DALAM MAHKAMAH MAJISTRET DI SHAH ALAM

DALAM NEGERI SELANGOR DARUL EHSAN, MALAYSIA

GUAMAN NO: BA-A72NCvC-384-03/2017

Antara

SHAMSUDIN BIN MOHD YUSOF
(NO K/P: 500521-05-5017) **…PLAINTIF**

Dan

SUHAILA BINTI SULAIMAN
(NO K/P: 740914-04-5322) **…DEFENDAN**

JUDGMENT

[1] This suit was initiated by the Plaintiff claiming from the Defendant the that capital that was invested by the Plaintiff in a project known as the Mindef Project apart from the profit that was promised by the her in lieu to the capital invested for RM20,000 and RM17,000 respectively, the general damages, interest and cost.

[2] The Plaintiff and Defendant had called 2 witnesses each to prove the claim and in rebutting the Plaintiff's claim thereof.

The Plaintiff's claim

[3] The Plaintiff's claim is founded on the following facts. The Plaintiff knew the Defendant from a scheme known as Ufun and entailing from that, the Plaintiff was offered by the Defendant to join a tender project for the Ministry of Defence (MINDEF) for supplying the army caps. This was to recover from the losses the Plaintiff has incurred from the Ufun project. The offer by the Defendant was made orally but some of the conversations in relation to the project's term was vide the phone calls, the Short Messaging System (SMS), and WhatsApp. The Plaintiff had invested RM10,000 into 2 payments where 1 was paid to Promenage Solution's bank account and the other payment was to the RHB Bank's account registered under Lissuzy Empayar Sdn. Bhd. There were numerous breaches by the Defendant as alleged by the Plaintiff and among others the failure of the Defendant to pass the agreement in conjunction to the investment. The Defendant had only paid the fruit of the investment of RM1,000 only and stop paying the remaining although he was promised of 15% the profit monthly. The oral agreement was terminated by the Plaintiff's solicitor.

The Defence

[4] The overall Defence by the Defendant centred on the denial on every averment of the Plaintiff and she merely agrees on the fact that they knew each other in the Ufun scheme program. The Defendant further avers that the involvement of the Plaintiff in the investment following the investment by the defendant much earlier and such involvement was on the Plaintiff's own risk.

The issues

[5] Based on the pleadings, the evidence and testimonies of the witnesses as well as the submissions by both parties, the issues that need to be dealt with by this Court are:

a. Whether there was oral agreement between the Plaintiff and the Defendant for the investment as well as the benefit of the investment;

b. If the 1st question is answered in affirmative, whether there was breach to the said agreement;

c. Whether the Defendant is to be held responsible over the agreement (if proven) between the Plaintiff and the Defendant.

The Law

[6] The duty of the Plaintiff during the trial and until the conclusion of the trial is to prove his case against the Defendant before the similar burden is shifted to the Defendant. He should be guided with the principle as enunciated under Section 101, 102 dan 103 **of Evidence Act 1950** respectively state these:

101 Burden of proof

(1) Whoever desires any 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.

(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

102 On whom burden of proof lies

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.

103 Burden of proof as to particular fact

The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

[7] In the Supreme Court's case of ***Selvaduray v. Chinniah*** *[1939] 1 LNS 107*, it is desirable that the burden of proof is on the Plaintiff to prove his case before the same burden shifted to the Defendant. Tarrell, AG CJ in delivering the judgment of the court had referred to the case of **Abrath v. North Eastern Railway Co**, 11 QBD, 440, at page 452:-

"But then it is contended (I think fallaciously), that if the Plaintif has given prima facie evidence, which, unless it be answered, will entitle him to have the question decided in his favour, the burden of proof is shifted on to the Defendan as to the decision of the question itself. This contention seems to be the real ground of the decision in the Queen's Bench Division. I cannot assent to it. It seems to me that the propositions ought to be stated thus: the Plaintif may give prima facie evidence which, unless it be answered either by contradictory evidence or by the evidence of additional facts, ought to lead the jury to find the question in his favour: the Defendan may give

> evidence either by contradicting the Plaintif's evidence or by proving other facts: the jury have to consider upon the evidence given upon both sides, whether they are satisfied in favour of the Plaintif with respect to the question which he calls upon them to answer; if they are, they must find for the Plaintif; but if upon consideration of the facts they come clearly to the opinion that the question ought to be answered against the Plaintif, they must find for the Defendan. Then comes this difficulty-suppose that the jury, after considering the evidence, are left in real doubt as to which way they are to answer the question put to them on behalf of the Plaintif: in that case also the burden of proof lies upon the Plaintif, and if the Defendan has been able by the additional facts which he has adduced to bring the minds of the whole jury to a real state of doubt, the Plaintif has failed to satisfy the burden of proof which lies upon him".

[8] In the case of ***Eastern Enterprise Ltd v. Ong Choo Kim [1969] 1 LNS 35****; [1969] 1 MLJ 236* Winslow J had stated this at page 244 as below:

> "I accordingly find that the Plaintifs have not discharged the burden of proving a case against the Defendan in the first place.
>
> No burden accordingly shifts to the Defendan... the Defendan would not have to disprove something which has not been proved against him."

[9] The evidential burden as stated above has been strictly followed and similarly applied by the High Courts in numerous cases and was reaffirmed by the Higher Courts on appeal. For example, in the latest decision of Federal Court, the similar views on discharging this evidential burden was again reiterated in its own manner in the case of **Keruntum Sdn Bhd v The Director of Forests & Ors** [2017] 3 MLJ 281, presided by 5 panel of judges as:

> [78] It is settled law that the burden of proof rests throughout the trial on the party on whom the burden lies. Where a party on whom the burden of proof lies, has discharged it, then the evidential burden shifts to the other party (see UN Pandey v Hotel Marco Polo Pte Ltd [1980] 1 MLJ 4). When the burden shifts to the other party, it can be discharged by cross-examination of witnesses of the party on whom the burden of proof lies or by calling witnesses or by giving evidence himself or by a combination of the different methods. See Tan Kim Khuan v Tan Kee Kiat (M) Sdn Bhd [1998] 1 MLJ 697.

Findings of the Court

Issue 1: Whether there was agreement between the Plaintiff and the Defendant for the investment as well as the benefit of the investment;

[10] By citing **Razman Abdullah v. Azim Tan Sri Datuk Abdul Aziz [2015] 1 CLJ 706,** I am of the concurrent view with the Plaintiff's submission that the agreement does not necessarily in a written form whereby the oral agreement is enforceable as well. For clearance, Justice Komathy Suppiah JC had opined as the followings while referring to few authorities:

> **[24]** Whilst it is true that there is no formal written agreement executed, it is settled law there is no requirement under the Contracts Act 1950 that an agreement must be in writing in order to be enforceable. An oral agreement is a valid and enforceable agreement.

[25] In *Lau Sieng Nguong v. Hap Shing Company Ltd [1969] 1 LNS 80*, the court held that:

> It was clear law that where a contract was to be deduced from a set of documents it was necessary to look into the whole of the correspondence between the parties to see if the parties have come to a binding agreement.

[26] The Federal Court in *Charles Grenier Sdn Bhd v. Lau Wing Hong [1997] 1 CLJ 625* observed that:

> Federal Court examined the correspondence between parties and conclude even though the parties had not signed a formal sales and purchase agreement, an enforceable contract had come into existence as that was the result intended by parties.

[11] According to the Plaintiff, the offer was made verbally by the Plaintiff and later the Defendant had communicated to the Plaintiff through WhatsApp messages. It was the evidence of the Plaintiff, the offer was made by verbal and due to his acceptance, such offer concluded as a contract.

[12] Before deciding on that issue, I must examine the WhatsApp communication between the Plaintiff and the Defendant as the Plaintiff's evidence that the offer that was made orally earlier was transpired into writing in that form. The whole communication at page 23-36 (**P4a**) and page 39-40 (**P4b**) of the Ikatan B is relevant on this issue.

[13] I shall start the discussion here by referring to the message at 29.3.2016 @ 4.57pm. At that hour, the Defendant had already asked the Plaintiff the question below:

Assalam en sham…you jadi nak invest dalam projek mindef tu …

[14] Upon reading this message, it could be inferred what was stated by the Plaintiff in his evidence is true that there might be a prior offer made to the Plaintiff. Upon sending this WhatsApp to the Plaintiff, I am of the view that there was no contract concluded yet when there was no acceptance by the Defendant. For this, I am guided by the principle from the case of Court of Appeal's decision in **Eckhardt Marine Gmbh v Sheriff, High Court Of Malaya, Seremban & Ors [2001] 4 MLJ 49; [2001] 3 CLJ 864** whereby the Court had stated this:

> First, the general approach that is to be adopted by a court in determining whether there is an agreement concluded between the parties is to see whether there is a definite offer made by one party which has been accepted by the other. In other words, whether the agreement in question may be resolved into an offer and a corresponding acceptance. That such an approach should be generally adopted was affirmed by the House of Lords in Gibson v Manchester City Council [1979] 1 All ER 972. ...
>
> Second, there are a number of guidelines–we emphasise that these are only guidelines–that have been formulated by courts to ascertain whether there was an offer in a given case and by whom it was made. Thus, as a general rule, an advertisement is considered by courts to be not an offer but a mere invitation to treat, that is to say, an offer to make offers. ...

> Third, an offer may be made unconditionally or upon stated conditions. In the later case, an acceptance to be valid must accord with the terms of the offer. A conditional offer lapses upon the failure of the condition. If authority is required for these rather elementary propositions, it may be found in Financings Ltd v Stimson [1962] 3 All ER 386.
>
> Fourthly, the act of acceptance may be either by words or by conduct or it may be partly by words and partly by conduct. Brogden v Metropolitan Railway Co [1877] 2 App Cas 666 is a case of acceptance by conduct. ...

[15] Subsequent to that message, the Defendant had convinced the Plaintiff with few other information such as she had met the owner, seen the document, affirmed that the project was genuine. In lieu to this information, the Plaintiff had agreed to bank in RM10,000. On 31.3.2016, the Plaintiff had deposited the said money [1st payment]. The Defendant on 1.4.2016 confirmed that the 1st payment was received by her.

[16] On 11.4.2016, the Plaintiff had multiplied his investment to another RM10,000 but at this time around, the payment was made to RHB No. 2-12273-0005392-2 under the name of Lisssuzy Empayar Sdn Bhd. The slip as thr poof of payment is at page 17 of the Ikatan B.

[17] All in all, the Plaintiff had paid RM20,000. As far as the communication is concerned at P4a, I am certain, the said investment by the Plaintiff

was for the so called Mindef Project. This is in relation to the army caps project. The evidence of the Defendant below confirmed this:

S: Mengapa?

J: Saya tahu dari pengetahuan saya, Plaintiff menyaman saya kerana saya menerima deposit daripada Plaintif untuk disalurkan dalam projek topi Mindef

S: Saya cadangkan kamu telah beritahu Plaintif tentang satu project topi Mindef?

J; Ya Betul

[page 53, Notes of Evidence]

[18] According to the Plaintiff's evidence, the Plaintiff was promised out of the investments, the Plaintiff would be paid 15% return of investments payable on monthly basis despite the promise that the said contribution remained untouched or he would not lose this money. As far as the term in pertain to the Return of Investment is concerned, through the cross examination, the Defendant had stated this:

S: Adakah kamu setuju bahawa penyertaan project tender ini memberi pulangan 15%?

J: Sebagaimana yang dimaklumkan kepada company induk

S: Adakah kamu setuju, Plaintif telah meyertai sebanyak RM20,000 di dalam project ini?

J; Setuju

S: Adakah kamu setuju bahawa Plaintif patut terima RM3000 sebulan bersama 15%?

J: Ya, setelah bayaran diterima daripada syarikat Induk

[page 54, Notes of Evidence]

[19] On the other term of the agreement that the Plaintiff would not lose his investment money, the evidence of the Defendant is as below:

S: Saya cadangkan, kamu telah yakinkan Plaintif dengan memberitahu Plaintif beberapa kali bahawa modal tidak akan hilang, tidak hangus dan tidak akan lebur?

J: Saya hanya sampaikan apa yang disampaikan oleh syarikat induk. Jawapannya tidak. Saya tidak meyakinkan

[20] Even though the Defendant's evidence that she was merely conveying what she had received from the main company, but the fact remained, the terms on Return and investment as well as the investment would be returned back, were the terms that attracted the Plaintiff to invest. This was affirmed through her WhatsApp on 25.6.2016 @ 7:19pm. At page 33 of the Ikatan B as well as the WhatsApp on 11.5.2016 @ 10:01 am. Upon the investment of the said money, it is ruled out that there was a formal contract between the Plaintiff and the Defendant executed.

[21] Even if the Defendant was only receiving the RM10,000 of the money deposited to her account and alleged that another investment was made to Lissuzy's account, but the Defendant in her evidence did not prove the latter to this Court.

[22] The Defendant should in my view prove to this Court that the said account belongs to Lissuzy was out of her control. She needs to call the contemporaneous evidence to prove that. Merely stating that account was beyond her control, could not be accepted by this Court. To rely on the SSM Search at page 3-8, Ikatan B as a proof that the Lissuzy Empayar is not related to her to my view as flawed as the details stated there is insufficient to rebut her involvement in the Lissuzy Empayar.

[23] In strengthening the fact, she agreed that the Lissuzy Empayar account's number was given by her to the Plaintiff showing that she had knowledge of the owner of the said account. She should have called any witness from Lissuzy Empayar to confirm that this account belongs to them for her liability to be lifted up but she did not.

[24] Apart, there was inconsistency of her evidence on the 'syarikat Induk'/owner. As far as the deposit of the 2nd payment is concerned, she said the Plaintiff wanted to bank in to the 'syarikat induk'/owner account. For that, she gave Lissuzy Empayar Sdn. Bhd. But in the conversation between her and the Plaintiff in **P4a,** she emphasized the 'syarikat induk'/owner is Tenaga Kayangan Sdn. Bhd.

[24A] On this inconsistency, she was not certain at the time when giving the Lissuzy Empayar's account number that this Lissuzy is the project owner or the different entity with them. In such, she had yet to

discharge her evidential burden that the Lissuzy and Promenage are strangers to her.

[25] So, be it the payment was made to the Promenage Solution which was confirmed as hers and to Lissuzy Empayar Sdn. Bhd which was not proven as not hers, this Court was of the view that the Plaintiff had a contract with the Defendant for the investment that was made for RM20,000 and the Defendant was said to be obliging to the agreed terms that:

i. The plaintiff would not lose his deposit of RM20,000; and
ii. The Plaintiff would be paid the Return of Investment on 15% monthly out of this investment paid.

[26] As some of the communication and the promise was by verbal and in WhatsApp form, I am certain that the contract that was entered between them was in the mixture of the both and by overall the said contract concluded.

[27] As conclusion, the 1st issue is answered in affirmative.

Issue 2: If the 1st question is answered in affirmative, whether there was breach to the said agreement;

[28] When this Court had answered the 1st issue in affirmative, I am now dealing with the 2nd issue whether there was a breach to that agreement.

[29] It was the evidence of the Defendant that the Plaintiff and other investors were promised to be paid the Return of Investment despite the main investment remain intact. She stated that, this information was conveyed to them through her by the Owner. Her main defence, she was also one of the investor and the mediator between the other investors including the Plaintiff with the owner of the project.

[30] She was trying to inform the court as the mediator, her duty was to convey the message and she had no relationship as the owner of the project.

[31] On this averment, I found her stance as totally a misdirection. This is because, as ruled out by me, she had contracted with the Plaintiff in particular. Based on her representation, the Plaintiff had deposited the said monies.

[32] Should she was on the stance that her duty was only conveying the message and information, she should in my view calling the person or the owner of the project to testify or at least making them as 3rd party but she did not. Merely mentioning their names and without concrete proof that the project was truly belongs to that particular person that

she named, I am of the view, it was merely shifting the blame to the unknown person.

[33] Her conduct of not calling the owner of the project nor making them as 3rd party to the present suit would entitle this court to invoke the adverse inference under section 114(g) of the Evidence Act 1950. In coming to this finding, this Court is guided by the principle laid down in Privy Council's case of ***Maganmal v Darbarilal AIR 1928 PC 39*** which was referred to by Gopal Sri Ram (when his Lordship was) in the Court of Appeal's case of **CGU Insurance Bhd v Asean Security Paper Mills Sdn. Bhd** [2006] 3 MLJ 1 in which his Lordship stated that:

> **"**To call as his witness the principal person involved in the transaction, who was in a position to give a firsthand account of the matters in controversy and throw light on them, and who could have refuted on oath the allegation of the other side"

[34] Despite, there was no evidence that all investors were introduced to the owner of the project. There was no attempt of her making the documents that she saw and claimed as genuine as part of the evidence. Although she showed a letter from Yayasan Bakti Negara Terengganu at page 36 of the Ikatan B, but that letter was not in full page and the said letter was addressed to Bunga Emas Ventures Sdn, Bhd. This Bunga Emas Ventures was not proven to be the owner of this project.

[35] There was no evidence as well that the owner was member of the WhatsApp group created by the Plaintiff who manage to explain the real scenario of the investment. The only person who dealt with the Plaintiff was the Defendant for this project and thus, as the information she had conveyed could not be proven from the owner, it is assumed that such information was from her.

[36] In the absence of all the above, it supports my view that the agreement was between the Plaintiff and the Defendant and the breach was due to her undertaking that was not fulfilled and she is said to have breached to the agreement or the contract established with the Plaintiff.

[37] Apart from the above breaches, there was another undertaking that she did not fulfill. That is in the respect of providing the agreement to the Plaintiff. She did not deny the said promise was made but according to her, such would only be furnished once she receives the agreement from the owner.

[38] Be it her respond to such averment, I found it silly. To my view, her position on the agreement only arose when the Plaintiff was questioning on the validity of the said project as we can see the whole conversation at page 24 and 25 in particular.

[39] Because of that, the Defendant promised to give the agreement but up to the trial date, the said agreement was not given to the Plaintiff. In such instance, an inference that could be made is that the promise on

giving the agreement was only the Defendant tactical to calm the Plaintiff down.

[40] If she could not provide the said agreement, she could at least call the person in charge from the 'projek induk' to come verifying her position and stance but she did not. This failure could lead to an inevitable fact that there was no such promise given by the 'project induk' and it was her promise indeed.

[41] If her stance that the agreement was to be given after receiving the 1st payment, she should have done that while depositing RM1000 to the Plaintiff on 6.7.2016 but she did not. That was the 1st time he received the profit even though not as promised. There is failure on her part.

[42] Despite, during the heating conversation with the Plaintiff on 23.8.2016, the Defendant said that she had the agreement with the sister of the person in 'syarikat induk' through her promenage solution, but she did not show it to the Plaintiff or other investors. This shows that the issue of the agreement was also mocked up to cover the Defendant's breach per se.

[43] Based on the above, there was multiple breaches to the agreed term between parties caused by the Defendant. For this issue, it is certain that it was answered in affirmative too.

Issue 3: Whether the Defendant is to be held responsible over the agreement (if proven) between the Plaintiff and the Defendant.

[44] When it is ruled that the Defendant was the one offering for the agreement to be entered and she was also confirmed as the one who had breach the said agreement, she had to be responsible over the agreed terms that she had failed to fulfil.

Demeanour of the Defendant.

[45] Throughout the trial, I found that the line of evidence given by the Defendant in form of defensive evidence. She was blaming the 'project induk' and averred that what she had informed to the Plaintiff was from the project induk. However, she had failed to call the person in the project induk to verify on few items.

[46] There was discrepancy on what project actually was. In her WhatsApp communication, she referred some as uniform and some as army cap and during her cross examination, she said the army cap was part of the uniform and later whether she realize or not, she said that the uniform project was not involving her. This is so weird to me. When she was so persistent to state that the army cap is part of uniform project but later changed her evidence that she did not involve in the uniform project, it could assume that there was no such project. The said Mindef project was mocked up by her in gaining the profit.

[47] She did not deny that she was one of the team leader in Ufun and she knew the Plaintiff from the Ufun. The way the Plaintiff was induced to this project was because she knew the problem the Plaintiff was suffering from the Ufun and she is said to be an opportunist of inviting the Plaintiff maybe on the fact she knew that the Plaintiff could not be so much bothered about the Ufun project. She was an opportunist.

[48] She also said that she was one of the investor in the Mindef project but throughout the trial, she did not tender any single evidence showing the proof of the said investment. Even though she said the proof was passed to her lawyer and the lawyer response, it was not pleaded and therefore such evidence was not included, there was no undertaking for the said evidence to be given later showing that she did not have the proof of her investment.

[49] Without that evidence, it could be sump up that the Defendant was not the investor and her truthfulness is in doubt.

[50] She could at least tender the evidence pertaining to police report should she had lodged against the project induk but she did not. Throughout her conversation, she was not even sure whether to lodge one clearly shows her actual character and demeanour as untrustworthy.

[51] She must remember that she was an agent (as that was her stance) between the projek induk and all the investors and her responsibility was quite high. The investors including the Plaintiff do not have contact

of the projek induk initially and all transaction was through her and she must protect them in manner that the said project was genuine as well as the outcome of the agreement but she did not.

[52] She merely blaming the projek induk and asking them to ‘bersabar’ without any proactive measure taken to attract their attention to the ‘genuinity’ of the said project back. From the group that she had established, she was seen as removing everyone in the group at the peak of the heating discussion. This indicates the irresponsibility of her.

[53] There was part of the communication when she stopped and forbid the investors from dealing with the Mindef shows that the program she invited the rest including the Plaintiff was a scam.

[54] From the above, her demeanour concludes that she is not a reliable person and it shall go with the weight of her evidence too.

CONCLUSION

[55] Based on the above, it could be sump up that:

i. There was an agreement tying the relationship between the Plaintiff and the Defendant even though part of it was executed in form of writing through WhatsApp and part was by oral that was not disputed;

ii. There were breaches to the said Agreement;

iii. The allegation that she was a middle man only is not acceptable as from the evidence, it could be inferred that her involvement is more than that;

iv. As her involvement was quite substantial, the breaches were also by her fault;

v. She is held to be responsible over the said breaches.

vi. Her demeanour while giving evidence showing that she is untrustworthy witness and it shall go to the weight too. The Plaintiff's evidence outweighs her evidence in overall due to this.

[56] Based on the above, upon hearing the witnesses and reading the submission by the Plaintiff and upon perusing the pleadings and the documents, and on balance of probability, the Plaintiff had successfully proven his case against her and the claim ought to be allowed in which I am so ordering.

[57] In respect of cost, I am certain to order the Plaintiff to be paid RM5000 as cost.

[58] I must state here, in coming to this finding, I just confine myself to the documents at para **[56]** above while ignoring the submission by the Defendant on reason that the Defendant solicitor did not appear during

the oral submission date that was fixed on 18.9.2017 neither him writing explaining his absence. He did not also offer an apology to the system due to his disappearance but merely sending the submission through email on 20.9.2017. He did not explain why he did not turn up either.

Dated 25th September 2017.

KHAIRUL NIZAM BIN ABU BAKAR
Magistrate
Shah Alam Magistrate Court