



IN THE HIGH COURT OF MALAYA AT KUALA LUMPUR

(COMMERCIAL DIVISION)

[SUIT NO: 22NCC-228-08/2015]

BETWEEN

CITIBANK BERHAD

... PLAINTIFF

AND

ENRICH POWER SDN BHD & 2 ORS

... DEFENDANTS

JUDGMENT

[1] Enclosure 6 is the Plaintiff's application for summary judgment pursuant to Order 14 Rules of the Court 2012 against the Defendants filed on 5.10.2015. The Plaintiff claims are as follows:-

- [i] the sum of RM2,766,293.58 and RM1,767,253.75;
- [i] interest arising out of outstanding and unpaid facilities extended to the 1st Defendant and guaranteed by the 2nd and 3rd Defendants; and
- [iii] costs.

[2] The application is supported by an Affidavit in Support affirmed by Chan Kok Leong on 7.9.2015. This Court referred and considered the Defendant's affidavit in Reply of Loo Boon Lek affirmed on 5.10.2015. The Plaintiff's affidavits in Reply are affirmed by Chew Chee Keong on 21.10.2015

The Background

[3] The Plaintiff granted to the 1st Defendant Working Capital Facilities of RM4million sometime in April 2011. In May 2012 the facilities were revised to RM6 million comprising of overdraft facility of RM1.5million and a Ringgit Invoice Financing Facility of RM4.5million.

[4] Sometime in September 2014 the Plaintiff granted to the 1st Defendant a Commercial Card Program facility with a maximum limit of RM2.5million. The Guarantors executed 2 separate Guarantees and Indemnity dated 22.5.2012 and 2.6.2014 in favour of the Plaintiff as security for both the facilities. The Plaintiff also received other security from the 1st Defendant 3 sets of Memoranda of Deposits and the letters of set off, and a charge over the time deposits dated 2.6.2014 for the sum of RM750,000.00.

[5] On or about 10.6.2015 the 1st Defendant notified the Plaintiff that its distributor, Digi Telecommunications Sdn. Bhd. terminated its services and that the 1st Defendant will no longer require any credit facilities. An extension of six months was requested by the Defendants to make payments.

[6] The Plaintiff rejected the request for extension and on 30.6.2015 terminated the Working Capital Facilities and on 17.6.2015 terminated the Commercial Card Program facility. The Plaintiff issued a demand to the Defendants and the Defendants failed to comply with the demand.

The Law

[7] In *National Company for Foreign Trade v. Kayu Raya Sdn. Bhd.* [1984] 2MLJ 300, the Federal Court has stated as follows:

“...We think it appropriate to remind ourselves once again that in every application under O. 14, the first considerations are (a) whether the case comes within the order and (b) whether the plaintiff has satisfied the preliminary requirements for proceeding under O. 14. For the purposes 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 may 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....”.

[8] The Supreme Court in *Bank Negara Malaysia v. Mohd Ismail* [1992] 1 CLJ 627 held that the duty of a Judge does not end as soon as the fact is asserted by one party, or denied or disputed by the other on affidavit. The Judge has a duty to reject such assertion or denial if such assertion or denial is equivocal or lacking in precision

or is inconsistent with undisputed contemporary documents or is inherently improbable.

“.....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 on 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 as not triable. In our opinion, unless this principle is adhered to, a Judge is in no position to exercise his discretion judicially under an O. 14 application. Thus, apart from identifying the issues of fact or law, the Court must go one step further and determine whether they are triable. This principle is sometimes expressed by the statement that a complete defence need not be shown. The defence set up need only show that there is a triable issue.”.

[9] The Plaintiff have satisfied the preliminary requirements as laid down in the *Kayu Raya*'s case that are,

- [1] the Defendants have entered appearance;
- [2] the Statement of Claim have been served on been served on the Defendants; and
- [3] the Affidavit in Support is in compliance with O. 14 r. 2 Rules of the High Court (RHC).

[10] The burden is now shifted to the Defendants to satisfy the Court why Judgment should not be entered against them.

Issue raised by the Defendants

Discussions between the Defendants and the Plaintiff

[11] The Defendants only raised one central issue that is, the discussions between the representatives of the Plaintiff and the Defendants with regards to a the proposal to create another charge over the Defendants' lands in the Plaintiff's favor.

[12] It is the submission of the Defendants that the 2nd and 3rd Defendant had series of meeting with the Plaintiff's officers, one Koay Kings Tern and Nicky Yau Kok Wen. It is contended by the Defendants that at one of the meeting Nicky Yau had represented that the 1st Defendant could perform a second charge on the properties owned by the Defendants as further security so that the facilities would not be recalled.

[13] It is submitted by the Plaintiff that it was not obliged to accept the proposal made by the Defendants. Furthermore, the properties in question were encumbered and securitized to other lenders whom the Defendants owed monies. Thus, making it impossible for the Plaintiff to accept the proposal.

[14] The Plaintiff had set off a part of the sums owed and reduced the accruing interest on the unpaid sums. The Defendants failed to show any manifest error of the Certificate of Indebtedness.

[15] The Defendants had not discharged the burden to establish triable issues requiring a trial of the Plaintiff's claim, in that, the issues that pass the test of *bona fide* triable issues to be supported by

documents contemporaneous to the lending which are precise and/or consistent with the undisputed contemporary document (see *Cempaka Finance Bhd v. Ho Lai Yin [trading as KH Trading & Anor* [2006]; *Bank Negara Malaysia v. Mohd Ismail & Ors* [1992] 1 CLJ Rep 14; [1992] 1 MLJ 400).

[16] Based on the reasons stated above this Court is of the considered view that there are no triable issues raised by the Defendants which merits a full blown trial. Enclosure 6 for summary judgment is allowed with costs.

(HASNAH DATO' MOHAMMED HASHIM)

Judge

High Court of Malaya

Kuala Lumpur.

Dated: 28 DECEMBER 2015

Counsels:

For the plaintiff/respondent - Chong Juen Quan; M/s Raja Darryl & Loh

For the defendants/appellants - Eu Jin & Eugene Lim; M/s Josephine, LK Chow & Co



Case(s) referred to:

National Company for Foreign Trade v. Kayu Raya Sdn Bhd
[1984] 2MLJ 300

Bank Negara Malaysia v. Mohd Ismail [1992] 1 CLJ 627

Cempaka Finance Bhd v. Ho Lai Yin [trading as KH Trading & Anor [2006] 3 CLJ 544

Legislation referred to:

Rules of the Court 2012, O. 14