IN THE HIGH COURT OF MALAYA AT PULAU PINANG

[CIVIL NO: 22NCVC-312-11/2013]

BETWEEN

STANDARD CHARTERED BANK MALAYSIA BERHAD ... PLAINTIFF

AND

1. BGEN RESOURCES SDN BHD
2. SEW WEI MIN
3. SIM MEE FONG
4. SIM WEE MIN ... DEFENDANTS

GROUNDS OF JUDGMENT

Introduction

[1] This is an application for summary judgment by Plaintiff, Standard Chartered Malaysia Bhd against 2nd, 3rd and 4th Defendants who are guarantors for overdraft and trade facility granted by the Plaintiff to the 1st Defendant, Bgen Resources Sdn. Bhd.

The Background Facts

[2] At the 1st Defendant request, the Plaintiff granted the 1st Defendant banking facilities with terms and conditions as set out in a letter of offer dated 28.10.2011.

The banking facilities granted were:-

(i) RM100,000 overdraft facility.

(ii) RM1,400,000 trade facility.

[3] The 2nd 3rd and 4th Defendants are guarantors for the said banking facilities and executed a guarantee agreement with Plaintiff on the 10.1.2012.

[4] The terms of the guarantee *inter alia* include:

(i) an undertaking by the guarantors irrevocably and unconditionally to pay the Plaintiff the amount due and owing by the 1st Defendant under the banking facilities as principle debtors.

(ii) a clause that a certified statement of account showing the indebtedness of the 1st Defendant amounts to a conclusive evidence of indebtedness of the 1st Defendant to the plaintiff.

[5] The said banking facilities were then utilized by the Defendants however the Defendants defaulted the monthly payments despite letter of demand being issued. As a result, on the 4.3.2013 Plaintiff terminated the said banking facilities.

[6] Thereafter, Plaintiff issued a letter of demand dated 4.3.2013 for Defendants to pay the outstanding sum which are as follows:

(i) **RM3,008.60** together with interest at 8.10% per annum for the overdraft facility.

(ii) **RM1,395,000** together with interest at 8.10% per annum for the trade facility.

[7] The Plaintiff proceeded with civil suit against the Defendants after the Defendants failed to comply with the said demand.

Findings of the Court

[8] The position in law in relation to summary judgment application is well settled. In *National Company for Foreign Trade v. Kayu Raya Sdn. Bhd* [1984] 2 MLJ 300, [1984] 2 CLJ 220, George Seah FJ in delivering the judgment the Federal Court stated as follows:

"… We think it appropriate to remind ourselves once again that it every application under O. 14 the first consideration are (a) whether the case within the order and (b) whether the plaintiff has satisfied the preliminary requirements for proceeding under O. 14. For the purpose of an application under O. 14, the preliminary requirements

(i) the defendant must have entered an appearance;

(ii) the statement of claim must have been served on the defendant;

(iii) the affidavit in support of the application must comply with the requirements of r. 2 of the O. 14.

… If the plaintiff fails to satisfy either of these considerations, the summons my be dismissed. if however, these considerations are satisfied, the plaintiff will have established a prima facie case and he becomes entitled to judgment. This burden then shifts to the defendant to satisfy the court why judgment should not be given against him... [see O. 14 r. 3 and 4 (1)]

[9] This principles was reiterated in the case of *Chempaka Finance Bhd v. Ho Lai Ying & Anor* [2006] 3 CLJ 544 where YAA Steve Shim CJ (as he then was) had this to say:

> *"… In an application under O. 14, the burden is on the plaintiff to establish the following conditions: that the defendant must have entered appearance; that the statement of claim must have been served on the defendant; that the affidavit in support must comply with r. 2 of O. 14 in that it must verify the facts on which the claim is based and must state the deponent's belief that there is no defence to the claim. (See Supreme Leasing Sdn. Bhd v. Dior Enterprise & Ors [1990] 2 MLJ 36). Once those conditions are fulfilled, the burden then shifts to the defendant to raise triable issues. The law on this is trite".*

[10] Revering to the present case, the Plaintiff had fulfilled the preliminary requirement or conditions as laid down in the above cases. As such the burden is then shifted to the defendant to raise or to show any triable issue.

[11] The meaning of triable issue was discussed and explained by the Federal Court in the case of *Voo Min En & ors Leong Chung Fatt* [1982] 2 MLJ 241 as follows:

> *.... That being the case,* ***it is not enough for the respondent in answer to the appellants' application to sign final judgment, to raise an issue, or any issue. He must, however, raise such issue as would require a trial in order to determine it.*** *In other words, the issue raised must be an arguable issue. But when the issue raised is irrelevant and inspective, or to use the words of Lord Greece, M.R. in Cow v. Casey. "when the point is understood and the court satisfied that it*

is really unarguable", the appellant should be entitled to what they prayed for in the summon-in-chambers.

In our view the point raised by the respondent as to the existence of an oral agreement to renew the lease of the ground floor of the demised premises in this case in really not an arguable issue as it is neither effective, nor admissible and therefore does not constitute a triable issue".

[12] The affidavit of Sim Wee Min (enclosure 20), the 4th Defendant and who also affirmed this affidavit on behalf of other Defendants raised 3 issues that was said to be triable issues. They are:

(a) the maturity date of the trade facility.

(b) Plaintiffs letter of demand dated 4.3.2013 was made *mala fide*.

(c) the actual amount of debt that defendant owed the Plaintiff.

[13] On the maturity dated of the trade facility, counsel for the Defendant contended that the maturity date for payment of the trade facility was fixed by the bank system and not 30 days from the date it was given as agreed in the offer letter dated 28.10.2011.

[14] As regards this issue, the 4th Defendant in paragraph 6 and 7 of his affidavit said this:

"Paragraph 6

Saya mengatakan bahawa Plaintiff dengan sengaja telah enggan menyatakan terma-terma dan syarat-syarat berkaitan dengan kemudahan 'trade facility' terutama mengenai 'maturity' yang menjadi asas pertikaian antara Plaintif dan Defendan Pertama".

Paragraph 7

Saya mengatakan kekeliruan bermula dari bulan Jun/Julai, 2012 apabila pihak Plaintiff mengemaskini sistem mereka, tempoh maturity trade line tidak lagi 30 hari seperti yang dipersetujui tetapi diputuskan oleh sistem sendiri saya juga mengatakan bahawa pihak kami tidak dimaklumkan mengenai perubahan ataupun mengenai maturity tersebut...."

[15] The Plaintiff, in turn submitted that the 'maturity date' which is 30 days is written in the said offer letter dated 28.10.2011 and the invoices of Financing Supplier - 'Finance Notification' printed by the Plaintiff clearly showed that the maturity date is within 30 days.

[16] Having gone through all the invoices exhibited in the affidavit in reply by Thayavathaney K. Ramachandaran for the Plaintiff which are 'SCB-6', 'SCB-7', 'SCB-8", 'SCB-9', 'SCB-10', 'SCB-11', 'SCB-12', 'SCB-13' and 'SCB-14', it shows that the maturity date stated therein for payment is within 30 days. As such the contention by the plaintiff on this issue is devoid of any merits.

[17] The next issue is whether the letter of demand dated 4.3.2013 issued by Plaintiff to the Defendants was made *mala fide*.

[18] On this issue, there is nothing put forth by the Defendants to substantiate the allegation of *mala fide*. It is a mere assertion which inconsistent with the documents presented before this court.

[19] In *Bank Negara Malaysia v. Mohd. Ismail & Ors* [1992] 1 MLJ 400 [1992] 1 CLJ 627 the Supreme Court explained the duty of a judge when dealing with facts averred in an affidavits as follows:

> *"Under an O. 14 application, the duty of a judge does not end as soon as a fact is asserted by one party, and denied or disputed by the other in an affidavit. When such assertion, denial or dispute is equivocal, or lacking in precision or is inconsistent with undisputed contemporary documents or other statements by the same deponent, or a inherently improbable in itself, then the judge has duty to reject such assertion or denial, thereby rendering the issue not triable".*

[20] As such after having analyzed all the affidavits and documents exhibited therein, I am of the considered view that in the present case the issue of *mala fide* as raised by the Defendant is inherently improbable in itself rendering the issue not triable.

[21] Lastly, on the issue of the actual account of debt, both parties had agreed that a statement of account issued by the Plaintiff as conclusive evidence against the Defendants as to their indebtedness.

[22] In the offer letter dated 28.10.2011 as agreed by the 1st Defendant, clause 15 stated as follows:

> *"A statement or notice by the manager or any duty authorized officer or agent of the Bank for the time being or computer generated notices issued by the Bank which do not require signature as to the amount of such balance and liabilities incurred or due to the Bank or as the rate of interest or the amount of interest payable,* ***shall be conclusive evidence for all purposes.*** *In addition should the borrower fail to report any error therein to the Bank within such period as prescribe by the Bank, such statement or notice* ***shall be conclusive evidence of the Borrowers liability to the Bank of the amount stated therein".***

[23] Apart from this, in the agreement dated 10.1.2012 between the Plaintiff and 2nd, 3rd and 4th Defendants as the guarantors, clauses 11.2 and 11.2 clearly stated as such:-

> ***Clause 11.1*** - *Accounts maintained by the Bank in connection with the Guaranteed obligations are prima facie evidence of the matters to which they relate for the purpose of any litigation or arbitration proceedings.*
>
> ***Clause 11.2*** - *Any certification or determination by the Bank of a rate or amount under their Guarantee will be, in the absent of manifest error, conclusive evidence of the matters to which of relates.*

[24] In the present case, the Plaintiff had issued a certificates of indebtedness and exhibited in the affidavit it of Thayataney K. Ramachandran as 'SCB4' and d 'SCB-5' both dated 4.3.2013.

This certificates is conclusive proof of the actual indebtedness of the Defendants in the absent of manifest error which the Defendants in time case failed to show.

[25] On the issue of conclusiveness of certificate of indebtedness, Federal Court in *Chempaka Finance Bhd (supra)* explained as follows:

> *This observation appeared to has escaped the attention of the Court of Appeal in the present case. In the result, the Court of Appeal took the position that the conclusiveness of the certificate of indebtedness exh. P3 was binding only upon the parties and that the court would still have to determine whether sufficient evidence had been adduced to prove quantum and the correctness of the amount claimed. With respect, such a proposition goes against the entrenched principles enunciated by Raja Azlan Shah CJ (Malaya) (as His Highness then was) in Citibank N.A. v. Ooi Boon Leong & Ors [1981] 1 MLJ 282 when he said inter alia:*
>
> *We have often said to this court many a time that where the issues are clear and the matter of substance can be decided once and for all without going to trial there is no reason why the Assistant Registrar or the judge in chambers, or, for that matter, this court shall not deal with the whole matter under the R.S.C. Order 14 procedures. In the present case, the guarantee contains a clause which enables the bank by producing a certificate of Indebtedness by its officer to dispense with legal proof of the actual indebtedness of the respondents.... It means that, for the purpose of fixing liability of the respondents, the company's indebtedness may be ascertained conclusively by a certificate.*

> *The above dictum, establishes firmly the conclusive nature and extent of a certificate of indebtedness.* ***A certificate of indebtedness operates in the field of adjectival law. It excuses the plaintiff from adducing proof of debt. Such a certificate shifts the burden onto the defendant to disprove the amount claimed".***

[26] As mentioned earlier, there is nothing to show any manifest error on the face of the said certificates of indebtedness and as these certificates was issued in accordance of clauses 15 and 11 aforesaid, therefore they are conclusive proof of actual debt of Defendants to the Plaintiff.

Conclusion

[27] For the reasons as explained above and based on the authorities cited, I am of the considered view that there is no triable issue in the present case. As such the application by Plaintiff for summary judgment in enclosure 10 is allowed with cost of RM3,000 to be paid by Defendants to the Plaintiff.

(NORDIN HASSAN)
Judicial Commissioner
High Court
Penang.

Dated: 8 SEPTEMBER 2014

Counsels:

For the Plaintiff - Fadil Azuwan; M/s Arifin & Partners

For the Defendant - V Amareson; M/s Amareson & Meera