BANK KERJASAMA RAKYAT (M) BHD v KOPERASI PERDANAJAYA MALAYSIA BHD

CaseAnalysis

[2020] MLJU 1720

Bank Kerjasama Rakyat (M) Bhd v Koperasi Perdanajaya Malaysia Bhd [2020] MLJU 1720

Malayan Law Journal Unreported

HIGH COURT (KUALA LUMPUR)

ATAN MUSTAFFA YUSSOF AHMAD JC

SUIT NO WA-22M-669-09/2019

19 October 2020

Jagjit Kaur (Tengku Nazihah Hanis with her) (Sidek Teoh Wong & Dennis) for the plaintiff.
Irzan Iswatt Mohd Nor (Haniff Khatri) for the defendant.

Atan Mustaffa Yussof Ahmad JC:

GROUNDS OF JUDGMENT

[1]This judgment concerns 2 applications. These are the Plaintiff's summary judgment application (encl. 12) against the Defendant, arising from a writ action filed by the Plaintiff against the Defendants for recovery under financing facilities given to the Defendant and the Plaintiff's application to strike out the Defendant's Counterclaim in this current suit (encl. 14). Both applications were heard together at the conclusion of which I dismissed both encl. 12 and encl. 14. This judgment contains the full grounds for my decisions.

Background Facts

[2]Upon the request of the Defendant the Plaintiff issued a letter of offer ("***the First Letter of Offer***") dated 2.4.2010 for a Bai Al-Inah facility of RM30,000,000.00 to the Defendant ("***the First Financing Facility***") which was duly accepted by the Defendant. This was for the purpose of the Defendant's working capital in providing Syariah based personal financing facilities to its members upon the terms contained in the First Financing Facility. The repayment of the First Financing Facility was by way of monthly instalments through salary deductions of the Defendant's members via a Biro Perkhidmatan Angkasa (BPA) Account.

[3]On 24.5.2010, the Plaintiff and the Defendant entered into the following agreements:

a) Asset Sale Agreement dated 24.5.2010 ("***the First Asset Sale Agreement***");

b) Asset Purchase Agreement dated 24.5.2010 ("***the First Asset Sale Agreement***"); and

c) Deed of Assignment of Proceeds dated 24.5.2010 ("***the First Deed of Assignment***").

[4]The Lafaz Aqad Jualan and Lafaz Aqad Belian for the First Asset Purchase Agreement and the First Asset Sale Agreement respectively was thereafter executed on 22.7.2010.

[5]Upon the request of the Defendant, the Plaintiff issued a letter of offer dated 3.12.2010 to the Defendant which was duly accepted by the Defendant whereby the Plaintiff extended the tenure of the First Financing Facility.

[6]Upon the request of the Defendant, the Plaintiff issued a letter of offer ("***the Second Letter of Offer***") dated 9.2.2011 for a Bai Al-Inah facility of RM50,000.000.00 to the Defendant ("***the Second Financing Facility***") which was duly accepted by the Defendant. This was again for the purpose of the Defendant's working capital in providing Syariah based personal financing facilities to its members upon the terms contained in the Second Financing Facility. The repayment of the First Financing Facility was by way of monthly instalments through salary deductions of the Defendant's members via a Biro Perkhidmatan Angkasa (BPA) Account.

[7]Pursuant to the Second Letter of Offer, the Plaintiff and Defendant entered into the following agreements:

a) Master Facility Agreement dated 10.3.2011;

b) Asset Sale Agreement dated 10.3.2011 ("*the Second Asset Sale Agreement*"); and

c) Asset Purchase Agreement dated 10.3.2011 ("*the Second Asset Purchase Agreement*").

[8]The Lafaz Aqad Jualan and Lafaz Aqad Belian for the Second Asset Purchase Agreement and the Second Asset Sale Agreement respectively was thereafter executed on 10.3.2011.

[9]In accordance with the terms in the agreements with respect to the Second Financing Facility, an amount of RM49,716,900.00 was paid by the Plaintiff to the Defendant which was acknowledged by the Defendant in the Defendant's Letter dated 23.9.2015 whereby the Defendant acknowledged that an amount of RM50,000,000.00 was fully drawn down save for RM283,100.00.

[10]According to the Plaintiff, the Defendant failed to make monthly payments of the sale price in respect of the First Financing Facility and Second Financing Facility (together, "*the Financing Facilities*") and the Plaintiff issued reminders to the Defendant to make the full monthly payments for the sale price in respect of the Financing Facilities.

[11]The Plaintiff, through its previous solicitor, Messrs. Rashid Zulkifli, by way of a letter dated 29.4.2019 recorded that the Defendant had defaulted in making the payment of RM571,702.31 relating to the Financing Facilities and demanded from the Defendant to remedy the default by paying the outstanding monthly amount of RM571,702.31 in 14 days.

[12]The Defendant failed to make the full payment, thus vide a letter from Messrs. Rashid Zulkifli dated 24.5.2019, the Plaintiff issued another letter of demand to the Defendant demanding the payment of the outstanding amount of RM807,868.96 comprising RM425,849.25 under the First Financing Facility and RM382,019.71 under the Second Financing Facility within 14 business days from the date of the letter.

[13]Subsequently, the Plaintiff through Messrs Rashid Zulkifli's letter dated 21.6.2019 ("*the Termination Letter*") terminated the Financing Facilities and demanded that the Defendant to

make full payment of the total amount due, according to the terms of the Financing Facilities, which according to the Plaintiff amounted to RM99,169,829.64 as at 31.5.2019, within 14 working days from the date of Termination Letter.

[14]The payment was not forthcoming thus the Plaintiff filed its action for the recovery of the remaining outstanding amount under the Financing Facilities on 3.9.2019 for a sum of RM31,165,835.02 as at 31.7.2019 for the First Financing Facility and a sum of RM67,059,39877 as at 31.7.2019 under the Second Financing Facility together with Ta'wid.

[15]The Defendant counterclaimed against the Plaintiff in the Defendant's Defence and Counterclaim praying for the following:

a) A declaration that the Defendant does not have any amount indebted to the Plaintiff under the First Financing Facility and the Second Financing Facility;

b) General Damages to be assessed by the Court for the Defendant's loss of profit due to the improper repayment formula in the First Financing Facility and Second Financing Facility set out by the Plaintiff; and

c) Exemplary Damages to be assessed by the Court for the unethical action and the breach of fiduciary duty by the Plaintiff.

d) Subsequently the Plaintiff filed the application for summary judgment under O. 14 Rules of Court 2012 ("***Rules of Court***") on 11.11.2019 for judgment on the same amounts claimed in the Statement of Claim. The Plaintiff also filed an application to strike out the Defendant's Counterclaim pursuant to O. 18 r. 19 Rules of Court.

Enclosure 12: Summary Judgment ApplicationLaw on Summary Judgment (O. 14)

[16]It is trite that once an application under O. 14 of the Rules of Court is shown to have been correctly and properly filed, the burden shifts and thus rests on the defendant who desires to resist the application to raise a defence which shows a "bona fide triable issue", in the sense of an issue which justifies and warrants the matter to be considered at the trial proper.

[17]Order 14 r. 3 of the Rules of Court provides that unless the defendant satisfies the Court with respect to the claim, or the part of a claim, to which the application relates that:-

(a) there is an issue or question in dispute which ought to be tried

or

(b) there ought for some other reason to be a trial of that claim or part, the Court may give such judgment for the plaintiff against the Defendant on that claim or part as may be just having regard to the nature of the remedy or relied claimed.

[18]It is useful to refer once again to the often quoted decision of the former Supreme Court in *National Company For Foreign Trade v. Kayu Raya Sdn Bhd* [1984] 2 MLJ 300 which ruled as follows:-

> *"We think it appropriate to remind ourselves once again that in every application under* Order 14 *the first considerations are (1) whether the case comes within the Order and (b) whether the plaintiff has satisfied the preliminary requirements for proceeding under* Order 14*. For the purposes of an application under* Order 14 *the preliminary requirements are:-*
>
> i) *the defendant must have entered an appearance;*
>
> ii) *the statement of claim must have been served on the defendant; and*
>
> iii) *the affidavit in support of the application must comply with the requirements of Rule 2 of the* Order 14.
>
> *... If the plaintiff fails to satisfy either of these considerations, the summons may be dismissed. If however, these considerations are satisfied, the plaintiff will have established a prima facie case and he becomes entitled to judgment. The burden then shifts to the defendant to satisfy the Court why judgment should not be given against him"*

[19]The Plaintiff has satisfied these preliminary requirements, and this is not disputed by the Defendant. Thus the burden is now firmly on the Defendant to show that there is a triable issue that does not justify summary judgment be entered against them. If the Defendant can demonstrate even one triable issue, this Court will not grant summary judgment. But it has to be a genuinely triable issue as would require a trial in order to determine it (see *Voo Min En & Ors v. Leong Chung Fatt* [1982] 2 MLJ 241).

Triable issues raised by the Defendants

[20]Through the Defendant's affidavits and submissions, the Defendant attempted to raise the following as triable issues:

a) Whether the principal balance outstanding for the Financing Facilities as of 31.12.2018 was only RM46,097,054.55 and not RM 50,389.089.07?

b) Whether the profit rate charged by the Plaintiff is based on the terms of the Financing Facilities and "Hukum Syara"?

c) Whether the total disbursement amount released by the Plaintiff to Defendant for the Second Financing Facility was only RM49,599,900.00 and not RM49,716,900.00?

d) Whether the early settlement made by the Defendant was RM7,189,877.68 and not RM7,134,954.19?

e) Whether the amount allegedly deducted from the Defendant's Saving Account in Plaintiff amounting to RM124,164.00 was debited on 6.11.2014 as "sinking fund" to replace the amount allegedly used to pay the outstanding monthly installment due to the Plaintiff for the month of October 2014?

f) Whether the parties agreed that there is no dispute regarding the variance and/or shortfall of the Financing Facilities repayment in 2016 for the sum of RM 454,357.69 demanded by the Defendant?

g) Whether the Bank Draft cancellation with the Plaintiff for the sum of RM243,327.01 is contractually right?

h) Whether the termination of the Financing Facilities via the letter dated 21.6.2019 is unlawful?

Analysis and findings

[21]The Defendant contended that there is a mismatch between the principal balance outstanding figure as of 31.12.2018 and the figure according to the Defendant's records which led to the variance and/or shortfall of the sum RM4,292,035.42. According to the Defendant, in

its record, the principal balance outstanding was only RM46,097,054.55 (see exh. SA-5 of enc. 27) and not RM50,389,089.07 as per the Plaintiff's record.

[22]In relation to this, the Defendant contended that it had repeatedly, through emails and letters, made queries and sought clarification from the Plaintiff as to how the repayment of both Financing Facilities as of 31.12.2018 had been treated by the Plaintiff. In the Defendant's letter dated 15.5.2017 to the Plaintiff (ex MA-20 of encl. 13) which was in response to the notice of demand dated 29.4.2018, the Defendant highlighted that there was no breakdown of how the figures were arrived at and queries raised by the Defendant in emails and personal discussions were skirted by the Plaintiff. Particularly the Defendant recorded that the principal balance outstanding as at 31.12.2018 in the Defendant's books was RM46,097,054.55 whereas in the Plaintiff's books it was RM50,389,089.97. The Defendant sought an explanation as to how there was a difference of RM4,292,035.42 when the Defendant's payments had been in order until December 2018.

[23]The Defendant contended that until the date of Termination Letter, the Plaintiff had failed to furnish the details of breakdown which resulted a mismatch for the differential sum of RM4,292,035.42. Instead the Plaintiff directed the Defendant to refer to their own details themselves.

[24]The Plaintiff submitted that the Plaintiff, as a bank, had a fiduciary duties to the Defendant, as its customer, to clarify how repayments by the Defendant were treated by furnishing the details of the breakdown to shed some light on how the parties arrived at different numbers in the principal outstanding balance which resulted in a mismatch for the sum of RM4,292,035.42.

[25]The Plaintiff submitted that this issue requires cross-examination of both witnesses on the issue of variance in the principal balance outstanding.

[26]The Plaintiff contended that the principal balance owed by the Defendant for the Second Financing Facility as at 31.12.2018 was RM50,389,089.97 and not RM46,097,054.55 as alleged by the Defendant. For this the Plaintiff referred to a document which it described as an Audit Report as at 31.12.2018 (exh. MA-17 of encl. 13) which according to the Plaintiff clearly shows

that the principal balance owed by the Defendant for the Second Financing Facility was RM50,389,089.97.

[27]The Plaintiff submitted further that cl. 4.07 (d) of the First Deed of Assignment provides that "In the event of early settlement and / or new financing ("overlapping financing ") to its members, the Assignor is to settle to the Bank the balance of outstanding sum due and payable by its members to the Assignor or the Assignor shall replace with another security of equivalent or higher value from the one replaced." Therefore if there is any shortfall due to early settlement by the members, it is the responsibility of the Defendant to settle the outstanding balance or replace it with other securities of equal value or higher to the Plaintiff.

[28]The Plaintiff also contended that the Defendant had never at any time submitted notices of the discrepancies of the principle outstanding amount for the two Financing Facilities.

[29]The Plaintiff also submitted that that there is no fiduciary obligation and responsibility to the Defendant and the Plaintiff's obligations are only as stated in the agreements relating to the Financing Facilities.

[30]The Plaintiff also contended that the principal amount outstanding under the Financing Facilities was proven by a Statement of Account as at 31.1.2018 (in exh. MA-17 of encl. 13) which calculates the profit rate on a "ceiling rate" basis in contrast to the Defendant's contention of the principal amount outstanding shown by the Defendant's own record which was without any basis.

[31]The differential sum of RM4,292,035.42 between the figure for the principal balance outstanding contended by the Defendant and the Plaintiff, is in my view, not an insignificant amount which is a triable issue, if it remains contentious in the summary judgment application. This has an impact on the lawfulness of the notices of demand issued by the Plaintiff on 29.4.2019 and 24.5.2019 as well as the notice of termination dated 21.6.2019.

[32]The Plaintiff contended that the principal balance outstanding of RM50,389,089.97 is established through exh MA-17 in encl. 13. The Plaintiff says that this is an Audit Report. If this

were true, that would establish the amount in favour of the Plaintiff. However, upon careful examination of the document, I find that this is not true. This was a letter from the Plaintiff dated 22.7.2019 to the Defendant's auditor enclosing a statement of account for their audit purpose which was given pursuant to the auditor's request by way of a letter dated 15.7.2019. This immediately casts doubt as to whether the amount of RM50,389,089.07 said by the Plaintiff to be the principal balance outstanding is correct.

[33]Further, the Plaintiff's contention that the principal amount outstanding under the Financing Facilities was proven by a Statement of Account as at 31.1.2018 which calculates the profit rate on a "ceiling rate" basis is also dubious. The Statement of Account in exh. MA-17 contains no figure that matches or indicates the figure of RM50,389,089.07 contended by the Plaintiff to be the principal amount outstanding.

[34]The Defendant on the other hand, sought to show that the principal amount outstanding was only RM46,097,054.55 through exh. SA-5 of enc. 27 which was a statement showing each year's balance from 2013. I find that in spite of the Plaintiff's allegation that the Defendant's own record has no basis, there is a logical and methodical approach to the calculation as compared to the Plaintiff's documents. The Plaintiff's problem is further compounded by its misleading representation to the Court that exh. MA-15 in encl. 13 was an Audit Report while adducing a Statement of Account which does not appear to support its contention of the principal balance outstanding figure.

[35]Seen from this perspective, the Plaintiff's certificate of indebtedness in the form of its Statement of Account dated 31.12.2018 (exh. MA-5 in encl. 57) is not conclusive to prove the indebtedness of the Defendant to the Plaintiff. Although the certificate had shifted the burden onto the Defendant to disprove the amount claimed (see *Cempaka Finance Bhd v. Ho Lai Ying & Anor* [2006] 2 MLJ 685), the Defendant nevertheless has given me good reasons to question the accuracy of the Plaintiff's certificate.

[36]In such circumstances the Defendant has succeeded vide its affidavit to put forward cogent affidavit evidence to show that there is a manifest error in the Plaintiff's certificate of indebtness through its challenge by showing the discrepancy in the Plaintiff's principal balance outstanding

amount which forms the basis of the whole amount outstanding to the Plaintiff. I thus find that that the certificate is not conclusive as evidence against the Defendant in these proceedings.

[37]From the foregoing, the lawfulness of the notices of demand issued by the Plaintiff on 29.4.2019 and 24.5.2019 as well as the notice of termination dated 21.6.2019 is impacted due to the amount outstanding to the Plaintiff, which in my view, remains unproven. Further inquiry into the correct amount outstanding must be made by way of a viva voce trial with witnesses. I thus find that the Defendant has successfully raised a triable issue in this summary judgment application which entitles it to have the summary judgment application dismissed. In *South East Asia Insurance Bhd v. Kerajaan Malaysia* [1998] 1 CLJ 1045, the Court of Appeal (per Shaik Daud Ismail JCA) stated the following in relation to effect of raising of triable issues in a summary judgment application:

> *"It is well settled that if a defendant in an* O. 14 *application succeeds in raising even a single triable issue. it will not be a fit and proper case to order summary judgment We are satisfied that there are triable issues in this case and, therefore, it is not a fit and proper case for the court to exercise its discretion to order summary judgment. It is not such a plain and obvious case as the learned judge made it out to be."*

[38]Given that a single triable issue entitles the O. 14 application to be dismissed, I do not find it necessary to consider the other issues raised by the Defendant and dismissed encl. 12.
Enclosure 14: Plaintiff's application to strike out the Defendant's Counterclaim

[39]The Plaintiff submitted that the Defendant's allegations in the Counterclaim and the affidavit in reply of the Defendant do not disclose any reasonable cause of action, are scandalous, frivolous and vexatious and is an abuse of the process of court. In relation to this the Plaintiff further argued that the Defendant does not have a defence on the merit which calls for a full trial and have only put forward a bare defence and bare denials.

[40]The Plaintiff also submitted that the same issues were raised by the Defendant in both encl. 12 (summary judgment application) and encl. 14 (striking out application) thus if the application for summary judgment is allowed then the Defendant's submission is "ipso facto" prevented by the principle of res judicata and therefore the Court ought to allow the Plaintiff's application to strike out the Defendant's Counterclaim.

[41]For this proposition, the Plaintiff relied on the Court of Appeal decision of *Residence Hotels and Resorts Sdn Bhd v. Seri Pacific Corp Sdn Bhd* (2016) 2 MLJ 640 where it was held:

> *"(2) Res judicata is a substantive rule of law. It means a decision on the 'merits' which disposes once and for all of the matters decided and the same becomes the truth between the parties, so that, except on appeal or other exceptional circumstances such as fraud, it cannot be re-litigated between persons bound by the judgment. The doctrine of res judicata has developed over the years to extend to issue estoppel as well, the requirements of which are: (a) that the same question has been decided; (b) that the judicial decision which is said to create the estoppel was final; and (c) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised. It must be shown that the earlier judgment necessarily and with precision determined the point in issues to constitute res judicata (see para 26 (a)).*
>
> *(3) The counterclaim arose and was as a direct consequence / result of the defence pleaded against the plaintiff's claim and therefore, the issues in both were one and the same. The issues in the counterclaim were identical with those that arose in the main claim. As such, the doctrine of estoppel / res judicata ought to be applied in dealing with the counterclaim (see para 26 (c))."*

[42]In the Counterclaim the Defendant pleads that the Plaintiff had wrongfully terminated the Financing Facilities under the law of contract and/or the terms of the Financing Facilities and/or by the improper action of the Plaintiff's cancellation of the Financing Facilities and/or as a result of the breach of fiduciary responsibilities of the Plaintiff towards the Defendant. The Defendant prayed, inter alia, for a declaration that the Defendant does not have any amount indebted to the Plaintiff under the First Financing Facility and the Second Financing Facility.

[43]In dismissing the summary judgment application of the Plaintiff in encl. 12, I found that the amount of RM50,389,089.07 said by the Plaintiff to be the principal balance outstanding was adequately challenged by the Defendant as the document relied on by the Plaintiff to prove the amount is not an Audit Report report as contended by the Plaintiff. Also the Statement of Account relied on by the Plaintiff to prove this figure does not show the principal balance outstanding. Thus there is merit to the Defendant's contention that the termination of the financing facilities was unlawful because the basis of the whole amount outstanding to the Plaintiff is left in doubt.

[44]The same issue arises in encl. 14 and I similarly find that there is merit to the Defendant's

contention that the termination of the financing facilities was unlawful because the basis of the whole amount outstanding to the Plaintiff is left in doubt for the same reasons, applying the principle that the doctrine of estoppel / res judicata ought to be applied in dealing with a counterclaim which arose and was as a direct consequence of the defence pleaded against the plaintiff's claim, as decided in *Residence Hotels and Resorts Sdn Bhd v. Seri Pacific Corp Sdn Bhd* (supra) advanced by the Plaintiff.

[45]Premised on the above, this is thus not a fit and proper case for the Defendant's Counterclaim to be summarily struck out as none of the limbs of O. 18 r. 19 Rules of Court has been satisfied. I therefore dismissed Enclosure 14.

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