

**IN THE HIGH COURT OF MALAYA AT KUALA LUMPUR
(COMMERCIAL DIVISION)
[CIVIL SUIT NO. D-22NCC-1309-2010]**

BETWEEN

**SOUTHEAST ASIA SPECIAL ASSET ... PLAINTIFF
MANAGEMENT BERHAD**

(yang telah mengambilalih segala liabiliti, asset,
kepentingan, hak dan remedy bagi akaun Defendan
melalui Perintah Letakhak bertarikh 15/1/2010)

AND

OH KIM HOE

... DEFENDANT

***BANKING:** Securities for advances - Deposit of shares as security - Plaintiff proposed to dispose of pledged securities to reduce total amount due from defendant - Quantum of debt - Whether entire security afforded by defendant disposed of - Whether any basis to contend that there remained shares unsold - Whether sale of pledged securities done at an undervalue*

***CIVIL PROCEDURE:** Parties - Locus standi - Vesting order - Effect of - Certificate of Indebtedness bearing CIMB Bank Berhad's letter head produced to prove quantum due and owing - Entire assets and liabilities of CIMB assigned to and vested in plaintiff - Whether plaintiff had locus to institute these proceedings - Whether proper party to sue was CIMB and not plaintiff - Whether pursuant to such vesting CIMB had locus to initiate any action as debt had been effectively assigned to and vested in*

plaintiff - Whether fact that Certificate of Indebtedness was produced on CIMB's letterhead could alter or revoke such assignment - Whether Certificate of Indebtedness merely certified quantum due - Whether Certificate altered ownership of debt which belonged to plaintiff which was the correct party to collect the same

[Plaintiff's claim allowed.]

FOUNDATIONS OF JUDGMENT

The Defendant in this case, Oh Kim Hoe, ('the Defendant') was a customer of Southern Bank Berhad. In or around 26 May 2000, he entered into a Facility Agreement with Southern Bank Berhad whereby the Bank afforded him a Term Loan of RM6,256,400.00 on the terms and conditions specified in the agreement.

The Plaintiff is a company incorporated in Malaysia that is licensed to conduct banking business. On 6 September 2006, all the assets,

liabilities and business of Southern Bank Berhad was assigned to Bumiputra-Commerce Bank Berhad which subsequently changed its name to CIMB Bank Berhad. On 15 January 2010 all the rights, liabilities, assets, remedies and securities of CIMB Bank, including the debt of the Defendant owed to CIMB Bank, was assigned and vested in the Plaintiff with effect from 20 January 2010.

Due to the default in the repayment of the Term Loan, the Plaintiff now seeks to recover monies it claims to be due and outstanding from the Defendant to it.

This matter was first fixed for the hearing of an application for summary judgment followed immediately thereafter by trial, in the event the Plaintiff should not succeed in its application. During the hearing of the summary judgment application I ruled that the sole issue for adjudication at trial in respect of this matter related to the disposal of pledged securities by the Defendant which comprised the security for the grant of the Term Loan to the Defendant. This then was the primary issue adjudicated upon at trial.

It should be highlighted that in the course of the summary judgment application the Defendant sought to suggest that the Plaintiff here had no locus to institute these proceedings because a Certificate of Indebtedness bearing CIMB Bank's letter head had been produced to prove the quantum due and owing when in fact the entire assets and liabilities of CIMB Bank had been assigned to and vested in the Plaintiff with effect from 29 January 2010. Accordingly it was contended that the proper party to sue in the instant case was CIMB and not the Plaintiff.

I dismissed this contention as being misconceived as with effect from 29 January 2010 all interests in the Defendant's debt had been vested by order of court in the Plaintiff. With such vesting CIMB Bank Berhad could have no locus to initiate any action as the debt had been effectively assigned to and vested in the Plaintiff. The fact that the Certificate of Indebtedness was produced on the letterhead of CIMB Bank Berhad could not alter or revoke the assignment. In any event the Certificate of Indebtedness merely certified the quantum due, but did not alter the ownership of the debt, which belonged to the Plaintiff which was therefore the correct party to seek to collect the same.

I therefore ruled that the sole issue for adjudication was whether, as a matter of fact, the entirety of the security afforded by the Defendant had been disposed of, and whether this had been done fairly and not at an undervalue as contended by the Defendant.

Salient Background Facts

Vide a Letter of Offer from Southern Bank Berhad dated 4 April 2000 and a Facility agreement dated 26 May 2000, Southern Bank Berhad offered and the Defendant accepted a Term Loan in the sum of RM6,256,400-00 on terms as set out in the said Agreement. As security for the provision of the Loan the Defendant executed a Memorandum of Deposit bearing registration number 39470/2000 dated 26 May 2000. *Vide* this Memorandum of Deposit the Defendant pledged as security for the loan, shares as enumerated in the Memorandum of Deposit. The terms of repayment as specified in the Facility Agreement was that the Defendant was bound to make monthly installment payments in the sum

of RM56,575.00 per month over a period of 240 months commencing upon the disbursement of the Term Loan.

It is not in dispute that the Term Loan was fully disbursed to the Defendant for his benefit and use.

Subsequently there was default in the servicing of the loan, ie, the Defendant failed to comply with his obligation to make the monthly repayments. The Plaintiff's sole witness, one Mizahani binti Othman, an Assistant Manager in CIMB Bank Berhad, PW-1 ('PW-1'), testified that discussions were conducted between the parties between 2001 and 2006 in connection with proposals to resolve the sums due. This is borne out to some degree by correspondence between the parties. (In this context it is relevant that I ruled in the course of the trial that all without prejudice correspondence would not be considered or looked at by the Court). As a consequence of these discussions, the Plaintiff proposed to dispose of the pledged securities (as it was entitled to do under the terms of the Memorandum of Deposit) to reduce the total amount due from the Defendant to the then Bank, and now the Plaintiff.

The Plaintiff kept the Defendant advised of the sale of the pledged securities from time to time, including *vide* letters dated 10 September 2004 and letter dated 5 May 2009.

Significantly, PW-1 stated in the course of her evidence that initially, a portion of the Defendant's pledged shares were realised and the proceeds thereof utilised to reduce the debt due to the Plaintiff, as of 28 July 2006. The Plaintiff did not realise the entirety of the Defendant's pledged securities because the Defendant himself asked that they not

be sold, *vide* a request in writing, according to PW-1. In response the Plaintiff advised the Defendant *vide* letter dated 23 August 2005 that the pledged shares would be realised in stages depending upon the price of the shares. Thereafter the Plaintiff slowly realised the entirety of the pledged shares, keeping the Defendant advised *vide* letters dated 28 July 2006, 19 September 2006, 29 July 2008 and 5 May 2009. PW-1 advised that the disposal was conducted pursuant to clauses 5 and 6(b) of the Memorandum of Deposit whereby the Defendant accorded the Plaintiff the discretion to realise the pledged shares at any time for the purposes of settling the outstanding sums due to the Plaintiff.

PW-1 also referred to the complete statement of accounts in respect of the Defendant's account to corroborate her evidence that even after the disposal of the pledged securities which had the effect of reducing the debt, there was still a debt due and owing to the Plaintiff in the sum of RM8,831,813.71 together with interest. As a consequence a letter of demand was issued and as there was no response the current legal proceedings initiated.

In the course of cross-examination, the thrust of learned counsel for the Defendant's defence was that the Plaintiff had failed to provide documentary evidence to support the contention of PW-1 that the entirety of the pledged shares had in fact been disposed of and the proceeds thereof utilised to reduce the debt due to the Plaintiff.

PW-1 explained in the course of cross-examination that the Defendant had first defaulted on the Term Loan in 2001. However the sale of shares had commenced in 2004. When asked whether there were still shares left to be sold in 2006, PW-1 agreed. PW-1 was asked to

produce sale contract notes for the pledged shares to show that the Defendant's shares had been sold which she said she did not have. She did however maintain that proof of the disposal of the pledged securities was evident from the statement of account of the Defendant where upon disposal the proceeds were utilised to offset the debt due from the Defendant to the Plaintiff.

PW-1 was then asked whether she had any proof to show that the shares had been sold at market value. She replied that in accordance with the Bank's practice, and as stipulated in correspondence to the Defendant, the pledged securities had been sold in accordance with market values.

PW-1 was then asked to provide documentary evidence to show that all of the shares had been sold. She said that she was not able to do so. She maintained however that all of the Defendant's shares had been sold in stages because the Plaintiff had received proposals of settlement from the Defendant.

In the course of re-examination, PW-1 referred to the statement of account and maintained that proceeds from the realisation of shares had been received from 2006, as the Defendant had made no monetary repayments thereafter. She was referred to a specific entry marked 'credit' in the Statement of Account which showed that a sum of RM223,581.89 had been received and stated that this was from the proceeds of sale of shares. She was able to identify these proceeds of sale because of the relevant code that appeared in respect of the transaction which identified it to be proceeds of sale.

With this the Plaintiff closed its case and the Defence called its only witness, the Defendant.

In his evidence the Defendant admitted that he had signed the Facility Agreement. He set out the shares he had pledged. He candidly admitted that he faced financial difficulties from 2001 and defaulted in the repayment. He also admitted that he had carried out negotiations with the then creditor, Southern Bank Berhad and asked them to sell of his shares to reduce the loan sum. However he said they only started to do so in stages from 2004 when the prices of the shares were low. He relied on a weekly trading information from Bursa to suggest that the disposals were carried out at prices that were too low.

He stated in examination in chief that he did not owe any money to the Bank. However he failed to explain how this was the position. He complained that Southern Bank Berhad did not advise him of the disposal of the shares. He also maintained that he did not know whether they had disposed of all of the shares.

In the course of cross-examination, he agreed that he had a series of discussions with the Bank beginning from 2004 until 2009 in which he requested for time to settle the debt due. He was asked expressly whether he admitted owing a sum of money to the Bank. His response was that he did not know the figure. In other words he did not deny the existence of a debt.

It was then put to him that although he was not aware of the exact amount, whether he was aware that the Bank had disposed of a part of the shares. His response was that he was made aware upon receipt of

letters from the Bank. In respect of the balance of the shares he was asked why he did not write to the Bank to find out whether it had been disposed of too. His response was that as the Bank was at liberty to dispose of the shares at any time, he did not make a request.

He was then asked to estimate the number of shares which remained unsold, in view of his contention that he did not believe that all the pledged shares had in fact been sold. To this question which was put to him more than once, he maintained that he did not know and was unable to effect any estimation. It was then put to him that the Bank had in fact disposed of all the shares. He maintained that he was not aware of this.

In the course of re-examination he was asked again what the quantum of unsold shares was and he maintained that he was unable to estimate the same. With this the defence closed its case.

In essence in this case, the fact of the subsistence of a debt is not in issue. What remains in issue is the quantum of the debt. The Defendant maintains that the entirety of his pledged shares have not been disposed of, and therefore the quantum now claimed by the Plaintiff is not proven. However the Defendant is unable to estimate or point to the quantum of shares that remain unsold.

The Plaintiff in response maintains that all of the pledged securities have been sold and that the quantum now due and remaining is as claimed in the statement of claim. In other words due credit has been accorded to the Defendant as borne out by the Statement of Accounts. In this context, the Plaintiff relies on the evidence of PW-1 where she pointed to entries showing that proceeds were credited to the Defendant's account

to reduce the outstanding sum, the latest being in or around 10 August 2009 when two large payments in the sums of RM238,058.79 and RM223,581.89 were credited to the Defendant's account. According to PW-1 the code reflected there, namely 7090 denotes the fact that these were proceeds from the pledged shares and not payments by the Defendant. The Defendant did not deny this.

I have considered the evidence of both PW-1 and DW-1, the Defendant. It appears to this Court that:-

- (a) The Plaintiff has established through the evidence of PW-1 that based on its records, all of the pledged shares have been sold;
- (b) This is corroborated by the entries in the Defendant's account showing that proceeds otherwise than by way of repayment from the Defendant were credited so as to reduce the amount outstanding. This could only emanate from the sale of the pledged securities;
- (c) The Defendant did not explain where these monies came from. Neither did he deny that these entries emanated from the sale of the pledged securities;
- (d) The Defendant was not in a position to estimate or even state conclusively that not all the pledged shares had been sold. He merely maintained that he was not aware whether this was the case. In short there was no clear denial of the fact of such sale;

- (e) The Defendant admitted that there was a debt due and owing to the Plaintiff. He was merely unsure of the quantum.

Given the entirety of the evidence it appears to this Court that the Plaintiff has managed to establish from the foregoing that it did indeed dispose of all of the pledged securities and credited the Defendant's account accordingly so as to reduce the quantum outstanding. The contention that there remain shares which are unsold is without evidential basis. The Defendant merely sought proof of this fact which was provided for by PW-1 on behalf of the Plaintiff. It is not necessary to provide sale contract notes in order to establish this fact. The statement of account of the Defendant showing entries crediting monies to the Defendant establishes this on a *prima facie* basis. The Defendant has been unable to rebut that evidence.

Finally in so far as selling at a price below the market price, the Defendant apart from making a bare allegation and producing the weekly trading prices made no serious effort to establish this contention. From the documents before the Court it appeared that the Plaintiff had in fact managed to dispose of the shares at median market prices, rather than at an undervalue.

I am satisfied that on a consideration of the evidence as a whole, the Plaintiff has managed to prove its case on a balance of probabilities. The contention that there possibly remains a balance of unsold shares and that the pledged shares were sold at an under value were not proven. Accordingly the Plaintiff is entitled to judgment as prayed for in the sum of RM8,831,813.71 as of 2 June 2010 together with interest thereon at the rate of 2% per annum above CIMB Bank Berhad's Base Lending

Rates with daily rests from 3 June 2010 until the date of final settlement and costs of RM15,000.00.

NALLINI PATHMANATHAN
Judge
High Court (Commercial Division)
Kuala Lumpur

DATED: 30 JANUARY 2012

Counsel:

For the plaintiff - Muhammad Akram; M/s Che Mokhtar & Ling

For the defendant - S Y Lee; M/s S Y Lee & Partners