

## Safeguarding the Welfare of the Mentally Disordered under the Mental Health Act 2001<sup>171</sup>

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### Abstract:

Part X of the Mental Health Act 2001 in Malaysia governs proceedings in inquiries into mental disorders. Specifically, the Malaysian courts are empowered to appoint a committee of person and/or a committee of the estate of the person to govern the affairs of a person who is determined to be mentally disordered and who is incapable of managing his or her affairs.

This article seeks to examine the process of appointment of such committees and the extent of powers available to these committees. Consideration is given to the current safeguards available to protect the welfare of the mentally disordered person within the current legal framework and commentary is provided on the adequacy of the existing safeguards.

**Keywords:** Mental Health Act 2001; committee of estate; committee of person

### 1. Introduction

The Mental Health Act 2001 (“**MHA 2001**”) came into force in 2010, when the Mental Health Regulations<sup>172</sup> came into operation in 2010. MHA 2001 is applicable to all parts of Malaysia, passed to consolidate the laws relating to mental disorders<sup>173</sup> and to provide for the admission, detention, lodging, care, treatment, rehabilitation, control and protection of persons who are mentally disordered.<sup>174</sup>

In particular, Part X of the MHA 2001 contains specific provisions allowing the High Court (henceforth referred to as the Court), on an application before it, to make an order directing an inquiry to determine whether a person subject to the jurisdiction of the Court and alleged to be mentally disordered is incapable of managing himself<sup>175</sup> and his affairs due to such mental disorder.<sup>176</sup> If the Court adjudicates that the person alleged to be mentally disordered is, owing to his mental disorder, incapable of managing himself and his affairs,<sup>177</sup> the Court may order that a committee of person and/or a committee of the estate of the person be appointed in respect of the mentally disordered person.<sup>178</sup>

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<sup>172</sup> Mental Health Regulations 2010.

<sup>173</sup> Nur Aina Syafiqah Azawawi and Anisah Che Ngah, ‘Mental Health Law Development in Malaysia’ [2019] 1 CLJ(A) i.

<sup>174</sup> Mental Health Act 2001 (MHA 2001) Preamble.

<sup>175</sup> References to the masculine are henceforth deemed to be references to the feminine as well.

<sup>176</sup> MHA 2001, s 52(1).

<sup>177</sup> *ibid* s 56.

<sup>178</sup> *ibid* s 58.

This article will first examine the process of appointment and the extent of powers available to these committees, highlighting the distinctions between a committee of person and committee of the estate of the person. Consideration is then given to the safeguards available to protect the welfare of the mentally disordered person within the current legal framework as well as the adequacy of such safeguards.

## **2. Proceedings under Part X of the MHA 2001**

### **2.1. Definition of a mentally disordered person**

A mental disorder is defined under section 2(1) of the MHA 2001<sup>179</sup> to mean ‘any mental illness, arrested or incomplete development of the mind, psychiatric disorder or any disorder or disability of the mind however acquired’.

The legislation is clear, however, that a person is not to be dealt with as someone with a mental disorder only by reason of his promiscuity or other immoral conduct, sexual deviancy, consumption of alcohol or drug etc,<sup>180</sup> although this does not prevent the serious physiological, biochemical or psychological effects, temporary or permanent, of drug or alcohol consumption from being regarded as an indication that a person is mentally ill.<sup>181</sup>

Under Part X of the MHA 2001, section 51 defines a mentally disordered person as ‘any person specifically found by due course of law to be both mentally disordered *and* incapable of managing himself and his affairs’.<sup>182</sup> Thus, it is only when a person with a mental disorder can be shown to be unable to manage himself or his affairs that any committee will be appointed.

The conclusion of whether a person is mentally disordered is a judicial decision. While Courts may be properly aided by medical opinions, ultimately the Court is not relieved from its obligation to exercise its discretion and form its own judgment,<sup>183</sup> not allowing the decision to be made completely vicariously through medical specialists.<sup>184</sup> The Court is not bound to accept the evidence of medical practitioners even in the face of unchallenged medical opinions, provided the Court has sound reasons to do so.<sup>185</sup>

### **2.2. Inquiry on a mentally disordered person – The Court procedure**

Pursuant to section 52(3) of the MHA 2001,<sup>186</sup> the categories of people who can apply to the Court for an inquiry on a mentally disordered person are the relative<sup>187</sup> of the person alleged to be mentally disordered, or any public officer nominated by the Health Minister for the purpose of making the application.<sup>188</sup>

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<sup>179</sup> *ibid* s 2(1).

<sup>180</sup> *ibid* s 2(2).

<sup>181</sup> *ibid* s 2(3).

<sup>182</sup> *ibid* s 51.

<sup>183</sup> *Wong Kim v Loh Kim Foh* [2003] 4 MLJ 535 (HC).

<sup>184</sup> *ibid*.

<sup>185</sup> *Gary Lim Ting Howe v Lim Pang Cheong & Ors* [2015] MLJU 832 (HC), [34].

<sup>186</sup> MHA 2001, s 52(3).

<sup>187</sup> *ibid* s 2(1) - Husband or wife, son or daughter, father or mother, brother or sister, grandparent or grandchild, maternal or paternal uncle or aunt, nephew or niece.

<sup>188</sup> *ibid* s 52(3).

Upon an application being made, the Court generally follows a two-tiered process.<sup>189</sup> Firstly, the court determines whether on a *prima facie* basis, the allegation that the subject person of the application is mentally disordered<sup>190</sup> is potentially true. There does not need to be conclusive proof of this allegation,<sup>191</sup> merely whether there is *prima facie* evidence that the person is of unsound mind and is incapable of managing himself and his affairs.<sup>192</sup> The initial assessment allows the judge to determine if there is any real ground for an inquisition.<sup>193</sup> Thus, if the *prima facie* test is satisfied, the Court is empowered to order an inquiry as a second step to determine whether the person is unable to manage himself or his affairs due to his mental disorder. If the *prima facie* case is not satisfied, however, no inquiry will be ordered by the Court, with the result that the application will be dismissed *in limine*. The High Court decision of *Wong Kim v Loh Kim Foh*<sup>194</sup> was an instance where the Court found insufficient *prima facie* evidence to order an inquisition. While medical reports suggested that the 90-year-old defendant was suffering from Alzheimer's disease, a 55-minute interview conducted by the judge found that the defendant "*spoke freely and fluently*", was "*cooperative and coherent*" and "*surprised me with his capacity for comprehension*".<sup>195</sup>

At any time after the application for an inquiry is made, the Court may require the person who is alleged to be mentally disordered to be produced for personal examination by the Court or a psychiatrist.<sup>196</sup> The factors to be considered by the psychiatrist<sup>197</sup> are the nature and degree of the person's condition, the complexity of his estate, the effect of the condition of the person upon his conduct in administering the estate; and any other circumstances the psychiatrist considers relevant to the estate and the person and his condition.<sup>198</sup> In the alternative or in addition, the Court may, on evidence it deems sufficient, order that the person be admitted into a psychiatric hospital for observation for a period not exceeding one month, which may be extended by a further one month vide application of the Medical Director.<sup>199</sup>

During the inquiry stage, the Court will consider the psychiatrist's report under section 54, the certification of the Medical Director under section 55, and other evidence and arguments it thinks fit to determine if the person is incapable of handling himself and his affairs by reason of his mental disorder.<sup>200</sup> Other questions that the Court may direct to be answered include those pertaining to the nature of the property belonging to the person alleged to be mentally disordered; the persons' relatives; and the period during which he has been mentally disordered.<sup>201</sup>

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<sup>189</sup> Note the differing approaches in *Tan Poh Lee & Ors v Tan Kim Choo @ Tan Kim Choon & Anor* [2018] 6 MLJ 141 (CA) and *Ng Pik Lian v Tai May Chean & Anor and other appeals* [2021] 10 CLJ 841 (CA).

<sup>190</sup> Within the meaning of the MHA 2001, s 51.

<sup>191</sup> *Tan Poh Lee & Ors v Tan Kim Choo @ Tan Kim Choon & Anor* [2018] 6 MLJ 141 (CA).

<sup>192</sup> *Wong Kim v Loh Kim Foh* [2003] 4 MLJ 535 (HC).

<sup>193</sup> *ibid*.

<sup>194</sup> *ibid* made pursuant to section 3 of the Mental Disorders Ordinance 1952 (now repealed) which contains a similar provision as section 52 of the MHA 2001.

<sup>195</sup> *ibid* 543.

<sup>196</sup> MHA 2001, s 54(1).

<sup>197</sup> As defined in section 2 of the MHA 2001.

<sup>198</sup> MHA 2001, s 54(2).

<sup>199</sup> *ibid* s 55(1).

<sup>200</sup> *ibid* s 56.

<sup>201</sup> *ibid* s 52(2).

It should be noted that while the application under section 52 of the MHA 2001 needs to meet the initial *prima facie* threshold by the Court, it is not mandatory that the Court must order an inquiry once the threshold is met. Section 52(1) gives the Court a permissive power to do so.<sup>202</sup> That said, it is expected that a successful application under section 52 of the MHA 2001 should at least be supported by medical evidence in the form of a medical nature by a medical practitioner who has had a reasonable opportunity of viewing the condition of the alleged mentally disordered individual.<sup>203</sup>

It is not easy to satisfy the threshold of what it means to be mentally disordered under section 51 of the MHA 2001. The mere presence of unchallenged medical findings on dementia may not suffice if evidence shows that a person is in fact capable of managing his day-to-day affairs. In this regard, the High Court decision of *Gary Lim Ting Howe v Lim Pang Cheong & Ors*<sup>204</sup> was presented with surveillance reports which showed the alleged mentally disordered individual shopping for groceries, buying breakfast, and playing golf. The Court found that the individual's *'ability to manage time and space would also appear to be sufficiently unimpaired as to permit him to not only drive two different models of cars, but also to drive into the heart of Kuala Lumpur at rush hour on a weekday, find parking, and then have breakfast at a coffee shop on Jalan Imbi.'*<sup>205</sup> The Court opined that the evidence proved that the individual's executive function was still intact.

Illustrations from case law where the Court has deemed it fit to appoint a committee over the mentally disordered person and/or his estate include where there is a court order from another jurisdiction declaring the individual to be of unsound mind and incapable of managing himself and his affairs.<sup>206</sup> The Court is, however, mindful not to allow the inquiry mechanism to be used purely as a litigious tool. In the High Court decision of *Tee Wee Kok v Teh Liang Teik & Ors*,<sup>207</sup> for instance, the Court dismissed an application which had been filed under the then Mental Disorders Ordinance 1952. The dismissal was on the basis that the application was found to be made not in the best interests of the individual alleged to be mentally disordered, but merely to protect the position of the plaintiff in pending suits as a consequence of a bitter feud between siblings. The Court refused to allow an application made to protect the plaintiff's commercial interests without having regard to the interests of the said individual.

### 2.3. Change in the landscape of the law at the inquiry stage

The emergence of the recent Court of Appeal decision of *Ng Pik Lian v Tai May Chean & Anor and other appeals*<sup>208</sup> has introduced a new dimension on how the law may apply with respect to the first stage *prima facie* assessment and second stage inquiry process. *Ng Pik Lian (supra)* lays down 2 key propositions. Firstly, an order for inquiry is subject to an appeal given its

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<sup>202</sup> *Ling Towi Sing @ Ling Chooi Sieng & Ors v Dato' Ng Kong Yeap c/o Ling Towi Sing @ Ling Chooi Sieng* [2016] MLJU 425 (HC).

<sup>203</sup> *Tan Chin Yap v Nyanasegar A/L Muniandy & Anor* [2022] MLJU 2204 (HC).

<sup>204</sup> *Gary Lim Ting Howe v Lim Pang Cheong & Ors* [2015] MLJU 832 (HC).

<sup>205</sup> *ibid* [50].

<sup>206</sup> *Tan Guek Tian & Anor v Tan Kim Kiat (No. 1)* [2007] 3 MLJ 521 (HC).

<sup>207</sup> *Tee Wee Kok v Teh Liang Teik & Ors* [2010] 3 MLJ 84 (HC).

<sup>208</sup> *Ng Pik Lian v Tai May Chean & anor and other appeals* [2021] 10 CLJ 841 (CA).

intrusive nature on a person's fundamental liberties.<sup>209</sup> An order for inquiry was found to be a final decision disposing of the rights of the parties and was conclusive in nature in that a fundamental right of an individual had been affected, warranting an appeal. Secondly, the Court of Appeal found that a *prima facie* case is always rebuttable. This means that once a *prima facie* case is established, the party must be afforded the opportunity to rebut the same as a matter of justice within the same proceedings. The court expressly mentioned that it would be unfair for a person to go ahead with an inquiry before one can bring the evidence to rebut the *prima facie* case.<sup>210</sup>

The ratio decidendi of *Ng Pik Lian (supra)* is interesting and stands in contrast with another Court of Appeal decision delivered just 3 years prior in the case of *Tan Poh Lee & Ors v Tan Kim Choo @ Tan Kim Choon & Anor*<sup>211</sup> which held that once a *prima facie* case is established, no rebuttal evidence should be considered in the judge's deliberation on whether to proceed with the inquiry. Instead, rebuttal evidence should only be considered at the next stage, that is after the inquiry is performed, before relevant orders on the administration of affairs of the individual are made.<sup>212</sup> The difference between these two Court of Appeal decisions will be explored further below on the issue of safeguards available to mentally disordered people under the MHA 2001.

#### **2.4. On setting aside an order made under the MHA 2001**

It is apposite to also mention at this juncture that the High Court decision of *Gary Lim Ting Howe (supra)* referred to above was in effect a second-round determination of an individual's capacity to manage his affairs ('the second decision'). In that case, an earlier High Court decision had already made a determination that the individual was mentally disordered within the meaning of the MHA 2001 ('the first decision'). However, the first decision was obtained under circumstances where the individual had been adjudged to be bankrupt and was subject to continued public examination proceedings. As a result, judgment creditors applied to intervene to set aside the first decision and were ultimately allowed to intervene. A rehearing of their application to set aside the first decision was then ordered, whereby the individual was eventually found to be capable of managing his own affairs *vide* the second decision.

In addressing counsel's argument that the Court is not vested with the power to set aside a proper order under the MHA 2001, the later High Court decision notably found that the judgment creditors' right to apply for setting aside was rooted in section 62 of the MHA 2001<sup>213</sup> which provides that subject to the Act, the Court, may, on an application made to it concerning any matter connected with an inquiry, make such order in respect of the application and the costs of the application and of the consequent proceedings as under the circumstances seem just. The Court found that the application to set aside was made in consequence of a previous inquiry undertaken pursuant to section 52 and was therefore

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<sup>209</sup> *ibid* 847.

<sup>210</sup> *ibid* 849-850.

<sup>211</sup> *Tan Poh Lee & Ors v Tan Kim Choo @ Tan Kim Choon & Anor* [2018] 6 MLJ 141 (CA).

<sup>212</sup> *ibid* 150.

<sup>213</sup> MHA 2001, s 62.

'connected with an inquiry' as required under section 62.<sup>214</sup> The Court of Appeal<sup>215</sup> decision which allowed the judgment creditors to intervene opined that pursuant to section 62, among others, anyone with information can seek remedy in court to challenge the status of the mental state of the relevant individual, bearing in mind that the mental status of any person is a fluid matter. The Court of Appeal was also presented with surveillance reports. The application of section 62 in this manner is examined further below in the context of safeguards available to the mentally disordered.

### 3. Committee of person and committee of estate

#### 3.1. Individuals sitting on the committees

Once the Court determines that a person is mentally disordered and is thus unable to manage himself or his affairs, the court has the power to appoint a committee or committees of the person and of the estate of the person.<sup>216</sup> Broadly, a committee of person has the primary purpose of protecting the bodily safety of the mentally disordered individual and those around him; whilst a committee of the estate of the person (henceforth referred to as committee of estate) is aimed at managing the external affairs of the mentally disordered person including his property etc. If the Court deems fit, it may make provisions on the remuneration of the committee(s) out of the person's estate or the giving of security by the committee(s).<sup>217</sup>

It is possible for the same individual(s) to sit on both the committee of the person and the committee of estate.<sup>218</sup> It is, however, not necessary for both the committee of person and the committee of estate to be constituted. Section 58(2) of the MHA 2001 envisages that if a mentally disordered person is unable to manage his affairs but is not dangerous to himself or others, the Court may opt to appoint a committee of estate only without appointing a committee of persons.<sup>219</sup>

It appears that a single individual is sufficient to form a committee. While it is usual for the mentally disordered person's relative as defined under section 2 of the MHA 2001 to sit on the committee, blood relations are not a prerequisite, given the spirit and overall intent of the MHA 2001. In the High Court decision of *Liew Ju Min v Choo Wee Poh & Ors and another*,<sup>220</sup> an adopted daughter was found to be a suitable person to sit on the committee.

Indeed, a friend<sup>221</sup> can be appointed to sit on a committee, as the requirement for a relative to act as an applicant only applies during the inquiry stage.<sup>222</sup> For the purposes of the MHA 2001, a friend is described, among others, as a person, other than a relative, of or above eighteen years of age with whom the mentally disordered person ordinarily resides, and with whom he has or had been ordinarily residing for a period of not less than two years.

<sup>214</sup> *Gary Lim Ting Howe v Lim Pang Cheong & Ors* [2015] MLJU 832 (HC) [17] and [18].

<sup>215</sup> *Tan Sri Dato' (Dr) Rozali Ismail & Ors v Lim Pang Cheong @ George Lim & Ors* [2014] 6 CLJ 55 (CA) [21].

<sup>216</sup> MHA 2001, s 58(1).

<sup>217</sup> *ibid* s 58(1).

<sup>218</sup> *Hasnah bt Baba v Juliah bt Mohd Hassan* [2020] MLJU 499 (HC).

<sup>219</sup> MHA 2001, s 58(2).

<sup>220</sup> *Liew Ju Min v Choo Wee Poh & Ors and another case* [2017] MLJU 133 (HC).

<sup>221</sup> MHA 2001, s 2.

<sup>222</sup> *ibid* s 52(3).

Ultimately, a guiding principle adopted by the Court across the board in appointing a committee is whether the best interests of the mentally disordered person would be served.

### 3.2. Committee of person

The majority of cases under Part X of the MHA 2001 do not deal with the formation of a committee of person. A reading of section 58(2) of the MHA 2001 indicates that a committee of person is only appointed in narrow circumstances – when the mentally disordered person is dangerous to himself or others. Case law has interpreted this to mean the “*tendency of the person becoming violent and inflict injury*”.<sup>223</sup>

A fallback provision lies in section 73 of the MHA 2001, where the Court is presented with two options if it does not appoint a committee of person. The Court can either direct the person to be received into a psychiatric hospital;<sup>224</sup> or make an order handing him over to the care of a friend or relative who satisfies the Court that they undertake to take proper care of the person to prevent him from injuring himself or others.<sup>225</sup>

Given the distinction that the MHA 2001 makes between appointing a committee of person versus making the alternative decision of handing a mentally disordered person over to the care of a psychiatric hospital, friend or relative, the full extent of the powers of a committee of person remains to be illustrated. It may well be that a committee of person functions primarily in making medical decisions which have a bearing only on the immediate and urgent well-being of the mentally disordered person.

Across the Causeway, the Singapore High Court decision of *Re LP (Adult Patient: Medical Treatment)*<sup>226</sup> held that a committee of person had the power to act in place of the patient to give or withhold medical consent.<sup>227</sup> However, section 77(1)(b) of the Malaysian MHA 2001 allows a relative of a mentally disordered person to give consent on his behalf for surgery, electroconvulsive therapy of clinical trials if he is incapable of so consenting, without the requirement for the relative to first be part of a committee of person.<sup>228</sup> The question of the true ambit of powers of a committee of person thus lingers.

### 3.3. Committee of estate

There appears to be more clarity on the role to be performed by a committee of estate. Under the MHA 2001, a committee of estate essentially has powers for the management of the estate as the Court deems necessary and proper, with regard to the nature of the property, whether movable or immovable, of which the estate may consist.<sup>229</sup> Subject always to the directions of the Court, a committee of estate can, among others, execute conveyances and perform other acts in fulfilment of the contract entered into to dispose or sell his estate

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<sup>223</sup> *Liew Ju Min* (n 220) para 41.

<sup>224</sup> MHA 2001 s 73(1).

<sup>225</sup> *ibid* s 73(2).

<sup>226</sup> *Re LP (Adult Patient: Medical Treatment)* [2006] 2 SLR 13 (HC).

<sup>227</sup> The relevant section in the Singapore legislation is section 9 of the now repealed Mental Disorders and Treatment Act. Section 58 of the MHA 2001 shares a similar wording as section 9.

<sup>228</sup> MHA 2001, s 77.

<sup>229</sup> *ibid* s 59(1), s 60 to s 70.

before he became mentally disordered;<sup>230</sup> sell and dispose of the mentally disordered person's business premises;<sup>231</sup> and surrender, assign or dispose of the mentally disordered person's lease or sublease.<sup>232</sup>

The committee of estate's power does not extend to the sale or charge of the estate or any part of the estate or to the letting of any immovable property for a term exceeding three years,<sup>233</sup> although the Registrar of the Court may receive a proposal on this matter which will then be referred to the Court for an order.<sup>234</sup> The Court may, if it considers it just or for the benefit of the mentally disordered person, order the sale, charge or otherwise disposal of any movable and immovable property to raise money for (i) the payment of debts, (ii) discharge of any encumbrance on the estate, (iii) provision for future maintenance of the mentally disordered person and his family and (iv) payment for costs for proceedings under the MHA 2001.<sup>235</sup> A committee of estate is also empowered to commence litigation proceedings on behalf of the individual adjudged to be mentally disordered, if so ordered by the Court.<sup>236</sup> In this regard, a person found to be mentally disordered under the MHA 2001 can only sue by litigation representative.<sup>237</sup>

It is important that a committee of estate stays within the scope of powers expressly conferred by the court order, given the judicial approval required before powers of management of the estate can be exercised. In the Singapore High Court decision of *Peter Edward Nathan v De Silva Petiyaga Arther Bernard and another*,<sup>238</sup> a transaction for sale was deemed invalid as the committee executing the sale on behalf of the mentally disordered individual had no power to do so under the terms of the court order.

#### 4. Safeguards available to Mentally Disordered Persons under the MHA 2001

To be appointed as a committee on behalf of the person or estate of a mentally disordered individual is an onerous responsibility. It is thus necessary to explore whether the MHA 2001 as it stands affords the necessary protection to mentally disordered persons.

##### 4.1. Inquiry stage and setting aside a perfected order

The two-tier process adopted by the Court in inquiring into the mental state and capacity of the individual is a useful mechanism. One of the main divergences in case law as it stands, is whether an individual ought to be given the opportunity to rebut a preliminary assessment before an inquiry is carried out (the *Ng Pik Lian* approach) or whether an individual should only be allowed to rebut a preliminary finding (the *Tan Poh Lee* approach). An inquiry has been described by *Ng Pik Lian* as an "intrusive order" against a basic right to enjoy living freely and without interference from others.<sup>239</sup> Further, the Court need not necessarily order an

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<sup>230</sup> *ibid* s 65.

<sup>231</sup> *ibid* s 67.

<sup>232</sup> *ibid* s 68.

<sup>233</sup> *ibid* s 59(2).

<sup>234</sup> *ibid* s 60.

<sup>235</sup> *ibid* s 63.

<sup>236</sup> *Ling Towi Sing @ Ling Chooi Sieng & Ors v Sino-America Tours Corporation Pte Ltd* [2017] 1 LNS 1663 (CA).

<sup>237</sup> Rules of Court 2012, Order 76 Rule 2.

<sup>238</sup> *Peter Edward Nathan v De Silva Petiyaga Arther Bernard and another* [2016] SGHC 70 (HC).

<sup>239</sup> *Ng Pik Lian* (n 208) 842.



inquiry in determining if an individual is incapable of managing his affairs. That being the position, it is opined that the *Ng Pik Lian* approach is to be preferred in allowing an individual to rebut a preliminary assessment of being mentally incapable at a much earlier stage, instead of waiting to be subject to a potentially invasive inquiry.

The High Court case of *Gary Lim Ting Howe (supra)* is intriguing because it involves the setting aside of a perfected order. Ordinarily, perfected orders would render the court functus officio. There is no suggestion that the first decision was made in breach of rules of natural justice to warrant a setting aside in the usual course. Yet, the courts there had appeared to readily use section 62 as a statutory direction to allow the intervention of the judgment creditors. Further, it does not appear that the judgment creditors fall within the categories of persons who are typically empowered to apply for an inquiry.<sup>240</sup> It is opined that the use of section 62 in this manner is welcome to the extent that it signifies the courts' willingness to view the mental state of an individual as a live issue that has the capacity to change over time, but at the same time potentially widen the usual categories of persons who can question the state of mind of a person suspected to be mentally disordered.

*Gary Lim Ting Howe (supra)* might well be a case confined to its own set of facts<sup>241</sup> – it would be interesting to see if the Court would apply section 62 with equal force if, reversing the sequence of events in that case, an individual was *first* decisively found to be mentally capable of managing his own affairs but where subsequent fresh attempts are made to declare him mentally disordered upon the discovery of new facts.

At this stage, it is perhaps worth pointing out that in the recent High Court decision of *Tan Sri Dato' Kam Woon Wah v Andrew Kam Tai Yeow & Anor*,<sup>242</sup> the High Court granted an ad interim injunction to prevent the prosecution of MHA 2001 proceedings in a separate Originating Summons pending the disposal of underlying litigation proceedings between parties, who were father and son. The Court took note that the MHA 2001 proceedings were filed in the midst of ongoing legal battles between parties; where a psychiatric report had found no identifiable psychiatric or neurological disorder in the individual, and where no cogent countervailing evidence was presented to demonstrate such mental disorder. The Court found that if an ad interim injunction is not granted, the social standing of the individual would be greatly impacted. Indeed, the originating summons pertaining to the MHA 2001 proceedings was ultimately struck out by the High Court for being obviously unsustainable.<sup>243</sup>

In answer to how the Court might apply section 62 in a hypothetical scenario involving the reversal of sequence in events in *Gary Lim Ting Howe (supra)*, it is posited that the Court would likely consider at least one of the following (non-exhaustive) factors before redetermining an individual's capacity to manage his affairs: (a) whether the application is made with the individual's best interests in mind or whether it is made with any evident ulterior motive in mind; (b) the length of time that has passed since the initial decision

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<sup>240</sup> MHA 2001, s 52(3).

<sup>241</sup> *Gary Lim Ting Howe v Lim Pang Cheong & Ors* [2015] MLJU 832 (HC) was decided before the decision of *Ng Pik Lian v Tai May Chean & anor and other appeals* [2021] 10 CLJ 841 (COA), but *Ng Pik Lian (supra)* did not refer to *Gary Lim Ting Howe (supra)* in its decision.

<sup>242</sup> *Tan Sri Dato' Kam Woon Wah v Dato' Sri Andrew Kam Tai Yeow & Anor* [2022] MLJU 424 (HC).

<sup>243</sup> *Dato' Sri Andrew Kam Tai Yeow v Tan Sri Dato' Kam Woon Wah* [2023] MLJU 1146 (HC).

regarding the individual's mental state and (c) the strength of new evidence presented to the Court as to whether there is a *prima facie* case.

#### 4.2. On individuals sitting on committees

The MHA 2001 is silent on the quality of persons deemed fit to be on a committee. Instead, the question of appointment of the committee is left to the Court for determination. Case law has appeared to develop sound guiding principles on this point – with the Court considering, among others, whether family members intending to sit on a committee have a clear, objective and realistic plan for the individual. In the Singapore decision of *Wong Sau Kuen and others v Wong Kai Wah*,<sup>244</sup> the court was mindful to ensure harmonious decision-making among members of the committee in order to facilitate workable solutions to problems that will no doubt arise from time to time and to aid in effective decision-making.

The courts have on occasion shown themselves willing to go the extra mile in the protection of the mentally disordered individual. In the case of *Liew Ju Min (supra)*, the judge took the effort to personally visit the mentally disordered individuals at the hospital in the presence of parties, though not strictly required to under the MHA 2001. In the High Court case of *Goh Yong Peow v Goh Sok Choo & Ors*,<sup>245</sup> allegations were levelled against siblings regarding the management of assets and accounts of the mentally disordered person. In this case, the Court ordered the disclosure of documents pursuant to a discovery application in order to find out the nature, amount and value of all existing assets; and for the Court to determine if a committee should be appointed, and if so, who should sit on it.

#### 4.3. The duration of a committee sitting

Given the lack of reported decisions on a committee of person, the discussion herein will focus only on a committee of estate. It is helpful to note that every power vested in the committee is subject always to approval by the court. This is to ensure that no act is left to the whim and fancy of the committee. Indeed, under section 71 of the MHA 2001, it is possible for the court to take a middle road approach by ordering maintenance in favour of a mentally disordered person without the setting up of the committee.<sup>246</sup> Importantly a committee does not have to sit forever. A finding of mental incapacitation is effectively a reversible one. Section 74 of the MHA 2001 allows a person (including the mentally disordered individual) to make an application to court if there is reason to believe a mental incapacity has ceased. The court may thereafter make an inquiry in this regard.<sup>247</sup>

#### 4.4. On commencing and defending a legal suit

This last issue is specific to legal suits. A person found to be mentally disordered under the MHA 2001 can only sue or defend by litigation representative,<sup>248</sup> as stated in the procedural law of the Rules of Court 2012. The MHA 2001 and the Rules of Court 2012 are silent on who is suitable to be a litigation representative. Nonetheless, in the High Court decision of *Ling*

<sup>244</sup> *Wong Sau Kuen and others v Wong Kai Wah and Another* [2008] SGHC 5 (HC).

<sup>245</sup> *Goh Yong Peow v Goh Sok Choo & Ors* [2015] 10 MLJ 160 (HC).

<sup>246</sup> MHA 2001, s 71.

<sup>247</sup> *ibid* s 74.

<sup>248</sup> Rules of Court 2012, Order 76 Rule 2.

*Towi Sing @ Ling Chooi Sieng & ors v Sino America Tours Corp Pte Ltd*,<sup>249</sup> the Court agreed with a related Court of Appeal decision<sup>250</sup> that so long as there is valid court order appointing the plaintiff as committee of estate and to initiate legal proceedings for and on behalf of the mentally disordered person as a next friend or guardian ad litem, it did not matter that the plaintiffs are not technically litigation representatives as envisaged under Order 76 Rule 2(1) of the Rules of Court 2012.<sup>251</sup> The MHA 2001 would prevail over the Rules of Court 2012 as a subsidiary legislation.

The scenario in the paragraph above concerned the power to commence proceedings *after* an individual had been found to be mentally disordered. One of the more pertinent issues, however, is that there is no express provision under the MHA 2001 which requires that a plaintiff *first* be determined as a mentally disordered person prior to an institution of court proceedings by his or her litigation representative.<sup>252</sup> The potential implications of this are explored below.

In the High Court case of *Wong Kee Chong (An Infirm Suing Through His Wife And Next Friend, Chau Nyok Yen) v Wong Know & Ors*,<sup>253</sup> the plaintiff had sued the defendants through his wife as his next friend premised on a cause of action that there was a fraudulent transfer of the plaintiff's interests in 2 properties to the defendants when the plaintiff was not mentally competent to effect the transfer due to his chronic mental illness over a period of time. The Court found that the plaintiff's long history of chronic mental illness, which the defendants were aware of, meant that it was highly probable he was incapable of executing the transfer at the time.<sup>254</sup> The Court held that there was no legislative requirement for the plaintiff to be adjudged as a mentally disordered person within the definition of MHA 2001 before the appointment of a litigation representative is done, taking into account that the exception in Order 76 Rule 3(2) of the then Rules of High Court 1980<sup>255</sup> does not require a court order for the plaintiff's wife to act as his next friend.

On the other hand, in the more recent High Court decision of *Govindasamy A/L Munusamy Iwn Krishnan A/L R Munusamy dan Lain Lain*,<sup>256</sup> the issue was whether a litigation representative could be appointed to act on behalf of an individual without him first being declared as mentally disordered under the MHA 2001. The Court effectively departed from *Wong Kee Chong (supra)* and found that Order 76 Rule 3 merely contained procedural rules on the appointment of litigation representatives. Importantly, the High Court considered itself bound by the Court of Appeal decision of *MTD Prime Sdn Bhd v See Hwee Keong & Ors and Another Appeal [2016] 4 MLJ 695*<sup>257</sup> which effectively stated that a person could only be said to be mentally disordered if he had been so assessed under the provisions of the MHA 2001. According to the High Court, it is not for anyone to determine the state of a person's

<sup>249</sup> *Ling Towi Sing @ Ling Chooi Sieng & Ors v Sino America Tours Corp Pte Ltd* [2019] MLJU 2157 (HC) [15].

<sup>250</sup> *Ling Towi Sing @ Ling Chooi Sieng & Ors v Sino America Tours Corp Pte Ltd* [2017] 1 LNS 1663 (CA) [15]-[19].

<sup>251</sup> Rules of Court 2012, Order 76 Rule 2.

<sup>252</sup> *Tan Chin Yap v Nyanasegar A/L Muniandy & Anor* [2022] MLJU 2204 (HC).

<sup>253</sup> *Wong Kee Chong (An Infirm Suing Through His Wife And Next Friend, Chau Nyok Yen) v Wong Kow & Ors* [2013] 3 CLJ 622 (HC).

<sup>254</sup> Contracts Act 1950, s 11 and s 12.

<sup>255</sup> Rules of High Court 1980, Order 76 Rule 3(2).

<sup>256</sup> *Govindasamy A/L Munusamy v Krishnan A/L R Munusamy dan Lain-Lain* [2020] MLJU 2138 (HC).

<sup>257</sup> *MTD Prime Sdn Bhd v See Hwee Keong & Ors and Another Appeal* [2016] 4 MLJ 695 (CA).

mental capacity without reference to the MHA 2001. It thus follows that a litigation representative cannot be appointed unless a person had been specifically adjudged to be mentally disordered under the MHA 2001.

One does wonder if the silence of the MHA 2001 on the appointment of litigation representatives could lead to instances where suits are handled by less-than-scrupulous individuals as purported litigation representatives on behalf of individuals with mental disorders without the need to first satisfy the rigorous processes set out in Part X of the MHA 2001. No doubt Order 76 Rule 2(1) of the Rules of Court 2012<sup>258</sup> is intended to facilitate access to justice for individuals with mental illnesses who do not have capacity to litigate<sup>259</sup> even when they may not be mentally disordered following the definition of the MHA 2001;<sup>260</sup> that the Courts would still be vigilant in ensuring a litigation representative is a person of substance; and that there is arguably no automatic right to sue a mentally disordered person<sup>261</sup> who has a litigation representative.<sup>262</sup> However, the utility of the MHA 2001 might be somewhat watered down in this aspect, at least in some cases, without further clarity being obtained.

## 5. Conclusion

The MHA 2001 is a commendable piece of legislation that has provided fundamental guidance on the protection of mentally disordered individuals. Much discretion is left in the hands of the Court, perhaps in recognition of the fluid nature of decision-making pertaining to mental disorders. As seen in the case law, the courts have shown themselves to be flexible and logical in approaching Part X of the MHA 2001. As per the wise words of the court in *Wong Kim v Loh Kim Foh*<sup>263</sup> when commenting on an individual who had Alzheimer's but maintained cognitive function, it is encouraging to note that the courts champion an individual's right to peace and quiet as a go-to concern.

*"The defendant is now locked in a family dispute. It is hoped that this falling-out amongst them will be quickly resolved so that his wish to go home can be met and in the process be reunited with the plaintiff. In the twilight of his life, he deserves some peace and quiet."*

Notwithstanding the potential uncertainty raised on the application of section 62 and issues regarding litigation representatives above, it seems that so long as the liberty of the mentally disordered person is at the forefront of the court's mind and is the overarching consideration of the Act, the MHA 2001 can remain a helpful guiding piece of legislation in many instances.

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<sup>258</sup> Rules of Court 2012, Order 76 Rule 2(1).

<sup>259</sup> See the Masterman-Lister test in *Lim Thian Hock @ Lim Thiam Hock v Lim Choon Hiok* [2014] 9 MLJ 1 (HC).

<sup>260</sup> *Ziko Abbo v Ketua Polis Daerah Bau, Kuching, Sarawak* [2011] 3 CLJ 76 (CA).

<sup>261</sup> Under the MHA 2001.

<sup>262</sup> Rules of Court 2012, Order 76 Rule 1A and *JJ Raj v Dato Edward John Lawrence & Ors* [2015] 7 CLJ 238 (HC).

<sup>263</sup> *Wong Kim v Loh Kim Foh* [2003] 4 MLJ 535 (HC).

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