

**DALAM MAHKAMAH TINGGI MALAYA DI SHAH ALAM
DALAM NEGERI SELANGOR DARUL EHSAN, MALAYSIA
GUAMAN NO.: BA-22NCC-160-04/2022**

ANTARA

1. **CHEN YOOK BEE**
(No. K/P: 670713-08-5204)
2. **LOON CHEE WENG**
(No. K/P: 840228-14-5217)
3. **LEONG TACK MING**
(No. K/P: 535041-05-5607)
4. **TONY NG SOO MENG**
(No. K/P:680112-10-6179)
5. **PREMA A/P ACHU**
(No. K/P: 640524-10-7008)
6. **WAI CHEE SENG**
(No. K/P: 621221-10-7509)
7. **TAN ENG SOO**
(No. K/P: 640313-10-5651)
8. **CHIN YEW SIN**
(No. K/P: 590527-05-5247)

**[yang kesemuanya membawa guaman
untuk pihak sendiri sebagai pelabur
'Skim Pelaburan Mata Wang Digital'
dan juga untuk mewakili semua individu lain
yang telah melabur dalam
Skim Pelaburan Mata Wang Digital
sepertimana yang disenaraikan di Lampiran 1
yang dikepikan bersama Writ ini]**

- PLAINTIF-PLAINTIF

DAN



1. **NEUROGINE CAPITAL (L) LTD**
(No. Syarikat: LL 15607)
2. **EMAS FINTECH INC**
(No. Syarikat: CS201953873)
3. **CHEN CHEE ONN**
(No. K/P: 701214-10-5329)
4. **JASON KELLADY**
(No. K/P: 890127-43-5739)
5. **LOK WAI KEONG**
(No. K/P: 7410003-06-5343) - DEFENDAN-DEFENDAN

GROUNDS OF JUDGMENT

Introduction

[1] The First and Third Defendants' (is refer to as "D1 & D3") application to strike out the Plaintiffs suit is filed on 26-5-2022 (**Enclosure 6**) pursuant to Order 18 rule 19 (1)(a), (1)(b), (1)(c) and (1)(d) and O. 15 r. 6(2)(a) and/or (b) Rules of Court 2012 [*P.U(A) 205/2012*] against the Plaintiffs and also for the following orders:

- (a) *Writ dan Pernyataan Tuntutan yang kedua-duanya bertarikh 21-4-2022 (Writ dan Pernyataan Tuntutan tersebut) yang dimulakan dan difailkan oleh Plaintiff-Plaintif dibatalkan dengan kos dibayar serta-merta dan tanpa kebebasan kepada Plaintiff untuk memfailkan semula.*
- (b) *secara alternatif kepada relif (a) diatas, Defendan Pertama dan Defendan Ketiga dibatalkan daripada tindakan ini.*



- (c) *secara alternatif kepada relief (b) diatas, Defendan Pertama dan Defendan Ketiga hanya dikekalkan sebagai Defendan nominal sahaja, dan Plaintiff-Plaintif diarahkan untuk mengeluarkan Defendan Pertama dan Defendan Ketiga daripada tuntutan-tuntutan dan/atau relief-relief Writ dan Pernyataan Tuntutan tersebut.*
- (d) *segala prosiding selanjutnya di dalam tindakan ini, termasuk pemfailan Pembelaan Defendan Pertama dan Defendan Ketiga ditangguhkan sehingga pelupusan permohonan ini.*
- (i) *sekiranya permohonan ini tidak dibenarkan, Defendan Pertama dan Defendan Ketiga diberikan tempoh masa 14 hari untuk memfailkan Pembelaan Defendan Pertama dan Defendan Ketiga.*
- (e) *relief dan/atau perintah selanjutnya yang dianggap suai manfaat oleh Mahkamah ini.*

[2] D1 & D3 stated the following as their grounds for the application to strike out the claims:

- (a) *Plaintif-Plaintif pada setiap masa material berpengetahuan bahawa Defendan Pertama dan Defendan Ketiga hanya sekadar pembekal platform dagangan nTrade sahaja.*
- (b) *Plaintif-Plaintif telah mengakui bahawa “Skim Pelaburan Mata Wang Digital” adalah dianjurkan oleh Defendan Keempat dan Defendan Kelima bagi pihak Defendan Kedua sahaja.*



- (c) *Plaintif-Plaintif telah mengakui bahawa pelaburan Plaintiff-Plaintif adalah secara terus ke dalam bahawa “Skim Pelaburan Mata Wang Digital” di mana akaun adalah dipegang oleh Defendan Kedua.*
- (d) *Namun, butiran kecuaiian yang kononnya terhadap Defendan Pertama dan/atau Defendan Ketiga yang diplidkan dalam Pernyataan Tuntutan adalah tidak berkenaan langsung dengan kausa tindakan Plaintiff-Plaintif yakni pernyataan cuaiian (negligence misstatement).*
- (e) *Plaintif-Plaintif juga telah mengakui bahawa segala jumlah pelaburan daripada Plaintiff-Plaintif dipegang oleh Defendan Kedua sahaja.*
- (f) *Oleh itu, Plaintiff-Plaintif tidak mempunyai kausa tindakan yang munasabah terhadap Defendan Pertama dan Ketiga.*
- (g) *Kausa tindakan Plaintiff-Plaintif terhadap Defendan Pertama dan Defendan Ketiga adalah berbeza dengan Defendan Kedua, Defendan Keempat dan Defendan Kelima, di mana relief yang dituntut oleh Plaintiff-Plaintif dalam Writ dan Pernyataan Tuntutan adalah tidak berkenaan dengan Defendan Pertama dan Defendan Ketiga.*
- (h) *Selanjutnya, tuntutan Plaintiff-Plaintif dimulakan dengan sengaja terhadap Defendan Defendan tertentu dengan pengecualian pihak-pihak lain (selective persecution whilst blatantly excluding others).*



- (i) *Plaintif-Plaintif hanya menamakan Defendan Pertama dan Ketiga kerana Plaintif-Plaintif memerlukan seorang ‘kambing korbanan’ (scapegoat) untuk menanggung kerugian Plaintif-Plaintif.*

- (j) *Mahkamah yang Mulia ini dipergunakan/diperdayakan oleh Plaintif-Plaintif untuk satu matlamat yang kurang jujur.*

What are the Plaintiffs’ claims?

[3] The Plaintiffs are investors of the “Digital Currency Investment Scheme” and they bring this action on their own individual behalf and on behalf of and as representing all the other individuals who had invested in the Digital Currency Investment Scheme whose names and addresses are set out in the list marked as “Appendix 1” in the statement of claim.

[4] As for the D1 & D3, D1 is a company registered under the Labuan Companies Act 1990; is licensed by the Labuan Financial Services Authority and approved to conduct digital financial services related business; and operates the Artificial Intelligence (AI) driven money broking and trading platform “nTrade”.

D3 is a Malaysian citizen of full age and is a shareholder and director of D1 and also the Chief Executive Officer (CEO) of D1.

[5] The Second Defendant (D2) is a company registered in Philippines with its registered address in Philippines and having its Malaysia Office at Petaling Jaya, Selangor.



[6] The Fourth Defendant is a Malaysian citizen of full age and is and/or represented himself to be the CEO of D2.

[7] The Fifth Defendant is a Malaysian citizen of full age and is and/or represented himself to be the Chief Marketing Officer of D2.

[8] In the presentation by Fourth Defendant and Fifth Defendants, had made representation about the Digital Currency Investment Scheme.

[9] Relying upon the representations and acting on the faith and the belief that it was true, the Plaintiffs were each of them induced to enter into a business relationship and agreement with D2 and D1 wherein the Plaintiffs –

- become the investors in the Digital Currency Investment Scheme.
- engaged, appointed and authorized D2 as their trading agent, to purchase and sell foreign currencies and cryptocurrencies on their behalf.
- transferred/deposited monies in US currency to D2 address to activate their individual investment account.
- kept and/or left moneys and/or cryptocurrency in D2's account.
- referred others to join D2 and D1's Digital Currency Investment Scheme.



[10] The Plaintiffs and other investors, in the period from June to November 2020, had transferred monies to D2 and the amount was USD 2,492,021.83. The particulars of the dates of transferred and amount transferred by each of the Plaintiff and the other investors are as in Appendix 2 to the statement of claim.

Discovery of wrongdoings

[11] On or about 9-12-2020, the Plaintiffs had discovered that the D2's web portal page was purportedly "under maintenance", D4 released a video purportedly to all D2's investors claiming *inter alia* that the investors' monies and/or cryptocurrency held in D2's account were missing an/or had been misappropriated without his knowledge, the Plaintiffs' calls to D2 went unanswered and D2's Malaysia Office was closed.

[12] The Plaintiffs had discovered that D2 and D1 were a scam and/or fraudulent and the representations made by each of the Defendants were false, misleading and/or untrue.

[13] In the further enquiries and investigations conducted by the Plaintiffs, the Plaintiffs had discovered that –

- Labuan Financial Services Authority had issued 3 supervisory warnings to D1 regarding D2.
- D1 had known or had cause to know that D2 did not have skilled manpower to operate, did not comply and no legal and technical expertise and no license in the countries to which they want to operate.



- on or about end of October 2020, D2 had abandoned the Digital Currency Investment Scheme project with D1.
- on or about November 2020, D1 had suspended D2's access to D1's nTrade trading platform.
- on or about 4-12-2020, D1 had terminated their relationship with D2.
- D4 is wanted by the police and other individuals from D2 being held under the Prevention of Crime Act.1959.

The Plaintiffs' loss and damage

[14] The Plaintiffs and the other investors plead that the Defendants became constructive trustees for the Plaintiffs of all moneys received by them purporting to relate to the Digital Currency Investment Scheme; the Plaintiffs and the other investors are entitled to trace all the moneys that held by the Defendants or elsewhere.

[15] The Plaintiffs stated that when the Defendants made or causing to make the representations to the Plaintiffs, the Defendants intended and they well knew or ought to have known that the Plaintiffs and the other investors would rely on the representations and would be induced to enter into the agreement with D2 and D1 and join the Digital Currency Investment Scheme.

Therefore, the Plaintiffs pleaded that the Defendants were under a duty to take care in the making of the representations.



[16] Further, the Plaintiff had pleaded the particulars of breach of duty by the Defendants specifically the negligence of D1 & D3.

[17] The Plaintiffs also pleaded that the Defendants had been wrongfully and/or unjustly enriched at the Plaintiffs' and the other investors' expense.

The reliefs claim by the Plaintiffs on behalf of each of them and on behalf of the other investors against the Defendants and each of them

[18] The reliefs seek by the Plaintiffs and the other investors are –

- (a) a declaration that the agreement between the Plaintiffs, D1 and D2 has been rescinded.
- (b) an order that the Defendants do return to the Plaintiffs the sum of RM10,491,411.90 (conversion from USD 2,492,021.83 at the foreign currency rate of USD 1.00=RM4.21 as at 28-3-2022).
- (c) Alternatively –
 - (i) a declaration as to what sums in the hands of the Defendants are the assets of the Plaintiffs;
 - (ii) all due accounts and inquiries in payment of the sum found due to the Plaintiffs.
- (d) damages including aggravated and/or exemplary damages.



- (e) interest at the rate of 5% per annum on such sums as may be awarded by the Court.
- (f) costs.
- (g) such further or other relief as this Cour deems fit and just.

Objections by the Plaintiffs on the striking out's application

[19] The Plaintiffs strongly objected and opposed to the application to strike out the Plaintiffs' claims against all the Defendants.

[20] The learned counsel for the Plaintiffs submitted that there are no merits in this application that is able to sustain this application.

[21] In order for this Court to allow striking out, the learned counsel for the Plaintiffs cited the case of **Tractors Malaysia Bhd v. Tio Chee Hing [1975] 2 MLJ 1** –

“The power to dismiss an action summarily without permitting the plaintiff to proceed to trial is a drastic power. It should be exercised with the utmost caution”.

And the case of **Muniandy v. Tan Peck Soo & Ore [1990] 1 MLJ 502** where it is also trite that powers of the Court to strike out pleadings ought to be sparingly exercised and only in very exceptional cases.



[22] The learned counsel for the Plaintiffs seeks this Court to scrutiny the pleadings that all the facts pleaded had revealed the following:

- (a) the Plaintiffs' pleadings are adequately pleaded and shows valid causes of action against the Defendants, and that the Defence of the Defendants do reveal merits of this case to be tried and not summarily disposed of.
- (b) further and in the alternative, the Third Defendant's contention that the Defendants were not participants in D2's fraud, scam and/or dishonesty and/or that the monies were held to the account of D2 in their alleged defences may be proven at trial.
- (c) the existence of the First and Third Defendant's alleged defence(s) does not constitute a valid ground to summarily strike out the Plaintiffs' case.
- (d) the Plaintiffs' pleadings are not vague and/or embarrassing as alleged and it appears that the Defendants have mischaracterised the Plaintiffs' case against them;
- (e) it is not the case that the Plaintiffs are seeking to hold the the First and Third Defendant liable for the D2, D4 and D5 misrepresentations and offered as "sacrificial lambs" as alleged.
- (f) it is the Plaintiffs pleading and contention *inter alia* that the First and Third Defendant are themselves guilty of misrepresentation and negligence.



- (g) the Plaintiffs' claim is not ambiguous/unclear as alleged.
- (h) the Plaintiffs believe that the individuals and companies named in this action are liable and responsible to the Plaintiffs and/or had perpetuated fraud on them and by the action herein, they seek redress for the wrongdoings committed on them by the Defendants.
- (i) the Plaintiffs are not obliged/required by law to bring or name other "platforms" or other parties in this action and the non-joinder of such parties does not defeat the Plaintiffs' action

[23] Thus, the Plaintiffs' pleading and case are not defective and/or "obviously unsustainable" and the pleadings do show that there is a reasonable cause of action against the D1 & D3 and the Court may determine the issues in dispute by way of a full trial.

The Decision

[24] On 25-7-2022, the Court dismissed the application to strike out the Plaintiffs' claims with costs (subject to allocator fees). The First and Third Defendants appeal.

[25] The decision is as follows:

Mahkamah ini telah meneliti Notis Permohonan yang difailkan oleh D1 dan D3, pembelaan, jawapan kepada pembelaan, affidavit dan hujahan bertulis.



Berdasarkan rekod, D2, D4 dan D5 tidak memasukkan kehadiran mereka masing-masing. AoS dan CAN telah difailkan.

Mahkamah ini mendapati terdapat persoalan fakta mengenai perkara yang dinyatakan oleh Plaintiff-Plaintif dan D1 dan D3.

Hal perkara tuntutan hanya boleh dilupuskan melalui perbicaraan dan permohonan interlocutori menurut peruntukan yang D1 dan D2 bersandarkan tidak wajar dan tidak adil. Isu dan pertikaian fakta ini tidak boleh dilupuskan secara keterangan affidavit.

Mahkamah ini perlu meneliti keseluruhan keterangan melalui suatu perbicaraan penuh dengan saksi-saksi hadir untuk pihak-pihak membuktikan mengenai pertikaian.

*Dengan ini, Mahkamah ini **memutuskan untuk menolak Lampiran 6** dengan kos sebanyak RM6,000.00 (tertakluk kepada fi alokatur).*

[26] This judgment contains the reasons for my decision in dismissing the First and Second Defendants application in striking out the claims.



The Law

[27] Order 18, rule 19 provides –

“Striking out pleadings and endorsements (O. 18, r. 19)

“19. (1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the endorsement, of any writ in the action, or anything in any pleading or in the endorsement, on the ground that—

- (a) it discloses no reasonable cause of action or defence, as the case may be;
- (b) it is scandalous, frivolous or vexatious;
- (c) it may prejudice, embarrass or delay the fair trial of the action; or
- (d) it is otherwise an abuse of the process of the Court, and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

(2) No evidence shall be admissible on an application under subparagraph (1)(a).”



[28] In order for this case to be strike out, this Court must diligently follow the principle of laws as decided in judgment of YAA Mohamed Dzaidin SCJ i.e in the case of **Bandar Builder Sdn Bhd v. United Malayan Banking Corporation Berhad [1993] 4 CLJ 7-**

*“The principles upon which the court acts in exercising its power under any of the four limbs of O 18 r 19(1) of the RHC are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule (per Lindley MR in *Hubbuck & Sons Ltd v. Wilkinson, Heywood & Clark Ltd* 7, and this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it ‘obviously unsustainable’ (see *AG of Duchy of Lancaster v. L & NW Rly Co* 8). It cannot be exercised by a minute examination of the documents and facts of the case, in order to see whether the party has a cause of action or a defence (see *Wenlock v. Moloney & Ors* 9). The authorities further show that if there is a point of law which requires serious discussion, an objection should be taken on the pleadings and the point set down for argument under O 33 r 3 (which is in pari materia with our O 33 r 2 of the RHC) (see *Hubbuck & Sons Ltd v. Wilkinson, Heywood & Clark Ltd* 7). The court must be satisfied that there is no reasonable cause of action or that the claims are frivolous or vexatious or that the defences raised are not arguable.”*
(emphazied added)



Evaluations and Findings of this Court

[29] The issue to be decided is whether the Plaintiffs' claims are "*plain and obvious*", whether there is any credible evidence to prove the claims as stated in the statement of claim had occurred or not in order for the Plaintiffs to say there is a cause of action against the D1 & D3.

[30] Next, this Court must decide on the D1 & D3's application to strike out the claims, whether the D1 & D3 is protected under the provision of Order 18 rule 19 to protect them from vexed by hopeless litigation.

[31] In this case, it is obvious and clearly stated on the status of each of the Defendants. Only D2 is a foreign company and the other Defendants are Malaysian and D1 is incorporated in Malaysia.

[32] D2, D4 and D5 did not enter any appearance, no defence filed and unrepresented by any counsel. The "available" Defendants to tell the version from the Defendants' side of story is the D1 and D3.

[33] The alleged presentation that had induced the Plaintiffs and the other investors to join the Digital Currency Investment Scheme must be judged by calling the witnesses, be it the Plaintiffs, the Defendants, etc.

[34] After the testimony by the Defendants witnesses then this Court can evaluate whether the D1 & D3 are just "kambing hitam untuk dijadikan korban".



[35] A key challenge by the D1 & D3 is to prove that both of them are a real “kambing hitam untuk dijadikan korban” or “musang berbulu ayam” or any other proverb.

[36] The Digital Currency is any currency held in digital form and/or there is no physical form and only exists online. Cryptocurrency refers to exclusively digital currency that is based on the blockchain storage format.

[37] In this case the Plaintiffs and the other investors had invested and agreed to join the Digital Investment Scheme. To begin with, the Plaintiffs pleaded it is because of the representation made by the Defendants. All the Defendants must explain the nexus, the chain and any transactions that involved and related to them.

[38] Since the Plaintiffs and the other investors claimed for their moneys to be returned to them in the sums of of RM10,491,411.90 (conversion from USD 2,492,021.83 at the foreign currency rate of USD 1.00=RM4.21 as at 28-3-2022), then the Plaintiffs must prove that they had lost their investment due to the wrongdoing, negligence etc by the Defendants.

[39] The reason/ground stated by the D1 & D3 in the application to striking out the claim instituted by the Plaintiff is that the latter’s case has no cause of action. I disagree. I say so in view of the existence of the elements that –

- (a) this claim or answer is on the face of it is not obviously unsustainable;



- (b) in order to strike out this claim, it cannot be exercised by a minute examination of the documents and facts of the case;
- (c) there is a point of law which requires serious discussion; and
- (d) this court must be satisfied that there is no reasonable cause of action or that the claims are frivolous or vexatious or that the defences raised are not arguable.

[40] In order for the Plaintiffs to succeed in its claim, definitely this Court must hear the answers from the Plaintiffs pertaining to the reasons raised by the D1 & D3 in this striking out application. Arguments *via* affidavits and submissions cannot satisfy this Court.

[41] Before this Court hear the whole story *via* the full trial, all of the Defendants had filed striking out made under Order 18, rule 19 (1)(a), (1)(b), (1)(c) and (1)(d) Rules of Court 2012 [*P.U(A) 205/2012*] against the Plaintiffs and pleaded that the Plaintiff's Writ Summons & Statement of Claim discloses no reasonable cause of action; and/or is scandalous, frivolous or vexatious; and/or is otherwise an abuse of the process of the Court.

[42] The 4 issues raised by the D1 & D3 need this Court to exercise diligently and judiciously its powers under Order 18 Rule 19 (1)(a), (1)(b), (1)(c) and (1)(d) of the ROC 2012 and/or its inherent jurisdiction to strike out the claim herein.



[43] There are issues to be tried, and in this regard, reference to the following passage from the judgment of the Court of Appeal in **Pernec Ebiz Sdn Bhd v. CCI Technology Sdn Bhd & Ors [2015] 2 MLJ 117** would not be out of place –

“Even though the burden upon a plaintiff in a civil suit is only to prove its case upon a balance of probabilities, it must present its case sufficiently clearly to do so. It cannot merely file pleadings, file bundles of documents, proceed to trial, call witnesses to testify and argue on the various issue and expect the court to make out the case on its own for one party or other. ... Where the party upon whom the burden of proving its case lies fails to do so, it fails to prove its case and its action must be dismissed.”.

[44] This Court is satisfied upon a balance of probabilities that the D1 & D2 is not qualified to strike out the Plaintiff’s action. Reading loud on the defence filed by D1 & D3, the facts that –

- (a) the D3 had made the representation either for himself and/or behalf of D1 showed that the role played by D1 & D3 is not only “*sekadar pembekal platform dagangan nTrade sahaja*”.
- (b) the admission by the Plaintiffs that the Digital Currency Investment Scheme was organized by D4 and D5 on behalf of D2 is not an admission that can prove the D1 & D3 is just a passive character.



- (c) the fact that the investment moneys is credited into the D2's account is also not an admission that can prove the D1 & D3 is not liable.
- (d) whether the particulars of negligence and/or negligence misstatement as pleaded by the Plaintiffs are related to the cause of action is on the Plaintiffs' shoulder.
- (e) the conclusion made by the D1 & D3 that "*Plaintif-Plaintif tidak mempunyai kausa tindakan yang munasabah terhadap Defendan Pertama dan Ketiga*" is just a wrap up to escape from the action summarily.
- (f) whether the Plaintiffs' cause of action against D1 & D3 is difference from the D2, D4 and D5 because the reliefs sought are irrelevant to the D1 & D3, also not an excuse to delete the D1 & D3 from the whole cause of action. The D1 & D3 cannot be held as just "the secondary players" in the Digital Currency Investment Scheme.
- (g) on the issue of "*selective persecution whilst blatantly excluding others*" raised by the D1 & D3, this Court need a clear explanation from D1 & D3. The affidavits affirmed by D1 & D3 failed to help this Court.



(h) whether “*Mahkamah yang Mulia ini dipergunakan/diperdayakan oleh Plaintiff-Plaintif untuk satu matlamat yang kurang jujur*” by filing this claim against the Defendants, needs the Defendants and/or the learned counsel for the D1 & D3 to clarify to me.

[45] Based on the above, it is crystal clear that there are issues to be tried and this case is not fell under the category of on the face of it ‘obviously unsustainable’; It cannot be exercised by a minute examination of the documents and facts of the case, in order to see whether the party has a cause of action or a defence; and the authorities further show that if there is a point of law which requires serious discussion.

[46] This Court had given the instruction on the pre-trial case management and the full trial dates had been fixed on 4, 5, 6 & 7 July 2023 (for 4 days). Let the parties argue on all the issues raised. The interlocutory application is not the way to let the D1 & D3 win its case nor the Plaintiffs. The best evidence produced before this Court in the full trial will resolved the claims.



Conclusion

[47] In view of the foregoing, it is my judgment that having evaluated **Enclosure 6** and its supporting documents, I find that the Plaintiffs had succeed to establish that there is cause of action against the D1 & D3. As such, I dismiss **Enclosure 6**, with costs.

Dated: 12 August 2022

Rozi Bainon

(ROZI BINTI BAINON)

Judicial Commissioner

High Court NCvC12

Shah Alam

The Counsels:

For the Plaintiffs : Sin Yoong Ming
Tetuan Raja Ariff & Sin
Kuala Lumpur

For the First & Third Defendants : Azzuan Shah bin Abd Razak
Tetuan Shah & Wong
Kuala Lumpur

