IN THE MATTER OF SESSIONS COURT AT SHAH ALAM

IN THE STATE OF SELANGOR DARUL EHSAN

CIVIL SUIT NO. BA-A53-5-02/2021

ANTARA

AREM (MALAYSIA) SDN BHD

(No. Syarikat: 1074784-A) **… PLAINTIFF**

DAN

1. **BADAN PENGURUSAN BERSAMA PANGSAPURI SERI INTAN**

2. **MUHAMMAD HANIF BIN AMIR**
(No. K/P: 890309-14-5855)

3. **MOHAMMAD FAIEZUDDIN FITRI B MOHD RAZANI**
(No. K/P: 930315-03-5277)

4. **MUHAMMAD ARIFF BIN ZULKEFLEE**
(No. K/P:971005-14-5471)

5. **GLOBAL KNIGHT PROPERTY MANAGEMENT**
(No. Syarikat PM (3) 2771) **… DEFENDANTS**

GROUNDS OF JUDGMENT

A. Introduction

1. Plaintiff has filed Writ and Statement of Claim against Defendant claiming for the following reliefs:

(a) Ganti rugi am dibayar oleh Defendan Pertama kepada Plaintif untuk kerugian yang dialami oleh Plaintif akibat dari pelanggaran PMSA;

(b) Ganti rugi am dibayar oleh Defendan Kedua dan/atau Defendan Ketiga dan/atau Defendan Keempat kepada Plaintif akibat dari pelanggaran kontrak pekerjaan mereka dengan Plaintif;

(c) Ganti rugi khas dibayar oleh Defendan Pertama dan/atau Defendan Kedua dan/atau Defendan Ketiga dan/atau Defendan Keempat dan/atau Defendan Kelima samada secara bersama atau berasingan kepada Plaintif sebanyak RM88,320 iaitu yuran pengurusan bangunan jika PMSA diperbaharui untuk tahun 2020;

(d) Ganti rugi khas dibayar oleh Defendan Pertama dan/atau Defendan Kedua dan/atau Defendan Ketiga dan/atau Defendan keempat dan/atau Defendan Kelima samada secara bersama atau berasingan kepada Plaintif sebanyak RM88,320 iaitu yuran pengurusan bangunan jika PMSA di antara Defendan Pertama dan Defendan-defendan lain turut diperbaharui untuk tahun 2021;

(e) Ganti rugi teladan dan/atau gantirugi keterlaluan dibayar oleh Defendan Pertama dan/atau Defendan Kedua dan/atau Defendan Ketiga dan/atau Defendan keempat dan/atau Defendan Kelima samada secara bersama atau berasingan kepada Plaintif;

(f) Faedah sebanyak 5% setahun ke atas semua jumlah – jumlah tuntutan yang dibenarkan oleh Mahkamah di sini bermula dari tarikh penghakiman sehingga ke tarikh penyelesaian penuh;

(g) Defendan Pertama dihalang dari berurusan dengan Defendan Kedua, Defendan Ketiga, Defendan Keempat dan Defendan Kelima dan wakil-wakil mereka, samada secara langsung atau tidak

langsung untuk tempoh lima tahun dari tarikh tamat PMSA tersebut;

(h) Kos bagi tindakan ini; dan

(i) Lain-lain relif yang disifatkan sesuai dan berpatutan oleh Mahkamah yang mulia ini.

2. The Plaintiff called 2 witnesses as follows:
   (i) Padmini Priyadharisini – SP1
   (ii) Muhammad Razali bin Ahmad Zuri -SP2

3. The Defendant called four witnesses as follows:
   (i) Teoh Boon Wei -SD1
   (ii) Mohammad Faieezuddin Fitri Bin Mohd Razani -SD2
   (iii) Mohammad Ariff Bin Zulkeflee -SD3
   (iv) Mohmammad Hanif Bin Amir – SD4

Agreed Facts

4. Plaintiff is a company providing the services of, among other things, building management services as its business activities.

5. Sometime in July 2017, the 3rd Defendant join Plaintiff's company as a technician. The 2nd Defendant joined Plaintiff's company in January 2019 as a corporate service manager whereas the 4th Defendant joined Plaintiff's company as an administrative assistant in March 2019.

6. The 1st Defendant is the management body of a building known as Pangsapuri Seri Intan.

7. Plaintiff and the 1st Defendant entered into a Property Management Services Agreement dated 27.03.2018 ("**1st PMSA**") where Plaintiff

is to provide the 1st Defendant with its property management services from December 2017 until November 2018.

8. After the expiry of the 1st PMSA, the parties agreed to renew the agreement and subsequently entered into a Property Management Services Agreement dated 27.12 2018 ("**2nd PMSA**") where Plaintiff is to provide the 1st Defendant with its property management services from December 2018 until November 2019.

9. The 2nd Defendant then tendered his resignation with Plaintiff on 02.08.2019 and obtained a property management licence on 20.08.2019.

10. The 1st Defendant subsequently issued a notice to Plaintiff indicating its intention not to renew the 2nd PMSA with Plaintiff on 12.09.2019.

11. Shortly after the issuance of the said notice to Plaintiff by the 1st Defendant, the 3rd and the 4th Defendant also tendered their resignation with Plaintiff on 17.09.2019 and 23.09.2019 respectively.

12. Plaintiff subsequently found out that 1st Defendant had engaged the 5th Defendant as its new property manager to replace Plaintiff.

13. Plaintiff also found out that the 5th Defendant is a company incorporated by the 2nd Defendant that provides, among other things, building management services as its business activities.

14. 5th Defendant is owned and controlled by the 2nd Defendan whereas 3rd Defendant and 4th Defendant had joined 5th Defendant.

15. This led to the filing of this suit by Plaintiff against the Defendants in February 2021.

Issues to be tried raised by the Plaintiff

(i) Whether the termination of the PMSA Agreement between the Plaintiff and the 1st Defendant was due to the influence and the involvement of the Second, Third, Fourth and Fifth Defendant

(ii) Whether the resignation of the 2nd, 3rd and 4th Defendant was due to the influence and the involvement of the 1st Defendant

(iii) Whether the tender process done by the 1st Defendant was part of the Defendants' plan to replace the Plaintiff

(iv) Whether the 2nd, 3rd and 4th Defendant misused confidential information for their own benefit;

(v) Whether the 1st Defendant breached the PMSA Agreement and whether the clause 3.11 of the PMSA agreement contradicts/breaches section 28 of Contracts Act 1950

Defendant's issues to be tried

(i) Whether the 1st Defendant had complained about the quality of Plaintiff's service;

(ii) Whether the clause 3.11 of the PMSA agreement contradicts/breaches section 28 of Contracts Act 1950;

(iii) Whether clause 3.11 of the PMSA agreement is unreasonable and void.

Claim against First Defendant

Issue: Breach of Clause 3.11 of the PMSA Agreement by the First Defendant

Competing Arguments of Parties

16. The Plaintiff's argument is that the 1st Defendant had breached Clause 3.11 of the PMSA Agreement which states that:

*3.11 In the event any of the Property Manager's staff decides to cease employment with the Company for whatsoever reasons, such cessation shall effectively mean cessation of employment, the said such shall not for a period of five (5) years be **employed** either directly or indirectly by the JMB or any of their businesses they may venture into or embark upon which is in competition with Property Management or related Services and / or business of the Property Manager*

17. Defendant however said that Clause 3.11 is void and referred to the case of **NAGADEVAN A/L MAHALINGAM V MILLENIUM MEDICARE SERVICES [2011] 4 MLJ 739** in which the Court of Appeal held that:

[11] The said s 28 clearly provides that a contract in restraint of trade is void unless it falls under any of the exceptions thereto. It is apparent to us that the said provision is a statutory codification of the common law principle on this subject. However, we shared the view expressed by Visu Sinnadurai J in Polygram Records Sdn Bhd, that the validity of such covenant is not subject to the 'reasonableness test' under the common law. On this issue we also find support in the opinion expressed by Hashim J in Wriggleworth's case, to the effect that the English cases were not applicable in the interpretation of the said section. Further, in our view, the inclusion of the three common law exceptions to the general rule on the covenant in restraint of trade as provided in that section is a clear manifestation of the intention of the legislature to make the said provisions exhaustive.

"[12] We will proceed with the first issue. In Petrofina (Gt Britain) Limited v Martin And Another [1966] 1 All ER 126, Lord Diplock said, at p 138: ***'A contract in restraint of trade is one which a party (the covenantor) agrees with any other party (the covenantee) to restrict the liberty in the future to carry on trade with other persons not***

parties to the contract in such manner as he chooses *…' In the instant case it is apparent to us that the covenant in said cl [2011] 4 MLJ 739 at 74611(iii) has the effect of restricting the liberty of the appellant to carry on the practice of medical practitioner in future either by himself or with other persons for such period and within such limit as specified therein. We therefore conclude that it is an agreement in restraint of trade within the meaning of s 28 of the Act.*

[13] There remains the question as to whether such an agreement was made in anticipation of the dissolution of the partnership so as to fall within the ambit of the said exception 2. In our view it was not so made. It is apparent from the wordings thereof that the said exception only apply to an agreement made between partners, and that the same was made upon or in anticipation of the dissolution of the partnership. In the present case it is without doubt that the appellant was not even a partner of the firm at the time of the execution of the agreement. It is evident from cl 1 thereof, that he was only admitted as a partner of the firm pursuant to the agreement. Since the appellant was not even a partner of the firm then, it cannot be said that the said agreement was made in anticipation of the dissolution thereof. Further, it was not even pleaded in the statement of claim that the restrictive covenant sought to be enforced herein was made with such an objective.

[14] For the reasons aforesaid, we hold that the clause sought to be enforced herein was a covenant in restraint of trade, and therefore void under s 28 of the Act."

18. Defendant further cited the case of **POLYGRAM RECORDS SDN BHD v THE SEARCH & ANOR [1994] 3 MLJ 127** wherein Visu Sinnadurai J held that:

"Clause 6(v) which, I may add, is most inelegantly drafted, appears[1994] 3 MLJ 127 at 163 to prohibit the defendants from making any recordings in three different situations: (i) during the currency of the agreement (which appears to be redundant in view of a similar provision

in cl 6(i)); (ii) during the currency of the agreement, if the defendants are released from their obligations to record for the plaintiffs; and (iii) after the expiry of the contract. It appears that in situations (ii) and (iii), the defendants are prohibited from making any recordings, except with the written consent of the plaintiffs, for a period of two years thereafter.

The tenor of cl 6(v) is clearly that of a covenant in restraint of trade in the traditional sense. Whilst the validity of such covenants are tested by the reasonableness test by the English courts, the position in Malaysia is different. Once the Malaysian courts take the view that a particular covenant is a covenant in restraint of trade, the courts have no discretion, but to declare it to be void under s 28 of the Act, subject to the three exceptions provided for by the said section: see also Wrigglesworth v Wilson Anthony [1964] MLJ 269.

As none of these exceptions are applicable to the instant case, and having held that cl 6(v) is a covenant in restraint of trade, I hold cl 6(v) to be void and to be of no effect. As it is a void provision, it should further be deemed to be void ab initio, that is, from the time the second contract was entered into. I therefore, make a declaration to this effect, as prayed for by the defendants in their counterclaim."

19. In urging the court to agree with their arguments, the Defendant cited another authority decided by the Court of Appeal. In the case of **VISION CAST SDN BHD & ANOR V DYNACAST (MELAKA) SDN BHD & ORS [2014] MLJU 506**, the Court of Appeal held that:

[44] The learned Trial Judge in her evaluation of the material before the court appeared not to have addressed the above strict requirement and had omitted to apply it against the Plaintiffs.

[45] It was also the Defendants' submission that what the Plaintiffs were attempting was to restrain the Defendants from pursuing a lawful trade or business and pursuant to s.28 of the Contracts Act, 1950, such

restraints as found in Clause 2, in particular Clause 2.1(d) of the Deed of Restrictive Covenant, were void.

[48] The Supreme Court of India in Superintendence Company of India (P) Ltd v Krishnan Murgai AIR 1980 SC 1717 had occasion to consider in detail the scope of section 27 of the Indian Contract Act (similar to our s. 28 save that there was only the first exception remaining in the Indian provision). The Court pointed out:

"Neither the test of reasonableness nor the principle that the restraint being partial was reasonable are applicable to a case governed by section 27 of the Contract Act, ***unless it falls within exception 1. Under section 27 a service covenant extended beyond the termination of the service is void."***

In the recent decision of the Australian High Court in Maqbury Pty Ltd v xHafele Australia Pty Ltd (2001) 185 ALR 152 it was stated:

"The fact that the restraint can be said to have freely been bargained for by the parties to the contract provides no sufficient reason for concluding that the doctrine should not apply. All contractual restraints can be said to be of that character."

[49] The only contrary position as regards the effect of section 28 on agreements restraining one from being engaged in similar trade after resignation (termination) appeared to be that expressed by Abdul Malik J in the High Court case of Worldwide Rota Dies Sdn Bhd v Ronald Ong Cheow Joon (2010) 8 MLJ 297. His Lordship there in that case while acknowledging the strict terms of section 28 and the need for legislative intervention to change its rigours, yet opted to apply the common law regime (of reasonable restraint) to the issue of restraint of trade.

The learned author of Visu Sinnadurai, Law of Contracts (4th Edition) (Lexis Nexis, 2011) (at page 738) opines that this decision was clearly

wrong in importing a test of reasonableness to determine the validity of a clause in restraint of trade.

[50] Following from the above Clause 2.1(d) in so far and to the extent that it was an attempt to restrain the 2nd Defendant from pursuing a lawful trade or business was void and unenforceable.

20. Defendant therefore argued that Clause 3.11 of the PMSA places a restriction not only on the 1st Defendant but also on any of the former employers of the Plaintiff from embarking in a lawful business or trade. Based on the authorities above, the said clause extends and restraints the Defendants beyond the termination and / or non- renewal of the PMSA Agreement and should therefore be unenforceable and void ab initio.

21. Alternatively, it is argued by the Defendant that the 1st Defendant had not in fact breached the said clause. This is because clause 3.11 of the uses the term "employ" former employee of the Plaintiff. It is the Defendant's argument that the 5th and/or Second and/or Third and/or Fourth Defendant are not employees of the 1st Defendant but the 1st Defendant are merely using the services of the 5th Defendant for property management. The 1st Defendant does not have any control on who will be employed by the 5th Defendant in management of First Defendant.

22. The Plaintiff, on the contrary, contended that the 3 cases cited by the Defendant are distinguishable. Plaintiff submitted that the clause in the case of **Nagadevan A/l Mahalingam v Millenium Medicare Services [2011] 4 MLJ 739** relates to the enforceability of a restrictive covenant in a partnership agreement between medical practitioners. In this case, the restrictive covenants in issue read as follows:-

"[3] The agreement also contained a restrictive covenant, in cl 11 (iii), in the following terms:

No partner shall without the written consent of the Managing Parner:

(i) *...*

(ii) *...*

(iii) *Set up any medical practice within three (3) years after ceasing to be a partner within a radius of 15 KM from any partnership clinic as medical practitioner either by himself or as a partner or employee of any person or company."*

23. The case of **Polygram Records Sdn Bhd v The Search & Anor [1994] 3 MLJ 127** is also distinguishable. One of the issues raised in this case relates to the enforceability of a restrictive covenant between a recording company and a rock group. In this case, the restrictive covenants in issue read as follows:-

> *"Clause 6 (v) of the second contract (a similar provision was also contained in the first contract) provides as follows:*
>
> *During the continuance of this agreement and in the case of the artiste being released from the artiste's obligation to make sound recording for the company... or in the case of the termination of this agreement...then for a period of two years after the date upon which the company shall have released the artiste ... the artiste shall not without the written consent of the company ... render the artiste's services ... in any part of the world as a singer or performer of musical works for the purposes of making records...(Emphasis added)"*

24. Plaintiff further submitted that the case of **Vision Cast Sdn Bhd & Anor v Dynacast (Melaka) Sdn Bhd & Ors [2014] MLJU 506** in fact relates to the enforceability of a restrictive covenant between an employer (carrying the business of die-casting of parts) and an employee (quality control engineer – 2nd Defendant). In this case, the restrictive covenants in issue read as follows: -

"[32] Clause 2.1 of the Deed of Restrictive Covenant, in so far as was material for our consideration, is reproduced in its entirely here:

"2. EXECUTIVES RESTRICTIVE COVENANTS

2.1 Subject to clause 2.2 the Executive undertakes to the investors and, as a separate undertaking, to the Company (for itself and as trustee for each member of the Group) that –

(a) he will, during the period of his employment by the Group, observe the terms of his contract of service with the Group and will not be concerned or interested in any business (other than the business of the Group) whether or not in competition with any business carried on by the Group;

(b) he will at any time during the period of 12 months from the termination of his employment with the Group be concerned in any business within Singapore (the "Restricted Territory") competing with any of the businesses carried on by the Group at the time he ceases to be so employed;

(c) he will not at any time during the period of 12 months following the termination of this employment with the Group on his own account or for any other person solicit the services of, or endeavour to entice away from the Group any director, employee or consultant of the Group who during the period of 12 months prior to such termination occupied a senior or managerial position in relation to the Company or any of its subsidiary undertakings and with who the Executive had regular dealings in the course of his employment....

(d) he will not (except in the proper performance of his duties as an employee of the Group or as required by law) during the period of his employment with the Group or at any time thereafter divulge to any person whomsoever or otherwise make use of (whether for his own or another's benefit), take away, conceal, or destroy or retain and shall use all reasonable endeavours to prevent the publication or disclosure or any trade secret or other confidential information concerning the businesses, finances, dealings, transactions or affairs of the Group or any of its customers or clients entrusted to him or arising or coming to his knowledge during the course of his employment with the Group; and

(e) he will not at any time during the period of 12 months from the termination of his employment with the Group solicit (either on his own account or as the agent or employee of any other person) the customer of or deal with any person in respect of goods or services competitive with those supplied by the Group during the period of 12 months prior to such termination, such other person (or their agents) having been a client or customer of the Group in respect of such goods or services during such period and with whom or which the Executive had dealing during the course of his employment."

25. According to the Plaintiff, in all these 3 cases, the restrictive covenants are between partners of a professional and concern the livelihoods of a medical practitioner, between a recording company and a rock group, which also concern the livelihoods of the rock group, and between an employer and an employee, which most definitely affect the livelihoods of the employee.

26. However, as submitted by the Plaintiff, in the present case, the restrictive covenant is between a service provider (Plaintiff) and its customer (the 1st Defendant) which was intended to prevent solicitation of Plaintiff's employee by its customers.

27. Therefore, the Plaintiff submitted that the precedents cited by the Defendants do not apply to the present case as the restrictive covenant in the present case concerns a non-solicitation clause between a service provider and its customer.

28. Plaintiff refer to the case of **Wipro Limited vs Beckman Coulter International 2006 (3) ARBLR 118 Delhi**. This case concerns the dispute regarding the enforceability of the non-solicitation of employees clause:-

“The said agreement contained a document entitled 'Exhibit-D' and forms part thereof. Clause 5 of the said agreement which is the bone of contention between the parties, reads as under:

5. Non-Solicitation of Employees:

Both parties agree that for a period of two (2) years from the date of termination of the agreement to which this appendix is attached, including termination by either party with or without cause, either directly or indirectly solicit, induce or encourage any employee(s) to terminate their employment with or to accept employment with any competitor, supplier or customer of the other party, nor shall either party cooperate with any other in doing or attempting to do so. As used herein, the term 'solicit, induce or encourage' includes, but is not limited to (a) initiating communications with an employee relating to possible employment, and/or (b) offering bonuses or additional compensation to encourage employees to terminate their employment with and accept employment with a competitor, supplier or customer of the soliciting party, or (c) referring employees to personnel or agents employed by competitors, suppliers or customers of the soliciting party. General advertising of positions and other general means of recruitment shall not be considered

solicitation; and neither party shall be restricted from responding to unsolicited applicants who are employees of the other party."

29. In this case, the relationship between the disputing parties is that of a distributor and principal and has subsisted for almost 17 years which has been renewed from time to time.

30. It is the contention of the petitioners that the parties had agreed that for a period of two years after the termination of the agreement, this non-solicitation of employee clause would be operative. This clause provides that upon the termination of the agreement, neither party shall solicit, directly or indirectly or induce or encourage the employees of the other party to leave and join a competitor or join the other party.

31. A similarly issue raised in this case was that the non-solicitation clause amounts to restraint of trade and is therefore void as it is inconsistent with Section 27 of the Indian Contract Act, which is in *pari materia* with Section 28 of the Malaysian Contract Act:-

> *"The only question that remains is whether the requirement under the said Page 2687 clause 5 of Exhibit-D that, for a period of two years from the date of termination of the agreement, neither party shall directly or indirectly induce or encourage any employees to terminate their employment with or to accept employment with any other competitor, supplier or customer of the other party, would be hit by Section 27 of the Indian Contract Act as being in restraint of the trade, business or lawful profession."*

32. The petitioner, in this case, argued that the non-solicitation clause is a necessity for its business to protect its most valuable resources, its employees:-

"By virtue of the same, the parties intended, in effect, that the petitioner would be given a fair chance to develop its business interest for a period of two years after termination of the agreement with the aid of its specially trained, highly skilled, very valuable sales, marketing, service and support personnel. In these circumstances, it was further submitted that the reasonable restriction set out in the non-solicitation clause, which does not seek to impose a restriction on the petitioner's employees, has to be enforced. According to Mr Ramachandran, if the same is not done and the petitioner loses its most valuable resources, i.e., its sales and marketing and service and support personnel, its business in the bio-med segment would come to an end."

33. After considering various judicial precedents, the Indian court in this case held as follows:-

"……. 3) While construing a restrictive or negative covenant and for determining whether such covenant is in restraint of trade, business or profession or not, ***the courts take a stricter view in employer-employee contracts than in other contracts, such as partnership contracts, collaboration contracts, franchise contracts, agency/distributorship contracts, commercial contracts. The reason being that in the latter kind of contracts, the parties are expected to have dealt with each other on more or less an equal footing, whereas in employer-employee contracts, the norm is that the employer has an advantage over the employee*** *and it is quite often the case that employees have to sign standard form contracts or not be employed at all;……"*

34. Based on this rationale, the Court then held as follows:-

"In the light of these principles which have been culled out from the decisions with regard to the scope and ambit of the provisions of Section 27 of the Indian Contract Act, it remains to be considered as to whether the non-solicitation clause in question amounts to a restraint of trade, business or profession. ***Two things are material****.*

First of all, the contract in which the non-solicitation clause appears is a contract between the petitioner and the respondent whereby the petitioner was appointed as the sole and exclusive Canvassing Representative/Distributor of the respondent for its products in India.

Secondly, it is not a contract between an employer and an employee. If one considers the non-solicitation clause, it becomes apparent that the parties are restrained for a period of two years from the date of termination of the agreement, from soliciting, inducing or encouraging any employees of the other party to terminate his employment with or to accept employment with any competitor, supplier or customer of the other party.

It is a covenant which essentially prohibits either party from enticing and/or alluring each other's employees away from their respective employments. It is a restriction cast upon the contracting parties and not on the employees.

The later part of the non-solicitation which deals with the exception with regard to general advertising of positions makes it clear that there is no bar on the employees of the petitioner leaving its employment and joining the respondent

and vice versa. The bar or restriction is on the petitioner and the respondent from offering inducements to the other's employees to give up employment and join them. Therefore, the clause by itself does not put any restriction on the employees. The restriction is put on the petitioner and the respondent and, Page 2705 therefore, has to be viewed more liberally than a restriction in an employer-employee contract.

In my view, therefore, the non-solicitation clause does not amount to a restraint of trade, business or profession and would not be hit by Section 27 of the Indian Contract Act, 1872 as being void.

35. This Indian case was quoted in the case of **Renoir Consulting (M) Sdn Bhd v Alison Watson & Anor [2018] MLJU 1352** as it was relied upon by the Plaintiff in that case:-

[79] Having made the above findings, the learned Arbitrator deliberated on the validity of clause 25 vis-à-vis s. 28 of the Contracts Act by analysing the applicable law and cases decided by Malaysian courts and also English cases which, the learned Arbitrator noted, use the reasonable test which is not applicable in Malaysia. ***An Indian case (Wipro Limited v Beckham Coulter International (3) ARBLR 118 Delhi 2000)*** *cited by the Plaintiff was also considered by the learned Arbitrator who noted that the case cited was not an employer-employee case like in the instant case but it was* ***a service contract*** *between a principal and distributor and the non-solicitation clause which prohibits the parties from soliciting each other's employee was held not to be in violation of s.* ***27 of the Indian Contracts Act 1872 (equivalent to s. 28 of the Malaysian Contracts Act)****.....*

36. However, since the case concerned an application to set aside an arbitral award, the Court, in that case, did not discuss the Indian court's finding that the non-solicitation clause between business entities is not a restraint of trade that is subjected to Section 28 of the Contract Act.

37. Plaintiff brought to this court's attention some judicial precedents in Malaysia in which the Courts have upheld non-solicitation clauses and distinguished restraint of trade clauses and non-solicitation clauses.

38. In the case **Tint-Shop (M) Sdn Bhd v Yu Yeing Yin (Civil Suit No.: MT 4-22 -682-2008)**, Judicial Commissioner Kamardin Bin Hashim held as follows:-

"Isu terakhir Defendan adalah berkaitan dengan isu penyekatan perniagaan (restraint of trade). Plaintif hanya memohon injuksi berdasarkan klausa 10 iaitu "non-solicitation" dan bukan "noncompetition" dibawah klausa 9 Perjanjian tersebut. ***Kes-kes otoriti telah membezakan antara dua perkara tersebut dimana telah diputuskan bahawa injuksi untuk "non-solicitation" adalah dibenarkan dibawah undang-undang****....."*

39. In the case of **Ace Capital Growth Sdn Bhd v Kua Kee Koon & Ors [2021] MLJU 2118**, the Plaintiff applied for an injunction to restrain the Defendants. The injunction sought by Plaintiff seeks to restrain the Defendants:-

"1.1 from obtaining a business advantage belonging to the Plaintiff and competing with the Plaintiff in the business including
but not limited to the following:-

1.1.1 distributing, selling or in any way trading and/or dealing with precious metals and/or gold bullion trading traded by the Plaintiff ("Plaintiffs Products') including but not limited to:-

(a) Scrap gold bars;

(b) Cast gold bars; and

(c) Minted gold bars.

1.1.2 soliciting, canvassing or enticing orders for the Plaintiff's Products and/or services from any party including without limitation the customers of the Plaintiff or persons with whom the Plaintiff has dealings or otherwise dealing with any such customer or person for the sale of products which are the same as and/or similar to the Plaintiff's Products;....."

40. In that case, the High Court upheld the non-solicitation clause and granted the injunction in respect of prayer 1.1.2 to Plaintiff but refused to grant an injunction in respect of prayer 1.1.1 due to it being a restraint of trade.

41. According to Judicial Commissioner Anand Ponnudurai in that case, contractual terms of non-solicitations is a valid contractual term and ought to be adhered to:-

" [13] Whilst there is a dispute between the parties as to when D1 actually ceased employment and/or his directorship with the Plaintiff, as expressly provided in his contract, it is clear that the duties of confidentiality and nonsolicitation of business survives even after employment ceases. As such, in my view, ***the injunction granted in so far as non-using of confidential information as well as nonsolicitation was merely to enforce D1's contractual obligations as contained in such letter of appointment.*** *Furthermore, I am of the view that such order preserve status quo for the Plaintiff pending final disposal of this matter."*

42. In the case of **Worldwide Rota Dies Sdn Bhd v Ronald Ong Cheow Joon [2010] 8 MLJ 297**, Justice Abdul Malik Ishak (as he was then), has this to say when it comes to construing the applicability of Section 28 of the Contract Act 1950:-

> *"[131] In determining the importance of public interest in the restraint of trade doctrine, tribute must be paid to the sanctity of the contract between two parties. It is in the interests of the public policy not to interfere with the freedom of contract of the parties.*
>
> *[132] Notwithstanding the presence of s 1(2) of the Contract Act 1950,* ***there is an urgent need for legislative intervention in reviewing the necessity of having s 28 in the Contracts Act 1950. If both parties mutually agree to incorporate the restraint of trade clauses in their commercial transactions bearing in mind the nature of their businesses, the courts must give effect to them. The sanctity of the contract must be upheld.***
>
> *[133] Here, just like the case of The Hua Khiow Steamship Co Ltd v Chop Guan Hin, it is my judgment that on the facts of the present case, s 28 of the Contracts Act 1950 do not apply. I will apply generously the common law regime in construing the restraint of trade in this case.* ***In the face of globalisation, Malaysia should not be left behind and should move forward in tandem with the rest of the common law countries. The doctrine of restraint of trade is here to stay****."*

43. Based on the aforesaid, the Plaintiff urged this court to construe Section 28 of the Contract Act 1950 reasonably in line with the

commercial realities and sanctity of the contract, and consider the commercial realities and the relationship between the Plaintiff, a service provider and 1st Defendant, its former client.

Court's Findings and Analysis

44. After reviewing the various authorities submitted, this court is satisfied that based on the authorities, there is a distinction between restraint of trade clause and non - solicitation clause. Clause 3.11 under the 2nd PMSA Agreement signed in between the Plaintiff and the 1st Defendant falls under the second category, does not contravene s. 28 of the Contracts Act 1950 and therefore is not void.

45. The provision of s.28 of the Contracts Act 1950 pertinent to this issue was as follows:

> *Agreement in restraint of trade void*
>
> *28. Every agreement by which anyone is restrained from exercising a lawful profession, trade, or business of any kind, is to that extent void.*
>
> *Saving of agreement not to carry on business of which goodwill is sold*
>
> *Exception 1—One who sells the goodwill of a business may agree with the buyer to refrain carrying on a similar business, within specified local limits, so long as the buyer, or any person deriving title to the goodwill from him, carries on a like business therein:*
>
> *Provided that such limits appear to the court reasonable, regard being had to the nature of the business.*
>
> *of agreement between partners prior to dissolution*
>
> *Exception 2—Partners may, upon or in anticipation of a dissolution of the partnership, agree that some or all of them will not carry on a*

business similar to that of the partnership within such local limits as are referred to in exception 1.
or during continuance of partnership

Exception 3—Partners may agree that some one or all of them will not carry on any business, other than that of the partnership, during the continuance of the partnership.

46. In engaging the 5th Defendant to be the new management company whilst 5th Defendant was clearly an entity set up by the second Defendant who had in fact employed the 3rd and 4th Defendant under it, I find that the 1st Defendant had breached clause 3.11 of the Agreement which clearly provides as follows:

"In the event, any of the Property Manager's staff decides to cease employment with the company for whatsoever reasons, such cessation shall effectively mean cessation of services from AREM Group of Companies. Upon such cessation of employment, ***the said staff shall not for a period of five (5) years be employed either directly or indirectly by the JMB*** *or any of their business they may venture into or embark upon which is in competition with Property Management or related Services and/or business of the Property Manager."*

47. In my considered view, nothing in this clause restricts Plaintiff's former employee from embarking on any other trade or business. This Clause is intended to prevent pouching or solicitation in which the 1st Defendant as previous client of the Plaintiff shall not be allowed to employ either directly or indirectly any of the Plaintiff's former staff who choose to resign or cease their employment with Plaintiff for whatsoever reasons. Hence this clause is not a clause on "restraint of trade" but a non-solicitation clause.

48. There is no dispute that the 2nd, 3rd and 4th Defendants are all former staff of the Plaintiff. There is also no dispute that all three had resigned and ceased their employment with the Plaintiff. 1st Defendant cannot deny the fact that the existence of this clause in the first agreement when it was signed, this clause was still in place

upon the renewal of contract when the second agreement was signed. 1st Defendant must be aware of such clause and yet never raised any issues pertaining to this clause.

49. It is trite that the parties signing a document containing contractual terms are bound by the terms irrespective whether he has agreed to the terms or he has read the document or not. Since both parties mutually agree to incorporate such a clause in their agreement, this court agrees with the remarks of Justice Abdul Malik Ishak in the case of **Worldwide Rota Dies Sdn Bhd v Ronald Ong Cheow Joon [2010] 8 MLJ 297** that the court must give effect to the clause and the sanctity of the contract must be upheld.

50. I found the alternative argument that the three were not employed by the 1st Defendant is unconvincing as the term "indirectly" was used in the clause which means even if the three are not directly employed by the 1st Defendant, any form of indirect employment should also be taken into account. When we look into the facts, 1st Defendant cannot deny that they had paid the 5th Defendant for services rendered and 5th Defendant had hired 3th and 4th Defendant to render some of the services.

51. Based on the Proposal for Property Management Services produced by Second Defendant to 1st Defendant, clearly under paragraph 6.0, total staff cost per month is RM14000. The monthly salary for one technician cum handyman is RM2200 and for administrative assistant is RM2300. Third Defendant confirmed that he received monthly payment of about 2 – 3 thousand from the 5th Defendant (see 3rd Defendant's evidence at p. 81 NOP) whereas for 4th Defendant, he was employed by the 5th Defendant as an admin account and based at the 1st Defendant's Apartment with payment of RM2300 (see p. 101 of common bundle B). Second Defendant is the sole proprietor of 5th Defendant and 5th Defendant is directly under his control. This court therefore finds that the second Defendant is indeed 5th Defendant's alter ego.

52. Premised on the above evidence, it can be deduced that as a result of the appointment of the 5TH Defendant as the Property's property manager, the 5th Defendant would be entitled to RM6000 per month (see p. 107 – letter of appointment of 5th Defendant as property manager and 119 – proposal of 5th Defendant in common bundle B), this means second Defendant will receive this money. This court finds that although the 5th Defendant was appointed by the 1st Defendant as property manager but since payment were made from the 1st Defendant to pay the management fee and staffing cost of the 5th Defendant, 1st Defendant is considered indirectly had employed the second, third and fourth Defendant through the 5th Defendant.

53. Based on the relevant principles on the construction of contracts, where the natural meaning of the words is clear, the court should give effect to it. In determining that natural meaning, regard should be given to the dictionary meaning and the surrounding circumstance (with the aim of understanding the speaker's utterance) (see ***Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd [1997] AC 749*** ("**Mannai**"), which was cited with approval in ***Berjaya Times Square***).

54. In this case, to determine whether the second Defendant was employed by the 1st Defendant, this court favour a commercially sensible interpretation, also known as business common sense. This is because such a construction is "*more likely to give effect to the intention of the parties*" (***Mannai***, p.771). The term "employ" must be interpreted according to its natural meaning.

55. Defendant did not cite any authority to support their alternative argument except stating that the 5th and/or Second and/or Third and/or Fourth Defendant are not employees of the 1st Defendant as the 1st Defendant are merely using the services of the 5th Defendant for property management. The 1st Defendant does not have any control on who will be employed by the 5th Defendant in management of First Defendant.

56. Be that as it may, this court is of the view that to argue that the term "employ" must be construed strictly would certainly defeat the purpose of the clause. In

the event the Defendant raise the issue that the Service Agreement between the 1st Defendant and the second Defendant constitute a contract for service and not a contract of service and thus the second Defendant is merely an independent contractor and not employee as defined under section 2 of the Employees Provident Fund Act 1991 (Act 452), this court is mindful that there are various tests to be applied to determine this issue, however, I share the same view with the authors Prof Altaf Ahmad MIR and Dr Nik Ahmad Kamal in their text "Employment Law in Malaysia" (2003) that modern employment relationship is undoubtedly complex and cannot be solved by a single test.

57. In **Short v Henderson [1946] 62 TLR 427**, Lord Thankerton approved the four indicia of contract of service. According to him there are four main indicia, inter alia, the power of selection, the payment of wages or other remuneration, the right of suspension or dismissal and the right to control the method of doing the work.

58. In **Bata Shoe Co. (Malaysia) Ltd. V. Employees Provident Fund Board, [1967] 1 MLJ 120** Gill J (as he then was) said:

"A contract of service is **a question of fact**, depending upon the **terms of the engagement**, the **method of remuneration**, and the **power of controlling and dismissing the workmen**, although **none of these factors is by itself conclusive**."

59. No doubt that in this case, the 2nd Defendant was selected by the JMB to be the property manager through an open tender process and there is consideration or remuneration paid for this purpose. A letter of appointment was also issued for the same purpose. The Defendant did not deny the fact that there was a service agreement entered into between the 1st Defendant and the 5th Defendant. Nonetheless, the Defendant did not produce the said Service Agreement. Thus, this court is unable to look into the terms of the engagement.

60. In **Massey v Crown Life Insurance [1978] 2 All ER 576**, the court was of the view that: "the ***intention of the parties is important*** *where there is* ***ambiguity***

as to whether the contract is of service or for services, despite having considered the facts and circumstances of the case."

61. I do not intend to dwell in length to distinguish or draw a distinction between contract of service and contract for service here as I am of the view that be it a contract of service or a contract for service, of primary consideration before me was the incorporation of the term "indirect" in the clause. The insertion of the term "indirect" clearly reflect the intention of the parties that the term employ shall not be construed strictly and it is intended by the parties that a more liberal approach should be adopted where any form of indirect employment will be counted as covered under the circumstance of the case.

62. Secondly, a close scrutiny of Clause 3.11 indicated that the prohibition is not merely imposed on the JMB but also any business that this JMB may venture into which is related to property management. In other words, there are two limbs in Clause 3.11. For ease of reference, clause 3.11 is reproduced:

> *3.11 In the event any of the Property Manager's staff decides to cease employment with the Company for whatsoever reasons, such cessation shall effectively mean cessation of employment, the said such shall not for a period of five (5) years be* ***employed*** *either* ***directly or indirectly*** *by the* ***JMB*** *or* ***any of their businesses*** *they may venture into or embark upon which is* ***in competition with Property Management or related Services and / or business of the Property Manager***

63. The first limb is to prohibit the JMB i.e the 1st Defendant by soliciting the Plaintiff's former staff. The second limb is to prevent any former staff from being taken/recruited by any property management business that the 1St Defendant may embark upon.

64. By looking at the background of the parties, nature of their business and the agreement signed (the second PMSA agreement between the Plaintiff and the first Defendant), it is clear that the restriction is imposed on the JMB or its property management related business but not the former staffs of the Plaintiff.

The restriction imposed is meant to limit or to prevent the JMB from taking or soliciting any former employees of the Plaintiff who had ceased employment with the Plaintiff. Essentially, it is a restriction cast upon the contracting parties i.e the 1st Defendant and not on the Plaintiff's employees.

65. Hence if parties were required to first adopt the test to determine whether there is employer and individual employee relationship exist in between the 1st Defendant and the former staff of Plaintiff as explained in a plethora of cases before they can invoke this clause, it could produce an absurd result as the issue at hand now is not whether 2nd, 3th and 4th Defendant can be strictly interpreted or legally justified as an employee of the 1st Defendant but rather whether 1st Defendant had breached the PMSA by employing or indirectly employing the former staff of the Plaintiff.

66. Unlike most disputes in cases involving employer- employee where the crux of issue is to determine the actual relationship in between the parties in order to decide the entitlement of the so-called employee to contribution of EPF, SOCSO and etc, in this line of business, a service agreement was normally entered into in between the JMB and the property management company instead of the property manager. Emphasize should be placed on the fact that commonly the Joint Management Body of any strata property will engage property management company to provide property management and related services, in other words, to assist the JMB to discharge its duties and responsibilities as shall be incumbent upon the JMB to do under the Strata Management Act 2013. Clearly in this case, the JMB, had entered into a management Agreement with second Defendant's company to manage the property. The second Defendant admitted that he had formed a company named Global Knight Property Management i.e the 5th Defendant for this purpose.

67. This court refers to Section 21(2)(f) Strata Management Act 2013 which reads:

"*The powers of the Joint Management Body shall be as follows:*

***(f) to <u>employ</u> or arrange and secure the services** of **any person or agent** to undertake the maintenance and management of the common property of the building or lands intended for subdivision into parcels;"*

68. This court further refers to Regulation 21 of the Strata Management (Maintenance and Management) Regulations 2015 which is reproduced below:

21 Services of any person or agent to maintain and manage common property

*(1) If a joint management body **shall <u>employ</u> or arrange and secure the services** of **any person or agent** to undertake the maintenance and management of the common property of the building or lands intended for subdivision into parcels under paragraph 21(2)(f) of the Act, the joint management body shall enter into **a management agreement with such person or agent**.*

*(2) If the **person** or agent is **not a registered property manager**, he **shall not act** to undertake such maintenance and management of the common property unless he has lodged with the joint management body a bond **Form 12** to be given by a bank, finance company or insurer.*

69. In a nutshell, the JMB is allowed to employ any person to undertake the maintenance and management of the common property pursuant to Section 21(2)(f) Strata Management Act 2013 and if the JMB employs such person, the JMB shall enter into a management agreement with such person.

70. It is to be noted that under the Strata Management Act 2013 (Act 388), the term "person" is not specifically defined, hence the definition of "person" in Interpretation Acts (Act 388) will apply. According to Act 388, "person" includes a body of persons, corporate or unincorporate. This shows even the relevant Act also use the term "employ" in the context of a service/management agreement relationship. Notably, the term employ is also not defined under the section 2 of the Act 388.

71. It is trite that If the language of the contract is open to two interpretations, the court should prefer the approach which "*will avoid consequences which appear to be capricious, unreasonable, inconvenient or unjust, even though the construction adopted is not the most obvious, or the most grammatically accurate*" (see ***Australian Broadcasting Commission v Australian Performing Right Association Ltd (1973) 129 CLR 99***, pp.109-110). This is a known cannon of construction termed as the "reasonableness of the result" (see Sir Kim Lewison, *The Interpretation of Contracts* (6th edn, 2015), pp.428-433).

72. In the absence of clear of words, the court will not adopt a construction that would produce an unfair result (***Persimmon Homes (South Coast) Ltd v Hall Aggregates (South Coast) Ltd [2008] EWHC 2379***). The court must construe the contract holistically. No term is to be interpreted in isolation (***SPM Membrane***, p.485).

73. This court is of the view that it is unfair if the property manager who was a former staff of the previous management company can now hide under the shield of his new formed management company by relying on the doctrine of separate entity and argued that he was not the one employed but it was his company, a separate entity which was merely engaged to provide service.

74. Having those principles of law in construing a contract in mind and since the term "employ" is not defined under the second Service Agreement between Plaintiff and the first Defendant, this court is inclined to rely on the generic meaning of the term and is of the view that the incorporation of the term "indirect" is meant to further "dilute" the term "employ" so that a situation under the present case is catered to. The Federal Court in **Berjaya Times Squares** has succinctly set out the guidelines for interpreting a contract. At 620G-H, Gopal Sri Ram FCJ held:

"*[42] Here it is important to bear in mind that a contract is to be interpreted in accordance with the following guidelines.* ***First, a court interpreting a private contract is not confined to the four corners of the document. It is entitled to look at the factual matrix forming the background to the transaction.***

Second, the factual matrix which forms the background to the transaction <u>includes all material that was reasonably available to the parties.</u> Third, the interpreting court must <u>disregard any part of the background that is declaratory of subjective intent only</u>. Lastly, the court should adopt an <u>objective approach</u> when interpreting a private contract. " (emphasis added)."

75. Based on evidence of SP1, during her examination-in-chief, central to the Plaintiff's claim was as follows:-

[page 4 Notes of Proceeding]

S : Boleh puan terangkan secara terperici perniagaan plainitf?

J : Perniagaan saya adalah property management, so dalam urusan property management ini, produk kita bukan dalam bentuk benda. Our product is human resources. Human resources ialah staf yang kita recruit dan kita akan train them dan kita akan bagi mereka dengan SOP dan itu adalah tools yang kita akan bagi mereka berfungsi dalam perniagaan kita. Puan apa yang saya nak katakan kat sini dalam perniagaan kita tak ada produk ***our products is our staff****. Which is equip with their tools and training and thru our SOP that we are giving them,* ***so if people come in and take our staff maksudnya dia ambil produk company kita so that's how it is in our business****.*

76. SP1 also testified during her examination in chief that:-

[WS-SP1 Q&A 21]

"Clause 3.11 is a standard clause which was included in PMSA to prevent its staff from being solicited or poached by its clients thereby, causing loss to Plaintiff.

This is a common occurrence in the industry since the employees are placed in **direct contact with the clients** where the clients **often terminate the contract with the service provider and engage the staff previously placed at its site.**

This would cause severe loss to Plaintiff since Plaintiff is in the business of providing property management services, not training staffs to be employed by its clients."

[witness statement WS-SP1 Q&A 22 referred]

"The reason 5 years period is fixed in Clause 3.11 is because the period of 5 years is the reasonable period to prevent any attempt to poach Plaintiff's employees and or solicit Plaintiff's business."

77. This court notes that Plaintiff's evidence on the reason and rationale of Clause 3.11 was not challenged by any of the Defendants' witnesses or during the cross-examination of SP1.

78. As mentioned above, Clause 3.11 only prevents the 1st Defendant from engaging anyone who used to be under the Plaintiff's employ for 5 years and set up a competing business with Plaintiff. It does not prevent the 1st Defendant from engaging any other person as its new property manager. The restriction is imposed against the first Defendant.

79. Literal interpretation of clause 3.11 of the PMSA Agreement prohibits not only direct employment but also indirect employment. This court having perused the documents and analysed the evidence of the witnesses is satisfied that the facts of the case justified the term "indirect employment" under the circumstances.

80. Based on the aforesaid reasons, I find that the 1st Defendant had either employed or indirectly employed the second Defendant through the 5th Defendant whereas

the third and fourth Defendants are indirectly employed by the 1st Defendant. Plaintiff had successfully proven that the 1st Defendant breached Clause 3.11 of the PMSA Agreement.

Issue: Tort of business interference by the 1st Defendant

Court's Finding and Analysis

81. Plaintiff failed to prove that the 1st Defendant committed tort of business interference.

82. This court finds that there is no cogent evidence adduced by Plaintiff to establish the pleaded allegation that the 1st Defendant had offered/influenced/invited/suggested to the 2nd, 3rd and 4th Defendants to resign from the Plaintiff to set up the 5th Defendant to replace the Plaintiff.

83. It is trite that the onus of proof rests wholly on the Plaintiff, whether or not the Defendant gives evidence. This court thinks that the Plaintiff failed to discharge its burden of proof on balance of probabilities to prove its claim under this cause of action. Most of the alleged proof were merely pure speculation of Plaintiff. The ingredients for tort of business interference have not been fulfilled by the Plaintiff.

84. It must be noted that the PMSA Agreement between the Plaintiff and the 1st Defendant was not terminated. In the current case, notice had been given in compliance with the terms of the Agreement i.e clause 9 to inform the Plaintiff that the 1st Defendant would not renew the agreement with the Plaintiff. The Agreement was thus not renewed and came to an end upon its expiration date.

85. This court is of the view that the 1st Defendant is not obligated to renew the agreement with the Plaintiff under the contract. Whether or not there was any complaint made against Plaintiff prior to that would not change the fact that the 1st Defendant has all the right to choose either to renew the contract or to engage another management company, be it by way of open tender or whatsoever selection process one can name it. The Plaintiff has no locus to interfere with the 1st Defendant's selection process nor allege that such process is a camouflage

to cover the alleged collusion. Even if the 1St Defendant did not choose 5th Defendant as its new management company, the 1st Defendant has the absolute right to choose any other company other than the Plaintiff or deal with its own management in whatever way they want, this court had no qualms in saying that the Plaintiff after the expiration of the PMSA Agreement is no longer relevant in this matter.

Claims against 2nd, 3rd and 4th Defendants

Issue:

(i) Breach of Contract by 2nd, 3rd and 4th Defendants

Court's Finding and Analysis

86. Plaintiff failed to prove 2nd, 3rd and 4th Defendants had breached their obligation as employees of Plaintiff by failure/ refusal to take care of the Plaintiff's reputation and/or revealed company's confidential information.

87. There is no evidence to pinpoint either 2nd, 3rd or 4th Defendant had breached such obligation particularly in view of the fact that the Plaintiff admitted the fact that complaint had been made against Mr Naresh who is one of its employee and issues regarding the audited account report were not solved during their management period. These are true facts which cannot be denied by the Plaintiff. Whether or not they did or did not promise to hold EGM is quite a separate matter because as a whole this court considered that Plaintiff failed to satisfy 1st Defendant's certain expectations in managing the property during the Agreement period, hence if Plaintiff cannot deliver and is unwilling to deliver, why should the 1st Defendant stick to Plaintiff's service?

88. In any event, this court considers that the allegation made against the 2nd, 3rd and 4th Defendants in this aspect is too far-fetched.

Issue:

(ii) Tort of business interference by 2nd, 3rd and 4th Defendants

Court's Finding and Analysis

89. Plaintiff failed to prove that the termination of PMSA Agreement by the 1st Defendant is due to the influence of the 2nd, 3rd and 4th Defendants.

90. There is no positive evidence adduced by the Plaintiff in this aspect, this court is not persuaded to draw inferences from a few suggested facts by the Plaintiff as the court is not convinced that the circumstance of the case is sufficient for this court to draw those inferences. Furthermore, this court until now is still unclear about what are the asserted influence and how 2nd, 3rd and 4th Defendants influence the 1st Defendant.

91. After perusing the evidence, I agree with the Defendant's submission that the Plaintiff failed to establish that the 2nd Defendant has sufficient control over or connection with the committee members of the 1st Defendant. This is due to the fact that the 2nd Defendant in fact was never stationed to work at the 1st Defendant. The alleged log book which accordingly keep the record of the attendance of the Plaintiff's employee at the 1st Defendant was also not tendered in court. Hence, there is no evidence before this court that the 2nd Defendant had control over the committee of the 1st Defendant.

92. This court further finds that the allegation of gratification charges against the Defendants are very serious accusation and if indeed the Plaintiff is convinced that the offence of bribery took place, a report should be lodged to Malaysia Anti-Corruption Commission but which is not the case here. This court has no jurisdiction to try and decide the allegation of gratification against the Defendants in the current case. Furthermore, the Defendants also had denied such allegation. Hence, this court finds that the allegation made against 2nd, 3rd and 4th Defendants in this aspect is a bare assertion without particulars and must be disregarded. In the upshot, this court finds that the Plaintiff failed to prove that the 2nd, 3rd and 4th Defendants committed tort of business interference by offering/influencing/inviting/suggesting the 1st Defendant to terminate the PMSA Agreement and appoint the 5th Defendant.

Issue: Breach of Fiduciary Duty

Court's Finding and Analysis

93. Plaintiff's claim on breach of fiduciary duty is not pleaded and as parties are bound by the four corners of its pleadings, this court will not dwell on this issue. It would be most damaging to our administration and system of justice if parties are allowed to plead a certain complaint, lead evidence on another and the court decides on something entirely different (see **Joseph Paulus Lantip v Tnio Chee Chang and another appeal [2020] 5 MLJ 708.**)

Conclusion

94. Plaintiff's claim is allowed in part in which this court held that the Plaintiff had successfully proven that the 1st Defendant breached Clause 3.11 of the PMSA Agreement and granted the reliefs as stated in paragraph 46.1 - prayer (a), 46.7 prayer (g) and 46.8 prayer (h) of the Statement of Claim. Plaintiff's other claims are dismissed. The answers for Plaintiff's prayers are as follows:

a) General damages – RM10,000.

b) Special damages are not allowed.

c) Aggravated damages are not allowed.

d) Exemplary damages are not allowed.

e) Cost -RM10,000

Dated: October 2022

(YONG LEOU SHIN)
Judge
Session Court
Shah Alam Selangor

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