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## The Legal Implications Of Being Silent In WhatsApp Communication

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With the growing prevalence of digital communication platforms like WhatsApp, courts now commonly accept WhatsApp messages as admissible evidence in legal proceedings. However, the informal nature of these messages and their colloquial features pose challenges in interpreting their content as well as understanding the intentions of the parties involved.

This alert explores the complexities of using WhatsApp messages as admissible evidence in legal proceedings. The recent High Court case of *Chooi Loo See v PNSG Holdings Sdn Bhd & 2 Ors*<sup>1</sup> examined the complexities of interpreting WhatsApp messages and the significance of silence or non-response to certain statements made during the course of communications. In this case, the High Court dismissed the plaintiff's claim due to a lack of sufficient evidence to support the existence of an oral contract of guarantee.

### Background Facts

The case revolves around the sale of shares in PNS Group Sdn Bhd, where the plaintiff alleged that the 1<sup>st</sup> Defendant orally agreed to purchase the plaintiff's shares for RM 20.7 million (Purchase Price). The plaintiff further alleged that during a meeting, the 2<sup>nd</sup> and 3<sup>rd</sup> defendants allegedly provided an oral guarantee to assume joint and several liability if the 1<sup>st</sup> defendant defaults on payment (March Conversation). However, the defendants deny the existence of any valid agreement.

By the time the action came up for trial before the High Court, a judgment had been entered against the 1<sup>st</sup> defendant by the Court of Appeal. The Court of Appeal had overturned part of the High Court's dismissal of the plaintiff's summary judgment application against all the defendants and ruled in favour of the plaintiff that an oral share sales agreement existed. Consequently, the 1<sup>st</sup> defendant was held liable to pay the Purchase Price. In light of this ruling, the plaintiff argued that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants' silence in response

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<sup>1</sup> [2023] 1 LNS 526

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to the plaintiff's WhatsApp Message regarding the March Conversation, as well as their non-response to the letter of demand, served as evidence of the alleged oral contract of guarantee.

## High Court's Rationale

In cases involving alleged oral contracts of guarantee, the burden of proving its existence lies with the party seeking to enforce the guarantee. In the present case, apart from a bare averment that the oral guarantee was purportedly given, the plaintiff failed to provide sufficient credible evidence supporting his claim.

When examining the timeline from March 2020 to mid-September 2020, there was no evidence even remotely suggesting the existence of an oral contract of guarantee made by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants to the plaintiff. The plaintiff's claim of the contract's existence only surfaced approximately six months after the March Conversation and the lack of contemporaneous documents supporting the oral contract of guarantee significantly undermined the plaintiff's claim.

The High Court recognised that silence or non-response can be treated as admission in some cases. However, it must be corroborative with other probative evidence to establish the fact asserted by the statement. This was the principle enunciated by the Court of Appeal in *Small Medium Enterprise Development Bank Malaysia (formerly known as Bank Perusahan Kecil dan Sederhana Malaysia Bhd) v Lim Woon Kat*<sup>2</sup>, whereby it was held that failure to respond only goes to conduct, which was a relevant fact but not necessarily an admission.

Whilst *Mok Yii Chek v Sovo Sdn Bhd & Ors*<sup>3</sup> established that WhatsApp messages can be admissible as evidence, the unique colloquial features of WhatsApp communication present challenges when courts attempt to interpret the contents and intentions of the parties involved. In such instances, a more nuanced interpretation may be necessary, considering factors like the author's background, personality and the context of the conversation, rather than relying solely on a literal approach to deciphering a legal document.

<sup>2</sup> [2016] 5 MLJ 220

<sup>3</sup> [2015] MLRHU 196

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Taking the plaintiff's argument at its highest, the plaintiff's WhatsApp Message merely established that the 2<sup>nd</sup> and/or 3<sup>rd</sup> defendants may have made some oral assurances during the March Conversation. However, these assurances were made at a personal level, implying that, as directors of the 1<sup>st</sup> defendant, they were willing to give their word and stake their own reputation or credibility to ensure payment by the 1<sup>st</sup> defendant.

It is crucial to note that this is not a case where there was complete silence or non-response to the plaintiff's WhatsApp messages. The 2<sup>nd</sup> defendant did respond but only in respect of the assurance or promise that the 1<sup>st</sup> defendant would complete the payment. However, there was no mention of any oral guarantee, as alleged by the plaintiff. As such, the 2<sup>nd</sup> and 3<sup>rd</sup> defendants cannot be imposed the obligation of a guarantor solely based on the 2<sup>nd</sup> defendant's silence to dispute or deny the plaintiff's claim in the WhatsApp messages.

Having considered the circumstances of the case, the High Court was of the view that the plaintiff's WhatsApp Messages were likely issued as a prelude to the letter of demand, presumably because the plaintiff realised that his chances of recovery from the 1<sup>st</sup> defendant were uncertain, after the 1<sup>st</sup> defendant's cheques were dishonoured. Thus, the plaintiff's WhatsApp messages were clearly an attempt to enhance his position by holding the 2<sup>nd</sup> and 3<sup>rd</sup> defendants to be personally liable for the Purchase Price, alleging the non-existent oral contract of guarantee.

## Commentary

While WhatsApp messages are now accepted as evidence in legal proceedings, this case illustrates the significance of thorough examination and contextual analysis when dealing with WhatsApp messages in legal proceedings. Courts will exercise caution when assessing the reliability and authenticity of electronic evidence to ensure fair and just outcomes in a rapidly changing digital landscape. Parties to legal disputes should also be mindful of the implications of informal digital communication and the need for precise and contemporaneous documentation or recording when dealing with important matters.