Garnet Sdn Bhd … **1st Appellant**
Lester Lee Kok Wah … **2nd Appellant**

AND

Baiduri Bank Berhad … **Respondent**

(Court of Appeal of Brunei Darussalam)
(Civil Appeal No. 12 of 2011)

Before: Mortimer P, Davies and Leonard JJ A.
8th December, 2011.

Order 14 proceedings taken by bank against company debtor and the guarantor. Summary judgment in the bank's favour granted by the judge. On appeal by the debtor and the guarantor Certificate of indebtedness held to be conclusive of the amount owed. Submission that leave to defend should be given because the guarantor alleges he signed a settlement agreement because of undue influence rejected as the suggestion of undue influence was held to be unmeritorious and a sham. Appeal dismissed with indemnity costs.

Mr Christopher Sawan ak Jiram of Sheikh Noordin Mohammad & Associates for Appellant.
Ms Geetha a/p V Janardhanan of Abrahams Davidson & Co for Respondent

Cases cited in the Judgment:

Garnet Snd Bhd and Lester Lee Kok Wah v Baiduri Bank Civil Appeal No 8 of 2010

Mortimer P.:

The respondent/ plaintiff is a bank. The appellant/defendants are a company (the company) which is indebted to the bank and the guarantor of the company debt who is also its managing director.

This is an appeal against the decision of Findlay J on 14 July 2011 in which he granted the bank summary judgment under order 14 against the company and the guarantor for debts owing to the bank.

The company is in the construction business. Since about 1994 the bank has granted successive facilities to finance its construction contracts. At least since 18 October 2000 these facilities have been secured by the guarantor up to BN$8,000,000.00 together with provisions for interest.

In about November 2005 the company defaulted and shortly thereafter the bank demanded full repayment from the company and the guarantor. On 23 November 2006 the bank applied for summary judgment under order 14. The hearing was fixed for 22 January 2007 but before the hearing the parties reached a written settlement agreement which was signed on 19 January 2007 by the guarantor on behalf of the company.

This agreement enabled the company to discharge its obligation by paying a much lesser sum than that owing and paying that sum by instalments. The balance was to be partly recovered by the assignment of contract debts. It was an agreement greatly to the benefit of the company and the guarantor. Should there be a default however the bank could reinstate the order 14 proceedings under the facility agreements with all that that entailed.

The settlement agreement

The settlement agreement is relied upon by the bank as an admission of the total amount owing

By clause (c) of the settlement agreement in case of default the whole outstanding debt became immediately due and owing together with interest, legal fees and costs on a full indemnity basis and the bank was at liberty to restore the summary judgment application.

By preamble (ii) of the agreement the company and the guarantor admitted the outstanding debt of BND12,249,341.50 as at 19 January 2006 with interest at 11.5% from the 1 January 2006 until full and final settlement.

The bank agreed to settle the debt by the payment of BN$ 2,920,000.00 by instalments. Interest was agreed at a lesser rate than under the facility agreements and assignments of several substantial contracts was accepted by way of security and diminution of the debt.

It is to be noted that the company and the guarantor were represented by solicitors during the negotiation of the settlement agreement

The agreement is convincing evidence of the indebtedness of the company at the time when it was signed.

The default

Although one instalment was paid before the settlement agreement had been signed and a number of instalments were paid on time thereafter the company defaulted. Consequently the bank reinstated the summary judgment application and hearing was fixed on 21 February 2008. There followed unacceptable delay with the consequence that this relatively straightforward summary judgment application is still unresolved 4 years after it was reinstated.

Since then however on 20 March 2009 the bank issued a Certificate of Indebtedness in the sum of BND 16,131,211.63.

The appeal

Mr Sawan appears for the company and the guarantor and he contends that the company and the guarantor ought to be given leave to defend. He takes 2 points. 1st he submits that he should be permitted to go behind the certificate of indebtedness and challenged the breakdown of the sums due. 2nd he submits he should have leave to defend on the basis that the bank exerted undue influence upon the guarantor to sign the settlement agreement

The Certificate of Indebtedness

Mr Sawan submits that at no time has the bank provided a breakdown and particulars of the sums due, the interest charged, the money received from the assigned contracts nor the total sums repaid. As the company has repaid considerable sums over the years the lack of particulars prevents it from challenging the amount said to be due. For this failure justice requires that leave to defend should be granted.

The submission is emphasised by the suggestion that the money from the assigned contracts was to be paid into 3 nominated accounts all controlled by the bank but the company is unaware whether the money was paid into the correct account what interest was charged and at what rate.

These submissions are all linked to his suggestion that he ought to have leave to defend to challenge the Certificate of Indebtedness. In this respect he contends that he ought to be allowed to go behind the Certificate of Indebtedness.

His overwhelming difficulty on this point is that the law does not permit him to challenge the certificate. By Clause 12 of the facility agreements the company agreed:

> *12. A certificate of balance signed by any duly authorised officer of the Bank staff shall be conclusive evidence of the amount owing at any time.*

This provision could not be more certain. The company is bound by it. Similar provisions have been held to be conclusively binding in a number of different jurisdictions including England, Australia and Malaysia as well as in a decision of this court in this very case. See *Garnet Snd Bhd and Lester Lee Kok Wah v Baiduri Bank Civil Appeal No 8 of 2010* and the cases there cited.

The assigned contracts were taken by the bank as security not as a discharge of the debts owing even though it must give credit for any money received. The Certificate of Indebtedness is conclusive evidence against the company and the guarantor of all monies owing. This takes account of any money received under the assigned contracts.

Undue influence

The guarantor contends that the settlement agreement is of no effect as he signed on behalf of the company only when put under pressure amounting to undue influence by the bank. He alleges that he was told to sign because he had no defence and the bank

would succeed in obtaining summary judgment after which it would execute swiftly to ensure his ruin.

Additionally, the guarantor was considerably distressed in particular by deaths in his family.

Section 16 of the Brunei Contracts Act (106) provides:

> *1. A contract is said to be induced by "undue influence" where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.*
>
> *2. In particular and without prejudice to the generality of the foregoing principle, a person is deemed to be in a position to dominate the will of another --*
>
> *(a) where he holds a real or apparent authority over the other, or where he stands in a fiduciary relation to the other; or*
>
> *(b) where he makes a contract with the person whose mental capacity is temporarily or permanently affected by reason of age, illness or mental or bodily distress.*

Having considered the circumstances in some detail no credibility can be given to this defence. It is a sham designed to postpone, for it would not avoid, the day of reckoning.

We reach this conclusion for the following reasons:

- The guarantor and managing director of the company is a businessman of long experience. He has sought and received finance from the bank over many years. He is well versed in both the benefits and the obligations of such arrangements.
- Throughout his negotiations with the bank before during and after signing of the settlement agreement he was advised by solicitors. The negotiations to achieve the settlement were undertaken between his solicitors and the bank's solicitors at arm's length.

- The settlement agreement was reduced to writing and the guarantor's solicitors had a copy so that he could be properly advised.

- In his affidavit the guarantor contends that he was put under pressure by the bank's representative telling him that he had no defence to the banks claim, that unless he signed the agreement the bank would obtain judgment and would then proceed to execute swiftly with the consequence that the guarantor would be ruined. This seems to be no more than a realistic assessment at the time.

- The guarantor signed the agreement contrary to his solicitor's advice. As the agreement was greatly to the benefit of both him and the company his decision appears no less than a sound commercial one as it was so beneficial.

- Significantly one instalment was paid before the agreement was signed and many were paid afterwards. These payments affirmed the contract and no suggestion of undue influence was made at the time.

- When the company defaulted the bank did not restore the order 14 proceedings for 8 months. During this time no suggestion of undue influence was made.

- It was 2 years after the agreement was signed before any allegation of undue influence was made.

We therefore have no doubt that this is an unmeritorious and sham defence which is not a basis upon which leave to defend ought to be given.

Mr Sawan, who undertook this case at relatively short notice has put before the court all that could be said for his client but it is an unmeritorious appeal which must fail. We entirely agree with the judge.

The Order

We order that the appeal be dismissed. The bank shall have costs of the appeal of an indemnity basis to which it is entitled under the facility agreements.

Costs against solicitors personally

Before we leave this appeal we raised the provisions of Order 59 rule 8 at the call over. This deals with ordering costs against a solicitor personally.

As already appears from this judgment, the action the subject of this appeal commenced by writ and statement of claim filed on 10 May 2006, claiming for a debt due on 19 January 2006. It is plain to this Court that, from 19 January 2006, there has been no legitimate defence to this claim. It follows that, since 19 January 2006, the respondent has been kept out of a substantial debt which should have been paid on or shortly after that date.

The writ and statement of claim were followed by an application for summary judgment filed on 21 November 2006. Before that application was heard the parties entered into negotiations and made an agreement by which the defendant, the present appellant, agreed to pay the debt by instalments. That agreement was made in writing on 19 January 2007.

The defendant having failed to honour that agreement, the proceedings were restored and heard by a registrar of this Court on 28 July 2008. In her judgment delivered on 3 September 2008 the registrar said:

> *"The application for summary judgment was long drawn out. The numerous documents that extended to hundreds of pages and submissions that spanned over six months is already a clear indication that this matter was unsuitable to be summarily tried.*

> *I acknowledge that the voluminous documents were mainly as a result of the defendant's tenacity to argue every single issue in great length. This in return led to the plaintiff having to argue its case with equal vigilance.*
>
> *There is little doubt that the defendant owes the plaintiff money and I do not suppose that the defendants would disagree with me. I found most of the defendant's arguments are easily dismissed."*

Nevertheless the registrar found what she thought were two triable issues and dismissed the application. It is unnecessary to examine those in detail except to say that we think that she was wrong and that it is quite likely that she was led into error by the voluminous documentation to which she referred.

There then followed a series of delaying tactics by the appellant which have continued until after this appeal was set down and written arguments exchanged. These included a large number of applications and one appeal by the appellants all of which appear to have been aimed primarily at delaying judgment and all of which were dismissed with costs. They are set out in some detail in the written argument of the respondent before this Court and we do not find it necessary to set them out again here. It is sufficient to say that none of them appears to have had any substance. This conduct should not have occurred and it should not have been permitted.

At the call over for this sittings conducted by the President of this Court, his Lordship raised with the parties the question whether Order 59 rule 8 of the Rules of the Supreme Court might apply to the conduct of the solicitors for the appellants. Shortly thereafter the appellants' solicitors withdrew from acting for them and the conduct of this appeal on behalf of the appellants was assumed by Mr Sawan.

In the judgment from which the appellants appeal to this Court the learned judge said, speaking of the summary judgment proceedings:

> *"I can well understand why the registrar came to this conclusion. As she says, there were numerous documents extending to hundreds of pages and submissions that spanned over six months. However, a defendant cannot be permitted to defeat a clear case for summary judgment by using smoke and mirrors, seeking to confuse the issues and the court. I agree with the comments by the registrar that this was not a complex case, but a simple one which the respondent endeavoured to make complicated."*

The learned judge went on to say that, in his view, there could not be a clearer case for summary judgment. We agree with that conclusion. The learned judge then, with extraordinary patience, went on to deal with a number of plainly unarguable submissions by counsel for the appellants, in the end describing them as entirely without merit. Again we agree.

Order 59 rule 8 is relevantly in the following terms:

> *"8. (1) Subject to the following provisions of this rule, where [in] any proceeding costs are incurred improperly or without reasonable cause or*

wasted by undue delay or by any other misconduct or default the Court may make against any solicitor whom it considers to be responsible (whether personally or through a servant or agent) an order -

(a) disallowing the costs as between the solicitor and his client; and

(b) directing the solicitor to repay to his client costs to which the client has been ordered to pay to other parties to the proceedings; or

(c) directing the solicitor personally to indemnify such other parties against costs payable by them.

(2) No order under this rule shall be made against a solicitor unless he has been given a reasonable opportunity to appear before the Court and show cause why the order should not be made, except where any proceeding in Court or in Chambers cannot conveniently proceed, and fails or is adjourned without useful progress being made -

(a) because of the failure of the solicitor to attend in person or by a proper representative; or

(b) because of the failure of the solicitor to deliver any document for the use of the Court which ought to have been delivered or to be prepared with any proper evidence or account or otherwise to proceed.

(3) Before making an order under this rule the Court may, if it thinks fit, refer the matter (except in the case of undue delay in the drawing up of, or in any proceedings under, an order or judgment as to which the Registrar has reported to the Court) to the Registrar for inquiry and report and direct the solicitor in the first place to show cause before him.

……..

(5) The Court may direct that notice of any proceedings or order against a solicitor under this rule shall be given to his client in such manner as may be specified in the direction.

(6) Where in any proceedings before the Registrar the solicitor representing any party is guilty of neglect or delay or puts any other party to any unnecessary expense in relation to those proceedings, the Registrar may direct the solicitor to pay costs personally to any of the parties to those proceedings;
……..

……"

Solicitors should be aware that their duty to the court includes a duty not to advance unarguable propositions and not to embark on conduct designed to delay proceedings. There is a need to alert solicitors who practise in litigation that conduct of this kind will not be permitted to continue and that in appropriate cases it is the duty of the court to invoke this rule.

It may assist if we make the following comments about this rule and its application.

Making unarguable submissions is misconduct within the meaning of sub rule (1). So also is conducting proceedings without reasonable cause including, but not limited to, for the purpose of delay. Conduct of both kinds causes undue delay and wastes costs.

Sub rule (2) is aimed at ensuring that a solicitor against whom a court is considering making an order under sub rule (1) is accorded procedural fairness. This includes knowing what is alleged against him as early as possible and being given an adequate opportunity to reply. However this sub rule is not an invitation for an adjournment or to embark on satellite litigation. Other than in exceptional cases the question whether an order should be made under sub rule (1) should be determined in the principal proceedings by the judge or registrar who decides those proceedings. He or she will ordinarily be the person best informed about the matters upon which an order under this rule must be based. In almost all cases in which such an order is contemplated, there will have already been substantial and inexcusable delay. It is of the utmost importance that any further delay be avoided other than is necessary to ensure procedural fairness.

Sub rule (3) should be used only rarely. The reasons for this are the same as those given in the previous paragraph.

Judges and registrars have a duty to apply this rule in appropriate cases. Failure to do so may involve serious injustice to all the parties involved.

Mortimer, P.

Davies, J.A. **Leonard, J.A.**