John Daniel Chong Lai Man

AND

Major Haji Mohamad Hussain Bin Haji Mohamad

(Court of Appeal of Brunei Darussalam)
(Civil Appeal No. 20 of 2005)

Power P., Mortimer and Davies JJA.
3rd December, 2007.

Limitation of actions – accrued right under Limitation Act 1967 – 2004 amendments to *Interpretation and General Clauses Act* 1959 do not have the effect that *Emergency (Limitation) Order* 1991 took away existing right – application of *Marsal v Apong* [1998] 1 WLR 674 – appeal against judgment for defendant dismissed.

Mr. Christopher Sawan of Messrs. Zuls Partners Law Office for the Appellant.
Mr Kelvin Lim of Messrs. K. Lim & Company for the Respondent.

Cases cited in the Judgment:

Arnold Case [1988] A.C. 228 where it was said [1983] 1 A.C. 553, 558-559, 563.
Marsal v *Apong* [1998] 1WLR 674.
Yew Bon Tew v Kenderaan Bas Mara [1983] I A.C. 553

Davies JA.:

This is an appeal by the plaintiff in an action claiming the balance of a loan due and owing, against the dismissal of that action by the High Court. The learned trial judge dismissed the action because he held that the amount paid by the plaintiff to the defendant was not, as the plaintiff contended, a loan but, as the defendant contended, money paid for an investment which the defendant made on the plaintiff's behalf with P.T.Petrochem Diagra and which, as events turned out, proved to be a poor investment.

However the learned trial judge went on to hold, in the alternative, that if, as the plaintiff contended, the money paid by him was advanced as a loan to the defendant, the plaintiffs action was barred under the *Limitation Act* 1967 ("the 1967 Act").

In order to succeed in this appeal, therefore, the plaintiff appellant must overcome two hurdles. First he must persuade this Court to reverse the learned trial judge’s findings of fact and conclude that the money paid was, as the plaintiff contended, a loan. And secondly he must overcome the finding of law based on the 1967 Act.

As to the first of these hurdles, it is common ground between the parties that US$100,000 was paid by the plaintiff, at the defendant's request, to PT Petrochem Diagra by Standard Chartered Bank draft on 7 July 1986. The question here was whether it was paid by way of loan by the plaintiff to the defendant or by way of investment by the plaintiff, at the defendant's suggestion, in Petrochem. The records of Petrochem, which might have resolved this controversy one way or the other, were not produced by either side.

As the plaintiff contends in this appeal, such documentary evidence as was produced supports his contention that the money paid was by way of loan to the defendant. In the first place, on 20 July 1986, the defendant handed the plaintiff a blank cheque for B$250,000, drawn on Citibank. The defendant's explanation for this was that the plaintiff wanted some comfort for his investment. But if it was the plaintiff's own investment in Petrochem it is a little difficult to see why he would have looked to the defendant for such comfort.

Secondly, on 3 September 1992 the defendant signed a document headed "ACKNOWLEDGMENT" in which he stated that he had requested the plaintiff to purchase a bank draft from Standard Chartered Bank on the defendant's behalf and in which he acknowledged that it was on the understanding and agreement that, in consideration thereof, he would reimburse the plaintiff in full with interest at the prevailing bank rate. The defendant's explanation for his signing of this document was that he did not understand it; that at the time he was going through a divorce and was ill; and that he would have signed anything brought to him by the plaintiff, as this document was, because of the close friendship between them. The learned trial judge accepted this explanation by the defendant notwithstanding that it appears to be inconsistent with his acknowledgement in cross-examination that he read and understood the document when he signed it, an acknowledgement to which the learned trial judge referred in his reasons.

And finally there were four cash payments by the defendant to the plaintiff on 5 December 1995, 12 January 2000, 4 October 2001 and 22 March 2002 totalling $6,250. In respect of each of these payments there was produced by the plaintiff a receipt stating *"Loan refer letter 3rd September 1992"*. The defendant's explanation for these payments, which the learned trial judge also appears to have accepted, was that they were gifts in view of the facts that, by that time, the plaintiff was in poor health and that they had long been friends. The learned trial judge rejected the genuineness of the receipt documents and it is true that, from the similarity between them, it could be inferred that they were all written at the same time.

In addition to these documents there was, in the plaintiff's favour, an admission by the defendant that, by the time of this transaction, he had invested heavily in Petrochem which had sustained losses.

The learned trial judge found the versions given by both parties of the nature of the transaction "to say the least, unusual". However he accepted the defendant's version of the nature of the transaction and rejected that of the plaintiff. It was on this basis that he dismissed the plaintiff's claim.

Unassisted by any assessment of the relative demeanours of the parties, in which the learned trial judge plainly had an advantage over this Court, we would have thought that the existence of these documents, together with the defendant's admissions already referred to, would have led to a conclusion that the transaction was, as the plaintiff contended, a loan. Against that, of course, is the undoubted advantage to which we have referred which the trial judge had in seeing and hearing the witnesses give evidence and, consequently, in making primary findings of fact based on his assessment of the reliability of their respective versions of events, an advantage somewhat lessened by the fact that, by the time of trial, these events were more than a decade old. But for the matter to which we are about to turn, this Court might have been faced with the difficult task of deciding whether this was one of the rare cases in which, even allowing for that advantage, it should overturn findings of fact based on credit made by a primary judge.

Having reached that conclusion of fact, which was determinative of the action before him, the learned trial judge went on to consider whether if, contrary to that conclusion, the plaintiff's version should have been accepted, and the transaction was indeed a loan, his action was nevertheless time barred. In that event, the plaintiff's action was one for moneys due under a loan agreement performed by purchase by the plaintiff, on 7 July 1986 of the bank draft already referred to. It is on that question which, in our opinion, the plaintiff's action was, in any event, bound to fail.

Until 1991, the effect of section 3 and Part III of the Schedule to the 1967 Act was that the plaintiff's action would have been time barred after three years from the date on which the loan was made (par. 38 or par.40 of the Schedule). On that basis, as His Honour found, the limitation period would have expired, at the latest, on 7 July 1989, 3 years from the date on which the plaintiff's banker's draft in favour of P.T. Petrochem Diagra was paid, which was long before this action commenced on 8 January 2003.

By section 3 of the 1967 Act every suit instituted after the period of limitation prescribed, if the limitation has been set up as a defence, must be dismissed. The limitation was specifically pleaded by the defendant here.

However section 2 of the *Emergency (Limitation) Order* 1991 ("the 1991 Order") provides:

> *"2. (1) This Order shall apply to any action commenced after the date of coming into force of this Order, whether the cause of action accrued before or after that date.*
>
> *(2) Any action commenced before the date of coming into force of this Order shall continue in accordance with, and be bound by, the provisions of the Act repealed by section 52 of this Order."*

That provision came into force on 1 September 1991. The Act repealed by section 52 was the 1967 Act.

As the plaintiff's action commenced on 8 January, 2003, it falls, prima facie, within the operation of section 2, notwithstanding that the plaintiff's cause of action accrued before 1 September 1991. However, as His Honour pointed out, its correct operation requires that it be read together with sections 2 and 10 of the *Interpretation and General Clauses Act* 1959**.** The relationship between section 2 of the 1991 Order and sections 2 and 10 of the *Interpretation and General Clauses Act* was considered by the Privy Council in *Marsal v Apong* [1998] 1WLR 674. These sections of the *Interpretation and General Clauses Act*, at the time of the Privy Council's report to His Majesty relevantly provided:

> *"2. (1) Save where the contrary intention appears, the provisions of this Act shall apply to this Act and to any written law now or hereafter in force made by competent authority in Brunei Darussalam, and to any instrument made or issued thereunder.*
> *………"*
>
> *"10 The repeal of any written law shall not --*
>
> ……………………………
>
> *(c) affect any right, power, obligation, restriction or liability acquired, accrued, imposed or incurred under any written law so repealed;*
>
> *…………………………..."*

In delivering their report their Lordships said:

> *"Their Lordships consider that the approach to the interpretation of the Order of 1991 should be that approved by their Lordship's Board in the opinion prepared by Lord Brightman in Yew Bon Tew v Kenderaan Bas Mara [1983] I A.C. 553 and approved by the House of Lords in the Arnold Case [1988] A.C. 228 where it was said [1983] 1 A.C. 553, 558-559, 563:*
>
> > *'In their Lordships' view, an accrued right to plead a time bar, which is acquired after the lapse of the statutory period, is in every sense a right, even though it arises under an Act which is procedural. It is a right which is not to be taken away by conferring on the statute a retrospective operation, unless such a construction is unavoidable…….' "*

The 1991 Order plainly has some retrospective operation because it applies to an action commenced after the coming into force of the Order *"whether the cause of action accrued before or after that date"*. What it does not do, in terms, is apply to a cause of action accrued before that date in respect of which there has already accrued also a right to plead and rely on the limitation under the 1967 Act.

It is plain therefore that section 2 of the 1991 Order can be given full effect in this way; by applying it to causes of action accrued before the coming into force of the Order but not where that cause of action has matured into an accrued right to plead and rely on a limitation period under the 1967 Act. Indeed, as their Lordships pointed out in *Marsal,* in the absence of any express provision in the 1991 Order that existing rights to a limitation defence were taken away, the clear presumption must be the other way.

Consequently, in their Lordships view, the provisions of the *Interpretation and General Clauses Act* preserved the defendant's right to plead and rely on the limitation periods provided under the 1967 Act notwithstanding the coming into force of the 1991 Order.

As the learned trial judge pointed out, section 10 of the *Interpretation and General Clauses Act* was amended in 2004, after the date of the report of the Privy Council. That section is now relevantly in the following terms:

> *"10 Where a written law repeals in whole or in part any other written law, unless the contrary intention appears, the repeal shall not* ---
>
> *………………..."*

It can be seen that this effected two changes to section 10. Both, in our opinion, were made for the purpose of clarification only. The first is that it now refers to a repeal "in whole or in part" of any written law. This makes it clear that the section applies to a partial repeal as well as to the repeal of an entire law.

The second change is the addition of the words "unless the contrary intention appears". Section 2, which remains unchanged, already provided that "Save where the contrary intention appears" the provisions of that Act, including of course section 10, applied to any written law including the 1991 Order. So the amendment can have no intention other than to clarify the fact that section 10 will yield to a contrary intention.

In *Marsal* the Privy Council accepted that the provisions of section 10 yielded to a contrary intention but pointed out that there was no such contrary intention in the 1991 Order and that, in its absence, the clear presumption was to the contrary.

Mr Sawan, for the appellant before this Court, pointed to the following matters in reliance on which, he submitted, this case may be distinguished from *Marsal*. First he says, rightly, that this was an action for recovery of a loan which, if it were subject to the 1991 Order, would come within section 10 of that Order, under which the running of time is postponed until a written demand for repayment is made. But the fundamental question is whether that Order applies at all to this action; and that depends on whether section 2 of that Order, read with sections 2 and 10 of the *Interpretation and General Clauses Act,* intends to take away a right accrued under the 1967 Act.

When turning to that question, Mr Sawan submits that the addition of the words “unless the contrary intention appears” in section 10 of the *Interpretation and General Clauses Act* and the addition, in that Act, of 7A, requiring a purposive approach to interpretation, are sufficient to show such an intention. We have already discussed the effect of the addition of those words in section10. We cannot see how taking a purposive approach advances this submission and Mr Sawan did not explain how it did.

It follows that the trial judge was correct in his conclusion that the plaintiffs action, even if correctly categorised as an action for money paid by way of loan, was time barred.

For completeness we should refer to two additional matters which, it might be thought, touch on the question which we have just decided.

The first is the acknowledgement document dated 3 September 1992. This was created after the expiry of the limitation period which applied to this action. Whilst an acknowledgement of debt, after the making of a loan, may extend the limitation period under the 1967 Act, that is so only in respect of an acknowledgement made within the limitation period: the 1967 Act section 20 (1). Consequently the acknowledgement did not, in any way, affect the running of the limitation period against the plaintiff.

The second is that, this action having been struck out by the Registrar on the basis that it was time barred, on appeal from that order to the Supreme Court on 14 August 2004, that order was set aside. The application to the Registrar was plainly one made under Order 18 rule 18 which permits the striking out of a Statement of Claim, and consequently of an action, on the basis that it discloses no reasonably arguable cause of action. Consequently the order of the Supreme Court was not one rejecting a contention that the action was time barred; rather it was one holding merely that the plaintiff had some prospect of defeating the limitation plea and consequently that the action should be permitted to go to trial. It therefore has no bearing on the above conclusion.

For the reason that even if the plaintiff's version of events were to be accepted, the action is time barred, we would dismiss this appeal.

Orders

1. Dismiss the appeal.
2. Order nisi that the appellant pay the respondent's costs to be taxed if not agreed.
3. If either party wishes to be heard on costs that party must notify the Registrar by 6 December 2007.

Power, P.

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