



DALAM MAHKAMAH TINGGI MALAYA DI SHAH ALAM

DALAM NEGERI SELANGOR DARUL EHSAN

[GUAMAN CIVIL NO: BA-22NCVC-386-09/2019]

ANTARA

MOHD NAZASLI BIN ABDUL AZIZ

(No. K/P: 680608-14-5235)

... PLAINTIF

DAN

ELITE JETS SDN BHD

(No. Syarikat: 842842 — T)

... DEFENDAN

GROUND OF JUDGMENT

This is the Plaintiff's application for summary judgment against the Defendant pursuant to Order 14 of the ROC, 2012. This Court allowed the application at the conclusion of the hearing. The reasons for the decision are as follows.

Salient Background of the Case

The present suit brought by the Plaintiff in this case revolves around friendly loans advanced by the Plaintiff to the Defendant on 3 separate occasions.

First Loan

The first loan is contained in an Agreement dated 1.10.2018 whereby the Plaintiff agreed to advance a short term loan of RM500,000 to the



Defendant. The loan was to be paid back in 3 months. It was a term of the Agreement that the Defendant was to pay interest at 8% per month for the duration of the 3 months. It was also agreed if there was a delay in repayment the Defendant would be liable to pay interest at the rate of 8% per month until full payment. Pursuant to the Agreement the Defendant gave the Plaintiff a post dated RHB Islamic Bank Berhad cheque dated 5.1.2019 amounting to RM620,000 which comprised of the amount owed plus interest calculated at 8% for 3 months. The Agreement was signed by the Defendant's directors.

Prior to the depositing of the cheque the Defendant requested the Plaintiff to refrain from doing so and thus the cheque was not cashed. The due date for the cheque has since expired.

The Plaintiff sent reminders to the Defendant to repay the amount owed and directed his solicitors to send a Notice of Demand dated 6.8.2019 when the reminders failed to elicit any response from the Defendant. The solicitors for the Defendant replied to the Notice of Demand on 20.8.2019 acknowledging receipt of the letter. They informed the Plaintiff that they were awaiting instructions from the Defendant and would respond accordingly in due course.

The amount still remains due and owing until today.

2nd Friendly Loan

Sometime in January 2019, the Defendant requested for another friendly loan of RM500,000 from the Plaintiff. The purpose of this loan was to settle the amount owed by the Defendant to another company named QB Excellent Sdn Bhd. The parties did not enter into a written agreement.

The Plaintiff agreed to the request and issued a Maybank Islamic cheque dated 14.1.2019. In response to that the Defendant gave the



Plaintiff a postdated RHB Bank Berhad cheque dated 28.1.2019 for the sum of RM500,000. This cheque belonged to Private Jets Resources Sdn Bhd. Private Jet Resources Sdn Bhd is a company registered with SSM and it is wholly owned by the directors and shareholders of the Defendant. It has been established that the cheque was supposed to be cashed on 28.1.2019. The Defendant however requested the Plaintiff not to cash the cheque and the cheque has since expired.

When no repayment was forthcoming the Plaintiff sent reminders through Whatsapp messages to the Defendant. The Defendant replied requesting the Plaintiff to wait.

The Plaintiff followed up with an email requesting for repayment. The Defendant did not reply to this email.

The Plaintiff sent a Notice of Demand dated 6.8.2019 through his solicitors and received the same reply from the Defendant's solicitor i.e. that they were awaiting instructions from the Defendant and would reply in due course.

3rd Friendly Loan

Sometime in March 2019, the Defendant once again approached the Plaintiff and verbally requested for a friendly loan of RM1,300,000. The Defendant told the Plaintiff the money was needed for the purpose of chartering a flight.

The Plaintiff agreed to advance the loan and performed a credit card transaction to the Defendant's credit card terminal on 26.3.2019. The loan was given with the condition that the Defendant would repay the loan within 3 months and all that the Defendant was required to do was to pay the late interest charges incurred on the amount due in the

credit card. A copy of the credit card receipt is exhibited and marked as MNAA-8 in the Plaintiff's Affidavit in Support dated 11.11.2019.

The Defendant acknowledged the amount received through WhatsApp message to the Plaintiff. In the WhatsApp reply message the Defendant took note of the Plaintiff's request for them to pay the late interest charges on the credit card. The Defendant replied as follows: *"InsyaAllah.....kalau tak jadi vista will refund."* (see Exh MNAA-13).

The Defendant defaulted in payment and the Plaintiff sent reminders to the Defendant through WhatsApp messages. The Defendant acknowledged the messages and promised to repay the Plaintiff. In response to a WhatsApp reminder by the Plaintiff the Defendant replied on 4.5.2019 stating that he would pay the Plaintiff after he received payment from AEG.

On 5.5.2019 the Defendant sent a message to the Plaintiff as follows: *"ok understood sir.... will find ways to settle before puasa insyaAllah."*

When no payments were received the Plaintiff again sent reminders via WhatsApp messages and the Defendant's director replied by sending an image of a Boarding Pass dated 21.5.2019 indicating the Defendant was going to Singapore to attend a meeting with the bank. Further in the message the Defendant enquired from the Plaintiff whether they could make the payments to the Plaintiff's bank account in Singapore.

When the payment was not forthcoming the Plaintiff instructed his solicitors to issue a Notice of Demand to the Defendant on 6.8.2019. A reply was received from the Defendant's solicitor stating that they were still waiting for instructions from the Defendant and would reply in due course.

As the demands for repayment of all the three loans went unheeded, the Plaintiff commenced the instant writ action against the Defendant on 6.9.2019. This was followed by the present summary judgment application against the Defendant.

The Law on Summary Judgment

In this application for summary judgment, the Court is guided by the principles laid down in *National Company for Foreign Trade v. Kayu Raya Sdn Bhd* [1984] 2 CLJ 220 where it was stated by the Federal Court as follows:

“...we thinks it appropriate to remind ourselves once again that in every application under O. 14, the first considerations are (a) whether the case comes within the order and (b) whether the plaintiff has satisfied the preliminary requirements for proceeding under O. 14. For the purposes of an application under O. 14, the preliminary requirements:-

- i. The statement of claim must have been served on the defendant;*
- ii. The defendant must have entered an appearance;*
- iii. The affidavit in support of the application must comply with the requirements of r. 2 of the O. 14.*

... ..If the plaintiff fails to satisfy either of these considerations, the summary judgment application may be dismissed. If however, these considerations are satisfied, the plaintiff will have established a prima facie case and he becomes entitled to judgment. This burden then shifts to the defendant to satisfy the court why the judgment should not be given against him.....”

It is indisputable that the Defendant must show triable issues by way of affidavit evidence.

What amounts to a triable issue is explained by Mohd Azmi SCJ in the case of *Bank Negara Malaysia v. Mohd Ismail Ali Johor & Ors* [1992] 1 CLJ Rep 14. He held:

“In our view, basic to the application of all those legal propositions, is the requirement under O. 14 for the Court to be satisfied on affidavit evidence that the defence not only has raised an issue but also that the said issue is triable. The determination of whether an issue is or is not triable must necessarily depend on the law arising from each case as disclosed in the affidavit evidence before the Court.”

In the case presently before me, I am satisfied that the Plaintiff has fulfilled all the preliminary requirements as stated in *Kayu Raya Sdn Bhd (supra)*. It is therefore my opinion that the burden has shifted to the Defendant to satisfy the court why judgment should not be entered against them.

Summary of the Defendant’s Contentions

The Defendant refuted the Plaintiff’s claim in respect of all the 3 loan transactions.

The main points raised in argument by the Defendant for leave to defend the action were these:

1st Loan

It is the contention of the Defendant that the Agreement dated 1.10.2018 relied on by the Plaintiff was not enforceable as it was in

actual fact an illegal money transaction. The Defendant pointed to the fact that the Plaintiff charged interest on the amount lent.

Secondly the Defendant contended that the money was meant to be for investment purposes and was not a loan. The Agreement provided for the Plaintiff to get back his investment from QB Excellence Sdn Bhd. The cheque given to the Plaintiff was used as a collateral for the investment put in by the Plaintiff in the Defendant's other company known as Djets Pte Ltd. The Defendant pointed to the fact that there was no reason for the Plaintiff to wait and not cash the cheque at the appointed time to support their defence that this was an arrangement for investment purposes and not a loan as averred.

It was also the contention of the Defendant that the Agreement is invalid and unenforceable because it had not been approved by the Defendant's Board of directors or its shareholders. Furthermore the Agreement was not stamped and thus the Plaintiff could not rely on it to support his claim.

2nd Loan

As for the 2nd loan the Defendant contended that there were no documents furnished as proof that the loan was given to the Defendant. The Defendant said that if at all the loan was given, it did not involve them but that it was given to a 3rd party i.e. to Private Jets Resources. Thus it was submitted that the Plaintiff had no prevailing cause of action against the Defendant with regard to this transaction.

3rd Loan

In its defence, the Defendant asserted that the money was payment made by the Plaintiff for the purpose of renting a chartered flight. The Defendant averred that the Plaintiff booked the chartered flight



through the Defendant. The Defendant contended that it was made known to the Plaintiff that no refunds would be entertained for late cancellations. The Defendant alleged that the Plaintiff cancelled the booking at the last minute. The Defendant referred to an Invoice marked as Exh A in the Defendant's Affidavit in Reply dated 29.11.2019 where it is stated that all costs incurred after receipt of the said invoice is at own expense.

On the issue of the WhatsApp messages relied on by the Plaintiff as proof of the Defendant's acknowledgement of the debt it was contended that the messages did not show there was any agreement to repay the amount claimed. It was also the Defendant's contention that the messages did not specifically refer to any one of the Loans referred to by the Plaintiff.

Findings of this Court

I have undertaken a thorough consideration of the facts of the case, the evidence divulged through affidavit evidence as well as the documents attached as exhibits tendered. Based on these considerations I am satisfied that there are no triable or arguable issues raised by the Defendant that is worthy enough for me to order for a trial to take place. I have reminded and cautioned myself that a Defendant ought not to be shut out from defending his case unless it is very clear that he has no case in the action. I shall deal with the loans in the order they were given.

1st Loan

The 1st loan arises out of an Agreement inked between the Plaintiff and the Defendant on 1.10.2018. When examined, the details in the agreement show quite clearly that the Agreement was signed by the

two directors on behalf of the company. These are the two only existing directors cum shareholders of the company. This information can be gleaned from the SSM search exhibited as Exh MNAA-9 in the Affidavit in Support of the Notice of Application by the Plaintiff. The Agreement bears the chop of the company.

The title of the Agreement states “*A Private Treaty Agreement between M. Nazasli b Abdul Aziz on Private Loan Arrangement with Elite Jets Sdn Bhd*”. Paragraph 3 of the Agreement states “*that the board of directors and shareholders authorizes taking up a short term loan advance.*” It is also a term in the Agreement which specifically states that the 2 directors cum shareholders undertake to repay the sum borrowed within a specific time frame.

The overall tenor of the Agreement seems to specifically set out the terms and conditions for the loan to be given to the Defendant. The reason for the loan is stated in the Agreement i.e. that it is to be used by the Defendant for investment. From a perusal of the Agreement, the phrase ‘investment’ clearly was referring to the Defendant’s intention to invest in Private Jet Charters for a period of 3 months. Contrary to the Defendant’s assertion it was not referring to the Plaintiff’s wish to invest in the company. Hence I am not in agreement with the Defendant’s contention that there is a doubt as to whether the agreement was meant to be a loan or an investment.

It is my view that the terms of the Agreement clearly showed that the board of directors and the shareholders who are one and the same persons will ratify the loan taken. Therefore the argument that the Plaintiff had not obtained the approval of the Board of Directors is an afterthought and devoid of merit.

The mention of QB Excellence is explained in the Agreement itself i.e. that the Defendant will pay for the interest charged from proceeds

from their investment in QB Excellence. I find there is no confusion on this issue.

It was also contended by the Defendant that the post dated cheque amounting to RM620,000 was given as a collateral meant for the Plaintiff to invest in Djets Pte Ltd which is a company owned by the Defendant. I am in agreement with the Plaintiff's contention that the issue raised by the Defendant here appears to be a bare allegation and is not supported by the clear terms of the Loan Agreement. Therefore I reject the Defendant's contention on this score.

I accept the Plaintiff's contention that the fact that the Agreement referred to a post-dated cheque dated 5.1.2019 amounting to RM620,000 supported the Plaintiff's claim that this was a loan given to the Defendant and not an investment. The Defendant's allegation that it was an investment simply because the Plaintiff did not cash the cheque is not supported or reflected in the terms of the Agreement. It is plain that the loan was secured by the post dated cheque showing the total of the loan given together with the interest charged. Hence this is merely a bare allegation and has no merits.

The Defendant further contended that the loan is an illegal money lending transaction because the Plaintiff charged interest on the loan.

It is ironic that the Defendant in claiming that this is a money lending transaction has achieved the effect of acknowledging that this was a loan. This should put to rest the allegation that it was an investment.

With regard to the contention that this was a money lending transaction and hence contrary to the Moneylenders Act, I must emphasize here that not every friendly loan which imposes some sort of interest is a money lending transaction making it invalid and unenforceable. It is only when there is evidence that the Plaintiff is in the business of money lending or that he holds out as a person

carrying on the business of money lending. (See *Sundaram Subramanian v. Alamrio Properties Sdn Bhd & Ors* [2016] 10 CLJ 645). The test of the true transaction is in the facts of the case presented before the court.

In this case, there does not appear to be any activity of money lending going on. Indeed if one were to peruse the other 2 loans given to the Defendant it would show that the loans do not carry interest. Thus I find that these are friendly loans and not in the money lending sense of the word. Here the Defendant had not been able to demonstrate that the loan is caught by the provisions of the Moneylender's Act. This is thus a bare assertion made to avoid repayment of the loan given.

Finally I do not find any merits in the Defendant's claim that the Agreement is unenforceable for the reason that it was not stamped. It has been made explicitly clear in a number of decisions that the non-stamping of documents does not affect their admissibility as evidence in court proceedings (see *RHB Bank Bhd v. Kwan Chew Holdings Sdn Bhd* [2010] 1 CLJ 665].

It is therefore my finding that the Defendant has failed to raise any triable issues for the first loan transaction.

2nd Loan

The 2nd Loan does not carry any interest. As stated earlier the Plaintiff has asserted that the loan of RM500,000 was advanced to the Defendant to settle their debt to QB Excellent Sdn Bhd. There is a cheque given to the Plaintiff as collateral for the 2nd Loan (see Exh MNAA 8 of the Plaintiff's Affidavit in supported dated 11.11.2019).

The Defendant has sought to avoid the claim by stating that the cheque belonged to a Third Party and that the loan was given to that third party and not the Defendant. The Plaintiff has asserted that the

cheque was given by the Defendant and that the Defendant fully owned the third party company named Private Jet Resources. Exh MNAA 9 which is the SSM search done on Private Jet Resources confirms that Private Jet Resources is fully owned by the Defendant. The Defendant's argument on this point is without substance and is therefore rejected.

The Defendant further averred that there was a confusion whether the amount referred to in the 2nd Loan was RM500,000 or RM550,000. The Defendant referred to an email dated 1.8.2019 sent by the Plaintiff.

In the email the Plaintiff stated: *"RM550,000 cheque saya advance untuk Elite....."*

The Defendant alleged this amounted to a triable issue because there was a doubt as to whether the loan was for RM500,000 or RM550,000. In reply the Plaintiff contended that this was a typographical error and that it did not detract from the fact that the RHB Bhd cheque given by the Defendant for the 2nd Loan was for the sum of RM500,000. I find that the Plaintiff's contention has merits because the cheque given by the Defendant to the Plaintiff was for the sum of RM500,000. There was therefore no confusion on the amount.

In essence I find that the Defendant has failed to raise any triable issue for the 2nd Loan transaction.

3rd Loan

Here the main contention raised by the Defendant is that the money was given by the Plaintiff for a chartered flight he booked via the Defendant. The Defendant contended that the Plaintiff was not entitled for a refund because the cancellation was done at the last minute.



I find there is no basis for this assertion made by the Defendant. Firstly the Plaintiff would have to pay the money directly to the third party, not to the Defendant. Secondly assuming that the Defendant's assertions are true the Defendant could easily have shown proof of this with documentary evidence. It is noted that the amount is a large sum. It is not reasonable that there is no documentary proof of the cancellation and the refusal of refund.

I find this defence to be improbable and I reject it. If it were indeed payment for booking a chartered flight, there would be no reason for the Plaintiff to request the Defendant to pay the late interest charges on the credit card used for the transaction. I therefore find there are no triable issues with regard to the 3rd Loan transaction.

Other Considerations

During the course of all the 3 loans given, the Plaintiff communicated with the Defendant through WhatsApp messages and email. When that failed the Plaintiff appointed solicitors and sent Notices of Demand to the Defendant. Despite his efforts the Defendant neglected and refused to pay the Plaintiff the amount outstanding for all the 3 loans.

In this matter the court in perusing and considering the contents of the WhatsApp messages, the emails and the Notices of demand has found that these forms of communication used by the Plaintiff proved that the Defendant had taken the 3 separate loans from the Plaintiff and had subsequently defaulted in repayment. The Whatsapp messages, email and Notice of Demand are contemporaneous records of communication between the parties and these have proven the Plaintiff's claim against the Defendant. It is worth noting that the Defendant had never denied the contents of the WhatsApp messages, the email or the Notice of Demand sent to them.

WhatsApp Messages

The exchange of WhatsApp messages showed the pleas of the Plaintiff to the Defendant to repay what was owed. The replies which came back either showed the Defendant stalling the Plaintiff with empty promises to pay back soon or giving an expectation to the Plaintiff that he was about to bank in the money into the Plaintiff's account.

For the 1st Loan the Plaintiff asked: *“any hope on that repayment..... advanced loan I gave you with the post dated cheque of RM620K....*

The Defendant's reply was: *“Salam.....all my deals are coming this week. InsyaAllah. Just awaiting execution.”*

The same answer was given to the Plaintiff when asked about the amount owing in the 2nd Loan.

With regard to the 3rd Loan, the Plaintiff had on 26.3.2019 sent an image of the sum of RM1,300,000 credited into the Defendant's credit card terminal and a reminder to pay the late penalty charges for the use of the credit card facilities. The Defendant did not deny the Plaintiff's message.

Assuming if what the Defendant said was true i.e. that this was for payment of a chartered flight, the Defendant would have replied and corrected the Plaintiff. However the only acknowledgment by the Defendant was his reply on 5.5.2009 as follows: *“ok understood sir..... will find ways to settle before puasa insyaAllah”*

On another occasion the Defendant had contacted the Plaintiff by WhatsApp message informing him that he would pay him after receiving the money from AEG. On 21.5.2019 the Defendant's director sent an image of a boarding pass for a flight to Singapore and asking the Plaintiff whether he could make payment to the Plaintiff's account in Singapore. There are a number of WhatsApp messages

between the Plaintiff and the Defendant and all the messages showed the Defendant's acquiescence of the amount owed by it together with promises to repay the sums owed.

The full context of the communication can be seen from Exh MNAA-15 & 16 in the Plaintiff's Affidavit in Support dated 11.11.2019.

Therefore I am convinced that these WhatsApp messages corroborated the Plaintiff's version that the loans were given to the Defendant and the Defendant had not repaid the sum owing.

Email

The Plaintiff also sent an email to the Defendant reminding him of the amount still unpaid. After the Defendant did not pay up on the dateline for the 2nd Loan, the Plaintiff sent him an email dated 1.8.2019 asking "*RM550,000 cheque saya advance untuk Elite on QB Excellence yang Elite hutang*".

The Defendant did not respond to this email. I would agree that the failure to respond to the email can only be construed as an acceptance and an admission of the assertions of the Plaintiff. If it were true that the Defendant did not owe any money to the Plaintiff, the Defendant would have hasten to reply to set the record straight. Since there was failure to do so, I hold that there was admission that the Defendant had taken all three loans from the Defendant.

Letters of Demand

On the Plaintiff's instructions the Plaintiff's solicitor sent separate letters of demand for the 3 separate loans to the Defendant. The letters are dated 6.8.2019. The Defendant's solicitor replied to each of these letters with the standard answer "*we are currently taking instructions on your letter and would respond to the same accordingly.*"

I need go no further than refer to the case of *Hong Poh Teck & Ors v. Effort Ezy Sdn Bhd* [2017] 1 LNS 2004 where the High Court held:

"[33] It is pertinent to note that the Defendant had not replied nor disputed all the contents of the Plaintiff's solicitors' letters of 18.10.2016 and 31.10.2016 at all material times until 22.12.2016 where through its solicitors' letter, the Defendant stated that it had "cleared" the premises and were in the position to give "immediate possession" of the premises by merely enclosing the keys to the premises. Even in its solicitor's letter of 22.12.2016, the Defendant did not dispute as to the contents of the Plaintiffs' solicitors' letters of 18.10.2016 and 31.10.2016. As such the contents of those letters are deemed to be admitted. In David Wong Hon Leong v. Noorazman b. Adnan [1995] 4 CLJ 155 the Court of Appeal held

"Now there are cases-business and mercantile cases in which the Courts have taken notice that, in the ordinary course of business, if one man's business states in a letter to another that he has agreed to do certain things, the person who receives that letter must answer it if he means to dispute the fact that he did so agree."

In my view the contents of the Defendant's solicitor's letter in reply to the Plaintiff's solicitor's letter showed without a doubt that the

Defendant did not dispute that it owed the Plaintiff the amount claimed through the 1st 2nd and 3rd Loan.

Conclusion

On the facts of the case presented to me, I find that the Defendant has failed to raise any triable issues of fact or law against the Plaintiff's claim for all the 3 loans advanced to the Defendant. I find that the Defendant has also failed to show any defence on the merits based on the issues pleaded in the Defence and the matters raised in his affidavit in reply.

Accordingly I allowed summary judgment to be entered against the Defendant with costs.

Dated: 11 JUNE 2020

(JULIE LACK)

Judicial Commissioner

High Court of Malaya

Shah Alam, Selangor Darul Ehsan

Counsel:

For the plaintiff - Thevini Nayagam & Aieshah Nadia Masdar; M/s Rahman Rohaida

For the defendant - Nor Azlan Sharin; M/s Hanif Abdul Rahman & Associates

Case(s) referred to:



[2020] 1 LNS 893

Legal Network Series

National Company for Foreign Trade v. Kayu Raya Sdn Bhd [1984] 2 CLJ 220

Bank Negara Malaysia v. Mohd Ismail Ali Johor & Ors [1992] 1 CLJ Rep 14

Sundaram Subramanian v. Alamrio Properties Sdn Bhd & Ors [2016] 10 CLJ 645

RHB Bank Bhd v. Kwan Chew Holdings Sdn Bhd [2010] 1 CLJ 665

Hong Poh Teck & Ors v. Effort Ezy Sdn Bhd [2017] 1 LNS 2004

Legislation referred to:

Rules of Court 2012, O. 14