Privy Council Appeal No. 44 *of* 1962

Consolidated Agencies Limited – – – – – – *Appellant*

v.

Bertram Limited – – – – – – – – *Respondent*

FROM

THE COURT OF APPEAL FOR EASTERN AFRICA

REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 1ST JUNE 1964

Present at the Hearing:
LORD EVERSHED.
LORD GUEST.
LORD UPJOHN.
[*Delivered by* LORD GUEST]

This is an appeal by leave from a decision of the Court of Appeal for Eastern Africa, dated 29th March 1962 allowing an appeal from a judgment of Weston J. in the High Court of Tanganyika, dated 19th September 1961. The plaint, dated 13th April 1961 claimed that the defendant company (the appellant) was indebted to the plaintiff company (the respondent) in the following amounts:—(1) Shs.349,962/52 being moneys lent and advanced by the respondent to the appellant being repayable on demand: (2) Shs. 6,040/45 being interest at 6 per cent. per annum on Shs.349,962/52 from 1st January 1961 to 15th April 1961, and (3) further interest at 6 per cent. per annum from 16th April 1961 till judgment.

Weston J. found that the respondent's claim was time-barred, but he entered judgment for Shs.2,430/– conceded by the appellant to be due. The Court of Appeal for Eastern Africa allowed the appeal and allowed judgment for the respondent. On 21st November 1962 the Court of Appeal granted final leave to appeal to Her Majesty in Council.

The appellant appeared by counsel in support of the appeal, but although the respondent had lodged a case, no appearance was made for the respondent at the hearing before the Board.

The only question arising before the Board was whether the respondent's claim was time-barred.

The sum of Shs.349,962/52 as appeared from two statements of account annexed to the plaint were made up as follows:—

No. 1 Account showed a cash loan at 6 per cent. per annum of Shs.85,000/– on 9th March 1951: various payments were made to account between 14th December 1951 and 15th May 1958. Two further cash loans were advanced in September 1959 amounting to Shs.2,430/–. These are the sums for which judgment was *ex concessis* allowed by Weston J. and about which no question accordingly arises. The outstanding balance at 1st January 1961 on the account was Shs.23,427/52.

No. 2 Account showed a cash loan at 6 per cent. of Shs.269,000/– on 3rd August 1954. Two sums were paid to account on 26th August 1958 and 3rd February 1959 amounting to Shs.46,030/–. The outstanding balance on this account was Shs.326,535/–. The addition of these two outstanding balances amounts to Shs.349,962/52 the sum claimed in item No. 1 of the plaint.

The law governing limitation of actions in Tanganyika is contained in the Indian Limitation Act, 1908, with such amendments thereof as were in force on the 1st December 1920, which was applied to Tanganyika by virtue of the Indian Acts (Application) Ordinance of that date (Cap.2). The Schedule to the Act sets out the periods prescribed for different causes of action, the relevant periods being as follows:—

Description of suit	*Period of limitation*	*Time from which period begins to run*
57. For money payable for money lent	Three years	When the loan is made.

Section 19 of the Limitation Act provides:

> Where, before the expiration of the period prescribed for a suit or application in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by some person through whom he derives title or liability, a fresh period of limitation shall be computed from the time when the acknowledgment was so signed.
>
> (2) Where the writing containing the acknowledgment is undated, oral evidence may be given of the time when it was signed; but subject to the provisions of the Indian Evidence Act, 1872, oral evidence of its contents shall not be received.
>
> Explanation I.—For the purposes of this section an acknowledgment may be sufficient though it omits to specify the exact nature of the property or right, or avers that the time for payment, delivery, performance or enjoyment has not yet come, or is accompanied by a refusal to pay, deliver, perform or permit to enjoy, or is coupled with a claim to a set-off, or is addressed to a person other than the person entitled to the property or right.
>
> Explanation II.—For the purposes of this section, " signed " means signed either personally or by an agent duly authorised in this behalf.

Section 20 provides:

> Where interest on a debt or legacy is, before the expiration of the prescribed period, paid as such by the person liable to pay the debt or legacy or by his agent duly authorised in this behalf, or where part of the principal of a debt is, before the expiration of the prescribed period, paid by the debtor or by his agent duly authorised in this behalf, a fresh period of limitation shall be computed from the time when the payment was made:
>
> Provided that, save in the case of a payment of interest made before the 1st day of January 1928, an acknowledgment of the payment appears in the handwriting of, or in a writing signed by, the person making the payment.

So far as No. 1 Account is concerned the various payments made by the appellant to the respondent between the date of the loan (9th March 1951) and 18th March 1955 prevented time from running against the respondent. But from 18th March 1955 the account remained quiescent until 15th May 1958 when a payment to account of Shs.300/- was made by the appellant to the respondent. But as the debt became time-barred three years after 18th March 1955, that is in March 1958, the payment of Shs.300/- in May 1958 was ineffective to set time running again, having been made two months after the expiry of the three-year period of limitation.

In regard to No. 2 Account the loan became time-barred on 3rd August 1957 three years after it was made. The cash payment of Shs.20,030/- on 26th August 1958 was made over a year too late to avail the respondent.

The respondent contended in the Courts below that section 19(1) of the Indian Limitation Act operated so as to set in train a fresh period of limitation in regard to the sum claimed in the plaint.

In support of this contention the respondent relied on four balance sheets:—

(*a*) The balance sheet for the appellant company showing the financial position as at 31st December 1954. This contained an entry " Loans— Shs.412,385 " and was signed by W. Dharsee and K. P. Jafrabadwalla as Directors. The evidence disclosed that it must have been signed between 19th and 27th October 1956, nearly two years later.

(*b*) The balance sheet for the appellant company showing the financial position as at 31st December 1955. This contained an entry " Loans— Shs.277,385 " and was signed by the same two Directors according to the evidence between 6th and 19th November 1957, again nearly two years later.

(*c*) The balance sheet for the appellant company showing the financial position as at 31st December 1956. This contained an entry " Loans— Shs.364,208·78 " and was signed by the same two Directors between 12th March 1958 and 11th April 1958 some fifteen months later.

(*d*) The balance sheet for the appellant company showing the financial position as at 31st December 1957. This contained an entry " Loans and accrued interest Shs.365,831·28 " and was signed only by W. Dharsee as Director either on 28th or 29th April 1959, some sixteen months later.

Evidence was given by a witness, a partner in the firm of Chartered Accountants who during the relevant period audited the appellant company's books. This evidence which was accepted by the trial Judge was to the effect that the loans to the respondent were included in the general item " Loans " on each of these balance sheets. This finding was not challenged by the appellant in the Court of Appeal or before the Board. This witness also gave the evidence upon which the trial Judge fixed the approximate dates when the Directors signed the respective balances as already referred to. In passing it may be observed that this witness also testified that the balance sheets were not communicated to any other person than the appellant as he regarded them as confidential

The trial Judge held that the balance sheets were not sufficient acknowledgments to comply with the terms of section 19 as they were not acknowledgments of an existing liability. He did not consider it necessary to deal with the appellant's other objection to the validity of the acknowledgments, namely that they were not communicated to any person other than the appellant's agents. The Court of Appeal rejected both the appellant's objections to the acknowledgments contained in the balance sheets and held that the signature of the Directors was an effective acknowledgment of the existence of the debt as at the date of the signature.

The sole question before the Board is " Whether the balance sheets of the appellant company, signed by its directors in the circumstances, constituted acknowledgments of the liability of the appellant within section 19 of the Indian Limitation Act, 1908 ". If they are, then the debt is not time-barred. If they are not, then the debt is time-barred and the claim of the respondent must fail.

Their Lordships first proceed to examine section 19(1) of the Indian Limitation Act, in order to test the soundness of the decision of the trial Judge and the Court of Appeal that the acknowledgment to satisfy the requirements of section 19(1) must be of an existing liability. This is a pure question of construction of the relevant section. Their Lordships regret that they have not had the assistance of Counsel for the respondent. The section speaks of an " acknowledgment of liability being made in writing signed by the party " and the first period of limitation runs " from the time when the acknowledgment was so signed ". This indicates that the *punctum temporis* is the signing of the acknowledgment and the acknowledgment can only speak to the liability existing at the date of signature. This would be the *prima facie* view which their Lordships would take of the section unassisted by authority. This however is also the construction which has been consistently put on section 19 by the Indian Courts. *Rustomji* on the *Law of Limitation* (5th Edition) I page 297 expresses the matter thus:

> " To take a demand out of the statute of limitation on the ground of an acknowledgment, the language of the debtor must amount to an unequivocal admission of a subsisting debt, that is subsisting at the time of acknowledgment."

Reference may also be made to the earlier case of *Periavenkan Udaya Tevar v. Subramanian Chetti* [1897] I.L.R. (Madras) 239, and to the recent case of *Kandaswami Reddi v. Suppamal* [1922] A.I.R. (Madras) 104; 45 Madras 443. Their Lordships agree with the views expressed by Weston J. and Forbes V. P. that the case of *Maniram Seth v. Seth Rupchand* (1906) 33 Calcutta 1047 decided by the Privy Council did not impinge on the principle above stated.

Their Lordships do not doubt that this is the proper construction of section 19; the next question is whether the balance sheets amount to acknowledgments of an existing liability. In each case the balance sheet was signed many months after the end of the year to which the balance sheet related and the acknowledgment was therefore not of an existing liability but of a past liability as at the date to which the balance sheet was made up. To satisfy section 19 the liability must exist at the date of the signing of the acknowledgment and the directors' signature on the balance sheets did not refer to a liability at the date of signature but to a liability which existed when the balance sheet was made up. It would be quite unreal to treat the liability shown as existing at the date of signature, as it might have changed and had in the case of one balance sheet been reduced by the time of signature. For example in the balance sheet for the year to 31st December 1954 " Loans " were shown as Shs.412,385/- which included the loan to the appellant: but by the time the balance sheet was signed between 19th and 27th October 1956 the liability on account of loans had already been reduced by Shs.135,000/- as shown by the balance sheet for the year ending 31st December 1955 and in fact the appellant had paid the respondent Shs.15,000 in respect of No. 1 Account during the year 1955.

Their Lordships therefore conclude that Weston J. was right in deciding that the balance sheets were no more than acknowledgments of past liability and as such not sufficient compliance with section 19 of the Act.

The Court of Appeal while agreeing with the trial Judge that section 19 required an acknowledgment of an existing liability considered that two English cases which are referred to in the judgment of Forbes V. P. forced them to the conclusion that the signatures of the balance sheets by the directors were an effective acknowledgment of the existence of a liability at the date of signature. The English cases support the view that signatures on balance sheets may in certain circumstances operate as acknowledgments of liability. The real questions are:— under what circumstances and to which date do they relate? Until 1928 no question was ever raised in any English case that balance sheets could amount to acknowledgments of liability. But in *Atlantic and Pacific Fibre Co. v. Importing and Manufacturing Co.* [1928] Ch.836 Clauson J. held that the issue of balance sheets constituted a sufficient acknowledgment of the company's indebtedness to the debenture holders. As the debentures were documents under seal, the relevant limitation was contained in section 5 of the Civil Procedure Act and as this Act did not require that acknowledgment should be given to the creditor or to imply a fresh promise to pay, the learned Judge held that the balance sheets were sufficient acknowledgment. No question of the date of acknowledgment was raised.

This case was followed shortly after by *In Re The Coliseum (Barrow) Ltd.* [1930] 2 Ch. 44 before Maugham J. At page 47 that learned Judge observed:

> " Accordingly, had the statement been made in the balance sheet that the company owed a specified sum to a shareholder to whom the balance sheet was sent in the usual way that would have amounted, I think, to a sufficient acknowledgment within the authorities ".

Atlantic and Pacific Fibre Co. was not referred to. Moreover, the observation quoted was *obiter* as the decision in the case was that the signatures on the balance sheet containing a note of fees due to directors were not an

acknowledgment of liability, as the directors could not authorise the payment of fees to themselves. No question arose in that case as to the date to which the acknowledgment related.

The case most strongly relied on by the Court of Appeal was *Jones v. Bellgrove Properties Ltd.* [1949] 1 A.E.R. 498; [1949] 2 K.B. 700. In the special circumstances of this case the English Appeal Court held that balance sheets amounted to an acknowledgment of liability under section 24(1) of the Limitation Act, 1939 which is not in dissimilar language to the Indian Act. The circumstances were that at the Annual General Meeting of the Company on 31st December 1946 when the balance sheets for 1939, 1940, 1941, 1942, 1943–4 were produced Mr. Silver a Director of the defendant company said in the presence of the plaintiff " These are the accounts for five or six years. Would you care to look at them?" These balance sheets contained an item " Sundry Creditors £7,638.8.10." which included the loan made by the plaintiff. Birkett J. held that this amounted to an acknowledgment that the liability to the plaintiff existed at the date of the Annual General Meeting. The Court of Appeal affirmed his decision. Lord Goddard C. J. in giving the judgment of the Court followed the *Atlantic Fibre* case and quoted with approval the statement of Maugham J. in *Coliseum (Barrow) Ltd.* above quoted. Their Lordships consider that this case was rightly decided on its facts. But in their Lordships' view it would not be right to suggest that it can be used as authority for the view that a signature on a balance sheet is in all circumstances an acknowledgment of an existing liability, within the meaning of Section 24(1) of the Limitation Act 1939. Nor is it possible to suggest that it is an authority for the view that the signature on the balance sheet is an effective acknowledgment within the 1939 Act of the existence of the debt at the date of signature. No question arose in *Jones v. Bellgrove* as to the precise date to which the acknowledgment related, though Birkett J. had taken as effective the date of the Annual General Meeting for the reason that this was the date when the liability was acknowledged. In the Court of Appeal this date was accepted without question. So regarded, the case is therefore not inconsistent with the principle that the acknowledgment must be of an existing liability. This principle seems indeed to have been accepted in English law as early as 1849 (see *Howcutt v. Bonser* [1849] 3 Ex. 491. *Preston and Newsome Limitation of Actions* (3rd Ed.) p.240). In the only other case in which the question of a signature on a balance sheet arose, *Ledingham v. Bermejo Estancia Co. Ltd.* [1947] 1 A.E.R. 749 the question was never raised whether the acknowledgment was of an existing liability.

The Court of Appeal for Eastern Africa appear to have based their decision upon the view that *Jones v. Bellgrove Properties* has been followed in India in *Rajah of Vizianagaram v. Official Liquidator* [1952] A.I.R. (Madras) 136 § 33 at p.145. The report of the latter case is very condensed, but the decision in their Lordships' view is based upon a misreading of *Jones v. Bellgrove Properties*, if the Indian Court treated that case as authority for the view that balance sheets operate as acknowledgments at the date of their signature.

It may well be since the decision in *Atlantic Pacific Fibre* that balance sheets could in certain circumstances amount to acknowledgments of liability, that it has been assumed that the signature on the balance sheet speaks as from the date of the balance sheet, but the question has never been properly considered whether a signature on a balance sheet which must of necessity be made some time after the date to which the balance sheet has been made up can amount to an acknowledgment of an existing liability. There may be cases where it would be proper to assume that the liability persisted up to the date of signature which would then be an acknowledgment of an existing liability, though their Lordships venture to think that, if the effect of the English Limitation Act is the same as that of the Indian Act, some further consideration may have to be given to the general question whether and in what circumstances balance sheets may operate as acknowledgments of debts comprehended therein. In any case their Lordships find it difficult to see in the cases cited any justification for the acknowledgment, consisting of the signature of the balance sheets, being taken to be of the continued existence, at the date of the signature, of the debt stated in the balance sheet.

In the view which their Lordships take of the purported acknowledgment on the balance sheets it is unnecessary to consider the appellant's other objection to the balance sheets, namely that they were not communicated to any person other than the appellant's agent.

Their Lordships have therefore reported to the President of Tanganyika their opinion that this appeal should be allowed and the judgment of the Court of Appeal for Eastern Africa dated 29th March 1962 set aside with costs, and the judgment of Weston J. dated 19th September 1961 restored, and that the respondent should pay the costs of the hearing before the Board.

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In the Privy Council

CONSOLIDATED AGENCIES LIMITED

v.

BERTRAM LIMITED

DELIVERED BY
LORD GUEST

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