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IN THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL

O N A P P E A L
FROM THE FEDERAL COURT OF MALAYSIA
(APPELLATE JURISDICTION)

B E T W E E N :

10 (1) OOI BOON LEONG
(2) PETER KOK SIEW FATT
(3) HIROALD KOWADA
Appellants (Defendants)

- and -

CITIBANK N.A. Respondents (Plaintiffs)

CASE FOR THE RESPONDENTS

Record

1. This is an appeal from a decision of Raja Azlan Shah, C.J. Malaya, Chang Min Tat, F.J. and Salleh Abas, F.J. in the Federal Court of Malaysia (Appellate Jurisdiction) given on the 2nd July 1980 whereby the Court allowed an appeal by the Respondents/Plaintiffs ("the Bank") from the decision of Wan Hamzah J. given at Kuala Lumpur on the 8th January 1979 who had reversed the decision of the Assistant Registrar given on the 26th May 1978 whereby he entered summary judgment for the Bank against the Appellants/Defendants ("the Defendants") in the sum of M\$331,731.32 as claimed in the Statement of Claim together with interest and costs.

p. 59 ll. 38-39

p. 47 ll. 39-43

p. 42 l. 34

A. THE ISSUE

30 2. The sole issue in this appeal is whether the Defendants have any arguable Defence to the Bank's claim under a guarantee. The contention put forward by the Defendants is that they are discharged from their guarantee because :

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- (i) The Bank failed to obtain a valid debenture in that it did not contain any provision for Receivers to sell the properties charged;
- (ii) The Bank failed to obtain a signed letter of undertaking from all the shareholders.

B. THE FACTS

p. 22 ll. 25-26
p. 24 ll. 4-5
p. 25 ll. 30-31

3. The Bank are a Corporation incorporated in the United States of America and have a place of business in Kuala Lumpur. The Defendants are and were at all material times Directors of Leisure Industries Sdn. Bhd. ("the Company"). 10

pp. 29-32

4. By a letter dated the 24th March 1975 ("the facility letter"), the Bank offered to make funds amounting to M\$600,000 available to the Company for use in connection with an ice skating rink "substantially" according to the terms and conditions set out in the letter. The terms of the letter included the following requirements:

Security:

- p. 30 ll. 29-37
- (a) A registered first fixed and floating charge stamped for M\$600,000 over all fixed and current assets both present and future. 20
 - (b) Joint and several guarantee for M\$600,000 signed by [the Defendants].

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Conditions of Disbursement:

- p. 31 ll. 1-14
- Conditional upon the following terms:
- (a) Satisfactory completion of the securities and documentation.
 - (b) Letter of undertaking signed by all shareholders not to divest their respective shareholdings without the Bank's prior written consent and to inject additional capital into the Company in the event of cash shortfall as long as the term loan is outstanding. 30

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The Bank's offer was accepted by the Company.

5. In compliance with the Bank's security requirements, by a written joint and several guarantee addressed to the Bank dated the 24th March 1982 and signed by the Defendants, in consideration of the Bank making or continuing advances to the Company, the Defendants jointly and severally guaranteed payment on demand of all money and liabilities owing or incurred to the Bank by the Company. The Defendants' liability under the guarantee was limited to M\$600,000 plus interest from the date of demand under the guarantee. The guarantee provided, inter alia, as follows:

" Clause 8: p.12 ll.14-19

The liability of any of us hereunder shall not be affected by any failure by the Bank to take any security or by any invalidity of any security taken or by an existing or future agreement by the Bank as to the application of any advances made or to be made by the customer.

Clause 15: p.13 ll.45-50

To give effect to this guarantee the Bank shall be at liberty to act as though we and each of us were principal debtors or principal debtor to the Bank for all payments guaranteed by us as aforesaid to the Bank

Clause 16: p.14 ll.16-35

No one of us shall be discharged or released from this guarantee by any arrangement made after this guarantee or dealing between the customer and the Bank without our knowledge or consent or by any variation or alteration without our knowledge or consent in the agreement between the customer and the Bank for the making of advances or otherwise giving credit or affording banking facilities to the customer by the Bank. In order to give full effect to the provisions of this guarantee each of us hereby waives all rights, inconsistent with such provisions, and which we might otherwise as sureties be entitled to claim and enforce and we declare

Record

that the Bank shall be at liberty to act as though we or each of us were principal debtors or principal debtor to the Bank for all payments guaranteed by us as aforesaid to the Bank.

p.15 ll.25-29

Clause 20:

This guarantee shall be in addition to and shall not be in any way prejudiced or affected by any collateral or other security now or hereafter held by the Bank for all or any part of the money hereby guaranteed "

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p.26 ll.24-29

6. In further compliance with the Bank's security requirements the Company executed a Debenture dated the 6th May 1975 charging the Company's assets to the Bank in security for the Company's liability to the Bank.

p.26 ll.33-34

7. Thereafter the Bank advanced substantial sums to the Company but the Company subsequently defaulted in its repayment obligations. As at the 31st October 1977 the sum outstanding to the Bank was M\$302,999.30 principal and M\$28,732.02 interest. On the 23rd September 1977 the Bank demanded payment from the Defendants of all sums owing by the Company and this demand was repeated by the Bank's Solicitors in letters to the First and Second Defendants dated the 8th October 1977. The First Defendants' Solicitors replied on the 17th October 1977 denying liability to pay any sum to the Plaintiffs.

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p.3 l.43 -
p.4 l.3
pp.17-18

pp.18-20

p.21

pp.1-5

p.5

8. The Plaintiffs therefore commenced these proceedings in the High Court of Malaysia by specially indorsed Writ issued on the 13th December 1977 claiming M\$331,731.32 plus interest and costs. The Defendants entered an Appearance and by a Summons dated the 21st January 1978 the Plaintiffs applied under RSC Order 14 r.1 for summary Judgment for the amount claimed in the Statement of Claim together with interest and costs. Affidavits were filed on behalf of the Bank and each of the Defendants.

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pp.6-21 and
pp.34-35
pp.22-23,
pp.23-24 and
pp.25-36

C. THE MALAYSIAN STATUTES

9. The Contracts Act 1950 of Malaysia provides, inter alia, as follows:

Part I:

Section 1:

(2) Nothing herein contained shall affect any written law or any usage or custom of trade, or any incident of any contract, not inconsistent with this Act.

10 Part VIII:

Section 86:

Any variance, made without the surety's consent, in the terms of the contract between the principal debtor and the creditor, discharges the surety as to transactions subsequent to the variance.

Section 92:

20 If the creditor does any act which is inconsistent with the rights of the surety, or omits to do any act which his duty to the surety requires him to do, and the eventual remedy of the surety himself against the principal debtor is thereby impaired, the surety is discharged.

Section 94:

30 The surety is entitled to the benefit of every security which the creditor has against the principal debtor at the time when the contract of suretyship is entered into, whether the surety knows of the existence of such security or not; and, if the creditor loses or, without the consent of the surety, parts with the security, the surety is discharged to the extent of the value of the security.

D. THE JUDGMENTS BELOW

10. The Summons was heard by the Assistant Registrar who held on the 26th May 1978 that the

pp. 37-42

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Defendants had no arguable Defence to the Bank's claim and entered Judgment accordingly. Before the Assistant Registrar, the Defendants contended that they had the following arguable Defences to the Plaintiffs' claim :

(i) That the guarantee was signed on the understanding that the Plaintiffs would obtain a valid Debenture from the Company. The Debenture obtained was not valid because it did not contain any express powers to the appointment of a Receiver who could sell the Company's properties charged under the Debenture. 10

p. 39 l. 42 -
p. 40 l. 5

The Assistant Registrar did not consider this contention to be a "bona fide" issue. A competent Court had appointed Receivers with power to sell the properties of the Company. The doubtful intention of the Company to appeal against this Order did not help the Defendants. Further if there was any defect in the Debenture, the Defendants could not complain as they had by Clause 8 of the Guarantee consented to remain liable even if the security taken by the Bank were to turn out to be invalid. 20

p. 40 ll. 6-14

(ii) That the guarantee was void because it contained a promisory note which was not stamped under the Stamp Ordinance 1949.

p. 40 ll. 15-22

The Assistant Registrar held that this Defence was without substance. Production of the guarantee showed that it was duly stamped. This Defence was not put forward in good faith. 30

(iii) That the guarantee was signed on the understanding that the Plaintiffs would obtain the undertaking of all the shareholders of the Company not to divest their respective shares.

p. 40 l. 23 -
p. 42 l. 28

The Assistant Registrar held that this Defence did not raise any triable issue. The Bank was entitled to rely on Clause 8 of the guarantee which was not invalidated by Sections 92 or 94 of the Contracts Act 1950. The Defendants had expressly consented to the failure by the Bank to obtain security. 40

		<u>Record</u>
	11. By a Notice of Appeal dated the 31st May 1978 the Defendants appealed to the Judge in Chambers from the decision of the Assistant Registrar. This appeal was heard by Wan Hamzah J. on the 21st August 1978. In his reserved Judgment given on the 8th January 1979, the Learned Judge allowed the appeal and ordered that the Defendants be granted unconditional leave to defend. He held that the Defendants had the following arguable Defences:	p. 43
		pp. 44-45 pp. 46-47
10	(i) That the failure by the Bank to obtain a letter of undertaking from the shareholders not to divest their respective shareholdings and a Debenture containing a power for Receivers to sell the properties charged amounted to a failure by the Bank to do an act which was its duty to the sureties to do, so that the Defendants were entitled to be discharged from the guarantee under Section 92 of the Contracts Act 1950.	p. 46 l. 27 - p. 47 l. 15
20	(ii) That by reason of the Bank making disbursements without letters of undertaking from some shareholders and without a good Debenture, there had been a variation in the agreement for credit facilities to which the Defendants had not consented, so that they were entitled to be discharged under Section 86 of the Contracts Act 1950.	p. 47 ll. 16-26
30	(iii) That Clauses 8 and 16 of the guarantee were inconsistent with the provisions of the Contracts Act 1950 and therefore of no effect.	p. 47 ll. 35-39
	12. By a Notice of Appeal dated the 19th February 1979 the Bank appealed to the Federal Court of Malaysia from the decision of Wan Hamzah J. In their Judgment of the 2nd July 1980, the Federal Court (Raja Azlan Shah C.J. Malaya, Chang Min Tat and Salleh Abas F.J.J.) allowed the appeal and gave the Bank leave to sign final Judgment for M\$331,731.32 plus interest. In the Judgment of the Court, it was held:	pp. 49-50 pp. 53-57
40	(i) That the facility letter of the 24th March 1975 was admissible in evidence to determine the existence and the application of the terms of the guarantee having regard to Sections 91 and 92 of the Evidence Act 1950.	p. 29-32 p. 55 ll. 21-45

(ii) Section 86 of the Contracts Act 1950 would not discharge a guarantee where "it is without enquiry evident that the alteration is unsubstantial or that it cannot be otherwise than beneficial to the surety (Holne v Brunskill (1878) 3 KBD 495, 505-506). The variations, if any, in the terms of the contract between the Bank and the Company were so fleeting and patently non-prejudicial to the Defendants as to fall within the rule "de minimis non curat lex". 10
If the Debenture was defective in failing to provide power for Receivers to sell the properties to be charged, the Bank had obtained an Order from the High Court for the properties to be sold and this was an effective Order and could not be said to result to the detriment of the Defendants. As to the failure by the Bank to obtain an undertaking from other shareholders holding about 40% of the Company's shares, there was not a shred of evidence that 20
the shareholders had in fact transferred their shares and furthermore since the approval of the Board of Directors would be required for any transfer in accordance with the ordinary powers in the Articles of Association of a private company, the Defendants held the front line of Defence to prevent transfers. It has not been alleged that the shares were other than fully paid up. In any event the Bank was 30
entitled to rely on Clauses 8 and 16 of the guarantee, which amounted to a voluntary waiver of the rights of the Defendants to be subrogated on payment of the loan.

(iii) That all the issues were clear and that the Assistant Registrar was entitled to deal with the case under RSC Order 14 procedure.

E. SUBMISSIONS OF THE BANK

13. The Bank submits that the Learned Assistant Registrar and the Federal Court of Malaysia were right to hold that the Defendants had no arguable 40
Defence to the Bank's claim and to enter summary Judgment accordingly.

(i) The Debenture

14. The Debenture obtained by the Bank, although

it did not include an express right to appoint a Receiver with power to sell the Company's undertaking charged under the guarantee, complied with the terms of the facility letter of the 24th March 1975. pp.29-32
The facility letter provided for a registered first and floating charge to be given by the Company as security for the loan. It did not set out the terms of the Debenture to be given and, in particular, it did not state that the Charge was to contain an express provision that the Receiver was to have power to sell the properties charged under the Debenture. It is not suggested by the Defendants that the Debenture given by the Company did not constitute an effective "registered first fixed and floating Charge over all fixed and current assets, both present and future."

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15. Alternatively, if the Debenture obtained by the Bank did not strictly comply with the requirements of the facility letter, there was nevertheless no variance in the terms of the contract between the Company and the Bank nor did the Bank lose or part with any security. The mere failure by the Bank to obtain a Debenture containing a particular term cannot amount to a "variance" in the terms of the contract between the Company and the Bank. The Bank has not lost or parted with any security - rather it is the Defendants' complaint that they never obtained the right security in the first place. Sections 86 and 94 of the Contracts Act 1950 therefore have no application.

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16. Assuming that the Bank's omission to obtain a Debenture did amount to an omission by the Bank to do an act which the Bank's duty to the Defendants required them to do, it did not impair the eventual remedy of the Defendants against the Company. The Defendants' remedies were self-evidently not affected. It always remained open to the Bank to apply to the Court for the appointment of a receiver with the power to sell all property charged, as in fact occurred. Holme v Brunskill (1878) 3 KBD 495, 505-506; National Bank of Nigeria Limited v Awolesi (1964) 1 WLR 1311, 1316.

17. Finally the Bank is entitled to rely on Clauses 8 and 16 of the guarantee. These clauses define the Bank's duty to the Defendants and also amount to a consent by the Defendants to any failure by the Bank

to obtain security from the Company and to any variation in the security to be obtained. Clauses 8 and 16 of the guarantee are not inconsistent with the provisions of the Contracts Act 1950. The decision of the Bombay High Court in K.R. Chitguppi & Co. v Vinayak Kashinath Khadilkar (1921) AIR Bombay 164 (where a surety was held to be discharged from his guarantee after the Plaintiffs had materially varied the contract with the debtor with the effect that the debts guaranteed by the surety were substantially increased) can be distinguished and, as has been rightly held by the Federal Court of Malaysia in Heng Cheng Swee v Bangkok Bank Limited (1976) 1 MLJ 267, is only applicable to cases where there is no consent to variation in the Contract of Guarantee: in those circumstances the creditor cannot rely on a clause which simply purports to waive all statutory rights of the surety. 10

(ii) The letter of undertaking

18. The term in the facility letter as to the provision by the Company of a letter of undertaking was not part of the security to be provided by the Company to the Bank. It was simply a pre-condition of disbursement under the loan intended for the protection of the Bank rather than as security. Under Section 94 of the Contracts Act 1950, the Defendants would not have become subrogated to the rights of a Bank under the letter of undertaking since the letter would not constitute security which the Bank had against the Company at the time when the Contract of Guarantee was entered into. 20 30

19. The failure by the Bank to obtain a letter of undertaking signed by 40% of the shareholders in the Company was a mere omission which could not amount to a variance in the terms of the contract between the Bank and the Company. The omission was not of an act which the Bank's duty to the Defendants required the Bank to do and, in any event, the eventual remedy of the Defendants against the Company was not impaired. 40

20. Alternatively, the Bank is entitled to rely on Clauses 8 and 16 of the guarantee for the same reasons as are advanced in paragraph 17 above in relation to the Debenture.

21. In these circumstances the failure by the Bank to obtain a Debenture containing express powers for a Receiver to sell the property charged and to obtain a letter of undertaking from 40% of the shareholders in the Company did not discharge the Defendants from their liability under the guarantee under Sections 86 or 92 or 94 of the Contracts Act 1950.

F. SUMMARY

10 22. Wherefore, the Bank submits that this appeal should be dismissed with costs for the following, among other

REASONS

- (a) BECAUSE the Defendants have not been discharged from their joint and several guarantee to the Bank.
- (b) BECAUSE the Defendants have no arguable Defence to the Bank's claim.

JONATHAN HIRST

C. ABRAHAM

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B E T W E E N :

- (1) OOI BOON LEONG
 - (2) PETER KOK SIEW FATT
 - (3) HIROALD KOWADA
- Appellants (Defendants)

- and -

CITIBANK N.A.
Respondents (Plaintiffs)

CASE FOR THE RESPONDENTS

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