IN THE HIGH COURT OF MALAYA AT KUALA LUMPUR

IN THE FEDERAL TERRITORY OF KUALA LUMPUR

SUIT NO. WA-22NCvC-496-08/2020

Between

FAMEST SOLUTION ... Plaintiff

And

XIAO XIANG BUSINESS SDN BHD ... Defendant

GROUNDS OF JUDGMENT

Introduction

1. The Plaintiff's ("**P**") claim against the Defendant ("**D**") is for unpaid service fee based on a contract and damages due to an unlawful sanction imposed by D against P. D in turn made a counterclaim against P for damages due to breaches of contract and defamation. After a full trial, I allowed P's claim in part and dismissed D's counterclaim. These are the grounds of my judgment.

Background

2. Around December 2017, D entered into a contract with P ("**Contract**"). Whereby D as an online media platform appointed P as one of its official guilds to manage, recruit and provide live streamers to perform live streaming services on D's app-based live streaming platform known as 'Elelive'. The relationship between the guilds (such as P), D and the live streamers are governed by the following agreements:

(a) Letter of Engagement. This is a contract between the live streamers and D. Whereby D engages the live streamers to provide exclusive live streaming performance on D's platform for a fixed period of time;

(b) Letter of Assignment. This contract provides for the assignment of the service fee payable to the live streamers under the Letter of Engagement to the guilds (such as P). The guilds will then manage the service fees and remit the same to the live streamers after deduction of the guilds' commission, without any participation by D.

3. In connection with the Contract, D has issued rules and regulations to P as well as to the other guilds ("**Rules and Regulations**"). The Rules and Regulations are subject to amendment or update by D from time to time. One of the material terms under the Rules and Regulations is that the monthly service fee will be paid by D to the guild upon verification by both parties within the first 5 working days of each month. Subsequently and without any involvement or participation by D, the guild on its own will pay a salary to the live streamers based on the remuneration that has been mutually agreed between them.

4. Around July 2020, after P has submitted the service fee claim for the month of June 2020, P did not receive the said service fee amounting to

RM481,325.68 ("**Outstanding Fee**"). P avers that D has breached its contractual obligation in failing to make payment of the same to P for services rendered in June 2020. P maintains that it has duly carried out its obligations under the Contract and complied with the Rules and Regulations. And that D has never notified P about any contravention on P's part. Notwithstanding, on 15.7.2020, D punished P by imposing the following sanctions ("**Sanction**"):

(a) D will deduct 30% of the service fee payable to P for the month of June 2020;

(b) starting from July 2020 to 30 December 2020, the live streamers assigned under P's guild are free to transfer to other guilds without P's approval. No payment need to be made by those guilds to P for the said transfers. And no transfer fee shall be payable to D's platform for such transfers; and

(c) the salaries which are payable to P's live streamers will be paid directly by D until the deducted 30% service fee is fully utilised.

5. According to D, the reason for the Sanction is because one Hoe Boon Ann (username Gigaleon), who is allegedly P's agent ("**PW2**"), had violated the Rules and Regulations by enticing, luring and poaching one Meng Xiao Xian ("**MXX**"), a live streamer, from D's platform to another platform ("**Purported Breach**"). At that time, MXX was in the midst of finalizing and signing an exclusive agreement with D for a period of 3 years to perform live streaming service on D's platform. PW2 enticed MXX not to execute the exclusive agreement and poached her to join another rival platform known as 'BIGO Live'. Consequently, MXX informed her guild leader and D that she would not sign the exclusive agreement and ended her service contract with D.

6. D conducted an internal investigation and concluded that PW2 was an agent of P. D concluded that P has committed a Class 1 violation of the Rules and Regulations and imposed the Sanction. Aggrieved with the Sanction, P instituted this action and prayed for the following:

(a) the Outstanding Fee of RM481,325.68;

(b) a declaration that the Sanction is wrongful and unenforceable; and

(c) losses that P has suffered due to the Sanction amounting to RM4,333,200 ("**Wrongful Act Loss**") which consist of:

(i) damages estimated to be RM2,091,000 as there are 73 live streamers that had left P due to the Sanction, without P's consent and no payment was made to P in relation to the transfers;

(ii) estimated cost of recruiting or replacing the 73 live streamers that had left P, which is RM2,134,800; and

(iii) additional losses amounting to RM107,400 as there are 31 live streamers that had stopped online broadcasting due to the Sanction.

7. In its Defence and Counterclaim, D pleaded that PW2 was acting as an agent of P. That the actions of PW2 (and by extension, P) had contravened the Rules and Regulations. That the Sanction was rightfully imposed on P in accordance with the Rules and Regulations. Further, that P had committed other violations of the Rules and Regulations, particularly, in the act of poaching D's live streamers. D prayed for a

declaration that P had breached the Rules and Regulations And claimed a sum of RM1,081,696.94 for losses due to the alleged wrongdoings of P which consist of:

(a) RM603,918 as loss of profit due to the Purported Breach (i.e. poaching of MXX);

(b) RM407,938.80 as loss of profit due to the poaching of 11 existing live streamers from D's platform to BIGO Live; and

(c) RM69,840.14 as the remaining deduction in the approximation of 15% for the June 2020 service fee.

8. D further pleaded that it had suffered adverse publicity due to P's publication of defamatory remarks via a petition on Change.org ("**Petition**") and a Facebook post ("**Facebook Post**"), that were published on 16.7.2020. D claimed damages in the range of RM80,000 to RM100,000 for defamation. I note that the exact words which are alleged to be defamatory were not pleaded.

Trial

9. The full trial of the instant suit was conducted over 2 days on 21.7.2021 and 22.7.2021 via the Zoom video teleconferencing platform. P called 2 witnesses and D called 3 witnesses respectively.

(a) Ms Esther Yip ("**PW1**"), the founder of P's guild i.e. 'Rocket Guild';

(b) Mr Hoe Boon Ann ("**PW2**"), who D alleges is the agent of P's guild;

(c) Mr Chong Chee Keong ("**DW1**"), the General Manager of D;

(d) Mr Lim Yeong Shen ("**DW2**"), the guild leader of 'Red Leaf';

(e) Ms Liew Wei Wai ("**DW3**"), an ex-live streamer of P's guild.

Plaintiff's case

10. P's case is this. It is indisputable that P has fulfilled its obligations under the Contract and ought to be paid the Outstanding Fee for the month of June 2020. D's excuse for not paying the same is only due to the Sanction. However, the Sanction is unlawful.

11. Firstly, DW2, who is person in charge of another guild, was the one who filed a complaint to D regarding the Purported Breach. But DW2 admitted that he did not follow the complaint procedure laid down in the Rules and Regulations. DW2 even suggested that the complaint procedure in the Rules and Regulations do not apply to him.

12. Secondly, PW2 has not committed any breach under the Rules and Regulations. DW1 testified that the Sanction is due to the Purported Breach committed by PW2. Which he alleges is in contravention of paragraph 6(a) and 6(d) of the 'Definition of and Management Measures

for Elelive Live Broadcast Violations'. D relies on a Wechat conversation that PW2 participated in. However, P maintains that there is no violation of the said paragraph 6(a) and 6(d) as:

(a) PW2 did not ask MXX to transfer to another guild on D's platform (which is an offence under paragraph 6(a));

(b) PW2 did not entice or lure MXX to perform in another platform (which is an offence under paragraph 6(d));

(c) based on the Wechat conversation, PW2 was not the person who created the said Wechat group but was subsequently added to the said Wechat group; and

(d) PW2 was only having a conversation with MXX and answering questions posted by MXX.

13. Thirdly, P contends that the Sanction is excessive and not in accordance with the Rules and Regulations as:

(a) the Sanction has made a deduction of 30% of the June service fee which is way too severe for a 1st time offender. Based on the Rules and Regulations, a 1st time offender is only subjected to a deduction of 2% of the service fee. The 30% deduction is for a 5th time offender; and

(b) the Sanction that allowed:- (i) P's live streamers to transfer freely without paying P any transfer fee; and (ii) D to make direct payment of the June service fee (after the 30% deduction) to P's live streamers, are not within the ambit of the Rules and Regulations.

14. Fourthly, P avers that PW2 is not its agent. P has never represented to the public, or allowed PW2 to represent to the public, that he is P's agent. PW2's testimony supports P's contention that he is not an agent of P.

15. As a result of the Sanction, P avers that it has suffered the Wrongful Act Loss. With regard to D's counterclaim, P argues that it must be dismissed as:

(a) DW1 has admitted that D does not have any evidence to support its claim for the sum of RM407,938.80 (as loss of profit due to the poaching of 11 existing live streamers from D's platform to BIGO Live). Further, P had not poached the said 11 live streamers;

(b) the rest of the counterclaim are due to the Purported Breach, which D had already taken into account when imposing the Sanction. This is shown in the documents where D informed P that they have suffered losses amounting to RM1.8 million due to the Purported Breach and P can choose to pay the said sum if P is unhappy with the Sanction; and

(c) the purported defamation had been resolved as P had removed the Facebook Post following D's letter of demand.

Decision

16. In essence, P's case is that it has complied with the Contract and the Rules and Regulations and performed services for the month of June 2020. Accordingly, P is entitled to the Outstanding Fee. The reason for

the non-payment by D is that PW2 had purportedly violated the Rules and Regulations. P contends that this is not a valid ground as:

(a) P did not contravene the Rules and Regulations;

(b) nor was there any Purported Breach committed by PW2;

(c) even if there is (which is denied), any Purported Breach was by PW2, who is a third party independent contractor and not an agent of P;

(d) even if PW2 is P's agent (which is denied), the Sanction is not in accordance with the procedure stated in the Rules and Regulations and is also not within the parameters of punishment agreed between parties.

17. I generally agree with P's arguments. I gave judgment in favour of P for its claim of RM481,325.68 in respect of the Outstanding Fee. However, I did not allow P's claim for the Wrongful Act Loss of RM4,333,200, which I found to be unproven and too remote. I also dismissed D's counterclaim as it was not proven on a balance of probabilities. My reasons are as follows.

Defendant is liable to pay the Outstanding Fee

18. P's claim against D is founded on breach of contract. The salient terms and conditions under the Contract and the Rules and Regulations are:

(a) D shall make payment for the services provided by P on a monthly basis; and

(b) the transfer of P's live streamers is subject to the approval of P and D. And P is entitled to receive payment of transfer fee from the purchasing guild.

19. The salient terms of the Contract and the Rules and Regulations are reproduced below. P was appointed by D to recruit live streamers. In return, P would be paid a monthly service fee.

Elelive Live Streaming Commission Settlement

1. Settlement background:
   The guild helps the platform to recruit Malaysian live streamers (who must be of Malaysian nationality, please communicate with the management for other exceptional cases), the platform authorizes the live streaming business operation rights of the live streamers in Elelive to the guilds, and pays the guilds a monthly service fee, which is agreed in this document as follows. Remuneration of the live streamers is to be agreed between the guilds and the live streamers through the parties' own negotiation.

20. The payment of the service fee shall be made on a monthly basis.

3. Settlement time:
   If there are no special circumstances, verification will be done with the guild with regard to the details of the service fee for the previous month within the first 5 working days of each month. In case of public holidays or special circumstances, such time may be postponed. After all the above procedures are completed, payment will be made and arranged accordingly.

21. The entire service fee shall be paid by D to P. P on its own pays a salary to the live streamers. The remuneration of the live streamers is a matter to be agreed between P and the live streamers through their own negotiation.

Regarding settlement between the live streamer and the guild

A. Introduction to service fee settlement

The guild helps the platform recruit a Malaysian live streamer (who must be a non-mainland Chinese), and the platform grants the live streamer's right to operate live broadcast business in Elelive to the guild. The guild cooperates with the platform to recruit and train the live streamer to meet the platform's requirements. The platform pays the guild service fee every month in accordance with the following terms and conditions:
Key points:

1. Service fee = basic service fee + gift service fee. The basic service fee must meet the monthly requirements (see the table below). As soon as the gift service fee reaches 10,000 stars and above, payment shall be made at the end of the month.

2. All service fees are paid to the guild, and the guild on its own pays a salary to the live streamer.

22. I accept that P had duly complied with the Contract and the Rules and Regulations in providing the services to D. P is therefore entitled to the Outstanding Fee. This was largely unchallenged by D other than relying on the Sanction. D only contends that the amount of the Outstanding Fee is inaccurate and should be RM481,025.68, as opposed to the RM481,325.68 claimed by P.

23. First, the differential sum is relatively insignificant as it only amounts to RM300. Second, P had informed D that there was an error in D's calculation of the June service fee. However, D did not reply to the said calculation and has only raised the issue of the calculation being inaccurate during the pleadings stage. This appears to be an afterthought aimed at defeating P's claim for the Outstanding Fee.

24. There is no real dispute by D that P has earned the Outstanding Fee by virtue of having performed the services. The only dispute is that the correct amount should be RM300 lesser than the sum claimed by P. I find D's contention in this regard to be unsubstantiated and an afterthought. It is my finding that D has breached the Rules and Regulations in not paying the Outstanding Fee to P.

The Sanction is improper

25. D's excuse for refusing payment of the Outstanding Fee is that P had violated the Rules and Regulations. D contends that it is entitled to impose the Sanction as punishment against P. The reason for the Sanction can be summarized as follows:

(a) P has breached the Rules and Regulations on the premise that its agent (i.e. PW2) had poached MXX and induced her not to execute the exclusive agreement with D;

(b) an internal investigation was carried out and from there, D concluded that P has committed Class 1 Violation under the Rules and Regulations;

(c) D is vested with the right and discretion to impose such punishment on P, including but not limited to the termination of such collaboration, a permanent ban of such online account and facilities, and other such punishment deemed fit and necessary;

(d) D decided not to terminate or permanently ban P from D's platform. Instead a less severe sanction was imposed on P in view of the long-standing relationship between the parties.

26. It is my finding that the Sanction is improper as:

(a) P did not poach MXX not to execute the exclusive agreement with D;

(b) P is not liable for the acts or omissions of PW2 as he is not an agent of P;

(c) the complaint process and procedure, which resulted in the Sanction, is not in accordance with the Rules and Regulations;

(d) the punishment meted out via the Sanction is not within the parameters of the Rules and Regulations.

The Complaint process and procedure was not observed

27. The 'Elelive's Guild and Guild's Complaint Process', which is part of the Rules and Regulations, provides:

"First contact the official of the corresponding chat group to obtain the verification code for the complaint, and then fill in the following information.

The complaint mediation fee is in the sum of MYR 1,000 which sum will not be refunded if the complaint is unfounded or the case is lost, but will be refunded at the end of the month if the complaint is successful and the case is won. …

The **complaint shall be processed according to the official complaint handling procedure, otherwise the complaint shall be judged as unfounded**.

Within 48 hours of the result of the **first review**, if **both parties raised objections and provide justified evidence**, the platform will consider a **second review**, and the result of the second review shall be final and conclusive."

28. The Sanction, which was a result of the complaint made by another guild against P, must comply with the 'Elelive's Guild and Guild's Complaint Process'. This was confirmed by DW1, the General Manager of D, under cross-examination.

"Q: Alright. Sorry, just to stop you there, so I think you have answered the question which is you get the complaint. So, am I correct to say that you received the complaint from this Red Leaf Guild?

A: Yes.

Q: Alright. Can I please refer you to page 61 of B1? Alright, Mr Chong, can I check with you that this is actually the entire **complaint process for the, which is applicable to all the guilds**?

A: **Yes**.

Q: So can I direct you to actually page, paragraph 2, and paragraph 3, I just want to check with you whether did you whether there's any verification code the complaint or whether there's the sum of RM1,000 has been lodged to you? No-

A: Yes. There'll be a record by our internal department.

Q: OK I am asking you whether for this particular complaint that you mentioned, whether this too has been done?

A: I'm not sure as to this."

29. However, the complainant i.e. DW2 admitted during cross-examination that the 'Elelive's Guild and Guild's Complaint Process' was not adhered to.

> "Q: Ok. No problem. Can I check with you that **your complaint, you did not actually follow** the verification code and also, the RM1,000.00?
>
> A: Yes. **Agree**."

30. Premised on the above, my view is that the Sanction, which is a direct consequence of the complaint, is invalid. Since DW2 has admitted that his complaint was not in accordance with the Rules and Regulations. The complaint is therefore rendered *"unfounded"*, as stipulated by the Rules and Regulations itself. During re-examination, DW2 attempted to excuse such non-compliance by suggesting that the Rules and Regulations did not apply to him and he was not aware of it. But this is contrary to the testimony of DW1 who stated that the Rules and Regulations are applicable to all the guilds.

> "Q: Yes. Understand. Can you explain why the complaint was not accordance to this process?
>
> A: First of all, I'm **not sure whether this complaint process was before or after the message posted by me** in the WeChat group. And, but I've posted the message in the group. **I believe the new guild, new set up guild will follow this procedure**. But me has been working for three to four years with the Defendant."

31. Even if DW2 was not aware, it does not excuse him not following the complaint procedure. More so when DW1 has confirmed that the complaint process is applicable to all the guilds. It is not for DW2 to

unilaterally dictate which provision apply or do not apply to him. The complaint process is applicable to DW2. Since he admitted that he has failed to comply with the same as per the Rules and Regulations, the Sanction, which is the end result of the complaint, is therefore invalid.

32. In rebuttal, D argues that this point (i.e. that the applicable complaint process was not adhered to) was never pleaded by P and does not form part of P's pleaded case. That whether the complaint procedure was in accordance with the Rules and Regulations was not one of the 'Issues to be Tried'. I disagree. Paragraph 11.3 of the Statement of Claim reads:

> "11. The Plaintiff shall aver that the Official Statement by the Defendant was wrongful and in breach of the Contract, Terms and Conditions for, *inter alia*, the following reasons:
>
> …
>
> 11.3 The Defendant did not carry out any formal investigation on the Alleged Misconduct and the Plaintiff was not aware and was not informed of any on-going investigation on the Alleged Misconduct until the official announcement."

33. Item 8 of the 'Issues to be Tried' reads:

> "8. Whether the Defendant has informed and/or conducted an investigation before imposing the sanction against the Plaintiff in relation to the Purported Breach?"

34. In my view, the question of whether the applicable complaint process was observed can come within the ambit of whether an investigation was properly carried out. The 'Elelive's Guild and Guild's Complaint Process' itself speaks of parties 'raising objections' and 'providing justification'

following a ‘first review’. D will then *“consider a second review, and the result of the second review shall be final and conclusive”*. This indicates that the complaint ought to have been brought to P’s attention and P be given an opportunity to explain. Nevertheless, even if I am wrong in this regard, I am still satisfied that the Sanction is improper due to the other grounds advanced by P (which are discussed next).

Plaintiff and PW2 did not poach MXX

35. DW1 confirmed that the Purported Breach is based on paragraph 6(a) and 6(d) of the ‘Definition of and Management Measures for Elelive Live Broadcast Violations’ which reads:

> Guild violations (the above regulations also apply to guilds):
>
> a. Interfering with other guild operations, including but not limited to: **Maliciously poach** the live streamers of other guilds on the Elelive platform (discussing such transfers with other guild’s live streamers without the consent of the guild president etc),
>
> …
>
> d. **Entice and lure** other guild’s live streamers to start broadcasting on other platforms.

36. During cross-examination, DW1 testified:

> “Q: Alright. Ok, so now I’m going to refer you to page 193 to 198 and also page 154 to 184, this is in relation to the purported poaching. So I also like to cross refer to your witness statement at page 19, paragraph 19 and 27. So here you mentioned- Sally, can you show paragraph 27 of the witness

statement? Ok, so here **you mentioned that the Plaintiff's agent has actually poached, enticed and lured the live streamer**. Can I just check with you, so for this sanction, you are relying on- Sally, can you turn to page 44 and 45 of B1? Page 45, right. Ok, so can I check with you, so the **entire sanction is relying on item 6(a) and also 6(d)**?

A: Yes."

37. I find that neither P nor PW2 had violated the Rules and Regulations. With regard to paragraph 6(a), DW1 admitted that based on the evidence which D relied on to impose the Sanction, in particular the Wechat conversation, PW2 did not poach MXX to leave her then guild.

"Q: Ok. So let's look at 6(a) first, here actually mention that it's an offence to discuss the transfer with other live streamers without consent. So this one basically, am I correct to say that it's a transfer of guild to another guild within the Defendant's platform?

A: Yes.

Q: So if that is the case, then this official sanction is wrong, right? Because if you were to look at the evidence that you have submitted, the **entire wechat conversation did not actually talk about the transferring of Meng Xiao Xian to another guild**.

A: I disagree.

Q: So **you are saying that there's a transfer of guild in that particular wechat conversation?**

A: **No**.

Q: No. So if that's the case, then **your reliance on item (a) is wrong because there's no transfer of guild**.

A: Though the **wechat conversation never mentioned of the transfer to other guild** but this is our official sanction that, official sanction's finding that this was done in a **bad faith or mala fide** that they wanted to poach our live streamer."

38. Based on DW1's own testimony, I find that D's reliance on paragraph 6(a) of the 'Definition of and Management Measures for Elelive Live Broadcast Violations' is unjustified. For D to allege that PW2 has committed a breach under paragraph 6(a), even though the entire Wechat conversation did not mention the transfer of guild, which is the very evidence relied on by D for the Sanction, is untenable.

39. I also find that neither P nor PW2 had contravened paragraph 6(d) of the 'Definition of and Management Measures for Elelive Live Broadcast Violations'. P was not involved and was not even a party in the Wechat conversation. PW2 was also not the party who started the Wechat conversation. He was added subsequently to the Wechat conversation. This was admitted by DW1 under cross-examination. Although DW1 was rather evasive in the beginning, he subsequently admitted to it after being referred to the documentary evidence.

"Q: Right, do you agree with me that in relation to this wechat conversation, **Giga is actually added inside the conversation and he is not the one who is starting the conversation**?

A: You are saying that he was not in the group? He was added?

Q: He was not the one starting the group. He was added to the group.

A: I disagree.

Q: Can you please refer to page 193 of B1, Ok. So from this document, do you agree with me that it is clear that '**yolanda' is the one who added Giga into the Chat**? Not 'ni". It is between two… just ask whether –

A: Added Giga, and?

Q: And this Meng Xiao Xian into the group.

A: **Yes**."

40. I accept PW2's testimony, which I find to be credible and consistent with the contemporaneous documents. That MXX was desirous of leaving D and was the one who approach PW2 to obtain more information. PW2 did not poach, entice or lure MXX to join another platform. He was merely answering questions posted by MXX. For D to say that the conversation between PW2 and MXX is a violation of paragraph 6(d) of the 'Definition of and Management Measures for Elelive Live Broadcast Violations' is untenable because PW2 did not instigate MXX to leave D.

41. From the context of the Wechat conversation, I do not see any element of poaching, enticing or luring committed by PW2. If at all, MXX was the instigator as she was the one asking the questions which led to the answers from PW2. MXX posed the questions *"What should I do?"*, *"If the contract is not submitted back, it will not come into force, right?"* and *"I afraid he will not let me leave"*. Which suggest that she intended to leave D and was asking how to go about accomplishing that objective. Those questions triggered the various responses from PW2.

42. The relevant extracts from the Wechat conversation are as follows:

Meng Xiao Xian:

[Emoticon] I afraid that brother Feng will beat me to death.

What should I do?

Meng Xiao Xian:

If the contract is not submitted back, it will not come into force, right?

[Emoticon]

Giga Leon:

Yes

If it is not submitted within three months

It will not come into force

Meng Xiao Xian:

I afraid he will not let me leave

Su Liao Jie:

Just leave

Meng Xiao Xian:

I am still holding the contract

Giga Leon:

Pretend that you are sick

Meng Xiao Xian:

I remember I started at the same day with Emily

Giga Leon:

Incurable disease

Then you can leave after one year.

Meng Xiao Xian:

31st of May is Emily's last day.

Giga Leon:

Can't sign 3 years

Something like that

43. In his witness statement, PW2 testified:

"Q5: How were you involved in this matter before this Court today?

A5: On or about 15.7.2020, I was informed by the Plaintiff that the Defendant has punished the Plaintiff as I have acted as the Plaintiff's agent and had purportedly poached one of the Defendant's online streamer known as Meng Xiao Xian ("Meng"). That to me is an unwarranted allegation because **I am not the Plaintiff's agent** and **I did not actually poached Meng**."

44. P contends that the above testimony was unchallenged and not cross-examined by D during trial. Hence it is deemed to be admitted by D. P cited the Court of Appeal case of *Forest Steel Sdn Bhd v Iconic Gateway Sdn Bhd & Anor and another appeal* [2020] MLJU 563 which held that the failure to cross-examine a witness amounts to an acceptance of the witness' testimony. The Court of Appeal said (at page 17 of 35):

> *"[97] It is settled law that **failure to cross-examine a witness on a crucial part of the case will amount to an acceptance of the witness's testimony** (Wong Swee Chin v Public Prosecutor [1980] 1 LNS 138). Iconic is deemed to have accepted the evidence of PW2 and PW3 when they failed to cross-examine them on the issue of the preliminary works."*

45. In rebuttal, D pointed out that in *Forest Steel* (supra), no challenge was posed to both of the witnesses in that case. Reference was made to the Federal Court case of *Wong Swee Chin v Public Prosecutor* [1981] 1 MLJ 212 which held that there are exceptions to this general rule. The Federal Court said (at page 213):

> *"On this point, we need only say there is a **general rule that failure to cross-examine a witness on a crucial part of the case will amount to an acceptance of the witness's testimony**. But as is common with all general rules, **there are also exceptions** as pointed out in the judgment of the Supreme*

Court of New Zealand in Transport Ministry v Garry [1973] 1 NZLR 120, 122 where Haslam J said at page 122:-

> *In Phipson on Evidence 11th edition paragraph 1544 the learned author suggest examples by way of* ***exception to the general principle that failure to cross-examine will amount to an acceptance of the witness's testimony****, viz, where*
>
> *'… the story is itself of an incredible or romancing character, or the abstention arises from mere motives of delicacy or when counsel indicates that he is merely abstaining for convenience e.g. to save time. And* ***where several witnesses are called to the same point it is not always necessary to cross examine them all****."*

46. D's explanation is this. P has denied the status of PW2 as its agent. Since PW2 testified as P's witness, he is not expected to testify otherwise. Any challenge to PW2's testimony during cross-examination will be superfluous. D maintains that PW2's status as an agent can be shown from other evidence and there is no need for a direct question to be asked to challenge his testimony. In any event, PW1 has testified on the same point and it was challenged during cross-examination.

> "Q: Whatever it's worth, I put it to you that your contention that Giga Leon was not an agent is not true. It is fabricated just to deny Defendant's claim.
>
> A: Fabricated to deny the claim, yes?
>
> Q: Yes. Yes or no?
>
> A: I disagree."

47. I agree with D that there is no acceptance by it of PW2's said testimony purely on the ground that no question was put to PW2 during cross-examination. The challenge had already been raised earlier in connection with the testimony of another witness i.e. PW1. In addition, the

issue as to whether PW2 was acting as an agent of P is the crux of the instant suit. As can be seen in the 'Common Issues to be Tried'.

> "4. Whether the talent agent bearing the account name of Gigaleon is the Plaintiff's agent and/ or representative and/ or staff ("Alleged Agent")?"

48. Be that as it may, I accept the veracity of PW2's testimony as it is consistent with the documentary evidence and the overall probabilities of the case. PW2 is the only witness who was personally involved in the Wechat conversation who testified in court. MXX was listed as one of D's witness and her witness statement was filed in court. But MXX did not show up to offer her testimony during the trial. In my opinion, D is not justified in imposing the Sanction against P as the Purported Breach is not in violation of the Rules and Regulations.

The Sanction is not within the ambit of the Rules and Regulations

49. D maintains that the Sanction is in accordance with the Rules and Regulations. That it is necessary to serve as a deterrence against future contravention of the Rules and Regulations and in order to maintain harmonious relationship between the guilds. I disagree. Under paragraph 3 of the 'Definition and Management Measures for Elelive Broadcast Violations', which is part of the Rules and Regulations, the most severe punishment is provided under Class 1 violation which is to terminate the entire guild.

3. Description of the classification of penalty measures

If the live streamer and the guild have violated the regulations, once determined, they will be penalised according to the severity of the situations, which is classified as follows:

Class I violation (the most severe violation)
Class II violation (serious violation)
Class III violation (general violation)
Class IV violation (minor violation)

Class I violation : including but not limited to the termination of co-operation, permanent blocking of accounts and devices, etc.
Class II violation : Level 5 penalty (as follows) is imposed on accounts (including guild's account), and deduct all commissions of that month.

Class III violation : Giving warnings based on the situation, deduction of business service fee, imposing penalties of levels 1-4 (as follows) on accounts (including guild's account), and restrictions on live broadcast functions, etc.
Class IV violation : remind, warn, and require rectification based on the situation.

50. The parameters of the punishment for violation of the Rules and Regulations are expressly stated in the 'Definition and Management Measures for Elelive Broadcast Violations'.

※Rules for deduction of service fee for violations by the guild:

1) Depending on the complexity and severity of the situation, and where the loss amount can be referred to, the penalty will be based on reference to the loss amount (the final penalty amount is to be determined by the platform);
2) Where the loss amount cannot be referred to, the deduction is based on the percentage of service fee income of the previous month (the penalty is cumulatively added up but should not be more than 100%), and the minimum should not be less than 1,000 MYR (including 1,000 MYR).

Cumulative number of times in a month	1st time	2nd time	3rd time	4th time	5th time	≥5 times
Service fee deduction ratio	2%	4%	6%	8%	10%	10%

For example:
1) The guild has a reference to the loss amount of MYR 2,000 for the first violation of the regulations in the month. If there is no reference amount for the second violation, 4% of the service fee will be deducted. At the end of the month, a total of 4% of the service fee + 2,000 MYR will be deducted.
2) If the guild has violated the rules 7 times in the month, and there is no reference amount, the total service fee of 2%+4%+6%+8%+10%+10%+10%=50% will be deducted at the end of the month.

51. In light of the above, the Sanction, which stipulated the following, has gone beyond the ambit as expressly agreed between the parties in the Rules and Regulations.

(a) to deduct 30% of the June service fee;

(b) to allow the live streamers to transfer freely without P's consent;

(c) to make direct payment to P's live streamers after the 30% deduction.

52. With regard to sanction (a) above (i.e. 30% deduction of the June service fee), the Rules and Regulations prescribed a deduction ratio. Since this is the 1st time that P has purportedly committed a violation of

the Rules and Regulations, the prescribed deduction ought to be 2%. And not 30% as imposed by D. The 30% deduction is for a 5th time offender. It seems to me that D has imposed excessive punishment on P which is not in accordance with the Rules and Regulations.

53. With regard to sanctions (b) and (c) above (i.e. allowing P's live streamers to transfer to other guilds without P's consent and making direct payment to the live streamers), such punishments likewise are not within the parameters of the Rules and Regulations. The 'Definition and Management Measures for Elelive Broadcast Violations' have provided for all the punishments against different classes of violations. The aforesaid punishments meted out by D are not within the stipulated parameters. Under cross-examination, DW1 admitted that the transfer of live streamers is not within the scope of the punishment provided for under the Rules and Regulations.

> "Q: Ok. Can I refer you to page 57 of the same bundle? Do you agree with me that this rules and regulation pertaining to the **transfer of live streamer is not part of the rules and regulation for punishment**?
>
> A: You were saying that this is not part of the rules and regulation of the punishment?
>
> Q: Yes, that's what I'm asking.
>
> A: **Agree**."

54. In my opinion, D is not entitled to impose punishment that is more severe than what was agreed between the parties in the Rules and Regulations. D is not entitled to impose punishment at its uninhibited whim and fancy. This position is reflected in the Court of Appeal case of *KAB*

Corp Sdn Bhd & Anor v Master Platform Sdn Bhd and another appeal [2019] 6 MLJ 752 at 765 which said:

> *"[29] We now return to the present case where the central issue relates to the* ***principles which govern the exercise of contractual discretion*** *by the defendant. In our considered view, the* ***conferring of a contractual discretion on the defendant does not subject the plaintiffs to the defendant's uninhibited whim and fancy****. The authorities show that* ***not only must the discretion be exercised honestly and in good faith****, but having regard to the provisions of the SPA and the House Rules, it* ***must be not be exercised arbitrarily, capriciously or unreasonably****. The authorities are also clear that* ***such a limitation applies as a matter of necessary implication****. The rationale for such a limitation is that it is presumed to be the reasonable expectation and therefore the* ***common intention of the parties that there should be a genuine and rational, as opposed to an empty or irrational, exercise of discretion****. At first blush, the requirement of honesty and good faith seems quite clear. The* ***decision-maker invested with the discretion must properly direct itself to the task in hand and should not exercise the discretion for an ulterior motive****. The* ***requirement not to exercise the discretion unreasonably*** *is not analogous to a duty to take reasonable care but to Wednesbury reasonableness (see para [27] above)."*

55. It is noteworthy that D has for the first time stated in this proceedings that the Purported Breach is a Class 1 Violation. This was not stated in the Sanction itself and was only introduced during the pleading stage. It appears to be an afterthought to justify the unlawfulness of the punishment imposed. Even if the Purported Breach is a Class 1 Violation, the fact remains that the punishment imposed via the Sanction is not within the ambit of the Rules and Regulations. D argues that it is entitled to exercise its own discretion to impose appropriate punishment. This is pursuant to paragraphs 1 and 2 of the 'Definition of and Management Measures for Eleilive Live Broadcast Valuations' which reads:

"1. Elelive visitors, live streamers and guilds shall abide by the following regulations, otherwise they will be penalized for violation. The severity of a violation is assessed by the Elelive officials ***based on objective factors****, such as, the intent of the violation, the time of violation and the subject of the violation.*

2. Elelive visitors, guilds and live streamers are obliged to ensure that the environment of the Elelive lives broadcast is healthy and orderly. All guilds and live streamers shall be responsible for all contents of mic-linked live voice chat in the live broadcast room, live broadcast room information, short videos etc.; in the event any part of the aforementioned constitutes violation against regulations, Elelive officials shall ***penalize the violator in accordance with the severity of the violation conditions****, and the guild and live steamer concerned shall also be penalized together with the violator."*"

56. Such argument is devoid of merit. Even if D is entitled to exercise its discretion, the discretion must be exercised honestly and in good faith. And not arbitrarily, capriciously or unreasonably. Neither P nor PW2 were interviewed by D or afforded an opportunity to defend themselves before the Sanction was pronounced.

57. My opinion is that the punishment imposed must be within the parameters agreed between the parties. D is not entitled to come up with any kind of punishment based on its own whim and fancy. The aforesaid provision relied on by D itself states that any violation must be assessed objectively i.e. *"based on objective factors"*. Further, that any penalty must be in accordance with the severity of the violation conditions. Which in P's case should be as a 1st time offender. And not that imposed by D which is applicable for a 5th time offender.

PW2 is not Plaintiff's agent

58. It is my finding that PW2 is not the agent of P. The Purported Breach, if at all, is not committed by P but by PW2. Even if the Sanction is proper, the Sanction cannot be applied against P as PW2 is not P's agent. But merely an independent contractor who recommends live streamers to P on an ad hoc basis. As such, P is not responsible for any act or omission committed by PW2. The legal position is reflected in *Honeywill and Stein, Ltd v Larkin Brothers (London's Commercial Photographers), Ltd* [1934] 1 K.B. 191 at 196 which said:

> *"It is well established as a general rule of English law that an* ***employer is not liable for the acts of his independent contractor*** *in the same way as he is for the acts of his servants or agents, even though these acts are done in carrying out the work for his benefit under the contract. The determination whether the actual wrongdoer is a servant or agent on the one hand or an independent contractor on the other depends on whether or not the employer not only determines what is to be done, but retains the control of the actual performance, in which case the doer is a servant or agent; but if the* ***employer, while prescribing the work to be done, leaves the manner of doing it to the control of the doer, the latter is an independent contractor****."*

59. I do not find any agency relationship between P and PW2. PW2 is a user on D's platform who will from time to time communicate with the live streamers and occasionally recommend those live streamers to different guilds upon request. This was confirmed by PW2 during cross-examination.

> "Q: Ok. We would refer back to your Q&A 3. You said that 'I do not have a contractual relationship with the Plaintiff'. Am I right to say what you meant was you didn't sign any contracts with the Plaintiff? Is that what you are trying to say?

A: Yes I do not sign any contract with the Plaintiff.

Q: So that's what your meaning here, am I right?

A: Yes, I am but a **freelancer**.

Q: Sorry, Mr Hoe, I think, I cannot hear you properly. I am not sure if the others can hear you properly. Maybe you can speak louder. Ok, in your same question, you also maintained that you are **not an employee or agent of the Plaintiff**.

Interpreter: Sorry, let me explain to him first.

A: Yes. I am not.

Q: Am I right to say that you are not aware in relation, you do not have knowledge about the arrangement between Plaintiff and the Defendant?

A: Yes I totally do not know."

60. Based on the evidence, PW2 did not participate in the daily operation of P. PW2 is not in the official management group between P and D. PW2 did not manage and train the live streamers, which is P's scope of contract with D. P did not have any knowledge about the actions of PW2 pertaining to the Purported Breach. I am satisfied that P cannot be held responsible for the Purported Breach.

61. Further, there is no actual or apparent authority given by P to PW2. P has never represented to D or the public that PW2 is its agent. D and the live streamers are aware that even if PW2 were to recommend any live streamer to P, it is still subject to the approval of P whether the live streamer can join P's guild. The legal position concerning apparent or ostensible authority was discussed in the High Court case of *Industrial Concrete Products Bhd v Concrete Engineering Products Bhd* [2001] 2 MLJ 332 at 351 which said:

"Lord Diplock defines apparent or ostensible authority in the same case of Freeman & Lockyer v Buckhurst Park Properties (Mangel) Ltd & Anor [1964] 1 ALL ER 630 as:

> *a legal relationship between the principal and the contractor created by* ***representation****, made by the principal to the contractor, intended to be and in fact acted on by the contractor,* ***that the agent has authority to enter on behalf of the principal into a contract of a kind within the scope of the 'apparent' authority, so as to render the principal liable*** *to perform any of the obligations imposed upon him by such contract. To the relationship so created the agent is a stranger. He need not be (although he generally is) aware of the existence of the representation. The representation, when acted upon by the contractor by entering into the contract with the agent, operates as an estoppel, preventing the principal from asserting that he is not bound by the contract. It is irrelevant whether the agent had actual authority to enter into the contract".*

62. It is my finding that P cannot be held liable for any act or omission committed by PW2 as he was acting as an independent contractor and not as an agent for P.

PW2 does not have the authority and scope of duty akin to an agent

63. D argues that PW2 has the authority and scope of duty akin to an agent. According to D, the usual authority and duties of an agent for a guild in the live streaming business include but are not limited to:- (a) recruitment of live streamers for the guild; (b) liaising and managing the affairs of the guild's live steamers directly such as the live streamers' monthly service fee payouts; and (c) updating the guild's live streamers on the latest activities and announcements. D contends that such

authority was given to PW2 and he carried out duties delegated to an agent of a guild. D points to the following:

(a) in a WeChat conversation on 26.3.2020, PW2 introduced himself as an agent of P's guild (i.e. Rocket Guild) to another user on D's platform with the intention to discuss the transfer of guild for a particular live streamer;

(b) in a WeChat group conversation titled 'Rocket Team A' on 25.5.2020, PW2 was keeping P's live streamers informed and updated as to the latest activities and announcements, which were ongoing on D's platform.

64. P however maintains that PW2's only scope of work is to introduce live streamers to P. D's suggestion that PW2 has liaised and managed the affairs of P such as the live streamer's monthly service fee is a bare assertion without any evidence. D failed to adduce evidence to show that it is in fact PW2's scope of work to update P's live streamers on the latest activities and announcement. According to P, the relaying of messages to the live streamers was done by PW2 in his personal capacity. It is not PW2's duty to update and send the weekly announcement to the live streamers. PW2 has done so on his own accord without P's knowledge.

65. I agree with P that, as the guild, it is not responsible to relay messages to its live streamers as this is not a requirement stated in the Rules and Regulations. DW2's suggestion that this is required of a guild leader is an unsupported bare assertion. To suggest that PW2 was given the authority by P to relay messages to the live streamers is unfounded as relaying messages to the live streamers is not part of P's scope of work under the Rules and Regulations. Since P is not expressly required to do

so, D cannot unilaterally impose this as P's obligation and say that P has delegated such duty to PW2.

The purported express admission by Plaintiff

66. According to D, P has admitted that PW2 was acting as its agent based on:

(a) P's reply in a Wechat group conversation. In a WeChat group conversation on 15.7.2020, D highlighted PW2's actions concerning MXX to P. P's reply was that it felt *"disappointed with the **agent's behavior** too"*;

(b) P referred to PW2 as its agent in the Facebook Post. P stated:- *"Rocket Guild received an unexpected notice from official admin of Elelive on 15th July 2020 pertaining to a violation incidence, which points to intentional recruitment for exclusive live streamers on swapping of platform by a **certain agent** of the Guild"*;

(c) P has failed to deny the status of PW2 as its agent.

67. I agree with P that its use of the word 'agent' in the Wechat group conversation and the Facebook Post is not conclusive and should be seen in its proper context. In determining whether there is a principal and agent relationship, the focus should be placed on the factual matrix and not the mere title and address which does not have any impact towards establishing actual or ostensible authority. During re-examination, PW1 explained as follows:

"Q: I'll move on to a next category. The Defendant's counsel has suggested that you never deny that Giga is your agent and you said no. And also the Defendant's counsel actually put to you that your contention is not true and is fabricated to deny their claim, you actually disagreed with that. Can you explain on this?

A: Giga Leon is not my direct agent and therefore why do I have to deny. And why do I have to deny a fact? **His role is really introduce a live streamer to me**. But in view of their official sanction, **in view of the Defendant's official sanction mentioned that Giga Leon is the agent and for ease of reference, we just used the word 'agent**'. So in actual fact, but that doesn't mean that he is my actual agent, he's not my agent. Because sometime when we talk, because sometime when we talk, we refer someone as brother, but that doesn't mean that we are, how to say, we are blood related.

Q: Right, anything else?

A: This is merely to address, just to address someone."

68. P has never represented to the public at large that PW2 is its agent and is performing certain duties as agent on behalf of P. PW2 is merely a freelancer in which his only scope of work is to introduce live streamers to P. And even that is still subject to P's approval. P will thereafter make payment to PW2 for the services rendered as an independent contractor. P's use of the word 'agent' is nothing but a mere address which is not of significance given the facts of the case. I accept that P used the word 'agent' as a convenient reference and tagging on from D's use of the same in the first place in the Sanction. From the evidence, PW2 is in fact not P's agent and does not have authority to bind P. To suggest that PW2 is P's agent because of the use of a single phrase 'agent', which is contrary to the documentary evidence and conduct of parties, is untenable.

69. D's argument of estoppel is untenable as P has never represented to D that PW2 is its agent. P had no knowledge of PW2 introducing himself

as an agent of P's guild to other users and in the Wechat group conversation titled 'Rocket Team A'.

70. Lastly, D contends that PW2 is an agent as he receives commission from P on the basis of work done. I disagree. PW2 is an independent contractor with the sole duty of introducing live streamers to P. In this regard, PW2 is to be remunerated for such services. There is a commercial arrangement between them whereby P will pay PW2 a certain percentage of the commission. Such commercial arrangement does not necessarily equate to PW2 being P's agent merely because he receives a commission from P.

Plaintiff's claim for damages

71. For the reasons above, I am satisfied that D is in breach of the Contract by:

(a) failing to pay the Outstanding Fee to P;

(b) imposing the Sanction without valid ground; and

(c) meting out punishment that is not within the scope of the Rules and Regulations that have been agreed by the parties.

72. I turn now to the damages claimed by P. The law is trite that a claimant must prove his claim for damages. The claimant bears the

burden of proving both the fact and the amount of the damages. Damages must be proved with substantive evidence. It is not enough to provide mere particulars, summaries, estimations or general conclusions.

73. In *Datuk Mohd Ali Hj Abdul Majid & Anor v Public Bank Bhd* [2014] 6 CLJ 269 at 283, the Federal Court said:

> *"[33] Therefore, in a claim for damages, it is* ***not sufficient for the plaintiff to merely state the amount*** *of damages that he is claiming, he* ***must prove the damage that he had in fact suffered to the satisfaction of the court****. This principle is borne out in the case of Bonham-Carter v Hyde Park Hotel [1948] 64 TLR 177 where Lord Goddard CJ observed:*
>
> > *Plaintiffs must understand that if they bring actions for damages, it is for them to prove their damage; it is* ***not enough to write down the particulars****, and so to speak, throw them at the head of the court, saying: This is what I have lost, I ask you to give me these damages. They* ***have to prove it****."*

74. In *Lembaga Kemajuan Tanah Persekutuan (FELDA) & Anor v Awang Soh bin Mamat & Ors* [2009] 4 MLJ 610; [2009] 5 CLJ 1; [2010] 1 AMR 285, the Court of Appeal said (at page 665, MLJ):

> *"[137] All the 354 respondents plaintiffs are claiming damages and they must prove them. McGregor on Damages (16th Ed) at p 236 sets out the law on damages in this way:*
>
> > *A plaintiff claiming damages must prove his case. To justify an award of substantial damages he must* ***satisfy the court both as to the fact of damage and as to its amount****. If he satisfies the court on neither, his action will fail, or at the most he will be awarded nominal damages where a right has been infringed. If the fact of damage is shown but no evidence is given as to its amount so that it is virtually impossible to assess damages, this will*

generally permit only an award of nominal damages; this situation is illustrated by Dixon v Deveridge [1825] 2 C & P 109 and Twyman v Knowles [1853] 13 CB 222."

The Outstanding Fee

75. The Outstanding Fee is clearly due and owing to P. D's excuse for not paying the same is unjustified. D's calculation which allegedly shows a discrepancy of RM300 lower has been addressed earlier. I therefore ordered D to pay the Outstanding Fee of RM481,325.68 to P.

76. D highlighted that the Outstanding Fee does not fully belong to P. P would take its commission cut from the service fee and thereafter pay out the balance to its live streamers in accordance with the Letter of Assignment. Further, the Sanction has provided that the salaries of the live streamers under P's guild for June 2020 shall be paid out directly by D to the live streamers. D says that it had already paid RM406,558.12 directly to the live streamers under P's guild.

77. In essence, D contends that P is not entitled to the Outstanding Fee as a portion thereof had been paid to P's live streamers. I disagree. I have found the Sanction to be unlawful as the punishment imposed therein is not in accordance with the Rules and Regulations. One aspect of the punishment, which is relevant here, is that the Rules and Regulations do not allow D to make direct payment to P's live streamers without P's consent. Since P has never consented to D making any direct payment

on behalf of P, D is not entitled to do so. That D has done so is a clear breach of the Rules and Regulations.

78. In my view, whether D made direct payment on behalf of P is immaterial to this head of claim. The fact remains that without P's consent, D is not entitled to do so. Especially when the Rules and Regulations clearly provide that P is to pay the mutually agreed remuneration to its live streamers without any involvement or participation by D. D cannot unilaterally alter the terms of the Contract to make direct payment to P's live streamers.

79. I am guided by the Court of Appeal case of *Mega Air Conditioning Sdn Bhd v Speedfam Co Ltd* [2001] 4 MLJ 321 at 326-327 which held that when the parties had already agreed on a certain term, one of the parties cannot unilaterally change his mind on that term without the consent of the other.

> *"To my mind, the plaintiff was not entitled to do so because, firstly, the foc was packaged in the contract price and secondly, the defendant finally agreed to use the foc on the plaintiff's advice. The* ***plaintiff's conduct was tantamount to unilateral variation of the contracts and therefore, the plaintiff was in breach of contract*** *which entitled the defendant to rescind the contracts.*
>
> *…*
>
> *The general rule is that* ***a party to a contract must perform exactly what he undertook to do*** *(Chitty on Contracts (26th Ed) Vol 1 para 1991). It is not open to the courts to revise the words used by the parties, or to put upon them a meaning other than that which they ordinarily bear, in order to bring them with what the courts think the parties ought to have intended."*

80. D produced bank transfer slips as evidence of the payments made by it to P's live streamers. But it is unclear whether such payments are correct insofar as the recipients and the amounts are concerned. Under the Rules and Regulations, it is P who is responsible to make payment to its live streamers based on the remuneration that has been mutually agreed between them. D cannot evade its obligation to pay the Outstanding Fee to P on account of the direct payments. If it so wishes, the onus is on D to claw back the direct payments from the live streamers. That is not a concern of P. As between P and D, D is obliged to pay the entire Outstanding Fee of RM481,325.68 to P.

Plaintiff's claim for the Wrongful Act Loss

81. As regards the Wrongful Act Loss, I find that P has failed to prove, on a balance of probabilities, both the fact of the damage and the quantum. The Wrongful Act Loss is too remote and P failed to establish the causal link between such loss and D's wrongdoing. I shall deal with each of the 3 components of the Wrongful Act Loss.

Plaintiff's claim for RM2,091,000

82. In paragraph 13.1 of the Statement of Claim, P claimed damages estimated to be RM2,091,000 as there are 73 live streamers that had left P due to the Sanction, without P's consent and no payment was made to P in relation to these transfers. P provided the following calculation:

(a) RM1,966,800 - *"73 live streamers change to other agency, suppose I can get profit at this amount"*; and

(b) RM124,200 - *"32 live streamers decided to stop live stream under this incident caused deadweight loss"*.

83. However, there is no evidence to show that:- (a) P has suffered such loss; and (b) such loss was linked to or caused by D or the Sanction. None of the 73 live streamers was called to give evidence concerning the reason for their departure from P's guild. P is not in the position to assume the reason for the departure of the said 73 live streamers. This was admitted by PW1 under cross-examination.

"Q: But you cannot confirm, Ms Yip, because they are not here. You cannot speak on their behalf. Yes or no, Ms Yip? Let's move on. You look at the evidence. You don't look at common sense, Ms Yip. Just answer the question yes or no.

Interpreter: Yes, she already said agree."

84. P merely produced a one-page sheet table of calculation at page 217 of the Bundle of Documents marked as Bundle B1. But without any supporting documents. This was likewise admitted by PW1 under cross-examination.

"Q: For the claim of RM2,000,000, Ms Yip, is this the only supporting documents that you have before the Court?

A: And also the documents sent from the Defendant.

Q: I mean the calculation. The calculation. Is this the only document that you have?

A: Yes."

85. It seems to me that the said calculation prepared by P is self-serving. In this regard, the Court of Appeal case of *Tetuan Bahari Choy & Nongchik (law firm sued as a partnership) v Harta Megajaya Sdn Bhd* [2019] 6 MLJ 491 is instructive. In that case, the respondent sued the appellant for, among others, professional negligence in causing a failed land transfer transaction. The respondent claimed for the sum of RM5 million in damages but the High Court only awarded RM300,000 as actual loss suffered. On appeal, the Court of Appeal further reduced damages to RM100. The Court of Appeal agreed that the respondent failed to prove the damages claimed. The exhibits tendered were self-serving documents without any basis. The Court of Appeal said (at page 499):

> *"[18] Having perused the evidence on the record, we are of the view that Megajaya has failed to prove the damages sought. The documents tendered in support of the claim … are by themselves insufficient to establish liability against Bahari Choy. We* ***do not think that it is sufficient to merely write down the particulars to prove the claim for damages*** *sought. There was* ***no independent documentary or other evidence to support the estimates and projections****."*

86. In the circumstances, I find this head of claim to be unsubstantiated and dismissed the same.

Plaintiff's claim for RM2,134,800

87. In paragraph 13.2 of the Statement of Claim, P claimed RM2,134,800 as the estimated cost of recruiting and replacing the 73 live streamers that had departed from P's guild. P provided the following calculation:

(a) RM1,966,800 - *"73 live streamers change to other agency"*;

(b) RM124,200 - *"32 online decided to stop live stream under this incident caused deadweight loss"*; and

(c) RM43,800 - *"To get agency streamer change to live under my agency processing fees to pay ELELIVE Xiao Xiang Business Sdn Bhd each at RM600"*.

88. My reasons given earlier in dismissing P's claim for RM2,091,000 similarly applies here. P did not produce any evidence to prove that the departure of the 73 live streamers was caused by or linked to D or the Sanction. The only document produced was a one-page sheet table of calculation at page 199 of Bundle B1 prepared by P. There is no other supporting document. This was admitted by PW1 under cross-examination.

"Q: Again, this calculation was prepared by the Plaintiff?

A: Yes.

Q: Again, this is the only calculation to prove your loss?

A: Yes."

89. In addition, this claim contains the exact same components as the earlier claim for RM2,091,000. Save for RM43,800, which will be

discussed later. There appears to be an overlap between the earlier claim for RM2,091,000 and this head of claim. During cross-examination, PW1 agreed to the similarity in the amount of claims.

"Q: Ok, this is your second claim. Ok, now we move on to third claim. Your third claim is for the amount of RM2,134,800 which you said is to recruit and replace online streamers.

A: Yes.

Q: To prove this amount you also tendered your table of calculation in page 199 of Bundle B1. This is the table. Am I correct, Ms Yip?

A: Yes.

Q: So if you look at the calculation, again, 73 online streamers change to other agency RM1,966,800.

A: Yes.

Q: This is exactly the same sum as the calculation that you tendered to prove your claim for loss of the Plaintiff. Am I right?

A: Yes.

…

Q: So if we refer to page 199 and page 217, you can just agree or disagree with me, the calculation, the accounts, the numbers are exactly the same?

A: Yes.

Q: I put it to you that your claim overlaps. Do you agree?

A: I disagree."

90. Although PW1 disagreed that there was overlap, she offered no reasonable explanation as to why the same amount is claimed twice. As regards the component of RM43,800, such sum was merely a hypothetical sum to be borne by P if D made such claim against P for the live streamer's change of guild. However, there is no such claim made by D. As such, this

loss was never suffered by P. PW1 admitted to this under cross-examination.

> "Q: And then 73, the bottom line, 'To get agency streamer change to live under my agency processing fees to pay Elelive Xiao Xiang Business Sdn Bhd each at RM600, RM43,800. Has this payment made to the Defendant?
>
> A: If I wanted them to transfer back, I need not have to pay the Defendant.
>
> Q: Because this has been added into your calculation. So my question is, have you pay?
>
> A: Not yet."

91. In the circumstances, I likewise find this head of claim to be unsubstantiated and dismissed the same.

Plaintiff's claim for RM107,400

92. In paragraph 13.3 of the Statement of Claim, P claimed RM107,400 as additional losses due to 31 live streamers that had stopped their live streaming as a result of the Sanction. Similarly here, there is no evidence to substantiate this claim. Moreover, this claim appeared 3 times namely:- (a) in the claim for RM2,091,000, (b) in the claim for RM2,134,800 and (c) here. PW1 was questioned on such duplication during cross-examination.

> "Q: So, ok, I will refer to again the bottom line, '32 online streamers decide to stop livestream under this incident caused deadweight loss **RM124,200**'.
>
> A: Yes.
>
> Interpreter: Your question?

Q: Yes, that was my question. So **RM124,000** was added to RM1.9 million to make up the sum of RM2,091,000 that she is claiming as Plaintiff loss. Am I right?

A: Yes.

…

Q: Ok, then at page 199 for the third claim, third head of claim, 199. The same amount is also added in here **RM124,200**. Am I right?

A: Yes.

Q: And then you have a fourth claim for RM107,400 for the same thing. So basically you are **claiming for the same thing three times**, Ms Yip.

A: But they are three different things."

93. Although PW1 answered that all 3 claims are *"different things"*, there is no reasonable explanation as to how and why the claims are different. It seems to me that they are repetitive and overlapped. The law does not allow double recovery in respect of the same head of damage.

94. In short, P's claim for the Wrongful Act Loss is unsubstantiated as:- (a) P failed to prove the liability of D in causing such loss; (b) P failed to prove the quantum of such loss; and (c) the alleged losses overlap. I consider the claim for the Wrongful Act Loss to be speculative and not based on actual loss. This was admitted by PW1 under cross-examination.

"Q: I put it to you that your calculation is based on speculations and they are not your actual loss.

A: Yes."

Defendant's counterclaim

95. In its counterclaim, D claimed damages for defamation. D also claimed a sum of RM1,081,696.94 which consist of:

(a) RM603,918 as loss of profit due to the Purported Breach (i.e. poaching of MXX);

(b) RM407,938.80 as loss of profit due to the poaching of 11 existing live streamers from D's platform to BIGO Live; and

(c) RM69,840.14 as the remaining deduction in the approximation of 15% for the June 2020 service fee.

96. It is my finding that on a balance of probabilities, D has failed to discharge its burden of proof in relation to its counterclaim. Thus, I dismissed D's counterclaim. My reasons are as follows.

Defamation

97. In relation to D's claim for defamation, the Defence and Counterclaim pleaded:

"12. … The Defendant states and avers that it has in fact suffered adverse publicity which has resulted loss and damages due to the Plaintiff's publication of the **defamatory remarks of the Defendant via a petition on Change.org ("Petition") and a Facebook post** ("Facebook Post") which were published on 16.07.2020.

12.1 The Defendant further states that the statements and/or messages and/or wordings used in the Petition and the Facebook Post are defamatory and prejudicial to the Defendant ("Defamation");

12.2 In this regard, the Defendant through its then solicitors, Messrs Munhoe & Mar, issued a letter of demand to the Plaintiff on 20.07.2020, among others -

12.2.1 to remove the Petition and the Facebook Post from Change.org and Facebook respectively; and

12.2.2 that the Plaintiff shall be refrained from posting any further or additional statements and/or posts similar in nature to the Petition or the Facebook Post in any platform (electronically or otherwise).

12.3 Subsequently on 21.07.2020, the **Plaintiff has replied to the Defendant's then solicitors and proceeded to remove the said Petition and Facebook post**."

98. Firstly, the exact words which are alleged to be defamatory were not pleaded. I consider it necessary for D to plead verbatim the impugned statements which it complains of. This is to enable to court to understand the proper context in which they were published. I rely on the Court of Appeal case of *Chew Hock Jin v Lim Jenn Shiah & Other Appeals* [2021] 4 MLRA 499 at 511 which said:

*"[49] Moving on to the FB Posts, the **crucial fact to be noted is that the whole FB Posts and the exact words said to be offensive were not pleaded**. On this point, we have duly noted the observations and findings of the LHCJ in Appeal No: 210 with which we associate ourselves. The LHCJ had, in our view, correctly paid careful attention to the words actually uttered and those that were pleaded. In essence, the LHCJ rightly took into account the fact that **the words***

pleaded were only part of the statements published *in the Mandarin Language on 2 September 2015 and 1 December 2015 which the* ***plaintiffs chose not to plead in toto****. Hence,* ***the court, in confining itself to the words pleaded, was not in a position to determine the context in which they were uttered****.*

[50] Likewise, the LHCJ was not satisfied with accuracy of the translation which was not pleaded in its entirety and also expressed doubts as to whether the translation in fact gave an accurate picture of what was published in Mandarin in the FB Posts.

[51] His Lordship was entirely correct in expressing the position under the law of defamation to be that in order to properly determine whether the words are defamatory or otherwise and whether they refer to the plaintiff, ***the exact words and the whole article must be pleaded****."*

99. I also rely on the Court of Appeal case of *Credit Guarantee Corporation Malaysia Berhad v SSN Medical Products Sdn Bhd* [2017] 2 MLJ 629 at 644 which said:

[45] In this regard, it is settled law that in libel and slander, ***the very words complained of, whether stated orally or published, are the facts on which the action is grounded****. In other words,* ***these are material facts which must be pleaded*** *so that the defendant knows the precise charge against him and is then able to defend himself against it. It is* ***insufficient to merely describe their substance, purpose or effect****. It is* ***essential to set out the actual words used*** *so that the court can then decide, as a matter of law, whether the said words whether oral or published give rise to the defamatory imputations alleged (see Harris v Warre (1879) 4 CPD 125; Abu Samah bin Omar v Zainal bin Montel [2004] 5 MLJ 377; Lim Kit Siang v Datuk Dr Ling Liong Sik & Ors [1997] 5 MLJ 523; and Dato' V Kanagalingam v David Samuels & Ors [2006] 6 MLJ 521).*

[46] The other aspect of pleading in an action in defamation is that where the plaintiff complains of an article, he ***must specify the offending sections rather than merely pleading the whole article****. As Lord Denning MR pointed out in DDSA Pharmaceuticals Ltd v Times Newpapers Ltd [1972] 3 All ER 417, a*

pleading is defective if it throws on to the defendant a long article without picking out the parts said to be defamatory*.*

[47] In the instant case, the plaintiff's statement of claim at para 11 made a general reference to the CCRIS report dated 3 December 2010. The defamatory imputations were then set out in para 19. The plaintiff had clearly ***failed to reproduce any part of the CCRIS report much less picked out the parts that are defamatory****.* ***Failure to do so, in our view, is fatal to the action****. The learned JC appears to have not considered this important issue of defective pleading. For this reason alone, the claim in defamation cannot succeed.*

100. In the instant suit, none of the words complained of were pleaded at all (whether in their original form in Mandarin or an English translation thereof), let alone the whole Facebook Post or Petition. The Facebook Post is produced at page 13-14 of the Bundle of Documents marked as Bundle B2. But that does not cure the defect in the pleadings. The fact remains that the statements from the Facebook Post were not pleaded in the Defence and Counterclaim.

101. As regards the Petition, D refers to its solicitor's letter of demand which is produced at page 137-141 of Bundle B1. The said letter reads:

"2.3 Certain statements and/or messages and/or wordings used in the Petition and the Facebook Post are defamatory and prejudicial to our Client. **Examples of these defamatory statements include, but not limited to** -

2.3.1 *[excerpts in Mandarin]*

[English translation thereof]

…

2.4 In their plain and natural meaning and/or **innuendo**, the Defamatory Statements meant and/or understood to mean and/or imply that, **among others**-

…

4. In the event that you fail and/or refuse and/or neglect to adhere to Our Client's Demands herein, we have Our Client's strict instructions to commence the appropriate legal proceeding against you, in which event, you may be liable to further costs and interest incurred thereby."

102. The aforesaid letter only contains selected examples or excerpts from the Petition that are alleged to be defamatory. I consider that insufficient as the whole Petition must be pleaded to show the context in which they were used. Likewise here, the statements from the Petition were not pleaded in the Defence and Counterclaim.

103. D argues that there is no legal requirement for the exact words complained of to be pleaded. D cited the Court of Appeal case of *Karpal Singh a/l Ram Singh v DP Vijandran* [2001] 4 MLJ 161; [2001] 3 CLJ 871. In that case, the appellant submitted that the respondent did not sue the appellant on the actual words of the appellant's press statement in the sense that the respondent did not quote the whole of the press statement issued by the appellant and thus rendering the pleading defective. The Court of Appeal said (at page 178, MLJ):

*"Lest we get lost in the 'technical jungle', let us remind ourselves what these 'rules' are for. In the first place, there is neither statutory provision nor rules of court that the actual words must be pleaded in toto failing which the action fails, no matter what. The so-call '**rules' are developed by judges through their judgments**. We have seen that under certain circumstances the 'rules' was relaxed. We must look at the purpose, what prejudice it causes to a defendant in putting up his defence, in short, the justice of the case. I have reproduces the words of Diplock LJ in Slim v Daily Telegraph Ltd [1969] 1 All ER 497 which were quoted with approval by Hirst LJ in British Data Management plc and I shall not repeat. **Where the libel turns on the meaning of a particular word or words of course the words eg 'thief', must be pleaded, indeed the whole sentence***

and may be the paragraph should be pleaded so that the word used can be understood in the proper context it was used*. Here, we are concerned with statements of facts. There are no two meanings to them. It was not even challenged before us that they have other meanings. There is clearly no prejudice to the appellant.*

In the circumstances, I am of the view that ***even though the press statement was not quoted in toto in the statement of claim, the failure to do so, in the circumstances of this case, is not fatal****. I say so* ***for the following reasons****:*

(a) The statement of claim did refer to the press statement;

(b) The press statement was produced as an agreed document;

(c) The ***material words pleaded are substantially, in fact almost word for word the same as the undisputed words used in the press statement****.*

(d) The ***impunged words are statements of facts and bears only one meaning which is not in dispute****.*

(e) It is ***not disputed at least in this appeal that the words are defamatory****;*

(f) The pleading does not in any way prejudice the appellant's defence. It is not even alleged, at least in this appeal, that the pleading has in some way prejudiced the appellant in the preparation of his defence."

104. *Karpal Singh* (supra) is distinguishable. There, the failure to quote the entire press statement was held not to be fatal because, inter alia, (a) the material words pleaded are substantially, in fact almost word for word, the same as the undisputed words used in the press statement; (b) the impugned words are statements of facts and bears only one meaning which is not in dispute; and (c) it is not disputed that the words are defamatory. Those reasons do not apply here. In the instant suit:- (a) none of the words complained of were pleaded at all, much less the material words; (b) the impugned words do not appear to be statements of facts which bear only one meaning and which meaning is not disputed; and (c) it is in dispute whether the impugned words are defamatory.

105. Be that as it may, I cannot take this point too far. Simply because D's failure to plead the impugned words is not P's pleaded case. P had never raised any issue about D's pleading regarding defamation at any stage of the proceedings or during trial or in submissions. In fact, I was the one who asked parties for further submissions on this point. I am guided by the Court of Appeal case of *Hassan & Anor v Wan Ishak & Ors* [1961] 1 MLJ 45 where the defendant argued that the precise words of the alleged slander as proved at the trial were not set out in the statement of claim. The Court of Appeal said (at page 46):

> *"As a matter of practice* ***when defamatory words are alleged to have been spoken in a language other than the language of the Court these words should be set out in their original form in the pleadings and in addition a translation of them into the language of the Court should be pleaded****. Admittedly that was* ***not done here*** *but, again, admittedly* ***the point that it was not done was never raised at any stage of the proceedings or of the trial****.*
>
> *But although in my view the* ***actual words used in the language in which they were used should have been pleaded*** *the failure to do so cannot be held to have been fatal to the case of the respondents."*

106. As such, I am of the opinion that D's failure to plead the exact words complained of is not fatal. But only because this point was never raised by P.

107. Secondly however, P had already complied with D's demand pertaining to the alleged defamation. This is stated in paragraph 12.3 of the Defence and Counterclaim itself. That really puts an end to the matter.

On 21.7.2020, which is 1 day following the letter of demand and well within what D had demanded, P responded by informing that the Petition and the Facebook Post has been removed. Accordingly, D's demand has already been met. There was never any demand by D for compensation. D did not raise any further concern until P commenced this action. D's demand for compensation in respect of the alleged defamation appears to be a reaction to P's suit and an afterthought. I have no hesitation in dismissing D's claim for defamation.

Defendant's counterclaim for RM603,918

108. D claimed RM603,918 as loss of profit due to the alleged poaching of MXX. The methodology and basis of D's calculation in respect of the said sum was explained in Annexure B of its written submissions ("**Annexure B**"). According to D, the calculation of its estimated loss of profit for a period of 3 years is based on MXX's past income generated on D's platform from September 2019 to June 2020. D produced the following documents in the Bundle of Documents marked as Bundle B3 during trial:- (a) a summary at pages 107-108 of Bundle B3; and (ii) the documents in support of the calculation at pages 109-156 of Bundle B3.

109. D cited the Federal Court case of *SPM Membrane Switch Sdn Bhd v Kerajaan Negeri Selangor* [2016] 1 MLJ 464 at 505 which explained the methodology to determine the loss of profit for an unexpired term of a contract as follows:

"[130] This calculation does not reflect the principles of compensation for loss of profits and will put the appellant in a position well beyond that which it would rightfully be in, had the contract been properly performed. A calculation based on 'commissions', that is to say receipts, is very different from a calculation based on 'profits'. To award damages based on commissions would completely disregard the fact that had the contract been properly performed the appellant would have had to incur expenses and costs of operation, among other things. The proper sum should therefore be net of all the expenses that would be reasonably incurred in the remaining 20 month period. To do otherwise would give the appellant more than they would have obtained had the contract been performed, and therefore more than what they rightfully deserved. However, contrary to the respondent's submission and the judgment of the trial judge, the ***mere fact that the formula was the appellant's own formulation (presumably in contradistinction with a formula provided for within the contract) is not a ground for rejecting the formula****. The agreement did not stipulate a formula for calculating loss of profits, and as such the general principles of the common law will apply and* ***a formula that best estimates the future loss of profits will be preferred by the court****."*

110. D submits that there is no specific formula in respect of the calculation for loss of profit and D has formulated its own method of calculation as per Annexure B. P however took objection to Annexure B saying that the matters and calculations stated therein are additional or new information that were not tendered earlier during trial and were only introduced at submissions stage. P complains that it is deprived of the opportunity to cross-examine and to test the correctness and appropriateness of such calculation. P argues that the inclusion of Annexure B runs foul of the principles of natural justice and must be disregarded.

111. P cited the High Court case of *Rimbunan Raya Sdn Bhd v Wong Brothers Building Construction Sdn Bhd and another case* [2016] MLJU

1189 which held that the claimant had rightly objected to a new matter being raised by the respondent in the respondent's submissions:

> *"[22]* ***As the matter of a double claim was raised for the first time in the submissions filed, the Claimant's solicitors have rightly objected to it being raised*** *and had nevertheless replied it to the satisfaction of the adjudicator who did not find any double claim between the Penultimate Certificate and the Final Certificate."*

112. I agree with P. The said sum of RM603,918 was not stated in the summary at pages 107-108 of Bundle B3. The calculation in Annexure B was not stated in Bundle B3 but was introduced and elaborated by D during the submissions stage. In rebuttal, D said that the summary table calculation was set out in paragraph 17 of the Defence and Counterclaim. The calculation was explained by DW1 in Q&A 51 of his witness statement. Annexure B is merely a text form explanatory to pages 107-108 of Bundle B3. Even so, I find that they are merely summaries and estimations which were unproven.

113. Next, D suggested that as P did not cross-examine and dispute the summary at pages 107-108 and the supporting documents at pages 109-156 of Bundle B3, the quantum of RM603,918 must therefore be deemed to be accepted. D cited the High Court case of *Mieco Manufacturing Sdn Bhd v Yu Kheng Lai* [2015] 5 MLJcon 34 which held that a defendant must be deemed to have accepted the truth of the contents of documents, and inference could be drawn against the defendant due to the absence of challenge put forward by the defendant's counsel during cross-examination when he had agreed to include all disputed documents as Part B documents. The Court said (at page 56):

"[46] Perusing the evidence adduced during the cross-examination of the plaintiff witness or given by the defendant himself as the only witness for the defence, and the submission given by the defendant's counsel, I ***could not find any challenge had been put forward to disprove those documents to contradict the plaintiff's case****. The* ***defendant's counsel did not take the opportunity to recall plaintiff's witness to cross-examine him on the documents when he agreed with the plaintiff's counsel to include all disputed documents in Part B of agreed bundles****. The plaintiff was at verge of closing his case then. The defendant again* ***failed to raise any challenge or adduced any evidence to disprove the documents tendered in his witness statements and the defendant's counsel did not asked any additional question on the said documents****. From the evidence given to by the defendant, he is still a director of QHSB. He agreed that he has access to all QHSB's records and yet he has not been able to produce any evidence to show that QHSB has complied with all the terms and the obligations under the said agreement. I have conclude that he must therefore be* ***deemed to have accepted the truth of contents of all documents in Bundles*** *B–K and the only inference could be drawn is that QHSB does in fact owed the plaintiff the sum of RM6,953,899.80."*

114. I disagree with D. *Mieco Manufacturing* (supra) is distinguishable as the documents not cross-examined therein were Part B documents. In the instant suit, the said pages 107-156 of Bundle B3 are Part C documents. Which means the authenticity and contents of the documents are disputed. (See Order 34 rule 2(2)(e)(ii) of the Rules of Court 2012). Thus, P cannot be deemed to have accepted the truth of the said documents.

115. In any event, as I have found that P is not responsible for the Purported Breach, P cannot be held liable for this head of claim. Further, D has failed to discharge its burden of proof on its entitlement to this claim as D is actually seeking double recovery of its purported loss. This claim is derived solely from the Purported Breach. But that has already been

considered and taken into account when D imposed the Sanction against P. Having imposed the Sanction, D cannot be claiming against P twice for the same Purported Breach. This is shown in the Wechat conversation in which D stated:

> "**If you are not satisfied with this judgment**, ok. According to Meng Xiao Xian's past year performance in Elelive, the company estimates that the amount of loss for this coming three years will be MYR1.8 million. **You can choose to compensate the said amount**."

Defendant's counterclaim for RM407,938.80

116. It is trite law that he who asserts must prove. (See section 101 of the Evidence Act 1950). In order for D to succeed in its claim for RM407,938.80 (being loss of profit for 3 years that D allegedly suffered due to the purported poaching of the 11 live streamers), D will have to show that:

(a) P has committed the alleged poaching, or at the very least P is responsible for the alleged poaching; and

(b) D has suffered losses amounting to RM407,938.80 due to the alleged poaching.

117. Based on the evidence, D has not proven its case. There is no evidence that P had poached the 11 live streamers. DW1 admitted under cross-examination that D does not have any evidence to support this head of claim.

Q: Ok. Can I refer you to paragraph 19? Q&A 19, page 7 of your witness statement? Page 7, here, you have stated that the Plaintiff or the Plaintiff's employee, or the agent, or the servant has poached 11 live streamers. **Do you have any evidence to support** that?

Interpreter: Where? 11? Sorry.

A: **No**.

118. According to D, the 11 live streamers had joined another platform called 'BIGO Live'. But it might be possible that they had left D on their own accord or for reasons of their own which have nothing to do with P. I do not know since no evidence was led on this. D in its written submissions simply stated that there is *"no other cogent reason"* for the 11 live streamers' departure, other than that P had poached them. With respect, this submission is unsupported by evidence.

119. Next, P argues that the 11 live streamers exhibited P's logo. However, this does not equate to P having poached them. It is my finding that D's claim for the sum of RM407,938.80 is unsubstantiated. D merely pleaded but failed to support this head of claim with any documentary evidence in respect of both liability and quantum.

120. I refer to the High Court case of *Kasai Reiko v Annie Lor Lee Fong & Ors (Public Bank Bhd, intervener)* [2014] 7 MLJ 652 at 667-668 which said:

*"[40] Her counsel would have instructed her that her **pleadings** in her defence and that of her son D1 b **are not evidence** and that no matter how credible it*

may appear, she and her son must still give evidence on oath and be subject to the crucible of cross-examination. The first defendants cannot rely on their pleadings in their defence to refute the plaintiff's claim. ***Pleadings are not a substitute for adducing evidence*** *as highlighted in Ng Ben Thong & Ors v Krishnan a/l Arumugam [1998] 5 MLJ 579 at p 583 where it was held that:*

> *I am asked by the defence to rely on its pleadings and to dismiss this case. The defendant must realize that* ***pleadings is not evidence****. It is a bare averment of a party's case. The party* ***has to adduce evidence to substantiate its pleadings****. Whilst pleadings cannot become evidence in the absence of evidence being led in court, similarly evidence cannot be led outside the pleadings. Pleadings and evidence become the heart and soul of a case. They complement each other."*

121. On quantum, the methodology and basis of D's calculation for the said sum of RM407,938.80 was explained in Annexure C of its written submissions ("**Annexure C**"). In addition, the said calculation referred to a *"multiplier of 66% as commission cut payable to the Defendants Platform"*. P complains that this multiplier was only introduced for the first time during submissions. In rebuttal, D said that the calculation was explained by DW1 in Q&A 54 of his witness statement. Which made reference to pages 169-180 of Bundle B3. The 66% multiplier could be deduced from DW1's testimony that:- "*The Defendant's annual loss of profit in the sum of RM135,979.60 is calculated based on the 11 Live Streamers' annual general income of RM203,969.40"*. Annexure C is merely a text form explanatory to page 178 of Bundle B3. Even so, D has merely provided summaries and estimations but without any substantive evidence.

122. Similarly here, D argued that the calculation was not challenged by P and is therefore deemed to have been accepted. For the reasons

explained earlier (in relation to D's claim for the RM603,918), I likewise reject this head of claim.

Defendant's counterclaim for RM69,840.14

123. D claimed RM69,840.14 as the remaining deduction in the approximation of 15% for the June 2020 service fee. I find that D has failed to discharge its burden of proof on this quantum. D merely provided particulars of the same but without any substantive proof. Such particulars cannot be considered as a proof of the quantum claimed.

124. D's explanation for this head of claim is as follows. The June 2020 service fee payable to P is RM481,025.68. A 30% penalty deduction would be RM144,307.70. After deducting RM144,307.70 from the total sum of RM481,025.68, a balance sum of RM336,717.98 would then be paid to P's live streamers. However, considering that P's live streamers are not at fault, D did not deduct the full 30% (i.e. RM144,307.70) from the June 2020 service fee as it would affect the income of the said live streamers. As such, D decided to make a partial deduction of RM74,467.56 (which is an approximation of 15%) from the total service fee of RM481,025.68, and proceeded to pay P's live streamers the sum of RM406,558.12. As for the remaining deduction of RM69,840.14, D intended to deduct the same throughout the subsequent payout month. However, as P's generated revenue for the subsequent months was insufficient to cover such deduction, D did not proceed to deduct the same as it would similarly affect P's live streamers' income. In light of this, D

contends that P remains liable to pay the said RM69,840.14 being part of the punishment under the Sanction.

125. I do not accept D's explanation. First, as I have found the Sanction to be unlawful, D is not entitled to deduct the service fee payable to P. Second, D is not entitled to make direct payment to P's live streamers. Under the Rules and Regulations, D must pay the same to P and it is for P to then pay its live streamers based on their mutually agreed remuneration. Third, I find that D has acted in an arbitrary manner in relation to making the deductions. D arbitrarily decided whether to deduct and how much to deduct, without regard to its obligation towards P.

Aggravated and exemplary damages

126. The purported losses which are the subject matter of D's counterclaim only surfaced in its Defence and Counterclaim after P commenced this action against D. Prior to that, D has never once raised these purported losses to P. They appear to be an afterthought as a reaction to P's claim.

127. If I am wrong and D is entitled to damages, I consider D's claim for aggravated and exemplary damages to be unjustified. There is no injury to D that is exacerbated by any exceptional conduct of P. Nor did P act with vindictiveness or malice that would warrant condemnation or denunciation.

Conclusion

128. For the reasons above, I gave judgment in favour of P in respect of the Outstanding Fee of RM481,325.68. I dismissed P's claim in respect of the Wrongful Act Loss. I also dismissed D's counterclaim.

129. I awarded interest at the rate of 5% per annum on the above judgment sum from the date of judgment to the date of payment. Given that P did not succeed in a large part of its claim and neither did D, I made no order as to costs.

Dated 8 November 2021

Quay Chew Soon
Judicial Commissioner
High Court of Malaya, Kuala Lumpur
Civil Division NCvC 10

Counsels

Kevin Wong Gia Meng and Sally Beh Huan Fang *(Messrs Jason Teoh & Partners)* for the Plaintiff.

Long Chay Jo and Thomas Lee Ming Zhang *(Messrs Munhoe)* for the Defendant.

Cases cited

Forest Steel Sdn Bhd v Iconic Gateway Sdn Bhd & Anor and another appeal [2020] MLJU 563

Wong Swee Chin v Public Prosecutor [1981] 1 MLJ 212

KAB Corp Sdn Bhd & Anor v Master Platform Sdn Bhd and another appeal [2019] 6 MLJ 752

Honeywill and Stein, Ltd v Larkin Brothers (London's Commercial Photographers), Ltd [1934] 1 K.B. 191

Industrial Concrete Products Bhd v Concrete Engineering Products Bhd [2001] 2 MLJ 332

Datuk Mohd Ali Hj Abdul Majid & Anor v Public Bank Bhd [2014] 6 CLJ 269

Lembaga Kemajuan Tanah Persekutuan (FELDA) & Anor v Awang Soh bin Mamat & Ors [2009] 4 MLJ 610; [2009] 5 CLJ 1; [2010] 1 AMR 285

Mega Air Conditioning Sdn Bhd v Speedfam Co Ltd [2001] 4 MLJ 321

Tetuan Bahari Choy & Nongchik (law firm sued as a partnership) v Harta Megajaya Sdn Bhd [2019] 6 MLJ 491

Chew Hock Jin v Lim Jenn Shiah & Other Appeals [2021] 4 MLRA 499

Credit Guarantee Corporation Malaysia Berhad v SSN Medical Products Sdn Bhd [2017] 2 MLJ 629

Karpal Singh a/l Ram Singh v DP Vijandran [2001] 4 MLJ 161; [2001] 3 CLJ 871

Hassan & Anor v Wan Ishak & Ors [1961] 1 MLJ 45

SPM Membrane Switch Sdn Bhd v Kerajaan Negeri Selangor [2016] 1 MLJ 464

Rimbunan Raya Sdn Bhd v Wong Brothers Building Construction Sdn Bhd and another case [2016] MLJU 1189

Mieco Manufacturing Sdn Bhd v Yu Kheng Lai [2015] 5 MLJcon 34

Kasai Reiko v Annie Lor Lee Fong & Ors (Public Bank Bhd, intervener) [2014] 7 MLJ 652

Legislation cited

Order 34 rule 2(2)(e)(ii) of the Rules of Court 2012.

Section 101 of the Evidence Act 1950