KWANG MIN KWEE **.....Plaintiff**

AND

ALISAN JAYA SDN BHD **.....Respondent**

(Court of Appeal of Brunei Darussalam)
(Civil Appeal No. 12 of 2018)

Before: Burrell P, Seagroatt and Lunn JJ A.
22nd November 2018

Mr. Lim Chin Wah (Messrs Ahmad Zakaria and Associates) for Plaintiff
Mr. Rudi Lee Kim Boon (Messrs Rudi Lee, Annie Kon & Associates) for Respondent

Seagroatt, JA.:

This is an appeal by the plaintiff against the decision of Judge Norismayanti who dismissed the findings of the Registrar in dismissing the defendant's application to strike out the plaintiff's action under Order 18 RSC on the basis that it was time-barred by section 9 of the Limitation Act (Cap 9). The judge thereby allowed the defendant's application to strike out the claim under the Limitation Act.

The material facts are shortly stated. The plaintiff supplied goods to the value of BND$149,441.57 to the defendant in response to a purchase order dated 5th March 2008. They were delivered over a 3 day period ending 1st May 2008.

The plaintiff issued a Statement of Account to the defendant dated 1st April 2008 giving a 30 day period for payment which was to be made by 1st May 2008. No payment was made. The plaintiff's cause of action accrued on the 1st May 2008. A letter of demand was issued to the defendant dated 16th June 2008.

The plaintiff alleges an oral agreement that the plaintiff would be paid once the defendant had received payment from the government for whom the defendant was carrying out a project.

By letter of 25th January 2010 the defendant stated *"their management is looking into the matter."* Did this letter amount to a sufficient written acknowledgment of the debt so as to meet the provision of section 35(5) of the Limitation Act? There is a further letter dated the 16th November 2012 in similar terms.

The plaintiff commenced its action on the 16th April 2015 outside the 6 year limitation period under the Act, but relies, inter alia, on continuing to issue their statement of accounts up to and including 1st March 2012.

This could be seen as consistent with the alleged oral "back-to-back" agreement that the plaintiff would be paid once the defendant had been paid by its principal client, the government. It would be sensible for the plaintiff to continue to issue statements of account if only to serve as reminders of the amount due to be paid and keep the matter in the forefront of the defendant's knowledge of liability. It would also be an expectation that the defendant would notify the plaintiff once it had been paid by its client. Yet not one of these accounts bears a written inquiry of the defendant about its receipt of any such payment over a period of at least 3 ½ years.

There is such an obvious distinction to be drawn between *"payment if paid"* and *"payment when paid"* that it is unnecessary to consider the two authorities cited in detail save as to whether the term should be in writing or evidenced in any of the documents from the plaintiff to the defendant.

The judge carefully and fully considered the contentions advanced by the parties, having made it clear that the defendant's reliance upon an alternative defence of denial of liability was unobjectionable.

<u>The alleged "back to back" ("pay when paid") agreement</u>

This was not pleaded in the Statement of Claim. Given that the plaintiff must have been aware, and advised, that its proceedings were, at the very least, late it is surprising that it did not so appear as a clear averment, and perhaps even more so, that it did not feature in any of the letters sent to the defendant. Although, as stated earlier, the fact of persistent statements may be seen as reminders of an agreed liability, such an inference is effectively displaced by the failure to set out, positively, the alleged payment agreement. The judge's conclusion is unassailable although we do not agree that the original 30 day payment term is contradictory to the alleged "back to back" payment term. That could be seen as a formality to be adjusted as time passed by e.g. 30 days from the date of receipt of payment from the government. It is also of note that the appellant did not even raise the alleged agreement in its Reply to the Defence.

<u>The correspondence from the defendants</u>

This concerns two letters, one dated 25th January 2010 and the other dated 16 November 2012. The plaintiff sought to extract from these an acknowledgement of the debt so as to overcome the guillotine of the six year limitation period.

The first of these is in response to a letter dated the 5th January 2010 from the plaintiff reminding the defendant that the sum of BND$149,441.57 "is long overdue".

In the reply, the defendant simply acknowledges the plaintiff's letter and adds:

> *"(We) are pleased to inform your good office that our management is looking into this matter and in the meantime we thank you for your kind understanding."*

The plaintiff does not follow this up until 5th November 2012, <u>almost 3 years later</u>, when they write referring to the "second reminder letter dated the 5th January 2010" and the statement of account dated 1st March 2012 referring to a payment due of BND$153,960.67. It adds:

"Despite repeated reminders and your assurances, we have yet to receive a single repayment."

The defendants reply of the 16th November 2012 says:

"The management has taken note of your letter and we shall in our best endeavour assist to – resolve this matter amicably."

The plaintiff then allowed a further period of over two years to pass by before it instructed solicitors to send a written demand for payment to the defendant on the 11th February 2015. By then the limitation period had already expired.

In his original submissions at trial, the plaintiff referred to a purchase of goods to the value of BND$4,519.10 in February/March 2010, which sum was added to the monthly account for 1st March 2010. His claim at that later stage become one for BND$153,960.67 he having added that sum to his original demand in respect of the 2008 contract. But it is clear that this later supply is a separate contract and is unrelated to the subject matter of the current appeal.

If indeed there were negotiations between the parties over the intervening years, there is nothing by way of documentary evidence to support an acknowledgment by the defendant of the debt. Given the need for positive action, and the obvious passage of years without any assertion by the defendant of the alleged *"back-to-back"* payment by way of asking for extensions of time, it is surprising that the plaintiff delayed issuing proceedings until 16th April 2015, just over 3 years after the sending of the last statement of account.

Before us Mr. Lim for the appellant repeated the same arguments as had appeared in his initial written submission to Judge Norismayanti and in those handed in to this court namely:

1) The defendant could not plead both a denial of debt and the limitation point in his defence;
2) There was an implied back-to-back (pay when paid) agreement in the trade in Brunei;
3) Time did not run for the cause of action until 30 days after the last statement of account (in November 2012); and
4) The proper interpretation of the letters from the defendant was an acknowledgment of the debt.

None of these had any merit, nor any evidence to support them and it is unnecessary for us to add more.

We have concluded that the judge was right to hold that the Limitation Act S.9 applied so as to bar the plaintiff's claim.

This appeal is therefore dismissed with costs to the defendant.

Burrell, P.

Seagroatt, J.A. **Lunn, J.A**