DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR
(BAHAGIAN RAYUAN DAN KUASA-KUASA KHAS)
RAYUAN SIVIL NO.: WA-12BNCC-17-04/2018

ANTARA

WONG WEI PIN
(No. K/P: 800308-04-5180) … **PERAYU**

DAN

MALAYAN BANKING BERHAD … **RESPONDEN**
(No. Syarikat: 3813-K)

[Dalam perkara Mahkamah Sesyen di Kuala Lumpur
Guaman No.: WA-A52NCC-2072-10/2017]

ANTARA

MALAYAN BANKING BERHAD … **PLAINTIF**
(No. Syarikat: 3813-K)

DAN

WONG WEI PIN
(No. K/P: 800308-04-5180) … **DEFENDAN**

GROUNDS OF JUDGMENT

1. This is an appeal by the Plaintiff against the decision of the Learned Sessions Court Judge dismissing her claim and allowing the Defendant's Counterclaim. I have dismissed the appeal. These are the full reasons for my decision. The parties will be referred to as they were in the court below.

Salient Background Facts

2. On 9.8.2016, the Plaintiff went to the Defendant's The Gardens Mid Valley centre and applied for 2 credit cards. Later on the same day, the Defendant approved and issued 2 credit cards namely a Visa Infinite Card and the Reserve American Express Credit card [Amex Credit Card] to the Plaintiff.

3. It is inter alia a term of the Amex Credit Card that the cardholder can only earn Treats points on retail purchases for purposes of personal consumption i.e. non-business and non-commercial related consumption only. The Defendant reserved the right not to award Treats points on retail spending which the Defendant deems to be purchases made for business and commercial purposes using the Credit Card.

4. It is also inter alia a term of the Amex Credit Card that the Defendant may at its sole and absolute discretion decides to cancel the Credit Card if it is used for business or commercial purposes.

5. The Plaintiff used her Amex Credit Card for business purposes. She purchased goods from hypermarkets and then re-sold them to wholesalers for a higher price. Over a 10 month period, the Plaintiff transacted a total of 944 transactions amounting to over RM22 million. The Plaintiff usually pre-pays money into her account before using her Credit Card as a result of which she need not pay interest for the use of her Credit Card.

6. By letter dated 1.6.2017 from the Defendant to the Plaintiff, the Defendant notified the Plaintiff of the following terms and conditions of the Amex Credit Card:

> *3. MANNER OF USE*
>
> *3.6 Notwithstanding any other provisions to the contrary herein set out, Maybank may at its sole and absolute discretion at any point of time with or without notice can decide not to renew, cancel, revoke or suspend or restrict*

the use by the Cardmember and/or any supplementary upon the occurrence of any one of the following events"-

(a) Use the Credit Card as payment for any illegal purchases; or

(b) Use the Credit Card as payment for any unlawful transaction; or

(c) Use the Credit Card to purchase goods or services that will be resold i.e. "not for personal use of the Cardmember".

15 TREATSPOINTS

15.2 The Principal Cardmember is entitled to earn TREATS Points on retail purchases made with his/her Credit Card for purposes of personal consumption only, i.e. non-business and non-commercial related consumption only. Maybank reserves the right not to award TREATS points on retail spend which Maybank deems to be purchases made for business and commercial purposes using the Credit Card.

7. The Defendant said that based on its records, it observed that there had been utilisation on the Plaintiff's Credit Card for large and multiple transactions at various merchants for business usage. Accordingly, the Defendant informed the Plaintiff that it was reversing the Treats points which had been rewarded to her earlier amounting to 54,048,954.43 Treats points.

8. By letter dated 8.6.2017, the Defendant informed the Plaintiff that it was reversing the Treats points amounting to 4,519,368 points accumulated on 30.5.2017.

9. The Plaintiff's appeals were rejected by the Defendant which ultimately cancelled her Credit Card. Altogether, the Defendant had recalled 58,568,322.43 Treats points which the Plaintiff says is valued at RM510,381.22. Accordingly, the Plaintiff filed a claim in the Sessions Court against the Plaintiff for the sum of RM510,381.22. The Defendant counterclaimed for the sum of RM491,960,90 being the value of the Treats points already redeemed by the Plaintiff.

Findings Of The Learned Sessions Court Judge

10. The Learned Sessions Court Judge found that the Plaintiff had on her own admission confirmed that she had used her Credit Card for business purposes. This was a breach of the terms and conditions regarding the usage of the said card as envisaged by clause 15.2. The Learned Sessions Court Judge ruled that the Plaintiff cannot benefit from her own wrong and even if she did not read the terms and conditions of the usage of the card, she is still bound by the said terms

and conditions. Since the Plaintiff is not entitled to Treats points for business usage of the card, the court below dismissed the Plaintiff's claim and allowed the Defendant's Counterclaim. The Plaintiff appealed against the said decision.

Findings Of The Court

11. In hearing this appeal, I am reminded of the function of this court as established by case law authorities and have therefore proceeded approaching the same accordingly. The trite principle of law that an appellate court should be slow to interfere with the findings of fact of a trial judge cannot be emphasized enough. In particular, I refer to the decision of the Court of Appeal in the case of ***Rugber Kaur Ajaib Singh v Ho Shee Fun & Anor*** [2011] 5 CLJ 159; [2011] 1 MLRA 256 where it was stated as follows:

> *"It was obvious that the learned judge was fully aware of the principle that an appellate tribunal should be slow to interfere with the finding of fact of a trial judge, in this case the Sessions Court Judge, more so as he had the advantage of hearing and observing the demeanour of the witnesses before arriving at his conclusion. This well-established principle, which also has common sense written all over it, was clearly at the back of his mind as he had made mention of the case of Hussaina Rani Naina Mohamed v Ahmad*

Nadzri Kamaruddin & Anor [1997] 3 CLJ 500 in his grounds of judgment (see also Yahaya bin Mohamad v Chin Tuan Nam [1975] 1 LNS 195; Tan Chow Soo v Ratna Ahmad [1967] 1 LNS 178).

Despite the inhibition laid down by the above case, the learned judge still set aside the award of future earnings. Why he did that was merely an affirmation that the abovementioned inhibition is not absolute. It is the duty of an appeal court, if satisfied or convinced that the trial judge had acted upon principles of law that were wrong, had misapprehended the facts or had made a wholly erroneous conclusion, to reverse the decision (Tan Kuan Yau v Suhindrimani Angasamy [1985] 1 CLJ 429; [1985] CLJ (Rep) 323; Rasidin bin Partorjo v Frederick Kiai [1976] 1 LNS 123). Lindley MR in Coghlan v Cumberland [1898] 1 Ch 704 had occasion to say:

> *Even where, as in this case, the appeal turns on a question of fact, the Court of Appeal has to bear in mind that its duty is to rehear the case, and the court must reconsider the materials before the judge with such other materials as it may have decided to admit. The court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it; and not shirking from overruling it if on a full consideration the court comes to the conclusion that the judgment is wrong."*

12. The Court of Appeal has also, earlier in the case of ***Sivalingam Periasamy v Periasamy & Anor*** [1996] 4 CLJ 545; [1995] 3 MLJ 395

clearly stated the following often quoted rule, similarly applicable to the instant case:

> *"It is trite law that this Court will not readily interfere with the findings of fact arrived at by the court of first instance to which the law entrusts the primary task of evaluation of the evidence. But we are under a duty to intervene in a case where, as here, the trial court has so fundamentally misdirected itself, that one may safely say that no reasonable court which had properly directed itself and asked the correct questions would have arrived at the same conclusion".*

13. As such, whilst interference should be a judiciously measured response by an appellate tribunal, it is equally clear that apart from a wrong application of the law, insufficient judicial evaluation of the evidence is also an established basis justifying appellate intervention. This concept was lucidly explained by Gopal Sri Ram JCA (as he then was), delivering the judgment of the Court of Appeal in ***Lee Ing Chin & Ors v Gan Yook Chin & Anor*** [2003] 2 CLJ 19 where His Lordship referred to the need to assess the evidence and to weigh it and for good reasons accept or reject it accordingly, as follows:

> *"Suffice to say that we re-affirm the proposition that an appellate court will not, generally speaking, intervene unless the trial court is shown to be plainly*

wrong in arriving at its decision. But appellate interference will take place in cases where there has been no or insufficient judicial appreciation of the evidence. It is, we think, appropriate that we say what judicial appreciation of evidence involves. A judge who is required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. He must, when deciding whether to accept or to reject the evidence of a witness, test it against relevant criteria. Thus, he must take into account the presence or absence of any motive that a witness may have in giving his evidence. If there are contemporary documents, then he must test the oral evidence of a witness against these. He must also test the evidence of a particular witness against the probabilities of the case. A trier of fact who makes findings based purely upon the demeanour of a witness without undertaking a critical analysis of that witness' evidence runs the risk of having his findings corrected on appeal. It does not matter whether the issue for decision is one that arises in a civil or criminal case: the approach to judicial appreciation of evidence is the same".

14. The Plaintiff relied on 7 grounds as to why her appeal should be allowed. The last 2 grounds are a summary of her earlier grounds. The first ground is that the Learned Sessions Court Judge erred in law and in fact in failing to first identify the document which formed the contract of the Amex Credit Card agreed by both Plaintiff and the Defendant, if any. The Plaintiff submitted that she only filled up a "*Borang Aduan*" and was

given a Product Disclosure Sheet (PDS) which did not explicitly state that the terms and conditions of the Credit Card can be found at www.maybank2u.com. She submitted that the Learned Sessions Court Judge erred in making the finding that the PDS explicitly stated that terms and conditions of the Amex Credit Card can be found at the said website.

15. At the top left hand corner of the PDS it is stated as follows:

> *"(Read this Product Disclosure Sheet before you decide to take the Maybank 2 Cards Premier. Be sure to also read the general terms and conditions. Seek clarification from your institution if you do not understand any part of this document or the general terms.)*

It is stated towards the end of the PDS that should the customer require additional information or have any enquiry on the credit card, please refer to wwwmaybank.com.my website or write to Maybank Card Center with the address provided.

16. I agree with the Plaintiff that it is not explicitly stated in the PDS that the general terms and conditions are set out in the Maybank website. However, it is clear from the PDS that there are general terms

and conditions and those are not the terms set out in the PDS. It is accordingly the obligation of the Plaintiff to ascertain what the general terms and conditions are as she will be bound by them in the usage of the Credit Card.

17. Also, from her previous experience with the Defendant, the Plaintiff knew that the terms and conditions are to be found in the website. The Plaintiff had previously been issued with credit cards and a charge card by the Defendant. In respect of the previous Amex credit card, which was the Amex Platinum 2 Card, in the application form signed by the Plaintiff, she had confirmed that she shall read the terms and conditions of the Malayan Banking Berhad Credit Cardholder Agreement which have been displayed in the Malayan Banking Berhad's Maybank2u.com website and agreed to be bound by them. Clause 16.2 of that agreement is the same as clause 15.2 of the agreement in the instant case.

18. What is significant to note from the above is that the Plaintiff was aware that the terms and conditions mentioned in the PDS are contained in the Defendant's website and even if the Plaintiff chose not to read them, she is bound by them by her usage of the card.

19. In ***Amex Bank of Canada v Genge*** [2016] A.J No. 712, it was held that:

> *"I am satisfied that the evidence shows that the Defendant applied for and obtained an Amex credit card. The Defendant admits that he used the charge card. I find that by using the charge card he agreed to the terms and conditions of the card".*

20. In ***Royal Bank of Canada v Petitclerc*** [2016] O.J. No. 99, it was held that:

> *"10. Petitclerc admits he started using an RBC credit card in 1998. In 1998, the RBC Visa Cardholder Agreement ("Agreement") provided, among other things:*
>
> *(a) if Petitclerc's card was used, he was bound by the agreement (para 2) ...*
>
> *By his admitted use, Petitclerc was bound by the terms of this Agreement and all those subsequent to it. There was no requirement that he actually sign an Agreement ...*
>
> *18. Petitclerc argues that he never received a copy of the Agreements. This is no defence. Petitclerc agreed to the Agreements through use of the card.*

He never terminated any of the Agreements through complete payment and return of his card. He could have obtained a copy of any of the Agreements online, or by contacting RBC, by phone or in person".

21. In ***Citibank (Hong Kong) Ltd v Shum Yuet Mei*** [2005] HKCU 1179, it was held that:

"As explained in paragraph 27 of my Decision, Ds' reliance on their subjective understanding as to the proper interpretation of contract between the parties and their insistence on Ds' signatures and written confirmations to constitute binding contracts is misconceived.

There is in fact no implicit agreement as suggested by Chow. In paragraph 27 of my Decision, I held that a binding contract can arise, as what has happened in this case, by Ds' conduct in signing and using Cards, thereby accepting CI's T & C of Agreement. It is trite than an offer can be accepted by conduct to constitute a binding contract. I need do no more than refer to Chitty on Contracts, 29th edition, volume 1, paragraph 2-002 at page 122 and paragraph 2-208 at pages 135 to 136. I do not see any reasonable prospect of success for this ground of appeal".

22. In respect of the charge card that was issued by the Defendant to the Plaintiff, the Defendant had written to the Plaintiff on 6.2.2014 to

inform her of clauses 3.6 and 13.2 which are the same as clauses 3.6 and 15.2 of the instant agreement.

23. By another letter dated 21.8.2014, the Defendant again wrote to the Plaintiff setting out the said 2 clauses, stating that should there be continued failure to comply with obligations under the said clauses, the Defendant will not hesitate to cancel her card facilities without any further notice.

24. It is obvious that the Plaintiff did not stop using her card for business purposes as the Defendant had occasion to write to the Plaintiff again on 18.5.2015 again setting out the said 2 clauses and said that this will be the final reminder and should there continue to be failure to comply with obligations under the said clauses, the Defendant will not hesitate to cancel her card facilities.

25. By a further letter dated 17.6.2015, the Defendant again referred to the said 2 clauses and informed the Plaintiff of the cancellation of her charge card. It is obvious that the Plaintiff is a repeat offender who insists on using her card for business transactions despite being warned by the Defendant on numerous occasions not to do so.

26. I therefore find that the Learned Sessions Court Judge has not erred in making a finding that the Plaintiff is bound by clauses 3.6 and 15.2 of the terms and conditions of the Amex Credit Card issued to her.

27. The second ground relied on by the Plaintiff is that she did not breach the terms and conditions, even if the same were binding on her. The Plaintiff submitted that there is no express prohibition that she cannot use her card for business purposes.

28. In this respect, the oral evidence of DW3 Mohd Firdaus Bin Mohammed, a Customer Executive at the Defendant's credit card centre is pertinent. There was an internal memo instructing that the Plaintiff was to be specifically informed that she must not use her credit card for business purposes. For some unknown reason, the Defendant was of the view that the Plaintiff was no longer using her card for funding and the internal email instructed Gardens to advise the customer that the card is strictly for personal use and not for commercial purpose. This is due to her past history of using her cards for business purposes. Mohd Firdaus testified that before he gave the Credit Card to the Plaintiff, he told her that it must be used only for personal purpose and not for business purpose and that the Plaintiff understood what he said.

29. When passing the Amex Credit Card to the Plaintiff, Mohd Firdaus said [DW3 Q&A 4]:

> '*Sepertimana yang diarahkan, saya telahpun memberitahu Plaintif bahawa kad kredit tersebut cuma boleh digunakan untuk pembelian peribadi dan tidak boleh digunakan untuk pembelian perniagaan."*

30. He also confirmed that the Plaintiff agreed to the condition:

> *"Ya, Plaintif bersetuju dan saya seterusnya menyerahkan kad kredit tersebut kepadanya. Sekiranya Plaintif tidak setuju untuk hanya menggunakan kad kredit untuk belian peribadi sahaja, saya tidak akan menyerahkan kad kredit tersebut kepadanya."*

31. His evidence was not challenged.

32. The Plaintiff said that she does not recall being so notified but that is to be expected. The Learned Sessions Court Judge was in the best position to observe the demeanour of the witnesses and determine whether any witness is telling the truth or not. Her acceptance of Mohd Firdaus' evidence cannot be faulted, in the light of the internal email. If there was an internal email instructing that the Plaintiff be specifically

warned about the usage of her Credit Card, it is more likely than not that that instruction would have been complied with.

33. I do not agree with the Plaintiff that simply because there is no provision to say that she must not use the card for business purposes, there is no prohibition against her using the card for business purposes. The Defendant is entitled to cancel or revoke the card if it is used for business purposes. That in itself implies that the use of the card for business purposes is not permitted. In any event, the crux of the case concerns the Treats points that were given to the Plaintiff for the transactions effected by her. As far as the Treats points are concerned, it is clear that pursuant to clause 15.2 she is only entitled to Treats points on retail purchases for purposes of personal consumption only. This means that she is not entitled to Treats points for business purposes. Accordingly, the Defendant is entitled to reverse the Treats points that were wrongly credited to her. On this ground also, I do not find any error committed by the Learned Sessions Court Judge.

34. Next, the Plaintiff submitted that there is no contractual right to revoke Treats points. Whilst it is true to say that there is no express provision saying that the Defendant is entitled to revoke Treats points which were wrongly credited, it must be implied, from the fact that the

Plaintiff was not entitled to Treats points for business purposes, that the Defendant must have the implied right to revoke the Treats points that were wrongly credited to the Plaintiff. Otherwise, the Plaintiff will be unjustly enriched. I accept, as did the Learned Sessions Court Judge, that the Treats points were erroneously credited to the Plaintiff. The system of the Defendant generates the Treats points automatically and for some reason, it was not until 10 months later that the Defendant actually found out that the Plaintiff was using her card for business purposes. I find the Sessions Court Judge is not wrong in accepting that the verification calls made by the Defendant to the Plaintiff was for the purpose of detecting fraud, to ascertain whether the card was used by the Plaintiff and not by an unauthorised third party. It may be that the Defendant could have found out earlier about the Plaintiff's use of the card for business purposes but it did not find out until some 10 months after the card was issued and used by the Plaintiff. This is because Treats points are generated automatically by the system once a transaction is made and statements of account are generated by the system without verifying whether the transactions therein are for business or personal use. It was also impossible for the Defendant to monitor the nature of each transaction as there are more than 7,000,000 to 8,000,000 transactions every month and it is administratively impossible to call customers for every transaction made to assess the

purpose of the transaction. I am of the view that on this ground also, the Plaintiff has not shown any error of law or fact on the part of the Learned Sessions Court Judge.

35. The next ground relied upon by the Plaintiff is that the Learned Sessions Court Judge did not take into consideration the unethical business conducts performed by the Defendant. The Plaintiff alleged that the Defendant allowed and assisted the merchants to accept the Plaintiff's transactions, encouraged cardmembers to spend more for more financial gain, revoked the Treats points by force and threats, victimised other card members and that the Defendant's witnesses lied under oath.

36. Whilst it was open to the Defendant to take action against the merchants for breaching their contract with the Defendant by permitting the Plaintiff to use her card for business purposes, I do not think that it is a pre-requisite for the Defendant to assert its rights against the Plaintiff that the Defendant must first of all take action against the merchants. Accordingly, the fact that the Defendant has not taken action against the merchants for permitting the Plaintiff to use her Credit Card for business purposes is not a bar to the Defendant defending the Plaintiff's claim and making a counterclaim against her.

37. The Defendant has asserted that it did not gain from the Plaintiff using her Credit Card because the Plaintiff always pre-paid the amounts she would use and never had to pay any interest. The Plaintiff said that the Defendant gained by the payment of the Merchant Discount Rate (MDR) which was a commission paid by the merchant to the Defendant for using the credit card facilities. The Defendant explained that this is for administration charges and it would only gain if it earns interest levied on the credit card and there was no interest earned by the Defendant in this case. I find that, given it was the Plaintiff who breached the terms of the contract in gaining Treats points for business purposes, it is not a bar for the Defendant to take the action of revoking her Treats points, simply because the merchants in question pay the MDR to the Defendant. I also find, on the evidence, that the Defendant neither threatened nor forced the Plaintiff to do anything. The Defendant is obviously a repeat offender and she had been given warnings previously in relation to her charge card which she did not heed.

38. The fact that other card members who have used their cards for business purposes also face the same consequence as the Plaintiff is similarly not a bar to the Defendant's claim. Whilst there may have been some inconsistencies in the evidence of the Defendant's witnesses,

there is nothing to warrant the Court rejecting their evidence in total on the basis that they are not credible witnesses. The Defendant's claim is very simple and straightforward. It is a term and condition of the Plaintiff's Credit Card that she is not entitled to earn Treats points for her purchases as they were for business purposes. After finding out that she had been awarded Treats points for business purposes, the Defendant revoked the Treats points and claimed for the value of the points that she had already redeemed. Any inconsistency in the evidence of any of the Defendant's witnesses has no impact on the Defendant's claim.

39. Next the Plaintiff submitted that the Learned Sessions Court Judge erred in accepting the Defendant's allegation that the Plaintiff did not come to court with clean hands.

40. The Plaintiff submitted that one should not consider the previous cards that she had been issued with as they were different cards with different conditions. However, what cannot be disputed is that from her use of the previous cards, she knew that the terms and conditions of the cards are to be found at the Defendant's website. She also knew that she is only entitled to points if she used the card for personal consumption only and her charge card was expressly cancelled because

she used her card for business purposes and not because of the high credit risk exposure of over RM2.457 million given to her without any collateral. Furthermore, she had been expressly told by Mohd Firdaus before receiving her Credit Card that she was only to use it for personal use and not for business purposes. The fact that there is no documentary evidence of such warning from Mohd Firdaus to her does not preclude the court from accepting the testimony of Mohd Firdaus that the Plaintiff was warned as to the usage of the Credit Card before it was given over to her.

41. The Defendant also correctly relied on clause 14.5 of the terms and conditions of the Amex Credit Card which provides that notwithstanding any provision to the contrary, no failure or delay on the part of Maybank in exercising any of its rights, power or remedy hereunder shall be construed as a waiver and shall not impair such rights, power and remedy.

42. Pursuant to this, the Defendant is not precluded from revoking the Treats points which should never have been awarded to the Plaintiff even though it was done months after the points had been awarded.

43. I therefore find that the Learned Sessions Court Judge has not committed any error of law or fact in arriving at her decision. Accordingly, I dismiss the appeal with costs of RM5,000.00 subject to allocator.

Wong Chee Lin
Judicial Commissioner
Kuala Lumpur High Court
Dated: 19th July, 2018

The Appellant

Wong Wei Pin, the Appellant
(No. K/P: 800308-04-5180)

Solicitors For the Respondent

Messrs Shearn Delamore & Co
Advocates & Solicitors
7th Floor, Wisma Hamzah Kwong Hing
No. 1, Leboh Ampang
50100 Kuala Lumpur

Tel: 03-2027 2844
Fax: 03-2034 2763