

User Name: DAMIAN YEO SHEN LI DAMIAN YEO SHEN LI

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1. [Mohd Heidheer bin Abd Karim & Anor v Siti Nabilah bt Mohamad Isa \(pemilik tunggal NKT Group Resources\) & Ors and other cases \[2024\] MLJU 99](#)

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MOHD HEIDHEER BIN ABD KARIM & ANOR v SITI NABILAH BT
MOHAMAD ISA (PEMILIK TUNGGAL NKT GROUP RESOURCES) & ORS AND
OTHER CASES

CaseAnalysis

[2024] MLJU 99

Mohd Heidheer bin Abd Karim & Anor v Siti Nabilah bt Mohamad Isa (pemilik tunggal NKT Group Resources) & Ors and other cases [2024] MLJU 99

Malayan Law Journal Unreported

SESSION COURT (SHAH ALAM)

YONG LEOU SHIN SJ

CIVIL SUIT NO BA-A52NCVC-341-07 OF 2020, BA-A52NCVC-342-07 OF 2020 AND BA-A52NCVC-343-07 OF 2020

18 January 2024

Nik Mohamad Anuar Badiruddan (with Wan Shaifuddin bin Ab Wahid and Ku Amirul Faiz bin Ku Seman) (Amir Ruhana & Khairuddin) for the plaintiffs.

Adnan Seman @ Abdullah (Adnan Sharida & Assoc) for the defendants.

Yong Leou Shin SJ:

GROUND OF JUDGMENT

A. INTRODUCTION

[1] This is a consolidated case before this Court which consists of the following cases:-

- a. BA-A52NCVC-341 -07/2020 (CASE 341)
- b. BA-A52NCVC-342-07/2020 (CASE 342)
- c. BA-A52NCVC-343-07/2020 (CASE 343)

[2] The Plaintiffs in the consolidated suit of the above three cases are as follows:

- i. **BA-A52NCVC-341 -07/2020 (CASE 341)**
 - i. MOHD HEIDHEER BIN ABD KARIM
 - ii. NORZRI BIN ELIAS
- ii. **BA-A52NCVC-342-07/2020 (CASE 342)**
 - i. TAN WEN CHYI
- iii. **BA-A52NCVC-343-07/2020 (CASE 343)**
 - i. UM! HAZIRA BINTI ABD AZIZ
 - ii. MOHD SHAFIQZUDDIN BIN AHMAD SIDEK

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[3] This action is emanated from the Plaintiffs claim for damages in pursuance of agreements termed as "Licensing Agreement" signed between the Plaintiffs and the First Defendant. In respect of Plaintiffs' action in terminating the said agreements, First Defendant filed a counter-claim.

[4] The Plaintiffs also initiated professional negligence litigation against the Second Defendant, a legal practitioner from the Third Defendant's legal firm and she was the person in charge of the signed Agreements.

[5] The witnesses who had testified during the trial are as follows: -

Plaintiffs' witnesses

[6] After full trial, this court allowed the Plaintiffs' claim in part and dismissed the First Defendant's counter-claim.

B. SALIENT FACTS

[7] The First Defendant is the owner of a business named "***Nasi Kukus Tonggek***" (NKT).

[8] Before the branding of NKT took place, the idea of serving ***Nasi Kukus*** in a tin can together with the side dish came from Seri Keningau Sdn. Bhd., a food catering company established by the family members of the husband of the First Defendant, Mr. Muhammad Nur Aiman Bin Basuni.

[9] Seeing it as a business opportunity, the First Defendant started the NKT Group Resources, a sole proprietorship business and obtained help from her husband's company, Bason Group Holdings Sdn. Bhd. for workforce and management of the NKT business.

[10] The First Defendant then expanded her business into a few branches and managed the businesses together with Bason Group Holdings Sdn. Bhd. In advancing the business of NKT, the First Defendant started to offer to the public for a business opportunity with her in the form of licensing the said business.

[11] The said invitation brought the Plaintiffs in all three cases came forward and inquired about the business with the First Defendant.

[12] Following meetings between the First Defendant and the First Defendant's representative Muhammad Nur Aiman Bin Basuni, parties agreed to enter into licensing agreement with the First Defendant.

[13] The Plaintiffs then appointed the Second Defendant, Mrs, Azreen Binti Azmi to prepare the said Licensing Agreement. The Second Defendant contacted and liaised with respective Plaintiffs on the preparation of the said Licensing Agreement.

[14] The Plaintiff offered to the Defendants the licensing fee as defined in Clause 1 of the Licensing Agreement as follows:

- i. For Case 341, RM 140,000.00 being:
 - i. Licensing fee of RM 50,000.00
 - ii. Administration fee of RM 25,000.00
 - iii. Equipment Costs of RM 50,000.00
 - iv. Launching Day Marketing costs of RM 15,000.00
- ii. For Case 342, RM 160,000.00 being:
 - i. Licensing fee of RM 50,000.00
 - ii. Administration fee of RM 25,000.00
 - iii. Equipment Costs of RM 50,000.00
 - iv. Launching Day Marketing costs of RM 15,000.00
 - v. Operational costs of RM 10,000.00
 - vi. Startup Cost of Goods Sold of RM 10,000.00

- iii. For Case 343, RM 200,000.00 being:
 - i. Licensing fee of RM 50,000.00
 - ii. Administration fee of RM 25,000.00
 - iii. Equipment Costs of RM 50,000.00
 - iv. Launching Day Marketing costs of RM 15,000.00
 - v. Operational costs of RM 10,000.00
 - vi. Startup Cost of Goods Sold of RM 10,000.00

[15] The licensing fee for each case is RM 50,000.00 and the remaining sums are costs relating to administration, marketing, equipment and start up raw materials. The Plaintiffs paid the said sum.

[16] Accordingly, the Licensing Agreement that both parties had agreed upon was that the First Defendant agreed to grant license to the Plaintiffs the “business system” of the NKT and the Plaintiffs are allowed to appoint their own management team being the team that operates the business on day to day basis at a term of five years.

[17] As such, both parties entered into the Licensing Agreements on the dates set forth below:

- i. For Case 341 dated 6.12.2019
- ii. For Case 342 dated 12.2.2020
- iii. For Case 343 dated 27.11.2019

[18] After months of running their businesses, the Plaintiffs sent a termination letter and notice of demand dated 17.06.2020 (for Case 342) and 30.06.2020 (for Case 341 and 343) to terminate the said licensing agreements.

[19] In response, the First Defendant sent a letter dated 14.07.2020 through her solicitor informing the Plaintiffs that the said licensing agreements are terminated. The First Defendant further demanded RM 250,000.00 being the sum of money that the First Defendant purportedly entitled to by virtue of Clause 13.3 and 14.3 of the Licensing Agreements.

B. PLAINTIFFS' CASE

[20] In general, the Plaintiffs' case is as follows:

- a. The Plaintiffs claimed that the Licensing Agreements are Franchise Agreements. (**Paragraph 15-17 Statement of Claim (SOC) Enc. 25 Case 341, Paragraph 16-18 SOC Enc. 19 Case 342, Paragraph 15-17 SOC Enc. 21 Case 343**).
- b. The Licensing Agreements being a Franchise Agreements that are not registered under the Franchise Act 1998 are void agreements.
- c. The entering of the Licensing Agreement was a “nightmare” (**Paragraph 910 SOC Enc. 25 Case 341, Paragraph 9-10 Enc. 19 Case 342, Case 341, Paragraph 9-10 SOC Enc. 21 Case 343**).
- d. There were misrepresentations made by the First Defendant among them as follows (**Paragraph 14 SOC Enc. 25 Case 341, Paragraph 13 Enc. 19 Case 342, Case 341, Paragraph 14 SOC Enc. 21 Case 343**):
 - i. First Defendant is not a company that had been established for 26 years;
 - ii. First Defendant is not holding the trademark of NKT.
 - iii. First Defendant claimed that the business is able to sell 900-1000 dishes a day and able to achieve sales of RM 112,800.00 a month which in fact did not happen.
 - iv. The cost of goods sold (COGS) of the business can be achieved by 30% to 35% from total costs which in fact did not happen.
 - v. Training programme will be provided two weeks before the Plaintiffs' branches start to operate and a trainer will be put at the Plaintiffs' branches for two weeks after the business starts.
 - vi. First Defendant claimed to be a well experienced licensor which in fact was not as:

1. the First Defendant controlled the raw material costs;
2. the First Defendant kept putting pressure against the Plaintiffs with unnecessary spot checks;
3. the First Defendant failed to issue receipts for the kitchen equipment provided by the First Defendant and there are problems with the kitchen equipment;
4. the First Defendant failed to provide any business advice;
5. the First Defendant failed to do proper marketing for the Plaintiffs businesses.

e. There were negligent acts or omissions committed by the Second and Third Defendant in preparing the Licensing Agreement, among others including the following:

- i. preparing Licensing Agreements which are illegal (**prayer iv**),
- ii. failure to provide necessary advice that in fact the Licensing Agreements are void ab initio (**prayer v**);
- iii. failure to provide necessary advice that the Licensing Agreements are franchise agreements (**prayer vi**);
- iv. failure to provide necessary advice that the First Defendant is not a franchise holder and therefore shall not run a franchise business (**prayer vii**); and
- v. failure to provide necessary advice that the First Defendant is not the trademark holder of the NKT brand (**prayer viii**).

f. The Plaintiffs had suffered losses as below and claimed for special damages (**prayer ix**) as follows:

- i. RM 254,220.00 for the Plaintiffs in Case 341
- ii. RM 212,610.00 for the Plaintiffs in Case 342
- iii. RM 222,200.00 for the Plaintiffs in Case 343

g. The Plaintiffs claimed for exemplary damages (**prayer x**).

h. The Plaintiffs claimed for injunction to stop the First Defendant from disturbing the Plaintiffs'businesses (**prayer xi**):

C. DEFENDANTS' CASE

[21] In general, the Defendants' case is as follows:

- i. The Licensing Agreements are valid and not void. The Licensing Agreements are not Franchise Agreements.
- j. The drop of sales was due to the COVID-19 pandemic and lockdown initiated by the Government and not due to the act of the First Defendant.
- k. Only the Plaintiffs who claimed having problems and issues whereas there are other branches of NKT that still continue to do business under their own Licensing Agreement with the First Defendant despite facing pandemic COVID-19 and the said lockdown.
- l. There were no misrepresentations made by the First Defendant against the Plaintiffs in entering into the said Licensing Agreements.
- m. There was no negligence by the Second and Third Defendants in preparing and advising the Plaintiffs in entering into the said Licensing Agreements.
- n. The Plaintiffs neglected to comply with the Licensing Agreements to purchase the raw stocks from the First Defendant and also failed to comply with the terms of the Agreements, the Standard of Procedure (SOP), Manual Operation dan Manual Exercise prepared by the First Defendant.
- o. Despite numerous allegations that the business is void and causing loss to the Plaintiffs, the Plaintiffs still continue doing the NKT business after terminating the said Licensing Agreements.

p. The Plaintiffs also neglected to pay the royalty entitled by the First Defendant and the sales report prepared by the Plaintiffs are doubtful.

q. Hence the First Defendant counterclaimed as follows:

- i. Plaintiffs are to pay the sum of RM 200,000.00 as claimable sum under Clause 13.3 of the Licensing Agreements;
- ii. Plaintiffs are to pay the sum of RM 50,000.00 as penalty under Clause 14.3 of the Licensing Agreement;
- iii. General Damages from 28.07.2020 to 28.07.2022 or until the date when Plaintiffs close the NKT business according to Clause 11.1 of the Licensing Agreement;
- iv. Injunction order for the Plaintiffs to stop from opening any business similar to the NKT business until 28.07.2022;
- v. Injunction order for the Plaintiffs to submit sales report of the NKT business from their respective branches within 14 days from the date of decision.
- vi. Damages for the royalty that the First Defendant is entitled to under Clause 12.3 of the Licensing Agreements to be assessed,
- vii. Exemplary and aggravated damages.

D. ISSUES TO BE TRIED

[22] The following are agreed issues to be tried:

- a. Whether the Licensing Agreements are void because it fulfills the elements of a franchise?
- b. Whether the Plaintiffs are estopped and considered had waived their rights in claiming the Licensing Agreements to be void due to the alleged misrepresentations.
- c. Whether the Second and Third Defendants are negligent in the course of preparing the Licensing Agreements.
- d. Whether the First Defendant is entitled to the counterclaims made.
- e. Alternatively, whether the principle of *pari delicto* applies in the event the Licensing Agreements are considered void.

E. THE FINDINGS AND ANALYSIS OF THE COURT

[23] I now turn to my findings, analysis and determination. From the pleadings, issues to be tried and final submissions of the parties, I distil! and pick up the broad issues that I need to deal with each defendant as follows:

First Defendant (SD2)

Whether the Licensing Agreements are void because it fulfills the elements of a franchise?

[24] There is nothing wrong for the First Defendant to offer a licensing agreement if in fact the nature of the agreement is one of licensing.

[25] The issue here is when all the terms under the agreement depicted the elements of a clear Franchise agreement, ie a franchise system, permission to use the intellectual property, continuous control and pay of fee/consideration, why prepared it under the head of a Licensing agreement?

[26] Under [Section 4](#) of the [Franchise Act 1998 \(Act 590\)](#), “franchise” means a contract or an agreement, either expressed or implied, whether oral or written, between two or more persons by which—

- (a) *the franchisor grants to the franchisee the right to operate a business according to the franchise system as determined by the franchisor during a term to be determined by the franchisor;*
- (b) *the franchisor grants to the franchisee the right to use a mark, or a trade secret, or any confidential information or intellectual property, owned by the franchisor or relating to the franchisor, and includes a situation where the franchisor, who is the registered user of, or is licensed by another person to use, any*

intellectual property, grants such right that he possesses to permit the franchisee to use the intellectual property;

- (c) *the franchisor possesses the right to administer continuous control during the franchise term over the franchisee's business operations in accordance with the franchise system; and*
- (d) *(Deleted by Act A1442).*
- (e) *in return for the grant of rights, the franchisee may be required to pay a fee or other form of consideration.*
- (f) *(Deleted by Act A1442).*

[27] Whereas under the same provision, “franchise agreement” means a contract or an agreement made between a franchisor and a franchisee in respect of a franchise in return for any form of consideration but does not include any contract or agreement made for the purpose of direct selling as provided by the Direct Sales Act 1993 [Act 500].

[28] Firstly, the Defendants in their own submission admitted that vide the so called Licensing Agreement, the First Defendant agreed to grant license to the Plaintiffs the “business system” of the NKT and the Plaintiffs are allowed to appoint their own management team being the team that operates the business on day to day basis at a duration of five years. This basically fulfilled the first element (a) as stated under the definition of “franchise”, the only issue to be determined is whether the system is a business system or a franchise system.

[29] Based on clause 13.3 of the so called Licensing Agreement, Plaintiffs are not allowed to change the SOP or to purchase raw stocks from a third party without the first Defendant’s consent. Failure to comply with any terms of the agreement may lead to hefty fine and the First Defendant in fact had issued a few reminders to the respective Plaintiff for their alleged failure to comply with certain SOP such as using a different brand of coconut milk, failure to comply with the dress code requirement and act of purchasing raw stocks from a third party without first obtaining the First Defendant’s consent. This shows full and continuous control from the first Defendant. See SD2’s evidence at page 292 of the Notes of Proceeding:

[30] Further, apart from paying a Licensing fee of RM 50,000.00, Plaintiffs need to pay a royalty fee to the first Defendant based on Clause 15 of the Agreement. By virtue of Clauses 12.3 of the Agreement, the Royalty fee is calculated based on 6% from the ‘gross sales’ and failure to pay the fee within a specified period will incur an additional interest charges of 5% to the Plaintiffs. Hence, in order to enable the First Defendant to work out a statement of account or to have an insight on the sales achievement of the Plaintiffs, the First Defendant vide the same agreement requires the Plaintiffs to submit their monthly sales report to her.

[31] The First Defendant even admitted that despite the reluctance from the Plaintiffs to share their sales report, the First Defendant however obtained several months of draft sales report from the Plaintiffs. See SD2’s own evidence at page 293 to 295 Notes of Proceeding:

[32] First Defendant agreed that the Operation Manual is part of the Agreement which must be complied with. See her evidence at page 300 of the Notes of proceeding:

[33] Based on the terms of the Agreements, the SOP, Manual Operation and Manual Exercise prepared by the First Defendant, this court finds that a complete and a very detailed business system which is indeed a franchise system had been determined by the First Defendant to which all the Plaintiffs are bound to follow strictly with very limited flexibility,

[34] Evidence adduced disclosed that no other menu can be offered at the business station, packaging of the take away food should only use the standard packaging decided by the First Defendant, gravy and rice should not be separated in plating, even the size of squid used for the menu is controlled by the First Defendant. Whatever departure from any of the rules or procedures laid down in the Manual Operation and Manual Exercise and even the slightest deviation from the SOP must first obtain the First Defendant’s consent.

[35] Premised on the facts and contents of the agreement, this court is satisfied that there is overwhelming

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evidence shown in this case that the agreements in issue are in fact Franchise agreement as the four pre requisites of a franchise agreement have been fulfilled.

[36] Despite of the fact that the Defendants named the agreements as Licensing Agreement, this court is not bound by the label or whatever description given by the parties to the signed agreement. In the Court of Appeal case of *Sia Siew Hong & Ors v Lim Gim Chian & Anor* [1995] 3 MLJ 141, Gopal Sri Ram JCA in his judgement said:-

"But in the construction of contracts the court is not bound by the labels that parties choose to affix onto the particular document In all such cases the duty of the court is clear. And that duty is to construe the document as a whole and to determine from its language and any other admissible evidence its true nature and purport. As Jenkins LJ observed in *Addiscombe Garden Estates Ltd v Crabbe* [1958] 1 QB 513; at p 528; [1957] 3 All ER 563; at p 570; [1957] 3 WLR 980 at p991:

...the relationship is determined by the law, and not by the label which the parties choose to put on it, and that it is not necessary to go so far as to find the document a sham. It is simply a matter of ascertaining the true relationship of the parties.

Although the contract in the present appeal is termed a guarantee by the parties thereto, the document when read as a whole appeared to me in truth to be an indemnity. When I put this to Encik John during his argument, he readily agreed that the document was indeed an indemnity and not a guarantee. I think that counsel was right in the concession he made. However, since the issue is one of law that relates to the nature of a document, it behoves me to deal with the matter quite independently of any concession by counsel"

[37] In the case of *Dr H K Fong BrainBuilder Pte Ltd V SG-Maths Sdn Bhd*. [2018] 11 MLJ 701, YA Wong Kian Kheong observed that:

"As decided in the above Part D(2), Malaysian law applies to the MLA (2013). The MLA (2013) is not entitled a 'franchise' contract. Nor does the MLA (2013) use the word 'franchise'. However, as explained in Barisan Tenaga Perancang, the court is not bound by the label or description given by the parties to the MLA (2013). I am of the view that the FA applies to the MLA (2013) for the following reasons:-

According to [s 3\(1\)](#) of the [FA](#), FA applies to the operation of a 'franchise' in Malaysia. [Section 4](#) of the [FA](#) defines a 'franchise' as follows:

'franchise' means a contract or an agreement, either expressed or implied, whether oral or written, between two or more persons by which -

- (a)
- (b)
- (c)
- (d)
- (e)

A perusal of the MLA (2013) clearly shows that the MLA (2013) fulfills all the four cumulative conditions of a 'franchise' in [s 4\(a\), \(b\), \(c\) and \(e\)](#) of the [FA](#) ('four prerequisites');

[38] Based on [section 6](#) of the **Act 590**, a franchisor shall register his franchise with the Registrar before he can operate a franchise business or make an offer to sell the franchise to any person:

"[Section 6](#). Registration of franchisor.

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- (1) A franchisor or a foreign person who has obtained an approval to sell a franchise in Malaysia or to any Malaysian citizen under section 54 shall register his franchise with the Registrar before he can operate a franchise business or make an offer to sell the franchise to any person.
- (2) Any franchisor or foreign person who fails to comply with this section, unless exempted by the Minister under section 58, commits an offence and shall, on conviction, be liable—
 - (a) if such person is a body corporate, to a fine not exceeding two hundred and fifty thousand ringgit, and for a second or subsequent offence, to a fine not exceeding five hundred thousand ringgit; or
 - (b) if such person is not a body corporate, to a fine not exceeding one hundred thousand ringgit or to imprisonment for a term not exceeding one year or to both, and for a second or subsequent offence, to a fine not exceeding two hundred and fifty thousand ringgit or to imprisonment for a term not exceeding three years or to both."

[39] In *Dr H K Fong BrainBuilder Pte Ltd V SG-Maths Sdn. Bhd.* [2020] 6 MLRA 588, the court of appeal in citing the learned High Court Judge's judgment as stated under paragraph 30 affirmed the High Court's further finding stated in paragraph 34 that the Master License Agreement 2013 is tainted with illegality. Clearly the Court of Appeal agreed that the word "shall" should be given a mandatory effect. See Court of Appeal's judgement as follows:

"[30] For reasons discussed earlier the learned judge held "[T]he plaintiff is required to register the BrainBuilder Business franchise with the Registrar under s 6(1) FA 1998. The plaintiff's failure of non-registration amounts to a contravention of s 6(1) FA 1998 (Plaintiff's Breach). It is not disputed by the 1st to 3rd defendants that 1st defendant's failure to register the BrainBuilder Business franchise with the Registrar under s 6A(1) FA 1998 has breached s 6A(1) FA 1998 (1st Defendant's Breach)".[31] The learned judge then held the effect of the Plaintiff's Breach and 1st Defendant's Breach (Two Breaches) depends on whether ss 6(1) and 6A(1) FA 1998 are intended by Parliament to be mandatory or directory provisions. The learned judge further held that our legislature has intended ss 6(1) and 6A(1) FA 1998 to be mandatory provisions for the following reasons:

- (a) Based on four High Court's decisions that have held franchise agreements are void and unenforceable due to failure to register the franchise in question namely, (i) *SP Multitech Intelligent Homes Sdn Bhd v. 1 Home Sdn Bhd* [2010] 16 MLRH 537, at 539; (ii) *Munafnya Sdn Bhd lwn. Proquaz Sdn Bhd* [2012] MLRHU 861; [2013] 2 CLJ 189, at para 72; (iii) *Lim Seng Kiat & Anor v. Jee Hing Lim & Anor* [2015] MLRHU 992, at para 16; and (iv) *Tea Delights (M) Sdn Bhd & Anor v. Yeap Win Nee & Anor* [2015] MLRHU 893, at paras 9-16;
- (b) Use of the word "shall" in ss 6(1) and 6A(1) FA 1998 clearly shows Parliament's intention for these provisions to have mandatory effect and reliance was placed on the judgment of Mohd Dzaiddin FCJ (as he then was) in *PP v. Yap Min Woie* [1995] 2 MLRA 91;: [1996] 1 MLJ 169; [1995] 4 CLJ 692; [1996] 1 AMR 209
- (c) Parliamentary Debates clearly shows the legislature's intention for ss 6(1) and 6A(1) FA 1998 to be mandatory provisions.

[34] The learned Judge held in view of the 2 Breaches, the MLA 2013 is void in its entirety under s. 24(a) CA 1950 i.e.. the MLA 2013 is forbidden by ss.6(1) and 6A(1) FA 1998 and/or under s.24(b) CA 1950 i.e.. the MLA 2013 is of such a nature that, if permitted, would defeat ss.6(1) and 6A(1) FA 1998. The learned Judge relied on *Merong Mahawangsa Sdn Bhd & Anor v. Dato' Shazril Eskay Abdullah* [2015] 5 MLRA 377 where the Federal Court held that when a party has alleged a contract is illegal, the Court has a duty to consider the validity of the contract based on s.24 CA 1950 (per Jeffrey Tan FCJ at paras 70 &71).

[57] With respect we are of the considered opinion that there is no merit in the Plaintiffs above said submission. First, we agree with the learned Judge's findings in respect of the 2 Breaches (Plaintiff's Breach and the Defendant's Breach) in paras 31 and 34 above."

[40] In considering the legality of such agreements, Section 24 of the Contract Act 1950 is explicit where if an agreement is forbidden by law or prohibited by law or of such nature that it would defeat the law, that agreement is unlawful and void. Section 24 of the Contract Act 1950 provides inter alia:

"24 What considerations and objects are lawful, and what not

The consideration or object of an agreement is lawful, unless-

- (a) ***is forbidden by a law;***
- (b) ***it is of such a nature that, if permitted, it would defeat any law;***
- (c) ***it is fraudulent;***
- (d) ***it involves or implies injury to the person or property of another; or (e)the court regards it as immoral, or opposed to public policy.***

In each of the above cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

[41] In the case of *SP Multitech Intelligent Homes Sdn. Bhd. v. Home Sdn. Bhd.* [\[2010\] MLJU 1845](#), the court held that:

"The issue for determination is whether the Franchise Agreement dated 15.10.2001 (the agreement) as exhibited in TS-3 of Enclosure 2 is null and void ab initio by reason of illegality.

The regulation for the registration of business of franchises is governed by the Franchise Act 1998.

The agreement was entered into by the Plaintiff and the Defendant prior to the registration of the franchise business with the relevant ministry. The Defendant states that this was within the knowledge of the Plaintiff. Despite that the Plaintiff continued with the renovation of the business premise even after the approval of the registration and also continued doing the franchise works.

The fact shows that at the point in time when the Plaintiff was offered the said franchise by the Defendant i.e in the month of August 2001 the Defendant has not registered the said franchise with Bahagian Francais dan Vendor in Kementerian Pembangunan Usahawan (Ministry of Entrepreneur Development) as required under the said Act.

From the facts of the case, when the Plaintiff was offered the said franchise by the Defendant who is the franchisor, the Defendant has not register the said franchise. This is a clear contravention of [section 6\(1\)](#) and it is an offence bv virtue of [section 6 \(2\)](#) of the same.

Further at the time when the Plaintiff was offered the said franchise by the Defendant, the Defendant had failed to submit to the Plaintiff a copy of the disclosure documents at least 10 days before the Plaintiff signed the said Agreement on 15.10.2001 as is the requirement under the Act under [section 15 \(1\)](#). The disclosure documents which were not given to the Plaintiff are in exhibit TSP-7 of Enclosure 2. Failure to comply with the provision of [section 15](#) of the same is an offence.

It is clear that the said agreement has contravened [section 6](#) and [15](#) of the same.

Therefore, the Franchise Agreement is tainted with illegality."

[42] Since the First Defendant had not registered the said business as a franchise business, the agreements are of such nature that, if permitted, it would defeat the franchise law, it would mean that the agreement would have been void for it being "forbidden by law" (See *Guan Soon Tin Mining Co v. Wong Fook Huan* [1968] 1 LNS 43; [\[1969\] 1 MLJ 99.](#))

Whether parties were in pari delicto if agreements were illegal

[43] Next, this court needs to decide if the agreements were illegal, whether the parties were *in pari delicto*. This court is unable to apply the maxim of *pari delicto* in this case as the parties were not at equal fault in the first place (see *Paragon Union Bhd v Prestamewah Development Sdn Bhd & Anor and another appeal* [\[2018\] 4 MLJ 307](#)).

[44] In the current case, the Plaintiffs had been misled to believe that the agreements that they agreed to enter into are licensing agreements whilst in fact the nature and effect of the agreements show otherwise. The Plaintiffs were not the parties who intended to circumvent the requirement under the franchise laws. The Plaintiffs only realized the true nature of their business governing agreement later and the agreements were in fact not enforceable due to [S](#)

24(a), (b) and/or (e) of the *Contracts Act 1950* as they were against public policy. Hence, premised on the evidence, this court finds that the parties were not in pari delicto.

Second Defendant (SD4)

[45] Second Defendant's explained that as the First Defendant's business had not achieved the 3 years establishment requirement hence it is not possible to prepare a franchise agreement. Learned Counsel for the Second Defendant further argued and alleged that the second Defendant had acted under the instruction of the Plaintiffs to prepare licensing agreement and nowhere did the Plaintiffs instructed the second Defendant to prepare a franchise agreement.

[46] On the first argument, if indeed the three years requirement is a hurdle to the First Defendant to extend her business, then the Defendant should just adopt the scheme of licensing and comply with such licensing module, not naming it as Licensing Agreement but the whole effect of the agreement is one of franchise business model or at least 95% of it resembling a franchise agreement. In this regard, the law is clear, section 6 of the *Franchise Act 1998* states that:

"A franchisor shall register his franchise with the Registrar before he can make an offer to sell the franchise to any person."

[47] It is apposite at this juncture to refer the judgment of the High Court in *Tea Delights (M) Sdn. Bhd. v Yeap Win Nee* [2016] 7 MLJ 92 wherein the judge stated that:-

"[16] Therefore in such circumstances, it is trite that no court will lend its aid to the Defendants who has failed to register the franchise agreement before the commencement to the franchise business."

"[18] Further as the franchise must be registered and the franchisor has the duty to register it, it does not matter that the business operation of the franchise had ceased as alleged by the Defendants. As the registration of the franchise is the first step to be undertaken and since this was not done by the Defendants, the business operation of the franchise is doomed to fail from day one of its existence. Therefore, nothing turns on the allegation by the Defendants that the Plaintiffs only made the claim after the business operation failed and there was operational loss."

[48] On the second argument, I find that such argument is untenable as the contents of the agreements indicate that it was not prepared in accordance with the format of a licensing agreement despite the Second Defendant clearly knew that she was

instructed so and supposed to prepare a licensing agreement and NOT franchise agreement.

[49] Further, this court finds that the concept of "licensing" was actually conveyed to her by the First Defendant and not the Plaintiffs. See page 360 Notes of proceeding:

"PP1: Puan, semasa Puan berjuma dengan Defendan kedua, ada dia terangkan tentang perbezaan antara franchise dan juga licensing?"

SD2 (Nur Nabilah): Tidak.

PP1: Dan Puan tidak pernah minta dia untuk menjelaskan perbezaan ya.

SD2: Sebab saya tak focus on franchise. Bila saya jumpa **saya kata saya nak licensing sepetimana saya telah maklumkan**, jadi kita taka da wujudkan soal franchise di sini."

[50] Whilst the Second Defendant being retained or engaged by the Plaintiffs to prepare an agreement to enable them to explore into the business of NKT, she has a duty to protect her clients' interest and ensure that her clients entered into a legally valid agreement. The standard of care expected of lawyers entails explaining to clients the nature and content of relevant legal documents and taking reasonable steps to ensure that they understood the documents, the attendant risks if any and their legal implications. See **page 260, The Law of Torts in Singapore (2016), Gary Chan Kok Yew, second edition.**

[51] Nonetheless, I find that the Second Defendant had breached her fiduciary duty towards the plaintiffs for her failure to advise properly in this matter. For instance, see SP1's evidence at page 18 NOP:

"SP1: Macam Tuan cakap kan tadi saya bukan orang undang-undang jadi sekadar baca dan dijanjikan untuk diadakan satu sesi perbincangan tentang terma-terma tetapi perkara tersebut dimana kami berjumpa di kedai kooi tiba-tiba kena mari dan terus sign sahaja. dia terus sign sahaja tanpa membincangkan terma-terma yang dijanjikan."

[52] Second Defendant at a later stage of the trial produced certain WhatsApp conversation in between herself and the Plaintiffs to show that there was communication made between herself and the Plaintiffs before the agreements were signed. This court however finds that the content of such conversation merely refers to the preparation of the draft and the payment part, even the second Defendant averred that Plaintiff had read the agreement and requested some amendments to be made, the amendments are limited to the payment terms. In this regard, she clearly admitted that she did not explain the difference in between franchise and licensing too to the clients. See page 461 -466 of NOP where Second Defendant agreed to the suggestion as follows:

[53] Through re-examination, second Defendant tried to repair her evidence by saying that she did in fact explain the whole agreement when met up with them. See her answer at page 466 -467 NOP.

[54] However, this court is not convinced with her answer as earlier she had indicated that she only briefed the agreement in general to Puan Umi, see page 466 NOP:

[55] There is also no evidence to suggest that the Second Defendant did explain to the Plaintiffs about her position being engaged by the Plaintiffs but was taking instruction from the Defendants to prepare the agreements. It is best known to the Second Defendant whether or not her she had been placed in position of conflict of interest under the circumstances, but I find no evidence to indicate that she had at any point of time informed the Plaintiffs about her position or to at least advise the client about their right to engage another solicitor under the circumstances. A lawyer who acted for multiple clients and thereby placed himself in a conflict of interest position in breach of professional standards may be held liable for professional negligence. See *Satinder Singh Garcha v Uthayasurian Sidambaran* [2009] SGHC 240 **at 84**.

[56] As such, the Second Defendant failed to meet the standard of care expected from a legal practitioner in this field. Second Defendant is therefore found negligent in the course of discharging her duty as a professional lawyer retained for the above purpose.

Third Defendant

[57] Third Defendant was not the solicitor in charge of this matter, Plaintiff failed to link or establish that the third Defendant had in any ability owed a duty of care to the Plaintiffs. There is no relationship of proximity in between the third Defendant and the Plaintiffs. Under the circumstances, it is not fair and just to impose liability on the third Defendant.

Counter claim by the First Defendant

[58] Since the Agreements are considered void, the counter claim made by the First Defendant is therefore dismissed.

Damages claimed by the Plaintiffs

Exemplary damages

[59] With regard to the claim on exemplary damages, Plaintiffs failed to satisfy the court that the Defendants have acted with vindictiveness or malice in nature towards the Plaintiffs, or that they have acted with a "contumelious disregard" for the right to the Plaintiff.

[60] It is trite that exemplary/punitive damages are mostly awarded in situations where oppressive, arbitrary or unconstitutional action by the servants of the Government or that the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff or where the statute expressly authorizes exemplary damages. See *Rookes v Barnard* [1964] AC 1129. There is a string of local cases to support the above stand.

[61] In *Dunlea v Attorney-General* [2000] 3 NZLR 136, Thomas J drew a distinction between damages which were loss-centred and damages which were rights-centred. Damages awarded for the purpose of vindication are

essentially rights-centred, awarded in order to demonstrate that the right in question should not have been infringed at all.

[62] Further, the concept of vindictory damages was recognised as a form of compensation for the contravention of a constitutional right by the Privy Council. See *A-G of Trinidad and Tobago v Ramanoop* [\[2006\] 1 AC 328](#) and *Merson v Cartwright* [\[2005\] UKPC 38 \(Bahamas\)](#).

[63] As learned counsel for the Defendant had rightly pointed out, the allegation of malice as stated in the Plaintiffs' witness statement were said on the fact that the First Defendant maliciously conducted spot checks against them in conducting the ***Nasi Kukus*** Tonggek business and the First Defendant maliciously creating a business that would "*membolot duit simpanan kami secara jahaf*". However, from the evidence of SD2, she confirmed that despite there were incidents where the SOP has not been complied with, no penalty was charged to the Plaintiffs. See 397- 398 of the Notes of Proceeding.

[64] With reference to the alleged profit made, this court finds that the First Defendant did provide certain consideration in exchange for the money paid by the Plaintiffs and Plaintiffs were all aware of the payments need to be paid to start up the business and they agreed to make such payments. It is trite that the party who allege it should prove it, an allegation of malice intent must be proved accordingly. Reference is made to the High Court judgment in the case of *Straits Bunkering Pte Ltd v Ketua Pengarah Kementerian Perdagangan & Ors* [\[2019\] MLJU 1429](#) -

"[45] It is crucial to be cognisant that an allegation of mala fide must be proved and cannot be premised on bare averments. It has to be established on the basis of available cogent evidence, and not merely on some ill-defined and unsupported material. The Court cannot draw inferences, much less a conclusion about the existence of mala fide on unsubstantiated allegations."

[46] When the allegations of mala fide are made and when relief seeks to interfere with a particular action of the Government or its functionaries, such allegations have to be established and proved to the extent of an incontrovertible finding by the Court.

[47] It is trite law that the burden of proving mala fide is on the person making the allegations and the burden is a heavy one: *EP Royappa v State of Tamil Nadu* [1974] 4 SCC 3.

[48] The seriousness of allegations of mala fide demands proof of high order of credibility, and the Court should be slow to draw dubious inferences from incomplete facts placed before them by a party, particularly when the imputations are grave and they are made against the holder of office having high responsibility: *Union of India and Ors v Ashok Kumar and Others* [2005] 8 SCC 760.

[49] Without any evidence, the Applicant's allegations in this case remain bald, unsubstantiated and even spurious. I am of the view, therefore, that the Applicant had failed to discharge the burden of proving mala fide on the part of the Respondents."

[65] Looking in totality, I am not satisfied that this malicious intent had been proven and I am of the view that the cases at hand do not involve the infringement of a constitutional right. Further I cannot find any authority or similar case to support the Plaintiffs proposition that an exemplary damage should be granted in a similar situation. This court is not prepared to grant exemplary damages and hence no assessment of damages is needed.

Special Damages

[66] Based on the finding that the Agreements are void, this court is granting the following special damages for the Plaintiffs in each case:

- (i) case 341 - RM50,000 (Licensing Fee) and RM4220 (legal fees) for the Plaintiffs
- (ii) case 342 - RM50,000 (Licensing Fee), RM5070 (legal fees) for the Plaintiffs
- (iii) case 343 - RM50,000 (Licensing Fee) and RM7200 (legal fees) for the Plaintiffs

[67] Other than this, the Plaintiff failed to satisfy this court that the other expenses incurred are in fact losses suffered by them and they are bound to prove the amount of the losses. It is trite that the Plaintiffs had to discharge

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the burden of proving both the fact and the amount of damages before he could recover (See *Guan Soon Tin Mining Co v. Wong Fook Huan* [1968] 1 LNS 43; [\[1969\] 1 MLJ 99](#).)

[68] The Plaintiffs cannot be deemed to be entitled to the full amount of payments they have incurred in the failed business merely because the agreements prepared are void (see *Lim Seng Kiat & Anor v Jee Hing Lim & Anor* [2015] MLRHU 992.)

[69] This court finds that here, there are no sufficient materials been tendered before this court to enable the court to ascertain the alleged losses suffered taking into account some of the money paid was for the business startup and operation purpose. The Plaintiffs in the present cases in fact had their business set up and ran the business despite some had closed down but some had in fact still doing the same business after the trial had started. In the absence of witnesses' testimony for the computation of losses incurred out of the money invested for this purpose, this court is unable to assess the quantum of losses to be awarded.'

[70] In this regard, I refer to the decision of the Court of Appeal in *Alliance Connex Sdn Bhd & Anor v. Wangsa Budimas Sdn Bhd* [2022] 1 CLJ 173, where Vazeer Alam Mydin Meera JCA held:-

"[33] It is trite law that the respondent bears the burden of proof to establish the damages that it says that it has suffered. See: Popular Industries Ltd. v. The Eastern Garment Manufacturing Co Sdn Bhd [1990] 1 CLJ 133: (1990) 2 CLJ (Rep) 635. The burden of proof rests throughout the trial on the party who asserts that the facts exist (See: s. 101 of the Evidence Act 1950 and the judgment of the Federal Court in Hong Yik Trading v. Liziz Plantation Sdn Bhd (2017) 18 CLJ 491). Hence, it would be incumbent upon the respondent to adduce sufficient evidence of the loss and damage to the gym equipment and how the value of the loss was ascertained."

[71] In view of the absence of specific proof for this, this court dismissed the claim for other alleged special damages.

Cost

[72] Cost to be paid by the Defendants to the Plaintiffs according to the scale.

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