Rajathurai A/L Suppiah v Starship Agencies Sdn Bhd
[2015] MLJU 798

Malayan Law Journal Unreported

HIGH COURT (KUALA LUMPUR)

YA TUAN LEE SWEE SENG J

CIVIL SUIT NO. 22NCVC-67-02/2014

28 August 2015

*D Paramalingam (**Krish Maniam** & **Co**) for the plaintiff.*

Teh Lay Kheng (Kiu Jia Yau) Teh Kiu & Partners for the defendant.

YA Tuan Lee Swee Seng J:

JUDGMENT

[1]As has often been said, friendship and business do not mix well. There is a danger always of one clouding the other and when the lines between them are blurred, there is the inevitable problem of unmet expectations and corresponding disappointment. This was what happened here.

[2]The plaintiff had first been introduced to the owner of a shipping agency business in Singapore, one Mr Benedict Ng, through a mutual friend. That was in 1994. The plaintiff was then having his company secretarial and consultancy practice in Singapore under the name of Corporate Offshore Formation Management Pte Ltd. Mr Benedict was impressed with the experience of the plaintiff as well as his broad range of contacts in Malaysia, being a Malaysian himself. According to him, the plaintiff had held himself out as an offshore specialist and management consultant. With the plaintiff s background in accounting and finance as well as secretarial, Mr Benedict finally recruited him as a director of the defendant (Starship Malaysia) company that the plaintiff helped in incorporating. The defendant was incorporated on 12 April 1995. Later on 24 October 1997 another company was incorporated in Singapore called Starship Agencies (Mal) Pte Ltd (Starship Singapore). Initially the plaintiff was a 5% shareholder in the defendant company. Mr Benedict was and is the majority controlling shareholder. The plaintiff was also a shareholder of 1 share in Starship Singapore and a director as well; Mr Benedict Ng being the holder of 99,999 shares in Starship Singapore.

[3]Though his letter of appointment was not clear, for all intents and purposes, he was to play an executive role in the defendant company as well as the other companies that were later set up and loosely referred to as the Starship Group. The plaintiff understood his role as that of being in charged of accounting and finance and also negotiating contracts with various shipping companies and basically anything that Mr Benedict would assign to him from firefighting to public relations and marketing the business of the Starship Group.

Problem

[4]Exactly what were his terms of employment as an executive director of the defendant company were not very clear. There were some terms typed out by the plaintiff himself and some terms were cancelled apparently by Mr Benedict and scribbled over it with some amendments and notations. The said terms were on a plain sheet of paper. The plaintiff did not receive any formal appointment letter from either the defendant company or Starship Singapore.

[5]The plaintiff started working for the Starship Group so to speak from April 1996. There was the initial EA Form filed by one Ms Ong, an administrative staff of the defendant and signed by her on behalf of the defendant as the plaintiff s employer in the submission for tax to the Malaysian Inland Revenue Board for year ending 31 December 1997. The defendant through Mr Benedict and also a former accountant of the defendant, Miss Maria Yu as DW 2, contended that the plaintiff was paid from Starship Singapore after it was incorporated in mid1997 and that Starship Singapore was at all material times the employer of the plaintiff.

[6]It was only in 2011 when Starship Singapore had difficulty paying the plaintiff s salary because of a substantial slowdown in its business that the payment for his salary was by way of advance from the defendant company. Evidence was led of some email correspondence stating that the plaintiff s salary of SGD8,300.00 from 1 February 2011 would be paid by the defendant company and some follow-up emails stating that there was an agreement between the plaintiff and Mr Benedict that the salary would be converted to Malaysian Ringgit at a fixed exchange rate.

[7]There was evidence to show that there was contribution to the plaintiff s EPF account for the period from 2011 to 2012 with the employer stated as the defendant company. The plaintiff was not paid from 2013. According to Mr Benedict, he had informed the plaintiff orally that Starship Singapore would not be able to employ him from 2013 onwards because business had come to almost a standstill and that his services would be terminated from January 2013. The plaintiff denied ever been told this. He continued going to the

defendant s office to work though no longer assigned any work by Mr Benedict. He finally stopped going to the office from midJuly 2013.

Prayers

[8]He decided to claim for all arrears of unpaid salaries including for damages for breach of employment contract. He had also claimed for what he said was the advance he had made on the defendant s behalf for airfares, hotel charges and entertainment food and beverages bills which he said was incurred on behalf of the defendant.

[9]There was a claim too for bonuses which he said was due to him. Then there was a claim due on an oral contract where in he asserted that he had been promised orally by Mr Benedict that he would be paid a sum of 5% of the settlement sum in a winding-up petition brought by the Wong brothers who were shareholders of the defendant in an oppression petition by them as minority shareholders against the defendant and Mr Benedict, the plaintiff and other shareholders in the Kuala Lumpur High Court.

[10]Thus, the plaintiff claims against the defendant as follows under paragraph 15 of his Statement of Claim:

15.1. Compensation for termination of employment from the year 1996 to 2012 amounting to SGD132,800.00;

15.2. Salaries payable for 12 months for the year 2013 amounting to SGD99,600.00 (SGD8,300.00x12);

15.3. Claims due and owing pursuant to the scope of employment from the year 2000 to 2012 (including expenses, hotel, air travel and allowances, etc.) amounting SGD138,177.98 and RM137,177.93;

15.4. Accrued profits payable from the year 1996 to 2012, i.e. value of shares in the year 2005 pertaining to the case of Kuala Lumpur High Court Petition No. D1-26-49-2005 which was settled for USD2.1 million. The Plaintiff was entitled to 5% of the settlement sum which is approximately USD350,000.00 amounting to SGD455,000.00;

15.5. Bonuses of SGD8,300.00 per year which was not paid for minimum period of 12 years amounting to SGD99,600.00.

The total sum claimed by the plaintiff against the defendant is SGD925,177.98 and

RM137,177.93.

Principles

Whether the employer of the plaintiff is the defendant, Starship Malaysia or Starship Singapore

[11]This a case where because of friendship between the plaintiff and one Mr Benedict Ng, the Managing Director of the defendant and the Starship Group of Companies, many things were left unwritten or supposedly oral.

[12]His letter of employment or whatever that could be produced was just a scribbled piece of paper over some type-written terms with many terms being crossed out and some question marks on some of the terms. Nothing of the company s name was written on the part type-written and part scribbled letter. A clear copy of the letter appears at p 6 of Exhibit P1 which is the Report of the hand writing expert PW 2. The expert witness PW 2 Mr William Pang testified that the scribbled notes on the said letter are that of Mr Benedict Ng (DW 1). The expert witness was not cross-examined at all by the defendant. The Court accepts the unchallenged evidence of the expert that the hand writing on the said letter is that of Mr Benedict Ng.

[13]Whilst one is uncertain as to which company actually employed the plaintiff from the said letter, what was clear was that at that time Starship Singapore had not been incorporated yet; not until mid1997. On the other hand the plaintiff had already started work for Starship Malaysia, informally at least, in April 1996, being made in charged of finance and administrative matters of the defendant.

[14]The next document that might shed some light on the rather sketchy employment relationship between the plaintiff and the Starship Group of Companies he worked for was a Facsimile Message dated 5 May 1997 which appears at p 4 of Bundle H which was issued by the defendant on the defendant s letterhead and signed by Mr Benedict Ng as its managing director. It was by way of a general notice to all the staff of the defendant. It reads:

> THE GROUP FINANCIAL CONTROLLER AND SENIOR ADMINISTRATIVE MANAGER, BENNY S, WILL BE RESPONSIBLE FOR ALL FINANCE AND ADMINISTRATIVE MATTERS OF THE GROUP.

The name Benny S is the abbreviated name for Benny Suppiah and is the moniker of the plaintiff in the Starship Group of Companies.

[15]Such a contemporaneous document would lend credence to the plaintiff s assertion and understanding that he was being employed by the defendant and not Starship Singapore which was not incorporated until mid1997. It is also consistent with the plaintiff s assertion that the defendant company is the parent company of the other companies within the Starship Group of Companies. There were some 16 other companies under the Group and the plaintiff was made a director in 11 of them.

[16]Then there was a document at p 6 of Bundle H relating to the Inland Revenue Board of Malaysia which suggested some semblance of structure to an otherwise superficial relationship. It was an EA Form for the year 1997 bearing the defendant s rubber stamp and signed by one Miss Ong, the administrative manager of the defendant who had left the employment of the defendant. The plaintiff had no idea where she is now.

[17]The EA Form disclosed that the plaintiff was a director of the defendant and that his annual salary for 1997 was RM54,000.00. It also states that the plaintiff commenced employment with the defendant as a director on 1 April 1997. The EA Form further stated that a sum of RM5,940.00 was contributed to the Employee Provident Fund (EPF) for 2007. There is of course merits in the question asked by learned counsel for the defendant, Mr D Paramalingam, Why pay EPF for the plaintiff if he was not an employee of the defendant? Mr Benedict Ng, when cross-examined, had no answer to the same question.

[18]The said document is a Part B document. At the outset this Court had recorded that all documents in Part A and Part B are accepted as exhibits and evidence, subject only to weight to be attached to them. I had expected that Mr Benedict Ng would be calling the defendant s previous staff Miss Ong if he had wanted the Court to believe him that he had no knowledge of such a document. The defendant had not called Miss Ong. One would have expected the defendant to have an employees file for Miss Ong for contact purposes. There is no suggestion that the EA Form had been fabricated and indeed by agreeing that it is a Part B document, parties had agreed that the document is genuine but the contents are not admitted. In the absence of evidence to the contrary the Court would accept on a balance of probabilities the evidence of the defendant being reflected as the employer of the plaintiff, it being impractical to call Miss Ong, bearing in mind s 32(1)(b) of the Evidence Act 1950. As any false submission to the Inland Revenue Board would attract a penalty, I would say that there is a ring of truth that the information contained therein is

correct.

[19]There was also a document introduced by the defendant in Exhibit D 9 being the affidavit filed by the plaintiff in opposing the application by the then 2nd defendant, Mr Benedict Ng, to strike out the plaintiff s claim against him. This Court had struck out the claim against the 2nd defendant personally. The trial had then proceeded against only one defendant Starship Agencies Sdn Bhd. At page 12 of the said Exhibit D9 is a so-called Contract of Employment on Starship Singapore s letterhead but the Company is referred to as Starship Agencies Sdn Bhd which is the defendant herein. At any rate the said Contract of Employment was not signed by Mr Benedict Ng nor by the plaintiff. This document therefore does not take us very far, one way or the other.

[20]However, there is clear evidence that the plaintiff, from 1998 to 2010, was being paid by Starship Singapore. He had an employment pass in Singapore and in the application filed with the Singapore Ministry of Manpower for the employment pass, his employer is reflected as Starship Singapore. His position was stated as that of a Finance Director receiving a salary of SGD 8,300.00. I can accept the plaintiff s evidence that as he was required to work in Singapore which was the hub for shipping in South East Asia, he was required to have an employment pass and with that too, he had to pay taxes in Singapore. I had no doubt that there would be the equivalent of our EA Form that Starship Singapore would have to submit to the Inland Revenue Board of Singapore.

[21]The plaintiff used an interesting expression in his witness statement which is this: that he was being seconded to work in Singapore. For all intents and purposes, though he was still working for the Starship Group of Companies, his employer in law with the secondment, would be Starship Singapore. It was again another loose arrangement which nevertheless has contractual and statutory ramifications in that if his salaries were not paid, I am sure he would be suing Starship Singapore and if taxes were not paid to the Singapore Inland Revenue though deducted, the Singapore government will doubtless take immediate action against the employer. It is true that the defendant could not produce any letter of appointment by Starship Singapore but the conduct of the defendant in submitting its application for an employment pass for the plaintiff and presumably payment of income tax in Singapore with the Starship Singapore being held out as the plaintiff s employer would combine to colour and clothe Starship Singapore with the cloak of an employer.

[22]Correspondingly during this period from 1998 to 2010 there was no contribution of EPF as confirmed by the letter from EPF dated 28 July 2015 at p 1 of Bundle M. As a corollary, there is no evidence produced as to any submission of EA Form by the

defendant during this period to the Inland Revenue Board of Malaysia.

[23]I can accept the fact that to both the parties to this action, what was more important was the fact that the plaintiff served all the companies in the Starship Group of Companies and that it was only incidental in compliance with the law of the country that has the closest nexus to the plaintiff s physical presence and base that the plaintiff was treated, whether by the device of secondment or because of contractual convenience and statutory compliance, as being employed by Starship Singapore at least for the period from 1998 to 2010.

[24]The defendant tried to argue rather disingenuously that the payment of salaries from the defendant from February 2011 to December 2012 does not make the defendant the employer of the plaintiff and that it was merely an internal arrangement for accounting purpose. The defendant also pointed out that there were times in the past when the plaintiff s salaries were paid for a couple of months from Starship Emirates, another company in the Starship Group of Companies. I accept the fact that when Starship Singapore had some cash flow problem, the plaintiff s salaries may be paid by another entity in the Group without making that entity the employer of the plaintiff.

[25]However where the contractual arrangement had been formalized by email from Starship Singapore as can be seen from Miss Angie s email (angie@starshipgroup.com.sg) from Singapore to Miss Maria Yu, the accountant of Starship Malaysia (maria@starship.com.my) and where his salaries had bee paid for the last 2 years from 2011 to 2012 from the defendant, Starship Malaysia, the plaintiff is entitled to treat the defendant as his employer for all practical purposes.

[26]It is a case where his secondment to Starship Singapore had ended and he was transferred back to the defendant where his employment is concerned. It was in the context where work in Singapore at Starship Singapore had dwindled to a trickle after they lost a major agency. How else is he to treat this new contractual arrangement which has the statutory undergirding of payment to EPF for both his contribution and that of his employer, stated in the EPF contribution form and confirmed by EPF itself in their letter of 28 July 2015 at p 1 of Bundle M? So too his payment of income tax in Malaysia as stated in Miss Maria s email to the plaintiff; he earned an income from the defendant and is entitled to treat the defendant as his employer and more so when since February 2011, there was no evidence that there had been any payment of tax in Singapore or CPF contribution in Singapore.

[27]The plaintiff has good reason to consider his employment at least for the purpose of suing for his arrears of salaries to be with the defendant herein.

[28]There are the emails correspondence stating his salaries will be paid by the defendant based on SGD8,300.00 at the agreed exchange rate of 2.4 . There is more importantly the submission of the defendant to EPF stating that the defendant is the employer of the plaintiff and indeed at page 1 of Bundle M is a letter from EPF stating the defendant, Starship Malaysia, to be the Majikan or Employer of the plaintiff. The Plaintiff was aged 60 years old in 2012. Section 43 (1) of the Employees Provident Fund Act 1991 (EPF Act) provides:

> Subject to the provisions of section 52, every employee and every employer of a person who is an employee within the meaning of the Act shall be liable to pay monthly contributions on the amount of wages at the rate respectively set out in the Third Schedule.

[29]Part C of the Third Schedule of the EPF Act provides:

> (1) The rate of monthly contributions specified in this Part shall apply to-
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> (a) employees who are Malaysia citizens;
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> (b) employees who are not Malaysian citizens but are permanent residents of Malaysia; and
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> (c) employees who are not Malaysia citizens who have elected to contribute before 1 August 1998,
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> who have attained the age of sixty years.

AMOUNT OF WAGES FOR THE MONTH		RATE OF CONTRIBUTIONS FOR THE MONTH		
RM	RM	By the Employer	By the Employee	Total Contribution
From 19,900.01		1200.00	1100.00	2,300.00

to 20,000.00

[30]The plaintiff was drawing a salary of SGB8,300.00 per month and after applying the fixed exchange rate of 2.4, the plaintiff s salary per month in Malaysian Ringgit would be RM19,920.00 per month. The defendant s contribution as employer was RM1,200.00 and the plaintiff s contribution as employee was RM1,100.00 as can be seen from the EPF statements at pages 2 and 3 of Bundle M.

[31]An **employee** under s 2 of the EPF Act means any person, not being a person of the descriptions specified in the First Schedule, who is **employed under a contract of service** or apprenticeship, whether written or **oral** and whether expressed or **implied**, to work for an **employer**; (emphasis added)

[32]An **employer** under s 2 of the EPF Act means the person with whom an employee has entered into a contract of service or apprenticeship and includes

(a) a manager, agent or **person responsible for the payment of salary or wages to an employee** ;

(b) any body of persons whether or not statutory or **incorporated**;... (emphasis added)

A person under s 2 of the EPF Act includes any agent, **company**, association or body of persons corporate or unincorporate; (emphasis added)

[33] Wages under s 2 of the EPF Act means all remuneration in money, due to an employee under his **contract of service** ..... (emphasis added)

[34]As can be seen a contribution by both an employee and an employer under the EPF Act on wages paid attracts the assumption and application of a contract of service between an employee and an employer. Having submitted to a statutory requirement that carries a sanction for non-compliance, it is not open for the defendant to contend that it is only for a limited purpose under the EPF Act that it is to be regarded as an employer of the plaintiff. The sanction and sentence under s 43(2) of the EPF Act reflects the seriousness of the non-compliance as follows:

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(2) Any person being an employer who fails, within such period as may be prescribed by the Board, to pay to the Fund any contributions which he is liable under this Act to pay in respect of or on behalf of any employee in respect of any month shall be guilty of an offence and shall, on conviction, be liable to imprisonment for a term not exceeding three years or to a fine not exceeding ten thousand ringgit or to both.

[35]Consistent with that too is the submission of the EA Forms to the Inland Revenue Board by the defendant for year ending 31 December 2011 and year ending 31 December 2012 at pages 7 and 8 of Bundle H. Clearly the name of the employer is stated as the defendant at the bottom of each Form with the name of the submitting officer as Maria Yu, the accountant for the defendant and who testified for the defendant as DW 2.

[36]Under the Income Tax Act 1967 in s 3 thereof it it provided that:

Subject to and in accordance with this Act, a tax to be known as income tax shall be charged for each year of assessment upon the income of any person accruing in or derived from Malaysia or received in Malaysia from outside Malaysia.

[37]Under Classes of income on which tax is chargeable in s 4 of the Income Tax Act it is provided as follows:

Subject to this Act, the income upon which tax is chargeable under this Act is income in respect of

(a) gains or profits from a business, for whatever period of time carried on;

(b) **gains or profits from an employment**; (emphasis added)

[38]Again there is no running away from who is the employer when it comes to who pays the remuneration of the employee who is subject to income tax. The definitions of employee , employer and employment are collectively set out below under s 2 of the Income Tax Act and they are self-explanatory:

employee , in relation to an employment, means

(a) where the relationship of master and servant subsists, the servant;

(b) where that relationship does not subsist, **the holder of the appointment or office which constitutes the employment**;

employer , in relation to an **employment**, means

(a) where the relationship of master and servant subsists, the master;

(b) where that relationship does not subsist, **the person who pays or is responsible for paying any remuneration to the employee who has the employment**, notwithstanding that that person and the employee may be the same person acting in different capacities;

employment means

(a) employment in which the relationship of master and servant subsists;

(b) **any appointment or office**, whether public or not and whether or not that relationship subsists, **for which remuneration is payable**; (emphasis added)

[39]It cannot be over-emphasized that there is no stronger and safer conclusion of who an employer is when statutorily the defendant had held itself out, represented and indeed declared itself as the employer of the plaintiff. No matter how rough and rudimentary one s terms of employment may be, seeing that it was not formalized in a Letter of Employment or of what is recognised as a contract of service, the Court is not prevented from accepting that an oral contract has come into being or even imply the terms of a contract of employment from the payment of salary to the employee concerned.

[40]The defendant cannot be seen to be approbating and reprobating whenever it suits them. The dicta of the Court of Appeal in *PB Securities Sdn Bhd v Autoways Holdings Berhad* [2000] 4 CLJ 811 at p 823 is worthy of repetition here:

The principle that a person may not approbate and reprobate expresses two propositions.

(1) that the person in question, having a choice between two courses of conduct, is to be treated as having made an election from which he cannot resile, and

(2) that he will not be regarded, in general at any rate, as having so elected unless he has taken a benefit under or arising out of the course of conduct which he has first pursued and with which his subsequent conduct is inconsistent.

[41]Justice Low Hop Bing J (as he then was) had no difficulty pinning down the party that had engaged the employee and paying his salary as the employer in *Melaka Farm Resorts (M) Sdn Bhd v Hong Wei Seng* [2004] 5 MLRH 274 as set out below:

The question of the existence or otherwise of a contract of service is a question of mixed fact and law.

A contract of service may be express and brought into existence by the parties thereto by way of an execution of a written agreement, expressly setting out the detailed terms and conditions of service. That will remove all doubts as to the existence of a contract under s 10(1) of the Contracts Act 1950 and the parties are able to rely on these terms to establish their rights and obligations thereunder.

A contract of service may also be brought into orally. As the parties herein have not executed a written contract of service, it is necessary for me to determine whether a contract of service has been brought into existence only. In view of the clear evidence of the defendant adduced through its executive director that the plaintiff s monthly salary was RM2,000.00, it is abundantly clear to me that an oral contract of service has been brought into existence by the parties herein.

Further, **a contract of service may also be implied by the conduct of the parties, as eg, in the instant appeal, where the plaintiff has allowed the defendant to work in the defendant s place of employment and a sum of RM4,000 has been paid by the defendant to the plaintiff as salary for two months viz September and October 2001**.

S 9 of the Contracts Act 1950 provides that so far as the proposal or acceptance of any promise is made in words, it is said to be express while the proposal or acceptance of a promise made otherwise than in words is said to be implied. (emphasis added)

[42]The defendant is thus estopped from denying that it is the employer of the plaintiff. Whatever might be the arrangement and a loose one at that, that the defendant might have undertaken to manage the Starship Group of Companies, surely the plaintiff here cannot be faulted for treating the defendant, for intents and purposes, as his employer where arrears of salaries are concerned.

[43]Though the words estoppel or estopped are not found in the statement of claim, there had been led in evidence without any objection by the defendant the fact of the holding out of the defendant as the employer of the plaintiff in the EPF submissions and the Inland

Revenue submissions and indeed the point of estoppel has been submitted by both parties. I could do no better than to refer to the dicta of the *Federal Court in Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Berhad* [1995] 3 MLJ 331 at 341 343 as follows:

> Thus, although courts, through their pronouncements, require estoppel to be pleaded, there is also judicial recognition of circumstances that may take a particular case out of the governing principle. First, there is the principle, already alluded to, that what requires to be pleaded are the relevant facts which a litigant claims to give rise to an estoppel and not any special formula in staccato: *Laws Holdings Pty Ltd v Short* (1972) 46 ALJR 563 at p 571.
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> Secondly, even where a party has failed to set out the material facts in his pleading, but there is occasioned no surprise to his opponent, a court may, in the interests of justice, permit the point to be taken: *Coppinger v Norton* [1902] 2 IR 232 at p 243; *Co-operative Town Bank v Shanmugam Pillay* AIR 1930 Rang 265 at p 268; *Laws Holdings*. Useful reference may also be had to the instructive judgment of Edgar Joseph Jr J in *Rosita bte Baharom & Anor v Sabedin bin Salleh* [1992] 1 MLJ 379, affirmed by the Supreme Court in [1993] 1 MLJ 393.
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> Thirdly, **where there is no pleaded case of estoppel, but there is let in, without any objection, a body of evidence to support the plea, and argument is directed upon the point, it is the bounden duty of a court to consider the evidence and the submissions and come to a decision on the issue. It is no answer, in such circumstances, to say that the point was not pleaded:** *Oversea-Chinese Banking Corp Ltd v Philip Wee Kee Puan* [1984] 2 MLJ 1.
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> In *Habib Bank Ltd v Habib Bank AG Zurich* [1981] 2 All ER 650 at p 666; [1981] 1 WLR 1265 at p 1287, Oliver LJ dealt with an argument upon a point of pleading in the following way:
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> > Finally, there was, says Mr Aldous, neither express allegation nor express proof that HBZ had acted upon the encouragement. There is certainly an allegation in relation to estoppel in para 15 of the defence that HBZ have relied upon the right to use their own name and motif and have been permitted by the plaintiffs to build up a goodwill therein. That goodwill, in fact, was amply proved by the banking documents and by HBZ s witnesses. I really cannot think that it was necessary formally to call a witness to say we did this in reliance upon the supposition that we were allowed to use our corporate name . That reliance can be inferred from the circumstances as it was in *Greasley v Cooke* [1980] 3 All ER 711 (see the judgment of Lord Denning MR, at p 712) and I think that the judge was perfectly justified in inferring it from the evidence before him in this case.
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> It is to be emphasized that the categories of cases in which a court may permit an unpleaded point to be argued are not closed and that the foregoing three classes of cases are but mere illustrations of a much wider principle. It is this. **A court may permit a litigant to argue that his opponent is estopped from raising a particular contention if it is in the interests of justice to do so. It is really a matter within the discretion of the particular judge who, when deciding where the justice of the case lies, must have due regard to all the circumstances of the case, including any injury or prejudice that may be caused by the affected party being taken by surprise**. If a court comes to the conclusion that no injustice will be occasioned by permitting a party to raise estoppel as an issue, then, it may be justified in departing from the salutary rule contained in such decisions as *Haji Mohamed Dom v Sakiman* [1956] MLJ 45 and *Anjalai Ammal & Anor v Abdul Kareem* [1969] 1 MLJ 22 that imposes upon a judge the duty to strictly decide a case upon and only upon the issues raised in the pleadings and not upon an unpleaded case. Nevertheless, courts must ensure that the occasions upon which such a departure may be permitted are rare. For otherwise the rule which declares that a party is bound by its pleadings will be rendered meaningless.

That the justice of the case should be the overriding consideration is axiomatic. After all, courts exist to do justice according to the law as applied to the substantial merits of a particular case. And rules of court and of practice are created to facilitate the attainment of justice, not its obstruction.

Viewed from this standpoint, it appears quite clearly where the justice of the present case lies. It lies in favour of considering the estoppel issue..... (emphasis added)

[44]Further at p 345, lest it be raised that estoppel cannot be used to support a cause of action as in here, a breach of a contract of employment by the defendant, it was observed as follows:

We would add that it is wrong to apply the maxim estoppel may be used as a shield but not a sword as limiting the availability of the doctrine to defendants alone. Plaintiffs too may have recourse to it. The true nature of the doctrine in this context is that stated by Lord Russell of Killowen in *Dawsons Bank v Nippon Menkwa Kabushiki Kaisha* LR 62 IA 100 at p 108:

> Estoppel is not a cause of action. **It may (if established) assist a plaintiff in enforcing a cause of action by preventing a defendant from denying the existence of some fact essential to establish the cause of action, or (to put it in another way) by preventing a defendant from asserting the existence of some fact the existence of which would destroy the cause of action**. (emphasis added)

[45]This Court must take cognizance of the fact that here is a case where a person like the plaintiff is made or employed as an executive director for all the companies within the Starship and his time is spent on whichever companies would require his specialist input during the period of employment.

[46]So long as there is some evidence to justify treating the defendant as his employer, this Court would not fault or deny him his claim of the defendant as his employer.

[47]Whatever might have been the arrangement when the plaintiff was paid from Starship Spore from 2000 to 2010, it does not derogate from the fact that from February 2011 onwards, it was the defendant that had held themselves out to the authorities such as EPF and the Inland Revenue Board that they are the employer of the plaintiff.

[48]If it is just the convenience of payment of salaries for accounting purpose, then one

would have expected Starship Singapore to be reflected as the employer in the EPF submission forms as well as the submission to Inland Revenue Board. However the defendant has not led any evidence showing that. Neither has the defendant led any evidence to show that in the accounts of the defendant the salaries are reflected as an advance on behalf of Starship Singapore and that in the Starship Singapore s account, the salaries are captured as a debt owing to the defendant.

[49]In the interest of justice where there is credible evidence showing the defendant as the employer of the plaintiff in a structure where the plaintiff is to serve various companies in the Starship Group of Companies, one cannot be too pedantic and parochial in approach such as to pander to peculiar preference of the defendant. Admittedly, the amorphous apparatus works to the advantage of the Starship Group of Companies with Mr Benedict Ng at the helm and calling the shots and assigning the plaintiff to whichever companies within the Starship Group that would need his input and involvement at any point as well as period of time. Mr Benedict Ng and the plaintiff were the only 2 executive directors of most of the companies under the Starship Group of Companies. There is no doubt that Mr Benedict Ng was the person that the plaintiff took instructions from and report to. It was a structure where what is being done as instructed by Mr Benedict Ng representing the various separate entities within the Starship Group was far more important than which entity actually employed the plaintiff. In such a circumstance and context this Court would allow the plaintiff to consider himself as being employed by the company that has the closest nexus to him, that is the defendant. It is certainly not inconsistent with the colour and cloak of being employed by the defendant who had represented to at least 2 statutory and regulatory authorities i.e. the EPF and the Inland Revenue Board that it is the employer of the plaintiff. Call it a resecondment back to the original company that had earlier employed him or an assignment back from Starship Singapore to Starship Malaysia, of the defendant herein, the result is the same.

[50]In such an apparatus where the plaintiff is not affixed to any entity within the Group of Companies but always available to serve any and all companies within the Group, his infrequent physical presence at the office of the defendant in Port Klang paled in significance.

[51]The danger of giving the plaintiff the run-a-round cannot be discounted; should he be suing Starship Singapore he might be met with the defence that Starship Malaysia is the employer! At any rate the doctrine of separate legal entities pales into insignificance when both the parent company, the defendant herein, and its other sister companies in the Starship Group operate practically as a single entity, with the plaintiff as its executive director, being at the helm of all the companies in the Starship Group, and being there

whenever he is needed. It does not make sense for him to be paid separately from each entity but rather to have a base from which he operates. His base for all intents and purposes was at the defendant s office for the period from 2011 to mid2013 when he left the employment of the defendant.

[52]The Industrial Court in *Jimsburg Services Sdn Bhd v Rostam Wahidin* [1999] 1 MELR 721; [1999] 2 ILR 324 at pp 333 and 334, wrestled with this amorphous anomaly in arriving at who is the real employer. Its chairman Lim Heng Seng observed:

> The issue who is the real employer is often resolved by asking who had the power to hire and fire an employee and to control and to direct an employee as to the work he is engaged to perform. There is scant evidence on this issue. The Claimant was hired by the late Alexander David. It does also appear that Alexander David, deceased, was the person who had a say concerning the Claimant s duties and responsibilities. The above alone, however, leaves the issue unanswered as the deceased might well have been acting on behalf of either of the companies. However, there is the evidence that JC was the ultimate paymaster. The Court is of the opinion that **where the evidence of either JS and JC being the real employer appears to be evenly balanced the fact that it was JC which paid the Claimant s salary, reimbursed JS for the Claimant s work-related expenses and made statutory contributions to the EPF would be a significant factor leading the court to a finding that JC was the Claimant s real employer**.
>
> In the entire facts and circumstances of the case, the Court finds that the vehicle which was used by Alexander David, deceased, to engage the Claimant for the Jimsburg East Malaysia operations was JC and not JS. The documentary evidence pertaining to the Claimant s remuneration initially appears to point to an engagement of the Claimant in the capacity as general manager of JS. However, the company as shown that the sums paid to the Claimant by JS were invoiced to JC and were reimbursed accordingly by JC.
>
> It will be observed that JC s appointment of the claimant as executive director of JC was effected almost contemporaneously on 5 April 1995 (Exh J11). The bulk of the relevant documents relating to the Claimant s expenses which have relevance to the issue of the claimant s employment status originated from JS in connection with his appointment as general manager of JS but the same arrangements for reimbursement of the Claimant s salaries by JC in connection with his appointment as executive director of JC applied. **What is of further significance too is the fact that JC made contributions towards the EPF in favour of the Claimant**.
>
> The fact that it was JS which initially paid the Claimant s salary does not in the circumstances of this case make JS the Claimant s employer. **It is not unusual that companies related by common shareholders have such kinds of inter company arrangements for disbursing funds and sharing staff and personnel**. In this case, however there was an overriding reason for JC rather than JS to be the employer of the Claimant. (emphasis added)

[53]The observation of the Federal Court in the case of *Hotel Jaya Puri Bhd v National Union of Hotel, Bar & Restaurant Workers & Anors* [1979]1 MLRH 197 by Salleh Abas FJ (as he then was) at p 202 is pertinent:

> It is true that while the principle that a company is an entity separate from its shareholders and that a subsidiary and its parent or holding company are separate entities having separate existence is well established in company law, in recent years the Court has, in a number of cases, by-passed this principle if not made an inroad into it. The Court seems quite willing to lift the veil of incorporation (so the expression goes) when the justice of the case so demands. Thus the facts of the case may well justify the Court to hold that despite

separate existence a subsidiary company is an agent of the parent company or vice versa as was decided in *Smith, Stone and Knight v Birmingham Co* (1938) 4 All ER 116; *Re FG (Films) Ltd* (1955) 1 WLR 483 and *Firestone Tyre & Rubber Co v Llewlyn* (1957)1 WLR 464. *Professor Gower* in his Principles of Modern Company Law, 3rd Edn., p.213, said that **the Courts are coming to recognize the essential unity of a group enterprise rather than the separate legal entity of each company within the group**

It is clear therefore that the approach taken by the President of the Industrial Court is not without any legal support when he placed an emphasis on the essential unity of group enterprise which in this case consists of the Hotel and the Restaurant, especially when Datuk NA Kularajah who is the Managing Director of the Restaurant and had the ultimate authority over the employees. Thus, the practice of treating the employees of the Restaurant as being separate from the employees of the Hotel such as the Union having been told that they were so, their salaries, their EPF and SOCSO contributions being paid by the Restaurant, does not detract from the fact that the employees in question were in fact working in one group enterprise. In my judgment, by giving recognition to this fact, the President did not cause any violence to the sanctity of the principle of separate entity established in *Saloman v Salomon & Co* (1897) AC 22 but rather gave effect to the reality of the Hotel and the Restaurant as being in one enterprise. I find nothing unreasonable in the finding of the President by by-passing this principle. He did no more than to comply with the wishes of the Legislature that in the making of an award substantial merits of the case, the public interest and any matters which are necessary or expedient for the purpose of settling the dispute are among the factors which should be taken into consideration by the Court. In my view, the finding by the President is in no way against the principle of separate entity and I am therefore not prepared to interfere with the award on this account. (emphasis added)

[54]Cases of this nature would be facts-centric. Courts are anxious to see that justice is done for employee who has no control over the internal arrangement for payments of his salary but who understands and indeed is expected to serve the various companies in the Group. In the case of *Smith, Stone and Knight, Ltd V Lord Mayor, Aldermen And Citizens Of The City Of Birmingham* [1939] 4 All ER 116 it was held that possession by a separate legal entity was not conclusive on the question of the right to claim, and as the subsidiary company was not operating on its own behalf but on behalf of the parent company, the parent company was the party to claim compensation .

[55]The defendant had referred to the Federal Court case of *Employees Provident Fund Board v MS Ally & Co Ltd* [1975] 2 MLJ 89. However the two issues that were raised in that case were (1) whether the working assistants were employees within the meaning of the then Employees Provident Fund Ordinance 1951, that is whether they were persons employed under a contract of service to work for an employer; and (2) whether even if the working assistants were employees within the meaning of the Ordinance, contributions were payable by them towards the Employees Provident Fund. Here there is no quibble or quarrel over whether the plaintiff was employed under a contract of service. Rather the issue was who was his employer; he having contributed to EPF together with the defendant, who he contended, was his employer, for all intents and purposes.

[56]In the same vein, reliance by the defendant on *Kuala Lumpur Mutual Fund Bhd v J Bastion Leo & Anor* [1998] 1 CLJ (Rep) 145 SC, is misplaced. In that case the issue was

whether the respondent had been employed under a contract of service or a contract for services. The Court looked at the control test and a number of indicia and concluded that the control test would be a very important indicia in determining whether there is a contract of service. It further held that the non-contribution of EPF was not a conclusive test as to whether one was not so employed. In our case there was no question that the contract here was a contract of service; the only question was who was the employer in a structure where an employee serves all the companies within the Group; paid by Starship Singapore from 2000 to 2010 and for the last 2 years from 2011 to 2012, paid by the defendant before his termination.

[57]There is no injustice to the defendant here as even if it was paying on behalf of Starship Singapore the plaintiff s salary, it could always claim back from Starship Singapore what may be ordered by this Court. It has not seen it fit to join Starship Singapore as a third party to claim contribution and indemnity from it.

[58]I would thus find as a matter fact that the employer of the plaintiff for the period when he is claiming for arrears of salaries to be the defendant.

Whether the plaintiff is entitled to his claim for arrears of salaries and if so, how much.

[59]There is nothing unusual about a director of a company being at the same time, an employee of the company, employed as an executive director of a company and drawing a salary. In the Singapore Court of Appeal case of *Lim Hin Hock v Ong Jin Choon & Anor* [1991] 1 MLRA 828, Justice Chao Hick Tin JCA opined as follows:

> It is clear that **a director, as such, is not an employee of the company. But a director can hold a salaried employment in addition to his directorship and in that circumstance he will be an employee**. It was not in dispute thatIt s an executive director, the plaintiff s work involved financial administration, meeting prospective customers and entertaining them and soliciting business. The business of the two companies was in the shipping field involving loading and unloading and providing supplies to ships..... (emphasis added)

[60]In the faxed notice dated 5 May 1997 to the companies within the Group the defendant had introduced the plaintiff as the Group Financial Controller and Senior Administration Manager. There is no doubt that the plaintiff was drawing a salary throughout his employment. There is also nothing wrong in law for a director to enter into a contract of employment with the company as an executive director. The various name cards exhibited by the plaintiff for the various companies within the Group showed his designation as

Finance Director for the defendant and for Starship Singapore as well as for Starship Carriers Pte Ltd. There was the designation of Business Development for Starship Air Consultants Pte Ltd.

[61]He did not receive any letter of termination. This is again part of the friendship factor that is supposed to permeate the service of the plaintiff for the defendant or the Starship Group of Companies.

[62]He continued going to office until midJuly 2013. The defendant was clearly in breach of its contract of employment when it did pay the plaintiff s salaries. He considered himself as still working for the defendant company from even January 2013 when he did not receive his salary. He is perfectly entitled to do that until his services is terminated by the defendant. If that was not forthcoming as it was not in this case, he might have to terminate his services for breach of his contract of employment by the defendant in failing to pay his salaries. Even a labourer deserves his wages. Nobody works for free unless it is voluntary work with rewards in the hereafter!

[63]Lord Denning MR captures this dilemma of an employee caught in this bind of expected loyalty when wages are not forthcoming in the case of *Western Excavating (ECC) Ltd v Sharp* [1978]1 All ER 713 at p 717 as follows:

> **If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer s conduct. He is constructively dismissed**. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once.
>
> Moreover, he must make up his mind soon after the conduct of which he complains; for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract.

[64]The observation of his Lordship Abdul Malik Ishak J (as he then was) in *Alan Thomas Bohlsen v Draftworldwide Sdn Bhd* [2009] 8 MLJ 461 at p 503 would also be pertinent:

> [107]**The breaches by the defendant of** cl 6.01 of the employment agreement compounded by the cumulative effect of the other breaches as alluded to above issues pertaining to EPF, internet access, access to the computer hardware and software, telephone bills and automobile expenses, **went to the root of the contract. Such breaches entitled the plaintiff, at law, to**

accept the defendant s repudiation and treat the contract as coming to an end. On 27 July 2001, **the plaintiff considered himself as constructively dismissed. The very rubric or substance of the contract had collapsed**. It was beyond redemption.

[108] **What the plaintiff did was perfectly legitimate**. It is supported by the case of *Wong Chee Hong v Cathay Organisation (M) Sdn Bhd* [1988] 1 MLJ 92, a decision of the Supreme Court with a coram of Salleh Abas LP, Wan Suleiman and Syed Agil Barakbah SCJJ. In delivering the judgment of the Supreme Court, Salleh Abas LP had this to say in regard to constructive dismissal (see p 95 of the report):

> **The common law has always recognised the right of an employee to terminate his contract of service and therefore to consider himself as discharged from further obligations if the employer is guilty of such breach as affects the foundation of the contract or if the employer has evinced or shown an intention not to be bound by it any longer**. (emphasis added)

[65] The defendant s learned counsel was quick to point out that the plaintiff had not pleaded constructive dismissal in his claim and that parties are bound by their pleadings. Whilst it is important to have a proper perspective on pleadings so as not to lose sight of its primary purpose one might be refreshed with the dicta of his Lordship Gopal Sri Ram JCA (as he then was) in *Quah Swee Khoon v Sime Darby Bhd* [2000] 2 MLJ 600 at page 606:

> First, the learned judge erred in holding that the Industrial Court had decided the case dehors the pleadings. The case was adjudicated upon an unpleaded point. All the facts relevant to the point at issue had been pleaded. It is only the legal result that had not been pleaded. It is not necessary, even at common law, to plead the legal result flowing from a set of pleaded facts. There had been written argument about the legal result. **Since all the relevant evidence was before him, the learned chairman acted with propriety in holding that there had been a breach of the implied term in question**. (emphasis added)

[66] The plaintiff had led evidence that he could not continue working without a salary and so he stopped going to office in midJuly 2013. Surely this is not the conduct of an employee who had decided to affirm the contract by working for no pay! The plaintiff endured until he could no longer continue any further; both because of the indignity and injustice of it all.

[67] It would be fair to take midJuly 2013 as the date he terminated his employment with the defendant for breach of the contract of employment by the defendant employer. By not paying him his salaries for 6.5 months, the defendant had committed a fundamental breach of the contract of employment and the plaintiff accepted the breach in midJuly 2013 when he decided not to turn up for work any more as an executive director tasked with finance and administrative duties of the Starship Group of Companies.

[68]On the other hand the defendant contended that its Mr Benedict Ng had orally informed the plaintiff that his services would no longer be required after December 2012 because business had slowed down substantially and losses had mounted. It would be fair to say that for the termination of the services as an executive director of the defendant who had worked for the Starship Group since 1998, a formal letter of termination should be forthcoming. Parties here are accustomed to communicating with each other by emails but the defendant could not point to a single email giving notice of termination of his services; not from the defendant or for that matter from Starship Singapore.

[69]The email dated 7 January 2013 from Mr Benedict Ng marked as Exhibit D6, signing off as the Managing Director of the Starship Group, to the plaintiff is not a letter of termination of his services. It reads:

> Dear Benny
>
> As told to you the company is not able to offer you an allowance as from January 2013.
>
> Since 2006, when we lost the ZIM agency we have lost a revenue stream, the last six years expenses and coupled with the lawyers expenses have dried up our coffers and I am not in a position to subsidies anymore losses.
>
> We now need your help as with your connections in the finance world we can tap on it to seek your help in starting s new business in trading and freighting in Bulk Carriers which I have been financing for the last 4 months and if I am not able to get the LC financing we will stop operations in March. However if you can help with the LC then we will all survive and we can ride on Bulk Carrier for a salary.
>
> I had discussed the above in details with you, please to heheard there is a chance in supporting this business.

[70]The plaintiff may be pardoned for not treating this letter as a letter of termination as it makes no reference to that, not in the caption to the letter and not in the body of the said letter. The caption is rather Your monthly salary. Far from being a letter of termination it was a letter seeking the continuing expertise and connection of the plaintiff to obtain the necessary financing for freighting in Bulk Carriers.

[71]Expressing the defendant s inability to pay an allowance to the plaintiff is far from expressing an intent to terminate the services of the plaintiff as an executive director

holding the salaried position as the Group Financial Controller and Senior Administration Manager. In the absence of a formal written notice to terminate or even to terminate forthwith, this Court must reject the notion that the services of the plaintiff had been terminated. There is no anomaly in treating himself as having his services terminated as an executive director though still holding on to office in the board as a director, albeit as a non-executive director for all intents and purposes.

[72]The position of an executive director drawing a salary vis-a-vis that of non-executive directors was considered in the case of *Sime Darby Berhad & Ors v Dato Seri Ahmad Zubair & Ors; Tun Musa Hitam & Ors (Third Party)* [2012] 2 MLRH 466 as follows:

> One cannot deny that the duties of non-executive directors are different from that of executive directors. What is expected of and exacted from them as non-executive directors are different from that of executive directors. Whilst they all owe a common duty to the company to act in good faith in the best interest of the company at all times (s 132(1) of the Companies Act 1965), yet with respect to the execution of the matters that the board and committee members have discussed, deliberated and decided, it is the executive directors that would execute the decisions made. In other words, the executive directors will have to descend to the base and execute the decisions, solve problems, manage resources, monitor progress, measure performance and be answerable to the board and committee for the performance of the company as a whole. The executive directors being full-time employees of the company as most of them generally are, would be the hands-on people involved in the daily grind of negotiation, supervision and operations. The executive directors would be answerable to the board and committee as a whole for the quarterly performance of the company as the non-executive directors meet with the executive directors in the full board meetings to review quarterly results before these are released to investors through Bursa Malaysia. Little wonder what the full board is required to meet at least four times in a year. The duties of the non-executive director vis-avis the company are performed or an intermittent basis as he meets with the other non-executive directors and executive directors at the quarterly meeting of the board or more often as may be necessary. Whilst they receive director s fees for being non-executive directors, they do not draw a salary unlike executive directors who are expected to work in a normal nine to five job.

[73]He had his other varied complaints against the defendant in his statement of claim, ranging from being required to sign documents without being briefed in detail as to the nature of the transactions, not having access to the defendant s documents to ascertain if the defendant is engaged in irregular financial transactions and not declaring dividends in spite of profits made. These are not relevant in an employee s claim against the defendant company but more relevant in a future claim that the plaintiff might want to explore with respect to an oppression petition in his capacity as a minority shareholder in the defendant.

[74]As to his last drawn salary, it is clear from the evidence of the plaintiff (PW 3), Mr Benedict Ng (DW1) and the email by Angie Ng at page 28 of Bundle C that the plaintiff s salary per month is SGD8,300.00. Further, the exchange rate had been clearly fixed at RM2.4 to SGD1. This can be seen from the emails by the plaintiff dated 24 February 2011, Maria s email dated 24 February 2011 and Angie Ng s email dated 25 February 2011. These three emails can be found at pages 25 26 of Bundle C.

[75]I would hold that he is entitled to his last drawn salary of SGD 8,300.00 X 2.4 (being the contractually agreed exchange rate) X 6.5 months from Jan 2013 to midJuly 2013.

[76]Whether the Plaintiff is entitled to claim damages for breach of his employment contract and if so, how much

[77]Then there is the claim for compensation which he wanted to claim based on 1 month s salary for every year of service. That is a claim that may be given by an Industrial Court in a case of a dismissal without just cause and excuse or even a case where the employee may rightly treat himself as being constructively dismissed by his employer. The chief remedy under s 20(1) and (3) of the Industrial Relations Act 1967 (IRA) is that of reinstatement to his place of former employment and where it is practically impossible to do so, the Industrial Court would make an award of compensation in lieu of reinstatement. The practice has been to award a month s pay for every year of service of the employee based on his last drawn pay. In making such an award the Industrial Court under s 30(5) of the IRA is enjoined to act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form.

[78]However, the claim here is purely on contract and the most the Court can do in assessing damages is to look at what is a reasonable notice period that an employer in this circumstance of the case, should have given. Thus in *Fung Keong Rubber Manufacturing (M) Sdn Bhd v Lee Eng Kiat* [1981] 1 MLJ 238 FC at p 240, the Federal Court held that:

> In the case of a claim for wrongful dismissal, **a workman may bring an action for damages at common law**. This is usual remedy for **breach of contract**, e.g., a summary dismissal where the workman has not committed misconduct. **The rewards, however, are rather meager because in practice the damages are limited to the pay which would have been earned by the workman had the proper period of notice been given**. He may even get less than the wages for the period of notice if it be proved that he could obtain similar job immediately or during the notice period with some other employer At common law it is not possible for a wrongfully dismissed workman to obtain an order for reinstatement because the common law knew only one remedy, viz., an award of damages (emphasis added)

[79]This is not a case of a fixed-term contract where the Court may have regard to the salaries an employee would have earned had he not been wrongfully terminated of his employment. In the case of *Nong Chik Abu Bakar v Umpan Jaya Sdn Bhd* [2013] MLRHU 1 it was held by Justice Yeoh Wee Siam J as follows:

> The Plaintiff denied all questions put by Counsel for the Defendant to establish the Defendant s case as pleaded. In the absence of any oral and documentary evidence which could only be given by the Defendant s witnesses, the Court finds that the Plaintiff s evidence

remains unrebutted and must be accepted by the Court. Therefore, on a balance of probabilities, the Court finds that the Plaintiff has proved, to the satisfaction of the Court, that the Defendant s termination of the Plaintiff s service, without the 4 weeks notice when no misconduct has been proven against him, is a breach of the Plaintiff s Contract of Service and terms and Conditions of Service, and therefore unlawful.

Under s 74 (1) of the Contracts Act 1950, 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 his usual cause of things from the breach of it.

I allowed the Plaintiff s claim for RM125,420.00 which is for his total loss of income ie this sum would have been earned by him had he not been terminated in his service and had been allowed by the Defendant to continue with his service until the expiry of the contractual term of his employment on 31 April 2014. (emphasis added)

[80]In the case of*Tadika Tzu Yu Bersepadu v Hsu Hui Ying & Ors* [2015] 3 MLRH 358 it was held by Justice Ravinthran Paramaguru J as follows:

The general principle is that an employee, who pursues his action in the civil courts for wrongful dismissal unlike in the Labour Court or Industrial Court, is only entitled to contractual compensation or reasonable compensation. In the instant case, the contract did not spell out the compensation that the 1st defendant is entitled to. However, **at the time of dismissal, only 16 months of employment was left under the existing contract**. As I said earlier, the 1st defendant would only be about three months short of her 60th birthday at the end of the 16 months. In the premises, I hold that, had she succeeded in defeating the no case to answer submission, **she would only be entitled to 16 months salary** which is RM29,920.00 based on her last drawn salary of RM1,870.00. (emphasis added)

[81]In the Court of Appeal case of *Zakiah Bte Ishak v Majlis Daerah Hulu Selangor Darul Ehsan* [2005] 6 MLJ 517 at p 521 it was observed as follows in a claim based on breach of contract of employment where a notice period for termination is provided for:

8.....it is clear that the appellant was offered the post on a one year contract **subject to the right of either party to terminate the same by giving the other the requisite notice or in lieu thereof one month s salary**. The appellant accepted the offer on those terms. She cannot now complain. The premise upon which the respondent decided to terminate her contract is strictly a matter for the respondent. It is not open to the appellant to question the motive of the respondent. In this case it is clear that the appellant s service with the respondent was terminated; she was not dismissed as contended by learned counsel for the appellant. Therefore, she need not be given a right of hearing to exculpate herself. (emphasis added)

Further at p 524 it was held as follows:

[82] 17 The final point raised herein is that the notice was defective because nowhere in

the contract is it stated that her services could be terminated on a 24 hour notice. By giving her such a notice the respondent had acted in breach of the contract. It is true that the contract contains no such provision. However, **the contract does provide for three months notice of termination or in lieu of such notice the appellant be paid one month s salary. The appellant was paid one month s salary, therefore, she may be given such shorter notice than the three months as stipulated in the contract. A 24 hour notice, in our view, would suffice**. (emphasis added)

[83]Where there is no notice period provided for the employer to terminate a contract of employment, the Court in a civil claim for damages for breach of a contract would imply a reasonable notice period based on the nature of the contract and the circumstances of the case. In *Koperasi Pos Nasional v Hafsah bte Mohd Tahir* [2002] 6 MLJ 691 at pages 701 703, the High Court explained as follows:

> The crucial issue on which the arbitrator erred is as follows: **where the notice period to dismiss an employee is not stipulated then a period of reasonable notice cannot be inferred from within the clause is an error of law on the face because it is a principle of law, which the law does not countenance. In short, the arbitrator should have proceeded to hold that the applicant can terminate the services of the respondent by giving reasonable notice in the absence of a specific provision in the agreement providing for such termination with notice**. The arbitrator correctly held that he cannot apply principles applicable to that of the Industrial Court which comes under the purview of the Industrial Relations Act 1967. He correctly applied the dicta of the Court of Appeal in the case of *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal* [1996] 1 MLJ 481. The arbitrator however failed to appreciate that part of the judgment in full. Gopal Sri Ram JCA, in delivering the leading judgment of the court, made the very important point in his judgment, at p 508 which the arbitrator did not take into account and that is as follows:
>
> > The former s 20 conferred upon the Minister a discretion whether to refer the complaint of a non-union workman to the Industrial Court. Once referred, the Industrial Court could hear and adjudicate on the claim. If it came to the conclusion that there had been a dismissal which was without just cause or excuse, it could direct reinstatement a remedy, as earlier observed, not readily available in the ordinary courts. Or, **it could order the payment of reasonable compensation, which in monetary terms may, and often does, far exceed the meagre damages for breach of a contract of service recoverable at common law**.
>
> This dicta emphasizes that **reasonable compensation is conferred by statute to the Industrial Court and is not applicable to any court**. In the case of *Aetna Universal Insurance Sdn Bhd v Ooi Meng Sua* [2001] 3 MLJ 502, the Court of Appeal restated this principle. In delivering judgment of the court, Gopal Sri Ram JCA, held at p 504 as follows:
>
> > We are here concerned with the position at common law. It is materially different from industrial law. In industrial law, for example, a workman may obtain specific performance of his contract of employment through an order of reinstatement. But the common law and the ordinary rules of equity working in tandem do not provide such relief, save in the rarest of cases. See *Francis v Municipal Councilors of Kuala Lumpur* [1962] MLJ 407.
>
> The common law governing the relationship of master and servant is clear. It is contained in the following propositions:

(1) A master is entitled to summarily dismiss his servant at any time, notwithstanding any contractual provision requiring the giving of notice of termination:

(2) If a dismissal is challenged, the burden is on the master to justify it: *SR Fox v Ek Liong Hin Ltd* [1957] MLJ 1.

(3) If the master fails to justify the dismissal, then he must pay the servant such damages as are just in lieu of proper notice.

In the light of the above, **I am of the conclusion that damages in a situation such as that in our case, must be limited to salary in lieu of proper notice**.

The arbitrator, however, did not deal with the issues in the award. **The arbitrator has a misconceived view that since there was no mention of the applicant s right to terminate the respondent s services with proper notice in the agreement, he is of the opinion that no notice period should be implied**. This finding is clearly against the law. In the case of *Quek Chek Yen v Majlis Daerah Kulai* [1986] 2 MLJ 290, Hashim Yeop A Sani SCJ (as he then was) in delivering judgment of Supreme Court held at pp 293 294 stated as follows:

> the only question left to be considered is whether the one month s notice given to the appellant is adequate notice. The appellant had served the Local Council for more than 19 years. In the matter of termination of employment under a contract of service it has generally been accepted that the higher the position held by the employee and the bigger is the salary the longer would be the notice required to put an end to the contract of service. Gill J (as he then was) decided that three months notice in the case of an estate clerk with five to eight years service would be adequate *D Cruz v Seafield Amalgamated Rubber Co Ltd* [1963] MLJ 154. In *Francis v Municipal Councillors of Kuala Lumpur* [1962] MLJ 407, the Court of Appeal decided that the notice should be three months for an employee of seven years service. In *Chiam Heng Hsien v Jurong Town Corporation* [1986] 1 MLJ 121, the plaintiff was employed as an executive officer by the corporation and was confirmed in June 1972. In June 1976 it was found that he was in breach of certain provisions in the Jurong Town Corporation s Terms and Conditions of Service for taking up part-time employment elsewhere. After an enquiry, he was found guilty of the charges and his service was terminated. He then filed a suit in the High Court for a declaration that he was still in the employment of the defendant corporation and entitled to be remunerated as such. Alternatively, he claimed for damages for wrongful dismissal. His claim for the declaration was dismissed but the trial judge held that in regard to the circumstances of the case the proper sum to award would be three months salary.

In the light of the above, it can be seen that t**he Supreme Court clearly stated that despite the lack of any notice provision in the contract of employment to allow the employer to terminate the contract with notice, there can be a reasonable period of notice invoked**. In the case of *D Cruz v Seafield Amalgamated Rubber Co Ltd* [1963] MLJ 154, Gill J, applied this principle and held at pp 156 157 as follows:

> The case of *Payzu v Hannaford* (1918) 2 KB 348 is an authority for the proposition that where there is a contract of hiring of a workman and nothing is said on either side as to any notice to be given to determine the contract, it is an implied term of the contract that it can be terminated only by either party giving a reasonable notice.
>
> Where the parties have not declared their intention as to notice, then the notice will be such as custom or usage prescribes provided of course the custom or usage was known to the parties at the time when the contract was made. The custom must be general and uniform, certain and reasonable in its terms, of reasonable antiquity and so notorious that persons would contract on the basis of its existence: see *Foxall v International Land Credit Co* (1867) 16 LT 637. All these are questions of fact which must be proved by evidence although the courts will take judicial notice of a custom which is well established in the courts. Thus, there is a well established and judicially noticed custom in England that a domestic servant can be dismissed at any time by a month s notice or by the payment by the master of a month s wages in lieu of notice, although in this country only 14 days notice is

required as provided by Section 57 of the Employment Ordinance, 1956.

In the absence of any declared intention of the parties or custom, a contract of service can only be terminated by a reasonable notice. Halsbury s Laws of England (3rd Ed) Vol 25 at p 490, para 945, states the position as follows:

> If no custom or stipulation as to notice exists, and if the contract of service is not one which can be regarded as a yearly hiring, the service is terminable by reasonable notice. If a servant is taken into employment subject to the drawing-up of a written contract of service which is never in fact drawn up, there is contract of employment for an unspecified period which is terminable by reasonable notice.
>
> Indeed, custom and reasonable notice are closely lined to each other in the sense that what is customary is reasonable and that the law will not recognise an unreasonable custom. Thus, it is for the court to say what length of notice is reasonable in any given case. Evidence adduced to prove custom which is not sufficiently strong to prove its universal acceptance may be excellent evidence upon which the court may gauge what is reasonable, but each case must depend upon its own particular facts.

In the circumstances, **the arbitrator should have applied a reasonable notice period and not given backwages as he has done because by so doing, he had acted on a basis where the law does not allow him to do**. Backwages is a remedy only conferred to the Industrial Court.... (emphasis added)

[84]This contract of employment is one where in its rudimentary form the period of notice of termination item 10 was once proposed to be 6-month notice from either side but that proposed term had been cancelled out by a handwritten crossing drawn over it as can be seen at page 14 of Exhibit P1, the report of the handwriting expert. The plaintiff accepts the fact that there is no termination notice period in his employment. There is also no retirement age set in his contract of employment. The Minimum Retirement Age Act 2012 (MRAA) which came into force on 1 July 2013 expressly provides as follows in s 4(1):

> 4. Minimum retirement age
>
> (1) Notwithstanding any other written law, the minimum retirement age of an employee shall be upon the employee attaining the age of sixty years.

[85]The plaintiff was past the minimum retirement age of 60 years old when he decided to

accept the breach on the part of the defendant. To be more precise he was already 62; his date of birth being on 11 June 1951. He left the employment in midJuly 2013 and the MRAA had come into effect on 1 July 2013. By no means is it suggested that if a contract of employment does not have a retirement age stipulated, then upon the coming into force of the MRAA, the retirement age of 60 would apply, for if that be the case, then people like the plaintiff as an employee would have to immediately stop work. It is however true that the employee cannot be expected to work until he goes the way of all the earth. In such a situation either the employer or employee may be at liberty to give a reasonable notice to the other to terminate the employment contract, consistent with the jurisprudence on termination of a contract of employment by giving a reasonable notice period where none has been expressly provided for.

[86]In the circumstance a 3-month salary in lieu of the notice period would be fair compensation in that had the defendant terminated the employment of the plaintiff with a reasonable notice period, the defendant would have expected to serve a 3-month notice of termination of his employment. Though such a termination without assigning any reason therefore may be challenged in the Industrial Court, for a termination under contract and a claim for damages in a Civil Court, one is confined to whether a reasonable notice has been served on the party whose contract is sought to be terminated.

[87]I therefore assessed damages by ordering a 3-month salary in lieu of notice as damages based on his last drawn salary as follows: SGD 8,300.00 X 2.4 (being the contractually agreed exchange rate) X 3.

Whether the Plaintiff s claims for traveling, accommodation and entertainment are correctly made and proved

[88]There is the claim for travelling expenses, accommodation and entertainment. But the evidence showed that all these were incurred when the Plaintiff was being paid from Starship Spore. That was from the period of 2000 2010. The total claims under this head was for the sum of SGD 138,177.98 and RM137,177.93. All claims should rightly have been made to Starship Spore as his salary was being paid from there. For all practical purposes, that was the contractual arrangement between the parties during that period of time. There was no evidence introduced by the plaintiff to show that such claims during that period of time were paid from the defendant. On the contrary, the plaintiff had made claims for accommodation, petrol, food, air tickets, commission claims and expenses reimbursements for the period from 1996 to 2007 from Starship Singapore and those claims were paid and reimbursed by Starship Singapore to the plaintiff as can be seen in

the documents from pages 162 186 of Bundle C.

[89]DW 2 Miss Maria, the accountant of the defendant based in Port Klang from 2001 to 2015, confirmed that no such claims for travelling expenses, accommodation and entertainment had been submitted by the plaintiff to the defendant. She further clarified that any claims forms filled up by the plaintiff would have come to her if it had been submitted for payment by the defendant.

[90]Whatever was the contractual arrangement with respect to his employment, there is sufficient justification that the company against whom such claims should be made is Starship Spore that paid his salary.

[91]There is the problem of the claim being statute barred as more than 6 years have lapsed since the date the expenses were incurred as provided under s 6(1)(a) of the Limitation Act 1953. This is after all a claim in contract and the cause of action would arise from the date the claim is incurred. As there were numerous correspondence between the parties on a range of matters on the office work, one would have expected some reminders sent to the defendant on these long-outstanding claims. No emails have been produced on these claims.

[92]The plaintiff s reliance on the case of *Rizana Mohamad Daud v Naluri Corporation Bhd* [2013]1 CLJ 291 as setting the proposition that an employee may claim for the sums due to him upon his cessation from employment and that time starts to run from then where limitation is concerned, is misplaced. Justice V T Singham had held as follows in that case at pages 312 314:

> On the issue of limitation, this court finds that:
>
> (i) The compensation payable to the plaintiff under cl. 18 of the contract of employment would only arise upon cessation of employment as the head of the Legal/Corporate Secretarial which is after 14 April 2005 and not upon the date of the notice of termination dated 14 January 2005.
>
> (ii) The cessation of employment would only arise when the plaintiff is no longer permanently and physically present in the employment of the defendant and upon completion of the three months notice of termination and when the plaintiff is no longer paid her salary.
>
> (iii) By her letter dated 14 January 2005, the plaintiff has stated that she had exercised her right by giving three months notice of termination to resign from the employment as provided in cl. 18 of the contractor employment where it is stated that the employment may be terminated by either party giving three months notice and that the plaintiff would cease to be employed by the defendant on 14 April 2005.

(vi) The defendant did not also deny the plaintiff s entitlement for the compensation when the notice of termination was accepted by the defendant with the remark regrets and wish her success and happiness in the future undertakings . In fact, the defendant had unreservedly accepted the plaintiff s notice of termination of the contract of employment when she tendered her resignation by the notice of termination dated 14 January 2005 and the plaintiff had reminded the defendant to fulfill its obligations under the terms of her employment.

(vii) The plaintiff s claim which was filed in court on 6 April 2011 is not time-barred as the plaintiff is entitled to claim the compensation and she has filed this claim within the period of six years as permitted under the Limitation Act 1953.

> The law of limitation is based on public policy fixing a life span for legal remedy for the purpose of general welfare. It is pointed out that the rules of limitation are not meant to destroy the rights of the parties but are meant to see that the parties do not resort to dilatory tactics but seek their remedy promptly and the law of limitation fixes a life span for legal injury suffered and that is enshrined in the maxim interest reipublicae ut sit finis litium ie, it is for the general welfare that a period be put to litigation and that it is not meant to destroy the rights of the parties but they are meant to see that the party do not resort to dilatory tactics but seek their remedy promptly because the idea is that every legal remedy must be alive for legislatively fixed period of time. (*N Balakrishnan v MA Krishnamurthy* (1998) 7 SCC 123).

[93]As can be seen, the above was a case where the employee s agreed compensation would be due to her upon her cessation of employment. The Court had held that time only started to run where limitation is concerned not from the date she gave notice of termination of employment but from the date of physical cessation of employment after having served out the notice period, and rightly so.

[94]The plaintiff said that the documents are all with the defendant together with the claims forms submitted. If that be so, then the plaintiff should have applied for discovery of the said documents before proceeding to trial under O 24 r 7 of the Rules of Court 2012 (ROC). However that had not been done. One would have expected some particulars to be stated to substantiate the claims for travelling and accommodation as in for what meetings and with who and for what assignments.

[95]There is also similarly lacking the details that one would expect with respect to entertainment; who one has entertained for example.

[96]I am mindful too of section 167(2) of the Companies Act 1965 which only requires a company to keep its records for seven years:

> The company shall retain the records referred to in subsection (1) for seven years after the completion of the transactions or operations to which they respectively relate.

[97]There is the corresponding impossibility of the defendant verifying independently such dated claims incurred supposedly on behalf of the defendant company.

[98]Based on that and also on the fact that contractually the party to pay the claims is Starship Singapore, I would regretfully have to dismiss the claim for arrears of accommodation, airfares and entertainment which in any event have not been sufficiently and satisfactorily proved on a balance of probabilities to have been validly incurred on behalf of the Defendant.

[99]The claims being such a dated one and indeed statute-barred by limitation, there is the corresponding lack of particulars to substantiate the basis of the claims as having being incurred on behalf the company other than the plaintiff s I say so kind of evidence, I had no alternative but to dismiss this head of claims.

Whether the Plaintiff is entitled to 5% of the Settlement Sum of USD 2.1 million in a Kuala Lumpur High Court Winding-Up Petition which is approximately USD350,000.00 amounting to SGD455,000.00

[100]There is next the 5% promised payment to him orally made, alleged by the plaintiff as coming from Mr Benedict Ng. The 5% is based on the settlement sum of a case which the plaintiff said he played a key role in negotiating the settlement. The sum settled was USD 2.1 million. That worked out, according to the plaintiff, to about USD 350,000.00 or about SGD 455,000.00 (based on 1 USD = SGD 1.3) claimed as accrued profits payable from the year 1996 to 2012, i.e. value of shares in the year 2005.

[101]Surely for such a claim there must be some iota of written evidence substantiating the allegation. The parties are in the habit of emailing each other on matters affecting them both; here the plaintiff cannot point to any written evidence other than an allegation that it had been orally agreed.

[102]The plaintiff could of course have subpoenaed Ms Teh Lay Kheng , the counsel for the defendant, who he said was privy to this oral agreement, but he had chosen not to call her as a witness. He had not issued any subpoena to call her as a witness. Without any corroboration, I am in no position to find that there was such an oral agreement.

[103]Further such a promise to pay the plaintiff was pleaded in paragraph 16 of the statement of claim as having been made by Mr Benedict Ng as the 2nd defendant in the Suit when in fact before this trial, the action against the 2nd defendant had been struck out and there had been no appeal. The plaintiff thereafter had not amended the statement of claim to explicitly state that the agreement to pay was made by Mr Benedict Ng, the managing director representing the 1st defendant which had become the only defendant after the suit against the 2nd defendant had been struck out. The pleading for this claim is ambiguous and vague.

[104]In the overall circumstance of the case, I would hold that this claim has not been proved on a balance of probabilities.

Whether the Plaintiff is entitled to a claim of a month s bonus for every year of service

[105]It is clear here that bonus is not a contractual term of the contract of employment. The plaintiff had claimed bonuses for a minimum period of 12 years of service based on the sum of SGD8,300.00 per month for a year of service.

[106]This Court cannot substitute its discretion for that of the defendant as the plaintiff s employer.

[107]It may be that generally other staff would be rewarded with a month s salary for bonus but the plaintiff is different from other staff and enjoyed different terms of employment as an executive director wearing the hat too of the Group Financial Controller and Senior Administrative Manager.

[108]The **Halsbury s Law of Malaysia [2003 Reissue] Volume 7 [120.104]** has this helpful statement of the law here:

> most contracts of employment are terminable by notice so that the employee is entitled to recover only the amount of remuneration during the notice period. That remuneration includes wages or salary, including a reasonable amount of any variable such as commission, loss of a vehicle and other fringe benefits and loss of pension rights. Any additional sums, such as extra payments, **bonus** or tips and gratuities, **are recoverable only if contractually binding. So that discretionary amounts are not recoverable even if the employee was in fact likely to have received them** (emphasis added)

[109]It may even be a case where the defendant had chosen to be generous to the other staff where bonus is concerned but the plaintiff would have no cause for complaint.

[110]Long ago a story was told of a master who had a vineyard. He had negotiated with some workers their day s wage to work in his field at harvest time. Later in the day there were others standing in the marketplace doing nothing. They were enlisted without any negotiation on their wages. In fact the master merely said he would pay them whatever is right. At the end of the day the master paid all the same wage of a denarius and the cry of those who had been engaged earlier to work was that it was not fair for they had borne the burden of the work and the heat of the day! The master s reply was simple yet profound: I am not being unfair to you, friend. Didn t you agree to work for a denarius? Take your pay and go. I want to give the one who was hired last the same as I gave you. Don t I have the right to do what I want with my own money? Or are you envious because I am generous?

[111]I can accept that part of the evidence in the witness statement of Mr Benedict Ng which was not contradicted by the plaintiff in his answer to question 24 of DW1 WS 1 as follows:

> Q 24 What are these documents in p 145 to 147 Volume 2 Common Bundle (Bundle C) and why did you include this letter in this trial?
>
> A: This is the loan request of SGD100,000 from Starship Singapore to purchase a property in Singapore. In addition, at the request of the plaintiff, I had personally loaned to him SGD80,000 to assist the plaintiff to pay for his children s tertiary education. All these monies were not returned by the plaintiff to me. The reason I say this in court today and I adduced these documents is to show the close friendship between the plaintiff and I....

[112]These documents are by consent Part B documents and the plaintiff have not challenged the authenticity of these documents.

[113]The evidence of Mr Benedict Ng was that the plaintiff had enjoyed other perks that the other staff did not have. The defendant has denied that there was a so-called oral term on bonus that Mr Benedict Ng had promised him.

[114]Indeed the so-called oral term of a month s bonus for every year of service was not listed by the plaintiff in his Witness Statement PW 3 WS in Answer to Question 12.

[115]The claim for bonus was thus dismissed.

Pronouncement

[116]I had thus allowed only partially the claim for damages for breach of the employment contract by the defendant based on 3 months salaries and the claim for arrears of salaries not paid for 6.5 months.

[117]The sum of S$8,300 X 2.4 X (6.5 months + 3 months) = RM189,240.00 shall carry interest at the rate 5% per annum from date 16 July 2013 (a day after the plaintiff stopped work) to date of payment.

[118]After hearing submissions on costs, the Court ordered the defendant to pay the plaintiff the sum of RM30,000.00 as costs.

Postscript

[119]I can see that there is simmering discontent perhaps not unlike that brought by the other directors and shareholders in Kuala Lumpur High Court Petition No. D1-26-49-2005 between *Wong Sin Keong and Anor v Starship Agencies Sdn Bhd and 5 Ors* . The petition was under s 181 of the Companies Act 1965 for oppression of the minority shareholders on the defendant. The matter was settled for a sum of USD2.1 million. The Petitioners there transferred their shares to Mr Benedict Ng in consideration of the settlement sum. The plaintiff s complaint of being constrained if not compelled as a director to sign documents that he believed were irregular financial transactions, his complaint of the defendant not declaring dividends in spite of making profits, his denial of access to the defendant company s documents and financial records and bank statements, and what he perceived as the dilution of his shareholding in the defendant from 5% to 2.5% without service of a proper notice, all smack of a possible case of oppression which the plaintiff is at liberty to launch after this suit.

[120]The plaintiff is also caught in a bind where he cannot effectively resign as a director as there are now only 2 directors in the defendant company. Any resignation as a director that leaves the number of directors in the company to below 2, would be invalid under s 122(6) of the Companies Act 1965.

[121]This Court cannot give in a civil suit for breach of a contract of employment the remedies more appropriate and indeed reserved for a section 181 oppression petition under

the of the Companies Act 1965.

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