

Jerambak Holdings Pty Ltd ... **1st Appellant**
(formerly known as Glencoe Pty Ltd)
(Company No. A.C.N 009 615 105)
Halaqah Sdn Bhd ... **2nd Appellant**

AND

Pehin Datu Kesuma Diraja Col (R) ... **1st Respondent**
Haji Abdul Rahman Bin Mustapha
Dato Paduka Dr. Haji Morni Bin Othman ... **2nd Respondent**

(Court of Appeal of Brunei Darussalam)
(Civil Appeal No. 14 of 2010)

Mortimer, P.; Davies and Leonard, JJ.A.
6th December, 2010.

Limitation – Limitation Act Cap14, Section 27 (1) (a) – meaning of “in the possession of the trustee” – does not include property formerly in possession.

Mr Christopher Sawan of Messrs. Sheikh Noordin Mohamad for the Appellants.
Mr Daljit Singh Sandhu and Mr Vincent Joseph of Messrs Sandhu & Co for the Respondents.

Leonard, J.A.:

This is an appeal from a decision of Findlay JC who ordered that the action be struck out under Order 18 rule 18 of the Rules of the Supreme Court on the ground that it was time-barred.

The 1st plaintiff, Jerambak Holdings Pty Ltd (‘Jerambak’) is a company incorporated under the laws of Australia and registered in that country, whereas the 2nd plaintiff is a company registered and incorporated under the laws of Brunei Darussalam.

The 2nd defendant has not been served with the proceedings and is not concerned in this appeal.

It must be said that the Amended Statement of Claim was couched in such obscure terms that it was only at the hearing that it was possible to ascertain from Mr Sawan which claims were made by which plaintiff against which defendant.

Mr Sawan at the hearing conceded that the 2nd plaintiff’s claim against the 1st defendant Datu Kesuma Diraja Col (R) Haji Abdul Rahman Bin Mustapha (‘Pehin’) in relation to alleged overpayments of expenses is time-barred. The only issue remaining in this appeal is whether the Jerambak’s claim against Pehin is time-barred.

Pehin was a director of Jerambak. It is not disputed that between 19th February 2001 and 26th February 2001 an employee of Jerambak, without authority and without the knowledge of Pehin caused the transfer for his own benefit out of Jerambak's bank account of a total sum of AUD 690,000.00. The fact of the unauthorised transfers was reported to Pehin on the 28th February 2001. He investigated and when the employee gave an explanation, which Pehin accepted, and promised to return the money and make no more unauthorised transfers, Pehin took no action against him, reporting the situation to the 2nd defendant who was Chairman of the company. Between June and August of the same year, the same employee stole a further total of AUD255,324.76.

Jerambak's claim against Pehin is for damages for the loss it sustained as a result of the thefts on the basis that he failed to take action to prevent them or to recover the money. The latest date when Jerambak can be said to have become aware of the thefts, according to Mr Sawan, is the 7th February 2002 (the day when Pehin was dismissed). It was not until over 6 years later, on the 24th March 2008 that the writ was issued. Any claim against Pehin founded on negligence or breach of contract is time-barred. Jerambak therefore purported to base its claim on breach of trust and/or breach of fiduciary duty. Before this court, Mr Sawan accepted that in the absence of fraud on Pehin's part, a claim based on breach of statutory duty must be time-barred. He conceded that the pleadings indicated no factual basis for a claim of fraud, which was not pleaded, or of privity to fraud. His remaining ground for resisting the strikeout was that as a director, Pehin was a trustee of the money in the company's bank account and accordingly the claim fell within the ambit of section 27 (1) (b) of the Limitation Act, Cap 14. He submitted that the claim was therefore not subject to a limitation period.

In his submission Mr Sawan referred to evidence that Pehin, to whom the internet banking password for the accounts had been passed by the 2nd defendant, had passed it to the employee who was thus able to steal the money. There was no suggestion, however, that Pehin had been acting otherwise than in good faith and the matter of the password is not pleaded in the amended Statement of Claim.

Section 27 reads, so far as is material, as follows:

- “27. (1) No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action –*
- (a) in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or*
 - (b) to recover from the trustee trust property or the proceeds of trust property in the possession of the trustee, or previously received by the trustee and converted to his use.*
- (2) ...*
- (3) Subject to the preceding provisions of this section, an action by a beneficiary to recover trust property or in respect of any breach of trust, not being an action for which a period of limitation is prescribed by any other provision of this Act, shall not be brought after the expiration of 6 years from the date on which the right of action accrued.”*

There was no suggestion that Pehin had previously received the money and converted it to his use. Mr Sawan submitted that the words “in the possession of the trustee” covered trust property that had previously been in the trustee’s possession. Thus, he suggested, subsection (1)(b) would apply to the claim, as it related to money that had been in Jerambak’s account, of which, he said, Pehin had as trustee been in possession, before it was stolen by the employee. We find that the words “in the the possession of the trustee” bear their ordinary natural meaning and cannot bear the interpretation for which Mr Sawan contends. Section 27(1) (b) does not apply. Jerambak’s claim, therefore, so far as it purports to be founded on a breach of trust is caught by section 27(3) and is time-barred.

It is only fair to note that Mr Sawan, who has had an uphill task, was not acting for Jerambak when the writ was issued. With his customary courtesy and fairness he has said all that could be said on behalf of the plaintiffs

The appeal is dismissed. There will be the following orders.

1. The Amended Statement of Claim is struck out and the action is accordingly dismissed under Order 18 Rule 18 of the Rules of the Supreme Court.
2. Unless not later than the 8th December 2010 application is made for some other order the 1st respondent’s costs of the appeal and of the action be taxed if not agreed and paid by the appellants.

Mortimer, P.

Davies, J.A.

Leonard, J.A.