

IN THE HIGH COURT OF MALAYA AT MELAKA
CIVIL SUIT NO. MA-22NCvC-28-08/2019

Between

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Binary Group Services Bhd
(No. Syarikat: 650294-V)

... Plaintiff

And

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Karen Yap Chew Ling
(No. K/P: 810115-14-5336)

... Defendant

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GROUND OF JUDGMENT

[1] Enclosure 115 was filed by the Defendant on 22.12.2020. By
Enclosure 115, the Defendant was essentially seeking an order that
20 the ongoing full trial be continued on-line by zoom.

Facts material to Enclosure 115

[2] The Plaintiff is described in the Statement of Claim as a
company which owns and operates an online financial trading
25 platform for currencies, indices, commodities and volatility indices.

[3] The Defendant was an employee of the Plaintiff. She was part
of the senior management of the Plaintiff (notwithstanding the
Defendant's objection to her designation as ascribed by the Plaintiff).
30 She left her employ with the Plaintiff effectively on 4.4.2019.



[4] In this action, the Plaintiff alleges that the Defendant had, among others, transmitted or removed Confidential Information (as defined by the Plaintiff in the Statement of Claim) belonging to the Plaintiff without the Plaintiff's consent or authorisation. By this action, the Plaintiff claimed, among others, damages as against the Defendant.

Events material to Enclosure 115

[5] The Plaintiff's action against the Defendant went to trial. The trial commenced on 14.1.2020 and continued on 31.1.2020, 10.8.2020 and 14.8.2020. On 14.8.2020, the Plaintiff closed their case against the Defendant.

Events on 14.8.2020

[6] At all material times, the Defendant was residing in Cyprus. On 14.8.2020, counsel for the Defendant sought another date for the continued trial on the ground that the Defendant had not returned to Malaysia as she was concerned for her health and medical safety due to the Covid-19 pandemic in Malaysia. This Court granted the adjournment as sought by the Defendant, vacated a date for continued trial on 24.8.2020 and scheduled a new date for the continued trial on 5.11.2020. The period from 14.8.2020 until 5.11.2020 would have afforded the Defendant ample time to travel to Malaysia and to undergo any quarantine period required by the applicable laws in Malaysia.



Events on 8.10.2020

[7] The action was called up for case management on 8.10.2020. Among the issues dealt with on that date, counsel for the Defendant informed this Court that the Defendant confirmed that she does not intend to travel to Malaysia for the continued trial on 5.11.2020 due to the Covid-19 pandemic and the increasing cases in Malaysia. This Court maintained the trial date on 5.11.2020 and counsel for the Defendant was directed to make an application for an adjournment when the action was called up on 5.11.2020.

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Events on 5.11.2020

[8] The action was called up for the defence case as scheduled on 5.11.2020. Counsel for the Defendant sought an adjournment or in the alternative, requested that the defence case be conducted on-line by zoom. Both requests were objected to by the Plaintiff.

[9] It is pertinent to note that as at 5.11.2020, while the Courts of Judicature Act 1964 had been amended (by PU(B) 530/2020 with effect from 22.10.2020), there were no procedural laws/practice directions/guidelines in place for civil actions to be conducted on-line by zoom. The Rules of Court 2012 were amended by PU(A) 351/2020 and came into effect from 15.12.2020 while the "Arahan Amalan Bil. 1/2021" was with effect from 8.1.2021.

[10] This Court reviewed and considered Order 35 Rule 1(2) of the Rules of Court 2012. Order 35 Rule 1(2) of the Rules of Court 2012 states as follows:



“Failure to appear by both parties or one of them (O. 35, r. 1)

1. *(1) If, when the trial of an action is called on, neither party appears, the Judge may dismiss the action or make any other order as he thinks fit.*

5 *(2) If, when the trial of an action is called on, one party does not appear, the Judge may proceed with the trial of the action or any counterclaim in the absence of that party, or without trial give judgment or dismiss the action, or make any other order as he thinks fit.”*

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[11] Having considered the applicable procedural law at the time, and the submission by counsel for both parties, this Court did not grant the request for the trial to continue on-line by zoom but given the current Covid-19 pandemic worldwide, and taking into
15 consideration the safety of all concerned, including the health and medical safety of the Defendant, this Court granted the adjournment sought by the Defendant. A new date for the continued trial was scheduled on 23.12.2020. This Court directed that the adjournment was the final adjournment granted for the benefit of the Defendant.

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Events on 23.12.2020

[12] The action was called up for continued trial as scheduled on 23.12.2020. The Defendant was to have opened her case on that date. However, the Defendant was not present in Court. The
25 Defendant also had no other witness to testify with regard to her defence.



[13] Counsel for the Defendant informed this Court that on 22.12.2020, the Defendant filed a notice of application (which was later sealed and marked as Enclosure 115) under the new Order 33A of the Rules of Court 2012 (which came into effect on 15.12.2020 by
5 PU(A) 351/2020) for the trial to continue on-line by zoom or any other platform directed by the Court. However, the notice of application had not been sealed or extracted and the application was not before this Court on that date. According to counsel for the Defendant, in addition to the Covid-19 concerns, the Defendant also included
10 another reason for the application which was that her work visa had expired and if the Defendant were to leave Cyprus, she may not be able to re-enter Cyprus without a work visa. Counsel for the Defendant requested that the trial on that date be adjourned.

15 [14] The Plaintiff objected to the request and highlighted that on the prior date, a final adjournment had been granted for the benefit of the Defendant.

[15] After hearing submission by counsel for both parties, counsel
20 for the Defendant stated that he chose to close the Defendant's defence on that date.

[16] Thereafter, this Court proceeded to issue directions for the filing and service of written submission for both parties. This Court
25 also scheduled 4.2.2021 for the reply submissions by counsel for both parties.



Events on 6.1.2021

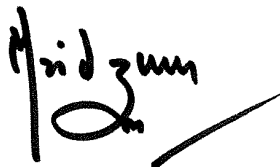
[17] On 6.1.2021, Enclosure 115 came up for hearing before this Court. At the outset, counsel for the Defendant informed this Court that although the Defendant had closed her case (on 23.12.2020),
5 counsel did not have instructions from the Defendant to withdraw Enclosure 115.

[18] The Plaintiff objected to Enclosure 115. Despite short notice, the Plaintiff had filed an affidavit to oppose Enclosure 115. One of
10 the grounds advanced by the Plaintiff was that the prayers sought in Enclosure 115 were no longer live issues as the Defendant had closed her case on 23.12.2020.

[19] After hearing submission by counsel for both parties, this Court
15 dismissed Enclosure 115 and ordered that costs in the sum of RM5,000.00 shall be paid by the Defendant to the Plaintiff.

Conclusion

[20] For the reasons stated above, on 6.1.2020, Enclosure 115 was
20 dismissed by this Court. This Court also ordered that costs in the sum of RM5,000.00 shall be paid by the Defendant to the Plaintiff.



25 **(MAIDZUARA BINTI MOHAMMED)**
Judicial Commissioner
High Court Melaka
26 March 2021

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Messrs Elaine Yap
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[Your Ref: B001/002/082019]

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Solicitors for the Defendant:

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(Cik Nur Shainaz Binti Azizor Rahman with him)
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