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AJS v RIS & Anor

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HIGH COURT (KUALA LUMPUR) — PETITION FOR JUDICIAL SEPARATION NO WA-33-364-07 OF 2019
FAIZAH JAMALUDIN J
21 FEBRUARY 2020

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Civil Procedure — Petition for judicial separation — Striking out — 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 — 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), (1)(b) & (1)(c) — Divorce and Matrimonial Proceedings Rules 1980 r 103

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Family Law — Separation — Judicial separation — Whether Law Reform (Marriage and Divorce) Act 1976 excluded all Muslims or did it only exclude Muslims who were married under Islamic law — Whether petitioner in joint petition for judicial separation entitled to cite an alleged adulterer or adulteress as co-respondent — Whether petitioner in joint petition for judicial separation entitled to claim for damages for adultery — Law Reform (Marriage and Divorce) Act 1976

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The petitioner wife was seeking a decree of judicial separation against her husband, the respondent. In her petition for judicial separation ('the petition'), the petitioner alleged, among others, that the respondent had committed adultery with JBMH ('the co-respondent'). She also prayed in the petition that the co-respondent was condemned for damages for the adultery. The co-respondent was a Muslim lady who professes the religion of Islam. Enclosure 15 was her application to strike out the petition against her on the grounds that: (a) the Law Reform (Marriage and Divorce) Act 1976 ('the Act') did not apply to Muslims; and (b) that an alleged adulteress might only be cited as a co-respondent in a petition for divorce and not a petition for judicial separation under the Act. The striking out application was made pursuant to O 18 r 19(1)(a), (1)(b) and/or (1)(c) and/or (1)(d) of the Rules of Court 2012 ('the ROC') and/or r 103 of the Divorce and Matrimonial Proceedings Rules 1980 ('the Rules') and/or the inherent jurisdiction of the court. In deciding on the co-respondent's application to strike out the petition against her, the court must first determine the following issues: (i) whether the Act excluded all Muslims or did it only exclude Muslims who were married under Islamic law or

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did the Act apply to a Muslim who was alleged to have committed adultery with a non-Muslim; and (ii) whether a petitioner in a joint petition for judicial separation entitled to cite an alleged adulterer or adulteress as a co-respondent and claim damages for adultery against him/her.

Held, allowing encl 15 with costs of RM3,000 paid by petitioner to co-respondent:

- (1) It was necessary for the court to apply the established rules of statutory interpretation in interpreting the said section. The words 'to a Muslim or to any person' in s 3(3) of the Act was an example of words in pairs with different and overlapping meanings: 'Muslim' meant a person who professes the religion of Islam and 'any person' could mean a person who was a Muslim. It also meant a person who was 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' meant that the LRA did not apply to a Muslim who was married under Islamic law and to any person who is married under Islamic law. The word 'any person' paired with 'Muslim' to cover situations where a person who might not be a Muslim was 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 Act did not apply to them. It was clear that the Act was enacted by Parliament to regulate the marriage and divorce of non-Muslims in Malaysia. The Act did not regulate the marriage and divorce of Muslims since it fell within the purview of the State Legislature under the Federal Constitution. Therefore, it could be said with certainty that the Act 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 (see paras 15, 18–19 & 28–29).
- (2) It was found that citing a Muslim as a co-respondent for alleged adultery in a petition for divorce under s 58 of the Act did 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 Act. Neither did it relate 'to a Muslim or any person who is married under Islamic Law'. Accordingly, the fact that an alleged adulterer or adulteress was a Muslim was 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 Act (see paras 35–36).
- (3) 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. The

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- A court found that the petitioner citing an alleged adulteress as a co-respondent in the petition was clearly contrary to the provisions of s 58 of the Act. The petitioner's prayer in the petition that co-respondent was condemned in damages for adultery was obviously unsustainable. The words 'frivolous or vexatious' in O 18 r 19(1)(b) of the ROC had been held to refer to cases which were obviously unsustainable. The petitioner action in citing the co-respondent and praying that she was condemned in damages in a petition for judicial separation, was clearly an abuse of process of court. The naming of co-respondent in the petition was designed to embarrass a woman whom the petitioner believed had committed adultery with her husband (see paras 40 & 44-47).

[Bahasa Malaysia summary

- D Isteri pemohon meminta keputusan perceraian kehakiman terhadap suaminya, responden. Dalam petisyennya untuk pemisahan kehakiman ('petisyen'), pemohon menuduh, antara lain, bahawa responden telah melakukan zina dengan JBMH ('responden bersama'). Dia juga memohon dalam petisyen itu agar responden bersama dihukum ganti rugi atas perlakuan zina tersebut. Responden bersama adalah seorang wanita Muslim yang menganut agama Islam. Kandungan 15 adalah merupakan permohonannya untuk membatalkan petisyen terhadapnya dengan alasan bahawa: (a) Akta Pembaharuan Undang-Undang (Perkahwinan dan Perceraian) 1976 ('Akta') tidak terpakai untuk orang Islam; dan (b) bahawa seorang wanita yang melakukan zina hanya boleh disebut sebagai responden bersama dalam petisyen perceraian dan bukan petisyen untuk pemisahan kehakiman di bawah Akta. Permohonan pembatalan dibuat menurut A 18 k 19(1)(a), (1)(b) dan/atau (1)(c) dan/atau (d) Kaedah-Kaedah Mahkamah 2012 ('KKM') dan/atau K 103 Peraturan Prosiding Perceraian dan Perkahwinan 1980 ('Peraturan') dan/atau bidang kuasa mahkamah. Dalam memutuskan permohonan responden bersama untuk membatalkan petisyen terhadapnya, mahkamah harus terlebih dahulu menentukan isu-isu berikut: (i) sama ada Akta tersebut mengecualikan semua penganut Islam atau hanya mengecualikan orang Islam yang berkahwin di bawah undang-undang Islam atau terpakai Akta tersebut untuk seorang Muslim yang didakwa telah berzina dengan orang bukan Islam; dan (ii) sama ada seorang pemohon dalam petisyen bersama untuk pemisahan kehakiman berhak menggunakan seorang lelaki yang dituduh berzina atau seorang wanita yang dituduh berzina sebagai responden bersama dan menuntut terhadapnya ganti rugi kerana berzina.

- I **Diputuskan**, membenarkan lampiran 15 dengan kos RM3,000 yang dibayar oleh pemohon kepada responden bersama:

- (1) Adalah keperluan untuk mahkamah menggunakan aturan penafsiran berkanun yang ditetapkan dalam menafsirkan seksyen tersebut. Perkataan 'untuk seorang Muslim atau kepada mana-mana individu'

dalam s 3(3) Akta tersebut adalah contoh perkataan yang berpasangan dengan makna yang berbeza dan bertindih: 'Muslim' bermaksud orang yang menganut agama Islam dan 'mana-mana individu' boleh bermaksud orang yang beragama Islam. Ini juga bermaksud seseorang yang bukan Islam. Mengamalkan prinsip *noscitur a socialis*, kata-kata berhampiran 'seorang Muslim atau mana-mana individu' dengan ungkapan 'yang berkahwin di bawah undang-undang Islam' bermaksud bahawa LRA tidak terpakai untuk seorang Muslim yang berkahwin di bawah undang-undang Islam dan kepada mana-mana orang yang berkahwin di bawah undang-undang Islam. Perkataan 'mana-mana individu' dipasangkan dengan 'Muslim' untuk merangkumi situasi di mana seseorang yang mungkin bukan beragama Islam telah berkahwin dengan seorang Muslim di bawah undang-undang Islam. Dalam keadaan seperti itu di mana seorang Muslim dan seorang Muslim, atau seorang Muslim dan bukan Islam telah berkahwin di bawah undang-undang Islam, Akta tersebut tidak terpakai untuk mereka. Sudah jelas bahawa Akta ini digubal oleh Parlimen untuk mengatur perkahwinan dan perceraian untuk orang bukan Islam di Malaysia. Akta itu tidak terpakai untuk perkahwinan dan perceraian umat Islam kerana ia berada dalam bidang kuasa Badan Perundangan Negeri di bawah Perlembagaan Persekutuan. Oleh itu, boleh dikatakan dengan pasti bahawa Akta tersebut digubal untuk mengatur perkahwinan dan perceraian orang bukan Islam di Malaysia dan bahawa secara jelas tidak termasuk perkahwinan dan perceraian orang Islam dan orang Islam yang berkahwin dengan mana-mana individu di bawah undang-undang Islam (lihat perenggan 15, 18–19 & 28–29).

- (2) Telah didapati bahawa memasukkan seorang Muslim sebagai responden bersama atas tuduhan berzina dalam petisyen perceraian di bawah s 58 Akta tidak termasuk dalam 'perkahwinan salah satu pihak yang menganut agama Islam' dalam s 3(3) Akta. Ia juga tidak berkaitan dengan 'seorang Muslim atau orang yang berkahwin di bawah Undang-undang Islam'. Oleh itu, kenyataan bahawa apabila seorang yang dituduh berzina adalah seorang Muslim tidak melarang seseorang pemohon untuk menyebutnya sebagai responden bersama dalam petisyen perceraian atau meminta agar responden bersama dihukum atas ganti rugi tuduhan berzina di bawah s 58 Akta (lihat perenggan 35–36).
- (3) Menamakan seorang wanita yang dituduh berzina sebagai responden bersama dalam petisyen perceraian, membenarkan seorang pemohon untuk meminta ganti rugi dari responden bersama atas tuduhan berzina. Seksyen 58 Akta tidak memperuntukkan ganti rugi terhadap responden bersama apabila relif yang dipohon adalah perceraian kehakiman. Mahkamah mendapati bahawa pemohon yang memasukkan seorang wanita berzina sebagai responden bersama dalam petisyen tersebut jelas bertentangan dengan peruntukan s 58 Akta tersebut. Permohonan

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- A pemohon dalam petisyen bahawa responden bersama dihukum ganti rugi kerana berzina jelas tidak digunakan. Kata-kata 'frivolous or vexatious' dalam A 18 k 19(1)(b) KKM digunakan untuk merujuk kepada kes-kes dengan jelas tidak dapat digunakan. Tindakan pemohon dalam memasukkan responden bersama dan memohon agar dia
- B dihukum ganti rugi dalam petisyen untuk penceraian kehakiman, jelas merupakan penyalahgunaan proses mahkamah. Penamaan responden bersama dalam petisyen itu dirancang untuk memalukan seorang wanita yang disyaki oleh pemohon yang telah berzina dengan suaminya (lihat perenggan 40 & 44–47).]
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Cases referred to

- Attorney-General of the Duchy of Lancaster v London and North Western Railway Company* [1892] 3 Ch 274, CA (refd)
- D *Chor Phaik Har v Farlim Properties Sdn Bhd* [1994] 3 MLJ 345; [1994] 4 CLJ 285; [1994] 3 AMR 2103, FC (refd)
- Hadi bin Hassan v Suria Records Sdn Bhd & Ors* [2005] 3 MLJ 522, HC (refd)
- Latifah bte Mat Zin v Rosmawati bte Sharibun & Anor* [2007] 5 MLJ 101, FC (refd)
- E *Middy Industries Sdn Bhd & Ors v Arensi-Marley (M) Sdn Bhd* [2013] 3 MLJ 511; [2012] 1 LNS 830, CA (refd)
- Ding Do Ca, deceased, Re* [1966] 2 MLJ 220, FC (refd)
- Royal College of Nursing of the United Kingdom v Department of Health and Social Security* [1981] 1 All ER 545; [1981] AC 800, HL (refd)
- F *Shudesh Kumar all Moti Ram v Kamlesh a/p Mangal Sain Kapoor* [2005] 5 MLJ 82, HC (refd)

Legislation referred to

- G Christian Marriage Ordinance (repealed by Law Reform (Marriage and Divorce) Act 1976)
- Courts of Judicature Act 1964 s 15
- Divorce and Matrimonial Proceedings Rules 1980 r 103
- Federal Constitution art 74, State List, List II, Ninth Schedule
- H Law Reform (Marriage and Divorce) Act 1976 ss 3(3), 58, 58(1), (2), 64(2), 65(1), (2)
- Rules of Court 2012 O 18 r 19(1)(a), (1)(b), (1)(c), (1)(d)
- Ravi Nekoo (Pushpa Ratnam and Parvinder Kaur with him) (Hakem Arabi & Assoc) for the petitioner.*
- I *CJ Siew (CY Ong with him) (Douglas Yee) for the co-respondent.*

Faizah Jamaludin J:

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INTRODUCTION

[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: (a) the Law Reform (Marriage and Divorce) Act 1976 ('the LRA') does not apply to Muslims; and (b) 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), (1)(b) and/or (1)(c) and/or (d) of the Rules of Court 2012 ('the ROC') and/or r 103 of the Divorce and Matrimonial Proceedings Rules 1980 ('the DMPR') and/or the inherent jurisdiction of this court.

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[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.

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[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.

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[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.

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

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A [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.

C ISSUES FOR DETERMINATION

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

- D (a) 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
- E (b) 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?

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

G *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 solemnized 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.)*

H The co-respondent's case

I [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 ...*'.

[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. A

[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 word 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. B
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The petitioner's case D

[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:

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 solemnized or registered under this Act; E

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

- (a) this Act does not apply to a Muslim *who is married under Islamic law*; or F
- (b) 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. G

Interpreting s 3(3) of the LRA H

[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. I

[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*, Oxford

- A University Press, Reprinted 2013 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 (supra, page 197)
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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. (supra, page 198)
- C [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 *Bennion on Statutory Interpretation*, LexisNexis (5th Ed 2008, s 378).
- D [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.
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- [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-Muslim are married under Islamic law, the LRA does not apply to them. While Muslims in
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- Malaysia are not permitted under the Syariah laws to marry a non-Muslim, such marriages are permitted in many countries.
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- [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.
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- [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. *Understanding Common Law Legislation: Drafting and Interpretation*, Oxford University Press, pp 81–85, 198.
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The intention of Parliament and the juridical nature of the LRA

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

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*... 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 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.*

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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.)

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[23] In *Re Ding Do Ca* 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.

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[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 Malaysia 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, *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.

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A [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:

B 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.

C [26] The Federal Court in *Chor Phaik Har v Farlim Properties Sdn Bhd* [1994] 3 MLJ 345; [1994] 4 CLJ 285; [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:

E 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.

F 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.

G [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 bte Mat Zin v Rosmawati bte Sharibun & Anor* [2007] 5 MLJ 101, said the following:

I [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 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 Thompson LP in *Re Ding Do Ca* 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.

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[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.

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[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.

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[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

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- A 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.
- 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 United Kingdom v Department of Health and Social Security* [1981] 1 All ER 545; [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*
- D *existence, the courts have to consider whether they fall within the Parliamentary intention ...* (Emphasis added.)
- E [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
- F 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,
- G 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.
- H [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'.
- I [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.

Can a petitioner cite an alleged adulteress in a joint petition for judicial separation? A

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

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

- (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. B
- (2) A petition under subsection (1) may include a prayer that the correspondent be condemned in damages in respect of the alleged adultery. (Emphasis added.) C

[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. D

[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 is for judicial separation and not a petition for divorce. E

[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 a/l Moti Ram v Kamlesh a/p Mangal Sain Kapoor* [2005] 5 MLJ 82, the High Court held that the wife could not claim damages against the party cited in a petition for judicial separation. F G

[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 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. H I

A [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
B 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
C 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
D 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
E 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 bin Hassan v Suria Records Sdn Bhd & Ors* [2005] 3 MLJ 522; *Attorney-General of the Duchy of Lancaster v London and North Western Railway Company* [1892] 3 Ch 274 at p 277. The Court of Appeal in *Middy Industries Sdn Bhd & Ors v Arensi-Marley (M) Sdn Bhd* [2013] 3 MLJ 511; [2012] 1 LNS 830 held that:
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[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 & Ors* [1990] 1 SLR 1251; *Afro Asia Shipping Co Ltd v Haridass Ho & Partners* [2003] 2 SLR 491; and *Riduan bin Yusof v Khng Thian Huat & Anor* [2005] 2 SLR 188).
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[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 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
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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 (Suing as a Firm) v Wee Chong Jin & Ors* [1998] 1 SLR 374 and *Lonrho plc v Fayed (No 5)* [1993] 1 WLR 1489).

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[46] This court finds that the petitioner 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.

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[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*, 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 all Moti Ram v Kamlesh alp Mangal Sain Kapoor*.

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DECISION

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

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[49] It is hereby ordered that:

- (a) the JS petition be struck out against the co-respondent;
- (b) paras 40–64 of the JS petition be expunged;
- (c) the co-respondent's name be expunged and removed from the intitlement of the JS petition and from all subsequent cause papers in relation to this matter;
- (d) 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
- (e) costs of RM3,000 to be paid by the petitioner to the co-respondent subject to the allocatur fee.

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A *Enclosure 15 allowed with costs of RM3,000 paid by petitioner to co-respondent.*

Reported by Mohd Kamarul Anwar

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