

Dr H K Fong Brainbuilder Pte Ltd v Sg-Maths Sdn Bhd & Ors [2018] MLJU 682

A CASE NOTE BY ELYSE DIONG TZE MEI.

Introduction

This case highlights the importance of registering a franchise with the Registrar of Franchises and the consequences of not doing so. In particular, the effect and applicability of **section 6(1) of the Franchise Act 1998 ("FA 1998")** are discussed.

Facts

The subject matter was "**Dr. Fong's Method**" of teaching mathematics to students in primary and secondary school, which was developed by **Dr Fong Ho Kheong ("Dr Fong")**. Dr Fong incorporated the plaintiff, **Dr H K Fong Brainbuilder Pte Ltd ("Dr H K Fong Brainbuilder")**, in Singapore which then entered into a **Master Licence Agreement** dated 18 December 2013 ("**MLA 2013**") with the first defendant, **Sg-Maths Sdn Bhd ("Sg-Maths")**, for the operation and management of the "**BrainBuilder**" business ("**the Business**") in Malaysia.

Both the second defendant ("**Lum Sau Leong**") and third defendant ("**Leong Chun Piew**") have been Dr Fong's "best friends" for 55 years. They own a total of 85% of the paid up shares in Sg-Maths and are the only directors of Sg-Maths. Dr Fong held 15% of the paid up shares in Sg-Maths.

Dr H K Fong Brainbuilder alleged, amongst others, that Sg-Maths had breached the MLA 2013 when Sg-Maths sub-licensed the Business to Mr. Suhaimi bin Ramly to operate a Brainbuilder Centre at Setapak. The defendants, amongst others, sought in turn for a declaration that the MLA 2013 was invalid¹.

High Court decision

When the case came before the High Court, the following issues were considered:

- a. Whether Malaysian courts have jurisdiction to hear the case in view of clause 37 of the MLA 2013 and, if yes, whether the law of Malaysia or
- b. Singapore applied?
- c. If Malaysian law applied, whether the FA 1998 applied to the MLA 2013?
- d. If the FA 1998 applied, whether there was a breach of sections 6(1)² and 6A(2)³ of the FA 1998?
- e. If there was a breach of sections 6(1) and 6A(2) of the FA 1998, whether the MLA 2013 was void under section 24(a) and/or (b) of the **Contracts Act 1950 ("CA 1950")**⁴.

Do Malaysian courts have jurisdiction to try this case?

Clause 37 of the MLA 2013 provides as follows:

“The construction, interpretation and enforcement of [MLA 2013] is governed by the laws in force in Singapore and the parties unconditionally and irrevocably submit to the non-exclusive jurisdiction of the Courts in Singapore.”

The High Court decided that the Malaysian High Court has the jurisdiction to hear the case for the following reasons:

- a. The causes of action for breaches of the **MLA 2013** and a guarantee executed by Lum Sau Leong and Leong Chun Piew in favour of Dr H K Fong Brainbuilder arose in Malaysia and not Singapore;
- b. The second to fourth defendants resided in Malaysia;
- c. Sg-Maths has its place of business in Malaysia;
- d. The Malaysian court was the **“forum conveniens”** (appropriate forum) because the documents were prepared, executed and performed in Malaysia, the alleged breaches took place solely in Malaysia and all the witnesses except Dr Fong resided in Malaysia.

Clause 37 does not bar the Malaysian High Court from hearing the case and, even if it did, the contractual clause was held unenforceable because there was a breach of sections 6(1) and 6A(2) of the FA 1998 which rendered the MLA 2013 void.

Does the FA 1998 apply to the MLA 2013?

Although the MLA 2013 was not named a **“franchise”** contract, the High Court held that the courts are not bound by labels or descriptions given by the parties in the contract.

The High Court perused the MLA 2013 and found that it clearly satisfied all four cumulative conditions of a **“franchise”** where:

- a. The franchisor grants to the franchisee the right to operate a business according to a franchise system as determined by the franchisor during the term to be determined by the franchisor;
- b. The franchisor grants to the franchisee the right to use a mark, or trade secret, or any confidential information or intellectual property, owned by the franchisor;
- c. The franchisor possesses the right to administer continuous control during the term over business operations in accordance with the franchise system; and
- d. The franchisee may be required to pay a fee or other form of consideration⁵.

In particular, the High Court Judge found that Dr H K Fong Brainbuilder had provided Sg-Maths with a **“Franchise Operations Manual”** and Sg-Maths was required to comply with the manuals.

Dr Fong had actually referred to Sg-Maths as the Master Franchisee and this is supported by the admission by Dr Fong that he had been advised by Dr H K Fong Brainbuilder’s solicitor to register the Business as a franchise.

Has there been a breach of sections 6(1) and 6A(2) of the FA 1998?

As a franchise, the High Court held that both the franchisor and franchisee of the Business are obliged to register the franchise with the Registrar. The requirement that a franchisor should register a franchise extends to include both local and foreign franchisors.

Applying a purposive construction of the FA 1998, the High Court rejected Dr H K Fong Brainbuilder’s argument that section 6(1) of the FA 1998 only mandates a local franchisor to register its franchise business.

In support, the High Court also had regard to the title of the FA 1998 which states that the FA 1998 is “to provide for the registration of, and to regulate, franchises, and for incidental matters” and the parliamentary debates on the implementation of the **Franchise Act (Amendment) Act 2012** on 17 July 2012 which made reference to the purpose and objective of registering a franchise under the FA 1998.

The High Court based its decision on the following grounds:

- a. It would create absurdity where local franchisors have to register their franchises with the Registrar under section 6(1) of the FA 1998 but foreign franchisors are exempted from such requirement.
- b. The Court further noted that under section 58 of the FA 1998, only the
- c. Minister (defined under section 4 of the FA 1998) may exempt a franchisor, local and foreign, from the requirement under section 6(1) of the FA 1998.

Injustice will be caused to franchisees of foreign franchises as a foreign franchisor would not have to comply with the mandatory provision under section 6(1) of the FA 1998.

Whether the MLA 2013 was void

Based on the High Court’s finding that the both the foreign franchisor and franchisee of the Business franchise had failed to register with the Registrar under sections 6(1) and 6A(1) of the FA 1998 respectively, the MLA 2013 was held to be void in its entirety and unenforceable.

The High Court found that the MLA 2013 was void in its entirety notwithstanding clause 48.1 of the MLA 2013 which provides for the severability of any provisions in the MLA 2013 which the Court finds to be invalid without invalidating other provisions of the MLA 2013.

The High Court in this instance did not exercise its discretion to “save” the lawful part of a contract on the following grounds:

- a. It would be an unlawful circumvention of the imperative provisions of sections 6(1) and 6A(1) of the FA 1998 which were intended by Parliament to be mandatory provisions; and
- b. The failure to comply with sections 6(1) and 6A(1) of the FA 1998 did not amount to non-compliance of any particular term of the MLA 2013. Rather, they concerned failure or lack of registration of the Business and this in itself taints the MLA 2013 in its entirety.

Conclusion

The High Court in the present case took a purposive interpretation of the FA 1998 in holding that, although the term “franchise” was not used in the agreement or contract, the arrangement between the parties may still be considered a franchise under the FA 1998.

Owing to the consequences that may result following the non-registration of franchises, it is prudent, not only for self-acknowledged franchise businesses to comply with the FA 1998, but also other businesses to re-examine their business models and consider if they fall within the definition of a “franchise” as provided for by FA 1998.

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- ¹ There were other issues that were also raised in this case, including
- i. the validity of the Guarantee executed by Lum Sau Leong and Leong Chun Piew, and if in
 - ii. fact MLA 2013 and the Guarantee were invalid, whether the Court may grant remedy under
 - iii. sections 66 and 71 of the CA 1950;
 - iv. whether there was tort of conspiracy and breach of confidence committed by the second to
 - v. sixth defendants against Dr H K Fong Brainbuilder;
 - vi. whether there was misrepresentation by Dr Fong to the first to third defendants;
 - vii. whether Dr H K Fong Brainbuilder's suit was an abuse of court process ("Other Issues").

However, as the crux of this article deals with franchise, these Other Issues will not be discussed here.

² A franchisor shall register his franchise with the Registrar before he can operate a franchise business or make an offer to sell the franchise to any person.

³ Before commencing the franchise business, a franchisee who has been granted a franchise from a foreign franchisor shall apply to register the franchise with the Registrar by using the prescribed application form and such application shall be subject to the Registrar's approval.

⁴ The consideration or object of an agreement is lawful, unless - (a) it is forbidden by a law or (b) it is of such a nature that, if permitted, it would defeat any law.

⁵ Section 4 of the FA 1998.

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