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

(BAHAGIAN DAGANG)

GUAMAN NO: D2-22-514-2004

ANTARA

PENGURUSAN DANAHARTA NASIONAL BERHAD ... PLAINTIF

DAN

SADDHONA INDRAN A/P SEVAPRAGASAM ... DEFENDAN
(Pentadbir Kepada Harta Pusaka
Indran a/l Saravanamuthu, si mati)

GROUNDS OF JUDGMENT

1. Pengurusan Danaharta Nasional Berhad is the Plaintiff in this claim by virtue of a Vesting Certificate issued under the Pengurusan Danaharta Nasional Berhad Act 1998 [Act 587]. Its claim against the Defendant, the executrix of the late Indran a/l Saravanamuthu [late Indran] is for monies due and owing under overdraft facilities originally provided by Allied Bank (Malaysia) Berhad to the late Indran.

2. This is the pleaded case the details of which are vital. According to the Statement of Claim, by way of 2 letters of offer dated 18.6.1996 and 10.10.1996, Allied Bank (Malaysia) Berhad offered the late Indran overdraft facilities for the sum of RM16,884,000.00 which sum was increased to

RM22,084,000.00 *vide* the 2nd letter of offer. These offers which were subject to the terms and conditions set out in the letters were accepted by the late Indran. These overdraft facilities were secured by way of first and third party legal charges over a substantial number of properties belonging to the late Indran and related third parties.

3. Allied Bank (Malaysia) Berhad changed its name to PhileoAllied Bank (Malaysia) Berhad [PhileoAllied Bank]. Subsequently, by a Vesting Certificate dated 8.11.1999 issued under section 14 of Act 587, all rights, titles and interests of PhileoAllied Bank in relation to the late Indran as set out in the Schedule of the Vesting Certificate vested in the Plaintiff with effect from 26.8.1999. According to section 14(4)(m)(ii) of Act 587 the rate of interest that may be imposed by the Plaintiff is that which is provided in the facility agreement or the base lending rate of a licensed institution determined by the Central Bank. The late Indran failed, refused and/or breached the terms of the agreement and the Plaintiff sued. That suit was withdrawn when the Plaintiff accepted the late Indran's offer of settlement. However, the late Indran failed and/or breached the terms of the settlement. The late Indran then passed away on 28.10.2001.

4. On 23.12.2002 the Plaintiff issued a letter of demand to the Defendant, the sole executrix of the late Indran's estate claiming for the sum of RM34,712,203.80 as outstanding on 31.10.2002. The letter alleges non-regularizing of the banking facilities provided *vide* letters of offer dated 18.6.1996, 10.10.1996 and 4.12.1997 [**page 348** of the Common Agreed Bundle of Documents - **Bundle A**] which will now respectively be referred to as 1st, 2nd and 3rd letters of offer. The Defendant failed, refused and/or

breached to pay the amount claimed. The status of the various properties charged was then set out. At paragraph 13, it was pleaded that the rate of interest imposed by the Plaintiff is 3% per annum above the base lending rate [BLR] of Malayan Banking Berhad, currently at 6%.

5. The Defence filed generally pleads denials, but at paragraph 9 points out that it has no knowledge of the 3rd letter of offer. The Defendant also disputes the right to impose interest at the rate of 3% per annum above the BLR. At paragraph 7 of the Reply to the Defence, the Plaintiff clarified that the sum mentioned in the letter of demand comprised accrued interest of RM12,023,553.00 and other charges of RM860.95. The final sum of RM31,763,304.26 pleaded at paragraph 14 of the Statement of Claim represents the amount due as at 31.3.2004 after taking into account the securities realized till that date. By the time of trial all securities have been realized and the amount claimed is as per the Statement of Claim.

6. The Plaintiff offered evidence at the trial through Noorshiha binti Mohamad, the Senior Manager of Prokhas Sdn Bhd [**PW1**] while the Defendant elected not to call any witness or offer any evidence. The Defendant was in fact submitting there is no case to answer on the basis that the Plaintiff had not discharged the burden of proof or established its case in law as the evidence tendered was unsatisfactory or unreliable. See ***Mohd Nor Afandi Mohamed Junus v Rahman Shah Alang Ibrahim & Anor [2008] 2 CLJ 369***. Having elected not to call evidence, the Defendant is bound by that election. More significantly, the evidence led by the Plaintiff must now be assumed to be true. This position of law was

determined in ***Jaafar Shaari & Siti Jama Hashim v Tan Lip Eng & Anor [1997] 4 CLJ 509*** @ 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****."*

7. In the course of the trial and at submissions, the first launch was to challenge the competency of PW1 to give evidence for and on behalf of the Plaintiff. If properly taken, this obviously impacts on the Plaintiff's case.

8. It was the submission of learned counsel for the Defendant that PW1 was an incompetent witness because she is not an employee of the Plaintiff but of Prokhas Sdn Bhd. Only employees of the Plaintiff are competent to testify for and on behalf of the Plaintiff. Now, according to PW1, Prokhas Sdn Bhd, a fully-owned subsidiary of the Ministry of Finance entered into a Management Agreement with the Plaintiff to 'manage' non-performing loans [NPL] acquired by the Plaintiff. A copy of the management Agreement was not tendered. It was submitted by the Defendant that without sight of the Agreement, the nature and effect of the Agreement was unclear. Learned counsel for the Defendant took the view

that the Agreement appears to be in the nature of an assignment of the Plaintiff's rights to litigate to Prokhas. If the right to litigate had been assigned or if it could be assigned then the Plaintiff ought to be Prokhas Sdn Bhd. The court was invited to apply a narrow interpretation of the phrase "to manage" as to exclude any right to prosecute in the name of the Plaintiff. In response learned counsel for the Plaintiff denied the existence of any assignment. Instead it was submitted that the arrangement between the Plaintiff and Prokhas Sdn Bhd is only to administratively manage the assets acquired by the Plaintiff.

9. It is elementary that the competency of a witness is not determined by who is the employer of the witness. Section 118 of the Evidence Act 1950 [Act 56] provides that any person can be a witness. A witness is incompetent only if "*prevented from understanding the questions put to them or from giving rational answers to those questions by tender years, extreme old age, disease, whether of body or mind, or other cause of the same kind*". By no stretch of the imagination can being another person's employee or not being employed by the parties to the claim be "cause of the same kind" and render the witness incompetent to testify. In any event during the cross-examination of PW1 the competency of this witness was never seriously challenged. Neither is it the submission of the Defendant that there is any suggestion of infirmity or that the evidence of PW1 ought to be disregarded by reason of hearsay. PW1 has testified that the arrangement between the Plaintiff and Prokhas Sdn Bhd is administrative. PW1 gave evidence for the Plaintiff and not for Prokhas Sdn Bhd. For all intent and purpose, the action is maintained by the named Plaintiff. It is unnecessary for me to interpret any part of the Management Agreement,

the contents of which are irrelevant. Therefore PW1 is a competent witness.

10. Now to the more important aspects of the case – whether the Plaintiff has proved its case. It does not appear to be in dispute that the overdraft facilities were enjoyed but beyond that there are no details of the drawdown or the breach upon which this claim is made. The paragraphs pleaded in relation to the earlier suit filed are of no significance as this action is not premised on the failure to settle as agreed. The crux of the Plaintiff's case is whether there is a debt due and owing to the Plaintiff. And the debt claimed relates really to the amount due from the interest levied and not so much on the principal. With the Defendant electing not to adduce any evidence but choosing to rely entirely on the oral and documentary evidence tendered by the Plaintiff, it is to the pleadings and those evidence that the determination will be made. The Defendant's case will rest or fall on the submissions of learned counsel for the Defendant and based on the evidence before the court.

11. First of all, the pleadings. It is the submission of the Defendant that the Plaintiff has not proved its case since documents offered are either incomplete or wanting. In the claim, only the 1st and 2nd letters of offer, the Vesting Certificate and the letter of demand are pleaded. Both the letter of demand and paragraph 13 of the Statement of Claim stipulated the rate of interest as at 3% per annum above the BLR. It is the variation of the rate from 1.5% to 3% that forms the bone of contention between the parties. At the trial only the first 2 letters were tendered. Learned counsel for the Defendant submitted that the failure to tender the 3rd letter of offer

mentioned in both the letter of demand and the Vesting Certificate [**pages 242 & 348 Bundle A**] rendered the claim as not proved. All 3 letters ought to have been tendered. In response the Plaintiff relied on the first 2 letters and section 14(4)(m)(ii) of Act 587 as entitling the Plaintiff to interest – See PW1's answer to Q34 in the examination-in-chief [Witness Statement - **PW1**]. PW1 was unable to explain the basis for such imposition of interest save to say that it was imposed by PhileoAllied Bank and claimed by virtue of section 14(4)(m)(ii) of Act 587. Whether the Plaintiff is entitled to its claim especially in relation to the interest depends on what was envisaged in the letters of offer and the interpretation of section 14(4)(m)(ii).

12. First, the letters of offer. At clause 1 in the 1st letter of offer [**page 1 Bundle A**], the rate of interest imposed was "1.5% per annum over our Bank's Base Lending Rate ("BLR"), herein referred to as the "Prescribed Rate". Interest on the OD Facility is to be serviced at the end of each month. Interest is to be calculated on the amount utilized at the end of each day and debited to your account at the end of each month".

13. When the overdraft was increased *vide* the 2nd letter of offer [**pages 6 & 7 Bundle A**] there were no new provisions on the matter of interest payable. Clause 4 in fact provided that – "Other terms and conditions shall remain unchanged". This means that the interest rate at clause 1 in the 1st letter of offer shall continue to apply. Although clause 8 in the 1st letter of offer provided for events of default, there are no provisions in either letters of offer on the imposition of interest in the event of default, late payment or for any other reason. In a typical case such matters would have been provided for in a loan or facility agreement. Hence the suggestion by

learned counsel for the Defendant that the absence of such an agreement meant that there was in fact no agreement. That is not so. All it means is that the letters of offer form the basis for any interpretation of the respective rights and liabilities of the parties.

14. Next, the Plaintiff relied on section 14(4)(m)(ii) of Act 587 which reads as follows:

> "(4) Without prejudice to subsection (1), (2) or (3) in relation to an asset vested in the Corporation-
>
> (m) where the interest rate payable under any agreement in respect of an asset acquired by the Corporation is to be determined by reference to the cost of funds or base lending rate of the seller or is an interest that is otherwise no longer determinable as provided in the agreement, the interest rate payable under such agreement shall be-
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> (i) such interest rate as the Corporation may agree with the obligor of the agreement; or
> (ii) determined in the same manner provided in the agreement by reference to the base lending rate of a licensed institution determined by the Central Bank."

15. Having looked at section 14(4)(m)(ii), it is clear that this provision merely allows the application of the BLR of a licensed institution determined by the Central Bank where the interest rate is determined by reference to the cost of funds, base lending rate of the seller or is an interest that is otherwise no longer determinable as provided in the agreement. In this case, Clause 1 provided that the interest rate is determined by reference to the BLR of PhileoAllied Bank, the seller in relation to the Plaintiff. Since the Plaintiff has stepped into the shoes of that bank, paragraph (ii) applies and the BLR of Maybank is used as it is the licensed institution determined by the Central Bank. But that is only insofar as a part of the prescribed rate is concerned, that which is determined by reference to the BLR. The interest rate payable remains that as "shall be determined in the same manner provided in the agreement". By no means does this provision enable the Plaintiff to vary the 1.5% per annum to 3 or even 3.5% per annum as was indicated in its first letter of demand dated 27.3.1998 [**page 233 Bundle A**]. That variation depends on other clauses or terms, if any, in the letters of offer. Since there is none, the rate remains the same. To interpret in the manner proposed by learned counsel for the Plaintiff will mean the whole interest chargeable is by reference to the BLR leaving no room for the imposition of 1.5, 3 or 3.5%. This clearly runs contrary to the provisions of section 14(4)(m)(ii). I therefore find the Plaintiff's reliance on and the interpretation of section 14(4)(m)(ii) of Act 587 as the basis for the imposition of interest at 3% per annum above the BLR as unsustainable and must be rejected.

16. The Plaintiff tendered the Loan Statement from 26.8.1999 to 31.3.2009 [**exhibit P7**]. In it are figures representing both the principal and

interest sums. As each charge was redeemed the amount obtained was included into the Statement but only towards reducing the interest and not the principal sum. As of 26.8.1998, the date the Plaintiff took over the debt from PhileoAllied Bank, an amount of RM6,531,011.48 was entered as representing the interest payable. However, PW1 was unable to explain how this sum was arrived at - what the rate of interest was and the basis for the rate. Similarly, she was unable to explain the rate as stated in the first letter of demand save to say that this was the rate when the loan was still with PhileoAllied Bank.

17. I agree with the submissions of counsel for the Defendant that the amounts pleaded at paragraphs 14 (a) and (b) of the Statement of Claim cannot be reconciled with the amounts set out in **exhibit P7**. At paragraphs 14(a) and (b) the sum claimed is RM22,084,000.00 outstanding as at 1.4.2004. However, **P7** shows an amount of RM31,762,443.31 as at 1.11.2004. At the rate of 3% per annum these amounts are not reconcilable rendering **P7** unsafe and unreliable and ought to be disregarded.

18. Learned counsel for the Plaintiff attempted to refer to the provisions in the Charge Annexure for the imposition of the additional 2% rate of interest. According to the Charge Annexure 1% is imposed where there is late payment and another 1% is imposed where there is no payment. These amounts are imposed over and above the prescribed rate. However, since there are neither details of the breach pleaded nor any evidence led on it, as well as the evidence of PW1, this submission must also be disregarded.

Further, any default of the Charge Annexure leads to a foreclosure and not to an increment in the rate of interest from 1.5 to 3 or 3.5%.

19. Without the 3rd letter of offer and with PW1 unable to explain the basis for the increased rate of interest and in view of my interpretation of section 14(4)(m)(ii) of Act 587, and more particularly, this being a special damage claim where the loss has to be specifically proved, I find that the Plaintiff has not discharged the burden of proof. The Plaintiff has not proved its case on a balance of probabilities and I accordingly dismiss the Plaintiff's claim with costs. I am informed by learned counsel for the Plaintiff that RM26,699,000.00 has already been recovered. However, in view of the position taken by the Defendant I make no order on this.

Date: 8th June 2009

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

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