

Yap Fook Hoo
(trading as Yapp Fook Hoo Transport Company
& Fook Hoo Builder Sand Filling Contractor) ... **Appellant**

AND

Lau Yun Company ... **Respondent**

(Court of Appeal of Brunei Darussalam)
(Civil Appeal No. 1 of 2009)

Before: Power, P; Mortimer and Davies, JJ.A.
18th May, 2009.

A certified copy of the Senior Magistrate's decision was not annexed to the notice of appeal to the judge. The appeal was not properly constituted but the Judge wrongly refused to hear the appellants' application for extension of time. Court of Appeal refused appellants' application for an extension of time as his prospects of success are minimal and dismissed the appeal.

Mr Balendran of Messrs. Ho & Siong for the Appellant.
Mr. Y C Lee of Messrs. Y C Lee & Lee for the Respondent.

Cases cited in the Judgment:

Clayton's case [1816] 1 Mer. 572.
In re Footman Bower & Co. Ltd [1961] Ch. 443.
Leeson v Leeson [1936] 156 C.A.

Mortimer, J.A.:

1. This is an appeal from the judgment of Barnett J on 17 February 2009 in which he struck out with costs an appeal from a decision of the Senior Magistrate which she gave on the 17 September 2008.

The Background

2. The Senior Magistrate gave judgment in favour of the plaintiff/respondent (Mr Lau) for B\$34,402.8 and interest against the defendant/appellant (Mr Yap). This was in respect of a long running account between the two of them for the supply of building materials by Mr. Lau to Mr. Yap between 1979 and 1996. The arrangement was that the goods were paid for by Mr. Yap on an instalment basis. His failed defence was that the claim was statute barred or alternatively that some of the money claimed had been paid.

The appeal before Barnett J

3. The appeal before Barnett J turned on procedural points. The magistrate's decision was delivered on 17 September 2008. Mr. Yap's notice of appeal was filed within time on 8 October 2008 and on 16 October 2008 the magistrate handed down her written reasons.
4. This notice of appeal was not accompanied by a certified copy of the magistrate's decision as required by rule 5 (2) of the Magistrates Courts (Civil Appeal) Rules. On the request of an appellant and on the payment of the prescribed fee a magistrate must deliver such a certified copy. See rule 62 of the Magistrates Courts (Civil Procedure) Rules.
5. Mr Teo, who represents Mr. Yap, did not immediately apply for the certified copy, in the mistaken belief that before he could do so he needed the reasons for judgment. The matter came before Barnett J on 11 February 2009. Mr Lee, appearing for Mr. Lau, contended that the appeal was not competent as the notice was not accompanied by a certified copy of the decision as required by Rule 5 (2). Mr Yap's counsel then sought and was granted an adjournment until 17 February to research the matter.
6. During the hearing on 11 February Barnett J told Mr. Teo that his belief that he needed to wait for the magistrate's reasons was wrong because the judgment is simply the order made and not the reasons for it. It appears that the advisors of both parties have since applied for a certified copy of the judgment without success.
7. When the hearing was resumed on 17 February the judge ruled that he had no discretion to excuse a breach of rule 5 (2) and held that the appeal was not properly constituted and struck it out. He referred to section 18 (3) of the Subordinate Courts Act Cap.6 which provides:

“The high court shall not entertain any appeal under this section unless the appellant has fulfilled all the conditions of appeal imposed in accordance with the Rules of Court or any other written law.”

However as the rules of court in that section refers to the Supreme Court Rules it has no application to rule 5 (2). Nevertheless the judge's ruling appears to be correct because Rule 5 appears to be mandatory and there is no other rule under which the court may excuse its breach.

8. When he granted an adjournment on 11 February 2009 Barnett J also ordered that a motion to extend time should not be made. Nevertheless, Mr. Teo, for Mr. Yap, issued a motion for leave to enlarge the time for filing a certified copy of the decision before the resumed hearing on 17 February. Because of his earlier direction the judge refused to hear it on the merits and struck it out.
9. The leave Mr Teo ought to have applied for was an order that the time for lodging in the Magistrates Court, and the service of the notice of appeal against the decision of the Senior Magistrate be extended to 7 days after a

certified copy of the decision is provided by the court. We treat Mr Teo's motion as if this was the application he made.

The Issues

10. There are three issues for our consideration:
 - a) Was the judge correct in holding that the appeal was not properly constituted in the absence of a certified copy of the magistrate's judgment?
 - b) Was the judge correct in refusing to hear the application on behalf of Mr Yap for an extension of time?
 - c) If not, ought an extension of time to appeal now be granted?

The appeal and the application to extend time

11. For the reasons we have set out the judge was correct in holding that the appeal was not properly constituted. We turn to the application to extend time for appealing.

The Judge's refusal to hear the application to extend time

12. Although the judge ordered Mr Teo not to apply for an extension of time to appeal we are aware of no good reason for his making such an order. If there were sound grounds for preserving Mr Lau's position these could have been considered on the hearing of the application.
13. We are of the opinion that the judge ought not to have given the direction and also that Mr Yap was not thereby prevented from making his application. Further we consider it was unjust of the judge not to hear any reasons which the appellant wanted to advance in support. He ought to have heard the application for extension of time and decided it on its merits.
14. In these circumstances we now turn to consider whether an application for extension ought now to be granted.

Leave to appeal

15. To determine this issue we need to consider all the circumstances but in particular the reasons why indulgence has to be sought, the length of any delay, the merits of the appeal and finally any prejudice to the respondent.
16. Mr. Lee, who appears for Mr Lau, concedes that the failure to obtain a certified copy of the judgment was not Mr. Teo's fault. For some reason, unknown to this court, the magistrate's court is unwilling or unable to provide such documents in a timely manner. In spite of the efforts of both parties the certified copy of the magistrate's judgment has not been provided even now.
17. Nevertheless, Mr. Lee contends that leave should be refused on the grounds that leave to extend time was not applied for before time expired for appealing, that the plaintiff is prejudiced by being kept out of his money and, in any event, that the prospects of success of any appeal are minimal.

18. He argues that leave to extend time for appealing ought to have been applied for in the usual way before time expired as the difficulties of obtaining certified copies in a timely manner from the magistrate's court are well known. Such applications have become the normal practice of those seeking to exercise their right of appeal. With this background there is little doubt that had leave for an extension been asked for before time expired it would have been granted. After all the appeal to the judge is as of right and the proposed appellant was not at fault for this delay.
19. The position was otherwise by the time the matter came before Barnett J. Time had passed and the proposed appellant appeared without a properly constituted appeal and having not taken any steps to ameliorate his position. Wasted time and wasted costs were a likely outcome. To proceed it was then necessary for him to seek the indulgence of the court.
20. We accede to Mr. Lee's submission that this delay is partly the responsibility of Mr. Yap and that his client has been to some extent prejudiced. Having regard to the overall timescale in which this action has been conducted it is not of great weight.
21. The merits of the appeal are of much greater weight. If the indulgence of the court is sought leave is unlikely to be given if the court's time will be wasted, if costs will be increased and if the prejudice caused to the other party will be enhanced.
22. The merits need to be considered with some care. Mr. Teo contends that Mr. Yap has an excellent prospect of success on two grounds. The first, that the judgment of the senior magistrate for BN\$ 34,204.81 is based on debts incurred between 1978 and 1996 each of which is statute barred under the six years limitation period provided by a section 9 of the Emergency (Limitation) Order 1991.
23. Mr. Yap's case on this was that payments made by him between 2002 and 2004 amounting to BN\$3,100.00 were allocated towards settling specific sums invoiced later for work done for a transport firm run by Mr. Yap, a different firm from his building enterprise in respect of which the statute barred sums were owing, with the consequence that the B\$3,100.00 payments were not acknowledgements of them. Having heard the witnesses and examined the documents the magistrate held that the 2002 and later debts were not time barred. The payments amounting to BN\$3,100.00 were instalments in part payment of the total sums owing. They were not acknowledgments of the earlier debts which prevented time running under the Limitation Order as Mr Lau was not party to any agreement or understanding that the payments were to be allocated only to the latest invoices from the transport firm.
24. In support of his chances of success on a rehearing counsel for Mr Yap points to the vouchers (receipts) signed by Mr Lau suggesting that because they are headed with the name of the transport firm Mr Lau allocated and accepted the sums amounting to BN\$3,100.00 as payments of the later transport invoices only with the consequence that they are not acknowledgements of the earlier

debts and the earlier sums owing to Mr Lau are statute barred contrary to the finding below. However, Mr Lee, who appears for Mr Lau, correctly points out that the vouchers are headed with the names of both Mr Lau's Transport and the Building Enterprises. They do not support Mr Yap's point, rather the reverse. They are consistent with the evidence that Mr Lau and Mr Yap always dealt with each other on a personal basis and not specifically in relation to one firm or the other and that there was running account between them.

25. In these circumstances is not surprising that the magistrate did not find it necessary to make specific reference to these vouchers. It was open to the magistrate to decide as she did, and nothing persuasive has been put before us to indicate that she was in error.
26. Her findings are on page 7 of her judgment in these terms;

“Based on all the evidence before me, I am satisfied that there was nothing in the evidence to support defence counsel's argument that the payments made by (sic) Mr. Lau from the years 2002 to 2004 were specifically for the bill dated 18 December 1996. Based on Mr. Yap's history of payment, I believed that the payment made by Mr Yap was part of the continuous debt which Mr. Yap owed to Mr. Lau. Hence, I am satisfied that by virtue of section 35 (b)(sic) of the said order, Mr. Yap, being the person liable or accountable for the claim that knowledge is the claim and makes payment in respect of it right and that it is treated as having accrued out not before the date of acknowledgement or payment.

Pertaining to the document shown at D3 annex D, I am of the view Mr. Yap owe a duty to inform Mr. Lau that he is making the paying specifically to the said bill and not to the debt in general. Failure to communicate to Mr. Lau, tantamount to one sided agreement, which in my point of view does not bind Mr. Lau at all.”

27. The magistrate was applying Sec. 35(5)(a) of the Limitation Order the material part of which provides:

“(5)where any right of action has accrued to recover:-

(a) and (sic) debt or other liquidated pecuniary claim: and the personal liable...for the claim acknowledges the claim or makes any payment in respect of it the right shall be treated as having accrued on and not before the date of the acknowledgement or part payment.”

On the evidence she rightly held that there was a running account between the parties and in the absence of agreement to the contrary therefore, the payments were in respect of the entire balance and were acknowledgments of the balance. See *Clayton's case* [1816] 1 Mer. 572; *In re Footman Bower & Co. Ltd* [1961] Ch. 443; *Leeson v Leeson* [1936] 156 C.A.

28. Mr. Teo's second point on his prospects of success is that the senior magistrate ought to have found that two payments one of BN\$ 9, 900.00 and the second of BN\$ 17,100.00 had been made by Mr. Yap and not accounted for in the sum claimed and awarded. He also argued that the three statements of account issued by Mr. Lau in August 2002, October 2002 and 30 April 2004 were unreliable, and insufficient to satisfactorily prove the debt. He invited our attention to the detail of entries in the invoices and to cheque stubs. None of the documents is conclusive and necessary explanations were given in oral evidence. Counsel made the same submissions to this court which were made to the magistrate and considered by her at trial.
29. Again, the factual findings depend significantly upon the oral evidence of the parties. The magistrate considered these issues, including the evidence of the payments and the three statements of account together with the oral evidence upon them with care and in detail. Finally she concluded;

"I am inclined to believe Mr. Lau's evidence, I believe Mr. Lau's evidence when he testified in court that he remembered all the details. I believed his evidence because, Mr. Lau was able to give a full account of the debts which Mr. Yap owed him and his evidence has been consistent throughout.

In view of the evidence, I find that in favour of Mr. Lau."

30. These were complicated accounts and documents which required oral evidence to explain them. With this in mind Mr Yap's counsel correctly points out that this oral evidence was dealing with facts which took place many years ago. He contends that on these grounds alone there is a good prospect of success on a rehearing of all the evidence.

Conclusion on leave to appeal

31. Where the proposed appeal is a rehearing of all the evidence it is less burdensome on the applicant for leave to demonstrate a real prospect of success. Not only can he demonstrate errors of the judge but it is open for him to show that he has additional or different evidence to put forward on appeal. There is however nothing in the submissions we have heard upon which we could find any real prospect of success should we grant leave and allow the appeal to be heard. The points put before us were all in front of the magistrate, it is not demonstrated that she was in error and it is not suggested that any additional evidence is available for consideration on a rehearing. The chances of success on appeal are minimal.
32. As to the appellant's failure to apply for an extension of time; he was at fault for appearing in front of Barnett J. with an improperly constituted appeal and without having taken any steps to remedy the position. He ought to have applied for an extension before time expired. These latter two matters are not of great weight but the delay has caused some relatively minor prejudice to the other party.

33. Taking these matters into account in exercising our discretion we have no hesitation in refusing leave to extend the time for appealing. We are also of the view that had Barnett J. heard the application, as he should have done, he also should have refused it.

Conclusion on the Appeal

34. We hold that the judge correctly found that the appeal before him was not properly constituted and that he erred in not hearing the application by counsel for Mr Yap for an extension of time to appeal.
35. For the reasons we have given we refuse the application for leave to extend the time to serve the notice of appeal. This appeal is dismissed.

Order

36. The appeal is dismissed with an order nisi for costs to be taxed if not agreed. If either party wishes to contest the order for costs, application should be made to the Registrar with notice to the other party on or before 16 May 2009.

Power, P.

Mortimer, J.A.

Davies, J.A.