

18/84

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

O N A P P E A L

FROM THE FEDERAL COURT OF MALAYSIA
(APPELLATE JURISDICTION)

B E T W E E N :

O.C.B.C. LTD.

Appellants
(Plaintiffs)

and

10 PHILIP WEE KEE PUAN
@ WEE KEE PHUAN

Respondent
(Defendant)

CASE FOR THE APPELLANTS

Record

1. This is an appeal from the decision of the Federal Court of Malaysia at Kota Bharu, Kelantan (Wan Sulaiman F.J. Salleh Abas, F.J. and Hashim Sani, J) given on the 30th day of July 1981 whereby the Federal Court allowed an appeal by the Respondent in the action from the decision of the High Court in Malaya (Haji Mohamed Zahir bin Haji Ismail, J) given at Kota Bharu on the 8th day of March 1980 awarding the Appellants judgment for the sum of \$44,250.72 with interest therein at 10.8% with monthly rests as from 26th December 1972. p.23-26
- 20
2. The issues raised in this appeal are: (i) whether the Appellants' claim against the Respondent is statute barred; and if so, (ii) whether the debt the subject matter of the claim was revived by a letter of acknowledgement of debt by the Respondent dated 14th day of January 1974, and (iii) whether though not pleaded in the Appellants' Statement of Claim, the said letter can be relied upon by the Appellants. p.13-17
- 30

3. THE FACTS

(1) The Appellants are a company carrying on the business of bankers at its branch at O.C.B.C. Building, Jalan Temenggong, Kota Bharu, Kelantan and elsewhere. On request made by the Respondent on or about 2nd day of October 1963, the Appellants granted certain overdraft facilities to the Respondent up to an amount of M\$25,000.00.

(2) This overdraft facility was secured by a Charge executed by the Respondent's father, Wee Sidk Hor @ Wee Sock Ho @ Wee Saw Hor @ Wee Sok Hor @ Wee Siok Hor of several pieces of land, for the purpose of repayment to the Appellants on demand of all sums advanced by the Appellants to the Respondent to a limit of \$25,000.00 with interest at the bank's current rate with monthly rests. 10

(3) At the request of the Respondent, the Appellants made various advances from time to time to the Respondent. The last entry in the Respondent's Account in respect of which the overdraft was granted was on the 8th day of September 1965 when the Respondent made a payment into the account of a sum of M\$200.00. Since then the account became dormant and by the 26th day of December 1972 the amount of the debt together with accumulated interest owed to the Appellants stood at M\$69,250.72. 20

(4) The Respondent's father died on the 17th day of October 1964 intestate and his estate was handed to the Official Administrator, Malaysia for administration. 30

(5) On or about the 3rd day of January 1973, the Appellants' through their Solicitors wrote to the Respondent and to the Assistant Official Administrator, Malaysia respectively demanding settlement of the Defendants said current account in the sum of \$69,250.72 as on the 26th day of December 1972 with interest thereon at the bank's current rate with monthly rests. However, no payments were received. 40

(6) On or about the 23rd day of December 1973 the Appellants made an application to the High Court in Kota Bharu in Originating Summons No. 109 of 1973 to foreclose the said Lands under the Charge executed by the Respondent's late father.

(7) On or about the 14th day of January 1974, the Respondent sent a letter addressed to Messrs.

Foo Say Ghee & Co., the Solicitors then representing the Appellants requesting "for a postponement of the application for Originating Summons to a later date sometime in the middle of March 1974" so as to enable him to raise as initial payment to the Appellants a sum of about M\$25,000.00. He further promised to arrange to sell the properties comprised in the Charge and then pay the balance amount owing to the Appellants.

10 (8) On the 26th day of September 1974 the Appellants obtained an Order of the Court inter alia to the effect that the land comprised in the said Charge be sold by Public Auction under the direction of the Senior Assistant Registrar of the High Court, Kota Bharu for the recovery by the Appellants of the sum of M\$25,000.00 being the limit of liability of the estate of the Respondent's late father under the said Charge with further interest thereon and monthly rests.

20 (9) The Official Administrator, in compliance with the Order of the Court as aforesaid, paid to the Appellants on the 13th day of November 1975 the sum of M\$25,000.00 being the principal amount guaranteed on the Charge and on the 23rd day of February 1976, paid a further sum of M\$562.00 being the interest due.

30 (10) The balance amount of M\$44,250.75 with interest and monthly rests as from 26th day of December 1972 to date of realisation, outstanding is agreed to by the parties and is not an issue in question.

(11) The Appellants filed their Writ on the 15th day of June 1975, claiming from the Respondent the balance amount due with interest at the rate of 10.8% per annum or at the bank's current rate with monthly rests as from the 26th day of December 1972 to date of realisation and costs.

40 4. S.14 The Limitation Ordinance 1963 section 26(2) provides as follows: "where any right of action has accrued to recover any debt or other liquidated pecuniary claim, or any claim to the personal estate of a deceased person or to any share or interest therein, and the person liable or accountable therefor acknowledges the claim or makes any payment in respect thereof, the right shall be deemed to have accrued on and not before the date of the acknowledgement or the last payment. Provided that a payment of a part of the rent or interest due at any time shall not extend the period for claiming the remainder of the rent or interest then due, but any payment of interest
50 shall have effect, for the purposes of this sub-

Record

section only, as if it were a payment in respect of the principal debt."

p.13-17
p.15 1.45

5. The action was heard on the 23rd and 24th January 1980 and Judgment was given on 17th March 1980. The Learned Judge (Mohamed Zahir bin Haji Ismail) found that the debt was statute barred but nevertheless held that the Respondent's letter dated 14th January 1974 revived the time for suing by the Appellants and started time to run afresh. He further held that all that is necessary for an acknowledgement which takes the case out of the statute is that the debtor should recognise the existence of the debt, or that the person who might rely on the statute, should recognise the rights against himself. The acknowledgement need not even contain a promise to pay and it is immaterial that the amount of the debt is not expressed in the acknowledgement or that the correctness of the amount claimed is disputed in the acknowledgement. He entered judgment for the Appellants in the amount of M\$44,250.72 with interest thereon at 10.8% with monthly rests as from 26th December 1972 to date of realisation and costs to be taxed.

10
20

6. The Respondent appealed to the Federal Court of Malaysia at Kota Bharu, Kelantan which heard the appeal on the 6th day of June 1981. The Court (Wan Suleiman, F.J., Salleh Abas, F.J. and Hashim Sani J.) on the 30th day of July 1981 ordered that the appeal be allowed with costs.

30

The Court held that it is settled law that for the purpose of the statute of limitation as regards overdraft the course of action against the borrower arises every time an advance is made by the bank and that no demand for repayment of debt is necessary for the accrual of cause of action, unless there is a term in the overdraft Agreement requiring such notice. The Court found that as the account in question became dormant on the 8th day of September 1965, time for purpose of the limitation act began to run from that date and the Suit was accordingly statute-barred. The Court further held that the letter of acknowledgement dated the 14th day of January 1979 constitutes a new cause of action and as it has not been pleaded in the Statement of Claim and the debt having been statute-barred, the Statement of Claim discloses no cause of action. The Federal Court relied on the decision in Mat bin Lim and Anor vs Ho Yut Kam & Anor (1967) 1 MLJ 13 where the point was dealt with by Raja Azlan Shah J as he then was, as stating the

40
50

correct position of the law relating to the Pleading and Judgment on the Statute of limitation. The Court then gave judgment in favour of the Respondent and allowed the appeal with costs.

7. The Appellants obtained Final leave to appeal to the Judicial Committee of the Privy Council on the 22nd day of March 1982.

10 8. The Appellants submit that the High Court was correct in holding that the Respondent's letter dated the 14th January 1974 revived the time for suing by the Appellants and started time to run afresh and that the Appellants' claim is accordingly not statute-barred.

20 9. It is further submitted that time starts running in the case of an overdraft, from the date of demand, which in this case was on the 3rd January 1973 when the Appellants sent a letter to the Respondent demanding the repayment of the amount due and the present claim is accordingly not statute-barred (see) Halsbury's Law of England, 3rd Edition at page 217 and Joachimson vs Swiss Bank Corporation (1921) 2 KB p.110.

30 10. As to paragraph 8 above it is submitted that although the phrase "acknowledgement" is not defined by the Limitation Ordinance the said letter constituted a sufficiently clear admission of the existence of debt and or an unequivocal promise to pay by the Respondent who is for purpose of the Limitation 1963 Ordinance clearly "the person accountable therefor".

11. The Appellants submit that the Federal Court were wrong in holding that since the said letter of 14th January 1974 had not been pleaded in the Statement of Claim the Appellants could not succeed.

40 The Rules of procedure of the Malaysian Courts are such that, if a party fails to plead an acknowledgement there can be no difficulty in curing the defect by an appropriate amendment at any stage of an action, provided that no injustice is done thereby.

It is submitted that if the Appellants had applied for leave to amend the Statement of Claim or to serve a Reply to rely upon the acknowledgement, such application would undoubtedly have been granted by the Trial Judge for he had permitted the evidence to be given and for argument to be advanced on the issue. Counsel for the Respondent

Record

made no objection to the admission in evidence of the letter of acknowledgement, expressly stated that he had nothing to ask upon it, decided to call no evidence at all and thereafter proceeded to argue the question of acknowledgement along with all the other issues in action, both in law and in fact, during the closing submission. It is submitted that all the relevant material was therefore before the Court and the absence of a pleading was a pure technicality.

10

The Rules of the Federal Court 1980 confers upon the Federal Court of Malaysia pursuant to Order 51 (1) "The Court shall have all the powers and duties, as to amendment or otherwise, of the appropriate High Court, together with full discretionary power to receive further evidence by oral examination in Court, by Affidavit or by deposition taken before an examiner or commissioner."

12. It is submitted that the Federal Court should have held that the absence of a pleading was in the circumstances immaterial or allowed an appropriate amendment in order to reflect the true position which was that the acknowledgement issue was taken, put in evidence and argued fully before the Court of first instance. A similar approach was adopted by Chief Justice Rajah Azlan Shah in Kep Mohamed Ali v KEP Mohamed Ismail (1981) 2 MLJ 10 a Federal Court decision subsequent to Mat Bin Lim & Anor vs Ho Yut Kam & Anor 1967 1 MLT 13.

20

30

13. THE APPELLANTS HUMBLY SUBMIT THAT THE APPEAL SHOULD BE ALLOWED FOR THE FOLLOWING AMONG OTHER

R E A S O N S

- (1) Because the High Court was right.
- (2) Because the Federal Court was wrong.
- (3) Because the Appellants' claim was not statute-barred.
- (4) Because the Respondent's letter of Acknowledgement dated 14th January 1979 revived the Appellants' claim resulting in time running afresh as from that date.

40

GEORGE NEWMAN, Q.C.

C. ABRAHAM.

IN THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL

O N A P P E A L

FROM THE FEDERAL COURT OF MALAYSIA
(APPELLATE JURISDICTION)

B E T W E E N :

O.C.B.C. LTD. Appellants

and

PHILIP WEE KEE PUAN
@ WEE KEE PHUAN Respondent

CASE FOR THE APPELLANTS

Coward Chance,
Royex House,
Aldermanbury Square,
London EC2V 7LD.

Solicitors for the Appellants