

**Business Assets as Matrimonial Property From the Civil Law and Shariah Perspectives;
Implication For National Family Policy**

By

Zuhairah Ariff Abd Ghadas (Dr.)¹ and Norliah Ibrahim (Dr.)²

E-mail: zuhairah@iiu.edu.my; norliah@iiu.edu.my

Abstract

Matrimonial property disputes are one area of law, which is highly litigated before the registrars and judges. Under the Malaysian law, the court shall have power to order the division of any assets acquired by the divorced parties during the marriage including those attained by the sole efforts of one part to the marriage. Reference to personal property normally did not raise contentious issue as the court would apply the general rule / method in dividing or concluding the matrimonial property.

However, when it comes to distribution of business assets or interest in business, particularly those which are under the business's name, many legal issues may arise, such as rights or entitlement of the ex-spouse to claim, proportion and division of the assets as a matrimonial property, *locus standi* of the ex-spouse to take legal action and rights to future interest/benefits of the business assets/profits.

This paper intends to look into approaches of both the civil and Shariah courts in determining the status of business assets/interest as a matrimonial property relating to business assets/interest. Findings of this research shall be useful in formulating the national policy on distribution of business assets as matrimonial property. Research methodology which is adopted is mainly doctrinal and case law analysis.

Keywords: Matrimonial Property, Business Assets/Interest, Shariah

¹ Associate Professor, Department of Civil Law, International Islamic University Malaysia.

² Assistant Professor, Department of Islamic Law, International Islamic University Malaysia.

1.) Biographical Data

Dr.Zuhairah Ariff Abd Ghadas is an Associate Professor at the Department of Civil Law, Ahmad Ibrahim Kulliyah of Laws. She teaches Law of Contract, Company Law and Building Contract at the Kulliyah of Laws and Business Law and Commercial Laws at the Kulliyah of Economics and Management Sciences. Her area of specialization is SMEs and Partnership laws.

2.) Biographical Data

Dr.Norliah Ibrahim is an Assistant Professor at the Department of Islamic Law, Ahmad Ibrahim Kulliyah of Laws. She teaches Family Law and Evidence and Procedure of Shariah Court. She is also the coordinator for the Family Law and Ethics Unit (Research Cluster). Her area of specialization is matrimonial property law.

Introduction

It is an everlasting wish of married couples that the marriage will last until they die. Nonetheless, despite the wish for interminable happiness, it is observed that one of the main reasons for divorce is related to financial issues, such as insufficient and unstable financial sources/standing of the parties. When it comes to matrimonial property claims, it is obvious that both parties are requesting or defending their rights for the property which exists during the marriage. The main test applied by both the Civil and Shariah courts in deciding rights and proportion of the divorced parties is the "contribution test" whereby if both parties contributed to the acquisition of the property then both parties shall have rights on the property. The proportion shall be decided based on the fraction which each parties contributed to the property.

It is observed that the contribution test could be effectively applied for tangible assets such as houses, land, vehicles, jewelleries and saving which are personally owned by the parties. However, when it comes to assets under a business's name which is owned by both or one of the parties, the contribution test may not be appropriate. This is because the parties' interest in business is not direct; it shall be subjected to type of business structure and nature of interest in the property. An interest in shares is not similar in interest in the value of the shares whilst personal property of the owner which had been transferred to a company shall not be considered as the owner's property despite that it is still in the possession and used by the owner. In short, when it comes to distribution of assets in business as matrimonial property, the contribution test is seen to be insufficient to be the sole test for the court to apply.

Definition of matrimonial property (*harta sepencarian*)

The statutes in Malaysia are silent as regards to the definition of the matrimonial property. Even though the Married Women Act (Revised 1990) is the main statute which deals with the married women's property, no reference is made to the term matrimonial property. The Law Reform (marriage and Divorce) Act 1976 (hereinafter referred to as the LRA) also leaves the term undefined and this failure has led to uncertainty in deciding what should and should not be included in the division. However, generally matrimonial property has been refers to any property, which is acquired during the marriage either by the joint effort or the sole effort of the party. It also includes property, which is owned before the marriage provided that it has been substantially improved by the other parties or by both parties during the marriage.³ In the case of *Ching Seng Woah v. Lim Shook Lin*,⁴ Shankar J held that :

“...the expressions refer 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

³ Refer to section 76 (5) of the LRA.

⁴ [1997] 1 MLJ 109.

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.”⁵

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.

The above finding corresponds to the decision of Lord Denning in the case of *Wachtel v. Wachtel*⁶ where matrimonial assets should refer to those things, which are acquired by one or the other or both of the parties. This must be coupled with the intention that it should be continuing provision for them and their children during their joint lives, and used for the benefit of the family as a whole. The judge divides the matrimonial assets into two parts; assets “of a capital nature” such as the matrimonial home and its furniture and “revenue producing nature” which include the earning power of husband and wife. The finding of Lord Denning conforms with the decision of Lord Diplock in the case of *Pettit v. Pettit*⁷ where matrimonial property or family assets means “property whether real or personal, which has been acquired by either spouse in contemplation of their marriage or during its subsistence and was intended for the common use and enjoyment of both spouses or their children”.⁸ The above cases show that the English courts by using the word “family assets”, describe matrimonial property as property in which both spouses should have some interest either because of the way in which it was acquired or because of the manner in which it was used.⁹

While for the Muslim, the definition section of the IFLA defines it as a “property jointly acquired by husband and wife during the subsistence of marriage in accordance with the conditions stipulated by Hukum Syara”.¹⁰ The judges in the decided cases also give a definition of *harta sepencarian* which basically refers to any property acquired during the marriage in which both parties contributed to its acquisition. In the old case of *Hujah Lijah binti Jamal v. Fatimah binti Mad Diah*¹¹ Briggs J. defined *harta sepencarian* as “property acquired during the subsistence of their marriage by a husband and wife out of their resources or by their joint efforts. The acquisition referred to may be extended to cover enhancement of value by reason of cultivation or development.”¹² In pursuant to that, there was no reason for the wife, being a

⁵ *Ibid*, at p. 122.

⁶ [1973] Fam. 72, at p.90.

⁷ [1970] AC 777.

⁸ *Ibid*, at p. 819.

⁹ See the English Law Commission (Family Property Law), the Law Commission Published Working Paper, No. 42, para 0.24 at p. 15.

¹⁰ Refer to section 2 of the IFLA.

¹¹ [1930] 16 MLJ 63

¹² *Ibid*, at p. 63.

lawful widow, not to get one-half of the property bought originally from savings which accumulated from a piece of land inherited from her parents, even though it was registered in the name of the deceased husband.

In the case of *Yang Chik v Abdul Jamal*,¹³ the learned Kadhi said to the effect: “ the concept of harta sepencarian is of the property that is acquired during the marriage with both the husband and wife contributing by the joint efforts or money to acquire the property”.

Harta sepencarian in actual fact is not only confined to both their efforts in acquiring the property but extends further to cover their contribution whether formal or informal. This principle is best illustrated in the case *Piah binti Said v Che Lah bin Awang*¹⁴ where the Kadhi Besar of Penang defined the term as :

“ Property acquired jointly during the subsistence of the marriage as result of joint efforts of the parties. This would arise in cases where the parties were either employed in similar occupations or otherwise and whether the contributions by the parties were formalized or not, and irrespective of whether there was a clear division of functions or otherwise.”¹⁵

From the above definition, it is clear that harta sepencarian is basically refers to any property which is acquired during the marriage, either by the joint effort or the sole effort of the parties as long as there is a contribution either directly or indirectly by the party who does not acquire the property. It is based upon “recognition of the part played by a divorced spouse in the acquisition of the relevant property and improvement done to it

(in cases it where it was acquired by the sole effort of one spouse). It is due to this joint effort or joint labour that a divorced spouse is entitled to a share in the property acquired (during coverture). As long as the claimant has assisted in the working of it, the law presumes that the property was *harta sepencarian* and it therefore falls on the other spouse who denies the claim to rebut the presumption.”¹⁶

Thus, if formerly the claim on *harta sepencarian* usually in the form of land, matrimonial houses and animals used to work the land, it has developed as to include moveable and immovable property like household goods and furnishing, inline with the life style and the purchasing power of society.¹⁷ It might also include joint bank accounts, compensation paid for land acquired by the government¹⁸, shares registered in the name of either spouse,¹⁹ as well as business assets which has been acquired during the marriage.²⁰

¹³ [1985] 6 JH. 146.

¹⁴ (1983) 3 JH 220.

¹⁵ *Ibid*, at p.223.

¹⁶ *Ibid*.

¹⁷ Mimi Kamariah, *Family Law in Malaysia*, Malayan Law Journal, Kuala Lumpur, 1999, p. 366.

¹⁸ *Rokiah bte Haji Abdul Jalil v. Mohammad Idris bin Shamsuddin* (1410) JH 111; [1989] 3 MLJ ix, *Kamariah v. Mansjur* (1986) 6 JH 301.

The law on matrimonial property in Malaysia

In Malaysia, the law that governs the division of matrimonial property is the Law Reform (marriage and Divorce) Act 1976 (hereinafter referred to as the LRA). As its long title provides that 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 Act. The Act which generally applies not only to all persons in Malaysia but also to those residents outside Malaysia whose domicile is in Malaysia²¹ was enforced throughout Malaysia since the date of the enforcement of the LRA i.e. first March 1982.²²

While for the Muslims, they are governed by the Islamic Family Law Act and Enactments. However for the purpose of this article, reference is made only to the Malaysian law as codified in the Islamic Family Law (Federal Territories) Act 1984, which is also the model followed by many other states in Malaysia.

(i) 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.

¹⁹ *Noor Jahan bt. Abdul Wahab v. Md Yusuff bin Amanshah* [1994] 1 MLJ 156.

²⁰ *Tengku Anun Zaharah v. Dato' Dr. Hussein* [1980] 3 JH 12.

²¹ See section 3 of the LRA.

²² See PU (B) 73/1982.

- (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 efforts of one part 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 the 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 courts think reasonable ; but in any case the party by whose effort the assets were acquired will get 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.”

Referring to the above provision, it is clear that section 76 of the LRA is dealing with the power of the court to order the division of matrimonial assets acquired during the marriage upon granting a decree of divorce or judicial separation. The section is divided into two parts, one is where the assets were acquired by joint effort which is provided for in sub section (1) and the other where they were acquired by the sole effort of one party to the marriage which is dealt with in sub section (3). For the first category, the court shall lean towards equality of division, subject however, to certain factors for consideration such as the extent of the contribution made by each party in money, property or work towards the acquiring of the assets.²³ Besides, any debts owing by either party which were contracted for their joint benefit will also be considered without undermining the needs of the minor children, if any, of the marriage.²⁴

Similarly, for assets acquired by the sole effort of one party to the marriage, the court may divide the assets in such proportions as it thinks reasonable.²⁵ However this is also subject to certain factors namely the extent of the contribution made by the other party who did not acquire the assets to the welfare of the family by looking after the home or caring for the family.²⁶ Similarly, if there are minor children from the marriage, their needs shall be taken into account as provided

²³ Section 76(2) (a) of the LRA.

²⁴ Section 76(2) (b) and (c) of the LRA.

²⁵ Section 76(4) of the LRA.

²⁶ Section 76(4) (a) of the LRA.

for in section 76(4) (b) of the LRA. Provided, however, that in any case the party by whose efforts were acquired shall receive a greater proportion.²⁷

Hence, section 76(5) of the LRA further elaborates that for the purpose of this section, assets acquired during a marriage includes assets owned before the marriage by one party as well. Nevertheless, it is subject to the condition that the claimed property must be substantially improved during the marriage by the other party or by their joint effort.

While for the Muslims parties, The IFLA actually provides an identical provision except for the words “matrimonial property” being substituted by “*harta sepencarian*” while divorce and judicial separation” are replaced with the words “*talaq* and when making the order of divorce”.²⁸

Interest in business

The interest of parties in business is normally measured in the form of ownership, i.e, the quantum of shareholding or contribution in the business. Shareholdings or ownership in business is distinct from the management right. Generally, shareholders have right to decide for the business but no right to manage the business. However, in small businesses, normally, the owners are the both the shareholders and the managers. In such as case, the owners shall have both rights to decide and manage the business. In a big business, the ownership structure and management structure are usually separated between the owners and the managers. In this circumstances, the managers only run the business but do not have the decision making power. These two rights also depended on types of business entity of the business. For the unincorporated business association, such as the sole proprietorships and partnerships, the ownership and management rights are not separated. The sole proprietors and partners have both powers to decide and manage the business. However, in a company structure, the decision making is divided between the members and the directors. Members only decide during the company meetings whilst directors decide and manage the daily matters of the business. In a small company, normally the members and the directors are the same persons. In such circumstances, the members have both powers to decide and manage the business.

In discussing the interest in business, this paper shall look into both the pecuniary interest (business assets) and non-pecuniary interest (management and decision making rights).

(i)Business Assets

In financial accounting, assets are economic resources.²⁹ Assets represent ownership of value that can be converted into cash (although cash itself is also considered an asset).³⁰ Anything tangible or intangible that is capable of being owned or controlled to produce value and that is held to have positive economic value is considered an asset.³¹ Tangible assets are those that have

²⁷ Section 76(4) of the LRA.

²⁸ Please refer to section 58 of the IFLA.

²⁹ Wikipedia. Retrieved from <http://en.wikipedia.org/wiki/Asset> on 10 August 2011.

³⁰ Sullivan, Arthur, Steven M. Sheffrin (2003). *Economics: Principles in action*. Upper Saddle River, New Jersey 07458: Pearson Prentice Hall. pp. 272

³¹ Wikipedia. Retrieved from <http://en.wikipedia.org/wiki/Asset> on 10 August 2011.

a physical substance and can be touched, such as currencies, buildings, real estate, vehicles, inventories, equipment and it contained various subclasses, including current assets and fixed assets.³² Intangible assets are nonphysical resources and rights that have a value to the firm because they give the firm some kind of advantage in the market place. Examples of intangible assets are goodwill, copyrights, trademarks, patents and financial assets, including such items as accounts receivable, bonds and stocks.³³

It is perceived that during a marriage, the husband and wife will be accumulating assets for the household, for example houses, cars, land, shares.etc. Assets which are acquired under the parties' personal name would raise less complication if claimed as matrimonial property as the court has a clear guideline on distribution of jointly acquired property as matrimonial property. However, for assets which were initially acquired by the parties under their individual names but later transferred to a business which is owned by one or both of the divorced parties, complications may arise as to the rights of the parties in claiming the assets as a matrimonial property.

Generally, the court applied the "contribution test" in deciding rights of parties claiming for matrimonial property but this is only possible if the assets are under one of the divorced parties' name. However, once the assets have been transferred to a business, generally it shall be own by the business and the parties cannot directly claimed that the assets shall be distributed to them as matrimonial property.

One of the factors that the court needs to look at is type of business entity in which the business is carried on. If the assets were transferred to a sole proprietorship or a partnership, then there would be not much issue as the individuals still have rights upon assets of the business. This is because in both sole proprietorship and partnerships structure, the owner/partners are not distinct from the business. Any assets own by the business are deemed to be assets of the owner/partners. However, in a company structure, once the owner transferred his or her assets to the business, it is deemed to be the company's property. In *Abdul Aziz bin Atan & 87 Ors v Ladang Rengo Malay Estate Sdn Bhd*,³⁴ main assets of the company consisted of land. All the shareholders of the company had transferred their entire shares to a certain buyer. A question arises as to whether assets of the company were also transferred to the buyer by virtue of sale of all the shares. The court held that it is trite law that an incorporated company is a legal person separate and distinct from the shareholders. As the company did not change its identity or personality, it continued to own all its assets. As such, if the divorced parties intend to claim that the company's assets as part of the matrimonial property, the court has to apply a different approach to determine the status of the assets prior to applying the contribution test.

The court should first invoke the doctrine of lifting of the corporate veil to decide whether assets of the company could be distributed as matrimonial property. This is because only property which belongs to the divorced parties could be claimed and divided as matrimonial property whilst property which has been transferred to a company shall be considered as other person's property. However, if the court applies the doctrine of lifting of corporate veil and found that the property was transferred to the company by one of the divorced parties to avoid certain personal

³² J. Downes, J.E. Goodman, "Dictionary of Finance & Investment Terms", Baron's Financial Guides, 2003.

³³ Ibid. See also J. G. Siegel, N. Dauber & J. K. Shim, "The Vest Pocket CPA", Wiley, 2005.

³⁴ [1985] 2 MLJ 165

obligation, such as distribution of the property as a matrimonial property, the position could be different. In *Wan Khairani binti Wan Mahmood v Ismail bin Mohamad & Anor*,³⁵ the appellant and the first respondent were divorced in 1990. In 1992 the appellant commenced an action in the Syariah Court for 'harta sepencarian' orders ('the Syariah action'). The appellant and the first respondent were both directors and shareholders in the second respondent. The first respondent was the majority shareholder whereas the appellant was the minority shareholder. The appellant alleged that the first respondent was the trustee under a written trust deed dated 21 January 1986 in respect of some land ('the lands') registered in the name of the trustee and held in trust for the second respondent. The purchase price for the lands was paid for by the second respondent. The government subsequently acquired these lands and compensation monies were paid to the first respondent in 1997 and 1999. On 16 February 2001, the appellant added the lands as assets to her Syariah action.

In the Shariah court,³⁶ the judge applied the doctrine of separate legal entity and lifting of corporate veil to decide whether money paid by the government for the land (claimed to be the matrimonial property) to a company which is owned by the husband could be claimed by the wife as matrimonial property. After detail consideration and application of the doctrine, Mohamad Shakir Abdul Hamid J, held that there are sufficient evidence that the land belong to the company and not the husband and as such the money paid to the company for the land could not be claimed as a matrimonial property. Although in *Wan Khairani* case, the applicant did not succeed in her claim, the case showed that the doctrine of lifting corporate veil could be applied to decide status of assets or property which had been transferred to a company

(ii) Management rights

In a business, the management rights refer to the right to make decision for the business. This right actually goes beyond right to profit sharing or shareholding. In a business structure, ownership and control are two distinct rights. The fact that a person holds shares or interest in the company does not necessary means that he/she has management right or control in the business. To determine the composition and distinction of ownership, the business structure/form is vital.

The decision making power in is normally vested in the owner and the structure depends on types of business entities. For example, in a sole proprietorship, which is a one man business, only the owner is entitled to decide for the business. There is no issue of sharing management or decision making rights in sole proprietorships.

On the other hand, in a partnership structure or a firm, the partnership law is clear that all partners may participate in the firm.³⁷ This provision impliedly gives all partners the decision making right and it is up to the partners either to be an active partner by exercising the management right or to become passive partner by not taking active role in the management of the business. In both circumstances, partners will jointly liable for the business debts.³⁸ No

³⁵ [2008] 1 MLJ 164

³⁶ Case No. 0063/1991T

³⁷ Partnerships Act 1961; s.26

³⁸ Partnerships Act 1961; s.7 and s.11

partners can be exempted from liability of the firm. This principle is known of unlimited liability.³⁹ The unlimited liability regime which is imposed in partnerships structure is in fact the legal justification which underlined the law that all partners have management rights. As such, in a partnership structure the right of participation in business is/must be shared between all partners.

In a company structure, the ownership structure is a bit more complex than sole proprietorships and partnerships structure. In a company, there are two main decision making organs, namely the members and directors. Directors decide through the board of directors (BOD) meeting whilst the members decide through the company's meetings (AGM or EGM). Despite the ideal perspective of giving members the right to decide in the business, the real fact is that it is the BOD that has the management right, particularly in the running of the business.⁴⁰ The members' rights are only exercisable in the company's meetings and it is only if and when the company calls for a meeting, that members may exercise their decision making right other than during the AGM. If the company did not call for any meeting, members will not be able to exercise their voting rights. This highlights the fact that shareholding does not necessarily connote control. Shareholding indicates ownership but not necessarily control.

According to Dr Saleem Sheikh and Professor SK Chatterjee:⁴¹

'The divergence of interest between ownership and control had created a division of functions. Within the corporation, shareholders had only interests in the enterprise while the directors had power over it. The position of the shareholders had been reduced to that of having a set of legal and factual interests in the enterprise.'

As such, in a company structure, the fact that a person has bulk of shares does not automatically mean that he/she has management or right to participate in the business. Another important principle to highlight is that in a company structure, the management right generally vested in the BOD which means that it must be shared between more than one person.

One important observation which can be highlighted is that not all business forms allow sharing of participation rights. A divorced couple may claim certain proportion/ value of a sole proprietorships business as matrimonial property but not in right of participation as the control is vested upon one person only. On the other hand, in a partnership and a company structure, the divorced parties may claim right of participation in the business as matrimonial property because it can be shared.

In the English case of *Wachtel vs Wachtel*, Lord Denning M.R held that "the phrase 'family assets' is a convenient short way of expressing an important concept of matrimonial property. It refers to those things which are acquired by one or other or both of the parties, with the intention that they should be continuing provision for them and their children during their joint lives, and

³⁹ See *Kasinathar Balendra Thuraisingham v. Affin Bank Berhad* [2009] 1 LNS 1734; *Restoran Rizqin v Asia Commercial Finance (M) Berhad & Another Cases* [2005] 1 LNS 27; *MBF Capital Bhd & Anor v. Tommy Thomas & Anor (No 5)* [1998] 3 CLJ 383

⁴⁰ Article 73; Table A, Fourth Schedule of Companies Act 1965

⁴¹ Dr Saleem Sheikh and Prof SK Chatterjee, *Perspectives on Corporate Governance*, in Dr Saleem Sheikh and Prof William Rees(eds), *Corporate Governance & Corporate Control*, Cavendish Publishing Limited, London, (1995) at 40.

used for the benefit of the family as a whole. The judge divides the matrimonial assets into two parts; assets “of a capital nature” such as the matrimonial home and its furniture and “revenue producing nature” which include the earning power of husband and wife.

If the definition in *Wachtel* case is used as the judicial guideline of what is matrimonial property, then, there is no reason to exempt divorced couple to claim the right of participation in business as part of matrimonial property. As long as it can be proved that the business was established/acquired before or during marriage with the intention that it is for continuing provision for them and their children during their joint lives, and used for the benefit of the family as a whole, divorced parties should be entitled to claim some proportion in the business.

Despite this observation, the case law showed otherwise. In *Koay Cheng Eng v. Linda Herawati Santoso*⁴², the petitioner contended that the respondent is not entitled to any maintenance payments as she is a professionally qualified architect, licensed to practice in the UK and, hence, capable of earning a living in the UK, free from the responsibility of raising any children. The petitioner declared his monthly income at RM10 000. The respondent disputed this and submitted that the petitioner had failed to make a full and frank disclosure of his income. The petitioner also contended that the respondent is ineligible to a share of the matrimonial assets because she did not contribute towards the purchases of the properties. The respondent, on the other hand, submitted that she is entitled, under s. 76(1) and (2) of LRA, to half of all the matrimonial assets, including the properties and motor vehicles owned by the petitioner, a share in the petitioner’s ENT clinic, and an equal share in the petitioner’s provident fund contributed during the subsistence of the marriage.

The court held that the petitioner’s contention that the respondent should not be paid any maintenance was unsustainable. The parties had been married for 17 years and the respondent had hoped for the marriage to survive. The respondent had sacrificed a career as an architect to follow the petitioner in his various postings before they moved to Malaysia 11 years ago. It would be a grave injustice to not order maintenance in favour of the respondent.

The court also held that properties acquired by the parties in Malaysia were paid for mostly with the moneys repatriated from the UK. Some of such properties were subsequently disposed of and the proceeds were used to purchase other properties. The respondent was able to show a direct contribution in relation to the purchase of the properties in the UK and consequently, she would be entitled to an equal share in the properties purchased in Malaysia. However, from the evidence, it is found that the respondent was never involved in the setting up or management of the petitioner’s clinic and as such, she was unable to prove her claim of having contributed to the clinic.

In deciding the above judgment, the judge made sole reference to *Sivanes a/l Rajaratnam v Usha Rani a/p Subramaniam*⁴³ whereby the Court of Appeal upheld the decision of the High Court that upon the divorce, the wife was entitled to a share of the clinic as matrimonial property because the wife had contributed to the setting up of the clinic by among others:

⁴² [2005] 1 CLJ 247

⁴³ [2002] 3 MLJ 273

- (i) standing as guarantor for bankung facilities
- (ii) selling the family car to tide over the difficult period and
- (iii) Utilising joint savings in the opening of the clinic

Another interesting case law to highlight the approach of court in deciding interest in business as part of matrimonial property (for Muslim) is *Boto' binti Taha v Jaafar bin Muhamed*⁴⁴ In this case the parties were married in 1966. At the time of the marriage the plaintiff-wife worked as a coffee-shop assistant and the defendant-husband carried on a fishmonger business in Dungun. The business of the defendant prospered and during the marriage he bought the matrimonial home, a piece of land, 4 fishing boats, fishing nets and a fish stall. The marriage ended in a divorce in 1974 and on the divorce the defendant only paid the plaintiff her maintenance for the period of *eddah*. The plaintiff applied to High Court for a declaration that she was entitled as *harta sepencarian* (*matrimonial property*) to one-half share in all the properties acquired during her marriage to the defendant and to one-half of all the income derived from the properties since their divorce.

The court held that *harta sepencarian* is based on customs practiced by the Malays and rests upon the legal recognition of the part played by a divorced spouse in the acquisition of the relevant property and in improvements done to it, in cases where it was acquired by the sole effort of one spouse only. It is due to this joint effort or joint labour that a divorced spouse is entitled to a share in the property. The fact that the plaintiff accompanied the defendant in his business trips and giving up employment because of the marriage must amount to her joint efforts in the acquisition of those properties. Interestingly, the court further held in this case that even though the plaintiff did not take direct part in the defendant's fish business, her constant companionship was responsible for the defendant's peace of mind which enabled him to function effectively as a businessman. The evidence shows that she was helping the plaintiff's business indirectly as a partner in his business trips. As such, the properties which are the subject of the present suit are *harta sepencarian*.

The above cases law highlighted the approach of the Malaysian court in determining right of divorced parties to claim shares in business as matrimonial property. It can be seen that if parties did not contribute to the business, direct or indirect or was never involved in the management of the business, direct or indirect, he/she would not be entitled to the business as part of matrimonial property. Some degree of participation is required to indicate interest of the parties in the business.

⁴⁴ [1985] 2 MLJ 98

Observation

In deciding the divorce settlement and matrimonial property claims, the court normally refers to the statutory and judicial guideline. Nonetheless, it is perceived that there are other aspects which need to be highlighted in determining the composition of matrimonial property. For example, in relation to business assets, the court should separate between the pecuniary and non-pecuniary assets. In the case of management rights in business, the court must firstly, take into consideration the business structure, whether it allows the parties to share or to be jointly involved as decision maker. It is only viable to grant right of participation as part of matrimonial property if the business structure allows the decision making power to be shared, for example in a company and/or a partnership but not in a sole proprietorship.

The entity of the business structure is also important to determine status of the pecuniary business assets as matrimonial property. In the unincorporated business association, the divorced parties could claim assets of business which belong to one of them because the business assets are still considered as personal assets of the owners. However, if the assets are in a company structure, the court has to apply the doctrine of lifting of corporate veil to first determine whether the assets can be distributed as matrimonial property.

In formulating the national policy on matrimonial property, in depth deliberation should be made on business assets as its status are not as direct as personal assets. The fact that certain assets has been transferred to a business or belong to a business does not automatically stop the rights to claim it as matrimonial property. Nonetheless, there are few legal principles other than the contribution test which the court needs to look into to determine the status and the division of the business assets as matrimonial property. The issues on rights of divorced parties on business assets is seen as one of major issues which need to be deliberated as it could involves high value of assets and also it may affect future of the claimants.