IN THE HIGH COURT OF MALAYA AT KUALA LUMPUR

IN THE FEDERAL TERRITORY, MALAYSIA

CIVIL SUIT NO. 22A-566-2011

BANK KERJASAMA RAKYAT MALAYSIA BERHAD ...PLAINTIFF

AND

1. **PERTAMA PERDAGANGAN SDN BHD**

   (COMPANY NO. : 34408-H)

2. **IR JAMES LOH TIENG KOH @ LOH TIENG KANG**

   (I/C NO. : 570618-02-5029)

3. **LOH TIENG HOCK**

   (I/C NO. : 580709-02-5103)

4. **ISMAIL BIN IDRIS ...DEFENDANTS**

   (I/C NO. : 520316-02-5503)

GROUNDS OF JUDGMENT

INTRODUCTION

[1] Enclosure 95 was the Plaintiff's appeal to a Judge in Chambers against the decision of the learned Senior Assistant Registrar (SAR) in refusing to grant leave to the Plaintiff to issue a writ of execution to enforce

a judgment entered against the Defendants more than six years since the date of the judgment. I had decided to allow the Plaintiff's appeal. The Defendants now appealed against that decision.

BACKGROUND

[2] Having perused the affidavits, I found the following facts:

2.1 In 2004, the 1st Defendant (D1) obtained a loan of RM15 million from the Plaintiff. The 2nd - 4th Defendants (D2 - D4) stood as guarantors. D1 defaulted the loan.

2.2 Consequent to the default, parties entered into a negotiation which culminated in a restructured loan of RM19 million in 2008, in addition to the outstanding balance amount from the original 2004 loan amounting to RM755,673.62. The Defendants defaulted again to service the outstanding amount of the original 2004 loan and the restructured loan.

2.3 The Plaintiff filed this Suit (Suit 566) against the Defendants for the amount of RM19,846,041.42 being the outstanding sum on the restructured RM19 million loan.

2.4 The Plaintiff filed a separate Suit 22A-563-2011 (Suit 563) to claim an amount of RM753,58,53 outstanding on the original 2004 loan.

2.5 A judgment in default was entered against the Defendants for Suit 563 on 8.8.2011.

2.6 On 15.3.2012 parties entered into a Consent Judgment for this Suit 566 with conditions, among others, for the outstanding amount to be paid by the Defendants within 1 year from the said date. The Defendants failed to fulfill the said condition.

2.7 Following the JID and Defendants' failure to comply with the condition of the Consent Judgment, the Plaintiff commenced the following actions:

(i) Foreclosure Proceeding

(a) On 6.10.2013 the Plaintiff filed an OS for an Order for Sale of the Charged Land;

(b) Following that, between December 2013 - April 2014 the Plaintiff and the Defendants negotiated;

(c) Upon the negotiations, the Plaintiff set out its terms of settlement vide its letter to D1 dated 18.4.2014, which was agreed upon by D1 vide its letter dated 25.4.2014;

(d) On 28.5.2014 a Consent Order was recorded on the Foreclosure, which was subsequently amended on 14.9.2015;

(e) Pursuant to that Consent Order, D1 and a third party, Visi Sempena Sdn Bhd, was to enter into a private treaty for the sale of the Charged Land at an agreed price of RM20,555,943.62 or lower, as agreed between the Plaintiff and D1;

(f) The Plaintiff discovered that D1 and Visi Sempena instead had entered into a Sale and Purchase Agreement (SPA) on the Charged Land at a price of RM1.00, without the Plaintiff's prior knowledge;

(g) Having been alerted that the Plaintiff will proceed to reactivate the Foreclosure of the Charged Land, without informing the Plaintiff, D1 and Visi Sempena entered into a Supplementary SPA on the Charged Land dated 27.11.2014 to vary the sale price of land from RM1.00 to RM20,555,943.62;

(h) On 13.11.2014 the Plaintiff proceeded to re-commence the Foreclosure by filing an application to obtain directions to proceed with auction of the charged land, which was dismissed by the Registrar on 20.10.2015;

(i) The Plaintiff did not succeed in all its appeals against that dismissal, with the Federal Court on 16.3.2017 dismissing the Plaintiff's leave application to appeal after making a finding that D1 had acted in accordance with the Amended Foreclosure Order;

(j) On 26.5.2020, the Plaintiff filed a separate action against the Defendants and Visi Sempena claiming fraud in their initial and Supplementary SPA over the Charged Land (Foreclosure Civil Suit);

(k) The Defendant and Visi Sempena applied to strike out the Foreclosure Civil Suit which was dismissed by the High Court on 3.5.2021. Their appeal are still pending before the Court of Appeal.

(ii) Bankruptcy

(a) To execute the JID, the Plaintiff filed Bankruptcy Notices (BN) against D2 – D4 at the Alor Setar High Court;

(b) Vide order dated 29.2.2016 the learned SAR allowed the BN to be served on D2 – D4 vide substituted service;

(c) Vide letter dated 11.4.2016 D1 proposed another settlement, which was rejected by the Plaintiff vide its letter dated 26.4.2016;

(d) D2 – D4's applications to set aside the BN were dismissed by the SAR;

(e) On 12.7.2017 the High Court allowed D2 – D4's appeal against the SAR's dismissal and set aside the BN because the judgment sum stated in the BN differs from the sum stated in the JID obtained in Suit 563;

(f) Following that, on 3.8.2017 the Plaintiff withdrew its Creditors Petition against D2 – D4 with liberty to file afresh.

(iii) Settlement negotiations

(a) While the above proceedings were taking place, the Plaintiff and the Defendants continued to partake in numerous sessions of negotiations to settle the claimed and outstanding sum;

(b) In actual fact settlement negotiations between the Plaintiff and the Defendants had continuously taken place since 2007 until as recent as 2022.

(iv) Writ of Execution

(a) Consequent to the developments as set out in the preceding paragraphs, and as the date to enforce the CJ had lapsed on 15.3.2018, on 13.11.2018 the Plaintiff filed an application for leave to issue a writ of execution to enforce the CJ.

(b) On 26.12.2018 the leave application was dismissed by the learned SAR. On 22.4.2019 the High Court allowed the Plaintiff’s appeal against that dismissal and granted leave for the Plaintiff to execute the CJ. On 22.1.2020 the Court of Appeal dismissed the Defendants' appeal against the High Court's decision.

(v) Winding Up proceeding

(a) On 11.9.2019, following the High Court's decision on 22.4.2019 granting the Plaintiff leave to execute the JID and CJ, the Plaintiff issued two Statutory Notices pursuant to s. 465 of the Companies Act to wound up D1.

(vi) Fortuna Injunction

(a) On 7.10.2019 D1 filed for Fortuna Injunction to restrain the Plaintiff from presenting the winding up petition due to its pending appeal against the decision of the High Court. On 14.10.2019 the High Court granted an Interim Fortuna Injunction.

(b) On 21.10.2019 the Plaintiff filed application to set aside the Interim Fortuna Injunction. After the inter partes hearing, on 13.5.2020 the High Court granted the Fortuna Injunction and dismissed the Plaintiff's setting aside application. On 14.10.2021 the Court of Appeal allowed the Plaintiff's appeal against the Fortuna Injunction.

[3] What could be distilled from the facts above are that although the Plaintiff breached the 6-year period to execute the CJ, it had not slept on its rights. The Plaintiff was not a litigant who is successful but inactive. On the contrary the actions as enumerated in the preceding paragraphs demonstrated that the Plaintiff had continuously taken measures to file the relevant and correct applications to execute the CJ, albeit its agreement to stall them due to the Defendants' requests. On its latest action to execute the CJ, the Plaintiff fought all the way to the Court of Appeal and successfully

obtained leave to execute the CJ pursuant to the Court of Appeal's decision on 22.1.2020. But despite the leave, the Plaintiff cannot continue to execute the CJ as its hands were tied for the period 7.10.2019-14.10.2021 when the Fortuna Injunction was in effect. Immediately after that, the Defendants continuously attempted to seek settlement during the period of November 2021-February 2022, which were subsequently rejected by the Plaintiff. Six months after that, on 22.8.2022, the Plaintiff filed its 2nd application for leave to execute the CJ. This application was dismissed by the learned SAR on 3.2.2023. Hence the current appeal before me now.

DECISION

[4] At the hearing of the Plaintiff's application, I had informed both counsels that as the affidavit evidence and the written submissions before me were sufficient to enable me to decide on the application, requests by counsels to file further submissions were denied.

[5] I must emphasize that this is actually the 2nd round of leave application by the Plaintiff for the issuance of a writ to execute a lapsed order.

[6] The law governing the Plaintiff's application for leave to issue the writ to execute a lapsed order is trite. O. 46 r. 3(2)(b) of the Rules of Court 2012

provides that the Plaintiff shall state the reasons of its delay to enforce the JID within the 6 years' time period: See ***Affin Bank Bhd v. Wan Abdul Rahman [2003] 1 CLJ 826; [2003] 2 MLJ 509.***

[7] As a first step, what this Court needed to do is to determine whether or not the Plaintiff had complied with the procedural requisites as set out in O. 46 r. 2(1), 3(1), 3(2)(a) and 3(2)(b) of the Rules. The Plaintiff's application shall be by way of a notice of application in Form 88 supported by an affidavit-

(i) identifying the CJ entered by both parties;

(ii) stating the amount originally due under the CJ, the terms therein and the amount due at the date of this application; and

(iii) setting out the reasons for the Plaintiff's delay in enforcing the CJ.

[8] Non-compliance with the above requirements could lead to the Plaintiff's application being dismissed *in limine*, unless the Plaintiff can show to the satisfaction of the Court that such non-compliance has not caused any miscarriage of justice nor any occasion of prejudice to the Defendants that cannot be cured by Order 1A and Order 2 : ***Perbadanan Usahawan Nasional Berhad v Tampak Gemerlap & Ors [2019] MLJU 1374***.

[9] I am satisfied that the Plaintiff had used the correct form of application, had properly identified the CJ and the terms of the CJ entered by both parties on 15.3.2012, and the amount originally due under Suit 566 and the amount due at the date of this application had also been clearly spelt out in the Plaintiff's supporting affidavits.

[10] Having passed the first step, the remaining issue – which is the main issue – that needed to be determined by this Court is whether the Plaintiff had sufficiently explained its delay in filing the leave application and its delay in enforcing the CJ.

[11] It is pertinent for me to regurgitate the factual matrix of the case leading to this Court allowing the Plaintiff's appeal:

(a) as the impugned CJ was entered by both parties on 15.3.2012, the 6 years' time period for the Plaintiff to enforce the CJ lapsed on 15.3.2018;

(b) the 1st time the Plaintiff filed for leave to execute the CJ was vide its application on 5.10.2018, which was successfully obtained by the Plaintiff on 22.1.2020 following the Court of Appeal's decision affirming the High Court's issuance of the leave;

(c) the Defendants successfully obtained a Fortuna Injunction against the Plaintiff which was operative for the period 7.10.2019 - 14.10.2021. That injunction effectively halted and barred the Plaintiff to commence any enforcement actions against the Defendants. This bar was lifted on 14.10.2021 when the Court of Appeal allowed the Plaintiff's appeal against the issuance of the said injunction;

(d) by the time the Fortuna Injunction was lifted, the leave to execute the CJ which was granted pursuant to the decision of the Court of Appeal on 22.1.2020 had already lapsed on 22.1.2021; and

(e) the Plaintiff filed an application for leave to execute for the 2nd time on 22.8.2022 in Enclosure 95.

[12] Apart from the prevailing circumstances and facts that led to the filing of Enclosure 95 as set out above, this Court also took Judicial Notice that between the period of March 2020 - November 2021, Malaysia was under various movement control orders to contain the Covid-19 pandemic, and in response to the rising numbers of Covid-19 cases in Malaysia, His Majesty the Yang di-Pertuan Agong had declared an Emergency for the period 12.01.2021 - 01.08.2021.

[13] The Defendants made a continuous attempt to seek settlement during the period of November 2021 - February 2022, which were subsequently rejected by the Plaintiff. Whilst all these were taking place, the writ of execution issued pursuant to the Court of Appeal's decision on 22.1.2020 had expired on 22.1.2021.

[14] With that backdrop, I made a finding that the Plaintiff's 2nd application for leave to issue a writ of execution filed on 22.8.2022, was well within a reasonable period. The delay, if any, had been sufficiently explained by the Plaintiff.

[15] It is trite law that it is the Plaintiff's obligation to set out sufficient reasons for its delay in enforcing the CJ and not merely setting out chronology of events.

[16] The learned SAR failed to appreciate all the above facts. He failed to consider that the Plaintiff's affidavits had extensively set out very reasonable grounds and reasons for the time it had taken to execute the CJ. Those were not merely statement on chronology of events.

[17] The SAR had erred for his failure to take into account all the events that had taken place since the Plaintiff commenced its action in October

2013 to execute the CJ until the few months in 2022 before the Plaintiff filed the 2nd leave application to execute the CJ. Had the SAR been diligent to peruse those events that actively took place during the span of that 9 years, he would not have dismissed the leave application by the Plaintiff.

[18] The SAR's brief reasonings stated that he was satisfied that the Plaintiff had raised sufficient and cogent reasons to support its application. However, relying on ***Pacific Sanctuary Holdings Sdn Bhd (formerly known as Ideal Prestige Sdn Bhd) v Masaland Construction Sdn Bhd [2020] 3 MLJ 692,*** the learned SAR concluded that he disregarded those cogent reasons upon his finding that the existence of the letters dated 18.4.2014 and 25.4.2014 between the Plaintiff and the Defendants formed a Settlement Agreement between them. He made a finding that as there was a Settlement Agreement between the parties, any dispute thereon constituted a new cause of action surrounding the Settlement Agreement which in effect has put Suits 563 and 566 to an end. The SAR then decided that the Plaintiff's remedy was to file a fresh action to enforce the said Settlement Agreement and not to execute the JID and the CJ, which the SAR regarded as "otiose by the Settlement Agreement".

[19] The SAR's reference to ***Pacific Sanctuary*** was correct. But his application of the principle laid down in that case that led him to arrive at the

conclusion that the 2014 letters formed a Settlement Agreement that put Suits 563 and 566 to an end was clearly a misdirection.

[20] I had touched on these two letters in the earlier paragraph (refer paragraph 2.7 (i)(c)). In gist, the Plaintiff was in the midst of foreclosing the Defendants' land charged for the loans. Upon negotiations, the Plaintiff set out its terms not to proceed with foreclosure vide its letter to D1 dated 18.4.2014, which was agreed upon by D1 vide its letter dated 25.4.2014. This culminated in a Consent Order entered by both parties on 28.5.2014, which was subsequently amended on 14.9.2015. The Plaintiff found the Defendants to have failed to fulfill the terms of the Consent Order and thus decided to re-commence the foreclosure of the charged land. This attempt by the Plaintiff was unsuccessful when the Federal Court ruled that the Defendants had actually fulfilled the terms of the Consent Order. In actual fact, the effect of the letters dated 18.4.2014 and 25.4.2014 was overtaken by the Consent Order dated 28.5.2014. Therefore, the issue of the 2014 letters being the Settlement Agreement and that any action to be taken by the Plaintiff against the Defendants shall be proceeded separately pursuant to that Settlement Agreement as decided by the SAR does not arise. The SAR had clearly erred and misdirected his mind when he dismissed the leave application premised on this issue.

[21] As explained in the paragraphs earlier (refer paragraphs 2 (i), (j) and (k)), the Plaintiff had filed a separate action against the Defendants and Visi Sempena on their SPA over the Charged Land. The suit is still pending. Thus, the SAR's suggestion for the Plaintiff to commence a separate action against the Defendants on this issue had to actual fact been initiated by the Plaintiff some 3 years earlier.

[22] I am satisfied that here is clearly not a case of a successful but inactive litigant as explained succinctly by Justice Suriyadi Halim in ***MBT (M) Sdn Bhd v. Syarikat Perniagaan Mesra Sdn Bhd [2004] 1 LNS 25; [2004] 1 MLJ 676***. The recurring flaws of the Plaintiff, if any, were its unbelievably soft, puny and accommodating stance towards a defaulting borrower, all of which are irrelevant for purposes of the leave application.

[23] Enclosure 95 was therefore allowed with costs.

Dated : 03 January 2024

-signed-

(MOHD RADZI BIN HARUN)

Judge

High Court of Malaya

PARTIES:

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