DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR

(BAHAGIAN DAGANG)

GUAMAN NO: 22M-12-01/2015

ANTARA

KUWAIT FINANCE HOUSE (MALAYSIA) BERHAD - PLAINTIF
(NO. 672174-T)

DAN

KOPERASI PERKHIDMATAN SETIA BERHAD - DEFENDAN
(B-5-0430)

GROUNDS OF JUDGMENT

The defendant, a co-operative society, provides loans to its members, who are civil service employees. The members make payments to the defendant by way of deductions from the members' salaries pursuant to a salary deduction system established with Angkatan Koperasi Kebangsaan Malaysia Berhad or "Angkasa".

[2] Sometime in 2007 to 2008, the plaintiff granted to the defendant a revolving Murabahah Tawarruq facility of RM15,000,000.00 which was subsequently increased to RM45,000,000.00 (the Initial MTQ Facility). On 09th July 2013, the plaintiff agreed to restructure the outstanding sums under the Initial MTQ Facility and granted to the defendant a Murabahah Tawarruq Working Capital Financing - facility of RM20,000,000.00 (the Said MTQ Facility. Pursuant to the Said MTQ Facility, the plaintiff sold goods (palm oil) to the defendant, for inter alia, a Deferred Sale Price of RM19,781,494.84, with the defendant paying the Deferred Sale Price by monthly instalments.

[3] The parties had signed some security documents to secure the MTQ facilities. As part of the security arrangement for the MTQ facilities granted by the plaintiff and pursuant to the security documents, the defendant had agreed to :-

i. Irrevocably and unconditionally instruct Angkasa to remit all payments under the salary deduction system payable to the defendant by its members (the Receivables) to be paid directly to the plaintiff i.e., into a collection/receivables

account to be maintained with the plaintiff, with such account known as Escrow Account 1; and

ii. Create an Escrow Account 2 to be maintained with the plaintiff for progressive placement by the defendant of a deposit equivalent to two monthly installments payable by the defendant to the plaintiff, to be utilized towards outstanding Deferred Sale Price.

[4] It is the plaintiff's contention that the defendant has since 25th June 2014 defaulted in payments on due dates and despite various demands made, has failed to pay the amount due. Hence the plaintiff filed this action for recovery of the amounts purportedly due and owing by the defendant.

Applications

[5] Before me now, there are two applications filed by the plaintiff as follows:

a) Enclosure 7, an application under Order 30 and Order 43 Rules of Court 2012 for inter alia the following order:

i. A Receiver be appointed over all sums payable to the defendant by the defendant's relevant members in repayment of loan under the salary deduction system established by Angkasa ; and

ii. The defendant accounts to the plaintiff for the receivable which are payable to the plaintiff.

b) Enclosure 12, an application under Order 14 Rules of Court 2012 for a summary judgment in respect of the plaintiff's claim against the defendant to recover the outstanding sums under the Murabahah Tawarruq facility granted by the plaintiff to the defendant.

Enclosure 12

[6] I shall first deal with enclosure 12 before making any decision on enclosure 7.

[7] From the affidavits filed and submissions made by the defendant, I conclude the defendant's only defence are:

i. That the plaintiff had failed to furnish the defendant with financial documentations as it requested to enable the defendant to prepare an explanation for the drop in the receivables ;

ii. The plaintiff should realize the security before declaring default.

[8] I have perused the cause papers and considered submissions made by the parties, written as well as oral.

[9] On the issue of financial documents, exhibit KFH-12 in enclosure 19 clearly shows that the plaintiff had by letters dated 30th September 2014 and 14th March 2014 provided the defendant with the documents as requested by them. This was not denied by the defendant. In fact the defendant had responded to those two letters of the plaintiff vide their letters dated 06th November 2014 and 08th November 2014 as shown in exhibit KFH-9 of enclosure 13. In those two letters the defendant acknowledged receiving the documents and no longer asked for further documents but merely

requested for extension of time to furnish the plaintiff with the information. Hence, the defendant's defence that the plaintiff had failed to furnish the defendant with financial documentations, with due respect, in my view, is clearly misconceived.

[10] One vital point to me is that, the plaintiff had through its solicitor issued a letter dated 08th October 2014 as shown in exhibit KFH-6, to the defendant declaring that an event of default had occurred and that payment of all monies under the said MTQ Facility was immediately due and payable to the plaintiff and demanding full payment of the same. The defendant had, by a letter dated 07th October 2014 as shown in exhibit KFH-7 of enclosure 13 (the letter was clearly wrongly dated because although dated 07th October 2014, it referred to the plaintiff's letter dated 08th October 2014 which the defendant claimed in that letter to have received on 10th October 2014); **ADMITTED** that there was delay in payment but blamed it to deficiencies in the collection of the receivable. However, despite the plaintiff furnishing the defendant with the financial documentations as the defendant had requested, the defendant had failed to explain the reason for the

drop in the receivable. Although the defendant was given extensions of time, the defendant had still failed to settle the outstanding amount.

[11] In **Kuwait Finance House (Malaysia) Berhad v Teknogaya Diversified Sdn Bhd [2012] MLJU 282**, one of the issues raised by the defendant in the summary judgment application is that the plaintiff should have realized the security first before commencing any action against the defendant. The court, in finding that such allegation was not a triable issue and allowing summary judgment, held that:

> *"[10] Berlandaskan premis yang sama, Mahkamah ini juga tidak bersetuju dengan Isu Kedua yang dibangkitkan oleh Defendan-Defendan kerana Klausa 15.6 Perjanjian KFH Murabahah Tawarruq Asset Financing-i Facility dan Perjanjian KFH Murabahah Tawarruq Working Capital Financing-i Facility serta Klausa 2(j) Perjanjian-perjanjian Jaminan secara nyata tidak menyokong hujah tersebut.*
>
> *[13] Selepas mengambil kira prinsip di atas, Mahkamah mendapati bahawa Klausa 15.6 Perjanjian KFH Murabahah Tawarruq Asset Financing-i Facility dan Perjanjian KFH Murabahah Tawarruq Working Capital Financing-i Facility serta Klausa 2(j) Perjanjian-*

perjanjian Jaminan adalah jelas memberi hak kepada Plaintif untuk menggunakan mana-mana cara yang dibenarkan oleh undang-undang untuk mendapatkan kembali wang yang tertunggak di bawah kemudahan-kemudahan yang diberi kepada Defendan 1."

[12] In this instant case, it is undisputed that the terms of the monies in Escrow Accounts 1 and 2 are governed by the security documents between the plaintiff and the defendant, in particular the Assignment of Designated Accounts dated 05th July 2007. It is expressly agreed under the terms of the agreements that the plaintiff shall be entitled to deal with the monies in Escrow Accounts 1 and 2 and apply the same towards reduction of the outstanding Deferred Sale Price only upon the declaration of an Event of Default. Refer to clause 12.3 of the Supplemental Murabahah Tawarruq Facility Agreement, clause 2.3,6.2 and 8.2 of the Assignment of Designated Accounts; as shown in exhibit KFH-2 and KFH3 of enclosure 13. Hence, the defendant's argument that the plaintiff should realize the security i.e to uplift the monies in Escrow Accounts 1 and 2 before declaring that an event of default has occurred, is also in my view without merit.

[13] Looking at this case as a whole, I am convinced that the defendant's liability to the plaintiff for the claim has clearly been established especially by virtue of clauses 5 and 6 of Supplemental Letter of Offer dated 09th July 2013 as shown in exhibit KFH-4 of enclosure 13 and clause 11 and Schedule 8 of the MTQ Facility as shown in exhibit KFH-2 of enclosure 13.

[14] Another important point is that the plaintiff has produced its Statement of Indebtedness dated 18th March 2015 as shown in exhibit KFH-10 of enclosure 13 showing the amount due and owing by the defendant under the said MTQ Facility and claimed by the plaintiff herein. The defendant has not disputed the amounts or shown any error on the face of the Statement of Indebtedness produced by the plaintiff. As such, I agree with the plaintiff that such Statement of Indebtedness shall be deemed as final and conclusive and binding upon the defendant herein and the amount claimed by the plaintiff against the defendant must be accepted as correct. Refer to the Federal Court in **Cempaka Finance Bhd v Ho Lai Ying [2006] 2 MLJ 685**.

[15] Based on the above, I fully agree with the plaintiff that there is no issue to be tried in this matter. This is a clear and obvious case for a summary judgment to be entered. Hence enclosure 12 prayers (a) and (b) are allowed with cost.

Enclosure 7

[16] The learned counsel for the defendant has argued that enclosure 7 is interim in nature. Now that the suit has been disposed off, (as enclosure 12 is allowed) there is no need to proceed with enclosure 7.

[17] The learned counsel for the plaintiff has argued that although it is true that in enclosure 7, the plaintiff's prayer is pending the disposal of the matter, the plaintiff now wishes the court to amend the prayer so that a receiver be appointed until further order and parties at liberty to apply. The reason being the control of the receivable and management of the account is still with the defendant. It has been established that this receivables have actually been assigned to the plaintiff and should be paid to the

plaintiff but was not and the plaintiff does not know what has happened to the monies and of the future collections of the monies.

[18] I have considered the parties' submissions. In the plaintiff's Statement of Claim the plaintiff has prayed for the following orders;

a) ….

b) That the defendant accounts to the plaintiff for the receivables payable to the defendant by Angkasa and all settlement and claims thereto for the period from May 2007 to January 2015 within ten (10) days from such order;

c) An order that the defendant be restrained from dealing with any of the receivables for any purpose other than to pay the same immediately to the plaintiff.

[19] Order 30 rule 1 of Rules of Court 2012 reads as follows:

> ***" 1. Application for receiver and injunction (O. 30 r. 1)***
>
> *(1) An application for the appointment of a receiver may be made by notice of application.*

(2) An application for an injunction ancillary or incidental to an order appointing a receiver may be joined with the application for such order.

(3) Where the applicant intends to apply for the immediate grant of such injunction, he may do so ex parte by a notice of application supported by an affidavit.

(4) The Court hearing an application under paragraph (3) may grant an injunction, restraining the party beneficially entitled to any interest in the property of which a receiver is sought from assigning, charging or otherwise dealing with that property until after the hearing of a notice of application for the appointment of the receiver and may require such a notice of application, returnable on such date as the Court may direct, to be issued".

[20] Looking at the application in enclosure 2 itself the plaintiff has not sought for any order for injunction in the application although prayer (c) of the Statement of Claim suggests so. In deciding the application under Order 30 Rules of Court 2012, I refer to the case of **Lim Poh Choo v Absolute Ascend Sdn Bhd [2007] LNS 582**. In that case the court has laid down the principles in appointing the receivers. The said principles are as follows:

a) There is a good prima facie claim to title ;

b) The property is in jeopardy ; and

c) The applicant would be in worse position if the appointment is delayed.

[21] In this instant case, there are security documents that have been executed by the defendant which assign the receivables to the plaintiff as security for the said MTQ facility. Therefore the plaintiff in my view does have a good prima facie claim to title. The defendant in this case is responsible to deduct the salaries from its members who are civil servants. By virtue of the said deduction, the deducted payment from the salaries of the civil servant has definitely been made to the defendant. However, from 2007 the value of receivables was dropped from 81,623,220.00 to RM33,358,179.8 in 2013 (the difference approximately 48,265,041.00 (half from the initial receivables). This was not explained and the defendant merely requested for documents from the plaintiff and then blaming the plaintiff for not providing the documents, which I find not to be true. The deficiencies could only be caused if a member have passed away or have resigned from

the government service. Even so, the member (or his estates) is still obliged to make the payment. The plaintiff is in jeopardy as monies paid to the defendant by the members are not paid to the party entitled i.e the plaintiff. It is my view if the appointment of a receiver is delayed it will make the situation worst.

[22] I am of the view that the plaintiff has fulfilled all the requirements under Order 30 of Rules of Court 2012. The plaintiff has nominated Mr Alvin Tee Guan Pian as a receiver and he has given his consent via exhibit KFH 10. He has over 20 years of vast professional and management experience (see exhibit KFH-11). Therefore I opine, he is fit to become a receiver. See case **TNEU Beh v Tanjung Kelapa Sawit Sdn Bhd [2004] 4 CLJ 629** for a person to be fit to be appointed as a receiver. The plaintiff also has sought for an order under Order 43 rule 1 which reads as follows:

> ***" 1. Summary order for account (O. 43 r. 1)***
>
> *(1) Where a writ is endorsed with a claim for an account or a claim which necessarily involves taking an account, the plaintiff may, at any time after the defendant has entered an appearance or after the time limited for appearing, apply for an order under this rule.*

(2) A defendant to an action begun by writ who has served a counterclaim, which includes a claim for an action or a claim which necessarily involves taking an account, on-

(a) the plaintiff;

(b) any other party; or

(c) any person who becomes a party in accordance with such service, may apply for an order under this rule.

(3) An application under this rule shall be made by notice of application, if the Court so directs, shall be supported by affidavit or other evidence.

(4) On the hearing of the application, the Court may, unless satisfied by the defendant by affidavit or otherwise that there is some preliminary question to be tried, order that an account be taken and may also order that any amount certified on taking the account to be due to either party be paid to him within a time specified in the order."

[23] There is nothing in the affidavit of the defendant for preliminary issue to be tried. I, therefore feel that the plaintiff's application therefore can be allowed. In the case of **Fong Sheng Cheung v Huan Chak Chon [1999] 4 MLJ 308**, the court held that the plaintiff must establish that they have a sufficient interest to be able to call for an account. In this case it has been established that

the receivables are assigned to the plaintiff as security for the MTQ facility and the defendant has failed to make the payment. The plaintiff therefore does have sufficient interest to be entitled for an account of the same to be furnished by the defendant.

[24] I also agree with the learned counsel for the plaintiff's submissions. Although summary judgment has been entered against the defendant, the defendant is still in control of the receivable and management of the account. I therefore allow enclosure 7 with cost and with amendment as suggested by the learned plaintiff's solicitor in his oral submission, i.e by substituting the words "pending disposal of the action" with the word " until further order of the court and parties at liberty to apply".

DATO' ZALEHA BINTI YUSOF
JUDGE
HIGH COURT OF MALAYA
KUALA LUMPUR

Dated: 18th May 2015

For the Plaintiff: Kong Chia Yee, Yong Sin Min and Lum Kok Kiong; Messrs Shook Lin & Bok

For the Defendant: Balraj Singh a/l Mahinder Singh; Messrs Balraj Singh & Co