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The firm was established with two (2) main objectives; namely to enable the partners to have control over their professional career and to provide the best possible solution to our clients' legal requirements taking into account not only the law but also the commercial aspects of our clients' circumstances.

It is the firm's strong believe that lawyers, though professionals, are essentially service providers. Accordingly, we strive to provide our clients' with the best possible solution in the shortest time possible.

AREAS OF PRACTICE

Articles

Arbitration & Alternative Dispute Resolution	-	Right of Re-Entry
Banking & Finance	-	
Banking & Recovery Litigation	-	Comments on Distress Act
Construction and Building Contracts	-	
Corporate	-	Dissolution of a partnership
Employment, Labour & Industrial Relations	-	
General Litigation Practice	-	Employment
Intellectual Property	-	
Probate & Administration of Estate	-	Outside the defect liability period
Real Estate Practice	-	
Miscellaneous Matters	-	Seriously Speaking
Securities & Corporate Litigation	-	

## BRIEFLY

It has indeed been an eventful first quarter, the overnight policy rate having been increased by Bank Negara Malaysia by 25 basis point (however fixed deposit rates have remained unchanged – no wonder the foreign banks love doing business in Malaysia), the retail price of both petrol and diesel having been increased by 30 sens and the introduction of the new National Automotive Policy and 9<sup>th</sup> Malaysian Plan.

A word of caution:- with the spread of the avian flu worldwide, it is best that you should ensure the 'force majeure' provision in your contract covers such an epidemic.

## TENANCY

*"Right of Re-entry"* by Gan Wee Howe

Most tenancy agreements allow a landlord to terminate the tenancy by re-entering the premises when a tenant fails to pay the rent due. This right to re-enter is a physical act where the landlord goes to the premises and take back possession of the premises. Upon exercising re-entry (i.e. taking back possession) the tenancy will be terminated.

Exercising this right to re-enter is impractical, at most times, and is not without danger as the tenant is usually still in occupation of the premises.

So does this mean that if a tenancy agreement provides for termination by way of re-entry only, a landlord needs to carry out the physical act of re-entry before the tenancy can be terminated?

Fortunately for the landlord (or unfortunately for the tenant, depending on which side you are on) the Court of Appeal in *HP Projects Sdn. Bhd. v. Investprop (M) Sdn. Bhd.* [2005] 3 CLJ 851 is of the view that there are times when re-entry may not be desirable, particularly where animosity exists between the landlord and tenant. In any event, the remedy of recovering possession (back from the landlord) is available to the tenant under the Specific Relief Act, 1950 should the tenant be dispossessed of the premises by re-entry. (Section 8 of the Act provides for a person who has been dispossessed without his consent of immoveable property other than in due course of law to commence action for recovery of possession.)

The Court of Appeal said that to avoid such a dangerous and dubious course (i.e. the act of re-entry), the best alternative (to re-entry) is to file an action against the tenant claiming possession of the premises. Such an action is accepted as being equivalent to a physical re-entry.

The Court went on to hold that although the landlord did not physically re-enter the premises, its act of filing an action for possession and serving the same on the tenant is sufficient to constitute a re-entry into the premises in accordance with the provision for termination in the tenancy agreement. The date of termination is the date of service of the action on the tenant.

*[ Comments : Notwithstanding the decision in the above case, we strongly advise that as a landlord your tenancy agreement should not have re-entry as a pre-condition to termination of the tenancy. We foresee that there may be some cases where it may be argued by the counsel for the tenant that under the circumstances of the tenant's case there is no reason why re-entry could not have been exercised.*

*Please feel free to contact us if you require a review of your tenancy agreement or to revise the termination provision in your tenancy agreement.]*

#### *Commentary on the Distress Act by Gan Wee Howe*

Can double rent be recoverable by way of distress pursuant to the Distress Act, 1951.

The answer is no according to the High Court case of *Mari Boutique Sdn. Bhd.v. Jaya Jusco Stores Sdn. Bhd.* [2003] 4 CLJ 848 for the following reasons:

1. Section 4 of the Act says that you shall not distrain for rent except in accordance with the Act;
2. although "rent" is not defined in the Act, "tenant" is defined as any person from whom a landlord claims rent to be due under any lease, sub-lease or agreement;
3. Section 5(1) provides for distraining of rent for a period not exceeding 12 months. This addresses the situation where the tenancy is still subsisting;
4. Section 5(3) provides that arrears of rent may be recovered after termination of tenancy provided that either the tenant is still in occupation of the premises or any goods of the tenant are still on the premises;
5. a landlord is entitled to claim double rent from a tenant under Section 28(4) of the Civil Law Act, 1956 where the tenant remains in occupation of the premises after termination of the tenancy;
6. double rent is not a contractual rent (i.e. rent agreed upon between the landlord and tenant) but a form of damages for failing to quit the premises after the tenancy has been terminated;
7. in view of the above, double rent is not arrears of rent and therefore is not recoverable by a writ of distress under the Act.

*[Comments: We are of the view that the judge's reasoning in the above case is sound. However, another judge in the High Court is not bound to follow the decision in the above case.]*

## Partnership

*“Dissolution of a Partnership”* by Dion Kor Shiang Hua

The dissolution of a partnership can occur in the on of the following ways:-

1. by notice (Section 34 of the Partnership Act 1961 (“Act));
2. by bankruptcy or death of a partner (Section 35 of the Act);
3. by illegality of the partnership (Section 36 of the Act); or
4. by a court order (Section 37 of the Act).

In addition to the above, dissolution can also occur if a partner retires or is expelled as a result of a change in the composition of the partnership.

### Dissolution by Notice

A partnership is essentially a contractual relationship and therefore can be dissolved or terminated by agreement between the parties at any time.

Section 34 of the Act provides, inter alia, that a partnership is dissolved if:-

- (a) entered into for a fixed term, by the expiration of that term;
- (b) entered into for a single adventure or undertaking, by the termination of that adventure or undertaking;
- (c) entered into for an undefined time, by any partner giving notice to the other(s) of his intention to dissolve the partnership.

### Dissolution by bankruptcy or death

Section 35 of the Act provides that every partnership is dissolved by the death or bankruptcy of any partner.

The operation of this section shall be subject to any contrary agreement; therefore the partners may agree that any bankruptcy or death will not dissolve the partnership.

### Dissolution by illegality of partnership

Section 36 of the Act provides that a partnership can be dissolved by the happening of any event which makes it unlawful for the business of the firm to be carried on or for the members of the firm to carry on the partnership. The partners cannot contract out of this provision i.e. the partners cannot provide that the partnership will continue despite the illegality.

### Dissolution by the court

Section 37 of the Act provides that any partner may apply to the court for a decree of dissolution of a partnership in any of the following cases:-

- (a) lunacy or permanently unsound mind of a partner;
- (b) incapacity of a partner;
- (c) misconduct of a partner;
- (d) willful breach by a partner of the partnership agreement;
- (e) where the partnership can only be carried on at a loss;
- (f) where the court is of the opinion that there are just and equitable ground to dissolve the partnership.

## Employment

*Recent cases on fixed term contract of employment by Eric Soon*

### Introduction

It is common practice among employers to employ employees on a fixed term contract.

This practice is especially common where a key employee of a company reaches retirement age. Without doubt, an employee who has worked for so long has the years of experience and skill which the company may still need. Perhaps, the company may have overlooked its succession planning or may have not been able to find a suitable replacement on time, in which event an employee may be needed for a specified period of time after retirement to carry on with his duties and to ensure a smooth transition of responsibilities to the new employee.

In such a situation, an employer will usually enter into a contract with the retired employee for a specified period of time, usually for a fixed period of one or two years, and what is commonly known or referred to as a fixed term contract.

A fixed term contract of employment is also used for employees who have not reached retirement age. In such instances, a company knows that the services of an employee will not be required for long term but for a fixed period. For example, a company finds out that it does not have enough manpower to handle a project it has undertaken. The company anticipates that the requirement for additional manpower is only for the duration of the project. The company will then look for employees on a fixed term basis with the expiry date of the contract of employment tied to completion of the project.

There are many other instances where a fixed term of employment will be used and the examples stated here are by no means exhaustive.

What is pertinent though, is that problems can occur when a fixed term contract is not renewed when it expires. In a dispute of this nature, the employee will allege unjust dismissal and seek reinstatement.

We would now highlight some of the recent decisions affecting this area of the law.

### **The Employment Act 1955 (“EA 1955”)**

Section 11 (1) of the EA1955 provides that a “contract of service for a specified period of time or for the performance of a specified piece of work shall, unless otherwise terminated in accordance with this Part, terminate when the period of time for which such contract was made has expired or when the piece of work specified in such contract has been completed.”

### **Recent Cases**

In *Kesatuan Pekerja-Pekerja Resorts World, Pahang v. M. Vasagam Muthusamy* [1999] 1 ILR 369, it was held at page 373 *g – h* as follows:-

“..., that it was a genuine fixed-term contract of employment, in normal circumstances such a contract automatically comes to end of itself, **in the absence of express renewal. In normal parlance, there is neither a resignation nor a termination – and the letter of Notice not to renew the claimant’s contract in exh. CLA30 was not a letter of termination. It was simply a letter of non-renewal.**” [emphasis added]

It was further held at page 374 *a – c* of the said judgment:

“The further question of whether the president harboured ill-will or motive in not wanting to renew the claimant’s contract is of little consequence in the light, of the court’s finding that it was a genuine fixed-term contract regarding the claimant’s appointment.

In good conscience and equity therefore, and on the substantial merits of the case, there was no unlawful termination of the claimant or dismissal without just cause or notice

The claim of the claimant is hereby dismissed.

No unjust dismissal.”

Dissatisfied, the claimant in *Kesatuan Pekerja-Pekerja Resorts World, Pahang v. M. Vasagam Muthusamy* [1999] 1 ILR 369 applied to the High Court by way of a certiorari proceeding to quash the award.

The claimant's application was dismissed and is reported as *M. Vasagam Muthusamy v. Kesatuan Pekerja-Pekerja Resorts World, Pahang & Anor* [2003] 5 CLJ 448 (and is also reported in [2003] 5 MLJ 262), wherein it was held by the Judge at page 458 *b – d* of the reported judgment as follows:

I am of the opinion that the Industrial Court had correctly addressed the issue in this case **by determining first whether or not the contract in question was a genuine fixed term contract** (see pp. 3 and 4 of the said award). **If the Industrial Court made a finding that it was not a genuine fixed term contract but was really a contract of employment, then only be the Industrial Court be required to ask whether there was a dismissal or not and that if so whether it was with just cause or excuse.** In the instant case, since a finding was reached that the contract concerned was indeed a genuine fixed term contract, the question of there being a dismissal or not does not arise. Once it was established that there is a genuine fixed term contract, the dissolution of the contract upon reaching the expiry date of the fixed term would clearly spell the end of the worker's tenure with the relevant company. [Emphasis added]

Further down the judgment at page 458 *f*, the Judge said:

Having found the contract to be a genuine fixed term contract, the Industrial Court rightly disposed of the dispute without going into the irrelevant question whether there was a dismissal and whether it was with just cause and excuse.

The learned High Court Judge also held that there was no obligation to state reasons for the non-renewal of the applicant's contract. This is what the learned Judge said at page 457 *b*:

It is observed that the first respondent is not disputing the fact that in the first respondent's letter of non-renewal of contract dated 14 April 1996, the first respondent did not state the reasons for the said non-renewal of the applicant's contract. **In the first place, I think the first respondent is under no obligation to state any reasons for the non-renewal of a fixed term contract as it was clear to both parties that the fixed term contract was to expire by a specified date.** [Emphasis added]

The claimant's appeal against the High Court decision was also dismissed by the Court of Appeal and is reported as *M. Vasagam a/l Muthusamy v. Kesatuan Pekerja-Pekerja Resorts World, Pahang & Anor* [2006] 1 MLJ 206. In dismissing the claimant's appeal, Abdul Kadir Sulaiman JCA (delivering judgment for the Court of Appeal) said that the Court of Appeal agreed with the second respondent and the learned High Court judge that the contract in the present case was a genuine fixed term contract terminable upon the expiry of the fixed term agreed upon.

A recently reported case on fixed term contract of employment is *Asian Supply Base Sdn Bhd v. Terry Mogindol* [2005] 1 ILR 708, which applied the principles in *M. Vasagam Muthusamy v. Kesatuan Pekerja-Pekerja Resorts World, Pahang & Anor* [2003] 5 CLJ 448. At page 771 *d* of the reported judgment, it was held as follows:

“The correct approach to be applied in the determination of the issue with regard to fixed term contract is aptly stated by the High Court in the case of ***M. Vasagam Muthusamy v. Kesatuan Pekerja-Pekerja Resorts World, Pahang & Anor*** [2003] 5 MLJ 262...”

and at pages 720 h-1 to 721 a – c,

“Similarly, in *Colgate Palmolive (M) Sdn Bhd v. Yap Pak Foong* [2001] 3 CLJ 9 (“*Colgate Palmolive*”) the Court of Appeal stated a p. 102 of its Judgment:

Like an employee in a genuine fixed term contract of employment who leaves at the expiration of his fixed term, the retired employee has completed engagement with the employer for a definite term, on which event, he gracefully retires. This is just cause enough for an employer to formally bring an end to their employment relationship.

The principles as stated in the cases of *Vasagam* and *Colgate Palmolive* are applicable to the instant case. In the Court’s view, the fixed term contract has formally brought an end to the employment relationship between the claimant and the company in the instant case and as such there was no obligation for the company to state reasons for the non-renewal of the said contract.”

In ***Asian Supply Base Sdn Bhd v. Terry Mogindol***, the claimant’s case was dismissed on the ground that it was a fixed term contract. At page 723 h, it was adjudged as follows:

“In view of the fact that this Court had made a finding that the contract in question is a genuine fixed term contract the question as to whether there was a dismissal or not does not arise. Accordingly, the claimant’s claim for unlawful dismissal for unlawful dismissal for the company’s alleged failure and/or refusal to renew the claimant’s contract of employment when it expired on 25 October 2000 is hereby dismissed.”

## **Conclusion**

From the cases mentioned above, we can safely conclude that where a contract of employment is a genuine fixed term contract, the issue of whether there was a dismissal or not doesn’t arise simply because the contract comes to an end upon reaching its expiry date.

Once it is determined that the contract of employment is a genuine fixed term contract of employment, an employer is not obliged to renew the contract upon its expiry and no reasons need to be given for the non-renewal.

If the contract of employment in question is not a fixed term contract of employment but a normal contract of employment, then the question of whether there was a dismissal or not and following that, whether it was with just cause or reason becomes relevant.

Accordingly, what is stated in the contract of employment becomes important. As a first step, the court will look at what is stated in the contract of employment to determine if it is a genuine fixed term contract. In a genuine fixed term contract of employment, the fixed period of employment and the commencement and expiry dates must be stated in the contract.

## Miscellaneous Matters

*"Outside the Defect Liability Period"* by Dion Kor Shiang Hua

A common fallacy amongst house buyers is that they can only make a claim against the developer for defects in their property within the 18 months defect liability period as stipulated in their Sale and Purchase Agreement (be it Schedule G or H of the Housing Development (Control and Licensing) Regulations 1989).

A buyer can in fact sue the developer for structural defect outside the contract and after the abovesaid period has expired under the common law of tort. A developer owes a duty of care to the purchaser to construct the property properly i.e. the developer shall be liable to a purchaser for negligent construction of the Property.

However, the purchaser must commence legal action against a negligent developer within 6 years from that date the purchaser first discovered the defect.

## Seriously Speaking

*Why Lawyers should never ask a witness a question if they aren't prepared for the worst answer.*

In a trial, a Southern small town prosecuting attorney called his first witness to the stand. The witness was a grand motherly, elderly woman.

He approached her and asked, "Mrs.Jones, do you know me?" She responded, "Why, yes I do know you, Mr. Williams. I've known you since you were a young boy, and frankly, you've been a big disappointment to me. You lie, you cheat on your wife, you manipulate people and talk about them behind their backs. You think you're a big shot when you haven't the brains to realise you never will amount to anything more than a two-bit paper pusher. Yes, I know you."

The Lawyer was stunned.

Not knowing what else to do, he pointed across the room and asked, "Mrs. Jones, do you know the defence attorney?" She again replied, "Why yes, I do. I've known Mr. Bradley since he was a youngster too. He's lazy, bigoted and he has a drinking problem. He can't build a normal relationship with anyone and his law practice is one of the worst in the entire state. Not to mention he cheated on his wife with three different women, one of them was your wife. Yes, I know him."

The defence attorney almost died.

The judge asked both counsellors to approach the bench and in a very quiet voice, said, "If either of you bastards asks her if she knows me, I'll throw you in jail for contempt."

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