MALAYSIAN
JUDGMENTS

IN THE COURT OF APPEAL OF MALAYSIA

Coram: Rohana Yusuf, JCA; Tengku Maimun Tuan Mat, JCA; Harmindar Singh Dhaliwal, JCA

Chow Kwee Chai v PGL Vision Sdn Bhd

Citation: [2018] MYCA 215 **Suit Number:** Rayuan Sivil No. J-02(NCVC)(W)-770-04/2017

Date of Judgment: 04 July 2018

JUDGMENT

[1] This appeal is brought by the appellant, Chow Kwee Chai (trading in the name of East Pearl Timber) against the decision of the learned High Court Judge at Johore Bahru, who had allowed the claim of the respondent, PGL Vision Sdn Bhd against him. We heard the appeal and had unanimously dismissed it for the reasons we set out below.

[2] The respondent's claim against the appellant was for payment of the sale of timber logs which remained outstanding. According to the respondent the appellant was a customer of the respondent company and had transacted with the appellant since the year 2013. The transaction as pleaded at paragraph 4 of the Statement of Claim, was for the timber logs sold and delivered by the respondent. The claim was supported by the statement of accounts as found at page 183 Ikatan Teras Bersama Jilid 2, together with the delivery orders and invoices. A sum of RM1,902,945.17 (as at 14.05.2013) remained outstanding and unpaid.

[3] The respondent's case was that it bought the timber logs from the licensee of a concession area at Cherul Mukim Bandi Daerah Kemaman Terengganu (the Concession Area). The licensee, Ismail Bin Said (who was a director of a company known as Staricoplus Sdn Bhd), and who testified as SP1, confirmed that he was the licensee of the Concession Area and he had sold timber logs to the respondent. SP1 also testified that he had appointed Dato' Chai Han Kwang (Dato' Chai) to assist him to extract the timber logs from the Concession Area.

[4] The appellant had acknowledged receipt of the timber logs supplied by the respondent, between 03.03.2013 to 14.05.2013 which amounted to a total cost as pleaded in the claim of the respondent. All reminders sent by the respondent to the appellant demanding for payment did not meet any response and the amount claimed remained unpaid. This forms the basis of the claim by the respondent in this suit.

[5] In defending the claim, the appellant denied being a customer of the respondent, denied ordering

the timber logs from the respondent and denied of any indebtedness. Alternative to all of these denials, the appellant's pleaded defence is that the purchase price claimed by the respondent had already been fully paid to the agent of the respondent, Dato' Chai. Further to that and in the course of trial, the appellant raised issues on the illegality of the agreement between him and the respondent on the supply of timber.

[6] After a full trial the learned trial Judge found in favour of the respondent. It was held that the respondent had proved its claim on a balance of probabilities. The learned trial Judge found the claim of the respondent was well substantiated with the delivery orders and invoices produced in Court (see Rekod Rayuan Bahagian C, Jilid 1), whereas the defences raised by the appellant were found to be contradictory and without proof. According to the learned trial Judge, the defence of denial of transactions contradicted the delivery orders and invoices as tendered by the respondent. The defence that the appellant had already paid the amount through Dato' Chai was not proved because the appellant failed to establish in evidence that Dato' Chai was an agent of the respondent. There was no document evidencing that the purported payment made to Dato' Chai was for the claim of the respondent. Furthermore, Dato' Chai was not called as a witness to corroborate the appellant's case.

[7] The learned trial Judge had also deliberated on the issue of illegality raised as a defence by the appellant. The learned Judge agreed that the agreement between the parties is one prohibited by section 24 of the **Contracts Act 1950**, and therefore null and void. However, the claim of the respondent was still allowed applying section 66 of the **Contracts Act** and the principle of unjust enrichment.

[8] On appeal before us the appellant raised issues that the learned Judge had erred in his finding of facts and law in allowing the claim of the respondent. Fifteen grounds were listed in the Memorandum of Appeal. In both the oral and written submissions, however, it was urged upon this Court by the learned appellant's counsel for an appellate intervention into the findings of the learned trial Judge as the learned Judge had erred in the following areas:

i. in finding that there was no evidence led that Dato' Chai was the agent of the respondent;

ii. failing to accept that payment was already made to Chai;

iii. failing to consider section 149 of the **Contracts Act 1950**;

iv. having found the agreement void *ab initio* and yet allowed the claim; and

v. in his findings on unjust enrichment.

It is to be reiterated here that the ground on illegality raised by the appellant was that the learned Judge, though was correct in finding that the agreement between parties was null and void under section 24 of the **Contracts Act**, but had erred in allowing the claim despite the illegality.

[9] Learned appellant's counsel invited the Court to intervene with the trial Judge's finding of facts which held that there was no evidence that Dato' Chai was the agent of the respondent. Learned

counsel submitted that all the Delivery Orders issued by the respondent belonged to Jet Foo Trading Sdn Bhd, with the rubber stamp of the respondent affixed; that Dato' Chai was a shareholder of Jet Foo Trading together with Mahachai Holding (M) Sdn Bhd. SP2 testified that Mahachai Holding (M) Sdn Bhd also belonged to Dato' Chai. The Delivery Orders were issued by SP2 who was the former employee of Dato' Chai.

[10] In his testimony the appellant insisted that he did not at any time deal with the respondent company for the purchase of the timber logs. All dealings was between him and Dato' Chai. SD2 had also said that all the timber logs from the Concession Area were purchased by Dato' Chai and instructions such as timber species, price and the purchase regarding the sale of timber logs to the appellant was given to him by Dato' Chai. SD2 would prepare the delivery orders on behalf of the respondent but on the instruction of Dato' Chai.

[11] The appellant's version was that sometime in 2011 Dato' Chai approached the appellant and offered to sell him timber logs from the Concession Area, upon the issuance of the relevant Forest Licenses. The appellant accepted the said offer after inspecting the Concession Area and checking with his sources at the Forestry Department. Consequently, at the instruction of Dato' Chai, the appellant had on various occasions paid a total of RM2,534,249.98 to him or to persons instructed by him as advance payment for purchase of timber logs. According to the appellant that was a very common practice in the timber industry.

[12] Documents evidencing payment of a total sum of RM2,534,249.98 were referred to the Court. Exhibit D187 (pp. 273-290 Ikatan Teras Bersama Jilid 2) and exhibit D188 (pp. 291-301 Ikatan Teras Bersama Jilid 2) showed bank-in-slips of Public Bank Islamic Berhad denoting payment made by the appellant to Dato' Chai into his account in that Bank. Bank-in-slips of Maybank show payment made by the appellant to SP2 into SP2's account. And bank-in-slip of CIMB Bank/ CIMB Islamic Bank evidencing payment made by the appellant into Dato' Chai's account in that Bank. There were cash vouchers duly signed by Dato' Chai accepting cash payment from the appellant. There were also payment made to person or persons purportedly instructed by Dato' Chai by way of the appellant's cash voucher, where the bank-in-slips of Maybank show payment made into Tan See Yam's account.

[13] Learned counsel submitted, the documents evidencing payment coupled with the fact that delivery orders of Dato' Chai's company known as Jet Foo Trading Sdn Bhd were used, clearly linked Dato' Chai and his active involvement in the sale of timber logs in the Concession Area to the appellant. Consequently, it was submitted, notwithstanding the sale under the name of the respondent, Dato' Chai in all circumstances of the case must be considered the principal or at the very least an agent of the respondent. Learned counsel contended, the trial Judge should have accepted the evidence which demonstrates that all dealings between parties were made by the appellant through Dato' Chai. The learned Judge had erred in failing to infer that Dato' Chai was the agent of the appellant. Being an agent, the payment made to him would absolve any liability on the part of the appellant to the respondent.

[14] We agree with learned counsel that some of the evidence as highlighted above was not given consideration in the grounds of judgment of the learned trial Judge. However, that notwithstanding,

the above evidence in our view is of very little assistance to establish that Dato' Chai was an agent of the respondent.

[15] Having scrutinised the appeal records before us we agree with the finding of the learned trial Judge. SD2 who was a subpoenaed witness of the appellant had admitted and confirmed that he was the one who prepared the invoices on behalf of the respondent and issued them to the appellant. SD2 explained how the delivery orders belonging to Jet Foo Trading had been used. He said he was in the forest extracting timber at that material time. According to him when the delivery orders of the respondent were out of stock he had borrowed the empty delivery orders forms from his former employer, Jet Foo Trading Sdn Bhd because Jet Foo had changed its name to Rimbunan Makmur Sdn Bhd and could no longer use them. Thus the name of Jet Foo on each of the delivery orders was cancelled and stamped with the rubber stamp of the respondent's company, together with the seal of the company. All the delivery orders were then addressed to the appellant.

[16] The documents of payment tendered by the appellant in exhibits D187 and D188 were given due consideration by the learned trial Judge. The learned Judge however, held that it was no proof of anything since these documents do not indicate the purpose for which the payments were made. The documents evidencing payment into the bank account of Dato' Chai was not an indication that it was a payment made in relation to the claim of the respondent in this case. The bank-in-slips and cash vouchers exhibited in fact do not specify that the purpose of payment was for the timber supplied by the respondent. We therefore, agree with the learned trial Judge that these documents are not proof that the appellant had made payment through Dato' Chai for the purchase price claimed by the respondent.

[17] Further to that, the total sum of RM2,534,249.98 paid does not tally with the amount claimed by the respondent of only RM1,902,945.17. Apart from these documents no other evidence was produced to corroborate the appellant's assertion that he had in fact paid the purchase price claimed by the respondent through Dato' Chai. We further agree with the learned trial Judge therefore, that the appellant ought to have called Dato' Chai to testify on both the issues of agency and payment. In our view, that would be the best evidence before the Court. Only Dato' Chai would be able to testify and confirm if he in fact received the payment, and if he did, it was received on behalf of the respondent.

[18] The learned trial Judge was therefore correct to find the alternative defence of the appellant that payment had already been paid to the respondent not proved when there was no evidence adduced by the appellant that Dato' Chai was the agent of the respondent. There was no evidence adduced to show that the purported payment was made by the appellant to the respondent through Dato' Chai as Dato' Chai was never produced in Court to confirm the same. We agree with the finding of the learned Judge and we find the reasons proffered are sound and properly substantiated.

[19] Having considered the evidence before him and defences raised, the learned trial Judge, at paragraph 5 of the grounds of judgment at page 5 held that the respondent had established its case that the appellant ordered and purchased the timber logs and owed the respondent the sum claimed.

We agree with this finding. It was also in evidence that the lorry driver of the appellant was the one who collected the logs from the respondent in the logging forest. The respondent through SD2 prepared all the delivery orders with list of detailed specification. The Delivery Orders were usually given to the lorry driver, who sent them together with the timber logs to the appellant.

[20] The appellant on the other hand was found to have contradicted himself in his defence when he denied the transaction between them. The denial, according to the learned Judge became a bare denial in the face of the invoices and delivery orders tendered in Court. It was the appellant's own witness SD2, who admitted preparing the delivery orders on behalf of the respondent, which were passed through the lorry driver. Counsel for the respondent pointed out that during the trial the appellant initially objected to the invoices for lack of signatures by the respondent. However, his own witness SD2 admitted and acknowledged that the invoices were issued by him on behalf of the respondent. This eventually led to the acknowledgment and admission of the delivery orders and invoices by the appellant himself testifying as SD3.

[21] Thus we agree with the learned Judge and His Lordship was correct to hold the respondent had proved its case on a balance of probabilities. The finding of the learned Judge was well reasoned. The claim of the respondent was substantiated with the necessary documents in the form of invoices and delivery orders addressed to the appellant, to prove delivery of the timber logs. We have no reason to disturb these factual findings. We are mindful that the appellate court should not unnecessarily disturb the decision of a trial court, unless the findings are plainly wrong as enunciated by the Federal Court in **China Airlines Ltd v Maltran Air Corp. Sdn Bhd & Another Appeal** [1996] 3 CLJ 163. This is not one of such case.

[22] In any event, if what the appellant had asserted is in fact true the appellant can always claim back the purported payment against Dato' Chai. It would also be sensible for the appellant to institute a claim against him by way of a third party proceedings.

[23] We next dealt with the defence of illegality which was raised by the appellant at the High Court though it was not a pleaded defence. The learned trial Judge allowed the defence of illegality notwithstanding that it was not pleaded, as His Lordship was of the view that the Court can take notice of illegality *ex facie*, citing an authority of the Federal Court decision in **Merong Mahawangsa Sdn Bhd & Anor v Dato' Shazryl Eskay bin Abdullah** [2015] 5 MLJ 619.

[24] As we have alluded to earlier, in relation to illegality issue learned counsel contended that the learned Judge had erred because though the agreement was found to be illegal for having consideration that is prohibited by statute and hence against public policy, but yet allowed the claim of the respondent. The application of section 66 of the **Contracts Act** by the learned Judge was said to be inappropriate and the doctrine of unjust enrichment should not have been applied.

[25] On the pleading point, we agreed with the learned Judge and the legal position was correctly stated. Though not pleaded, the Courts are bound at all stages of proceedings to take note of illegality. Illegality need not be pleaded as it is a question of substance of which if necessary the Court even on its own motion may take cognisance of. Thus when a suggestion is made to the Court that a contract

is illegal, notwithstanding that it is not pleaded the Court is bound to give consideration to the fact that the contract may be illegal and that the Court may not be able to enforce it. This issue had been exhaustively discussed by the Federal Court in **Merong Mahawangsa** (supra).

[26] The finding of illegality by the learned Judge as appeared in the grounds of judgment (pages 6-7) was premised on the following established facts:

(i) The goods supplied by the Plaintiff to the Defendant were timber logs.

(ii) SP1, a director of Staricoplus Sdn Bhd, was the licensee of the two "Lesen Mengambil Hasil Tanah" for Charul Mukim Bandi, Kemaman (the Forest Licenses) Exhibit D14 and D15. He told the Court that he engaged one Dato' Chai Han Kwang of Mahachai Holdings (M) Sdn Bhd as a contractor to assist him to extract timber logs from the concession area. He also told the Court that he sold all the timber logs to the Plaintiff.

(iii) The timber logs supplied to the Defendant was from the forest concession area in Charul, Mukim Bandi, Kemaman under the Forest Licenses dated 2.7.2012 issued by the Forestry Department (Exhibit D14 and D15).

(iv) Clause 26 of the two licenses (D14 and D15) provides:

"26.0 <u>Kayu Balak diproses di Kilang Pelesen Sendiri</u>

Dalam skim Kilang Papan, semua kayu-kayu yang dipotong dan diambil dari kawasan lesen dalam satu-satu tahun dipotong dan dijadikan papan atau lain-lain kayu sedia di kilang papan 'pelesen' sendiri dan/atau mana-mana kilang papan dalam negeri yang pelesen mempunyai perkongsian mengikut cara bekerja yang ditetapkan kecuali jika ada kebenaran bertulis daripada Pengarah Perhutanan Negeri Terengganu."

(Exhibit D14 Bundle 1 page 22 Exhibit 15 Bundle 1 page 59).

It is clear from Clause 26 that all the timber logs from the concession areas are to be sent to the licensee's sawmill and processed into sawn timbers unless with the permission of the Pengarah Perhutanan Negeri Terengganu.

(v) SD1 Timbalan Pengarah Perhutanan Negeri Terengganu told the Court that the Pengarah did not at any time waive the above mentioned condition.

[27] The learned Judge first found the agreement between the parties, for the sale of timber in breach of an express additional condition in clause 26.0 of the licence issued under the **National Forestry Act 1984 (NFA)**. *A fortiori* the agreement was found to be illegal and against public policy. The illegality as found by the learned Judge began with the supply of timber from the licensee (as testified by SP1) to the respondent and the illegality continued with the agreement of supplying the timber logs by the respondent to the appellant, which formed the basis of claim in this appeal.

[28] There was no cross appeal by the respondent on the finding of illegality made by the learned Judge. In his written submissions however, learned respondent's counsel disputed and raised issues with that finding. There was no objection raised by learned appellant's counsel on that submission. Hence we have proceeded to deliberate on the finding of illegality by the learned trial Judge.

[29] We would begin by a careful examination of condition 26.0 of the licence, where it states:

> *"26.0 Kayu Balak diproses di Kilang Pelesen Sendiri*
>
> *Dalam Skim Kilang Papan, semua kayu-kayu yang dipotong dan diambil dari kawasan lesen dalam satu-satu tahun dipotong dan dijadikan papan atau lain-lain kayu sedia di kilang papan 'pelesen' sendiri dan/atau mana-mana kilang papan dalam negeri yang pelesen mempunyai perkongsian mengikut cara bekerja yang ditetapkan kecuali jika ada kebenaran bertulis daripada Pengarah Perhutanan Negeri Terengganu"* (Exhibit D14).

From its wordings condition 26.0 applies to a particular scheme known as "Skim Kilang Papan". In such a scheme any timber from the licenced area must be processed either at the licensee's own sawmill or at any sawmill within the state of Terengganu, where the licensee has a partnership with. Unless a written permission is obtained from the Director of Forestry of Terengganu, the timber logs cannot be processed at any other place.

[30] To recapitulate, the learned Judge opined that because condition 26.0 of the licence has not been complied with and that condition was imposed on a licence issued under a law, the agreement between parties therefore tantamount to a contract, the consideration of which is forbidden by law under section 24(a) of the **Contracts Act**. Hence it was held by the learned Judge that the agreement for the sale of timber between the licensee (SP1) with the respondent which was made against the prohibition in condition 26.0 is a contract that falls under section 24(a) and therefore void. It follows, according to the learned Judge, that the sale from the respondent to the appellant would also be in breach of condition 26.0 and therefore is forbidden by law and against public policy.

[31] Having carefully considered the grounds of judgment of the learned Judge on this issue, we are constrained to observe that there are some flaws in the reasoning made. A condition imposed on a licence cannot be law as envisaged by section 24(a) simply for the reason that the licence is issued pursuant to a statute. Under section 24 a contract is void when the consideration or object of the agreement falls under any one of the clauses (a) to (e). A contract is unlawful under section 24(a) either for contravening a statute or at common law. The learned Judge in his judgment referred to learned author Visu Sinnadurai on **Law of Contracts (Third Edition)** and quoted paragraph 24.08, where learned author observed that the word 'law' in section 24(a) and (b) is not confined to instances of statutory infringement but covers by-laws, rules, regulations and other subsidiary legislation in force. The learned Judge however, failed to note that it was also opined by the learned author that a contravention of guidelines or administrative policy does not make a contract illegal for being a contract forbidden by law under section 24(a). Conditions imposed on a licence though issued under a law does not make them law. Thus, the agreement in question, even if it is in breach of condition 26.0 cannot fall within the category of an agreement, the consideration or the object of

which is forbidden by law. Whether it is an agreement against public policy is quite something else.

[32] Before we embark on the issue of public policy, it would be pertinent to look into the illegality issue as found by the learned trial Judge. The learned trial Judge did not make a specific finding that there was a breach of condition 26.0 by either the respondent or the appellant or even the licensee in the first place. It would appear that the evidence relied upon by the learned Judge in holding that there was a breach of condition 26.0 was the testimony of Timbalan Pengarah Perhutanan Negeri Terengganu (SD1). He was the only witness who testified on matters relating to licence during the trial.

[33] On our perusal of the appeal records we found, SD1's testimonies did not affirmatively state that the contract for the sale of timber from the Concession Area by the licensee contravened condition 26.0. SD1 was never questioned directly on this point by the appellant's counsel. In cross--examination in fact SD1 responded to say that he did not know for sure, if the licensee had breached condition 26.0. What he said was that he had no knowledge of any breach of conditions by the licensee because he was not aware of any complaint made of any breach by the licensee. At that same time he also said he had never issued any permission to take out timber pursuant to condition 26.0 during his tenure. The evidence on the breach of clause 26.0 by SD1 is neither here nor there. The learned Judge in our view had erred in concluding that both levels of agreements for the sale of timber were in fact in breach of condition 26.0 in the first place, when there was no clear evidence to suggest so.

[34] Now looking at the condition again, learned counsel for the respondent was correct that clause 26.0 is only binding on the licensee as a holder of the licence. It was imposed on SP1 as licensee and would only bind the licensee and not the respondent. Thus if the licensee had breached condition 26.0 he would face the consequence of it under the NFA.

[35] It must be borne in mind that the conditions imposed on the licence would bind the holder of the licence and nobody else. Besides the licensee nobody else is privy to those conditions. Unlike law, these conditions are not within public domain. The learned trial Judge did not make affirmative finding as to why and how condition 26.0 was breached by the licensee as well as the respondent. Nothing was adduced in evidence if the respondent was even aware of such a condition. Having examined the appeal records in particular the testimonies of SD1 we have difficulties in agreeing with the learned trial Judge that a case of a breach of condition 26.0 has been clearly made out. The finding of the learned trial Judge that the contract is null and void for breach of condition 26.0 was not made on a proper finding of fact. The learned trial Judge had also erred in saying that a breach of licence condition results in an illegal agreement for a breach of statute, under section 24(a).

[36] We note the submission of learned counsel for the respondent that the agreement between parties in this appeal was preceded by two other sets of agreements. First, the contract between the State Authority of Terengganu with the licensee. Second, the agreement for the sale of timber between the licensee and the respondent. The condition imposed in clause 26.0 is within the knowledge of the licensee and no evidence was adduced to show that the respondent in entering into the agreement to purchase the timber from the licensee, was aware that there was condition 26.0 in

existence. We agree with counsel for the respondent that this was not established in evidence.

[37] In our view, the trial court was hampered in its role as a decider of facts because there were insufficient pleaded facts to support the issue of illegality. In this regard it is pertinent to note that, under O.18 r.8(1) of the **Rules of Court 2012**, a party is required to specifically plead any matter, for example, performance, release, any relevant statute of limitation, fraud or any fact showing illegality which he alleges, which cause the claim or the defence not maintainable, or which may take the opposite party by surprise, or which raises issues of fact not arising out of the pleadings. It is patently clear that the defence by the appellant failed to plead any material fact to support allegation of illegality or public policy. The learned Judge had failed to make any finding of fact first of all to support a case of illegality. The learned trial Judge had merely assumed that there was a breach of the condition by the parties mainly because SD1 said he had never issued any authorisation pursuant to condition 26.0.

[38] The learned trial Judge had therefore erred in holding that the agreement was illegal for two main reasons. There was no proper finding of breach of condition 26.0 and even if that condition is breached it is not breach of a statute and the agreement cannot be said to be an agreement forbidden by statute as envisaged by section 24. As we have earlier alluded to the learned trial Judge held that not only the agreement was forbidden by law but also against public policy. The learned trial Judge did not explain how a breach of condition 26.0 if any, caused the agreement to be *void ab initio*, for the reason of it being opposed to public policy.

[39] It must be borne in mind that there is no definition of public policy under the Contracts Act. The scope and application of public policy has been the subject of some controversy. It was said that public policy is a "very unruly horse, and when once you get astride it you never know where it will carry you" (see **Burrough J in the English case of Richardson v Mellish** (1824) 2 Bing 229). It is for the Court to define the scope of public policy under s. 24(e) of the **Contracts Act**.

[40] The Federal Court had done so in **Theresa Chong v Kin Khoon & Co.** [1976] 2 MLJ 253. In that case, the plaintiff entered into an agreement with the defendant to engage her as a remisier. She was not registered with the Stock Exchange. It was contended that the agreement entered between them was against public policy since rules of Stock Exchange deals with public. It was found that the plaintiff who had acted as a remisier for the defendant was in contravention of the Stock Exchange Rules, which required all remisiers to be registered with the Stock Exchange. Despite non-registration the plaintiff in that case transacted a series of share dealings with the defendant.

[41] It was contended that the contract between them was in violation of Stock Exchange Rules and was therefore illegal as being contrary to public policy. The Federal Court held that the Stock Exchange Rules is binding on the plaintiff but not the defendant. Not being registered as a remisier, is not contrary to public policy because the bye-laws of the Stock Exchange are the bye-laws of a private body which have no force of law. If the plaintiff was acting as an unregistered remisier then she was committing a breach of bye-law 97 of the Stock Exchange Rules which provides for a penalty. But the dealing with such a remisier did not make the contract illegal as being opposed to

public policy.

[42] The Federal Court at page 25b in that case cited with approval the following passage in *Cheshire and Fifoot's Law of Contract* (8th Edition):

> "First, although the rules already established by precedent must be moulded to fit the new conditions of a changing world, it is no longer legitimate for the Courts to invent a new head of public policy. A judge is not free to speculate upon what, in his opinion, is for the good of the community. He must be content to apply, either directly or by way of analogy, the principles laid down in previous decisions. He must expound, not expand, this particular branch of the law.
>
> Secondly, even though the contract is one which *prima facie* falls under one of the recognized heads of public policy, it will not be held illegal unless its harmful qualities are indisputable. The doctrine, as Lord Atkin remarked in a leading case [1938] AC 1, should only be invoked in clear cases in which the harm to the public is substantially uncontestable, and does not depend upon the idiosyncratic inferences of a few judicial minds ... In popular language ... the contract should be given the benefit of the doubt."

[43] In **Merong Mahawangsa** (supra) the above principle was reiterated. It was held by the Federal Court that it is contrary to public policy that a person be engaged for a valuable consideration to use his position and interest to procure a benefit from the government because the sale of influence engenders corruption. The RM20 million consideration in the agreement by way of a letter of undertaking was intended to secure a bridge project of the government where the plaintiff pleaded that he used his influence and good relation to procure the said project. Such a contract was found to be void under section 24(e) for being a contract which is illegal for offending public policy.

[44] Thus in each case it would therefore be necessary to identify with precision the nature of the public policy that may be called into question. In the transaction between the parties in this appeal, nothing in particular was addressed by the appellant either in the pleadings or in the submission before us. In this respect, the only allegation of breach of condition 26.0 is that the respondent had bought the timber from the licensee without the necessary approval. An approval is required under condition 26.0 when the licensee did not process the timber at its own sawmill or at a sawmill where the licensee has a joint venture with.

[45] It has been the submission of learned appellant's counsel that if an agreement in breach of condition imposed on the licence is permitted it will defeat the law which prohibits the taking of forest produce except under a licence issued under the NFA, and upon the conditions contained in the said licence. To allow a person who is in clear violation of this provision to claim from this unlawful act, is against public policy. Such a submission in our view is totally misconceived.

[46] It must be made clear that the NFA prohibits the general taking out of forest produce unless made under a valid license. The timber in question is indeed a forest produce which can be taken out as in this case, because the licensee has been granted with the licensee in exhibits 14 and 15. Thus this is not a case where the timber logs were taken out without license, which would have made it

illegal under the NFA.

[47] We are here dealing with a condition on the license under clause 26.0 which prohibits the processing of timber in some other sawmill that do not belong to the licensee, as opposed to a prohibition against the taking out of forest produce. Whilst it is not difficult to appreciate the underlying reason for the prohibition against taking out of forest produce, we are in no position to understand the underlying public policy reason for condition 26.0. It is not for the Court to speculate upon what, in its opinion is for the good of the community underlying that prohibition. The Court must be content to apply, either directly or by way of analogy, the principles laid down in previous decisions as to what a public issue is. The Court must expound, not expand this particular branch of the law. There was no evidence adduced in this appeal as to what was the public policy that has been called into question for the timber to be sold or be processed in any other place than the sawmill owned or jointly owned by the licensee. In such event, in our view the decision of the learned trial Judge on this point, remained pure speculation and was not substantiated by any foundation. Such finding is therefore unsustainable. Thus for all the above reasons we are not able to concur with the learned trial Judge's view that the contract is illegal and void.

[48] Having found that a case of illegality had not been made out by the appellant, it would no longer be necessary for us to deal with the legal remedy under section 66 or the issue on unjust enrichment. We are however in agreement with the learned trial Judge on his finding of liability against the appellant as we have no reason to disturb the finding of facts made. We affirmed the decision of the learned Judge and agreed that the claim of the respondent had been established on a balance of probabilities. We therefore dismissed the appeal of the appellant with costs.

signed

ROHANA YUSUF
Judge
Court of Appeal Malaysia

Dated: 04 July 2018

COUNSEL

For the Appellant: Wong Fook Yong, Messrs. Wong, Law & Ti, A-23, Tingkat 1, 2 & 3, Lorong Sri Kuantan 2, Sri Kuantan Square, Jalan Teluk Sisek, 25000 Kuantan, Pahang Darul Makmur

For the Respondent: KS Pang, Messrs. K.S. Pang & Co, Unit 8-02, 8th Floor, Menara TJB, 80000 Johor Bahru, Johor

LEGISLATION REFERRED TO:

Contracts Act 1950, Sections 24, 24(a), 24(b), 24(c), 24(d), 24(e), 66, 149

National Forestry Act 1984

Rules of Court 2012, Order 18 Rule 8(1)

JUDGMENTS REFERRED TO:

Burrough J in the English case of Richardson v Mellish (1824) 2 Bing 229

China Airlines Ltd v Maltran Air Corp. Sdn Bhd & Another Appeal [1996] 3 CLJ 163

Merong Mahawangsa Sdn Bhd & Anor v Dato' Shazryl Eskay bin Abdullah [2015] 5 MLJ 619

Theresa Chong v Kin Khoon & Co. [1976] 2 MLJ 253

Notice: The Promoters of Malaysian Judgments acknowledge the permission granted by the relevant official/ original source for the reproduction of the above/ attached materials. You shall not reproduce the above/ attached materials in whole or in part without the prior written consent of the Promoters and/or the original/ official source. Neither the Promoters nor the official/ original source will be liable for any loss, injury, claim, liability, or damage caused directly, indirectly or incidentally to errors in or omissions from the above/ attached materials. The Promoters and the official/ original source also disclaim and exclude all liabilities in respect of anything done or omitted to be done in reliance upon the whole or any part of the above/attached materials. The access to, and the use of, Malaysian Judgments and contents herein are subject to the Terms of Use.