Garnet Sdn Bhd … **1st Appellant**
Lester Lee Kok Wah … **2nd Appellant**
[Brunei Green I/C No. 50-689240]

AND

Baiduri Bank Berhad … **Respondent**

(Court of Appeal of Brunei Darussalam)
(Civil Appeal No. 8 of 2010)

Mortimer, P.; Davies and Leonard, JJ.A.
27th November, 2010.

Evidence – whether bank's certificate of money due was conclusive evidence. Whether 'without prejudice' correspondence admissible where there has been a concluded settlement.

A bank claimed money due and applied for summary judgment. The hearing of the application was adjourned with liberty to restore after a settlement had been entered into by the parties. The settlement agreement contained an admission of the debt and provided that if the debtors defaulted in performance of the terms of the settlement they agreed to the bank's entering summary judgment. The debtors defaulted and when the bank restored the application in relation to the original claim it sought to adduce evidence as to the settlement. When the defendants claimed that the settlement had been brought about by undue pressure, the bank sought to produce a 'without prejudice' letter to show that negotiations had been conducted at arms length through solicitors. The defendants applied to strike out the letter and other evidence relating to the settlement, claiming privilege. They also applied to strike out a certificate from the bank which, the bank claimed, was under its contract with the debtors conclusive evidence of the sum stated in the certificate to be due.

Held:

The certificate, in the absence of fraud or of manifest error on its face was admissible, as were the letter and the evidence of the settlement. There was no ground for striking out.

Mr. Adrian Chan of Messrs. Veerasamy Associates for the Appellants.
Ms. Geetha a/p V Janardhanan of Messrs. Abrahams Davidson & Co. for the Respondent.

Cases cited in the Judgment:

Bache & Co (London) Ltd v Banque Vernes Et Commerciale de Paris SA [1973] 2 Lloyd's Rep 437.
Baiduri Bank Bhd v Lee Fat Khong and Lee Fatt Shoon, Civil Suit No. 36 of 2006.
Citibank NA v Oi Boon Leong & Ors [1981] 1 MLJ 282.

Chen Heng Ping & Ors v Intradagang Merchant Bankers (M) Bhd [1995] 2 MLJ 363
Dubbs v The National Bank of Australasia Limited [1935] 53 CLR 643.
Malayan Banking Bhd v Lau Suk Kee and Lau Ing Kwong, Civil Suit No. 154 of 2003
Rush & Tomkins v Greater London Council [1989] 1 AC 1280
Sin Liang Construction Pte Ltd v Singapore Telecommunications Ltd (2007) 2 SLR 433
Tomlin v Standard Telephones and Cables Ltd [1969] 1 WLR 1378.
Walker v Wilsher (1889) 23 QBD 335

Leonard, J.A.:

This is an appeal from a decision of the Chief Justice made on 1st December 2009 dismissing an appeal by the appellants against a decision of a Registrar made on the 20th April 2009. It concerns the admissibility of evidence which the Bank seeks to adduce at the hearing of an application for summary judgment in an action against the Appellants for money due to the bank. There has been a shocking delay in the hearing of the application for summary judgment which was filed as long ago as 21st November, 2006. That delay has been caused to a large extent by a series of eleventh hour applications made by the Appellants. Though those applications have failed, they have served to prevent the completion of the hearing of the application for summary judgment.

The appellants seek the striking out of two exhibits, RAB-1 and RAB-2 referred to in the affidavit of Raymond Bariou, Senior Deputy General Manager of the Bank, affirmed on the 21st March 2009 and of all reference to them in the affidavit. According to the Bank, after negotiations held at arms length through solicitors, the parties arrived at a settlement in which the Appellants admitted that they owed the debt and agreed to pay a lesser sum to the bank by instalments. The fact of the settlement is apparently disputed. It is said that it was provided in the settlement agreement that if the appellants defaulted in payment, the Bank could proceed to obtain summary judgment. The Bank says that there has been such default and it wishes to proceed to summary judgment on its original claim. It seeks to adduce in evidence RAB-1, a certificate signed by Raymond Bariou, one of its authorized officials and it claims that under the terms of its contract with the borrower, the certificate is deemed to be conclusive evidence of the sum owing at the stated date. The appellants would like that evidence to be excluded but it is settled law that such certificates are admissible in the absence of fraud or of a manifest error on the face of the certificate and that there is no reason of public policy for excluding them. See *Dubbs v The National Bank of Australasia Limited* [1935] 53 CLR 643. *The same conclusion has been reached in England, Malaysia and Brunei. See Bache & Co (London) Ltd v Banque Vernes Et Commerciale de Paris SA* [1973] 2 Lloyd's Rep 437; *Citibank NA v Oi Boon Leong & Ors* [1981] 1 MLJ 282*; Malayan Banking Bhd v Lau Suk Kee & Anor* HCCS No 145 of 2003 (10 August 2005); *Baiduri Bank Bhd v Lee Fat Khong and Lee Fatt Shoon,* Civil Suit No. 36 of 2006; *Chen Heng Ping & Ors v Intradagang Merchant Bankers (M) Bhd* [1995] 2 MLJ 363. In the judgment of the Court of Appeal of Malaysia in the last cited case, Mahadev Shankar JCA, where there was no suggestion of fraud and it was conceded that there was no manifest error on the face of the certificates, said

> *"In such a situation, a fishing expedition for errors in the guise of an application for further and better particulars would be unwarranted."*

We respectfully agree.

Complaint is made that the certificate was made after the commencement of proceedings and was not pleaded. That makes no difference so far as admissibility is concerned. The certificate can be made at any time. It is evidence of the state of the account on the date stated. Material facts are to be pleaded but not evidence; O.18 r. 6. Rules of the Supreme Court.

We now turn to the other exhibit, namely RAB-2, which the Bank seeks to adduce at the hearing of its application for summary judgment. It is a letter dated the 12th January 2007 from the Bank's solicitors to the Appellants' solicitors, marked 'Without Prejudice' informing them that their client has agreed to draft terms of settlement and paid a sum in part payment. It is the Bank's case that the formal settlement was entered into on the 19th January 2007 and that in it the appellants admitted to owing the amounts claimed in the Writ and Statement of Claim and agreed to pay a lesser amount by monthly instalments. They also allegedly agreed to the Bank's entering summary judgment against them should they default in the payment of the monthly instalments. The Bank says that there has been such default. The Appellants seek the exclusion of the letter on the ground that it is privileged. The Bank says that the purpose of producing it is to show that before the settlement was formally concluded the parties were negotiating at arms length through solicitors. This is to counter the suggestion made by the appellants that they were caused by undue influence or harassment to enter into the settlement. As to the fact of the settlement itself, evidence of which the Appellants want excluded, the Bank says that as a result of it, an adjournment of the hearing for summary judgment was obtained and the evidence serves to explain the circumstances in which it has had to come back to court again to restore its application.

As between the parties to a disputed claim, the privilege attaching to without prejudice negotiations directed towards a settlement remains if the negotiations fail but it falls away when the settlement is made. See *Walker v Wilsher* (1889) 23 QBD 335 which was applied in *Tomlin v Standard Telephones and Cables Ltd* [1969] 1 WLR 1378. In argument to the contrary, the Appellants relied upon *Rush & Tomkins v Greater London Council* [1989] 1 AC 1280 but that case was concerned with the question whether correspondence leading to a settlement was privileged as against a person not a party to that settlement who sought to obtain it by way of discovery of documents. The case does not assist them. In it Lord Griffiths at p. 740 of the report said

> *"Thus the without prejudice material will be admissible if the issue is whether or not the negotiations resulted in an agreed settlement, which is the point that Lindley LJ was making in Walker v Wilsher (1889) 23 QBD 335 at 337 and which was applied in Tomlin v Standard Telephones and Cables Ltd [1969] 3 All ER 210, [1969] 2 WLR 1378."*

In *Sin Liang Construction Pte Ltd v Singapore Telecommunications Ltd* (2007) 2 SLR 433 the Singapore High Court held that where a debtor clearly acknowledges his liability, there can be no protection afforded by the 'without prejudice' privilege for there is no legitimate interest to protect and there is no reason why a creditor should not be allowed to rely on the fact of the acknowledgement. We respectfully agree.

The settlement agreement and evidence relating to it are undoubtedly admissible.

The appellants have sought to pray in aid Section 23 of the Evidence Act Cap. 108. That section provides that in civil cases no admission is relevant if it is made either upon an express condition that evidence of it is not to be given or under circumstances from which the court can infer that the parties agreed together that evidence of it should not be given. There is no evidence of such an express provision. The circumstances are not such as to lead us to infer that there was any agreement that went further than that to be implied from 'without prejudice' negotiations.

Failing exclusion of the evidence, the appellants want an order that Mr Bariou attend for cross-examination about the certificate and the letter. They want to go behind the certificate. We do not consider that such an order is necessary or desirable in the present case. Still less necessary or desirable is an order striking out the parts of Mr Bariou's affidavit which the appellants seek to exclude.

The Chief Justice, dealing in detail with the authorities, held that the evidence in question was admissible and declined to order that Mr Bariou should attend for cross-examination. We see no reason to disagree with him. He remarked upon the fact that the hearing of the substantive application had been delayed and said, rightly in our view, that the Appellants' application when it came before the Registrar should have been heard with the substantive application so that all issues might thereafter be dealt with together. He drew attention to the possibility of making use of Order 4 Rule 1 and Order 34A of the Rules of the Supreme Court, which, as he said, have been put in place to save costs, time and effort. We feel that far too often litigants succeed in manipulating the system in order to delay proceedings by means of multiple applications and appeals when it would be possible to list matters together so as to avoid multiplicity of proceedings and unjust delay. The court should be vigilant to prevent such abuse of process.

It has been suggested that it is somehow unfair of the Bank to adduce the evidence complained of but we disagree. It will be for the person deciding at long last the merits of the application for summary judgment to decide what weight is to be put on that evidence. The sooner the hearing takes place, the better.

The appeal is without merit and is dismissed. There will be an order nisi that that unless application is made by the 3rd of December 2010 for some other order the Respondent's costs of the appeal be taxed, if not agreed, on a full indemnity basis and paid by the Appellants.

Mortimer, P.

Davies, J.A. **Leonard, J.A.**