

**DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR**  
**DALAM WILAYAH PERSEKUTUAN, KUALA LUMPUR**  
**GUAMAN SIVIL NO: WA-22NCC-268-06/2021**

**ANTARA**

**CHEN JUI-LIANG**

**(No. Paspot Republik**

**China (Taiwan): 351591279)**

**... PLAINTIF**

**DAN**

**CHOW ZEE NENG**

**(NO. K/P: 670827-10-6181)**

**... DEFENDAN**

**JUDGMENT**

**A. Introduction**

[1] The plaintiff filed this action against the defendant, claiming an amount of RM5,00,000 that he had allegedly lent to the defendant.

[2] After a full trial, I dismissed the claim. The reasons for my decision are set out below.



## **B. Background Facts**

[3] The facts leading up to this claim are highly disputed. The plaintiff alleged that on or around 19 September 2018, he entered into a friendly loan agreement with the defendant ("Loan Agreement"). Pursuant to the Loan Agreement, the plaintiff agreed to lend RM6,000,000 to the defendant.

[4] The plaintiff then issued three cheques dated 19 September 2018 for a total amount of RM5,000,000 to the defendant. The cheques were issued by the plaintiff's brother, Chen Jui Hung. The fact of the issuance of these cheques is not in dispute.

[5] The defendant denies that any loan was given to him. Instead, he claimed the plaintiff paid RM5,000,000 as part-payment for the acquisition of shares in Asia Media Group Berhad ("Asia Media"). However, Asia Media was later listed as an affected listed issuer under Practice Note 17 (PN17) of the Main Market Listing Requirements of Bursa Malaysia.

[6] The plaintiff claimed that the defendant failed to repay the loan to him, and is seeking the amount of RM5,000,000 from the defendant. The plaintiff also claimed unjust enrichment against the defendant.

## **C. Considerations and Findings**

[7] The main issue in dispute is whether the plaintiff had in fact provided a loan to the defendant, which the defendant had failed to repay.



[8] This claim is therefore premised mainly on the Loan Agreement. However, no signed copy of the Loan Agreement was provided to support the claim.

[9] The plaintiff claimed to have signed the Loan Agreement, but did not obtain a copy of the agreement. Further, there did not appear to be any effort on his part to procure a copy of the agreement, save for oral requests that he claimed to have made, but which he did not have any evidence of. There is also no evidence of any demand made by the plaintiff to the defendant for the amount outstanding.

[10] Instead, the plaintiff relied on the testimony of his solicitor, Lim Mui Eng (“LME”), who stated that she had overseen the preparation of the Loan Agreement. However, LME admitted in the course of cross-examination that the Loan Agreement that she referred to and that is relied on for the purpose of this claim is merely a draft. This draft was not signed by the plaintiff or the defendant.

[11] LME also admitted that she did not make any attempt to procure a copy of the Loan Agreement. I find it to be inconceivable for an advocate and solicitor tasked with drafting and executing a loan agreement, to have neglected to request for a copy of the agreement. This is especially so considering the value of the loan is significant.

[12] I find the failure of the plaintiff to provide a signed copy of the Loan Agreement raises serious questions as to the existence of the loan which forms the very premise of the plaintiff’s claim.



[13] Pursuant to section 101(1) of the Evidence Act 1950 (“EA”), a party desiring judgment as to any legal right dependent on the existence of asserted facts, must prove that those facts exist.

[14] In ***Tenaga Nasional Bhd v Perwaja Steel Sdn Bhd [1995] 4 MLJ 673***, the court held that:

*“Under s 101(1) of the Evidence Act 1950, whoever desires the court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist. In other words, the plaintiff must prove such facts as the plaintiff desires the court to give judgment as to its right to claim against the defendant or the defendant's liability to pay the plaintiff. **The burden of proof is on the plaintiff: s 101(2). In order to succeed here, the plaintiff must prove its claim affirmatively.**”*

(emphasis added)

[15] In the present case, the burden is on the plaintiff to prove the existence of the Loan Agreement. This should have been done by tendering the Loan Agreement as primary evidence under section 64 of the EA, or if the circumstances in section 65 apply, by way of secondary evidence. Primary evidence of the Loan Agreement is the original copy of the Loan Agreement (section 62 of the EA), and secondary evidence would include a copy of the Loan Agreement or an oral account of the content of the Loan Agreement (section 63 of the EA).



[16] The only document tendered in court is a draft of a loan agreement. The draft is undated and unsigned.

[17] It is to be noted that one of the circumstances provided for in section 65 of the EA, which allows secondary evidence to be given, is where the original copy of a document is shown or appears to be in the possession of the person against whom the document is sought to be proven (section 65(1)(a)(i)). In such a case, a notice to produce under section 66 of the EA ought to be issued to the person, and secondary evidence may be tendered if the person does not produce the document.

[18] In this case, the plaintiff alleged that he signed the Loan Agreement. He claimed that the original Loan Agreement is with the defendant. Yet, he did not provide any evidence that he requested for the original Loan Agreement from the defendant at any time before the commencement of this action. Nor did he attempt to produce the Loan Agreement as secondary evidence pursuant to section 65 of the EA. No notice to produce under section 66 of the EA was issued to the defendant.

[19] Such a lackadaisical attitude in procuring a document that is central to his claim has in my view led to the plaintiff failing to prove his case.

[20] I also considered the defendant's case that the amount of RM5,000,000 was paid by the plaintiff for the purpose of acquisition of shares in Asia Media. The only evidence given by the defendant in this regard is proof of the plaintiff's ownership of shares in Asia Media. There is no evidence of the utilisation of the RM5,000,000 for the purchase of



the shares in Asia Media. Dato' Ricky Wong, who was alleged to have sold the shares was not called as a witness.

[21] Balancing the evidence provided by the plaintiff and the evidence provided by the defendant, I am unable to reach a conclusion on which version of events is on the balance of probabilities, more plausible.

[22] In this regard, I relied on section 102 of the EA, which provides that:

*“The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”*

[23] Based on this section, the burden is on the plaintiff to prove his case. I am of the view that the plaintiff's failure to tender the Loan Agreement, whether by way of primary or secondary evidence, has led to him not being able to prove his case on a balance of probabilities. The reasoning in ***Selvaduray v Chinniah [1939] 1 MLJ 253*** at pages 254 and 255 is instructive:

*“The burden of proof under section 102 of the Evidence Enactment is upon the person who would fail if no evidence at all were given on either side, and **accordingly the plaintiff must establish his case. If he fails to do so, it will not avail him to turn round and say that the defendant has not established his.** The defendant can say "It is wholly immaterial whether I prove my case or not. You have not proved yours" (see the*



*judgment of the Privy Council in **Raja Chandranath Roy v. Ramjai Mazumdar**, 6 Bengal Law Reports, p 303)...*

...

*... **it is clear that the onus is on the plaintiff to prove his case.** After the conclusion of the whole case there must be some preponderance in his favour. It may be true that the plaintiff established a prima facie case, **but at the conclusion of the trial the learned Judge has found that the position was exactly even, i.e. that any preponderance in the plaintiff's favour had disappeared. That being the case the plaintiff must necessarily fail, as he has not discharged the onus which is upon him.** No doubt the defendant would equally have failed if he had been the claimant and had tried to establish, as a substantive part of his case, the alternative version which he tried to prove in answer to that of the plaintiff. But as he was not the claimant, that consideration is quite immaterial. It is quite sufficient for his purpose if he can satisfy the Court that the plaintiff has not established his case and the learned Judge has so found."*

(emphasis added)

[24] In this case, the plaintiff failed to prove on the balance of probabilities that an agreement had been executed for the purpose of a loan by the plaintiff to the defendant. The plaintiff has therefore failed to prove his case, and consequently, his claim must fail. The fact that the defendant's case is on the balance of probabilities is also improbable, is



irrelevant, as it is the plaintiff as the claimant, who must first prove his case.

**D. Decision**

[25] With my considerations and findings as set out, I dismissed the plaintiff's claim, with costs.

Dated 28 July 2023

- sgd -

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

**Counsel:**

Plaintiff : Fong Lip Jeen of Messrs. Wong & Ting

Defendant : Samir Zainal of Messrs. Radzlan Low & Partners

