Pg Dato Setia Yusof Bin Pg Dato Hj Sepiuddin **… Appellant**

AND

Baiduri Bank Berhad **… Respondent**

(Court of Appeal of Brunei Darussalam)
(Civil Appeals No. 9 of 2006 and 6 of 2007)

Power, P.; Mortimer and Chong, JJ.A.
3rd May, 2008.

1. Only on exceptional circumstances will the Court of Appeal allow an appeal against a decision below by consent of the parties.
2. There can be no criticism of the decisions below but in the exceptional circumstances of this case appeal allowed on the application of the parties and the bank's indication that it does not wish to oppose the appeal.
3. The plaintiff Bank to pay the costs thrown away in the Appeal and below up to 28 April 2008 as well as the costs of today's application.

Mr. Daud Ismail of Messrs Daud Ismail & Co. for the Appellant.
Mr. Tang Weng Leong of Messrs CCW Partnership for the Respondent.

Mortimer, J.A.:

Briefly the history of this matter is that the bank applied for and obtained an Order 14 summary judgment against the defendant before the Registrar on the 9th of May 2005. The defendant appealed on the 25th of April 2006. Hayati, J. dismissed the appeal giving full reasons. During the last session of this court in November 2007, the plaintiff applied for the admission of London Counsel to argue the appeal. We granted this application and adjourned the substance of the appeal to be heard during this sitting.

In the meantime, the bank has indicated that it no longer wishes to resist the appeal and on the 7th of April 2008, it informed the defendant. Both parties appear to have wrongly assumed that that was the end of the appeal, but of course it is not. The court will not permit the parties to decide that the Judge's decision below is wrong. Obviously, that cannot be so for whether or not a judge's decision is upheld or reversed is entirely within the jurisdiction of this court. However, as is well established, in exceptional circumstances, having heard the parties, the court may allow an appeal in these circumstances.

We have heard the parties here and we are satisfied that this is a borderline Order 14 case. There are undoubtedly serious issues of fact and where the plaintiff bank having given the matter anxious consideration has formed the opinion that these issues ought to be resolved other than upon affidavit and this matter ought to go to trial, this obviously must weigh heavily with us.

There can be no possible criticism of the way in which the Registrar and the Judge considered this application and ruled upon it. But in these very unusual circumstances we have come to the conclusion that on balance the matter ought to go to trial and therefore in these unusual circumstances, we allow the appeal.

But there is an issue on costs. The parties are agreed that the defendant should pay the costs thrown away up till and including the 7th of April, the date when the defendant informed the solicitors for the plaintiff that it would not oppose the appeal thereafter the costs are in dispute. The effective paragraph in the letter of the 7 th of April 2008 from the bank reads

> "On a strictly without prejudice basis, our client instructs that they are prepared to consent to your client's aforesaid appeal."

The defendant's solicitor replied on the 9 th of April in two letters, the effect of which, was to ask the bank to agree to pay the costs thrown away before the Court of Appeal and below. However, they added one extraneous matter saying they would accept the bank's offer to concede the appeal on the basis that it was "prepared to confirm that they would consent to not oppose our application for Miss Geraldine Andrews QC's ad hoc admission to conduct the trial".

The bank did not reply to this and two days later the defendant's solicitor wrote "If we do not receive your reply by 12 noon tomorrow, the 12 th of April, we shall consider that the appeal before the Court of Appeal will proceed as scheduled." The only reply t hat this elicited from the bank was asking for time to consider the contents of the letter.

The bank did not reply immediately saying it would pay the costs thrown away in the Court of Appeal and below, but asking for time to consider the proposed condition not to oppose Miss Andrew's ad hoc admission. It was not until the 28 th of April, that the bank agreed to pay the costs thrown away to be taxed if not agreed but it still did not agree to the condition about Miss Andrew's admission. The defendant's solicitor wrote a letter to the bank on the 29 th of April pointing out that it had continued to prepare for the appeal after the 7th of April as it was obliged and that those preparations included briefing Miss Andrews, leave for her admission having been given by this court. The issue before us is therefore whether the bank should pay the cost thrown away by the defendant's preparation for appeal after the 7th of April.

Unfortunately, as we have indicated, the bank never informed the defendant, that it was prepared to pay the costs thrown away until 28 April. The only indication that the bank relies upon is in the original letter of 7 th April. It contends that the words 'on a strictly

without prejudice basis' really have no meaning and that at that time it had fully consented to abandon the appeal. The argument continues that in the circumstances that the defendant ought not to have incurred further costs in the preparation of this appeal.

When one considers the duty of the defendant in these circumstances one immediately has to conclude that the words "on a strictly without prejudice basis" meant that the bank could at anytime withdraw its concession. The defendant was obliged by the rules of the court to continue to prepare for the appeal and it did so.

In these circumstances, the bank must pay those costs thrown away after the 7th of April. It follows that, our order is that the bank will pay the costs thrown away of this appeal and below to be taxed if not agreed. That it costs up to the 28th of April as well as the costs of today.