

DALAM MAHKAMAH TINGGI MALAYA DI JOHOR BAHRU

DALAM NEGERI JOHOR DARUL TA'ZIM, MALAYSIA

GUAMAN SIVIL NO: JA-22NCvC-186-11/2022

ANTARA

LIM HAN MING

(NO. K/P: 650604-01-5890)

...PLAINTIF

DAN

LIM HAN PENG

(No. K/P: 660917-01-5161)

...DEFENDAN

(melalui tindakan asal)

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...DEFENDAN

(melalui tuntutan balas)



GROUND OF JUDGMENT

[1] This is an appeal arising from the decision of this Court in dismissing the Plaintiff's application in enclosure 25 filed on 11.7.2023 pursuant to Order 24 Rule 3/Rule 7 and Rule 12 against the Defendant seeking for a list of all documents contended to be in the Defendant's possession, custody or power that would adversely affect the Defendant or the Plaintiff's case or that would support the Plaintiff's case, the list to be submitted 7 days from the date of the order of this application.

[2] In addition to this, the Plaintiff also sought for the following documents:

- a) the sale agreement of the business partnership Luck Shopping Centre (200803208229/JM0525365-A) to the third party sometime on November 2020;
- b) Form P business partnership Luck Shopping Centre (200803208229/ JM0525365-A) for the assessment year of 2009 to 2016;
- c) Form B of the Defendant for the assessment year of 2009 to 2016; and
- d) the Defendant's statement of account of Hong Leong Bank number: 07000181355 from 1.1.2011 to 31.12.2017.

Brief facts

[3] The Plaintiff and the Defendant are siblings, the Plaintiff being the eldest child that is the sister and the Defendant the second child that is a son respectively of Mr. Lim Kiang Hiong and Madam Yee Sia Moi. They have another younger brother Lim Ham Choon and the youngest is a



sister Lim Siow Hong. Both the father and mother passed away on 18.2.2021 and 2.9.2010 respectively, the father Mr. Lim Kiang Hiong died intestate.

[4] Being the eldest, the Plaintiff with the consent of the 3rd and 4th siblings on 15.11.2021 (with the Defendant objecting), applied to be the sole administrator via Saman Pemula No: JA-31NCvC-513-11/2021 (hereafter refers to as 'the OS'). For this purpose, a list of properties of the deceased comprising of the following was annexed to the OS:

- a) 25% of the partnership in Luck Shopping Centre;
- b) all parts of the land registered under GRN 283881 Lot 51681 Mukim Pulai, Daerah Johor Bahru, Negeri Johor known as No. 182, Jalan Layang 16, Taman Perling, 81200 Johor Bahru held by Desmond Lim Di Loong (IC No.: 960917-01-7057) (who is the son of the Defendant) as trustee of the deceased; and
- c) loan of RM655,000.00 to Lim Han Peng (Defendant).

[5] The deceased has no liabilities as suggested by the list prepared by the Plaintiff. A list of beneficiaries equally followed the list of properties to the OS and they being the Plaintiff, the Defendant, the 3rd and 4th child of the deceased. In the cause of the OS proceeding, the Plaintiff, the 3rd and the 4th siblings discovered that a caveat has been entered on the particular land by the Defendant via WA-KAVEAT-1878-09/2021 dated 23.2.2022 that moved the Plaintiff to issue a warning dated 17.7.2022 to the Defendant to disclose the Defendant's interest on the deceased's properties.



[6] Acting on this, appearance was entered by the Defendant and issues arising being determined by the Court hearing the OS (upon having sight of the amended statement of defence and counter-claim filed by the Defendant) to be as follows:

- a) whether the list of assets said to be that of the deceased prepared by the Plaintiff are part of the deceased's inheritance (the contention of the Defendant is that the 25% sharing of the partnership in Luck Shopping Centre was sold to a third party, the 'loan' of RM655,000.00 to the Defendant which the Defendant denies and further contends the claim is barred by Limitation Act whilst the whole of land GRN 283881 to be withdrawn from the list of assets as Desmond being the registered owner and not the deceased);
- b) whether the list of assets prepared and put forward by the Defendant are part of the deceased's inheritance and ought to be listed in the list of deceased's assets, the assets to be as follows:
 - i. a Toyota Corolla Altis 1.8(A) number JHP 1818; and
 - ii. 5,000 units of shares from Titah Development Sdn Bhd owned by the Plaintiff (the Defendant content it is held by the Plaintiff on trust to the deceased).
- c) if medical payment for the deceased by the Defendant of RM47,950.03 ought to be categorized as 'a liability' and must be listed;



- d) if the Plaintiff is fit to be authorized as 'sole-administrator' or the Defendant be made as 'co-administrator' to jointly administer the deceased's assets with the Plaintiff.

[7] The learned trial Judge of Johor Bahru High Court, rightly so, having perused the said cause papers, on 9.11.2022 applying O72 Rules of Court 2012, directed the OS to be converted to Writ having found dispute of facts that requires the case to be tried.

[8] The Defendant in objecting to this discovery application via his affidavit in reply deposed that Luck Shopping Centre including the deceased's share was sold off to a third party in November 2020 upon the deceased's retirement on 1.1.2020. As to the land registered under the Defendant's son's name i.e. Desmond said by the Plaintiff held by Desmond as trustee, the Defendant said this as an error of fact.

[9] The Plaintiff including the other 2 beneficiaries subsequently, agreed with the Defendant's proposal for the Toyota Corolla car to be included as asset and the sum RM47,950.03 to form part of the deceased's liability, this as reflected in the 'Statement of Agreed Facts'. As to 5,000 units of shares in Titah Development Sdn Bhd, the Plaintiff maintained that these shares are registered under her name as a gift to her by the deceased.

[10] Based on the Plaintiff's affidavit enclosure 36 in responding to the Defendant's affidavit in reply enclosure 28, the Plaintiff did not dispute the fact that Luck Shopping Centre partnership was sold off in November 2020 but maintained that the deceased was still a partner in that said business as the deceased's name was still reflected in the SSM search



until 12.4.2021, with the registered business of Luck Shopping Centre was only terminated on 5.10.2021.

[11] Such being the case, the Plaintiff argued that the Defendant must account for the proceeds of the deceased's 25% shares in the partnership. It is on this basis, the Plaintiff contended that the sale agreement of the partnership business becomes relevant to enable a determination on how much was the sale and the 25% entitlement of the deceased.

Court's findings

[12] For an application filed pursuant to O. 24 r.3, 7 and 12 of the Rules of Court 2012 (ROC), the test can be found set in the Supreme Court decision in **Yekambaran s/o Marimuthu v. Melayawata Steel Berhad [1994] 2 CLJ 581** where Edgar Joseph Jr. SCJ held (at p. 585):

“The essential elements for an order for discovery are threefold, namely first, there must be a "document", secondly, the document must be "relevant" and thirdly, the document must be or have been in the "possession, custody or power" of the person against whom the order for discovery is sought”.

[13] The 3 tests that must be satisfied by the Plaintiff cumulatively, will be dealt with under the respective headings below. In doing this, this Court is guided by the case authorities submitted by both parties, on the crucial perimeters or boundaries of a discovery application so that such application is not an exercise to gather information by way of a fishing expedition.



[14] Following from this, it is observed by this Court that the application filed by the Plaintiff for further relevant information must be focused on the provisions in the Rules of Court 2012 as to the extent of the information the applicant is seeking to achieve by filing this application. For this purpose, O24 r.3, 7 and 12 are produced below:

“Order for discovery (O. 24, r. 3)

3. (1) ***Subject to the provisions of this rule and of rules 4 and 8***, the Court may at any time order any party to a cause or matter (whether begun by writ, originating summons or otherwise) to give discovery by making and serving on any other party a list of the documents which are or have been in his possession, custody or power and may at the same time or subsequently also order him to make and file an affidavit verifying such a list and to serve a copy thereof on the other party.

(2) (There is no paragraph (2))

(3) (There is no paragraph (3))

(4) The documents which a party to a cause or matter may be ordered to discover under paragraph (1) are as follows:

(a) the documents on which the party relies or will rely; and

(b) the documents which could—

(i) adversely affect his own case;

(ii) adversely affect another party's case; or

(iii) support another party's case.

Order for discovery of particular documents (O. 24, r. 7)

7. (1) ***Subject to rule 8***, the Court may at any time, on the application of any party to a cause or matter, make an order requiring any other party to make an affidavit stating whether any document specified or described



in the application or any class of document so specified or described is, or has at any time been, in his possession, custody or power, and if not then in his possession, custody or power when he parted with it and what has become of it.

(2) An order may be made against a party under this rule notwithstanding that he may already have made or been required to make a list of documents or affidavit under rule 3.

(3) An application for an order under this rule shall be supported by an affidavit stating the belief of the deponent that the party from whom discovery is sought under this rule has, or at some time had, in his possession, custody or power the document, or class of document, specified or described in the application, and that it falls within one of the following descriptions:

- (a) a document on which the party relies or will rely;
- (b) a document which could—
 - (i) adversely affect his own case;
 - (ii) adversely affect another party's case; or
 - (iii) support another party's case; and
- (c) a document which may lead the party seeking discovery of it to a series of inquiry resulting in his obtaining information which may—
 - (i) adversely affect his own case;
 - (ii) adversely affect another party's case; or
 - (iii) support another party's case.

(4) An order under this rule shall not be made in any cause or matter in respect of any party before an order under rule 3 has first been obtained in respect of that party, unless, in the opinion of the Court, the order is necessary or desirable.



Order for production to Court (O. 24, r. 12)

12. (1) At any stage of the proceedings in any cause or matter the Court may, subject to rule 13(1), order any party to produce to the Court any document in his possession, custody or power relating to any matter in question in the cause or matter that falls within one of the following descriptions:

- (a) documents on which the party relies or will rely;
- (b) documents which could—
 - (i) adversely affect a party's case; or
 - (ii) support a party's case; and
- (c) documents which may lead to a series of inquiry resulting in the obtaining of information which may—
 - (i) adversely affect a party's case; or
 - (ii) support a party's case.

(2) The Court may deal with the documents when produced in pursuance of an order made under paragraph (1) in such manner as it thinks fit.”

[15] Reading O24 r.3 on the face of it, seems to suggest an avenue for a very wide discovery termed as ‘general discovery’ and the inspection of documents in Lampiran A by the applicant as one of ‘specific discovery’ for identified documents but yet, one must not overlook the application of r.8 and r.13 that provides as follows:

“Discovery to be ordered only if necessary (O. 24, r. 8)

8. On the hearing of an application for an order under rule 3, 7 or 7a, the Court, if satisfied that discovery is not necessary, or not necessary at that stage of the cause or matter, may dismiss or adjourn the application and shall in any case refuse to make such an order if and so far as it is of the



opinion that discovery is not necessary either for disposing fairly of the cause or matter or for saving costs.

Production to be ordered only if necessary (O. 24, r. 13)

13. (1) An order for the production of any documents for inspection or to the Court shall not be made under any of the foregoing rules unless the Court is of the opinion that the order is necessary either for disposing fairly of the cause or matter or for saving costs.

(2) Where on an application under this Order for production of any document for inspection or to the Court, privilege from such production is claimed or objection is made to such production on any other ground, the Court may inspect the document for the purpose of deciding whether the claim or objection is valid.”

[16] Wide, it may appear are the provisions of the discovery application, case laws are resorted to which then enable this Court to undertake an exercise as to what is permissible and what is not for the purpose of such application. Reading the principles in **Yekambaran s/o Marimuthu** (supra) suggests that the discovery is ‘fact centric’ or ‘fact focus’ (see: **Bandar Utama Development Sdn Bhd & Anor v Bandar Utama 1JMB [2019] 10 CLJ 516** (COA). It would require this Court to analyze the cause papers to satisfy itself of such need for the said documents based on the facts.

[17] For this purpose, this Court agrees with the submission by the Defendant that the ‘general discovery’ sought is too wide for this Court to rule it as just and necessary, it amounting to a fishing expedition as the prayer under the ‘General Discovery’ being overly broad, vague and



unspecific (see: **Hayel Saeed Anam & Company Limited v Marwan Ahmed Hael Saeed [2022] MLJU 892 (HC)**)).

[18] In addition, the Plaintiff must satisfy the principles in **Yekambaran s/o Marimuthu** (supra) below, as such wide relief sought in the 'General Discovery' would go against those principles, reproduced again as follows:

"The essential elements for an order for discovery are threefold, namely first, there must be a "document", secondly, the document must be "relevant" and thirdly, the document must be or have been in the "possession, custody or power" of the person against whom the order for discovery is sought".

[19] For this reason, applying r.8 of the ROC 2012, this Court is unable to agree with the Plaintiff that the relief sought for a general discovery order is necessary either for disposing fairly of the cause or matter or for saving costs. As otherwise, it would mean on top of the 'Notice to Produce' enclosure 17 by the Plaintiff filed under O24 r.10 which the Defendant disagreed for the inspection of the same on the basis that no such documents have been indicated by the Defendant, other unknown nor identified documents would be left for parties to argue on the relevancy and for this Court to further determine if necessary. This would only amount to a waste of precious judicial time and would go contrary towards saving costs.

[20] As to the specific discovery of documents contained in Lampiran A, which are as follows:



a. The Sale Agreement of Luck Shopping Centre

20.1 The Defendant maintained there was no written agreement and the sale was done verbally with the third party whilst the Plaintiff argued it being highly improbable for the sale to have occurred without a written agreement. This Court is of the view that the Plaintiff has the task of showing proof of its existence as from the Statement of Claim of the Plaintiff, the Plaintiff has the knowledge of the sale of this business to a third party and the payment trail said to have been received by the Defendant.

20.2 This Court cannot seek from the Defendant for anything further than his deposition maintaining the non-existence of a written sale agreement, especially so with the Plaintiff's contention that the Defendant although a partner in the said business, was engaged merely to act as an assistant to the deceased and added with the fact that the sale transpired in November 2020 during the deceased's lifetime. The physical existence of the sale agreement unsubstantiated by any evidence. To allow it would amount to entertaining a discovery application on the basis of presumption (see: **Ong Commodities Pte Ltd v Kek Tek Huat Sdn Bhd & Anor [2015] 10 CLJ 585**)

b. the financial documents being:

- i. Profit and Loss Account of the business of Luck Shopping Centre from 2009 to 2016**
- ii. Borang P of the Business of Luck Shopping Centre from 2009 to 2016**
- iii. Borang B of the Defendant from 2009 to 2016**



**iv. the statement of account of Hong Leong Bank Account
from 01.01.2011 to 31.12.2017**

20.3 This Court (taking all the 4 financial documents above together), agrees with the submission by the Defendant that the documents are 'in such a wide spread and range of time' and would tantamount to a fishing expedition, more so when the word 'dipercayai' is used when the Plaintiff contends as follows:

"... wang sebanyak RM5,000,000-00 daripada simati dipercayai dikeluarkan daripada wang simati yang dimasukkan dan disimpan di dalam akaun bank Defendan tersebut...".

20.4 This is added further by the fact, arising from the transaction in relation to Lot Kedai Perling which took place in September 2015 and June 2016, contrary to the documents sought by the Plaintiff from 2009 to 2016/2017. As to the significance of these documents in relation to Luck Shopping Centre which the partnership was terminated in 2021, unless and until the Plaintiff proves its case and establishes liability against the Defendant, the application for discovery of these financial records including of the quantum of the sale price is premature and intrusive, unless and until the fact in issue being the deceased's estate's entitlement is determined.

20.5 The purpose of these financial documents is to establish that it is beyond the Defendant financial capacity to make those payments hence implies ownership of the property falls on the deceased. To the contrary, the Defendant in his affidavit in reply had annexed the payment slip of the purchase price to Lim Ham Choon.



Thus, on the face of the record, the Plaintiff has failed to show relevancy of these financial documents.

[21] Based on these reasons, this Court is of the view the discovery application would not achieve to show that the Plaintiff's claim would be feasibly achieved and assisted in great length by saving time and costs. The application is therefore dismissed with cost.

-Signed-

(NURULHUDA NUR'AINI BINTI MOHAMAD NOR)

Judge

High Court of Malaya

Johor Bahru

Dated: 30th April 2024



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