

MALAYSIA

IN THE HIGH COURT IN SABAH AND SARAWAK

AT KOTA KINABALU

SUIT NO.: BKI-22NCvC-130/12-2017

BETWEEN

RHB BANK BERHAD

(COMPANY NO. 6171-M)

...

PLAINTIFF

AND

FIRST OMNI SDN BHD

(COMPANY NO. 535112-K)

...

1st DEFENDANT

TT INTERNATIONAL LIMITED

(COMPANY NO. 198403771D)

...

2nd DEFENDANT



GROUND OF DECISION

1. This is my ruling in respect of the 2nd Defendant's Notice of Application dated 27-3-2019 (Encl.63) made under order 14A of the Rules of Court, 2012.

Brief background facts

2. The Plaintiff is a licensed bank in Malaysia. In 2001, the Plaintiff granted various banking facilities comprises of overdraft, letter of credit/trust receipt/bankers' acceptance/shipping guarantee totalling 2,200,000.00 to the 1st Defendant, a company having a registered and business address in Kota Kinabalu, Sabah.
3. The banking facilities were extended and restructured several times over the years thereafter by several letters of offer of the Plaintiff with the last letter of offer dated 30-9-3008 which were accepted by the 1st Defendant.
4. The 2nd Defendant, a company in the Republic of Singapore has given three (3) Corporate Guarantees to the Plaintiff in respect of the banking facilities.

5. In later part of 2008, the 2nd Defendant faced financial difficulties. The 2nd Defendant filed an application in the High Court of the Republic of Singapore and obtained an order to call for a meeting of its creditors to propose a scheme of arrangement to compromise or settle the debts of the 2nd Defendant.
6. It seems that such meetings were called, a scheme was approved by the majority of the 2nd Defendant's creditors and such scheme was also approved by the High Court of the Republic of Singapore on 15-3-2010 and with an effective date on 19-4-2010.
7. It seems also that the scheme is binding on all creditors of the 2nd Defendant by virtue of the companies law of the Republic of Singapore.
8. Under the scheme of arrangement (by clause 6.5.2), any contingent claim which is, any potential liability of the 2nd Defendant that has not become legally valid and binding and actually due from the 2nd Defendant by the 5th anniversary of the effective date (i.e. by 19-4-2015), the relevant contingent creditor shall be deemed to irrevocably, unconditionally and permanently waive its rights to claim any amount for the 2nd Defendant.

The nature of the claim and defence

9. However, the Plaintiff claimed that the 1st Defendant has defaulted in making repayment of the banking facilities in October 2017.
10. On 19-12-2017, the Plaintiff commenced the action herein against the 1st Defendant for the sum of RM1,262,950.01 owing as at 29-10-2017 and also against the 2nd Defendant under the Corporate Guarantees given by the 2nd Defendant.
11. In anticipation of the defence of the Defendant based on the scheme of arrangement, the Plaintiff pleaded that by the assurance given by the 2nd Defendant in its letter dated 31-5-2017 that the Corporate Guarantees given were legally valid and binding notwithstanding the scheme of arrangement, the Plaintiff has not demanded for further and better security for the debt under the banking facilities.
12. The Defendant denied that such assurance was given. The Defendant asserted that the Plaintiff has wanted a fresh Corporate Guarantee to be given in view of the scheme of arrangement and

the new form of Corporate Guarantee were not given by the 2nd Defendant.

13. Relying on the terms of the scheme of arrangement, the 2nd Defendant pleaded as its defence that the Plaintiff has not crystalized the contingent claim under the said Corporate Guarantee given by the 2nd Defendant within the 5th anniversary of the Effective Date (i.e. by 19-4-2015). The 2nd Defendant claimed that the Plaintiff is deemed to have waived its rights to claim any amounts under the Corporate Guarantee given by the 2nd Defendant.
14. The 2nd Defendant also pleaded that the Plaintiff has elected to be bound by the terms of the scheme of arrangement by its Proof of Debt submitted on 17-8-2018 which was rejected by the scheme manager in the scheme of arrangement. The Plaintiff has also requested and granted by the scheme manager, several extension of time to submit dispute notice and appointment of Independent Assessor which the Plaintiff did not do so.
15. The Plaintiff denied that that it has elected to be bound by the terms of the scheme of arrangement.

The instant 2nd Defendant's Application under Order 14A of Rules of Court, 2012

16. It seems that the 1st Defendant was wound up in Companies (Winding-Up) Petition No. BKI-28NCC-10/1-2018 (see: Note of proceedings on 24-9-2018) presented in the High Court at Kota Kinabalu.
17. Thus, in this action, directions were given for trial of the action only as between the Plaintiff and the 2nd Defendant.
18. On 17-3-2019, the 2nd Defendant took out this instant application which the 2nd Defendant framed the following issues to be determined under order 14A of the Rules of Court 2012:

- (a). Whether the Plaintiff has been deemed to have irrevocably, unconditionally and permanently waived its rights to its present claim, based on the construction of the Scheme of Arrangement dated 9th September 2009 as amended by the addendum dated 28th September 2009 and as sanctioned with alterations pursuant to the brief grounds by the Court of Appeal of the Republic of

Singapore on 13th October 2010 (“the 2nd Defendant’s Existing Scheme”), including without limitation, Clause 6.5.2 of the 2nd Defendant’s Existing Scheme, on the basis that the Plaintiff’s Contingent Claim did not crystallize by the fifth anniversary of the Effective Date (19th April 2010) of the 2nd Defendant’s Existing Scheme; and;

- (b) Whether the Plaintiff’s submission of the Proof of Debts dated 25th September 2009 pursuant to the 2nd Defendant’s Existing Scheme crystallized the Plaintiff’s Contingent Claim under the Banking Facilities.

19. Order 14A of the Rules of Court 2012 provides that:

“Determination of questions of law or construction (O 14A r 1)

1.— (1). The Court may, upon the application of a party or of its own motion, determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the Court that—

(a) such question is suitable for determination without the full trial of the action; and

(b) such determination will finally determine the entire cause or matter or any claim or issue therein.

(2. On such determination the Court may dismiss the cause or matter or make such order or judgment as it thinks just.

(3) The Court shall not determine any question under this Order unless the parties have had an opportunity of being heard on the question.

(4) The jurisdiction of the Court under this Order may be exercised by a Registrar.

(5) Nothing in this Order shall limit the powers of the Court under Order 18, rule 19 or any other provisions of these Rules.”

20. Before the court proceeds to determine any issues, whether they are question of law or construction of any document, as framed by the 2nd Defendant, it is for the 2nd Defendant to satisfy the court not only that these issues are suitable for determination without the full trial of the action but also that the determination of such issues will finally determine the entire cause or matter and if not, any claim or issue therein. See: **Dato' Sivananthan Shanmugam v Artisan Fokus Sdn Bhd** [2015] 2 CLJ 1062.

21. In **Kerajaan Negeri Kelantan v Petroliam Nasional Bhd and other appeals** [2014] 6 MLJ 31 Federal Court Justice, Abdull Hamid Embong FCJ held that:

*“[36] It is well settled that an issue is only suitable for determination under O.14A if the points of law to be determined thereunder have been stated in clear and precise terms and the facts disclosed by the pleadings and affidavit evidence are sufficient for the court to make such determination which would be final as to the entire cause or matter (see Allen v Gulf Oil Refining Ltd [1980] QB 156 and Seloga Jaya Sdn Bhd v UEM Genisys Sdn Bhd [2008] 2 CLJ 686). **The trial judge is therefore vested with the discretion to rely on the***

pleadings or to rely on affidavit evidence before him to determine whether the matter is suitable for determination without full trial of the action (see Dream Property Sdn Bhd v Atlas Housing Sdn Bhd)."

22. The issues are suitable for determination under Order 14A of the Rules of Court 2012 when all facts material to the issues are admitted or not disputed. The court is not to proceed to determine the issues on assumed facts.

23. It is not a requirement that the determination should dispose of the whole case. It is sufficient if it would dispose of the major part of the case or the dominant issue in the case. The mere fact that the case appears to be or is complicated is no justification not to consider the application. See: **Petroleum Nasional Bhd v Kerajaan Negeri Terengganu** [2004] 1 MLJ 8 and Malaysian Civil Procedure, Volume 1-2018 Edition, paragraph 14A/1/6.

Analysis of the issues arising from the pleadings and affidavits and issues framed by the 2nd Defendant in the application

24. The issues framed by the 2nd Defendant were based on the assumption that the Plaintiff is bound by the scheme of arrangement as approved by the Court in the Republic of Singapore. I do not think that is right.
25. Upon perusal of the pleadings and the affidavits as filed, it appears that there is no serious dispute in respect of the provisions of the scheme of arrangement as approved by the Court in the Republic Singapore.
26. However, contrary to the contentions of counsel for the 2nd Defendant, based pleadings and the affidavit as filed, the Plaintiff's case is that the scheme of arrangement is not valid and binding on the Plaintiff. There was representation by the Plaintiff notwithstanding the scheme of arrangement, that Corporate Guarantee was still legally valid and binding on the 2nd Defendant. The Plaintiff has denied it has elected to be bound by the scheme of arrangement.

See: Paragraphs 2A to 5 of the Plaintiff's Amended Statement of Reply To the 2nd Defendant's Re-amended Statement of Defence (Encl.83) read with paragraphs 4A to 8 of the 2nd Defendant's Re-amended Defence (Encl. 81)

27. Thus, in respect of the issue of liability of the 2nd Defendant under the Corporate Guarantees, I find the proper and main issues arising from the pleadings and affidavits as filed are:

(a) whether the Plaintiff is bound by the Scheme of Arrangement and provisions therein which is the dependant on the determination of underlying issues:

(i) whether the scheme of arrangement approved by the Court in the Republic Singapore discharged the 2nd Defendant's obligations and liabilities under the Corporate Guarantees given by the 2nd Defendant to the Plaintiff (which is a question of law); and

(ii) whether there was a legal enforceable agreement or contract between the Plaintiff and the 2nd Defendant for the Plaintiff to be bound by the scheme of

arrangement (which is a mixed question of fact and law).

(b) Even if the scheme of arrangement is binding on the Plaintiff, whether there was representation by the 2nd Defendant that notwithstanding the scheme of arrangement, the Corporate Guarantees remained valid and enforceable which the Plaintiff has acted to its detriment that the 2nd should be held to the representation.

28. Before the issues as framed by the 2nd Defendant in this application can be determined, the aforesaid issues in respect of whether the Plaintiff is bound by the scheme of arrangement have to be determined first and cannot be assumed.

29. In respect of the scheme of arrangement approved by the Court in the Republic Singapore, it takes effect by reason of the order of the Court in the Republic of Singapore approving the scheme, rather than by mutual consensual agreement. See: **Bond Corporation Holdings Ltd v The State of Western Australia** (1992) 10 ACLC 715 at 719 or (1992) 7 WAR 61 at 67.

30. The discharge of the 2nd Defendant's debts to all creditors as provided and under the scheme of arrangement takes effect by the operation of the legislation or law applicable in the Republic of Singapore. Can it, a foreign legislation operates to discharge the debts or liability of the Corporate Guarantees given by the 2nd Defendant in Sabah, Malaysia? I do not think so.
31. Clause 28 of all the three (3) Corporate Guarantees given by the 2nd Defendant to the Plaintiff provide that they shall be governed by and construed in accordance with the laws of Malaysia. See: exhibits "TPJ-3", "TPJ-4" and "TPJ-5" of Enclosure 64.
32. The proper law of contract in respect of these Corporate Guarantees given by the 2nd Defendant to the Plaintiff is the law of Malaysia. The liabilities and debts arising thereunder cannot be discharged by a foreign laws, in this case the laws of the Republic of Singapore.
33. In **New Zealand Loan and Mercantile Agency Co Ltd v Morrison** [1898] AC 349, the respondent in that case placed money on deposit in Victoria, Australia with the appellant, a company incorporated in England and carrying on business in

Victoria, Australia. The High Court in England later sanctioned a scheme of arrangement under the English Joint Stock Companies Arrangement Act, 1870 and declared it binding on all creditors. Thereafter, the respondent commenced an action in Victoria to recover her deposit. By its defence, the appellant raised the scheme of arrangement.

34. In that case, the Judicial Committee of the Privy Council held that the scheme of arrangement sanctioned by an English Court was a proceeding in a foreign court and cannot be pleaded in a Victorian Court as a defence to an action by a non-assenting Victorian creditor for the full amount of her claim.

35. Similarly, in **Global Distressed Alpha Fund 1 Limited Partnership v PT Bakrie Investindo** [2011] 2 BCLC 275, the defendant was incorporated in Indonesia as an investment holding company. It raised finance through debt by the issue of guaranteed notes. The notes were issued by a Dutch company owned by the defendant. They were guaranteed by the defendant. The guarantee and the notes were subject to English law. The notes were not, however, paid on their maturity date. A debt reorganisation composition plan was accepted by a majority

of the defendant's creditors and was ratified by the Indonesian Court. Under the Indonesian composition plan, the defendant's obligations under the guarantee of the notes were discharged.

36. Subsequently, in that case, the claimant bought some of the notes amounting to US\$2m, from a prior holder. It brought proceedings against the defendant before the English court, relying on the guarantee. The Commercial Court of the Queen's Bench Division, United Kingdom held that it was bound by the established case law and held that the discharge of the defendant's obligations as guarantor as a matter of Indonesian law was of no effect in English law, which was the governing law of the guarantee.

See also: **Antony Gibbs & Sons v LA Societe Industrielle Et Commerciale Des Metraux** (1890) 25 QBD 399; and **National Bank of Greece and Athens v Metlis** [1957] 3 All E.R. 608.

37. It seems that the 2nd Defendant's liability to the Plaintiff under the Corporate Guarantees given here in respect of the banking facilities cannot be discharged by the scheme of arrangement in the Republic of Singapore.

38. In respect of the issue whether the scheme of arrangement constituted a legal enforceable agreement or contract binding on the Plaintiff, though the Plaintiff did file its proofs of debt with the scheme manager but the proof was rejected. The Plaintiff has never voted or got the chance to vote in the meeting of the creditors of the 2nd Defendant in Singapore for the scheme of arrangement.
39. Based on the affidavits, at this stage, I do not find any evidence clearly established the fact of an offer made by the 2nd Defendant, acceptance by the Plaintiff of such offer and consideration as required under the Contract Act, 1950 to give rise to an enforceable agreement or contract that the Plaintiff should be bound by the scheme of arrangement.
40. In respect of the issue of representation by the 2nd Defendant that notwithstanding the scheme of arrangement, the Corporate Guarantees should remain valid and enforceable and whether the Plaintiff has acted to its detriment, I find it arguable that the 2nd Defendant did make such representation based on the 2nd Defendant's letter dated 31-5-2017 which stated that the Corporate Guarantee remained valid, binding and sufficient to secure the

banking facilities and seeking for the Plaintiff to allow the 1st Defendant to continue instalment repayment and not imposing requirement of additional security. See: exhibit “TBP-1” of Enclosure 69.

41. There is the issue of whether the Plaintiff had indeed relied on such representation to its detriment. There is a further issue whether the Plaintiff and the 2nd Defendant had agreed to the execution and giving of a fresh Corporate Guarantees to be given by the 2nd Defendant and whether non-execution of such Corporate Guarantee was due to default of the 2nd Defendant or the Plaintiff. See also exhibits “TPJ-17”, “TPJ-18”, “TPJ-19” and “TPJ-20” of Enclosure 71.

42. The affidavit evidence relating these issues seems to be conflicting.

43. In the premises, I am not persuaded that the two (2) issues as framed by the 2nd Defendant for determination in this application are suitable for determination without the full trial of the action and that the determination of such issues will finally determine the

entire cause or matter or if not, any claim or issue therein. They are not the dominant or core issues.

Pronouncement and orders

44. For the reasons heretofore, I therefore dismiss the 2nd Defendant's Notice of Application dated 27-3-2019 (Encl.63).
45. I award the Plaintiff a sum of RM2,000.00 as costs of the application subject to and with allocatur fee.

Dated: This 30th day of April 2020

SIGNED

(WONG SIONG TUNG)

Judicial Commissioner

High Court

Kota Kinabalu

Date of Grounds of Decision : **Delivered on 30.4.2020**
through Zoom app
video conference

Date of Delivery of Decision : **30.4.2020**

Date of Hearing : **27.2.2020**

For the Plaintiff : **Christopher Chong**
of Messrs. Lind Willie
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Notice: This copy of the Court's Grounds of Decision is subject to amendment and editorial revision.