THE UPDATE

T&HW LAW PRACTICE ● AMALAN GUAMAN

The Quarterly Law Bulletin of TAY & HELEN WONG Law Practice

Retro Q3 & Q4 of 2021 (July - December 2021) PP16300/03/2024(033194)

TABLE OF CONTENTS		Page

Published on 5 April 2024

If there is any query, please direct it to:

Tay Hong Huat
hhtay@thw.com.my
Tel: +6019-3160987; +603-79601863

BANKRUPT'S SCHEME TO DECEIVE CREDITORS AND DG OF INSOLVENCY

The learned Judicial Commissioner (now a Judge) aptly provided an overview of the case of *Lau Kok Loon @ Lau Say Siok v Low Yee Meng*[i]:

> "*This judgment deals with the enforcement of an illegal contract to place* (with the defendant) *certain shares* (in a company) *belonging to the plaintiff from the reach of his creditors. After settling with his creditors and obtaining an annulment of his bankruptcy order, the plaintiff sought from the defendant the return of the shares. The defendant claimed that the shares were transferred to him under an illegal contract and by reason thereof the court should not lend its hand in aid of the plaintiff's claims. The defendant filed an application to strike out the action.*"

Initially, a trust deed was executed by the plaintiff (P) to declare that he held the shares in trust for the defendant (D) on account of natural love and affection. Notwithstanding the trust deed, P maintained that he remained the beneficial owner of the shares. Arguably, the trust deed was a sham which was intended to deceive P's creditors. Later, when a creditor (AMMB) commenced bankruptcy against P, P transferred his shares to D.

In resisting the application, P argued that his claim was based on the resulting trust that was created when he transferred his shares in the company to D without any intention for the beneficial ownership therein to be transferred to D; and he need not rely on any illegal transaction. The court, however, disagreed. Having entered into an illegal contract, the party who was *in pari delicto* could not come to court to enforce the contract[ii] - *ex turpi causa non oritur actio* principle. And there was evidence to rebut the presumption of resulting trust in this case. The trust deed suggested that P was merely holding the shares in trust for D at all times; the transfer of the said shares was nothing more than a transfer by P as trustee to D as the beneficiary. The circumstances thus did not support a resulting trust.

P further relied on the doctrine of locus poenitentiae which is an exception to the defence of illegality. It means "the right to withdraw" or "the time of repentance" and refers to the act of repentance by a party who had entered into an unlawful contract. It permits the party to recover monies paid or goods transferred, notwithstanding the illegality where the party in fact withdrew from carrying through with the illegal contract which remains executory. However, contrary to P's contention that he had settled his debts and no creditor had been deceived by his act of transferring the

[i] [2021] 6 AMR 289

[ii] See also *Law Ding Hock v Ng Yoon Lin (p)* [2008] 8 CLJ 94

shares to D, P had in fact carried out the illegal purpose of avoiding the shares from being discovered by AMMB and/or put the shares beyond AMMB's reach. P had also deceived AMMB to accept a much lesser sum as full and final settlement of the judgment debts and to annul his bankruptcy order. The doctrine was therefore not available to P to recover his shares from D.

The court also applied "the trio of considerations" approach as propounded in the landmark decision of the UK Supreme Court in *Patel v Mirza*[i] in determining whether a party to an illegal agreement could enforce a claim against the other party. It is a policy-based approach based on an assessment of relevant competing public policy considerations and proportionality factors instead of the conventional reliance-based approach in *Tinsel v Milligan*[ii]. In the view of the learned JC, P's act of transferring the shares D and not disclosing the same so as to avoid his creditors and to deceive the Director General of Insolvency (DGI) was a contravention of s.109(1) of the Bankruptcy Act 1967 and also s.422 of the Penal Code. The underlying object of the aforesaid statutory provisions was to prevent any dishonesty and/or fraudulent action by a debtor to deceive his creditors and to ensure that all of the debtor's available assets were made known to the DGI for the benefit of the debtor's creditors. The purpose of the said provisions would be enhanced if P's claim against D was denied; and that answered the first consideration in *Patel v Mirza* in the affirmative. Whilst it was true that the punishment for the offence was a matter for the criminal court, it would be inconsistent for the court to permit P to recover the fruits of his illegal act when the same action was deemed appropriate to be punished in the criminal court. The second consideration was also answered against P. Given that the balancing of policy considerations in the first two stages were decided against P's claim, it would not be strictly necessary to consider the third consideration on proportionality[iii].

P's claim was ultimately struck out with costs.

****

COMPANY LAW

COURT CONVENING MEETING FOR AIRASIA X'S SCHEME OF ARRANGEMENT

The High Court had in *AirAsia X Bhd v Aviation Ltd & Ors*[iv] set out some principles that could be useful as a guide for scheme consultants and advisors with regards to a scheme of arrangement undertaken pursuant to s.366 of the Companies Act 2016 (the Act). The subject was the application under s.366(1) of the Act for an order to convene and hold meetings of the company's creditors to approve a scheme of arrangement by the company. This would enable the company to avoid the prospect of

[i] [2017] AC 467, SC (UK)
[ii] [1994] 1 AC 340, HL (UK)
[iii] *Ecila Henderson v Dorset Healthcare University NHS Foundation Trust* [2020] UKSC 43, SC (UK)
[iv] [2021] 10 MLJ 942

liquidation and to continue as a going concern and the creditors to secure a better repayment of their debts.

There are 3 stages to a scheme:
(a) an application for an order under s.366(1) of the Act that a meeting(s) of classes of creditors to be convened (convening stage);
(b) the actual convening and holding of the creditors meeting(s) (meetings stage); and
(c) if the scheme is approved by the requisite majority (of 75% in value and majority in numbers) at the relevant meeting(s), an application is made to the court for its sanction of the scheme under s.366(4) of the Act (sanction stage).

The classes of the scheme creditors in *AirAsia X Bhd* (AAX) were (i) Secured Class A creditors; and (ii) Unsecured Class B creditors.

On the issue raised as to whether the court should determine the classification of creditors (the constituent or composition of the classes) at the convening stage or only after the convening stage (i.e. the sanction stage), the learned Judicial Commissioner (JC) answered the former[i]. The identification of the classes of creditors was a principal jurisdiction question[ii] to ensure that each class was properly constituted so that the meetings for each of the classes could be properly convened. This could only be achieved if the question was taken at the convening stage which would save costs and time and gave greater clarity and certainty to the convening of the meetings[iii].

Indeed, other jurisdictional issues that may crop up for determination by the courts at the convening stage include: (a) whether the proposed scheme meets the definition of a 'compromise or arrangement'; (b) whether the company is so hopelessly insolvent that even the 'post-scheme' company is unable to survive as a going concern[iv].

On the classification of creditors, the learned JC found that the lessors of lease agreements of aircrafts who had paid 'security deposits' and 'maintenance reserves' were not to be classified under the secured creditors. It was also incorrect to treat Airbus as a secured creditor on the basis or 'predelivery payments' as a security over the assets of AAX. The lessors however objected to being placed in the same class as Airbus since the quantum of Airbus' claim constituted in excess of 75% of the debts within the unsecured creditors class which effectively depraved the lessors of having any meaningful weight in its votes. The court however rejected quantum of the creditor's

[i] Adopted the approach in *Re Apcoa* [2015] 2 BCLC 659.
[ii] Issues on discretionary or value judgment are to be determined at the sanction stage.
[iii] See *Re Hawk Insurance Co Ltd* [2001] 2 BCLC 480, CA (UK); *Re Stronghold Insurance Co Ltd* [2019] 2 BCLC 11; *The Royal Bank of Scotland NV v TT International Ltd and another appeal* [2012] SGCA 9, CA (S'pore)
[iv] *Re Noble Group Ltd* [2018] EWHC 3092, Ch (UK), *Sri Hartamas Development Sdn Bhd v MBf Finance Bhd* [1990] 2 MLJ 31

claims as a reason to exclude them from the class.

Nonetheless, having analyzed the respective rights of the lessors and Airbus in the absence of the scheme and under the scheme and applying the test in *Re Stronghold Insurance Company Ltd*[i], the learned JC came to the finding that there was a difference between their rights; and it was significant and warranted that the lessors be placed in a separate class from Airbus. Airbus' rights under the scheme were so dissimilar with the lessors' that they could not sensibly consult together with a view to their common interests.

On the lessors' contention that the debts owing by AAX arising from the lease agreements were governed by English law and applying Gibbs Rule[ii], such debts could not be discharged or varied by Malaysian court under the scheme as they could only be discharged under English law, the court ruled that this Rule did not operate to restrict the court from entertaining and if thought fit, approving a scheme of arrangement.

Eventually, the court granted orders as prayed for by AAX subject to the lessors of lease agreements with AAX be treated as unsecured creditors and be placed in Class B Unsecured Creditors whilst Airbus be treated as unsecured creditor and be placed in a separate class from the other unsecured creditors in Class B.

****

COMPANY LAW

SINGLE SHAREHOLDER REQUISITIONED EGM

A single shareholder with 15.77% of the shareholding of P, a public listed company, requisitioned for an extraordinary general meeting (EGM) pursuant to s.311(3) of the Companies Act 2016 (CA 2016) for the purpose to remove the directors and company secretary of P and for the appointment of three new directors and a new company secretary. P filed an action in *Eka Noodle Berhad v Norhayati binti Tukiman*[iii] to declare the EGM notice invalid, null and void on the ground that a requisition for a meeting of members under s.311(3)(a) of the

[i] [2019] 2 BCLC 11

[ii] It is a common law principle which provides that a debt governed by English law cannot be discharged or compromised by foreign insolvency proceedings, see *Anthony Gibbs & Sons v LA Societe Industrielle Et Commerciale Des Metraux* [1890] 25 QBD 399, CA (UK)

[iii] [2021] 8 AMR 601

CA 2016 must be made by more than one member, given the use of the word "members" therein. It was also contended that there was no written consent of the proposed new directors attached to the EGM notice in breach of s.201 of the CA 2016; and the removal of all directors would be in breach of s. 196 of the CA 2016.

The High Court dismissed P's action. The provisions of the CA 2016 do not discriminate between companies with a single member and those with more than one member. Although the word "members" is used in s.311(3)(a) of the CA 2016, the court resorted to s.4(3) of the Interpretation Acts 1948 and 1967 for words in the singular to include the plural and *vice versa*. The court also applied *Kwan Hung Cheong & Anor v Zung Zang Trading Sdn Bhd*[i] as upheld by the Federal Court[ii] which ruled the words 'members' and 'requisitionists' in s.144 of the Companies Act 1965 (the predecessor of the CA 2016) may refer to 'member' and 'requisitionist' in the singular.

It is not stipulated in s.201 of the CA 2016 that consent and declaration of the proposed new directors must be delivered together with the requisite notice. The consent and declaration of the new directors to be appointed having been obtained, there was no breach of the said s.201.

The inclusion of the proposed resolution on the removal of the company secretary which is actually within the ambit of the board of directors did not ipso facto invalidate the whole of the EGM notice.

On the contention that the removal of all the directors would have breached s.196 of the CA 2016, the resolutions on the appointment of new directors could be voted upon first before the resolutions to remove the existing directors were tabled and voted upon. The removal and appointment of directors need not follow the sequence set out in the EGM notice.

****

CONSTRUCTION LAW / COURT PROCEDURE

ADJUDICATION DECISION UNDER CIPAA AS THE BASIS FOR S.466 STATUTORY DEMAND

An adjudication decision pursuant to the Construction Industry Payment and Adjudication Act 2102 (CIPAA) can form the basis for the statutory notice under s.466(1)(a) of the Companies Act 2016 (CA 2016) (the s.466 Notice) to demand for the payment of the adjudicated amount failing which a winding-up petition may be presented. That was the decision of the Court of Appeal (COA) in *Sime Darby Energy Solution Sdn Bhd v RZH Setia Jaya Sdn Bhd*[iii] which overruled the decision of the High Court (HC)[iv].

[i] [2018] 4 AMR 637, CA
[ii] [2021] 4 MLJ 86, FC
[iii] [2021] 9 CLJ 880
[iv] *RZH Setia Jaya Sdn Bhd v* Sime Darby Energy Solution Sdn Bhd [2021] 3 AMR 407, [2020] 1 LNS 889

The HC had earlier refused to grant a *Fortuna* injunction against the defendant (D) to restrain D from filing or continuing any winding-up petition against the plaintiff (P) based on the s.466 Notice which demanded payment of the adjudicated sum pursuant to an adjudication decision made by the adjudicator in adjudication proceedings under CIPAA against P in respect of the D's claim as subcontractor for outstanding sum for carrying out certain construction works, pending final disposal of the arbitration proceeding. Briefly, the HC held that the CIPAA decision was not a final decision which would subsequently be superseded or overridden by a final award in arbitration in a court suit. The statutory remedies under s 28 to 31 of CIPAA by applying to the court for the registration of the adjudication decision as a court judgment and thereafter to enforce the same by way of one of the modes of execution of judgment under Orders 45 to 51 of the Rules of Court 2012 (ROC 2012) were adequate to serve the legislative purpose of enabling the contractors and service providers in the construction industry to collect their payments expeditiously as compared to the previous remedy of arbitration. Therefore, there was no compelling reason to accord a successful litigant in adjudication proceedings who had not registered the decision as a court judgment, any special right over and above those of other ordinary creditors who similarly had not obtained court judgments in their favour. On the facts, P had shown *bona fide* substantial disputes to the debt in excess of D's claims in the adjudication through cross claims for liquidated ascertained damages (the LAD claim) for the delay in D's completion of works supported by documents and steps taken to refer the disputes to arbitration.

On appeal, the COA held that until and unless the adjudication decision was set aside, it could, in law, form the basis for the s.466 Notice to demand for the payment of the adjudicated amount failing which a winding-up petition may be presented. Whether or not P had a *bona fide* cross-claim against D on merits to challenge the petition was a matter to be adjudged by the winding-up court. An unproven cross-claim could not be the basis for restraining the filing of a winding-up petition based on a valid and enforceable adjudication decision. The COA reiterated that the law was settled following the earlier Cour of Appeal decision in *Likas Bay Precint Sdn Bhd v Bina Puri Sdn Bhd*[i] that one may proceed to wind up a company based on an adjudication decision under CIPAA even without having to first apply to enforce the same under s.28 of CIPAA.

Further, by virtue of s.466(1) of CA 2016, as the statutory notice had been served on P and there was no settlement of the debt claimed, P would be deemed to be incapable of settling its debt. Even if a company was shown to be solvent but was indebted to a creditor, simple refusal to pay upon service of the notice could not justify the granting of an order legitimately restraining the commencement of a winding-up petition.

[i] [2019] 3 CLJ 499

Other than the aforesaid principles of law, it would appear, in our considered view, that the decision of the COA was more on findings of facts which they disagreed with the learned HC Judicial Commissioner (LJC). They pointed out the LJC had failed to note that P merely made a bare allegation that arbitration proceedings had been commenced for the LAD claim when in fact, the said proceedings only began on 10 June 2020 and hence, as on the date of LJC's decision, no arbitration proceedings. As the purported existence of the LAD claim was an important factor that led to the grant of *Fortuna* injunction, such factual error vitiated the LJC's finding. P's conduct in failing to act timeously to file application to set aside the adjudication decision and to stay execution thereof and seven-month delay in commencing arbitration for the LAD claim was inconsistent with P's stance that they would suffer irreparable loss should an injunction not be granted. Indeed, the COA stated that the overall conduct of D pointed to their intention to delay settlement of the judgment debt which was not presently within their means and were not *bona fide* to protect their rights. Lastly, the LJC erred in failing to apply the principle in *Likas Bay Precint* on the premise of P's right as the losing party in the adjudication proceedings to pursue court action or arbitration that might eventually prevail over or reverse the adjudication decision. In the view of the COA, this was an uncertain event that should not be used to preclude the statutory right of D to pursue a winding-up action.

The order of the LJC was set aside and D's appeal was allowed with costs.

****

CONTRACT / DAMAGES

IS THERE STILL A CONUNDRUM ON S.75 OF CONTRACTS ACT 1950 ?

Section 75 of the Contracts Act 1950 (the Act) deals with the effect of a sum named in a contract as payable when a breach of the contract occurs. It is a lengthy provision but due to space constraint, only the main body of the provision is set out below:

> " *When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such a breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.*"

Generally, any stipulated sum in a contract (be it genuine pre-estimate of the damages or penalty) cannot be recovered *simpliciter* unless the court is satisfied that it is a reasonable sum; and the amount recoverable cannot exceed the said stipulated sum.

In 1995, the Federal Court had in *Selva Kumar Murugiah v Thiagarajah Retnasamy*[i] interpreted the said s.75 of the Act. The qualifying words "*whether or not actual damage or loss is proved to have been caused thereby*" were held to be limited to those cases where the court would find it difficult to assess damages for the actual damage or loss[ii] as distinct from or opposed to all other cases, when a plaintiff in each of them would have to prove the damages or the reasonable compensation for the actual damage or loss in the usual ways. The words did not dispense with the general rule that a party claiming damages must prove his loss. Thus, *Selva Kumar* appears to have resolved the issue as to whether the plaintiff may recover *simpliciter* the sum fixed in the contract. The answer is in the negative. In ordinary cases, the plaintiff still bears the burden to prove his loss.

Selva Kumar was followed for many years including by Federal Court in *Johor Coastal Development Sdn Bhd v Constrajaya Sdn Bhd*[iii].

In November 2018, however, the Federal Court appeared to have given a different interpretation of s.75 of the Act in *Cubic Electronics Sdn Bhd (in liquidation) v Mars Telecommunications Sdn Bhd*[iv]. The following observations were made by the apex court :-

> "...(t)here is no necessity for proof of actual loss or damage in every case where the innocent party seeks to enforce a damages clause. *Selva Kumar (supra)* and *Johor Coastal (supra)* should not be interpreted (as what the subsequent decisions since then have done) as imposing a legal straightjacket in which proof of actual loss is the sole conclusive determinant of reasonable compensation. Reasonable compensation is not confined to actual loss, although evidence of that may be a useful starting point. ..."

The Federal Court then applied the UK Supreme Court decision in *Cavendish Square Holding BV v Talal El Makdessi*[v] in relation to the concepts of 'legitimate interest' and 'proportionality' in deciding what amounted to 'reasonable compensation' under s.75 of the Act.

> "...(t)here is nothing objectionable in holding that the concepts of "legitimate interest" and "proportionality" as enunciated in *Cavendish (supra)* are relevant in deciding what amounts to "reasonable compensation" as stipulated in s. 75 of the Act. Ultimately, the

[i] [1995] 1 MLJ 817, FC

[ii] eg. where there was no known measure of damages employable.

[iii] [2009] 4 MLJ 445, FC. See Sinnadurai, Law of Contract Fifth Edition, Volume 2, para [13-72], p.1251 for the list of cases.

[iv] [2019] 6 MLJ 15, FC

[v] [2015] UKSC 67, SC(UK)

central feature of both the *Cavendish case (supra)* and s. 75 of the Act is the notion of reasonableness.

...

Consequently, ... it is incumbent upon the court to adopt a common sense approach by taking into account the legitimate interest which an innocent party may have and the proportionality of a damages clause in determining reasonable compensation. This means that in a straightforward case, reasonable compensation can be deduced by comparing the **amount** that would be payable on breach with the **loss** that might be sustained if indeed the breach occurred (emphasis added). Thus, to derive reasonable compensation, there must not be a significant difference between the level of damages spelt out in the contract and the level of loss or damage which is likely to be suffered by the innocent party.

Notwithstanding the foregoing, it must not be overlooked that s. 75 of the Act provides that reasonable compensation must not exceed the amount so named in the contract. Consequently, the impugned clause that the innocent party seeks to uphold would function as a cap on the maximum recoverable amount.

Then, on the burden of proof:

"...The initial onus lies on the party seeking to enforce a clause under s. 75 of the Act to adduce evidence that firstly, there was a breach of contract and that secondly, the contract contains a clause specifying a sum to be paid upon breach. Once these two elements have been established, the innocent party is entitled to receive a sum not exceeding the amount stipulated in the contract irrespective of whether actual damage or loss is proven, subject always to the defaulting party proving the unreasonableness of the damages clause including the sum stated therein, if any.

If there is a dispute as to what constitutes reasonable compensation, the burden of proof falls on the defaulting party to show that the damages clause is unreasonable or to demonstrate from available evidence and under such circumstances what comprises reasonable compensation caused by the breach of contract. Failing to discharge that burden, or in the absence of cogent evidence suggesting exorbitance or unconscionability of the agreed damages clause, the parties who have equality of opportunity for understanding and insisting upon their rights must be taken to have freely,

> deliberately and mutually consented to the contractual clause seeking to pre-allocate damages and hence the compensation stipulated in the contract ought to be upheld.

In short, *Cubic* states that s.75 of the Act allows reasonable compensation to be awarded by the court irrespective of whether actual loss or damage is proven. Thus, proof of actual loss is not the sole conclusive determinant of reasonable compensation. The initial onus lies on the plaintiff to adduce evidence of breach of contract and clause specifying a sum to be paid upon breach (the damages clause). Once these are established, the innocent plaintiff is entitled to receive a sum not exceeding the amount stipulated in the contract irrespective of whether actual damage or loss is proven subject always to the defaulting defendant proving the unreasonableness of the damages clause including the sum stated therein. The burden of proof falls on the defendant to show that the damages clause is unreasonable.

There are apparent differences in the two decisions in *Selva Kumar* and *Cubic* on the recovery *simpliciter* of the stipulated sum in the contract in the event of a breach and on whose the burden of proof falls to enforce the damages clause or to disprove it as unreasonable.

In September 2021, the Federal Court had the opportunity in *Tekun Nasional v Plenitude Drive (M) Sdn Bhd (and Another Appeal)*[i] to consider which decision was to prevail and the true test for recovery under s.75 of the Act. However, in *Tekun*, the High Court's decision was on 15 November 2016 whilst the Court of Appeal's decision was on 24 April 2018, all of which were before Federal Court decision in *Cubic* which was on 21 November 2018. For a decision (*Cubic*) to be binding retrospectively, the case (*Tekun*) must still be at the trial stage to enable the parties to prepare and argue their case based on the burden of proof applicable at that material time. Thus, *Cubic* was held by Federal Court not applicable retrospectively to *Tekun* where the full trial had been completed and decided by the court of first instance. *Cubic* would only apply prospectively to cases where the trials have yet to be completed.

[i] [2021] 8 AMR 427, FC

Although the apex court did not seize upon the opportunity to make any statement on which decision was to prevail, it is noteworthy that it made a remark at the end of the judgment that "(s)*ince the law on s 75 of the CA is now already decided by this court in* Cubic, *we do not find it necessary to answer the questions posed in this appeal*." Until further clarification or decision from the highest court on the land, *Cubic* appears to be good law despite being subject of critics and academic debate[i].

****

CONTRACT / DAMAGES

NO BEST OF BOTH WORLDS

In *Koperasi Kastam Diraja Malaysia Bhd v Yi Go Group Sdn Bhd*[ii], the Court of Appeal explored the issue on how to assess damages for breach of a contract when it was terminated after 3 months into the contract that was agreed to be for 5 years. The contract was for the rental of 10 used storage containers and a forklift and a crane to be operated by P's workers. P had a fixed rate of rental for the containers and the two machines with a minimum use expressed in the number of times the machines were to be used per month. P issued invoices for the months of October to December 2017 but D failed to pay. P terminated the contract and commenced legal action. P claimed for the outstanding amount of RM143,877.90 and also RM3.6 million as damages based on the whole of the contract period of 5 years being the rental P would have received had the contract been performed to its expiry date. The outstanding amount was allowed and the Registrar awarded only nominal damages of RM100,000.00 but the High Court reversed the decision and awarded RM3.6 million.

The Court of Appeal set aside the High Court award. The storage containers and the two machines had been removed by P from D's premises. Thus, it would be overcompensating P if damages was calculated based on the whole 5-year contract period at the agreed rate for P would have had the benefit of the containers and machines in its possession when they could be let out to others. They were not custom-made or designed specially for D only but appeared to be generic and common.

The assessment of damages based on the entire period of the contract and the agreed rates had the contract been carried through to its completion would be far in excess of the losses suffered and inappropriate as there was no evidence led that P could not let out the 10 containers, forklift and crane after repossession from D. It would be disproportionate and excessive[iii] and allowing P to profit from its loss which

[i] See Sinnadurai, Law of Contract Fifth Edition, Volume 2, para [13-74], p.1260.

[ii] [2021] 5 MLJ 590, [2021] 10 CLJ 31, CA

[iii] *Cubic Electronics Sdn Bhd (in Liquidation) v MARS Telecommunications Sdn Bhd* [2019] 2 CLJ 723, FC

was not the principle in awarding damages upon a breach of a contract.

P had repossessed the storage containers and machines but remained silent about whether they had been let out to others or been lying idle since the repossession. It appeared that P wanted to have the best of both worlds: to regain possession of the containers and machines and to sue to recover the rentals from D for the remaining unexpired 5-year period. That was not permissible. Having repossessed the items, P had to prove loss of profit (and not loss of revenue since there was the costs element in all businesses) and not the rentals for the unexpired period[i]. P had failed to do so. Thus, P could only be awarded nominal damages. The sum of RM100,000 may not be called nominal which generally means minuscule or small in terms of amount or a token sum but such sum was not without precedent for a case of breach of contract as in the case of *Delpuri-Hari Corp JV Sdn Bhd v Perbadanan Kemajuan Negeri Selangor*[ii]. The appellate court did not disturb the sum.

****

CONTRACT LAW

COMPLIANCE WITH FRANCHISE ACT

It is vital for a franchised business to comply with the provisions of the Franchise Act 1998 (the FA 1998) in Malaysia. That was the message from the High Court decision in *Janet Ooi Hui Ming v STC Management Sdn Bhd & Anor*[iii]. The plaintiff (P) was the franchisee of the right to establish and run one Shane Centre by utilizing the know-how of the school management under the "cooperation chain system" and the Shane Brand trade names, trademarks and other symbols which were controlled by the 1st defendant (D1), the franchisor. The defendants contended however that the agreement was merely for the grant of a licence for P to use the Shane brand and not for a franchise. Upon evaluation of the factual matrix, all the four limbs in s.4 of the FA 1998 were satisfied; and the agreement was ruled as a franchise agreement.

However, the Shane brand was not registered with the Malaysian Registrar of Franchise which meant D1 was operating a franchise business without first registering the said brand. The effect of non-registration of the Shane brand franchise rendered the agreement as a franchise agreement being tainted with illegality and becoming void. The failure to register the said franchise rendered the agreement unlawful under s.24 of the Contracts Act 1950 (CA).

The court also found that there were misrepresentations made by D1 *via* its director, the 2nd defendant (D2) which were negligent, reckless and/or fraudulent in breach of s.18 of the CA. In reliance of such

[i] *SPM Membrane Switch Sdn Bhd v Kerajaan Negeri Selangor* [2016] 1 CLJ 177 (FC*), Lay Hong Food Corporation Sdn Bhd v Tiong Nam Logistics Solutions Sdn Bhd* [2017] 10 CLJ 680, CA

[ii] [2014] 1 LNS 1075, CA. See also *Tahan Steel Corporation Sdn Bhd v Bank Islam Malaysia Bhd* [2012] 1 CLJ 959.

[iii] [2021] 8 CLJ 952

representations, P had entered into the agreement. This resulted in injury to P when it transpired that the agreement was void as the Shane brand was not a valid franchise as an unregistered franchise in Malaysia.

The court allowed P's claim for restitution under s.66 of the CA to be restored to the position P would have been had the tort not been committed. This essentially entitled P to all payments made by her to the defendants under the agreement: initial fees for teaching materials, renovation costs incurred for the premises, purchases for the purpose of operations, salary payments of staff and various operational and capital expenses including forfeited tenancy deposits, rentals, utilities and advertisement expenses.

****

CONTRACT LAW

COERCION & UNJUST ENRICHMENT ALTERED THE AGREED PRICE FOR LAND

The numerous plaintiffs in *Transnasional Express Sdn Bhd & Ors v Tan Chong Industrial Equipment Sdn Bhd*[i] were operators of express bus companies whilst the defendant was the owner of the buses which were leased to the defendants. There were defaults under the lease agreements incurring a debt of RM32.92 million. The defendant terminated the agreements and repossessed 49 buses. The plaintiffs proposed to settle the debt by transferring a piece of land to the defendant. A settlement agreement (the SA) was entered into and after taking into account the value of the land in the sum of RM16 million, the balance debt due was RM16.92 million which was to be paid in eight monthly instalments. Pursuant to the SA, a sale and purchase agreement was entered into for the sale of the land (the SPA). When the plaintiffs defaulted in making the payment, the defendant terminated the SA and repossessed the buses. The plaintiffs commenced the present suit against the defendant, based on coercion under s.71 and 73 of the Contracts Act 1950 (the Act) and unjust enrichment under the common law.

It was the plaintiffs' case that the true value of the land was substantial enough to settle the debt with excess of no less than RM22.67 million. The defendant countered that there was no principle of law that permitted the alteration of the agreed purchase price of RM16 million which was the price and not the valuation.

At the material time, the plaintiffs were desperate for the return of the 49 repossessed buses to continue providing the services for passengers during Hari Raya season; all tickets to the respective destination were already sold. The defendant was fully aware that in the event the plaintiffs failed to provide such services, their licence might be revoked by the

[i] [2021] 10 CLJ 314

Suruhanjaya Pengangkutan Awam Darat. The defendant refused to budge in the negotiation and insisted for the value of the land to be fixed at RM16 psf totaling RM16 million. Pressure was asserted by the defendant's representatives or else a winding up notice would be issued. At the trial, the defendant did not rebut such testimony by the plaintiff's witness. It was thus the finding of the trial Judge that the plaintiffs were at the mercy of the defendant as a dominant party asserting pressure on the plaintiffs to cooperate to abide the value of the land as RM16 million. The defendant was in a position to dictate and economically coerce the plaintiffs, leaving no room for negotiation who then had no choice but to accept the terms dictated by the defendant and eventually signed the SA and SPA 2 days before Hari Raya festival. Such finding of coercion enabled the plaintiffs to claim for restitution of the money paid pursuant to s.73 of the Act.

The trial Judge accepted the valuation given by the plaintiffs' valuer, Henry Butcher and not the defendant's valuer, Rahim & Co. Taking the value of RM55 psf, the land was valued at RM55.6 million. That being so, the defendant would have gained an astoundingly excessive and unconscionable amount of RM22.67 million after the deduction of the debt in full at RM32.92 million. The defendant took advantage of the situation at that time; the predicament of the plaintiffs to provide services during the festive season. In short, the defendant had been enriched; the enrichment was gained at the plaintiffs' expense by way of coercion; and the defendant's enrichment was unjust. No special defence had been raised by the defendant. The plaintiffs were entitled to restitution from the defendant.

****

RESCISSION & DAMAGES AS REMEDIES NOT IN CO-EXISTENCE

The importance of knowing the nature of action taken and the types of remedy available for the causes complained of was driven home by the Court of Appeal in *Fabulous Range Sdn Bhd v Helena K Gnanamuthu*[i]. In the case, P bought a bungalow from D together with fixtures, fittings and interior design works (the Property) via a sale and purchase agreement and a supplemental agreement (collectively SPA) in June 2010. In September 2013, P terminated the SPA and initiated a suit for rescission of the SPA to restore her position as if the SPA was never entered into i.e. restitution as well as for breach of the SPA. Nonetheless, P continued to pay the purchase price of the Property and fully settled the same in October 2014. The trial Judge at the High Court granted the reliefs claimed by P. D appealed against the decision and partially succeeded.

The appellate court held that P in seeking rescission must prove that there has been a total failure of consideration[ii] whereby D had committed a fundamental breach of the SPA which went to the root of the agreements. There could not be such failure of consideration given the fact that P had taken vacant possession of the Property and had exercised her rights under the SPA by taking the keys of the Property, inspecting it and submitting her defect checklist to D, claiming for liquidated ascertainable damages (LAD) pursuant to the SPA and continuing to pay the bank loan, notwithstanding having terminated the SPA and having the Property transferred to her name. P had affirmed the SPA and could not rescind it and seek restitution[iii]. The trial court had thus erred in granting an order of rescission in P's favour. The findings of the trial Court were that the defects of the Property were not a result of building defects (but were due to non-maintenance and lack of care for more than 2 years) and that the Property was not uninhabitable; hence there was no total failure of consideration. Since the breach of contract was not fundamental and was only a breach of warranty, P was only entitled to damages[iv].

The remedy of rescission as a result of misrepresentation and of damages due to breach of contract were inconsistent with each other and both could not be allowed to co-exist together. P however had not elected to pursue her claim on the ground of misrepresentation or breach of contract[v]. The grant of an order of rescission and an award of damages was thus wrong.

[i] [2021] 5 MLJ 736, [2021] 8 CLJ 1, CA
[ii] *LSSC Development Sdn Bhd v Thomas Iruthayan & Anor* [2007] 2 CLJ 434, CA; *Berjaya Times Square Sdn Bhd v M-Concept Sdn Bhd* [2010] 1 CLJ 269, FC
[iii] *TTDI Jaya Sdn Bhd v Yew Hong Teng & Anor* [2017] 1 CLJ 436, CA
[iv] *Ching Yik Development Sdn Bhd v Setapak Heights Development Sdn Bhd* [1997] 1 CLJ 287, CA
[v] *Bounty Dynamics Sdn Bhd v Chow Tat Ming & Ors* [2015] 9 CLJ 422, CA

On the facts, P did not rely on the brochure of the Property in deciding to purchase the Property. P's decision was a result of inspections made on several visits to the Property. There was no issue of P relying solely on the brochure and there was no misrepresentation, innocent or otherwise, based on it. The remedy of rescission was not available.

P's termination of the SPA on a breach of a non-fundamental term was unlawful. Such breach was one of warranty and D's refusal or omission to rectify the defects did not entitle P to claim for rescission but only to damages. Indeed, P's termination of the SPA on the premise of a breach of warranty was unlawful and constituted a breach of the SPA.

To sum up, the decision of the High Court was set aside except the award of LAD as damages. The matter was remitted to the High Court for assessment of damages arising from the failure of D to make good of the defects and to comply with specific conditions as stipulated in the SPA.

****

COURT PROCEDURE

JUDGMENT SILENT ON JOINT OR JOINT AND SEVERAL LIABILITY

There are 2 important outcomes from the Federal Court decision in *Lembaga Kumpulan Wang Simpanan Pekerja v Edwin Cassian Nagappan*[i]: (i) the "joint and several" liability on the directors for unpaid contributions under the Employment Provident Fund Act 1991 (the EPF Act) where such words "joint and several" are not stated in a judgment; and (ii) the principle that where the liability in a judgment is "joint", such liability is proportionate to the number of promisors as propounded in the Court of Appeal (COA) case of *Sumathy Subramaniam v Subramaniam Gunasegaran & Another Appeal*[ii] is erroneous; and the COA decision in *Kejuruteraan Bintai Kindenko Sdn Bhd v Fong Soon Leong*[iii] is preferred.

In *Edwin Cassian*, a Consent Judgment was entered against a company and its two directors (the Defendants) for the company's failure to make employer's contributions pursuant to the EPF Act. The judgment required the Defendants to pay the EPF Board the arrears but did not state whether they were jointly and severally liable for the judgment sum. Both the High Court and COA ruled that in the absence of the phrase

[i] [2021] 5 MLJ 253, [2021] 7 CLJ 823, FC
[ii] [2018] 2 CLJ 305, CA
[iii] [2021] 5 CLJ 1, CA

'jointly and severally' in the judgment, each defendant would only be liable for a portion of the judgment sum, proportionate to his share/interest/obligation.

In the final appeal, the apex court overturned the decisions of the courts below. There had been a misapprehension of the term 'joint liability' as liability for only half of the debt and not the full amount. Joint liability in fact arises when two or more persons jointly promise to do the same thing and there is only one obligation or promise. The obligation is single and entire. On the other hand, several liability arises when two or more persons make separate promises to another by the same or different instruments. There is more than one obligation or promise. Joint and several liability arises when two or more persons in the same instrument jointly promise to do the same thing and also severally make separate promises to do the same thing. Joint and several liability gives rise to one joint obligation and to as many several obligations as there are joint and several promisors. It is misconceived to state that in a joint liability situation, the liability for two or more debtors is shared. Where the debts are jointly incurred, each promisor is liable for the whole amount. Whilst the liability for the fill promised sim is shared equally between all the promisors, that is between the promisors *inter se* but does not affect the rights of the creditor.

On that score, *Sumathy* is flawed because it pre-supposed that joint liability in a judgment was proportionate to the number of promisors, from the perspective of the creditor. The position of the creditor was conflated, erroneously, with that of the debtors or promisors *inter se*. *Sumathy* is no longer good law.

Back to *Edwin Cassian*, it is crystal clear that s.46 of the EPF Act imposes joint and several liability on the directors of a company for unpaid contributions. Such statutory provisions must be given full effect and it is not open to the courts to stultify or vary them by construing judgments in a manner not consonant with the EPF Act. The liability of the judgment debtors in the present case was both joint and several by operation of law.

> "If the premise that 'oint and several liability' could not be read into the judgment due to an absence of such words were to be accepted, it similarly follows that a silent judgment could not automatically be inferred to impose 'joint' liability where there is no such mention. This is especially so when the liability that arises is explicitly stipulated by statute."

****

1. DEMOTION AND RE-GRADING AS AN INSTANCE OF CONSTRUCTIVE DISMISSAL

In *Ng Teck Fay v Mahkamah Perusahaan Malaysia & Anor*[i], the claimant was employed as Assistant General Manager (AGM) in 2008 by the company and appointed as the Head of the Family Claims Department the following year. In 2014, he extended an internal e-mail to the company's 3rd party administration to which he apologized for his oversight after being issued with a show cause letter by the company. A warning was also issued to him, He was then handed with 2 letters, namely (i) a letter entitled 'change of job scope' which essentially reduced his scope of duties by taking away from him the medical claims for health insurance products; and (ii) a letter entitled 'job re-grading to senior manager' which demoted and downgraded him from an AGM to a senior manager. He was also told that he could resign should he disagree with the contents of the above letters. He opted to leave the company, citing constructive dismissal.

Both the Industrial Court and High Court ruled against the claimant. On appeal, the Court of Appeal set aside both the decisions and allowed the claimant's claim for unlawful dismissal. The appellate court reiterated the four conditions[ii] that have to be met in order for the claimant to prove constructive dismissal. On the facts, this had been fulfilled. The company's decision to re-grade the claimant, in order to align his new job scope with the company's re-organisational structure, amounted to a breach of the employment contract which entitled him to deem himself constructively dismissed despite his acceptance of the company's decision[iii]. In his position as the AGM, he was the head of the business unit, family, group and medical claims. When he was re-graded and demoted, the company took away the medical claims administration from his original scope of responsibilities. This resulted in him having lesser responsibilities. Furthermore, when he was demoted to senior manager, the company took away one deputy manager and one assistance manager from reporting to him. The benefits enjoyed by him were also reduced. The post of senior manager was never held by the claimant. The Industrial Court and the High Court had failed to consider that an employee could not be demoted or re-graded to a post which he never held before. There was insufficient judicial appreciation of the totality of

[i] [2021] 5 MLJ 574, [2021] 4 ILR 481, [2021] 10 CLJ 73, CA

[ii] See *Anwar Abdul Rahim v Bayer (M) Sdn Bhd* [1998] 2 CLJ 197, *Wong Chee Hong v Cathay Organisation (Malaysia) Sdn Bhd* [1988] 1 CLJ 45

[iii] The appellate court held that the claimant was entitled to change his mind bearing in mind that at the meeting with the general manager of HR in the presence of the group MD, he was threatened either he accepted the re-grading or resigned. It was perfectly reasonable for the claimant, after being confronted with such threats and being deprived of legal advice and time to consider the offers, to change his mind four days later.

evidence which warrants appellate intervention[i].

2. RELEVANCY OF DOMESTIC INQUIRY

A new principle appeared to have laid down by the Court of Appeal (CA) in relation to the extent of relevancy of a domestic inquiry (DI) in a case of dismissal of employee. In *Lini Feinita bt Muhammas Feisol v Indah Water Konsortium Sdn Bhd*[ii], the panel for DI found the employee/claimant guilty of only the 2nd and 3rd charges (out of a total of seven charges) for misconduct. The employer/company took into account the decision of the DI panel and the seriousness of all charges as well as her past record of service and terminated her services. At the Industrial Court (IC), the claimant succeeded but at the High Court (HC), the company managed to obtain *certiorari* to quash the IC award.

On appeal to the CA, the HC decision was set aside and the IC award was reinstated. It was held that *the fact that there was a DI and the findings thereof ought to be considered by the IC; and unless the decision of the DI could be shown to be perverse, the company could not be allowed to reargue its case based on all seven charges to justify the termination in the IC. The decision of the DI panel was a material factor and ought to be considered by the IC notwithstanding that the IC heard the matter afresh and was not bound by the decision or findings of the DI panel and was entitled to make its own finding.* Thus, the HC had committed a fundamental error of law in holding that the finding of the DI panel should have been completely disregarded by the IC.

The CA also noted that contrary to the DI panel's finding that the claimant was only guilty of two of the seven charges, the company considered the seriousness of all the seven charges most of which were not proven before the DI panel. At the judicial review stage at the HC, to allow the company to try to justify the dismissal on all seven charges would be highly inequitable and unconscionable. It was akin to allowing the company to reintroduce its case at the IC to the detriment of the claimant and defeat the very process of the DI.

3. LIMITED REMEDY IN CIVIL COURT FOR WRONGFUL DISMISSAL CLAIM

The High Court in *Malayan Banking Bhd v Prabanah Manogaran Sultan*[iii] aptly pointed out the vast differences between (i) filing a complaint on unfair dismissal (without just cause or excuse) from employment to the Industrial Relations office pursuant to s.20 of the Industrial Relations Act 1967 (the IRA) and (ii) filing a civil suit in a court of law for wrongful dismissal at common law.

In terms of remedies, in (i), the Industrial Court upon finding a dismissal to be unfair has the powers to order: (a) back

[i] See *Lee Ing Chin v Gan Yook Chin* [2003] 2 CLJ 19, CA; [2004] 4 CLJ 309, FC; *Ranjit Kaur S Gopal Singh v Hotel Excelsor (M) Sdn Bhd* [2010] 8 CLJ 629

[ii] [2021] 4 MLJ 769

[iii] [2021] 11 MLJ 800, [2021] 6 CLJ 370

wages up to 24 months to be paid to the aggrieved employee; (b) the employee to be reinstated; (c) the employee to be compensated *in lieu* of reinstatement, usually at the rate of one month's remuneration for each year of completed service. These are statutory creations and have no place at common law and civil courts. In (ii), reinstatement is not available as the common law knows only one remedy, viz. damages. And damages are confined to the pay which would have been earned by the employee had the proper period of notice been given[i].

In a wrongful dismissal suit at common law, the question is whether the employee was terminated according to the terms of the employment contract. Where there was no serious misconduct, the employee must be given contractual notice of termination or remuneration *in lieu* thereof as damages. Where there was serious misconduct, the employee need not be given contractual notice of termination and might be summarily dismissed without notice, in which event he is not entitled to remuneration *in lieu* of notice.

As to burden of proof, in an Industrial Court matter, the burden was on the employer to justify that the dismissal was fair or with just cause or excuse. In civil suit, the burden was on the employee to prove that he had been wrongfully dismissed. The standard of proof was on the balance of probability, not raising a doubt.

In short, given the enormous advantages in having an unfair dismissal claim adjudicated in Industrial Court as opposed to civil court, readers are advised to file representation/complaint under the IRA for a case of dismissal from employment within 60 days from the date of cessation of employment.

4. ENFORCING AN INDUSTRIAL COURT AWARD WITHOUT REGISTERING IT AS A CIVIL COURT JUDGMENT

The petitioner in *Cheah Aei Ling v HKS Infra & Earthwork Sdn Bhd*[ii] had been awarded the sum of RM104,000 by the Industrial Court (the Award) as compensation for her wrongful dismissal. The Award had not been registered as an order of Court. The respondent filed for judicial review at the High Court to set aside the Award. Meanwhile, the petitioner filed a winding-up petition against the respondent on the ground of the respondent's inability to pay debts.

The High Court struck off the petition as abuse of process of the court. Section 56 of the Industrial Relations Act 1967 set out the process that needs to be adhered to whether there is non-compliance with an Award. An IC award is not enforceable until the procedure is complied with. The Award is not final and binding until it is registered and accepted as a judgment by either High Court or Sessions Court. Until then, it cannot be executed. The

[i] See also *Fung Keong Rubber Manufacturing (M) Sdn Bhd v Lee Eng Kiat & Ors* [1981] 1 MLJ 238, FC

[ii] [2021] 3 ILR 161

Award does not *per se* entitle the petitioner to levy execution or to commence any recover process; it is not a judgment of a court but only an award of a tribunal i.e. IC and therefore still subject to challenge by any of the parties in a court of law. Indeed, the Award was then subject to challenge vis-à-vis the judicial review application. As such, it could not be a ground to show that the respondent was unable to pay its debts and be relied upon to initiate winding-up proceedings. In addition, the petitioner had not been a creditor as envisaged under the Companies Act 2016.

The petitioner had commenced the petition for a collateral purpose, i.e. as a mean to enforce the sum awarded. As such, the petition had been premature and bad in law and the petitioner had not had the requisite *locus standi* to commence it on the strength of the Award itself. The "obviously unsustainable" petition was ordered to be struck out.

5. UNJUSTIFIED 2ND CONSTRUCTIVE DISMISSAL CLAIM

In *Pusparani P Balasingam v Westports Malaysia Sdn Bhd*[i], the claimant was a Legal Manager who had walked out claiming constructive dismissal on 7 March 2019 (the 1st CD). Subsequently, she and the company had entered into a consent memorandum pursuant to s.20(2) of the Industrial Relations Act 1967 (IRA) wherein she had been reinstated to her former position effective 15 April 2019. She reported back for work and a few days later, a meeting had been convened to confirm her job assignment in her role as the Legal manager. However, she disputed the job objectives assigned to her and the alleged unreasonable KPIs and flawed wordings contained in the Objectives. She contended that the company had not been genuine in her reinstatement and walked out claiming constructive dismissal for the 2nd time on 29 April 2019 (the 2nd CD). She refused to report back to work despite being asked by the company.

The Industrial Court ruled for the company and that the claimant had abandoned her employment. A scrutiny of the salient parts of the terms of the consent memorandum had shown that the company had agreed to reinstate her to her original position as a Legal Manager in accordance with the original terms and conditions of employment, without any loss in her seniority, but it had not particularized her job functions, scope and objectives in that position. The job scope, objectives and KPIs had been left to the parties to deliberate and agree upon.

The facts had shown that the claimant had been transferred many times which had entailed new job descriptions and objectives. Thus, her job scope and objectives had not been permanent or cast in stone and had instead been evolving. She had been fully aware that her return to the legal portfolio would entail changes. Even if she had had grievances, she should have carried out the job functions and negotiated with

[i] [2021] 2 ILR 262

the company on her issues. What she had done from the time she had been reinstated to her position until her 2nd CD should have been avoided. She should have continued to perform the tasks given to her, without repeatedly disputing the instructions of her superior, whilst at the same time continuing discussion with her superior relating to the proper handing over of the legal portfolio.

Her email dated 25 April 2019 had sought a long list of information and given comments. She had been very demanding and had asked for things that had not been contained in the consent memorandum. The company could not have entertained every demand of hers without proper consideration as it had involved taking away the job functions of other employees who were in the midst of performing them. She had not been sincere or genuine to find a solution to her grievances. In any event, the issues she had raised had not amounted to a fundamental breach of her contract of employment. The company had made all efforts to accommodate her but she had been unwilling to reciprocate and/or adamant that all her requests be met immediately. Her conduct had been nothing short of abandoning her employment with the company.

6. ALLEGATION OF "KHALWAT"

The company in *Mohamad Noor Jaamad lwn Puspakom Sdn Bhd*[i] carried out business in inspecting vehicles pursuant to concession of the government and giving approval on vehicles to ensure roadworthiness. The claimant had worked as an Operation Supervisor Grade NE 5 and Relief Branch Manager for 18 years. He received a show cause letter on the charge of "khalwat' which was claimed to have brought disrepute to the company, against the Kod Etika & Amalan Perniagaan and Polisi Prosedur Disiplin Syarikat. Although the claimant had replied to the show cause letter, the company was dissatisfied and terminated his services. Upon complaint on dismissal without just cause or excuse under s.20 of the IRA, the Industrial ruled in favour of the claimant. Until the day of hearing in Industrial Court, there has been no prosecution brought against the claimant on the said offence. The

[i] [2021] 2 ILR 332

"khalwat" offence took place outside the premises of the company, outside working hours and has no relation to the duties of the claimant; it was more like a personal problem of the claimant. Until and unless he has been charged and convicted in court, he could not be said to be guilty as alleged. Therefore, the termination of services by the company was without just cause of excuse.

7. REPORTING WRONGDOING OF CO-WORKER

In *Elizabeth Agnes A. Anthony v Berjaya Times Square Theme Park Sdn Bhd*[i], the claimant raised many grounds in order to support her claim of constructive dismissal against her employer. The Industrial Court however ruled on three such grounds as having been made out to prove that the employer had damaged the relationship of trust and confidence that had existed between them; and hence a breach of the fundamental term (by implication) of mutual trust and confidence. She had thus been constructively dismissed by the employer (the company), justifying her walking out of her employment.

Firstly, the claimant had sought clarification from the company on her superior (Henry)'s attempt to coax her to resign and the allegation against him for instructing her colleagues to lodge a complaint against her. It was a legitimate and reasonable request for clarification but the company had failed to respond; and had instead charged her with misconduct, subjected her to a domestic inquiry (DI) and issued her a final stern warning. The company had acted oppressively and unreasonably.

Secondly, the claimant was accused of provocation against the management by her allegations against Henry and creating disharmony between employees and management. Evidence however showed that the matters raised by her were allegations of wrongdoings by Henry. The act of reporting the wrongdoings of other employees, even if it was the immediate superior of that employee, cannot be regarded as provocation towards the management or creating disharmony. The relationship between an employee and employer is premised on trust and confidence. It is the duty of every employee to protect and safeguard the interest and property of his employer. Her complaints had led to disciplinary action being taken against Henry. Thus, she had by her actions been protecting the company. It had been wrong of the company to accuse her of provocation towards management and of creating disharmony. She should not have been punished. By bringing this charge against her, the company had damaged the relationship of trust and confidence.

Thirdly, the 3 charges levelled against her in the 2nd show cause letter had lacked the requisite particulars of the alleged claimant's wrongdoings. Charges against an employee have to be clear and specific. Whilst the company had sought to question

[i] [2021] 4 ILR 104

her credibility, trustworthiness and integrity, there was nothing stated on how and why such qualities of her had been called into question. The company's action of levelling baseless charges had therefore been an affront to the relationship of trust and confidence between the parties.

8. DISMISSAL DUE TO FRUSTRATION OF CONTRACT

The legal concept of "frustration of contract" in the sphere of employment law was subject to scrutiny in *Sathasivam Muthusamy v Tenaga Nasional Berhad*[i]. The claimant had worked with the company for about 7 years as an Auger Crane Operator. He was arrested and remanded by the police and charged in the Magistrate and Sessions Court for being in possession of dangerous drugs under the Dangerous Drugs Act 1952. He failed to inform the company of his arrest and detention. Whilst in police custody, he did not turn up to work. Before a show cause letter could be issued for his absence without leave, the police had informed the company of his arrest and him being tested positive for methamphetamine and his detention without bail at prison. The company proceeded to terminate his employment on the ground of "frustration" since he had been unable to perform his duties. About a year later, he was acquitted of all criminal charges. He appealed to the company to allow him to return to work which was rejected.

It was held that the law on frustration of a contract allows an employer to terminate the contract of employment with an employee when the latter is unable to perform the agreed work because he has been imprisoned for a criminal offence as in the present case. The frustrating event here was the claimant's detention at the prison which had rendered the performance of his contract impossible. His arrest and imprisonment had not been foreseeable when the contract was entered into. The relevant question was whether the supervening event, i.e. his arrest and detention had rendered the performance of his employment contract impossible or something radically different from that which the parties had contemplated when they had entered into it. When the arrest and detention is only temporary, it will not automatically render the performance of the contract impossible. Automatic frustration happens when the arrest or detention renders the resumption of performance of the contract, within reasonable time, a practical impossibility. The company had

[i] [2021] 4 ILR 558

not known or had any idea of when his case would be concluded. No reasonable employer would be expected to continue with the claimant's services in such a situation, not knowing when he would be able to return to work. Thus, there was nothing wrong in the company's actions of invoking the doctrine of frustration and determining the contract of employment.

Under the statutory "dismissal without just cause or excuse" i.e. s.20 of the Industrial Relations Act 1967, the law requires that a purported dismissal must be substantively justified and procedurally fair. The approach taken in relation to the right to terminate the services of the employee, in the case of arrest or detention, from the perspective of industrial law, is very different from common law wrongful dismissal. The former is associated to leave of absence. The claimant here had been terminated due to his arrest and detention which had rendered it impossible to perform his contract. It had been a discharge *simpliciter* which had not required an enquiry. It is doubtful what purpose would be served by a formal show cause letter being delivered to him and what conceivable answer he could give especially when the arrest and detention are not attributable to the employer. Thus, the dismissal could not be set aside purportedly on the ground that the principles of natural justice have been violated.

The Industrial Court Chairman went on to advise the workers that in cases of imprisonment or detention, they must still apply for leave, either during police custody or from prison, from their employer if they wish to continue in employment and to return to work after release from prison. The claimant had failed to apply for leave and therefore, the company's actions of issuing the termination letter to him, after more than 2 months, had been justified. An employer is not bound to wait for an employee for an indefinite period of time and in this case, it would have had to keep his post vacant for 15 months!

9. COMPULSIVE SEXUAL HARASSER

In *Abdul Halim Mohd Salleh v Cagamas Berhad*[i], the claimant, a Senior Vice President (Acting Head), Treasury & Capital Markets (TCM), was slapped with 74 charges of

[i] [2021] 4 ILR 284

serious misconduct ranging from breach of the company's instructions as in the suspension letter, indecent behaviour by using foul and demeaning language, abuse of position and sexual harassment over 4 employees. The Domestic Inquiry found him guilty of the majority charges whereupon the company terminated his services. The Industrial Court (IC) found for the company. The majority charges (56) that the claimant was found guilty of pertained to indecent and unprofessional conduct and sexual harassment of various kinds. This justified his dismissal.

Due to space constraint, we shall only focus on a few notable points. The first was on the charge that the claimant had disregarded the instruction in the suspension letter that he was not allowed to contact the employees of the company during his suspension period without written permission of the Senior VP of Human Capital & Administration. The claimant had however contacted two employees without obtaining such permission under the pretext that he had done so to enable him to prepare his defence and/or reply to all the allegations made against him. The IC did not accept such excuse and found him guilty of insubordination. Likewise, his excuse to communicate with another employee in order to assist and advise him on his preparations for the company's meeting with the media and to get opinion on presentation slides (work-related) was rejected by the IC.

On the charge of indecent behaviour towards his female subordinate by using foul and demeaning language, his explanation of uttering so due to her inefficiency in handling tasks was rejected. No matter what stress or hectic schedule the claimant had been under, he had no right to use foul and demeaning language against subordinates. As a superior, he ought to be an example and had owed a higher duty of care to behave in a professional manner. On his contention that such use had been a common occurrence in the TCM department and that most of the time it had been uttered in frustration or as a joke, no matter what context it had been in and regardless of whether it had been commonly used, it had not given him an excuse to utter such profane and demeaning language.

On the charge that the claimant had constantly nit-picked and scolded his subordinate, these were related to work matters and as such, there had not been a breach of the Code of Ethics. An employee is expected to work up to the mark set by the superior and if that standard is not met, the employee must be prepared to face admonishment from the superior; the employee cannot expect to be mollycoddled all the time by her superior. The claimant had not been guilty of such charge.

On various charges relating to the claimant's sexual harassment against 4 employees, his contention that they had fabricated the charges as the evidence was uncorroborated was rejected by the IC. It is trite law that for sexual harassment complaints, the absence of corroboration

does not defeat the claim. The claimant's excuse that he had uttered inappropriate intimate words to a subordinate in jest did not find favour with the IC. It was remarked that in sexual harassment cases, the motive of the perpetrator is irrelevant; what is important is the effect on the victim (i.e. the subjective perception of the victim). His inappropriate enquiries, when looked at in totality, had given the impression that she had been having an intimate relationship with the CEO, which had humiliated and disgusted her especially since it had been uttered in the presence of her other colleagues.

On his defence that one of the "victims" had not only not reported the incidents immediately but had in fact carried on going out with him for drinks or social outings for years, it was held that in sexual harassment cases, silence on the part of the victim does not necessarily mean acquiescence. In most cases, the victim fears losing her employment due to the strong influence her superior may have in the company. Victims of sexual harassment often have to be given the courage, guidance and assistance to speak up against their perpetrators lest these perpetrators go unnoticed and continue to prey on either the same victims or try their luck on others which was exactly what had happened here. The mere fact that the victim had continued to go for drinks or social outings had not meant that she had welcomed the claimant's inappropriate behaviour. She had just wanted to get her work done and not create problems that could lead to her losing her job or facing the social stigma in the event her complaints were dismissed. The IC also held that repeated unwanted social invitations by a superior to his subordinate employee is tantamount to a psychological sexual harassment.

In conclusion, no reasonable employer, considering the multitude of charges that the claimant had been guilty of, could further repose its trust or confidence in him. The evidence had shown that he had been a compulsive sexual harasser who preyed on his subordinate female staff. It was not an isolated incident but a series of workplace and/or sexual harassment that made him guilty as charged which justified his dismissal.

10. VARIOUS SHORTCOMINGS IN CHARGE & DOMESTIC INQUIRY

There are a few significant principles that emerged from the Industrial Court case in *Shaharul Miza Muhamad v Serba Dinamik International Ltd*[i].

First, the charge against the claimant in the Notice of Domestic Inquiry (DI) and Charge Sheet which was criminal in nature, i.e. "involved in corrupt practices in Tanzania" had failed to state important particulars such as time, date and amount involved.

Secondly, the show cause letter had not included a charge but merely stated that

[i] [2021] 3 ILR 540

the company had received a report alleging the claimant's involvement in fraudulent and corrupt practices. The charge framed against him was held to be defective as it had lacked material particulars and had deprived him of knowing what exactly he had needed to answer to in the DI.

Thirdly, the chairman of the DI was involved in the investigation which thus made it a real likelihood of bias against the claimant. The manner the DI was conducted (with the panel members participating actively) showed the DI to be more of an investigation than an opportunity for the claimant to present his case and defend himself. DI was thus not valid.

Fourthly, the notes of the DI had not been signed by the claimant who had not been served a copy of the notes to confirm its accuracy.

Fifthly, the reason stated in his termination letter had not been the misconduct or charge that he had been asked to answer to, in either the show cause letter or at the DI, which had deprived him of a chance to defend himself.

All in all, the Industrial Court ruled that the company had failed to prove the claimant's alleged misconduct of corruption. His dismissal was without just cause and excuse; and he was awarded compensation for the remainder period of his 2-year fixed term contract.

[i] [2021] 3 MLJ 78, [2021] 4 ILR 417, [2021] 10 CLJ 663, FC

****

EMPLOYMENT LAW

POST-DISMISSAL REASONS OR MATTER DISCOVERED SUBSEQUENT UNAVAILABLE TO JUSTIFY DISMISSAL

In a very significant decision, the Federal Court has answered the question on whether the Industrial Court, in the exercise of its statutory function to adjudicate on a representation of dismissal without just cause or excuse under s.20 of the Industrial Relations Act 1967 (IRA), may consider matters which did not form the reason/basis for the dismissal when the employer made the decision to dismiss, but which the employer seeks to put forward post-dismissal in the Industrial Court, to justify its earlier decision to dismiss the workman.

In *Maritime Intelligence Sdn Bhd v Tan Ah Gek*[i], the claimant was found guilty pursuant to the domestic inquiry (DI) of the charges of unethical behaviour that could tarnish the image of the institute where she worked and acting unprofessionally and using derogatory language about the academic staff. However, the Industrial Court held that the DI was invalid and allowed the company to establish before it the reasons and basis for the dismissal. The company then for the first time raised in its pleadings the allegations of the claimant never qualified for her position as her Master degree was from an unaccredited university

in Malaysia. The Industrial Court rejected the company's new allegation on the claimant's lack of qualifications and ruled in favour of the claimant which decision was upheld by the High Court and Court of Appeal (COA). However, the COA held that the Industrial Court had the right to inquire into grounds that differed from the reasons for the dismissal which were subsequently raised by the company in its pleadings to justify the workman's dismissal and that the Industrial Court had the discretion whether to consider the new grounds and, if it did, the requisite weight to be attached to the same. By such decision, the COA had taken a new and definitive position on post-dismissal allegations in dismissal cases under s.20.

The Federal Court held that by virtue of the clear statutory content of s.20(3), the function of the Industrial Court is tied inextricably to the representations of the workman of a dismissal without just cause or excuse which were made by the workman at the time of his dismissal for reasons which he feels are without any reasoned basis. The focus of the enquiry of the Industrial Court is therefore premised on matters and events as they occurred at the time of the dismissal operating in the mind of the employer, which preceded the decision to terminate. By way of elaboration, specific factors, events or reasons would have operated on the employer's mind, prior to the employer deciding to terminate the workman's services. The workman made his representation or complaint of dismissal without just cause or excuse based on those reasons, factors or events only. Therefore, the representations based on those limited reasons, factors or events only can comprise the basis for assessment and adjudication by the Industrial Court under s.20(3). In short, the term "representations" under s.20(3) ties the jurisdiction of the Industrial Court down to the reasons, factors or events operating in the mind of the employer at the time of the dismissal resulting in the representation.

Matters outside of the representation under s.20(3) would include matters which were not operative in the employer's mind when the decision to dismiss was taken, but which the employer chooses to put forward post-dismissal at a subsequent stage in the Industrial Court, to justify the decision to dismiss the workman, *ex post facto*. There is no provision in IRA for the industrial tribunal to embark on a far-ranging survey to ascertain whether, given matters which the employer had discovered subsequently and not put to the workman, it is justified in dismissing the workman. Those subsequent matters may well go into the issue of the moulding of the relevant relief such as contributory conduct or comprise basis to refuse reinstatement and reduce or refuse compensation *in lieu*.

Where the domestic inquiry was not held or was defective and the employer is allowed to justify the reasons for the dismissal in the court, it is not a license for the employer to introduce fresh matters and events or occurrences that have subsequently appeared to the employer to provide good basis to justify the dismissal. It remains the position that the reasons advanced in the Industrial Court inquiry should be the reasons operating in the mind of the employer at or immediately prior to the dismissal. It does not extend to other reasons recurring to the employer subsequently at the Industrial Court inquiry stage.

That said, the subsequent events may still be considered in the moulding of the reliefs. It is open to the employer to adduce evidence of compelling new facts such as breach of trust or theft discovered post-dismissal for the purpose of the remedy to be afforded to the workman. It may well be sufficient to counter a claim for reinstatement or to disallow compensation *in lieu* of reinstatement.

The answer to the question of law posed, *i.e.* whether the Industrial Court has the right to enquire into reasons subsequently advanced by the employer *via* pleadings at the hearing stage before the Industrial Court to justify the dismissal, even if such reasons were not the reasons advanced at the time of the dismissal, was in the negative.

****

LAND / CONTRACT LAW

ILLEGAL STRUCTURE TO BE EXCLUDED IN ASSESSMENT OF DAMAGES

P had bought the subject premises (the Premises) through a public auction in February 2014. D was then occupying the Premises under a tenancy agreement with the previous owner. In December 2014, the High Court ordered D to deliver vacant possession of the Premises to P and damages to be assessed up to the date of delivery. Vacant possession was eventually delivered to P in March 2016. The Premises was made up of two structures: a five-storey office building and a single-storey warehouse, both of which were attached. In the assessment of damages, P took the position that the assessment was for the whole Premises whilst D contended that it should be confined only to the single-storey warehouse, on the ground that the five-storey building had not been issued with a certificate of fitness (CF) (without D being

aware) when entering into the tenancy agreement with the previous owner.

Based on the above brief facts, the High Court in *SSN Medical Products Sdn Bhd v Chin Hin Helmet Sdn Bhd*[i] ruled for P. D did rent and the action against D was for the whole Premises. The user principle applied as D had benefited from using the Premises as their factory.

The Court of Appeal, however, disagreed and allowed D's appeal. The court could not ignore the presence of illegality and s.24 of the Contracts Act 1950 under which consideration or object of an agreement could not contravene a statute or it was of such a nature that if permitted, it would defeat any law. There was no approval applied for or plan submitted to the local authority, MBPJ by the owner for the erection of the five-storey building. No CF was issued after it had been erected. There were clear violations of provisions in the Street, Drainage and Building Act 1974 (the Act) and Uniform Building By-Laws 1984 (UBBL).

The five-storey building was an illegal structure. P ought not to be allowed to claim for the market rental for the entire Premises as part of it contained an illegal structure under the Act and UBBL. Premised on illegality, the user principle relied upon by P was inapplicable. The award of damages in the sum of RM2.84 million was reduced to a sum of RM258,000.00.

TORT

VIOLENCE IS NOT THE WAY TO GO

Awie (A), the singer and actor, was found liable by the High Court (HC) for wife battering as reported in *Ahmad Azhar bin Othman v Rozana bt Misbun*[ii]. There was a total of 3 batteries[iii]: (1) assaulting his wife (R) in the presence of their children, maid and chauffer; (2) hitting R on her face and chest at a building reception counter; and (3) assaulting R again at the car park. For the 1st

[i] [2021] 5 MLJ 906, [2021] 7 CLJ, CA
[ii] [2021] 9 MLJ 82
[iii] For elements of the tort of battery, see *Daning bin Laja v KK Hj Tuaran bin Majid* [1993] 1 CLJ 44.

battery, A was charged under s.325 of the Penal Code (PC) but eventually, with R's consent, the charge was compounded under s.260 of the Criminal Procedure Code (CPC) whereby R received a sum of RM10,000 from A. For the 2nd battery, A was charged under s.323 of the PC and fined upon his plea of guilty. R filed an action in Sessions Court based on the 3 batteries. A was found liable which resulted in his appeal.

The HC dismissed A's appeal and upheld the award of general damages (RM30,000) and aggravated damages (RM50,000). There was nothing in s.260 of the CPC to bar R from filing the action against A. The CPC was only applicable to criminal matters and not to civil cases. Constitutionally, s.260 of the CPC could not deprive R's fundamental right of access to justice as enshrined in Art. 5(1) of the Federal Constitution.

The compounding of charge solely concerned the 1st battery whereas the action was based on the three batteries. Thus, A could not rely on it to deny his liability for the 2nd and 3rd batteries.

The Sessions Court and not the Syariah Court had the jurisdiction to hear the action based on a tort of battery. Reliance was placed on s.65(1)(b) of the Subordinate Courts Act 1948, s.4A of the Married Women Act 1957 and s.10 of the Domestic Violence Act 1994, all of which clearly conferred jurisdiction upon civil courts to hear claim in relation to injuries to person by spouse and/or domestic violence.

****

THANK YOU for your time in reading this issue.

For past issues, please visit our website at www.thw.com.my