IN THE COURT OF APPEAL OF MALAYSIA

Coram: Iskandar Hashim, JCA; Dr. Badariah Sahamid, JCA; Mary Lim, JCA

Malayan Banking Berhad v Syed Ahmad Safar Bin Syed Kechik

Citation: [2018] MYCA 247 **Suit Number:** Rayuan Sivil No. A-02(NCVC)(W)-1974-10/2016

Date of Judgment: 24 May 2018

Litigation & court procedure – Application to strike out a claim pursuant to Order 18 Rule 19(1)(a)(b) and (d) of the Rules of Court 2012 – Whether there was a clear and obvious case for striking out – Principles governing the striking out – Whether the claim "obviously unsustainable", or "frivolous or vexatious" to be struck out

JUDGMENT

Introduction

[1] This is an appeal against the decision of the learned High Court Judge delivered on 21.9.2016, wherein the learned Judge allowed the Defendants' application to strike out the Plaintiff's Writ and Statement of Claim pursuant to Order 18 Rule 19(1)(a)(b) and (d) of the **Rules of Court 2012**.

[2] For ease of reference, parties will be referred to as they were in proceedings before the High Court.

Background Facts

[3] The Plaintiff, a commercial bank had granted overdraft facilities in the amount of RM 3.5 million to NSS Tenaga Sdn Bhd (NSS) in which the 2nd Defendant was a director.

[4] The loan was guaranteed by Aisah binti Itam (1st Defendant), Syed Ahmad Safar bin Syed Kechik (2nd Defendant) and one, Zainol bin Ramli.

[5] NSS defaulted on payment of the overdraft facilities.

[6] The Plaintiff instituted a suit against NSS and the guarantors (including the 2nd Defendant) *vide* civil suit 22-34-2009 at the Ipoh High Court ('the 2009 suit').

[7] On 30.4.2010, the Plaintiff withdrew the 2009 suit with liberty to file afresh.

[8] On 4.4.2012, the Plaintiff filed civil suit no. 22NCVC-61-04/2012 ('the 2012 suit') in respect of the same overdraft facilities against the same Defendants as in the 2009 suit.

[9] On 23.5.2012, the Defendants filed their defence and counterclaim against the Plaintiff, in which they alleged fraud and forgery in respect of the signatures to the loan documents. The Defendants had also lodged police reports on the matter.

[10] On 27.11.2012, a consent judgment was entered between the Plaintiff and NSS and a guarantor, Zainol bin Ramli. The 2012 suit against the Defendants was withdrawn by the Plaintiff. There was nothing in the notes of proceedings to indicate that the 2012 suit was withdrawn with no liberty to file afresh.

[11] When NSS and Zainol failed to comply with the terms of payment under the consent judgment, the Plaintiff, on 13.4.2015, filed another suit *vide* civil suit no. 22 NCVC-45-04/2015 against the 1st and 2nd Defendants. ('the 2015 suit').

[12] Among the defences raised by the 2nd Defendant was that the 2nd Defendant was not served with the writ to the 2015 suit. The writ was served at the 2nd Defendant's former address as stated in his old identification card ('I.C.') and not at his current address as stated in his I.C.

[13] The 2nd Defendant also contended that the action of the Plaintiff was statute barred. In addition, the Plaintiff could not institute the 2015 suit as when the 2012 suit against the Defendants was withdrawn by the Plaintiff, there was no liberty to file afresh.

Issues before the High Court

[14] The learned High Court Judge had determined that the issues before him were as follows:

1. Whether there was a clear and obvious case for a striking out of the Plaintiff's Writ of Summons and Statement of Claim against the 2nd Defendant who was not a party to the loan transaction?

2. Whether the Plaintiff's claim against the Defendants is statute barred under section 6(1) of the **Limitation Act, 1953**?

3. Whether the service of the writ in the 2015 suit on the 2nd Defendant was bad as it was not served at the current address of the 2nd Defendant as stated in his I.C.?

Findings and decision of the High Court

[15] The learned Judge found that this was a fit and proper case to warrant striking out the Plaintiff's claim against the 2nd Defendant pursuant to Order 18 rule 19(1)(a), (b) and (d) and Order 92 rule 4 of the **Rules of Court 2012**. The findings and decision of the learned Judge may be summarised as follows:

The 2nd Defendant was not a party to the loan transaction between the Plaintiff and NSS.

[16] The 2nd Defendant had raised the defence that the signature on the loan documents which was purported to be his signature was a forgery. This was not a mere denial as this was supported by a Police forensic report.

[17] The 2nd Defendant had also denied going to the office of Norali bin Nordin, a solicitor, or that he had signed the said documents in the presence of the abovementioned solicitor. Norali had affirmed in his affidavit that he had witnessed the 2nd Defendant's signature on the loan documents. The 2nd Defendant had lodged a police report against Norali and a complaint with the Disciplinary Board of the Bar Council on the alleged false attestation.

[18] While the primary debtor, NSS and a guarantor, Zainol, had admitted to the loan facilities in the 2012 suit, their liability cannot be extended to the 2nd Defendant. Any payments made by NSS, the principal debtor does not revive the action against the 2nd Defendant.

[19] The 2nd Defendant was also not a party to the consent judgment entered into between the Plaintiff, NSS and a guarantor, Zainol. The Defendants can thus regard the matter as having been conclusively resolved.

The Plaintiff's suit against the Defendants is barred by the six year limit under section 6(1) of the Limitation Act, 1954.

[20] The cause of action against all the Defendants accrued when the Plaintiff commenced the 2009 suit on 24.2.2009. Thus the Plaintiff is obliged to file the suit against the Defendants on or before 23.2.2015. Since the Plaintiff had filed this suit on 13.4.2015, the Plaintiff's suit is caught by the Limitation Act, 1953.

Service of the writ

[21] The writ was served on the 2nd Defendant's last known address at No. 16, Lorong Bendahara, Jalan Langgar, 05300 Alor Setar, Kedah. However, the 2nd Defendant's address according to his I.C. is No. 1495, Taman Mutiara, Jalan Sultanah, 05350 Alor Setar, Kedah. The non-service of the 2015 writ on the 2nd Defendant was fatal to the Plaintiff's claim.

[22] In addition, the learned Judge was unable to find in the hand written notes of proceedings of the Judge who had heard the matter previously, a written note that the Plaintiff had applied for and was given liberty to file afresh. In the absence of such leave, the Plaintiff's 2015 suit was an abuse of the process of the court.

[23] For all the reasons stated above, the learned Judge made the finding that the 2nd Defendant's application to strike out the Plaintiff's claim pursuant to Order 18 r. 19(1)(a), (b) and (d) was within the scope of the abovementioned Order as well as Order 92 r. 4 of the **Rules of Court 2012**.

OUR DECISION

[24] After a careful consideration of the written and oral submissions of learned counsels, as well as a perusal of the Appeal Records, we were of the view that there are merits in this appeal that warrant appellate intervention. Accordingly, we allowed the Plaintiff/ Appellant's appeal with costs and set aside the order of the High Court. The grounds of our decision are set out below.

[25] At the outset, it is worthy of note that what is on appeal before us is the decision of the learned Judge to strike out the Plaintiff's claim under Order 18 r. 19(1)(a), (b) and (d) of the **Rules of Court 2012**. The principles according to which a court may strike out a claim are well established but bears repeating. In the case of **Bandar Builder Sdn Bhd & 2 Ors v United Malayan Banking Corporation Bhd** [1993] 4 CLJ 7, the Supreme Court had stated as follows:

> *"The principles upon which the Court acts in exercising its power under any of the four limbs of O.18 r. 19(1) of the High Court are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule ..., and this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it "obviously unsustainable". It cannot be exercised by a minute examination of the documents and facts of the case, in order to see whether the party has a cause of action or a defence... The Court must be satisfied that there is no reasonable cause of action or that the claims are frivolous or vexatious or that the defences raised are not arguable."*

[26] It is apparent to us that the Plaintiff's claim was neither "obviously unsustainable", nor "frivolous or vexatious" to warrant it being struck out.

[27] It is not disputed that the Plaintiff had granted loan facilities to NSS and that the 2nd Defendant was at the material time a director of NSS. The principal defence raised by the 2nd Defendant was that he was not a party to the loan transaction as his signature on the loan documents had been forged.

[28] We note, that even at the outset, in the framing of the first issue for determination, the learned Judge had misdirected himself by a premature determination of a contentious fact i.e. that the 2nd Defendant was not a party to the loan transaction.

In his grounds of judgment, at para. 21, he had stated thus:

> *"Isu-isu utama yang perlu dipertimbangkan oleh Mahkamah untuk mencapai keputusan ini adalah:*
>
> > *(i) Sama ada terdapat kes yang jelas dan nyata bagi 'writ of summons' dan Pernyataan Tuntutan Plaintif dibatalkan kerana Plaintif telah memulakan dan melaksanakan tindakan guaman tersebut terhadap Defendan Kedua yang bukannya pihak kepada Perjanjian Pinjaman".*

[29] The learned Judge then proceeded to make a "finding of fact" that the signature on the loan

documents purported to be that of the 2nd Defendant was a forgery on the basis of a Police expert forensic report. The learned Judge had clearly erred in arriving at such a determination without the benefit of a trial where such contentious facts may be tested by examination and cross examination of relevant experts and witnesses.

[30] This is especially so since what was before the High Court was the affidavit of the solicitor, Norali bin Nordin, who had affirmed that the 2nd Defendant had signed the loan documents before him in his office. The 2nd Defendant had vehemently denied this and alleged the solicitor to have made a false declaration and lodged a police report as well as a report to the Bar Council. Be that as it may, the learned Judge had clearly misdirected himself in believing the version of the 2nd Defendant without giving the opportunity for the solicitor to prove his allegation. Clearly, the learned Judge had conducted a "trial by Affidavits", instead of leaving such contentious fact finding matters to the rigours of a full trial.

[31] On this ground alone, we are of the considered view that the learned Judge was plainly wrong. For the same reasons, the other two issue are issue of mind fact and law which also cannot be disposed of by way of a trial by affidavits. We therefore allowed the appeal and set aside the order of the High Court. Accordingly, we ordered the matter to proceed for trial at the High Court. We also ordered costs in the cause and deposit to be refunded to the Appellant.

Dated: 24 May 2018

SIGNED

DR. BADARIAH BINTI SAHAMID
Judge,
Court of Appeal Putrajaya

COUNSEL

For the Appellants: Tetuan Khong & Son, 45-1A-45-3A, Jalan Sultan Azlan, Shah Utara, Taman Ipoh Selatan, 31400 Ipoh

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LEGISLATION REFERRED TO:

Limitation Act 1953, Section 6(1)

Rules of Court 2012, Order 18 Rule 19(1)(a), (b) and (d), Order 92 Rule 4

JUDGMENTS REFERRED TO:

Bandar Builder Sdn Bhd & 2 Ors v United Malayan Banking Corporation Bhd [1993] 4 CLJ 7