

**DALAM MAHKAMAH RAYUAN MALAYSIA
(BIDANGKUASA RAYUAN)
RAYUAN SIVIL NO. W – 04 – 100 – 2005**

ANTARA

MBF INSURANS SDN BHD

... PERAYU

DAN

LEMBAGA PENYATUAN DAN
PEMULIHAN TANAH PERSEKUTUAN
(FELCRA)

... RESPONDEN

[Dalam Perkara Rayuan Sivil No. R1-11-313-2001
Dalam Mahkamah Tinggi Malaya di Kuala Lumpur
(Bahagian Rayuan dan Kuasa-Kuasa Khas)

Antara

Lembaga Penyatuan Dan Pemulihan
Tanah Persekutuan (FELCRA)

... Perayu

Dan

MBF Insurans Sdn Bhd

... Responden]

(Dalam Perkara Mahkamah Majistret Di Kuala Lumpur
Dalam Wilayah Persekutuan
Saman Pemula No. 72-23973-1993

Antara

Lembaga Penyatuan Dan Pemulihan
Tanah Persekutuan (FELCRA)

... Plaintiff

Dan

MBF Insurans Sdn Bhd

... Defendan)

Coram: Gopal Sri Ram, J.C.A.
Suriyadi bin Halim Omar, J.C.A.
Hasan bin Lah, J.C.A.

JUDGMENT OF HASAN BIN LAH, J.C.A.

1. By a Security Guarantee dated 18.8.1989 the appellant agreed to provide a guarantee that the sum of RM22,017.00 would be paid by way of a security deposit upon demand by the respondent, subject to the terms and conditions of the Security Guarantee. The period of the guarantee was from 15.6.1989 to 14.6.1990. It was then extended for another year by way of an endorsement made on 5.9.1990 as follows:-

“This guarantee will expire on 14th June 1991. Claims if any must be received on or before this date.”

2. When the contractor, Haza Enterprise, did not complete its works under the contract awarded to it by the respondent the respondent wrote a letter to the appellant on 21.6.1991 demanding that the sum of RM22,107.00 be paid to the respondent pursuant to the Security Guarantee. The appellant rejected the claim on the ground that the claim was made after the expiry of the guarantee.

3. Arising from that the respondent filed an action in the Magistrate Court to claim for the said sum against the appellant. The Magistrate Court dismissed the respondent's action on the ground that the respondent's claim was out of time as the claim was made after the expiry of the said guarantee. The respondent appealed against the decision to the High Court and the High Court reversed the Magistrate's decision. The learned High Court Judge was of the view that the shelf-life of the said guarantee which is embodied in the

said endorsement was contrary to section 29 of the Contracts Act 1950 and therefore void as an attempt to contract out of the Limitation Act 1953. In coming to that conclusion the learned High Court Judge relied on the judgment of the Supreme Court in *New Zealand Insurance Co. Ltd v Ong Choon Lin* [1992] 1 MLJ 185. This time it was the appellant's turn to be dissatisfied with the decision. It appealed against the said decision of the learned High Court Judge to this court.

4. It was the contention of the learned counsel for the appellant that the learned High Court Judge had erred in law and fact in holding that the shelf-life of the said guarantee was contrary to section 29 of the Contracts Act 1950. According to the learned counsel for the appellant the case of *New Zealand Insurance Co. Ltd v Ong Choon Lin* is not in pari materia with the facts of the present case as that case concerns with the rights of an insured under a fire insurance policy whereas the present case relates to a shelf-life of a security guarantee and it is trite that parties are entitled to prescribe a shelf-life to guarantee and performance bonds. He also submitted that the learned High Court Judge failed to take cognisance that in the law of guarantee the

guarantee may expressly provide that it is to expire at a specified date or after a specified date. In support of that he referred to the passages in the following books :-

- (a) O' Donovan, The Modern Contract of Guarantee;
- (b) Andrews and Millet, Law of Guarantees (3rd Ed);
- (c) Low Kee Yang, The Law of Guarantees in Singapore and Malaysia; and
- (d) Poh Chu Chai on Law of Pledges, Guarantees and Letters of Credit (5th Ed).

5. It is also the contention of the learned counsel for the appellant that this case has nothing to do with limitation. It only concerns with the shelf-life of the said guarantee. What it means here is that if the creditor fails to demand within the shelf-life he does not have a cause of action against the guarantor.

6. In reply to that the learned counsel for the respondent submitted that the respondent's claim is not time barred and the relevant provision of the said guarantee if so construed as limiting the time within which the respondent is entitled to enforce its rights is void to that extent. In support of that he relied on section 29 of the Contracts Act 1950 and the case of *New Zealand Insurance Co. Ltd v Ong Choon Lin*. According to the learned counsel the liability and obligation of the appellant arose on 4.6.1991 when a notice was sent to the contractor informing the contractor that it was in breach of the contract as it did not perform its works in accordance with the schedule stated in the agreement. As such the respondent's cause of action against the appellant accrued on 4.6.1991 and the respondent had 6 years within which to enforce the claim. By requiring the respondent to make the claim not later than 14.6.1991 the appellant is limiting the time of 6 years within which the respondent is allowed to enforce such claim and to that extent the condition imposed by the said guarantee is void under section 29 of the Contracts Act 1950. The learned counsel for the respondent also submitted that the argument made by the learned counsel for the appellant in this case had also been argued in *New Zealand Insurance Co. Ltd v Ong Choon Lin* and it

was rejected by the Supreme Court.

7. I have had the benefit of reading the judgments in draft of my learned brothers, Gopal Sri Ram J.C.A. and Suriyadi Halim Omar J.C.A. With respect, I fully agree with the view expressed by my learned brother Gopal Sri Ram J.C.A. I agree that the word “claim” in the endorsement to the said guarantee must mean a demand by the respondent of the appellant in respect of a breach occurring before 14 June 1991 and the meaning of the endorsement in the said guarantee must be construed in the way in which a reasonable commercial person would construe it. In this case the claim was made in respect of the breach as stated in the respondent’s letter dated 4 June 1991 to the contractor.

8. I agree for the reasons stated by my learned brother Gopal Sri Ram J.C.A. that the appeal should be dismissed with costs.

Dated this 9th day of August 2007.

Hasan Bin Lah
Judge, Court of Appeal
Malaysia

Counsel for the appellant: Tunku Farik bin Tunku Ismail

Solicitors for the appellant: Tetuan Azim, Tunku Farik &
Chong

Counsel for the respondent: Zainur bin Zakaria

Solicitors for the respondent: Tetuan Zainur Zakaria & Co.