

AJS v. RIS & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
 FAIZAH JAMALUDIN J
 [PETITION FOR JUDICIAL
 SEPARATION NO: WA-33-364-07-2019]
 21 FEBRUARY 2020

FAMILY LAW: *Judicial separation – Petition – Striking out – Application for – Co-respondent in petition applied to strike out petition against her – Petitioner alleged husband and co-respondent had adulterous relationship and prayed that co-respondent be condemned for damages – Co-respondent a Muslim practising the religion of Islam – Whether Law Reform (Marriage and Divorce) Act 1976 applies to Muslims – Whether alleged adulteress may only be cited as co-respondent in petition for divorce – Whether petitioner citing alleged adulteress as co-respondent in petition for judicial separation contrary to s. 58 of Law Reform (Marriage and Divorce) Act 1976 – Rules of Court 2012, O. 18 r. 19(1)(a), (b) & (c) – Divorce and Matrimonial Proceedings Rules 1980, r. 103 – Law Reform (Marriage and Divorce) Act 1976, s. 3(3)*

CIVIL PROCEDURE: *Striking out – Petition – Petition for judicial separation – Co-respondent in petition applied to strike out petition against her – Petitioner alleged husband and co-respondent had adulterous relationship and prayed that co-respondent be condemned for damages – Co-respondent a Muslim practising the religion of Islam – Whether Law Reform (Marriage and Divorce) Act 1976 applies to Muslims – Whether alleged adulteress may only be cited as co-respondent in petition for divorce – Whether petitioner citing alleged adulteress as co-respondent in petition for judicial separation contrary to s. 58 of Law Reform (Marriage and Divorce) Act 1976 – Rules of Court 2012, O. 18 r. 19(1)(a), (b) & (c) – Divorce and Matrimonial Proceedings Rules 1980, r. 103 – Law Reform (Marriage and Divorce) Act 1976, s. 3(3)*

STATUTORY INTERPRETATION: *‘to a Muslim or to any person’ – Law Reform (Marriage and Divorce) Act 1976, s. 3(3) – Principle of noscitur a sociis – Whether applies to Muslim married under Islamic law – Intention of Parliament – Whether citing of Muslim as co-respondent for alleged adultery in petition for divorce under s. 58 of Law Reform (Marriage and Divorce) Act 1976 comes within ambit of a ‘marriage of one of the parties which professes the religion of Islam’ in s. 3(3) – Whether fact that adulterer or adulteress is a Muslim bars petitioner from citing him or her as co-respondent in petition for divorce*

The petitioner wife sought a decree of judicial separation against her husband (‘respondent’). In her petition for judicial separation (‘JS petition’), the petitioner alleged, among others, that the respondent had committed adultery with JBMH and cited her as a co-respondent. She also prayed in the JS petition that the co-respondent be condemned for damages for the adultery. The co-respondent, a Muslim lady who professes the religion of Islam, filed encl. 15, an application to strike out the JS petition against her on the

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A grounds that (i) the Law Reform (Marriage and Divorce) Act 1976 ('LRA') does not apply to Muslims, and (ii) that an alleged adulteress may only be cited as a co-respondent in a petition for divorce and not a petition for judicial separation under the LRA. Her striking out application was made pursuant to O. 18 r. 19(1)(a), (b) and/or (c) and/or (d) of the Rules of Court 2012 ('ROC') and/or r. 103 of the Divorce and Matrimonial Proceedings Rules 1980 ('DMPR') and/or the inherent jurisdiction of the court. In deciding on the co-respondent's application, this court must determine the following issues (i) whether the LRA excludes all Muslims or does it only exclude Muslims who are married under Islamic law. Does the LRA apply to a Muslim who is alleged to have committed adultery with a non-Muslim, and (ii) can a petitioner in a joint petition for judicial separation cite an alleged adulterer or adulteress as a co-respondent and claim damages for adultery against him/her.

Held (allowing encl. 15):

- D (1) The words 'to a Muslim or to any person' in s. 3(3) of the LRA is an example of words in pairs with different and overlapping meanings: 'Muslim' means a person who professes the religion of Islam and 'any person' can mean a person who is a Muslim or a non-Muslim. Applying the principle of *noscitur a sociis*, the close proximity of the words 'a Muslim or to any person' with the phrase 'who is married under Islamic law' means that the LRA does not apply to a Muslim who is married under Islamic law and to any person who is married under Islamic law. The word 'any person' is paired with 'Muslim' to cover situations where a person who may not be a Muslim is married to a Muslim under Islamic law. In such situations where a Muslim and a Muslim, or a Muslim and non-Muslim are married under Islamic law, the LRA does not apply to them. It could be said with certainty that the LRA is enacted to govern the marriage and divorce of non-Muslims in Malaysia and that it expressly excludes the marriage and divorce of Muslims and Muslims married with any person under Islamic law. (paras 18, 19 & 29)
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- H (2) Looking at the intention of Parliament in enacting the LRA and applying the common sense rule of construction and the plain meaning rule, s. 58 does not relate to the 'marriage of a Muslim under Islamic law or to any person who is married under Islamic law.' It may not have been in the contemplation of Parliament when it enacted the LRA in 1976, of a state of affairs where a married non-Muslim commits adultery with a Muslim. However, it would be reasonable to presume that Parliament did not intend to exclude from the LRA the ability to seek damages from adulterers in a divorce petition, just by reason of their religion. First, the citing of an alleged adulterer in a divorce petition does not relate to
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marriage and divorce of Muslims; secondly, the naming of alleged adulterers pursuant to s. 58 of the LRA was not premised on them being non-Muslims; thirdly, the naming of an alleged adulterer as a co-respondent in a divorce petition enables the court, once adultery is proven, to condemn the adulterer with damages for breaking up the marriage; and finally, the naming of an adulterer in a divorce petition does not fall within the State List in List II of the Ninth Schedule of the Federal Constitution. For these reasons, the citing of a Muslim as a co-respondent for alleged adultery in a petition for divorce under s. 58 of the LRA does not come within the ambit of a 'marriage of one of the parties which professes the religion of Islam' in s. 3(3) of the LRA. Neither does it relate 'to a Muslim or any person who is married under Islamic law.' The fact that an alleged adulterer or adulteress is a Muslim is not a bar against a petitioner from citing him or her as a co-respondent in a petition for divorce or from seeking that the co-respondent be condemned for damages in respect of the alleged adultery under s. 58 of the LRA. (paras 32-36)

(3) In this instant case, the petitioner alleged adultery between the respondent husband and JBMH and cited her as a co-respondent in the JS petition. The JS petition is a petition for judicial separation and not a petition for divorce. Unlike a decree of divorce, the pronouncement by this court of a decree of judicial separation does not legally dissolve a marriage. Once a decree of judicial separation is granted, the petitioner is no longer obliged to cohabit with the respondent: s. 64(2) of the LRA. To dissolve the marriage after the granting of a decree of judicial separation, the petitioner would then have to present a petition for divorce. Section 65(1) of the LRA expressly states the fact that a petitioner had been granted a decree of judicial petition would not bar the petitioner from presenting a petition for divorce or a court from pronouncing a decree of divorce. Pursuant to s. 65(2) of the LRA, the court may treat the decree of judicial separation as sufficient proof of the adultery, desertion, or other ground on which it was granted. (paras 39 & 41)

(4) The petitioner citing an alleged adulteress as a co-respondent in the said JS petition was clearly contrary to the provisions of s. 58 of the LRA. Her prayer in the petition that JBMH be condemned in damages for adultery was obviously unsustainable and clearly an abuse of process of this court. The naming of JBMH as a co-respondent in the JS petition was designed to embarrass a woman whom the petitioner believed had committed adultery with her husband. The petitioner's action lacked *bona fides* and was 'not calculated to lead to any practical result.' Even if the petitioner successfully proved that the respondent had committed

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- A adultery with JBMH, this court did not have the power to condemn JBMH for damages in a petition for judicial separation under s. 58. (paras 44-47)

Case(s) referred to:

AG of Duchy of Lancaster v. L & NW Ry Co (1892) 3 Ch 274 (refd)

- B *Chor Phaik Har v. Farlim Properties Sdn Bhd [1994] 4 CLJ 285 FC (refd)*
Hadi Hassan v. Suria Records Sdn Bhd & Ors [2004] 8 CLJ 225 HC (refd)
Latifah Mat Zin v. Rosmawati Sharibun & Anor [2007] 5 CLJ 253 FC (refd)
Middy Industries Sdn Bhd & Ors v. Arensi-Marley (M) Sdn Bhd [2012] 1 LNS 830 CA (refd)
Re Ding Do Ca, Deceased [1966] 1 LNS 157 FC (refd)
- C *Royal College of Nursing of the UK v. Department of Health and Social Security [1981] AC 800 (refd)*
Shudesh Kumar Moti Ram v. Kamlesh Mangal Sain Kapoor [2005] 2 CLJ 371 HC (refd)

Legislation referred to:

Courts of Judicature Act 1964, s. 15

- D Divorce and Matrimonial Proceedings Rules 1980, r. 103
 Federal Constitution, art. 74
 Law Reform (Marriage and Divorce) Act 1976, ss. 3(3), 51, 51A, 58(1), (2), 64(2), 65(1)
 Rules of Court 2012, O. 18 r. 19(1)(a), (b), (c), (d)

Other source(s) referred to:

- E *Bennion on Statutory Interpretation*, LexisNexis, 5th edn, 2008, s 378
 Mehrun Siraj, *Women and the Law Significant Developments in Malaysia, Law & Society Review, Vol 28, No 3, Law & Society in Southeast Asia*, 1994, pp 561-572
 Francis Bennion, *Understanding Common Law Legislation: Drafting and Interpretation*, Oxford University Press, Reprinted 2013, pp 81-85, 197-198
- F *For the petitioner - Ravi Nekoo, Pushpa Ratnam & Parvinder Kaur; M/s Hakem Arabi & Assocs*
For the co-respondent - CJ Siew & CY Ong; M/s Douglas Yee
Reported by Suhainah Wahiduddin

G **JUDGMENT**

Faizah Jamaludin J:

Introduction

- H [1] In this instant case, the petitioner wife is seeking a decree of judicial separation against her husband, the respondent. In her petition for judicial separation (“JS petition”), the petitioner alleges, among others, that the respondent had committed adultery with JBMH and cited her as a co-respondent. She also prayed in the JS petition that the co-respondent be condemned for damages for the adultery.

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[2] The co-respondent is a Muslim lady who professes the religion of Islam. Enclosure 15 is her application to strike out the JS petition against her on the grounds that (i) the Law Reform (Marriage and Divorce) Act 1976 (“LRA”) does not apply to Muslims; and (ii) that an alleged adulteress may only be cited as a co-respondent in a petition for divorce and not a petition for judicial separation under the LRA. Her striking out application is made pursuant to O. 18 r. 19(1)(a), (b) and/or (c) and/or (d) of the Rules of Court 2012 (“ROC”) and/or r. 103 of the Divorce and Matrimonial Proceedings Rules 1980 (“DMPR”) and/or the inherent jurisdiction of this court.

[3] At the conclusion of the hearing of the co-respondent’s application, I allowed her striking out application on the grounds that the petitioner’s action in citing her as a co-respondent in the JS petition was scandalous, frivolous or vexatious and was an abuse of the process of court.

[4] For the reasons discussed in this judgment, I held that under s. 58 of the LRA, only in petitions for divorce can an alleged adulterer or adulteress be made a co-respondent and damages for adultery be claimed against the said co-respondent. An alleged adulterer or adulteress cannot be cited as a co-respondent in a petition for judicial separation.

[5] I further held the fact that an alleged adulterer or adulteress is a Muslim is not a bar against him/her being named as a co-respondent in a divorce petition and damages for adultery to be claimed against him/her under s. 58 of the LRA.

[6] The full grounds for my decision are set out in this judgment.

[7] As the petitioner’s application for JS petition involves young children of tender age, I have used my discretion under s. 15 of the Courts of Judicature Act 1964 to refer in this judgment to the petitioner, the respondent, the co-respondent and the children by their initials. The petitioner is AJS. She is referred to as “the petitioner” or “the wife”. The respondent is RIS and he is referred to as “the respondent” or “the husband”. The co-respondent is JBMH. She is referred to as “the co-respondent”. The children are referred to in the intitlement as ERS, RIS and MMS.

Issues For Determination

[8] In deciding on the co-respondent’s application to strike out the JS petition against her, this court must first determine the following issues:

- (i) whether the LRA excludes all Muslims? Or does it only exclude Muslims who are married under Islamic law? Does the LRA apply to a Muslim who is alleged to have committed adultery with a non-Muslim? and

- A (ii) can a petitioner in a joint petition for judicial separation cite an alleged adulterer or adulteress as a co-respondent and claim damages for adultery against him/her?

Does The LRA Exclude All Muslims? Or Does It Only Exclude Muslims Who Are Married Under Islamic Law? Does The LRA Apply To A Muslim Who Is Alleged To Have Committed Adultery With A Non-Muslim?

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[9] Section 3(3) of the LRA provides as follows:

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This Act shall not apply to a Muslim or to any person who is married under Islamic law and no marriage of one of the parties which professes the religion of Islam shall be solemnised or registered under this Act; but nothing herein shall be construed to prevent a court before which a petition for divorce has been made under section 51 from granting a decree of divorce on the petition of one party to a marriage where the other party has converted to Islam, and such decree shall, notwithstanding any other written law to the contrary, be valid against the party to the marriage who has so converted to Islam. (emphasis added)

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Co-Respondent's Case

[10] The co-respondent's case is that the LRA does not apply to Muslims based on the first eight words of s. 3(3) of the LRA, "This Act shall not apply to a Muslim ..."

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[11] Learned counsel for the co-respondent, Mr CJ Siew submits that the LRA does not apply to a Muslim except in cases of ss. 51 and 51A, where one party to a marriage has converted to the religion of Islam. He argues that the inclusion of the co-respondent pursuant to s. 58 of the LRA is not one of the exceptions provided under the LRA.

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[12] Mr. Siew submits that as the LRA does not apply to Muslims pursuant s. 3(3) of the LRA, the petitioner is not entitled to cite JBMH as a co-respondent and make a claim for damages against her. He invites this court to read only the first eight words of s. 3(3) of the LRA and submits from the reading of the first eight words of the said section, it is clear that the LRA does not apply to a Muslim and that a Muslim person shall not be subjected to the jurisdiction of the civil courts under the LRA. He argues that for this reason, the inclusion of the co-respondent as a party to the judicial separation proceedings between the petitioner and the respondent pursuant to the LRA is wrong in law.

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Petitioner's Case

[13] Learned counsel for the petitioner, Mr Ravi Nekoo, on the other hand, submits that reading the first three lines of s. 3(3) of the LRA, namely:

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This Act shall not apply to a Muslim or to any person who is married under Islamic law and no marriage of one of the parties which professes the religion of Islam shall be solemnised or registered under this Act;

The proper interpretation of s. 3(3) is that:

- (i) this Act does not apply to a Muslim who is married under Islamic law;
or
- (ii) this Act does not apply to any person who is married under Islamic law.

[14] Mr Nekoo submits that s. 3(3) should not be read as (i) this Act shall not apply to a Muslim or (ii) to any person who is married under Islamic law, as suggested by Mr Siew. He contends that since the LRA governs marriages and divorces, any reference to the word “Muslim” must necessarily refer to a Muslim married under Islamic law. He submits that the word “Muslim” in s. 3(3) of the LRA cannot be read in vacuum.

Interpreting s. 3(3) Of The LRA

[15] In determining the correct interpretation of s. 3(3) of the LRA, it is necessary for this court to apply the established rules of statutory interpretation in interpreting the said section.

[16] The late Francis Bennion, lecturer of law at Oxford University and a renowned author of several books on statutory interpretation, in his book *Understanding Common Law Legislation: Drafting and Interpretation*¹ says that:

pair of words used in statutes may have opposite meanings (antonyms), identical meanings (synonyms), shared meanings (overlapping terms), conjoined meanings (hendiadys) or different meanings.²

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a pair of words may be linked conjunctively (requiring both terms to be satisfied) or disjunctively (requiring only one of the terms to be satisfied).³

[17] Bennion goes on to say that the rule of construction of *noscitur a sociis* (which in Latin means “it is known from its associates”), requires that terms be construed in the light of their surrounding words.⁴

[18] In this instant case, the words “to a Muslim or to any person” in s. 3(3) of the LRA is an example of words in pairs with different and overlapping meanings: “Muslim” means a person who professes the religion of Islam and “any person” can mean a person who is a Muslim. It can also mean a person who is a non-Muslim.

[19] Applying the principle of *noscitur a sociis*, the close proximity of the words “a Muslim or to any person” with the phrase “who is married under Islamic law” means that the LRA does not apply to a Muslim who is married under Islamic law and to any person who is married under Islamic law. The word “any person” is paired with “Muslim” to cover situations where a person who may not be a Muslim is married to a Muslim under Islamic law. In such situations where a Muslim and a Muslim, or a Muslim and non-

A Muslim are married under Islamic law, the LRA does not apply to them. While Muslims in Malaysia are not permitted under the Syariah laws to marry a non-Muslim, such marriages are permitted in many countries.

[20] Additionally, the phrase “no marriage of one of the parties which professes the religion of Islam shall be solemnised or registered under this Act” in s. 3(3) of the LRA, means that marriages between a Muslim and a Muslim, or a Muslim and non-Muslim cannot be solemnised or registered under the LRA.

[21] Bennion states that the rules of interpretation laid down at common law include (1) the rule that regard must be had to the juridical nature of an enactment; (2) the plain meaning rule; and (3) the common sense construction rule.⁵

The Intention Of Parliament And The Juridical Nature Of The LRA

[22] The need for reform of non-Muslim marriages in Malaysia was first raised in 1966 by the then Lord President, Thomson LP in the case *Re Ding Do Ca, Deceased* [1966] 1 LNS 157; [1966] 2 MLJ 220 where he made the following observations in pp. 223 and 224 of the judgment:

... the whole question of personal law in this country, particularly as regards questions of marriage, divorce and succession, calls for the attention of the legislature. As regards persons professing Islam the position is tolerably clear. But as regards persons of Chinese race the law the courts are administering is probably different from any law that exists or ever has existed in China. It even differs from the law which is applied in at least one other jurisdiction within which there are large numbers of locally-domiciled Chinese persons (see *Mong Kuen v. Wong May Wong* [1948] NZLR 348). The same sort of position may well arise in relation to persons professing the Hindu religion by reason of the enactment in India of the Hindu Marriage Act, 1955.

The questions involved are questions which go to the very root of the law relating to the family which, after all, is the basis of society at least in its present form, and the existence of a civilised society demands that these questions be settled beyond doubt by legislation which will clearly express the modern mores of the classes of persons concerned and put the rights of individuals beyond the chances of litigation.

(emphasis added)

[23] In *Re Ding Do Ca (supra)*, the Federal Court held that as the Christian Marriage Ordinance did not have a provision expressly stating that a marriage solemnised according to the Ordinance was monogamous, and as the personal law of the Chinese was the customary law of their Chinese race and the Chinese custom permitted plurality of wives, the deceased, Ding Do Ca, was entitled to enter into a polygamous marriage. The Federal Court held that deceased’s second marriage was valid despite his earlier and subsisting marriage under the Christian Marriage Ordinance.

[24] A few years later in 1971, a royal commission was appointed to study the existing laws and to propose amendments to reform and unify the marriage and divorce laws applicable to non-Muslims throughout Malaysia⁶. The Royal Commission on Non-Muslim Marriage and Divorce Laws (also known as the Ong Commission) was chaired by the late Justice Tan Sri HT Ong, then Chief Judge (Malaya). The Commission published its report and drafted the Law Reform (Marriage and Divorce) Bill in 1972.

[25] The Law Reform (Marriage and Divorce) Bill was presented to Parliament in 1972. In the Parliamentary Debate for the second and third reading of the Bill that took place on 4 November 1975, the then Minister of Law, the late Tan Sri Abdul Kadir bin Yusof, as reported in Hansard, said:

The Bill is not applicable to Muslim marriages because a Muslim marriage is governed by Muslim law and under Article 76(2) of the Constitution, Parliament is not empowered to make laws in respect of any matters of Muslim law except as provided therein.

[26] The Federal Court in *Chor Phaik Har v. Farlim Properties Sdn Bhd* [1994] 4 CLJ 285; [1994] 3 MLJ 345; [1994] 3 AMR 2103, held that Hansard can be used as an aid of construction of an Act of Parliament provided the statement reported in Hansard was made by a Minister or other promoter of the Bill. However, the words of the Minister or promoter of the Bill can only be an aid to interpretation and cannot substitute the words of the Act. Edgar Joseph Jr FCJ in delivering the judgment of the Federal Court said the following:

Nevertheless, we have arrived at the conclusion that we should follow the recent trend of the cases decided in the United Kingdom, Australia, New Zealand and Singapore and permit a relaxation of the exclusionary rule by allowing a reference to Hansard as an aid to statutory interpretation where the enactment is ambiguous or obscure, or which if literally construed might lead to an absurdity and provided always that the statement reported in Hansard was made by a Minister or other promoter of a Bill. More particularly, we gratefully adopt the passage in the judgment of Lord Browne-Wilkinson in *Pepper v. Hart*, reproduced above.

We hasten to add, however, that when resort to Hansard is permissible, that by itself although meriting serious consideration cannot be determinative of the issue since it is only available as an aid to interpretation. To hold otherwise, would amount to substituting the words of the Minister or other promoter of the Bill for the words of the statute, and that cannot be the law.

[27] Parliament is not permitted to legislate on the marriage and divorce of Muslims. Pursuant to art. 74 of the Federal Constitution, the Islamic personal law regulating the marriage and divorce of Muslims falls under the State List in List II of the Ninth Schedule. On the jurisdiction of Parliament as regards the enactment of marriage and divorce laws for Muslims and non-Muslims, the Federal Court in *Latifah Mat Zin v. Rosmawati Sharibun & Anor* [2007] 5 CLJ 253; [2007] 5 MLJ 101, said the following:

A [24] ... while Parliament may make law in relation to marriage and divorce, it is not permitted to make law on the same subject-matter affecting Muslims because it falls under paragraph (ii) as Islamic personal law relating to marriage and divorce. *The net effect is that marriage and divorce law of non-Muslims is a matter within the jurisdiction of Parliament to make, while marriage and divorce law of Muslims is a matter within the jurisdiction of the*
B *Legislature of a State to make.* (emphasis added)

[28] Looking at the juridical nature of the LRA and the history leading up to its enactment – from the comments made by Thomson LP in *Re Ding Do Ca* (*supra*) in 1966 on the need for the Legislature to look at the personal law of non-Muslims in Malaysia relating to marriage, divorce and succession; to the setting up of the Royal Commission on Non-Muslim Marriage and Divorce Laws in 1971; the tabling of the Law Reform (Marriage and Divorce) Bill in Parliament in 1972; and to the statement made by Minister of Law in the Parliamentary Debate in the second and third reading of the Bill in 1975 - it is clear that the LRA was enacted by Parliament to regulate the marriage and divorce of non-Muslims in Malaysia. It is equally clear that the LRA does not regulate the marriage and divorce of Muslims since it falls within the purview of the State Legislature under the Federal Constitution.

[29] Therefore, it can be said with certainty that the LRA was enacted to govern the marriage and divorce of non-Muslims in Malaysia and that it expressly excludes the marriage and divorce of Muslims and Muslims married with any person under Islamic law.

[30] Even the recent amendment to s. 3(3) of the LRA by the Law Reform (Marriage and Divorce) (Amendment) Act 2017 (Act A1546) (the “2017 Amendment Act”), which took effect from 15 December 2018, did not extend the LRA to marriages and divorces by Muslims. The 2017 Amendment Act extended the LRA to divorces of non-Muslims who had married under LRA or deemed married under LRA where one spouse after the marriage converts to Islam, either after the filing of the petition or after the pronouncement of a decree, or a petition for divorce under the LRA. Notwithstanding the amendment to s. 51 and the introduction of s. 51A by the 2017 Amendment Act, the LRA still does not apply to Muslims who are married under Islamic law or any person who is married under Islamic law.

[31] Section 58 of the LRA allows a party to petition for divorce to name the alleged adulterer as a co-respondent either in the petition for divorce or in the answer to the petition. Under s. 58(2) of the LRA, the petitioner may include a prayer that the co-respondent be condemned for damages in respect of the alleged adultery. Where such damages are claimed, the court may award damages, if the court is satisfied that the adultery between the respondent and the co-respondent has been proved.

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[32] Looking at the intention of Parliament in enacting the LRA and applying the common sense rule of construction and the plain meaning rule, s. 58 does not relate to the “marriage of a Muslim under Islamic law or to any person who is married under Islamic law”. Moreover, the ability of a petitioner to cite and pray for damages against an alleged adulterer in a divorce petition under the LRA does not come within the ambit of Islamic personal law; neither does it come within the State List in List II of the Ninth Schedule of the Federal Constitution. A B

[33] It is readily acknowledged that there are situations where statutes may apply to circumstances that may not have been reasonably contemplated at the time that the statute was enacted by Parliament. In such cases, Lord Wilberforce in *Royal College of Nursing of the UK v. Department of Health and Social Security* [1981] AC 800, said: C

In interpreting an Act of Parliament it is proper, and indeed necessary, to have regard to the state of affairs existing, and known by Parliament to be existing, at the time. It is a fair presumption that Parliament's policy or intention is directed to that state of affairs. Leaving aside cases of omission by inadvertence, this being not such a case, *when a new state of affairs, or a fresh set of facts bearing on policy, comes into existence, the courts have to consider whether they fall within the Parliamentary intention ...* D

(emphasis added)

[34] As regards the LRA, it may not have been in the contemplation of the Ong Commission when it drafted the Law Reform (Marriage and Divorce) Bill in 1972 or Parliament when it enacted the LRA in 1976, of a state of affairs, where a married non-Muslim commits adultery with a Muslim. However, it would be reasonable to presume that Parliament did not intend to exclude from the LRA the ability to seek damages from adulterers in a divorce petition, just by reason of their religion. First, the citing of an alleged adulterer in a divorce petition does not relate to marriage and divorce of Muslims; secondly, the naming of alleged adulterers pursuant to s. 58 of the LRA is not premised on them being non-Muslims; thirdly, the naming of an alleged adulterer as a co-respondent in a divorce petition enables the court, once adultery is proven, to condemn the adulterer with damages for breaking up the marriage; and finally, the naming of an adulterer in a divorce petition does not fall within the State List in List II of the Ninth Schedule of the Federal Constitution. E F G

[35] For these reasons, I find that citing a Muslim as a co-respondent for alleged adultery in a petition for divorce under s. 58 of the LRA does not come within the ambit of a “marriage of one of the parties which professes the religion of Islam” in s. 3(3) of the LRA. Neither does it relate “to a Muslim or any person who is married under Islamic Law”. H I

A [36] Accordingly, this court finds the fact that an alleged adulterer or adulteress is a Muslim is not a bar against a petitioner from citing him or her as a co-respondent in a petition for divorce or from seeking that the co-respondent be condemned for damages in respect of the alleged adultery under s. 58 of the LRA.

B *Can A Petitioner Cite An Alleged Adulteress In A Joint Petition For Judicial Separation?*

[37] Section 58(1) and (2) of the LRA states as follows:

58 Damages for adultery may be claimed against a co-respondent

C (1) On a petition for divorce in which adultery is alleged, or in the answer of a party to the marriage praying for divorce and alleging adultery, the party shall make the alleged adulterer or adulteress a co-respondent, unless excused by the court on special grounds from doing so.

D (2) A petition under subsection (1) may include a prayer that the co-respondent be condemned in damages in respect of the alleged adultery. (emphasis added)

E [38] To the ordinary reasonable man, the plain and ordinary meaning of s. 58 is that in order to cite an alleged adulteress as a co-respondent in a petition, (a) the petition must be a petition for divorce; and (b) there must be an allegation of adultery.

F [39] In this instant case, the petitioner alleges adultery between the respondent husband and JBMH and cites her as co-respondent in the JS petition. The JS petition is petition for judicial separation and not a petition for divorce.

G [40] Naming an alleged adulteress as co-respondent in a divorce petition, enables a petitioner to pray for damages from the co-respondent for the alleged adultery. Section 58 of the LRA does not provide for damages against a co-respondent when the relief sought is judicial separation. In *Shudesh Kumar Moti Ram v. Kamlesh Mangal Sain Kapoor* [2005] 2 CLJ 371, the High Court held that the wife could not claim damages against the party cited in a petition for judicial separation.

H [41] Unlike a decree of divorce, the pronouncement by this court of a decree of judicial separation does not legally dissolve a marriage. Once a decree of judicial separation is granted, the petitioner is no longer obliged to cohabit with the respondent s. 64(2) of the LRA. To dissolve the marriage after the granting of a decree of judicial separation, the petitioner would then have to present a petition for divorce. Section 65(1) of the LRA expressly states the fact that a petitioner had been granted a decree of judicial petition will not bar the petitioner from presenting a petition for divorce or a court

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from pronouncing a decree of divorce. Pursuant to s. 65(2) of the LRA, the court may treat the decree of judicial separation as sufficient proof of the adultery, desertion, or other ground on which it was granted.

[42] Mr Siew for the co-respondent submits that the petitioner's disregard for the LRA in citing the co-respondent in the JS petition was malicious and premised on an ulterior motive to cause prejudice and embarrassment to her. He also submits that the court's process has not been used in a *bona fide* manner and has been clearly abused by the petitioner in citing the co-respondent in the JS petition.

[43] Learned counsel for the petitioner, however, chose not to submit to this court on whether or not the petitioner's act citing the co-respondent in the JS petition was scandalous, frivolous or vexatious or whether it was an abuse of the process of the court. Mr Ravi Nekoo submitted on the issue of whether or not the LRA excludes an alleged adulteress who is a Muslim but remained silent on the question of the correctness of the petitioner's citing JBMH as the co-respondent and praying for damages for adultery against her in a petition for judicial separation in light of the express provisions in s. 58(1) and (2) of the LRA.

[44] I find that the petitioner citing an alleged adulteress as a co-respondent in the said JS petition is clearly contrary to the provisions of s. 58 of the LRA. Her prayer in the petition that JBMH be condemned in damages for adultery is obviously unsustainable.

[45] The words "frivolous or vexatious" in O. 18 r. 19(1)(b) of the ROC has been held to refer to cases which are obviously unsustainable (see *Hadi Hassan v. Suria Records Sdn Bhd & Ors* [2004] 8 CLJ 225; [2005] 3 MLJ; *AG of Duchy of Lancaster v. L & NW Ry Co* (1892) 3 Ch 274). The Court of Appeal in *Middy Industries Sdn Bhd & Ors v. Arensi-Marley (M) Sdn Bhd* [2012] 1 LNS 830 held that:

[10] In short, the words "frivolous or vexatious" under r. 19(1)(b) refer to cases which are obviously unsustainable or wrong. The words connote purposelessness in relation to the process or a lack of seriousness or truth and a lack of *bona fide*; they also include proceedings where a party is not acting *bona fide* and merely wishes to annoy or embarrass his opponent, or when it is not calculated to lead to any practical result (see: *Goh Koon Suan v. Heng Gek Kiau* [1990] 2 SLR (R) 705; *Afro-Asia Shipping Co (Pte) Ltd v. Haridass Ho & Partners* [2003] 2 SLR (R) 491; and *Riduan Yusof v. Khng Thian Huat & Anor* [2005] 2 SLR (R) 188).

[11] The phrase "abuse of process" under r. 19(1)(d) signifies that the process of the court must be used *bona fide* and properly and must not be abused. It includes consideration of public policy and interest of justice. The court will prevent any improper use of its machinery. It will prevent the judicial process from being used as a means of vexation and

A oppression in the process of litigation. The categories of conduct rendering a claim frivolous, vexatious or an abuse of process are not closed and will depend on all the relevant circumstances of the case. If an action was not brought *bona fide* for the purpose of obtaining relief but for some other ulterior or collateral purpose, it might be struck out as an abuse of the process of the court. (See: *Gabriel Peter & Partners v. Wee Chong Jin* [1997] 3 SLR (R) 649 and *Lonrho plc v. Fayed (No. 5)* [1993] 1 WLR 1489).

[46] This court finds that the petitioner's action in citing the co-respondent and praying that she be condemned in damages in a petition for judicial separation, is clearly an abuse of process of this court.

C [47] In my view, the naming of JBMH as a co-respondent in the JS petition, was designed to embarrass a woman whom the petitioner believes had committed adultery with her husband. To paraphrase Ramly Ali JCA (as he then was) in *Middy Industries (supra)*, I find that the petitioner's action lacked *bona fides* and was "not calculated to lead to any practical result". How can the citing of JBMH in the JS petition lead to a practical result? Even if the petitioner successfully proves that the respondent had committed adultery with JBMH, this court does not have the power to condemn JBMH for damages in a petition for judicial separation under s. 58 (see *Shudesh Kumar Moti Ram v. Kamlesh Mangal Sain Kapoor (supra)*).

E **Decision**

[48] For the reasons above, I hereby allow the co-respondent's application in encl. 15.

[49] It is hereby ordered that:

- F (i) the JS petition be struck out against the co-respondent;
- (ii) paras. 40 to 64 of the JS petition be expunged;
- (iii) the co-respondent's name be expunged and removed from the intitulement of the JS petition and from all subsequent cause papers in relation to this matter;
- G (iv) the petitioner shall file an amended petition for joint separation to comply with paras. 2 and 3 above within seven days from the date of this order; and
- H (v) costs of RM3,000 to be paid by the petitioner to the co-respondent subject to the allocatur fee.

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Endnotes:

1. Francis Bennion, *Understanding Common Law Legislation: Drafting and Interpretation*, Oxford University Press, Reprinted 2013.
2. *supra*, p 197.
3. *supra*, p 198.
4. *Bennion on Statutory Interpretation*, LexisNexis, 5th edn, 2008, s 378.
5. Francis Bennion, *Understanding Common Law Legislation: Drafting and Interpretation*, Oxford University Press, Reprinted 2013, pp 81-85, 197-198.
6. Mehrun Siraj, *Women and the Law & Society in Southeast Asia*, 1994, pp. 561-572.

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