

# Corporate/M&A

## Catajaya Sdn Bhd v Shoppoint Sdn Bhd: Interpretation of Termination Clause

**A case note by Charlie Wong Jing Xiong.**

### Introduction

It is important to deal with the termination of any contract in a delicate manner as there may be far-reaching consequences to the relationship and contractual obligations of the contracting parties. More so if the termination is not mutually agreed to by the contracting parties or is effected unilaterally as it would essentially end the commercial relationship and free parties from their respective future contractual obligations.

Recently, the Federal Court in **Catajaya Sdn Bhd v Shoppoint Sdn Bhd**<sup>1</sup> gave a significant decision on the construction of termination clauses.

### Facts

This case is primarily concerned with a share sale and purchase agreement dated 29 August 2008 (“SSA”) which was entered into between Catajaya Sdn Bhd (“Catajaya”) and Shoppoint Sdn Bhd (“Shoppoint”) and the two shareholders of Shoppoint (“Shareholders”) where Catajaya was to acquire Shoppoint from the Shareholders.

The SSA provided a specific timeline for Catajaya to make payment of the purchase price which includes, *inter alia*, payment of the balance purchase price by the agreed completion date of 31 December 2008.

Catajaya had failed to pay the balance of the purchase price by 31 December 2008 and had requested for extension of time vide letter to Shoppoint dated 24 November 2008 prior to the completion date.

The request for extension of time by Catajaya was rejected by Shoppoint vide letter dated 12 January 2009 in which Shoppoint also terminated the SSA pursuant to clause 11 of the SSA on the basis that time was of the essence.

There are two relevant termination clauses in the SSA, namely clauses 11 and 12 of the SSA.

Clause 11 of the SSA reads:

*“In the event that the Purchaser shall breach any of its obligations herein, the Vendors may by notice in writing terminate this Agreement ... provided always that Completion has not taken place whereupon this Agreement shall forthwith ceased to have any further effect or force and neither party shall have any further claim against the other save for antecedent breach.”*

On the other hand, clause 12.2(i) of the SSA reads:

*“This Agreement may be terminated by either party by notice in writing to the other and wherein the consequences under Section 10 and Section 11 shall be applicable to the Purchaser and the Vendor respectively (i) if either of the parties hereto shall commit any material breach of its obligations under this Agreement and shall fail to make good such breach within thirty (30) days from the date of receipt of notice from the other party requiring it to do so...”*

On a cursory reading of clauses 11 and 12, the obvious difference is whether an innocent party is required to provide a 30-day cure period to the defaulting party to remedy a breach.

Decision of the High Court and Court of Appeal<sup>2</sup>

The High Court dealt with the question of whether the termination notice by Shoppoint (vide the letter dated 12 January 2009) was valid as Shoppoint had relied on clause 11 of the SSA to terminate the SSA and did not grant Catajaya the 30-day cure period as provided for in clause 12 of the SSA. Shoppoint argued that the SSA may be terminated without any prerequisite compliance with clause 12 of the SSA as clause 11 of the SSA is a stand-alone provision.

Upon examination of the evidence and witnesses, the High Court held that clause 11 of the SSA was an independent provision to terminate the SSA for a fundamental breach of the SSA (which in this case would be the failure by Catajaya to make payment of the purchase price by the stipulated timeline).

The High Court further held that the recourse to the two-tier process under clause 12 of the SSA (being the requirement to notify the breach and the 30-day cure period for the defaulting party) would lead to ludicrous consequences as it would allow Catajaya to complete the purchase of the shares of Shoppoint beyond the completion date of 31 December 2008, contrary to the express provision in the SSA that time was of the essence.

The High Court had then concluded that the termination notice vide letter dated 12 January 2009 was in fact valid and effective.

On appeal by Catajaya, the Court of Appeal upheld the decision of the High Court and dismissed the appeal. The Court of Appeal held that clauses 11 and 12 of the SSA are meant to cater for two different termination scenarios where clause 11 of the SSA is for a situation where completion of the SSA has not taken place while clause 12 of the SSA is for termination by either party.

While the Court of Appeal had agreed with Catajaya that termination clauses should be interpreted and construed strictly, it further held that the general rule of interpretation as enunciated in **Berjaya Times Square Sdn Bhd v M-Concept Sdn Bhd**<sup>3</sup> should also be complied with.

As such, the Court of Appeal had considered the clear meaning and intent of the SSA against the backdrop of the parties' intention during the negotiation leading to the SSA, in particular, the fact that time is of the essence for the SSA and that there was no intention to grant Catajaya an extension of time.

#### Decision of the Federal Court

The question that required determination by the Federal Court was whether termination clauses in a contract ought to be construed strictly in Malaysia. It is to be noted that a strict interpretation of the termination clauses would require exact and meticulous compliance with the formal or procedural requirements stipulated therein.

The Federal Court ruled in the affirmative, although it had reached an entirely different conclusion on the interpretation of clause 11 of the SSA by referring to a string of landmark judgments in Malaysia and in the United Kingdom including, among others, **Attorney General of Belize v Belize Telecom**<sup>4</sup> and **Charles Grenier Sdn Bhd v Lau Wing Hong**<sup>5</sup>.

*"[53] Lord Hoffman observed in Attorney General of Belize v. Belize Telecom [2009] UKPC 10:*

*The Court has no power to improve upon the instrument which it is called upon to construe, whether it be a contract, a statute or articles of association. It cannot introduce terms to make it fairer or more reasonable. If it is concerned only to discover what the instrument means. However, that meaning is not necessarily or always what the authors or parties to the document would have intended...*

*[55] In so far as construction of the terms of an agreement the role of the Court is merely to interpret the terms by examining the words and language used as well taking into consideration the factual matrix of the case. The Court must not even attempt to improve the words used in the clauses which*

*the parties have made themselves, however desirable the improvement may be. His Lordship Dato Gopal Sri Ram JCA (as he then was) in Charles Grenier Sdn. Bhd. v. Lau Wing Hong [1997] 1 CLJ 625..."*

In interpreting clause 11 of the SSA, the Federal Court had concluded that clause 11 of the SSA cannot be interpreted in isolation from clause 12 of the SSA as both provisions are clear, unambiguous and complement each other. The Federal Court took this position as clause 12 of the SSA had referred to clause 11 and had expressly provided the requirement for the two-tier process.

The Federal Court also held that it would make commercial sense for Catajaya to be given the opportunity to remedy the purported breach as Catajaya has paid a substantial sum as a deposit for the SSA.

Consequently, the Federal Court had allowed the appeal by Catajaya and had set aside the orders of the High Court and the Court of Appeal.

#### Conclusion

This case shows that Malaysian courts have taken the view that termination clauses should be given a strict interpretation. Parties to any commercial contracts should take heed of the lessons in this case and be cautious when invoking termination rights to ensure strict compliance with the termination clauses.

#### Endnotes:

<sup>1</sup>Catajaya Sdn Bhd v Shoppoint Sdn Bhd [2020] 1 LNS 2037.

<sup>2</sup>Catajaya Sdn Bhd v Shoppoint Sdn Bhd [2019] 1 LNS 922.

<sup>3</sup>Berjaya Times Square Sdn Bhd v M-Concept Sdn Bhd [2010] 1 CLJ 269.

<sup>4</sup>Attorney General of Belize v Belize Telecom [2009] UKPC 10.

<sup>5</sup>Charles Grenier Sdn Bhd v Lau Wing Hong [1997] 1 CLJ 625

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