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LEGAL INSIGHTS

A SKRINE NEWSLETTER

MESSAGE FROM THE EDITOR-IN-CHIEF

This issue of our newsletter marks the end of fifteen years since we started publishing our newsletter. It is quite an achievement as we have managed to publish four issues per year throughout this period, with the exception of one year in which three were published.

I would like to extend the Firm's appreciation to our lawyers who have found time from their legal practice to contribute articles and case commentaries. Without their contributions, this endeavour would have floundered. The contribution of the members of our newsletter editorial team has been equally significant. It is through their efforts that we have, hopefully, kept a high standard for our publication and kept its contents interesting.

It would be remiss not to record our appreciation to Lee Tatt Boon, our erstwhile Partner and present Consultant, who set our Firm on this path of publishing a newsletter.

To each of you mentioned above, our sincere thanks, for your contribution.

Last, but by no means the least, I hope our readers will find the contents of this issue of Legal Insights interesting.

With best wishes,

Kok Chee Kheong
Editor-in-Chief

CONTENTS

ANNOUNCEMENTS

ASIA-MENA COUNSEL – 2018 RANKINGS

Our Firm was awarded the Firm of the Year Award for 2018 in four practice areas: Anti-Trust / Competition; Aviation; International Arbitration; and Real Estate / Construction. We also received Honourable Mentions in the following areas: Compliance / Regulatory; Corporate M&A; Energy & Natural Resources; and Litigation and Dispute Resolution.

IFLR 1000 2019 RANKINGS

We were ranked as a Tier 1 Firm by IFLR 1000 2019 in four practice areas: M&A; Project Development - Infrastructure; Project Development - Power; and Project Development - Oil & Gas; and in Tier 2 for Banking and Finance.

Eight of our lawyers were recognised as leading lawyers: Dato' Philip Chan (Market Leader); Theresa Chong, To' Puan Janet Looi, Quay Chew Soon and Phua Pao Yii (Highly Regarded); Fariz Abdul Aziz (Notable Practitioner); and Sim Miow Yean and Lee Ai Hsian (Rising Stars).

CHAMBERS ASIA-PACIFIC 2019 RANKINGS

Chambers Asia-Pacific ranked our Firm in Band 1 for Dispute Resolution and Intellectual Property, and in Band 2 for Corporate / M&A; Employment and Industrial Relations; Projects, Infrastructure & Energy; Shipping; and Technology, Media and Telecommunications.

Fourteen of our lawyers were ranked: Leong Wai Hong, Dato' Lim Chee Wee and Lee Shih (Dispute Resolution); Ivan Loo (Construction); Vinayak Pradhan (International Arbitration and Construction); To' Puan Janet Looi, Quay Chew Soon and Cheng Kee Check (Corporate / M&A); Khoo Guan Huat (Intellectual Property); Charmayne Ong (Intellectual Property and TMT); Siva Kumar Kanagasabai (Employment and Industrial Relations and Shipping); Selvamalar Alagaratnam (Employment and Industrial Relations); Tan Shi Wen (Competition / Anti-Trust); and Khong Siong Sie (Tax).

SENIOR ASSOCIATES

The Firm congratulates Tan Su Ning and Siew Suet Mey on their promotion to Senior Associates.

Su Ning is a member of our Employment and Industrial Law Practice Group. She represents clients in employment disputes and advisory matters.

Suet Mey is a member of our Construction and Engineering Practice Group. Her work portfolio comprises mainly of construction and engineering disputes, arbitration, adjudication and civil litigation.

AVOIDING CORPORATE CORRUPTION

Selvamalar and Caroline explain Malaysia's

The new section 17A which was introduced into the Malaysian Anti-Corruption Commission Act 2009 ("MACC Act") in May 2018 provides for corporate criminal liability for corruption offences as well as for personal liability of persons involved in the management of a commercial organisation.

Section 17A(1) provides that a commercial organisation commits an offence if a "person associated" with the organisation corruptly gives, agrees to give, promises or offers to any person any gratification, whether for the benefit of that person or another person, with intent to obtain or retain business for the organisation, or to obtain or retain an advantage in the conduct of business for the organisation.

For the purposes of section 17A, "commercial organisation" includes companies and partnerships (including limited liability partnerships), whether incorporated or formed in Malaysia or elsewhere, provided that the organisation concerned carries on business, or part of its business, in Malaysia; and a "person associated" refers to a director, partner, employee or any person who performs services for or on behalf of a commercial organisation.

Pursuant to section 17A(3) when a commercial organisation is convicted of an offence under section 17A, a director, controller, officer, partner or member of the management of the organisation is deemed to have committed the offence unless he proves that the offence was committed without his consent or connivance, and that he had exercised due diligence to prevent the commission of the offence, having regard to the nature of his function and to the circumstances.

SANCTIONS FOR CORPORATE LIABILITY OFFENCE

The penalties that can be imposed against a commercial organisation found to have committed an offence under section 17A are severe. The organisation can be subject to a fine of not less than 10 times the sum or value of the gratification or RM1.0 million, whichever is higher, or to imprisonment for a term not exceeding 20 years, or to both.

It has been announced that section 17A will come into force on 1 June 2020. In light of this, we will discuss the measures that commercial organisations can adopt to mitigate the risk of corporate liability for corruption offences. The measures that individuals may adopt to mitigate the risk of personal liability fall outside the scope of our discussion.

CORPORATE DEFENCE - ADEQUATE PROCEDURES

The sole statutory defence available to a commercial organisation against corporate liability is that it had in place adequate procedures to prevent associated persons from committing corruption. This is similar to the position under the UK Bribery Act.

It is therefore patently clear that adequate procedures must be put in place but what are such "adequate procedures" and how

CRIMINAL LIABILITY FOR OFFENCES

Guidelines on Adequate Procedures

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CAROLINE LEONG (R)

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does one ensure that they are sufficiently adequate?

The Prime Minister's Department issued the Guidelines on Adequate Procedure ("Guidelines") dated 4 December 2018 pursuant to section 17A(5) of the MACC Act. These Guidelines were formed on the basis of five principles which may be used as reference points for any anti-corruption policies, procedures and controls which commercial organisations may choose to implement. The adequate procedure principles are: Top Level Commitment, Risk Assessment, Undertake Control Measures, Systematic Review, Monitoring and Enforcement, and Training and Communication.

Top level commitment

The Guidelines emphasise the primary responsibility on top management to ensure that commercial organisations practice the highest level of integrity and ethics, comply fully with the applicable laws and regulatory requirements on anti-corruption, and effectively manage the key corruption risks.

The effectiveness of any anti-corruption effort requires the buy-in and commitment of top-level management, setting the tone from the top and spearheading its effort in fighting corruption. Clear communication internally and externally from the board of directors and the highest level of management that the organisation has zero tolerance for corruption is imperative. Besides corporate statements or charters reciting the anti-corruption values, a culture of integrity must be instilled at all levels, including through proper procedures and reporting channels.

Risk Assessment

A risk assessment forms the basis of a commercial organisation's anti-corruption efforts. This will assist in understanding and identifying where the risks exist, the extent of such risks and to identify the required processes, systems and controls to minimise, if not eliminate, those risks.

The Guidelines recommend that a comprehensive risk assessment be done every three years, with intermittent assessments conducted to ensure integrity levels are not compromised. This may be on a stand-alone basis, but it is further recommended that the assessment be incorporated into the organisation's general risk register. The assessment process should be tailored to the commercial organisation's business and culture, keeping in mind factors such as its size, location, nature of business and organisation structure.

Undertake Control Measures

Control and contingency measures that are reasonable and proportionate to the risks of corruption and the nature, scale and complexity of the commercial organisation's activities should be implemented. The Guidelines identify two items that should be included, namely due diligence on any relevant parties or personnel and reporting channels that are accessible, confidential and prohibit retaliation.

The application of section 17A of the MACC Act is far-reaching. It extends to any person who performs services for or on behalf of a commercial organisation, meaning that a commercial organisation may be liable for the corrupt acts of its agents or even suppliers. It is hence important that before entering into commercial relationships, due diligence is carried out on potential business associates, partners and/or agents. Due diligence here refers to the process of investigating, analysing and researching a company to ensure that the company is run in a manner which is consistent with the standards of the commercial organisation. Due diligence tools may be crafted to serve this purpose. The due diligence process should be fully documented as such documentation may prove useful if there is an investigation by the authorities into the dealings of the commercial organisation with its business partners. As an additional step of vigilance, due diligence should also be carried out periodically while the commercial relationship is ongoing to ensure constant compliance.

The Guidelines also recommend that policies and procedures of the commercial organisation should deal with areas where higher risks of corruption lie as identified by the risk assessment process, which could include, among others, gift receiving and giving, movement of moneys, bribery, fraud, and influence peddling. These should be clear and precise and be crafted in a way that is effective in deterring corrupt practices within or on behalf of the organisation. While not specified in the Guidelines, it is suggested that written policies clearly set out the prohibited acts which may amount to an offence under the MACC Act, while bearing in mind that the list should not and cannot be exhaustive.

The bare minimum that a commercial organisation should have in place are: (a) anti-bribery and corruption policy or statement; (b) code of business conduct and ethics; (c) standard operating procedures for due diligence; (d) written confirmation and undertakings in contractual documents; (e) whistleblowing policy; (f) written limits of authority; and (g) internet and communication policy.

These policies and procedures must be endorsed by top level management, kept up to date, communicated to and remain easily and readily accessible by all associated persons at all times. Employment agreements should include a requirement for all employees to abide by the policies and procedures as and when

continued on page 21

CONDITIONAL AGREEMENTS INVOLVING ESTATE LAND – YAY OR NAY?

Iris Tang explains the landmark decision on section 214A of the National Land Code 1965

On 10 October 2018, the Federal Court delivered its grounds of judgment in *Gula Perak Berhad v Datuk Lim Sue Beng & Other Appeals* [2018] 1 LNS 1617 (collectively "Appeals"). The Appeals relate to six appeals which were heard together and emanated from an application by the liquidators of Gula Perak Berhad ("Gula Perak") for the sanction of the Shah Alam High Court in Companies Winding-up No.: MT-FLJC-28-81-2011 ("Winding-up Court") to enter into a compromise arrangement with Faithmont Estate Sdn Bhd ("Faithmont") and AmBank (M) Berhad ("AmBank") to complete the sale and purchase transaction of a piece of estate land.

The Federal Court, by a 3:2 decision, held that a conditional agreement involving the sale and purchase of an estate land which contains a condition precedent that the said agreement is subject to the approval of the Estate Land Board does not contravene section 214A(1) of the National Land Code ("NLC") and is therefore not null and void.

> **"a conditional agreement … subject to the approval of the Estate Land Board does not contravene section 214A(1)"**

Central to the Appeals is the interpretation to be given to section 214A(1) of the NLC which provides, *inter alia*, that no estate land is capable of being transferred, conveyed or disposed of in any manner whatsoever, unless approval of such transfer, conveyance or disposal has first been obtained from the Estate Land Board.

BRIEF BACKGROUND FACTS

Gula Perak was the registered proprietor of an oil palm plantation in Perak Darul Ridzuan ("Property"). The Property was charged and subsequently assigned to AmBank as security for bonds issued by Gula Perak in favour of AmBank.

On 28 October 2005, Gula Perak and Faithmont entered into an agreement ("SPA") whereby Gula Perak agreed to sell and Faithmont agreed to purchase the Property for RM19 million. As the Property comprised estate land, the SPA was expressly made subject to, *inter alia*, the fulfilment of a condition precedent that Gula Perak was to obtain the Estate Land Board approval pursuant to section 214A of the NLC before transferring the Property to Faithmont. However, Gula Perak failed to apply for the Estate Land Board approval.

On 25 March 2010, Faithmont sought specific performance of the SPA against Gula Perak ("the 636 Suit") and commenced another action against AmBank wherein Faithmont claimed, *inter alia*, that AmBank was not a registered chargee of the Property and sought various declaratory reliefs and damages ("the 438 Suit").

Gula Perak was wound up on 1 March 2013 and liquidators were appointed.

The 636 Suit and the 438 Suit were subsequently consolidated ("the Suit"). In the midst of the trial, the dispute was successfully mediated and the parties agreed to settle the Suit on terms of a proposed consent order ("Compromise") subject to the sanction of the Winding-up Court, as Gula Perak was already in liquidation. One of the salient terms of the Compromise was for Gula Perak to submit an application to the Estate Land Board for approval to transfer the Property to Faithmont.

DECISION OF THE WINDING-UP COURT

On 19 June 2015, Gula Perak filed an application in the Winding-up Court to obtain sanction for the Compromise ("Application"). The Application was opposed by Yakin Tenggara Sdn Bhd ("Yakin Tenggara"), a contributory of Gula Perak, and Lim Sue Beng ("LSB"), an unsecured creditor of Gula Perak. In resisting the Application, both Yakin Tenggara and LSB contended, among others, that the Compromise was made without the prior approval of the Estate Land Board and was therefore illegal pursuant to sections 214A(1) and 214A(10A) of the NLC.

The Application was allowed by the Winding-up Court which held that the Compromise, which was essentially a conditional contract, was not prohibited under sections 214A(1) and 214A(10A) of the NLC. As the Winding-up Court had sanctioned the Compromise, the parties went back to the trial judge and recorded a Consent Order on 11 November 2015 ("Consent Order") to resolve the Suit.

Thereafter, the liquidators of Gula Perak forwarded to Faithmont executed application forms for the State Authority approval and the Estate Land Board approval, as well as the transfer form on 16 November 2015. Faithmont submitted the applications for the relevant approvals and obtained the approvals of the State Authority and the Estate Land Board on 20 November 2015 and 29 February 2016 respectively, and the sale of the Property was completed on 23 March 2016.

DECISION OF THE COURT OF APPEAL

Dissatisfied with the Winding-up Court's decision, Yakin Tenggara and LSB appealed to the Court of Appeal on 3 December 2015. On 3 January 2017, the Court of Appeal allowed both appeals on the ground that the SPA, which was executed by Gula Perak and Faithmont prior to obtaining the Estate Land Board approval, contravened section 214A(1) of the NLC. Therefore, the Court of Appeal set aside the Winding-up Court's decision and ordered the parties to be reinstated to their original positions before the

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Consent Order.

According to the Court of Appeal, the legislative intent behind section 214A(1) of the NLC is to prohibit the transfer, conveyance and disposal of estate land "*in any manner whatsoever*" without first obtaining the approval of the Estate Land Board. The Court of Appeal took the view that although no actual "*transfer*" took place at the time of the Compromise, the common intention between parties was to circumvent the strict requirement of section 214A(1) by dealing with estate land without the prior approval of the Estate Land Board.

The Court of Appeal agreed with an earlier decision of the Court of Appeal in *Tai Thong Flower Nursery Sdn Bhd v Master Pyrodor Sdn Bhd* [2014] 9 CLJ 74 ("Tai Thong") where it was held that the approval of the Estate Land Board is to be obtained before the execution of the agreement by which the land would be conveyed and transferred.

DECISION OF THE FEDERAL COURT

Leave to Appeal

Thereafter, Gula Perak, Faithmont and AmBank successfully obtained leave from the Federal Court to appeal against the Court of Appeal decision.

> **"section 214A itself contemplates that a conditional agreement between the proprietor … and the intended purchaser is to be in place"**

Six questions of law were posed to the Federal Court, all of which were distilled by the Federal Court to the following question:

"*Whether a conditional agreement to sell an estate land (SPA) to a purchaser with a condition precedent that the sale was subject to obtaining the approval of the Estate Land Board is in breach of section 214A(1) of the NLC when no prior approval is obtained from the Board before entering into the said SPA?*"

Findings of the Federal Court

The Federal Court answered the aforesaid question in the negative, holding that section 214A(1) of the NLC does not prohibit the making of a conditional or contingent agreement to sell estate land which expressly states that the intended sale is subject to prior approval of the Estate Land Board. Instead, the prohibition imposed by section 214A(1) is against any act of transfer, conveyance or disposal of estate land without the Estate Land Board approval.

The Federal Court was of the view that the SPA by itself did not have the effect of transferring or disposing the Property from Gula Perak to Faithmont and did not even take effect unless and until the Estate Land Board's approval had been obtained and all the conditions precedent stipulated in the SPA had been fulfilled. As such, the SPA could not be declared null and void.

Joint application for Estate Land Board approval

In interpreting section 214A(1), the Federal Court devoted particular attention to the wording of section 214A(4) of the NLC, which lays down a mandatory requirement for both the intended vendor and purchaser to jointly sign and submit an application to the Estate Land Board in Form 14D for its approval.

The Federal Court opined that the requirement in Form 14D to include the name and signature of the intended purchaser shows that the existence of an intended purchaser is a pre-requisite for the application to the Estate Land Board. Thus, section 214A itself contemplates that a conditional agreement between the proprietor of the estate land and the intended purchaser is to be in place at the time when Form 14D is to be jointly submitted to the Estate Land Board. The Federal Court added that it would only make practical sense if the proprietor and the intended purchaser had first entered into a conditional agreement before it was possible to submit any application to the Estate Land Board.

The Federal Court also observed that the court ought to have taken a common sense approach and considered the practical aspect of commercial transactions involving the sale and purchase of estate lands.

In arriving at the above conclusions, the apex Court generally agreed with the approach adopted by the High Court in *Rengamah a/p Rengasamy v Tai Yoke Lai & Anor* [1998] 1 CLJ 987 which dealt with the same issue.

Distinguishing Tai Thong

The Federal Court took the view that *Tai Thong*, which was heavily relied upon by the Court of Appeal, was not applicable to the facts of the Appeals as the core issue in *Tai Thong* related to the legality of the actual act of transferring the land in question prior to obtaining approval from the Estate Land Board; whereas the Appeals concerned the legality of a SPA which was subject to a condition precedent that the transfer could only be effective after the Estate Land Board approval had been obtained.

continued on page 21

PARDON ME, I'M GOING HOME

Nimalan Devaraja unravels the mysteries of the royal pardon

The dethroning of Barisan Nasional (and its predecessor, the Alliance Party), after almost 61 years as the governing coalition of Malaysia, was Malaysia's biggest news of 2018.

Hot on its heels however was the granting of a royal pardon by the Yang di-Pertuan Agong to Datuk Seri Anwar Ibrahim a long week after the declaration of a new government. The bestowing of the royal pardon brought an end to a tumultuous two decades in the lives of Anwar and his family which had seen him go in and out of prison on various charges.

The royal pardon also enabled Anwar to contest and be elected as the Member of Parliament for Port Dickson (a few hundred kilometres from his usual stomping ground in Permatang Pauh where he had served as a Member of Parliament for six terms) through a by-election engineered to bring him back to the House of Representatives. However, his journey back to the august House brought many challenges, one of which was the process and effect of the royal pardon which he had received. This challenge brought into sharp focus the pardon process, which shall be discussed in this article.

THE POWER OF THE ROYAL PARDON

The power to grant a royal pardon is largely embodied in Article 42(1) of the Federal Constitution which provides:

"*The Yang di-Pertuan Agong has power to grant pardons, reprieves and respites in respect of all offences which have been tried by court-martial and all offences committed in the Federal Territories of Kuala Lumpur, Labuan and Putrajaya; and the Ruler or Yang di-Pertua Negeri of a State has power to grant pardons, reprieves and respites in respect of all other offences committed in his State*".

A reading of Article 42(1) dispels two common misconceptions about the royal pardon. First, that the power of clemency is vested solely in the Yang di-Pertuan Agong. Instead, His Majesty's power is restricted to offences tried by court martial or committed in the three Federal Territories. For offences committed in the other States, this power lies with the Ruler or Yang di-Pertua Negeri of the State in which the offence is committed. For example, a petition for clemency for an offence committed in Georgetown would be in the hands of the Yang di-Pertua Negeri of Pulau Pinang and not the Yang di-Pertuan Agong.

Second, although the power to pardon is commonly described as a 'royal pardon', it is not always the case as the Yang di-Pertua Negeri of Sabah, Sarawak, Penang and Malacca are not of royal lineage.

It is interesting to note that the powers set out in Article 42(1) of the Federal Constitution are subject to four qualifications. The first is contained in Article 42(10) which provides that the powers to grant pardons or to commute sentences imposed by any Syariah courts in Malacca, Penang, Sabah, Sarawak or the Federal Territories shall be exercisable by the Yang di-Pertuan Agong as the Head of the religion of Islam in those states.

The remaining three qualifications are set out in Article 42(12) of the Federal Constitution which provides as follows:

(1) where the powers are to be exercised by the Yang di-Pertua Negeri of a State in respect of himself or his wife, son or daughter, such powers shall be exercised by the Yang Di-Pertuan Agong;

(2) where the powers are to be exercised by the Yang di-Pertuan Agong or the Ruler of a State in respect of his son or daughter, such powers shall be exercised by the Conference of Rulers; and

(3) where the powers are to be exercised in respect of the Yang di-Pertuan Agong, the Ruler of a State or his consort, such powers shall be exercised by a Ruler of a State to be nominated by the Conference of Rulers.

In exercising the executive power to grant a royal pardon, the Yang di-Pertuan Agong/Ruler/Yang di-Pertua Negeri is required to consider the advice of the designated consultative body, the Pardons Board.

In addition, the Yang di-Pertuan Agong's powers to grant pardons and remissions under the Federal Constitution were extended to security offences pursuant to the Essential (Security Cases) Regulations 1975. These powers ceased in 2011 with the annulment of the Proclamation of Emergency issued on 15 May 1969.

AVENUES TO A ROYAL PARDON

There are several means by which a person who has been convicted of an offence may be considered for a royal pardon. Where a person is sentenced to death upon his conviction, section 281(c) of the Criminal Procedure Code imposes an obligation on the Menteri Besar of the State in which the offence was committed to submit details of the conviction and sentence to the Ruler of the relevant State for consideration under Article 42 of the Constitution.

In the case of a person who is serving a long term of imprisonment, Regulation 54 of the Prison Regulations 2000 requires the Commissioner General of Prison to submit a report to the Menteri Besar of the State in which the offence was committed (or to the Yang di-Pertuan Agong in the case of a security offence or court martial) for consideration under Article 42 of the Constitution after the person has completed four, eight, twelve or sixteen years of imprisonment and every subsequent year thereafter.

A person may initiate a petition for clemency under Regulation 113 of the Prisons Regulations 2000. The first petition may be submitted as soon as practicable after his conviction. Thereafter, he may submit a second petition three years after the date of

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conviction and further petitions at two-year intervals, unless there are special circumstances which should be brought to the notice of the Yang di-Pertuan Agong/Ruler/Yang di-Pertua Negeri.

THE PARDONS BOARD

Article 42(5) of the Federal Constitution establishes a Pardons Board for each State as well as one for the Federal Territories. The Pardons Board consists of:

(1) the Attorney-General of the Federation (or his representative);

(2) the Chief Minister of the State/the Federal Territories Minister; and

(3) not more than three other members appointed by the Yang di-Pertuan Agong/Ruler/Yang di-Pertua Negeri.

The three members mentioned in sub-paragraph (3) above cannot be members of the Legislative Assembly of the State or the House of Representatives. They are appointed for a term of three years but are eligible to be reappointed.

The Pardons Board is to be presided over by the Yang di-Pertuan Agong/Ruler/Yang di-Pertua Negeri and must meet in his presence. The Pardons Board is also required, under Article 42(9) of the Federal Constitution, to consider any written opinion which may be given by the Attorney-General before tendering its advice to the Yang di-Pertuan Agong/Ruler/Yang di-Pertua Negeri to consider. Slightly different procedures apply where a matter falls within the three qualifications set out in Article 42(12) of the Constitution.

IS THE ADVICE BINDING?

While the Pardons Board is required by the Federal Constitution to tender its advice to the Yang di-Pertuan Agong/Ruler/Yang di-Pertua Negeri, case law suggests that the decision is personal to the Yang di-Pertuan Agong/Ruler/Yang di-Pertua Negeri and therefore the advice of the Pardons Board need not necessarily be heeded.

In the Supreme Court case of *Sim Kie Chon v Superintendent of Pudu Prison & Ors* [1985] 2 MLJ 385, Sim Kie Chon commenced legal proceedings to challenge the decision of the Pardons Board to reject his petition for clemency on the basis that the Pardons Board had previously commuted the death sentence of Mokhtar Hashim (a former Minister of Youth and Sports) who was convicted of the murder of Datuk Mohamad Taha Talib, a former Negri Sembilan State Assemblyman.

In dismissing this contention, the Supreme Court made it clear that it was not the function of the Pardons Board to commute a death sentence. The role of the Pardons Board was limited to merely tendering advice to the Yang di-Pertuan Agong, but it was His Majesty himself who exercised the executive power, which was one of a high prerogative of mercy.

This principle was applied by the High Court in *Karpal Singh v Sultan of Selangor* [1988] 1 MLJ 64, where Karpal Singh had sought a declaration that the blanket statement made by the Sultan of Selangor that he would not pardon anyone who had been sentence to death for drug trafficking was in violation of Article 42 of the Federal Constitution. Karpal Singh took the position that the Sultan could only reject a petition of clemency after considering the advice of the Pardons Board and applying his mind to the petition before him. In applying *Sim Kie Chon,* the High Court held that it was not mandatory for the Sultan to act on the advice of the Pardons Board.

As a side note, it is possible that Mokhtar Hashim may be the only Malaysian to have received a double pardon, first in 1984 when his death sentence was commuted to life imprisonment, and thereafter in 1991 when he was granted a full pardon. Both pardons were granted by the Yang di-Pertuan Agong under the Essential (Security Cases) Regulations 1975 as Mokhtar had been charged and convicted for a security offence.

JUSTICIABILITY OF A DECISION

A crucial question that springs to mind is whether the decision of the Yang di-Pertuan Agong/ Ruler/Yang di-Pertuan Negeri can be challenged by way of judicial review proceedings in a manner similar to challenges mounted against the decisions of other administrative bodies/tribunals.

This issue came before the Supreme Court in *Superintendent of Pudu Prison & Ors v Sim Kie Chon* [1986] 1 MLJ 494, the second episode of the Sim Kie Chon saga. The protagonist, Sim Kie Chon, had been convicted on a charge under the now-repealed Internal Security Act 1960 and sentenced to death by the Kuala Lumpur High Court (upheld on appeal by the Federal Court). As mentioned above, the Yang di-Pertuan Agong had rejected Sim's plea for clemency.

Following the disposal of the initial proceedings initiated by him, Sim instituted fresh proceedings for, among others, declarations that the decision of the Pardons Board was void and legally ineffective and that the Pardons Board had acted in breach of natural justice. The Appellants' application to set aside the proceedings as an abuse of the process of the court was dismissed and resulted in the appeal before the Supreme Court.

continued on page 20

NOW, EVERYONE CAN SUE

Witter Yee explains a recent landmark decision of the Federal Court on defamation

On 26 September 2018, the Federal Court in *Chong Chieng Jen v Government of State of Sarawak & Anor* [2018] 8 AMR 317 affirmed the majority decision of the Court of Appeal which held that the Government of Sarawak and the State Financial Authority can sue for defamation.

BRIEF FACTS

The First Respondent is the Government of the State of Sarawak. The Second Respondent is the State Financial Authority of the First Respondent. The Appellant, the then Vice Chairman of Democratic Action Party (DAP) was a Member of Parliament for Bandar Kuching as well as a member of the Sarawak State Legislative Assembly for Kota Sentosa. The Respondents sued the Appellant for libel, alleging that the Appellant had made defamatory statements concerning mismanagement of the State's financial affairs.

> **"our Courts should not import common law … when legislation in Malaysia has clearly provided for the principle of law to be applied"**

The statement was published in the Sin Chew Daily on 3 January 2013 and in the DAP's leaflet, both in Chinese and English. The statement was also published in an online news portal Malaysiakini on 18 March 2013. The DAP's leaflet contained a drawing of the figure "RM11,000,000,000.00" being sucked into a whirl pool with a black hole at the centre. The statements attributed to the Appellant included the following:

"…Chong said whenever people talked about the lack of facilities, the government always give a lame excuse of not having enough fund (sic) but right unknown to us there is this RM11 billion disappearing into the blackhole. Chong said this proved a point that the state does not have money it's because state money going somewhere else and Chong warned the state government that they may be able to get away from the Opposition questioning but they cannot get away from the people as a whole."

The Appellant relied on various defences, such as justification, fair comment, qualified privilege and that the words complained of were not defamatory. The Appellant also contended that the Respondent had no *locus standi* to maintain an action for defamation and that it would be contrary to public policy and public interest, and also against common law as well as the principle of freedom of speech and expression, for such an action to be instituted.

DECISIONS OF THE HIGH COURT AND COURT OF APPEAL

On 28 April 2014, the Kuching High Court dismissed the Respondents' claim on the ground that the right of a State Government or a statutory body to sue does not extend to the right to sue for defamation. The learned Judge relied on the principle expounded by the House of Lords in *Derbyshire County Council v Times Newspaper Ltd & Ors* [1993] AC 534 ("Derbyshire") in coming to this decision. Dissatisfied, the Respondents appealed to the Court of Appeal against the High Court's decision.

On 7 April 2016, the Court of Appeal by a 2:1 majority held that the Respondents have the right to sue and maintain an action for defamation and allowed the Respondents' appeal. Dissatisfied, the Appellant sought leave to appeal to the Federal Court.

THE RELEVANT LEAVE QUESTIONS

Leave to appeal to the Federal Court was granted to the Appellant on three questions of law, of which the following two will be discussed in this article:

(1) Whether the Government Proceedings Act 1956 (GPA), and in particular Section 3 therein, precludes the principle in *Derbyshire* from being extended to the Government of Sarawak?

(2) Whether Section 3(1)(c) of the Civil Law Act 1956 (CLA) precludes the principle in *Derbyshire* from being extended to the Government of Sarawak?

DECISION OF THE FEDERAL COURT

Question 1: Whether the GPA, and in particular Section 3 therein, precludes the principle in Derbyshire from being extended to the Government of Sarawak?

In answering this question, the Federal Court held that our Courts should not import common law from other countries when legislation in Malaysia clearly provides for the principle of law to be applied, as held in *Public Services Commission Malaysia & Anor v Vickneswary RM Santhivelu* [2008] 6 CLJ 573.

The Federal Court further held that in Malaysia, the right of the Federal Government and State Governments to sue is a statutory right specifically provided under section 3 of the GPA which states:

"Subject to this Act and of any written law where the Government has a claim against any person which would, if such claim had arisen between subject and subject, afford ground of civil proceedings, the claim may be enforced by proceedings taken by or on behalf of the Government for that purpose in accordance with this Act."

In interpreting the meaning of "*written law*" in section 3 of the GPA, the Federal Court held that under section 3 of the Interpretation Acts 1948 and 1967, the definition of "written law" does **not** include "common law" which under the said Acts

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mean "the common law of England". Thus, the statutory right of the Government to sue in civil proceedings under section 3 of the GPA including for defamation, is not subject to the common law of England.

The Federal Court agreed with the majority decision of the Court of Appeal which held that section 2(2) of the GPA gives a wide definition of "*civil proceedings*" to include "*any proceeding whatsoever of a civil nature before a court*". Hence, if an individual makes an allegation critical of a Government, which allegation if made against another individual would afford ground for that other individual to sue, then the Government may sue in defamation.

The Federal Court rejected the Appellant's contention that the Government has no reputation and hence, is incapable of being defamed. The Federal Court held that in *Derbyshire*, the House of Lords decided that a local government corporation could not sue for defamation not because it held that such a corporation had no "governing reputation" but because of the likely chilling effect on freedom of speech of granting a right to sue.

> **"Section 3(1)(c) of the CLA precludes the principle in Derbyshire from being extended to the Government of Sarawak"**

Question 2: Whether Section 3(1)(c) of the CLA precludes the principle in Derbyshire from being extended to the Government of Sarawak?

The Federal Court in answering Question 2 in the affirmative, held that Section 3(1)(c) of the CLA precludes the principle in *Derbyshire* from being extended to the Government of Sarawak. In arriving at this decision, the Federal Court relied on the case of *Majlis Perbandaran Ampang Jaya v Steven Phua Cheng Loon & Ors* [2006] 2 MLJ 389 which held that when a Court is faced with the situation whether a particular principle of common law of England is applicable, the Court has to first determine whether there is any written law in force in Malaysia. If there is, the Court does not have to look anywhere else.

The Federal Court held that the GPA is the specific law in force which governs proceedings by and against the Federal Government and State Governments, including the State Government of Sarawak. The right of the Government including the State Government of Sarawak to sue, including to sue for defamation, is statutorily provided under section 3 of the GPA. Hence, the English common law principle expounded in *Derbyshire* does not apply.

The Federal Court also rejected the Appellant's contention that it is contrary to the public interest to accord the government a right to sue for defamation as it infringes the fundamental right of freedom of expression under Article 10(1)(a) of the Federal Constitution (FC). The Federal Court, relying on the Federal Court case *of PP v Azmi Sharom* [2015] 8 CLJ 921, held that in Malaysia, the right to freedom of speech provided in Article 10 of the FC is not absolute or unfettered as Article 10(2)(a) authorises Parliament to enact laws to impose such restrictions as it deems necessary to provide against contempt of court, defamation, or incitement to any offence.

Having determined affirmatively that the Respondents have the right to maintain an action for defamation, the Federal Court remitted the case back to the High Court for trial to determine whether the impugned words by the Appellant were defamatory of the Respondents and, if necessary, for assessment of damages.

COMMENTS

This Federal Court's decision has raised grave concerns among academicians, members of the press and the legal fraternity that allowing the Federal Government and State Governments to sue for defamation would stifle criticism of such bodies for fear of legal action.

The promises in the Election Manifesto of the present Government for the 14th Malaysian General Elections include a guarantee of freedom for the media to act as a check and balance to the Government as well as the promise of freedom of speech in institutions of higher learning.

To fulfil the aforesaid election promises and to promote a broader right of freedom of speech and expression, the Malaysian Parliament should consider giving statutory recognition to the *Derbyshire* principle by amending Section 3 of the GPA to exclude the right for the Federal Government and State Governments to take action for defamation.

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JUDICIAL MANAGEMENT OF JUDICIAL MANAGEMENT

Geraldine Goon examines the first reported decision in Malaysia on judicial management

The Malaysian High Court recently delivered the very first grounds of judgement in relation to judicial management in *Leadmont Development Sdn Bhd v Infra Segi Sdn Bhd & Another Case* [2018] 10 CLJ 412. The provisions on judicial management which were introduced in Malaysia under the Companies Act 2016 ("Act") came into force on 1 March 2018.

Of import in this pioneering decision are the following points. First, the High Court retains its inherent jurisdiction to set aside a judicial management order ("JMO") on the application of a creditor, *ex debito justitiae* (*on account of justice*) despite the lack of an express power to do so in the Act. Secondly, the basis for setting aside the JMO was not one prescribed in the Act. The JMO was set aside on the basis that there was sufficient evidence that the scheme would not receive 75% in value of creditors' approval.

BACKGROUND FACTS

Leadmont Development Sdn Bhd ("Leadmont"), a developer, obtain a JMO. Infra Segi Sdn Bhd ("Infra Segi") had been Leadmont's main contractor on a stalled project (the Selayang StarCity Project) and was also a secured creditor of Leadmont.

The project was carried out on land owned by Leadmont's subsidiary Sierra Delima Sdn Bhd ("Sierra Delima"). Sierra Delima had also obtained a JMO in separate proceedings. As Infra Segi had intervened to set aside that JMO as well, both proceedings were considered together.

Leadmont had obtained the JMO on an *ex parte* basis. Infra Segi sought to set aside the JMO on two bases. First, that there had been a material non-disclosure of facts and second, that Leadmont had acted on a *mala fides* basis. However, the JMO was not set aside on either of these two grounds.

In coming to its decision to set aside the JMO, the High Court considered the background and purpose of judicial management, as introduced by the Act. The High Court then shed some light on the requirements of section 405(1) of the Act which sets out the conditions under which the High Court may issue a JMO.

THRESHOLD FOR "SATISFIED" UNDER SECTION 405(1)(a)

Section 405(1)(a) of the Act requires a Court to be "satisfied" that a company is or will be unable to pay its debts. The High Court was of the view that the meaning of the word "satisfied" in section 405(1)(a) indicated that a higher level of persuasion was necessary as compared to the lower threshold for the term "consider" in section 405(1)(b) of the Act. In coming to this determination, Judicial Commissioner Wong Chee Lin was persuaded by the judgment of Hoffman J (as His Lordship then was) in *Re Harris Simons Construction Ltd* [1989] BCLC 202.

INTERPRETATION OF "GOING CONCERN"

The High Court then considered Section 405(1)(b)(i) of the Act and the meaning of the phrase "going concern". The definition of "going concern" was consistent in both "Words & Phrases" (Vol.2) (2nd Ed) and International Standard on Auditing (ISA) 570 and was accepted to mean "will continue its operations for the foreseeable future".

To determine whether the making of a JMO will enable the company to continue as a "*going concern*", the High Court considered whether the making of the order would be a more advantageous realisation of the company's assets as opposed to a winding up, as prescribed by Section 405(1)(b)(iii) of the Act.

Finally, the High Court pointed to Section 405(5)(a) of the Act which gives the courts wide powers to issue a JMO if the "*Court considers the public interest so requires*". What constitutes "*public interest*" is to be determined on a case by case basis.

OPPOSING NOMINATION OF JUDICIAL MANAGER VS OPPOSING APPLICATION FOR JMO

The High Court then briefly dealt with the different rights of different types of creditors. A secured creditor who has appointed, or is entitled to appoint, a receiver or receiver and manager of the company's property is entitled to be given notice of the application for a JMO and to oppose an application for a JMO.

All creditors other than a secured creditor are not entitled to be given notice. They are also limited to opposition to the nomination of the judicial manager and not to the making of the JMO.

DISCHARGE VS SETTING ASIDE OF A JMO

The High Court then considered the only four scenarios (at this point in the development of the law) where a JMO can be discharged, namely:

(i) if the judicial manager's proposal is not approved by 75% of the total value of creditors whose claims have been accepted by the judicial manager (*section 421(5)*);

(ii) if the purpose of the judicial management has been successfully achieved (*sections 424(1) and 424(2)(a)*);

(iii) if the purpose of the judicial management is incapable of achievement (*sections 424(1) and 424(2)(a)*); or

(iv) if the company's affairs, business and property are being managed by the judicial manager in a manner which is unfairly prejudicial to the interest of its creditors or members, or if a particular act or omission by the judicial manager is or would be so prejudicial to them (*sections 425(1)(a) and 425(3)(d)*).

However, the High Court was of the view that there is no provision in the Act or the Companies (Corporate Rescue Mechanism) Rules 2018 ("Rules") which allows for the setting aside of a JMO by a creditor. In coming to this conclusion, the High Court

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considered and stressed that the English position is dissimilar to the Malaysian position. The English legislation provides an express provision for the setting aside of an administration order which is absent from the Act.

The ancillary argument that Order 42 rule 13, Order 32 rule 6 and/or Order 92 rule 4 of the Rules of Court 2012 ("ROC") all allow for the setting aside of the JMO was rejected by the High Court on the basis of procedural differences in the applicability of the ROC provisions.

POWER TO SET ASIDE A JMO

The High Court was of the view that it derived power to set aside a JMO from its inherent jurisdiction.

For example, a setting aside could be granted where the *ex parte* JMO had been made without full and frank disclosure of the material facts, or if it had been obtained *mala fides*. The High Court relied on *Selvam Holdings (Malaysia) Sdn Bhd v Grant Kenyon & Eckhardt Sdn Bhd; BSN Commercial Bank Malaysia Bhd & Ors (Interveners)* [2000] 3 CLJ 16 where it had been held that "*in exceptional cases, the Court has inherent power to set aside an order where the justice of the case requires the Court to intervene and correct an earlier order that contains a serious defect and there is a need to have it set aside*".

The High Court reasoned that at an *ex parte* hearing, only the applicant will be heard, and this imposes a duty on the applicant to provide the High Court with full and frank disclosure. This principle was applied to a JMO application even though the High Court recognised that there could be instances where a JMO may not be an *ex parte* application.

In this case, although the High Court found that Leadmont could have disclosed more information during the application for the JMO, the facts that had been disclosed were sufficient to allow Leadmont to avoid the setting aside of the JMO.

REASON FOR SETTING ASIDE THE JMO

Interestingly, the High Court then took on an inquisitorial role in coming up with its own reason to set aside the JMO.

The Learned Judicial Commissioner had been informed that the value of Infra Segi's debt in Leadmont was approximately 26% of the total indebtedness. More importantly, counsel for Leadmont had admitted that if the Sierra Delima scheme failed, the Leadmont scheme would also fail. Sierra Delima's indebtedness to Infra Segi together with six other creditors who had stated their objections to the JMO amounted to 46.9% of the total value of Sierra Delima's creditors. As such, Infra Segi seemed to be in a position to ensure that both schemes would not succeed due to the value of its claims.

The High Court therefore concluded that the scheme to be proposed by the judicial manager of Leadmont would not be approved by the requisite majority of creditors pursuant to section 432(2) of the Act and set aside the JMO.

The High Court took a cue from the Singaporean decision of *The Royal Bank of Scotland NV (formerly known as ABN Amro Bank NV) and others v TT International Ltd and another appeal* [2012] SGCA 9. Essentially, if there is "*no realistic prospect*" of the requisite approval being achieved, the High Court should not act in vain.

OBSERVATIONS OF THE CONCLUSIONS IN LEADMONT

Some considerations and queries arise out of the determinations of the Learned Judicial Commissioner in Leadmont.

First, the question of the right to vote and the status of the creditor is key to determining the *locus standi* of the creditor. Rule 31 of the Rules divides creditors into four types, namely:

(i) An unsecured creditor who would prove the entirety of his debt and be allowed to vote on the whole value of his unsecured debt;

(ii) A secured creditor who chooses to maintain his security and is therefore not allowed to vote;

(iii) A secured creditor who surrenders his entire security will be entitled to vote in the creditors' meeting on the whole value of his debt which has become unsecured; or

(iv) A partly secured creditor who maintains his security and only proves his debt to the value of the balance after deducting the security.

This issue is important for the following reason. Based on the decision above, only a secured creditor is entitled to oppose an application for a JMO. However, a secured creditor will not be able to rely on its secured debt for the purposes of voting at the creditors' meeting to approve a scheme. In such event, the votes which the secured creditor will be able to exercise at the meeting are limited to the amount of the unsecured debt, if any, held by it. This issue will be especially important to a secured creditor who is facing a JMO or the prospect of a JMO and has to consider how it can strategically utilise the debt owed to it.

Secondly, *Leadmont* did not address the decision of the Singapore High Court in *Re Genesis Technologies International*

continued on page 22

REORDERING THE ORDER OF NATURE

Trevor Padasian highlights the key points on the decriminalisation of LGBT sex between consenting adults in India

On 6 September 2018, the Supreme Court of India ("SCI") delivered another one of its epochal landmark decisions in *Navtej Singh Johar & Ors. versus Union of India thr. Secretary Ministry of Law and Justice* (Writ Petition (Criminal), No. 76 of 2016 with 5 other writ petitions) where it decriminalised LGBT sex (which encompasses homosexual sex and transgender sex) between consenting adults.

In doing so, the SCI declared that a major part of the colonial-era section 377 of the Indian Penal Code ("IPC") (in force since 1 January 1862), was unconstitutional as it contravened Articles 14, 15, 19 and 21 of the Constitution of India ("Constitution"). (An Article hereinafter refers to an Article of the Constitution.) It did clarify that the adults concerned must be above the age of 18 years who are competent to consent and the consent must be freely given.

Navtej's significance in terms of constitutional law and the human rights movement in India is far-reaching and monumental. It is on par with the ground-breaking *National Legal Services Authority v Union of India case* ((2014) 5 SCC 438) ("NALSA") which preceded it by five years and *Joseph Shine v Union of India* (Writ Petition (Criminal) No. 194 of 2018) which was decided 21 days after *Navtej* was pronounced. In *NALSA*, transgender people were declared to be a 'third gender' deserving of fundamental rights under the Constitution. In *Joseph Shine*, another colonial-era section 497 of the IPC criminalising adultery was struck down as being unconstitutional.

BACKGROUND

As described in Justice R.F. Nariman's judgment, the cases which were heard together had a 'chequered history'. At the heart of these cases was section 377 of the IPC which reads:

"***377. Unnatural offences:*** *Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.*

Explanation*: Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.*"

Prior to *Navtej*, the Delhi High Court in *Naz Foundation v Government of NCT of Delhi* 111 DRJ 1 (2009) declared that, insofar as it criminalised consensual sexual acts of adults, section 377 contravened certain constitutional freedoms provided by the Constitution and was therefore unconstitutional. Although the respondent in that case did not file an appeal, the SCI in *Suresh Kumar Koushal and Anr. v Naz Foundation and Ors* (2014) 1 SCC 1 ("Suresh Koushal") heard appeals filed by private individuals and groups and reversed the Delhi High Court's judgment.

Three years after *Suresh Koushal*, a nine-Judge Bench of the SCI in *Justice K.S. Puttaswamy (Retd.) and Anr. v Union of India and Ors.* (2017) 10 SCC 1 ("Puttaswamy") unanimously declared that there was indeed a fundamental right of privacy in favour of all persons and that the right to make choices fundamental to a person's way of living could not be arbitrarily interfered with. The decision in *Puttaswamy* led a three-Judge Bench of the SCI to refer the correctness of *Suresh Koushal's* decision to a larger bench. Hence the *Navtej* case was heard by five judges of the SCI.

THE PETITIONERS

The Petitioners described themselves in one of the petition as "*upstanding, public-spirited citizens who live and work in India and have the greatest love for this country and faith in the rule of law*" [http://orinam.net/377/navtej-johar-vs-uoi-petition/]. Two of the petitioners, Navtej Singh Johar and Sunil Mehra, were in a 20-year relationship. Sunil Mehra opted not to apply to join the Indian Administrative Service although he had passed the requisite civil services preliminary exam because he was "*apprehensive about his career prospects in State employment because of criminalization of his sexual orientation.*" Another petitioner, Ayesha Kapur, could not reveal her sexual orientation to her mother until she was in her mid-30s and her mother had become terminally ill. Ayesha had also given up a profitable corporate career for fear of being outed [http://orinam.net/377/navtej-johar-vs-uoi-petition/].

THE JUDGMENT

The SCI unanimously allowed the writ petitions on 6 September 2018. Four uplifting judgments were delivered, comprising in total nearly 500 pages. They were written by the former Chief Justice of India, Dipak Misra (with whom Justice A.M. Khanwilkar concurred), Justice R.F. Nariman; Justice Dr Dhananjaya Y Chandrachud, and Justice Indu Malhotra, the first female lawyer to be appointed directly as a SCI judge.

CONSTITUTIONAL FREEDOMS

Misra CJI held that the Constitution is a "*living and organic document capable of expansion with the changing needs and demands of the society*". The primary objective of having a constitutional democracy is to transform society progressively and inclusively. "*Transformative constitutionalism not only includes within its wide periphery the recognition of the rights and dignity of individuals but also propagates the fostering and development of an atmosphere wherein every individual is bestowed with adequate opportunities to develop socially, economically and politically.*"

With this in mind, the Justices upheld the constitutional right to equality (Article 14), the right not to be discriminated against on grounds of religion, race, caste, sex or place of birth (Article 15), the right to freedom of speech and expression (Article 19), and the right to life and personal liberty (Article 21) in the context of a person's identity. At the core of the concept of identity is self-determination.

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Dignity is "*an inseparable facet of every individual that invites reciprocative respect from others to every aspect of an individual which he/she perceives as an essential attribute of his/her individuality, be it an orientation or an optional expression of choice.*" In that context, the SCI rejected the argument (accepted in *Suresh Koushal*) that the Lesbian Gay Bisexual and Transgender ("LGBT") community comprised only a 'minuscule' fraction of the total population of India. "*Discrimination of any kind strikes at the very core of democratic society.*" The framers of the Constitution could never have intended that the fundamental rights are for the benefit of the majority only.

Unlike for instance section 375 of the IPC where the presence of "wilful and informed consent" takes an act outside the meaning of rape, section 377 of the IPC does not contain such a qualification. Section 377 therefore criminalises even voluntary carnal intercourse by members of the LGBT community. The "unwanted collateral effect" was that even "'*consensual sexual acts', which are neither harmful to children nor women, by the LGBTs have been woefully targeted thereby resulting in discrimination and unequal treatment to the LGBT community*". This was in direct contravention of Articles 14 and 19.

Chief Justice Misra unswervingly declared that consensual "*carnal intercourse among adults, be it homosexual or heterosexual, in private space, does not in any way harm the public decency or morality.*" Therefore, so far as section 377 penalises any "*consensual relationship between two adults, be it homosexuals (man and a man), heterosexuals (man and a woman) or lesbians (woman and a woman), cannot be regarded as constitutional.*"

As section 377 failed to distinguish between "*non-consensual and consensual sexual acts of competent adults in private space which are neither harmful nor contagious to the society*" and had become an "*odious weapon for the harassment of the LGBT community by subjecting them to discrimination and unequal treatment*", it was manifestly arbitrary as it was capricious, irrational, without an adequate determining principle, excessive and disproportionate. In view of the SCI decision in *Shayara Bano v Union of India* (2017) 9 SCC 1, it should be partially struck down. *Suresh Koushal*, not being consistent with the foregoing principles, was overruled.

Justice Nariman, after quoting Oscar Wilde's "*love that dare not speak its name*" existing between same-sex couples at the outset of his judgment, shone luculent light on a same-sex couple's right to equal treatment and right to privacy. The rationale for the Victorian-era section 377, that is Victorian puritanical morality, had been superseded by constitutional morality which is the soul of the Constitution, assuring the dignity of the individual. As the rationale had long gone, there was no reason for section 377 to continue merely for the sake of continuing. The Justice cited the Latin maxim *cessant ratione legis, cessat ipsa lex* (when the reason for a law ceases, the law itself ceases) in support of this proposition.

NOT A MENTAL ILLNESS

The American and Indian Psychiatric Associations had debunked the fallacious misdiagnosis that homosexuality was a mental illness. There were now progressive statutory provisions stipulating amongst others that "*mental illness shall not be determined on the basis of non-conformity with moral, social, cultural, work or political values or religious beliefs prevailing in a person's community*" (see section 3(3)(b) of the Indian Mental Healthcare Act 2017 which came into force on 7 July 2018). The "Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity" (Yogyakarta Principles) were reaffirmed. Justice Nariman concluded that the Yogyakarta Principles gave further content to the fundamental rights contained in Articles 14, 15, 19 and 21. The Judge recommended that the government take all measures to ensure that the *Navtej* judgment be publicised widely through the public media to reduce and finally eliminate the stigma associated with LGBT members. All government officials, including police officials, should be given sensitisation and awareness training of the plight of such persons.

SEXUAL ORIENTATION

Justice Chandrachud analysed the international comparative jurisprudence and concluded that, amongst others, sexual orientation is an intrinsic element of liberty, dignity, privacy, individual autonomy and equality; intimacy between consenting adults of the same-sex (and the choice of whom to partner) is beyond the legitimate interests of the state; sodomy laws violate equality by targeting a segment of the population for their sexual orientation. Members of the LGBT community are entitled to the benefit of an equal citizenship, without discrimination, and to the equal protection of the law.

PARTS OF SECTION 377 MAINTAINED

Justice Malhotra emphasized that the provisions of section 377 will continue to govern non-consensual sexual acts against adults, all acts of carnal intercourse against minors and acts of bestiality. Her Ladyship declared that the reading down of section 377 would not lead to the re-opening of any concluded prosecutions. It could however be relied upon in all pending matters, whether they are at the trial, appellate, or revisional stages.

continued on page 23

TORT OF INDUCEMENT OF BREACH OF CONTRACT

Wong Juen Vei explains the elements of this tort

The tort of inducement of breach of contract arises when a person intentionally induces another to commit a breach of an existing contract against a third person. An illustration of this tort can be seen as follows:

"A has an existing contract with B and C is aware of it, and C persuades or induces A to break the contract with B and resulted in damage to B."

DEVELOPMENT OF THE TORT OF INDUCEMENT OF BREACH OF CONTRACT

The origin of this tort stems from the seminal case of *Lumley v Gye* (1853) 118 ER 749. In *Lumley*, a much sought-after opera singer, Johanna Wagner, was lured to London by Benjamin Lumley of Her Majesty's Theatre in Haymarket on an exclusive singing contract. However, before Wagner arrived in Britain, her services were poached by Frederick Gye of the Royal Italian Opera in Convent Garden. As a result, Lumley sued Gye.

By a majority of 3:1, the Queen's Bench held that Gye was liable for having "*wrongfully and maliciously enticed and procured*" Wagner's breach of contract with Lumley, thereby establishing the tort of inducing breach of contract that endures until today.

At one time it was arguable that the principle established in *Lumley* only applied to contracts of employment. However, in *Bowen v Hall* (1881) 6 QBD 333, the English Court of Appeal accepted the broader proposition that a claimant might sue for violation of any contractual right. As a result, it is now settled law that this tort of inducement applies to contracts of all kinds.

THE POSITION IN MALAYSIA

The law relating to the tort of inducement of breach of contract was considered by the Federal Court in *Loh Holdings Sdn Bhd v Peglin Development Sdn Bhd* [1984] 1 CLJ (Rep) 211. The Federal Court, relying on the English case of *Greig v Insole* [1978] 1 WLR 302, held that at common law, it constitutes a tort for third persons to deliberately interfere in the execution of a valid contract which has been concluded between two or more parties if the following five conditions are satisfied:

(a) there must be direct or indirect interference, coupled with the use of unlawful means;
(b) the defendant must be shown to have knowledge of the relevant contract;
(c) the defendant must be shown to have the intent to interfere;
(d) the plaintiff must show that he has suffered special damages, that is, more than nominal damages; and
(e) so far as it is necessary, the plaintiff must successfully rebut any defence based on justification which may be put forward by the defendant.

This proposition affirmed by the Federal Court was also considered by the Court of Appeal in *Kelang Pembena Kereta-Kereta Sdn Bhd v Mok Tai Dwan* [2000] 1 MLJ 673 and *SV Beverages Holdings Sdn Bhd & Ors v Kickapoo (M) Sdn Bhd* [2008] 4 MLJ 187.

These elements of the tort shall be discussed in turn.

ELEMENTS OF THE TORT

Direct Interference or Indirect Interference Coupled with Unlawful Means

According to Lord Denning MR in *Torquay Hotel Co Ltd v Cousins* [1969] 1 All ER 522, the meaning of "*interference*" is not confined to the actual procurement or inducement of a breach of contract. Lord Denning opined that it can also cover situations whereby the third person prevents or hinders one party from performing his contract.

In *D.C. Thomson & Co Ltd v Deakin* [1952] Ch 646, Lord Jenkins LJ sets out four categories of cases which could amount to a direct interference by a third party of the rights of one of the parties to a contract. These four categories are as follows:

(a) a direct persuasion or procurement or inducement applied by the third party to the contract-breaker, with knowledge of the contract and the intention of bringing out its breach;
(b) dealings by the third party with the contract-breaker which to the knowledge of the third party are inconsistent with the contract between the contract-breaker and the person wronged;
(c) an act by the third party with knowledge of the contract which if done by one of the parties to it would have been a breach of that contract; and
(d) the imposition by the third party, who has knowledge of the contract, of some physical restraint upon one of the parties to the contract so as to make it impossible for him to perform it.

In respect of cases of indirect interference, Jenkins LJ further held it is necessary to prove the use of unlawful means if the indirect interference is to be actionable.

The difference between direct interference and indirect interference was explained by Lord Hoffman LJ in *Middlebrook Mushrooms Ltd v Transport and General Workers' Union* [1993] ICR 612. His Lordship opined that the essential difference lies in causation. If the person immediately responsible for bringing the procurement or inducement was the defendant or someone for whose acts he was legally responsible, the inducement is direct. On the other hand, if it was a third party responding to the defendant's inducement or persuasion but exercising his own choice in the matter and not being a person for whom the defendant is legally responsible, the inducement is indirect.

In *Middlebrook Mushrooms*, the Court of Appeal opined that the distribution of leaflets by former employees of the plaintiff who were members of the Transport and General Workers' Union asking the public not to buy goods supplied by their former employer was an indirect interference. However, the Court held that the union had not induced a breach of contract as it had not used any unlawful means to interfere with the contract.

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Knowledge of the Contract

The second requirement of this tort is that the defendant must have knowledge of the contract. However, the defendant need not have exact knowledge of all terms of the contract.

In *Emerald Construction Co. Ltd v Lowthian* [1966] 1 WLR 691, the defendants knew of the existence of the contract between the claimants and their co-contractors but they did not know its precise terms. Nevertheless, the evidence showed that the defendants were determined to bring the contractual relationship to an end if they could. The Court of Appeal held that this was sufficient to entitle the claimants to an interim injunction.

Intention to Interfere

This element of the tort requires the plaintiff to prove that there was an intentional invasion of his contractual rights and not merely that the breach of contract was the natural consequence of the defendant's conduct.

In the House of Lord case of *OBG Ltd v Allan and others* [2007] UKHL 21, Lord Hoffman held that to be liable for inducing breach of contract, the defendant must know that he is inducing a breach of contract. It is not enough that the defendant knows that he is procuring an act which as a matter of law or construction of the contract, is a breach. The defendant must actually realise that his procurement or inducement would result in a breach of contract.

This proposition is illustrated by the House of Lords' decision in *British Industrial Plastics Ltd v Ferguson* [1940] 1 All ER 479, in which the plaintiff's former employee offered the defendant information about one of the plaintiff's secret processes which he, as an employee, had invented. The defendant knew that the employee had a contractual obligation not to reveal trade secrets but thought that if the process was patentable, it would be the exclusive property of the employee. He took the information in the honest belief that the employee would not be in breach of contract. The House of Lords held that he was not liable for inducing a breach of contract.

Special Damages

To satisfy this requirement, the plaintiff must prove that damage was suffered in consequence of the defendant's conduct. Slade LJ in *Greig v Insole* held that it is sufficient for the plaintiff to show "*the likelihood of more than nominal damage resulting*" from the complained conduct of inducement.

There must be a causal link between the defendant's conduct and the damage. In *Jones Bros (Hunstanton) Ltd v Stevens* [1955] 1 QB 275, as the contract-breaker would have taken the same steps and damage would have been sustained in any event but for the defendant's inducement or procurement, the defendant's inducement was held to be not an effective cause of the damage or loss. As a result, the action for inducement of breach of contract failed.

The Defence of Justification

A person inducing a breach of contract commits no actionable wrong if his interference is justified. However, what would amount to an effective justification has not been satisfactorily defined nor have the limits of the defence been precisely defined. In *Glamorgan Coal Co Ltd v South Wales Miners' Federation* [1903] 2 KB 545, Romer LJ held that the following factors should be taken into account by the courts when considering the defence of justification:

(a) nature of the breached contract;
(b) the position of the parties;
(c) the grounds for the breach; and
(d) the method in which the breach was procured.

The defence of justification may be proved where the person inducing the breach of contract acts in accordance with a duty. In the English case of *Brimelow v Casson* [1923] All ER 40, the defence of justification succeeded where the union officials persuaded a theatre manager to breach his contract because the company's salaries were so low that "*some chorus girls were compelled to resort to prostitution*". It has been suggested that the pressure of a moral obligation as justification is the basis of *Brimelow* as there was a moral duty to the defendant's members and possibly to the public.

It is not a sufficient justification for the defendant to say he did not act maliciously and had no ill-will or desire to injure the other parties to the contract. In *South Wales Miners' Federation v Glamorgan Coal Co Ltd* [1905] AC 239, a union known as the South Wales Miners' Federation was formed to consider trade and wages and to protect the workmen. The wages of the workmen were paid on a sliding scale agreement in accordance with the rising and falling price of coal. The union, concerned that the wages would fall too low with the price of coal, called for several "stop days" for the workmen, causing approximately 100,000 workmen to break their employment contracts with the plaintiffs. The union, *inter alia*, argued that there was no malice or ill-will against the plaintiffs as the union had a duty to protect the interests of its members and they could not be made legally responsible for the consequences of their action if they acted honestly in good faith and without any malice or motive.

The House of Lords dismissed the union's defence of justification and held that it is no defence that the persons procuring the breaches of contract have a duty to protect the interest of

continued on page 23

CHALLENGING THE RESULT OF AN ELECTION

Leong Wai Hong and Karen Tan explain the pitfalls when drafting an election petition

In Malaysia, the result of an election can be challenged by way of an election petition. A lawyer must be well-versed with the procedural requirements when drafting an election petition. This is because non-compliance with the procedural requirements will result in an election petition being struck out without the need for a trial by the Election Judge on an application by the winning candidate or the Election Commission.

The rationale for strict compliance is explained by the Privy Council sitting on an appeal from the decision of the Federal Court in *Devan Nair v Yong Kuan Teik* [1967] 1 MLJ 261. One of the issues in this case concerned whether non-compliance with a time frame specified in Rule 15 of the Second Schedule to the Election Offences Ordinance 1954 (now the Elections Offences Act 1954 ("EOA")) rendered the proceedings a nullity. In delivering the judgment of the Court, Lord Upjohn observed:

"So the whole question is whether the provisions of rule 15 are "mandatory" in the sense in which that word is used in the law, i.e., that a failure to comply strictly with the times laid down renders the proceedings a nullity; or "directory" i.e., that literal compliance with the time schedule may be waived or excused or the time may be enlarged by a judge … This question is a difficult one as is shown by the conflict of opinion in the courts below.

> **"Non-compliance with the procedural requirements will result in an election petition being struck out without the need for a trial"**

His Lordship went on to say, "*The circumstances which weigh heavily with their Lordships in favour of a mandatory construction include … (t)he need in an election petition for a speedy determination of the controversy, a matter already emphasised by their Lordships. The interest of the public in election petitions was rightly stressed in the Federal Court, but it is very much in the interest of the public that the matter should be speedily determined …*"

GROUNDS TO INVALIDATE AN ELECTION RESULT

Section 32 of the EOA specifies five grounds on which an election may be declared void by an election petition, that is, where it is proved to the satisfaction of the Election Judge that:

(a) general bribery, general treating or general intimidation have so extensively prevailed that they may be reasonably supposed to have affected the result of the election;

(b) non-compliance with the provisions of any written law relating to the conduct of any election if it appears that the election was not conducted in accordance with the principles laid down in such written law and that such non-compliance affected the result of the election;

(c) a corrupt practice or illegal practice was committed in connection with the election by the candidate or with his knowledge or consent, or by any agent of the candidate;

(d) the candidate personally engaged a person as his election agent, or as a canvasser or agent, knowing that such person had within seven years previous to such engagement been convicted or found guilty of a corrupt practice by a Sessions Court, or by the report of an Election Judge; or

(e) the candidate was at the time of his election a person disqualified for election.

CASE STUDIES

We illustrate the danger of an improperly drafted election petition using five election petitions that arose from the 14th Malaysian General Election ("GE 14") for the Perak state constituencies of Hutan Melintang, Tapah, Changkat Jong, Lubok Merbau and Bagan Serai.

Hutan Melintang State Constituency

In *G. Manivannan a/l Gowindasamy v Khairuddin bin Tarmizi & 2 Ors*, the Petitioner (the Parti Keadilan Rakyat candidate) filed an election petition alleging that the 1st Respondent (the Barisan Nasional candidate) was wrongly reported as having been elected by the 2nd Respondent (the Returning Officer) and/or the 3rd Respondent (the Election Commission), *inter alia*, on the ground that the 1st Respondent had committed the offence under section 11(1)(b) of the EOA which involves the offence of treating, undue influence or bribery, and therefore the election should be declared void under section 32(a) of the EOA.

The Election Court struck out the petition, *inter alia*, on the ground that the Petitioner had failed to identify the exact offence and also failed to set out sufficient facts and particulars in the petition. The Court held that the election petition which merely cited the section without the material facts relating to the specific corrupt practice failed to disclose a cause of action and was therefore fatal.

Tapah State Constituency

In *Mohamed Azni v Dato' Seri M. Saravanan & 2 others*, the Petitioner (the Parti Keadilan Rakyat candidate) filed an election petition alleging that the 1st Respondent (the Barisan Nasional candidate) was wrongly reported as having been elected by the 2nd Respondent (the Returning Officer) and/or the 3rd Respondent (the Election Commission), *inter alia*, on the ground that the existence of same names of voters in the electoral rolls of ordinary voters and the electoral rolls of postal voters had affected the result of the election in the constituency.


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The Election Court struck out the petition, *inter alia*, on the ground that the Petitioner only pleaded facts relating to the complaint but had failed to specify the provisions of written law relating to the conduct of the election which had not been complied with by the 3rd Respondent. The Court also held that the Petitioner had failed to prove that the alleged non-compliance of the election laws had affected the result of the election.

Changkat Jong State Constituency

In *Faizul Ismail v Mohd Azhar bin Jamaluddin & 2 others*, the Petitioner (the Parti Keadilan Rakyat candidate) filed an election petition alleging that the 1st Respondent (the Barisan Nasional candidate) was wrongly reported as having been elected by the 2nd Respondent (the Returning Officer) and/or 3rd Respondent (the Election Commission) for the Changkat Jong state seat, *inter alia*, on the ground that the 2nd Respondent had breached Regulation 25(12)(b) of the Election (Conduct of Elections) Regulations 1981 ("ECER") by failing to prepare sufficient copies of Form 14 (Statement of the Poll After Counting the Ballot).

In dismissing the election petition, the Election Court held that the petition failed to comply with the EOA and the Election Petition Rules 1954 ("EPR") as the irregularities were not clearly stated; for example, the Petitioner had failed to specify the number of copies of Form 14 that had been insufficiently prepared by the 2nd Respondent and the extent to which it had affected the result of the election.

Lubok Merbau State Constituency

In *Zulkarnine Hashim v Dr Jurij Bin Jalaludin*, the Petitioner (the Parti Keadilan Rakyat candidate) filed an election petition alleging that the 1st Respondent (the Barisan Nasional candidate) was wrongly reported as having been elected by the 2nd Respondent (the Returning Officer) and/or the 3rd Respondent (the Election Commission) on the ground that the 1st Respondent was holding an office of profit as the headmaster of a religious school and the secretary to the Tourism Ministry and was therefore disqualified from contesting in GE 14.

The Election Court struck out the petition on the ground that the petition was unsustainable as the 1st Respondent's affidavit clearly showed that he had resigned from those positions before the election.

Bagan Serai State Constituency

In *Adam bin Asmuni v Dato Dr Noor Azmi bin Ghazali & 2 others*, the Petitioner (the Parti Keadilan Rakyat candidate) filed an election petition alleging that the 1st Respondent (the Barisan Nasional candidate) was wrongly reported as having been elected by the 2nd Respondent (the Returning Officer) and/or the 3rd Respondent (the Election Commission), *inter alia*, on the ground that the 2nd Respondent had breached Regulation 15 of the ECER by refusing to allow the Petitioner to enter three of the polling centres, and had therefore deprived the Petitioner's right to monitor the voting process in these centres.

The Election Court struck out the petition on the ground that the Petitioner had failed to comply with Rule 4(1)(b) and paragraph (3) of the form prescribed by Rule (4)(4) of the EPR which require the Petitioner to state the concise facts and grounds relied upon by the Petitioner. This was because the Petitioner had failed to state the particular provision of section 32 of the EOA which the Petitioner had relied upon to sustain the prayers.

The Court also held that even assuming that the Petitioner is relying on section 32(b) of the EOA, the Petitioner had failed to comply with the two mandatory requirements under section 32(b), i.e. that there has been non-compliance with the provisions of any written law relating to the conduct of the election and that such non-compliance affected the result of the election.

CONCLUSION

The above cases illustrate the importance of lawyers being familiar with election law when filing an election petition. Non-compliance with any of the mandatory provisions of election legislation is fatal. As Sulong Matjeraie J (as His Lordship then was) said in *Chiew Chiu Sing v Dato' Seri Tiong King Sing* [2005] 1 MLJ 759, at paragraph 84:

"'The general rule is well settled that the statutory requirements of election law must be strictly observed and that an election contest is not an action at law or a suit in equity but is a purely statutory proceeding unknown to the common law and the court possesses no common law power. It is also well settled that it is a sound principle of natural justice that the success of a candidate who has won at an election should not be lightly interfered with and any petition seeking such interference must strictly conform to the requirement of the law:' per Mahajan CJ in Jagan Nath v Jaswant Singh & Ors [1954] SCR 892 at 895."

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TIME'S UP!

Kwan Will Sen and Elizabeth Goh explain a recent decision on the lifespan of freezing and seizure orders under Malaysia's anti-money laundering laws

The Court of Appeal's ruling in *Lim Hui Jin v CIMB Bank Bhd & Ors* [2018] 6 MLJ 724 has provided some clarity on the limits and scope of freezing and seizure orders made under Part VI of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ("Act").

SALIENT FACTS

The appellant's mother was investigated for money laundering offences under section 4(1) of the Act. In the course of investigations, the appellant's bank account was frozen on 24 June 2014 ("Freezing Order") under section 44(1) of the Act.

The Act was amended pursuant to the Anti-Money Laundering, Anti-Terrorism Financing (Amendment) Act 2014 ("Amendment Act") and assumed its present name as from 1 September 2014. On 11 September 2014 (ten days after the coming into force of the Amendment Act), a seizure order was issued under section 50(1) of the Act against the appellant's bank account ("Seizure Order").

Subsequently, the appellant's mother, but not the appellant, was charged with offences under the Act. On 5 May 2016, the appellant commenced proceedings seeking the release of the monies and all the accrued interest in his bank account. The High Court dismissed his action. Hence, the present appeal.

> "section 52A was to be read purely for the purpose of computing the lifespan of a seizure order"

THE COURT OF APPEAL'S DECISION

The Court of Appeal allowed the appeal and ordered the appellant's bank account to be released. The reasons for the Court of Appeal's decision are discussed below.

Computation of lifespan of a seizure order

Under Section 52A (a provision introduced under the Amendment Act) of the Act, a seizure order issued under section 50(1) ceases to have effect upon:

(a) the expiration of 12 months from the date of seizure order; or

(b) where there is a prior freezing order, the expiration of 12 months from the date of the freezing order,

if the person from whom the property was seized has not been charged with an offence under the Act.

As the Freezing Order had been issued against the appellant's account on 24 June 2014 before the Seizure Order was issued on 11 September 2014, the Seizure Order ceased to have effect on 23 June 2015 (i.e. 12 months from the date of the Freezing Order). By the time the appellant's action was filed in May 2016, the Freezing Order and the Seizure Order had expired by effluxion of time.

The Court of Appeal also considered section 44(5) of the Act which stipulates, *inter alia*, that a freezing order shall cease to have effect after 90 days from the date of the order if the person against whom the order was made had not been charged with an offence under the Act. The Court noted that on the face of it, there may be a contradiction between section 44(5), which limits the lifespan of a freezing order to 90 days, and section 52A, which prescribes longer lifespan of 12 months from the date of a "prior freezing order". In this regard, the Court clarified that section 52A was to be read purely for the purpose of computing the lifespan of a seizure order, and that the lifespan of a freezing order is 90 days as provided for under section 44(5).

In the Court's opinion, the appellant's account should have been released on 21 September 2014, that is 90 days after the issuance of the Freezing Order on 24 June 2014 by virtue of section 44(5) of the Act as the appellant had not been charged within 90-day period stipulated in that provision.

The respondents further argued that the Seizure Order was issued pursuant to the Freezing Order dated 24 June 2014, before section 52A came into force upon the enforcement of the Amendment Act on 1 September 2014. As such, the respondents contended that section 52A did not apply retrospectively to the Seizure Order. The contention was rejected by the Court. According to the Court, the Seizure Order was subject to the 12-month limitation period prescribed by section 52A as it was issued on 11 September 2014, which was well after section 52A came into force on 1 September 2014.

As the Seizure Order had expired by virtue of section 52A and the appellant had not been charged with an offence under the Act, the appellant's bank account should have been released upon expiration of the Seizure Order.

No perpetuity under section 50(1)

The respondents also relied on section 50(1) of the Act to justify the continued seizure of the appellant's bank account. This provision is specific to seizure of movable property in financial institutions. It empowers the Public Prosecutor "*… notwithstanding any other written law, (to) by order direct that such movable property or any accretion to it in the financial institution be seized by the investigating officer … in whole or in part, until the order is varied or revoked.*" The respondents contended that the Seizure Order had neither been varied nor revoked by the Public Prosecutor.

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The Court of Appeal held that section 50(1) must be read together with Section 52A in that the Public Prosecutor's power to vary or revoke the seizure order could only be exercised before the expiration of the seizure order and not thereafter. Once a seizure order has expired, there is nothing for the Public Prosecutor to vary or revoke. To hold otherwise would be to violate Article 13(1) of the Federal Constitution which safeguards a person from being deprived of property save in accordance with law.

Bar to civil suits only if seizure remains in force

Another ground raised by the respondents was that the Freezing Order and Seizure Order could not be reviewed by the Court in a civil proceeding by virtue of section 54(3) of the Act, which reads as follows:

"(3) For so long as a seizure of any property under this Act remains in force, no action, suit or other proceedings of a civil nature shall be instituted … be maintained or continued in any court or before any other authority in respect of the property which has been so seized … except with the prior consent in writing of the Public Prosecutor."

> **"The Court of Appeal held that section 50(1) must be read together with Section 52A"**

The Court ruled that section 54(3) did not apply to the present case because the condition in the operative words "*For so long as a seizure of any property under this Act remains in force*" was not satisfied. The Seizure Order was no longer in force as it had expired by the time the appellant commenced proceedings in the High Court for the release of his bank account.

No application for forfeiture

While the Court noted that the present proceedings were not proceedings to forfeit the monies in the appellant's account, the Court went on to elucidate the two scenarios where seized property could be forfeited under the Act:

(1) If there is any prosecution for an offence under the Act, section 55 allows the Court to make an order for the forfeiture of property if the offence is proved against the accused, or if the offence is not proved against the accused, where 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 and for valuable consideration; or

(2) If there is no prosecution for an offence under the Act, the Court may order seized property to be forfeited upon the application of the Public Prosecutor under section 56 before the expiration of 12 months from the date of the freezing order or seizure order. This provision also expressly provides for the release of the property to the person from whom it was seized upon the expiration of 12 months from the date of the seizure.

In both the above instances, the conditions set out in the respective sections have to be satisfied before the Court issues an order for forfeiture.

The Court noted that no application had been made for forfeiture under section 56 in the present case.

Prosecuted person under section 55(1)

In relation to the forfeiture powers under section 55(1), the Court of Appeal also said that the prosecuted person under that section must necessarily refer to the person from whom the property was seized under section 50(1). According to the Court, it stands to reason that the property cannot be forfeited by way of a criminal prosecution against some other person for an offence under the Act.

As the appellant had not been prosecuted under the Act, the Court held that the fact that the appellant's bank account was the subject matter of a criminal proceeding against his mother was of no consequence as the Freezing Order and Seizure Order relate to the appellant's, and not his mother's, bank account.

OBSERVATIONS

This decision suggests that in order for property to be forfeited under section 55(1), the person who is accused of the offence must be the person from whom the property was seized and not a third party.

The Court of Appeal's ruling provides an important safeguard for an individual's right to property enshrined in Article 13(1) of the Federal Constitution. This decision makes it clear that a person's properties cannot be held indefinitely if he is not charged with an offence under the Act within the time limits of a freezing order or seizure order. Upon the expiration of such orders, the relevant properties are to be released to the person from whom they were seized.

continued on page 22

PARDON ME, I'M GOING HOME

continued from page 7

In allowing the appeal, the Supreme Court reiterated at the outset the principle in *Sim Kie Chon* that the role of the Pardons Board is only advisory in nature and that the true decision-maker is the Yang di-Pertuan Agong. The Supreme Court took the view that Sim was attempting to challenge the exercise by the Yang di-Pertuan Agong of his powers of clemency under Article 42 of the Federal Constitution. However, this was fatal to his case as Article 32(1) of the Federal Constitution provided that the Yang di-Pertuan Agong shall not be liable to any proceedings in any court. It held that the power of the Yang di-Pertuan Agong was an executive act which was by its very nature not an act that is susceptible or amenable to judicial review. This was in accordance with the legal principle enunciated by the apex courts of Australia and England at the time.

This issue came up again before a 5-member bench of the Federal Court in *Juraimi bin Husin v Pardons Board, State of Pahang & Ors* [2002] 4 MLJ 529. Juraimi, together with the infamous shaman, Mona Fandey, and her husband, had been convicted of the murder of Mazlan Idris, a State Assemblyman in Pahang. Juraimi was sentenced to death by all three tiers of the Superior Courts. His petition to the Sultan of Pahang for clemency was subsequently rejected, at which point he commenced legal proceedings to challenge the constitutionality of the said rejection.

The matter was referred to the Federal Court to determine certain questions of law, the primary one of which was whether the decision-making process of the Sultan of Pahang was justiciable. In this case, the process was challenged on the basis that there had been an inordinate delay of approximately two years between the presentation of the clemency petition and the rejection of the same.

Having examined the authorities before it, the Federal Court decisively held that the prerogative of mercy, which includes the power to grant a royal pardon, was not susceptible to judicial review because its nature and subject matter was not amenable to the judicial process. This would include challenges made against the decision-making process as the attempt to make the process justiciable would indirectly make the decision itself justiciable.

It is therefore clear that the decision of the Yang di-Pertuan Agong/Ruler/Yang di-Pertua Negeri on a petition for a royal pardon cannot be reviewed and examined by the Court. The granting of a royal pardon is solely at the discretion of the Yang di-Pertuan Agong/Ruler/Yang di-Pertua Negeri.

The position in Malaysia differs from the current position in the United Kingdom where it has been held in *Regina v Secretary of State for The Home Department, Ex-parte Bentley* [1994] QB 349 that decisions on a petition for clemency are susceptible to judicial review if their nature and subject matter were amenable to the judicial process and insofar as the challenge did not require the court to review questions of policy.

IS ADMISSION OF GUILT REQUIRED?

It is commonly assumed that an application for a royal pardon means that the person convicted of the crime is making an admission of guilt. However, there is nothing in law that says that a petition for clemency can only be made on this basis. The Yang di-Pertuan Agong/Ruler/Yang di-Pertua Negeri is entitled to take into account protestations of innocence or external factors in reaching a decision to grant a royal pardon as His Majesty is free to act in the overarching interest of justice, public interest and conscience. As held by the Federal Court in *Public Prosecutor v Lim Hiang Seoh* [1979] 2 MLJ 170:

"*When considering whether to confirm, commute, remit or pardon, His Majesty does not sit as a court, is entitled to take into consideration matters which courts bound by the law of evidence cannot take into account, and decides each case on grounds of public policy*".

EFFECT OF A PARDON

There appears to be two types of pardons – a "*conditional pardon*" where the sentence is substituted with a lesser sentence, for example, a death sentence being commuted to life imprisonment, or a "*free pardon*", which according to Baron Pollock in *Hay v Tower Justices* 24 QBD 561 extends beyond merely acquitting of punishment and operates to purge the offence so as to clear the party from the infamy and all other consequences of his crime.

The effect of the pardon granted to Anwar Ibrahim was called into question during the Port Dickson by-election. Anwar's eligibility to contest in the by-election was challenged by Noraziah Mohd Shariff, a voter in the Port Dickson Parliamentary Constituency, on the ground that Anwar had only received a "full pardon" whereas Article 48(1)(e) of the Federal Constitution requires a person to receive a "free pardon" to avoid being disqualified under that provision by reason that the person had been convicted of an offence and sentenced to a term of imprisonment of one year or a fine of RM2,000.00.

While the Federal Constitution refers to a "free pardon" in several provisions, it does not use the term "full pardon" at all. It would appear that the question as to whether the royal pardon bestowed upon Anwar tantamount to a "free pardon" would depend on the terms of the pardon granted by the Yang di-Pertuan Agong. Unfortunately, this issue remains a moot point for now as the case was struck out by the High Court due to Noraziah's failure to attend Court on the date fixed for case management of her case.

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AVOIDING CORPORATE CRIMINAL LIABILITY

continued from page 3

established by the commercial organisation. Ideally, employees should be required to sign-off on all policy documents issued.

Systematic Review, Monitoring and Enforcement

A commercial organisation's duty in preventing bribery and corruption does not end with the implementation of policies and procedures. Continuous or regular monitoring and review of its and its associated persons' practices in relation to the control measures, policies and procedures is key to avoid or minimise risks. Such reviews may be conducted via an internal audit or an audit carried out by external independent parties such as the MS ISO 37001 auditors.

The Guidelines recommend procedures which in effect would monitor, review and ensure that policies and procedures put in place by the commercial organisation are effective and complied with. As a prudent step, reviews could extend to internal procedures such as accounting, record keeping, and internal audit to ensure and heighten effectiveness.

Vigilance is required to avoid condonation of breaches of policies and procedures. A commercial organisation must insist on strict adherence to its policies and procedures, including taking disciplinary action for what might otherwise be minor non-compliance or a cultural norm.

Training and Communication

A commercial organisation is expected to conduct trainings and communicate its policies and charter on anti-bribery and corruption through the right modes, within and outside the organisation so that there is no doubt as to its stance in respect of this matter. It should cover policy, training, reporting channels and consequences of non-compliance. Based on each commercial organisation's structure and culture, the best mode of communication should be considered, including the format, medium and language to be used.

Training, guidance, and courses should be undertaken within the commercial organisation for its employees and associated persons to ensure thorough understanding of the anti-corruption position and the effectiveness of the measures put in place, including alerting employees of their roles within and outside of the commercial organisation and on the consequences of non-compliance.

CONCLUSION

In anticipation of section 17A coming into force, commercial organisations are encouraged to prepare themselves for the inevitable.

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ESTATE LAND – YAY OR NAY?

continued from page 5

In distinguishing *Tai Thong*, the Federal Court agreed with the majority decision of the Court of Appeal in *Vellasamy Pennusamy & Ors v Gurbachan Singh Bagawan Singh & Ors* [2015] 5 MLJ 437 which held, *inter alia*, that section 214A(1) of the NLC did not prohibit the execution of a conditional agreement for sale of estate land.

CONCLUSION

The Federal Court concluded that section 214A(1) of the NLC did not prohibit a conditional agreement being entered into in relation to estate land so long as the general consensus between the parties was that no transfer is to be effected until the Estate Land Board's approval is obtained. The Federal Court opined that section 214A(1) was not intended to bar parties from entering into a conditional sale and purchase agreement involving estate land and that there was no requirement to obtain the approval of the Estate Land Board first before entering into any form of conditional agreement with the intended purchaser involving such land.

In so far as the Appeals are concerned, the Federal Court held that the SPA was merely a manifestation of Gula Perak's desire to sell the Property to Faithmont, to be followed by a joint submission with Faithmont for the Estate Land Board's approval in Form 14D. As such, the SPA as well as the Consent Order were within the intent and scope of sections 214A(1) and 214A(4) of the NLC.

The Federal Court's decision in the Appeals has provided much welcomed clarity as to the application of section 214A(1) of the NLC to conditional sale and purchase agreements entered into between parties involving estate land. This decision also clarifies the perceived conflict in the Court of Appeal decisions of *Vellasamy* and *Tai Thong*. The Federal Court adopted the approach in *Vellasamy* to the Appeals as it concerned a similar issue of law and distinguished *Tai Thong* on the basis that it relates to the legality of the actual act of transferring estate land before the approval of the Estate Land Board is obtained.

The Federal Court is to be commended for adopting a common sense approach in interpreting section 214A of the NLC and recognising the practical aspect of commercial transactions involving the sale and purchase of estate lands, while giving effect to legislative intent of the said section at the same time.

Although the Federal Court's well-reasoned decision was arrived at only by a 3:2 majority, it is hoped that the last word has indeed been spoken as regards the scope and operation of section 214A(1) of the NLC.

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JUDICIAL MANAGEMENT OF JUDICIAL MANAGEMENT

continued from page 11

(S) Pte Ltd [1994] 3 SLR 390 on Section 227B(3)(c) of the Singapore Companies Act 1967 which is identical to Section 407(3) of the Act. In *Re Genesis Technologies*, the Court dismissed an application for a JMO even though only unsecured creditors had objected to the application. It remains to be seen whether the Malaysian courts will be persuaded by this case in future.

Finally, the High Court had essentially predetermined the fate of the schemes of both Sierra Delima and Leadmont before the companies had an opportunity to present their schemes to their respective creditors and address any concerns. The success of Leadmont's scheme was dependent on the success of Sierra Delima's scheme. A total of seven creditors (including Infra Segi) had banded together to achieve 38.7% in value of Sierra Delima's creditors. If Sierra Delima had had a chance to present its scheme to its creditors and address the creditors' concerns, it may have had a chance to turn the tide. Some of the creditors who initially opposed the JMO could subsequently have been convinced. Success in Sierra Delima's scheme may have allowed Leadmont's scheme to also succeed.

The Malaysian High Court has previously considered this issue in *RHB Bank Berhad v Gula Perak Berhad; Town Hang Securities Co Limited (Applicant)* [2013] 1 LNS 1409 ("Town Hang Securities") which led to a similar outcome in relation to an application to convene a creditors' meeting under section 176 of the Companies Act 1965 (now repealed). If there is no realistic prospect of success due to a lack of approval of the majority of shareholders, the court may refuse to grant leave to convene a meeting of the creditors. However, in *Town Hang Securities*, a substantial 61.9% in value of the creditors did not support the scheme leading Yaacob Haji Md Sam J to conclude that the statutory requisite 75% in value of approval would not be obtained.

However, the Singaporean High Court in *Re Attilan Group Ltd* [2017] SGHC 283 appears to set a higher standard for refusing leave to call a meeting in relation to a scheme of arrangement. In this case, the applicant's contention that it had garnered support from 76% in value of its creditors was challenged by another creditor on grounds that some of those debts could be subject to significant discounts. Aedit Abdullah J said that the question of discounting was a matter to be considered by the chairman at the creditors' meeting or by the Court when sanction is sought. In the opinion of the Learned Judge, it would be premature to refuse leave to call a meeting "*unless the issue is one which would so clearly result in the scheme's failure that it will be futile to call the meeting*" and the applicant and the scheme managers ought to be given the opportunity to reconsider the scheme right up to the voting by the creditors unless there is "*incontrovertible evidence*" that the threshold of 75% will not be met.

In any event, there is no requirement within the Act to show that the scheme would have be approved by 75% of the total value of creditors in order to maintain a JMO.

CONCLUSION

Although the legal interpretation of the meaning of words and threshold test are both useful for those navigating their way around the new judicial management provisions, it is the derivation of power to set aside a JMO and the reasons for doing so that are key considerations. We understand that no appeal was filed against the decision and it remains to be seen whether the precedents set by this case will be followed in future.

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TIME'S UP!

continued from page 19

Lim Hui Jin has far-reaching implications on the conduct of investigations under the Act where properties of a person have been frozen or seized, as is often the case. In such event, enforcement agencies must endeavour to complete their investigations and proffer charges against the accused within 12 months from the date of a seizure order, or of a freezing order if one has been issued. Failure to do so could result in the properties being returned to the person concerned, unless an application has been made to forfeit the property under section 56 of the Act within the lifespan of the relevant order. It remains to be seen whether the 12-months' time frame imposed on enforcement agencies is realistic and practicable especially in cases of large scale or complex investigations that involve multiple parties or jurisdictions.

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REORDERING THE ORDER OF NATURE

continued from page 13

THE POSITION IN MALAYSIA

The original version of section 377 of the Malaysian Penal Code ("MPC") mirrored section 377 of the IPC. However, pursuant to the Penal Code (Amendment) Act 1989, the original section 377 was replaced by a new provision and several new provisions, including section 377A, were introduced from 5 May 1989. Sections 377 and 377A of the MPC provide as follows:

"***Section 377. Buggery with an animal.***

Whoever voluntarily has carnal intercourse with an animal shall be punished with imprisonment for a term which may extend to twenty years, and shall also be liable to fine or to whipping.

Explanation - Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section."

Section 377A. Carnal intercourse against the order of nature.

"*Any person who has sexual connection with another person by the introduction of the penis into the anus or mouth of the other person is said to commit carnal intercourse against the order of nature.*

Explanation - Penetration is sufficient to constitute the sexual connection necessary to the offence described in this section."

The offence of bestiality in Section 377 of the MPC which is embodied in section 377 of the IPC remains in place in both jurisdictions. However, as a result of *Navtej*, section 377 of the IPC (which is now in substance section 377A of the MPC) has been read down so that consensual sexual relations between adults of the same sex no longer constitute an offence in India. If the principles laid down in *Navtej* were to be applied in Malaysian jurisprudence, section 377A would arguably be deemed unconstitutional as Malaysia's Federal Constitution contains most, if not all, of the constitutional freedoms in the Indian Constitution referred to in *Navtej's* judgments.

CONCLUSION

Navtej is one of three landmark SCI decisions in the last five years that illustrate the progressive outlook of the SCI judges. Their Lordships have strived to safeguard the rights and dignity of individuals in India by giving a dynamic interpretation to the fundamental rights enshrined in the Constitution. In the context of a society renowned for being conservative, *Navtej*, *NASLA* and *Joseph Shine* leave a legacy both transformative and enduring.

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INDUCEMENT OF BREACH OF CONTRACT

continued from page 15

those whom they procure and act in what they regard to be the performance of that duty in good faith, without ill-will towards the other parties to the contract, and indeed believing that the breaches of contract would be for the benefit of those other parties as well as for those whom they were under an obligation to protect. The House of Lords further held that in an action for such procurement, the plaintiffs need not prove malice in the sense of spite or ill-will.

Remedies

Generally, there are two remedies available if the tort of inducement is proven i.e. damages and injunctive relief. While a contract claim would typically lie against the breaching party, the outcome that can be achieved through the tort of inducement can be more attractive both for practical reasons and legal considerations. The practical reason being that the third party sometimes may be more pecunious than the contract-breaker. Furthermore, damages in tort may be more extensive than their contractual equivalent, with a more liberal remoteness test and the absence of a stringent duty to mitigate. In an extreme case, aggravated or exemplary damages might even be awarded if the tort of inducement is proven.

In addition to damages, an injunction may be granted to prevent the defendant from continuing to induce non-performance of contract. The usual equitable requirements are applicable where an injunction is sought.

CONCLUSION

The development of business and commercial relations have caused the common law to recognise a cause of action for inducing a breach of contract, thereby affording greater security to the performance of contracts.

Nevertheless, the inducement of breach of contract remains largely a difficult tort to assert as its ambit, as well as its requirements, have yet to be clearly defined by case law. However, it is precisely this unsettled state of this tort that provides some flexibility to its application in different cases in order to achieve justice. In considering the elements and defences for this tort, Rix LJ in the English Court of Appeal decision of *Stocznia Gdanska SA v Latvian Shipping Co (No.3)* [2002] 2 All ER (Comm) 768 aptly observed that:

"Those considerations are designed to keep a wide-ranging tort within bounds. It is therefore important that they are not applied mechanically and that regard is had to the balancing demands of moral constraint and economic freedom. For these purposes the concept of knowledge and intention, direct participation, the causative relevance of unlawful means, and the possibilities of justification, are presumably sufficiently flexible to enable the principles of the tort to produce the right result."

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LEGAL INSIGHTS

A SKRINE NEWSLETTER

SKRINE WAS FOUNDED ON 1ST MAY 1963 AND IS TODAY ONE OF THE LARGEST LAW FIRMS IN MALAYSIA. SKRINE IS A FULL-SERVICE FIRM DELIVERING LEGAL SOLUTIONS, BOTH LITIGATION AND NON-LITIGATION, TO NATIONAL AND MULTINATIONAL CLIENTS FROM A BROAD SPECTRUM OF INDUSTRIES.

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