

## The Evidence Act in Industrial Litigation

by David Tan Seng Keat

In adjudicating disputes within its scope of reference, the Industrial Court is charged under s 30 of the Industrial Relations Act 1967 with the duty to:

“... act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form”.<sup>1</sup>

Yet, cases heard before the Industrial Court are adversarial in nature, and follow in the style of the civil courts in so far as the filing of pleadings, production of documentary and oral evidence and the cross-examination of witnesses are concerned.

The question therefore arises whether the *technicalities* to be disregarded could include the law of evidence and the rules governing how evidence is adduced and assessed.

In 2002, the Court of Appeal appeared to take an affirmative position, when it observed as follows:

“... it is quite clear to us that the Industrial Court should not be burdened with the technicalities regarding the standard of proof, the rules of evidence and procedure that are applied in a court

of law. The Industrial Court should be allowed to conduct its proceedings as a ‘court of arbitration’, and be more flexible in arriving at its decision, so long as it gives special regard to substantial merits and decide a case in accordance with equity and good conscience”.<sup>2</sup>

The Industrial Court has itself taken the view that, given its historical origin as the Industrial Arbitration Tribunal, the Evidence Act<sup>3</sup> did not apply to it by virtue of s 2 of the Act, which excludes from its ambit “any proceedings before an arbitrator”.<sup>4</sup>

The Industrial Court went on “to take cognisance of the principles underlying the provisions found in the Evidence Act, which are founded in experience, logic and common sense”,<sup>5</sup> while ultimately concluding that it was nevertheless empowered to admit evidence which would be inadmissible under the Evidence Act.

This has been the position taken by the Industrial Court — to hold itself unfettered by the strict laws of evidence, if not its spirit. It has on numerous occasions<sup>6</sup> held that it could accept hearsay and secondary evidence “*where the circumstances warrant its admission subject to relevance, weight and fairness*”,<sup>7</sup> with one chairman saying:

“I would go further to say that the Evidence Act 1950 does not apply to the Industrial Court but that only the underlying principles codified in the Act applies.”<sup>8</sup>

1 Industrial Relations Act 1967, s 30(5)

2 *Telekom Malaysia Kawasan Utara v Krishnan Kutty Sanguni Nair & Anor* [2002] 3 CLJ 314 at 322, per Abdul Hamid Mohamad JCA

3 Evidence Act 1950 [Act 56]

4 *Rosli Yahya v Affin Bank Berhad* [2007] 3 ILR 474 at 482-483

5 *Ibid*, at 483

6 See, for example, *Gauri Narayanasamy v Alliance Bank (M) Berhad* (Award No 1412 of 2010); *Suresh Raj P Thangaveloo v Allied Pickfords (M) Sdn Bhd* (Award No 703 of 2015); *Peter @ Patrose Gp Lazarus v Sankyu (M) Sdn Bhd* [2016] 3 ILR 143; *Santokh Singh Visaka Singh v Cashflow Horison Sdn Bhd* [2012] 3 ILR 59; and *Mohd Saufi Ahmad Rozali & Anor v Puspakom Sdn Bhd* [2013] 2 ILR 144

7 *Gauri v Alliance*, *supra*, n 5 at p 7

8 *Santokh Singh Visaka Singh v Cashflow Horison Sdn Bhd* [2012] 3 ILR 59 at 64, per Rajendran Nayagam

### **Hwa Tai Industries<sup>9</sup>**

In 2011, the High Court departed from this view, taking the position that 'the clear provision of section 30(5) is of general application and is in no way prohibiting the application of the Evidence Act' to the Industrial Court.<sup>10</sup>

The High Court expressly rejected the argument that the *technicalities* to be disregarded under s 30 should include the provisions of the Evidence Act, and observed that:

"The Evidence Act contains general provisions dealing with the relevancy of facts, admissibility of evidence, and the weight to be attached to such evidence. It is not, to my mind, a handbook for procedure. It deals with the law of evidence. Section 30(5) merely states that the courts should not be too concerned with technicalities and form. It does not in any way override the application of the Evidence Act. There being no other legislation in force relating to evidence in the Industrial Court, it must be taken as a rule of necessity that the Evidence Act should apply."<sup>11</sup>

The High Court concluded that it would be "*inconceivable that the Evidence Act in its entirety has no application to industrial jurisdictions*".<sup>12</sup>

### **Measat Broadcast<sup>13</sup>**

The applicability of the Evidence Act was further underscored in *Measat Broadcast*, which provides that:

"Judgments, orders or decrees ... are irrelevant unless the existence of such judgment, order or decree is a fact in issue or is relevant under some other provision of this Act."<sup>14</sup>

Essentially, s 43 prevents the findings of fact arrived at by one court in one case from being used in another case.

The High Court found s 43 to be applicable to Industrial Court awards, concluding that the Industrial Court was hearing sworn testimony from witnesses and was entrusted to:

"... exercise its own independent judgment because the fact in issue in each case must be proved independently".<sup>15</sup>

The Court of Appeal, in affirming the decision,<sup>16</sup> observed that the Industrial Court, having relied upon the factual findings of another court in making its own decision, had committed a breach of natural justice by denying parties the opportunity to cross-examine witnesses and challenge relevant evidence.

Adherence to the law of evidence was therefore seen as inseparable from the discharge of the Industrial Court's statutory duty.

### **A flexible approach, for what it is worth**

Following the latest decision of the Court of Appeal, it seems clear that the mandate to act without regard to

9 *Hwa Tai Industries Berhad v Mohd Fairuz Bala bin Abdullah & Anor* [2011] 1 LNS 1387

10 *Ibid*, at p 10

11 *Id*, at p 12

12 *Id*, at p 11

13 *Measat Broadcast Systems Sdn Bhd v Woo Chee Seong & Ors* (Application for Judicial Review No 25-39-03/2016)

14 Evidence Act 1950, s 43

15 *Supra*, n 12 at para 193

16 *Woo Chee Seong & Anor v Measat Broadcast Systems Sdn Bhd* (Court of Appeal Civil Appeal No W-02(A)-944-05/2017)

technicalities and legal form cannot be construed as a licence to disregard the law of evidence.

It is therefore submitted that s 30(5) of the Industrial Relations Act 1967 should be read as allowing the Industrial Court to be flexible in its proceedings, permitting it to take evidence *de bene esse* (“for what it is worth”) in the course of proceedings, before conducting a critical assessment of the admissibility of that evidence. As observed by the House of Lords:

“The question of admissibility relates not to what the judge or judges see or read but what they take into account in making a substantive decision and what they treat as legitimate evidence for the parties to use in argument.”<sup>17</sup>

In short, it is open for the Industrial Court to dispense with the technicalities and formalities of evidential objections during proceedings before it, and to hearken to the law of evidence in making its decisions. This approach accords with the Industrial Court’s statutory mandate while upholding the foundational goal of evidence law — ensuring compliance with natural justice and procedural fairness.

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17 *R v Mirza* [2004] UKHL 2 at para 146, per Lord Hobhouse of Woodborough