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Permanent Or Fixed Term Contract & The Piercing Of The Corporate Veil – The Case Of Ahmad Zahri

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The nature of the employer – employee relationship is ever evolving. Courts have resorted to various legal interpretations to keep abreast with this evolution.

In the case *Ahmad Zahri bin Mirza Abdul Hamid v AIMS Cyberjaya Sdn Bhd* [2020] 5 MLJ 58 (the Ahmad Zahri case), the Federal Court was faced with two questions of law. Firstly, the apex court had to consider whether the need for a work permit was a material consideration in determining if an employment contract is a genuine fixed term contract. Secondly, does an employment contract, which is renewed successfully without an application by the employee and without intermittent breaks is in reality a permanent employment.

This alert focuses on the second question, which was the central question in the appeal.

Brief Background

The employee, one Ahmad Zahri bin Mirza Abdul Hamid, a Singaporean, was employed by AIMS Data Centre 2 Sdn Bhd (ADC) on 26.8.2009 as a consultant. His contract was for a fixed term of one year (1.10.2009 – 30.9.2010) and entitled him to a performance bonus scheme. The contract was signed by the CEO of ADC, Mr Gan Te-Shen (original contract). In brief, the subsequent events were:

- | | |
|-------------------------|--|
| 1.10.2010
30.9.2011; | – Seemingly satisfied with his performance, ADC renewed his contract a further 3 times, on similar terms as the original contract and each of those 3 contracts, were signed by ADC's CEO but for the final renewal i.e. the 4th contract, where it was signed by the CEO of the |
| 1.10.2011
30.9.2012; | |
| 1.10.2012
30.9.2013; | |

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Company, AIMS Cyberjaya Sdn Bhd (the Company).

- 7.1.2013 ADC consolidated with the Company and the terms of his employment contract remained the same as the original contract.
- 10.9.2013 Ahmad Zahri allegedly received a letter from the Company, offering him further employment for a year, from 1.10.2013 until 30.9.2014, sans the performance bonus scheme (new terms).
- 18.9.2013 In response, the Company renewed the his contract for a period of 3 months instead i.e. 1.10.2013 until 31.12.2013, under the same new terms.
- 1.10.2013 Ahmad Zahri rejected the offer via e-mail.
- 18.10.2013 Ahmad Zahri received a letter notifying him that he was given 2 months' notice of expiry of his contract from 1.11.2013 until 31.12.2013 and that he was granted early release from his employment with effect from 19.10.2013. Dissatisfied with the Company, he pursued the matter to the Industrial Court (IC).

The IC lifted the corporate veil of the ADC and the Company, and found as a fact that Ahmad Zahri worked for a group of companies who operated as a single enterprise. As such, he had been a permanent employee of the Company all along and was dismissed without just cause. In lifting the corporate veil, the IC found that the Ahmad Zahri employment contract had in fact been a permanent and uninterrupted one which the Company

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had renewed annually without the Ahmad Zahri having to apply for renewal. The IC's decision was upheld by the HC, upon an application for judicial review. The Company then appealed to the Court of Appeal, where it succeeded in its appeal. Upon further appeal by Ahmad Zahri to the Federal Court (FC), the decision of the Court of Appeal was set aside and the decision of the IC was reinstated.

Findings Of the Federal Court

In endorsing the IC's decision, the Federal Court considered two issues:

- a) Was the IC correct to pierce the corporate veil of the Company and ADC based on the facts present in this case.
- b) Was the workman a permanent employee or was he on a fixed term contract.

Piercing of the corporate veil

There are a number of factors that permit the piercing of the corporate veil such as fraud, sham, group enterprise and injustice. It must be noted, as the Federal Court did, that the list is non-exhaustive. However, for the purposes of the instant appeal, the apex court zeroed in on two factors - namely group enterprise and injustice/unfairness. The Federal Court reasoned that the piercing of the corporate veil is proper in such instances when the companies in the same group are so intertwined and indistinguishable that they ought to be treated as a single unit. Thus, in such cases, it is only proper to lift the corporate veil to treat the parent company as liable for the actions of its subsidiaries. It was to be a method of checks on balance on such corporations who seek to limit their liability through incorporation.

In this instance, the case of Hotel Jaya Puri Bhd v National Union Of Hotel, Bar & Restaurant Workers & Anor [1980] 1 MLJ 109 is seminal. In short, the case involved the retrenchment of a number of workers, all members of the National Union of Hotel, Bar and

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Restaurant Workers, employed by the Jaya Puri Chinese Garden Restaurant Sdn Bhd due to losses suffered by the company. The restaurant on the other hand, was a fully owned subsidiary of the hotel and both the hotel and the restaurant had the same managing director. This retrenchment resulted in an industrial dispute where the employees claimed that they were dismissed and not retrenched as they were employees of the hotel and not the restaurant. The IC found in favor of the employees. Upon appeal, the Federal Court held that the courts are quite willing to pierce the corporate veil, despite the doctrine of separation of powers when justice in the case demands it.

In grappling with the issue of lifting the corporate veil in Ahmad Mirza, the court referred to Law Kam Loy And Anor v Boltex Sdn Bhd And Others [2005] MLJU 225 where the Court of Appeal held that the lifting of the corporate veil operates on two very distinct considerations when operating in the sphere of company law and employment law. As such it can be surmised that within the sphere of industrial relations, the requirements for the piercing of the corporate veil is a less onerous one as the focus is equitable principles.

The Federal Court listed the following guidelines for the piercing of the corporate veil, within the context of employment law:

- a) Where there is 'functional integrality' between entities.
- b) Unity of establishment between the entities.
- c) The existence of a fiduciary relationship between the members of the entities and/or extent of control.
- d) There was essential unity of group enterprise.
- e) Whenever it is just and equitable to do so and/or when the justice of the case so demand.

These guidelines however are non – exhaustive and the circumstances where a court may pierce the corporate veil is never closed.

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Armed with the above reasoning, the Federal Court found that the Company and the ADC were essentially part and parcel of the same group and there was essentially a unity of group enterprise. It held in evidence, amongst others, that the letter of offer was signed by the same CEO of the Company and ADC and that the workman continued to report to Mr Chiew whilst at ADC and whilst with the Company after 18.10.2012 and that the Company's contract with the ADC allowed for the workman to be moved to any of ADC's subsidiary and/or associate companies.

In essence, in piercing the corporate veil, the Federal Court was able to establish the true labour relationship between the parties in terms of the existing labour relation realities. The refusal of the Court of Appeal to lift the corporate veil, meant that it was unable to identify the employer – employee relationship and this runs contrary to the fundamental purpose of the IRA.

Was The Workman A Permanent Employee Or Was He On A Fixed Term Contract?

Having come to the above conclusion, the Federal Court then turned its attention to the issue of whether the Ahmad Zahri was indeed a permanent employee of the Company or was he employed on a permanent basis, which was dressed up as several fixed term contracts.

In so doing, the Federal Court considered 3 factors to determine whether an employer had a genuine need for the services of the employee for a fixed duration:

- a) The intention of parties
- b) The subsequent conduct of the employer during the course of the employment
- c) Nature of the employers business and the nature of the work the employer is engaged to perform

The above 3 factors however, need to be considered in light of the security of tenure in job employment, as recognised by the Malaysian courts and balanced with

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the employer prerogative to make commercial decisions for reasons of better economy or better management.

Having considered all the above, the Federal Court came to the conclusion that the Ahmad Zahri employment by ADC and subsequently the Company was continuous and without a break from 2009 to 2013.

Conclusion

The piercing of the corporate veil played a pivotal role in this case as articulated by the Federal Court. Coupled with a less arduous requirement in the context of employment law, simply makes this principle more potent. It perhaps is one of the best weapons in the arsenal of the court, particularly when considering the often evolving nature of corporate structures, to ensure that the workmen are always protected and no one party gets the upper hand at the expense of another.

Authored by Kuhan Manokaran, an associate from the firm's Dispute Resolution practice.

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