AMERICAN INTERNATIONAL ASSURANCE COMPANY LTD v. KOH YEN BEE
COURT OF APPEAL, KUALA LUMPUR
ABDUL HAMID MOHAMAD, JCA; MOHD SAARI YUSOFF, JCA; MOHD NOOR AHMAD, JCA
CIVIL APPEAL NO: J-02-143-00
16 AUGUST 2002
[2002] 4 CLJ 49

***AGENCY**: Termination - Revocation by principal - Agency revoked on 15 days' notice without reasons assigned - Whether just and equitable - Whether ss. 158& 159 Contracts Act 1950applicable - Whether s. 158only covers fixed-term agency Contracts - Whether application of s. 159 subject to s. 158- Whether agency Contract valid - Natural justice - Audi alteram partem - Suitability and application of in private Contracts - Distinction between principal/agent relationship and Employer/Employee relationship - Doctrine of estoppel - Inequality of bargaining power - Compensation for termination of agency, calculation of and reasonable notice*

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***CONTRACT**: Inequality of bargaining power - Applicability under Malaysian common law - Considerations - Contracts Act 1950, s. 14- Civil Law Act 1956, s. 3(1)- Judicial 'legislation' on substantive law with retrospective effect - Uncertainty in the law - Freedom of parties to Contract*

***WORDS & PHRASES**: "continued for any period of time" - Contracts Act 1950, s. 158- Whether only covers fixed-term agency Contracts - Whether all agency Contracts continuing for any period of time are covered*

This was an appeal by the appellant/insurance company ('the principal') from the decision of the High Court allowing the claim of the respondent/insurance agent ('the agent') against the principal for terminating the agency contract between the two parties. The High Court had found that the termination of the agency by the principal based upon cl. 26(b) of the agency contract was without sufficient cause and without reasonable notice and thus contrary toss. 158and 159 of the Contracts Act 1950('the Act') respectively; that no reasons were given by the principal to the agent for the termination of the agency; and that the termination of the agency was in bad faith, unlawful, unfair and unjust, and in contravention of the rules of natural justice. In the upshot, the learned judge awarded the agent RM3 million for loss of earnings. The issues central to the principal's instant appeal were: (i) whether cl. 26(b) of the agency contract which provided that "... this agreement may be terminated without giving any

reason thereof... by either party upon 15 days' notice in writing..." was valid in the face of ss. 158and 159 of the Act; (ii) whether the rules of natural justice, in particular the *audi alteram partem* rule, were applicable; (iii) whether the conduct of the principal leading up to the termination of the agency was such that it ought to be estopped from enforcing its strict contractual rights under cl. 26(b) of the agency contract; and (iv) the applicability of the doctrine of inequality of bargaining power under Malaysian common law.

Held:

Per Abdul Hamid Mohamad JCA (majority)

[1] The phrase "... contract that the agency should be continued for any period of time..." in s. 158 of the Actmeans 'an agency contract for a **fixed** or **definite** period of time'. Thus, as the agency contract between the principal and the agent was not one for a fixed period of time, s. 158 of the Actwas not applicable and the remedies provided therein were not available to the agent. Furthermore, the operation of s. 159 of the Actis subject to s. 158which precedes it; it followed, therefore, that s. 159 of the Actwas also not applicable to the agency contract herein. Consequently, cl. 26(b) of the agency contract was valid under the law of contract.

[2] The rules of natural justice which are applicable to public bodies should not be applied to a purely contractual relationship. Judges should be slow in extending such doctrines into the world of business. Business management cannot be equated with the administration of justice. The economy of the country may grind to a halt if companies are expected to be run like a court of law.

[3] The instant case concerned the exercise of private-law rights under a private contract. The relationship between the principal and the agent was purely contractual and not that of an employer and an employee. The *audialteram partem* rule was, therefore, inapplicable.

[4] There was no evidence that the principal would forbear from exercising its rights under cl. 26(b) of the agency contract, or that as a result of such a promise or representation from the principal, and in reliance thereof, the agent entered into the agency contract. The facts of the instant case simply did not justify the invocation of the doctrine of estoppel against the principal.

[5] The applicability of the doctrine of inequality of bargaining power under the common law of Malaysia is still doubtful because: (i) section 14 of the Actonly recognises coercion, undue influence, fraud, misrepresentation and mistake as the factors that affect free consent; (ii) section 3(1) of the Civil Law Act 1956 in particular its opening words, the cut-off dates therein and the proviso thereto is couched in restrictive language; (iii) the courts are hesitant about 'legislating' on substantive law with retrospective effect; and (iv) of the uncertainty in the law that may be caused. The courts should scarcely interfere with the freedom of parties to contract unless the bargain is contrary to the clear provisions of the law, in particular the Act.

*[**Bahasa Malaysia** Translation Of Headnotes*

Ini adalah rayuan perayu/syarikat insuran ('prinsipal') terhadap keputusan Mahkamah Tinggi yang membenarkan tuntutan responden/agen insuran ('agen') terhadap prinsipal kerana menamatkan perjanjian agensi di antara mereka. Mahkamah Tinggi berpendapat bahawa penamatan perjanjian agensi oleh prinsipal yang berasaskan fasal 26(b) perjanjian tersebut adalah tanpa sebab dan tanpa notis yang munasabah dan dengan itu bertentangan dengan peruntukan ss. 158dan 159 Akta Kontrak 1950('Akta'); bahawa tiada alasan diberikan oleh prinsipal kepada agen atas penamatan agensi; bahawa penamatan agensi adalah berniat jahat, tidak sah, tidak adil dan melanggari prinsip keadilan asasi. Berikutnya, hakim bijaksana memberikan award RM3 juta kepada agen kerana kehilangan pendapatan. Dalam rayuan prinsipal di sini isu-isu yang berbangkit ialah: (i) sama ada fasal 26(b) perjanjian agensi yang memperuntukkan "...perjanjian ini boleh ditamatkan tanpa memberi apa-apa alasan... oleh mana-mana pihak dengan memberi 15 hari notis" adalah sah mengambilkira peruntukan ss. 158dan 159 Akta; (ii) sama ada prinsip keadilan asasi, terutama *audi alteram partem*, terpakai; (iii) sama ada kelakuan prinsipal hingga kepada penamatan perjanjian agensi adalah sebegitu rupa ianya harus diestop dari melaksanakan hak-hak kontraktualnya di bawah fasal 26(a) perjanjian agensi; dan (iv) keterpakaian doktrin ketidakseimbangan kuasa tawar-menawar dalam undang-undang awam Malaysia.

Diputuskan:

Oleh Abdul Hamid Mohamad HMR (majoriti)

[1] Ungkapan "... contract that the agency should be continued for any period of time..." dalam s. 158 Aktabermaksud 'suatu perjanjian agensi untuk suatu tempoh tertentu atau ditetapkan'. Dengan demikian, oleh kerana perjanjian di antara prinsipal dan agen bukan merupakan perjanjian untuk suatu tempoh yang ditetapkan, maka s. 158adalah tidak terpakai dan segala remedi di dalamnya adalah tidak terbuka kepada agen. Selain itu, pemakaian s. 159adalah tertakluk kepada s. 158 yang mendahuluinya; ianya dengan itu mengikut bahawa s. 159Akta juga tidak terpakai kepada perjanjian agensi di sini. Dengan yang demikian, fasal 26(b) perjanjian agensi adalah sah di sisi undang-undang kontrak.

[2] Prinsip-prinsip keadilan asasi yang terpakai kepada badan-badan awam tidak harus terpakai kepada perhubungan yang merupakan suatu perhubungan kontraktual semata-mata. Para hakim seharusnya tidak terburu-buru untuk menggunapakai doktrin ini kepada dunia perniagaan. Pengurusan perniagaan tidak boleh disamakan dengan pentadbiran keadilan. Ekonomi negara mungkin boleh terhenti jika syarikat-syarikat dikehendaki menjalankan urusan seperti sebuah mahkamah keadilan.

[3] Kes semasa membabitkan pelaksanaan hak undang-undang persendirian di bawah perjanjian persendirian. Hubungan di antara prinsipal dan agen adalah semata-mata berbentuk kontraktual dan bukan di antara majikan dan pekerja. Prinsip *audi alteram partem*, dengan itu, tidak terpakai.

[4] Tiada keterangan yang menunjukkan bahawa prinsipal tidak akan melaksanakan hak-haknya di bawah fasal 26(b) perjanjian egensi, ataupun

bahawa agen bertindak untuk memeterai perjanjian agensi tersebut akibat dari janji atau representasi yang sedemikian rupa yang dibuat oleh prinsipal. Fakta kes semasa tidak menjustifikasikan penggunaan doktrin estopel terhadap prinsipal.

[5] Keterpakaian doktrin ketidakseimbangan kuasa tawar-menawar di bawah undang-undang awam Malaysia masih meragukan kerana: (i) seksyen 14 Aktahanya mengiktiraf paksaan, pengaruh tidak wajar, fraud, misrepresentasi dan khilaf sebagai faktor yang menjejaskan kerelaan; (ii) seksyen 3(1) Akta Undang-Undang Sivil 1956 terutama ungkapan pembukaannya, tarikh-tarikh penentuan di dalamnya serta proviso kepadanya diolah dengan perbahasaan sempit; (iii) mahkamah bersikap berhati-hati untuk 'menggubal' undang-undang substantif dengan kesan retrospektif; dan (iv) ketidakpastian dalam undang-undang yang mungkin berbangkit. Mahkamah seharusnya tidak mengganggu kebebasan pihak-pihak untuk berkontrak kecuali apa yang meterai bertentangan secara jelas dengan peruntukan undang-undang, terutama Akta.

Rayuan dibenarkan dengan keputusan majoriti.]

Reported by Gan Peng Chiang

Case(s) referred to:

A/S Awilco v. Fulvia SPA di Navigazione, The Chikuma [1981] 1 All ER 652 ***(refd)***

Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Bank Bhd [1995] 4 CLJ 283 ***(refd)***

Chan Chow Kian v. International Trading Co Ltd [1969] 1 LNS 20; [1969] 2 MLJ 233 ***(refd)***

Datuk Joginder Singh & Ors v. Tara Rajaratnam [1983] 1 LNS 21; [1983] 2 MLJ 196 ***(refd)***

Johnson v. Moreton [1978] 3 All ER 37 ***(refd)***

Landau and Sons v. Ahmed Ayub AIR [1922] Sind 25 ***(refd)***

Lloyd v. MacMahon [1987] AC 625 ***(dist)***

Menteri Sumber Manusia v. Association of Bank Officers [1999] 2 CLJ 471; [1999] 2 MLJ 359 ***(refd)***

Mohamed Selan v. PB Securities Sdn Bhd [1992] 1 LNS 23; [1992] 1 MLJ 762 ***(refd)***

Rookes v. Barnard [1964] AC 129 ***(refd)***

Saad Marwi v. Chan Hwan Hua & Anor [2001] 3 CLJ 98 ***(refd)***

SEA Housing Corporation Sdn Bhd v. Lee Poh Choo [1982] CLJ 355; [1982] CLJ (Rep)

305 ***(refd)***

Sohrabji Dhunjibhoy Medora & Anor v. The Oriental Government Security Life Assurance Co Ltd AIR (33) [1946] PC 6 ***(dist)***

Sykt Jaya v. Star Publications (M) [1990] 1 CLJ 155; [1990] 3 CLJ (Rep) 151 ***(dist)***

Teh Poh Wah v. Seremban Securities Sdn Bhd [1996] 4 CLJ 16 ***(refd)***

WJ Allan & Co Ltd v. El Nasa Export and Import Co [1972] 2 QB 189 ***(refd)***

Wong Pa Hock v. American International Assurance Co Ltd & Anor [2002] 2 CLJ 267 ***(foll)***

Legislation referred to:

Civil Law Act 1956, s. 3(1)

Contracts Act 1950, ss. 14, 158, 159

Other source(s) referred to:

GH Treitel, *Law of Contract*, 9th edn

Prof Sir William, *Administrative Law*, 5th edn

Pullock & Mulla, *Indian Contract & Specific Relief Acts*, 12th edn, vol II

Counsel:

For the appellant - Dato' Sivaparanjothi (S Ruthern, Ch'ng Kim Hock, Wong Kee Them & Wong Kee Them); M/s V Siva & Partners

For the respondent - Dato' Dr Cyrus Das (Ong Chee Yong & Ong Peck Ha); M/s Ong & Ong

JUDGMENT

Abdul Hamid Mohamad JCA:

The appellant is an insurance company. The respondent was the appellant's insurance agent. The respondent's agency was terminated by the appellant. The respondent sued the appellant alleging that the termination letter dated 26 January 1995 was given in bad faith and/or was unlawful, unfair, unjust and/or in contravention of the rules of natural justice. It was alleged that the termination of the agent's contract dated 27 February 1992 by the appellant was without sufficient cause, that the appellant failed to give to the respondent a reasonable notice

of the termination of the agency contract, that the appellant had failed to disclose the reasons for the dismissal, and that she had suffered loss and damage and had been deprived of her rights, privileges and benefits contained in the agent's contract. She claimed loss of earnings, being the total of First Year Commission, General Business Commission, Career Benefits Payment and other incomes from 1995 until the age of 65 years, calculated on a projected increase of 10% per annum totalling RM9,720,000. She also claimed loss of Agent's Provident Fund totalling RM300,000. Of course, she also claimed interest and costs.

The learned judge gave judgment in her favour and awarded her RM3,000,000 for loss of earning which was to be paid forthwith "as she had suffered all these years while waiting for justice from this court". The learned judge also awarded a sum of RM20,804.17 for loss of provident fund. The learned judge also awarded interest of 8% per annum on the pre-trial damages from the date of termination of the agent's contract until the date of judgment and 8% from the date of judgment until the date of full payment thereof.

The appellant appealed to this court. We gave our decision on 3 May 2002. It was a majority decision. My brother Mohd. Saari Yusoff and I were of the view that the appeal should be allowed. My brother Mohd. Noor Ahmad was of the view that the appeal "on liability" should be dismissed but the appeal "on quantum" should be allowed partly by reducing the damages to RM50,000.

Coming back to the facts. As said earlier, the respondent was an insurance agent of the appellant. The agency was governed by an agent's contract dated 27 February 1992.

The preamble to the agent's contract reads as follows:

> WITNESSETH: That the Agent is hereby authorised to procure and transmit to the Company applications for all forms of life assurance, group insurance, annuities and general insurance within the territory wherein the Company has the right to do business, and to collect and pay over the Company first year and renewal premiums and on such business; all subject to the Terms and Conditions on the following pages hereof which the Agent has read which forms part of this Agreement, as fully as if set forth over the signatures of the parties hereto.
>
> The Company agrees to pay and the Agent agrees to accept as full and complete remuneration for his services under this Agreement, Commissions and Incentives as specified in the Schedule of Commissions attached to and forming a part hereof, which schedule shall be subject to change or revocation at any time on written notice by the Company.

Clause 24 reads as follows:

> 24(a) This written contract constitutes the whole agreement between the parties herein
>
> > b) This agreement shall unless the Company otherwise consents in writing supersede abrogate and annul any contract or relationship heretofore held by the Agent with the company as agent, broker or otherwise but shall not affect any bond given

there under. The provisions of this Clause shall not apply to any existing Agency Leader's Contract entered into between the Agent and the Company.

Clause 26(b) reads as follows:

26(b):

Subject to sooner termination of this Agreement by the Company in Accordance with Clause 27 hereof this Agreement may be terminated without giving any reason thereof.

b) By either party upon 15 day's notice in writing;...

Clause 32 reads:

32. Nothing contained herein shall be construed to create the relationship of employer and employee whether expressly or impliedly between the Company and the Agent.

The respondent had been an agent of the appellant since 28 December 1987. By a letter dated 26 January 1995 the appellant terminated the respondent's contract. The content of the letter reads as follows:

Dear KOH YEN BEE

Re: TERMINATION OF AGENT'S CONTRACT

In accordance with Clause 26(b) of your Agent's contract signed between you and our Company, we hereby give you fifteen (15) days notice effective from today to terminate the said contract.

You are required to return to us immediately the following:

1)Agent's authorisation Card.

2)Application forms, brochures and other sales material and documents supplied to you by our Company.

3)Condition Binding Receipt Books.

Yours faithfully

Sgd. (Illegible)

LIM BOON KWEE

Manager Agency Records Department.

For the purpose of this judgment, we do not think it is necessary to reproduce the subsequent

correspondence between the parties.

The main issue is whether cl. 26(b) of the agent's contract is valid, in particular, whether the agreement may be terminated by giving 15 days' notice without giving any reasons.

Before embarking on the specific grounds, it is important to note that the provision applies to both parties, not just the principal, ie, the appellant. Just as the principal may by giving a 15-day notice without giving any reason, terminate the agreement, the agent may do likewise. We do not know the practice or the norm in the insurance industry. That may well be the norm in the industry.

However, in this case, where the agreement was terminated by the principal, the learned judge talked about the case as "a classic case of a master flexing its muscles to show its might notwithstanding the innocence of it servant", "outrageous behaviour of the appellant", "a case pure and simple, of the big bullying the small, and the strong oppressing the weak... an oppression which manifested its ugly head for every one to see", "cruelty and malice", "inhumane conduct" and so on, and the agent is viewed as "weak", "innocent", "simple", "scapegoat" and so on and for all that, the agent must be compensated. What if the agent is the one who gives the 15 days' notice of termination of the agreement without giving any reasons? Would the position be reversed?

Sections 158and 159 of the Contracts Act 1950

We shall first deal with the issue whether cl. 26(b) is inconsistent with ss. 158and 159 of the Contracts Act 1950. Indeed, it is only on this point that our views differ: the majority holds the view that ss. 158and 159are not applicable whereas the minority holds the view that they are applicable.

The two sections read as follows:

> 158. Where there is an express or implied contract that the agency should be continued for any period of time, the principal must make compensation to the agent, or the agent to the principal, as the case may be, for any previous revocation or renunciation of the agency without sufficient cause.
>
> 159. Reasonable notice must be given of such revocation or renunciation; otherwise the damage thereby resulting to the principal or the agent, as the case may be, must be made good to the one by the other.

There appears to be only two decided cases in this country, both of the High Court, in which the two sections were considered. The first is *Chan Chow Kian v. International Trading Co. Ltd.*[1969] 2 MLJ 233. In that case, the plaintiff brought an action for goods sold and delivered. The defendant counterclaimed that the plaintiff had unjustly and deliberately terminated his appointment as distributor of the goods. The plaintiff had terminated the agency because of late payments. The court held that on the facts the plaintiff had sufficient cause to terminate the agency and therefore the counterclaim should be dismissed.

The first thing that should be noted is that in that case the contract of agency was for a period of five years and it was terminated before the expiry of that period. In the circumstances of that case it was perfectly right for the learned judge to apply s. 158even though he held that

the plaintiff had sufficient cause to terminate the agency. Even then, that ground was considered on the assumption that there was a contract.

All that that case decides is that where there is a fixed period of time, in that case five years, s. 158applies. That is perfectly correct and we agree with it.

The next case is the case of *Wong Pa Hock v. American International Assurance Company Ltd and Anor. [2002] 2 CLJ 267*.

The facts of that case are quite similar to the facts in the present appeal. Indeed the defendants in both cases are the same. Clause 24(b) in that case is in *pari materia* with cl. 26(b) in this case. Indeed the learned counsel for the plaintiff in that case relied on the judgment of the learned judge now under appeal. But the court in that case was asked to decide a preliminary issue whether the plaintiff was entitled to the rule of natural justice of being given reasons for the termination of the contract and the opportunity to be heard. In coming to the conclusion that he did, the learned judge *inter alia*, considered the provisions of ss. 158and 159 of the Contracts Act 1950. He concluded that the two sections do not apply as the contract was not for a fixed period of time.

Indeed that is the issue that this court has to decide: is the agent's contract a contract for "any period of time"? That depends on the meaning of the words "any period of time." Does it mean a fixed period of time?

Unfortunately, we find little assistance from established text books on the law of contract in Malaysia or even India, where the relevant provisions in their respective Contracts Acts are in *pari materia*.

The better way therefore is to read the two sections and interprete them. In substance, what s. 158says is that where an agency contract is "for any period of time", one party must make compensation to the other "for a previous revocation or renunciation of the agency without sufficient cause." In other words, if the contract is for any period of time, compensation must be made if the contract is revoked or renounced prior to the expiry of the period and without sufficient cause. If the revocation or renunciation is made with sufficient cause, no compensation need be made.

Do the words "for any period of time" mean a fixed period of time? In our view, the answer is "yes", and it cannot be otherwise. It is true that the word "fixed" is not used, but the word "period" itself must have a beginning and an end. Otherwise, it is not a "period". The *Concise Oxford Dictionary, inter alia*, gives the meaning of the word "period" as "a length or portion of time." Thus for example, we talk about "the period of limitation". K.J. Aiyar's Judicial dictionary explains the "Period of limitation" as "the period of years, months or days prescribed by law impassing limitation."

Secondly, if s. 158applies to all contracts of agency, the words "where there is an express or implied contract that the agency should be continued for any period of time" would have no meaning. The drafters might just as well say, "where a contract of agency is revoked or renounced without sufficient case, the principle must make compensation to the agent, or the agent to the principle, as the case may be." It is said that this is a continuing contract and therefore, the section applies. But, this is merely stressing on the word "continued" used in the section. But the word "continued" is followed immediately with the words "for any period

of time."

Thirdly, the section also talks of "a previous revocation or renunciation". The *Concise Oxford Dictionary* gives the meaning of "previous" as "coming before in time or order". Something can only happen "previous" to an event if the time of the happening of that event is definite or fixed.

On these grounds, we do not see how the section can be read to cover all contracts of agency, whether or not there is a fixed period of time. In our judgment, the words "continued for any period of time", can only mean continued for a fixed or definite length of time be it one year, one month or whatever. But there must be a beginning and an end, known to the contracting parties at the time of the contract.

Coming back to the facts of this case. The agent's contract was signed on 27 February 1992. Clause 1 provides that subject to the appellant's (company's) right to terminate the agreement as set out in the agreement, the agreement "shall only be deemed too be valid and binding upon the appellant so long as the agent's schedule of commissions shall continue to subsist." The schedule of commission is signed annually. The written contract constitutes the whole agreement between the parties cl. 24. The agreement becomes automatically terminated without prior notice to the agent if, *inter alia*, the schedule commissions ceases to subsist cl. 27.

We are unable to find any indication that the contract is meant to be for any fixed period of time, be it for one year or whatever. The only indication, perhaps, is that the schedule of commissions is to be signed annually. But that schedule of commissions only fixes the rate of commissions payable during the period of the schedule's subsistence. That schedule of commissions itself is subject to revocation or change and to the terms and conditions of the agents' contract.

In the circumstances, we are of the view that the agent's contract is not "for any period of time," meaning a fixed or definite period of time. Therefore, the provision of s. 158is not applicable. Therefore, it was not revoked or renounced "previous" to the expiry of the period, as the period does not exist. Therefore the issue whether there was sufficient cause or not did not arise.

We now come to s. 159.

In brief, s. 159says that reasonable notice must be given for such revocation or renunciation, otherwise the damage to the principal or agent must be made good.

The question is whether s. 159 is independent of s. 158 meaning that in all cases of revocations and renunciations, reasonable notice must be given otherwise the damage resulting thereby must be made good.

There appears to be two schools of thought amongst the High Courts in India, one says it is independent of s. 158, the other says the opposite see p. 2204, *Pullock & Mulla: Indian Contract & Specific Relief Acts*, 12th edn, vol. II.

Again, we prefer to look at the section and interprete it. We are of the view that the words "such revocation and renunciation" only refer to a revocation or renunciation under s. 158.

First, this section follows immediately after s. 158. Secondly, there is no reason for the word "such" to be used if it is not meant to refer to the revocation and renunciation mentioned in s. 158. Thirdly, s. 159 uses the very same words used in s. 158 ie "revocation and renunciation."

The learned judge however, referred to *Mohamed Selan v. PB Securities Sdn. Bhd*. [1992] 1 MLJ 762 and said:

> It would be correct to say that the case of *Mohamed Selan (supra)*is authority for the following proposition: that notwithstanding the clause "without assigning any reason whatsoever," a party suspending an agent's authority may "intentionally and voluntarily abandon" the right not to give any reason and where he has given a reason, the court is entitled to examine that reason and decide whether on the reason given, the principle's action to suspend the plaintiff's trading was justified under the circumstances.

*Mohamed Selan*is a judgment of the High Court. The plaintiff was engaged as a remisier by the defendant stockbrokers. The plaintiff then acted for a client in the sale of a certain shares quoted at the KLSE. It was later discovered that a large number of share certificates concerned had been reported stolen or missing. The client was paid for the shares on the very day that he had delivered the share certificates and transfer forms to the defendant, in contravention of the rules of KLSE. The defendant was required to buy other shares to replace some of the stolen shares and deliver them to the buyers. The defendant then suspended the plaintiff from trading and gave reasons for its decision (although the agreement provided that no reason need be given for suspension) but on appeal he was allowed to continue trading under certain conditions. The plaintiff prayed for various orders including a declaration that the suspension was null and void and damages.

Eusoff Chin J (as he then was), *inter alia*, held that the defendant had not exercised reasonable deligence in the performance of its duty, flouted the KLSE rules and had not taken reasonable precautions to prevent the receipt of stolen share scripts from the client, and that the losses suffered by the defendant was through its own negligence.

The learned judge (as he then was) in that case said:

> It is therefore, clear that the defendant, knowing and being fully aware of its rights under cl. 4 of the remisier's agreement to suspend the plaintiff without assigning any reason whatsoever, intentionally or voluntarily abandoned that right when it gave its reasons for suspending the plaintiff. In other words, the defendant had waived its rights not to give reasons for suspending the plaintiff from trading.
>
> Now that the defendant had chosen to give its reasons for suspending the plaintiff, the court is entitled to examine the reasons given, and to decide whether on the reasons given, the defendant's action to suspend the plaintiff from trading was justified under the circumstances. I have already made my findings that on the facts, the defendant had suffered the losses through its own negligence, and because of that it is not justified for the defendant to put the blame on the plaintiff, and to suspend him immediately from trading. Further, the defendant had no just cause to recover its losses suffered through its own negligence by deducting the amount of the losses from the security

> deposit of the plaintiff. Although the plaintiff had been wrongfully suspended by the defendant from trading, it will not be proper for this court to order the defendant to re-employ the plaintiff as its remisier on the principle that one man will not be compelled to employ another against his will. The plaintiff's remedy lies in damages.

It is this passage that the learned judge relied on in the present case.

We do not want to say whether *Mohamed Selan*was rightly or wrongly decided because an appeal to this court may still be pending.

In the present case, the cause of action is purely on a private contract. The issue is whether cl. 26(b) is valid, under the law of contract. Other principles like natural justice, which is applicable to public bodies, should not be applied to a purely contractual relationship. Judges, who, by the nature of their job, always have natural justice in their minds, should be slow to extend such principles to the world of business. Business management should not be equated with administration of justice. Business, indeed the country's economy might grind to a halt if companies are expected to be run like a court of law.

The requirement that reasons must be given, if applied to a private contract such as in this case, would work both ways. If, as in this case, a big company, the principal, is expected to adhere to the principles of natural justice when terminating a contract, failing which it is liable to pay damages even though the contract makes clear provision regarding it, the same requirement should also apply to the agent when the agent seeks to terminate the same contract. Would the agent be required to provide grounds thereto (unless where ss. 158and 159 of the Contract Act 1950apply) and give the principle the right to be heard, failing which the termination is void and the agent has to continue to be an agent or pay damages?

In any event, the issue here is whether cl. 26(b) is valid. If it is, then it is a complete answer to the termination of the contract pursuant thereto.

In the circumstances, we are of the view that since s. 158is not applicable, s. 159is also not applicable. Clause 26(b) of the agent's contract is not void as being inconsistent with the provisions of the two sections.

Natural Justice

The next issue is whether the *audi alteram partem* rule applies:

> In the earlier part of the judgment, the learned judge, under the heading of "Introduction", made the following remark:
>
> > Of crucial importance to this case would be the *audi alteram partem* rule: the rule requiring fair hearing. It seemed to me the AIA have not heard of this rule requiring fair hearing. Being an international American Corporation, AIA threw this rule to the wind.

However, as we understand the judgment, the learned judge did not hold that the termination

of the agents' contract was unlawful because a fair hearing was not given.

In any event, the question of giving a fair hearing does not arise at all in this case. As submitted by the learned counsel for the appellant, and we agree with him, this is a case of and concerning the exercise of a private law right under a private contract. It does not concern a public body acting pursuant to powers derived from an Act of Parliament. The relationship between the appellant and the respondent was purely a contractual relationship, not that of an employer and an employee. Clause 32 clearly provides so.

The case of *Lloyd v. MacMahon* [1987] AC 625 relied on by the learned judge is a public law case. For the distinction between the powers of public authorities and those of private persons, see *Menteri Sumber Manusia v. Association of Bank Officers*[1999] 2 MLJ 359 FC, in particular the passage from *Administrative Law*, 5th edn by Professor Sir William Wade, quoted by Edgar Joseph Jr. FCJ.

Estoppel

Under the heading "AIA must be estopped by their conduct from relying upon cl. 26(b) of the agents' contract" the learned judge said:

> Is it just that AIA should, in the light of its conduct, succeed in the action given the peculiar facts of the case? The answer would certainly be in the negative and the doctrine of estoppel would be vigorously applied in favour of the plaintiff.

And again:

> Having perused through the evidence with a toothcomb, I have no hesitation to hold that the circumstances of the conduct and behaviour of AIR were such that it would be wholly inequitable that AIA should be permitted to assert the applicability of clause 26(b) of the Agent's Contract dated February 27, 1992. This was part and parcel of my judgment and I so hold accordingly.

First, as pointed out by the learned counsel for the appellant, estoppel was never pleaded, nor particulars given, by the respondent.

The "state of affairs" listed by the learned judge on which he "vigorously" applied the doctrine by conduct are as follows:

> (1) the plaintiff was an innocent party;
>
> (2)the plaintiff's Agent's Contract was terminated for the sole reason of her being married to Soh Chor Ann;
>
> (3)the plaintiff was deprived of an opportunity of explaining why her contract should bot be terminated;
>
> (4)the timing of the termination was done in bad taste; it suggested cruelty or malice; it suggested that AIA had acted rashly in instructing that the letter

termination be sent out just before Chinese new year;

(5)that the defendant, AIA, is a large multinational corporation while the plaintiff is a mere ordinary Malaysian citizen earning an honest living;

(6)AIA terminated the plaintiff's Agent's Contract in the belief a false delusion, that they did not have to answer to the plaintiff; and

(7)AIA terminated the plaintiff's Agent's Contract in the belief again a false delusion, that they did not have to account for their action in a court of law.

As for the law, we would only quote a passage from the judgment of Lord Denning in *WJ Allan & Co. Ltd. v. El Nasa Export and Import Co.* [1972] 2 QB at p. 189, which was quoted with approval by Gopal Sri Ram JCA in *Boustead Trading (1985) Sdn. Bhd. v. Arab-Malaysian Bank Bhd.[1995] 4 CLJ 283*at p. 297:

> If one party by his conduct, leads another to believe that the strict rights arising under the contract will not be insisted upon, intending that the other should act on that belief, and he does act on it, then the first party will not afterwards be allowed to insist on strict legal rights when it would be inequitable for him to do so.

We agree with the submission of the learned counsel for the appellant that there is no evidence that the appellant would forbear from exercising its rights under cl. 26(b), nor was there any evidence that as a result of such a promise or representation and in reliance thereof the respondent entered into the contract. On the other hand evidence shows that about 120 such notices were issued every month which clearly shows that the appellant was relying on cl. 26(b) and it is very unlikely that there would be a special forbearance in respect of the respondent.

Furthermore, as pointed out by the learned counsel for the appellant, and we agree, that the effect of an estoppel is not to extinguish a right but merely to suspend it. The right can be resurrected through the issuance of notice. In the *Law of Contract* by G.H. Treitel, 9th edn, the learned author says:

> The equitbale doctrine, like the common law doctrine of waiver, does not extinguish, but only suspends, rights. In *Hughes v. Metropolitan Ry*. The landlord was not forever prevented from enforcing the covenant: he could have enforced it on giving reasonable notice requiring the tenant to do the repairs. This aspect of the doctrine was stressed in *Tool Metal Manufacturing Co. Ltd. v. Tungsten Electric Co. Ltd.*, where a licence for the use of a patent provided that the licensees should pay "compensation" if they manufactured more than a stated number of articles incorporating the patent. In 1942 the owners of the patent agreed to suspend the obligation to pay "compensation" until a new agreement was made. They later gave notice to end the suspension. It was held that they were once again entitled to the payments after the expiry of a reasonable time from the giving of notice. The reason for this rule is that, in equity, the effect of the representation is to give the court a discretion to do what is equitable in all the circumstances; and in the cases just discussed it would not be equitable (or in accordance with the intention of the parties)

wholly to extinguish the representor's or promisor's rights.

The learned judge also purported to rely on the judgment of this court in *Teh Poh Wah v. Seremban Securities Sdn. Bhd.*[1996] 2 AMR 2322 to use estoppel not as a shield but as a sword, and invoked the doctrine to estop the appellant from relying on cl. 26(b).

To appreciate what Gopal Sri Ram JCA said in that case, we should first look at the facts of that case, which is aptly summarised in the head note:

> In that case, the appellant's husband, H, had a Mareva injunction imposed on him. The appellant (wife) opened a current account with Public Bank; she says that she signed all the cheques in blank and handed the cheque book to her husband, who entered into a contract with the respondent stock brokers. H bought and sold shares through the respondent and all transactions were done in the wife's name as her name was on a purported written agreement. After the account went bad, the respondent sued the appellant for recovery of monies owed to them, amounting to RM275,000. The appellant said she did not know of H's actions; the respondent's application to strike out the appellant's defence and counterclaim was allowed by the trial judge. Hence this appeal.
>
> ...
>
> **Held**
>
> It would be inequitable and unjust for the appellant to now assert facts that contradict her earlier conduct as the undisputed facts reasonably support an inference that the respondent was influenced by the appellant's conduct to entertain the belief that the appellant had given H carte blanche to act on her behalf. Furthermore, the doctrine of estoppel applies to the facts of this case.

In his judgment, the learned judge of the Court of Appeal said at p. 2325:

> This is a case where the wife, by her actions, would have led a reasonable man to believe that she had given her husband a carte blanche to act on her behalf. The undisputed facts reasonably support an inference that the respondent was influenced by the conduct of the appellant to entertain such a belief. She cannot therefore now assert facts that would contradict her earlier conduct. That would be inequitable and therefore unjust. She must face the consequences of the series of events which she set in motion by acceding to the husband's plan. If it were otherwise, it would amount to our letting her off the hook for assisting in the intentional breach of an order of court. That would, in our judgment, amount to condoning an attempt to subvert the machinery of justice. We will not tolerate such a result.
>
> In our judgment, this appeal may quite satisfactorily be resolved by reference to the doctrine of estoppel. If is a flexible doctrine by which courts seek to do essential justice between litigating parties.

The learned judge of the Court of Appeal, then went on to say:

> We would add that it is wrong to apply the maxim 'estoppel may be used as 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 Russel 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.

In other words, a plaintiff too may rely on estoppel, not as a cause of action, but for the purpose so clearly stated by Lord Russel of Killowen in *Dawsons Bank* 's case.

In that case, the appellant (wife), having opened a bank account, signed all the cheques in blank and handed the cheque book to her husband (who was subjected to a Mareva injunction) who entered into a contract with the respondent, bought and sold shares through the respondent, all done in the wife's name. Only after the account went bad that she said she did not know of the husband's actions. Under the circumstances, clearly estoppel applies against her. Otherwise, it would be inequitable and unjust that she be let off the hook for assisting the husband in his intentional breach of the Mareva injunction.

The facts of the present case do not justify the application of the doctrine of estoppel.

The learned judge also held that the appellant was estopped by the agreed facts, para 6(c) to (d). We do not think we need to reproduce them. They are questions posed to the court eg whether the termination was made in bad faith, unlawful, unfair, in breach of natural justice; whether it was without sufficient cause, whether a reasonable notice was given. These are questions for the court to decide based on the pleadings of the respondent. Whether or not they are tabulated, the court would have to consider them anyway, as those are the grounds pleaded by the respondent for challenging the termination. They are not admitted facts. With respect, we do not understand how they can be considered to be "admitted facts" to found an estoppel against the appellant.

Effect Of Addendum

Next the learned judge held that even if the appellant could rely on cl. 26(b), that clause had been varied or modified by the addendum to the agent's contract.

The addendum, dated 8 March 1994 says:

> If the Agent after terminating the Agent's Contract which he previously held with another Life Insurance Company hereinafter called "the previous Insurer") joins or had joined the Company, the Agent shall not within two (2) years from the termination date of his previous contract, divert to the Company any policy issued by the previous insurer. If the Agent commits a

breach of this condition, the Company shall terminate the Agent's contract.

Dated this 8th day of MARCH 1994.

Again, with respect, we fail to see how this addendum modifies the provisions of cl. 26(b). An addendum is clearly an addition or a supplement. It is meant to prevent unfair business practice of "pinching" the business from an agent's former principal. The addendum signed by the parties here is not even in the interest of the appellant. It is, I believe, a rule made in the interest the insurance business as a whole. Of course an agent who breaches it may have his agency terminated. If at all it is an additional ground for the termination of the agency, in case of breach of the addendum. How or how else it modifies or varies the provision of cl. 26(b), we are unable to understand.

The respondent herself in her evidence admitted in no uncertain term that the addendum did not refer to cl. 26(b). She then went on to explain what it meant and confirmed that it did not affect her as she did not work with another company before joining the appellant.

This ground is clearly misconceived.

Inequality Of Bargaining Position

Even though the learned judge in his judgment repeatedly talked about "the big" and "the small", the "master" and the "servant", the "strong" and the "weak" and so on, he did not however deal with this ground separately. Neither did he conclude that cl. 26(b) was void on the ground of inequality of bargaining position, coercion or undue influence. Perhaps the reason is understandable: the respondent did not plead this ground in her statement of claim.

However, before us, more so in his written submission, the learned counsel for the respondent devoted one part under the heading "The termination is invalid and an unconscionable exercise of contractual power." He resorted to the word "unconscionable" pleaded in para 6 of the statement of claim. He argued that the contractual power was "exercised widely and in a willy nilly fashion." He argued that there was overwhelming evidence "of the callous and unconscionable exercise of this power of termination." They are that the appellant had no complaint personally against the respondent "who was at all times an outstanding performer". The only ground was the decision to terminate her husband's agency. It was argued that the appellant was "able to take this high handed attitude because of the absolute power it has reserved for itself under cl. 26(b)."

First, it must be pointed out it is wrong to say that cl. 26(b) contains absolute powers of termination reserved by the appellant for itself. The provision of cl. 26(b) applies to both parties. Both the appellant and the respondent may resort to it. If and when the agent resorts to it, is it also "unconscionable"?

Learned counsel for the respondent relied heavily on the provision of s. 3(1) of the Civil Law Act 1956and the decision of this court in *Saad bin Marwi v. Chan Hwan Hua & Anor[2001] 3 CLJ 98*. That case appears to be the first case in this country in which the court applied the doctrine of inequality of bargaining power independently of the well-established doctrine of undue influence. In *Datuk Joginder Singh & Ors. v. Tara Rajaratnam*[1983] 2 MLJ 196 (FC) a case involving a solicitor and his client, where the word "unconscionable" was used in

passing, the issue was considered under the head of "undue influence".

We do not wish to enter into an argument whether the doctrine of inequality of bargaining power or unconscionable contract may be imported to be part of our law. However, we must say that we have some doubts about it for the following reasons. First is the specific provisions of s. 14 of the Contracts Act 1950which only recognises coercion, undue influence, fraud, misrepresentation and mistake as factor that affect free consent. Secondly, the restrictive wording of s. 3(1) of the Civil Law Act 1956, in particular, the opening words of that subsection, the cut-off date and the proviso thereto. Thirdly, that fact the court by introducing such principles is in effect "legislating" on substantive law with retrospective effect. Fourthly, the uncertainty of the law that it may cause.

Be that as it may there is a lot to be said for the decision of this court in *Saad* 's case in view of the facts therein and the justice that the court should do. *Saad* 's case is a very clear case where a farmer whose earnings came, partly, from collecting coconuts. He had two pieces of land the value of which, as accepted by the High Court, was about RM2.4 million. Yet, the respondent, undoubtedly one of those unscrupulous businessmen, got him to sign an agreement to sell the property to him for RM42,000. The agreement was in English which language was not understood by Mr Saad. He was not represented by a lawyer. Even the so-called deposit of RM4,200 which was said to have been paid was never paid. It was set off against the rental of the coconut land of the respondent that he harvested. The contract imposed a liability on Saad to apply for and obtain indefeasible title within 12 months of the agreement, something which is almost impossible for him to do. Even if he could, the legal fees would have left him with nothing. Indeed he might end up a debtor minus the land.

The facts of that case clearly supports such a decision if justice were to prevail.

The facts of this case is nowhere similar to the facts in *Saad* 's. Here the respondent was an insurance agent. The contract was perfectly understood by her. It was not a one-off contract, but was subsisting for about ten years and there was no complaint by her of the terms thereof. The clause which is now challenged is applicable to both parties. If it is not unconscionable to the appellant if she exercises that right, why should it be unconscionable to her when the respondent exercises that same right?

In this kind of case, we think that the court should be slow to interfere with the freedom of the parties to contract unless it is contrary to the clear provisions of the law, in this case, in particular the Contracts Act 1950. Bearing in mind the tone of the judgment of the learned Judge, the reminder by Lord Bridge in *A/S Awilco v. Fulvia SPA di Navigazione, The Chikuma* [1981] 1 All ER 652 (H.L.) may be useful:

> The ideal at which the courts should aim, in construing such clauses, is to produce a result that in any given situation both parties seeking legal advice as to their rights and obligations can expect the same clear and confident answer from their advisers **and neither will be tempted to embark on long and expensive litigation in the belief that victory depends on winning the sympathy of the court.** (emphasis added).

We are of the view that this ground too has no merits.

On these grounds we are of the view that the appeal should be allowed with costs.

Quantum

Even though, in view of our decision on liability, it would be academic for us to deal with the issue of quantum of damages, since there is an appeal and a dissenting judgment, it appears that we have to say something about it.

However, our job has been made easier because we have now had the advantage of reading the judgment of our brother Mohd. Noor Ahmad in draft on it. That saves us the necessity of discussing the judgment of the learned judge on the issue of damages at length. We agree with our brother Mohd. Noor Ahmad who disagreed with the approach taken by the learned judge and the award made by him for the reasons given by our brother Mohd. Noor Ahmad.

Unfortunately and with respect we also do not agree with our brother Mohd. Noor Ahmad who calculated the amount of damages based on one year's income less 50%.

In our view, if the provisions of s. 158 and/or 159 apply/applies and because of that the 15-day notice provided by cl. 26 is void, being unreasonable, then the question is what is the reasonable notice?

We were shown the case of *Sohrabji Dhunjibhoy Medora and Another v. The Oriental Government Security Life Assurance Co. Ltd.* A.I.R. (33) [1946] Privy Council 6.

The facts and the decision of the Privy Council was aptly summarized thus:

> A life insurance company appointed D as its Chief Agent for Gujerat. The letter of appointment dated 9th July 1892, contained the following paragraph: "The Agency would stand in the name of D & Co., but as already explained you alone would be our recognised agent and would be solely responsible. On your retiring or otherwise discontinuing the work the agency would cease and your partner would have absolutely no claim thereunder." Later on, on the suggestion of D this paragraph was cancelled by the company by a letter and D and two others were admitted as partners and recognised as agents working under the title of D and Co., but the other suggestion that the agency should last so long as the firm of D and Co., stood was ignored. In 1917, on the death of D and other partners the appellants who were D's sons, were allowed by the company to come into the firm as partners in connexion with the agency. But nothing was said in the letter of appointment about the duration of agency. In 1939 the company terminated their agency by giving 3 1/2 months notice:
>
> Held that, as the letter of 9th July 1892 showed, the original appointment was to last for the life time of D if he so long continued in business and it could not have been determined by notice. But in the absence of any reference in the correspondence to the duration of the agency of the appellants, the agency was terminable by reasonable notice.
>
> Held further that the notice of 3 1/2 months given by the company was inadequate to determine an agency which had lasted for nearly 50 years, under which a very large business had been built up, and great expense incurred by

the agents.

Sri John Beaumont, delivering the judgment of the Privy Council said:

> On the question as to what notice was reasonable, if their Lordships had agreed with the High Court upon the other questions at issue, they would have accepted without question the concurrent findings of fact that two years was a reasonable notice; nor must their Lordships be taken as dissenting from that view. But as the case will have to be remitted to the High Court for the assessment of damages on the basis that the appellants have certain rights in relation to commission on renewal premiums after the termination of their contract, their Lordships think that the High Court should be free to reconsider the question of length of notice. The only opinion on the matter which their Lordships feel called upon to express is that the notice of 3 1/2 months given by the respondents was inadequate to determine an agency which had lasted for nearly 50 years, under which a very large business had been built up and great expense incurred by the agents.

In our view that case is not an authority that should be followed regarding the length of a reasonable notice. First, it is a 1945 judgment coming from the then India. We are talking about 21st century Malaysia. We doubt very much whether that authority is followed even in India now, what more in England. Time and things certainly have changed over the past 57 years. Secondly, even the Privy Council had not finally decided that, in that case, the notice should be two years. The Committee left it to the High Court to reconsider the question of the length of notice. Thirdly, the original appointment was to last for life, a far cry from the terms agreed to by the parties in the present appeal. Fourthly, D was appointed a sole agent, whereas in the present appeal the respondent is one of the many, may be hundreds, that may be terminated. We do not know how many agents terminate their agency during the same period.

Another case we think we should mention is *Syarikat Jaya v. Star Publications (M)[1990] 1 CLJ 155; [1990] 3 CLJ (Rep) 151*. It is a judgment of Edgar Joseph Jr. J (as he then was). In that case the defendants appointed the plaintiff sole agent for the sale of newspapers published by the defendant. The agreements were each for a period of three years but terminable after the first year upon, *inter alia*, three month's notice in writing. Regarding the issue of a reasonable notice of termination, the learned judge, considering the circumstances of the case as a whole, "not forgetting the expedition and time spent by the plaintiffs and the desirability of a period of adjustment of business", held that six months would have been a reasonable period.

Again, it must be pointed out that the agent there was a sole agent and the contract period provided in the agreements was three years. So, in our view that case too is not an authority for the proposition that the reasonable notice for the termination of an agency, of whatever type, should be six months.

What then is a reasonable notice for the termination of an insurance agency contract at the present time?

Unfortunately, we do not have any evidence of the current practice in the industry. The fact that the impunged agreement states 15 days, the fact that about 120 agents are terminated

every month by the appellant and the fact that there had not been any challenge prior to this case, seems to suggest that the accepted norm in the industry is that the period is much shorter than even six months.

We are of the view that the better way for the court to decide the issue is, first, to hear evidence of the practice in the industry as the decision may be detrimental, not only to the insurance companies but also the agents themselves and the industry. The period fixed by the court will not only bind future agreements but will also operate retrospectively on existing agreements. (Even Parliament does not usually make laws with retrospective effect.) The period will bind both the insurance companies and the agents. If the period is too long, an insurance company genuinely wanting to terminate an unproductive and uncooperative agent may be jeopardised. Similarly, an agent who cannot make ends meet as an agent of a particular insurance company, may have to remain with the company until the period expires.

The fact that the law does not fix a definite period for such notice of termination shows that circumstances may be different from one type of agency and the other, from one industry to another.

It is no answer, we think, to say that each case should be decided on the facts and in the circumstances of that particular case. The principals and the agents would want to know what is the reasonable length of notice to be stipulated in future agreements. Otherwise there would be no certainty that a period believed to be reasonable by both parties at the time the contract was executed, agreed to by both parties, would be upheld by the court much later, and with retrospective effect. The judgment of the High Court in this case has given rise to, at least, one similar suit already.

In short, the judgment of the court, in fixing such a period, should not be a guesswork. The test of what "a reasonable man" thinks is reasonable does not help either, if though "the reasonable man" is reasonable, he is ignorant of the practice in the industry and the implications of his opinion. A principle of law should not be born out of ignorance. That is why in our view the practice in the industry is a factor that should be considered.

But, if, in spite of our shortcomings, our view is required, on the facts of this case, we are of the view that a notice of three months should be reasonable. The award of damages should then be arrived at by taking the average income per month multiply by three months, making a total of about RM25,000. We would grant that amount if we have to make our decision on it.