PERCETAKAN CHINOON SDN BHD

v.

ARAB MALAYSIAN FINANCE BERHAD

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL AZIZ MOHAMAD JCA
[SUIT NO. D2-22-77-1997]
20 APRIL 2006

HIRE PURCHASE: *Breach of agreement - Damages - Facility agreement and hire-purchase agreement purportedly entered into by both parties - Whether defendant terminated hire-purchase agreement and withdrew facility agreement without reasonable cause and notice - Whether plaintiff itself intended to terminate hire-purchase agreement - Whether facility agreement a binding contract*

CONTRACT: *Breach - Damages - Facility agreement and hire-purchase agreement purportedly entered into by both parties - Whether defendant terminated hire-purchase agreement and withdrew facility agreement without reasonable cause and notice - Whether plaintiff itself intended to terminate hire-purchase agreement - Whether facility agreement a binding contract*

The plaintiff company, in its statement of claim, contended that there were two agreements that were binding on the defendant, a finance company: (i) the defendant's letter to the plaintiff dated 20 August 1990 ('the defendant's letter') by which the defendant informed the plaintiff that it had agreed in principle to make available hire-purchase facilities to the plaintiff subject to certain terms and conditions ('facility agreement'); and (ii) a hire-purchase agreement in respect of a TCE paper-bag-making machine ('TCE machine') entered into by both parties on or about 19 September 1996 ('HP agreement'). The plaintiff averred that the defendant "unilaterally, arbitrarily and without reasonable cause and/or any notice, terminated" the HP agreement, and that as a result, the plaintiff suffered forfeiture of the deposit, loss of profit and loss of business goodwill. The plaintiff also submitted that in reliance on the facility agreement, it had made arrangements to purchase two Hindelberg printing machines and that the arrangements had to be aborted, resulting in loss of profit and loss of business goodwill, as a result of the defendant's unilateral, arbitrary and unreasonable conduct in withdrawing the facility agreement. The plaintiff, therefore, sought damages for breach of both the facility agreement

and the HP agreement. The defendant submitted that one Chin, the managing director of the plaintiff, cancelled the deal and that the plaintiff was the one that wanted to terminate the HP agreement. The defendant also contended that the facility agreement was not a binding contract but only "an indication of the defendant's willingness to do business with the plaintiff subject to further terms and conditions to be agreed between the plaintiff and the defendant".

Held (allowing the plaintiff's action):

(1) In view of the fact that the plaintiff began by needing the TCE machine to make business profits and had done all that it had done to acquire the TCE machine, it was improbable that at the eleventh hour it decided to cancel the arrangement for the financing of it, so that it was unable to proceed with the purchase and suffered forfeiture of the deposit, unless there was a reasonable explanation for such a financially injurious change of mind. No explanation had been suggested in evidence or in submission and the defendant's only witness, one Liza, could not offer one. Her evidence rendered unjustified and baseless the suggestion that had been put earlier to Chin, in cross-examination, that he agreed to cancel the deal upon or after being told that he had not been honest in his application. On a balance of probabilities, Chin did not cancel the deal. That was a conclusion that flowed from the circumstance of absence of explanation and it was not a circumstance that this court must insist that Liza should have been cross-examined on before drawing the conclusion. (paras 14 & 15)

(2) The plaintiff had written to the defendant demanding damages for having "unilaterally, unreasonably and arbitrarily withdrawn" the RM2 million facility. Although the defendant's letter was about the facility for the TCE machine, the fact was that, as the evidence showed, the withdrawal of that facility was closely connected with or was the result of the withdrawal of the umbrella facility. In any case, the important point to realize was that the plaintiff's letter necessarily implied a denial by the plaintiff that it was the plaintiff that wished to cancel the deal relating to the TCE machine. (para 17)

(3) As regards the facility agreement, the plaintiff had accepted the terms and conditions in the defendant's letter. One of terms required the joint and several guarantee of two persons, one of who was Chin. The defendant sent the "Master Guarantee" to the plaintiff for execution and the two guarantors executed it. The guarantee, which was a document emanating from the defendant themselves, referred to that letter as "the Master Facility Agreement". In the guarantee, the guarantors gave undertakings and guarantees in 14 paragraphs. The Master Facility Agreement and each HP agreement that may be entered into under it were collectively referred to as "the Agreements". A number of paragraphs indicated that it was envisaged that the plaintiff had certain enforceable obligations under the Agreements, and therefore, under the Master Facility Agreement. Since the defendant itself referred to the defendant's letter as the Master Facility Agreement and indicated its enforceability, the letter constituted a binding agreement. (paras 19 & 20)

(4) The defendant did breach the facility agreement and the HP agreement, and was liable in damages to the plaintiff for the breaches. (para 22)

[Damages to be assessed by registrar.]

Case(s) referred to:

Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen & Ors [1995] 3 CLJ 639 CA ***(refd)***

Browne v. Dunn [1893] 6 R 67 ***(refd)***

Carapiet v. Derderian AIR [1961] Cal 359 ***(refd)***

For the plaintiffs - Jerald Gomez; M/s Jerald Gomez & Assoc

For the defendants - V Rajadevan; M/s M Pathmanathan & Co

Reported by Suresh Nathan

JUDGMENT

Abdul Aziz Mohamad JCA:

[1] In their statement of claim the plaintiff company contend that there were two agreements that were binding on the defendants, a finance company. One (para. 5) was the defendants' letter to the plaintiffs dated 20 August 1990 by which the defendants informed the plaintiffs that they had "agreed in principle

to make available hire purchase ... facilities to you on the following brief terms and conditions". There were fifteen terms and conditions. No. 3 specified the articles to be covered by the facilities as "New/used machinery/equipment/vehicles related to the (plaintiffs') business activities, acceptable to (the defendants)". No. 4 limited the facilities to RM2,000. No. 14 limited the period of utilization of the facilities to six months from the date of the letter, that is to say, until 19 or 20 February 1997. The last paragraph of the letter said: "The terms and conditions stated herein are indicative and the above facilities shall be subject to further terms and conditions of the hire purchase ... agreement(s) to be executed by you. We trust the above indicative terms and conditions are to your satisfaction." Paragraph 5 of the statement of claim terms the letter as "facility agreement". I, too, shall term it so.

[2] The other agreement that the plaintiffs contend was binding on the defendants was a hire-purchase agreement in respect of a TCE paper-bag-making machine ("TCE machine"). In para. 7(1) of the statement of claim the plaintiffs say that they "proceeded to enter into (the) agreement with the defendants." In his evidence, Encik Chin Kwan Kee, the managing director of the plaintiff company, said that that agreement was entered into about a week before 26 September 1996, which was the date of the defendants' receipt for the payment of RM7,471, being the advance payment of the final instalment of RM7,271 under that agreement, plus RM200 documentation fee. So that agreement would have been entered into on or about 19 September 1996. I shall refer to that agreement as "the HP agreement".

[3] In para. 10 the plaintiffs aver that on 3 October 1996 the defendants "unilaterally, arbitrarily and without reasonable cause and/or any notice, terminated" the HP agreement. In para. 11 the plaintiffs aver that as a result, they suffered forfeiture of the deposit, loss of profit, and loss of business goodwill. According to the evidence, the deposit was the deposit paid on the TCE machine and was forfeited when the balance of the price was not paid because the plaintiffs were not able to obtain the financing from the defendants, and the lost profit was the profit that the plaintiffs expected to make from the use of the machine in connection with the production of envelopes, angpow packets and paper-bags.

[4] In para. 12 the plaintiffs aver that in reliance on the facility agreement they made arrangements to purchase two Hindelberg printing machines and in para. 13 they aver that the arrangements had to be aborted, resulting in loss of profit and loss of business goodwill, as a result of the defendants' unilateral, arbitrary and unreasonable conduct in withdrawing the facility agreement. I view para. 13 as combining an averment of unlawful withdrawal of the facility agreement and an averment of the consequences of it. The defendants' counsel has not argued otherwise although I have afforded him an opportunity to do so.

[5] In this action, therefore, the plaintiffs seek damages for breach of the facility agreement and breach of the HP agreement. It has been agreed that I need only to decide on liability, the assessment of damages to be done by the Registrar.

[6] The submissions in this case are all in writing. The written submission of the defendants' counsel is dated 14 October 2004. In it he gives several reasons for contending that the plaintiffs' action should be dismissed. He has another written submission dated 9 November 2004, but that does not in any way add to or strengthen his written submission of 14 October 2004. It is mainly a response to the reference by the plaintiffs' counsel to an aspect of this case which I am not going to take into consideration, namely the defendants' failure in their effort to amend the statement of defence to include an allegation of fraud against the plaintiffs in relation to the purchase of the TCE machine. Therefore it is the written submission of 14 October 2004 that I will be referring to.

[7] As regards the HP agreement, para. 5.1 of the statement of defence contends that there was no HP agreement in respect of the TCE machine. The only submission of the defendants' counsel in support of this contention is at the bottom of p. 5 of the written submission, where, after dealing with the question of the existence of the facility agreement, he merely says, "There was no such further agreement between the parties …", meaning there was no HP agreement. I have drawn his attention to this and given him an opportunity to argue in a further written submission why, on the evidence, he says that there was no HP agreement. He has not done so. I conclude therefore that he is not able to show that there is no evidence of the existence of the HP agreement. In the circumstances I need not, to decide this point, go into the evidence. I will only say that even the defendants'

solicitors at the time, in their letter dated 14 December 1996 to the plaintiffs' solicitors, accepted that the HP agreement existed. This was what they said:

> In the circumstances, our clients instruct us to put you on notice, which we hereby do, that they exercise their right under Clause 14 of the Hire Purchase Agreement and now terminate the same.

[8] Before I deal with another submission of the defendants' counsel about the HP agreement, it is necessary to set out certain pertinent evidence. The relevant part of the evidence of Encik Chin Kwan Kee, the plaintiffs' managing director, is this. The HP agreement was entered into on or about 19 September 1996. He was to repay the facility by forty-two instalments, the final instalment being of RM7,271, which he had to pay in advance. On 19 September 1996 (p. 12 PBD) the defendants requested for payment of RM7,471, being the sum of RM7,271 plus RM200 documentation fee. This was paid and the defendants issued a receipt dated 26 September 1996 (p. 13 PBD).

[9] He, Encik Chin, had been sourcing for high-tech and very fast machines, besides the TCE machine, to be bought for the expansion of the plaintiffs' business with the RM2 million facility under the facility agreement. He said that among the machines that he managed to source for were the two Hindelberg machines (pp. 9 and 10 PBD). He then said:

> I did telephone Liza Razali telling her there were two more machines we needed to buy. She said defendants were withdrawing the RM2 million facility. I kept on pushing for an answer. She said it was the management's decision. She refused to see me. I was not able to contact or see anybody for an explanation. I went to the office to see the management or Liza for explanation but they kept providing me with all kinds of excuses.

Cik Liza (full name Norhazlizawati bt. Mohd. Razali) was the defendants' officer with whom Encik Chin had been dealing. Encik Chin went on to say that about two weeks after he had ceased chasing for an explanation for the withdrawal of the RM2 million facility, probably in the third week of October, he received a letter dated 3 October 1996 from the defendants (p. 19 PBD). The heading of the letter referred to the hire-purchase facility for the TCE machine. The letter said, "We are informed that you wish to cancel this particular deal. As such we are returning to you the following documents". One of the documents was the plaintiffs'

cheque for RM7,417, "RM7,147" stated by the letter being clearly an error. Encik Chin affirmed in examination-in-chief that he did not cancel the deal.

[10] In cross-examination, when asked whether he replied to the letter, he said that he went to see Cik Liza, who said it was the management's decision to withdraw the facilities. When asked whether he asked for the reason, he said he did but got no answer. Then it was put to him: "You were told it was because you were not honest in your application. You were informed about it before the letter and you agreed to the cancellation as stated in the letter". Encik Chin absolutely disagreed with what was put to him.

[11] For the submission of the defendants' counsel that I am coming to, he referred to Cik Liza's explanation of the statement "We are informed that you wish to cancel this particular deal" in the defendants' letter of 3 October 1996. This was what Cik Liza said:

> It was Chin himself who telephoned me saying he wished to cancel the deal. I cannot remember his reason for wanting to cancel the deal. He telephoned me particularly to tell me that he wanted to cancel the deal. I cannot remember whether he gave a reason for wanting to cancel the deal.

The plaintiffs' counsel did not cross-examine Cik Liza on her explanation.

[12] The defendants' counsel refers to para. 5.2 of the statement of defence, which includes the averment that the plaintiffs had intimated "that they did not require the facility" and had requested for the return of the cheque, "which the plaintiffs duly accepted without protest at that time or any time thereafter …". To this the plaintiffs replied in para. 4 of their reply that at all material times they made known to the defendants their objection to the return of the cheque and the "unilateral, arbitrary and unreasonable termination of the agreement". The submission of the defendants' counsel is that the failure to cross-examine Cik Liza on her evidence that I have quoted amounted to an acceptance of her evidence and an abandonment of the plaintiffs' pleaded case of unilateral, arbitrary and unreasonable termination of the HP agreement.

[13] In support of that submission, counsel refers to certain passages that were cited by Gopal Sri Ram JCA in the Court of Appeal in *Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen & Ors* [1995] 3 CLJ 639. Two of the passages are from *Browne v. Dunn* [1893] 6 R 67, a decision of the House of Lords. One of them is the following from Lord Herschell LC's speech, at p. 659 of *Aik Ming*:

> Now, my Lords, I cannot help saying that it seems to me to be absolutely essential to the proper conduct of a cause where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact, by some questions put in cross-examination showing that that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which it is suggested indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit. My Lords, I have always understood that if you intend to impeach a witness you are bound, whilst he is in the box, to give him an opportunity of making any explanation which is open to him; and, as it seems to me, that is not only a rule of professional practice in the conduct of a case, but is essential to fair play and fair dealing with witnesses.

The other passage is the following from Lord Halsbury's speech, at p. 659 of *Aik Ming*:

> To my mind nothing would be more absolutely unjust than not to cross-examine witnesses upon evidence which they have given, so as to give them notice, and to give them an opportunity of explanation, and an opportunity very often to defend their own character, and, not having given them such an opportunity, to ask the jury afterwards to disbelieve what they have said, although not one question has been directed either to their credit or to the accuracy of the facts they have deposed to.

The principle in the two passages from *Browne v. Dunn* is that a witness should not, on the strength of certain circumstances, be said not to have spoken the truth on a particular point, if he has not been cross-examined as to those circumstances. It does not apply in the context of the evidence that I have set out, because the plaintiffs are not relying on any specific circumstances that Cik Liza was not cross-examined on to suggest that she was not telling the truth when she said that it was Encik Chin himself who

wished to cancel the deal. The situation is simply that Encik Chin, when giving evidence for the plaintiffs, denied cancelling the deal and Cik Liza, when it came to her turn to give evidence for the defendants, asserted that Encik Chin cancelled the deal. It is a matter for the court to decide, on a balance of probabilities, whether Encik Chin did or did not cancel the deal.

[14] Let me decide this question right away at this juncture. In view of the fact that the plaintiffs began by needing the TCE machine to make business profits and had done all that they had done to acquire it, I am unable to accept it as probable that at the eleventh hour they decided to cancel the arrangement for the financing of it, so that they were unable to proceed with the purchase and they suffered forfeiture of the deposit, unless there is a reasonable explanation for such a financially injurious change of mind. No explanation has been suggested in evidence or in submission. Cik Liza could not offer one. She was the only witness for the defendants. Her evidence renders unjustified and baseless the suggestion that had been put earlier to Encik Chin in cross-examination, as I have related, that he agreed to cancel the deal upon or after being told that he had not been honest in his application. I therefore conclude that on a balance of probabilities Encik Chin did not cancel the deal.

[15] That is a conclusion that flows from the circumstance of absence of explanation. I do not think it is a circumstance of the kind that those two passages intended. It is not a circumstance that I must insist that Cik Liza should have been cross-examined on before I could draw the conclusion. If it had been suggested to Cik Liza in cross-examination that, contrary to her evidence, it is not probable, in the absence of an explanation, that Encik Chin would have cancelled the deal, I cannot imagine what answer she might possibly have given to contradict the suggestion, since she herself had no explanation. In all likelihood she would not have been able to respond satisfactorily to the suggestion or she would have agreed with it, which would have done nothing to render probable her assertion that it was Encik Chin who had wanted to cancel the deal.

[16] Another passage that the defendants' counsel refers to is the following from Mukherji J's judgment in *Carapiet v. Derderian* AIR [1961] Cal 359, which appears at p. 659 of *Aik Ming*:

> The law is clear on the subject. Wherever the opponent has declined to avail himself of the opportunity to put his essential and material case in cross-examination, it must follow that he believed that the testimony given could not be disputed at all. It is wrong to think that this is merely a technical rule of evidence. It is a rule of essential justice. It serves to prevent surprise at trial and miscarriage of justice, because it gives notice to the other side of the actual case that is going to be made when the turn of the party on whose behalf the cross-examination is being made comes to give and lead evidence by producing witnesses. It has been stated on high authority of the House of Lords that this much a counsel is bound to do when cross-examining that he must put to each of his opponent's witnesses in turn, so much of his own case as concerns that particular witness or in which that witness had any share. If he asks no question with regard to this, then he must be taken to accept the plaintiff's account in entirety. Such failure leads to miscarriage of justice, first by springing surprise upon the party when he has finished the evidence of his witnesses and when he has no further chance to meet the new case made which was never put and secondly, because such subsequent testimony has no chance of being tested and corroborated.

The passage is essentially aimed at the springing of a surprise by one party on his opponent in the form of a new case of which the opponent has not had notice because his witnesses, when they gave evidence, were not cross-examined on it. It can only apply to prevent unfairness to the party who presents his case first, usually the plaintiff. In this case the passage can only be used by the plaintiffs against the defendants had the situation envisaged by the passage arisen. It can never be used against the party who presented his case first, in this case the plaintiffs.

[17] The defendants' counsel submits that the plaintiffs' failure to take the earliest opportunity to dispute the allegation in the defendants' letter of 3 October 1996 must be taken to mean that the plaintiffs agreed that it was they who wished to terminate the HP agreement. No authority has been cited for the proposition and I am not aware that that is the law. The fact is that on 27 November 1996 the plaintiffs' solicitors wrote to the defendants demanding damages for having, by the defendants' said letter of 3 October 1996, "unilaterally, unreasonably and arbitrarily withdrawn" the RM2 million facility. Although the defendants' letter was about the facility for the TCE machine, the fact is that, as the evidence shows, the withdrawal of that facility was closely connected with or was the result of the withdrawal of the umbrella

facility. In any case, the important point to realize is that the plaintiffs' letter necessarily implies a denial by the plaintiffs that it was they who wished to cancel the deal relating to the TCE machine.

[18] As regards the facility agreement, the defendants' counsel submits in Part B of his written submission that it is not a binding contract but only "an indication of the defendant's willingness to do business with the plaintiff subject to further terms and conditions to be agreed between the plaintiff and the defendant". In support of the submission the defendants' counsel merely relies on the fact that the defendants' letter dated 20 August 1990 stated that the defendants' agreeing to make available the RM2 million facility was "in principle" and on the last paragraph of the letter, which I have quoted and will quote again:

> The terms and conditions stated herein are indicative and the above facilities shall be subject to further terms of the Hire Purchase ... agreement(s) to be executed by you.

This submission relates to paras. 2 and 3 of the statement of defence.

[19] The plaintiffs accepted the terms and conditions in the defendants' letter of 20 August 1996. One of the terms and conditions set out in the letter, No. 10, required the joint and several guarantee of two persons, one of whom was Encik Chin. On 9 September 1996 the defendants sent to the plaintiffs the "Master Guarantee" for execution. The two guarantors executed this on 28 September 1996. The guarantee, which was a document emanating from the defendants themselves, referred to that letter as "the Master Facility Agreement". In the guarantee, the guarantors gave undertakings and guarantees in fourteen paragraphs. In para. 1 the Master Facility Agreement and each HP agreement that may be entered into under it were collectively referred to as "the agreements". A number of the paragraphs indicate that it was envisaged that the plaintiffs had certain enforceable obligations under the "the agreement", and therefore under "the Master Facility Agreement". Besides the mention of "enforcement of the agreements" in para. 1, I need only quote specifically paras. 2 and 13:

> 2. I/We hereby further covenant jointly and severally to indemnify AMFB against any loss or damages, cost and expenses (as conclusively certified by AMFB) incurred or suffered by AMFB arising out of or as a result of the non-

observance, non-compliance or non-performance by the Customer of any of the terms, conditions, covenants, stipulations and undertakings contained in the Agreements.

13. If the Customer shall make or commit a default or breach of any of the terms of the Agreements I/we shall indemnify AMFB and its assigns and successors in title against all losses damages costs expense incurred or suffered by AMFB as a result of or arising out of such default on the part of the Customer.

[20] Since the defendants themselves referred to the letter of 20 August 1996 as the "Master Facility Agreement" and indicated its enforceability, I hold that the letter constituted a binding agreement.

[21] Finally, the defendants' counsel submits that there was no evidence of any other machine besides the TCE machine that the plaintiffs wished to buy for which they approached the defendants for financing. That is in reference to para. 8 of the statement of defence, where the defendants claim they had no knowledge of the plaintiffs' averment in para. 12 of the statement of claim that in reliance on the facility agreement they had made arrangements to purchase two Hindelberg machines, and where the defendants also aver that the plaintiffs did not apply for or "make any representation to the defendants for any hire purchase facility in respect of" those machines. The submission is not correct. I have set out Encik Chin's evidence about the Hindelberg machines and his telephoning Cik Liza about them.

[22] I find that the defendants did breach the facility agreement and the HP agreement and are liable in damages to the plaintiffs for the breaches. The damages will be assessed by the registrar. I order costs for the plaintiffs.