

Ruziah binti Haji Mohamed Daud

Respondent/Plaintiff

AND

Takaful Brunei AM Sdn Bhd

Appellant/Defendant

**(Intermediate Court of Brunei Darussalam)
(Civil Suit No.16 of 2014)**

Appeal against Registrar's Order

Dk Hjh Norismayanti binti Pg Hj Ismail, Judge.

24th May 2018

Civil Procedure – Summary Judgment – triable issues – leave to defend.

Civil Procedure – Pleadings – Affidavits – Conflicting facts pleaded and affirmed.

Insurance – negligence - duty of care/obligation – practice and procedure – national insurance companies – whether the requirements imposed on a national insurance company has been discharged – release of cheque to an unauthorized third party.

Mr M.S Wong (M/S Abrahams, Davidson & Co.) for Appellant/Defendant

Mr Eugene Loh (M/S Yusof Halim & Partners) for Respondent/Plaintiff

Cases cited in Judgment:

Alloy Automotive Sdn Bhd v Perusahaan Ironfield Sdn Bhd [1986] 1 MLJ 382

Banque de Paris et des Pays-Bas (Suisse) S.A. v Costa de Naray and Another [1984] 1 296

Habibullah Mohamed Yousuff v Indian Bank [1999] SGCA 49

Jones v Stone [1894] A.C. 122

Leolaris (M) Sdn Bhd v Bumiputra Commerce Bank Bhd [2013] 7 MLJ 25

Marfani & Co. Ltd v Midland Bank Ltd [1967] 3 All ER 967

Ng Shou Chun v Hung Chun San [1994] 1 HKC 155

National Westminster Bank v Daniel [1993] 1 WLR 1453

JUDGMENT

Dk Hajah Norismayanti, Judge:

This is the Defendant's appeal against the decision of the learned Registrar made on the 28th July 2015 in granting the Plaintiff's application for summary judgment with interest and cost to be taxed if not agreed.

Outline of the cause of action

This is a case where the Plaintiff claims against the Defendant the sum of \$67,000.00 being the amount due and owing for the settlement of a motor vehicle insurance claim. The crux of the case is

that the plaintiff alleges negligence by the Defendant in releasing the sum of \$67,000.00 via a BIBD cheque to an unauthorized third party. As a result of the release of the BIBD cheque to the unauthorized third party, events occurred thereafter that resulted in the Plaintiff to have lost the total sum of \$67,000.00 and thus suffered loss and damage.

Setting aside of Judgment in Default of Appearance

It is a matter of record that a Judgment in Default of Appearance (JID) was entered by the Plaintiff on the 8th April 2014. The Defendant's application to set aside the JID was dismissed on the 20th October 2014 but was subsequently set aside on appeal to the Intermediate Court Judge on the 7th January 2015. The judge set aside the JID on appeal on the following grounds: (1) A Certificate of Non Appearance was not filed at the time the JID was entered; (2) the delay in filing the setting aside application was not inordinate; and (3) the Statement of Claim was described by the judge as being messy and unclear and the issue of negligence was still an issue that needed to be ventilated at trial.

The Law on Summary Judgment and leave to defend

In considering this appeal, I refer to past case authorities that provides useful guidelines in addressing Ord 14 applications. In *Jones v Stone [1894] A.C. 122* it was determined that unless it can be shown that there is no dispute as to facts or law which raises a reasonable doubt that the Plaintiff is entitled to judgment, then leave to defend should be granted. In *Banque de Paris et des Pays-Bas (Suisse) S.A. v Costa de Naray [1984] 1 296* it was held by Ackner LJ "It is of course trite law that Order 14 proceedings are not decided by weighing the two affidavits. It is also trite that the mere assertion in an affidavit of a given situation which is to be the basis of a defence does not, ipso facto, provide leave to defend; the court must look at the whole situation and ask itself whether the defendant has satisfied the court that there is a fair or reasonable probability of the defendant's having a real or bona fide defence."

Relying on the case of *Jones v Stone*, it was held in *Habibullah Mohamed Yousuff v Indian Bank [1999] SGCA 49* that "The power to give summary judgment under Ord 14 is intended only to apply to cases where there is no reasonable doubt that a plaintiff is entitled to judgment, and where it is inexpedient to allow a defendant to defend for mere purposes of delay". It was further held "Where a defendant shows that he has a fair case for defence or reasonable grounds for setting up a defence, or even a fair probability that he has a *bona fide* defence, he ought to have leave to defend;...". I also refer to the case of *Alloy Automotive Sdn Bhd v Perusahaan Ironfield Sdn Bhd [1986] 1 MLJ 382* where it was held "Where all issues are clear, summary judgment should be given. A defendant ought not to be shut out from defending unless it is very clear that he has no case in the action. A complete defence need not be shown."

It is also clear under Ord 14 r 3(1) of the Rules of the Supreme Court that the court may give judgment to the plaintiff unless the court is satisfied that "...there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial..".

Appeal against Registrar's Order granting Summary Judgment

This is a rehearing of the Plaintiff's initial application for Summary Judgment which was granted in July 2015.

Respondent/Plaintiff's submission for Summary Judgment

The plaintiff applied for Summary Judgment on the basis that there are no merits to the Defence. The main argument put forth by the Plaintiff is that the Defendant had breached the insurance policy and was negligent. Particulars of the Defendant's negligence as pleaded in the Plaintiff's Statement of Claim (SOC) are as set out below:

- (a) Released the cheque to an unauthorized party;*
- (b) Failed to exercise reasonable care and skill in effecting the policy and releasing the Cheque to an unauthorized party that is not the Plaintiff;*
- (c) Failing to take any or any adequate steps in verifying the identity of the unauthorized person collecting the Cheque;*
- (d) Failing to impose and/or carry out proper procedure for releasing the Cheque.*

It is the Plaintiff's contention that the Defendant prepared a BIBD cheque no.560504 in the sum of \$67,000.00 dated 23rd July 2011 (the cheque) made payable under the name of the Plaintiff. The Plaintiff claims to have never been notified by the Defendant about the issuance of the cheque at the material time. According to the Plaintiff, sometime in 2013 after making a query to the Defendant on status of the payment due to her, it was only then that the Plaintiff became aware the cheque had been issued and was released to an allegedly unauthorized third party on the 29th July 2011 without her knowledge or consent. The Plaintiff was also informed that the cheque was cashed out at the Defendant branch in Kuala Belait. In light of the information she received, the Plaintiff proceeded to file a police report on the 25th July 2013.

The Plaintiff further contends that it was impossible for her to collect the cheque on the 29th July 2011 as she was not in the country between the 21st July 2011 and 8th August 2011. The Plaintiff affirms that she had travelled to Singapore, London and Paris during the said period. The Plaintiff exhibits copies of her passport as proof of her being abroad at the material time. As the Plaintiff claims that she was not in the country and was not aware that the cheque was issued by the Defendant, the Plaintiff contends that it was impossible for her collect it or to give any authorization to a third party to collect the said cheque. It is further argued that the Defendant did not take the necessary step of getting proper identification of the third party nor was there any evidence of a letter authorizing the third party to collect the cheque. The Plaintiff relies on the case of *Leolaris (M) Sdn Bhd v Bumiputra Commerce Bank Bhd* [2013] 7 MLJ 25 where the learned Judge agreed that "Mere inaction on the part of the customer cannot absolve the bank from its liability to the customer and that by itself cannot cast a liability on the customer."

After filing the police report, the Plaintiff then discovered that the cheque was deposited into the Plaintiff's business account "Syazie Enterprise" on the 30th July 2011. It is not disputed that the Plaintiff is the sole proprietor of Syazie Enterprise and that she is an authorized signatory to the account. By all account, the Plaintiff affirms that she was not aware of the cheque issuance, cheque collection and cheque deposit into the account of Syazie Enterprise prior to this discovery. The Plaintiff also discovered that the amount of \$67,000.00 deposited into her business account was entirely withdrawn on the same date i.e. 30th July 2011 by an unknown person.

It is therefore the Plaintiff's case that if not for the negligence of the Defendant in releasing the cheque to an allegedly unauthorized third party, the Plaintiff would not have suffered loss and damage.

The Appellant/Defendant's submission opposing Summary Judgment

Opposing the Summary Judgment, the Defendant denies any negligence on their part. It is contended that the Defendant's duty and/or obligation was to ensure that the BIBD cheque was issued in the name of the Plaintiff. The Defendant submits that they have complied with the provisions set out under the section 6 (1) of the Bills of Exchange Act which states *"The drawee must be named or otherwise indicated in a bill with reasonable certainty."* The cheque was made out to *"Ruziah Binti Hj Mohamed Daud"* as required under section 6(1). The Defendant further refers to section 81 of the Bills of Exchange Act which states *"Where a person takes a crossed cheque which bears on it the words 'not negotiable', he shall not have and shall not be capable of giving a better title to the cheque than that which the person from whom he took it had."* The cheque issued by the Defendant was a crossed cheque bearing the words "NOT NEGOTIATBLE, ACCOUNT PAYEE ONLY".

It is not in dispute that the BIBD cheque no.560504 dated 23rd July 2011 made payable to the Plaintiff's name was released by the Defendant on the 29th July 2011. The issue is whether the cheque was issued to the Plaintiff or an unauthorized third party or even an authorized third party. The Defendant produced a payment voucher (exhibit BK1) dated 23rd July 2011 which shows the signature, identification number, date and name of the person who collected the BIBD cheque. According to the payment voucher, it was collected by "RUZIAH BINTI HAJI MOHAMED DAUD" on the 29th July 2011 and bore the signature "Rozie". The voucher also states the identification number of the collector which is exactly the same to the Plaintiff's identification number.

Furthermore, it is part of the Defendant's Defence that the Plaintiff had at all material times was aware and/or had knowledge of the transaction and/or alleged unauthorized withdrawal. The Plaintiff avers that she did not sign the payment voucher and that she did not collect the cheque and she did not give any authorization to collect the cheque on her behalf. The Defendant takes issue on this averment. The Defendant submits that the third party that collected the cheque would have had the Plaintiff's consent and authority to do so. It is argued that this is a triable issue that ought to be dealt at a trial proper.

In the Defendant's affidavit in reply dated 19th May 2015, it is also averred that it is immaterial whether the Plaintiff was in the country or not as the cheque was made out in the Plaintiff's name. The cheque can only be deposited into the Plaintiff's account and only the Plaintiff can clear the cheque. This is evidenced by the fact that the cheque was deposited into the Plaintiff's business account Syazie Enterprise where the Plaintiff is the sole proprietor. What happens to the deposited funds thereafter is beyond the Defendant's control.

The Defendant also claims that there are contrasting facts pleaded in the Plaintiff's SOC and the Plaintiff's affidavit in support of the summary judgment. Paragraph 7 of the SOC reads as follows:

"On the 29th July 2011, a cheque amounting to B\$67,000.00 was issued in the name of the Plaintiff by the Defendant ('the cheque'). Upon arrival at the Defendant's headquarters to collect the Cheque, the Plaintiff was informed that the Cheque had been dispatched to another branch in Kuala Belait. After further enquiries made to the Defendant and/or its representatives by the Plaintiff, it was discovered that the Defendant had negligently released the Cheque to an unauthorized party. The Cheque was subsequently cashed out at a BIBD branch in Kuala Belait."

Based on this pleading, the Defendant submits that there is a discrepancy in the SOC and the Plaintiff's own affidavit evidence. From the reading of paragraph 7 of the SOC, it can be assumed that once the Plaintiff knew or was informed of the issuance of the BIBD cheque on the 29th July 2011, she went to the Defendant's headquarters to collect it. This pleading is clearly different to what is affirmed in the Plaintiff's affidavit where the Plaintiff claims to be abroad at the material

time. The Defendant also points out that there has been no application to amend the SOC. Due to the contrasting facts, the Defendant submits that this supports their contention that this case is not suitable for summary judgment.

Court's finding

Upon consideration, it is my finding that the main argument should center on the release of the BIBD cheque. The question before the court is whether the Defendant had carried out the proper duty, practice and/or obligation of a standard insurance company in the release of the cheque? Are the affidavit evidence produced before the court sufficient to make a determination? Has the defendant raised triable issues or set up a bona fide defence to the claim? In considering these questions, I refer to the affidavits, the bundle of documents and authorities relied on in this appeal.

The Plaintiff's claim that the Defendant had failed to carry out proper procedure for releasing a cheque and failed to take any adequate steps in verifying the identity of the unauthorized person collecting the cheque. The Defendant on the other hand claims that they have taken all reasonable steps to discharge their duty and/or obligation by ensuring that the cheque was made out in the Plaintiff's name. By doing so, no one else can cash out the cheque apart from the Plaintiff. The Defendant also asserts that the cheque was released to an authorized party contrary to the Plaintiff's claim.

I am of the opinion that this matter cannot be resolved based on affidavit evidence alone. Much has been argued on the practice and procedure of banks and financial institutions and the Plaintiff submits that the same should also apply to the release of cheques by the Defendant. The Defendant in this case is a national insurance company that operates counter services and issues cheques. Based on affidavit evidence before the court, this court is not fully informed of what is the policy and practice and procedure that is carried out by the Defendant or that of a standard national insurance company. I would apply the case of *National Westminster Bank v Daniel* [1993] 1 WLR 1453 and the case of *Ng Shou Chun v Hung Chun San* [1994] 1 HKC 155 where it was determined that "*In an application under O 14 or O 86 RSC it is not a proper course for the court to embark on a mini-trial of the action on affidavit evidence. In future, it is sufficient for the court to ask itself whether the defendant's assertions are believable, not whether they are to be believed.*" I also refer to the case of *Marfani & Co. Ltd v Midland Bank Ltd* [1967] 3 All ER 967 where it was held that the standard duty of bankers does not include the duty to subject an account to microscopic examination and "It is not expected that the official of banks should also be amateur detectives." As such, I find that the Defendant's Defence is not completely without merits and considering the facts of the case, the Defence is considered to be credible.

There is also the fact that cheque was deposited into the Plaintiff's business account. This is exactly what the Defendant had submitted whereby the cheque can only be paid into the Plaintiff's account albeit the Plaintiff's business account. Can it be determined that the Plaintiff did receive Defendant's payment in full? The Plaintiff submits that the release should have been made to the Plaintiff herself or an authorized party. On the other hand, it can be argued that regardless of who collected the cheque at this point since the cheque was paid into the Plaintiff's business account. This shows that this is not a clear cut case. I am of the view that this issue is also triable.

I further take into consideration the issue of contrasting facts before the court. I refer to the Plaintiff's SOC and affidavit in support of summary judgment. It is trite law that a party is bound by its pleading and yet there are contradictory statements in the Plaintiff's SOC and affidavit. I find that the Plaintiff's pleading is vague and poses a lot of questions. In the absence of any clarification, the

court is left with the question of which version of events should be believed. When exactly was the Plaintiff notified of the BIBD cheque? On or about the 29th July 2011 or sometime in 2013? If the Plaintiff was not informed or was not aware of the cheque, why did she go to the Defendant's headquarters to collect the cheque? It is also a fact that the Plaintiff did not apply to amend the SOC despite the Intermediate Judge's earlier decision on the 7th January 2015 in finding the SOC is messy and unclear. I apply the case of *Alloy Automotive Sdn Bhd* whereby the court should only grant summary judgment where all the issues are clear. This is simply not the case in the present action. And again it is not proper for the court to embark on a mini-trial of the action on affidavit evidence (*case of Ng Shou Chun referred*). For this reason I also find that this is not a suitable case for summary judgment.

I have considered the current position between the two parties as a whole and I am satisfied that there is a fair or reasonable probability of the defendant having a real or bona fide defence.

Conclusion

I find that there are triable issues in this case which should be properly addressed at trial. The appeal against the order for Summary Judgment succeeds and the Ord 14 judgment is set aside. The Defendant is given unconditional leave to defend. Cost here and below is awarded to the Defendant/Appellant, to be taxed if not agreed.

DK HJH NORISMAYANTI PG HJ ISMAIL
Intermediate Court Judge