

BIOPRIDE SDN BHD

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v.

MALAYSIAN AIRLINE SYSTEM BHD

HIGH COURT MALAYA, KUALA LUMPUR

B

NOOR AZIAN SHAARI J

[CIVIL SUIT NO: S7-22-597-02]

30 DECEMBER 2005

CONTRACT: Breach - Damages - Waste disposal contract - Termination - Recourse to termination not justified by terms of contract - Whether termination clause wrongly invoked - Whether termination invalid - Whether defendant liable to damages

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CONTRACT: Rescission - Waste disposal contract - Termination by party not privy to contract - Whether lacking locus standi - Whether void - Special and general damages - Liability

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By a letter dated 25 April 2001, the defendant ('MAS') awarded the plaintiff a contract to provide waste disposal services for one MAS Catering Sdn Bhd ('MCSB') for one year for a consideration of RM16,800 per month ('the contract'). The contract period was limited to one year notwithstanding that cl. 2.4 of the Terms of Quotation agreed earlier by the parties stipulated that "the initial term of the contract shall be for a period of two years and it may be extended for another year at the option of MCSB". Clause 2.4 aside, the contract also provided that "any worker found improperly to be removing or in possession of any property belonging to MCSB shall be fined RM2,000 per worker and not be allowed to continue to work within the MCSB premises", and further that "MCSB reserve the right to terminate the contract by serving a written one month notice in advance". Following the contract, and in order to perform its part of the bargain, the plaintiff *inter alia* purchased a lorry, a hook-lift and a certain quantity of bins. Some four months later, the plaintiff's lorry driver (PW2) was found to be in possession of certain items which he had collected from MCSB's rubbish disposal area but was alleged by the defendant to be stolen materials. The defendant complained to the plaintiff about PW2 and subsequent thereto, MCSB, by letter dated 7 September 2001, terminated the contract with immediate effect "due to gross misconduct on the part of your client which we find to be totally unacceptable". The plaintiff tried to seek an amicable settlement to the matter and having failed that sued the defendant for special damages of RM434,032.69 as well as aggravated, exemplary and general damages.

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A Held (allowing the claim):

- B** (1) Considering that the goods found in the possession of PW2 were not taken from the defendant's possession, that there was no duty on the part of the plaintiff or its employee to return any goods found thrown away but still usable, that PW2 had not been caught on CCTV installed at the relevant premises, and that PW2 was never charged in court notwithstanding that a police report was lodged against him, the conclusion could only be that there was never any theft or misconduct committed by the plaintiff's workers. That being the case, the termination of the contract was invalid. (paras 15 & 17)
- C**
- D** (2) Even if the plaintiff's workers were found to be of "gross misconduct or improperly removing or be in possession of any property belonging to MCSB", of which there was no evidence, the defendant was still wrong in invoking the termination clause. This was because, by virtue of cl. 2.11.5 of the contract, the defendant should only impose a fine in the sum of RM2000 and not allow the employee concerned to be working in the premises of MCSB. On this ground, the defendant's termination of the contract was also wrong in law. (paras 17 & 18)
- E**
- F** (3) The contracting parties here were the plaintiff and the defendant, whilst MCSB was not privy and never a party to the contract. In the circumstances, notwithstanding the clause allowing MCSB to terminate the contract, MCSB had no *locus standi* to do so. Consequently, on this ground too, the termination of the contract was bad in law. (paras 20 & 21)
- G** (4) The purchase of the lorry, hook-lift and Roro Bins by the plaintiff was necessary for the plaintiff to carry its part of the contract and serve the defendant. The plaintiff had also suffered loss of income arising from the balance period of the contract. In the circumstances, the court would allow the plaintiff's claim for special damages for RM343,032,69. (paras 25 & 26)
- H** (5) The plaintiff was led to believe that they had at least a two-year contract with the possibility of an extension of one more year. Based on this, and the fact that the plaintiff had already purchased equipment to carry out the contract, the court would also allow the plaintiff's claim for general damages in the sum of RM201,600 (the monthly contracted sum of RM16,800 multiplied by 12 months).
- I** The judgments sums would carry interest at 4% per annum of the

judgment sum from the date of filing to the date of judgment and 8% per annum from the date of judgment to the date of realization. (paras 29 & 30)

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[Order in terms.]

Case(s) referred to:

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Majujaya Holdings Sdn Bhd v. Pens-Transteeel Sdn Bhd [1994] 1 CLJ 134 HC (foll)

For the plaintiff - Tabian Tahir (Azmi Jamaluddin & Amran Kamaruddin with him); M/s Amran Azmi & Haslina

For the defendant - Justin Voon (Fitra & KW Lai with him); M/s Sidek Teoh Wong & Dennis

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Reported by Rose Aziz

JUDGMENT

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Noor Azian Shaari J:

[1] By this writ and statement of claim, the plaintiff, Biopride Sdn. Bhd. is suing the defendant, Malaysian Airline System Berhad for damages in the sum of RM434,032.69, aggravated damages, exemplary damages, general damages, interest at the rate of 4% per annum on the judgment sum from the date of filing of the writ until date of judgment, interest at the rate of 8% per annum on the judgment sum from date of judgment till date of realization and cost.

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[2] The claim is based on a contract awarded to the plaintiff by defendant *vide* a letter of the defendant dated 25 April 2001. Subsequently, by a letter dated 7 September 2001 from MAS Catering Sdn. Bhd. the contract was terminated with effect from 8 September 2001.

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[3] The plaintiff now sues the defendant in respect of this termination.

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[4] The statement of agreed facts are as follows:

1. Plaintiff adalah sebuah syarikat sendirian berhad yang ditubuhkan di Malaysia dan beralamat berdaftar di Lot 514-3, Lorong Sungai Mulia 1, KM 7, Jalan Gombak 53000 Kuala Lumpur.
2. Defendan adalah sebuah syarikat berdaftar yang beralamat di Tingkat 33, Bangunan MAS, Jalan Sultan Ismail 50250 Kuala Lumpur.

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- A** 3. Plaintiff telah membuat tawaran tender pada 26 July 2000 bagi perkhidmatan pelupusan bahan buangan untuk MAS Catering Sdn. Bhd. di dapur kapal terbang di KLIA Sepang, Lapangan Terbang Antarabangsa Kuala Lumpur untuk tempoh dua tahun.
- B** 4. Defendan telah melalui surat bertarikh 25 April 2001 bersetuju untuk memberikan (award) tender tersebut kepada Plaintiff untuk tempoh satu tahun dari 1 May 2001 hingga 30 April 2002 dan nilai tender sebanyak RM16,800 sebulan.
- C** 4.1 Tender tersebut telah diberikan kepada Defendan mengikut terma-terma dan syarat-syarat seperti yang terkandung di dalam Surat Penerimaan Tender bertarikh 25 April 2001 dan Bahagian II Tender Pembuangan Sisa-sisa (Tender of Waste Disposal).
- D** 5. Melalui surat Tawaran Tender dan/atau Form of Quotation, Surat Penerimaan Tender, Surat Penerimaan Tender bertarikh 25 April 2001 dan Bahagian II Tender Pembuangan Sisa-sisa (Tender of Waste Disposal) pihak Plaintiff dan Defendan dan/atau ejennya telah bersetuju untuk terikat terhadap terma-terma dan syarat-syarat yang dinyatakan di dalam dokumen-dokumen tersebut.
- E** 6. Defendan telah melalui ejennya melalui surat bertarikh 7 September 2001 telah menamatkan kontrak di bawah Surat Tawaran Tender tersebut dengan serta merta berkuatkuasa 8 September 2001.
7. Plaintiff telah membantah penamatan kontrak tersebut.
- F** **[5]** “The Issues To Be Tried” are as follows:
1. Whether the termination of the contract which was effective immediately on 8 September 2001 is valid.
2. If the termination is not valid, is the plaintiff entitled to damages claimed as a result of the termination.
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- [6]** The plaintiff called two witnesses:
- (1) PW1 – Nizam Shah Mohd Noor
– Manager of the plaintiff
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- (2) PW2 – Abdul Halim bin Yaacob
– Driver of the plaintiff at the time of the incident.
- [7]** The defendant called three witnesses:
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- (1) DW1 – Azmi Zainal
– Operation Manager of LSG Skycheffs Brahim Sdn. Bhd.

- (2) DW2 – Kamaluddin bin Aban Faisal A
– Manager Support & Security of LSG Skychefs Brahim Sdn. Bhd.
- (3) DW3 – Hazmie Hambug B
– Security Officer
- [8]** At the outset it should be noted that though the contract is between the plaintiff and the defendant, the plaintiff was to provide the services of waste disposal at the MAS Catering Sdn. Bhd. at Flight Kitchen KLIA. C
- [9]** The relevant exhibits (documents) are as follows:
- (1) P1 – dated 18 December 2000 – defendant’s letter offering the plaintiff to tender for the services required.
- (2) P2 – dated 26 July 2000 – tender by the plaintiff to the defendant. D
- (3) P3 – dated 18 December 2000 – “Form of Quotation & Terms and Condition of the Contract.”
- (4) P4 – dated 25 April 2001 – the letter of defendant awarding the contract to defendant for a period of one year from 1 May 2001 to 30 April 2002. E
- (5) P5 – dated 28 July 2001 from Arab-Malaysian Finance Bhd approving a hire purchase facility to the defendant for one unit New Nissan Diesel PKD211N Lorry for RM149,500 after deducting down payment of RM17,137.69. F
- (6) P6A – dated 24 September 2001 – invoice by Hyva (M) Sdn. Bhd. in respect of a Hyva Hooklift at a price of RM117,900 G
- P6B – dated 24 September 2001 – delivery order by Hyva (M) Sdn. Bhd. in respect of the Hyva Hooklift.
- P6C – dated 5 July 2001 receipt by Hyva (M) Sdn. Bhd. for the amount of RM35,400 H
- (7) P7A – dated 16 October 2001 Schedule to hire – purchase Agreement between the defendant with Arab-Malaysian Finance Berhad. vehicle number is WJM7205. I
- P7B – dated 27 August 2001 Regulation Certificate of Vehicle WJM7205.

- A** (8) P8 – dated 7 September 2001 – letter by MAS Catering Sdn. Bhd. terminating the service of the defendant with effect from 8 September 2001.
- B** (9) P9 – dated 24 October 2001 letter by Bodipalar Ponnudurai Nathan, Advocates & Solicitors acting for the plaintiff to the defendant.
- C** (10) P10 – dated 1 November 2001 letter from the defendant to plaintiff stating that the reason for termination was “due to the gross misconduct on the part of your client which we find to be totally unacceptable.”.
- (11) P11 – dated 2 November 2001 letter from Bodipalar Ponnudurai Nathan to the defendant asking for settlement of the matter.
- D** (12) P12 – dated 26 February 2002 letter from Messrs. Amran Azmi, Advocates & Solicitors to the defendant informing the defendant that if they fail to settle, the plaintiff would commence legal action.
- E** (13) P13 – dated 8 March 2002 – fax by the defendant to Messrs. Amran Azmi that the defendant cannot accede to the plaintiff’s demand.
- (14) D14 – dated 26 July 2000 – letter by plaintiff to defendant submitting the tender for the services.
- F** (15) D15 – dated 1 January 2001 – letter by plaintiff to defendant submitting the tender for the services.
- (16) D16 – dated 5 January 2001 (date received by defendant) “Form of Quotation” signed by plaintiff to the defendant.
- G** (17) D17 – the plaintiff’s company profile.
- (18) D18 – dated 6 September 2001 police report made by Hazmie Hambug – DW3.
- H** [10] As can be seen from the exhibits listed above, the plaintiff tendered twice. The second letter *vide* exh. P1 (the offer to tender) and P3 (Form of Quotation) was the one that led to the letter of offer P4. The terms and conditions binding the parties are in exh. P3.
- I** [11] P3 contains the following important and relevant provisions which will be material to this case. They are:

2.4 Period/Term of Contract

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The initial term of the contract shall be for a period of two years and it may be extended for another one year at the option of MCSB.

2.11 Manpower

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2.11.5 Workers employed by the contractor must be of high integrity and of good behavior. Any workers whose behavior is objected to by any supervisory staff of MCSB shall be removed and shall cease to be employed in connection with this contract entered into between the contractor and MCSB. Any worker found improperly removing or be in possession of any property belonging to MCSB or the company's employees or clients without proper authority, consent or reasonable explanation shall be fined RM2,000 per worker and not be allowed to continue to work within MCSB premises.

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2.21 Termination Of Service Agreement

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2.21.1 MCSB reserve the right to terminate the contract by serving a written notice one month in advance if the performance of the contractor found to be dissatisfactory and no explanation need to be given.

[12] Exhibit D15 dated 1 January 2001 is a letter of undertaking signed by the plaintiff. Paragraph 3 of the said letter reads as follows:

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We agree to strictly abide by and conform to any term and conditions, whether expressed or implied as stipulated by Malaysia Airline System Berhad pertaining to each relevant contract of supply, and we further agree that in the event of any breach or anticipated breach on our part of any of the said terms and conditions, Malaysia Airline System Berhad reserves the right to terminate the contract forthwith and to withdraw immediately any Purchase order already issued in connection thereof, Provide Always that such termination shall be without prejudice to the right of Malaysia Airline System Berhad under such contract. We also agree that in the event of such termination, Malaysia Airline System Berhad may in its absolute discretion obtain alternative goods/services from elsewhere and charge us any increase difference in cost.

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[13] *Vide* P8 dated 7 September 2001 the service of the plaintiff was terminated with effect from 8 September 2001. So, basically the contract was only on for a period of 4 months 7 days.

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[14] I now have to decide if the termination is valid or otherwise. If it is then I would have to decide on the issue of damages. If I hold that the termination is lawful, I would then dismiss the plaintiff's claim with cost.

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A [15] In order to arrive at a decision, I make the following finding of facts based on the evidence adduced through witnesses and documents. The findings are:

B (1) The defendant found the plaintiff lorry driver PW2 in possession of items listed in D18 ie, the police report made by DW3.

(2) I do not find that this tentamounts to theft that violates cl. 2.11.5 of P3 because:

C (i) The goods were not taken from possession of defendant, but collected from rubbish disposal area;

(ii) There is no duty on the part of plaintiff or its employee to return any goods found thrown away but still usable (even if the goods in still usable);

D (iii) PW2 was not caught on CCTV that are installed at the relevant premises; and

E (iv) The evidence shows a police report was lodged but PW2 was never charged in court. DW3, the person who lodged the police report has never been called to give evidence in any trial involving PW2.

F [16] Under the circumstances there was never an improper behavior of the plaintiff's workers, specifically PW2. The defendant alleged that the plaintiff's employee was not of "high integrity and of good behavior" and that was the reason for the termination of the contract. In fact *vide* P10, letter of the defendant dated 1 November 2001 to the plaintiff's lawyers then (Messrs Bodipalar Ponnudurai Nathan), the defendant stated that the termination "was due to the gross misconduct on the part of your client which we find to be totally unacceptable".

G [17] Based on the evidence I find that there was no misconduct on the part of the plaintiff's workers, therefore the termination is not valid. However, even if the plaintiff's workers is found to be of "gross misconduct" or "improperly removing or be in possession of any property belonging to MCSB or the company's employees or clients without proper authority, consent or explanation" (which is not supported by evidence) the defendant was wrong in invoking the termination clause as there exists cl. 2.11.5 in P3, the terms and conditions of the service contract where the defendant should fine the plaintiff in the sum of RM2,000 and not allow the employee concerned to be working in the premises of MCSB.

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[18] I therefore find that the defendant's termination of the contract is wrong in law. A

[19] Before I proceed to consider the damages claimed I would like to make an observation here. The tender was awarded by the defendant, Malaysian Airline System Berhad, as seen from P4. However, the termination was effected by another entity that is not a party to the contract ie, MAS Catering Sdn. Bhd. It is not denied that the service was to be provided for MAS Catering Sdn. Bhd. and there is a cl. P3 that MAS Catering Sdn. Bhd. may extend the contract at its option (cl. 2.4) and it can also terminate the contract (cl. 2.21.1). However, it is trite law that only parties to a contract or who are privy to a contract can enforce the contract. Even though the plaintiff and the defendant had agreed in the "Statement of Agreed Facts" encl. 8 in the case file that "Defendan telah melalui ejennya melalui surat bertarikh 7 September 2001 telah menamatkan kontrak di bawah Surat Tawaran Tender tersebut dengan serta-merta berkuatkuasa 8 September 2001." B C D

[20] I find that the court can consider the validity of this letter of termination, as the main issue here is the validity of the termination of the contract. I am of the opinion that based on privity of contract, the letter of termination is void. E

[21] There is no direct case on this issue but in the case of *Majujaya Holdings Sdn. Bhd. v. Pens-Transtel Sdn. Bhd. & Anor* [1994] 1 CLJ 134, the *locus standi* of the party was questioned. It was decided by the learned judge that the plaintiff as nominee of contracting party "has no *locus standi* to commence this suit in its own name." Guided by this, I would emphasize again that the contracting parties were the plaintiff and the defendant, therefore MAS Catering Sdn. Bhd. had no *locus standi* to terminate the agreement. F

[22] Under the circumstances, for both reasons (ie, cl. 2.11.5 of P3 and validity of the letter of termination) stated above or at least on one, the termination of the contract is bad in law. G

[23] Since I've found that the termination is bad and not valid I've to consider the damages prayed for by the plaintiff as result of the termination. H

[24] During the trial, the defendant tried to adduce evidence to mitigate the damages claimed by the plaintiff. The defendant claimed that it was not necessary for the plaintiff to purchase the lorry and attempted to adduce evidence to this effect by proving that, to tender for the job the plaintiff had to have three lorries. This, I find unacceptable as this was I

A the tender requirement more to indicate the ability of the tenderer. There was a necessity to purchase the lorry, hook-lift and Roro Bins once the tender was awarded.

B [25] I find that the equipment that the defendant had in its possession before being awarded the tender was sufficient to carry out work for their existing contract then, ie, for Alam Flora Kuala Lumpur, Alam Flora Shah Alam and Fauna. When the award was given by the defendant, the plaintiff definitely needed new equipment to carry out the new job. As such the purchase of the lorry, hook-lift and Roro Bins were necessary in order to serve the defendant. From the evidence adduced, I have no doubt that the purchase of the three equipment was necessary for the contract between the plaintiff and the defendant and the purchase was for the said contract.

C [26] I would therefore allow the plaintiff's claim for special damages as prayed ie, the sum of RM434,032.69 made up of:

D	i) Kos pembelian lori pengangkutan	RM166,637.69
	ii) Kos tambahan untuk pemasangan hook-lift system di lori tersebut	RM117,900.00
E	iii) Kos pembelian Roro Bins	RM18,000.00
	iv) Kerugian pendapatan bagi tempoh yang belum tamat di bawah tender tersebut berjumlah RM134,000.00	RM131,495.00
F	Jumlah	RM434,032.69

[27] Next I would have to consider the general damages prayed for by the plaintiff.

G [28] P1 dated 25 April 2001 awarding the contract to the plaintiff states that the contract was to be for one year from 1 May 2001 to 30 April 2002. However, P3 dated 18 December 2000 the Term of Quotation, cl. 2.4 states that "The initial term of the contract shall be for a period of two years and it may be extended for another one year at the options of MCSB".

H [29] Therefore the plaintiff was led to believe that they had at least a two year contract with the possibility of an extension of one more year. Based on this, the plaintiff purchased the equipment totaling RM434,032.69 but the believe was not to be true when the contract was

I wrongfully terminated.

[30] I would therefore allow the plaintiff's claim for general damages ie, the monthly contracted sum of RM16,800 multiplied by 12 months ie, RM201,600. **A**

[31] To sum up, the order of the court would be:

- (i) The contract between the plaintiff and defendant was wrongfully terminated on 8 September 2001; **B**
- (ii) The defendant pay the plaintiff the following:
 - (a) RM434,032.69 as special damages; **C**
 - (b) RM201,600 as general damages;
 - (c) interest at the rate of 4% per annum on the judgment sum from date of filing of writ to date of judgment;
 - (d) interest at the rate of 8% per annum on the judgment sum from date of judgment to date of realization; and **D**
 - (e) costs.

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