IN THE HIGH COURT OF MALAYA AT KUALA LUMPUR
IN THE FEDERAL TERRITORY, MALAYSIA
[CIVIL SUIT NO: WA-22NCvC-338-05/2021]

BETWEEN

1MALAYSIA DEVELOPMENT BERHAD
(Company No.: 200901005292 (848230-V)) **... PLAINTIFF**

AND

1. **ARUL KANDA KANDASAMY**
   (NRIC No.: 760302-14-5363)

2. **TAN SRI DR. MOHD IRWAN SERIGAR ABDULLAH**
   (NRIC No.: 570307-03-5529) **... DEFENDANTS**

GROUNDS OF JUDGMENT

[Enclosure 105]

Preliminary

[1] Essentially, the circumstances surrounding this application revolve around the affairs involving 1MDB, who is the plaintiff in this suit. Firstly, the first defendant was sacked from his position as Chief Executive Officer ("CEO") of the plaintiff, followed by his arrest and criminal proceedings, and finally, this civil suit. The first defendant claims this has irreparably damaged his reputation, resulting in financial losses and embarrassment. This is the complaint of the first defendant which led to the filing of Enclosure 105, which is his application to amend his defence to include a counterclaim.

[2] The first defendant also contends that since he has been acquitted of

the criminal charges and His Lordship Mohamed Zaini Mazlan J (as His Lordship then was), who presided over the audit tampering criminal case, has found no evidence suggesting that he is liable for any purported wrongdoings, this is the right time to file Enclosure 105. A further strengthening point is that even the prosecution's appeal regarding the acquittal was dismissed by the Court of Appeal. Furthermore, since he has not been able to strike out this suit against him, what better time than now to file a counterclaim?

An overview of the case

[3] As of January 2015, the first defendant was appointed as CEO of the plaintiff, which is a wholly-owned subsidiary of the Ministry of Finance. After his contract expired on 31.12.2017, the plaintiff's board of directors requested that his contract be extended. His contract was further extended to 30.6.2018 by the Employment Extension Agreement dated 23.2.2018. As part of this new agreement, the plaintiff was supposed to pay the first defendant an ex gratia bonus of RM5 million. However, only RM2.5 million was paid out to him. Over the extension period, he received RM101,300.00 per month as his salary, but only from January to April 2018.

[4] Following the 2018 General Election, the first defendant alleges that he was accused of dishonesty and untrustworthiness in managing the plaintiff due to the changes in the country's political landscape. As a result, the Employment Extension Agreement was terminated on 25.6.2018.

[5] Consequently, this civil suit was filed against the defendants, amongst others, for fraudulent breach of duties and fraudulent breach of trust regarding Brazen Sky Investment and the dispute with IPIC and Aabar PJS, claiming USD1,830,000,000.00 for loss and damages suffered by the plaintiff. As part of this civil suit, the plaintiff asserts that the Employment Extension Agreement is void.

[6] Because of such factual circumstances, the first defendant is now seeking to include a counterclaim in his amended defence in order to seek compensation for the losses he allegedly suffered as a result of the plaintiff's abuse of process. Specifically, he claims RM202,600.00 in salary loss and RM2.5 million in unpaid bonus balance, both of which are in accordance with his Employment Extension Agreement. Aside from that, he also claims special damages of RM54 million as a result of the plaintiff's wrongful and mala fide actions in commencing not only this civil suit but also allegedly a criminal proceeding in order to justify terminating the Employment Extension Agreement. These things caused the first defendant to suffer significant reputational damage and embarrassment, which led to his inability to secure alternative employment.

The first defendant's arguments in support of his application

[7] According to the first defendant, Enclosure 105 was filed without delay. This is because the first defendant's application to strike out the plaintiff's action was dismissed by this court in August 2023. Furthermore, the first defendant must await the outcome of the criminal proceedings to determine his position on the allegations made against him. Due to the first defendant's discharge and acquittal, it is now possible to file Enclosure 105.

[8] The first defendant argues that the Public Account Committee found that the plaintiff's board of directors, including the first defendant, failed to discharge their duties and responsibilities at the material time. On this specific issue, His Lordship Mohamed Zaini Mazlan J (as His Lordship then was) found that the first defendant did not attempt to camouflage the shenanigans surrounding the plaintiff, and despite the fact that he was brought in to rescue the plaintiff, he was publicly blamed for the plaintiff's affairs because of something that happened to the plaintiff before his time. As a result, His Lordship concluded that there was no evidence that he was complicit with the plaintiff's problems.

[9] Due to this, there was no delay on the part of the first defendant and no prejudice to the plaintiff, especially since the trial is some 7 months away, thereby allowing one to amend before the trial. On the issue of the prospect of success, the first defendant argues that it's still too early for a decision to be made.

[10] Aside from that, the first defendant argues that even the limitation has not set in yet, which, in any event, won't happen until June 2024. The first defendant also takes the position that he can file a separate action but all issues are in this case, which makes this a bona fide application to amend by incorporating his counterclaim to ventilate the real controversy between the parties so as to reflect his loss and damages which flow from the same subject matter and facts as this current civil suit. Since none of the issues in the application to amend are new to the plaintiff, there is, therefore, no prejudice to the plaintiff.

An objection to Enclosure 105 by the plaintiff

[11] The plaintiff's main argument for defeating Enclosure 105 is delay, in addition to the fact that it's a tactical manoeuvre with no prospect of success. According to facts, this suit was filed nearly three years after the first defendant's employment was terminated, with the first defendant's defence filed on 20.2.2022 and Enclosure 105 filed on 17.11.2023. There was a 22-month gap between those two. Apparently, there were already facts available concerning the first defendant's application back then, as evidenced by para 18 of the first defendant's defence, which specifically stated that the plaintiff had wrongfully terminated the employment of the first defendant, the same basis on which the first defendant proposes to incorporate now in his re-amended defence.

[12] It is further compounded by the fact that there was no explanation for the delay in including the counterclaim even though all the facts were known as early as February 2022. The first defendant's reason that he was waiting for the audit report tampering case decision cannot be

true, since the audit report tampering case didn't have anything to do with termination. Neither the audit tampering issue nor the malicious prosecution are involved in this action. Wrongful termination is the basis of the counterclaim. Further to this, despite the striking-out decision being delivered on 23.8.2023, Enclosure 105 was only filed almost three months later.

[13] Furthermore, some of the issues raised by the first defendant are not supposed to be included in this case. This is due to the fact that the former Minister of Finance is not a party in this suit, despite the fact that a number of allegations have been brought against him. It is also not true that the plaintiff initiated the criminal proceedings. The plaintiff did not make the criminal charges against the first defendant. Furthermore, the proposed counterclaim of RM54 million is incorrect since special damages must occur before the action. Consequently, loss of income due to an alleged injury constitutes general damages. The loss of general damages cannot be quantified.

Court's analysis and decision

[14] It is necessary to first examine the law applicable to the amendment application for guidance in order to proceed to analyse the merits of the first defendant's application. The following are the provisions of Order 20 rule 5 of the Rules of Court 2012:

> Amendment of writ or pleading with leave (O. 20, r. 5)
>
> 5. (1) Subject to Order 15, rules 6, 6A, 7 and 8 and the following provisions of this rule, the Court may at any stage of the proceedings allow the plaintiff to amend his writ, or any party to amend his pleading, on such terms as to costs or otherwise as may be just and in such a manner, if any, as it may direct.
>
> (2) Where an application to the Court for leave to make the amendment mentioned in paragraph (3), (4) or (5) is made

after any relevant period of limitation current at the date of the issue of the writ has expired, the Court may nevertheless grant such leave in the circumstances mentioned in that paragraph if it thinks it just to do so.

(3) An amendment to correct the name of a party may be allowed under paragraph (2) notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if the Court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or, as the case may be, intended to be sued.

(4) An amendment to alter the capacity in which a party sues (whether as plaintiff or as defendant by counterclaim) may be allowed under paragraph (2) if the capacity in which, if the amendment is made, the party will sue is one in which at the date of issue of the writ or the making of the counterclaim, as the case may be, he might have sued.

(5) An amendment may be allowed under paragraph (2) notwithstanding that the effect of the amendment will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the action by the party applying for leave to make the amendment.

[15] As set forth in Order 20 rule 5 of the Rules of Court 2012, the court has the discretion to grant leave to amend pleadings at any time during the proceedings. However, this discretion must still be exercised in accordance with established principles. In order to exercise discretion, it is important to consider the case of *Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd & Ors* [1983] 1 MLJ 213 as a starting point. The Federal Court's judgment in this case was delivered by His Lordship

Mohamed Azmi FJ who provided principles for amendments that are still very relevant and applicable today. His Lordship held the following at pp 214 and 215:

> Under Order 20 of the Rules of the High Court 1980, which is equivalent to Order 28 Rules of Supreme Court, a Judge has a discretion to allow leave to amend pleadings. Like any other discretion, it must of course be exercised judicially (see *Kam Hoy Trading v Kam Fatt Tin Mine* [1963] MLJ 248. The general principle is that the court will allow such amendments as will cause no injustice to the other parties. Three basic questions should be considered to determine whether injustice would or would not result, (1) whether the application is *bona fide;* (2) whether the prejudice caused to the other side can be compensated by costs and (3) whether the amendments would not in effect turn the suit from one character into a suit of another and inconsistent character. (See *Mallal's* Supreme Court Practice page 342). If the answers are in the affirmative, an application for amendment should be allowed at any stage of the proceedings particularly before trial, even if the effect of the amendment would be to add or substitute a new cause of action, provided the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the original statement of claim.

[16] To complete this discussion, the Federal Court in *Hong Leong Finance Bhd v Low Thiam Hoe and another appeal* [2016] 1 MLJ 301 provided further guidance regarding the issue of an amendment application made too late in the proceedings. As His Lordship Zulkefli CJ (Malaya) (as His Lordship then was) observed at pp 308 and 309:

> [18] It is pertinent to note that *Yamaha Motor* was decided under the old RHC 1980. The civil procedure has since then changed with the introduction of the pre-trial case management in the year 2000 under O. 34 of the RHC 1980 (22 September 2000)

and now under O. 34 of the RC 2012 (1 August [2016] *1 MLJ 301 at* 3092012). Nowadays the court recognises especially under the new case management regime that a different approach needs to be taken to prevent delay in the progress of a case to trial and for its completion. The progress of the case is no longer left in the hands of the litigants but with the court in the driver's seat (see the case of *Syed Omar bin Syed Mohamed v Perbadanan Nasional Bhd* [2013] 1 MLJ 461; [2012] 9 CLJ 557). In particular when an application to amend the pleading is made at a very late stage as was done in the present case, the principles in *Yamaha Motor* ought not to be the sole consideration. This is because an order for compensation by payment of costs in such a case may not be an adequate remedy and it would also disrupt the administration of justice which affects the courts, the parties and the other users of the judicial process (see the case of *Conlay Construction Sdn Bhd v Perembun (M) Sdn Bhd* [2014] 1 MLJ 80).

[17] After reviewing the facts before me, I agree with the plaintiff that the amendment application was filed with a prolonged delay. As far as this delay is concerned, I find that the steps, timelines and reasons for filing this application at this point in time were not sufficiently explained by the first defendant. In this regard, I observe that the first defendant already knew of all the material facts at the time his defence was filed or, at the very least, at the time the first application to amend the defence was made. Obviously, none of the issues raised by the first defendant in his proposed counterclaim are new to him. From this standpoint, the first defendant had no reason to wait until the disposal of his application to strike out the claim since he had, in fact, amended his defence for the first time on 21.3.2023 pending the disposal of his striking-out application.

[18] In addition to the foregoing, I also find that the criminal proceedings and the findings therein do not prevent the first defendant from raising

the issues he intends to raise now. The criminal case is a separate proceeding with separate issues, which does not in any way preclude the first defendant from bringing his counterclaim earlier. Taking this into account, I must conclude that there has been a delay in amending the defence for the second time to include the counterclaim. It is, therefore, not just the length of time until the trial, which is around seven months away, but the issue of delay extends backwards through the history of the proceedings, affecting the genuineness of the first defendant's intention to raise it at this stage.

[19] My findings of delay are supported by Her Ladyship Evrol Mariette Peters JC's (as Her Ladyship then was) decision in *Mah Sing Properties Sdn Bhd v SG Prestige Sdn Bhd* [2021] MLJU 2. The court observed in this case that if the facts leading to the amendment had been known at the time of the original pleading, the amendment application would not have been allowed:

> [26] I found the Defendant’s reason for its delay unconvincing as it did not explain why the averments in the proposed amendments, were not mentioned in the original Defence, bearing in mind that these facts were readily available at the time the original Defence was filed.
>
> [27] On this note, reference is again made to *Ismail bin Ibrahim & Ors v Sum Poh Development Sdn Bhd & Anor where* it was held that the circumstances in which an amendment would not be permitted are: (a) where the facts giving rise to the amendment were known at the time of the original pleading; and (b) where the delay in making the amendment was in connection with some tactical manoeuvre.
>
> [28] The same concerns were expressed in *Lim Nyang Tak Michael v ACE Technologies Sdn Bhd* [1995] 4 MLJ 616, where in dismissing the defendant’s application to amend the defence, the Court held that if the defendant truly had a valid defence, it

would not have waited, and the fact that it did, raised the inference that the application was a tactical manoeuvre and was done in bad faith to delay the rights of the plaintiff on his claim.

[20] With that in mind, it appears to me that the first defendant's reasons for filing the amendment application at this stage are not only questionable but also indicate that the amendment application was not bona fide. The first defendant had no reason not to file his counterclaim back then if it was indeed a genuine intention from the very beginning, particularly when the facts leading to the proposed amendments were already mentioned in his amended defence dated 21.3.2023.

[21] Moreover, some of the allegations and claims raised in the intended counterclaim seem untenable in light of their prospect of success. Not only is the then Minister of Finance not a party here, but in any event, this type of dispute should be handled statutorily through the Industrial Court. In *7 Eleven Malaysia Sdn Bhd v. Ashvine Hari Krishnan* [2023] 4 MLRA 252, His Lordship S Nantha Balan JCA, speaking for the Court of Appeal, ruled that the plaintiff had abused the process by failing to let the Industrial Court determine the dispute:

> [68] For the reasons as stated above, we are of the view that the Plaintiff's claim, per Suit 694, is a clear manifestation of an abuse of process. As a matter of principle, if the claim is one for compensation for wrongful dismissal (loss of employment) then it is a claim which ought to be ventilated via the statutory dispute mechanism ie Industrial Court and not the civil court.
>
> [69] In the final analysis, we agree with and endorse the approach taken by the High Court in Ng Siang Teck - a civil suit by a dismissed employee who chooses not to pursue the statutory dispute resolution mechanism/process under the Act and/or seek the requisite statutory remedy under the Act and who seeks instead monetary compensation for loss of employment via a

common law action ought to be struck out as being an abuse of process of the court.

[22] In making this finding and regardless of the above, I also keep in mind that there is no prejudice to the first defendant since he also considers that the issues raised in the intended counterclaim can still be brought separately in a new action, perhaps with much more detail, especially since allegations have been made against the then Minister of Finance.

[23] In this regard, it appears to me that the first defendant's amendment application introduces new substantive issues and causes of action involving the then Minister of Finance's role in terminating his employment. New allegations have been made against the said Minister that were not included in the original defence. This is a clear departure from the first defendant's original position. Essentially, it changes the original amended defence's character into a suit of another and inconsistent character. In such a case, the plaintiff would suffer prejudice which cannot be compensated for by costs.

Conclusion

[24] Given the facts presented above, I find that the first defendant's application is without merit. Therefore, Enclosure 105 is dismissed with costs of RM3,000.00 subject to allocatur.

(RAJA AHMAD MOHZANUDDIN SHAH)
Judicial Commissioner
High Court of Kuala Lumpur

Dated: 6 FEBRUARY 2024

Counsel:

For the plaintiff - Brendan Navin Siva, Aida Haryani Salamon & Wong Sze Some ; M/s Brendan Siva

For the 1st defendant - Sanjay Mohanasundram, Adam Lee Leong; Soon &

Hing Hong Jer; M/s Sanjay Mohan

For the 2nd defendant - Lavinia Kumaraendran, Mavin Thillainathan & Ravindejit Kaur; M/s Lavania & Balan Chambers

Cases referred to:

Conlay Construction Sdn Bhd v Perembun (M) Sdn Bhd [2014] 1 MLJ 80

Eleven Malaysia Sdn Bhd v. Ashvine Hari Krishnan [2023] 4 MLRA 252

Hong Leong Finance Bhd v Low Thiam Hoe and another appeal [2016] 1 MLJ 301

Kam Hoy Trading v Kam Fatt Tin Mine [1963] MLJ 248

Lim Nyang Tak Michael v ACE Technologies Sdn Bhd [1995] 4 MLJ 616

Mah Sing Properties Sdn Bhd v SG Prestige Sdn Bhd [2021] MLJU 2

Syed Omar bin Syed Mohamed v Perbadanan Nasional Bhd [2013] 1 MLJ 461; [2012] 9 CLJ 557

Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd & Ors [1983] 1 MLJ 213