

# JUDGMENT Express

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Mohammad Najib Tun Haji Abdul Razak  
v. Thomas Thomas @ Mohan K Thomas

[2026] 3 MLRA

## MOHAMMAD NAJIB TUN HAJI ABDUL RAZAK

v.

## THOMAS THOMAS @ MOHAN K THOMAS

Court of Appeal, Putrajaya

Ravinthran N Paramaguru, Wong Kian Kheong, Nadzarin Wok Nordin JJCA

[Civil Appeal No: W-01(IM)(NCvC)-907-12-2022]

10 March 2026

*Civil Procedure: Striking out — Summary striking out of claim — Appeal against decision of High Court to strike out appellant’s claim against respondent/Attorney General summarily under O 18 r 19(1) Rules of Court 2012 — Exercise of prosecutorial discretion of Attorney General under art 145(3) Federal Constitution — Misfeasance in public office — Malicious process — Negligence — Federal Constitution, art 8 — Whether appellant’s causes of action in claim plainly unsustainable*

This was an appeal against the decision of the High Court to strike out the appellant’s claim summarily under O 18 r 19(1) of the Rules of Court 2012. The appellant was a former Prime Minister of Malaysia, having ceased to hold office following the 14th General Election in May 2018. The respondent, on the other hand, was appointed Attorney General of Malaysia on 4 June 2018 and held office until 28 February 2020. Under art 145 of the Federal Constitution (“FC”), the Attorney General was also the Public Prosecutor. Upon his appointment as Attorney General, the respondent authorised the prosecution of the appellant for various offences arising from the affairs of the company known as 1 Malaysia Development Berhad and its subsidiary, SRC International Sdn Bhd. In the instant civil suit, the appellant had sued the respondent with respect to 35 charges preferred against him in four criminal cases. The causes of action pleaded against the respondent were: (a) misfeasance in public office; (b) malicious process; and (c) negligence. In addition, the appellant pleaded that the respondent had breached art 8 of the FC by discriminating against him, in that individuals in other cases were allegedly accorded different treatment. The respondent then applied to strike out the appellant’s suit. The High Court Judge (“Judge”) allowed the respondent’s application, resulting in the present appeal.

**Held** (unanimously dismissing the appeal with costs):

**Per Ravinthran N Paramaguru JCA:**

(1) While art 145(3) of the FC granted prosecutorial discretion to the Attorney General, it did not immunise the wrongful exercise of it from civil actions. Neither did any other written law provide such protection to the Attorney General. Furthermore, in all the cases in the law reports where the Attorney General or Deputy Public Prosecutors had been sued for malicious prosecution,



save in the instant case in the court below and in the case of *Nik Mohd Suhaimi Ahmad Ghazali v. Siti Fairuz Shamsuri & Ors* that was decided by the same Judge, no court had said that said tort could not be availed in a civil action because the prosecutorial discretion under art 145(3) would operate to extinguish it at the outset. Therefore, the exercise of prosecutorial discretion of the Attorney General under art 145(3) was not immunised from civil actions if it was abused and exercised in bad faith. (para 52)

(2) In the instant case, the plea of misfeasance was devoid of particulars. Apart from the allegation that the respondent was prejudiced against the appellant from the outset, there were no particulars to support this tort with specific facts apart from what was pleaded in para 34(d) of the statement of claim. The allegation that the respondent prejudged the case and did not study the case was a bare averment devoid of particulars. As stated by the Judge, the prosecutor acted on the investigation papers submitted by the investigators. If the prosecution authorised by the respondent was done recklessly and without foundation, the appellant should have pleaded some facts to support the elements of malice and bad faith instead of making bare averments. (para 59)

(3) It was not clear how the tort of malicious process could apply to the facts of the present case. The instant appellant's complaint was that the prosecution was commenced by the respondent in bad faith and without reasonable and probable cause. This did not concern the misuse of a legal process, such as an application for a search warrant, which was inherently incapable of terminating in favour of a plaintiff. Here, the appellant was facing criminal trials that were capable of terminating in his favour. In such circumstances, the proper cause of action, if supported by evidence, would be the tort of malicious prosecution if the proceedings terminated in his favour. In the premises, it was plain and obvious that the plea of malicious process was unsustainable on the pleaded facts. (paras 71-72)

(4) There were no facts pleaded to support the tort of abuse of process. The respondent was the Attorney General at the material time and, based on the investigations carried out, authorised the prosecution of the appellant. The purpose of a prosecution must be presumed to be the securing of a conviction. If the appellant's case was that the prosecution was instituted for some ulterior purpose, or aimed at achieving an outcome other than a conviction, such an allegation ought to have been specifically pleaded. It was not. Indeed, the appellant did not plead the tort of abuse of process or any of its essential elements in the statement of claim. In the circumstances, this purported cause of action was plainly unsustainable. (paras 77-78)

(5) As for the claim of negligence, there was plainly no duty of care owed to the appellant by the respondent in his capacity as a private citizen. If the statements were defamatory of the appellant and made without justification, the appellant's remedy quite obviously lay in a defamation action rather than in negligence. Hence, the plea of negligence was also plainly unsustainable. (para 82)



(6) Article 8 was pleaded in the statement of claim on the basis that other accused persons allegedly received more favourable treatment from the respondent when he was the Attorney General. This was plainly a frivolous plea. Those other cases bore no connection to the appellant's case. Whatever discretion was exercised by the respondent as Attorney General in those cases was exercised within the said criminal proceedings, as permitted by art 145(3) of the FC and recognised in the case of *Johnson Tan Han Seng v PP & Other Appeals*. It could not be seen how such exercises of prosecutorial discretion could give rise to a civil cause of action in relation to the prosecution of the appellant. This plea should be struck out at the outset for being wholly unmeritorious and frivolous. (para 83)

**Per Wong Kian Kheong JCA (Supporting):**

(7) The present appeal ought to be dismissed on the following brief grounds: (1) in respect of the tort of negligence, the respondent, as the then Attorney General/Public Prosecutor, did not owe any duty of care to the appellant with regard to the exercise of the respondent's discretion in the filing of the charges against the appellant; (2) the appellant could not file this suit against the respondent premised on the pleaded torts because at the time of the filing of this suit, the appellant had not been finally acquitted of the charges brought against him; and (3) Malaysian courts should not recognise the tort of malicious process against the respondent as the then Attorney General/Public Prosecutor. (para 119)

**Case(s) referred to:**

*Ananda Kumar S Maharajah v. Peguam Negara Malaysia & Ors* [2025] MLRHU 3213 (fold)

*Dato' Seri Anwar Ibrahim v. PP* [2002] 1 MLRA 266 (refd)

*Everett v. Ribbands And Another* [1952] 1 All ER 823 (distd)

*Grainger v. Hill* (1838) 4 Bing NC 212; 132 ER 769 (refd)

*Johnson Tan Han Seng v. PP & Other Appeals* [1977] 1 MLRA 290 (distd)

*Karpal Singh & Anor v. PP* [1991] 1 MLRA 96 (distd)

*Khairuddin Abu Hassan v. Wan Aedil Wan Abdullah & Ors And Another Appeal* [2025] 4 MLRA 254 (refd)

*Law Society Of Singapore v. Tan Guat Neo Phyllis* [2007] SGHC 207; [2008] 2 SLR 239 (refd)

*Lok Kok Beng & Ors v. Loh Chiak Eong & Anor* [2015] 5 MLRA 152 (refd)

*Long Samat & Ors v. PP* [1974] 1 MLRA 412 (distd)

*Malaysia Building Society Bhd v. Tan Sri General Ungku Nazaruddin Ungku Mohamed* [1998] 1 MLRA 67 (refd)

*Muniandy Subrayan & Ors v. Chairman And Board Members Koperasi Menara Maju Bhd* [1996] 2 MLRA 104 (refd)



*Nik Mohd Suhaimi Ahmad Ghazali v. Siti Fairuz Shamsuri & Ors* [2023] MLRHU 2062 (distd)

*Ou Yang Chow Min v. Green Venture Capital Sdn Bhd & Another Case* [2022] 6 MLRH 489 (refd)

*Ramalingam Ravinthran v. Attorney-General* [2012] SGCA 2 (refd)

*Rawther v. Abdul Kareem* [1966] 1 MLRA 398 (refd)

*Rosli Dahlan v. Tan Sri Abdul Gani Patail & Ors* [2014] MLRHU 349 (folld)

*Roy v. Prior* [1971] AC 470 (distd)

*Sharil @ Shahrir Ab Samad v. Tommy Thomas @ Mohan K Thomas & Ors* [2025] 4 MLRH 1 (folld)

*SKN Land & Development Sdn Bhd v. Crest Worldwide Resources Sdn Bhd; Mudajaya Corporation Bhd & Ors (Interveners) And Another Appeal* [2026] MLRAU 22 (refd)

*Sundra Rajoo Nadarajah v. Menteri Luar Negeri, Malaysia & Ors* [2021] 5 MLRA 1 (refd)

*Symphony Life Berhad v. Ng Ying Ying & Ors And Other Appeals* [2026] 2 MLRA 440 (refd)

*TN Metal Industries Sdn Bhd & Ors v. Ng Pyak Yeow* [1995] 5 MLRH 110 (refd)

*Tony Pua Kiam Wee v. Government Of Malaysia & Another Appeal* [2019] 6 MLRA 432 (refd)

#### **Legislation referred to:**

Courts of Judicature Act 1964, s 14(1)

Criminal Procedure Code, ss 120, 376(1), (3)

Constitution of the Republic of Singapore [Sing], art 35(8)

Federal Constitution, arts 8, 145(3)

Rules of Court 2012, O 18 r 19(1)(a), (b), (d)

Subordinate Courts Act 1948, s 107(1)

#### **Counsel:**

*For the appellant: Firoz Hussein Ahmad Jamaluddin (Yudistra Darma Dorai, Melody Tham Cheng Yee, Daniel Annamalal, Woo J Enn, Harel Nieryan & Dheveendra Krishna Kumar with him); M/s Raj, Ong & Yudistra*

*For the respondent: Alan Adrian Gomez (Mervyn Lai Wei Shiung & Haikaldin Mahyidin with him); M/s Tommy Thomas*

[For the High Court judgment, please refer to *Mohammad Najib Tun Haji Abdul Razak v. Thomas Thomas @ Mohan K Thomas & Anor* [2023] 4 MLRH 356]



## JUDGMENT

### Ravinthran Paramaguru JCA (Majority):

#### Introduction

[1] This is an appeal against the decision of the High Court to strike out the claim of the appellant summarily under O 18 r 19(1) of the Rules of Court 2012.

#### Background Facts

[2] Before I turn to the legal issues arising in this appeal, it is convenient to first set out briefly the background facts relevant to the appellant's claim. They are as follows.

[3] The appellant is a former Prime Minister of Malaysia, having ceased to hold office following the 14th General Election in May 2018. The respondent, on the other hand, was appointed Attorney General of Malaysia on 4 June 2018, shortly after that election. He held office until 28 February 2020. Under art 145 of the Federal Constitution, the Attorney General is also the Public Prosecutor. Thus, in this judgment, any reference to the office of the Attorney General is to be understood as a reference to his capacity as the Public Prosecutor.

[4] Upon his appointment as Attorney General, the respondent authorised the prosecution of the appellant for various offences arising from the affairs of the company known as 1 Malaysia Development Berhad ("1MDB") and its subsidiary, SRC International Sdn Bhd ("SRC").

[5] In the instant civil suit, the appellant has sued the respondent with respect to the 35 charges preferred against him in four criminal cases. The Government of Malaysia was initially named as the 2nd defendant but the case against it was subsequently withdrawn, leaving the respondent as the sole defendant. The said four criminal cases are set out in para 2 of the statement of claim as follows:

- (1) The 1 Malaysia Development Berhad ("1MDB") case;
- (2) The International Petroleum Investment case ("IPIC") case;
- (3) The alleged abuse of power under the Malaysian Anti-Corruption Commission Act 2009 ("MACC Act 2009") case.
- (4) The alleged money laundering under the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ("AMLATFPUAA 2001") case.

[6] It must be noted at the outset that when the present suit was filed in October 2021, none of the four cases had been concluded. All were still pending and the appellant had neither been discharged nor acquitted of the charges. In another



related matter, namely the SRC case, the appellant had been convicted by the High Court, and that decision was then pending appeal before the Court of Appeal. However, in para 2 of the Statement of Claim itself, the charges in the SRC case were expressly excluded as forming the basis of the alleged wrongs for which the respondent is sued in tort.

[7] I shall now refer to the causes of action pleaded against the respondent. They are:

- (a) Misfeasance in public office (paragraph C(I) of the Statement of Claim);
- (b) Malicious process (paragraph C(I) of the Statement of Claim);
- (c) Negligence (paragraph C(II) of the Statement of Claim).

[8] In addition, the appellant pleaded that the respondent had breached art 8 of the Federal Constitution by discriminating against him, in that individuals in other cases were allegedly accorded different treatment.

[9] The alleged factual basis for the torts pleaded against the respondent is set out in paragraphs [8] to [31] of the Statement of Claim, and may be summarised as follows. Long before his appointment as Attorney General, and as early as 2012, the respondent is said to have formed the personal view that there was criminal conduct in relation to the affairs of 1MDB, and that “a massive fraud had been perpetrated”. In 2015, he allegedly discussed the purported wrongdoing in connection with 1MDB with Tun Mahathir bin Mohamed, who would later return to office as Prime Minister after the 14th General Election. In 2016, he accused the appellant of misappropriating funds from 1MDB in an article written for Malaysiakini.

[10] On his first day in office as the Attorney General, the respondent had said that he would study the 1MDB matter and prosecute the relevant persons. In para 18, the appellant pleaded that the respondent decided to prosecute him although the then MACC Director told him they found no wrongdoing.

[11] In paragraphs [24] to [29], the appellant pleaded that the respondent had been prejudiced against him before his appointment as Attorney General, during his time in office and after he left office. This is seen from the disparaging remarks he had made against the appellant from time to time.

[12] With respect to the plea of breach of art 8 of the Federal Constitution, the appellant alleged that the respondent had prosecuted him with passion, in contrast to the alleged failure to direct further investigations into the case concerning the death of a fireman, Muhammad Adib bin Muhammad Kassim, the withdrawal of charges against twelve individuals for terrorist activities involving the Liberation Tigers of Tamil Eelam (LTTE), and the withdrawal of charges against Lim Guan Eng, who was then the Secretary-General of the Democratic Action Party.



## Striking Out Application

[13] The respondent applied to strike out the suit upon service of the writ under all the limbs of O 18 r 19 of the Rules of Court 2012. In the affidavit in support, the respondent denied all the material factual averments. He averred that the Attorney General's discretion to prosecute under art 145(3) of the Federal Constitution is non-justiciable. With respect to interference in investigations, the respondent denied the allegation. He also denied authorising prosecution without first studying the case or that he had acted maliciously or in bad faith.

## Decision of High Court

[14] The learned High Court Judge held that the respondent is immune from proceedings against him by virtue of the discretionary power under art 145(3) of the Federal Constitution. Under this article, the Attorney General, who is also the Public Prosecutor, is conferred with the discretionary power to institute, conduct or discontinue any proceeding for criminal offences. This is the main reason the learned High Court Judge found that there was no reasonable cause of action. The learned High Court Judge also opined that the exercise of the power under art 145(3) is non-justiciable and cannot be challenged by way of civil action.

[15] The learned High Court Judge also held that for the tort of misfeasance and malicious process to exist, the respondent must have conducted the criminal proceedings or been involved in it. However, when the instant case was instituted, the trial of the four cases had not even commenced and there was no final determination. Therefore, His Lordship opined that the instant suit is a collateral attack on the 35 criminal charges in the said four cases. He also held that there was a "check and balance" mechanism in that it is the courts that will determine whether the appellant is guilty and not the respondent.

## Issues In The Appeal

[16] Counsel for the appellant argued that he is not challenging the discretionary power of the respondent to prosecute his client in the criminal court. He further submitted that the instant civil suit is not a collateral attack on the criminal cases. Therefore, the reasoning of the High Court based on the constitutional discretionary power to prosecute and the non-justiciability of the exercise of that power is erroneous.

[17] However, he argued that quite apart from taking out an application in a criminal proceeding to strike out or quash a criminal charge, an Attorney General can be sued personally in a civil case, which is what his client had done. He further argued that, contrary to the finding of the High Court, sufficient material facts had been pleaded to support the tort of malicious process.

[18] On the other hand, the main issues argued by counsel for the respondent were the non-justiciability of the exercise of the Attorney General's discretionary powers under art 145(3) of the Federal Constitution, the



non-existence of the tort of malicious process, and the insufficiency of the pleadings, or alternatively, the inapplicability and unsustainability of the other torts alleged. I shall address the main issues that arise from the arguments of the parties below.

### Immunity From Civil Action

[19] From my reading of the written grounds of judgment, the learned High Court Judge was of the view that the Attorney General has legal immunity when he exercises his powers under art 145(3) and his act of prosecuting the appellant is non-justiciable. Thus, the learned High Court Judge said that there was no chance of success. This is the main reason, apart from other reasons, that he found there was no reasonable cause of action. In paragraph [41] of the judgment, His Lordship said as follows:

The most recent development in respect of the justiciability of art 145(3) is the Federal Court's decision in *Sundra Rajoo*. However, this court agreed with the defendant that *Sundra Rajoo's* decision did not alter the position of the unfettered discretion of the Attorney General, more so the issue is different in that whether *Sundra Rajoo* as a high officer of the KLRCA has immunity from prosecution or otherwise, as a suspect. **Here it is very clear that the Attorney General/Tommy Thomas has the immunity from being sued by virtue of the discretion granted to him by art 145(3) of the Federal Constitution.** The decision in *Sundra Rajoo* however, only opened the avenue of judicial review. Even so, the Federal Court held that it is only in rare and exceptional cases that the decision may be judicially reviewed.

[Emphasis Added]

[20] In paragraph [44], His Lordship said there is no reasonable cause of action because of the immunity of the Attorney General when he exercises his power under art 145(3). I reproduce below the said paragraph:

[44] Similarly in Malaysia, in a case of a Magistrate being sued for anything done in the course of the proceedings, he can apply to strike out the claim because of the protection accorded to him under s 107 of the Subordinate Courts Act 1948 as there was no cause of action. **Likewise in the present case, as Tommy Thomas is protected and is immune from any proceedings by virtue of the discretionary powers accorded to him, the plaintiff's claim should be struck out as there was no reasonable cause of action, to begin with.**

[Emphasis Added]

[21] In paragraph [42], His Lordship held that in the light of previous decisions of the superior courts establishing the principle that the exercise of the Attorney General's discretion under art 145(3) is non-justiciable, the tortious claims of misfeasance in public office, malicious process and infringement of art 8 ought to be struck out, as they disclose no reasonable cause of action and are therefore plainly unsustainable.



[22] In coming to his conclusion, the learned High Court Judge had regard to the several notable decisions of the apex court in the past such as *Long Samat & Ors v. PP* [1974] 1 MLRA 412, *Johnson Tan Han Seng v. PP & Other Appeals* [1977] 1 MLRA 290, *Karpal Singh & Anor v. PP* [1991] 1 MLRA 96, *Dato' Seri Anwar Ibrahim v. PP* [2002] 1 MLRA 266. His Lordship distinguished the more recent Federal Court case of *Sundra Rajoo Nadarajah v. Menteri Luar Negeri, Malaysia & Ors* [2021] 5 MLRA 1, where it was held that discretionary power under art 145(3) is amenable to judicial review in appropriate circumstances.

[23] I have read the above-mentioned eminent authorities which the High Court applied in the instant case with respect to the issues of immunity and non-justiciability *vis-à-vis* the discretion of the Attorney General under art 145(3) of the Federal Constitution.

[24] With respect, I am of the view that those cases have been misapplied to the instant civil suit. It must be noted that all of the said cases were criminal proceedings, unlike the instant case, which is a civil action. In each of the said cases, the accused sought to challenge the exercise of the Attorney General's discretion in the following contexts: the decision to proceed with a prosecution after inordinate delay (see *Karpal Singh & Anor v. PP (supra)*); the choice of charge preferred (see *Long Samat & Ors v. PP (supra)*); alleged discriminatory treatment in charging persons found in possession of firearms (see *Johnson Tan Han Seng v. PP & Other Appeals (supra)*); and the decision to prosecute under a law annulled by the Dewan Rakyat but not annulled yet by the Dewan Negara (see *Dato' Seri Anwar Ibrahim v. PP (supra)*).

[25] It was in those factual contexts in the said criminal proceedings and in the course of addressing attempts to impugn the Attorney General's discretion to institute criminal proceedings that the courts observed that such discretion is unfettered. I do not disagree with said eminent authorities. However, I do not find in any of those judgments a pronouncement that the Attorney General enjoys immunity from civil liability for wrongs committed in the exercise of his prosecutorial discretion under art 145(3) of the Federal Constitution.

[26] I also note that although art 145(3) grants the Attorney General the power to prosecute at his discretion, no provision in the said article or elsewhere in the Federal Constitution or other written law grants him immunity from civil actions like the statutory immunity granted to Judges, Judicial Officers, Sessions Court Judges and Magistrates. The protection is given in s 14(1) of the Courts of Judicature Act 1964 (Revised 1972) and s 107(1) of the Subordinate Courts Act 1948 (Revised 1972). The similarly worded provisions enact that they shall not be liable to be sued in any civil court for any act done in the discharge of their official duty.

[27] Indeed, if it were the law that the Attorney General could not be sued even when he maliciously and in bad faith exercises his prosecutorial powers, the long-recognised tort of malicious prosecution in this country would cease to apply against him and Deputy Public Prosecutors. The tort would then



operate only against private individuals who set the criminal law in motion, such as those who lodge police reports, give false statements, or institute private prosecutions. This issue has been considered in a number of High Court decisions, to which I shall turn below.

[28] However, before proceeding further and without undue digression, it is appropriate to consider the nature and elements of the tort of malicious prosecution. These were authoritatively set out by the Federal Court in the leading decision of *Rawther v. Abdul Kareem* [1966] 1 MLRA 398, where Thomson LP stated as follows:

In any such action the plaintiff must prove at least five things and unless he does so he cannot succeed. He must prove that the defendant set the criminal law in motion against him. He must prove that the criminal proceedings against him terminated in his favour, that the defendant had no “reasonable and probable cause” for setting the law in motion against him and that the plaintiff was actuated by malice in the sense that he had a motive other than only to carry the law into effect. And for historical reasons (the action was originally in case) he must prove damage.

[29] No reported case in which such an action has succeeded against the Attorney General was cited to us. It would, in any event, be a rare case in which such a claim succeeds, given the heavy burden on a plaintiff to establish malice and bad faith on the part of the Attorney General, who is entrusted with the administration of the criminal law and whose functions necessarily include the prosecution of wrongdoers, as opposed to a private individual.

[30] Nevertheless, in several reported decisions, our courts have grappled with the question of whether the Attorney General or Deputy Public Prosecutors may be sued for this tort. I am mindful that in the instant case, the tort of malicious prosecution was not pleaded. I shall nonetheless examine the malicious prosecution cases against the Attorney General or Deputy Public Prosecutors for the purpose of considering the argument of counsel for the respondent that the exercise of prosecutorial discretion is non-justiciable in the sense that it cannot give rise to any civil liability even if it is abused.

[31] Perhaps, this issue arose for the first time in the High Court case of *Rosli Dahlan v. Tan Sri Abdul Gani Patail & Ors* [2014] MLRHU 349. In that case, an advocate sued the Attorney General, Deputy Public Prosecutors, and other public officials for various torts, including malicious prosecution and misfeasance in public office. The defendants applied to strike out the action. Insofar as the Attorney General and the Deputy Public Prosecutors were concerned, one of the grounds relied upon was that no civil action could be maintained against them on the basis that they were protected by absolute prosecutorial immunity.

[32] The High Court did not accept the above-mentioned ground of legal immunity to strike out the civil action under O 18 r 19(1) of the Rules of Court 2012. Vazeer Alam Mydin JC (now FCJ) was mindful that a long line of cases



starting with the *Long Samat case (supra)* had established that the Attorney General's exercise of prosecutorial discretion in respect of his discretion to prosecute, or not to prosecute, or to discontinue a prosecution or amend or prefer a lesser charge is not justiciable or subject to judicial oversight. His Lordship observed as follows in paragraph [76] of his judgment:

A good starting point to determine this issue would be to look at constitutional principles. There is a separation of the prosecutorial and judicial function in the Federal Constitution and both are given equal status. As co-equals, it is generally accepted that one body may not interfere with the functions of the other, and in this regard the courts have consistently refused to subject the Attorney General's exercise of prosecutorial discretion to judicial oversight, with the exception of the power of the court to prevent unconstitutional or unlawful exercise of prosecutorial power.

[33] However, His Lordship noted, as I did earlier, that the said cases were criminal cases and did not deal with the question of the Attorney General's immunity with regard to civil actions. His Lordship also referred to the Singapore position stated in the High Court case of *Law Society Of Singapore v. Tan Guat Neo Phyllis* [2007] SGHC 207; [2008] 2 SLR 239. In that case, Chan Sek Keong CJ opined that the Attorney General's power can be reviewed if he uses the power for an ulterior purpose or the power is abused. Article 35(8) of the Singapore Constitution that grants the power to prosecute to the Attorney General is similarly worded as our art 145(3). I would pause to observe that the above-mentioned view expressed in *Law Society Of Singapore v. Tan Guat Neo Phyllis (supra)* was later endorsed in the landmark Singapore Court of Appeal case of *Ramalingam Ravinthran v. Attorney-General* [2012] SGCA 2.

[34] After referring to the similar positions in two other commonwealth jurisdictions, namely Canada and England, Vazeer Alam Mydin JC rejected the notion of absolute prosecutorial immunity in the following passage:

[93] Once again there is clear affirmation by the English Court of Appeal of the principle that the Public Prosecutor does not enjoy absolute prosecutorial immunity and a person "who is aggrieved by a prosecutor's decision, has in our system potentially extensive private law remedies for a deliberate abuse of power." And that would include a claim for malicious prosecution and misfeasance in public office.

[35] In two recent well-argued High Court decisions, a not dissimilar position was adopted when grappling with the same issue, namely the scope of the Attorney General's absolute prosecutorial discretion *vis-à-vis* the alleged existence of immunity from civil actions for its purported abuse.

[36] In *Sharil @ Shahrir Ab Samad v. Tommy Thomas @ Mohan K Thomas & Ors* [2025] 4 MLRH 1, the plaintiff received RM1 million from the then Prime Minister who incidentally is the appellant in this appeal. The plaintiff was charged with a money-laundering offence for failing to declare the receipt of the said sum. The charge was subsequently withdrawn and the court ordered



an acquittal. The plaintiff then sued the defendants for malicious prosecution, wrongful arrest and misfeasance in public office.

[37] The 1st defendant, who was the Attorney General at the time the charge was instituted and who is also the respondent in the instant appeal, applied under O 18 r 19(1) of the Rules of Court 2012 to strike out the plaintiff's claim on the grounds that it disclosed no reasonable cause of action, was scandalous, frivolous or vexatious, constituted an abuse of the process of the court, or was otherwise unsustainable in law.

[38] The main argument of the 1st defendant was that art 145(3) of the Federal Constitution immunized him from civil claims arising from the exercise of the prosecutorial power vested in the said article. Roz Mawar JC (now Judge) rejected that argument and preferred to follow the approach taken in *Rosli Dahlan v. Tan Sri Abdul Gani Patail & Ors* (*supra*). Her Ladyship said as follows:

[12] The 1st defendant's contention on absolute prosecutorial immunity drawn from the common law is also unpersuasive. Even under English common law, courts have recognised the feasibility of malicious prosecution claims notwithstanding such immunity (see *Riches v. Director Of Public Prosecutions* [1973] 2 All ER 935 and *Elguzouli-Daf v. The Commissioner Of Police Of The Metropolis & Anor* [1995] 1 All ER 833). More pertinently, the High Court in several local cases like *Rosli Dahlan v. Tan Sri Abdul Gani Patail & Ors* [2014] MLRHU 349 and *Dato' Pahlawan Ramli Yusuff v. Tan Sri Abdul Gani Patail & Ors* [2014] 4 MLRH 573 has categorically held that the Attorney General enjoys no absolute immunity from suit for malicious prosecution.

[13] The 1st defendant has not provided any cogent reason to depart from these authorities. On the contrary, this court finds the detailed reasoning in these judgments, drawing from developments in other Commonwealth jurisdictions, highly persuasive. Prosecutorial immunity cannot be absolute and must yield in exceptional cases where prosecutorial power has been abused for improper motives. To hold otherwise would place the Attorney General completely above the law. As such, this court holds that claims for malicious prosecution and misfeasance in public office can lie against the Attorney General in appropriate cases and it is not a legal position contrary to art 145(3) of the FC.

[39] This decision was subsequently followed in the High Court case of *Ananda Kumar S Maharajah v. Peguam Negara Malaysia & Ors* [2025] MLRHU 3213. In that case, the Attorney General and a deputy public prosecutor were sued for malicious prosecution.

[40] The plaintiff had earlier been charged with causing hurt. After a lapse of two years, the charge was withdrawn and the Magistrate ordered a discharge amounting to an acquittal. One of the central issues before the High Court was whether the civil action against the Attorney General could be sustained in light of the prosecutorial discretion conferred under art 145(3) of the Federal Constitution.



[41] Elaine Yap Chin Gaik JC distinguished the old line of criminal cases that dealt with the non-justiciability of the Attorney General's prosecutorial discretion under art 145(3) of the Federal Constitution on the basis that they did not concern civil liability. Although the plaintiff's case was dismissed for other reasons, Her Ladyship adopted the view expressed in *Rosli Dahlan v. Tan Sri Abdul Gani Patail & Ors (supra)* and *Sharil @ Shahrir Ab Samad v. Tommy Thomas @ Mohan K Thomas & Ors (supra)* that the Attorney General does not enjoy immunity from civil liability arising from the exercise of prosecutorial discretion.

[42] The learned Judicial Commissioner in the above-mentioned case also drew support from the Court of Appeal decision in *Khairuddin Abu Hassan v. Wan Aedil Wan Abdullah & Ors And Another Appeal* [2025] 4 MLRA 254, although there was no direct discussion on the import of the prosecutorial discretion vested in art 145(3) of the Federal Constitution.

[43] In that case, the plaintiff filed a suit against various individuals, including police officers, the Inspector General of Police, the Attorney General and a Deputy Public Prosecutor. The claim was for malicious prosecution and unlawful detention. The claim for unlawful detention was allowed by the High Court but the claim for malicious prosecution was dismissed. The Court of Appeal affirmed the decision to dismiss the malicious prosecution claim after examining it on its merits. It is important to note that the Court of Appeal did not dismiss the appeal on the ground that the prosecutorial discretion of the Attorney General is non-justiciable, nor on the ground that it confers immunity from civil actions when it is abused. This finding is implicit in the following statement of the Court of Appeal:

With regard to the non-justiciability of the discretion to prosecute, this was not about the denial of prosecutorial authority but the abuse of such authority.

[44] Around the same period, the only contrarian view on this issue was expressed by the learned High Court Judge in the instant case and by the same Judge in the case of *Nik Mohd Suhaimi Ahmad Ghazali v. Siti Fairuz Shamsuri & Ors* [2023] MLRHU 2062.

[45] In *Nik Mohd Suhaimi's* case, the plaintiff was investigated by the Malaysian Anti-Corruption Commission (MACC) and charged with forgery. He was acquitted without his defence being called. The appeal against this decision was later withdrawn. He sued the MACC and its officers for false imprisonment, wrongful arrest and harassment. He also sued the Attorney General and Deputy Public Prosecutors for malicious prosecution. At the end of the full trial, the High Court found that the plaintiff had proved his claim for wrongful imprisonment, wrongful arrest and harassment against the MACC. However, the High Court disallowed the claim for malicious prosecution against the Attorney General on the ground that it is unsustainable because of the discretionary prosecutorial power under art 145(3) of the Federal Constitution.



[46] I observe that even with respect to criminal proceedings as opposed to civil actions against the Attorney General that I discussed above, the recent Federal Court of *Sundra Rajoo Nadarajah v. Menteri Luar Negeri, Malaysia & Ors (supra)* demonstrated that the discretion of the Attorney General to prosecute is amenable to judicial review in rare and exceptional circumstances.

[47] In the above-mentioned case, the appellant was the former director of the Asian International Arbitration Centre, which was established under the auspices of the Asian-African Legal Consultative Organization (AALCO). He was charged for criminal breach of trust in the Sessions Court. The charges stated that the offences were committed by the appellant in his capacity as “the Director of the AIAC”.

[48] To cut a long story short, the issue that arose in the appeal was with respect to the immunity of the appellant as a “High Officer” under the International Organizations (Privileges and Immunities) Act 1992 (Act 485) and the prosecutorial discretion of the Attorney General. The appellant claimed he had legal immunity from criminal proceedings by virtue of being a “High Officer”. It was not disputed that the Secretary General of AALCO declined to waive the immunity of the appellant. The appellant took out judicial review proceedings to challenge the decision of the Attorney General to prosecute him.

[49] The High Court found in favour of the appellant after making a finding that the immunity covered criminal proceedings. The Court of Appeal then reversed the decision on three grounds. The first ground was that the immunity was not complete. The second ground was that the appropriate forum to determine the immunity status was the criminal court. The third ground was that the decision of the Attorney General was premised on unfettered discretion and therefore such decision is not amenable to judicial review.

[50] The Federal Court disagreed with all the findings of the Court of Appeal. It held that immunity from “legal process” under the said International Organizations (Privileges and Immunities) Act 1992 (Act 485) included criminal proceedings. As for the judicial review procedure, the Federal Court held that where the allegation is that the charge is a nullity, the proper forum is the High Court acting within its supervisory jurisdiction. With respect to the prosecutorial discretion of the Attorney General, the Federal Court held it was not absolute and unfettered and that, in rare and exceptional cases, such as in that case where the appellant had legal immunity, the discretion is subject to judicial review.

[51] I have referred to *Sundra Rajoo Nadarajah v. Menteri Luar Negeri, Malaysia & Ors (supra)* by way of comparison only, as in that case the prosecutorial discretion was directly challenged. In the instant case, as in the cases of *Rosli Dahlan v. Tan Sri Abdul Gani Patail & Ors (supra)* and *Sharil @ Shahrir Ab Samad v. Tommy Thomas @ Mohan K Thomas & Ors (supra)* and *Ananda Kumar S Maharajah v. Peguam Negara Malaysia & Ors (supra)* (the trio of cases), there is no challenge



to the prosecutorial discretion of the Attorney General under art 145(3) of the Federal Constitution. What is questioned in this case and in the said trio of cases is the consequence of the abuse of that discretion and whether it can give rise to an actionable tort, such as malicious prosecution against the Attorney General.

[52] For my part, I agree with the views expressed in the trio of cases that I discussed above. At the risk of repetition, I note that whilst art 145(3) of the Federal Constitution grants prosecutorial discretion to the Attorney General, it does not immunize the wrongful exercise of it from civil actions. Neither does any other written law provide such protection to the Attorney General. Furthermore, in all the cases in the law reports where the Attorney General or Deputy Public Prosecutors have been sued for malicious prosecution, save in the instant case in the court below and in the *Nik Suhaimi* case that was decided by the same High Court Judge, no court has said that said tort cannot be availed in a civil action because the prosecutorial discretion under art 145(3) will operate to extinguish it at the outset. For the above reasons, I am of the view that the exercise of prosecutorial discretion of the Attorney General under art 145(3) is not immunized from civil actions if it is abused and exercised in bad faith.

[53] I am also of the view that the High Court erred when it said that the instant civil suit is a collateral attack on the four criminal cases. The remedy sought in the statement of claim is not the quashing of the charges but only damages for the alleged torts. In fact, counsel for the appellant had placed on record that his client is not challenging the criminal charges via this suit.

[54] I shall now consider the sufficiency and the sustainability of the pleaded causes of action.

### **Misfeasance**

[55] The particulars of this tort are pleaded in paragraph 34 (d)(i-iv), which I have summarized when setting out the background facts. They are:

- (i) Prejudging Najib Razak's case before deciding to prosecute him.
- (ii) Not studying the case against Najib Razak independently and objectively.
- (iii) Interfering with investigations.
- (iv) And, acting maliciously and in bad faith.

[56] The key ingredients of the tort of misfeasance in public office were set out in the Federal Court case of *Tony Pua Kiam Wee v. Government Of Malaysia & Another Appeal* [2019] 6 MLRA 432. In that case, the plaintiff sued the Prime Minister for the tort of misfeasance in public office by unlawfully enriching himself. The action was struck out by the High Court primarily on the ground



that the Prime Minister is not a public officer. The decision was affirmed by the Court of Appeal. In allowing the appeal and reinstating the suit, the Federal Court took the opportunity to affirm the existence of the tort in our law and discuss its ingredients in the following passage:

[184] The key ingredients of the tort are:

- (i) an abuse of public power or authority;
- (ii) by a public officer;
- (iii) who either: (a) knew that he was abusing his public power or authority; or (b) was recklessly indifferent as to the limits of their public power or authority; and
- (iv) who acted or omitted to act either with: (a) the intention of harming the plaintiff (targeted malice); or (b) with the knowledge of the probability of harming the plaintiff, or with reckless indifference to the probability of harming the plaintiff or a class of persons of which the plaintiff was one.

[57] The tort of misfeasance was further described by the Federal Court as follows:

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

[58] At the time the instant suit was instituted, all four criminal cases were still pending. Accordingly, it could not yet be determined whether the decision to prosecute was made in bad faith or without reasonable and probable cause. In my view, therefore, the claim for misfeasance in public office, insofar as it is founded on the decision to prosecute, was prematurely brought. I draw an analogy to the essential element of the tort of malicious prosecution, namely that the criminal proceedings must have terminated in favour of the plaintiff before such an action may be commenced. Otherwise, a plaintiff who seeks to challenge a decision to prosecute on the ground of bad faith could circumvent this requirement by framing the claim as one for misfeasance in public office rather than malicious prosecution. If such an action were allowed to proceed and succeed, it would be incongruous, if not absurd, should the plaintiff ultimately be convicted in the criminal proceedings. On the ground of prematurity alone, I would therefore hold that the respondent is entitled to



strike out the claim for misfeasance in public office insofar as it is premised on the Attorney General's decision to prosecute the appellant.

[59] In the instant case, the fact that the respondent, as the Attorney General, was a public officer is not in dispute. However, I am of the view that the plea of misfeasance is also devoid of particulars. Apart from the allegation that the respondent was prejudiced against the appellant from the outset, there are no particulars to support this tort with specific facts apart from what is pleaded in paragraph 34(d) of the statement of claim that I reproduced earlier. The allegation that the respondent prejudged the case and did not study the case is a bare averment devoid of particulars. As stated by the learned High Court Judge, the prosecutor acts on the investigation papers submitted by the investigators. If the prosecution authorised by the respondent was done recklessly and without foundation, the appellant should have pleaded some facts to support the elements of malice and bad faith instead of making bare averments.

[60] As for the argument that the respondent had interfered with the investigations, again, I find that plea to be a bare averment without particulars. All that was pleaded is that the respondent had met the then Prime Minister, Tun Mahathir bin Mohamed, and the investigators. This fact by itself is not sinister or improper, as the respondent was the Attorney General at the material time and can require investigators to submit reports under s 120 of the Criminal Procedure Code. No particulars whatsoever with respect to the fabrication of evidence were pleaded. I would therefore agree with the observations of the learned High Court Judge in paragraphs [47] to [49] on the issue of insufficiency of particulars.

[61] For the above reasons, I am of the view that the plea of misfeasance in public office is premature and is not supported by particulars as well.

### **Malicious Process**

[62] As observed by counsel for the respondent, the same set of facts to support misfeasance was pleaded to support this purported tort. The tort of malicious process has yet to be recognized in our law. Even if it is recognized, the facts of this case do not permit it to be pleaded. My reasons for this conclusion are as follows.

[63] First, I repeat here that the appellant did not plead malicious prosecution as a cause of action but has instead pleaded "malicious process". In para 68 of the written submission, counsel for the appellant appeared to have conceded that the tort of malicious process has not been adjudicated in this context in Malaysia, for he said as follows:

It is indeed so that malicious process has not been adjudicated in this context in Malaysia. But, there is recognition of the tort of abuse of process. This tort is analogous to malicious process.



[64] To support the claim for malicious process, counsel for the appellant cited the case of *Roy v. Prior* [1971] AC 470, which is a decision of the House of Lords. In this case, the plaintiff was a medical doctor. His patient was charged for theft. His solicitor wanted the plaintiff to give evidence in his defence. On the assumption that the plaintiff was evading service, the solicitor gave evidence *ex-parte* to obtain a warrant of arrest. After being arrested and compelled to give evidence, the plaintiff brought an action against the solicitors for causing his arrest. Lord Morris of Borth-y-Gest, who wrote the leading judgment, treated the cause of action as “malicious arrest” or “abuse of process” and allowed it to proceed. Insofar, as the false evidence given by the solicitor to procure the arrest warrant was concerned, where witness immunity would apply, it was held to be immaterial as the process itself was abused. The other law lords concurred. Lord Morris said as follows:

The gist of the complaint, where malicious arrest is asserted, is not that some evidence is given (though if evidence is given falsely it may be contended that malice is indicated) but that an arrest has been secured as a result of **some malicious proceeding for which there was no reasonable cause.**

.....

So also in actions based upon alleged abuses of the process of the court it will often have happened that the court will have been induced to act by reason of some false evidence given by someone. In such cases the actions are not brought on or in respect of **any evidence given but in respect to malicious abuse of process** (see *Else v. Smith* (1822) 2 Chit.304).

.....

The gist and essence of the claim is that process was instituted as a result of which the court was induced to order the arrest of the plaintiff. **It is alleged that this was done maliciously and without reasonable cause and that the giving of evidence as merely a step in bringing about the alleged abuse of process.**

[Emphasis Added]

[65] Thus, the above-mentioned case is about malicious arrest or abuse of the court process. There is no discussion in any of the judgments of the law lords whether there is a tort such as “malicious process” that can apply to a prosecution that is commenced without reasonable and probable cause.

[66] Counsel for the appellant also referred to the English Court of Appeal case of *Everett v. Ribbands And Another* [1952] 1 All ER 823. This case was referred to in *Nik Suhaimi's* case by the same learned Judge as in the court below. In *Nik Suhaimi's* case, the same Judge decided “to rebrand” the claim for “wrongful imprisonment/arrest/harassment” to “malicious process or abuse of process.”

[67] The facts of *Everett v. Ribbands And Another (supra)* may be briefly stated as follows. A police officer at the instance of a third person laid information against the plaintiff to the Magistrate. Consequently, the plaintiff was ordered



to find sureties and keep the peace for twelve months. The plaintiff sued the police officer concerned and the third person for malicious prosecution. It must be noted that the action was not for malicious process.

[68] The issue before the High Court and the Court of Appeal was whether the proceedings brought against the plaintiff could have been determined in his favour. Since the answer was in the affirmative and the proceedings were decided against the plaintiff, it was held that the action in malicious prosecution cannot succeed. Denning LJ said that in ancient times, the procedure to require a man to provide sureties to keep the peace was merely a legal process, and it was done without him being heard. However, since 1879, it was converted to a full legal hearing with the characteristics of a criminal proceeding and the person who is the subject of a complaint can be heard in his own defence. Therefore, Denning LJ said no action for maliciously instituting the proceedings lies as it did not end favourably for the plaintiff. The appeal of the plaintiff was dismissed unanimously.

[69] Denning LJ also, by way of obiter, discussed the difference between an action for malicious process and malicious prosecution in the following passage:

In these cases where the process of the law was invoked without the other party being heard, it was settled law that the injured party could bring an action for damages if he could show that the process was obtained maliciously and without reasonable and probable cause: *Steward v. Gromett*. **This action was known as an action for malicious process. It differed from malicious prosecution in that there was no need for the plaintiff to prove that he had been acquitted. There could be no question of acquittal because the process issued without his innocence or guilt being decided.** It issued, indeed, without his being heard at all. A modern parallel is the issue of a search warrant. If it is obtained maliciously and without reasonable and probable cause, an action lies.

[Emphasis Added]

[70] From my reading of the above-mentioned passage, it is quite clear that when the court referred to malicious process, it was a reference to a legal process which cannot end in acquittal or conviction, like in a case where a search warrant is obtained maliciously. In the said case, as the proceeding which was of a criminal nature, could have terminated in favour of the plaintiff but did not, the judges of the Court of Appeal were of the opinion that the cause of action in malicious prosecution failed.

[71] Therefore, even if I were to recognise the tort of malicious process in our law, I am unable to see how it could apply to the facts of the present case. The instant appellant's complaint is that the prosecution was commenced by the respondent in bad faith and without reasonable and probable cause. This does not concern the misuse of a legal process such as an application for a search warrant, which is inherently incapable of terminating in favour of a plaintiff.



Here, the appellant was facing criminal trials that were capable of terminating in his favour. In such circumstances, the proper cause of action, if supported by evidence, would be the tort of malicious prosecution if the proceedings terminate in his favour. In the premises, I am unable to see how the two English authorities relied upon by counsel for the appellant can support his argument with respect to the tort of malicious process.

[72] In the premises, it is plain and obvious that the plea of malicious process is unsustainable on the pleaded facts.

### **Abuse Of Process**

[73] Counsel for appellant also argued that the tort of malicious process is analogous to the tort of abuse of process which has been recognized in our law. In support, he cited the cases of *TN Metal Industries Sdn Bhd & Ors v. Ng Pyak Yeow* [1995] 5 MLRH 110 and *Malaysia Building Society Bhd v. Tan Sri General Ungku Nazaruddin Ungku Mohamed* [1998] 1 MLRA 67 where the tort of abuse of process was discussed.

[74] In *TN Metal Industries Sdn Bhd & Ors v. Ng Pyak Yeow (supra)*, the plaintiff applied for leave to commence action against the provisional liquidator for the tort of conspiracy, abuse of legal process, malicious prosecution and trespass. After considering several notable English cases, including the leading case of *Grainger v. Hill (1838) 4 Bing NC 212; 132 ER 769* which established the tort of abuse of process, the Kamalanathan Ratnam JC at the High Court said as follows:

Where a legal process, the basis for which in itself could have proper foundation, has been perverted to satisfy some other motive such as extortion or oppression, an action will lie at the feet of a party that suffers the wrong. This is the tort of abuse of process.

[75] In *Malaysia Building Society Bhd v. Tan Sri General Ungku Nazaruddin Ungku Mohamed (supra)*, a High Court Judge sitting in the bankruptcy court not only set aside the adjudicating and receiving order against the debtor but also directed damages to be assessed. The senior assistant registrar assessed damages at more than RM2 million. The creditor's application to set aside the order for damages was dismissed by the Judicial Commissioner. Upon appeal, the Court of Appeal held that the High Court exercising bankruptcy jurisdiction had no power to make an award of damages and allowed the appeal of the creditor. The Court of Appeal also observed that the respondent obtained RM2 million in damages without proving a single element of the tort of abuse of process. In arriving at this finding, Gopal Sri Ram, who delivered the judgment of the court, set out the principles of the said tort after considering eminent authorities in the following passages:



In my judgment, the essential elements of the tort of abuse of process are these:

- (1) The process complained of must have been initiated;
- (2) The purpose for initiating that process must be some purpose other than to obtain genuine redress which the process offers. In other words, the dominant purpose for which the process was invoked must be collateral, that is to say, aimed at producing a result not intended by the invocation of the process; and
- (3) The plaintiff must have suffered some damage or injury in consequence.

It is to be stressed that neither malice nor the termination of the proceedings in the plaintiff's favour are necessary elements of the tort. To put it plainly, a plaintiff in an action for abuse of process need not prove that the defendant had invoked the process of the court maliciously. Neither does he have to prove that the proceedings terminated in his favour.

It is only upon proof of the elements that go to make up the tort of collateral abuse of process, that a plaintiff is entitled to an award of damages.

[76] I am mindful that the tort of abuse of process has not been pleaded by the appellant in the statement of claim. However, since counsel for the appellant has argued that the tort of malicious process is analogous to this tort, I have considered whether any facts to sustain this tort have been pleaded.

[77] I find that no facts have been pleaded to support this tort, and I find it to be plainly unsustainable. My reasons are as follows.

[78] The respondent was the Attorney General at the material time and based on the investigations carried out, authorised the prosecution of the appellant. The purpose of a prosecution must be presumed to be the securing of a conviction. If the appellant's case was that the prosecution was instituted for some ulterior purpose or aimed at achieving an outcome other than a conviction, such an allegation ought to have been specifically pleaded. It was not. Indeed, the appellant did not plead the tort of abuse of process or any of its essential elements in the statement of claim. In the circumstances, this purported cause of action is plainly unsustainable.

### **Negligence**

[79] The cause of action in negligence is pleaded in paragraphs [38] to [40] in the statement of claim. In paragraphs [38] and [39], it is pleaded that the respondent had a duty to act fairly and in accordance with the law and the Federal Constitution. The said paragraphs read as follows:



38. By virtue of his powers pleaded above, Tommy Thomas has obligations and duties to all citizens. In particular to persons whom are being investigated for criminal offences, such as Najib Razak.
39. The duties may be distilled as follows:
  - a. A duty to act fairly and independently in regard to criminal investigations and prosecutions.
  - b. A duty to act in accordance with the provisions of the Federal Constitution in regard to criminal investigations and prosecutions.
  - c. A duty to act within the boundaries of the law and due process.

[80] This is a vague pleading as there is no specific averment with respect to the breach of the duty of care or the breach of the law.

[81] In paragraph [40], it is pleaded that the respondent made statements against the appellant after leaving the office of the Attorney General. The paragraph reads as follows:

[40] And, further, as seen in the paragraphs above, after Tommy Thomas left office, he used his inside knowledge of the prosecutions against Najib Razak to make disparaging and prejudicial remarks against Najib Razak. This was despite the fact that the criminal charges against Najib Razak were ongoing in the courts. This is a breach of Tommy Thomas's duty, as a former Attorney General, not to make *sub judice* comments that will influence and impact ongoing criminal trials. He was negligent and oppressive.

[82] The appellant pleaded that this had prejudiced and impacted the criminal trials by reason of the alleged sub-judice statements. I wholly agree with the view of the High Court that there is plainly no duty of care owed to the appellant by the respondent in his capacity as a private citizen. In my view, if the statements were defamatory of the appellant and made without justification, the appellant's remedy quite obviously lies in a defamation action rather than in negligence. I therefore agree with the High Court that the plea of negligence is plainly unsustainable.

### **Breach of Article 8**

[83] Article 8 was pleaded in the statement of claim on the basis that other accused persons allegedly received more favourable treatment from the respondent when he was the Attorney General. In my view, this is plainly a frivolous plea. Those other cases bear no connection to the appellant's case. Whatever discretion was exercised by the respondent as Attorney General in those cases was exercised within the said criminal proceedings, as permitted by art 145(3) of the Federal Constitution and recognised in the case of *Johnson Tan Han Seng v. PP & Other Appeals (supra)*. I fail to see how such exercises of prosecutorial discretion could give rise to a civil cause of action in relation to the prosecution of the appellant. This plea should be struck out at the outset for being wholly unmeritorious and frivolous.



## Conclusion

[84] As I said at the outset, the appellant sued the respondent for only three torts, i.e., misfeasance, malicious process and negligence. I found that on the pleaded facts, the plea of misfeasance was premature when the action was filed. It has been pointed out that, by now, some of the criminal charges have been dropped. However, I find that to be irrelevant as the cause of action had not accrued when the action was filed. With respect to the plea of malicious process, even if it is recognized in our law, it only applies to a legal process that is incapable of terminating in favour of a plaintiff (the appellant herein). In the instant case, as the matters in question are criminal charges, it is plain to us that the tort of malicious process or abuse of process (even if it was pleaded) cannot apply.

[85] I cannot help but draw the inference that the purpose of these pleas was to avoid waiting for the criminal trials to conclude in favour of the appellant which is an essential ingredient of the tort of malicious prosecution. In the cases of *Sharil @ Shahrir Ab Samad v. Tommy Thomas @ Mohan K Thomas & Ors (supra)* and *Ananda Kumar S Maharajah v. Peguam Negara Malaysia & Ors (supra)* that I discussed earlier, it must be noted that the respective plaintiffs waited for criminal proceedings to terminate in their favour before mounting a civil action for malicious prosecution.

[86] With respect to the plea of negligence, I found that it is plainly unsustainable as no duty of care is owed by the respondent to the appellant and no particulars of breach have been pleaded either. As for the invocation of art 8 of the Federal Constitution, I found that it was irrelevant and frivolous.

[87] Although I have disagreed with the learned High Court Judge on the issue of the immunity of the Attorney General with respect to civil actions, for the other reasons given above, the appeal is unanimously dismissed with costs of RM12,000.00, subject to payment of allocatur.

[88] My learned brothers have read this judgment in draft and have expressed their agreement with it. However, Justice Wong Kian Kheong has also written a supporting judgment to which Justice Nadzarin bin Wok Nordin and I have indicated our agreement.

### Wong Kian Kheong JCA:

#### A. Introduction

[89] We have dismissed the above appeal (This Appeal) with costs of RM12,000.00 (subject to allocatur fee) (Our Decision).

[90] My learned brother, Ravinthran a/l Paramaguru JCA, has previously forwarded to me a copy of his draft written judgment regarding Our Decision (Draft Judgment). I concur with the Draft Judgment and wish to add further reasons in support of Our Decision (This Judgment). A draft of This Judgment



had been forwarded to my learned brothers, Ravinthran a/l Paramaguru and Nadzarin bin Wok Nordin JJCA. Both my learned brothers had expressed their agreement with This Judgment.

## B. Issues

[91] The following questions will be discussed in This Judgment:

- (1) is there a breach of the second rule of natural justice (2nd Rule) when the learned High Court Judge in this suit (This Suit), gave a reason for the decision to strike out This Suit (High Court's Decision) which had not been submitted on by both learned counsel in This Suit?;
- (2) with regard to the tort of negligence, whether -
  - (a) the Attorney General (AG) cum Public Prosecutor (PP) (referred collectively in This Judgment as the "AG/PP"); and
  - (b) Deputy Public Prosecutors (DPPs) owe a duty of care to accused person(s), complainant(s) and/or victim(s) [Accused Person(s)/Complainant(s)/Victim(s)] in respect of prosecutions which have been instituted, conducted and/or discontinued by the AG/PP and DPPs with regard to the Accused Person(s)/Complainant(s)/Victim(s) [Prosecution(s)];
- (3) can accused person(s) file a suit against the AG/PP and DPPs for the following three torts (3 Torts) in respect of the Prosecution(s) -
  - (a) tort of malicious prosecution;
  - (b) tort of misfeasance in public office; and
  - (c) tort of abuse of process?; and
- (4) whether our courts should recognise a new tort of "malicious process" against the AG/PP and DPPs when the AG/PP and DPPs may be liable for the tort of malicious prosecution.

## C. Was There A Breach Of The 2nd Rule By The Learned High Court Judge?

[92] The learned High Court Judge stated in paragraphs 56 to 69 of his "grounds of judgment", an additional reason for the High Court's Decision (Additional Reason), namely, there is a "built in check and balance" mechanism in this country wherein the respondent in This Appeal (Respondent), as the then AG/PP, could not have committed the following three torts against the appellant in This Appeal (Appellant):



- (1) the tort of malicious process;
- (2) the tort of misfeasance in public office; and
- (3) the tort of negligence.

[93] According to the Appellant's learned counsel, the 2nd Rule had been breached by the learned High Court Judge because -

- (1) both learned counsel did not submit on the Additional Reason in the High Court with regard to the Respondent's application to strike out This Suit (Respondent's Striking Out Application); and
- (2) if the High Court had intended to rely on the Additional Reason to decide on the Respondent's Striking Out Application, the 2nd Rule required the learned High Court Judge to pose the Additional Reason to both learned counsel before the High Court's Decision was made and this would have enabled learned counsel to submit to the High Court on the Additional Reason.

[94] I am not able to accept the above contention that there was a breach of the 2nd Rule when the High Court's Decision was made without affording both learned counsel a right to submit on the Additional Reason. The following reasons support this decision:

- (1) the 2nd Rule only requires all parties in court proceedings to be given a right to adduce evidence and to submit on all the issues which arise in the proceedings — please refer to the Court of Appeal's judgment in *SKN Land & Development Sdn Bhd v. Crest Worldwide Resources Sdn Bhd; Mudajaya Corporation Bhd & Ors (Interveners) And Another Appeal* [2026] MLRAU 22, at [32];

The main issue in the Respondent's Striking Out Application (Main Issue) was whether the High Court should exercise its discretion to strike out This Suit under O 18 r 19(1)(a), (b) and/or (d) Rules of Court 2012 (RC). Both parties in this case had been afforded a right to adduce affidavit evidence and to submit on the Main Issue before the High Court's Decision was made; and

- (2) the High Court, like all other courts in this country, are not bound by any submission, written and oral, of any party. This is one of the essential attributes of judicial independence.

#### **D. Whether AG/PP and DPPs Owe A Duty Of Care To Accused Person(s)/ Complainant(s)/Victim(s) With Regard To The Prosecution(s)**

[95] With regard to the tort of negligence, according to the Federal Court's judgment delivered by Zainun Ali FCJ in *Lok Kok Beng & Ors v. Loh Chiak Eong & Anor* [2015] 5 MLRA 152 at [67], [68], [74], [76], [80], [82] and [86], whether



a defendant owes a duty of care to the plaintiff in a particular factual matrix (Factual Matrix) depends on the following evidence and reasons:

- (1) was there “sufficient legal proximity” between the plaintiff and defendant wherein it was reasonably foreseeable that if the defendant did not exercise reasonable care in the Factual Matrix, the plaintiff would suffer injury, death and/or loss? In this regard, the court may consider whether there was physical proximity, circumstantial proximity and causal proximity between the plaintiff and defendant in the Factual Matrix; and
- (2) whether the existence of a duty of care in the Factual Matrix (owed by the defendant to the plaintiff) was negated by any policy consideration.

[96] I reproduce below art 145(3) of the Federal Constitution (FC), s 376(1) and (3) of the Criminal Procedure Code (CPC):

“Article 145(3) FC

**The [AG] shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a Syariah court, a native court or a court-martial.**

Section 376 CPC [PP]

- (1) **The [AG] shall be the [PP] and shall have the control and direction of all criminal prosecutions and proceedings under this [CPC].**

...

- (3) **The [PP] may appoint fit and proper persons to be [DPPs] who shall be under the general control and direction of the [PP] and may exercise all or any of the rights and powers vested in or exercisable by the [PP] by or under this [CPC] or any other written law except any rights or powers expressed to be exercisable by the [PP] personally and he may designate any of such [DPPs] as Senior [DPPs].”**

[Emphasis Added]

[97] Firstly, it is not disputed that by virtue of art 145(3) FC and s 376(1) CPC, the AG/PP has a constitutional discretion to -

- (1) institute any prosecution;
  - (2) amend any charge before the commencement of the trial of the accused person(s);
  - (3) conduct any prosecution; and
  - (4) discontinue any prosecution
- (4 Prosecutorial Powers).



**[98]** Secondly, by virtue of s 376(3) CPC, subject to the AG/PP's "general control and direction", DPPs may exercise any one or all of the 4 Prosecutorial Powers.

**[99]** Lastly, with regard to the exercise of the 4 Prosecutorial Powers, I am of the firm view that the AG/PP and DPPs do not owe any duty of care to Accused Person(s)/Complainant(s)/Victim(s) due to the following reasons:

- (1) the primary basis for the exercise of the 4 Prosecutorial Powers is public interest (Public Interest Basis);
- (2) the Public Interest Basis clearly outweighs the personal, private and/or individual death, interests, loss and/or damage of the Accused Person(s)/Complainant(s)/Victim(s);
- (3) if the AG/PP and DPPs owe a duty of care to the Accused Person(s)/Complainant(s)/Victim(s), this will be contrary to public policy -
  - (a) the Accused Person(s)/Complainant(s)/Victim(s) may file a civil suit against the AG/PP and/or DPPs based on the tort of negligence (Negligence Suit);
  - (b) there may be a simultaneous duplicity in proceedings, namely the criminal proceedings against the accused person(s) and the Negligence Suit [Duplicity (Proceedings)]. In the case of a Duplicity (Proceedings), the accused person(s) may apply to the criminal court to stay the criminal proceedings pending the final disposal of the Negligence Suit [Stay (Criminal Proceedings)]. If a Stay (Criminal Proceedings) is granted, there may be an injustice because with the passage of time -
    - (i) complainant(s), victim(s) and prosecution witness(es) [Complainant(s)/Victim(s)/Prosecution Witness(es)] may pass on or may not be available to give evidence in the criminal proceedings; and
    - (ii) the recollection of the Complainant(s)/Victim(s)/Prosecution Witness(es) may be adversely affected; and
- (4) the public policy considerations as explained in the above subparagraphs (1) to (3), would negate the existence of any duty of care which could be owed by the AG/PP and DPPs to the Accused Person(s)/Complainant(s)/Victim(s).



### E. Can The Appellant File This Suit based On A Tort Of Malicious Prosecution?

[100] The Statement of Claim in This Suit (SOC) did not plead a tort of malicious prosecution against the Respondent. Having said that, I need to discuss this tort because when the court decides the Respondent's Striking Out Application under O 18 r 19(1) RC, in the interest of justice, the court has a discretion to dismiss the Respondent's Striking Out Application and allow the Appellant to amend the SOC so as to "save" This Suit — please refer to the judgment of Mahadev Shankar JCA in the Court of Appeal in *Muniandy Subrayan & Ors v. Chairman And Board Members Koperasi Menara Maju Bhd* [1996] 2 MLRA 104, at p 105. I reproduce below O 18 r 19(1) RC:

**“Order 18 r 19(1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the endorsement, of any writ in the action, or anything in any pleading or in the endorsement, on the ground that -**

- (a) **it discloses no reasonable cause of action** or defence, as the case may be;
- (b) **it is scandalous, frivolous or vexatious;**
- (c) it may prejudice, embarrass or delay the fair trial of the action; **or**
- (d) **it is otherwise an abuse of the process of the Court,**

and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.”

[Emphasis Added]

In the interest of justice, I will now consider whether the learned High Court Judge should have -

- (1) dismissed the Respondent's Striking Out Application; and
- (2) exercised the court's discretion pursuant to O 18 r 19(1) RC to allow the Appellant to amend the SOC so as to include a claim against the Respondent based on a tort of malicious prosecution.

[101] In the Federal Court case of *Rawther v. Abdul Kareem* [1966] 1 MLRA 398, at p 401, Thomson LP explained the five elements of a tort of malicious prosecution [5 Elements (Tort of Malicious Prosecution)] as follows -

**“In any such action [tort of malicious prosecution] the plaintiff must prove at least five things and unless he does so he cannot succeed. He must prove that the defendant set the criminal law in motion against him. He must prove that the criminal proceedings against him terminated in his favour, that the defendant had no “reasonable and probable cause” for setting the law in motion against him and that the plaintiff [sic — should be the defendant] was actuated by malice in the sense that he had a motive other**



than only to carry the law into effect. And for historical reasons (the action was originally in case) he must prove damage.”

[Emphasis Added]

According to *Rawther*, the 5 Elements (Tort of Malicious Prosecution) are -

- (1) the defendant had instituted criminal proceedings against the plaintiff [**1st Element (Tort of Malicious Prosecution)**];
- (2) the plaintiff had been finally acquitted in the criminal proceedings [2nd Element (Tort of Malicious Prosecution)]. In the following cases, the civil suits based on the tort of malicious prosecution were only filed after the fulfilment of the **2nd Element (Tort of Malicious Prosecution)**, namely after the plaintiffs had been finally acquitted of the criminal charges in question -
  - (a) the judgment of See Mee Chun JCA in the Court of Appeal case of *Khairuddin Abu Hassan v. Wan Aedil Wan Abdullah & Ors And Another Appeal* [2025] 4 MLRA 254, at item no 21 in the table in [9];
  - (b) Vazeer Alam Mydin JC’s (as he then was) decision in the High Court in *Rosli Dahlan v. Tan Sri Abdul Gani Patail & Ors* [2014] MLRHU 349, at [29];
  - (c) the judgment of Roz Mawar Rozain JC (as she then was) in the High Court case of *Sharil @ Shahrir Ab Samad v. Tommy Thomas @ Mohan K Thomas & Ors* [2025] 4 MLRH 1, at [3(x)] (Sharil); and
  - (d) Elaine Yap Chin Gaik JC’s decision in the High Court in *Ananda Kumar S Maharajah v. Peguam Negara Malaysia & Ors* [2025] MLRHU 3213, at [9];
- (3) the defendant had no “reasonable and probable cause” to institute criminal proceedings against the plaintiff [**3rd Element (Tort of Malicious Prosecution)**];
- (4) in the institution of criminal proceedings against the plaintiff, the defendant had been actuated by malice in the sense that the defendant had a motive other than only to carry the law into effect [**4th Element (Tort of Malicious Prosecution)**]; and
- (5) the plaintiff had suffered loss and/or damage due to the criminal proceedings instituted by the defendant against the plaintiff [**5th Element (Tort of Malicious Prosecution)**].



[102] In this instance, the AG/PP had filed 35 criminal charges in four cases against the Appellant (Charges). I am of the view that at the time of the filing of This Suit, the Appellant had no valid cause of action against the Respondent premised on the tort of malicious prosecution. This is because at the time of the filing of This Suit, the 2nd Element (Tort of Malicious Prosecution) had not been fulfilled, namely, the Appellant had not been finally acquitted of the Charges.

[103] As explained in the above paragraph 14, there was no basis to dismiss the Respondent's Striking Out Application and allow the Appellant to amend the SOC so as to include a claim against the Respondent based on a tort of malicious prosecution.

#### **F. Can This Suit Be Filed Against The Respondent For The Tort Of Misfeasance In Public Office?**

[104] The tort of misfeasance in public office has been explained by the following judgment of the Federal Court delivered by Nallini Pathmanathan FCJ in *Tony Pua Kiam Wee v. Government Of Malaysia & Another Appeal* [2019] 6 MLRA 432, at [184]:

“[184] **The key ingredients of the tort are:**

- (i) **an abuse of public power or authority;**
- (ii) **by a public officer;**
- (iii) **who either:**
  - (a) **knew that he was abusing his public power or authority; or**
  - (b) **was recklessly indifferent as to the limits of their public power or authority; and**
- (iv) **who acted or omitted to act either with:**
  - (a) **the intention of harming the plaintiff (targeted malice); or**
  - (b) **with the knowledge of the probability of harming the plaintiff, or with reckless indifference to the probability of harming the plaintiff or a class of persons of which the plaintiff was one.”**

[Emphasis Added]

[105] Firstly, it is to be noted that in *Tony Pua Kiam Wee*, at [1] and [2] -

- (1) the suit was filed against the Federal Government and the then Prime Minister (PM) (the Appellant in this case); and
- (2) the allegation was that the then PM had committed misfeasance in public office in relation to a sovereign fund established for the economic benefit of Malaysia and the Malaysian people, known as “1MDB”.



It is clear that the material facts in *Tony Pua Kiam Wee* were not based on an exercise of the 4 Prosecutorial Powers by the AG/PP and DPPs. Hence, the Appellant could not rely on *Tony Pua Kiam Wee* to support This Appeal.

**[106]** Secondly, with regard to an exercise of the 4 Prosecutorial Powers, a plaintiff can only file a civil action for damages against the AG/PP and/or DPP based on the tort of misfeasance in public office [Civil Suit (Tort of Misfeasance in Public Office)] upon proof on a balance of probabilities of an “abuse of public power or authority” by the AG/PP and/or DPP in respect of the prosecution against the plaintiff, namely, after the prosecution had finally ended in favour of the plaintiff. If otherwise, how can the plaintiff prove on a balance of probabilities an abuse of public power or authority by the AG/PP and/or DPP in respect of the prosecution in question?

Furthermore, only upon a final termination of the prosecution in favour of the plaintiff, i.e., when the plaintiff’s loss and/or damage due to the prosecution had crystallized, can the plaintiff then institute a Civil Suit (Tort of Misfeasance in Public Office). If a plaintiff can file a Civil Suit (Tort of Misfeasance in Public Office) when the prosecution had not been finally concluded in favour of the plaintiff, a Duplicity (Proceedings) would arise and such an outcome is neither just nor desirable — please refer to the above sub-paragraph 11(3)(b).

In the following High Court cases, Civil Suits (Tort of Misfeasance in Public Office) were only filed after the accused persons had been finally acquitted of the criminal charges:

- (1) *Rosli Dahlan*, at [29]; and
- (2) *Sharil*, at [3(x)];

**[107]** As the Appellant had not been finally acquitted of the Charges at the time of the filing of This Suit, the learned High Court Judge had rightly exercised his discretion to strike out This Suit with regard to the tort of misfeasance in public office.

**[108]** With regard to the exercise of the 4 Prosecutorial Powers, I am of the view that the tort of malicious prosecution (as recognised in *Rawther* and *Khairuddin*) provides a just, effective and adequate remedy for accused persons who had been -

- (1) charged with offences by the AG/PP and/or DPPs; and
- (2) ultimately acquitted of those charges.

Premised on the above reasons, there is no necessity to rely on the tort of misfeasance in public office in respect of the invocation of the 4 Prosecutorial Powers by the AG/PP and/or DPPs. Having said that, a plaintiff may still rely on the tort of misfeasance in public office regarding the exercise of any public



power or authority by the AG/PP and/or DPPs, which does not concern the 4 Prosecutorial Powers.

### **G. Whether This Suit Could Be Filed Against The Respondent For The Tort Of Abuse Of Process**

[109] The SOC did not plead the tort of abuse of process against the Respondent. As explained in the above para 12, I will now discuss whether the Respondent's Striking Out Application should be dismissed and the Appellant be allowed to amend the SOC so as to include a claim against the Respondent based on a tort of abuse of process.

[110] With regard to the tort of abuse of process, Gopal Sri Ram JCA (as he then was) had decided as follows in the Court of Appeal case of *Malaysia Building Society Bhd v. Tan Sri General Ungku Nazaruddin Ungku Mohamed* [1998] 1 MLRA 67, at pp 67, 68, 73, 76 and 77 (*MBSB's Case*):

**“On 3 April 1984, the appellant before us obtained judgment in Civil Suit C431 of 1984 for the sum of RM1,475,529.68. It was a judgment in default of appearance. Later, on 4 April 1986, acting on the judgment, the appellant, as petitioning creditor, instituted bankruptcy proceedings against the respondent which culminated in the making of receiving and adjudicating orders on 10 March 1986.**

**On 20 October 1987, the respondent took out a motion to set aside these orders. He also asked for other relief, including an order that ‘damages be paid by the petitioning creditor to the debtor’. On 19 June 1992, the learned judge who heard the respondent’s motion granted an order in its terms Apart from annulling the adjudicating order and rescinding the receiving order, he directed that damages be paid by the appellant to the respondent....**

**On 10 July 1995, the appellant filed a summons in chambers to set aside that part of the order dated 19 June 1992 that awarded damages to the respondent. The ground upon which the application was made was that the judge had no jurisdiction to make that order. The appellant’s summons was heard before the learned judicial commissioner who, after hearing arguments, dismissed it on 2 March 1996. It is against that decision that the present appeal has been brought.**

**When the appeal was called on yesterday, we formed the preliminary view that the High Court lacked the power to do what it did, namely to make a summary award of damages to be assessed....**



I am therefore in agreement with Mr Das' submission that there is absent in the High Court in our country, any power to award damages upon making orders under s 105 [of the then Bankruptcy Act 1967 (BA)]. Put another way, a High Court exercising bankruptcy jurisdiction under 105 [BA] may only make those orders referred to in the five subsections thereunder. It cannot make any other orders.

Every person who is aggrieved by some wrong he considers done him is at liberty to invoke the process of the court. Equally may a litigant invoke the process to enforce some claim which he perceives he has against another. When however, the process of the court is invoked, not for the genuine purpose of obtaining the relief claimed, but for a collateral purpose, for example, to oppress the defendant, it becomes an abuse of process. Where the court's process is abused, the proceedings complained of may be stayed, or if it is too late to grant a stay, the party injured may bring an action based on the tort of collateral abuse of process.

In my judgment, the essential elements of the tort of abuse of process are these:

- (1) The process complained of must have been initiated;
- (2) The purpose for initiating that process must be some purpose other than to obtain genuine redress which the process offers. In other words, the dominant purpose for which the process was invoked must be collateral, that is to say, aimed at producing a result not intended by the invocation of the process; and
- (3) The plaintiff must have suffered some damage or injury in consequence.

It is to be stressed that neither malice nor the termination of the proceedings in the plaintiff's favour are necessary elements of the tort. To put it plainly, a plaintiff in an action for abuse of process need not prove that the defendant had invoked the process of the court maliciously. Neither does he have to prove that the proceedings terminated in his favour.

It is only upon proof of the elements that go to make up the tort of collateral abuse of process, that a plaintiff is entitled to an award of damages."

[Emphasis Added]



[111] In a recent Court of Appeal case of *Symphony Life Berhad v. Ng Ying Ying & Ors And Other Appeals* [2026] 2 MLRA 440 at [51], [54] and [55], it was decided as follows:

“[51] We are of the following view regarding *MBSB’s Case*:

- (1) the material facts in *MBSB’s Case* were-
  - (a) based on a judgment in default of appearance, the appellant obtained receiving and adjudicating orders (Bankruptcy Orders) under the then applicable Bankruptcy Act 1967 (BA) (now the Insolvency Act 1967) against the respondent; and
  - (b) the respondent applied to the High Court to set aside the default judgment and Bankruptcy Orders. The High Court not only set aside the default judgment and Bankruptcy Orders but also ordered an assessment of damages to be paid by the appellant to the respondent [Assessment Order (Damages)];
- (2) the sole issue to be determined by the Court of Appeal in *MBSB’s Case* was whether the High Court had the jurisdiction and power under s 105 BA to make the Assessment Order (Damages) [Sole Issue (*MBSB’s Case*)]. The Sole Issue (*MBSB’s Case*) was answered in the negative.

In view of the Sole Issue (*MBSB’s Case*), the Court of Appeal’s *dicta* regarding the tort of abuse of process, was purely *obiter*; and

- (3) the Court of Appeal’s judgment in *MBSB’s Case* was an oral one, namely, the Court of Appeal did not require time to consider further (the Court of Appeal did not enter a *curia advisari vult*).

....

[54] Our research has revealed a 2-1 majority judgment of the Federal Court in *Ng Wai Pin v. Ong Yew Teik & Other Appeals* [2025] 4 MLRA 513. We reproduce below the majority judgment of Zabarlah Mohd Yusof FCJ in *Ng Wai Pin*, at [5], [118] to [123], [125], [126], [129] and [132] to [134]:

“[5] This Court had allowed leave to appeal on the following common questions of law for all of the appeals, which are as follows:

2. Whether it is permissible for a party who had been vindicated and/or was successful in a first action to mount a second action against the same opposing party in the first action based upon the conduct and/or evidence of the said opposing party?

Question 2:

...

[118] The categories of abuse of process can arise in various ways and never close. The factual matrix of our present case lends its context to the abuse. In our case the plaintiff had succeeded and obtained



judgment and reliefs against D1 in suit 1333 (the 1st suit). The judgment sum had been settled with interest. The background facts in Suit 460 (the 2nd suit) relates to the same ECT Sale of Shares, the same acknowledgement of debt and the same alleged debt of RM8,018,225.00 as claimed in suit 1333 (the 1st suit) to which he had been paid. All these had been litigated and canvassed in suit 1333 (the 1st suit).

[119] Suit 460 (the 2nd suit) is the 2nd suit against D1. The plaintiff has succeeded in Suit 1333 (the 1st suit) and obtained whatever remedy with interests.

[120] The 2nd claim by the plaintiff against D1 and the other defendants is an abuse of process. The plaintiff had been vindicated or was successful in the 1st suit cannot mount a second action against the same party in the first action based on the conduct and/or evidence of the said opposing party. This runs counter to the policy considerations as set out earlier.

[121] It would be a spectre to have a justice system where chain like litigation is allowed and proceedings will run *ad infinitum* with no end. This was demonstrated by Lee Tat Development and our present appeals.

[122] Apart from the aforesaid, there is no express findings of fabrication of evidence, the tort of perjury, fraud, forgery, conspiracy, malicious prosecution or abuse of process in suit 1333 (the 1st suit). In any event, whatever its worth of those evidence (be it false, perjury or fabrication of false evidence, manipulation or coercion of witnesses), the plaintiff won in suit 1333 (the 1st suit). The plaintiff already got his remedy in suit 1333 (the 1st suit). This is in contrast to the facts in *Jones v. Kaney*, *Darker and Hall v. Simmons*, where the plaintiffs in those cases were without remedy. There were also no express findings in suit 1333 (the 1st suit) that the plaintiff suffered loss/damage as was found in *Jones v. Kaney*, *Darker* or the 3 cases in *Hall v. Simmons*. Being a successful litigant in suit 1333 (the 1st suit), the plaintiff in our present case, cannot be said to have been wronged. His pleaded claim at paras 32-34 states that the acts of the defendants caused him damage and loss with respect to his claim under Suit 1333 (the 1st suit) does not have a leg to stand on. It is certainly not supported by the facts, namely the decision of suit 1333 (the 1st suit) was decided in the plaintiff's favor. In other words, there is no damage or loss suffered with respect to his claim under Suit 1333 (the 1st suit).

[123] Damage or injury is an essential element of the tort of abuse of process as held in *Malaysia Building Society Bhd v. Tan Sri General Ungku Nazaruddin Ungku Mohamed* [1998] 1 MLRA 67.

...

[125] It is undisputed that the Court of Appeal in Appeal 1694 (which is the appeal to suit 1333 (the 1st suit)) via the order dated 10 January



2019 had ordered interest on the judgment sum at 5% per annum from the date of filing of Suit 1333 to the date of realization.

[126] The plaintiff in our present case has been reasonably compensated by the award of interests on the judgment sum awarded to him by the Court of Appeal in Appeal 1694. As such, the plaintiff is precluded from claiming any form of damages stemming from D1's alleged refusal to pay to the plaintiff the RM8,018,225.00 due under the purported Acknowledgment of Debt.

...

[129] As the plaintiff had been paid the judgment sum with interest for suit 1333 (the 1st suit), it is an abuse of process if this Court is to allow the plaintiff to attempt to claim new damages against the defendants based on essentially the failure of the D1 to repay the damages in the form of judgment sum which had already been adjudged in the sum of RM8,018,255.00 in the first Suit.

...

[132] Clearly, the subject matter of the present case has already been dealt with by the High Court in suit 1333 (the 1st suit), the majority decision in the Court of Appeal (in Appeal 1694) and on appeal to the Federal Court. To allow suit 460 (the 2nd suit) to go for trial is to allow re litigation on the same issues which had been decided in suit 1333 (the 1st suit).

[133] Thus the learned High Court Judge did not err when His Lordship held that it is an abuse of court process for the plaintiff to reopen or relitigate the issues again in the present appeals. The plaintiff's claim against D1-D5 concerned the evidence that was presented in Suit 1333 (the 1st suit) and the damages or loss claimed are all relating to the failure of D1 to pay the principal sum of RM8,018,225.00 expeditiously. His Lordship also found that there is clear substantial duplication of issues and reliefs of damages sought in Suit 1333 and the present appeal. Such findings by the High Court did not warrant any appellate intervention by the Court of Appeal.

[134] We therefore answer Question 2 in the negative."

[Emphasis Added]

[55] We express the following view:

- (1) according to the majority judgment in *Ng Wai Pin*-
  - (a) if a party (X) had succeeded to claim for relief in the first suit against Y (1st Suit), X cannot subsequently file a second suit against Y for further relief based on the tort of abuse of process (2nd Suit); and
  - (b) in view of the fact that X had already obtained relief against Y in the 1st Suit, Y may apply to court in the 2nd Suit to strike



out the 2nd Suit pursuant to O 18 r 19(1)(d) RC on the ground that the 2nd Suit constitutes an abuse of court process;

- (2) it was decided in *MBSB's* Case that Y may file the 2nd Suit against X for the tort of abuse of court process without-
- (a) waiting for the “termination” of the 1st Suit; and
  - (b) the 1st Suit being “terminated” in Y’s favour

Notwithstanding the above part of the Court of Appeal’s judgment in *MBSB's* Case, the 2nd Suit should only be filed by Y against X after the 1st Suit had been finally concluded in Y’s favour [Final Conclusion in Y’s Favour (1st Suit)]. Our reasons are as follows-

- (i) if the 1st Suit was finally decided in X’s favour, we cannot envisage any basis for Y to file the 2nd Suit against X based on the tort of abuse of process. In fact, if the 2nd Suit is filed by Y in the above circumstances, X may apply to court to strike out the 2nd Suit on the ground that the 2nd Suit constitutes an abuse of court process under O 18 r 19(1)(d) RC; and
- (ii) if there is Final Conclusion in Y’s Favour (1st Suit) and if Y has suffered actual loss and/or damage in excess of the costs awarded by the court in Y’s favour in the 1st Suit (Y’s Further Loss/Damage), Y can then file the 2nd Suit against X and claim for Y’s Further Loss/Damage premised on X’s abuse of process in filing the 1st Suit against Y.

We rely on the following judgment of the High Court in *Sonic Finance Inc & Anor v. Halim Mohammad & Ors* [2016] MLRHU 1505, at [34], a case premised on the tort of abuse of process-

“[34] Cik Marina Nasution, the 1st Defendant’s learned counsel, has contended that the Plaintiffs are liable to pay for all of the 1st Defendant’s legal fees and disbursements incurred for the 3 Actions [basis for the tort of abuse of process]. I accept this submission with a qualification — the 1st Defendant has been previously awarded costs against the Plaintiffs (Costs) and the Costs can be recovered by the 1st Defendant from the Plaintiffs. Accordingly, the 1st Defendant is entitled to claim for all legal fees and disbursements incurred in the 3 Actions less the Costs (Deduction) — please see *Ranjeet Singh Sidhu*, at [64(b)(i)]. If the Deduction is not given in this Assessment, this will enrich the 1st Defendant unjustly because the 1st Defendant will have a “double recovery” in respect of the Costs (by way of the previous order granting Costs and through this Assessment

[Emphasis Added]; and



- (3) in view of the reasons explained in the above sub-paragraphs (2)(i) and (ii), if there is no Final Conclusion in Y's Favour (1st Suit), Y should not be allowed to file a counterclaim in the 1st Suit [Y's Counterclaim (1st Suit)] based on the tort of abuse of process allegedly committed by X in filing the 1st Suit (as in this case).

Furthermore, if Y's Counterclaim (1st Suit) is filed, the total loss and/or damage which may be subsequently suffered by Y as a result of the final conclusion of the 1st Suit, has yet to crystallise. In other words, Y's Counterclaim (1st Suit) is pre-mature in the above circumstances.

Needless to say, if the Original Action is finally concluded in Y's favour, the six-year limitation period under s 6(1)(a) of the Limitation Act 1953 for Y to sue X for X's commission of the tort of abuse of process (by filing the 1st Suit), can only commence after Y's Further Loss/Damage has been incurred."

[Emphasis Added]

[112] As explained in *Symphony Life-*

- (1) the material facts in *MBSB's* Case did not concern an abuse of process. Hence, the Court of Appeal's *dicta* regarding the tort of abuse of process, was purely *obiter*. In any event, there was no exercise of the Prosecutorial Powers by the AG/PP and/or DPPs in *MBSB's* Case; and
- (2) a civil suit based on the tort of abuse of process [Civil Suit (Tort of Abuse of Process)] can only be filed by a plaintiff (X) against a defendant (Y) if the civil proceedings previously instituted by Y against X (Y's Earlier Suit) had ended in X's favour. Only when X had finally succeeded in Y's Earlier Suit, can X file the Civil Suit (Tort of Abuse of Process) against Y.

[113] I am of the opinion that a plaintiff cannot file a Civil Suit (Tort of Abuse of Process) in respect of the invocation of the 4 Prosecutorial Powers by the AG/PP and DPPs. This view is due to the fact that with regard to the exercise of the 4 Prosecutorial Powers by the AG/PP and DPPs, Malaysian case law (in *Rawther* and *Khairuddin*) has already provided for the tort of malicious prosecution as a just, effective and adequate remedy for any accused person. Needless to say, a plaintiff may institute a Civil Suit (Tort of Abuse of Process) regarding the exercise of the powers of the AG/PP and DPPs in proceedings in respect of the plaintiff which do not concern the 4 Prosecutorial Powers.

[114] As explained in the above para 25, there is no room for the High Court to dismiss the Respondent's Striking Out Application and allow the Appellant to amend the SOC so as to include a claim against the Respondent based on a tort of abuse of process.



## H. Should Our Courts Recognise The Tort Of Malicious Process Against AG/PP And DPPs?

[115] Firstly, the categories of torts are never closed, and Malaysian courts may recognise new torts in the interest of justice. In *Ou Yang Chow Min v. Green Venture Capital Sdn Bhd & Another Case* [2022] 6 MLRH 489, at [35], the High Court decided as follows:

“[35] I would take this opportunity to express my view as to whether Malaysian case law should recognize a tort of abuse of adjudication process under CIPAA [Construction Industry Payment and Adjudication Act 2012]. Firstly, as decided by Lord MacMillan in the House of Lords in *Donoghue v. Stevenson* [1932] AC 562, at 619, the categories of tort are never closed. Secondly, without the benefit of argument from learned counsel, I cannot envisage a tort of abuse of adjudication process unless all the following three circumstances are present:

- (1) a claimant (Y) has instituted adjudication proceedings against a respondent (Z) and the adjudicator has dismissed Y’s adjudication claim against Z [Dismissal (Adjudication Claim)].

Alternatively, if an adjudication decision has been delivered in favour of Y against Z, Z has successfully applied to the High Court to set aside the adjudication decision and the High Court’s setting aside order has been affirmed on appeal by the Court of Appeal or Federal Court, as the case may be (Setting Aside Order). When there is a Setting Aside Order, Y cannot obtain leave of court under s 28 CIPAA to enforce the adjudication decision;

- (2) no Litigation/Arbitration has been commenced between Y and Z. Alternatively, Litigation/Arbitration has been instituted and resolved in favour of Z against Y [Z’s Success (Litigation/Arbitration)]. If Y is successful in Litigation/Arbitration against Z, this means that Y has performed construction work for which Z should be liable to Y. In such a case, I cannot foresee how Y has abused the adjudication process under CIPAA; and
- (3) Z has suffered loss due to the Dismissal (Adjudication Claim) or the Setting Aside Order [Z’s Loss (Adjudication)]. Z’s Loss (Adjudication) should be distinguished from Z’s loss due to Litigation/Arbitration in Z’s Success (Litigation/Arbitration) [Z’s Loss (Litigation/Arbitration)]. This is because Z’s Loss (Litigation/Arbitration) may be claimed by Z from Y pursuant to tort of Y’s abuse of court process, tort of arbitral process (if recognized by Malaysian case law) and/or tort of malicious prosecution.”

[Emphasis Added]



[116] In *Nik Mohd Suhaimi Ahmad Ghazali v. Siti Fairuz Shamsuri & Ors* [2023] MLRHU 2062 at [1], [5], [11] to [18], [30] and [53], the High Court decided as follows:

“[1] The plaintiff had filed a suit against all the defendants for the tort of false imprisonment which entails wrongful arrest, wrongful detention and harassment and the tort of malicious prosecution.

...

[5] Hence this suit by the plaintiff for false imprisonment/wrongful arrest/harassment and malicious prosecution against all the defendants. (Technically, the tort of false imprisonment was against the MACC and its officers and the tort of malicious prosecution against the Public Prosecutor and its deputies).

...

#### The Tort Of Malicious Process/Abuse Of Process

[11] The tort of malicious process or abuse of process was introduced earlier in the United Kingdom, where the police were found to be liable for procuring arrests maliciously and without reasonable cause. This tort is newly introduced in Malaysia. It entails the torts of wrongful arrest/detention/wrongful imprisonment etc, and the lists are not closed. Apart from the United Kingdom, some other Commonwealth countries, for example, New Zealand, Australia and Canada have recognised it. As we will see later, the Supreme Court of Canada earlier had even introduced the tort of negligent investigation against the police, as they recognised that the torts of false imprisonment, misfeasance etc, do not provide an adequate remedy.

[12] It is distinct from the tort of malicious prosecution which applies against the Public Prosecutor. In the case of *Everett v. Ribbands And Another* [1952] 1 All ER 823, at p 826, lines B to D, the court held:

This action was known as an action for malicious process. It differed from malicious prosecution in that there was no need for the plaintiff to prove that he had been acquitted. There could be no question of acquittal, because the process issued without his innocence or guilt being decided at all. It issued, indeed, without his being heard at all. A modern parallel is the issue of a search warrant. If it is obtained maliciously and without reasonable and probable cause, an action lies.

See also *Roy v. Prior* [1971] AC 470.

[13] This tort prevails in a situation like the present case before the court whereby the claimant/plaintiff was rightfully and legally arrested but in the process, he was subjected to abuse, harassment, intimidation, inducement, and harm which had affected him not only physically but mentally and psychologically. (This court agreed that the arrest and detention was legal). Hence, he should be entitled to some form of redress or remedy for



malicious process/abuse of process, as this court ruled that the arrest and detention were legal.

[14] In the English case of *Goldsmith v. Sperrings Ltd* [1977] 2 All ER 566, p 574, lines E to F, the Court of Appeal, in a dissenting judgment, said this about the tort of abuse of process:

What may make it (the legal process) wrongful is the purpose for which it is used. If it is done in order to exert pressure so as to achieve an end which is improper in itself then it is a wrong known to the law.

[15] This dissenting judgment was applied by our court in *TN Metal Industries Sdn Bhd & Ors v. Ng Pyak Yeow* [1995] 5 MLRH 110. The judge held that the tort of abuse of process is distinct from malicious prosecution. It is applied in cases when a legal process has been misused to satisfy some other ulterior motives, thus:

Where a legal process, the basis for which in itself could have proper foundation, has been perverted to satisfy some other motive such as extortion or oppression, an action will lie at the feet of a party that suffers the wrong. This is the tort of abuse of process. Unlike the tort of malicious prosecution, the tort of abuse of process does not depend on the wrongful procurement of the legal process but in the misuse of the process however correctly it was obtained...

[16] The Court of Appeal in the case of *Malaysia Building Society Bhd v. Tan Sri General Ungku Nazaruddin Ungku Mohamed* [1998] 1 MLRA 67 above also applied the dissenting judgment in *Goldsmith v. Sperrings Ltd* (*supra*). The court ruled that, if a legal process is abused for an ulterior motive, and harm is done to the person for which the process is initiated against, then the court can award damages against the wrongdoer.

[17] This position has been neatly summed up by Lord Denning MR in his dissenting judgment in *Goldsmith v. Sperrings Ltd & Ors* [1977] 1 WLR 478, where at p 489 His Lordship said:

In a civilised society, legal process is the machinery for keeping and doing justice. It can be used properly or it can be abused. It is used properly when it is invoked for the vindication of men's rights or the enforcement of just claims.

It is abused when it is diverted from its true course so as to serve extortion or oppression: or to exert pressure so as to achieve an improper end. When it is so abused, it is a tort, a wrong known to the law. The judges can and will intervene to stop it. They will stay the legal process, they can, before any harm is done. If they cannot stop it in time, and harm is done, they will give damages against the wrongdoer.

[18] Though a dissenting judgment, the principle enunciated by Lord Denning has been accepted as authoritative of what constitutes an abuse of process. See: *Malaysia Building Society v. Tan Sri General Ungku Nazaruddin* (*supra*).



...

[30] This court ruled that, his arrest, detention and being charged on 20 March 2014, although legal, but the adverse publicity was very damaging to his life and reputation as a businessman. This has also greatly affected the reputation of his family as a whole. That had changed his life not for the better, thereafter. From the evidence adduced, this court found that this action by the defendants (SPRM) was deliberate and hence malicious as it was pre-planned. This was because the 3rd defendant had at the SPRM Headquarters, Putrajaya, informed the plaintiff of his eventual charging the next day and that the media was already informed. This is an act of harassment and inducement to lure the plaintiff to plead guilty. In fact, during his arrest, he was also deprived of making preparations regarding his bails, medication etc, at that period of time. The plaintiff was brought to Kuantan handcuffed during the journey where he was charged at the Kuantan Sessions Court the next day.

...

### Conclusion

[53] This new approach by the court must be recognised and is timely as it is built on the foundation of fairness, reasonableness, justice and respect to this group of vulnerable suspects/detainees. This resonates with the application of the eggshell skull rule and the call that the time has come for society and officers of investigation and law enforcement agencies (like MACC and police) to recognise the rights of these vulnerable suspects/arrestees as they are, at the extreme of the spectrum are susceptible to suffer from mental health which can cause them to even take away their own life (see *Teoh Beng Hock's* case). The Ministry of Health once declared that from surveys conducted, four in every ten ordinary Malaysians, suffer from some form of mental health issues and remedial measures are to be taken to arrest this problem. It will be more profound to this group of people.”

[Emphasis Added]

[117] I am of the following view regarding *Nik Mohd Suhaimi*:

- (1) the plaintiff was charged with a criminal offence but was finally acquitted of the charge;
- (2) the plaintiff had filed a suit against, among others, the PP and DPP based on the tort of malicious prosecution;
- (3) the High Court did not decide on whether the PP and DPP were liable for the tort of malicious prosecution. Instead, the learned High Court Judge found that the officers of the Malaysian Anti-Corruption Commission (MACC) had committed the tort of malicious process and tort of abuse of process against the plaintiff with regard to the treatment of the plaintiff when the plaintiff was in the custody of the MACC officers;



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- (4) *Nik Mohd Suhaimi* did not decide that the tort of malicious process applied to the exercise of the 4 Prosecutorial Powers by the AG/PP and DPPs; and
  - (5) the tort of malicious process should not be recognised against the invocation of the 4 Prosecutorial Powers by the AG/PP and DPPs because-
    - (a) our case law (in *Rawther* and *Khairuddin*) has already enforced the tort of malicious prosecution with regard to the exercise of 4 Prosecutorial Powers by the AG/PP and DPPs; and
    - (b) if our courts recognise the tort of malicious process against the AG/PP and DPPs in respect of the Prosecution(s), a Duplicity (Proceedings) would arise and such an outcome is neither just nor desirable — please refer to the above sub-paragraph 11(3)(b).

**[118]** As explained in the above sub-paragraph 29(5), the Appellant could not file This Suit against the Respondent based on the tort of malicious process. Consequently, the learned High Court Judge did not err in law and in fact by striking out This Suit with regard to the tort of malicious process.

### **I. A Summary Of This Judgment**

**[119]** In summary, This Appeal is dismissed with costs on the following brief grounds:

- (1) in respect of the tort of negligence, the Respondent, as the then AG/PP, did not owe any duty of care to the Appellant with regard to the exercise of the Respondent's discretion in the filing of the Charges against the Appellant;
  - (2) the Appellant could not file This Suit against the Respondent premised on the 3 Torts because at the time of the filing of This Suit, the Appellant had not been finally acquitted of the Charges; and
  - (3) Malaysian courts should not recognise the tort of malicious process against the Respondent as the then AG/PP.
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