

Covid Act: "Inability to Perform Contractual Obligation" tested in Courts

Part II of the Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (Covid-19) Act 2020¹ ("**Covid Act**"), which relieves contracting parties with inability to perform contractual obligations, has come into operation retrospectively on 18 March 2020 upon the enforcement of Covid Act on 23 October 2020. In June 2021, the former Minister in the Prime Minister's Department (Parliament and Law) – Datuk Seri Takiyuddin Bin Hassan made another extension order to extend the operation period of Part II from 1 July 2021 to 31 December 2021.² Thus, for the time being, Part II protection is still available to eligible businesses at least until the end of this year.

Throughout the operation of Part II (thus far more than 1 and a half year now), there have been much uncertainties in the legal as well as business sectors regarding the precise scope of its operation, especially in respect of **Section 7: Inability to perform contractual obligation** and **Section 10: Saving**. The lack of reported judicial authorities in this regard have also contributed to such uncertainties.

Nonetheless, from the few reported cases discussed in this article, we can generally observe that the Court had been vigilant in ensuring that only those who genuinely satisfy the requirements are afforded with protection under Part II.

Categories of Contract under Part II

In *WPP Business Services v Cosmopolitan Avenue Sdn Bhd*³, there was a dispute between a landlord and a tenant in respect of the termination and handing over possession of the premises. The parties then entered into a settlement agreement in respect of the dispute. Based on the settlement agreement, the landlord was supposed to make certain payments to the tenant. Apparently, the landlord failed to make the necessary payments in accordance with the settlement agreement.

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¹ Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (Covid-19) Act 2020 (Act 829).

² Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (Covid-19) (Extension of Operation) (No. 2) Order 2021 – P.U.(A) 287/2021.

³ *WPP Business Services Sdn Bhd v Cosmopolitan Avenue Sdn Bhd* [2021] MLJU 1042 (Sessions Court).

The tenant then commenced an action against the landlord and applied for a summary judgment for amongst others the principal sum of RM600,000.00. In opposing the summary judgment application, the landlord argued that its financial situation was affected by the Covid-19 pandemic and the imposition of the movement control orders (“MCOs”). As such, the landlord attempted to seek protection under the Covid Act.

One of the key issues in *WPP Business Services (supra)* was whether the settlement agreement falls under any of the categories of contracts specified in the Schedule of the Covid Act.

The Sessions Court held that the landlord is not entitled to get protection except for some remaining payments, as the settlement agreement (notwithstanding entered into based on a tenancy agreement) does not fall under any of the categories specified in the Schedule of the Covid Act. Additionally, the Court was also not convinced that the landlord is facing financial difficulties as a result of the MCOs.

Tenancy

In *Ang Pi Kui v Lee Wee Teck*⁴, the plaintiff, a tenant of a coffeeshop, filed an action in court to seek amongst others a declaration that the landlord is not entitled to terminate the tenancy agreement. The tenant argued that the landlord cannot terminate the tenancy agreement due to Section 7 of the Covid Act.

One of the key issues arose in *Ang Pi Kui (supra)* was whether the landlord is entitled to terminate the tenancy agreement.

The High Court held that the tenant is not entitled to the Part II protection because the tenancy had expired on 31 August 2020. In the absence of a notice of renewal, the tenancy was terminated on 18 September 2020. Therefore, the saving provision of Section 10 of the Covid Act applied for any contract terminated between 18 March 2020 and 23 October 2020.

Construction Contract

In *Pilecon Engineering Bhd v Malaysian Trustees Bhd*⁵, the plaintiffs filed an action for amongst others a reasonable extension of time for them to comply with their payment obligations under a consent judgment. In support of their action, the plaintiffs argued that the Covid-19 pandemic has adversely affected the first plaintiff in the construction business. As such, the plaintiffs sought to rely on Section 7 of the Covid Act for protection of construction contracts.

⁴ *Ang Pi Kui v Lee Wee Teck* [2021] 1 LNS 58 (High Court).

⁵ *Pilecon Engineering Bhd v Malaysian Trustees Bhd* [2021] MLJU 1167 (High Court).

One of the key issues before the High Court in *Pilecon Engineering (supra)* was whether the plaintiffs are entitled to the protection under Section 7 of the Covid Act.

The High Court held that the plaintiffs are not entitled to the protection, because the plaintiffs had breached their payment obligations multiple times in previous consent judgments and settlement agreements between the parties prior to the Covid-19 pandemic.

Commentary

The above decisions may serve as a guidance on how Part II of the Covid Act may be interpreted by the court. However, it appears that there is still no appellate authority in relation to Part II. In any event, Part II is scheduled to expire by the end of this year. It remains to be seen on whether the government will make yet another extension order for Part II.

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