

Liaw Watt Lee ... **1st Appellant**
Tan Biew Peng ... **2nd Appellant**
Lim Beng Kwang ... **3rd Appellant**

AND

Baiduri Bank Berhad ... **Respondents**

(Court of Appeal of Brunei Darussalam)
(Civil Appeal No. 2 of 2007)

Ak Saiffuzzaman Bin Pg Hj Md Yasin ... **1st Appellant**
Tan Biew Peng ... **2nd Appellant**
Lim Beng Kwang ... **3rd Appellant**

AND

Baiduri Bank ... **Respondents**

(Court of Appeal of Brunei Darussalam)
(Civil Appeal No. 3 of 2007)

Power, P; Mortimer and Litton, JJ.A
24th May, 2007

Principal debtor and guarantors sued by bank for amounts owing under loan agreement
Action settled. Consent judgment embodying settlement agreement. Failure to
make repayments stipulated in settlement agreement. Writ issued relying upon
loan agreement. Summary judgment sought and granted in that action. Held, on
appeal, that there was no entitlement to summary judgment in the action brought
relying upon the original loan agreement as the consent judgment embodying the
Settlement Agreement extinguished the original causes of action. Quare whether
the position would be otherwise in a fresh action relying upon the consent
judgment.

Mr Edward Tagnipis (M/S Fathan, Rudi Lee & Associates) for the Appellant.
Mr Tang Weng Leong (M/S CCW and Partnership) for the Respondent.

Power, P.:**The Facts**

We are dealing here with two actions brought by the Baiduri Bank (the bank). The first was against Yeecom Construction (B) Sdn Bhd (Yeecom) and 3 guarantors (Civil Suit 83 of 2000) and the second was against Hytec Engineering Sdn Bhd (Hytec) and 3 guarantors (Civil Suit 85 of 2000). The actions were heard together.

On 19 June 1997 the bank had granted financing facilities of \$900,000 to Yeecom with the 2nd, 3rd and 4th Defendants at trial as guarantors. On 28 June 1997 the bank granted financing facilities of \$800,000 to Hytec with the 2nd, 3rd and 4th defendants at trial as guarantors. As at 7 February 2000 Yeecom owed the bank \$8,918,076.84. As at 1 February 2000 Hytec owed the bank \$2,764,835.20.

On 3 May 2000 the bank filed a writ against Yeecom and its guarantors claiming \$9,918,076.84 and, on the same day, a writ against Hytec and its guarantors claiming \$2,764,835.20. In each case contractual interest, full indemnity legal fees and costs were claimed. Defences were filed and on 15 August 2000 the bank applied under O.14 for Summary Judgment.

The Settlement Agreement

A compromise was, however, reached and on 11 September 2000 the parties entered into a consolidated Settlement Agreement.

The defendants agreed in Clause 6 that if the bank did not enforce the debentures and did not proceed with the application for summary judgment they would provide consideration to the bank:

“6. In consideration of the Bank not pursuing with enforcing the debentures against the 1st and 2nd Borrowers and not proceeding with summary judgment under the said High Court Civil Suits No 83 and 85 of 2000, the Defendants hereby agrees to provide consideration to the Bank as will be stipulated herein below.”

This consideration was set out in Clause 7:

“7. The Bank has agreed to reduce the total sums owed by the Defendants and the Guarantors from the amount of B\$12,682,912.34 to B\$9,682,912.34 on the total amounts claimed under both High Court Civil Suits No 83 and 85 of 2000 as full settlement of the Defendants obligations to the Bank in respect of the obligations laid down in Clause 1 and 2 of this Settlement Agreement with no further banking interests to be charged.”

Clause 8 provided that in consideration of the “*global discount*” of \$3,000,000 the defendants would enter into consent judgments in the two actions. It was as follows:

“8. The Defendants in consideration of the global discount offered by the Bank, hereby agree to enter consent judgment for High Court Civil Suits No 83 and 85 of 2000 and further covenant to make payment of the remaining amounts in the following manner:

8.1. The Defendants agree that the mode of repayment shall be as follows:

8.1.1.1 An undertaking from Puja Construction Company Sdn Bhd to the Bank that they shall earmark and release 92.5% of the retention sum due under the project “Improvement of Facilities and Upgrading of terminal Equipment at Brunei International Airport” (Project No. BSB/DOD/V1.2/1999) by Puja Construction Company Sdn Bhd to the 1st Borrower. The final sum of which shall be determined by reference to the official certification of the appropriate government-appointed project consultant and which shall not be less than 7.5% of the contract sum between Puja Construction Company Sdn Bhd and the 1st Borrower.

8.1.1.2 The 1st Borrower shall ensure that Puja Construction Company Sdn Bhd undertakes to release the proportion of the retention sums due from Puja Construction Company Sdn Bhd to the 1st Borrower directly to Baiduri Bank.

The Defendants further agree to undertake to release all of the following expected progress payments and retention sums within 2 weeks of signing this Settlement Agreement.

8.1.2 The expected progress payments and retention sums due by the various clients to the 1st Borrower as listed under Schedule 1 to this Settlement Agreement. Items 1 and 2 will be released to Baiduri Bank. Items 3, 4, 6 and 7, the Defendants will obtain undertaking from the creditors in favour of Baiduri Bank. Item 5, the Defendants will assign absolutely the proceeds to Baiduri Bank.

8.1.3 The expected progress payments and retention sums due by the various clients to the 2nd Borrower as listed under Schedule 2 to this Settlement Agreement.

8.1.4 It shall be a further condition of this settlement agreement that the Defendants shall ensure that their respective clients as listed in the annexed schedules 1 and 2 do execute some form of surety or written undertaking to honour the said assignments upon signing this settlement.

- 8.2.1 The 1st and 2nd Borrower (Hytec Engineering Sdn Bhd and Yeecom Construction Sdn Bhd) have covenanted to pay the Bank \$30,000 every month until their accounts have been completely cleared.
- 8.2.2 The 1st installment payment of \$30,000 shall be by the 15th September 2000. All subsequent payments shall be made without fail within the 15 days of every consecutive Calendar month.
- 8.2.3 The Defendants undertake to take any necessary action (in particular to the rectification of defective work) to ensure that all the projects (in particular Government projects) undertaken by the 1st and 2nd Borrower are expediently completed to the stage whereby the retention sums can be released.
- 8.3 All parties agree that the Bank shall have the right to review monthly payments due from the 1st and 2nd Borrower every 6 months, with the first review to start from the date of signing this settlement agreement.
- 8.4 The 1st and 2nd Borrower agree to pay the Bank 10% of any other contract revenue except the airport project that they will receive in future in an effort to clear all their clients debts. In this respect the 1st and 2nd Borrower covenant to inform the Bank of the details of all new contracts or projects that have been awarded to them.
- 8.5 The Defendants have agreed to make a contribution of \$25,000 towards part of the costs of legal fees incurred by the Bank to be payable in 5 separate consecutive monthly installments to DR COLIN ONG LEGAL SERVICES commencing at the same time as the monthly installment payment of \$30,000 to Baiduri Bank. The first installment for legal fees shall be \$5,000 per month.
- 8.6 The Defendants agree that they shall work with the Bank in disposing of their excess assets and shall recover the miscellaneous receivables and apply the proceeds to reduce their debt with Baiduri Bank.
- 8.7 All parties have agreed that there will be no further banking interest rates charged by the Bank on the remaining outstanding sums but that the Bank shall be entitled to the normal Court interest at 6% per annum.

It seems clear that the parties, by this clause, were stipulating that consent judgments were to be entered in the overall sum of \$9,682,912.34 and that the amount owing thereunder (what the parties referred to as "*the remaining amounts*") was to be paid by payment of (i) retention sum from Puja Construction, (ii) the expected progress payments and retention sums set out in 8.1.2 and 8.1.3, (iii) \$30,000 per month by Hytec and Yeecom, (iv) 10% of contract revenue as set out in 8.4 and (v) by the disposal of excess assets as set out in 8.6.

The Consent Judgment

Consent judgments in each action were stipulated in the agreement by Clauses 9 and 10:

- “9. The Bank shall, within one (1) week of the date of signing this Settlement Agreement enter separate consent judgments pursuant to this settlement agreement for both High Court Civil Suits No 83 and 85 of 2000 with the Registrar or similar officer of the High Court of Brunei Darussalam.
10. For avoidance of doubt, the filing of the Judgment shall be carried out by the Bank through their solicitor, D. Colin Ong Legal Services, the terms of which must be mutually agreed between parties.”

Agreement in Event of Default

We turn finally to Clauses 11 and 12 which were as follows:

- “11. The Defendants hereto agree and covenant that this Settlement Agreement is to be construed in addition to the existing rights already held by the Bank under the individual guarantees and other security documentation. The Bank shall not utilize their existing rights outside the terms of this settlement agreement unless the Defendants fail in any of their obligations under this settlement agreement.
12. Both parties shall reserve their existing rights in respect of claims and defences of their existing documents so long as such rights are not inconsistent with the consent judgment entered by both parties in this agreement.”

The Consent Judgment

As matters transpired no consent judgments as envisaged by the settlement agreement were filed. What was filed on 30th October 2000 some 6 weeks after the date of the settlement agreement was a consent judgment in the following terms:

“**BY CONSENT IT IS ADJUGED** that the above parties have agreed to settle the above matter pursuant to the terms of the consolidated settlement agreement (a copy of which is annexed herewith) of both Suit No. 85 of 2000 and Suit No. 83 of 2000 dated 11th day of September 2000 between the Plaintiffs and the Defendants.

AND IT IS FURTHER ORDERED that the Summons In Chambers entered as No. 329 of 2000 be withdrawn.”

Default

The defendants, Hytec and Yecom, defaulted in their monthly instalments of \$30,000 per month and on 26th September 2005 the bank applied for leave to amend the Statement of Claim in each suit. Leave was granted without objection from the defendants.

The Amended Statements of Claim

The amended Statements of Claim maintained the original actions but gave credit for payments that had been made. The claim against Yecom had been reduced to \$9,728,255 by 8 February 2000 and the claim against Hytec to \$2,160,992.98 by 2 February 2000.

O.14 Applications to the Registrar

On 17 December 2005 the bank filed fresh O.14 applications seeking judgment of \$18,158,139.70 against Yecom and its guarantors and of \$4,242,300.67 against Hytec and its guarantors together with ancillary relief. Affidavits in support swearing to the default in payments were sworn. Both applications were dismissed by the Senior Registrar. As she was satisfied that because of the consent judgment she was *functus officio*.

Appeal to Chong, J.

Each matter was then appealed to Chong J. who allowed each appeal entering summary judgment against the three guarantors in the Yecom action and against Hytec and its guarantors. When so doing he referred to:

Atkinson and another v Caston and another (the Times 17 April 1991)
Plumly v Horrells [1869] 20 L.T. 473
Knowles v Roberts [1988] 38 Ch. D. 263
Prudential Assurance Co. Ltd v Mc Bains Cooper [2000] 1 W.L.R 2000
Korea Foreign Insurance Company v Omne RE SA [1999] ESCA Civ. 1166.

Having canvassed those authorities he held:

“Reverting to the facts in the instant case, the parties concluded a settlement agreement before the O.14 applications were heard. The agreement was incorporated in a “Consent Judgment” in each action albeit no judgment was entered in respect of the compromised claims nor an order made for compliance. There is uncontroverted evidence that the defendants have failed to comply with the terms of repayment under the settlement agreement.

In my judgment, upon a true construction of the clauses 6 and 7 of the settlement agreement, in consideration of the bank not pursuing the original claims and reducing the sums claimed, the defendants were obliged to make payment in

accordance with the mode of repayment set out in clause 8. By clauses 11 and 12 the bank expressly preserved its right to revert to the original claims upon failure by the defendants to comply with any of the terms of the settlement agreement.

Since the defendants are in breach of the terms of the settlement agreement the bank can elect either to (1) revert to the original claims or (2) enforce the compromise. If the bank elects the latter remedy, in the circumstance and on the authority of Atkinson, it may do so by starting fresh actions or in the existing actions. The bank has chosen to pursue the original claims. In my judgment the bank is entitled to do so. The bank's recourse to the original claims is entirely consistent with "Consent Judgment" which incorporates all the terms of the settlement agreement in each action.

For these reasons I would allow the appeals. Summary Judgment is entered against the three guarantors in the Yeecom action. In relation to the Hytec action, summary judgment is entered against Hytec and the three guarantors. There will be costs here and below to the bank to be taxed if not agreed. This order nisi as to costs will become absolute within 7 days unless counsel apply to be heard."

The 3 guarantors in each matter now appeal against that decision.

Court of Appeal – Submission that Appeal is Misconceived

The first matter with which we must deal is the submission by the appellants that this appeal and the appeal to Chong, J. are misconceived as the only decision of the Registrar was as to a preliminary point namely that the consent judgment made her functus officio so that she could not go on to hear the application for Summary Judgment. There was, it is argued, no order by her either granting or refusing Summary Judgment and that there can therefore be no appeal therefrom.

The Registrar held:

"The preliminary objection raised by the defendants succeeds. I rule that the court is functus officio to hear the summary judgment application, and that the application is, in any event, misconceived, as a result I dismissed the application with costs to the defendants."

The Notice of Appeal stated that the appeal was brought "*against the whole decision*" of the Registrar dismissing the Plaintiff's application for summary judgment....."

Further the Notice went on to state that an application would be made "*for an order setting*" aside the decision "*of the Registrar*" and/or an order for summary judgment....."

Decision on Preliminary Point

The appeal was plainly against the refusal by the Registrar to grant Summary Judgment and was an application for Summary Judgment to be granted. Further, such an appeal is by way of rehearing.

The only way in which the argument of the appellant could succeed in this regard would be if the Judge failed to consider the Summary Judgment application and had, somehow, confined himself exclusively to the preliminary point.

This he clearly did not do as the passage below demonstrates:

“The Amended Statement of Claim in each suit maintained the original cause of action but took into consideration payments that had been made by the defendants. In the Yeecom action the claim is for \$9,728,255 as of 8 February 2000 and in the Hytec action the claim is for \$2,160,992.98 as of 2 February 2000, together with contractual interest, legal fees on a full indemnity basis and costs.

On 17 December 2005 the bank filed a fresh application for summary judgment on the Amended Statement of Claim in each suit. In the Yeecom action the bank’s claim is for \$18,158,139.70 and in the Hytec action the claim is for \$4,242,300.67, together with interest, legal fees and costs.

The applications were supported by the affidavits of Chan Eng Pheng, the Senior Manager of the bank, in which deposed that (1) Yeecom and Hytec were in breach of the settlement agreement in that they had defaulted in payments; and (2) despite demands by the bank to the defendants, the defendants had failed to settle the outstanding debts due under the banking facilities agreement.

There is no merit in the submission that the Judge had before him only an appeal against the preliminary issue and that the appeal did not involve the refusal to grant Summary Judgment.

The Principal Argument

We turn to the principal argument which was, as set out in the appellant’s argument, that when a settlement agreement is embodied in a consent judgment “*it becomes part of the judgment and **the terms of the settlement must be treated as the judgment itself***”.

Heavy reliance was placed on authorities which establish that when a settlement agreement is not embodied in a consent judgment, in the event of a breach, the plaintiff may revive and continue his original claim in the same action if such recourse is provided for in the settlement agreement. There is no point in referring to these authorities as no issue is taken with them.

The resolution of this matter is given only limited assistance by the authorities cited. The court must ascertain the real agreement of the parties as evidenced by their settlement agreement and the effect of its incorporation into a consent order. Clause 7 plainly states that the parties have agreed that \$9,682,912.34 is the amount to be paid as full settlement of the defendants' obligations to the Bank. In Clause 8 it is agreed that this amount is to be embodied in consent judgments the sum of which is to be paid as stipulated in Clause 8.1 to 8.4. In Clauses 9 and 10 it is agreed that the judgments are to be filed within one week of the date of signing of the settlement. This was never done. The consent judgment which was filed 6 weeks later simply embodied the terms of the settlement agreement.

This variation was never adverted to in argument before us. We proceed, however, upon the basis that the parties must have agreed to vary Clause 9 so as to allow the entry of a single consent judgment in the terms of the settlement agreement. This was then done in accordance with Clause 10 by Dr. Colin Ong Legal Services.

If Clauses 7 and 8 had stood alone they would clearly have constituted a concluded settlement in the sum stated. The failure to embody them in a judgment pursuant to Clause 9 would not affect the binding nature of the settlement agreement that had been reached by the parties. If there was no clause allowing the Bank to revive and pursue its original claim it would be entitled in the event of a breach to sue only for the sum stipulated in the settlement agreement. The issue for this court, as it was for the court below, involves a determination of the meaning and effect of Clauses 11 and 12, seen in the context of the agreement read as a whole.

This raises two questions:

- i) Did the settlement agreement by reason of Clauses 11 and 12 allow the bank to revive and continue its original action?
- ii) Was this right in any way affected by the incorporation of the settlement agreement into a consent judgment?

The first sentence in Clause 11 is as follows:

“The Defendants have to agree that this settlement agreement is to be construed in addition to the existing rights already held by the bank under the individual guarantees and other security documentation.” (Emphasis supplied).

This Clause is concerned with “*the individual guarantees*” which had been entered into by the 2nd, 3rd and 4th Defendants in each loan agreement. Paragraph 5 in each writ pleaded the loan agreement whereby

“in consideration of the Plaintiffs making or continuing advances or otherwise giving credit or affording banking facilities or other accommodation to the 1st Defendant, the 2nd, 3rd and 4th Defendants agreed to guarantee, upon demand, the payment of all sums of money and liabilities at any time due on any account

whatsoever from or by the 1st Defendant to the Plaintiff together with interest at the rate of Prime plus 6% per annum.”

The guarantee was given in relation to money “*at any time due*” on, in each case, the 1st Defendant’s account with the Bank.

Clause 11 goes on to state:

“The Bank shall not utilize their existing rights outside the terms of this settlement agreement unless the Defendants fail in any of their obligations under this settlement agreement.”

The “*existing rights*” in this sentence must be the same as the existing rights in the first sentence of Clause 11, i.e. existing rights already held by the Bank under the individual guarantees. The second sentence, therefore, allows the Bank to enforce its existing rights against the guarantors in the event of the defendants failing in their obligations under the settlement.

However, as guarantors they are only liable for the amount owed by the principal debtor, Hytec in one agreement and Yeecom in the other, and this amount is the amount calculated in accordance with the settlement agreement. This must be so as there is no default clause in the settlement agreement reviving the full liability of the principal debtors should they default in their repayments. Indeed, although Clause 9 was never put into effect, it makes the intention of the parties plain by stipulating that separate consent judgments be entered into for both Civil Suits 83 and 85 in the sums agreed. The liability of the principal debtors thereafter was clearly only to be in the amounts agreed in Clause 7. What is the effect of Clause 12?

Clause 12 reads:

“Both parties shall reserve their existing rights in respect of claims and defences of their existing documents so long as such rights are not inconsistent with the consent judgment entered by both parties in this agreement.”

The right of the Bank to proceed against the guarantors is clearly not “*inconsistent*” with the agreement as the agreement provides in Clause 11 that in the event of default the Bank is entitled to utilize its rights under the individual guarantees.

Effect of Consent Judgment

What was effect of the consent judgment? It embodied the settlement agreement but as a matter of practical reality it took the matter no further than the agreement it embodied, as will be explained more fully below. The parties agreed that the principal debtor was to pay the amount stipulated in Clause 7 by way of the repayments set out in Clause 8. There was no default clause. The guarantors remained liable in the amounts at any time owed by the principal debtors by virtue of Clause 11.

Although the point taken before the Registrar by the defendants was categorized as a “*preliminary objection*”, in fact it was the core issue, which was simply this: Did the consent judgment of 30 October 2000 have the effect of extinguishing the causes of action pleaded in the statement of claim? To answer that question one normally looks to the terms of the consent judgment to see what the parties actually did to settle their differences. And here one comes immediately up against a difficulty in this case: The consent judgment is not in the usual form of a *Tomlin Order* (see Practice Note [1927] W.N.290) where the court orders a stay of the proceedings save for the purpose of carrying out the terms of the settlement annexed to the order, with liberty to apply as to carrying such terms into effect. Under a *Tomlin Order* the original causes of action are permanently stayed; proceedings taken under the original action are only for enforcement purposes.

Here the consent judgment is worded in unusual terms. The first paragraph (see paragraph 10 above) did not order anything. It served simply as a recital, recording the fact of settlement and its terms. Nothing else.

The only *order* as such is in the second paragraph:

“**AND IT IS FURTHER ORDERED** that the summons in chambers entered as No. 329 of 2000 be withdrawn”.

Here one has a glimpse of the parties’ intention relating to the core issue: The application for summary judgment under Ord.14 based upon the pleaded causes of action was to be withdrawn: One would assume from the wording of the order, *permanently* withdrawn.

When one turns to the settlement itself, one sees Clause 7, which is in unequivocal terms: The Bank has agreed to reduce the sums claimed in the two actions to \$9,682,912.34 “*as full settlement of the Defendants’ obligations to the bank in respect of the obligations laid down in Clause 1 and 2 of this Settlement Agreement with no further banking interest to be charged*”. Full stop. On the face of it, the bank has agreed to relinquish its claims totaling \$12,682,912.34 as pleaded in the statement of claim, for the benefits it was to receive under the settlement. Clause 7 contains no words of qualification such as one would expect to see if the bank was somehow keeping its options open to revert to its original claim in the event of default under the settlement.

One of the benefits the bank was getting under the settlement was the involvement of an entity not a party to the litigation: A company called Puja Construction Company Sdn Bhd. The effect of this clause in the agreement was that retention money due under a building project would be paid over directly to the bank. This would, on its face, contradict the notion of the bank retaining its right to claim the full sum of \$12,682,912.34 if the defendants should default under the settlement: There was no provision in that clause for the bank to repay those benefits in the event of it reverting to its original claim.

There is, of course, no law that precludes parties from settling an action in such a way that, in the event of breach of the terms of settlement, they can revert to the original cause of action: *Korea Foreign Insurance Company v Omne* RE SA [1999] ESCA Civ. 1166, cited by Chong, J. in the court below is an example. But for this to be achieved the order itself must be in clear terms. Generally speaking, when judgment is given in an action, the original causes of action merge in the judgment; the plaintiff's rights to relief as expressed in the statement of claim are extinguished and become rights to enforce the judgment instead. This is trite law. Can the consent order in this case have a different effect? The bank's case rests solely upon clauses 11 and 12.

In our judgment, in the context of the agreement as a whole, Clause 11 and 12 are at best equivocal. As the primary obligations under the settlement fell upon the two companies – for instance to pay to the bank \$30,000 per month under Clause 8.2.1 – the settlement agreement had, of course, to make provisions so that the bank's rights against the guarantors in respect of those new obligations are preserved. And likewise the bank's rights under “*security documentation*”. This is what the first sentence of Clause 11 seems to say: Or, at any rate, is capable of saying. This view is reinforced by Clause 12: The “*consent judgment*” in Clause 12 plainly refers back to Clause 9 where the bank undertook to “*enter separate consent judgments*” within one week: On its face, and if nothing else was said, such consent judgment would in the normal course of events have extinguished the original causes of action.

And there is this additional point: Once a step is taken to implement the terms of the settlement – whether taken by the parties themselves or by third parties brought in under those terms, as for example Puja Construction Company under Clause 8.1 – then plainly the bank is not entitled simply to “*revert to the original claims*”. The bank must in some way account for the benefits it has received under the settlement. The agreement makes no provisions for this, and reinforces the view that the consent judgment was intended to extinguish the original causes of action.

Conclusion

In our judgment the bank was not entitled to summary judgment against the guarantors on the original writs. The position might well be otherwise in a fresh action relying upon the consent judgment.

The appeals must be allowed. There will be an order nisi that the respondent pay the appellants' cost to be taxed if not agreed to be made absolute at **10 a.m. on Saturday, 26th May**. If parties wish to be heard in this regard, notification must be given to the court and to each other by 3.00 p.m. on Thursday 24th May.