Rights and Liabilities of Scholars and Scholarship Authorities for Breach of Scholarship Agreements under the Contracts (Amendment) Act 1976*

*Sujata Balan***

I. Introduction

Many individuals seek to become beneficiaries of scholarship schemes in the pursuit of attaining qualifications and credentials to help fulfil their employment and economic needs. As the cost of education is steadily on the rise, the need for financial aid is a necessity for poor and needy students.

It is therefore propitious that the need for such financial aid coincides with the policies adopted by the government and other institutions which provide scholarships. Pursuant to the government's development programmes for the nation, large sums are allocated to give financial aid to deserving and talented students to pursue higher education. In return, a scholarship agreement will be entered into between the student

---

* Valuable insights on the Contracts (Amendment) Act 1976 and its provisions may be obtained from an article published in 1976, namely, Saxena, IC, "Scholarship Agreements in Malaysia: A New Deal" (1976) 3 *JMCL* 253.

** LLB (Hons)(Lond), CLP (Malaya), LLM (Malaya), Advocate & Solicitor of the High Court of Malaya (Non-practising); Lecturer, Faculty of Law of the University of Malaya, Kuala Lumpur, Malaysia.

and the scholarship provider. The scholarship agreement will almost always provide that the student is to enter into a contract of service with the scholarship provider upon completion of his educational pursuit. The government's objective in awarding scholarships was summarised aptly by Dato' Chan Siang Sun[1] more than 30 years ago when he remarked that scholarships awarded should not be regarded as charities but should form part of the government's development programme.[2] Thus, scholarship agreements are necessary instruments in achieving dual purposes – that of national development and the employment as well as economic needs of individuals.

Be that as it may, the contractual relationship between the student (hereafter referred to as the "scholar") and the scholarship provider (hereafter referred to as "the scholarship authority") may not always proceed as smoothly as one would expect. Invariably, some scholars violate their scholarship agreement by refusing to perform or complete the contract of service imposed upon them. Typical defences raised by the scholar are that of infancy, lack of consideration and the penal nature of the compensatory clauses in the scholarship agreements.[3] There may also be a violation on the part of the scholarship authority. For instance, the scholarship authority may refuse to disburse the loan to the scholar under the scholarship agreement or refuse to enter into the contract of service with the scholar upon completion of his studies. These violations would amount to a breach of the scholarship agreement entitling the aggrieved party to sue for a remedy.

The purpose of this article is to examine and evaluate the rights and liabilities of the scholar and the scholarship authority and the remedies available to them in the event of a breach of a scholarship agreement. The scope of this article is confined to scholarship agreements regu-

[1] Deputy Minister of Education in 1975.

[2] Parliamentary Debates, Dewan Rakyat, Jilid I, Bil 85, 16 Disember 1975, Rang Undang-Undang Kontrak (Pindaan).

[3] Saxena, IC, "Scholarship Agreements in Malaysia: A New Deal" (1976) 3 *JMCL* 253. See also *Government of Malaysia v Thelma Fernandez & Anor* [1967] 1 MLJ 194 and *Government of Malaysia v Gurcharan Singh & Ors* [1971] 1 MLJ 211, both of which will be discussed later in this article.

lated by the Contracts (Amendment) Act 1976 (hereafter referred to as "the Amendment Act"). As will be discussed at a later stage of this article, the Amendment Act regulates scholarship agreements made between a scholar and the Federal Government or State Government or a statutory authority or an approved educational institution under the Amendment Act.[4] Hence, this article does not cover scholarship agreements made between private bodies[5] and scholars as these scholarship agreements do not come within the ambit of the Amendment Act.

This article is divided into five parts. The introduction is contained in Part I. Part II of this article discusses the position of the law on scholarship agreements prior to the passing of the Amendment Act. Part III examines the new scheme of the law under the Amendment Act and some of its vital provisions. Part IV deals with specific provisions of the Amendment Act which relate to the rights and liabilities of and remedies available to the contracting parties. Part V examines how the courts have interpreted and applied these provisions. Part VI then considers whether the present law should undergo reform. Finally, Part VII contains the writer's concluding remarks.

II. Remedies for Breach of Scholarship Agreements before the Passing of the Contracts (Amendment) Act 1976

Before examining the remedies for breach of a scholarship agreement provided under the present legislation, it would be pertinent to consider the position of the law prior to the passing of the Amendment Act.

Before the passing of the Amendment Act, there were uncertainties in this area of the law. Differing approaches taken in judicial decisions and the lack of clear legal principles were the causes of the uncertainties. The legal position then was governed by the Contracts

---

[4] The Amendment Act, s 2.

[5] Unless the private bodies concerned are approved educational institutions under the Amendment Act.

Act 1950. In this regard, it is notable that apart from exception 3 to s 29,[6] the Contracts Act 1950 did not contain any specific provision relating to scholarship agreements. Accordingly, the rights and liabilities of parties to a scholarship agreement, even if it involved the government or a statutory body, were determined in accordance with settled principles of contract law based on the general provisions of the Contracts Act 1950 and the common law.

During this period, two interesting cases came before the courts. The first was *Government of Malaysia v Thelma Fernandez & Anor*[7] (hereafter referred to as "*Thelma Fernandez's* case"), a decision of the High Court. The second case, also a decision of the High Court, was *Government of Malaysia v Gurcharan Singh & Ors* [8] (hereafter referred to as "*Gurcharan Singh's* case"). Both these cases will be considered in turn.

A. *Thelma Fernandez's* Case

In *Thelma Fernandez's* case, the scholarship authority, which was the Government of Malaysia, claimed damages for breach of the scholarship agreement by the scholar. The scholar had received training at the Malayan Teachers' Training College for two years. Pursuant to the scholarship agreement, the scholar was bonded to serve the scholarship authority as a teacher for five years. The scholar served the scholarship authority for only two and a half years. The scholarship authority contended that pursuant to the terms of the scholarship agreement, it should be refunded all the monies it had expended for the scholar's studies. The scholar and his sureties challenged this by alleg-

[6] Contracts Act 1950, s 29, exception 3 provides: Nor shall this section render illegal any contract in writing between the Government and any person with respect to an award of a scholarship by the Government wherein it is provided that the discretion exercised by the Government under that contract shall be final and conclusive and shall not be questioned in any court. In this exception, the expression "scholarship" includes any bursary to be awarded or tuition or examination fees to be defrayed by the Government and the expression "Government" includes the Government of a State.

[7] [1967] 1 MLJ 194.

[8] [1971] 1 MLJ 211.

ing, *inter alia*, that the provision for the refund of all the monies amounted to a penalty and was, therefore, unenforceable under s 75 of the Contracts Act 1950.[9]

It was held that the scholarship authority could recover all the monies it had expended for the scholar's course of training. Raja Azlan Shah J (as His Royal Highness then was), who delivered the judgement of the High Court, said:

> That [refund], in my view, is not an extravagant or unconscionable sum compared with the greatest loss that could conceivably be proved to have followed from the breach. On the other hand, it is the plaintiffs [the scholarship authority] who have to suffer a great deal more and the damage they are likely to suffer is far greater than the stipulated sum agreed upon, not to mention that they would lose a qualified teacher and the time factor to train another one. The criterion here is the failure to implement the Government's education policy.[10]

The learned judge adopted the view that the amount claimed by the scholarship authority was not a penalty because of the need to preserve the interest of the government in carrying out its educational policy. The learned judge adverted to the fact that the government was at that time, short of qualified teachers in the face of an ever growing population in post-independence Malaysia. Therefore, in anticipation of the possibility of a premature determination by the scholar, the scholarship authority took steps to avoid the hassle and expense of proving in a court of law the actual loss sustained by agreeing in advance an ascertainable sum to be paid by the scholar.[11] In the premises, despite the fact that the scholar had already served half of his bond period, the scholar was made to repay the scholarship authority the total sum

---

[9] Pursuant to the operation of s 75 of the Contracts Act 1950, "penalty clauses" are not enforceable as the aggrieved party is only limited to a right to claim "reasonable compensation" not exceeding the stipulated sum in the agreement. Section 75 of the Contracts Act 1950 and its legal effect will be discussed in greater detail in a later part of this article.

[10] *Supra*, n 7 at p 196.

[11] *Ibid.*

expended on his education. Undoubtedly, the approach taken by the High Court was harsh on the scholar but was deemed necessary because of the economic conditions in Malaysia as described above. Although this case went on appeal to the Federal Court, it was eventually settled out of court on a compromise.

B. *Gurcharan Singh's* Case

In *Gurcharan Singh's* case, the scholarship authority had also provided the scholar with a course of training at a Malayan teachers' training institution. The cause of action was founded on breach of the scholarship agreement as the scholar had failed to serve the scholarship authority as a teacher for five years after the training, as agreed between the parties. The claim was for the sum of RM11,500. It was alleged that this was the actual sum spent to educate the scholar. The scholar's main defence was that the scholarship agreement was invalid as it was entered into when he was a minor.[12] As such, he did not possess the capacity to contract. Alternatively, it was contended that as the scholar had served the scholarship authority for three years and ten months out of the five-year contractual period, the claim for RM11,500 was excessive and not reasonable.[13]

At the hearing of this case, the scholarship authority raised an alternative claim against the scholar on the ground of necessaries of life supplied to the scholar pursuant to s 69 of the Contracts Act

---

[12] Contracts Act 1950, s 11 provides:

> Every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind, and is not disqualified from contracting by any law to which he is subject.

See also the Privy Council case from India, *Mohori Bibee v Dhurmodas Ghose* (1902-03) LR IA 114, where a contract entered into with a minor was held to be void *ab initio*.

[13] *Supra*, n 9.

1950.[14] It followed that there were two questions before the court. Firstly, was there a valid contract between the contracting parties? Secondly, if there was no valid contract, could the scholar be liable under s 69 for necessaries supplied to him in the form of the scholarship authority's expenditure on his training?

On the first issue, the court held that the scholar did not have the capacity to enter into a contract as he was a minor. The scholarship agreement was invalid. Consequently, the scholarship authority's claim for breach of contract was disallowed. Further, as the liability of the principal debtor (the scholar) was held to be a *sine qua non* for the sureties' liability, the scholarship agreement could not be enforced against the sureties as well.

However, the court found the scholar liable under s 69 of the Contracts Act 1950, on the ground that education was a form of necessaries of life supplied to him. The learned judge in that case, Chang Min Tat J (as he then was) took the view that the word "necessaries" in s 69 must be construed broadly[15] and as such, would include education.

Having determined the issue relating to the liability of the scholar, the court then turned to the question as to the remedy to be granted to the scholarship authority. It was held that since the minor's liability had to be reasonable under s 69, the amount payable to the scholarship authority should be proportionate to the scholar's period of default. The scholar had already served the government three years and ten months out of the stipulated five-year period. For this reason, the court held that the scholarship authority could not claim the sum of RM11,500,

---

[14] Contracts Act 1950, s 69 provides:

> If a person is incapable of entering into a contract or anyone whom he is legally bound to support is supplied by another person with necessaries suited to his condition in life, the person who has furnished such supplies is entitled to be reimbursed from the property of such incapable person.

[15] *Supra*, n 8 at p 216.

which was the entire sum expended for the scholar's training. In this regard, the court in *Gurcharan Singh's* case did not follow the approach that was taken in *Thelma Fernandez's* case. In the latter case, when determining the amount of damages payable to the scholarship authority, the scholar was made to repay the entire sum expended on his education, regardless of the fact that the scholar had served nearly half of his bond period. Notably, Chang Ming Tat J had made reference to *Thelma Fernandez's* case but had merely adverted to the fact that that case went on appeal to the Federal Court and was eventually settled out of court on a compromise. Interestingly, the learned judge also made the remark that the *Thelma Fernandez's* case must be "now seen to be no more good law".[16] It is unfortunate that the learned judge did not provide any further explanation for this statement.

The two cases discussed above demonstrated that the law on the subject of remedies upon breach of a scholarship agreement was ambiguous and inadequate. Diverse approaches were taken in each case in relation to the liability of the scholar and remedy to be granted to the scholarship authority. Further, the principles to be considered when determining the amount recoverable by the scholarship authority where the contract of service had been partly performed, were uncertain and lacked clarity.

It therefore became necessary for the issue of remedies upon breach of scholarship agreements to be resolved. This was imperative not only to provide certainty in this area of the law but also, and perhaps more importantly, to facilitate the government's educational policy and to aid national development. This led to the passing of the Amendment Act, the key provisions of which will be considered in the following part.

---

[16] *Id* at p 217.

III. The Contracts (Amendment) Act 1976

The Amendment Act came into force on 27 February 1976. It makes a significant impact on the law relating to scholarship agreements. The preamble to the Amendment Act describes the Act as "an Act to amend the Contracts Act 1950 to make provisions with respect to scholarship agreements". Notably, it has been opined that the Amendment Act is not, in form, an amending Act because it only makes specific provisions with respect to scholarship agreements and it is to be construed as one with the Contracts Act 1950.[17]

Some of the vital provisions of the Amendment Act will now be considered.

A. *Definition of Scholarship Agreement*

As has been noted above, prior to the passing of the Amendment Act, the Contracts Act 1950, apart from s 29, did not contain any specific provision relating to scholarship agreements. This "void" is now filled by the Amendment Act. Section 2 of the Amendment Act provides a definition of a scholarship agreement. A scholarship agreement, for the purposes of the Amendment Act, means any contract or agreement between an "appropriate authority" and any person with respect to any scholarship, award, bursary, loan, sponsorship or appointment to any course of study, the provision of leave with or without pay, or any other facility for the purpose of education or learning of any description.[18] An appropriate authority means the Federal Government or a State Government, a statutory authority or an approved educational institution.[19] An approved educational institution under the Amendment Act means any institution or body declared as such by the Minister of Education.[20] By reason of this comprehensive definition, the Amend-

[17] Ahmad Ibrahim, "Legislative Digest (Malaysia)" [1976] 1 MLJ lxxxvi.

[18] The Amendment Act, s 2.

[19] *Ibid.*

[20] *Ibid.*

ment Act makes it clear that the necessary parties to a scholarship agreement are the scholarship authority and the scholar. Although the definition does not include a surety as a party to a scholarship agreement, the role of a surety is not discounted by the Amendment Act. A separate definition of a surety is provided in s 2[21] and as shall be seen later, s 5 expressly mentions the surety's obligations under a scholarship agreement.[22] This definition also makes it clear that the Amendment Act does not apply to all scholarship agreements. For example, and as mentioned earlier, scholarship agreements made between scholars and private bodies do not fall within the Amendment Act unless the private bodies concerned are approved educational institutions under the Amendment Act. Such scholarship agreements are governed by the Contracts Act 1950 and the common law.

B. *Protection from Invalidating Factors*

Significantly, the Amendment Act provides protection to scholarship agreements from several grounds which invalidate agreements under the Contracts Act 1950. Section 4 of the Amendment Act states:

> Notwithstanding anything to the contrary contained in the principal Act, no scholarship agreement shall be invalidated on the ground that-
> (a) the scholar entering into such agreement is not of the age of majority;
> (b) such agreement is contrary to any provisions of any written law in force relating to moneylenders; or
> (c) such agreement lacks consideration.

This section protects the scholarship authority from the typical defences raised by scholars upon breach of a scholarship agreement. The defences of minority, the lack of consideration or contravention of the Moneylenders Act 1951, are no longer invalidating factors to defeat the validity of a scholarship agreement. It is therefore clear from s 4

[21] *Ibid.* A surety "means a person referred to as a surety, or as a guarantor, or by any other corresponding term, in a scholarship agreement".

[22] See the discussion on s 5 at Part IV below.

of the Amendment Act that the position of the earlier law as stated in *Gurcharan Singh's* case has been altered, namely, where the scholarship agreement was held to be invalid by reason of the scholar's minority.[23]

It is also notable that when the Amendment Act was passed in 1976, the exclusion from contravention of the Moneylenders Act 1951 may be considered as an act of abundant caution. At that time, s 2 of the Moneylenders Act 1951 defined a moneylender as follows:

> "moneylender" includes every person whose business is that of moneylending or who carries on or advertises or announces himself or hold himself out in any way as carrying on that business whether or not that person also possesses or earns property or money derived from sources other than the lending of money and whether or not that person carries on the business as a principal or as an agent.

A scholarship authority within the Amendment Act, namely, the Federal Government, State Government, statutory authority or an approved educational institution will not be within the definition of a moneylender under the then s 2 of the Moneylenders Act 1951. As explained in a number of cases, for example, *Ngui Mui Khin & Anor v Gillespie Bros & Co Ltd*,[24] the Moneylenders Act 1951 was only intended to apply to persons who were carrying on the business of moneylending. It is also to be noted that s 3 of the Moneylenders Act 1951, prior to its amendment in 2003, provided that "any person who lends a sum of money in consideration of a larger sum being paid shall be presumed until the contrary be proved to be a moneylender". This provision was deleted when the Moneylenders Act 1951 was amended in 2003. Be that as it may, the presumption in the provision could have been easily rebutted because a scholarship authority within the Amendment Act cannot be said to be persons carrying on the business of moneylending. However, today, the exclusion in s 4 of the Amendment

---

[23] *Supra*, n 17. Professor Ahmad Ibrahim remarked in his commentary of the Amendment Act, "The case of *Government of Malaysia v Gurcharan Singh & Ors* [1971] 1 MLJ 211 can therefore no longer be followed in Malaysia".

[24] [1980] 2 MLJ 9.

Act would be relevant to a scholarship authority because the definition of a moneylender in s 2 of the Moneylenders Act 1951 was amended in 2003 to read as follows:

> moneylender means any person who lends a sum of money to a borrower in consideration of a larger sum being repaid to him.

It is to be noted that the new s 2 is in imperative terms and does not create a rebuttable presumption as was the case with the deleted s 3 of the Moneylenders Act 1951. Thus, it is now possible to argue that a scholarship agreement which requires a scholar to pay a larger sum than the sum actually expended is a moneylending transaction for the purposes of the Moneylenders Act 1951. In such a case, s 4 of the Amendment Act will afford adequate protection to the scholarship authority.

C. *Jurisdiction of the Court to Hear Scholarship Agreement Cases*

Section 7 of the Amendment Act states that the Sessions Court has jurisdiction to hear all civil proceedings relating to a scholarship agreement. The section states as follows:

> Notwithstanding anything contained in any written law to the contrary, the Sessions Court and, in the case of Sabah and Sarawak, the Court of a Magistrate of the First Class shall have jurisdiction in all civil proceedings which arise from or relate to a scholarship agreement.

The issue as to whether the Sessions Court has the exclusive jurisdiction to hear cases on scholarship agreements was resolved by the Supreme Court in *Bank Negara Malaysia v Gerald Glesphy & Ors.*[25] In that case, the scholarship authority took out a writ in the High Court to commence legal action against the scholar for breach of the scholarship agreement. The scholarship authority claimed the sum of RM90,000 as liquidated damages, interests and costs. The scholar applied

[25] [1992] 1 MLJ 151.

to strike out the writ on the ground that s 7 of the Amendment Act provides that the Sessions Courts has exclusive jurisdiction to hear scholarship agreement cases, thereby ousting the jurisdiction of the High Court.

It was held by the Supreme Court that the plain wording of s 7 did not state that the Sessions Court was conferred with exclusive jurisdiction. Harun Hashim SCJ said:

> [Section 7] merely says 'the Sessions Court ... shall have jurisdiction ...'. It would be different if the word 'only' is added before the words 'the Sessions Court' or by some other expressions like 'to the exclusion of any other Court' ... Section 7 is therefore only permissive and not imperative in enhancing the jurisdiction of the sessions court ...
>
> ... It follows that s 7 of the Act read together with s 23 of the Courts of Judicature Act 1964 does not oust the jurisdiction of the High Court to try scholarship agreement cases.[26]

It follows from this decision that the Amendment Act does not oust the jurisdiction of the High Court to hear cases on scholarship agreements. However, if a plaintiff files such a case in the High Court, he would be entitled to costs in the High Court at the rates prescribed for the Sessions Court only.

D. *The Amendment Act is Retrospective*

A further point to be noted is that the Amendment Act is retrospective. Section 6 states that the provisions of the Amendment Act apply to existing scholarship agreements in the same way as they apply to scholarship agreements entered into after the passing of the Amendment Act. Notably, the words "existing scholarship agreements" refer

---

[26] *Id* at pp 153-154.

to scholarship agreements entered into *before* the commencement of the Amendment Act and which had not expired[27] prior to the commencement of the Amendment Act.[28]

E. *Remedies upon Breach of a Scholarship Agreement*

At the outset, it should be noted that the Amendment Act provides remedies for the scholarship authority only and not for the scholar. It has been suggested that this may be justified on the basis that in the two reported cases prior to the passing of the Amendment Act, it was the scholars who committed the breaches and in each case, the scholarship authority had adopted a lenient approach.[29] In the first case, namely *Thelma Fernandez's* case,[30] the scholarship authority compromised the matter in the Federal Court and in the second case, *Gurcharan Singh's* case,[31] the scholarship authority had temporarily suspended the agreement to enable the scholar to pursue higher studies.[32]

Be that as it may, the writer submits that the remedies in the Amendment Act were specifically designed to implement the government's educational policies and to ultimately advance the government's plan for national and economic development. It must be borne in mind

---

[27] It is submitted that a scholarship agreement would expire in the following circumstances:

i. upon the due performance of all obligations which arise under the agreement;

ii. on the operation of a clause in the agreement specifying expiry of the agreement; and

iii. in the case of non-performance of both or either party, after the expiry of the relevant limitation period.

[28] The Amendment Act, s 2.

[29] *Supra*, n 3 at p 264.

[30] *Supra*, n 7.

[31] *Supra*, n 8.

[32] However, when the scholar later joined the scholarship authority, he did not complete the period of service.

that the Amendment Act was enacted at a time when the government was facing problems such as brain drain and the lack of skilled workers. Scholars were leaving the government service because of the lure of better paid jobs abroad and in the private sector.[33] Naturally, this was a setback to national development. Therefore, it is submitted that the differential treatment referred to in the preceding paragraph is premised on the ground of giving priority to the transcendental goal of economic progress and advancement of the nation.

The remedies for breach of a scholarship agreement are provided in s 5 of the Amendment Act. Section 5 and its legal effects will be considered in detail in the following part.

IV. Remedies under the Contracts (Amendment) Act 1976

A. *Remedies Available to the Scholarship Authority*

[33] *Supra*, n 2, during the Parliamentary Debate on the Contract (Amendment) Bill, the then Deputy Minister of Education, Dato' Chan Siang Sun, when proposing the Bill before Parliament, stated as follows:

> The reason for this amendment is to strengthen the scholarship agreements made between the Federal Government, State Governments, statutory bodies, higher studies foundations and State scholarship foundations as sponsors and students who receive the scholarships. The plans to grant scholarships or any other facilities to a student by the Government and statutory bodies are closely tied to plans to have enough skilled workers to meet the country's needs ...
>
> ... To conduct development projects and plans [for the country] in the next few years, Government departments and semi-governmental agencies will require a large number of skilled workers but the pool of skilled workers is very limited because on the whole the country is now facing a lack of skilled workers in all professional fields. Also, the Government and semi-governmental agencies cannot afford to pay high salaries and other lucrative benefits which are offered by the private sector. Therefore, without offering scholarship schemes on a larger scale, the Government and semi-governmental agencies will always be faced with shortage of personnel, especially professionals, and employees in the government service will be taken by the private sector which offers higher salaries and better benefits. (Translated from Bahasa Malaysia.)

Sections 5(a) and (b) of the Amendment Act provides specific remedies to the scholarship authority in the event of a breach of the scholarship agreement by the scholar. Section 5 states:

> Where a scholarship agreement has been broken by the scholar -
>
> (a) if a sum is named in the agreement as the amount to be paid in case of such breach, notwithstanding anything to the contrary contained in the principal Act, the scholar and the surety shall be liable jointly and severally to pay and the appropriate authority shall be entitled to be paid the whole of the such named sum whether or not actual damage or loss has been caused by such breach, and no deduction shall be made from the said named sum on account only of any partial period of service performed by the scholar on completion of his course of study; or
>
> (b) if no such sum is mentioned in the scholarship agreement, the scholar and surety shall be jointly and severally liable to pay and the appropriate authority shall be entitled to be paid -
>
> (i) the whole amount expended by the appropriate authority under the agreement; and
>
> (ii) the whole of such further amount as it will cost the appropriate authority or another authority designated to it to engage a person with qualifications and experience similar to those which were to be obtained by the scholar to perform the services required of the scholar on the completion of his course of study for the period specified in the scholarship agreement.

Section 5(a) deals with the situation where there is a fixed sum named in the agreement as payable in the event of a breach by the scholar. The wording of s 5(a) is clear and requires no elucidation. Pursuant to the section, upon breach of a scholarship agreement, the liability of the scholar is for the whole sum named in the agreement irrespective of whether actual damage was caused or whether the scholar had partially performed his contract.

In contractual terms, the remedy provided in s 5(a) of the Amendment Act takes the form of either liquidated damages or a penalty. Liquidated damages is the term used to describe the sum named in the contract as a genuine pre-estimate of the loss caused to the aggrieved party, in that if the contract is broken by the other, the aggrieved party is entitled to recover that amount named without being required to prove actual damage.[34] At common law, a distinction is drawn between liquidated damages and a penalty. If the sum named in the contract in the event of a breach is in the nature of a threat held over the party *in terrorem*, that sum is a penalty and will be subjected to the equitable jurisdiction of the court.[35] Therefore, at common law, it is always a question of importance whether the sum named in the contract is in the nature of liquidated damages or a penalty. This question is "to be decided upon the terms and inherent circumstances of each particular contract, judged of as at the time of making the contract, and not as at the time of the breach".[36]

In relation to the remedy provided under s 5(a) of the Amendment Act, the distinction described above does not serve any purpose. This is because s 5(a) allows an automatic claim on the whole of the fixed sum named in the agreement, be it a penalty or otherwise.

Further, under Malaysian contract law, the English common law approach of making a distinction between liquidated damages and a penalty is inapplicable, as the situation is governed by s 75 of the Contracts Act 1950.[37] It is settled law that s 75 has erased this dis-

[34] Phang, BL, *Cheshire, Fifoot and Furmston's Law of Contract*, (Singapore: Butterworths Asia, 2nd ed, 1998) at p 1034. See also *Wallis v Smith* (1882) 21 ChD 243 at p 276, per Cotton LJ.

[35] *Id* at p 1035.

[36] *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* [1915] AC 79 at pp 86-87.

[37] Contracts Act 1950, s 75 reads as follows:

> When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.

tinction.[38] Section 75 of the Contracts Act 1950 provides that where a contract contains any amount to be paid in the event of a breach, the party complaining of the breach is only entitled to reasonable compensation not exceeding the sum named. In *Selva Kumar a/l Murugiah v Thiagarajah a/l Retnasamy*,[39] the Federal Court held that by reason of s 75, there is now no difference between a penalty and liquidated damages. In every case if a sum is named in a contract as the amount to be paid in case of breach, it is to be treated as a penalty. To qualify for compensation for the breach, the aggrieved party must prove the actual damage that has been suffered.[40] If there is no such proof or evidence, there will be no award of reasonable compensation.[41]

However, in the case of scholarship agreements governed by the Amendment Act, the question of the fixed sum in the agreement being penal or reasonable does not arise at all. The sum named as payable upon breach is unquestionable in court and would be allowed as of right. The scholar is liable to pay the whole amount irrespective of whether any damage was caused to the scholarship authority or whether the contract of service has been partially performed. It has, therefore, been correctly suggested that the effect of s 5(a) of the Amendment Act is to override the operation of s 75 of the Contracts Act 1950.[42]

Another form of remedy to the scholarship authority is found in s 5(b) of the Amendment Act. This section applies "where no sum is mentioned"[43] in the scholarship agreement as payable upon breach.

---

[38] See decision of the Federal Court in *Selva Kumar a/l Murugiah v Thiagarajah a/l Retnasamy* [1995] 1 MLJ 817. See also earlier authorities: *SS Maniam v The State of Perak* [1957] 1 MLJ 75, *Wearne Bros (M) Ltd v Jackson* [1966] 2 MLJ 155, *Linggi Plantations Ltd v Jegatheesan* [1972] 1 MLJ 89.

[39] [1995] 1 MLJ 817.

[40] *Id* at pp 823-824.

[41] *Id* at p 826. See also *Constrajaya Sdn Bhd v Johor Coastal Development Sdn Bhd* [2002] 6 MLJ 115.

[42] *Supra*, n 3 at p 264.

[43] The Amendment Act, s 5(b).

Thus, this clause envisages two situations. It may cover a situation where the scholarship agreement is silent on damages payable upon breach. It will also apply where there is a clause providing that the whole of the sum spent on the scholar is payable, and this sum is not named in the agreement. In both situations, s 5(b)(i) states that the liability of the scholar and the surety is to pay "the whole amount expended by the appropriate authority under the agreement".[44] The use of the words "under the agreement" in the section makes it clear that the scholarship authority can only claim monies spent on the scholar under the scholarship agreement. In other words, any expenditure incurred or loss suffered by the scholarship authority that do not fall within the scope of the scholarship agreement or within the contemplation of the parties at the time the agreement was made, will not be allowed.

Furthermore, under s 5(b)(ii) of the Amendment Act, the scholar is also liable to pay such additional sum of money that the scholarship authority will have to incur to engage another person with similar qualifications and experience for the period specified in the scholarship agreement. It has been noted that the words "cost ... to engage" would probably include all such expenses as will be involved in the reselection process, advertisement costs, overhead charges of administration and the costs of travel of the new incumbent to join the post including the cost of the return journey. It was further noted that this cost does not and should not extend to the difference between the monthly salaries of the erring scholar and the new incumbent.[45] This conclusion was premised on the basis that the Amendment Act uses the words "costs ... to engage" as opposed to "costs ... to engage *and maintain*". If the latter words were used, it would have been clear that the legislature intended the erring scholar to compensate the scholarship authority not only for the expense of hiring the new incumbent but also for the maintenance of the new incumbent for the period specified in the scholarship agreement.

---

[44] The Amendment Act, s 5(b)(i).

[45] *Supra*, n 3 at p 266.

Be that as it may, this view may be countered on the following premise. The principal reason for the grant of a scholarship to the scholar is based upon a firm expectation that the scholar will be hired and that he will perform his obligations for the entire period specified in the contract. Thus, the bargain entered into by the parties is that the scholarship authority will fund the scholar's education and in return, the scholar will serve the scholarship authority for the entire period stipulated in the scholarship agreement. The scholar is hired not just to fill a position but to fill a position for a specific period of time stipulated in the contract. It follows that the cost of "engaging" a new incumbent to fill the position left vacant by the erring scholar can be construed as the cost of hiring *and* maintaining a new incumbent for the specific period stipulated in the scholarship agreement. In other words, although the Amendment Act does not explicitly state "costs ... to engage *and maintain*" a new incumbent, it is axiomatic that engagement of the new incumbent includes maintenance of the new incumbent for the period specified in the scholarship agreement. Necessarily, the cost of maintaining the new incumbent would extend to the difference between the monthly salaries of the erring scholar and the new incumbent.

From a contractual perspective, the remedy provided for the scholarship authority in s 5(b) of the Amendment Act is that of unliquidated damages. Damages are un-liquidated when "they have not been assessed beforehand by the parties or some statute in which case the jury [or the court] is at liberty, subjected to the rules governing the measure of damages, to award such damages as they think appropriate to the injury which the plaintiff has sustained".[46]

In the premises, it is submitted that the award of damages under s 5(b) of the Amendment Act would be subject to s 74 of the Contracts Act 1950 which provides for the normal measure of damages that may be obtained by a party upon breach of a contract. Section 74, which is regarded as the statutory enunciation of the rule in *Hadley v Baxendale*,[47] provides that upon a breach of a contract, the aggrieved

[46] Halsbury Laws of England, 3rd ed, Vol 9, p 220.

[47] (1854) 9 Ex 341.

party is entitled to receive damages which naturally arose from the breach or which the parties knew to be likely to result from the breach.[48]

B. *Remedies Available to the Scholar*

As have been noted above, the position of the scholar prior and subsequent to the passing of the Amendment Act remains unchanged. The Amendment Act does not provide any remedy to the scholar where there is a breach of the scholarship agreement by the scholarship authority. The liability of the scholarship authority is also not dealt with as the Amendment Act is silent on breaches by the scholarship authority. Thus, scholars will have to rely on the Contracts Acts, 1950 and the common law to obtain a remedy against the scholarship authority in the event of a breach.

In accordance with settled contractual principles, the scholar must first show that the scholarship authority has committed a breach of the scholarship agreement. As mentioned earlier in this article, a clear example of a breach of the scholarship agreement is where the scholarship authority fails or refuses to disburse the whole or part of the loan sum agreed. Another instance of a breach is where the scholarship authority refuses to enter into the contract of service with the scholar upon completion of his studies.

In both instances, there is a breach going to the root of the contract and the position of the scholar would be governed by s 40 of the Contracts Act 1950.[49] The scholar may put the contract to an end and treat himself as being discharged from the contract. The scholar would then be entitled to the normal measure of damages under s 74 of the

---

[48] See dicta of Mohammed Dzaiddin SCJ in *Malaysian Rubber Development Corp Berhad v Glove Seal Sdn Bhd* [1994] 3 MLJ 569 at p 575.

[49] Contracts Act 1950, s 40, states:

> When a party to a contract has refused to perform, or disabled himself from performing his promise in its entirety, the promisee may put to an end the contract, unless he has signified, by words or conduct, his acquiescence in its continuance.

Contracts Act 1950. Naturally, the scholar's remedy is limited to monetary compensation for his actual loss of money.

V. The Approach of the Court

It is important to see how the court has construed and given effect to the aforesaid provisions of the Amendment Act. Unfortunately, there have not been many reported cases dealing specifically with the construction and interpretation of ss 5(a) and (b)[50] of the Amendment Act. However, there are some cases dealing with breaches of scholarship agreements and two of such cases are discussed below.

A. *University of Malaya v Lee Ming Chong*[51]

In this case, a scholarship agreement was entered into between the scholarship authority (the University) and the scholar (Lee) to pursue the degree of Master of Business Administration and Accounting in Canada. Upon his return, Lee was to serve the University for a period of not less than 5 years. A breach of this term would render Lee liable to pay liquidated damages of RM5,000. Lee served the University for only 2 ½ years out of the stipulated 5 years. The University brought an action against Lee for the said sum of RM5,000 for Lee's breach. Many arguments were raised by Lee in his defence. Among them, it was argued that the sum of RM5,000 was a stipulation by way of a penalty and unenforceable in law. In dealing with this defence, the High Court had simply referred to s 5(a) of the Amendment Act and stated that by reason of the said provision, the sum of RM5,000 was not a penalty. The University was thus entitled to be paid the whole of RM5,000.

---

[50] To date, there is no reported case on s 5(b) of the Amendment Act.

[51] [1986] 2 MLJ 148.

B. *Bank Negara Malaysia v Mohd Ismail & Ors*[52]

In this case, the scholarship authority namely, the bank, claimed liquidated damages in the sum of RM70,000 against the scholar and his sureties for breach of the scholarship agreement. The scholar had refused to serve the bank for a period of ten years upon completion of his studies and had resigned a few months after commencing employment with the bank. In this case, it is to be noted that the Supreme Court made no reference to s 5(a) of the Amendment Act nor did it consider whether or not the fixed sum of RM70,000 was a penalty. The Court attached importance to three letters which contained a clear admission of liability by the scholar to pay the bank RM70,000 as liquidated damages for breach of the scholarship agreement. The Supreme Court restored the order made by the Senior Assistant Registrar which granted summary judgement, under Order 14 of the Rules of the High Court 1980, to the bank for the sum of RM70,000.

In both the cases mentioned above, the applicable law to determine the remedy is s 5(a) of the Amendment Act as a fixed sum was stipulated as payable upon breach. In both cases, the courts did not question the entitlement of the scholarship authority to the fixed sum stipulated in the scholarship agreement. The operation of s 75 of the Contracts Act 1950 and the question of the scholarship authority only being entitled to reasonable compensation not exceeding the sum named in the agreement, did not arise at all. It is respectfully submitted that this approach is a correct one. This is because pursuant to s 5(a) of the Amendment Act, the fixed sum stipulated in the scholarship agreement is to be granted to the scholarship authority as of right.

However, this approach has a drawback. The drawback will feature in cases where the fixed sum stipulated in the scholarship agreement is grossly inflated and disproportionate to the actual loss suffered by the scholarship authority. For example, the scholarship authority may have expended only RM10,000 but the sum payable in the event of breach is set at RM50,000 or more. To further illustrate this point, even if the default of the scholar is one month or one day, the schol-

[52] [1992] 1 MLJ 400.

arship authority would be entitled to the full sum named in the agreement. No deduction will be made for the period of the scholar's partial performance of his bond. In such cases, the scholar would be at the losing end and the scholarship authority would obtain a windfall. Clearly, to allow the scholarship authority to claim the fixed sum from the scholar in such circumstances would be unjust and inequitable. It can be likened to a sum held over the scholar *in terrorem*. Despite this, proceeding on the clear wording of s 5(a), the fixed sum would still be granted by the court.

It is conceded that the fixed sum is intended to act as a deterrent for the scholar to breach his bond under the scholarship agreement. Further, the parties should be bound by all the terms and conditions which were expressly agreed to by them at the time of the making of the contract. However, it cannot be denied that the scholar is at the losing end of the bargain. In most cases, the scholar would be unable to pay the fixed sum to the scholarship authority. Thus, the liberty of the scholar would be curtailed and subjected to constraints. The scholar is not free to join other bodies that may offer better opportunities and prospects.

The fixed sum may also make it difficult for scholars to obtain persons to stand as sureties for them. The sureties may find the fixed sum to be very oppressive and will be afraid to become a party to such scholarship agreements. This is because they can never guarantee that the scholar will complete the entire period of service which is specified in the scholarship agreement.

Is there then a better approach to safeguard the interests of both the scholarship authority and the scholar? This will be considered in the following section.

VI. Liabilities of Scholars and Scholarship Authorities under the Contracts (Amendment) Act 1976 – The Case for Reform

This writer humbly proposes that the courts should be given the mandate to question the rationality and fairness of the sum named in the scholarship agreement where the sum is grossly inflated or disproportionate to the actual loss suffered. This may be done by inserting a provision into s 5 of the Amendment Act to the effect that notwithstanding anything contained in the section, the court has the discretion to determine the reasonableness of the sum claimed as payable on breach of the scholarship agreement. Such a provision would achieve a proper balance between safeguarding the interests of both the scholarship authority and the scholar.

It is also respectfully submitted that the approach of the court in *Gurcharan Singh*'s case was a fair one in that the court took into account the period of service already performed by the scholar and held the scholar's liability to be proportionate to his period of default. In this case, the damages finally awarded was reduced from RM11,500 (which was the sum claimed to be actually expended on the scholar) to RM2,683.[53] However, that it was the clear intention of the legislature to expressly prohibit this approach is undeniable. Section 5(a) of the Amendment Act states in clear terms that "*no deduction shall be made from the said named sum on account only of any partial period of service performed by the scholar on completion of his course of study*" (emphasis added). The writer suggests that these words were included at a time when "brain drain" was one of the main problems to tackle on the government's agenda. The growth of a skilled workforce in the government service was essential for national reconstruction and economic progress.[54] There was therefore a need to safeguard the interests of scholarship authorities from erring scholars who attempt to leave the government service for better opportu-

---

[53] *Supra*, n 8 at p 217.

[54] *Supra*, n 33.

nities. However, thirty years have passed since then and the socio-economic conditions in Malaysia have significantly improved. It is therefore appropriate for new provisions to be introduced into the Amendment Act to take into account the changes in Malaysian society.

Another matter to be considered here is the concept of mitigation of damages. Mitigation of damages proceeds on the principle that the law does not allow a plaintiff to recover damages to compensate him for losses which would not have been suffered if he had taken reasonable steps to mitigate his loss.[55] It is immediately clear that the principle of mitigation of damages will operate only after a breach of a contract has occurred as prior to breach, a plaintiff would have no need to mitigate his losses. In the Malaysian context, the concept of mitigation of damages is preserved in the Explanation to s 74 of the Contracts Act 1950.[56] The issue here is this. When seeking a remedy under s 5 of the Amendment Act, is the scholarship authority under a duty to mitigate its loss and can the sum claimed be reduced by the loss that could have been mitigated?

This issue was dealt with, albeit *obiter*, in *University of Malaya v Lee Ming Chong*.[57] In that case, Lee had raised as part of his defence, the fact that the University had failed to mitigate its losses. In response to this the learned judge, Wan Hamzah SCJ stated:[58]

> Lee has not shown how the University could mitigate its loss. *Even if there was a loss which could have been mitigated, I do not see how the judgement amount can be reduced by such loss in view of the above provision of [section 5(a) of the Amendment Act].* (Emphasis added.)

---

[55] See *British Westinghouse Electric and Manufacturing Co v Underground Electric Railway Co of London* [1912] AC 673 at p 689, per Lord Haldane.

[56] Contracts Act 1950, s 74, Explanation states:

> In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account.

[57] *Supra*, n 51.

[58] *Id* at 153.

In this case, it was the opinion of the court that s 5(a) of the Amendment Act had dispensed with the scholarship authority's duty to mitigate losses. It is the writer's humble view that this interpretation is correct as the clear and unequivocal wording of s 5(a) gives the scholarship authority an automatic right to claim the sum named in the scholarship agreement as payable upon breach. It is to be noted that apart from *University of Malaya v Lee Ming Chong,*[59] this issue has not been raised in any subsequent cases involving scholarship agreements under the Amendment Act.

However, should the duty to mitigate losses be imposed on the scholarship authority when it claims for a remedy under s 5(b) of the Amendment Act? To reiterate, s 5(b) will apply in a situation where no sum was named in the scholarship agreement as payable upon breach. In such a situation, the scholarship authority is entitled to the whole amount expended by it under s 5(b)(i) and to costs incurred by it to engage another person of similar qualifications and experience under s 5(b)(ii).

Insofar as s 5(b)(i) is concerned, it is submitted that there is no reason for the duty of mitigation to be impose on the scholarship authority. This is because the sum claimed under s 5(b)(i), namely, the whole amount expended by the scholarship authority under the scholarship agreement, would have been incurred before the breach. Prior to the breach, the duty to mitigate does not arise at all.

However, the principle of mitigation is relevant when a claim is made under s 5(b)(ii) as the sum claimed thereunder relates to expenses incurred after the breach of the scholarship agreement. As noted earlier, s 5(b)(ii) deals with costs actually incurred by the scholarship authority to engage a person of comparative qualifications and experience. This would include expenses involved in the reselection process, advertisement costs, overhead charges of administration and the costs of travel of the new incumbent to assume the post. Should the scholarship authority be duty bound to show that it has taken

[59] *Supra*, n 51.

reasonable steps to mitigate its losses when it makes a claim under this section?

This writer proposes that a scholarship authority which claims a remedy under this section must be subjected to the requirement of having to mitigate its losses and to show reasonableness of the sum incurred. This will ensure that there is a proper check to deter the scholarship authority from inflating its losses and then bringing these claims against the scholar.

VII. Conclusion

The Amendment Act came into force in 1976. In this period, the government was faced with a pressing need to prevent "brain drain" and the flight of skilled workers from government service to better paid jobs. Therefore, when formulating remedies for breaches of scholarship agreements, it was necessary for the legislature to give precedence to the needs of the government and scholarship authorities over the rights of the scholar. This state of affairs was deemed necessary to facilitate the educational policies of the government and to aid the transcendental goal of economic and national development.

However, more than thirty years have passed since the Amendment Act came into force. The socio-economic conditions in Malaysia have undergone significant and far-reaching changes. Malaysia is on her way to becoming a developed country. Is there still a need to preserve the imbalance between scholarship authorities and scholars? The imbalance has the propensity to produce unfair and harsh results. It may take on a punitive nature and impose an onerous burden on scholars. It is therefore appropriate for the provisions of the Amendment Act to be reviewed.

It is respectfully submitted that efforts should be taken to formulate a law that would balance and safeguard the rights of both the scholar and scholarship authority. In the premises, perhaps it is time to undertake a review of the law on remedies for breach of scholarship agreements under the Amendment Act.

Section 95(2) of the Street, Drainage and Building Act 1974: The Highland Towers' Decisions - The Guardian or the Guarded?

*Faizah Nazri binti Abd Rahman**

I. Introduction

The decision of the case arising from the Highland Towers tragedy had a widespread effect on almost every person who had been following the development of the case from the time the initial tragedy befell the unfortunate victims of that incident over 12 years ago, till the time when a cause of action to the High Court was brought,[1] followed by the appeal made to the Court of Appeal,[2] and finally to the Federal Court.[3] The case was brought about as a result of the collapse of one of three 12-storey apartment towers collectively known as the Highland Towers on 11 December 1993 killing 48 people. The location of the apartment blocks is in the Mukim of Hulu Klang, Gombak, in the State of Selangor, Malaysia.

* LLB (Hons)(SHU), LLM (Soton); Lecturer, Faculty of Law of the University of Malaya, Kuala Lumpur, Malaysia.

[1] *Steven Phoa Cheng Loon & 72 Ors v Highland Properties Sdn Bhd & 9 Ors* [2000] 3 AMR 3567.

[2] *Arab-Malaysian Finance Bhd v Steven Phoa Cheng Loon & Ors and Other Appeals* [2003] 1 MLJ 567.

[3] *Majlis Perbandaran Ampang Jaya v Steven Phoa Cheng Loon & Ors* [2006] 2 MLJ 389.