DR ZARIDA HAMBALI & ORS v. UNIVERSITI KEBANGSAAN MALAYSIA
HIGH COURT, KUALA LUMPUR
MOHAMAD ARIFF MD YUSOF JC
[RAYUAN SIVIL NO. R3(2)1-12B-650-2004]
30 APRIL 2009

**Case(s) referred to:**

**Counsel:**

*For the appellant/defendant - N Sivanesan; M/s Vicknaraj, RD Ratnam, Rajesh Kumar & Associates*

*For the responden/plaintiff - Terence Philips; M/s Nordin, Torji & Yussof Ahmad*

**DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR**
**(BAHAGIAN RAYUAN DAN KUASA-KUASA KHAS)**
**[RAYUAN SIVIL NO. R3(2)1-12B-650-2004]**

**ANTARA**

**DA BINTI HAMBALI** **... PERAYU-PERAYU**
**IROM B ABD WAHID**
**AISHAH HJ CHE MD ALI**

**DAN**

**TI KEBANGSAAN MALAYSIA** **... RESPONDEN**

(DALAM MAHKAMAH SESYEN DI KUALA LUMPUR
SAMAN NO: 1-52-9570 TAHUN 1997)

ANTARA

I KEBANGSAAN MALAYSIA ... PLAINTIF

DAN

DA BINTI HAMBALI ... DEFENDAN-DEFENDAN
IROM B ABD WAHID
AISHAH HJ CHE MD ALI

## GROUNDS OF DECISION

This was an appeal from the decision of the learned judge of the Sessions Court after a full trial involving the case of a breach of a Scholarship Agreement between the 1st Appellant and the Respondent. The 2nd and 3rd Appellants were sued in their capacity as Guarantors for the 1st Appellant.

Having critically assessed the evidence and the governing law, I was not satisfied that the decision of the learned Sessions Court Judge should be reversed. There was no fundamental misdirection either on the findings of facts on the evidence, or on the law. There was a proper evaluation of the evidence and the grounds of decision had good evidential and legal support.

I agreed with the finding of the learned Sessions Court Judge that the relevant contractual provisions, in particular Clause 8(iv), were sufficiently clear to lead to the conclusion that the 1st Appellant had breached the Scholarship Agreement and therefore was liable, in accordance with the terms of the contract, to pay the sums expended on her by the University during the duration of her period of study. The learned Sessions Court Judge was right to allow the claim by the University as Plaintiff against the Defendants for the sum of RM 219,450.54 together with interest at the rate of 8% per year from the date of judgment until full settlement and costs.

As far as the background facts are concerned, they can be simply stated. The 1st Appellant entered into a Scholarship Agreement with the University on 6th December 1990. Under the Scholarship Agreement, the University agreed to grant 1st Appellant a study leave and to finance her to undergo a Doctor of Philosophy Degree at the University for a duration of three years.

At the time of the execution of the Scholarship Agreement, the 1st Appellant was an employee of the Respondent University. Nevertheless, it was common ground that the Ph.D. programme was full-time and the 1st Appellant pursued the course whilst under study leave. She received her full pay and other allowances together with additional allowances comprising thesis allowance, book allowance and cost of living allowance. Her other allowances included ITK (Imbuhan Tetap Kerajaan), BIP (Bayaran Insentif Pakar Kritikal) and IIP (Imbuhan Tetap Perumahaan).

By Clause 1(e) of the Scholarship Agreement, the 1st Appellant agreed to serve with the University for an agreed period, defined by the Agreement as *"satu tempoh bersamaan dua kali ganda lamanya dari tempoh yang diambil untuk mengikuti kursus atau menamatkan kursus latihan mulai dari tarikh ia tamat kursusnya atau kembali ke Malaysia mengikut mana yang kemudian."* subject to a proviso, which was the agreed contract period should not be less than seven years.

As far as the consequences of breach of contract was concerned, Clause 8 covered the position. That contractual provision read:

*"Adalah diisytiharkan dan dipersetujui lagi bahawa jika PELAJAR:*

*(i) Meninggalkan kursus latihannya sebelum sempurnanya kursus itu tanpa persetujuan*

*Universiti; atau*

*(ii) Mendapati biasiswanya dibatalkan sebagaimana yang tersebut di atas; atau*

*(iii) Dilucutkan jawatannya dalam perkhidmatan Universiti oleh sebab kelakuan buruk, kecuaian atau indah tak indah kepada tugas-tugasnya dalam tempoh dia telah berjanji untuk berkhidmat dengan Universiti di bawah perjanjian ini;*

*(iv) Engkar, atau sebab keburukan kelakuannya menjadikan dirinya tidak sesuai untuk berkhidmat atau terus berkhidmat dengan University,*

*maka dalam mana-mana hal yang demikian itu PELAJAR dan PENJAMIN-PENJAMIN hendaklah bersama dan masing-masing bertanggungjawab bagi pihak diri mereka ...membayar kepada Universiti apabila diminta dalam tempoh enam puluh hah wang sebanyak $50,000.00...atau semua wang yang telah dibayar kepada PELAJAR atau bagi pihaknya secara gaji, elaun-elaun atau sebaliknya dan semua wang yang telah dibelanjakan atau tanggungannya telah diterima oleh Universiti secara yuran, tambang dan lain-lain bersangkutan dengan atau disebabkan oleh Perjanjian inimengikutyang mana lebih banyak."*

The 1st Appellant completed her course of study in 1993 and thereafter worked with the University as a lecturer until 2nd January 1997 when she resigned. She then worked as a doctor in a private clinic for two years before becoming a lecturer in the Medical Faculty, University Putra Malaysia.

The sequence of events is necessary to emphasise. It was not the case of resigning from the Respondent University and then immediately joining another university, but one where the 1st Appellant had actually resigned and worked in the private sector first before resuming employment with a local university.

The evidence disclosed that on 8.9.1999 University Putra Malaysia had written to the Respondent requesting the latter to consider allowing the 1st Appellant to serve the remainder of the Agreed Period of Employment with the Respondent University at University Putra Malaysia so that she could complete that Agreed Period of Employment pursuant to the Scholarship Agreement. University Putra Malaysia took into consideration a Government circular which was issued in 1988 by the Pengarah Perkhidmatan Awam, Malaysia. This was the "Surat Pekeliling Perkhidmatan Bil. 4 Tahun 1988" headed "Pemindahan Kontrak Pemegang-Pemegang Biasiswa/Dermasiswa Persekutuan/Hadiah Latihan Persekutuan". It was argued by the 1st Appellant that this particular Government circular allowed her to serve the remaining period under the Scholarship Agreement with the Respondent University in another local university, in this case University Putra Malaysia.

Apart from this argument based on the Service Circular No. 4 of 1988, the 1st Appellant also raised two other grounds in response to the Respondent's claim against her. The two other grounds related to an alleged ambiguity of the terms of the Agreement, and inequality of bargaining power. With respect, I did not find these grounds to have sufficient merit.

As for the argument based on the Service Circular, it was evident from the very terms of the document that it was intended to cover and only cover scholarships awarded by the Federal Government and its scholars. The Service Circular had nothing to do with scholarships and study leave offered by universities to its serving employees. The learned Sessions Court

Judge was correct to conclude as he did in this respect. There was no ambiguity in this connection. The express purpose of the circular stated:

*"1. TUJUAN*

*1.1. Tujuan Surat Pekeliling Perkhidmatan ini ialah untuk memaklumkan mengenai keputusan Kerajaan berkaitan dengan kedudukan kontrak pemegang biasiswa/dermasisiwa/hadiah latihan Persekutuan ..."*

The 1st Appellant could not therefore legitimately argue that the Respondent University should consider her service with University Putra Malaysia as part of her fulfilment of the terms and conditions of her Scholarship Agreement with University Kebangsaan. This would be a matter of negotiation between the two universities and not one dictated by the above-mentioned Service Circular.

As for the alleged ambiguity of the terms in the Scholarship Agreement, the learned Sessions Court Judge alluded expressly to Clause 8(iv) and gave a passing comment that they could have been more elegantly drafted, but this comment did not detract from his conclusion that there was no ambiguity in the use of the term "engkar". With respect, legal drafting cannot be equated with scholarly literature. The normal principles of construction of contractual documents, when applied to this particular clause in the Agreement, will give short shrift to this argument of perceived ambiguity.

As often stated, it is not the function of the court to rewrite a contract for the parties. See for instance *Phua Corp Sdn Bhd v. Newacres Sdn Bhd [1992] 3 CLJ (Rep) 274; [1992] 4 CLJ 2179*:

"... in the interpretation of the terms of the contract the judge is not to impose new terms in or rewrite a contract and his function is only to express intention of the parties to the contract -"

See also *Trollope v. Colls Ltd.* [1973] 2 All ER 262, cited in *Phua Corp Sdn Bhd v. Newacres Sdn Bhd*:

"The court's function is to interpret and apply the contract which the parties have made for themselves. If the express terms are perfectly clear and free from ambiguity, there is no choice to be made between different possible meanings; the clear terms must be applied even if the court thinks some other terms would have been no suitable ...

Similarly in *Morello Sdn Bhd v. Jaques (International) Sdn Bhd [1995] 2 CLJ 23*; [1995] 1 MLJ 577:

"For the purposes of construction of contracts, the intention of the parties is the meaning of the words they have used. In *Schuler (L) AG v. Wickman Machine Tools Sales Ltd* [1974] A.C. 235 ... Lord Simon of Glaisdale approved the following passage in Norton on Deeds [Second Edition] at page 50:

... the question to be answered always is, "what is the meaning of what the parties have said?" not "what did the parties mean to say?" ... it being a presumption *juris et de jure* ... that the parties intended to say that which they have said."

On the facts of this case, it was clear what the parties intended. It was clear that the 1st Appellant had to serve University Kebangsaan for seven years after completing her Ph.D. under the Scholarship Agreement. It would have been absolutely illogical to conclude that because she resigned, the term "engkar" could not apply to a resignation, as opposed to a dismissal or termination of employment by the University. In this respect, I found the testimony of the 1st Appellant during the trial, as disclosed by the appeal record, unconvincing. She knew she had to serve the University for seven years, and yet chose to argue that because she resigned she could not be said technically to have been in breach or "engkar". Pure semantics cannot be allowed to override clear contractual intention.

Counsel for the Defendants also cited section 30 of the Contracts Act, reading:

"30. Agreements void for uncertainty.

Agreements, the meaning of which is not certain, or capable of being made certain, are void."

It is important to note that the section also speaks of a "meaning" which is not "capable of being made certain". Clause 8(iv), if at all inherently uncertain, was certainly capable of being made certain.

With regard to the argument on inequality of bargaining power, I found little support for the argument even on the Defendants' own case authorities submitted before this Court. In the situation where a staff member of the Medical Faculty of the University contracts with the University for study leave to pursue a Ph.D. program with very generous terms in relation to full pay and other allowances, it stretches credulity to suppose that there was such an inequality of bargaining power that the contract between the two parties should be avoided. There is no element of compulsion or unconscionable bargain in this sort of fact situation. In *Saad bin Marwi v. Chan Hwan Hua & Anor [2001] 3 CLJ 98*; [2001] 2 AMR 2010, the Court of Appeal has defined the doctrine of inequality of bargaining power in terms of "any situation that results in the weaker party being overmatched and overreached" or when the stronger party "secures an immoderate gain". On the facts of this appeal, these requirements were singularly absent. Seven years of service after the completion of a Ph.D. program might seem onerous, but where parties willingly contract on this basis without any element of compulsion at the outset, parties must be held to their bargain.

For these reasons, I was of the view that the learned Sessions Court Judge had reached a correct decision on the evidence and the law, and therefore dismissed the appeal with costs.

Sgd.
**(MOHAMAD ARIFF MD YUSOF)**
PESURUHJAYA KEHAKIMAN
MAHKAMAH TINGGI MALAYA
BAHAGIAN RAYUAN DAN KUASA-KUASA KHAS 3
KUALA LUMPUR

**Dated:** 30 APRIL 2009