

CONTRACT

Construction of terms – Termination of agreement – Unilateral termination by notice – Whether agreement lawfully terminated – Whether reasons required to be given – Meaning of “unable to perform”

SPM Membrane Switch Sdn Bhd v Kerajaan Negeri Selangor

[2016] 1 CLJ 177, Federal Court

Facts The case concerned the interpretation of a clause in an agreement (“the Agreement”) entered between the appellant, a company, and the respondent, the State Government. The Agreement included a provision enabling the respondent to terminate the Agreement unilaterally by giving a thirty days ‘notice to the appellant on various grounds stated in the Agreement, including the ground that the appellant was ‘unable to perform the services under the agreement’ (“the Ground”). The Agreement also contained a review procedure in which any unsatisfactory performance may be remedied within a certain period of time, with an option to terminate pursuant to the Ground upon failure of such remedy. The respondent terminated the Agreement unilaterally on the basis of breach of the terms of the Agreement. The appellant claimed that such termination was defective and bad in law, on the basis of failure to provide reasons for such termination and that the Ground could only be invoked after the review procedure had been satisfied. The High Court dismissed the appellant’s claim. The Court of Appeal upheld the High Court’s ruling upon appeal. Dissatisfied, the appellant appealed.

Issue The issue was whether the review procedure has to be exercised prior to the termination of the Agreement.

Held In allowing the appeal, the court found that the review procedure must be invoked and satisfied before the respondent may terminate the Agreement based on the Ground. “Unable to perform” is the circumstances where there is a severe breach of obligation committed by the appellant who is able to perform the Agreement. Thus, the reasons for the respondent’s dissatisfaction towards the appellant’s performance have to be furnished earlier under the review procedure in order to accord the appellant a chance to remedy its performance. This is because the failure of the appellant in remedying its performance pursuant to the review procedure would result in the termination of the Agreement on the Ground by the respondent.