



DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR

(BAHAGIAN DAGANG)

[GUAMAN CIVIL NO.: WA-22NCC-381-09/2017]

ANTARA

AMINAH BINTI FAUDZAR

(No. K/P: 650824-02-5564)

... PLAINTIF

DAN

1. HARVEN VENTURES SDN BHD

(No. Syarikat: 677796-W)

2. SARWAN SINGH A/L KUNDAN SINGH

(No. K/P: 690430-01-6223)

**... DEFENDAN-
DEFENDAN**

GROUND OF JUDGMENT

[1] This is an assessment of damages by the Plaintiff against the 2nd Defendant. I have allowed the damages claimed by the Plaintiff. These are the full reasons for my decision.

Salient Background Facts

[2] In 2014, the Plaintiff entered into the following agreements with the 1st Defendant in respect of the investment schemes introduced by the 2nd Defendant:



- (a) A Profit Guarantee Agreement dated 30.4.2014 in respect of the Plaintiff's investment of RM5 million ("**the RM5 million Contract**");
- (b) A Profit Guarantee Agreement dated 30.5.2014 ("**the RM1.5 million Contract I**") and a Profit Guarantee Agreement dated 15.7.2014 ("**the RM1.5 million Contract II**") in respect of the Plaintiff's investment of RM3 million; and
- (c) A Profit Guarantee Agreement dated 30.4.2014 ("**the RM1 million Contract**") in respect of the Plaintiff's investment of RM1 million.

[3] The 2nd Defendant stood as guarantor for the 1st Defendant and had executed a Letter of Guarantee dated 30.4.2014 ("**the Guarantee**"). The 2nd Defendant further agreed to indemnify the Plaintiff in full against all losses, costs and expenses incurred by the Plaintiff.

[4] The sum totalling RM 9 million has been paid in full by the Plaintiff to the 1st Defendant and the 1st Defendant has acknowledged receipt of the same.

[5] Between April 2014 and October 2014, the Plaintiff had been receiving the monies from the 1st Defendant. Following the Plaintiff's repeated requests, the 1st Defendant had made part payments in the sum of RM70,000.00 per month from December 2014 until September 2016.

[6] The Plaintiff then through her solicitors, Messrs Shook Lin & Bok, issued letters of demand dated 18.5.2017 to the 1st Defendant demanding payment of the sum of RM18,313,086.00 (which is made up of the principal investment sum of RM9 million together with the



fixed profits as at May 2017), within one (1) month from the date of the letters of demand.

[7] The Plaintiff has also through her solicitors, Messrs Shook Lin & Bok, issued letter of demand dated 22.6.2017 to the 2nd Defendant demanding for payment of RM18,313,086.00, within seven (7) days from the date of the letters of demand.

[8] The Defendants, however, failed, neglected and/or refused to comply with the Plaintiff's aforesaid demands.

[9] The Plaintiff and the 1st Defendant have attempted to resolve the matter through mediation but such attempt was unsuccessful, resulting in the filing of the Plaintiff's action herein.

[10] On 5.2.2018, upon the Plaintiff's application for leave to enter summary judgment against the Defendants, the Plaintiff obtained partial Judgment against the Defendants for the payment of the investment sum of RM9 million with interest thereon at the rate of 4% per annum calculated from 5.2.2018 until the date of full settlement and costs of RM5,000.00 ("**the SJ**").

[11] On 5.2.2018, the Court has directed for the Plaintiff's remaining claims for fixed profits payable by the Defendants to the Plaintiff to proceed to trial. The Court has directed that the trial would be confined to only the quantum of claim, the outstanding amount of fixed profits payable by the Defendants ("**the issues of the Quantum of Claim**"), as the Defendant's liabilities under the Profit Guarantee Agreements and the Letter of Guarantee had been established.

[12] At that time, the Defendants did not appeal against the decision of the Order dated 5.2.2018.

[13] Due to the 1st Defendant's default in payment under the SJ, the Plaintiff presented a winding-up petition against the 1st Defendant in



the Kuala Lumpur High Court under the Companies Winding-Up No.: WA-28NCC-511-05/2018 on 30.5.2018. The 1st Defendant was subsequently ordered to be wound up on 3.8.2018. The 2nd Defendant has also failed to make payment under the SJ to the Plaintiff.

[14] Accordingly, the Plaintiff is only proceeding against the 2nd Defendant in respect of its claim for fixed profits.

[15] On 20.8.2018, upon the consent of the parties, the Court has directed for the Issue of the Quantum of Claim to be disposed of based on the documents filed herein and by way of written submissions.

[16] These are the Plaintiff's claims, as set out below:

- (a) the payment of the fixed profits under the Profit Guarantee Agreements as at May 2017;
- (b) interest at the rate of 4% per annum on the fixed profits under the Profit Guarantee Agreements as at May 2017;
- (c) the payment of the fixed profit in the sum of RM2,224,362.00 per year to be calculated from 31.5.2017 until the full settlement of the investment sum of RM5 million by the 2nd Defendant to the Plaintiff;
- (d) the payment of the fixed profit in the sum of RM60,000.00 per month to be calculated from 31.5.2017 until the full settlement of the investment sum of RM1.5 million by the 2nd Defendant to the Plaintiff;
- (e) the payment of the fixed profit in the sum of RM70,000.00 per month to be calculated from 5.6.2017 until the full settlement of the investment sum of RM1.5 million by the 2nd Defendant to the Plaintiff;

- (f) the payment of the fixed profit in the sum of RM30,000.00 per month to be calculated from 31.5.2017 until the full settlement of the investment sum of RM1 million by the 2nd Defendant to the Plaintiff;
- (g) costs; and
- (h) such further and/or other relief as this Honourable Court deems fit.

Findings Of The Court

[17] Initially there was a dispute as to how much the 1st Defendant had paid to the Plaintiff but , for purposes of the assessment of damages, the Plaintiff is prepared to concede that the 1st Defendant had paid the sum of RM4,175,601.00 to the Plaintiff so that sum is not in dispute.

[18] The Plaintiff has computed the fixed profits payable as at May 2017 in accordance with clause 23 of the respective Profit Guarantee Agreements. The fixed profits payable as at May 2017 is in the sum of RM9,313,086,00 (RM18,313,086.00 minus the investment sums of RM9 million).

[19] The 2nd Defendant is not disputing the fixed profits payable under the said clause 23 but was initially disputing the sums which have already been paid to the Plaintiff.

[20] According to the Plaintiff's records, she had only received part payments of the fixed profits from the Defendants in the sum of RM 3,090,000.00 up to September 2016.

[21] However, the Defendants contend that fixed profits in the sum of RM4,175,601.00 have been paid to the Plaintiff. This gives rise to a differential sum of RM1,085,601.00.

[22] During the case management on 20.8.2018, the Plaintiff has through her solicitors informed the Court that, without admitting to any other contention of the Defendants and to prevent any wastage of the Court's time and resources, the Plaintiff is prepared to concede to the Defendant's contention in respect of the total part payments made in the sum of RM4,175,601.00.

[23] In light of the above, the fixed profits due to the Plaintiff under the Profit Guarantee Agreements as at May 2017 is RM8,227,485.00 (RM9,313,086.00 minus the differential sum of RM1,085,601.00).

[24] The Plaintiff is also entitled to receive future fixed profits under the Profit Guarantee Agreements.

[25] In respect of the RM5 million Contract, Clause 23 provides that:

“The Company hereby agrees that it shall pay to the Investor a minimum total profit of RM2,224,362.00 (yearly profit) for one year of Investment period which is from 30th April, 2014 and the said profit shall be paid to the Investor by way of a fixed sum of RM100,000 per month (hereinafter referred to as “the monthly profit”) payable at the end of each month commencing from 30th April 2014 and the balance of the profit amounting to RM1,024,362.00 shall be paid to the Investor at the end of the one year investment period. The yearly profit shall be paid to the Investor continuously until the said sum has been fully withdrawn by the Investor. This total profit sum will continue be payable to the Investor as long as the Investor says invested in the Company's business...”

[26] In respect of the RM1.5 million Contract (I), Clause 23 provides that:

“The Company hereby agrees that it shall pay to the Investor a fixed profit of RM60,000 per month (hereinafter referred to as “the profit”) payable at the end of each month until the said sum has been fully withdrawn by the Investor”.

[27] In respect of the RM1.5 million Contract (II), Clause 23 provides that:

“The Company hereby agrees that it shall pay to the Investor a fixed profit of RM70,000 per month (hereinafter referred to as “the profit”) payable on the fifth (5th) of each month commencing on fifth (5th) of July 2014 until the said sum has been fully withdrawn by the Investor”.

[28] In respect of the RM1 million Contract, Clause 23 provides that:

“The Company hereby agrees that it shall pay to the Investor a fixed profit of RM30,000 per month (hereinafter referred to as “the profit”) payable at the end of each month until the said sum has been fully withdrawn by the Investor”.

[29] The Plaintiff is clearly entitled to the future fixed profits as she has yet to “withdraw” the investment sum of RM9 million as there is no dispute that the Plaintiff had received no payment at all from either the 1st Defendant or the 2nd Defendant under the SJ.

[30] It was agreed under the Guarantee that the amount owing by the 1st Defendant shall, upon demand, be payable by the 2nd Defendant as the guarantor. The 2nd Defendant further agreed to indemnify the Plaintiff in full against all losses, costs and expenses incurred by the Plaintiff. Clause 1 and 15 of the Guarantee respectively states as follows:



“(1) The Guarantor(s) will pay to you on demand all money which now is or may during the operation of the Company’s account with you anywhere and on any account whatsoever whether from the Company alone or from the Company jointly with or as surety for any other person or persons ... and the satisfaction of all liabilities whether past, present or future, absolute or contingent which are now or shall from time to time or at any time hereafter becoming owing or remaining unpaid or incurred by the Company to you and with such rests period as may be from time to time imposed or stipulated by you both before and after judgment or order and all costs charges (including legal charges on a solicitor and own client basis) and expenses which you may incur in enforcing or seeking to enforce any security for or obtaining or seeking to obtain payment of all or any part of the money hereby guaranteed”.

“(15) For the consideration aforesaid and as a separate and independent stipulation:

(i) ...

(ii) The Guarantor(s) hereby irrevocably and unconditionally undertake to indemnify you in full and keep you fully indemnified against all loss damage disabilities costs and expenses including legal fees on a solicitor and own client basis whatsoever which you may sustain or incur...”

[31] In response to the Plaintiff’s submission, the 2nd Defendant had not disputed the fixed profits claimed by the Plaintiff as at May 2017. However, the only issue raised by the 2nd Defendant is that the Plaintiff is only entitled to future profits up to 2.8.2018 as the 1st Defendant was ordered to be wound up on 3.8.2018. The 2nd Defendant does not refer to any authority why he said the Plaintiff is



only entitled to future profits up to the date of winding up (or one day prior to the winding up) of the 1st Defendant but I assume the 2nd Defendant is referring to the provision of section 8(2A) of the Bankruptcy Act 1967 (“the Act”) which reads as follows:

“Notwithstanding subsection (2), no secured creditor shall be entitled to any interest in respect of his debt after the making of a receiving order if he does not realise his security within six months from the date of the receiving order.”

[32] The 2nd Defendant has not even laid the proper foundation for his proposition. For instance, the 2nd Defendant has not referred to the relevant provision, has not set out whether the Plaintiff is a secured creditor or not and has not considered that even if the Plaintiff is a secured creditor, the 6 months has not expired as the 1st Defendant was only wound up on 3.8.2018.

[33] In any event, the issue raised by the 2nd Defendant is without basis. In the case of *Andrew Lee Siew Ling v. United Overseas Bank (M) Bhd* [2013] 1 MLJ 449, the Federal Court considered the issue: *“Can a secured creditor in law claim interest, inter alia, from a guarantor and/or person whose liability is pursuant to a guarantee and/or indemnity and/or a third party charger, after the date of winding up of a borrower company or the receiving order if it does not realise its security within six month of the winding up order or receiving order made against the borrower as a consequence of s. 8(2A) of the Bankruptcy Act 1967 read together with s. 4(1) of the Civil Law Act 1956?”*

[34] The Federal Court held that section 8(2A) did not apply to a guarantor cum indemnifier. Section 8 of the Act dealt with the property or person of a debtor against whom a receiving order is made. Sections 8(2) and 8(2A) deals with what the secured creditor could and could not do in respect of realising or otherwise dealing



with its security where the debtor was concerned. Nothing in those two sections suggested that they governed the properties or persons or parties against whom no receiving order had been made.

[35] The guarantor was not the debtor envisaged in section 8(1) of the Act. No receiving order was made against him. As such section 8(2) did not apply to him and it followed that the exception to that section, i.e. s. 8(2A) also did not apply to him. It was not Parliament's intention in enacting section 8(2A) to affect the interest of the secured creditor vis-à-vis any guarantor or indemnifier.

[36] Accordingly, even if section 8(2A) had applied against the 1st Defendant and it must be pointed out that the 2nd Defendant had not shown that the Plaintiff was a secured creditor, section 8(2A) of the Act would not have applied to the 2nd Defendant as guarantor.

[37] That is why I am of the view that the only issue raised by the 2nd Defendant in these proceedings is without basis.

[38] In the circumstances, I made the following orders in favour of the Plaintiff against the 2nd Defendant:

- (a) Judgment for the sum of RM8,227,485.00 as at May 2017;
- (b) Interest at the rate of 4% per annum on the sum of RM8,227,485.00 from the date of judgment until date of realisation;
- (c) Payment of fixed profits in the sum of RM2,224,362.00 per annum from 1.6.2017 until date of payment of the investment sum of RM5 million by the 2nd Defendant to the Plaintiff;
- (d) Payment of fixed profits in the sum of RM60,000.00 a month from 1.6.2017 until date of payment of the



investment sum of RM1.5 million by the 2nd Defendant to the Plaintiff;

- (e) Payment of fixed profits in the sum of RM70,000.00 a month from 5.6.2017 until date of payment of the investment sum of RM1.5 million from the 2nd Defendant to the Plaintiff; and
- (f) Payment of fixed profits in the sum of RM30,000.00 a month from 1.6.2017 until full payment of the investment sum of RM1 million by the 2nd Defendant to the Plaintiff and costs of RM5,000.00 subject to allocator.

(WONG CHEE LIN)
Judicial Commissioner
Kuala Lumpur High Court

Dated: 14 SEPTEMBER 2018

COUNSEL:

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Case(s) referred to:

Andrew Lee Siew Ling v. United Overseas Bank (M) Bhd [2013] 1 MLJ 449

Legislation referred to:

Bankruptcy Act 1967, s. 8(1) (2) (2A)

Civil Law Act 1956, s. 4(1)