Zuraimy bin Kushaili v Sarawak Energy Bhd [2021] MLJU 286

Malayan Law Journal Unreported

COURT OF APPEAL (PUTRAJAYA)

YAACOB MD SAM, LEE SWEE SENG AND SUPANG LIAN JJCA

CIVIL APPEAL NO Q-02(NCvC)(W)-1501-07 OF 2018

4 March 2021

Mekanda Singh (Satinder Singh Sandhu with him) (Sandhu & Co) for the appellant.
Nicholas Wung Duk Ying (Alan Bong with him) (Reddi & Co) for the respondent.

Lee Swee Seng JCA:

JUDGMENT OF THE COURT

[1]This is an appeal by an employee against the decision of his employer in not paying him his retirement benefits as stated in his contract of employment after the employer had decided not to extend his fixed term of service of 3 years.

[2]There is a bit of history as to why the employee, together with others in the same senior management of the employer, had migrated from a permanent contract of employment where their retirement age was 56 and had been placed under a fixed term contract. The fixed term contract came with a substantial increase in salary and a bonus tied to performance of the employer and the employee.

[3]The employee had interpreted the relevant clause in the new contract for a fixed term to mean that the employer has the discretion, when not renewing the contract upon its expiry, to pay the employee a sum equivalent to 2 years salary or to emplace the employee to his previous position and pay grade before the fixed term contract.

[4]The employer, however, contended that by “absolute discretion” as expressed in the clause, is meant that the employer also has a discretion when not renewing the fixed term contract, to choose between the 2 options of retirement benefits of 2 years or to emplace the employee back to the old scheme under the permanent contract or not at all — in which case the employee’s contract of employment comes to an end.

At the High Court

[5]The reliefs sought by the plaintiff against the defendant company are for the following Orders as stated in paragraph 21 of the Statement of Claim as follows:

(1) a declaration that upon a true construction of Clause 13 of the Fixed Term Contract dated 20.1.2011, the defendant was under an obligation to make a decision whether or not to renew the Fixed Term Contract dated 20.1.2011 and that if the Fixed Term Contract be not renewed, the defendant was under an obligation to either (1) pay the plaintiff a retirement benefit equivalent to 2 years of the last drawn salary at the end of the Fixed Term Contract dated 20.1.2011 or (2) re-appoint the plaintiff to his pre-contract grade, without any loss of seniority;

(2) a declaration that the defendant’s refusal to carry out its obligation pursuant to Clause 13 of the Fixed Term Contract dated 20.1.2011 amounted to a breach of contract;

(3) a declaration that the holding of a Domestic Inquiry by the Inquiry Panel appointed by the defendant to inquire into 7 charges of misconduct against the plaintiff after the expiry of the Fixed Term Contract dated 20.1.2011 was unlawful, null and void;

(4) a declaration that the decision of the Inquiry Panel communicated to the plaintiff under the defendant's letter dated 23.2.2015 was unlawful, null and void;

(5) damages for breach of contract;

(6) exemplary damages; and

(7) interest thereon as this Honourable Court deems fit.

[6]The High Court before which the employee brought his claim for declarations and damages dismissed it on ground that the employer was perfectly within its contractual obligation not to renew the Fixed Term Contract when it expired and further that it had no obligation to choose between one of the two options stated because the discretion of the employer also covered its discretion not to choose either of the two options.

[7]The High Court had therefore held that the employee's contract had expired upon the expiry of its term and that he is not contractually entitled to the 2 years salary compensation as retirement benefits and neither was he entitled to be emplaced back into the previous salary scheme.

[8]The employee was dissatisfied with the High Court's decision, being convinced that its interpretation of the relevant clauses had been erroneous, producing a situation never intended, which was that he was left with no remedy of compensation of 2 years salary.

[9]There were other events that occurred during the period of the Fixed Term Contract of employment that might have precipitated the employer's decision not to renew the contract and not to pay him the 2 years salary compensation.

[10]These included his re-designation and transfer to another department and his initial refusal to accept it. There was also a domestic inquiry held after his initial refusal to accept the re-designation.

[11]Ultimately nothing turns on both events as they had all become water under the bridge as he did finally accept his re-designation and transfer. There was another domestic enquiry held before the expiration of his Fixed Term Contract but continued after the cessation of his employment but that cannot possibly have any legal effect on the parties but more for record purpose if there is any value or worth that may be attached to it.

[12]The employee was the plaintiff in the High Court and the employer company the defendant.

At the Court of Appeal

[13]Before us the employee plaintiff as the appellant only pursued Grounds 1, 2, 3 and 8 of the Memorandum of Appeal relating to the decision on the interpretation by the High Court of the second paragraph of Clause 13 of the Fixed Term Contract dated 20.1.2011 between the parties ("the contract") and the dismissal of the plaintiff's claim for damages for breach of the said Clause under prayers 1, 2, 5 and 7 of paragraph 21 of the Statement of Claim.

[14]The employee plaintiff had dropped the remaining grounds pleaded in the Memorandum of Appeal in regard to the dismissal of the claims for damages, *inter alia*, for breach of contract when he was re- designated Vice President Government Relations, the non-payments of covering allowance as Head of Corporate Services and performance- based bonus as well as the claim for a declaration that the holding of the Second Domestic Inquiry after the expiration of the said contract was illegal, null and void.

[15]The issues for determination in this appeal are as follows:

(a) whether, upon a true construction of Clause 13 of the said contract, the defendant is under an obligation either to pay the plaintiff a retirement benefit equivalent to 2 years of last drawn salary or to re-appoint the plaintiff to his pre-contract salary grade without any loss of seniority in the event it decides not to renew the contract;

(b) whether the defendant breached Clause 13 of the said contract when it failed or refused to either pay to the plaintiff a retirement benefit equivalent to 2 years of last drawn salary or to re-appoint him to his pre-contract salary grade without loss of seniority; and

(c) if the above issues are decided in the plaintiff's favour, there are two other issues for determination: (i) what is the loss and damage suffered by the plaintiff and (ii) whether the plaintiff is entitled to interest on the amount awarded as damages and, if so, for what period and at what rate.

Whether the "absolute discretion" of the defendant company in Clause 13 of the contract gives it an option, when not renewing the plaintiff's contract, to pay no compensation whatsoever

[16]There are basically two schools of thought when it comes to interpreting a term of a contract. The purist or literal approach would emphasise the fact that one must interpret the clause within the context of the 4 walls of the contract and that the factual matrix before the contract was entered into is immaterial. The parties' intentions are to be judged from the words used in the contract finally inked and not to discussions or negotiations before and not to correspondence interchanged between the parties leading to the final contract being signed. This is more so when there is an "entire contract" clause.

[17]That approach gives certainty which is further reinforced by s.91 and 92 of the Evidence Act 1950 where oral evidence is excluded to vary the terms of the written contract.

[18]The purposive or commercial sense approach is that the factual matrix that leads to the contract being entered into is always relevant and when there is a dispute which invariably would turn on the interpretation of a clause or some clauses, the context of the circumstances surrounding the entering into the contract is vital to throw light on what the parties are now disputing.

[19]Perhaps the two contrasting approaches are not as diametrically opposed to each other as it may first seem to be. It would be fair to say that where the words used are clear then parties cannot make the words to say something different under the pretext of a wider context of factual matrix surrounding the circumstances giving rise to the contract.

[20]However where the words employed are capable of more than one meaning, then the Court is always entitled to look at the wider context of the factual matrix that led to the contract being negotiated and concluded and to arrive at an interpretation that is not repugnant to the whole purpose of the contract entered into and that which makes business sense.

[21]Too literal an approach based purely on interpreting the words used in a disputed clause may yield a meaning that is not commercially sensible and which could not have been the intention of the parties when the contract was entered into. However, the proponent of this approach would ask the rhetorical question of how else is the intention of the parties to be discerned other than from the words employed.

[22]The danger of the purposive approach is that it may at times run into the danger of the Court rewriting the terms of the contract for the parties or supplying what is missing under the rubric of an 'implied term" to give the clauses "business efficacy" or to arrive at a reasonable result for the parties.

[23]The fine line to tread is always to hold in a dynamic balance the task of ascertaining the objective intention of the parties from the words employed at the time the contract was entered into without running foul of the accusation of rewriting the contract for the parties and where more than one interpretation is possible, to lean in favour of that which makes business and commercial sense.

[24]The Federal Court in *SPM Membrane Switch Sdn Bhd v Kerajaan Negeri Selangor* [2016] 1 MLJ 464; [2016] 1 CLJ 177 has endorsed generally the approach taken in the landmark case of *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 with respect to the principles of interpretation of contract as follows:

> "[27] ....The judgment of Lord Hoffmann is reproduced below, where His Lordship stated that:
>
> .. I do not think that the fundamental change which has overtaken this branch of the law, particularly as a result of the speeches of *Lord Wilberforce in Prenn v. Simmonds* [1971] 1 WLR 1381, 1384-1386 and *Reardon Smith Line Ltd v. Yngvar Hansen-Tangen* [1976] 1 WLR 989, is always sufficiently appreciated.
>
> The result has been, subject to one important exception, to assimilate the way in which such documents are interpreted by judges to the common sense principles by which any serious utterance would be interpreted in ordinary

life. Almost all the old intellectual baggage of 'legal' interpretation has been discarded. The principles may be summarised as follows:

(1) **Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.**

(2) The background was famously referred to by Lord Wilberforce as the **'matrix of fact'**, but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.

(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.

(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax: see *Mannai Investments Co Ltd v. Eagle Star Life Assurance Co Ltd* [1995] 1 WLR 1 508.

(5) **The 'rule' that words should be given their 'natural and ordinary meaning' reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents.** On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in *Antaios Compania Naviera SA v. Salen Rederierna AB* [1985] AC 191, 201: **If detailed semantic and syntactial analysis of words in a commercial contract is going to lead to conclusion that flouts business common sense, it must be made to yield to business common sense.**

[28] However, there are reservations to a wholesale adoption and approval of the *ICS* principles. The applicability of the *ICS* principle, specially *vis-a-vis* the question of rectification of contracts, is doubted. This has been alluded to in the recent judgment of this court in *Menta Construction Sdn Bhd v. Lestari Puchong Sdn Bhd* [2015] 8 CLJ 1117 for reasons that we will not repeat here. Save for this reservation, the remaining *ICS* principles, for avoidance of doubt, where it does not concern rectification – are good law.

[29] Although recent decisions such as *Arnold v. Britton And Others* [2015] UKSC 36 appeared to have weaned itself from *ICS*, we believe a closer look would be instructive. There, Lord Neuberger and Lord Hodge emphasised on "the natural meaning of the words" when giving effect to a contract, since parties have control of the language therein.

.....

[34] Where the natural meaning of the contract is not clear and in the particular absence of words to the effect mentioned above, the principles in *ICS* in their qualified form (see [28] which qualifies its application vis-à-vis rectification), remain applicable and relevant to the construction of the contract such as to enable **the court to objectively determine "the meaning which the contract would convey to a reasonable person having all the background knowledge ... available to the parties**." (emphasis added)

[25]With that as the preamble one must now look at the relevant facts of the case. Some have been agreed by the parties in their Statement of Agreed Facts and the Supplementary Statement of Agreed Facts, and some that may be fairly inferred from the unfolding of events not seriously disputed, shall now be narrated.

[26]The plaintiff started employment with the defendant in June 2003. He joined the defendant as a Senior Manager for Legal & Human Resource and was confirmed to this position with effect from 1.3.2004. The defendant was then known as the Sarawak Enterprise Corporation Berhad (SECB).

[27]In 2006, upon a restructuring within the SECB Group of Companies and the adoption of Syarikat SESCO Berhad's Terms and Conditions of Service (Scheme B), the plaintiff continued in the employment in the company as the Group General Manager, Group Corporate Affairs. He was responsible for all aspects of the company's Human Resources, legal affairs, secretariat, regulatory affairs, information technology, company administration and public and corporate relations.

[28]The defendant then decided to embark on a bold move to further restructure its organisation and by its board's resolution of 8.12.2010 it authorised the Chief Executive Officer (CEO) to conclude new employment contracts with the current and future members of the Executive Management Board (EMB) members for a specified period and "a right of reversion to a pre-contract position in the event the contract is not renewed".

[29]The further restructuring saw the plaintiff entering into the said contract dated 20.1.2011 for the position of "Vice President CEO Office" with salary grade SG2 that comes with a monthly salary of RM25,000.00 for a period of three years from 1.2.2011 to 31.1.2014 (both dates inclusive) upon the terms and conditions as set out therein.

[30]The plaintiff thus enjoyed a considerable increase in salary of approximately RM5,000.00 and when the plaintiff's salary was increased from RM19,974.00 to RM25,000.00, there was an increase of slightly more than 25%.

[31]Some time in 2012 there was an unhappy episode involving the plaintiff when the company in its letter of 22.3.2012 re-designated him to be the Head of Business Development with immediate effect. He refused to accept the position and so a domestic inquiry was convened. He did withdraw his letter of rejection of the re-designation while the domestic inquiry was in progress but the domestic inquiry nevertheless found him guilty of insubordination and he was given a serious warning.

[32]By a letter dated 3.1.2013 from the defendant, the plaintiff was offered a new revised fixed-term contract for the post of Vice President, Government Relations, reporting to the Chief Operating Officer (COO) instead of the CEO, which offer he did not accept. To him it was a demotion and a double punishment, after having received the earlier serious warning letter. The defendant company by its letter of 17.5.2013 formalised the offer to be for a period of 3 years commencing 13.5.2013 and terminating on 12.5.2016.

[33]By that time the tension between the parties was palpable. The plaintiff finally withdrew his letter of non-acceptance and did in fact accept the position of Vice President Government Relations albeit that his contract would expire on 31.1.2014. The plaintiff's stand was that a re- designation past the period of the fixed term contract would require a new contract to be negotiated and concluded with him.

[34]As can be seen, there is a bit of history to this case and the defendant may have thought there was a way to get rid of what may be said to have become a thorn in the flesh. So, by its letter of 10.1.2014 the defendant informed the plaintiff that the said contract shall expire on 31.1.2014 with the cryptic note that the said contract shall automatically terminate on the said date.

[35]The plaintiff, being legally trained, might have anticipated this coming. He wrote back to the company by his letter of 28.1.2014 and requested that he be provided with any one of the options (a) or (b) as stated in Clause 13 of the said contract.

[36]The defendant responded with the assured stance that the options set out in Clause 13 were exercisable by it at its absolute discretion and that it had decided not to offer to the plaintiff any of the options set out in the contract.

[37]To the plaintiff that interpretation was repugnant to the terms and spirit of the contract and a reflection of bad faith on the part of the defendant company in punishing him for what it deemed to be a recalcitrant employee whose presence in the company was more a liability than an asset when what the plaintiff did was just to exert his contractual employment rights.

[38]Notwithstanding the company having informed the plaintiff by its letter of 10.1.2014 that his employment would automatically terminate upon the expiry of the contract on 31.1.2014, the company convened a second domestic

inquiry to inquire into seven charges of alleged misconduct against the plaintiff and informed him so by letter of 13.1.2014.

[39]The Inquiry Panel sat on 21.1.2014 and 27.1.2014 to hear preliminary matters such as objection to its composition and on the list of witnesses to be called. However, it only commenced its Inquiry proper on 27.2.2014 and concluded on 23.10.2014, after the contract had expired and the plaintiff was no longer under its employment.

[40]It then took another 4 months, on 23.2.2015 to communicate to the plaintiff that he had been found guilty of Charge No. 3, 4 and 7 and not guilty of the remaining charges.

[41]The company's stand was that the plaintiff was the one who had asked for adjournment because he had personal matters to attend to and so the domestic inquiry could not commence until after he had left employment. The company further argued that the plaintiff had voluntarily participated in the domestic inquiry and cannot therefore raise any objection now that he had been found guilty of 3 of the 7 charges of misconduct.

[42]The plaintiff's version was that the company had threatened to proceed in his absence if he was not willing to attend the domestic inquiry.

[43]For the purpose of the present appeal, the plaintiff is not pursuing his prayer that the inquiry and its findings be declared null and void, perhaps appreciating that an inquiry of such a nature after the plaintiff's employment had expired would only be academic and would have no bearing on his claim for damages for breach of the contract for not paying him the retirement benefits when the company decided not to renew the contract upon its expiry.

[44]We also noted that the company's pleaded stand in paragraph 24(j) of its Defence is that "the termination of the plaintiff's employment on 31.1.2014 was consequent to the expiry of the fixed term contract dated 20.1.2011, and not on grounds of misconduct."

[45]The plaintiff decided to sue the company and on 18.12.2015, he commenced legal action claiming for, *inter alia,* declaratory reliefs, damages for breach of the contract and interest. On 4.7.2018, the High Court dismissed his claim and undaunted, he had appealed to this Court.

[46]The terms of Clause 13 in so far as they are relevant to the determination of the issue are reproduced below:

> "13. Renewal of Contract or Reversion to Pre-contract Position
>
> The Company reserves the right to renew this contract for a further term which is to be decided by the Company based on the current terms upon the expiry of the initial contract period. The Company is however under no obligation to offer a contract beyond the existing mandatory retirement age of 56 years old. In the event that the Company decides not to further renew the Incumbent's contract, the Company reserves the right, at its absolute discretion, to offer the Incumbent either:
>
> (a) retirement benefit which is equivalent to the sum of two years of the last drawn gross contract salary of the Incumbent payable in full at the end of the initial contract;
>
> or
>
> (b) to re-appoint the Incumbent to his/her pre-contract salary grade, without any loss of seniority in service. Once the Incumbent is reverted to his/her pre-contract salary grade and salary, the contract shall cease to exist and the terms of the employment shall revert to the general conditions of service under TACOS.
>
> In electing to exercise its right to re-appoint the Incumbent to his/her pre-contract salary grade pursuant to 13(b) above, the Company is obliged to offer to the employee a position that is relevant to the employee's background and experience.
>
> The Company's obligation to offer further employment to the Incumbent at the end of the contract ceases upon the Incumbent reaching the mandatory retirement age of 56 years old ...".

[47]Does paragraph 2 of Clause 13 give the company 3 options upon the expiry of the contract period and the company deciding not to renew the contract for a further period? The 3 options being:

(a) Pay the employee 2 years of retirement benefit based on his last drawn salary or

(b) Put the employee back on his pre-contract permanent position salary grade without loss of seniority or

(c) Neither of the above options with the result that the employee's employment comes to an end without any retirement benefits.

[48]Granted the above is always subject to the fact that the "company's obligations to offer further employment to the Incumbent at the end of the contract ceases upon the Incumbent reaching the mandatory retirement age of 56 years old ..."

[49]The learned High court Judge was confident and comfortable with the interpretation that the "absolute discretion" that qualifies the company's reservation of its right would certainly include its right not to exercise either one of the 2 options available and she observed as follows:

> "118. **From my understanding of Clause 13**, it does not guarantee the Plaintiff the security of tenure .... **I am inclined to agree with the learned counsel for the Defendant that the phrase "*the Company reserves the right to renew the Contract*" in the first paragraph of Clause 13 simply means that the Defendant has the right to renew or not to renew the said Contract and that the Defendant will exercise that right if it deems necessary.**
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> 119. This interpretation is consistent with the second paragraph of Clause which envisaged a scenario where the Defendant has decided not to renew the said Contract. In which event, it provides that "*the Company reserves the right, at its absolute discretion*" to offer either option (a) or (b). **To my understanding, this phrase means that the Defendant has the right to offer or not to offer to the plaintiff either a retirement benefit under option (a) or to re-appoint him to his pre-contract position. The decision to offer the option or not to make the offer is entirely the discretion of the Defendant.**
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> 120. Had it been the intention of Clause 13 that upon non-renewal of the said Contract, the Defendant has to offer either option (a) or (b), then, as rightly submitted by learned counsel for the Defendant, the underline phrase in this statement "*In the event that the Company decides not to further renew the incumbent's contract, the Company reserves the right, at its absolute discretion ...*" would not have been incorporated." (emphasis added)

[50]One would note that option (c) above is not spelt out in paragraph 2 of Clause 13. The question is whether the "absolute discretion" qualifies the company's right to choose between options (a) and (b) or does it extend to not exercising the right at all to offer either option (a) or (b). The answer is germane when the question is asked, can the company in exercising its right not to renew the contract, reserve its right not to exercise either option (a) or (b)?

[51]The answer must surely be that the reservation of right of the company is the right to choose between one of 2 options in option (a) or option (b). If it were otherwise as in reserving its right not to exercise either option (a) or (b), then it should be spelt out clearly that there is option (c).

[52]Clause 13 must be read as a whole and when that is done one can see that there is an overarching obligation to offer employment to the employee until he reaches the retirement age of 56 years old such that if the company should exercise the right, that it had reserved, not to so offer employment, then retirement benefits must be paid out in consideration of the company not putting the employee back to his original salary grade and position as can be seen in the last paragraph of Clause 13 as follows:

> "The Company's obligation to offer further employment to the Incumbent at the end of the contract ceases upon the Incumbent reaching the mandatory retirement age of 56 years old ...".

[53]When the right and obligation of the company are placed side by side, we must refrain from an interpretation that would be repugnant to the scheme and structure of the contract bearing in mind that it was a migration from a permanent contract and further that the migration back is at the absolute discretion of the company subject always

to the company not having an obligation to offer any employment to the employee once he has reached the retirement age of 56 years old.

[54]Thus the company has the right to decide whether or not to renew the contract once the fixed term expires subject always to the fact that the obligation to offer further employment ceases when the employee reached 56 years old.

[55]The company further has the right, should it decide not to renew the contract after its expiry, to offer one of the two options stated. It is a right to be exercised at its absolute discretion, unfettered by any factor save for the retirement age factor which takes away its obligation to further employ the employee concerned.

[56]When one looks at the company's right and the countervailing obligation, the only permitted and possible interpretation, consistent with the purpose of the contractual scheme and structure is that there is no third option where the company reserves its right to either offer or not to offer one of the 2 options expressly stated.

[57]It cannot be gainsaid that the 2 options are standing offers which the company cannot withdraw unilaterally but which it may decide to choose one or the other without being called into question as to why it chooses either of the 2 options.

[58]If the reservation of the right of the company includes the right not to grant one of the two options to the employee after the fixed term contract expires, then it must be clearly and categorically stated so that the employee is not lulled into a sense of complacency in believing that he had nothing to lose.

[59]However the learned High Court Judge was influenced by the fact that the words highlighted below give the right to the company to choose not to give either option (a) or (b) to the employee as the reservation of the company's right is at its "absolute discretion" as follows:

> "In the event that the Company decides not to further renew the incumbent's contract, **the Company reserves the right, at its absolute discretion to offer the Incumbent either..**.." (emphasis added)

[60]One must then ask what was the right that the company had expressly reserved. It was the right "to offer the Incumbent either...." One cannot truncate a sentence half way through without asking what was being qualified by the words "reserved the right". It was a right circumscribed by one of the 2 options i.e. either option (a) or (b). It is not neither option (a) nor (b).

[61]The High Court fell into error when it construed the 2 rights of the company with respect to not renewing the contract after its expiry and with respect to what to offer the incumbent in the event that the first right is exercised not to renew the contract, as absolute rights unfettered by any factors.

[62]Whilst the first right in not renewing the contract after its expiry may be so, the second right with respect to what follows if the first right is exercised, is circumscribed by what the company had agreed to offer the incumbent employee and it may exercise either option (a) or option (b) and the exercise of such a right cannot be questioned or challenged in any way as contractually the incumbent employee had agreed to the company deciding as it may, in its absolute discretion, deem fit.

[63]We can accept that the expression "reserve its right" to mean that "the Defendant has the right to do something specific, and that the Defendant will use that right if it feels that it is necessary". Again, we have no quarrel with the contention, based as it is upon the dictionary meaning of the phrase "reserves the right" which means "a phrase used to tell someone that you have the right to do something specific, and that you will use that right if you feel it is necessary".

[64]The ordinary meanings of the word "reserve" have been stated as follows:

(i) "to keep back, to retain, to keep for future use or special use and to retain or hold to a future time" as stated in **Black's Law Dictionary** (Revised 4th Edition) page 1473;

(ii) "to keep, to hold, to retain" and "to set apart for some purpose something specially kept apart for future use or for specific purpose" given in P. Ramanatha Aiyar's **The Law Lexicon**, page 1575.

[65]Whilst the first right is not subject to qualification, the second right is. To have equated the 2 rights as the same absolute discretion without paying attention to the syntax would be a mistake. The relevant parts of the learned Judge's Grounds of Judgment is reproduced below to show how the error had subtly crept in:

> "118. I am inclined to agree with the counsel for the Defendant that the phrase "the Company reserves the right to renew the Contract" in the first paragraph of clause 13 **simply means that the Defendant has the right to renew or not to renew the said contract and that the Defendant will exercise that right if it deems necessary."** (emphasis added)

[66]The words "the Company reserves the right, at its absolute discretion, to offer the Incumbent either: (a) retirement benefit.....; or (b) to re-appoint the Incumbent to his/her pre-contract salary grade..... " in the second paragraph of the clause were held by the court to mean:

> "119. ... that the Defendant has the right to offer or not to offer either a retirement benefit under option (a) or to re-appoint him to his pre- contract position. The decision to offer the option or not to make the offer is entirely the discretion of the Defendant"

[67]The "absolute discretion" is with respect to how the second right to choose between one of the two options may be exercised. The incumbent employee cannot question that and he had contractually agreed not to question that.

[68]The company's interpretation is that the employee would stand to lose everything if after the fixed term of 3 years at an increased salary scheme with an achievement bonus scheme, the contract would automatically terminate with no retirement benefits if he is not put back in his previous salary grade and position. The company is saying that Clause 13 allows it to not place the employee back into the old pre- contract scheme and not to pay any retirement benefits at all even after the fixed term contract has expired.

[69]That would be to do violence to the word "either" which word would restrict the free and absolute exercise of its right, in its absolute discretion, to one of the two options. If it were otherwise and that there would be a third option available in that the company had also reserved its right not to exercise one of the two options provided, than that right must be specifically spelt out and expressly stated.

[70]It can be so done by placing the qualifying words "or not at all" at the appropriate place such as the following:

> "In the event that the Company decides not to further renew the Incumbent's contract, the Company reserves the right, at its absolute discretion, to offer the Incumbent either (a) or (b) **or not at al**l as follows:....." (emphasis added)

[71]Reading English as it stands and giving the words employed in Clause 13 its ordinary and natural meaning and employing the rules of grammar and interpreting the sentence in its syntax and taking into consideration the context of the whole Clause 13, this Court, arrives at only one possible interpretation. It is this: upon the company exercising its right not to renew the contract upon the expiry of its fixed term, it has the right, in its absolute discretion, to exercise one of the two options. It does not have the right to take away its offer of one of the two options and to reserve for itself the right not to want to exercise either option (a) or option (b) and to allow the contract to expire without the need to pay the employee the retirement benefits in option (a).

[72]Where the language and words used are clear the Court would give effect to the language and words employed as reflecting what was the intention of the parties when the contract was entered into. Thus "if the language of the document is clear and unambiguous and applies accurately to the existing facts" and the intention of the parties can be gathered from the language of the document itself, the Court must not rewrite the terms for the parties. See *Perbadanan Kemajuan Negeri Selangor v Selangor Country Club Sdn Bhd* [2017] 2 MLJ 819 at page 831.

[73]We thus agree with the plaintiff that the defendant is under an obligation either to pay the plaintiff a retirement benefit equivalent to 2 years of last drawn salary or to re-appoint the plaintiff to his pre-contract salary grade without any loss of seniority in the event it decides not to renew the contract, which the company had decided in this case.

Whether the purposive and factual matrix approach would also further underscore the same interpretation that is consistent with the language used in Clause 13

[74]Where the language of the clause is capable of bearing more than one meaning, the court is entitled "to select the meaning which accords with the commercial purpose of the clause". See *MFI Properties Ltd. v BICC Group Pension Trust Ltd.* [1986] 1All. ER 974 at 976.

[75]Assuming for a moment that Clause 13 is susceptible to a second meaning in that when the company exercises its second right it may choose between option (a) or (b) or not at all, the court is entitled "to select the meaning which accords with the commercial purpose of the clause rather than the one which appears commercially irrational" following the principle in **MFI Properties Ltd** (supra).

[76]The Court of Appeal in *The Government of Malaysia v Imej Warisan Sdn Bhd* [2018] 2 MLJ 791, His Lordship, Vernon Ong, JCA (as he then was), stated the following guidelines for the interpretation of the contract at page 800:

> "[25].....*Berjaya Times Squares Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd* [2010] 1 MLJ 597 at p 620; ; [2010] 1 CLJ 269 at p 296 (FC). 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 includes all material that was reasonably available to the parties. Third, the interpreting court must disregard any part of the background that is declaratory of subjective intent only. Lastly, the court should adopt an objective approach when interpreting a private contract (see *Investors Compensation Scheme Ltd v West Bromwich Building Society; Investors Compensation Scheme Ltd v Hopkin & Sons (a firm) and others; Alford v West Bromwich Building Society and others; Armitage v West Bromwich Building Society and others* [1998] 1 All ER 98). As Lord Clyde said in *Bank of Credit and Commerce International SA v Ali and others* [2001] 2 WLR 735:
>
> > The knowledge reasonably available to them (that is to say the parties to the contract) must include matters of law as well as matters of fact. The problem is not [*801] resolved by asking the parties what they thought they intended. It is the imputed intention of the parties that the court is concerned to ascertain. The parties may well have never applied their minds to the particular eventuality which has subsequently arisen, so that they may never in fact have had any conscious intention in relation to that eventuality. It is an objective approach which is required and a solution should be found which is both reasonable and realistic. The meaning of the agreement is to be discovered from the words which they have used read in the context of the circumstances in which they made the agreement. The exercise is not one where there are strict rules, but one where the solution is to be found by considering the language used by the parties against the background of the surrounding circumstances. (Emphasis added.)"

[77]Here it does not make commercial sense, let alone compute with common sense, for an employee in senior management, to have agreed to convert a permanent contract of employment to that of a fixed term without the safeguard of either a retirement benefit upon the expiry of the fixed term, in this case 3 years, or to be placed back into the previous permanent contract with a lower salary grade but with no loss of seniority. Granted the choice of either of the two options of (a) or (b) is entirely left to the absolute discretion of the company.

[78]For the company to now say that it is not obliged to choose either option (a) or (b) as it may decide not to exercise one of the two options consistent with its having reserved its right not to renew the contract and now not to grant option (a) or (b) to the incumbent employee, would tantamount to pulling the rug beneath the employee's feet.

[79]Had the employee known of that intention he would not have agreed to be placed on the fixed term contract from a permanent contract. The plaintiff employee had rightly understood Clause 13 to be subject to the company's overall obligation to employ the employee until he reaches the age of 56 years old such that having acquired the right not to renew the contract any further at its firsts expiry or subsequent expiry, the company is obligated to pay the retirement benefits as stated in one of the two options.

[80]The company had a choice if it does not want to pay the retirement benefits of 2 years last drawn monthly salary to exercise option (b) and put the employee back into the old permanent contract scheme based on the previous salary grade with no loss of seniority.

[81]To say that the company can have a third option (c) to neither exercise either option (a) or (b) would be repugnant to the whole scheme of conversion of the employment contract from permanent to fixed term for some increase in salary with no retirement benefit whatsoever in the case of early termination of the employment through effluxion of time once the initial 3 years is over.

[82]The employee would have been short-changed and indeed it would be unfair labour and industrial relations practice. It would be literally promoting a senior employee to a higher salary grade only to get rid of him if he does not perform without the need to hold a domestic inquiry to terminate him on account of his poor performance.

[83]Even if the employee is considered to have performed poorly, the company in deciding not to extend his term of fixed contract or to put him back into the old salary scale is still obliged to pay him his retirement benefits consisting of his 2 years salary based on his last drawn salary.

[84]The new employment scheme and structure of a fixed term contract albeit with a higher salary scale and potentially better bonus scheme based on performance of the employee and of the employer cannot be a device to deprive an employee of the benefits due to him if he were to continue under the previous permanent scheme. Neither should it be a device for an employer to get rid of what it deems to be “dead woods” or non-performers.

[85]Granted an employer may explore from time to time different compensation and salary schemes and structures to motivate its employees to excel and achieve new heights and even to filter out those not in sync with the company’s ethos and key performance indicators (KPIs). However, its approach must be fair in that proper retirement benefits must be in place for those that the company does not want to retain.

[86]Short of that, it is then incumbent on the company to go through the normal exercise of issuing a show cause letter for poor performance against a backdrop of objective criteria or KPIs that have been reasonably set.

[87]In *Reardon Smith Line v Hansen - Tangen* [1976] 3 All E.R. 570, Lord Wilberforce in his judgment explained the need for the court to know the commercial purpose of the contract at page 574:

> “..No contracts are made in a vacuum: there is always a setting in which they are to be placed. The nature of what is legitimate to have regard to is usually described as ‘the surrounding circumstances’ but this phrase is imprecise: it can be illustrated but hardly defined. In a commercial contract, it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes the knowledge of the genesis of the transaction, the background, the context, the market in which they are operating.”

[88]Whilst the commercial purpose of the contract may be to achieve a more rigorous scheme of assessing the performance of senior management against the backdrop of a more volatile employment and energy market, the migration from a permanent contract to a fixed term contract must not be to take away with one hand what the other hand had given in terms of increase in salary and other pay package and perks.

[89]If it is, it would be a colourable exercise in the name of motivating the senior management to rally and be conscripted to do battle against the common enemies of a tougher and more volatile market, not to mention more competition in the horizon, only to be booted out through the more palatable exit route of the effluxion of time for the fixed term contract.

[90]It is only too true that human nature being what it is and a corporation is no exception as it is also run by humans, it would be doing oneself a disservice if one does not retain those, especially in senior management who excel beyond the targets set for them.

[91]It is also very real indeed that it is difficult to terminate an employee on account of poor performance unless the lack of performance stands out like a sore thumb or that there are clear KPIs at the outset.

[92]One perhaps might have come across the Peter Principle, laid out in a 1969 book by Dr. Laurence J. Peter, who described the following paradox:

> “if organisations promote the best people at their current jobs, then organisations will inevitably promote people until they are no longer good at their jobs. In other words, organisations manage careers so that everyone “rises to the level of their incompetence.”

[93]Little wonder that for senior management positions, the trend is now to employ them on a fixed term contract where their pay package and perks are tied to their performance and that of their department and the overall performance of the company.

[94]Before their term is over the Board or whichever is the committee in charge of assessment and evaluation of their performance, would meet to consider if the company should extend the terms of service of the senior management employee.

[95]Being a fixed term contract there is no legitimate expectation that the term of employment would be extended. There is of course a hiccup in cases where a company has to migrate senior management employees from a permanent contract scheme and structure to that of a fixed term. Hence the need to offer a retirement benefit if the company does not, for any reason whatsoever, renew the fixed term contract after its expiry. That is the rationale behind the "absolute discretion" that the employee like the plaintiff here, agreed to have reposed on the employer.

[96]Parties are clear in that they entered into the fresh employment contract with eyes open in that if the employee's term is not extended, he is entitled to the 2 year retirement benefits and package as if he had been given an early retirement before his retirement age.

[97]To adjust back to one's previous salary grade is not going to be easy and may even be perceived as not having made the mark. Additionally, the previous position might have been filled by a less senior person. Hence the absolute discretion that is being vested on the employer to decide if a payment of 2 years salary as retirement benefits would be more conducive for industrial harmony and the good of both the employer and the employee.

[98]It would defy business logic for the company to convert the permanent contract to a fixed term contract if at the end of the fixed term which in this case was 3 years, the company can then refuse to extend the contract and refuse to place the incumbent employee back to its previous salary grade with no obligation to pay retirement benefits when in effect by not doing so, the company is retiring the employee before his retirement age.

[99]In Clause 13 itself there are 2 occasions when the expression the "company's obligation" to continue to employ the employee until his retirement age of 56 is expressed in the negative as follows:

> "The Company is however under no obligation to offer a contract beyond the existing mandatory retirement age of 56 years old....
>
> .....
>
> The Company's obligation to offer further employment to the Incumbent at the end of the contract ceases upon the Incumbent reaching the mandatory retirement age of 56 years old ...".

[100]One cannot escape the conclusion that before the retirement age of 56 years is up the company may retire the employee earlier by not renewing the contract and by not placing him under his previous salary grade and scheme but instead pay him the retirement benefits envisaged in option (a) based on the agreed amount of 2 years salary based on his last drawn salary.

[101]The Federal Court in **SPM Membrane** (supra) approved of the business or commercial sense approach in interpreting contract where more than one interpretation is possible as follows:

> "[78] Thus the nub of this appeal is, when one has to choose between two competing interpretations, the one which makes more commercial sense should be preferred if the natural meaning of the words is unclear. It is noteworthy that the same approach was taken by Lord Hodge (in the majority decision of *Arnold v Britton), where His Lordship accepted the unitary process of construction in Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900 para 21 that:
>
> > [*492]...if there are two possible constructions, the Court is entitled to prefer the construction which is consistent with business common sense and to reject the other."

[102]The business logic approach was highlighted by the Court of Appeal in *Ban Chong Hing & anor v Gama Trading Co. [Hong Kong] Ltd.* [2011] 6 CLJ 493, where His Lordship Abdul Malik Ishak, JCA, upon reviewing the authorities explained the objective approach to interpretation at page 508:

> "[35] ... That the task of interpreting a contract requires an objective approach. And the court must determine the objective aim or purpose of the transaction and this is usually done by taking into account the factual matrix that forms the background to the contract. At the end of the day, the correct test to apply is the test of a reasonable man and this is said to be the stamp of an objective approach as opposed to the subjective view of a party to the contract. Of course, **emphasis is always placed on the words used in the contract but where the words used lead to a conclusion that defies business logic, then the contract must be construed in such a way as to make it conform to business logic**." (emphasis added)

[103]The recitals to an agreement provides the necessary context for the agreement, setting out the brief state of affairs that had given impetus to the agreement about to be entered into. The Court of Appeal in *Wasco Coatings (M) Sdn Bhd v Nacap Asia Pacific Sdn Bhd and others* [2015] 5 CLJ 462 at pages 475-476 looked at the object of a settlement agreement as revealed by its recitals in construing the meaning of the words of Clause 4(iv) therein. The Court of Appeal observed as follows:

> "**[31]** The duty of the court is to construe a contract document as a whole and to determine from its language and any other admissible evidence its true nature and purport (see *Sia Siew Hong & Ors v. Lim Gim Chian & Anor* [1996] 3 CLJ 26). In the case of *Hoh Kiang Ngan & Ors v. Hoh Han Keyet* [2013] 5 CLJ 222; ; [2013] 4 MLJ 199 the Court of Appeal held as follows:
>
> > To arrive at a correct interpretation of any provision in a contract, which will be fair and just, a court is entitled to consider the history or background facts leading to the execution of the contract; In *Bon Chong Hing @ Chong Hing & Anor v. Gama Trading Company (Hong Kong) Ltd* [2011] 6 CLJ 493; ; [2011] 4 MLJ 52. His Lordship Abdul Malik Ishak JCA delivering the judgment of the Court of Appeal on the construction and interpretation of an agreement adopted the meaning that best serves the commercial purpose of the shareholders' agreement. The learned judge applied the business common sense approach which generally favours a commercially sensible construction.
>
> **[32]** Mindful of this principle of interpretation, the inescapable and logical approach that we should adopt in this appeal is that **the settlement agreement ought to be construed by looking at the history, background facts and the reasons leading to the execution of the settlement agreement."** (emphasis added)

[104]The background facts as contained in the recitals to the contract as well as other admissible evidence that are relevant to provide the context for the migration of the agreement from permanent contract to a fixed termed contract with a right of reversion subject to the absolute discretion of the company to pay retirement benefit in lieu of the conversion must now be examined.

[105]The recitals in the preamble to the said contract are reproduced below:

> "WHEREAS SEB is a vertically integrated power utility company in Sarawak, Malaysia **and the Incumbent is an established permanent employee of SEB under the existing terms and conditions of employment referred to as SEB's Terms and Conditions of Service or 'TACOS'** which shall include the existing, revised, new or additional terms and conditions approved by SEB from time to time;
>
> **WHEREAS following the SEB's Board approval on 8th December 2010 on the organization restructuring of the company, SEB is desirous to offer the Incumbent employment on contract basis for a period specified under this contract;**
>
> AND WHEREAS, the Incumbent has agreed to accept SEB offer of the employment on contract subject to the terms and conditions hereinafter appearing." (emphasis added)

[106]We agree with learned counsel for the plaintiff that the facts forming the background to the said contract and relevant in determining the purpose of Clause 13 disclosed by the above recitals are:

(a) that the plaintiff was "an established permanent employee of SEB [the defendant] under existing terms and conditions" known as 'TACOS';

(b) that he was offered employment on contract basis for the period specified and upon the terms and conditions stated in the contract;

(c) that the offer to employ the plaintiff on a contract basis was made following an organisation restructuring approved by the defendant's board on 8.12.2010.

[107]As the extract of what was decided in the Board's meeting of 8.12.2010 was referred to in the recitals without the full minutes being reproduced, it is certainly relevant and admissible to help shed some light into the contract. For the record the contents of the above board resolution passed on 8.12.2010 of the defendant's Board of Directors' meeting held on the said date (marked as Exhibit C pages 1-2) were confirmed by DW6 (Siti Aisyah Binti Adenan) when they were put to her in cross examination.

[108]The said restructuring was referred to in the Board's meeting as follows in its minutes:

> "8.....that as a condition of their transition to the new roles and designations outlined in Appendix 1, all current and future Executive Management Board (EMB) members be offered a contract of employment with an initial three years term, with provision to extend for up to two years by mutual agreement **and a right of reversion to a pre-contract position in the event that a contract is not renewed.**" (emphasis added)

[109]It was thus recorded that the defendant approved an offer of a fixed term contract with "a right of reversion to a pre-contract position in the event that a contract is not renewed" to be given to established permanent employees who were Executive Management Board members as "a condition of their transition to their new roles and designations... ".

[110]Learned counsel for the plaintiff submitted that the "right of reversion to a pre-contract position" in the event that the contract is not renewed was incorporated as a right to offer to re-appoint the plaintiff to his pre-contract salary grade as option (b) in the second paragraph of Clause 13 of the contract. In addition, the parties included a right to offer a retirement benefit equivalent to two years of the last drawn gross contract salary as an alternative under option (a). The defendant was given the absolute discretion to choose which one of the two options to grant to the plaintiff.

[111]We agree with learned counsel for the plaintiff that the purpose of the right to offer to the plaintiff either one of the two options in the second paragraph of Clause 13 was to provide a benefit to the plaintiff as a condition of his transition from a permanent employee to a fixed term contract employee.

[112]The meaning given by the High Court to the Clause confers a discretion upon the defendant to offer or not to offer either of the two options in the second paragraph of the Clause. That interpretation does not uphold the bargain between the parties as well as what the Board had decided with respect to the reversionary mechanism within the new contract structure. It would be grossly unfair and unconscionable for the plaintiff to be deprived of the agreed retirement benefits under option (a) should the defendant decide not to offer the reversion to the previous salary scheme under option (b).

[113]It must be appreciated that once the reversion to the previous contract is made the employment becomes a permanent employment until the employee retires at 56 years old.

[114]To uphold the company's contention would be to fly against the clear words of Clause 13 and more than that, would be inconsistent with the decision of the Board of 8.12.2010. It would be inconsistent with the objective aim or purpose of the Clause and should be rejected. See *Sia Siew Hong & Ors v Lim Gim Chian & Anor* [1995] 3 MLJ 141 at page 153.

[115]Taking the factual matrix of the contract into consideration, the company cannot manoeuvre its way out of its obligations to either grant a retirement benefit of 2 years salary or to allow the reversion to the previous permanent contract scheme and salary grade.

Whether there was a breach of Clause 13 by the company when it refuses to pay the plaintiff the agreed retirement benefit

[116]As stated before the absolute discretion of the company is circumscribed within the 2 choices available in option (a) or option (b) once the following conditions are fulfilled namely, (i) upon the company making a decision not to renew the said contract; and (ii) provided the plaintiff has not reached the mandatory retirement age of 56 years old.

[117]Both the above conditions were satisfied in the present case. The company had communicated its decision to the plaintiff in its letter dated 29.1.2014 that it had made a decision not to offer any of the two options in Clause 13 in the purported exercise of its discretion as appears from the following passage of the said letter:

> "We further write to clarify that the options set out in Clause 13 of the Contract Is exercisable at the absolute discretion of SEB as stipulated therein. Given the facts and circumstances outlined herein above, SEB has decided not to offer you any of the options set out therein."

[118]As confirmed by DW6 (Siti Aisyah Binti Adenan) the plaintiff was 41 years old at the date of the expiry of the contract period, i.e. on 31.1.2014.

[119]In the evidence adduced at the trial, the company sought to justify its failure or refusal to offer either of the two options in Clause 13 on the grounds, inter alia, that it had offered to the plaintiff employee vide a letter dated 17.5.2013 a fixed term contract for the post of Vice President, Government Relation which the plaintiff did not accept.

[120]It was not the pleaded case of the company that it had exhausted the right to offer extension of employment when the plaintiff did not want to accept employment until 12.5.2016 and so Clause 13 had become inoperative.

[121]The pleaded case of the company was that it decided not to renew the contract and not to exercise either options. In paragraph 22(e) of the Defence the company had pleaded as follows:

> "(e) Given the Plaintiff's work performance from 2011, as well as the facts and circumstances commencing from 22.3.2012 until 25.10.2013, the Defendant had decided not to exercise its discretion to offer the Plaintiff any of the option set out in Clause 13 of the Fixed Term Contract dated 20.1.2011;"

[122]We agree with learned counsel for the plaintiff that the offer dated 17.5.2013 (p137 RR) of employment as a Vice President Government Relations for the period continuing after the first expiry of the contract on 31.1.2014 was outside the terms of Clause 13 not least because the contract was still operative and there was still some 8 months before its expiry.

[123]In any event not only had the plaintiff accepted the position of Vice President Government Relations but that the company had by their letter of 23.8.2013 at p 146 RR agreed to the plaintiff continuing in the position as Vice President Government Relations expiring on 31.1.2014. The company reiterated this in its letter of 29.1.2014 at p 150-154 RR that the fixed term contract shall automatically expire on 31.1.2014. In fact, the stand of the company is captured in paragraph 26(e) of its Defence as follows:

> "(e) The Plaintiff assumed the reassigned position as VP Government Relations on 13.5.2013 and carried out his duties and responsibilities as VP Government Relations until the expiry of his contract of employment with the Defendant with effect from 31.1.2014."

[124]Surely after agreeing to the plaintiff serving in the capacity of Vice President Government Relations until 31.1.2014 it cannot latch on to the past history of the plaintiff as a ground of refusal to offer the plaintiff either one of the two options when his contract expired on 31.1.2014. If indeed the plaintiff had not been willing to perform the duties of Vice President Government Relations until 12.5.2016, that would at best be insubordination to be taken up through the process of a show cause letter and a domestic inquiry.

[125]We note that the learned High Court Judge had held as follows in her Grounds of Judgment at paragraph 122:

> "It has been established in evidence that the Defendant exercised its right not to renew the said Contract upon the Plaintiff's rejection of its offer of Vice- President, Government Relations fixed term Contract for the period 13.5.2013 to 12.5.2016."

[126]As we had stated before, the reason for the company not to offer an extension of the fixed term contract after its expiry on 31.1.2014 is not relevant as it has the absolute right not to do so.

[127]It is not relevant that some 8 months ago the plaintiff had rejected an offer of the position of Vice President Government Relations to run from 13.5.2013 to 12.5.2016. The relevant question is whether when the fixed term contract expired on 31.1.2014 did the company offer to renew the contract. The answer is "no" as held by the learned High Court Judge in paragraph 122 of her Grounds of Judgment referred to above.

[128]Once it has exercised that absolute right, it is left with only one of 2 options (a) or (b) to choose from. Since (b) was not forthcoming it was obvious that the company must honour what it had agreed with the plaintiff to pay him the retirement benefit as agreed.

[129]Past conduct of the plaintiff, no matter how unacceptable, cannot be used as justification for not wanting to offer the plaintiff one of two options in option (a) or (b) upon the expiry of the plaintiff's 3 year contract. After all it was already water under the bridge as the fixed term contract would only be expiring on 31.1.2014 as accepted by the company in its letter of 23.8.2013 accepting that the plaintiff is to serve as Vice President Government Relations until the contract expires.

[130]In paragraph 22(c)(i) of its Defence the company had taken the position and pleaded as follows:

> "(i) By the letter dated 23.8.2013, the Plaintiff was informed that he would continue in his current position as VP Government Relations under the terms of his existing fixed term contract dated 24.1.2011 for the period 1.2.2011 to 31.1.2014."

[131]It had become a non-issue as the company had not pursued with the domestic inquiry any further. If the company had proceeded with the domestic inquiry and found the plaintiff guilty of misconduct for his perceived insubordination, then it is for the company to dismiss him accordingly and mete out such punishment as it may deem reasonable.

[132]Apparently the learned High Court Judge was influenced by the fact that the company had a right not to renew the contract once it expires as the plaintiff had earlier rejected the offer of Vice President Government relations for a further fixed term for the period 13.5.2013 to 12.5.2016.

[133]As stated, whilst the plaintiff cannot possibly refuse the re- designation to Vice President Government Relations, he is not legally obliged to accept that re-designation past 31.1.2014.

[134]The fact also remains that the company did not offer to extend his term upon its expiry on 31.1.2014 when by its letter of 29.1.2014 it informed the plaintiff that his contract would not be renewed.

[135]This is more than amply clear in the defendant's own pleading at paragraph 26(g) of its Defence as follows:

> "(g) In view of the Plaintiff's refusal to accept the said Offer (i.e. Fixed Term Contract for the period 13.5.2013 to 12.5.2016), the Defendant decided not to renew the Fixed Term Contract dated 20.1.2011 pursuant to Clause 13 therein upon the expiry thereof;"

[136]That is a decision that the company was perfectly entitled to make without the need to give any reason. It may well be that it still was very sore with the plaintiff not having accepted the position of VP President of Government Relations for 3 years from the date of offer 13.5.2013 to expire on 12.5.2016.

[137]Surely the company cannot rely on a rejection of an offer made some 8 months before the expiry of the plaintiff's fixed term contract for which no show cause letter or domestic inquiry was conducted, to now justify its decision not to renew the contract and more than that, having no legal obligation to pay the retirement benefit.

[138]As we had stated before, the company had communicated to the plaintiff by its letter of 29.1.2014 its decision not to renew the contract and that triggers the operation of Clause 13 with respect to what happened next - one of two options that the company was legally obliged to discharge.

[139]We are thus unable to agree with the learned High Court Judge when she held as follows:

> "122. It has been established in evidence that **the Defendant exercised its right not to renew the said Contract upon the Plaintiff's rejection of its offer of Vice-President, Government Relations fixed term Contract for the period 13.5.2013 to 12.5.2016.**
>
> 123. **The Defendant did not offer the Plaintiff either a retirement benefit or reappointment to his pre- contract position.**
>
> 124. Learned counsel for the Defendant submitted, and I concur, that **the Defendant was exercising within the limit of its contractual and/or management prerogative and that it was a genuine and lawful exercise of discretion."** (emphasis added)

[140]The fact that there was a second domestic inquiry that was held and continued after his contract had expired does not help the company because breach of the contract took place when the company refused to pay the plaintiff his retirement benefit upon the company deciding not to renew his contract nor to put him back into his previous contract with its salary grade with no loss of seniority.

[141]The fact that the company was not happy with the attitude of the plaintiff was palpable if not patent. The plaintiff had applied for the Domestic Inquiry proceedings to be postponed because of family commitments and it was postponed to a date after the expiry of his contract of employment with the company which came into effect from 31.1.2014.

[142]His attendance in the Domestic Inquiry on the postponed dates would be on a voluntary basis solely for purposes of defending and/or exculpating himself against the charges of misconduct preferred against him. It took another year for the Domestic Inquiry to be concluded with the company finding him guilty of misconduct.

[143]It is of course very strange as to the need for the company to continue to conclusion the Domestic Inquiry long after the contract of employment had expired on 31.1.2014. It had become purely academic and the company cannot use it to justify its conduct which must be judged as at 31.1.2014 when it said the fixed term contract had come to an end and that it was neither paying the plaintiff his retirement benefit not reverting him back to his previous contract in the salary grade then.

[144]The rights of the parties had crystallised on 31.1.2014 when any retirement benefit is to be paid out at the end of the initial period of 3 years.

[145]At any rate the plaintiff as appellant had abandoned any appeal against the dismissal of his claim that the second Domestic Inquiry is a nullity as he is only confining his reliefs to damages for breach of contract when he was not given the retirement benefit as a consequence of the company deciding not to renew his contract nor put him back to the pre- contract salary grade and position.

[146]The company breached its obligation under Clause 13 when, vide the letter dated 29.1.2014, it informed the plaintiff that it had made a decision not to offer him either of the two options stated in the second paragraph of Clause 13 of the contract.

[147]The plaintiff is entitled to damages for breach on the part of the company of its obligation under clause 13 to offer either (a) a retirement benefit equivalent to 2 years last drawn gross salary; or (b) to re-appoint the plaintiff to his pre-contract salary grade without loss of seniority. This obligation arose on the expiry of the initial period of the said contract, that is, on 31.1.2014.

[148]By reason of the breach of the said Clause, the plaintiff suffered loss and damage in that he was deprived of the retirement benefit equivalent to the sum of two years of the last drawn gross contract salary payable in full at the

end of the initial contract period or, alternatively, he was deprived of re-appointment to his pre-contract salary grade without loss of seniority.

[149]Being a personal contract of employment it is impracticality, if not impossible, to grant the plaintiff specific performance in being emplaced back to his previous contract and neither is the plaintiff claiming this. It would anyway be a decision that cannot be questioned by the plaintiff had the company decided not to emplace him back to his previous contract and salary grade. He is left with the option that he is entitled to claim which is the retirement benefit under option (a) of the second paragraph of Clause 13. It is stated to be "equivalent to the sum of two years gross contract salary of the Incumbent (the plaintiff) payable in full at the end of the initial period".

[150]Section 74 of the Contracts Act 1950 would be relevant. Section 74 reads as follows:

> "Compensation for loss or damage caused by breach of contract
>
> 74(1) When a contract has been broken, the party who suffers by the breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from the breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.
>
> (2) Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach."

[151]It is more than clear that the loss of the plaintiff that naturally arose from the company's breach is the amount that the company had contractually agreed to pay the plaintiff which is 2 years of his last drawn salary.

[152]The gross contract salary of the plaintiff is stated in Clause 3 of the contract to be RM25,000.00 per calendar month. The fact that the plaintiff's salary under the contract was RM25,000.00 per month was admitted in evidence by DW6 (Siti Aisyah Binti Adenan). We agree with learned counsel of the plaintiff that, on the said evidence, the retirement benefit amounted to RM600,000.00. (RM25,000.00 x 24 months = RM600,000.00).

[153]It is a loss that arises naturally out of the breach and to which the plaintiff is entitled.

[154]The plaintiff also claimed interest on damages for breach of contract "at such rate and for such period as the court deems just" under prayer (7) of paragraph 21 of the Statement of Claim. It is expressly provided in the second paragraph of Clause 13 that the retirement benefit was "payable in full at the end of the initial contract". The initial contract period ended on 31.1.2014.

[155]Interest is generally awarded to a party who had been kept out of the compensation sum and thus deprived of its use. See s.11 Civil Law Act 1956 and the Court of Appeal's case of *Lee Guan Par v Hotel Universal Sdn Bhd* [2005] 4 MLJ 589 where at p 597 it was observed as follows:

> "[25] The basis on which the courts have acted in awarding interest under this section is that the defendant has kept the plaintiff out of the money which ought to have been paid to him and since the defendant has had the use of the money the defendant ought to compensate the plaintiff accordingly. In *Harbutt's 'Plasticine' Ltd v Wayne Tank & Pump Co Ltd* [1970] 1 QB 447, Lord Denning, at p 468 said:
>
> > An award of interest is discretionary. It seems to me that the basis of an award of interest is that the defendant has kept the plaintiff out of his money; and the defendant has had the use of it himself. So, he ought to compensate the plaintiff accordingly."

[156]Since the retirement benefit was payable on the expiry of the initial contract, i.e. on 31.1.2014, it is only right and reasonable that the plaintiff is compensated from being kept out of the money which ought to have been paid to him in full on the said date, but which the defendant has had use of, since it was not paid out to the plaintiff.

[157]Therefore we order interest at the rate of 5% per annum on the sum of RM600,000.00 from 1.2.2014 until full payment.

Pronouncement

[158]We had borne in the forefront of our mind that an appellate should not set aside a decision of the trial court unless it is plainly wrong. Here we had not disturbed any findings of fact that are relevant as the core issue was one of interpretation and construction of Clause 13 of the contract and that is a question of law and not of fact. See the Federal Court's decision in *Far East Holdings Bhd & Anor v Majlis Ugama Islam Dan Adat Resam Melayu Pahang and Other Appeals* [2018] 1 MLJ 1.

[159]For the reasons given above, we had set aside the order of the High Court and award the plaintiff a sum of RM600,000.00 as damages together with interest at the rate of 5% per annum on the sum of RM600,000.00 from 1.2.2014 until full payment.

[160]We also awarded costs of RM20,000.00 to appellant/plaintiff here and below subject to allocatur.

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