MALAYSIAN JUDGMENTS

IN THE COURT OF APPEAL OF MALAYSIA

Coram: Hamid Sultan Abu Backer, JCA; Abdul Rahman Sebli, JCA; Mary Lim, JCA

Wong Kian Wah v Ng Kien Boon

Citation: [2018] MYCA 230 **Suit Number:** Civil Appeal No. W-02(NCVC)(W)-868-05/2017

Date of Judgment: 31 July 2018

Litigation & court procedure – Admission of facts – Whether the High Court judge correct in refusing to enter judgment based on the admission – Whether this resulted in the miscarriage of justice – Section 17 of the Evidence Act, Order 27 of Rules of Court 2012

JUDGMENT

[1] The appellant's appeal is against the decision of the learned High Court judge who refused to enter judgment for the plaintiff in respect of two loan agreements notwithstanding that there was admission by the respondent of the two loan agreements as well as there was an admission by way of Statement of Agreed Facts for the sum of RM2,700,000.00. The said Statement of Agreed Facts *inter alia* reads as follows:

> "1. At the request of the Defendant, the Plaintiff advanced a sum of RM2,700,000.00 to the Defendant, by way of a fixed deposit sum of equivalent amount which was used by the Defendant to secure an overdraft facility for the same amount granted by Hong Leong Bank Berhad to NST Capital Group Sdn. Bhd. on 21.6.2013.
>
> 2. The Defendant and the Plaintiff had signed a Loan Agreement to reflect the above arrangement on 12.6.2013.
>
> 3. ..."
>
> [Emphasis added].

[2] This case ought to have been settled by the jurisprudence of admission itself and the court as of right ought to have entered judgment for the admitted sum of RM2,700,000.00 with interest and costs as prayed.

Brief Facts

[3] It will be sheer waste of judicial time to summarise the facts, findings and decision of the learned judge as it has been adequately dealt with in a three page judgment without mentioning or considering the Statement of Agreed Facts. The said judgment is repeated verbatim and read as follows:

> "1. The Plaintiff's claim against the Defendant is for the refund of a sum of RM2.7 million alleged to be a friendly loan given to the Defendant by the Plaintiff.
>
> *Salient facts*
>
> 2. By the Statement of Claim, the Plaintiff's claim is grounded on a loan agreement dated 12.6.2013. In the Recital to the agreement it is provided that 2 loan sums have been purportedly given to the Defendant i.e. the sum of RM2,668,750.00 (First Loan Sum) and RM2.7 million (Second Loan Sum).
>
> 3. The Plaintiff prior to the trial date, elected to pursue only the claim for RM2.7 million i.e. the Second Loan Sum as according to the Plaintiff (PW1), he admitted that "there is a lack of evidence to support the disbursement and/or advancement of the 1st Loan" (see Q&A 2 of the Plaintiff's witness statement).
>
> 4. He then proceeded to state that he was no longer relying on the friendly loan agreement to pursue his claim for the Second Loan Sum of RM2.7 million.
>
> 5. It is the testimony of the Plaintiff that he had disbursed the sum of RM2.7 million to the Defendant by depositing this sum by way of 6 fixed deposit of RM450,000.00 each (the FD account) all in the name of 3 persons i.e. the Defendant, one Yap Yee Huat and himself.
>
> 6. This sum of money was purportedly to be used by the Defendant as a pledge to secure an O/D facility of RM2.7 million with Hong Leong Bank for one NST Capital Group Sdn Bhd, a company owned by the Defendant.
>
> 7. As a result of the default of NST Capital Group in settling the outstanding amount with the bank, the bank had uplifted the FD of RM2.7 million.
>
> 8. Repeated demands by the Plaintiff for the refund of the RM2.7 million proved futile: hence this suit was filed.
>
> *Findings*
>
> 9. It is trite law that parties are bound by their pleadings. From the Statement of Claim it is abundantly clear that the Plaintiff's claim is grounded on a purported friendly loan agreement (see paragraph 3 of the Statement of Claim).
>
> 10. However, by his own testimony in court, he had resiled from his pleadings and said that he was

no longer relying on the friendly loan agreement to support his claim for RM2,748,000.00 a sum the Plaintiff alleged to be the actual amount he had lost as a result of the RM2.7 million loaned and/or advanced to the Defendant.

11. This was not his pleaded claim.

12. On this ground alone, the Plaintiff's claim must fail.

13. Even if he were to pursue his claim for the sum of RM2.7 million (or RM2,748,000.00) on the basis that it was a purported loan there is no satisfactory proof that this sum was loaned to the Defendant as the FD account showed that the FDs were emplaced with the bank in the name of 3 persons: i.e. the Plaintiff himself, the Defendant and a third party, one Yap Yee Huat who is not a party to this proceedings nor was he called as a witness. The Defendant did not have exclusive control over the FD account and as such the FD account cannot be taken to be proof of the alleged "loan" of RM2.7 million.

14. It is also trite law that the burden is on the Plaintiff to prove his claim which he had failed to do in this case.

15. Accordingly, the Plaintiff's claim is dismissed.

16. Given the circumstances of this case. I make no order as to costs."

[4] The Memorandum of Appeal of the appellant reads as follows:

"1. The learned Judge had erred in law and in fact in failing to adjudicate and determine the Agreed Issues To Be Tried, which have been agreed upon by both parties and filed into Court, namely:

(a) Whether the Defendant has made any repayment to the Plaintiff towards interest or principal sum in respect of the aforesaid friendly loan of RM2,700,000.00?

(b) Whether the Defendant has any valid defence not to repay the aforesaid friendly loan sum of RM2,700,000.00 together with the agreed interest payable thereon?

2. The learned Judge had erred in law and in fact in holding that the Appellant had resiled from his pleadings which were premised upon a loan agreement when the Appellant had merely affirmed at the trial that he was only seeking the repayment back of one of the 2 loans as stated in the said loan agreement.

3. The learned Judge had erred in law and in fact in failing to appreciate that the Appellant had not withdrawn any of the statements in the Statement of Claim, especially paragraph 3 (II) therein which states as follows:

"Defendan telah meminjam jumlah Wang sebanyak Ringgit Malaysia Dua Juta Tujuh Ratus Ribu (RM2,700,000.00) Sahaja daripada plaintif sahaja sebagai pinjaman Wang

kali kedua ("Second Loan Sum");"

4. The learned Judge had erred in law and in fact in failing to appreciate and/or take into consideration that the basis of the Appellant's claim against the Respondent as pleaded was a contract for a personal loan with all the material particulars clearly stated and identified in the Statement of Claim, such as the following:

(a) The parties giving and receiving the loan;

(b) Amount of the loan;

(c) Disbursement of the loan sum;

(d) Term/ Duration of the loan; and

(e) Letter of demand.

5. The learned Judge had erred in law and in fact in failing to appreciate that the Respondent was neither misled nor confused by any of the Appellant's pleadings or evidence adduced at the trial.

6. The learned Judge had also erred in law and in fact in failing to appreciate and/or consider that the Respondent in his evidence at the trial had unequivocally admitted to the following:

a. The Respondent had approached the Appellant for financial assistance;

b. The Respondent was a close friend of the Appellant's son;

c. The purpose of the RM2.7 million loan was to secure an overdraft facility accorded to NST Capital SB, a company owned by the Respondent;

d. The letter of offer for the said overdraft facility with the fixed deposit sum of RM2.7 million expressed as a security therein had also been identified and acknowledged;

e. The 6 fixed deposit receipts in the sum of RM450,000.00 each had also been identified and acknowledged;

f. The funds for the 6 fixed deposit receipts were from the Appellant;

g. NST Capital SB was in default on the overdraft facility;

h. The fixed deposit sum was uplifted by the bank and used to set off the outstanding owing by NST Capital SB to the said bank;

i. The Appellant had made demand to the Respondent for the repayment of the loan sum; and

j. The Respondent's lawyers, on his instruction, had made an offer to the Appellant to settle the debt of the Respondent by way of offer of properties which are set out in a letter, had also been

identified and acknowledged.

7. The learned Judge had also erred in law and in fact in failing to appreciate and/or consider that the Appellant had stated in evidence in no uncertain term and in the absence of rebuttal evidence to the contrary, that the funds for the 6 fixed deposit receipts are all his.

8. The learned Judge had also erred in law and in fact in failing to appreciate that the Appellant has successfully proven his claim against the Respondent on a balance of probability.

9. The learned Judge had also erred in law and in fact in failing to hold that the Respondent had failed to provide any proof of any re-payment to the Appellant of the loan sum, whether of interest or principal.

10. The learned Judge had also erred in law and in fact in failing to hold that the Respondent had failed to establish any valid defence to the Plaintiffs claim in respect of the loan sum of RM2.7 million.

11. That in all the circumstances of the case, the learned Judge had erred in law and in fact in dismissing the Appellant's claim."

[5] We have read the appeal records and able submissions of the parties. After having given much consideration to the submissions of the learned counsel of the respondent, we take the view that the appeal must be allowed. Our reasons *inter alia* are as follows:

(a) In the instant case, there is more than sufficient material to attract sections 17 and 58(1) of the **Evidence Act 1950** as well as Order 27 of **Rules of Court 2012**, which relate to admissions as well as the duty of the court to enter judgment for the admitted sum.

(b) The failure of the court to consider both of these provisions in the judgment itself compromises the integrity of the decision making process resulting in miscarriage of justice. This requires the Court of Appeal to intervene and make orders related to the admitted sum as per the powers vested to the Court of Appeal pursuant to section 69 of the **Courts of Judicature Act 1964**.

[6] On the face of admitted facts, it was plainly wrong for the learned judge to conclude that the plaintiff had not proved the case. Admission can come before the writ is filed or during the case management or even during the trial. The pleading rules play little significance when parties to an action actually admits the sum claim and such admission may even be contrary to the pleaded case. This is set out in Order 27 rule 3 of **RC 2012** which reads as follows:

"Judgment on admission of facts (O. 27, r. 3)

3. (1) Where admissions of fact are made by a party to a cause or matter either by his pleadings or otherwise, any other party to the cause or matter may apply to the Court for such judgment or order as upon those admissions he may be entitled to, without waiting for the determination of any other question between the parties, and the Court may give such judgment, or make such order, on

the application as it thinks just.

(2) An application for a judgment or order under this rule shall be made by a notice of application."

[7] A notice of application is not necessary if an order has to be made at the trial. In the instant case, the sum admitted during trial was not in issue and in consequence section 17 of **EA 1950** will entitle a judgment in favour of the appellant as opposed to dismissal of the plaintiff s claim in totality.

[8] For reasons stated above the appeal is allowed with judgment for the plaintiff in the sum of RM2.7 million with interests as prayed in the statement of claim, with no order as to costs. Deposit was to be refunded.

We hereby ordered so.

Dated: 31 July 2018

Sgd

DATUK DR. HAJI HAMID SULTAN BIN ABU BACKER
Judge
Court of Appeal, Malaysia

Note: Grounds of judgment subject to correction of error and editorial adjustment etc.

COUNSEL

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For the Respondent: Mr. Wong Kok Yih, Messrs Farid Wong & Wee, Advocates & Solicitors, No. 23-2A, Jalan Bandar 12, Pusat Bandar Puchong, 47100 Puchong, Selangor Darul Ehsan

LEGISLATION REFERRED TO:

Courts of Judicature Act 1964, Section 69

Evidence Act 1950, Sections 17, 58(1)

Rules of Court 2012, Order 27, Order 27 Rule 3