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1. [Barisan Baiduri \(M\) Sdn Bhd & Anor v Ariz bin Ramli \[2020\] MLJU 2421](#)

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BARISAN BAIDURI (M) SDN BHD & ANOR v ARIZ BIN RAMLI

CaseAnalysis

| [2020] MLJU 2421

Barisan Baiduri (M) Sdn Bhd & Anor v Ariz bin Ramli [2020] MLJU 2421

Malayan Law Journal Unreported

HIGH COURT (KUALA LUMPUR)

KHADIJAH IDRIS J

SUIT NO WA-22NCC-584-10 OF 2019

31 October 2020

RK Sharma (Ng Jun Wei with him) (Amrit & Company) for the plaintiffs.

Thilagam Panasamy (David Gurupatham and Koay) for the defendant.

Khadijah Idris J:

Grounds of Judgment

(Enclosure 3)

Introduction

[1] In this writ action the Plaintiffs seek for, among others, -

- (a) a declaration that the 2nd Plaintiff has the exclusive right to the use of the name "Caprice", "Bang Bang", "Lil Mo" and "Lil Sha" and any other names invented by the Defendant;
- (b) an order for all accounts and investigations on the amount due and payable by the Defendant to the 2nd Plaintiff through the use of the name "Caprice", "Bang Bang", "Lil Mo" and "Lil Sha" and any other names invented by the Defendant;
- (c) an order that the Defendant pay to the 2nd Plaintiff all sums due and payable by the Defendant to the 2nd Plaintiff derived from the use of the name "Caprice", "Bang Bang", "Lil Mo" and "Lil Sha" and any other names invented by the Defendant; and
- (d) general damages, exemplary damages and aggravated damages.

[2] Via enclosure 3, the Plaintiffs filed for a prohibitory injunction on the following terms –

suatu perintah ad-interim diperintahkan terhadap Defendan iaitu, ARIZ BIN RAMLI (NO. K/P: 860725-14-5275) bagi melarang Defendan samada secara diri atau melalui ejennya dan/atau pengkhidmatnya dan/atau selainnya walau dengan apa jua cara daripada menggunakan nama "Caprice", "Bang Bang", "Lil Mo", "Lil Sha" dan juga apa juga nama yang telah dicipta atau yang akan dicipta pada masa depan oleh Defendan sehingga pelupusan notis permohonan Plaintiff-Plaintif ini;

suatu perintah injunksi diperintahkan terhadap Defendan iaitu, ARIZ BIN RAMLI (NO. K/P: 860725-14-5275) bagi melarang Defendan samada secara diri atau melalui ejennya dan/atau pengkhidmatnya dan/atau selainnya walau dengan apa jua cara daripada menggunakan nama "Caprice", "Bang Bang", "Lil Mo", "Lil Sha" dan juga apa juga nama yang telah dicipta atau yang akan dicipta pada masa depan oleh Defendan sehingga pelupusan tindakan di sini atau sebagaimana yang diperintahkan oleh Mahkamah yang Mulia ini;

[3] On the hearing date of enclosure 3, the Plaintiffs did not pursue for the ad interim injunction. After having considered the affidavits filed and the parties' submission this court dismissed the Plaintiffs' application for an interim injunction restraining the Defendant from using the name "Caprice", "Bang Bang", "Lil Mo" and "Lil Sha" and any other names invented or will be invented by the Defendant pending the disposal of this writ action. The Plaintiffs appealed. The reasons are stated below.

Factual background

[4] The 1st Plaintiff is a locally incorporated company and is engaged in the business advisory and investment activities.

[5] The Defendant is an artist, music composer and is engaged in the business of providing operation and support services to the entertainment industries. Apart from being a singer, he is also a motivational speaker.

[6] On 20 December 2018, the 1st Plaintiff and Defendant executed a shareholders agreement ("Shareholders Agreement"). The objective of the Shareholders' Agreement is stipulated in recital (c) and clause 2.1 of the same. In essence the parties has agreed to execute the Shareholders Agreement to record the parties mutual agreements and mutual rights and obligations in the 2nd Plaintiff which is established for the implementation and operation of the proposed projects described in Appendix 1 of the said agreement and all other projects ("Projects"). The Shareholders Agreement is also meant to regulate the terms upon which the parties are to deal with their shares, the relationship of the parties, the management and conduct of the activities and business of the 2nd Plaintiff Company.

[7] It is agreed that the 1st Plaintiff holds 51% of the 2nd Plaintiff's shares and the Defendant holds 49% of the same.

[8]For the purpose of enclosure 3, the salient and relevant terms of the Shareholders' Agreement may be summarised as follows –

- (a) clause 3.2.2 – in consideration of the 1st Plaintiff providing the initial capital expenditure and working capital requirements (“Initial Funding”) the Defendant undertakes, among others, -
 - (i) to provide expertise on the creativity and design of the products, merchandises and services relating to the Projects, the marketing material, design and branding pertaining to the Projects;
 - (ii) to consent to the name “*Caprice*” and “*Bang Bang*” to be used from 1 January 2019 for the purposes of giving the 2nd Plaintiff the full benefit;
 - (iii) to incorporate into the 2nd Plaintiff all improvements, inventions, works of authorship, technology, designs, formulas, ideas, processes, techniques, know-how, data and business methods whether or not patentable, made or discovered or conceived or reduced to practice or developed by the Defendant under the name “*Bang Bang*”, “*Lil Mo*” and “*Lil Sha*” (“Prior Invention”). Grant to the 2nd Plaintiff the exclusive, worldwide license to make, modify, use, market, sell and distribute all Prior Invention as part of the parties’ effort to implement the Projects;
 - (iv) agree that all improvements, inventions, works of authorship, technology, designs, formulas, ideas, processes, techniques, how-how, data and business methods whether or not patentable, made or discovered or conceived or reduced to practice or developed by the Defendant (in whole or in part, either alone or jointly with others) hereafter in relation to the Projects (“New Invention”) will be the property of the 2nd Plaintiff;
 - (v) to grant to the 2nd Plaintiff the exclusive, worldwide license to make, modify, use, market, sell and distribute such new Invention as part of the parties’ effort to implement the Projects.
 - (vi) the Defendant waives all his moral rights in relation to any such Prior Invention and New Invention which are the property of the 2nd Plaintiff; and
 - (vii) the 2nd Plaintiff shall be the sole owner of all IP Rights in relation to any such Prior Invention and New Invention and the Defendant assigns to the 2nd Plaintiff all IP Rights (as defined therein) in relation to the Prior Invention and New Invention and arising from the Projects and the 2nd Plaintiff shall be the sole legal beneficiary owner of any such IP Rights.
- (b) in Appendix 1 of the Shareholders Agreement the Projects listed includes, amongst others, the following –
 - (i) recording and release of new songs by the Defendant under the name “*Caprice*” and by the 2nd Plaintiff’s new artists;
 - (ii) concerts by the Defendant under the name “*Caprice*” and by the 2nd Plaintiff’s new artists;
 - (iii) new artiste created by the Defendant and the 2nd Plaintiff;

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- (iv) branding and marketing, animation and virtual characters, launching of merchandise of “*Bang Bang*”, “*Lil Mo*” and “*Lil Sha*”;
- (v) branding and marketing, animation and virtual characters, launching of merchandise of the 2nd Plaintiff’s new artists or animation or created by the Defendant from time to time; and
- (vi) comics and story books “*Bang Bang*”, “*Lil Mo*” and “*Lil Sha*” and the 2nd Plaintiff’s new artists or animation characters.

[9]The Plaintiffs allege the Defendant has breached the terms of the Shareholders Agreement in the following instances –

- (a) the Defendant has carried out commercial activities using the names “*Caprice*”, “*Bang Bang*”, “*Lil Mo*” and “*Lil Sha*” and “*Zynakal*”(another name invented by the Defendant). However the 2nd Plaintiff did not receive any proceeds and / or profits from the said commercial activities as the Defendant failed to pay to the 2nd Plaintiff the said proceeds and / or profits even though the 2nd Plaintiff has the exclusive right to the use of the said names and any other name created by the Defendant; and
- (b) thus the Defendant is in breach of his fiduciary duties.

Enclosure 3Plaintiffs’ case

[10]The reasons cited by the Plaintiffs in support of their application for an interim injunction may be summarised as follows –

- (a) via clause 9.3.1 the Defendant has agreed that in the event of a breach, the 2nd Plaintiff shall be entitled to an interim injunction to restrain the Defendant from committing any violation of the covenant and obligations in clause 9;
- (b) The serious issues to be tried are as follows –
 - (i) whether the 2nd Plaintiff has the exclusive right to the use of the names “*Caprice*”, “*Bang Bang*”, “*Lil Mo*”, “*Lil Sha*” and any other names invented by the Defendant and to the proceeds and/or profits made through the use of the said names;
 - (ii) whether the Defendant is in breach of his fiduciary duties to the detriment of the 2nd Plaintiff; and
 - (iii) whether the Defendant has any defence to the Plaintiffs’ claim.
- (c) The balance of convenience favours the Plaintiffs in that –
 - (i) the interim injunction is necessary to preserve the status quo of the subject matter; and
 - (ii) the interim injunction is necessary to prevent the 2nd Plaintiff from suffering further losses.

Defendant’s case

[11]It is argued by the Defendant that the issues raised by the Plaintiffs are irrelevant as the Defendant had already terminated the Shareholders Agreement long before this writ action was filed by the Plaintiffs. The Plaintiffs therefore has no enforceable rights against the Defendant and it follows that there is no need for an interlocutory injunction. Thus there is no bona fide serious issues to be tried.

[12]The Defendant in resisting the Plaintiffs application for injunction, the raised the following issues –

- (a) the Plaintiffs' claim is essentially monetary claim. As such damages is an adequate remedy to the Plaintiffs. The amount which is payable to the Plaintiffs is quantifiable. Thus the application for interim injunction ought to be dismissed;
- (b) the Plaintiffs did not come with clean hands as the Plaintiffs failed to disclose the following –
 - (i) the Plaintiffs failed to disclose that the Defendant was induced to enter into the Shareholders Agreement by the 1st Plaintiff, one Dato' Abd Rahman bin Soltan ("DARS") and Dato' Marina binti Hashim ("DMH"). Further the 1st Plaintiff, DARS and DMH have conspired to cause harm unto the Defendant through undue influence, by hatching and executing unlawful schemes, with malicious to cause irreparable damage to the Defendant.
 - (ii) DARS and DMH are the directors of the 1st Plaintiff and had fraudulently misrepresented to the Defendant that the Defendant will be given the following –
 - (1) given a three-storey bungalow owned by Dato' Rahman located at No.1, Seri Pilmoor Bayu Timur, Jalan PJU 1A/1, Ara Damansara, 47301 Selangor Darul Ehsan ("Bungalow");
 - (2) a roadworthy and ready-to-drive Lamborghini car ("Lamborghini") for the purposes of promoting the 2nd Plaintiff and for the marketing of the 2nd Plaintiff's products; and
 - (3) director fee amounting to RM8000.00 per month ("Director's Fee").
- (c) as such the Defendant has filed a counterclaim against the 1st Plaintiff, 2nd Plaintiff, DARS and DMH for fraudulent misrepresentation. Another person named as defendant in the Defendant's counterclaim is one Choi Lai Yee ("CLY") a solicitor whom the Defendant alleged was appointed by DARS and DMH to advise the Defendant on the Shareholders Agreement. However it is the Defendant's contention that CLY has, among others, breached his fiduciary duties towards the Defendant and was negligent in discharging his duty which resulted in the Defendant executing the Shareholders Agreement which the Defendant now claim to be illegal. The Defendant also contend that CLY has conspired with the 1st Plaintiff, 2nd Plaintiff, DARS and DMH and induced him to enter into the Shareholders Agreement and to cause irreparable damage to him.

[13]Defendant disputes the validity of the Shareholders Agreement on the following grounds –

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- (a) the terms of the Shareholders Agreement in particular provisions relating to the “exclusive dealings of the parties” has deprived the Defendant of his constitutional right under Article 5 of the Federal Constitution as the right to life includes right to livelihood; and
- (b) clause 9.2 which inter alia prohibits the Defendant, during the term of the Shareholders Agreement and for a period of one year following the termination of the same, from engaging in any business which is the same or substantially the similar to the business provided by the 2nd Plaintiff amounts to restraint of trade which is illegal and against public policy.

[14]The balance of convenience favours the refusal of the injunction because –

- (a) the Plaintiffs delayed in filing the application for injunction – almost 5 ½ months after the Shareholders Agreement was allegedly terminated by the Defendant;
- (b) if the injunction is granted, this will affect third parties who are not involved in this dispute between the Plaintiffs and Defendant, namely –
 - (i) customers who placed their orders with the Defendant will not be able to get their goods in time;
 - (ii) persons (producer, shareholders) who invested in the Defendant’s business will suffer a great loss; and
 - (iii) the Defendant’s employee will be terminated.
- (c) to restrain the Defendant from using the names he created will amount to restraint of trade, hence the injunction cannot also be granted clearly against public policy to restrain trade.

[15]It is further contended by the Defendant that he has terminated the Shareholders Agreement because of the 1st Plaintiff’s failure to fulfil their obligations under the same, including failure to provide the Initial Funding to the 2nd Plaintiff.

[16]Thus the Defendant’s counterclaim against the Plaintiffs seeking among others, for a declaration that the Defendant had lawfully terminated the Shareholders Agreement and a mandatory injunction to restrain the Plaintiffs from interfering and obstructing the Defendant’s business.

The law

[17]The law in respect of prohibitory injunction is well settled. The principles that court must consider in dealing with application for such a relief may be summarized as follows –

- (a) whether there is any bona fide serious question to be tried. In doing so the court must evaluate the facts placed before the Court to determine if a bona fide serious question to be tried has indeed been disclosed. At this juncture the court must refrain from making any determination on the merits of the claim or any defence to it. It is sufficient if he identifies with precision the issues raised on the joinder and decides whether these are serious enough to merit a trial;

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- (b) where the balance of convenience lies; and
- (c) whether damages is an adequate remedy to the applicant.

Whether there is any bona fide serious question to be tried

[18]The facts as gathered from the affidavits clearly established that the 1st Plaintiff and the Defendant has executed the Shareholders Agreement for the purpose of incorporating the 2nd Plaintiff to undertake, among others, the Projects as defined in the said agreement.

[19]For purpose of implementing the Projects by the 2nd Plaintiff, the 1st Plaintiff and the Defendant has mutually agreed as follows –

- (a) the Defendant consent to the names “*Caprice*”, “*Bang Bang*”, “*Lil Mo*”, “*Lil Sha*” and any other names invented by the Defendant to be used by the 2nd Plaintiff from 1 January 2019;
- (b) the Defendant grants to the 2nd Plaintiff, among others, the exclusive, worldwide license to make, modify, use, market and sell and distribute the name “*Caprice*”, “*Bang Bang*”, “*Lil Mo*”, “*Lil Sha*” (the names are collectively defined as “Prior Inventions”) and also New Inventions (includes, among others improvements, inventions works of authorship developed by the Defendant in relation to the Projects);
- (c) the Defendant waives all his moral rights in relation to the Prior Inventions and New Inventions which are the property of the 2nd Plaintiff;
- (d) the 2nd Plaintiff is the sole owner of all IP Rights in relation to any such Prior Invention and New Inventions and the Defendant assigns to the 2nd Plaintiff all IP Rights in relation to the Prior Invention and New Inventions; and
- (e) the Defendant shall conduct the Project in the ordinary course and will not engage in extraordinary transaction which would have a material and adverse effect on the, inter alia, Project or the 2nd Plaintiff without the consent of the 1st Plaintiff.
- (f) the Defendant shall not, inter alia,
 - (i) during the term of the Shareholders Agreement and for a period of 1 year after the termination of the said agreement, engage in any business which is the same or substantially similar to the Project or in competition with the Project; and
 - (ii) during the continuance of the Shareholders Agreement be directly or indirectly employed or concerned with any position in any organisation or trade or business where a conflict of interest or potential conflict of interest may arise between the personal interest of the Defendant and the interest of the 2nd Plaintiff.

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[20]The Plaintiffs' complaint is that although the Defendant has been engaged in commercial activities using the names "Caprice", "Bang Bang", "Lil Mo", "Lil Sha" and "Zynakal" (another name invented by the Defendant) the 2nd Plaintiff did not receive any proceed and / or profits from the said commercial activities. Thus the Defendant has breached the Shareholders Agreement.

[21]The Plaintiffs attached the list of the commercial activities at Exhibit MKH – 4 of the Plaintiffs affidavit enclosure 4. Exhibit MKH-4 is a 4 paged document which contain a table divided into 5 columns setting out "NO", "SUBJECT", "PARTICULARS", "PARTICIPATION" AND "APPROX VALUE (RM)". A screenshot of the first and second page of the said exhibit is produced below –

BANG BANG STUDIOS SDN. BHD.
COMMERCIAL ACTIVITIES PENDING JUSTIFICATION

NO	SUBJECT	PARTICULARS	PARTICIPATION	APPROX VALUE (RM)
1	BAL - song	music video (5.9 mil ++ views) - youtube & spotify	caprice & zynakal	
2	TAKUT -song	music video (1.4 mil++ views) - youtube & spotify	caprice	
3	BAD BOYS TOUR 2019	concert @ The Bee	caprice & zynakal	
4		concert @ Publika	caprice & zynakal	
5		concert @ Sunway Lagoon	caprice & zynakal	
6		concert @ bukit Jalil	caprice & zynakal	
7	DURIAN KILLER WIPES	product	caprice	
8	ONITSUKATIGER shoe	product endorsement	caprice & zynakal	
9		shibuya tokyo launching event	caprice & zynakal	
10	#SWITCH2BAL	pwtc concert showcase	caprice & zynakal	
11		product endorsement	caprice & zynakal	
12	@evaairways	endorsement	zynakal	
13	@taiwantourismbureaumalaysia	video	zynakal	
14	@itsbheart & @zynakal	product - jeans shirt	zynakal	
15	GENTLEMEN'S TONIC	product endorsememt	caprice	
16		barbershop @ publika	caprice	
17		barbershop @ mont kiara	caprice	
18		barbershop @ season place, kl	caprice	
19	XDEHALBRO11	hoodie	caprice	

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20		landyard - gold edition	caprice
21	BANG BANG	hoodie - bear	caprice
22	PERSEPOLIS	movie endorsement	caprice
23	ISLAMPRO application	product & services	caprice
24	MENGAJI.COM	application for android & ios	caprice
25	SALAM JODOH	application for android & ios	caprice
26	EATIGO application	product endorsement	zynakal
27	THE CULTURE	concert showcase	caprice & zynakal
28	FUN DAY @ Sunway Lagoon	concert showcase	caprice & zynakal
29	MAXTAG	product endorsement	zynakal
30	NIKE shoe	product endorsement	zynakal
31	@printworks.studio	landyard	caprice
32	MAS # keep flying	music video (10k views - youtube)	caprice
33	PERFUME	product endorsement kuantan	caprice & zynakal
34	TEROK	music video (555k views - youtube)	zynakal
35	BANG BANG raya edition	baju melayu	caprice
36		sampul duit raya	caprice
37		sayang baby edition	caprice

[22]A perusal of the Exhibit MKH-4 shows it is a list of what appears to be events purportedly to have been participated by the Defendant. This is simply not sufficient to show that the Defendant has, as a matter of fact, carried out commercial activities using the names "Caprice", "Bang Bang", "Lil Mo" and "Lil Sha" and "Zynakal". Thus Exhibit MKH-4 is also insufficient to show the Defendant has breached the Shareholders Agreement as alleged.

[23]As such the Plaintiffs contentions that they are entitle to an interim injunction because the Defendant has agreed, pursuant to clause 9.3.1 of the Shareholders Agreement that the 2nd Plaintiff shall be entitled to an interim injunction in the event of breach by the Defendant would require investigation.

[24]On the other hand, the Defendant is challenging the validity of the Shareholders Agreement on the grounds discussed below –

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(a) inducement / undue influence

- (i) the Defendant alleges he was induced to enter into the said agreement on the representation of the 1st Plaintiff and the 2 directors of the 1st Plaintiff, namely DARS and DMH.

According to the Defendant, DARS and DMH has promised him the Bungalow, Lamborghini and the Director's Fee (hereinafter collectively referred to as "Promises"). However the alleged Promises was never fulfilled and he terminated the Shareholders Agreement;

- (ii) the Defendant adduced Exhibit AR-2, Exhibit AR-3, Exhibit AR-4 and Exhibit AR-5 to support his allegations. Perusal of the said exhibits indicate the grievances voiced by the Defendant in respect of the unfulfilled alleged Promises and also the manner how the affairs of the 2nd Plaintiff was conducted. It is the Defendant's position that via his letter dated 8 May 2019 (Exhibit AR-5) to the 1st Plaintiff he had terminated the Shareholders Agreement;
- (iii) the Plaintiffs deny the alleged Promises, pointing out there were no provision in the Shareholders Agreement relating to the alleged Promises. It is further contended by the Plaintiffs –
 - (aa) the Bungalow belongs to DARS and was rented to the 2nd Plaintiff. It was a gesture on the part of DARS to allow the Defendant and his family to occupy temporarily the Bungalow to help the Defendant towards achieving his dream to provide a bungalow for his family to live in. This will enable the Defendant to focus on his career and later to fulfil such dream;
 - (bb) with regards to the Lamborghini, the said car does not belong to DARS and it was only intended to be used as a marketing tactic to promote the 2nd Plaintiff products.
- (iv) The Plaintiffs adduced documents to support their contentions Exhibit MKH-5 and Exhibit MKH-6. Some of these documents appears to indicate that the Bungalow and Lamborghini are provided and / or given to the Defendant for him to carry out the Projects for the benefit of the 2nd Plaintiff. At the same time, the Plaintiffs' contentions that the Promises is an afterthought appears to be doubtful as the Defendant had, through his email dated 17 May 2019 (see Exhibit MKH-9 page 67 of enclosure 19), raised issues on the failure of the Plaintiffs to deliver what appears to be the Promises.
- (b) the alleged Promises may be in contravention of clause 17.2 (that the Shareholders Agreement supersedes any other agreement) and clause 17.8 (no amendment binding unless it is in writing and signed by the parties) of the said agreement (the position took by the Plaintiffs). However this court is not prepared to make any determination of fact on this issue of inducement and / or undue influence as it is highly factual. This require further evidence subject to cross-examination at the trial of this action.
- (c) on the issue of termination of the Shareholders Agreement –
 - (i) the Defendant relies on his letter dated 8 May 2019 (Exhibit AR-5 of enclosure 11) which the Defendant alleges to be the letter of termination. However documents after 8 May 2019 produced by

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the Plaintiffs does not appear to indicate the Defendant has terminated the said agreement on 8 May 2019;

- (ii) this can be seen from Exhibit MKH-9 of enclosure 19 which are exchange of e-mails between the 1st Plaintiff and / or 2nd Plaintiff and the Defendant between the period 12 May 2019 to 29 May 2019 (see page 63 - 73). In most of the emails the Defendant had made repeated request for meetings to be held with the 1st Plaintiff and the 2nd Plaintiff for purpose of discussing the Defendant's plan to launch, among others, the "*Raya Season*", "*Sayang Baby edition*", "*Bang Bang hoodies*" and other products of the 2nd Plaintiff. The Defendant also appears to be venting his frustration on the delay by the Plaintiffs to make decision;
 - (iii) in fact via his e-mail dated 15 May 2019 the Defendant had sought the consent of the 1st Plaintiff and 2nd Plaintiff to use his "own money to incur all costs to sell a "*Bang Bang hoodie*" in order to avoid further losses to the 2nd Plaintiff. The Defendant appears to be begging the Plaintiffs to understand his position as he had not received income for 4 months and that "*we [presumably all the parties] have lost 2 seasons and I cannot afford to live like this*";
 - (iv) via some of the e-mails the Defendant has also voiced his dissatisfaction of, among others, having to coughed up his own money for the 2nd Plaintiff "*Bang Bang*" talk show talents and to pay the sales team (see the Defendant's e- mail at page 67 and page 73 respectively of enclosure 19). In the same e-mail the Defendant had also informed the Plaintiffs that he is willing "*to proceed on the 3 items on my won, I handle ALL costs. I will also hire my own ppl to package and ship all the new parcels, and some from proceeds i will pay the personal debt ... You are preventing me from income. And now u are preventing me from doing business during peak season...*";
 - (v) subsequently in his e-mail dated 29 May 2019 where the Defendant said that was his 5th request for a meeting with the Plaintiffs, he had also pointed out that "*based on our contract [presumably the Shareholders Agreement] we are required to have management meetings anyways and the last one was two months ago*".
- (d) thus it would appear as at 29 May 2019 the Defendant still rely on the Shareholders Agreement to get the Plaintiffs to agree to discuss the dispute (which appears to be issues in relation to the business of the 2nd Plaintiff and also the contractual disputes between the 1st Plaintiff and Defendant).
- (e) in this respect it is pertinent to note that despite relying on the letter dated 8 May 2019 being the letter which purportedly terminated the Shareholders Agreement, at the same time the Defendant avers that he "*akhirnya memuktamadkan penamatian Perjanjian Pemegang Saham pada sekitar awal bulan Jun 2019 dan menyampaikan yang sama kepada Barisan Baiduri dan Bang Bang Studios pada sekitar awal bulan Jun 2019.*". Going by the said averment it would appear the Defendant's position is that the termination of the Shareholders Agreement was finalized around early June 2019. However, unlike the termination alleged to have taken place on 8 May 2019, the Defendant did not provide any documentary evidence to support his allegations;

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- (f) it is also the Defendant's contention that the 1st Plaintiff and the Management Committee of the 2nd Plaintiff (said to be appointed by the 1st Plaintiff) has breached the Shareholders Agreement in particular clauses 3.2.1 and 3.2.2 where it is alleged by the Defendant that he was prevented from performing his obligations in relation to the Projects (see Defendant's Exhibit AR-14 of enclosure 11). This has caused the products of the 2nd Plaintiff were not delivered to the customer (who the Defendant alleges are his fans) in due time which in turn has caused him to lose his long-time loyal fans and this has prejudiced his career as a celebrity (see Exhibit AR-12 and Exhibit AR-15 of enclosure 11). The Defendant has terminated the Shareholders Agreement and therefore not bound by the terms and conditions of the same. As the Shareholders Agreement had been terminated, the Plaintiffs' claim is unsubstantiated and therefore there are no serious issues to be tried. Hence the Defendant counterclaim against the Plaintiffs, seeking a declaration that he has lawfully terminated the Shareholders Agreement.
- (g) however it is contended by the Plaintiffs that the Defendant, after he issued the purported letter of termination, has by his conduct (see paragraph 24 (c) above) shown his intention and willingness to continue to carry on the business of the 2nd Plaintiff. Thus the Defendant had elected not to terminate the Shareholders Agreement and is therefore estopped from claiming that he has terminated the same;
- (h) it is also contended that the late delivery was caused by the Defendant's inaction delay to furnish and provide adequate and sufficient particulars of all the payments made to the accounts department, this has caused the accounts department to laboriously trace all the payments that were made; and
- (i) the Plaintiffs' stand is obvious, as their claim against the Defendant is crucially premised on the existence of the Shareholders Agreement, in particular clause 3.2.2 (iii) where it is contended that the Defendant has granted the exclusive right to the 2nd Plaintiff to use the name "*Caprice*", "*Bang Bang*", "*Lil Mo*" and "*Lil Sha*" and any other names invented by the Defendant and that the Defendant is liable to pay to the 2nd Plaintiff monies derived from the use of the said names.

[25] Premised on the above, this court is of the view the issue whether the Shareholders Agreement had been terminated or otherwise and whether termination is lawful or otherwise are serious issues the determination of which would require further investigation at the trial. The said issues are highly contested and factual and this court is not in a position, at this juncture to make any determination or finding of fact in relation to the case put forward by the Plaintiffs and Defendant.

[26] On the issue of illegality of the Shareholders Agreement raised by the Defendant, this court is of the view the said issue requires full argument and mature consideration at the trial of the action as it, among others, involves the construction of the relevant provisions in the Shareholders Agreement and the application of the relevant law.

Balance of convenience

[27] Having determined the serious issues to be tried, the next question to be considered is whether justice of the case lies in favour of granting the interim injunction sought by the Plaintiffs.

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[28] Via his Statement of Defence, Defendant pleaded as follows –

8.1 Defendan yang menggunakan nama pentas "Caprice" merupakan seorang penyanyi rap terkenal, penulis lagu, penerbit rakaman, ahli perniagaan, pengasas aplikasi "Classruum", "Mengaji.com", "IslamPro", "Umrahloka", "Salam Jodoh", Youth Icon dan penceramah motivasi yang terkenal dan mempunyai reputasi yang baik di seluruh Malaysia.

8.2 Defendan juga merupakan penerima anugerah Youth Icon of the Year

(M) SME and Entrepreneurs (SEBA) oleh Yayasan Usahawan Malaysia.

8.3 Pada tarikh pemfailan Pembelaan dan Tuntutan Balas ini, Defendan mempunyai 799,000 pengikut "followers" dalam akaun laman social Instagramnya yang bernama "Capriceofficial".

8.4 Sebelum Defendan memasuki Perjanjiaan Pemegang Saham tersebut dan / atau membuat kerjasama dengan Plaintiff Pertama dan Plaintiff Kedua, Defendan telah mempunyai projek-projek sendiri seperti berikut:

- a) *Jihad in Education (Lawatan Cerama Motivasi);*
- b) *Islam Pro;*
- c) *Mengaji.com;*
- d) *Umrahloka;*
- e) *Salam Jodoh; dan*
- f) *Siaran harian ("daily posting") oleh Defendan dalam laman sosial instagramnya menangani isu-isu semasa yang memberikan pengaruh positive kepada masyarakat, khususnya golongan belia.*

9. Defendan, walaupun mempunyai populariti yang tinggi dalam kalangan masyarakat, beliau juga tidak gagal untuk memberikan tumpuan kepada isu-isu sosial. Salah satu projeknya Jihad in Education adalah perbincangan motivasi bertujuan untuk memberi pencerahan kepada pemikiran pelajar, dan untuk "empower" mereka agar dapat mendorong mereka untuk berjaya dalam kehidupan dan keluar dari zon selesa mereka.

[29] In his affidavit the Defendant describe himself as follows –

- (a) *"seorang belia dan penyanyi lagu, ahli perniagaan dan penceramah motivasi, sesungguhnya mempercayai bahawa saya mempunyai masa hadapan yang cerah" (see paragraph 37 Defendant's affidavit enclosure 11 and Exhibit AR-8); and*
- (b) *"seorang penyanyi lagu dan selebriti terkenal di mana punca pendapatan saya adalah melalui populariti sendiri ..." (see paragraph 102 Defendant's affidavit enclosure 11).*

[30] The Plaintiffs deny the above. However the facts appears to support the Defendant's claim that he is a popular artist / celebrity. This can be seen from the documents produced as Exhibit AR-7 and Exhibit AR-8 of enclosure 11

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and crucially, the Shareholders Agreement. The said agreement executed by the 1st Plaintiff and Defendant clearly states the objective of the Shareholders Agreement is for the 2nd Plaintiff to carry out the Projects (which include all other projects carried out by the 2nd Plaintiff locally and / or internationally) as listed in Appendix 1. Under the said agreement (clause 3.2.2 which is summarized in paragraph 8 above) it is the obligation and responsibility of the Defendant to carry out the Projects.

[31]It is further agreed by the parties that the Defendant consent to the Prior Invention (consisting the names "*Bang Bang*", "*Lil Mo*", and "*Lil Sha*" and which the Defendant appears to own the IP right) to be exploited for the benefit of the 2nd Plaintiff. Not only that, it is also mutually agreed that New Invention developed by the Defendant is also to be exploited for the benefit of the 2nd Plaintiff. One crucial point which is of extreme importance and worthy of attention is that the 2nd Plaintiff shall be the sole owner of all IP Rights in relation to the Prior Invention and New Invention.

[32]More importantly, the 1st Plaintiff and Defendant has agreed to exploit and manipulate the Defendant's creations and / or works for the benefit of the 2nd Plaintiff.

[33]The above facts shows that the Plaintiffs are well aware of the popularity of the Defendant due to his many talents, his reputation / influence to the younger generation and the profits and potential profits that the Defendant's creations and / or works is capable of generating. This is further demonstrated by the 1st Plaintiff's willingness to embark on a commercial joint venture with the Defendant as evident in the Shareholders Agreement and to provide the Initial Funding (which is stated in clause 3.2.1 (iii) of the Shareholders Agreement as has been and will be funded by the 1st Plaintiff) and the First Party Advance (which is the sum of up to RM 500,000.00 to be provided by the 1st Plaintiff for a period of 12 months from the date of the Shareholders Agreement as stated in clause 3.2.1 (iv) of the same).

[34]Having considered the above position and the facts in totality, this court is of the view it would not do justice to refrain the Defendant from using the name "*Caprice*", "*Bang Bang*", "*Lil Mo*" and "*Lil Sha*" and any other names invented or will be invented by the Defendant on the following grounds –

- (a) the Plaintiffs main grievances as evident from their affidavits is that the Defendant failed to pay to the 2nd Plaintiff the proceeds or profits derived from commercial activities carried out by the Defendant using the said names. As stated above, the Exhibit MKH-4 is insufficient to demonstrate that the commercial activities were carried out by the Defendant and that the Defendant has breached the Shareholders Agreement as alleged. As stated above, whether there is a breach by the Defendant will require evidence to be adduced at the trial. In this respect the allegation that the Defendant has breached his fiduciary duties to the 2nd Plaintiff would, to a certain extent depend on whether the Defendant has breached the Shareholders Agreement;
- (b) in relation to the purported termination by the Defendant, there appears to be an unexplained delay on the part of the Plaintiffs in applying for an injunction for purpose of enforcing the Shareholders Agreement. Enclosure 3 was filed about 5 months after the purported letter of termination dated 8 May 2019 was sent

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to the Plaintiffs. No evidence adduce to show the Plaintiffs had replied to the purported letter of termination. However the Plaintiffs now contend the purported termination is unlawful for non-compliance with clause 10 and 11 of the Shareholders Agreement. The Plaintiffs' inaction (failed to act on the Defendant's letter or take immediate steps to enforce the Shareholders Agreement) is not consistent with the need for an injunction to prevent the 2nd Plaintiff from suffering further losses as contended by the Plaintiffs especially so when the Plaintiffs took the position that the Shareholders Agreement is at all material time subsisting and enforceable. Thus this court ought not be called to "assist" the Plaintiffs when they, by their own inaction, have failed to act to protect their interest (*Haji Wan Habib Syed Mahmud V Datuk Patinggi Haji Abdul Taib Mahmud & Anor* [\[1986\] 2 MLJ 198](#)). It would appear the Plaintiffs are content with the Defendant using the said names but for the profits which were not paid to the 2nd Plaintiff;

- (c) although there are serious issues to be tried, it would be inequitable to refrain the Defendant from using the said names when the facts shows that the Defendant's livelihood depend on his exploitation of the names and / or products that he has created or developed which includes "*Caprice*", "*Bang Bang*", "*Lil Mo*" and "*Lil Sha*". This can be seen from the exchange of e-mails between the Defendant and the Plaintiffs as can be seen in Exhibit MKH-9 of the Plaintiff's affidavit enclosure 19 and summarised in paragraph 24 (c) above. In one e-mail to the Plaintiffs, the Defendant begged to be allowed to use his own monies for the marketing, new songs, music video, packaging, staffing and production of 2 new hoodies so as to enable him to receive income. The Defendant appears to be very active and enthusiastic in carrying out the Projects for the benefit of the three parties and had called on the Plaintiffs for support; and
- (d) under the circumstances justice would not be served if the Defendant is prohibited from using his creation, works and products. In this respect I am incline to agree with learned counsel for the Defendant's argument that an injunction would adversely affect the reputation of the Defendant and consequentially his livelihood. The Defendant ought to be allowed to use the names he created not only for his financial survival but also for the benefit of the 2nd Plaintiff. This is especially so when the Plaintiffs' complaint is simply this – the 2nd Plaintiff is being deprived of profits made by the Defendant from the use of the names created by the Defendant. In the event the Defendant is found to be in breach of the Shareholders Agreement, the Defendant would be liable to pay damages. By allowing the Defendant to continue using the said names and derive income / profit from it, this will to a certain extent assist the Defendant in satisfying his liability (if any), thus avoiding paper judgment.

[35]The Plaintiffs cited a High Court case *Polygram Records Sdn Bhd v Hillary Ang & Ors* [\[1988\] 3 MLJ 37](#); [1988] 2 CLJ (Rep) 163 to support their argument that the balance of convenience lies in favour of the Plaintiffs for the interlocutory injunction be granted against the Defendant. In their written submission the Plaintiffs reproduced the following paragraph of the judgment –

... It must not be forgotten that the first to fifth defendants are members of a singing group of pop music and that sales of their recordings depend largely on their popularity. Right now, they are at the height of their popularity and sales are expected to be brisk and rising... Thus bearing in mind the brand of music involved, the uncertainty of acceptance of their

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recordings and their selling power, it is clearly understandable that quantification of damages is not possible and on balance I had concluded that on the peculiar facts of this case, an interim injunction should issue in the manner asked for by the plaintiffs..."

(emphasis added)

However the Plaintiffs did not demonstrate how that particular part of the judgment assist the Plaintiffs' position in the context of this instant case.

[36]I have considered the said case and I am of the view the said case is not of assistance to the Plaintiffs. The reason for saying so is discussed below. At the outset it must be emphasized while legal principles are well established, each case are to be determined base on its facts and merit.

[37]In the *Polygram Records*' case, the plaintiffs, a music and sound recording company, had entered into a contract with the first to fifth defendants. Under the said contract the latter undertook, for a period of two years, to perform musical works for the plaintiffs exclusively which the plaintiffs would distribute and sell. The plaintiffs alleged that the first to fifth defendants had breached their undertakings under the contract by recording their musical works with other individuals, firms and companies, particularly the first to fifth defendants' company, and with the sixth defendant, thereby depriving the plaintiffs of the profits which they would otherwise have earned.

[38]The plaintiffs applied for an interim injunction to restrain the first to fifth defendants from holding themselves out as being free to enter into any recording contract with any other recording company except the plaintiffs and to restrain the sixth defendant, a rival company, their servants and agents from entering into any distributorship agreement with the first to fifth defendants for the purpose of distributing their musical works recorded by the first to fifth defendants' own company or by any other company.

[39]The first to fifth defendants did not dispute that they had breached their undertakings under the contract. However the said defendants had raised the following objections –

- (a) the contractual relationship between them and the plaintiffs no longer exists;
- (b) even if there is one, the court should be reluctant to grant an injunction as the contract is a contract of or for personal service; and
- (c) damages would be a more appropriate remedy.

[40]On the facts, the court held –

- (a) the agreement was still in existence and the first to fifth defendants were still bound by their undertakings not to perform for others except the plaintiffs;

- (b) what the plaintiffs were trying to enforce was their right to have the undertakings given by the first to fifth defendants observed. It is not that the plaintiffs are preventing the first to fifth defendants from earning a livelihood altogether but that they should not do so with others for their livelihood is already guaranteed by their undertakings in the contract. To that extent, the court held it is not prevented from exercising its discretion to grant the interim injunction; and
- (c) the court was of the view because of the brand of music involved, the uncertainty of acceptance of their recordings and their selling power, quantification of damages is not possible.

On balance and on the peculiar facts of the case the High Court allowed the plaintiff's application for an interim injunction.

[41]The facts of the *Polygram Records*' case can be distinguished from the instant case –

- (a) the injunction sought in the *Polygram Records*' case was to restrain the defendants from entering into recording contract with any other recording company except the plaintiffs. The plaintiffs were merely enforcing the undertaking given by the defendants under the contract as the plaintiffs' position was that the contract was still subsisting which the court held so.

Simply put, the defendants were not prevented from earning a livelihood altogether. This is because the defendants were asked to do so with the plaintiffs (that is, perform musical works for the plaintiffs exclusively which the plaintiffs would distribute and sell and the defendants are paid royalties by the plaintiffs) in accordance with the undertakings given by them in the contract they had entered with the plaintiffs; and

- (b) in the instant case, despite the Plaintiffs' contention that the Shareholders Agreement is valid, the Plaintiffs are not seeking for the enforcement of the same by the Defendant. Rather they are coming to court to seek an injunction to prohibit the Defendant from using, in any manner whatsoever ("*walau dengan apa juar cara*"), the names "*Caprice*", "*Bang Bang*", "*Lil Mo*" and "*Lil Sha*". The Projects in Appendix 1 of the Shareholders Agreement appears to set out the use of the said names in activities to be carried out by the Defendant for the benefit of the 2nd Plaintiff. The interim injunction seeks not only to prohibit the Defendant from using the said names but also any names that had been created by the Defendant. This simply means Defendant is prohibited from using whatever names created by him as set out in Appendix 1 (the Projects which is supposed to be performed by the Defendant for the benefit of the 2nd Plaintiff). Not only that, the injunction sought by the Plaintiffs is intended to prohibit the Defendant from using any names that will be created by the Defendant in the future ('*dan juga apa juga nama yang telah dicipta atau yang akan dicipta pada masa depan*'). As can be seen in Exhibit MKH-9 of enclosure 19, the Defendant's livelihood is very much depending on his creations and works. This simply means, pending the disposal of this instant action, the injunction if granted would practically deprive the Defendant of his livelihood.

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(c) Surely, under the circumstances, the court of equity cannot at this juncture, be asked to exercise its discretionary power to grant an interim injunction which will cause suffering and misery on a litigant whose liability has yet to be proven. This is especially so when injunction is intended to produce a just result for the period between the date of the application and the trial proper.

[42]On balance, it is this court's view that the Defendant would suffer the greater injustice by the grant of an interim injunction.

Whether damages is an adequate remedy

[43]It would appear the 2nd Plaintiff also rely on the *Polygram Records*' case to argue that damages is not an adequate remedy because the damages could not be quantified. In that case the court had considered the brand of music involved, the uncertainty of acceptance of the defendants' recordings and their selling power and held damages in unquantifiable. However in this instant case, the Plaintiffs did not provide any explanation why damages is unquantifiable. It is to be noted it is not the Plaintiffs' case that their reputation or goodwill is tarnished or that their credibility is lost which could be difficult to quantify (which may justify their argument that damages is inadequate remedy).

[44]At the risk of repetition, the Plaintiffs is claiming for proceeds or profits that they claim as due and payable to the 2nd Plaintiff from the use of the names which includes, among others, "Caprice", "Bang Bang", "Lil Mo" and "Lil Sha". They are also claiming all other kind of damages from the Defendant. In this respect this court agree with the Defendant's contentions that the Plaintiffs claim is a monetary claim. The 1st Plaintiff is concerned about its return on the investment made on the 2nd Plaintiff. Whereas the 2nd Plaintiff is concerned about the profits that is due to them from the IP Rights it own over the Prior Invention (which includes, among others, "Caprice", "Bang Bang", "Lil Mo" and "Lil Sha") and New Invention.

[45]It is crystal clear the Plaintiffs are not concerned about the commercial activities carried out by the Defendant using the said names. Instead they are concerned and troubled with the monies that the use of the said names generate which they alleged to have been deprived of. Thus the Plaintiffs' claim is ultimately about monies alleged to have been lost. Such losses is quantifiable and the Plaintiffs would be entitled to monetary compensation in the event they succeed to prove their case at the trial.

Preserving status quo

[46]It is argued by the Plaintiffs the interim injunction is necessary to maintain the status quo. It is trite that interim injunction is intended to preserve the status quo prior to the application for injunction pending the disposal of the dispute between parties. In this instant case prior to the filing of this action and application for injunction, it is the Plaintiffs' case that the Defendant has carried out commercial activities using the names which includes, among others, "Caprice", "Bang Bang", "Lil Mo" and "Lil Sha". That is the state of affairs existing prior to the application for injunction and as stated above, the Plaintiffs are content with that position (save and except the profits that they are

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deprived of). Thus in this instant case, the interim injunction sought has nothing to do with maintaining the status quo, instead it has the reverse effect.

Conclusion

[47]Premised on the aforesaid reasons, the Plaintiffs' enclosure 3 for interim injunction was accordingly dismissed with costs.

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