IN THE HIGH COURT IN MALAYA AT KUALA LUMPUR
IN THE STATE OF WILAYAH PERSEKUTUAN
[CIVIL SUIT NO. WA-22NCvC-375-05/2019]

BETWEEN

Musharaka Venture Management Sdn Bhd
[Company No.: 759067-M] **... PLAINTIFF**

AND

1. **Luqman Zulhusni Ismael**
   [Identity Card No.: 820924145853]

2. **Hairul Hisham Mohamad Soradi**
   [Identity Card No.: 820919105515]

3. **Quantum Desire Sdn Bhd**
   [Company No.: 1051567-D] **... DEFENDANTS**

Evidence

GROUNDS OF DECISION

Introduction

[1] In the course of assessment of damages after trial, and after the filing of written submissions, and in the course of analyzing the evidence submitted, this Court had made an order for the production of several documents pursuant to **section 165 of the Evidence Act** to assist the Court in its deliberations. Dissatisfied the defendants appealed. Whether it is appealable would be for the consideration of the Court of Appeal. Meanwhile, these are the grounds for the ruling or decision made and, meanwhile, the assessment of damages continues.

Brief background

[2] On 20.7.2022 after a full trial on liability, Justice Ahmad Bin Bache allowed the plaintiff's claim against all the three defendants for inter alia breach of fiduciary duties and misuse of the plaintiff's information and assets by the first and second defendants, with damages to be assessed. Similarly, costs ordered on a solicitor client basis was to be assessed. The three defendants are:

i) Luqman Zulhusni Bin Ismael (No. KP 820924-14-5833) ("Luqman");

ii) Hairul Hisham Bin Mohamad Soradi (No. KP 820919-10-5515) ("Hisham"); and

iii) Quantum Desire Sdn Bhd (No. Syarikat: 1051567-D) ("QDSB").

[3] The defendants failed in their appeal to the Court of Appeal against the judgment on liability with the Court of Appeal dismissing their appeal with costs on 8.8.2023 but varying the order for costs to be assessed on an indemnity basis under **Order 59 rule 16 (4) of the Rules of Court 2012 ("ROC")**. Their application for leave to appeal to the Federal Court was dismissed on 16.1.2024.

[4] Upon Justice Ahmad Bin Bache's transfer to the Criminal Division, I took over the management of this action on 28.2.2023, and in due course, the assessment of damages came before me. Proceedings commenced on 15.11.2023 and continued on 12.1.2024 with the plaintiff calling one witness. The defendants were to produce two witnesses, Luqman and Hisham, but decided to produce only Luqman. Thereafter, the parties were directed to put in their submissions in writing with 8.3.2024 scheduled for clarification and or decision.

[5] Whilst evaluating the evidence and the submissions filed by the parties, I observed that the plaintiff's claim for damages of RM54 million was premised upon documents which it asserted the

defendants have but were not produced. The plaintiff called upon this Court to make an adverse inference against the defendants for their non-production of these documents.

[6] I was not comfortable to make such an adverse inference because the amount being claimed is huge. From the documents produced thus far, the amount claimable may be lower, leading me to the provisional view that the production of the documents would assist the Court to make a more accurate assessment. Further, I had been informed by Mr. Afifi bin Ahmad, learned counsel for the defendants that the reason the defendants decided not to call Hisham to testify on 12.1.2024 was because he was told that Hisham is down with diarrhea and could not attend Court. An adjournment would allow Hisham to be produced, if the defendants are so minded to do so.

[7] In my considered view, the justice of the case demands that the damages claimed be assessed as accurately as is possible. Thus, on 8.3.2024, I had invoked my powers under **section 165 of the Evidence Act 1950** and called upon the defendants to produce the joint venture agreement (together with the annexures mentioned therein), which the third defendant had entered into with a third party (then known as Warisan Harta Sabah Sdn Bhd) to the alleged financial detriment of the plaintiff. From the assertions made by the plaintiff, these documents would provide the information to assist in the calculation of its losses. **Section 165** provides as follows:

> *"165. Judge's power to put questions or order production Act 56 Evidence Act 1950*
>
> *Part III PRODUCTION AND EFFECT OF EVIDENCE*
>
> *ChapterXEXAMINATION OF WITNESSES*
>
> *165. Judge's power to put questions or order production*

> ***The Judge may, in order to discover or to obtain proper proof of relevant facts, ask any question he pleases, in any form at any time****, of any witness or of the parties, about any fact relevant or irrelevant;* ***and may order the production of any document or thing;*** *and neither the parties nor their agents shall be entitled to make any objection to any such question or order, nor, without the leave of the court, to cross-examine any witness upon any answer given in reply to any such question:*
>
> *Provided that-*
>
> (i) *the judgment must be based upon facts declared by this Act to be relevant and duly proved;*
>
> (ii) *this section shall not authorize any Judge to compel any witness to answer any question or to produce any document which the witness would be entitled to refuse to answer or produce under sections 121 to 131 if the question were asked or the document were called for by the adverse party; nor shall the Judge ask any question which it would be improper for any other person to ask under section 148 or 149; nor shall he dispense with the primary evidence of any document, except in the cases hereinbefore excepted."*

[8] The order for the production of the said documents would provide the opportunity for Hisham to recover from his bout of diarrhea, and testify should he so wish, which will also assist the defendants to avoid any adverse inference to be drawn against him for not taking the witness stand. The order for production is to my mind neutral to the interests of both parties, made to assist the court in its assessment of damages.

[9] In answer to the order made by me on 8.3.2024 for the production of the said document, Hisham deposed an affidavit (Encl 141) filed on

8.4.2024 asserting that the document sought is with a third party, Warisan Harta Sabah Sdn Bhd (now known as Qhazanah Quantum Sdn Bhd) and despite his requests, he was not able to secure the cooperation from Warisan Harta Sabah Sdn Bhd to produce the same.

[10] Hisham's averments were repeated by learned counsel, Mr. Affifi, when the parties attended Court on 14.6.2024 in continuation of the assessment of damages proceedings. As Warisan Harta Sabah Sdn Bhd is not a party to this action, I was not minded to make an order against a non-party, hence leaving it to the plaintiff to apply to have a subpoena issued for the production of the said document, if it so pleases. The assessment of damages was then adjourned to 24.7.2024.

[11] Upon the plaintiff's application, a subpoena (Encl 147) was issued to the Managing Director of Qhazanah Quantum Sdn Bhd. Upon him taking ill, the assessment of damages proceedings scheduled for 24.7.2024 was adjourned to 31.7.2024. On this date, one Puan Zazurainny @ Zaz Binti Zainuddin who is the Head of the Legal Department of Qhazanah Sabah Bhd (formerly known as Warisan Harta Sabah Sdn Bhd) attended in obedience to the subpoena.

Objections by the defendants

[12] However, before Puan Zazurainny @ Zaz Binti Zainuddin could be called to the witness stand, learned counsel for the defendants raised an objection. He asserted that the assessment of damages proceedings has concluded and that if the plaintiff so wishes to adduce further evidence, the plaintiff has to apply to re-open its case. He asserted that such a procedural step is important because if an application is made, which he says can be made orally, the defendants can then oppose it and upon disposal, its outcome can then be taken up to the Court of Appeal.

[13] Learned counsel for the plaintiff strongly objected to the position taken by learned counsel for the defendants but to my mind, the plaintiff, in abundance of caution, made an oral application as requested. Learned counsel for the defendants in opposing this oral application cited and relied upon *Prince Court Medical Centre Sdn Bhd v. Germguard Technologies (M) Sdn Bhd* [2016] 4 MLJ 1 (CA) and *Tan Kah Khiam v. Liew Chin Chuan* [2007] 2 MLJ 445 (CA) to assert that the plaintiff ought not be allowed to re-open its case, to repair its case, failing which they would be prejudiced and there will be no end to litigation. Learned counsel added that it is not for the Court to direct the plaintiff on how to prepare its case and that **section 165 of the Evidence Act 1950** cannot be invoked to re-open a case.

Court's analysis and findings

[14] In my considered view, the assessment of damages was not re-opened by the plaintiff. Instead, the production of the documents was sought by the Court. The assessment of damages has yet to conclude with the pronouncement of judgment. Instead, it is ongoing. The production of the documents was to assist the Court to assess damages based on evidence which the records show that the defendants ought to have. That the production was ultimately made pursuant to a subpoena issued by the Court does not make it any less an order made by the Court. After all, a subpoena carries with it the majesty of the Court, non-compliance of which, may see the issuance of a warrant of arrest and the defaulting party held in contempt of court.

[15] The oral application made by the plaintiff and opposed by the defendants does not convert the production of the documents sought by the Court to one made as a result of the plaintiff seeking to *"rectify, repair or cover up any loophole"* in its case as was held in *Prince Court (supra)*. The case of *Prince Court (supra)* is readily distinguishable because in Prince Court:

i) it was not the Court who sought for the production of a document. Instead it was the appellant (defendant) who applied to reopen its case to adduce further evidence;

ii) in the appellant's application, the appellant applied for documents exhibited as Exhibits CSL-1 to CSL-22 to the affidavit of Dr Chong Su-Lin to be received in evidence for the purpose of the claim and counterclaim, and more importantly, that the appellant be granted leave pursuant to **Order 20 rule 5 of the Rules of Court 2012** to amend its defence and counterclaim; and

iii) His Lordship Abdul Rahman Sebli JCA (now CJSS) at para 9 cited with approval, the following passage of the speech of Gopal Sri Ram JCA (later FCJ) in *Tan Kah Khiam v. Liew Chin Chuan & Anor* [2007] 2 MLJ 445; [2007] 4 CLJ 715 at para 6 which says:

> *"In my judgment, the criteria for permitting a party at a trial to reopen its case for the purpose of either recalling a witness or calling fresh evidence are very different from those that govern the statutory jurisdiction of an appellate court to receive further evidence … What an applicant for further evidence at the appellate stage seeks to do is to persuade the court hearing the appellant that if the trial judge had had the further evidence before him, he may, or even would, have come to a different conclusion.* ***But that is not the position at the trial. For temporally speaking, whether the trial judge may exercise his discretion to permit the reopening of a party's case will very much depend on the stage at which the application is made. It may be more likely that discretion may be exercised at the stage where the application is made immediately after a party closes his case. But it may be less likely that*** *discretion will* ***be***

> ***favourably exercised where the application is made after the defendants have closed their case and just before the trial judge is about to pronounce his judgment. In the spectrum of factual possibilities that exist between each of these two extremes the exercise of discretion would, in my judgment, very much depend as to whether the justice of the case lies having regard to the peculiar facts and circumstances before the court."***
>
> (Emphasis added)

[16] In this case, there was no application by the plaintiff to amend its case. Instead, the trial on liability had been concluded.

[17] I was not ready to pronounce judgment on the damages claimed. In fact, I was still in the midst of perusing and evaluating the evidence including the pleadings wherein I observed that in the defendants' defence and counterclaim, they had pleaded at paragraph 34, that a joint venture was sealed between the third defendant and Warisan Harta Sabah Sdn Bhd. Under this joint venture, a company is set up called Warisan Quantum Management Sdn Bhd to manage funds from SME Corporation Malaysia to the sum of RM50,000,000.00. The defendants further pleaded that they will refer to the documents pertaining to the funds to be managed by Warisan Quantum Management Sdn Bhd.

[18] However, the several documents mentioned in the joint venture agreement were not produced. The damages claimed was pegged to this sum of RM50,000,000.00. Thus, to my mind, the justice of the case requires the production of the joint venture agreement made by the third defendant with another party to enable this Court to evaluate the claim by the plaintiffs instead of relying on a mere adverse inference to be drawn so as to award a sum which is reasonable, moderate and conventional. As was said by His Lordship, Mohd Zawawi Salleh JCA (later FCJ) in *Sambaga Valli KR*

Ponnusamy v. Datuk Bandar Kuala Lumpur and others and another appeal [2018] 1 MLJ 784 at para 11:

> "[11] *Thirdly, the assessment of damages in action in this nature does not admit of fixed rules and mathematical precision, but is a matter left to the sound discretion to the judges. The courts refuse to lay down any rules or mathematical formula by which such damages are to be assessed by judges.* ***The fairness and reasonableness of the award cannot be subjected to any recognised test or measure by any certain standard****. If the award is manifestly inadequate or excessive, or there are indications that the award was influenced by improper considerations or the mistake was too plain, the appellate court should not hesitate to remedy the trial court's error. All the courts should do are to award sums which* ***is reasonable, moderate and conventional."***

[19] Wherefore, I find the objections raised by the defendants to be without merit, and had proceeded with the continuation of the assessment of damages. This saw the documents produced through Zazurainny @ Zaz Binti Zainuddin (PW2) and I observed that one of the signatories to the joint venture agreement was the second defendant. What inferences are to be drawn have to await the completion of the assessment with judgment pronounced.

Conclusion

[20] Wherefore, on the peculiar facts of this case, and in my considered view, the justice of the case required the production of the documents sought pursuant to **section 165 of the Evidence Act 1950** and I so ordered, and the objections by the defendants thereto is misconceived and devoid of merits.

Dated: 24 SEPTEMBER 2024

(Su Tiang Joo)
Judge
High Court in Malaya at Kuala Lumpur

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