Liaw Watt Lee	**…**	**1st Appellant**
Tan Biew Peng	**…**	**2nd Appellant**

AND

Baiduri Bank Berhad	**…**	**Respondents**

(Court of Appeal of Brunei Darussalam)
(Civil Appeal No. 20 of 2008)

AND

Hytec Engineering Co. Sdn Bhd	**…**	**1st Appellant**
Ak Saifuzzaman Pg Hj Md Yassin	**…**	**2nd Appellant**
Tan Biew Peng	**…**	**3rd Appellant**
Lim Beng Kwang	**…**	**4th Appellant**

AND

Baiduri Bank Berhad	**…**	**Respondents**

(Court of Appeal of Brunei Darussalam)
(Civil Appeal No. 21 of 2008)

Before: Power, P; Mortimer and Davies, JJ.A.
23rd May, 2009.

Enforceability of an agreement recorded by court but not part of any order – Does res judicata apply to an issue which arises after commencement of an action which was not then pursued in the action.

Mr Selvanathan Subramaniam of Messrs. Fathan Rudi Lee & Lee for the Appellants.
Mr. W L Tang of Messrs. CCW Partnership for the Respondents.

Cases cited in the Judgment:

Atkinson v Castam [1991] Times Law Reports 190.
Greenhalgh v Mallard [1947] 2 ALLER 255 at 257.
Henderson v Henderson [1843] 3 HARE 100 at p.155.
Port of Melbourne Authority v Anchum Pty Ltd [1981] 147 CLR 589.
The Pacific Bank Bhd v Chan [1998] at p.7.

Power, P.:

The original actions were commenced on 3rd May 2000. In HCCS 83, the Bank sued Yeecom Construction (B) Sdn Bhd (Yeecom) and its three guarantors for moneys owing under financing facilities of $900,000 granted to Yeecom on 19th June 1997. By 7th February 2000 Yeecom owed the Bank $8,918.076.84 under this facility. On 3rd May 2000 the Bank filed a writ against Yeecom and its guarantors claiming that amount.

In HCCS 85 the Bank sued Hytec Engineering Sdn Bhd (Hytec) and its three guarantors for moneys owing under financing facilities $800,000 granted to Hytec on 28th June 1997. By 1st February 2000 Hytec owed the Bank $2,764,835.20 under this facility. On 3rd May 2000 the Bank filed a writ against Hytec and its guarantors claiming that amount.

Defences were filed and on 15th August 2000 the Bank applied for Summary Judgments under O.14 in both actions.

On 11th September 2000 the parties entered into a consolidated Settlement Agreement under which it was agreed, in Clause 7, that the Bank would give a global discount of $3,000,000 from the total that the Bank was claiming in both actions.

In consideration of this the defendants agreed, inter alia, in Clause 8 that consent judgments in both actions would be entered and covenanted to repay the remaining amount owing in the following way:

(i) A third party, Puja Construction Company Sdn Bhd (Puja), was to pay certain, to be ascertained, sums.
(ii) Certain payments owed and to become owing to Yeecom and Hytec were to be released to the Bank.
(iii) Yeecom and Hytec were to pay the Bank $30,000 each month until their accounts were cleared.

Clauses 9 of the Settlement Agreement stipulated that separate consent judgments would be entered in each action pursuant to the agreement within one week of the signing thereof.

Clauses 11 and 12 stipulated that the Bank would not *"utilize their existing rights outside"* the Settlement Agreement *"unless the defendants fail in any of their obligations"* under it.

No consents judgments embodying the terms of the Settlement Agreement were filed but on 30th October 2000, some 6 weeks after the date of the agreement, what was styled a "consent judgment" was filed in the following terms:

> *"BY CONSENT IT IS ADJUDGED that the above parties have agreed to settle the above matter pursuant to the terms of the consolidated settlement agreement (a copy of which is annexed herewith) of both Suit No. 85 of 2000 and Suit No. 83*

of 2000 dated 11th day of September 2000 between the Plaintiffs and the Defendants.

AND IT IS FURTHER ORDERED that the Summons In Chambers entered as No. 329 of 2000 be withdrawn."

In reality the only judgment therein was the order withdrawing the summons. The initial paragraph did no more than record that the parties had entered into a consolidated Settlement Agreement.

Hytec and Yeecom defaulted in the payment of the monthly installments of $30,000.

The Bank applied on 26th September 2005 for leave to amend the Statement of Claim in each suit. Leave was granted without objection. The amendments gave credit for payments already made.

On 17th December 2005 the Bank filed fresh O.14 applications seeking judgment for $18,158,139.70 against Yeecom and its guarantors and $4,242,300.67 against Hytec and its guarantors. On 4th May 2006 both applications were dismissed by the Senior Registrar as she was satisfied that, because of the consent judgment, she was functus officio.

On 2006 the Bank appealed those decisions to a judge in chambers. Both matters went on before Chong J. On 18th December 2006 he held:

(i) The defendants had failed to comply with the terms of repayment under the settlement agreement.
(ii) By virtue of Clause 6 and 7 of the Settlement Agreement the defendants were obliged to repay as required by clause 8.
(iii) Clauses 11 and 12 preserved the right of the Bank to revert to the original claims upon failure of the defendants to comply with the Settlement Agreement.
(iv) As the defendants were in breach of the Settlement Agreement the Bank was entitled either to revert to the original claims or to enforce the compromise and that the Bank could therefore revert to the original claim. He allowed the appeal and entered Summary Judgments against the 3 guarantors in the Yeecom action and against Hytec and its 3 guarantors. Hytec and the guarantors appealed against those decisions.

These appeals came before the Court of Appeal in Civil Appeals Nos. 2 and 3 of 2007.

A preliminary point was taken in which it was contended that the Registrar when ruling herself functus officio had not dealt with the o.14 application and that no appeal lay as regards that application. The Court of Appeal found no merit in this submission.

The principal argument of the appellants was that when a Settlement Agreement was embodied in a consent judgment *"it became part of the judgment and the terms of the settlement must be treated as the judgment itself."*

The Court of Appeal was satisfied that:

> *"If Clauses 7 and 8 had stood alone they would clearly have constituted a concluded settlement in the sum stated. The failure to embody them in a judgment pursuant to Clause 9 would not affect the binding nature of the settlement agreement that had been reached by the parties. If there was no clause allowing the Bank to revive and pursue its original claim it would be entitled in the event of a breach to sue only for the sum stipulated in the settlement agreement. The issue for this court, as it was for the court below, involves a determination of the meaning and effect of Clauses 11 and 12, seen in the context of the agreement read as a whole."*

The Appeal Court held that the appeal raised two questions

> *"(i) Did the settlement agreement by reason of Clauses 11 and 12 allow the bank to revive and continue its original action?*
>
> *(ii) Was this right in any way affected by the incorporation of the settlement agreement into a consent judgment?"*

The Appeal Court was satisfied that the core issue was whether the "consent judgment" of 30th October 2000 had the effect of extinguishing the causes of action pleaded in the Statement of Claim. It found that judgment to be in unusual terms as it was in the first paragraph simply a recital recording the fact of settlement and its terms. The only order was in the second paragraph which ordered *"that the summons in chambers entered as No. 329 of 2000 be withdrawn"*. The Appeal Court was satisfied that: *"Here one has a glimpse of the parties' intention relating to the core issue. The application for Summary Judgment under o.14 based upon the pleaded causes of action was to be withdrawn: one would assume from the wording of the order* ***permanently*** *withdrawn"*.

The Appeal Court was satisfied that generally *"when judgment is given in an action, the original causes of action merge in the judgment; the plaintiff's rights to relief as expressed in the Statement of Claim are extinguished and become rights to enforce the judgment instead."*

The Court then asked whether the "consent judgment" in the present case might have had a different effect. The Bank contended it did relying upon Clauses 11 and 12. The Court having considered those clauses which it found were, at best, equivocal and bearing in mind that Puja, a third party, was involved was satisfied that the consent judgment was intended to extinguish the original causes of action and that the Bank was not entitled to summary judgment against the guarantors on the original writs. The Court finally stated:

> *"The position might well be otherwise in a fresh action relying upon the consent judgment."*

The Bank then in HCCS 131 and 132 of 2007 took action against the appellants based on the Settlement Agreement and the "consent judgment".

It then, in those actions, sought summary judgments. The Registrar refused to grant summary judgments and an appeal was made to Judicial Commissioner Findlay. Before him it was argued

(i) That the actions were res judicata. This submission the rejected pointing to the final words in the judgment of the Court of Appeal.

(ii) That there were triable issues as the amounts owing were not certain it being submitted that the Bank should be put to "strict proof" in this regard. This submission the Commissioner found confusing as the respondent before him appeared at times to be conceding that they were liable and had not made any challenge before him to the Bank's calculations. He found no merit in this ground.

(iii) That the actions were time barred. The Commissioner was satisfied that the Bank was entitled to take action to recover the full amount due under the Settlement Agreement and consent judgments when it accepted the failure to pay as a repudiation of the whole agreement and that it did so when it issued the letter of demand on 9th August 2007. This ground was, therefore, also rejected.

The Commissioner having found that no triable issue had been raised granted summary judgment in each action.

Appeals have now been brought to this Court against that decision. In Civil Appeal 20 the appellants are Law and Jan two of the guarantors of Yeecom in HCCS 132. In Civil Appeal 21 the appellants are Hytec and the 3 guarantors in HCCS 131.

Mr Selva for all appellants contends firstly that the Settlement Agreement was embodied in the Consent Judgment and seeks to argue that the Bank cannot relitigate matters dealt with and determined by that judgment. He seeks to rely upon the decision of the Court of Appeal in *Atkinson v Castam* [1991] Times Law Reports 190. This we are satisfied does not assist him. Although the relevant facts of that case are superficially similar to those in this, it stands as authority only for the proposition that where a judge of first instance concludes that an agreement which required a defendant to do or refrain from doing something is recorded as part of the decision of the court, but there is no order requiring that to be done or refrained, the plaintiff is entitled to have the agreement enforced without the need for a fresh action because it is implicit in the order that the plaintiff should have liberty to apply.

Here we are inclined to doubt whether the agreement was recorded as part of the order of the court, which was that the summons be withdrawn, so as to have that consequence. In

any event, if it were, though the plaintiff would have been entitled to have the agreement enforced without the need of a fresh action, by applying to the court for that purpose, he was not thereby precluded from suing on it. The principle is intended to confer an additional and simpler right, not thereby to limit the plaintiff's rights.

Mr Selva next contended that the Bank could have relied upon the Settlement Agreement in its original actions HCCS 83 and 85. He concedes that the agreement was not in existence at the time when those actions commenced but argues that it would have been open to the Bank, had it been exercising reasonable diligence when it applied for leave to amend its Statements of Claim in those two actions and thereafter when it made O.14 applications therein to have included a claim under the agreement. He relies upon *Henderson v Henderson* [1843] 3 HARE 100 at p.155 as cited in *The Pacific Bank Bhd v Chan* [1998] at p.7 which states:

> *"The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but every point which belonged to the subject of litigation and which the parties, exercising reasonable diligence might have brought forward at the time."* (Emphasis supplied)

He relies also upon the following citation also from *The Pacific Bank Berhad* case citing a judgment of Somerwell L.J. in *Greenhalgh v Mallard* [1947] 2 ALLER 255 at 257:

> *"…res judicata for this purpose is not confined to the issues which the court is actually asked to decide, but…it covers issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them."* (Emphasis supplied)

The initial difficulty faced by Mr Selva faces is that the issues arising out of the Settlement Agreement could not have been *"clearly part of the subject matter of the litigation and so clearly could have been raised"* as the Settlement Agreement clearly did not exist when the actions were commenced. The Bank could not, no matter how reasonable their diligence, have relied upon it at the time the action was commenced on 3rd May 2000. Mr Selva submits, however, that the Bank should have amended its Statements of Claim prior to the hearing of the second O.14 applications on 4th May 2006.

Did the Bank fail to exercise reasonable diligence when it failed to do that?

We bear in mind also the following passage from the majority decision in *Port of Melbourne Authority v Anchum Pty Ltd* [1981] 147 CLR 589:

> *"In these cases ….(Greenhalgh v Mallard [1947] 2 ALLER 255 and Brisbane City Council [1979] AC 425) in applying the Henderson v Henderson principle to a plaintiff said to be estopped from bringing a new action by reason of the*

> *dismissal of a earlier action Somerwell L.J. and Lord Wilberforce insisted that the issue in question was so clearly part of the subject matter of the initial litigation and so clearly could have been raised that it would be an abuse of process to allow a new proceeding."* (Emphasis supplied)

The principle in *Henderson v Henderson* has, a far as we are aware, never been extended to allow matters which have come into existence after the commencement of proceedings to be taken into consideration when considering whether an issue estoppel has arisen. Whether such an extension would in some circumstances be proper is not a matter which we are required to consider as we are quite satisfied that in the present circumstances it would not be proper to prevent the Bank from recovering on the basis of issue estoppel.

Mr Selva next argued that the limitation period of 6 years, where there is an action founded on a simple contract as provided by s. 9 of Cap 14 of the Limitation Act, had come into play. In the course of argument it became apparent that there was no merit in this contention as it was clear from the affidavit of Mr Raymond A. Bariou, the Senior Deputy Manager of the Bank, that the last payment by Hytec and Yeecom under the Settlement Agreement had been made 3rd November 2001 and the writ was filed on 1st October 2007. The action was therefore commenced within the limitation period.

Finally Mr Selva submitted that the O.14 Summary Judgment should not have been granted because of paragraph 4 of the Settlement Agreement which states:

> *"4. The Bank has in addition also appointed corporate receives Messrs. Ernest and Young to realize all receivables of the 1st Borrower and the 2nd Borrower under the separate debentures issued by both the said borrowers in favour of the bank."*

It was argued that Clause 4 of the Settlement Agreement had given the Bank the right through their receivers Messrs Ernest and Young to realize all receivables under certain debentures and that as no credit appears to have been given in this regard a triable issue arises. This submission is without merit. It has never been raised before and we have the affidavit evidence of Mr Bariou, which is unchallenged as to the amounts owing on 7th June 2007 for which judgment was given by Findlay J.C.

This appeal is dismissed. There will be an order nisi that the appellants in each action pay the respondents' costs to be taxed if not agreed.

This order will become absolute at 9 a.m. on 27th May unless application is made.

Power, P.

Mortimer, J.A. **Davies, J.A.**