Criminal Liability for Breach of Fiduciary Duty: A Case of Criminal Breach of Trust by the Personal Representative of the Deceased’s Estate

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ABSTRACT
The governing law on the administration of estate in Malaysia requires an appointment of a personal representative before a deceased’s estate can be dealt with. The personal representative acts as a fiduciary and is empowered to take possession and control over of the estate. However, in the hands of an unscrupulous personal representative, the estate might be dishonestly used or misappropriated. In such a case, the personal representative could be charged for criminal breach of trust, as provided by the Malaysian Penal Code and would therefore be punished with imprisonment, whipping and fine. This article aims to examine whether such punishment is adequate in regulating the conducts of the personal representative and remedying the estate beneficiaries against the misconducts of such personal representative. The study adopts a doctrinal analysis by examining the existing primary and secondary materials including statutory provisions as provided in the Probate and Administration Act 1959 (Act 97) and the Penal Code (Act 574), case law and other legal and non-legal literature relating to the adequacy of the relevant law. The article finds that once the estate has been misappropriated, charging the personal representative and punishing him for criminal breach of trust are inadequate and will not give much benefit to the estate beneficiaries. The punishment should be extended to depriving the personal representative of his own property so that the rights of the estate beneficiaries as the vulnerable party are better protected.

Keywords: Criminal breach of trust, estate beneficiaries, deceased’s estate, breach of fiduciary duty, personal representative, remedy

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INTRODUCTION

The administration of a deceased’s estate can be a trying process especially for those grieving. This is due to the fact that before the estate could be distributed to the beneficiaries, it has to be managed and administered for the purpose of paying all debts and liabilities of the deceased. Estate administration, as perceived by the Malaysian law, incorporates the need for the appointment of a personal representative. Once appointed, the personal representative is charged with great trust to ensure that the rights of the estate beneficiaries are well protected and preserved. In this context, the personal representative’s duties and estate beneficiaries’ rights can be said as to be akin to two sides of the same coin. The personal representative owes duties to uphold the beneficial interests of the beneficiaries. He is assigned with the tasks of gathering and taking possession and control of the assets of the estate, protecting and prudently investing those assets during administration and identifying the enforceable and payable debts and obligations of the deceased person. Sidhu (2005) stated that the main duties of a personal representative are to collect all debts due to the estate, pay all the debts and satisfy all the liabilities of the estate, and convert unauthorised investments into authorised ones.

The capacity to hold property is co-extensive with the ability of the personal representative to become a trustee and a fiduciary to the deceased’s estate beneficiaries (Raman, 2012; Sidhu, 2005; Sundrum, 2012), and is therefore duty bound to observe fiduciary duties in carrying out his duties. Acting as a trustee basically means that the personal representative must act in a fiduciary capacity by putting the interest of the estate beneficiaries beyond his own interest (Ahmad & Andrews, 2005; George, 2005; Haley & McMurtry, 2011; Hingun & Ahmad, 2013). Being arrayed with twofold character of trusteeship and fiduciary, the misconducts of unscrupulous personal representative would make him subject to potential liabilities and accountabilities. As a fiduciary serving as an executor or a trustee at that particular time, the notion of the beneficiaries’ vulnerability at the hands of the personal representative cum fiduciary is of an essence. Finn (1989) and Shepherd (1981) suggested that a person will be a fiduciary in his relationship with another when and insofar as that other is entitled to expect that he will act in that other’s or in their joint interest to the exclusion of his own several interests.

In carrying out all those duties, the personal representative is vested with wide-ranging power to deal with the deceased’s estate. Undeniably, in the hands of an unscrupulous personal representative, the estate might be misappropriated or misused. The estate beneficiaries, on the other hand, are powerless in assuming control or ensuring comprehensive monitoring over this matter due to their lack of authority to deal with such estate as they actually stand at the mercy of the personal representative (Nor Azlina & Akmal Hidayah, 2013).
outcome of this disparity in power relations creates the likelihood that the personal representative may abuse his position for personal gain or gain of third parties. Hence, the adequacy of the governing law in remedying the estate beneficiaries against the acts of unscrupulous personal representative needs to be examined so that the rights of the estate beneficiaries would not be adversely affected.

**METHODOLOGY**

With enormous powers conferred by the law, the personal representative steps into the shoes of the deceased and takes over the deceased’s rights as the owner of the property. It is obvious that whenever one person has an effective control of property but is required to act for the benefit of another, there is a possibility that he will misuse the power that he holds (Pearce, Stevens, & Barr, 2010). Thus, one of the most common areas of conflict in the administration of estate is the failure of the personal representative to properly administer the estate and discharge his office accordingly.

In this regard, it is often perceived that a breach of trust or misappropriation of property by the personal representative is a civil matter, which is actually an inaccurate perception. This is because the Malaysian Penal Code has illustrated that the misconducts of a personal representative may also amount to a criminal breach of trust. In such a case, the personal representative is not only liable under civil action but could also be charged for criminal breach of trust as provided by the Penal Code.

Hence, this article seeks to examine the offence of criminal breach of trust by the personal representative in the administration of the deceased’s estate. The discussion includes an analysis of the powers and duties of the personal representative, the personal representative as fiduciary, the offence of criminal breach of trust and the adequacy of its punishment in remedying the estate beneficiaries. The article excludes the discussion on the method of estate distribution either by will or Distribution Act 1958 and the rules of *faraid* for the non-Muslims and Muslims respectively as the offence of criminal breach of trust is normally committed before the deceased’s estate could actually be distributed.

For the purpose of the discussion, the article adopts the doctrinal analysis by examining the existing primary and secondary materials including statutory provisions as provided by the Probate and Administration Act 1959 (Act 97) and the Penal Code (Act 574), as well as case law and other legal and non-legal literatures relating to the case of criminal breach of trust by the personal representative to the deceased’s estate.

**DISCUSSION**

The area of administration of estate in West Malaysia is currently governed by various statutes of general application that are applicable to both Muslims and non-Muslims, namely, the Rules of Court 2012, Probate and Administration Act 1959, Small Estates (Distribution) Act 1955 and
Public Trust Corporation Act 1995. The jurisdiction to deal with the administration of estate lies with three different backgrounds of administrative bodies, namely, the High Court, the Small Estate Distribution Section under the Department of Director General of Lands and Mines and the Public Trust Corporation, depending on the type of estate left by the deceased. The administration of estate by the High Court involves the grants of representation to the two classes of representatives, namely, executor and administrator. Probate and Administration Act 1959, the principal statute affecting estate administration in Malaysia, provides that:

"personal representatives means the executor, original or by representation, or administrator for the time being of a deceased person, and as regards any liability for the payment of death duties includes any person who takes possession of or intermeddles with the property of a deceased person without the authority of the personal representatives or the Court".

The difference of the two classes, namely, executor and administrator, is based on the nature of their appointment. Executor is normally appointed by the testator in the latter’s last will to administer the estate. Administrator on the other hand is a person appointed by the court in the event of intestacy, or where the deceased dies without leaving any will. Nevertheless, the phrase ‘personal representatives’ essentially covers both executors and administrators (Hayton et al., 2005; Akmal Hidayah, 2012). In academic writing, executors and administrators in many occasions have been collectively described as the personal representatives of a deceased’s estate (United Asian Bank Bhd v Personal Representatives of Roshammah (decd) [1994] 3 MLJ 327). It is so as both parties play the same role in the administration of the deceased’s estate and owe duties to the estate beneficiaries.

In cases of administration of small estates, where the estate consists wholly or partly of immovable property and does not exceed two million ringgit in total value, section 13(4) of the Small Estates (Distribution) Act 1955 empowers the Land Administrator to grant letters of administration to such person or persons as he thinks fit, subject to such security as he may require and may in his discretion dispense with security. The grant of letters of administration may be made for the purpose of collecting and preserving the deceased’s assets or in cases of insolvent estates (section 13 (7), Small Estates Distribution Act 1955). The grant may also be made where the immovable properties of the deceased do not have titles, or where there are only documents evidencing title or beneficial interest or equitable interest in land.

As for the administration of estates by the Public Trust Corporation, it is governed by the Public Trust Corporation Act 1995 where under this Act, the offices of Public Trustee and Official Administrator ceased to exist and the property, rights
and liabilities of the Public Trustee and Official Administrator are now vested in a Corporation known as Amanah Raya Berhad. The Corporation is empowered to administer the estates in its capacity as one of the administrative bodies. By virtue of section 17(1) of the Act, if a person dies testate or intestates, leaving only movable property and that the total value of the property does not exceed six hundred thousand ringgit, a summary administration in respect of the property may be made by the Corporation. On the other hand, the Corporation may also be appointed as a personal representative to the deceased’s estate and be granted probates of will or letters of administration by the Court.

The article predicates that although the term ‘personal representative’ normally refers to the personal representative as appointed by the High Court, the offence of criminal breach of trust, as provided by the Penal Code, should also be extended to the administration granted by the Land Administrator in cases of small estate and the appointment of Amanah Raya Berhad as the personal representative in any case the representative fails to discharge the office accordingly.

Powers and duties of the personal representative

The primary power of a personal representative is to dispose of property. Section 60(3) of Probate and Administration Act 1959 states that a personal representative may charge, mortgage or otherwise dispose of all or any property vested in him as he may think proper to do so. In Ong Thye Peng v. Loo Choo Teng & Ors [2008] 1 CLJ 121, the court remarked that this provision concerned with the manner of disposal of the property of a deceased person by his personal representative. Furthermore, in Lau Yoke Hee & Anor V. Ting Liang Teng & Anor [2005] 3 CLJ 770, the court held that the personal representative can dispose of property vested in him without the beneficiaries’ consents. It can also be seen that the Probate and Administration Act 1959 confers vast powers upon the personal representative to administer the deceased’s estate. For instance, the personal representative is granted with powers to sue in respect of all causes of action that survive the deceased. The personal representative may also exercise the same power of recovering debts due to the deceased at the time of his death as the deceased had when living.

Other powers and duties incorporated in the Probate and Administration Act 1959 also include the power to sell any immovable property, duty to keep an inventory of the deceased estate, duty to pay for debts, power to appropriate any part of the property, power to appoint trustees of minor’s estate and power to postpone distribution of the deceased estate before the expiration of one year from the death. In discharging the duties, the personal representative must necessarily act with due diligence to take possession of all property of the deceased and account for any property in respect of which possession has not been made possible. He must also
assume a responsibility which he must discharge with due diligence, by making the fullest inquiries and by taking all steps that are necessary and reasonable to ascertain the total values of the deceased’s estate.

In the course of managing the estate, the personal representative is also considered as a trustee to hold the estate on trust on behalf of the beneficiaries. By being a trustee, the personal representative holds a fiduciary duty which means that he is regarded by law to be a person who has undertaken an obligation of loyalty to another, namely, the beneficiaries, and is compelled to put that other person’s interest before his or her own which gives rise to a relationship of trust and confidence. When the deceased’s estate is under the personal representative control, he has the power of owner vis-a-vis third parties, but unlike a genuine owner he is not entitled to apply the estate for his own benefit. He has a duty to hold the deceased’s estate for the estate beneficiaries and distribute it to them accordingly. Oakley (1997) suggested four characteristics of fiduciary relationship, which in fact is the basis of the relationship between the fiduciary and the beneficiaries, namely, an undertaking by the alleged fiduciary; reliance placed on the alleged fiduciary by the other party, property which is put under the control of the alleged fiduciary; and vulnerability of the other party to the alleged fiduciary.

**Personal representative as a fiduciary**

A personal representative is held to the highest degree of good faith in performing his duties and owes fiduciary responsibility to the estate beneficiaries. The question on whether a personal representative receives and holds the deceased’s property in a fiduciary capacity has been considered by several Malaysian cases. In *Guindarajoo Vegadason V. Satgunasingam Balasingam* [2014] 1 LNS 866, for instance, the court held that an administrator is appointed by the court to be the guardian of the estate and he is in a fiduciary position with regards to the assets that come into his possession by virtue of his office. His duty is not only to preserve them and deal with them in accordance with the law but also to apply them in the due course of administration for the benefit of the creditors, legatees of various sorts and the residuary beneficiaries. The court referred to the decision in the case of *State of Gujerat v. Jaswantlal Nathalal* [1968] SCR 2 408 where the Supreme Court of India held that the person handing over the property must have confidence in the person taking the property so as to create a fiduciary relationship between them. It was further held that the administrator and trustee of the properties of the estate owed a fiduciary duty to the legal beneficiaries to the said estate, ie, the administrator/trustee and legal beneficiaries’ relationship (*Loh Cheng Leong & Ors v. Tan BengKheng&Ors* [2012] 1 LNS 582). Hence, executors and trustees of the estate of the deceased were in a fiduciary relationship vis-a-vis the beneficiaries.

In *Koh Yook Tin (Suing as Executor to the Estate of Lim Chuak @ Lim Kwee*
Kee, deceased) v. Koh Kim Leng @ Hoo Kim Leng & Anor [2013] 1 LNS 1088, the court upheld that personal representative acted as trustee owed a fiduciary duty to the estate of the deceased, the plaintiff and other shareholders. The court was guided interalia by the case of Malaysian Assurance Alliance Bhd v. Anthony Kulanthai Marie Joseph [2011] 1 CLJ 15, where the Court held that where a person is in possession of trust property which he knows does not belong to him, the law regards him as a constructive trustee. A constructive trust is simply a relationship created by equity in the interest of conscience. Therefore, it can be said that personal representative in discharging his duty is the only person authorised to deal with deceased’s estate for the benefit of beneficiaries. The element of entrustment exists after the extraction of the letters of representation by the personal representative from the appropriate administrative bodies as he is perceived by the law to step into the deceased’s shoes (Akmal Hidayah & Nor Azlina, 2014).

The beneficiaries’ vulnerability curtails completely from their dependency upon their fiduciary or utmost good faith towards the former’s best interest within the confines of fiduciary relationships (Rotman, 1996). Vulnerability is the major focus as this doctrine is premised upon the notion that beneficiaries are generally inferior in power vis-à-vis their fiduciary and that fiduciary law serves to displeasure this disparity by imposing strict duties upon fiduciary to act in the best interests of the beneficiaries. It is often impossible to stop those people who are dishonest from taking advantage of the opportunities for abuse that their positions bring (Noor & Halim, 2013). However, when a fiduciary fails to perform his duties, the beneficiaries are eligible to bring claims against him for breach of duty, and wherever appropriate, to obtain a remedy (Rotman, 2012).

The offence of criminal breach of trust under the Penal Code

Criminal breach of trust is clearly defined in section 405 of the Penal Code, which reads as follows:

“Whoever, being in any manner entrusted with property, or with any dominion over property either solely or jointly with any other person dishonestly misappropriates, or converts to his own use, that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or willfully suffers any other person so to do, commits ‘criminal breach of trust’.”

The provision describes the person who may be guilty as one being in any manner entrusted with property or dominion over it. If that person dishonestly misappropriates the property, he or she commits a criminal breach of trust. In other words, a criminal breach of trust may be well-defined as the dishonest appropriation of another’s property by a person to whom it has been entrusted, or into whose hands it has legally
come. The ownership or beneficial interest in the property in respect of which the so-called criminal breach of trust has been committed, must be in some person other than the accused, and the latter must hold it on account of some person or in some way for his benefit.

The essential ingredients with regard to section 405 of the Penal Code have been stated by Wan Suleiman FJ in *PP v Yeoh Teck Chye* [1981] 2 MLJ 176 that for a person to be guilty of the offence of criminal breach of trust, there must be a proof that the accused has been entrusted with property or dominion over property and that he should dishonestly misappropriate or convert the property to his own use or dishonestly use or dispose of the property or wilfully suffer any other person to do so in violation of, any direction of law prescribing the manner in which such trust is to be discharged or of any legal contract made touching the discharge of such trust. A trust here may be defined as any arrangement by which one person is authorized to deal with property for the benefit of another. The person who is entrusted with certain property is entrusted directly with the said property, that is to say, delivered to him with specific purpose where the element of possession exists.

The terms ‘dishonestly’ and ‘wrongful gain and wrongful loss’ are explained in section 24 and section 23 of the Penal Code, respectively. Section 24 of the Penal Code provides that whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another person, irrespective of whether the act causes actual wrongful loss or gain is said to do that thing dishonestly. The section further explains that, in relation to the offence of criminal misappropriation or criminal breach of trust, it is immaterial whether there was an intention to defraud or to deceive any person. A wrongful gain simply means gain by unlawful means of property to which the person gaining is not legally entitled, whereas wrongful loss is the loss by unlawful means of property to which the person losing it is legally entitled (Section 23, Penal Code). Therefore, a person is said to gain wrongfully when such person retains wrongfully, as well as when such person acquires wrongfully. A person is said to lose wrongfully when such person is wrongfully kept out of any property, as well as when such person is wrongfully deprived of property. A person is said to do a thing fraudulently if he does that thing with the intention to defraud, but not otherwise (Section 25, Penal Code).

It has been considered in *Sathiadas v PP* [1970] 2 MLJ 241, where the court in the case held that the gist of this crime is entrustment and dishonest misappropriation. Loss as a consequence of the act is not a factor; it is the act itself which amounts to this offence. In essence, the offence of criminal breach of trust is an offence relating to property and its commission is directed against the beneficial owner of that property. So, there can be no criminal breach of trust where the beneficial owner consents to the use of the property in a particular way. That consent of the beneficial owner is a complete
defence to the offence of criminal breach of trust and is to be found in the words “in violation of any legal contract, express or implied, which he has made touching the discharge of such trust”.

Criminal breach of trust by the personal representative

It is interesting to note that one of the illustrations to Section 405 of the Penal Code expressly illustrates the conduct of fraudulent personal representative as criminal breach of trust. The illustration of the section is as follows:

A, being executor to the will of a deceased person, dishonestly disobeys the law which directs him to divide the effects according to the will, and appropriates them to his own use. A has committed criminal breach of trust.

The law recognises illustration appended to a particular section as an aid to statutory interpretation as it may give examples to illustrate the working of its provisions (Wan Arfah, 2011). The Privy Council in Mohamed Syedol Ariffin v Yeoh Ooi Gark [1916] 1 MC 165, an appeal from Straits Settlement stated that it is the duty of a court to accept, if that can be done, illustration appended to a section as relevant in the interpretation of the text, and that it would require a very special case to justify their rejection on the ground of their assumed inconsistency to the section themselves.

The law requires that before criminal breach of trust is established it must be shown that the person charged has been entrusted with property or with dominion over property and that he has been guilty of breach of trust using the latter phrase loosely. There must be an element of entrustment and therefore the person accused must be shown to hold the property in a fiduciary capacity. In cases of estate administration, the element of entrustment is satisfied as a personal representative acting as a trustee is held to hold the deceased’s estate in a fiduciary capacity. A trust relationship is a classic example of a relationship, fiduciary in character. According to McGhee (2010), a constructive trust is a trust which is imposed by equity in order to satisfy the demands of justice and good conscience, without reference to any express or presumed intention of the parties. Riddall (1996) illustrated the constructive trust as a remedial device employed to correct unjust enrichment. It does not only implicate the act of taking title to property from one person whose title unjustly enriches him but also extends to the act of transferring the property to another who has been unjustly deprived of it.

Punishment for criminal breach of trust

The offence of criminal breach of trust is generally punishable under section 406 of the Penal Code. The section provides that:

“Whoever commits criminal breach of trust shall be punished with imprisonment for a term which shall not be less than one year and not more than ten years and with whipping, and shall also be liable to fine”.

However, the Penal Code also provides for stiffer punishment for persons who hold positions of higher degree of trust and confidence (Ariffin, 2013; Seng, 1994) specifically person who works in his capacity as a public servant or in the way of his business as a banker, merchant, factor, broker, attorney or agent (Section 409, Penal Code).

The “agent” was quite exhaustively defined in section 402A of the Penal Code. The section states that for the purposes of sections 405, 406, 407, 408, 409 of the Penal Code, unless the contrary appears from the context, an agent includes any corporation or other person acting or having been acting or desirous or intending to act for on behalf of any company or other person. There is a long list of other person which include partner, co-owner, clerk, servant, employee, banker, broker, auctioneer, architect, clerk of works, engineer, advocate and solicitor, accountant, auditor, surveyor, buyer, salesman, trustee executor, administrator, liquidator, trustee within the meaning of any Act relating to trusteeship or bankruptcy, receiver, director, manager or other officer of any company, club, partnership or association or in any other capacity either alone or jointly with any other person and whether in his own name or in the name of his principal or not (Aishah Mohamed Rose & Anor v PP [2014] 1 LNS 957). The punishments specified for each group of persons are summarised in Table 1.

<table>
<thead>
<tr>
<th>Penal Code provision</th>
<th>Who?</th>
<th>Punishments</th>
</tr>
</thead>
<tbody>
<tr>
<td>Section 406</td>
<td>Any person</td>
<td>Imprisonment for a term which shall not be less than 1 year and not more than 10 years and with whipping, and shall also be liable to fine.</td>
</tr>
<tr>
<td>Section 407</td>
<td>Carrier</td>
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<td>Section 408</td>
<td>clerk or servant</td>
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</tr>
<tr>
<td>Section 409</td>
<td>public servant/ agent</td>
<td>Imprisonment for a term which shall not be less than 2 years and not more than 20 years and with whipping, and shall also be liable to fine.</td>
</tr>
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</table>

Adequacy of Punishment for Criminal Breach of Trust by the Personal Representative

It is undeniable that the principal objective of criminal law is to punish an offender. It is one of the functions of law under penal technique. This technique prohibits kinds of antisocial conduct, much of which are also prohibited by moral rules as well as providing the machinery of law enforcement, from the police force, through the courts exercising criminal jurisdiction, to the prison service. It is one method to experiencing moral disgrace for being convicted of a crime and is one of the principal preventive mechanisms of the penal mode.

Unfortunately, this is not similarly significant for estate administration cases. This is because the existing punishment of imprisonment, whipping and fine as prescribed by the Penal Code is only sufficient to fulfil the preventive and
punitive penal function of the law. It is still far from achieving its grievance remedial function that provides for the enforcement of remedial award such as compensation. McLeod (2012) has earlier suggested that it is necessary for the policy-makers to look for the availability of punitive or exemplary damages in certain types of civil cases or the possibility of courts making compensation orders while exercising their criminal jurisdiction, both which clearly mix the grievance remedial function and punitive function. For this purpose, it is suggested that reference to section 66 of the Probate and Administration Act 1959 would be relevant. The section provides for the liability and accountability of the personal representative in cases where he wastes or converts to his own use any part of the estate. If he dies, such liability is extended to his personal representative who shall be liable and chargeable in respect of the waste or conversion, to the extent of the available assets of the defaulter, in the same manner as the defaulter would have been, if living.

CONCLUSION
From the discussion, it could be established that whilst the offence of criminal breach of trust also includes the misappropriation of the deceased’s estate by the personal representative, its punishment is still inadequate and will not give much benefit to the estate beneficiaries. Hence, there is a need for another mechanism to compensate the estate beneficiaries for their loss resulting from the dishonest conducts of the personal representative from the criminal law perspective. The punishment under the current criminal breach of trust may successfully operate to regulate the conducts of the personal representative but is not sufficient to remedy the estate beneficiaries against the misconducts of such personal representative. It is therefore recommended that, a dishonest personal representative while being convicted for an offence of criminal breach of trust, there is a need to extend the punishment to deprive the personal representative of his own property through criminal forfeiture process equally been used in other criminal offences such as money laundering and drugs trafficking so that the rights of the estate beneficiaries as the vulnerable party are better protected. This is because, once the estate has been wasted or misappropriated, charging the personal representatives with criminal breach of trust under the current legal provision would not give much benefit to the estate beneficiaries as at this stage, the latter might have been left with nothing to be benefited from the deceased’s estate.

REFERENCES


