Pg Dato Setia Yusof Bin Pg Dato Hj Sepiuddin

AND

Baiduri Bank Berhad

(Court of Appeal of Brunei Darussalam)
(Civil Appeal No. 6 of 2007)

Power, P; Mortimer and Davies, JJ.A.
26th November, 2007.

Appeal against 0.14 grant of Summary Judgment; Refusal to allow ad hoc admission of English Queen's Counsel; Appeal against that decision - Held: Decision wrong in so far as it took into account skill and qualifications of local counsel. Decision reverse on ground special skill and qualifications were required.

Mr. Daud Ismail with him Mdm. Rokiah Swed (M/S Daud Ismail & Company) for the Appellant.
Mr. Tan Weng Leong (M/S CCW Partnership) for the Respondent.
Mr Pg Izad Ryan for the Law Society.

Power, P.:

This matter arises out of an action by the Baiduri Bank Berhad ("the Bank") to obtain payment under a letter of guarantee which it was alleged Pg Dato Setia Yusof Bin Pg Dato Hj Sepiuddin ("the Guarantor") had signed guaranteeing payment of a loan which the Bank had made to Busko Ltd.

The Bank applied to the Registrar for summary judgment under O.14 and on 9 May 2005 the Registrar granted their application. She had before her at this hearing 2 affidavits from Philippe Petitier the Senior Deputy General Manager of the Bank and 2 affidavits from the Guarantor.

The first from Mr Petitier, filed on 27 September 2004, asserted that $419,657.58 with interest was owed by the Guarantor to the Bank under a letter of guarantee executed by the guarantor on 30 September 1996. It asserted further that the guarantor *"certified that he had read and understood the terms and conditions and liabilities set out in the guarantee and further confirmed that it has not been misrepresented to him or that the Defendant signed the guarantee under influence"*.

It is not contested that the guarantee and the confirmation were signed by the guarantor. There is also an indecipherable witness signature on the guarantee under which there is a stamp which reads *"Haliluddin Dato Hj Talib*
I.C No: 060783 (Y)
Baiduri bank Berhad"

The appearance on the face of the document is that it was witnessed by a bank officer.

The affidavit went on to state that judgment against Burko Ltd. had not been met and that the Guarantor, had not responded to a letter of demand dated 12 August 2003.

This brought forth an affidavit in opposition from the Guarantor filed on 21 December 2004. He denied any knowledge of a banking facility having been granted to Busko Ltd. He referred to the guarantee which purports to be witnessed by *"Haliluddin Dato Hj Talib"* of the *"Baiduri Bank"*. ("Haliluddin") He said that initially he had thought that he had met that person as his sister ("Pengiran Mariam") was accompanied by a man when she approached him and asked him to sign *"what was supposed to be a form to allow my sister to open a personal bank account with the Baiduri Bank."* He says that he now knows that the man was not Haliluddin but was a Malaysian, Mr. Zulazis Bin Mohd Zin, the new, third husband of Pengiran Mariam. He says that his sister told him that she needed to open a bank account and *"needed a person of good standing to recommend her and Baiduri Bank had agreed with her to use my name."* He says *"they assured me that there was nothing detrimental at all to myself….."* and that when he said that he *"did not know the contents of the document"* they assured him that there was *"no potential liability"* and that he was in a hurry and signed the document.

Annexed to his affidavit is a statutory declaration by Pengiran Mariam in which she states that she wanted to obtain banking facilities for her company BURKO from the Bank that she approached HALILUDDIN, "the Bank Manager" who after negotiation told her *"he needed me to find someone to sign a set of bank guarantee documents".* She said that she proposed her brother and that Haliluddin said *"yes"* and passed her a set of Bank guarantee documents marked with 'X' where her brother was to sign. She goes on to say that she got the Guarantor to sign the guarantee, that he was in a *"real hurry"* to send his wife to the airport, that he signed the documents without reading them and that she filled in the Guarantor's name and address in her own handwriting. She confirmed that she was accompanied by her husband and that Haliluddin was not present at the time of signing. She neither confirms nor denies the representations as to the nature of the document which she is alleged to have made. She says that on the following day she returned the signed documents to Haliluddin at the Bank.

The Guarantor contends that he had signed the document *"as a result of undue influence and misrepresentation"* and asserts further that no proper letter of demand was ever served upon him.

Mr. Petitier filed an affidavit in reply on 29 January 2005 in which, inter alia, he asserts that the Guarantor admitted in a letter from his then solicitors, Messrs Joseph Hoo Morris

& Lal, dated 17 July 2000 that he was aware that his sister had obtained a loan from the Bank. This letter states that the Guarantor *"recalled vaguely that some years ago, his sister Pg Mariam sought his assistance to apply for a loan from Baiduri Bank Berhad for a business project. After undue pressure from his sister he signed a blank form <u>to support her application for the loan.</u> He never heard from the Baiduri Bank Berhad whether the loan was approved at all."* (Emphasis supplied) Reference is also made to a letter written by the Guarantor himself dated 29 August 2003 in which, it was contended, he admitted that Haliluddin had been with his sister when he signed the guarantee. Also annexed to this affidavit is a financial statement signed by the Guarantor and dated 20th August 1996. It is to be noted that this statement is dated some 6 weeks prior to the date of the guarantee. It is addressed to the Baiduri Bank and confirms itself to be a true and accurate statement of the Guarantor's financial condition. It states that the Guarantor is 54 years old and is employed by the Brunei Government as a Special Duties Officer to His Majesty the Sultan at a salary of $9,500 per month; that he has a bank account with the Hong Kong Bank Brunei; that he has 8 cars (Porsche, Bentlay, Rolls Royce, Mercedes) a house; and has net worth of approximately £500,000.00.

This affidavit from Mr Petitier brought forth a second affidavit from the guarantor filed on 2 March 2005 in which he say that he had never used the word *"loan"* in discussing the matter with his then solicitors. He states further that he only learnt that the man was not Haliluddin after his sister had *"owned up to the fact the man who was present that night"* was her husband. As to the financial statement the Guarantor says *"I am advised that my position with respect to that document is similar to that of every other document that the agent of the Plaintiff, Pengiran Mariam, has misled me into signing".* It is difficult to know what exactly the Guarantor means by these words.

It is to be noted that the only answer made by Mr Petitier to the Guarantor's statement that the man at the meeting in 1996 was not HALILUDDIN, but was, in fact, Pengiran Mariam's new husband, was an assertion that the guarantor was "estopped" from asserting it was not HALILUDDIN. It is asserted that the "estoppel" arose because of the Guarantor's reference to the man by the name HALILUDDIN in his letter of 29 August 2003. The Guarantor in his final affidavit explains how it was that he came to make that, as he says, mistaken reference.

When the matter came before the Registrar the position was as follows:

The Guarantor was contending that he had hurriedly signed the guarantee believing it to be a letter of recommendation; that he had been led into this belief by Pengiran Mariam and the man accompanying her; that the man with her was not the bank officer Haliluddin but was, in fact, her new husband; that he had signed the guarantee because of undue influence and misrepresentation.

The bank was contending that the Guarantor at the time of signing the guarantee had signed a separate document certifying that he had read and understood the terms of the guarantee; that he was made liable as a Guarantor both by his signing of the Guarantee and his acknowledgment in the separate document; that he had provided a financial statement to the Bank some 6 weeks before signing the guarantee; that he had in July 2000 acknowledged through his then solicitors that he had signed a blank form to support his sister Pg Mariam's application for a loan.

The bank also appears to be contending that Haliluddin, a bank officer, was present at the time of signing. It is relying, in this regard, not on positive evidence but rather on an assertion that the claimant is "estopped", because of a letter he had written, from asserting that Haliluddin was not present.

The law regarding 0.14 applications is too well know to require elaboration by us. Leave to defend must be given if the evidence of the defendant raises triable issues that is issues which are reasonably capable of belief.

The Registrar made the following observation, in the course if her decision, as to Haliluddin:

> *"I am puzzled as to the presence of the witness at the time the guarantee was signed. Defendant himself stated in his letter (P9) that the witness Pg Haliluddin was present at the time of signing. However the defendant contradicts himself by stating in his own affidavit that <u>neither Pg Mariam</u> nor Pg Haliluddin was present at (sic) the guarantee was signed. What is pertinent is the effect of the witness' attendance. I agree with the defendant in that the plaintiff should have explained the terms of the agreement to the defendant."* (Emphasis supplied)

It is not easy to understand what exactly was meant by these observations. However the Registrar went on to find:

> *"I am satisfied that the Bank had properly obtained the defendant's consent by way of the defendant's signature and that the defendant had constructive notice of the guarantee."* Shortly thereafter the Registrar found *"I am satisfied that the defendant was fully aware of the guarantee at the time he signed it."* She went on to find that she was satisfied *"that there was no misrepresentation of undue influence."*

These findings are an express rejection of the affidavit evidence of the guarantor.

The matter was then taken on appeal to Hayati J. She held that the guarantor *"must not only raise issues for his defence, he must further prove that they are triable issues."* She rejected any suggestion that the doctrine of undue influence might have application to their sister/brother relationship and was satisfied that the alleged misrepresentations were *"just an after thought and a mere attempt to confuse"* liability. She made no mention of Haliluddin except to say that the creditor had thought that Pg Mariam's husband was a bank officer. There was no mention of the suggested absence of Haliluddin from the signing and, if that let so, of his later false indication that he had witnessed the creditor's signature. The judge was, it seems clear, satisfied that the documentary evidence, i.e. the financial statement, the signed guarantee, the signed confirmation; the admission in the solicitor's letter of July 2000 were of such clear and convincing weight that no credit could be properly given to the matters sworn to by the Guarantor.

The creditor appealed this decision ("the substantial appeal") to the Court of Appeal and applied to the Chief Justice for the ad hoc admission of English Queen's Counsel Miss Geraldine Andrews to argue the appeal. The Chief Justice refused that application and we are now hearing an appeal against that refusal ("this appeal").

The Chief Justice set out the position before him stating that the guarantor *"applies under the provisions of section 7(1)(a) of the Legal Profession Act [Cap 132] (hereinafter referred as "the Act", for the ad hoc admission of Miss Geraldine Mary Andrews QC (hereinafter referred to as the applicant) to conduct the appeal on behalf of the appellant in this matter.*

This section reads:

"7(1) Notwithstanding anything to the contrary contained in this Act, a Judge may, in his discretion, admit to practice for the purpose of any one case any person who satisfied the requirements of either of paragraph (a) or of paragraph (b), that is to say –

> *(a) a person who holds Her Britannic Majesty's Patent as Queen's Counsel; and who –*
>
> *(i)* *does not ordinarily reside in Brunei Darussalam but has came, or intends to come, to Brunei Darussalam for the purpose of appearing in the case on the instructions of an advocate and solicitor; and*
>
> (ii) *possesses special skill and qualifications for the purpose of the case whether or not such special skill and qualifications are available in Brunei Darussalam;"*

The Chief Justice went on:

> *"It is not disputed that the applicant is a Queen's Counsel in terms of section 7(1)(a) of the Act. Learned Counsel has set out in his affidavit in support of 16th September 2006 the qualifications and experience of the applicant in some detail with supporting documents. I do not think that there is any dispute about the ability and vast experience of the applicant in the field of banking, financial and commercial law, not ignoring her 'particular' experience in the law of guarantees, and is the co-author of the book "The Law of Guarantees", which is claimed to be widely recognized by practitioners, academics and judges as one of the leading textbooks on the subject".*

The principal submission to the Chief Justice was that the doctrine of constructive notice since the decision in *Royal Bank of Scotland v Etridge* (No. 2) and conjoined appeals

[2002] s H.C 773 now applies *"to all situations in which the guarantor is not a commercial guarantor and that the steps that had previously been regarded as sufficient to protect a lender from being faced with notice of the wrongdoing are no longer good enough."*

It was submitted that this remains *"a difficult and complex area of the law and one which is particularly suitable for the involvement of expert counsel in the argument of the appeal."*

It was also submitted that Miss Andrews was well equipped to argue that the bank had never made any valid demand under the guarantee.

The Chief Justice held

(i) That the legal and factual issues in this matter were not of such complexity that they are utterly beyond the ken, reference and legal capacity of some of the senior counsel available locally.

(ii) That the applicant has not been able to show that the case "requires the use of some special skill or of some of the qualifications" of the proposed applicant.

We cannot agree with the Chief Justice as regard (i) above, as we are satisfied that since the amendment to s. 7(I) whether or not special skill and qualifications are available in Brunei Darussalam is not a matter relevant to the exercise of discretion under the section.

The question that remains for us is whether the Chief Justice was right to hold that the substantive appeal did not require the use of some special skill or some of the qualification of Miss Andrews Q.C.

The issue for the court to decide in the substantive appeal is whether the Guarantor had raised triable issues which might be sufficient to establish that the Bank could be said to have had actual or constructive notice of the misrepresentations said to have been made by Pg Mariam. The issues of fact involved are as follows:

(i) Under what circumstances and for what purpose did the Guarantor sign the financial statement dated 20th August 1996?

(ii) Did Pg Mariam make the alleged misrepresentations?

(iii) If so were they made in the presence of HALILUDDIN?

(iv) If not did HALILUDDIN at some later time falsely append his signature as a witness to the guarantee?

If nothing more than those issues was involved in the substantive appeal no special skill or expertise would be required. However, it would be open to argue in that appeal, and counsel for the Bank has indicated that such argument will be advanced, that even if those matters were to be resolved in a way favourable to the Guarantor the Bank ought nonetheless not to be fixed with actual or constructive notice of any misrepresentation and that the 0.14 application was therefore rightly granted. Argument for and against such a contention would, in our view, involve difficult questions of law and we are satisfied that Miss Andrews Q.C. does possess special skill and qualification for the purpose of such argument. The appeal must be allowed and Miss Andrews Q.C. admitted for the purpose of the substantive appeal.

Order nisi that costs be reserved to the hearing of the 0.14 appeal to be made final, if no application be made, at 10 a.m. on THURSDAY 29th November 2007.