

~~GMH 9.2~~

36/1963

IN THE JUDICIAL COMMITTEE OF  
THE PRIVY COUNCIL.

No. 36 of 1962.

ON APPEAL

UNIVERSITY OF LONDON  
INSTITUTE OF ADVANCED  
LEGAL STUDIES  
19 JUN 1964  
25 RUSSELL SQUARE  
LONDON, W.C.1.

FROM THE SUPREME COURT OF THE FEDERATION  
OF MALAYA.  
IN THE COURT OF APPEAL AT KUALA LUMPUR.

B E T W E E N

KOK HOONG (Plaintiff) Appellant

-and-

LEONG CHEONG KWENG MINES  
LIMITED (Defendant) Respondent

74127

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CASE FOR THE RESPONDENT

- 15 1. This is an appeal by the Plaintiff in the action by leave of the Court of Appeal of the Federation of Malaya sitting at Kuala Lumpur dated 18th September 1962 from the order of the said Court of Appeal dated 6th March 1962, reversing the order of Mr. Justing Oong in the Supreme Court of the Federation of Malaya dated 6th September 1961 whereby the Learned Judge had held before trial on a Preliminary Point of Law raised by the Reply that the Respondent was estopped by a judgment dated 3rd November 1954 from contending in this action that the Appellant was at all material times a money-lender within the meaning of S.3 of the Moneylenders Ordinance 1951, or that the transaction in question in the pleadings was a moneylending transaction or is void or unenforceable under the said Ordinance or that the documents mentioned in the pleadings constitute a Bill of Sale and are therefore void or unenforceable under the Bills of Sale Enactment or otherwise.
  - Pages 52 and 53.
  - Pages 10 and 11.
  - Pages 67 and 68.
- 20
- 25
- 30
- 35
- 2. By an agreement in writing dated 20th January 1952 the Appellant let or purported to let certain mining machinery and equipment on hire to the Respondent from 20th
  - Page 55.

June 1952 at the rent of 2,500 Malayan Dollars per month payable on the 19th of each month commencing on 19th July 1952.

3. On the expiry of the said term of 12 months the said hiring or purported hiring was continued on the terms and conditions contained in the said written agreement. No new written agreement was entered into, but it is submitted that such continuance constituted a new agreement between the parties.

Pages  
64 & 65.

4. On 30th June 1954 the Appellant commenced an action by summary procedure plaint in the High Court at Kuala Lumpur Number 272 of 1954. In the plaint in the said action the Appellant pleaded the said written agreement and the said extension respectively and that the Respondent had failed and neglected to pay rent for the said machinery and equipment (i.e. pursuant to the said written agreement and extension) for a period of 9 months commencing the 20th September 1953 and in the premises the Appellant claimed:

(a) 22,500 dollars being arrears of the said instalments of rent and also interest thereon at 12% per annum from 19th June 1954 as provided by the said agreement.

(b) the further sum of 900 dollars being interest on arrears of rent up till 18th June 1954, and

(c) the costs of the suit.

5. By the Civil Procedure Code then in force and later repealed as from 31st March 1958, if a Defendant in such an action wished to appear in the action, it was necessary for him first to apply for and obtain the leave of the Court to that effect. No such application was made by the Respondent in the said action and accordingly on 3rd November 1954 judgment was signed by the Appellant for the whole of the said sums claimed, by reason of the Respondent not having obtained leave to appear and defend the said suit.

Pages  
67 & 68.

5 6. In or about May 1955 (according to  
the case as pleaded by the Appellant) by  
agreement between the parties, the  
Appellant re-took possession of 2 items  
of the said machinery and equipment, namely  
2 diesel engines, and it was agreed be-  
tween the parties that the Respondent was  
to continue the hiring of the remainder of  
the said machinery and equipment on the  
10 terms and conditions contained in the said  
written agreement subject to the following  
variations, viz :-

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1 - 4.

- 15 a) the hiring to commence as from 20th  
April 1955,
- b) the rent to be 2,000 dollars per month  
with the first payment on 19th May  
1955,
- 20 c) that the insurance of the said  
chattels was to be in the sum of  
80,000 dollars only instead of 100,000  
as provided in the said original written  
agreement.

25 Again it is submitted that this was a com-  
pletely different agreement from the said  
original written agreement or the said  
original extension thereof and cannot be  
said to be the same agreement as was the  
subject matter of the said action Number  
272 of 1954.

30 7. The present action was commenced by  
the Appellant on 14th June 1957. By his  
Amended Plaint the Appellant pleaded the  
said agreement in writing in the said ex-  
tension and the re-taking of possession of  
35 the said 2 items by agreement between the  
parties and the new agreement referred to  
in paragraph 6 hereof (though he did not  
describe it in terms as a new agreement):  
he further pleaded that the Respondent was  
40 8 months in arrear with the said rent of  
2,000 dollars per month and was therefore  
owing 16,000 Dollars arrears plus 560  
dollars interest of such arrears up to  
18th December 1955; that the said hiring  
45 had been determined on 19th December 1955  
by a letter written by the Appellant  
dated 25th November 1955 and that not-  
withstanding a demand to that effect the

Pages  
1 - 4.

Appellant had refused and failed to return the said machinery and equipment. In the premises the Appellant claimed :-

- a) the said sum of 16,000 dollars plus interest at 12% per annum from 19th December 1955 until realization, 5
- b) the said sum of 560 dollars plus interest at 6% per annum from the date thereof until realization,
- c) damages for wrongful detention. 10
- d) an order for the delivery up of the said machinery and equipment,
- e) the costs of the said suit.

Pages 1 - 4. The Respondent will refer to the said amended plaint for its full terms. 15

Pages 5 & 6. 8. By the Amended Defence delivered on 22nd July 1961 the Respondent admitted the said written agreement and alleged that the same was complementary to an oral agreement between the parties of the same date whereby the Respondent had purported to sell the said machinery and equipment to the Appellant; that the two agreements formed part of a continuous transaction the purpose and effect of which was to make the Respondent's said machinery and equipment security for the aggregate sum of 112,000 dollars lent by the Appellant to the Respondent on 20th and 26th June 1952 with interest thereon, of which the Respondent had repaid 16,710 dollars; that the agreement of hire was on its true construction a Bill of Sale not in the statutory form or registered and therefore void and unenforceable by virtue of the Bills of Sale Enactment and that furthermore the said agreement of sale being ancillary to the hire agreement the Appellant had acquired no title to the said chattels or any right to the possession thereof; that furthermore the Appellant is and was at all material times a moneylender within the meaning of S.3 of the Moneylenders Ordinance 1951 and that as he had not furnished any Note or Memorandum in accordance with S.10 (1) of the said Ordinance, the said loans and any interest thereon are not recoverable in law. The 45

Respondent will refer to its said Amended Defence for its full terms. Pages 5 & 6.

5 9. By his Reply dated 24th July 1961 the Appellant joined issue with the Respondent and further contended that by reason of the said judgment in the said earlier action dated 3rd November 1954, the Respondent is estopped from contending either that the Appellant is a moneylender or that the transaction in question was a moneylending transaction or that the documents are other than what they purport to be or that they or either of them are or is void or that 10 the Appellant is not entitled to the reliefs claimed. The Respondent will refer to the said Reply for its full terms. 15

20 10. The said point as to the alleged estoppel raised by the Reply having been directed by order dated 28th July 1961 to be tried as a Preliminary Point, Mr. Justice Oong on 6th September 1961 decided the point in favour of the Appellant, namely that the Respondent is estopped from raising the said Defences and made an order in the terms referred to in paragraph 1 here- of which order was reversed by the Court of Appeal at Kuala Lumpur on 6th March 1962. Pages 7 & 8. 25 52 & 53.

30 11. The Court of Appeal found it unnecessary to give any decision on certain submissions made on behalf of the Respondent but confined itself to one aspect of the matter in a closely reasoned judgment delivered by Chief Justice Thompson. The said judgment is referred to for the full terms and effect thereof. The effect of the said judgment may be briefly summarised as follows :- that the said Defences raised by the Respondent were in the nature of confession and avoidance and not a mere traverse; that the principle to be applied is that enunciated in the case of Howlett v. Tarte 10 C.B. (N.S.) 813 and in particular the judgment of Williams J. at page 826 cited with approval by Farwell L.J. in Humphries v. Humphries 1910 2 K.B. at pages 45 534 and 535 and in Cooke v. Rickman 1911 2 K.B. 1125. The principle was summarised by the Learned Chief Justice in the following words :- Pages 35 to 52.

" There would thus seem to be ample authority for the proposition that when a Plaintiff in an action makes averments relevant to his action which are not denied the Defendant is estopped in any subsequent proceedings from denying these averments or averring facts inconsistent with them. No such estoppel, however, arises from an omission in the previous proceedings to plead facts which are not inconsistent with those pleaded by the Plaintiff and which go to support a defence by way of confession and avoidance or a special plea in law.

As it is put in Smith's Leading Cases (13th Edition) Volume II p. 679 :-

'The omission by a Defendant to set up a Defence in an earlier action does not estop him from setting it up in a later action brought by the same Plaintiff, provided that such defence is not inconsistent with any traversable averment made by the Plaintiff in the earlier action.

.....  
 If, however, the Defendant to a second action attempts to set up a defence which is inconsistent with any traversable allegation in the earlier action there is an estoppel.' "

The Learned Chief Justice also referred to other cases and in particular to the case of New Brunswick Railway Co. v. British and French Trust Corporation Ltd. 1939 A.C. 1. Having arrived at that result the Learned Chief Justice did not think it necessary to discuss the other points raised in argument on behalf of the Respondent. It is respectfully submitted that the said judgment of the Learned Chief Justice was correct, but in so far as may be necessary the Respondent will also rely on the further points set out below.

12. It is submitted that as each of the said Defences raised by the Respondent are Defences created by statute and requiring the facts to be specially pleaded so as to

5 give rise to the application of the statute  
in each respective case, there can be no  
bar to the same being pleaded. (In re: A  
Bankruptcy Notice 1924 Ch.76 at page 97)  
10 (Griffiths v. Davies 1943 2 A.E.R. 209  
at page 212). The Learned Chief Justice  
drew a distinction between pleading the  
statutes and pleading the facts giving  
rise to the application of the statutes,  
15 but it is respectfully submitted that no  
such distinction ought to be drawn, as it  
is not possible to plead a statute without  
also pleading the relevant facts, unless  
such facts are already alleged in the State-  
ment of Claim.

13. It is further submitted that a judg-  
ment obtained in default of appearance  
cannot on the facts of this case give rise  
to an estoppel and a fortiori having regard  
20 to the fact that at the material time by the  
terms of the Civil Procedure Code it was not  
possible to enter an appearance without the  
leave of the Court. It is conceivable that  
a position could arise in which the Court  
25 refused such leave or granted it only upon terms  
with which the Defendant was unable to com-  
ply. The Respondent will furthermore rely  
on the words of Lord Maugham L.C. in the  
New Brunswick Railway Case (supra) at  
30 page 21.

35 "'In my opinion we are at least justifi-  
fied in holding that an estoppel  
based on a default judgment must be  
very carefully limited. The true  
principle in such a case would seem  
to be that the Defendant is estopped  
from setting up in a subsequent  
action a defence which was neces-  
sarily, and with complete precision,  
40 decided by the previous judgment; in  
other words, by the res judicata in  
the accurate sense'."

45 It is submitted that the matters raised by  
the Respondent in its Defence in the  
present action were not "necessarily and  
with complete precision" decided by the  
said default judgment. The Respondent  
will also rely on the following further  
passages in the New Brunswick Railway Case:

Lord Thankerton at page 26, Lord Russell of Killowen at page 28 and Lord Wright at pages 37/38 and the speech of Lord Shaw in Hoystead v. Commissioners of Taxation 1926 A.C.155 at page 171.

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14. It is further submitted that the principle of estoppel on a previous judgment has no application where the contract sued on in the second action is a different contract from that which was the subject matter of the first. There was no issue before the Court in the first action in relation to the contract which is the subject matter of the present action. Adapting the words of Lord Wright in the New Brunswick Case at page 38, the Respondent could not be charged with the omission to traverse a claim which could not be traversed in the earlier action because it was not before the Court. The Respondent will rely on the following dicta in the New Brunswick Case, viz :- Lord Maugham L.C. at pages 19 and 20, Lord Wright at page 38, and Lord Romer at page 41 to 43.

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15. The Respondent respectfully submits that this appeal should be dismissed with costs for the following (among other)

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#### R E A S O N S

(1) For the reasons given in the judgment of the Court of Appeal and in particular the judgment of the Learned Chief Justice.

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(2) Because it is submitted that the Defences raised by the Amended Defence are Statutory Defences and that there cannot be a bar to pleading a Statutory Defence or the facts giving rise to such Statutory Defence.

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(3) Because on the facts of this case the judgment obtained in default of appearance (and a fortiori having regard to the fact that it was necessary for the Respondent to apply for and obtain leave to appear) cannot give rise to an estoppel.

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5 (4) Because it is submitted that there cannot be an estoppel where the present action is brought in respect of a different contract from that which was the subject matter of the earlier action.

PHILIP GOODENDAY.

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(Defendant)

Appellant

- and -

LEONG CHEONG KWENG MINES  
LIMITED. (Plaintiff)

(Defendant)

Respondent.

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CASE FOR THE RESPONDENT

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Agents for:

LOVELACE & HASTINGS,  
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