

**DALAM MAHKAMAH RAYUAN MALAYSIA
(BIDANG KUASA RAYUAN)
RAYUAN SIVIL NO: W-02(NCVC)(W)-1561-08/2019**

ANTARA

- 1. NATIONAL FEEDLOT CORPORATION SDN BHD
(NO. SYARIKAT: 756757-K)**
- 2. NATIONAL MEAT & LIVESTOCK CORPORATION SDN BHD
(NO. SYARIKAT: 708347-T)**
- 3. AGROSCIENCE INDUSTRIES SDN BHD
(NO. SYARIKAT: 683230-K)**
- 4. REAL FOOD COMPANY SDN BHD
(NO. SYARIKAT: 705419-K)**
- 5. DATO' SRI DR MOHAMAD SALLEH BIN ISMAIL
(NO K/P: 480513-03-5379)**

... PERAYU-PERAYU

DAN

**PUBLIC BANK BERHAD
(NO. SYARIKAT: 6463-H)**

RESPONDEN

[Dalam Mahkamah Tinggi Di Kuala Lumpur
(Bahagian Sivil)
Guaman No: 22NCVC-623-05/2012

Antara

- 1. National Feedlot Corporation Sdn Bhd
(No. Syarikat: 756757-K)**
- 2. National Meat & Livestock Corporation Sdn Bhd
(No. Syarikat: 708347-T)**

3. Agrosience Industries Sdn Bhd
(No. Syarikat: 683230-K)
4. Real Food Company Sdn Bhd
(No. Syarikat: 705419-K)
5. Dato' Sri Dr Mohamad Salleh Bin Ismail
(No. K/P: 480513-03-5379)

....Plaintif-Plaintif

Dan

Public Bank Berhad
(No. Syarikat: 6463-H)

....Defendan]

CORAM:

**AZIZAH BINTI HAJI NAWAWI, JCA,
P. RAVINTHRAN, JCA,
S. NANTHA BALAN, JCA.**

EXECUTIVE SUMMARY OF JUDGMENT

1. This is a summary of our full grounds which we have prepared in respect of our decision which is unanimous.
2. The Plaintiffs had claimed for loss and damage arising out of the Bank's wrongful disclosure of certain confidential banking information ("**the Confidential Information**") which was said to be in breach of the Bank's statutory, contractual, and/or fiduciary duties of confidentiality as a financial institution in failing to protect its clients' personal and financial information.

3. Essentially, it is alleged that the Bank had breached banking secrecy and disclosed confidential information relating to the Plaintiffs' bank accounts to third parties and that by reason of such disclosure, one Rafizi Ramli ("**Rafizi**") was able to hold a press conference on 7 March 2012 ("**the press conference**") whereby these banking details were made public.
4. The wrongful disclosure was in the form of documents labelled in 5 enclosures ("**Lampiran A-E**"), which were relied upon by Rafizi in the press release which were distributed to the media at the press conference. Rafizi released the documents containing the Confidential Information together with a write-up or "expose" captioned as - "*Bukti Bagaimana Dana Awam Untuk Projek Fidlot Digunakan Sebagai 'Jaminan' Pinjaman Peribadi Untuk Membeli 8 Unit Hartanah Mewah Di KL Eco City, Bangsar*".
5. In dismissing the claim, the Judge exonerated the Bank from any culpability or responsibility for the wrongful disclosure. Before us, it was argued that the Judge had erred in fact and/or in law in finding that the Bank had performed its duty of confidentiality with reasonable care and skill by putting in place policies and procedures to safeguard the confidentiality of its customer's information and transactions, including the Plaintiffs.

6. The thrust of the Plaintiffs' case is that the person who leaked the confidential information was a clerical staff of the Bank, one Johari bin Mohamed ("**Johari**") who was at all material times a clerk at the Bank's Jinjang Branch. Johari was a senior clerical staff of the Bank. He joined the Bank as a clerk on 17 July 1995. The Plaintiffs have no connection with the Jinjang Branch as their accounts and banking business is with the Jalan Hang Lekiu Branch of the Bank.

7. Cheam Chen Hooi ("**Cheam**") was all material times the Officer-in-Charge of the Jinjang's Branch's Credit Department and it was his duty to supervise officers and clerks, including Johari. Cheam was Johari's superior at the Jinjang Branch. Cheam's User ID was JJGBCCH which meant Jinjang branch, Cheam Chen Hooi. Cheam said that his workload was heavy. On 16 February 2012 Cheam had asked Johari to help out on credit related work. He went over to Johari's computer to sign-in using his User ID on his (Johari's) computer to allow him access to restricted areas of the Bank's computer system, e.g., "Customer Profile - Balance Summary" ("**CP-BS**"). Johari was asked to attend to matters such as discharge of charge, redemption, release of loan and other credit related work. But Johari used this opportunity to get into the Bank's IBM Mainframe and download and printed the Plaintiffs' CP-BS. The CCTV footage showed that he put the printed documents in an envelope and kept it in his drawer and took it with him when he left the office on 16 February 2012.

8. The following dates are critical in our analysis of the issues in this appeal;
- i. **16 February 2012** – which is the date when Johari wrongfully accessed the Bank’s IBM Mainframe and downloaded the Plaintiffs’ CP-BS. This is the starting point in the narrative of this case;
 - ii. **7 March 2012** – Rafizi’s press conference where he disclosed the confidential information (Lampiran A-E);
 - iii. **30 March 2012** – Feedlot’s letter to the Bank (signed by P5- Dato’ Salleh) wherein the Bank was informed of the wrongful disclosure of the Plaintiffs’ banking details. Lampiran A-E were annexed to the letter of complaint. The letter was copied to Bank Negara Malaysia.;
 - iv. **6 April 2012** – Messrs. Shafee & Co. sent a letter of demand to the Bank, seeking damages of RM60Million;
 - v. **12 April 2012** – the Bank issued a show cause letter alleging that Johari had misconducted himself. It is to be noted that the subject matter of the misconduct reflects exactly Dato’ Salleh’s complaint per his letter 30 March 2012;
 - vi. **16 April 2012** – Johari’s reply to the show-cause where he said he was under BAFIA investigation and had been advised to remain silent.

- vii. **24 April 2012** – the Bank issued a Notice of Domestic Inquiry to Johari and he was charged with having committed misconduct.
9. Essentially, in the Notice of Domestic Inquiry the Bank had alleged that Johari had committed the following contraventions.

Contravention of Section 97 of the Banking and Financial institution Act (BAFIA) 1989, Bank Negara Malaysia/ GP7 Guidelines On Code Of Ethics (Part 1) Item 12: Confidentiality and the Public Bank Group Service Undertaking Item 3.5 signed by you on 17 July 1995.

10. Insofar as the act of misconduct is concerned, the Bank relied on the following material facts as the basis of Johari's serious misconduct.

Sometime between 9.25am and 9.45am on 16 February 2012, you had accessed the Bank's System via the login at PC workstation JJGWSSCN002 to perform inquiry and printing of the Customer Profile-Balance Summary for the following customers thereby causing their information/document to be revealed, divulged and provided to unauthorized third party sometime between 16 February 2012 and 7 March 2012:

- a) Dato' Sri Dr. Mohammad Salleh bin Ismail;
 - b) Agrosience Industries Sdn Bhd;
 - c) National Meat and Livestock Corporation Sdn Bhd; and
 - d) National Feedlot Corporation Sdn Bhd
11. On **2 May 2012**, the Domestic Inquiry was conducted. The Bank's key witnesses in the Domestic Inquiry were Veronica Foo (Head of Investigation Audit) and Fam Yoke Fon (General Manager of the Bank's Information Technology Division).

12. Through these witnesses the Bank presented the case to the Domestic Inquiry panel and sought to establish the material facts relevant to the charge of misconduct against Johari.
13. At no time did the Bank take the position that Lampiran A-E annexed to Dato' Salleh's letter 30 March 2012 were not the Banks's documents or that it did not pertain to the Bank, or that there was no disclosure by Johari to third parties.
14. In fact, the Domestic Inquiry panel found Johari was guilty of the charge of misconduct. In the meanwhile, on the same day of the Domestic Inquiry, Johari resigned.
15. By letter of 18 May 2012, the Bank's solicitors replied to the letter of demand and stated as follows:

2. Our client instructs us that pursuant to its internal investigations on the matters raised in your said letter of 6.4.2012 and your client's letter of 30.3.2012, **it appears** that one of our client's staff had, without authority, accessed our client's credit information systems in connection with your clients' information. **It appears that the said staff may have been responsible for the unauthorized printing of some of the information as attached to your clients' letter dated 30.3.2012.**

3. Our client further instructs that **it does not know who gave the printout of such information to third parties** nor who received such information. We would like to place on record that our client requires all its personnel to comply strictly with observing secrecy and the provisions of the Banking and Financial Institutions Act concerning our client's customers accounts at all times. Such disclosure of information to third parties was not authorised by our client at all.

16. It is to be noted that when the above letter was written, the Domestic Inquiry has already been concluded. In that Inquiry, the Bank's witnesses has given robust and meticulous evidence by reference to the IT evidence and CCTV right up to the time when Johari left the Bank at the end of the day on 16 February 2012 when he was seen taking out an envelope and a courier bag. All of these was to support the Bank's position that Johari had made a wrongful disclosure to third parties. Thus, by their conduct in taking disciplinary proceedings against Johari which is based entirely on the Plaintiffs' letter of complaint dated 30 March 2012, the Bank had impliedly accepted that it was Johari's disclosure that enabled Rafizi to have access to the impugned documents.

17. However, what happened at the trial was totally different. The Bank's witnesses took a different stance and refused to accept that Lampiran A-E came from the Bank or that Johari made a wrongful disclosure of the Bank's customer's details to third parties which eventually found their way into Rafizi's hands. In our view, the Judge took a wrong turn in treating the Domestic Inquiry notes of proceeding as being irrelevant to the issues at the trial. By doing so, the Judge misdirected herself because the Domestic Inquiry notes of proceedings were obtained by the Plaintiffs after a heavily contested application for discovery in Enclosure 107, which was allowed by the earlier Judge. The issue of relevancy of Domestic Inquiry Notes of Proceedings was *res judicata* and it was erroneous for the Bank to object to Plaintiffs' counsel making reference to the Notes of Proceedings and for the Judge to have rejected the Notes of Proceedings as being irrelevant.

18. The result of the Domestic Inquiry was that the Panel was convinced that Johari had committed the act(s) of misconduct in terms of the matters stated in the charge per the Bank's letter dated 24 April 2012 and found him guilty of the said charge. The truth of the matter was that it was the Bank's position at the Domestic Inquiry that Johari was the culprit who wrongfully accessed the Bank's computer system and performed the inquiry and printed the Plaintiffs' CP-BS and gave it to third parties. Eventually, the impugned documents got into Rafizi's hands.
19. At the Domestic Inquiry, Foo and Fam gave detailed evidence as to the outcome of their respective investigations. Fam's evidence was in relation to the IT aspect of the investigations whereas Foo was the lead investigator who weaved all the parts of the evidence together and compiled an investigation report (which was not produced in Court).
20. Further proof of the Bank's express or implicit acceptance as to provenance of the impugned documents may be gathered from the fact that the Bank's show cause letter to Johari, the Notice of Domestic Inquiry to Johari and indeed, the Domestic Inquiry against Johari was based on the impugned documents that were annexed to the Plaintiffs' letter dated 30 March 2012. At all material times there was no suggestion whatsoever that the impugned documents are not the Bank's documents.

21. In this regard, Foo testified at the Domestic Inquiry and gave evidence in favour of the Bank. She was there to make out a case for the Bank that Johari was guilty of misconduct as per the terms of the charge that was framed against him. She did not say that the impugned documents are not the Bank's documents.
22. Indeed, at the Domestic Inquiry the Bank proceeded on the basis that the impugned documents were the Bank's documents. Foo referred to the CCTV and tracked Johari's movements where he was seen stapling the printed documents and putting them in an envelope and later he was seen taking an envelope from his drawer before he left the office.
23. Indeed, if as the Bank subsequently maintained, that the impugned documents were not the Bank's documents, then the Bank should have informed the Plaintiffs that they are barking up the wrong tree and they ought not to have taken disciplinary action against Johari which was obviously precipitated by the complaint letter dated 30 March 2012. During cross-examination at the trial, Foo said that the impugned documents were not the Bank's documents. She said:
 - (a) *"..my investigation did not show that there was, we could not find the evidence of disclosure"* and
 - (b) *" My finding shows there is only unauthorized access of accessing and printing the documents"*.
 - (c) *"... my finding shows only unauthorized access and printing from Johari. I have no evidence that he had taken out any documents from the bank..."*

(d) *“...The thing on the disclosure, whether he took it out and disclose to third party okay, there is no evidence to it. So, I did put it inside my witness statement on that. Because I cannot give any positive answer to the bank. I have no positive finding on that.”*

24. Clearly Foo’s testimony during the trial was fundamentally at variance from what she said before the Domestic inquiry Panel. But the Judge did not consider this part of the evidence, which of itself was a serious mis-appreciation of vital evidence. This stemmed in part from the Judge’s stance in rejecting the Domestic Inquiry notes as being irrelevant.
25. Had the Judge looked at Foo’s evidence including what she had said the Domestic Inquiry and what the Prosecuting Officer had submitted before the Domestic Inquiry Panel, it would have been crystal clear that it was always the Bank’s position that the documents Annexures A-E which were annexed to the complaint letter contained information (CP-BS) relating to the Plaintiffs accounts with the Bank and that this had indeed emanated from the Bank and Johari was responsible for the extraction of this Confidential Information and disclosing it to third parties.

26. Of course, there is no smoking gun evidence to show that Johari had passed the information directly to Rafizi but to suggest that the Annexures A to E are not the Bank's documents and that there was no evidence that the Confidential Information of the Plaintiffs were disclosed to third parties is a complete *volte-face* by the Bank. At the trial, the Bank seemed to suggest that the Annexures A-E "appear to be similar" to the CP-BS of the Plaintiffs accounts with the Bank.
27. This is rather odd. If it is being suggested that they are not the same then why was action taken against Johari. The Bank should have just written to the Plaintiffs to say that these are not the Bank's documents. The reality was otherwise. The documents which Rafizi had revealed at the press conference did in fact come from the Bank and the culprit who obtained it nefariously was Johari and it was he who printed them and took them out of the Bank and gave to third parties, which found its way into Rafizi's hand.
28. If the impugned documents were alien to the Bank then she should have said so at the Domestic Inquiry. It is important to note that Foo was the officer who "investigated" the Plaintiffs' complaint. Of course, her investigation report was not produced at the trial, but we do not think that she was of the view (prior to the trial) that the impugned documents were not the Bank's documents. That the impugned documents were not the Bank's documents was a convenient, self-serving position to take so as to exculpate the Bank from liability for the most egregious and outrageous public disclosure of the Plaintiffs' banking information. It was clearly an afterthought.

29. On the other hand, during cross-examination Fam conceded that the impugned documents came from the Bank.
30. As we said earlier, the Judge took a wrong turn in accepting the Bank's evidence and concluding that the impugned documents were not the Bank's documents. Had the Judge carefully considered the evidence, she would have concluded that Foo's answer that the impugned documents were not the Bank's documents was not credible especially in light of the Bank's response (per Shook Lin & Bok's letter dated 18 May 2012), the Bank's show cause letter to Johari and Notice of Domestic Inquiry and the conduct of the Bank during the Domestic Inquiry where the impugned documents (Annexure A, B, C and D) were unconditionally tendered in evidence.
31. Looking at all the circumstances, it would take very little to tilt the probabilities in favour of the conclusion that it was Johari who had handed over the impugned documents to third parties and these then eventually found their way into Rafizi's hands. The rest is, as they say, history.
32. Ultimately, it is what Johari did that facilitated the disclosure of the impugned documents to Rafizi.
33. We have trawled through the evidence and we agree with the submissions that were made by counsel for the Plaintiffs that there is no evidence that any of the Confidential Information was in the public domain prior to 7 March 2012.

34. To conclude on the issue of liability, we are of the view that there was serious mis-appreciation of evidence as elaborated above, which warrants appellate intervention on our part. In the case before us the Judge ignored vital evidence in particular, the testimony of Foo before the Domestic Inquiry panel and indeed the Bank's stance *vis-à-vis* the charge of serious misconduct against Johari (breach of s.97(1) BAFIA). We therefore allow the appeal on liability in respect of all the Plaintiffs, except P4 who has no claim against the Bank.

Damages

35. In this case, the Plaintiffs have asked for general damages, aggravated and exemplary damages. It is important to note that the trial was not bifurcated. Thus, the Plaintiffs adduced evidence on the quantum of loss suffered as a result of the breach of confidentiality on the part of the Bank. Essentially, the Plaintiffs relied on the evidence of Zakaria Bin Mohammad (**PW3**) who was a financial consultant. But the Judge evaluated PW3's evidence and rejected it. As such, no damages were awarded. The law on damages is quite well settled. In law, exemplary and aggravated damages are not claimable for breach of contract. Although it may have been possible for equitable damages for breach of confidence to be awarded it appears that this was not pursued at the trial as the Plaintiffs' focus was on the losses that they allegedly suffered.

36. In so far as we are concerned, on the question of damages, we have examined the Judge's reasons for dismissing the claim for damages. The Judge's reasons are to be found in paragraphs [123] to [140] of her Grounds of Judgment. Having regard to the entire matrix of facts and based on the documents and contemporaneous conduct of the parties and oral testimony of the witnesses, the Judge concluded that the Plaintiffs had failed to prove the claim for general damages, aggravated and exemplary damages.
37. In our view the learned Judge, having considered all the evidence, was fully entitled to reach her evaluative judgement as per the Grounds of Judgment. Although the Plaintiffs criticised the Judge's approach and reasoning on the issue of damages, we are not persuaded that the Judge's approach was erroneous, the reasoning flawed, or the conclusions wrong.

Nominal Damages

38. Since the Plaintiffs have failed in their claim for substantial or any damages, the question is whether we should award nominal damages. See: **Sony Electronics (M) Sdn Bhd v Direct Interest Sdn Bhd [2007] 2 MLJ 229 (CA)**.
39. Since the Plaintiffs have succeeded on liability but have failed to prove damages, we feel that we should order nominal damages. We therefore award a sum of RM10,000.00 as nominal damages with interest thereon at 5% per annum from 22 May 2012 until the date of full payment or realization.

Outcome

[1] The Plaintiffs' appeal on liability is allowed. P4's appeal is dismissed as they have no claim against the Bank. The High Court's order on liability is set aside. The High Court's decision to dismiss the claim for substantial damages, aggravated damages and exemplary damages is affirmed. We award a sum of RM10,000.00 as nominal damages with interest thereon at 5% per annum from 22 May 2012 until the date of full payment or realization. As for costs, we set aside the costs ordered by the High Court in the sum of RM350,000.00. We are of the view that based on the facts and circumstances of the case here, the Plaintiffs are entitled to costs of the proceedings in the High Court and in the Court of Appeal. We therefore order the Bank to pay RM500,000.00 (Ringgit Five Hundred Thousand) to the Plaintiffs, as costs here and below (subject to allocator). The interlocutory costs previously ordered by the High Court are maintained.

Order accordingly.

S. Nantha Balan
Judge,
Court of Appeal,
Putrajaya, Malaysia.

Date: 30 August 2023

Legal Representation

For the Plaintiffs

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