DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR

DALAM WILAYAH PERSEKUTUAN KUALA LUMPUR

GUAMAN NO: WA-22NCC-606-11/2022

ANTARA

1. **P. PONNAMAL A/P PONNIAH**
   (NO. K/P: 510720-01-5172)

2. **PREMA A/P ACHU**
   (NO.K/P: 640524-10-7008)

3. **DEBORAH ANN RODRIGO**
   (NO. K/P: 651003-10-7276)

4. **Y.M. CHE ENGKU MAHIRAH BT ABDULLAH**
   (NO. K/P: 510313-10-5904)

5. **GOH CHIANG BENG**
   (NO. K/P: 640824-08-5103)

6. **ALEXANDER VINCENT**
   (NO. K/P: 640515-08-6233)

7. **GEA BAN THONG**
   (NO. K/P: 640229-08-5213)

8. **NG GUAT TIN**
   (NO. K/P: 650425-18-5770)

9. KOH KOCK KEANG
(NO. K/P: 590826-10-6219)

10. SUPRAMANIAM A/L S SHANMUGAM
(NO. K/P: 580322-08-6171)

11. HARITH BIN ABDUL HAMID
(NO. K/P: 641116-01-6267)

12. ISMAT BIN ABDUL RAUF
(NO. K/P: 580419-06-5203)

13. KOH KOK CHONG
(NO. K/P: 621030-10-6669)

14. GEA SEOK ENG
(NO. K/P : 490628-08-5260)

15. THANGAMUTHU A/L KARUPPIAH
(NO. K/P : 570802-10-6259) **… PLAINTIF-PLAINTIF**

DAN

1. GOH HWAN HUA
(NO. K/P: 660901-01-5175)

2. I-SERVE ONLINE MALL SDN BHD
(NO SYARIKAT : 1096985-X)

3. BRIGHT MOON VENTURE PLT
(NO PENDAFTARAN: LLP0022149-LGN)

4. QA SMART PARTNERSHIP PLT
(NO PENDAFTARAN: LLP0020886-LGN)

5. TRILLION COVE HOLDINGS BERHAD
(NO SYARIKAT: 1386271-T) … DEFENDAN-DEFENDAN

GROUNDS OF JUDGMENT

A. Introduction

[1] The plaintiffs filed an application for discovery against the defendants ("Discovery Application"), under order 24 rule 7 of the Rules of Court 2012 ("ROC").

[2] The main documents that are of contention in the Discovery Application are bank account statements, which the defendants argued are not relevant to the determination of the issues before this court.

[3] The court allowed the Discovery Application, for the reasons set out below.

B. Background Facts

[4] The plaintiffs are investors. They are claiming the return of the sums they had paid and redemption sums due under subscription

agreements and partners' financing agreements they had entered into with the 3rd to 5th defendants (collectively, the "Agreements").

[5] The plaintiffs alleged that payments they made to the 3rd to 5th defendants pursuant to the Agreements were for the benefit of the 1st and 2nd defendants, who are the ultimate beneficiaries and controlling minds behind the 3rd to 5th defendants. It is the plaintiffs' case that the defendants operated as a single economic unit, and are therefore collectively responsible to return sums due to the plaintiffs. It is also the plaintiffs' case that the 3rd to 5th defendants did not have the necessary licences to accept deposits from the public. As such, the Agreements are invalid, illegal and *void ab initio*.

[6] The defendants' defence is that the monies claimed in this suit are part of monies seized pursuant to orders made under section 50(1) of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ("AMLATFA"), and as such, under section 54(3) of the AMLATFA, the plaintiffs are prohibited from commencing this action.

[7] Further, the defendants claimed this action was filed for a collateral purpose and in bad faith, as the plaintiffs were aware that the Agreements were frustrated due to supervening events, namely the freezing and seizure orders granted.

C. <u>The Discovery Application</u>

[8] The plaintiffs filed the Discovery Application pursuant to order 24 rule 7 of the ROC. Order 24 rule 7 provides that:

"(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."*

(emphasis added)

[9] The documents referred to in the Discovery Application can be summarised as follows:

a. For the 1st defendant, the unredacted version of his bank account statements (prayer 1(a) of enclosure 146);

b. For the 2nd defendant:

i. the unredacted version of its bank account statements (prayer 2(a) of enclosure 146); and

ii. documents related to the global resolution between the Attorney General's Chambers ("AGC") and the defendants (prayer 2(b) of enclosure 146);

c. For the 3rd defendant, licences from Bank Negara Malaysia ("BNM") (prayer 3(a) of enclosure 146);

d. For the 4th defendant:

i. the unredacted version of its bank account statements (prayer 4(a) of enclosure 146);

ii. documents related to the global resolution between the AGC and the defendants (prayer 4(b) of enclosure 146); and

iii. licences from BNM (prayer 4(c) of enclosure 146); and

e. For the 5th defendant:

i. the unredacted version of its bank account statements (prayer 5(a) of enclosure 146); and

ii. licences from BNM (prayer 5(b) of enclosure 146).

[10] The following occurred at the commencement of the hearing:

a. The court was informed that the 5th defendant had been wound up. The plaintiffs therefore withdrew enclosure 146 as against the 5th defendant.

b. The plaintiffs withdrew prayers 3 and 4(c), in respect of the discovery of the licences from BNM.

c. The defendants confirmed that they have no objection to providing documents related to the global resolution with the AGC. These relate to prayers 2(b) and 4(b).

[11] As such, the only remaining documents that are in contention in enclosure 146 are the bank account statements, which are the subject matter of prayers 1(a), 2(a) and 4(a) (collectively, the "Bank Account Statements"), and which relate only to the 1st, 2nd and 4th defendants.

D. Considerations and Findings

Elements for the grant of a discovery order

[12] The elements to be met for the court to grant an order for discovery are set out in ***Yekambaran Marimuthu v Malayawata Steel Bhd [1994] 2 CLJ 581***, where the court held at page 585e that:

> *"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 party against whom the order for discovery is sought.****"*
>
> (emphasis added)

[13] Thus, in determining whether the Discovery Application should be granted, the court must consider whether:

a. There are documents for which discovery is sought;

b. The documents are relevant; and

c. The documents are in the possession, custody or power of the 1st, 2nd and 4th defendants.

Element 1: Whether there are documents for which discovery is sought

[14] I am of the view that the first element, the existence of documents for which discovery is sought, has been met. The 1st, 2nd and 4th defendants have not denied that the bank accounts listed by the plaintiffs in enclosure 146 belong to them. Consequently, it cannot be denied that the Bank Account Statements related to these accounts are in existence.

Element 2: Whether the documents are relevant to this action

[15] The second element, namely that the Bank Account Statements must be relevant to this action, is subject to serious dispute. The 1st, 2nd and 4th defendants argued that the Bank Account Statements are not relevant to this action.

[16] I found ***Ong Boon Hua @ Chin Peng v Menteri Hal Ehwal Dalam Negeri, Malaysia [2008] 3 MLJ 625*** to be instructive on this issue. The Court of Appeal referred to ***The Compagnie Financiere Et Commerciale Du Pacifique v The Peruvian Guano Company (1882) 11 QBD 55***, a case setting out the principles governing discovery. The following passage of the judgment of Brett LJ was cited with approval by the Court of Appeal at page 643G of its judgment:

"The doctrine seems to me to go farther than that and to go as far as the principle which I am about to lay down. It seems to me that every document relates to the matters in question in the action, ***which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which may - not which must - either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary.*** *I have put in the words "either directly or indirectly," because, as it seems to me,* ***a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of inquiry*** *…"*

(emphasis added)

[17] This approach – that a document is relevant if it contains information that directly or indirectly enables the party seeking discovery to advance his own case or damage the case of his adversary – has been codified in order 24 rule 7(3) of the ROC. Order 24 rule 7(3) provides that:

"(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.*"*

(emphasis added)

[18] ***Yekambaran*** (supra) also referred to the test of "materiality" of documents for which discovery is sought. The court held as follows at page 585f of its judgment:

"The observation of Edward Bray in his highly regarded work on discovery at p. 18 as to the test of "materiality" merits quotation; there he says this:

> *... for the purpose of **testing the materiality** of the discovery to a particular issue ... **it is the case of the party seeking the discovery that must be assumed to be true, and not that of the party from whom the discovery is sought.***

*I note that proposition received judicial approval in **Format Communications Mfg. Ltd. v. ITT (UK) Ltd. [1983] FSR 473 CA**."*

(emphasis added)

[19] Further, order 24 rule 8 of the ROC provides that the court shall make a discovery order only if necessary to dispose a matter fairly or to save costs. Order 24 rule 8 states that:

> *"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.**"*

(emphasis added)

[20] From the authorities cited, the approach to be taken by this court in considering whether the Bank Account Statements are relevant and whether discovery is necessary, is as follows:

a. The Bank Account Statements ought to contain information which may:

i. either directly or indirectly advance the plaintiffs' case or another party's case, or damage the plaintiffs' case or another party's case; or

ii. lead the plaintiffs to a series of inquiry resulting in them obtaining information which may either directly or indirectly advance their case or another party's case, or damage their case or another party's case.

b. The grant of the Discovery Application must be necessary either for disposing fairly of this action, or for saving costs.

c. The plaintiffs' case must be assumed to be true.

[21] I examined the issues in dispute between the parties, to determine whether the Bank Account Statements are relevant to this action and the grant of the Discovery Application is necessary. From my assessment of the pleadings, the issues include:

a. Whether the 1st defendant is the single controlling mind of the defendants;

b. Whether the defendants operate as a single economic unit;

c. Whether funds collected by the 3rd to 5th defendants through the Agreements were utilised by the 1st and 2nd defendants;

d. Whether there is a co-mingling of funds between the defendants; and

e. Whether the Agreements are invalid, illegal and *void ab initio*.

[22] What arises from these issues is the plaintiffs' claim that the defendants operate as a single economic unit, with the 1st defendant being the mastermind behind the arrangement. The plaintiffs claimed that the funds collected by the 3rd to 5th defendants through the Agreements were used for the purpose of the 1st and 2nd defendants.

[23] Thus, the Bank Account Statements are highly relevant, as they would disclose the movements of the monies deposited by the plaintiffs, and how the monies are treated. The statements would shed light on whether there is a co-mingling of funds between the defendants, as alleged by the plaintiffs. It is also for this reason that I agreed with the plaintiffs that the Bank Account Statements must remain unredacted.

[24] The statements are also important to determine the nature of the defendants' overall operations, including whether the 1st defendant is the controlling mind behind the defendants.

[25] I considered the three arguments raised by the 1st, 2nd and 4th defendants.

[26] First, they argued that the Discovery Application is a fishing expedition and is oppressive to them. They referred to ***Nguang Chan aka Nguang Chan Liquor Trader & Ors v Hai-O Enterprise Bhd & Ors [2009] 5 MLJ 40*** to support their argument. While I acknowledge that the Court of Appeal in ***Nguang Chan*** (supra) had held that a party should not be allowed to fish for evidence to prop up his case, I find there to be a significant difference between the facts in ***Nguang Chan*** (supra) and the facts of the present case. In ***Nguang Chan*** (supra), the respondents filed applications for the appellants to produce documents, the existence of which was inferred from statements made in the appellants' witness statement. This led the court to the finding that the applications were a fishing expedition intended to prop up the respondents' case.

[27] The present case is distinguishable. The bank accounts in question have been properly identified by the plaintiffs, and the plaintiffs have provided a set time frame for the Bank Account Statements that are required, namely between the date of the earliest subscription agreement (16 November 2020) to the date of the BNM seizures (11 November 2021).

[28] In this sense, the Bank Account Statements were specifically identified and it cannot therefore be said that the Discovery Application is a fishing expedition or is unduly oppressive.

[29] The second argument – raised by the 1st defendant – is that not all of the bank accounts were investigated by the AGC and BNM. Further, one of his bank accounts is a joint bank account with his wife. These facts are in my view a non-issue. They are nonetheless relevant to the action before this court and the claims raised by the plaintiffs, specifically that there was a co-mingling of funds between the defendants.

[30] The third argument is that there was a delay in the filing of the Discovery Application. The Discovery Application was filed on 20 June 2024, after trial dates had been fixed by the court. The trial is due to commence on 14 October 2024. Based on these dates, I do not consider there to be an inordinate delay in the filing of the Discovery Application, that would result in prejudice to the defendants.

[31] With these findings, I am of the considered view that the Bank Account Statements are relevant to the determination of issues before this court. Further, a discovery order over the Bank Account Statements is necessary for the fair disposal of this matter.

Element 3: Whether the documents are in the possession, custody or power of the 1st, 2nd and 4th defendants

[32] The question of whether documents are in the possession, custody or power of a person against whom discovery is sought was examined in ***Lonrho Ltd v Shell Petroleum Co Ltd [1980] 1 WLR 627***.

In considering the phrase “possession, custody or power”, the House of Lords held at page 635G, that:

> *“**The phrase, as the Court of Appeal pointed out, looks to the present and the past, not to the future.** As a first stage in discovery, which is the stage with which the subsidiaries appeal is concerned, it requires a party to provide a list, identifying documents relating to any matter in question in the cause of matter in which discovery is ordered. Identification of documents requires that they must be or have at one time been available to be looked at by the person upon whom the duty lies to provide the list. Such is the case when they are or have been in the possession or custody of that person; and in the context of the phrase “possession, custody or power” **the expression “power” must, in my view, mean a presently enforceable legal right to obtain from whoever actually holds the document inspection of it without the need to obtain the consent of anyone else. Provided that the right is presently enforceable, the fact that for physical reasons it may not be possible for the person entitled to it to obtain immediate inspection would not prevent the document from being within his power;** but in the absence of a presently enforceable right there is, in my view, nothing in Order 24 to compel a party to a cause or matter to take steps that will enable him to acquire one in the future.”*
>
> (emphasis added)

[33] ***Lonrho*** (supra) was relied on by the 1st defendant, who argued that since his bank accounts were closed in 2023, the Bank Account Statements are by definition no longer in his power, as he does not have a presently enforceable right to obtain the statements.

[34] I disagree for two reasons. First, the 1st, 2nd and 4th defendants have not proffered any evidence to prove that their bank accounts have been closed. They relied on their own self-serving statements that the accounts had been closed, but did not provide any evidence to prove this statement.

[35] Second, the closure of bank accounts does not equate to there being no enforceable legal right for the 1st, 2nd and 4th defendants to obtain the Bank Account Statements from their banks. In my view, they would still have a legal right to access the Bank Account Statements, or any bank account statements from their bank accounts from the date the accounts were opened until the date of their closure. They had also failed to demonstrate how their legal right to access the Bank Account Statements no longer exists upon closure of the bank accounts.

[36] With this, the court finds that the Bank Account Statements are in the possession, custody or power of the 1st, 2nd and 4th defendants.

E. <u>Decision</u>

[37] With the considerations as set out, the court finds that the elements required for a discovery order to be granted have been met.

[38] Prayers 1, 2, and 4(a), (b), (d), (e) and (f) of the Discovery Application are allowed, with costs. The prayers granted have taken into account the withdrawal of specific prayers by the plaintiffs and the defendants' non-objection to providing documents related to the global resolution with AGC.

Dated 12 September 2024

ADLIN ABDUL MAJID
Judge
High Court of Malaya
Commercial Division (NCC6)
Kuala Lumpur

Counsel:

Plaintiffs	:	Amanda Sonia Mathew (together with Sachpreetraj Singh) of Messrs. Raj & Sach
1st defendant	:	Tina Ann Francis of Messrs. Mathews Hun Lachimanan
2nd defendant	:	Ava Geh of Messrs. Chetan Jethwani & Company
3rd and 4th defendants	:	Varunnath Viswanathan of Messrs. KP Lu & Tan