

DALAM MAHKAMAH SESYEN DI KUALA LUMPUR
DALAM WILAYAH PERSEKUTUAN, MALAYSIA
(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)

...PLAINTIFF

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 IN REPLY

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

Introduction

1. This is the Plaintiff's reply to the Defendants' written submissions dated 28.7.2017. The Plaintiff will submit as follows:
 - 1.1 Consumer Protection Act 1999 ('**CPA**') is applicable to the Defendants notwithstanding the Communications and Multimedia Act 1998 ('**CMA**') and General Consumer Code of Practice for the Communications Industry Malaysia ('**GCCP**'); and
 - 1.2 Early Termination Charges is subject to Section 75 of Contracts Act 1950 ('**CA**').

Submissions

1st Issue: CPA is applicable notwithstanding CMA and GCCP

Applicability of CPA

2. The Communications and Multimedia Consumer Forum of Malaysia ('**CFM**') is a forum set up by the Malaysian Communications and Multimedia Commission ('**MCMC**'). It is not a government authority or a statutory body. Its roles relate to drafting, legal, membership, education and promotions, complaints, compliance and monitoring in the communication and multimedia industry.
3. It is pertinent to highlight that CFM does not have the jurisdiction to review and decide on the legality of the disputed clauses of the Terms and Conditions of the Defendants' service contract with CPA. Only the Courts can.

4. Even if the Plaintiff addresses his claim to CFM, it cannot declare a clause or the Terms and Conditions as unlawful. Further, CFM concerns more on the service by the service provider and grievances of a consumer which are unrelated to the Plaintiff's claim.
5. The Defendants submitted the provisions of CPA are excluded by the specific provisions relating to consumer protection under CMA and GCCP: *refer paragraph 4.20 Defendants' submissions* ('DS'). With due respect, GCCP is a guideline developed by CFM while CPA is a statute enacted by the Parliament. GCCP does not have any clauses on unfair terms as stipulated under CPA.
6. CPA is an all-encompassing statute concerning consumer protection in Malaysia, including consumers in the communication and multimedia industry. It lists specifically types of contracts which are not subject to CPA pursuant to section 2 CPA. Communication and multimedia industry does not fall in the list.
 - 6.1 While the impugned clauses are related to certain provisions in GCCP, Section 98(2) of CMA is applicable in so far as the Defendants' "so-called" compliance of GCCP. It does not extend to the Defendant's compliance on the unfair terms under CPA.
 - 6.2 The Defendants' reliance of complete defence pursuant to Section 98(2) of CMA is only with regards to the provisions in GCCP. Until and unless the law expressly extends the protection to CPA, the impugned clauses can be challenged under CPA.

6.3 Moreover, Section 24G(1) of CPA enables this Court to declare the impugned clauses as unenforceable or void. It also carries criminal liability under Section 24I(1) of CPA.

Impugned Clauses are Unlawful

7. While the Plaintiff terminated the Contract with the 1st Defendant due to the poor quality of the Defendants' internet signal, the Plaintiff submits he has the right to terminate the Contract at any time for any reason and the Defendants should not penalise the Plaintiff from doing so.

7.1 Just because there are clauses in the Terms and Conditions which enable the Defendants to penalise the Plaintiff and disclaim themselves from liability on their service do not mean that they are immune from the law.

8. It is worth highlighting that the Plaintiff is not contending on the sum of the early termination penalty: *refer paragraph 5.3 of DS*. Instead, the Plaintiff contends the penalty for early termination is unlawful and contravenes CPA.

8.1 It is unfair for a service provider to have the upper hand of penalising its consumer for an early termination of its service when in effect, it does not suffer any losses or prejudice from the termination. At most, it loses a customer. And the Plaintiff has not defaulted in his payment of the Defendants' service.

- 8.2 If this continues, aggrieved or dissatisfied consumers who are no longer interested in contracting with a service provider will have no choice but to wait until the contract expires or they risk paying for a penalty for exercising their rights to an early termination.
9. The Plaintiff's claim concerns on the unfair standard term contract by the Defendants which was prepared with little or no negotiation with the Plaintiff and other consumers prior to the execution of the contract. It operates on a 'take it or leave it' basis. The Defendants confirmed the same: *refer paragraph 5.5(b) DS*.
10. Consumers are often given standardized drafted agreements by the service provider which have been prepared in ways to fully protect itself against possible claims by the consumers. Although theoretically the Plaintiff may have the freedom to contract, in reality he has no choice but to sign the Contract if he wants to subscribe to the Defendants' service. In most cases, if a potential consumer refuses or disagrees on a certain clause in the standard form contract, the service provider will decline to proceed with the transaction.
11. The Defendants' suggestion that the Plaintiff should not have entered into the Contract does not solve the problem. It only affirms that the consumers do not have any bargaining power in negotiating for the contract. Even if the Plaintiff enters into another contract of similar service with another service provider, the standard form contract is likely to contain the same penalty clauses.

12. It is also unappealing for the Defendants to rely on the Plaintiff's profession as an advocate and solicitor and argued he had failed to prove the impugned clauses have resulted in an unjust advantage to the Defendants or unjust advantage to the Plaintiff pursuant to Sections 24C and 24D of CPA upon entering the Contract.

12.1 It does not matter if the Plaintiff is an advocate and solicitor, a doctor or an ordinary person. That was not the prerequisite or consideration when he signed for the Defendants' service. He entered the Contract not in the capacity as an advocate and solicitor but as an ordinary consumer.

12.2 The 1st Defendant was not bothered about the Plaintiff's profession when considering his eligibility to enter into the Contract. CPA too, does not distinguish between an advocate and solicitor and an ordinary person. Eventually, the Plaintiff is an aggrieved customer of the Defendants.

12.3 Therefore, the Court should not at this juncture consider the Plaintiff's profession as a basis to impose a higher test on the Plaintiff as oppose to what an ordinary consumer would be subjected to.

13. Based on the above, the Defendants do not have a complete defence on the impugned clauses as they are subject to CPA. This Court ought to assess their lawfulness.

Issue 2: Early Termination Charges is subject to Section 75 of CA

14. Early termination charges is a form of penalty. Even if it is not, the Federal Court has held that liquidated ascertained damages and penalty have no difference and are subject to Section 75 of CA: see *Selva Kumar s/o Murugiah v Thiagarajah s/o Retnasamy* [1995] 1 MLJ 817, FC [**TAB-H Plaintiff's Additional Bundle of Authorities ('PABOA')**].
15. If this Court decides the impugned clauses particularly clause 11(b) of the Terms and Conditions are lawful, the Defendants have a duty to adduce evidence and must first and foremost prove its actual damage or loss for its claim on the same pursuant to C. The provision states:

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

See: **TAB-I PABOA**

16. Any failure to prove such loss or damages particularly where the Defendants might suffer from (which is denied) and where it can be assessed within existing rules will result in the refusal of the Court to award such damages: see *Selva Kumar s/o Murugiah v Thiagarajah s/o Retnasamy* [1995] 1 MLJ 817, FC [**TAB-H PABOA**].

17. In short, the Defendants cannot rely on clause 11(b) of the Terms and Conditions to automatically penalise the Plaintiff. There is no proof to any loss. Until and unless the Defendants show this Honorable Court otherwise, the Defendants should not be entitled to an automatic benefit at the Plaintiff's expense: see *Johor Coastal Development Sdn Bhd v Constrajaya Sdn Bhd* [2009] 4 MLJ 445 at para 32 [**TAB-J PABOA**].
18. Moreover, unless there is a clause in the Contract which excludes the application of Section 75 of CA, parties are bound by the requirement therein: see *Johor Coastal Development* [**TAB-J PABOA**].
19. Also, neither the pleadings nor the affidavit show the Defendants' attempts to mitigate its losses following the early termination of the Contract. Essentially, the Defendants who have failed to mitigate the losses cannot later recover any such loss flowing from its neglect: see *Kabatasan Timber Extraction Co. v Chong Fah Shing* [1969] 2 MLJ 6 [**TAB-K PABOA**].
20. If this Court is not amenable to the Plaintiff's position and dismisses this suit, the Plaintiff submits the Defendants and other service provider will always be advantaged at the consumers expense each time there is an early termination of contract notwithstanding the reasons without them having to prove their loss pursuant to section 75 of CA 1950 and the cases of *Selva Kumar* and *Johor Coastal*.

Conclusion

21. Lastly, the Plaintiff, therefore, humbly prays for an order in terms as prayed in the summons.

Dated 14 August 2017.



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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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