DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR

DALAM WILAYAH PERSEKUTUAN KUALA LUMPUR

<u>GUAMAN NO: WA-22NCC-606-11/2022</u>

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)

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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)

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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 enclosure 112, an *ex-parte* application for a mareva injunction against the defendants.

[2] The court dismissed the application, after finding insufficient evidence of a risk that the defendants will dissipate their assets.

B. Background Facts

[3] The plaintiffs' claim is for the return of sums paid and redemption sums due under subscription agreements and partners' financing agreements they had entered into with the 3rd to 5th defendants (collectively, "Agreements").

[4] 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

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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 outstanding 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 plaintiffs claimed that the Agreements are invalid, illegal and *void ab initio*.

[5] 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.

[6] 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 made.

C. <u>Considerations and Findings</u>

[7] In enclosure 112, the plaintiffs sought to restrain the defendants from dissipating assets amounting to RM8,209,330, which the plaintiffs claimed to be due and owing to them.

[8] The court thus considered the conditions required to be met for the grant of a mareva injunction, which are set out in ***S&F International***

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Limited v Trans-Con Engineering Sdn Bhd [1985] 1 MLJ 62 and ***Creative Furnishing Sdn Bhd v Wong Koi [1989] 2 MLJ 153***. They are as follows:

a. The plaintiff must have a good arguable case against the defendant;

b. The defendant must have assets within the jurisdiction; and

c. There is a real risk of the assets being dissipated or removed.

[9] In considering the first condition, namely whether the plaintiffs have a good arguable case against the defendants, I found the case of ***Biasamas Sdn Bhd v Kan Yan Heng [1994] 4 MLJ 1*** to be instructive. At page 5D of the judgment, the Court of Appeal held as follows on the question of whether a good arguable case had been proven:

> *"What is a good arguable case is difficult to define. The respondents need not show that they have a case so strong as to warrant summary judgment nor even a strong prima facie case.* ***It would generally be sufficient if the respondents can show on the evidence available, there is a fair chance that they will obtain judgment against the appellants*** *(see* ***Ninemia Maritime Corp v Trave Schiffahrtsgesellschaft mbH & Co KG; The Niedersachsen [1984] 1 All ER 398*** *, on appeal to CA* ***[1984] 1 All ER 413; [1983] 1 WLR 1412****)."*

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(emphasis added)

[10] In ***S&F International*** (supra), the Federal Court adopted the reasoning by Mustill J in ***Ninemia Maritime Corpn v Trave Schiffahrtsgesellschaft mbH & Co KG, The Niedersachen [1984] 1 All ER 398*** at page 404d, which was affirmed on appeal to the Court of Appeal, that a good arguable case is:

> *"… a case which is more than barely capable of serious argument, and yet not necessarily one which the judge believes to have a better than 50% chance of success."*

[11] I am of the view that the facts of the present case meet the requirement of a good arguable case, in that it is a case that is more than barely capable of serious argument, and that would give rise to a fair chance that the plaintiffs will obtain judgment against the defendants.

[12] In the present case, the plaintiffs are seeking the return of sums paid and redemption sums due under the Agreements. It can hardly be disputed that the plaintiffs entered into the Agreements, made payments to the 3rd to 5th defendants pursuant to the Agreements and have not received any returns from the payments made. The defendants' main defence is that the monies claimed in this suit are part of monies seized pursuant to freezing and seizure orders granted, and the Agreements have been frustrated by these supervening events.

[13] It is also important to highlight that the defendants had filed applications to strike out this action. I dismissed the striking out applications (see ***P. Ponnamal a/p Ponniah & Ors v Goh Hwan Hua &***

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Ors [2023] MLJU 3346), as I found that the plaintiffs' claim is not obviously unsustainable and raises questions that are fit to be decided after a full trial.

[14] With the dismissal of the striking out applications, it would follow that the plaintiffs have a good arguable case against the defendants. As such, the first condition for the grant of a mareva injunction has been met by the plaintiffs.

[15] I also find that the second condition, the existence of the defendants' assets within the jurisdiction, has been met. The plaintiffs have shown that the defendants have assets within the jurisdiction, including monies in various bank accounts.

[16] However, the plaintiffs failed to meet the final condition for the grant of a mareva injunction, namely to show that there is a real risk of the defendants' assets being dissipated or removed.

[17] The plaintiffs argued that there is a lack of probity on the part of the defendants, as evidenced by the non-payment of monies due to the plaintiffs, the fact that the 1st to 4th defendants did not have the requisite licences to carry out their businesses, and the defendants' involvements in illegal deposit-taking. The allegations are premised on events prior to the filing of this suit, and which led to the filing of this suit. They are essentially allegations forming part of the plaintiffs' claim, and in my view, they are insufficient to show a real risk that the defendants' assets will be completely dissipated unless restrained.

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[18] To demonstrate a lack of probity and a risk of dissipation of the defendants' assets, there must be allegations over and above the allegations that led to the filing of this action. In ***Creative Furnishing*** (supra), the Supreme Court held that the refusal to settle the debt in dispute and the dishonouring of a cheque issued towards payment of the debt were not sufficient evidence of a risk of dissipation of the defendants' assets. The court referred to ***Aspatra Sdn Bhd v Bank Bumiputra Malaysia Bhd [1988] 1 MLJ 97*** and affirmed the importance of a mareva injunction for the purpose of preserving assets and preventing a defendant from dissipating assets before judgment. However, the court cautioned:

> *"**But the remedy is not of unlimited application.** On the facts of the appeal before us, the respondent must satisfy the court firstly, that he had a good arguable case; secondly, that the appellant had assets within jurisdiction, and thirdly. **that there was a real risk of the assets being dissipated or removed before judgment in that there must be solid evidence to establish the risk.** In our opinion, mere refusal to pay a disputed debt and issuing of a dishonoured personal cheque by a director of the second defendant (who was not a party in this appeal), as presented before the learned judge, fell far too short of the necessary evidence to establish real risk of dissipation of assets of the appellant before judgment."*

(emphasis added)

[19] In this case, I find the non-payment of monies said to be due to the plaintiffs and the allegations of illegal deposit-taking which form the

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premise of this action, are not sufficiently solid for the plaintiffs to argue that there is a risk the defendants will dissipate their assets.

[20] It is also important to highlight that this suit was filed on 23 November 2022, and enclosure 112 was only filed 15 months later, on 28 February 2024. There is no evidence before this court that since the filing of the action, steps had been taken by the defendants to dissipate their assets or that any risk exists that the defendants will dissipate their assets.

[21] An application for a mareva injunction is by its very nature urgent. It is filed due to concerns that assets will be dissipated and judgment obtained will be futile. It is worth noting that in this case, the defendants' assets that are the subject matter of enclosure 112 are liquid assets that can be easily disposed of, and which thus gives rise to a higher risk of dissipation. As such, had there been a real concern by the plaintiffs that the defendants would dissipate their assets, the plaintiffs should have immediately filed an application for a mareva injuction as soon as this suit was filed.

[22] The plaintiffs claimed that they were only made aware of investigations carried out on the defendants when these investigations were reported in the media in November 2023. Even so, enclosure 112 was only filed three months later, on 28 February 2024.

[23] The urgency of a mareva injunction application is evident by the conduct of the parties in the cases cited by the plaintiffs. I observed that in ***Creative Furnishing*** (supra) and ***Aspatra*** (supra), mareva injunction applications were filed on the same date the suits were filed, while in the

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other cases, the applications were filed very soon after the filing of the suits.

[24] The lack of urgency in the filing of enclosure 112 by the plaintiffs suggests that the plaintiffs did not consider there to be a material risk that the defendants would dissipate their assets. Thus, I find the delay in filing enclosure 112 to be fatal to the defendants' case.

[25] Taking into account the totality of my findings as set out, and specifically the finding that the plaintiffs had failed to prove that there is a risk of dissipation of the defendants' assets, I find the balance of convenience lies against the grant of a mareva injunction.

D. Decision

[26] The plaintiffs have not met the threshold for the grant of a mareva injunction, and as such, the court dismissed enclosure 112.

Dated 6 September 2024

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

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Counsel:

Plaintiffs	:	Amanda Sonia Mathew (together with Sachpreetraj Singh) of Messrs. Raj & Sach

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