

# LHAG Insights

Corporate & Commercial Disputes



## ABOUT THE AUTHORS



SM Shanmugam  
Partner

**Corporate &  
Commercial Disputes**

E: [ssm@lh-ag.com](mailto:ssm@lh-ag.com)



Hooi Chung Wai  
Associate

**Corporate &  
Commercial Disputes**

E: [hcw@lh-ag.com](mailto:hcw@lh-ag.com)

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### Joint Liability vs Joint and Several Liability

Example: A obtains judgment against B and C for RM500,000. Are B and C liable to equal proportions of the judgment sum, i.e., RM250,000 each, or are they each liable for RM500,000?

This distinction between “*joint liability*” and “*joint and several liability*” was recently clarified by the Federal Court.

#### Brief facts

In *Edwin Cassian*,<sup>1</sup> the Employees’ Provident Fund (EPF) Board filed a claim against a company and its directors for the company’s failure to make employer contributions on behalf of its employees. Parties recorded a consent judgment where all three defendants agreed to pay the EPF Board the outstanding sum, but did not include the phrase the defendants would be “*jointly and severally liable*”.

As the defendants did not comply with the consent judgment, the EPF Board commenced bankruptcy proceedings against one of the defendants, Edwin, for the full outstanding judgment sum. Edwin then applied to set aside the bankruptcy notice and creditor’s petition, which was allowed by the senior assistant registrar and subsequently affirmed by the High Court judge. Aggrieved, the EPF Board filed an appeal to the Court of Appeal, but it was also unsuccessful.

<sup>1</sup> *Lembaga Kumpulan Wang Simpanan Pekerja v Edwin Cassian a/l Nagappan @ Marie* [2021] 5 MLJ 253; [2021] 7 CLJ 823 (FC)

## The *Sumathy* factor

In the courts below, the EPF Board's reliance on the statutory provision that expressly provides for "*joint and several liability*" in respect of any unpaid contributions<sup>2</sup> was rejected. It was held that since the phrase "*joint and several liability*" was not inserted in the consent judgment, such wording could not be subsequently imported into it, and therefore the defendants were only liable to pay the judgment sum in equal proportions.

Applying *Sumathy*,<sup>3</sup> the courts below went on to remark that the bankruptcy proceedings against Edwin were defective as the EPF Board claimed for the whole judgment sum instead of only the portion owed by Edwin.

## Clarifying the misconception

On appeal, the Federal Court addressed the distinction between these oft-used phrases as follows:<sup>4</sup>

- (a) Joint liability: When two or more persons jointly promise to do the same thing. There is only one promise.
- (b) Joint and several liability: When two or more persons jointly promise to do the same thing and also severally make separate promises to do the same thing. There is more than one promise.

In both instances above, performance by one person discharges the others.

Noting the distinction, the apex court went on to clarify the position of joint liability:

- (a) Where debts are jointly incurred, each debtor is liable for the entire amount unless a contrary intention is shown. Such intention has to be expressed, as enshrined in the Contracts Act 1950:

"When two or more persons make a joint promise, the promisee may, in the absence of express agreement to the contrary, compel any one or more of the joint promisors to perform the whole of the promise."<sup>5</sup>

<sup>2</sup> Employees Provident Fund Act 1991, s 46

<sup>3</sup> *Sumathy a/p Subramaniam v Subramaniam a/l Gunasegaran and another appeal* [2017] 6 MLJ 753 (CA)

<sup>4</sup> *In Re Vallibhai Adamji* (1933) 35 BOMLR 881; 1933 Indlaw MUM 179

<sup>5</sup> Contracts Act 1950, s 44

**Head Office**

Level 6, Menara 1 Dutamas  
Solaris Dutamas  
No. 1, Jalan Dutamas 1  
50480 Kuala Lumpur  
Malaysia  
Tel: +603 6208 5888  
Fax: +603 6201 0122

**Johor Office**

Suite 21.01  
21st Floor, Public Bank Tower  
No.19, Jalan Wong Ah Fook  
80000 Johor Bahru, Johor  
Tel: +607 278 3833  
Fax: +607 278 2833

**Penang Office**

18-33-A3 Gurney Tower  
Persiaran Gurney  
10250 Georgetown  
Pulau Pinang  
Tel: +604 299 9668  
Fax: +604 299 9628

**Email**

[enquiry@lh-ag.com](mailto:enquiry@lh-ag.com)

**Website**

[www.lh-ag.com](http://www.lh-ag.com)

- (b) It follows that a creditor is entitled to proceed against one or more of the debtors to secure payment of a debt in its entirety, so long as the debt remains unrealised.
- (c) However, if any of the debtors satisfies the debt in its entirety, the creditor cannot maintain its action against the rest of the debtors. This will prevent a “double recovery” by the creditor.
- (d) The debtor who discharged the liability may in turn claim a proportionate share from the other debtors. The recourse available among the debtors *inter-se* does not affect the rights of the creditor.
- (e) Of salient, the mere insertion of the phrase “*joint liability*” in a judgment would not suffice to divide the liability among the debtors, unless it is expressly stated that liability is to be borne in equal or other specified proportions.
- (f) In the present case, the statutory provision relied on by the EPF Board which imposes “*joint and several liability*” for the unpaid contributions must be given full effect.

**Authors’ comments**

The Federal Court in *Edwin Cassian* draws the curtain on the superficial distinction between the phrases “*joint liability*” and “*joint and several liability*”.

By operation of law, it is for now settled that the joint liability of debtors under a court judgment would be “*joint and several*”, even in the absence of such a phrase. The creditor is thus entitled to enforce the full judgment sum against one of the several debtors, leaving the “chosen one” in solitary to recover against the other debtors.

Editor: Koay Sook Kuan

If you have any queries, please contact associate **Hooi Chung Wai** ([hcw@lh-ag.com](mailto:hcw@lh-ag.com)) or his team partner, **SM Shanmugam** ([ssm@lh-ag.com](mailto:ssm@lh-ag.com)).