IN THE HIGH COURT IN MALAYA AT KUALA LUMPUR

IN THE FEDERAL TERRITORY OF KUALA LUMPUR, MALAYSIA

[SUMMONS NO.: WA-22NCVC-237-04/2018]

BETWEEN

1. **ZUL BIN ALI**
   (NO. K/P: 590827-08-5247)

2. **MOHD AKIL BIN MOHD ISA**
   (NO. K/P: 621206-08-6199)

3. **MIOR ZULKIFLI BIN MEOR MUHAMAD**
   (NO. K/P: 640110-08-6315)

4. **SABRI BIN ARSHAD**
   (NO. K/P: 601217-07-5649)

5. **MOHAMAD KHIR BIN HAMID**
   (NO. K/P: 640822-02-5801)

6. **NORIZAM BINTI IBRAHIM**
   (NO. K/P: 670426-08-5340)

7. **MAZIDAH BINTI BACHOK**
   (NO. K/P: 631020-01-6132)

8. **SUHARA BINTI RAMLEE**
   (NO. K/P: 620120-08-6396)

9. **MOHAMMAD ISA BIN PILOS**
   (NO. K/P: 611020-10-5807)

10. BAHARUM NASIR BIN OTHMAN
(NO. K/P: 620212-07-5053)

11. RAIMAH BINTI ABDUL GHANI
(NO. K/P: 680521-01-6342)

12. IBRAHIM BIN AHMAD
(NO. K/P: 640715-02-5427)

13. AHMAD BIN LAZIN
(NO. K/P: 600821-08-5187)

14. NOR HASHIM BIN MOHD SHARIF
(NO. K/P: 601130-05-5135)

15. RAITI BINTI YAACOB
(NO. K/P: 660320-08-7074)

16. ROSLAN BIN CHE MAT
(NO. K/P: 650614-09-5003)

17. WAN MAZILA BINTI WAN ZAHRI
(NO. K/P: 670503-08-6516)

18. ABDUL KARIM BIN MOHAMED
(NO. K/P: 620103-08-6431)

19. ABDUL KARIM BIN OTHMAN
(NO. K/P: 610108-71-5007)

20. AZEMI BIN RUSLAN
(NO. K/P: 630509-02-6227)

21. SURINA BINTI MOHAMAD SUPIAN
(NO. K/P: 640908-10-6194)

22. CHE DON BINTI ARIFFIN

(NO. K/P: 650513-02-5516)

23. WAN RAZMI BIN WAN MAT
(NO. K/P: 660207-03-5803)

24. AZIZAH BINTI JUSOH
(NO. K/P: 631205-03-5452)

25. AZAHAR BIN CHE AHMAD
(NO. K/P: 670222-09-5037)

26. MOHD HARIS BIN DIN
(NO. K/P: 661101-06-5427)

27. ROSLIN BINTI MOHAMED
(NO. K/P: 680506-03-5262)

28. SHARIFAH NORLIA BINTI SYED NOOR
(NO. K/P: 651108-02-5138)

29. NORMA BINTI DARUS
(NO. K/P: 660703-02-5882)

30. ABU KASIM BIN ONDOT
(NO. K/P: 610114-05-5375)

31. NIK KAMARIAH BINTI RAJA IBRAHIM
(NO. K/P: 680521-01-6342)

32. SAIFUDIN BIN ABD MAJID
(NO. K/P: 650428-10-5001)

33. MAZLAN BIN AHMAD
(NO. K/P: 660101-08-8137)

34. ABDUL HALIB BIN TASWIRJO
(NO. K/P: 610926-10-6887)

35. SHAH BIN MD NOR
(NO. K/P: 590603-08-5721)

36. NOORASMADI BIN MAT NOR
(NO. K/P: 630923-03-5401)

37. NORAINI BINTI ABDUL TALIB
(NO. K/P: 651202-02-5708)

38. SAHAR BIN SAIDON
(NO. K/P: 600722-01-5693)

39. ROSLAN BIN MAT ZAIN
(NO. K/P: 610726-07-5537)

40. R ABAS BIN R SULAIMAN
(NO. K/P: 590609-06-5449)

41. MARINA BINTI MUSA
(NO. K/P: 630819-03-5436)

42. FARIDAH BINTI HAMID
(NO. K/P: 650214-02-5030)

43. NORIZAN BINTI ABD MANAN
(NO. K/P: 610907-08-5216)

44. RAUDZATUN MUTAHHARAH BINTI ABD RAHIM
(NO. K/P: 610405-08-5822)

45. FARIZA BINTI HASHIM
(NO. K/P: 620705-08-6164)

46. NORLAILA BINTI HASHIM
(NO. K/P: 630105-08-6936)

47. MOHD NOR BIN AHMAD

(NO. K/P: 610611-01-6051) … PLAINTIFFS

AND

1. LEMBAGA LEBUHRAYA MALAYSIA

… FIRST DEFENDANT

2. PROJEK LEBUHRAYA USAHASAMA BERHAD (NO. SYARIKAT: 954700-A)

… SECOND DEFENDANT

GROUNDS OF JUDGMENT

Introduction

[1] The First Defendant and Second Defendant had, vide Notice of Applications dated 28.6.2018 (Enclosure 8) and 2.8.2018 (Enclosure 13), respectively applied to strike out the Plaintiffs' Writ and Statement of Claim ('SoC') which were filed on 30.4.2018 pursuant to O. 18, r. 19(1)*(a)*, *(b)*, *(c)* or *(d)* and/ or O. 92, r. 4 of the Rules of Court 2012 ('RoC 2012').

[2] Having heard oral submissions by learned counsels for the Plaintiffs and the Defendants and having read the Affidavits and written submissions filed, I allowed both Defendants' applications with costs of RM5,000.00 for each Defendant subject to allocatur.

[3] Being dissatisfied, the Plaintiffs have appealed against my decision. My full grounds for allowing the Defendants' applications for striking out are set out herein below.

[4] For purposes of these grounds, I shall refer to the First Defendant as "D1" and the Second Defendant as "D2".

The Cause Papers

[5] The relevant affidavits in respect of Enclosure 8 are as follows:

(a) D1's Affidavit In Support ('AIS') affirmed on 26.6.2018 (Enclosure 9);

(b) Plaintiffs' Affidavit In Reply ('AIR') affirmed on 27.7.2018 (Enclosure 12); and

(c) D1's AIR affirmed on 10.8.2018 (Enclosure 15).

[6] In so far as Enclosure 13 is concerned, the related Affidavits are –

(a) D2's AIS affirmed on 2.8.2018 (Enclosure 14);

(b) Plaintiffs' AIR affirmed on 27.8.2018 (Enclosure 16); and

(c) D2's AIR affirmed on 1.10.2018 (Enclosure 17).

Background facts

[7] The Government of Malaysia had decided to privatise the North - South Expressway Project ('said Project') managed by D1, a statutory body established on 24.10.1980 under the Highway Authority Malaysia (Incorporation) Act 1980 [*Act 231*], with effect from 31.5.1988. Following the decision, D2 was incorporated for purposes of the privatisation exercise.

[8] By letter dated 29.11.1988, D2 offered employment to all employees of D1 on the following terms:

(a) Scheme A or Scheme B: For permanent employees who have been confirmed in their posts and have not reached the optional age of retirement; and

(b) Scheme B: For employees who have either reached the optional age of retirement, were under probation or temporary employment.

[9] Consequently, D1 extended the terms and conditions of employment under Scheme A or Scheme B to all its employees, including the Plaintiffs, vide letters dated 30.11.1988. Scheme A is essentially the terms and conditions in the Government service whilst Scheme B is the terms and conditions as offered by D2. Both Schemes are described in the letters of offers to D1's employees in the following manner:

> "*2. ... PLUS menawarkan 2 jenis terma-terma dan syarat-syarat perkhidmatan sebagaimana berikut yang tuan/puan dikehendaki memilih semasa bersetuju menerima tawaran untuk berkhidmat dengan PLUS.*
>
> *SKIM A*
>
> *2.1 Terma-terma dan syarat-syarat perkhidmatan SKIM A ialah terma-terma dan syarat-syarat perkhidmatan Kerajaan sebagaimana terpakai sekarang termasuk apa-apa pindaan dan penyemakan yang di buat oleh Kerajaan dari semasa kesemasa. Ringkasan terma-terma dan syarat-syarat perkhidmatan SKIM A adalah dilampirkan bersama dengan tawaran PLUS.*
>
> *SKIM B*

2.2 Terma-terma dan syarat-syarat perkhidmatan SKIM B ialah terma-terma dan syarat-syarat perkhidmatan PLUS sebagaimana dilampirkan bersama dengan tawaran mereka itu.".

[10] D1's employees were given until 29.12.1988 to make a decision. All the Plaintiffs opted to accept the offer of employment with D2 based on the terms and conditions of Scheme B.

[11] In the SoC, the Plaintiffs pleaded that they were instructed to resign and/ or cease employment with D1 and to accept the offer of employment with D2. The Plaintiffs claimed that as a result of the privatisation of the said Project by the Defendants, the Plaintiffs had no choice and were forced to accept D2's offer although they were not informed of the complete terms of employment.

[12] It was further pleaded by the Plaintiffs that there were elements of cheating against them because the briefings given by D1 regarding the cessation of employment with D1 and acceptance of the offer of employment by D2 had convinced the Plaintiffs that their rights and interests will be preserved and improved whereas at the point of time when the Plaintiffs were required to sign the acceptance forms, the terms of employment were incomplete. The principle of undue influence is said to apply in this matter such that the Plaintiffs were induced to accept D2's offer of employment.

[13] The Plaintiffs went on to plead that one of the human rights and/ or fundamental liberties guaranteed by the Federal Constitution is that their position would not be lowered nor would their employment benefits be reduced in comparison to what was received during the employment with D1. The Defendants are

alleged to have violated the rights of the Plaintiffs by causing a reduction in the employer's contribution under the Employees' Provident Fund ('EPF'), pensionable benefits scheme and other benefits. In particular, D2 is said to have contravened subsections 47(1) and (2) of the EPF Act 1991 [*Act 452*] and failed to grant the Plaintiffs' rights to pensions, gratuities and other benefits as provided under the Statutory and Local Authorities Pensions Act 1980 [*Act 239*].

[14] Clause 19.2 of the *Terma-Terma Dan Syarat-Syarat Perkhidmatan Untuk Kakitangan Bukan Eksekutif Lembaga Lebuhraya Malaysia: Skim B, November 1988* ('said Clause') that was offered by D2 to the Plaintiffs states as follows:

> "*19.2 Skim Faedah Persaraan*
>
> *19.2.1 Semua pekerja yang disahkan dalam jawatan adalah layak menerima faedah persaraan seperti berikut:*
>
> 2 *x gaji pokok yang terakhir x jangkamasa perkhidmatan tahunan dengan PLUS*
>
> *Tolak:*
>
> *Jumlah caruman PLUS kepada KWSP untuk pekerja tersebut termasuk faedah terkumpul.*
>
> …".

[15] Article 51 of *Perjanjian Bersama Keempat (1 hb Januari 2014 – 31 hb Disember 2016) Antara Projek Lebuhraya Usahasama Berhad Dengan Kesatuan Pekerja-Pekerja Projek Lebuhraya Usahasama Berhad (Cog. No: 061/2015)* ('4th Collective

Agreement') provides for the *Skim Baksis* for ex-employees of D1 in the following terms:

"***ARTIKEL 51*** ***SKIM BAKSIS UNTUK BEKAS PEKERJA*** **LEMBAGA LEBUHRAYA MALAYSIA**

Bekas Pekerja LLM layak mendapat Skim Baksis seperti yang diperuntukkan di dalam Perjanjian Konsesi. Skim Baksis akan dikira seperti berikut:

2 x Gaji Pokok Terakhir x Jangka Masa Berkhidmat dengan Syarikat

Tolak

Jumlah caruman KWSP oleh Syarikat termasuk faedah terkumpul

Pihak Syarikat dikehendaki membayar Skim Baksis ini semasa Pekerja berkenaan bersara.

...".

According to D2's Defence filed on 13.6.2018 (Enclosure 7), the 4th Collective Agreement applies only to those Plaintiffs who are holding, or had held, the post of Customer Service Assistant.

[16] A similar Article as Article 51 quoted above appears as Article 54 in *Perjanjian Bersama Keempat (1 hb Januari 2014 – 31 hb Disember 2016) Antara Projek Lebuhraya Usahasama Berhad Dengan Kesatuan Pekerja-Pekerja Projek Lebuhraya Usahasama Berhad (Cog. No: 003/2015)* ('5th Collective Agreement') which applies to ex- employees of D1 who worked as Supervisors.

[17] On 30.4.2018, the Plaintiffs filed this suit against the Defendants seeking the following reliefs:

(a) a declaration that the said Clause in the Terms and Conditions of Service for Non-Executive Employees of D1 (Scheme B) is null and void and contrary to the EPF Act 1991;

(b) a declaration that Article 51 of the 4th Collective Agreement is null and void and contrary to the EPF Act 1991;

(c) a declaration that the Plaintiffs are entitled under the law to receive the retirement benefits scheme without any deduction of EPF contributions by the employers and the accumulated interest or cumulative dividends;

(d) a declaration that the Plaintiffs are entitled under the law to receive pensions, gratuities or other benefits as provided under Act 239;

(e) an order that D2 pays the Plaintiffs retirement benefits scheme based on the following formula:

2 x last basic salary x years of service

(f) a declaration that D2's contribution of 11% to EPF is a reduction of employment benefits and unlawful under the law;

(g) a declaration that the Plaintiffs are entitled to employer's contribution of 13% to EPF;

(h) a declaration that the Terms and Conditions of Service for Non- Executive Employees of D1 (Scheme B) is tainted by the principle of undue influence;

(i) general damages to be assessed by the Court for each Plaintiff;

(j) special damages calculated on the reduction of EPF contributions by D2 for each Plaintiff;

(k) exemplary damages; and

(l) interest; cost and any other reliefs deemed expedient by the Court.

[18] As at the date of filing of the SoC, the 1st. until the 33rd. Plaintiffs are still under the employment of D2 whilst the 34th. until the 47th. Plaintiffs have retired.

[19] In its Defence, D2 denied all of the Plaintiffs' allegations in the SoC and specifically pleaded that the Plaintiffs are entitled to retirement benefits as provided under the said Clause, Article 51 of the 4th Collective Agreement and Article 54 of the 5th Collective Agreement. The 4th Collective Agreement had been given cognizance by the Industrial Court vide Cognisance No. 061/2016 whilst the terms in *Perjanjian Bersama Kelima (1 hb Januari 2017 – 31 hb Disember 2020) Antara Projek Lebuhraya Usahasama Berhad Dengan Kesatuan Pekerja-Pekerja Projek Lebuhraya Usahasama Berhad*, where Article 51 therein is similar to Article 51 in the 4th Collective Agreement, were agreed by the parties in Industrial Court Consent Award No: 2042 Year 2018 dated 28.8.2018.

[20] D2 further pleaded that it had paid the employer's contribution to EPF for all its employees, including the Plaintiffs, at the rate of 15% per month without fail. In addition, the terms and conditions of the Plaintiffs' employment with D2 are not governed by Act 239 in view of the fact that the Plaintiffs had

opted for Scheme B rather than Scheme A during the privatisation in 1988.

Submissions by the Defendants

[21] After hearing oral submissions and reading the written submissions filed by learned counsels representing D1 and D2 respectively, I find that there are similar grounds put forth to support the contention of each Defendant that the Plaintiffs' action against them is scandalous, frivolous or vexatious; prejudices, embarrasses or delays the fair trial of the action; or is an abuse of the process of the Court. The common reasons are as follows:

(a) The Plaintiffs' action is time barred under section 2(a) of the Public Authorities Protection Act 1948 (Revised – 1978) [*Act 198*] ('PAPA 1948') and/ or section 6 of the Limitation Act 1953 (Revised - 1981) [*Act 254*] ('LA 1953'). The Defendants argued that it is an undisputed fact that all the Plaintiffs had voluntarily opted for Scheme B in December 1988 (see the *Borang Pilihan Sendiri* signed by the Plaintiffs as per exhibit "**NMR-4**" in D2's AIS Enclosure 14) and commenced their employment with D2 on 1.12.1988. This action was filed on 30.4.2018, after almost 30 years have lapsed. Moreover, the Plaintiffs have, from the time that they were employed with D2, been enjoying all the benefits and yet it was only in 2018 that the Plaintiffs claimed that the said Clause is not to their advantage. The Plaintiffs are thus estopped from denying the full force of the said Clause. It was further submitted that if at all it is true that the Plaintiffs became aware of the said Clause when they were given a copy of the

Scheme B terms of contract after a few years of working with D2, the Plaintiffs should have filed their claim back then, which presumably was still within the limitation period, and not to have waited for so many years to have passed.

(b) It is clear from the pleadings and all the affidavits filed that the matter before the Court arose from the decision of the Government to privatise the said Project in 1988. The privatisation was wholly handled by D1 together with the offer for continued employment of its employees with D2 based on the terms and conditions either under Scheme A or Scheme B. The employees of D1, including the Plaintiffs, were given the option to continue to be employed by D2 on the terms of either Scheme A or Scheme B, or to be terminated. It was submitted that the Government's decision and policies related to this privatisation exercise and the declarations sought by the Plaintiffs in connection with pensions under Act 239 and superannuation benefits under the EPF Act 1991 are under the realm of public law. Therefore, the Plaintiffs' claim against the Defendants is unsustainable since the reliefs sought by the Plaintiffs involve mixed questions of public and private law, or are substantially based on substantive principles of public law and should be made by way of judicial review under O. 53 RoC 2012 and not by a Writ of Summons. In this regard, learned counsel for D1 cited the case of *Ahmad Jefri Mohd Jahri v. Pengarah Kebudayaan & Kesenian Johor & Ors* [2010] 5 CLJ 865 while D2's counsel relied on the judgment in *Smart Fair Sdn Bhd v. Pentadbir Tanah Daerah Kerian dan satu lagi* [2018] MLJU 156 to support their contentions.

[22] D1's submissions canvassed the added point that the Plaintiffs failed to plead the particulars relating to the elements of undue influence in the SoC. It is unreasonable for the Plaintiffs to not have filed a civil suit or not raised any objections concerning their terms of employment much sooner if indeed undue influence had been exerted upon the Plaintiffs.

[23] On the part of D2, it was additionally submitted that –

(a) because 30 years have passed, it would be difficult for D2 to obtain the relevant documents and witnesses and this would cause great prejudice to D2. This prejudice is accentuated by the fact that the Plaintiffs had alleged undue influence exercised by D1 when the continuation of employment was offered to them. In light of this allegation, it is impossible for D2 to defend its case without calling the officers who were involved at the material time;

(b) there is not an iota of evidence to show that D2 has committed any offence under the EPF Act 1991 as alleged and as such, the Plaintiffs will not succeed in seeking the declarations sought in the Writ of Summons; and

(c) the said Clause had been incorporated as one of the terms of the 4th Collective Agreement and 5th Collective Agreement and a Consent Award was handed down by the Industrial Court on 28.8.2018. The Plaintiffs' relief for a declaration that Article 51 of the 4th Collective Agreement is invalid and contrary to the EPF Act 1991 cannot possibly succeed because it is tantamount to an attack of a Collective Agreement which has been taken cognizance by the Industrial Court in its Award and cannot be varied without the mutual agreement of the parties.

Submissions by the Plaintiffs

[24] The Plaintiffs' counsel submitted that the Defendants had used their dominant positions and undue influence to force the Plaintiffs into accepting the terms and conditions of employment (Scheme B) although the Plaintiffs had initially intended to opt for Scheme A. Furthermore, the Plaintiffs' contended that at the material time, certain representations were made by the Defendants and the Plaintiffs were not informed of the complete contractual terms of employment if the Plaintiffs took up the offer to work for D2.

[25] The Plaintiffs further argued that their cause of action is not statute- barred since they only became aware of the full terms and conditions of employment (Scheme B) sometime in 2014 when some of the Plaintiffs met with Mrs. Hajah Zuraidah, the Director General of Human Resource Division of D1. Alternatively, the Plaintiffs' cause of action is said to involve issues of fraud where section 29 LA 1953 would be applicable**.**

[26] In addition, the Plaintiffs submitted that the Defendants had caused the Plaintiffs to suffer huge losses as they have been deprived of their retirement benefits and had the employer's contribution deducted from their EPF. Thus, the Plaintiff should not be deprived of their rights to have their case ventilated in a full trial as this is not a case where the claim is obviously unsustainable. En. Muhamad Syahrul Nizam cited the Court of Appeal decision in *Solai Realty Sdn Bhd v. United Overseas Bank (Malaysia) Bhd* [2013] MLJU 281 as a reminder of the drastic power of striking out a plaintiff's SoC without permitting the party from having his day in the court of law to establish his claim by adducing evidence and calling of witnesses.

[27] The other cases referred to by learned counsel for the Plaintiffs to support his submissions are *Bandar Builders Sdn. Bhd. & 2 Ors v. United Malayan Banking Corporation Bhd.* [1993] 4 CLJ 7; *Ng Wu Hong v. Abraham Verghese a/l TV Abraham & Ors* [2008] 7 MLJ 45; *AmBank (M) Bhd v. Kamariyah bt Hamdan & Anor* [2013] 5 MLJ 448; *Funk David Paul v. Asia General Asset Bhd* [2014] 1 MLJ 661; *Joan Funk @ Joan Fung Nyuk Lee v. Allianz General Insurance Co (M) Bhd* [2011] 6 MJ 805; *Ji Soon Hin v. The Government of Malaysia & Ors* [1999] 2 MLJ 263; and *Sivarasa Rasiah v. Badan Peguam Malaysia & Anor* [2002] 2 MLJ 413.

Evaluation and Decision of the Court

[28] The Defendants' respective applications for striking out of the Plaintiffs' Writ and SoC are premised on the four limbs under O. 18, r. 19(1) RoC 2012 in a disjunctive manner and/ or upon the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court under O. 92, r. 4 RoC 2012.

[29] The principles applicable to the exercise of the Court's discretionary power under O. 18, r. 19(1) RoC 2012 are well established; it is only in plain and obvious cases that recourse should be had to the summary process under this rule and the summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it "obviously unsustainable" (see *Bandar Builders Sdn. Bhd., supra*). The use of the word "obviously" denotes that on the face of it, the claim must be plainly or evidently unsustainable in law (see *Pet Far Eastern (M) Sdn Bhd v. Tay Young Huat* [1999] 5 MJ 558).

[30] In so far as striking out of the Writ and SoC on the ground that it discloses no reasonable cause of action, the test to be applied is whether on the face of the SoC, the court is prepared to conclude that the cause of action is obviously unsustainable. The Court must be satisfied that the SoC as it stands is insufficient, even if proved, to entitle the Plaintiffs to the relief which they asked for. The state of affairs to which the Court must have regard is that which prevailed at the date the action is filed and affidavit evidence is inadmissible (see *Gasing Heights Sdn Bhd v. Aloyah bte Abd Rahman* [1996] 3 MLJ 259).

[31] Paragraph 3.3 in D1's Defence and paragraph 19.2 in D2's Defence have raised the issue of limitation of time under PAPA 1948 and LA 1953. Therefore, the distinction as to which provision of the law is used to ground an application for striking out of the SoC and its consequences as was discussed in the judgment of the Federal Court in *Tasja Sdn Bhd v. Golden Approach Sdn Bhd* [2011] 3 CLJ 751 does not arise in the case before this Court. In *Tasja Sdn Bhd*, it was held that if the application is based on section 2(a) PAPA 1948 or subsection 7(5) Civil Law Act 1956 [*Act 67*] where the period of limitation is absolute, then in a clear and obvious case such application should be granted without having to plead a defence of limitation. On the other hand, if the basis of the application is under LA 1953 where limitation is not absolute then such application for striking out should not be allowed until and unless limitation is pleaded as required under section 4 LA 1953.

[32] D1 is a statutory body established, *inter alia*, to supervise and execute the design, construction, regulation, operation and maintenance of inter-urban highways, and to impose and collect tolls. The functions and powers of D1 as prescribed in section

11 Act 231 are in line with the purpose of its establishment and include the powers to plan and carry out research to ensure efficient utilisation of highways and other facilities along highways, and to do everything for the betterment and proper use of highways and other facilities along highways.

[33] Section 2(a) PAPA 1948 provides for a limitation period of 36 months to apply in the following circumstances:

> "***Protection of persons acting in execution of statutory* or other public duty**
>
> ***2.*** *Where, after the coming into force of this Act, any suit, action, prosecution or other proceeding is commenced in the Federation against any person for any act done in pursuance or execution or intended execution of any written law or of any public duty or authority or in respect of any alleged neglect or default in the execution of any such written law, duty or authority the following provisions shall have effect:*
>
> *(a) the suit, action, prosecution or proceeding shall not lie or be instituted unless it is commenced within thirty-six months next after the act, neglect or default complained of or, in the case of a continuance of injury or damage, within thirty-six months next after the ceasing thereof;*
>
> *...* ".

[34] Although the protection afforded under the above provision is in terms of "*any person*", only those persons who are in some sense public authorities are entitled to claim it (see *Griffiths v. Smith*

[1941] AC 170). The term "*public authority*" is not defined in LA 1953 and the Interpretations Acts 1948 and 1967 (Consolidated and Revised 1989) [*Act 388*] but "*public office*" and "*public officer*" are defined in the latter statute. The characteristics of a public authority has been suggested to be that it should carry on some undertaking of a public nature for the benefit of the community or of some section or geographical division of the community and that it should have some governmental authority to do so (see Rich J in Renmark *Hotel Inc. Commissioner of Taxation* [1949] 79 CLR 10). The courts in several cases have decided, among others, that the State Governments, State Islamic Development Corporation, Urban Development Authority, and local authorities are public authorities, where in certain instances, section 2 of PAPA 1948 was held to be applicable to such bodies by virtue of express provisions in other statutes (see, *inter alia*, *Goh Joon v. Kerajaan Negeri Johor* [1998] 7 MLJ 621; *Saw Seng Kee v. Director of Lands & Mines, Penang & Ors.* [1987] 1 MLJ 80; *Vadivell a/l G Murugiah v. Yang Di-Pertua Majlis Daerah Kinta Barat, Batu Gajah* [1998] 6 MLJ 347; and *Bencon Development Sdn Bhd v. Majlis Perbandaran Pulau Pinang & Ors* [1999] 2 MLJ 385). In view of D1's functions and powers which are for the benefit of the public, I have no difficulty in concluding that D1 is a public authority.

[35] However, the matter does not end here. A section on PAPA 1948 is included in the "*Law of Limitation*" by Choong Yeow Choy, Butterworths Asia, 1995 at pages 158 – 161 where the learned author has explained that every act by a public authority does not entail the application of PAPA 1948. Section 2 of PAPA 1948 requires that such act be "*done in pursuance or execution or intended execution of any written law or of any public duty or*

authority or in respect of any alleged neglect or default in the execution of any such written law, duty or authority". Thus, an added question has to be asked, namely whether the neglect or default, if proved against the defendant, is neglect or default in the execution of the defendant's statutory duty or authority. I am unable to say more on this aspect since the submissions by learned counsels for both parties did not delve further into this element. Learned counsels have seemingly adopted a rather simplistic approach in urging this Court to conclude that PAPA 1948 applies just because D1 is a public authority. In any event, the fate of the Defendants' applications can be decided by considering the limitation period under LA 1953 which has also been pleaded by the Defendants.

[36] D2 is a company incorporated under the Companies Act 2016 [*Act 777*] (where by virtue of subsection 619(5) Act 777, a company registered under the Companies Act 1965 [*Act 125*] shall be deemed to have been registered under Act 777). PAPA 1948 is not applicable to D2 and thus reference has to be made to section 6 LA 1953 which provides as follows:

> ***"Limitation of actions of contract and tort and certain* other actions**
>
> ***6.*** *(1) Save as hereinafter provided the following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say –*
>
> *(a) actions founded on a contract or on tort;*
>
> *... "*.

[37] Based on the pleadings in the SoC, the Plaintiffs claimed that there were elements of cheating when D1 gave briefings regarding the cessation of employment with D1 and the offer of employment with D2. It was also at this juncture that the Defendants are alleged to have used their dominant position to exert undue influence on the Plaintiffs in forcing them to accept the Terms and Conditions of Service for Non- Executive Employees of D1 (Scheme B). It is indisputable that all these events occurred on or around 1988. It is settled law that for the purpose of LA 1953, the cause of action arises from the date the cause of action accrued (see *Lau Choo Seng v. Chong Wei Kee, Messrs Sim Hazlina & Co* [2010] MLJU 1910). In this case, I am of the view that the cause of action had accrued on or around 1988. Therefore, this civil suit, having been filed in April 2018, and taking the maximum period of limitation as pleaded by both Defendants i.e. 6 years, is clearly statute- barred under subsection 6(1) LA 1953.

[38] Where a claim is statute-barred, the proper ground to rely on for striking it out is that the claim is frivolous, vexatious and an abuse of the process of the court since the limitation defence bars the remedy and not the claim. One of the examples of actions struck off for being frivolous or vexatious at page 357 in the "*Malaysian Rules of Court 2012, An Annotation, Volume 1*" Lexis Nexis 2012 is where a claim is statute-barred and "*In BPI International Finance Ltd (formerly known as Ayala Finance (HK) Ltd) v. Tengku Abdullah Ibni Sultan Abu Bakar [2009] 4 MLJ 821, CA, the appellant's application to strike out the writ and statement of claim pursuant to RHC O. 18 r. 19(1)(b) or (c) on the ground that the statement of claim had set up causes of action which were barred by the Limitation Act 1953 was allowed. The limitation defence bars the remedy and not the*

claim; it may be impossible to say, in such cases, that there is no reasonable cause of action: see Ronex Properties Ltd v. John Laing Construction Ltd [1982] 3 WLR 875.".

[39] In view of the above and the Affidavits which have been filed in support of, and to counter, Enclosures 8 and 13, I proceeded to address my mind to the merits of the Defendants' applications under the three other limbs of O. 18, r. 19(1) RoC 2012 as well, namely whether the Writ and SoC is scandalous, frivolous or vexatious; may prejudice, embarrass or delay the fair trial of the action; or is otherwise an abuse of the process of the Court. Since the Defendants' applications are not solely based on limb *(a)* of O. 18, r. 19(1) RoC 2012, I am not precluded from considering the affidavit evidence filed in respect of the same (see *Malayan United Finance Bhd v. Cheung Kong Plantation Sdn Bhd* [2000] 2 MLJ 38 and *Raja Zainal Abidin bin Raja Haji Tachik v. British-American Life & General Insurance Bhd* [1993] 3 MLJ 16). These affidavits are given weightage after the submissions concerning limb *(a)* of O. 18, r. 19(1) RoC 2012 have been considered in line with the principles laid down in *See Thong & Anor v. Saw Beng Chong* [2013] 3 MR 385.

[40] In carrying out this exercise, it is notable that the Plaintiffs have sought to introduce factual evidence which is glaringly absent in the SoC by way of their AIR. In paragraphs 20, 21, 26 and 29 of the Plaintiffs' AIR which was affirmed by the 1st. Plaintiff on behalf of all the other Plaintiffs (Enclosure 12), it is stated that –

> "*20. Saya ingin menyatakan bahawa terma-terma kontrak kerja tersebut hanya diketahui Plaintif-Plaintif pada sekitar tahun 2014 dimana saya dan sebahagian Plaintif-Plaintif telah berjumpa dengan Puan Hajah*

Zuraidah iaitu Ketua Pengarah Bahagian Sumber Manusia Lembaga Lebuhraya Malaysia di pejabat Lembaga Lebuhraya Malaysia, Kajang.

21. Berdasarkan perjumpaan tersebut, saya dan Plaintif-Plaintif telah dimaklumkan bahawa terma-terma kontrak tawaran kerja yang terdapat pada Skim B yang didakwa Defendan-Defendan tersebut adalah tidak sama dengan terma-terma kontrak tawaran kerja yang telah disahkan oleh Tan Sri Halim Saad bagi pihak Lembaga Lebuhraya Malaysia dimana pihak PLUS bersetuju tidak akan mengurangkan apa-apa faedah kemudahan yang sedia ada dan kemudahan- kemudahan lain daripada kerajaan.

…

26. Pada September 2017, pihak Defendan-Defendan juga telah mengadakan taklimat kepada bekas kakitangan Lembaga Lebuhraya Malaysia bagi menawarkan Skim Persaraan Khas yang mana juga melibatkan sebahagian daripada Plaintif-Plaintif.

...

29. Oleh yang demikian, saya menyatakan bahawa sejak tahun 2014 dimana apabila saya dan Plaintif-Plaintif mengetahui berkenaan terma-terma kontrak tawaran kerja oleh Defendan Kedua adalah bertentangan dengan apa yang telah direpresentasikan oleh Defendan Pertama (termasuk Defendan Kedua) kepada Plaintif-Plaintif, pihak kami telah dengan sebaik mungkin mendapatkan nasihat-nasihat daripada beberapa pihak sebelum meneruskan

tindakan ini dimana saya percaya bukanlah suatu kelewatan yang disengajakan.".

[41] The same averments appear in paragraphs 20, 21, 26 and 29 of the Plaintiffs' AIR in Enclosure 16, which was also affirmed by the 1st. Plaintiff on behalf of all the other Plaintiffs.

[42] The Plaintiffs relied on those averments in contending that the cause of action accrued only in 2014 and hence, the filing of the suit in April 2018 is well within the time allowed under LA 1953. However, it is trite law that any omission in the SoC cannot be made good by affidavit evidence. The Federal Court in *United Malayan Banking & Corporation Berhad v. Palm & Vegetable Oils (M) Sdn. Bhd. & Ors.* [1983] 1 M.L.J. 206 at page 207 held that:

"…

As we have said earlier the deposit of the shares as security was not disclosed in the Statement of Claim when the action was instituted nor was the fact that the security had been realised in a series of sales of the shares between January and September, 1980, and these matters were only disclosed for the first time in June, 1981 in the affidavit in support of the Order 14 Summons. This omission is surprising, to say the least, and we cannot but observe that any defect or omission in the Statement of Claim cannot be made good by affidavit evidence: Gold Ores Reduction Co. v. Parr where Mathew J., said that "it is most important that a defendant should know from the writ what the exact claim against him is"….".

[43] Furthermore, the Plaintiffs reliance on section 29 LA 1953 to postpone the operation of the limitation period is a non-starter

since they have not specifically pleaded fraud in their pleadings. The relevant portion of the said provision is worded as follows:

> "***Postponement of limitation period in case of fraud or* mistake**
>
> ***29.*** *Where, in the case of any action for which a period of limitation is prescribed by this Act, either -*
>
> *(a) the action is based upon the fraud of the defendant or his agent or of any person through whom he claims or his agent; or*
>
> *(b) the right of action is concealed by the fraud of any such person as aforesaid; or*
>
> *(c) the action is for relief from the consequences of a mistake,*
>
> *the period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake, as the case may be, or could with reasonable diligence have discovered it:*
>
> *...".*

[44] In the case of *Ho Hup Construction Company Berhad v. Zen Courts Sdn Bhd & 6 Ors* [2018] 1 LNS 340, Mohd Nazlan Mohd Ghazali J alluded to the requirement of reasonable diligence in discovering the fraud in the factual context of that case and concluded that -

> "**[107]** *Section 29 LA 1953 cannot assist the plaintiff for the primary reason that the plaintiff could not show that it could not have discovered the facts concerning the alleged concealment. The requirement of reasonable diligence is*

crucial (see the Court of Appeal decision in Lin Kai Wing & Anor v. Lin Kai Lam & Ors [2016] 10 CLJ 77).

...

[110] *The defence of limitation is a well-established basis to justify a striking out of a claim (see the former Federal Court decision in Haji Hussin bin Hj Ali & Ors v. Datuk Haji Mohamed bin Yaacob & Ors and Connected Cases [1983] 2 MLJ 227). The instant claim by the plaintiff against the third and fourth defendants is a prime example of such a claim. It is conspicuously unsustainable. It is to be struck out.".*

[45] In the case before this Court, the 1st. Plaintiff had lodged a police report at the Sungai Senam Police Station in Ipoh, Perak on 10.8.2016 (see exhibit "**ZBA-2**" in the Plaintiffs AIR Enclosure 12). In that report, the 1st. Plaintiff stated that:

"*... Saya ingin membuat laporan berkenaan misrepresentasi yang disengajakan oleh Lembaga Lebuhraya Malaysia dan PLUS untuk memperdaya saya dan lain-lain pekerja Lembaga Lebuhraya Malaysia yang ditawarkan bekerja di Syarikat Projek Lebuhraya Utara-Selatan kerana memberi maklumat yang tidak betul berkaitan terma-terma dan syarat-syarat perkhidmatan Skim B dan seterusnya memaksa dan mendesak saya dan pekerja-pekerja lain untuk menerima perkhidmatan Skim B dengan menandatangani surat persetujuan tanpa diberikan secara bertulis terma-terma dan syarat-syarat perkhidmatan Skim B ketika kami menandatangani surat persetujuan tersebut.*

Saya hanya menyedari terdapat misrepresentasi yang disengajakan itu apabila pekerja-pekerja yang mula bersara mendapati bahawa Faedah Persaraan tidak dibayar mengikut yang dimaklumkan bagi pekerja-pekerja yang memilih Skim B malah bertentangan dengan undang-undang buruh dan Kumpulan Wang Simpanan Pekerja menyebabkan kami mengalami atau akan mengalami kerugian yang amat besar berbanding sekiranya kami memilih perkhidmatan Skim A.

Saya membuat laporan ini kerana rasa ditipu dan dianiaya dan hak saya sebagai pekerja telah dilanggar oleh Lembaga Lebuhraya Malaysia dan PLUS dan saya mengkehendaki pihak berkuasa menyiasat dan mengambil tindakan undang- undang terhadap individu-individu dan pihak syarikat PLUS yang telah memperdaya saya dan pekerja-pekerja lain untuk mengaut keuntungan bagi pihak PLUS. Saya mohon agar pihak polis menyiasat berkenaan perkara ini kerana terdapat pencanggahan dari persetujuan asal antara pihak PLUS dengan Lembaga Lebuhraya Malaysia yang mana saya percaya berlaku penyelewengan terhadap wang faedah persaraan tersebut dan terdapat salah laku pihak-pihak terlibat….".

[46] The word used to describe the alleged wrongdoings by the Defendants against the Plaintiffs in the said police report is "*misrepresentasi*". By the Plaintiffs own first information report, they have stated that they came to realise that there was intentional misrepresentation when several employees who had opted for Scheme B in D2's employment retired. There is no other evidence in the Plaintiffs' AIR to show that the requirement of reasonable diligence has been fulfilled, if indeed the Plaintiffs' cause of action is based on fraud. Therefore, the

Plaintiffs have not only attempted to make good the defects and/ or omissions in their SoC by way of their AIR, they have further failed to appreciate the need to fulfil the express requirement in section 29 LA 1953 to show reasonable diligence on the part of the Plaintiffs so as to discover the alleged fraud perpetrated by the Defendants on them.

[47] Based on the foregoing analysis, this is an apt case for the Writ and SoC to be struck out by reason of limitation of time under O. 18, r. 19(1)*(b)* and *(d)* RoC 2012. The rationale of the limitation law which is promulgated with the objectives of discouraging plaintiffs from sleeping on their actions and to have a definite end to litigation has to be appreciated and enforced by the courts (see *Credit Corp. (M) Bhd. v. Fong Tak Sin* [1991] 1 CLJ Rep 69). The Defendants would be severely prejudiced if the matter goes to trial as accusations of misrepresentation, cheating, abuse of dominant position, undue influence and fraud are very grave indeed and yet those who are instrumental in deciding the policies in connection with the privatisation of the said Project and determining the terms and conditions of employment to be offered to D1's employees and entrusted to explain the same to the employees may already be deceased or in their twilight years. If the latter, their ability to attend court and testify as to events which occurred in the late 1980s, and not to mention the Defendants' ability to trace the relevant documentary evidence are very much handicapped. There is a possibility that D1's records which are relevant to defend this claim, being "public records" within the meaning of the National Archives Act 2003 [*Act 629*] may have been destroyed in accordance with the provisions of the statute.

[48] Although the primary reason upon which I had decided to allow the Defendants' applications in Enclosures 8 and 13 is that the

Plaintiffs' claim is statute-barred, there is another justification in concluding that the claim is obviously unsustainable namely, the lack of clarity and precision as to the basis of the claim, and where misrepresentation and undue influence were raised, the necessary particulars related to the same are absent.

[49] Every pleading must contain a statement in summary form of the material facts on which a plaintiff relies for his claim, but not the evidence by which those facts are to be proved, and not the law: see O. 18, r. 7 RoC 2012. O. 18, r. 12 RoC 2012 goes further to provide regarding the particulars of pleading that –

> "*12. (1) Subject to paragraph (2), every pleading shall contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing words –*
>
> *(a) particulars of any misrepresentation, fraud, breach of trust, willful default or undue influence on which the party pleading relies; and ...*".

[50] Apart from the fact that the SoC contains pleadings on law by quoting the provisions of subsections 47(1) of the EPF Act and subsections 13(1) and 13(2) Act 239, I find that the basis of the Plaintiffs' complaints is muddled. The Plaintiff's actual cause of action does not appear to have been well thought through because words to the effect that there were misrepresentation, cheating, abuse of dominant position, undue influence, concealment of full and complete terms of the contract and fraud on the part of the Defendants have been liberally thrown in the SoC and later, in the Plaintiffs' AIR. Under such circumstances, whether the distinction, at least between "undue influence", "fraud" and "misrepresentation" as provided under sections 16,

17 and 18 of the Contracts Act 1950 [*Act 136*] has been clearly understood by the Plaintiffs is questionable.

[51] To make matters worse, the Plaintiffs have not pleaded any specific details of the alleged undue influence. No particulars of undue influence were given in the affidavits either. In any event, where particulars of undue influence are not pleaded in the SoC, the defect or omission in the SoC cannot be made good by affidavit evidence: see *United Malayan Banking & Corporation Berhad* (*supra*).

[52] And the same goes for the alleged misrepresentation and fraud. Insufficient particularisation goes against the intent and mandatory requirement of O. 18, r. 12 RoC 2012. The Plaintiffs have to give such an extent of definite facts pointing to misrepresentation, undue influence and/ or fraud so as to satisfy this Court that the writ action by the Plaintiffs is not frivolous and vexatious and otherwise an abuse of process against the Defendants [see *Malaysian French Bank Bhd v. Abdullah bin Mohd Yusof & Ors* [1990] 1 LNS 1 and *Ho Hup Construction Company Berhad* (*supra*)].

[53] On a final note, as regards D2's argument that Plaintiffs' claim is tantamount to an attack of a Collective Agreement which has been taken cognizance by the Industrial Court, and therefore is an award of the Industrial Court and cannot be varied without the mutual agreement of the parties, the Plaintiffs have failed to rebut D2's averments in their AIR. Where material averments contained in an affidavit are not answered, the averments must be taken to have been admitted: *Sunrise Sdn Bhd v. First Profile (M) Sdn Bhd* [1996] 3 MLJ 533.

Conclusion

[54] Premised on the reasons as stated above, the Defendants have discharged the legal burden on them to show that the SoC is scandalous, frivolous or vexatious, or an abuse of the process of the court by affidavit evidence. I therefore allowed both Defendants' applications to strike out the Plaintiffs' Writ and SoC with costs of RM5,000.00 for each Defendant subject to the payment of allocatur fees.

Dated: 26 APRIL 2019

(ALIZA SULAIMAN)
Judicial Commissioner
High Court NCvc 1
Kuala Lumpur

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Bandar Builders Sdn. Bhd. & 2 Ors v. United Malayan Banking Corporation Bhd. [1993] 4 CLJ 7

Ng Wu Hong v. Abraham Verghese a/l TV Abraham & Ors [2008] 7 MLJ 45

AmBank (M) Bhd v. Kamariyah bt Hamdan & Anor [2013] 5 MLJ 448

Funk David Paul v. Asia General Asset Bhd [2014] 1 MLJ 661

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Ji Soon Hin v. The Government of Malaysia & Ors [1999] 2 MLJ 263

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Pet Far Eastern (M) Sdn Bhd v. Tay Young Huat [1999] 5 MJ 558

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Griffiths v. Smith [1941] AC 170

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Goh Joon v. Kerajaan Negeri Johor [1998] 7 MLJ 621

Saw Seng Kee v. Director of Lands & Mines, Penang & Ors. [1987] 1 MLJ 80

Vadivell a/l G Murugiah v. Yang Di-Pertua Majlis Daerah Kinta Barat, Batu Gajah [1998] 6 MLJ 347

Bencon Development Sdn Bhd v. Majlis Perbandaran Pulau Pinang & Ors [1999] 2 MLJ 385

Lau Choo Seng v. Chong Wei Kee, Messrs Sim Hazlina & Co [2010] MLJU 1910

In BPI International Finance Ltd (formerly known as Ayala Finance (HK) Ltd) v. Tengku Abdullah Ibni Sultan Abu Bakar [2009] 4 MLJ 821, CA

Ronex Properties Ltd v. John Laing Construction Ltd [1982] 3 WLR 875

Malayan United Finance Bhd v. Cheung Kong Plantation Sdn Bhd [2000] 2 MLJ 38

Raja Zainal Abidin bin Raja Haji Tachik v. British-American Life & General Insurance Bhd [1993] 3 MLJ 16

Thong & Anor v. Saw Beng Chong [2013] 3 MR 385

United Malayan Banking & Corporation Berhad v. Palm & Vegetable Oils (M) Sdn. Bhd. & Ors. [1983] 1 M.L.J. 206

Ho Hup Construction Company Berhad v. Zen Courts Sdn Bhd & 6 Ors [2018] 1 LNS 340

Credit Corp. (M) Bhd. v. Fong Tak Sin [1991] 1 CLJ Rep 69

Malaysian French Bank Bhd v. Abdullah bin Mohd Yusof & Ors [1990] 1 LNS 1

Sunrise Sdn Bhd v. First Profile (M) Sdn Bhd [1996] 3 MLJ 533

Legislation referred to:

Public Authorities Protection Act 1948, s. 2(a)

Limitation Act 1953, ss. 4, 6, 29

Highway Authority Malaysia (Incorporation) Act 1980, s. 11

Contracts Act 1950, ss. 16, 17, 18

Rules of Court 2012, O. 18, rr. 7, 12, 19(1)(a), (b), (c), (d), O. 92, r. 4

Rules of the High Court 1980, O. 18 r. 19(1)(b), (c)