IN THE HIGH COURT OF MALAYA IN KUALA LUMPUR
(COMMERCIAL DIVISION)
[SUIT NO: 22NCC-263-07/2014]

BETWEEN

STANDARD CHARTERED BANK MALAYSIA BERHAD
(Company No: 115793-P) **... PLAINTIFF**

AND

1. **COMPUTER RELATED MEDIA SDN BHD**
   (Company No: 330564-X)

2. **TONY KHOO**
   (NRIC No: 640624-13-5081)

3. **ENG LIAN NEO**
   (NRIC No: 651026-04-5098) **... DEFENDANTS**

CIVIL PROCEDURE: *Summary judgment - Banking - Action against principal debtor and guarantors - Default of credit facilities - Failure to object to monthly statement of account - Whether borrower was estopped from challenging contents of bank's monthly statement of account when borrower failed to raise any objection within stipulated time period - Whether certificate of indebtedness considered conclusive evidence of outstanding sum claimed by plaintiff*

EVIDENCE: *Proof of - Proof of - Debt - Certificate of indebtedness - Conclusiveness - Liability of principal debtor and guarantors - Whether certificate of indebtedness was conclusive evidence of liability*

[Plaintiff's application allowed with costs.]

Case(s) referred to:

Andrew Lee Siew Ling v. United Overseas Bank (Malaysia) Bhd [2013] 1 CLJ 24 FC ***(refd)***

Berjaya Times Squares Sdn Bhd v. M-Concept Sdn Bhd [2010] 1 CLJ 269 FC ***(refd)***

Boustead Trading [1985] Sdn Bhd v. Arab-Malaysian Merchant Bank Berhad [1995] 4 CLJ 283 FC ***(refd)***

Cempaka Finance Bhd v. Ho Lai Ying & Anor [2006] 3 CLJ 544 FC ***(foll)***

Citibank NA v. Ooi Boon Leong & Ors [1980] 1 LNS 168; [1981] 1 MLJ 282 FC ***(refd)***

Credit Corp (M) Bhd v. Lucky Height Development Sdn Bhd & Ors [1996] 1 LNS 69 HC ***(dist)***

Dalip Bhagwan Singh v. Public Prosecutor [1997] 4 CLJ 645 FC ***(refd)***

David Wong Hon Leong v. Noorazman Adnan [1995] 4 CLJ 155 CA ***(refd)***

EC Designabuild Sdn Bhd v. Bunga Kembang Sdn Bhd [2007] 1 AMR 578 ***(refd)***

Jetara Sdn Bhd v. Maju Holdings Sdn Bhd [2007] 3 CLJ 41 CA ***(refd)***

Malaysia Building Society Bhd v. Univein Sdn Bhd [2002] 2 CLJ 81 HC ***(refd)***

National Company For Foreign Trade v. Kayu Raya Sdn Bhd [1984] 1 CLJ Rep 283 FC ***(refd)***

Saad Marwi v. Chan Hwan Hua & Anor [2001] 3 CLJ 98 CA ***(refd)***

Sia Siew Hong & Ors v. Lim Gim Chian & Anor [1996] 3 CLJ 26 CA ***(refd)***

Sunrise Sdn Bhd v. First Profile (M) Sdn Bhd & Anor [1997] 1 CLJ 529 FC ***(refd)***

Tan Chong Keat v. Pengurusan Danaharta Nasional Bhd [2008] 4 CLJ 748 CA ***(foll)***

United Merchant Finance Bhd v. Majlis Agama Islam Negeri Johor [1999] 2 CLJ 151 FC ***(refd)***

Wee Lian Construction Sdn Bhd v. Ingersoll-Jati Malaysia Sdn Bhd [2010] 4 CLJ 203 CA ***(refd)***

Legislation referred to:

Financial Services Act 2013, s. 2(1), 2(1)(a)(iii)

Rules of Court 2012, O. 14 r. 1(1), r. 2(1), r. 3(1), r. 4(1), O. 18 r. 12(1)

GROUNDS OF JUDGMENT
(Court enclosure no. 8)

A. Facts

1. The plaintiff bank (Plaintiff) has offered various credit facilities (**Credit Facilities**) to the first defendant company (**1st Defendant**) by way of the Plaintiff's letter of offer dated 4.5.2012 (**LO**). Attached to the LO is the

Plaintiff's *"Standard Terms & Conditions Covering Banking Facilities Granted By [Plaintiff] Forming Part of [LO]" (STC).* Clause 3 at page 5 of the LO states as follows:

> *"3.* ***Acceptance***
>
> ***Please indicate your acceptance of the above banking arrangement by signing and returning to the Bank the duplicate of the [LO], the [STC] … within 14 days from the date hereof, …***
>
> *failing which the Bank shall be entitled to exercise its discretion to cancel the [Credit Facilities]."*

2. The 1st Defendant accepted the LO and STC. At page 6 of the LO:-

> ***"We, [1st Defendant], accept the foregoing terms and conditions, the attached [STC] … in respect of the [Credit Facilities] offered."***
>
> (emphasis added).

It is to be noted that the second and third defendants (**2nd and 3rd Defendants**) accepted the LO and STC on behalf of the 1st Defendant.

3. The LO required, among others, as a security for the 1st Defendant's repayment of the Credit Facilities, a joint and several guarantee from the 2nd and 3rd Defendants. A guarantee dated 25.5.2012 has been signed by the 2nd and 3rd Defendants in favour of the Plaintiff (**Guarantee**).

4. The 1st Defendant defaulted in repaying the Credit Facilities and the Plaintiff's solicitors sent a letter dated 17.6.2014 to the 1st Defendant (**Plaintiff's Letter dated 17.6.2014 to 1st Defendant**) which stated, among others, the following:

(a) the 1st Defendant had *"failed to regularize and/or update ... payments and/or keep the accounts in proper order""* (**1st Defendant's Default**);

(b) in view of the 1st Defendant's Default, the Plaintiff recalled the entire Credit Facilities (**Plaintiff's Recall of Credit Facilities**) and demanded the 1st Defendant to pay the full outstanding sum of RM2,119,485.60 (**Outstanding Sum**) as at 9.6.2014 together with interest at 10.10% (current Base Lending Rate of 6.6% + 3.50%) per annum (**Interest Rate Claimed by Plaintiff**) with daily rest with effect from 10.6.2014 until date of full settlement; and

(c) if the 1st Defendant did not remit to the Plaintiff the Outstanding Sum with the Interest Rate Claimed by Plaintiff and all legal charges within 7 days from the *"Plaintiff's Letter dated 17.6.2014 to 1st Defendant"*, the Plaintiff would proceed with legal action against the 1st Defendant.

5. There was no reply by the 1st Defendant to the *"Plaintiff's Letter dated 17.6.2014 to 1st Defendant"*.

6. The Plaintiff's solicitors also sent a letter dated 17.6.2014 to the 2nd and 3rd Defendants (***Plaintiff's Letter dated 17.6.2014 to 2nd and 3rd Defendants***) which stated, among others, the following:

(a) the 1st Defendant's Default had been committed; and

(b) pursuant to the Guarantee, the Plaintiff demanded the 2nd and 3rd Defendants to pay the Outstanding Sum with the Interest Rate Claimed by the Plaintiff and all legal charges within 7 days from the *"Plaintiff's Letter dated 17.6.2014 to 2nd and 3rd Defendants"* and upon the failure of the 2nd and 3rd Defendants to do so, the Plaintiff would proceed with legal action against the 2nd and 3rd Defendants.

7. The 2nd and 3rd Defendants did not respond to the *"Plaintiff's Letter dated 17.6.2014 to 2nd and 3rd Defendants"*.

B. This suit

8. The Plaintiff filed this action against the 1st to 3rd Defendants (**Defendants**) to claim for the Outstanding Sum with the Interest Rate Claimed by the Plaintiff and costs (**This Suit**).

9. In This Suit, the Plaintiff applied for summary judgment against the Defendants (This Application) under Order 14 of the Rules of Court 2012 (**RC**).

10. In This Application, the Plaintiff has exhibited, among others:

(a) the LO and STC which have been accepted by the 1st Defendant;

(b) the Guarantee signed by the 2nd and 3rd Defendants;

(c) the *"Plaintiff's Letter dated 17.6.2014 to 1st Defendant"* with the certificate of posting of that letter;

(d) the *"Plaintiff's Letter dated 17.6.2014 to 2nd and 3rd Defendants"* with the certificate of posting of that letter;

(e) all the monthly bank account statements of the 1st Defendant from 31.1.2014 to 30.6.2014 (**1st Defendant's Monthly Bank Account Statements"**). *"Note 1"* of the 1st Defendant's Monthly Bank Account Statements stated:-

> ***"If you note any discrepancies, please advise the Bank within 14 days from date of receipt. Otherwise the Statement is considered as correct."***
>
> (emphasis added); and

(f) a certificate of indebtedness dated 9.6.2014 (**Certificate of Indebtedness**) which stated as follows:-

"Name of Borrower: *[1st Defendant]*
Name of Guarantors: *[2nd and 3rd Defendants]*
Account No: *312157297290*
Outstanding sum as at 9 June 2014: RM2,119,485.60
Interest Rate: ***[Interest Rate Claimed by Plaintiff]***

I, the undersigned hereby confirmed that the above-said certificate is extracted from entries made in usual and ordinary course of business in the books and records of [Plaintiff], which books and records are in the custody and control of the [Plaintiff] and I further confirm that I have examined the above-said certificate with the original entry and I hereby certify it to be true and correct.

…
Manager, Credit Risk Control, SME Banking
[Plaintiff]"

(emphasis added).

C. Defendants' submission

11. The Defendants are jointly represented by one firm of solicitor.

12. The defence filed in This Suit on behalf of all the Defendants (**Defence**): -

(a) denied that the Credit Facilities had been disbursed to the 1st Defendant;

(b) denied that the 2nd and 3rd Defendants had given the Guarantee;

(c) denied the 1st Defendant's Default;

(d) alleged that the Plaintiff's Recall of Credit Facilities was unlawful;

(e) denied the 1st Defendant's indebtedness to the Plaintiff in respect of the Credit Facilities;

(f) averred that the Plaintiff did not provide accurate and complete statements of accounts to the 1st Defendant;

(g) claimed that the 1st Defendant did not receive the *"Plaintiff's Letter dated 17.6.2014 to 1st Defendant";* and

(h) alleged that the Plaintiff had imposed an excessive interest rate.

13. The Defendants' affidavit merely raised an issue to be tried in respect of the excessive interest rate charged by the Plaintiff.

14. The Defendants' learned counsel, Mr. M. Raman, submitted as follows:-

(a) the interest rate of 10.10% per annum claimed by the Plaintiff was contrary to the LO and the agreement by the Defendants that the

Plaintiff could only charge interest at the rate of 8.1% per annum;

(b) there was no evidence that the 1st Defendant had received the monthly account statements;

(c) there was no evidence of the Plaintiff's increase of interest rate from 8.1% per annum to 10.10% per annum; and

(d) This Application should be dismissed with costs as there is a triable issue in respect of the Interest Rate Claimed by Plaintiff. The Defendants relied on the unreported High Court's judgment in *Credit Corp (M) Bhd v. Lucky Height Development Sdn Bhd & Ors* [1996] 1 LNS 69.

D. Court's duties in deciding a summary judgment application

15. It is not disputed by the Defendants that the following 3 matters required by Order 14 rules 1(1) and 2(1) RC (**3 Conditions for Summary Judgment**) have been satisfied:

(a) the statement of claim in this case (**SOC**) has been served on the Defendants;

(b) the Defendants have entered appearance; and

(c) the Plaintiff's deponent has affirmed an affidavit verifying the facts on which the SOC is based and the belief of the Plaintiff's deponent that there is no defence to the SOC.

16. The 3 Conditions for Summary Judgment has been decided by our Federal Court in the following cases:

(a) *Cempaka Finance Bhd v. Ho Lai Ying & Anor* [2006] 3 CLJ 544, 551-552; and

(b) *National Company for Foreign Trade v. Kayu Raya Sdn Bhd* [1984] 1 CLJ (Rep) 283, at 285.

17. As decided in *Cempaka Finance Bhd and National Company for Foreign Trade*, once the 3 Conditions for Summary Judgment have been satisfied by the Plaintiff, the burden then shifts to the Defendants to resist This Application by satisfying the court under Order 14 rules 3(1) and 4(1) RC that there is *"an issue or question in dispute which ought to be tried"*.

18. Even if the Defendants cannot raise any triable issue, This Application may still be dismissed under Order 14 rule 3(1) RC if *"there ought for some other reason to be a trial",* namely there are circumstances that ought to be investigated by the court - the Federal Court's judgment in *United Merchant Finance Bhd v. Majlis Agama Islam Negeri Johor* [1999] 1 MLJ 657, at 666-668.

19. Based on the above authorities, I will consider whether the Defendants have raised any triable issue and assuming the Defendants are unable to raise any triable issue, is there *"some other reason for trial"*?

E. Provision of finance by banks

20. Before I proceed to discuss This Application, I need to remind myself of the following matters:

(a) any person is free to apply and to accept credit facilities from any bank. The bank has the prerogative to offer any credit facility on terms and conditions as the bank sees fit. The doctrine of freedom to contract is recognised in our law of contract. In *Berjaya Times Squares Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v. M Concept Sdn Bhd* [2010] 1 MLJ 597, at 606, the Federal Court held as follows in respect of a sale and purchase agreement of a commercial shop lot in *"Berjaya Times Square"*:-

> *"Before addressing these issues there is an important observation that needs to be made. It is this.* ***The agreement in the present case is one that is not regulated by statute.*** *In short, it is not a contract governed by the housing development legislation.* ***The appellant and respondent were therefore at complete liberty, in accordance with the doctrine of freedom of contract to agree on any terms they thought fit."***
>
> (emphasis added).

The title to the Financial Services Act 2013 (FSA) states that FSA is, among others, *"to provide for the regulation and supervision of financial institutions"*. Section 2(1)(a)(iii) FSA defines *"banking business"* to include *"provision of finance"*. *"Credit facility"* is defined in s. 2(1) FSA to mean -

> *"(a) the giving of any advance, loan or other facility in whatever form or by whatever name called;*
>
> *(b) the giving of a guarantee; ..."*

It is to be noted that FSA does not provide for standard terms and conditions for any credit facility agreement, unlike the Housing Developers (Control and Licensing) Regulations 1989 [**HDR**] which provide standard forms for the sale and purchase of a *"housing accommodation"* (please see reg. 11(1), Schedules G and H to HDR). Nor does FSA regulate the provision of credit facilities by banks. It is to be noted that Part 8 FSA (please see ss. 123 to 125 and Schedule 7 to FSA) regulates "financial services or products" by *"financial service providers"* to *"financial consumers"*. Part 8 FSA does not apply to credit facilities agreements;

(b) there is no Malaysian legislation which is equivalent to the English *"Unfair Contract Terms Act 1977"*. This has been acknowledged by our Court of Appeal in the following 2 cases:

(i) *Saad Marwi v. Chan Hwan Hua & Anor* [2001] 3 CLJ 98, at 115; and

(ii) *Wee Lian Construction Sdn Bhd v. Ingersoll-Jati Malaysia Sdn Bhd* [2010] 4 CLJ 203, at 220-221; and

(c) in *Malaysia Building Society Bhd v. Univein Sdn Bhd* [2002] 2 CLJ 81, at 95, the High Court stated as follows regarding a borrower's *"attitude"* upon the borrower's default of credit facilities which caused the provider of credit facilities to apply for an order for sale of the land charged to the provider of credit facilities -

> *"Defendant's learned counsel has commended himself to the mobilisation of all the provisions of procedural law relating to charge actions under O. 83, in addition to the precepts of every substantive law under the [National Land Code] and indeed every nook and corner of the law of the land, thereby leaving absolutely no stone unturned, for the purpose of avoiding an order for sale. Be that as it may, one thing is crystal clear.* ***The initiative to apply for and obtain the approval and consequential disbursement of the loans originated from the defendant. The loans were given legal effect after the plaintiff and the defendant have sought and obtained legal advice and representation resulting in the documentation of the charges and their eventual registration.***
>
> ***At the time of the disbursement of the loans, there was apparent happiness all round and nothing turned on the illegality, invalidity or unenforceability of the loans. The inability of the defendant to***

maintain and service the loans has resulted in the heaping of the aforesaid submissions for the defendant."

(emphasis added).

F. No triable issue regarding disbursement of Credit Facilities (Disbursement), 1st Defendant's Default, Outstanding Sum and Interest Rate Claimed by Plaintiff

21. Clause 15(a) and (b) STC (**Clause 15(a) and (b) STC**) provide as follows:

> *"15(a)* ***A statement or notice by the manager or duly authorised officer of the Bank for the time being or computer generated notices issued by the Bank which do not require signatures as to the amount of such balance and liabilities incurred or due to the Bank or as to the rate of interest or the amount of interest payable, shall is [sic] conclusive evidence for all purposes.***
>
> *15(b)* ***If the Borrower fails to report any error therein to the Bank within such period as prescribed by the Bank, such statement or notice shall be conclusive evidence of the Borrower's liability to the Bank of the amount stated therein."***
>
> (emphasis added).

22. Clause 25(a) and (b) STC (**Clause 25(a) and (b) STC**) provide the mode of communication as follows:

25(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

25(b) ***Notices may be given or made by post … 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 … as stated in the [LO]*** *…* ***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; …"***

(emphasis added)

23. It is clear that by virtue of Clause 25(b)(i) STC, the 1st Defendant's Monthly Bank Account Statements and the *"Plaintiff's Letter dated 17.6.2014 to 1st Defendant"* are deemed to be delivered to the 1st Defendant. It is to be noted that the Defendants' affidavit did not deny receipt of the 1st Defendant's Monthly Bank Account Statements.

24. The 1st Defendant's Monthly Bank Account Statements have expressly required the 1st Defendant to notify the Plaintiff of any discrepancy in the 1st Defendant's Monthly Bank Account Statements within 14 days upon receipt of the 1st Defendant's Monthly Bank Account Statements (**Fourteen-Day Period**). Accordingly, the 1st Defendant is bound by Clause 15(b) STC to

"report any error" in respect of the Disbursement, Outstanding Sum and Interest Rate Claimed by Plaintiff within the Fourteen-Day Period as expressly required in the 1st Defendant's Monthly Bank Account Statements. Upon the 1st Defendant's 6 consecutive failures to inform the Plaintiff within the Fourteen-Day Period regarding the Disbursement, the Outstanding Sum and the Interest Rate Claimed by Plaintiff stated in 1st Defendant's Monthly Bank Account Statements from 31.1.2014 to 30.6.2014, the 1st Defendant is bound to accept the Disbursement, the Outstanding Sum and the Interest Rate Claimed by Plaintiff as *"conclusive evidence"* under Clause 15(a) and (b) STC.

25. Besides the application of Clause 15(b) STC in this case, the 1st Defendant is estopped from denying the Disbursement, the Outstanding Sum and the Interest Rate Claimed by Plaintiff as held by *the Federal Court in Boustead Trading [1985] Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd* [1995] 4 CLJ 283. *Boustead Trading (1985) Sdn Bhd*, at p. 294, decided, among others, as follows:

> ***"The time has come for this Court to recognise that the doctrine of estoppel is a flexible principle by which justice is done according to the circumstances of the case. It is a doctrine of wide utility and has been resorted to in varying fact patterns to achieve justice. Indeed, the circumstances in which the doctrine may operate are endless."***
>
> (emphasis added).

Boustead Trading (1985) Sdn Bhd, at p. 290, is applicable in This Suit because in *Boustead Trading (1985) Sdn Bhd*, the assignment notice had an endorsement stating that any objection to the relevant invoice must be reported within 14 days after the receipt of that invoice. The Federal Court held in *Boustead Trading (1985) Sdn Bhd*, at p. 291, 293-294 and 297-298, that the appellant company was estopped from denying the invoices in question because the appellant had failed to object to those invoices within the fourteen-day period. Similar to *Boustead Trading (1985) Sdn Bhd*, the 1st Defendant's Monthly Bank Account Statements expressly required the 1st Defendant to notify the Plaintiff of any discrepancy in the 1st Defendant's Monthly Bank Account Statements within the Fourteen-Day Period and upon the 1st Defendant's failure to do so, the 1st Defendant is estopped from challenging the contents of the 1st Defendant's Monthly Bank Account Statements regarding the Disbursement, the Outstanding Sum and the Interest Rate Claimed by Plaintiff.

26. Furthermore, if:-

(a) there had been no Disbursement;

(b) 1st Defendant's Default had not occurred; and

(c) the 1st Defendant had disputed the Outstanding Sum and the Interest Rate Claimed by Plaintiff

- the 1st Defendant would have replied as such to the *"Plaintiff's Letter dated 17.6.2014 to 1st Defendant"*. In fact, the 1st Defendant did not respond at all to the *"Plaintiff's Letter dated 17.6.2014 to 1st Defendant"*. Such an omission in a commercial relationship means that the 1st Defendant admits the Disbursement, the 1st Defendant's Default, the Outstanding Sum and the Interest Rate Claimed by Plaintiff. The following cases are relevant:-

(i) in *David Wong Hon Leong v. Noorazman bin bin Adnan* [1995] 4 CLJ 155, at 159, the Court of Appeal decided as follows:-

> ***"During argument, we registered our surprise at the learned Judge's reluctance to enter judgment for this sum of RM100,000. After all, the appellant had failed to respond to the letter of 17 December. If there had never been an agreement as alleged, it is reasonable to expect a prompt and vigorous denial. But, as we have pointed out, there was no response whatsoever from the appellant.***
>
> *In this context, we recall to mind the following passage in the judgment of Edgar Joseph Jr. J. in Tan Cheng Hock v. Chan Thean Soo [1987] 2 MLJ 479-487:*
>
> > *In Wiedemann v. Walpole [1891] 2 Q.B. 534, 537 an action for breach of promise of marriage, it was held, that the mere fact that the defendant did not answer letters written to him by the plaintiff in which she stated that he had promised to marry her, was no evidence corroborating the plaintiff's testimony in support of such promise. Lord Esher M.R., in his judgment, remarked,*

> *Here, we have only to see whether the mere fact of not answering the letters, with nothing else for us to consider is any evidence in corroboration of the promise.' (Emphasis added). Earlier, in his judgment, he said,* ***'Now there are cases - business and mercantile cases in which the Courts have taken notice that, in the ordinary course of business, if one man of business states in a letter to another that he has agreed to do certain things, the person who receives that letter must answer it if he means to dispute the fact that he did so agree.*** *(The emphasis is ours.)"*
>
> (emphasis added);

(ii) David Wong Hon Leong has been affirmed by the Court of Appeal in *Jetara Sdn Bhd v. Maju Holdings Sdn Bhd* [2007] 3 CLJ 41, at 55; and

(iii) in *JEC Designabuild Sdn Bhd v. Bunga Kembang Sdn Bhd* [2007] 1 AMR 578, at 586-587, the High Court held that a defendant's failure to reply to the plaintiff's demand for payment of a debt, would support a summary judgment application against that defendant in respect of the debt

27. The Certificate of Indebtedness clearly stated the Outstanding Sum and the Interest Rate Claimed by Plaintiff. According to Clause 15(a) STC, the Certificate of Indebtedness shall be conclusive evidence of the Outstanding Sum and the Interest Rate Claimed by Plaintiff. The following 2 Federal Court cases have held that a certificate of indebtedness is conclusive

unless the borrower is able to prove fraud or show manifest error in respect of that certificate:

(a) *Cempaka Finance Bhd*, at p. 691-692; and

(b) *Citibank NA v. Ooi Boon Leong & Ors* [1981] 1 MLJ 282, at 284.

28. In this case, the 1st Defendant is not able to prove fraud on the Plaintiff's part. In fact, the 1st Defendant has not filed any counterclaim alleging fraud on the Plaintiff's part.

29. The 1st Defendant is unable to show any manifest error in the Certificate of Indebtedness. In *Tan Chong Keat v. Pengurusan Danaharta Nasional Bhd* [2008] 4 CLJ 748, at 754-755, the Court of Appeal decided as follows:

> *"It follows, in our judgment, that* ***the submissions advanced by the appellant that the respondent had failed to discharge the burden of proving the sums due to the lending bank from the appellant is without merit. Once the respondent adduced in evidence the cl. 13 certificate of indebtedness, the debt was proved. It was then for the appellant to attack the said certificate on grounds of manifest error.*** *And that brings us to the second argument made before us.*
>
> *Learned counsel for the appellant submitted that the cl. 13 certificate of indebtedness was a useless piece of paper because the documentary evidence before the court had shown a reduction of the rate of interest by the lending bank on more than one occasion. Accordingly, the respondent's own documents produced at trial rendered the certificate of indebtedness so unreliable that the judge was not entitled to act upon it.*

> ***Although in para. 1 of his defence, the appellant stated, to use the pleader's words; "the plaintiff's claim is incorrect and does not specify the exact amount claimed, less whatever payments made", nowhere in that pleading is to be found an assertion that the certificate of indebtedness was bad for manifest error. Further, nowhere in the defence have there been any particulars pleaded, disclosing the nature of the alleged manifest error. In the face of this glaring omission, the learned judge cannot be faulted for failing to deal with the point. A plea of manifest error is a special plea, and in accordance with O. 18 r. 12 of the Rules of the High Court 1980 must be expressly taken. A plaintiff who relies on an account stated or a certificate of indebtedness is entitled, as a matter of natural justice, to know the grounds on which the account or certificate, as the case may be, is challenged on substantial grounds admissible in law. In our judgment, since the point was not properly taken by the appellant, it is not open to him now to raise this in his argument in support of his appeal."***
>
> (emphasis added).

In this case, the Defence did not allege any manifest error in the Plaintiff's computation of the Outstanding Sum as stated in the Certificate of Indebtedness. Nor did the Defence give any particular in accordance with Order 18 rule 12(1) RC as to why the Outstanding Sum was not manifestly correct. Accordingly, as decided by **Tan Chong Keat**, it is not open to the 1st Defendant to allege that the Certificate of Indebtedness contains a manifest error.

30. I find that the Certificate of Indebtedness is true for the following reasons:

(a) the Certificate of Indebtedness is corroborated by the 1st Defendant's Monthly Bank Account Statements and the *"Plaintiff's Letter dated 17.6.2014 to 1st Defendant";*

(b) the contents of the Certificate of Indebtedness have been extracted from entries made in the usual and ordinary course of the Plaintiff's business in the Plaintiff's books and records (**Banker's Books**). The Banker's Books are kept in the Plaintiff's custody and control; and

(c) the Plaintiff's deponent who holds the position of a manager in the Plaintiff's employment, has:-

(i) confirmed that he has examined the Certificate of Indebtedness with the original entries in the Banker's Books Outstanding Sums stated in the Plaintiff's Certificate of Indebtedness; and

(ii) certified the contents of the Certificate of Indebtedness to be true and correct.

31. It is to be noted that if the 1st Defendant's Default did not occur, the Plaintiff's Recall of Credit Facilities would be unlawful. However, the 1st Defendant did not send any letter to the Plaintiff to:-

(a) allege that the Plaintiff's Recall of Credit Facilities was unlawful; and

(b) demand the Plaintiff to withdraw immediately the Plaintiff's Recall of Credit Facilities and to reinstate immediately the Credit Facilities.

It is pertinent to note that the 1st Defendant did not counterclaim against the Plaintiff in This Suit that the Plaintiff's Recall of Credit Facilities was illegal. In fact, the 1st Defendant did not even reply to the *"Plaintiff's Letter dated 17.6.2014 to 1st Defendant"*!

32. In view of the above reasons, I am satisfied that the 1st Defendant has failed to discharge the legal onus to raise a triable issue so as to defeat This Application. Nor do I find *"some other reason for trial"* to justify a dismissal of This Application.

33. The Defendants relied on the *High Court case of Credit Corp (M) Bhd v. Lucky Height Development Sdn Bhd & Ors*, at p. 4-5, which decided as follows:

> *"In Moscow Narodny Bank Ltd v. New Kok Ann Realty Sdn Bhd [1989] 3 MLJ 310 at p 313, LC Vohrah J in deciding an application under s. 256 of the National Land Code 1965 for an order for the sale of lands charged to the bank held as follows:*
>
> > *Clause 2 provided for interest to be paid on the principal 'at the rate of eight and a half per centum (8½%) pa or at such other rate or rates as may be imposed by the bank from time to time with monthly rests' and cl 4 provided that 'the bank shall be entitled at any time and from time to time to vary at its discretion such rate of interest by serving a notice in writing on the chargor(s) and/or the borrower(s) such of its intention and such amended rate of interest shall be payable as from the date specified in the notice'. As it was admitted by the plaintiff's senior credit officer, Tan Chee Cheong, in cross-examination that no notice was sent either to*

> *the defendant or Mosbert, counsel for the defendant stated that any interest leviable could not exceed 8½% pa. There has been no evidence or allegation that any interest had been improperly imposed by the plaintiff and it is also not disputed that at the time when the notice of demand dated 20 February 1967 was given (see encl 2, exh P2), Mosbert was already in liquidation and its affairs were managed by the official receiver of Hong Kong so that no purpose would have been served if the notice of variation had been sent either to Mosbert or the defendant. In any event, I am of the view that in the absence of fraud, by virtue of cl 2 'the statement of the manager, assistant manager, sub-manager, accountant or any other officer of the bank as to the amount of such balance shall be final and conclusive'. I agree with counsel for the plaintiff that the defendant cannot now argue that the amount stated by the plaintiff as being due is not correct.*

With respect, this court is unable to agree with the learned judge's interpretation of cl 2. I hold that no claimant should be allowed to hide behind a conclusive evidence clause and be allowed to make unlawful demands against its borrowers or guarantors. *This is especially so when it is admitted by the claimant's own officers that no notice had been sent. Such being the case, it is well nigh impossible to determine the date from which the varied interest is to be payable, it being clearly and expressly stated in cl 4 above that 'such amended rate of interest shall be payable as from the date specified in the notice'.*

Further, it cannot be argued that notwithstanding the fact that since there had indeed been a reduction in the interest rate charged as compared to the agreed rate, no notice to vary need be issued. *The objections on principle must remain or otherwise there would be nothing to prevent the plaintiff from first reducing the rate of interest and then increasing it and not giving notice. In any event, there was no evidence that the first defendant had waived the requirement of the notice of variation of the rate of interest.*

I am fortified with regard to the view I hold that the presence of a conclusive evidence clause per se, cannot prevent the guarantors from questioning the correctness or otherwise of the account sought to be produced as conclusive evidence against them when I refer to the decision of Siti Norma Yaakob J (as her Ladyship then was) where she held in Oriental Bank Bhd v. Jaafar Sidek bin Mohd Salam & Ors *[1990] 2 CLJ 72 at p 73:*

> *Under cl 1 of the guarantee, the defendants had agreed to pay interest at the rate or rates for the time being agreed between the first defendant and the plaintiff. It is not disputed that such rate was agreed at 3.75% per annum above the plaintiff's base lending rate. There is documentary evidence to show that the plaintiff's base lending rate had been reduced to 7% per annum in which case the plaintiff is only entitled to charge interest at 10.75% and not 13.75% as is now claimed.*
>
> *In the light of such apparent likelihood of the first defendant's account being incorrect, the application cannot be intended to have the effect of circumventing cl 19 of the guarantee. For the clause to operate against the defendants, the plaintiff must first establish that any certificate it issues on the first defendant's indebtedness can be accepted as correct and I consider that this is a condition precedent which must be fulfilled by the plaintiff. In this case, the defendants have given me good reasons to question the accuracy of the plaintiff's certificate issued under cl 19, and under such circumstances, I consider that the certificate can no longer be regarded as being conclusive as evidence against the defendants in these proceedings.*

It is most unfortunate that the ***Moscow Narodny Bank*** *case was not referred to her Ladyship for consideration."*

(emphasis added).

The High Court in *Credit Corp (M) Bhd* allowed the borrower's appeal against summary judgment ordered by the learned Senior Assistant Registrar on the ground that there was a triable issue in respect of the interest rate imposed by the respondent.

34. I respectfully decline to follow *Credit Corp (M) Bhd* for the following reasons:

(a) an earlier Federal Court's judgment in *Citibank NA v. Ooi Boon Leong* (decided in 1981 in respect of the conclusive effect of a certificate of indebtedness) was not referred to in *Credit Corp (M) Bhd*. Accordingly, *Credit Corp (M) Bhd* may be decided *per incuriam* of *Citibank NA v. Ooi Boon Leong*. In *Dalip Bhagwan Singh v. Public Prosecutor* [1997] 4 CLJ 645, at 660, the Federal Court explained the *per incuriam* doctrine as follows:-

> *"A few words need be said about a decision of Court of Appeal made per incuriam as mentioned above. The words "per incuriam" are to be interpreted narrowly to mean as per Sir Raymond Evershed, MR in Morelle v. Wakeling [1955] 2 QB 379, 406 as a "decision given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding in the court concerned so that in such cases,*

some part of the decision or some step in the reasoning on which it is based, is found on that account to be demonstrably wrong." "; and

(b) after *Credit Corp (M) Bhd*, subsequent appellate judgments in *Cempaka Finance Bhd* and *Tan Chong Keat* make it clear that the Plaintiff may rely on the conclusiveness of a certificate of indebtedness. Indeed, I am bound by *stare decisis* to give effect to *Cempaka Finance Bhd, Citibank* and *Tan Chong Keat* regarding the conclusiveness of the Certificate of Indebtedness in accordance with Clause 15(a) STC.

35. In any event, *Credit Corp (M) Bhd* may be distinguished from this case as follows:

(a) Clause 25(b)(i) STC has deemed delivery to the 1st Defendant of the 1st Defendant's Monthly Account Statements which contained the Interest Rate Claimed by Plaintiff;

(b) the 1st Defendant did not correct or deny the Interest Rate Claimed by Plaintiff as stated in the 1st Defendant's Monthly Account Statements from 31.1.2014 to 30.6.2014;

(c) the 1st Defendant did not correct or deny the Interest Rate Claimed by Plaintiff in the *"Plaintiff's Letter dated 17.6.2014 to 1st Defendant"*; and

(d) clause 2 of STC (Clause 2 STC) allows the Plaintiff to vary the interest rate at the Plaintiff's "absolute discretion":-

> *"2.* ***STIPULATIONS AS TO INTEREST***
>
> *(a)* ***The Borrower must pay interest … at such rates and in the manner stipulated by the Bank.***
>
> ...
>
> (c) ***The interest rate(s) … may be varied by the Bank from time to time at its absolute discretion …"***
>
> (emphasis added).

In *Credit Corp (M) Bhd*, there was no provision in the loan agreement equivalent to Clause 2(c) STC.

G. Plaintiff's cause of action against 2nd and 3rd Defendants

36. This court is satisfied that the 2nd and 3rd Defendants are liable to the Plaintiff under the Guarantee for the Outstanding Sum together with the Interest Rate Claimed by Plaintiff. This decision is due to the following reasons:

(a) despite paragraph 5 of the Plaintiff's affidavit alleging that the 2nd and 3rd Defendants had signed the Guarantee, the Defendants'

affidavit did not deny such an averment. It is trite law that a party who does not deny a factual averment in an affidavit, is deemed to have accepted that averment - the Federal Court's judgment in *Sunrise Sdn Bhd v. First Profile (M) Sdn Bhd & Anor* [1996] 3 MLJ 533, at 541;

(b) clause 2(a)(i) and (ii) of the Guarantee [**Clause 2(a)(i) and (ii) Guarantee**] provide that the 2nd and 3rd Defendants *"irrevocably and unconditionally"*, as *"principal obligors"*, *"undertake"* with the Plaintiff that whenever the 1st Defendant does not pay any amount forming part of the *"Guaranteed Obligations"* (defined in clause 1 of the Guarantee), the 2nd and 3rd Defendants *"must immediately on demand"* by the Plaintiff pay that amount as if the 2nd and 3rd Defendants were the principal obligors in respect of that amount. Clause 2(a)(i) and (ii) Guarantee clearly rendered the 2nd and 3rd Defendants as principal debtors to the Plaintiff. The Federal Court has decided in *Andrew Lee Siew Ling v. United Overseas Bank (M) Bhd* [2012] 3 MLJ 449, at 459, that if a guarantee has provided that a guarantor stands as a principal debtor to a bank, the guarantor is *"primarily liable for losses which the principal borrower could not have been made liable"* and the guarantor's *"liability is not dependent or secondary to the liability of the principal borrower"*. In this case, the liability of the 2nd and 3rd Defendants under Clause 2(a)(i) and (ii) Guarantee arises upon the failure of the 2nd and 3rd Defendants to pay the Outstanding Sum with the Interest Rate Claimed by Plaintiff as demanded in the *"Plaintiff's Letter dated 17.6.2014 to 2nd and 3rd Defendants"*;

(c) clause 2(a)(iii) of the Guarantee [**Clause 2(a)(iii) Guarantee**] states that the 2nd and 3rd Defendants agree to indemnify the Plaintiff *"immediately on demand against any cost, loss or liability suffered by the"* Plaintiff. Clause 2(a)(iii) Guarantee clearly

imposes an obligation on the 2nd and 3rd Defendants to indemnify the Plaintiff in respect of the Outstanding Sum. In the following cases, the Court of Appeal has enforced contractual provisions which give rise to an obligation to indemnify:-

(i) *Sia Siew Hong & Anor v. Lim Gim Chian & Anor* [1996] 3 CLJ 26, at 33-34; and

(ii) *Leong Weng Choon v. Consolidated Leasing (M) Sdn Bhd* [1998] 3 MLJ 860, at 865-866;

(d) clause 11.2 of the Guarantee provides that the Certificate of Indebtedness *"will be, in the absence of manifest error, conclusive evidence"* of the liability of the 2nd and 3rd Defendants to the Plaintiff. I am bound by *Cempaka Finance Bhd, Citibank* and *Tan Chong Keat* to give effect to the Certificate of Indebtedness as against the 2nd and 3rd Defendants;

(e) the failure of the 2nd and 3rd Defendants to deny the *"Plaintiff's Letter dated 17.6.2014 to 2nd and 3rd Defendants"*, has grave repercussions for the 2nd and 3rd Defendants as explained in *David Wong Hon Leong, Jetara Sdn Bhd* and *JEC Designabuild Sdn Bhd*; and

(f) the 2nd and 3rd Defendants accepted the LO and STC on behalf of the 1st Defendant. The LO expressly required the Guarantee as one of the securities for the repayment of the Credit Facilities. As such, the 2nd and 3rd Defendants had actual knowledge of the Guarantee required by the Plaintiff from the time they accepted the

LO and STC on the 1st Defendant's behalf. Once the 2nd and 3rd Defendants have signed the Guarantee, they cannot now resile from their obligations under the Guarantee to pay the Outstanding Sum with the Interest Rate Claimed by Plaintiff.

37. Based on the aforesaid reasons, I am unable to find:-

(a) any issue which justifies a trial of This Suit for the 2nd and 3rd Defendants; and

(b) any circumstance in this case that ought to be investigated by this court in respect of the 2nd and 3rd Defendants. In other words, there is no *"other reason for trial"* concerning the 2nd and 3rd Defendants.

H. Court's decision

38. For reasons given in this judgment, I have no hesitation to allow This Application against all the Defendants with costs.

(WONG KIAN KHEONG)
Judicial Commissioner
High Court (Commercial Division)
Kuala Lumpur

DATE: 8 JANUARY 2014

Counsels:

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

For the defendant - M Raman; M/s M Raman & Associates