



other documents in relation to sale of the equity of shares of ZICO, bank accounts, ZICO company minutes, audited statements of profits and losses, shareholdings of ZICO and statement of payment of dividends to shareholders.

- [4] The Plaintiff's application is based on his entitlement to the documents as the founder, a former partner and still an equity holder of ZICO who is no longer in possession of the documents.

The Facts Supporting the Application

- [5] The facts supporting the Plaintiff's application are as stated in his affidavit in support of the OS. The facts as summarized show that the Plaintiff founded ZICO in 1987 using his name as the sole proprietor.
- [6] The 1st and 2nd Defendants were the senior partners of the firm, whereby the 1st Defendant was also the partner responsible for managing the firm.
- [7] As a way forward in 2004, the Plaintiff divested 38% of his shares to 9 partners whereby the 1st and 2nd Defendants were given the largest number of shares.
- [8] In 2008 as a result of being appointed a Federal Minister, the Plaintiff further divested 47% of his shares to the 2nd Defendant and 10% of the shares to the 1st Defendant by entering into a written agreement dated 24/3/2008 for a consideration sum of RM25,650,000 in 20 annual instalments.
- [9] The Plaintiff further contends that in 2014 ZICO was capitalized and a new entity ZICO Holdings was incorporated. On the formation of ZICO Holdings it was orally agreed between the



Plaintiff and the 1st Defendant through several meetings, that the balance payment due for the payment of the 58% equity be replaced with shares in the ZICO Holdings.

[10] The Plaintiff claims that since the oral agreement and being allotted the shares of ZICO Holdings, he had not been appraised of the running of the firm and neither was he informed as to the worth of his shares or any information of any dividends. His attempt to obtain this information from the firm was unsuccessful.

[11] It was then the Plaintiff attempted to persuade the firm to return his name but was instead persuaded to rejoin the firm. However within 1 week from his rejoining he was given a termination letter.

[12] To enable for him to proceed with any legal proceedings to reclaim his rights, the Plaintiff has filed in this OS for the relevant document for his future course of legal actions.

1st Defendant's Reply

[13] In his affidavit in reply the 1st Defendant apart from endorsing the facts stated in the affidavit of reply of the 2nd Defendant denied the Plaintiff's assertion that the agreement for payment of the 58% shares under the 2018 agreement was superseded by an oral agreement between him and the Plaintiff to defray the payment in exchange for shares in ZICO Holdings.

[14] The 1st Defendant further contended that it was in public domain by way of annual statement account that ZICO Holdings since its listing on the Singapore Stock Exchange in 11/11/2014 had never declared any dividends.



[15] The 1st Defendant also states that he had resigned from ZICO on 10/11/2014 and had therefore no documents with regard to ZICO in his possession. The 1st Defendant also asserts that the documents of ZICO Holdings belong to the firm and not to him personally and he is not authorized to release the documents.

[16] The minutes of meetings of ZICO Holdings are private and confidential and therefore cannot be disclosed and are also not relevant for any proceedings between the Plaintiff and the firm.

The 2nd Defendant's Reply

[17] The 2nd Defendant avers that the documents sought by the Plaintiff are unnecessary as the Plaintiff has already identified the cause of action and the parties against whom the actions can be taken as stated in the Plaintiff's own affidavit in support of the OS.

[18] Further the 2nd Defendant states that the documents that the Plaintiff is asking for should be in his possession as he was privy to the documents until he left in 2008. Further this application is nothing more than a fishing expedition.

[19] The 2nd Defendant further asserts that since the Plaintiff has already filed an action in the High Court Kuala Lumpur via case number WA- 22NcVc-805-12/2020 this application for discovery is a duplicity.

The Issues

[20] The issues arising for determination in this case can be crystalized based on the affidavits filed as well as the submission of parties as follows:



- i) whether the Plaintiff's application under Order 24 Rule 7A of the Rules which provides for an application for discovery before the commencement of any proceedings be sustained in the light of the fact that the Plaintiff has already filed a civil case in the High Court against the firm.
- ii) If the answer in the affirmative then the further issue is whether the Plaintiff is entitled to the documents.

Has the Proceedings Commenced?

[21] Order 24 Rule 7A of the Rules provides as follows:

7A. Discovery against other person (O. 24 r. 7A)

(1) An application for an order for the discovery of documents before the commencement of proceedings shall be made by originating summons and the person against whom the order is sought shall be made defendant to the originating summons.

[22] The Plaintiff contends that the civil claim filed is for an action of passing off for the use of the Plaintiff's name as the name of the firm and unrelated to any other potential claim the Plaintiff has against the Defendants.

[23] On this issue the Court agrees with the Plaintiff the civil claim filed by the Plaintiff is for passing off as ZICO using his name and unrelated to any other claims the Plaintiff might have against the Defendants.

[24] In short the Court finds that the proceedings which the Plaintiff intends to take has not commenced and therefore this a proper



application to be made under Order 24 Rule 7A(1) and Order 24 Rule 7A (7)(a) is not applicable here.

[25] Order 24 Rule 7A(7)(a) provides that a party will not be compelled to produce any documents if the subsequent proceedings have already started.

Is the Plaintiff entitled to the documents?

The purpose for which the documents are required

[26] The law as to discovery has been fully discussed by both parties in the light of decided cases. The Defendant relies on the cases of *Infoline Sdn Bhd v. Benjamin Lim Keong Hoe* [2017] 6 MLJ 363 and *Kuah Kok Him & Ors v. Earnst & Young* [1997] 1 SLR 169.

[27] In essence this cases decided that for an application under Order 24 Rule 7A of the Rules an extremely high threshold test has to be applied. The application should not be a fishing expedition, and it is a means to save cost and time as well as that the party applying has no other avenue for discovery available once proceedings have commenced.

[28] The Defendant emphasized the fact that the application should only be allowed and discovery ordered if the party applying is unable to identify any cause of action and the party against whom the proceedings are to be taken.

[29] In this case the Defendant contends that the Plaintiff has already identified the cause of action in his affidavit in support of the application itself as well as the Plaintiff has also identified the party against whom the actions can be taken.



- [30] The Plaintiff relied on the cases of *Dunning v. United Liverpool Hospitals' Board of Governors* [1973] 1 WLR 586, *Shaw Vauxhall Motors Ltd* [1972] All ER 1185.
- [31] The Plaintiff contends that this English case have expounded that the application for discovery is not only necessary to identify the cause of action but also to determine whether the person has a good cause of action or not.
- [32] The Plaintiff contends that this principle was adopted in Malaysia in the case of *Infoline Sdn Bhd (sues as trustee of Tee Keong family Trust) v. Benjamin Lim Keong Hoe* [2017] 6 MLJ 363.
- [33] On this issue this Court agrees with the contention of the Plaintiff that the order of discovery before the commencement of proceeding is not limited to identifying potential causes of actions but also to inform the applicant whether he can succeed in his cause of action.
- [34] The Plaintiff on getting the documents can then make an informed decision whether to proceed with any legal proceedings. After getting the documents the Plaintiff might well decide not to proceed with any legal proceeding which will save him time and cost.
- [35] Another important reason for viewing the documents pre proceedings is to satisfy another provision of the Rules related to drafting of pleadings. The rules as to drafting of pleadings entails that all material facts be pleaded and it is the principle of law that the parties are bound by their pleadings.
- [36] If discovery is only allowed post proceedings as it often happens, the parties invariably have to apply to amend the



pleadings in line with the new facts discovered. This wastes time not only of the parties but also court and incurs more cost.

[37] In short it is the Court's view while agreeing a high threshold must be followed the application should not be limited and confined to merely identifying the issues or the parties to the subsequent proceedings.

Whether documents relevant and necessary

[38] Apart from the decided cases the Court also considered the provision of the Rules itself in determining whether to give the order for discovery.

[39] The 2 relevant provisions are Order 24 Rule 7A(3) and Order 24 Rule 8 of the Rules. Order 24 Rule 7A(3) provides as follows:

3) An originating summons under paragraph (1) or a notice of application under paragraph (2) shall be supported by an affidavit which shall-

(a) in the case of an originating summons under paragraph (1), state the grounds for the application, the material facts pertaining to the intended proceedings and whether the person against whom the order is sought is likely to be party to subsequent proceedings in Court; and

(b) in any case, specify or describe the documents in respect of which the order is sought and show, if practicable by reference to any pleading served or intended to be served in the proceedings, that the documents are relevant to an issue arising or likely to arise out of the claim made or likely to be



made in the proceedings or the identity of the likely parties to the proceedings, or both, and that the person against whom the order is sought is likely to have or have had them in his possession, custody or power.

[40] Order 24 Rule 8 of the Rules provides as follows:

8. Discovery to be ordered only if necessary (O. 24 r. 8)

On the hearing of an application for an order under rule 3, 7 or 7A, the Court, if satisfied that discovery is not necessary, or not necessary at that stage of the cause or matter, may dismiss or adjourn the application and shall in any case refuse to make such an order if and so far as it is of the opinion that discovery is not necessary either for disposing fairly of the cause or matter or for saving costs.

[41] A sum total of this provision indicates that the Court has the sole discretion to allow the documents in the event the documents are necessary and relevant to the issues that may come up. The Plaintiff has also to indicate whether the Defendants will be parties to the subsequent proceedings.

[42] From the affidavits filed it is clear that the Defendants are most likely to be made parties to the subsequent proceedings. As to whether the documents are necessary or relevant to the issues which might come out later is best answered looking at the facts as stated in the affidavits filed in connection with this OS.

[43] From the reading of the affidavits one issue which looms large and clear is as to payment for the 58% shares transferred by the Plaintiff to the 1st and 2nd Defendants. There is contradictory



stand between the Plaintiff and the Defendants and especially the 1st Defendant of whether the original agreement as to payment of the consideration for the transfer of shares was varied.

[44] In this case the Court finds that the documents asked for in discovery are relevant and necessary for this issue as well as other issues that might arise subsequently.

[45] Finally the Court is also satisfied that the documents the Plaintiff is seeking for are not in his possession and he has no other means to retrieve those documents. The Court is also satisfied that the documents asked for, are in the possession of the Defendants and if not they are in a position to get them.

Conclusion

[45] In the upshot the Court allowed the Plaintiff's application with a cost of RM3,000.

Dated: 10 JUNE 2021

(AKHTAR TAHIR)

Judge

High Court of Malaya, Kuala Lumpur

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Case(s) referred to:

Infoline Sdn Bhd v. Benjamin Lim Keong Hoe [2017] 6 MLJ 363

Kuah Kok Him & Ors v. Earnst & Young [1997] 1 SLR 169

Dunning v. United Liverpool Hospitals' Board of Governors [1973] 1 WLR 586

Shaw Vauxhall Motors Ltd [1972] All ER 1185

Infoline Sdn Bhd (sues as trustee of Tee Keong family Trust) v. Benjamin Lim Keong Hoe [2017] 6 MLJ 363

Legislation referred to:

Rules of Court 2012, O. 24 rr. 7A(1), (3), (7)(a), 8