OTS(B) C1/CO/0008/2016

8

**IN THE HIGH COURT OF MALAYA AT KUALA LUMPUR**
**(COMMERCIAL DIVISION)**
**SUIT NO. WA-22NCC-243-05/2021**

BETWEEN

1. SUKUMARAN A/L RAMASAMY
(NRIC NO.: 660727-10-5393) ... 1st PLAINTIFF

2. ANNANITHY A/L R PERIASAMY
(NRIC NO.: 721115-10-5655) ... 2nd PLAINTIFF

3. PERIASAMY A/L RAMASAMY
(NRIC NO.: 430422-10-5495)

Acting as Power of Attorney for the 1st Plaintiff Power of Attorney dated 25.7.2013 and registered at the High Court on 9.12.2014 (Reg. No.: 100994/14)

Acting as Power of Attorney for the 2nd Plaintiff Power of Attorney dated 25.7.2013 and registered at the High Court on 9.12.2014 (Reg. No.: 100995/14) ... 3rd PLAINTIFF

AND

PUBLIC BANK BERHAD
(No Syarikat: 196501000672 (6463-H)) ... DEFENDANT

**GROUNDS OF JUDGMENT**

**Introduction**

[1] The Defendant ("Bank") filed the application in enclosure ("Enc.") 11 to strike out the Plaintiffs' Writ and Statement of Claim pursuant to Order 18 rule 19 (1) (b) and/or (d) Rules of Court 2012 ("ROC 2012").

9

[2] On 26.1.2022, I allowed Enc. 11 with costs. These are the reasons for my decision.

**Background facts**

[3] The background facts are culled from the cause papers and submissions of the parties.

[4] The 1st and 2nd Plaintiffs are respectively, the son-in-law and son of the 3rd Plaintiff.

[5] At the request of the 1st and 2nd Plaintiffs (interchangeably "the Borrowers"), the Bank agreed to grant a Fixed Loan (Swift Plan) Facility of RM600,000.00 ("the Facility") Facility vide a Letter of Offer dated 11.9.2003 and Facilities Agreement dated 8.4.2004 (collectively referred to as "the Agreement") executed by the Borrowers for purposes of financing the purchase of the property held under H.S.(D) 5640, Lot 5905, Mukim Damansara, Daerah Petaling, Selangor Darul Ehsan bearing postal address at No.89, Jalan SS14/1, 47500 Subang Jaya, Selangor Darul Ehsan which was charged in favour of the Bank as security for the Facility ("the Charged Property").

[6] Pursuant to the terms and conditions of the Agreement, the Borrowers are required to service the monthly instalments of RM3,960.00 for the first 12 months after release of the loan, RM4,121.00 for the subsequent 12 months, and RM4,684.00 for the remaining 216 months with adjustments in the final instalment, commencing from 26.3.2004.

[7] The Bank claimed that from the outset, the Borrowers made the first instalment payment late and over the years until date of application to

10

strikeout, the Borrowers continued to make sporadic payments under the Facility which led to the interest rate being revised upwards and late payment charges to be imposed on the Facility, causing the outstanding sum under the Facility to increase over time; resulting in the Bank revising upwards the monthly instalment of RM4,684.00 payable from the third year onwards by the Bank's letter dated 16.5.2013.

[8] Unhappy with the "excessive "interest, late payment charges and outstanding sum, the Plaintiffs hurled various accusations of overcharging against the Bank and turned to the various authorities such as Bank Negara, the Ombudsman for Financial Services ("OFS"), the Attorney General of Malaysia, Ketua Setiausaha Negara and the Prime Minister's office.

[9] The OFS adjudicated the matter and in its adjudication dated 27.7.2018 inter alia stated:

> "In the light of the above, we find that the bank has the contractual right to increase the interest spread rate by virtue of the default in the repayment.
>
> The bank had nevertheless offered an interest waiver of RM20,000.00. We find that the bank's offer is fair and reasonable. We make an award that the interest of RM20,000.00 to be waived from the Complainants fixed loan account.
>
> The above decision is final and there is no appeal. If the Complainants accept this final decision, they are to inform Public Bank Berhad in writing of the acceptance within 30 days from the date of this decision. Public Bank Berhad is to waive the sum of RM20,000.00 from the fixed loan account within 14 business days from the date the Complainants informed the bank of the acceptance of this decision.
>
> If the Complainants reject this decision, Public Bank Berhad is not bound by the decision and they are free to pursue their rights against Public Bank Berhad through other means such as legal proceedings."

[10] Following the Bank's letter of demand dated 9.4.2021 for arrears under the Facility from 31.7.2020 – 31.3.2021 together with notice that the Bank would commence civil and/or foreclosure proceedings if the arrears were not settled, the Plaintiffs commenced this action on 4.5.2021 against the Bank seeking various declaratory orders in relation to the Facility as follows:

i) a declaratory order that the Bank calibrate the entire repayment schedule scientifically to ascertain the correctness of the interest/penalty calculation;
ii) that the Bank pay back a sum of RM56,234.63 or such other sum determined through the calibration as the interest overcharged;
iii) a declaration that until the calibration is agreed and accepted, the Plaintiffs will continue to pay monthly instalment of RM4,684.00 towards repayment of the loan to the Bank;
iv) that the Bank provide a rebate of RM100,000.00 instead of RM35,000.00 offered previously;
v) that the Bank is restrained from commencing legal proceedings against the Plaintiffs if prayer (iii) above is complied with by the Plaintiffs;
vi) costs; and
vii) such further or other reliefs deemed fit and proper by the Court.

**Defendant's contentions**

[11] In support of the striking out on the basis that the suit herein is unsustainable as it is scandalous, frivolous, vexatious and/or is clearly an abuse of court's process, the Defendant in essence contended that:

12

11.1 the revision of interest and imposition of late payment charges on the Facility is legitimate and proper;

11.2 the Plaintiffs are not in the position to dictate the interest rebate offered by the Bank;

11.3 the revised repayment terms resulted from the Plaintiffs' default and breach of Agreement; and/or

11.4 the Bank is entitled to exercise its legal rights and commence legal proceedings against the Plaintiffs.

[12] On the first ground that the revision of interest and imposition of late payment charges on the Facility is legitimate and proper the Defendant argued that:

12.1 Owing to a history of perpetual default by the Borrowers in paying the monthly instalments since disbursement of the Facility over the past 17 years, as evidenced by the statements of account exhibited in PBB-4, the Bank exercised its contractual right to revise the interest rate upwards and imposed late payment charges pursuant to clause 7 and 8 of the Facilities Agreement:

"7. **ADDITIONAL INTERESTS**

In addition and without a prejudice to the powers, rights and remedies of the Bank herein provided, if the Borrower shall default in the payment on the due date of any one or more of the Instalments, interest and/or any other sum payable under the Facilities Agreement, the Borrower shall pay to the Bank interest on the amount from time to time outstanding in respect of the overdue sum for the period beginning on the due date and ending on the date of actual payment both before and after judgment in

13

accordance with this clause. The rate of interest applicable shall be One per centum (1%) per annum (hereinafter referred to as "the Additional Interest") which rate aforementioned and with such rests as the Bank shall in its absolute discretion deem fit subject to such minimum charge as may be imposed by the Bank, or such other rate or rates as may be prescribed by the Bank from time to time at its absolute discretion which rate or rates may be over and above the Prescribed Rate on the amount in default or the sum remaining unpaid or any other sum at that time in arrears calculated from the date of such default until the date of payment of the amount thereof and the decision of the Bank as to the Additional Interest chargeable under this Clause shall be final and conclusive and shall not be questioned on any account whatsoever.

8. **VARIATION OF INTEREST RATE(S)**

8.1 Notwithstanding the provisions relating to the Prescribed Rate payable on the Facilities as hereinbefore provided or the Additional Interest payable on the overdue sums, the Borrower agrees that the Bank shall be entitled at anytime or from time to time to vary, at its absolute discretion, the Prescribed Rate payable on the Facilities and/or Additional Interest Rate payable on the overdue sums.

Notwithstanding the generality of the foregoing, the variation may be in respect of the Base Lending Rate or the Bank's prevailing Cost of Funds, or the spread or quantum of interest that is payable over and above the Base Lending Rate or the Bank's prevailing Cost of Funds, or the percentage of interest itself in cases where the rate of interest is not calculated on the Base Lending Rate or the Bank's prevailing Cost of Funds or a combination of any one or more of the methods aforesaid including varying or changing the basis upon which the rate of interest as herein provided or the Prescribed Rate, is arrived."

14

12.2 The right to revise interests is also stated at Appendix III clause 1 (iv) of the Letter of Offer:

"Bank reserves the right to:-

iv revise the interest rate upwards, if the account is not conducted in a satisfactory manner and/or when there is any perceived increase in credit risk by the Bank. "

12.3 The Defendant's learned counsel argued that similar contractual clauses were upheld by Low Hop Bing J (as he then was) in *Standard Chartered Bank Malaysia Berhad v Arivalagan A/L Krishnan & Anor [2001] 4 CLJ 168* at 183:

"As such, it is crystal clear that the plaintiff in accordance with this clause is allowed to vary its rate of interest at any time and from time to time. The bank, also in accordance with cl. 6.04(3), does not have to give notice of change of rate of interest, and failure to do so shall not prejudice or have the effect of invalidating any variation. My view is fortified by the judgment of the Court of Appeal in Foo Yoke Foon v Public Bank Bhd [2000] 3 CLJ 405."

See also: *Foo Yoke Foon v Public Bank Bhd [2000] 3 CLJ 405 at page 407e-f, Court of Appeal*

12.4 Counsel then argued that as the Borrowers have executed the Agreement and have agreed to the terms and conditions therein including provisions afforded to the Bank to revise the interest rate and impose late payment charges, the Borrowers are bound by the Agreement and cannot now resile from the same, especially after benefitting from the disbursement of the Facility. In the case of *Platinage Properties Sdn Bhd v Hong Leong Bank Berhad [2020] 1 LNS 848*, it was held that:

15

"[16] This Court is of the view that the argument put forth by the Appellant was an afterthought. The interest rate imposed on the Appellant is provided under the default provision in the Letter of Offer dated 14.9.2011. This can be found under Clause 4.2 in where it is stated that the Respondent's Base Lending Rate ("BLR") is subject to the variations and changes from time to time subject to the Respondent's full discretion...

[17] This Court finds as a fact that the Appellant is fully aware of the terms and conditions stipulated in the Letters of Offer as well as the Facility Agreement. After all, the Banking Facility was extended at the request of the Appellant and the Appellant had gone on to utilise the said facility. Added to that, the Appellant had consistently made the payments prior to the default. To now question the issue of interest rate imposed is clearly an afterthought and cannot hold water.

[18] In the present appeal, there is no plea of fraud or misrepresentation raised by the Appellant. As such, there is no basis to question the terms and conditions of the Letters of Offer and the Facility Agreement after having benefitted from the same. In Tan Sri Abdul Khalid Ibrahim v. Bank Islam Malaysia Bhd & Anor case [2010] 4 CLJ 388, it was held that:

> "(3) Questioning the validity of an agreement after benefitting from it and upon default, in itself lacked bona fide... "

The following cases were also cited in support:

(a) *HSBC Bank Malaysia Bhd (Formerly Known As Hong Kong Bank Malaysia Bhd) v LH Timber Products Sdn Bhd (Formerly Known As Ho Lim Sawmill Sdn Bhd) & ORS [2005] 6 MLJ 625* at para 53-54;

16

(b) *Terrance Simon Marbeck v Kerajaan Malaysia [2003] 6 CLJ 120* at page 129a-d.

12.5 The Bank claimed that notices and half yearly statements of account were issued notifying the Plaintiffs of the revised interest rate, changes to BLR and the amount outstanding and no query was raised until 20.4.2015 when the Plaintiffs wrote to the Bank, for the very first time, alleging that the interest charged was excessive without any regard to their delinquent payments for the years before. 6 years after the Borrowers' letter dated 20.4.2015, the Plaintiffs filed this suit.

12.6 It is not open now to the Borrowers to raise any dispute, citing in support the recent case of *Jurudaya Construction Sdn Bhd v Castwell Industries (M) Sdn Bhd [2021] MLJU 794; [2021] 1 LNS 693* where it was held that:

> "Therefore, it is not open to the Appellant now to raise issues which were never raised at that point in time when those issues should have been raised. Meaning to say, since there were no dispute raised, there can be no serious issues related to the invoice. To my mind, the issues raised by the Appellant is a sheer afterthought [para 21(a)].
>
> In the instant case, Appellant's non-query of the official invoice and interest stated therein would preclude them from raising any objection now. The Learned Sessions Court Judge was correct to point out that the conduct of Appellant/Defendant in not challenging the matter and remaining silent ie, pertaining to the imposition of interest would not assist the Appellant. (case in point is KGN Jaya Sdn. Bhd v. Pan Reliance Sdn Bhd [1996] 2 CLJ 611; [1996] 1 MLJ 233). Hence, it does not lie in the mouth of the Appellant to now deny the Respondent's claim related thereto." [para 21(b)]."

17

12.7 The OFS had looked into the Plaintiffs' complaints and have found in favour of the Bank.

[13] As for the 2nd ground that Plaintiffs are not in the position to dictate the interest rebate offered by the Bank, it was submitted that:

13.1 Having breached the terms and conditions of the Agreement, the Plaintiffs are not entitled to any interest rebate but seek an Order from this Court to compel the Bank to give them interest rebate of RM100,000.00.

13.2 Any rebate is a matter of goodwill and at the Bank's discretion pursuant to clause 23(d) of the Facilities Agreement which reads:

> "23. MODIFICATION AND INDULGENCE
>
> The Borrower hereby irrevocably and unconditionally confirms, consents and agrees that the Bank may, at sole discretion at any time and from time to time and without in any way prejudicing the Bank's rights and interest in the security hereby created and irrespective of whether a default has occurred, review, modify, vary and/or determine the Facilities in the following manner:-
>
> .....
>
> (d) grant the Borrower and/or the Security Party or to any other surety or guarantor any time indulgence;"

13.3 The Bank has waived RM1,204.42 on 20.8.2015. At the Plaintiffs' repeated requests, the Bank was prepared to waive another RM35,000.00 interest rebate (increased from the initial offers of RM10,000.00 and RM20,000.00), on a goodwill basis but the Borrowers as defaulters, insisted on a higher sum which they are not entitled to.

18

[14] As for the 3rd ground, the Bank posited that the revised repayment terms resulted from the Plaintiffs' default and breach of Agreement, leading to a higher outstanding sum under the Facility and for the Facility to be settled within its original tenure, the Bank, in accordance with clause 6.1 (f) and clause 23 (i) increased the monthly instalment sum:

> "(f) If and whenever the Prescribed Rate of interest payable by the Borrower under the Facilities Agreement shall be varied in any manner whatsoever as herein provided, the Bank may at its absolute discretion make the necessary adjustment consequent upon such variation either:-
>
> (i) by varying the amount of any instalments towards payment of the Term Loan and interest thereon; and/or
>
> (ii) by varying the number of the Instalments towards payment of the Term Loan and interest thereon.
>
> .....
>
> "23. MODIFICATION AND INDULGENCE
>
> The Borrower hereby irrevocably and unconditionally confirms, consents and agrees that the Bank may, at sole discretion at any time and from time to time and without in any way prejudicing the Bank's rights and interest in the security hereby created and irrespective of whether a default has occurred, review, modify, vary and/or determine the Facilities in the following manner:-
>
> .....
>
> (i) vary the number and/or the amount of any instalments or progressive reduction (if any) to be paid by the Borrower to the Bank."

[15] The Bank postulated that the Plaintiffs are precluded from challenging the revised repayment terms as the Borrowers did not raise

19

any issue with the same subsequent to the Bank's letter dated 16.5.2013, and have paid the revised monthly repayment. There was no overpayment as alleged. In fact, the Bank had been more than accommodating:

15.1 The Bank had agreed to reduce the interest rate to the original interest rate effective from 1.5.2015 (subject to prompt and punctual instalment payments), waived late payment charges on 20.8.2015 and offered interest rebates to the Borrowers;

15.2 The Bank vide its letter dated 22.9.2020 also offered a Rescheduling Repayment Arrangement ("RRA") which entails:

15.2.1 reducing the interest rate to the original interest rate stipulated in the Agreement;

15.2.2 original monthly instalment sum reinstated until full settlement subject to adjustment in final instalment; and

15.2.3 extension of loan tenor of 3.5 years.

15.3 The Plaintiffs however refused to accept the RRA and unjustifiably demanded for the original repayment terms to be reinstated after the Borrowers have made payments under the revised payment terms.

[16] Lastly, it was argued for the Bank that it is entitled to exercise its legal rights and commence legal proceedings against the Plaintiffs. Clause 34 of the charge document gives the bank concurrent rights to commence legal proceedings and foreclosure:

20

"34. BANK'S RIGHT TO COMMENCE FORECLOSURE AND LEGAL PROCEEDINGS CONCURRENTLY

Notwithstanding any provision hereof, it is hereby expressly agreed that upon default or breach by the Chargor and/or the Borrower of any term, covenant, stipulation and/or undertaking herein provided and on the part of the Borrower and/or the Chargor to be observed and performed, the Bank shall thereafter have the right to exercise all or any of the remedies available whether by this Charge or by the Facilities Agreement(s) or by statute or otherwise and shall be entitled to exercise such remedies concurrently, including pursuing all remedies of sale or possession pursuant to this Charge and civil suit to recover all monies due and owing to the Bank."

**Plaintiffs' contentions**

[17] The Plaintiffs' contentions may be summed up as follows:

17.1 the Bank has charged all kinds of arbitrary interests, penalty interests and overcharged the Plaintiffs a sum RM56,234.63 in interest as shown in "the Plaintiffs' expert analysis" at Appendix C of the Statement of Claim;

17.2 the Defendant has demanded the Plaintiffs to pay RM7,824 monthly from 30.4.2015 to 26.2.2024, for almost 10 years, which is a two-fold increase in the repayment instalments and did not give any valid reason; the initial monthly payments of RM4,340 doubled to RM7,824 is clear evidence of the Bank acting arbitrarily and in breach of the Facility Agreement;

21

17.3 there was no explanation what the rebates, (RM10,000, RM20,000 and RM35,000) is all about and how will it work; These rebates appears to increase each time the Plaintiffs appeal to various authorities, such as Bank Negara Malaysia, Ombudsman for Financial Services, the Attorney General of Malaysia, *Ketua Setiausaha Negara* and even the Prime Minster's Office, to seek their indulgence on this matter. It was only due to these appeals that the Defendant had started to offer the rebates;

17.4 Despite the Plaintiffs paying all instalments and extra instalments and interests, the Bank vide 2 letters dated 16 March 2021 and 9 April 2021 had threatened action and foreclosure to dominate and obtain an unfair advantage over the Plaintiffs; and

17.5 the action is not obviously unsustainable to deserve a striking out as there are many issues including the need to bring in third party witnesses Bank Negara Malaysia, Ombudsman for Financial Services, the Attorney General of Malaysia, *Ketua Setiausaha Negara* and even the Prime Minster's Office, and also production of expert reports.

**Findings**

[18] As mentioned earlier, the striking out application was made by the Plaintiff under the different limbs of Order 18 Rule 19 (1) (b) and/or (d) ROC 2012 which reads:

22

"19. Striking out pleadings and endorsements (O. 18 r. 19)

(1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the endorsement, of any writ in the action, or anything in any pleading or in the endorsement, on the ground that-

(a) .....
(b) it is scandalous, frivolous or vexatious;
(c) .....or
(d) it is otherwise an abuse of the process of the Court,

and **may** order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be."

[19] In considering a striking out, the succinct words of the Federal Court are apposite in *Seruan Gemilang Makmur Sdn Bhd v Kerajaan Negeri Pahang Darul Makmur & Anor [2016] 3 MLJ 1; [2016] 3 CLJ 1.* In a judgment delivered by Ramly Ali FCJ, the Court said:

"[25] The principles for striking out pleadings pursuant to O 18 r 19 of the ROC are well settled. It is only in a plain and obvious case that recourse should be had to the summary process under this rule; and this summary process can only be adopted when it can clearly be seen that a claim on the face of it is obviously unsustainable (see *Bandar Builder*; *Hubbuck & Sons v Wilkinson, Heywood and Clark* [1899] 1 QB 86; *A-G of Duchy of Lancaster v London and North Western Rly Co* [1892] 3 Ch 274).

[26] The tests for striking out application under O 18 r 19 of the ROC, as adopted by the Supreme Court in *Bandar Builder* are, inter alia, as follows:

(a) it is only in plain and obvious cases that recourse should be had to the summary process under the rule;

(b) 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*' (Emphasis added);

23

(c) 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; and

(d) if there is a point of law which requires serious discussion, an objection should be taken on the pleadings and the point set down for argument under O 33 r 3 of the ROC; and

(e) 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.

.....

[28] The basic test for striking out as laid down by the Supreme Court in *Bandar Builder* is that the claim on the face of it must be 'obviously unsustainable'. The stress is not only on the word 'unsustainable' but also on the word 'obviously' ie the degree of unsustainability must appear on the face of the claim without having to go into lengthy and mature consideration in detail. If one has to go into lengthy and mature consideration in detail of the issues of law and/or fact, then the matter is not appropriate to be struck out summarily. It must be determined at trial.

[29] The established rule on this point is that the court should not examine the evidence in this summary proceedings in such a way as to amount to conducting a trial on the conflicting affidavit evidence. As rightly said by Lord Diplock in the House of Lords in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 at p 407:

> ... The court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried.
>
> It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial ... "

24

[20] Having considered entirely the averments in the parties' affidavits, pleadings, submissions both written and oral, it is manifestly clear to me that the Plaintiffs' complaints on the revision of interest rates, the charging of additional interest and revision upwards of monthly loan repayment instalments do not have any teeth for reasons:

20.1 Clause 7 and 8 of the Facility Agreement as well as Appendix III clause 1 (iv) of the Letter of Offer expressly gives the Bank the contractual right to revise the interest rate by varying the prescribed rate of interest, charge additional interest, impose late payment charges on default by the Plaintiffs; The terms in the Facilities Agreement under "Additional Interest" provides that if the borrower defaults in the payment on the due date of any one or more of the instalments, the bank is entitled to impose additional interest. The additional interest rate may be at 1% pa or such other rate or rates as may be prescribed by the bank at its absolute discretion which rate or rates may be over and above the prescribed rate on the amount in default or the sum remaining unpaid or any other sum at that time in arrears calculated from the date of default until the date of payment. The decision of the bank as to the additional interest chargeable shall be final and conclusive;

20.2 The Plaintiffs' complaint that they have been overcharged a sum of RM56,234.63 is but a threadbare complaint viewed in the light of the Bank's contemporaneous documents;

20.3 As for the rebates which the Plaintiffs term as "meaningless", this court is of the utmost respectful view that any rebate is a matter of favour and goodwill and at the Bank's discretion

25

pursuant to clause 23(d) of the Facility Agreement; the Plaintiffs cannot escape the variation in interest rate and imposition of additional interest due to default in payment by reason of the express wordings of the Agreement; in this context, it does not lie in the mouth of the Plaintiffs to insist that they be given a rebate of RM100,000;

20.4 clause 6.1 (f) and clause 23 (i) of the Facility Agreement in crystal clear terms allow the Bank to vary the amount and number of instalments towards repayment of the term loan; the Bank is entitled to do so under the terms of the agreement; further, the Plaintiffs by their own pleadings have been paying the revised instalments and cannot now complain;

20.5 I agree with the Bank that where there is default, the Bank is entitled to at its option to pursue all and any remedies available to it to recover the monies lent by it. Clause 34 of the charge expressly allows the concurrent exercise of remedies by the Bank. In my view, the principles in the case of *Low Lee Lian v Ban Hin Lee Bank Bhd [1997] 1 MLJ 77* puts paid the Plaintiffs' argument where the Court held as follows:

> "Now, it is trite that a chargee/creditor may pursue any or all remedies to recover monies lent by him. He may enforce his statutory charge against the chargor by way of proceedings in rem under s 256 of the Code. He may sue the principal debtor (who may or may not be the chargor) upon the personal covenant contained in any loan agreement that was entered into between the parties. He may proceed against the surety who has guaranteed the loan. And he may pursue all of these courses simultaneously, contemporaneously or successively. See China and South Sea Bank Ltd v Tan [1989] 3 All ER 839 at p 842."

26

[21] In addition, the Federal Court in *Chan Boi Loi v Public Bank Bhd & Another Application [2011] 1 MLJ 478; [2009] 6 CLJ 8* held:

> "A lender is entitled to pursue all remedies available against a borrower simultaneously, contemporaneously or successively to recover the money lent unless there is an agreement to the contrary."

[22] It is to be noted that the *Low Lee Lian* principles were reaffirmed by the Federal Court in the *Chan Boi Loi case* (supra).

[23] It is basic in the law of contract that what have been agreed by contracting parties should be given effect to. The Federal Court in *Michael C. Solle v United Malayan Banking Corporation [1986] 1 MLJ 45* said as follows:

> "The principles of construction to be applied to the undertaking are similar to those applied to an ordinary contract. The intentions of the parties are to be gathered from the language used. They are presumed to have intended what they said. The common and universal principle is that an agreement ought to receive that construction which its language will admit, which will best effectuate the intention of the parties, to be collected from the whole agreement."

[24] 2 cases decided by the Court of Appeal also serve as useful guidance:

(i) *Setapak Heights Development Sdn Bhd v Tekno Kota Sdn Bhd [2006] 2 CLJ 337*:

> "[27] It is axiomatic that it is the duty of the court to give effect to the clear intention of the parties as expressed in cl. 5(b) of the agreement which is in clear, unambiguous and unmistakable language. In the Central Bank of India Ltd, Amritsar v Harford Fire Insurance Co Ltd AIR [1965] SC 1288 it was held that:

27

> Now it is commonplace that **it is the court's duty to give effect to the bargain of the parties according to their intention** and when that bargain is in writing the intention is to be looked for in the words used unless they are such that one may suspect that they do not convey the intention correctly. If those words are clear, there is very little that the court has to do. The court must give effect to the plain meaning of the words however much it may dislike the result."

(ii) *Dato' Sivananthan a/l Shanmugam v Artisan Fokus Sdn Bhd [2016] 3 MLJ 122* at para 31:

> "In law, parties are bound by the terms of the contract that they have entered into and likewise in this case, the rights and obligations of the parties are governed by the agreement. The intentions of the parties are to be gathered from the language used. They are presumed to have intended what they said...The duty of the court is to give effect to the clear intention of the parties as expressed in the agreement. If the words are clear, unambiguous and in unmistakable language, there is very little the court has to do. The court must give effect to the plain meaning of the words however much it may dislike the result."

[25] This Court in hearing the striking out application is entitled to examine the affidavits critically and not merely conclude that there is a triable issue just because the Plaintiffs dispute the Bank's rights to vary the interest rate, impose additional interests and/or late payment charges, vary the monthly repayments of the term loan. In my judgment, this action can be decided on questions of law inter alia on whether the Bank has right to vary the interest rate, impose additional interests and late payment charges, vary the monthly repayments of the term loan under the Facility Agreement. Applying the test in *Syed Ibrahim bin Syed Abdul Rahman v Liew Su Chin (f) [1984] 1 MLJ 160* to be critical of the affidavit evidence which must on the face be at least plausible, I find the undisputed

28

contemporaneous documentary evidence show it is indisputable that the Plaintiffs breached their express obligation to pay the Bank monthly instalments as clearly provided under the Agreement. Being bound by the terms of the loan documents, the Plaintiffs who are in default cannot be heard to complain about the variation in the interest rate, imposition of additional interests and late payment charges and variation of the monthly repayments of the term loan.

[26] On the question whether there was an abuse of process on the part of the Plaintiffs, the Bank had set out the facts and the relevant authorities in lucid detail. I find myself to be in complete agreement with the Bank's learned Counsel's analysis of the authorities, and am persuaded that on the facts, there is abuse of process on the part of the Plaintiffs; and I do not propose to burden this judgment with a repetition of the submissions.

[27] Letters were also written by the Plaintiffs to Bank Negara, the Prime Minister's office; Tan Sri Tommy Thomas, the then Attorney General of Malaysia; Federation of Malaysian Consumers Association ("FOMCA"); Ketua Setiausaha Negara (exhibit PBB7). On this aspect, the Court of Appeal in *See Thong & Anor v Saw Beng Chong [2013] 2 MLJ 235* set out the circumstances which would justify striking out under Order 18 rule 19 (1) (b) and (d), as follows:

> "[15] Sub-paragraph(1)(b) deals with pleading which is 'scandalous, frivolous or vexatious'; while sub-para (1)(d) deals with 'an abuse of the process of the court'. In Murray v Epsom Local Board [1897] 1 Ch 35 it was held by the court that, 'scandalous' generally refers to matters which improperly cause a derogatory light on someone, usually a party to an action, with respect to moral character or uses repulsive language .....

29

The words 'frivolous or vexatious' generally refer to a groundless action of statement with no prospect of success, often raised to embarrass or annoy the other party to the action. In considering whether any proceedings were vexatious or frivolous, **one is entitled to and ought to look at the whole history of the matter and it is not to be determined by whether the pleading discloses a cause of action or not** (see Attorney General of The Duchy of Lancaster v London & North Western Railway Co [1892] 3 Ch 274; and Re Vernazza [1959] 2 All ER 200). It was decided in the above case of Attorney General of The Duchy of Lancaster that 'frivolous or vexatious actions mean cases which are obviously frivolous or vexatious or **obviously unsustainable'.**

.....

[18] Sub-para (d) of the rule deals with pleading which is 'an abuse of the process of the court'. In Castro v Murray (1875) LR 10 Exch 213, the phrase **'abuse of the process of the court'** had been described generally to refer to situations **where the court's process is used for an unlawful object and not for the actual purpose intended to achieve justice.** It involves a process which is contrary to good order established by usage. In dealing with this sub-para (1)(d), again the judge is entitled to look at the affidavit evidence, on the same principle applicable to sub-para (1)(b) ie striking out is not appropriate when there is conflicting evidence in the affidavits. The judge must determine and decide the issue in question by consideration of the undisputed facts."

[28] In *Tan Wei Hong & Ors v Malaysia Airlines System Bhd & Ors [2017] 4 MLJ 540* the Court of Appeal defined the phrase and said:

"[7] ....

(h) **A pleading is "frivolous" or "vexation" when it discloses no reasonable cause of action on its face.** The Oxford English Dictionary defines "frivolous" as follows: b Law. In pleading: Manifestly insufficient or futile. Black Law Dictionary, 9th ed. (Thomson Reuters, St. Paul, Minnesota, 2009), defines

30

"frivolous" as "lacking a legal basis or legal merit; not serious; not reasonably purposeful..."; and **"frivolous suit" as "A lawsuit having no legal basis, often filed to harass or extort money from the defendant".** Among the definitions of "vexatious" and "vexation" in the Oxford English Dictionary are the following:

**Vexatious** 1. Causing, tending or disposed to cause, vexation.

c spec of legal actions: **Instituted without sufficient grounds for the purpose of causing trouble or annoyance to the defendant.**

And, "Vexation, the action of troubling or harassing by aggression or interference (sometimes spec by unjustifiable claims or legal action)."

Black's Law Dictionary defines "vexatious suit" as "a lawsuit instituted maliciously and without good grounds, meant to create trouble and expense for the party being sued".

(i) The Oxford English Dictionary defines "abuse (of process) as (ii) wrong or improper use, misuse, misapplication, perversion; turning the wrong way, diversion to an improper use, corruption, distortion". **A pleading is an abuse of process if the litigation process is used for improper purpose; eg, where the proceedings constitute a sham; where the process of the court is not being fairly or honestly used, or is employed for some ulterior or improper purpose;**

.....

[8] Concerning "abuse of process", Supreme Court Practice, 1995, p. 344 (Sweet & Maxwell), observed as follows:

This term connotes that the process of the court must be used bona fide and properly and must not be abused. **The court will prevent improper use of its machinery and will, in a proper case, summarily prevent its machinery from being used as a means of vexation and oppression in the process of litigation... The <u>categories of conduct</u>**

rendering a claim frivolous, vexatious or an abuse of process are not closed but depend on all the relevant circumstances. And for this purpose considerations of public policy and the interests of justice may be very material.

[9] We hasten to add that clearly, the courts have a duty to uphold **the integrity of the judicial system by declining to adjudicate on matters which constitute an abuse of the courts' process**. While the circumstances in which the pleadings themselves will disclose no reasonable cause of action on their face will be relatively limited, the inherent jurisdiction of the court to look beyond the pleadings has meant that it can act at a relatively early stage to strike out proceedings where claim is clearly unsustainable and cannot succeed. Order 18 r. 19(1)(d) represents an important weapon in the armoury of the courts to prevent abuse of process. Order 18 r. 19(1)(d) extends beyond the other grounds and capture all other instances of misuse of the court's process, such as a proceeding that has been brought with an improper motive or an attempt to obtain a collateral benefit."

[29] I only wish to add that on the material before the court, it is not difficult to surmise from the cumulative events since inception of disbursement of the loan including the attempts to get the various authorities involved, show that this Action in essence, was not filed to obtain a vindication of the Plaintiffs' rights or to enforce a just claim but that the action was filed for an ulterior purpose, as a tactical manoeuvre and for a collateral purpose aimed at getting the Bank to accede to the Plaintiff's request for a rebate of RM100,000 and to revert to the monthly instalment payments of RM RM4,684.00 (as also made clear by the Plaintiffs' letters dated 17.9.2020 and 6.10.2020). The allegations of unconscionability is to paint the Bank as villain to dignify and glue together the sans merit claims against the Bank.

32

[30] When the process of the court is invoked, not for the genuine purpose of obtaining the relief claimed, but for a collateral purpose, it becomes an abuse of process. Another 2 notable cases in 1998 often cited by our courts also explained what is "abuse of process of the court":

(i) *Gabriel Peter & Partners (suing as a firm) v Wee Chang Jin [1998] 1 SLR 374* at page 384:

> "The term 'abuse of the process of the Court', in Order 18 rule 19(1) (d), has been given a wide interpretation by the Courts. It includes considerations of public policy and the interests of justice. This term signifies that the process of the Court must be used bona fide and properly and must not be abused. The Court will prevent the improper use of its machinery. It will prevent the judicial process from being used as a means of vexation and oppression in the process of litigation. The categories of conduct rendering a claim frivolous, vexatious or an abuse of process are not closed and will depend on all relevant circumstances of the case. A type of conduct which has been judicially acknowledged as an abuse of process is the bringing of an action for a collateral purpose... **if an action was not brought bona fide for the purpose of obtaining relief but for some other ulterior or collateral purpose, it might be struck out as an abuse of the process of the Court.**"(emphasis added)

(ii) In the case of *Malaysia Building Society Bhd v Tan Sri General Ungku Nazaruddin bin Ungku Mohamed [1998] 2 MLJ 425, 1998] 2 CLJ 340,* Gopal Sri Ram JCA had this to say in regard to the doctrine of abuse of process:

> "Every person who is aggrieved by some wrong he considers done him is at liberty to invoke the process of the court. Equally may a litigant

33

> invoke the process to enforce some claim which he perceives he has against another. When however, the process of the court is invoked, not for the genuine purpose of obtaining the relief claimed, but for a collateral purpose, for example, to oppress the defendant, it becomes an abuse of process. Where the court's process is abused, the proceedings complained of may be stayed, or if it is too late to grant a stay, the party injured may bring an action based on the tort of collateral abuse of process."

[31] The categories of abuse are not closed. **When abuse is revealed, the court has a duty, not a discretion, to dismiss the action**: *Hunter v Chief Constable of Midlands Police [1982] AC 529*, per Lord Diplock at 536D. Following Lord Diplock's pronouncement and that of Zawawi Salleh JCA (now FCJ) in *Tan Wei Hong* at [9] that "the courts have a duty to uphold the integrity of the judicial system by declining to adjudicate on matters which constitute an abuse of the courts' process", the inevitable consequence in the instant action must be a dismissal of the Plaintiffs' claim.

[32] I must hasten to add, that I have considered that a striking out order is a draconian order and it will not be lightly made. I am, in this context reminded of the observation of *Seah FJ* in the Federal Court case of *CC Ng & Brothers Sdn Bhd v Government of State of Pahang [1985] 1 CLJ 235; [1985] CLJ (Rep) 45; [1985] 1 MLJ 347*:

> "The inherent power to dismiss an action summarily without permitting the plaintiff to proceed to trial is a drastic power. It should be exercised with the utmost caution [per Lord Diplock in Tractors Malaysia Bhd v Tio Chee Hing [1975] 2 MLJ 1.It is a jurisdiction which ought to be very sparingly exercised and only in very exceptional cases. I do not think its exercise would be justified merely because the story told in the pleadings was highly improbable, and one which it was difficult to believe could be proved."

34

[33] On balance, I think justice demands that the Action should be dismissed. The instant suit cannot succeed – it is obviously unsustainable. Neither in my respectful view should the Defendant be put through the costly process of a full trial nor the Court's invaluable time be wasted in the circumstances as obtained here. The Plaintiffs must be held strictly to their bargain on the clear and unambiguous terms in the Facility Agreement governing their relationship with the Bank, and obligations *inter se* each other. The authorities on this is legion of which a few were alluded to in an earlier part of this judgment. The sanctity of the contract must be preserved and this Court should not, and will not go behind the written terms to introduce or add new terms to it.

[34] Accordingly, Enc. 11 is allowed under O 18 r 19 (b) and (d) ROC 2012 with costs.

Dated: 6th April 2022

- *sgd* -

.....
Liza Chan Sow Keng
Judicial Commissioner
High Court of Malaya at
Kuala Lumpur

**COUNSEL:**

| | | |
|---|---|---|
| For the Plaintiffs | : | Jeramal @ Ganesan a/l Muthu<br>Mr. JD Kumaran<br>Messrs J Ganesan Tajul Anuar & Co |
| For the Defendants | : | Chan Jia Lin<br>Messrs Shook Lin & Bok |

35

## CASES CITED

Standard Chartered Bank Malaysia Berhad v Arivalagan A/L Krishnan & Anor [2001] 4 CLJ 168

Foo Yoke Foon v Public Bank Bhd [2000] 3 CLJ 405

Platinage Properties Sdn Bhd v Hong Leong Bank Berhad [2020] 1 LNS 848

HSBC Bank Malaysia Bhd (Formerly Known As Hong Kong Bank Malaysia Bhd) v LH Timber Products Sdn Bhd (Formerly Known As Ho Lim Sawmill Sdn Bhd) & ORS [2005] 6 MLJ 625

Terrance Simon Marbeck v Kerajaan Malaysia [2003] 6 CLJ 120

Jurudaya Construction Sdn Bhd v Castwell Industries (M) Sdn Bhd [2021] MLJU 794; [2021] 1 LNS 693

Seruan Gemilang Makmur Sdn Bhd v Kerajaan Negeri Pahang Darul Makmur & Anor [2016] 3 MLJ 1; [2016] 3 CLJ 1

Low Lee Lian v Ban Hin Lee Bank Bhd [1997] 1 MLJ 77

Chan Boi Loi v Public Bank Bhd & Another Application [2011] 1 MLJ 478; [2009] 6 CLJ 8

Michael C. Solle v United Malayan Banking Corporation [1986] 1 MLJ 45

Setapak Heights Development Sdn Bhd v Tekno Kota Sdn Bhd [2006] 2 CLJ 337

Dato' Sivananthan a/l Shanmugam v Artisan Fokus Sdn Bhd [2016] 3 MLJ 122

Syed Ibrahim bin Syed Abdul Rahman v Liew Su Chin (f) [1984] 1 MLJ 160

See Thong & Anor v Saw Beng Chong [2013] 2 MLJ 235

Tan Wei Hong & Ors v Malaysia Airlines System Bhd & Ors [2017] 4 MLJ 540

36

Gabriel Peter & Partners (suing as a firm) v Wee Chang Jin [1998] 1 SLR 374

Malaysia Building Society Bhd v Tan Sri General Ungku Nazaruddin bin Ungku Mohamed [1998] 2 MLJ 425, 1998] 2 CLJ 340

Hunter v Chief Constable of Midlands Police [1982] AC 529

CC Ng & Brothers Sdn Bhd v Government of State of Pahang [1985] 1 CLJ 235; [1985] CLJ (Rep) 45; [1985] 1 MLJ 347

**STATUTE/LEGISLATION REFERRED**

Order 18 rule 19 (1) (b) and/or (d) and/or Order 92 rule 4 Rules of Court 2012