Chuan & Company Pte Ltd v Ong Soon Huat
[2003] SGCA 15

Case Number : CA 118/2002

Decision Date : 05 April 2003

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; Judith Prakash J

Counsel Name(s) : Aqbal Singh (Unilegal LLC) for the Appellant; Philip Fong, Josephine Choo (Harry Elias Partnership) for the Respondent

Parties : Chuan & Company Pte Ltd — Ong Soon Huat

Limitation of Actions – Acknowledgment of debt – Inclusion of disputed sum in estate duty affidavit – Whether creditor entitled to rely on letter as acknowledgement – Limitation Act (Cap 163, 1996 Rev Ed) s 27

Limitation of Actions – Acknowledgment of debt – Debtor referred to sum as an 'alleged' debt – Whether there was acknowledgement – Limitation Act (Cap 163, 1996 Rev Ed) s 27

Limitation of Actions – Acknowledgment of debt – Whether claim may be acknowledged after it is time-barred – Effect of acknowledgment of time-barred claim – Limitation Act (Cap 163, 1996 Rev Ed) ss 26(2), 28(5)

Words and Phrases – 'Acknowledgment' – Limitation Act (Cap 163, 1996 Rev Ed) ss 26, 27

Words and Phrases – 'Made to' – Limitation Act (Cap 163, 1996 Rev Ed) s 27(2)

Delivered by Chao Hick Tin JA

1 This appeal raises the question whether the present action instituted by the plaintiff-appellant against the defendant-respondent for the recovery of a sum of $7,164,304.64 has become time-barred. This question in turn rests upon the question whether two documents emanating from the respondent constitute "acknowledgment' within the meaning of s 27 of the Limitation Act (the Act).

The background

2 The appellant, Chuan & Company Pte Ltd (Chuan), is a family company, now under voluntary liquidation. It was formed by one Ong Toh. Before its incorporation, it was run by him as a sole proprietorship for some twenty years.

3 Ong Toh passed away on 30 March 1995 and the respondent, Ong Soon Huat, a nephew of his, is the executor of his estate.

4 During his lifetime, Ong Toh dealt with the assets of Chuan as if they were his own. Even after he had on 26 November 1990 transferred all his shares in Chuan to his two daughters (Ms Ong Kim Hong and Ms Ong Thian Hong) by his third wife, and had ceased to be a director, he continued to treat the property of Chuan in any way he pleased. He simply withdrew money from Chuan.

5 From 1987, Ong Toh would acknowledge the moneys taken by him from Chuan by signing on the yearly confirmation of debts statements sent to him by the company auditors, Chan Hock Seng & Company. The last statement of debts was signed by him on 10 March 1994, where he acknowledged owing Chuan the sum of $7,164,304.64. This is the sum which the liquidator of Chuan is seeking to claim back from the estate of Ong Toh in this action.

6 On 9 December 1995, the executor filed an estate duty affidavit with the Estate Duty Department (EDD) in which the said sum was included as a debt owed by the estate to Chuan.

7 On 17 January 2001, pursuant to a request of EDD, the executor's solicitors wrote to Chuan's auditors asking for copies of documents relating to the alleged debt. The relevant parts of the letter read:-

> 2. We recently took over conduct of the matter … and we would be grateful if you could assist us with queries from the Commissioner of Estate Duties.
>
> 3. First, the Commissioner has asked for documents in support of:-
>
> ....
>
> ....
>
> (ii) Chuan & Co Pte Ltd's allegation that a debt of $7,164,304.64 was owing by the deceased to the company as at 30 March 1995.
>
> 4. Without such documents, the Commissioner will refuse to make a deduction for the alleged debts. In the circumstances, please let us have copies of all the documents substantiating the alleged debts…

The documents requested in the letter were duly furnished by Chuan.

Decision below

8 At the request of the parties, the court below decided, before commencing trial, to determine the question as to whether the claim by Chuan had become time-barred as a preliminary question. The judge ruled that the claim was barred by limitation on 10 March 2000, six years from the date Ong Toh signed the last statement of debts. She held that neither the estate duty affidavit nor the letter of 17 January 2001 constituted an acknowledgement of a debt within the meaning of s 27 of the Limitation Act.

The statutory provisions

9 Section 6(1)(a) of the Limitation Act provides that an action founded on a contract or on tort "shall not be brought after the expiration of six years from the date on which the cause of action accrued." However, s 26(2) provides that where the person liable for any debt "acknowledges the claim or makes any payment in respect thereof" the right of action to recover the debt shall be deemed to have accrued on the date of the acknowledgement.

10 What would constitute an acknowledgement is prescribed in s 27, and as this question is central to the issue before us, we shall set out the provisions in full:-

> 27(1) Every such acknowledgment as is referred to in section 26 shall be in writing and signed by the person making the acknowledgment.
>
> (2) Any such acknowledgment or payment as is referred to in section 26 may be made by the agent of the person by whom it is required to be made under that section, and shall be made to the person, or to an agent of the person, whose title or claim is being acknowledged or, as the case may be, in respect of whose claim the payment is being made.

Estate duty affidavit

11 We shall first examine the estate duty affidavit. In the schedule to the affidavit filed by Ong Soon Huat, the sum of $7,164,304.64 was listed as a debt owing by Ong Toh to Chuan. What needs to be determined is whether the affidavit can be considered to be an acknowledgment of the debt "made to (Chuan) or to an agent of (Chuan)" within the meaning of s 27(2).

12 Chuan accepts that to constitute an "acknowledgment" there must be a clear admission of liability. Relying upon *Bank of America National Trust Savings Association v Cheong Hoon Choy* [1982] SLR 60, Chuan argues that it does not matter that the affidavit was not, according to its terms, expressly or impliedly, addressed to Chuan, so long as it was "delivered to the creditor or his agent by or with the authority of the debtor or his agent." The fact that the acknowledgment was addressed to a third party, the Commissioner of Estate Duties, instead of Chuan, is not necessarily an impediment to it being an effective acknowledgment.

13 In *Bank of America National Trust Savings Association v Cheong Hoon Choy*, the defendant executed a charge over a property owned by him and another person, who had become a bankrupt, to secure overdraft and other facilities granted to that other person. In May 1973, the Official Assignee at Kuala Lumpur paid, on behalf of the defendant and the bankrupt, the sum of M$140,000

to the plaintiffs on the understanding that the charge executed by the defendant would be released. Later the plaintiff claimed the balance sum of M$70,454.43 from the defendant. One of the defences raised was that the claim was time-barred. In response, the plaintiff averred that there was an acknowledgement of the debt by the defendant in April 1973 when the defendant's solicitors wrote to the Official Assignee. The relevant part of the letter read:-

> The aforesaid land is charged in favour of Bank of America … and the amount outstanding to-date is $206,029.69. We understand that you are in the process of selling the said bankrupt's half share in the said land for redemption of the said charge.
>
> Kindly withhold further action in the proposed sale as our client is able to obtain a better offer …

It is significant to note that this letter was specifically copied to and was received by the plaintiff's solicitors in Kuala Lumpur.

14 There, it was contended that the letter did not amount to an acknowledgement under s 27(2) because it was not addressed to the plaintiff or its agent, and the Official Assignee was not an agent of the Bank. However, as the letter had expressly acknowledged the debt, and a copy of the letter was sent to the plaintiff's solicitors, the court held that the letter would constitute a sufficient acknowledgement for the purpose of s 27(2).

15 In coming to its decision, the court there had relied on the English case of *Re Compania de Electricidad de la Provincia De Buenos Aires Ltd* [1980] CH 146 where Slade J, after noting that there did not appear to be any authority on the meaning of the expression "made to the person, or to an agent of the person, whose title or claim is being acknowledged", enunciated the following proposition (at 193):-

> .. a written acknowledgment cannot be said to be "made to" a creditor or his agent, within the meaning of section 24(2) unless either (a) it is delivered to the creditor or his agent by or with the authority of the debtor or his agent or (b) it is expressly or implicitly addressed to and is actually received by the creditor or his agent.
>
> In my judgment, in case (a) it would not matter that the acknowledgment was not, according to its terms, expressly or implicitly addressed to the recipient. In case (b) it would not matter that the acknowledgment reached the hands of the creditor otherwise than by or with the authority of the debtor. In either case, however, it would be necessary that the creditor should actually receive the acknowledgment before he could rely on it.

> A company's balance sheet must in my judgment be regarded as implicitly addressed to (among other persons) those creditors whose debts are referred to in it. It follows that in my judgment, as Miss Arden submitted, and, as I understood him, Mr Sykes did not contend to the contrary, an effective "acknowledgment" of a debt must be said to have been "made" by the company to any creditor who can establish by appropriate evidence that (i) he has actually received, from whatever source, a copy of a balance sheet of the company, signed by directors of the company and referring to "sundry creditors"; (ii) he is one of the "sundry creditors" so referred to. In such circumstances the balance sheet of the company would constitute an effective acknowledgment of the relevant debt, not as at the date on which it was actually signed by the directors or received by the creditor, but as at the date of the balance sheet, being the date to which the signature of the directors related; and the cause of action would be deemed to have accrued at that date:…

16 However, the fact situation in the present case is not the same as that in *Cheong Hoon Choy*, where the letter in question was copied to the creditor's solicitors and was in fact received. Here, the estate duty affidavit was not "made to" Chuan or its solicitors. It was addressed to the Commissioner of Estate Duties. It was never received by Chuan or its solicitors. The executor even refused to give a copy of it to Chuan's solicitors when requested. Chuan only secured a copy by virtue of an order of court obtained in the present action. Such a delivery, by compulsion of an order of court, can hardly suffice to constitute an acknowledgment. It would be noted from the dicta of Slade J, that to constitute an acknowledgment, there must be some intention to convey the contents of the document to the creditor or his agents. Under the first category of delivery enunciated by Slade J, the delivery to the creditor is deliberate. Under the second category, it is implied. Chuan can hardly claim to have relied on a document which it had never seen before the commencement of the action.

17 Moreover, in *Bowring-Hanbury's Estate v Bowring Hanbury* [1943] 1 All ER 48, Bennett J held that the admission of a debt contained in an affidavit relating to the estate of a deceased person sworn for probate purposes could not constitute a sufficient acknowledgment since it was made to the probate court and not to the creditor.

18 We accept the argument of Chuan that if an affidavit, though by its terms not addressed to the creditor, is nevertheless sent by the debtor to the creditor, that could amount to an effective acknowledgment of the debt. This would fall within the first category of delivery enunciated by Slade J. It seems clear to us that the concept of "acknowledgment" within the meaning of the Limitation Act envisages a voluntary desire to admit a debt. Otherwise, it would mean that a letter written to a complete third party, admitting to a debt to the creditor, would amount to an acknowledgement of the debt to the creditor if the latter should somehow come into possession of it. An acknowledgement to make time run afresh in respect of a claim, or to revive a time-barred claim, cannot be obtained by way of a sidewind.

19 Thus, it is our opinion that the first ground raised by Chuan to defeat the defence of time-bar must fail.

Letter of 17 January 2001

20 We now turn to examine the second document, i.e., letter of 17 January 2001. We have in ¶7 above set out the pertinent parts of the letter which Chuan asserts contained an acknowledgment of the debt. As this document was addressed to Chuan's auditors, Chan Hock Seng & Co, it is just as good as being made to Chuan. What is left to be considered is whether there was an acknowledgment of the debt in the letter.

21 Counsel for Chuan argued that the court below had taken too narrow a view of the document when it held that the letter did not contain an acknowledgment of the debt and that it only contained an allegation by Chuan that Ong Toh owed Chuan the sum of $7,164,304.64. He further argued that the letter should be read together with the estate duty affidavit; the context is all important. It would be fair to assume that the Commissioner of Estate Duty had asked for documentary proof of the debt because the respondent, the executor of the estate of Ong Toh, must have stated in the affidavit that the estate owed Chuan the said sum. Counsel also contended that the words "Chuan & Co Pte Ltd's allegation" appearing in the letter should be construed as referring to the Commissioner's query on the respondent's admission of debt to Chuan set out in the affidavit.

22 Good v Parry [1963] 2 All ER 59 is a case where the English Court of Appeal had the opportunity to consider s 23(4) of the *English Limitation Act 1939* [which is in *pari materia* with our s 27(2)] and where it held that, unlike the previous law, for a document to constitute an acknowledgment, there need not be an express or implied promise to pay. But there must, nevertheless, be a clear acknowledgment of a debt or other liquidated damage, although the specific sum was not stated. In the latter event, reference could be made to extrinsic evidence to ascertain the amount. Lord Denning MR explained that (at 61):-

> … the debt must be quantified in figures or, at all events, it must be liquidated in this sense that it is capable of ascertainment by calculation, or by extrinsic evidence, without further agreement of the parties.

23 In *Good v Parry* the court held that the sentence, "The question of outstanding rent can be settled as a separate agreement as soon as you present your account" did not acknowledge any debt as due. It merely acknowledged that there might be a claim.

24 In contrast, in *Dungate v Dungate* [1965] 3 All ER 818, a certain G, took several loans from his brother, the plaintiff. On 23 February 1962, G wrote a letter to the plaintiff containing the sentence, "Keep a check on totals and amounts I owe you and we will have account now and then." The English

Court of Appeal held that this letter was a clear acknowledgment of a debt due to the plaintiff. In Diplock LJ's view, the letter in question "made it quite plain that there were amounts owing and outstanding."

25 A third case, *Kamouh v Associated Electrical Industries International Ltd & Anor* [1979] 2 WLR 795, is also highly illustrative. There, the plaintiff's brother had in April 1967 procured a contract for the defendants and had incurred expenses in connection therewith. The next month, May 1967, the first defendants in a letter to the brother stated that they recognised that he was in effect out of pocket to the extent of £100,000 for those activities. In reply to a letter from him, the defendants wrote in March 1970 to deny that there was any agreement to pay him remuneration and added:-

> Turning now to your out-of-pocket expenses, you will appreciate that you have had substantial payments on account although I understand that so far no detail or corroborative evidence has been produced by you. You will appreciate that it is quite impossible for this company to make any further payment to you in respect of your disbursements without a detailed account supported by appropriate and acceptable evidence of payment. If you will provide the required information it will have early consideration.

26 We should mention that the plaintiff in *Kamouh* commenced the action in a representative capacity. Parker J held that the above paragraph could not amount to an acknowledgment. All it meant was "we do not admit that you were entitled to even that which you have already been paid. Before you can have anything more, you will have to show that that and more was due."

27 The plaintiff there sought to argue that this letter of March 1970 should be read together with the letter of May 1967. While Parker J accepted that the letter in question should properly be read in its context, and, for that purpose, reference could be made to the earlier letters, including that of May 1967, he nevertheless held that the letter of March 1970 could not be viewed to be an acknowledgment, as it did not admit that any sum was due to the plaintiff's brother as expenses. It was no more than an acknowledgment that there might be something owing.

28 It is of interest to note that in *Agricultural Mortgage Corporation v Williams & Ors*, a decision of the English Court of Appeal of 15 May 1995, the court affirmed the principle that in determining whether a letter constituted an acknowledgment earlier correspondence could be looked into. In that case the defendants argued that if the earlier correspondence was taken into account, it would be seen that there was no intention to acknowledge the title of the plaintiffs as mortgagees. However, the court held that the expression "they are amply secured" in the letter in question clearly suggested that the plaintiffs were secured as mortgagees under the mortgage.

29 In our view, the rules governing the construction of a document to determine whether it

constitutes an acknowledgment should be no different from those applicable to the construction of other documents. Their ultimate object is to determine the intention of the maker in the light of the words he has used. Where the words in a document are clear, it is not permissible to refer to extrinsic material and give them a meaning which is at variance with the express words. It is only where the words used in a document are ambiguous that extrinsic material may be referred to to assist in determining the intended meaning. But where, as in *Agricultural Mortgage Corporation* and *Dungate v Dungate*, and particularly in the present case, the express words are clear, the court should not rewrite the document into something it is not. Here, the letter in question referred to Chuan's "allegation" of a debt and asked Chuan for documents "substantiating the alleged debts". We are unable to read this letter as amounting to an acknowledgment of a debt. To do so would do violence to the plain words of the document.

Existing debt

30 Before we conclude we would like to refer to a statement made by the judge below which requires clarification. It reads:-

> The law requires there to be 'an unequivocal admission of a subsisting debt, that is subsisting at the time of the acknowledgment' (per Lord Evershed at p. 482 of *Consolidated Agencies Ltd v Bertram Ltd* [1956] AC 470 quoted with approval by the Malaysian Federal Court in *Wee Tiang Teng v Ong Chong Hooi* [1978] 2 MLJ 54 at 56). It is noteworthy that as at 17 January 2001, the debt was already time-barred, it no longer subsisted.

31 It seems to us that the judge thought that where limitation has set in, a debt could not be revived by a subsequent acknowledgment. In coming to that view the judge relied upon the Malaysian Federal Court case of *Wee Tiang Teng v Ong Chong Hooi & Anor* [1978] 2 MLJ 54 which in turn relied upon the Privy Council decision in *Consolidated Agencies Ltd v Bertram Ltd* [1956] AC 470.

32 What seems to have been overlooked is that the applicable statutory provision (s 19 of the Indian Limitation Act) in the *Bertram* case is quite different from s 26(2) of our Act. There, the provision read:-

> *Where, before the expiration of the period prescribed for a suit or application in respect of any property or right*, an acknowledgment of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by some person through whom he derives title or liability, a fresh period of limitation shall be computed from the time when the acknowledgment was so signed. [Emphasis added].

33 Our section 26(2) reads:-

> Where any right of action has accrued to recover any debt or other liquidated pecuniary claim, or any claim to the personal estate of a deceased person or to any share or interest therein, and the person liable or accountable therefor acknowledges the claim or makes any payment in respect thereof, the right shall be deemed to have accrued on and not before the date of the acknowledgment or the last payment.

34 While the Malaysian limitation provision was very similar to ours, the fact of the matter was that in *Wee Tiang Teng v Ong Chong Hooi* the acknowledgment in question was given before the limitation period had expired. So there the question whether a time-barred claim could be revived by subsequent acknowledgment did not arise for consideration.

35 Moreover, the position in Singapore on this point is made all the clearer by s 28(5) of the Act, which reads:-

> *An acknowledgment made after the expiration of the period of limitation* prescribed for the bringing of an action to recover the debt or other claim shall not bind any successor on whom the liability devolves on the determination of a preceding estate or interest in property under a settlement taking effect before the date of the acknowledgment. [Emphasis added].

There is also a corresponding provision in s 28(7) where part payment of the debt is made after the expiry of the limitation period.

36 Under our statutory scheme, where the limitation period has expired, what it means is that the debt is irrecoverable. If the debtor is sued, he may plead the defence of limitation. However, this defence must be expressly pleaded: see s 4 of the Act, O 18 r 18(1) of the Rules of Court and the House of Lords' decision in *Ketteman v Hansel Properties* [1987] AC 189 at 219. Thus, a judgment may be entered on such a claim unless the debtor raises the limitation defence. A judgment may also be entered if there is a subsequent acknowledgment of the debt. Therefore, our scheme of things does not render a debt which is time-barred non-existent; it only renders the debt irrecoverable if limitation is pleaded.

Judgment

37 Notwithstanding the erroneous view of the judge below on the abovementioned point, the present appeal must still be dismissed as neither the estate duty affidavit nor the letter of 17 January 2001 is an acknowledgment within the meaning of s 27(1) and (2) of the Act. The respondent shall have the costs of this appeal. The security for costs, together with any accrued interest, shall be released to the respondent's solicitors to account of costs.