Salim Anthony v Sumitomo Corp Capital Asia Pte Ltd and Others and Another Application [2004] SGHC 117

Case Number : OS 1368/2003, 1566/2003

Decision Date : 04 June 2004

Tribunal/Court : High Court

Coram : Lai Siu Chiu J

Counsel Name(s) : Davinder Singh SC, Hri Kumar and Kabir Singh (Drew and Napier LLC) for plaintiff; Philip Jeyaretnam SC and Ajinderpal Singh (Rodyk and Davidson) for first defendant; Tan Chuan Thye and Andy Yeo (Allen and Gledhill) for second to seventh defendants

Parties : Salim Anthony — Sumitomo Corp Capital Asia Pte Ltd; Sakura Merchant Bank (Singapore) Ltd; Mizuho Corporate Bank Ltd; The Norinchukin Bank; The Sumitomo Trust and Banking Co Ltd; Sumitomo Mitsui Banking Corporation Singapore Branch; Dresdner Bank Aktiengesellschaft

Contract – Assignment – Whether assignment of creditors' rights and interests under Facility Agreement invalid – Whether assignment complied with legal requirements and contractual terms under Facility Agreement

Credit and Security – Guarantees and indemnities – Discharge – Plaintiff in first originating summons – Whether discharged all obligations under guarantee – Whether entitled to be subrogated to rights of creditors under Facility Agreement

Credit and Security – Guarantees and indemnities – Discharge – Plaintiff in second originating summons – Whether entitled to be subrogated to rights of creditors under Facility Agreement upon paying plaintiff in first originating summons

4 June 2004 *Judgment reserved.*

Lai Siu Chiu J

The background

1 PT Satomo Indovyl Monomer ("the Borrower") is a joint venture company established in Indonesia, under a joint venture agreement dated 17 April 1995 ("the JVA") made between Sumitomo Corporation ("Sumitomo"), PT Sulfindo Adiusaha ("Sulfindo") and Brenswick Limited ("Brenswick"). The shareholdings in the Borrower of Sumitomo, Sulfindo and Brenswick are 25%, 51% and 24% respectively.

2 By a facility agreement dated 31 March 1997 ("the Facility Agreement") made between the Borrower of the one part and Mizuho Corporate Bank Ltd ("the third defendant"), The Norinchukin Bank ("the fourth defendant"), The Sumitomo Trust & Banking Co Ltd ("the fifth defendant"), Sumitomo Mitsui Banking Corporation ("the sixth defendant") and Dresdner Bank Aktiengesellschaft ("the seventh defendant") of the other part (hereinafter referred to collectively as "the Lenders"), the Lenders agreed to extend banking facilities of up to US$94,500,000 ("the Loan") to the Borrower. The second defendant was the Security Agent appointed under cll 1 and 22 of the Facility Agreement, while the third defendant was the Facility Agent appointed under the same clauses thereof. The purpose of the Loan was to finance the construction and setting-up of a manufacturing plant for the Borrower, as more particularly elaborated below at [55].

3 Pursuant to the conditions precedent stated in the Facility Agreement, the Borrower executed documents dated 7 May 1997 ("the Security Documents") in favour of the second defendant as the Security Agent of the Lenders. The securities consisted of land on which the Borrower sited its manufacturing plant, the plant itself, machinery and other movable assets.

4 By a deed dated 11 April 1997, Anthony Salim ("the plaintiff") executed a guarantee ("the Guarantee") in favour of the second to seventh defendants as the Lenders. Under the terms of the Guarantee, the plaintiff guaranteed the obligations of Sulfindo and Brenswick under the Facility Agreement. The plaintiff was, at the material time, the sole owner and shareholder of Sulfindo and Brenswick. As Sulfindo and Brenswick jointly own 75% of the Borrower, the plaintiff was effectively the majority shareholder of the Borrower.

5 The three shareholders of the Borrower also entered into a shareholders' support agreement ("SSA") dated 7 May 1997. Under cl 12(A) thereof, Sulfindo unconditionally and irrevocably guaranteed Brenswick's obligations to make payment under the terms of the SSA, in favour of the Borrower and the third defendant as Facility Agent.

6 In September 1998, the Indonesian Bank Restructuring Agency ("IBRA") took over ownership of Sulfindo and Brenswick. In December 2001, IBRA transferred ownership of the two companies to a Hong Kong company called Durability Enterprise Limited.

7 Under cl 5(A) of the Facility Agreement, the Borrower had agreed to repay the advances disbursed by the second to seventh defendants under the Loan, in 12 equal semi-annual instalments commencing 30 April 1999. On or before 30 April 2002, the Borrower obtained two deferrals under cl 5(B) of the Facility Agreement. However, it subsequently defaulted on the principal instalment due on 30 October 2002.

8 The Lenders took the position that the Borrower was in breach of cl 5(A) of the Facility Agreement under cl 19(A)(1) thereof and that an event of default had occurred.

9 By a letter dated 31 December 2002 to the Borrower from the third defendant, the latter as Facility Agent declared an event of default had occurred, pursuant to cl 19(B)(2) of the Facility Agreement and that a sum of US$50,242,628.45 (inclusive of all advances, unpaid accrued interest and fees) was due from the Borrower. This was followed by another letter dated 2 January 2003 from the third defendant to the shareholders of the Borrower, giving notice under cl 8 of the SSA and demanding payment of the aforesaid amount in the following proportions:

(a) Sumitomo – $12,560,657.11,

(b) Sulfindo – $25,623,740.51,

(c) Brenswick – $12,058,230.83.

Sumitomo paid $12,560,657.11 to the third defendant on 27 February 2003; the other two shareholders did not pay.

10 Consequently, by a letter dated 15 January 2003, the third defendant demanded immediate payment of US$12,058,230.83 from Sulfindo as guarantor of Brenswick, pursuant to cl 12 of the SSA. In turn, by a letter dated 17 January 2003, the second defendant as Security Agent demanded payment from the plaintiff as guarantor the sum of US$37,743,023.30 by 11.00am New York time, on the day which fell after the plaintiff's receipt of the letter. The plaintiff did not make any payment on

the demand within the deadline stipulated.

11 On 17 April 2003, the Lenders commenced proceedings against the plaintiff in Suit No 370 of 2003 ("the Suit") for, *inter alia*, the sums of US$25,623,740.51, US$12,058,230.83 and interest of US$631,656.04. The plaintiff filed his defence to the claim after which the Lenders applied for summary judgment. Before the application could be heard, however, it was overtaken by other events. The Suit was subsequently discontinued by the Lenders.

12 On 22 August 2003, the third defendant as Facility Agent gave notice of default ("the Default Notice") to the Borrower and required the Borrower to pay the sum of US$38,871,245.15 to the New York bank account of the Facility Agent not later than 29 August 2003.

13 Clause 26(C) of the Facility Agreement gave any of the Lenders the right to transfer all or any of the outstanding loans to any bank or financial institution with the consent of the Facility Agent provided that prior notice was given to the Borrower.

14 By a letter dated 4 September 2003 ("the Notice"), the third defendant informed the Borrower that in its capacity as Facility Agent, it had transferred all the outstandings under the Facility Agreement to a financial institution (not identified). Individually, the Lenders also wrote to the Borrower on 4 September 2003 in the same terms as the Notice, including a statement that "the transfer remains subject to certain conditions".

15 The plaintiff paid the third defendant as Facility Agent the sum of US$38,915,000 for value on 5 September 2003. The amount was greater than that demanded in the Default Notice as the plaintiff made allowance for interest charges after 29 August 2003 (the deadline for payment) up to 5 September 2003.

16 On 4 September 2003, the plaintiff's solicitors wrote to the Lenders' solicitors giving notice that the plaintiff as guarantor had made full payment to the Facility Agent, pursuant to the demand dated 17 January 2003 from the second defendant. The plaintiff's solicitors requested the Facility Agent's certification by 12 noon of 5 September 2003 that the then outstandings had been settled in full and final settlement of the plaintiff's obligations under the Guarantee. The plaintiff's solicitors requested further confirmation by the same deadline that, against full payment by the plaintiff, the Lenders would assign and/or transfer to the plaintiff all their rights and security which they then held in respect of the Facility Agreement.

17 By a letter dated 5 September 2003 to the plaintiff, ("the Notice of Assignment") Sumitomo Corporation Capital Asia Pte Ltd ("the first defendant") and the Lenders informed the plaintiff that the Lenders had, by an assignment agreement dated 3 September 2003 ("the Assignment"), assigned to the first defendant all their present and future rights, title, interest, claims and entitlements under or in respect of the Facility Agreement. The plaintiff was not given a copy of the Assignment.

18 By a letter dated 5 September 2003 to the first defendant's solicitors, the plaintiff's solicitors put the first defendant on notice that as the plaintiff had made full payment of all the outstanding sums before his receipt of the Notice of Assignment, the Notice of Assignment was invalid and of no effect. The plaintiff's solicitors wrote separately to the Lenders' solicitors on the same day repeating the plaintiff's assertion that the Assignment was invalid.

19 In a letter dated 9 September 2003 to the plaintiff's solicitors, the second and third defendants' solicitors confirmed that at 12.01am on 5 September 2003, the Lenders had completed the transfer to the first defendant of their entire rights and obligations under the Facility Agreement.

The solicitors confirmed receipt by the third defendant as Facility Agent, of the plaintiff's payments on 5 September 2003 and advised that the amounts had been transferred to the first defendant in accordance with the arrangements made between the Lenders and the first defendant, and the provisions of the Facility Agreement. The letter added that the third defendant was only made aware of the plaintiff's payments on the morning of 8 September 2003.

20 The plaintiff was of the view that the Assignment to the first defendant was in breach of cl 26(C) of the Facility Agreement. As he had fully discharged his obligations under the Guarantee, the plaintiff's solicitors wrote to the first defendant's solicitors on 10 September 2003 to say the plaintiff was entitled to be subrogated to the rights of the Lenders or the first defendant as the new lender.

21 The first defendant did not agree and on 10 September 2003, its solicitors replied to the plaintiff's solicitors to say that the plaintiff's payment of US$38,915,000 did not fully discharge the plaintiff's liabilities. The first defendant's English solicitors then instructed a local firm of solicitors ("R&D") who wrote to the plaintiff's solicitors on the same day, requiring the plaintiff to pay all costs and expenses, pursuant to cl 17 of the Facility Agreement, by 5.00pm of Thursday, 11 September 2003.

22 As no figure was specified for costs and expenses, the plaintiff's solicitors inquired of R&D on 11 September 2003 as to the quantum. R&D's response on 12 September 2003 merely stated, "we will let you have the amount once we have determined it". However until the date (22 September 2003) when the plaintiff filed his Originating Summons No 1368 of 2003 and his first affidavit, neither R&D nor the Lenders' solicitors had informed the plaintiff or his solicitors of the amounts they were claiming under cl 17 of the Facility Agreement.

The applications

23 Consequently, the plaintiff filed Originating Summons No 1368 of 2003 ("the first OS") seeking, *inter alia*, the following reliefs:

(a) a declaration that the purported assignment (the Assignment mentioned at [17] *supra*) of the rights of the Lenders under the Facility Agreement to the first defendant is void, of no effect and/or is otherwise invalid;

(b) a declaration that the plaintiff has discharged all his obligations under the Guarantee dated 11 April 1997 executed by the plaintiff in favour of the Lenders and an order that the original Guarantee document be returned to the plaintiff forthwith;

(c) alternatively to prayer 2, for an order that the Lenders (or the first defendant) state on affidavit the amount purportedly due from the plaintiff under cl 17 of the Guarantee, and a declaration that, upon payment of the said amount by the plaintiff, the plaintiff has discharged all his obligations under the Guarantee;

(d) a declaration that the Assignment being void and/or otherwise invalid upon the plaintiff discharging his obligations under the Guarantee, the plaintiff is subrogated to the rights of the Lenders under the Facility Agreement;

(e) alternatively, in the event that the Assignment is held to be valid, and upon the plaintiff discharging his obligations under the Guarantee, a declaration that the plaintiff is subrogated to the rights of the first defendant under the Facility Agreement;

(f) an order that the Assignment being void and/or invalid, upon the plaintiff discharging his obligations under the Guarantee, the second defendant and/or the Lenders assign and/or transfer to the plaintiff all rights and/or security held by the second defendant as Security Agent on the Lenders' behalf, under the Security Documents.

24 Sulfindo, on its part, filed Originating Summons No 1566 of 2003 ("the second OS") on 30 October 2003, essentially requesting the same reliefs as those prayed for by the plaintiff in the first OS (as set out in [23(a)] and [23(e)] above) save that Sulfindo further prayed for a declaration that upon its payment to the plaintiff of sums due and owing by the company under the SSA and paid under the Guarantee, the company was entitled to be subrogated to the rights of the Lenders under the Facility Agreement.

The affidavits

25 The facts set out in preceding paragraphs were mainly gathered from the first affidavits filed by the plaintiff in the first OS and by Sulfindo's President Director, Diana Lumakso ("Diana"), in the second OS and partly extracted from the submissions of the plaintiff. Both deponents filed further affidavits in both applications in reply to affidavits filed by the defendants.

26 Diana generally relied on the plaintiff's first affidavit in the first OS for the full details leading to the filing of both applications. Sulfino has not reimbursed the plaintiff the sums he had paid on the company's behalf. This is obvious from the following paragraphs in Diana's first affidavit where she said:

> 41 Sulfindo is now considering making payment to Salim. However, given the position taken by the 1st defendants in OS 1368/2003 over the terms of the Guarantee and the validity of the Assignment, Sulfindo is concerned that in the event that it repays Salim (the plaintiff), it will face difficulty asserting its rights to be subrogated to the rights of the Lenders or the 1st defendants (depending on the validity of the Assignment) under the Facility Agreement.
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> 42 In the premises, it is imperative that prior to making any payment, Sulfindo's legal rights are determined by this Honourable Court.

27 I turn now to the affidavits filed by the Lenders' representatives. For both matters, affidavits were filed by Yusuke Ito ("Ito") and Kyoichi Nagata ("Nagata") on behalf of the first and third defendants respectively. Essentially, the contents of their affidavits were the same for both applications.

28 Ito is the managing director of the first defendant. He confirmed the plaintiff's belief that the first defendant is related to, indeed it is a wholly-owned subsidiary of, Sumitomo. In his affidavit filed on 14 October 2003 ("the first affidavit"), Ito exhibited a copy of the Assignment from the Lenders to the first defendant, which is governed by English law. He deposed that under cl 2.1 of the Assignment, it was agreed that the first defendant would assume, perform and comply with the obligations under the Facility Agreement and pay the Lenders as the assignors, the Settlement Amount (defined as US$38,912,401.26) on the Settlement Date (which was specified as 5 September 2003). By cl 2.1(b) of the Assignment, the parties agreed that the Assignment would come into effect on the Settlement Date.

29 Ito produced documents which showed that the first defendant had paid into the third defendant's New York account with JPMorgan Chase Bank ("JPMorgan New York") the sum of US$38,912,401.26 on 5 September 2003 at 9.50am Singapore time, or 1.50am Greenwich Mean Time

("GMT"), or 9.50pm on 4 September 2003 New York time. Consequently, the Assignment came into effect on 5 September 2003. The Notice of Assignment ([17] *supra*) was hand-delivered to the plaintiff at his Singapore residence on 5 September 2003 at about 12.30pm Singapore time or 4.30am GMT or 0.30am New York time.

30 Ito pointed out that the plaintiff's remittance was received into the account of the Facility Agent with JPMorgan New York for value on 5 September 2003, at 9.10pm Singapore time or 1.10pm GMT or 9.10am New York time. The three different times were well *after* the first defendant's payment of US$38,912,401.26 to the third defendant and *after* the Notice of Assignment from the Lenders and the first defendant had been hand-delivered to the plaintiff.

31 Ito further pointed out that the plaintiff only paid the outstanding costs under cover of his solicitors' letter dated 30 September 2003. By their solicitors' letter dated 3 October 2003, the first defendant returned the original Guarantee to the plaintiff.

32 Ito deposed that Sumitomo, together with the other shareholders of the Borrower, had agreed to act as guarantor of the Borrower by way of cash deficiency support and completion guarantee provisions under cll 7 and 8 of the SSA, proportionate to the shares held. Accordingly, Sumitomo was a joint and several guarantor as to 25% of the Borrower's obligations while Sulfindo, and in turn the plaintiff, was a guarantor as to 75% of the Borrower's obligations.

33 According to Ito, the third defendant had, on 28 March 2002, requested that the shareholders provide US$7,541,666.67 by way of cash deficiency support to the Borrower, to meet its obligations to the Lenders by 30 April 2002. On 30 April 2002, Sumitomo paid US$1,885,416.67 to the third defendant representing 25% of the sum requested. Neither Sulfindo nor Brenswick paid its share of the sum.

34 On 2 January 2003, the third defendant again as Facility Agent demanded of the shareholders US$50,242,628.45 under the completion guarantee provisions under cll 7 and 8 of the SSA. In compliance thereof, Sumitomo paid US$12,671,184.48, being 25% of the amount requested, to the third defendant on 27 February 2003. Neither Sulfindo nor Brenswick paid its share of the sum.

35 Ito asserted that the plaintiff is not entitled to subrogation of the first defendant's rights against the Borrower, one reason being that the plaintiff is not a surety of the Borrower but of Sulfindo. Ito pointed out that the plaintiff had not stated in his first affidavit, what arrangements he had made with Sulfindo at the time. In any case, under cl 4(A) of the Guarantee, the plaintiff had waived all rights of subrogation.

36 In his first affidavit filed on 15 October 2003, Nagata, who was/is the third defendant's Head of Project Finance, deposed that, prior to the Assignment and while the Suit was still pending, the Lenders' solicitors had written to the plaintiff to inform him that the Lenders were negotiating to sell their rights title and interest in the Facility Agreement, even though there was no legal obligation on the part of the Lenders to inform the plaintiff.

37 Nagata repeated what was said in Ito's first affidavit about the timing of the receipt by JPMorgan New York, of the remittances from the first defendant and the plaintiff. He added that at about 10.54am on 4 September 2003, the third defendant received a SWIFT message ("the MT103 message") from the sixth defendant acting as agent of the first defendant, stating that US$38,912,401.26 had been received from the first defendant for value on 5 September 2003. The Lenders accepted the MT103 message as fulfilling the conditions contained in cl 2.1 of the Assignment and para 3 of the transfer notice ("the Transfer Notice") which is to be given to the Facility Agent in

accordance with cl 26(C) of the Facility Agreement.

38 Consequently, at about 5.00pm on 4 September 2003, each of the Lenders in preparation for the performance of their obligations under cl 9 of the Assignment, signed the Transfer Notice previously signed by the first defendant and which the third defendant then countersigned.

39 In relation to the plaintiff's remittance to JPMorgan New York, Nagata explained that the same was effected by PT Pan Indonesia Bank ("Panin") giving instructions to its New York correspondent, namely JPMorgan New York, *via* a SWIFT message ("the MT100 message") which was never sent directly to any of the Lenders or to the third defendant. The Lenders had no notice of the MT100 message until they received a copy from their solicitors on the morning of 5 September 2003. In the absence of any prior agreement with the Lenders, the MT100 message did not constitute payment.

40 Upon notification of the MT100 message, the third defendant immediately requested JPMorgan Singapore to check with its New York branch. The New York branch confirmed the third defendant's account had not been credited with funds by the plaintiff or Panin. The third defendant was however informed by JPMorgan Singapore that its New York branch had received payment from the first defendant.

41 As the Assignment was effected at 12.01am on 5 September 2003 by the Lenders to the first defendant, Nagata contended that the same was valid. The third defendant was only notified on 8 September 2003 by JPMorgan Singapore, that the latter's New York branch had received the plaintiff's remittance on 5 September 2003 at 10.00pm Singapore time.

42 An affidavit was filed by Yeo Leng Tiong ("Yeo"), a representative of JPMorgan's Singapore branch. Yeo exhibited documents to evidence the times that remittances were received from the first defendant and from Panin on 5 September 2003.

4 3 The plaintiff responded to the affidavits of Ito and Nagata by his second affidavit filed on 26 November 2003. He asserted that he had discharged his obligations in full by his payment of US$38,915,000. The plaintiff alleged that the Lenders and the first defendant held him to ransom by holding onto the Guarantee even after his payment of the aforesaid sum. Consequently, he had no choice but to ask for information pertaining to the costs and expenses they claimed he owed, even though he did not admit liability. The plaintiff pointed out that the first defendant's solicitors' letter dated 29 September 2003 claiming he still owed US$1,431.28 to the first defendant did not furnish a breakdown which his solicitors had previously requested, nor was an explanation given as to how the figure was derived.

44 The plaintiff further alleged that the Lenders and the first defendant took steps to register the Assignment in Indonesia with the Jakarta courts on 12 September 2003 even though they were aware (from his solicitors' letter dated 5 September 2003), that he was challenging the validity of the Assignment. He accused them of acting in bad faith. He then learnt that the Lenders and the first defendant applied to the Jakarta court on 16 September 2003 to deliver a notification of transfer dated 5 September 2003 ("the Notification") from the Lenders to the Borrower and Sulfindo, presumably pursuant to the purported Assignment dated 3 September 2003. The Jakarta court had ordered the bailiff to deliver the Notification to the Borrower and Sulfindo. The Borrower had filed an objection to the Notification on the ground that the Lenders and Sumitomo were involved in a conspiracy.

45 The plaintiff revealed that neither he nor his solicitors were aware of a subrogation

agreement made between the first defendant and Sumitomo ("the Subrogation Agreement") until the first defendant registered it with the Land Office in Jakarta, Indonesia, on 23 September 2003. He cited this incident as another example of bad faith on the part of the first defendant. His solicitors' letter dated 11 September 2003 to the first defendant's solicitors had given notice that he was claiming the rights of subrogation of the Lenders. Despite knowing his stand, the first defendant secretly entered into the Subrogation Agreement with Sumitomo. The plaintiff was not surprised that the registration of the Assignment and the Subrogation Agreement documents with the Jakarta courts took place between 10 and 29 September 2003; that being the period when his solicitors' repeated requests of the first defendant's solicitors for a figure for the costs and expenses supposedly owing by him, drew a blank.

46 Even if it was true (as contended by Ito) that any transfer notice under the Facility Agreement need only be given to the Borrower and not to the guarantor, the plaintiff pointed out that prior notice of the transfer was given to the Borrower on 4 September 2003, *after* the Assignment dated 3 September 2003. This was in clear breach of cl 26(C) of the Facility Agreement, as the prior notice was executed *after* the purported Assignment. The prior notice given was also not reasonable notice, as it gave the Borrower effectively less than 24 hours' notice of the Lenders' intention to transfer their interest to the first defendant.

47 The plaintiff denied he had waived his rights of subrogation pursuant to cl 4(A) of the Guarantee. He took issue with Nagata's contention that notification to the Lenders' solicitors of the MT100 message did not equate payment of the sum of US$38,912,401.26 by him. The plaintiff drew attention to the fact that his solicitors' letter dated 4 September 2003 not only made known to the Lenders that he had paid the said sum for value on 5 September 2003, but had also enclosed a copy of the MT100 message as proof of his remittance.

48 In his second affidavit filed on 10 December 2003, Nagata defended the Lenders' action in registering the Assignment in Indonesia. He said the Lenders had to act on the basis that the Assignment was valid and that the registration process was a necessary step consequent on the execution of the document.

49 Nagata questioned the plaintiff's contention that the plaintiff had not waived his rights of subrogation. Nagata revealed that the Salim group of companies belonging to the plaintiff's family had an in-house legal counsel who, on 3 June 1997, gave a legal opinion to the Lenders to the effect that the documents involved, including the Guarantee, were binding and enforceable on the plaintiff, Sulfindo and the Borrower.

50 Nagata disagreed with the plaintiff's interpretation of the MT100 message dated 4 September 2003; he contended it only evinced an intention to pay on the part of the plaintiff, not evidence of payment. Payment was only received by JPMorgan New York a day later, on 5 September 2003. He asserted that the Lenders could not reasonably be expected to rely on the MT100 message, particularly when the past conduct of the plaintiff, the Borrower, Sulfindo and Brenswick evinced no intention to pay on their part. In fact, the Lenders had been in litigation with the plaintiff on the Guarantee, as he disputed his liability thereunder.

51 In his second affidavit filed on 10 December 2003, Ito denied there was anything sinister in the delay in furnishing the figure for costs to the plaintiff's solicitors. He explained the 19-day delay (10–29 September 2003) was the time taken to obtain the information from the third defendant. He deposed that under cl 17 of the Guarantee, the plaintiff was obliged to pay such costs.

52 There was also nothing sinister in the conduct of the first defendant in registering the

Assignment in Indonesia, nor did the first defendant act in bad faith. As the assignee, the first defendant was entitled to take steps to register the Assignment so that it would be recognised in Indonesia. If the Assignment was declared invalid by a Singapore court, then the registration in Indonesia would be of no effect.

53 Ito pointed out that the first defendant was of the view that the plaintiff was not entitled to subrogation of the Lenders' rights under the Facility Agreement. As such, the first defendant was entitled to be subrogated to those rights, particularly as it had discharged its obligations as a 25% shareholder of the Borrower, in meeting the demands for payment made by the third defendant on the Lenders' behalf.

54 Ito alleged it was the plaintiff, and not the first defendant, who had sought to steal a march on the defendants. The plaintiff had instituted proceedings in Indonesia against the Borrower even though he knew that the Borrower was not a proper defendant to a claim for subrogation and that the Borrower would be unlikely to contest the proceedings, the majority of its directors being nominees of Sulfindo. The minority director of the Borrower, who is a Sumitomo appointee, had not been apprised of the status quo of those proceedings.

55 Another officer of the first defendant gave the reason why the first defendant took an assignment from the Lenders. Toshio Nakamura ("Nakamura"), the Assistant General Manager, referred to the JVA. He explained it involved the construction, in West Java, of a new vinyl chloride monomer plant and the acquisition, from Sulfindo, an adjacent and existing ethylene dichloride plant. Under cll 7 and 8 of the JVA, the Borrower's management consisted of a board of supervisors and a board of directors ("the BOD"). Both boards are hereinafter collectively referred to as "the Boards". Of the four commissioners and four directors on the Boards, three each were appointed by the Borrower and one each by Sumitomo. Chlorine required for both plants was supplied by another plant owned by Sulfindo.

56 Nakamura referred to cll 10.1(6) and 11.2 of the JVA which obliged Sulfindo to provide chlorine from its plant to the Borrower based on a return of investment formula ("ROI") which ensured a specific return on investment, which was US dollar-based. The markets for the products of the joint venture were international markets and were priced in US dollars. Nakamura alleged that after Sulfindo was affected by the Asian financial crisis, it attempted to change the basis on which its chlorine price was calculated, in particular, by contending that the investment element should be derived from the audited accounts of the Borrower, which are rupiah-based. As the Indonesian rupiah had depreciated against the US dollar, this meant a sharp increase in the chlorine price to a level which the Borrower could not sustain.

57 When the Borrower defaulted on the principal instalment (US$5,156,250.00) due on 30 October 2002 ([7] *supra*), the Lenders accelerated the loan. This meant that the entire outstanding sum under the Facility Agreement became due and payable. Prior thereto, Sulfindo and Brenswick had caused the Borrower to overpay Sulfindo (presumably for the supply of chlorine) in an amount of US$30,392,728.25 (by Sumitomo's calculations), which moneys should have been utilised to service the loans extended under the Facility Agreement, as well as to keep the Borrower as a going concern.

58 Nakamura deposed that in January 2003, Sulfindo went to the extent of obtaining a bankruptcy order against the Borrower. Despite the objections of Sumitomo's appointee, the bankruptcy petition was not contested by the Borrower. It was only later that the Indonesian Supreme Court rescinded the bankruptcy order on an appeal by several creditors of the Borrower including Sumitomo. Consequently, Nakamura blamed Sulfindo for not only the default of the Borrower under the Facility Agreement but also for Sumitomo's exposure under the SSA.

59 He said when the Lenders commenced the Suit, Sumitomo was concerned that its serious losses in the JVA would be further compounded by the Lenders seeking to realise their securities, which included mortgages on the two plants and the land on which they were situated. Any forced sale of the same would severely prejudice Sumitomo's interests as a 25% shareholder of the Borrower and as a guarantor which had paid 25% of the Borrower's indebtedness pursuant to the demands made by the third defendant under the SSA. These considerations prompted Sumitomo (using the first defendant as the vehicle), to execute the Assignment.

60 Nakamura revealed that Sumitomo had not expected the plaintiff to pay on the Guarantee before the Lenders obtained judgment in the Suit. The plaintiff had ignored the demand for payment made some eight months earlier in January 2003. The plaintiff's two payments therefore came as a pleasant surprise. Nakamura surmised the plaintiff could have been prompted to pay when he learnt of the impending Assignment.

61 Nakamura made it clear Sumitomo and the first defendant would abide by the court's decision on the validity of the Assignment. He pointed out that even if the plaintiff was entitled to subrogation pursuant to his payments, his rights were limited to 75%, with the remaining 25% subrogation rights being vested in Sumitomo, by virtue of Sumitomo's payments under the SSA to the Lenders. Consequently, Sumitomo would still be entitled to exercise its rights in regard to the securities, subject to the total amount due to it.

62 In addition to what Ito had deposed to on the proceedings the plaintiff had initiated in the Indonesian courts, Nakamura pointed out that the jurisdiction clause (cl 23 of the Guarantee) required the plaintiff to submit to the jurisdiction of the Singapore courts. The plaintiff could not therefore sue in Indonesia and should explain why he had commenced the Indonesian proceedings against the Borrower. The Borrower is in any case not the proper party to subrogation proceedings which rights only concern the guarantor and creditor. Nakamura surmised that the plaintiff probably assumed that the Borrower would not contest the Indonesian proceedings.

63 Diana filed an affidavit in the first OS in which she refuted the allegations made by Nakamura on the supply of chlorine by Sulfindo. She explained that Sulfindo's supply of chlorine was governed by a chlorine supply agreement dated 1 May 1997 made between the company and the Borrower, although the supply had actually started much earlier in January 1996. Sulfindo supplied the chlorine through pipelines linking Sulfindo's chlorine plant with the Borrower's plant. After the creation of the JVA, a similar chlorine supply agreement was made between Sumitomo and the Borrower under which terms Sumitomo was to secure the supply of ethylene to the Borrower at the most competitive price.

64 Although Sulfindo was the majority shareholder of the Borrower, Diana deposed that the voting rights were such that the consent of Sumitomo's director was required for any decision of the Boards to be effective. Consequently, it was not true that Sumitomo had no veto rights if it disagreed with the majority decision of the Boards.

65 Diana admitted that Sumitomo and Sulfindo disagreed on the method of calculation of the price of chlorine under the JVA, based on the ROI formula. However, Sulfindo's interpretation, that the pricing to the Borrower is rupiah-based, had been determined to be correct by the District Court of South Jakarta on 13 May 2002. She pointed out that it was only in early 1998 that Sumitomo suddenly asserted that the chlorine supplied by Sulfindo should be priced in US dollars, as its initial investment in the Borrower was in US dollars.

66 As chlorine payments by the Borrower had to be approved by the BOD, Sumitomo's director used his voting rights to block payments to Sulfindo based on rupiah prices. She claimed it was

Sumitomo's unreasonable stand which caused the eventual collapse of the JVA and the cessation of operations by the Borrower on 2 December 2002. (The dispute between Sumitomo and Sulfindo is the subject of arbitration proceedings which are still pending.)

67 Diana alleged that Sumitomo had a motive for wanting the supply of chlorine to be priced in US dollars. As a result of the depressed value of the rupiah against the US dollar, if the chlorine was based on US dollars, it would result in the price having a zero value, which meant that Sulfindo would be supplying the product for free to the Borrower.

68 She further alleged that from subsequent events, it was clear that Sumitomo had embarked on a deliberate campaign to cause both the Borrower and Sulfindo to default on their obligations to pay the Lenders under the Facility Agreement. Diana claimed that the securities pledged to the Lenders by the Borrower under the Facility Agreement were worth in excess of US$100m. By having its director in the Borrower block payments for chlorine to Sulfindo, Sumitomo knew Sulfindo would suffer financial difficulties. First, it caused the Borrower to default on the Lenders' demands and later, Sulfindo to be called upon for payment as guarantor of the Borrower for the sums demanded of the latter. As neither company could meet its obligations to the Lenders, it caused the Lenders to call upon the Guarantee and look to the plaintiff for payment of the sums allegedly owed by Sulfindo and Brenswick under the SSA. She contended that Sumitomo's acts went far beyond protecting its interests as a shareholder and guarantor, contrary to what Nakamura had suggested in his affidavit. Diana also denied Nakamura's claim that Sulfindo had been overpaid in excess of US$30m by the Borrower. In fact, as at October 2002, the Borrower owed US$29,091,381.40 to Sulfindo for chlorine supplied by the latter.

The submissions

The plaintiff's arguments

69 Having dealt with the affidavits, I turn now to the arguments canvassed by the parties in support of their respective positions. I start first with the submissions put forth on behalf of the plaintiff and Sulfindo.

70 Mr Davinder Singh revealed that between 1997 (when the Facility Agreement was executed) and 2002, the Borrower had made repayments of the loan of US$94m down to about US$50m. This showed that the Borrower's operations were extremely profitable.

71 He then referred to cl 26 of the Facility Agreement which states:

> **Transfers**
>
> (A) **Benefit and Burden of this Agreement:** This Agreement shall benefit and bind the parties, any New Lender in respect of which a Transfer Notice becomes effective in accordance with Clause 26(C), their permitted assignees and their respective successors. Any reference in this Agreement to any party shall be construed accordingly.
>
> (B) **Borrower:** The Borrower may not assign or transfer all or part of its rights and obligations under this Agreement.
>
> (C) **Lenders:** *Any lender may at any time transfer all or part of its Outstandings to any bank or financial institution with the consent of the Facility Agent provided that prior notice has been given to the Borrower of such transfer*. Any Lender may at any time transfer all or part of

its Available Commitment to any bank or financial institution with the consent of the Facility Agent. Any such transfer shall be made by delivering to the Facility Agent a duly completed and executed Transfer Notice. On receipt of such a notice, the Facility Agent shall countersign it for and on behalf of itself and the other Lenders to this Agreement and subject to the terms of that Transfer Notice …

[emphasis added]

72 He also referred to the Notice dated 4 September 2003 ([14] *supra*) from the third defendant (as Facility Agent) to the Borrower, purportedly giving prior notice in compliance with the first sentence in cl 26(C). The Notice stated:

> We refer to the LFA [Facility Agreement] and in particular to Clause 26(C) in the LFA. We hereby give you prior notice of our transfer of all of our Outstandings under the LFA to a financial institution. The transfer remains *subject to various conditions*. Once these conditions have been satisfied, you will be informed of all relevant details. [emphasis added]

giving the impression that the transfer had not yet taken place. Similarly, the Lenders' letters to the Borrower, all dated 4 September 2003 containing the exact same notice, also gave that impression. To date, however, the Lenders have not elaborated on the phrase "subject to various conditions" nor have they produced evidence to show compliance with those conditions. If the conditions actually meant only the obtaining of the consent of the Facility Agent, this has also not been produced. The plaintiff therefore contended no proper notice of the transfer had been given. It followed therefrom that the Assignment was not valid or binding.

73 Counsel pointed out that the Lenders declared the Assignment effective, without waiting for confirmation required under para 3 of the Transfer Notice, that the first defendant had credited the account of the third defendant with payment of US$38,912,401.26. He drew the court's attention to the plaintiff's solicitors' letter dated 5 September 2003 to the Lenders' solicitors. There, the plaintiff had pointed out that the Assignment dated 3 September 2003 was inconsistent with the phrase "subject to various conditions" contained in the Lenders' letters dated 4 September 2003. It was only in the Lenders' solicitors' letter dated 9 September 2003 that the Lenders asserted the plaintiff's remittance was received by the third defendant *after* the Assignment.

74 The Lenders' contention, that the Assignment was effective immediately after midnight of 5 September 2003, was not supported by evidence of receipt of payment from the first defendant. As the plaintiff had discharged all the outstanding debts ("the outstandings") of the Borrower as at 5 September 2003, the Lenders had nothing to assign or transfer in any case. Counsel alleged the Lenders and the first defendant deliberately structured the Assignment such that it would be effective before the Borrower, Sulfindo and/or the plaintiff had any opportunity to consider the implications of the Assignment or to take steps to pay the outstandings to pre-empt the Assignment. The Lenders were also accused of failing to disclose to the plaintiff that Sumitomo was related to the first defendant, until after the Assignment purportedly became effective. The deception was to cover up the fact that the Lenders and Sumitomo had made a secret deal on the Assignment.

75 Mr Davinder Singh further alleged that the first defendant deliberately delayed informing the plaintiff about the amount of costs he had to pay under cl 17 of the Guarantee, noting that before R&D's letter dated 10 September 2003, no such demand for costs and expenses had been made. He complained that even after the plaintiff had paid those costs under protest, the first defendant raised a new objection, namely, that the plaintiff had no rights of subrogation, notwithstanding his payment as guarantor. The entire arrangement between the Lenders, the first defendant and Sumitomo was

designed to ensure the securities remained in Sumitomo's hands.

76 Counsel submitted that the Lenders' reliance on cl 4(A) of the Guarantee for their argument that the plaintiff had waived his rights of subrogation was misconceived. The clause states:

> The Guarantor waives all rights of subrogation and contribution and any rights which he may have to claim prior exhaustion of remedies against the Borrower, Sulfindo or any other person by any of the Secured Creditors as well as all other benefits, rights of a surety or enforcement or set-off and agrees that demands under this Guarantee may be made from time to time irrespective of whether any steps or proceedings are being or have been taken against the Borrower, Sulfindo and/or any other person or are being or have been taken to enforce any agreement or security or other guarantee or indemnity.

The clause did not mean that the plaintiff waived his rights of subrogation absolutely, but that he must postpone his rights of subrogation until *after* the "Secured Creditors" (defined under the Facility Agreement as the Lenders, the Security Agent, the Facility Agent and all their respective permitted assignees, transferees, novatees and successors) had first exhausted their remedies against the Borrower, Sulfindo *etc*. He referred to cl 7 of the Guarantee to reinforce his argument, noting that none of the defendants referred to it. That clause states:

> Prior to the Release Date:-
>
> (i) any right of the Guarantor, by reason of the performance of any of his obligations under this Guarantee, to be indemnified by Sulfindo or to take the benefit of or enforce any security, guarantee or indemnity shall be exercised and enforced only in such manner and on such terms as the Security Agent (acting on instructions from the Majority Lenders) may require; and
>
> (ii) in the event that the Guarantor receives or recovers any amount (a) as a result of any exercise of any such right or claim or (b) in the winding-up of Sulfindo, the Guarantor shall immediately notify the Security Agent of the receipt of any such amount and promptly pay the same to the Security Agent.

I should add that "Release Date" was defined in the Facility Agreement as "[t]he date on which the Borrower has irrevocably paid, repaid or discharged in full the Secured Indebtedness".

77 The plaintiff's final submission was, that to deprive him of the rights of subrogation, on the ground that he had waived such rights under cl 4(A) of the Guarantee, would unjustly enrich the defendants. In effect, it meant the defendants could hold onto the securities even after the plaintiff had paid all the outstandings and he could recover nothing.

The defendants' submissions

78 The defendants' submissions focused on the interpretation of cl 4(A) of the Guarantee. It would be appropriate at this juncture to refer to their interpretation. Counsel acting for the first defendant and for the second to seventh defendants, adopted a common view on how the clause operates.

79 According to counsel, the plaintiff's interpretation of the clause did not make sense. Mr Jeyaretnam read the word "*prior*" as an adjective to the noun "exhaustion" whereas counsel for the plaintiff read it to mean a preposition "prior to". He pointed out there was no object against which

the plaintiff might claim. Both Mr Jeyaretnam and Mr Tan said the waiver clause was necessary as the plaintiff was an "insider" being related to the Borrower *via* his total 75% shareholding in Sulfindo and Brenswick.

80 As for cl 7 of the Guarantee, Mr Jeyaretnam again disagreed with the plaintiff's interpretation. He submitted it referred to the indemnity rights of the guarantor. After the plaintiff had discharged his obligation as guarantor in this case, the plaintiff could look for an indemnity from others and take security from the Borrower or from the other surety, Sulfindo. He explained that the Lenders inserted cl 7 to overcome the problem where they had to pursue the Borrower at the same time as the guarantor for outstanding debts. Exercise of the rights under cl 7 was subject to controls imposed by the Security Agent. Counsel relied on *Loy Hean Heong v NM Rothschild & Sons* [1993] 1 SLR 332 where the same clause arose for determination.

81 On the complaint of unjust enrichment, Mr Jeyaretnam argued that meant unjust enrichment on the part of the Borrower, not the plaintiff as guarantor. The principle of unjust enrichment stops the release of securities to the debtor until the guarantor has received payments he made on the debtor's behalf. There was no question of unjust enrichment on the part of the first defendant as it had paid out US$12m on the Borrower's behalf and would only recover what they had paid out, not 100% of the value of the securities pledged to the Lenders.

82 On the question of payment, Mr Jeyaretnam pointed out that there was a difference between the two SWIFT messages. In relation to the Lenders and the first defendant, it had been agreed by the Assignment that payment took place when the MT103 message was issued. This was not the case for the MT100 message issued on the plaintiff's behalf. Under the terms of the Guarantee, payment to the Lenders would only be deemed received from the plaintiff upon actual receipt of his funds, and if received after 11.00am of a particular day, would be treated as having been received the following day.

83 Counsel further questioned the *locus standi* of the plaintiff. He contended it was not for the plaintiff, but the Borrower, to raise the issue of prior notice of the transfer, since the plaintiff was not a party to the Facility Agreement. The Borrower had not raised this issue in the second OS.

84 A further argument from Mr Tan was that the Borrower (as well as the plaintiff) had been in default for a long time. For the plaintiff to argue that he should have been given reasonable notice was really a red herring as, by September 2003, the Lenders' relationship with the Borrower had already terminated by reason of the latter's default.

The decision

The Guarantee

85 Mr Davinder Singh had submitted that the subrogation rights of a surety are unassailable. He cited Andrews & Millet's *Law of Guarantees* (3rd Ed, 2000). An extract from the textbook (at para 11.17) was relied on; it states:

> Subrogation is not a right deriving from the contract of guarantee, and the surety does not (and cannot be expected to) "stipulate for the benefit of the security which the principal debtor has given". It is a right that arises out of the relationship of surety and creditor itself. Equity intervenes to assist the surety because, he having paid off the principal debt (or at least that part for which he is liable as surety), it would be unconscionable for the principal then to recover the securities from the creditor while remaining under an obligation to indemnify the surety for the

payment, and for the creditor to throw the whole liability onto the surety by electing not to avail himself of the security for the guaranteed debt.

86 A passage (at 188–190, section 61:51) from another textbook, Williston's *A Treatise on the Law of Contracts* vol 23 (4th Ed, 2002), was relied on by the plaintiff as to when the right of subrogation arises:

> The right of subrogation is based upon principles of equity and natural justice. … But no rule can be laid down which will determine all cases. Its applicability is to determined from the facts and circumstances of each particular case … Subrogation is founded on the principle that one cannot enrich himself by getting free of debt at the expense of another, not so fundamentally or primarily bound, by permitting him to pay the debt. The matter is one of comparative equities, the root of the doctrine being in justice and equity and not in contract. ... The remedy is broad enough to include every instance in which one person, not a mere volunteer, pays a debt for which another is primarily liable and which in equity and good conscience should have been discharged by the latter.

87 Neither side disputed that if a surety is to be deprived of his rights in a contract of guarantee, it has to be done in the clearest language. The Lenders relied on a passage from *Halsbury's Laws of England* vol 20 (4th Ed Reissue, 1993) at para 236 on waiver of a surety's rights of subrogation. It states:

> The rights which a guarantor possesses of standing in the creditor's place as regards the creditor's securities and equities, and on the bankruptcy of the principal debtor, may be waived by express words in the contract of guarantee itself. It may also be impliedly waived by the guarantor's acceptance of an indemnity from the principal debtor in lieu of the right he would otherwise have possessed …

whilst the plaintiff relied on a passage (at para 7.3) from McGuinness's textbook, *The Law of Guarantee (A Treatise on Guarantee, Indemnity and the Standby Letter of Credit*) (Carswell Sweet & Maxwell, 1986):

> [T]he rights of a surety are not founded upon contract, but arise by law and operation of equity, and grow out of and form part of the guarantee relationship itself. They are derived from the very nature of the liability asumed by the surety. … Although the surety may waive the benefit of any right to which he is entitled, in the absence of an express provision or necessary inference to that effect in the terms in the terms of the guarantee agreement, these rights and obligations will be seen to form part of every guarantee relationship.

88 If there was any ambiguity in the Guarantee, the plaintiff argued it should be resolved in the surety's favour, relying on another passage (para 4.02) from *Law of Guarantees* ([85] *supra*) which states:

> There is a substantial body of authority which indicates that contracts of suretyship are to be construed in the same way as any other contract. However, the general approach of the court seems to be that contracts of this kind must be strictly construed so that no liability is imposed on the surety which is not clearly and distinctly covered by the terms of the agreement. … Accordingly, in cases of ambiguity the *contra proferentem* rule would normally be applied, with the usual result that the construction which is more favourable to the surety is adopted. The justification for this approach is that in most cases, the terms of the contract will have been drafted by the creditor.

89 In his second affidavit, Nagata, on the third defendant's behalf, had deposed that the Salim group of companies had an in-house legal counsel who had rendered a legal opinion to the Lenders to confirm enforceability of the Guarantee on the plaintiff, Sulfindo and the Borrower. That fact, with respect, cannot be taken to mean the plaintiff had waived his rights of subrogation under cl 4(C) of the Guarantee.

90 Taking into consideration all the relevant principles of law cited by the parties, I am of the view that the defendants' interpretation of cl 4(C) of the Guarantee is incorrect. Read with cl 7 thereof, I agree with counsel for the plaintiff that his client's rights of subrogation are postponed and not waived thereunder. Clause 4(C) was inserted precisely because the plaintiff was an "insider" in relation to the Borrower and Sulfindo. The defendants' interpretation of cl 4(C) would make no sense of cl 7 otherwise, not to mention it would unjustly enrich the Lenders. Having recovered their entire outstandings from the plaintiff, the defendants' interpretation would mean that the defendants (whether as the original lenders or by substitution in the case of the first defendant) would be entitled to retain the securities, to the detriment of the plaintiff as surety. In this regard, I reject as without basis, the first defendant's argument that unjust enrichment in this context is confined to the Borrower. The Lenders' stand would also be contrary to the legal position that a creditor who has been fully paid no longer has any interest in the security it holds. The fact that the plaintiff is a surety of Sulfindo, which itself is a surety of the Borrower, should not make a difference to his rights. In this regard, I refer to another extract (at 861, section 1270) from Williston's *A Treatise on the Law of Contracts* vol 10 (3rd Ed, 1967) where it is stated:

> The surety of a surety is entitled to the same right of subrogation to which the prior surety is entitled, for, as to the successive surety, the prior one is a principal and the successive surety having paid the debt stands in the shoes of the prior surety, and, by right of the latter, in the shoes of the creditor.

The Assignment

91 Mr Tan had submitted that for an assignment to be effective, the law requires compliance with s 4(8)of the Civil Law Act (Cap 43, 1999 Rev Ed) ("the Act"), *ie* express notice in writing has to be given

> to the debtor, trustee or other person from whom the assignor would have been entitled to received or claim such debt or chose in action … subject to all equities which would have been entitled to priority over the right of the assignee under the law as it existed before 23rd July 1909 ...

That proposition of law is undoubtedly correct. However, compliance with s 4(8) of the Act is not the only legal requirement. The notice of assignment must also be clear and unambiguous. For this proposition, I refer to the plaintiff's citation of an extract from *Cheshire, Fifoot & Furmston's Law of Contract (Second Singapore and Malaysian Edition)* (Butterworths Asia, 1998) where the author stated (at 861):

> The one essential in all cases is that the notice should be clear and unambiguous. It must expressly or implicitly record the fact of assignment, and must plainly indicate to the debtor that by virtue of the assignment the assignee is entitled to receive the money.

92 The notice must also be unconditional. The plaintiff referred to an extract from *Chitty on Contracts* vol 1 (28th Ed, 1999) where the authors, in commenting on s 136 of the UK Law of Property Act 1925 ("the LPA"), which provision is *in pari materia* with s 4(8) of the Act, had this to

say (at para 20-016):

> Under the statute notice in writing to the debtor is necessary. It is "wrong to suppose that a separate document purposely prepared as a notice, and described as such, is necessary in order to satisfy the statute. The statute only requires that information relative to the assignment shall be conveyed to the debtor, and that it shall be conveyed in writing." … Beyond this, however, the statute has been strictly construed, and it has been held that the notice must be unconditional …

A clearer statement of the law on this point can be found at *Halsbury's Laws of England* vol 6 (4th Ed Reissue, 1991) at para 19 where in their commentary on the same section of the LPA, the authors stated:

> A mere statement of an intention to assign is not sufficient.

93 I must now to look at the contractual position to see whether the parties had merely adopted or gone beyond s 4(8) of the Act and imposed more requirements. This is where cl 26(C) of the Facility Agreement comes into play.

94 Mr Davinder Singh had drawn the court's attention to cl 26(C) ([71] *supra*) which gave the Lenders (but not the Borrower) the right to transfer the Borrower's indebtedness "to any bank or financial institution … *provided that prior notice has been given to the Borrower of such transfer*" [emphasis added]. He contrasted this provision with the third defendant's purported notice as Facility Agent (as well as the common letter from the Lenders) dated 4 September 2003 ([72] *supra*) to the Borrower, where the Lenders gave prior notice of their transfer of all outstandings to a financial institution, which transfer was subject to certain conditions.

95 Three observations arise from a plain reading of the Notice and the Lenders' letter: (a) the transferee was not identified; (b) there were conditions attached to the transfer (not particularised to date) and (c) the actual transfer had not yet taken place. A reasonable conclusion to be drawn therefrom, was that the Facility Agent and/or Lenders would revert to the Borrower at a later date to advise the name of the transferee, to confirm the conditions of transfer had been complied with, and that the transfer had been effected. Thinking the assignment was imminent but had not taken place (according to his counsel), the plaintiff paid US$38,915,000 on 4 September 2003 itself, for value the following day. However, it was too late by then as can be seen from the next paragraph.

96 In para 1 of their joint Notice of Assignment dated 5 September 2003 ([17] *supra*) addressed to and hand-delivered to the plaintiff, the Lenders had stated:

> We refer to an Assignment Agreement between the Assignors and the Assignee dated *3 September 2003*, pursuant to which the Assignors have assigned all present and future rights, titles, interests, claims and entitlements under or in respect of the Financing Agreements to the Assignee, including the aggregate right to full payment of the entire financial obligations of PT Satomo Indovyl Monomer under the LFA. [emphasis added]

I accept the submission of the plaintiff that the Notice of Assignment is inconsistent with the Lenders' letters dated 4 September 2003. To be effective, a notice of assignment must not precede, but must come *after*, a notice of intention to transfer. In this regard, I reject the argument of the first defendant that there are two routes by which the Lenders can transfer the Borrower's indebtedness – one by transfer and the other by assignment. There is only one route – that provided under cl 26(C) of the Facility Agreement – whether it is described as a transfer or an assignment.

97 The next consideration is para 3 of the Transfer Notice addressed to the third defendant which states:

> The undersigned New Lender agrees that it assumes and acquires new rights and/or obligations in accordance with Clause 26(C) of the Agreement on and with effect from 5th September 2003 subject only to the Facility Agent's having received SWIFT Message Type 100/103 confirmation from Sumitomo Mitsui Banking Corporation Singapore Branch that the sum of US$38,912,401.26 has been credited to the Facility Agent's account with JPMorgan Chase Bank, New York for value that date.

Mr Davinder Singh had criticised the Lenders' conduct in not waiting for confirmation of payment from the sixth defendant that US$38,912,401.26 had been credited to the Facility Agent's (third defendant's) account with JPMorgan New York.

98 The first defendant's counsel had countered this argument with the contention that MT100 was an old form of SWIFT message whereas MT103 was a new form of message from one bank to another, communicating credit of a payment which a receiving bank acts upon. He said a MT103 message would only come from a paying, not a receiving bank. Consequently he contended, the Lenders were entitled to accept that payment had been made by the first defendant by the third defendant's receipt of the sixth defendant's MT103 message at 10.54am on 4 September 2003, in accordance with the Transfer Notice (see [37] *supra*).

99 It is noteworthy that the Lenders applied a different standard when it came to confirmation of the plaintiff's payment. They were not prepared to accept at face value the MT100 message enclosed with the plaintiff's solicitors' letter dated 4 September 2003 to their solicitors (stating the plaintiff had paid through Panin ([39] and [40] *supra*) US$38,915,000 for value the following day), on the basis that the payment instructions could be revoked. They insisted on confirmation of the remittance from JPMorgan New York, which only came on 5 September 2003 at 9.10pm, 12 hours after the first defendant's payment at 9.50am. I note that according to the Lenders' solicitors' letter dated 9 September 2003 to the plaintiff's solicitors, the transfer from the Lenders to the first defendant was completed at 12.01am on 5 September 2003. That would have been more than nine hours *before* the first defendant's payment was received.

100 Another observation I would make at this stage is that although the defendants asserted the Borrower, and not the plaintiff, had *locus standi* to question the validity of the Notice of Assignment dated 5 September 2003, none of the Lenders produced any evidence to suggest the same or a similar notice was given to the Borrower. Consequently, there was non-compliance with cl 26(C) in any event.

101 Mr Davinder Singh had referred to the following passage (at para 228) from *Halsbury's Laws of England* vol 20 ([87] *supra*) which states:

> As soon as the guarantor has paid to the creditor what is due to the creditor under the guarantee, he is entitled, unless he has waived them, to be subrogated to all the rights possessed by the creditor in respect of the debt, default or miscarriages to which the guarantee relates.
>
> … [I]f the creditor assigns the guaranteed debt and the securities for the debt, the assignment is subject to the obligation to preserve the securities for the guarantor's benefit.

for his argument that the first defendant as assignor took the securities of the Borrower under the

Assignment, subject to the obligation to preserve the securities for the plaintiff's benefit. I do not think the defendants can challenge this statement of the law.

102 The Lenders had relied on cl 17 of the Guarantee which states:

> The Guarantor shall pay on demand all costs and expenses (including legal fees and all goods and services, value added and other duties or taxes payable on such costs and expenses) incurred by any of the Secured Creditors in protecting or enforcing any rights under this Guarantee.

for their contention that until and unless the plaintiff paid the legal costs and fees, he would not be deemed to have discharged all his obligations as guarantor, citing *Loy Hean Heong v NM Rothschild & Sons* ([80] *supra*) in support. However, instead of telling the plaintiff to pay a certain sum to settle legal costs or expenses what did the first defendant do? It asked the plaintiff's solicitors by R&D's letter dated 10 September 2003 ([21] *supra*) to:

> Please confirm by 5pm on Thursday 11 September 2003 that your client will pay all such costs and expenses.

but took another 19 days to advise the plaintiff (who had inquired as to the involvement of the first defendant in the Suit by his solicitors' letter dated 11 September 2003) to pay the figure (US$4,030.02 or S$6,980.00) for the Lenders' legal fees. As the plaintiff had paid more than the sum (US$38,912,401.26) demanded of him as surety, the balance he was required to pay by way of legal fees was a mere US$1,431.28, as set out in R&D's letter dated 29 September 2003. I cannot imagine that a man who has paid US$38,915,000 would quibble over paying US$1,431.28 by comparison. He would have paid the legal fees promptly (albeit reserving his rights) had he been informed of the amount by 11 or 12 September 2003.

103 There are three observations which I wish to make in connection with the outstanding legal fees:

> (a) Nagata's explanation (in his second affidavit) that it took time to obtain the figure from the third defendant is a lame and unacceptable excuse. The defendants were all represented by Singapore-based law firms. Why should it take such an inordinately long time to obtain the information requested?
>
> (b) I believe the delay was deliberate and was coloured by the defendants' proceedings in Indonesia ([45] *supra*) to register the Assignment (not to mention the ongoing shareholders' dispute between Sumitomo and Sulfindo which is the subject of arbitration proceedings);
>
> (c) The decision in *Loy Hean Heong* does not support the defendants' argument. The facts were very different. There, the plaintiff as guarantor had paid the judgment sum and costs of the two defendants for the sums owed to the latter by the borrower Freelin Investment Pte Ltd ("Freelin"). However, he failed to obtain the release (proportionate to his payment) of the option securities charged by Freelin to the defendants because the court accepted the defendants' contention that there was still a substantial amount owed by Freelin to the defendants, under the facility agreement made between the defendants and Freelin.

104 It is noteworthy that neither the defendants nor their solicitors disclosed to the plaintiff or his solicitors the Subrogation Agreement ([45] *supra*) between the first defendant and Sumitomo, before the document was registered with the Land Office in Jakarta on 3 September 2003. No explanation or credible explanation has been given by the defendants for their omission.

105 Even if the plaintiff's remittance (according to the affidavit of the bank's representative, Yeo) was received by JPMorgan New York 12 hours *after* the first defendant's remittance on 5 September 2003, it is my view that the Notice of Assignment of the Lenders dated 5 September 2003 is defective and invalid. That notice referred to an "Assignment Agreement" dated 3 September 2003, on which date there was not, and could not have been, an (effective) assignment from the Lenders to the first defendant because the letter dated 4 September 2003 from the third defendant to the Borrower giving notice of the *intended* transfer did not comply with cl 26(C) of the Facility Agreement, for the reasons stated earlier (see [95]). Further, the notice was neither clear nor unambiguous.

106 The plaintiff's complaint that the *prior notice* (by the Notice of 4 September 2003 ([14] *supra*)) was unreasonable under cl 26(C) of the Facility Agreement was said by the Lenders' solicitors to be a "red herring", because the plaintiff had been in default for close to nine months (since 17 January 2003) and payment from him was not expected. With respect, that excuse is untenable. Just because a guarantor has been in default for a considerable length of time does not mean he is not entitled to reasonable notice to afford him an opportunity to take steps (in this case) to prevent the proposed transfer of the Lenders from taking place.

107 I question the double standards which the Lenders adopted in relation to payments from the plaintiff and the first defendant. On the one hand, they would not accept evidence of the plaintiff's remittance by the MT100 message. On the other hand, they said evidence of receipt of the MT103 message from the first defendant sufficed as payment. I surmise the Lenders took this inconsistent stand to circumvent the fact that the first defendant's remittance was received by JPMorgan New York for value on 5 September 2003 at 01:50:28 hours GMT, *after* the transfer from the Lenders to the first defendant was completed, which was at 12.01am, according to the Lenders' letter dated 9 September 2003 to the plaintiff's solicitors. The plaintiff should not be penalised for the fact that his remittance made through an Indonesian bank (Panin) took longer to reach JPMorgan New York than the first defendant's remittance effected through the sixth defendant. He had paid on 4 September 2003 by way of the MT100 message *before* the Lenders transferred or assigned the outstandings to the first defendant.

108 Whilst I would not agree with the plaintiff's assertion that there was a conspiracy against him on the part of the defendants, the conduct of the Lenders and Sumitomo do suggest a concerted effort on their part to thwart, if not deny, the plaintiff his rights of subrogation, subsequent to his payment of US$38,915,000.

109 The first defendant's representative, Nakamura, had deposed that if the court ruled that the Assignment is invalid, the plaintiff's rights of subrogation are in any case restricted to 75% as Sumitomo retains 25% interest in the securities of the Borrower. That is correct.

110 I am of the view that the Notice of Assignment and the Assignment itself are invalid against the plaintiff and do not operate to deprive him of his rights of subrogation. Accordingly, I make the following orders on the first OS (No 1368 of 2003):

(a) orders in terms are granted for prayers 1, 2, 4;

(b) an order in terms of prayer 6 is granted, subject to the transfer of securities by the defendants to the plaintiff being proportionate to the plaintiff's 75% shareholdings in the Borrower;

(c) an order in terms is granted for prayer 8 and,

(d) two sets of costs to the plaintiff, against the first defendant and separately against the second to seventh defendants.

111 For the second OS (No 1566 of 2003), I grant orders in terms of prayers 1 and 2 (subject again to the 75% limit as in order (b) for the first OS) and costs.

112 For both applications, the parties are given liberty to apply generally should there be a need.

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