts is substantially similar to that under the CIA.

Notwithstanding these developments, a person who seeks protection against contingencies through insurance or takaful contracts should still be mindful not to cover up important facts or circumstances that may be relevant to the insurer. Otherwise, he could still run the risk of blowing his cover.

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OF PRIESTS, PRISONERS AND PETROL STATION ATTENDANTS

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(2) Mr Khan's actions had occurred in one long unbroken chain, whereby he had immediately followed the claimant back to his car and told the claimant in threatening words that he was never to come back to the petrol station; and

(3) the fact that Mr Khan gave the claimant an order to keep away from his employer's premises, reinforced by violence, illustrated the fact that he was "*purporting to act about his employer's business.*"

The Supreme Court also held that Mr Khan's motive was entirely irrelevant and the fact that he was clearly motivated by personal racism rather than a desire to benefit his employer's business did not matter in finding that a sufficiently close connection existed for the purposes of establishing vicarious liability.

> “ the "law of vicarious liability is on the move", and … "has not yet come to a stop" ”

CONCLUSION

It is evident from the cases reviewed that the traditional boundaries of the law on vicarious liability in the United Kingdom have been extended in recent times. In the words of Lord Phillips in *Christian Brothers*, the "*law of vicarious liability is on the move*", and Lord Reed in *Cox*, "*has not yet come to a stop*".

The question as to whether a quasi-employment relationship, such as those that existed in *Christian Brothers* and *Cox*, would suffice to establish vicarious liability, is one which has yet to be considered by the Malaysian Courts.

Although the Malaysian Court of Appeal in *Zulkiply bin Taib & Anor v Prabakar a/l Bala Krishna & Ors and other appeals* [2015] 2 MLJ 607 had accepted the *Lister* test, it remains to be seen whether the Malaysian Courts will extend the "*close connection*" test to the extent which the English Supreme Court had in *Mohamud*.

It remains to be seen if the Malaysian Courts will follow the new trend established by the courts in the United Kingdom when the opportunity arises.

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REVAMPING THE BANKRUPTCY ACT 1967

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(c) the bankrupt has failed to co-operate in the administration of his estate.

The creditor's application must be served on the DGI and the bankrupt and the court is required to hear the DGI and the bankrupt before making an order. The Amendment Act does not address the consequences of the bankrupt's absence at the hearing.

The court may either dismiss the application and approve the automatic discharge or suspend the discharge for two years. In the case of suspension, the bankrupt must continue to fulfil his statutory duties and obligations and will be automatically discharged at the end of the 2-year period.

The amendments by their wording suggest that the automatic discharge after a suspension of two years is not conditional upon the due fulfilment by the bankrupt of his duties and obligations during that period.

As mentioned earlier, the Act presently only permits the DGI to issue a certificate of discharge after five years from the date of the receiving and adjudication orders. If the court upholds an objection from a creditor, no certificate of discharge can be issued by the DGI within two years. After the 2-year period, there is no automatic discharge and it is up to the DGI to commence fresh proceedings for the issue of a certificate of discharge (which may be objected to by the creditors).

The Malaysian Courts have had various opportunities to consider the factors that have to be taken into account when dealing with challenges to an application for the issue of a certificate of discharge. These cases may provide helpful guidance by way of analogy as the new provisions also confer a discretion on the DGI to discharge a bankrupt *vide* the issue of a certificate of automatic discharge.

In *Re Benny Ong Swee Siang; Ex p United Overseas Bank (Malaysia) Bhd* [2016] 3 CLJ 1001, page 1006-1007, the High Court held that the DGI does not have an absolute discretion to issue the certificate of discharge and his discretion must be exercised reasonably and with due consideration as demanded by public interest, reason and justice. A contrary view has been laid down in other cases, for instance, *Re Endon Tamseran; Ex P Parkash Singh Wasawa Singh* [2009] 8 CLJ 379, pages 385-386, where the court has held that the DGI has practically unfettered discretion in dealing with an application for the issue of such a certificate. However, the view in *Re Benny Ong Swee Siang* is to be preferred.

In *Mayban Finance Bhd v Lee Kee Sen* [2014] 10 CLJ 543, pages 546-547, the High Court said that the DGI had the burden of justifying that the discharge is warranted and just in the circumstances of the case. What is just depends on whether a delicate balance could be achieved between the interests of the bankrupt to free himself from the chains of bankruptcy and the right of the creditors to receive the judgment sum. This is consistent with the pronouncements by the Court of Appeal which has said that although in an appropriate and deserving case a bankrupt may be discharged from his bankruptcy, he should not be discharged at the expense of commercial morality and public perception on bankruptcy law in the country. In allowing a discharge, the court must be very cautious in balancing between the interest of the bankrupt as an individual and the interest of the public and commercial reality at large (*Lim Hun Swee v Malaysia British Assurance Bhd & Ors and Other Appeals* [2010] 8 CLJ 680 at pages 696-697). The Court also cautioned that society at large must not be given the impression that being a bankrupt is not a serious matter (*Public Bank Bhd v Choong Yew Wah* [2014] 5 CLJ 695 at 706).

Although the *Lim Hun Swee* and *Public Bank* cases dealt with conventional applications to the court for discharge, the Court of Appeal's pronouncements are arguably applicable to an application for the issue of a certificate of automatic discharge. In the context of the amendments, the DGI's discretion will still have to be exercised according to the established principles at both stages of the process: (a) when deciding whether to issue a notice of discharge; and (b) when responding to a proposed automatic discharge.

EFFECTIVE DATES OF THE AMENDMENTS

Except for the amendments that relate to prohibited objections to the discharge of a bankrupt which have retrospective effect, the provisions of the Amendment Act are applicable only to debtors who are adjudicated bankrupt after the coming into operation of the Amendment Act.

All proceedings, actions or other matters required to be done under the Act which are pending immediately before the enforcement of the Amendment Act will be continued or concluded under the Act as it stood before the coming into operation of the Amendment Act.

CONCLUSION

The amendments under the Amendment Act are far reaching and will go some way in meeting the Government's objectives set out in the second paragraph of this article, particularly in providing greater protection for debtors, specifically social guarantors, and reducing the number of bankruptcy cases. Certain provisions may hopefully be fine-tuned, for example, to provide the criteria to assist the courts in deciding whether a judgment creditor has exhausted all modes of execution and enforcement to recover the debts owed by the principal debtor. It remains to be seen whether the amendments would have the effect of dampening the risk appetite of and changing the types of security acceptable to financial institutions and other creditors.

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A REMEDY FOR TRANSGRESSION – A GLOBAL DISCUSSION

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this in cases where there is conduct which calls for *"condign punishment"*. In such circumstances, the Australian Courts have held that the award must be *"of a size sufficient to serve as a deterrent to others – particularly to those who abuse a position of public office to the detriment of others."* (see *Sanders v Snell* (1997) 143 ALR 426).

THE POSITION IN MALAYSIA

Scenario 2 is based on the Malaysian case, *Datuk Seri Khalid bin Abu Bakar v N Indra a/p P Nallathamby (the administrator of the estate and dependent of Kugan a/l Ananthan, deceased) and another appeal* [2015] 1 MLJ 353, also known as the "*Kugan Case*". Kugan was the deceased, and a claim of misfeasance in public office was mounted by Kugan's mother as administratrix of his estate, against five defendants, namely the CPO, a constable in the Taipan police station, the OCPD, an officer on duty at the Taipan police station and the Government of Malaysia. In that case, the High Court found the CPO and the OCPD liable in misfeasance for their cover-up of the circumstances leading up to Kugan's death.

On appeal, the Court of Appeal, in applying the principles of the *Three Rivers Case* affirmed the decision of the High Court on this point. The Court Appeal in its deliberation stated:

"We say that this wilful disregard to ensure that the truth behind the death of the deceased is made known together with other undisputed evidence set-out above are enough to satisfy a case of public misfeasance. It is also our view that there has been a reckless indifference to the illegal act of the second defendant … Lord Steyn in the Three Rivers Case opined … that to impose liability where the defendant had acted with reckless indifference to the illegality of his act and the probability of its causing injury was 'an organic development which fits into structure of our law governing intentional torts'. We adopt His Lordship's view without any reservation."

The Court of Appeal's whole-hearted adoption of the principles enunciated in the *Three Rivers Case* is not uncommon. The cases of misfeasance in public office in Malaysia have consistently applied the spirit of the principles enunciated in the *Three Rivers Case.*

In *Kemajuan Kuari (M) Sdn Bhd v PTB Suramix Sdn Bhd and 3 Others* [2015] MLJU 1018, where the defendants included the Terengganu State Government and other entities directly or indirectly belonging to the Terengganu State Government, an action in misfeasance in public office was brought by Kemajuan Kuari in the High Court for the revocation of its permit to extract and remove rocks from a piece of quarry land in Terengganu. Kemajuan Kuari's permit did not have an expiry date nor was there a fixed duration of the approval.

Kemajuan Kuari carried out its works and stockpiled rocks at various sites for use later. A few years later, Kemajuan Kuari was informed that it was no longer approved to carry out such works. The approval was instead granted to PTB Suramix. After the revocation of the approval, Kemajuan Kuari was prevented from extracting rocks from the quarry land and the Defendants converted to their own use the rocks and rock by-products stockpiled at the various locations. Kemajuan Kuari was also prevented from using the jetty to transport the stockpiles out.

The High Court found that the revocation of Kemajuan Kuari's approval amounted to misfeasance in public office, and this was upheld by the Court of Appeal. The Court of Appeal stated that the revocation of the permit was on a false pretext and that the Terengganu State Government had instructed PTB Suramix to remove and sell rocks from Kemajuan Kuari's stock piles without regard for the latter's rights. The Court of Appeal reiterated the principles of misfeasance in public office as stated *in Bourgoin SA and Ministry of Agriculture, Fisheries and Food* [1986] 1 QB 716, which largely resemble those of, and inspired discussion, in the *Three Rivers Case.*

Despite the adoption of English principles, it is worth noting that there are differences in the application of this law in Malaysia.

First, Order 53 Rule 5 of the Rules of Court 2012 provides a limited avenue for an aggrieved applicant in a judicial review to claim damages. However, this is a discretionary remedy and is not awarded as of right. This was affirmed by the Court of Appeal in a recent case between The Edge Communications Sdn Bhd and the Home Ministry on the suspension of the former's publishing permits.

Second, any action for vicarious liability against the State or Federal Government in an action of misfeasance in public office against a public authority may be limited by Sections 5 and 6 of the Government Proceedings Act 1956. In *LCBN Development Sdn Bhd & Anor v Pengarah Tanah dan Galian Selangor & Ors* [2014] 3 MLJ 445, the Court of Appeal held that if the act of the public officer cannot give rise to a private action against the public officer concerned, then the Government will not be liable.

CONCLUSION

Misfeasance in public office is a difficult tort to assert as it lies in a precarious position between justice and fault. On the one hand, it seeks to remedy an inequity leading to actual loss. On the other, it is blind to actual unlawful conduct if no damage is caused and in fact imposes an unduly heavy burden of proving culpability.

It is submitted that the ambit of this tort must be expanded and interpreted to address due punishment to any abuse of public office, even if it is through a civil function of the law.

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LEGAL INSIGHTS

A SKRINE NEWSLETTER

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