DALAM MAHKAMAH PERSEKUTUAN MALAYSIA DI PUTRAJAYA
(BIDANGKUASA RAYUAN)
[RAYUAN SIVIL NO.: 02(f)-11-02/2019(W)]

ANTARA

AHMAD ZAHRI BIN MIRZA ABDUL HAMID
(Singapore ID.: S73102254A) ... PERAYU

DAN

AIMS CYBERJAYA SDN BHD
(No. Syarikat: 794695-X) ... RESPONDEN)

(Dalam Perkara Rayuan Sivil No.: W-02(A)-287-02/2017 Di Mahkamah Rayuan Malaysia Bidang Kuasa Rayuan

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(Dalam Perkara Mahkamah Tinggi Malaya Kuala Lumpur
Bahagian Rayuan dan Kuasa-Kuasa Khas
Permohonan Untuk Semakan Kehakiman No: WA-25-117-07/2016

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CORAM:

TENGKU MAIMUN TUAN MAT, CJ

MOHD ZAWAWI SALLEH, FCJ

IDRUS HARUN, FCJ

NALLINI PATHMANATHAN, FCJ

ABDUL RAHMAN SEBLI, FCJ

JUDGMENT OF THE COURT

Introduction

[1] The key issue in this appeal is whether the appellant/claimant was employed on a fixed term contract or was a permanent employee of the respondent at the material time. The Industrial Court and the High Court found that the appellant/claimant was a permanent employee of the respondent and his dismissal from his employment was without just cause or excuse. On appeal, the Court of Appeal set aside the decision of the High Court and allowed the respondent's appeal.

[2] On 7.1.2019, this Court granted the appellant/claimant leave to appeal on the following questions of law:

(i) Whether a need for work permit is a material consideration in determining whether an employment contract is a genuine fixed term contract; and

(ii) Does a contract of employment which is renewed successively without application by the employee and without any intermittent breaks in between, is in reality a permanent employment.

The Factual Background and Antecedent Proceedings

[3] We do not propose to narrate the detailed factual background and antecedent proceedings of the case. They may be recounted in chronological order as follows:

End of 2008	The appellant/claimant was invited to join, invest and then became a shareholder of the AIMS Data Centre 2 Sdn Bhd ("ADC").
27.5.2009	The appellant/claimant received a letter of appointment from ADC for the position of the Consultant. The letter was signed by Gan Te- Shen, the Chief Executive Officer ("CEO") of ADC.
26.8.2009	The appellant/claimant received a contract for consultancy services from ADC for a fixed term i.e., from **1.10.2009 to 30.9.2010** ("original contract"). On the same day, the appellant/claimant received a letter of appointment as Vice President Product Development of ADC, from **1.10.2009**. According to this original contract, the appellant/claimant would be entitled for performance bonus scheme. The contract and the letter were signed by Gan Te- Shen, the CEO of ADC.
24.9.2010	The appellant/claimant received a renewal contract for a further period of twelve (12) months from **1.10.2010 to 30.9.2011**. All the terms and conditions of the contract remained unchanged. The letter was signed by Chiew Kok Hin, the CEO of ADC.
8.10.2011	The appellant/claimant received a renewal contract for a further period of twelve (12) months, from 1.10.2011 to 30.9.2012. All the terms and conditions of the contract remained unchanged. The letter was signed by Chiew Kok Hin, the CEO of ADC.
11.10.2012	The appellant/claimant received a renewal contract for a further period of twelve (12) months, from 1.10.2012 to 30.9.2013. All the terms and conditions of the contract remained unchanged. The letter was signed by Chiew Kok Hin, the CEO of ADC.
18.10.2012	The appellant/claimant received a renewal contract for a further period of twelve (12) months from 1.10.2012 to 30.9.2013, as Consultant of AIMS Cyberjaya Sdn Bhd ("respondent") instead of ADC. This was due to the phasing out of ADC. All the terms and conditions of the contract remained the same as the original contract dated 26.8.2009. The letter was signed by Chiew Kok Hin, the CEO of the respondent.
7.1.2013	ADC was subsequently consolidated into the respondent. In view of the company structure, the appellant/claimant was re-designated to assume the position of Vice President, Product, & Solutions with effect from 1.1.2013 in the respondent. All the terms and conditions of the contract remained the same as the original contract dated 26.8.2009. The letter was signed by Chiew Kok Hin, the CEO of the respondent.
10.9.2013	The appellant/claimant was given a letter by the respondent offering him further employment from 1.10.2013 until 30.9.2014. However, the respondent sought to change the terms of the appellant's/claimant's employment by excluding

	the performance bonus scheme. The letter was signed by Chiew Kok Hin, the CEO of the respondent.
13.9.2013	The appellant/claimant had informed Chiew Kok Hin, the CEO of the respondent, that he was not agreeable to the new terms and conditions of the contract.
18.9.2013	The respondent renewed the appellant's/claimant's contract for a period of three (3) months from **1.10.2013 to 31.12.2013**. The terms and conditions of the contract still remained unchanged i.e. excluding the performance bonus scheme. The letter was signed by Chiew Kok Hin, the CEO of the respondent.
1.10.2013	The appellant/claimant informed the respondent that he was unable to accept their offers, via an email.
18.10.2013	The appellant/claimant received a letter notifying him that the respondent gave him two (2) months' notice of expiry of his contract from **1.11.2013 until 31.12.2013**. The respondent also informed the appellant/claimant that they had decided to grant him an early release from his employment with effect from 19.10.2013. The appellant/ claimant made a representation under section 20 of the Industrial Relations Act (1967). The reconciliation attempts before the Industrial Relations Department failed and the matter was subsequently referred to the Industrial Court for adjudication.
1.4.2016	The Industrial Court held that the appellant/claimant was a permanent employee of the respondent and the purported "fixed term contracts" were not genuine fixed term contracts and the appellant's/claimant's dismissal was without just cause or excuse. The Industrial Court awarded back wages of twenty-four (24) months and compensation of one and a half (1½) month salary for each year of the appellant's/claimant's service in lieu of reinstatement.
1.7.2016	Dissatisfied with the award of the Industrial Court, the respondent filed a judicial review application to quash the Industrial Court's award.
6.1.2017	The High Court dismissed the respondent's application for judicial review.
27.1.2017	The respondent then appealed to the Court of Appeal.
30.11.2017	The Court of Appeal allowed the respondent's appeal and set aside the decision of the High Court and the award of the Industrial Court.
26.12.2017	The appellant/claimant then filed the notice of motion for leave to appeal to the Federal Court.
7.1.2019	Leave to appeal to the Federal Court was granted on two (2) questions of law. The two (2) questions of law are as stated in paragraph [2] of this judgment.
28.11.2019	After perusing the appeal record, reading the written submissions and hearing oral submissions from both parties, this Court allowed the appeal. The award of the Industrial Court was reinstated.

The 2nd Leave Question

[4] We will first deal with the 2nd Leave Question which is the determinative and central question in this appeal. The issue whether the appellant/claimant was employed on fixed term contract or was a permanent employee of the respondent is at the heart of the dispute between the parties.

[5] The appellant's/claimant's case before the Industrial Court was that his contract of employment with the respondent was permanent in nature and not a genuine fixed term contract. The Industrial Court found in favour of the appellant/claimant and vide its award dated 1.4.2016 concluded as follows:

> *"[45] Based on the totality of the evidence before this Court, the conclusion that is reached is that the claimant was a permanent employee of the Company and the purported "fixed term contracts" were not genuine fixed term contracts. Since the Company had terminated the claimant on the ground that his contract had expired, the dismissal is therefore found to be without just cause and excuse."*

[6] In arriving at its decision, the Industrial Court made the following findings of fact:

(i) all contracts of employment of the appellant/claimant were automatically renewed upon the initiative of the Company and not based on any application by the appellant/claimant;

(ii) the appellant/claimant was not a Consultant but an employee of the company;

(iii) the appellant's/claimant's function and position were not for a fixed duration but had an indefinite amount of time as was within the reasonable contemplation of parties; and

(iv) there was no break in the appellant's/claimant's employment with the respondent as confirmed by the respondent's own witness in her testimony.

[7] The Industrial Court lifted/pierced the corporate veil of the

respondent and held that the appellant/claimant was in fact a permanent employee and there was continuity of employment from ADC.

[8] The High Court affirmed the decision of the Industrial Court's award. On appeal, however, the Court of Appeal allowed the respondent's appeal. The Court of Appeal held, inter alia, that this was not a case where the corporate veil of the respondent ought to be lifted/pierced to reveal that the appellant/claimant was at all material times a permanent employee of the Company since joining AIMS group of companies in 2009 as opposed to an employee on a fixed term contract.

[9] The nub of the Court of Appeal's reasoning is captured as follows at paragraphs [16] and [17]:

> *"[16] Established authorities have held that there must be special circumstances, where there is either actual fraud at common law or some inequitable or unconscionable conduct amounting to fraud in equity that warrants the lifting of the corporate veil by either the Industrial Court or the High Court. (Refer to* ***Law Kam Loy & Anor v Boltex Sdn Bhd & Ors*** *[2005] 3 CLJ 355).*
>
> *[17] There is no evidence that the facts of the instant case demonstrate fraud or unconscionable conduct of the Applicant and neither did the Learned High Court address this matter in her 'Grounds of Judgment'. Thus, there are no grounds for the Industrial Court or the Learned High Court Judge to lift the corporate veils of AIMS Data Centre 2 Sdn Bhd and the Applicant, AIMS Cyberjaya Sdn Bhd to treat the two separate entities as one i.e. the Applicant, AIMS Cyberjaya Sdn Bhd."*

Lifting/Piercing the Corporate Veil

[10] Learned counsel for the appellant/claimant vehemently argued that the Court of Appeal had erred and/or failed to appreciate that the Industrial Courts would, in appropriate cases, more readily lift/pierce the corporate veil to reveal the true employer and prevent the employer from disclaiming responsibility for an employee. In support of his

submission, reliance was placed on the Federal Court's decision in *Hotel Jaya Puri Bhd v National Union of Hotel Bar and Restaurant Workers* [1980] 1 MLJ 109 ("*Hotel Jaya Puri* case").

[11] Learned counsel further submitted that in the industrial jurisprudence, the mere description of a contract as a fixed term contract is not conclusive of whether an employee was indeed employed as such. The Court is duty bound to enquire from the evidence adduced what was the real nature of the appellant's/claimant's employment and if there is a need to lift/pierce the corporate veil of the company, then this ought to be done to reveal the true nature of the appellant's/claimant's employment.

[12] Based on the evidence adduced before the Industrial Court, it was submitted that the Court of Appeal erred when it held that the veil of incorporation of ADC and the respondent could not be lifted/pierced to reveal that the appellant's/claimant's employment was in fact a continuous employment from the time he was employed in 2009 until his termination in October 2013.

Our Decision on the 2nd Leave Question

[13] Put simply, "lifting/piercing the corporate veil" means disregarding the dichotomy between a company and a natural person behind it and attributing liability to that person where he has misused or abused the principle of corporate personality. Since the decision of the House of Lords in *Salomon v. Salomon & Co* [1897] AC 22, which affirmed the legal principle that, upon incorporation, a company is generally considered to be a new legal entity separate from its shareholders, the courts in Malaysia, England and other Commonwealth jurisdictions have found exceptions to the general principle stated in *Salomon (supra)* and have lifted/pierced the corporate veil to reveal those who controlled the company.

[14] The application of the doctrine of veil lifting/piercing the corporate veil is far from clear from case law. Professor Farrar has described the Commonwealth authority on piercing the corporate veil as "incoherent and unprincipled" (See: J. Farrar, 'Fraud, Fairness and

Piercing the Corporate Veil' (1990) 16 *Canadian Business Law Journal* 474, 478). It would appear that the circumstances in which the corporate veil may be lifted/pierced are greatly circumscribed and the courts tend to take a fact-based approached on the matter.

[15] Courts have recognised a number of factors that may lead to lifting/piercing of the corporate veil. Generally speaking, grounds under general law for lifting/piercing the corporate veil may be grouped into the following categories:

(a) agency;

(b) fraud;

(c) sham or façade;

(d) group enterprise; and

(e) unfairness/injustice.

These categories are probably not exhaustive. For the purpose of this instant appeal, categories (d) and (e) are relevant.

[16] A court may lift/pierce the corporate veil where the relationship between companies in the same group is so intertwined that they should be treated as a single entity to reflect the economic and commercial realities of the situation. An argument of "group enterprise" is that in certain circumstances a corporate group is operating in such a manner as to make each individual entity indistinguishable, and therefore it is proper to lift/pierce the corporate veil to treat the parent company as liable for the acts of the subsidiary. Lifting/piercing the corporate veil is one way to ensure that a corporate group, which seeks the advantages of limited liability, must also accept the corresponding responsibilities.

[17] In the employment law perspective, the application of the "single economic unit" test or "functional integrality" test is particularly significant in ascertaining the continuity of employment for the scope of dismissal protection [see *Manley Inc. v. Fallis* (1977), 2 B.L.R. 277 (Ont. C.A.)]. It recognises the complexity of modern corporate

structures and that the corporate veil must only be pierced in exceptional circumstances. On the other hand, such complexity should not be an obstacle to defeat the legitimate entitlements of wrongfully dismissed employees. This approach has its root on the general notions of fairness, equality and proportionality in the treatment of vulnerable employees. It serves to balance fairness with evolving commercial realities.

[18] One of the seminal cases in Malaysia on lifting/piercing the corporate veil is the ***Hotel Jaya Puri*** case. It was a decision in respect of judicial review application for *certiorari* against the decision by the Industrial Court ordering Hotel Jaya Puri Berhad ("the Hotel") to pay compensation of 2 months salaries plus fixed allowances in favour of workmen employed in the business of Jaya Puri Chinese Garden Restaurant Sdn Bhd ("the Restaurant"). The Restaurant, which was a fully owned subsidiary of the Hotel had 56 workers employed and operated its business at the hotel premises by paying a rental. Subsequently, the Restaurant closed its business due to financial losses and the employees were retrenched. It resulted in an industrial dispute and the matter was referred to the Industrial Court. The employees claimed that they had been dismissed rather than retrenched as they were employees of the Hotel. The Industrial Court issued an award directing the Hotel to pay compensation.

[19] The Industrial Court found that the Hotel was in fact the employer of the workers and reasoned that:

(i) The Hotel and the Restaurant were inter:dependent;

(ii) There was functional integrality and unity of establishment between the Hotel and the Restaurant. In other words, functionally the Hotel and the Restaurant were in fact one integral whole and in terms of management, they also constituted a single unit; and

(iii) A number of senior officers including the secretary, personnel manager and assistant manager were common to both the Hotel and the Restaurant.

[20] On appeal, Salleh Abas FJ (as he then was) upheld the decision of the Industrial Court. His Lordship observed:

> *"It is true that while the principle that a company is an entity separate from its shareholders and that a subsidiary and its parent or holding company are separate entities having separate existence is well established in company law, in recent years the court has, in a number of cases, by:passed this principle if not made an inroad into it.* ***The court seems quite willing to lift the "veil of incorporation" (so the expression goes) when the justice of the case so demands.*** *The facts of the case may well justify the court to hold that despite separate existence a subsidiary company is an agent of the parent company or vice versa as was decided in* ***Smith, Stone and Knight v. Birmingham Corporation*** *[1938] 4 All ER 115;* ***Re FG (Films) Limited*** *[1955] 1 WLR 483; and* ***Firestone Tyre & Rubber Co v Llewelyn*** *[1957] 1 WLR 464.*
>
> ...
>
> *In my judgment,* ***by giving recognition to this fact, the President did not cause any violence to the sanctity of the principle of separate entity established in Salomon v Salomon... but rather gave effect to the reality of the Hotel and the Restaurant as being in one enterprise****.... In my view, the finding by the President is in no way against the principle of separate entity and I am therefore not prepared to interfere with the award on this account..."*
>
> [Emphasis added]

[21] The willingness of the Malaysian courts to lift/pierce the corporate veil by adopting the principle enunciated in the ***Hotel Jaya Puri*** case, particularly in the industrial disputes, is not new. In *Rusli Luwi v. RM Top Holdings Sdn Bhd & Ors* [2003] 4 MLRH 352, the High Court found no difficulty in lifting the veil of incorporation, when the respondents, one of which was a subsidiary of the other, were operating as one business enterprise. Another example of this can be found in *Jimsburg Services Sdn Bhd v. Rostam Wahidin* [1999] 2 ILR

324.

[22] In this instant appeal, the Court of Appeal, relying on the case of ***Law Kam Loy (supra)***, held that the corporate veil of the respondent ought not to be lifted/pierced. Learned counsel for the appellant/claimant submitted that the Court of Appeal failed to properly consider the context in which the decision was made.

[23] We agree with the submission. If the case is properly considered, one would discover that the Court of Appeal in ***Law Kam Loy (supra)*** had endorsed that the Industrial Court may, in special and appreciate circumstances, lift of the corporate veil to reveal who is the proper employer, such as in a situation where there is actual fraud at common law or some inequitable or unconscionable conduct amounting to fraud in equity. Gopal Sri Ram JCA (as he then was) stated as follows –

> *"...But that is not to say that the court in the* ***Hotel Jayapuri*** *case was wrong in lifting the veil of incorporation of the facts of that case.* ***The Hotel Jayapuri case was concerned with the Industrial Relations Act 1967 which requires the Industrial Court to disregard the technicalities and to have regard to equity, good conscience and the substantial merits of a case. Accordingly, in industrial law, where the interests of justice so demand, it may, in particular cases be appropriate for the Industrial Court to pierce or to disregard the doctrine of corporate personality. That is what happened in the Hotel Jayapuri case and no criticism of that case on its facts may be justified".***
>
> [Emphasis added]

[24] In our considered opinion, the case of ***Law Kam Loy (supra)*** simply stands for the proposition that whilst the approach of the Supreme Court in the ***Hotel Jaya Puri*** case may not be suitable in present times (*vis:a:vis* current company law principles), the practice of the courts in lifting/piercing the corporate veil may still be accepted in the realm of industrial relations as the correct approach to reveal who is the employer in the given case in order to achieve social justice

so that the workmen are not adversely affected. In addition section 30(5) of the Industrial Relations Act 1967 provides that the court shall act according to *"equity, good conscience and the substantial merits of the case without regard to technicalities and legal form"*.

[25] In this connection, perhaps it would be useful to embark on a voyage cross other Commonwealth jurisdictions to look at persuasive authorities relevant to the issue under discussion.

South Africa

[26] In the South Africa, particularly in industrial and labour court matters, there has been willingness to pierce the veil. In the circumstance where the company is the agent or alter ego of its shareholders and directors, the courts are concerned with reality of the situation and not its form. In essence, what is important is the manner in which the company operated and with the individual's relationship to that operation. In the case of *Footwear Trading CC v. Mdlalose* [2005] 5 BLLR452 (LAC), Nicholson JA noted that –

> *"The abuse of juristic personality occurs too frequently for comfort and many epithets have been used to describe the abuse against which the courts have tried to protect third parties, namely puppets, shams, masks and alter ego. However, the general principle underlying this aspect of the law of lifting the veil is that, when the corporation is the mere alter ego or business conduit of a person, it may be disregarded. The lifting of the veil is normally reserved for instances where the shareholders or individuals hiding behind the corporate veil are sought to be responsible. I do not see why it should not also apply where companies and close corporations are juggled around like puppets to do the bidding of the puppet master."*

[27] The Labour Appeal Court concluded that although Fila (PTY) Ltd and Footwear Trading CC were separate legal personalities, an expose of both entities would show that they were controlled by the same individuals and were inextricably interlinked, confirmed that they were in effect joint or co: employers.

[28] In *Esterhuizen v. Million Air Services (in liquidation) & Others* (2007) 28 ILJ 1251 (LC), the applicant had referred a constructive dismissal dispute to the Commission of Conciliation, Mediation and Arbitration ("CCMA") in 2001. The employer (first respondent) failed to appear at both conciliation and arbitration hearings. The CCMA found in favour of the applicant and awarded compensation. A warrant of execution was issued.

[29] When the deputy sheriff tried to execute the writ, he was informed by third respondent, the manager of Million:Air Services Carletonville (Pty) Ltd (second respondent) which had been incorporated in 2003, that the first respondent had been liquidated.

[30] The applicant applied to the Labour Court to declare that the second respondent was the same business operations as the first respondent and was liable, jointly and severally with the third respondent, to pay the amount awarded to the applicant in a CCMA award. Further, that it be declared that the third respondent was the real employer of the applicant and that he is liable, jointly and severally with the second respondent, to pay the amount awarded to the applicant in the CCMA award.

[31] The Labour Court of South Africa found that there were policy considerations allowing the corporate veil be pierced to reveal who the true employer was. Francis J, in delivering the judgment of the court, held that the conduct of the third respondent was 'gravely improper'. The court found that the liquidation of the first respondent was a stratagem of the third respondent, in a deliberate attempt to thwart the employee's right to compensation. The third respondent had absolute control over both of the companies involved. He was the common denominator in the applicant's dismissal, the liquidation of the company, and the incorporation of the second company. The third respondent was the real employer and was liable, jointly and severally with the second respondent, to pay the amount awarded to the applicant in the CCMA award.

Canada

[32] The Canadian law recognises a doctrine known as the common employer doctrine. Under the doctrine, two or more legal entities can be employers of a person in relation to the same work where there is a sufficient degree of relationship between the different entities that act as common employers. What counts as a sufficient degree of relationship is determined on a case by case basis but includes "factors such as individual shareholdings, corporate shareholdings, and interlocking directorships the essence of that relationship will be the element of common control" (See: *Sinclair v. Dover Engineering Services Ltd* [1988] 49 D.L.R. (4th) 297).

[33] The idea of common employers was first recognised in *Bagby v. Gustavson Int'l Drilling Co Ltd* (1980), 24 A.R. 18, but the test was not clearly stated until *Sinclair (supra)*. In *Sinclair (supra)***,** the plaintiff was a professional engineer who wanted to bring a wrongful dismissal claim against two companies. One company, Dover Engineering Services Ltd ("Dover"), held itself out as his employer. Another company, Cyril Management Limited ("Cyril"), was responsible for paying the plaintiff. Cyril also deducted all payments from the plaintiff's salary for income tax, unemployment insurance and his pension plan. Dover was owned by Mr Vernon Gould and Mr Donald Keenan. Cyril was effectively a management company that paid everyone who worked for Dover and the other companies owned by the Gould partnership.

[34] The Court held both companies were the common employers of the plaintiff and it did not matter that the companies were in this complex business relationship with one another. Wood J stated –

> *"16. I see no reason why such an inflexible notion of contract must necessarily be imposed upon the modern employment relationship. Recognizing the situation for what it was, I see no reason, in fact or in law, why both Dover and Cyril should not be regarded jointly as the plaintiff's employer. The old:fashioned notion that no man can serve two masters fails to recognize the*

realities of modern:day business, accounting and tax considerations.

...

18. As long as there exists a sufficient degree of relationship between the different legal entities who apparently compete for the role of employer, there is no reason in law or in equity why they ought not all to be regarded as one for the purpose of determining liability for obligations owed to those employees who, in effect, have served all without regard for any precise notion of to whom they were bound in contract."

[35] The case of *Downtown Eatery (1993) Ltd v. Ontario* (2001) 8 C.C.E.L. (3d) 186 (Ont. C.A.), had affirmed that the focus of the common employer doctrine was the relationship between the employers and not on the relationship between the employers and the employee. In this case, the plaintiff was a manger of a night club. He had been awarded damages for wrongful dismissal against his employer. However, his employer was insolvent. He sought judgment against all the companies involved in the nightclub enterprise, which he claimed belonged to the same corporate group. The Court held that all the companies belong to one integrated unit and they were the plaintiff's joint employer.

[36] MacPherson JA stated that although an employer is entitled to establish complex corporate structures and relationships, the law should be vigilant to ensure that permissible complexity in corporate arrangements does not work an injustice in the realm of employment law.

New Zealand

[37] In New Zealand, the first acknowledgement of the concept of having two employers was in the case of *Inspector of Awards v. Pacific Helmets (NZ) Ltd* [1988] NZILR 411. Chief Judge Horn stated –

"I see nothing in principle to prevent two people or firms joining

together to employ one man for their respective purposes. And the more so when those purposes are closely associated."

[38] The acceptance of the concept of joint employers was confirmed by Shaw J, in the case of **Orakei Group (2007) Limited v Doherty** [2008] NZEmpC 65**.** The Employment Court confirmed that a person can be employed in the same employment by two or more companies; but there must be a sufficient degree of relationship between the legal entities for them to be joint employers. Common control by both employers would be usual in joint employment relationship.

The United Kingdom

[39] In the context of employment law, there are two cases which highlighted the principle that a parent company could owe tortious liability for the health and safety of its subsidiary's employees, namely: *Chandler . Cape Plc* [2012] EWCA Civ 525 and *Thompson v. Renwick Group Plc* [2014] EWCA Civ 635.

[40] In *Chandler (supra)*, the subsidiary's employee, who suffered from disorders caused by asbestos in the workplace, claimed damages against the parent company. The case appeared to be the first which actually imposed a duty of care to an employee of a company on that company's parent company. Arden LJ applied the three:stage test i.e. (i) whether the damage was 'foreseeable'; (ii) whether there was 'proximity' between the parties, and (iii) whether it was 'fair, just and reasonable' to impose the duty on the party. As a result, her Ladyship recognised the duty of care of the parent company either to advise its subsidiary about the steps to take or to ensure the implementation of these steps due to the parent's knowledge of the working condition and its superior knowledge about the risks. Her Ladyship summarised her judgment in paragraph [69] as follows –

> *"[I]n appropriate circumstances the law may impose on a parent company responsibility for the health and safety of its subsidiary's employees. Those circumstances include a situation where, as in the present case, (1) the businesses of the parent and subsidiary are in a relevant respect the same; (2) the parent has,*

> *or ought to have, superior knowledge on some relevant aspect of health and safety in the particular industry; (3) the subsidiary's system of work is unsafe as the parent company knew, or ought to have known; and (4) the parent knew or ought to have foreseen that the subsidiary or its employees would rely on its using that superior knowledge for the employees' protection."*

Although her approach could have the same effect as piercing the veil, Arden LJ rejected the view of this approach as 'veil:piercing'.

[41] In *Thompson (supra)***,** the possibility of a direct duty of care owed by the parent company was again recognised with the criteria proposed by *Chandler (supra)*. However, the claim by the employee was rejected due to lack of sufficient evidence. Tomlinson LJ stated that the four factors mentioned by Arden LJ in *Chandler (supra)* were descriptive rather than exhaustive. Although the degree of fairness was as high as in Chandler, Thomlinson LJ rejected the claim of the plaintiff as there was no evidence of the parent's knowledge and control related to foreseeability and proximity. Hence, the parent company's direct duty of care could not be recognised.

[42] From a short review of cases above, it would appear that although the principle of separate legal entity is at the core of the company law, there are a number of situations in which a corporate group and its members can be treated the same. In other words, while the *dicta* in **Hotel Jaya Puri** case is correct in substance particularly in the context of industrial jurisprudence, the approach of 'common employer' taken by the Canadian, South African and English courts better explains the rationale in industrial law terms in order to achieve equity and social justice. This is in keeping with the tenor and purpose of the Industrial Relations Act 1967.

[43] In sum, insofar as employment law is concerned, the circumstances which are believed to be most peculiar basis under which the court would lift/pierce the corporate veil and find a group of companies to be common employers include –

(i) Where there is "functional integrality" between entities;

(ii) Unity of establishment between the entities.

(iii) The existence of a fiduciary relationship between the members of the entities and/or the extent of control;

(iv) There was essential unity of group enterprise; and

(v) Whenever it is just and equitable to do so and/or when the justice of the case so demands.

But these circumstances are just guidelines and are by no means being exhaustive. The circumstances for which the Court may lift/pierce the corporate veil are never closed.

[44] Reverting back to the mainstream of the present appeal, we are of the considered opinion that ADC and the respondent were part and parcel of the same group. There was "an essential unity of group enterprise". The uncontroverted evidence established that:

(i) The appellant's/claimant's original contract of employment with ADC was dated 26.8.2009;

(ii) *Vide* letter dated 11.10.2012, ADC informed the appellant/claimant that his contract as Consultant will be renewed for another twelve (12) months from 1.10.2012 to 30.9.2013;

(iii) However, vide letter dated 18.10.2012 from the respondent, the appellant/claimant was informed that his contract as a Consultant will be renewed under the respondent, instead of ADC. Further, it was expressly stated that there will be no change in his designation, grade and other terms and conditions of his contract dated 26.8.2009;

(iv) In the letter dated 18.10.2012, the respondent expressly stated that the appellant's/claimant's contract is being renewed under the respondent instead of under ADC in view of the phasing out of ADC;

(v) The Chief Executive Officer of ADC who signed the letter dated 11.10.2012 and the Chief Executive officer of the respondent who signed the letter dated 18.10.2012 (i.e. seven (7) days later) were one and the same : Mr. Chiew Kok Hin;

(vi) It was a finding of fact by the Industrial Court that ADC was consolidated into the respondent and vide a letter dated 7.1.2013, in view of the new company structure, the appellant/claimant had been re:designated to assume the post of VP, Product and Solutions with effect from 1.1.2013;

(vii) It was a finding of fact by the Industrial Court that the appellant/claimant continued to report to Mr. Chiew Kok Hin before and after the letter dated 18.10.2012; and

(viii) It was a finding of fact by the Industrial Court that according to the testimony of the respondent's witness (COW:1) the appellant's/claimant's contract with ADC allowed for the appellant/claimant to be moved to any of its subsidiaries and/or associate companies. Thus, the appellant/claimant was asked to assume the position of VP, Product & Solutions with the respondent on 7.1.2013.

[45] For all the aforesaid reasons, we are of the considered view the Court of Appeal was wrong when it held that ADC and the respondent were two separate legal entities and failed to treat the appellant's/claimant's contract of employment as a continuous one from ADC to the respondent. In our view, the doctrine, whether is categorized as "essential unity group enterprise" or "common employer", its purpose is to permit the corporate veil to be pierced in order to establish or identify the true labour relationship between parties in terms of the existing labour relation realities. The Court of Appeal's failure to identify the employer: employee relationship runs contrary with the fundamental purposes of the Industrial Relation Act 1967.

[46] Further, the Court of Appeal was wrong in reversing the findings of fact by the Industrial Court and ruled that the appellant/claimant had accepted a three (3) months contract that was offered to him in September 2013. The facts clearly showed that the appellant/claimant did not accept the offers because the Company had removed his entitlement to the performance bonus scheme in which he was a participant at all material times since he was in employment with AIMS group of companies in 2009.

[47] It is an established rule, enunciated in a long line of decisions, that the appellate court will not disturb the findings of fact made by the trial court as to the credibility of witnesses in view of its opportunity to observe the demeanor and conduct of witnesses while testifying and the said findings will generally be accepted or acted upon unless it can be demonstrated that the trial court's decision is plainly wrong or the decision is one that no reasonable judge or tribunal could have reached (See: *Tay Kheng Hong v. Heap Moh Steamship Co Ltd* [1964] 1 MLJ 87; *Chow Yee Wah & Anor v. Choo Ah Pat* [1978] 2 MLJ 41b; *Gan Yook Chin (P) & Anor v. Lee Ing Chin @ Lee Teck Seng* [2005] 2 MLJ 1; *Tengku Dato' Ibrahim Petra Tengku Indra Petra v. Petra Perdana Bhd & Another* [2018] 2 CLJ 641, *Henderson v. Foxworth Investments Ltd and another* [2014] 1 WLR 2600; *Mc Graddie v. Mc Graddie* [2013] WLR 2477). We observe that the Court of Appeal did not proffer any reasons whatsoever in revising the Industrial Court's finding that the appellant/claimant did not accept the three (3) months contract that was offered to him. In our considered opinion, there is no material error in the findings of fact by the Industrial Court which justifies the Court of Appeal to reverse its decision. The findings of fact by the Industrial Court are amply supported by the relevant evidence on record.

Fixed Term Contract Or Permanent Employee

[48] We now turn to the issue on whether on the facts and circumstances of the present appeal, the appellant/claimant was employed on a fixed term contract or was a permanent employee of the respondent.

[49] The Court of Appeal had considered the issue of fixed term contract in the light of its decision on the issue of separate legal entity. The Court of Appeal concluded that it was wrong for the Industrial Court and the High Court to have lifted the corporate veil based on the facts of the present appeal. The Court of Appeal disregarded the earlier contracts of employment between the appellant/claimant and ADC.

[50] The Court of Appeal held that the appellant/claimant was appointed under a fixed term contract of three (3) months and that early termination of the appellant's/claimant's contract employment was affected in accordance with clause 8 of the appellant's/claimant's contract of employment dated 18.9.2013 which provides as follows –

> *"8. Termination*
>
> *Your appointment may be terminated by giving two (2) months notice. Such notice shall be given by the party that intends to effect the determination. Where no notice is given, two (2) months salary in lieu of notice shall be payable by the party effecting such termination."*

[51] Clause 1(e) of the same contract of employment provides as follows–

> *"This contract shall supersede all other contracts previously issue under AIMS Data Centre 2 Sdn Bhd and AIMS Data Centre Pte Ltd."*

[52] It was submitted on behalf of the respondent that the Court of Appeal was right in holding that there was no continuity of employment because the two companies were two separate legal entities. It was further submitted that even if a contract of employment was renewed successively without any application by the employee and without any intermittent breaks in between, this did not change the character and nature of a fixed term contract into a permanent contract. And clause 1(e) of the appellant's/claimant's contract of employment shows that there is no continuity between the appellant's/claimant's contract of employment and his past fixed term contracts.

Our Decision

[53] Security of tenure in employment or job security is recognised by our Malaysian courts (see *Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan & Anor* [1996] 1 MLJ 481, *Ang Beng Teik v. Pan Global Textile Bhd, Penang* [1996] 4 CLJ 313, *The New Straits Times Press (Malaysia) Bhd v. Chong Lee Fah* [2003] 2 ILR 239). This right however, has to be balanced with the employer's prerogative to make commercial decisions for reasons of better economy or better management (see *Harris Solid State (M) Sdn Bhd & Ors v. Bruno Gentil s/o Pereira & 2 Ors* [1996] 4 MLJ 747, *Malaysia Shipyard and Engineering Sdn Bhd v. Mukhtiar Singh & 16 Ors* [1991] 1 ILR 626).

[54] The use of fixed term contract employee had become a trend in Malaysia, particularly in the employment of expatriates and also in the construction industry where employees are commonly engaged on a project basis. A fixed term contract is a contract of employment for a specific period of time i.e. with a defined end (See: *Wiltshire Country Council v. National Association of Teachers in Further and Higher Education and Guy* [1980] 1 C.R 455). As a general rule, such contract cannot be terminated before its expiry date except for gross misconduct or by mutual agreement. However, a contract can still be for a fixed:term if it contains within it a provision enabling either side to terminate it on giving notice before the term expires (See: *Dixon and another v. British Broadcasting Corporation* [1979] 1 Q.B. 546). In this connection, the main issue that presents itself is whether there is a genuine fixed term contract or there is an employment on a permanent basis dressed up as several fixed term contracts.

[55] The judicial treatment regarding the question of whether an employer had a genuine need for the service of an employee for a fixed duration may be divided into three (3) consideration points –

(i) The intention of parties (see *Han Chiang High School/Penang Han Chiang Associated Chinese School Association v. National Union of Teachers in Independent Schools, West Malaysia & Industrial Court of Malaysia*

(1990) 1 ILR 473**,** *Hasni Hassan & Ors v. Menteri Sumber Manusia & Anor* [2013] 6 CLJ 74);

(ii) Employers' subsequent conduct during the course of employment (see *Innoprise Corporation Sdn. Bhd., Sabah v Sukumaran Vanugopal* [1993] 1 ILR 373B, *Sime UEP Development Sdn Bhd v Chuah Poi* [1996] 1 ILR 256, *Malaysia Airlines Bhd v. Michael Ng Liang Kok* [2000] 3 ILR 179, *Holiday Villages of Malaysia Sdn Bhd v Mohd Zaizam Mustafa* [2006] 2 LNS 0812); and

(iii) Nature of the employer's business and the nature of work which an employee is engaged to perform (see *Audrey Yeoh Peng Hoon v Financial Mediation Bureau* [2015] 3 ILR 371, *Charles Aseervatham Abdullah v. The Zenith Hotel Sdn Bhd* [2018] 2 LNS 2349**)**.

The Intention Of Parties

[56] In the *locus classicus* case on fixed term contract, *Han Chiang High School (supra)*, the Court distinguished between a genuine fixed term contract and one which is a sham**.** In this case, the material facts are that the school had employed teachers on fixed term contracts of two (2) years. A number of teachers who had joined the Union of Teachers in Independent Schools were informed that their employment would cease upon expiry of the fixed term contract. The Union applied to the High Court for an interlocutory injunction restraining the school from terminating the services of the teachers. The High Court granted the injunction but the then Supreme Court subsequently set aside the injunction because the forum to deal with complaints of wrongful dismissal was the Industrial Court. After the injunction was set aside, the school proceeded to inform the teachers that their service was no longer required. The teachers claimed that they were dismissed without just cause and excuse.

[57] The Industrial Court held that although there might have been a genuine need for fixed term contracts when the school was first inaugurated in 1951, there did not appear to be such a need when it had

been successfully established as some of the teachers had taught for more than twenty (20) years and had their contracts renewed unfailingly during those years. In holding that the fixed term contracts were not genuine, the Industrial Court stated that the system of fixed term contracts in the school was employed not out of genuine necessity, but as a means of control and subjugation of its teaching employees.

[58] In *Hasni Hassan (supra)*, five (5) employees were migrated to fixed term contracts in 2003 as part of a transformation plan to improve the performance of government:linked companies, which in this case Telekom Malaysia Berhad ("Telekom"). Telekom, had offered all senior management officers the option of either remaining under current terms as permanent employment or to accept fixed term contracts. In order to accept the fixed term contracts, the employees would have to resign from their permanent employment.

[59] The dispute arose when five (5) of those officers did not have their fixed term contracts renewed. They lodged a complaint under section 20 of the Industrial Relations Act 1967, but the Minister declined to refer the matter to the Industrial Court. The employees applied for judicial review of the Minister's decision. At the High Court, the decision of the Minister was upheld. Three of the five employees appealed to the Court of Appeal, which allowed the appeal and referred the matter to the Industrial Court for adjudication.

[60] Even though the Court of Appeal held that it is for the Industrial Court to decide the matter on merit (genuineness of the fixed term contract), the Court of Appeal went further and stated that the Telekom had genuine intentions when they offered the fixed term contracts to their senior management as their intention was to increase performance and productivity and, as reward, the senior management would be able to earn higher incomes. The Court of Appeal also stated that this was part of a business plan and there was no ulterior or sinister motive on the part of the Telekom when they offered the fixed term contracts and the fixed term "was not a guise to shorten the employment of the employees previously on permanent contracts".

Employers' Subsequent Conduct During The Course Of Employment

[61] We have the opportunity to review several cases decided by the Industrial Court on this issue and we agree with the approach adopted that in determining whether a contract of employment is a fixed term contract or permanent employment, the employer's subsequent conduct during the course of employment is a relevant consideration. The total duration or length of service with an employer is also a factor that would be considered.

[62] In the case *Sime UEP (supra)*, a clerk was employed for four (4) years on a contract that was renewed annually. During his four (4) years there, the employee was involved in various projects. The Industrial Court held that an employee cannot be considered to be employed for a temporary or one:off job if he was not employed for a particular project and he had been involved in various projects during his tenure.

[63] In the case of *Malaysia Airlines (supra)*, the employee was engaged on a fixed term contract of two (2) years as second officer in the Rural Air Service. He was confirmed in his position as second officer two (2) months later. Eight (8) months into his employment, he was promoted as a commander and was confirmed in that position after serving a probationary period of six (6) months. His fixed term contract was subsequently renewed twice, each time for three (3) years. When the employee wrote to the company on the forthcoming expiry of his third fixed term contract, he was given a three:month contract by the company. The Industrial Court, in finding that the employee's employment had been permanent, considered that the Rural Air Service was not a temporary operation and that it did not have a definite duration beyond which the cessation of the business is inevitable.

[64] The next case is *Holiday Villages (supra)*. In this case, a resort employed both seasonal and permanent employees. Seasonal employees had a fixed term in their contracts which would range from three (3) to six (6) months or for a season. The resort was not open for the whole

year and would be closed during the monsoon season which falls between November and January of each year. The employee had begun employment on a fixed term contract for one (1) season. He was subsequently employed for six (6) consecutive seasons. The Industrial Court acknowledged that the resort was only open for nine (9) to ten (10) months in a year and that there was a genuine need for fixed term contracts as it was inconceivable to expect the resort to pay salaries when it was closed.

[65] Notwithstanding the genuine need for fixed term contracts, the Industrial Court found that the employee was, by the last fixed term contract in the series of fixed term contracts, a permanent employee of the resort as:

(i) he was employed even during the off:season as a laundry supervisor;

(ii) he was given a new contract without the need to reapply; and

(iii) he was able to continue in employment even after the alleged expiry of his penultimate fixed term contract without an extension.

Nature Of The Employer's Business And The Nature Of Work Which An Employee Is Engaged To Perform

[66] Factors that determine the true character of a fixed term contract may also include the nature of the employer's business and the nature of the work which an employee is engaged to perform. In *Charles Aseervatham Abdullah v. The Zenith Hotel Sdn Bhd* [2018] 2 LNS 2349**,** a similar issue with the present appeal arose for the court determination: whether or not an employee who had worked for 3 separate entities over several years was on a fixed term contract. In arriving at its award, the Industrial Court examined the entirety of the claimant's employment history, and came to conclusion that the contract was not a genuine fixed term contract.

[67] With the principles outlined above in mind and based on the factual matrix of the instant appeal, we are satisfied that the appellant's/claimant's contract of employment beginning with ADC before being terminated under the respondent, was not one:off, seasonal or temporary employment. It was on going, continuous employment without a break from 2009 to 2013. In our considered opinion, the Court of Appeal erred in not recognising the industrial law principle of lifting/piercing the corporate veil in the circumstances and the ongoing nature of the appellant's/claimant's contract of employment with both the companies.

Our Decision On The 1st Leave Question

[68] We now turn our attention to the 1st leave Question. The Court of Appeal held that an expatriate who requires a work permit to work in Malaysia can never be a permanent employee in Malaysia, relying on *Nash'at Muhy Mahmoud v. Malaysia Airline System Bhd* [2013] 2 LNS 1745 and *Toko Inomoto & Ors v. Malaysian Phiharmonic Orchestra* [2015] 2 LNS 1034.

[69] Learned counsel for the appellant/claimant mounted a spirited attack on the decision of the Court of Appeal in respect of this issue. Learned Counsel argued that the Court of Appeal ought to have referred to the Federal Court case of *Assunta Hospital v. Dr. A. Dutt* [1981] 1 MLJ 115 which held that the citizenship of an employee has no bearing in deciding whether the applicant was in permanent employment or under a fixed term contract.

[70] We agree with the submission. In *Assunta Hospital (supra)***,** Dr. Dutt was an Indian citizen and was engaged as a radiologist in the Assunta Hospital, on a 3:year contract, which was renewed without any break a number of times. Later, the Dr.'s contract was terminated. The Industrial Court awarded a sum of RM522,000 as compensation in lieu of reinstatement. In the Federal Court, the employment contract of Dr. Dutt was not an issue but the court did make an observation that the last letter of appointment described the period of engagement as "permanent" and that there was no doubt that the contract offered a

certain security of tenure. On the citizenship matter, the Court had these to say:

> *"As for the non:citizenship status of Dr. Dutt, we shared the astonishment of the judge at the relevance of this point. Our views can be stated shortly;* ***whether Dr. Dutt can get an extension of his visit:pass so as to be able to stay in this country or the issue of a work:permit in order to be able to take up the appointment are not matters that can influence the court in the proper exercise of the jurisdiction conferred on it by the Minister's reference of***
>
> ***the representations for reinstatement. If an order is made ordering reinstatement and the workman is unable to obtain either the visit pass or the work:permit, the employer would not be in contempt of the order. It is for the workman to make the order effective. All that the hospital had to do is to make the post available to the workman. As for any suggestion that the order for reinstatement would influence the Ministry of Home Affairs to issue the visit pass or the work:permit, there cannot be any truth in it, and it cannot possibly be said that the Ministry of Home Affairs is bound to comply with the order for reinstatement. In any event, it is of no concern to the hospital."***
>
> [Emphasis added]

[71] In *Toko Inomoto & Ors v. Malaysian Philarmonic Orchestra* [2017] 1 LNS 201, one of the issues that was dealt with by the learned High Court Judge was whether or not an employee's citizenship is a material consideration in deciding whether an employment is on a permanent basis. The Learned High Court Judge took the view that the issue of the citizenship is not a material consideration. At paragraph 223 of the judgment, the learned judge said:

> *"I agree with the counsel for the applicant that* ***the issue of citizenship was not a material consideration for the Industrial Court to take into account****."*

[Emphasis added]

[72] In our view, the proposition of law propounded above is correct in law. The citizenship of the appellant/claimant has no bearing in deciding whether the appellant/claimant was in permanent employment or in employment under a fixed term contract. We also note that the **Industrial Relations Act 1967** does not make any distinction between the citizens of Malaysia and non:citizens.

[73] At this juncture, it is pertinent to consider the definition of "workman" in **section 2 of the Industrial Relations Act 1967**:

> *"'workman' means any person, including an apprentice employed by an employer under a contract of employment to work for hire or reward, and for the purpose of any proceedings in relation to a trade dispute includes any such person who has been dismissed, discharged or retrenched in connection with or as a consequence of that dispute or whose dismissal, discharge or retrenchment has led to that dispute."*

[74] According to this definition, a workman is "any person" employed under "a contract of employment", and in the case of a "trade dispute", he is a person whose dismissal, discharge or retrenchment from employment leads to or is the cause of the dispute. But what is the meaning of any "person", "contract of employment" and "trade dispute"?

[75] The word "person" is interpreted in **section 3 of the Interpretation Acts 1948 and 1967 (Act 388),** as including body of person, corporate, or unincorporated.

[76] "Contract of employment" is defined by the **section 2 of the Industrial Relations Act 1967** as "any agreement whether oral or in writing and whether express or implied, whereby the person agrees to employ another as a workman and that other agrees to serve his employer as a workman".

[77] Meanwhile, "trade dispute" is defined in **section 2 of the**

Industrial Relations Act 1967 to mean "any dispute between an employer and his workmen which is connected with the employment or non:employment or the terms of employment, or conditions of work of any such workmen"

[78] It is a pertinent to understand the combined effects of these definitions. Salleh Abas LP in the case of *Inchcape Malaysia Holdings Bhd v RB Gray & Anor* [1985] 2 MLJ 297 said –

> ***"The combined effect of these definitions is that a person is a workman if the contract of employment under which he is employed requires him to serve his employer as a workman and in the case of a trade dispute a person is a workman if the dispute between him and his employer is connected with his employment as a workman****. The definition, therefore, does not go very far and in fact it goes in circle. I am still left with the same question: who is a workman? But one thing is clear in that whilst a contract of employment is part of the definition****, it does not follow that every person who is employed under a contract of employment or being an employee of another is a workman. To be a workman a person must be employed as a workman. If he is employed in other capacity he cannot be a workman.***
>
> *...*
>
> *"Now let me turn to the definition of workman in our IRA. Although it may appear to be wide, in fact it is limited by its own definition of contract of employment, which means any agreement whereby (an employer) agrees to employ his employee as "a workman", and the (other employee) agrees to serve his employer, (also) as "a workman". We were urged to disregard the expression "as a workman" as being a mere labelling. I cannot agree****. I have no right to treat it as mere surplusage.*** *It was included there for good measure just as the words "or otherwise" in the National Arbitration Tribunal case (supra) were held to extend the definition beyond the natural and common sense meaning of the word "workman".* ***In my view the***

expression "as a workman" indicates the intention of the legislature in that in construing the term "workman", the purpose for which a person is employed must be taken into consideration. In other words, the function and responsibility of an employee are the criterion and must be looked into."

[Emphasis added]

[79] Further, in *Assunta Hospital (supra)*, the Federal Court also upheld the finding of the Industrial Court that, Dr. A. Dutt, a professional radiologist, who was employed under a contract of service was a workman. The Court rejected the narrow definition of workman adopted by Indian courts because the expression "in any industry" which is part of the statutory definition of workmen in **Indian Industrial Disputes Act 1947** is conspicuously absent from the definition under our **Industrial Relations Act 1967**.

[80] One other important point to note is that Malaysia is a member country of International Labour Organisation (ILO). Article 10 of the ILO Migrant Workers (Supplementary Provisions) Convention 143 of 1975, states –

"Each Member for which the Convention is in force undertakes to declare and pursue a national policy designed to promote and to guarantee, by methods appropriate to national conditions and ***practice, equality of opportunity and treatment in respect of employment and occupation, of social security, of trade union and cultural rights and of individual and collective freedoms for persons who as migrant workers or as members of their families are lawfully within its territory****."*

[Emphasis added]

[81] This ILO Convention, to which Malaysia is a party, expressly provides that states should undertake to promote and guarantee equality of opportunity and treatment between migrant workers and nationals.

[82] This ILO standards apply to migrant workers and nationals

equally. In *Nacap Asia Pacific Sdn Bhd v. Jeffrey Ronald Pearce & Anor* [2011] 5 CLJ 791**,** the learned judge referred to Article 9 of the ILO Migrant Workers (Supplementary Provisions) Convention 143 of 1975 and stated–

> *"This ILO Convention, to which Malaysia is a party, expressly provides that where laws and regulations which control the movement of migrants for employment : such as the Immigration Act : have not been respected,* ***the migrant worker shall nevertheless enjoy equality of treatment in respect of rights arising out of past employment. This is the international labour standard prescribed by the ILO****."*
>
> [Emphasis added]

[83] Based on the above reasons, we take the view that all workers should be treated with fairness, dignity, and equality without distinction whether they are local or foreigners. This is also consonant with Article 8(1) of the Federal Constitution which essentially provides that all persons are equal before the law and entitled to the equal protection of the law.

[84] In our judgment, the decision of the Court of Appeal that a foreign national cannot have a permanent contract of employment cannot withstand judicial scrutiny and is liable to be set aside.

Conclusion

[85] We say that the **Hotel Jaya Puri** case is still good law. The Industrial Court made a finding of fact that the appellant/claimant work for one group of companies as one enterprise. Applying the principles enunciated in *Han Chiang (supra)*, we find that the appellant's/claimant's contract of employment is a permanent contract and not a fixed term contract.

[86] The work permit is a non:issue in the present appeal. The work permit was not pleaded in the respondent's Statement:in:Reply filed at the Industrial Court. The respondent also did not raise the matter in its

submission before the Industrial Court. The appellant's/claimant's evidence in the Industrial Court that he had a valid Malaysian Working Pass and did not require a work permit from the respondent was not challenged. Further, the respondent's witness, COW1, admitted that the respondent had never applied any work permit for the appellant/claimant. Since the work permit issue was not canvassed and ventilated, it was right for the Industrial Court and the High Court not to consider this issue. It is trite that parties are expected to put before the trial court all questions both of fact and law upon which they wish to have an adjudication. Parties to litigation are entitled to know where they stand and tailor their expenditure and efforts in dealing only with what is known to be in dispute. In our considered view, the Court of Appeal ought not to have dealt with the issue at all and should have allowed it to enjoy its eternal sleep. In any event, it has no application in determining whether the appellant's/claimant's contract was a fixed term contract or whether he was a permanent employee.

[87] In the circumstances of the present appeal, the fact that the appellant/claimant is a foreigner is irrelevant in determining whether the dismissal is with just cause or otherwise.

[88] For all the foregoing reasons, the questions posed for our determination are answered as follows –

(i) Whether a need for work permit is a material consideration in determining whether an employment contract is a genuine fixed term contract; and

In the negative.

(ii) Does a contract of employment which is renewed successively without application by the employee and without any intermittent breaks in between, is in reality permanent employment?

In the affirmative.

[89] Consequently, the appeal is allowed with costs. So ordered.

Dated: 28 MAY 2020

(MOHD ZAWAWI SALLEH)
Federal Court Judge
Malaysia

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[This judgment is subject to final editorial approved by the Court].