



## Joint Liability vs Joint and Several Liability:

### A lawful distinction

In a relationship between a creditor and debtor, the issue of liability is always a cause of concern. This is made even more apparent when there is more than one debtor involved as the terms of liability is not necessarily clear. Among the popular issues of contention is whether the debtors' liability is joint or joint and several. In this commentary, we will explore this artificial distinction through the recent Federal Court case of **Lembaga Kumpulan Wang Simpanan Pekerja v. Edwin Cassian Nagappan @ Marie [2021] 1 LNS 928**.

#### 1. Background facts

A suit was commenced by the Employee's Provident Fund Board against a company and its directors, Edwin Cassian and one other, for the failure of their company to make employer contributions on behalf of its employees. A consent judgment was recorded where each of the three defendants agreed to pay arrears amounting to RM133,697.00 together with dividends and interests.

However, the judgment did not expressly specify the type of liability to be borne by them i.e. whether the defendants would be "jointly and severally" liable for the judgment sum.

When the defendants failed to comply with the terms of the judgment, the EPF Board commenced a bankruptcy action solely against Edwin Cassian who then applied to set aside the action which was allowed by the Senior Assistant Registrar of the High Court. An appeal to the judge in chambers was dismissed by the judge of the High Court.

On appeal to the Court of Appeal, the main point of contention by the EPF Board is for the court to read in the words "jointly and severally" as stipulated in Section 46 (1) of the Employees Provident Fund Act 1991 ("EPF Act") into the judgment which reads as follows:

### ***Joint and several liability of directors, etc***

***"Where any contributions remaining unpaid by a company, a firm or an association of persons, then, notwithstanding anything to the contrary in this Act or any other written law, the directors of such company including any persons who were directors of such company during such period in which contributions were liable to be paid, or the partners of such firm, including any persons who were partners of such firm during such period in which contributions were liable to be paid, or the office-bearers of such association of persons, including any persons who were office-bearers of such association during such period in which contributions were liable to be paid, as the case may be, shall together with the company, firm or association of persons liable to pay the said contributions, be jointly and severally liable for the contributions due and payable to the Fund."***

## **2. Federal Court decision and the diverging authorities before it**

The sole question posed before the Federal Court is on the point of law:

*"Whether this Court should give effect to the liability on a "joint and several" basis as provided under Section 46 of the Employees Provident Fund Act 1991 in a situation where "joint and several" were not specially stated in the court judgment."*

The court unanimously answered in the affirmative and to analyse the court's reasoning behind this, we must dive into the diverging authorities before it:-

- **Sumathy A/P Subramaniam v Subramaniam A/L Gunasegaran & Anor Appeal [2017] 6 MLJ 753**

In Sumathy, the court took the view that where bankruptcy proceedings were simultaneously initiated against two judgment debtors, they could not both be held liable for the whole judgment sum if the judgment did not specify that liability was joint and several.

In other words, the court cannot insert the feature of "joint and several" liability if such phrase were never inserted into the judgment in the first place.

- **Kejuruteraan Bintai Kindenko Sdn Bhd v Fong Soon Leong [2021] 2 MLJ 234**

In Kejuruteraan Bintai, Fong and four other petitioners were ordered to pay cost of RM50,000 to the company. When this was not paid, Kejuruteraan Bintai commenced bankruptcy proceedings against Fong for the sum of RM50,000. This was challenged by Fong on the basis that since the order for cost never specified that liability was joint and several, he was only liable for an equal portion of the sum with the rest of the petitioners.

Despite acknowledging the preponderance of judicial laws where unless stated otherwise, judgement debtors are regarded as jointly and severally liable under a judgment or order, the Court of Appeal abided by the doctrine of *stare decisis* and held that it is bound by the previous decision of Sumathy. The bankruptcy action was subsequently set aside.

### 3. Analysis in Edwin Cassian

The Federal Court in its reasoning drew a distinction between the intertwined terms:

**Joint liability:** Where two or more persons jointly promise to do the same thing. It refers to one obligation or promise and consequently, performance by one discharges all.

**Joint and Several liability:** Where two or more persons jointly promise to do the same thing and also severally make separate promises to do the same thing.

The important point to note is the difference in the number of promises made.

Critically, the Federal Court emphasised that the term “joint liability” in a judgment does not render liability of each of the debtors to be halved or divided into equal portion according to his interest or obligation, unless clearly and expressly stated to that effect.

The court went further and noted that although a judgment for joint and several liability does not prevent a creditor from bringing several actions against several debtors separately, if any of the debtors satisfies the whole judgment sum, the right of a creditor to bring an action against another is extinguished. This prevents double recovery by the creditor and addresses the issue of a creditor being “overpaid” in Sumathy.

In the instant appeal, Section 46 of the EPF Act has expressly made clear of the joint and several liability of the directors of a company for unpaid contributions and therefore must be fully implemented over the terms of the judgment.

Fortunately, the law is even made clearer on account of Section 44 of the Contracts Act 1950 which provides as follows:

***Any one of joint promisors may be compelled to perform***

*(1) When two or more persons make a joint promise, the promisee may, in the absence of express agreement to the contrary, compel any one or more of the joint promisors to perform the whole of the promise*

In short - all joint contracts essentially imposed complete accountability for the obligation on each of the promisors unless the contract expressly states otherwise. Therefore, when debts are incurred jointly, each promisor is responsible for the entire amount. There was no indication that a joint liability situation renders the obligation to be somehow halved or according to portion. This was the misconception that prevailed in Sumathy.

#### **4. Conclusion**

It is pertinent to note that the point of law in Edwin Cassian was decided in the context of Section 46 of the EPF Act which manifestly imposes joint and several liability. Nevertheless, adopting the court's analysis above and by virtue of the statutory law provided in Section 44 of the Contracts Act 1950, it is reasonable to conclude that joint and several liability prevails in any contracts or agreement unless a judgment or order stipulates otherwise.



**FARINA HANIM**

Associate

[farina.hanim@taypartners.com.my](mailto:farina.hanim@taypartners.com.my)