

IN THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL
ON APPEAL FROM THE FEDERAL COURT
OF MALAYSIA (APPELLATE JURISDICTION)

BETWEEN:

O.C.B.C. LIMITED Appellant
(Plaintiff)

AND

PHILIP WEE KEE PUAN @ Respondent
WEE KEE PHUAN (Defendant)

AMENDED CASE FOR THE RESPONDENT

RECORD

1. This is an appeal by the Plaintiff in the action by leave of the Federal Court of Malaysia Holden at Kula Lumpur dated the 22nd March 1982 from the order of the said Federal Court dated the 30th July 1981 allowing an appeal against the decision of The Honourable Dato Justice Mohamed Zahir bin Haji Ismail in the High Court of Malaysia whereby judgment was entered against the Respondent in the sum of \$44,250.72 together with interest thereon at the rate of 10.8% per annum with monthly rests as from 26.12.72 to date of realisation.
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- p.28.L.1.
p.29.L.10
p.26.L.26
p.27.L.41

p.13.L.18
p.19.L.22

RECORD

p.1.L.1.
p.5.L.45
P.10.L.8-34
p.13.L.38-40
p.23.L.32-38
p.25.L.34-37
P.1.L.1.
p.5.L.45
p.13.L.18
p.18.L.15
p.6.L.1-26
p.12.L.1-23

2. This appeal arises out of proceedings in the High Court of Malaysia in which the Appellant Bank sought to recover from the Respondent advances made to him on current account together with interest commission and banking charges. That account was last operated by the Appellant in 1965 after which time it became dormant. The proceedings were begun by a specially indorsed Writ dated 14th June 1975. Trial took place on the 23rd and 24th January 1980. Judgment was delivered on the 8th March 1980. The only defence persisted in was that the claim was statute barred. 10

p.13.L.18
p.18.L.45
p.14.L.28
p.15.L.15
p.15.L.16
p.17.L.47
p.53.L.1-50

3. In his judgment Mohamed Zahir J. held that time ran against the Appellant Bank's claim from the date when their advances were made but that the Respondent acknowledged the debt by a letter dated 14th January 1974 and thereby started time running afresh. On this basis he entered the said judgment for the Appellant Bank for the sum (agreed subject to liability) of \$44,250.72 with interest thereon since 26th December 1972 20

p.25.L.23-40
p.25.L.43

4. On appeal the Federal Court of Malaysia upheld the view that (in the absence of an acknowledgment) time ran against the Bank from 1965 but allowed the present Respondent's appeal to them upon the basis that such acknowledgment constituted a new cause of action and that unless it was pleaded in the Statement of Claim (which it was not) the present Respondent should be entitled to judgment.

5. The contentions of the Respondent are:

(Ai) That the High Court of Malaysia and the trial Judge were right in holding for the reasons set out in their respective judgments, that for the purpose of limitation of action, the cause of action against the borrower arose everytime the bank made an advance and that no demand was necessary for the accrual of that cause of action. The Respondent will contend that that view of the law is supported rather than negated by the decision in Joachimson v. Swiss Bank Corporation (1921) 2KB 110 which turns upon the banking obligations that are inherent in the relation of banker and customer, whereas an overdraft facility is not an inherent part of that relationship which arises from a special agreement between banker and customer and does not have the special features which were the basis of the decision in that case;

p.25.L.40
p.14.L.28
p.15.L.15

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(i) That the said letter and its material content was a material fact upon which the Appellant had to rely in support of its claim which the Appellant was required by Order 19 Rule 4 of the Rules of the Supreme Court 1957, (and, when it came into force on the 1st June 1980, Order 19, Rule 5 of the Rules of the High Court 1980) to set out a statement in summary form in its pleadings;

p.53.L.1-50

(ii) That the Appellant made no reference whatever to the said letter or its material content in its pleadings (being a Statement of Claim only);

p.2.L.48
p.5.L.12

p.53.L.1-50

(iii) further or alternatively the said letter its contents and the provisions of Section 26 of the Limitation Ordinance 1953 as to the effect of acknowledgment upon the date when the right of action in respect of the Appellant's claim accrued were each and all matters which the Appellant was required by Order 19, Rule 15 of the Rules of the Supreme Court 1957 (and, when it came to force on the 1st June 1980, Order 18, Rule 8 of the High Court Rules 1980) to plead specifically in a pleading subsequent to its Statement of Claim (at all events if it had not already done so in its Statement of Claim);

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(iv) That the Appellant did not plead any of these matters in any such pleading;

(v) That it was the duty of the Learned High Court Judge to give judgment upon the issues raised by the pleadings and upon them only;

(vi) That had the question of amendment of the Appellant's pleadings been raised at the said trial in the High Court, which it was not, the effect of the amendment would have to have been to raise a case that the Appellant's cause of action accrued or was to be deemed to have accrued on the date of the said acknowledgment;

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p.7.L.8
p.12.L.43

(vii) at the date the matter of the alleged acknowledgment was first raised by the Appellant (as Plaintiff) namely the 23rd January 1980, in re-examination of the Plaintiff's Witness Lin Din Seng, the Respondent had already acquired an

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p.7.L.34
P.11.L.14

accrued right to immunity from suit upon the basis of the said acknowledgment and/or in respect of the Appellant's claim herein since the 6 year limitation applicable under Section 6 of the Limitation Ordinance 1953 had run from the date of the said acknowledgment and expired on or before the 15th January 1980;

(viii) That amendment of the Statement of Claim to plead the matters dealt with in

10 (i) and (iii) above would have retrospectively destroyed that accrued right and would have been contrary to the long established and well founded practice of the Court;

(ix) that the learned High Court Judge at no stage addressed himself to the question of whether the Plaintiff should be given leave to raise the matter of acknowledgment which was not pleaded and/or whether such
20 leave should be given when that matter of acknowledgment was first raised at a date (namely the 23rd January 1980) when the cause of action which, if there were a sufficient acknowledgment, would be deemed to have accrued from its date was statute barred by the provisions of Section 6 of the Limitation Ordinance 1953;

P.11.L.1
p.18.L.15

p.2.L.46
p.5.L.10

p.11.L.1-8

30 (x) That had the learned High Court Judge properly directed himself in the exercise of his discretion as to these matters he would have refused the Plaintiff leave to raise the

matter of the acknowledgment and/or would have to have considered (which he did not) whether there were any or any sufficient special circumstances to justify giving such leave and to have concluded that ~~there~~ were not;

p.53.L.1-50

(xi) That the said letter of 14th January 1974 did not constitute an acknowledgment in respect of the Appellant's claim against the Respondent for the purposes of Section 26(2) of the Limitation Ordinance 1953;

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(xii) That for the reasons set out in (i) - (ix) above as applied to the hearing before the Federal Court and its powers and by reason of the terms of Order 20 Rule 5 of the Rules of the High Court the decision of the Federal Court should be upheld.

6. The Respondent submits that this appeal should be dismissed with costs for the following amongst other

R E A S O N S

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1. BECAUSE the judgment of the High Court as to acknowledgment was without foundation in the record

2. BECAUSE the Learned High Court Judge did not address himself to the question whether the Plaintiff should be permitted to raise the matter of acknowledgment though it was not pleaded and/or if he had done so or did so should have refused such permission as, at the date when that matter of acknowledgment was first raised in the action, the

cause of action in respect of which the acknowledgment was relied upon would, even were the acknowledgment an effective one for the purposes of Section 26(2), of the Limitation Ordinance 1953 have been statute barred

3. BECAUSE the letter dated 14th January 1974 did not constitute an acknowledgment of the Appellant's Claim against the Respondent for the purposes of Section 26(2) of the Limitation Ordinance 1953.

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4. BECAUSE the judgment of the Federal Court was right.

JOHN M. BOWYER

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Respondent
(Defendant)

AMENDED
CASE FOR THE RESPONDENT

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