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BANK BUMIPUTRA (MALAYSIA) BERHAD v. SURIA JAYA SDN BHD & ORS
HIGH COURT, KUALA LUMPUR
ABDUL HAMID MOHAMAD J
GUAMAN NO: D2-22-1418-98
14 MARCH 2000
[2000] 1 LNS 304

***BANKING**:*

**Counsel:**

*TS Ong with Wong Hok Mun; M/s Azim Ong & Krishnan*

*Gobind Singh Deo; M/s Karpal Singh & Co*

**GROUNDS OF JUDGMENT**

By a letter of award dated 15th July 1996, Petroliam Nasional Berhad (Petronas) awarded to the First Defendant time charter (charter party) for the carriage of crude oil, etc. One of the terms of the award was that the First Defendant must within 14 days from the issuance of the letter of award submit a performance bond the terms of which were also specified.

So the First Defendant approached the Plaintiff for the facility.

By a letter dated 26th July 1996, the Plaintiff informed the First Defendant that it had approved the First Defendant's application for the credit facility. The type of facility was a letter of guarantee to the limit of RM1,368,000.00. The beneficiary was Petronas. The purpose was "For issuance of performance bond to Petronas for a contract to supply an ocean going tanker, tender no. 001/96." The Second and Third Defendants were to be guarantors. The duration was "For a period of four (4) years with an option to extend for another one (1) year (plus) 90 days claim period."

Paragraph 10 provides:-

> "The liability will be discharged upon return of the Bank's original LG or beneficiary's written consent for cancellation or upon expiry of the LG."

The letter contains pre-disbursement conditions as follows Paragraph 11:-

> "After the followings have been complied with and returned/submitted to the Bank:-

(a) The Banks Letter of Offer has been duly accepted.

(b) Board of Director's Resolution authorising acceptance of the above facility.

(c) 40% marginal deposit has been duly met.

(d) Loan Agreement has been executed and sealed."

The offer was accepted. The date of acceptance was not stated.

On 27th July 1996 the Plaintiff gave the Letter of Guarantee to Petronas. As it is very important and not very long it is reproduced here for convenience:-

"Kuala Lumpur

27th July, 1996

To: PETROLIAM NASIONAL BERHAD (hereafter referred to as "PETRONAS", a company incorporated under the Laws of Malaysia and having its registered office at Menara Dayabumi, Jalan Sultan Hishamuddin, 50050 Kuala Lumpur.

WHEREAS:

(A) By the letter of Award dated 15th July 1996 pertaining to the TIME CHARTER PARTY AGREEMENT For the Provision of An Ocean Going Tanker For The Carriage Of Crude Oil, Condensate And Fuel Oil between SURIA JAYA TANKERS SDN. BHD. of No. 5205, Mezanine Floor, Persiaran Raja Muda Musa, 42000 Port Klang (hereinafter called "Bidder") of the one part and PETRONAS of the other part, Bidder agrees to perform the services in accordance with the TIME CHARTER PARTY AGREEMENT as per SECTION III of the Invitation to Bid (ITB) Documents.

(B) One of the expressed condition precedents of the bid is that the Bidder shall provide a performance Bond in the form of Bank Guarantee to PETRONAS duly executed by BANK BUMIPUTRA MALAYSIA BERHAD.

Now therefore BANK BUMIPUTRA MALAYSIA BERHAD of Menara Bumiputra, Jalan Melaka, P.O. Box 10407, 50913 Kuala Lumpur (hereinafter referred to as the "GUARANTOR") hereby irrevocably and unconditionally guarantees and undertakes to PETRONAS as follows:-

1. If Bidder shall in any respect fail to execute the TIME CHARTER PARTY AGREEMENT or commit any breach of its obligations thereunder, of GUARANTOR shall pay to PETRONAS on first demand, without proof or conditions the

sum of RINGGIT MALAYSIA: ONE MILLION THREE HUNDRED SIXTY EIGHT THOUSAND NINE HUNDRED ONLY (RM1,368,900.00) being ONE (1) MONTH of Charter Hire Rate after receipt of the said written demand notwithstanding any protest, arbitration, legal proceeding or contestation by the Bidder or by the GUARANTOR or by any third party.

Provided always that the total of all partial demands so made shall not exceed the sum of RINGGIT MALAYSIA: ONE MILLION THREE HUNDRED SIXTY EIGHT THOUSAND NINE HUNDRED ONLY (RM1,368,900.00) and that the GUARANTOR's liability to PETRONAS as aforesaid shall correspondingly be reduced in proportion to any partial demand having been made as aforesaid.

2. The GUARANTOR shall not be discharged or released from this Guarantee by any arrangement made between Bidder and PETRONAS with or without the consent of the GUARANTOR or by an alteration in the obligations undertaken by the Bidder or by any forbearance whether as to payment, time, performance or otherwise, or any change in the name or constitution of PETRONAS or Bidder.

3. This Guarantee is a continuing security and shall be irrevocable and remain in force and effect from 15TH JULY 1996 until ninety (90) days after the expiry of the contract period and in the case of the TIME CHARTER PARTY AGREEMENT being discontinued one (1) calendar year after the date of discontinuation but not later than 14TH OCTOBER 2000.

4. The GUARANTOR agrees to undertake that the Guarantee is given regardless of whether or not the sum outstanding occasioned by the losses, damages, costs, expenses or otherwise incurred by PETRONAS is recoverable by legal action or arbitration.

5. All claims, if any in respect of this Guarantee must be received by the Bank on or before 14TH OCTOBER 2000 after which all our liabilities and obligations in respect of this Guarantee shall be absolved.

IN WITNESS whereof this Guarantee has been duly executed by the GUARANTOR the 27th day of July 1996. Signed for and) for BANK BUMIPUTRA Behalf of the said) MALAYSIA BERHAD Guarantor in the) KUALA LUMPUR BRANCH Presence of) TRADE FINANCE CENTRE Signed Signed (Witness) (Authorised Signatures) Accepted for and on) Behalf of PETRONAS) In the presence of)

_____(Witness)(Authorised Signatures)

A Loan Agreement dated 20th November 1996 was executed between the Plaintiff and the First Defendant.

Clause 2 provides for the maximum amount of the bank guarantee and the duration, which are the same as those provided in the letter of offer referred to earlier.

Clause 5.1 is of importance. It provides, *inter alia* :

"(a).....

(b).....

(c).....

(d) Payment Under Guarantee: The Bank shall at all times be entitled to make any payment under any Bank Guarantee for which a demand has been made without further investigation or enquiry and need not concern itself with the propriety of any claim made or that the Bank was or might have been justified in refusing payment in whole or in part of the amount so demanded; accordingly it shall not be a defence to any demand made of the Borrower under this Agreement, nor shall any of the Borrower's obligations hereunder be affected or impaired by the fact that the Bank was or might have been justified in refusing payment, in whole or in part, of the amounts so claimed.

(e) Indemnity:-

(i) The Borrower shall unconditionally and irrevocably undertake, as a continuing obligation, to keep the Bank fully indemnified in accordance with the following provisions of this Agreement from and against any expenses, loss, damage, cost, claim or liability whatsoever which the Bank may incur under or in connection with this Agreement or the Bank Guarantee.

(ii) If the bank notifies the Borrower that a beneficiary has required the Bank to pay any sum under the Bank Guarantee, the Borrower shall forthwith on demand but in any event not later than seven (7) days from the date of payment of such sums by the Bank pay to the Bank the amount which the Bank has been so required to pay under such Bank Guarantee together with interest thereon chargeable at the prevailing overdraft rate or such other rate as the Bank may in its absolute discretion impose in the manner specified in the clause hereof and notwithstanding that: (1) That sum may not have been properly due under such Bank Guarantee or whether because the corresponding sum was not properly due to the beneficiary or for any other reason; or (2) The Bank Guarantee or any of its provisions or any other document is void, violable or invalid or is not binding on or enforceable against the Borrower or the

> Bank respectively for any reason whatsoever, whether known to the Bank or not, including, without limitation, illegality, disability, lack of corporate capacity, or lack of powers on the part of the Borrower's directors or Authorised Signatory or the Bank (quite).
>
> (iii).....
>
> (iv).....
>
> (v) The Bank shall at all times be entitled to make any payment under any of the Bank Guarantee for which a demand has been made without further investigation or enquiry and need not concern itself with the propriety of any claim made or purported to be made under and in the manner required by the terms of such Bank Guarantee and accordingly debit the Borrower's account with the Bank of such amount paid thereto, accordingly it shall not be a defence to any demand made of the Borrower under this Agreement, nor shall any of the Borrower's obligations hereunder be affected or impaired by the fact that the Bank was or might have been justified in refusing payment, in whole or in part, of the amounts so claimed.
>
> (vi) If in the event of debiting the Borrower's Account pursuant to Section 5.1(e) (v), the Borrower's account becomes overdrawn, the Borrower shall pay interest on the overdrawn amount at the prevailing temporary overdraft rate from the date of debiting until the date of settlement to the Bank.
>
> (vii) The indemnity in this Section 5.1 shall continue until: (1) All the terms, covenants and conditions of this Agreement have been fully and completely performed by the Borrower or otherwise discharged; (2) The Bank has been discharged from all its obligations under the Bank Guarantee; and (3) The Bank has received a letter from each and every beneficiary discharging the Bank from its obligations to that beneficiary under the relevant Bank Guarantee and the Bank shall have received the original of the Guarantee.

Whereupon this indemnity shall be discharged....."

Clause 19.20 provides that the letter of offer shall from part of the Loan Agreement. However, in the case of any inconsistency of the terms and conditions in the letter of offer and the Loan Agreement, the provisions in the Loan Agreement shall prevail.

The Second and Third Defendants executed the Guarantee and Indemnity Agreement on the same day.

On 26th December 1996 Petronas and the Defendant executed the Time Charter Party "for

the provision of an ocean going tanker for the carriage of crude oil condensate and fuel oil."

On 23rd September 1997, the Second Defendant as the Managing Director of the First Defendant wrote to the Plaintiff. The letter reads:-

> "Dear Sir,
>
> Account No: 001001100000404
>
> Letter of Credit Facility RM1,368,900.00
>
> Letter of Guarantee No. G001954
>
> We have pleasure to return herewith the original copy of the Letter of Guarantee issued by you to Petronas dated 27th July 1996 for cancellation with immediate effect. Kindly arrange to refund to us the commission charged for the unused period.
>
> In this connection, we hereby request to immediately uplift our fixed deposit of RM547,560.00 which is held on lien against the above facility and credit to our account No. 0240903924 with Bank Bumiputra Malaysia Bhd., Port Klang.
>
> Your prompt attention in the above matter solicited.
>
> Yours faithfully,
>
> SURIA JAYA TANKERS SDN.BHD.
>
> Signed."
>
> The Plaintiff complied with the Defendant's request.

On 7th January 1998 Petronas wrote to the Plaintiff demanding payment of the guarantee sum. The letter reads:-

> "Dear sir,
>
> Re: Demand For Guarantee (Letter of Guarantee No: G001954)
>
> This is to inform you that Suria Jaya Tankers Sdn. Bhd. has committed a breach of its obligations under the TIME CHARTER PARTY AGREEMENT dated 26th of December 1996 for the Provision of An Ocean Going Tanker for the Carriage of Crude Oil, Condensate and Fuel Oil.
>
> Pursuant to item 1 of the Letter of Guarantee No: G001954 dated 27th of July 1996, PETRONAS hereby without proof or conditions, requests Bank Bumiputra Malaysia Berhad as Guarantor for Suria Jaya Tankers Sdn. Bhd. to pay to PETRONAS the sum of RINGGIT MALAYSIA One Million Three Hundred Sixty Eight Nine Hundred Only (RM1,368,900.00) with immediate

effect.

Kindly remit the above amount to Account No: 001-23132-41.

Thank you for your co-operation.

Signed."

According to PW1, he was surprised when he received this letter of demand from Petronas. He wrote back to Petronas on 9th January 1998. The Plaintiff asked Petronas how the First Defendant managed to acquire the original copy of the Bank Guarantee. The letter also said that the Plaintiff had contacted Mr. Ooi Leong Heat of the First Defendant (DW2) and it was confirmed by him that the original copy of the said Bank Guarantee was returned to the First Defendant for cancellation by one of Petronas' staff by the name of Encik Suhaimi Kassim.

This was followed by another letter dated 15th January 1998.

On 21st January 1998, Petronas replied, insisting that the Plaintiff honour the guarantee.

On 23rd January 1998, the Plaintiff wrote to the First Defendant informing the First Defendant about Petronas' demand and asking the First Defendant to settle the amount claimed by Petronas within seven days.

There was no response from the First Defendant.

So the Plaintiff paid Petronas the amount.

On 23rd February 1998 the Plaintiff demanded the First Defendant to settle the amount of RM1,368,900.00 within seven days. The First Defendant failed to pay and the Plaintiff commenced this action to recover the guaranteed sum, which was paid to Petronas.

All these facts are not in dispute. As the case turns out, the issues are:-

(i) Whether the Plaintiff was liable to pay the amount to Petronas; and

(ii) Whether the Plaintiff is entitled to recover it from the Defendant.

On the first question, the Defendants seem to be saying two things. First, that the contract between the Plaintiff and Petronas was incomplete. That is because, it was argued, Petronas had not signed on the Letter of Guarantee. It was argued for the Defendant that Petronas did not accept the guarantee because Petronas wanted it to be for five years and not four years.

Secondly it was argued that the Plaintiff had cancelled the Letter of Guarantee and therefore it did not exist anymore. As such there was no obligation on the part of the Plaintiff to pay Petronas.

I found both grounds without any merit. Regarding the first, that is, that there was no completed contract between the Plaintiff and Petronas, the absence of signature on the part of Petronas on the Letter of Guarantee issued by the Plaintiff is of no significance at all.

It was Petronas that required the Defendant to provide a performance bond in the form of a Letter of Guarantee. Approached by the Defendant, the Plaintiff agreed to give it to Petronas. It was the Plaintiff that gave the guarantee to Petronas. What was required was the signature of the Plaintiff, not that of the Petronas. What was required to be done was to have it delivered to Petronas to make it binding. The column provided for signature of Petronas' representative, clearly meant as an acknowledgement of receipt of the document. If Petronas did not accept the Letter of Guarantee provided by the Defendant, clearly Petronas would not have signed the Charter Party Agreement with the Plaintiff later (on 26th December 1996), as the guarantee was one of the preconditions to the award.

Furthermore, this argument (that there was no completed contract) seems to go against the Defendant's second argument, that is, that the Letter of Guarantee had been cancelled by the Plaintiff in the process of extending it. (I shall deal with this issue later). If there was no existing binding contract, what was there to be extended or cancelled?

Secondly, it was also argued that the Letter of Guarantee had been cancelled. Therefore, there was no obligation to pay on the part of the Plaintiff.

The Letter of Guarantee was an irrevocable and unconditional Letter of Guarantee payable on demand without proof or condition. In the case of *Esso Petroleum Malaysia Inc. v. Kago Petroleum Sdn. Bhd. [1995] 1 CLJ 283*; [1995] 1 MLJ 157, the Federal Court was faced with a similar performance bond. Peh Swee Chin FCJ writing the judgement of the Court said, at page 157:-

> "This performance bond was, on a true construction, a pure on demand guarantee, and it that was required to trigger it was a demand in writing."

Similarly, in this case, during the lifetime of the guarantee, once Petronas demanded payment the Plaintiff had no choice but to pay, and that was what it did. The Plaintiff, having given it, had no power to cancel it. The Defendant certainly had no power to interfere, as it was not even a party to the guarantee. It was a matter between the Plaintiff and Petronas, even though it was given by the Plaintiff at the request of the Defendant.

Let us now look more closely at the facts relating to the alleged "cancellation" of the Letter of Guarantee by the Plaintiff.

The Letter of Guarantee was given by the Plaintiff to Petronas. It was an irrevocable and unconditional guarantee. Therefore only Petronas, the beneficiary, could "cancel" it. Then, by letter dated 23rd September 1997, the Second Defendant, as the Managing Director of the First Defendant returned the original copy of the Letter of Guarantee and requested the Plaintiff to refund the commission for the unused period and the uplifting of the First Defendant's fixed deposit of RM547,560.00 which was held in lien against the said facility.

PW1, the Head of the Guarantee Section of the Plaintiff bank, in his evidence, *inter alia*, said:-

> "... Di dalam surat ini, Defendan Pertama telah mengembalikan gerenti bank asal kepada Plaintif. Sehingga hari ini, kami masih tidak pasti bagaimana Defendan Pertama telah memperolehi salinan asal gerenti bank daripada

Petronas."

He further said:-

> "... kami telah menerima permohonan Defendan Pertama atas dasar "good faith". Kami percaya kenyataan Defendan Pertama bahawa Petronas telah bersetuju kepada pembatalan gerenti bank.
>
> Oleh itu dengan niat baik, kami telah mengembalikan deposit tetap kepada Defendan Pertama.
>
> ....
>
> Dengan faedah "hindsight", kami telah membuat keputusan yang tidak baik berhubung dengan panggilan (bad judgment call) dalam mempercayai Defendan Pertama. Petronas tidak pada bila-bila masa bersetuju kepada pembatalan gerenti ini..."

We now come to evidence of DW1, the Managing Director of the First Defendant. In his examination in chief (see witness statement) he said:-

> ".... Petronas tidak bersetuju menjadi benefisiari kepada kemudahan itu. Defendan Pertama telah pun menghantar kepada Petronas surat bertarikh 27 Julai 1996 (Letter of Guarantee - added) oleh Plaintif, untuk ditandatangani Petronas sebagai tanda penerimaan tawaran itu sebagai benefisiari tetapi malangnya surat ini dikembalikan kepada Defendan Pertama tanpa ditandatangani oleh Petronas."

He further said:-

> "... saya telah pun diberikan dokumen ini (Letter of Guarantee - added) oleh seorang wakil Petronas di pejabat Petronas di Bangunan Daya Bumi. Beliau memberitahu saya bahawa Petronas tidak setuju dengan syarat 4 tahun seperti mana ditetapkan di dalam surat berkenaan dan minta supaya ia diubah."

He went on to say:-

> "Defendan Pertama telah melalui surat bertarikh 23 September 1997 mengembalikan surat tersebut (the Letter of Guarantee - added) kepada Plaintif seperti mana perlu untuk dibatalkan kemudahan perjanjian pinjaman tersebut dengan serta-merta. Kami juga meminta supaya wang RM547,560.00 yang dibayar kepada Plaintif dikembalikan kepada Defendan Pertama..."

Under cross-examination, he said that the Letter of Guarantee was not valid because there was no mention of it in the Charter Party (which was signed subsequently).

When asked about the Letter of Guarantee he said:-

> "I agree guarantee is irrevocable. It remains irrevocable until 14th October

> 2000. I agree Bank Guarantee remains in force until 14th October 2000.
>
> I agree duty of Plaintiff is to pay Petronas when demand is made."

Then in the next breadth he said:-

> "I don' the agree bank has to pay Petronas. Put: Bank under obligation to pay Petronas?
>
> Answer: Yes."

When questioned about the Plaintiff's letter dated 23rd February 1998 to the Defendant, he admitted receiving the letter, and said:-

> "I agree the call has been made on Bank Guarantee. I did not make an application to court to stop Plaintiff from paying. I left it to Plaintiff..."

Further he said:

> "Petronas wants period to be 5 years. Petronas handed the guarantee to me because they were not happy, they wanted to extend it for another year."

When it was put to him that Petronas never wrote to the Plaintiff discharging the guarantee, he agreed that Petronas did not.

It is very clear from the evidence reproduced above that Petronas accepted the guarantee of the Plaintiff. Otherwise Petronas would not have executed the Charter Party, as the performance bond in the form of a Letter of Guarantee, was a condition precedent imposed by Petronas. All that Petronas wanted was that the period of four years be extended to five years. It was for that purpose that Petronas returned it to the First Defendant. But the First Defendant took that opportunity to ask for it to be cancelled with immediate effect and for the refund of the commission and the uplift the fixed deposit. True, PW1, the officer of the Plaintiff, might have been unwise in not ascertaining the fact from Petronas. But that does not make the wrong perpetrated by the First Defendant right. In any event, as it was only Petronas that could discharge the Plaintiff's liability under the guarantee, which Petronas did not do, the purported cancellation by the Plaintiff at the request of the First Defendant was void. The Letter of Guarantee remained valid, indeed, as admitted by DW1, until 14th October 2000. The fact that it was not mentioned in the Charter Party does not nullify the requirement for the Letter of Guarantee. The fact that the Plaintiff was bound to pay Petronas under the guarantee is without doubt. Similarly, the fact that the First Defendant was bound to pay the Plaintiff is also without doubt.

The Second and Third Defendants were sued as guarantors. They did not put up a separate defence. Indeed, only one Statement of Defence was filed. They made no distinction between them and the First Defendant. In other words they were relying on the same defence as the First Defendant. Indeed their counsel, in his written submission, took the same approach.

In the circumstances and for the reasons given above, I gave judgement for the Plaintiff against all of them as prayed with interest and costs.