

Small Medium Enterprise Development Bank Malaysia Bhd (dahulunya dikenali sebagai Bank Perusahaan Kecil dan Sederhana Malaysia Bhd) v Klinik Pakar Wanita Dr Nora Sdn Bhd & Ors
[2018] MLJU 1334

Malayan Law Journal Unreported

HIGH COURT (KUALA LUMPUR)

WONG CHEE LIN JC

SUIT NO WA-22NCC-375-09 OF 2017

26 September 2018

R Subashini a/p Ramakrishnan (also Mob Defendant sol) (Ganesan & Irmohizam) for the plaintiff.

Prakash Lachimanan (Krish Maniam & Co) for the defendants.

Wong Chee Lin JC:

GROUND OF JUDGMENT

[1] This case concerns an application by the Plaintiff to strike out the Counterclaim of the Defendants. I have allowed the application. These are the full reasons for my decision.

Salient Background Facts

[2] The Plaintiff granted a loan facility for a sum of RM3,870,000.00 to the 1st Defendant pursuant to a letter of offer dated 25/8/2006 and a Facilities Agreement dated 14/12/2006.

[3] The facility was guaranteed by the 2nd and 3rd Defendants.

[4] The facility was also secured by 3 Deeds of Assignment over certain offices executed by the Defendants in favour of the Plaintiff.

[5] Vide a Letter of Restructuring dated 26/8/2009, the facility was restructured subject to the terms and conditions therein stated.

[6] Vide a Letter of Restructuring dated 20.6.2011, the facility was again restructured subject to the terms and conditions therein stated.

[7]Subsequently, vide a Letter of Restructuring dated 21.11.2014, the facility was rescheduled subject to the terms and conditions stated therein.

[8]The 1st Defendant by way of its letter dated 3.12.2015 admitted to the Plaintiff that its hospital project was halted as a result of change in board of directors at its joint venture partner company Healthscope. According to the 1st Defendant, the new board has expressed hesitation to continue with the project given current economic conditions.

[9]The 1st Defendant refused to pay further loan instalments after a while and the Plaintiff caused letters of demand dated 23.8.2017 to be issued against the Defendants demanding the total outstanding sum of RM4,825,900.63 as at 22.8.2017 together with interest and late payment interest thereon.

[10]The Defendants did not make payment as a result of which the claim in court was filed by the Plaintiff and the Plaintiff filed an application for summary judgment. I had allowed the application for summary judgment and the Defendants have appealed to the Court of Appeal. The appeal is still pending. In the meantime, the Plaintiff has applied to strike out the Counterclaim of the Defendants.

[11]In its Counterclaim, the Defendants claimed that the Plaintiff failed to forward statements of account to the Defendants, that the Plaintiff delayed in providing the statements of account and the redemption statement requested by the 1st Defendant for the purpose of an interested investor who wished to purchase the office units. As a result of the delay, the Defendants alleged that the investor lost interest in purchasing the said office units, resulting in loss to the Defendants. The Defendants also alleged that without any reason, the Plaintiff has blacklisted the 1st Defendant after rescheduling its facilities which adversely affected the financial situation of the 1st Defendant.

Findings Of The Court

[12]On the principles of striking out, the Supreme Court in the case of *Bandar Builder Sdn Bhd & 2 Ors v United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7 has held that:

“[1] The principles upon which the Court acts in exercising its power under any of the four limbs of O. 18 r. 19(1) Rules of the High Court 1980 are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule. This summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the fact of it obviously unsustainable”.

[13]Further, in *Pengiran Othman Shah Bin Pengiran Mohd Yusoff & Anor v Karambunai Resorts Sdn Bhd & Ors* [1996] 1 MLJ 309, the Court of Appeal, in affirming the High Court's decision striking out the statement of claim under Order 18 rule 19, as the statement of claim disclosed no reasonable cause of action, was frivolous, vexatious and

abuse of the process of court, held that where the affidavit evidence disclose a dispute of facts, such facts must be analyzed, and if they are found to be inconsistent with the undisputed contemporary documents or inherently improbable in themselves, the court is entitled to reject those facts and proceed upon the undisputed contemporaneous documentary evidence.

[14]It is true, as submitted by the Plaintiff, that this Court had already considered all the issues raises in the Counterclaim when determining the Plaintiff's summary judgment application. This court had found that the Defendants have not succeeded in raising any triable issue.

[15]The Plaintiff relied on the doctrine of res judicata and issue estoppel and cited the cases of *Asia Commercial Finance (M) Berhad v Kawal Teliti Sdn Bhd* [1995] 3 CLJ 783, *Dr Ramachandran a/l Sivaguru v Perwira Habib Bank Malaysia Bhd & Anor* [1993] 3 MLJ 59, *Bank Bumiputra Malaysia Berhad v Azlan Bin Hashim* [1994] 3 CLJ 602 and *Loh Holdings Sdn Bhd v Penglin Development Sdn Bhd & Anor* [1984] 2 MLJ 105.

[16]It is settled law that the broader principle of res judicata is founded on the twin principles that there should be an end to litigation and justice demands that the same party shall not be harassed twice for the same cause. I am of the view that it should not apply when the judgment of the court relied upon is the subject matter of an appeal. It is only the final judgment that will give rise to the principle of res judicata.

[17]Furthermore, in the summary judgment application, the court is considering whether there is an issue to be tried as a matter of defence. In the striking out of the Counterclaim, the Court is considering different issues and that is whether there is a valid cause of action which is not scandalous, vexatious or embarrassing or otherwise an abuse of the process of the Court.

[18]However, all things being equal, the Court would, on the same facts, reach the same conclusions as in the summary judgment application, in order to be consistent. But are all things equal in this case?

[19]The Defendants have introduced the independent forensic report prepared by one Arzim Associates after the filing of the summary judgment application. There were findings made by the said Arzim Associates about the loan given by the Plaintiff to the 1st Defendant in their report but the Plaintiff did not respond in any way whatsoever to the said findings.

[20]All that the Plaintiff said was that the Defendants had not shown that they could not have engaged Arzim Associates to come up with their report prior to the summary judgment application and there is no basis for the said report to be admitted as further

evidence in the appeal by the Defendants against the summary judgment ordered against them.

[21]While this is relevant, what the Plaintiff does not seem to appreciate is that, in this application, the application to strike out the Counterclaim, it is open to the Defendants to rely on the said report in answer to the application. It does not matter whether the Plaintiff succeeds in adducing this report as further evidence in the appeal in the Court of Appeal. They are entitled to rely on the report in the application to strike out the Counterclaim.

[22]This is what the report finds about the loan which is the subject matter of the Plaintiff's claim.

[23]We noted that from the second and third reschedulement, either principal loan or unearned interest was increased, vice versa without proper explanation to Directors of KPWDN and repayments made were not acknowledged. In addition, the twelve (12) plus twelve (12) post-dated cheques (or 24 blank cheques requested) were questionable. There were no explanations whether the cheques were cleared during moratorium period. SME Bank also refused to disclose any statement of balance from their side by claiming they have lost all records. Therefore, the increased of principal loan and unearned interest as in second reschedulement were not explained.

[24]The findings seem to support the contention that the amount claimed as being due and owing to the Plaintiff might not be accurate.

[25]I asked Learned Counsel for the Defendant whether the findings in the additional report has any bearing on the issue of blacklisting of the Defendant and he frankly admitted that it has no direct bearing on that issue. However, he said that the additional report shows that the Defendant has given the Plaintiff various post dated cheques which were for some reason not banked in by the Plaintiff and never taken into account. However, Learned Counsel for the Defendant was unable to say for sure whether any of the post dated cheques relate to the facility in the present case, as the Plaintiff has altogether granted 3 facilities to the Defendant and the present proceedings only concern one of facilities. The Plaintiff submitted that none of the cheques in question relate to these proceedings. Since the Defendant is unable to say for certain whether the cheques which were not banked in by the Plaintiff relate to the present facility, I find that there is no issue to be tried as to whether the Defendant has been improperly blacklisted. The Plaintiff's response to this was that the 1st Defendant had failed to pay the instalments with effect from September 2016 and the Plaintiff as a financial institution involved in the system of CCRIS reporting is subject to guidelines issued by Bank Negara Malaysia and was obliged to report the information to Bank Negara Malaysia. There was no reply to the Plaintiff's affidavit for the purpose of the summary judgment application so it was deemed that the

Defendants have accepted the response of the Plaintiff (see *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281)

[26]The Defendants allege that the Plaintiff had time and again failed to furnish the Statements of Account regularly to the Defendants despite the Defendants' request. The Plaintiff has denied this and said that it has furnished statements of account whenever requested by the 1st Defendant and the emails exhibited show that the statements of account have been furnished to the 1st Defendant when the Plaintiff was requested to forward them. This is not a current account where statements of account should be sent monthly. The Plaintiff also pointed out that the Defendants have in fact exhibited the statement of account from 1.1.2016 until 28.2.2017 which proves that the Plaintiff had in fact provided the statements of account at the material time.

[27]This allegation raised by the Defendants is without basis. The Plaintiff has provided statements of account whenever requested by the 1st Defendant.

[28]The Defendants referred to an occasion when on 31.3.2016, the 1st Defendant requested the Plaintiff for the bank statements and a redemption statement for review by prospective investors who were interested to purchase the units of shop office. The Plaintiff only supplied the statements and redemption statement on 20.4.2016 by which time, the Defendants allege, the investors had lost interest, thus causing extreme losses to the Defendants.

[29]The documents before me do not show that the 1st Defendant had impressed on the Plaintiff any urgency in its request and I find that the response of the Plaintiff was not inordinately delayed. In any event, there is no evidence of loss or prejudice suffered by the Defendants due to this incident.

[30]The Defendants exhibited a Memorandum of Understanding between Primanora Medical Centre Sdn Bhd and Healthscope Limited dated 4 July but the year is unclear and cannot be made out. The Plaintiff has already been informed vide letter from the Defendants that the project with Healthscope was halted due to the change in the board of directors. There is no evidence linking this Memorandum of Understanding to the incident.

[31]There is a Confidentiality Agreement dated 27.12.2015 between one Hussein Saleh Saeed Alamoudi Goup and the 2nd Defendant. If the bank statements and redemption statement were required for this agreement, then the Defendants had themselves delayed until 31.3.2016 before asking the Plaintiff for the statements. They cannot blame the Plaintiff, especially when they did not impress upon the Plaintiff the urgency of the request.

[32]In the light of the foregoing, I have allowed the Plaintiff's application with costs of

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RM5,000.00 subject to allocator.

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