

DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR

(BIDANGKUASA RAYUAN)

RAYUAN SIVIL NO. WA - 12ANCvC - 135 - 08/2017

ANTARA

FAHRI AZZAT (NO. K/P: [REDACTED])

...PERAYU

DAN

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

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

(Kedua-dua Responden juga dikenali sebagai YES) ...RESPONDEN-RESPONDEN

[Dalam Mahkamah Sesyen Di Kuala Lumpur
(Bahagian Sivil)]

Saman Pemula No. WA - B54 - 37 - 03/2017

Antara

Fahri Azzat (No. K/P [REDACTED])

...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

Diputuskan oleh Tuan Mohd Zulbahrin bin Zainuddin pada 17 Ogos 2017.]

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Overview

1. This is an appeal against a dismissal of an Originating Summons by the Sessions Court concerning declarations relating to the Consumer Protection Act 1999 (“**the Act**”) i.e. *whether a supplier may contractually require a consumer to pay for services that will not be supplied or to impose a disproportionate penalty to that effect.*

2. The sole issue for determination by this Court is:-

“Whether Clause 11(b) of the standard form contract dated 16-9-2015 between the Appellant consumer and the 1st Respondent supplier is an “unfair term” within the meaning of section 24D(1)(a) or (b) of the Act.”

3. Clause 11(a) and (b) of the said standard form contract reads:-

“11. Effect of Termination

a) Upon the termination of Your account/Agreement by either party You will be liable to Us for:

(i) the prorated Commitment Fee up to the date of termination for the Billing Cycle in which the termination occurred;

(ii) any voice calls, SMS and other services charges Incurred up to and including the effective date of termination; and

(iii) any outstanding amount(s).



b) Before the expiry of an applicable Contract Period, if You terminate this Agreement OR if this Agreement is terminated due to Your fault, *You shall* in addition to the foregoing sub-clause(a)(ii) and (iii) *be liable to pay Us the sum equivalent to the aggregate Commitment Fees for the unexpired Contract Period* (hereinafter referred to as “Early Termination Charges”)” [Emphasis added] (*R/P, Jilid 1, p. 71*)

4. The Session Court had completely failed to give effect to the express provisions of the Act. Thus, this is a matter warranting appellate intervention and clarification on the rights of consumers with respect to disproportionate penalties imposed by suppliers.

Facts

5. On 16-9-2015, the Appellant and the 1st Respondent entered into a standard form contract for the subscription of “YES” wireless internet broadband for two (2) years beginning 16-9-2015 till 16-9-2017 for a monthly payment of RM 78.00. (“**the Contract**”). The effect of clause 11(b) of the Contract was not explained, in person, to the Appellant: *R/P Tambahan, p. 281 (para 6) & pp. 283 – 284 (para 15)*
6. On 19-2-2017, the Appellant terminated the contract owing to his dissatisfaction of the quality of the service and/or perceived breaches of implied guarantees by the 1st Respondent under the Act: *R/P Tambahan, p. 282, para 11*
7. The 1st Respondent insisted on the enforcement of clause 11(b) of the Contract (“**the Impugned Clause**”) which required payment of the unexpired contract period (“**the Early Termination Charges**”). The

Appellant paid the Early Termination Charges *under protest*, that the Impugned Clause is “subject to legal challenge” on the grounds that the “charges for termination are unlawful”: *R/P, Jilid 1, p. 64*

8. On 31-3-2017, the Appellant filed the instant action in the Sessions Court for declarations relating to the Act (*R/P, Jilid 1, pp. 12 – 15*). This was dismissed on 17-8-2017 (*R/P, Jilid 1, pp. 7 – 8*), and an appeal to the High Court was lodged on 22-8-2017 (*R/P, Jilid 1, pp. 9 – 11*).

Grounds of Appeal (R/P Tambahan, pp. 277 – 279)

9. It is not in dispute that the Appellant was a “consumer”, the 1st Respondent a “supplier”, and the Contract a “standard form contract” within the meaning of sections 3 and 24A of the Act [*IAP, Tab 1*].

10. Pursuant to section 24A of the Act [*IAP, Tab 1*], it is submitted that the Impugned Clause results in a significant imbalance in the rights and obligation of the parties given that it forces consumers to pay the Early Termination Charges (without services being supplied) despite legitimate or economic reasons by consumers to terminate the Contract, such as:-

10.1 *Breaches of the implied guarantees by the 1st Respondent under the Act.* e.g. fitness for particular purpose (section 54) [*IAP, Tab 1*].

This defeats the purpose of consumer protection under the Act;

10.2 *The availability of similar services of better nature and quality by competitors of the 1st Respondent.* This stifles competition in the

marketplace among suppliers of similar services, and diminishes the capacity for consumers to make economic choices; and

10.3 *Personal or extenuating circumstances*: Even in unavoidable circumstances such as having to move abroad or emergencies requiring financial expenditure, consumers are imposed with an unnecessary financial burden.

11. Section 24D of the Act [*IAP, Tab 1*] reads:-

“(1) A contract or a term of a contract is substantively unfair if the contract or the term of the contract-

(a) is in itself *harsh*;

(b) is *oppressive*;

(c) is unconscionable;

(d) excludes or restricts liability for negligence; or

(e) excludes or restricts liability for breach of express or implied terms of the contract without adequate justification.

(2) For the purposes of this section, a court or the Tribunal may take into account the following circumstances:

(a) whether or not the contract or a term of the contract imposes conditions-



(i) which are unreasonably difficult to comply with; or

(ii) which are not reasonably necessary for the protection of the legitimate interests of the supplier who is a party to the contract;

(b) whether the contract is oral or wholly or partly in writing;

(c) whether the contract is in standard form;

(d) whether the contract or a term of the contract is contrary to reasonable standards of fair dealing;

(e) whether the contract or a term of the contract has resulted in a substantially unequal exchange of monetary values or in a substantive imbalance between the parties;

(f) whether the benefits to be received by the consumer who entered into the contract are manifestly disproportionate or inappropriate, to his or her circumstances;

(g) whether the consumer who entered into the contract was in a fiduciary relationship with the supplier; and

(h) whether the contract or a term of the contract-

(i) requires manifestly excessive security for the performance of contractual obligations;



(ii) *imposes penalties which are disproportionate to consequences of a breach of contract;*

(iii) denies or penalizes the early repayment of debts;

(iv) entitles the supplier to terminate the contract unilaterally without good reason or without paying reasonable compensation; or

(v) entitles the supplier to modify the terms of the contract unilaterally”
[Emphasis added]

12. The Impugned Clause is substantively unfair within the meaning of Section 24D of the Act i.e. it is harsh, if not oppressive, given that:-

12.1 *it imposes a condition that is not reasonably necessary for the protection of the legitimate interests of the 1st Respondent.* There is no necessity shown by the 1st Respondent as to why it needs to be compensated for the unexpired contract period. The 1st Respondent would incur no loss given that it will no longer be providing the services contracted for. Any physical transmission device provided for receipt of the internet service will be useless, and a return of the same can be contractually provided for. In fact, in the instant case, Appellant admits to returning the physical transmission device provided to the 1st Respondent after termination of the Contract.

12.2 *the contract is in standard form:* As admitted, a physical copy of the Contract was not even given to the Appellant; he was told to locate it on a website (*R/P, Jilid 1, p. 34, para 26*). The Appellant

was not given an opportunity, beforehand, to read, seek advice or negotiate on the Impugned Clause of the Contract. In effect, there was no prior consideration by the 1st Respondent supplier of the Appellant consumer's consent to the Impugned Clause; it was irrelevant to them. As a result, the Appellant was placed in a predicament i.e. he is compelled, or is forced, to be bound by the Impugned Clause of the Contract even if he disagreed with it.

12.3 *it is contrary to reasonable standards of fair dealing*: The UK High Court case of *The Office of Fair Trading v Ashbourne Management Services Ltd* [2011] EWHC 1237 (Ch) [IAP, Tab 2] is instructive on the issue of standards of fair dealing. The said case saw the High Court declare a contractual term which imposed an “obligation upon members [of gyms] to pay monthly subscriptions for the minimum period when they have overestimated the use they will make of their memberships and failed to appreciate that unforeseen circumstances may make their continued use of a gym impractical or their memberships unaffordable” to be an unfair term within the meaning of UK's Unfair Terms in Consumer Contracts Regulations 1999, Regulation 5 (at paras. 2, 50, 63, 116, 122, 124, 130, 132, 133, 162, 164, 167, 168, 171, 174 & 175). This, it is submitted, is on all fours with the instant dispute between the Appellant consumer and the 1st Respondent supplier.

12.4 *it has resulted in a substantially unequal exchange of monetary values or in a substantive imbalance between the parties*: There is no similar clause which applies to the 1st Respondent supplier i.e. “Before the expiry of an applicable Contract Period, if [the 1st

Respondent] terminates this Agreement OR if this Agreement is terminated due to [the 1st Respondent's] fault, [the 1st Respondent] shall be liable to pay [the Appellant] the sum equivalent to the aggregate Commitment Fees for the unexpired Contract Period", nor contractual alternatives provided for consumers in the situation mentioned in sub-paragraphs 10.1 – 10.3 above.

12.5 *it imposes penalties which are disproportionate to consequences of a breach of contract.* As an illustration, a consumer who terminates the Contract with the 1st Respondent after four (4) months owing to an unavoidable transfer of employment to a location out of Malaysia will have to pay RM1,560.00 as the Early Termination Charges. This is a disproportionate penalty. A penalty of one (1) month (RM 78.00), it is submitted, would be reasonable if not proportionate in all circumstance.

13. The Sessions Court took into account irrelevant considerations such as:-

13.1 *The Appellant's occupation:* The Act does not make any distinction in a consumer's occupation; all consumers are considered equal under the Act.

13.2 *That the Appellant has signed the contract.* If the Appellant had not signed the Contract he would not have rights under the Act to file this action. This argument by the 1st Respondent is a non-starter.

13.3 *The provisions of the Communications and Multimedia Act 1998 (“the CMA”) or policies of the Malaysian Communications and Multimedia Commission:* The CMA is a law “to provide for and to regulate the converging communications and multimedia industries” [IAP, Tab 3], while the Act is a law “for the protection of consumers” [IAP, Tab 1]. Thus, the CMA is not relevant to the determination of this dispute involving a “consumer” and a “supplier” under the Act.

14. Given matters above, it is submitted that there was a complete failure by the Sessions Court to determine the action according to law. This is particularly critical given Parliament’s intent, in 2010, when amending the Act to add section 24D i.e. to protect consumers from unfair contract terms, particularly in standard form contracts including those for the subscription of internet services:-

“Menteri Perdagangan Dalam Negeri, Koperasi dan Kepenggunaan [Dato’ Sri Ismail Sabri bin Yaakob]: Terima kasih Tuan Yang di-Pertua. Tuan Yang di-Pertua, saya memohon mencadangkan iaitu rang undang-undang bernama suatu akta untuk meminda Akta Pelindungan Pengguna 1999 (Akta 599) dibacakan kali yang kedua sekarang.

...

Bahagian baru 3A berkenaan terma kontrak tidak adil menetapkan peruntukan-peruntukan bagi melindungi pengguna daripada terma-terma tidak adil yang wujud dalam suatu kontrak terutamanya kontrak bentuk seragam. Kontrak bentuk seragam adalah kontrak di mana terma-termanya tidak dirunding atau dibincangkan terlebih dahulu.

Terma-terma ini pada kebiasaannya memihak atau menguntungkan pihak yang menyediakan terma-terma tersebut. Begitu juga persetujuan atau kerelaan pengguna terhadap syarat-syarat kontrak tidak dipertimbangkan seperti mana yang terdapat di dalam Kod Doktrin Kebebasan Kontrak yang sewajarnya diamalkan oleh kedua pihak yang bertransaksi. Keadaan ini memaksa pengguna terikat dengan terma-terma kontrak walaupun sering kali ia tidak adil kepada pengguna dan memberi peluang kepada pengedar atau penjual untuk menyalahgunakan kelebihan mereka dalam kontrak bentuk seragam bagi menindas pengguna.

Seperti Ahli-ahli Yang Berhormat sedia maklum, penggunaan kontrak bentuk seragam dalam urus niaga seharian merupakan cara berniaga yang diterima umum pada masa ini. Ini disebabkan ia berupaya meningkatkan kecekapan urus niaga, mengurangkan kos transaksi dan mempercepatkan proses pengendalian. Antara contoh kontrak bentuk seragam adalah seperti melanggan perkhidmatan telefon, saluran televisyen, *perkhidmatan internet*, keahlian pusat kesihatan dan khidmat letak kereta.

...

Pada tahun 2010 sahaja kementerian telah menerima sebanyak 38 aduan mengenai ketidakpuasan terhadap kontrak, ia termasuk dalam *perkhidmatan telekomunikasi*, perbankan, perkhidmatan kesihatan, pusat kecantikan dan bengkel kereta. *Dalam banyak keadaan, sering kali pengguna berhadapan dengan pihak pembekal daripada syarikat yang besar dan pada kebiasaannya pengguna hanya diberi pilihan untuk menerima atau tidak dengan izin, take it or leave it kontrak yang ditawarkan. Pengguna tidak diberikan peluang untuk membaca, mendapatkan nasihat berkenaan sesuatu terma atau merundingkan terma-terma dalam kontrak tersebut.*

Suka saya memaklumkan kepada Ahli-ahli Yang Berhormat bahawa kewujudan peruntukan khas berkenaan terma kontrak tidak adil bukanlah bertujuan untuk mengekang kemajuan dan kelancaran yang diwujudkan melalui penggunaan kontrak bentuk seragam. Akan tetapi ia bertujuan untuk *memastikan doktrin niat baik di dalam berkontrak dengan izin, good faith in contract wujud dalam transaksi di antara pengguna dan peniaga.*

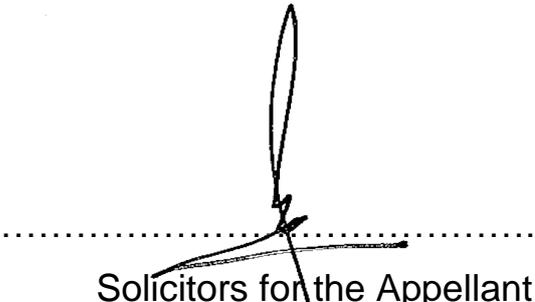
Ini secara langsung akan *mewujudkan suasana perniagaan yang beretika* dan untuk memastikan *amalan-amalan perdagangan yang baik diutamakan di dalam ekonomi negara.* Banyak negara telah pun mempunyai perundangan berkaitan terma kontrak tidak adil seperti *United Kingdom, Korea, Singapura dan Brunei.* Oleh yang demikian, peruntukan baru berkenaan terma kontrak tidak adil di bawah Akta 599 adalah merupakan satu lagi langkah ke hadapan, yang telah diambil oleh kerajaan dalam usaha *memberikan perlindungan berterusan kepada pengguna di negara ini.*” [Emphasis added] (Penyata Rasmi Parlimen, Dewan Rakyat, 9-6-2010, Rang Undang-Undang Pelindungan Pengguna (Pindaan) 2010, Bacaan Kali Yang Kedua dan Ketiga, pp. 50 – 53) [IAP, Tab 4]

15. The allowance of this appeal incurs no loss to a big company like the 1st Respondent; who is at liberty to revise their standard form contracts. Indeed, it is with a determination such as this by the High Court under the Act that ensures that companies like the 1st Respondent are well informed about what amounts to an “unfair term” in their consumer contracts and guides their business practices. In that regard, this appeal will have a far reaching consequence to trade, business and industries in Malaysia i.e. it ensures, as the Minister has stated above, “that an ethical business environment is created and good trade

practices are prioritized within the national economy”. Consumers shouldn’t have to be required to pay for services that will not be supplied or to be imposed with a disproportionate penalty to that effect. These terms are, with respect, unfair by the standards of any reasonable consumer.

16. Accordingly, the question in paragraph 2 above should be answered in the *affirmative*: *That Clause 11(b) of the standard form contract dated 16-9-2015 between the Appellant consumer and the 1st Respondent supplier is an “unfair term” within the meaning of section 24D(1)(a) or (b) of the Act.*
17. In that light, the Appellant prays for this appeal to be allowed with costs and the appropriate declarations granted.

Dated this 8th day of January 2018



Solicitors for the Appellant
Messrs Fahri & Co.

This **Appellant’s Outline Submissions** is filed by the Messrs Fahri & Co, the Appellant’s solicitors, with the address for service at No. 15-2, Jalan PJU 7/16A, Mutiara Damansara, 47800 Petaling Jaya, Selangor.
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