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1. *Export-Import Bank of Malaysia Bhd v Brahim's Overseas Ventures Sdn Bhd & Ors [2020] MLJU 2601*

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Export-Import Bank of Malaysia Bhd v Brahim's Overseas Ventures Sdn Bhd & Ors [2020] MLJU 2601

Malayan Law Journal Unreported

HIGH COURT (KUALA LUMPUR)

ATAN MUSTAFFA YUSSOF AHMAD JC

SUIT NO WA-22M-249-06 OF 2020

14 June 2020

Afifi Ahmad (Azrul Afifi & Azuan) for the plaintiff.
Gurubachan Singh Johal (Qeemnoor Zahreen Zazanee with him) (Nashir Johal & Co) for the defendants.

Atan Mustaffa Yussof Ahmad JC:

JUDGMENT

[1]This judgment concerns the Defendants' discovery application (encl. 35) against the Plaintiff made pursuant to O. 24, O. 26 and O. 92 r. 4 Rules of Court 2012 ("***ROC 2012***") as stated in the Notice of Application. After considering the affidavits and written submissions filed together with the oral submissions of counsels, I dismissed encl. 35. This judgment contains the full grounds for my decisions.
Background Facts

[2]The Plaintiff granted to the 1st Defendant a bank guarantee facility in Jordanian Dinar for overseas projects amounting to JOD4,000,000.00 ("***the Facility***") by way of a Letter of Offer dated 27.7.2011. In relation thereof the Plaintiff and the 1st Defendant entered into a Facility Agreement dated 13.2.2012 ("***the Facility Agreement***").

[3]The Facility was to secure the financial performance of the 1st Defendant as a shareholder of 50% in a company called Arab Ready Meals, PSC ("***ARM***") relating to the granting of a 10 year financing facility of JOD8,000,000.00 from Jordan Kuwait Bank ("***the Beneficiary***").

[4]Under the terms of the Facility, the Facility is provided to the 1st Defendant as a guarantee whereby the Plaintiff will pay the Facility amount to the Beneficiary if the Beneficiary makes any claim against the Plaintiff on the Facility. In the event the Plaintiff makes a payment to the Beneficiary the 1st Defendant is obliged to make payment to the Plaintiff on the entire amount claimed by the Beneficiary.

[5]Under the security arrangement for the Facility the following deeds and agreements were executed as security and in consideration of the Facility granted:

a) An Irrevocable and Unconditional Joint and Several Guarantee Agreement dated 13.2.2012 ("***the Guarantee Agreement***") executed by the 2nd Defendant and the 3rd Defendant;

b) Deed of Assignment (Political Risk Insurance) dated 13.2.2012 ("***the PRI Deed of Assignment***") executed by the Plaintiff and the 1st Defendant; and

c) Cash Collateral Agreement dated 13.2.2012 executed by the Plaintiff and the 1st Defendant.

[6]In respect of the Guarantee Agreement, the 2nd Defendant and the 3rd Defendant jointly and severally agreed to guarantee the entire outstanding amount under the Facility Agreement.

[7]On or about 28.2.2019, the Beneficiary claimed on the Facility from the Plaintiff in the amount of JOD2,773,668.00. In accordance with the terms and conditions of the Facility Agreement, on or around 1.3.2019, the Plaintiff released full payment to the Beneficiary an amount of JOD2,773,668.00. On 6.3.2019, the Plaintiff demanded from the 1st Defendant to repay the Facility amounting to JOD2,773,668.00 released to the Beneficiary.

[8]According to the Plaintiff, the 1st Defendant failed to make payment in accordance with the Facility Agreement as agreed following the letter of demand dated 6.3.2019. A letter of demand and termination dated 15.1.2020 was then issued through the Plaintiff's solicitors to the 1st Defendant, 2nd Defendant and 3rd Defendant whereby the Facility was terminated and the Plaintiff demanded from the Defendants payment a sum of RM16,312,252.05 due and owing as at 31.12.2019. As the payment was not forthcoming, the Plaintiff filed this action on 12.6.2020 to claim from the Defendants an amount of RM16,656,410.42 due and owing as at 30.4.2020 which includes interest and penalty. The Statement of Claim was subsequently amended. On 16.10.2020 the Plaintiff filed an application for summary judgment in encl. 20 to pray for a judgment to be entered on the amount claimed by the Plaintiff in the Amended Statement of Claim ("***the Order 14 Application***").
The Defendants' discovery application

[9]The Defendants' application was made pursuant to O. 24, r.26 and O. 92 r. 4 of ROC 2012. The Defendants prayed for the Plaintiff to produce the following documents:

a) The Contract Agreement referred to in Clause 1 of the Facility Agreement where the contract means "*...contract entered into between the Arab Ready Meals, PSC ("ARM") and Jordanian Armed Forces ("JAF") for the supply of ration packs/pouches ("the Contract Agreement")"*

b) The original copy of the Military Kitchen Agreement signed between Jordanian Armed Forces and ARM referred in the Insurance Policy (from 1.3.2013 to 29.3.2016) and (from 1.3.2016 to 28.2.2019) ("***the Military Kitchen Agreement"***);

c) Insurance Policy No. EXIM/ECI/OII-JOD/01/2011 referred to in Schedule 2 of the PRI Deed of Assignment ("***the Insurance Policy***"); and

d) Reinsurance Policy as requested by the Defendants' solicitors via a letter dated 12.11.2020 ("***the Reinsurance Policy***").

Law on discovery

[10]As stated in the Defendants' Notice of Application (encl. 35), the Defendants' application is made pursuant to O. 24, O. 26 and O. 92 r. 4 ROC 2012.

[11]From the affidavits and submissions of the Defendants, it was apparent that the specific rules that the application relate to are r. 10 and r. 11 of O. 24 ROC 2012. Rule 10 relates to Inspection of documents referred to in pleadings and affidavits and r. 11 relates to power of the court to order for production of the documents for inspection.

[12]In the exercise of this Court's powers to order the productions of documents this Court is guided by the legal principles succinctly stated by his lordship Tan Sri Datuk Edgar Joseph Jr in the case of *Yekambaran Marimuthu v. Malayawata Steel Berhad* [1994] 2 CLJ 581 in the following manner:

> *"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....."*

[13]Equally applicable in such applications is Order 24 r. 13 which states:

> *"Production to be ordered only if necessary (O. 24, r. 13)*
>
> **[13]***(1) An order for the production of any documents for inspection or to the Court shall not be made under any of the foregoing rules unless the Court is of the opinion that the order is necessary either for disposing fairly of the cause or matter or for saving costs."*

[14]The burden is on the party seeking discovery to satisfy the Court that the production of the documents is necessary to dispose of the suit fairly or to save costs In *Nguang Chan aka Nugang Chan Liquor Trader & Ors v. Hai-O Enterprise Bhd & Ors* [2009] 5 MLJ 40, Court of Appeal held as follows:

> *"Under O. 24 r. 13 (1) of the RHC, an order for the production of documents for inspection is not to be made unless the court is of the opinion that such order is necessary either for disposing fairly of the case or matter or for saving costs. It is for the party seeking production to satisfy the court that such production is necessary for the purpose specified in r. 13(1). The court would dismiss a plaintiff's application for discovery if the plaintiff is merely fishing for evidence to prop up his case and to allow him discovery would be unduly oppressive to the party giving discovery."*

Defendants' submissions

[15]The Defendants submitted that the interconnectedness and relevance of the Contract Agreement, Military Kitchen Agreement, Insurance Policy and Reinsurance Policy have been thoroughly pleaded, explained and justified in the pleadings. In relation to this the Defendants further submitted and contended as follows:

a) The Contract Agreement, Military Kitchen Agreement, Insurance Policy and Reinsurance Policy (together, "***the Subject Documents***") were referred to in the Defence and the Defendants' Affidavit in Reply to the Plaintiff's Order 14 Application.

b) The Subject Documents were contemporaneously executed and the arrangement between parties is contained in several documents, therefore reference should be made to the Subject Documents which should be read together.

c) In the Facility Agreement there was a reference to the PRI Deed of Assignment in Recital C:

d)

> *"(c) in consideration of EXIM BANK providing and continue to provide the Facility and as security for the payment and repayment of the Secured Amounts (as hereinafter defined), the Customer has agreed to execute this Facility Agreement, the Guarantee Agreement, the Deed of Assignment (Political Risks Insurance) and the Memorandum of Deposit (hereinafter collectively referred to as "this Agreement"):…."*

[16]In respect of the Subject Documents the Defendants contended as follows:

a) The Contract Agreement is referred to in Clause 1 of the Facility Agreement where this contract means "...*contract entered into between the Arab Ready Meals, PSC ("ARM") and Jordanian Armed Forces ("JAF") for the supply of ration packs/pouches*".

b) The Military Kitchen Agreement requested is the original copy in the Arabic language as the copy given by the Plaintiff is just the unsigned and translated version of the agreement in English. For the ease of understanding of the Defendants, the original draft Military Kitchen Agreement was translated.

c) It is stipulated and stated in the Facility Agreement that the PRI Deed of Assignment is part of the Facility Agreement and the 1st Defendant had subscribed to a Political Risks Insurance Policy under the superintendence of the Plaintiff through a Deed of Assignment as a condition precedent to the Facility Agreement and the Deed of Assignment is defined in the Facility Agreement as *"...assignment of Political Risk Insurance from an Insurance company acceptable to EXIM BANK subscribed by the Customer in favor of EXIM BANK*". Thus the Insurance Policy was referred to in Schedule 2 of the PRI Deed of Assignment.

d) The Reinsurance Policy was referred to in para.s 37, 22 and 18 of the Defendants' Affidavit in Reply of the Order 14 Application.

e) In the Facility Agreement, in the definition of "Security Documents", the PRI Deed of Assignment is included as one of the documents. This is also pleaded in para. 15 of the Amended Statement of Claim.

f) The Plaintiff acknowledged the Facility Agreement and stated that the Plaintiff shall refer to the effect and terms of the Facility Agreement fully in para. 4 of the Amended Statement of Claim, thus the Plaintiff admitted the Facility Agreement in its totality which means all the Subject Documents must be referred to together and collectively.

g) The Defendants contended that there were 3 insurance policies entered into between the 1st Defendant as the Insured and the Plaintiff as the Insurer from 29.2.2012 until 28.2.2019. The Defendants referred to the last renewed insurance policy for the period from 1.3.2016 to 28.2.2019 which provided that the purpose of the insurance policy was to indemnify the Insured (the 1st Defendant) for loss caused by an act of Breach of Contract by the Jordanian Armed Forces.

Plaintiff's submissions

[17]The Plaintiff raised a preliminary objection stating that as the Defendants' Affidavit in Support and the Defendants' Affidavit in Reply involve contentious or disputed questions of facts, this application cannot be sustained as an affidavit on contentious facts affirmed by the Defendants' solicitor cannot be allowed to stand in these proceedings. The Plaintiff further submitted:

a) The facts deposed by the solicitor in the Defendants' Affidavit in Support at para.s 4(a), (b), (c), (d), (h), (j) and (k) are contentious in nature.

b) The solicitor's averments in para.s 4(a) and 4(d) of the Affidavit in Support are new facts which were never raised in the pleadings, thus she could not have obtained and deposed such content.

c) As the depositions by the solicitor in the Defendants' Affidavit in Support are contentious in nature and not within the solicitor's knowledge, the solicitor is in no position to affirm the affidavit on behalf of the Defendant.

d) Paragrpahs 6, 7, 8, 10, 11 and 12 of the Defendants' Affidavit in Reply also contains numerous contentious and disputed facts.

[18]The Plaintiff also raised another preliminary objection in stating that the Defendants' application is too wide and vague as the Defendants failed to specify under which rule that the Defendants are seeking discovery of under O. 24 of the ROC 2012. The Plaintiff further submitted:

a) Order 24 provides for a few modes or types of discovery under specific rules (rules 3, 7, 10 and 11) and each mode or type of discovery has different governing principles that needs to be fulfilled for the applicant to obtain an order for discovery.

b) Applications for discovery in reported cases have been premised under a specific sub-rule or few sub-rules on discovery. The Plaintiff referred to *MK Cooling Services & Anor v. Chong Kek Fong* [2020] MLJU 2178, *Malaysia Debt Venture Berhad v. Platinum Techsolve Sdn Bhd & Ors* [2020] MLJU 1421 and *Teck Guan (Hup Kee) Sdn Bhd lwn NGC Energy Sdn Bhd* [2017] MLJU 2370.

c) As the Defendants have failed to specify under which sub-rule the discovery application is made, hence, the Defendants' application herein cannot be sustained.

[19]It is said by the Plaintiff that the Defendants have no right to such production and inspection of the Contract Agreement and the Military Kitchen Agreement under O. 24 r. 10 ROC 2012 as there is no direct reference made in the Plaintiff's Amended Statement of Claim to the agreement and it is not part of the Plaintiff's pleading. In relation to this, the Plaintiff submitted and contended as follows:

a) Even if the Facility Agreement was pleaded in the Amended Statement of Claim, it does not necessarily mean that all other documents mentioned in the Facility Agreement are also part of the pleading. The Court was referred to *Nguang Chan aka Nguang Chan Liquor Trader & Ors v. Hai-O Enterprise Bhd & Ors* [supra] (Court of Appeal) for the proposition that there must be a direct allusion to the document in the affidavit for the other party to have the right to such production and inspection under O. 24 r. 10 of the RHC and a reference by inference is not sufficient.

b) The Plaintiff's main claim does not involve or relate to any documents other than those specifically pleaded in the Amended Statement of Claim and it is unfair for the Defendant to put a burden on the Plaintiff to produce to the Court, a document that was never pleaded especially if the Plaintiff is not a party to the Contract Agreement or the Military Kitchen Agreement.

c) Although the Defendants requested for the original Arabic version of the Military Kitchen Agreement the Plaintiff had already forwarded the English translation of the Military Kitchen Agreement through the Plaintiff's solicitors' letter dated 14.7.2020 that is now in the Plaintiff's possession.

d) The Military Kitchen Agreement was entered into by the 1st Defendant who should have the relevant copy or version in their possession and if the document is no longer in the Defendants' possession, the Plaintiff cannot now be put with the burden to produce the document for the Defendants' lack of safe keeping.

e) The Defendants were informed through the Plaintiff's solicitors' letters dated 11.8.2020, 1.9.2020 and 27.10.2020 that the copy of The Military Kitchen Agreement forwarded to them was the only copy that was in the Plaintiff's possession. This version of the Military Kitchen Agreement was forwarded by the Defendants to the Plaintiff as a fulfillment of the condition precedent to the Facility Agreement.

[20]The Plaintiff also advanced the submission that the Insurance Policy requested was never pleaded by the Plaintiff and the Defendants have no right to such production and inspection of the Insurance Policy under O. 24 r. 10 ROC 2012. In this regard, the Plaintiff submitted and contended as follows:

a) The Insurance Policy was the very first insurance policy subscribed by the Defendants back in 2011 and subsequently there were several renewed insurance policies. The Insurance Policy, which had lapsed, is no longer in the Plaintiff's possession and has been disposed.

b) It would be oppressive and unreasonable for the Plaintiff to produce a document from far back in 2011 which has already been disposed. The Plaintiff relied on the case of *MK Cooling Services & Anor v. Chong Kek Fong* [supra] which decided that expecting a party to produce documents 7 years back, where they are expected to be numerous as they are ordinarily used in course of business, would be oppressive and unreasonable unless it is critical to the issue in dispute.

c) The Insurance Policy being the very first insurance policy is irrelevant but also unnecessary for the purpose of the suit or counterclaim. The Plaintiff referred the Court to *Kerajaan Negeri Kelantan v. Petroliam Nasional Bhd & Other Appeals* [2014] 6 MLJ 31 (Federal Court) for the proposition that documents sought for discovery which are not relevant and do not throw any light towards establishing or deciding the core issue in question do not need to be produced. The Plaintiff also referred to *Malaysia Debt Ventures Berhad v. Platinum Techsolve Sdn Bhd & Ors* [supra] (Court of Appeal) for the proposition that the party that seeks discovery has the burden to establish that the documents sought are relevant and necessary for disposing the matter fairly and for savings of cost.

d) For the purpose of insurance policy, even if it is still valid and subsisting, the Insurance Policy that is of concern is the latest insurance policy that is Policy OII/BOV/JOD/SL/2016-01 that was valid from 1.3.2016 until 28.2.2019, and not the Insurance Policy which was very first insurance policy.

[21]The Plaintiff submitted that the information regarding the Reinsurance Policy is not subject to discovery as the Defendants are seeking for an information regarding the Reinsurance Policy and not a document relating to the Reinsurance Policy. It is further submitted and contended by the Plaintiff as follows:

a) The Defendants' letter dated 12.11.2020 reads, "*Our clients have instructed us to find out from you whether your client did reinsure the above policies and if so, has your client made a claim on the re-insurers*".

b) The Court is referred to *MK Cooling Services & Anor v. Chong Kek Fong* [supra] where the court held that what is subject to discovery is only documents and information which is not subject to discovery is to be disregarded.

c) The issue of reinsurance policy is irrelevant and unnecessary to the core issue of the present case relying on *Kerajaan Negeri Kelantan v. Petroliam Nasional Bhd and other appeals* [supra].

Findings and analysis of the CourtPreliminary Objection

[22]On the preliminary objection relating to the deposing of the Defendants' affidavits by its solicitor, I agreed with the Plaintiff's submission that the Defendants' Affidavit in Support and the Defendants' Affidavit in Reply affirmed by the Defendants' solicitor do not satisfy the conditions for the solicitor to depose an affidavit on behalf of her client. The facts deposed by the solicitor in the Defendants' Affidavit in Support are generally contentious in nature thus did not satisfy the requirement set out in *Malayan Banking Bhd v. Charterfield Corp Sdn Bhd* [supra] that a solicitor may only depose an affidavit on behalf of the litigant if the facts to be deposed are not contentious or disputed question of facts.

[23]However, I invoked my inherent powers and discretion under O. 92 r. 4 of the ROC 2012 to prevent injustice. I thus accepted the affidavits and proceeded to consider the merits of the Defendants' application and the submissions.

[24]As for the preliminary objection relating to Defendants' failure to specify under which rule that the Defendants are seeking discovery of under O. 24 of the ROC 2012, I accepted the Defendants' oral submission that from the nature of the application which relates to the production of documents referred to pleadings or affidavits upon the objection of the Plaintiff to produce any document for inspection after being served a notice requiring the Plaintiff to produce the documents, it is clear that the application was made under r. 10 and r. 11 of O. 24 ROC 2012. The Plaintiff also did not show any difficulty in responding to the application through the Plaintiff's Affidavit in Reply and its submissions.

[25]Again, I invoked my inherent powers and discretion under O. 92 r. 4 of the ROC 2012 to prevent injustice. I thus dismissed the preliminary objection and considered this application.
The Contract Agreement and the Military Kitchen Agreement

[26]The Defendants have sought for the discovery of the Contract Agreement and the Military Kitchen Agreement treating these are two separate documents. In the Defendants' submissions, the Defendants referred to Clause 1 of the Facility Agreement which is the clause containing definitions. Therein "Contract Agreement" is defined as "*the contract entered into between ARM and JAF for the supply of ration packs/pouches*". The "Contract Agreement" is then referred to in the Facility Agreement numerous times.

[27]As for the Military Kitchen Agreement, apart from naming this document as one of the documents sought for discovery by the Defendants, there are no other references to this document in the Defendants' Affidavit in Support.

There is one more reference to the Military Kitchen Agreement in the document exhibited by the Defendants in the Defendants' solicitors' letter dated 23.1.2020 which is part of exhibit "QZZ-1" but this does not show that the document is different from the Contract Agreement.

[28]The Plaintiff averred in the Plaintiff's Affidavit in Reply that the Contract Agreement is the Military Kitchen Agreement and exhibited a document which is the English translation of the Military Kitchen Agreement, the original of which is in Arabic, as exhibit "WN-2". This is not denied by the Defendants in the Defendants' Affidavit in Reply.

[29]Thus I was satisfied that the Contract Agreement and the Military Kitchen Agreement prayed for by the Defendants and referred to in the Facility Agreement are one and the same, thus they will be dealt with together.

[30]I have examined the Plaintiff's Amended Statement of Claim and I found that therein there is no direct reference made in the Plaintiff's Amended Statement of Claim regarding the agreements. The Defendants argued that because the Facility Agreement makes a reference to the Contract Agreement (which is also the Military Kitchen Agreement) then there is a reference by the Plaintiff to the Contract Agreement or Military Kitchen Agreement. This is not the position in law as there must be a direct allusion to the documents sought for discovery in the pleadings of the Plaintiff. In *Nguang Chan aka Nguang Chan Liquor Trader & Ors v. Hai-O Enterprise Bhd & Ors* [supra] the Court of Appeal stated:

> "In *Dubai Bank Ltd v. Galadari & Ors (No 2)* [1990] 2 All ER 738 *at p 744 the English Court of Appeal held that the natural and ordinary meaning of the phrase 'reference to' imports the making of a direct allusion to a document or documents. The absence of a direct allusion to the document in the affidavit will mean that the other party will not have the right to such production and inspection under O 24 r 10 (which in pari materia with our O 24 r 10 of the RHC), The court rejected the submission that 'reference' includes a 'reference by inference', that is, where an assertion made in an affidavit or pleading gives rise to an inference that the document must or might exist."*

[31]The Defendants have also failed to explain why the Contract Agreement or Military Kitchen Agreement is relevant and necessary. Nothing have been submitted by the Defendants on this point except to say that this document was contemporaneously executed with the Facility Agreement and reference should be made to all the documents to ascertain the intention of the parties. In para. 4(h) the Defendants averred that without the documents the Defence will be incomplete, flawed and compromised. In the Defendants' Affidavit in Support, the averments in para. 4(m) and (n) were the Defendants will be prejudiced by the absence of these documents and the application will help strengthen the Defendants' defence. I find these assertions to be very vague which do not assist the Defendants.

[32]It is trite that the document sought must be relevant as decided in *Yekambaran s/o Marimuthu v. Malayawata Steel Bhd* [supra]. The burden to establish that the Contract Agreement or Military Kitchen Agreement is relevant

and necessary for disposing the matter fairly and for savings of cost is on the Defendants which the Defendants have failed to discharge. See *Malaysia Debt Ventures Berhad v. Platinum Techsolve Sdn Bhd & Ors* [supra].

[33]Further, the Plaintiff is not a party to the Contract Agreement or the Military Kitchen Agreement and the Court accepts that the Plaintiff does not have possession of the original Arabic version. The agreement was entered into by the 1st Defendant who should have the relevant copy or version in its possession and the Plaintiff cannot be burdened with producing the document which is not in the Defendants' possession, the reason for which was never explained by the Defendants.
Insurance Policy No. EXIM/ECI/OII-JOD/01/2011

[34]With regard to the Insurance Policy, nothing was explained in the Defendants' Affidavit in Support as to why the Insurance Policy is relevant but also necessary for disposing the matter fairly and for savings of cost. The only averments made by the Defendants in the Defendants' Affidavit in Support, which were applicable to all the Subject Documents were that the application will help strengthen the Defendants' defence which otherwise would be incomplete, flawed and compromised and the Defendants will be prejudiced.

[35]I then turned to the Defendants' Affidavit in Reply and at para. 8 the Defendants stated, in reference to security documents pleaded by the Plaintiff in the Amended Statement of Claim, "*The important question here is whether the Plaintiff has used the security documents and "entitlement" and whether the Plaintiff had exhausted all avenues before filing this Writ against the Defendants?"*

[36]Although this was not averred to by the Defendants in their affidavits, the Defendants' defence is premised on a set-off to extinguish the claim by the Beneficiary under the Facility Agreement, Jordan Kuwait Bank, the party that provided a loan to ARM which triggered the Plaintiff's claim when the Beneficiary made a claim under the Facility Agreement. This set-off is based on the 1st Defendant being able to make its claim pursuant to Overseas lnvestment Insurance Policy No: OII/BOV/JOD/SL/2016-01 in respect of which the Defendants are praying for certain declarations in the Counter Claim to enable the 1st Defendant to be paid under this policy. To be clear, this was the last insurance policy that was in effect for the period between 1.3.2016 until 28.2.2019 and not the Insurance Policy sought for in this application which is an insurance policy subscribed by the Defendants in 2011. Particularly, there is no explanation from the Defendants why the first insurance policy subscribed in 2011 is relevant for the purpose of Defence when the policy that was in effect when the claim was made by the Beneficiary on or about 28.2.2019 was Overseas lnvestment Insurance Policy No: OII/BOV/JOD/SL/2016-01.

[37]The Defendants have not demonstrated how the Insurance Policy relates to the Defendants' pleaded case and why this document is relevant and necessary. In determining relevancy, the documents sought must be based on the applicant's pleaded case. In *Malaysia Debt Ventures Berhad v. Platinum Techsolve Sdn Bhd & Ors* [supra] the Court of Appeal had the occasion to address the issue of whether a document, a draft settlement agreement (DSA), sought to be produced is relevant and necessary when it is not based on the pleaded case. The Court of Appeal held that if a document is not part of the pleaded case, it is irrelevant and not necessary. S. Nantha Balan JCA had this to say:

> *"[207] Indeed, it bears repeating that it is not even the respondents' pleaded case that the DSA is part of the building block which forms the basis for the assertion that there is a settlement agreement which had been (purportedly) concluded between MDV and R1. The respondents' pleaded case is that based on the exchange of correspondence and the discussions between the representatives from MDV and R1, there is a concluded settlement agreement.*
>
> *[208] Thus, based on the respondents pleaded case (per the Defence and Counterclaim) the contents of the DSA are irrelevant as to whether there was (or was not) a concluded settlement agreement.*
>
> *[209] On that premise and analysis, it becomes quite clear that the DSA is neither relevant nor necessary for the fair disposal of the trial."*

[38]After considering the Defendants' submissions, affidavits and even the Defendants' Defence, I find that the Defendants have also not satisfied the burden of establishing that the Insurance Policy i.e. Insurance Policy No. EXIM/ECI/OII-JOD/01/2011 is necessary for disposing the matter fairly and for savings of cost. See *Nguang Chan aka Nugang Chan Liquor Trader & Ors v. Hai-O Enterprise Bhd & Ors* [supra]. Even if the document is necessary the applicant must show that discovery is necessary for disposing fairly of the proceedings or for saving costs. This was the view of the Court of Appeal in *Malaysia Debt Ventures Berhad v. Platinum Techsolve Sdn Bhd & Ors* [supra]:

[202] In our view, the proper approach to the question of whether discovery is "necessary" may be gleaned from the case of *Bayerische Hypo-und Vereinsbank AG v. Asia Pacific Breweries (Singapore) Pte Ltd and other applications* [2004] SGHC 155; [2004] 4 SLR (R) 39 *("Bayerische")*

where the High Court of Singapore at paragraph [37] stated as follows:

> *"The ultimate test is whether discovery is necessary for disposing fairly of the proceedings or for saving costs. An assertion that the documents are relevant will not be good enough. Equally, an assertion that the documents are necessary because they are relevant will not be enough."*

Reinsurance Policy

[39]As for the Reinsurance Policy, the Defendants are merely seeking for information regarding the reinsurance, and not a document relating to the reinsurance. This is clear from the Defendants' letter dated 12.11.2020 which reads, "*Our clients have instructed us to find out from you whether your client did reinsure the above policies and if so, has your client made a claim on the re-insurers.*"

[40]The Plaintiff's solicitors then informed the Defendants through a letter dated 16.11.2020 that the request for information is denied wherein the stated, "*In regards to your request on information regarding the reinsurance, we are instructed that the same cannot be disclosed since your client is not a patty to such reinsurance*."

[41]The Defendants did not respond to correct the Plaintiff that it was actually a Reinsurance Policy document that was sought and not merely information.

[42]In *MK Cooling Services & Anor v. Chong Kek Fong* [supra] it was stated:

> *"What is subject to discovery is only documents. Information is not subject to discovery. Therefore any information sought for is to be disregarded."*

[43]Further, even if it is a document that is sought for by the Defendants there is no satisfactory explanation by the Defendants as to why this document is relevant. At para. 12 of the Defendants' Affidavit in Reply the Defendants merely averred, "… *the Reinsurance Policy is highly relevant to the Defendants as the Plaintiff in mitigation of its losses, if any, is to resort to such reinsurance and as such would absolve the Defendants of their alleged liability*." In the Court's view, more details are needed to show what is the nature of the document sought for and how the document would establish that the Plaintiff had not mitigated its losses. Such general and vague averments will not assist the Plaintiff especially since this was only first mentioned in the Defendants' Affidavit in Reply, not the Defendants' Affidavit in Support where if so done the Plaintiff would have had adequate opportunity to respond to this issue. Also, in the Defendants' submissions there was nothing submitted specifically by the Defendants on the utility of the Reinsurance Policy. The Defendants submitted generally regarding all the Subject Documents where they argued that the Subject Documents were contemporaneously executed and the arrangement between parties is contained in several documents, therefore reference should be made to the Subject Documents which should be read together.

Conclusion

[44]Premised on the Defendants' affidavits and submissions, I conclude that the Defendants does not have a right to such production and inspection of the Subject Documents under O. 24 r. 10 ROC 2012. The Defendants have not discharged their burden to show that the Subject Documents are relevant and necessary for disposing the matter fairly and for savings of cost in accordance with the principles established by *Yekambaran Marimuthu v. Malayawata Steel Berhad* [supra] and *Nguang Chan aka Nugang Chan Liquor Trader & Ors v. Hai-O Enterprise Bhd & Ors* [supra].

[45]Accordingly I dismissed encl. 35 with costs of RM3,000.00 subject to the allocator.

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