BEH KEANG YU @ BAIK KEANG YU v FAIRTRIO MARKETING SDN.BHD [2006] ILJU 69

Industrial Law Journal Unreported (ILJU)

INDUSTRIAL COURT (KUALA LUMPUR)

DATO' AHMADI BIN HAJI ASNAWI

CASE NO 19/4-23/99 1274 OF 2006

19 July 2006

Encik G.Kalidas(Tetuan K.Nadarajah & Partners);Encik Mohan Singh(Tetuan ***David Gurupatham*** & Kaoy)

AWARD

THIS MATTER was referred to court by way of a ministerial reference for an award under *section 20(3)* of the *Industrial Relations Act, 1967* (hereinafter referred to as "the Act") on 18th December 1998. It arose out of the alleged dismissal of Encik Beh Keang Yu @ Baik Keang Yu (hereinafter referred to as "the Claimant") by Fairtrio Marketing Sdn Bhd (hereinafter referred to as "the Company") on 18th December 1998.

The Claimant was one of the founders and subscribers of shares of the Company incorporated in 1994, through his nominee, his brother-in-law, one Khor Yong Hong. As the Claimant's nominee Khor Yong Hong also sat on the Company's board of directors (hereinafter referred to as "the BOD") as one of the directors. The other 2 founders and shareholders are COW-1 and Lim Han Woo, a Singaporean. All 3 of them held 1/3 share each of the Company's total 75,000 ordinary shares of RM1.00 each.

On 1.5.1996, Khor Yong Hong resigned his directorship and the Claimant was appointed as director in his stead on the same day. The shares previously held by Khor Yong Hong was subsequently transferred to the Claimant on 7.4.1997.

Pursuant to a director's resolution made under Article 90 of the Company's Articles of Association (hereinafter referred to as "Company's A.A"), the Claimant was appointed as the Company's managing director (hereinafter referred to as "MD") effective 18.3.1997. By the same resolution COW-1 was appointed as the Company's executive director (hereinafter referred to as "ED").

On grounds of breach of fiduciary duty as MD and conduct amounting to criminal breach of trust and/or dealings to the detriment of the Company and the shareholders, the directors' meetings on 22.12.1997 and 2.1.1998 as per exhibits marked CO-2 and CO-3 respectively attached to the Company's Statement in Reply, resolved to remove the Claimant as the MD of the Company and that his appointment as MD be revoked pursuant to Article 91 of the Company's A.A effective 2.1.1998. The Claimant ceased to be the Company's MD therefrom.

The Claimant contends that his removal as MD of the Company by the BOD resolution amounted to a dismissal without any just cause or excuse orchestrated by COW-1 and Lim Han Woo to get rid of him on account of his refusal to accede to the unreasonable requests and actions of the said Lim Han Woo.

On the other hand the Company avers that the Claimant was not dismissed but was removed as the MD on grounds enumerated in the directors' resolutions and that the said removal was carried out in accordance with the

provisions of the *Companies Act, 1965* and the A.A of the Company, which is purely a matter for the internal management of the Company.

On the facts, in my view, the primary issue for determination in this reference is whether in all the circumstances of the case, the Claimant is a workman within the definition of the Act and thence from to allow him to seek and have recourse under *section 20* of the same to address his difficulties.

It is trite that the burden is upon the Company to prove on a balance of probabilities that the Claimant is not a workman under the Act - see *Syarikat 3M Malaysia Sdn Bhd v Nik Kamaruddin bin Ismail (1990) 1 MLJ 365*.

Section 2 of the Act provides that "workman" means any person, including an apprentice, employed by an employer under a contract of employment to work for hire or reward and for the purposes of any proceedings in relation to a trade dispute includes any such person who has been dismissed, discharged or retrenched in connection with or as a consequence of that dispute or whose dismissal, discharge or retrenchment has led to that dispute.

In *Dr. A. Dutt v Assunta Hospital (1981) 1 MLJ 304* at page 310 Chang Ming Tat FJ said -

> " As for the determination whether Dr. Dutt was or was not a workman within the Act, we have, in an earlier decision *Assunta v Dr. A. Dutt* , said that the question is a mixed question of fact and law and it is for the Industrial Court to determine this question. The fact is the ascertainment of the relevant conduct of the parties under their contract of service and the inference proper to be drawn therefrom as to the terms of the contract and the question of law, once the terms have been ascertained, is the classification of the contract for services or for service…"

The Federal Court in *Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia & Anor* (1995) 3 MLJ 389 held that the test to ascertain whether one is a workman or otherwise is -

> " In our judgement, the correct test to be applied in determining whether the Claimant is a workman under the Act is that enunciated by Chang Min Tat FJ in *Dr. A. Dutt v Assunta Hospital (1981) 1 MLJ 304* at page 311. We accordingly hold that a workman under the Act is one who is engaged under a contract of service. An independent contractor who is engaged under a contract for services is not a workman under the Act. We take this view because it provides, as earlier observed, for a flexible approach to the determination of the question. It is fairly plain to see why flexibility is achieved by having resort to this test.
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> **In all cases where it becomes necessary to determine whether a contract is one of service or for services, the degree of control which an employee exercises over a claimant is an important factor, although it may not be the sole criterion. The contract between the parties must, therefore, first be ascertained. Where this is in writing, the task is to interpret its terms in order to determine the nature of the later's duties and functions. Where it is not then its terms must be established and construed. But in the vast majority of cases there are facts which go to show the nature, degree and extent of control. This include, but are not confined, to the conduct of the parties at all relevant times. Their determination is a question of fact. When all the features of engagement have been identified, it becomes necessary to determine whether the contract falls into one category or the other, that is to say, whether it is a contract of service or a contract for services.**
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> **There is not a single satisfactory test that is available for the determination of the issue…**
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> We approve the approach taken by Eusoff Chin J (now Chief Justice) in *Syarikat 3M Malaysia Sdn Bhd v Nik Kamaruddin bin Ismail (1990) 1 MLJ 365* where he said (at page 366) -
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> **" I am incline to think that the Industrial Court was not concerned with nomenclature or position held by the Claimant, but was concerned to get the truth of the Claimant's duties and functions in the Company. In this case in order to determine whether the Claimant was or was not a workman, the Industrial Court had heard oral evidence, and perused documents submitted to it and, come to the conclusion that from the duties and functions performed by the Claimant, he could not be said to be the mind and brain of the Company. A figure head director who merely signs documents as directed by the Company's board of directors certainly cannot be said to be a part of the brain and mind of the Company."**

> **The reference to the need to have been the brain or controlling mind of a company in the passage cited was necessary by reason of the decision in Inchcape which constitute binding precedent. That aside, the importance of the passage cited lies in the approach suggested by the learned Chief Justice, namely, on examination of the functions of the Claimant."**

The decision in *Inchcape Malaysia Holdings Bhd v RB Gray & Anor* was formally overruled by the Federal Court in *Kathiravellu Ganesan & Anor v Kojasa Holdings Bhd* (1997) 3 CLJ 777 where the court pronounced that **Inchcape** was wrongly decided and is no longer good law.

In *John Hancock Life Insurance (M) Bhd v Menteri Sumber Manusia Malaysia & Ors* *(2004) 3 MLJ 227*, the learned judge held that -

> " The first respondent minister has purportedly referred to the "control" test set out in the Federal Court decision of *Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia & Anor* *(1995) 3 MLJ 369*, in determining the issue of whether a person is a "workman" under *S20* of the Act and as defined under the Act. It would appear that the first respondent minister has taken the "control" test as the sole and exclusive test in seeking to determine the "workman" issue. This is incorrect since the Federal Court in Hoh Kiang Ngan itself recognised that the control test is "an important factor although it may not be the sole criterion. In this regard, the Federal Court emphasised it is necessary to determine "all features of the engagement" in determining whether a person is a workman or not i.e. to consider all relevant circumstances and factors of the engagement and not merely the terms of the contract..... It is further shown that the first respondent minister has misapplied the control test set out in Hoh Kiang Ngan. In particular it would be noted that the "control" in Hoh Kiang Ngan referred specifically to the nature, degree and extent of control in which the job functions are carried out and not merely to a general reporting/approval functions (such as to the board of directors, as in the present case) on a periodic basis. Such general reporting/approval on a periodic basis does not constitute "control", as envisaged in the decision of Hoh Kiang Ngan. If the test in Hoh Kiang Ngan is properly applied, all features of the engagement must be considered.

To surmise, from the authorities referred to aforesaid it is apparent that in order to determine whether one is a workman or not under the Act, it is pertinent to consider all relevant factors and circumstances including but not confined to whether he is engaged under a contract of service or for services, the nature, degree and extend of control which the company exercises over an employee, his functions and duties, the intention of the parties at the material time, the conduct of the parties at the relevant time, whether he was or was part of the brain and mind of company and all other features of the engagement defining and governing the relationship between the company and that person or employee. There is not a single satisfactory test to determine the issue and its determination is certainly a question of fact.

Having perused the facts and evidence and all the features of the engagement between the parties herein, it is my findings that the Claimant could not have been a workman within the definition of the Act and therefore he could not avail himself to the protection offered by *section 20* of the Act.

In the first place he was a founder member of the Company through his nominee, his brother-in-law, adverted to earlier, who was also holding shares on his behalf. The brother-in-law was also a member of the Company's BOD. The directorship and share holding was later reverted to the Claimant. This much was never really challenged by the Claimant. This feature alone certainly goes a long way to show the Claimant's involvement in the Company from its inception.

The evidence further reveals that at the time of the Company's incorporation, the Claimant was employed full time as a business manager in Astar Marketing Sdn. Bhd. This perhaps explained the need to appoint his brother-in-law as his nominee upon the Company's incorporation for he was engaged full time elsewhere. While with Astar Marketing Sdn Bhd, the Claimant admitted that he even had the time to secretly divert business to the Company for his own benefit. At the opportune time he left Astar Marketing Sdn Bhd and firmly planted his roots quickly in the Company. In quick succession he became one of the directors of the Company, later as MD of the Company and finally had the ownership of the shares held by his nominee reverted or transferred back to him. It seems to me that he had all the liberty to come and go and dictate his own terms in the Company as desired by him. This privilege is certainly not a privilege normally exercisable by the humble workman. Additionally the scheme of events and the

prevailing general scenario aptly suggested that the Claimant's position could not have been described in any other designation but literally part and parcel of the alter-ego of the Company, the body of persons who would have been the brain and directing mind of the Company.

Now the Claimant claimed that upon joining the Company he was appointed as its business manager. He also claims that he was paid a monthly salary and made voluntary contributions to EPF. But he was not able to produce any letter of appointment or contract of employment appointing him to the said position, contrary to the Company's practice of issuing one, as shown in the appointment of his own witness Ooi Khean Hooi (CLW-3) vide contract of employment shown at pages 14 - 15 of CLB-4. Equally he was not able to produce or say what were his terms of employment and his functions, duties and limitations as the Company's business manager. The Claimant also testified that 2 months later he was promoted to become a director on account of his excellent performance. But again he was not able to substantiate his claim with any letter of his promotion. Nor were his duties, functions and limitations as a director ever delineated. The promotion of an employee is indeed a very important event. It carries with it greater powers, additional pay and perks and responsibilities. It is a formal occasion that requires a formal recognition and that it would be well documented. But the Claimant failed to produce a single document to show that he was promoted to a new position, carrying with it new responsibilities, pay, perks, powers, duties and functions.

The only logical inference that can be had from the Claimant's inability to produce the said documents is that there is no such appointment or promotion as claimed by the Claimant nor any letter or contract of employment or letter of promotion, for the Claimant was never an employee of the Company but the employer.

This evidence runs in tandem with COW-1's testimony, the Company's only other working director in charge of administration and finance, who testified that the Claimant as the Company's MD had all the powers to fully manage the Company, recruit and terminate its employees and formulate the Company's policies and directions. In that capacity he was never an employee of the Company. There is thus no need to appoint or promote himself.

The Claimant pleaded and also testified that he was appointed as the Company's MD by a resolution of the Company, as indicated by exhibit CL-3 attached to his SOC, passed in accordance with the Company's A.A (at pages 64 to 78 of COB-1). He was one of the directors who signed the resolution appointing himself as the MD of the Company. In my view this certainly cannot be the work of the humble workman and that it was never the intention of Company to designate him as an employee of the Company. The greater picture shows that he was one of those who called the shots in the Company, as evidenced by his own appointment as the Company's MD.

In the event I am in full agreement with the submission of the learned counsel for the Company that by virtue of the Claimant's appointment by way of a resolution and in the absence of any terms of employment, henceforth the Claimant's functions, duties, powers and responsibilities must necessarily lie in the Company's A.A, as expressly provided in Articles 73 to 78 of the same. He was exercising his duties, powers and functions pursuant to the Company's A.A. In that position he was one of those who could determine and formulate the directions and policies of the Company. His position was further fortified by the fact that he was also one of the substantial shareholders and a member of BOD of the Company who were collectively the directing minds and brains of the Company. Hence in *Law Yan Chai v Johore Mining & Stevedoring Co. Sdn Bhd* *(1997) 1 MLJ 776*, the learned judge after considering *Hoh Kiang Ngan's case* (supra) held as follows -

> " A person who represented the directing mind and will of the company, the very ego and the centre of the personality of the company, was not a workman within the meaning of *section 2* of the Act for he was being placed in a position to determine and formulate the company's policy .....
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> **On the facts of this case, the applicant was not a workman within the contemplation of the Act. The applicant when he was holding the position of managing director for the respondents was the brain and directing mind of the respondent. This disqualifies him from being a workman under the Act."**

On the facts, the Claimant's position in the Company was not much different from the position of the applicant in the above said case.

There can be no doubt that the Claimant did participated actively in the meetings of the Company.

The Claimant also testified that he was paid monthly salaries during his tenure as the MD of the Company. However, again he was unable to produce any salary slips or other documentary evidence to that effect. On the other hand, COW-1's testimony that the Claimant was not paid salaries but only director's remuneration was fully fortified by the payment vouchers shown in exhibit COB-17 to 27, which was casually referred to as salaries. I have no hesitation in accepting COW-1's testimony relating to the same and thus find as a fact that the Claimant was not paid salaries but only director's remuneration. It thus debunked his claim that he was the Company's workman for all intents and purposes.

I also have no hesitation in accepting COW-1's testimony who was incharge of the Company's admin and finance, that it was upon the Claimant's behest that EPF deductions and contributions were made and the Claimant's reasons for doing the same. In any event the factum of voluntary contribution of EPF does not suddenly reduce the position of the Claimant into that of a workman after having considered all the features of the Claimant's engagement with the Company. Management and BOD meetings as indicated in minutes of the meetings exhibited to the Claimant's Petition No. D6-26-14-1998 filed in the High Court in his attempt to seek reinstatement as MD or alternatively to wind-up the Company exhibited in exhibit COB-1 at pages 29 to 31, 32 to 34 and pages 82, 83, 88 - 89, 24 showed the full extend of the Claimant's role in running the affairs of the Company. There is no issue as to the admissibility of the statements found in the pleadings, the affidavits filed in support thereof and the exhibits exhibited therein in the said Petition and there is nothing in the law preventing the court from considering and taking the same into account to arrive at a just findings in this case presently.

Of course the Claimant now denies altogether the statements and exhibits in the said petition and owned it to the mistakes of his solicitors. However I find that the excuses given by the Claimant could not hold water. No attempts were made by the Claimant to correct those mistakes nor were any action taken against his solicitors for the said mistakes for which he had paid very dearly. Additionally the minutes of meetings indicating his active participation in the Company's affairs were not the creation of his solicitors, but minutes of meetings, prepared by the Company's own secretary. Is the Claimant also now blaming the Company's secretary for the purported errors in the said minutes?

The learned counsel for the Company poignantly pointed out the contents of a letter, exhibited in COB-2 at pages 297 to 298, issued by another firm of solicitors written upon the Claimant's instruction to the other 2 directors of the Company, the contents of which, in my view, firmly laid to rest the principal role played by the Claimant in the affairs of the Company, reproduced below for purposes of clarity -

> **" We are instructed by our client that our client is the shareholder of Fairtro Marketing Sdn. Bhd. (Fairtrio) holding 34% of the total paid up capital of Fairtrio and both of you respectively holding 33% each.**
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> **Fairtrio is like a partnership where all the partners/shareholders shall get involved in the operation of Fairtrio. As a result of this agreement, our client was on 18.3.1997 appointed as the Managing Director.…**
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> **Our client's interest in Fairtrio and the spirit of partnership are totally disregarded by both of you to our client's detriment…"**

It is a factual evidence accepted by both parties that the Claimant was removed from the position of MD of the Company by the meetings of the BOD held on 22.12.1997 and 21.1.1998 (see resolutions marked CO-2 and CO-3 attached to the Company's Statement in Reply. The Claimant himself attended both these meetings in his capacity as a director of the Company and he was given all the opportunity to have his say before its passing. Admittedly the resolutions to remove him from his position as MD were passed in accordance with the procedures of the Company as laid in the Company's A.A.

Much was said about this removal and the reasons behind his removal thereof. However, in my view it is not within the business of this court to enquire into this issue nor the veracity of the reasons for the removal nor the legality and propriety of the AGM and the decisions made thereunder. It is certainly a matter of company law and has nothing to do with an action arising under *section 20* of the *Industrial Relations Act 1967*, for it is trite that the removal of the MD or officers of the Company by shareholders, which is a different entity from the company, strictly

is done in the exercise of their shareholding rights under company law. Likewise, the same is equally the law in respect of the Claimant's removal as a director of the Company, initiated subsequently.

In *John Hancock Life Insurance (M) Bhd v Menteri Sumber Manusia, Malaysia & Ors* (supra) at page 17, the his Lordship stated -

> " *Section 20* of the said Act, on its express terms, empowers the Industrial Court to adjudicate a "dismissal" between an "employer" and "workman". The Industrial Court being a creature of statute, must act strictly within the powers expressly conferred upon it."
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> This section does not, on its express terms, entitle the Industrial Court to enquire into and adjudicate upon what is essentially an issue of company law, i.e. the rights of shareholders to remove a director (or officer of a company) and enquire into the basis or otherwise of such decision taken at such meeting of shareholders of a company. Such a removal by shareholders taken by way of resolution of a general meeting of a company cannot amount to a "dismissal" within the meaning of *section 20* of the said Act."

Additionally Article 91 of the Company's A.A stipulates that the appointment of the MD shall be automatically determined if he ceases from any cause to be a director. It was not in dispute that the Claimant was also subsequently removed as a director of the Company and lost his attempt for reinstatement in the High Court. In such situation the Claimant cannot now be reinstated as a the director of the Company against the wishes of the Company's shareholders. It follows through that the Claimant cannot also be reinstated to his former position as the Company's MD as he is no longer a director of the Company.

In conclusion, the Claimant owed his position as MD in the Company by virtue of his directorship in the Company which is closely intertwined with his shareholding interest in the Company, which at the time of his "dismissal" amounted to 34% of the same. He was a founder member of the Company and was and still is the single largest owner of the shareholding. In essence he was part of the Company. He was part of the body of persons controlling and running the Company. In the whole circumstances of the case the Claimant was certainly not a workman under the Act after the conduct and intention of the parties, the nature, degree and extend of control he exercised, his functions and duties and all other features of his engagement is put under close scrutiny. He was part and one of the numero-unos of all that he surveys.

For the reasons given I hereby dismissed the Claimant's claim without having to go into the merits of the case on account that he was not a workman within the definitions of the Act. He was beyond the reach and jurisdiction of *section 20(3)* of the Act. The Court is thus not seized with the powers and jurisdiction to entertain his claim.

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