

**IN THE HIGH COURT OF MALAYA AT KUALA LUMPUR
(COMMERCIAL DIVISION)
SUIT NO. D22-3066-1998**

BETWEEN

HONG LEONG LEASING SDN BHD ... PLAINTIFFS

AND

MOHD FAIZ BIN ABDULLAH ... DEFENDANT

GROUND OF DECISION (Enc. 1)

**BEFORE HIS LORDSHIP TUAN ANANTHAM KASINATHER
JUDGE HIGH COURT MALAYA
KUALA LUMPUR IN OPEN COURT**

Background Facts

Some time in the year 1997, the Defendant desirous of acquiring a public company approached Hong Leong Finance Berhad (*'HLFB'*) for assistance to structure and to finance the acquisition of a public company. HLFB together with HLG Capital Markets Sdn. Bhd. (*'HLGCM'*) then, offered to structure and finance the acquisition of this public company by the Defendant. The public company involved was Inchcape Timuran Berhad, which company subsequently changed its name to Arus Murni Corporation Bhd (*'AMCB'*). The Defendant together with one Hamzah Harun choose to use a company known as Arus Murni Sdn Bhd (*'AMSB'*) as the vehicle to

acquire the shares of AMCB. At the material time, the Defendant and Hamzah Harun were directors and shareholders of AMSB. The Defendant was proposing to achieve the objective of acquiring AMCB with the assistance of other investors. The other investors were to buy the other shares of AMCB. The other investors (*'hereinafter collectively referred to as the syndicated borrowers'*) were Nik Hussain bin Nik Mohamed (*Nik*), Hood bin Osman (*Hood*), Low Thiam Hoe (*Low*) and Mekuritek Sdn Bhd (*Mekuritek*). Towards this end, HLFB and HLGCM arranged a syndicated term loan for RM 224, 478,000 for AMSB and the following syndicated term loans for the syndicated borrowers:

A)	Mekuritek Sdn. Bhd. (<i>'Mekuritek'</i>)	– RM 30,161,000.00
B)	Hood bin Osman (<i>'Hood'</i>)	– RM 80,100,000.00
C)	Low Thiam How (<i>'Low'</i>)	– RM 30,161,000.00
D)	Nik Hussain bin Mohamed (<i>'Nik'</i>)	– RM 80,100,000.00

The parties involved in providing the syndicated term loans under the syndicated Loan Agreements were HLFB and HLGCM as Arrangers, HLFB as the agent and HLFB Sime Bank berhad, BSN Comercial Bank, DCB Bank Berhad (*now RHB*

Berhad), Southern Bank Berhad and Southern Finance Berhad (*the five lenders hereinafter collectively referred to as 'the syndicated lenders'*).

The syndicated term loan for AMSB is evidenced by the syndicated Loan Agreement dated 24th March 1997 (**Exh. 20 – 116 of C4**). The syndicated term loan for the syndicated borrowers is evidenced by the syndicated term Loan Agreement dated 24th March 1997 (**Exh. 28 – 390 of D3**). One of the terms in all the syndicated term Loan Agreements required AMSB and the syndicated borrowers to pay interest every 6 months from the date of the disbursement of the Syndicated Term Loan. The Syndicated Term Loans were disbursed on 26th March 1997 and consequently the first tranche of interest payable on or before 26th September 1997.

By way of a Loan Agreement dated 20th September 1997 (*'Loan Agreement'*), the Plaintiff granted a Term Loan to the Defendant in the sum of RM 26, 315,955.85 (*'Term Loan'*) (**Exh. 5-40 of D**). The purpose of the loan according the Loan Agreement was to finance the purchase of listed shares in the Kuala Lumpur Stock Exchange. The terms of the Loan Agreement, inter alia required:

- a) the Defendant to repay the Term Loan with interest on or before 26th March 1998;

- b) the Defendant to pay interest to be at the rate of 13% p.a on daily rests;
- c) the Defendant to pay default interest at the rate of 14% p.a and
- d) the Defendant to provide shares listed on the Kuala Lumpur Stock Exchange ('KLSE') by way of a third party first fixed charge.

According to the Defendant, contrary to the terms of the Loan Agreement, the Term loan was, in fact, fully utilised to satisfy the first tranche of interest payable on the syndicated term loans granted to AMSB and the syndicated borrowers. To regularise the utilization of the term loan in this manner, the Defendant pre-signed a written instruction dated 26th September 1997 addressed to the Plaintiff authorizing it to credit the sum of RM 26,315,955.55 into his personal account with Hong Leong Bank Berhad ('HLBB') bearing Account No. 00100131831 ('*Defendant's Account*'). Acting on this instruction the Plaintiff, in turn, instructed HLBB to transfer this sum to the account of the Defendant with HLBB in two tranches of RM 5,815,955.55 and RM 20, 500,000. The total amount transferred into the Defendant's Account was RM 26,315,955.55.

By way of another pre-signed instruction dated 26th September 1997, the Defendant, then, instructed HLBB to transfer the RM 26,315,955.55 from the Defendant's account in HLBB to the account of Hong Leong Finance Berhad ('HLFB') bearing account No. 001 00 06697 5 ('HLFB Account'). In yet, another pre-signed instruction dated 26th September 1997, the Defendant instructed HLFB, in turn, to credit the amount of RM 26,315,955.55 in the respective amounts stated corresponding to the name of AMSB and the syndicated borrowers in satisfaction of the interest payable by each of these parties in respect of the syndicated term loan granted to them. The amount credited towards account of the interest payable for the period March to September 1997 under each of these accounts is as set out below:

a)	AMSB	–	RM 13,729,512.83
b)	Mekuritek	–	RM 1,643,665.18
c)	Hood	–	RM 4,649,556.18
d)	Low	–	RM 1,643,665.18
e)	Nik	–	RM 4,649,556.18

On 15th January 1998, the Plaintiff issued a notice requiring the Defendant to comply with the security requirement under the Term Loan, namely the pledging of shares as security for repayment. On 17th March 1998, the Plaintiff issued another reminder for the Defendant to fulfill the requirement on

pledging shares as security. In the same notice, the Plaintiff also demanded that the Defendant settle the arrears of interest due under the Loan Agreement. The Defendant did not reply to the demands dated 15th January 1998 and 17th March 1998. On 26th March 1998 (which is the deadline for repayment), the Defendant failed to repay the Term Loan. On 27th March 1998, the Plaintiff issued a notice of demand to the Defendant for the amount outstanding under the Term Loan. On 13th June 1998, the Plaintiff through its solicitors demanded for payment of the Term Loan. The Defendant failed to make any payment causing Plaintiff to commence this claim.

The Plaintiff's Case

The Plaintiff's claim is based on a breach by the Defendant of the terms and conditions of the Loan Agreement, in particular, his default in repaying the Term Loan by 26th March 1998. According to the Plaintiff, the documents executed by the Defendant personally reveal the trail of the utilization of the Term Loan to be one whereby the term loan was used to satisfy the interest for the period March to September 1997, payable by the syndicated borrowers and AMSB in respect of the syndicated term loans granted to them. The utilization being in accordance with the instructions of the Plaintiff. By reason thereof, it is the Plaintiff's case that the Defendant is liable to repay the term loan together with the agreed contractual and default interest from the date of default.

The Defendant's Case

According to the statement of defence, the term loan although structured to finance the Defendant's purchase of public listed shares, was, in fact, intended to satisfy the interest payable by AMSB and the syndicated borrowers under the syndicated term loans taken by them. Apart from the term loan being utilised for a purpose contrary to that stipulated in the Loan Agreement, it is also the Defendant's case that none of the conditions precedent prior disbursement were fulfilled when the funds were disbursed. The conditions precedent that were not followed include the Loan Agreement not being stamped and no pledge securities account (*'Designated Account'*) being opened. Based on the aforesaid facts, the Plaintiff contends that the Loan Agreement is a sham and ought not to be enforced. The second line of defence is that the Plaintiff has no knowledge as to whether the proceeds of the term loan was, in fact, utilised to satisfy the interest payable by the syndicated lenders and AMBS on the syndicated term loans granted to them in respect of the period March to September 1997, as alleged by the Plaintiff. The thrust of this defence is essentially that the documents produced by the Plaintiff to prove this application of the term loan toward account of such interest lacks credibility.

Decision

I propose in this decision to deal with the issues raised by the Defendants in the order in which they have been raised by Counsel for the Plaintiff. The first issue is that the Loan Agreement is a sham.

Sham Agreement

It is clear from the facts and documents before the Court that the purpose stipulated in the Loan Agreement did not represent the real purpose behind the Loan Agreement. I accept the evidence of the Defendant that the understanding between the parties from the outset was for the term loan to be utilised to satisfy the interest payable by AMSB and the syndicated borrowers under the syndicated term loans granted to them. Towards this end, the Defendant executed Exh. 165 of B, shortly after the execution of the Loan Agreement, authorizing HLFB to appropriate the proceeds of the term loan in specific sums to the accounts belonging to AMSB and the syndicated borrowers. In my judgment, the mere fact that the purpose stated in the Loan Agreement was not followed by the parties thereafter, does not render the agreement to be unenforceable, so long as the purpose of the agreement is not against public policy. To render the agreement unenforceable in its performance, the affected party must be able to demonstrate that either one or both of the parties had the intention to perform the agreement in a manner contrary to public policy.

Where no public policy consideration is involved, as is the case here, there is nothing in the law which precludes the parties from performing the agreement for a purpose other than that stipulated in the agreement, so long as the variation is by mutual agreement. On the particular facts of this case, it is evident that the variation was mutual as the Defendant pre-signed letters of authorisation / instruction to various parties, in accordance with this purpose, to effect the variation. In this respect, it should not be overlooked that although the proceeds were utilised to satisfy the interest payable by AMSB and the syndicated borrowers, the Defendant stood to benefit indirectly from the use of the term loan in this manner as he was involved with AMSB and the syndicated borrowers in the exercise of taking over control of AMCB and, additionally, the guarantor of the facilities granted to them. Evidence was led during the trial that the claim against AMSB and the syndicated borrowers under the syndicated term loans did not include interest for the period March to September 1997 since such interest was recovered through the amounts credited from the proceeds of the term loan granted to the Defendant. In other words, should the syndicated borrowers' default, the liability of the Defendant as the guarantor of these facilities would be reduced by the amount credited into the accounts of AMSB and the syndicated borrowers. In fact, this is precisely what happened in this case as evidenced by Exhibits 109-114 of Bundle C1 whereby the

calculation of interest on the syndicated term loan account of AMSB commenced 26th September 1997.

Two other grounds were advanced on behalf of the Defendant in support of his defence that the Loan Agreement was a sham. The first is that it was not stamped. The second was that there were blanks in parts of the Loan Agreement when signed by the Defendant. The Defendant made the same allegation in respect of the pre-signed letters that he issued to the Plaintiff, HLBB and HLFB for the utilization of the term loan. The Defendant claimed that the figures were added after he pre-signed the letters.

As regards the Loan Agreement not being stamped, this cannot render the agreement to be unenforceable since under clause 4.1 of the Loan Agreement, the Defendant was liable to pay the stamp duty. According to the Plaintiff, when the agreement was brought into Malaysia for the purposes of legal proceedings, a request was made to the Defendant's solicitors for payment of the stamp duty but to no avail. Since the obligation to provide the necessary funds to stamp the Loan Agreement vested on the Defendant, I am not prepared to hold the unstamped Loan Agreement to be unenforceable, as, in that event, the Court would be allowing the Defendant to take advantage of his own breach (**see Gimstern Corp. (M) Sdn. Bhd Anot v. Global Insurance Co. Sdn Bhd (1987) CLJ**).

As regards the allegations that the Plaintiff inserted details into the Loan Agreement and the pre-signed letters, I find no merit in them. I opine to this effect because, in most cases, the insertions were initialed by the Defendant. The Defendant confirmed in cross examination that the initials were made by him. In any event, in my judgment, the unilateral insertion of details in a document does not render the document to be invalid so long as the insertions to be made, were agreed in principle between the parties at the time of the execution of the document. On the facts of this case, it is clear that the insertions relate to either the rate of interest or particulars of the amounts to be credited to each of the syndicated lender accounts. As the Defendant had already agreed in principle to the subsequent incorporation of these items, the insertion of details pertaining to what was agreed in principle earlier, will not prejudice the enforceability of the Loan Agreement and / or the pre-signed letters. I accept the pronouncements of Lord Scarman in **United Dominions Trust Ltd. v. Western B. S Romany (1976) 1 Q.B 513** and followed by our Court in **Chai Theng Song v. Malayan United Finance Bhd (1993) 2 CLJ 640** that, in that event, the insertions are deemed to have been made with the Defendant's consent.

Application of the proceeds of Loan Agreement

At the commencement of the trial, it became evident that the Defendant's primary defence was no longer that the Loan

Agreement was a sham as much as that the Plaintiff had failed to prove that the proceeds of the term loan had been applied consistent with the instructions of the Defendant. Counsel for the Defendant drew a distinction between instructions to apply and the application itself. The submission being that the existence of instructions did not afford proof that the instructions had been carried out. Counsel for the Defendant in the course of the cross examination of the Defendant's witnesses, in particular, PW 3, endeavoured to highlight discrepancies in the documentary evidence tendered by the Plaintiff to prove that no actual transfer of the term loan proceeds into the various accounts of the syndicated borrowers had taken place. Counsel for the Defendant also submitted that the evidence tendered by the Plaintiff did not sufficiently establish on a balance of probabilities that the term loan proceeds had been utilised in accordance with the Defendant's instructions.

I propose at this juncture to examine in detail the evidence of PW 3 and the documentary evidence tendered through him to ascertain whether the Plaintiff did comply with the Defendant's instructions. The Defendant's instruction can be gleaned from Exhibit 165 of B. According to this instruction, the total proceeds of the term loan of RM 26,315,955.55 (**see Exh. 16 of B**) was to be utilised to credit the accounts of the syndicated borrowers in the amount corresponding to their

names. According to PW 3, HLFB and the syndicated lenders were owed different sums of money under their respective syndicated term Loan Agreements. For this reason, it was necessary to remit separately the proceeds to the accounts of the syndicated borrowers with the syndicated lenders. The Plaintiff relies on the following documents to prove the transfer and receipt of the total amount of the term loan proceeds by HLFB and the remaining syndicated lenders. The document being:

- a) Exh. 1 of D4;
- b) Exh. 2 of D4 and
- c) Exh. 3 to 8 of D4

Exh. 1 of D4 to establish that the term loan proceeds were, indeed, received by HLFB. This credit transfer note states that the monies were received for *'payment of interest, commitment fees and nominee charges for syndicated term loan for Arus Murni and four others'* (**see Q & A 21 of WSPW 3**). Exh. 2 of D4 is an hand written memo attached to the internal note of 26th September 1997 – Exh. 3 of D4. These two documents show that HLFB instructed the Treasury Department to transfer RM 18,606,332.31 towards settlement of the loans of the syndicated borrowers with the syndicated lenders. The amounts to be credited into the account of each syndicated borrower being stipulated corresponding to the

syndicated borrowers account number with each of the syndicated lenders. Exhs. 3 to 8 of D4 are the letters despatched by HLFB to the four other syndicated lenders notifying them of the remittances to them via telegraphic transfers by way of payment of the 6 monthly interest and commitment fees due to them from the syndicated borrowers and AMSB. The sum of RM 7,701,546.51 and the sum of RM 8,760.73 was retained by HLFB in satisfaction of the 6 monthly interest and nominee charges due to it as one of the syndicated lenders. Exhs. 9 to 38 of D4 are the ledger cards maintained for the syndicated term loans granted by HLFB to the syndicated borrowers and AMSB (**see Q & A 6 of WSPW 3**). These ledger cards, according to PW 3 are maintained to record transactions in the accounts of the syndicated borrowers in respect of the syndicated term loan facility granted by HLFB. These ledger cards also record the interest accruing due monthly, the commitment fees, nominee fees and other charges due and payable under the syndicated term loan facilities by each of the syndicated borrowers to HLFB. Finally, the ledger cards also record any payment received from the syndicated borrowers.

Upon an examination of these documents, it is evident that there is only a small difference of some RM 8076.73 between the term loan of RM 26,315,955.55, and the amount transferred to the syndicated lenders including HLFB. Counsel for the Defendant contended that this discrepancy coupled with

the alterations appearing in the ledger records affords ample evidence of the Plaintiff's failure to discharge the burden vested upon it to prove that the application of the term loan proceeds was in accordance with the instructions of the Defendant. As regards this discrepancy, I accept the evidence of PW 3 that this amount was used to set off the nominee and other incidental charges due to the Plaintiff as the lead syndicated lender (**Exh. 2 of D4**). The other discrepancy highlighted by counsel for the Defendant was in respect of Hood's account. The ledger card at page 22 of D4 included an entry of RM 1,358,403.66 as having been paid by way of interest up to September 1997. However, page 1 of D3 recognised the sum of RM 1,360,904.12, as the payment made by Hood towards account of interest for the same period. The explanation for this discrepancy by PW 3 was that the amount actually credited to Hood's account with HLFB was the figure of RM 1,362,184.92. According to him, over and above interest, the sum of RM 2244.26 was received by way of commitment fee and another sum of 1532 was received by way of incidental charges. In other words, the aggregate received from Hood was RM 1,362,184.92. PW 3 was unable to explain the discrepancy between the figures in page 22 of D4 and page 1 of D3. In my judgment, the discrepancy is so minute that it does not warrant this Court holding the Plaintiff to have failed to discharge the burden of proving its claim.

On the balance, I am satisfied that HLFB applied the full term loan in accordance with the instructions of the Defendant by transferring the term loan to the account of the syndicated borrowers and AMSB in satisfaction of the interest payable by them for the period March to September 1997 in respect of their syndicated term Loan Agreements. Accordingly, I order judgment in favour of the Plaintiff in terms of prayers (a) and (b) of prayer 7 of Enc. 1. I also order the Defendant to pay interest on the principal sum of RM 26,315,955.55 at the rate of 14% p.a from 1st June 1998 till the date of payment. I order the Defendant to pay costs of 30,000 to the Plaintiff in respect of Enc. 1.

Sgd.
(Anantham Kasinather)
Hakim
Mahkamah Tinggi Kuala Lumpur

Date of Decision: 12th August 2010

Counsels:

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*(Tetuan Lee Hishamuddin
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Ms. M. Nagaletchimy
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