



**DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR
(BAHAGIAN DAGANG)
[GUAMAN NO. 22NCC-120-04/2014]**

ANTARA

STANDARD CHARTERED BANK MALAYSIA BERHAD

(No.Syarikat:115793-P)

... PLAINTIF

DAN

1. BELTRONIX INTERTRADE SDN BHD

(No. Syarikat: 218979-U)

2. JAIKRISHIN TIRATHDAS

(No. K/P: 630929-08-5039)

3. ROMA KISHINCHAND LAKHANI

(No. K/P: 680924-75-5078)

... DEFENDAN-

DEFENDAN

GROUND OF DECISION

1. *Vide* a Notice of Application dated 9/6/2014 (encl.9) made pursuant to O. 14 of the Rules of Court 2012 ('the RC'), the Plaintiff applied for summary judgment with costs against the Defendants for the sums of:-

- (1) RM840,225.59 as at 17/10/2013 together with interest on the said sum of RM840,225.59 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 18/10/2013 until the date of full settlement for Term Loan Account No. 44171994;

(2) RM2,582,769.41 as at 17/10/2013 together with interest on the said sum of RM2,582,769.41 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 18/10/2013 until the date of full settlement for Term Loan Account No.44172028.

2. The Plaintiff's application is supported by the Affidavit in Support of Paruveen Kaur a/p Ranjit Singh affirmed on 9/6/2014 (encl.10) ('Plaintiff's Affidavit in Support'), the Plaintiff's Affidavit in Reply(I) and the Plaintiff's Affidavit in Reply(II) affirmed by Thayavathaney K. Ramachandran on 17/7/2014 (encls.14 & 15 respectively). The Defendants opposed the Plaintiff's application by the 1st Defendant's Affidavit in Reply affirmed by the 1st Defendant on 4/7/2014 (encl.12) and the 3rd Defendant's Affidavit in Reply affirmed by the 3rd Defendant on 4/7/2014 on behalf of himself and the 2nd Defendant (encl.13).

3. For the purpose of this application I am satisfied that the preliminary requirements must have been complied with ie, (i) the Defendants have entered appearance; (ii) the statement of claim must have been served on the Defendants; 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 Defendants to satisfy the Court why judgment should not be given against them (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 Defendants 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 Mohd. 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. The Plaintiff, via a Letter of Offer dated 10/10/2012, granted a term loan facility ('Facility 1') to the 1st Defendant for a sum of RM815,000.00 under Account No.44171994 (exh.SCB-10, Plaintiff's Affidavit in Reply (I)).

4.1. In consideration of the Plaintiff's agreement to give the 1st Defendant Facility 1, the 2nd and 3rd Defendants executed a Guarantee Agreement dated 8/5/2009 ('1st Guarantee Agreement'), whereby they agreed to be guarantors for the 1st Defendant for the principal not exceeding RM1,000,000.00 together with the interest (exh.SCB-2, Plaintiff's Affidavit in Support).

5. At the 1st Defendant's request, the Plaintiff, *via* a Letter of Offer dated 10/10/2012, granted the 1st Defendant a term loan facility ('Facility 2'), for a sum of RM2,500,000.00 under Account No.44172028 (exh.SCB-11, Plaintiff's Affidavit in Reply (I)).

5.1. In consideration of the Plaintiff's agreement to give the 1st Defendant Facility 2, the 2nd and 3rd Defendants executed a Guarantee Agreement dated 18/9/2009 ('2nd Guarantee Agreement') whereby they agreed to be guarantors for the 1st Defendant for the



principal not exceeding RM2,500,000.00 together with the interest (exh.SCB-4, Plaintiff's Affidavit in Support).

6. At all material times, the 1st Defendant defaulted in making payments and/or to regularise the 2 Facilities. The Plaintiff terminated the Facilities granted to the 1st Defendant and therefore claimed the outstanding amounts due and owing under the said 2 Facilities.

7. The Plaintiff, through his solicitors, issued letters of demand dated 17/10/2013 to each of the Defendants, demanding the amounts claimed in the application for Summary Judgment. However, till to date, the Defendants have failed to remit the amounts demanded (collectively marked as exh.SCB-5, Plaintiff's Affidavit in Support).

8. I shall now deal with the purported issues raised by the Defendants which they claimed to be triable.

No knowledge of the terms and conditions of the Letters of Offer and the Guarantee Agreements

9. First, the Defendants contended that they had no knowledge of the Letters of Offer and the Guarantee Agreements and the terms contained therein. I find there is no merit in the Defendants' contention for these reasons.

9.1. I find this contention to be misconceived. The 1st Defendant had duly executed the Letters of Offer dated 10/10/2012 for Facility 1 and Facility 2 and the 1st and 2nd Guarantee Agreements. The 1st Defendant did not deny receipt of the Letters of Offer of 10/10/2012; neither did it lodge a complaint after the issuance of the same. In fact the 1st Defendant had been making payments to the Plaintiff after the

issuance of the Letters of Offer dated 10/10/2012 as is evident from the Statements of Account which showed that in respect of Facility 1 and Facility 2, the Plaintiff received the last payments of RM6,200.00 on 22/7/2013 and RM4,000.00 on 19/8/2013 (exhs.SCB-8 and SCB-9, Plaintiff's Affidavit in Support) respectively. By the execution of the same and in the absence of any allegation of fraud or misrepresentation, the Defendants are bound by the terms in the Letters of Offer dated 10/10/2012 and the 1st and 2nd Guarantee Agreements 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.

No consent by Guarantors to the amendments in the Letters of Offer

10. Learned Counsel for the Defendants in his Skeletal Submission dated 7/8/2014 submitted that (i) the 2nd and 3rd Defendants signed the Letter of Guarantee on 8/5/2009 but the Letter of Offer to the 1st Defendant was only made on 30/9/2011; (ii) the terms of the Letter of Offer on 30/9/2011 were amended on 10/10/2012; (iii) the 2nd and 3rd Defendants had no knowledge of these new terms; (iv) there was no consent to the amendments from the 2nd and 3rd Defendants as guarantors; and (v) the 2nd and 3rd Defendants cannot be bound by the new terms without their consent as guarantors.

10.1. I agreed with the submission of the Plaintiff that the aforesaid issue was not pleaded in the Statement of Defence and the Defendants' Affidavits in Reply, encls.12 and 13. Hence with respect I am of the view that it is not open to the Defendants to now raise this



issue at the submission stage which thus warranted me to disregard this issue.

11. In any event, in this regard, assuming I err in my ruling, by virtue of cl.12.1(b) of the 1st and 2nd Guarantee Agreements, the 2nd and 3rd Defendants had 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 1st Defendant. In my considered view the issuance of the Letters of Offer of 10/10/2012 was to inform the 1st Defendant that the Plaintiff had amended the Facilities offered to the Defendants as per the terms contained in the respective Letters of Offer dated 10/10/2012 for Facility 1 and Facility 2. The 2nd and 3rd Defendants are nevertheless bound by the terms under the 1st and 2nd Guarantee Agreements irrespective of whether they had consented to the amendment on the quantum of the credit under cl.12(b) of the 1st and 2nd Guarantee Agreements.

12. The learned Counsel for the Defendants did not provide any authority to support his argument referred to in para 10 above. However I believe learned Counsel for the Defendants has in mind s. 86 of the Contracts Act 1950 which states:-

“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.”

12.1. In this regard s. 86 of the Contracts Act 1950 has no application in the event the parties agreed to dispense with its application in the

agreement as in this instant case, by virtue of cl.12.1(b) in the 1st and 2nd Guarantee Agreements. 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 3rd defendant, the guarantor of the 1st defendant who was granted a banking facility by the plaintiff contended that 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 of the report 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).”

12.2. Further, the 2nd and 3rd Defendants are bound to comply with the following common salient terms of the 1st and 2nd Guarantee Agreements that:-

- (a) they will guarantee payment and pay the Plaintiff the 1st Defendant’s debt provided that the total principal sum shall not exceed the principal sum of RM1,000,000.00 and RM2,500,000.00 for Facility 1 and Facility 2 respectively (cl.1);
- (b) the Guarantee shall be a continuing security until full payment of the 1st Defendant’s debt (cl.6); and

- (c) they shall be principal debtors for all the sums of money which may be recoverable from the 1st Defendant (cl.8).

Defendants are not liable to pay the debts to the Plaintiff as the Facilities were covered and guaranteed by Syarikat Jaminan Pembiayaan Perniagaan Berhad

13. The Defendants alleged that (i) they are not liable to pay the debts to the Plaintiff as the Facilities are covered and guaranteed by Syarikat Jaminan Pembiayaan Perniagaan Berhad ('SJPP'); and (ii) the Plaintiff should take action against SJPP instead of proceeding against the Defendants. I am of the view there is no merit in the Defendants' contention for the following reasons.

13.1. Facility No.44172028 (Facility 2) was covered and guaranteed by SJPP. Facility No.44171994 (Facility 1) was not covered and guaranteed by SJPP. (see exhs.SCB-10 and SCB-11, Plaintiff's Affidavit in Reply(I))

13.2. With regard to Facility No.44172028 (Facility 2), under the Master Agreement dated 7/4/2009 between SJPP and, *inter alia*, the Plaintiff (exh.SCB-12, Plaintiff's Affidavit in Reply (I & II)), it was agreed that the Government of Malaysia would guarantee a substantial percentage of the financing facility to be given out to the 1st Defendant.

13.3. However, the guarantee given by SJPP does not extinguish the 1st Defendant's liability to pay the outstanding amounts to the Plaintiff. The 1st Defendant's liability still remains i.e. to pay the outstanding amount to the Plaintiff as agreed according to the terms set out in the Letters of Offer dated 10/10/2012. (see exhs.SCB-10 and SCB-11, Plaintiff's Affidavit in Reply(I))

13.4. Under cl.8 of the Master Agreement, it is provided that the Plaintiff will have to exhaust legal actions against all the Defendants to recover the amount due before the Plaintiff can utilize the claim from SJPP. SJPP will not automatically pay the guaranteed sum to the Plaintiff unless the Plaintiff shows to SJPP that the Plaintiff has exhausted all legal actions against the Defendants to recover the debt.

Defendants dispute the amount claimed

14. The Defendants disputed that they are indebted to the Plaintiff for the sums of:-

- (1) RM840,225.59 as at 17/10/2013 together with interest on the said sum of RM840,225.59 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 18/10/2013 until the date of full settlement under Facility No.44171994 (Facility 1);
- (2) RM2,582,769.41 as at 17/10/2013 together with interest on the said sum of RM2,582,769.41 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 18/10/2013 until the date of full settlement under Facility No.44172028 (Facility 2).

14.1. In my judgment the Defendants cannot deny liability for the aforesaid sums for these reasons. By signing the Letters of Offer dated 10/10/2012, the Defendants agreed that the Plaintiff may impose interest of 9.10% on both Facilities (exhs.SCB-10 and SCB-11 in cl.2(a), Plaintiff's Affidavit in Reply(I)).

14.2. Further the Plaintiff's claim is supported by the respective Certificate of Indebtedness and Statements of Account as follows:

- (a) Facility No.44171994 (Facility 1) by the Certificate of Indebtedness as at 17/10/2013, exh.SCB-6, Plaintiff's Affidavit in Support;
- (b) Facility No.44172028 (Facility 2) by the Certificate of Indebtedness as at 17/10/2013, exh.SCB-7, Plaintiff's Affidavit in Support;
- (c) Facility No.44171994 (Facility 1) by the Statement of Account dated 31/12/2012, 31/3/2013, 30/6/2013, 31/12/2013 and 31/3/2014, exh.SCB-8, Plaintiff's Affidavit in Support; and
- (d) Facility No.44172028 (Facility 2) by the Statement of Account dated 31/12/2012, 31/3/2013, 30/6/2013, 31/12/2013 and 31/3/2014, exh.SCB-9, Plaintiff's Affidavit in Support.

14.3. The Defendants had agreed pursuant to cl.15 of the Letters of Offer dated 10/10/2012, exhs.SCB-10 and SCB-11 and cl.22 of the Guarantee Agreements, exhs.SCB-2 and SCB-4 that the Certificate of Indebtedness and the Statements of Account issued by the Plaintiff shall be conclusive proof of the 1st Defendant's indebtedness. The Statements of Account showed that the Defendants had been making payments to the Plaintiff after the issuance of the Letters of Offer dated 10/10/2012 (see para 9.1 above).

14.4. The Defendants did not lodge any complaint to the Plaintiff if there were any discrepancies in the Statements of Account. Neither did the Defendants responded to the Letters of Demand dated 17/10/2013 from the Plaintiff's solicitors; instead they chose to remain silent and only disputed the Plaintiff's claim when the Writ of

Summons were served on them. The failure of the Defendants to respond promptly to the demand and register their complaints with the Plaintiff indicated that they did not dispute the Plaintiff's claim (see *David Wong Hon Leong v. Noorazman bin Adnan* [1996] 1 AMR 7(CA) at p.13 line 25-p.14 line 10) cited in *Vila Harapan (M) Sdn Bhd v. Serdang Ria Sdn Bhd & Anor* [2011] 1 LNS 205 at p.14 and *Sukhdev Singh a/l Pritam Singh v. Jeffrey Paul Raj a/l Wilson Paul Raj & 2 Ors* [2010] 1 LNS 1654 at p.14).

14.5. The Defendants disputed the payment of late payment charges made in the Statements of Account, exhs.SCB-8 and SCB-9 contending that the Letters of Offer dated 12/10/2012 did not provide for 'Late Charges'. I find this contention is a non-starter since imposition of late payment fees is provided in cl.2(e) of the Letters of Offer.

14.6. 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. This is 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.



15. 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 Defendant in terms of prayers 1 and 2 referred above with costs fixed at RM4,000.00.

Dated: 30 NOVEMBER 2014

(LAU BEE LAN)

Judge

Counsel:

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Legislation referred to:

Contracts Act 1950, s. 86