

MAYBAN FINANCE BHD

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v.

OTAHULU INDUSTRIES (M) SDN BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR

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HISHAMUDIN YUNUS J

[CIVIL SUIT NO: S3-22-63-1998]

22 JANUARY 2008

TORT: Damages - Defamation - Libel - Guarantee agreement containing forged signatures - Listing of person's name and particulars in 'Financial Information System' - Effect and implication thereof

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TORT: Damages - Conspiracy - Guarantee agreement containing forged signatures - Approval of loan to third party based on forged signatures - Whether there was conspiracy to injure

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The plaintiff bank sued the 3rd and 4th defendants for breach of a guarantee agreement in relation to a loan granted by the plaintiff to a third party. The 3rd and 4th defendants counter-claimed for alleged negligence and conspiracy to injure; the 3rd defendant also counter-claimed for defamation. It was an agreed fact that the signatures in the agreement, alleged to be that of the 3rd and 4th defendants, were forgeries. It was also an agreed fact that the plaintiff had entered the 3rd defendant's name in the 'Financial Information System' ('FIS'). When a person's name is listed in the FIS he is considered *prima facie* a loan defaulter and unworthy of credit, and financial institutions will decline his loan application. Due to his name being blacklisted as such, the 3rd defendant was later unable to obtain a loan that he applied for from another bank.

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Held (for the 3rd and 4th defendants):

(1) On the evidence, it was defamatory to the 3rd defendant for the plaintiff to supply the 3rd defendant's particulars to the FIS. This was because the financial community would regard such information to mean that the 3rd defendant was *prima facie* a defaulting borrower; whereas the truth was that the 3rd defendant was neither a borrower nor a guarantor. There must have been, on the evidence, a conspiracy between the plaintiff and a third party to make use of the forged signatures

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A of the 3rd and 4th defendants. The guarantee form that
contained the 3rd and 4th defendants' forged signatures was
throughout in the plaintiff's possession. Based on the forged
signatures, the plaintiff had approved a loan to a third party
and had released the money; and the third party had defaulted
B in the repayment. It was on the basis of the forged signatures
that the plaintiff filed the present civil suit against the 3rd and
4th defendants. The plaintiff's officers did not show any
sympathy to the 3rd and 4th defendants when they came to
the plaintiff's office and explained that the signatures were
C forged. The bank officer arrogantly told them "See you in
court!"

*[Damages of RM250,000 awarded to 3rd defendant in respect of tort of
defamation; damages amounting to RM150,000 each awarded to 3rd and
D 4th defendants for tort of conspiracy to injure.]*

*For the plaintiff - Haniza Abdul Rani; M/s Aziz Zakaria, Shaiful & Wan
For the 3rd & 4th defendants - Yusfarizal Yussof (Ahmad Edham with him);
M/s Zulpadli & Edham*

E *Reported by Suresh Nathan*

JUDGMENT

F **Hishamudin Yunus J:**

[1] This trial concerns a counter-claim by the 3rd and 4th
defendants against the plaintiff.

G [2] Earlier, on 5 June 2003, the plaintiff's suit against the 3rd
and 4th defendants was withdrawn with costs awarded to the
defendants.

[3] The 3rd and 4th defendants are counter-claiming for alleged
negligence and conspiracy to injure.

H [4] The 3rd defendant is also counter-claiming for defamation.

I [5] The trial began with the defendants giving evidence. At the
conclusion of the defendant's case in the counter-claim, the
plaintiff offered no evidence. In fact the plaintiff and their counsel
were absent on 18 September 2006 for the continued hearing. On
this date, the counsel for the plaintiff was supposed to continue

with her cross-examination of the 3rd defendant (DW1). But she was absent and so was the representative of the plaintiff bank. As the learned counsel for the defendants did not intend to re-examine DW1, the next witness for the defendants was called and that was the 4th defendant (DW2).

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[6] At the end of the trial, having considered the evidence and submissions, I gave judgment for the defendants. I found the plaintiff liable for defamation and conspiracy to injure. I awarded damages to the 3rd and 4th defendants.

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[7] It is an agreed fact that the signature in the hire purchase agreement, alleged to be that of the 3rd defendant, is a forgery.

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[8] It is an agreed fact that the plaintiff had entered the 3rd defendant's name in the 'Financial Information System'.

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[9] It is an agreed fact that the signature in the hire purchase agreement, alleged to be that of the 4th defendant, is a forgery.

[10] The 3rd defendant is a dental specialist practising at a private hospital known as the Damansara Specialist Centre at Damansara Utama, Petaling Jaya. At the invitation of the 2nd defendant, he became a shareholder and director of the 1st defendant company, Otahulu Industries (M) Sdn Bhd ('Otahulu'), a company dealing with the manufacturing of dental equipments. The other defendants were also shareholders of Otahulu and their respective shareholdings were as follows:

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2nd defendant – 31%

3rd defendant – 10%

4th defendant – 10%

5th defendant – 49%

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[11] On 2 February 1996, the 3rd and 4th defendants made up their mind to resign as directors of Otahulu, following a dispute among the directors of the company over a company resolution and regarding the 5th defendant's role in the company. So, they drafted a letter of resignation dated 2 February 1996 (exh. D3); however, they did not tender their resignation that day.

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A [12] On the following day, 3 February 1996, the 3rd defendant, together with the 4th defendant, went to plaintiff's branch office at Medan Tuanku, Kuala Lumpur, to inquire about the status of Otahulu's loan with the plaintiff bank. They were informed by a credit officer of the bank in charge of the 1st defendant's loan
B that the 3rd and the 4th defendants were not named as guarantors of the loan. The 3rd and 4th defendants felt relieved knowing that they were not guarantors. However, upon examining the bank's file on the loan, the 3rd and 4th defendants, to their surprise, discovered that the file contained only a single document.
C After repeated requests, the bank officer supplied the 3rd and 4th defendants with a photo copy of that document, that is, exh. D2. D2 is a blank hire purchase guarantee form (containing the standard provisions) with the name, address and phone numbers of the 1st defendant company stamped at the bottom left hand side of the document where the words 'SIGNATURE OF
D GUARANTOR' appear. And there is a signature written over the stamped words.

E [13] Then two days later, on 5 February 1996, the 3rd and 4th defendants attended a board of directors' meeting of the 1st defendant company. Also present were the other directors of Otahulu, namely, the 2nd and 5th defendants. The meeting was held at the 5th defendant's office. At this meeting, the 5th defendant informed the other directors/defendants that she
F intended to have complete control over the company. The 3rd and 4th defendants disagreed with the proposal and, as a mark of protest, tendered their resignation.

G [14] Almost two years later, in November 1997 the 3rd defendant received a notice of demand dated 20 November 1997 from the plaintiff bank alleging that the 3rd defendant was a guarantor for Otahulu's loan with the plaintiff, and demanding that the 3rd defendant, as a guarantor, settled the said loan. The 3rd defendant went again to the same branch office of the plaintiff and there he was shown by an officer of the bank a copy of the
H guarantee agreement form allegedly signed by him on 26 January 1996. He was advised to repay the loan given to Otahulu. The signature, however, was a forgery. When the 3rd defendant protested saying that it was a forgery, he was asked to see an officer of the plaintiff, one Encik Fazli bin Abu Hassan, who
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allegedly had witnessed the signature of the 3rd defendant. And the said Encik Fazli, however, confirmed that he had never seen the 3rd defendant before. In spite of this, the bank officer was not sympathetic and instead he told the 3rd defendant that his name had been 'blacklisted' in the Financial Information System. The bank officer also told him repeatedly 'See you in Court.' and 'We always win.'

[15] On 10 December 1997, the 3rd defendant lodged a police report regarding the forgery. He was investigated by the police for a few days, and samples of his signatures were taken.

[16] After lodging the report, he then went to the plaintiff's office requesting the plaintiff to defer inserting his name in the Financial Information System until the police completed their investigation. Unfortunately this request was turned down by the plaintiff.

[17] Subsequently the 3rd defendant was served with a writ summons by the plaintiff. The statement of claim alleges that the 3rd defendant (together with the 4th defendant) had breached a guarantee agreement. In the statement of claim the plaintiff claimed from the 3rd and 4th defendants for the repayment of the sum loaned to Otahulu.

[18] Some time in the middle of 1998 the 3rd defendant applied for a loan from RHB Bank for the purpose of upgrading his clinic but was informed by the bank officer that his name had been 'blacklisted' as his name had appeared in the Financial Information System. As a consequence of his name appearing in the Financial Information System the defendant was unable to obtain the loan.

[19] The 3rd defendant once again went to the plaintiff's branch office and there an officer by the name Mohamad Shamsul Azahar bin Abu Bakar confirmed to the 3rd defendant that his name was indeed already in the Financial Information System.

[20] Subsequently the 3rd defendant went to Credit Corporation Malaysia (CCM) to inquire about his status, as his company, Bumi Dental Suppliers Sdn Bhd, in which he was a director, had taken a loan from CCM for the purchase of a vehicle. There he met an officer who checked the Financial Information System (FIS) and the officer confirmed that the 3rd defendant's name had

A been ‘blacklisted’ because of the unsettled Otahulu loan and his position as a ‘guarantor’ with the plaintiff bank. The officer gave him a copy of the FIS computer printout (exh. D6).

B [21] Now, financial institutions utilize the services of the Financial Information System. It is the practice among financial institutions that before a loan is approved the financial institution in question will be checked with the Financial Information System in order to know the credit standing of the loan applicant. When a person’s name is listed in the Financial Information System he is considered
C *prima facie* a loan defaulter and unworthy of credit, and financial institutions will decline his loan application. In other words, there is a stigma on the person once his name is listed in the Financial Information System.

D [22] Now, turning to the 4th defendant, in December 1997 she received a notice of demand dated 20 November 1997 from the plaintiff demanding the former to make a repayment of more than RM700,000 to the plaintiff, allegedly as a guarantor of a loan taken by Otahulu who had defaulted. The 4th defendant was
E shocked by this letter as she had never signed as a guarantor in respect of the 1st defendant’s loan with the plaintiff.

F [23] The 4th defendant immediately went to the plaintiff’s branch office, and there a bank officer gave her a photocopy of a two-page document dated 26 January 1996. She was shocked to see that the document contained a forged signature of hers. She complained to the officer about the forgery, but the unexpected reply that she got from the officer was:

See you in Court!

G [24] Subsequently, through her contacts the 4th defendant managed to get from the 5th defendant’s office three documents. The first document is a six-page letter of offer dated 21 August 1995 signed by an assistant general manager of the plaintiff bank addressed to the Executive Chairman of Otahulu offering a loan
H of RM1.0 million to Otahulu. The second document is a Malayan Banking cheque for RM180,000 dated 21 August 1995 issued in favour of a foreign company called as ‘Zarnavaz Co. Ltd’. The third document is a Malayan Banking cheque for RM100,000
I dated 21 August 1995 issued by the plaintiff’s Medan Tuanku branch in favour of the 5th defendant.

[25] On 13 December 1997 the 4th defendant lodged a police report regarding the forgery. A

[26] Like the 3rd defendant, the 4th defendant too was sued by the plaintiff for breach of a guarantee agreement pertaining to Otahulu's loan. B

[27] The defendants' third witness (DW3), namely, Ms Lim Swee Lian, the Senior Manager of Financial Information Services Sdn Bhd, provides the Court with information regarding the Financial Information Services/System ('FIS') system. In her evidence she said her company operates the FIS. It is an online (computerized) system. According to her only 'members' have access to the information provided by FIS. By 'members' she meant financial institutions, including hire purchase companies. The company had 400 members subscribing to the services (FIS). The plaintiff, according to Ms Lim, is a member. The members feed into the system with information on their respective borrowers. This information in turn is shared by the members. Before a member approves a loan application, the member will check with the FIS to ascertain as to whether the applicant's name is listed by the FIS. If his name is listed then the applicant will *prima facie* be considered to be a defaulting borrower. DW3 confirmed that the plaintiff did supply the 3rd defendant's name to FIS. DW3 also confirmed that the information pertaining to the 3rd defendant's 'loan' status *vis-à-vis* the plaintiff bank, as contained in the computer printout exh. D6, came from the FIS. On the status of the third defendant, exh. D6 was shown to DW3. This is her evidence regarding the status of the third defendant: C
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Q: What does this inquiry result tell about Dr. Dzul Khaini bin Hj. Husain, in relation to Mayban Finance, Medan Tuanku Branch? G

A: It is just a general reference result asking the inquirer to clarify Dr. Dzul's status with Mayban Finance, Medan Tuanku branch. H

Q: Does this inquiry result indicate that Dr. Dzul is a non-performing borrower?

A: On the surface, you can say that. But for clarification one still have to seek clarification from Mayban Finance. I

- A Q: Is the word ‘borrower’ or ‘guarantor’ or any code to that [effect] shown in this document.
- A: No.
- B Q: Then, how come you said earlier ‘On the surface, you can say that’?
- A: Generally our members are using general reference as for non-performing loan accounts. But they can also use it for other purposes.
- C [28] To my understanding, what witness is saying, in essence, is this: because the 3rd defendant’s name appears in the FIS, to the members of the FIS, the 3rd defendant is *prima facie* a defaulting borrower.
- D [29] On the evidence, I am satisfied that the plaintiff is guilty of the tort of defamation in relation to the 3rd defendant. It is defamatory to the 3rd defendant for the plaintiff to supply the 3rd defendant’s particulars to the FIS system. It is defamatory because the financial community will regard such information to mean that the 3rd defendant is *prima facie* a defaulting borrower; whereas the truth is that the 3rd defendant was neither a borrower nor a guarantor.
- E [30] On the evidence there must have been a conspiracy between the plaintiff and a third party to make use of the forged signatures of the 3rd and 4th defendants. The guarantee form that contained the forged signatures of the 3rd defendant and 4th defendants was throughout in the possession of the plaintiff bank. Based on the forged signatures, the plaintiff had approved a loan to a third party and had released the money; and the third party had defaulted in the repayment. It was on the basis of the forged signature that the plaintiff filed the present civil suit against the 3rd and 4th defendants. The plaintiff’s officers did not show any sympathy to the 3rd and 4th defendants when they came to the plaintiff’s office and explained that the signature was forged. The bank officer arrogantly told them:

See you in court!

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[31] I awarded damages in the sum of RM250,000 to the 3rd defendant in respect of the tort of defamation. A

[32] I awarded damages in the sum of RM150,00 each to the 3rd and 4th defendants for the tort of conspiracy to injure.

[Judgment for the 3rd and 4th defendants with costs.] B

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