

DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR
DALAM WILAYAH PERSEKUTUAN, MALAYSIA

(BAHAGIAN DAGANG)

GUAMAN NO: (D5)(D12)-22-2123-1998

ANTARA

PICA (M) CORPORATION BERHAD

..... PLAINTIF

DAN

**NILAILAND SDN BHD
MOHD. HALMI BIN HAJI ISMAIL
PAUL LEONG JEE HONG
NUSAKOTA SDN BHD**

**..... DEFENDAN-
DEFENDAN**

GROUND OF JUDGMENT

1. This is a claim for recovery of money lent to the 1st Defendant with the 2nd, 3rd and 4th Defendants standing as guarantors. The claim against the 3rd Defendant was withdrawn when the 3rd Defendant was adjudged bankrupt and, discontinued against the 4th Defendant. The claim went to trial against the 1st and 2nd Defendants.

2. After the trial had commenced, it was learnt that the 2nd Defendant had also been adjudged a bankrupt. The trial was subsequently adjourned to enable the bankrupt/Plaintiff to obtain the necessary sanction to proceed. On 13.5.2009 the Plaintiff was granted leave by the Bankruptcy Court to proceed with this action against the 2nd Defendant.

Despite being advised of the hearing date, the Insolvency Office representing the bankrupt 2nd Defendant did not attend trial.

Background Facts

3. The Plaintiff called 5 witnesses. Through PW2 and PW4, the Managing Director and Assistant General Manager of the Plaintiff at the material time, it was shown that the Plaintiff offered the 1st Defendant a short-term loan of RM5million subject to legal documentation and to terms and conditions as contained in Appendix I to letter of offer dated 3.2.1997 [exhibit P7]. A loan agreement dated 12.3.1997 was subsequently drawn up [exhibit P3]. As security, a lien-holder's caveat and a first charge over certain land belonging to the 4th Defendant [exhibit P8] and a debenture over certain assets belonging to the 4th Defendant [exhibit P5] were entered. The 2nd and 3rd Defendants agreed to guarantee and indemnify the Plaintiff [exhibit P4].

4. As evident from the loan agreement, the loan was intended for payment of certain land premium and for the 1st Defendant's general working capital. The loan was to be repaid in one 'bullet repayment' with interest at 19% per annum [Prescribed Rate]. In the event of default the interest payable is 2% per annum over and above the Prescribed Rate.

5. These same witnesses testified as to the full drawdown of the loan by the 1st Defendant. A drawdown notice dated 12.3.1997 [exhibit P10] issued by the 1st Defendant to the Plaintiff was tendered in evidence. The utilization of the loan was also shown through exhibit P13. This

evidenced issue of RM4,293,921.00 to Pentadbir Tanah Daerah Petaling and RM706,079.00 to Abdul Moin bin Mian respectively.

6. By letter dated 27.2.1998 [**exhibit P15**], the 1st Defendant requested an extension of one year to settle the loan. The Plaintiff agreed to the request subject to terms [**exhibit P16**]. But the 1st Defendant failed to settle as agreed and letters of demand were issued to the Defendants [**exhibits 18 & 19**]. A Statement of Accounts setting out the computation of the principal sum and the interest was tendered as **exhibit P1** through PW1, the Senior Accounts Assistant of the Plaintiff at the material time. PW3, a director of CAFs Services Sdn Bhd, the company to whom the keeping of accounts and records of the accounts of the Plaintiff had been outsourced was also called to verify the evidence of PW1 since the debt outstanding from the Defendants remain in the accounts of the Plaintiff.

Submission of No Case to Answer

7. After the Plaintiff had closed its case, learned counsel for the 1st Defendant submitted there was no case to answer and elected not to lead any evidence. Learned counsel for the 1st Defendant took the position that there was insufficient evidence led to establish the Plaintiff's case. With this option, the 1st Defendant stated its case and learned counsel for the Plaintiff was then invited to reply.

8. The principles governing such an election have been well-laid down in the Supreme Court's decision in ***Jaafar Shaari & Siti Jama Hashim v Tan Lip Eng & Anor [1997] 4 CLJ 509*** and the Court of Appeal's

decision in *Mohd Nor Afandi Mohamed Junus v Rahman Shah Alang Ibrahim & Anor* [2008] 2 CLJ 369. In *Mohd Nor Afandi Mohamed Junus* the Court of Appeal observed at p 380:

“It is trite that when a submission of no case is undertaken, it means that a defendant at the close of the plaintiff’s case (in this case the appellant’s) either had not made out a case in law, or the evidence was unsatisfactory or unreliable for the court to hold that the burden had been discharged. In *Storey v Storey* [1961] P 63, at p 5 the court opined in the following manner:

There are, however, two sets of circumstances under which a defendant may submit that he has no case to answer. In the one case there may be a submission that, accepting the plaintiff’s evidence at its face value, no case has been established in law, and in the other that the evidence led for the plaintiff is so unsatisfactory or unreliable that the court should find that the burden of proof has not been discharged.”

9. Once the election has been made, the 1st Defendant is bound. The evidence led by the Plaintiff would be assumed to be true as was stated in *Jaafar Shaari @ p 528*: “... if the party on whom the burden of proof lies gives or calls evidence which, if it is believed, is sufficient to prove this case, then the judge is bound to call upon the other party, and has no

power to hold that the first party has failed to prove his case merely because the judge does not believe this evidence. At this stage the truth or falsity of the evidence is immaterial. For the purpose of testing whether there is a case to answer, all the evidence given must be presumed to be true.”

10. When considering whether or not to make the submission and election, the caution of the Supreme Court in **Jaafar Shaari** of no turning back must be heeded. At **p 519** the Supreme Court referred to the “... *peril of not having the evidence of their most important witness and of having adverse inference drawn against them for failing to call any such evidence should the circumstances appropriately call for such adverse inference or for the presumption of avoiding unfavourable evidence by the defence to be invoked against the defendants”*.”

11. It needs no reminder that another consequence of such a submission and election is the likelihood of a decision in the plaintiff’s favour where the court finds the evidence led to be satisfactory and reliable without more. In **Mohd Nor Afandi Mohamed Junus** the Court of Appeal said at **p 384**: “... *we had found the evidence satisfactory, reliable and by no stretch of the imagination farfetched, to vitiate the presumption of truth at the stage of the plaintiff. With the quality evidence before the court presumed to be true, the logical step was for the court to find for the appellant, what with the respondent not being assisted by the non-materialization of rebuttal evidence”*. This decision must therefore be carefully and thoroughly considered before making it.

Findings

12. The submission of the 1st Defendant can be summarized as follows. The Plaintiff is said not to have led sufficient evidence to establish its case for three reasons. First, the loan agreement upon which the claim is premised has not been proven to be valid. The company search on the 1st Defendant is unreliable. If properly carried out, it would have shown that the 3rd Defendant was no longer a director of the 1st Defendant. Second, the amount claimed has not been proved. Lastly, the failure to mitigate by the realization of the securities charged and, the withdrawal of action against the 3rd Defendant are seen to negative the right of the Plaintiff to claim and a failure to establish its case against the 1st Defendant.

13. I shall deal with each issue separately. First, the validity of the loan agreement [**exhibit P3**]. In reply, learned counsel for the Plaintiff pointed out that **P3** contains all the necessary features of a valid contract. In particular it bears the corporate seal of the 1st Defendant and the signature of two of its directors. Where it is alleged that the signatories are not authorized, the Rule in *Turquand's* case or the "indoor management" rule is relied on.

14. Having considered the evidence and the submissions, I find the loan agreement is valid. This dispute actually concerns only the authorization of the 3rd and not the 2nd Defendant in entering into the loan arrangements. On the matter of the search with the appropriate authorities concerning the identities of the directors, I find the search is but one of several ways in which the Plaintiff may prove that the agreement is

valid. In fact, on its own search results would not amount to anything. Here, the loan agreement clearly bears the company seal and the signatures of 2 directors. It must therefore be presumed valid. Other evidence led is only corroborative, such evidence being the relevant company resolution that undoubtedly shows authorization given to the 3rd Defendant to sign and execute all “legal documents ... pertaining to the aforesaid Loan Facility” [exhibit P25]. Further, there is Form 49 dated 14.2.1997 [exhibit P22] provided to the Plaintiff. This Form holds the 2nd and 3rd Defendants out as directors of the 1st Defendant. Together with the oral evidence of PW2 and PW4, such evidence more than adequately proves the validity of the loan agreement. I am also satisfied the Plaintiff has taken all reasonable steps to ensure proper authorization is in place before agreeing to the loan and more importantly, before disbursements of the loan.

15. I agree too that the Rule in *Turquand's* case applies in the facts of this case. This rule or the ‘indoor management’ rule is a presumption of regularity. The Plaintiff, an outsider is entitled to assume that all internal procedural requirements are in accord. This practical rule is necessary for commercial efficacy and confidence. This Rule was recognized in ***Pekan Nenas Industries Sdn Bhd v Chang Ching Chuen & 12 Ors [1998] 1 AMR 169***. At **p 203** the Federal Court took the view that: “... *the effect of the Rule in Turquand's case is that it reduces the enquiries which outsiders having dealings with a company – or more correctly – outsiders who reasonably think they are having dealings with a company – must make, which, of course promotes business convenience. Such outsiders have no right to insist on proof by the company's directors that the*

provisions of its memorandum or articles have been complied with, and they cannot therefore be deemed to have constructive notice of some failure to comply which they have no means of discovering (Gloucester County Bank v Rudry Merthyr Steam and House Coal Colliery Co (1895) 1 Ch 629 at 636 per Lindley LJ) and it is this which provides the legal basis for the Rule”.

16. Further, at **p 207** the Federal Court explained the rationale for such a principle – *“We need hardly add that the Rule in Turquand’s case is designed to protect not the company itself, but persons dealing with the company. It follows that there is no reason why persons, including outsiders, who enter into transactions with a company, and who are sued should not invoke the benefit of the Rule, as a defence.”* I see no reason why the protection cannot be invoked where the outsider is the claimant. Outsiders cannot be expected to always inquire into internal compliance matters before transacting.

17. This rule is of course displaced in circumstances which point to knowledge: *“The Rule in Turquand’s case cannot, however, be invoked by an outsider who knows or ought to know that here is an irregularity.”* – see ***Pekan Nenas @ p 206.***

18. In the circumstances, the challenge is without merit. Before leaving this issue, I do however need to mention that this challenge is in fact one of the pleaded defences of the 1st Defendant – see paragraphs 7, 8 9 and 10 of the Defence. Having opted not to lead any evidence, it is now highly inappropriate to raise the issue and to do so in this manner. Otherwise it

may appear to be a backdoor introduction of the 1st Defendant's case which he is not permitted to do so having made the option.

19. Next, the amount of the debt due. Exhibit **P1**, the Statement of Accounts was challenged on the basis that the original ledgers from which the accounts were prepared had not been tendered. Not much weight ought therefore to be given to this Statement. The entries in the Statement were also said to have been prepared upon instructions given. I find nothing unusual or improper in the preparation of this Statement. PW1 who prepared the Statement testified that she had recorded the data and information relating to the loan accorded to the 1st Defendant into both the ledger and the computerized data system maintained by the Plaintiff at the material time. The Statement is a restatement or compilation of the same data already contained in the two other records. A satisfactory explanation has been offered as to why those other records were not made available to the court. Her evidence and also the Statement of Accounts are therefore credible evidence which may be relied on to establish the amount of debt outstanding from the Defendants.

20. I should also say that because of the position opted by the 1st Defendant and the 2nd Defendant not being present to offer his case, there is in fact no other evidence before me. The disbursement of the loan has been proven through the testimonies of PW2 and PW4. There is evidence of default and the application of clause 14 in the loan agreement giving the Plaintiff the right of claim against the Defendants. A demand has been made [**exhibit P16**] which failed to illicit any payment from the 1st and 2nd Defendants.

21. I therefore find that the evidence led by the Plaintiff both credible and sufficient to prove the sums owed and at the rate of interest as agreed in the loan agreement.

22. Lastly, it was submitted that no evidence of mitigation was offered. The withdrawal of the claim against the 3rd Defendant was perceived negatively as this person was instrumental in the loan arrangements and its drawdown. However, due to the nature of the securities I agree with learned counsel for the Plaintiff that the realization of securities follows the award of judgment in the Plaintiff's favour. Similarly, I find no merit in this issue.

23. Insofar as the claim against the 2nd Defendant is concerned, it was submitted by learned counsel for the Plaintiff that even if the loan agreement is invalid, the 2nd Defendant remains liable as indemnifier. The decision of the Supreme Court in ***South East Asia Insurance Bhd v Nasir Ibrahim [1992] 2 MLJ 355*** was relied on. At **p 360** the Supreme Court said:

“We found in the first place that the difference between a contract of indemnity and a contract of guarantee appears to have been overlooked. A contract of indemnity is defined in s 77 of our Contracts Act 1950 as ‘a contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person’. A contract of guarantee, according to s 79 of the

Contracts Act 1950 'is a contract to perform the promise, or to discharge the liability, of a third person in case of his default'. The person who gives the guarantee is called the 'surety'; the person in respect of which the default the guarantee is given is called the 'principal debtor', and the person to whom the guarantee is given is called the 'creditor'. In a contract of indemnity, the promisor undertakes an original and independent obligation to indemnify, as distinct from a contract of guarantee which is a collateral contract by which the promisor undertakes to answer for the default of another person who is primarily liable to the promise."

24. In this regard, I find the existence of the guarantee proven – **exhibit P4**. The liability of the 2nd Defendant is dependent on the failure of the 1st Defendant to pay under the loan agreement and a demand being made on the 2nd Defendant as set out at clause 11 of the guarantee. The letter of demand, exhibit **P19** evidences the demand which remains unsettled. No evidence to the contrary has been led to establish the 2nd Defendant's case.

25. In conclusion, I find the Plaintiff has proved its case on a balance of probabilities and the burden has moved to the defence. Since the 1st Defendant has elected not to give evidence, and the 2nd Defendant not present though aware of the proceedings, I find the burden which had shifted to these Defendants not discharged. In the premises the Plaintiff's claim against the 1st and 2nd Defendants is allowed in the terms sought. The 1st Defendant's counterclaim is dismissed there being no evidence

whatsoever led to establish that counterclaim. I shall make only one order of costs of RM35,000.00 (as proposed) to the Plaintiff to be paid by the 1st Defendant. There shall be no order as to costs against the 2nd Defendant who is a bankrupt.

Date: 1st July 2009

(DATO' MARY LIM THIAM SUAN)
JUDICIAL COMMISSIONER
HIGH COURT KUALA LUMPUR
(COMMERCIAL DIVISION)

Solicitors:

S.S. Ling for the Plaintiff
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