IN THE FEDERAL COURT OF MALAYSIA

(APPELLATE JURISDICTION)

CIVIL APPEAL NO.: 01(i)-44-11/2018(W)

BETWEEN

TONY PUA KIAM WEE
(NRIC NO.: 720801-01-5081) … **APPELLANT**

AND

GOVERNMENT OF MALAYSIA … **RESPONDENT**

–HEARD TOGETHER WITH–

IN THE FEDERAL COURT OF MALAYSIA

(APPELLATE JURISDICTION)

CIVIL APPEAL NO.: 02(i)-111-11/2018(W)

BETWEEN

TONY PUA KIAM WEE
(NRIC NO.: 720801-01-5081) … **APPELLANT**

AND

DATUK SERI NAJIB BIN TUN HAJI ABDUL RAZAK
(NRIC NO.: 530723-06-5165) … **RESPONDENT**

[In The Matter of Court of Appeal of Malaysia at Putrajaya

(Appellate Jurisdiction)

Civil Appeal No.: W-02(IM)(NCVC)-2293-11/2017

Between

Tony Pua Kiam Wee
(Nric No.: 720801-01-5081) … Appellant

And

Datuk Seri Najib Bin Tun Haji Abdul Razak
(Nric No.: 530723-06-5165) … Respondent

[In the High Court of Malaya at Kuala Lumpur

(Civil Division)

Civil No.: WA-21NCVC-5-01/2017

Between

Tony Pua Kiam Wee
(Nric No.: 720801-01-5081) … Plaintiff

And

1. Datuk Seri Najib Bin Tun Haji Abdul Razak
   (Nric No.: 530723-06-5165)
2. Kerajaan Malaysia … Defendants

Coram : Tengku Maimun Tuan Mat, CJ
Ahmad Maarop, PCA
Azahar Mohamed, FCJ
Alizatul Khair Osman Khairuddin, FCJ
Rohana Yusuf, FCJ
Mohd. Zawawi Salleh, FCJ
Nallini Pathmanathan, FCJ

JUDGMENT OF THE COURT

INTRODUCTION

1. In January 2017, Tony Pua, the plaintiff in the High Court and appellant here ('Tony Pua'), brought an extraordinary claim against the then (and now former) Prime Minister of Malaysia, Dato' Seri Najib bin Tun Abdul Haji Razak ('Najib Razak') and the Government of Malaysia ('Government'), premised on the common law tort of misfeasance in public office.

2. The thrust of the claim was that the then Prime Minister, Najib Razak, had committed misfeasance in public office in relation to a sovereign fund established for the economic benefit of Malaysia and the Malaysian people, known as 1MDB. More particularly, it was alleged that the then Prime Minister had abused his public office by personally benefitting and/or profiting from the receipt of monies from the 1MDB fund, comprising public funds.

3. In response to this claim, the defendants, both Najib Razak and the Government, sought to strike out Tony Pua's claim under **Order 18 Rule**

19(1)(a), (b), (c) and (d) of the Rules of Court 2012 and under the inherent jurisdiction of the Court.

4. In the High Court the claim was struck out summarily under **Order 18 Rule 19(1)(a)** for a variety of reasons. For the purposes of these appeals, the primary ground of relevance is that **the former Prime Minister was not a 'public officer' or a 'person holding public office' as contemplated under the tort of misfeasance in public office**.

5. The High Court stated that it was bound by the decision of the Court of Appeal in another civil suit namely **Tun Dr Mahathir bin Mohamad & Ors v Datuk Seri Mohd Najib bin Tun Hj Abdul Razak [2018] 3 MLJ 466 ('the Mahathir suit/case').** In that suit the Court of Appeal held conclusively that Najib Razak was not a 'public officer' for the purposes of the tort of misfeasance in public office.

6. In the instant appeals, the Court of Appeal affirmed its reasoning in the **Mahathir suit**, and to that end only, upheld the decision of the High Court. In essence it held that as the principal constituent element under this common law tort had not been met, the action could not stand. Accordingly, the cause of action pleaded against the Government, as being vicariously liable for the former Prime Minister's actions or omissions, also failed *in limine*.

7. Tony Pua appealed against these decisions which resulted in the two appeals before us, namely **Appeal No. 02(i)-111-11/2018(W**) against Najib Razak ('Appeal No. 111') and **Appeal No. 01(i)-44-11/2018(W)** ('Appeal No. 44') against the Government.

8. On 5 November 2018 this Court granted leave for the following questions of law to be ventilated and adjudicated in respect of both appeals:

Leave Question 1 (in Appeal 111 against Najib Razak)

> **Whether a court, in determining if the Prime Minister or any other Minister is a public officer for the purposes of the tort of misfeasance in public office, is limited by the definition of "public officer" in section 3 of the Interpretation Acts 1948 and 1967 read together with Articles 132 and 160 of the Federal Constitution?**

Leave Question 2 (in Appeal 44 against the Government)

> **Whether the Prime Minister or any other Minister is a public officer within section 5 of the Government Proceedings Act 1956 for the purposes of the tort of misfeasance in public office?**

9. In addition to the questions above, two other issues were raised during the course of the hearing of the appeal on 23 April 2019. We sought further clarification from the parties on points of law which we felt were integral to the proper determination of these appeals:

(i) firstly, whether Tony Pua has the requisite locus standi to commence these proceedings; and

(ii) in any event, whether the loss and/or injuries pleaded by Tony Pua are sufficient to constitute a valid cause of action.

10. From the two leave questions and the clarification sought, the following matters require legal interpretation and analysis:

11. Is the tort of misfeasance in public office, a tort stemming from the common law, actionable against the respondent, the former Prime Minister of Malaysia, as an individual holding public office or as a public officer?

12. If so, does the cause of action as pleaded by the appellant contain the constituent elements of the tort so as to comprise a valid cause of action for the purposes of **Order 18 Rule 19(1)(a)** or does it fail to do so, warranting the action being struck out?

13. Is the Government vicariously liable for the acts of Najib Razak if the tort is proven against him pursuant to the provisions of the **Government Proceedings Act 1956 ('GPA')**? (The subject matter of the second appeal before us.)

Salient averments in the statement of claim

14. In order to answer the questions of law before us it is necessary to first comprehend the nature and content of the claim made by Tony Pua against Najib Razak and the Government.

15. Tony Pua's claim was struck out by both the High Court and the Court of Appeal, as stated above, on the basis that no valid cause of action

was found to subsist. This in turn was because Najib Razak was not considered a public officer for the purposes of a cause of action founded on the tort of misfeasance in public office. That is the central issue before us.

16. In order to ascertain whether or not the Court of Appeal was correct in concluding that Najib Razak was **not** a person holding public office or a 'public officer' within the context of the tort of misfeasance in public office, it is necessary to consider the factual matrix as set out in the statement of claim. The issue is not a pure question of law to be considered *in vacuo*.

17. Further and in any event, in order to determine whether the claim is sustainable or contains a valid cause of action (including the issue of whether Najib Razak was a public officer for the purposes of the tort in question) it is also necessary to examine the statement of claim to ascertain that the essential constituents of such a cause of action subsist (see **Order 18 Rule 19(1)(a)**). In undertaking this examination, the Court presumes that the allegations made in the claim are true. (See generally: **Mooney & Ors v Peat, Marwick, Mitchell & Co & Anor [1967] 1 MLJ 87**, per Raja Azlan Shah J at page 88 and the judgment of Lord Reid in **Rediffusion (Hong Kong) Ltd v. A-G of Hong Kong [1970] AC 1136** as affirmed by our Court of Appeal in **Matchplan (Malaysia) Sdn & Anor v. William D Sinrich & Anor [2004] 1 CLJ 810**, at page 819).

<u>The statement of claim</u>

18. Tony Pua was at the material time in January 2017, a citizen, a taxpayer and a member of parliament for Petaling Jaya Utara. As stated

earlier, Najib Razak, the defendant who is the respondent here, was at the material time the Prime Minister of Malaysia. He was also the Minister of Finance. He was the Chairman of the Board of Advisors for 1Malaysia Development Berhad ('1MDB') since its incorporation in 2009.

19. Tony Pua filed this action against Najib Razak and the Government of Malaysia in respect of the now well publicised events surrounding the allegations of the unlawful dissipation of 1MDB funds. The 1MDB fund takes on prominence in the context of this cause of action as it is a fund established by the Government of Malaysia through the Ministry of Finance under the leadership of Najib Razak. It is a wholly-owned subsidiary of the Ministry of Finance Incorporated.

20. The fund was set up to carry out economic development through the forging of strategic global partnerships and by promoting foreign direct investments. The Ministry of Finance Incorporated provided a paid up capital of RM1 million. The fund comprised and utilised public funds. Ultimately the 1MDB fund was set up for the economic benefit of the Malaysian people. To this end 1MDB as a government linked company founded on public funds, was bound to utilise such funds in the interests of and having regard to the citizens of Malaysia.

21. The statement of claim goes on to detail the facts comprising the substratum to found the cause of action, more particularly the acts alleged to comprise the misfeasance in public office. From **paragraphs 8 to 158** the statement of claim sets out:

(a) Najib Razak's role, direct and indirect, in 1MDB in relation to decision making and the implementation of such decisions,

in his capacity as Prime Minister, Minister of Finance and Chairman of 1MDB's Board of Advisors. It is pleaded *inter alia* that he was required to approve any financial commitments by 1MDB including investments that were likely to affect specific guarantees given by the Government for the benefit of 1MDB, as expressly provided by Article 117 of 1MDB's Memorandum and Articles of Association;

(b) The sequence of events giving rise to the utilisation of public funds for investments where Najib Razak played a central role in approving the same; and

(c) To enable 1MDB to secure its funding, the Government had provided guarantees or issued letters of support including:

(i) the issuance of 30 year Islamic Medium Term Notes valued at RM5 billion paying an annual profit rate of 5.75% by 1MDB in 2009;

(ii) Guaranteed a 10 year RM2 billion loan for Kumpulan Wang Amanah Persaraan ('KWAP') to SRC International Sdn Bhd in 2011;

(iii) Guaranteed a RM800 billion 10 year loan borrowed from PERKESO vide 1MDB's subsidiary in 2011;

(iv) Guaranteed a USD 3 billion loan to 1MDB Global Investment Limited another subsidiary in 2013;

(v) Provided an indemnity to International Petroleum Investment Corporation ('IPIC') and its subsidiary Aabar Investment PJS ('Aabar') for financial assistance extended by IPIC and Aabar to 1MDB, the further details of which are set out in paragraph 10.6 of the statement of claim.

22. The statement of claim sets out in detail the role of Najib Razak in initiating or instructing these investments and guarantees, the latter of which were premised on public funds and which placed these funds in jeopardy.

23. The allegations against Najib Razak in relation to the key element of recklessness include:

(1) Knowingly and/or recklessly using his influence and position to, *inter alia*, procure guarantees, undertakings, and/or assurances from the Government for 1MDB bonds, from which proceeds were transferred into his personal bank accounts;

(2) Maliciously, knowingly and/or recklessly approving 1MDB and/or its associated companies to enter into various investment transactions and agreements without conducting due diligence which resulted in the unlawful and surreptitious dissipation and/or misappropriations of 1MDB funds;

(3) Maliciously knowingly and or recklessly facilitating and or allowing sham agreements to take place in order to create

falsified circuitous trails to conceal the unlawful misappropriations of 1MDB funds;

(4) Such acts as stated above were undertaken for improper purposes and contrary to the purpose and intent of 1MDB's incorporation including the unlawful enriching of himself and his associates, including Riza Aziz and Low Taek Jho;

(5) Recklessly providing wrong or misleading replies to queries posed to him in Parliament to conceal the true facts of the various 1MDB transactions; and

(6) Unlawfully receiving the sum of USD 731 million and/or any other amount directly or indirectly from 1MDB.

24. Premised on the foregoing paragraphs, it is the appellant's submission that a sufficient case has been made out against Najib Razak to establish misfeasance in public office. This necessarily includes the primary constituent element, namely that Najib Razak in carrying out these acts, committed the tort in his capacity as an individual holding public office. In short he was a public officer in the context of this common law tort.

Reliefs sought by Tony Pua

25. Tony Pua, in his capacity as a Malaysian taxpayer, claims as against the Najib Razak the following reliefs:

(i) A declaration that Najib Razak committed misfeasance in public office;

(ii) A declaration that Najib Razak had abused his public office in personally benefitting and/or profiting from his receipt of 1MDB funds; and

(iii) General, exemplary, and aggravated damages.

26. By way of special damages, premised on the following matters, Tony Pua claims loss based on the following facts pleaded in his statement of claim:

(i) his tax monies had been utilised for the incorporation of 1MDB, which were dissipated and/or misappropriated;

(ii) his tax monies will be used in the future to clear the guarantees given by the Government of Malaysia;

(iii) a travel ban had been imposed on him as a result of his public statements in relation to 1MDB matters; and

(iv) the loss in value of his wealth as a result of the significant devaluation of the Malaysian Ringgit caused by Najib Razak's conduct.

27. Tony Pua's claim against the 2nd defendant was levied on vicarious liability principally under the provisions of the **GPA**.

THE DECISIONS OF THE COURTS BELOW

The Decision of the High Court

28. The decision of the High Court is a commendably complete and wide-ranging judgment which examined both the factual matrix and tort of misfeasance in considerable detail. The nature of the claim, the law relating to the tort, the requisite ingredients necessary to establish such a tort, particularly the loss and damage alleged to be suffered by the plaintiff, the locus standi of the plaintiff to bring the action – were all considered in detail, apart from the central issue of whether the position of Prime Minister falls within the ambit of holding public office or 'public officer'.

29. The judgment of the High Court examined the salient historical origins and development of the tort of misfeasance, more particularly in the English House of Lords decision in **Three Rivers (above)**, the now seminal decision on this area of the law. After examining the entirety of the claim, with regard to whether the constituent elements of the tort had been made out the High Court struck out Tony Pua's suit on the following grounds:

(i) That it was bound by the decision of the Court of Appeal in the Mahathir suit. Najib Razak is not a 'public officer' and hence, Tony Pua cannot at the outset meet his claim;

(ii) Further, that Tony Pua cannot meet the requisite *locus standi* requirement and that this action ought to have been brought by way of a relator action;

(iii) In any event, Tony Pua would be unable to prove any of the other elements of the tort, including the essential element of intention or knowledge. This element required proof of knowledge on the part of Najib Razak that his acts would damage Tony Pua (or a class of persons of which he was a member), or that he was reckless as to this possibility. Another salient element that could not be met was that of damage and loss – accordingly the cause of action failed; and

(iv) As the suit against the Government was premised on vicarious liability, it could no longer stand and had to be struck out also.

30. Notably, the learned Judicial Commissioner highlighted that the 'public officer' point was not the main reason why Her Ladyship struck out Tony Pua's suit. Her Ladyship reiterated that she was bound by the prior decision of the Court of Appeal in the **Mahathir case**, which held that Najib Razak as Prime Minister at the material time, was not a 'public officer'. Her Ladyship's primary reasons for striking the claim out were points (ii) to (iv) above. In summary, the content of the statements in the claim, assumed to be true, were insufficient to found a cause of action in tort, particularly in relation to locus standi and the loss and damage allegedly suffered. Accordingly this was the main ground to strike out the suit.

The decision of the Court of Appeal in relation to these two appeals

'Public officer' and its definition for the purposes of the tort of misfeasance in public office

31. The Court of Appeal affirmed the decision of the High Court. After setting out and examining the diametrically opposed submissions of counsel for Tony Pua on the one hand and Najib Razak and the Government on the other, on the definition to be accorded to the term 'person holding public office' and 'public officer', the Court of Appeal reiterated its reasoning in the **Mahathir case**, quoting from and adopting paragraphs 43 and 44 of that judgment.

32. In the **Mahathir case** the referenced paragraphs in the judgment provide, *inter alia*, that section **3 of the Interpretation Acts 1948 and 1967 ('Interpretation Acts')** is to be read harmoniously with **Articles 132(1), 132(3), and 160(2) of the Federal Constitution ('Federal Constitution')** such that 'public officer' and 'Prime Minister' comprised two different entities. Parliament intended them to be different. Moreover **Article 132(3) of the Federal Constitution** expressly provides that the 'public service' shall not be taken to comprise the office of 'any member of the administration' to which the Prime Minister and thereby Najib Razak (at the material time) belonged. Further **section 66 of the Interpretation Acts** provides that the Prime Minister means the person appointed as such by the Yang di-Pertuan Agong under **Article 43 of the Federal Constitution**. This was to be contrasted with a 'public officer' whose appointment is not by the Yang di-Pertuan Agong but by the Public Services Commission. Accordingly, the Court of Appeal reasoned that the Prime Minister is not a public officer and a public officer not the Prime

Minister. The latter was in point of fact a ‘member of the administration’ while a public officer is a member of the ‘public services’. It was held that the distinction was plain and obvious.

33. In the instant appeals the Court of Appeal determined that as it had earlier opined that the statutory interpretation of the term ‘public officer’ ought to be applied to the common law interpretation of such term, it saw no reason to depart from its earlier interpretation in the **Mahathir case**.

34. It further held that it was fortified in its interpretation by the fact that leave to appeal to the Federal Court in the **Mahathir case** had been refused. As such the decision of the Court of Appeal in the **Mahathir case** remained the determinative authority on this point.

35. However the Court of Appeal did state that in the present appeals Tony Pua had presented ‘novel’ and ‘persuasive’ arguments on the point that statutory interpretation of the term ‘public officer’ were useful solely for the purpose of interpreting written law, but could not and ought not to be used for the interpretation of the common law, more particularly in relation to the tort of misfeasance in public office. The Court of Appeal went on to state that it was timely either for this Court or even the legislature if necessary to decide on or provide for a clear definition of “public officer” for the specific purpose and application in the law of the tort of misfeasance in public office.

Applying the test of a claim being 'obviously unsustainable' for the purposes of an application to strike out under Order 18 Rule 19

36. One other point requires clarification in relation to the decision of the Court of Appeal. In the course of its judgment it held that the Judicial Commissioner had erred in her approach to the law on striking out by undertaking an examination of the claim and requiring that the requisite elements of the tort be made out particularly in relation **to limb (a) of Order 18 Rule 19 of the Rules of Court 2012**. Essentially in relation to ingredients other than whether Najib Razak was a public officer the Court of Appeal held that those ingredients were matters to be dealt with by way of oral evidence to be adduced at trial. The 'other ingredients' related to whether:

(a) Tony Pua had sufficient antecedent legal rights or interest to sue Najib Razak for alleged misfeasance in public office;

(b) Najib Razak when committing the 1MDB related actions acted either with the specific purpose of injuring Tony Pua (first form of the tort) or with the knowledge (or reckless carelessness) that his act would probably injure Tony Pua (second form of the tort);

(c) Najib Razak's action caused Tony Pua's loss and damage; and

(d) That such loss and damage is recoverable.

37. In short the approach taken by the Court of Appeal was that as long as the element of 'public officer' was established, all other matters ought to be ventilated at trial and it was not necessary for the other ingredients to be established in a striking out claim. In support of this contention reliance was placed on **Sivarasa Rasiah & Ors v Che Hamzah Che Ismail & Ors [2012] MLJ 473** at pages 479 and 480 where it was stressed that a trial by affidavit ought not to be undertaken, and that a court should not conduct a minute examination of the documents and the facts of the case. In that case it was held that as long as the claim discloses 'some cause of action' or 'raises some question fit to be tried' on the face of it, it ought not to be struck out. The fact that the case is weak and unlikely to succeed is insufficient basis to strike out a claim. There the test for striking out as laid down by the Supreme Court in **Bandar Builder Sdn Bhd & 2 Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ('Bandar Builder's case')** was reiterated namely that it ought to be 'obviously unsustainable'.

38. With the greatest respect, the Court of Appeal in the instant appeals appears to have conflated and misapplied the principle that there ought to be no trial by affidavit with the need to examine and ascertain that there is a proper cause of action made out which can proceed to trial. The essence of a striking out application particularly under **limb (a) of Order 18 Rule 19** is that upon an examination of the claim as pleaded in the statement of claim, a whole and coherent cause of action must subsist. A whole and coherent cause of action cannot subsist until and unless all the essential ingredients comprising that cause of action subsist or are made out in the body of the statement of claim. That in turn means that it is incumbent upon a court undertaking a striking out exercise to scrutinise a claim purposively such that it is satisfied that prima facie, the statement

of claim contains a sufficient factual matrix to support each and every ingredient of the cause of action pleaded. The issue of whether or not such a factual matrix is capable of proof is a matter of evidence which must, necessarily, be dealt with by way of oral evidence at trial. However this latter issue is wholly separate and disparate from whether or not the ingredients of a particular cause of action have been made out.[1]

39. It may well be the case that a claim is pleaded in such a manner that the factual matrix is scandalous or so frivolous or vexatious that it can give rise to no other inference than that it is wholly indefensible or unsustainable. This would be plainly discernible on the face of a claim. Such pleas or averments would fall for striking out under one of the other limbs of **Order 18 Rule 19** and/or the inherent jurisdiction of the Court.

40. We would therefore conclude that the Judicial Commissioner did not err in:

(a) identifying and enumerating the composite elements that make up the cause of action of misfeasance in public office; and

[1] See for example, the case of **Sukatno v. Lee Seng Kee & Anor [2009] 4 CLJ 171; [2009] 1 LNS 115** where His Lordship Abdul Malik Ishak JCA stated at paragraph 35: "*The law books are replete with authorities on pleadings. They all say that pleadings are (i) concise statements of fact; (ii) and that only material facts and not law or evidence has to be pleaded (**Knowles v. Roberts [1888] 38 Ch D 263, CA**)*." It thus follows that since pleadings do not contain evidence, what the court has to decide at the hearing of a striking out application premised under **O.18 r19 (1)(a)** is not the truth of the claim (see paragraph 17 of our grounds above) but only whether a reasonable cause of action has been made out. On the meaning of a reasonable cause of action, see **Indah Desa Saujana Corporation Sdn Bhd & Ors v. James Foong Cheng Yuen & Anor [2008] 1 CLJ 651** where His Lordship Low Hop Bing JCA stated at paragraph 39: "*A reasonable cause of action means simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person.*"

(b) scrutinising and examining whether the averments as pleaded were sufficient to found such a cause of action.

41. This is the correct procedure to undertake when determining whether to strike out a claim, particularly under limb (a). Recourse ought not to be had to the oversimplified catchphrase of 'let the matter go to trial' in place of undertaking the task of identifying the elements and ascertaining whether the plea meets and supports, by way of a salient factual matrix, each of those elements. To do otherwise would be to misconstrue and misapply the classic and timeless test of only striking out a claim which is 'obviously unsustainable' as enunciated in **Bandar Builder's case (above)**.

The Decision of the Court of Appeal in the Mahathir case

42. It is evident from the decision of the Court of Appeal which comprises the subject matter of the appeals before us, that considerable reliance was placed on the decision of that court in the **Mahathir case**. It is not therefore possible to determine the questions in the present appeals without comprehending and examining the decision of the Court of Appeal in that case. The ratio and legal analysis in that case effectively comprises the substratum of the present appeals because that Court reiterated and relied upon the legal reasoning there to determine the present appeals.

43. In short it would not be possible to arrive at a reasoned decision in the instant appeals without examining the legal reasoning in the **Mahathir case**, because such reasoning has been incorporated by the Court of Appeal in its grounds in reaching its decisions in the current appeals. It is

therefore both appropriate and necessary to consider the reasoning in that case.

The Facts in the Mahathir Case

44. Much as Tony Pua has done in the present appeals, Mahathir Mohamad and two other plaintiffs sued Najib Razak in his capacity as the then Prime Minister of Malaysia, the Minister of Finance and the Chairman of the Board of Advisors of 1MDB. The plaintiffs' causes of action were premised on:

(i) the tort of misfeasance in public office; and/or
(ii) breach of fiduciary duties in public office.

45. The above causes of action were principally premised on the allegation that Najib Razak had abused those aforementioned positions. The relief the plaintiffs sought were a declaration that Najib Razak had committed the tort and/or that he had breached his said fiduciary duty. In the result, the plaintiffs also sought that Najib Razak pay RM2.6 billion and RM42 million to the Government of Malaysia.

46. Najib Razak applied to strike out the suit under all four limbs of **Order 18 rule 19(1) of the Rules of Court 2012**. The same argument was mounted namely that he was not a public officer. The plaintiffs in that suit countered this contention, again on similar if not identical grounds put forward by Tony Pua in the instant appeals.

47. It is necessary to trace the history of the legal reasoning from the High Court upwards as the Court of Appeal there approved and adopted the legal rationale of the High Court.

The decision of the High Court in the Mahathir Case

48. The High Court referred to **section 3(1) of the Civil Law Act 1956 ('CLA')** which qualifies the application of common law and English rules of equity. It provides that the applicable common law is subject to the written law in force either prior to, or subsequently made in Malaysia.

49. It then went on to consider written law, namely, the **Federal Constitution** and the **Interpretation Acts**.

50. The High Court relied on **section 3 of the Interpretation Acts** which defines:

(i) 'public office' as an office in any of the public services (as understood under the **Federal Constitution**) and

(ii) a 'public officer' as a person who lawfully holds, acts or exercises the function of a public service;

(iii) "public services" means the public services mentioned in **Article 132 (1) of the Federal Constitution***;* and

(iv) "Minister" means, subject to **subsection 8(2)**, a Minister of the Government of Malaysia (including the Prime Minister and a Deputy Minister)."

51. These definitions were construed in conjunction with **Articles 132(1) and 132(3)** which, when construed together provide that neither a Minister nor the Prime Minister (nor several other categories of offices) comprise a part of the public services. **Article 132(3)** specifically provides that the public service "shall not comprise" the office of any 'member of the administration' in the Federation or a State. The latter category of persons, namely a 'member of administration' is defined in **Article 162(2)** to mean "….*in relation to the Federation, a person holding office as Minister, Deputy Minister, Parliamentary Secretary or Political Secretary…*"

52. Relying on the foregoing provisions of the **Interpretation Acts** and the **Federal Constitution**, the High Court went on to apply those provisions to the term 'public office' in relation to the common law tort of misfeasance in public office. It then concluded that these relevant statutory provisions circumscribe and effectively exclude the wider connotations accorded to the meaning of a holder of a public office. It would appear that the conclusion of the High Court was that the express provisions of the **Interpretation Acts** and the provisions of the **Federal Constitution** abrogated and statutorily narrowed the common law definition of both public office and thereby 'public officer'. Thus, while the term "public officer" might have a broader meaning in other jurisdictions like England and the Caribbean, the definition in Malaysia is limited by the aforementioned written law.

53. As the plaintiffs there could not establish the fundamental element of 'public officer' within the context of the written law, the High Court concluded that the claims were obviously unsustainable and were thus struck out.

The Decision of the Court of Appeal in the Mahathir Case

54. The principal issue before the Court of Appeal was whether the High Court's interpretation of "public officer" premised on the **Federal Constitution** and the **Interpretation Acts** was right. The Court of Appeal concurred with the reasoning of the High Court and dismissed the appeal.

55. Apart from such concurrence the Court of Appeal set out further legal reasoning, grounds and analysis in holding that Najib Razak as the then Prime Minister of Malaysia was not a 'public officer' as envisioned under the tort in this jurisdiction.

56. The starting point of the deliberations was the decision of the Caribbean Court of Justice in **Marin and Another v The Attorney-General of Belize [2011] CCJ 9 (AJ) ('Marin')**. The issue in that case related to whether an action could be brought by the Attorney-General for the tort of misfeasance in public office against its own officers or former officers, on behalf of the state. The Court held by a majority that they could do so.

57. It is clear that the central issue in that case was somewhat different from the present appeals.

58. However what is relevant is that the 'officers' in question were two former ministers of government. It was alleged that during their respective terms of ministerial office they arranged the transfer of 56 parcels of state land to a company beneficially owned and/or controlled by one of them. The action was brought by the Attorney-General to recover the unlawful benefits and monetary gains.

59. In short the fact that the former ministers comprised officers holding 'public office' was not in issue. It was accepted that the ministers fell within that category of persons holding 'public office' and to that extent comprised 'public officers' for the purposes of the common law tort of misfeasance in legal office.

60. Having reviewed **Marin (above)**, the Court of Appeal then considered **section 3 of the Interpretation Acts** which defines the term common law as being the common law of England, and the restriction circumscribing the application of such common law as provided by **section 3(1) of the CLA**. It was accepted that the decision of the House of Lords in **Three Rivers (above)** represents the common law of England. However the Court of Appeal went on to hold that the law as set out in **Three Rivers (above)** was not the common law of Malaysia and as such could not be accepted "*lock stock and barrel without regard to our written law"*. It was further stated that even if the common law position was to be adopted it had to comply with the proviso to **section 3(1) of the CLA**.

61. The Court went on to examine the ingredients of the tort of misfeasance as analysed by the House of Lords in **Three Rivers**. The first ingredient to be established is that the defendant must be a public officer and this analysis of the requisite ingredients was fully accepted by the Court of Appeal. Decrying the fact that the House of Lords failed to define the term 'public officer' exhaustively, the Court of Appeal went on to distinguish the general definition accorded to the term by stating that the case did not deal with whether the Prime Minister of England was a public officer, which was the central issue before the Court below.

62. In so stating the Court of Appeal with the greatest respect, appears to have failed to recognise that an exhaustive definition is simply neither tenable nor prudent given the multitude of scenarios of abuse of power and discretion that can arise in the context of a person holding public office. Any such definition would be hard put to encompass such a variety of situations and is far more likely to stultify or restrict the ambit of the tort.

63. The Court of Appeal then held that the question to be asked in the context of the tort is whether the Prime Minister of Malaysia is a 'public officer' under Malaysian law. That in turn, it was held, would depend on the question whether the term 'public officer' was to be determined by reference to the common law of England or by reference to the written law of Malaysia. The Court honed this issue further by identifying the crucial question to be whether it was permissible for the Court to apply the common law meaning of 'public officer' when there is written law in force in Malaysia to define the meaning of the words and such other words. The written law was identified to be **section 3 of the Interpretation Acts** which defines 'public office', 'public officer' and 'public services', as well as 'Prime Minister' and 'Minister' and 'written law'.

64. In other words the Court of Appeal appears to have accepted that the common law definition of 'public officer' is wide and capable of being construed widely but in Malaysia is restricted, varied or abrogated to the extent specified in **section 3 of the Interpretation Acts**.

65. Relying on these definitions the Court of Appeal accepted and applied the definitions accorded to 'public officer' as being a person who holds 'public office' in any of the general 'public services' of the Federation, while 'Prime Minister' means the person appointed as Prime

Minister by the Yang di-Pertuan Agong under **Article 43 of the Federal Constitution**.

66. **Articles 132(1) and 132(3) of the Federal Constitution** were then considered for the definitions of 'public services' and what does NOT comprise the 'public services' respectively. **Article 132(3)** expressly excludes the office of any member of the administration. A member of the administration is defined in **Article 160(2)** and means a person holding office as a minister, etc., thereby excluding the Prime Minister from the definition of 'public officer' holding office in the public services under the provisions of the **Interpretation Acts** and the **Federal Constitution**, both of which comprise written law.

67. In summary the Court of Appeal held that by virtue of **section 3(1) of the CLA** the common law meaning of 'public officer' as propounded in **Three Rivers**, "***must, as a matter of law, give way to the statutory meaning given to the words by section 3 of the Interpretation Acts, which is a provision "that has been made or may hereafter be made by any written law" within the meaning of section 3(1) of the Civil Law Act***." It was further reasoned that no facet of the common law of England could override Malaysian written law.

68. The foregoing comprised the core of the reasoning of the Court of Appeal in holding that the Prime Minister could not possibly be a public officer.

69. By way of further explanation and reiteration, the Court of Appeal stated that the question to be asked is not whether the common law tort of misfeasance in public office applies as **Three Rivers (above)** has been

confirmed as part of our law by the Federal Court in **Keruntum Sdn Bhd v The Director of Forests & Ors [2017] 3 MLJ 281 ('Keruntum')**, but whether the first ingredient of the tort covers the office of Prime Minister. And given the definitions accorded to the key terms in the **Interpretation Acts** and the **Federal Constitution**, there was no doubt that the Prime Minister was not a 'public officer' for the purposes of the common law tort.

70. In short, it was the view of the Court of Appeal that the relevant express provisions of the **Interpretation Acts** and the **Federal Constitution** comprised written law modifying and effectively occluding/excluding the wider common law definition of 'public officer' in the context of the tort of misfeasance in public office.

71. The matters detailed above comprise the key parts of the Court of Appeal's reasons for concluding that the Prime Minister is not susceptible to a claim of misfeasance in public office under the common law.

72. The appellants in the **Mahathir case** sought leave to appeal to the Federal Court but leave was refused.

OUR ANALYSIS AND DECISION

Appeal No. 111 – Leave Question 1

The Application of Common Law Principles in Malaysia

73. It is evident from the reasoning of the Court of Appeal in the Mahathir case, which was adopted by the same Court in the instant appeals, that the rationale for holding that a Prime Minister of Malaysia

does not fall within the purview/ambit of the definition of a 'person holding public office' or a 'public officer' for the purposes of the tort of misfeasance in public office is that the wide/broad definition accorded to the term under the common law has been abrogated, restricted and modified by written law, post-1956. As such, the wider common law definition cannot prevail or override the written law which provides otherwise.

74. The question that arises for consideration in this appeal is whether the legal rationale and application of the **Interpretation Acts** and the **Federal Constitution** in determining the application of the common law as provided under **section 3(1) of the CLA**, as has been done, is the correct/true approach to be adopted, or is flawed.

ANALYSIS

MISFEASANCE IN PUBLIC OFFICE

Basis of the tort

75. In order to ascertain the correct interpretation of "public officer" for the purposes of the tort of misfeasance in public office, it is instructive to consider the basis of the tort as a starting point.

76. The development of misfeasance in public office and its role in the general scheme of tort law was considered by the House of Lords in the leading case of **Three Rivers District Council and Others v Governor and Company of the Bank of England (No 3) [2003] 2 AC 1**. The tort is founded on the unifying element of abuse of public power in bad faith (at 191-192). Lord Steyn explained the rationale of the tort (at 190, 192):

"The rationale of the tort is that in a legal system based on the rule of law executive or administrative power 'may be exercised only for the public good' and not for ulterior and improper purposes: *Jones v Swansea City Council* [1990] 1 WLR 54, 85F, per Nourse LJ … The basis for the action lies in the defendant taking a decision in the knowledge that it is an excess of the powers granted to him and that it is likely to cause damage to an individual or individuals."

(emphasis added)

77. The essence of the tort was elucidated by Slade LJ in **Jones v Swansea City Council [1989] 3 All ER 162** (at 175):

"The essence of the tort, as I understand it, is that someone holding public office has misconducted himself by purporting to exercise powers which were conferred on him not for his personal advantage but for the benefit of the public or a section of the public either with intent to injure another or in the knowledge that he was acting ultra vires. All powers possessed by a local authority, whether conferred by statute or by contract, are possessed 'solely in order that it may use them for the public good': see *Wade Administrative Law* (6th edn, 1988) p 400."

78. In a similar vein, Nourse LJ (dissenting on other issues) expressed the basis of the tort as follows (at 175):

"The assumptions of honour and disinterest on which the tort of misfeasance in a public office is founded are deeply rooted

in the polity of a free society... It ought to be unthinkable that the holder of an office of government in this country would exercise a power thus vested in him with the object of injuring a member of that public by whose trust alone the office is enjoyed. It is unthinkable that our law should not require the highest standards of a public servant in the execution of his office."

(emphasis added)

79. The principles of law in **Three Rivers** have been accepted and applied by the Malaysian courts, as recognised by this Court in **Keruntum Sdn Bhd v The Director of Forests & Ors [2017] 3 MLJ 281** (at [81]). However, we note that the ingredients of the tort were not considered in detail in **Keruntum**; the Court found it unnecessary to determine whether the elements laid down in Three Rivers should be applied, and in any event held that misfeasance was not proven against the defendants on the facts.

Meaning of public officer

80. It is only in view of the rationale and basis of the tort of misfeasance that the proper scope of "public officer" can be determined. The classic description of "public officer" in the context of misfeasance is the passage of Best CJ in the early case of **Henly v Lyme Corporation (1828) 5 Bing 91** (at 107-8, quoted with approval by the High Court of Australia in **Northern Territory of Australia v Mengel (1995) 129 ALR 1**):

"Then, what constitutes a public officer? In my opinion, every one who is appointed to discharge a public duty, and receives

a compensation in whatever shape, whether from the crown or otherwise, is constituted a public officer."

81. It is the notion of a public duty or public power that is central to the concept of "public officer". "Whatever its nature or origin, the power may only be exercised for the public good" (**Jones v Swansea City Council** at 186). What is required is an "exercise or non-exercise of public power, whether common law, statutory or from some other source" (**Ng Kim Moi v Pentadbir Tanah Daerah Seremban, Negeri Sembilan [2004] 3 MLJ 301** at 38, where the Court of Appeal quoted the ingredients of the tort as set out in the 5th edition of de Smith, Woolf, and Jowell's Judicial Review of Administrative Action).

82. Thus, in **Henly v Lyme Corporation**, a civil action may be brought against a corporation entrusted with the public duty of repairing a cob for failing to do so. In **Jones v Swansea City Council**, a local council which refused to allow a change of user of premises leased to an individual was susceptible to a claim in misfeasance of public office, even though the immediate origin of the power was in contract. In **Dunlop v Woollahra Municipal Council [1982] AC 158**, the defendant council as a statutory corporation exercising governmental functions was regarded as a "public officer" for the purposes of the tort. In the case of **Three Rivers** itself, it was accepted that the Bank of England, with the principal responsibility of supervising banking activities in the UK, constituted a "public officer" for the purposes of an action for misfeasance.

83. These authorities illustrate that the ambit of "public officer" in the tort of misfeasance of public office is not confined merely to persons employed in the public service. Indeed, there is no logical basis to do so.

84. An interpretation thus restricted would effectively render immune the holders of the highest offices in administration, who are entrusted with the greatest public power and corresponding duty to exercise it for the public good, from a tort founded in the very notion that public power cannot be abused in bad faith. It is repugnant both to common sense and to the rule of law. Such a restrictive definition of "public officer" would "unnecessarily emasculat[e] the effectiveness of the tort" (to borrow the expression of Lord Steyn in **Three Rivers** at 195).

85. We would thus endorse the passage in **Henly v Lyme** as a general description of "public officer" for the purposes of the tort of misfeasance in public office.

<u>The Delineation between Written Law and the Common Law as applicable in Malaysia</u>

86. The starting point lies in the definition of the word "law". **Article 160(2) of the Federal Constitution** defines "law" so as to include:

> *"…. written law, the common law in so far as it is in operation in the Federation or any part thereof, and any custom or usage having the force of law in the Federation or any part thereof."*

87. Section 3 of the Interpretation Acts further defines "common law":

> "*common law" means the common law of England*"

88. The said section also defines the meaning of "written law":

"written law" means —

(a) the Federal Constitution and the Constitutions of the States and subsidiary legislation made thereunder;

(b) Acts of Parliament and subsidiary legislation made thereunder;

(c) Ordinances and Enactments (including any federal or State law styling itself an Ordinance or Enactment) and subsidiary legislation made thereunder; and

(d) any other legislative enactments or legislative instruments (including Acts of Parliament of the United Kingdom of Great Britain and Northern Ireland and Orders in Council and other subsidiary legislation made thereunder) which are in force in Malaysia or any part thereof;….."

89. From these definitions, it is clear that **the common law** comprises **'law'** so far as it is in operation in the Federation, but does not comprise a part of the '**written law'** of Malaysia.

90. There is a clear distinction between '**common law'** and **'written law'** under our law. **Common law** in so far as it is applied in Malaysia is not regarded as written law (see **Article 160(2)** above). As the renowned author R.H. Hickling notes in his treatise: **'Malaysian Law – An Introduction to the Concept of Law in Malaysia' (Pelanduk Publications, 2001), at pages 83-84**:

"Even the humble citizen, let alone the youngest of law students, understands the essential nature of written law: and indeed, for most people, written law is what they understand by the term law generally; in other words, they think of law as consisting of statute law and subsidiary legislation made under statutes, as opposed to adat, customary law and the law made by judges. And although customs and judicial decisions may be, and indeed often are set down in writing, they are not popularly regarded as written law."

91. It is therefore sufficiently clear that common law and the written law exist as independent streams of law. The common law is "law" for as long as it remains in force. The mechanism for determining whether it remains in force lies in **section 3(1) of the CLA 1956**:

"Save so far as other provision has been made or may hereafter be made by any written law in force in Malaysia, *the Court shall*

(a) in Peninsular Malaysia or any part thereof, apply the common law of England and the rules of equity as administered in England on the 7 April 1956;…

Provided always that the said common law, rules of equity and statutes of general application shall be applied so far only as the circumstances of the States of Malaysia and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary."

[Emphasis added]

92. By virtue of **section 3(1) of the CLA** the **'common law'** applicable in Malaysia is capable of amendment, modification and/or abrogation by **written law** enacted after 7 May 1956.

93. Applying the foregoing to the current question before us, it follows that the common law tort of misfeasance in public office, which would include the definition of a 'person holding public office' or a 'public officer', is applicable in Malaysia subject to the proviso to **section 3(1) Civil Law Act** unless the common law tort has been modified, varied or abrogated by written law.

94. In other words, the section in its ordinary meaning means that the common law of England as of 7 May 1956 'shall' be applied in Malaysia save for the two express provisions under the section, namely:

(i) Express exclusion, variation or abrogation of the common law of England by Malaysian written law; and

(ii) The proviso to the section which requires that the common law of England only be applied to the extent that: (a) the circumstances of the country and their respective inhabitants permit; and (b) subject to such qualifications as local circumstances render necessary.

95. It would therefore follow that if there has been abrogation, express or implied, of the tort including the definition of a 'public officer' by written law, then the propositions and case-law stipulated in England and other jurisdictions adopting the tort in like vein are inapplicable in so far as they contradict the abrogated position in Malaysia. As pointed out earlier the

application of the tort in itself is not in issue as borne out by its application in a number of cases including **Keruntum (above)**, **LBCN Development Sdn Bhd ('LBCN') & Anor v. Pengarah Tanah Dan Galian Selangor & Ors [2014] 3 CLJ 970, [2014] 1 LNS 122** etc. It is the definition of its key ingredient and the ambit of that definition that is in issue here. However any such abrogation or variation can only be effected by **written law**.

96. Therefore the first question to be asked is whether there has been any such abrogation or modification of the common law tort including the definition of 'public officer' as has been found by the Court of Appeal. It must be borne in mind that any such abrogation must be specifically in relation to the tort of misfeasance in public office and that too by way of written law.

97. This brings to the fore the question of whether the **Interpretation Acts**, more particularly **section 3**, and **Articles 132(1) and (3) of the Federal Constitution** are statutory provisions of general application; or alternatively were in fact enacted with the identifiable/specific purpose of abrogating the common law tort of misfeasance in public office, more particularly with reference to narrowing the definition of a 'public officer' or 'a person who holds public office'.

98. If these statutory provisions comprising written law were enacted specifically to modify, in Malaysia, the application of the tort to 'public officers' **only,** as defined in the **Interpretation Acts** and the relevant Articles of the **Federal Constitution**, then it should follow that the definition of 'public officer' has in fact been abrogated or modified.

99. If however **section 3 of the Interpretation Acts** and **Articles 132(1) and (3) of the Federal Constitution** are not capable of being so construed, namely that those provisions are of general application and not expressly nor impliedly for the purposes of abrogating or limiting the ambit of the definition of 'public officer' within the tort of misfeasance in public office, it would follow that the broader common law definition of 'public officer' was, at all material times, and is, presently, applicable.

100. Therefore, it would appear that the answer to Leave Question 1 turns on the proper construction of **section 3 of the Interpretation Acts** and **Articles 132(1) and (3) [as well as Article 66] of the Federal Constitution** particularly in relation to **section 3(1) of the CLA**, so as to ascertain whether such written law has the effect of varying, modifying or abrogating the common law tort of misfeasance in public office.

The exclusion of common law by statute

101. The general principle may be stated thus: A statute abrogates a common-law principle where it expressly states an intention to abrogate that principle, or where it implicitly abrogates the principle by adopting a scheme that is wholly incompatible with the continued application of the common law principle.

102. When determining whether statute or written law has abrogated or modified common law, it is implicit that there must be a degree of specificity in abrogating the common law position. For example if the issue relates to the abrogation of a particular cause of action such as breach of promise of marriage in contract, then the question to be asked is which statute expressly or impliedly abrogates this particular cause of action. In

other words the written law or statute should specifically encompass the common law position such that the common law cause of action is effectively replaced.

103. In **Majlis Perbandaran Ampang Jaya v Steven Phoa Cheng Loon & Ors [2006] 2 MLJ 389**, Abdul Hamid Mohamad FCJ stated:

> *"[42] Strictly speaking, when faced with the situation whether a particular principle of common law of England is applicable, first the court has to determine whether there is any written law in force in Malaysia. If there is, the court does not have to look anywhere else. If there is none, then the court should determine what is the common law as administered in England on 7 April 1956, in the case of West Malaysia."*

104. Applying the foregoing to the present facts, the question to be asked is whether there is any written law in force in Malaysia which abrogates and substitutes the common law tort of misfeasance in public office. The answer is that there is none. Then the next step is to establish the common law as administered in England on 7 April 1956 and apply it.

105. It would not be tenable to state that **section 3 of the Interpretation Acts and Articles 132(1) and 132(3) of the Federal Constitution** have abrogated the common law tort of misfeasance in public office, more so in only one aspect, namely the definition of 'public officers' or a 'person holding public office'. It does not accord with the principles of statutory or legislative interpretation. This in turn is because the **Interpretation Acts** are of general application and cannot or ought not to be construed as

varying or abrogating **a portion** of the common law tort of misfeasance in public office namely the definition of a 'public officer'.

106. At the risk of repetition, for the common law position to be abrogated there must be specificity in terms of the written law altering irrevocably the common law position. Examples of the abolition of common law rules are set out in **Bennion on Statutory Interpretation**:

> *"Example 32.1 In relation to the common law of tort, the defence of common employment was abolished by the Law Reform (Personal Injuries) Act 1948 s 1 while the tort of detinue was abolished by the Torts (Interference with Goods) Act 1977 s.2.*
>
> *Example 32.2 The Law Reform (Miscellaneous Provisions) Act 1970 s.5 ended common law actions for enticement, seduction and the harboring of a wife or child.*
>
> *Example 32.5 Several common law crimes were abolished by the Criminal Law Act 1967 s 13. The way they were described by the Act is of interest. It abolished 'any distinct offence under the common law in England and Wales of maintenance (including champerty, but not embracery), challenging to fight, eavesdropping or being a common barrator a common scold or a common night walker."*

107. What is apparent in all these examples is that a specific statute or Act abrogates the common law action. The tort of misfeasance in public office is one of a multitude of causes of action that subsist under the

common law and which remain applicable pursuant to **section 3(1) CLA**. To conclude that that particular cause of action, specifically **a portion** of that cause of action relating to the definition of a public officer has been abrogated and replaced by the generic words of **section 3 of the Interpretation Acts** or **Articles 132(1) and 132(3) of the Federal Constitution** is unsustainable in law. It runs awry of the accepted principles of statutory interpretation.

108. There is a common law presumption that the common law shall continue to apply until and unless the Legislature passes law with the express intention of excluding it. See the words of **Thomas Lord Trevor CJ in Arthur v Borkenham (1708) 11 Mod. 139, at page 150**:

> *"The general rule in exposition of all Acts of Parliament is this, that in all doubtful matters, and where the expression is in general terms, they are to receive such a construction as may be agreeable to the rules of common law, in cases of that nature; for statutes are not presumed to make any alteration in the common law, further or otherwise than the Act does expressly declare; therefore in all general matters the law presumes the Act did not intend to make any alteration ; for if the Parliament had had that design, they would have expressed it in the Act."* [emphasis ours].

Implied abrogation or modification

109. Neither can it be said that the effect of section 3 of the Interpretation Acts and the relevant articles of the Constitution was to **indirectly**

abrogate or vary the definition of a public officer. No statutory scheme has come into effect by virtue of these sections which has the effect of negating or altering the common law tort or more significantly, any part of it. There is simply no nexus between the common law tort of misfeasance in public office or any part of that tort such as the definition of a public officer, and these written laws.

110. Therefore there is, with the greatest of respect, no rational basis to conclude that the definitions as set out in the written laws in question somehow abrogated or narrowed the definition of 'public officer' or 'person holding public office' as understood in the common law tort of misfeasance in public office. This is particularly so where this Court has expressly approved and adopted the cause of action (see **Keruntum**, **(above).**

An analysis of the relevant written law to ascertain whether it abrogates or varies the common law definition of 'public officer'

111. Even if it were to be assumed that the written law in question, namely the **Interpretation Acts** and **Federal Constitution** could be utilised to modify or vary or abrogate a part of the common law tort of misfeasance in public office, namely that part of the cause of action relating to the definition to be accorded to a 'public officer', that conclusion is flawed because that cannot be the effect of the combined effect of section 3 of the **Interpretation Acts** and the relevant Articles of the **Federal Constitution**. This is because:

(a) The relevant provision of the **Interpretation Acts** only has effect on written law. That does not encompass the common law; and

(b) The relevant Articles of the **Federal Constitution** relied upon, are to be construed in the context of the **Federal Constitution** itself.

112. Article **160(1) of the Federal Constitution** provides:

"*The Interpretation and General Clauses Ordinance 1948, as in force immediately before Merdeka Day shall, to the extent specified in the Eleventh Schedule,* ***apply for the interpretation of this Constitution as it applies for the interpretation of any written law within the meaning of that Ordinance…*****"** [emphasis added]

113. Therefore it is recognised in the **Federal Constitution** that the **Interpretation Acts** apply to the interpretation of the **Federal Constitution** and the interpretation of any written law.

The long title of the **Interpretation Acts** in turn reads:

"*An Act to provide for the commencement, application,* ***construction, interpretation and operation of written laws****; to provide for matters in relation to the* ***exercise of statutory powers*** *and duties; and for* ***matters connected therewith****.*" [emphasis added]

114. The **Interpretation and General Clauses Ordinance 1948** has since been repealed by the **Interpretation Acts**, but as manifested from the long title of the **Interpretation Acts**, and **Article 160(1) of the Federal Constitution**, Parliament's intention in enacting the **Interpretation Acts** was for the construction and interpretation of written law. As set out above, the common law is not written law.

115. It is trite that in construing the purpose of an Act and the intention of Parliament in passing it, the long title shall be construed and have effect as part of the Act. (See: **section 15 of the Interpretation Acts** and the decision of the Federal Court **in Mohamad Ezam Bin Mohd Noor v Ketua Polis Negara & Other Appeals [2002] 4 MLJ 449, at page 493**.)

116. As submitted by counsel for Tony Pua, the definition section of the **Interpretation Acts**, namely **section 3** is governed by **section 2**, which provides:

> ***(1) Subject to this section, Part I of this Act shall apply for the interpretation of and otherwise in relation to –***
>
> > ***(a) this Act and all Acts of Parliament enacted after 18 May 1967;***
> >
> > *(b) all laws, whether enacted before or after the commencement of this Act, revised under the Revision of Laws Act 1967 [Act 1];*
> >
> > *(c) all subsidiary legislation made under this Act and under Acts of Parliament enacted after the commencement of this Act;*

(d) all subsidiary legislation, whether made before or after the commencement of this Act, revised under the Revision of Laws Act 1968;

(e) all subsidiary legislation made after the 31 December 1968, under the laws revised under the Revision of Laws Act 1968.

(2) PART 1 shall not apply for the interpretation of or otherwise in relation to any written law not enumerated in subsection (1).

(3) PART 1 shall not apply where there is:

(a) express provision to the contrary; or

(b) something in the subject or context inconsistent with or repugnant to its application."

117. This further fortifies the conclusion that **section 3 of the Interpretation Acts** is not applicable to, and therefore cannot be applied to interpret 'public officer' or 'public services' for the purposes of the common law tort of misfeasance in public officer which is applicable in Malaysia under **section 3 of the CLA**.

118. It is clear that the purpose of the definition section in the **Interpretation Acts** (governed by **section 2** and circumscribed in its application to only Part 1) is primarily for the interpretation of the legislation specified, namely interpretation of written law.

119. It is therefore abundantly clear that in the natural and ordinary construction of the **Interpretation Acts**, Parliament intended to apply the definition of "public officer" only to written law. There is nothing apparent in the language of the **Interpretation Acts** to suggest that Parliament expressly intended to exclude the common law definition of the term. As such, as far as the **Interpretation Acts** are concerned, the common law presumption stands. The term "public officer" as it is understood under the common law retains its meaning in a suit for misfeasance in public office.

PUBLIC OFFICER

120. Next we turn our attention to the construction of "public officer" under the **Federal Constitution**. **Article 132(1)** ought to be read with clause (3) which excludes "members of the administration" from the definition of the "public service". According to **Article 160(2)**, "members of the administration" means, *inter alia*, 'a Federal Minister'.

121. It must be noted here that not only do its opening words begin with "for the purposes of this Constitution…", **Article 160(2)** itself begins with the words: "in this Constitution…". Logically, the plain and ordinary meaning of the phrase "for the purposes of this Constitution" as appearing in the opening words of **Article 132(1)** (and the similar wording in **Article 160(2))** suggests the definition of 'public services' and related terms was intended only to apply to the Federal Constitution.

122. It has long been settled that the language of statutes of Parliament cannot be extended beyond their proper and natural meaning in order to meet particular cases. (See: **Pinkerton v Easton (1873) LR 16 Eq. 490**, at page 492). Further, it also trite that when a statute begins with the words

"in this Act", the definitions or references are meant for that statute only. (See: Lord M'Laren in **Lord Advocate v Sprot's Trustees (1901) F 440**, at page 444-445.)

123. It therefore follows that the definition of 'public officer' in the **Federal Constitution** is for application in the **Federal Constitution**, and not for the purposes of comprehending the reach of the term 'public officer' in the tort of misfeasance in public office under the common law.

THE PURPOSIVE APPROACH TO CONSTRUCTION OF THESE ARTICLES IN THE CONSTITUTION

124. A purposive interpretation of this issue relating to the proper definition to be accorded to 'public officer' under the common law would yield much the same result. It would appear that **Article 132 of the Federal Constitution** reflects the administrative structure envisaged for the governance and operation of the Federation.

125. 'Members of the administration', for example Ministers, were kept separate as apparent from **Article 66 (above)** for the purposes of efficient, stable and independent administration of the Federation. Political impartiality was an important consideration. But this division of the functioning of the government by no means served as an indicator of who comprised 'a person holding public office' or 'a public officer' for the purposes of the tort of misfeasance under the common law. This is apparent from the historical background to the divisions amongst the administration as is apparent in the **Federal Constitution** today.

126. The Report of the Federation of Malaya Constitutional Conference (London) 1956 is particularly relevant to comprehend the purpose of **Part X of the Federal Constitution on the Public Services (at paragraphs 20 and 40-41):**

> *"Personnel matters, however, so far as individual members of the force are concerned,* ***are administrative in character****. Later in this Report* ***we make recommendations in respect of the administration of personnel matters in the public*** *service* ***generally****; these include the establishment of a Public Service Commission.*
>
> *The first essential for ensuring an efficient administration is that* ***the political impartiality of the public service should be recognised and safeguarded…*** *Experience has shown that this is best secured by* ***recognising the service as a corporate body owing its allegiance to the Head of State and so retaining its continuous existence irrespective of changes in the political complexion of the government of the day.***
>
> *The public service is necessarily and rightly subject to ministerial discretion and control in the determination and execution of government policy, but in order to do their job effectively public servants must feel free to tender advice to Ministers, without fear or favour, according to their conscience and to their view of the merits of the case.*

A public service is rightly regarded as a profession holding out prospects of a career covering the working life of its members."

[Emphasis added]

127. The above recommendations were supported and adopted by the Reid Commission in the drafting of **Part X of the Federal Constitution**. The drafters of the Federal Constitution had this to say in the **Reid Commission Report 1957, at paragraphs 154-155**:

"*We have fully accepted these recommendations, and have endeavoured to apply them in making our own proposals.* ***Accordingly, we have made provision in Part X of the draft Constitution for the permanent existence of these three Commissions****.*

If the Commissions are to perform their functions in the manner contemplated by the Report, we think that it is essential that they should be completely free from Government influence and direction of any kind... In determining the <u>functions</u> of the Public Services Commission, we feel, as was stated in the London Report, that the broad principle should be that the Legislature and Government are necessarily responsible for fixing establishments and terms of employment, while the Public Services Commission is charged with the internal administration of the service as a professional body and with the responsibility for public service matters including appointments, promotions, and the application, when

necessary, of disciplinary provisions in respect of members of the public service."

[Emphasis added]

128. The foregoing portions of the reports indicate that the framers of our Federal Constitution necessarily intended to create a public service which was free from executive influence i.e. one that would work with, and not for, the Government (be it the executive, legislative or judicial branches). That is why ministers (or even judges for that matter), are taken as being excluded from the public service.

129. The foregoing fortifies the argument that the opening words "for the purposes of this Constitution" mean that the entries contained in **Article 132 of the Federal Constitution** were enacted for an efficient administrative structural purpose. There is nothing to suggest that the definitions in the **Federal Constitution** can be taken out of the express context in which those definitions were made, so as to abrogate or narrow the definition of the common law meaning of the term 'public officer'.

130. Ultimately, while Ministers are not 'public officers' under the **Federal Constitution**, they are no less holders of 'public office' for the purposes and in the context of misfeasance in public office. They derive their salary from the public purse and carry out their functions with a public purpose.

131. It is for the above reason that Lord Steyn in **Three Rivers**:

"*It is the office in a relatively wide sense on which everything depends.*"

132. And decades before the above pronouncement, the English Courts in **R v Whitaker [1914] 3 KB 1283, at page 1296**, had held:

> "*The examination of codes or drafts of codes and even references to the older text-books afford no sound ground of authority on which we can base the decision of this appeal. Attention must be called to the terms of the indictment in order to show the reasons for thinking that it discloses a charge of conspiracy at common law. A public officer is an officer who discharges any duty in the discharge of which the public are interested, more clearly so if he is paid out of a fund provided by the public. If taxes go to supply his payment and the public have an interest in the duties he discharges, he is a public officer.*"
>
> [emphasis added]

133. The case above concerned an indictment for common law conspiracy. It was not an action alleging misfeasance. But the common law definition of 'public office' set out by it, is indicative of a general intention to accord a broad construction to the term 'public officer'. It certainly accords with the broad definition afforded by Lord Steyn in **Three Rivers (above)**. It is also apposite to note that the **Whitaker case** was decided well before the **CLA's** prescribed cut-off dates.

134. In the result, the only logical conclusion to be drawn is that there was no express legislative intent in either the **Federal Constitution** or the **Interpretation Acts** to abrogate the common law definition of the term 'public officer'. This fortifies our earlier conclusion that the first exception

to the application of the common law *i.e.* abrogation by written law does not apply.

The Decision of this Court in Keruntum (above)

135. The Court of Appeal made mention of **Keruntum (above)** in passing but, with respect, failed to note the significance of the decision (by which it was bound). The second respondent in **Keruntum (above)** was the Chief Minister of Sarawak. In accordance with the definition of 'members of the administration' in **Article 160** any person holding office as Minister, Deputy Minister, parliamentary secretary or political secretary in the state or holding office as members of the Executive Council are excluded from the public service in **Article 132**.

136. The Federal Court accepted that the principles of law set out in **Three Rivers (above)** had been accepted and applied by the Malaysian Courts. That case involved, the Chief Minister of Sarawak. By analogy with the legal rationale of the Court of Appeal in the instant appeals, he would not be a 'public officer' for the purposes of the tort of misfeasance in public office under the common law.

137. However the Federal Court dealt with the case on the basis that the Chief Minister was a public officer.

Modification of the Common Law to Suit Local Circumstances – No necessity

138. The other exception to the application of common law in Malaysia is the one requiring conformity with 'local circumstances'. The tort of

misfeasance in public office which takes its roots from the 17th century in England (at the latest), would fall within the cut-off date stipulated in **section 3 of the CLA**. The question is whether it requires modification to suit 'local circumstances'. Our courts have already accepted this tort as it is recognised in **Three Rivers (above)** into Malaysian common law, and that too without qualification:

(i) The judgment of the Federal Court in **Keruntum (above)**;

(ii) The judgment of the Court of Appeal in **LBCN (above)**; and

(iii) The judgment of the High Court in **Rosli bin Dahlan v Tan Sri Abdul Gani bin Patail & Ors [2014] 11 MLJ 481**.

139. This court in **Keruntum (above)** found no reason to modify the tort in any manner so as to 'suit local circumstances'. We see no reason to depart from the earlier decision.

140. One of the most fundamental reasons why this tort lends itself so suitably to so many jurisdictions is the underlying basis of the tort. The rationale has been set out succinctly by learned counsel for the appellant and we adopt the same below:

(a) In a legal system based on the rule of law, executive or administrative power may be exercised 'only for the public good' and not for ulterior and improper purposes (see **Three Rivers (above),** page 7);

(b) The underlying purpose of the tort is to protect each citizen's reasonable expectation that a public officer will not

intentionally injure a member of the public through deliberate and unlawful conduct in the exercise of public functions. (see **Odhavji Estate v Woodhouse [2003] 3 S.C.R. 263 at paragraph 30)**;

(c) It is regarded as the only tort having its roots and application within public law alone (see **Pyrenees Shire Council v Day (1998) 151 ALR 147 at paragraph 124)**; and

(d) There is an obvious public interest in bringing public servants guilty of outrageous conduct to book. Those who act in such a way should not be free to do so with impunity (see **Watkins v Secretary of State for the Home Department and others [2006] 2 AC 395** at paragraph 8). However in the same case Lord Bingham balanced the statement by stating: *"On the other hand, it is correctly said that the primary role of the law of tort is to provide monetary compensation for those who have suffered material damage rather than to vindicate the rights of those who have not….."*

141. A perusal of the not inconsiderable volume of authority on the subject will disclose that the tort of misfeasance in public office is grounded on the rule of law. Amongst the fundamental aspects of the rule of law is that: The law is supreme over the acts of both government and private persons. That law is one and it is applicable to all. To that end, no man is above the law and all are equal before the law.

142. It is beyond argument that the rule of law is a fundamental feature of the constitutional framework of this country (see **Indira Gandhi a/p**

Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals [2018] 1 MLJ 545). Further afield in Canada the 'internal architecture' of the Canadian Constitution was explained by the Supreme Court of Canada with regard to the rule of law in **Reference re Secession of Quebec, [1998] 2 S.C.R. 217**. The statements of the Court, with respect, resonate strongly in Malaysia, given the basis and structure of our Constitution and the fact that we are a democracy:

> *"The principles of constitutionalism and the rule of law lie at the root of our system of government. The rule of law as observed in Roncarelli v Duplessis [1959] SCR 121 at 132, is "a fundamental postulate of our constitutional structure"……. The 'rule of law' is a highly textured expression, importing many things which are beyond the need of these reasons to explore but* ***conveying, for example, a sense of orderliness, of subjection to known legal rules and of executive accountability to legal authority". At its most basic level the rule of law vouchsafes to the citizens and residents of the country a stable, predictable and ordered society in which to conduct their affairs.*** *It provides a shield for individuals from arbitrary state action."*
>
> [emphasis added]

143. Further on in the judgment reference was made to the elements that comprise the rule of law, certainly as viewed in that jurisdiction:

> *" In the Manitoba Language Rights Reference, supra, at pp 747-752, this Court outlined the elements of the rule of law.*

> *We emphasized**, first, that the rule of law provides that the law is supreme over the acts of both government and private persons. There is, in short, one law for all.*** *Second, we explained, at p.749, that "the rule of law requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order".* ***……A third aspect of the rule of law is…….that "the exercise of all public power must find its ultimate source in a legal rule." Put another way, the relationship between the state and the individual must be regulated by law.*** *Taken together, these three considerations make up a principle of profound constitutional and political significance."*
>
> [emphasis ours]

144. These excerpts are of importance in what, we have said at the outset, is an extraordinary case which has brought world-wide attention to 1MDB and Malaysia. It is a case where a Prime Minister of a country is alleged to have acted unlawfully, illegally, recklessly and/or knowingly in relation to substantive quantities of funds, to the ultimate detriment of, *inter alia* Tony Pua and the general public of Malaysia. The allegations, which are presumed to be true for the purposes of a striking out application are outrageous. In these circumstances can it reasonably be said that the (then) Prime Minister, who was also the Minister of Finance is immune from action under this civil tort for misfeasance, simply because he does not fall within the ambit of a 'public officer' under specific statutory provisions in the **Interpretation Acts** and the **Federal Constitution** which refer to tangentially different matters, as has been explained in extenso above? Does this accord with the rule of law?

145. Put another way, the decisions of the Courts below mean that no member of the administration, namely the members of the Executive, who play a direct role in the affairs of the State vis a vis ordinary citizens, can be liable in tort notwithstanding outrageous conduct resulting for example in the loss of considerable quantities of public funds.

146. The doctrines of the rule of law and the separation of powers underpin and comprise the 'internal architecture' of our Constitution (as so aptly put by the Supreme Court of Canada). So, to conclude that the definition of public officer in Malaysia excludes members of the administration such as a Prime Minister, so that members of the administration like the defendant/respondent in the instant appeals, may allegedly act with impunity, so as to knowingly and/or recklessly dissipate public funds and remain immune to civil action under this tort, is anathema to the doctrine of the rule of law and the fundamental basis of the **Federal Constitution**. Such a construction of the term 'public officer' which erodes the rule of law, is repugnant and cannot prevail.

147. The tort of misfeasance in public office is designed specifically to address just such an issue as the pleadings disclose in the present case. In **Roncarelli v Duplessis [1959] SCR 121** the Canadian Supreme Court found the Prime Minister and the Attorney-General of Quebec liable in tort for revoking a liquour licence in furtherance of an improper and invalid exercise of power.

148. Similarly in **Marin and Another v Attorney-General [2011] 5 LRC 209** (which we discussed briefly at the outset) the Belize Caribbean Court of Justice approved the Attorney-General suing former Ministers for misfeasance in public office relating to acts of corruption. Corruption is a

scourge and as is the case in many other jurisdictions, prevalent here too. As stated in Marin by Bernard J:

> *"[56] It is beyond dispute that corruption is increasing exponentially in our world economies, thereby imposing on governments the need to take firm action against public officers who abuse their office for personal enrichment….."*

149. The question that arises is this: who is to take action against the persons holding high public office and who head the government, the executive organ of the state, and are paid out of public funds, if the definitions accorded to 'public officer' and 'a person holding public office' by the courts below remains the prevailing law?

150. Put simply, the definitions accorded by the Courts below ought not to, and do not prevail, as they are in direct conflict and contradict the most basic tenets of the rule of law. A person holding public office or a public officer in the context of the tort of misfeasance should be construed broadly. It must apply to "those vested with governmental authority and the exercise of executive power" (per Lord Hobhouse in **Three Rivers**).

151. In answer to the question whether there is a need to alter the common law cause of action, more particularly the definition of public officer to meet local circumstances as specified in **section 3 of the CLA** we conclude that there is no necessity to vary or alter the basic elements of the definition under the common law.

152. The essential tenets of the rule of law remain of fundamental importance in Malaysia. As the tort of misfeasance in public office

encapsulates the essence of the rule of law, it is applicable in its original form without modification under **section 3 of the CLA** (see also **Alma Nudo Atenza & Other Appeals v Public Prosecutor [2019] 1 LNS 437** on the relationship between the rule of law and the **Federal Constitution**, as well as the duty of the courts to enforce the rule of law by the former Chief Justice of Malaysia Richard Malanjum).

153. If anything, the importation and subsistence of the original tort should be strengthened and applied more stringently to address the subsisting problem of corruption in public office. However, it must be borne in mind that it remains a tort which requires several elements to be made out including material damage to the plaintiff bringing the action.

154. Based on the factual matrix and the law that we have set out in extenso above, we are of the view that it is clear that Najib Razak, the then Prime Minister of the country falls within the ambit of a 'person holding public office' or a 'public officer' as envisaged under the common law tort of misfeasance in public office. We are, with respect, unconvinced by the reasonings of the Court of Appeal in the **Mahathir case**. The legal rationale and hence the result reached was, again with greatest of respect, erroneous. We are unable to comprehend why the development of the Malaysian common law should be stultified to exclude such bearers of public office from the full reach of the law.

155. Therefore, we answer Leave Question 1 in the negative.

Appeal No. 44 – Leave Question 2: Whether the Prime Minister or any other Minister is a public officer within section 5 of the GPA for the purposes of the tort of misfeasance in public office?

156. The **GPA** does not define the word "public officer". It does however, in **section 2**, define the words "officer" as follows:

> *"officer" in relation to a Government, includes a person in the permanent or temporary employment of such Government and accordingly (but without prejudice to the generality of the foregoing)* ***includes a Minister of such Government****".*
>
> [Emphasis added]

157. Section 5 of the GPA reads:

> **"*Liability of the Government in tort***
>
> *5. Subject to this Act, the Government shall be liable for any wrongful act done or* ***any neglect or default*** *committed by any* ***public officer*** *in the same manner and to the same extent as that in which a principal, being a private person, is liable for any wrongful act done, or any neglect or default committed by his* ***agent****, and for the purposes of this section and without prejudice to the generality thereof,* ***any public officer acting or purporting in good faith to be acting in pursuance of a duty imposed by law shall be deemed to be the agent of and to be acting under the instructions of the Government.*****"**
>
> [Emphasis added]

158. **Section 5** does not use the generic word ‘officer’. Instead, it uses the word ‘public officer’. **Section 6**, which stipulates exceptions to the vicarious liability of the Government, also uses the word ‘public officer’.

159. The only issue for consideration here is whether, in construing the definition of ‘public officer’ in **section 5 of the GPA**, the definitions expressly set out in the **GPA** itself should apply, or whether the definition under the **Interpretation Acts** should be resorted to. The term ‘public officer’ is defined more broadly under the **GPA** as compared to the definition of the similar term under **section 3 of the Interpretation Acts**.

160. Having considered the submissions of parties we are inclined to concur with counsel for Tony Pua, the appellant that the term ‘public officer’ should be defined by reference to the Act in which it appears, namely the **GPA**.

161. The reasons are as follows:

(a) To utilise the definition of “public officer” in **section 3 of the Interpretation Acts** would render the definition of ‘officer’ in **section 2** otiose and meaningless. It is a trite principle of law that Parliament does not legislate in vain (see **Positive Vision Labuan Ltd v Ketua Pengarah Hasil Dalam Negeri and other appeals [2017] 2 MJ 421**, paragraph 44); and

(b) **Section 2(3) of the Interpretation Acts** clarifies that the interpretations in **Part I of the Interpretation Acts** (of which its definition of ‘public officer’ are a part), shall not apply if there is:

(i) an express provision to the contrary; or

(ii) something in the subject or context inconsistent with or repugnant to its application.

162. Applying **section 3 of the Interpretation Acts** would be contrary to the definition expressly set out in **section 2 of the GPA**. It would also be inconsistent with and repugnant to the purpose of the **GPA**, which provides for the existence of vicarious liability in the circumstances set out in **section 5**.

PURPOSIVE INTERPRETATION OF THE GPA

163. The **GPA** was first known as the **Government Proceedings Ordinance 1956**. It was enacted by the then Federal Legislative Council, a body established under the **Federation of Malaya Agreement 1948** under the purview of the British. It was drafted in similar vein to the **UK Crown Proceedings Act 1947 ('UK CPA').**

164. Section 2(1) of the UK CPA bears essential similarities to **section 5 of the GPA**. It provides that the "*Crown is subject to all those liabilities in tort to which, if it were a private person of full age and capacity it would be subject*".

165. And in relation to torts committed by the Crown's servants or agents, it allows for the Crown to be sued *inter alia* for the acts or omissions of the Crown's servant or agent only if such act or omission would have given rise to a cause of action in tort against that servant or agent or his estate. Although phrased in the negative, the concept of

vicarious liability is clear in that liability affixes to the Crown in situations where the servant or agent could personally be sued in tort.

166. In essence **section 2** allowed the Crown to be sued directly for the tortious acts of its servants or agents.

167. In practice the servants or agents extended to a list of government departments which were 'authorised' departments for the purposes of the Act. This included the Cabinet office and all the Ministries in the UK Government. This meant that the Crown remained vicariously liable for the acts and omissions of its Ministers.

168. The rationale of the **GPA**, like the **UK CPA** is also to statutorily establish vicarious liability vis a vis the Government in respect of the acts or omissions of its officers, subject to the express provisos or other statutory provisions excluding such liability in specific circumstances.

169. Once it is accepted that the purpose of the **GPA** is to establish vicarious liability on the part of the Government (which is borne out by the express provisions of **section 5**) it follows that importing the definition of 'public officer' in **section 3 of the Interpretation Acts** would render the underlying purpose of the **GPA** meaningless. In other words, despite express provisions creating such vicarious liability, this may be circumvented by importing a definition from another statute, namely the **Interpretation Acts**. Any construction which allows for the express circumvention of the very purpose for which the statutory provision was established is perverse and cannot be sustained. Therefore **section 3 of the Interpretation Acts** cannot be imported to construe **section 5 of the GPA**.

170. Following on from this, the importation of **section 3 of the Interpretation Acts** would have the effect of giving Ministers immunity from suit for their acts and omissions which is again contrary to the purpose of **section 5**.

171. Again such an importation would also render the Government itself immune from suit and that would defeat the purpose of the Act too.

172. For these reasons it is evident to us that the term 'public officer' in **section 5 of the GPA** includes Ministers based on the definition of 'officer' in **section 2**.

CASE-LAW

173. For completeness we address an issue raised on behalf of the Government. Learned senior federal counsel for the Government argued that this Court has held in **Government of Finance, Government of Sabah v Petrojasa Sdn Bhd [2008] 5 CLJ 321** that a Minister is not a "public officer" in the context of **section 5 of the GPA**.

174. There, the Federal Court imported the definition of "public officer" in the **Interpretation Acts** into the **Specific Relief Act ('SRA') 1950**. Learned senior federal counsel argues that we ought to do the same with **section 5 of the GPA**. With respect, we find ourselves unable to agree with that argument. Reading that judgment in context, we are of the respectful view that the authority goes against the very point made by learned senior federal counsel.

175. The facts of that case were shortly these. The Government of Sabah failed to honour a judgment-debt. The judgment-creditor essentially sought an order of *mandamus* to compel the State Finance Minister to honour that debt. The question that arose for adjudication there was whether such an order could be made against persons 'holding a public office' in light of **section 44 of the SRA 1950**.

176. At paragraph 20 of the judgment, Abdul Hamid Mohamad (FCJ) in clear terms noted that "public office" is not defined in the **SRA**, and it was for that reason this Court imported the Interpretation Acts' definition. The **GPA** on the other hand contains its own specific definition of the term, which as we have stated above, must be utilised in preference to the definition accorded to the term in the **Interpretation Acts**.

177. For the foregoing reasons, we answer Leave Question 2 in the **affirmative**.

The Additional Questions – Locus Standi and the Sufficiency of the Plea of Loss and Damage suffered by Tony Pua

178. We now turn to our additional questions regarding Tony Pua's locus standi and the sufficiency of the pleas relating to the loss and damage alleged to be suffered by Tony Pua. We are of the view that these issues are interconnected and may therefore be taken together.

179. As a preliminary point, it is settled law that it remains open to this Court, when determining an appeal, to frame additional questions for the purpose of doing complete justice according to the substantial merits of a particular case (see **Palm Oil Research and Development Board**

Malaysia & Anor v Premium Vegetable Oils Sdn Bhd & another appeal [2005] 3 MLJ 113, at paragraphs 30-31).

180. In any event, as stated at the outset, it comprises a necessary part of a court's duties, when determining whether a cause of action subsists for the purposes of **Order 18 Rule 19(1)(a)**, that it undertakes a study of the pleading in issue to ensure that the essential or core elements giving rise to the existence of a cause of action are made out. While we have determined that Najib Razak is a 'public officer' for the purposes of the tort of misfeasance in public office, it remains to be considered whether the other elements, particularly damages, have been made out.

181. In order to undertake this exercise it is important to appreciate the law on this subject which identifies the essential core ingredients of the tort.

The law relating to the tort of misfeasance in public office

182. The tort relates to deliberate dishonest conduct and abuse of power by a public officer. As stated in **Three Rivers (above)** (per Lord Steyn) the rationale underlying the tort is that "*in a legal system based on the rule of law executive or administrative power "may be exercised only for the public good" and not for ulterior and improper purposes….."*

183. The quintessence of the rule of law is that no man is above the law and that all men are equal before the law. This tort therefore serves to protect citizens against abuse of power by public officials. To that extent it is distinctive in that it combines both public and private law elements, unlike other torts which are wholly private in nature.

184. The key ingredients of the tort are:

(i) an abuse of public power or authority;

(ii) by a public officer;

(iii) who either (a) knew that he was abusing his public power or authority, or (b) was recklessly indifferent as to the limits of their public power or authority; and

(iv) who acted or omitted to act either with (a) the intention of harming the plaintiff (targeted malice); or with the knowledge of the probability of harming the plaintiff, or with reckless indifference to the probability of harming the plaintiff or a class of persons of which the plaintiff was one.

185. It is therefore an intentional tort. The element which receives the most emphasis is that of bad faith, ie the abuse of power and the targeted malice or the complete indifference to the effect of the abuse of power on the plaintiff or a class of such persons. It is also the element which makes this tort hard to plead and to prove as it is only in rare circumstances that such facts subsist as would allow the plea to remain on the record. In many instances the plea is struck out as it is simply insufficient. This is because it is not every act or omission on the part of a public officer which lends itself to the bringing of an action premised on this tort. It requires outrageous conduct with the requisite intention to injure and this serves as a safeguard to preclude a multitude of actions from being initiated.

186. We have, at the outset, when examining the statement of claim in the instant appeals, analysed the same and concluded that the ambit of the powers of the public officer and his breach of the same with either targeted malice or reckless indifference to the effect of such abuse has been extensively set out in relation to 1MDB. We refer to paragraphs 21 – 23 inclusive, where the elements as set out above have been, to our minds, adequately met. The pleas in those paragraphs are sufficient to meet the core ingredients of a claim in the tort of misfeasance in public office, as set out in (i) to (iv) immediately above.

187. The ingredient that requires consideration here is whether Tony Pua has in fact suffered 'harm' or special or material damage personally, that suffices as an ingredient to meet the requirements of this cause of action. Again at paragraph 26 Tony Pua has particularised the details of such loss. However the contention here by the respondents is that this in itself is insufficient, and that Tony Pua needs to establish "an antecedent legal right or interest" to sue Najib Razak and the Government (vicariously) in his capacity as a taxpayer or personally.

188. A similar argument was brought up in **Three Rivers**. In essence the question is who can sue in respect of an abuse of power by a public officer? It was argued that in order to sustain a claim an "antecedent legal right or interest" and an element of "proximity" had to be established. The High Court in **Three Rivers (above)** dismissed this contention holding that if an officer deliberately does an act which he knows is unlawful and will cause economic loss to the plaintiff there is no necessity for such a plaintiff to identify a specific legal right that has been infringed aside from the right not to be so damaged or injured by the deliberate abuse of power. However the UK Court of Appeal held that the notion of proximity (giving

rise to a legal right) ought to be a part of the tort of misfeasance as it is in negligence. The House of Lords disagreed. It was held as follows:

> *"…It would be unwise to make general statements on a subject which may involve many diverse situations. What can be said is that, of course, any plaintiff must have a sufficient interest to found a legal standing to sue. Subject to this qualification, principle does not require the introduction of proximity as a controlling mechanism in this corner of the law. The state of mind required to establish the tort, as already explained, as well as the special rule of remoteness……..keeps the tort within reasonable bounds……."*

189. The reasoning of the High Court was upheld. In the same case Lord Hobhouse reasoned in much the same way. He explained that the tort is applicable where a holder of public office does not honestly believe that what he is doing is lawful, hence the statements that the central tenet of the tort is bad faith or abuse of power. It covers the situation where the plaintiff has suffered some financial or economic loss, which in turn raises the question of what the relationship is between the plaintiff's loss and the defendant's bad faith or abuse of power. There is therefore no necessity to establish an antecedent legal right or standing. Neither is there a need to establish 'proximity' as is the case in other torts such as negligence.

190. The well known author on this area of the law, Mark Aronson **'Misfeasance in Public Office' accessible at <http://www.lawcom.gov.uk/app/uploads/2016/01/apb_tort.pdf>, at page 13** puts it this way: *"The tort can be (and usually is) committed*

without any infraction upon a claimant's antecedent right or breach of duty on the defendant's part. It therefore cannot conform to the classic corrective justice model of correlative rights and duties, and yet it is occasionally suggested that claimants need to demonstrate standing to sue."

191. It is evident from **Three Rivers (above)** and a series of other cases such as **Akenzua and another (administrators of the estate of Laws (deceased)) v Secretary of State for the Home Department and another [2002] EWCA Civ 1470; Odhavji [2003] 3 SCR 263 at 285** that the need to establish legal standing or locus standi is not a necessary element of the tort. What is equally clear however is that the plaintiff must have suffered material damage personally in order for the cause of action to be sustained. Whether that may be determined summarily is a further question that requires consideration.

192. Applying the legal reasoning from the stated cases, the question in the instant appeals would be whether Najib Razak (or the Government vicariously) is capable of being liable for the tort of misfeasance in public office to Tony Pua for the losses he has claimed to have suffered. These are financial losses or economic losses (particularised in paragraph 26 of the statement of claim) These losses include the following particularised matters:

(i) That his tax monies had been utilised for the incorporation of 1MDB, which were dissipated and/or misappropriated;

(ii) His tax monies will be used in the future to clear the guarantees given by the Government of Malaysia;

(iii) A travel ban had been imposed on him as a result of his public statements in relation to 1MDB matters; and

(iv) The loss in value of his wealth as a result of the significant devaluation of the Malaysian Ringgit caused by Najib Razak's conduct.

193. Firstly can it be said that the particularised losses are fictitious, spurious or incapable of computation? In other words, that they are not real losses? The answer to that must be no. This is because he is a taxpayer and the funds claimed to be dishonestly abused or dissipated are public funds. In relation to those public funds, Tony Pua enjoys a rateable proportion that is calculable, at least in theory. Whether or not Tony Pua is able to establish such losses in trial is an entirely different matter and one which is not capable of being determined summarily.

194. The loss which he claims to have suffered as a consequence of the travel ban is again prima facie provable or calculable provided there is evidence to substantiate it. Tony Pua might have labelled this loss as a reputational loss leading the learned Judicial Commissioner to conclude that it was best recovered by way of an action in defamation. With great respect, the Judicial Commissioner was not entirely correct. This is because the loss claimed by him is not as a consequece of defamatory statements made of him. Rather it arises as a consequence of the travel ban issued when he queried the losses alleged to be suffered as a consequence of Najib Razak's alleged acts and omissions in relation to the 1MDB fund. Prima facie such a claim qualifies as a claim for pecuniary or economic loss which may well have been sustained as claimed. That again must be matter for the plaintiff to establish at trial. It is not a suitable

question to be determined summarily. What is clear is that it is not an ‘obviously unsustainable’ head of damage. The question of remoteness similarly is one that ought not to be determined summarily as that is an issue that should be deliberated in the context of evidence adduced at trial.

195. On the issue of causation can it be said that Tony Pua’s claim is obviously unsustainable? Again the answer must be no. When the former Prime Minister who is entrusted to ensure that public funds are utilised for the public good and not for any improper purpose, is alleged to have dishonestly and/or recklessly utilised or benefited personally from such public funds, a citizen, or member of parliament is entitled to make claim for the loss he has suffered.

196. What comes to the fore is the concern of the opening of the floodgates. However as has been stressed in numerous other jurisdictions, it is the dishonest or outrageous conduct of the holder of public office causing detriment or injury to the plaintiff that is the paramount consideration. If indeed there has been, or there arises a volume of cases which disclose the abuse of power or misappropriation of public or governmental funds, then it can be no answer that the volume of claims justifies their being shut out. The abuse of public power by holders of public office is of such gravity that it warrants the attention of the courts, where there is indeed basis for such claims. The essential ingredients must be established and material damage suffered by the plaintiff is one of those ingredients.

197. The instant case must be one of the most obvious examples of just such a situation. Rarely is it that the foremost holder of public office in a country is alleged to have abused his position in the manner as is set out in the statement of claim here in relation to the 1MDB fund. Certainly the case-law does not disclose such an extreme situation. The closest example is that in **Marin (above)**. It is perhaps the novelty of the situation that may have well caused consternation and a reluctance to recognise the applicability of the tort, (prima facie and subject to proof) to the present claim. But as stated by Lord Bingham in **Watkins v Home Office (above)** and reiterated by Bernard J in **Marin (above**): *'novelty is not in itself a fatal objection'.* Similarly in the instant case, as in any other case that might ensue, it bears repetition that it is necessary to ensure that the ingredients of the tort are made out, but if they are, there is no reason to deny a plaintiff the remedy in damages that he seeks.

198. As to the concern that allowing this matter to proceed to trial will give rise to a large or unmanageable number of unmeritorious claims, again we can do no better than to echo the words of Bernard J in **Marin (above)**:

> *"….it will rest on the shoulders of the courts to provide the necessary brakes on any attempt at misuse of the tort for ulterior motives."*

199. In this case we reiterate that the primary issue for determination was the meaning of 'public officer' for the tort of misfeasance. The remaining elements as expanded in **Three Rivers (above)** must still be proven by the claiments at trial.

200. Ultimately, the losses claimed by Tony Pua are financial or pecuniary losses. Alternatively they can be termed economic losses. Tony Pua claims that he suffered such losses as a consequence of the abuse of power by Najib Razak, in relation to the 1MDB losses. The element of causation is a matter that ought not to be determined summarily. There is a sufficient plea in the statement of claim to justify the prima facie view that it is not 'obviously unsustainable'.

201. For these reasons, we are of the considered view that the claim ought not to be struck out but should proceed to trial.

CONCLUSION

202. In conclusion, we answer the leave questions as follows:

Leave Question 1 (in Appeal 111)

> *Whether a court, in determining if the Prime Minister or any other Minister is a public officer for the purposes of the tort of misfeasance in public office, is limited by the definition of "public officer" in section 3 of the Interpretation Acts 1948 and 1967 read together with Articles 132 and 160 of the Federal Constitution?*

Answer: Our answer is in the negative.

Leave Question 2 (in Appeal 44)

Whether the Prime Minister or any other Minister is a public officer within section 5 of the Government Proceedings Act 1956 for the purposes of the tort of misfeasance in public office?

Answer: Our answer is in the affirmative.

203. For the reasons stated, we allow these appeals with costs.

204. This judgment is prepared pursuant to section 78(1) of the Courts of Judicature Act 1964, as Justice Alizatul Khair binti Osman Khairuddin has since retired.

Dated: 19.11.2019.

Signed by

NALLINI PATHMANATHAN
Judge
Federal Court of Malaysia

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