SPM Membrane Switch Sdn Bhd v Kerajaan Negeri Selangor

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 01(f)-10–04 OF 2013(B)
AHMAD MAAROP, HASAN LAH, ZAINUN ALI, JEFFREY TAN AND RAMLY ALI FCJJ
13 NOVEMBER 2015

Contract — Termination — Validity — No reasons given for termination — Whether agreement lawfully terminated — Whether notice to terminate that was vague and unspecific was defective and bad in law — Whether there was requirement of reasons in notice of termination at common law — Construction of terms — Whether particularised reasons were required for notice of termination under cl 8.1(b) of agreement — Whether cl 8.1 provided freestanding right to unilaterally terminate contract — Whether true construction of contract showed that cl 8.1 (b) could only be invoked after review procedure in cl 9 had been satisfied — Whether appellant's subjective knowledge alone paramount in determining that provision of reasons was unnecessary — Remedies — Whether appellant entitled to claim loss of profit for wrongful termination

By way of an agreement dated 27 September 2001 ('the agreement') the respondent appointed the appellant to assist it with the collection of outstanding quit rent in Selangor. the agreement included a term that allowed the respondent to terminate the agreement unilaterally by giving thirty days' notice to the appellant in the event that one of eight grounds, as set out in cl 8.1(b) of the agreement, was to occur. The respondent sought to terminate the agreement it had entered into with the appellant on grounds that the latter had breached various terms of the agreement. Therefore, in purported exercise of its right under cl 8.1(b) of the agreement, the respondent issued a letter of a notice of termination on 22 November 2004 giving 30 days' notice. On 27 December 2004 the termination was effected by way of a subsequent letter. However, both letters did not specify any reason for the termination. The appellant commenced an action against the respondent for the outstanding sum for services rendered prior to termination amounting to RM2,558,548.51 and for wrongful termination and lost profit. The appellant submitted that the termination was defective and bad in law in that it failed to provide any reasons for the said termination. According to the appellant, particularised reasons should be provided in the notice of termination. The appellant further argued that cl 8.1(b) could only be invoked after the procedure in cl 9, pertaining to conducting a performance review of the appellant company's performance of its services under the agreement, had been satisfied. The trial judge found that no reasons were required to be provided for a termination under cl 8.1(b) and that cl 9 need not be invoked before cl 8.1(b) was validly exercised. The trial

judge also found that the appellant was in breach of the agreement, having committed all the various breaches of contract as alleged by the respondent. As such the High Court partially allowed the appellant's claim for the RM2,558,548.51 but dismissed the claim for wrongful termination and lost profit. On appeal, the Court of Appeal also found that an exercise of the right of termination under cl 8.1(b) was not connected with the review procedure under cl 9 and that the two clauses were to be read disjunctively. The Court of Appeal thus upheld the decision of the trial judge. The appellant had applied for and obtained leave to proceed with the present appeal wherein it has raised the question of law as to whether a notice to terminate a privatisation agreement, which was vague, unspecific and uncertain was defective and bad in law. It was the appellant's case that no review was conducted of its performance and as a result no reasons were given for the purposes of determining if the appellant had fallen foul of cl 8.1(b).

Held, allowing the appeal with costs of RM50,000:

(1) The question of valid termination turns upon whether or not there was in fact a valid reason at the time of termination and not on whether or not the terminating party (subjectively) knew or believed there to be one. The appellant's submissions offered little help in establishing, as a matter of principle that termination by notice required the communication of particularised reasons from the terminating party to the non-terminating party. Accordingly, no such principle existed in the general law of contract (see paras 23–24).

(2) It therefore became inevitable to consider whether particularised reasons were required for a notice of termination in accordance with cl 8.1, specifically cl 8.1(b) and to consider the interpretation of clll 8.1 and 9 particularly in relation to each other and the effect such interpretation had on the question of breach and that of valid termination procedure. There were two alternative interpretations of clll 8 and 9. The first of these was that cl 8.1 (b) could only be invoked after the procedure in cl 9 had been satisfied, and accordingly notice with particularised reasons was given. The second interpretation was that cl 9 did not need to be invoked before cl 8.1 (b), since cl 9 was purportedly silent regarding the provision of reasons in a notice of termination. In view of the uncertainty of the operation of clll 8 and 9 since no evidence was shown that both parties understood how these clauses were to operate, the interpretative tools available were employed in arriving at a correct and just decision. Upon the interpretation of clll 8 and 9 of the agreement as parts of a whole contract it was apparent that cl 8.1 did not provide a freestanding right to terminate the contract. If it was a freestanding right then it could be easily used to subvert the purpose of cl 9, which could not be the intention of the parties as objectively determined. In the circumstances the first construction was to be preferred (see paras 67–72 & 88–89).

(3) When one has to choose between two competing interpretations, the one which made more commercial sense should be preferred if the natural meaning of the words was unclear. Under cl 9, the review procedure gave the opportunity for the respondent to review the appellant's performance, but this was by no means unilateral as a matter of procedure. The terms of cl 9 made this clear. Clause 9.1 for instance, obliged the parties to agree upon the terms and conditions of the review prior to any review occurring. This was clearly meant to protect the interests of both parties, iethe interest of the respondent in ensuring that the unsatisfactory situation was remedied, and the interest of the appellant in avoiding breach and termination of the contract. Arguably the purpose of this clause leans in favour of protecting the position of the appellant against wilful termination for one, and to provide an added layer of protection in that it was given the opportunity to 'remedy the unsatisfactory situation' in 30 days. It could not be the case that the respondent was allowed to circumvent the purpose of cl 9 by invoking unilateral termination under cl 8.1 (b) when cl 9.3 itself refers to cl 8.1(b) as a means of protecting the respondent's interests. Thus in stating that there was a right under cl 8.1 to be exercised independently of cl 9, the Court of Appeal failed to appreciate the niceties or nuances of the contractual terms upon proper construction. Thus, it could be concluded that upon a true construction of the contract, cl 9 should be invoked and satisfied before termination under cl 8.1 (b) could be validly exercised so as to ensure that the meaning and purposes of the two clauses were not lost or rendered nugatory by operation of the other (see paras 74–78 & 94).

(4) Thus, particularised reasons had to be provided for cl 9, since they were there to provide the opportunity to meaningfully remedy any unsatisfactory performance or situation. Therefore, termination under cl 8.1(b) would require these particularised reasons to have been expressed earlier (ie 30 days before) and with the notice of termination since the failure to remedy would be the basis upon which cl 8.1(b) is relied upon. In the circumstances the cl 8 termination was not valid (see para 95).

(5) The Court of Appeal had erred in its reasoning that the appellant's subjective knowledge alone was paramount in determining whether or not the provision of reasons in the respondent's notice of termination was required. The Court of Appeal's implied reasoning was that the respondent was under no obligation to elucidate the reasons for termination since the appellant's letter in response to the notice of termination, dated 6 December 2004, by its intonation showed 'that the appellant had accepted the termination without any protest'. In other words, reasons were not required with the notice of termination because they were already known by the appellant. However, the test to ascertain

whether the communication of reasons in the notice was necessary was an objective rather than a subjective one. Further, the trial judge's and the Court of Appeal's reliance on the letter was wholly unsatisfactory and an egregious breach of the rules of natural justice because the letter was not pleaded by the respondent. It is trite law that the rules of procedure and natural justice permit the court to only consider the issues and evidence pleaded before it. In the present case the appellant was also not given an opportunity to answer the allegation that the way the letter was written implied that the it had either waived any requirement for providing reasons or that by its 'gracious acceptance' in accepting the termination without protest had a full comprehension of the reasons why it was terminated (see paras 107–108, 111 & 113–114).

(6) The respondent's main contention that the appellant was prevented from claiming any loss of profits since damages for loss of profits was not one of the prescribed remedies under cl 8.5 of the agreement was no longer sustainable since there was no valid termination pursuant to cl 8 of the agreement. Upon a proper construction of the agreement, it was apparent that the breach of the agreement had given rise to damages for loss of profit pursuant to s 74 of the Contracts Act 1950. As such, it was ordered that this claim ought to be remitted to the High Court for assessment of damages on the issue of quantum occasioned by wrongful termination of the contract (see paras 125–126 & 133).

[Bahasa Malaysia summary

Melalui perjanjian bertarikh 27 September 2001 ('perjanjian itu') responden telah melantik perayu untuk membantunya untuk mengutip sewa pintu di Selangor. Perjanjian itu termasuk terma yang membenarkan responden untuk menamatkan perjanjian itu secara unilateral dengan memberi notis 30 hari kepada perayu sekranya salah satu daripada lapan alasan, seperti yang dinyatakan dalam klausa 8.1(b) perjanjian itu, berlaku. Responden memohon untuk menamatkan perjanjian itu yang dimasukinya dengan perayu atas alasan bahawa perayu telah melanggar pelbagai terma perjanjian itu. Oleh itu, sebagai menjalankan haknya di bawah terma klausa 8.1(b) perjanjian itu, responden telah mengeluarkan surat notis penamatan pada 22 November 2004 dengan memberikan notis 30 hari. Pada 27 Disember 2004, penamatan itu dilaksanakan melalui surat seterusnya. Walau bagaimanapun, kedua-dua surat itu tidak menyatakan apa-apa sebab untuk penamatan itu. Perayu telah memulakan tindakan terhadap responden untuk baki jumlah perkhidmatan yang diberikan sebelum penamatan itu berjumlah RM2,558,548.51 dan untuk penamatan salah dan hilang keuntungan. Perayu berhujah bahawa penamatan itu adalah defektif dan tidak mengikut undang-undang di mana ia telah gagal memberikan apa-apa sebab untuk penamatan tersebut. Menurut perayu, sebab-sebab yang diperincikan hendaklah diberikan dalam notis penamatan. Perayu selanjutnya berhujah bahawa klausa 8.1(b) hanya boleh

digunakan selepas prosedur dalam klausa 9, berkenaan pelaksanaan penilaian prestasi untuk prestasi syarikat perayu berhubung perkhidmatannya di bawah perjanjian itu, telah dipenuhi. Hakim perbicaraan mendapati bahawa tiada sebab diperlukan untuk diberikan bagi penamatan di bawah klausa 8.1(b) dan bahawa klausa 9 tidak perlu digunakan sebelum klausa 8.1(b) dilaksanakan dengan sah. Hakim perbicaraan juga mendapati bahawa perayu telah melanggar perjanjian, kerana melakukan semua pelanggaran kontrak sepertimana dikatakan oleh responden. Oleh itu Mahkamah Tinggi membenarkan sebahagian tuntutan perayu berjumlah RM2,558,548.51 tetapi menolak tuntutan itu kerana penamatan secara salah dan hilang keuntungan. Semasa rayuan, Mahkamah Rayuan juga mendapati bahawa penggunaan hak penamatan di bawah klausa 8.2(b) tidak berkait dengan prosedur semakan semula di bawah klausa 9 dan agar kedua-dua klausa itu dibaca secara berasingan Mahkamah Rayuan oleh itu mengekalkan keputusan hakim perbicaraan. Perayu telah memohon untuk dan memperoleh kebenaran meneruskan rayuan ini di mana ia menimbulkan persoalan undang-undang berhubung sama ada notis untuk menamatkan perjanjian penswastaan, yang tidak jelas, tidak spesifik dan tidak pasti adalah defektif dan tidak mengikut undang-undang. Ia adalah kes perayu bahawa tiada semakan semula dijalankan untuk prestasi dan akibatnya tiada sebab diberikan bagi tujuan menentukan jika perayu melanggar klausa 8.1(b).

Diputuskan, membenarkan rayuan dengan kos RM50,000:

(1) Persoalan tentang penamatan sah bergantung kepada sama ada atau tidak terdapat pada hakikatnya sebab yang kukuh pada masa penamatan itu dan bukan sama ada atau tidak pihak yang menamatkan (secara subjektif) mengetahui atau mempercayai terdapat sebab yang kukuh. Hujah perayu tidak membantu untuk membuktikan, perkara prinsip bahawa penamatan melalui notis memerlukan komunikasi sebab-sebab terperinci daripada pihak yang menamatkan kepada pihak yang tidak menamatkan. Sewajarnya, tiada prinsip yang wujud dalam undang-undang am kontrak (lihat perenggan 23–24).

(2) Oleh itu tidak dapat dielakkan untuk mempertimbangkan sama ada sebab-sebab yang terperinci dikehendaki untuk notis penamatan menurut klausa 8.1, khususnya klausa 8.1(b) dan untuk mempertimbangkan pentafsiran klausa-klausa 8.1 dan 9 terutamanya berkaitan satu sama lain dan kesan pentafsiran ke atas persoalan berhubung pelanggaran dan prosedur penamatan yang sah. Terdapat dua pentafsiran alternatif untuk klausa-klausa 8.1 dan 9. Yang pertama adalah klausa 8.1(b) hanya boleh digunakan selepas prosedur dalam klausa 9 dipenuhi, dan sewajarnya notis dengan sebab-sebab yang terperinci diberikan. Pentafsiran kedua adalah klausa 9 tidak perlu digunakan sebelum klausa 8.1(b), kerana klausa 9 dikatakan tidak menyatakan apa-apa tentang keperluan memberi sebab dalam notis

penamatan. Berdasarkan ketidaktentuan berhubung operasi klausa-klausa 8 dan 9 kerana tiada keterangan ditunjukkan bahawa kedua-dua pihak memahami bagaimana klausa-klausa tersebut beroperasi, alat pentafsiran sedia ada digunakan untuk tiba kepada keputusan yang betul dan adil. Berdasarkan pentafsiran klausa-klausa 8 dan 9 perjanjian itu sebagai sebahagian daripada keseluruhan kontrak ia jelas bahawa klausa 8.1 tidak memperuntukkan hak yang bebas untuk menamatkan kontrak. Jika ia adalah hak yang bebas maka ia boleh dengan mudah digunakan untuk menggugat tujuan klausa 9, yang tidak mungkin niat pihak-pihak sebagai objektif yang ditentukan. Dalam keadaan itu maksud pentafsiran pertama menjadi pilihan (lihat perenggan 67–72 & 88–89).

(3) Apabila seseorang perlu membuat pilihan antara dua pentafsiran yang bersaing, pentafsiran yang lebih bersifat komersial patut dipilih jika maksud semula jadi perkataan-perkataan tidak jelas. Di bawah klausa 9, prosedur semakan semula memberikan peluang untuk responden menyemak semula prestasi perayu, namun cara ini tidak bermaksud secara unilateral sebagai suatu perkara prosedur. Terma-terma klausa 9 jelas menyatakan begitu. Klausa 9.1 contohnya, mewajibkan pihak-pihak bersetuju dengan terma dan syarat semakan semula itu sebelum apa-apa semakan semula berlaku. Ini jelas bermaksud untuk melindungi kepentingan kedua-dua pihak, iaitu kepentingan responden untuk memastikan keadaan tidak memuaskan diremedikan, dan kepentingan perayu mengelak pelanggaran dan penamatan kontrak. Boleh dikatakan tujuan klausa ini lebih kepada melindungi kedudukan perayu terhadap penamatan yang disengajakan, dan untuk memberikan perlindungan tambahan yang mana ia diberikan peluang untuk 'remedy the unsatisfactory situation' dalam 30 hari. Ia bukan kes di mana responden dibenarkan untuk mengelak tujuan klausa 9 dengan menggunakan penamatan secara unilateral di bawah klausa 8.1(b) walhal klausa 9.3 juga merujuk kepada klausa 8.1(b) sebagai cara untuk melindungi kepentingan responden. Oleh itu dengan menyatakan ia satu hak di bawah klausa 8.2 untuk dilaksanakan secara berasingan klausa 9 itu, Mahkamah Rayuan gagal untuk memahami kelainan dan kerumitan terma-terma kontraktual setelah diteliti dengan betul. Oleh itu, ia oleh disimpulkan bahawa setelah pentafsiran kontrak itu, klausa 9 hendaklah digunakan dan dipenuhi sebelum penamatan di bawah klausa 8.2 boleh dilaksanakan dengan wajar bagi memastikan maksud dan tujuan kedua-dua klausa tersebut tidak hilang atau dijadikan yang bukan-bukan oleh operasi yang satu lagi (lihat perenggan 74–78 & 94).

(4) Oleh itu, sebab-sebab yang diperincikan perlu diberikan untuk klausa 9, kerana ia perlu untuk memberi peluang untuk memberi remedi apa-apa prestasi atau keadaan yang tidak memuaskan. Justeru, penamatan di bawah klausa 8.1(b) menghendaki sebab-sebab yang diperincikan itu

dikemukakan lebih awal (iaitu 30 hari sebelum) dan bersama notis penamatan kerana kegagalan untuk meremedi akan menjadi asas untuk digunakan oleh klausa 8.1(b). Dalam keadaan itu penamatan berdasarkan klausa 8 tidak sah (lihat perenggan 95).

(5) Mahkamah Rayuan terkhilaf dalam pertimbangannya bahawa pengetahuan subjektif perayu sahaja adalah penting untuk menentukan sama ada atau tidak pemberian sebab-sebab dalam notis penamatan responden dikehendaki. Pertimbangan tersirat Mahkamah Rayuan adalah bahawa responden tidak mempunyai kewajiban untuk menjelaskan sebab-sebab penamatan kerana surat perayu sebagai maklum balas kepada notis penamatan itu, bertarikh 6 Disember 2004, berdasarkan intonasi menunjukkan 'that the appellant had accepted the termination without any protest'. Dalam erti kata lain, sebab-sebab tidak diperlukan bersama notis penamatan kerana ia telah diketahui oleh perayu. Walau bagaimanapun, ujian untuk menentukan sama ada komunikasi sebab-sebab dalam notis itu perlu adalah suatu yang objektif dan bukan subjektif. Selanjutnya kebergantungan hakim perbicaraan dan Mahkamah Rayuan ke atas surat itu tidak memuaskan langsung dan merupakan satu pelanggaran rukun keasilan asasi kerana surat itu tidak dipli oleh responden. Ia adalah undang-undang lapuk bahawa rukun prosedur dan keadilan asasi membenarkan mahkamah untuk hanya mempertimbangkan isu-isu dan keterangan yang dipli di hadapannya. Dalam kes ini perayu juga tidak diberikan peluang untuk menjawab dakwaan itu bahawa cara surat itu ditulis membawa maksud tersirat yang ia sama ada telah mengetepikan apa-apa keperluan untuk memberikan sebab-sebab atau melalui 'gracious acceptance'nya dalam menerima penamatan itu tanpa bantahan mempunyai pemahaman penuh sebab kenapa ia ditamatkan (lihat perengan 107–108, 111 & 113–114).

(6) Hujah utama responden bahawa perayu dihalang daripada menuntut apa-apa kerugian keuntungan oleh kerana ganti rugi untuk kerugian keuntungan bukan salah satu daripada remedi yang dinyatakan di bawah klausa 8.5 perjanjian itu tidak lagi mampan kerana tiada penamatan yang sah menurut klausa 8 perjanjian. Setelah pentafsiran perjanjian yang wajar ia jelas bahawa pelanggaran perjanjian itu telah menimbulkan ganti rugi untuk kerugian keuntungan menurut s 74 Akta Kontrak 1950. Oleh itu, ia diperintahkan bahawa tuntut ini patut diremitkan kepada Mahkamah Tinggi untuk penilaian ganti rugi berhubung isu kuantum yang disebabkan oleh penamatan kontrak secara salah (lihat perenggan 125–126 & 133).]

Notes

For cases on validity, see 3(4) *Mallal's Digest* (5th Ed, 2015) paras 7096–7109.

Cases referred to

Allgood v Blake (1873) LR 8 Exch 160 (refd)
Arnold v Britton and others [2015] UKSC 36, SC (refd)
BS&N Ltd (BVI) v Micado Shipping Ltd (Malta) ('The Seaflower') [2001] CLC 421, CA (refd)
Bank Bumiputera Malaysia Bhd Kuala Terengganu v Mae Perkayuan Sdn Bhd & Ors [1993] 2 MLJ 76, SC (refd)
Attorney General of Belize and others v Belize Telecom Ltd and another [2009] UKPC 10; [2009] 1 WLR 1988, PC (refd)
Berjaya Times Square Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd [2010] 1 MLJ 597, FC (refd)
Chamber Colliery Ltd v Twyerould [1915] 1 Ch 268, HL (refd)
Charter Reinsurance Co Ltd v Fagan [1997] AC 313, HL (refd)
Charter v Charter (1871) LR 2 P&D 315 (refd)
Chong Khee Sang v Phang Ah Chee [1984] 1 MLJ 377 (refd)
Codelfa Construction Prop Ltd v State Rail Authority of New South Wales (1982) 149 CLR 337, HC (refd)
Cooperative Wholesale Society Ltd v National Westminster Bank plc [1995] EGLR 97, CA (refd)
Danaharta Urus Sdn Bhd v Pembinaan Nadzri Sdn Bhd and Anor [2006] MLJU 331, HC (refd)
Equitable Life Assurance Society v Hyman [2002] 1 AC 408, HL (refd)
Foo Jong Peng v Phua Kiah Mai and another [2012] SGCA 55; [2012] 4 SLR 1267, CA (refd)
Hadley v Baxendale (1854) 9 Ex 341; (1854) 165 ER 145 (refd)
Hadmor Productions Ltd v Hamilton [1983] 1 AC 191, CA (refd)
Hamdan bin Johan & Ors v FELCRA Bhd & Ors [2010] 8 MLJ 628; [2010] 3 CLJ 474, HC (refd)
Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd [1962] 2 QB 26, CA (refd)
Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 WLR 896, HL (refd)
Jaafar bin Shaari & Anor (suing as administrators of the estate of Shofiah bte Ahmad, deceased) v Tan Lip Eng & Anor [1997] 3 MLJ 693, SC (refd)
Janagi v Ong Boon Kiat [1971] 2 MLJ 196 (refd)
Lin Lin Shipping Sdn Bhd v Govindasamy Mahalingam [1993] 2 MLJ 474, HC (refd)
Lockland Builders Ltd v Rickwood (1995) 77 BLR 38, CA (refd)
Fercometal v Mediterranean Shipping Co SA [1989] AC 788, HL (refd)
Menta Construction Sdn Bhd v Lestari Puchong [2015] 6 MLJ 633, FC (refd)
Nikmat Masyhur Sdn Bhd v Kerajaan Negeri Johor Darul Ta'zim [2014] 1 MLJcon 213; [2008] 9 CLJ 46, HC (refd)
Oceanbulk Shipping and Trading SA v TMT Asia Ltd and others [2011] 1 AC 662; [2010] UKSC 44, SC (refd)

Perkayuan OKS No 2 Sdn Bhd v Kelantan State Economic Development Corp [1995] 1 MLJ 401, FC (refd)
Rainy Sky SA v Kookmin Bank [2011] 1 WLR 2900, SC (refd)
Sembcorp Marine Ltd v PPL Holdings Pte Ltd and another and another appeal [2013] SGCA 43, CA (refd)
Sigma Finance Corporation (in administrative receivership), Re [2010] 1 All ER 571
Stocznia Gydnia SA v Gearbulk Holdings Ltd [2009] EWCA Civ 75, CA (refd)
Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board [1973] 1 WLR 601, HL (refd)
William Forster Charter v Charles Charter (1874) LR 7 HL 364, HL (refd)

Legislation referred to

Contracts Act 1950 s 74, 74(1), 74(2)
Evidence Act 1950 ss 92(f), 93, 94
Evidence Act 1872 [IND]
Evidence Act [SG] ss 94(f), 95, 96

Razlan Hadri Zulkifli (Hazman bin Ahmad, Ho Kok Yew and Nadirah Izyan bt Azaddin with him) (Omar Ismail Hazman & Co) for the appellant.
Nik Suhaimi bin Nik Sulaiman (Ahmad Fuad bin Othman and Rafiqha Hanim Mohd Rosli with him) (Selangor State Legal Advisor) for the respondent.

Zainun Ali FCJ:

[1] Leave for the appeal before us was unanimously granted on 11 April 2013 on the question of law of 'whether a notice to terminate a concession/privatisation agreement which is vague, unspecific and uncertain is defective and bad in law'.

THE FACTS

[2] Kerajaan Negeri Selangor ('the respondent') and SPM Membrane Switch Sdn Bhd ('the appellant'), entered into an agreement ('the agreement') on 27 September 2001 in which the respondent appointed the appellant to assist them in collecting outstanding annual quit rent in Selangor (particularly in the districts of Petaling, Kuala Langat, Hulu Langat, Sepang and Hulu Selangor).

[3] A supplemental agreement was entered into on 9 July 2003.

[4] Pursuant to the agreement, the appellant was responsible for the collection of arrears of quit rent. There were a number of obligations the appellant agreed to, which amongst others, included the setting up of a

computer system, acquisition of data, preparation and service of notices of demand; maintaining sufficient manpower and conducting a public information campaign with regard to the collection of quit rent.

[5] The agreement also provided the parties with a review procedure should the respondent determine that the appellants performance of its services under the agreement was unsatisfactory. 'Services' were defined as the preparation, execution and service of necessary documents to assist the respondent with the collection of arrears within the districts in Selangor. Should the performance remain unsatisfactory after the period of 30 days given to remedy the deficiencies, the respondent could terminate the agreement unilaterally.

[6] It was also open to the respondent and appellant to terminate the agreement by agreement; whereas it was open to the respondent to terminate unilaterally should one of eight grounds listed, including where an inability of the appellant to perform its services were to happen, under the agreement.

[7] The respondent alleged multiple breaches of contract on the appellant's part, inter alia, that the computer system was not set up, insufficient manpower was provided, various forms and notices had failed to be served and that the public information campaign was conducted unsatisfactorily. Therefore, in purported exercise of its right under cl 8.1(b) of the agreement, the respondent issued a letter of a notice of termination on 22 November 2004 giving 30 days' notice.

[8] On 27 December 2004 the termination was effected by way of subsequent letter. The respondent's letters did not, however, specify any reason for the termination.

[9] For ease of reference, the relevant clauses are hereby reproduced.

CLAUSE 8 TERMINATION

8.1 Termination by the State Government

The State Government shall be entitled to terminate this agreement by giving thirty (30) days notice to the Company if:

(a) the equity structure and/or the structure of the board of directors of the Company is modified without the State Government's written consent within one (1) year of the date of this Agreement;

(b) the Company is unable to perform its Services as provided under the agreement;

(c) the Company shall cease to or threatened to cease to carry out its operation or if in the opinion of the State Government, the company is not carrying on its operation with sound financial and commercial standards;

(d) if a Receiver and/or Manager shall be appointed in respect of the Company's assets or any part thereof;

(e) a petition shall be presented or any order be made or a resolution be passed for the windingup of the Company or if the Company enters into liquidation whether voluntarily or compulsorily;

(f) at the time it becomes unlawful for the Company to perform its obligations under this Agreement;

(g) legal proceedings of any kind be instituted against the Company;

(h) any judgment is obtained against the Company.

CLAUSE 9 PERFORMANCE REVIEW

9.1 The parties hereby agree that the State Government may at any time during the Contract Period review the Company's performance of its Services under this Agreement [upon such terms and conditions as the State Government and the Company may hereafter agree in writing].

9.2 In the event that the State Government shall determine the Company's performance of its obligations under this Agreement as unsatisfactory; the Company shall be given thirty (30) days to remedy the unsatisfactory situation.

9.3 If the State Government finds the unsatisfactory situation is not remedied at the end of thirty (30) days given under Clause 9.2, the State Government shall have the option of treating such unsatisfactory performance as an event of default which entitles the State Government to terminate this Agreement pursuant to Clause 8.1(b) and accordingly the State Government shall be entitled to all reliefs provided under Clause 8.

SUMMARY OF PROCEEDINGS

The decision of the High Court

[10] The learned judge of the High Court at trial, partially allowed the appellant's claim ie for the outstanding sum for services rendered prior to termination, amounting to RM2,558,548.51. The other claim for wrongful termination and lost profit was dismissed.

[11] The learned judge held that the agreement was lawfully terminated under cl 8.1(b) and that cl 9 need not be invoked before cl 8.1(b) was validly exercised. The learned judge held that no reasons were required to be provided for a termination under cl 8.1(b) on the basis that the appellant, in a letter which was not pleaded before the court or tendered in evidence, had appeared to have received the termination notice graciously, and had not objected to the

termination. The learned judge held that the contract must be given its plain and ordinary meaning; thus the interpretation of the express terms of the contract was merely what the words, in plain and ordinary language meant. No more no less. The learned judge also ruled that the words 'unable to perform its services' was understood to include not only 'inability' but also 'failure' to do so.

[12] The learned trial judge also found that the appellant was in breach of the argument, with respect to all the breaches alleged by the respondent, namely cll 6.1, 6.2, 6.3, 6.4, 6.8 and 6.9 of the agreement. The judge found that the appellant had failed to set up a computer system for the purposes of collecting arrears according to the respondent's requirements expressed by its witnesses, inter alia, the assistant district officers. The trial judge also found a failure with regard to the public information campaign, the acquisition of data, the preparation and service of notices of demand and a failure to return data upon termination.

The decision of the Court of Appeal

[13] The Court of Appeal in a unanimous decision upheld the trial judge's decision. It held that although there was a requirement imposed upon the respondent in the contract to specify the reasons or grounds upon which termination was founded with reference to cl 8.1 to avoid arbitrariness, it held that the obligation to provide a reason or reasons in the notice of termination was not required in the present appeal. This was because the appellant had, through its gracious acceptance of termination through an upleaded letter in response to the notice of termination, demonstrated that it was fully aware of the reasons for its termination. The Court of Appeal also held that an exercise of the right of termination under cl 8.1(b) was not connected with the review procedure under cl 9 and that the two clauses were to be read disjunctively. The Court of Appeal upheld the findings of the High Court on breach and remedies, stating that it was not its position to interfere with the findings of fact except on limited and exceptional circumstances.

Question of law and summary of issues

[14] In answering the question of law before this court ie 'whether a notice to terminate a privatisation agreement which is vague, unspecific and uncertain is defective and bad in law,' a number of issues arise.

[15] Firstly, whether cl 8.1 requires the provision of particularised reasons in the notice of termination;

secondly whether cll 9 and 8.1(b) are to be read conjunctively or disjunctively and whether cl 9 has to be satisfied BEFORE cl 8.1(b) of the contract can be relied upon;

thirdly, whether the breaches found by the trial judge are correct and relevant in determining a contractual right of termination;

fourthly, whether these breaches have an impact upon any remedy the appellant might obtain should the appellant succeed on the appeal; and

fifthly, what remedy the appellant might obtain should the appellant succeed on the appeal.

LAW AND ANALYSIS

[16] In determining the question of law and the appeal before this court, we shall first consider whether there is a requirement of reasons in a notice of termination at common law. If it is shown that none exists, we shall discuss the relevant principles of construction of contracts and then determine if, on the terms of the present contract, such a requirement exists. We shall also briefly consider the relationship between the principles under the common law and that of construction of contract. We shall also consider some other aspects of the judgment of the courts below, and lastly, we shall consider the questions of breach and the remedies.

Termination of contract at common law

Under this head, the question is whether or not there is a requirement that reasons be provided at common law where a notice of termination is given.

A good starting point would be to consider the principles found in *Perkayuan OKS No 2 Sdn Bhd v Kelantan State Economic Development Corp* [1995] 1 MLJ 401.

[17] Learned counsel for the appellant submitted that a recipient of notice of termination must be left with no reasonable doubt as to why it was being terminated and what they are required to perform in order to remain compliant with the contract, failing which the notice of termination would necessarily be bad in law.

[18] Counsel for the appellant cited *Perkayuan OKS No 2 Sdn Bhd v Kelantan State Economic Development*. This case, inter alia, concerned the termination of an agreement between the appellant, Perkayuan OTP Sdn Bhd (later *Perkayuan OKS No 2 Sdn Bhd*) ('Perkayuan') and the respondent, Kelantan State Economic Development Corp ('Kelantan Corp'), which

granted Perkayuan, rights and privileges to carry out logging in a timber concession within the state of Kelantan, subjects to the terms of the agreement. Later, Kelantan Corp sought to terminate the contract on grounds that Perkayuan had breached various terms of the contract (including a term restricting assignment, lease, sub lease or transfer of the rights under the agreement) and notice was delivered by letter from Kelantan Corp's solicitors to Perkayuan. The letter laid out several grounds for termination which were deemed by the court, to be 'lacking in detail' and 'insufficiently particularised' and 'vague' in the judgment of Lamin FCJ (as His Lordship then was). This was found despite the fact that some details were provided, inter alia, that the reasons in the notice identified assignment, lease, sublease and transfer as a reason for termination. The fact that the identity of the third parties to whom the rights were allegedly assigned and/or transferred were not particularised rendered the notice vague enough to constitute bad notice at law (see p 407G).

[19] Notwithstanding the judgment in *Perkayuan*, there is no suitable authority for the proposition, as a matter of general common law that a notice of termination would necessarily be bad in law *in all cases* if reasons are not provided in the notice of termination, thereby causing the recipient of the notice to have reasonable doubt as to why they were terminated and what they are required to do, in order to remain compliant to the contract.

[20] Nonetheless, we do recognise that there are certain circumstances in which, as a matter of construction of contract, the recipient of the aforementioned notice is entitled to have the reasons for termination communicated to it by the terminating/non-defaulting party where the contract provides for a 'grace period' in which the defaulting party is entitled to remedy its allegedly defective performance to the satisfaction of the non-defaulting party. This is clearly because a party that is afforded the opportunity to remedy deficiencies in performance cannot do so unless it has notice of the deficiencies, either actual or constructive. This stands to reason.

[21] This proposition holds not as a general proposition in the law of contract, but upon construction where the parties expressly or impliedly agree to it in the contract.

[22] Short of any clear authority, the aforementioned proposition cannot be sustained. In any case, it is too onerous to impose upon every contract the requirement for reasons to be given in the event of termination. We take note, however, that it is in principle possible for the requirement of reasons (whether or not 'sufficiently particularised' per the meaning of the Federal Court in *Perkayuan*) to arise as an express or implied term of the contract itself, particularly where the defaulting party is afforded the opportunity to remedy the alleged default in a stipulated period.

[23] It is trite law that 'if a party refuses to perform a contract (ie wishes to terminate), giving a wrong or inadequate reason or no reason at all, he may yet justify his refusal it there were at the time facts in existence which would have provided a good reason, even if he did not know of them at the time of his refusal' (see *Chitty on Contract* (32nd Ed) E Peel (eds) at 24-014). The question of valid termination, therefore, turns upon whether or not there was in fact a valid reason at the time of termination and not on whether or not the terminating party (subjectively) knew or believed there to be one.

[24] Curiously, the submissions of learned counsel for the appellant offer little help in establishing, as a matter of principle, that termination by notice requires the communication of particularised reasons from the terminating party to the non-terminating party. Accordingly, no such principle exists in the general law of contract.

CONSTRUCTION OF CONTRACT

[25] It is therefore inevitable to now consider whether particularised reasons are required for a notice of termination in accordance with cl 8.1, specifically cl 8.1(b). We will also consider the interpretation of cll 8.1 and 9 particularly in relation to each other and the effect such interpretation has on the question of breach and that of valid termination procedure.

PRINCIPLES OF CONSTRUCTION

[26] The principles of interpretation of contract are as familiar as any canons of construction would be to legal practitioners.

[27] In recent times, the restatement of principles in the landmark case of *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, at pp 912–913 ('*ICS*') provides a helpful starting point for the consideration of the relevant principles. The judgment of Lord Hoffmann is as reproduced below, where His Lordship stated that:

> ... I do not think that the fundamental change which has overtaken this branch of the law, particularly as a result of the speeches of Lord Wilberforce in *Prenn v Simmonds* [1971] 1 WLR 1381, 1384–1386 and *Reardon Smith Line Ltd v Yngvar Hansen-Tangen* [1976] 1 WLR 989, is always sufficiently appreciated.
>
> The result has been, subject to one important exception, to assimilate the way in which such documents are interpreted by judges to the common sense principles by which any serious utterance would be interpreted in ordinary life. Almost all the old intellectual baggage of 'legal' interpretation has been discarded. The principles may be summarised as follows:
>
> (1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background

knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

(2) The background was famously referred to by Lord Wilberforce as the 'matrix of fact', but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.

(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification . The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.

(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax: see *Mannai Investments Co Ltd v Eagle Star Life Assurance Co Ltd* [1995] 1 WLR 1 508.

(5) The 'rule' that words should be given their 'natural and ordinary meaning' reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in*Antaios Compania Naviera SA v Salen Rederierna AB* [1985] AC 191, 201:

> If detailed semantic and syntactical analysis of words in a commercial contract is going to lead to conclusion that flouts business common sense, it must be made to yield to business common sense.

[28] However, there are reservations to a wholesale adoption and approval of the *ICS* principles. The applicability of the second *ICS* principle, specifically vis-a-vis the question of the admissibility of extrinsic evidence including pre-contractual negotiations, is doubted. This has been alluded to in the recent judgment of this court in *Menta Construction Sdn Bhd v Lestari Puchong* [2015] 6 MLJ 633 for reasons that I will not repeat here. Save for this reservation, the

remaining *ICS* principles are good law.

[29] While evidence of previous negotiations of the parties and their declarations of subjective intent have been excluded from the admissible background in the third *ICS* principle (see above), there is reason to believe that this rule has been somewhat diluted as a matter of English law in the case of *Oceanbulk Shipping and Trading SA v TMT Asia Ltd and others* [2011] 1 AC 662; [2010] UKSC 44 where the Supreme Court accepted as admissible 'without prejudice' negotiations prior to a settlement agreement to demonstrate the 'relevant background' and aid in the interpretation of the settlement agreement. While the intentions of the Supreme Court were noble, it is the view of this court that the approach taken in *Oceanbulk* is too permissive to be applied to the Malaysian context.

[30] For this reason, a brief excursus on the question of parol evidence of subjective intent and other extrinsic evidence is merited. Courts in each jurisdiction need to strike the fine balance between the competing demands of commercial certainty and practical justice in commercially sensible interpretations. They have to do so in accordance with the legal framework already in place in the jurisdiction. It is in this connection that the Evidence Act 1950 (Act 56) is briefly considered.

[31] The Singapore Court of Appeal in *Sembcorp Marine Ltd v PPL Holdings Pte Ltd and another and another appeal* [2013] SGCA 43 provided some helpful comments at [53]–[65] on the history and meaning of its Evidence Act (Cap 97, 1997 Rev Ed) in relation to the admissibility of extrinsic evidence. The particular provisions of the Singaporean legislation considered were ss 94(f), 95 and 96 which are in pari materia with our Evidence Act 1950, ss 92(f), 93 and 94.

[32] The relevant sections are reproduced in this judgment:

> 92 Exclusion of evidence of oral agreement
>
> When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to section 91, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying, adding to, or subtracting from its terms:
>
> Provided that:
>
> ...
>
> (f) any fact may be proved which shows in what manner the language of a document is related to existing facts.
>
> 93 Exclusion of evidence to explain or amend ambiguous document

A When the language used in a document is on its face ambiguous or defective, evidence may not be given of facts which would show its meaning or supply its defects.

94 Exclusion of evidence against application of document to existing facts

B When language used in a document is plain in itself and when it applies accurately to existing facts, evidence may not be given to show that it was not meant to apply to such facts.

[33] The Evidence Act was drafted to codify the common law position at C 1872, which is the year the Indian Evidence Act of 1872 was drafted, and from which our Evidence Act was derived. Section 92(f) embodies the contextual approach whereby extrinsic material is allowed to shed light on the meaning of a document. However, s 92(f) is not without qualification, which can be seen in, inter alia, ss 93 and 94. Read together, they must have been intended to D limit the permissive nature of s 92(f).

[34] The question that follows is: what did Sir James Fitzjames Stephen, the drafter of the Indian Evidence Act of 1872 intend to be caught by the exclusionary provisions, ss 93 and 94? His treatment of two cases: *Charter* E *v Charter* (1871) LR 2 P&D 315 (and on appeal to the House of Lords: *William Forster Charter v Charles Charter* (1874) LR 7 HL 364); and *Allgood v Blake* (1873) LR 8 Exch 160 shed some light on the matter.

[35] Briefly, in *Charter*, Lord Penzance admitted parol evidence of the F testator's intentions in the interpretation of a will. Lord Chelmsford in the House of Lords rejected this evidence of the testator's intentions because the sort of ambiguity required for the admission of parol evidence was not present in that case. It was only in cases of latent ambiguity that evidence of the intention of the drafter was admissible. G

[36] Sir James Stephen contrasted *Charter* with the *Allgood* case. In *A Digest of the Law of Evidence* (James Fitzjames Stephen, Harry Lushington Stephen and Lewis Frederick Sturge eds) (Macmillan and Co Limited, 12th Ed, 1936) Sir James Stephen said, at p 211: H

(T)he rule stated by Blackburn J, as follows: 'In construing a will, the Court is entitled to put itself in the position of the testator, and to consider all material facts and circumstances known to the testator with reference to which he is to be taken to have used the words in the will, and then to declare what is the intention evidenced I by the words used with reference to those facts and circumstances which were (or ought to have been) in the mind of the testator when he used those words... No doubt, in many cases the testator has, for the moment, forgotten or overlooked the material facts and circumstances which he well knew. And the consequence sometimes is that he uses words which express an intention which we would not have wished to express, and would have altered if he had been reminded of the facts

> and circumstances. But the Court is to construe the will as made by the testator, not to make a will for him; and therefore it is bound to execute his expressed intention, even if there is a great reason to believe that he has by blunder expressed what he did not mean.

[37] Therefore, the view is that the common law at that time permitted extrinsic evidence of surrounding circumstances to aid in the interpretation of words used in a contract, which is transferred into the Evidence Act as effected in s 92(f). This includes extrinsic evidence of 'facts and circumstances which were (or ought to have been) in the mind of the (drafter) when he used those words. However, this does not extend itself to parol evidence of a drafter's subjective intention so as to include it within the surrounding circumstances (see *Sembcorp Marine* at paras [63] and [64]).

[38] Therefore, the question of admissibility of extrinsic evidence is governed by the rules of evidence which can be found in the Evidence Act and the common law. Section 92(f) of the Act must be read in conjunction with ss 93 and 94. While extrinsic evidence of surrounding circumstances is generally admissible under s 92(f), parol evidence of the drafter's intentions remains generally inadmissible. This explains the qualification of the second *ICS* principles in the Malaysian context.

[39] Although recent decisions such as *Arnold v Britton and others* [2015] UKSC 36 appeared to have weaned itself from *ICS*, we believe a closer look would be instructive. There, Lord Neuberger and Lord Hodge emphasised on 'the natural meaning of the words' when giving effect to a contract, since parties have control of the language therein.

[40] That is well and good. However the prudence of Lord Neuberger's warning escapes the net, when, as in the present appeal, the meaning of words is not clear.

[41] In *Arnold*, it is clear that the words to be interpreted are what the parties have agreed upon. As Lord Neuberger said:

> When one turns to Clause 3(2), each of the 91 leases of the chalets in Oxwich Park, the *natural meaning of the words seems clear.* (Emphasis added.)

[42] The same does not appear to be so in this appeal. In fact it is the very absence of clear words in cll 8 and 9 which compel an approach as is taken now.

[43] There are no words in cll 8 and 9 which in clear terms express for instance that:

(a) cl 8.1(b) could only be invoked after a review is done in cl 9; or conversely if it could be done without invoking cl 9; or

(b) 'unable to perform the services under the agreement' has a defined meaning; or

(c) particularised reasons must be provided for.

[44] Where the natural meaning of the contract is not clear and in the particular absence of words to the effect mentioned above, the principles in *ICS* in their qualified form (see [28] which qualifies its application vis-a-vis extrinsic evidence), remain applicable and relevant to the construction of the construct such as to enable the court to objectively determine 'the meaning which the contract would convey to a reasonable person having all the background knowledge ... available to the parties'.

[45] The principles of Lord Hoffmann were summarised in *Berjaya Times Square Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd* [2010] 1 MLJ 597 at [42] at p 620G. Gopal Sri Ram FCJ, who delivered the leading judgment of the court stated:

> Here it is important to bear in mind that a contract is to be interpreted in accordance with the following guidelines. First, a court interpreting a private contract is not confined to the four corners of the document. It is entitled to look at the factual matrix which forms the background to the transaction. Second, the factual matrix which forms the background to the transaction includes all material that was reasonably available to the parties. Third, the interpreting court must disregard any part of the background that is declaratory of subjective intent only. Lastly, the court should adopt an *objective* approach when interpreting a private contract. (Emphasis added.)

[46] This objective approach to interpretation is the 'ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation which they were at the time of the contract' (K Lewison, *The Interpretation of Contracts* (5th Ed, 2011), Sweet and Maxwell, at p 1.03).

[47] The purpose of interpretation, as Lord Steyn observed in *Equitable Life Assurance Society v Hyman* [2002] 1 AC 408, 'is to assign to the language of the text the most appropriate meaning which the words can legitimately bear'.

[48] Lewison commented upon this, saying:

> Beguilingly simple though the formulation of Lord Hoffmann's first principle is, it contains the fundamental philosophy underlying the English approach to the interpretation of contracts. That is that *interpretation does not involve the search for the actual intentions* of parties but for an objective meaning. The purpose of

interpretation is not to find out what the parties intended, but what the language of the contract would signify to a *properly informed ordinary speaker of English*. The refocussing of intention on the impression made by the words on the reader, rather than on the intended message of the writer, is a departure from the traditional formulation of the aim of interpretation, namely to ascertain the presumed intention of the parties. It is this philosophy that explains the rationale for such of the exclusionary rules of evidence as remain in English law. In this respect, as Lord Hoffmann acknowledged, the five principles do not follow the way in which serious utterances are interpreted in ordinary life. (Emphasis added.)

[49] Professor McMeel in G McMeel, *The Construction of Contracts: Interpretation, Implication and Rectification* (2nd Ed, 2011) adds at paras 1.44–1.46:

First, construction is concerned with ascertaining the meaning which the document (or utterance) would convey to the reasonable person. It is not concerned with identifying some (fictional) common intention of the parties. The parties are taken to have contracted on the basis that they both accept the determination of an independent tribunal as to the meaning and effect of the language they have deployed, applying the standard of the reasonable person : In this sense the meaning is 'objectively ascertained'.

Secondly, the court adopts a common-sense approach to the meaning of contractual language, rather than one based on literalism or technical arguments of syntax and semantics. Whilst the general rule is that a commonsense reading is to be preferred, in respect of some contracts or some species of contractual clause a stricter approach to language may be adopted on the grounds of legal policy.

Thirdly, the tribunal considers as relevant not just the immediate context of the remainer of the instrument, but all the admissible surrounding circumstances (legal, regulatory and factual background, albeit not the prior negotiations or declarations of subjective intention) when interpreting the language. Crucially this approach is adopted whether or not a particular phrase or clause is unclear or ambiguous. Ambiguity is no longer a precondition for recourse to such 'extrinsic evidence'.

[50] Consistent with this analysis is the case of *Berjaya Times Square* where at para [43], p 621E, Gopal Sri Ram, FCJ (as His Lordship then was) adopting the British authorities, states:

The most recent statement of the guideline to *interpretation* of contract statutes and other instruments is to be found in Attorney General of *Belize & Ors v Belize Telecom* [2009] UKPC 10, where delivering the advice of the board, Lord Hoffman said:

> The Court has no power to improve upon the instrument which it is called upon to construe, whether it be a contract, a statute or articles of association. It cannot introduce terms or make it fairer or more reasonable. If it is concerned only to discover what the instrument means. However, that meaning is not necessarily or always what the authors or parties to the document would have intended. It is the meaning which the instrument would convey to a reasonable person having

> all the background knowledge which would reasonably be available to the audience to whom the instrument is addressed ... It is this objective meaning which is conventionally called the intention of the parties or the intention of Parliament, or the intention of whatever person or body was or is deemed to have been the author of the instrument.

[51] Thus in addition to the above in interpreting the contract, the court must approach it holistically. No term is to be taken or interpreted in isolation. This canon of construction is so long established, it is almost banal. See for instance *Chamber Colliery Ltd v Twyerould* [1915] 1 Ch 268:

> ... the application of the well-known (sic) rule that a deed ought to be read as a whole, in order to ascertain the true meaning of its several clauses; and that the words of each clause should be so interpreted as to bring them into harmony with the other provisions of the deed, if that interpretation does no violence to the meaning of which they are naturally susceptible.

[52] This is further reinforced by Lord Mustill in *Charter Reinsurance Co Ltd v Fagan* [1997] AC 313, 384, where His Lordship stated that 'the words (to be interpreted) must be set in the landscape of the instrument as a whole'.

[53] In *Re Sigma Finance Corporation* [2010] 1 All ER 571, Lord Mance said:

> In my opinion, the conclusion reached below attaches too much weight to what the courts perceived as the natural meaning of the words ... and too little weight to the context in which the sentence appears and to the scheme ... as a whole. Lord Neuberger was right to observe that the resolution of an issue of interpretation in a case like the present is an iterative process, involving 'checking each of the rival meanings against other provisions of the document and investigating its commercial consequences ...'
>
> ... Like him, I also think that caution is appropriate about the weight capable of being placed on the consideration that this was a long and carefully drafted document, containing sentences or phrases which it can, with hindsight, be seen could have been made clearer had the meaning now sought to be attached to them been specifically in mind ...
>
> ... Even the most skilled drafters sometimes fail to see the wood for the trees, and the majority below acknowledged ... Of much great importance in my view, in the ascertainment of the meaning that the Deed would convey to a reasonable person with the relevant background knowledge, is an understanding of its overall scheme and a reading of its individual sentences and phrases which places them in the context of that overall scheme.

[54] In the same case, Lord Collins said that 'in complex documents of the kind in issue there are bound to be ambiguities, infelicities and inconsistencies.

An overliteral interpretation of one provision without regard to the whole may distort or frustrate the commercial purpose'.

[55] As a relevant addendum, the relationship between interpretation and implication are considered in this discussion of the principles of construction. According to Lord Hoffmann in Attorney General for *Attorney General of Belize and others v Belize Telecom Ltd and another* [2009] UKPC 10; [2009] 1 WLR 1988 (PC) this characterisation can be traced back to the speech of Lord Pearson in *Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board* [1973] 1 WLR 601 (HL), where His Lordship had warned:

> The court does not make a contract for the parties. The court will not even improve the terms which the parties have made for themselves, however desirable the improvement might be. The court's function is to interpret and apply the contract which the parties have made for themselves. If the express terms are perfectly clear and free from ambiguity, there is no choice to be made between different possible meanings: the clear terms must be applied even if the court thinks some other terms would have been suitable. An unexpressed term can be implied if and only if courts finds that the parties must have intended that term to form part of their contract.

[56] Meanwhile Mason J in the High Court of Australia, in *Codelfa Construction Prop Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337 stated:

> When we say that the implication of a term raises an issue as to the meaning and effect of the contract we do not intend by that statement to convey that the court is embarking on an orthodox exercise in the interpretation of the language of the contract, that is, assigning a meaning to a particular provision. Nonetheless, the implication of a term is an exercise in interpretation, though not an orthodox instance.

[57] Interestingly, this relationship between implication and interpretation was clearly alluded to by Lord Hoffmann in *Belize* when His Lordship drew from the reasoning of *Investors Compensation Scheme* on interpretation of contracts, as referred to in *Berjaya Times Square* above. In laying down the general approach to implication at [16] His Lordship pronounced:

> The Board will make some general observations about the process of implication. The court has no power to improve upon the instrument which it is called upon to construct, whether it be a contract, a statute or article of association. It cannot introduce terms to make it fairer or more reasonable. However, that meaning is not necessarily or always what the authors or parties to the document would have intended. It is the meaning to a reasonable person having all the background knowledge which would reasonably be available to the audience to whom the instrument is addressed: See *Investors Compensation Scheme Ltd v West Bromwich Building Society*. It is this objective meaning which is conventionally called the intention of the parties, or the intention or Parliament or the intention of whatever person or body was or is deemed to have been the author of the instrument.

[58] In this connection, the implication as laid out by Lord Hoffmann was the 'reasonable person' test (at [21]):

> It will be noticed ... that this question can be reformulated in various ways which a court may find helpful in providing an answer – the implied term must 'go without saying' it must be necessary to give 'business efficiency to the contract' and so on – but these are not in the Board's opinion to be treated as different or additional tests. There is only one question: is that what the instrument, read as a whole against the relevant background, would reasonably be understood to mean?

[59] The principles set out by Lord Hoffmann are neatly summarised in an article by Professor Richard Hooley, *Implied Terms After Belize Telecom* CLJ Vol 73, No 2 (2014), at pp 324–325:

(1) A court has no power to improve the instrument it is asked to construe whether to make it fairer or more reasonable. It is concerned only to discover what the instrument means.

(2) That meaning is what the instrument would convey to a 'reasonable person' or 'reasonable addressee' having all the background knowledge which would reasonably be available to the audience to whom the instrument is addressed. This objective meaning of the instrument is what is conventionally called the intention of the parties or of whoever is the deemed author of the instrument.

(3) The question of implication arises where an instrument does not expressly provide for what is to happen when some event occurs. In most cases, the usual inference is that nothing is to happen, and the express provisions of the instrument continue to operate undisturbed. If the event causes loss to one of the parties, the loss lies where it falls.

(4) In some cases, however, the 'reasonable addressee' of the instrument will conclude that the only meaning which the instrument can have, consistent with its other terms and the relevant background is that something is to happen in response to the particular event that has not been expressly provided for in the instrument's terms. In such a case, it is said that the court implies a term as to what will happen if the event in question occurs.

(5) Nevertheless, that process does not add another term to the instrument; it only spells out what the instrument means. In other words, the implication of a term is an exercise in the construction of the instrument as a whole.

(6) It follows that in every case of implication, the single question for the court is whether the implied term would spell out in express words what the instrument, read as a whole against the relevant background, would reasonably be understood to mean.

[60] Interestingly, the Privy Council in *Belize* acknowledged an implied term, stating that it was (at [32]) 'required to avoid defeating what appears to

have been the overriding purpose of the machinery of appointment and removal of directors, namely to ensure that the board reflects the appropriate shareholder interests in accordance with the scheme laid out in the articles'.

[61] It is of some significance that our neighbouring jurisdiction of Singapore has not adopted the authority of *Belize* – as seen in *Sembcorp Marine Ltd v PPL Holdings Pte Ltd and another and another appeal* [2013] SGCA 43 and *Foo Jong Peng v Phua Kiah Mai and another* [2012] SGCA 55; [2012] 4 SLR 1267.

[62] *Sembcorp Marine* inter alia dealt with the admissibility of surrounding circumstances, the Evidence Act (Singapore) and the common law.

[63] In the same case, Menon CJ gave the 'Singapore Approach' in a three step process, and reaffirmed the case of *Foo Jong Peng*.

[64] This approach has been criticised by writers such as Richard Hooley, who said that *Sembcorp Marine* had 'artificially' distinguished implication and *interpretation* (and also construction) so as to avoid any justification for 'interpretative' approach to implication. It is suggested that in sticking to the more traditional tests (of 'business efficiary test' and 'officious bystander test,') the Singapore position could still be mired in controversy, given its restrictive element (where its normative reference point is necessity).

[65] In any case, the Singapore position is not something we particularly have to concern ourselves with.

[66] As much as it is desirable to consider the competing approaches here, the present case does not strictly turn upon which approach is taken. So we shall leave that for another time, while applying the authority of *Belize* adopted in *Berjaya Times Square* above.

THE PRESENT CONTRACT

[67] Having laid out the principles of construction, we will now consider the present contract. In our view two alternative interpretations of the contract are possible, especially in the interpretation of cll 8 and 9.

[68] The first of these is that, upon proper construction of the terms of the contract, cl 8.1(b) can only be invoked after the procedure in cl 9 has been satisfied, and accordingly notice with particularised reasons is given. The second interpretation is that the contract is silent regarding the provision of reasons in a notice of termination and that cl 9 does not need to be invoked

before cl 8.1(b), since cl 9 is purportedly silent on the matter. In my view, the former construction is to be preferred for reasons to be stated below.

[69] In its judgment, the Court of Appeal stated that they found (at [11]–[12]):

> ... merit in the argument by the appellant that Clause 8.1 necessitates a reason to be cited. It is pertinent to note that Clause 8.1 listed out 8 different reasons and circumstances under which the respondent can terminate the agreement ... (Clause 8.1 was reported in the judgment) ... From the above it is clearly stipulated that the right to terminate can only be carried upon the occurance of any of the grounds listed in (a) to (h). The grounds listed are specific and the appellant ((sic), they mean respondent) ought to choose under which of the reasons the termination was made. The learned judge, despite her finding that reason (sic) need not be cited, recognised that the right under Clause 8.1 cannot be exercised arbitrarily. In our view, it is because the right cannot be arbitrarily exercised that the respondent is obliged to inform the appellant under which particular sub-clause of Clause 8.1 was the agreement terminated. We do not agree with the learned judge that just because Clause 8.1 does not specially require a reason to be given the respondent need not do so. In our view when there are 8 different reasons for the respondents to act upon, it is incumbent upon the respondent to notify under which of the reasons it terminated the agreement.

[70] The Court of Appeal then, contrary to the above, goes on to incorrectly hold at [13] that the need to communicate reasons is displaced because the appellant's gracious acceptance of termination demonstrated that the reasons were known. This is held to be incorrect below.

[71] Our view is that the Court of Appeal is correct to the extent that it states that one of the grounds of (a) to (h) must be relied upon to terminate the contract according to cl 8.1 (b), and accordingly the right cannot be arbitrarily exercised; to the extent that the Court of Appeal states that enumerated grounds for termination in and of itself imposes a requirement to provide reasons is unsatisfactory. Then again, the Court of Appeal appears to have missed the point that the reasons must not only relate to which subclause is in effect but, as the case may be in cl 8.1(b), what reasons or facts gave rise to the conclusion that the appellant was 'unable to perform its Services as provided under the agreement'. This is, in our view, a consistent case put forth by the appellant that no review was conducted, and thus no reasons or bases were given, for the purposes of determining if the appellant had fallen foul of cl 8.1(b). The case does not merely turn on whether or not 'the correct ground (a) to (h)' was cited. Therefore, no requirement of reasons in the sense described above arises purely on the basis that grounds for termination were enumerated in cl 8.1.

[72] However, that is not to say that there is no basis upon proper construction of the contract for there to be a requirement of reasons. In our view, this comes about as a result of the interpretation of cll 8 and 9 as parts of a whole contract. Firstly it is noted that there was no discussion in either of the courts below as to whether or not the exact set of circumstances would give rise to termination under cll 8.1(b) and 9.2. There was no comparison of whether the words 'unable to perform its Services' and 'shall determine the Company's performance of its obligation under this Agreement as unsatisfactory' ('unsatisfactory performance') and whether the use of different terminology was meant to convey a different meaning. 'Services' under the agreement is defined to mean 'the preparation, execution and service of all necessary documents to assist the State Government to collect Arrears'. The definition is wide and would appear to cover what 'unsatisfactory performance' would be understood to mean. However, the word 'unable' has to be properly considered. In our view, the appellant's contention at trial that a failure to perform does not fall within the meaning of 'unable' which it contends, only conveys the meaning of 'incapacity,' cannot be wholly accepted. Mainly this is because the true capacity of the promisor to perform its obligation is of no relevance to the promise if there is merely capacity but no actual performance (ie unwilling to perform) or if performance is done very badly. As such, 'inability' has to include circumstances where there is severe breach even though the promisor is, as a matter of principle, 'able'. Nonetheless, there is some truth in its submission that mere breach would not fall into that category of 'inability', which in our view is a higher threshold than a mere breach, say, of warranty. Unfortunately, the nuances of this were not captured in either of the judgments below, and the only question the courts below asked was whether or not there was 'breach'. This is inadequate, not to mention highly unsatisfactory.

[73] Returning with greater acuity to the question of interpretation of cll 8 and 9, it appears that unsatisfactory performance must be wider than inability to perform its services. They deal with similar issues but there are differences to the question of degree.

[74] Under cl 9, the review procedure gives the opportunity for the respondent to review the appellant's performance, but this is by no means unilateral as a matter of procedure. The terms of cl 9 make this clear. Clause 9.1 for instance, oblige the parties to agree upon the terms and conditions of the review prior to any review occurring. This is clearly meant to protect the interests of both parties, that is to say the interest of the respondent in ensuring that the unsatisfactory situation is remedied (whether by the appellant, or where there is discharge or termination, by its substitute), and the interest of the appellant in avoiding breach and termination of the contract. Arguably the purpose of this clause leans in favour of protecting the position of the appellant against wilful termination for one, and to provide an added layer of protection

in that it is given the opportunity to 'remedy the unsatisfactory situation' in 30 days. It cannot be the case that the respondent is allowed to circumvent the purpose of cl 9 by invoking unilateral termination under cl 8.1(b) when cl 9.3 itself refers to cl 8.1(b) as a means of protecting the respondent's interests. In this regard, cl 9.3 provides that if the state government finds the unsatisfactory situation is not remedied at the end of 30 days ... the state government shall have the option of treating the unsatisfactory performance as an event of default which entitles the state government to terminate this agreement pursuant to cl 8.1(b) and accordingly the state government shall be entitled to all reliefs provided under cl 8.

[75] In stating that there is right under cl 8.1 to be exercised independently of cl 9, the Court of Appeal fails to appreciate the niceties or nuances, if you like, of the contractual terms upon proper construction. Consider for instance, where a review has been instituted under cl 9 pursuant to terms and conditions that have been agreed upon by both parties. Assume also that the terms of the review do not prevent cl 8.1(b) from being invoked during the period of review. If we accept the Court of Appeal's analysis that 'Clause 8.1 is a stand-alone clause giving right to the respondent to terminate upon an occurrence of any of the events or reasons set out thereunder' (at [17]), it could follow that the respondent is entitled to terminate midway through the review process, provided that the 'Company is unable to perform its services as provided under the agreement' is still relevant at the given time. In our view, this would be contrary to the purposes of cl 8 and, in particular, cl 9 of the contract – it cannot be what the parties could reasonably have understood the terms of the contract to mean.

[76] This line of reasoning is further supported if a question is asked: if, at the end of 30 days, the appellant has remedied the 'unsatisfactory performance' under cl 9, would there still be a right on the part of the respondent to terminate under cl 8.1(b)?

[77] The obvious answer to the question would be 'no' because that would inherently frustrate the purposes of cl 9.

[78] Thus the nub of this appeal is, when one has to choose between two competing interpretations, the one which makes more commercial sense should be preferred if the natural meaning of the words is unclear. It is noteworthy that the same approach was taken by Lord Hodge (in the majority decision of *Arnold v Britton*), where His Lordship accepted the unitary process of construction in *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900 para 21 that:

> ... if there are two possible constructions, the Court is entitled to prefer the construction which is consistent with business common sense and to reject the other.

[79] Thus it would appear that even *Arnold v Britton and others* [2015] UKSC 36 is not totally opposed to the application of business common sense approach in construing a contract, in the absence of clear words. Between the two interpretations, the first allows the respondent to unilaterally deprive the appellant of the opportunity to remedy any of its performance that the respondent has 'determined as unsatisfactory', whilst the other allows termination upon where appellant has not remedied its unsatisfactory performance after 30 days. As mentioned above, there is no reason to believe that 'unable to perform its services' means exactly the same thing as 'unsatisfactory performance' since it can be presumed that the drafters would have used the same term. Thus unsatisfactory performance must be 'lesser' than that of being unable to perform services. But the determination of inability to perform services is something that can be done and should be done by way of a cl 9 review.

[80] In our view, the latter interpretation makes more commercial sense. One may well ask why. Well, it is because it is conceivable that matters will begin as 'unsatisfactory performance' before they escalate to be matters of 'inability to perform services.' Since the option is given to the respondent to tackle it at the earlier stage, one cannot reasonably understand the contract to mean that the respondent can sit on the 'unsatisfactory performance,' then roll over and play dead, and then wait for it to escalate so as to deprive the appellant of the opportunity to remedy what is 'determined' unsatisfactory. That would not be the way the contract would be understood by the reasonable person, having knowledge of the material facts. Clause 9 would be understood as giving an opportunity to remedy, which would be illusory if the respondent could deprive the appellant of that, simply by waiting. This interpretation is also in accordance with and further the mutual co-operation provision under cl 12.8.1 which provides:

> 12.8 Mutual Co-Operation
>
> 12.8.1 In entering into the agreement the parties hereto recognise that it is impracticable to make provision for every contingency that may arise in the course of performance hereof and accordingly the parties hereto declare it to be their intention that this Agreement shall operate between them with fairness and without detriment to any of them.

[81] The respondent submits that there is a 'freestanding right' under cl 8.1 to terminate the contract. The Court of Appeal agreed with this. It appears that this stems from a misunderstanding of the interpretation of the word 'may'. It could be said that the use of the word 'may' under cl 9 confers a discretion upon

A the respondent who has a choice of whether or not to institute a review. That much may be true. However the word 'may' may be contrasted with two words or phrases, namely, 'may not' and 'must'. It is only when compared with 'must' that 'may' is understood as being discretionary in the manner that the respondent submits. Preferably and alternatively 'may' as contrasted with 'may
B not' merely expresses permissiveness. To take the respondent's submission to its logical conclusion, then cl 8.1(b) as a 'freestanding right' can easily be used to subvert the purpose of cl 9. That cannot be the intention of the parties as objectively determined. Being able to terminate whilst the review procedure is ongoing does not sit comfortably with the idea of being given an opportunity
C to remedy ('may remedy'). Therefore cl 8.1(b) is hardly a freestanding right and it must be read in context with cl 9, so that the purpose of cl 9 in protecting the appellant is not obviated. Clause 9 qualifies cl 8.1(b) because if they were to be read entirely separately, cl 8.1(b) could not be effected in the correct way as
D elucidated above.

[82] It has been contended that if cl 9 was meant to be invoked before cl 8.1(b) could be relied on, the contract could have said so. However, the reverse is also true. If the procedure under cl 9 was not required to have been
E satisfactorily completed before cl 8.1(b) could be relied upon, the contract could have also made it abundantly clear. The question is not what the contract could or could not have said, but what it must mean. We find it difficult to disregard the link that cl 9.3 makes with cl 8.1(b). If such a link was being made explicitly in the contract, it is reasonable to conclude, especially having adopted
F the reasoning in the previous paragraph contrasting 'unsatisfactory' and 'unable,' and that the set of circumstances that are applicable to cl 9 will almost always be chronologically prior to that of cl 8.1(b) and that ought to be borne in mind for the purposes of understanding the contract. To dispel this, cl 9 could have been drafted to read 'without prejudice to the right to terminate
G under cl 8.1 ...' as such words 'without prejudice' in a contract are not mere verbiage and their absence may be indicative of intent (*Lockland Builders Ltd v Rickwood* (1995) 77 BLR 38. Instead, as shown, cl 9.3 provides that the unsatisfactory performance under cl 9.2 as an event of default, which entitles the state government to terminate this agreement under cl 8.1(b).

H

[83] In this connection, the evidence of the drafting lawyer ie Hj Edlin bin Ghazaly (SP1) is relevant. From pp 136 to 155, SP1 illustrated the mechanics of cll 8 and 9.

I **[84]** According to SP 1, 'if the State Government thinks that the performance is under par ... or not performing, then the State Government can invoke Clause 9, but if the State Government thinks that it is not performing, it is so bad, then they can just give thirty (30) days notice of Clause 8.1 – it terminate the services'.

[85] It is clear from the above testimony, that the application of a cl 9 review is dependent on the degree of the appellant's inability in performing the services under the agreement.

[86] In reiterating the disjunctive application of these two clauses, it is unclear as to the degree of breaches contemplated, which would attract a review or not.

[87] The distinction of whether the clauses contemplate a breach of condition or warranty for instance, were not captured in either of the judgments in the court below.

[88] In view of the uncertainty of the operation of cll 8 and 9 since no evidence is shown that both parties understood how these clauses are to operate, the interpretative tools available would be employed in arriving at a correct and just decision.

[89] Crucially, the evidence of the drafting lawyer is evidence of pre-contractual negotiations which are not admissible to aid in the construction of a contract. This was not at all criticised by the lower courts. If the appellant chooses to call upon witnesses that give evidence prejudicial to its own case, it has every right to do so, no matter how ill-advised that course of action may be. Notwithstanding that, no party should adduce evidence which is inadmissible and the courts must be judicious in determining when such patently inadmissible evidence is presented before itself. Therefore, the evidence of the drafting lawyer, if accepted, only highlights the ambiguity present in the clauses. But since the evidence is inadmissible, it should not be considered in determining the 'factual matrix' or the 'relevant background' upon which the clauses should be understood.

[90] In this, there is absence of clear words in the contract.

[91] In view of the above, the majority decision in *Arnold v Britton* does not figure. In *Arnold*, Lord Carnwath in his dissent, made clear that even Lord Hodge (one of the majority judges in *Arnold*), acknowledges an important passage in the judgment of Lord Clarke JSC in *Rainy Sky SA v Kookmin Bank* that 'there is often a tension between, on the one hand, the principle that the parties' common intention should be derived from the words they used, and on the other, the need if possible, to avoid a nonsensical result'.

[92] Clearly if the parties had used unambiguous language, the court must apply that language. But in this appeal an ambiguity persists. One is always conscious of the rider stated by Lord Clarke in *Cooperative Wholesale Society Ltd v National Westminster Bank plc* [1995] EGLR 97, when applying the

commercial common sense rule that:

> This robust declaration does not, however, mean that one can rewrite the language which the parties have used in order to make the contract conform to business common sense. But language is a very flexible instrument and, if it is capable of more than one construction, one chooses that which seems most likely to give effect to the commercial purposes of the agreement.

[93] Reading the contract in its entirety, there are terms that give the appellant discretion, a margin of appreciation, in performance of its obligations, such as in cl 6.1.2. There is latent ambiguity in those cases since the obligations of appellant are only very broadly defined, not specifically. There is no way for the appellant to know what exceeds the bounds of its discretion or not, which is part of the reason why cl 9 exists. That 'the State Government shall determine the Company's performance of its obligations under this agreement as unsatisfactory' means that the standard by which the review process is to begin is subject to the opinion and determination of the respondent. This is communication between the two contracting parties. Clause 9 is there to help the two contracting parties to be accurate and precise in the performance of their obligations. This is also to emphasise that cl 9 is there to protect the appellant, especially because it is given discretion to perform certain obligations in certain ways that it sees fit. Thus cl 9 allows the appellant to be in accord with the respondent and continues to rely on the contract and therefore it must come prior to that of cl 8.1(b).

[94] What can be concluded from the above is that, upon a true construction of the contract, cl 9 must be invoked and satisfied before termination under cl 8.1(b) may be validly exercised. This is to ensure that the meaning and purposes of the two clauses are not lost or rendered nugatory by operation of the other.

[95] Thus, particularised reasons have to be provided for cl 9, since they are there to provide the opportunity to meaningfully remedy any unsatisfactory performance or situation. Therefore, termination under cl 8.1(b) would require these particularised reasons to have been expressed earlier (ie 30 days before) and with the notice of termination since the failure to remedy would be the basis upon which cl 8.1(b) is relied upon. Thus we find that the said cl 8 termination was not valid.

IMPLICATION AS INTERPRETATION

[96] The following paragraphs are strictly obiter dicta. Had the appellant pleaded the existence of an implied term requiring the exercise of cl 9 before termination under cl 8.1(b) could lawfully occur according to the contract, they might have been able to obtain the benefit of it. It is unfortunate that they

did not do so. Thus the power to decide on the matter in a way that directly affects the outcome in the present appeal is accordingly restrained. If any ruling on the interpretation of the express terms of the contract above – according to what a reasonable person with the relevant background would have understood the parties to mean – is in any way doubtful, the only alternative interpretation could potentially give rise to an implied term requiring the procedure in cl 9 to be completed or exhausted before termination on the grounds of cl 8.1 can be lawfully taken. We have given our reasons for preferring the construction of the terms in the manner we have done so above and shall not repeat them here.

[97] However if the alternative interpretation is preferred, there would be an inherent ambiguity in the operation of the terms of the contract. Because of cll 9 and 8, we have a clear understanding of what happens when cl 8.1(b) is relied upon *after* the procedure under cl 9 has been complied with; namely, that the valid termination can be effected with 30 days' notice. However, it is unclear as to what should happen where cl 9 has not been relied upon before an cl 8.1(b) termination is sought to be effected. Under *this* interpretation, the terms are silent on the matter. We are asked to consider whether or not this evinces an intention that 'something should be done' per *Belize*.

[98] If we accept the alternative interpretation, as the trial judge would have framed the contract, the contract is silent, that is to say, that the instrument does not expressly provide for what is to happen when some event occurs (*Belize* ([17]), as to whether or not particularised reasons are required and on the question of whether cll 9 and 8.1(b) are to be read disjunctively or conjunctively. It will be recognised from *Belize* that the considerations are not altogether different to that of interpretation. The court is still looking at what the parties would have understood the contract to mean.

[99] To further elaborate on this point, the contract is clear that where a review has been conducted under cl 9 and after 30 days the unsatisfactory performance has failed to be remedied by the appellant, then the respondent may choose to treat the failure to remedy, as giving rise to a termination under cl 8(1)(b). However, it says nothing as to what ought to happen if no review is brought. That is what is meant to be established by implication here.

[100] What is clear is this. When cl 8.1(b) is read with cl 9, bearing in mind the purposes of cl 9 as expressed in the preceding section, there is sufficient justification for the 'reasonable addressee' to understand the instrument to mean that something 'ought to happen' in the case of this silence as to the terms of the contract. As Lord Steyn said in *Equitable Life*:

> If a term is to be implied, it could only be a term implied from the language of (the instrument) read in its commercial setting.

[101] Our view is that a commercial understanding of the intended purposes of cl 9, inter alia, reducing the risk of jeopardy to the appellant, is comparable to the 'overriding purpose of the machinery of appointment and removal of directors, namely to ensure that the board reflects the appropriate shareholder interests in accordance with the scheme laid out in the articles' that was found in *Belize*. Accordingly, a term could have been implied (if it was pleaded) that cl 8.1(b) could not be invoked unless cl 9 review had been satisfactorily completed and that this meant that cl 8.1(b) required the same type of particularised reasons that would be necessary in cl 9 due to its nature of providing an opportunity for the appellant to remedy its unsatisfactory performance.

[102] As alluded to earlier, the above analysis is obiter since the issue of implied term was not pleaded by the appellant. Counsel would be well-advised to consider all arguable grounds of submissions in the future so as to ensure that the parties' legitimate interests can be protected through the justice system; not to mention that the court is assisted in coming to a determination on the real issue of the case.

Procedure and relationship between common law and contractual termination

[103] Since the respondent did not plead common law termination we will not dwell on it. We shall merely briefly consider the interplay between the duties of notice and provision of particularised reasons between common law and contract. But since the respondent did not plead common law termination, there is no necessity for us to decide on the matter. However, where rights of termination under common law and the contract arise, they may not co-exist unless the contract provides that they may; for instance with words to the effect of 'without prejudice to any other legal or equitable right or remedy' as was the case in *Lockland Builders Ltd v Rickwood* as well as *Fercometal v Mediterranean Shipping Co SA* [1989] AC 788. In the absence of such a clause, however, such as in *Stocznia Gydnia SA v Gearbulk Holdings Ltd* [2009] EWCA Civ 75 it was decided such that, although fact-specific, a party may, prima facie, rely on both contractual and common law rights without thereby affirming the contract.

Evidential and substantive relevance of 'gracious acceptance' of termination

[104] The Court of Appeal, despite finding (at para 12 of its judgment), that it was incumbent upon the respondent to notify (the appellant) under which of the reasons it terminate the agreement, affirmed the judgment of the trial judge who was of the view that ... 'kelihatan plaintiff menerima notis penamatan perjanjian tersebut dengan baik'.

[105] The Court of Appeal took this to mean that the appellant accepted the termination gracefully (sic), and thus the respondent's failure to give reasons in its notice would not nullify the validity of respondent's termination notice.

[106] We am unable to agree with the judgment of the learned justices of the Court of Appeal. In particular, we find the notion that the respondent who is 'obliged to inform the appellant under which particular sub-clause of Clause 8.1 was the agreement terminated' (sic) in failing to do so, has its failure swept under the carpet by the appellant's 'gracious acceptance' of the termination in its letter dated 6 December 2014. The respondent terminated in breach of the contract – broken a covenant. What has been broken cannot be unbroken, merely overlooked; or in legal terms, waived. No such waiver occurred on these facts, and the respondents did not submit that any waiver occurred, and rightly so, for then every letter acknowledging termination which failed to express surprise would be held to have inadvertently waived contractual rights, which is unsustainable in any sensible legal system. The bottom line is that no legal authority can support the proposition affirmed by the Court of Appeal and the trial judge, since 'graciousness' does not extinguish legal rights and neither does it render notice of reasons to be superfluous and unnecessary. It is inconceivable that being 'gracious' lends itself towards salvation of a legally invalid notice of termination.

[107] In our view, the Court of Appeal erred in its reasoning that the appellant's subjective knowledge alone was paramount in determining whether or not the provision of reasons in the respondent's notice of termination was required. The Court of Appeal's implied reasoning was that the respondent was under no obligation to elucidate the reasons for termination since the appellant's letter in response to the notice of termination, dated 6 December 2004, by its intonation showed, at [14], 'that the appellant had accepted the termination without any protest. It does not reflect a reaction of someone who was caught by surprise or was not aware of why the agreement was terminated in the first place'. In other words, reasons were not required with the notice of termination because they were already known by the appellant.

[108] However, in our view the test to ascertain whether the communication of reasons in the notice is necessary (or conversely, superfluous) is an objective rather than a subjective one. To draw an analogy from deciding whether or not repudiatory breach has in fact occurred, the courts looks at whether or not repudiatory breach has occurred by an objective standard and will disregard the subjective belief of the party liable for breach and any of its agents. There is no reason why it should not do the same with regards notice of the reasons for termination. In our view, it is insufficient that the respondent contends to the effect that the appellant has a moment of epiphany upon receipt of the notice of termination and henceforth understands and appreciates the subjective

reasons of the respondent for terminating the contract. This is not to be understood as meaning that the standard for breach is that which is subjective to the respondent, for breach is also determined objectively. Similarly this does not mean that the respondent may under no circumstances rely upon reasons which exist at the time of termination or notice apart from those that are disclosed, though this is subject to exceptions. Instead, one must appreciate that the reasons for termination are the respondent's and the respondent's only, and unless actual (or even constructive) notice of those reasons can be demonstrated, a termination notice with reasons must be provided should the contract, properly construed, require them. In the present case, one only has to ask if the reasonable person observing the exchange between the appellant and the respondent, having only the knowledge which they shared in common, would be able to understand and identify the reasons for which the respondent was claiming termination of the contract. In our view, the mere intonation of the letter does not suffice. Barring further evidence which demonstrates that the appellant should have known but wilfully chose not to know, the facts of the present case proffer no sufficient explanation. Upon reflection, the question of 'whether notice of reasons, when required by contract, is satisfied by an objective or subjective standard' is of enough significance to the present case (as it decided the question of the validity of termination in the Court of Appeal) and to public policy to have been properly considered as a question of law in the appeal.

[109] Furthermore, it seems markedly unfair, in our view, to interpret civility in the face of imminent and inevitable termination of the part of the appellant as imputing both actual knowledge of the reasons for termination, thus releasing the respondent of its responsibility, which it failed to fulfil, to communicate to give reasons upon proper construction of the contract above; and acquiescence or, worse, waiver of the need for notice to be given with reasons under the contract and the appellant's right to challenge the unlawful termination of the contract.

[110] There are further reasons for undermining the weight of the aforementioned letter. We note that counsel for the respondent 'applauds the diligence of the learned trial judge for considering the letter despite the fact that it was never pleaded'. As the appellants submit, the letter was neither pleaded by the respondent/defendant in its defence, nor was it raised in evidence or that the appellant afforded any opportunity to cross-examine any of the respondent's witnesses on the letter. The allegations of gracious acceptance were not put to any of the appellant's witnesses. The first mention of the letter by the respondent was during submissions after trial. Counsel for the appellant has brought our attention to a number of authorities including *Danaharta Urus Sdn Bhd v Pembinaan Nadzri Sdn Bhd and Anor* [2006] MLJU 331; *Chong Khee Sang v Phang Ah Chee* [1984] 1 MLJ 377; *Lin Lin Shipping Sdn*

Bhd v Govindasamy Mahalingam [1993] 2 MLJ 474; and *Jaafar bin Shaari & Anor (suing as administrators of the estate of Shofiah bte Ahmad, deceased) v Tan Lip Eng & Anor* [1997] 3 MLJ 693, which we have regarded to be a helpful exposition of the relevant common law rules.

[111] It is trite law that the rules of procedure and natural justice permit the court to only to consider the issues and evidence pleaded before it and not what it perceives that counsel should or could have argued. In *Janagi v Ong Boon Kiat* [1971] 2 MLJ 196, Sharma J held that:

> It is on examination of the pleadings that the court notices the differences which exist between the contentions of the parties to the action. In other words the matters to which the parties are at issue are determinable by an examination of the pleadings. An issue arises when a material proposition of law or fact is affirmed by one party and denied by the other. *The court is not entitled to decide a suit on a matter on which no issue has been raised by the parties.* It is not the duty of the court to make out a case for one of the parties when the party concerned does not raise or wish to raise the point. In disposing of a suit or matter involving a disputed question of fact, it is not proper for the court to displace the case made by a party in its pleadings and give effect to an entirely new case which the party had not made out in its own pleadings. (Emphasis added.)

[112] Indeed, in *Hadmor Productions Ltd v Hamilton* [1983] 1 AC 191, Lord Diplock said:

> Under our adversary system of procedure, for a judge to disregard the rule b which counsel are bound has the effect of depriving the parties to the action of the benefit of one of the most fundamental rules of natural justice: *the right of each to be informed of any point adverse to him that is going to be relied upon by the judge and to be given an opportunity of stating what his answer to that is.* (Emphasis added.)

[113] It is apparent that the letter was not pleaded by the respondent, that it was not exhibited as evidence of the relevant witness, and that no opportunity was given to the appellant to answer the allegation that the way the letter was written implied that the appellant had either waived any requirement for providing reasons or that by its 'gracious acceptance' in accepting the termination without protest, could be thought to impute to it a full comprehension of the reasons why it was terminated. Therefore, we find the trial judge's and the Court of Appeal's reliance on the letter to be wholly unsatisfactory and an egregious breach of the rules of natural justice.

[114] Furthermore the letter dated 6 December 2004 was more than two weeks after the notice of termination received by the appellant dated 22 November 2004. It is at the very least troubling that this letter, in the judgment of the trial judge and the Court of Appeal, is conclusive evidence of the state of the appellant's knowledge two weeks before or is able to impute, by

way of phrasing and intonation, the appellant's knowledge of the respondent's subjective reasons. As discussed two paragraphs above, even if the latter were possible, objectively proved knowledge is the only matter of relevance. Therefore, the letter should have been ruled inadmissible and should not have been relied upon.

Conclusion on the question of law

[115] As the aforementioned paragraphs illustrate, the answer to the question of law is perhaps not a simple 'yes' or 'no' but a more nuanced 'it depends on the proper construction of the contract'. Insofar as the appellant contends that the respondent, when terminating the contract, has a duty to give reasons in accordance with general law, that contention is false and without authority. Nonetheless, such a duty may be imposed by proper construction of the contract. Factors that lend towards establishing such a duty are, inter alia, where grounds for valid termination of the agreement are particularised in the contract and where the contract purports to give the party in breach an opportunity to remedy its unsatisfactory performance, such that without knowledge of the particular alleged breaches, no meaningful effort to remedy them can be taken. In the context of the present case, the notice of termination is bad in law.

ANALYSIS ON THE COURTS' FACTUAL FINDINGS OF THE APPELLANT'S BREACH

[116] Given what has already been said above, there is no need for us to decide on the question of the appellant's breach in order to answer the question of law in the appeal today; neither has the respondent raised in the alternative, any form of counterclaim for breach of warranty on the part of the appellant. Therefore, this analysis of breach will be brief.

Breach

[117] As mentioned in the earlier paragraphs, there is a somewhat unsatisfactory lack of analysis as to whether or not the breaches that were found constituted deficiencies or breaches which gave rise to a cl 8.1(b) right of termination. It appears to have been assumed that they were either instances of 'qualifying' breach or 'conditions' although none of these legal terms were expressly used in the judgment. Any breach was assumed to constitute an inability to perform services under the agreement. However, given the reasoning expressed earlier in this judgment, they could not have given rise to termination under the contract without the appellant having first had recourse to the protection of cl 9.

[118] We note that cl 8.4 of the agreement states that 'the rights to terminate

this agreement given by this clause shall be without prejudice to any other right or remedy of either party in respect of the breach concerned (if any) or any other breach' and therefore, as a matter of principle, does not exclude there being a common law right of termination should the breach be a repudiatory breach of condition – sometimes curiously known as 'fundamental breach' although no separate category of fundamental terms exists. Unfortunately, this was neither pleaded nor analysed at trial and as such it is unnecessary for us to decide on the issue.

[119] Neither was there any meaningful analysis as to whether or not the various terms under cl 6 constituted conditions, warranties or innominate terms. Their descriptions as 'Covenants' in the agreement are by no means instructive. This is no fault of the learned trial judge since the issue of common law termination was not pleaded by the respondent. However, it is appropriate for us to provide some guidance, by no means exhaustive, in a brief paragraph or two on the subject.

[120] A common law right to terminate typically arises when there has been a breach of condition. A 'neat' classification for whether or not a term is a condition is found in the judgment of Waller LJ in *BS&N Ltd (BVI) v Micado Shipping Ltd (Malta) ('The Seaflower')* [2001] CLC 421 at [42], citing *Chitty on Contracts*:

> ... a term of a contract will be held to be a condition:
>
> (i) if it is expressly so provided by statute;
>
> (ii) if it has been so categorized as the result of previous judicial decision (although it has been said that some of the decisions on this matter are excessively technical and open to reexamination by the House of Lords);
>
> (iii) if it is so designated in the contract or if the consequences of its breach, that is, the right of the innocent party to treat himself as discharged, are provided for expressly in the contract; or
>
> (iv) if the nature of the contract or the subject-matter or the circumstances of the case lead to the conclusion that the parties must, by necessary implication, have intended that the innocent party would be discharged from further performance of his obligations in the event that the term was not fully and precisely complied with.
>
> Otherwise a term of a contract will be considered to be an intermediate term. Failure to perform such a term will ordinarily entitle the party not in default to treat himself as discharged only if the effect of breach of the term deprives him of substantially the whole benefit which it was intended that he should obtain from the contract.

[121] The description in *The Seaflower* on the right to terminate for breach of an innominate term is derived from the judgments of Lord Diplock LJ in

Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd [1962] 2 QB 26 at [69]–[70], [72] and the judgment of Sellers LJ at [57] of the same case.

[122] Some further comments regarding some of the findings and analysis of breach in the present case will be made here. Firstly, and most obviously, the breach of cl 6.9 is no longer relevant since cl 6.9 was purported to apply 'after any event of termination of this agreement, pursuant to Clause 8'. Since it is held that there was no valid cl 8 termination, the obligations under cl 6.9 accordingly fall away.

[123] Clause 6.1, for instance, failed to be appreciated as providing considerable discretion to the appellant as to the type of and manner in which a computer system would be set up. The evidence adduced demonstrated a dissatisfaction among the assistant district officers (ADOs) regarding the system in their meetings, but it is unclear whether or not any of that was expressly communicated to the appellant, much less that it formed terms of the contract. A similar argument can be raised for the provision of sufficient manpower. There is a difference between expectations of a contract and obligations under a contract, and it is not clear on proper construction of the contract that these expectations were specific obligations under the contract. It cannot be stressed more that these alleged breaches were an apt case for review under cl 9 and had such review been invoked upon terms to be agreed between the parties, a more peaceable solution may have been possible. The review was also an avenue which would have provided the respondent the opportunity to express its dissatisfaction with the way in which the discretion provided under the contract had been exercised by the appellant and would have unequivocally communicated its expectations of the computer system.

[124] As for the remaining breaches which we will decline to comment further upon, it bears repeating that no termination could have occurred without first resorting to a cl 9 review.

REMEDIES

[125] We now proceed to the subject of remedies. The respondent has unhelpfully made no submission on the question of quantum to this court. In the previous hearings, however, the respondent's main contention was that since damages for loss of profits was not one of the prescribed remedies under cl 8.5 of the contract, the appellant was therefore prevented from claiming any loss of profits. This contention is no longer sustainable since there was no valid termination pursuant to cl 8 of the agreement. The trial judge and the Court of Appeal concurred with this reasoning and accepted the submission on the basis that cl 8.1(b) applied. Since it does not, the respondent's submission accordingly fails. Furthermore cl 8.4 states that the rights under cl 8 shall be

without prejudice to any other right or remedy of either party in respect of the breach concerned (if any) or any other breach.

[126] Therefore, on a proper construction of the agreement, we agree with the appellant's submission that breach of the agreement may give rise to damages for loss of profit pursuant to s 74 of the Contracts Act 1950.

[127] Section 74(1) and (2) of the Contracts Act 1950 is reproduced in this judgment:

> Compensation for loss or damage caused by breach of contract
>
> 74 (1) When a contract has been broken, the party who suffers by the breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from the breach, or which the parties knew, when they made the contract, to be the likely result from the breach of it.
>
> (2) Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

Thus we find that an assessment of damages would be appropriate in this appeal.

[128] Section 74(1) and (2) in *Hamdan bin Johan & Ors v FELCRA Bhd & Ors* [2010] 8 MLJ 628; [2010] 3 CLJ 474 was held to substantially affirm the common law rule laid down in *Hadley v Baxendale* (1854) 9 Ex 341; (1854) 165 ER 145 where in the general assessment of damages for breach of contract, the general rule is that the aggrieved party is to be put in the same position as they would be if the contract had been properly performed, so that normally he is entitled to recover from the contract breaker his loss of profit or the benefit of the bargain. The other cases cited by the appellant include *Bank Bumiputera Malaysia Bhd Kuala Terengganu v Mae Perkayuan Sdn Bhd & Ors* [1993] 2 MLJ 76 and *Nikmat Masyhur Sdn Bhd v Kerajaan Negeri Johor Darul Ta'zim* [2014] 1 MLJcon 213; [2008] 9 CLJ 46 essentially set forth the same propositions ie that the damage or loss suffered must be within the contemplation of both parties whether actual or constructive, that the loss suffered was a natural and probable result of the defendant's breach and that it included loss of profits. We have no disagreement with the statements of principle in this case. It is clear that a rate of commission amounting to 20% was agreed for the collection of the arrears, and it therefore would be the natural and probable result, as well as have been in the contemplation of the parties that premature termination would result in the loss of those profits.

[129] However, we do not approve of the appellant's method of calculation for the loss of profits. In its pleadings the appellant claimed for over RM19m whilst in its written submissions the appellant claimed RM10,415,421.43

(and, incidentally, incorrectly added the word million behind the figure). Let it be said that such careless disregard for precision is less than satisfactory. Counsel for the appellant stated that 'this sum (and the formula used in arriving at that figure) was explained and had been proven at trial. Essentially, it is based on the average of the commissions due to the appellant for the preceding 40 months which is then multiplied with the balance (of) 20 months. The accuracy of these figures was not challenged during trial' (para 54 of the appellant's written submissions)

[130] This calculation does not reflect the principles of compensation for loss of profits and will put the appellant in a position well beyond that which it would rightfully be in, had the contract been properly performed. A calculation based on 'commissions', that is to say receipts, is very different from a calculation based on 'profits'. To award damages based on commissions would completely disregard the fact that had the contract been properly performed the appellant would have had to incur expenses and costs of operation, among other things. The proper sum should therefore be net of all the expenses that would be reasonably incurred in the remaining 20 month period. To do otherwise would give the appellant more than they would have obtained had the contract been performed, and therefore more than what they rightfully deserved. However, contrary to the respondent's submission and the judgment of the trial judge, the mere fact that the formula was the appellant's own formulation (presumably in contradistinction with a formula provided for within the contract) is not a ground for rejecting the formula. the agreement did not stipulate a formula for calculating loss of profits, and as such the general principles of the common law will apply and a formula that best estimates the future loss of profits will be preferred by the court.

[131] Therefore, contrary to the respondent's submission, we do not think that proper consideration on quantum was allowed for at trial. There were no clear submissions made as to the expenses incurred and a very loose use of the words *pendapatan* and *kutipan*, which shed no light on the actual loss of profits. The respondent should also take the opportunity to submit on whether the formula is a proper representation of the loss of profits, that is to say whether or not there are any other factors that could reasonably have been expected to increase or reduce the collections, and corresponding commissions, be it a significant reduction in remaining arrears or for any other reason. The challenge by the respondent exclusively on the basis that loss of profits was not expressly stated in cl 8.5 was wholly inadequate.

CONCLUSION

[132] Therefore, on the basis of the reasons provided above, the respondent had an obligation, upon proper construction of the contract, to initiate a review prior to termination and to therefore provide particularised reasons to that end.

[133] For the above reasons we therefore allow this appeal with costs. We order that this claim be remitted to the High Court for assessment of damages, by a High Court judge on the issue of quantum occasioned by wrongful termination of the contract.

Costs of RM50,000 to the appellant.

Deposit refunded to the appellant.

Appeal allowed with costs of RM50,000.

Reported by Kohila Nesan