

Duty of Full and Frank Disclosure in the Division of Matrimonial Property: The Law and Practice in Malaysia

¹Norlia Ibrahim, ²Nora Abdul Hak and ¹Roslina Che Soh

¹ Assistant Professors, Ahmad Idrahim Kulliyah of Laws, International Islamic University Malaysia, Malaysia

² Associate Professor, Ahmad Ibrahim Kulliyah of Laws, International Islamic University Malaysia, Malaysia

Abstract: Marriage does not affect spouse's right to acquire property. However, any property acquired during the marriage is recognized as a matrimonial property if it is evidenced that the other spouse has contributed directly or indirectly in its acquisition. On that basis, once the marriage breaks up, the parties start to distinguish the ownership of the property and desire it to be returned to the original owner or to be sold and the proceeds to be divided between them. Some divorces are concluded smoothly and amicably but in other cases both parties fight over practically everything especially their rights in matrimonial property. The governing statute provides a proper guideline on how the property is to be divided depending on whether the property is jointly or solely acquired by the party. Nonetheless, fair distribution is almost impossible if the parties fail to discharge a duty of full and frank disclosure of all information relevant to the case particularly the total assets, income and liabilities. Thus, this paper attempts to discuss the duty of full and frank disclosure in dividing matrimonial property. This will include a discussion on the power of the court to make an adverse inference against the party if they fail to discharge their duty for the purpose of sustaining fair distribution of the matrimonial property in Malaysia by referring to the relevant provisions and decided cases.

Key words: Matrimonial property, full and frank disclosure, law and practice

INTRODUCTION

Matrimonial property dispute is one area of law, which is litigated daily before the registrars and judges with numerous cases reported in Malaysian law journals. Although the ownership of matrimonial property may arise also during the course of a marriage, such as, when one of the parties has been declared as bankrupt as emphasized by Shankar J. in the case of *Overseas Investment Pte. v. Anthony William O'Brien* [1988] 3 MLJ 332, when he said that the spouse's ownership over matrimonial property prevails throughout the marriage and it would be absurd and illogical that spouse's title only arises upon divorce or death, more often than not, at that particular time the couple may not anxious to distinguish the ownership of property. The reason is primarily because at that time they are sharing the benefit together. However, upon divorce, both parties start to distinguish the ownership of property and desire it to be returned to the original owner or to be sold and the proceeds to be divided upon them. Some divorce proceedings are concluded smoothly but in other cases it turns to be the other way around. The parties will fight over practically everything of what has been accumulated throughout their marriage to be divided between them

Materials and Discussion:

Definition of Matrimonial Property:

The Married Women Act 1957 (Revised 1990) which regulates the status of married woman in Malaysia clearly provides in section 4 that married woman shall be capable of acquiring, holding and disposing of any property as if she were a *feme sole*. The provision indicates a full recognition of an individual independent property rights even though after a valid marriage has be entered into which directly shows that marriage does not affect the spouse's right to own property. However, the law also provides that any property acquired during the marriage is considered as a matrimonial property if it is evidenced that the other spouse has contributed either directly or indirectly to its acquisition. Matrimonial property therefore refers to any property acquired during the marriage either by joint effort or sole effort of the party. Hence it also includes any property owned before the marriage provided that it has been substantially improved during the marriage by both the parties or the other party who did not acquire the property.

Shankar J. in the case of *Ching Seng Woah v. Lim Shook Lin* [1997] 1 MLJ 109, at page 122, defines a matrimonial property as;

Corresponding Author: Norlia Ibrahim, Assistant Professors, Ahmad Idrahim Kulliyah of Laws, International Islamic University Malaysia, Malaysia
E-mail: norlia@iium.edu.my

“...the expression refers to the matrimonial home and everything which is put into it by either spouse with the intention that their home and chattels should be a continuing resource for the spouses and their children to be used jointly and severally for the benefit of the family as a whole. It matters not in this context whether the asset is acquired solely by the one party or the other or by their joint efforts. Whilst the marriage subsists, these assets are matrimonial assets. Such assets could be capital assets. The earning power of each spouse is also an asset.”

The above definition clearly indicates that matrimonial property should cover anything that is acquired during the marriage. The definition is wide enough so as to cover the earning power of the spouse even though the quantification of the amount may lead to another dispute (Norliah Ibrahim, 2004). Therefore, matrimonial property includes not only landed property but also cars, shares, savings, unit trusts, insurance policies, EPF balances, club membership etc as long as the property was acquired during the marriage (Faizah Tamby Chik, 2003). In certain situations it may also include property owned before the marriage provided that it has been substantially improved by both parties or by other party during the marriage.

Provisions on Matrimonial Property:

In Malaysia, the law that governs the division of matrimonial property for non-Muslims is the Law Reform (Marriage and Divorce) Act 1976 (hereinafter referred to as the “LRA”). As its long title provides, it is an Act to provide for monogamous marriages and the solemnization and registration of such marriages and to amend and consolidate the law relating to divorce and to provide for matters incidental thereto. The division of matrimonial property is specifically dealt with in section 76 of the LRA. The LRA generally applies not only to all persons in Malaysia but also to those residents outside Malaysia whose domicile is in Malaysia (Section 3(1) of the LRA). It was enforced throughout Malaysia since the date of the enforcement of the LRA i.e first March 1982. (PU (B) 73/1982).

Law Reform (Marriage and Divorce) Act 1976:

Section 76 reads: -

(1) The court shall have power, when granting a decree of divorce or judicial separation to order the division between the parties of any assets acquired by them during the marriage by their joint efforts or the sale of any such assets and the division between the parties any proceeds of sale.

(2) In exercising the power conferred by sub-section (1) the court shall have regard to-

(a) the extent of contributions made by each party in money, property or work towards the acquiring the assets;

(b) any debts owing by either party which were contracted for their joint benefit; and

(c) the needs of the minor children (if any) of the marriage,

and subject to those considerations, the court shall incline towards equality of division.

(3) The court shall have power, when granting a decree of divorce or judicial separation to order the division between the parties of any assets acquired by them during the marriage by the sole effort of one party to the marriage or the sale of any such assets and the division between the parties any proceeds of sale.

(4) In exercising the power conferred by sub-section (1) the court shall have regard to-

(a) the extent of contributions made by the other party who did not acquire the assets to the welfare of the family by looking after the home or caring the family;

(b) the needs of the minor children (if any) of the marriage;

and subject to those considerations, the court may divide the assets or the proceeds of sale in such proportions as the court think reasonable; but in any case the party whose effort the assets were acquired shall receive a greater proportion

(5) For the purposes of this section, references to assets acquired during marriage include assets owned before the marriage by one party, which have been substantially improved during the marriage by the other party or by their joint efforts.”

Division of Matrimonial Property:

The provision in section 76 of the LRA provides that the court is conferred with a power to divide a matrimonial property when granting a decree of divorce or judicial separation between the parties. There are reasons for division but the primary concern as rightly emphasized by Weitzman is to recognize each spouse’s contribution to the acquisition of the matrimonial property (Weitzman, L.J 1992). Leong seems to agree with such justification and claims that the reason for division surrounds the idea that marriage is an economic partnership whereby any material gain made during the course of the marriage was actually has been acquired by the two partners where both discharge the breadwinning and homemaking roles concurrently. (Leong Wai Kum, 1996). Therefore, the assertion made by some people that the division of matrimonial property is to reward the ‘innocent spouse’ and to punish ‘the guilty spouse’ is baseless since the basis of the division is not out of compassion but because they have earned it in their own way. (Leong Wai Kum, 1989)

Generally, the LRA provides some guidelines on how the matrimonial property should be divided depending on whether the property was jointly or solely acquired. For the joint effort property, the court incline towards equality of division while for the sole effort property the acquirer will get a greater proportion (Section 76 (2) and (4) of the LRA). However, the same section provides that before the division is made, there are certain factors that need to be considered by the court including the extent of the contribution made by each party in money, property or works towards the acquiring of the assets, debts owing by either party which were contracted for their joint benefit, the needs of minor children if any from the marriage and the extent of contribution made by the other party who did not acquire the assets, to the welfare of the family. In other words, the court must first determine whether the property is a joint effort or the sole effort property. This point has been clearly highlighted in the case of *Loke Sow Leng v Yap Eng Kee* [2005] 1 CLJ 247, when the judge referred to the case of *Lim Beng Cheng v Christopher Lee Joo Peng* [1996] 2 CLJ 697, and the court emphasizes at p.700 that:

“When dealing with an application under section 76 of the Act it is essential for this court to make a finding of fact on the question of whether the said property was acquired by the Wife and the Husband during the marriage by their joint effort or if so to apply section 76(1) and (2); or whether the said property was acquire by the Husband during the marriage by his sole effort and if so to apply section 76(3) and (4) of the Act”

In applying the law, the approach of the judges differs from one to another. Some of them choose to adhere strictly to the available provisions which clearly emphasize the need to interpret the provision literally with a fear that it might cause injustice to either party as in the case of *Wee Ah Lian v. Teo Siak Weng Weng* [1992] 1 SLR 688. Others prefer to be more flexible by looking into various possible ways in order to come out with a fair and equitable division of the property. This approach is in conformity with the purpose of the law, which aims at providing a just and equitable division of the matrimonial property between the spouses which was emphasised by the court in several cases including the case *Ng Hwee Keng v. Chia Soon Hin William* [1995] 2 SLR 231. Hence it gives an opportunity for judges to include other possible factors depending on the needs and circumstances of the parties, though it is not stated in the provision.

Duty of Full and Frank Disclosure:

The duty of full and frank disclosure generally refers to a duty, which requires all parties to a dispute to provide information relevant to the case including all sources of earnings, interest, income, liabilities, property and other financial resources. (Duty of Disclosure, http://www.familycourt.gov.au/wps/wcm/resources/file/eb59b7022384a75/BRDisc_0309V2.pdf) The duty of full and frank disclosure that has been long practiced by the English courts as evidenced in many decided cases including the case *Ette v Ette*, [1965] 1 ALL ER 341 and *Robinson v. Robinson* [1982] 2 ALL ER 699 which was later approved in the case of *Livesey (formerly Jenkins) v. Jenkins* [1985] 1 ALL ER 106 is very significant for the court to exercise its power equitably, and it has been emphasized that there is no other way of doing this except by ordering the parties to discharge the duty. Consequently, in property disputes, the duty lies on both husband and wife, as affirmed by the Court of Appeal, in the case of *Bee Giok v. Loh Kum Yong* [1997] 1 SLR 153. They are required to give full corporation to the court by providing a full and frank disclosure of the details of the property, their economic situation and their contribution towards the acquisition of the property (Leong Wai Kum, 1997). Otherwise, difficulty will arise in assessing the worth of the assets.

The duty of the parties to make full and frank disclosure is considered as a mandatory requirement of the Divorce and Matrimonial Proceedings Rules 1980. Rule 61(2) provides:

“Where a respondent or the petitioner is served with a notice ... of an application for ancillary relief, ... he shall within 14 days after service of the notice, file an affidavit in answer to the application containing full particulars of his property and income...,”

Rule 61(3) of the Divorce and Matrimonial Proceedings Rules 1980 provides;

“Within 14 days after service of any affidavit under paragraph (2) or within such other time as the court may fix, the applicant shall file an affidavit in reply containing full particulars of his property and income”.

Rule 65(4) of the Divorce and Matrimonial Proceedings Rules 1980 provides;

“Any party to an application for ancillary relief may by letter require any other party to give further information...or to furnish a list of relevant documents or to allow inspection of any such document, and may, in default of compliance by such other party, apply to the registrar for directions.”

Thus, the above rules obviously impose upon the parties a duty to exercise the utmost good faith in making the fullest disclosure of all relevant information. However, it is to be noted that the duty of full and frank disclosure is only required where there is a notice to proceed with an application for ancillary relief (notice) as clearly provided in Rule 61(2) of the Divorce and Matrimonial Proceedings Rules 1980. This is because Rule 61 of the Divorce and Matrimonial Proceedings Rules 1980 imposes on the party who is served with a notice in Form 11 or 13 in respect of an application for ancillary relief a mandatory duty to file an affidavit in answer to the application containing full particulars of his property and income. The application of the rules has been

explained in the case of *Ananda Dharmalingam v Chantella Honeybee Sargon* [2006] 6 MLJ 179. The court ruled that there must be in the first place the process by which demands were made, documents exchanged, and cross-examination had taken place before any adverse inference can be drawn against the said party with respect to such means. Thus, the court decided that since the husband in these proceedings was never served with a notice to proceed with ancillary relief, nor was he requested by letter to give 'further information', the inference of lack of full and frank disclosure as contended by the wife does not even arise.

The duty of full and frank disclosure was also described in detail in the case of *Wee Ah Lian Teo v. Siak Weng* [1992] 1 SLR 688. M. Karthigesu J., at p. 699, emphasised that;

...the position in law is that full and frank disclosure is important and in its absence the court is entitled to draw inferences adverse to the husband as to his capacity or faculties and to treat him as a man in a position to command a very substantial income."

Thus, it is obvious from the quotation that the court reserves a right to make its own inference should the parties refuse to give full corporation to the court. The same point also has been addressed by the court in the case of *Lee Puey Hwa v. Tay Cheow Seng* [1992] 3 MLJ 1, where the court highlighted that the court is not powerless against a party's absence of full and frank disclosure. Thus, it is undeniable fact that the duty of full and frank disclosure is very significant in assisting the court in dividing the matrimonial property equitably. Or else, the court reserves a right to draw an adverse inference against the parties who failed to discharge the duty of full and frank disclosure in the proceeding.

Presumption of Adverse Inference:

The presumption of adverse inference is dealt with in section 114(g) of the Evidence Act 1950 which provides:

"The court may assume that the evidence which could be and is not produced would if produced be unfavourable to the person who withholds it."

There are two conditions to be fulfilled in invoking this presumption i.e. the court must make sure that the evidence withheld is material to the case and the withholding must be deliberately and not merely on account of failure to obtain evidence.(Mariette Peters, 2004). Therefore, unless the two conditions have been fulfilled, the presumption of adverse inference cannot be made due to the failure of the parties to discharge the duty of full and frank disclosure in the proceedings.

The above presumption has been applied by the court in the case of *Parkunan a/l Achulingam v Kalaiyarasy a/p Periasamy* [2004] 6 MLJ 240, where the judge agreed that the court is entitled to draw an adverse inference with regards to the petitioner husband's income as a result of his failure to provide full and frank disclosure as provided under section 114(g) of the Evidence Act 1950. In deciding the case, a few cases have been cited by the court including the case of *Leow Kooi Wah v Philip Ng Kok Seng* [1997] 3 MLJ 133 and the English case of *J.v.J.* [1955] P.214. In both cases the court observed that the obligations of the husband in the cases are to be full, frank and clear in that disclosure. Any shortcomings of the husband from the requisite standard can and normally should be visited at least by the court drawing inferences against the husband on matters the subject of the shortcomings in so far as such inferences can properly be drawn. The same principle has also been emphasized by the court in the case of *Wee Ah Lian v. Teo Siak Weng* [1992] 1 SLR 688.

Similarly in the case *Shirley Khoo v. Kenneth Nok Kong Chua* [1989] 2 MLJ 264, the court has drawn an adverse inference when the husband alleged that *inter alia* his salary had not increased, even when he went to work in Japan. The wife unfortunately was not able to give any evidence to challenge his allegation. Thean J. in deciding this case had no difficulty deciding:

" I think he earns more than that...one would expect the total emolument from his new employer would exceed his previous salary...There must have been some financial attractions or inducements to join this organization and work abroad. His financial position must have improved."

Therefore, the court is entitled to draw an adverse inference and came to the conclusion that the husband should have earned more than the previous salary as he was working in Japan which gave a clue to the court as to his financial standing.

The parties in the case of *Koh Kim Lian Angela v. Choong Kian Haw*[1994] 1 SLR 22 have been reminded of the power of court to make an adverse inference due to their failure to discharge the duty of full and frank disclosure. In commenting on the case, Leong Wai Kum said that if the husband complied with his legal obligation to make full and frank disclosure in his affidavit of means, the court would then have been able to reach at a more precise calculation which could be less than the existing amount, i.e. \$379,000 (Leong Wai Kum, 1993). The court in deciding the case referred to the decided cases such as *Lee Puey Hwa v. Tay Cheow Seng* [1992] 3 MLJ 1, *Wee Ah Lian v. Teo Siak Weng* [1992] 1 SLR 688 and *Ette v. Ette* [1965] 1 All ER 341 which established an identical principle.

In another development, an allegation made by the wife that the husband has failed to discharge the duty of full and frank disclosure has been rejected by the court in the case of *Lah Ah Chai v Chong Mee Ling* [2005] 2 MLJ 2010. In this case the petitioner wife applied for an order to vary the Decree Nisi with respect to the

distribution of matrimonial property and for the petitioner-husband to make full and frank disclosure of all his properties acquired during the course of the marriage and before the said Decree Nisi was made absolute by the court. Her grounds for the application were *inter alia*, the petitioner-husband failed to make full and frank disclosure in the joint petition of all the assets procured by petitioner-husband during the course of the marriage and before the Decree Nisi is made absolute and/or had willfully concealed the true facts to induce the petitioner-wife to agree to the term of the division of the matrimonial properties in the joint petition. She claimed that there was a misrepresentation by the petitioner husband, which has deprived her rights to claim over the matrimonial property and applied for variation order in respect of the division of matrimonial property.

The court in dismissing the appeal decided that variation order can only be made with regards to an order in respect of maintenance for the wife or children due to mistake of fact or misrepresentation. When a property adjustment is made, be it in a judicial separation relating to maintenance on the facts, the petitioner-husband could not be said to have knowingly or deliberately failed to make full and frank disclosure and he did not willfully conceal the true facts to induce the petitioner-wife to agree to the terms of the division of the matrimonial properties in the joint petition. Therefore, the petitioner-wife's allegations pertaining to the misrepresentation by the petitioner-husband were not reasonable and were merely pure baseless assertion.

Why is it important to comply with the duty of full and frank disclosure?

It is an undeniable fact that the duty of full and frank disclosure is very important in assisting the judge to equitably divide the matrimonial property among the parties. Hence, it was pointed out that these days, the courts and lawyers are sophisticated in tracing property both nationally and internationally. Many international partnerships now exist between countries, whose authorities work closely together and are committed to overcoming such wrongdoing. If the asset itself cannot be located, attempts to move or conceal it are likely to point to its existence. If things are not adequately explained by a spouse so as to achieve understanding and transparency, as what has been emphasized by the court in almost all the cases, the court can draw an adverse inference and take this into account in reaching its final decision (Full Disclosure available at <http://www.divorce.co.uk/Fullarticle/tabid/246/ItemID/68/View/Details/Default.aspx>) In addition, such non-disclosure of assets is obviously an attempt to undermine the dignity of the court and court proceedings.

Conclusion:

The primary reason for a division of matrimonial property is to recognize each spouse's contribution either directly or indirectly to the acquisition of the property. (Lenore J. Weitzman' 1992) Both of them in actual fact make an equal, even though non-identical contribution to the acquisition of the property. Pursuant to this idea, it is emphasised that any material gain made during the course of the marriage must be divided among them once the marriage is terminated.(Leong Wai Kum, 1996).

Although the relevant provisions clearly highlighted several factors that the court has to take into cognizance in dividing the property, fair distribution is almost impossible if the parties have failed to discharge the duty of full and frank disclosure. The decided cases demonstrate that there is basically no way to deter the court from exercising its duty. Despite the fact that the parties refused to follow the court order to discharge the duty of full and frank disclosure, the court can make its own inferences by determining the relevant facts of the case in sustaining their power in dividing the matrimonial property equitably in Malaysia.

REFERENCES

- Faizah Tamby Chik, 2003. How Litigants Should Prepare Their Cases in Divorce Proceedings, 4 MLJ cxxix.
- Leong Wai Kum, 1996. "Trends and developments in Family Law", *Review of judicial and legal reforms in Singapore between 1990 and 1995*, Singapore, Butterworth, pp: 700.
- Leong Wai Kum, 1997. *Principles of Family Law in Singapore*. Butterworths Singapore.
- Leong Wai Kum, 1989. Division of Matrimonial property upon termination of marriage. 1 *Malayan Law Journal*. pp. xiii-xviii.
- Leong Wai Kum, 1993. Division of Matrimonial Assets: Recent Cases and Thought for Reform. *Singapore Journal of Legal Studies*, pp: 351-400.
- Leong Wai Kum, 1997. Butterworths' Annotated Statutes of Singapore, Singapore: Butterworths.
- Leong Wai Kum, 1999. *Cases and Materials of Family Law in Singapore*. Singapore: Butterworths.
- Leong Wai Kum, 2000. *Cases and Materials of Family Law in Singapore*. Singapore: Butterworths.
- Leong Wai Kum, 2000. The Just and Equitable Division of gains between Equal Former Partners of Marriage. *Singapore Journal of Legal Studies*, pp: 208-240.
- Leong Wai Kum, 2001. The laws in Singapore and England Affecting Spouses' Property on Divorce. *Singapore Journal of Legal Studies*. pp: 19-52.

Lenore J. Weitzman, 1992. Marital property: Its transformation and division in the United States, in Lenore J. Weitzman and Mavis Maclean (edit.), *Economic Consequences of Divorce, the International Perspectives*. Oxford: Clarendon Press, pp: 85-142.

Mariette Peters, 2004. *Evidence*. MLJ, Kuala Lumpur, pp: 46-48.

Norliah Ibrahim, 2004. A study on the Malaysian Civil Law Relating to Matrimonial Property after Dissolution of Marriage, Ph.D Thesis, Malaysia, International Islamic University Malaysia.

Duty of Disclosure available at http://www.familycourt.gov.au/wps/wcm/resources/file/eb59b7022384a75/BRDisc_0309V2.pdf

Full Disclosure available at <http://www.divorce.co.uk/Fullarticle/tabid/246/ItemID/68/View/Details/Default.aspx>

Family Law - The Legal Obligation of Full And Frank Disclosure available at http://www.laclawyers.com.au/document/Family-Law-_-The-Legal-Obligation-of-Full-And-Frank-Disclosure.aspx