



SUPREME COURT OF THE PHILIPPINES  
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Republic of the Philippines  
Supreme Court  
Manila

**EN BANC**

**HERMINIO T. DISINI,**

*Petitioner,*

**G.R. No. 205172**

Present:

GESMUNDO,\* C.J.,  
PERLAS-BERNABE,  
LEONEN,  
CAGUIOA,  
HERNANDO,  
CARANDANG,  
LAZARO-JAVIER,\*  
INTING,  
ZALAMEDA,  
LOPEZ, M. V.,  
DELOS SANTOS,  
GAERLAN,  
ROSARIO, and  
LOPEZ, J. Y., JJ.

- versus -

**REPUBLIC  
PHILIPPINES,**

**OF THE**

*Respondent.*

Promulgated:

June 15, 2021

X-----Intombar-Carvas-----X

**DECISION**

**HERNANDO, J.:**

This Petition for Review on *Certiorari*<sup>1</sup> assails the April 11, 2012 Decision<sup>2</sup> and the October 24, 2012 Resolution<sup>3</sup> of the *Sandiganbayan* in Civil Case No. 0013 which declared as ill-gotten the commissions received by Herminio T. Disini (Disini) relative to the Bataan Nuclear Power Plant (BNPP) project, and ordered him to account for and reconvey the total amount

\* No part.

<sup>1</sup> *Rollo*, Vol. I, pp. 32-73.

<sup>2</sup> *Id.* at 75-126; penned by Associate Justice Rafael R. Lagos and concurred in by Associate Justices Efren N. De La Cruz and Rodolfo A. Ponferrada.

<sup>3</sup> *Id.* at 128-136.

of \$50,562,500.00, with interest until fully paid.<sup>4</sup> In its assailed Resolution, the anti-graft court denied the Republic's Motion for Partial Reconsideration and Disini's Partial Motion for Reconsideration and Motion to Strike Out for lack of merit.<sup>5</sup>

### **The Antecedents:**

This case involves the recovery of ill-gotten wealth against Disini, a close associate of former President Ferdinand E. Marcos (President Marcos), in relation to the BNPP project.<sup>6</sup> The BNPP project is a nuclear power plant project awarded to Westinghouse Electric Corporation (Westinghouse) and Burns & Roe, Inc. (B&R), as main contractor and architect-engineer, respectively, in 1976.<sup>7</sup> The BNPP remains inoperable to this day.<sup>8</sup>

On July 23, 1987, the Republic, through the Presidential Commission on Good Government (PCGG), filed a complaint for reconveyance, reversion, accounting, restitution and damages against Disini, President Marcos and Imelda Marcos (Imelda), for amassing ill-gotten wealth during President Marcos' term.<sup>9</sup> Among others, the Republic alleged that Disini received special concessions from President Marcos in relation to the award of the BNPP contract to Westinghouse and B&R, for a scandalously exorbitant amount.<sup>10</sup> Allegedly, Disini received substantial commissions from Westinghouse and B&R for the award of the contract and its execution.<sup>11</sup>

During trial, only the Republic presented evidence since Disini was a party in default<sup>12</sup> after summons to him remained unserved and after summons by publication against him was completed.<sup>13</sup> The default order was sustained by this Court in a Decision rendered on July 5, 2010 which became final and executory on November 18, 2010.<sup>14</sup>

The Republic presented the following witnesses *ex parte*, namely: (a) Lourdes Magno, Information Technology Officer III of the PCGG; (b) Rodolfo B. Jacob (Jacob), former President of Herdis Group, Inc. (Herdis); (c) Danilo Richard V. Daniel, Director IV of the PCGG Research Department; (d) Angelo Manahan (Manahan), former Executive Vice-President and Chief Operating Officer of Herdis; (e) Rafael Sison, former member of the Board of

<sup>4</sup> Id. at 125-126.

<sup>5</sup> Id. at 136.

<sup>6</sup> See id. at 75.

<sup>7</sup> Id. at 35, 112-113.

<sup>8</sup> Id. at 36.

<sup>9</sup> Id. at 76. The complaint was later on amended to implead Rafael Sison as co-defendant, in his capacity as a director of the Development Bank of the Philippines. He was, however, later on dropped from the case for being a state witness, along with Rodolfo Jacob.

<sup>10</sup> Id. at 358.

<sup>11</sup> Id.

<sup>12</sup> Id. at 90.

<sup>13</sup> Id. at 77.

<sup>14</sup> Id. at 79.

Governors of the Development Bank of the Philippines (DBP); (f) Cristina A. Beranilla, PCGG Legal Assistant; (g) Ricardo Paras III, Chief State Counsel; (h) Atty. Jesus P. Disini (Jesus), second cousin of Disini and former Senior Vice-President of Herdis; and (i) Jesus Vergara (Vergara), former President of Asia Industries, Inc. (AII).<sup>15</sup> The Republic also presented the deposition of Rolando C. Gapud (Gapud), former officer of Bancom Development Corporation, former President of the Security Bank and Trust Company, and President Marcos and Imelda's financial advisor.<sup>16</sup>

However, Jesus' testimony was not given any probative value in view of his immunity agreement with the Republic that his affidavits were to be used solely for the New Jersey District Court (NJDC) case and the International Court of Arbitration (ICA) proceedings involving Westinghouse and B&R's claims against the Republic. This Court upheld the said immunity agreement in *Disini v. Sandiganbayan*<sup>17</sup> which clearly prohibited the Republic from using him as a witness in "any claim brought by the Republic against Herminio Disini."

The Republic also offered documentary evidence, such as Exhibits A to Z and series; AA to ZZ and series; AAA to ZZZ and series; and AAAA to DDDD and series.<sup>18</sup>

#### **Version of the Republic:**

The Republic claimed that Westinghouse solicited the influence of Disini, a known close associate of President Marcos, to become its Special Sales Representative (SSR) to ensure its appointment as the main contractor for the BNPP project, for a fee of 3% of the contract price as commission.<sup>19</sup> The Republic also alleged that Disini unduly took advantage of his close association with President Marcos to obtain favorable terms for Westinghouse by requesting President Marcos to issue orders or directives to the National Power Corporation (NPC) to accept Westinghouse's proposals in relation with the BNPP project.

Meanwhile, AII and Westinghouse entered into an agreement wherein the former would act as the latter's SSR in the Philippines for a fee of \$3,000,000.<sup>20</sup> Thereafter, Power Contractors, Inc. (PCI); a consortium entered into by Onofre B. Banson, Antonio P. Chanco, Vergara, Jose P. Dans, Jr., Rufino M. Asi, Ventura O. Ducut, Claudio B. Altura, Lucio C. Torres, and Jacob, as stockholders, Monark International Inc., Vinnell-Belvoir Corporation, and Engineering Equipment, Inc., was formed to undertake the

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<sup>15</sup> Id.

<sup>16</sup> *Records*, Vol. IX, p. 492.

<sup>17</sup> 635 Phil. 402 (2010).

<sup>18</sup> *Records*, Vol. IX, pp. 192-233.

<sup>19</sup> Id. at 240.

<sup>20</sup> Id. at 916, 928.

civil and other related works of the BNPP project.<sup>21</sup> PCI was 40% owned by AII.<sup>22</sup>

Thereafter, Disini, through his company Herdis, acquired AII's 40% interest in PCI to gain and benefit from PCI's contract with Westinghouse.<sup>23</sup> Also, he acquired AII to benefit from the latter's SSR agreement with Westinghouse.<sup>24</sup> The Republic claimed that all commissions due to AII was directly paid by Westinghouse to Disini, through Herdis, and not to AII which resulted in the latter's financial distress.

On the other hand, B&R had a written agreement with Technosphere Consultant Group, Inc. (TCI), a company owned by Herdis. Pursuant to their agreement, TCI would receive a commission of 10% of the contract price of B&R as the architect-engineer in the BNPP project. This commission was for the services rendered by Disini in influencing President Marcos to award the BNPP project to B&R as architect-engineer.

Both Westinghouse and B&R made their payments to Disini beginning 1976. However, these commissions were not recorded in the books of Herdis, AII or TCI. Instead, they were remitted by Westinghouse and B&R to a certain Rene Pasche in Switzerland who deposited the money in Disini's Switzerland bank accounts. However, in 1978, Westinghouse started to remit the commissions through the International Corporate Bank (Interbank) in the Philippines in which Disini and Jacob were the authorized signatories. A substantial portion of the Interbank account was then deposited in the overseas bank accounts in Switzerland under the account names "965 Summa" and "735 Phil" with Disini's wife, Pacencia, and Jacob as the authorized signatories.<sup>25</sup>

### ***Sandiganbayan Decision:***

On April 11, 2012, the *Sandiganbayan* rendered its assailed Decision declaring the commissions in the amount of \$50,562,500.00 received by Disini to be ill-gotten wealth<sup>26</sup> and ordering him to account for and reconvey the said amount to the Republic.<sup>27</sup> The dispositive portion of the assailed Decision reads:

**WHEREFORE**, premises considered, judgment is hereby rendered DECLARING ILL-GOTTEN the commissions received by defendant HERMINIO T. DISINI in connection with the Bataan Nuclear Power Plant transaction. Defendant Disini is ordered to ACCOUNT for these commissions

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<sup>21</sup> Id. at 944.

<sup>22</sup> Id. at 897.

<sup>23</sup> Id.

<sup>24</sup> Id. at 935.

<sup>25</sup> Id. at 275.

<sup>26</sup> *Rollo*, Vol. I, p. 125.

<sup>27</sup> Id.

and to RECONVEY the total amount of \$50,562,500.00 he received by virtue of this transaction to the Plaintiff, with interest until fully paid. Plaintiff's claims for actual, moral, temperate, nominal, exemplary damages, attorney's fees, litigation expenses, and treble judicial costs are DISMISSED for not being established by a preponderance of evidence.<sup>28</sup>

Notably, only Disini was found liable by the *Sandiganbayan* of having amassed ill-gotten wealth by way of substantial commissions totaling \$50,562,500.00 which he received from Westinghouse and B&R in connection with the BNPP project. The *Sandiganbayan* found Disini to be a close personal and business associate of President Marcos based on the following: his appearances in Malacañang to play golf together with a select group of people, several phone calls from President Marcos himself, submission of *aide memoires* to President Marcos which contained information relating to the business development of Herdis, and various requests to President Marcos for the approval of his loans from government banks and other requests for the benefit of his companies.<sup>29</sup>

In ruling for the Republic, the *Sandiganbayan* relied on the testimonies of witnesses Manahan, Vergara, and Jacob, all of whom were privy to the BNPP project.<sup>30</sup> It held that the evidence presented by the Republic established the following:

Disini, as the owner of Herdis and a known close associate and family friend of President Marcos, served as an SSR of Westinghouse<sup>31</sup> and B&R<sup>32</sup> in exchange for substantial commissions totaling \$50,562,500.00.<sup>33</sup> As Westinghouse and B&R's SSR, Disini used his personal and close association with President Marcos to ensure that the BNPP project would be awarded to Westinghouse and B&R.<sup>34</sup> In addition, Disini sought private concessions from President Marcos in the form of orders which favored and allowed Westinghouse and B&R to continue with the BNPP project despite unfavorable terms against the Philippines.<sup>35</sup>

In arriving at the total amount of commissions received by Disini from Westinghouse and B&R, the *Sandiganbayan* primarily relied on Exhibit E-9,<sup>36</sup> Disini's purported summary of the total commissions from Westinghouse and B&R in relation to the BNPP project. The Anti-Graft Court found no probative value on the documentary evidence relating to the existence of Disini's Switzerland bank accounts to prove receipt of commissions as they were mere photocopies, unauthenticated and not properly translated.

<sup>28</sup> Id.

<sup>29</sup> *Records*, Vol IX, pp. 238-242, 283-288.

<sup>30</sup> *Rollo*, Vol. I, p. 115.

<sup>31</sup> Id. at 107.

<sup>32</sup> *Records*, Vol IX, pp. 896, 911.

<sup>33</sup> *Rollo*, Vol. I, p. 117.

<sup>34</sup> Id. at 122-123.

<sup>35</sup> Id. at 109-110.

<sup>36</sup> Id. at 405.

Nonetheless, the *Sandiganbayan* ruled that even if most of the documentary evidence were photocopies with no probative value, the testimonies of Manahan, Vergara, Jacob and Sison constituted preponderant evidence that: (a) Disini and President Marcos were close associates, or relatives by affinity; (b) President Marcos acquiesced to Disini's representation as the exclusive agent for Westinghouse and B&R with respect to the BNPP project; (c) Westinghouse and B&R agreed to pay commission to Disini for the latter to influence President Marcos to award the contracts to them; and (d) Disini, did in fact, receive these commissions.

However, while the *Sandiganbayan* found Disini liable, it held that there was no evidence of President Marcos' and Imelda's receipt of the commissions.<sup>37</sup> Thus, they were not held liable.<sup>38</sup>

Both parties filed their respective motions for reconsideration. The Republic argued that it sufficiently proved that anomalous grants of loans and guarantees were given to the companies owned by President Marcos and Disini through Presidential Decree (P.D.) Nos. 550 and 750; and Letter of Instruction (LOI) Nos. 658 and 1132. It insisted that President Marcos and Disini misappropriated, embezzled and converted funds of government financial institutions by granting unwarranted favors to Herdis. It likewise alleged that President Marcos accumulated ill-gotten wealth in conspiracy with Disini, thus, he should also be held liable for the receipt of commissions from Westinghouse and B&R in relation to the BNPP project. Lastly, it claimed that it is entitled to actual, temperate, nominal and exemplary damages, attorney's fees and other judicial costs.

On the other hand, Disini opined that the Republic had no cause of action against him as there was no contract or quasi-contract violated. Also, he alleged that witnesses Manahan, Vergara and Jacob had no personal knowledge of the allegations in their affidavits. Specifically, he cited Manahan's Transcripts of Stenographic Notes (TSN) in Criminal Case No. 28001-02<sup>39</sup> filed before the *Sandiganbayan* which showed his lack of personal knowledge on matters alleged in his affidavit. Also, he insisted that he did not take undue advantage of his alleged close relationship with President Marcos for personal gain or benefit. Lastly, no evidence was adduced to prove the amount of commissions he allegedly received from Westinghouse and B&R.

On October 24, 2012, the *Sandiganbayan* denied both the Republic's Motion for Partial Reconsideration and Disini's Partial Motion for Reconsideration and Motion to Strike Out for lack of merit.<sup>40</sup> It ruled that Disini, having been declared in default, cannot present as evidence Manahan's TSN in Criminal Case Nos. 28001-02 in a motion for reconsideration.

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<sup>37</sup> Id. at 118.

<sup>38</sup> Id. at 124.

<sup>39</sup> Id. at 267-315.

<sup>40</sup> Id. at 136.

As a party in default, Disini lost his right to present evidence and to participate in the trial by filing a Motion to Strike Out. Thus, the *Sandiganbayan* ruled that it is not bound to recognize the said Motion to Strike Out filed by Disini or to act on it.

As to the Republic's motion for partial reconsideration, the *Sandiganbayan* held that it failed to present credible evidence to prove the accumulation of ill-gotten wealth by President Marcos, Imelda and Disini based on P.D.s and LOI issued by President Marcos. The anti-graft court noted that the Republic did not offer any evidence to prove the specific amounts of loans or other accommodations granted by President Marcos to Disini.

It opined that the Republic should not expect the *Sandiganbayan* to make its own investigation to determine the particular loan amounts or accommodations and favorable treatment granted to Disini by President Marcos based on P.D. Nos. 550 and 750 as well as LOI Nos. 658 and 1132. As to the damages claimed by the Republic, the *Sandiganbayan* ruled that there was no factual basis for the award of moral, temperate, nominal and exemplary damages.<sup>41</sup>

As to Disini's motion for partial reconsideration, the *Sandiganbayan* ruled that Jacob's testimony proved that Disini indeed received commissions from Westinghouse and B&R for his services rendered regarding the award of the BNPP project to them. Absent any countervailing evidence, Jacob's testimony deserved probative weight despite the lack of documentary proof. However, the *Sandiganbayan* maintained its ruling that there was no sufficient evidence to show that President Marcos and Imelda received any commissions from Westinghouse and B&R.<sup>42</sup>

Hence, Disini filed the instant Petition for Review on *Certiorari* under Rule 45. Meanwhile, on June 3, 2014, Disini died and was substituted in the suit by his heir Herminio Angel E. Disini, Jr.<sup>43</sup>

### Issues

Disini raised the following issues<sup>44</sup> in his Petition:

1. Whether the *Sandiganbayan* violated the rule on authentication of documents under Section 20 of Rule 132 of the Rules of Court when it admitted and relied on Republic's Exhibit E-9. x x x

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<sup>41</sup> Id. at 124.

<sup>42</sup> Id.

<sup>43</sup> *Rollo*, Vol II, pp. 668-670, 671-674.

<sup>44</sup> *Rollo*. Vol. I, pp. 46-47.

2. Whether there [was] a civil law cause of action that justify[d] the *Sandiganbayan's* [order] to account for and reconvey to the Republic the sum of \$50,562,500.00. x x x

3. Whether the *Sandiganbayan* violated Section 14 of Article VIII of the 1987 Constitution when it concluded that the Westinghouse contract exist[ed]. x x x

4. Whether the *Sandiganbayan* violated Section 14 of Article VIII of the [1987 Constitution] when it concluded that [Disini] received the sum of \$50,562,500.00. x x x

*First*, Disini claims that the *Sandiganbayan* disregarded the rule on authentication of documents when it admitted and relied on Exhibit E-9, a private document attached to Manahan's affidavit, to arrive at the amount of \$50,562,500.00.<sup>45</sup> According to Disini, no one authenticated, signed, nor identified Exhibit E-9.<sup>46</sup> Further, Exhibit E-9 was allegedly disowned by Manahan during the taking of his deposition in separate criminal cases.<sup>47</sup>

However, the *Sandiganbayan* refused to consider Manahan's deposition on the ground that Disini was a party in default. Disini contends that the anti-graft court should not have ignored evidence which was presented in a related case lest it violate the fundamental rule of fairness and deny the defaulting party due process of law.

Moreover, Disini argues that the *Sandiganbayan* simply cannot infer from or use the amounts indicated in Exhibit E-9 as there was nothing in the said document which would suggest that the amounts represented the commissions paid to Disini. No other evidence was presented to prove that actual payments were made.

Besides, the Republic did not offer as evidence the Westinghouse and B&R contracts which would be the best evidence to prove the amount of commissions. The *Sandiganbayan* cannot take judicial notice of the: (1) contracts of the BNPP project; (2) consideration therefor; (3) commission agreements related thereto; and (4) payments to Westinghouse by the Republic or the commissions actually received by Disini.

Also, the witnesses presented had no personal knowledge of the Westinghouse and B&R contracts. In fact, Vergara testified that he was not present during the negotiation of the final draft of the contract and the signing thereof. Even Jacob did not categorically testify that the amounts he remitted pertained to commissions from certain contracts as he had no personal knowledge that the said commissions were related to particular transactions.

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<sup>45</sup> Id. at 47-55.

<sup>46</sup> Id.

<sup>47</sup> Id.



*Second*, Disini alleges that there was no civil law cause of action that justified the *Sandiganbayan*'s directive to account for and reconvey to the Republic the sum of \$50,562,500.00.<sup>48</sup> Disini claims that he was never a public official, hence, he could not be held liable for breach of public trust. There was also no evidence to prove that the alleged commissions he received were part of the purchase price paid by the Republic to Westinghouse and B&R relating to the BNPP project.

Disini cites the rulings of the two (2) foreign tribunals, namely, the NJDC and the ICA, which found that no bribery attended the execution of the Westinghouse and B&R contracts, respectively. Both the NJDC and the ICA found no evidence that Disini acted as agent to secure the award of the BNPP project to Westinghouse and B&R; neither was there any evidence to prove that President Marcos received commissions from the said contracts.

Furthermore, Disini asserts that he could not be held liable for breach of trust without a public officer being also held liable as a conspirator. The reliance of the *Sandiganbayan* on Executive Order (EO) Nos. 1, 2 and 14-A was misplaced as these EOs did not create a civil cause of action but merely authorized the PCGG to undertake the recovery of ill-gotten wealth and vest the *Sandiganbayan* with jurisdiction thereon. No law was mentioned upon which to base the cause of action for the reconveyance of \$50,562,500.00.

*Third*, Disini maintains that the *Sandiganbayan* violated Section 14 of Article VIII of the 1987 Constitution when it concluded that the Westinghouse contract existed even though it was never produced, presented nor seen by any witnesses.<sup>49</sup> The *Sandiganbayan* accepted as a fact the existence of the Westinghouse and B&R contracts without any documentary proof presented by the Republic.

Disini also insists that the Republic can no longer assail the validity of the Westinghouse and B&R contracts as the ICA and NJDC decisions found no illegalities in their procurement, award, negotiation and execution. The Republic cannot relitigate the same issue as it is bound by the foreign decisions.

*Finally*, Disini avers that the *Sandiganbayan* violated Section 14 of Article VIII of the 1987 Constitution when it concluded that he received the sum of \$50,562,500.00, despite lack of proof thereof.<sup>50</sup> He contends that Jacob did not specifically quantify the total commissions he allegedly received. The absence of the specific amount precludes a conclusion that he actually received commissions from Westinghouse and B&R.

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<sup>48</sup> Id. at 55-60.

<sup>49</sup> Id. at 60-63.

<sup>50</sup> Id. at 63-70.

Also, Jacob did not identify all the documents attached to his affidavit. He merely mentioned Exhibit 3 as an example, but the said document pertained to Herdis and TCI and did not indicate Disini as the recipient or payee of the alleged remittance. No bank documents were presented by the Republic to show the remittances to his accounts in Interbank, as well as the subsequent transfers to his accounts in Switzerland and other places. Disini argues that the *Sandiganbayan* failed to explicitly state the facts upon which its conclusion that he received \$50,562,500.00 were based in violation of due process and Section 14, Article VIII of the Constitution.

In its July 29, 2013 Comment,<sup>51</sup> the Republic argued that it has valid civil causes of action against Disini.<sup>52</sup> Since the complaint was for recovery of ill-gotten wealth, it was founded on EO Nos. 1, 2 and 14-A (1986).<sup>53</sup> The PCGG was tasked to recover ill-gotten wealth amassed by President Marcos, his close relatives, subordinates, business associates, dummies, agents, or nominees. Under EO No. 14-A, the PCGG, with the assistance of the Office of the Solicitor General (OSG) and other government agencies, is empowered to file and prosecute all ill-gotten wealth cases investigated by it under EO Nos. 1 and 2.

The Republic further argued that despite the fact that Disini was not a public official or fiduciary agent of the government, his receipt of substantial commissions by reason of his influence and close relationship with President Marcos constitutes grave abuse of right and power resulting in unjust enrichment and causing grave damage and prejudice to the Republic and the Filipinos.

The Republic also maintains that the *Sandiganbayan* correctly relied on Exhibit E-9 in arriving at the amount of \$50,562,500.00 since Manahan attested to its veracity.<sup>54</sup> Exhibit E-9, a one-page tabulation of commissions received by Disini typed on his stationery, forms part of Manahan's affidavit. While the amount of \$50,562,500.00 is not expressly stated in Exhibit E-9, a simple addition of the amounts listed in Items I to IV would sum up to \$50,562,500.00. Exhibit E-9 was identified by Manahan in his direct examination where he declared that he fully understood the contents of his affidavit and attested to the veracity of all its annexes attached thereto.

Further, considering that Disini was in default, he is barred from presenting evidence such as witness Manahan's alleged disavowal of Exhibit E-9 in Criminal Case Nos. 28001-02.<sup>55</sup> As a consequence of the default order, Disini can no longer present his own evidence and therefore cannot invoke

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<sup>51</sup> *Rollo*, Vol. II, pp. 581-619.

<sup>52</sup> *Id.* at 588-596.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 597.

<sup>55</sup> *Id.* at 597-601.

Manahan's deposition in Criminal Case Nos. 28001 and 28002 pending before the *Sandiganbayan*.

As to the existence of the Westinghouse contract and Disini's receipt of the commissions, the Republic argues that both were satisfactorily established by the testimonies of witnesses Jacob, Manahan and Vergara.<sup>56</sup> In particular, the testimonies of Manahan and Vergara as to the existence of the Westinghouse and B&R contracts are entitled to great weight because of their credibility and close business relationship with Disini. Also, Disini is estopped from questioning the existence of the Westinghouse and B&R contracts as he himself invoked the decisions of the NJDC and ICA. In effect, he admitted the existence of the said contracts.

Lastly, the Republic alleges that Disini's petition should be dismissed as it was filed out of time.<sup>57</sup> Disini received a copy of the *Sandiganbayan's* Resolution dated October 24, 2012 on November 7, 2012. Under Section 2, Rule 45 of the Rules of Court, Disini had only 15 days from November 7, 2012, or until November 22, 2012 within which to file a petition for review on *certiorari*. However, Disini filed his petition more than two (2) months from November 22, 2012. Hence, this petition was clearly filed out of time or as a mere afterthought.

In his January 21, 2014 Reply,<sup>58</sup> Disini reiterates the following: (a) Exhibit E-9 is unreliable, incompetent and unauthenticated which should not have been relied upon by the *Sandiganbayan* in computing his alleged commissions; (b) the Republic has no legal basis to account for the amount of \$50,562,500.00 as he did not violate any of its rights under EO Nos. 1, 2 and 14-A; (c) the *Sandiganbayan* should not have ignored witness Manahan's disavowal of Exhibit E-9 in Criminal Case Nos. 28001-02;<sup>59</sup> and (d) the *Sandiganbayan* should have required the Republic to present the Westinghouse and B&R contracts and Disini's alleged SSR agreements. Lastly, he opined that procedural rules should be liberally applied and that the instant petition should be given due course as it is of transcendental importance.

After the parties' submission of their respective memoranda, the case was submitted for resolution.<sup>60</sup>

### **Our Ruling**

We grant the Petition in part.

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<sup>56</sup> Id. at 601-614.

<sup>57</sup> Id. at 614-615.

<sup>58</sup> Id. at 627-665.

<sup>59</sup> Id. at 630-641.

<sup>60</sup> Id. at 699-742, 750-827.

The issues raised by Disini will be discussed into two (2) parts, *viz.*: (I) whether the Republic, through the PCGG and the assistance of the OSG, has a cause of action against Disini in relation to the recovery of substantial commissions he received from Westinghouse and B&R; and (II) whether there is preponderance of evidence to prove that Disini is liable to account for and reconvey the ill-gotten wealth he acquired from Westinghouse and B&R in relation with the BNPP project.

## I

### **The case is founded on EO Nos. 1, 2, 14 and 14-A (1986).**

Section 1(d) of the Freedom Constitution<sup>61</sup> mandates the President to continue the exercise of legislative power until a legislature is elected and convened under a New Constitution. It vests in the President the power and duty to enact measures to achieve the mandate of the people, among others, “the [recovery] of ill-gotten properties amassed by the leaders and supporters of the previous regime and protect the interest of the people through orders of sequestration or freezing of assets of accounts.”<sup>62</sup> Hence, then President Corazon C. Aquino (Pres. Aquino) issued EO No. 1 creating the PCGG with the task of assisting the President in regard to:

(a) The recovery of all ill-gotten wealth accumulated by former President Ferdinand E. Marcos, his immediate family, relatives, subordinates and close associates, whether located in the Philippines or abroad, including the takeover or sequestration of all business enterprises and entities owned or controlled by them, during his administration, directly or through nominees, by taking undue advantage of their public office and/or using their powers, authority, influence, connections or relationship.

(b) The investigation of such cases of graft and corruption as the President may assign to the Commission from time to time.

(c) The adoption of safeguards to ensure that the above practices shall not be repeated in any manner under the new government, and the institution of adequate measures to prevent the occurrence of corruption.<sup>63</sup>

Further, EO No. 2<sup>64</sup> was issued enjoining the following:

(1) Freeze all assets and properties in the Philippines in which former President Marcos and/or his wife, Mrs. Imelda Romualdez Marcos, their close relatives, subordinates, business associates, dummies, agents, or nominees have any interest or participation.

<sup>61</sup> 1986 Provisional (Freedom) Constitution of the Philippines; Proclamation No. 3, February 28, 1986.

<sup>62</sup> Section 1 (d) of the Freedom Constitution.

<sup>63</sup> Executive Order No. 1 (1986).

<sup>64</sup> Executive Order No. 2 (1986).

(2) Prohibit any person from transferring, conveying, encumbering or otherwise depleting or concealing such assets and properties or from assisting or taking part in their transfer, encumbrance, concealment, or dissipation under pain of such penalties as are prescribed by law.

(3) Require all persons in the Philippines holding such assets or properties, whether located in the Philippines or abroad, in their names as nominees, agents or trustees, to make full disclosure of the same to the Presidential Commission on Good Government within (30) days from publication of this Executive Order, or the substance thereof, in at least two (2) newspapers of general circulation in the Philippines.

(4) Prohibit former President Ferdinand Marcos and/or his wife, Imelda Romualdez Marcos, their close relatives, subordinates, business associates, dummies, agents, or nominees from transferring, conveying, encumbering, concealing or dissipating said assets or properties in the Philippines and abroad, pending the outcome of appropriate proceedings in the Philippines to determine whether any such assets or properties were acquired by them through or as a result of improper or illegal use of or the conversion of funds belonging to the Government of the Philippines or any of its branches, instrumentalities, enterprises, banks or financial institutions, or by taking undue advantage of their official position, authority, relationship, connection or influence to unjustly enrich themselves at the expense and to the grave damage and prejudice of the Filipino people and the Republic of the Philippines.<sup>65</sup>

Thereafter, EO No. 14 was issued directing the PCGG to file all such cases, whether civil or criminal, with the *Sandiganbayan* to recover all assets and properties illegally acquired or misappropriated by President Marcos, Imelda, their close relatives, subordinates, business associates, dummies, agents or nominees. Further, EO No. 14-A decreed that civil suits to recover unlawfully acquired property under Republic Act No. 1379 or for the restitution, reparation of damages, or indemnification for consequential and other damages or any other civil actions under the Civil Code or other existing laws filed with the *Sandiganbayan* against President Marcos, Imelda, their close relatives and associates, may proceed independently of any criminal proceedings and may be proved by preponderance of evidence.<sup>66</sup>

Verily, the Freedom Constitution and EO Nos. 1, 2, 14 and 14-A confirm the authority and duty given to the PCGG to file the instant action against Disini for recovery of his alleged ill-gotten wealth relative to the BNPP project. Thus, contrary to Disini's contention, the Republic, through the PCGG, has a valid cause of action against him. EO No. 1, founded on the Freedom Constitution, explicitly tasked the PCGG to assist in the recovery of ill-gotten wealth. EO Nos. 2, 14 and 14-A further defined and bolstered the duties of the PCGG in the exercise of its mandate. There is no doubt, therefore, that the Republic, through the PCGG, has a clear-cut cause to file the present suit against Disini in view of his alleged involvement in the BNPP

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<sup>65</sup> Id.

<sup>66</sup> Executive Order No. 14-A (1986).

project through receipt of substantial commissions from Westinghouse and B&R for influencing President Marcos in their favor.

Furthermore, it is clear from the Amended Complaint<sup>67</sup> that the action is one for **recovery of ill-gotten wealth**:

#### I. NATURE OF THE ACTION

1. This is a civil action against Defendants Herminio T. Disini, Rodolfo Jacob, Rafael A. Sison, Ferdinand E. Marcos and Imelda R. Marcos **to recover from them ill-gotten wealth consisting of funds and other property** which they, in unlawful concert with one another, had acquired and accumulated in flagrant breach of trust and of their fiduciary as public officers, with grave abuse of right and power and in brazen violation of the Constitution and laws of the Republic of the Philippines, thus resulting in their unjust enrichment during Defendant Ferdinand E. Marcos' 20 years of rule from December 30, 1965 to February 25, 1986, first as President of the Philippines under the 1935 Constitution and, thereafter, as one-man ruler under martial law and Dictator under the 1973 Marcos-promulgated Constitution.

x x x x

#### IV

#### GENERAL AVERMENTS OF DEFENDANTS' ILLEGAL ACTS

x x x x

10. Among others, in furtherance of the plan and acting in the manner referred to above, in unlawful concert with one another and with gross abuse of power and authority, Defendants Ferdinand E. Marcos and Imelda R. Marcos:

x x x x

(b) **awarded contracts with the Government to their relatives, business associates, dummies, nominees, agents or persons who were beholden to said Defendants, under terms and conditions grossly and manifestly disadvantageous to the government;**

x x x x

#### V

#### SPECIFIC AVERMENTS OF DEFENDANTS' ILLEGAL ACTS

13. **Defendants Herminio T. Disini** and Rodolfo Jacob, by themselves and/or **in unlawful concert, active collaboration and willing participation of Defendants Ferdinand E. Marcos and Imelda R. Marcos, and taking undue advantage of their association and influence with the latter Defendant**

<sup>67</sup> Rollo, Vol. I, pp. 347-367.

spouses in order to prevent disclosure and recovery of ill-gotten assets, engaged in devices, schemes and stratagems such as:

(a) [A]cted as the above Defendant spouses' dummy, nominee and/or agent in acquiring and exercising control of several corporations, such as: (1) Herdis Group of companies, (2) Energy Corporation, (3) Vulcan Industrial Mining, (4) United Oriental Bank, (5) Three-M;

X X X X

(c) [U]nlawfully utilizing the Herdis Group of Companies and Asia Industries, Inc. as conduits through which Defendants received, kept, and/or invested improper payments such as unconscionably large commissions from foreign corporations, like the Westinghouse Corporations;

(d) [S]ecured special concessions, privileges and/or benefits from Defendants Ferdinand E. Marcos and Imelda R. Marcos, such as a contract awarded to Westinghouse Corporation which built an inoperable nuclear facility in the country for a scandalously exorbitant amount that included Defendant's staggering commissions – Defendant Rodolfo Jacob executed for HGI the contract for the aforesaid nuclear plan;

X X X X

14. The acts of Defendants, singly or collectively, and/or in unlawful concert with one another, constitute gross abuse of official position and authority, flagrant breach of public trust and fiduciary obligations, acquisition of unexplained wealth, brazen abuse of right and power, unjust enrichment, violation of the Constitution and laws of the Republic of the Philippines, to the grave and irreparable damage of Plaintiff and the Filipino people.<sup>68</sup> (Emphases supplied)

The allegations in the Amended Complaint clearly show that Disini is being sued for amassing ill-gotten wealth. Indeed, as will be further discussed hereafter, the commissions received by Disini from Westinghouse and B&R are ill-gotten wealth which necessitate the filing of this action.

The PCGG Rules and Regulations define ill-gotten wealth as follows:

SECTION 1. Definition. — (A) "Ill-gotten wealth" is hereby defined as any asset, property, business enterprise or material possession of persons within the purview of Executive Orders Nos. 1 and 2, acquired by them directly, or indirectly thru dummies, nominees, agents, subordinates and/or business associates by any of the following means or similar schemes:

<sup>68</sup> Id.

(1) Through misappropriation, conversion, misuse or malversation of public funds or raids on the public treasury;

**(2) Through the receipt, directly or indirectly, of any commission, gift, share, percentage, kickbacks or any other form of pecuniary benefit from any person and/or entity in connection with any government contract or project or by reason of the office or position of the official concerned.**

(3) By the illegal or fraudulent conveyance or disposition of assets belonging to the government or any of its subdivisions, agencies or instrumentalities or government-owned or controlled corporations;

(4) By obtaining, receiving or accepting directly or indirectly any shares of stock, equity, or any other form of interest or participation in any business enterprise or undertaking;

(5) Through the establishment of agricultural, industrial or commercial monopolies or other combination and/or by the issuance, promulgation and/or implementation of decrees and orders intended to benefit particular persons or special interests; and

**(6) By taking undue advantage of official position, authority, relationship or influence for personal gain or benefit.**<sup>69</sup> (Emphasis supplied)

In *Republic v. Sandiganbayan*,<sup>70</sup> ill-gotten wealth is defined as the “vast resources of the government” amassed by President Marcos, his immediate family, relatives and close associates, to wit:

Although E.O. No. 1 and the other issuances dealing with ill-gotten wealth (*i.e.*, E.O. No. 2, E.O. No. 14, and E.O. No. 14-A) only identified the subject matter of ill-gotten wealth and the persons who could amass ill-gotten wealth and did not include an explicit definition of *ill-gotten wealth*, we can still discern the meaning and concept of *ill-gotten wealth* from the WHEREAS Clauses themselves of E.O. No. 1, in that **ill-gotten wealth consisted of the "vast resources of the government" amassed by "former President Ferdinand E. Marcos, his immediate family, relatives and close associates both here and abroad." It is clear, therefore, that ill-gotten wealth would not include all the properties of President Marcos, his immediate family, relatives, and close associates but only the part that originated from the "vast resources of the government."**<sup>71</sup> (Emphasis supplied)

In *Bataan Shipyard & Engineering Co., Inc. v. Presidential Commission on Good Government*<sup>72</sup> and *Presidential Commission on Good Government v. Tan*,<sup>73</sup> We defined ill-gotten wealth as those “acquired through or as a result of improper or illegal use of or the conversion of funds belonging to the

<sup>69</sup> PCGG Rules and Regulations Implementing Executive Orders Nos. 1 and 2 (1986).

<sup>70</sup> 663 Phil. 212 (2011).

<sup>71</sup> *Id.* at 298.

<sup>72</sup> 234 Phil. 180 (1987).

<sup>73</sup> 564 Phil. 426 (2007).



Government or any of its branches, instrumentalities, enterprises, banks or financial institutions, or by taking undue advantage of official position, authority, relationship, connection or influence, resulting in unjust enrichment of the ostensible owner and grave damage and prejudice to the State.”<sup>74</sup>

Furthermore, in *Chavez v. Presidential Commission on Good Government*,<sup>75</sup> ill-gotten wealth is defined as those “assets and properties purportedly acquired, directly or indirectly, by former President Marcos, his immediate family, relatives and close associates through or as a result of their improper or illegal use of government funds or properties; or their having taken undue advantage of their public office; or their use of powers, influence or relationships, resulting in their unjust enrichment and causing grave damage and prejudice to the Filipino people and the Republic of the Philippines.”<sup>76</sup>

In sum, in order to be considered as ill-gotten wealth, they must have: (a) originated from the government; and (b) been taken by former President Marcos, his immediate family, relatives, and close associates by illegal means.<sup>77</sup>

Evidently, the BNPP is a government project the construction of which was awarded to Westinghouse as the main contractor and B&R as the architect-engineer, allegedly through undue advantage of Disini’s influence and close association with President Marcos. In exchange, Disini allegedly received substantial commissions based on 3% and 10% of the total contract price from Westinghouse and B&R, respectively. Obviously, the payment of the alleged commissions would be coming from Westinghouse and B&R, which are private corporations, and not directly from the government.

However, contrary to the contention of Disini, ill-gotten wealth also encompasses those that are derived indirectly from government funds or properties through the use of power, influence, or relationship resulting in unjust enrichment and causing grave damage and prejudice to the Filipino people and the Republic. The alleged subject commissions may not have been sourced directly from the public funds but it is beyond cavil that Disini would not have amassed these commissions had he not exerted undue influence on President Marcos.

Disini indirectly and unjustly enriched himself through his influence and close association with President Marcos by ensuring that the BNPP project would be awarded to Westinghouse and B&R. Besides, his alleged receipt of commissions from Westinghouse and B&R is clearly within the definition of ill-gotten wealth under the PCGG Rules and Regulations, that is, the receipt,

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<sup>74</sup> Id. at 443.

<sup>75</sup> 360 Phil. 133 (1998).

<sup>76</sup> Id. at 165.

<sup>77</sup> Id.

directly or indirectly, of any commission from an entity in connection with any government contract or project.

Disini's argument that he may not be held liable since he was not a public officer, or that there was no finding of conspiracy between him and President Marcos, deserves scant consideration. Suffice it to say that EO Nos. 1, 2, 14 and 14-A (1986) clearly provide that ill-gotten wealth may be recovered from President Marcos' immediate family, relatives, subordinates and close associates, notwithstanding their private status. Undoubtedly, the Republic may recover ill-gotten wealth not only from President Marcos, Imelda and his immediate family but also from his dummies, nominees, agents, subordinates and/or business associates whether or not President Marcos is also found liable together with them.

In light of the above issuances authorizing the recovery of ill-gotten wealth, there is no doubt that the Republic has a valid cause of action founded in EO Nos. 1, 2, 14 and 14-A (1986).

## II

We now come to the issue of whether the Republic has proved by preponderance of evidence its allegations that Disini should be held liable and made to account for and reconvey his ill-gotten wealth consisting of the substantial commissions he received from Westinghouse and B&R relative to the BNPP project. To resolve this matter, the Court needs to review and evaluate the evidence presented by the Republic which is generally not allowed in a petition for review on *certiorari* under Rule 45.

### **Procedural matters:**

As a general rule, the Court's jurisdiction in a Rule 45 petition is limited to the review of pure questions of law.<sup>78</sup> Rule 45 does not allow the review of questions of fact because the Court is not a trier of facts.<sup>79</sup>

A question of law arises when there is doubt as to what the law is on a certain state of facts, while a question of fact exists when there is doubt as to the truth or falsity of the alleged facts.<sup>80</sup> The test in determining whether a question is one of law or of fact is whether the appellate court can resolve the issue raised without reviewing or evaluating the evidence, in which case, it is

<sup>78</sup> RULES OF COURT, Rule 45, Sec. 1 provides:

Section 1. Filing of petition with Supreme Court. — A party desiring to appeal by *certiorari* from a judgment or final order or resolution of the Court of Appeals, the *Sandiganbayan*, the Regional Trial Court or other courts whenever authorized by law, may file with the Supreme Court a verified petition for review on *certiorari*. The petition shall raise **only questions of law** which must be distinctly set forth. (Emphasis supplied)

<sup>79</sup> *General Mariano Alvarez Services Cooperative, Inc. v. National Housing Authority*, 753 Phil. 353, 359 (2015).

<sup>80</sup> *Id.*, citing *Land Bank of the Philippines v. Yatco Agricultural Enterprises*, 724 Phil. 276, 284-285 (2014).

a question of law.<sup>81</sup> Any question that invites evaluation of the whole evidence, as well as their relation to each other and to the whole, is a question of fact and thus proscribed in a Rule 45 petition.<sup>82</sup>

The rule however admits of exceptions:

(1) [W]hen the findings are grounded entirely on speculations, surmises, or conjectures; (2) when the inference made is manifestly mistaken, absurd, or impossible; (3) when there is a grave abuse of discretion; **(4) when the judgment is based on misappreciation of facts**; (5) when the findings of fact are conflicting; (6) when in making its findings, the same are contrary to the admissions of both appellant and appellee; (7) when the findings are contrary to those of the trial court; **(8) when the findings are conclusions without citation of specific evidence on which they are based**; (9) when the facts set forth in the petition as well as in the petitioner's main and reply briefs are not disputed by the respondent; and **(10) when the findings of fact are premised on the supposed absence of evidence and contradicted by the evidence on record.**<sup>83</sup> (Emphases supplied)

Here, Disini raised the issues on the authenticity of Exhibit E-9, the existence or absence of Westinghouse and B&R contracts, and the actual receipt and amount of commissions from Westinghouse and B&R. Clearly, these issues involve questions of facts. They relate to the probative weight of Exhibit E-9, the existence of the Westinghouse and B&R contracts, and the commission agreements, and Disini's receipt of the sum of \$50,562,500.00.<sup>84</sup> Precisely, these issues require a judicious review of all the evidence presented in this case. Thus, these issues are not proper in a Rule 45 petition.

Nevertheless, We find that the circumstances in the instant case warrant the application of the exception rather than the general rule, as will be discussed below.

#### **Existence of Westinghouse and B&R contracts and commission agreements.**

The alleged commissions received by Disini, *i.e.*, 3% and 10%, were supposedly based on the total contract price of the Westinghouse and B&R contracts, respectively. However, Disini avers that the records are bereft of any evidence as to the existence of these contracts and their corresponding commission agreements. In fact, the *Sandiganbayan* anchored its decision as to existence of these contracts and commission agreements on the testimonies of Vergara and Jacob who narrated how the BNPP contract was awarded to

<sup>81</sup> Id.

<sup>82</sup> Id.

<sup>83</sup> *Verdadero v. People*, 782 Phil. 168, 176-177 (2016), citing *Laborte v. Pagsanjan Tourism Consumers' Cooperative*, 724 Phil. 434, 447-448 (2014).

<sup>84</sup> *Rollo*, Vol. I, pp. 46-47.

Westinghouse and B&R and how Disini used his close personal relationship with President Marcos to obtain substantial concessions.

Under the Best Evidence Rule under Section 3, Rule 130 of the Rules of Court, no evidence shall be admissible other than the original document when the subject of inquiry is the contents of a document, to wit:

Section 3. *Original document must be produced; exceptions.* — When the subject of inquiry is the contents of a document, no evidence shall be admissible other than the original document itself, except in the following cases:

(a) When the original has been lost or destroyed, or cannot be produced in court, without bad faith on the part of the offeror;

(b) When the original is in the custody or under control of the party against whom the evidence is offered, and the latter fails to produce it after reasonable notice;

(c) When the original consists of numerous accounts or other documents which cannot be examined in court without great loss of time and the fact sought to be established from them is only the general result of the whole; and

(d) When the original is a public record in the custody of a public officer or is recorded in a public office.

The rule's purpose is to ensure that the exact contents of a writing are brought before the court,<sup>85</sup> to act as an insurance against fraud<sup>86</sup> and to protect against misleading inferences resulting from the intentional or unintentional introduction of selected portions of a larger set of writings.<sup>87</sup> However, when the evidence sought to be introduced concerns external facts, such as the existence, execution or delivery of the writing, without reference to its terms, the Best Evidence Rule cannot be invoked.<sup>88</sup> In such case, secondary evidence may be admitted even without presenting the original.

In the present case, the Republic claims to have proved the existence of the Westinghouse and B&R contracts in relation to the BNPP project as well as the existence of their corresponding commission agreements with Disini.

We agree with the Republic. As to the proof of the existence of the Westinghouse and B&R contracts in relation to the BNPP project as well as the existence of their corresponding commission agreements with Disini, We hold that it was sufficiently established by the testimonies of Vergara and

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<sup>85</sup> *Heirs of Margarita Prodon v. Heirs of Maximo Alvarez and Valentina Clave*, 717 Phil. 54, 66 (2013) citing Lempert and Saltzburg, *A Modern Approach to Evidence*, (American Casebook Series), Second Edition, 1982, p. 1007.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 66-67.

<sup>88</sup> *Id.* at 67 citing McCormick on Evidence (Hornbook Series), Third Edition 1984, Â§ 233, p. 707.

Jacob. Despite the non-presentation of the original contracts themselves, the Republic has duly proved their execution, to wit:

**Affidavit of Vergara dated November 15, 1988:<sup>89</sup>**

2. Approximately in 1973, at about the time of the oil embargo, Westinghouse saw the opportunity to promote nuclear power in the Philippines. I discussed the subject on many occasions with Mr. L.P. Sabol, the Westinghouse Power Systems District Manager stationed in Manila, and later with Mr. L.C. Saunders, the Westinghouse Vice-President, Power Systems-Far East, stationed in Hongkong. Westinghouse was very anxious to obtain a contract for the first nuclear plant project in the Philippines. However, Westinghouse had recently lost in the bidding for the Malaya II power plant project in the Philippines, and they suspected that they lost because Westinghouse lacked influence with President Marcos. **We decided not to make the same mistake in connection with the nuclear project, and we therefore set about recruiting someone close to President Marcos to serve as our "Special Sales Representative" (SSR).**

3. Mr. Sabol and I spent some time considering who should be approached to act as the Westinghouse SSR. I first contacted Dr. Pacifico Marcos, the brother of President Marcos. Dr. Marcos declined to act as SSR because he knew nothing about electric power plants or the nuclear project and believed that the President might question his involvement. **Sometime later I was having breakfast at Wack-Wack golf club when I saw Herminio T. Disini. I knew that Disini was a close family friend of President Marcos and that his wife was the personal physician and cousin of Imelda Marcos. I therefore decided to approach Disini to see if he would serve as SSR.**

4. Herminio Disini was initially unenthusiastic about my proposal because he, like Pacifico Marcos, knew nothing about nuclear power. Disini's attitude seemed to change, however, when I reminded him that the project could cost as much as \$600 million, yielding a commission in the range of \$30 million. Disini suggested a meeting, and I brought Mr. Sabol to Disini's office that same day. Mr. Sabol gave Disini some Westinghouse brochures and explained the nuclear project. **The meeting ended with Disini promising to give us an answer within one week. Less than a week later Disini called to say that he would be interested in acting as the Westinghouse SSR for the nuclear project. When he accepted appointment as SSR, I knew that the project would be awarded to Westinghouse. Mr. Disini would not have accepted appointment unless it had been cleared with Mr. Marcos. I told this to Mr. Sabol. It then became necessary to secure Westinghouse management approval of Disini's appointment as SSR and to set the financial arrangement with him.** Mr. Saunders came to Manila for that purpose and met with Disini, Sabol and myself at the Hyatt Hotel. Later I went to San Francisco with Disini and Sabol to meet with other Westinghouse officials at the Airport Hilton. There were approximately five people present from Westinghouse. **The agenda was to answer the question – why would Westinghouse appoint Mr. Disini. At first, Westinghouse seemed skeptical about Disini's abilities, but I assured them that once Disini accepted appointment as SSR it meant that Westinghouse had already received the nuclear project. I explained Mr. Disini's close relationship with the**

<sup>89</sup> Records, Vol. IX, pp. 893-897.

President. I also mentioned the fact that Burns & Roe had been appointed consultant to NPC. This was very important to Westinghouse because it demonstrated Mr. Disini's influence with the President. This information satisfied Westinghouse and they agreed to retain Disini as SSR.

5. Prior to my trip to San Francisco, Mr. Saunders introduced me to representatives of Burns & Roe, Inc., an American engineering firm interested in a consulting arrangement with NPC. I arranged a meeting between Mr. Disini and Mr. Ketterer of Burns & Roe. The meeting was for Mr. Ketterer to understand how Mr. Disini might help Burns & Roe secure the consultancy contract. Later I arranged a meeting between Mr. Hull of Burns & Roe and Mr. Disini. During this meeting Mr. Disini agreed to assist Burns & Roe and Burns & Roe agreed to pay commissions to Disini in exchange for his influence with President Marcos.

6. Westinghouse agreed to the basic terms of the SSR arrangement in San Francisco. Later, Westinghouse entered into a written SSR agreement with Disini and agreed to pay him substantial "commissions" if he succeeded in obtaining the nuclear plant contract for Westinghouse. It was my perception that Westinghouse did not want to spend the money and time necessary to prepare a detailed proposal without some tangible evidence they would get the job. Mr. Sabol prepared and submitted a draft letter of intent to be issued by NPC, a copy of which is attached hereto as Exhibit A.

7. The SSR agreement with Westinghouse listed as many services as possible to attempt to justify the size of the fee involved, even though a number of the services were not to be performed. When Westinghouse encountered any difficulties with NPC during the contact negotiations, we could call upon Disini to visit the President and arrange to have the President intervene on behalf of Westinghouse. One such Westinghouse request to Disini is attached hereto as Exhibit B. Another such request is in the form of a Westinghouse "Aide Memoire" (attached as Exhibit C), which is the format we often used to communicate through Disini with the President. The Aide Memoire bears the President's directives to NPC in accordance with the views expressed by Westinghouse.<sup>90</sup> (Emphases supplied.)

#### **Supplemental Affidavit of Vergara dated December 9, 1988:<sup>91</sup>**

8. Although we reached a general agreement on the SSR terms, the implementing details remained to be worked out and were not finalized until later. The agreement contained certain general terms. It would be effective on March 15, 1974. Disini would receive three percent (3%) of the total contract price (firm plus reimbursables). Payments would not be due until the prime contract for the plant had been signed and Westinghouse had started to draw funds against it.

9. It was clearly understood and agreed by Disini and Westinghouse that the main service to be provided by Disini was to influence President Marcos to award the contract to Westinghouse. In fact, during the entire term of the SSR contract (which extended for over ten years), Disini rendered no substantial services of any kind to Westinghouse, beyond securing the prime contract itself.

<sup>90</sup> Id.

<sup>91</sup> Id. at 906-916.

10. Another aspect of the deal that Disini and I discussed with Westinghouse in Manila was the necessity for a commitment to engage Burns & Roe to become the architect-engineer for the project. Disini had a parallel SSR agreement with Burns & Roe under which he would receive commissions from Burns & Roe if that company was selected to perform design work during the project's execution. Therefore, he needed to ensure that Burns & Roe received the architect/engineering subcontract on the project from Westinghouse. Saunders and Sabol had agreed to this aspect of the deal in order to preserve the role of Westinghouse as prime contractor. Westinghouse PSPD personnel who had to make the decision were opposed to Burns & Roe. This issue was only resolved two months later, as further discussed below.

x x x x

15. As discussed above, the deal with Burns & Roe would result in commission payments to Disini. Therefore, it was in everybody's interest that Westinghouse honor Sabol's and Saunders' recommendation and engage Burns & Roe. In late April 1974, Mr. Kenneth Roe came to the Philippines to sign Burns & Roe's Phase I consulting contract with NPC and, while in Manila, met with Disini and confirmed the SSR agreement that Mr. Hull had negotiated with Disini. We now needed to have a deal between Westinghouse and Burns & Roe finalized so that all parties would be bound to each other.

x x x x

20. The following day, President Marcos met with the Westinghouse delegation (Wallace, Keogh, Sabol, myself and others (for a formal presentation). Wallace led the presentation. The President jokingly commented that "you people know how to choose your representative" – referring to H. Disini. There is no doubt in my mind that Westinghouse executives understood that their SSR payments were providing the inducement to President Marcos to award the contract to Westinghouse.<sup>92</sup> (Emphases supplied)

**Affidavit of Jacob dated October 31, 1990:**<sup>93</sup>

11. I was aware that Herdis was acting as the Special Sales Representative ("SSR") for Westinghouse and Burns & Roe in [not readable]. Westinghouse had a written agreement with Herdis providing that Herdis would receive commissions in the amount of 3% of the Westinghouse contract price. Burns & Roe had a written agreement with Technosphere Consultants Group, Inc. ("Technosphere"), a Herdis company, pursuant to which Technosphere would receive about 10% of the Burns & Roe contract price as commissions. During the course of the BNPP project, I was responsible for invoicing and arranging payments from Westinghouse and Burns & Roe under these agreements. See Exhibit 2. Aside from Mr. Disini's efforts in obtaining the award of the project to Westinghouse and Burns & Roe, I am not aware of any other material services rendered by Herdis or Technosphere under their respective agreements.<sup>94</sup> (Emphases supplied)

<sup>92</sup> Id. at 908-913.

<sup>93</sup> Id. at 237-243.

<sup>94</sup> Id. at 240.

Vergara's and Jacob's affidavits satisfactorily proved the due execution of the Westinghouse and B&R contracts and their corresponding commission agreements with Disini. Vergara narrated in detail how Disini was appointed as Westinghouse's SSR and how he exerted influence on President Marcos to appoint it as the BNPP project main contractor. Also, Vergara clearly testified on how he arranged a meeting between Disini and B&R for the former to also become the latter's SSR to President Marcos with respect to the BNPP project.

These transactions with Westinghouse and B&R were corroborated by Jacob in his affidavit. As deduced from Vergara's and Jacob's affidavits, the BNPP project was successfully awarded to Westinghouse as the main contractor and to B&R as the architect-engineer because of Disini's influence and close association with President Marcos. Certainly, the existence of the Westinghouse and B&Rs contracts had been duly proved.

As to Disini's commission agreements with Westinghouse and B&R, Vergara and Jacob positively affirmed the existence thereof as they had the opportunity to personally witness and participate in these transactions. Vergara was the President of AII, which acted as the SSR of Westinghouse in the Philippines. He was present at the start of the negotiation between Westinghouse and Disini until the award of the BNPP project to Westinghouse.

Certainly, his testimony as to the existence of Disini's commission agreement with Westinghouse is credible and highly probable under the circumstances. In addition, Vergara was also present during the negotiation between Disini and B&R as he, himself, brokered and arranged the meeting between Westinghouse and B&R for the former to engage the services of the latter as architect-engineer, pursuant to Disini's agreement with B&R.

Jacob corroborated Vergara's declarations when he, as the President of Herdis, confirmed the existence of these commission agreements. He specifically testified that: (a) Herdis and Westinghouse had a written agreement wherein the former would receive 3% of the latter's total contract price in the BNPP project; and (b) TCP, a subsidiary of Herdis, and B&R also had a written agreement wherein the former would receive 10% of the total contract price of the latter in the BNPP project.

These testimonies sufficiently prove the existence of the Westinghouse and B&R contracts and their corresponding commission agreements. Contrary to Disini's contention, the Best Evidence Rule is not applicable in the present case. The Republic presented the affidavits of both Vergara and Jacob to prove the existence and execution of these contracts and the corresponding commission agreements without inference as to the contents or terms thereof. Hence, We rule in favor of the Republic.



However, for Disini to be held liable to return and account for the commissions he allegedly received, the Republic must prove by preponderance of evidence not only the existence of these contracts and commission agreements but the receipt of these substantial commissions by Disini from Westinghouse and B&R as well.

**Disini received commissions from Westinghouse and B&R:**

The evidence on record shows that Disini received commissions from Westinghouse and B&R despite the non-presentation by the Republic of the Westinghouse and B&R contracts and their respective commission agreements. The sworn testimonies and affidavits of Vergara and Jacob are categorical, credible and corroborative, sufficiently proving that Disini, through Herdis and its subsidiaries, acquired ill-gotten wealth in relation to the BNPP project.

**Vergara's Affidavits:**

Vergara testified as to his participation in the negotiation and execution of the Westinghouse and B&R contracts and Disini's commission agreements. He declared that Disini received millions of dollars in commissions from Westinghouse and B&R relative to the BNPP project as well as additional compensation through contracts entered into by Herdis and its subsidiaries, to wit:

8. Disini received "commission" payments from Westinghouse and Burns & Roe amounting to many millions of dollars. He received additional compensation through contracts and subcontracts awarded to companies he owned to provide goods or services for the nuclear project. I formed Power Contractors, Inc., for example, to perform the civil/structural construction work for the project. Asia Industries owned 40% of PCI at the outset. This 40% was acquired almost immediately by Mr. Disini. Mr. Jacob acquired [FOR HERDIS] an existing insurance company, and renamed it Summa Insurance, Inc., to provide the insurance coverage for the project. By virtue of his relationship with President Marcos and his agreements with Westinghouse and Burns & Roe, Disini could obtain virtually any lucrative contract or subcontract for the nuclear project that he wished.<sup>95</sup> (Emphases supplied)

Vergara testified as to Disini's participation in the BNPP project by facilitating the award of the BNPP project to Westinghouse and B&R and through acquisition of companies involved in the BNPP project. Vergara participated in the incorporation of PCI, a consortium which performed civil or constructional work for the BNPP project. Thereafter, PCI, which was 40% owned by AII, was subsequently acquired by Disini. He also declared that Herdis acquired an insurance company and renamed it as Summa Insurance,

<sup>95</sup> Id. at 897.

Inc. (SII) which provided insurance coverage for the BNPP project. Vergara claimed that these companies, PCI and SII, gave lucrative compensation to Disini in view of his involvement in the BNPP project.

He also confirmed that Disini received these substantial commissions through Herdis and AII, thus:

28. **Pursuant to the respective SSR agreements Westinghouse entered into with Asia Industries and Herdis, commissions were paid to Asia Industries and Herdis.** Exhibit 4 is a July 14, 1975 revision of the SSR Agreement between Asia Industries and Westinghouse, which I signed for Asia Industries.

29. **Many of the commission payments ostensibly made to Asia Industries were actually credited but never received by Asia Industries.** Rodolfo Jacob and Jerry Orlina, who were Disini's righthand financial advisors, would know the disposition, transfer and distribution of the commission payments and the actual amount involved.<sup>96</sup> (Emphases supplied)

In his Supplemental Affidavit dated January 25, 1989,<sup>97</sup> Vergara further elucidated on what happened to AII's commissions due from Westinghouse which were not received by or transferred to the company, viz.:

7. The Westinghouse-NPC contract was signed in February 1976 and Westinghouse was released to start work a few months later, whereupon the SSR commissions began to accrue. **Even though commissions were paid Herdis by Westinghouse as they became due, Asia Industries did not receive any commission payments and was not even notified that the first two payments had been made until much later, when I asked Westinghouse for an accounting.**

X X X X

11. I was head of Asia Industries from 1975 until its acquisition by the National Development Company in April 1982. During this period, I served as Asia Industries' President and also as a member of its Board of Directors. I managed the company in all respects except the financial one, for HGI controlled our treasury and finances.

12. **Westinghouse's SSR agreement with Asia Industries (Exhibit 4 to the Supplemental Affidavit) committed Westinghouse to paying Asia Industries over \$6 million in commissions.** We used that commitment in July 1977, when Asia Industries sought to acquire Usiphil, Inc. ("Usiphil"), a former sister company. We applied for a \$25 million standby letter of credit from the Philippine National Bank ("PNB"), a Philippine Government-owned bank, to finance the acquisition. Our application was supported by Usiphil's business prospects, and was backed in part by our anticipated receipt of nuclear power plant commissions from Westinghouse. We did succeed in acquiring Usiphil, but it apparently took President Marcos' personal involvement to overcome the opposition of PNB to the transactions.

<sup>96</sup> Id. at 916.

<sup>97</sup> Id. at 933-943.

X X X X

14. It was my understanding and expectation that Asia Industries would receive and avail itself of the Westinghouse commissions. **Starting in 1978, as a result of the U.S. Department of Justice's investigation of illegal payments in connection with the nuclear power plant project, Westinghouse stopped sending commission payments to Switzerland and began to remit the payments directly to the Philippines. After this switch, Asia Industries commissions still ended up in the hands of HGI.** In most cases, the transfers of funds were reflected in the company's books as "short-term investments" or "other current assets." Exhibit 4 is a copy of Asia Industries' financial statements for the years 1979 and 1980. As Exhibit 4 shows, by the end of 1980 Asia Industries had booked 47.3 million pesos in "short term investments" and 1.5 million pesos as "other assets." The transfer of Westinghouse commissions to HGI accounts for the vast majority of the amounts covered by those entries.

15. **In some cases, the commission payments were transferred directly to HGI without even entering them in Asia Industries' books. For example, in January 1979 Westinghouse forwarded to Asia Industries a commission payment of \$579,619.27, and gave notice of this transfer by a January 30, 1979 telex from its Export Treasury Department to our General Manager V.B. Mimbres (Exhibit 5 hereto is a copy of that telex). Upon receipt of the funds, Mr. Jacob requested that we turn the \$579,000 commission over to him immediately, and this was done.** Exhibit 6 memorializes the transaction; it is a May 8, 1980 memorandum to me from Asia Industries' treasurer, Mr. Gutierrez, indicating the disposition given to the check. Mr. Jacob never reimbursed Asia Industries for this check.<sup>98</sup> (Emphases supplied)

In addition to the existence of Westinghouse's commission agreement with Herdis, Vergara also confirmed the existence of Westinghouse's agreement with AII. Vergara declared that AII and Westinghouse had an SSR agreement wherein the former would receive commissions from the latter in exchange for its service as SSR. However, Vergara deposed that no commissions were ever received by the company from Westinghouse as these commissions were directly paid or transferred to Herdis, AII's owner.<sup>99</sup> This clearly demonstrated how Disini utilized companies such as AII and Herdis in his scheme of amassing ill-gotten wealth. He merely procured AII to facilitate his receipt of the commissions thereby unjustly enriching himself to the detriment of the Republic. This fact was confirmed by Vergara when Disini purchased AII because of its SSR agreement with Westinghouse and the certainty that the BNPP project would be awarded to Westinghouse, to wit:

5. **Aware of the large amounts in commissions that Westinghouse would pay Asia Industries once the nuclear power plant project was initiated, Mr. Disini offered to buy Asia Industries from its corporate parent, and was able to purchase it for approximately \$2.5 million. This deal was indicative of Mr. Disini's complete confidence that he would be able to secure a contract for the nuclear power plant.** This confidence was

<sup>98</sup> Id. at 935-939.

<sup>99</sup> Id. at 935.

further evidenced by the fact that Mr. Disini had to borrow from a Swiss bank the purchase price of Asia Industries, and offered the upcoming commissions on the nuclear power plant as proof of his ability to pay back the loan. Mr. Disini, his chief assistant Rodolfo Jacob, and I travelled to Basel, Switzerland to arrange for the bank loan and close on the sale with U.S. Industries, Inc.<sup>100</sup> (Emphasis supplied.)

The existence and due execution of these contracts and commission agreements, the successful award of the BNPP project to Westinghouse and B&R and the construction of the still inoperable BNPP strengthened the fact that commissions due to Disini already accrued, and were credited and received by the latter. Disini would not have bought AII if he was not confident that Westinghouse would be awarded the BNPP project. Thus, when the Westinghouse contract was signed and thereafter implemented, the commissions due Disini also accrued. Vergara's affidavits affirmed Disini's receipt of commissions, thus:

**Supplemental Affidavit of Vergara dated December 9, 1988:**

8. Although we reached a general agreement on the SSR terms, the implementing details remained to be worked out and were not finalized until later. The agreement contained certain general terms. It would be effective on March 15, 1974. Disini would receive three percent (3%) of the total contract price (firm plus reimbursables). Payments would not be due until the prime contract for the plant had been signed and Westinghouse had started to draw funds against it.

9. It was clearly understood and agreed by Disini and Westinghouse that the main service to be provided by Disini was to influence President Marcos to award the contract to Westinghouse. In fact, during the entire term of the SSR contract (which extended for over ten years), Disini rendered no substantial services of any kind to Westinghouse, beyond securing the prime contract itself.<sup>101</sup> (Emphasis supplied)

**Affidavit of Vergara dated January 25, 1989:**

7. The Westinghouse-NPC contract was signed in February 1976 and Westinghouse was released to start work for a few months later, whereupon the SSR commissions began to accrue. Even though commissions were paid Herdis by Westinghouse as they become due, Asia Industries did not receive any commission payments and was not even notified that the first two payments had been made until much later, when I asked Westinghouse for an accounting.<sup>102</sup> (Emphasis supplied)

Although Vergara testified that he had no personal knowledge as to the transfer of these commissions to Disini, his testimonies and sworn affidavits are relevant in laying the foundation of Disini's receipt thereof by

<sup>100</sup> Id.

<sup>101</sup> Id. at 908-909.

<sup>102</sup> Id. at 935-936.

categorically declaring the existence of these Westinghouse and B&R contracts and their respective commission agreements and the time of accrual of these commissions. Also, Vergara demonstrated the extent of Disini's participation in the BNPP project through his company Herdis and its subsidiaries, and his further acquisition of other companies involved in the project. This reveals Disini's considerable interest in a government project which he obviously attained due to his influence and close association with President Marcos.

### **Jacob's Affidavits:**

For his part, Jacob was equally candid in his testimony and sworn affidavits which firmly established Disini's receipt of these commissions. Based on his personal knowledge as President of Herdis, he declared that he participated in the transfer of these commissions from Westinghouse and B&R to Disini's accounts, to wit:

#### **Affidavit dated October 31, 1990:**

11. I was aware that Herdis was acting as the Special Sales Representative ("SSR") for Westinghouse and Burns & Roe in [not readable]. Westinghouse had a written agreement with Herdis providing that Herdis would receive commissions in the amount of 3% of the Westinghouse contract price. Burns & Roe had a written agreement with Technosphere Consultants Group, Inc. ("Technosphere"), a Herdis company, pursuant to which Technosphere would receive about 10% of the Burns & Roe contract price as commissions. **During the course of the PNPP project, I was responsible for invoicing and arranging payments from Westinghouse and Burns & Roe under these agreements.** See Exhibit 2. Aside from Mr. Disini's efforts in obtaining the award of the project to Westinghouse and Burns & Roe, I am not aware of any other material services rendered by Herdis or Technosphere under their respective agreements.

X X X X

13. **I was aware that Westinghouse and Burns & Roe made commission payments beginning 1976. Upon Mr. Disini's instructions, the commission payments were not recorded on the books of Herdis and Technosphere. Upon Mr. Disini's further instructions, I directed Westinghouse and Burns & Roe to remit the commissions directly to Mr. Rene Pasche in Switzerland who deposited them in Swiss banks. This was the arrangement until the U.S. Department of Justice Investigation in 1978, when Westinghouse advised us that henceforth payments would be remitted straight to Manila.** On the basis of my dealings with Westinghouse officials and my examination of their internal memos and other documentary evidence, I believe that Westinghouse knew that President Marcos was getting financial benefits from the contract.

14. **To receive the Westinghouse commission payments in the Philippines, Foreign Currency Deposit Unit accounts were opened at International Corporate Bank ("Interbank"). Mr. Disini and I were the**

signatories for the accounts. A substantial portion of the funds in this Interbank account were remitted to overseas accounts in Switzerland and elsewhere. Exhibit 3 is an example of a remittance that I ordered transferring commission payments from Interbank to the Swiss Velks Bank for the account 20529 Santa Clara.<sup>103</sup> (Emphases supplied)

**Supplemental Affidavit dated June 16, 1994:**

1. Moreover, Mr. Disini had opened bank accounts in Switzerland under the account names "965 Summa" and "735 Phil", where Pacencia Disini and I were authorized signatories. I surmise that I was made a signatory to these accounts because Mr. Disini trusted me to give Mrs. Disini the necessary assistance in any transactions regarding the funds deposited in such accounts although I do not recall having personally made withdrawals from such accounts. I confirm the authenticity from such accounts. I confirm the authenticity of my signatures in the aforementioned accounts as evidenced by the Swiss bank documents attached hereto as Annexes "A", "B", "C", "D", "E" and "F".

x x x x

8. Anent the commission payments made by Westinghouse in connection with the contract for the construction of the Bataan Nuclear Power Plant, since Mr. Disini owns HERDIS, he personally received the commissions due HERDIS and such payments were kept off the books of HERDIS. However, while as I stated in my previous affidavit, I had a role in transmitting some of these commissions, upon Mr. Disini's instructions, to his bank accounts in Switzerland and Singapore. I was not involved in the international operations of Mr. Disini's personal businesses abroad. Mr. Disini hired foreign officers and personnel to manage his businesses abroad. One of this trusted men, a finance man by the name of Rene Pasche, was in charge of his Swiss bank accounts and in fact, the name of one of Mr. Disini's company, PADIS SA, stands for Pasche and Disini.<sup>104</sup> (Emphases supplied)

A review of Jacob's affidavits, identified and duly authenticated by him, reveals that as President of Herdis, he had personal knowledge of Herdis' transactions, especially with respect to the BNPP project as well as other circumstances surrounding it. For a testimonial evidence to be believed, it must not only proceed from the mouth of a credible witness but must also be credible in itself such that common experience and observation of mankind lead to the inference of its probability under the circumstances.<sup>105</sup>

Jacob's credibility to testify on the matter of Disini's receipt of commissions stemmed from Disini's trust and confidence in him as he was personally invited by Disini to work for his company Herdis, to wit:

<sup>103</sup> Id. at 240-241.

<sup>104</sup> Id. at 275-276.

<sup>105</sup> *Dizon v. Matti, Jr.*, G.R. No. 215614 (Resolution), March 27, 2019, 889 SCRA 1, 25.

**Affidavit dated October 31, 1990:**

4. Sometime in mid-1974, Mr. Disini visited me at my office and first broached the idea of my joining Herdis as President. In subsequent talks, he persistently tried to convince me to do so. He explained the expansion plans of Herdis and that he needed me to set up and run a professional organization to implement these plans. He assured me that as Herdis President I would have a free hand in major decisions and policies. He also offered to guarantee me a compensation package at least equivalent to what I was receiving at SGV. These discussions went on for several months.

5. After some serious thought, I accepted Mr. Disini's offer sometime in late 1974. About March, 1975, Mr. Disini began introducing me to the officers and staff of Herdis and its subsidiaries. Occasionally, I was given informal briefings on Herdis' business corporations. I likewise was invited by Mr. Disini to be present in two or three meetings with Westinghouse officers, wherein I was introduced. I recall that in one meeting with Westinghouse officers in April, 1975, the matter of commissions and contract price were discussed (as reflected in Mr. Sabol's April 15, 1975 letter to me. See Exhibit 1.)<sup>106</sup> (Emphases supplied)

Undoubtedly, Disini trusted Jacob as he hired him as President of Herdis and even allowed him to join in his meetings with Westinghouse. Disini also entrusted to Jacob the task of transferring his commissions from Westinghouse and B&R to his overseas personal bank accounts. In fact, Jacob declared that he was even made a signatory to some of these overseas bank accounts, as well as in a Philippine foreign currency deposit unit account.

Despite the fact that the Republic offered mere photocopies of the bank documents, this does not affect the admissibility and probative value of Jacob's sworn statement as to the existence of the bank accounts and Disini's receipt of commissions, especially since these statements came from a credible witness such as Jacob. To stress, when the evidence presented concerns the existence, execution or delivery of the writing, without inference to its terms, the Best Evidence Rule cannot be invoked. Clearly, Jacob is credible to testify on matters regarding Disini's receipt of commissions from Westinghouse and B&R and the manner of his participation as well as that of Herdis and its subsidiaries. Hence, his testimony and sworn affidavits must be accorded probative value.

Moreover, Jacob corroborated Vergara's testimony that Herdis and its subsidiary TCI received commissions from Westinghouse and B&R, respectively, even when these companies did not render any service in relation to the BNPP project. As part of his affidavit, the Republic attached certain transmittal letters, invoice and bank documents the contents of which may not be admissible in evidence as they are mere photocopies and not properly authenticated. However, these may be considered part of Jacob's testimony as

<sup>106</sup> Records, Vol. IX, pp. 237-238.

he, himself, was the recipient and/or author no less of these transmittal letters and invoice, and the signatory to the bank documents.

Also, Jacob explained that Herdis received the commissions from Westinghouse but they were not recorded in its books and were instead remitted directly to Disini's overseas bank accounts and later to a Philippine fiduciary deposit unit account which were then transferred by Jacob himself to Disini's overseas bank accounts. As part of Jacob's testimony, the Republic offered a sample remittance made by Jacob to Disini's overseas bank account. Again, the document and the contents thereof are not *per se* considered as admissible under the Rules, but is only part of the narration of the witness that he effected the transfer of these commissions to Disini.

We are cognizant of the fact that the Republic presented "certified xerox copies" of most, if not all, of its documentary evidence. In the assailed Decision, the *Sandiganbayan* gave no probative value to these documents tending to prove Disini's overseas bank accounts as they were not properly authenticated or translated, to wit:

We, however, cannot give probative weight to the documents relating to the existence of the so-called Disini Swiss accounts considering that these documents are foreign private documents in the German and French language.  
x x x

x x x x

The evidence consisting of Exhibits "HHH," "HHH-TR," "III," "III-TR," "JJJ" and sub-markings, "JJJ-TR," "KKK" and sub-markings, "KKK-TR," "LLL" and sub-markings, "LLL-TR," "MMM," "MMM-TR," "NNN," "NNN-TR," "NNN-1," "NNN-1 (TR)," "OOO," "OOO-TR," "PPP," "PPP(TR)," "QQQ" and sub-markings and their respective translations, "RRR" and sub-markings and their respective translations, "SSS" and sub-markings and their respective translations, "TTT," "TTT(TR)," "UUU," "UUU(TR)," "VVV," and "VVV(TR)" presented by the plaintiff were unauthenticated and not properly translated. **All the documents relating to these accounts were photocopies. As stated in the Rules of Court, for a private document to be proven, due execution and authenticity must be proven. This was not fulfilled by the plaintiff as what was presented were mere photocopies of supposed bank statements/records received by the Philippine Embassy in Switzerland and those which a PCGG employee had received here in the Philippines.** No evidence established why the originals of the documents could not be produced. At the very least, the plaintiff should have presented the records as received by the Philippine Embassy. **Furthermore, the documentary evidence given were also photocopies of the translations, which were done here in the Philippines.** There was no explanation as to why this was done. Thus, the translation of French and German texts into English is unacceptable. There was no opportunity for the Court to scrutinize the translations as the supposed translator was not even presented.



Additionally, majority of the other documentary evidence offered by the plaintiff are mere photocopies. Some were even photocopies of photocopies, and bad copies at that. xxx<sup>107</sup> (Emphasis supplied)

Nonetheless, the absence of these documents is not fatal to the Republic's cause especially since the testimonial evidence offered contained positive declarations of witnesses based on their personal knowledge. We thus hold that the Republic has duly proved by preponderance of evidence through the affidavits of Vergara and Jacob, the fact of receipt by Disini of these commissions from Westinghouse and B&R.

### **Preponderance of Evidence:**

In cases involving ill-gotten wealth, EO No. 14-A clearly requires preponderance of evidence.<sup>108</sup> Section 1, Rule 133 of the Rules of Court provides for the quantum of evidence for civil actions, and delineates how preponderance of evidence is determined, *viz.*:

Section 1. *Preponderance of evidence, how determined.* - In civil cases, the party having the burden of proof must establish his case by a preponderance of evidence. In determining where the preponderance or superior weight of evidence on the issues involved lies, the court may consider all the facts and circumstances of the case, the witnesses' manner of testifying, their intelligence, their means and opportunity of knowing the facts to which they are testifying, the nature of the facts to which they testify, the probability or improbability of their testimony, their interest or want of interest, and also their personal credibility so far as the same may legitimately appear upon the trial. The court may also consider the number of witnesses, though the preponderance is not necessarily with the greater number.<sup>109</sup> (Emphasis supplied)

Preponderance of evidence means that the evidence adduced by one side is, as a whole, superior to that of the other side.<sup>110</sup> Essentially, preponderance of evidence refers to the comparative weight of the evidence presented by the opposing parties.<sup>111</sup> As such, it has been defined as "the weight, credit, and value of the aggregate evidence on either side," and is usually considered to be synonymous with the term greater weight of the evidence or greater weight of

<sup>107</sup> *Rollo*, Vol. I, pp. 119-120.

<sup>108</sup> Section 3 of Executive Order No. 14-A (1986) provides:

Sec. 3. The civil suits to recover unlawfully acquired property under Republic Act No. 1379 or for restitution, reparation of damages, or indemnification for consequential and other damages or any other civil actions under the Civil Code or other existing laws filed with the *Sandiganbayan* against Ferdinand E. Marcos, Imelda R. Marcos, members of their immediate family, close relatives, subordinates, close and/or business associates, dummies, agents and nominees, may proceed independently of any criminal proceedings and may be proved by a preponderance of evidence.

<sup>109</sup> RULES OF COURT, Rule 133, Sec. 1.

<sup>110</sup> *Republic v. Reyes-Bakunawa*, 716 Phil. 629, 642 (2013), citing *Encinas v. National Bookstore, Inc.*, 485 Phil. 683, 695 (2004).

<sup>111</sup> *Id.*

the credible evidence.<sup>112</sup> It is proof that is more convincing to the court as worthy of belief than that which is offered in opposition thereto.<sup>113</sup>

In this case, Disini was declared in default and failed to adduce evidence in his behalf. However, the Republic must still abide by the principles of due process which require that there be preponderant evidence of Disini's acquisition of ill-gotten wealth. Hence, the Republic carries the heavy burden of proof and must discharge such burden satisfactorily; otherwise, the action would fail.

Applying said principle, the factual circumstances established by the Republic through testimonial evidence are sufficient and convincing enough to prove that Disini received substantial commissions from Westinghouse and B&R in relation to the BNPP project despite lack of documentary proof of his receipt thereof. It bears noting that these commissions were ill-gotten wealth acquired by Disini through illegal or clever means to disguise and hide the illicit nature of its acquisition.

Hence, original copies of documentary evidence showing actual receipt by Disini of these commissions would surely be arduous, if not impossible, to retrieve. In fact, Jacob affirmed that these commissions were not even recorded in Herdis' company books which means that Disini intended to conceal receipt of these commissions to avoid any trace of his illegal involvement with the BNPP project by leaving no proof of receipt thereof by Herdis.

The narrations of Vergara and Jacob which duly established the existence of the Westinghouse and B&R contracts and their corresponding commission agreements, and the transfer of these commissions to Disini's overseas bank accounts, convince this Court that Disini indeed received substantial commissions constituting ill-gotten wealth. In addition, the testimonies and sworn affidavits of Vergara and Jacob, as President of AII and Herdis, respectively, deserve greater consideration since they had the opportunity to personally witness these factual circumstances because of their respective positions in the companies owned by Disini.

Also, the corroborative testimonies of Vergara and Jacob are worthy of belief as they are neither improbable nor impossible. Both Vergara and Jacob have no reason to lie and would gain no benefit from doing so. As witnesses who have sworn under oath, they may be held liable for perjury for giving false statements or failing to comply with the order to testify or provide information.<sup>114</sup>

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<sup>112</sup> Id.

<sup>113</sup> Id.

<sup>114</sup> Section 4 of Executive Order No. 14-A (1986).

Further, their act of testifying for the Republic is specifically enjoined by Executive Order No. 2 which requires all persons holding assets or properties in their names as nominees, agents or trustees, to make full disclosure of the same to the Republic. Indeed, Jacob's own admission that he was made a signatory to Disini's overseas bank accounts and Philippine fiduciary deposit unit account is a duty required under the law. Consequently, Vergara and Jacob were obliged to fully disclose these illegal contracts and their participation thereto. Hence, there is no reason to doubt their testimonies and sworn affidavits. They are straightforward, candid, and in some respect, supported by their own admissions against interest.

Contrary to Disini's contention, the lack of a definite amount in Vergara's and Jacob's testimonies, except the statement that Disini received 3% and 10% of Westinghouse's and B&R's total contract price, respectively, does not refute or negate the operative fact of Disini's acquisition of ill-gotten wealth through concealment of his commissions behind the facade of Herdis and its subsidiaries. In fine, We find that the Republic has duly proved by preponderance of evidence that Disini acquired ill-gotten wealth in the form of commissions from Westinghouse and B&R by acting as their SSR for the BNPP project.

In ruling for the Republic, the *Sandiganbayan* relied on *Yuchengco v. Sandiganbayan (Yuchengco)*<sup>115</sup> when it held that the affidavits of Manahan, Vergara and Jacob are sufficient to hold Disini liable to reconvey ill-gotten wealth, *i.e.* US\$50,562,500.00, even without documentary proof. In the assailed Decision, the *Sandiganbayan* stated:

**As in *Yuchengco*, this Court chooses to place its belief on the testimonies of Jacob, Vergara and Manahan because of their credibility and the inherent corroborative nature of their testimonies. There is not a shred of evidence to controvert their statements, not only because defendants were declared in default, but also because there is no reason to doubt their credibility. These witnesses occupied very special loci of trust and confidence within the Disini circle, and also observed from a privileged point of view the dealings with Marcos, and vice versa. Their affidavits were sworn to and also affirmed through their testimonies before the Court. There is no doubt in Our mind that their statements should be given utmost weight. The testimonial evidence presented by the plaintiff remained unrebutted and uncontradicted and therefore, amounts to preponderant evidence.**<sup>116</sup> (Emphasis supplied)

In *Yuchengco*, this Court gave credence to the testimonial evidence offered by the Republic even if almost all documents it offered were mere photocopies. The issue in *Yuchengco* centered on the recovery of the Marcoses' shares of stock in the Philippine Telecommunications Investment Corporation (PTIC): 76,779 shares in the name of Ramon U. Cojuangco,

<sup>115</sup> 515 Phil. 1 (2006).

<sup>116</sup> *Rollo*, Vol. I, p. 115.

21,525 shares in the name of Imelda O. Cojuangco, and 111,415 shares in the name of Prime Holdings Incorporated (PHI).<sup>117</sup>

Consequently, as to the true owner of PHI, witness Jose Yao Campos' (Campos) testimony was categorical when he declared that in all of the corporations he organized, the certificates indorsed in blank or deed of trust or assignment in favor of an unnamed beneficiary were delivered to President Marcos. Even without presenting these deeds of trust or assignment, his testimony proved the existence and the delivery thereof to President Marcos. His testimony, therefore, supported the Republic's contention that PHI was a dummy corporation for President Marcos.<sup>118</sup>

Here, the Republic offered the affidavits of Vergara and Jacob to prove that Disini received substantial commissions from Westinghouse and B&R. Similarly, their testimonies proved the existence of the Westinghouse and B&R contracts and their respective commission agreements and Disini's receipt of these substantial commissions.

Moreover, in *Yuchengco*, Campos' testimony was corroborated by witness Rolando Gapud who testified that he did not own the 400 shares of stock in PHI but only held it in trust for President Marcos. He also affirmed, based on his personal knowledge, that the certificates indorsed in blank deed of trust or assignment were delivered to President Marcos. Another witness, Francisco de Guzman, confirmed that Campos organized PHI with his associates and that they held their shares as mere nominees. Thus, the issue of who owned PHI was well-supported by the testimonies of Campos, Gapud and de Guzman even without the purported deeds of assignment.<sup>119</sup>

In the present case, Vergara's sworn affidavits corroborated that of Jacob. Vergara testified as to the negotiation of contracts by Disini with Westinghouse and B&R as well as the existence of these contracts and commission agreements. These facts were confirmed by Jacob when he categorically admitted his participation in the transfer of these commissions to Disini's overseas bank accounts as per the existing commission agreements of Herdis and TCI with Westinghouse and B&R, respectively. Both witnesses also declared that Herdis and TCI did not render any service for the BNPP project that would justify the payment of these commissions. Clearly, the commissions were paid for the service of Disini as Westinghouse and B&R's SSR to President Marcos.

However, unlike in *Yuchengco* where the specific shares of Marcos' dummy corporations were identified and undisputed, here the amount of commissions received by Disini is being contested. The Republic's witnesses did not specifically quantify the amount of commissions but referred to certain

<sup>117</sup> *Yuchengco v. Sandiganbayan*, supra note 115, p. 50.

<sup>118</sup> Id. at 26-29.

<sup>119</sup> Id. at 34-37.

documents which were not only mere photocopies but were also not properly authenticated. Hence, these documents are inadmissible and have no probative value.

Also, Vergara and Jacob's testimony that Disini was paid 3% and 10% of the Westinghouse and B&R contracts as commissions clearly warrants the review of the terms of the contract which is covered by the Best Evidence Rule. Hence, We cannot give credit to these declarations without violating a basic evidentiary rule.

While it is true that *Yuchengco* was not intended as a precedent with respect to giving weight and credence to testimonial evidence despite lack of documentary proof in future cases involving actions for recovery of ill-gotten wealth, *Yuchengco* did not state nor in any way imply, that testimonial evidence is superior over documentary evidence and sufficient to establish proof of ill-gotten wealth.

What the ruling in *Yuchengco* teaches is that testimonial evidence when credible, categorical and corroborated is given credence and weight to prove acquisition of ill-gotten wealth. This is not a justification, however, for any party to merely submit photocopies of documents without properly authenticating the same in violation of evidentiary rules and confidently expect its claims to be granted based on testimonial evidence, especially when the contents of a documentary evidence are put in issue and necessary for adjudication on the merits.

Nonetheless, We ruled in *Republic v. Spouses Gimenez*<sup>120</sup> that the court may consider testimonial evidence and exhibits offered as part of the witnesses' testimonies in an action for acquisition of ill-gotten wealth, thus:

Notably, the *Sandiganbayan's* evaluation of the evidence presented by petitioner was cursory. Its main reason for granting the Motion to Dismiss on Demurrer to Evidence was that there was no evidence to consider due to petitioner's failure to file its Formal Offer of Evidence. It brushed off the totality of evidence on which petitioner built its case.

**Even assuming that no documentary evidence was properly offered, this court finds it clear from the second assailed Resolution that the Sandiganbayan did not even consider other evidence presented by petitioner during the 19 years of trial. The Sandiganbayan erred in ignoring petitioner's testimonial evidence without any basis or justification. Numerous exhibits were offered as part of the testimonies of petitioner's witnesses.**

Petitioner presented both testimonial and documentary evidence that tended to establish a presumption that respondents acquired ill-gotten wealth during respondent Fe Roa Gimenez's incumbency as public officer and which total amount or value was manifestly out of proportion to her

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<sup>120</sup> 776 Phil. 233 (2016).

and her husband's salaries and to their other lawful income or properties.<sup>121</sup>  
(Emphasis supplied)

While We recognize that the defendant's right to due process of law must always be protected and upheld, We also acknowledge the Republic's tedious job, through the PCGG, in gathering evidence of ill-gotten wealth which is mostly cleverly concealed and not easily apparent and accessible given the nature of its illegality. We cannot just ignore the credible, candid and corroborated testimonial evidence on the pretext of lack of documentary evidence. Neither should We place superiority on the documentary evidence over the sworn testimonies of witnesses and *vice versa*. All admissible evidence should be weighed, considered and scrutinized by the court for and/or against parties to arrive at a judgment taking into consideration the quantum of evidence required.

Hence, We affirm the *Sandiganbayan's* ruling that Disini acquired ill-gotten wealth by receiving substantial commissions from Westinghouse and B&R in connection with the BNPP project by giving credence to Jacob and Vergara's testimonial evidence and the exhibits offered as part of their testimonies which are credible, categorical and corroborative. However, We cannot subscribe to the *Sandiganbayan's* conclusion that Disini is liable to reconvey the amount of \$50,562,500.00.

**No sufficient proof of the  
amount of \$50,562,500.00:**

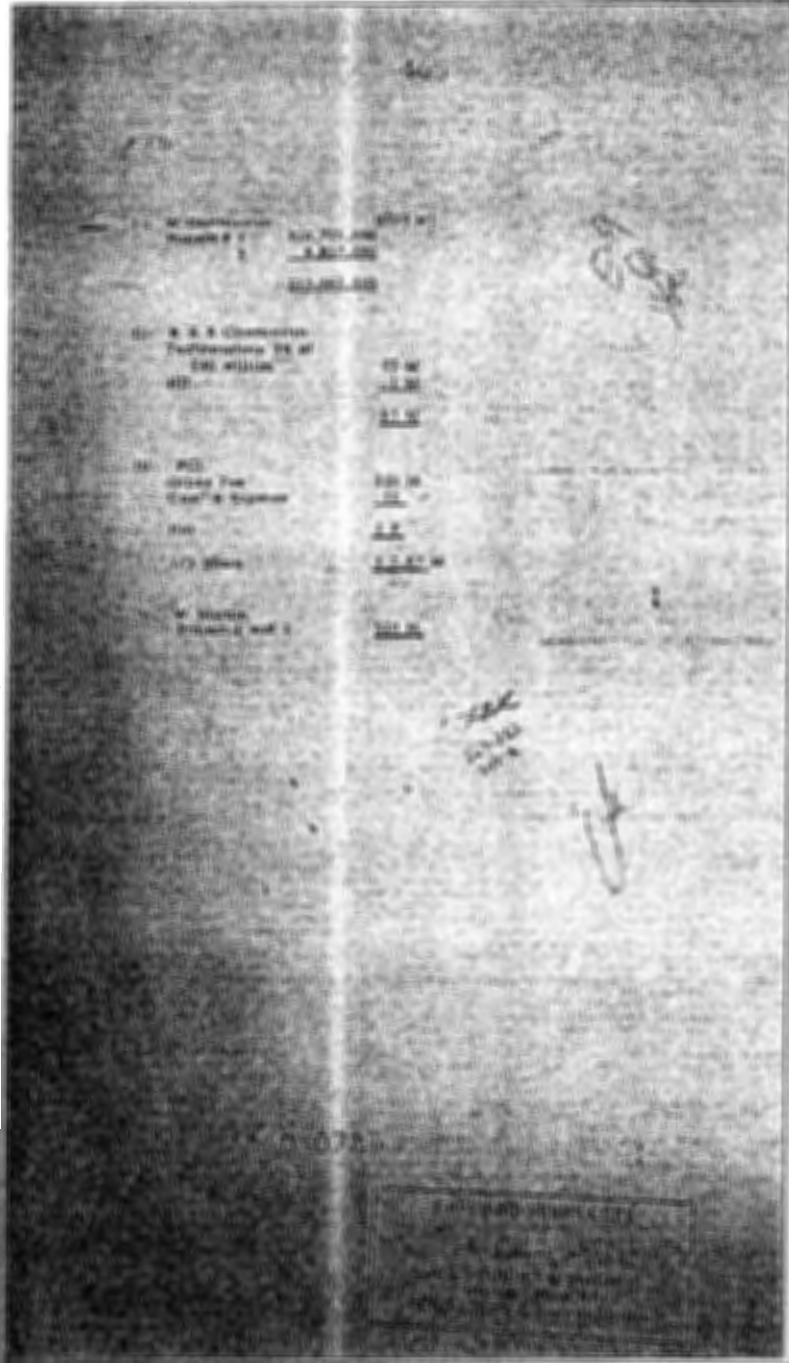
To prove the amount of the total commissions received by Disini, the best evidence would be the Westinghouse and B&R contracts and their corresponding commission agreements, especially considering the Republic's claim that the commissions received by Disini were based on 3% and 10% of the total contract price of the Westinghouse and B&R contracts, respectively, which clearly requires an inquiry into the specific terms and contents of the contracts. However, the Republic offered no justification as to their non-presentation thereof. As to the secondary evidence, *i.e.*, Exhibit E-9 and the affidavits of Manahan, Vergara and Jacob, the Republic offered no explanation why they should fall under any of the exceptions to the Best Evidence Rule.

The *Sandiganbayan* nevertheless accorded great weight to Exhibit E-9 or a tabulation of commissions allegedly typewritten on Disini's stationery, which was attached to Manahan's affidavit, to arrive at the amount of \$50,562,500.00. We reproduce Exhibit E-9 below.<sup>122</sup>

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<sup>121</sup> Id. at 275-276.

<sup>122</sup> Records, Vol. 1, p. 405.



Patently, Exhibit E-9 is a certified xerox copy. The Republic intends to prove the total amount of commissions received by Disini by presenting his typewritten tabulation of commissions on his stationery. However, under the Best Evidence Rule, when the subject of inquiry is the content of a document, no evidence shall be admissible other than the original document itself subject to certain exceptions. Here, the Republic failed to offer any plausible reason or justification why it presented a mere photocopy instead of the original.

Mere attestation by the affiant that he saw the original copies of the documents and that the photocopies are faithful reproductions of the original will not suffice without the Republic offering proof that the presentation of the secondary evidence is within the exceptions contemplated under Section 5, Rule 130 of the Rules of Court. Absent such justification, the certified xerox copy of Exhibit E-9 attached to Manahan's affidavits cannot be given any

evidentiary value for the purpose for which it was offered, *i.e.*, to establish the amount of commissions received by Disini.

Further, in offering documents as evidence before the court, such are classified as either public or private. Rule 132, Section 19 of the Rules of Court provides:

SEC. 19. *Classes of Documents.* — For the purpose of their presentation in evidence, documents are either public or private.

Public documents are:

(a) The written official acts, or records of the official acts of the sovereign authority, official bodies and tribunals, and public officers, whether of the Philippines, or of a foreign country;

(b) Documents acknowledged before a notary public except last wills and testaments; and

(c) Public records, kept in the Philippines, of private documents required by law to be entered therein.

All other writings are private.

The importance of classifying documents into public or private is explained in *Patula v. People*,<sup>123</sup> to wit:

The nature of documents as either public or private determines how the documents may be presented as evidence in court. A public document, by virtue of its official or sovereign character, or because it has been acknowledged before a notary public (except a notarial will) or a competent public official with the formalities required by law, or because it is a public record of a private writing authorized by law, *is self-authenticating and requires no further authentication in order to be presented as evidence in court.* In contrast, a private document is any other writing, deed, or instrument executed by a private person without the intervention of a notary or other person legally authorized by which some disposition or agreement is proved or set forth. Lacking the official or sovereign character of a public document, or the solemnities prescribed by law, a private document requires authentication in the manner allowed by law or the Rules of Court before its acceptance as evidence in court.<sup>124</sup>

Whether a document is public or private is relevant in determining its admissibility as evidence. Public documents are admissible in evidence even without further proof of their due execution and genuineness. On the other hand, private documents are inadmissible in evidence unless they are properly authenticated.<sup>125</sup> Clearly, Exhibit E-9 is a private document, thus it must be properly authenticated to be admissible and given probative value.

<sup>123</sup> 685 Phil. 376 (2012).

<sup>124</sup> *Id.* at 397.

<sup>125</sup> *Salas v. Sta. Mesa Market Corporation*, 554 Phil. 343, 348 (2007).



**Admissibility is different from probative value:**

Disini assails both the admissibility and probative value of Exhibit E-9. He claims that the *Sandiganbayan* violated the rule on authentication of documents under Section 20 of Rule 132<sup>126</sup> when it *admitted* and *relied* on Exhibit E-9.<sup>127</sup>

“[A]dmissibility of evidence should not be confused with its probative value. Admissibility refers to the question of whether certain pieces of evidence are to be considered at all, while probative value refers to the question of whether the *admitted* evidence proves an issue.”<sup>128</sup> “Thus, a particular evidence may be admissible, but its evidentiary weight depends on judicial evaluation within the guidelines provided by the rules of evidence.”<sup>129</sup>

Evidence is admissible when it is relevant to the issue and is not excluded by the law or the rules on evidence.<sup>130</sup> Before any *private* document offered as authentic, such as Exhibit E-9, is received in evidence, its due execution and authenticity must be proved by anyone who saw the document executed or written, or by evidence of the genuineness of the signature or handwriting of the maker.<sup>131</sup> “During authentication in court, a witness positively testifies that a document presented as evidence is genuine and has been duly executed or that the document is neither spurious nor counterfeit nor executed by mistake or under duress.”<sup>132</sup>

Disini argues that since Exhibit E-9 was not authenticated, it should not have been admitted by the *Sandiganbayan*.<sup>133</sup>

**Exhibit E-9 was not authenticated:**

A review of the records shows that Exhibit E-9 was indeed not authenticated. Its due execution and genuineness were not proved by the Republic in accordance with Section 20 of Rule 131.

<sup>126</sup> RULES OF COURT, Rule 132, Sec. 20 states:

Section 20. *Proof of private document.* — Before any private document offered as authentic is received in evidence, its due execution and authenticity must be proved either:

(a) By anyone who saw the document executed or written; or

(b) By evidence of the genuineness of the signature or handwriting of the maker.

Any other private document need only be identified as that which it is claimed to be. (21a)

<sup>127</sup> *Rollo*, Vol. I, pp. 47-55.

<sup>128</sup> *Heirs of Lourdes Sabanpan v. Comorposa*, 456 Phil. 161, 172 (2003), citing *PNOC Shipping & Transport Corporation v. Court of Appeals*, 358 Phil. 38, 59 (1998).

<sup>129</sup> *Id.*

<sup>130</sup> RULES OF COURT, Rule 128, Sec. 3 states:

Section 3. *Admissibility of evidence.* — Evidence is admissible when it is relevant to the issue and is not excluded by the law or these rules. (3a)

<sup>131</sup> RULES OF COURT, Rule 132, Sec. 20.

<sup>132</sup> *Salas v. Sta. Mesa Market Corp.*, supra note 119 at 349, citing Ricardo J. Francisco, *Evidence: Rules of Court in the Philippines (Rules 128-138)*, 3rd ed., pp. 504-505, and *Bough v. Cantiveros*, 40 Phil. 209, 213 (1919).

<sup>133</sup> *Rollo*, Vol. I, pp. 47-55.

Notably, during the presentation of Manahan, he only authenticated his affidavit, and not Exhibit E-9. The transcript of stenographic notes taken during his presentation reflect as much:

Q Do you recall having executed on January 26, 1989 an Affidavit which we have previously marked as Exhibit "E", consisting of twelve pages, and which was subscribed and sworn to before Notary Public Estella Regina Q. Bernad, which annexes were marked as Exhibits "E-1" to "E-11"?

A Yes, Ma'am.

Q I am showing you this Exhibit "E" entitled Affidavit dated January 26, 1989 together with all its annexes. What is the relation of this document to the one that you mentioned?

A It is the same, Ma'am.

Q Do you confirm that you affixed your signature on the bottom portion on each and every page of this Affidavit and above the typewritten name Angelo V. Manahan found on page eleven of the said Affidavit?

A Yes, Ma'am.

X X X X

Q **Mr. Manahan, do you affirm the truthfulness of your statement in the said affidavit, and do you understand fully its contents and the annexes described as Exhibits "E-1" to "E-11"?**

A **Yes, Ma'am.**<sup>134</sup> (Emphasis supplied)

The only testimony on Exhibit E-9 was the one provided by Manahan in his affidavit:

**16. Exhibit 9 (Document 00727) is a one-page tabulation of nuclear power plant commissions, typed in Mr. Disini's stationery.** Although I was HGI's chief financial officer, I was not informed of the details of the arrangement under which HGI [received] commissions from Westinghouse Electric Corporation ("Westinghouse") in connection with the Philippine Nuclear Power Plant ("PNPP"). Anything that related to BNPP was treated as secret by Mr. Disini and his close advisors. The Westinghouse commission payments were handled by Mr. Jerry Orlina, who was Mr. Disini's personal finance officer. The Westinghouse commission payments were never received by HGI in the Philippines, and my understanding is that they were paid directly into foreign bank accounts. The funds from the commissions never entered HGI's treasury.<sup>135</sup> (Emphasis supplied)

<sup>134</sup> TSN, February 14, 2007, pp. 6-8.

<sup>135</sup> *Rollo*, Vol. I, p. 508.

Such one-sentence description does not suffice to authenticate the document. There was no statement that Exhibit E-9 was genuine and had been duly executed or that it was neither spurious nor counterfeit, or executed by mistake or under duress.

Notably, the *Sandiganbayan* stated in the assailed Decision that Exhibit E-9 was only **admitted as part of Manahan's testimony**:<sup>136</sup>

This Court resolved plaintiff's Formal Offer of Evidence in the following manner:

- To **ADMIT the affidavits marked as Exhibits A, B, C, D, E, XX, YY, ZZ and their sub-markings in so far as they were testified on by witnesses Rodolfo Jacob, Jesus Vergara, Angelo Manahan and Rafael Sison**, the affiants in the said affidavits.

X X X X

**The documentary evidence presented by the plaintiff were only admitted as part of the testimony of the witnesses.** Therefore, these pieces of evidence do not have independent status. Its probative force depends entirely on the credibility of the testimony of the witness who identified the documents. Nevertheless, the contents of the document will be considered part of the narration of the witness.<sup>137</sup> (Emphases supplied)

A document admitted as part of the testimony of a witness does *not* constitute proof of the facts stated therein.<sup>138</sup> It merely forms part of the testimony of the witness, and does not have an independent status. Its probative force depends entirely on the credibility of the testimony of which it is a part of.<sup>139</sup>

Thus, when the *Sandiganbayan* admitted Exhibit E-9 as part of Manahan's testimony, it was not supposed to consider Exhibit E-9 as proof of the fact stated therein, *i.e.*, the amount of commissions. The Anti-Graft Tribunal was supposed to treat Exhibit E-9 only as part of Manahan's testimony. Contrary to its express statement, the *Sandiganbayan* actually *relied* on Exhibit E-9 to determine the amount of commissions.

In the assailed Decision, the *Sandiganbayan* found that the total amount of commissions received by Disini in connection with the BNPP project supposedly amounted to \$50,562,500.00:

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<sup>136</sup> Id. at 90.

<sup>137</sup> Id.

<sup>138</sup> *Republic v. T.A.N. Properties, Inc.*, 578 Phil. 441, 455 (2008), citing *Haverton Shipping Ltd. v. National Labor Relations Commission*, 220 Phil. 356, 362-365 (1985).

<sup>139</sup> *Manliclic v. Calaunan*, 541 Phil. 617, 630 (2007), citing *People v. Martinez*, 340 Phil. 374, 388 (1997).

According to the testimonies of Manahart and Vergara, Westinghouse agreed to pay a commission of 5% of the total contract amount. Asia Industries was entitled to get a commission of ½% of the value of the Westinghouse components sold on the nuclear project. Herdis Management and Investment Corporation were entitled to a 3% transaction, as commission. Technosphere Consultants, Inc. (sic) a Herdis company, supposedly obtained a 10% commission from Burns & Roe because of Disini's involvement. According to Vergara, the project cost was as much as \$600 million, and basing on Jacob's testimony, these commissions were deposited in the Swiss bank accounts in the name of Disini and his immediate family. It appears, however, that the amounts deposited in the Swiss bank accounts in the names of Liliana and Herminio Angel Disini were already withdrawn as a consequence of the Swiss Federal Court's Partial Decision dated August 18, 2006 unblocking the same. This makes the issue of the Swiss accounts being held in *custodia legis* moot and academic. Disini's own summary of the total commissions generated by this transaction amounting to \$50,562,500.00 is as follows:<sup>140</sup> (Emphasis supplied)

I.	W Commission	(\$715 m)	
	Project # 1		\$10,725,000
			8,837,500
			-----
			\$19,562,500
II.	B & R Commission		
	Technosphere 5% of \$40 million		\$2M
	HD		1M
			-----
			\$3M
III.	PCI		
	Gross Fee		\$20M
	Cost of Expense		12M
			-----
			\$8M
IV.	W Margin		
	Project 1 and 2	\$20M <sup>141</sup>	

Significantly, the amount of \$50,562,500.00 does not appear in any of the pleadings filed by the parties or in the witnesses' testimonies. It appeared for the *first* time in the assailed Decision. The *Sandiganbayan* explained that such amount was arrived at after adding items I to IV of Exhibit E-9. By adding items I to IV, the *Sandiganbayan* clearly relied on Exhibit E-9 to determine the amount of commissions received by Disini.

<sup>140</sup> *Rollo*, pp. 116-117.

<sup>141</sup> *Id.* at 117.

**The *Sandiganbayan* erred in relying on Exhibit E-9:**

Since Exhibit E-9 was unauthenticated, and thus inadmissible in evidence as proof of the fact stated therein, the *Sandiganbayan* should not have relied thereon in determining the exact amount of commissions received by Disini. By doing so, it relied on a documentary evidence whose due execution and genuineness were not established.

In addition, We also doubt the use of Exhibit E-9 in the determination of the amount of the commissions received by Disini for the following reasons:

*First*, Exhibit E-9 is patently vague. It lacks significant details such as the date of writing and the author. It uses acronyms which meanings were not explained by Manahan nor the Republic. Again, the only statement provided by Manahan, *i.e.*, "16. Exhibit 9 (Document 00727) is a one-page tabulation of nuclear power plant commissions, typed in Mr. Disini's stationery," reveals no details as to its source nor ownership.

*Second*, when the *Sandiganbayan* reproduced Exhibit E-9 in the assailed Decision, it omitted the phrase "1/3 Share" amounting to "\$2.67". It did not explain why the omission was made.

*Third*, there is evident disparity between the amount indicated in Exhibit E-9 as the Westinghouse commission, compared to the amount cited by the *Sandiganbayan* in its assailed Decision:

According to the testimonies of Manahan and Vergara, Westinghouse agreed to pay a commission of **5% of the total contract amount**. Asia Industries was entitled to get a commission of ½% of the value of the Westinghouse components sold on the nuclear project. Herdis Management and Investment Corporation were entitled to a 3% transaction, as commission. Technosphere Consultants, Inc. (sic) a Herdis company, supposedly obtained a 10% commission from Burns & Roe because of Disini's involvement. **According to Vergara, the project cost was as much as \$600 million**, and basing on Jacob's testimony, these commissions were deposited in the Swiss bank accounts in the name of Disini and his immediate family. x x x <sup>142</sup>  
(Emphases supplied)

Certainly, 5% of the \$600,000,000.00, *i.e.* US\$30,000.00, is substantially far from the amount of \$19,562,500.00 indicated in Exhibit E-9 as the "W Commission", assuming "W" refers to Westinghouse. Indeed, the *Sandiganbayan* erred when it relied on Exhibit E-9 in arriving at the amount of \$50,562,500.00.

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<sup>142</sup> Id. at 116-117.

**Criminal Cases Nos. 28001-02:**

To further assail Exhibit E-9, Disini points to the existence of Manahan's deposition in Criminal Case Nos. 28001-02, where he allegedly disowned knowledge of Exhibit E-9.<sup>143</sup> Disini cites the following stenographic notes taken during Manahan's deposition:

Q: Thank you. Is it your intention Mr. Manahan to specify that Exhibit "9" is an authentic and accurate tabulation?

A: **I cannot say so because I did not see the originals, Sir.**

Q: **And neither did you have any participation in its preparation.**

A: **No, Sir, I did not have any participation in its preparation.**

X X X

Q: May I refer you to Exhibit "9" Mr. Manahan, of your Affidavit, which according to your affidavit, is one-page tabulation of nuclear power plant commissions, typed in Mr. Disini's stationery. My question to you Mr. Manahan is, did you have any participation in preparing this tabulation?

A: No, Sir.

Q: When for the first time did you see Exhibit "9"?

A: **When it was shown to me by the PCGG, Sir.**<sup>144</sup> (Emphases supplied)

In response, the Republic argues that Disini is barred from invoking the deposition considering that he was already declared in default.<sup>145</sup> As a consequence of the default order, Disini had lost his standing in court and can no longer present his own evidence.<sup>146</sup>

We agree with the Republic.

**A party in default may not present its own evidence:**

<sup>143</sup> Id. at 47-55.

<sup>144</sup> Id. at 53.

<sup>145</sup> Id. Vol. II, pp. 597-601.

<sup>146</sup> Id.

“A party in default loses [its] right to present evidence, control the proceedings, and examine or cross-examine witnesses.”<sup>147</sup> Such party has “no right to expect that [its] pleadings would be acted upon by the court nor may be object to or refute evidence or motions filed against [it].”<sup>148</sup>

However, while a party in default loses the right to present evidence, it retains the right to appeal as part of the remedies available to a party in default.<sup>149</sup> The grounds that may be raised in such an appeal are restricted to any of the following:

Indeed, a defending party declared in default retains the right to appeal from the judgment by default. However, the grounds that may be raised in such an appeal are restricted to any of the following: **first, the failure of the plaintiff to prove the material allegations of the complaint; second, the decision is contrary to law; and third, the amount of judgment is excessive or different in kind from that prayed for. x x x**<sup>150</sup> (Emphasis supplied)

A party in default is precluded from raising any other ground in its appeal from the judgment by default since, otherwise, it would then be allowed to adduce evidence in its defense, which right it had lost after it was declared in default.<sup>151</sup>

Here, when Disini was declared in default, he lost his right to present evidence. While he retained his right to appeal, which he exercised when he filed the Petition, he was proscribed from pleading the existence of the deposition in Criminal Case Nos. 28001-02. Thus, we do not find any error with the *Sandiganbayan*'s refusal to consider Manahan's deposition in Criminal Case Nos. 28001-02.

In the same vein, We reject Disini's invocation of the ICA award dated December 19, 1991 and the NJDC decision dated July 15, 1993, which supposedly cleared him of bribery charges in relation to the Westinghouse and B&R contracts. By introducing these new matters, Disini is effectively

<sup>147</sup> *Otero v. Tan*, 692 Phil. 714, 724 (2012), citing *Cavili v. Judge Florendo*, 238 Phil. 597, 603 (1987).

<sup>148</sup> *Id.*

<sup>149</sup> See *Tiburcio v. Castro*, 244 Phil. 599, 602 (1988), where the following remedies were enumerated: Under the Rules of Court, there are several remedies available to a defaulted party, namely:

a) The defendant in default may, at any time after discovery thereof and before judgment, file a motion, under oath, to set aside the order of default on the ground that his failure to answer was due to fraud, accident, mistake or excusable neglect, and that he has meritorious defenses; (Sec 3, Rule 18)

b) If the judgment has already been rendered when the defendant discovered the default, but before the same has become final and executory, he may file a motion for new trial under Section 1(a) of Rule 37;

c) If the defendant discovered the default after the judgment has become final and executory, he may file a petition for relief under Section 2 of Rule 38; and

d) He may also appeal from the judgment rendered against him as contrary to the evidence or to the law, even if no petition to set aside the order of default has been presented by him. (Sec. 2, Rule 41) (*Lina v. Court of Appeals*, 135 SCRA 637, 642)

<sup>150</sup> *Otero v. Tan*, supra at 725, citing *Martinez v. Republic of the Philippines*, 536 Phil. 868, 875-880 (2006).

<sup>151</sup> *Id.*, citing *Arquero v. Court of Appeals*, 673 Phil. 545, 557 (2011).

adducing evidence in his defense, which right he had lost after he was declared in default.

Nevertheless, it should be noted that while a party in default loses its right to present evidence, the court is still supposed to protect its right by rendering judgment in accordance with the evidence required by law.<sup>152</sup> It may not admit nor rely on incompetent evidence:<sup>153</sup>

While it may be said that by defaulting, the defendant leaves himself at the mercy of the court, **the rules nevertheless see to it that any judgment against him must be in accordance with the evidence required by law. The evidence of the plaintiff, presented in the defendant's absence, cannot be admitted if it is basically incompetent.** Although the defendant would not be in a position to object, elementary justice requires that only legal evidence should be considered against him. If the same should prove insufficient to justify a judgment for the plaintiff, the complaint must be dismissed. And if a favorable judgment is justifiable, it cannot exceed in amount or be different in kind from what is prayed for in the complaint.<sup>154</sup> (Emphasis supplied)

This is why We overturn the *Sandiganbayan*'s reliance on Exhibit E-9, which is inadmissible in evidence to determine the amount of commissions received by Disini for being unauthenticated and in violation of the Best Evidence Rule. Nonetheless, We recognize that the Republic preponderantly proved that Disini indeed received substantial commissions and thus, it is entitled to recover even without a definite proof of its total amount. In lieu thereof, We grant Republic's claim for temperate and exemplary damages.

**Republic is entitled to temperate and exemplary damages:**

The Republic, in its Amended Complaint,<sup>155</sup> claimed actual, moral, nominal and exemplary damages, to wit:

19. Fifth Cause of Action – LIABILITY FOR DAMAGES – (a) By reason of the unlawful acts set forth above, Plaintiff and the Filipino people have suffered actual damages in an amount representing the pecuniary loss sustained by the latter as a result of Defendants' unlawful acts, the approximate value and interest on which, from the time of their wrongful acquisition, plus expenses which Plaintiff has been compelled to incur and shall continue to incur in its effort to recover Defendants' ill-gotten wealth all over the world. Defendants are, therefore, jointly and severally liable to Plaintiff for actual damages and for expenses incurred in the recovery of Defendants' ill-gotten wealth.

<sup>152</sup> Id. at 276-277, citing *Tanhu v. Judge Ramolete*, 160 Phil. 1101, 1126 (1975).

<sup>153</sup> Id.

<sup>154</sup> Id.

<sup>155</sup> *Rollo*, Vol. I, pp. 347-367.



(b) As a result of Defendants' unlawful, malicious, immoral and wanton acts described above, Plaintiff and the Filipino people had painfully endured and suffered for more than twenty long years, and still continue to endure and suffer anguish, fright, sleepless nights, serious anxiety, wounded feelings and moral shock, as well as besmirched reputation and social humiliation before the international community, for which Defendants are jointly and severally liable to Plaintiff and the Filipino people for moral damages.

(c) In addition, Plaintiff and the Filipino people are entitled to temperate damages for their sufferings which, by their very nature, are incapable of pecuniary estimation, but which this Honorable Court may determine in the exercise of its sound discretion;

(d) Defendants, by reason of the above described unlawful acts, have violated and invaded the inalienable right of Plaintiff and the Filipino people to a fair and decent way of life befitting a Nation with rich natural and human resources. This basic and fundamental right of Plaintiff and the Filipino people should be recognized and vindicated by awarding nominal damages in an amount to be determined by the Honorable Court in the exercise of its sound discretion.

(e) By way of example and correction for the public good and in order to ensure that Defendants' unlawful, malicious, immoral and wanton acts are not repeated, said Defendants are jointly and severally liable to Plaintiff for exemplary damages.<sup>156</sup>

Despite the failure of the Republic to prove the total amount of commissions received by Disini, the Court fully recognizes its right to recover the ill-gotten wealth. Disini is not at all entitled to these commissions as he illegally acquired them through the use of his influence and close relationship with President Marcos without rendering any service for the benefit of the Republic's BNPP project.

Evidently, Disini unjustly enriched himself by receiving substantial commissions from Westinghouse and B&R and acting as the SSR in order to ensure the award of the BNPP project to the said companies by taking undue advantage of his close relationship with President Marcos. Article 22 of the Civil Code provides that that "[e]very person who through an act or performance by another, or any other means, acquires or comes into possession of something at the expense of the latter without just or legal ground, shall return the same to him."

There is unjust enrichment when a person unjustly retains a benefit to the loss of another, or when a person retains money or property of another against the fundamental principles of justice, equity and good conscience. The principle of unjust enrichment essentially contemplates payment when there is no duty to pay, and the person who receives the payment has no right to receive it.<sup>157</sup>

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<sup>156</sup> Id. at 363-364.

<sup>157</sup> *Manila International Airport Authority v. Avia Filipinas International, Inc.*, 683 Phil. 34, 44 (2012).

We further elucidated on the concept of enrichment in *University of the Philippines v. PHILAB Industries, Inc.*:<sup>158</sup>

Unjust enrichment is a term used to depict result or effect of failure to make remuneration of or for property or benefits received under circumstances that give rise to legal or equitable obligation to account for them; to be entitled to remuneration, one must confer benefit by mistake, fraud, coercion, or request. Unjust enrichment is not itself a theory of reconvey. Rather, it is a prerequisite for the enforcement of the doctrine of restitution.<sup>159</sup>

Also, in *Reyes v. Lim*,<sup>160</sup> the court may, in the exercise of equity jurisdiction, make a ruling despite the “silence, obscurity or insufficiency of the laws,” thus:

The instant case, however, is precisely one where there is a *hiatus* in the law and in the Rules of Court. If left alone, the *hiatus* will result in unjust enrichment to Reyes at the expense of Lim. The *hiatus* may also imperil restitution, which is a precondition to the rescission of the Contract to Sell that Reyes himself seeks. This is not a case of equity overruling a positive provision of law or judicial rule for there is none that governs this particular case. This is a case of silence or insufficiency of the law and the Rules of Court. **In this case, Article 9 of the Civil Code expressly mandates the courts to make a ruling despite the "silence, obscurity or insufficiency of the laws." This calls for the application of equity, which "fills the open spaces in the law."**

Thus, the trial court in the exercise of its equity jurisdiction may validly order the deposit of the ₱10 million down payment in court. **The purpose of the exercise of equity jurisdiction in this case is to prevent unjust enrichment and to ensure restitution. Equity jurisdiction aims to do complete justice in cases where a court of law is unable to adapt its judgments to the special circumstances of a case because of the inflexibility of its statutory or legal jurisdiction. Equity is the principle by which substantial justice may be attained in cases where the prescribed or customary forms of ordinary law are inadequate.**<sup>161</sup> (Emphasis supplied.)

In fine, the Republic’s failure to particularly prove the actual amount of commissions received by Disini should not override its right to recover the illegally-acquired commissions considering the fact that it has satisfactorily established, by preponderance of evidence, Disini’s receipt thereof. Necessarily, public funds were released for the construction of the BNPP project. Disini indirectly amassed a portion of these public funds through commissions paid by Westinghouse and B&R. These commissions or “kickbacks” are not only illegal or fraudulent but detrimental to the Republic and highly unfair and prejudicial to ordinary Filipino taxpayers.

<sup>158</sup> 489 Phil. 693 (2004).

<sup>159</sup> Id. at 710.

<sup>160</sup> 456 Phil. 1 (2003).

<sup>161</sup> Id. at 9-10.

However, actual damages to be recoverable must be supported by evidence on record and cannot be left merely to the discretion of the court. While We affirm the Republic's entitlement to recover Disini's ill-gotten wealth, no other evidence was presented to show the definite amount thereof. The Republic failed to substantiate its claim for actual pecuniary loss or damages sustained by reason of Disini's acquisition of ill-gotten wealth.

While it is true that the Republic failed to prove the amount of commissions received, this does not mean, however, that Disini is free from any liability under this civil action for reconveyance, reversion, accounting, restitution and damages. Thus, under the principle of unjust enrichment, We uphold the Republic's right to recover these commissions in favor of the Filipino people. No one should unjustly enrich himself by receiving commissions in connection with a government project when clearly he has no right for it nor entitled to retain the same.

Nonetheless, since recovery thereof cannot be effected due to the absence of a definite amount, We deem it proper to award the Republic temperate damages for the pecuniary loss and the Filipino people suffered on account of Disini's illegal acquisitions of substantial commissions from Westinghouse and B&R, albeit the amount thereof not being proven with certainty. Under Article 2224 of the Civil Code, temperate or moderate damages, which are more than nominal but less than compensatory damages, may be recovered when the court finds that some pecuniary loss has been suffered but its amount cannot, from the nature of the case, be determined with certainty. In *Araneta v. Bank of America*,<sup>162</sup> the concept of temperate damages is explained thus:

The Code Commission, in explaining the concept of temperate damages under Article 2224, makes the following comment:

"In some States of the American Union, temperate damages are allowed. **There are cases where from the nature of the case, definite proof of pecuniary loss cannot be offered, although the court is convinced that there has been such loss.** For instance, injury to one's commercial credit or to the goodwill of a business firm is often hard to show with certainty in terms of money. Should damages be denied for that reason? The judge should be empowered to calculate moderate damages in such cases, rather than that the plaintiff should suffer, without redress from the defendant's wrongful act."<sup>163</sup> (Emphasis supplied)

In *Seven Brothers Shipping Corp. v. DMC-Construction Resources, Inc.*,<sup>164</sup> the Court enumerated the cases where temperate damages were rightly granted and awarded when proof of the actual amount was not duly proved, to wit:

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<sup>162</sup> 148-B Phil. 124 (1971).

<sup>163</sup> Id. at 131.

<sup>164</sup> 748 Phil. 692 (2014).

In contrast, under Article 2224, temperate or moderate damages may be recovered when the court finds that some pecuniary loss has been suffered but its amount cannot, from the nature of the case, be provided with certainty. This principle was thoroughly explained in *Araneta v. Bank of America*, which cited the Code Commission, to wit:

The Code Commission, in explaining the concept of temperate damages under Article 2224, makes the following comment:

In some States of the American Union, temperate damages are allowed. There are cases where from the nature of the case, definite proof of pecuniary loss cannot be offered, although the court is convinced that there has been such loss. For instance, injury to one's commercial credit or to the goodwill of a business firm is often hard to show with certainty in terms of money. Should damages be denied for that reason? The judge should be empowered to calculate moderate damages in such cases, rather than that the plaintiff should suffer, without redress from the defendant's wrongful act.

Thus, in *Tan v. OMC Carriers, Inc.*, temperate damages were rightly awarded because plaintiff suffered a loss, although definitive proof of its amount cannot be presented as the photographs produced as evidence were deemed insufficient. Established in that case, however, was the fact that respondent's truck was responsible for the damage to petitioner's property and that petitioner suffered some form of pecuniary loss. In *Canada v. All Commodities Marketing Corporation*, temperate damages were also awarded wherein respondent's goods did not reach the Pepsi Cola Plant at Muntinlupa City as a result of the negligence of petitioner in conducting its trucking and hauling services, even if the amount of the pecuniary loss had not been proven. In *Philtranco Services Enterprises, Inc. v. Paras*, the respondent was likewise awarded temperate damages in an action for breach of contract of carriage, even if his medical expenses had not been established with certainty. In *People v. Briones*, in which the accused was found guilty of murder, temperate damages were given even if the funeral expenses for the victim had not been sufficiently proven.<sup>165</sup> (Citations omitted)

Here, the Republic is entitled to recover temperate damages as there is no doubt that Disini trampled on the rights of the Filipino people to benefit from, and make good use of, these ill-gotten wealth, *i.e.*, substantial commissions or kickbacks he acquired; and that the whole nation significantly suffered pecuniary loss due to Disini's illegal acquisition of these public funds.

In assessing the amount of such damages, Article 2216 of the Civil Code provides:

Art. 2216. No proof of pecuniary loss is necessary in order that moral, nominal, temperate, liquidated or exemplary damages, may be adjudicated. The assessment of such damages, except liquidated ones, is left to the discretion of the court, according to the circumstances of each case.

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<sup>165</sup> Id. at 701-702.

Considering the relevant circumstances of this case, the amount of One Billion Pesos (₱1,000,000,000.00) as temperate damages is reasonable and justified. It bears stressing that this is not just an ordinary civil action for recovery of property and damages. This is an action for recovery of ill-gotten wealth which is imbued with public interest and concerns not only the government but every Filipino citizen, then and now. As part of the healing process of this nation, the Freedom Constitution specifically mandates the President to prioritize the recovery of these ill-gotten wealth. Hence, the loss or injury suffered by every Filipino due to Disini's acquisition of ill-gotten wealth must be duly recognized and compensated.

Further, We note that the Filipino people have not at all benefitted from the BNPP as it has remained inoperable as of this writing, a proverbial White Elephant. Obviously, a considerable amount of public funds had been invested and allocated for the construction of the BNPP, which funds came from the blood, sweat and tears of the Filipino taxpayers. The ill-gotten wealth should have been used and spent for and by the rightful owner thereof and not just by one person or a select group of people in power.

Also, the Republic was unduly deprived of its rights over these substantial commissions as part of public funds, and was compelled to litigate for their recovery for more than three decades. We cannot overemphasize that Disini received these ill-gotten wealth starting in 1976 when the construction of the BNPP began. Consequently, he had profited immensely from these commissions for a significant portion of his lifetime at the expense of the Filipinos.

Taking into consideration the inflation rate and the Philippine Peso's purchasing power at that time, these substantial commissions, if recovered, would have been greatly valued now and could have been used for the betterment of the Philippines. In addition, the Republic would have been entitled to recover legal interest on the total amount of commissions received had it proved such.

Undeniably, the recovery of these illegally acquired public funds, properties and assets has great impact on every Filipino's life. Hence, the award of One Billion Pesos (₱1,000,000,000.00) temperate damages is reasonable under the circumstances taking into consideration the rights of all Filipino citizens encroached upon by Disini's acquisition of ill-gotten wealth and the damage caused to the Republic for its failure to make good use of the same.

With the grant of temperate damages, this allows the imposition of exemplary damages by way of example or correction for the public good.<sup>166</sup> Exemplary damages cannot be recovered as a matter of right<sup>167</sup> and are only considered when moral, temperate, liquidated or compensatory damages are granted.<sup>168</sup> “Exemplary damages are designed by our civil law to permit the courts to reshape behavior that is socially deleterious in its consequence by creating negative incentives or deterrents against such behavior.”<sup>169</sup> Its purpose is to serve as a deterrent to serious wrong doings and as a vindication of undue sufferings and wanton invasion of the rights of an injured or a punishment for those guilty of outrageous conduct.<sup>170</sup>

There is no doubt that Disini’s receipt of these substantial commissions from Westinghouse and B&R is illegal and despicable which is no less than abhorred by our Freedom Constitution as its mandate includes eradication of graft and corruption, punishment of those guilty thereof and recovery of ill-gotten wealth. Verily, Disini’s conduct should be corrected and deterred as his use of influence or power for his own personal benefit to the detriment of the Republic caused substantial injury not only to public funds but to the morale, trust and confidence of Filipinos in the government and its projects. Hence, this Court finds it reasonable under the circumstances to award One Million Pesos (₱1,000,000.00) as exemplary damages.

Nevertheless, the Republic is not entitled to nominal damages as it is incompatible with the award of temperate damages. Nominal damages are recoverable where a legal right is technically violated and must be vindicated against an invasion that has produced no actual present loss of any kind or where there has been a breach of contract but no substantial injury or actual damages whatsoever have been or can be shown.<sup>171</sup> Clearly, Disini’s illegal acquisition of substantial commissions from Westinghouse and B&R produces injury or damage to the Republic which has been deprived the use of these public funds in the interest of the Filipinos.

In the same manner, moral damages cannot be awarded in favor of the Republic as it failed to convince this Court that it suffered any form of physical suffering, mental anguish, fright, serious anxiety, besmirched reputation, wounded feelings, moral shock, social humiliation, or any other similar circumstance because of Disini’s acquisition of ill-gotten wealth.<sup>172</sup>

<sup>166</sup> CIVIL CODE, Article 2229.

<sup>167</sup> CIVIL CODE, Article 2233 .

<sup>168</sup> CIVIL CODE, Article 2229.

<sup>169</sup> *Sulpicio Lines, Inc. v. Karaan*, G.R. No. 208590, October 3, 2018, 881 SCRA 588, 606 citing *New World Developers and Management, Inc. v. AMA Computer Learning Center, Inc.*, 754 Phil. 463, 475 (2015)

<sup>170</sup> *Lim v. Tan*, 801 Phil. 13, 25 (2016) citing *People v. Combate*, 653 Phil. 487, 507-508 (2010) citing *People v. Dalisay*, 620 Phil. 831 (2009).

<sup>171</sup> *Seven Brothers Shipping Corp. v. DMC-Construction Resources, Inc.*, supra note 158, p. 700.

<sup>172</sup> *Locsin v. Hizon*, 743 Phil. 420, 438-439 (2014).

Finally, the monetary awards shall earn the legal interest at the rate of 6% per *annum* from the finality of this Decision until their satisfaction.<sup>173</sup>

### III

In summary, We find that the *Sandiganbayan* did not err in finding Disini liable for the commissions he received from Westinghouse and B&R in relation to the BNPP project. The Republic had preponderantly proved the: (a) existence of the Westinghouse and B&R commissions and their respective commission agreements; and (b) Disini's receipt thereof based on the testimonies of Jacob and Vergara. However, the *Sandiganbayan* erred in relying on Exhibit E-9 to determine the exact amount of commissions the Republic is entitled to recover. Nonetheless, We deem it proper to grant the Republic: (a) temperate damages in the amount of One Billion Pesos (₱1,000,000,000.00) to compensate for the Republic's pecuniary loss by reason of Disini's acquisition of ill-gotten wealth; and (b) exemplary damages in the amount of One Million Pesos (₱1,000,000.00) to set an example and to serve as a deterrent to socially deleterious actions, such as acquisition of ill-gotten wealth. The Court further validates the express findings of the *Sandiganbayan* that former President Ferdinand E. Marcos and former First Lady Imelda Romualdez-Marcos had no participation whatsoever with regard to Disini's illicit dealings in the BNPP Project.


Lastly, We sternly remind Disini's counsel of record, Bernas Law Offices, to strictly observe court deadlines. The Petition was filed almost two (2) months late.<sup>174</sup> On this ground alone, We could have already dismissed it, if not only for the importance of the issues involved. But this case has unfortunately gone on for too long; its definitive resolution is long overdue. We therefore remind all the parties that any further perceived attempt to delay its resolution shall not merit this Court's liberality.

**WHEREFORE**, the Petition is **GRANTED in PART**. The assailed April 11, 2012 Decision and October 24, 2012 Resolution of the *Sandiganbayan* in Civil Case No. 0013 are hereby **AFFIRMED** with **MODIFICATION**. The order to account and reconvey \$50,562,500.00 is **DELETED** for lack of basis. Instead, petitioner is **DIRECTED to PAY** the Republic of the Philippines temperate damages in the amount of One Billion Pesos (₱1,000,000,000.00), and exemplary damages in the amount of One Million Pesos (₱1,000,000.00). These monetary awards shall earn legal interest at the rate of 6% per *annum* from the finality of this Decision until their full satisfaction.

<sup>173</sup> *Nacar v. Gallery Frames*, 716 Phil. 267 (2013).


<sup>174</sup> In its Motion to Admit the Attached Petition for Review on Certiorari, it stated that a copy of the assailed Resolution was received by the Bernas Law Offices' receptionist on November 7, 2012, but the receptionist only informed Attys. Jose A. Bernas and Joanne Mae A. Bibal of the receipt on January 9, 2013. Thus, the Petition was only filed on January 16, 2013.


**SO ORDERED.**

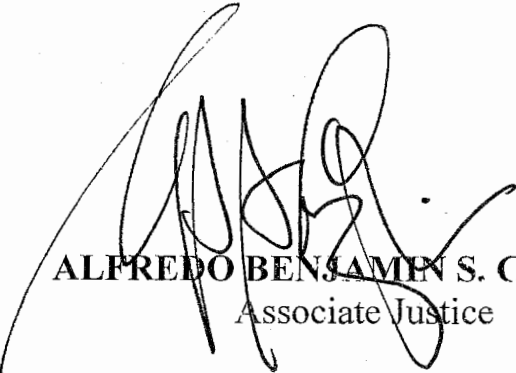
  
**RAMON PAUL L. HERNANDO**  
Associate Justice

**WE CONCUR:**

No part.  
**ALEXANDER G. GESMUNDO**  
Chief Justice

  
**ESTELA M. PERLAS-BERNABE**  
Associate Justice

  
**MARVIC M. V. F. LEONEN**  
Associate Justice

  
**ALFREDO BENJAMIN S. CAGUIOA**  
Associate Justice


  
**ROSALIND D. CARANDANG**  
Associate Justice

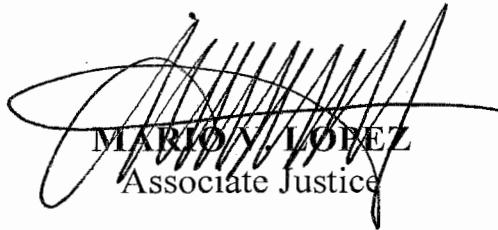



No part.


**AMY C. LAZARO-JAVIER**  
Associate Justice

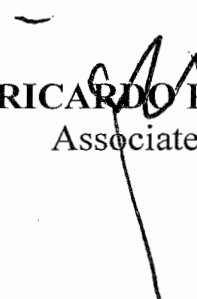
  
**HENRI JEAN PAUL B. INTING**  
Associate Justice


  
**RODIL V. ZALAMEDA**  
Associate Justice

  
**MARIO V. LOPEZ**  
Associate Justice

  
**EDGARDO L. DELOS SANTOS**  
Associate Justice

  
**SAMUEL H. GAERLAN**  
Associate Justice

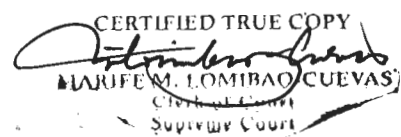
  
**RICARDO R. ROSARIO**  
Associate Justice

  
**JHOSEP V. LOPEZ**  
Associate Justice

**CERTIFICATION**

Pursuant to Section 13, Article VIII of the Constitution, I certify that the conclusions in the above decision had been reached in consultation before the case was assigned to the writer of the opinion of the Court.

  
**ALEXANDER G. GESMUNDO**  
Chief Justice

CERTIFIED TRUE COPY  
  
**MARIFE M. LOMIBAO CUEVAS**  
Clerk of Court  
Supreme Court