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 560

Malayan Law Journal Unreported

HIGH COURT (KUALA LUMPUR)

WONG CHEE LIN JC

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

3 April 2018

R Subashini a/p Ramakrishnan (Mob Defendant sol with him) (Ganesan & Irmohizam) for the plaintiff.
*Prakash Lachimanan (**Krish Maniam** & **Co**) for the defendants.*

Wong Chee Lin JC:

GROUNDS OF JUDGMENT

[1]This case concerns an application by the Plaintiff bank for summary judgment against the Defendants, as documented in enclosure 8. I allowed the Plaintiff's application on 10/5/2018. 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 the application for summary judgment.

Analysis and findingsThe law

[11]This is an application for summary judgment under Order 14 of the Rules of Court 2012 (ROC 2012). It is established law that once an Order 14 application is demonstrated to be properly filed, the burden shifts and rests on the Defendant who seeks to resist the application to raise a defence which shows a " bona fide triable issue", in the sense of an issue which justifies and warrants the matter to be considered at a full trial.

[12]This is in keeping with the requirements of Order 14 r 3 of the ROC 2012 which provides that unless the defendant satisfies the Court with respect to the claim, or part of a claim, to which the application relates that:

(a) there is an issue or question in dispute which ought to be tried; or

(b) there ought for some other reason to be a trial of that claim or part thereof,

[13]The Court may give such judgment for the Plaintiff against the Defendant on that claim or part as may be just having regard to the nature of the remedy or relief claimed.

[14]In the often quoted decision of the former Supreme Court in *National Company For Foreign Trade v Kayu Raya Sdn Bhd* [1984] 2 MLJ 300 it was authoritatively ruled as follows:

> *"We think it appropriate to remind ourselves once again that in every application under* Order 14 *the first considerations are (1) whether the case comes within the Order and (b) whether the Plaintiff has satisfied the preliminary requirements for proceeding under* Order 14. For the purposes of an application under Order 14 *the preliminary requirements are:-*
>
> (i) *The defendant must have entered an 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 Rule 2* of Order 14.
>
> *…If the plaintiff fails to satisfy either of these considerations, the summons may be dismissed. If however, these considerations are satisfied, the plaintiff will have established a prima facie case and he becomes entitled to judgment. The burden then shifts to the defendant to satisfy the Court why judgment should not be given against him."*

[15]I would also like to refer to the leading judgment of the former Supreme Court on summary judgment applications in *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400 which held as follows:

> *"In an application under* O. 14*, the court has to be satisfied on affidavit evidence that the defence has not only raised an issue but also that the said issue is triable. The determination of whether an issue is or is not triable depends on the facts or the law arising from each case as disclosed in the affidavit evidence before the court. A complete defence need not be shown. The defence set up need only show that there is a triable issue. 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. Where 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 is inherently improbable in itself, then the judge has a duty to reject such assertion or denial, thereby rendering the issue not triable. Unless this principle is adhered to, a judge is in no position to exercise his discretion judicially in an* O 14 *application."*

[16]The issues raised by the Defendants are considered below.

[17]The Defendants raised a preliminary issue. It is that the Plaintiff did not even meet the threshold requirements for an Order 14 application. The Defendants allege that the Plaintiff did not comply with Order 14 r 2 of the Rules of Court 2012 ("ROC") and did not verify the cause of action as required.

[18]The Defendants relied on the case of *Supreme Leasing Sdn Bhd v Dior Enterprise & Ors* [1990] 2 MLJ 36 which referred to the old Irish case of *Murphy v Nolan* [18 LR (Ireland) 468] where Lord Ashborne said at p. 470:

> *"Now, there is no question that the affidavit in support of a motion for judgment must do two things- (1) verify the cause of action and (2) state that the defendant has no defence. The contention here is that the cause of action was not sufficiently verified. The way the cause of action was verified was this:-*
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> *'The defendant herein is indebted to me in the sum of $ 24.16s as per particulars specially endorsed on the writ of summons herein'"*

[19]In that case, the plaintiff's application was held defective and ought to be dismissed outright.

[20]There is no substance in this issue raised by the Defendants. I have reviewed the affidavit in support affirmed by the Plaintiff's Vice President. In paragraph 5, it was stated that the Plaintiff's claim against the Defendants was in connection with the default of the 1st Defendant in the repayment of a Fixed Asset Loan in accordance with the securities executed by the 1st Defendant and pursuant to a Guarantee executed by the 2nd and 3rd Defendants.

[21]Copies of the letter of offer and the Facilities Agreement, the Guarantee and the various Deeds of Assignment were exhibited. The Plaintiff then went on to refer to and exhibit the various Restructuring Agreements entered into between the Plaintiff and the 1st Defendant, the demand for the outstanding sum made on the Defendants, the failure on the part of the Defendants to pay the outstanding sum of RM4,825,900.63 and the Plaintiff set out the existence and effect of the conclusive evidence clause, stated that based on the facts

and evidence set out above the debt was still due and owing and the deponent verily stated that the Defendants have no defence on the merits in the action and have raised no triable issues.

[22]I find that the Plaintiff has complied with Order 14 r 2 of the ROC and has duly verified its cause of action against the Defendants. Pursuant to the National Company for Foreign Trade case, the burden is on the Defendants to raise a triable issue.

[23]The Defendants raised three issues.

[24]The 1st issue is that the Plaintiff has breached its duty of care to the Defendants. In respect of this issue, the Defendants say that there is a doubt as to what the true nature of the loan granted to the 1st Defendant was. The Plaintiff in its affidavit in support of the application has referred to a Fixed Assets Loan whereas the Facility Agreement exhibited only identified it as a loan facility.

[25]There is no substance to this allegation. In the Schedule to the Facility Agreement, the Loan Facility Amount is stated as "Loan Facility for Fixed Assets in the sum of RM3,870,000.00 only to be disbursed from Tabung Japanese Bank International Cooperation". So the Plaintiff is not wrong to refer to the facility as a Fixed Assets Loan. This is not a triable issue.

[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]The Defendants also alleged that they were blacklisted by the Plaintiff without justification. The Plaintiff responded to the effect 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 is no reply to the Plaintiff's affidavit so it is deemed that the Defendants have accepted the response of the Plaintiff.

(see *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281)

[33]I find that this allegation does not raise a triable issue.

[34]The 2nd issue raised by the Defendants is that the Plaintiff had wrongfully and illegally imposed compound interest and/or penalty charges which the Defendants say the Plaintiff was not entitled to do under the Facility Agreement.

[35]This issue is without substance. Section 4.05 of the Facility Agreement provides for the capitalisation of interest. It therefore entitles the Plaintiff to charge compound interest. Section 4.06 of the Facility Agreement allows the Plaintiff to charge interest at a rate which is 1% higher than the prescribed rate if the borrower shall default in the payment on the due date of any one or more of the instalments. The Plaintiff contended that it has only charged such interest as is permissible under the Facility Agreement and the Defendants have not proved otherwise. Incidentally, the facility is a conventional facility as shown in the certificate of indebtedness exhibited by the Plaintiff. As such, the allegation that the Plaintiff is not entitled to charge interest is without basis.

[36]The 3rd issue raised by the Defendants relate to the properties under the Deeds of Assignment. The Defendants allege that the Plaintiff has failed to disclose to the Court as to the current status of the properties and whether strata titles have been issued.

[37]The Plaintiff's reply is that if strata titles have been issued, the Defendants are obliged to execute National Land Code charges over the properties in favour of the Plaintiff but to-date the Plaintiff does not know whether strata titles have been issued as no such charges have been executed by the Defendants.

[38]This issue is of no substance. The Deeds of Assignment are only relevant insofar as they should be mentioned as the security for the loan granted to the 1st Defendant. Whether strata titles have been issued or not has nothing to do with the indebtedness of the Defendants to the Plaintiff in respect of the loan facility.

[39]The last issue raised by the Defendants is that there is no cause of action deposed as against the 2nd and 3rd Defendants in the Plaintiff's Affidavits.

[40]This issue is without basis. The Plaintiff has deposed that the loan to the 1st Defendant is secured inter alia by the Guarantee executed by the 2nd and 3rd Defendants. The Guarantee is exhibited and the Plaintiff has in its Affidavit in Reply set out terms of the Guarantee and the 2nd and 3rd Defendants' liability thereunder.

[41]In this case, both the Facility Agreement and the Guarantee contained clauses to the effect that a statement of account signed by an officer of the Plaintiff showing the indebtedness of the 1st Defendant shall be conclusive and binding on the Defendants as to any amount due to the Plaintiff.

[42]The Plaintiff has exhibited the signed statement of account showing the indebtedness of the 1st Defendant as at 22/8/2017. In the case of *Cempaka Finance Bhd v Ho Lai Ying & Anor* [2006] 3 CLJ 544, the Federal Court held as follows:

> *"...whether a certificate of indebtedness issued in accordance with the express provisions of the contract which provide that the certificate is final and conclusive of the matters stated therein, is final and conclusive evidence of the amount in the absence of any manifest error on the certificate...A certificate of Indebtedness operates in the field of adjective law, excusing the plaintiff from adducing the proof of debt and shifting the burden on to the defendant to disprove the amount claimed.....A clause of this nature has been described as a conclusive evidence clause and has been held to be binding and valid by courts in Australia and England..."*

[43]Since the Defendants' allegation as to the Plaintiff's right to impose penalty interest or late payment interest and to compound interest is without basis, the Defendants have not succeeded in showing any error in respect of the statement of account.

[44]Where it is a sham defence, in the case of *Comptroller General of Inland Revenue, Malaysia v Weng Lok Mining Co. Ltd* [1969] 2 MLJ 98 it was held that:

> *"...*O.14 *was intended to put an end to that state of things and to prevent sham defences from defeating the rights of the parties by delay and at the same time causing great loss to the plaintiffs who were endeavouring to enforce their rights."*

[45]In the circumstances, after considering the affidavits filed by the parties and the submissions of the parties, I find that the Defendants have not raised any triable issue

which will merit a trial. I accordingly allow the Plaintiff's application with costs of RM5,000.00 subject to allocator.

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