

**DALAM MAHKAMAH TINGGI MALAYA DI SHAH ALAM**  
**DALAM NEGERI SELANGOR DARUL EHSAN**  
**(GUAMAN SIVIL NO : BA-22NCVC-584-12/2019)**

**ANTARA**

**KABILAN A/L ANASALAM**

**(No. K/P. : 630806-07-5517)**

**...PLAINTIF**

**DAN**

**1. VEERASINGAM A/L MUTHUSAMY**

**(No. K/P. : 660818-10-5823)**

**2. METRO OUTSOURCE SERVICES SDN BHD**

**(No. Syarikat : 1161164 – A)**

**...DEFENDAN-DEFENDAN**

**GROUND OF JUDGEMENT**

**Introduction**

**(1)** The Plaintiff filed this civil suit against the Defendants claiming the sum of RM2,774,715.08 being his share of profits arising out of a contract he secured for the Defendants with Heineken (M) Sdn Bhd. The contract in question will be referred to as the Heineken contract from hereon.

**(2)** The 1<sup>st</sup> Defendant is a director of the 2<sup>nd</sup> Defendant company. The 2<sup>nd</sup> Defendant is a company which has a business address in Menara Klang, Selangor. It is in the business of supplying labour and manpower to other companies.



1 **(3)** The Plaintiff's cause of action against the Defendants are set out in  
2 the Plaintiff's Amended Statement of Claim dated 24.1.2020. In short, the  
3 Plaintiff alleged that the 1<sup>st</sup> Defendant requested him to secure contracts  
4 for the supply of labour. In return for the service the 1<sup>st</sup> /2<sup>nd</sup> Defendant  
5 promised to pay the Plaintiff 50% of the profits for any contract secured.

6  
7 **(4)** The 1<sup>st</sup> and 2<sup>nd</sup> Defendants have filed their amended statement of  
8 defence against the Plaintiff's claim. Essentially the defence is that they  
9 had never given any promise to share the profits gained from the  
10 Heineken contract

### 11 12 **Plaintiff's Case**

13 **(5)** The background facts giving rise to the Plaintiff's claim was  
14 elucidated from the cause papers and written submissions of the  
15 respective parties.

16  
17 **(6)** The Plaintiff and the 1<sup>st</sup> Defendant were friends at the material time.

18  
19 **(7)** At the behest of the 1<sup>st</sup> Defendant, the Plaintiff agreed to secure  
20 contracts for supply of foreign and/or local workers. The Plaintiff has  
21 claimed that this agreement was based on the representation by the 1<sup>st</sup>  
22 Defendant that the Plaintiff will be paid 50% from the profits obtained from  
23 the contracts secured by the Plaintiff after deduction of reasonable  
24 expenses incurred by the Defendants.

25  
26 **(8)** Apart from that the 1<sup>st</sup> Defendant offered to take the Plaintiff as his  
27 business partner and they were supposed to jointly carry out the business  
28 of supplying foreign and local workers to other companies.



1 **(9)** Acting on the assurances and representation given by the 1<sup>st</sup>  
2 Defendant the Plaintiff submitted the Defendants' profile to Heineken (M)  
3 Sdn Bhd as he had personal and close contact with Heineken's personnel.  
4 The Plaintiff was personally present for the meetings with Heineken. The  
5 first submission was rejected as the 1<sup>st</sup> Defendant failed to follow the  
6 Plaintiff's advice on the quotation amount. The Plaintiff continued to work  
7 on and pursue the matter until ultimately the contract was awarded to the  
8 2<sup>nd</sup> Defendant.

9  
10 **(10)** The staff of Heineken informed the Plaintiff of the payments made  
11 to the Defendants. The 2<sup>nd</sup> Defendant received the sum of  
12 RM3,835,954.99 between the year 2016 to 2018.

13  
14 **(11)** The Plaintiff requested for the details of the payments and expenses  
15 incurred by the Defendants but was repeatedly fobbed off with excuses  
16 that they will only let him know after it had been finalized.

17  
18 **(12)** The Plaintiff was never paid 50% of the profits as agreed. Instead  
19 only a sum of RM10,000 was paid to him. Thereafter the 1<sup>st</sup> Defendant  
20 avoided his calls and refused to talk to him.

21  
22 **(13)** Meanwhile before their falling out, the Plaintiff in reliance of the 1<sup>st</sup>  
23 Defendant's continual assurance and representations had resigned from  
24 his current employment in order to join the Defendants as a business  
25 partner. This was because the 1<sup>st</sup> Defendant had on numerous occasions  
26 promised the Plaintiff a position as his business partner in the company.



**Defendants' Defence**

**(14)** In the Statement of Defence it was pleaded by the Defendants as follows :

- (i) it was the Plaintiff who initially requested the 1<sup>st</sup> Defendant to submit the 2<sup>nd</sup> Defendant's profit for the supply of manpower to Heineken;
- (ii) there was no proposal for a 50:50 sharing;
- (iii) the Defendants suffered losses in respect of the Heineken contract;
- (iv) the payment of RM10,000 to the Plaintiff was a loan at the request of the Plaintiff.

**(15)** In his testimony the 1<sup>st</sup> Defendant claimed that he did not receive any positive response after submitting the company's profile to Heineken. Only after 6 months did Heineken contacted and requested him to resubmit their proposal for the supply of labour which he did on 22.6.2016. On 29.9.2016 Heineken awarded the contract to the Defendants.

**(16)** The 1<sup>st</sup> Defendant vehemently maintained that he did not promise the Plaintiff any profit sharing, commission or any other form of payment in respect of the Heineken contract. The 1<sup>st</sup> Defendant further testified that even if he had promised a commission, he would never have agreed to pay 50% of the profits as claimed by the Plaintiff.

**(17)** In respect of the Heineken contract the 1<sup>st</sup> Defendant averred that his company billed and only received RM3,835,954.70 from Heineken. This amount did not yet take into account the cost of sales and other overheads. The 1<sup>st</sup> Defendant claimed that although the revenue received



1 looked impressive on paper, it was ultimately not at all profitable due to  
2 the high operational cost.

3  
4 **(18)** The 1<sup>st</sup> Defendant stated that he never offered the Plaintiff a  
5 partnership in the 2<sup>nd</sup> Defendant.

6  
7 **(19)** As for the payment of RM10,000 received by the Plaintiff, the 1<sup>st</sup>  
8 Defendant explained that it was given as a result of a request for a loan in  
9 order for the Plaintiff to pay for an outstanding car loan. The 1<sup>st</sup> Defendant  
10 emphasized that the payment had nothing at all to do with the Heineken  
11 contract.

## 12 13 **The Trial**

14 **(20)** The trial took place on 8.8.2022 and was completed within the day.  
15 The Plaintiff called two witnesses and also gave evidence on his own  
16 behalf.

17  
18 **(21)** The 1<sup>st</sup> Defendant gave evidence on his own behalf and on behalf  
19 of the 2<sup>nd</sup> Defendant.

## 20 21 **Issues For Determination**

22 **(22)** Parties collectively prepared and submitted a total of 8 issues to be  
23 tried. I found the issues that were pertinent and relevant could be reduced  
24 to 3 main issues and the rest are just elaboration of the other issues.

25  
26 **(23)** The issues for the consideration of this court are as follows :

- 27 (1) whether there was an agreement that the Plaintiff would assist  
28 the Defendants to secure contracts for the supply of  
29 foreign/local labour to the Defendants;



- 1 (2) whether there was an oral agreement that the 1<sup>st</sup> Defendant  
2 would share profits on 50:50 basis after deduction of  
3 expenses if he were to secure contracts for the 2<sup>nd</sup> Defendant;  
4 (3) whether the Defendants had breached their promise to pay  
5 the Plaintiff his share of the profits for securing the Heineken  
6 contract for the Defendants.

7  
8 **Decision of the Court**

9 **(24)** Having fully and carefully considered the issues raised and the  
10 evidence presented by the Plaintiff and the Defendants, I was satisfied  
11 and came to the finding that the Plaintiff had succeeded in proving his  
12 claim on a balance of probabilities against both the Defendants and I  
13 allowed the Plaintiff's claim.

14  
15 **(25)** It is well settled that the party who desires the court to give judgment  
16 as to any right or liability bears the burden of proof. The onus is on the  
17 Plaintiff to prove his case on a balance of probabilities that there was an  
18 oral contract which was binding on the parties (see sections 101, 102, 103  
19 Evidence Act, 1950).

20  
21 **(26)** The undisputed facts which I shall rely on would be the following :

- 22 (1) the Plaintiff introduced the Heineken contract to the  
23 Defendants;  
24 (2) the Plaintiff told the Defendants to submit the company profits  
25 for the contract of labour supply to Heineken;  
26 (3) the Plaintiff was present for the meetings with Heineken  
27 officials;  
28 (4) the 2<sup>nd</sup> Defendant received the sum of RM3,835,954.99 from  
29 Heineken for the years 2016 right up to 2018.



1 (i) Whether there was an agreement that the Plaintiff would  
2 assist the Defendants to secure contracts for the supply of  
3 foreign/local labour to the Defendants;

4  
5 (ii) whether there was an oral agreement that the 1<sup>st</sup> Defendant  
6 would share profits on 50:50 basis after deduction of  
7 expenses if he were to secure contracts for the 2<sup>nd</sup> Defendant;

8  
9 **(27)** Both these issues largely overlap and therefore may be taken and  
10 addressed together.

11  
12 **(28)** It trite that a contract may be in the form of a written document or an  
13 oral agreement between the parties.

14  
15 **(29)** Section 10 of the Contracts Act 1950 sums up what makes up a  
16 valid contract :

17 (1) all agreements are contracts if they are made by the free  
18 consent of parties competent to contract, for a lawful  
19 consideration and with a lawful object, and are not hereby  
20 expressly declared to be void.

21 (2) Nothing herein contained shall affect any law by which any  
22 contract is required to be made in writing or in the presence of  
23 witnesses or any law relating to the registration of documents.

24  
25 **(30)** It has been confirmed by the Plaintiff in his testimony that there was  
26 no written contract between the parties. All the terms were agreed orally.  
27 The Plaintiff attempted to get the 1<sup>st</sup> Defendant to prepare a written  
28 contract but the 1<sup>st</sup> Defendant was always evasive. I see no reason to  
29 disbelieve the Plaintiff when he stated that he did not want to make an



1 issue out of it as they were friends and he trusted the 1<sup>st</sup> Defendant would  
2 not renege on his promises. The Plaintiff believed the 1<sup>st</sup> Defendant and  
3 acted upon the representations made by the Defendants. The Plaintiff  
4 explained as follows :

5  
6 *“PD: My question to you, why didn’t you prepare one?”*

7 *PW1: Because I didn’t want to have any issues with the friendship. He*  
8 *said trust me I will do it. He said we are like brother how am I going to*  
9 *cheat you. So I also trusted him.”*

10  
11 **(31)** The 1<sup>st</sup> Defendant admitted under cross-examination that the  
12 Heineken contract was introduced by the Plaintiff :

13  
14 *“PP: No one. So you can agree with me that this contract, when we use*  
15 *the word of contract it just for the sake of saying the word. **This contract***  
16 ***for Heineken was through Mr. Kabilan. Do you agree with me?***

17 *DW 1: **Yes.***

18  
19 *PP: **So you can also agree with that Mr Kabilan is the one who***  
20 ***asked you to put the quotation in for the contract with Heineken?***

21 *DW 1: **First, of course.***

22  
23 **(32)** Undoubtedly the contract was initially rejected by Heineken as the  
24 rates quoted by the Defendants was on the high side. This evidence is  
25 supported by the contemporaneous documents i.e. the Quotation for  
26 Supply of Workers (p.7 Bundle B). The 1<sup>st</sup> Defendant himself admitted that  
27 the contract which was rejected on the first occasion was due to his  
28 mistake in quoting a high price.

29  
30 **(33)** It was never disputed that the 1<sup>st</sup> Defendant had reached out to the  
31 Plaintiff for assistance to secure contracts for supply of foreign and local





workers for his company. The evidence from the Plaintiff and his two other witnesses showed that the 1<sup>st</sup> Defendant was always pestering the Plaintiff to help him secure contracts for the company. The Plaintiff agreed to help the Defendants and armed with the Defendants' business profile had gone to see his contacts in Heineken and spoke to them. The Plaintiff said he dealt with Mr Prakash and Ms Tan Chin Teng who was the Manager cum Procurement at Heineken. The profile of the 2<sup>nd</sup> Defendant was handed over to Ms Tan Chin Teng. The Plaintiff claimed that he was directly involved even after the contract with Heineken was secured. He said he attended the initial meetings between the Defendants and Heineken and had full knowledge of the pricing and quotations that were involved in the calculation for labour charges and expenses in this contract.

**(34)** The defence, on the other hand contended that they secured the contact through their own efforts and not through the intercession of the Plaintiff pointing out that the initial contract which the Plaintiff assisted in was rejected by Heineken. It is my considered view having evaluated the evidence of both the Plaintiff and the Defendants that the first failed attempt was part and parcel of the build-up towards securing the contract with Heineken. I believed the evidence of the Plaintiff when he testified that the first attempt was unsuccessful because the 1<sup>st</sup> Defendant failed to listen to his advice when quoting the rate of payment for worker pricing. This evidence is documented in page 7 of Bundle B and is admitted by the 1<sup>st</sup> Defendant under cross-examination :

*“PP: Right. So, the contract was rejected because of your pricing?”*

*DW 1: Ya, for the pricing.”*



1 (35) Therefore there was nothing unusual about the first rejection  
2 because the Defendants were ultimately awarded the contract a mere few  
3 months later.

4  
5 (36) The primary issue for the court's consideration is whether there  
6 exists an oral agreement between the Plaintiff and the Defendants to  
7 secure the Heineken contract. It is trite that oral agreements, if proved are  
8 enforceable. In the case of **Accolade Land Sdn Bhd v Mass Rapid**  
9 **Transit Corporation Sdn Bhd & Ors [2020] 2 CLJ 295** it was stated that:

10  
11 *“Oral contracts are by their very nature, oral. And oral contracts if proved*  
12 *are enforceable in law barring any valid defence. There is in fact no*  
13 *requirement that all contracts have to be reduced into writing.”*  
14

15 (37) The test of whether there was an intention to enter into an oral  
16 contract is an objective one.

17  
18 (38) A careful scrutiny of the evidence adduced from the trial has shown  
19 that the Plaintiff had succeeded in proving there was an oral binding  
20 contract between the Plaintiff and the Defendants in regard to procuring  
21 the Plaintiff's assistance to secure contracts for the supply of workers for  
22 the Defendants. It was observed that the Plaintiff and the 1<sup>st</sup> Defendant  
23 were close friends at the material time. It was never denied that the 1<sup>st</sup>  
24 Defendant had constantly beseeched the Plaintiff to help him secure  
25 contracts for the company. Most if not all their meetings were spent on  
26 discussions on finding ways and means for the Plaintiff to assist the  
27 Defendants to secure the contract with Heineken. It was never denied that  
28 the Plaintiff took the Defendants' company profile and gave it to his friends  
29 in Heineken. I hold that the surrounding circumstances under which the



1 Heineken contract was procured were not seriously disputed. The 1<sup>st</sup>  
2 Defendant made representations to the Plaintiff and relying on and acting  
3 on those representations the Plaintiff had used his time and efforts to  
4 secure the Heineken contract for the Defendants. It bears repetition for  
5 me to state that although the first attempt was unsuccessful, nothing much  
6 should turn on this because the 2<sup>nd</sup> attempt was successful due to the  
7 Plaintiff's earlier leg work and efforts as well as the Plaintiff's close  
8 contacts with the personnel in Heineken. The Plaintiff's role was to secure  
9 the contract and he had achieved this aim when the contract was given to  
10 the Defendants. The Plaintiff had delivered on his part of the bargain. The  
11 Defendants on their own merits would not have been able to secure the  
12 Heineken contract. In any event the 1<sup>st</sup> Defendant had admitted to the oral  
13 agreement albeit reluctantly when he agreed that the contract with  
14 Heineken was through the Plaintiff (see **Para 31** above).

15  
16 **(39)** It is also in evidence that the 1<sup>st</sup> Defendant admitted that he did not  
17 know any of the people who worked in Heineken. He admitted that the  
18 Plaintiff accompanied him in the first meeting with Heineken :

19  
20 *"PP: Now, at that meeting the Plaintiff was with you?"*

21 *DW 1: For the first one yes."*  
22

23 **(40)** For these reasons I find there was sufficient evidence to conclude  
24 that the Plaintiff and the Defendants had formed the intention to enter into  
25 the oral agreement where each party had agreed to perform its part of the  
26 bargain. It is obvious that the parties had agreed to enter into an  
27 agreement that the Plaintiff would procure the Heineken contract for the  
28 Defendants and the Defendants in consideration of that would agree to  
29 share the profits with the Plaintiff. This to my mind was enough for me to



1 conclude that the parties conducted themselves in such a way that an oral  
2 agreement did in fact exist. It showed the intention of the parties which  
3 substantiates the existence of an oral agreement on the terms stated by  
4 the Plaintiff.

5  
6 **(41)** The next question would then be whether the 1<sup>st</sup> Defendant had  
7 indeed represented to the Plaintiff that he will be paid 50% from the profits  
8 obtained from the contracts that was secured after deduction of  
9 reasonable expenses incurred by the Defendants. According to the  
10 Plaintiff the oral representation was made many times to him. Some of  
11 those times the representation was made in the presence of the Plaintiff's  
12 friends, PW 2 and PW 3.

13  
14 **(42)** The Defendants have contended that the Plaintiff could not adduce  
15 any documentary evidence to support his claim of there being an  
16 agreement for the parties to share the profits equally between them. It was  
17 contended that even the documents relied upon by the Plaintiff to support  
18 his claim were the Defendant's documents in the Common Bundle of  
19 Documents. To this the Plaintiff's reply was that since the contract was  
20 between the 2<sup>nd</sup> Defendant and Heineken directly, it stood to reason that  
21 all documents pertaining to the said contract would be in the possession  
22 of the 2<sup>nd</sup> Defendant. In any event it is permissible under the law for any  
23 party to rely on oral evidence of witnesses in order to prove his case.  
24 Nevertheless, the onus is on the Plaintiff who bears the burden to prove  
25 his claim of the existence of the oral agreement.

26  
27 **(43)** In his witness statement the Plaintiff stated that the 1<sup>st</sup> Defendant  
28 made the offer to share the profits equally between them sometime in the  
29 year 2015 or 2016 when they were at a restaurant in Subang Jaya. The



1 Plaintiff and the 1<sup>st</sup> Defendant were there together with their common  
2 friends Mr Mohammad Kuna Muno (PW 2) and Mr Mohan Raj (PW 3).

3  
4 **(44)** The testimony of PW 2 corroborated the Plaintiff's evidence. In his  
5 witness statement PW 2 stated the following :

6  
7 *"3.Q: Can you tell the Court, regarding this meeting?*

8 *A: In this meeting, 1<sup>st</sup> Defendant offered to share the profits on 50:50*  
9 *with the Plaintiff when he secured contracts to supply workers. The*  
10 *Plaintiff seated in front of 1<sup>st</sup> Defendant told me that he was going to*  
11 *resign from his current job to join the 1<sup>st</sup> Defendant since he has brought*  
12 *in a big customer (Heineken). 1<sup>st</sup> Defendant acknowledged the*  
13 *statement."*

14  
15 **(45)** The court was told that the friends regularly hung out together where  
16 they would discuss work related matters among other things. PW 2 agreed  
17 that he did not have personal knowledge of all the terms but he knew that  
18 the discussion involved the profit sharing proposal made by the 1<sup>st</sup>  
19 Defendant to the Plaintiff if the Plaintiff was successful in securing  
20 contracts for the supply of workers for the 2<sup>nd</sup> Defendant. Under cross  
21 examination PW 2 stated :

22  
23 *"PD: So you were part of the discussion?*

24 *PW 2: No, I was just listening to their discussion.*

25  
26 *PD : You did not hear what was the terms of the agreement?*

27 *PW 2: I know about the terms of the agreement because it was not the*  
28 *first discussion between them.*

29  
30 *PD : Do you know the contract to supply workers actually took place?*

31 *PW 2: Yes*



1 PD: You know? How would you know?

2 PW 2: Subsequent meetings.

3  
4 PD : Who told you?

5 PW 2: Both of them.”

6  
7 **(46)** Counsel for the Defendant urged the Court to reject the evidence of  
8 PW 2 as it constituted hearsay evidence, that PW 2 had no personal  
9 knowledge in respect of the details of the proposal but was merely relying  
10 on information told to him by both the Plaintiff and the 1<sup>st</sup> Defendant.

11  
12 **(47)** I would respectfully disagree with the Defendant’s contention. From  
13 my evaluation of these regular meetings between the friends, the topic of  
14 conversation almost always led back to a discussion with regard to the  
15 profit sharing proposal initiated by the 1<sup>st</sup> Defendant to the Plaintiff. PW 2  
16 sat with the Plaintiff and the 1<sup>st</sup> Defendant and was privy to the discussions  
17 taking place between them. He participated in the conversation and he  
18 personally heard the discussion in regard to the 1<sup>st</sup> Defendant’s  
19 representation that he would share 50:50 with the Plaintiff if the contracts  
20 were awarded to the Defendants. That to me was first hand knowledge  
21 and not hearsay evidence at all.

22  
23 **(48)** In this regard I would like to refer to the view of Abdul Kadir Sulaiman  
24 (later FCJ) (as he then was) in ***Tempil Perkakas Sdn Bhd v Foo Sex***  
25 ***Hong (t/a Agrodrive Engineering) [1996] 1 LNS 99*** at p.547 :

26  
27 “... It is clear law that if anything is said or tendered through a witness  
28 which is not within the actual knowledge of the witness, anything said or  
29 tendered would remain inadmissible notwithstanding the omission to



1           *object by the opposing party. The opposing party cannot be taken to*  
2           *have admitted to what had been said and tendered.”*

3  
4   **(49)** I also wish to refer to the Court of Appeal case of ***Hassan Ali Basri***  
5   ***v PP [2018] 4 CLJ 312*** which held as follows :

6  
7           *“[44] So, ‘hearsay evidence’ and ‘information’ are two different kettles of*  
8           *fish altogether. The information that PW1 gave to the appellant was*  
9           *not hearsay evidence for the simple reason that it was within his own*  
10          *personal knowledge. It was not something that he came to know of*  
11          *from a third party not called as a witness. It was what he saw with*  
12          *his own eyes and heard with his own ears and not what a third party*  
13          *told him. Learned counsel was therefore misconceived in contending*  
14          *that the information that PW1 gave to the appellant was hearsay*  
15          *evidence.”*

16  
17   **(50)** Similarly, in the case presently before this court PW 2 saw with his  
18   own eyes and heard with his own ears the conversations and discussions  
19   that took place between the Plaintiff and 1<sup>st</sup> Defendant. It was not  
20   something the Plaintiff or the 1<sup>st</sup> Defendant told him. In assessing the  
21   evidence of PW 2, I have no hesitation to hold the considered view that  
22   his evidence was not hearsay and it is admissible. His evidence wholly  
23   corroborates the Plaintiff’s version.

24  
25   **(51)** The Plaintiff’s other witness, PW 3 similarly corroborated the  
26   Plaintiff’s version. His evidence describing what happened at the meeting  
27   is as follows :

28  
29           *“3. Q: Can you tell the Court, regarding this meeting?*

30           *A: In this meeting, 1<sup>st</sup> Defendant offered to share the profits on 50:50*  
31           *with the Plaintiff when he secured contracts to supply workers. In my*



1           *presence many times 1<sup>st</sup> Defendant told the Plaintiff that he will pay him*  
2           *his share of profit as soon as he collects the payments from Heineken.*

3  
4           4. Q: *When did this meeting took place?*

5           A: *Around year 2017 to 2018 in Centro Klang.”*  
6

7   **(52)** The Defendants have attacked the evidence of PW 3, questioning  
8 the reliability of his testimony claiming apart from it being hearsay  
9 evidence; pointing out that the Heineken contract was awarded to D2 on  
10 29.9.2016 and any offer in respect of the oral agreement would have had  
11 to have been made before the Heineken contract was awarded to D2. On  
12 that basis the Defendants argued that PW 3 was in no position to confirm  
13 nor have any personal knowledge of the offer made by D1 to Plaintiff.  
14

15 **(53)** Having carefully considered the evidence of PW 3 in totality I find  
16 the Defendants’ argument is misconceived. I disagree with the defence  
17 refusal to accept the corroborative elements of the testimony provided by  
18 PW 3. I am fortified in this view from these excerpts of the testimony by  
19 PW 3 :  
20

21           *“PD: Yes. Don’t worry. Its already been agreed that the contract was in*  
22           *2016. Everybody stated that. So now my question is this the contract*  
23           *was already agreed upon, how come 2017 only then you are learning*  
24           *about this terms of the contract.*

25           *PW 3: That’s the time I see them. I told you right at Centro every time I*  
26           *go and meet them there. Then they discussed about this job that they*  
27           *already got and profit sharing. That’s the time that Mr. Kabilan told me*  
28           *he wants to resign and all that.*  
29





1 **(54)** Further to his testimony SP 3 explained what he knew of the  
2 discussion that took place between the Plaintiff and the 1<sup>st</sup> Defendant as  
3 follows :

4  
5 *“PW 3: Ok. See I told you right I can’t really remember what year, maybe*  
6 *17. But the things when they sitting there he told that since they already*  
7 *got the job they will go on share basis 50%. The details on how much*  
8 *he got the business all I don’t know. What I know they supply workers*  
9 *around 50 workers, around that. That’s all I know. I mean they talking*  
10 *about that and both of them were there. They are always there, sit down*  
11 *there and normally will discuss that.”*  
12

13 **(55)** The evidence given by PW 3 when taken in totality was reasonable  
14 and rational. It overwhelmingly showed on a balance of probabilities that  
15 this was a common theme or thread of the conversation whenever the  
16 friends met up and the conversation would inevitably go back to the 1<sup>st</sup>  
17 Defendant offering sweet promises that he would share the profits equally  
18 if the Plaintiff helped him.

19  
20 **(56)** I find the evidence given by PW 2 and PW 3 to be supportive and  
21 corroborative of the Plaintiff’s evidence of the oral agreement that the  
22 Defendants will share the profits on an equal basis with the Plaintiff when  
23 he secured the contract to supply workers. This approach was similarly  
24 used and accepted in the case of ***John Ambrose v Peter Anthony &***  
25 ***Anor [2017] 4 MLJ 374*** where the Court observed as follows :

26  
27 *“[17] Throughout the cross-examination, the plaintiff was consistent that*  
28 *the oral agreements between the him and the first defendant took place*  
29 *at Park Royal Hotel, Kuala Lumpur sometime in 2009 and 2010.*

30 ***[29] The Plaintiff’s evidence is supported by Dato Yahya b Hamzah***  
31 ***(PW 1) who confirmed that he was present at the meeting between***



1        **the plaintiff** and the first defendant at Park Royal Hotel Kuala Lumpur  
2        in October 2009...”

3  
4        **(57)** In **John Ambrose (supra)** the Court of Appeal remarked on the  
5        manner in determining whether an oral agreement is said to have existed  
6        or not and one of the crucial tests is for the court to test the consistency  
7        of the witnesses during cross-examination. Tengku Maimon Tuan Mat  
8        JCA (as she was then) in delivering the judgment of the court held as  
9        follows :

10  
11        *“There were in existence oral agreements between the plaintiff and the*  
12        *first defendant that the payments made to the plaintiff were part*  
13        *payments of the commissions under the oral agreements. These can be*  
14        *seen in the (i) consistency of the plaintiff during cross-examination that*  
15        *the oral agreements took place sometime in 2009 and 2010. The*  
16        *plaintiff’s evidence was supported by PW 1 who, in his cross-*  
17        *examination, was also consistent in his evidence that he heard the*  
18        *discussion between the plaintiff and the first defendant on the*  
19        *commissions to be paid to the plaintiff for the projects secured; (ii) the*  
20        *first defendant’s admission in his evidence to the various payments*  
21        *made to the plaintiff and it was more probable than not that the payments*  
22        *made to the plaintiff were part payments of the commissions pursuant*  
23        *to the oral agreements...”*

24  
25        **(58)** When viewed cumulatively it was evident from the consistent  
26        testimony of the Plaintiff and his witnesses. They were consistent and  
27        corroborated each other’s evidence and they were unshaken under  
28        intense cross-examination. There is no reason not to accept the evidence  
29        of these witnesses. Similarly, in this case it is my finding as a fact on the  
30        strength of the abovementioned case that the oral agreement to share



profits on an equal basis existed and by virtue of s. 10 of the Contracts Act 1950, it was valid and enforceable.

**(59)** It would be reasonable to come to the inference that there could be no other reason for the Plaintiff to expend time and effort to secure the contract for the Defendants other than that there was an agreement that the Plaintiff would be rewarded with the promise of sharing an equal profit. Even though they were friends, it would be unreasonable and going against the norm for the Plaintiff to assist the Defendants without any consideration offered. This finding is in line with the evidence adduced by the Plaintiff that he was offered the post of business partnership to jointly carry out the supply of foreign and local workers to other companies as well as the suggestion by the 1<sup>st</sup> Defendant that the Plaintiff's designation would be in the role of Assistant General manager in the company. To that end the 1<sup>st</sup> Defendant had even prepared name cards for the Plaintiff's imminent position in the company. Furthermore, the Plaintiff in reliance of the representations made by the Defendants had put in his resignation from his employment with his previous employer.

**(60)** The other pertinent factor in the consideration of this issue is the payment of RM10,000 made by the 1<sup>st</sup> Defendant to the Plaintiff. Here the 1<sup>st</sup> Defendant made the payment in two tranches. He paid the sum of RM7000 by cheque and the balance of RM3000 was by cash. The 1<sup>st</sup> Defendant has not denied that he made this payment but has contended that this was for a loan requested by the Plaintiff. I do not find this a credible defence.



1 **(61)** The 1<sup>st</sup> Defendant was evasive and less than candid about the  
2 reason for the loan. This extract from the notes of proceedings is  
3 particularly telling :

4  
5 *“PP: From 2014 to 2016, did the Plaintiff ever ask you for any loan?”*

6 *DW 1: Yes, a lot of favour.*

7  
8 *PP: Favour?*

9 *DW 1: Yes, favours.*

10  
11 *PP: No, no. Did Plaintiff ever asked you for any loan?*

12 *DW 1: Of course he had some for RM3000, RM2,00, he wanted to pay*  
13 *for his car and all that.*

14  
15 *PP: Did you give him?*

16 *DW 1: No.*

17  
18 *PP: No, I put it to you, Mr Veera, Plaintiff had never asked you any loan.*

19 *You may agree or disagree.*

20 *DW 1: Never asked me a loan?*

21  
22 *PP: Ya.*

23 *DW 1: I don't know about that.”*

24  
25 **(62)** It is in evidence that the money was given after the Heineken  
26 contract was secured. The Plaintiff in his evidence stated that he kept on  
27 reminding the 1<sup>st</sup> Defendant to keep his promise and share the profits from  
28 the Heineken contract but the Defendant always evaded his reminders. I  
29 do not see any support for the Defendants' contention that the RM10,000  
30 was given as a loan. There is no reason for the Plaintiff to ask for a loan.  
31 It is no coincidence that the money was given to the Plaintiff after the



1 Heineken contract was secured. I was very much persuaded that it was  
2 none other than a part payment for the consideration given by the Plaintiff  
3 to assist the Defendants to secure the contract. The natural inference  
4 would therefore be that the Defendants paid the sum of RM10,000 as part  
5 payment for the Plaintiff's success in obtaining the contract for the  
6 Defendants. Unfortunately it would appear that once the contract was  
7 securely in the hands of the Defendants, all the promises to share the  
8 profits equally were quickly abandoned.

9  
10 **(63)** It is rather perplexing that in this case if indeed what the 1<sup>st</sup>  
11 Defendant alleged is true, that the payment of RM10,000 was a loan  
12 requested by the Plaintiff, why then did the Defendants never request for  
13 or demand for the repayment of the loan? The Defendant did not issue  
14 any notices of demand for the repayment of the loan. More importantly  
15 neither was there a counter-claim filed in this suit for the return of the  
16 alleged monies borrowed. The fact that the Defendant had not demanded  
17 for the repayment for the money lent strongly suggested that it was never  
18 considered to be a loan.

19  
20 **(64)** Apart from the above, I feel it important to refer to the Notice of  
21 Demand dated 10.12.2018 sent to the Defendants by the solicitors acting  
22 on behalf of the Plaintiff. In this Notice of Demand, a specific allegation  
23 was raised against the Defendants in regard to the reason for the payment  
24 of RM10,000 i.e. that it was part payment towards the profits earned from  
25 the Heineken contract. The Defendants did not respond to the said notice  
26 nor did they raise any protest or question the purpose of the money that  
27 was paid to the Plaintiff. One would have expected that the Defendants  
28 would lose no time in denying the Plaintiff's assertions in the Notice of  
29 Demand by replying to it immediately. The fact that they did not and chose



1 to remain silent leads to an irresistible inference that they accepted that  
2 the money was part payment of the profits that was to be shared equally  
3 between the Plaintiff and the Defendants.  
4

5 **(65)** I note that the allegation it was a loan was only raised much later  
6 when the defence was filed. Accordingly, I doubt the bona fides of raising  
7 this allegation for the first time in the defence and I can come to no other  
8 conclusion then to hold that it is an afterthought and a futile attempt to  
9 draw attention away from the actual reason for the payment of RM10,000.  
10

11 **(66)** The Defendants' allegation that the payment was a loan is clearly  
12 unsupported and unsubstantiated. Such an unsubstantiated allegation  
13 does not help the progress of the defence. In fact, it has the opposite  
14 effect. The rule is that "he who asserts must prove." (see ***Juahir Sadikon***  
15 ***v Perbadanan Kemajuan Ekonomi Negeri Johor [1996] 4 CLJ 1***). The  
16 onus is on the Defendants to do so. This the Defendants plainly failed to  
17 establish. As such I am satisfied and I make the finding that it is more  
18 probable than not that the payment of the sum of RM10,000 was part  
19 payment of the unpaid profit sharing to the Plaintiff as was promised by  
20 the 1<sup>st</sup> Defendant. This further strengthened the Plaintiff's case that there  
21 was a concluded agreement between them for equal profit sharing.  
22

### 23 **Non calling of the Heineken witness**

24 **(67)** It hardly needs repeating that if a party suppresses material  
25 evidence in a trial, the court may exercise its discretion to draw an adverse  
26 inference under s. 114(g) of the Evidence Act 1950 against that party. S.  
27 114(g) reads as follows :  
28

29 *"114 Court may presume existence of certain fact*



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1       The court may presume the existence of any fact which it thinks likely to  
2       have happened, regard being had to the common course of natural  
3       events, human conduct, and public and private business, in their relation  
4       to the facts of the particular case....

5       The court may presume:-

6       (g) **that evidence which could be and is not produced would if**  
7       **produced be unfavourable to the person who withholds it;**

8       However it has to be emphasized that such an adverse inference should  
9       not be drawn unless the circumstances justify it. This well settled  
10      proposition of the law comes from the Federal Court decision of  
11      Munusamy Vengasasalam v PP [1987] 1 MLJ 492 where it was held:

12      *"It is essential to appreciate the scope of s.114(g) lest it be carried too*  
13      *far outside its limit. **Adverse inference under that illustration can only***  
14      ***be drawn if there is withholding or suppression of evidence and***  
15      ***not merely on account of failure to obtain evidence.** It may be drawn*  
16      *from withholding not just any document, but material document by a*  
17      *party in his possession, or for non-production of not just any witness but*  
18      *an important and material witness to the case."* **(Emphasis added)**

19  
20   **(68)** Reverting back to this case counsel for the Defendants invited this  
21   Court to invoke the presumption under S. 114(g) of the Evidence Act  
22   against the Plaintiff for failing to produce Ms Tan Chin Teng from  
23   Heineken. It was contended that Ms Tan Chin Teng is a material witness  
24   as she can confirm or deny the fact that the Plaintiff was liaising with  
25   Heineken on behalf of the Defendants. It was also contended that the  
26   Plaintiff's failure to call Ms Tan Chin Teng during the trial meant that there  
27   was a failure to discharge the burden that was on the Plaintiff to prove that  
28   there were active negotiations or communication on his part in securing  
29   the Heineken contract for the Defendants.



1 (69) In the midst of the trial, counsel for the Plaintiff had informed the  
2 court that the subpoena which was addressed to the manager of the  
3 procurement department of Heineken was refused and the Plaintiff  
4 thereupon made the decision to proceed and close the Plaintiff's case with  
5 only the available witnesses for the day.

6  
7 (70) Viewed as a whole and considering the arguments raised by both  
8 learned counsel, I took note of the contents and particulars of the  
9 subpoena which quite significantly was addressed to the manager of the  
10 procurement department of Heineken and not to Ms Tan Chin Teng. The  
11 purpose for attendance was in respect of the payments made by Heineken  
12 to the 2<sup>nd</sup> Defendant.

13  
14 (71) Viewed cumulatively I take note of the fact that the Defendants in  
15 their Defence as well as in the testimony of the Defendants' witness at the  
16 trial, did not dispute the fact that the Heineken contract was introduced by  
17 the Plaintiff. I was greatly persuaded and which I was mindful of was that  
18 the 1<sup>st</sup> Defendant agreed that it was the Plaintiff who sourced the  
19 Heineken contract for him. Furthermore it is also in evidence that 1<sup>st</sup>  
20 Defendant under cross-examination had admitted that he had no contacts  
21 and knew no one in Heineken.

22  
23 (72) The fact remained that the Defendants admitted in their Defence  
24 that the Heineken contract was initiated and introduced by the Plaintiff.  
25 These judicial admission by the Defendants are crucial. In ***Yam Kong***  
26 ***Seng & Anor v Yee Weng Kai [2014] 4 MLJ 478*** the Federal Court  
27 reiterated that it is trite law that a judicial admission made in a pleading  
28 stands on a higher footing than evidentiary admission.





(73) Apart from that I need hardly repeat that an adverse inference under s.114(g) can only be drawn if there has been withholding or suppression of evidence and not merely on account of failure to obtain evidence. An adverse inference for not calling a witness cannot be drawn if there is already available and sufficient evidence to support the party who would have called that witness. As has been seen, even without the evidence of Ms Tan Chin Teng, the evidence that the Heineken contract was introduced by the Plaintiff has been proven. If the Defendant felt that Ms Tan Chin Teng was a material witness then it is for the Defendants to subpoena her to unfold the narrative of their defence. In the end analysis I would respectfully decline to exercise my discretion to invoke an adverse inference under s. 114(g) Evidence Act 1950 because there is sufficient evidence adduced by the Plaintiff to prove the claim. There is nothing to stop the Plaintiff from relying on evidence adduced by the Defendants as well. The case of ***Tan Kah Khiam v Liew Chin Chuan & Anor [2006] 4 CLJ 715*** is referred to for support on this stand. The Court of Appeal held at pg 450 :

*“In a civil case, one party’s evidence is the other’s as well. So, a plaintiff may rely on the defendant’s evidence to prove his or her case. The converse is also true...”*

### **Credibility of Witnesses**

(74) A witness’s credibility is always taken into consideration in any evaluation of evidence by the court.

(75) Having evaluated the evidence produced before this Court as a whole I am satisfied and I make the finding that all the witnesses for the Plaintiffs are reliable and credible. Although they are friends I see no



evidence and none was forthcoming that PW 2 and PW 3 would derive some personal gain or profit in their testimony. Neither have the Defendants suggested any credible motive for the two witnesses to give false evidence against the Plaintiff.

(76) I have explained earlier why I accepted the evidence of PW 2 and PW 3. Likewise I find the Plaintiff to be a credible witness as well. He gave evidence in a straightforward manner and I found his evidence coherent, convincing and in accord with the inherent probabilities of his claim and hence I accept his evidence. The Plaintiff's witnesses corroborate each other and are consistent regarding the probabilities and the factual circumstances of this case before me. At the same time, I reject the defence version as it is inconsistent with the probabilities of this case. I found the Defendants' main and only witness to be unconvincing and less than truthful regarding the surrounding circumstances pertaining to the existence of the oral agreement and its terms. The Defendant's witness gave implausible excuses and less than cogent explanations under cross-examination. Chief among these was the reason for the payment of RM10,000 which I found was a bare allegation and an afterthought simply to deprive the Plaintiff from being entitled to an equal share of the profits as agreed. This, in my view severely affected the credibility of the 1<sup>st</sup> Defendant to a point almost beyond repair.

#### **Whether the Defendants had profited from the Heineken contract**

(77) The Plaintiff gave evidence that based on the quotation supplied by the Defendants there would be a profit of 43% made by the 2<sup>nd</sup> Defendant on the total amount paid by Heineken to the 2<sup>nd</sup> Defendant. The Defendants on the other hand gave evidence that there was a loss which arose out of the contract. The 1<sup>st</sup> Defendant stated that the profit and loss



1 accounts prepared by the company showed proof that the Defendants  
2 incurred losses. The monies received and the expenses incurred in  
3 respect of the Heineken contract are all within the knowledge of the  
4 Defendants. The onus is on the Defendants to prove the expenses and  
5 the losses incurred as alleged. However, it is unfortunate that the  
6 Defendants failed to tender any documents of the same into Court. The  
7 testimony of the 1<sup>st</sup> Defendant is reproduced below :

8  
9 *“PP: Para 7, Yang Arif. Ok. Mr Veera, do you want to look at the hard*  
10 *copy? Its at page 15. Are you there Mr Veera?*

11 *DW 1: Yes.*

12  
13 *PP: Ok, para 7.*

14 *DW 1: Ok.*

15  
16 *PP: This is what you have stated. “Disebabkan ini, Defendan-defendan*  
17 *menyatakan bahawa D2 telah mengalami kerugian untuk keseluruhan*  
18 *kontrak daripada Heineken tersebut. **Defendan-defendan akan***  
19 ***mengemukakan bukti-bukti yang kukuh atas fakta ini ketika***  
20 ***perbicaraan kelak nanti.** So now Mr. Veera where is your proof that*  
21 *this contract at loss? Do you have any documents before in the bundle*  
22 *to show this contract is at loss?*

23 *DW 1: Profit and loss account.*

24  
25 *PP: Ya, where is it in the bundle?*

26 *DW 1: I have submitted.*

27  
28 *YA: Yes, its not there, Next question?*

29  
30 *PP: I put it to you Mr Veera there is no documents to support. That is*  
31 *why there is no documents in the bundle. I put it to you, you may agree*



1           or disagree. There is no documents to support, that is why it is not in the  
2           bundle.

3           DW 1: I have all the documents, profit and loss account. IF it is not in the  
4           bundle I can produce. No problem.

5  
6           PP: Now Mr Veera, my next question is that I put to you that you have  
7           made profit from this contract, agree?

8           DW 1: If I have made profit, I will continue the contract. Why should I ask  
9           Heineken to terminate my contract?

10  
11          YA: Mr Veera, yes or no?

12          DW 1: No.”  
13

14   **(78)** The Defendants have deliberately failed to produce the profit and  
15   loss accounts despite the 1<sup>st</sup> Defendant’s averment that he would produce  
16   it at the trial. At this juncture this Court is entitled to draw an adverse  
17   inference against the Defendants for not producing the Profit and Loss  
18   accounts which he had positively averred he would produce. The non-  
19   production of the Profit and Loss accounts raises a strong presumption  
20   that, if produced, would support the case for the Plaintiff. The Defendants  
21   have withheld the Profit and Loss accounts, a document which is in their  
22   possession. Here the production of the Profit and Loss accounts would  
23   surely have shed light as to whether the Defendants had indeed suffered  
24   losses arising out of the contract as they claimed. There was a failure to  
25   explain why these documents were not produced bearing in mind that it  
26   was the assertion of the Defendants that the Profit and Loss accounts  
27   would reveal the truth of the matter. The Profit and Loss account is  
28   material evidence and the best evidence to show whether there were  
29   losses incurred from the Heineken contract or otherwise. The Defendants  
30   claim there are losses but yet there is nothing shown to the Court to  
31   corroborate the Defendant’s bare assertion. These documents were in the



1 possession of the Defendants and they saw it fit not to withhold it. This  
2 court is compelled to draw an adverse inference under s. 114(g) of the  
3 Evidence Act 1950 that the Profit and Loss accounts which could have  
4 been produced, if produced, would have been unfavourable to the  
5 Defendants.

6  
7 **(79)** It is untenable for the Defendant to claim there is no profit in respect  
8 of the Heineken contract. This is so especially in light of the fact that the  
9 Defendant still found it feasible to carry on fulfilling the terms of the  
10 contract with Heineken for a period of 3 years. If the contract was running  
11 at a loss surely the Defendants would have immediately terminated it at  
12 the expiry of the contractual period instead of continuing with it. If it were  
13 indeed true that the contract was not a profitable one then the 1<sup>st</sup>  
14 Defendant being a reasonable businessman with a good number of years  
15 experience to his name would never have entered into it in the first place.  
16 I agree with the Plaintiff's contention that it goes against common sense  
17 for the Defendants to allege that there were losses incurred on the  
18 Heineken contract but yet still carry on with it for a number of years.

## 19 20 **Conclusion**

21 **(80)** Having evaluated the evidence adduced in totality on a balance of  
22 probabilities I find that the Plaintiff has established that there existed an  
23 oral agreement whereby the Defendants would share equally the profits  
24 after deduction of expenses if the Plaintiff were successful in securing  
25 contracts for the Defendants. In breach of that oral agreement the  
26 Defendants have failed or refused to pay the Plaintiff his share of the  
27 profits. That now leaves the Court with the duty to quantify the amount of  
28 damages to be allowed to the Plaintiff.



1 **(81)** The only evidence before the Court as to the profit earned through  
2 the Heineken contract comes from the Plaintiff. There is not an iota of  
3 evidence adduced by the Defendants to suggest that they incurred losses  
4 as alleged.

5  
6 **(82)** The testimony of the Plaintiff through the available documentary  
7 evidence showed that the Defendants received a sum of RM3,835,954.99  
8 from the Heineken contract for the years 2016 to 2018. The Plaintiff has  
9 shown from the calculations carried out that the profits received by the  
10 Defendants was for the sum of RM1,649,460.65. Therefore, the Plaintiff  
11 is entitled to half of that sum which is RM824,730.32 together with interest  
12 and costs.

13  
14 Dated 14 March 2023.

15  
16  
17  
18  
19 **(JULIE LACK)**

20 **Judge**

21 **High Court of Malaya**

22 **Shah Alam, Selangor Darul Ehsan**  
23  
24  
25  
26  
27  
28  
29



1 Counsel

2 For the Plaintiff :

3 Jaspal Singh Mann, Pramjit Kaur and Santhakumari Thangavelu  
4 (*MESSRS. MANN & ASSOCIATES*)

6 For the Defendant :

7 Surendran a/l K. Sreetharan with Sabrina Binti Mohd Ameen  
8 (*MESSRS. HARNIZA & CO.*)

