

DALAM MAHKAMAH SESYEN DI KUALA LUMPUR
DALAM WILAYAH PERSEKUTUAN, MALAYSIA
s(BAHAGIAN SIVIL)
SAMAN PEMULA NO. WA – B54 – 27 – 03/2017

Dalam perkara Perjanjian Perkhidmatan Internet di antara YTL Communications Sdn Bhd dan Fahri Azzat, pemegang akaun pengguna no. 819549719.

Dan

Dalam perkara Seksyen 41 dan 42 Akta Relief Spesifik 1950.

Dan

Dalam perkara Akta Perlindungan Pengguna 1999, secara khususnya Seksyen 2, 6, 17, 24A, 24B, 24C, 24D, 24E, 24I, 32 and 33.

Dan

Dalam perkara Akta Kontrak 1950, secara khususnya Seksyen 75.

Dan

Dalam perkara Akta Jualan Barangan 1957, secara khususnya Seksyen 16.

Dan

Dalam perkara Aturan 7, 15 Kaedah 16 dan 92 Kaedah 4 Kaedah-Kaedah Mahkamah 2012.

ANTARA

FAHRI AZZAT (NO. K/P: 751201-71-5019)

...PLAINTIF

DAN

1. YTL COMMUNICATIONS SDN BHD (SYARIKAT NO. 793634-V)

2. YTL DIGITAL SDN BHD (SYARIKAT NO. 236882-K)

(Kedua-dua Defendan juga dikenali sebagai YES)

...DEFENDAN-DEFENDAN

PLAINTIFF'S WRITTEN SUBMISSIONS

(Enclosure 1 | Plaintiff's Originating Summons dated 31.3.2017)

Introduction

1. The Plaintiff prays for the following reliefs (*see pg 2 – 3 of the Originating Summons dated 31.3.2017 ('OS')*):
 - 1.1 A declaration that the Defendants' service contract is a standard form contract as defined under Section 24A(b) of the Consumer Protection Act 1999 (**'CPA'**);
 - 1.2 A declaration that clauses 1(f), 1(h) and 11(b) of the Terms and Conditions of the Defendants' service contract (**'the disputed clauses'**) are unfair pursuant to Sections 24A(c), 24C(1), 24D(1)(a), 24D(1)(b) and 24D(1)(c) CPA where if found liable, may be convicted under Section 24I(1)(a) CPA;
 - 1.3 A declaration that the penalty of RM 582.40 imposed on the Plaintiff is unlawful (**'the penalty charge'**);
 - 1.4 The Defendants to refund RM 582.40 to the Plaintiff within 7 days of this Order; and
 - 1.5 General damages and interest.
2. All that the Plaintiff seeks concern legal issues of which material or disputed facts are not essential for this Court's consideration.

Brief Facts

3. For the benefit of this Court, the relevant facts in relation to the Plaintiff's claim are as follows:
 - 3.1 On 16.9.2015, the Plaintiff entered into a contract with the 1st Defendant for the subscription of "YES" wireless internet broadband for 2 years beginning 16.9.2015 until 16.9.2017 for a monthly payment of RM 78.00 (**the Contract**): *refer paragraph 2.1 of the Plaintiff's Affidavit in Support (PAIS)*.
 - 3.2 On 19.2.2017, the Plaintiff terminated the Contract before the term ended because the broadband often has no internet network and the internet service is unreliable: *refer paragraph 9 PAIS*. He was penalised for the early termination pursuant to clause 11(b) of the Terms and Conditions and had to pay the 1st Defendant RM 582.40: *refer p 31 exhibit FA-4 PAIS*.
 - 3.2.1 The 1st Defendant had mandated the Plaintiff to complete the Account Closure Request Form in order for it to process the termination request. By signing the form, the Plaintiff is also forced to admit all the debts imposed by the 1st Defendant: *refer exhibit FA-2 PAIS*.
 - 3.2.2 Since the Plaintiff is no longer interested in subscribing the 1st Defendant's service, he reluctantly acknowledged the form with reservation to his right to challenge the penalty charges: *refer exhibit FA-2 PAIS*.

3.3 On 23.2.2017, the Plaintiff issued a letter of demand (**'LOD'**) to the Defendants: *refer exhibit FA-5 PAIS*. The Defendants then replied on 16.3.2017 by email and enclosed the Terms and Conditions: *refer exhibit FA-6 of the Plaintiff's Affidavit in Reply* (**'PAIR'**).

3.3.1 That was the first time the Plaintiff was made aware of the Terms and Conditions: *refer paragraph 9.2 PAIR*.

3.4 Dissatisfied with some of the clauses in the Terms and Conditions, the Plaintiff is exercising his right as an aggrieved consumer under CPA and filed this proceedings against the Defendants on 31.3.2017.

3.4.1 The Plaintiff is challenging the disputed clauses on the basis they are unfair pursuant to Sections 24A(c), 24C(1), 24D(1)(a), 24D(1)(b) and 24D(1)(c) CPA and unlawful pursuant to Section 17 CPA and Section 75 of Contracts Act (**'CA'**).

4. The Plaintiff will submit as follows:

4.1 The disputed clauses of the Terms and Conditions are unfair pursuant to Sections 24A(c), 24C(1), 24D(1)(a), 24D(1)(b) and 24D(1)(c) CPA: *see paragraphs 11 – 13 PAIS* ('1st Issue'); and

4.2 The early termination clause of the Terms and Conditions is not enforceable and unlawful pursuant to Section 17 CPA and Section 75 CA: *see paragraph 14 - 15 PAIS* ('2nd Issue').

1st Issue: The disputed clauses contravene Sections 24A, 24C and 24D CPA

5. The Plaintiff was a consumer of the service supplied by the 1st Defendant as a supplier of “YES” wireless internet broadband as defined by CPA. Thus, the Registration Form, the Terms and Conditions of the 1st Defendant’s service contract together with the Account Closure Request Form form as a the Contract subject to CPA: *refer to Sections 2(1) and 3 CPA [TAB-A Plaintiff’s Bundle of Authorities (PBOA)] and Section 24B CPA [TAB-B] PBOA.*
6. The Registration Form, the Terms and Conditions of the 1st Defendant’s service contract and the Account Closure Request Form are standard forms drafted for general use in the telecommunication and internet industries as interpreted under Section 24A(b) CPA: *refer [TAB-B] PBOA.*
 - 6.1 The Terms and Conditions are separated from the Registration Form signed by the Plaintiff, whereby they are displayed on the Defendants’ website and can be amended by the 1st Defendant unilaterally pursuant to clause 15 of the Terms and Conditions: *see p 32 of exhibit FA-4 PAIS and exhibit A of Defendant’s Affidavit in Reply (DAIR).*
 - 6.2 The Account Closure Request Form is a standard form where the Plaintiff was compelled to complete in order for the 1st Defendant to process the termination request: *see exhibit FA-2 PAIS.*
 - 6.3 The Defendants admit that the Account Closure Request Form is a procedure set for the 1st Defendant’s record on all its customers who want to terminate the service provided by it: *see paragraph 19 DAIR.* In other words, since the Plaintiff wanted to terminate the Contract, he

must sign the form regardless whether the Plaintiff agrees with the terms and conditions of it.

6.4 Similarly, the Registration Form is a procedure set by the 1st Defendant for anyone who wishes to subscribe to its service regardless whether he agrees with the terms and conditions of it.

7. However, as a consumer, the Plaintiff is the weaker party in the contract as he was not wholly informed on the full and exact Terms and Conditions of the 1st Defendant's service contract upon signing the Registration Form. Although the Plaintiff signed the Registration Form, it was concluded without bargains and on the assumption that the Plaintiff automatically agrees to all the Terms and Conditions in the Defendants' website.

7.1 There was no freedom of contract whereby the Plaintiff is free to make whatever contract he wishes with the 1st Defendant on its service.

7.2 While many consumers are not aware on the implication of hidden terms and conditions and one-sided service contracts, the Plaintiff submits although he subscribed to the Plaintiff's service, it does not exclude his right to contend on the lawfulness and fairness of the Terms and Conditions and disputed clauses because remedy, no matter in what form, is a right for consumer protection.

8. The Plaintiff will emphasize on the disputed clauses of the Terms and Conditions of the 1st Defendant's service contract. They are as follows:

8.1 Clause 1(f): The actual service coverage area may differ from the service coverage map provided at the website.

- 8.2 Clause 1(h): The service is provided on an “as is” and “as available” basis and the 1st Defendant shall not be liable for the use of the service; and
- 8.3 Clause 11(b): If the Plaintiff terminates the agreement before the expiry of the contract period, he will be liable to pay the 1st Defendant early termination charges, i.e. the sum equivalent to the aggregate commitment fees for the unexpired contract period.
(see: pp 29 & 31 exhibit FA-4 PAIS)
9. The disputed clauses entitle the 1st Defendant to disclaim themselves from liability for the quality of services they rendered and automatically penalize the Plaintiff for early termination regardless of his reason.
10. So, based on the Terms and Conditions, if the Plaintiff is not satisfied with the 1st Defendant’s service, he cannot exercise his right to an early termination unless he pays for the remaining commitment fees for the unexpired period for a service that already frustrated him. Alternatively, he will have to bear with the Defendant’s poor service and keep paying for the monthly instalment until the completion of the contract period.
11. On the other hand, the 1st Defendant have the right to terminate the Plaintiff’s account on various grounds as stipulated under clause 10(b) of Terms and Conditions and is not subject to any charges or penalty for doing so. Instead, the Plaintiff or other consumers will have to pay the 1st Defendant for commitment fees, voice calls, SMS and any outstanding amounts: *see page 31 exhibit FA-4 PAIS.*

- 11.1 Many service agreements akin to the 1st Defendant's service contract have many unfair practices in favor of the supplier or service providers. Similarly, here, the 1st Defendant benefitted from the Plaintiff's early termination by charging him penalty. They also can unilaterally amend the contract without considering the rights of and impacts against the consumers and disclaim themselves for their services.
12. Further, these clauses are procedurally unfair pursuant to Section 24C(1) CPA (*refer: [TAB-B] PBOA*) because it resulted in unjust advantage to the 1st Defendant and unjust disadvantage to the Plaintiff for the following reasons:
- 12.1 The Plaintiff was never informed by the Defendants on the Terms and Conditions of the 1st Defendant's service contract upon subscribing to their service. He was only told on the monthly instalment sum and commencement of the service: *see paragraphs 9.1, 9.2 & 15 PAIR.*
- 12.2 The Plaintiff was never given the opportunity to bargain and negotiate on the Terms and Conditions: *refer section 24C(2)(b) CPA [TAB-B] PBOA.*
- 12.3 The Terms and Conditions is a standard form contract not amenable to amendment by the Plaintiff or any of the 1st Defendant's consumers: *refer section 24C(2)(d) CPA [TAB-B] PBOA.*
- 12.4 It was impossible for the Plaintiff to negotiate for the alteration or rejection of the Terms and Conditions because:

12.4.1 It was never shown and explained to the Plaintiff upon signing up for the 1st Defendant's service;

12.4.2 It is a unilateral agreement drafted by the 1st Defendant;

12.4.3 The terms were only available on the Defendants' website instead of the Registration Form which the Plaintiff signed;

Refer: section 24C(2)(e) CPA [TAB-B] PBOA

12.5 The Terms and Conditions is not fully mentioned or attached in the Registration Form and can only be found at the Defendants' website: *refer section 24C(2)(f) CPA [TAB-B] PBOA;*

12.6 The Plaintiff relied on the skill, care or advice of the Defendant's agent that the service covers his house and he will get good coverage in entering into the contract: *refer paragraph 2.2 PAIS and section 24C(2)(k) CPA [TAB-B] PBOA;*

12.7 Any other consumer will have to go through similar procedure with no bargaining or negotiation power in entering the contract and subject themselves to unfair standard terms including the penalty charges if he decides to terminate the contract before the expiry of the contract period: *refer section 24C(2)(j) CPA [TAB-B] PBOA.*

13. Moreover, these clauses are also substantially unfair pursuant to Section 24D CPA (*refer: [TAB-B] PBOA*) because they are harsh and oppressive standard forms: *refer section 24D(1)(a) & (b), 24D(2)(c) CPA [TAB-B] PBOA.* The Court should also consider the following:

- 13.1 The Account Closure Request Form is a standard form for the 1st Defendant's record: *see paragraph 19 DAIR*. However, the form forced the Plaintiff to admit whatever debts imposed by the 1st Defendant: *see clause 11 of exhibit FA-4 PAIS*. It is not a mere procedural form for record purpose. It is a form which forces the Plaintiff to admit and pay for the penalty due to early termination.
- 13.2 The Terms and Conditions entitles the 1st Defendant to terminate the contract unilaterally: *refer section 24D(2)(b)(iv) CPA [TAB-B] PBOA*; and
- 13.3 It also entitles the 1st Defendant to modify the terms of the contract unilaterally: *refer section 24D(2)(b)(v) CPA [TAB-B] PBOA*.
14. Based on the above, the disputed clauses are unfair and in contravention of the standard form agreement pursuant to CPA.
- 14.1 In the alternative, the Terms and Conditions are not enforceable as they are only available on the Defendants' website and are not attached or fully stated in the Registration Form and Account Closure Request Form. The Plaintiff did not sign Terms and Conditions and it was never brought to the Plaintiff's attention until after the Plaintiff received a reply from the Defendants' agent on the reply to his LOD.
15. The 1st and/or 2nd Defendants should be penalized under Section 24I (1) CPA for the above reasons.

2nd Issue: The early termination clause is not enforceable and unlawful pursuant to Section 17 CPA and Section 75 CA

16. The early termination clause pursuant to clause 11(b) of Terms and Conditions compels the Plaintiff to pay the 1st Defendant early termination charges, i.e. the sum equivalent to the aggregate commitment fees for the unexpired contract period following the early termination request. Essentially, it is a penalty.
17. The 1st Defendant penalised the Plaintiff by charging him the remaining 7 months' of unexpired contract period from March to September 2017: *refer to Exhibit FA-3 of PAIS.*
18. The contract is also subject to CA. This means the 1st Defendant must show that they have suffered losses following the early termination clause and are entitled impose penalty on the Plaintiff pursuant to Section 75 CA: *see [TAB-C] PBOA.*
19. The law on this is trite. In *Johor Coastal Development Sdn Bhd v. Constrajaya Sdn Bhd* [2009] 4 CLJ 569, the Federal Court held that a party cannot retain the moneys paid as compensation without proof of loss or damage. This is because the provision requires that in every case, the Court must determine what is reasonable compensation, “whether or not actual damage or loss is proved to have been caused thereby.”: *see paragraph 32 at TAB-D PBOA.*
20. Although there is clause 11(b) of Terms and Conditions which unjustly authorizes the 1st Defendant to impose penalty against the Plaintiff for early termination of the contract, they must first and foremost prove they suffered actual loss caused by the Plaintiff.

21. The Plaintiff submits the 1st Defendant do not suffer any losses following the early termination. At all material times, the Plaintiff has duly paid the monthly instalment as verified by the 1st Defendant: *see exhibit B DAIR*. The Plaintiff has not defaulted or caused losses to the 1st Defendant in any way.
22. Instead, the imposition of penalty against the Plaintiff had unjustly enriched or benefited the 1st Defendant as it gained RM 582.40 being the commitment fees for the remaining 7 months for services that it need not provide and the Plaintiff does not need: *see paragraph 12.4 PAIS*.
23. Given the harshness of the Terms and Conditions particularly the disputed clauses, it is manifestly unfair and unjust for the 1st Defendant to be enriched at the expense of the Plaintiff for early termination of the Contract pursuant to clause 11(b) of the Terms and Conditions, while not having to provide any service for the remaining 7 months to the Plaintiff and the Plaintiff not defaulting the Contract: *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd [2015] 2 MLJ 441 [TAB-E] PBOA*.
24. There is no basis for the Defendant to penalise the Plaintiff for exercising his right to an early termination of the Contract. Based on the above, the Plaintiff is entitled to the refund of RM 582.40.
25. Alternatively, the penalty charge is a form of future services contract pursuant to Section 17(1) CPA: *see [TAB-F] PBOA*. This provision defines a future services contract as a contract for consumer services that will be provided on a continuing basis and as prescribed by the Minister from time to time.

- 25.1 The category of future services prescribed by the Minister is listed under Section 2 of the Consumer Protection (Future Services Contract) (Amendment) Order 2014 (**‘CPFSC Order’**): *see [TAB-G] PBOA*.
- 25.2 Nevertheless, the list is not exhaustive and does not exclude other type of services. The aim of this provision is to prevent the suppliers from taking unjust advantage over the consumers.
26. If this Court thinks that the penalty charge is a future services contract, then the 1st Defendant can only impose penalty provided under Section 17(2) CPA: *see TAB-E PBOA*. But it did not.
27. In a nutshell, the Plaintiff submits that the Defendant is not entitled to the penalty charge as it fails to fulfil Section 75 CA. Alternatively, the penalty is excessive and unlawful, of which the Defendant can be penalised under Section 17(2) CPA.

Sum up

28. The disputed clauses are procedurally and substantively unfair to the Plaintiff as a consumer pursuant to 24A(c), 24C(1), 24D(1)(a), 24D(1)(b) and 24D(1)(c) CPA.
29. The penalty is unlawful pursuant to section 75 CA and Section 17 CPA and the Defendant should refund the sum paid by the Plaintiff.
30. The Plaintiff, therefore, humbly prays for an order in terms as prayed in the OS.

Dated 2 August 2017.



Solicitors for the Plaintiff

Messrs. Fahri & Co.

This **Plaintiff's Written Submission** is filed by Messrs Fahri & Co., solicitors for the Plaintiff whose address for service is at No. 15-2, Jalan PJU 7/16A, Mutiara Damansara, 47800 Petaling Jaya, Selangor Darul Ehsan.

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