CHUNG KHIAW BANK MALAYSIA BERHAD v. RAJU JAYARAMAN KERPAYA
HIGH COURT, PULAU PINANG
ABDUL HAMID MOHAMED J
CIVIL SUIT NO. 23-248-88
19 APRIL 1995
[1995] 1 LNS 51

Certificate of indebtedness — Whether erroneous and inconclusive
Guarantees — Whether liability limited — Terms of guarantee agreement
Interest — Whether plaintiff can capitalise interest — Absence of such clause in loan agreement — Banking practice and usage
Interest — Whether plaintiff could claim for late payment or penalty interest — No such provision in agreement
Notice of demand — Larger amount than what is due — Validity

Counsel:

For the plaintiff - Tommy Thomas (V. Arivanandhan with him); M/s. Cheong Wai Meng & Van Buerle

For the defendant - Dennis Xavier; M/s. Jayaraman, Ong & Co.

JUDGMENT

Abdul Hamid Mohamed J:

On 9 August 1983, at the request of the defendant and Hipparion (Malaysia) Sdn. Bhd. (Hipparion), the plaintiff entered into a loan agreement with Hipparion whereby the plaintiff advanced to Hipparion a term loan of RM1,000,000 which was repayable together with interest thereon at the rate of 3% per annum above the plaintiff's base rate or prime rate whichever shall be the higher by 84 equal monthly instalments of RM18,464.90 each.

Clause 6 of the agreement *inter alia* provides that the plaintiff may from time to time by notice in writing increase or reduce the interest rate payable on the said loan.

Clause 12(c) provides that in case default is made by Hipparion in the payment of any monthly instalment, the plaintiff shall be at liberty to demand immediate payment of the balance of the debt payable and upon such demand being made, the balance of the debt payable shall be immediately payable.

By a letter of guarantee dated 3 September 1983 the defendant guaranteed payment on demand of all sums of money owing to the plaintiff up to the limit of RM1,000,000.

By clause 2(2) of the letter of guarantee the defendant also agreed to pay interest on such sum at such rate as the plaintiff may from time to time stipulate as well as before and after

judgment.

Hipparion defaulted in the payment of monthly instalments and by a letter of demand dated 14 August 1985, the plaintiff demanded payment of RM1,072,013.17 due to the plaintiff as at 31 July 1985 together with interest according thereon.

Hipparion and the defendant failed to pay the said sum on any part thereof.

On 24 November 1987 the plaintiff obtained judgment against Hipparion for the said sum of RM1,072,013.17 together with interest thereon at the rate of 14% per annum from 1 August 1985 to the date of payment and realisation.

Notwithstanding the said judgment, Hipparion has not made any payment of the said sum.

By a letter of demand dated 28 July 1988 the plaintiff demanded from the defendant the sum of RM1,565,922.92 due to the plaintiff as at 30 June 1988 with interest thereon at the rate of 14% per annum from 1 July 1988 to the date of payment and realisation. The defendant failed to pay the sum or any part thereof.

The plaintiff claimed against the defendant for the said sum of RM1,565,922.92, interests and costs.

A lengthy statement of defence was filed. I shall not summarise it here, as during the trial only, some of the defences were raised, which I shall deal accordingly.

The plaintiff called one witness, its credit officer. The defendant did not call any witness.

I gave judgment for the plaintiff less RM31,855.89 which was the penalty or late payment interest, with interest and costs. The defendant appealed.

I shall deal with the issues raised during the trial.

First, whether the defendant was liable to repay the loan and interest thereon.

That there was a loan agreement between the plaintiff and Hipparion and that the defendant gave a guarantee to the plaintiff both dated 1 September 1993 were not in dispute. However, learned Counsel for the defendant argued that the defendant's liability under the guarantee agreement was limited to RM1,000,000 only. He argued that Hipparion had paid 11 instalments, and that the property had been sold by the plaintiff for RM1,150,000 so basically the principal loan had been settled. In other words, he said as what had been paid was more than RM1,000,00 and as the limit of the defendant's guarantee was only RM1,000,000 the defendant was not liable to pay the amount claimed.

With respect I do not think that that ground has any merit.

First, it is clear from the loan agreement itself that Hipparion was not only liable to repay the principal sum but also interests - see clauses 2(ii), (iii), 5.

Perphas, I should add here that on 15 March 1985 the plaintiff, through its solicitors gave notice to Hipparion giving notice to pay up the whole amount of RM1,007,815.75 then due.

Hipparion replied the following day:

> Please be informed that we will pay all the outstanding instalments and instalment for April 1985 by next month.

On 9 September 1985 Hipparion again wrote to the plaintiff:

> Due to extremely difficult business conditions we have not been able to pay the instalments as and when became due.
>
> In the circumstances we shall be grateful if you would kindly let us know **the amount of interest** (emphasis added) only due on the loan, up to 30 September 1985 **so that we can make arrangements to pay at this sum to you in the first place** (emphasis added).
>
> Thereafter we shall be grateful if the loan can be restructured for a longer term with lower instalments preferably quarterly.

These are admissions of debts by Hipparion.

Then on 10 October 1985 Hipparion sent a cheque for RM100,000 to the plaintiff. However payment was stopped. On 24 November 1987 plaintiff obtained judgment against Hipparion. There was no appeal against it.

We now come to the guarantee agreement. Clause 1, *inter alia*, provides:

> 1. I (defendant added) will pay to you on demand all sums of money which are now or shall hereafter from time to time and at any time be owing to you from the customer or remain unpaid...

Clause 2 provides:

> 2.(1) This guarantee shall be a continuing guarantee up to the limit or extent of the principal sum of Malaysian Ringgit One Million (RM1,000,000) for the purpose of securing not merely an equivalent amount but [subject always to the said principal limit of Malaysian Ringgit One Million (RM1,000,000)] the whole of the moneys mentioned in clause 1 hereof.
>
> (2) In addition to the said principal limit I will, upon demand being made for payment of the sum obtainable from the hereunder, be liable to pay interest on the sum at such rate or rates as you may from time to time stipulate as well after as before judgment, if any is obtained in respect thereof.

It is very clear therefore that the defendant's liability is not only limited to RM1,000,000.

The next question is whether the plaintiff is entitled to capitalise the interests remain unpaid.

Learned Counsel for the defendant submitted that the agreement does not provide for capitalisation of interest. He showed the Court the kind of provision that should be incorporated in the agreement if compound interest were to be made payable, as is found in

the *Encyclopaedia of Forms and Precedents,* Fourth Edn., Vol.14 para. 2.25.

It was conceded by learned Counsel for the plaintiff that such a provision was not incorporated in the loan agreement. However, he argued that clause 5 was the capitalisation clause. In the alternative he argued that the Court should infer that there was an implied term for it. For this proposition he relied on the House of Lords decision in *National Bank of Greece SA v. Pinios Shipping Co. No.1 & Anor.* [1990] 1 All ER 78.

With respect, I do not find anything in clause 5 of the loan agreement as providing for capitalisation of interest. This leaves me with the question whether such a term should be implied.

It appears to me that the case of *National Bank of Greece S A* is an authority that a bank's right to captilise interest may be implied as a term which arises by reason of practice and usage of bankers. That practice is prevalent here, as in England. I see no reason why the decision should not be followed in this country.

The third point raised by learned Counsel for the defendant was that there was no provision in the agreement for late payment or penalty interest. Learned Counsel for the plaintiff conceded that the plaintiff could **not** claim late payment or penalty interest which amount to RM31,855.39. I deducted that amount in my judgment.

Next it was argued by learned Counsel for the defendant that the certificate produced by the plaintiff as evidence of indebtedness (P2) was erroneous and therefore not conclusive. I accept as law that the certificate of indebtedness is binding on the defendant unless there is a mainfest error - see *D & C Nomina Merchant Bankers Bhd. v. Gunung Kuari Sdn. Bhd. & 3 Ors.* [1990] 2 CLJ 58 and *Oriental Bank Bhd. v. Jaafar Sidek & Mohd. Salam & Ors.* [1990] 2 CLJ 72. However, as this case went for full trial, even if it is shown that the certificate is erroneous to a certain extent, it does not mean that the whole certificate must be rejected and the whole claim should fail. This Court must consider all the evidence, oral and documentary, and decide whether the plaintiff, on the balance of probabilities, has proved its case and to what extent of the claim.

Considering the evidence before me, besides the claim for late payment or penalty interest, it is not shown to be erroneous. Considering all the evidence before me, I am satisfied that the plaintiff has proved its claim (less the late payment interest), on the balance of probabilities.

Learned Counsel for the defendant cross-examined PW1 whether the premise was rented out by the plaintiff from the date the licence was terminated until it was auctioned, because, understandably, if it was rented out by the plaintiff, the plaintiff would have received rentals which should be credited to the Hipparion's account. PW1 replied that during the period the premise was left vacant. The defendant chose not to call any witness. He himself chose not to be present in Court. The Court has to accept PW1's evidence.

It was also argued by learned Counsel for the defendant that there had been a breach of clause 12 of the loan agreement. Clause 12 allows the plaintiff to sell the property in the case of default of payment. However, it does not provide for a time period within which period it should be done. Learned Cousel for the defendant argued that it should be done within reasonable time. He pointed out that the property was sold about four years after the licence was terminated. He argued that that amounted to unilateral variation of the provision of

clause 12 and therefore discharged the defendant of his liability as a guarantor.

Unfortunately, the defendant chose not to adduce any evidence to show the circumstances which would support his contention that the property was sold not within a reasonable time. Definitely the Court cannot just by looking at the relevant dates, come to a conclusion that the sale was not done within a reasonable time or not. The Court should be told why that period was not a reasonable time. The defendant was making this allegation. He should prove it. He had not done so.

In any event, I do not agree that the fact that the property was sold some four years after the licence was terminated amount to a unilateral variation of the contract and/or discharges the defendant of his liability under the guarantee agreement.

That brings me to the last issue, that is whether the notice of demand which was for a larger amount than what the plaintiff after the trial succeeded to prove that it was entitled to claim, is invalidated. On this issue, I find the cases of *Public Bank Bhd. v. Chan Siok Lie & Ors.* [1990] 1 CLJ 564 of great help. In *Public Bank Bhd.* 's case, Shanker J (as he then was) said, *inter alia*, at p.308:

> 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 the *Shell Marketing Co. of Borneo Ltd. v. Tan Sri Datuk Wee Boon Ping* [1990] 1 CLJ 564 case, the amounts stated in the letters of demand were more than the amount finally claimed. That did not prevent the learned Judge from giving summary judgment for the plaintiff.

It should be pointed out that in the present case, my decision was given after a full trial. It would be most unjust 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 circumstances I was of the view that the plaintiff had on the balance of probabilities, proved its claim, except for the late payment or penalty interest of RM31,855.89. I gave judgment for the plaintiff in the sum of RM1,638,520.64 up to 31 December 1994, interest at 8% per annum from 1 January 1995 until the full amount is paid and costs on the basis of one Counsel only.