

CASE NOTE

Section 75 of Contracts Act 1950 on Recoverability of Rental for Unexpired Term of a Tenancy Agreement

Introduction

As to-date in the Malaysian law, despite the increase in judicial reference on the language of Section 75 of the Contracts Act 1950 ("S.75 CA") to justify an award of compensation/damages for the claim of rental under an unexpired term of a tenancy agreement, there is generally a lack of understanding towards its highly uncertain legal position.

SECTION 75 OF CONTRACTS ACT 1950

By virtue of S. 75 CA, it is clearly stated that when a contract has been broken and the contract stipulated the amount to be paid for the breach, the innocent party is entitled to receive a reasonable compensation not exceeding the amount named in the contract, whether or not actual damage or loss is proved:

"When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for."

EVOLVEMENT OF THE LEGAL POSITION OF SECTION 75 CONTRACTS ACT 1950

Tracing back to the Federal Court decision in the previous landmark case of *Selva Kumar a/l Murugiah v Thiagaraj a/l Retnasamy* [1995] 2 CLJ 374 ("**Selva Kumar**") which followed by *Johor Coastal Development Sdn Bhd v Constrajaya Sdn Bhd* [2009] 4 CLJ 569 ("**Johor Coastal**"), the Federal Court held that the party seeking to claim and enforce a damage clause under S.75 CA is at all times required to strictly prove that there is an actual loss or damage suffered

despite the fact that a breach of contract has been established and that the contract contained an agreed liquidated damages clause. Its decision on the scope of S.75 CA is said to have created much unrest on various industries in Malaysia, especially the construction industry.

The court has however taken a slightly different approach in the case of *Berjaya Times Square v Twingems Sdn Bhd & Anor* (No. 2) [2012] 1 LNS 166 ("**Twingems**") where it was held that the losses suffered by the landlord owing to non-performance by the tenant of its obligations under the tenancy agreement were considered as actual losses and there is no necessity for the landlord to specifically prove that there is actual loss/damage suffered. It has further held that should a tenancy agreement prescribed a compensation/damages to be paid by the tenant for a premature termination, such compensation /damages is thereby allowed under the scope of S.75 CA. Thus, it appears herein that the court have followed the Federal Court decision in *Selva Kumar* and at the same time adopted a more purposive approach in interpreting the wording of S.75 CA, which can be clearly seen from the judgment delivered by *Asmabi Mohamad JC* in *Twingems*, stating that:

"Pursuant to clause 10(2) of the Tenancy Agreement, the Plaintiff was entitled to claim for the unexpired terms as liquidated damages as a result of the defendants' non-fulfillment of its part of the bargain...The Plaintiff therefore had no obligation to mitigate its losses as claimed by the Defendants."



THE LAW TODAY

Until recently, the Federal Court in Malaysia has revisited this area of law in the recent landmark case of Cubic Electronics Sdn Bhd (in liquidation) v Mars Telecommunications Sdn Bhd [2019] 6 MLJ 15 (“**Cubic**”) where the court has clearly in its decision departed from the previous Federal Court decisions in the cases of Selva Kumar and Johor Coastal and held that the legal position on the scope of S.75 CA for the recoverability of rental for unexpired term of a tenancy agreement recognised in Selva Kumar would no longer be applicable. The Federal Court stated that there is now no necessity for proof of actual damage where an innocent party seeks to enforce a damages clause under S.75 CA.

In essence, the Federal Court through its decision in Cubic has reversed the obligation of parties to a contract. Previously, the Federal Court in delivering its decisions in cases of Selva Kumar and Johor Coastal, required that the party seeking to enforce a damage clause under S. 75 CA to strictly prove that there was actual damages suffered, despite the fact that the breach of contract was established and that the contract contained an agreed liquidated damages clause. However, in this recent Federal Court decision in Cubic case, it was held that the initial burden of proof lies on the claiming party seeking to enforce a damage clause under S.75 CA to adduce evidence that there was in fact a breach of contract and that the contract contains a clause specifying a sum to be paid upon breach.

Upon successfully meeting the above two requirements, the claiming party would be entitled to receive reasonable compensation, ie. a sum of monies not exceeding the amount stated in the contract, irrespective of whether the claiming party is able to prove the actual damages he/she has suffered. In the event if there is a dispute as to what constitutes a reasonable compensation, the burden of proof then falls on the defaulting party to show that damages clause is unreasonable or to demonstrate what comprises a reasonable compensation. The proof of actual loss or damage is thus not the sole conclusive determinant of reasonable compensation.

CONCLUSION

In a nutshell, with regards to this major restatement of law in Cubic case regarding the new ruling on the wordings of S.75 CA, it is indeed a welcomed departure from the previous legal position on the liquidated damages clause as decided in the case of Selva Kumar. The Malaysian cases decided along the years regarding this area of law have clearly shown the declining in the judicial threshold required under the scope of S.75 CA as discussed in the above cases. The decision made in the Cubic case has certainly makes it unequivocally clear that the doctrine of contract sanctity has come back alive and the very purpose of having liquidated damages clause in a contract is no longer undermined with the new ruling on the wordings of S.75 CA.

