
ARAB-MALAYSIAN MERCHANT BANK BHD v CHONG ON FOH MEDICAL HALL
& LIQUOR DEALERS
HIGH COURT, PENANG
ABDUL HAMID J
CIVIL APPEAL NO 11-25-1995
17 JUNE 1996
[1996] 1 LNS 113

EVIDENCE - Documentary evidence - Admissibility of Evidence Act 1950 s 73A(1) & (2)

Legislation referred to:

Evidence Act 1950 s 73A(1), (2)

Counsel:

Chan Siew Cheong (Kumar Jaspal Quah & Aishah) for the appellant.

Leong Sing Cheong (Chen Leong & Co) for the respondent.

Abdul Hamid J

The plaintiff ('the appellant') is a licensed merchant bank in Kuala Lumpur. The defendant ('the respondent') is a firm. The appellant's claim against the respondent is based on a factoring agreement dated 12 March 1985. At the hearing, one Simon a/l Jones Ganesh, an officer of the appellant, gave evidence. He wanted to tender the agreement. It was objected to by learned counsel for the respondent. After recording further evidence and hearing arguments by both learned counsel on s 73A of the Evidence Act 1950 ('the Act'), the learned magistrate ruled that the agreement was not admissible. He then adjourned the case sine die for the appellant to appeal to this court.

This appeal only concerns the admissibility of the agreement. However, first, I would like to say that in my view the learned magistrate should have proceeded with the trial and decided the case once and for all. That would have saved cost and time.

Now, coming to the issue before me. Section 73A of the Act provides:

73A Admissibility of documentary evidence in civil cases, etc

- (1) Notwithstanding anything contained in this Chapter, in any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of

that fact if the following conditions are satisfied:

(a) if the maker of the statement either:

(i) had personal knowledge of the matters dealt with by the statement; or

(ii) where the document in question is or forms part of a record purporting to be a continuous record, made the statement (so far as the matters dealt with thereby are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have had, personal knowledge of those matters; and

(b) if the maker of the statement is called as a witness in the proceedings: Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead, or unfit by reason of his bodily or mental condition to attend as a witness, or if he is beyond the seas and it is not reasonably practicable to secure his attendance, or if all reasonable efforts to find him have been made without success.

(2) In any civil proceedings, the court may at any stage of the proceedings, if having regard to all the circumstances of the case it is satisfied that undue delay or expense would otherwise be caused, order that such a statement as is mentioned in sub-s (1) shall be admissible as evidence or may, without any such order having been made, admit such a statement in evidence:

(a) notwithstanding that the maker of the statement is available but is not called as a witness; and

(b) notwithstanding that the original document is not produced, if, in lieu thereof, there is produced a copy of the original document or of the material part thereof certified to be a true copy in such manner as may be specified in the order or as the court may approve, as the case may be.

Under the section, a statement is admissible under three circumstances:

(1) where the maker is called to give evidence ? s 73A(1)(i);

(2) where the maker is not available but the proviso to sub-s (1) of that section is satisfied; and

(3) where the maker is available but not called as a witness, under circumstances provided by sub-s (2) of that section. It should be understood that that sub-s (2) is separate from sub-s

(1). Under sub-s (1), the statement is not admissible unless:

(a) the maker himself gives evidence; or

(b) the proviso applies.

The proviso is a proviso to sub-s (1) and not to sub-s (2). So, if the statement is not admissible under sub-s (1), the learned magistrate should have considered whether it was admissible under sub-s (2). Under sub-s (2), the statement is admissible if the court is satisfied that undue delay or expense would be caused in order to call the maker to give evidence.

With respect, it appears to me that the learned magistrate only considered sub-s (1) and not sub-s (2).

Would the agreement be admissible under sub-s (2)? We will have to revert to the facts.

The plaintiff is a merchant bank. The document in question is an agreement between the bank and another company. On behalf of the bank, it was signed by one Dr Junid and one Dr Cheah Teoh Keong, a managing director. PW1, through whom the agreement was sought to be tendered, is an officer of the bank. It is his duty to provide information regarding accounts of clients who fail to repay the bank. The document is kept by the bank. He has knowledge of the document. Dr Junid has left the bank. Dr Cheah could not come to the Magistrate's Court, Bukit Mertajam (from Kuala Lumpur) as he is a busy man. He himself had come to Bukit Mertajam (from Kuala Lumpur) five or six times for the same case. It should be noted that the claim was only for a sum of RM5,425.82. He said that the costs incurred by the plaintiff were more than what the plaintiff was claiming.

That is the scenario. I am of the view that this was the type of circumstances that s 73A(2) was enacted to serve. That intention is clearly to avoid undue delay or expense of requiring, in this case, the signatory who has left the bank or the managing director to be personally present in court just to produce the agreement. What more when the suit is in Bukit Mertajam, the office of the plaintiff is in Kuala Lumpur and the claim is only RM5,425.82; and even the officer has had to make five or six trips already.

I am of the view that the circumstances of this case justify the agreement to be admitted under sub-s (2) of s 73A of the Act.

I allowed the appeal and remitted the case back to the learned magistrate to proceed with the trial to the end.

I hope that the magistrate will take note and, in future, not adjourn a hearing sine die every time he makes a ruling on an objection to the admissibility of a document or a statement, or for that matter preliminary objections on so-called points of law. Such appeals are causing delay in the disposal of cases and causing cases to be pending for years, resulting in the public losing confidence in the courts. Furthermore, such appeals will only add up to the costs of the suit, which may be more than the amount claimed.

