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1. *Foo Jickson v Carlsberg Marketing Sdn Bhd [2018] MLJU 1506*

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Foo Jickson v Carlsberg Marketing Sdn Bhd [2018] MLJU 1506

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HIGH COURT (JOHOR BAHRU)

SEE MEE CHUN J

CIVIL APPEAL JA-12BNCC-4-03 OF 2018

3 October 2018

Florence Toh *(Adahikamah bt Abu Bakar with her) (William,* ***Florence*** *& Partners) for the appellant.*
Chan Mun Yew (Lee Hishammuddin Allen & Gledhill) for the respondent.

See Mee Chun J:

ALASAN PENGHAKIMAN Introduction

[1]The Plaintiff filed a claim in the Sessions Court against Groceries Schelf Gastro Sdn Bhd (Groceries) as the 1st Defendant for the return of a sum of money disbursed and against the 2nd Defendant, a director in Groceries, for a sum of RM270,000 being the sum guaranteed by him. The claim against Groceries was withdrawn due to it being wound up.

[2]The claim against the 2nd Defendant was allowed by the Sessions Court Judge (SCJ). On appeal, the decision of the SCJ was confirmed. This is the 2nd Defendant's appeal against the decision of the High Court.

Background

[3]The Plaintiff and Groceries had entered into an agreement dated 1-12-2011 (Solus Agreement) where essentially Groceries was to purchase beer products from the Plaintiff's authorized dealers for the period 1-12-2011 to 30-11-2013. There were monthly sales target and a minimum total sales target. The Plaintiff was to provide trade offers, sponsorships and disbursement to Groceries.

[4]On 1-6-2012 the Solus Agreement was revised by a Supplementary Solus Agreement where the Upfront Disbursement was increased from RM180,000 to RM270,000, the monthly sales target increased from 40.77 hectolitres (180 kegs) to 44.85 hectolitres (4,320 kegs) and the total sales target from 978.48 hectolitres (4,320 kegs) to 1,614.49 hectolitres (7,128 kegs) and all other terms remained the same.

[5]The Solus Agreement and the Supplementary Solus Agreement can be found in RR2A/82-89 and RR2A/90-92 and will be collectively referred to as the Agreements. The Agreements were terminated on 25-9-2013 (RR2A/108-109).

[6]As a result of the Supplementary Solus Agreement, the 2nd Defendant executed a Supplementary Letter of

Guarantee and Indemnity dated 1-6-2012 whereby the 2nd Defendant irrevocably guaranteed and undertook to pay to the Plaintiff up to the sum of RM270,000 of the upfront disbursements in the event of a breach by Groceries. The earlier guarantee and indemnity dated 1-12-2011 and Supplementary Guarantee and Indemnity can be found in RR2A/93 and 94 and will be collectively referred to as Guarantees and Indemnities.

Liability of the 2nd Defendant

[7]The 2nd Defendant is not disputing the Agreements were signed nor the Guarantees and Indemnities but had urged the Court to look beyond the black and white agreements and into the real business arrangement or industrial practice (paragraphs 9.1 to 9.4 of its written submission dated 10-7-2018).

[8]The 2nd Defendant's liability is premised on there being a breach by Groceries. Pursuant to the Supplementary Guarantee and Indemnity it is stated-

> ". . . I shall now hereby Irrevocably Guarantee and Undertake to refund to you such proportional amount of the upfront disbursements as claimed by you and referred to in the Supplemental Letter totaling Ringgit Malaysia Two Hundred Seventy Thousand (RM270,000.00) only in the event that:
>
> i) The Sales Target or Total Sales Target defined and specified in Supplemental Letter is not achieved in accordance with the terms therein; and/or
>
> ii) If the Outlet shall be in material breach of any terms and conditions stipulated in the Solus Agreement and the Supplemental Letter.?.

[9]The evidence in the Sessions Court was clear there had been a breach of the Agreements. According to PW1 (Mr Lee Hong Fatt, Manager of Accounts Receivable) his evidence in Q&A 22 and 23 was that-

> "Qn : Did the Company perform its part of the Agreements?
>
> Ans : No. The Company breached the Agreements by:
>
> (a) Failing to achieve the Monthly Sales Target Sales of 198 kegs (equivalent to 44.85 Hectolitres) at any point in time throughout the term of the Agreements;
>
> (b) Failing to achieve the Total Sales Target of 7,128 kegs (equivalent to 1,614.49 Hectolitres) despite nearly 1 year and 10 months into the Agreements. In this regard, the Company only managed to achieve a total sales target of 28.60 after it last purchase of the Beer Products listed in Schedule 3 of the Solus Agreement, in October 2012.
>
> (c) The Company ceased to purchase Beer Products listed in Schedule 3 of the Solus Agreement, from TKT from October 2012 onwards.
>
> Qn : How are you aware of this?
>
> Ans : I obtained this information from the Summary of Sales Volume generated by the Plaintiff's internal system, known as

the Carlsberg Distributor Information System (“CDIS System?).

Please refer to Summary of Sales Volume at 74-74a PBD

From the Summary of Sales Volume, it can b e seen that the Company’s last purchase of Beer Products was on October 2012 resulting in the total sales volume of only total 28.60 Hectolitres which translates to 1.77% of the Total Sales Target of 1,614.49 Hectolitres.?.

(RR2A/26).

[10]The breach was confirmed by PW2 (Mr Tan Choon Heng, Sales Manager) in his Q&A 16 and 17 (RR2A/36-37) and PW3 (Mr Lim Teck Quan, Sales Executive servicing Groceries) in his Q&A 16-18 (RR2A/50-51).

[11]Groceries was also not able to support its contention it had met the stipulated sales target. This can be seen from the evidence of DW1 (the 2nd Defendant himself)-

“Qn : Can you show the Court there is no evidence before the Court today that you purchased to reach the Sales Target. Do you have any evidence before the Court? Yes or no? To show that you have purchase and you have reach the Sales Target? Yes or no?

Ans : Ok, we purchase . . .

Qn : Where? Can you show it to the Court? Is there any evidence?

Ans : In June itself, you offered me . . .

Qn : Is there any evidence before the Court, Mr. Foo?

Ans : No.?.

(RR3B/674).

[12]The breach by Groceries is thus supported by the documents in the form of the sales volume generated by the

CIDS and invoices issued by the Plaintiff's authorized distributor Thong Kee Distributor Sdn Bhd (TKT). These invoices can be found in RR2B/170-228 and DW1 admitted receiving them.

[13]Pursuant to clause 5 of the Solus Agreement if Groceries were to be in default, the Plaintiff is entitled to withhold payments, stop the supply of beer products, terminate and demand the refund of any sums disbursed.

The Plaintiff's obligation

[14]Clause 1 of the Solus Agreement provided that subject to Groceries fulfilling the terms of the Agreement, the Plaintiff was to provide the trade offers, sponsorship and disbursements stated in schedule 2.

[15]According to the Plaintiff it had paid RM240,000 as upfront disbursement and RM72,575.50 as promotional support to Groceries. The manner of payment was succinctly explained by PW1 (Q&A 16-21, RR2A/20-25), PW2 (Q&A 12-15, RR2A/34-36) and PW4 (Mr Kee Yik Chuan, Director of TKT, Q&A 10-15, RR2A/47-50). The evidence was that the Plaintiff would issue delivery notes (DN) to Groceries who then redeemed upon presentation of the DN to TKT and TKT would issue credit notes (CN) or payment vouchers to TKT depending on the type of payment. The Court was satisfied that the documents produced showed DNs issued by the Plaintiff (RR2A/115-116, 119, 121, 123, 125, 127, 129, 131, 133, 135, 137, 139, 141 and 143), and the payment vouchers (RR2A/117-118) and CNs (RR2A/120, 122, 124, 126, 128, 134, 138, 140, 142, 144, 150, 154) issued by TKT.

[16]Ultimately 10 DNs amounting to RM240,000 were issued to Groceries who in turn redeemed them by the issuance of 2 cheques from TKT for RM150,000 and 5 CNs of RM90,000. The promotional support in the sum of RM72,576.50 were paid in the form of Plaintiff issuing 14 DNs to Groceries who then redeemed from TKT through 7 CNs and 6 invoices. The Plaintiff had thus met its obligations under the Agreements as opposed to Groceries which had not.

Contention of the 2nd Defendant

[17]The 2nd Defendant does not dispute that the upfront payment of RM240,000 and promotional support of RM72,576.50 have been made. However its appeal to the Court was founded on the free of charge (foc) beer products supplied and that TKT and not the Plaintiff could claim for the RM150,000 disbursed.

(a) Foc beer products

[18]According to the 2nd Defendant, out of the RM72,576.50 provided as promotional support, a total of RM39,635.00 was foc beer which the Plaintiff was not entitled to claim. This was because there was nothing in the Agreements to provide that in the event of termination the Plaintiff could claim it. Reliance was also placed on the evidence of PW3 where he agreed "that whatever product that is free of charge shouldn't be claimed by way of money term? (RR3A/609). The proposition by the 2nd Defendant was that no one is entitled to claim back something that had been given foc.

[19]The answer to this contention lies in clauses 5(c) of the Solus Agreement which provides as follows-

> "5. Default of breach
>
> In the event that there is any default or material breach by the customer of any term contained herein, then the company hereby reserves the right at its absolute discretion by way of notice to the customer:

. . .

c) to demand for a refund of any sum which has been disbursed to the Customer by the Company herein (including but not limited to the upfront payments, value of sponsored beer, promotion support, advertising and promotion sponsorship which has been disbursed to the Customer; and/or

d) to terminate this Agreement.?.

[20]Clause 5(c) is very wide and provides for any payments made to Groceries to be refunded in the event of a breach by Groceries. As though that was not clear enough it went on to state "(including but not limited to the upfront payments, value of sponsored beer, promotion support, advertising and promotion sponsorship which has been disbursed to the Customer)?. This would include the foc beer. This was in fact the evidence of PW1 and PW2 who when arriving at the amount paid for promotional support included the free beer products, in their Q&A 20 (RR2A/23) and Q&A 14 (RR2A/36) respectively. PW1 had also in re examination confirmed that "products beer *percuma*? was the value of sponsored beer within the meaning of the termination clause (RR3A/569).

[21]Clause 6 further states the Plaintiff is entitled to claim for the refund of foc beer if the Sales Agreement is terminated. It states as follows-

"6. Termination and effect of termination

Upon the termination this Agreement by the company herein pursuant to clause 5, the Customer shall refund and/or procure its directors or such other relevant party to refund to the Company in full all monies due hereunder including any sum which has been disbursed to the Customer by the Company for the purposes herein (including but not limited to the upfront payments, value of sponsored beer, promotion support, advertising and promotion sponsorship which has been disbursed to the Customer. . .?.

[22]The Plaintiff was thus entitled to claim the full amount of RM72,576.50 (including value of the foc beer) disbursed to Groceries.

(b) Who is to claim for the RM150,000 disbursed

[23]It was not disputed that the RM150,000 disbursed to Groceries from the upfront disbursement totaling RM240,000 were from cheques issued by TKT.

[24]It was thus contended by the 2nd Defendant that only TKT could claim for this amount. This contention was without merit as from the evidence accepted by the Court, the arrangement was for the Plaintiff to issue DNs to Groceries (which DNs were instructions to TKT to issue payments to Groceries) which would then redeem the value of the DNs with TKT and TKT to Groceries.

[25]It was arising from this that the cheques amounting to RM150,000 were issued. As explained by PW4-

"Qn : Just let me summarise your answer and tell me whether the Court and we get it right. So, your company Thongkee Trading issued this RM150,000 to Groceries Schelf Gastro on the instruction of the Plaintiff.

Ans : Yes.

Qn : Will Thongkee Sdn Bhd pay this RM150,000 pay to the Groceries if the Plaintiff say no.

Ans : No, I wouldn't do that.

Qn : Ok. Can you tell this Honorouble Court, has this RM150,000 paid to Groceries Schelf Gastro been paid by the Carlsberg to your company?

Ans : Yes, been paid.

Qn : To date, does the Plaintiff owe your company any money pertaining to this outlet?

Ans : Not a single cent.?.

(RR3A/625).

[26]Hence it was only on the Plaintiff's instructions that TKT disbursed the RM150,000 to Groceries and this money has been paid by the Plaintiff to TKT. The specific DNs for this can be found in RR2A/115-116 and the payment vouchers in RR2A/117-118.

[27]PW4 was not the "low credible? witness as made out by the 2nd Defendant and that only one Kee Huey Miin being the director and shareholder of TKT would have the knowledge to testify. As shown by the evidence, PW4 stated that Kee Huey Miin was not the sole person involved in the transaction but "we all? were involved (RR3A/617).

Breach of industrial practice

[28]It was contended by the 2nd Defendant that the industrial practice was for the Plaintiff to pay TKT for all the beer products supplied to Groceries and TKT would not supply beer if no upfront disbursements were received. According to the 2nd Defendant this was from the series of whatsapp messages, sms, emails and letters.

[29]With reference to the Agreements, there was never any obligation on the Plaintiff to pay for all the beer products purchased by Groceries. On the contrary, the Solus Agreement was for Groceries to purchase from the distributor which was TKT and the Plaintiff was to provide the trade offers, sponsorship and disbursements and this is spelled out in clause 1.

[30]The Solus Agreement in clause 5(a) also provided that if there was a breach, the Plaintiff could withhold any payment or disbursements to Groceries. There being a breach, which this Court had earlier found, the Plaintiff was entitled to withhold the disbursement of RM30,000. There was therefore no breach by the Plaintiff when it did not disburse the RM30,000 via the established arrangement of DNs and CNs or payment vouchers.

[31]There was thus no basis for the industrial practice as alleged by the 2nd Defendant as the position was made clear in the Agreements.

[32]Further there was also no proof as to such an industrial practice or a 3rd agreement where the veracity and truth of the whatsapp, sms and correspondence could not be proved.

[33]Other than the whatsapp etc which this Court did not accept, there was no evidence forthcoming to establish the industrial practice. This is evident from the evidence of DW1 himself-

> "Qn : Do you then now have any evidence, documentary evidence before the Court or even anyone to prove this industrial practice? This existence of this so called "industrial practice??
>
> Ans : Well....
>
> Qn : Can you prove it?
>
> Ans : Well. . . I try to get a pub owner to come over. . . but it just . . .
>
> Qn : Not about trying, Mr Foo. Are they here today, right here, right now?
>
> Ans : They are not . . .
>
> Qn : Can you prove it now?
>
> Ans : No, they are not willing to because . . .?.

(RR3B/656).

The Agreements to be given effect

[34]The Court thus takes the view that the clear words in the Agreements had to be given effect to such that it cannot go beyond the 4 corners of the Agreements. The 2nd Defendant appears to recognise this when it referred to *Wan Salimah Wan Jaafar v Mahmood Omar* [1985] 5 MLJ 162 that parties signing contractual terms are bound and it is wholly immaterial whether the document has been read. However the 2nd Defendant seeks the Court to go beyond the terms of the Agreements that foc beer could not be claimed and that there was an industrial practice, which this Court declines to do so.

Counterclaim

[35]The 2nd Defendant's counterclaim is based on the Plaintiff breaching the Agreements and industrial practice. Since it is the Court's finding there was no breach of the Agreements by the Plaintiff nor the existence of any industrial practice, the counterclaim has to fail.

[36]Further, the 2nd Defendant being the guarantor is not entitled to claim for loss and damage on behalf of Groceries. This is based on trite law which states that a company is separate legal entity from its directors. When the company suffers a loss, the proper plaintiff to initiate the action is the company itself and not its director or its guarantor. The director or its guarantor is not entitled to claim for the losses of the company.

[37]In *Cheng Heng Ping & Ors v Perwira Affin Bank Bhd* [1999] 1 CLJ 611 the defendant bank, extended loan facility to a company under a facility agreement. The company was wound up and the plaintiff, being the director of the company and guarantor to the facility agreement filed a claim against the defendant bank for breach of the facility agreement. The court held at pages 618-619 that the plaintiff had no locus standi to claim-

> "Locus Standi And Privity of Contract
>
> The present plaintiffs have no locus standi or capacity to pursue the present Civil Suit no: 22-264-1997 for the following reasons:
>
> (1) The ECR facility was extended by the present defendant to Campall only. Campall was a separate entity different from the directors and the shareholders. If Campall were to say that the present defendant had breached the contract by refusing to allow usage of the balance of the ECR facility, then the right to seek redress and file the present Civil Suit no: 22-264-1997 should be accorded to Campall and not to the present plaintiffs. The rule in *Foss v Harbottle* [1843] 2 Hare 461 states, *inter alia*, that the proper plaintiff for a wrong done to the company is the company itself. . .?.

Conclusion

[38]For all the above reasons, the 2nd Defendant's appeal was dismissed.