BAIDURI BANK BERHAD **Plaintiff**

AND

PG DATO SETIA YUSOF BIN PG DATO HJ SEPIUDDIN Defendant

(High Court of Brunei Darussalam)
(Civil Suit No. 64 of 2004)

Before Judicial Commissioner James Findlay In Chambers.
Dates of Hearing: 8th and 9th January, 2014.
Date of Handing Down Judgment: 15th January, 2014.

Mr Tang Weng Leong and Mr On Hung Zheng (M/S CCW and Partnership) for the Plaintiff.
Mr Stephen Andrew Nathan, QC
Mr Hj Daud Ismail (M/S Daud Ismail and Company) for the Defendant.

J U D G M E N T

Findlay, J.C.:

The event that gave rise to this litigation happened almost eighteen years ago. Then, the defendant signed a document that, the plaintiff alleges, rendered him liable to the plaintiff for a debt due by a company called Brunko Sdn. Bhd. .

The document is headed "Guarantee to be given by individuals". The relevant parts provide for the guarantor guaranteeing on demand any money advanced to the company up to the sum of B$500,000. Clause 6 speaks of "My liability as principal debtor . . ." but seem to establish that liability only in the circumstances mentioned under Clause 12, which circumstances do not seem to apply in this case. There is nothing in this document that provides for a situation, as here, where there is no longer any money due under advances to the company because the debt has been novated and replaced by a judgment debt on 1 October 2003, the enforcement of which is time-barred.

The document provides for it to be "sealed, signed and delivered", but it was not sealed or delivered. The document purports to be signed by the defendant "in the presence of" the plaintiff's manager, but, in fact, it may not have been so signed. The document is dated 30 September 1996, but the evidence is that this date was inserted after the defendant signed it.

The plaintiff's pursuit of its claim should have been a routine matter. There were no extraordinary complications that would lead to extraordinary delays and, of the face of the matter, it is extraordinary that, in 2014, the plaintiff has still not got the matter to trial. The claim is a simple one, without any unusual legal complications. There are few witnesses and few relevant documents.

In fact, the plaintiff did issue a writ on 15 May 2000 against the company, the defendant, defendant's sister and her husband, but the writ was not served on the defendant and that matter did not proceed against the defendant. Default judgment was entered against the company on 1 October 2003. As I have said, the enforcement of this judgment is now time-barred.

Another writ was issued against the defendant alone on 1 April 2004. That claim alleged that the defendant was liable on the basis that the document I mentioned above was a "guarantee" to pay the money due by the company. There was no suggestion, at this stage, that the defendant was also liable as a principal debtor. The claim alleges a letter of demand dated 14 November 2003. On 18 October 2004, the defendant filed a defence in which, broadly, he denies liability on the basis that he was wrongly induced into signing the document by his sister, who was the plaintiff's agent. He also alleges that there was no proper demand. He further alleges that the claim against the company may be time-barred.

The plaintiff's reply alleges, amongst other things, that the defendant signed the guarantee as a principal debtor and that the plaintiff's manager witnessed the guarantee "certifying that the defendant understood" the document and that the contents were not misrepresented to him and he was not induced to enter into it. The reply now pleads another demand dated 23 March 2000 and one dated 21 July 2003. This allegation that the manager had witnessed the execution of the guarantee by the defendant was deleted in an amended reply, although, strangely, in evidence, the plaintiff sought to assert that the defendant was "estopped" from denying that the manger was present.

The plaintiff was granted leave by the Senior Registrar on 3 April 2013 to amend its claim. This now alleges that the defendant is liable as surety and principal debtor. The plaintiff says that, as principal debtor, no demand was necessary, but, as surety, demands were made on 23 March 2000, 12 August

2003 and 21 July 2003. The plaintiff replied to the letter of 21 July 2003 on 29 August 2003. The plaintiff alleges further letters of demand dated 11 November 2003 and 12 July 2012.

The defendant now appeals against this decision granting the plaintiff leave to amend its claim.

The defendant also applies to strike out or dismiss the plaintiff's action on the basis that the plaintiff has been guilty of inordinate and inexcusable delay so that there is a risk that a fair trial may not be possible. This came before the Senior Registrar in the first instance. The Senior Registrar dismissed this application. The defendant now appeals against this decision. I intend to deal with this aspect of the matter firstly, because, it seems to me, that if this application by the defendant is successful, the aspect of the amendment of the plaintiff's claim falls away.

Looking at this matter overall, as I believe the plaintiff should have done, the situation is that the event with which the litigation is concerned happened in 1996. That fact should have told the plaintiff that is was of the utmost importance to bring the matter to trial with all possible speed, not to conduct the proceedings in a leisurely manner, as if time was of little importance.

I do not intend to conduct a survey of the individual delays, some of which are excusable, such as the delay pending the decision of the Court of Appeal on the summary judgment application, but there were other delays, some of many months, where the plaintiff did little or nothing to hasten the matter to trial. The plaintiff explains some of the delays by saying that the defendant agreed to or acquiesced in postponements, but that does not help the plaintiff. The defendant had no incentive to push the matter forward; the plaintiff was in charge of its own case and it was for it to expedite the matter to trial in the light of the real possibility of dimming memories of events so long ago. An example of the sort of inexplicable delay appears from an affidavit of 20 February 2013, in which Mr Tang affirmed that "In year 2011 and early 2012" he did two things; he sought the assistance of leading counsel and he procured an enquiry agent to determine the defendant' address. It is extraordinary that, in the light of the urgency that should have driven Mr Tang, he thought it was appropriate that in a period of over a year he should attend to only two simple things that should have done in a few days at most.

The defendant made in quite clear in his lawyers' letter of 2 August 2012 that the plaintiff was concerned about the delay, pointing out that the plaintiff had served a notice of intention to proceed on 11 July 2012, but that the plaintiff had not excused or explained the plaintiff's failure to prosecute the case diligently.

The letter expressly reserved the defendant's right to strike out the case. The letter said that in February 2011 the plaintiff had said that it wished to amend the statement of claim but no steps were taken to do so. The letter went on the spell out in some detail the consequences of the delay. The plaintiff's response to this letter was to say, simply, that he did not agree with it and would proceed with the application to amend.

The plaintiff suggests that some of the delay was caused by problems in serving the defendant. I cannot believe that this aspect should have caused any appreciable delay. Brunei is a small place. The defendant was in charge of Brunei's office in London, so he clearly was someone of some prominence in the Bruneian community. I believe a few telephone calls would have established the defendant's whereabouts quite easily. In any event, the plaintiff certainly knew where the defendant was by July 2003.

I conclude there was undoubtedly inordinate and inexcusable delays following the issue of the writ on 1 April 2004, but this is not the end of the matter. Having come to this conclusion, a court is entitled to look at what happened before the issue of this writ. I do not know when there had been default by the company, but it must have been at some time before the first writ was issued of 15 May 2000 and thereafter the plaintiff apparently did nothing before the second writ was issued on 1 April 2004. At this stage, it was already eight years after the relevant event so one might have expected the plaintiff to proceed quickly and diligently.

So four years elapsed between the two writs without any explained activity at all. The only excuse given by the plaintiff is a brief statement that it was unable to serve the defendant. No details of any attempts to do so are supplied. I cannot believe that the plaintiff was unable to trace the whereabouts of the defendant over this long period.

Overall, it is inconceivable that a party could have properly conducted a comparatively simple case such as this without inordinate and inexcusable delays where it has not reached trial after at least 14 years. In any event, in my judgment, the plaintiff has not adequately explained or excused this.

Any trial seeking to resolve factual disputes as to what happened 18 years before is bound to be difficult. One aspect of this case is the construction of the document signed by the defendant and delay should not cause any problems in this respect. But here there are more important factual disputes regarding the events that led to the defendant signing the document. The defendant says that he was led to believe that he was signing a document recommending his sister as a potential customer of the plaintiff. I do not know what the defendant's

sister would say at a trial, but it must be in doubt that she would freely admit that she perpetrated a fraud on her brother. And what is the sister's husband going to say? There would be, I anticipate, differences in this evidence as to what happened on that occasion 18 years before. There would also be factual disputes as to how it came about that the defendant's sister came into possession of the bank guarantee. Did the plaintiff give that to her? If so, what was said to her by the plaintiff about obtaining the defendant's signature on it? These facts would be relevant in relation to whether or not the defendant's sister was the plaintiff's agent in procuring the defendant's signature on the document. It is also not clear to me whether or not the plaintiff is going to say that the plaintiff's manager witnessed the defendant's signature. At some time, the plaintiff alleges he was present, but seems to have changed its mind about that.

All this would be sufficient to convince me that the delay would probably result in real difficulties in having a fair trial. But here there is more. The defendant is now an elderly man suffering from a mild cognitive impairment manifesting in memory loss, possibly in the early stages of Alzheimer's disease. If the matter proceeds to trial, it is probable that he would face a vigorous cross-examination by experienced counsel, seeking to show that he is lying. The plaintiff would be bound to seek to show that the defendant is not telling the truth about the events surrounding his signature of the document. In this situation, how is any court going to seek to decide the matter fairly when there is likely to be conflicting evidence and some of it from a man who, because of his age and memory impairment, is not likely to perform well? If the trial had come about ten years ago, as I think it should have done, the situation might well have been quite different. Now, I believe, the likelihood of a fair trial is in grave jeopardy.

I should say here that one of Mr Tang's arguments based on some authority is that, should I be inclined to dismiss the plaintiff's claim, I should turn from that course because the plaintiff could simply start a new action based on the valid demands made by the plaintiff and, if I dismissed the plaintiff's action, the result would be wasted costs and time. However, if I am right in deciding that it is probable that there cannot now be a fair trial of the plaintiff's claim, this would apply as much to the new action by the plaintiff as it does to this action. Consequently, in my judgment, the commencement of a new action would be an abuse of process.

For these reasons, I dismiss the plaintiff's claim, with costs of his application, this appeal and the suit to the defendant, to be taxed if not agreed.

The defendant's appeal against the order allowing the plaintiff to amend its claim is now academic. There is no longer any claim to amend. However, if this

matter goes further, as I suspect it will, I will deal with the appeal, if only to give my view on what order I would have made regarding costs.

Here, as I have already mentioned, there has been considerable delay in the plaintiff seeking to put its house in order. This is not satisfactory, but I approach the matter on the basis that a court is always reluctant to prevent a party pleading the case it wishes to plead.

The substance of Mr Nathan's main argument in this appeal is that, if I allow the amendments, I will be depriving the defendant of a defence that the claim is time-barred. There is, perhaps, a subsidiary argument that I should not allow the amendment to allege that the defendant is a primary debtor because, on any reading of the guarantee, this claim is not maintainable.

There is no doubt that the plaintiff's claim against the company based on the default judgment is time-barred. It follows, argues Mr Nathan, that any claim on a guarantee that is subsidiary to this primary debt would also be time-barred and, if I allow the amendment, the defendant's defence in this regard would disappear.

Mr Nathan's argument is that to allow a claim under a guarantee where the primary debt is time-barred means that a claimant under such a guarantee could press a claim without any time limit, even 100 years after the main time-bar, by simply issuing a letter of demand so that the cause of action arose on that demand and that, he says, would be ridiculous. I have some sympathy with this view, but there can be no doubt, on the authorities, that a time-bar effecting the principal debtor does not discharge the surety.

The amendment to base the claim on an allegation that the defendant is a principal debtor raises an issue that I very much doubt would be established on any interpretation of the guarantee, but, I suppose, it is arguable and a matter for decision by a trial judge.

On my view of this matter, the plaintiff would have been entitled to make these amendments, even where the facts relating to some allegations arose after the issue of the writ.

Accordingly, I would have dismissed the defendant's appeal and allowed the amendments. I would have ordered costs of this appeal to the plaintiff, to be taxed if not agreed. I would have ordered the defendant to file and serve his re-amended defence to the new claims within 21 days of the amendments being served.

There are two other matters before me.

The first matter relates to an application by the defendant to adjourn proceedings pending an application for the ad hoc admission of Mr Nathan and another application by the defendant to have the application by the plaintiff to amend its claim and the defendant's application to dismiss the plaintiff's claim heard together and adjourned for hearing before a judge. On 28 February 2013, the Senior Registrar dismissed the defendant's application to adjourn the proceedings and directed that both the other matters be heard together before her on 4 March 2013. The defendant has appealed against this order.

By effluxion of time and passing of events, the defendant's appeal, other than in regard to costs, is now academic.

Mr Tang argues that I should not entertain this appeal and cites an authority of the Court of Appeal in Hong Kong that supports him. I am not convinced that this authority, which seems to be setting a rule of policy rather than law, is persuasive in the situation before me, but, in light of the view I take of this matter, this does not arise.

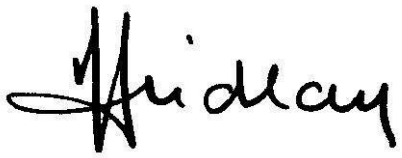
Firstly, I see no compelling reason why, in the first instance, the joint hearing should have been before a judge. Secondly, there was no prejudice to the defendant in refusing the adjournment. In fact, I applaud the Senior Registrar's attempt to avoid any further possible delays. I think I would have made the same decision.

Accordingly, the defendant's appeal fails, with costs of the appeal to the plaintiff, to be taxed if not agreed.

The other matter is an appeal by the defendant against the Registrar's order refusing to extend the defendant's time for service of his re-amended defence until the hearing of the substantive matters mentioned above.

Here, I must say I have difficulty in understanding why the defendant's should not have had this leave. It was known at this time that the plaintiff was seeking to amend its claim. It does not to me seem sensible to expect the defendant to file a re-amended defence which could well have been purposeless if the plaintiff obtained leave to amend his claim. The defendant would then have to file a re-re-amended defence. Costs would have been wasted.

Accordingly, I would have allowed that extension of time. It follows I believe that the costs of this appeal should be to the defendant, to be taxed if not agreed.



JAMES FINDLAY
Judicial Commissioner