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MUSHARAKA VENTURE MANAGEMENT SDN BHD v LUQMAN ZULHUSNI BIN ISMAEL & ORS

CaseAnalysis
| [2022] MLJU 2868

Musharaka Venture Management Sdn Bhd v Luqman Zulhusni bin Ismael & Ors [2022] MLJU 2868

Malayan Law Journal Unreported

HIGH COURT (KUALA LUMPUR)

AHMAD BACHE J

GUAMAN SIVILNO WA-22NCVC-375-05/2019

30 September 2022

Afifi Ahmad (with Nabilla bt Rosli and Balqis Shahril) (Azrul Afifi & Azuan) for the appellant/defendant. Mastura bt Ma'sud (with James Ng, Tengku Hisham and Nurul Eizatul) (Arifin & Partners) for the respondent/plaintiff.

Ahmad Bache J:

GROUNDS OF JUDGMENT

A. INTRODUCTION

[1] The Plaintiff has filed a claim against its two (2) former employees, namely the First and Second Defendants for breach of their fiduciary duties and fidelity towards the Plaintiff when they were employed and working with the Plaintiff. The Plaintiff had also pursued against the Third Defendant in pursuant of their breach.

[2] The Plaintiff has also filed a claim against the First and Second Defendants for having breached their duties as directors of the Plaintiff.

[3] The Defendants had filed a counterclaim against the Plaintiff.

[4] At the end of the trial, after hearing submissions from both parties, this Court ruled that, on a balance of probabilities, the Plaintiff had succeeded in their claims but damages are to be assessed.

[5] This Court also ruled that the Defendants had failed to prove their counterclaims on a balance of probabilities with costs.

[6] Dissatisfied, the Defendants had filed a Notice of Appeal against both the decisions of this Court.

[7] Herewith are the grounds for that decision.

B. BACKGROUND FACTS

[8] The Plaintiff (**"MVM"**) is in the business of solution/venture capital and private equity and was incorporated on 12.1.2007. The Plaintiff was managed by his founder and Managing Director, Nur Idzam Yaakub (**"Idzam/SP1"**) and Nik Muhamad Zaki (**"Nik/SP2"**).

[9] The First Defendant/SD1/Luqman was MVM's Investment Manager and he also held himself out as MVM's "Investment Director" (as found at **pages 83, 89 & 90 of B**).

[10] The Second Defendant/SD2/Hairul was MVM's employee as well as MVM's Director.

[11] According to Nur Idzam (SP1), he nurtured, mentored and taught about venture capital and private equity industry to both of them.

[12] Both the First Defendant and Second Defendant had worked with Nur Idzam for more than 11 years prior to this suit.

[13] In early 2015, MVM had negotiation with Warisan Harta Sabah (**"WHS"**) to establish a joint venture (**"JV"**) investment scheme in which both of them (SD1 and SD2) were assigned to handle the same. However, by 6.5.2015 MVM (Plaintiff)/Nur Idzam/SP1 did not receive any feedback from both the First and the Second Defendant regarding the proposed JV.

[14] It was only in July 2018 that Nur Idzam realized that both Defendants had, without MVM's consent, formed Quantum Desire (the Third Defendant) and became Directors on 21.9.2015 whose business entails the same activities with the Plaintiff. Hence the suit.

C. THE LAW: FIDUCIARY AND/OR FIDELITY DUTIES

[15] The duties owed by directors to a company are dictated under common law and the provisions under the **Companies Act 2016 ("the Act")**. Under *Section 213* of the Act:

"Duties and responsibilities of directors

213. (1) A director of a company shall at all times exercise his powers in accordance with this Act, for a proper purpose and in good faith in the best interest of the company.

(2) A director of a company shall exercise reasonable care, skill and diligence with —

(a) *The knowledge, skill and experience which may reasonably be expected of a director having the same responsibilities; and*

(b) *Any additional knowledge, skill and experience which the director in fact has.*

(3) A director who contravenes this section commits an offence and shall, on conviction, be liable to imprisonment for a term not exceeding five years or to a fine not exceeding three million ringgit or to both."

[16] Further, *Section 218* of the Act makes it clear that a director or officer of a company shall not, without the consent or ratification of a general meeting do the following acts:

*"**Prohibition against improper use of property, position, etc**.*

218. (1) A director or officer of a company shall not, without the consent or ratification of a general meeting —

(a) *use the property of the company;*

(b) *use any information acquired by virtue of his position as a director or officer of the company;*

(c) *use his position as such director or officer:*

(d) *use any opportunity of the company which he became aware of, in the performance of his functions as the director or officer of the company; or*

(e) *engage in business which is in competition with the company,*

to gain directly or indirectly, a benefit for himself or any other person, or cause detriment to the company.

(2) Any person who contravenes this section commits an offence and shall, on conviction, be liable to imprisonment for a term not exceeding five years or a fine not exceeding three million ringgit or to both."

D. ANALYSIS AND FINDING OF THE COURT

Issues

[17] There are 2 main issues involved as follows:

(a) whether the First and Second Defendant had breached their fiduciary and fidelity duties; and

(b) whether the First and Second Defendants actions were in conflict or in competition with the Plaintiff's interests and corollary to that, contravened the provisions under the Companies Act 2016 (**page 8 of Bundle A**).

Analysis

[18] This Court had heard the evidence through the testimonies of witnesses for the Plaintiff and the Defendant which unfolded the following facts/narratives:

[19] In 2015, MVM/Plaintiff started negotiations and discussions with Warisan Harta Sabah (**"WHS"**) to establish a joint venture investment fund management company to manage an investment from investors between RM50 million to RM100 million (**"JV project"**). Luqman/(SD1) and Hairul/(SD2) were tasked/assigned and entrusted by MVM to handle the proposal and negotiations with WHS for the JV project. Both Luqman and Hairul were expected to report and update Nur Idzam/(SP1) on the status and progress of the JV project with WHS. It was in evidence that from 29.1.2015 onwards, there were numerous discussions that MVM/Plaintiff had with WHS's representative with one, Joehary Ismail (**"Joe"**).

[20] During the negotiation and discussions, presentation slides, the Memorandum of Understanding (**"MOU"**) and Draft JV Agreement between MVM and WHS were prepared and sent via emails to WHS.

[21] It was in evidence that after the last email from Luqman to WHS's representative, Kelsie on 3.5.2015, there was no further email between MVM and WHS and so too no further progress or update from Luqman and Hairul to Idzam or MVM on the JV project.

[22] Nur Idzam (SP1) trusted Luqman and Hairul wholeheartedly and did not suspect anything amiss until 3 years later in July 2018, when Nur Idzam discovered their treacherous conduct. Luqman and Hairul, without Idzam's or MVM's knowledge and consent, had became directors on 21.9.2015 and shareholders of Quantum Desire/the Third Defendant/(**"QD"**).

[23] Nur Idzam had also discovered that (Quantum Desire/the Third Defendant) and WHS had ultimately formed "WQM" on 30.6.2017 in which Luqman became a director on 19.7.2017 and Hairul became a director on 30.6.2017 together with Joe of WHS on 30.6.2017.

[24] Finally, Nur Idzam (SP1) discovered that QD and WHS are also the shareholders of "WQM".

[25] Idzam gave evidence that he asked Luqman to leave MVM on 31.7.2018 after he discovered Luqman's treachery and that Hairul tendered his resignation as a director in MVM on 6.3.2018 and SSM report shows that he resigned as director on 25.1.2019.

Ruling/Finding

[26] This Court has heard the testimonies of the Plaintiff's witnesses i.e SP1 and SP2 and also that of the Defendants and has also perused the contemporaneous documents/tendered. This Court ruled that, the events (including the acts of the First and the Second Defendant) above took place while both of them were still employed and working with MVM (the Plaintiff).

[27] Hence, having considered the totality of the evidence this Court ruled that whilst under the employment of the

Plaintiff, Luqman/(SD1) and Hairul/(SD2) had covertly joined QD and had worked together with Joe from WHS. This Court also ruled that both SD1 and SD2 had used QD as a vehicle to hijack the JV project from MVM.

[28] This Court need not have to venture too far. Suffice for this Court to rule that in essence the 3 of them namely Luqman/(the First Defendant), Hairul/(the Second Defendant) and Joe had set up a competing company (WQM) whilst both of them were still working with MVM/(Plaintiff).

[29] The First and the Second Defendants argued that they formed QD (Third Defendant) as their preparation and planning for their future. During cross examination, Hairul gave evidence that the shareholder's name which appeared in the SSM report on QD is that of his wife.

[30] Both Luqman/(SD1) and Hairul/(SD2) alleged that there was no competition with MVM as their company (WQM) handles private equity fund whereas MVM handles venture capital fund.

[31] However, this Court agreed with the Plaintiff that testimonies and contemporaneous documents produced at the trial showed that both MVM and WQM handle both Islamic private equity and venture capital investment funds. As found at pages **83 & 90 of Bundle B**, Luqman, as an Investment Director, had described clearly that MVM operates both Islamic Private Equity and Venture Capital.

[32] This Court also observed that even WQM's website clearly shows that WQM engages in Islamic Private Equity and Venture Capital. Further, Joe had confirmed that the MOU was already signed by WHS for a private equity investment with MVM, hence confirming that MVM engages in private equity fund as well. A perusal of MVM's Memorandum of Association shows that MVM also engages in both Islamic private equity and venture capital funds.

[33] Hence this Court ruled that, both MVM and WQM have the same nature of business (i.e Islamic Investment Funds) dealing and promoting private equity and venture capital funds.

[34] Hairul/SD2 disloyalty towards the Plaintiff can further be seen when SD2 gave evidence that he was also a director in other companies and alleged that Nur Idzam (SP1) was aware of that and had no objection to Hairul's said appointment.

[35] However, those companies that Nur Idzam had no objection to was where Hairul was appointed as a nominee Director or nominee shareholder in MVM's own group of companies.

[36] Hence, for the above reasons, this Court ruled that the First and the Second Defendant (namely Luqman and Hairul) had acted in bad faith *(mala fide)* because they had used MVM's office, business relationship, resources, expertise and knowledge to work for QD (instead of MVM). The main purpose was to hijack the proposed JV project with WHS and formed WQM.

[37] It then begs the question as to how the Court can come to a conclusion on the *mala fide* acts of both the First and Second Defendant together with Joehary Ismail @ Joe (SD3).

[38] After hearing testimonies from witnesses and taking into consideration of the overall evidence, this Court ruled that Luqman's *mala fide* act can be seen when Luqman joined QD as a Director on 21.9.2015, which is shortly after his last update to Nur Idzam on the JV project with WHS on 6.5.2015. Hairul's *mala fide* act was when he admitted that Joe had influenced him and Luqman to leave MVM and set up their own company.

[39] Joe (SD3) also has admitted his *mala fide* act. During Joe's cross examination, he agreed that to form his own company and set up a JV company with WHS would be a conflict of interest and a wrongdoing on his part.

[40] Joe (SD3) had testified as follows at page 62 of the Notes of Proceedings of 7.4.2022:

> *"MM Ok. Saya katakan kapada En Joe ya, sebagai Chief Investment Officer di Syarikat Warisan Harta Sabah (WHS), En Joe memang tidak dibenarkan untuk menubuhkan apa-apa syarikat untuk kepentingan peribadi En Joe, betul?*
>
> *JOEHARY Betul. Ya betul, Yang Arif.*
>
> *MM Ya. Sebab kalau, kalau En Joe buat itu. breach of fiduciary duty lah, betul?*

JOEHARY Ya, understand. Ya, betul, Yang Arif.

MM Jadi En Joe, oleh kerana En Joe ini tidak boleh menubuhkan syarikat untuk kepentingan peribadi En Joe ya.

JOEHARY Ya."

Joe also admitted during re-examination that it was he who encouraged Luqman and Hairul to set up their own company.

[41] Joe also gave evidence that he considered Luqman and Hairul as experts and experienced persons in the industry hence, he chose QD (namely Luqman and Hairul) (the First and Second Defendant) over MVM (namely Nur Idzam/PW1).

[42] At the end of the day, this Court ruled that, the 2 of them as employees i.e Luqman/(SD1) and Hairul/(SD2) together with Joe had worked together and used SD1's and SD2's company, QD to hijack the proposed joint venture project with WHS from MVM and then formed a new joint venture company between QD and WHS on 30.6.2017 and called it WQM. This is very wrong. Even if this Court was wrong in founding that the purpose was to hijack the proposed joint venture project, the attitudes and actions by both the Defendants were wrong in statutes and in common law.

[43] In the case ***of** Ang Bee Hong v. HSBC Bank Malaysia Berhad* [2017] 1 ILR 537, it was held that:

> ***"The servant stands in a fiduciary relation***
>
> *The relation between an employer and an employee is of fiduciary character. The word "fiduciary" means belonging to trust or trusteeship. It means that whenever an employer engages a worker he puts trust that the worker will faithfully discharge the service and protect and further the interest of the employer..."*

[44] As Luqman and Hairul (the First and Second Defendant) had joined and formed their own companies (QD and WQM) whilst still working with MVM (i.e as employee) and that under the law (as stated above), they as employees ought not to conduct or be involved in any other business ***during or outside*** working hours, more so that may pose a conflict of interest with the company nor used office facilities or resources to conduct their other businesses, hence they have committed a breach of fiduciary duties.

[45] In the case of *Federal Auto Cars Sdn Bhd v. Roslan Zahari Effendi* [2000] 1 ILR 636 referred by the Plaintiff, the court held that:

> *"There was conflict in other form, such as using the time an employee is paid for to carry out his own business activities or using the facilities paid for by the employer to further his business activities... Without going into the legal jargon, the principles of natural justice and so on, common sense would show that what the claimant admitted he had done, was plainly unacceptable and wrong as an employee. A person who tries to serve two masters at the same time will fail in both enterprises."*

[46] Likewise, Luqman's and Hairul's, the First and Second Defendant's conduct in receiving salaries from MVM and using MVM's office, contacts, project/business information and resources whilst at the same time advancing their own company's (QD), objective (that may includes plotting to take over the JV project) was/is plainly unacceptable and wrong.

[47] It is trite that while in the employment of a company, an employee must not operate any business of his/her own similar to that of the company's. This is to avoid any kind of competition or conflict of interest with his/her employer.

[48] Also, it is trite that every employee ought to know that competing with his/her employer is not condoned by law even if there is no specific rule, term or policy in the company to that effect as illustrated in the case of *Leong Peng Yoong & Ors v. Venuganan Muniandy* [2007] 1 ILR 30, referred to by the Plaintiff.

[49] In that case, the claimant was running two (2) companies of his own while in the employment of the

Respondents and one of the companies was running a concurrent business with that of the Respondents giving rise to a conflict of interest. The Industrial Court held:

"...the due or faithful discharge of an employee's duty to his employer is the fundamental and paramount contribution by the employee in his employment for which he should not act inconsistent with the interest of the employer. Running a company which has concurrent business with the employer entails a clear conflict of interest which a faithful employee should avoid at all costs".

[50] In so far, as the 2 being Directors are concerned, it is clear that under Section 218, of the *Companies Act 216* that Directors should not place himself in competition with his company. As a Director, the position demands the person to act honestly and with utmost good faith for the best interest and benefit of the company. This Court agreed with the submission of the Plaintiff that the Director should not put his personal interests, family, friendship over those of the company's interest. This Court agreed with the Plaintiff that the role of a Director is likened to that of a trustee who owes a **duty of fidelity, loyalty and good faith** to the beneficiaries of that trust.

[51] This Court also ruled that the conduct of Luqman and Hairul tantamount to a breach of trust, and breach of fiduciary and fidelity duties as in the case of *Industrial Development Consultants Ltd v. Cooley* *[1972] 2 All ER 162* referred to by the Plaintiff. In that case the Defendant was a Managing Director who resigned from that position to take advantage of a contract he had secured for himself while negotiating originally for the company. The Defendant had realized that he had a good chance to clinch the project for himself and he lied to his employer citing ill health to leave the company. He was made accountable by the Court to the company for the profits he would derive from that contract.

[52] Amongst others the Court held:

"Held (i) ... He was under a duty therefore to disclose all information which he received in the course of his dealings with the gas board. Instead he had embarked on a deliberate course of conduct which had put his personal interests as a potential contracting party with the gas board, in direct conflict with his pre-existing and continuing duty as managing director to the plaintiffs. He was therefore in breach of his fiduciary duty to the plaintiffs in failing to pass on to them all the relevant information received in the course of his dealings with the gas board and in guarding it for his own personal purposes and profit (see page 173 h to page 174 c and page 175 c to e, post)."

(ii) Because of his breach of duty, the defendant was received or would receive under the contract with the gas board. The question whether the benefit of the contract would have been obtained for the plaintiffs but for the defendant's breach of fiduciary duty was irrelevant. It is therefore irrelevant that, as a result of the order to account, the plaintiffs would receive a benefit which they would not otherwise have received (see p 175 h and j and p 176 d and e, post).

[53] Regarding Luqman's (the First Defendant) position, he denied that he was a Director and hence not liable. Based on the documents produced at the trial and Luqman's cross examination, and supporting evidence from Nur Idzam (SP1), this Court ruled that it was established that Luqman had represented himself as a Director.

[54] This was Luqman's evidence regarding his position under cross examination.

"MM Ya, awak telah letak sini investment director. Jadi, saya katakan sememangnya anda adalah seorang pengarah ***Musharaka****.*

Luqman Ok."

[55] Further, Section 2 (1) of the Act provides that:

"director" includes any person occupying the position of director of a corporation by whatever name called and includes a person in accordance with whose directions or instructions the majority of directors of a corporation are accustomed to act and an alternate or substitute director."

[56] In **Re Hydrodam (Corby) Ltd 1994 2 BCLC 180**, the Court held that:

"A de facto director is a person who assumes to act as a director. He is held out as a director by the company, and claims and purports to be a director, although never actually or validly appointed as such".

See also *Soh Chee Gee v. Syn Tai Hung Trading Sdn Bhd* [2019] 2 MLJ 379**.**

[57] Hence under the law (Company Law, Capital Market and Common Law), individuals who represent, perform or occupy the functions of Directors despite not being legally appointed, registered, or qualified as one can be found liable. As this matter/dispute involved investments and capital market, it comes under *Section 317 A* of the *Capital Market Services Act 2007 (CMSA)*.

[58] Hence, both Luqman, the First Defendant and Hairul, the Second Defendant are liable, both as employees and as Directors. To business whilst being employed by the Plaintiff. More so, when such business is the same business with the business of the company they are serving.

Other Issues

[59] Even though the Defendants alleged that they were no letter of appointment given to them individually, this Court upon examining the evidence in totality agreed with SP1 that there existed but were lost (purportedly carted away by Hairul who was in charge of Finance and Human Resource). Logic dictates that every employee who reported for work must have received a letter of offer and appointment with the terms of employment etc. being stipulated i.e contract of employment. The denial of both the Defendants on this matter is untenable and against logic, as those informations and letters are necessary for EPF contribution and Income Tax purposes especially.

[60] Regarding the purported WHS's letter and Nik's (SP2) letter dated 28.3.2016, this Court ruled that those 2 letters were introduced by the Defendants for reasons best known to them, inspite being disputed by the Plaintiff. This Court ruled that they are self-serving evidence that need to be corroborated. However, no credible evidence were adduced by both Defendants to corroborate the contents of both letters. In the first place, the contents of Nik's letter dated 28.3.2016 was never accepted by the Court from the start as it is subjected to proof. Further, it is trite that a self-serving testimony carries little or no weight in the absence of some corroborative evidence. See *Damansara Realty (Pahang) Sdn Bhd v. Om Cahaya Mineral Asia Bhd* [2021] 5 MLJ 1.

[61] Be that as it may, this Court had already found that both of them are with respect, dishonest employees and Directors whose actions should not be condoned.

Counterclaims by the Defendants

[62] The Defendants had also filed counterclaims against the Plaintiff. The counterclaims are as follows:

"(a) Ganti rugi am;

(b) Ganti rugi teladan;

(c) Faedah pra-penghakiman atas ganti rugi dari tarikh pemfailan writ saman di sini hingga tarikh penghakiman pada kadar 5% setahun menurut Seksyen 11 Akta Undang- Undang Sivil 1956 *atau, pada kadar dan bagi tempoh yang difikirkan sesr ai oleh Mahkamah Yang Mulia ini;*

(d) Faedah pasca-penghakiman menurut Aturan 12 Kaedah 12 Kaedah-Kaedah Mahkamah 2012 *ke atas perenggan kecil-perenggan kecil (a), (b) dan (c) di atas pada kadar 5% setahun dari tarikh penghakiman sehingga penyelesaian;*

(e) Kos; dan

(f) Relif-relif selanjutnya atau yang lain bagi Defendan-Defendan yang Mahkamah Yang Mulia ini berpendapatan sesuai dan patut."

[63] Having heard the evidence and submissions from parties, this Court ruled that the Defendants failed to prove their counterclaims on a balance of probabilities. This finding of the Court are also related to the Court's earlier finding on their being liable for their wrong attitudes and conducts.

[64] This Court ruled that it was MVM/Plaintiff who had been grossly wronged by the Defendants' conduct which led to a big loss of business to MVM but no loses on the part of the Defendants. Hence, they are not entitled for any damages. In so far as the Plaintiff is concerned by filing this suit, all that MVM seeks for, is to recover their losses which they legally deserve.

[65] The Defendants also failed to prove the circumstances outlined in the case of *Rookes v. Barnard* [1964] 1 All ER 367 to justify their claim for exemplary damages such as to prove oppressive or arbitrary actions by the Plaintiff, amongst others.

[66] The Defendants also failed to prove that MVM had acted maliciously or having bad faith to damage the Defendants' business or to tarnish their reputation, as claimed and submitted by the Defendants. In fact, the Plaintiff had abandoned prayers (c) and (d), hence proving their good faith, and a gesture of goodwill.

[67] This Court also ruled that as special damages were not pleaded and particularized and strictly proved by the Defendants, they are not entitled for the same.

[68] The Federal Court in *Ong Ah Long v. Dr. S Underwood* [1983] 2 MLJ 324, held that:

> *"It is a well-established principle that special damages in contrast to general damages, have to be specifically pleaded and strictly proved. They are recoverable only where they can be included in the proper measure of damages and are not too remote."*

E. CONCLUSION

[69] Premised on the foregoing reasons, in the upshot this Court ruled that the Plaintiff had successfully proved its claim on a balance of probability. Prayers (a) (b) (e) (f) are allowed and subject to be assessed. Prayers (c) and (d) were disallowed as the Plaintiff has abandoned them. The Defendants' counterclaims are without merit and hence dismissed with costs of RM45,000.00.

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