

DALAM MAHKAMAH SESYEN DI KUALA LUMPUR
DALAM WILAYAH PERSEKUTUAN, MALAYSIA
(BAHAGIAN SIVIL)
SAMAN PEMULA NO. WA-B54-37-03/2017

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 Pengunna 1999, secara khususnya Seksyen 2, 6,17, 24A, 24B, 24C, 24E, 24I, 32 dan 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

HUJAHAN JAWAPAN DEFENDAN-DEFENDAN

Dengan Izin Tuan,

Pihak Defendan-Defendan dengan rendah diri memohon kebenaran Mahkamah yang Mulia ini untuk meneruskan hujahan Defendan-Defendan dalam Bahasa Inggeris.

1.0 Introduction

- 1.1 These are the Defendants' Reply Submissions, in reply to the Plaintiff's Written Submissions dated 2.8.2017 ("Plaintiff's Submissions").
- 1.2 We refer to the Defendants' Written Submissions dated 28.7.2017 ("the Defendants' Submissions") and adopt the expressions, definitions and abbreviations therein.

2.0 No basis for this Honourable Court to disregard material facts

- 2.1 At the outset, we would highlight that it is mischievous for the Plaintiff to suggest, as he seeks to do in paragraph 2 of the Plaintiff's Submissions, that all that he seeks "concerns legal issues" of which "material or disputed facts are not essential for this Court's consideration".
- 2.2 In the first place, it is not for the Plaintiff to usurp this Honourable Court's function in determining whether or not (or what) facts are material, relevant or essential in the present case. Furthermore, it is trite that he who alleges must prove. The Plaintiff must prove all material facts necessary to establish his cause of action herein, which we submit he has failed to do so.

- 2.3 More importantly, this court cannot possibly or properly determine the legal issues raised by the Plaintiff in the present case in a vacuum and without regard to the material facts. Otherwise, this court will essentially be deciding hypothetical or academic legal questions.
- 2.4 As VC George J (as he then was) observed in **Korea Development Corporation v. Government of Malaysia** [1986] 2 MLJ 53 at 54 [DBA, Vol. 2, Tab 19]:-

Also to be borne in mind is that the power to make a binding declaration of right is a discretionary remedy – Russian Commercial & Industrial Bank v British Bank for Foreign Trade [1921] 2 AC 438. Inter alia, the Court will not generally decide academical or hypothetical questions – Re Barnato [1949] Ch 258 or where the plaintiff's claim is too indirect or insubstantial and would not give him relief in any real sense i.e. relieve him from any liability or disadvantage or difficulty: Thorne Rural District Council v Bunting [1972] Ch 470. (Emphasis added)

- 2.5 If the Plaintiff insists that the court ought to embark on deciding hypothetical legal issues whereby actual or material facts to support the Plaintiff's claim are "not essential" and need not be proven, we submit that the Plaintiff's entire claim ought to be dismissed *in limine* with costs, as it is simply not the function of this Honourable Court to decide academic or hypothetical questions based on assumed facts which are not proven.

3.0 Plaintiff not credible and lacks *bona fides*

- 3.1 Having sought to dismiss or trivialize the material or disputed facts, the Plaintiff in the same breath goes on to set out the background facts in a misleading manner.
- 3.2 In this regard, we repeat the material background facts as set out in paragraphs 2.1 to 2.17 of the Defendants' Submissions. Further, we specifically address

certain aspects of the so-called factual background set out in paragraph 3 of the Plaintiff's Submissions below.

- 3.3 As to paragraph 3.1 of the Plaintiff's Submissions, we reiterate and emphasise that the Plaintiff had knowingly, willingly and voluntarily agreed to enter into the Contract for a minimum term of 24 months in order to obtain the "Huddle XS" device free of charge. Further, it is important to note the Plaintiff does not challenge the legality or fairness of the minimum contract term, the very term which the Plaintiff breached in seeking an early termination of the Contract.
- 3.4 As to paragraphs 3.2 to 3.2.2 of the Plaintiff's Submissions:-
- (a) it is misleading and incorrect for the Plaintiff to argue that he terminated the Contract due to any alleged poor quality of service. We repeat that the Plaintiff never made any complaint whatsoever regarding the quality of the Broadband Services provided by 1st Defendant, and the Plaintiff himself had positively averred in an earlier affidavit that his claim herein has nothing to do with the services or quality of services provided by the 1st Defendant: see paragraph 5.2 of the Plaintiff's 3rd Affidavit;
 - (b) it is misleading and incorrect for the Plaintiff to allege that he was "penalised" for the early termination of the Contract. There was never any penalty to begin with. We repeat that the Plaintiff himself was in breach of contract by seeking an early termination of the Contract, despite agreeing to a minimum term of 24 months in order to obtain the benefit of the free "Huddle XS" device. The Plaintiff now seeks to take advantage of his own wrong by seeking to challenge the validity of the Early Termination Charges in Clause 11(b) under the alleged guise of "unfair terms", which should not be condoned by this Honourable Court;
 - (c) the Plaintiff is not being candid or honest with this Honourable Court in attempting to portray himself as a lay consumer who was "forced" to do anything or did so "reluctantly" as alleged or at all. As we have already highlighted, the Plaintiff is a practicing advocate and solicitor and was

clearly capable of protecting his rights and interests throughout at all times: see paragraph 5.5 of the Defendants' Submissions;

- (d) the Plaintiff's lack of credibility is readily demonstrated by the Plaintiff's own written submissions: the Plaintiff in his written submissions (prepared by himself in the name of his own legal firm) makes numerous and detailed (albeit misconceived) legal arguments reflecting the level of his legal knowledge and training, yet in the same written submissions and in the same breath tries to portray himself as a weak, ignorant consumer unable to protect himself or understand what he was getting himself into. The Plaintiff's conduct herein does not disclose a *bona fide* legal grievance: it discloses gamesmanship.

- 3.5 As to paragraph 3.3.1 of the Plaintiff's Submissions, it is hardly credible for the Plaintiff to allege that he was only made aware of the Terms and Conditions "for the first time" in March 2017. As we have already submitted, as early as 16.9.2015, the Plaintiff had executed the 1st Defendant's Service Registration Form which referred to the terms and conditions of the Contract on the 1st Defendant's website. In fact, the Service Registration Form even clearly stated that upon termination of the Service Plan the Plaintiff was required to "*pay the early Termination Charges*": see **Exhibit D** of the Defendants' Further Affidavit. Again, being an advocate and solicitor, it is hardly credible for the Plaintiff to suggest that he signed documents without reading them. It is simply not open to the Plaintiff to "switch off" or "dis-apply" his legal training and knowledge and feign ignorance whenever it suits his needs.

4.0 No contravention of Sections 24A, 24C and 24D

- 4.1 Contrary to the Plaintiff's arguments in paragraphs 5 – 15 of the Plaintiff's Submissions, we submit that it is clear that there has been no contravention whatsoever of sections 24A, 24C and 24D of the Consumer Protection Act 1999 as alleged or at all. In this regard, we repeat paragraphs 4.1 to 5.19 of the Defendants' Submissions.

A. Contract is not "standard form contract"

- 4.2 Section 24A(b) of the Consumer Protection Act 1999 defines "*standard form contract*" to mean "*a consumer contract that has been drawn up for general use in a particular industry*".
- 4.3 However, we submit the Plaintiff has failed to prove that the Contract in question has been drawn up for "**general use**" in the communications and multimedia industry. The Contract and the relevant forms or procedures which were drawn up by the 1st Defendant merely contain the 1st Defendant's terms of business which only apply to its own customers. The Contract was not drawn up for "general use" in the industry.
- 4.4 We note that the definition of "standard form contract" in Section 24A(b) is **not** defined to mean a consumer contract that has been drawn up by a supplier for use in relation to its customers or where a person deals on the supplier's standard terms of business.
- 4.5 Comparison may be made with the Singapore Unfair Contract Terms Act 1994 (Chapter 396), where section 3(1) dealing with liability arising in contract, "applies as between contracting parties where one of them deals as consumer or on the other's written standard terms of business" [DBA, Vol. 2, Tab 20]. The Singapore Act makes it clear that the contract is one which applies as between consumer and supplier, and does not relate to any general use in the industry.
- 4.6 We have also referred to the General Consumer Code published by the Communications and Multimedia Consumer Forum, which is binding on all communications services providers including the 1st Defendant. Although the General Consumer Code prescribes the procedure or guidelines for terms and conditions of contracts with customers, it is left to the individual suppliers to formulate the exact content of such terms and conditions. It is therefore important to note that there is no standard form consumer contract "drawn up for general use" in the communications and multimedia industry.

4.7 Accordingly, we submit that the Plaintiff has failed to establish that the Contract in question was a "standard form contract" within the meaning of section 24A(b) of the Consumer Protection Act 1999.

B. Plaintiff raises various unpleaded and/or misleading issues

4.8 The Plaintiff's arguments in paragraphs 7 to 7.2 of the Plaintiff's Submissions again are mischievous as the Plaintiff is attempting to portray himself as a "weaker party", which is unreal and hardly credible in view of the fact that the Plaintiff is a practising advocate and solicitor. We repeat paragraph 3.4 above.

4.9 The Plaintiff at paragraphs 9 to 11.1 of the Plaintiff Submissions then make numerous arguments based on facts and issues which were **not pleaded** and/or which we submit are calculated to mislead this Honourable Court. We reply as follows:-

- (a) it is misleading and incorrect for the Plaintiff to speak of any "liability for quality of services rendered" when the Plaintiff never once complained of the quality of the services provided by 1st Defendant, and where the Plaintiff himself had positively averred in an earlier affidavit that his claim herein has nothing to do with the services or quality of services provided by the 1st Defendant: see paragraph 5.2 of the Plaintiff's 3rd Affidavit;
- (b) it is misleading and incorrect for the Plaintiff to suggest he is "automatically penalised" when the Plaintiff himself was in breach of contract by failing to complete the minimum term of 24 months, whereby the early termination charges merely seek to compensate the 1st Defendant for the losses it has suffered due to such breach and non-completion. There is simply no penalty involved;
- (c) there is no basis for the Plaintiff to make any arguments based on or with reference to Clause 10(b) of the Contract, when the Plaintiff does not

even challenge the legality or fairness of the said Clause 10(b) and never pleaded the same. It is clear that such attempt is merely to confuse this Honourable Court as to the true issues at hand;

- (d) the Plaintiff's allegation that there are "many service agreements" that have "many unfair practices" is a bare allegation which is **not pleaded** and in any event is unsupported by any credible evidence. It merely demonstrates how the Plaintiff is willing to make unsubstantiated allegations in order to bolster what is in reality a hopeless case;
- (e) the 1st Defendant did not "benefit" from the Plaintiff's early termination by "charging him penalty" as alleged or at all. Again, there is no penalty involved whatsoever. All that happened was that the Plaintiff was required to comply with his contractual obligation of paying early termination charges due to the Plaintiff failing to honour the minimum contract term of 24 months, which had resulted in the 1st Defendant being deprived of the revenue it would have earned if the Plaintiff did not breach the Contract.

C. Impugned Clauses neither procedurally nor substantially unfair

- 4.10 We repeat paragraphs 5.1 to 5.19 of the Defendants' Submissions and submit that the Impugned Clauses are neither procedurally nor substantially unfair as alleged or at all.
- 4.11 Insofar as procedural fairness is concerned, we would in particular reiterate and emphasize that the Plaintiff is a practising advocate and solicitor: he clearly understood and knew of the implications of the terms and conditions when the Contract was signed, and he was clearly capable of protecting his rights and interests throughout at all times. The reality is that all of the arguments made by the Plaintiff in paragraphs 12 to 12.7 of the Plaintiff's Submissions are mere afterthoughts.

- 4.12 On the other hand, insofar as substantive unfairness is concerned, we submit that the Plaintiff's arguments at paragraphs 13 to 13.3 are wholly irrelevant and ought to be disregarded completely by this Honourable Court. In this regard, we note that the Plaintiff now appears to complain about: (i) the 1st Defendant's Account Closure Request Form, (ii) the 1st Defendant's ability to terminate the contract unilaterally, and (iii) the 1st Defendant's ability to modify the terms of the contract. However, the Plaintiff never pleaded these facts or matters and never challenged the legality or fairness of these forms or clauses in its pleaded case. We submit the Plaintiff cannot be permitted to raise arguments in relation to these issues which were not pleaded. It is trite that parties are bound by their pleadings.
- 4.13 Indeed, we note that at paragraph 14.1 of the Plaintiff's Submissions, the Plaintiff now even seeks to argue that the entire Terms and Conditions of the Contract are not enforceable. Yet again, the Plaintiff never pleaded this and never challenged the legality or fairness of the entirety of the Terms and Conditions of the Contract in its pleaded case. We submit that the Plaintiff cannot be permitted to keep shifting the goalpost and changing the substance of his case at his whims and fancies, in blatant disregard of the rules of pleadings and (ironically) procedural and substantive fairness.

D. Section 24I(1) Consumer Protection Act 1999 not applicable.

- 4.14 As the Plaintiff has failed to prove that the Impugned Clauses are procedurally or substantially unfair, we submit that section 24I(1) of the Consumer Protection Act 1999 simply does not apply on the facts of the case.
- 4.15 However, for completeness, we note that section 24I(1) of the Consumer Protection Act 1999 provides that "(1) Any person who contravenes any of the provisions of this Part commits an offence and **shall on conviction** be liable ..."
- 4.16 It is clear that an offence committed under section 24I(1) of the Act is penal and criminal in nature. In this regard, it is important to note that **Section 147 of the Consumer Protection Act 1999** provides that "No prosecution for or in relation

to any offence under this Act shall be instituted without the written consent of the Public Prosecutor.” [DBA, Vol. 2, Tab 21].

- 4.17 It is absolutely clear that the Plaintiff has not obtained any written consent from the Public Prosecutor to seek a declaration that an offence has been committed under section 241(1) of the Consumer Protection Act 1999. In other words, the Plaintiff has no locus standi to seek such declaration.
- 4.18 Accordingly, the Plaintiff's prayer for a declaration that an offence has been committed under section 241(1) of the Consumer Protection Act 1999 is clearly an abuse of process of this Honourable Court. This further demonstrates the bad faith of the Plaintiff in attempting to seek such relief from this Honourable Court despite knowing full well that he had no consent from the Public Prosecutor to do so.

5.0 Early Termination Charges are lawful and enforceable.

- 5.1 The Plaintiff at paragraphs 16 to 24 of the Plaintiff's Submissions essentially argues that the Early Termination Charges in Clause 11(b) are a penalty. We submit that such arguments are wholly without merit and should be rejected. In this regard, we repeat paragraphs 6.1 to 6.9 of the Defendants' Submissions.
- 5.2 We further submit that the authority of **Johor Coastal Development Sdn Bhd v Constrajaya Sdn Bhd** [2009] 4 CLJ 569 does not at all assist the Plaintiff, as the 1st Defendant has clearly proven its losses in this case.
- 5.3 In particular, we repeat that the Early Termination Charges in Clause 11(b) are in nature of liquidated damages, being a genuine covenanted pre-estimate of damage or losses. The Early Termination Charges of RM582.40 are simply the contract sum which the 1st Defendant would have earned (7 months of unexpired contract period) if the Plaintiff had completed the agreed Contract Term of 24 months. These are the actual losses suffered by the 1st Defendant when the Plaintiff sought an early termination of the Contract.

It is the actual sum which the 1st Defendant would have been entitled to receive had the Contract been performed to its completion by the Plaintiff.

5.4 It is clear that the formula for computing the Early Termination Charges mirror or reflect the actual losses which would be suffered by the 1st Defendant upon such early termination by the Plaintiff. The matter is made clear once one considers what would happen if the Plaintiff refused to pay such charges: if the 1st Defendant commenced proceedings to recover damages from the Plaintiff for early termination in breach of the Contract, the losses which the 1st Defendant would have suffered are the revenue which it would have earned for the 7 months unexpired contract period, which is the exact same amount i.e. RM582.40. In this regard, that the Plaintiff has paid previous monthly installments, or that no services would be provided or received upon early termination are simply irrelevant.

5.5 Similarly, the Plaintiff's argument that the 1st Defendant would be "unjustly enriched" is wholly without merit. The case of **Dream Property Sdn Bhd v Atlas Housing Sdn Bhd** [2015] 2 MLJ 441 does not assist the Plaintiff at all. In that case, the Federal Court observed (at page 487) that a party:-

... can escape restitutionary liability by showing that there was a legal ground for receiving an enormously enhanced and improved asset ... The important point to note here is that the defendant was not required to benefit the plaintiff by legislations or by contract ... (Emphasis added)

5.6 In the present case, we submit that it is clear that the 1st Defendant has a legal ground for receiving and retaining the sum of RM582.40. The Plaintiff was required to pay the 1st Defendant by reason of Clause 11(b) of the Contract. Accordingly, the 1st Defendant has not been unjustly enriched.

5.7 In any event, we would highlight that yet again, the Plaintiff is seeking to now raise the issue of unjust enrichment which was never pleaded. This is impermissible and should not be allowed by this Honourable Court.

6.0 Contract is not a Future Services Contract

- 6.1 Finally, the Plaintiff at paragraphs 25 to 26 of the Plaintiff's Submissions alternatively argues that the Early Termination Charges in Clause 11(b) is a form of future services contract under section 17(1) of the Consumer Protection Act 1999.
- 6.2 We submit that such arguments are again wholly without merit and should be rejected. In this regard, we repeat paragraphs 7.1 to 7.4 of the Defendants' Submissions.
- 6.3 As we have earlier submitted, the Plaintiff has failed to prove that the Contract was a contract for consumer services "as prescribed by the Minister" under section 17(1) of the Consumer Protection Act 1999.
- 6.4 In fact, the Plaintiff himself has produced the Consumer Protection (Future Services Contract) (Amendment) Order 2014 which shows that the Contract in the present case is not a future services contract prescribed by the Minister. As such, section 17(1) of the Consumer Protection Act 1999 clearly does not apply to the Contract in the present case.
- 6.5 In the circumstances, the Plaintiff's argument that "*the list is not exhaustive and does not exclude other type of services*" is clearly absurd and not worthy of serious consideration. The Plaintiff is effectively inviting this Honourable Court to usurp the function of the Minister and to prescribe the present Contract as a "future services contract", when the Minister has not thought it fit to do so, and which the court in any event has no power or jurisdiction to do so. It is an outrageous and absurd argument which must be rejected.
- 6.6 If at all, we reiterate that the foregoing merely proves the point that the Plaintiff has raised numerous frivolous and baseless issues to attempt to bolster a hopeless case. This has unnecessarily and unreasonably protracted and added

to the costs and complexities of these proceedings, for which the Plaintiff ought to be made liable for costs.

7.0 CONCLUSION

7.1 For the foregoing reasons, we respectfully pray that the Plaintiff's claim herein be dismissed with costs.

Dated the 9th day of August 2017



Messrs. Dorairaj, Low & Teh
Solicitors for the Defendants'

This Defendants' Reply Submission is filed by Messrs Dorairaj, Low & Teh, Solicitors for the Defendants, whose address for service is at Tingkat 3, Wisma Maran, No.28 Medan Pasar, 50050 Kuala Lumpur.
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