

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

(BAHAGIAN DAGANG)

GUAMAN NO: D5-22-1852-2001

ANTARA

**UTAMA MERCHANT BANK BERHAD
(No. Syarikat 23878-X)**

... PLAINTIF

DAN

**1. SOON HUN TECHNOLOGIES (M) SDN BHD
(No. Syarikat 88402 – A) (DALAM PENERIMAAN)**

2. SAW GIM BOON

3. CHOO KUM NOI

4. LAMIN BIN ISMAIL

5. DATO' MOHD NADZMI BIN MOHD SALLEH

**... DEFENDAN-
DEFENDAN**

GROUND OF JUDGMENT

1. The pertinent facts of the case are as follows. By letter of offer dated 25.11.1997 [Letter of Offer], the Plaintiff granted the 1st Defendant a revolving credit facility for the sum of RM3million subject to terms and conditions as contained in the letter of offer [credit facility]. A Facility Agreement dated 20.3.1998 to the same effect was subsequently entered into between the parties [Facility Agreement]. On the same date, the 2nd - 5th Defendants executed a guarantee and indemnity for the credit facility [Guarantee]. These defendants agreed to jointly and severally guarantee the payment by the 1st Defendant to the Plaintiff of the indebtedness as defined in the Guarantee. These defendants further agreed to pay to the

Plaintiff the indebtedness on demand. Also executed were 2 deeds of assignment as further security for the credit facility.

2. The Facility Agreement *inter alia* provided that interest is to be payable by the 1st Defendant at the rate of 1.75% per annum above the cost of funds to the Plaintiff (Applicable Rate). In the event of default or late payment of interest and/or principal, further interest was payable at the rate of 1% per annum above the Applicable Rate on the outstanding sum from the date due till the date of actual payment calculated on a daily basis. Under the Facility Agreement the Plaintiff had absolute discretion to vary the rate of interest.

3. The 1st Defendant defaulted and breached the Facility Agreement when it failed to make payment. As at 31.5.2001, the sum due was RM3,494,749.26 together with interest. Separate letters of demand sent to the defendants on 22.6.2001 failed to secure payments. All 5 Defendants were then sued. However, the 1st Defendant was wound-up and the Plaintiff filed a proof of debt. Proofs of debt were also filed in respect of the 2nd and 3rd Defendants who were adjudicated bankrupt. In the case of the 4th Defendant a judgment in default was entered. This case finally went to trial against the 5th Defendant. **Bundles A and A1** contain documents whose authenticity but not contents are agreed between the parties.

Submission of No Case to Answer

4. After the Plaintiff had closed its case, the 5th Defendant opted to submit that there was no case to answer and elected not to adduce

evidence. The 5th Defendant is perfectly entitled to make this option but once made, he is bound.

5. From the submissions or statement of case made pursuant to Order 35 rule 4(4) Rules of the High Court 1980 [RHC 1980], it would appear that the 5th Defendant is taking the position that the Plaintiff has not made out a case in law or there was no case to answer *simpliciter*. It is not based on unsatisfactory or unreliable evidence led by the Plaintiff. At **page 380** of ***Mohd Nor Afandi Mohamed Junus*** the Court of Appeal observed:

“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.”

6. Although learned counsel for the 5th Defendant urged this Court not to draw an adverse inference against the 5th Defendant for not opting to give evidence this is but one of the consequences of such a submission. In ***Jaafar Shaari & Siti Jama Hashim v Tan Lip Eng & Anor [1997] 4 CLJ 509*** the Supreme Court warned at **page 519** of 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*”. Yet another important consequence of an election not to give evidence is “... *all the evidence led by the plaintiff must be assumed to be true*” – see **page 528** of ***Jaafar Shaari***. This same principle was applied in ***Mohd Nor Afandi Mohamed Junus v Rahman Shah Alang Ibrahim & Anor [2008] 2 CLJ 369***. This will mean that the documents tendered by the Plaintiff and especially the contents in these documents will be assumed to be true.

7. One other observation on the consequence of submitting no case to answer and electing not to adduce evidence is - where the court finds the evidence led satisfactory and reliable with the added quality of presumed true, the next logical step would be to decide in the plaintiff’s favour. At **page 384** the Court of Appeal in the same decision of ***Mohd Nor Afandi Mohamed Junus*** said: “... *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". Finally, it cannot be gainsaid that any defence filed is irrelevant as the 5th Defendant is not putting up its case for consideration or determination by the court.

8. In view of the 5th Defendant's submission of no case to answer and electing not to call any evidence, the only issue is whether on a balance of probabilities the Plaintiff has adduced sufficient credible evidence to establish a case in law against the 5th Defendant. In other words, whether the Plaintiff has discharged its burden of proof.

Claim against the 5th Defendant

9. The Plaintiff's claim is founded on the Guarantee where the 5th Defendant had agreed to pay on demand by the Plaintiff. To succeed, the Plaintiff must establish the existence of the Guarantee, the material terms relied on, the indebtedness of the 1st Defendant, the demand, and, the failure to pay on demand.

10. The summary of the 5th Defendant's submission is this. The 5th Defendant was discharged from his obligations under the Guarantee because a new facility *vide* letter of offer dated 2.4.1999 and letter dated 5.4.1999 [**exhibit P11**] had been granted by the Plaintiff to the 1st Defendant. This was said to be evident from the letters of demand issued to the 5th Defendant [**page 59 Bundle A**] and the 1st Defendant [**exhibit P6**]. However, as the letter of offer dated 2.4.1999 was not tendered, the court was invited to draw an adverse inference and hold that the Plaintiff had not proved its case on a balance of probabilities.

11. The Plaintiff called two witnesses. The first witness, Jaswander Singh a/l Mehar Singh [**PW1**] was the Senior Manager, Company Secretarial & Legal Affairs Department of the Plaintiff at the material time. The second witness, Ho Chan Tat [**PW2**], the Manager for the Accounts/Statistics Department of the Plaintiff at the material time testified on the preparation of the Certificate of Indebtedness – **exhibit P10**. PW1 has personal knowledge of this matter having being involved in the arrangement of the credit facility to the 1st Defendant. As Company Secretary, PW1 recorded deliberations and decisions made at the Board of Directors' meetings including meetings when the credit facility was discussed.

12. PW1 testified on the existence and the terms of the Letter of Offer [**pages 1 – 6 Bundle A**], the Facility Agreement [**pages 7 - 47 Bundle A**] and the Guarantee [**pages 48 – 58 Bundle A**]. According to him, clause 4.01 of the Facility Agreement provided that the credit facility was subject to several conditions precedent. The credit facility was disbursed despite non-fulfillment of all the conditions precedent. The conditions precedent that met the satisfaction of the Plaintiff were those set out in answer to Q12 in his witness statement and to which the relevant evidence were tendered and marked as **exhibits P1, P2, P3, P4 and P5** and as found at **pages 1-2, 6-8, 9, 10-14 and 15-50 of Bundle A1**.

13. PW1 was cross-examined extensively on the conditions precedent and the execution of the credit facility. Its purpose being to question the exercise of discretion on the part of the Plaintiff in accepting unsuitable or insufficient security, and the appropriateness of allowing drawdown. The upshot was to support the 5th Defendant's contention of discharge.

14. Having observed the Plaintiff's witnesses and more particularly having regard to the documentary evidence presented, I find that there is more than ample evidence before me to prove the existence of a credit facility that was enjoyed by the 1st Defendant. It is irrelevant that the disbursement of the facility took place even though not all conditions precedent had been met. This was envisaged in clause 4.01 of the Facility Agreement which provided the Plaintiff with the right to "waive such conditions precedent as it may deem fit". It is also immaterial if the conditions precedent provided differed from that specified as clause 4.01 merely required the Plaintiff to be satisfied as to the conditions precedent received. And PW1 had testified that the Plaintiff was so satisfied. Clause 4.06 further provided that the Plaintiff "may in its absolute discretion notwithstanding that one or more of the conditions precedent may not have been fulfilled, proceed to disburse the Facility or any part thereof". PW1 further testified that the 1st Defendant failed to make payment of the sums due under the Facility Agreement leading to an event of default as defined under clause 13.01 of the Facility Agreement.

15. The next issue is whether letter of offer dated 2.4.1999 and letter dated 5.4.1999 [**exhibit P11**] intended a new credit facility or to restructure the repayment of the existing credit facility which was unpaid at that material time. It was the submission of learned counsel for the 5th Defendant that exhibit **P11** was a new credit facility with no default clause which would then undermine the Plaintiff's right to sue. This was said to be evident from the letters of demand issued to the 5th Defendant [**page 59 Bundle A**] and the 1st Defendant [**exhibit P6**].

16. From the evidence of PW1 and the reading of the penultimate paragraph in **P11**, it is clear that the letter of 5.4.1999 was intended for the restructuring of repayments and to be read subject to the “existing terms and conditions as set out in the Facility Agreement” and letter of offer dated 2.4.1998.

17. However, all these matters pertain to the credit facility which is really relevant if the case was one between the Plaintiff and the 1st Defendant. But this is not. This is a case against the 5th Defendant as guarantor and premised on the Guarantee. And the liability of the 5th Defendant depends entirely on the terms of the Guarantee. In ***Orang Kaya Menteri Paduka Wan Ahmad Isa Shukri bin Wan Rashid v Kwong Yik Bank Berhad*** [1989] 3 MLJ 155 @ 156:

“A guarantor must never be made liable beyond the precise terms of his commitment. This is important because the language of guarantees and their subject matter and the surrounding circumstances differ almost in every case.”

18. Even if there was a variation or modification of the credit facility including a new facility created, or as suggested, a failure on the part of the Plaintiff to realize securities in the Facility Agreement, the liability of the 5th Defendant remains unaffected - see ***Low Lee Lian v Ban Hin Lee Bank Bhd*** [1997] 2 CLJ 36. This is by reason of the guarantee being a continuing guarantee as envisaged under clause 3. Further, there are numerous provisions in the Guarantee which provide that the Guarantee and thereby the 5th Defendant, are not affected, released or exonerated by

any variation, modification etc. be it of the securities or any of the Debt Documents. Amongst such clauses are clauses 7.2, 7.3, 7.4, 8.1, 8.2 and 9. "Debt Documents" are defined in clause 1 of the Guarantee as "the Letter of Offer and all instruments and/or documents under, pursuant or in relation to which banking or credit facilities or other banking accommodation is/are granted or made available by the Plaintiff to the 1st Defendant from time to time". For the sake of completeness, these relevant clauses in the Guarantee are set out:

"7. Time, Indulgence, etc

This Guarantee and Indemnity shall be without prejudice to and shall not be affected nor shall I/we be released or exonerated by the matters following:-

- 7.2 any variation, exchange, renewal, release, realization or modification of any such right or remedy or securities or your refusal or neglect to complete, enforce or assign any judgment specialty or other security or instrument negotiable or otherwise and whether satisfied by payment or not;
- 7.3 any variation of the Debt Documents;
- 7.4 any time given or extended to the Borrower and/or any other person(s) including me/us and the parties to any negotiable or other security instrument guarantee or contract or any other indulgence granted to or compromise composition or arrangement made with the Borrower and/or any other person(s).

8. **Non-Discharge Events**

You may at all times without prejudice to this Guarantee and Indemnity and without discharging or in any other way affecting my/our liability hereunder and without my/our consent or notice to me/us:-

- 8.1 determine, vary, reschedule or increase any credit or facility to the Borrower and open and/or continue with any other account(s) current or otherwise of the Borrower with you at any branch(es);
- 8.2 agree to grant or grant to the Borrower any loan, credit or other facility whether in addition to or substitution for the loan, credit or facility granted or to be granted under the Debt Documents.

9. **Failure to take Security**

My/our liability hereunder shall not be affected by any failure by you to take any security or by any invalidity of any security taken or by any existing or future agreement by you as to the application of any advances made or to be made you to the Borrower.”

19. The Guarantee also does not require the 5th Defendant's prior consent to be procured before any variation and the like may be affected. In fact the contrary was contracted. From these several clauses, it is clear that even if for a moment there has been any variation to the extent of a new facility being granted to the 1st Defendant, the 5th Defendant remains liable as guarantor when the 1st Defendant fails to pay. In **Citibank N.A. v**

Ooi Boon Leong & Ors [1981] 1 MLJ 282 @ 283 the Federal Court decided that the parties “*are the sole judges whether or not they will consent to remain liable notwithstanding such variation, and that if they have not so consented they will be discharged*”. This principle was not disturbed by the Privy Council in ***Ooi Boon Leong & Ors v Citibank N.A. [1984] 1 MLJ 222***. Similar to the situation in ***Citibank*** the clauses in this Guarantee obviously reflect the 5th Defendant’s intention to voluntarily waive any variation or alteration. It would be inequitable and wrong to allow the 5th Defendant to now resile from the terms of the Guarantee after the Plaintiff has relied and acted upon it.

20. By clause 2.1 of the Guarantee [page 50 Bundle A] the 5th Defendant guaranteed the payment by the 1st Defendant to the Plaintiff of the Indebtedness and that the 5th Defendant will pay the Indebtedness to the Plaintiff on demand. The indebtedness is defined in clause 1 *inter alia* as:

“... all principal sums not exceeding in aggregate the principal limit and other monies, obligations and liabilities whether actual or contingent, now or hereafter from time to time and at any time owing to the Plaintiff by the 1st Defendant or remaining unpaid to the Plaintiff by the 1st Defendant in whatever currency denominated (whether on the general balance of the 1st Defendant’s account with the Plaintiff anywhere or on any account whatsoever or otherwise and whether the 1st Defendant alone or jointly or severally with or as surety for any other person) including monies owing:-

v) by way of interest (as well after as before any demand or judgment) calculated at such rate and manner as may from

time to time be agreed upon between the Plaintiff and the 1st Defendant or allowed by the Plaintiff or payable by the 1st Defendant...”

21. The Plaintiff has produced the letter of demand dated 22.6.2001 sent to the 5th Defendant demanding the settlement of the sum of RM3,494,749.26 as at 31.5.2001 [**page 59 Bundle A**]. Proof of posting of that letter by registered post to the 5th Defendant’s address as appearing in the Guarantee on 26.6.2001 has also been tendered as **exhibits P8** and **P9**. The address to which the letter of demand was sent has been admitted by the 5th Defendant to be his – see paragraph 3 in the Defence. In any event the 5th Defendant has not specifically denied receiving this letter.

22. From the evidence offered, I find that the letter of demand was effectively served in accordance with clause 22 of the Guarantee – see ***Amanah Merchant Bank Bhd (formerly known as Amanah-Chase Merchant Bank Bhd) v Lim Tow Choon (menerusi Pegawai Pemegang Harta) [1994] AMR 1***. Clause 22 provides-

“22.1 Any demand for payment or any other demand or notice given under this Guarantee and Indemnity shall be sufficiently served by you or by any other person acting for the time being as your solicitor(s) if addressed to me/us and left at or sent by telex, telefax or post to:-

22.1.1 my/our address in Schedule III; ...

A demand or notice sent by post shall be deemed to have been served on the day following the date of posting notwithstanding that it be undelivered or returned undelivered. In proving such service, it shall be sufficient to prove that the notice or demand was properly addressed and posted”.

23. PW1 has given evidence that the 5th Defendant has not paid the sum demanded. In the circumstances, such failure clearly amounts to a breach of clause 2.1 of the Guarantee.

24. Finally, the Plaintiff has tendered a Certificate of Indebtedness [**P10**] through its 2nd witness, **PW2**. As provided under clause 21 of the Guarantee, this Certificate was prepared as evidence of indebtedness. Clause 21 states:

“21. Evidence of Indebtedness

Any ... a statement signed by you as to the Indebtedness for the time being remaining unpaid to you by the Borrower shall be final and conclusive evidence (save for manifest errors) against be binding on me/us for all purposes”.

25. Learned counsel for the 5th Defendant chose not to cross-examine PW2. His evidence therefore stands unchallenged. Of greater significance is the certificate of indebtedness stands as final and conclusive evidence of the debt. In his submissions the position taken by the 5th Defendant is that this Certificate cannot be relied on as it was not

pleaded. If it had been pleaded then the 5th Defendant would have raised manifest errors in order to challenge the conclusiveness of the certificate.

26. I disagree. As I have said earlier – this is a claim based on a contract of guarantee and indemnity. This is evident from the Statement of Claim to which the Defendant has responded with ease. What the Plaintiff needs to establish is the existence of the guarantee, the material terms relied on, the breach and the debt due. The fact of the debt and its amount have already been pleaded and that suffices. In order to prove the debt pleaded, and in accordance with the intention of the parties as provided in clause 21, the certificate is tendered as final and conclusive evidence.

27. In ***Cempaka Finance Bhd v Ho Lai Ying & Anor [2006] 3 CLJ 544 @ 554*** the Supreme Court held that “A certificate of indebtedness operates in the field of adjectival law. It excuses the plaintiff from adducing proof of debt. Such a certificate shifts the burden onto the defendant to disprove the amount claimed”. That decision was recently followed by the Court of Appeal in ***Tan Chong Keat v Pengurusan Danaharta Nasional Bhd [2008] 4 CLJ 748***.

28. The 5th Defendant chose not to cross-examine PW2. The Certificate – **exhibit P10** assumed to be true and reliable evidence of the indebtedness of the 5th Defendant cannot be ignored. With the 5th Defendant further opting not to adduce evidence to counter or challenge the evidence tendered, the burden of proof that shifted to the 5th Defendant has now not been discharged by the 5th Defendant. There is no other evidence on this issue before me. In the circumstances, I am

perfectly entitled to hold that this certificate finally and conclusively evidences the amount of indebtedness of the 5th Defendant to the Plaintiff. This certainly accords with the intention of the parties as set out in clause 21 of the Guarantee. The Plaintiff has clearly established and proved its case on a balance of probabilities. Accordingly, I allow the Plaintiff's claim with costs.

Date: 18th June 2009

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

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