ASIA COMMERCIAL FINANCE (M) BHD v EQUATORIAL PROPERTIES SDN BHD & 3 ORS
High Court, Pulau Pinang
8 April 1999
Civil Suit No 23-461-86
ABDUL HAMID MOHAMAD J

Civil procedure – Amendments – Statement of claim – Application to amend statement of claim in order to update amount claimed and interests – Whether proceeds of sale of land charged as security should be deducted from debt due – Whether interest unilaterally imposed – Evidence Act, s 73A

Abdul Hamid Mohamad J
Alasan Penghakiman

This suit was filed in 1986. The Plaintiff, a licensed finance company sued the First Defendant, the principal borrower and the Second, Third and Fourth Defendants as guarantors for the First Defendant for a sum of RM687,840.11 as at the date of the filing of the suit.

There have been numerous applications over the period of more than ten years until the case was finally fixed for hearing.

On 19th July 1997, the "Fixing Day", the Senior Assistant Registrar allotted two days for the hearing of this case, *i.e.* on 14th and 15th October 1997. On 19th September 1997 the Plaintiff filed a Summons in Chambers seeking to amend the Statement of Claim. The Senior Assistant Registrar allowed the application on 11th October 1997, *i.e.* three days before the trial was supposed to begin.

In the meantime, on 22nd September 1997, the 1st and 3rd Defendants filed a Summons in Chambers for an order that questions and/or issues raised by them be tried as preliminary issues before the full trial of other questions and issues in the action. Secondly, that pending the disposal of the preliminary issues, all further proceeding be stayed (Enclosure 75).

This application was filed after eleven years and only three weeks before the trial was supposed to begin.

On 14th October 1997, which was supposed to be the first day of the trial, I heard the First and Third Defendants' application (Enclosure 75).

I dismissed the application and inspite of a request for postponement by learned counsel for the First and Third Defendants directed that the trial should begin in the afternoon. It began in the afternoon and continued the next day and adjourned for continuation on 19th and 20th January 1998.

On 28th November 1997 the appeal against the Senior Assistant Registrar's decision allowing amendments to the Statement of Claim came up for hearing before me in chambers. Basically, the amendments were to up-date the amount claimed, first, by deducting from the amount claimed the amount recovered from the sale of the land charged to the Plaintiff by the First Defendant as security for the loan. Secondly, to update the interests as it had been eleven years since the suit was filed. The Senior Assistant Registrar had allowed the amendments. The Defendant appealed to Judge in Chambers.

So, on 28th November 1997 I heard the appeal. I allowed it because I was of the view that it was unnecessary. Whether or not the statement of claim is amended, the amount recovered from the sale of the charged land must be taken into account. It was ironical that the Defendants were objecting to it. Regarding the interest, prayer (a) has already made it very clear that the Plaintiff was also claiming interest from 1st July 1986 until the date of payment and/or realisation. What the Plaintiff sought to do through the amendments was to particularise the amounts of interests. That can be done at the trial. Furthermore, the trial had begun, after eleven years, and was to continue in about a month. To allow the Plaintiff's amendments would only cause further delay.

I narrate all these events because, as will be seen later, learned counsel for the Defendants argued that the claim for interests subsequent to the filing of Writ should not be allowed because the Plaintiff's application to amend the Statement of Claim had been dismissed. But, he wanted the proceeds of the sale of the land to be deducted from the debt due.

The claim in brief

The Plaintiff is a finance company. The First Defendant is a limited company. At the request of the First Defendant, the Plaintiff advanced a loan of RM600,000.00. The loan was secured by a charge on land known as Holding No. 186, Town District, Penang together with premises bearing address No. 396, 398, 398A, 398B and 398C, Chulia Street, Penang. The Second, Third and Fourth Defendants were guarantors of the said loan. The loan was defaulted and demands were made. The Defendants failed to pay and this action was filed, against the First Defendant and a principal borrower and against the Second, Third and Fourth Defendants as guarantors.

In the meantime the charged land was sold by an order of court. The Fourth Defendant has been adjudicated bankrupt and did not appear during the trial. The Second Defendant has earlier represented by Mr. Annamalai but neither the Second Defendant nor his counsel appeared during the trial. It was only the Third Defendant who rigorously defended the action on his own behalf as guarantor and on behalf of the First Defendant, the company.

As I have stated, in view of the fact that the case had been in court for more than eleven years then, I directed the trial to proceed as scheduled even though there was an appeal pending against my decision refusing the Defendant's application filed only three weeks before the full trial was to begin for an order that the preliminary issues raised by the Defendants be heard first. Secondly, I made it very clear when I allowed the Defendants' appeal against the decision of the Senior Assistant Registrar allowing the Plaintiff to amend the statement of claim because, to me, the amendments were unnecessary as they were only to update the amount claimed due to the. passage of time and what had transpired in the meantime. So, I allowed the Plaintiff to adduce evidence updating the claim which comprised the reduction of the amount claimed by the amount recovered from the sale of the charged land and by adding the interest payable since the filing of the suit.

Only two witnesses gave evidence in this trial, the Branch Manager of the Plaintiff (PW1) and the Third Defendant. PW1 impressed me as a truthful witness. Unfortunately, I cannot say the same about the Third Defendant. He was evasive. For example, asked whether he was still a director of the First Defendant on the day he gave evidence in court he said he did not know because he had so many companies. When it was put to him that he was not a director of the First Defendant anymore he replied: “I don't know”. Asked about the interest rate of 3% above the BLR he replied: “There was no written confirmation that the interest will be 3% above BLR”. [This is in spite of the clear provision in the letter of offer, which offer must have been accepted by the First Defendant, of which he his wife were directors, otherwise the loan would not have been given.) Asked whether the First Defendant had defaulted paying interests he replied: “I have to check the records”. It was put to him that as at 30th June 1996 the First Defendant had defaulted many payments, his reply was “possible”. (This is in spite of the fact that the First -Defendant is actually “his own” company. He himself said “I signed the guarantee because we needed the loan”.)

Indeed, his evidence is totally unreliable.

Objection to admissibility of documents.

The Plaintiff called its Branch Manager as its first witness (PW1). In the course of his examination-in-chief he produced the usual bank documents like the ledger card (P8), the Notice of Demand (P7) to the First Defendant informing the latter of the change of Base Lending Rate (BLR) and the rate charged on the loans. These were not objected to and were duly produced and marked as court exhibits. However, in his submission, learned counsel for the First and Third Defendants argued that these documents were not admissible as the makers were not called.

I do not think that the tactic is fair at all. This is a civil case. In my years of

experience of hearing such cases I have not come across a counsel who would require every bank officer or clerk or whosoever who has made an entry in a bank document, type, sign or post a letter to be called as witnesses merely to identify and produce the documents. On rare occasions when counsel do object, they object to a particular document when the witness seeks to produce it, thus giving an opportunity to the other side to call the officer concerned. And they only do so when they have questions to ask about the contents of the document and not just to make it difficult for the other side. I do not think it is fair to the Plaintiff, in this case, to allow the counsel for the Defendants to surprise the Plaintiff this way.

Whatever it is, I am of the view that these documents are admissible under section 73A of the Evidence Act 1950.

Interest

Daily rest or monthly rests

a) The first issue raised by First and Third Defendants was that the Plaintiff had wrongly and contrary to the term of the letter of offer (P1), Charge Agreement (P2) and Guarantee (P3) imposed
interest at "daily rests" against them.

It was admitted by PW1 that the interests should be calculated on monthly rests basis, not on daily rests basis. However, he confirmed that the amount claimed was correct. It was calculated on monthly rests basis. What is wrong is the statement in the Statement of Claim, which mentions "daily rests" instead of "monthly rests".

PW1 referred to the ledger card (P8) and said that he relied on the ledger card for the amount. He further said that it was not possible that the ledger card was inaccurate as it was subject to the bank's internal audit and was also audited by Bank Negara auditors.

I have no reason to doubt the accuracy of the ledger card maintained by the Plaintiff. On 26th June 1998, when I gave my decision I was under the wrong impression that the total amount claimed of RM1,119,140.47 included interests calculated on daily rests basis, and not monthly rests. So I recorded that the I gave judgment for RM1,119,140.47 less the amount of interest that would have to be deducted if the calculation were made on monthly rests basis. I directed learned counsel for the Plaintiff to submit the "correct" amount within one week. Learned counsel came back and reported to me that the Plaintiff had reconfirmed that the amount of RM1,119,140.47 was in fact calculated on monthly rests basis, and was the correct amount due. I had no reason to doubt it and recorded the judgment for that amount. In other words, what is wrong is the statement in the Statement of Claim which mentions "daily rests" basis, not the calculation as

the calculation was done on monthly rests basis.

Whether unilaterally imposed

(b) Clause 3 of the letter of offer dated 21st March 1985 (P1) provides, regarding interest rate, as follows:
" 3 percent *per annum* monthly rest above our Company's Base Lending Rate (BLR). Our present BLR is 13.5% *per annum*."

Clause 11 provides:
Interest on Late Payment
" 11. Penalty interest of 3 percent *per annum* over and above the prescribed rate."

As clearly stated by the letter of offer and further explained by PW1 in his evidence, as on the date of the letter of offer, the normal-interest rate chargeable was 13.5% (BLR) + 3% = 16.5%. Penalty interest or interest **** 11*** on late payment was 3% over and above that 16.5% making a total of 19.5%.

As everybody knows and explained by PW1 the BLR is a fluctuating rate. So when the BLR changes, the "normal" rate will be 3% plus whatever BLR at that time. If we look at P9 to P18 the BLR changes from time to time and one time it went down to as low as 8.5% which means that the rate was reduced accordingly. If there is late payment, 3% will be added over and above that "normal interest".

The mechanism is provided in the letter of offer.

The Third Defendant's evidence could not assist him much, if at all.

While he agreed that the terms were in the letter of offer he said that one Eddie Lee had told him that the interest rate was 3% above BLR. Eddy "did not say about varying interest rate". Even if that is true it confirms that the rate is 3% above BLR. If he means to say that he did not know that the BLR
Varies from time to time, he was clearly pretending as it is unimaginable that an architect having "so many companies" (in his own words) would not know it.

Clearly there is no merit in the Third Defendant's contention that the interests were unilaterally imposed and contrary to the agreement.

On the question whether penalty interest was lawfully imposed. The letter of offer provides for it. It is a normal banking practice. In Chung Khiaw Bank Malaysia Bhd. V. Raju Jayaraman Kerpaya(1) Mahkamah Tinggi Pulau Pinang Guaman Sivil No. 23-248-88, confirmed by the Court of Appeal (see (1997) 2 MLJ 5090) I did not allow penalty interest as it was conceded by learned counsel for the Plaintiff in that case that it was not provided for in the agreement between the parties. In that case, I allowed capitalisation of interest even though it was not

provided for in the agreement following National Bank of Greece S.A. v. Pinios Shipping Co. No. 1 & Anor (2) which recognised that the bank's right to capitalise interest may be implied as a term which arises by reason of practice and usage of bankers.

Here the late payment or penalty interest was agreed to by the parties and I see no reason why that practice and usage of the bankers should not be recognised by the Court.

The Third Defendant also denied receiving any notice of variation of BLR. The Plaintiff produced the notices sent to the First Plaintiff at its given address — see P9 — P18. As Third Defendant, he said he did not receive these notices in his personal capacity. Speaking for the First Defendant he said at that time the First Defendant "had no office", for convenience, I suppose. I have no doubt whatsoever that the notices of change of BLR were sent to the First Defendant.

Claim premature

It was argued for the First and Third Defendants that the claim was premature because the Plaintiff should have foreclosed the land first, but the Plaintiff chose to sue the Defendants first. The Third Defendant said that one Eddie Lee (not called by the Defendants), apparently an officer of the bank, made it very clear to him that the Plaintiff would dispose of the land first. He went on to say: "Plaintiff has not complied with the express representation. They tried to dispose of my land first. (Now witness says). They should dispose of my land first. But, they sued me first". (Note that now he talks of the land as "my land").

There is clearly no merit in this argument. First, it is not probable that there is such a representation. **** 14*** Secondly such evidence is inadmissible under section 91 and 92 of the Evidence Act 1950. Thirdly, there is nothing in law, as far as I know, which prevents a bank from suing the borrower and the guarantors before the security (land) is sold pursuant to a foreclosure proceedings.

Notice of Demand

In paragraph 11 of the Statement of Claim the Plaintiff averred that by a notice of demand dated 4th November 1986 the Plaintiff made demand against the Defendants for payment of the sum of RM687,840.11 with interests accruing thereon. The Defendants did not specifically deny this averment. The notice of demand, (they were not carbon copies) was produced as P7 together with the A.R. Cards, through PW1. Under cross-examination the Third Defendant was asked:

"Q: After receipt of this notice of demand you did not respond?

A: We did not respond because we felt it was premature. There was no reply/response from us."

It is very clear that proper demand was made but the Defendants did not respond.

The other point raised regarding the notice of demand was that the amount was wrong. In his evidence, in the examination in chief, the Third Defendant did not say that the amount demanded was wrong. Under cross-examination which I have reproduced, the Third Defendant said that they did not reply or respond to the notice of demand because they thought it was premature.

In his evidence, PW1 said that the amount of RM687,840.11 stated in the notice of demand comprised the principal amount, interest and penalty interests then due, of course, as shown in the ledger card. I have held that the Plaintiff was entitled to penalty interest and that the ledger card shows the correct position of the account. In the circumstances, there is no merit in the allegation that the amount stated in the notice of demand was wrong.

Even in cases where the amount stated in the notice of demand is shown to be different from the amount actually due, that fact does not render the demand invalid. In Chung Khiaw Bank Limited v. Raju Jayaraman Kerpaya (1), referred to earlier, which was confirmed by the Court of Appeal, I said:

" It would be most unfair if, just because the notice demanded a few ringgit more than the amount the Court after a full trial found to be due, the debtor is relieved from paying the whole amount due and owing. Furthermore, in this case, the fact that the notice demanded a slightly larger amount to be paid could not in any way prejudice the Defendant as the Defendant did not pay anything at all."

In that case, I found support for that proposition in Public Bank Bhd. v. Chan Siok Lie & Ors. (3) in which Shakar J (as he then was) said:

"Nor is there any general rule that in all cases, unless the precise amount owing is correctly stated in a notice the notice will be invalidated."

In Shall Marketing Co. of Borneo Ltd. v. Tan Sri Datuk We Boon Ping (4) the amounts stated in the letters of demand were more than the amount finally claimed. In spite of that summary judgment was given for the Plaintiff.

So, even if the amount stated in the letter of demand is more than the amount actually due, which is not the case here, the notice of demand is still valid. Further, as in Chung Khiaw Bank Limited's case there is no prejudice to the Defendants who merely ignored the demand.

Property was disposed of at gross undervalue

The First and Third Defendants also tried to re-open the issue of reserve price for the public auction of the charged land. This is what the Third Defendant said in

his evidence:
“ Property was sold in 1994, at RM726,750.00. In 1994 it was worth about 2.5 million. In 1994 I had a valuation report. I gave to my former lawyer. Is was presented to Court. Defendant 1 did not appeal against the reserve price.”

Indeed, the Third Defendant's a evidence answers his own argument. As usual, after the order for sale was given in the foreclosure proceedings, the reserve price was fixed by the Senior Assistant Registrar. The First Defendant had presented its valuation report for consideration by the Senior Assistant Registrar. The First Defendant did not appeal against the decision of the Senior Assistant Registrar on the reserve price. That is the end of matter. The Defendants cannot now complain that it was too low and consequently the land was sold for a very low price.

In conclusion, I found that the Plaintiff had proved its claim. I gave judgment for the Plaintiff for RM1,119,140.47 which was the amount due as at 15th August 1997, not the original amount claimed as at 1st July 1986 which was RM687,840.11. This is in spite of the fact that I did not allow the Plaintiff's amendment to update the figures as I was of the view that it was not necessary as the original prayer has clearly stated that the Plaintiff was also claiming interests “to the date of payment and/or realisation”. The judgment sum also took into account the proceeds of sale of the land which was deducted to arrive at that judgment sum. I also awarded costs to the Plaintiff.

Anoop Singh (Cheong Wai Meng & Van Buerle) for plaintiff — Jayne Koe (Cheah Teh & Su) for first and third defendants