IN THE HIGH COURT OF MALAYA AT KUALA LUMPUR

IN THE FEDERAL TERRITORY, MALAYSIA

CIVIL ACTION NO: WA-23NCVC-34-05/2020

BETWEEN

SU TIANG JOO **… PLAINTIFF**

AND

CHAI AH MING **… DEFENDANT**

GROUNDS OF JUDGMENT

1. The parties to this suit have filed the following applications: -

   (i) Enclosure 71 – Plaintiff's Application for Discovery under Order 24 rule 3 of the Rules of Court 2012; and

   (ii) Enclosure 78 – Defendants' Application for Discovery under Order 24 rule 3 of the Rules of Court 2012.

2. I have considered the affidavits and submissions filed by parties.

A. Application for Discovery under Order 24 rule 3 of the Rules of Court

Applicable Law

3. I summarise the applicable principles of law that are applicable in an application for discovery under Order 24 rule 3 of the Rules of Court 2012: -

(i) There must be a "document" that is being sought by the applicant.

(ii) The document must be relevant – whether it contains information that will either support / advance his case or damage his case.

(iii) The document must be or have been in the possession of the party on which discovery is sought.

(iv) The application is necessary at that stage, i.e. that it will (a) ensure the fair disposal of the matter or (ii) it will save costs.

4. Please refer to the following cases: -

(i) Suruhanjaya Pilihanraya & Ors v Kerajaan Negeri Selangor and another Appeal [2018] 2 MLJ 322;

(ii) Ernst & Young (sued as a firm) v SJ Asset Management Sdn Bhd (in liquidation) & Anor [2019] 3 MLJ 795;

(iii) Kingtime International Ltd v Petrofac E & C Sdn Bhd [2020] 1 CLJ 862.

(iv) Rotta Research Lab v Ho Tack Sien [2010] 10 CLJ 491.

5. I am guided by the decision of Edgar Joseph J (as he then was) in ***Yekambaran s/ o Marimuythu v Malayawata Steel Berhad [1994] 2 CLJ 581*** at page 585: -

> "…The essential elements for an order for discovery are threefold; namely, first there must be a "document", secondly, the document must be "relevant" and thirdly, the document must be or have been in the "possession, custody or power" of the party against whom the order for discovery is sought.

It is indisputable, that the items of which discovery is sought are documents and that they are in the possession, custody or power of the defendant and nothing more need be said about this.

As to "relevance", our Rules of the High Court limit discovery to documents which are "relevant to" or "relate" to the factual issues in dispute.

More particularly, the discovery obligation applies to documents "relating to matters in question in the action" [Rules of the High Court, O. 24, r. 1(1)] or "relating to any matter in question in the cause or matter" [O. 24, r. 3(1)]. In practice, relevance is primarily determined by reference to the pleadings but there need not be a pleading for a matter to be said to be in issue. (See *Phillips v. Phillips* [1879] 40 LT 815, 821.

In this context, relevance is defined broadly. It does not extend to documents relevant merely to a party's credibility unless that itself is a fact in issue. **(See *George Ballantine & Sons Ltd. v. Dixon & Son Ltd.*[1974] 1 WLR 1125**). If, however, the document's relevance is to a fact in issue, not simply to credibility, it has long been settled that relevance of an indirect kind suffices.

The classic authority, on the test for relevance in the context of discovery is ***Compaignee Financiere du Pacifique v. Peruvian Guano Co.*** **[1882] 11 QBD 55** where Brett LJ said this (p. 63):

It seems to me that every document relates to the matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which may - not which must - either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary. I have put in the words "either directly or indirectly", because, as it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of inquiry, which may have either of these two consequences...

The observation of Edward Bray in his highly regarded work on discovery at p. 18 as to the test of "materiality" merits quotation; there he says this:

> ... for the purpose of testing the materiality of the discovery to a particular issue... it is the case of the party seeking the discovery that must be assumed to be true, and not that of the party from whom the discovery is sought…"

Plaintiff's application for Discovery in Enclosure 71

6. The Plaintiff's application in Enclosure 71 is specific. He seeks: -

> **"All exchange of WhatsApp messages between the Defendant and participants in the WhatsApp Group Chat or WhatsApp Group Chat in relation to the tender exercises for the maintenance contracts with the Mines Residence Association ("MRA") and / or mines MRA Services Sdn Bhd"**

7. In this case, the Plaintiff's application is specific to the WhatsApp conversations concerning the tender exercise for the maintenance contracts for the purposes of the Mines Residence Association and / or MRA Services Sdn Bhd.

8. Counsel for the Plaintiff has brought to my attention the recorded conversation between the Plaintiff one Francis that was subsequently transcribed. The series of conversations between the Plaintiff and the said Francis indicate that there exists a WhatsApp group that had discussed or apparently discussed the issues that are now pending before this Court. The Plaintiff contends that the contents of what was discussed in this WhatsApp Group will assist him in his claim against the Defendant or at the very least assist him in putting forward his potential measure of damages against the Defendant if he is successful.

9. The Defendant, on the other hand, submits that this (i) application is merely a fishing expedition filed by the Plaintiff and (ii) it is not necessary as he has given the documents in his possession that are relevant to the Plaintiff's solicitors. He contends that he has given to the Plaintiff documents relating to 4 WhatsApp Group that have conversations relating to the Landscape and Maintenance Activities.

10. The Defendant admits in his affidavit in reply that there are these WhatsApp groups that were set up for the purposes of the

MACC query and in preparation of the potential litigation relating to the Mines Residence and maintenance project. The Defendant contends that the statements contained in the WhatsApp discussions are not relevant for the purposes of this proceedings and the production of these documents is unnecessary and would be a waste of time and costs.

11. To determine whether the Defendant's contention is correct, I directed that the Defendant provide the document that is within his control that may fall within the purview of the discovery sought by the Plaintiff. This power is provided to this Court according to Order 24 rule 12 of the Rules of Court 2012 and I am guided by ***Nguang Chan aka Nguang Chan Liquor Trader & Ors v Hai-O Enterprise Bhd & ors [2009] 5 MLJ 40*** and the decision of English Court of Appeal in ***Westminster Airways v Kuwait Oil Co [1951] 1 KB 134***.

12. The Defendant has since provided a bundle of documents containing a series of WhatsApp communications relating to the affairs of the Mines Residence to this Court.

13. After considering the said bundle, I find that the WhatsApp communication does not contain any statements that are relevant for this proceeding. I am reminded of the decision of Su Geok Yiam J in ***Kenwood Electronics (Malaysia) Sdn Bhd v People's Audio Sdn Bhd & ors [2003] 5 CLJ 436***, where her Ladyship dismissed the application for discovery when the documents sought were found to be irrelevant. Similarly, in that case, her Ladyship had inspected the documents and found that they were irrelevant. Reference is also made to Malaysian Debt Ventures Bhd v Platinum Techsolve Sdn Bhd [2020] MLJU 1421.

14. Therefore, I opine that the Plaintiff's application for the documents referred to earlier is unnecessary and should not be allowed. I do not find any justification and I believe that the discovery sought by the Plaintiff will not save time and costs as suggested. I find that the documents sought are irrelevant for the determination of this suit.

15. Nonetheless, I allow prayer 1, 2 and 3 of the Notice of Application as they are general discovery orders sought pursuant to Order 24 rule 3 (4) of the Rules of Court 2012.

Defendant's application for discovery in Enclosure 78

16. As I have stated earlier, the Defendant has also applied for discovery of the following documents: -

(i) The WhatsApp messages between the Plaintiff and Cornelius De Costa regarding the Tender exercise for the Landscaping and Maintenance Contract at Mines Resort City;

(ii) WhatsApp between the Plaintiff and Sheila De Costa relating to the same contract; and

(iii) The Plaintiff's itemized mobile phone bill for the month of July.

17. I have considered the arguments raised by the Defendant and the Plaintiff. I find that this application is also unnecessary at this stage. The Plaintiff has affirmed an affidavit stating that the documents sought as identified in item (i) do not exist and that the documents sought in item (ii) are subject to section 122 of the Evidence Act 1950 – i.e. communication between husband and wife. Thus, the discussions if any between the Plaintiff and Sheila De Costa are subject to marital privilege. I agree with the Plaintiff's contention on both issues.

18. With regard to the application for discovery of the telephone bills, I am of the opinion that the said application should also not be allowed at this stage as it is unnecessary and will not save time and costs. I also find that as the Plaintiff has stated on affidavit that there was no such discussion between him and his father-in-law, the disclosure of the itemized telephone bill is unwarranted.

19. It is for the Defendant to show that this document existed and why it is relevant. In other words, he must show to my satisfaction that there was such a discussion between the Plaintiff and his father -in-law in the month of July. Otherwise, this will be merely a fishing expedition and mere guesswork at best.

20. I refer to the judgment of Azizul Azmi Adnan JC (as he then was) in ***Wu Siying & ors v Malaysian Airline System Bhd & ors [2016] 8 CLJ 740*** where he explained what would be tantamount to a fishing expedition that is not allowed in an application for discovery: -

> "[14] An explanation of what amounts to impermissible fishing is contained in the decision of the Federal Court of Australia, exercising its appellate jurisdiction, in WA Pines Pty Ltd v. Bannerman[5]:

Though the power to require discovery be acknowledged, how should it be exercised? It depends upon the nature of the case and the stage of the proceedings at which the discovery is sought. In the present case, discovery is sought before there is a title of evidence to suggest that the Chairman did not have the requisite cause to believe which para 6 of the statement of claim would put in issue. Some assistance was sought to be derived from cases where discovery had been given to a party before he was required to give particulars of his claim: cases such as Ross v. Blake's Motors [1951] 2 All ER 689, but in cases of that kind there is either an anterior relationship between the parties which entitles one to obtain information from the other, or sufficient is shown to ground a suspicion that the party applying for discovery has a good case proof of which is likely to be aided by discovery. This is not such a case. This is a case where a bare allegation is made by para 6 of the statement of claim and, the paragraph being denied, the applicant seeks to interrogate the Chairman and ransack his documents in the hope of making a case. That is mere fishing. As Smithers J said in Melbourne Home of Ford Pty Ltd v. Trade Practices Commission, supra (5 TPC at 35; ATPR at 18,087: "In the absence of such evidence the proceeding is essentially speculative in nature. In such circumstances for the Court to assist the applicants by making available to them the processes of interrogatories and discovery would be to assist them in an essentially fishing exercise and from this the Court on established principles should refrain". His Honour's refusal of discovery was right and it ought not to be disturbed."

21. I believe that the application is speculative in nature hoping that it will assist the Defendant's case. As I have stated earlier, the Plaintiff has since denied the existence of such document, and this has not been denied credibly with any contradicting evidence by the Defendant.

22. Therefore, in the circumstances, I find that the Defendant's application is also unnecessary and hereby dismiss the application for discovery.

B. Orders of this Court

23. I allow part of the applications and make the following orders;

I. Enclosure 71: Prayers (1), (2), (3) are allowed. Prayer (4), (5) and (6) are not allowed.

II. Enclosure 78 is dismissed.

III. Cost in the cause for both applications

Dated 6th December 2021

Dato' Indera Mohd Arief Emran bin Arifin
Judicial Commissioner
High Court of Malaya, Kuala Lumpur
Civil Division NCvC 8

Ms. Cheong Su Yin together with Ms. Cadie Lee (Counsels for the Plaintiff)
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