



**IN THE HIGH COURT OF MALAYA AT KUALA LUMPUR
(COMMERCIAL DIVISION)**

[SUIT NO: WA-22NCC-370-08/2020]

BETWEEN

OCBC BANK (MALAYSIA) BERHAD
(COMPANY NO: 199401009721)

... PLAINTIFF

AND

1. ADVENTURE DRIVEN SDN BHD
(COMPANY NO: 201801042860)

2. CHEN KHAI VOON
(NRIC NO: 600924-10-6577)

3. LIM BENG GUAN
(NRIC NO: 701125-04-5483)

... DEFENDANTS

BEFORE

**YA KHADIJAH BINTI IDRIS
JUDGE**

GROUND OF JUDGMENT

(ENCLOSURE 7)

Introduction

[1] Enclosure 7 is the Plaintiff's application for summary judgment to be entered against the Second Defendant ("2nd Defendant") and the Third Defendant ("3rd Defendant") pursuant to Order 14 of the Rules of Court 2012 ("RoC 2012")

[2] The 2nd Defendant did not object enclosure 7. As such, order in



terms of Enclosure 7 was granted against the 2nd Defendant on 7 December 2020.

[3] Having heard the parties' submission, this court allowed Enclosure 7 with costs of RM7,000 against the 3rd Defendant.

[4] Aggrieved with the said decision, the 3rd Defendant appealed. The grounds for allowing enclosure 7 is set out below.

Plaintiff's case

[5] *Via* Letter of Offer dated 26 December 2018 ("Letter of Offer") (as amended by subsequent letters of 15 January 2019, 11 February 2019, 20 February 2019, 4 March 2019, 5 March 2019, 20 December 2019, 28 February 2020 and 22 April 2020), the Plaintiff granted a term loan facility of RM21,000,000.00 ("Term Loan") to the 1st Defendant.

[6] The said facility was for the purpose of part financing the 1st Defendant's purchase of 1,000,000 ordinary shares in Papparich Group Sdn Bhd ("PGSB")

[7] The 1st Defendant is an investment company holding 1,000,001 ordinary shares in PGSB and its only source of income would be the dividends derived or to be derived from those shares in PGSB (see Exhibit OCBC-5, Enclosure 8).

[8] Pursuant to an application filed by the 3rd Defendant on 24 August 2020, the 1st Defendant is placed under judicial management of a judicial manager under section 406 of the Companies Act 2016. Thus a moratorium is effective and no proceeding shall be continued against the 1st Defendant without the leave of court.

[9] In respect of the Term Loan, the Plaintiff and 1st Defendant executed the Facilities Agreement dated 21 February 2019 ("Facilities



Agreement”). The Facilities Agreement is produced as Exhibit OCBC-2 of Enclosure 8.

[10] Pursuant to the Letter of Offer and the Facilities Agreement, the 1st Defendant expressly agreed, *inter alia*, the following:-

- (a) to pay all monies due to the Plaintiff on demand (see clause 6 of the Facilities Agreement);
- (b) to pay interest on the Term Loan at the rate of 1% per annum above Plaintiff’s Base Lending Rate (“BLR”) on daily basis monthly rests until full settlement thereof (see clause 2(b) of the Letter of Offer at Exhibit OCBC-1 of Enclosure 8);
- (c) that upon the occurrence of an event of default (as defined therein), all sums owing and / or payable under the Term Loan shall become immediately due and payable and the Plaintiff shall pay a late payment interest of 1% above the applicable rate on daily basis monthly rests until full settlement thereof (see clause 2(e) of the Letter of Offer at Exhibit, OCBC-1 of Enclosure 8); and
- (d) that the 1st Defendant shall pay all costs and expenses incurred by the Plaintiff on a full indemnity basis in respect of the enforcement if the Plaintiff’s right to recover all monies due from the 1st Defendant (see clause 18 of the Facilities Agreement).

[11] As security for the repayment of the Term Loan, the following were executed in favour of the Plaintiff:-

- (a) a Charge Over Securities dated 6 November 2019 executed by the 1st Defendant in respect of all its shares in PGSB;



- (b) a Charge Over Securities dated 6 November 2019 executed by the 2nd Defendant in respect of his 173,840 shares in PGSB;
- (c) an Assignment of Proceeds (Dividend Proceeds) dated 7 November 2019 executed by the 1st Defendant in relation to all its rights, title and interest in and to all monies (including dividends) payable or derived or to be derived from all its shares in PGSB;
- (d) an Assignment of Proceeds (Dividend Proceeds) dated 21 February 2019 executed by the 2nd Defendant in relation to all his rights, title and interest in and to all monies (including dividends) payable or derived or to be derived from his 173,840 shares in PGSB;
- (e) a Cash Deposit Agreement dated 21 February 2019 executed by the 1st Defendant over its fixed deposit monies under Account No.: 701-339659- 2 (“Fixed Deposit”);
- (f) a Negative Pledge dated 6 November 2019 executed by PGSB; and
- (g) a Letter of Guarantee dated 21 December 2019 executed by the 2nd and 3rd Defendants (“Guarantee”).

[12] By the Guarantee, the 2nd and 3rd Defendants irrevocably and unconditionally guaranteed, as a principal debtor and not merely as a surety, jointly and severally, to pay the Plaintiff on demand all sums and due payable by the 1st Defendant to the Plaintiff under the Term Loan with interest thereon and all costs and expenses incurred by the Plaintiff in enforcing the provisions thereof.

[13] The 1st Defendant company had duly utilised the Term Loan.

[14] The 2nd and the 3rd Defendants are the only 2 shareholders of PGSB. A total of 1,173,841 out of 2,000,000 shares in PGSB are charged in favour of the Plaintiff in the manner as described in paragraphs 11 (a) and (b) above.

[15] PGSB is the investment holding company of a group of companies known as the “Papparich Group” which comprises, *inter alia*, Papparich Malaysia Sdn Bhd (“PMSB”) and its subsidiary, Roti Roti Manufacturing Sdn Bhd (“RMSB”).

[16] On 15.5.2020, the 2nd Defendant filed 2 different petitions in the High Court of Malaya at Shah Alam for the winding up of:-

- (a) PGSB under Companies Winding-Up No.: BA-28NCC-213-05/2020 as seen in Exhibit OCBC-6 of enclosure 8; and
- (b) RMSB under Companies Winding Up No: BA-28NCC-214-05/2020 as shown in Exhibit OCBC-7 of enclosure 8.

[17] Based on the aforesaid winding-up petitions, the 2nd Defendant has verified, among others, the following:

- (a) PGSB and RMSB had “insufficient assets” to meet their liabilities;
- (b) the current liabilities of PGSB and RMSB far exceeded their current assets;
- (c) the continued ability of PGSB and RMSB to operate as a going concern was dependent on loans from the 2nd Defendant;
- (d) Papparich Group as a whole had suffered losses of RM7,883,192.00 for FYE 2019 or an accumulated loss of RM14,673,263.00;



- (e) the 2nd Defendant did not intend to advance any further sums of money to the Papparich Group;
- (f) PGSB and RMSB were unable to pay their debts pursuant to section 466 of the Companies Act 2016; and
- (g) it would be just and equitable for PGSB and RMSB to be wound up.

[18] It is the Plaintiff's contentions that events of defaults had occurred under the Term Loan which include, *inter alia*, the following:

- (i) PGSB was in default of payment of and / or was unable to pay its indebtedness to its creditors, including the 2nd Defendant;
- (ii) a petition had been filed for the winding up of PGSB;
- (iii) the 1st Defendant and / or PGSB had threaten to cease to carry on all or a substantial part of its business;
- (iv) there was a material adverse change in the 1st Defendant's assets and financial position in the prevailing circumstances and / or economy;
- (v) there was a material adverse change in PGSB's assets and financial position in the prevailing circumstances and / or economy;
- (vi) the 1st Defendant's ability to perform its obligations under the loan and / or security documents or repay the Plaintiff for the sums owing and / or payable under the Term Loan had been and/or may be affected; and
- (vii) the ability of PGSB and / or the 2nd Defendant to perform



their respective obligations under the security documents had been and / or may be affected.

[19] Pursuant thereto, the Plaintiff had through its solicitors, Messrs. Kee Sern, Siu & Huey issued notices dated 25 June 2020 to the 1st, 2nd and 3rd Defendants demanding for a full payment of all the sums due and owing under the Term Loan (see Exhibit OCBC-8 of Enclosure 8). However the 1st, 2nd and 3rd Defendants had failed, neglected and / or refused to settle the outstanding sums due with interest thereon or any part thereof.

[20] On 26.6.2020, the Plaintiff uplifted the Fixed Deposit and applied a total sum of RM1,033,137.07 towards the reduction of the 1st Defendant's indebtedness under the Term Loan (see Exhibit OCBC-9 of Enclosure 8).

- (a) As at 30 June 2020, the indebtedness of the 1st, 2nd and 3rd Defendants to the Plaintiff stands at RM20,463,047.04. A Certificate of Indebtedness in respect of the 1st Defendant's indebtedness is produced and marked as Exhibit OCBC-11 of enclosure 8. The 3rd Defendant is bound by clauses 20 and 21 of the Guarantee to accept the Certificate of Indebtedness signed by the Plaintiff's officer as to the indebtedness of the 1st Defendant as conclusive evidence of the sum due and owing to the Plaintiff under the Term Loan.

The 3rd Defendant's case

[21] It is argued by the 3rd Defendant that he is discharged from his liability as a guarantor of the 1st Defendant's indebtedness for the following reasons:-

- (a) following an agreement reached between the 2nd Defendant

and the 3rd Defendant on 7 January 2019, the 2nd Defendant was to buy out the 3rd Defendant interest in the 1st Defendant's as well as that of another entity ie, Agathisfour Sdn Bhd's interest in Paparich Malaysia Sdn Bhd ("January 2019 Agreement")

- (b) the Plaintiff has on 13 February 2019 been informed by the 2nd Defendant, in the presence of the 3rd Defendant, that the 3rd Defendant was to be removed as a guarantor and that the 3rd Defendant was to no longer have any liability in respect of and in connection with the facility granted by the Plaintiff to the 1st Defendant.
- (c) thereafter and critically, the Plaintiff no longer dealt with the 3rd Defendant *vis a vis* the affairs of the 1st Defendant and had in fact dealt exclusively with the 2nd Defendant. Thus the Plaintiff would in law be *estopped* from perusing its claim against the 3rd Defendant.

[22] The Plaintiff has conducted itself to endanger the security in the form of the PGSB shares that have been pledged to the Plaintiff by the 1st Defendant as well as by the 2nd Defendant as security.

[23] At a meeting at the Plaintiff's office on 2 July 2020 the 3rd Defendant has made it clear to the Plaintiff that the Plaintiff should proceed to immediately enforce its security rights over the charged shares of PGSB. According to the 3rd Defendant, he had even offered to the Plaintiff that the said shares may be realised by way of a closed tender to the 2nd and 3rd Defendant. It is contended by the 3rd Defendant that such a tender would have a reserve price which would be sufficient to fully pay off the outstanding sums due to the Plaintiff. However, the proposal was later rejected by the Plaintiff, and its failure to do so has purportedly jeopardised the security;



[24] The Plaintiff had granted an interest payment moratorium to the 1st Defendant for a period of 6 months from 1 April 2020 without the knowledge or consent of the 3rd Defendant;

[25] There were purported manifest errors in the Plaintiff claim.

[26] The 3rd Defendant has taken out 3rd party proceedings against the 2nd Defendant seeking an indemnity from the 2nd Defendant in respect of any liability that may be visited upon the 3rd Defendant.

The law

[27] In an application for summary judgment under Order 14 rules 1 and 2 of the Rules of Court 2012 (RoC 2012), it is incumbent on an applicant seeking the same to prove the following:-

- (a) the statement of claim has been served on the defendant;
- (b) the defendant has entered appearance; and
- (c) the applicant has affirmed an affidavit verifying the facts on which the statement of claim is based. The applicant is also required to affirm his belief that the defendant has no defence to the statement of claim.

[28] Upon the fulfilment of the above preliminary requirements the burden is on the defendant to prove under Order 14 rules 3 and 4 of the RoC 2012 that there is an issue or question in dispute which ought to be tried (*National Company For Foreign Trade v. Kayu Raya Sdn Bhd* [1984] 1 CLJ (Rep) 283; *Cempaka Finance Bhd v. Ho Lai Ying & Anor* [2006] 3 CLJ 544). An application for summary judgement may also be dismissed by the court if the defendant satisfies the court that there ought for some other reason to be a trial namely there are circumstances that ought to be investigated by the court (*United Merchant Finance Bhd v. Majlis Agama Islam Negeri Johor* [1999] 2



CLJ 151; [1999] 1 MLJ 657).

Findings of the court

[29] It is not disputed that the Statement of Claim had been served on the 3rd Defendant and that Memorandum of Appearance (enclosure 6) was duly entered by the 3rd Defendant.

[30] In support of enclosure 7, the Plaintiff through the Head of the Plaintiff's Special Asset Management Department has verified the facts in relation to the indebtedness of the 1st Defendant under the Term Loan and the Facilities Agreement including the salient terms and conditions therein, the occurrence of the event of default and failure of the 1st Defendant to settle the outstanding sum demanded which led to the Plaintiff's initiation of this instant action against the 1st Defendant as the borrower and the 2nd and 3rd Defendants as guarantors under the Guarantee.

[31] The Plaintiff has also verified the facts in relation to the Guarantee executed by the 2nd and 3rd Defendants including the salient terms and conditions and the failure of the 3rd Defendant to settle the indebtedness of the 1st Defendant despite the demand made by the Plaintiff in its letter of demand.

[32] It is averred by the Plaintiff that the 1st, 2nd and 3rd Defendants are truly and justly indebted to the Plaintiff in respect of the Term Loan in the sum of RM20,463,047.94 is owing, due and payable by the 1st Defendant company and the Guarantors and that there is no defence to the claim made by the Plaintiff against the 2nd Defendant and 3rd Defendant.

[33] Of significance and pursuant to clause 21 of the Guarantee, a Certificate of Indebtedness signed by the Plaintiff's officer in respect of the 1st Defendant's indebtedness is produced and marked as



Exhibits OCBC-11 of enclosure 8.

[34] Thus in so far as the preliminary requirements is concerned, the Plaintiff has fulfilled the said requirements. As such the burden shifts on the Defendant to prove that there are issue or question in dispute which ought to be tried or there ought for some other reason to be a trial, namely, there are circumstances that ought to be investigated by the court. As stated above the Defendant need not raise a complete defence, suffice for the Defendant to show there is a triable issue or question. In *South East Asia Insurance Bhd v. Kerajaan Malaysia* [1998] 1 CLJ 1045 it was held if a defendant in an Order 14 application succeeds in raising even a single triable issue, it will not be a fit and proper case to enter summary judgment.

[35] The 3rd Defendant raised a preliminary objection in that there is no verification of facts on the ground that the Plaintiff's affidavit in support of enclosure 7 refers to the Plaintiff's Statement of Claim and not to the Amended Statement of Claim which was amended on 19 October 2020 ie, after enclosure 7 was filed. Thus it is argued that the Amended Statement of Claim has not been verified.

[36] On this point, this court is in agreement with the Plaintiff that such contention ought to be rejected outright as the 3rd Defendant failed to give prior notice of its intention to raise preliminary objections which is in breach of rule 11:04 of the Rules and Ruling of the Bar Council Malaysia. Such breach is adequate for this court to dismiss the preliminary objection (*Malaysia Building Society Bhd v. Univein Sdn Bhd* [2002] 7 MLJ 501; [2002] 2 CLJ 81).

Whether there are *bona fide* triable issues

[37] As a guarantor to the Term Loan, the 3rd Defendant's rights, obligations and liabilities is subject to the terms and conditions of the Guarantee (*Heng Cheng Swee v. Bangkok Bank Ltd* [1976] 1 MLJ 267;

Sun Holding (Sun Park Hotel) Co Ltd & Ors v. Export-Import Bank of Malaysia Bhd [2016] 1 MLJ 115).

[38] The 3rd Defendant's contentions that he is discharged from his liability as a guarantor of the 1st Defendant 's indebtedness is not tenable for the following reasons:-

- (a) The January 2019 Agreement was purportedly between the 2nd Defendant and the 3rd Defendant. As averred by the 3rd Defendant in his affidavit, the 3rd Defendant and the 2nd Defendant are embroiled in a series of litigation in relation to an agreement between both the parties where the 3rd Defendant alleges the 2nd Defendant has agreed to buy out his interest in, among others, in the 1st Defendant and Paparich Malaysia Sdn Bhd. It is alleged by the 3rd Defendant that pursuant to the purported January 2019 Agreement the 3rd Defendant would be removed as a guarantor in respect of the Term Loan granted to the 1st Defendant.
- (b) The 3rd Defendant produced pleadings and cause papers of 2 suits which relate to the purported January 2019 Agreement (see Exhibit LGB-1 and LBG-2 of enclosure 12).
- (c) It is not disputed that the Plaintiff was not a party to the said purported January 2019 Agreement. It is also obvious that the dispute between the 2nd Defendant and the 3rd Defendant which is an internal issue of the 1st Defendant company does not concern the Plaintiff.
- (d) Thus such dispute ought not to affect the Plaintiff's right to recover the 1st Defendant's indebtedness against 3rd Defendant who under the Guarantee has agreed,



unconditionally and irrevocably and also as principal debtor and not merely a surety, to guarantee the repayment of the Term Loan. Importantly the Plaintiff is not a party in the said 2 suits. Thus the purported January 2019 Agreement cannot be imposed on the Plaintiff.

- (e) The critical contemporaneous evidence before this court is the Guarantee. In this respect it is to be noted that clause 3 (a) of the Guarantee provides that the 3rd Defendant's shall not be discharged as a guarantor by any fact, circumstance, act, omission whatsoever.
- (f) Clause 7 of the Guarantee provides for the termination of a guarantor's liability under the Guarantee only in relation to future transactions. Even under such circumstances the said guarantor shall remain liable to the Plaintiff any outstanding liabilities of the 1st Defendant / borrower to the Plaintiff including in respect of obligations undertaken by the Plaintiff prior to the termination until payment has been made in full.
- (g) In this instant action the Plaintiff's claim against the 3rd Defendant is in respect of the indebtedness of the 1st Defendant under the Term Loan which had been made available to the 1st Defendant and utilised for the benefit of the 1st Defendant. Thus such liabilities is not in respect of future transactions as contemplated under clause 7 of the Guarantee.
- (h) It appears that the 3rd Defendant place heavy reliance on the Plaintiff's knowledge of the January 2019 Agreement and the request made by the 2nd Defendant to the Plaintiff's officer for the removal of the 3rd Defendant as a guarantor to support his contentions that he is discharged

as guarantor.

- (i) However the 3rd Defendant failed to show that the Plaintiff has agreed to the request made by the 2nd Defendant. Importantly there was no request made by the 3rd Defendant to the Plaintiff for him to be discharged of his obligation and liabilities under the Guarantee. As such the 3rd Defendant's contentions that the Plaintiff is *estopped* from pursuing its claim against the 3rd Defendant is misconceived.
- (j) This court is of the view the 3rd Defendant's claim that the Plaintiff through its Senior Relationship Manager has agreed to the request at the meeting on 13 February 2019 to discharge him as guarantor is not plausible in light of the terms and conditions of the Guarantee discussed above. Furthermore, it does not make commercial sense to discharge a guarantor of a huge loan of RM21,000,000.00 without there being a formal request by the 3rd Defendant and a formal approval / agreement by the Plaintiff.

[39] With regards to the 3rd Defendant's contentions that the Plaintiff ought to have proceed to immediately enforce security rights over the charged shares of PGSB which the 3rd Defendant alleges would be able to fully pay off the outstanding sums due to the Plaintiff, clause 16 of the Guarantee grants to the Plaintiff the liberty to enforce the Guarantee against the 2nd Defendant and the 3rd Defendant as guarantor without first taking legal action against the 1st Defendant to recover the indebtedness under the Term Loan. Thus the Plaintiff is not obliged to realize the charge over the securities in respect of the PGSB shares and / or accept the 3rd Defendant's proposal on the manner in realizing the said charge (*Low Lee Lian v. Ban Hin Lee Bank* [1997] 1 MLJ 77; [1997] 2 CLJ 36).



[40] Besides that, as pointed out by the Plaintiff the sale of the PGSB shares would not be feasible and viable in view of the winding up petition commenced against PGSB. Under that circumstance it is doubtful the outstanding sum due to the Plaintiff would be able to pay in full as alleged by the 3rd Defendant.

[41] With regards to the interest payment moratorium to the 1st Defendant, the Plaintiff's letter dated 22 April 2020 to the 1st Defendant's notifying the Plaintiff's agreement to grant the said moratorium was copied to the 2nd Defendant and 3rd Defendant who are the guarantors to the Term Loan obtained by the 1st Defendant. Thus the 3rd Defendant as a director of the 1st Defendant ought to have known about the same.

[42] Plaintiff explained the moratorium was granted at the request of the 1st Defendant and pursuant to the Additional Measures to Assist Borrowers / Customers Affected by the Covid-19 outbreak as announced by Bank Negara Malaysia. Although there is no evidence to support the Plaintiff's explanation, it is the Plaintiff right under the term of the loan and Guarantee to grant such moratorium to the 1st Defendant and that the Guarantee is not prejudiced or affected by such moratorium (see clause 12.1 (a) and 12.1 (d) of the Guarantee).

[43] As stated above, the Plaintiff has produced the Certificate of Indebtedness as Exhibit OCBC-11 of enclosure 8 under clause 21 of the Guarantee as to the indebtedness of the 1st Defendant. The 3rd Defendant's Allegations that there is manifest error in the Plaintiff's claim is not substantiated. The 3rd Defendant has failed to demonstrate how the amount claimed or the computation of the same is wrong. Merely making bare assertions of error without providing details is not sufficient to amount to manifest error. Thus the Certificate of Indebtedness is binding on the 3rd Defendant as to the amount due and owing by the 1st Defendant to the Plaintiff.



[44] Furthermore the 3rd Defendant in his affidavits (enclosure 12) opposing enclosure 7 did not dispute the sum the Plaintiff is claiming in paragraph 22 to 25 of the Plaintiff's affidavit in support of its application for summary judgment (enclosure 8). Thus the 3rd Defendant is *estopped* from making unfounded allegations in respect of the sum claim by the Plaintiff.

Conclusion

[45] Premised in the aforesaid this court is of the view the issues raised by the 3rd Defendant's are not *bona fide*. The 3rd Defendant is simply bound by the term and conditions of the Guarantee which is the vital contemporaneous evidence in relation to the 3rd Defendant's obligation and liabilities under the Guarantee. Thus judgment was entered against the 3rd Defendant on a reduced sum of RM16,149,542.97 due as at 31 December 2020, interest as stated in prayer a of enclosure 7 and costs of RM7,000.00.

DATED: 28 APRIL 2021

(KHADIJAH IDRIS)

JUDGE

HIGH COURT

Counsel:

For the Plaintiff - Lau Kee Sern & Lim Pey Tsyng; M/s Kee Sern, Siu & Huey

For the 3rd Defendants - Michael Chow & Wendy Yeong; M/s Michael Chow