



**DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR  
BAHAGIAN DAGANG  
[GUAMAN NO.22NCC-118-04/2014]**

**ANTARA**

**STANDARD CHARTERED BANK MALAYSIA BERHAD**

(No.Syarikat:115793-P)

**... PLAINTIF**

**DAN**

**1. BONAHERO (MALAYSIA) SDN BHD**

(No.Syarikat:196259-P)

**2. FOO SHIH LIN**

(No. K/P: 760603-10-5007)

**3. TAI YOKE FOONG**

(No. K/P: 570128-10-5384)

**4. LI MING CHUAN**

(No. Paspot: 301147784)

**... DEFENDAN-  
DEFENDAN**

**GROUND OF DECISION**

**1.** *Vide* a Notice of Application dated 22/5/2014 (encl.8) made pursuant to O. 14 of the Rules of Court 2012 ('the RC'), the Plaintiff applied for summary judgment of the following:

(1) that the Defendant shall pay the Plaintiff the sum of RM1,209,399.58 as at 31/1/2014 together with interest on the said sum of RM1,209,399.58 at the rate of 9.10% (2.5% + the Plaintiff's current Base Lending Rate of 6.60%) per annum based on monthly rest from 1/2/2014 until the date of full settlement;

(2) cost; and



(3) any further and other relief deemed fit and proper by the Court.

2. The Plaintiff's application is supported by the Affidavit in Support of Thayavathaney K. Ramachandran affirmed on 22/5/2014 (encl.9) ('Plaintiff's Affidavit in Support') and the Plaintiff's Affidavit in Reply(1) affirmed by the same deponent on 24/6/2014 (encl.11). The Defendants opposed the said application by Defendants' Affidavit in Reply affirmed by Foo Shih Lin (2nd Defendant who was also authorised to affirm the said Affidavit on behalf of the other Defendants) on 9/6/2014 (encl.10).

3. For the purpose of this application I am satisfied that the preliminary requirements have been complied with ie, (i) the Defendant has entered appearance; (ii) the statement of claim must have been served on the Defendant; and (iii) the affidavit in support of the application must comply with the requirements of r. 2 of O. 14 of the RC. Upon these considerations being satisfied, the Plaintiff will have established a *prima facie* case and it comes entitled to judgment and the burden shifts to the Defendant to satisfy the Court why judgment should not be given against it (per George Seah FJ in *National Company For Foreign Trade v. Kayu Raya Sdn. Bhd.* [1984] 1 CLJ (Rep) 283 at p.285 e-f).

3.1. It is also trite law that in a claim for summary judgment the burden is on the Defendant to raise triable issues though a complete defence need not be shown; the determination of whether an issue is triable or not must necessarily depend on the facts or the law arising in each case as disclosed in the affidavit evidence before the Court (per Mohamed Azmi SCJ in *Bank Negara Malaysia v. Mohd Ismail*

*Ali Johor & Ors* [1992] 1 CLJ (Rep) 14 at p.19; also cited in *Abdol Mulok Awang Damit v. Perdana Industri Holdings Bhd* [2003] 3 CLJ 497 at p.503 e-f).

4. The brief facts of the case are as follows. Upon the request of the 1<sup>st</sup> Defendant and *vide* a Letter of Offer dated 22/11/2012 (exh.SCB-1, Plaintiff's Affidavit in Support), the Plaintiff granted the 1<sup>st</sup> Defendant an Overdraft Facility ('the Facility') for the sum of RM1,600,000.00 under Account no. 633120017545.

4.1. In consideration of the Facility granted to the 1<sup>st</sup> Defendant, the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants had executed a Guarantee Agreement dated 25/8/2009 (exh.SCB-2, Plaintiff's Affidavit in Support) whereby they had agreed, jointly and severally to be guarantors for the 1<sup>st</sup> Defendant for the principal of RM2,000,000.00 together with interest.

4.2. The 1<sup>st</sup> Defendant had defaulted in making payments and/or to regularise the Facility. The Plaintiff terminated the Facility and therefore claimed for the outstanding sum due and owing under the Facility.

4.3. Through its solicitors, the Plaintiff issued letters of demand (exh.SCB-3, Plaintiff's Affidavit in Support) to all the Defendants dated 14/2/2014 for the sum of RM1,209,399.58 as at 31/1/2014 together with interest thereon of 9.10% (2.5% + current Base Lending Rate of 6.60%) per annum with monthly rest from 1/2/2014 until the date of full settlement. However till to date the Defendants failed to remit the payment demanded to the Plaintiff.

5. I shall now deal with the issues raised by the Defendants which they claimed to be triable based on the Defendants' Statement of Defence. First, the Defendants contended that they had no



knowledge of the Letter of Offer dated 22/11/2012 and the terms contained therein. I find there is no merit in the Defendants' contention for these reasons.

5.1. Prior to the Letter of Offer dated 22/11/2012, the Plaintiff had issued the Letter of Offer dated 3/7/2009 whereby the 1<sup>st</sup> Defendant accepted the said offer of Overdraft Facility of RM2,000,000.00 as is evident from exh.SCB-5, Plaintiff's Affidavit in Reply (1).

5.2. In consideration of the said offer of Overdraft Facility of RM2,000,000.00 from the Plaintiff to the 1<sup>st</sup> Defendant, the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants had executed the Guarantee Agreement dated 25/8/2009 (exh.SCB-2, Plaintiff's Affidavit in Support) whereby they had agreed, jointly and severally to be guarantors for the 1<sup>st</sup> Defendant for the principal of RM2,000,000.00 together with interest.

5.3. The Plaintiff had issued 2 other Letters of Offer dated 9/8/2010 and 4/1/2012, exhs.SCB-6 and SCB-7, Plaintiff's Affidavit in Reply (1) respectively. It is observed that the Letter of Offer dated 22/11/2012, exh.SCB-1 which makes reference to the Letter of Offer of 4/12/2012, exh.SCB-7 did not change the terms of the Facility save that the limit of the Facility granted to the 1<sup>st</sup> Defendant was changed from RM2,000,000.00 to RM1,600,000.00.

5.4. The 1<sup>st</sup> Defendant did not deny receipt of the Letter of Offer of 22/11/2012, exh.SCB-1; neither did it lodge a complaint after the issuance of the same. In fact the 1<sup>st</sup> Defendant had been making payments to the Plaintiff towards the Account No.633120017545 since November 2012 as is evident from the Statements of Account (exh.SCB-8, Plaintiff's Affidavit in Reply (1) dated 30/11/2012, 31/12/2012, 31/01/2013, 28/02/2013, 31/03/2013, 30/04/2013, 31/05/2013, 30/06/2013, 31/07/2013, 31/08/2013, 30/09/2013, 31/10/2013, 30/11/2013, 31/12/2013).

5.5. Therefore in my judgment it cannot lie in the mouth of the 1<sup>st</sup> Defendant to say that it has no knowledge about the Letter of Offer of 22/11/2012, exh.SCB-1.

6. This brings me to the 2<sup>nd</sup> purported triable issue. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants alleged that they did not sign the Guarantee Agreement dated 25/8/2009, exh.SCB-2 and neither receive the same.

6.1. I find this contention to be totally baseless and is a non-starter in the light of the Guarantee Agreement dated 25/8/2009, exh.SCB-2 which has been executed by each of them. By the execution of the same, the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants are bound by the terms in the Guarantee Agreement in the absence of any allegation of fraud or misrepresentation as held by Dato' Hj. Abdul Malik bin Hj. Ishak JC (as he then was) in *Ooi Yoke In (F) & Anor. v. Public Finance Berhad* [1993] 2 CLJ 464 [469-470] albeit in the context of a hire purchase contract.

6.2. Therefore in my judgment, the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants are bound to comply with the following salient terms of the Guarantee Agreement that:-

- (a) they will guarantee payment and pay the Plaintiff the 1<sup>st</sup> Defendant's debt provided that the total principal sum shall not exceed the principal sum of RM2,000,000.00 (cl.1);
- (b) the Guarantee shall be a continuing security until full payment of the 1<sup>st</sup> Defendant's debt (cl.6); and
- (c) they shall be principal debtors for all the sums of money which may be recoverable from the 1<sup>st</sup> Defendant (cl. 8).



7. This brings me to the 3<sup>rd</sup> purported issue whereby the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants deny liability alleging that that the Guarantee Agreement is *mala fide void ab initio* in contravention of the law and equity particularly for varying the terms of the Letter of Offer of 22/11/2012, exh.SCB-1 without the consent of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants. The Defendants cited s. 86 of the Contracts Act 1950 and the case of *Kidurong Land Sdn Bhd & Anor v. Lim Gaik Hua & Ors* [1990] 1 MLJ 485 [493I left column to A-H right column].

7.1. The Plaintiff urged the Court to disregard this issue submitting that it was not pleaded in the Defence but only raised in para 17 of the Defendants' Affidavit in Reply. With respect I cannot agree with the Plaintiff because the Defendant had pleaded the same in para 3 (a) and (b) of the Statement of Defence. However in my judgment there are other reasons why the contention of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants cannot be sustained.

7.2. Firstly, by virtue of cl.12(b) of the Guarantee Agreement, the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants have agreed and acknowledged that their liabilities shall be absolute and unconditional and shall not be abrogated, prejudiced, affected or discharged by any determination, increase, amendment or variation to any of the terms or quantum of the credit, banking or other accommodation extended to the 1<sup>st</sup> Defendant. In my considered view the issuance of the Letter of Offer of 22/11/2012 which was to reduce the amount of Facility from RM2000,000.00 to RM1,600,000.00 is an amendment of the quantum of the credit which the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants are nevertheless bound to be held liable for, irrespective of whether they have consented or otherwise under cl.12(b) of the Guarantee Agreement.

7.3. Secondly, this brings me to the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants' argument on contravention of s.86 of the Contracts Act which reads:-

**“86. Discharge of surety by variance in terms of contract.**

Any variance, made without the surety’s consent, in the terms of the contract between the principal debtor and the creditor, discharges the surety as to transactions subsequent to the variance.”

7.3.1. There is no identification of any specific clause per se by the learned Counsel for the Defendants be in in the Written Submission, Reply Submission or orally of which clause in the Guarantee Agreement is said to be in contravention of the Contracts Act. I am of the opinion that the Defendants must have had in mind clause 12(b) of the Guarantee Agreement and is submitting that cl.12(b) is not enforceable as it contravenes s. 86 of the Contracts Act in that the parties cannot contract out of any provision of the law.

7.3.2. I find there is no merit in the Defendants’ contention as I agreed with the Plaintiff’s submission that s. 86 of the Contracts Act has no application in the event the parties agreed to dispense with its application in the agreement. A similar argument was canvassed in the case of *CIMB Bank Berhad v. Dataran Fokus Sdn Bhd & 2 Ors.* [2013] 1 LNS 399 where the 3<sup>rd</sup> defendant, the guarantor of the 1<sup>st</sup> defendant who was granted a banking facility by the plaintiff contended cl.8 of the guarantee contravenes s. 86 of the Contracts Act. I agreed with the view expressed by Hashim Hamzah JC (as he then was) at para 15 that since s. 86 of the Contracts Act provides no express terms to render an agreement void, the parties may contract out of the said provision following the Privy Council decision in *Ooi Boon Leong & Ors. v. Citibank N.A.* [1984] 1 MLJ 222 at p.226 where it was held by Lord Brightman that:

“If freedom to contract is to be curtailed in relation to a particular subject matter, their Lordships would expect the prohibition to be expressed in the statute, and not left by the legislature to be picked up by the reader as an implication based upon sections dealing with different subject matters. Furthermore, it may be noticed that when the Contracts Act intends to

render an agreement void, it says so in express terms; see Sections 25 to 31 under the cross-heading “Void Agreements”, read with the definitions in section 2(e) and (g).”

7.3.3. With respect I am of the view that *Kidurong’s* case (*supra*) relied on by the Defendants can be distinguished in that there was no similar provision in the likes of cl.12(b) in the Guarantee Agreement in this present case or cl.8 of the guarantee in *CIMB Bank Berhad v. Dataran Fokus Sdn Bhd & 2 Ors.* (*supra*) executed by the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants who are the guarantors. Thus there was no discussion of the effect of a contract in the event that parties agreed to dispense with the application of s. 86 of the Contracts Act 1950.

8. The 4<sup>th</sup> purported issue is the Defendants’ contention that they did not receive the letters of demand. I find there is no merit in the Defendants’ contention. Cl.25 of the Letter of Offer of 22/11/2012 and cl.30 of the Guarantee Agreement which are similarly worded under the heading ‘Notices’ reads:-

**“25. NOTICES**

- (a) Any demand, request, notice or other communication (collectively referred to as “Notices”) by or on behalf of the Bank or the Borrower shall be in writing.
- (b) Notices may be given or made by post, telegram, facsimile, personal delivery or such other mode as may be allowed by the Bank. Notices shall be issued by or on behalf of the Bank (including computer generated notices/statements that do not require any signature) to the Borrower at the Borrower’s address, facsimile number or electronic mail address as stated in the Letter of Offer or the last known address, facsimile number or electronic mail address notified by the Borrower in writing. The Notices are deemed delivered to the Borrower:
  - (i) in the case of post, two days after the date of posting notwithstanding the Notices are returned undelivered or unclaimed;
  - (ii) ...;





- (iii) ...;
- (iv) ...;
- (v) ...”

8.1. As alluded to in para 4.3 above the letters of demand were issued to the Defendants and posted via certificate of posting to the addresses as stated in the Letter of Offer and the Guarantee Agreement and there is no proof of any change of addresses of the Defendants. Therefore in accordance with cl.25 of the Letter of Offer of 22/11/2012 and cl.30 of the Guarantee Agreement I am satisfied that the letters of demand dated 14/2/2014, exh.SCB-3 are deemed delivered to the Defendants 2 days after the date of posting.

9. This brings me to the final purported issue of whether the Defendants are indebted to the Plaintiff for RM1,209,399.58 as at 31/1/2014 together with interest on the said sum of RM1,209.399.58 at the rate of 9.10% (2.5% + the Plaintiff’s current Base Lending Rate of 6.60%) per annum based on monthly rest from 1/2/2014 until the date of full settlement. In my judgment the Defendants cannot deny liability for the aforesaid sum for these reasons.

9.1. The interest of 9.10% includes the 1% commitment fee charged to the 1<sup>st</sup> Defendant on unutilised limit as agreed by the parties at para 1 of the Letter of Offer dated 3/7/2009.

9.2. Further the Plaintiff’s claim is supported by the Certificate of Indebtedness as at 31/1/2014, exh.SCB-4, Plaintiff’s Affidavit in Support and the Statements of Account, exh.SCB-8. The Statements of Account have been sent to the 1<sup>st</sup> Defendant on monthly basis and showed the breakdown of the amount outstanding. The amount

claimed by the Plaintiff for the sum of RM1,209,399.58 as at 31/1/2014 is shown in the Statement of Account dated 31/1/2014.

9.3. The Defendants had agreed pursuant to cl.15 of the Letter of Offer dated 22/11/2012 and cl.22 of the Guarantee Agreement that the Certificate of Indebtedness and the statements of account issued by the Plaintiff shall be conclusive proof of the 1<sup>st</sup> Defendant's indebtedness.

9.4. The Defendants did not lodge any complaint to the Plaintiff within 14 days from the date of receipt of the Statements of Account if there were any discrepancies in the Statements of Account as printed in the said Statements.

9.5. Finally, since the Defendants have not demonstrated any manifest error in the Certificate of Indebtedness, in accordance with the law, the Certificate of Indebtedness constitutes conclusive proof of the amount claimed by the Defendants to the Plaintiff as supported by the following authorities:

- (a) *Cempaka Finance Bhd v. Ho Lai Ying & Anor* [2006] 3 CLJ 544 (FC) at p.554A-E;
- (b) *Tan Chong Keat v. Pengurusan Danaharta Nasional Bhd* [2008] 4 CLJ 748 (CA) at p.754H-I to p.755A-C;
- (c) *Yusof Rahmat v. Bumiputra-Commerce Bank Bhd* [2007] 7 CLJ 225 (HC) at p.232A-F.

**10.** Since it is my finding that the Defendants have not raised any triable issue which require to be ventilated at a trial, I allowed the Plaintiff's application for summary judgment to be entered against the Defendants in terms of prayers 1 and 2 with costs fixed at RM3,000.00.



**Dated:** 29 NOVEMBER 2014

**(LAU BEE LAN)**

Judge

**Counsel:**

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**Legislation referred to:**

Contracts Act 1950, s. 86

Rules of Court 2012, O. 14