

“Liable jointly and severally” – what is the implication?

If you have obtained a judgment in your favour against several judgment debtors but there is no mention in the judgment that they are liable jointly and severally for the judgment sum, what is your right against the debtors when it comes to enforcement of the judgment? This was the issue canvassed before the Federal Court in ***Lembaga Kumpulan Wang Simpanan Pekerja v Edwin Cassian Nagappan***¹.

Facts

The Employees’ Provident Fund Board (“EPF Board”) filed a suit against a company and its directors, Edwin and Bernard, for the company’s failure to make employer contributions on behalf of its employees. At the High Court, the parties recorded a consent judgment where the defendants agreed to pay the EPF Board, amongst others, the arrears of the employer contributions.

When the defendants failed to settle the judgment in full in accordance with the consent judgment, the EPF Board commenced a bankruptcy proceeding against Edwin alone for the entire outstanding judgment sum.

Edwin applied to set aside the bankruptcy notice and the creditor’s petition, premised on the ground that he could not be held liable for the whole judgment sum because the consent judgment did not include the phrase that the defendants would be “jointly and severally” liable for the judgment sum.

High Court

The setting aside application was first heard and allowed by the Senior Assistant Registrar (“SAR”) of the High Court. Upon appeal to the judge-in-chambers, the High Court Judge affirmed the SAR’s decision and ordered the defendants to pay the sum in equal proportions. It was held that if the words “jointly and severally” liable were not included in the consent judgment, the court cannot look behind the judgment.

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¹ *Lembaga Kumpulan Wang Simpanan Pekerja v Edwin Cassian Nagappan* [2021] 7 CLJ 823.

Court of Appeal

The Court of Appeal agreed with the High Court's decision and held that the bankruptcy notice and the creditor's petition filed by the EPF Board were defective because they claimed for the entire judgment sum instead of only the portion owed by Edwin.

Federal Court

Understanding “Joint” and “Joint and Several” Liability

The Federal Court has clarified that it is a misconception to say that in a joint liability situation, the liability of two or more debtors is shared and the creditor can only recover in equal proportions against each of the debtors.

“Joint liability” simply means there is only one and the same promise / obligation jointly made by two or more persons. If one person performs the promise, the other persons will accordingly be discharged.

On the other hand, “joint and several liability” means, in the same instrument, two or more persons jointly promise to do the same thing and severally make separate promises to do the same thing.

The Federal Court referred to and held that Section 44 of the Contracts Act 1950 (“CA”) provides for joint liability, which read as follows:

“Where two or more persons make a joint promise, the promise 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.”

As such, if there are two or more debtors jointly liable to pay a judgment debt, each of them is liable for the whole amount. The judgment creditor is entitled to proceed against any of them to recover the entire judgment sum. It is a separate matter between the judgment debtors to claim contribution from one another for an equal contribution, but this does not affect the rights of the creditor under Section 44 of the CA.

What happens if a judgment is silent on the type of liability?

The Federal Court had taken the opportunity to examine the following two Court of Appeal's decisions that offer divergent views on a similar subject:

In ***Sumathy Subramaniam v Subramaniam Gunasegaran & Another Appeal***², the respondent sued the principal borrower and the guarantor (the appellants) and entered two separate summary judgments against them. The terms of the summary judgments were the same, which stated that the defendant is liable to pay to the plaintiff the judgment sum. Subsequently, the respondent filed two separate bankruptcy notices against both appellants for the entire judgment sum. In applying to set aside the bankruptcy notices, the appellants argued that the terms of the summary judgment did not specify that the liability was joint and several, therefore the appellants must be equally liable where each of them was only liable for half of the judgment sum.

The Court of Appeal in *Sumathy (supra)* held that where the judgment has not specified that liability is joint and several, the liability is necessarily joint. As such, each of the judgment debtors will share the liability equally. If the judgment creditor chooses to go against one of the judgment debtors, the latter is only required to pay his own portion and not the entire judgment sum. The Court cannot read or infer the appellants' liability to be joint and several in the absence of such terms in the judgment.

In ***Kejuruteraan Bintai Kindenko Sdn Bhd v Fong Soon Leong***³, the appellant and 13 others were each awarded costs of RM50,000.00 in an oppression action filed by the respondent and 4 other petitioners. The appellant subsequently commenced bankruptcy proceedings against the respondent to recover the costs. In applying to set aside the bankruptcy notice and creditor's petition, the respondent argued that its liability for the costs was joint and this meant that the respondent and the other 4 petitioners were each only liable to pay an equal portion of the RM50,000.00. Accordingly, it was argued that the respondent was only liable to pay the appellant a sum of RM10,000.00.

The Court of Appeal in *Kejuruteraan Bintai (supra)* held that judgment debtors are regarded as jointly and severally liable to honour the entire judgment sum, unless it is stated otherwise. In other words, the liability of the judgment debtors is not split and divided equally but each of them is liable for the entire judgment debt. Thus, there is no need to read into a judgment the idea of joint and several liability.

² *Sumathy Subramaniam v Subramaniam Gunasegaran & Another Appeal* [2018] 2 CLJ 305 (Court of Appeal).

³ *Kejuruteraan Bintai Kindenko Sdn Bhd v Fong Soon Leong* [2021] 5 CLJ 1 (Court of Appeal).

Despite coming to a different reasoning with *Sumathy (supra)*, the Court of Appeal in *Kejuruteraan Bintai (supra)* did not allow the appellant's appeal for it was bound by the doctrine of *stare decisis* to follow the decision in *Sumathy (supra)*.

The Federal Court in the present case concurred with the reasoning in *Kejuruteraan Bintai (supra)*. It further held that the Court of Appeal's reasoning in *Sumathy (supra)* that joint liability meant equal and shared liability, was flawed.

Based on the above discussions, it follows that a creditor's right will not be circumscribed by not having the nature of the debtors' liability explicitly spelt out in the judgment. Unless it is stated otherwise where the liability of the debtors is to be borne in equal proportions, the judgment creditor is entitled to go against one or any number of the debtors for the entire judgment sum so long as the judgment debt remains unrealised.

Statutory provision prevails over a Court Order

The pertinent question of law before the Federal Court in the present case is set out below:

“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 the words “joint and several” were not specifically stated in the court judgment?”

As stated above, the consent judgment entered into between the parties did not provide for the type of liability. The EPF Board argued that its action was filed pursuant to Section 46 of the Employees Provident Fund Act 1991 (“EPF Act”) which provides that, where any contributions remaining unpaid by a company, the directors of such company shall together with the company, be jointly and severally liable for the contributions.

On this issue, the Federal Court agreed with the EPF Board and held that:

- (1) The EPF Act prevails over the terms of the judgment. Thus, the Courts must give full effect to Section 46 of the EPF Act which imposes joint and several liability on the directors for unpaid contributions.
- (2) Although the consent judgment is silent on the type of liability, the liability of the directors for unpaid contributions is both joint and several by operation of law.

Conclusion

The Federal Court's decision has clarified the misunderstanding of the concept of joint liability. From the perspective of a judgment creditor, the liability of two or more judgment debtors is not shared in equal proportions. Thus, the judgment creditor is at liberty to enforce the judgment against one or any number of the debtors for the entire judgment sum. If one judgment debtor has satisfied the judgment in full, naturally the judgment creditor cannot pursue against the other debtors for that judgment. However, if only part payment is recovered, the judgment creditor can still go after another judgment debtor for the remaining outstanding sum.

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