

IN THE COURT OF APPEAL OF BRUNEI DARUSSALAM

CIVIL APPEAL NO. 7 OF 2001

BETWEEN

SITI HAWA BINTI HAJI MOHD HUSSEIN 1st Appellant
MALAI HASHIM BIN HAJI MALAI OTHMAN 2nd Appellant

AND

AWG RAMLE BIN MOHD SHARIFF 1st Respondent
SHARIFAH MARIANAH HAJI MALAI OTHMAN 2nd Respondent
STANDARD CHARTERED BANK 3rd Respondent

Before : HUGGINS, P.; FUAD AND SILKE, JJ.A..

Date of Hearing : 9TH OCTOBER 2001.

Date of Judgment : 25TH OCTOBER 2001.

J U D G M E N T

HUGGINS, P.:

The circumstances leading up to this appeal are as follows. The 1st and 2nd Respondents wished to buy Lot 23927 in E.D.R. 21315. For this purpose they sought to borrow money from the 3rd Respondent (“the Bank”). The loan was made on terms set out in a letter dated 29th April 1988. These included a provision that the land would be charged for repayment of the loan, a provision that Lot 114720 in E.D.R. 13564 owned by the 1st Appellant would be similarly charged and a provision that the 2nd Appellant (the husband of the 1st Appellant) would sign a guarantee of the 1st and 2nd Respondents’ liability. Memoranda of charge were duly executed, but that relating to Lot 23927 was

not registered. The borrowers defaulted and the Bank looked to the Appellants to make good the outstanding balance of the debt.

In the present action against the Bank the Appellants sue upon an alleged implied warranty that the Bank would perfect its security by registering the charge on Lot 23927 and, in the alternative, in negligence in failing to register the charge.

On 14th November 2000 the Bank took out a summons asking for the action to be struck out on the grounds (1) that by cl.26 of the charge executed by the 1st Appellant it was expressly provided that the Bank had power inter alia

“to deal with exchange release or modify or abstain from perfecting or enforcing any security or other guarantees or rights it may now or at any time hereafter or from time to time have from or against the Chargor or the Borrower or any other person”,

and (2) that in cl.6 of the guarantee signed by the 2nd Appellant there was a comparable provision. The summons came before a Senior Registrar, who ordered that the action be struck out. The Appellants appealed to a Judge in Chambers and their appeal was dismissed. They now ask this Court to reverse the decision of the Judge.

Although the claim indorsed on the Writ and the subsequent Statement of Claim were drafted by solicitors, before us the 2nd Appellant has appeared in person and has also represented his wife. He has sought to contend that the Manager of the Bank represented to them that they would be liable only if any other security had first been realised and had failed to satisfy the debt, but no such allegation was made in the Statement of Claim, and no application has been made to amend. In para.16

“The plaintiffs further aver that in requiring them to enter into the said Memorandum of Charge and the guarantee the 3rd Defendant expressly and impliedly warranted that they would

act in ‘good faith’ and would not do any acts or any acts of omission which would be inconsistent with the Plaintiff’s entitlement and rights of subrogation over the said security namely Lot 23927”.

The only other complaints made by the Appellants before us have been, first, that some of the loan was advanced by the Bank to the borrowers before the charge and guarantee were signed and that they were not told of this. There was no obligation to tell them, for the date of payment was immaterial. Secondly, they assert that there was a statutory duty on the Bank to register the charge on Lot 23927 arising from s.23(1) of the Land Code, but on the true construction of that sub-section it is not mandatory: it merely makes an unregistered transfer, charge, lease or sub-lease unenforceable.

The only question which has caused me any difficulty is whether the Appellants should be given leave (for which they have not asked) to amend their Statement of Claim to plead the representation upon which they now seek to rely but which has not been fully particularised. The result of the present application depends entirely upon the answer which we give to that question, because the terms of the documents the Appellants signed are clear.

In all the circumstances I am not persuaded that an amendment should be allowed. Accordingly I must conclude that the Courts below came to the right decision, and I would dismiss the appeal.

FUAD, J.A.:

Mr Hashim is clearly suffering under a burning sense of grievance and believes that he has been very badly treated by the Bank. He is unrepresented before us but Counsel appeared for him before the Registrar and the Judge in Chambers. There can be no doubt that the decision to strike out his action was right as the matter was presented to the Registrar and the Judge.

Neither in Mr Hashim's Statement of Claim, nor in the affidavit he swore when resisting the Bank's strike out application, nor in the skeleton arguments of Counsel then appearing for him, was any mention made or reliance placed on a representation of the kind Mr Hashim now seeks to be allowed to assert.

Mr Hashim's Statement of Claim speaks of express and/or implied warranties affecting his liability, but no such warranties can be discerned in the relevant documents (the terms of which negate their existence). Therefore the representations Mr Hashim now seeks to raise must presumably be oral ones. These would not be easy to establish in the face of the contents of the contractual documents.

An appellate court certainly has power to allow pleadings to be amended in appropriate cases, but I do not think it can be right to set aside Leonard J's judgment to allow Mr Hashim to amend his pleadings in the way he seeks to do in the circumstances of this case.

I, too, would dismiss the appeal.

Silke, J.A,

The History

Awg Ramle bin Mohd Shariff and Sharifah Marianah Haji Malai Othman - the 1st and 2nd Respondents respectively in the proceedings before us – desired to buy, from a Mr Lim, a house and a piece of land described as Lot No. 23927.

They needed finance for this. They went to the Standard Chartered Bank. On the 29th April 1988 the then Manager of the Bank, Mr. William B Dawson, wrote a letter to the two respondents telling them that their application had been approved on terms and conditions therein set out – the Banking Arrangements Letter.

In so far as they are relevant those terms were that a fixed loan of \$236,000.00 repayable in ninety six equal monthly instalments at a rate of BND 2,458 per month plus interest to start at the end of May 1988 was granted. There was to be a standing order authorising the Bank to debit their account monthly in this amount.

As security there was to be a deposit of Title Deeds of another lot of which Siti Hawa binte Haji Mohd Hussein is and was the registered owner. She and her husband, Malai Hashim bin Haji Malai Othman, are respectively the first and second appellants before us. This is Lot 14720 which contains the family home. It was the 2nd appellant who presented this case to us on behalf of his wife and himself. I shall refer to him as Malai Hashim.

He gave a letter of guarantee. He is the brother of the 2nd Respondent.

The 3rd Respondent here is, for the sake of completeness, the Bank. It, represented by Mr. Siva Sankaran, was the only Respondent to appear and present argument.

S 23 of the Land Code, Cap 40 requires that any transfer, charge, lease or sublease of land be approved by His Majesty the Sultan-in-Council before it can be registered.

The Bank noted that it required, and had received, a Memorandum of Charge, with the 1st appellant as the chargor and with the Bank as chargee, for the full sum of BND 236,000 : they also held, pending approval of that Memorandum of Charge, an irrevocable Power of Attorney signed by the first appellant permitting the Bank to “use, manage, sell or otherwise dispose of” Lot 14720 as it should deem appropriate.

Further they also held the title deeds of the Lot to be purchased – 23927- together with the two memorandum of charge, one by the then registered owner Lim Chin Tian and one signed in escrow by the prospective registered owners.

It is of moment, in view of the later happenings, to recite the concluding words of the paragraph in the Banking Arrangements letter relating to these two charges:

“duly witnessed pending the approval of His Majesty the Sultan-in-Council.”

Pending that approval the Bank also held an irrevocable Power of Attorney given by Mr Lim and the 1st and 2nd Respondents permitting the Bank to act in the same manner as mentioned in the Power that was given by the 1st appellant in respect of Lot 14720.

The Bank also held the Letter of Guarantee given by Malai Hashim.

The loan was to be available to the 1st and 2nd Respondents on the terms in the Banking Arrangements letter.

They were informed that the “banking facility” detailed in it, while subject to review on 26th April 1989, was made available at all times solely at the discretion of the Bank.

Both respondents signified their acceptance of these Banking arrangements. Their confirmation is not dated.

No copy of the Banking Arrangements Letter was sent to either of the appellants.

For some reason of which we are not aware – possibly a delay in payment of the purchase price – the transfer of the land from Mr. Lim to the 1st and 2nd Respondent was not entered in Land Register until 2nd April 1990.

The Bank made no attempt – again we do not know why - Mr. Sankaran, when asked, informed us that he had no instruction on the matter – to register the memoranda of charge they held on Lot 23927. They never did seek the necessary prior approval of

His Majesty the Sultan-in-Council. On the memoranda there is endorsed a draft approval which was never effected, though we are told some attempt was made in 2000 to seek approval and to register the memorandum in respect of Lot 23927.

Monies were paid out to the 1st and 2nd Respondents under the agreed terms. Malai Hashim has produced the details of the loan account of the 1st and 2nd respondents which shows the disbursements and repayments by and to the Bank. Those repayments were sporadic and the last one of consequence was made on the 16th March 1999 leaving a balance due at that time of BND 137,69.79. The closing balance on 20th July 2000 is shown as BND 149,831.05. As no payments have apparently been made since then the debit balance will now have increased substantially.

If Mr. Lim, when the transfer of his land into the names of the now registered owners was effected in 1990, was ever informed that he was discharged from the duties required of him by his Power of Attorney or that memorandum of charge he signed was also discharged when that transfer took place, we know not.

In 1992, the 1st and 2nd respondents required funding for some other purpose. They approached Malayan Banking Berhad – “Maybank”. Maybank required security. The 1st and 2nd respondents, in clear contravention of the terms of a clause in their memorandum of charge to the Bank prohibiting their so charging without the consent of the Bank, which it would appear was never sought, charged Lot 23927 to Maybank. Maybank, on 30th September 1993 registered that charge.

How the Title Deeds of Lot 23927, deposited with the Bank, came to be used for that transaction remains a mystery. Where those Title Deeds are now we do not know.

Because the Land Register was silent as to the charge in favour of the Bank, Maybank had no notice of it. Their charge is the prior registered charge whichever

course the Bank may now take. If they still hold the Title Deeds, they may have an equitable charge over them.

Maybank is not, of course, before us. We do not know – Mr. Sankaran again having no instructions on this - what if any, steps have been taken to sell Lot 23927. Malai Hashim, as we understand him would not object if there were a sale of Lot 23927 and if he were to be called upon to pay any deficit between the sale price and the repayment to the Bank and Maybank. Mr. Sankaran says that he could only avail himself of this if he were to first pay up the full amount now due under his guarantee. I, for one, got the impression that the Bank were not interested in any sale of Lot 23927 or consultation with Maybank until Malai Hashim paid up. I hope I am wrong in this but it does not, in any event, affect the main issue before us.

The Actions

On 14th July 1999 a firm of advocates wrote to the 1st appellant, as the registered owner and chargor of Lot 14720, on the Bank's instructions informing her that, as the "customers" – the 1st and 2nd Respondents – had failed to service the repayment of banking facilities:

“...The Banks will foreclose on the property.

The property has been valued at B\$412,000.00.

If you are interested in redeeming the property, please contact us or the Bank.”

This says, Malai Hashim, is the first time, eleven years after the original charge, that the Bank had made any approach to either his wife or himself.

Malai Hashim who is, incidentally, Head of Research in the Ministry of Development, then started to make enquiries as to what had happened in the intervening years.

On the 14th June 2000 the advocates wrote again on behalf of the Bank to the 1st appellant. They made reference to registered charge No. 140 of 1990, to the amount then due by 1st and 2nd Respondents as being B\$173,618.71 and stated that they would sell Lot 14720 unless either the 1st and 2nd Respondents or the 1st appellant paid the Bank within two months.

As a result of this letter Malai Hashim made a search, at the Land Office, on the Register relating to Lot 23927 and found the position to be as earlier described. His then advocates wrote to the Bank's advocate to this effect:

“Our clients are puzzled as to why said property is now charged to Malayan Banking Berhad and are equally puzzled that no action have (sic) been taken against the borrowers/customers regarding the matter.”

Malai Hashim met and discussed the matter with officials of the Bank but nothing was resolved.

On the 8th September 2000 the advocates for the Bank wrote to Malai Hashim requiring him to pay, under the terms of his guarantee, the then outstanding amount of B\$151,081.54 due by the 1st and 2nd Respondents. If he failed to pay, legal action would be initiated against him.

On the 19th September 2000, the Bank instituted proceedings entitled Suit 181/2000 with Malai Hashim as defendant. A defence was filed in that action and there is a counterclaim.

It would appear that the details of that suit were not referred to in the proceedings which concern us. Mr. Sankaran objected to Malai Hashim going into its details. We accepted that objection.

On the same day proceedings entitled Suit 182/2000 were filed with the 1st and 2nd appellants as plaintiffs and the 1st and 2nd Respondents, and the Bank, as defendants.

There was an Indorsement of Claim. The plaintiffs in 182/2000 claimed, as the surety on the part of the 1st appellant and Malai Hashim as the guarantor, for a declaration that, by reason of the Banks breach of duty and or negligence, they be discharged under both charge on Lot 14720 and guarantee and “exonerated” from all liabilities; for an order that the Bank should cancel that charge and give the Title Deeds of Lot 23927 to the 1st appellant. For an order that Malai Hashim’s guarantee be cancelled and, finally, for an order granting an injunction restraining the Bank from foreclosing against Lot 14270.

There was then a Statement of Claim giving details of the reasons why those declarations were sought and orders requested. There was reference to an express duty on the Bank (paragraph 6) to secure the due registration of the charge on Lot 23927.

There were other averments in that document which need not concern us now except for that contained in paragraph 16 which reads:

“The Plaintiffs further aver that the 3rd defendant [the Bank] for the protection of the Plaintiffs right as a foresaid further expressly and impliedly warranted that they would and was under a duty to act in “good faith” and to exercise due diligence to preserve and perfect the security documents and securing the due registration of the

Charges over Lot 23927 and thereafter enforcing the said security in event of defaults on the part of the 1st and 2nd defendant.” [1st and 2nd Respondents] here. (my emphasis).

The reason why I think this paragraph has moment will appear later.

The proceedings before us

On the 14th November 2000, in action 182/2000 the Bank sought an order from the Registrar that the claim of the 1st and 2nd appellant be struck out under O 18 r19(d) (sic) of the Rules of the Supreme Court 1980 or under the inherent jurisdiction of the Court.

This application was heard on the 28th February 2001 and it was ordered by Dy Ramzidah, the Registrar, that the Writ of Summons and the Statement of Claim be struck out.

We do not have her reasons but nothing turns on this.

Against that order the 1st appellant and Malai Hashim appealed to a Judge who heard the matter on the 26th June 2001. He upheld the Registrar’s order and dismissed the appeals.

He gave his written reasons later.

The 1st appellant and Malai Hashim now appeal against that decision.

Before the Registrar and the Judge, Leonard J., the appellants were legally represented: before ourselves they were not.

At both hearings the appellants relied on a duty they said lay on the Bank to register the Memorandum of Charge on Lot 23927. It was contended the Bank failed in their duty.

The Bank said no. It relied on clauses in similar wording contained in both the Memorandum of Charge and the guarantee.

Clause 26 of the Memorandum of Charge, so far as it is material, reads

“26. The chargee may at any time and without in any way affecting the security hereby created:-

- (a)
- (b)
- (c)
- (d)
- (e) deal with exchange release or modify or abstain from perfecting any security or other guarantees or rights it may now or at any time hereafter have from time to time have from or against the Chargor or the Borrower or any other person.
- (f)

Clause 6 of the guarantee, so far as it is material, reads

“6. The Bank may at all times without prejudice to this guarantee and without discharging or in any way affecting my/our liability hereunder.

- (1)
- (2)
- (3)
- (4) abstain from perfecting or enforcing any securities or other guarantees or right which the Bank may now or hereafter have from or against the customer or any other person.”

These are standard clauses.

As Leonard J. rightly said

“This being an action in tort, the first thing the Plaintiffs [the 1st appellant and Malai Hashim] needed to establish was the existence of a duty. They would then have had to show a breach of that duty followed by a consequential loss.”

Relying in particular, on the use of the word “abstain” in both these clauses the Bank says we were under no such duty. Despite the harshness of such a view, in the circumstances here, the Bank was correct.

There was no cause of action disclosed on the pleadings as they stood and the decision of both the Registrar and the Judge are, on the face of them, unassailable.

But, before us Malai Hashim raised specifically, and for the first time in these proceedings, a representation he says was made to him by the then Manager of the Bank, Mr. Dawson, to the effect that the Bank would not proceed against the 1st appellant or Malai Hashim until it had exhausted its rights against the 1st and 2nd Respondents. This representation, if proved, could place a duty on the Bank to see that they were in a position to carry it out. In my judgment, while never spelt out in the pleadings it was foreshadowed by the use of expression “expressly.....warranted” contained in paragraph 16 of the Statement of Claim set out above.

In parenthesis, I note that Writ No. 181/2000 to which there is a defence and counterclaim, cites Malai Hashim, the guarantor, as sole defendant. Writ No. 182/2000 is a claim by both the Mortgagor and the guarantor with the Bank as the 3rd named defendant.

No Court will strike out an action if, by amendment, the pleadings can show a viable cause of action.

Now it is not for this Court to draft amendments to a pleading for a party, unrepresented or not. Further it is not for this Court to forecast the final result of an action containing, in its pleadings, such amendment – and I am more than aware that the 1st appellant and Malai Hashim are, presently, unrepresented and that the amount of the debt still rises. Nor it is for the Court to advise what should be done about action 181/2000 though this obviously would be affected. I am fully aware that we do not have sight of any amendment.

However, in my judgment, it would be proper here to give leave to the 1st appellant and Malai Hashim to amend their pleadings to clearly show the particulars of the express warranty which they allege and its consequence. Time limits would have been imposed on the making of such amendments.

I would have allowed the appeal for the reasons given.

SIR ALAN HUGGINS
President, Court of Appeal

DATO SERI PADUKA KUTLU TEKIN FUAD
Judge, Court of Appeal

WILLIAM SILKE
Judge, Court of Appeal

Appellant

Mr Siva Sankaran

In Person

for Respondent