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Dr HK Fong Brainbuilder Pte Ltd v SG-Maths Sdn Bhd & Ors

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(1PCv)(W)-367–02 OF 2018
KAMARDIN HASHIM, KAMALUDIN MD SAID AND LAU BEE LAN JJCA
13 AUGUST 2020

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Contract — Formation — Master licence agreement (MLA) — Parties also executed guarantee and power of attorney — Whether the MLA 2013 was franchise under the Franchise Act 1998 — Whether failure to register the franchise rendered it illegal and void under the Contracts Act 1950 — Whether trial judge erred in finding the MLA 2013 unenforceable — Whether if MLA 2013 was illegal and void the personal guarantee and the power of attorney that arose from the MLA 2013 were also illegal, void and unenforceable — Whether MLA 2013, the guarantee and power of attorney, form a single composite transaction — Unjust enrichment — Whether plaintiff had proven a cause of action in unjust enrichment against first, second and third defendants

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Civil Procedure — Appeal — Interference by appellate court — Whether there were appealable errors committed by trial judge which warranted appellate intervention — Counterclaim — Whether first, second and third defendants ought to have filed a notice of appeal against the dismissal of the counterclaim

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Dr HK Fong Brainbuilder Pte Ltd ('the plaintiff'), was a company incorporated in Singapore by one Dr Fong Ho Keong ('Dr Fong'), a Singaporean who claims to have developed a business to use certain methods to teach mathematics to students in primary and secondary schools (the 'Brainbuilder' business). Lim Sau Leong ('the second defendant') and Leong Chun Piew ('the third defendant'), who were interested in the Brainbuilder business, set up SG-MATHS Sdn Bhd (the first defendant) in Malaysia. The second and third defendants owned 85% of the first defendant while Dr Fong owned the remaining 15%. The plaintiff company entered into a Master License Agreement (the MLA) with the first defendant on 26 February 2008 and when that expired another MLA in 2013 (the MLA 2013). The MLA 2013 allowed the first defendant to, among others, operate and manage the 'BrainBuilder' business in Malaysia. The parties also executed a guarantee and power of attorney. The plaintiff also claimed that Lum Chee Gheet ('the fourth defendant'), the second defendant's daughter had taken over a registered business from the second and third defendants and also established two other centres (the fifth and sixth defendants), which were in competition with the plaintiff. The plaintiff then terminated the MLA 2013 but the first defendant

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had not complied with the post-termination provisions in the MLA 2013. This prevented the plaintiff from taking over the first defendant and other BrainBuilder Business centres operated by the first defendant. The plaintiff filed an action for conspiracy to defraud and breach of confidence against the six defendants. By way of this action the plaintiff sought inter alia, to compel the second to sixth defendants to cease all businesses that were in competition with the plaintiff and for the return of all materials resembling the plaintiff's BrainBuilder Business; to restrain the defendants from destroying the first defendant's business details; for general, aggravated and exemplary to be paid by the defendants jointly and severally; and for the first, second and third defendants to make restitution to the plaintiff for loss and damage. In response the defendants alleged that they had been misled by the plaintiff to believe that it owned the method to teach mathematics to students in primary and secondary schools (the 'Brainbuilder' business), when in actual fact this method was based on Singapore's Mathematics Syllabus, which was owned by the Singapore Government. The defendants also claimed that the termination of the MLA 2013 was an attempt by the plaintiff to take over the first defendant without paying the agreed RM2.5m to the second and third defendants. Consequently, the first, second and third defendants counterclaimed against the plaintiff for a declaration that the MLA 2013 and the guarantee were invalid, for a refund of all monies paid by the first defendant to the plaintiff and for damages to be assessed. The defendants argued that if the High Court ruled the MLA 2013 was illegal, it ought to order the plaintiff to refund the sum of RM1,078,781 paid by the first to third defendants to the plaintiff. The trial judge found the MLA 2013 to be a franchise under the Franchise Act 1998 ('the FA') and that the plaintiff and the first defendant had breached s 6A(1) of the FA. Since the franchise was never registered by the plaintiff under the FA, the trial judge found it was illegal and void under the Contracts Act 1950 ('the Act') and as such unenforceable against the first to third defendants. The trial judge further held that as the MLA 2013 was illegal and void the personal guarantee and the power of attorney that arose from the MLA 2013 were also illegal, void and unenforceable. The High Court held that the plaintiff failed to establish the cause of action of conspiracy to defraud and breach of confidence against the second to sixth defendants. The High Court also refused to order restitution of the monies paid by the first defendant to the appellant under the illegal MLA 2013. Consequently, the High Court dismissed the plaintiff's claim with no order as to costs and the first to third defendants' counterclaim with no order as to costs. This was the plaintiff's appeal against the decision of the High Court and the defendants' cross-appeal against the dismissal of its counterclaim. The plaintiff appealed on the grounds that the trial judge had erred in applying the purposive approach to ascribe a wide interpretation to the word 'franchisor' in s 4 of the FA to include 'foreign franchisor' and on the other hand applied the literal approach to construe s 6 of the FA to warrant the plaintiff to register.

Held dismissing the appeal and the cross-appeal and ordering the plaintiff/appellant to pay global costs in the sum of RM10,000 to each respondent:

(1) The trial judge was correct in his findings that the BrainBuilder Business is a 'franchise' under s 4(a), (b), (c) and (e) of the FA. Further the purposive construction used by the trial judge is supported by the long title of the FA. However, it is settled law that once the trial judge had chosen to adopt the purposive then that method will replace the literal method of construction (see paras 24–27).

(2) The plaintiff's argument that the trial judge when interpreting the FA ought to have taken into consideration that the 'Buku Panduan', had no merit. The 'Buku Panduan' which serves as a guideline for the registration of franchise business was issued by the Minister of Domestic Trade and Consumer Affairs pursuant to s 60 of the FA. The question of taking any judicial notice does not arise because it was clear that the 'Buku Panduan' has not been issued pursuant to any enabling provision under the FA for it to have the force of law. As such, it was unnecessary to refer to the 'Buku Panduan' (see paras 28–31).

(3) Use of the word 'shall' in ss 6(1) and 6A(1) of the FA clearly shows Parliament's intention for these provisions to have mandatory effect. Dr Fong's explanation that it was the responsibility of the first, second and third defendants to register the franchise was untenable in light of our finding that s 6(1) of the FA applied to a foreign franchisor. In the circumstances, the trial judge was correct in finding that the registration of the franchise is imperative and that non-registration of the same will render the franchise agreement void and unenforceable. Further, even if it was the first defendant's failure not to register the BrainBuilder Business under s 6A(1) of the FA, the plaintiff could have exercised the power granted by the first defendant to the plaintiff under the power of attorney to apply to the Registrar (as the first defendant's lawful attorney) to register under s 6A(1) of the FA (see paras 36–40).

(4) The finding of the learned judge that the three documents, that was the MLA 2013, the Guarantee and power of attorney, 'form a single composite transaction' falls within the purview of the ratio of the Federal Court in *Malayan Banking Bhd v Neway Development Sdn Bhd & Ors* [2017] 5 MLJ 180. As such, the illegality of the MLA 2013 will consequently taint the guarantee and the power of attorney. Further, by parity of reasoning the guarantee and the power of attorney will likewise be void in their entirety under s 24(a) and/or 24(b) of the Act. Since the three documents are void, it was not necessary to deal with the plaintiff's appeal against the trial judge's findings on conspiracy to defraud it and breach of confidence. This was because both these causes of action in tort

will only arise on the assumption that the three documents are valid (see paras 46–48).

(5) A perusal of the plaintiff's list of issues to be tried shows that the trial judge was correct in stating that the cause of action in unjust enrichment is not listed as an issue to be tried. It was clear that the plaintiff had failed to prove a cause of action in unjust enrichment as the plaintiff had not pleaded in the statement of claim that the first to third defendants had been unjustly enriched at the plaintiff's expense. Hence, there were no appealable errors committed by the trial judge which warranted appellate intervention (see paras 50–52, 64 & 75).

(6) The first to third defendants by seeking restitution sought to vary a substantive finding of the court. As such, they ought to have filed a notice of appeal against the dismissal of the counterclaim and not seek to vary the decision of the High Court. The defendants should not be allowed to raise the dismissal of their counterclaim through the notice of cross appeal as to do so was tantamount to allowing them to seek relief through the backdoor (see paras 67–72).

[Bahasa Malaysia summary

Dr HK Fong Brainbuilder Pte Ltd ('plaintif'), adalah sebuah syarikat yang ditubuhkan di Singapura oleh Dr Fong Ho Keong ('Dr Fong'), seorang warga Singapura yang mendakwa telah mewujudkan suatu perniagaan untuk menggunakan kaedah tertentu untuk mengajar matematik kepada pelajar di sekolah rendah dan menengah (perniagaan 'Brainbuilder' tersebut). Lim Sau Leong ('defendan kedua') dan Leong Chun Piew ('defendan ketiga'), yang berminat dalam perniagaan Brainbuilder, menubuhkan SG-MATHS Sdn Bhd (defendan pertama) di Malaysia. Defendan kedua dan ketiga memiliki 85% daripada defendan pertama sementara Dr Fong memiliki baki 15%. Syarikat plaintif menandatangani perjanjian lesen induk (MLA) dengan defendan pertama pada 26 Februari 2008 dan apabila ianya tamat MLA selanjutnya pada tahun 2013 (MLA 2013). MLA 2013 membenarkan defendan pertama, antara lain, mengendalikan dan menguruskan perniagaan 'BrainBuilder' di Malaysia. Pihak-pihak juga menandatangani Jaminan dan Surat Wakil Kuasa. Plaintif juga mendakwa bahawa Lum Chee Gheet ('defendan keempat'), anak perempuan defendan kedua telah mengambil alih perniagaan berdaftar dari defendan kedua dan ketiga dan juga menubuhkan dua pusat lain ('defendan kelima dan keenam'), yang bersaing dengan plaintif. Plaintif kemudian menamatkan MLA 2013 tetapi defendan pertama tidak mematuhi peruntukan pasca-penamatan dalam MLA 2013. Ini menghalang plaintif mengambil alih defendan pertama dan pusat Perniagaan BrainBuilder lain yang dikendalikan oleh defendan pertama. Plaintif memfailkan tindakan konspirasi untuk menipu dan perlanggaran kerahsiaan terhadap keenam-enam defendan. Melalui tindakan ini, plaintif memohon antara lain, untuk menyebabkan defendan kedua hingga keenam bagi menghentikan kesemua

perniagaan yang bersaing dengan plaintif dan mengembalikan kesemua bahan yang menyerupai Perniagaan BrainBuilder milik plaintif; untuk menahan defendan daripada memusnahkan butiran perniagaan defendan pertama; gantirugi am, buruk dan teladan untuk dibayar oleh defendan secara bersesama dan berasingan; dan bagi defendan pertama, kedua dan ketiga untuk membuat restitusi kepada plaintif atas kerugian dan kerosakan. Sebagai balasan, defendan mendakwa bahawa mereka telah dikelirukan oleh plaintif untuk mempercayai bahawa ia memiliki kaedah untuk mengajar matematik kepada pelajar di sekolah rendah dan menengah (perniagaan 'Brainbuilder' tersebut), padahal sebenarnya kaedah ini berdasarkan Sukatan Pembelajaran Matematik Singapura, yang dimiliki oleh Kerajaan Singapura. Defendan juga mendakwa bahawa penamatan MLA 2013 adalah cubaan plaintif untuk mengambil alih defendan pertama tanpa membayar RM2.5 juta yang dipersetujui kepada defendan kedua dan ketiga. Lanjutan dari itu, defendan pertama, kedua dan ketiga membuat tuntutan balas terhadap plaintif untuk suatu deklarasi bahawa MLA 2013 dan jaminan tidak sah, untuk pembayaran balik kesemua wang yang telah dibayar oleh defendan pertama kepada plaintif dan untuk penaksiran kerugian. Defendan berpendapat bahawa sekiranya Mahkamah Tinggi memutuskan MLA 2013 adalah tidak sah, ianya akan memberikan perintah kepada plaintif untuk mengembalikan sejumlah RM1,078,781 yang telah dibayar oleh defendan pertama hingga ketiga kepada plaintif. Hakim perbicaraan memutuskan bahawa MLA 2013 sebagai francais di bawah Akta Francais 1998 ('AF') dan bahawa plaintif dan defendan pertama telah melanggar s 6A(1) AF. Oleh kerana francais tidak pernah didaftarkan oleh plaintif di bawah AF, hakim perbicaraan mendapati ianya tidak sah dan terbatal di bawah Akta Kontrak 1950 ('Akta tersebut') dan dengan itu tidak dapat dilaksanakan terhadap defendan pertama hingga ketiga. Hakim perbicaraan selanjutnya memutuskan bahawa oleh kerana MLA 2013 adalah tidak sah dan membatalkan jaminan peribadi dan Surat Wakil Kuasa yang berbangkit dari MLA 2013 juga adalah tidak sah, terbatal dan tidak dapat dilaksanakan. Mahkamah Tinggi berpendapat bahawa plaintif gagal membuktikan kausa tindakan konspirasi untuk menipu dan perlanggaran kerahsiaan terhadap defendan kedua hingga keenam. Mahkamah Tinggi juga enggan membenarkan restitusi wang yang telah dibayar oleh defendan pertama kepada perayu di bawah MLA 2013 yang tidak sah. Oleh itu, Mahkamah Tinggi menolak tuntutan plaintif tanpa perintah mengenai kos dan tuntutan balas defendan pertama hingga ketiga tanpa perintah mengenai kos. Ini adalah rayuan plaintif terhadap keputusan Mahkamah Tinggi dan rayuan balas defendan terhadap penolakan tuntutan balasnya. Plaintif merayu dengan alasan bahawa hakim perbicaraan telah terkhilaf dalam menerapkan pendekatan tujuan untuk memberikan tafsiran yang meluas kepada perkataan 'franchisor' dalam s 4 AF untuk memasukkan 'franchisor asing' dan sebaliknya menggunakan pendekatan harfiah dalam menafsirkan s 6 AF untuk membenarkan plaintif untuk mendaftar.

Diputuskan menolak rayuan dan rayuan balas dan memerintahkan plaintif/perayu membayar kos global berjumlah RM10,000 kepada setiap responden:

(1) Hakim perbicaraan tepat dalam dapatan beliau bahawa Perniagaan BrainBuilder adalah 'francais' di bawah s 4(a), (b), (c) dan (e) AF. Selanjutnya pendekatan tujuan yang diguna pakai oleh hakim perbicaraan disokong oleh tajuk AF. Namun, ianya dalah undang-undang yang mantap bahawa setelah hakim perbicaraan memilih untuk mengguna pakai pendekatan tujuan maka kaedah tersebut akan menggantikan kaedah pendekatan harfiah (lihat perenggan 24–27).

(2) Hujahan pihak plaintif bahawa hakim perbicaraan ketika membuat penafsiran AF harus mempertimbangkan sebagai 'Buku Panduan', tidak mempunyai merit. 'Buku Panduan' yang berfungsi sebagai garis panduan untuk pendaftaran perniagaan francais dikeluarkan oleh Kementerian Perdagangan Dalam Negeri dan Hal Ehwal Pengguna berdasarkan s 60 AF. Persoalan dalam mengambil notis kehakiman tidak timbul kerana jelas bahwa Buku Panduan belum dikeluarkan berdasarkan peruntukan di bawah AF bagi memberikan kesan dalam undang-undang. Oleh itu, ianya adalah tidak perlu untuk merujuk kepada Buku Panduan (lihat perenggan 28–31).

(3) Penggunaan kata 'hendaklah' dalam ss 6(1) dan 6A(1) AF menunjukkan dengan jelas niat Parlimen agar peruntukan ini memberikan kesan mandatori. Penjelasan Dr Fong bahawa ianya adalah tanggungjawab defendan pertama, kedua dan ketiga untuk mendaftarkan francais tidak dapat dipertahankan berdasarkan penemuan kami bahawa s 6(1) FA terpakai untuk francaisor asing. Dalam keadaan tersebut, hakim perbicaraan tepat dalam membuat dapatan bahawa pendaftaran francais adalah mustahak dan bahawa tidak membuat pendaftaran akan menjadikan perjanjian francais terbatal dan tidak dapat dilaksanakan. Selanjutnya, sekiranya ianya adalah kegagalan defendan pertama untuk tidak mendaftarkan Perniagaan BrainBuilder berdasarkan s 6A(1) AF, plaintif dapat menggunakan kuasa yang diberikan oleh defendan pertama kepada plaintif di bawah surat wakil kuasa untuk memohon kepada Pendaftar (sebagai peguam sah defendan pertama) untuk mendaftar di bawah s 6A(1) AF (lihat perenggan 36–40).

(4) Dapatan hakim yang bijaksana bahawa tiga dokumen, iaitu MLA 2013, jaminan dan surat wakil kuasa, 'membentuk satu transaksi komposit' berada dalam dapatan Mahkamah Persekutuan dalam *Malayan Banking Bhd v Neway Development Sdn Bhd & Ors* [2017] 5 MLJ 180. Oleh itu, MLA 2013 yang tidak sah akan menjejaskan Jaminan dan Surat Wakil Kuasa. Selanjutnya, dengan menimbang dapatan, Jaminan dan Surat Wakil Kuasa juga akan terbatal secara keseluruhannya di bawah s 24(a)

dan/atau 24(b) Akta tersebut. Oleh kerana tiga dokumen tersebut terbatal, ianya tidak ada keperluan untuk menangani rayuan plaintif terhadap dapatan hakim perbicaraan mengenai konspirasi untuk menipu dan perlanggaran kerahsiaan. Ini kerana kedua-dua kausa tindakan ini hanya akan timbul dengan anggapan bahawa tiga dokumen tersebut adalah sah (lihat perenggan 46–48).

(5) Penelitian terhadap senarai isu untuk dibicarakan oleh plaintif menunjukkan bahawa hakim perbicaraan tepat dalam menyatakan bahawa kausa tindakan dalam pengkayaan yang tidak wajar tidak disenaraikan sebagai isu yang akan dibicarakan. Ianya jelas bahawa plaintif telah gagal membuktikan kausa tindakan pengkayaan yang tidak wajar kerana plaintif tidak memplidkan dalam pernyataan tuntutan bahawa defendan pertama hingga ketiga telah diperkaya secara tidak wajar terhadap plaintif. Oleh itu, tidak ada kesalahan oleh hakim perbicaraan yang dapat dirayu yang membenarkan campur tangan mahkamah rayuan (lihat perenggan 50–52, 64 & 75).

(6) Defendan pertama hingga ketiga dalam memohon restitusi berusaha untuk mengubah keputusan penting mahkamah. Oleh yang demikian, mereka seharusnya memfailkan notis rayuan terhadap penolakan tuntutan balas dan tidak berusaha mengubah keputusan Mahkamah Tinggi. Defendan tidak seharusnya dibenarkan untuk membangkitkan penolakan tuntutan balas mereka melalui notis rayuan balas kerana dalam berbuat demikian sama dengan membiarkan mereka memohon relif melalui pintu belakang (lihat perenggan 67-72).]

Cases referred to

Barisan Tenaga Perancang (M) Sdn Bhd v Dr Mansur Bin Hussain & Ors [2016] MLJU 1251; [2017] 2 MLRH 177, HC (refd)

DYTM Tengku Idris Shah ibni Sultan Salahuddin Abdul Aziz Shah v Dikim Holdings Sdn Bhd & Anor [2002] 2 MLJ 11; [2002] 1 MLRA 116, FC (refd)

Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd (Bar Council Malaysia, intervener) [2004] 2 MLJ 257; [2004] 1 CLJ 701, FC (refd)

David Hey v New Kok Ann Realty Sdn Bhd [1985] 1 MLJ 167, FC (refd)

Dr Lee Chong Meng v Abdul Rahman bin Hj Abdullah, Returning Officer & Ors [2000] 6 MLJ 98; [2000] 3 CLJ 519, HC (refd)

Dream Property Sdn Bhd v Atlas Housing Sdn Bhd [2015] 2 MLJ 441; [2015] 2 CLJ 453, FC (refd)

Edwin Thomas v F&N Beverages Marketing Sdn Bhd & Anor [2016] MLJU 1437; [2016] 1 LNS 1645, HC (refd)

Foo Loke Ying & Anor v Television Broadcasts Ltd & Ors [1985] 2 MLJ 35; [1985] CLJ Rep 122, SC (folld)

Gan Yook Chin (P) & Anor v Lee Ing Chin@ Lee Teck Seng & Ors [2005] 2 MLJ 1, FC (refd)

Kabushiki Kaisha Ngu v Leisure Farm Corp Sdn Bhd & Ors [2016] 5 MLJ

557; [2016] 8 CLJ 149, FC (refd)
Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd [1971] AC 850, HL (refd)
Krishnadas a/l Achutan Nair & Ors v Maniyam a/l Samykano [1997] 1 MLJ 94; [1997] 1 CLJ 636, FC (folld)
Lai Soon Onn v Chew Fei Meng and other appeals [2019] 2 MLJ 96; [2018] 10 CLJ 48, CA (refd)
Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor [2003] 2 MLJ 97; [2003] 2 CLJ 19, CA (refd)
Lim Seng Kiat & Anor v Jee Hing Lim & Anor [2015] MLRHU 1, HC (refd)
Liputan Simfoni Sdn Bhd v Pembangunan Orkid Desa Sdn Bhd [2019] 4 MLJ 141; [2019] 1 CLJ 183, FC (distd)
Lori (M) Bhd (interim receiver) v Arab-Malaysian Finance Bhd [1999] 3 MLJ 81; [1999] 2 CLJ 997, FC (refd)
Malayan Banking Bhd v Neway Development Sdn Bhd & Ors [2017] 5 MLJ 180, FC (refd)
Merong Mahawangsa Sdn Bhd & Anor v Dato' Shazryl Eskay bin Abdullah [2015] 5 MLJ 619; [2015] 5 MLRA 377, FC (refd)
Munafsya Sdn Bhd v Proquaz Sdn Bhd [2012] MLRHU 1, HC (refd)
Nabors Drilling (Labuan) Corp v Lembaga Perkhidmatan Kewangan Labuan [2018] MLJU 636; [2019] 1 CLJ 277, HC (refd)
Nothman v Barnet London Borough Council [1978] 1 WLR 220, CA (refd)
Ooi Soon Eng v Ng Kee Lin [1980] 1 MLJ 26; [1979] 1 LNS 61, FC (refd)
Palm Oil Research and Development Board Malaysia & Anor v Premium Vegetable Oils Sdn Bhd & another appeal [2005] 3 MLJ 97; [2004] 2 CLJ 265, FC (refd)
Pang Mun Chung & Anor v Cheong Huey Charn [2018] 4 MLJ 594; [2018] 8 CLJ 663, CA (distd)
Patel v Mirza [2017] 1 All ER 191, SC (refd)
Pengerusi Suruhanjaya Pilihanraya Malaysia (Election Commission of Malaysia) v See Chee How & Anor [2016] 3 MLJ 365; [2015] 8 CLJ 367, CA (refd)
PP v Yap Min Woie [1996] 1 MLJ 169, FC (refd)
Rimba Muda Timber Trading v Lim Kuoh Wee [2006] 4 MLJ 505; [2006] 3 CLJ 93, FC (refd)
SP Multitech Intelligent Homes Sdn Bhd v Home Sdn Bhd [2010] MLJU 1845; [2010] 16 MLRH 537, HC (refd)
Sababumi (Sandakan) Sdn Bhd v Datuk Yap Pak Leong [1998] 3 MLJ 151; [1998] 3 CLJ 503, FC (refd)
Tan Chee Hoe & Sons Sdn Bhd v Code Focus Sdn Bhd [2014] 3 MLJ 301; [2014] 4 MLRA 11, FC (refd)
Tea Delights (M) Sdn Bhd v Yeap Win Nee [2016] 7 MLJcon 92; [2015] MLRHU 1, HC (refd)
UEM Group Bhd (previously known as United Engineers (M) Bhd v Genisys Integrated Engineers Pte Ltd & Anor [2018] supp MLJ 363; [2010] 9 CLJ 785, FC (refd)

Legislation referred to

Contracts Act 1950 ss 24, 24(a), (b), (e), 66, 71
Courts of Judicature Act 1964 s 68(1)(c)
Franchise (Compounding of Offences) Regulations 1999
Franchise (Forms And Fees) Regulations
Franchise (Qualifications of a Franchise Broker) Regulations 1999
Franchise Act 1998 ss 2(1)(a), 4, 4(a), (b), (c), (e), 6, 6(1) 6A, 6A(1), 6B, 14(2), 41, 60
Industrial Relations Act 1967 s 28
Interpretation Acts 1948 and 1967 s 17A
Labuan Financial Services Authority Act 1996 s 4A
National Land Code s 340(2), Form 14A
Pengurusan Danaharta Nasional Berhad Act 1998
Rules of Court of Appeal 1994 r 8(1), (3), First Schedule Form 2

Appeal from: Civil Suit No WA-22IP-40–08 of 2016 (High Court, Kuala Lumpur)

Joy Appukuttan (Kelvynn Foo Wai Tzen with him) (KH Lim & Co) for the appellant.
Kok Pok Chin (Ong Hong Keit and Marcus Chong with him) (PC Kok & Co) for the respondents.

Lau Bee Lan JCA:

INTRODUCTION

[1] This is an appeal by the appellant against the decision of the learned judicial commissioner ('judge') made on 19 January 2018 dismissing the appellant's claim with no order as to costs and dismissing the counterclaim of the first to third respondents with no order as to costs.

[2] The first to third respondents filed a cross-appeal dated 20 April 2018 against the said High Court decision in relation to the High Court's refusal to order restitution of the monies paid by the first respondent to the appellant under the illegal MLA 2013.

[3] We shall for easy reference refer to the parties as they were in the court below.

BRIEF FACTS

[4] The plaintiff, Dr HK Fong Brainbuilder Pte Ltd is a company incorporated in Singapore by Dr Fong Ho Keong ('Dr Fong'), a Singaporean citizen. Dr Fong claims to have developed 'Dr Fong's Method' of teaching

mathematics to students in primary and secondary schools. The second and third defendants were Dr Fong's best friends for 55 years and interested in the business. Pursuant to that, the first defendant was established; the second and third defendants owned 85% of first defendant while Dr Fong owned the remaining 15%.

[5] There is another company called Dr Fong BrainBuilder Pte Ltd ('DFB') which was owned by Dr Fong as well. DFB entered into a master license agreement with the first defendant on 26 February 2008 ('MLA 2008') which expired on 30 June 2012. On 18 December 2013, another MLA, ('MLA 2013'), a guarantee and power of attorney were executed ('the three documents'). The MLA 2013 allows the first defendant to, among others, operate and manage the 'BrainBuilder' business (a business to teach mathematics to students) ('BrainBuilder business') in Malaysia.

[6] The fourth defendant is the second defendant's daughter and former employee of the first defendant. The plaintiff alleged the fourth defendant had taken over a registered business called 'Pusat Latihan Perkembangan Kaji Kreatif' ('PLPKK') from the second and third defendants. The second and third defendants established the fifth and sixth defendants.

[7] The plaintiff claimed that: (i) first defendant had breached the MLA 2013 by awarding a sub-license to En Suhaimi bin Ramly to operate a franchise in Setapak; and (ii) PLPKK and the fifth and sixth defendants are competing businesses with the BrainBuilder business and had used Dr Fong's method which is the plaintiff's confidential information. The plaintiff then terminated the MLA 2013 on 8 October 2015. The first defendant did not comply with the post-termination provisions in the MLA 2013 to enable the plaintiff to take over first defendant's BB centres, ie BrainBuilder Business centres operated by the first defendant to teach mathematics using Dr Fong's method.

[8] The plaintiff prayed, among others: (i) that the second to sixth defendants be restrained from dealing with the first defendant's customers and from disclosing the plaintiff's confidential information and other business techniques; (ii) that the second to sixth defendants be compelled to cease all business that are in competition with the plaintiff; (iii) for the return of all materials resembling the BrainBuilder business to the plaintiff; (iv) for an injunction to restrain the defendants from destroying, among others, the first defendant's business details; (v) that the first to third defendants provide a complete business account derived by the first defendant arising from the BrainBuilder business; (vi) that the receiver be appointed over the first, fourth, fifth and sixth defendants; (vii) that general, aggravated and exemplary damages be payable by the defendants jointly and severally; (viii) that the first, second and third defendants make restitution to the plaintiff for loss and

damage; and (ix) costs and interest be payable to the plaintiff.

[9] The defendants asserted: that Dr Fong's method is based on Singapore's mathematics syllabus ('Singapore maths') owned by the Singapore government and that Singapore maths has been taught by many tuition and learning centres in Malaysia; they were misled by the plaintiff to believe that the plaintiff owned the Singapore maths method; the termination was a disguise for the plaintiff's assistance to take over the first defendant without paying the agreed RM2.5m to the second and third defendants; the fourth defendant resigned after the termination took place; PLPKK has no business; and the fifth and sixth defendants did not operate the mathematics tuition centres.

[10] The first to third defendants counterclaimed against the plaintiff for a declaration that the MLA 2013 and the guarantee are invalid; refund of all money paid by the first defendant to the plaintiff and damages to be assessed.

[11] At the High Court, the plaintiff's claim and the first to third defendant's counterclaim were dismissed with no order as to costs. The security for costs furnished by the plaintiff was refunded.

DECISION OF THE HIGH COURT

[12] Essentially the findings of the learned judge are:

(a) the learned judge has found as a matter of fact:

(i) the plaintiff's witnesses are reliable;

(ii) the defendants' witnesses are unreliable; and

(iii) the first to third defendants have breached the MLA 2013 (on the assumption that the three documents are valid ie this court reverses the High Court decision that the three documents are void);

(b) the MLA 2013 is a franchise under the Franchise Act 1998 ('the FA 1998'). The plaintiff has breached s 6(1) of the FA 1998 and the first defendant has breached s 6A(1) of the FA 1998. Since the franchise was never registered by the plaintiff under the FA 1998, it is illegal and void under the Contracts Act 1950 ('the CA 1950') and is unenforceable against the first to third defendants;

(c) as the MLA 2013 is illegal and void the personal guarantee of first to third defendants given by them to the plaintiff and the power of attorney by reason of the illegal MLA 2013 is also illegal, void and unenforceable;

(d) ss 66 and 71 of the CA 1950 cannot be applied and/or invoked;

(e) the plaintiff did not plead and tender evidence for the doctrine of unjust enrichment;

(f) on the assumption that the MLA 2013, the guarantee and the power of attorney are valid, the first to third defendants are held to be liable to the plaintiff for breaches of the MLA 2013 and the second and third defendants are held liable to the plaintiff under the guarantee; and

(g) the plaintiff failed to establish the cause of action of conspiracy to defraud and breach of confidence against the second to sixth defendants.

OUR DECISION

Main appeal

Interpretation of the FA 1998

MLA 2013 is a franchise

[13] At the High Court the plaintiff argued that the MLA 2013 is not a franchise but a license. However based on the memorandum of appeal, the plaintiff appeared to have accepted the MLA 2013 is a 'franchise'. Be that as it may, for completeness, we shall deal with the learned judge's finding on why the FA 1998 apply to the MLA 2013.

[14] His Lordship took cognisance that the MLA 2013 does not use the word 'franchise' but relied on *Barisan Tenaga Perancang (M) Sdn Bhd v Dr Mansur Bin Hussain & Ors* [2016] MLJU 1251; [2017] 2 MLRH 177 at para 39 (decision was affirmed by this court) in that the court is not bound by label or description given by parties to the MLA 2013. The learned judge held that the MLA 2013 is a franchise under the FA 1998 and therefore the FA 1998 applies to MLA 2013 for the following reasons:

(1) 'franchise' under s 4 of the FA 1998 means *a contract or an agreement*, expressed or implied, whether oral or written, *between two or more persons* by which all the four cumulative conditions of a 'franchise' stipulated in s 4(a), (b), (c) and (e) of the FA 1998 are fulfilled in the MLA 2013 ('four prerequisites'). They are:

(a) *the franchisor grants to the franchisee the right to operate a business according to the franchise system as determined by the franchisor during a term to be determined by the franchisor*;

(b) *the franchisor grants to the franchisee the right to use a mark, or a trade secret, or any confidential information or intellectual property, owned by the franchisor or relating to the franchisor, and includes a situation where the franchisor, who is the registered user of, or is licensed by another person to use, any intellectual property, grants such right that he possesses to permit*

the franchisee to use the intellectual property;

(c) *the franchisor possesses the right to administer continuous control during the franchise term over the franchisee's business operations in accordance with the franchise system*; and

(d) [Deleted by Franchise (Amendment) Act 2012 (Act A 1442)]

(e) *in return for the grant of rights, the franchisee may be required to pay a fee or other form of consideration.*

(f) [Deleted by Act A 1442]. (Emphasis added.)

(2) the unrebutted oral evidence of the second and third defendants regarding the operation of the first defendant's BrainBuilder business proves that such a business fufills all the four prerequisites;

(3) cll 11.2, 11.9, 13.1 and 23.2 of the MLA 2013 state that the first defendant shall comply with manuals. The plaintiff has provided the first defendant with a 'Franchise Operations Manual' ('FOM') to operate the BrainBuilder business;

(4) Dr Fong and the plaintiff (whose alter ego is Dr Fong) have actual knowledge of the fact that the MLA 2013 is a franchise agreement based on the following evidence:

(a) Dr Fong's email dated 11 April 2013 to the second defendant referred to the first defendant as a master franchisee;

(b) Ms Anne Hooi Yoke Ling ('Ms Hooi') was the plaintiff's solicitor who drafted MLA 2008 and the three documents. During cross-examination, Dr Fong admitted that he had been advised by Ms Hooi by way of an email dated 24 December 2013 to register the BrainBuilder business as a franchise but he did not act on that advice. The learned judge attached great weight to Miss Hooi's email which was sent to Dr Fong only six days after the execution of the three documents on 18 December 2013;

(c) Dr Fong explained during re-examination that the first defendant had been given the 'task' to register BrainBuilder business as a franchise; and

(d) counsel for the plaintiff cross-examined the third defendant regarding Dr Fong requesting him to look into the issue of franchise way back in December 2013 and he disagreed with the proposition that he was concerned that Bumiputera quota in the first defendant will be implemented.

Whether s 6 of the FA 1998 apply to the plaintiff? A

[15] Returning to the mainstream, we shall now touch on the primary grounds of appeal canvassed by the plaintiff. First, the plaintiff took issue with the purposive approach applied by the learned judge in ascribing a wide interpretation to the word 'franchisor' in s 4 of the FA 1998 to include 'foreign franchisor' and on the other hand applied the literal approach to construe s 6 of the FA 1998 to warrant the plaintiff to register. The plaintiff submits the function of the court is not to add words into the statute but to give the words of the statute its ordinary and natural meaning citing *Foo Loke Ying & Anor v Television Broadcasts Ltd & Ors* [1985] 2 MLJ 35 at p 39; [1985] CLJ Rep 122 at p 126 f (SC) and *Krishnadas a/l Achutan Nair & Ors v Maniyam a/l Samykano* [1997] 1 MLJ 94 at p 98; [1997] 1 CLJ 636 at p 645 a-b (FC). B C

[16] With respect we find there is no merit in the plaintiff's aforesaid submission. For ease of comprehension the relevant parts of ss 6, 6A and 6B of the FA 1998 are reproduced: D

> 6 *Registration of franchisor*
>
> (1) *A franchisor shall register his franchise with the Registrar before he can operate a franchise business or make an offer to sell the franchise to any person.* E
>
> *(2) Any franchisor who fails to comply with this section, unless exempted by the Minister under section 58, commits an offence and shall, on conviction, be liable —*
>
> (a) *(a) If such person is a body corporate, to a fine not exceeding two hundred and fifty thousand ringgit, and for a second or subsequent offence, to a fine not exceeding five hundred thousand ringgit;* F
>
> 6A *Registration of franchisee of foreign franchisor*
>
> (1) *Before commencing the franchise business, a franchisee who has been granted a franchise from a foreign franchisor shall apply to register the franchise with the Registrar by using the prescribed application form and such application shall be subject to the Registrar's approval.* G
>
> 6B *Registration of franchisee*
>
> *A franchisee who has been granted a franchise from a local franchisor or local master franchisee shall register the franchise with the Registrar* by using the prescribed registration form within fourteen days from the date of signing of the agreement between the franchisor and franchisee. (Emphasis added.) H

[17] We accept the principles governing the interpretation of a statute propounded in *Foo Loke Ying* and *Krishnadas a/l Achutan Nair*. However in the context of the appeals before us, we are of the view that the learned judge was correct in adopting the purposive approach in the interpretation of the material provisions in the FA 1998 for the reasons which follow. I

[18] His Lordship's purposive approach is justified by the fact of:

(a) his finding that '[S]s 6, 6A and 6B FA have been introduced by Act A1442 with effect from 1 January 2013, [P]art 1 ofthe Interpretation Acts 1948 and 1967(FA), (by virtue of s 2(1)(a) of the FA and in particular s 17A of the IA) applies to interpret FA'; and

(b) his reliance on *Palm Oil Research and Development Board Malaysia & Anor v Premium Vegetable Oils Sdn Bhd & another appeal* [2005] 3 MLJ 97; [2004] 2 CLJ 265 that 'In accordance with s 17A of the IA, this court gives a purposive interpretation of ss 6, 6A and 7 of the FA' which is '[as] intended by Parliament through Act A 1442 [for] all franchises, local and foreign, to be registered with the Registrar (Purposive Construction)'.

[19] Contrary to the plaintiff's submission that the learned judge's reliance on *Palm Oil Research* is misplaced since the case is premised on the interpretation of tax law, with respect we are of the view that the said case is of assistance for the principle that the Federal Court applied s 17A of the IA to give a purposive construction of albeit, a tax statute. This is bolstered by the case of *DYTM Tengku Idris Shah ibni Sultan Salahuddin Abdul Aziz Shah v Dikim Holdings Sdn Bhd & Anor* [2002] 2 MLJ 11 at p 21; [2002] 1 MLRA 116 at p 121 wherein the Federal Court held 'This purposive approach has now been given statutory recognition by our Parliament enacting s 17A in the Interpretation Acts 1948 and 1967 (Act 388) ... [and] [i]n view of the statutory recognition we can and should adopt a purposive approach in the interpretation of 'Ruler' for the purposes of arts 181, 182 and 183 (of the Federal Constitution)' (per Haidar Mohd Noor FCJ (as he then was)).

[20] Learned counsel for the plaintiff argues that s 6 of the FA 1998 does not apply to the plaintiff, a foreign franchisor for the following reasons:

(a) the FA 1998 should be viewed as a whole wherein it makes specific reference to 'foreign franchisor' in s 6A FA of the 1998;

(b) the word 'foreign' does not appear in the word 'franchisor' in s 6 FA of the 1998;

(c) s 4 of the FA 1998 and the 'Buku Panduan' published in the Official Portal of the Ministry of Domestic Trade and Consumer Affairs defines 'franchisor' as to include a master franchisee and not a foreign franchisor. We shall address the issue of whether the 'Buku Panduan' has the force of law hereafter;

(d) it is a principle of interpretation of statute that where the Legislature includes a particular term in one part or section of a statute but omits it

in another part or section of the same, it must be the Legislature's intention to disparate inclusion or exclusion, citing the case of this court in *Lai Soon Onn v Chew Fei Meng and other appeals* [2019] 2 MLJ 96 at p 117; [2018] 10 CLJ 48 at pp 66–67 para [54];

(e) premised on the Parliamentary debates, the FA 1998 was amended by Act A1442 that included s 6A where the words 'foreign franchisor' was introduced. However there were no amendments to s 4 of the FA 1998 on the definition of 'franchisor' or to s 6 of the FA 1998 to add the words 'foreign franchisor'. Hence the Legislature did not intend to compel foreign franchisors to be registered;

(f) the long title to the FA 1998 relied on by the learned judge to mean the Act is to provide registration must be the registration of local franchisor, local master franchisee and local franchisee; and

(g) the principle of *expressio unius est exclusion alterius* applies wherein the express mention of 'foreign franchisor' in s 6A of the FA 1998 and its exclusion from s 6 of the FA 1998 implies the Legislature's deliberate intention of omission in the latter section citing *Dr Lee Chong Meng v Abdul Rahman bin Hj Abdullah, Returning Officer & Ors* [2000] 6 MLJ 98 at p 107; [2000] 3 CLJ 519 at p 527 f, g and i (HC).

[21] We do not disagree with the fact that reference to the long title of a statute as the learned judge did in following *Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd (Bar Council Malaysia, intervener)* [2004] 2 MLJ 257 at p 281; [2004] 1 CLJ 701 at p 736 when the Federal Court 'referred to the preamble to the Pengurusan Danaharta Nasional Berhad Act 1998 to ascertain the object of that statute' and Parliamentary Debates can be an aid to the construction of a statute as acknowledged by the learned judge premised on *Danaharta Urus* at pp 737–741). Neither do we disagree with the principle of *expressio unius est exclusion alterius.* However with respect we are unable to accept the submission of the plaintiff in deducing why the Legislature did not intend to compel foreign franchisors to be registered.

[22] We agree with the findings of the learned judge that the BrainBuilder business 'is a 'franchise' under s 4(a), (b), (c) and (e) of the FA'. Further the purposive construction alluded in para 19(b) above is supported by:

(a) the long title of FA 1998 which states 'to provide for the registration of … franchises';

(b) Parliamentary debates with respect to the passing of Act A1442 on 17 July 2012 wherein the learned judge stated the objectives of 'the requirement to register franchises on the part of franchisors and franchisees are as follows:

A

(i) to enable the Registrar to supervise the development of the franchise industry in this country;

(ii) to protect franchisees from being defrauded;

(iii) to encourage entrepreneurs to participate in the franchise industry; and

B

(iv) to attract foreign investors to invest in our Malaysian franchise industry.

(c) the wide definition of 'franchisor' in s 4 of the FA to mean 'a person who grants a franchise to a franchisee and includes a master franchisee with

C

regard to his relationship with a subfranchisee, unless stated otherwise in this Act'; and

(d) the learned judge took cognisance of the fact that to concede to the submission of the plaintiff that s 6(1) of the FA applies only to local 'franchisors' will result in two scenarios:

D

(a) this *will create an absurdity* wherein local franchisors have to register their franchises with the Registrar under s 6(1) FA but foreign franchisors are exempted from such a requirement. Under s 58FA, only the 'Minister' (defined in s 4 FA as the Minister for the time being charged with the

E

responsibility for matters relating to franchises) may exempt a franchisor, local and foreign, from the requirement of registration under s 6(1) FA; and

(b) this *will create an injustice* to franchisees of foreign franchises [as compared to franchisees of local franchises which are required to be registered under s 6(1) FA]. This is because if a foreign franchisor is not required to

F

register the foreign franchise with the Registrar under s 6(1) FA, the foreign franchisor may wriggle out from compliance with mandatory provisions legislated by Parliament in FA for the protection of franchisees of foreign franchises. (Emphasis added.)

G

[23] In our judgment the purposive construction taken by the learned judge is in accord with the position adopted by the Federal Court at p 121 in *DYTM Tengku Idris Shah ibni Sultan Salahuddin Abdul Aziz Shah* when it referred to *Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd* [1971] AC 850

H

at p 899 wherein Lord Diplock quoted a passage in *Nothman v Barnet London Borough Council* [1978] 1 WLR 220 where Lord Denning MR said at p 228, as follows:

I

In all cases now in the interpretation of statutes, we adopt such a construction as will 'promote the general Legislature purpose' underlying the provision. It is no longer necessary for judges to wring their hands and say: 'There is nothing we can do about it.' *Whenever the strict interpretation of a statute gives rise to an absurd and unjust situation, the judges can and should use their good sense to remedy it by reading words in, if necessary so as to do what Parliament would have done, had they had the situation in mind.* (Emphasis added.)

[24] It is apposite for us to refer to the statements of the learned judge at sub-paras (3) and (4) of para 40 at p 36 of his grounds of judgment ('grounds') which read:

> (3) *additionally or alternatively, a literal interpretation* of s 6(1) FA together with the wide definition of 'franchisor' in s 4 FA, requires a foreign franchisor to register the franchise with the Registrar (*Literal Interpretation*);
>
> (4) *based on the Purposive Construction and Literal Interpretation*, the plaintiff is required to register the BrainBuilder Business franchise with the Registrar under s 6(1) FA ... (Emphasis added.)

[25] Whilst we agree with the purposive approach taken by the learned judge, with respect we do not agree with the learned judge's aforesaid statements as emphasised because having opted to adopt the purposive approach, then '[i]t is a matter for the purposive approach to replace the literal [method of construction]'. As opined by the Federal Court at p 121 in *DYTM Tengku Idris Shah ibni Sultan Salahuddin Abdul Aziz Shah* when it referred to *Kammins Ballrooms*.

[26] On the issue of whether the 'Buku Panduan' has the force of law, the plaintiff submits:

(a) the learned judge when interpreting the FA 1998 ought to have taken into consideration that the 'Buku Panduan' has the force of law. The cases of *Edwin Thomas v F&N Beverages Marketing Sdn Bhd & Anor* [2016] MLJU 1437; [2016] 1 LNS 1645 at paras 79–80 and *Nabors Drilling (Labuan) Corp v Lembaga Perkhidmatan Kewangan Labuan* [2018] MLJU 636; [2019] 1 CLJ 277 at pp 289 paras [34], 290 [35]–[37], 291 [37] were cited;

(b) the 'Buku Panduan' which serves as a guideline for the registration of franchise business was issued by the Minister of Domestic Trade and Consumer Affairs pursuant to s 60 of the FA 1998; and

(c) relying on the case of *David Hey v New Kok Ann Realty Sdn Bhd* [1985] 1 MLJ 167 for the proposition that the Federal Court had taken judicial notice of the 'Guidelines for the Regulation of Acquisition of Assets, Mergers and Take-overs', the plaintiff urges this court to take judicial notice that the *Buku Panduan* by the Minister provides a proper explanation ofthe definition of the word 'franchisor' (in s 6 of the FA 1998)'.

[27] We observe that there is a common denominator in both cases highlighted to us by the plaintiff ie there is an enabling provision allowing the issuance of the 'guidelines' in question. In *Edwin Thomas*, the High Court held Practice Note No 1 of 1987, a set of guidelines has the force of law because it

was issued under s 28 of the Industrial Relations Act 1967. On the other hand, in *F&N Beverages Marketing*, the Guidelines for Carrying on Offshore Leasing Business in Labuan 2003 was held by the High Court to be made by the Lembaga Perkhidmatan Kewangan Labuan (respondent) pursuant to the power conferred on it under s 4A of the Labuan Financial Services Authority Act 1996.

[28] Based on our research, the Franchise (Forms And Fees) Regulations (PU(A) 422 of 1999) is the only regulations made by the Minister pursuant to s 60 of the FA 1998. The other two regulations are:

(a) Franchise (Qualifications of a Franchise Broker) Regulations 1999 (PU(A) 423 of 1999) made by the Minister pursuant to s 14(2) of the FA 1998; and

(b) Franchise (Compounding of Offences) Regulations 1999 (PU(A) 424 of 1999) made by the Minister pursuant to s 41 of the FA 1998.

In light of the above, with respect we make this observation that the submission on behalf of the plaintiff that the *Buku Panduan* was issued by the Minister of Domestic Trade and Consumer Affairs pursuant to s 60 of the FA 1998 is misconceived.

[29] The question of taking any judicial notice does not arise because in light of the existence of the three aforementioned regulations, it is clear that the *Buku Panduan* has not been issued pursuant to any enabling provision under the FA 1998 for it to have the force of law. We therefore find it unnecessary to refer to the *Buku Panduan*.

Validity of the MLA 2013

[30] For reasons discussed earlier the learned judge held '[T]he plaintiff is required to register the BrainBuilder Business franchise with the Registrar under s 6(1) of the FA 1998. The plaintiff's failure of non-registration amounts to a contravention of s 6(1) of the FA 1998 (the plaintiff's breach). It is not disputed by first to third defendants that first defendant's failure to register the BrainBuilder business franchise with the Registrar under s 6A(1) of the FA 1998 has breached s 6A(1) of the FA 1998 (the first defendant's breach)'.

[31] The learned judge then held the effect of the plaintiff's breach and first defendant's breach (two breaches) depends on whether ss 6(1) and 6A(1) of the FA 1998 are intended by Parliament to be mandatory or directory provisions. The learnedjudge further held that our Legislature has intended ss 6(1) and 6A(1) of the FA 1998 to be mandatory provisions for the following reasons:

(a) based on four High Court decisions that have held franchise agreements are void and unenforceable due to failure to register the franchise in question namely:

(i) *SP Multitech Intelligent Homes Sdn Bhd v Home Sdn Bhd* [2010] MLJU 1845; [2010] 16 MLRH 537 at p 539;

(ii) *Munafsya Sdn Bhd v Proquaz Sdn Bhd* [2012] MLRHU 1 at para 72;

(iii) *Lim Seng Kiat & Anor v Jee Hing Lim & Anor* [2015] MLRHU 1 at para 16; and

(iv) *Tea Delights (M) Sdn Bhd v Yeap Win Nee* [2016] 7 MLJcon 92; [2015] MLRHU 1 at paras 9–16;

(b) use of the word 'shall' in ss 6(1) and 6A(1) of the FA 1998 clearly shows Parliament's intention for these provisions to have mandatory effect and reliance was placed on the judgment of Mohd Dzaiddin FCJ (as he then was) in *Public Prosecutor v Yap Min Woie* [1996] 1 MLJ 169 at pp 172–173; and

(c) Parliamentary debates clearly shows the Legislature's intention for ss 6(1) and 6A(1) of the FA 1998 to be mandatory provisions.

[32] The learned judge recognised the court has a discretion to invoke the doctrine of severance to 'save' the lawful part of a contract by severing the illegal provisions under cl 48.1 MLA 2013. However His Lordship was of the opinion he could not apply the doctrine of severance because:

(a) an invocation of the doctrine of severance will undermine ss 6(1) and 6A(1) of the FA 1998 which are intended by Parliament to be mandatory provisions; and

(b) the two breaches held by him do not concern a particular term of the MLA 2013 which is illegal and can be severed from other lawful provisions of the MLA 2013 but rather concerns the lack of registration of the first defendant's BrainBuilder business and taints the entire MLA 2013.

[33] The learned judge held in view of the two breaches, the MLA 2013 is void in its entirety under s 24(a) of the CA 1950 ie, the MLA 2013 is forbidden by ss 6(1) and 6A(1) of the FA 1998 and/or under s 24(b) of the CA 1950, the MLA 2013 is of such a nature that, if permitted, would defeat ss 6(1) and 6A(1) of the FA 1998. The learned judge relied on *Merong Mahawangsa Sdn Bhd & Anor v Dato' Shazryl Eskay bin Abdullah* [2015] 5 MLJ 619; [2015] 5 MLRA 377 where the Federal Court held that when a party has alleged a contract is illegal, the court has a duty to consider the validity of the contract based on s 24 of the CA 1950 (per Jeffrey Tan FCJ at paras 70–71).

[34] The learned judge held the decision to invalidate the entire MLA 2013 based on s 24(a) and/or s 24(b) of the CA 1950 is not unjust to the plaintiff because Dr Fong and the plaintiff (Dr Fong is plaintiff's alter ego) have been legally advised by the plaintiff's solicitors (Miss Hooi) vide Miss Hooi's email dated 24 December 2014 to register the first defendant's BrainBuilder business franchise under the FA 1998 but which was ignored based on the misconceived idea that shares in the first defendant may have to be given to Bumiputeras (see sub-para 4(d) of para 15 above).

[35] On the issue of validlity, essentially the learned plaintiff counsel argues that:

(a) s 6 of the FA 1998 only penalises the master franchisee, the first defendant. Where there is express provision to render a franchise agreement null and void, it must be construed that the mere presence of a penal provision in s 6 of the FA 1998 cannot be equated to imply that the MLA 2013 is illegal, null or even void; and

(b) the MLA 2013 in fact complies with s 6A of the FA 1998. This is done through the presence of cl 15.1(f) of the MLA 2013 that obliges the first and third defendants to inter alia register the BrainBuilder business.

[36] In essence the abovesaid arguments are similar to the plaintiff's contentions at the High Court in para 36 of the grounds:

> (3) s 6(2) FA provides for penal consequences if there is a breach of s 6(1) FA by a local franchisor. There is however no criminal sanction for a contravention of s 6A(1) FA by the franchisee of a foreign franchise. Accordingly, Parliament does not intend to invalidate MLA (2013) for the first defendant's failure to register the BrainBuilder Business franchise with the Registrar under s 6A(1) FA (1st Defendant's Failure).

[37] The plaintiff further argues that the learned judge erred in placing too much reliance on the single correspondence between the plaintiff and its' solicitor's email dated 24 December 2013 that the plaintiff could have used the power of attorney to register under s 6A of the FA1998 when he failed to consider sufficiently the evidence of Dr Fong's email dated 26 December 2013, what Dr Fong communicated to the second and third defendants at a meeting on 8 July 2014, the first to third defendants were provided with the franchise manual, Dr Fong's explanation of his email from his solicitor that the task was on the first to third defendants to register (para 6.19 of the plaintiff's main submission).

[38] With respect, we are of the view that the submission of the plaintiff in paras 36–38 above is untenable in light of our finding that s 6(1) of the FA 1998 applies to a foreign franchisor. Contrary to the plaintiff's submission that

the cases of *SP Multitech*, *Munafsya Sdn Bhd*, *Lim Seng Kiat* and *Tea Delights* have no application as they are concerned with the relationship between a local franchisor and/or master franchisee, we are of the view that the learned judge did not err in placing reliance on these cases for the principle that registration of franchise is imperative and non-registration of the same will render the franchise agreement void and unenforceable. Taking it at the highest, even if it was the first defendant's failure not to register the BrainBuilder business under s 6A(1) of the FA 1998, we agree with the learned judge's finding that the plaintiff could have exercised the power granted by the first defendant to the plaintiff under the power of attorney to apply to the registrar (as the first defendant's lawful attorney) to register under s 6A(1) of the FA 1998.

[39] Further, since it is our finding that s 6(1) of the FA 1998 applies to a foreign franchisor, we will now turn to the submission of the plaintiff that the court should be slow to striking down commercial contracts. In support of this proposition, the plaintiff refers to *Lori (M) Bhd (interim receiver) v Arab-Malaysian Finance Bhd* [1999] 3 MLJ 81; [1999] 2 CLJ 997. This was also the contention of the plaintiff at the High Court (refer para 36 of the grounds). We accept the dicta of the Federal Court at p 1010 a-b as highlighted to us by the plaintiff, ie:

> It is a familiar proposition that courts should be slow to find illegality and strike down commercial transactions (see, eg *St John Shipping Corporation v Joseph Rank Ltd* [1956] 3 All ER 683, 690, 691; *Central Securities (Holdings) Bhd v Haran bin Mohamed Zaid* [1979] 2 MLJ 244, 247).

which we observe is repeated at pp 1015–1016 a–c. however in the very passage which the plaintiff quoted in submission lies a very material principle of law stated by the Federal Court (at p 1015 h) which we find the plainiff overlook and which we stress as follows:

> It is true that s 3 of the Civil Law Act 1956, directs our courts to apply the Common Law of England in force at the date of its coming into effect; that is 7 April 1956, *only in so far as the circumstances permit and save where no provision has been made by statute law*. (Emphasis added.)

[40] In *Merong Mahawangsa*, the question upon which leave was granted to appeal against the order of the Court of Appeal from a High Court decision was whether an agreement to provide services to influence the decision of a public decision maker to award a contract was a contract opposed to public policy as defined under s 24(e) of the CA 1950 and therefore void. In allowing the appeal, the Federal Court, among others, at p 387 para [16] opined:

> [16] Section 24 of the Act stipulates five circumstances in which the consideration or object is unlawful, namely, where: (a) it is forbidden by a law; (b) it is of such a nature that, if permitted, it would defeat any law; (c) it is fraudulent; (d) it involves

A or implies injury to the person or property of another; or, (e) the court regards it as immoral, or opposed to public policy. 'In each of the above cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void ... *The provisions of s 24 of our Contracts Act 1950 referred to earlier are explicit statutory injunctions. The statute provides*
B *expressly that the considerations or objects referred to in paras (a), (b) and (e) of s 24 shall be unlawful and the agreement which ensues shall be unlawful and void. Paragraph (a) deals with what is forbidden or prohibited by law;* para (b) deals with what could defeat the object of any law; and para (e) deals with public policy' (*Chung Khiaw Bank Ltd v Hotel Rasa Sayang Sdn Bhd & Anor* [1990]1 MLRA 348 per Hashim Yeop Sani CJ (Malaya), delivering the judgment of the court), *which statements*
C *'continue to be good law'* (*Fusing Construction Sdn Bhd v Eon Finance Bhd & Ors And Another Appeal* [2000] 1 MLRA 330, 337 per Gopal Sri Ram JCA, as he then was, delivering the judgment of the court. (Emphasis added.)

D We observe that in respect of *Lori Malaysia*, the Federal Court at p 388 para [20] stated:

> [20] Even so, in *Lori Malaysia Bhd v Arab-Malaysian Finance Bhd*, this court counselled that courts should be slow to strike down commercial contracts on the ground of illegality, contrary to the view expressed in *Chung Khiaw Bank Ltd v Hotel*
E *Rasa Sayang Sdn Bhd & Anor.*

The foregoing statement was preceded by what the Federal Court stated at p 388 para [19]:

F > *It is perfectly settled, that where the contract which the plaintiff seeks to enforce, be it express or implied, is expressly or by implication forbidden by the common law or statute, no court will lend its assistance to give effect*. (*Cope v Rowlands* [1836] 2 M&W 149, 157 per Parke B, which was quoted with approval in *Tan Chee Hoe & Sons Sdn Bhd v Code Focus Sdn Bhd* [2014] 3 MLJ 301; [2014] 4 MLRA 11 per Ramly Ali FCJ, delivering the judgment of the court). 'Under s 2(g) of the Contracts Act, an
G > unlawful agreement is not enforceable' (*Lori Malaysia Bhd v Arab-Malaysian Finance Bhd* [1999]1 MLRA 274, per Edgar Joseph Jr FCJ, delivering the judgment of the court). (Emphasis added.)

H Thereafter the Federal Court at p 407 para [71] held, among others, '[W]henever the illegality of a contract is raised or become apparent, it is the duty of the court to take it up, by reference to s 24 of the Act'. This legal principle was correctly adopted by the learned judge at para 34 above. Hence we find there is no error on the learned judge's part in respect of his findings in paras 34–35 above.

I

[41] Under the head of argument on illegality, learned counsel for the plaintiff submits that even if s 6 of the FA 1998 did apply to the plaintiff, the section does not render the MLA 2013 illegal for non-registration. To this end counsel urges the court to consider the recent developments on illegal contracts

in the judgment of the Supreme Court of the United Kingdom in *Patel v Mirza* [2017] 1 All ER 191, *Pang Mun Chung & Anor v Cheong Huey Charn* [2018] 4 MLJ 594; [2018] 8 CLJ 663 and *Liputan Simfoni Sdn Bhd v Pembangunan Orkid Desa Sdn Bhd* [2019] 4 MLJ 141; [2019] 1 CLJ 183. We shall revisit these cases later.

Guarantee provides for indemnity

[42] Learned counsel for the plaintiff submits the learned judge erred when he held that the second and third defendants' guarantee and the power of attorney are illegal and void under s 24(a) and (b) of the CA 1950 arising from the illegality of the MLA 2013 as there was an indemnity from the second and third defendants to the plaintiff pursuant to cl 2 of the guarantee and the indemnity is collateral to the MLA 2013 and cannot be vitiated by any illegality that may strike down the MLA 2013. In support thereof, the plaintiff cites:

(a) *Law of Contract* (4th Ed) where the learned author, Dato' Seri Visu Sinnadurai makes the following observation at para 4.56 p 267:

> [4.56] Other principles relating to collateral contracts: consideration, illegality and breach. The following principles of law stated in Chitty on Contracts, General Principles, (301h Edn) at paragraph 12-006, should be noted:
>
> > Consideration for the collateral contract is normally provided by entering into the main contract, *but a collateral contract may also be actionable even if the main contract is unenforceable, eg illegality*. Breach of the collateral contact will give rise to an action for damages for its breach, but not as a general rule to a right to treat the main contract as repudiated; and

(b) *Rimba Muda Timber Trading v Lim Kuoh Wee* [2006] 4 MLJ 505 at pp 510–511; [2006] 3 CLJ 93 at p 99 where 'the Federal Courl found favour with the argument that although the sub-contract was held to be illegal the respondent's claim is founded on the collateral rights acquired under the contract'.

[43] With respect we are not persuaded by the above submission of the plaintiff. We are more incline to agree with the approach taken by the learned judge for the reasons which follow. The learned judge held the three documents ie the MLA 2013, the guarantee and the power of attorney form a single composite transaction premised on the following reasons:

(1) the 3 Documents concern the same BrainBuilder Business;

(2) the 3 Documents are prepared by the same solicitor, Ms Hooi;

(3) clause 5.3 MLA (2013) provides that 'all persons with ownership interest' in MLA (2013) 'must' execute the Guarantee in the form provided in Appendix 3 to MLA (2013) (Appendix 3). The Guarantee is exactly in the form of Appendix 3;

(4) clauses 1 to 4 of the Guarantee solely concern the obligations of the first defendant under MLA (2013);

(5) clause 34 MLA (2013) states that to 'secure the performance' of the first defendant of the obligations under MLA (2013), the first defendant irrevocably appoints, among others, the Plaintiff as the first defendant's attorney. Hence, the execution of the PA. Clause 1 PA provides that the first defendant has irrevocably appointed, among others, the Plaintiff as the first defendant's attorney; and

(6) the 3 Documents were executed on the same day (18.12.2013) and their execution was witnessed by Ms Hooi.

[44] In *Malayan Banking Bhd v Neway Development Sdn Bhd & Ors* [2017] 5 MLJ 180 on the findings of the courts below, the Federal Court (per Richard Malanjum CJ (Sabah and Sarawak) (as he then was) stated (at p 187 [12]):

> [12] The primary reason given by the High Court in dismissing the claim was that the term loan was for an illegal purpose in that it was given for the purchase of the native land in contravention of ss 17(1) and 64(1) of the SLO [Sabah Land Ordinance]. It was held that s 17(1) of the SLO clearly prohibits any dealing between a native and a non-native in respect of a native land. As such, it was ruled that since the transaction was tainted with illegality the whole sale and purchase agreement was void by virtue of s 24(a) and (b) of the Contracts Act 1950. In turn, all the other instruments connected with the sale and purchase agreement such as the deed of assignment and the letters of guarantee were also tainted with illegality.

Having found the leave question (at 185 [2]) to be academic, the Federal Court (at 190[22]) in essence held where a contract is void under any paragraph in s 24 of the CA 1950, any other contract, instrument or document which is related to the void instrument may be tainted with illegality and may also be rendered void.

[45] We are of the view that the finding of the learned judge that the three documents 'form a single composite transaction' falls within the purview of the ratio of the Federal Court in *Malayan Banking* that ' ... *any subsequent and documentation that linked to or* arose *out of the purchase would have been tainted with such illegality'*. Thus we agree with the learned judge's finding that the illegality of the MLA 2013 will consequently taint the guarantee and the power of attorney. Further, by parity of reasoning, we also agreed the guarantee and the power of attorney will likewise be void in their entirety under s 24(a) and/or 24(b) of the CA 1950.

Unjust enrichment

[46] Since we rule that the three documents are void, we do not find it is necessary to deal with the appeal brought by the plaintiff against the learned judge's findings on conspiracy to defraud it and breach of confidence. This is because both these causes of action in tort will only arise on the assumption that the three documents are valid. The learned judge took cognisance of the same and stated 'In the event that the Court of Appeal reverses the above decision that the three documents are void, I will proceed to decide whether the 1st to 3rd Defendants have breached the MLA (2013) and Guarantee' (para 55 of the grounds).

[47] It is apposite at this juncture to refer to the learned judge's grounds at para 35:

> 35. Learned counsel for the plaintiff and defendants have cited an impressive array of cases on illegal contracts. I am of the view that whether a contract or transaction has breached a provision of law, depends on the construction of that provision. As such, cases on illegality depend on the interpretation of the particular law which has been contravened.

It is in this context that learned counsel for the plaintiff submits that the learned judge erred when he failed to consider sufficiently the principles laid down in *Sababumi (Sandakan) Sdn Bhd v Datuk Yap Pak Leong* [1998] 3 MLJ 151 at p 176; [1998] 3 CLJ 503 at pp 540 and 541, namely, '… one must find out first if the statute prohibits or forbids the act which the parties have contracted to do by the contract in question, and NOT whether the statute prohibits the contract or the making of the contract in question by the parties …'.

In this regard, whilst we acknowledge that 'This difference is real, though very subtle.' (per Peh Swee Chin FCJ (as he then was) at p 541 b), a common thread runs through the decisions of Lamin Mohd Yunus PCA (as he then was), Peh Swee Chin FCJ and Zakaria Yatim FCJ (as he then was) 'that the said agreement is a contract or amounts inevitably to a contract to do an act forbidden or prohibited by s 21 under the said statute (Pool Betting Act 1967)' and 'This is contrary to s 24(a) of the Contracts Act and the agreement is therefore illegal and void'. Such a contract is unenforceable. Similarly on the facts of this appeal, the learned judge has correctly found the two breaches render the MLA 2013 void in its entirety under s 24(a) and/or 24(b) of the CA 1950 alluded in paras 31 and 34 above.

[48] Returning to the mainstream, we shall now turn to the plaintiff's appeal on unjust enrichment. As to whether the plaintiff can rely on the doctrine of unjust enrichment, the learned judge appropriately relied on *Dream Property*

Sdn Bhd v Atlas Housing Sdn Bhd [2015] 2 MLJ 441; [2015] 2 CLJ 453 at paras 110 and 117–118 where the Federal Court held the court may grant restitution to a plaintiff when the following four cumulative conditions of a cause of action in unjust enrichment have been proven by the plaintiff:

(1) the defendant had been enriched;

(2) the defendant's enrichment has been gained at the Plaintiff's expense;

(3) the defendant's retention of the benefit is unjust; and

(4) the defendant has no defence to extinguish or reduce the defendant's liability to make restitution.

[49] According to the learned judge the plaintiff has failed to prove a cause of action in unjust enrichment as the plaintiff did not plead in the statement of claim that the first to third defendants have been unjustly enriched at the plaintiff's expense. From the pleadings point, whilst it is true that the plea for unjust enrichment is found in the plaintiff's reply to the first to third defendants' defence as submitted by the plaintiff, however we agree with the learned judge that the plaintiff did not plead in the statement of claim regarding any advantage received by the first defendant under a void MLA 2013 as the plaintiff has taken the position that the MLA 2013 is valid and has not breached the FA 1998. Further a perusal of the plaintiff's list of issues to be tried shows that the learned judge was correct in stating that the cause of action in unjust enrichment is not listed as an issue to be tried. Hence there is no error on the learned judge's part in terms of pleadings.

[50] From the evidential perspective, the learned judge has considered the evidence before him and correctly concluded that the plaintiff has failed to prove that the first to third defendants have been enriched at the expense of the plaintiff and the retention of the benefit is unjust and evidence has been adduced that the first defendant has paid the plaintiff pursuant to the MLA 2013 (para 54 of the grounds). We find the learned judge did not err as the purported evidence premised on the plaintiff reliance of the findings of the learned judge at para 9.3.1, 9.3.2, 9.3.3 and 9.3.4 is misplaced as these are findings of the learned judge on the assumption the three documents are valid (para 55 of the grounds onwards). It is our finding that the three documents are void and hence, contrary to the plaintiff's submission, these findings of the learned judge do not apply.

[51] We will now consider the applicability of *Patel v Mirza*, *Pang Mun Chung* and *Liputan Simfoni*. In *Patel v Mirza*, Mr Patel paid Mr Mirza £620,000 pursuant to a contract under which Mr Mirza was to use the money to trade in RBS (bank) shares with the benefit of insider information which Mr Mirza is to procure. The anticipated insider information however was not

forthcoming and the contract lapsed. No such insider information was provided and the trade/bet failed to take place. Mr Mirza refused to refund the £620,000 back to Mr Patel. So, Mr Patel sued Mr Mirza for the refund of the money actually paid by Mr Patel to Mr Mirza. Mr Patel succeeded in his claim for restitution of the monies actually given.

The members of the UK Supreme Court differ in their reasoning: Lord Toulson with whom Lady Hale, Lord Kerr, Lord Wilson, Lord Hodge and Lord Neuberger agree whilst Lord Mance agreed with Lord Clarke and Lord Sumption.

[52] At p 191 e-f, the UK Supreme Court stated:

> The principal issue was whether a party to a contract to carry out an illegal activity was precluded from recovering money paid under the contract from the other party under the law of unjust enrichment.

[53] Following *Patel v Mirza* whether unjust enrichment can apply to an illegal contract is subject to three considerations, namely:

(a) to consider the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by denial of the claim;

(b) to consider any other relevant public policy on which the denial of the claim may have an impact; and

(c) to consider whether denial of the claim would be a proportionate response to the illegality.

These principles can be gleaned from the judgment of the UK Supreme Court at paras 120–121 as follows:

> [120] *The essential rationale of the illegality doctrine is that it would be contrary to the public interest to enforce a claim if to do so would be harmful to the integrity of the legal system* (or, possibly, certain aspects of public morality, the boundaries of which have never been made entirely clear and which do not arise for consideration in this case). *In assessing whether the public interest would be harmed in that way, it is necessary (a) to consider the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by denial of the claim, (b) to consider any other relevant public policy on which the denial of the claim may have an impact and (c) to consider whether denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts.* Within that framework, various factors may be relevant, but it would be a mistake to suggest that the court is free to decide a case in an undisciplined way. The public interest is best served by a principled and transparent assessment of the considerations identified, rather by than the application of a formal approach capable of producing results which may appear arbitrary, unjust or disproportionate.

A [121] A claimant, such as Mr Patel, who satisfies the ordinary requirements of a claim for unjust enrichment, should not be debarred from enforcing his claim by reason only of the fact that the money which he seeks to recover was paid for an unlawful purpose. There may be rare cases where for some particular reason the enforcement of such a claim might be regarded as undermining the integrity of the B justice system, but there are no such circumstances in this case. I would dismiss the appeal. (Emphasis added)

[54] In *Pang Mun Chung*, the appeal is primarily concerned with the application of the defence of illegality and public policy in relation to an action C brought to enforce a trust. The Court of Appeal referred to *Patel v Mirza* at pp 681 [67] and 685 [83] opined:

[83] In the present case, we take the view that the public policy of denying the first defendant an unjust windfall must take precedence over whatever policy advanced in favour of applying the illegality defence. In this connection, we are reminded of D the oft-quoted passage in *St John Shipping Corp v Joseph Rank Ltd* [1957] 1 QB 267 of Devlin J as follows (at p 288):

> Although the public policy in discouraging unlawful acts and refusing them judicial approval is important, it is not the only relevant policy consideration. E There is also the consideration of preventing injustice and the enrichment of one party at the expense of the other.

[55] Applying the 'proportionality test' to the facts of this case learned plaintiff counsel submits the following: F

6.35.1 By allowing the Plaintiff's claim, it would not undermine the purpose of the prohibiting rule since Parliament has considered the consequence of contravening s.6(1) FA 1998. (s.6(2) FA 1998).

6.35.2 [P]arliament did not intend to render the MLA 2013 illegal for breach of G s.6(1) FA 1998.

6.35.3 The nature and gravity are procedural, as opposed to contracts where the object and/or purpose is unlawful (*Lim Kar Bee v Duofortis Properties (M) Sdn Bhd* [1992] 1 CLJ Rep 173

H 6.35.4 The conduct of the parties here is clear. The 1st to 3rd Defendants did nothing to procure the registrations despite the obligation to do so under the MLA 2013 and repeated reminders made by the Plaintiff at meetings.

6.35.5 On the issue of centrality and remoteness of the illegality to the contract, s.6 FA 1998 obliges the franchisor to register before he can operate a franchise business I but it does not prevent parties from executing the MLA 2013.

6.35.6 The consequences of denying the claim would mean that the Defendants will benefit from its own breach, at the expense of the Plaintiff.

[56] With respect we are of the considered opinion that there is no merit in the plaintiff's above said submission. First, we agree with the learned judge's findings in respect of the two breaches (plaintiff's breach and the first defendant's breach) in paras 31 and 34 above.

[57] Next it is pertinent to note that the Court of Appeal in *Pang Mun Chung* held:

> [28] Dealing now with the issue of illegality, *we observe, at the outset, that the law in this regard can be segregated broadly into contracts that are illegal under statute (statutory illegality) or contracts which are illegal at common law. There is no suggestion in the present case of any statutory illegality*. We need only concern ourselves with illegality at common law which must be grounded upon established heads of public policy as the case law suggests. This principle is also embodied in s. 24(e) of the Contracts Act which provides that any agreement of which the consideration or object is immoral or opposed to public policy is void. (Emphasis added)
>
> (per Harmindar Singh Dhaliwal JCA at 673 [28])

On this score the case of *Pang Mun Chung* can be distinguished as the said case concerns with illegality at common law premised on established heads of public policy and s 24(e) of the CA 1950 whilst the appeal before us concerns with contracts that are illegal under statute (statutory illegality) as alluded in para 34 above.

[58] In *Liputan Simfoni*, among others, the facts are the respondent (plaintiff) was the registered proprietor of a piece of land. An imposter company claiming to be the plaintiff applied to the third defendant, Pendaftar Tanah and Galian, Wilayah Persekutuan Kuala Lumpur for a replacement issue document of title alleging that it had lost the original document of title to the land. The third defendant issued a replacement document of title and the imposter company entered a sale and purchase agreement ('first SPA') to sell the land to the second defendant. Upon completion of the sale, the second defendant was registered as the owner of the land. The second defendant entered into a sale and purchase agreement with the appellant (first defendant), Liputan Simfoni for the sale of the land ('second SPA'). The plaintiff commenced a suit against all three defendants seeking, among others, declarations that the transfers of the land to the first and second defendants were void ab initio and orders that the subject land be restored to the plaintiff and the third defendant to rectify the entries in the document of title of the subject land. The High Court allowed the plaintiff's claim, holding, among others, that the transfer of the land from the second defendant to the pt defendant was obtained by a void instrument which in turn rendered the title of the first defendant defeasible pursuant to s 340(2) of the NLC and the land was restored to the plaintiff. The Court of Appeal affirmed the High Court decision. Leave to appeal was allowed to the first defendant, among others, on

the question of law '(v) whether a finding that a sale and purchase agreement is void ab initio pursuant to s 24(b) of the CA 1950 renders the Form 14A under the NLC void, despite the Form 14A being a valid instrument duly registered in favour of the subsequent bona fide purchaser with the Land Office'.

[59] Having considered, among others, *Patel v Mirza* at pp 220 [123] and 221 [124] (which passage was highlighted to us by counsel for plaintiff). Hasan Lah FCJ (as he then was) (delivering judgment of the Federal Court at p 222 [125]–[126] held:

> [125] Having carefully considered the authorities cited by the parties, we are inclined to agree with the contention of learned counsel for the first defendant that the second SPA is not void. We agree with the view that the courts should be slow in striking down commercial contracts on the ground of illegality. *The compliance with the Stamp Act 1949 and the Real Property Gains Tax 1976 are not the prerequisite for the second SPA to be enforceable. There is no prohibition under the two Acts to preclude the first defendant from acquiring rights to the subject land.* The Stamp Act 1949 provides a penalty for breach of its provisions. Similarly, under the Real Property Gains Tax Act 1976 there are penalties for breach of its provision. In addition, it is provided that tax due and payable may be recovered by the Government by civil proceeding as a debt to the Government. *The object of the two Acts is to raise revenue*. There is therefore no sufficient nexus such as would satisfy the test laid down in *Curragh Investment Ltd.* The first defendant's infringement of the two Acts therefore did not prevent it from suing on the contract which is legal.
>
> [126] In addition, we find that the test laid down by Lord Toulson in *Patel* that is to say, the trio considerations, is a sensible one, which we should follow. Applying the test to the facts of this case, we find that it is an overkill for the first defendant to lose the subject land for the infringement of the two Acts which is punishable by a fine upon conviction. (Emphasis added.)

[60] In our considered opinion, the case of *Liputan Simfoni* can be distinguished. Unlike the findings of the Federal Court as emboldened above, in this appeal, for the given reasons it is a prerequisite for all franchisors and franchisees (local and foreign) to register their franchises with the Registrar under ss 6(1), 6A(1) and 6B FA 1998, otherwise the entire MLA 2013 is void under ss 24(a) and/or 24(b) CA 1950 as held by the learned judge (paras 74(4) and 75 of the grounds).

[61] Save for *Pang Mun Chung* and *Liputan Simfoni* which were not ventilated before the High Court, the learned judge was not oblivious of the development of case law, among others, *Patel v Mirza* (at para 51 of the grounds) but expressed that '[he was] not able to apply the cases cited (including *Patel v Mirza*) because we have our own s 66 of the CA. Furthermore as a matter of stare decisis, [he was] bound by the Federal Court's judgment in *Tan Chee Hoe & Sons*'. We agree with the approach taken by the learned judge for the reasons which follow.

[62] Since we agree with the learned judge that the three documents are void, in terms of whether any remedy is available to the plaintiff, one of the provisions to consider is s 66 CA of the 1950. We find the learned judge appropriately refer to *Tan Chee Hoe & Sons Sdn Bhd v Code Focus Sdn Bhd* [2014] 3 MLJ 301; [2014] 4 MLRA 11 as the Federal Court, among others, at paras 37–38 (per Ramly Ali FCJ) (as he then was) stated:

> [37] The effect of a void contract or agreement is provided for under s 66 [CA]
>
> ...
>
> [38] ... The Privy Council in *Harnath Kaur v lnder Singh* [1922] LR 50, lA 69 in considering a claim based on s 65 of the Indian Contracts Act 1872 [CA (India)] (which is identical to ours 66 [CA]) ruled:
>
> > an agreement, therefore, discovered to be void is one discovered to be not enforceable by law, and on the language of the section, would include an agreement that was void in that sense from its inception as distinct from a contract that becomes void.

[63] The learned judge proffered reasons why he was unable to invoke s 66 of the CA 1950 as follows:

> 48. I am unable to invokes 66 CA in this case because the first defendant has made payments under the MLA (2013) to Dr Fong and the plaintiff regarding the first defendant's right to operate BrainBuilder Business. As such, the first defendant has not received any advantage under the MLA (2013) to be restored to the plaintiff under s 66 CA. Moreover, the plaintiff has taken the position in this case that MLA (2013) is valid and has not breached FA. Hence, the plaintiff did not plead in the SOC and adduce any evidence regarding any advantage received by the first defendant under a void MLA (2013).
>
> 49. The material facts in *Tan Chee Hoe & Sons* can be easily distinguished from this case because the purchaser in a sale of shares contract in *Tan Chee Hoe & Sons* has received a deposit of 10% of the sale price from the vendor (an advantage under the contract) and this deposit is rightfully ordered by the Court of Appeal (affirmed by the Federal Court) to be restored to the vendor under s 66 CA. In this case, no deposit has been paid by any party under the MLA (2013).

Cross-appeal

[64] Through its notice of cross appeal dated 20 April 2018, the defendants seek to vary part of the decision of the learned judge on three grounds:

(a) the defendants seek to allege that the learned judge ought to have refunded to the first defendant monies that were paid to the plaintiff ('first ground');

(b) the defendants seek to raise the issue that the first to third defendants

were not *pari delicto* to the alleged illegality of the MLA 2013 ('second ground'); and

(c) the defendants allege that the learned judge ought to order cost against the plaintiff pursuant to grounds 1 and 2.

[65] On the first ground, learned counsel for the defendants in oral submission merely argue that since the High Court ruled the MLA 2013 (franchise) was illegal, the High Court ought to refund RM1,078,781 to the first to third defendants that was paid to the plaintiff. The following dicta of the Federal Court in *Tan Chee Hoe & Sons* at p 32 [59] was drawn to our attention:

> (c) being a void contract, by virtue of s 66 of the Contracts Act 1950, the court of law may order restoration of whatever consideration or advantage paid or given under that contract.

[66] With respect in our judgment the defendants' submission has no merit whatsoever. We are of the view that the said refund is part of the relief which the first to third defendants seek in prayer 4 of their counterclaim ie 'Satu Perintah bahawa Plaintif hendaklah dalam masa 7 hari dari tarikh Perintah atau Penghakiman ini memulangkan semua wang yang telah dibayar oleh Defendan kepada Plaintif atau wakil Plaintif (Fong Ho Kheong)'.

[67] Rule 8(1) read with 8(3) and Form 2 in the First Schedule of the Rules of Court of Appeal 1994 allows the filing of notice of cross appeal to only vary the decision. In *Kabushiki Kaisha Ngu v Leisure Farm Corp Sdn Bhd & Ors* [2016] 5 MLJ 557; [2016] 8 CLJ 149 at p 157 [15], the Federal Court opined:

> [15] In construing r 8 and Form 2 of the RCA 1994, the Court of Appeal had rightly considered the critical words used, namely 'should be varied ... specifying the grounds thereof' and 'to be varied to the extent'. Following this, the Court of Appeal had rightly held that the word 'vary' by itself should be given its ordinary and natural meaning as stated in *The Concise Oxford Dictionary* to mean 'change, make different, modify'.
>
> [16] We also agree with the Court of Appeal's finding that it had considered the clear provisions under r 5 of the RCA 1994, and holding that r 5 of the RCA 1994 provided for an appeal to be lodged against the whole or part of any judgment or order of court, and such an appeal in contrast to a cross-appeal is by way of a re-hearing ... Hence, if it was the substantive finding of the court that was intended to be attacked, it behoved upon the party aggrieved to file a proper notice of appeal.

[68] In *Pengerusi Suruhanjaya Pilihanraya Malaysia (Election Commission of Malaysia) v See Chee How & Anor* [2016] 3 MLJ 365; [2015] 8 CLJ 367 at p 394 para [77], the Court of Appeal, among others, stated:

> ... a cross-appeal is only meant for variation of 'the decision' appealed against and not for variation, reversal or setting aside of any other decision of the High Court unrelated to the appeal filed by the appellant.

[69] Since what the first to third defendants seek to vary is a substantive finding of the court which relief is part of the counterclaim dismissed by the High Court, the defendants ought to have filed a notice of appeal against the dismissal of the counterclaim and not seek to vary the decision of the High Court.

[70] In addition, we are not minded to allow the defendants to raise the dismissal of their counterclaim through the notice of cross appeal as to do so is tantamount to allowing them to seek relief through the backdoor and results in deprivation of relevant praecipe to the government. An added reason is that the fourth to sixth defendants have no basis to raise this allegation in the notice of cross appeal as they are not privy or parties to the MLA 2013.

[71] In relation to the third ground, it is our view there can be no variation on the issue of cost since we find there is no basis to sustain the first ground and the second ground has been abandoned by the defendants. Further, we are of the view that since the issue of cost does not arise in the notice of appeal dated 15 February 2018 filed by the plaintiff, the defendants ought to have filed the appeal against the decision of the learned judge for not granting cost to the defendants instead of seeking the same through the notice of cross appeal.

[72] Further thereto, if the defendants seek to only appeal against the decision of the learned judge on cost, then they ought to have first obtain leave of the court pursuant to s 68(1)(c) of the Courts of Judicature Act 1964 ('the CJA'). The Federal Court in *Ooi Soon Eng v Ng Kee Lin* [1980] 1 MLJ 26; [1979] 1 LNS 61 held where no such leave was obtained under s 68(1)(c) of the CJA, the appeal fails in limine.

CONCLUSION

[73] We have carefully considered the written and oral submissions of the respective counsel and have perused the records of appeal before us. For all the foregoing reasons we are of the view there are no appealable errors committed by the learned judge which warrant appellate intervention (see Federal Court case in *Gan Yook Chin (P) & Anor v Lee Ing Chin@ Lee Teck Seng & Ors* [2005] 2 MLJ 1 at p 10 para [14] which endorsed the view of the Court of Appeal in *Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97; [2003] 2 CLJ 19, *Dream Property* at p 473 para [89] and *UEM Group Bhd (previously known as United Engineers (M) Bhd v Genisys Integrated Engineers Pte Ltd & Anor* [2018] supp MLJ 363 at p 381; [2010] 9 CLJ 785 at p 807 para

[40] as to when appellate intervention is warranted). In the circumstances we unanimously dismiss both the appeal and the cross-appeal. We order the appellant to pay global costs in the sum of RM10,000 to each respondent subject to payment of allocatur.

Order accordingly.

Reported by Kohila Nesan