

AGASTA CO LTD & ANOR v RINTIS MALAY MOTORS SDN BHD AND ANOTHER CASE

CaseAnalysis
| [2021] MLJU 1663

Agasta Co Ltd & Anor v Rintis Malay Motors Sdn Bhd and another case [2021] MLJU 1663

Malayan Law Journal Unreported

HIGH COURT (KUALA LUMPUR)

ONG CHEE KWAN JC

SUIT NOS WA-22NCC-132-03 OF 2019 AND WA-22NCC-412-09 OF 2018

29 August 2021

Cyndi Chow (Chiang Yi and Chin Kwan Vui with her) (Josephine, LK Chow & Co) in Suit No WA-22NCC-132-03 of 2019 for the plaintiffs.

Cyndi Chow (Chiang Yi and Chin Kwan Vui with her) (Josephine, LK Chow & Co) in Suit No WA-22NCC-412-09 of 2018 for the defendant.

Tabian Tahir (Mohd Amran with him) (Tabian Tahir & Co) in Suit No WA-22NCC-132-03 of 2019 for the defendant.

*Tabian Tahir (Mohd Amran with him) (Tabian Tahir & Co) in Suit No WA-22NCC-412-09 of 2018 for the plaintiff.
Chen Ket Chuin (Okabe Yamaguchi with him) supervising solicitor for the plaintiffs.*

Ong Chee Kwan JC:

GROUNDS OF JUDGMENT

Introduction

[1] This is my judgment after a full trial held via remote platform, on 5.7.2021, 6.7.2021 and 13.7.2021 in respect of Suit WA-22NCC- 132-03/2019 (**'Suit 132'**) and Suit No: WA-22NCC-412-09/2018 (**'Suit 412'**) which were heard together.

[2] The parties involved in Suit 132 and Suit 412 are Agasta Co. Ltd (**'Agasta'**), Nippon Export and Investment Insurance (**'NEXI'**) and Rintis Malay Motors Sdn. Bhd. (**'Rintis'**).

[3] Suit 412 was initially filed by Rintis against Agasta in 2018 in another Court. Pursuant to the Court Order dated 23.4.2019, Suit 412 was transferred to this Court to be heard together with Suit 132, which was an action filed by Agasta and NEXI against Rintis. In Suit 132, Rintis filed a counterclaim against Agasta which mirrors its claim in Suit 412, hence the reason for the 2 Suits to be heard together.

Background facts

[4] Agasta entered into Sales Contracts dated 20.7.2016 with Rintis to supply fifty-three (53) used and/or reconditioned vehicles (**'the Reconditioned Vehicles'**) to Rintis for a total sum of JPY 199,493,760 upon the terms and conditions stated therein which were signed and agreed upon by both parties (**'the Sales Contracts'**).

[5] It is not disputed that the Sales Contracts could not be fully performed and sometime on 27.7.2021, Agasta entered into an agreement with Rintis to reschedule the payment terms for the Sales Contracts (**'the Agreement'**).

Under the Agreement, Rintis was to make payment for the sum of JPY 170,195,760 by 24.9.2016 and the sum of JPY 29,298,000 by 26.9.2016 to the Agasta.

[6] The Sales Contracts and the Agreement expressly stipulated that in the event Rintis failed to pay Agasta for the sum of JPY 170,195,760 by 23.12.2016 and the sum of JPY 29,298,000 by 25.12.2016, credits of the Reconditioned Vehicles will be transferred to NEXI. More specifically, the said term under the Sales Contracts reads as follows:

"In case of RINTIS MALAY MOTORS SDN BHD failed to make payment in Seller's bank account by 150 days from the actually date of shipment, credit of following cars is transferred to Incorporated Administrative Agency, Nippon Export and Investment Insurance (NEXI)." (Pages 60 - 72 of B1)

Similarly, the Agreement contains a provision which reads as follows:

"In case of Buyer failed to make payment of JPY 170,195,760 in Seller's bank account by 23rd Dec 2016 and JPY 29,298,000 in Seller's bank account by 25th Dec 2016, credit of the 53 units is going to be transferred to Incorporated Administrative Agency, Nippon Export and Investment Insurance (NEXI)."

[7] NEXI is an insurance company. Because Rintis had delayed taking shipment or delivery of its orders under the Sales Contracts, Agasta had purchased several Export Credit Insurance for SMEs and AFF Sector Insurance Policy from NEXI (**'the Insurance Policies'**) to cover the risks that may arise from Rintis' default under the Sales Contracts and the Agreement. Pursuant to the Insurance Policies, Agasta had inserted as a term in the Agreement that the credits of the Reconditioned Vehicles will be transferred to NEXI in the event of Rintis' default in the payments.

[8] As it turned out, despite receiving the Reconditioned Vehicles on 13.8.2021, Rintis had failed, refused and or neglected to make the payments of JPY 199,493,760.00 to Agasta within the stipulated timeframe.

[9] Premised on Rintis's breach of the Agreement, Agasta proceeded to lodge its claim against NEXI to recover the losses. NEXI had accepted Agasta's claim and paid a sum of JPY 189,519,072 to Agasta on 10.10.2017 pursuant to the terms of the Insurance Policies.

[10] On the same day, Agasta issued a Letter of Subrogation dated 10.10.2017 (**'the Letter of Subrogation'**) to NEXI to acknowledge NEXI's payment for the sum of JPY 189,519,072 and contemporaneously Agasta had *'assigned, transferred and subrogated'* their rights equivalent to the paid amount and in respect of the claims under the Insurance Policies to NEXI.

[11] Thereafter, NEXI and Agasta jointly demanded from Rintis the sum of JPY 189,519,072 and JPY 9,975,688 respectively and commenced Suit 132 against Rintis in respect of the same.

[12] On the other hand, in Suit 412 and the Counterclaim in Suit 132 (**'the Counterclaim'**) Rintis is claiming that the Sales Contracts and the Agreement were entered by the Defendant under coercion and or by force and or by duress, rendering them voidable. Rintis claimed for damages against Agasta, amongst others, special damages in the sum of RM 5,221,000 and aggravated damages in the sum of RM 5,000,000.00.

[13] Rintis further claimed that NEXI, being a non-party to the Agreement, does not have any *locus standi* to sue Rintis.

Issues for determination

[14] The issues to be decided for this trial can be summarised as follows:-

- (a) Whether the Sales Contracts and the Agreement were entered under coercion and or by force and or by duress and thereby voidable?
- (b) Whether Rintis breached the Sales Contracts and the Agreement when it failed to make payment to settle the sum of JPY 199,493,760 for the fifty-three (53) Reconditioned Vehicles it received?
- (c) Whether NEXI has *locus standi* to bring the suit against the Rintis in its own name?

Court's Deliberation

[15] It is Rintis's pleaded case that the Sales Contracts and the Agreement were entered under coercion and or by force and or by duress and thereby voidable. Rintis claimed that they had suffered losses as a result thereof.

[16] The law is trite that he who asserts must prove. The burden of proof rests on the party who asserts the facts throughout the trial, while the burden of adducing evidence may shift from one party to the other. **Section 101 and 102 of Evidence Act 1950** read as follows:

Section 101 Burden of proof —

- (1) *Whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist.*
- (2) *When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.*

Section 102 On whom burden of proof lies –

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

[17] In *Yeohata Machineries Sdn Bhd & Anor v Coil Master Sdn Bhd & Ors* [2015] 6 MLJ 810, page 818, Vernon Ong JCA (as His Lordship then was held):

"[17] In law, the party who desires the court to give judgment in its favour as to any legal right or liability bears the burden of proof (s 101(1) of the Evidence Act 1950). The burden of proof on that party is twofold: (i) the burden of establishing a case; and (ii) the burden of introducing evidence. The burden of proof lies on the party throughout the trial. The standard of proof required of the plaintiff is on the balance of probabilities. The evidential burden of proof is only shifted to the other party once that party has discharged its burden of proof. If that party fails to discharge the original burden of proof, then the adverse party does not need to adduce any evidence..."

[18] Further, our former Chief Justice Tun Arifin Zakaria in the Federal Court case of *International Times & Ors v Leong Ho Yuen* [1980] 2 MLJ 86, page 87 also stated as follows:

"... According to sections 102 and 103 of the Evidence Act, if the party with whom this onus lies whether initially or subsequently as a result of its shifting does not give any or further evidence or gives evidence which is not sufficient, such party must fail."

[19] Applying **Section 101 and 102 of Evidence Act 19650** and the principle under the case of **Yeohata Machineries Sdn Bhd**, Rintis bears the burden to prove that there was coercion and or duress as pleaded when the Sales Contracts and the Agreement were entered into with Agasta.

[20] In the present case:

- (a) Rintis failed to call either Mr. Ronald Wong and or Mr. Chris Chen, who were Rintis' employees who had dealt with Agasta at all material times to give evidence in Court;
- (b) Rintis had not produced *any* evidence, let alone cogent and credible evidence to prove that the Sales Contracts and the Agreement was entered into under coercion and or by force and or by duress;
- (c) Rintis' sole witness, DW1 had resigned from Rintis on 30.6.2017. He did not have any personal knowledge at all in respect of the negotiation with Agasta on the Sales Contracts and the Agreement. Suit 412 was filed by Rintis on 19.9.2018 while Suit 132 was filed by Agasta and NEXI on 19.3.2019. Both occurred after the resignation of DW1 from the Defendant.

[21] Despite being the one and only witness for Rintis, DW1 admitted that he has no knowledge of Suit 412 and the Counterclaim during the cross-examination, which makes his evidence quite redundant and is of no value and assistance to Rintis' case. This is in line with the judgment delivered by David Wong CJ (as His Lordship then was) in the Federal Court case of *Majlis Peguam v Cecil Wilbert Mohanaraj Abraham* [2019] 5 MLJ 159, page 183 that the evidence given by a witness is of no value if the witness has no knowledge of the allegation made upon. It was held that:

"[61] As for the evidence of one Arulampalam Mariam Pillai, there is no value to it simply that he had no knowledge of the allegation made against the respondent.

[62] The same could be said of one Zulkifli Sulong who had interviewed Deepak Jaikishan (Deepak) wherein Deepak allegedly mentioned the respondent's name in regard of the preparation of SD2, but Deepak never came to testify before the DC. Hence, at best the evidence is hearsay as Zulkifli had said that he had no personal knowledge of the allegation against the respondent. Furthermore, there is merit in the complaint by learned counsel for the Respondent that the videotape produced before the DC was not the original but an edited version and there was no evidence by the editor of what was edited and was not edited. Hence to rely on such evidence would be wrong in law.

[63] As for the evidence of the remaining two witnesses from Harakah Daily, namely Mohd Nazri Abdullah and Majdan Yahya, their evidence is similar to that Zulkifli in that they are hearsay evidence.

[64] In regard of the evidence of Sivarasa Rasiah who had acted for Deepak to file a suit against Datuk Seri Najib where in the statement of claim Deepak had pleaded that the respondent had drafted SD2. But this suit had been settled and the suit was withdrawn. Also, Sivarasa had testified that he had no personal knowledge, hence his evidence is also of no value to the allegation made against the respondent."

[22] Agasta's claim against Rintis is premised upon the non-payment of goods sold and delivered and upon a breach of contract for:-

- (i) non-payment of Reconditioned Vehicles, amounting to the total sum of JPY 199,493,760, sold and delivered to Rintis under the Sales Contracts; and
- (ii) non-compliance with the repayment schedule stated in the Agreement.

[23] Due to Rintis's breach of contract, Agasta suffered losses in the sum of JPY 199,493,760. Agasta then proceeded to make the insurance claims against NEXI under the Insurance Policies. In this regard, PW3 testified that NEXI had paid out the insurance claims for the sum of JPY 189,519,072, which is 95% of the insured sum. This was what PW 3 said:

DC: We go straight to the notification of payment at page 201, Bundle B1. The one I am sharing on the screen right now. Do you agree with me this is the notification of payment from NEXI to Agasta for the payment dated 10.10.2017?

PW3: Yes, I agree.

DC: Do you agree with me that this payment was made based on the subrogation just now that your mentioned?

PW3: To be more accurate, insurance payment is to be made based on the insurance claim made by client. This payment we made to Agasta was made based on the claim made by Agasta.

DC: In this document, do you agree with me the loss stated was 199,493,760?

PW3: Yes.

DC: Do you agree that the total payment amount was only 189,519,072?

PW3: Yes, I confirmed that.

DC: Do you agree with me that the total payment of 189,519,072 is not the payment of the whole of the loss sustained by Agasta, which are 199,493,760?

PW3: I agree.

(Notes of Proceedings, page 50)

[24] It is undisputed that the Reconditioned Vehicles were delivered to Rintis and that no payment had been made to Agasta as agreed.

[25] The only defence put forward by Rintis is that the Sales Contracts and the Agreement are voidable as they were entered under coercion and/or by force and/or by duress. However, Rintis has failed to adduce any credible evidence to establish its claims of coercion or duress. Accordingly, premised on the agreed fact that the Reconditioned Vehicles were in fact sold and delivered and unpaid, it is my judgment that Agasta has shown on a balance of probabilities that Rintis had breached the Sales Contracts and the Agreement and is liable for payment of the full sum due and owing thereunder.

[26] Learned counsel for Rintis however contended that NEXI, being a *non-party* to the Agreement, does not have any *locus standi* to initiate Suit 132 against Rintis. More specifically, it is contended that in Suit 132, what was pleaded as the basis for NEXI's claim is that of subrogation. Learned counsel for Rintis submitted that NEXI as the insurer has no cause of action of his own and referred to the following authorities.

[27] In *Kementerian Pertahanan Malaysia & Anor v. Malaysian International Ship[ping Corp Bhd & Ors* [\[2007\] 5 MLJ 393](#), Zaleha Zahari JCA held as follows :-

"[7] In determining the issues in this appeal we took into consideration the following principles. 'Subrogation' is concerned with the mutual rights and liabilities of parties to a contract of insurance. Pursuant to a contract of insurance, where an insurer indemnifies an assured for a loss, he is entitled to 'stand in the shoes' of the assured and to receive the benefit of all of the rights and remedies which the assured may have against third parties in respect of such loss (Insurance Law in Australia, Kenneth Sutton; *Castellain v Preston* [1883] Vol IX QBD 380). This right is inherent in a contract of indemnity. It does not depend for its existence upon the occurrence of a loss under the policy but its exercise is of course dependent upon the payment of the loss. But as a right, it exists from the moment of the making of the contract of indemnity (see *State Government Insurance Office v Brisbane Stevedoring Pty Ltd* [1969] 123 CLR 228 at p 240, per Barwick C.J.).

[8] The cause of action in such cases at all times lies with the assured. Other than the assured, no one else can institute any remedy. As against the wrongdoer the insurer has no cause of action of his own (*Hobbs v Marlowe* [\[1978\] AC 16](#) at p 37). The assured must bring an action against the wrongdoer if he is called upon by his insurer to do so and is indemnified against the costs, but it is the assured's cause of action, not that of the insurer, that he sues on. The assured, is a nominal Plaintiff. The real plaintiff is the subrogated insurer as they are the one instructing solicitors, paying for the action, and the person to benefit from the action, and to lose by the action, if it is lost. Should an action be instituted against a third party, the third party's rights remain exactly the same whether he is being sued by the insurer or the assured."

[28] In the Federal Court case of *Teo Kim Kien & Ors v Lai Sen & Anor* [\[1980\] 2 MLJ 125](#), Chang Min Tat FJ held that :-

"This case clearly is concerned with the doctrine of subrogation under which an insured must bring an action against the wrong- doer if he is called upon by his insurers to do so and is indemnified against the costs, **but it is his own cause of action, not that of his insurer that he sues on; as against the wrong-doer the insurer has no cause of action of his own** : per Lord Diplock in *Hobbs v. Marlowe* at page 37."

[29] In response, learned counsel for NEXI submitted that NEXI has *locus standi* to bring action against Rintis in this case because:-

- (i) Pursuant to the terms of the Insurance Policies of which Agasta was compensated with the insured sum by NEXI, the governing law is Japanese law which in fact permits an insurer to commence an action in its own rights. In fact, Agasta had assigned, transferred, and subrogated its rights in respect of its claim against Rintis to NEXI pursuant to the Letter of Subrogation issued to NEXI;
- (ii) The Sales Contracts and the Agreement had expressly stipulated that the credits of the Reconditioned Vehicles will be transferred to NEXI if Rintis fails to make the payment of JPY 199,493,760. This was acknowledged and accepted by Rintis;
- (iii) Rintis had not taken any steps to oppose, intervene or question the subrogation any time prior to the commencement of this suit in Japan or in Malaysia and neither is 'subrogation' an issue raised in their pleadings; and
- (iv) In any case, Agasta has assigned all its rights in respect of its claim to NEXI under [section 4\(3\)](#) of the [Civil Law Act 1956](#).

[30] There is no dispute that the Insurance Policies are insurance contracts entered between Agasta and NEXI, both Japanese companies in Japan. The place the Insurance Policies was entered into was in Japan, the place of performance was in Japan and the currency used was Japanese Yen. Notwithstanding that Suit 132 is filed in Malaysia, the rights of Agasta and NEXI under the Insurance Policies must be determined in accordance with Japanese law. PW3 had testified to this and there is nothing to suggest otherwise.

[31] According to learned counsel for NEXI, the insurer right to sue in its own name is established under the operation of Japanese law via Article 42 of the Japanese International Trade and Investment Insurance Act (Act No. 67 of March 31, 1950). Pursuant to the aforesaid, when NEXI made an insurance payment to an insured person for the losses under trade insurance policy, NEXI would acquire any rights held by the policyholders or insured persons against third parties, up to an amount equivalent to the amount of the relevant insurance payment.

[32] However, PW3 in his testimony never made any specific reference to the said Article 42. What he say was that Agasta had '*assigned, transferred and subrogated*' its rights against Rintis to NEXI under the Letter of Subrogation dated 10.10.2017.

[33] More specifically, NEXI had paid JPY 189,519,072 representing 95% of the insured sum to Agasta to cover the latter's losses incurred from the inability to collect the contract sum from Rintis. Pursuant to the Letter of Subrogation, Agasta has assigned, transferred, and subrogated its rights in respect of its claim to NEXI. The relevant part of the letter reads as follows:

*"In consideration of you, **Nippon Export And Investment Insurance ('NEXI')**, paying us the above insurance money in the sum of **Total Japanese Yen 189,519,072** in connection with the above mentioned claim, we, **Agasta Co Ltd** hereby assign, transfer and subrogate our rights equivalent to the paid amount in and in respect of the claims as provided by the applicable law state in the contract of insurance to you."*

[34] During the cross-examination, PW3 confirmed that under Japanese law, the doctrine of subrogation enables NEXI to sue in its own name against Rintis after Agasta subrogated its rights in respect of its claim to NEXI. This was what PW3 said:

DC: My last question, My Lord. Based on your evidence, I put it to you that NEXI has no locus standi to sue Rintis Malay for the sum of JPY 189,519,072 under their own name, do you agree with me or not?

PW3: As I explained several times before, this insurance money was paid based on the terms and conditions of insurance, the insurance policy was issued based on the detailed terms and condition and we subrogated it after the insurance money was paid. This insurance policy was made in accordance with the law of Japan. We obtained the right to claim this amount after we subrogated it in accordance with the law of Japan. Therefore, I believe we have the right to sue Rintis.

(Notes of Proceedings, pages 57 – 58)

[cross-examination of PW3]

PC: I withdraw that question. My question is can you tell the court what you understand about subrogation?

PW3: First of all, NEXI acquired a right based on the principle of subrogation.

To be more specific, we covered 95% of the entire loss suffered by the insurer. Agasta is the creditor and Rintis is the debtor. Agasta was unable to recover the amount of money from Rintis which was 1.99 million yen. After we paid insurance money to Agasta, which covers 95% of the total loss, which means the right transferred to us, subrogated by us based on the same ratio which is the 95% of the total amount, so that's the right we have acquired based on subrogation.

(Notes of Proceedings, page 59)

[35] Rintis has not adduced any evidence before this Court suggesting that the Insurance Policies between Agasta and NEXI was not subject to Japanese law and or to contradict PW3's testimony that under Japanese law, NEXI is entitled to sue in its own name once Agasta issued to NEXI the Letter of Subrogation assigning, transferring and subrogating its rights against Rintis to NEXI.

[36] In the unreported decision of the Court of Appeal of **Rakuten General Insurance Co. Ltd. v Sun Ace Kakoh**

Sdn. Bhd. (J- 02(IM)(NCVC)-391-03/2019), a similar issue was raised as to whether a Japanese insurance company was the rightful party to sue in the proceedings.

[37] In that case, Sun Ace Corporation ('**SAC**'), a Japanese company entered into a contract with the respondent, a Malaysian company ('**SAK**') where SAK will manufacture, export, and deliver goods to SAC. Meanwhile, SAC has purchased insurance contract with the appellant ('**Rakuten**'), a Japanese insurance company to insure against all liability suffered arising from claims for damages goods supplied to another party. The insurance contract contained subrogation clause, which allows SAC to subrogate all its right to Rakuten.

[38] Subsequently, it was proven that the goods supplied by SAK were defective and the SAC's buyer claimed losses from SAC for breach of contract. SAC then filed insurance claim against Rakuten to cover its losses. Upon paying the insured sum in full, Rakuten assumed SAC's rights by way of subrogation and brought action against SAK in Malaysia.

[39] The preliminary issue raised in that case was whether Rakuten had the necessary *locus standi* to sue SAK in its own name based on the doctrine of subrogation. The High Court was of the view that since Rakuten had submitted to the jurisdiction of Malaysian court, the right of subrogation ought to be based on Malaysian law and not Japanese law. The High Court held that Rakuten did not have the necessary *locus standi* to sue SAK in its own name.

[40] On appeal, the Court of Appeal unanimously reversed the High Court decision and held that Rakuten had *locus standi* to sue SAK in its own name under the doctrine of subrogation. Firstly, the law of a contract is to be determine by the *lex loci contractus*, which remains unaffected when Rakuten submitted to Malaysian jurisdiction. Secondly, once Rakuten is imbued with the right to bring an action under the insurance contract in accordance with its proper law, it is merely bringing an action in Malaysia, in lieu of SAC, under the sales contract between SAC and SAK. Thirdly, Japanese law and Malaysian law apply separately to different aspects of the matter. Japanese law applied to the rights between Rakuten and SAC under the insurance contract, while Malaysian law applies to rights between SAC and SAK under the sales contract. Fourthly, even if Malaysian law applies to the insurance contract, SAC has met all the necessary conditions under [section 4\(3\)](#) of the [Civil Law Act 1956](#), where SAC has absolutely assigned all its rights under the sales contract to Rakuten.

[41] Following the decision of the Court of Appeal, I agree with learned counsel for NEXI that NEXI indeed has the *locus standi* to bring the present action against Rintis in its own name since its right to initiate the claim is based on Japanese law. I do not agree with learned counsel for Rintis that PW3's testimony that the Insurance Policies is subject to Japanese Law cannot be accepted since PW3 is not an expert. PW3 was testifying a *fact* that the Insurance Policies were subject to Japanese law. It was not an expression of his opinion but a term of the contract. Similarly, PW3 testified in his evidence in chief that under the terms of the Insurance Policies, NEXI is entitled to bring an action against Rintis in its own name upon subrogation. There is no need for an expert to testify to these facts. Rintis has not adduced any evidence to contradict PW3's testimony.

[42] In any case, Agasta has also complied with the conditions under [section 4\(3\)](#) of the [Civil Law Act 1956](#), as Agasta had in fact assigned its rights absolutely to NEXI in writing under the Letter of Subrogation and express notice of this assignment was given to Rintis on 20.7.2018 by NEXI.

[43] In *The Lotus M* [1997] 3 SLR(R) 175, pages 180 – 181, the Singapore Court of Appeal held that:

*"[22] In the usual insurance case, the right of the insurer who has settled the insured's claim to exercise the insured's rights against the third party who has caused the insured's loss is well accepted through the **doctrine of subrogation**. This well-known right was described by Brett LJ in *Castellain v Preston* (1883) 11 QBD 380 in the following terms:*

[The] underwriter is entitled to the advantage of every right of the assured, whether such right consists in contract, fulfilled or unfulfilled, or in remedy for tort capable of being insisted on or already insisted on, or in any other right, whether by way of condition or otherwise, legal or equitable, which can be, or has been exercised or has accrued, and whether such a right could or could not be enforced by the insurer in the name of the assured by the exercise or acquiring of which right or condition the loss against which the assured is insured, can be, or has been diminished.

[23] In the usual case as well, unless the insured has assigned his right against the wrongdoer to his insurer, the insurer is required to exercise the insured's rights against the wrongdoer in the name of the insured. The insured who has been fully indemnified by his insurer is obliged to permit the insurer to use his name in an action against the wrongdoer and if the

insured is unwilling to co-operate by lending his name to the insurer, he may be compelled to do so by the court: *King v Victoria Insurance Co* [1896] AC 250 ¹.

[24] However, in certain circumstances the insurer may sue in his own name. **For instance an insurer is entitled to sue in his own name if he has taken a legal assignment from the insured of the latter's rights and if the requirements of giving the requisite notice of the assignment as required by s 4(6) of the Civil Law Act (Cap 43, 1994 Ed) have been complied with.** Another instance where an insurer may also be entitled to sue a third party in his own name is where this right has been conferred by statute as in the present case, under s 18(b) of the Act.

[44] The conditions for an absolute assignment under [section 4\(3\)](#) of the [Civil Law Act 1956](#) was laid down by Chong Siew Fai CJ in the Federal Court case of *UMW Industries Sdn Bhd v Ah Fook* [1996] 1 MLJ 365, pages 370 – 371 :

"We have considered s 4(3) of the Civil Law Act 1956 referred to by counsel for both sides. The subsection lays down conditions for effecting absolute legal assignments. It is clear that the conditions are:

- (1) *that the assignment must be in writing under the hand of the assignor;*
- (2) *that the assignment must be absolute and not by way of charge only; and*
- (3) *that express notice in writing must have been given to the person liable to the assignor under the assigned chose in action.*

If the assignment fulfills all the above conditions, it would transfer absolutely the chose in action and the right to sue upon it in the assignee's own name."

[45] Once there is a valid assignment, the assignor is entitled to sue under its own name. This is established by our Federal Court in *Nouvau Mont Dor (M) Sdn Bhd v Faber Development Sdn Bhd* [1984] 2 MLJ 268, pages 269 – 270. One of the issues to be considered by the Court was whether the assignor was entitled to sue under his own name after an absolute assignment within the meaning of [section 4\(3\)](#) of the [Civil Law Act 1956](#) was made. Seah FJ, in delivering the judgment, held that:

"It is common ground that if the assignment was an absolute one, not purporting to be by way of charge only, within the meaning of [section 4\(3\)](#) of the [Civil Law Act 1956](#), then the appellant, as assignor was not entitled to sue in its own name but the action should be brought by the assignee (Public Bank) in its own name or by the assignee in the name of the assignor."

"It is plain that in every case of this kind, all the terms of the instrument must be considered; and whatever may be the phraseology adopted in some particular part of it, if, on consideration of the whole instrument, it is clear that the intention was to give a charge only, then the action must be in the name of the assignor. While, on the other hand, if it is clear from the instrument as a whole that the intention was to pass all the rights of the assignor in the debt or chose in action to the assignee, then the case will come within section 25 and the action must be brought in the name of the assignee"

[46] The Letter of Subrogation issued by Agasta to NEXI provides that Agasta's rights under the Sales Contracts and the Agreement are to be subrogated, assigned and transferred to NEXI. Agasta and NEXI, by a letter dated 20.7.2018, notified Rintis that pursuant to the Japanese law and in accordance with the principle of subrogation, NEXI becomes entitled to the payment of JPY 189,519,072 while Agasta is still entitled to claim the remaining sum of JPY 9,974, 688.

[47] Agasta and NEXI also notified Rintis that they will take legal action against Rintis in Japan and Malaysia if Rintis fails to pay the demand sum on the stipulated time.

[48] The notice of assignment was duly acknowledged by Rintis's former solicitor in charge, Messrs David Gurupatham & Koay with a reply letter dated 1.10.2018 addressed to Agasta and NEXI respectively, claiming that the matter shall be resolved by the Malaysian court and both Agasta and NEXI are refrained from initiating a legal proceeding in Japan until Suit 412 has been disposed of.

[49] Learned counsel for Rintis contended that the notice was insufficient as there was no reference to an assignment of the rights but merely a reference to subrogation. I am unable to agree. Our Court of Appeal in *Mohamed Tawfik bin Tun Dr Ismail v. HLG Credit Sdn Bhd & Ors* [2012] 2 MLJ 626 has held as follows:

'For a legal assignment to be valid, express notice in writing must be given to the debtor, but this does not require formal notice. It is sufficient if information relating to the assignment is conveyed to the debtor so that he has notice of the assignment (see *Harris Adacom Corporation v Perkom Sdn Bhd* [1994] 3 MLJ 504).'

Thus, all that is required is that the notice contained sufficient information relating to the assignment. Looking at the letter dated 20.7.2018, it is clear that the information relating to the assignment had indeed been conveyed to Rintis.

[50] Quite apart from the aforesaid, in the present case, NEXI did not bring the present action as the sole claimant. The insured, Agasta is also a co-claimant in Suit 132. In such a circumstances, it has been held by the Indian Supreme Court in **Economic Transport Organisation v. Charan Spinning Mills (P) Ltd** (Civil Appeal No. 5611 of 1999) (which was adopted in **Taj Mahal Hotel v. United India Insurance Ltd** (Civil Appeal No. 8611 of 2019) that an insurer can sue in its own name where the insurer and the insured are both co-complainants in the same action.

Conclusion

[51] In the premises, this Court orders that in respect of Suit 132, the Defendant, Rintis Malay Motors Sdn Bhd is to pay :

- a) The 1st Plaintiff, Agasta Co Ltd the sum of JPY 9,974,688 or its equivalent in Ringgit Malaysia with interest thereon at 5% per annum from the date of the Writ until the date of full and final settlement;
- b) The 2nd Plaintiff, Nippon Export and Investment Insurance the sum of JPY 189,519,072 or its equivalent in Ringgit Malaysia with interest thereon at 5% per annum from the date of the Writ until full and final settlement;
- c) Costs to the Plaintiffs in the sum of RM 50,000.00;
- d) The Defendant's Counterclaim is dismissed.

[52] For the reasons stated above, this Court also hereby dismissed Suit 412.