BETWEEN

Hj Md Yussop Bin Hj Md Daud **Appellant**

AND

Baiduri Bank Brunei **Respondent**

(Court of Appeal of Brunei Darussalam)
(Civil Appeal No. 4 of 2007)

Power, P.; Mortimer, and Litton JJ.A.
23rd May, 2007.

Appeal against judge's award of interest and default interest due on Banker's claim under facility letters granting a term loan. Agreement for repayments on the loan to be made from customer's current account which he did not keep in funds so that it went into unauthorised overdraft. Principal sums repaid by agreement. Issues concerning the interest and default interest payable on the overdraft and principal under the facility letters. Facility letter agreements held to apply to the current account as well as the loan account. Order of the judge upheld. Appeal dismissed.

Mr Chiew of Francis Chiew & Co for the Appellant.
Mr Nava of M/S Ahmad Isa & Partners for the Respondent.

Mortimer, J.A.:

This is an appeal by the appellant (the defendant) from the judgment of Leonard J of 8 February 2007 affirming in substance, clarifying and bringing up to date a decision of the registrar awarding the respondent (the plaintiff) bank interest and costs on sums owing.

The Facts

The defendant is a longstanding customer of the plaintiff bank. The relationship began long before the events with which we are concerned. These events begin with a restructuring agreement contained in facility letters addressed to the defendant on12 April 1999 and 2 July 1999. The latter supplemented and repeated the provisions of the former save for the amounts involved. This arrangement was to restructure the defendant's previous loan agreement and his overdrawn current account. The total loan to be drawn down was $822,000 which was to be repaid in 52 monthly instalments of about $15,807 plus monthly interest. These repayments were to be met out of the defendant's current account. The facility letters referred to both

the current account and the loan account. They were addressed to the defendant with his current account number and the repayment clause included the provision:

> "Please therefore ensure that your Current Account is adequately funded to meet this (these) loan repayments and interest."

The only address provided to the plaintiff by the defendant to which communications including statements could be sent was a post office box number. It appears that shortly after the agreements the defendant allowed the post office box address to lapse without providing an alternative address.

By the end of August 1999 the defendant failed to honour the agreement by ensuring that his current account was adequately funded to meet the repayments. In consequence the repayments were met out of the current account which went into an overdraft for which the defendant had no agreed facility. Had the bank not transferred money in this way the defendant would have defaulted after a few repayments and the whole loan sum would have become due under paragraph b) of Events of Default in the agreement.

By 1 May 2000 the unauthorised overdraft of the current account amounted to $126,213.13. On 6 May 2000 by a letter to the defendant which amounted to a notice of default the bank called in the balance of the loan amounting to $663,932.10 as well as the overdraft making a total of $790,136.13.

Following the notice of default, subject to a request for particulars by the defendant, it is accepted by the defendant that the default rate of interest provided for in the facility letters applied both to the overdraft and the balance of the loan. This was 6% over prime lending rate making 11.5% in all.

A request for particulars of the accounts and the breakdown of the sums owing was made in a letter to the plaintiff on 20 September 2000. The bank did not reply and the defendant took no further action through the court to obtain them

Following the notice the defendant still made no repayments and on 20 June 2000 the plaintiff took proceedings for the recovery of the principal and interest owed. On 30 September 2000 a defence was filed which was a general denial save for an admission that some money was owed but not the sum claimed.

Thereafter it is better that a veil is drawn over proceedings between the parties until April 2004. There was an interlocutory judgment for "damages" to be assessed. This is not easily understood. There was no claim for damages either in the statement of claim or elsewhere. The claim was for a debt and contractual interest. However, this misnomer misled no one. There were a number of hearings interspersed with lengthy adjournments during the registrar's 'assessment' at the end of which she made her order on 8 February 2005. This set out in unusual terms a consent judgment recording an agreement reached between the parties on 13 April 2004 for the repayment of $741,087.40 by 15 May 2004.

This sum of $741,087.40 was paid by cheque on 15 May 2004 which was not cleared until 21 May. This is an appropriate starting point for our consideration of this appeal as it was for the judge below. In spite of submissions to the contrary there is no doubt that this sum was the $790,136.13 principal and interest due on 1 May 2000 less the interest element. The interest element amounted to loan interest of $43,681.21 which had been calculated at the agreed loan rate of prime plus 2%. Also, a sum of $5,367.52 which was the past overdue default interest charged monthly at the default rate of prime plus 6%. These two sums representing interest amount to $49,048.73 and if this sum is deducted from the sum claimed the result is $741,087.40.

Leonard J gave judgment on the defendant's appeal to him on 3 February 2007. He had the advantage of a further affidavit from Catherine Chin who was the plaintiff's manager in charge of the defendant's account. The plaintiff claimed default interest on the sum of $741,087.40 from 1 May 2000 until 21 May 2004 when the payment cheque was cleared. Miss Chin's calculation which was accepted by the judge amounted to $345,803.56. Additionally default interest was claimed upon $49,048.73 which was the capitalised interest owing by the defendant on 1 May 2000 at the default rate up to the date of the judgment on 3 February 2007. This amounted to $38,170.66. This latter sum was accepted by the judge as due and owing and together with the other sums led to his judgment for a total of $433,022.95.

However, the judge held that interest at the default rate was continuing on $49,048.73 so in accordance with the provisions of the facility letters the judge ordered that interest at that rate should continue after judgment until the latter sum was settled.

Finally, he awarded costs on a solicitor and client basis.

The Appeal

The Appellant's Submissions

Mr Chiew, for the defendant, laboured under the disadvantage that he had not represented the defendant in the many and dispersed hearings before the registrar nor in the much more straight forward hearing in front of the judge. He takes two main points. The first is that no default interest ought to have been charged on any amount owing before the notice of default on 6 May 2000. The letter of 6 May 2000 refers to the state of the accounts on 1 May 2000 and it is convenient to take that as the relevant date. Mr Chiew urges that the facility letters do not apply to the current account at all and therefore default interest in so far as it has been charged on the current account cannot be claimed. He also submits that even if the facility letters do apply to the current account, on a proper understanding of the agreement, default interest only is payable after the notice.

His second point relates to a sum of $243,817.49 which according to Catherine Chin's first affidavit was taken by the plaintiff from the defendant's joint account with his brother and used to reduce the debt in the relevant accounts. As this sum is not mentioned in the calculation put before the judge, he submitted that there had

been an error. However, Mr Nava, who appears for the plaintiff, was present when the agreement was made for the defendant to repay the principal sum owing on 13 April 2004. He recalls the agreement was that this sum of $243,817.49 should be credited back to the joint account and treated as if it had never been taken from it. Mr Nava's recollection is supported by the registrar's note of the agreement. In the circumstances it is not necessary for us to consider this point any further. It was an understandable error on Mr Chiew's part.

Finally Mr Chiew touched upon the only substantial submission that seems to have been made by the defendant in the hearings below. This is that on 29 September 2000 the defendant asked the plaintiff for particulars of the breakdown of the relevant accounts. These were never provided by the bank. But the application was never followed up by the defendant in any application to the court and none were provided. The suggestion below was that no default interest should be paid after the request. It can be seen from the defendant's written submissions to the registrar and to the judge that this was his main submission at that time. Before this court the defendant pursues the point but only in his submissions on costs.

He contends that the failure of the plaintiff to provide particulars of the accounts in September 2000 should be reflected by the court here and below. It is submitted that the defendant was embarrassed by not knowing what sums he owed and this caused delay in the proceedings. Therefore, the registrar and the judge were both wrong in awarding costs on the higher scale. In these circumstances each retained a discretion which ought to have been exercised in the defendant's favour by awarding costs on the usual scale.

The Plaintiff's Submissions

Initially Mr Nava took a number of procedural points relating to the failure of the defendant to file documents for the appeal. However, we gave such directions for the abridgement of time and the filing of documents as were necessary to enable the appeal to proceed. It did.

On the main issue Mr Nava supports the judge's decision. He refers in particular to Catherine Chin's last affidavit and the calculation annexed to it. This was neither admitted nor challenged by the defendant and was accepted by the judge and reflected in his judgment.

Mr Nava supports the judge's finding that the plaintiff was entitled under the agreement to charge the default rate of interest on the current account before the default notice. He relies upon the provision for repayment of the loan through the current account (to which we have referred) and the wide provision under the clause for Default Interest. He submits that when these two clauses are read together the facility letters apply to the current account as well as the loan account with the consequence that the default rate of interest could be charged on the current account before the notice of default.

As for the awards of costs below on an indemnity, or solicitor and client basis, he relies upon the relevant provisions in the clauses on Fees and Expenses and Default Interest.

In answer to the defendant's contentions about the missing particulars Mr Nava points out that although the particulars were never provided in answer to the letter they were provided throughout by the plaintiff in usual monthly statements. Although the defendant may not have received these because he did not service his post office box number this was the only address which the defendant provided to the plaintiff. Yet, Mr Nava continues, no application for particulars was ever made to the court.

Conclusion

The main issue for our decision is whether the judge was right when he awarded the default rate of interest on the unauthorised overdraft before the notice of default was issued. This depends upon whether the agreement in the facility letters applies not only to the loan account but also to the current account. Both the letters are headed, 'BANKING FACILITY ACCOUNT NO: 00008–10222-8' which was the defendant's relevant current account. Whereas this heading is not conclusive it becomes so when the combined meaning and effect of the Repayment clause and the Default Interest clause in the facility letter are examined.

In a passage to which we have already referred the Repayment clause specifically refers to the current account by requiring the defendant to keep his current account adequately funded to meet the repayments of both the loan and the interest. Also relevant are certain terms of the Default Interest clause. Note the provision that:

> "In the event of delay in the payment of … any monies whatsoever due and owing under or in connection with the facility."

and the following passage,

> "…. the bank shall impose interest (at the default rate) on the overdue loan instalments or any other monies due and owing under or in connection with the facility until the date of full payment."

On a proper interpretation of the letters the provisions undoubtedly apply to the current account. Especially the requirement to 'adequately fund' it. The unauthorised overdraft was directly related to the failure to "adequately fund" it. These provisions are wide and do not depend upon a notice of default. See the passage to which we have referred. The plaintiff is therefore entitled under the agreement to charge default interest upon the unauthorised overdraft before the notice of default. This relates to the sum of $5,367.52 which is part of the $49,048.73 awarded by the judge.

As to the main point made by the defendant in the hearings below that the interest should not run after the plaintiff's application for particulars of the claim this lacks merit and has not been pursued. The failure to obtain particulars was the

defendant's fault. If particulars were required no good reason for not pursuing the request procedurally through the courts has been advanced. There is none. Nor is the failure to provide particulars any valid reason for the plaintiff not applying default interest to the sums owing in accordance with the agreement.

For these reasons we are satisfied that the judge's decision and the order he made on the sums owing for principal and interest are correct. The defendant had no answer before the judge to Catherine Chin's affidavit and the calculation annexed to it. His counsel's submission that the rate of default interest amounted to a penalty has not been pursued by Mr Chiew before this court no doubt because he realistically recognises that the submission also lacks merit.

Finally, both the judge and the registrar were right when each ordered the contractual level of costs on a solicitor and client basis. This is not only provided for in the Fees and Expenses clause of the facility letter:

> "You will reimburse us on demand all expenses (including legal expenses) incurred by us in connection with the negotiation, preparation and signature of this letter and in the preparation by our lawyers of all security documents, and will reimburse us in full on demand for all expenses (including legal expenses) incurred by us in suing for or protecting or enforcing our rights under this letter (on a full indemnity basis)."

But also in the Events of Default clause c) which provides:

> "In the event that the facility shall be declared immediately due and payable as stated above you will reimburse the bank for all losses and expenses incurred by the bank in consequence of the event of default including all legal fees and expenses (on a solicitor and client basis) incurred by the bank in enforcing its right through any process of law."

These clauses applied to the present proceeding for recovery and nothing has been advanced upon which we could find otherwise. The suggestion that the failure to provide particulars entitles the defendant to avoid the effect of the clauses is untenable for the reasons we have already expressed.

The appeal is dismissed with costs on a solicitor and client basis. We therefore affirm the judge's decision, and we order:

Judgment for the plaintiff for $433, 022.95, with an order nisi for costs on a solicitor and client basis.

Interest from 4 February 2007 until full settlement:

upon $49,048.73 of the judgment sum, or any part remaining unpaid,. at 11.5% per annum, and

upon $383,974.22 being the balance of the judgment sum or any part remaining unpaid at the judgment rate of 6% per annum.

The order nisi will become absolute at 4 p.m. on 24 May 2007. If either party wishes to make further submissions on costs it must notify the court, with notice to the other party, before the order becomes absolute and the parties will be heard at 9.a.m on Saturday 26 May 2007.