

20, 1982

No. 42 of 1980

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

O N A P P E A L
FROM THE FEDERAL COURT OF MALAYSIA

B E T W E E N :

KONG MING BANK BERHAD

Appellant

-and-

SIM SIOK ENG

Respondent

CASE FOR THE RESPONDENT

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Appellant

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		<u>RECORD</u>
10	1. ^{5th September} THIS IS AN APPEAL from the judgment dated 27th December , 1979 of the Federal Court of Malaysia holden at Kuching exercising appellate jurisdiction (Chang Min Tat F.J., Salleh Abas F.J. and Charles Ho. J.) the grounds of which was delivered on the 27th December, 1979 allowing the Respondent's appeal from the ruling in Chambers and the judgment in Open Court of the High Court of Borneo (George K.S. Seah J.) dated 15th January, 1979 and 24th February, 1979 respectively whereby it was ordered that the Appellant be at liberty to enter judgment against the Respondent in the sum of \$421,173.70 with interest at 12% per annum from April 1, 1978 until payment together with costs of the application in Chambers of \$81.00.	70 63-69 54-58 58-59
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	In allowing the appeal the Federal Court of Malaysia ordered the Appellant to pay the costs of the trial and of the appeal.	
30	2. This case arises out of an action under Civil Suit No.K.131 of 1978 brought by the Appellant against the Respondent for a sum of M\$380,172.17 which was with the leave of	1-4

5. By letter dated 4th April, 1978, the Appellant through its advocates demanded payment from the Respondent of the sum of M\$194,957.12 together with interest thereon and on 7th April, 1978 commenced proceedings against the Respondent in Civil Suit No. 131 of 1978 claiming the sum of M\$380,172.17 which sum was subsequently allowed to be amended by the learned trial judge in Chambers on 11th December, 1978 to M\$421,173.70.

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6. The Respondent pleaded the defence of limitation and relied on Article 40 to the Schedule to the Limitation Ordinance of Sarawak (Sarawak Ordinance Cap. 49) which reads:

<u>Description of Suit</u>	<u>Period of limitation</u>	<u>Time from which period begins to run</u>
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20	For money lent under agreement that it shall be payable on demand.	Three Years	When the loan is made.
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7. The learned trial judge held in Chamber that "the overdraft became an enforceable debt only after demand had been made by the Plaintiff Bank and time began to run from that moment. Since demand for repayment was made by counsel for the Plaintiff Bank on April 4, 1978 and the writ was issued on April 7, 1978 it follows that the defence that the action is statute barred fails". The learned trial judge reaffirmed his ruling when this matter was further argued in open court and said "there was no cause of action till after demand had been made and the plea that the action is statute barred therefore fails". The learned trial judge relied on Joachimson v Swiss Bank Corporation / 1921 / 3 KB 110.

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8. From this decision the Respondent appealed to the Federal Court of Malaysia (Chang Min Tat F.J., Salleh Abas F.J. and Charles Ho. J.). On 5th September, 1979 the Federal Court of Malaysia allowed the Respondent's appeal with costs both of the trial and of the appeal.

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- 63-69 9. The grounds of judgment of the Federal Court of Malaysia was delivered by Chang Min Tat F.J. who said that the Federal Court of Malaysia had in Bian Chiang Bank Berhad v Kong Hing Cheong [1978] 2 MLJ 193 held "... impliedly that in the case of an overdraft, no demand for payment was necessary to start time from running. In the absence of any stipulation for a demand for repayment on the overdraft, time ran from the date of the loan or from the date of the last payment of interest or part payment of capital, if paid before the expiration of the prescribed period, which was three years: Section 20(1) of the Limitation Ordinance. On the authority of that case, judgment should have been given for the Appellant where similarly there was no requirement for the overdraft to be repaid only on demand and the claim of the Bank on the overdraft dismissed, since more than 3 years had elapsed between the last payment of \$65,000.00 on November, 1974 which was clearly towards principal and April, 1978 when the writ was taken out". He also said that the case of Joachimson v Swiss Bank Corporation [1921] 3 KB 110 C.A. was to be distinguished from the present case as it dealt with the question whether demand was necessary to create a cause of action against a bank on a current account whereas the present case dealt with the case of a customer owing money to the bank on an overdraft. 10
- 64-65 10. Chang Min Tat F.J. then went on to say that it is a question of ascertaining the intention of the parties whether in fact they intend to make the demand a term of the contract. After considering the case of Ram Chunder Ghosaul v Juggutmonmohini Daber [1978] 4 CAL., 283 and Norton v Ellam 2M. & W 461; 150 E.R. 839 (1835-42) All E.R. Reprint 330 he concluded that "So in the case of an overdraft on a current account unless the parties stipulate clearly and other than by merely using the words "on demand", that the amount shall be payable on demand being made, time runs from the last advance by the bank to the customer or from the 20 30 40 50
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last payment of interest or capital or both by the customer. And it is to be observed that in the overdraft account in the instant case, there is no use of the words "on demand" and there is also no evidence or contention of any stipulation in the overdraft that a demand is an agreed condition before the debt becomes payable, and that this was a claim on the overdraft account".

10 11. As regards the Appellant's contention 67-69
that the period of twelve years in Article
101 to the Schedule to the Limitation
Ordinance of Sarawak applied to every
remedy available to the Chargee under
the charge and thus allowing twelve years
for the personal remedy against the
chargor or as well as against the charged
20 property the learned Federal Judge after
considering the cases of Ramdin v
Kallea Pershad L.R. (1884-85) 12 I.A. 12
and Barclays Bank Ltd v Beck & Anor
(1952) 1 All E.R. 549 C.A. in which
similar contention was advanced and
rejected said that the contention here
should also be similarly rejected and
concluded that "In our view therefore,
there is sufficient authority to hold
30 that the Bank, in its own turn, cannot
claim that the simple contract debt
of an overdraft is merged into the charge
and so far as limitation is concerned
covered by Article 101 and not by Article
40".

12. In dealing with Appellant's contention 69
(raised for the first time in the appeal)
that the defence of limitation could be
defeated by the provisions of Article 94 or
97 to the Schedule to the Limitation
40 Ordinance which respectively refer to
an action for compensation for the breach
of a written contract and to a suit for
which no period of limitation is
elsewhere provided the learned Federal
Judge said "The short answers are: the
Bank's action is not for compensation for
the breach of a contract in writing
and a period of limitation is provided
in Article 40 for a claim for money lent".

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63-69 13. The Respondent respectfully submits that the judgment of the Federal Court of Malaysia is correct and that the learned trial judge erred when he held that the overdraft became an enforceable debt only after demand had been made by the Appellant Bank and time began to run only from that moment and therefore in the present case the Appellant Bank's action was not statute barred. 10

14. The Respondent respectfully submit that the learned trial judge erred in that :

8-51 (i) as Mr. Goh Lee Miang, Credit Manager of the Appellant's Bank deposed in his affidavit of the 17th November, 1978, the terms and conditions upon which the overdraft facility of \$90,000.00 was granted were contained in the charge which clearly shows a situation of money lent under an agreement that it shall be payable on demand and as such caught squarely by Article 40 of the Schedule to the Limitation Ordinance of Sarawak (Sarawak Ordinance Cap. 49). 20

11-13 (ii) As the last payment in by the Respondent was on the 4th November, 1974 and as there is no provision in the Sarawak Limitation Ordinance making a demand necessary to make time runs, Article 40 to the Schedule to the Limitation Ordinance should be strictly construed so that time should be taken to commence running from the 4th November, 1974 and in commencing proceedings against the Respondent only on the 7th April, 1978 the Appellant was out of time. 30

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Nagendra Nath Dey & Anor v Sureh
Chandra Bey & Others / 1932 / AIR 165
Norton v Ellam 2M. & W 461; 150 E.R. 839;
/ 1835-42 / ALL E.R. Reprint 330
Bradford Old Bank v Sutcliffe / 1918 /
2 K.B. 833 at page 840.
D.V. Chitale & S. Appu Rao: Vol I "The Limitation Act, 1963" (4th Ed.) at page 861. 40

(iii) the learned trial judge failed to distinguish between a personal action for a debt and the remedy against the charged property available to the Appellant Bank in the circumstances.

10 Midland Bank Ltd v Stamps / 1978 / 3 ALL E.R. 1 at page 3 para H.
V.R.K.R.S. Chettiapals Chetty v Raja Abdul Rashid Ibui Almerhum Sultan Idris / 1933 / 11 MLJ 18.
John Edgar Jones v P.C.S.K.R. Palaniappa Chitty / 1935 / IV MLJ 175.

20 Even in the Limitation Ordinance (Sarawak Ordinance Cap. 49) this distinction is made by according to the action for money lent a limitations period of three years under Article 40 and the action on a charge a period of twelve years under Article 101.

30 Article 40 and Article 101 to the Schedule to the Limitation Ordinance of Sarawak (Sarawak Ordinance Cap 49) are similar respectively to Article 21 and Article 62 of the Indian Limitation Act, 1963. The learned authors, D.V. Chitale and S.Appu Rao in their two volumes book "The Limitation Act 1963" 4th Edition have exhaustively covered the Indian Limitation Ordinance and at page 860 of their Volume 1 in commenting on the Indian Article 21 said "The suit must be based on the loss" (their italics) and at page 1180 of the same volume said of the Indian Article 62 "This article applies to suits to enforce payment of money charged upon immoveable property. The suit must be or to recover money out of immoveable property charged and not from the Defendant personally" (their italics). The Respondent respectfully submits that the Appellant in taking out the specially Indorsed Writ of Summons herein opted for the personal action against the Respondent. This borne out by the sum claimed. If as the Appellant contends the claim is one under Article 101 to the Schedule to the Sarawak Limitation Ordinance the Appellant cannot on the terms of the Memorandum of Charge claim more than the maximum of \$90,000.00 stipulated therein.

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RECORD

65 15. The Respondent further submits that as the existence of the Memorandum of Charge was never pleaded or even referred to in the pleadings the learned trial judge should not have taken the same into consideration when deliberating his decision.

72-73 16. On the 4th day of August, 1980 the Federal Court of Malaysia (Lee Hun Hoe, Chief Justice, High Court, Borneo, Chang Min Tat, Judge, Federal Court, Malaysia and Salleh Abas, Judge, Federal Court, Malaysia) made an Order granting the Appellant leave to appeal to His Majesty the Yang Di-Pertuan Agong. 10

17. The Respondent submits that this appeal should be dismissed with costs for the following (amongst other).

R E A S O N S

1. BECAUSE the present suit is an action in debt against the Respondent personally; 20

2. BECAUSE Article 40 and not Article 101 to the Schedule to the Limitation Ordinance of Sarawak (Sarawak Ordinance Cap. 49) applies;

3. BECAUSE in the circumstances time started running on the 4th November, 1974;

4. BECAUSE in commencing this action on the 7th April, 1978 the Appellants' claim was statute barred; 30

5. BECAUSE the judgment of the learned trial judge was wrong;

6. BECAUSE the judgment of the Federal Court of Malaysia was right.

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B E T W E E N :

KONG MING BANK BERHAD Appellant

-and-

SIM SIOK ENG Respondent

CASE FOR THE RESPONDENT

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