

The Court of Appeal also held that the defence of estoppel did apply against Yap notwithstanding the fact that he had no knowledge of there being anything amiss with the share trading account as he had agreed in the first place under the terms of the Share Trading Contract with the bank that he was duty bound to notify the bank of any discrepancy and it was his own foolhardiness that had resulted in him being ignorant of the unauthorised transactions.

The Court of Appeal therefore allowed the bank's appeal and recently handed down its written grounds of decision.

Our Mr Chan Kok Keong and Mr Samuel Tan appeared for the bank before the High Court and the Court of Appeal.

*Hong Leong Bank Bhd v M Muthiah @ Nagappan & Anor and another appeal [2014] 1 MLJ 1*

In the case of *Hong Leong Bank Bhd v M Muthiah @ Nagappan & Anor and another appeal [2014] 1 MLJ 1*, the Federal Court decided that a notice of demand on a guarantor need not specify the precise outstanding amount due to the creditor, and that the liability of a guarantor in a continuing guarantee is not limited to the principal sum.

The Federal Court had to consider a common guarantee clause, found in a guarantee given by three guarantors to the respondent Bank in respect of a loan, and determine the extent of a guarantors' liability thereunder. The clause concerned is as follows:

“... jointly and severally guarantee payment on demand upon us of all monies and liabilities ... together with interest on all such debts and liabilities to the date of payment ....  
Provided that the total sum recoverable from us hereunder is limited to the sum of [RM5,665,000.00] owing or incurred to the Bank as aforesaid at the date of demand for the same is made by the Bank or discontinuance by any means of this guarantee by any of us ....”

This dispute revolved around whether the guarantors' liability was limited to the principal sum of RM5,665,000.00 or that it included interest thereon. This in turn gave rise to the further dispute that the letter of demand issued to the guarantors, which was for a far higher sum than the principal amount, as interest was included, was invalid for being imprecise.

The Federal Court in allowing the Bank's appeal, held that it was not mandatory for the notice of demand to state the exact amount due and payable to the creditor. The purpose of the demand was only to give notice to the debtor that the creditor is demanding repayment of the sum borrowed.

The Court also held that this proviso in the clause in question had to be read together with the other clauses in each guarantee and not in isolation. The other clauses in the guarantee to be read together were:-

- a) the clause which provided that the guarantors shall for the purpose of the debt be deemed to be principal debtors;
- b) the clause which stipulated that the guarantee is a continuing guarantee.

The Federal Court thus held that the liability of the guarantor was not limited to RM5,665,000.00 but also included accruing interest.

*Kamarulzaman bin Omar & Ors v Yakub bin Husin & Ors [2014] 2 MLJ 768*

In the case of *Kamarulzaman bin Omar & Ors v Yakub bin Husin & Ors [2014] 2 MLJ 768*, the Federal Court affirmed the doctrine of deferred indefeasibility in Malaysia and emphasised that the Proviso to Section 340(3) of the National Land Code, 1965 (NLC) is applicable only to a subsequent bona fide purchaser for valuable consideration.

Saribu bte Badai (“the Deceased”) was a registered coproprietor of 1/3 share in two lots of lands (“the said Lots”). After her death, the 1st to 4th Respondents applied for and obtained an order under the Small Estates Distribution Ordinance 1955 to distribute the Deceased's 1/3 share in the said Lots to the 1st to 4th Respondents. Thereafter, by two memoranda of transfers, the 1st to 4th Respondents transferred their total 1/3 share in the said Lots to the 5th and 6th Respondents for valuable consideration.

The Appellants were the nephew and nieces of the Deceased. They alleged that the 1st to 4th Respondents acquired title to the said Lots by fraud in that they had falsely stated they were the children/beneficiaries of the Deceased and that the 5th and 6th Respondents had therefore not acquired an indefeasible title to the Said Lots. The 1st to 4th Respondents did not defend the Appellants' claims and judgment was entered against them. In this regard, the Appellants' allegations of fraud were considered proven as against the 1st to 4th Respondents. The Appellants also sought to set aside the 5th and 6th Respondent's title to the Said Lots.