PANTAI MEDICAL CENTRE SDN BHD & ANOR

v.

SURESH KUMAR HARIHARAN

Court of Appeal, Putrajaya
Azizah Nawawi CJSS, Wong Kian Kheong, Azizul Azmi Adnan JJCA
[Civil Appeal No: W-02(NCvC)(W)-1207-07-2023]
23 February 2026

Contract: *Construction — Contract for services — Appeal against High Court decision arising from consultant's agreement — Whether action could be maintained against 2nd defendant not being legal entity capable of being sued — Whether agreement was fixed-term contract for services rendering plaintiff independent contractor and not employee, with no right to livelihood under Art 5(1) Federal Constitution and no right to prior hearing — Whether breach of contractual duty of good faith was material fact required to be pleaded under O 18 r 7(1) Rules of Court 2012 — Whether unpleaded evidence admitted without objection could nevertheless be considered — Whether Malaysian law recognised general duty of good faith implied by operation of law — Whether such duty could arise only by construction of contract or established tests for implied terms — Whether non-renewal of clinical privileges fell outside stipulated terminating events under cl 8.1 — Whether termination unlawful — Whether relief confined to compensatory damages under s 74(1) Contracts Act 1950, excluding aggravated and exemplary damages and mandatory injunction requiring apology*

The plaintiff, an orthopaedic surgeon, had previously served as Head of the Orthopaedic Department at Hospital Seri Manjung and thereafter entered into a Consultant's Agreement dated 21 October 2013 with the 1st defendant, Pantai Medical Centre Sdn Bhd, under which he was appointed to practise as a Resident Orthopaedic Surgeon at the hospital owned and operated by the 1st defendant for a fixed three-year term from 1 April 2014 to 30 March 2017, subject to the hospital's by-laws and the grant of clinical privileges ("CP"). During the currency of the agreement, the plaintiff's CP, which had been granted for a three-year period expiring on 29 July 2016, was not renewed by the hospital's management, and by letter dated 30 June 2016 the 1st defendant informed the plaintiff that his practice at the hospital would end on 29 July 2016 and that the agreement would be deemed terminated on that date. The plaintiff's appeal against that decision was first dismissed by email dated 5 July 2016 and, after the plaintiff was later heard on 27 July 2016, the 1st defendant maintained that decision. The plaintiff subsequently commenced proceedings in the High Court against the 1st defendant and the 2nd defendant (Pantai Hospital Manjung) seeking, *inter alia*, a declaration that the termination of the agreement was unlawful, damages, and a mandatory injunction compelling the defendants to issue a letter of apology. The High Court allowed the claim and granted the declaratory and injunctive relief together with an order for

assessment of damages, following which the defendants appealed to the Court of Appeal. The issues before the court were whether the plaintiff could maintain the action against the 2nd defendant where it was not a legal entity recognised in law; whether the Consultant's Agreement constituted a fixed-term contract for services rendering the plaintiff an independent contractor rather than an employee without a constitutional right to livelihood under art 5(1) of the Federal Constitution ("FC") or a right to be heard prior to termination; whether the plaintiff had pleaded, as required by O 18 r 7(1) of the Rules of Court 2012 ("ROC"), a material fact that the 1st defendant had breached a contractual duty of good faith and, if not, whether evidence of such breach could nevertheless be considered; whether a contractual duty of good faith could be implied in the agreement either by operation of law or upon its proper construction, particularly in light of cl 8.1 governing early termination and whether the 1st defendant's termination of the agreement was invalid and, if so, whether damages (including under s 74(1) of the Contracts Act 1950 ("CA")), aggravated or exemplary damages, and a mandatory injunction requiring an apology could properly be awarded.

Held (allowing the defendants' appeal in part):

(1) The action could not be maintained against the 2nd defendant as it was not a legal entity capable of being sued. Consequently, the appeal was allowed in respect of the 2nd defendant and the High Court judgment against it was set aside. (para 17)

(2) The Consultant's Agreement was a fixed three-year term contract for services under which the plaintiff acted as an independent contractor rather than an employee. As such, the plaintiff had no constitutional right to livelihood under art 5(1) of the FC and no right to be heard before termination of the agreement. The High Court had therefore erred in holding otherwise. (paras 18-21)

(3) A breach of a contractual duty of good faith constituted a material fact which ought to have been pleaded under O 18 r 7(1) of the ROC. The plaintiff's amended statement of claim did not plead such a breach and was therefore defective in that respect. (paras 23-24)

(4) Evidence relating to breach of the contractual duty of good faith had been adduced at trial without objection from the defendants. In such circumstances, the court was entitled to consider that evidence, as the absence of objection cured the defect in the pleadings where the evidence did not amount to a radical departure from the pleaded case. (para 25)

(5) Malaysian law did not recognise a general contractual duty of good faith implied by operation of law. Neither the Federal Court decision in *Lai Fee & Anor v. Wong Yu Vee & Ors* nor the Court of Appeal decision in *KAB Corporation Sdn Bhd & Anor v. Master Platform Sdn Bhd* established such a principle. Any duty of good faith ought to arise from the construction of the contract itself or by implication under recognised tests. (paras 26 & 32)

(6) A duty of good faith could arise from the construction of the contract or could be implied only where the established tests for implied terms, namely the officious bystander test and the business efficacy test, were satisfied. Those requirements were not met in the present agreement. (para 33)

(7) Clause 8.1 provided the sole and conditional right of early termination and could only be exercised upon the occurrence of the specified events in sub-paragraphs (a)–(j). The non-renewal of the plaintiff's clinical privileges was not one of those stipulated events, and the agreement was not subject to a condition precedent requiring renewal of such privileges. Accordingly, the 1st defendant was not contractually entitled to terminate the agreement on that basis. (paras 34-35)

(8) The Court of Appeal held that, because the 1st defendant's termination of the Agreement was unlawful, the High Court was right to grant a declaration that the termination was invalid. However, the plaintiff's monetary relief was confined to compensatory damages under s 74(1) of the CA, to be assessed only for the eight-month period from 30 July 2016 to 30 March 2017 by reference to the plaintiff's proved loss of income, subject to mitigation, together with interest at 5% per annum from 30 July 2016 until full payment. The court further held that any alleged loss of professional reputation and emotional distress was too remote and not recoverable on the evidence, that aggravated and exemplary damages were not available for mere breach of contract and that the High Court had no basis to compel the 1st defendant to issue an apology by way of a perpetual mandatory injunction. (paras 37, 42, 44, 50, 51, 52 & 53)

Case(s) referred to:

Abd Rahman Soltan & Ors v. Federal Land Development Authority & Anor And Other Appeals [2023] 4 MLRA 567 (refd)

Addis v. Gramophone Co Ltd [1908-10] All ER Rep 1 (refd)

Associated Provincial Picture Houses Ltd v. Wednesbury Corporation [1948] 1 KB 223 (refd)

Bank Bumiputra Malaysia Bhd Kuala Terengganu v. Mae Perkayuan Sdn Bhd & Anor [1993] 1 MLRA 198 (refd)

Braganza v. BP Shipping Ltd; "The British Unity" [2015] 4 All ER 639 (refd)

British Telecommunications Plc v. Telefonica O2 UK Ltd [2014] 4 All ER 907 (refd)

Catajaya Sdn Bhd v. Shoppoint Sdn Bhd & Ors [2021] 2 MLRA 46 (refd)

Darul Fikir v. Dewan Bahasa Dan Pustaka [2018] 5 MLRH 524 (folld)

D'Cruz v. Seafield Amalgamated Rubber Co Ltd [1963] 1 MLRH 251 (refd)

Dreamland Corp (M) Sdn Bhd v. Choong Chin Sooi & Industrial Court Of Malaysia [1987] 1 MLRA 357 (refd)

Iftikar Ahmed Khan v. Perwira Affin Bank Berhad [2018] 1 MLRA 202 (folld)

Jambatan Merah Sdn Bhd v. Public Bank Berhad [2015] MLRHU 1092(refd)

KAB Corporation Sdn Bhd v. Master Platform Sdn Bhd (distd)

Kabatasan Timber Extraction Company v. Chong Fah Shing [1969] 1 MLRA 408 (refd)

Lai Fee & Anor v. Wong Yu Vee & Ors (distd)

Lim Kar Bee v. Abdul Latif Ismail [1977] 1 MLRA 399 (refd)

Macquarie International Health Clinic Pty Ltd v. Sydney South West Area Health Service (2010) 383 ALR 577 (refd)

Malik v. Bank Of Credit And Commerce International SA (In Liquidation) [1997] 3 All ER 1 (refd)

Maritime Intelligence Sdn Bhd v. Tan Ah Gek [2021] 6 MLRA 15 (refd)

Sababumi (Sandakan) Sdn Bhd v. Datuk Yap Pak Leong [1998] 1 MLRA 332 (refd)

See Leong Chye @ Sze Leong Chye & Anor v. United Overseas Bank Berhad & Another Appeal [2018] 6 MLRA 605 (refd)

SPM Energy Sdn Bhd & Anor v. Multi-Discovery Sdn Bhd [2025] 3 MLRA 744 (refd)

SPM Membrane Switch Sdn Bhd v. Kerajaan Negeri Selangor [2016] 1 MLRA 1 (refd)

SR Fox v. Ek Liong Hin Ltd [1957] 1 MLRH 595 (refd)

Superintendent Of Lands And Surveys 4th Division & Anor v. Hamit Matusin & Ors [1994] 1 MLRA 300 (folld)

Tan Sri Khoo Teck Puat & Anor v. Plenitude Holdings Sdn Bhd [1994] 1 MLRA 420 (refd)

Legislation referred to:

Civil Law Act 1956, s 11

Contracts Act 1950, s 74(1), (2)

Courts of Judicature Act 1964, ss 70, 72

Evidence Act 1950, ss 91, 92

Federal Constitution, art 5(1)

Industrial Relations Act 1967, s 30(5), (6)

Rules of Court 2012, O 18 r 7(1), O 42 r 12

Rules of the Court of Appeal 1994, rr 54, 96

Counsel:

For the appellants: N Sivabalah (Fazleeza Azli & Goh Lee Ding with him); M/s Chan Ban Eng & Co

For the respondent: A G Kalidas (Jasmin Anne Raj, Wesley Wong Ray Fung & Parimalar Ilamaran with him); M/s K Nadarajah & Partners

JUDGMENT

Wong Kian Kheong JCA:

A. Issues to be decided in this appeal (This Appeal)

[1] We shall refer to the parties as they were in the High Court.

[2] The following questions arose in this case:

(1) whether the plaintiff, an orthopaedic surgeon (Plaintiff), could file this suit (This Suit) against the 2nd defendant "Pantai Hospital Manjung" (2nd Defendant), when the 2nd Defendant is not a legal entity which is recognised in law;

(2) whether the "Consultant's Agreement" dated 21 October 2013 (Agreement) between the 1st defendant company (1st Defendant) and the Plaintiff was a "fixed term contract for services" wherein the Plaintiff was an independent contractor for the 1st Defendant and was not its employee without-

(a) a constitutional right of livelihood under art 5(1) of the Federal Constitution (FC); and

(b) a right of hearing before the 1st Defendant terminated the Agreement with effect from 29 July 2016 (more than 8 months before the expiry of the Agreement on 30 March 2017) [1st Defendant's Termination (Agreement)];

(3) whether the Plaintiff's Amended Statement of Claim in This Suit (ASOC) had pleaded a material fact that the 1st Defendant had breached a contractual duty under the Agreement to act in good faith towards the Plaintiff [Contractual Duty (Good Faith)] as required by O 18 r 7(1) of the Rules of Court 2012 (RC);

(4) if the ASOC did not plead the 1st Defendant's breach of the Contractual Duty (Good Faith) [1st Defendant's Breach (Contractual Duty of Good Faith)], had the Plaintiff adduced evidence of the 1st Defendant's Breach (Contractual Duty of Good Faith) at the trial of This Suit (Trial) and the admissibility of such evidence had not been objected to by the 1st and 2nd Defendants (collectively referred to in this judgment as the "Defendants")?;

(5) if the court can consider the 1st Defendant's Breach (Contractual Duty of Good Faith) in this case-

(a) is a Contractual Duty (Good Faith) implied in the Agreement by Malaysian cases as a matter of "operation of law"?; and

(b) if a Contractual Duty (Good Faith) could not be implied in the Agreement by Malaysian cases as a matter of "operation of law"-

(i) whether on the construction of the Agreement, in particular cl 8.1(a) to (j) of the Agreement (Clause 8.1), the 1st Defendant could only exercise the right to terminate the Agreement before the expiry of the Agreement [1st Defendant's Right of Early Termination (Agreement)], upon the happening of any one or more of the events stipulated in cl 8.1(a) to (j); and

(ii) in view of an express cl 8.1 which had clearly provided for the 1st Defendant's Right of Early Termination (Agreement), could the court imply the Contractual Duty (Good Faith) in the Agreement?; and

(6) whether the 1st Defendant's Termination (Agreement) had failed to comply with cl 8.1; and

(7) if the 1st Defendant's Termination (Agreement) was invalid-

(a) whether compensatory damages (Compensatory Damages) should be awarded to the Plaintiff pursuant to s 74(1) of the Contracts Act 1950 (CA). In this regard, can Compensatory Damages include-

(i) the Plaintiff's loss of professional reputation; and/or

(ii) emotional distress suffered by the Plaintiff?;

(b) could the High Court award exemplary and aggravated damages to the Plaintiff for the unlawful 1st Defendant's Termination (Agreement)?; and

(c) whether the High Court could issue a perpetual mandatory injunction to compel the 1st Defendant to issue a letter of apology to the Plaintiff for the 1st Defendant's Termination (Agreement).

B. Background

[3] The 1st Defendant owns and operates a hospital, which was previously named "Hospital Pantai Seri Manjung" (Hospital). The Hospital is now renamed as "Pantai Hospital Manjung".

[4] The Plaintiff was previously the Head of Department of Orthopaedics in a Government hospital in Manjung, "Hospital Seri Manjung". Thereafter, by way of the Agreement, the Plaintiff was appointed by the 1st Defendant as

a "Resident Orthopaedic Surgeon" in the Hospital from 1 April 2014 to 30 March 2017.

[5] By virtue of cl 3(p) Agreement, the Plaintiff was required to abide by the "By-Laws" of the Hospital (By-Laws). The following By-Laws are relevant in this case:

(1) clause 4 of the purposes of the By-Laws [**Purpose (By-Laws)**] defined "clinical privileges" (**CP**) as the "permission conditionally awarded by the Management to a Medical Staff to perform specific diagnostic or therapeutic procedures within the Hospital";

(2) according to cl 6 Purpose (By-Laws), "Management" shall refer to the "Board of Management" of the Hospital (**Hospital's Management**) appointed by the 1st Defendant's Board of Directors;

(3) the term "Medical Staff" is defined in cl 8 Purpose (By-Laws) to mean, among others, all medical practitioners who have been granted rights and CP to practise at the Hospital by the Hospital's Management. The Plaintiff was clearly a member of the Hospital's Medical Staff within the meaning of cl 8 Purpose (By-Laws);

(4) according to art 3.1 By-Laws, among others-

(a) the evaluation and approval of an application for CP "shall be based upon the applicant's education, training, experience, competence and references" [**Article 3.1(ii)**]. Article 3.1(ii) also provided that the applicant "shall bear the burden of establishing his/her qualification and competency in the [CP] requested"; and

(b) a Medical Staff "will be required to be re-privileged by the [Hospital's Management] once every three (3) years" [**Article 3.1(iii)**]; and

(5) Article 10.2(i) By-Laws [Article 10.2(i)] provided as follows-

"**All complaints pertaining to non-compliance of the Code of Professional Conduct of the Malaysian Medical Council/Malaysian Dental Council, these By-Laws, or policies of the Hospital by any Medical Staff, or any concerns or complaints pertaining to his professional conduct shall be made in writing by the person aggrieved ("Complainant") to the Chief Executive Officer [CEO], and dealt with according to the provisions hereafter.**"

[Emphasis Added]

[6] On 29 July 2013, the Hospital granted CP to the Plaintiff for a period of three years from 30 July 2013 to 29 July 2016 (CP Period). Hence, the Plaintiff entered into the Agreement with the 1st Defendant on 21 October 2013.

[7] According to the Agreement, among others-

(1) clause 1 provided that the 1st Defendant appointed the Plaintiff "to practise as a Consultant at the Hospital within" the Plaintiff's discipline area (**Clause 1**);

(2) the 1st Defendant covenanted in cl 2(e) that so long as the Plaintiff was not in default of any of his obligations for the duration of the Agreement, the Plaintiff "shall be permitted to independently carry on his practice without obstruction, interference or interruption" by the 1st Defendant [**Clause 2(e)**];

(3) clause 6.1 read with items 6 and 7 of Schedule A to the Agreement stated that the duration of the Agreement was for three years from 1 April 2014 to 30 March 2017 [**Three-Year Duration (Agreement)**];

(4) Clause 8.1 stated as follows-

"**Termination** and Penalty

8.1 **The [1st Defendant] may without prejudice to any of its other rights and remedies terminate this Agreement by a written notice of not less than sixty (60) days to the [Plaintiff] upon the happening of any of the following events:**

(a) **if the [Plaintiff] shall be in breach of any of the terms of this Agreement;**

(b) **if the [Plaintiff] shall be in breach of the provisions of the By-Laws and any other by laws, rules and regulations of the Hospital;**

(c) **if the [Plaintiff] is found guilty of any misconduct or negligent act whether professional or personal in nature by the Malaysian Medical Council or other regulatory body;**

(d) **upon the recommendation of the [Hospital Management] pursuant to the provisions of the By-Laws relating to termination;**

(e) **if the [Plaintiff] is convicted of any offence punishable on conviction with an imposition of fine and/or imprisonment for a term exceeding three (3) months;**

(f) **if the [Plaintiff] shall die or if the [Plaintiff] shall be found or declared to be of unsound mind or professionally incompetent by the Medical and Dental Advisory Committee of the Hospital;**

(g) **if the [Plaintiff] is declared a bankrupt;**

(h) **if the Hospital or any substantial part thereof shall be damaged or destroyed by fire;**

(i) **if the appointment of the [Plaintiff] in accordance with the terms and conditions of this Agreement shall be illegal or shall be prohibited by any statute, law or regulations; or**

(j) **if the [1st Defendant] and/or Hospital shall cease to carry on operating the Hospital.**"

[Emphasis Added]; and

(5) clause 9.1 to 9.5 clearly provided that the Plaintiff was an independent contractor of the 1st Defendant (Clause 9.1 to 9.5).

[8] Before the expiry of the CP Period and during the currency of the Three-Year Duration (Agreement)-

(1) on 4 May 2016, the Hospital's Management informed the Plaintiff to apply for a renewal of his CP. Hence, by way of an application dated 16 May 2016, the Plaintiff applied to the Hospital's Management for a renewal of his CP [Plaintiff's Application (Renewal of CP)];

(2) in a letter dated 30 June 2016 from the 1st Defendant to the Plaintiff [1st Defendant's Letter (30 June 2016)], the Hospital's Management informed the Plaintiff as follows, among others-

(a) after "due evaluation and consideration" by the Hospital's Management, in accordance with art 3.1(ii) and (iii), the Hospital's Management had decided not to allow the Plaintiff's Application (Renewal of CP); and

(b) as the CP Period would end on 29 July 2016-

(i) the Plaintiff's practice in the Hospital "shall end" on 29 July 2016; and

(ii) the Agreement "shall be deemed terminated" on 29 July 2016 due to the reasons stated in the above sub-paragraph (a)

[1st Defendant's Termination (Agreement)];

(3) the Plaintiff appealed against the 1st Defendant's Termination (Agreement) in an email dated 4 July 2016 [Plaintiff's Appeal (Termination of Agreement)] to the 1st Defendant's Chief Operating Officer, Mr Nicholas Chan (DW4);

(4) the Plaintiff's Appeal (Termination of Agreement) was dismissed by way of DW4's email dated 5 July 2016 to the Plaintiff [1st Defendant's Email (5 July 2016)];

(5) by way of the Plaintiff's email dated 5 July 2016 in reply to the 1st Defendant's Email (5 July 2016) [Plaintiff's Email (5 July 2016)], among others-

(a) the Plaintiff requested for a reason why his CP was not renewed; and

(b) the Plaintiff's "sudden" loss of CP in a "reputable institution", ie., the Hospital, "will bring disrepute" to the Plaintiff;

(6) by way of a letter dated 23 July 2016, the Plaintiff requested for a right to be heard by the Hospital's Management with regard to the 1st Defendant's Termination (Agreement). Consequently, on 27 July 2016, the Hospital's Management heard the Plaintiff in respect of the 1st Defendant's Termination (Agreement) [1st Defendant's Hearing (27 July 2016)]; and

(7) after the 1st Defendant's Hearing (27 July 2016), the 1st Defendant informed the Plaintiff in a letter dated 27 July 2016 that, among others, upon "further deliberation and due consideration of the basis (including operational and commercial) of the non-renewal of the [Plaintiff's CP] to practice at [the Hospital]", the 1st Defendant's Termination (Agreement) was maintained.

[9] Due to the 1st Defendant's Termination (Agreement), the Plaintiff alleged as follows:

(1) the Plaintiff could not secure an appointment as a Resident Orthopaedic Surgeon in any private hospital;

(2) the Plaintiff is presently working as an orthopaedic specialist at a private clinic (Private Orthopaedic Specialist) with a considerably lower income than his previous appointment at the Hospital; and

(3) the non-renewal of the Plaintiff's CP had tarnished his professional reputation.

C. Proceedings in the High Court

[10] In This Suit, the Plaintiff claimed for, among others, the following remedies from the Defendants:

(1) a declaration that the termination of the Agreement by the 1st Defendant [1st Defendant's Termination (Agreement)] was unlawful;

(2) a mandatory injunction to compel the Defendants to write to the Plaintiff within 14 days from the date of the court's order, a letter of apology for-

(a) the Defendants' wrongful refusal to renew the Plaintiff's CP; and

(b) the unlawful 1st Defendant's Termination (Agreement)

[Perpetual Mandatory Injunction (Apology)];

(3) as a result of the wrongful 1st Defendant's Termination (Agreement), an order for the 1st Defendant to pay to the Plaintiff within 14 days from the date of the court's order, special damages in a sum of RM85,000.00 per month (based on the Plaintiff's monthly average income) from 30 July 2016 until the date of the court's order;

(4) general damages;

(5) aggravated damages; and

(6) exemplary damages.

[11] According to the Defence filed in This Suit on 24 May 2016, the "Credentialing and Privileging Committee" recommended to the Hospital's Management that the Plaintiff's CP should not be renewed because-

(1) the 1st Defendant had received "numerous complaints" from the Plaintiff's patients; and

(2) there were "numerous incidents" wherein the Plaintiff had failed to comply with the Code of Ethics for Medical Staff

[Reasons (Non-Renewal of the Plaintiff's CP)].

[12] After the Trial, the High Court delivered the following judgment in favour of the Plaintiff against the Defendants (High Court's Judgment):

(1) a declaration that the 1st Defendant's Termination (Agreement) was unlawful;

(2) a Perpetual Mandatory Injunction (Apology) was ordered;

(3) an order for the assessment of-

(a) special damages;

(b) general damages;

(c) aggravated damages; and

(d) exemplary damages;

(4) interest at the rate of 5% per annum (pa) on the total sum of assessed damages from 30 July 2016 until full payment of the same; and

(5) the Defendants shall pay costs of RM55,000.00 to the Plaintiff [Costs (High Court)].

[13] The following reasons were given in the learned Judge's "grounds of judgment" (GOJ) for the High Court's Judgment:

(1) before the non-renewal of the Plaintiff's CP by the 1st Defendant and the 1st Defendant's Termination (Agreement), the 1st Defendant did not disclose the Reasons (Non-Renewal of the Plaintiff's CP) to the Plaintiff. In fact, notwithstanding the Plaintiff's queries to the 1st Defendant, the Reasons (Non-Renewal of the Plaintiff's CP) were not disclosed at all by the 1st Defendant to the Plaintiff. The Reasons (Non-Renewal of the Plaintiff's CP) were only revealed in the Defence after the filing of This Suit;

(2) the Reasons (Non-Renewal of the Plaintiff's CP)-

(a) concerned "disciplinary issues" regarding the Plaintiff; and

(b) "impacted the Plaintiff's livelihood". Hence, the Plaintiff had a right to be heard with regard to the Reasons (Non-Renewal of the Plaintiff's CP) in accordance with the "sacrosanct" rule of natural justice. The learned Judge cited numerous cases regarding the Defendants' breach of the rule of natural justice in this case by terminating the Agreement without giving the Plaintiff a right to be heard;

(3) the Defendants did not comply with art 10.2(i) by not giving the Plaintiff a right to be heard in respect of the complaints made against the Plaintiff (Alleged Complaints). With regard to the Alleged Complaints-

(a) the Defendants did not conduct an "initial investigation"; and

(b) no "show cause" letter was issued by the Defendants to the Plaintiff;

(4) Clause 8.1 was breached when the 1st Defendant failed to give to the Plaintiff a written notice of not less than 60 days before the Agreement was terminated by the 1st Defendant;

(5) the Defendants had failed to prove on a balance of probabilities any one of the Reasons (Non-Renewal of the Plaintiff's CP);

(6) the 1st Defendant's Termination (Agreement)-

(a) was arbitrary and unlawful; and

(b) was carried out with an "ulterior motive" to remove the Plaintiff from the Hospital before the expiry of the Agreement; and

(7) as the Plaintiff had proven on a balance of probabilities that the Defendants had "acted unreasonably and unlawfully", the Plaintiff was entitled to the relief as adjudged in the High Court's Judgment.

D. Proceedings in the Court of Appeal

[14] This Appeal had been filed by the Defendants against the entire High Court's Judgment.

[15] On the first day of the hearing of This Appeal-

(1) we posed additional questions to all learned counsel as stated in the above sub-paragraphs 2(2) and (3) [Questions (Court)]; and

(2) in accordance with the second rule of natural justice, all the parties were given a right to file additional written submissions in respect of the Questions (Court) [Additional Written Submissions (Questions by the Court)]. We then adjourned the hearing of This Appeal to another date (2nd Hearing Date).

[16] After the Additional Written Submissions (Questions by the Court) had been filed by all the parties, we heard learned counsel on the 2nd Hearing Date and reserved our decision.

OUR DECISION

E. Could the Plaintiff file This Suit against the 2nd Defendant?

[17] It is clear that the 2nd Defendant is not a legal entity which could be sued by the Plaintiff in this case. Furthermore, the High Court's Judgment cannot be enforced at all against the 2nd Defendant. Accordingly, on these two grounds alone-

(1) This Appeal is allowed as against the 2nd Defendant; and

(2) we set aside the High Court's Judgment against the 2nd Defendant.

We rely on the High Court's decision in *Darul Fikir v. Dewan Bahasa dan Pustaka* [2018] 5 MLRH 524, at [1] and [8(1)], as follows:

"[1] **This judgment raises a novel question of whether "Dewan Bahasa dan Pustaka" (DBP) is a legal entity against whom legal proceedings can be instituted**.

...

[8] **I am of the view that there is no *bona fide* and serious question to be tried in This Action as regards DBP. On this ground alone, Enc. 3 is dismissed with costs. This decision is premised on the following reasons:**

(1) **based on DBPA's [Dewan Bahasa dan Pustaka Act 1959] long title, ss 3(1), (2), 6(1), 7(1), (2) and 26 DBPA, Parliament has clearly intended for the "Board of Control" of DBP (Board) to be the statutory entity for the purpose of all legal proceedings. Accordingly, by reason of DBPA, the Board (not DBP) should have been sued by the Plaintiff in This Action**. ..."

[Emphasis Added]

F. What was the nature of the Agreement?

[18] It was clear from cls 1, 2(e), 9(1) to (5) and the Three-Year Duration (Agreement) that-

(1) the Agreement was a fixed three-year term contract for services wherein the 1st Defendant had appointed the Plaintiff to be a Resident Orthopaedic Surgeon at the Hospital [Fixed Three-Year Term Contract (Independent Contractor)]; and

(2) the Plaintiff had not been employed by the 1st Defendant to be its employee at the Hospital.

G. Whether the Plaintiff had a constitutional right to livelihood in this case

[19] Article 5(1) FC provides as follows:

"Article 5(1) **No person shall be deprived of his life or personal liberty save in accordance with law**."

[Emphasis Added]

[20] It is clear that by virtue of art 5(1) FC, only employees (not independent contractors) have a constitutional right to livelihood in respect of their employment (Constitutional Right to Livelihood) — please refer to the judgment of Nallini Pathmanathan FCJ in the Federal Court case of *Maritime Intelligence Sdn Bhd v. Tan Ah Gek* [2021] 6 MLRA 15, at [39]. Furthermore, independent contractors are appointed by way of fixed-term agreements. It is inconceivable in law and commercial reality for fixed-term independent contractors to have a Constitutional Right to Livelihood.

[21] Since the Agreement in this case was a Fixed Three-Year Term Contract (Independent Contractor) (please refer to the above para 18), the learned High Court Judge had committed the following two errors of law (High Court's 1st and 2nd Legal Errors):

(1) the Plaintiff had no Constitutional Right to Livelihood; and

(2) the Plaintiff had no right to be heard before the 1st Defendant decided to terminate the Agreement. In this regard, we cite the following judgment of Wan Sulaiman SCJ in the Supreme Court in *Dreamland Corp (M) Sdn Bhd v. Choong Chin Sooi & Industrial Court Of Malaysia* [1987] 1 MLRA 357, at p 362-

"**Mr Lobo also sought to rely on a passage on p 241, 4th edn of *de Smith's Judicial Review of Administrative Action* which reads**:

> "Although breaches of natural justice used to be assignable as 'errors in fact,' a ground of challenge presupposing that the impugned order was merely voidable, there is a substantial body of recent judicial decisions to the effect that breach of the *audi alteram partem* rule goes to jurisdiction (or is akin to a jurisdictional defect) and renders an order or determination void."

Therefore, he argues that failure by the appellants to give the respondent a hearing before they dismissed him makes the dismissal void, and that the subsequent hearing and finding by the Industrial Court cannot validate it. The High Court should therefore, he submits, quash the award of the Industrial Court and order reinstatement.

The authorities cited in support, namely, *Surinder Singh Kanda v. The Government Of The Federation Of Malaya* [1962] 1 MLRA 233 and *University of Ceylon v. Fernando* [1960] 1 All ER 631, are, however, appeals against failure by administrative tribunals to observe the *audi alteram partem* rule, and are therefore inapplicable in this appeal.

The short answer to Mr Lobo's argument is that the right to a hearing, or as it is sometimes called the observance of procedural safeguards, is only applicable in respect of a hearing before an administrative tribunal and similar *quasi*-judicial tribunals performing judicial functions but do not apply to simple master-servant proceedings, such as the present one."

[Emphasis Added]

H. Is there a Contractual Duty (Good Faith) in this case?

H(1). Did the ASOC plead the 1st Defendant's Breach (Contractual Duty of Good Faith)?

[22] Order 18 r 7(1) RC provides as follows:

> "**Facts, not evidence, to be pleaded**
>
> Order 18 r 7(1)**Subject to the provisions of this rule and rr 10, 11 and 12, every pleading shall contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which those facts are to be proved, and the statement shall be as brief as the nature of the case admits**."
>
> [Emphasis Added]

[23] The Plaintiff's learned counsel had submitted that a Contractual Duty (Good Faith) is imposed by way of "operation of law" and consequently, the Plaintiff was not required to plead the 1st Defendant's breach of the Contractual Duty (Good Faith) [1st Defendant's Breach (Duty of Good Faith)] in the ASOC. We are not able to accede to this submission because, as explained in Part H(3) below, a Contractual Duty (Good Faith) cannot be implied in a contract by "operation of law".

[24] In the Federal Court case of *Iftikar Ahmed Khan v. Perwira Affin Bank Berhad* [2018] 1 MLRA 202, at [23], Abu Samah Nordin FCJ decided as follows:

> "[23] **What are material facts? All facts which must be proved in order to establish the ground of claim or defence are material: *Philipps v. Philipps* [1878] 4 QBD 127 at pp 133-134**...."
>
> [Emphasis Added]

Based on *Iftikar Ahmed Khan,* we have no hesitation to decide that for the Plaintiff to succeed in This Suit, among others, the Plaintiff had to prove the 1st Defendant's Breach (Duty of Good Faith). As such, the 1st Defendant's Breach (Duty of Good Faith) constituted a "material fact" within the meaning of O 18 r 7(1) RC and should have been pleaded by the Plaintiff in the ASOC.

H(2). Had the Plaintiff adduced evidence of the 1st Defendant's Breach (Contractual Duty of Good Faith) at the Trial?

[25] Notwithstanding the failure of the Plaintiff to plead the 1st Defendant's Breach (Duty of Good Faith) in the ASOC, the Plaintiff had adduced evidence at the Trial regarding the 1st Defendant's Breach (Contractual Duty of Good Faith) and the Defendants' learned counsel did not object to the admissibility of such evidence. Once the Defendants did not object to the admissibility of unpleaded evidence in respect of the 1st Defendant's Breach (Contractual Duty of Good Faith), the court may consider the effect of such unpleaded

evidence in deciding This Suit. We rely on the following judgment of Peh Swee Chin SCJ in the Supreme Court case of *Superintendent Of Lands And Surveys 4th Division & Anor v. Hamit Matusin & Ors* [1994] 1 MLRA 300, at pp 302 to 303 (*Hamit*):

> "**Generally, in civil cases only, both parties can validate any mode of adducing evidence by consent, express or inferred, even when such mode is irregular, for any irregularity is deemed to be waived by such consent. Technical rules of evidence can be to a limited extent, even dispensed with by a court without such consent, please see *Baerlein v. Chartered Mercantile Bank* [1895] 2 Ch 488; similarly with technical rules of procedure. Therefore, when such evidence represents a departure from pleadings, it should be objected to as when and where it is adduced, and it will be too late when it is only objected to later on, as in the final submission at the close of evidence in the instant appeal. In these circumstances, the party facing such evidence at variance from the pleadings, by failing to object, cannot be said to be taken by surprise, prejudiced, misled or embarrassed. Otherwise, the other side of the coin would be, in the event of such an objection raised at the stage of final submission being accepted by the court, that the party adducing such evidence may face the great risk of being denied leave to amend his pleadings in question at that stage**.
>
> **Such evidence, when given without any objection by the opposing party, will further have the effect of curing the absence of such plea in the relevant pleading, in other words, the effect of overcoming such defect in such pleading. As was stated by the Federal Court in *Ang Koon Kau & Anor v. Lau Piang Ngong* [1984] 1 MLRA 488: 'Evidence given at the trial can therefore in appropriate circumstances overcome defects in the pleadings where the net result of such evidence is to prevent the other side from being taken by surprise'. There is, however, at least one important exception to such curing of defect of pleading by evidence departing from such pleading without objection then and there to such evidence.**
>
> **The exception is when such evidence represents a radical departure from the pleadings, and is not just a variation, modification or development of what has been alleged in the pleading in question, please see** *Waghorn v. George Wimpey & Co Ltd* [1970] 1 All ER 474; [1969] 1 WLR 1764, which gave rise to the proposition, which was approved by *Ang Koon Kau & Anor v. Lau Piang Ngong* [1984] 1 MLRA 488, and *John G Stein & Co Ltd v. O'Hanlon* [1965] AC 890; [1965] 1 All ER 547; [1965] 2 WLR 496.
>
> **Therefore, a court inevitably ought to enquire, when there is failure to object to such evidence when it is adduced, whether it is such a radical departure, if not, it is a mere variation, modification or a development, then the impropriety of admission of such evidence at variance with the pleadings is deemed to be waived and the defect in such pleadings cured.**"
>
> [Emphasis Added]

The above Supreme Court's judgment in *Hamit* has been affirmed by the Federal Court in *Iftikar*, at [32] to [36].

Premised on the judgments of our two apex courts in *Hamit* and *Iftikar*, we decide that the unpleaded evidence regarding the 1st Defendant's Breach (Contractual Duty of Good Faith) was not a "radical departure" from the ASOC. Hence, the court could consider the unpleaded evidence in respect of the 1st Defendant's Breach (Contractual Duty of Good Faith) in this case.

H(3). Whether a Contractual Duty (Good Faith) could be implied in the Agreement by Malaysian cases as a matter of "operation of law"

[26] The Plaintiff's learned counsel had made a bold submission. According to him, the following Malaysian cases had implied a Contractual Duty (Good Faith) in the Agreement by way of "operation of law":

(1) the judgment of Vernon Ong Lam Kiat FCJ in the Federal Court in *Lai Fee & Anor v. Wong Yu Vee & Ors* [2023] 3 MLRA 495; and

(2) the Court of Appeal's judgment delivered by Vernon Ong Lam Kiat JCA (as he then was) in *KAB Corporation Sdn Bhd & Anor v. Master Platform Sdn Bhd* [2019] MLRAU 246.

For good measure, the Plaintiff's learned counsel also relied on the following two cases decided in the Supreme Court of the United Kingdom (UK):

(a) the judgment of Lord Sumption JSC in *British Telecommunications plc v. Telefonica O2 UK Ltd* [2014] 4 All ER 907; and

(b) the 3-2 majority decision of Lady Hale DP (as she then was) in *Braganza v. BP Shipping Ltd; "The British Unity"* [2015] 4 All ER 639.

[27] Firstly, this case concerned the 1st Defendant's Right of Early Termination (Agreement). This case did not concern-

(1) the formation and validity of the Agreement; and

(2) the performance of the Agreement by the Plaintiff and/or 1st Defendant.

[28] Secondly, we reproduce below the following parts of the Federal Court's judgment in *Lai Fee*, at [3], [39], [40], [56] to [62], [66] and [67]

> "[3] **On 11 April 2022, this court granted leave to the plaintiffs to appeal to the Federal Court on three questions of law**.
>
> ...
>
> **Question 3**:
>
> **Is the position by Lord Kerr in paragraph of the grounds in the English Supreme Court case *Takhar v. Gracefield Developments Ltd And Others* [2019] 3 All ER 283; [2019] UKSC 13, namely, … that the law does**

not expect people to arrange their affairs on the basis that other people may commit fraud' representative of the position of Malaysian law?

...

[39] **In our view, this issue relates to the notion of good faith in contract. The words 'good faith' has been defined in the Australian Legal Dictionary to mean 'propriety' or honesty. A thing is done in good faith when it is in fact done honestly, whether it be done negligently or not. It has also been defined as '[a] state of mind indicating honesty and lawfulness of purpose; honesty, absence of fraud, collusion or deceit (Words, Phrases & Maxims, Legally & Judicially Defined (Ananda Krishnan, Lexis Nexis) at para [G0225])**.

[40] **Under the English common law however, there is no general principle of good faith in contract — that a party to a contract exercise his rights in good faith, whether the right in question concerns the creation of a contract, its performance or its non-performance. There is no general requirement that a person act in good faith, reasonably and fairly (Chitty on *Contracts, General Principles* (33rd Ed Vol 1) para 1-044)**. There is no general obligation to act in good faith during negotiations of commercial contracts. The general rule is that mere non-disclosure does not constitute misrepresentation, for there is in general no duty on the parties to a contract to disclose material facts to each other, however dishonest such non-disclosure may be in particular circumstances. Nonetheless, there are exceptions to this general rule to disclose, namely: (i) where the contract is within the class of contract uberrimae fidei; (ii) where there is a *fiduciary* relationship between the parties; (iii) where the agreement in question is a 'relational' contract giving rise to an implied term of good faith; and (iv) where failure to disclose some fact distorts a positive representation.

...

[56] **So much for the common law jurisprudence which developed in England and Canada post *Yam Seng* and *Bhasin*. Be that as it may, it is in our view, important to note that the principles propounded by Leggatt J and Cromwell J in *Yam Seng* and *Bhasin* respectively, relate to the notion of good faith in contractual performance, and not to the duty of good faith in the creation of a contract. This distinction is significant because in *Yam Seng* and *Bhasin*, the wrongful acts complained of related to contractual performance whereas in our case the wrongful act complained of relates to the defendants' fraudulent conduct leading to the creation of the SPA.**

[57] **Whilst it is helpful to review the English common law position on the notion of good faith in contract, we think that a consideration of whether the position in Takhar is representative of Malaysian law must of necessity begin with a brief analysis of the law governing contracts in Malaysia. As a starting point, the law governing all contracts is the [CA]. However, as the Contracts Act is not a complete code on the law of contracts, other statutes will, depending on the individual facts and circumstances of each case, be applicable in conjunction with the Contracts Act: for example, Sale of Goods Act 1957, National Land Code, Hire Purchase Act 1967, Housing Developers (Control and Licensing) Act (Act 118), Employment**

Act 1955, Insurance Act 1996, Companies Act 2016, Bills of Sale Act 1950, Partnership Act 1961, Government Contracts Act 1949, Specific Relief Act 1950, Civil Law Act 1956, to name a few.

[58] There are, in law, several essential ingredients present in a valid contract. First, there must be an offer ('proposal') which is communicated to the other party (ss 2(a), 3 and 4(1) [CA]). Second, the party accepting the offer must also have communicated his acceptance to the proposer (ss 4(2), 7 and 8 [CA]). Third, the contract must be for a lawful consideration (s 10 [CA]), in the sense that the consideration of a contract must be lawful within the meaning of ss 24 and 25 [CA]. Fourth, all contracts must be made by the free consent of the parties (s 10 [CA]). The parties to a contract are said to consent 'when they agree upon the same thing in the same sense' (s 13 [CA]); this is also known by the Latin phrase '*consensus ad idem*' — which has been defined in the Australian Legal Dictionary as 'Agreement to do the same thing. The common consent necessary for a binding contract'. Consent is said to be only free within the meaning of s 14 [CA] (this requires a more detailed discussion and will be dealt with below). Fifth, the parties to the contract must be legally competent or have legal capacity to enter into a contract (ss 10, 11 and 12 [CA]). Sixth, all contracts must have certainty — contracts which are vague or where the meaning of which is not certain, or capable of being made certain, are void (s 30 [CA]). Lastly, contracts must be for a lawful object (ss 10, 24 and 25 [CA]).

[59] For the purposes of this judgment, it will be pertinent to consider the element of free consent of parties to enter into a contract. Consent is defined under s 13 [CA] as: 'Two or more persons are said to consent when they agree upon the same thing in the same sense'. The words 'free consent' is defined as consent which is not caused by: (a) coercion; (b) undue influence; (c) fraud; (d) misrepresentation; or mistake: see s 14, CA. In other words, sans these vitiating factors, consent is said to be free consent. Put another way, without consent that is free, there can be no consensus *ad idem*.

[60] Applying the law to the circumstances of this case, it may be inferred that the plaintiffs' consent to enter into the SPA was caused by fraud on the part of the defendants. In this case, the fraud was committed by the defendants with intent to induce the plaintiffs to enter into the SPA with Centennial (see also para [24](iii) above). The plaintiffs were also induced to immediately part with their interests in Fave to the defendants upon the execution of the SPA. The defendants who had the immediate benefit under the SPA attempted to insulate themselves against any obligations or liabilities under the SPA through Centennial and Westhill. The plaintiffs had acted honestly and in good faith and in the expectation that the balance purchase price would be paid in accordance with the terms and conditions of the SPA. In these circumstances, should the plaintiffs be faulted for acting as they did?

[61] **In our considered view, the principle that the law does not expect people to arrange their affairs on the basis that others may commit fraud is not inconsistent with the principle of free consent under the [CA]. We say this because the [CA] starts on the assumption that all contracts are valid. It is only if it can be proved that the consent was procured by coercion,**

fraud, misrepresentation or undue influence, then the contract becomes voidable at the option of the innocent party.

[62] **It is arguable that vitiating factors such as coercion, fraud, misrepresentation or undue influence denotes the absence of good faith. It may also be argued that the duty to act in good faith is therefore a *sine qua non* in every contract, the absence of which renders the contract voidable at the option of the innocent party**.

...

[66] **In the light of the foregoing, we are of the considered view that the sentiments expressed above are not inconsonant with the general tenor of the [CA]. Parties entering into a contract whilst accepting the risks and omissions in the preceding negotiations will assume the honesty and good faith of the other. As such, contracts that are entered into are presumed to be valid and enforceable. However, once it is established that the consent to an agreement was caused by coercion, fraud or misrepresentation, then the contract is no longer automatically valid and enforceable. Such a contract is voidable by operation of law (s 19(1) [CA]). It is voidable at the option of the innocent party; that is to say, the innocent party may elect to set aside the contract or insist that the contract shall be performed (s 19(2) [CA])**.

[67] **The fact that the [CA] starts on the footing that a contract is valid and enforceable underscores the premise that parties to a contract are not expected to arrange their affairs on the basis that other people may commit fraud. Indeed, parties who are engaged in negotiations for the purposes of entering into a commercial contract conduct themselves on the expectation of honesty, good faith and fair dealing. That expectation is essential to commerce which depends critically on trust. Absent such an assumption we do not think that there would be any agreement. Accordingly, we would answer question 3 in the affirmative**."

[Emphasis Added]

[29] It is clear that the Federal Court's judgment in *Lai Fee* only concerned the good faith of parties entering into an agreement. *Lai Fee* did not concern a party's right of early termination of the contract (as in this case). Hence, the Plaintiff's learned counsel could not rely on *Lai Fee* in this case.

[30] Thirdly, the following was decided by the Court of Appeal in *KAB Corporation*, at [1], [3], [15], [17], [18], [20] to [29], [34] and [35]:

"[1] **This case relates to a dispute on the amount of the administrative fee imposed by the master title owner of a commercial building as a condition for giving their consent to an assignment in favour of a bank**.

...

[3] **In 2005, Impiana Sdn Bhd (a related company of KAB) applied for an additional loan facility of RM6.5 million from a bank on the security of a third party assignment of KAB's office unit. The bank's solicitors wrote to Master Platform requesting for, *inter alia*, its consent for the third party**

assignment in favour of the bank. Master Platform agreed to give its consent subject to payment of RM65,000.00 being its administrative fee.

...

[15] In this case, there are no facts in issue to be determined. **The principal issue for determination relates to the application and interpretation of cl 20 of the SPA and cl 16.07 of the House Rules**.

...

[17] **Clause 16.07 on 'Transfer and/or Assignment' provides that pending the issuance of strata title the owners shall not, *inter alia*, assign their individual units without the prior written consent of the master title owner; consent may be given or withheld at the master title owner's absolute discretion save and except where there is no subsisting breach of the SPA or the House Rules. Subclause 16.07(2) provides that such consent may be subject to the payment of 'an administrative fee of such amount as the Master Title Owner shall at its absolute discretion determine from time to time'**.

[18] **We now turn to cl 20 of the SPA which is as follows:**

> 20. **The Purchaser shall not re-sell transfer or assign the rights duties and obligations under this Agreement without the written permission of the Vendor first had and obtained such consent not to be unreasonably withheld and provided that any transfer fee imposed by the Vendor and the legal costs and expenses of such transfer or assignment (including the Vendor's solicitor's costs)shall be borne absolutely by the Purchaser**.
>
> [Emphasis Added]
>
> ...

We think that cl 20 is also quite clear. A fee is imposed by the defendant for the giving of consent for an assignment. In the light of the foregoing provisions, it is clear that the defendant was entitled to impose an administrative fee as a condition for the giving of the consent for the assignment.

[20] **The defendant's stand is therefore premised on the SPA and the House Rules which it contends gives it absolute discretion to determine the amount of administrative fee.**...

Exercise of contractual discretion

[21] **Accordingly, it is now clear that pursuant to cl 20 of the SPA and cl 16.07 of the House Rules the defendant is invested with the contractual power to determine the amount of the administrative fee according to its absolute discretion**.

[22] **The word 'discretion' has been defined in innumerable ways; such as 'the right or ability to decide something' (*Cambridge Advanced Learner's Dictionary*, 2nd Ed) or 'the freedom to decide on a course of action' (*Concise Oxford English Dictionary*, 11th Ed). According to Words, Phrases & Maxims, Lexis Nexis: 'In its ordinary meaning, the word signifies unrestrained exercise of choice or will; freedom to act according to one's own judgment; unrestrained exercise of will; the liberty or power of acting without other control than one's own judgment. But, when applied to public functionaries, it means a power or right conferred upon them by law, of acting officially in certain circumstances according to the dictates of their own judgment and conscience, uncontrolled by the judgment or conscience of others. Discretion is to discern between right and wrong; and therefore whoever hath power to act at discretion, is bound by the rule of reason and law (2 Inst 56, 298. Tomlin's Law Dict)'. As such, absolute discretion implies the final and total power of acting on one's own judgment or the total and absolute unrestrained exercise of choice without any limits or control whatsoever.**

[23] At common law, the principles relating to the exercise of discretionary powers in public law, in particular, administrative law are well settled. The foundation of the public law duty to exercise discretionary power in a reasonable manner was laid down in Associated *Provincial Picture Houses Ltd v. Wednesbury Corporation* [1948] 1 KB 223 (CA). In Malaysia, the courts have the power of judicial review and supervision of administrative actions and control over the exercise of discretionary powers. The decisions of an inferior court, administrative tribunal or other public authority may be reviewed on the grounds of procedural impropriety, illegality, irrationality and possibly proportionality which permits the courts to scrutinise the decision not only for process but also for substance (*R Rama Chandran v. Industrial Court Of Malaysia & Anor* [1996] 1 MLRA 725). In essence, the general rule is that there is no such thing as an absolute or unfettered discretion; a discretion must be exercised reasonably (*Pengarah Tanah Dan Galian Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd* [1978] 1 MLRA 132).

[24] **Is the requirement of reasonableness applicable in the realm of private law; as in this case where the defendant appears to have the absolute discretion to fix the amount of the administrative fee. The answer to this question may be found in the common law. The application of the common law principles to the exercise of a contractual discretion arose in the seminal case of *CVG Siderurgica del Orinoco SA v. London SS Owners' Mutual Insurance Association Ltd, The Vainqueur Jose [1979] 1 Lloyd Rep 557* . It involved a claim to indemnity under the rules of the P and I club of which the plaintiff was a member. Rule 8(k) provided that: 'A member shall at the discretion of the Committee, be liable to have a deduction made from any claim where the Committee shall be of opinion that the Member has not taken such steps to protect his interests as he would have done if the ship had not been entered in this class. This deduction shall be of such an amount as the Committee in its discretion shall decide'. [Emphasis Added]. Mocatta J held that whenever a discretion is afforded to a party by contract it is an implied term that it must not be exercised unreasonably. The common law principles applicable to the exercise of a contractual discretion include fairness, reasonableness, *bona fides* and absence of misdirection in law.**

[25] **In *Braganza v. BP Shipping Ltd & Another, Lady Hale* of the UK Supreme Court traced the interrelationship between the legal principles on contractual review and the common law principles on the exercise of administrative law review**. In that case, Mr Braganza who was working as the chief engineer on an oil tanker disappeared one evening whilst the vessel was in the North Atlantic. Mr Braganza was never found and he was presumed dead. Mr Braganza's employer, BP Shipping Ltd conducted an internal inquiry which concluded that the most likely cause of Mr Braganza's death was suicide. On that premise, BP took the position that there had been 'wilful default' within the terms of the employment contract so that death benefits would not be payable to his widow. Mr Braganza's widow brought a claim, *inter alia*, in contract against BP for death benefits, contending that the decision-power was subject to an implied term and that BP's decision-making failed to meet the standards imposed. The High Court allowed Mrs Braganza's contractual claim on the basis that BP had failed to prove that the opinion was reasonable in the circumstances. The weight of the evidence was not proportionate to the seriousness of the consequences of the finding and BP had failed properly to take account the real possibility that Mr Braganza had been involved in an accidental fall whilst out on deck in the course of his work. BP appealed to the Court of Appeal which took a different view. The Court of Appeal held that in all the circumstances BP's decision was a reasonable one, reached after an appropriate, detailed and careful enquiry.

[26] **Mrs Braganza appealed to the UK Supreme Court which unanimously held that the decision-power was subject to an implied term. The central issues in that case were the principles which governed the exercise of contractual power, and the general approach a court ought to take to applying those principles. The majority (Lady Hale, Lord Kerr and Lord Hodge, Lord Neuberger and Lord Wilson, dissenting) held that BP's decision-making fell short of the requirement imposed by the implied term. BP's finding that suicide was the most likely cause of death was not supported by the evidence. Consequently, Mrs Braganza was entitled to receive the death benefits.**

[27] **After conducting a review of the following authorities, Lady Hale intimated that there are signs that the contractual implied term is drawing closer and closer to the principles applicable in judicial review: *Abu Dhabi National Tanker Co v. Product Star Shipping Ltd, The Product Star (No 2)* [1993] 1 Lloyd's Rep 397; *Paragon Finance plc v. Nash* [2001] EWCA Civ 1466; *Ludgate Insurance Co Ltd v. Citibank NA* [1998] Lloyd's Rep IR 221; *Gan Insurance Co Ltd v. Tai Ping Insurance Co Ltd* [2001] EWCA Civ 1047; *Socimer International Bank Ltd (in liq) v. Standard Bank London Ltd* [2008] EWCA Civ 116;** *Hayes v. Willoughby* **[2013] UKSC 17;** *British Telecommunications plc v. Telefonica O2 UK Ltd* **[2014] UKSC 42. Although the Justices disagreed as to the outcome of the appeal they agreed upon the content of the term to be implied. It was also unanimously agreed that a contractual decision-making power is limited, as a matter of necessary implication, by concepts of honesty, good faith and genuineness, and the need for the absence of arbitrariness, capriciousness and perversity and irrationality. Further, the UK Supreme Court held that both limbs of the Wednesbury test should apply ie: (a) relevant matters taken into account and irrelevant considerations must be excluded; and (b) the decision must not be one**

that no reasonable decision-maker could have made. Whilst none of the Supreme Court Justices explicitly justified the implied term on the basis of what Mr Braganza and BP intended, the rationale given by Lady Hale in her lead judgment was based on wider considerations of public policy to prevent abuses of power. As such, it appears that the term will be implied by operation of law and is not dependent on any enquiry into intentions nor on a finding that the parties intended to fetter the decision-power.

[28] **It can therefore be discerned that the UK Supreme Court in *Braganza* not only applied the settled administrative law review principles, but unequivocally applied administrative law principles to contractual review. The UK Supreme Court recognised that it is common for contracts to confer powers of discretion, including decision, often upon one party to the contract; in most cases it is the dominant party. For instance, loan contracts invariably grant the lending financial institution the power to vary interest rates from time to time at their discretion. It is not for the courts to re-write the parties' bargain for them, still less to substitute themselves for the contractually agreed decision-maker. If, however, there is a risk where one party has the power to make decisions which affect the rights of both parties to the contract, then that party has a clear conflict of interest. This particular conflict arises especially where there is a significant imbalance of power between the contracting parties. Accordingly, the courts have sought to ensure that such contractual powers are not abused. They have done so by implying a term as to the manner in which such powers may be exercised, a term which may vary according to the terms of the contract and the context in which the decision-making power is given. In other words, context will shape the content of the implied term and the practice of contractual review.**

[29] **We now return to the present case where the central issue relates to the principles which govern the exercise of contractual discretion by the defendant. In our considered view, the conferring of a contractual discretion on the defendant does not subject the plaintiffs to the defendant's uninhibited whim and fancy. The authorities show that not only must the discretion be exercised honestly and in good faith, but having regard to the provisions of the SPA and the House Rules, it must not be exercised arbitrarily, capriciously or unreasonably. The authorities are also clear that such a limitation applies as a matter of necessary implication. The rationale for such a limitation is that it is presumed to be the reasonable expectation and therefore the common intention of the parties that there should be a genuine and rational, as opposed to an empty or irrational, exercise of discretion. At first blush, the requirement of honesty and good faith seems quite clear. The decision-maker invested with the discretion must properly direct itself to the task in hand and should not exercise the discretion for an ulterior motive. The requirement not to exercise the discretion unreasonably is not analogous to a duty to take reasonable care but to Wednesbury reasonableness** (see para [27] above).

...

[34] **In the light of the abovementioned, we are of the view that the defendant had exercised its discretion unreasonably when it imposed the flat 1% rate for the administrative fee.**...

[35] **For the foregoing reasons, we are of the view that a nominal administrative fee of RM500.00 is fair and reasonable.**...”

[Emphasis Added]

[31] In *KAB Corporation*-

(1) clause 20 of a Sale and Purchase Agreement and cl 16.07 of the “House Rules” (Absolute Contractual Discretion Provisions) of a commercial building (Building) conferred an “absolute” contractual discretion on the owner of the master title of the Building (Building Owner) to decide on the amount of an “administrative fee” (Fee) as a condition for the assignment by way of a security of a parcel in the Building by the parcel owner in favour of a bank [Assignment (Security)];

(2) the appellant company borrowed a sum of RM6.5 million from a bank and the Building Owner imposed a fee of RM65,000.00 for its consent to the Assignment (Security). The Building Owner relied on the Absolute Contractual Discretion Provisions to impose the high Fee [Building Owner’s Exercise of Discretion (Fee)];

(3) the Court of Appeal in *KAB Corporation* followed the 3-2 majority decision of Lady Hale DP (as she then was) in *Braganza*, namely, the court has the power to review the exercise of a contractual discretion along the lines of the court’s power of judicial review of the exercise of a discretionary power in the realm of public law; and

(4) the Court of Appeal reviewed the Building Owner’s Exercise of Discretion (Fee) and decided that such exercise-

   (a) should be done “honestly and in good faith”; and

   (b) “must not be exercised arbitrarily, capriciously or unreasonably”.

The above limitations on the Building Owner’s Exercise of Discretion (Fee) apply “as a matter of necessary implication”.

After the Court of Appeal's review of the Building Owner's Exercise of Discretion (Fee), the Court of Appeal decided as follows-

(i) the Building Owner's Exercise of Discretion (Fee) was unreasonable in the sense as explained by the Court of Appeal of UK in *Associated Provincial Picture Houses Ltd v. Wednesbury Corporation* [1948] 1 KB 223; and

(ii) the Court of Appeal substituted a sum of RM500.00 (instead of RM65,000.00) as the Fee to be imposed by the Building Owner for its consent to the Security Assignment.

[32] As explained in the above paras 28 to 31, neither *Lai Fee* nor *KAB Corporation* had implied a Contractual Duty (Good Faith) in agreements by way of "operation of law". Furthermore, as explained in Part I below, a Contractual Duty (Good Faith) can only be provided by the contract in question, either expressly or by implication (not by "operation of law").

I. Is there a Contractual Duty (Good Faith) in the performance of a contractual right, obligation and discretion (Right/Obligation/Discretion)?

[33] We are of the following view regarding the issue of whether there exists a Contractual Duty (Good Faith) in the performance of a Right/Obligation/Discretion:

(1) a Contractual Duty (Good Faith) may exist on a construction of all the relevant provisions of the contract in question. In this regard, we rely on the following judgment of Lord Sumption JSC in ***British Telecommunications***, at [37]-

> "[37] **The manner in which English law ensures that contractual effect is given to the art 8 objectives is by treating BT's discretion under cl 12 as limited. As a general rule, the scope of a contractual discretion will depend on the nature of the discretion and the construction of the language conferring it. But it is well established that in the absence of very clear language to the contrary, a contractual discretion must be exercised in good faith and not arbitrarily or capriciously:** ***Abu Dhabi National Tanker Co v. Product Star Shipping Ltd, The Product Star (No 2)*** **[1993] 1 Lloyd's Rep 397 (per Leggatt LJ at 404);** ***Gan Insurance Co Ltd v. Tai Ping Insurance Co Ltd*** **[2001] EWCA Civ 1047, [2001] 2 All ER (Comm) 299 (per Mance LJ at [67]);** ***Paragon Finance plc v. Staunton, Paragon Finance plc v. Nash*** **[2001] EWCA Civ 1466, [2002] 2 All ER 248, [2002] 1 WLR 685 (per Dyson LJ at [39]-[41]). This will normally mean that it must be exercised consistently with its contractual purpose: see** ***Ludgate Insurance Co Ltd v. Citibank NA*** **[1998] Lloyd's Rep IR 221 (per Brooke LJ at 239-240);** ***Equitable Life Assurance Society v. Hyman*** **[2000] 3 All ER 961 (per Lord Steyn and Lord Cooke of Thorndon at 970 and 972), [2002] 1 AC 408 (at 459 and 461).** ..."
>
> [Emphasis Added]

(2) if a contract is silent on a Contractual Duty (Good Faith), the court may imply a Contractual Duty (Good Faith) if the following two tests are fulfilled cumulatively-

(a) the "officious bystander" test; and

(b) the "business efficacy" test

[**2 Cumulative Tests (Implied Term)**].

Our Federal Court has applied the 2 Cumulative Tests (Implied Term) in ***Sababumi***, at pp 347-348, as follows:

> "**Reverting to the first type of implied term which is dependent on a court drawing an inference as explained above, there are two tests to fix the parties with such an intention, ie that the parties must have intended to include such an implied term in the contract. The first test is a subjective test, as stated by MacKinnon LJ in *Shirlaw v. Southern Foundries (1926) Ltd* [1939] 2 KB 206 at p 227, that such a term to be implied by a court is 'something so obvious that it goes without saying, so that if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in the agreement, they would testily suppress his with a common "Oh, of course"**.'
>
> **The second test is that the implied term should be of a kind that will give business efficacy to the transaction of the contract of both parties. The test was described by Lord Wright in *Luxor (Eastbourne) Ltd & Ors v. Cooper* [1941] AC 108 at p 137, that in regard to an implied term, '… it can be predicated that "It goes without saying", some term not expressed but necessary to give the transaction such business efficacy as the parties must have intended'. Business efficacy in my opinion, simply means the desired result of the business in question**.
>
> …
>
> **Both tests in my opinion must be satisfied before a court infers an implied term. Thus, Lord Wilberforce in *Liverpool City Council v. Irwin & Anor* [1977] AC 239 at p 254 spoke of an implied term as a matter of necessity, so that the element of 'business efficacy is inseparable'. Lord Simon of Glaisdale in *BP Refinery (Westernport) Pty Ltd v. Hastings Shire Council* (1977) 16 ALR 363 described both tests as conditions the compliance of which the court must be satisfied, in addition to what I may describe as other requirements, of existing law. Closer to home, Chong Siew Fai J (as he then was) in** *Yap Nyo Nyok v. Bath Pharmacy Sdn Bhd* [1993] 1 MLRH 758 **held that both tests must be satisfied. If the implied term was not necessary to give business efficacy, the answer to the officious bystander, would have been a testy answer of 'Oh, don't talk rubbish'.**
>
> **The two tests referred to earlier are to enable the court to decide as to whether it should or should not infer that the implied term contended**

for is a term which parties to a contract must have intended to include in the contract."

[Emphasis Added]

The above judgment of ***Sababumi*** regarding the 2 Cumulative Tests (Implied Term) had been affirmed by the Federal Court in a judgment delivered by Zulkefli Ahmad Makinudin PCA in *See Leong Chye @ Sze Leong Chye & Anor v. United Overseas Bank Berhad & Another Appeal* [2018] 6 MLRA 605, at [74] to [76].

In this regard, when the Court of Appeal in ***KAB Corporation*** implied, among others, a duty to act "honestly and in good faith" with regard to the exercise of a contractual discretion, regrettably, the 2 Cumulative Tests (Implied Term) had not been applied in that case;

(3) when a Contractual Duty (Good Faith) does not exist-

(a) contracting parties are entitled to act solely in their own interest with regard to a contractual right or obligation; and

(b) a contracting party's exercise of a contractual discretion may be reviewed by the court if such exercise is unreasonable in the ***Wednesbury*** sense — please refer to the Court of Appeal case of ***KAB Corporation***; and

(4) if a Contractual Duty (Good Faith) exists, either by way of construction of the contract or by the court's implication of the Contractual Duty (Good Faith) [please refer to the above sub-paragraphs (1) and (2)], the Contractual Duty (Good Faith) has three contents as decided by Allsop P (as he then was) in the New South Wales Court of Appeal case of ***Macquarie International Health Clinic Pty Ltd v. Sydney South West Area Health Service*** **(2010) 383 ALR 577**, at [12], as follows-

(a) obligations to act honestly and with a fidelity to the bargain;

(b) obligations not to act dishonestly and not to act to undermine the bargain entered or the substance of the contractual benefit bargained for; and

(c) an obligation to act reasonably and with fair dealing having regard to the interests of the parties (which will, inevitably, at times conflict) and to the provisions, aims and purposes of the contract, objectively ascertained.

J. What is the effect of clause 8.1(a) to (j)?

[34] The only provision in the Agreement which conferred the 1st Defendant's Right of Early Termination (Agreement) was cl 8.1(a) to (j). We construe cl 8.1(a) to (j) as follows:

(1) as the Agreement was a commercial contract, the Agreement should be construed by the court in a manner which makes business common sense [**Business Common Sense Interpretation (Commercial Contract)**]. In this regard, we rely on the application of the Business Common Sense Interpretation (Commercial Contract) in the following judgment of the Federal Court delivered by Zainun Ali FCJ in *SPM Membrane Switch Sdn Bhd v. Kerajaan Negeri Selangor* [2016] 1 MLRA 1, at [78]:

> "[78] **Thus the nub of this appeal is, when one has to choose between two competing interpretations, the one which makes more commercial sense should be preferred if the natural meaning of the words is unclear. It is noteworthy that the same approach was taken by Lord Hodge (in the majority decision of *Arnold v. Britton*), where His Lordship accepted the unitary process of construction in** *Rainy Sky SA v. Kookmin Bank* [2011] 1 WLR 2900 para 21 that:
>
> > '... **if there are two possible constructions, the Court is entitled to prefer the construction which is consistent with business common sense and to reject the other.**'"
>
> [Emphasis Added]

(2) by virtue of cl 8.1(a) to (j), the 1st Defendant had a conditional right to terminate the Agreement before the expiry of the Three-Year Duration (Agreement) [**1st Defendant's Conditional Right (Early Termination of the Agreement)**] upon the happening of any one of the events stipulated in paragraphs (a) to (j) of cl 8.1 [**Condition (Clause 8.1)**]. If the events stated in paragraphs (a) to (j) of cl 8.1 did not happen, namely, the Condition (cl 8.1) was not satisfied, the 1st Defendant's Conditional Right (Early Termination of the Agreement) could not be exercised.

The 1st Defendant's Conditional Right (Early Termination of the Agreement) is consonant with the Business Common Sense Interpretation (Commercial Contract). If there is no fulfilment of the Condition (Clause 8.1), it made perfect business common sense for the Agreement to run its course, ie., both the Plaintiff and 1st Defendant should be allowed to complete the Three-Year Duration (Agreement);

(3) in the Federal Court's judgment delivered by Hasnah Hashim FCJ (as she then was) in *Catajaya Sdn Bhd v. Shoppoint Sdn Bhd & Ors* [2021] 2 MLRA 46, a contractual provision which had provided for a party's right to terminate a contract should be construed

strictly against the party who had terminated the contract. It is decided in ***Catajaya***, at [2], [63], [64] and [66], as follows:

"[2] **On 9 May 2019 this court granted leave in respect of these two questions**:

Question 1: Whether the law in Malaysia should be that termination clauses ought to be construed strictly; ...

...

[63] Reading the terms of the SSA in its entirety, we find that there is no latent ambiguity; the obligations of the parties are specifically defined. **Termination is not permitted unless as expressly stipulated under SSA. Notice must be given to the appellant to rectify the identified breach and take steps to rectify that breach within the prescribed time as agreed. There must be strict adherence to the clauses in an agreement which relates to termination**.

[64] **Termination of an agreement results in the end of the parties obligations. Reading the provisions of ss 11 and 12 of the SSA the party in breach must be notified of the identified reason for termination as well as be given the opportunity to rectify the breach. The Federal Court in *SPM Membrane* emphasised the importance of giving effect to the specific requirements of a termination clause, failing which a notice of termination would be defective**: ...

...

[66] **For the reasons adverted to above, we take the view that termination clause in an agreement ought to be construed strictly. In light of the foregoing, the first question must be answered in the positive.**"

[Emphasis Added]

The strict construction of a "termination of contract clause" against a party who has terminated the contract (as laid down in *Catajaya*) should apply *a fortiori* to an "early termination clause" such as cl 8.1(a) to (j) [which provided for the 1st Defendant's Conditional Right (Early Termination of the Agreement)];

(4) the Condition (Clause 8.1), ie., paragraphs (a) to (j) of cl 8.1, did not confer a right for the 1st Defendant's early termination of the Agreement on the ground that the Plaintiff's CP had not been renewed in accordance with art 3.1(ii) and (iii).

Firstly, the Plaintiff could not be faulted for the above omission [the fact that cl 8.1(a) to (j) did not allude to art 3.1(ii) and (iii)] because the Agreement was drafted by the 1st Defendant. If there is any ambiguity in cl 8.1(a) to (j) in not providing for the 1st Defendant's early termination of the Agreement due to the non-renewal of the Plaintiff's CP, in accordance with the "*contra proferentem*" rule of

interpretation, such ambiguity should be resolved in favour of the Plaintiff against the 1st Defendant (who had drafted the Agreement) — please refer to the judgment of the Court of Appeal in *Abd Rahman Soltan & Ors v. Federal Land Development Authority & Anor And Other Appeals* [2023] 4 MLRA 567, at [52].

Secondly, by virtue of the maxim of interpretation, *generalia specialibus non derogant*, the specific provision of cl 8.1(a) to (j) (for early termination of the Agreement) should prevail over the general provisions of art 3.1(ii) and (iii).

We are mindful that if the Plaintiff's CP were not renewed, the Plaintiff could not practise as a consultant in the Hospital. Such a conundrum was due to the Agreement as drafted by the 1st Defendant and could not form a lawful basis for the 1st Defendant's early termination of the Agreement;

(5) the Agreement was not subject to a condition precedent, namely, the renewal of the Plaintiff's CP in accordance with art 3.1(ii) and (iii) (**Alleged Condition Precedent**). This is because in a commercial contract (such as in this case), if the 1st Defendant and Plaintiff had intended for the application of the Alleged Condition Precedent in the Agreement, the Agreement would have expressly provided as such. The Agreement however did not provide for the operation of the Alleged Condition Precedent. Furthermore, cl 8.1(a) to (j) did not state that cl 8.1 was "subject to" art 3.1(ii) and (iii);

(6) the above construction of cl 8.1 in the above sub-paragraphs (1) to (4), in particular the Condition (Clause 8.1), does not disclose the existence of a Contractual Duty (Good Faith) under the Agreement. It is clear that if the Condition (cl 8.1) is fulfilled, the 1st Defendant's Conditional Right (Early Termination of the Agreement) could be lawfully exercised solely in the 1st Defendant's interest and wholly to the Plaintiff's detriment; and

(7) a Contractual Duty (Good Faith) could not be implied with regard to cl 8.1(a) to (j) due to the following two reasons-

(a) by virtue of ss 91 and 92 of the Evidence Act 1950 (EA), no extrinsic evidence could be admitted to contradict, vary, add to or subtract from cl 8.1(a) to (j). Reproduced below are ss 91 and 92 EA-

"**Evidence of terms of contracts**, grants and other dispositions of property **reduced to form of document**

section 91. **When the terms of a contract** or of a grant or of any other disposition of property **have been reduced by or by consent of**

the parties to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, **no evidence shall be given in proof of the terms of the contract**, grant or other disposition of property or of the matter **except the document itself**, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained.

...

Exclusion of evidence of oral agreement

section 92. **When the terms of any such contract**, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, **have been proved according to s 91, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying, adding to, or subtracting from its terms**:

Provided that-

(a) any fact may be proved which would invalidate any document or which would entitle any person to any decree or order relating thereto, such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, the fact that it is wrongly dated, want or failure of consideration, or mistake in fact or law;

(b) the existence of any separate oral agreement, as to any matter on which a document is silent and which is not inconsistent with its terms, may be proved, and in considering whether or not this proviso applies, the court shall have regard to the degree of formality of the document;

(c) the existence of any separate oral agreement constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved;

(d) the existence of any distinct subsequent oral agreement, to rescind or modify any such contract, grant or disposition of property, may be proved except in cases in which the contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of documents;

(e) any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to contracts of that description may be proved if the annexing of any such incident would not be repugnant to or inconsistent with the express terms of the contract; and

(f) any fact may be proved which shows in what manner the language of a document is related to existing facts."

[Emphasis Added]

Needless to say, the exceptional circumstances provided in proviso (a) to (f) of s 92 EA did not apply in this case; and

(b) a Contractual Duty (Good Faith) could not be implied in the face of an express provision in cl 8.1(a) to (j). In ***Sababumi***, Peh Swee Chin FCJ had decided as follows-

"**The first and most important type is an implied term which the court infers from evidence that the parties to a contract must have intended to include it in the contract though it has not been expressly set out in the contract.**"

[Emphasis Added]

[35] Premised on the construction of cl 8.1(a) to (j) as explained in the above sub-paragraphs 34(1) to (4), the 1st Defendant's Conditional Right (Early Termination of the Agreement) could not be exercised in this case for the simple reason that no evidence had been adduced by the 1st Defendant at the Trial regarding the fulfilment of the Condition (Clause 8.1). Furthermore, the 1st Defendant's Letter (30 June 2016) relied on the non-renewal of the Plaintiff's CP as the sole basis for the 1st Defendant's Termination (Agreement). The non-renewal of the Plaintiff's CP did not fall within any one of the paragraphs (a) to (j) of cl 8.1 and could not therefore entitle the 1st Defendant to terminate the Agreement before the expiry of the Three-Year Duration (Agreement). Accordingly, the 1st Defendant's Termination (Agreement) was unlawful due to the 1st Defendant's breach of cl 8.1(a) to (j).

[36] For the sake of completeness-

(1) the Plaintiff could not rely on art 10.2(i) in this case because the validity of the 1st Defendant's Termination (Agreement) depended solely on whether the 1st Defendant had complied with cl 8.1(a) to (j) or otherwise — please refer to the above paras 34 and 35. In this regard, the learned High Court Judge had erroneously relied on art 10.2(i) in this case (High Court's 3rd Legal Error). Having said that, the High Court's 3rd Legal Error, in our view, did not affect in any manner the unlawful 1st Defendant's Termination (Agreement) due to the 1st Defendant's breach of cl 8.1(a) to (j). In this regard, we rely on s 72 of the Courts of Judicature Act 1964 (CJA) which provides as follows:

"section 72. **Immaterial errors**

No judgment or order of the High Court, or of any Judge, shall be reversed or substantially varied on appeal, nor a new trial ordered by

the Court of Appeal, on account of any error, defect, or irregularity, whether in the decision or otherwise not affecting the merits or the jurisdiction of the Court."

[Emphasis Added]

In *Abdul Rahman Soltan*, at [54], the Court of Appeal had invoked s 72 CJA to "cure" an error of the High Court (in making the High Court's decision which was the subject matter of the appeal) which did not affect the "merits or the jurisdiction" of the High Court; and

(2) as explained in the above sub-paragraphs 34(6) and (7), in view of cl 8.1(a) to (j), the Contractual Duty (Good Faith) did not exist and could not also be implied in the Agreement. The learned High Court Judge had therefore committed an error of law in deciding that the 1st Defendant had breached the Contractual Duty (Good Faith) (High Court's 4th Legal Error). Once again, we are of the view that the High Court's 4th Legal Error is immaterial within the meaning of s 72 CJA.

K. What relief should be granted in this case?

K(1). Declaratory relief

[37] As the 1st Defendant's Termination (Agreement) was unlawful (please refer to the above paras 34 and 35), the High Court had correctly granted a declaration in this case that the 1st Defendant's Termination (Agreement) was invalid.

K(2) Compensatory Damages

[38] According to the relevant part of s 74 CA-

"section 74. **Compensation for loss or damage caused by breach of contract**

(1) **When a contract has been broken, the party who suffers by the breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from the breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it**.

(2) **Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.**

...

Explanation — In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account."

[Emphasis Added]

The two limbs of s 74(1) CA ("1st Limb [Section 74(1) CA]" and "2nd Limb [Section 74(1) CA]") have been explained by the High Court in *Jambatan Merah Sdn Bhd v. Public Bank Berhad* [2015] MLRHU 1092; [2015] AMEJ 212, at [46], as follows:

> "[46] **Even if the Plaintiff has suffered any loss or damage due to the Defendant's Breach (Alleged Loss), the Plaintiff must prove that the Alleged Loss is claimable and is not too remote under either one or both the limbs of s 74(1) CA (1950) as follows**:
>
> (a) **the Alleged Loss "naturally arose in the usual course of things" from the Defendant's Breach within the meaning of the first limb of s 74(1) CA (1950); and/or**
>
> (b) **both the Plaintiff and Defendant "knew, when they made the contract" that the Alleged Loss was "likely to result from the breach" of the Defendant's Breach as understood in the second limb of s 74(1) CA (1950).**"
>
> [Emphasis Added]

[39] Firstly, any claim for damages for a breach of contract can only be allowed by the court if an innocent contracting party (X) can discharge the evidential burden to prove on a balance of probabilities X's loss and/or damage due to the breach of contract within the meaning of the 1st Limb [Section 74(1) CA] and/or 2nd Limb [Section 74(1) CA] — please refer to the Court of Appeal's judgment in *SPM Energy Sdn Bhd & Anor v. Multi-Discovery Sdn Bhd* [2025] 3 MLRA 744, at [64(1)].

If X cannot discharge the above evidential burden, X is only entitled to nominal damages — please refer to the judgment of Edgar Joseph Jr FCJ in the Federal Court case of *Tan Sri Khoo Teck Puat & Anor v. Plenitude Holdings Sdn Bhd* [1994] 1 MLRA 420, at p 436.

[40] Secondly, cases on damages for breach of contract which have been decided in the UK and Singapore, in our view, have to be read with caution. This is because these countries have no legislation which is similar to our s 74(1) CA.

[41] Thirdly, as our CA is based on the Indian Contract Act 1872, Indian cases on damages for breach of contract are persuasive.

[42] Fourthly, we decide that as a result of the unlawful 1st Defendant's Termination (Agreement), the High Court shall assess the sum of Compensatory Damages to be paid by the 1st Defendant to the Plaintiff (Assessment) as follows:

(1) the Plaintiff is only entitled to Compensatory Damages for the period from 30 July 2016 [after the effective date of the 1st Defendant's Termination (Agreement) on 29 July 2016] until 30 March 2017 [the last day of the Three-Year Duration

(Agreement)], namely for a period of 8 months (Compensation Period);

(2) the Plaintiff is not entitled to claim beyond the Compensation Period because the Plaintiff was only appointed as an independent contractor for the 1st Defendant for the Three-Year Duration (Agreement). In other words, the Plaintiff could not claim for Compensatory Damages after the expiry of the Three-Year Duration (Agreement);

(3) the Compensatory Damages shall be in the form of financial loss suffered by the Plaintiff due to a drop in his income for the Compensation Period (Plaintiff's Financial Loss). The Plaintiff's Financial Loss could be recovered from the 1st Defendant because-

(a) the Plaintiff's Financial Loss "naturally arose in the usual course of things" from the invalid 1st Defendant's Termination (Agreement) as understood in the 1st Limb [Section 74(1) CA]; and/or

(b) both the Plaintiff and 1st Defendant "knew, when they made the [Agreement]" that the Plaintiff's Financial Loss was "likely to result" from the 1st Defendant's Termination (Agreement) within the meaning of the 2nd Limb [Section 74(1) CA];

(4) the average monthly income derived by the Plaintiff while working as an independent contractor at the 1st Defendant's Hospital [before the 1st Defendant's Termination (Agreement)] [Plaintiff's Average Monthly Income (Hospital)] should be ascertained first;

(5) the court shall then calculate the average monthly income of the Plaintiff as a Private Orthopaedic Specialist during the Compensation Period [Plaintiff's Average Monthly Income (Private Orthopaedic Specialist)];

(6) the average monthly amount of the Plaintiff's Financial Loss (Plaintiff's Average Monthly Financial Loss) shall be the surplus of the Plaintiff's Average Monthly Income (Hospital) over the Plaintiff's Average Monthly Income (Private Orthopaedic Specialist). Needless to say, if the Plaintiff's Average Monthly Income (Private Orthopaedic Specialist) exceeds the Plaintiff's Average Monthly Income (Hospital), the Plaintiff is only entitled to nominal damages;

(7) the total of the Plaintiff's Financial Loss shall be computed as follows-

(Plaintiff's Average Monthly Financial Loss) x 8 months (Compensation Period); and

(8) the Plaintiff had a duty to mitigate the Plaintiff's Financial Loss — please refer to the Explanation to s 74 CA and the Federal Court's judgment given by MacIntyre FJ in *Kabatasan Timber Extraction Company v. Chong Fah Shing* [1969] 1 MLRA 408 at 410. Consequently, the 1st Defendant has a right to lead evidence at the Assessment on any failure on the part of the Plaintiff to mitigate the Plaintiff's Financial Loss.

In this case, the learned High Court Judge ordered an assessment of, among others, "special damages" and general damages. The "special damages" stated by the High Court in the GOJ, in our view, were actually the Plaintiff's Financial Loss (general damages). Nonetheless, nothing turns on the High Court's erroneous description of "special damages" in this case.

[43] Fifthly, we will now discuss whether the Plaintiff could claim as Compensatory Damages for the following two "damages" due to the 1st Defendant's Termination (Agreement):

(1) the Plaintiff's loss of professional reputation; and/or

(2) the emotional distress suffered by the Plaintiff

(referred collectively in this judgment as "Loss of Professional Reputation/Emotional Distress").

[44] We are of the view that the Loss of Professional Reputation/Emotional Distress was too "remote" for the Plaintiff to claim in This Suit as understood in s 74(2) CA. Our reasons are as follows:

(1) the Loss of Professional Reputation/Emotional Distress did not naturally arise "in the usual course of things" from the 1st Defendant's Termination (Agreement) as required by the 1st Limb [Section 74(1) CA]; and

(2) both the Plaintiff and 1st Defendant did not know, when they made the Agreement, that the Loss of Professional Reputation/ Emotional Distress were "likely to result" from the 1st Defendant's Termination (Agreement). Hence, the 2nd Limb [Section 74(1) CA] was not satisfied in this case.

In any event, in view of the three-year fixed term appointment of the Plaintiff as a Resident Orthopaedic Surgeon in the 1st Defendant's Hospital, we are not satisfied that the Plaintiff had succeeded to discharge the evidential burden to

prove on a balance of probabilities that the Loss of Professional Reputation/ Emotional Distress could fall under the 1st Limb [Section 74(1) CA] and/or 2nd Limb [Section 74(1) CA].

[45] Notwithstanding our decision in the above para 44, we would take this opportunity to discuss previous cases decided in the UK and Singapore regarding the Loss of Professional Reputation/Emotional Distress in claims for breach of contract.

[46] The first case is the 5-1 majority judgment of the House of Lords in *Addis v. Gramophone Co Ltd* [1908-10] All ER Rep 1 (Majority — Lord Loreburn LC, Lord James, Lord Atkinson, Lord Gorell and Lord Shaw, dissenting Lord Collins). We will only reproduce below the judgment of Lord Loreburn LC in *Addis*, at p 3:

> "**The causes of action for detinue and for breach of contract were tried by Darling J, and a jury. The jury found for the plaintiff in detinue, damages 300 pounds; for the plaintiff in respect of wrongful dismissal 600 pounds; and for the plaintiff in respect of excess commission 340 pounds over and above what was earned by the plaintiff's successor during the six months from October 1905, to April 1906. Every one of these findings is impeached. [His Lordship dealt with the question of detinue, and held that the plaintiff was only entitled to nominal damages]. As to the damages of 600 pounds for wrongful dismissal, a controversy ensued whether the 600 pounds was intended to include salary for the six months or merely damages, because of the abrupt and oppressive way in which the plaintiff's services were discontinued and the loss he sustained from the discredit thus thrown upon him. Finally, a question of law was argued whether or not such damages could be recovered in law.**
>
> **To my mind, it signifies nothing in the present case whether the claim is to be treated as for wrongful dismissal or not. In any case there was a breach of contract in not allowing the plaintiff to discharge his duties as manager, and the damages are exactly the same in either view. They are, in my opinion, the salary to which the plaintiff was entitled for the six months between October 1905, and April 1906, together with the commission which the jury think he would have earned had he been allowed to manage the business himself. I cannot agree that the manner of dismissal affects these damages. Such considerations have never been allowed to influence damages in this kind of case. An expression of Lord Coleridge CJ (*Maw v. Jones (1) 25 QBD* at p 108) has been quoted as authority to the contrary. I doubt if the learned Lord Chief Justice so intended it. If he did, I cannot agree with him. If there be a dismissal without notice the employer must pay an indemnity; but, that indemnity cannot include compensation either for the injured feelings of the servant or for the loss he may sustain from the fact that his having been dismissed of itself makes it more difficult for him to obtain fresh employment.**"
>
> [Emphasis Added]

[47] The majority judgment in Addis had been adopted by Whyatt CJ in the High Court of Singapore in *SR Fox v. Ek Liong Hin Ltd* [1957] 1 MLRH 595, at pp 600-601, as follows:

> "**The plaintiff, however, contends that he is entitled to recover general damages in addition to these special damages. He stated in evidence that he has been unable to obtain employment as a master mariner since his illegal dismissal although he has tried repeatedly, by advertisement and otherwise, to do so, and he attributes this failure to the manner of his dismissal and to his being black-listed, although he is not able to say how or by whom he has been black-listed; and for this additional injury, he claims general damages. The principles upon which damages can be awarded for wrongful dismissal were discussed at length by the House of Lords in *Addis v. Gramophone Co Ltd* [1909] AC 488 and it was there clearly laid down that the damages cannot include compensation for the manner of the dismissal, for injured feelings or for loss sustained by reason of the fact that the dismissal of itself makes it more difficult to obtain fresh employment. Lord Shaw of Dunfermline pointed out that wrongful dismissal may be accompanied by circumstances which give rise to a separate cause of action and when this occurs the remedy does not merge with the proceedings for wrongful dismissal but remains available at law to the plaintiff if he wishes to pursue it. So far as the action for wrongful dismissal is concerned, the damages are limited, as Lord Atkinson indicated, to one or possibly, two heads: first, compensation for loss of the emoluments which would have been earned but for the breach of contract, and possibly, secondly, compensation in respect of the time which might reasonably elapse before the plaintiff could obtain fresh employment. Damages under the first head are covered in the present case by the special damages with which I have already dealt. It will be observed that the second head is referred to by Lord Atkinson only as a possible head of damages and there does not appear to have been any decision since that case which has resolved the doubt. I do not, however, find it necessary to decide this point because on the facts of the present case there was a period of four months between the date of the wrongful dismissal and the date when the contract would normally have expired which, in my opinion, was a reasonable period in which the plaintiff could seek fresh employment. The fact that the plaintiff did not obtain fresh employment during this period may have been due, as he thinks, to his being black-listed or to the fact that there was, as the Deputy Shipping Master of the Government marine department said in evidence, a surplus of master mariners in Singapore or to some other cause. But whatever the reason, it was not, in my opinion because the period between dismissal and the normal date of expiry of the contract was unreasonably short and consequently no damages are recoverable under this head, assuming it to be a legitimate head of damages in a case of this kind. It follows, therefore, that the plaintiff's damages in this case are limited to the sum of $5,471 and there must be judgment for the plaintiff for this sum with costs.**"
>
> [Emphasis Added]

[48] Addis had been considered by the House of Lords in *Malik v. Bank Of Credit And Commerce International SA (In Liquidation)* [1997] 3 All ER 1. We reproduce below the two judgments in *Malik*:

(1) according to Lord Nicholls, at pp 9 to 10-

> "**For present purposes I am not concerned with the exclusion of damages for injured feelings. The present case is concerned only with financial loss.** ...
>
> **However, Lord Loreburn LC's observations were framed in quite general terms, and he expressly disagreed with the suggestion of Lord Coleridge CJ in *Maw v. Jones* (1890) 25 QBD 17 at 108 to the effect that an assessment of damages might take into account the greater difficulty which an apprentice dismissed with a slur on his character might have in obtaining other employment. Similar general observations were made by Lord James of Hereford, Lord Atkinson, Lord Gorell and Lord Shaw of Dunfermline.**
>
> **In my view these observations cannot be read as precluding the recovery of damages where the manner of dismissal involved a breach of the trust and confidence term and this caused financial loss. *Addis v. Gramophone Co Ltd* was decided in the days before this implied term was adumbrated. Now that this term exists and is normally implied in every contract of employment, damages for its breach should be assessed in accordance with ordinary contractual principles. This is as much true if the breach occurs before or in connection with dismissal as at any other time.**
>
> **This approach would accord, in its result, with the approach adopted by courts and tribunals in unfair dismissal cases when exercising the statutory jurisdiction, currently limited to a maximum of £11,300.00, to award an amount of compensation which the court or tribunal considers 'just and reasonable' in all the circumstances. Writing on a clean slate, the courts have interpreted this as enabling awards to include compensation in respect of the manner and circumstances of dismissal if these would give rise to a risk of financial loss by, for instance, making the employee less acceptable to potential employers: see ss 123 and 124 of the Employment Rights Act 1996 and** *Norton Tool Co Ltd v. Tewson* [1973] 1 All ER 183, [1973] 1 WLR 45.
>
> **I do not believe this approach gives rise to artificiality. On the contrary, the trust and confidence term is a useful tool, well established now in employment law. At common law damages are awarded to compensate for wrongful dismissal. Thus, loss which an employee would have suffered even if the dismissal had been after due notice is irrecoverable, because such loss does not derive from the wrongful element in the dismissal. Further, it is difficult to see how the mere fact of wrongful dismissal, rather than dismissal after due notice, could of itself handicap an employee in the labour market. All this is in line with Addis's case. But the manner and circumstances of the dismissal, as measured by the standards of conduct now identified in the implied**

trust and confidence term, may give rise to such a handicap. The law would be blemished if this were not recognised today. There now exists the separate cause of action whose absence Lord Shaw of Dunfermline noted with 'a certain regret': see *Addis v. Gramophone Co Ltd* [1909] AC 488 at 504, [1908-10] All ER Rep 1 at 11. The trust and confidence term has removed the cause for his regret."

[Emphasis Added]; and

(2) Lord Steyn decided as follows at p 20 and 21 to 22-

"**I would accept, however, that Lord Loreburn LC and the other Law Lords in the majority [in *Addis*] apparently thought they were applying a special rule applicable to awards of damages for wrongful dismissal. It is, however, far from clear how far the ratio of *Addis*'s case extends. It certainly enunciated the principle that an employee cannot recover exemplary or aggravated damages for wrongful dismissal. That is still sound law. The actual decision is only concerned with wrongful dismissal. It is therefore arguable that as a matter of precedent the ratio is so restricted. But it seems to me unrealistic not to acknowledge that *Addis's* case is authority for a wider principle. There is a common proposition in the speeches of the majority. That proposition is that damages for breach of contract may only be awarded for breach of contract, and not for loss caused by the manner of the breach. No Law Lord said that an employee may not recover financial loss for damage to his employment prospects caused by a breach of contract. And no Law Lord said that in breach of contract cases compensation for loss of reputation can never be awarded, or that it can only be awarded in cases falling in certain defined categories. *Addis*'s case simply decided that the loss of reputation in that particular case could not be compensated because it was not caused by a breach of contract: see Nelson Enonchong '*Contract Damages for Injury to Reputation*' (1996) 59 MLR 592 at 596. So analysed *Addis*'s case does not bar the claims put forward in the present case**.

...

The principled position is as follows. Provided that a relevant breach of contract can be established, and the requirements of causation, remoteness and mitigation can be satisfied, there is no good reason why in the field of employment law recovery of financial loss in respect of damage to reputation caused by breach of contract is necessarily excluded. I am reinforced in this view by the consideration that such losses are in principle recoverable in respect of unfair dismissal: see s 123(1) of the Employment Rights Act 1996 and *Norton Tool Co Ltd v. Tewson* [1973] 1 All ER 183 at 188, [1973] 1 WLR 45 at 50-51. It is true that the relevant statute does not govern the appeals under consideration. But in the search for the correct common law principle one is not compelled to ignore the analogical force of the statutory dispensation: see Professor Jack Beatson Has the Common Law a Future Inaugural lecture delivered on 29 April 1996, Cambridge University Press. Not only does legal principle not support the

restrictive principle, which prevailed in the Court of Appeal, but there are no sound policy reasons for it.

Earlier, I drew attention to the fact that the implied mutual obligation of trust and confidence applies only where there is 'no reasonable and proper cause' for the employer's conduct, and then only if the conduct is calculated to destroy or seriously damage the relationship of trust and confidence. That circumscribes the potential reach and scope of the implied obligation. Moreover, even if the employee can establish a breach of this obligation, it does not follow that he will be able to recover damages for injury to his employment prospects. The Law Commission has pointed out that loss of reputation is inherently difficult to prove: Aggravated, Exemplary and Restitutionary Damages (Law Com Consultation Paper No 132) p 22, para 2.15. It is, therefore, improbable that many employees would be able to prove 'stigma compensation'. The limiting principles of causation, remoteness and mitigation present formidable practical obstacles to such claims succeeding. But difficulties of proof cannot alter the legal principles which permit, in appropriate cases, such claims for financial loss caused by breach of contract being put forward for consideration."

[Emphasis Added]

[49] *Addis* had been referred to by Gill J (as he then was) in the High Court case of *D'Cruz v. Seafield Amalgamated Rubber Co Ltd* [1963] 1 MLRH 251. However, the High Court in *D'Cruz* did not discuss or accept *Addis*. Moreover, there was no discussion of s 74(1) CA in *D'Cruz*.

At the risk of repetition, the UK and Singapore have no legislation which is equivalent to our s 74(1) CA. Hence, *Addis*, *SR Fox* and *Malik* should not be applied in Malaysia at the expense of s 74(1) CA. We should emphasise that our decision in the above para 44 is confined to the Plaintiff's failure to discharge the evidential burden to prove in this case on a balance of probabilities that the Loss of Professional Reputation/Emotional Distress fell within the 1st Limb [Section 74(1) CA] and/or 2nd Limb [Section 74(1) CA]. It is, of course, open in future cases for Loss of Professional Reputation/Emotional Distress to be claimable for breach of contract, provided that the Loss of Professional Reputation/Emotional Distress falls within s 74(1) CA.

[50] Lastly, with regard to the Assessment-

(1) after the High Court had assessed the amount of Compensatory Damages [Sum (Compensatory Damages)], the Plaintiff is entitled to claim from the 1st Defendant interest at the rate of 5% pa on the Sum (Compensatory Damages) pursuant to s 11 of the Civil Law Act 1956 (CLA) and O 42 r 12 RC. Section 11 CLA and O 42 r 12 provide as follows:

"section 11 CLA **Power of Courts to award interest on** debts and **damages**

> **In any proceedings tried in any Court for the recovery of any** debt or **damages**, **the Court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest as such rate as it thinks fit on the whole or any part of the** debt or **damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment**:
>
> Provided that nothing in this section-
>
> (a) shall authorize the giving of interest upon interest;
>
> (b) shall apply in relation to any debt upon which interest is payable as of right whether by virtue of any agreement or otherwise; or
>
> (c) shall affect the damages recoverable for the dishonour of a bill of exchange.
>
> Order 42 r 12 RC **Interest on judgment debts**
>
> Subject to r 12A, except when it has been otherwise agreed between the parties, **every judgment debt shall carry interest at such rate as the Chief Justice may from time to time determine or at such other rate not exceeding the rate aforesaid as the Court determines, such interest to be calculated from the date of judgment until the judgment is satisfied**."
>
> [Emphasis Added]

The court has a discretion pursuant to s 11 CLA to award pre-judgment interest on any judgment amount "at such rate as it thinks fit on the whole or any part of the ... damages for the whole or any part of the period ... between the date when the cause of action arose and the date of judgment" — please refer to the judgment by Raja Azlan Shah FJ (as His Majesty then was) in the Federal Court case of *Lim Kar Bee v. Abdul Latif Ismail* [1977] 1 MLRA 399, at p 405; and

(2) we affirm the High Court's exercise of discretion under s 11 CLA and O 42 r 12 RC which ordered the 1st Defendant to pay to the Plaintiff interest at the rate of 5% pa on the Sum (Compensatory Damages) from 30 July 2016 [after the effective date of the 1st Defendant's Termination (Agreement) on 29 July 2016] until full payment of the Sum (Compensatory Damages).

K(3). Could the High Court award exemplary and aggravated damages for unlawful 1st Defendant's Termination (Agreement)?

[51] The learned High Court Judge had, in our view, committed an error of law in ordering an assessment of aggravated damages and exemplary damages for the unlawful 1st Defendant's Termination (Agreement) (High Court's 5th Legal Error). The High Court's 5th Legal Error is premised on the following reasons:

(1) section 74(1) CA does not allow aggravated damages and exemplary damages to be awarded for a breach of contract. The court's limited power pursuant to s 74(1) CA to award compensatory damages for a breach of an agreement is contrasted with the wide powers of the Industrial Court (IC) to make an award under s 30(5) and (6) of the Industrial Relations Act 1967 (IRA). Reproduced below are s 30(5) and (6) IRA-

> "section 30(5)**The [IC] shall act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form**.
>
> ...
>
> section 30(6)**In making its award, the [IC] shall not be restricted to the specific relief claimed by the parties or to the demands made by the parties in the course of the trade dispute or in the matter of the reference to it under subsection 20(3) but may include in the award any matter or thing which it thinks necessary or expedient for the purpose of settling the trade dispute or the reference to it under subsection 20(3)**."
>
> [Emphasis Added]; and

(2) in the Supreme Court case of *Bank Bumiputra Malaysia Bhd Kuala Terengganu v. Mae Perkayuan Sdn Bhd & Anor* [1993] 1 MLRA 198-

(a) the High Court awarded, among others, a sum of RM5 million as exemplary damages for the 1st respondent company due to the appellant bank's wrongful termination of credit facilities (Exemplary Damages Award); and

(b) the Supreme Court set aside the Exemplary Damages Award. In this regard, Abdul Hamid Omar LP decided as follows-

> "**The principles for an award of exemplary damages appear in *Rookes v. Barnard* and *Cassell v. Broome*. In this case, we feel that the 1st respondent had not established its claim in accordance with these principles. We therefore disallow this claim and set aside the judge's award of RM5 m in respect thereof.**"
>
> [Emphasis Added]

[52] We have not overlooked the numerous cases cited by the Plaintiff's learned counsel in support of the High Court's order for an assessment of aggravated damages and exemplary damages. With respect, all these cases concern causes of action other than a breach of contract. Furthermore, these cases did not consider the effect of s 74(1) CA.

K(4). Whether the High Court could compel the 1st Defendant to apologise to the Plaintiff for the Unlawful 1st Defendant's Termination (Agreement)

[53] This Suit was not premised on a tort of defamation of the Plaintiff by the 1st Defendant. The Plaintiff's sole cause of action in this case was based on the invalid 1st Defendant's Termination (Agreement). We are of the view that the learned High Court Judge erred in law in awarding the Perpetual Mandatory Injunction (Apology) (High Court's 6th Legal Error). This is because for the unlawful 1st Defendant's Termination (Agreement), there is nothing in the CA which empowers the High Court to issue the Perpetual Mandatory Injunction (Apology). We are also not aware of any Malaysian case which has granted a perpetual mandatory injunction for a mere breach of an agreement.

L. Costs

[54] In view of the High Court's 1st, 2nd, 5th and 6th Legal Errors, This Appeal is allowed in part. Consequently, we exercise our discretion under s 70 CJA read with rr 54 and 96 of the Rules of the Court of Appeal 1994 to award part of the costs for This Appeal and This Suit in favour of the Plaintiff. In our judgment, a sum of RM80,000.00 shall be paid by the 1st Defendant to the Plaintiff for costs here and below (subject to allocatur fee).

M. Outcome of This Appeal

[55] The upshot is that This Appeal is allowed in part with the following order:

(1) the High Court's Judgment is affirmed save as follows-

(a) the entire High Court's Judgment against the 2nd Defendant is set aside; and

(b) the High Court's Judgment against the 1st Defendant with regard to-

(i) the Perpetual Mandatory Injunction (Apology);

(ii) special damages;

(iii) aggravated damages;

(iv) exemplary damages; and

(v) the Costs (High Court)

- are set aside;

(2) the Assessment (to assess Compensatory Damages only) shall be conducted by the High Court in accordance with the above paras 42 and 50; and

(3) the 1st Defendant shall pay costs to the Plaintiff as stated in the above para 54.

[56] A draft of this judgment (Draft) had been previously forwarded to my learned sister, Azizah Nawawi CJSS and my learned brother, Azizul Azmi Adnan JCA. Both my learned sister and brother had expressed their concurrence with the Draft.