

**DALAM MAHKAMAH TINGGI MALAYA KUALA LUMPUR
(BAHAGIAN SIVIL)**

GUAMAN NO: S5-22-1501-2004

ANTARA

AMFINANCE BERHAD

(Dahulu dikenali

sebagai MBF Finance berhad

.....PLAINTIF

DAN

1. IMAGE REVIEW SDN BHD

2. LEE PANG CHUAN

3. LEE PANG BENG

..... DEFENDAN

GROUND OF JUDGMENT

This is an application by the Plaintiff against the Defendants for Summary Judgment under 0 14 RHC 1980.

Brief facts

As per the Statement of Claim, the 1st Defendant was granted banking facility by a Letter of Offer dated 20.7.1996 for "New Principal Guarantee Scheme" amounting to RM 500, 000. In relation to this, parties have entered into a Loan Agreement dated

11.10.1996 subject to the terms and conditions. The 2nd and the 3rd defendants are the guarantors of the 1st Defendant by way of Guarantee Letter dated 11.10.1996. Later, The 1st Defendant had defaulted in the repayment and the Plaintiff had sent a letter of demand and a termination letter. The Defendants have however made 3 payments of RM 4000 on each occasion after the writ and Statement of Claim have been served on them.

The Plaintiff is relying on these documents:

- a. Letter of Offer dated 20.7.1996 (Exhibit B Enclosure 8)
- b. Loan Agreement dated 11.10 1996 (Exhibit C Enclosure 8)
- c. Letter of Guarantee by 2nd and 3rd Defendants as (Exhibit A Enclosure 8);
- d. Guarantee from Credit Guarantee Corporation Malaysia Berhad (CGC) for the amount of RM 350,000.00 subject to terms and conditions (Exhibit D and E of Enclosure 8).

Issues raised by the Defendants

- a) The amount claimed by the Plaintiff is wrong as the Plaintiff failed to take into account payments made by the Defendants;
- b) Whether the Plaintiff can impose default interest when the loan to the 1st Defendant has been restructured by the Plaintiff;
- c) Whether the 2nd and 3rd Defendant liable as joint guarantors to the Plaintiff in respect of the claim for RM 422, 803. 80.

- d) Whether the 2nd and 3rd Defendants discharged from their liabilities as guarantors on account of the Plaintiff's action as creditor in varying the express terms of the loan facility without the express agreement/ consent of the 2nd and 3rd Defendants;
- e) Has the failure of the Plaintiff to enforce the Corporate Guarantee issued by CGC prejudiced the 2nd and 3rd Defendants

1st Issue:

The amount claimed by the Plaintiff is wrong as the Plaintiff failed to take into account payments made by the Defendants

The Defendants have failed to produce via receipts to show that they have made payments for the accounts of No 802-562-923 to the Plaintiff, as alleged. The Plaintiff had challenged the veracity of the statement of accounts in exhibit "LPC-2" of enclosure 10 of the Defendant's affidavit. Moreover the dates of when the payments were made in LPC-2 in enclosure 8 are not consistent. There is a possibility that LPC-2 relates to an account which has no relevance to the Plaintiff. The Plaintiff contends that the defendants have 3 accounts with the Plaintiff. Refer to "LPC-3: of enclosure 10.

Therefore for positive confirmation of payment the defendants could have exhibited receipts of payments.

2nd Issue

Whether the Plaintiff can impose default interest when the loan to the 1st Defendant has been restructured by the Plaintiff

For this issue, although the loan had been restructured by the Plaintiff, that by itself does not change the terms and conditions of the original Agreement between the plaintiff and the Defendants, inclusive of interests which had been agreed upon. This is off course subject to the agreement of the restructuring of the payment of the loan (on a without prejudiced basis) pursuant to the letters dated 21.10.1998, 3.9.2001 and 23.11.2002 as found in exhibit LPC-3 of enclosure 10. The restructuring of the loan payment was expressly stated in the said letters in LPC-3 which states" Other terms and conditions shall remain unchanged".

Therefore the plaintiff is entitled to imposed the default interest rate although the loan had been restructured.

Issue 3:

Whether the 2nd and 3rd Defendant liable as joint guarantors to the Plaintiff in respect of the claim for RM 422, 803. 80.

The Defendants submits at the material time when the loan facility to the 1st Defendant had been terminated by the Plaintiff's solicitors letter dated 13.2.2004 the Plaintiff had failed to secure the Corporate Guarantee from CGC for the sum of RM 350, 000.00. This is so because, according to the Defendants, the last annual fee charged of RM 1750 in respect of the Corporate Guarantee was paid on 12.10.2001. Thereafter the Plaintiff no longer charges

the annual fee and by necessary implication thereof, the loan of the 1st Defendant is no longer guaranteed under the Corporate Guarantee for the sum of RM 350, 000.00 and such action has clearly prejudiced the 2nd and 3rd Defendant.

The defendants further submits that in the Letter of Guarantee issued by the 2nd and 3rd Defendant to the Plaintiff the recital therein clearly has not been fulfilled, in particular as to the pre-condition that the loan facility of RM 500, 000.00 given to the 1st Defendant must be guaranteed by a Corporate Guarantee for the sum of RM 350, 000.00. Therefore the defendants states that the pre conditions of liability has not been fulfilled at the time when the demand letter dated 13.2.2004 had been issued by the Plaintiff's solicitors to both of the 2nd and 3rd defendants.

On this issue from exhibit "LKT-1" in enclosure 18 shows a letter from CGCMB confirming that the CGC had been approved by them dated 12.8.1996. Thus the argument of the Defendants is misconceived.

It is to be noted that CGC is a contract between the Plaintiff and the CGC and the defendants is not privy to the contract. The CGC guarantee does not in any way affect the Defendants' liability to repay Plaintiff the loan or whatever sums that is due under the loan agreement between the Plaintiff and the defendant.

Issue 4:

Whether the 2nd and 3rd Defendants discharged from their liabilities as guarantors on account of the Plaintiff's action as creditor in varying the express terms of the loan facility without the express agreement/ consent of the 2nd and 3rd Defendants

The defendants submits that the plaintiff had unilaterally reduced the CGC Corporate Guarantee from RM 350, 000.00 to only the sum of RM 295, 000.00. This variation according to the defendants is in fact a variation which is caught by section 86 of the Contracts Act 1950. The consequence of which is that the 2nd and 3rd Defendant are thereby released from all their liabilities under their joint letter of Guarantee issued to the Plaintiff.

On this issue, what is to be noted is that it is the Defendants that applied for the restructuring of the payment of the loan. As such the coverage of CGC's Guarantee was accordingly amended. In any event the Defendants are not privy to the contract between the Plaintiff and CGCMB. Hence the Plaintiff can which gives the Plaintiff the rights to do so. vary or amend the coverage in the guarantee without the Defendants' consent. Refer to Enclosure 8, exhibit "B" clause 11 (a) and (b), Enclosure 19 Exhibit "LPC-6"

Issue 5:

Has the failure of the Plaintiff to enforce the Corporate Guarantee issued by CGC prejudiced the 2nd and 3rd Defendants

There is no obligation by the Plaintiff to provide proof to the defendants as to whether the Plaintiff had complied with the notice of "Classification of Non Performing Loan" to CGC. Again the issue of the Defendants are not privy to the guarantee between the Plaintiff and CGC. However the Plaintiff had shown that it had issued out notice on 28.11.2003 (exhibit LKT-2 of Enclosure 200 and the date of classification was on 31.10.2003. the classification of the loan was made after 6 months arrears pursuant to "specific points" clause 1 and 2 exhibit LKT-1 of Enclosure 18.

Therefore the issue of whether the 2nd and 3rd Defendants is prejudiced does not arise at all.

Thus from the above reasonings the Defendants have raised issues which are not triable. I therefore granted order in terms for Summary Judgment against the Defendants with costs.

Datin Zabariah Mohd Yusof
Tarikh 3.7.2009

Bagi pihak Plaintiff : Puan Nooron Aini Zakaria
(Tetuan Azaine & Fakhrul)

Bagi pihak Defendan : Encik K. W. Chow
(Tetuan Paul Cheah & Ass.)