Press Summary

Tony Pua Kiam Wee V Government Of Malaysia

(Civil Appeal NO: 01(I)-44-11/2018)

In January 2017, 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. The thrust of the claim was that Najib Razak had committed misfeasance in public office in relation to the sovereign fund, 1MDB. It was alleged that the then Prime Minister had abused his public office by personally benefitting from the receipt of monies from the 1MDB fund, comprising public funds.

The claim against the Government was premised on the basis of vicarious liability, meaning the Government was liable for the acts and/or omissions of the then Prime Minister.

In response to this claim, Najib Razak and the Government of Malaysia applied to strike out the claim altogether on the grounds 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.

Relying on an earlier decision by the Court of Appeal in **Tun Dr Mahathir & Ors v Datuk Seri Mohd Najib bin Tun Hj Abdul Razak [2018] 3 MLJ 466 ('Mahathir's suit')**, both the High Court and the Court of Appeal held on the facts of the instant appeal that Najib

Razak was not a 'public officer' for the purposes of the tort of misfeasance in public office.

As such no action could lie against him. It then followed that no cause of action could lie against the Government of Malaysia either. The net result was that Tony Pua could not proceed with his action against the former Prime Minister and the Government of Malaysia.

Questions of Law before the Federal Court

Leave was granted to appeal to this Court on two questions of law. These questions addressed, amongst others, the following issues:

(a) Is the tort of misfeasance in public office available against the then Prime Minister of Malaysia, as an individual holding public office or as a public officer?

(b) Does Tony Pua's claim as pleaded contain all the relevant elements of the tort so as to comprise a valid cause of action? (The consequence is that if it does not then it should be struck out);

(c) Can the Government be vicariously liable for the acts of Najib Razak if the tort is proven against him under the Government Proceedings Act 1956?

We answered these questions as follows:

(a) Yes, the tort of misfeasance in public office is available against the then Prime Minister of Malaysia as an individual holding public office or as a public officer;

(b) At this juncture, i.e. before trial, it would appear that Tony Pua's claim, prima facie, contains the necessary elements to constitute a valid claim. Whether or not he will succeed at trial is a question of evidence, particularly in relation to the alleged damage he suffered;

(c) Yes, the provisions of the Government Proceedings Act 1956 envisage that a claim may be brought against a public officer, as is provided for in section 5. This would include a claim against Prime Minister, who is a public officer as envisaged under the Act. Whether or not Tony Pua will succeed however, depends on the evidence, as the proviso to the section envisages that the Government is not responsible for the acts of such an public officer under certain specific conditions.

In summary what this means is that Tony Pua can proceed with his claim against Najib Razak and the Government of Malaysia by way of trial in a civil court.

Reasons for our Decision

The reasoning of the courts below and in the Mahathir case is that a Prime Minister of Malaysia does not fall within the definition of a 'person holding public office' or a 'public officer' for the purposes of misfeasance in public office, because the term, which holds a wide definition under the common law, has been abrogated, restricted and modified by the written law of Malaysia, after 1956.[1] As such they reasoned that the common law definition could not override the written law, which provides otherwise.

In reasoning that the written law of Malaysia had restricted the common law definition of public officer, the Court of Appeal relied on written law in the form of the Interpretation Acts and the Federal Constitution. We found that the Court of Appeal erred in so concluding because:

(a) A statute abrogates a common law principle where it expressly states an intention to so do. So in the context of the present issue the question to be asked is whether there is any specific written law in force in Malaysia which alters and substitutes the common law tort of misfeasance in public office? The answer is no. **Section 3 of the Interpretation Acts** and **Article 132 of the Federal Constitution** do not alter misfeasance in public office, as concluded by the court below. More so, when

[1] 1956 is the cut-off date for the application of the common law of England in Peninsular Malaysia under the Civil Law Act 1956

this principle is applied to only a portion of that tort, namely the definition of a 'public officer'.

(b) **Section 3 of the Interpretation Acts** only applies to written law. This is clear from **Article 160(1) of the Federal Constitution** which provides that the Interpretation Acts are applicable to the interpretation of the Constitution and the interpretation of written law. The section is not applicable to the interpretation of the common law.

Articles 132(1) and (3) were relied on by the courts below to conclude that Ministers as members of the administration were excluded from the definition of public service and therefore could not be public officers. This reasoning and interpretation of these Articles is untenable as those articles are to be construed purely in the context of, and for the purposes of the Federal Constitution. To that end the definition of 'public service' stipulated there is intended to apply to the Federal Constitution and not to the definition of a public officer under the common law.

A purposive reading of **Article 132 of the Federal Constitution** discloses that it reflects the administrative structure envisaged for the governance and operation of

the Federation, and not to determine who can be held liable for misfeasance while holding public office.[2]

This means that Ministers are no less holders of public office 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.

Therefore 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'.

(c) This Court has accepted the tort of misfeasance in public office in relation to, inter alia, a Chief Minister. In **Keruntum Sdn Bhd v The Director of Forests & Ors [2017] 3 MLJ 281**, one of the respondents was the Chief Minister of Sarawak. As Chief Minister of Sarawak he would, according to the rationale of the court below, be a member of the administration and not a member of the public service, and therefore not a public officer. This Court however applied the principles of misfeasance in public office, meaning that the Chief Minister of Sarawak **was** treated as a public officer or a person holding public office. This fortifies our conclusion that the then Prime

[2] See The Report of the Federation of Malaya Constitutional Conference (London) 1956 which is relevant to comprehend the purpose of Part X of the Federal Constitution on the Public Services which recommendations were supported and adopted by the Reid Commission in drafting Part X of the Federal Constitution.

Minister, is a person holding public office or a public officer for the purposes of misfeasance in public office.

(d) The underlying basis for the tort of misfeasance in public office 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. The tort serves 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. 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. **(Watkins v Secretary of State for the Home Department and others)**

The rule of law is a fundamental feature of the constitutional framework of this country. An intrinsic element of the rule of law is that the law is supreme over the acts of both government and private persons. In short there is one law for all. To that end the exercise of all public power must find its ultimate source in a legal rule. (see **Manitoba Language Rights Reference (Supreme Court, Canada at paragraphs 747-752**).

The tort of misfeasance in public office is designed specifically to address issues such as those that have arisen in the instant case. We therefore concluded that in construing whether the Prime Minister or any other Minister is a public officer, it is not limited by

the definition of ‘public officer’ in **section 3 of the Interpretation Acts** read together with **Articles 132 and 160 of the Federal Constitution**.

With respect to the second leave question, namely whether the Prime Minister or any other Minister is a public officer within **section 5 of the Government Proceedings Act 1956** we answered in the affirmative.

This question deals with the issue of whether the Government can be vicariously liable for the acts of the Prime Minister or any other Minister as public officers. In the courts below, as the former Prime Minister was found not to be a public officer or a person holding public office, it followed that there was no issue of vicarious liability arising.

However, as we have concluded that Najib Razak was a public officer, it follows that the question of vicarious liability needs to be addressed. The primary issue here was whether the term ‘public officer’ in the **Government Proceedings Act 1956** encompassed persons such as the former Prime Minister and Ministers. The position taken by the Government was that it did not, meaning that it could not be vicariously liable for the acts of the former Prime Minister. We did not concur.

There is a specific definition of ‘officer’ in the **Government Proceedings Act 1956**, which when construed purposively, supports the legal conclusion that the Government may be sued for alleged vicarious liability under that section. In other words, an

action can be brought against the Government in respect of the acts of a Prime Minister or other Minister under misfeasance in public office. However whether such an action is successful or not is a matter of fact and of law in the context of **section 5 of the Government Proceedings Act**. There is a specific exclusion of liability for acts committed by public officers in the section. It may well be the case that the facts and evidence at trial show no liability. However at this juncture, the plaintiff ought not to be shut out, particularly given the clear statutory provision in **section 5 of the Government Proceedings Act 1956.**

We finally considered whether the core elements of the tort of misfeasance were made out on the face of the statement of claim filed by Tony Pua. We concluded that the core elements had, prima facie, been satisfied. Of particular importance was that of the damage suffered by him personally. We concluded that it was not an obviously unsustainable claim in that the heads of damages could, in theory, be claimed, on the facts of the instant case. Whether he succeeds at trial again must be a question of evidence.

For these reasons, which we have set out in summary, the appeals are allowed with costs.

19 November 2019