Kim Eng Securities Pte Ltd v Tan Suan Khee
[2007] SGHC 75

Case Number : Suit 298/2006, RA 320/2006

Decision Date : 18 May 2007

Tribunal/Court : High Court

Coram : Belinda Ang Saw Ean J

Counsel Name(s) : Sean Lim (Hin Tat Augustine & Partners) for the plaintiff; Tan Suan Khee, defendant in person

Parties : Kim Eng Securities Pte Ltd — Tan Suan Khee

Evidence – Admissibility of evidence – "Without prejudice" privilege – Whether acknowledgment of debt subject to privilege

Evidence – Documentary evidence – Private documents – Whether e-mail from defendant discussing repayment of debt amounting to acknowledgment of debt – Whether e-mail not marked "without prejudice" forming part of negotiations and subject to without-prejudice privilege

Limitation of Actions – When time begins to run – Creditor calling on on-demand guarantee – No cause of action arising until demand for payment made – Time only beginning to run when demand made – Whether demand by creditor against guarantor out of time because of statute-barred principal transaction

18 May 2007

Belinda Ang Saw Ean J:

1 This was an appeal by the plaintiff, Kim Eng Securities Pte Ltd ("Kim Eng"), against an order of the Assistant Registrar made on 10 November 2006 whereby it was ordered that summary judgment be entered against the defendant, Tan Suan Khee, in the sum of $258.28 together with interest thereon at the rate of 7.5% per annum from 2 March 2005 until payment and costs fixed at $350. In addition, the Assistant Registrar granted the defendant unconditional leave to defend the balance of Kim Eng's claim and costs in the cause was ordered for this part of the application made under O14 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed). I allowed Kim Eng's appeal against the grant of unconditional leave to defend the balance claim amount of $342,860.56 and, accordingly, entered summary judgment in Kim Eng's favour in respect of the aforesaid claim amount. I also allowed Kim Eng's claim for interest. I fixed costs of the appeal and below at $7,000 inclusive of disbursements. The defendant has appealed against my decision.

Background Facts

2 Kim Eng is a member of the Singapore Exchange Securities Trading Ltd ("SES") carrying on the business of stockbroking. The defendant, at all material times, was a remisier with Kim Eng having been so appointed pursuant to an Agency Agreement dated 24 January 1992 ("the Agency Agreement") to act as Kim Eng's agent to trade and deal in stocks, shares and other marketable securities (collectively referred to as "the securities") in Kim Eng's name and in its trading room, upon the terms and conditions set out in the Agency Agreement.

3 The defendant had from time to time traded in securities in the SES for clients introduced by him

to Kim Eng. Arising from his trading activities, some of the clients defaulted on their transactions and contra losses were incurred. It was not disputed that contra losses could arise in the situations described by the defendant in his show cause affidavit of 13 September 2006. The first situation is where the client fails to pay on the due date for the securities bought on his behalf. Kim Eng elects to "force-sell" the securities and the resultant difference is the contra loss. The second situation is where the client fails to deliver the securities sold on his behalf. A "buy-in" from the market to perform the sale contract is undertaken by Kim Eng and the difference represents the contra loss.

4 In this action, the contra losses incurred formed the bulk of the claims. It is convenient to reproduce below the particulars of paragraph 15 of the Amended Statement of Claim.

PARTICULARS

(i)	Outstanding contra losses as at 1 March 2005 in respect of transactions dealt by or through the Defendant for the following clients:- (i) Tan Ee Hwa $ 285.28 (ii) Ng Soo Kee $65,551.89 (iii) Lee Tiong $ 1,009.64 (iv) Boh Kwee Eng $71,247.21	$138,094.02
(ii)	Accumulated interest on contra losses in respect of transactions dealt by or through the Defendant for the following clients:- (i) Tan Ee Hwa $ 19.93 (ii) Ng Soo Kee $ 48,456.04 (iii) Lee Tiong $ 821.97 (iv) Boh Kwee Eng $69,834.35	$119,132.18[note: 1]

(iii)	Accumulated interest on contra losses in transactions dealt by or through the Defendant and other sums due and payable by Defendant:- (i) Plaintiffs' Tax invoice dated 30/6/04 $51,668.53 _____ (ii) Plaintiffs' Tax invoice dated 31/7/04 (inclusive of $51,668.53) $ 52,872.74 (iii) Less interest reversal ($ 329.12) (iv) Plaintiffs' Tax invoice dated 31/8/04 ($ 729.02) (v) Plaintiffs' Tax invoice dated 30/9/04 ($ 92.34) (vi) Less Commission due to Defendant ($ 19.20) (vii) Less Commission due to Defendant ($ 204.00)	$51,668.53 $51,449.06
(iv)	Expenses incurred by Plaintiffs for Defendant in year 2004:- (i) SES Terminal ($480 per month) $ 3,360.00 (ii) SES Subscription ($75 per month) $ 525.00 (iii) Telephone charges (Jan – May 2004) $ 403.58 (iv) Telephone charges (June 2004) $ 50.00 (v) Licence fee $ 800.00	$ 5,138.58
(v)	Legal costs incurred by Plaintiffs in respect of claim made against Tan Ee Hwa	$ 1,054.00

5 Paragraph 8 of the Amended Statement of Claim relates to a different group of people and the contra losses incurred totalled $28,278.20. In an e-mail dated 21 June 2004, Kim Eng informed the defendant that it would utilise a sum of $28,278.20 held in the defendant's Trust Account with Kim Eng to pay the contra losses. In response, the defendant objected to the names given under this group and promised to provide Kim Eng with a list of deductions. He never did and on or about 28 June 2004, Kim Eng proceeded to deduct the sum of $28,278.20, utilising moneys in the defendant's Trust Account.

6 Kim Eng's claims in this action were made under the Agency Agreement. The relevant terms and conditions of the Agency Agreement read as follows:

7. Liability in respect of transactions

7.1 All sums due and payable to the Company in respect of transactions dealt by or through the Remisier in the name of the Company (hereinafter called the "contract sum") shall be settled within seven days of the date of despatch by the Company of the relevant debit note (s) (hereinafter called the "due date").

…

7.3 The Remisier hereby undertakes to pay the Company on demand:

(a) the contract sum or any part thereof remaining outstanding for more than seven days after its due date; and

(b) interest thereon at a rate to be determined from time to time from the due date to the date of full payment.

7.4 Any payment made by the Remisier under Clause 7.3 shall be refunded to him to the extent of any amount that may subsequently be recovered from the party liable for the same, after the deduction of any expenses incurred in connection with the recovery.

10. Indemnity

The Remisier shall indemnify the Company against all damages, liabilities, actions, proceedings, judgments, costs (including costs on a solicitor-and-client basis), claims, demands and any other losses of whatever nature that may be suffered or incurred by the Company in connection with or arising from transactions in securities dealt by or through the Remisier in the name of the Company (whether or not the same may have been caused by or may relate to any fraud, deceit, neglect, misconduct, breach of contract or default on the part of the Remisier or his client).

7 I should mention, for the sake of completeness, the supplemental letter to the Agency Agreement dated 9 January 2004 (and countersigned by the defendant) even though it was not specifically referred to by either party. The relevant portions read:

The Remisier agrees that the indemnity given by the Remisier in favour of the Company under Clause 10 of the Agency Agreement shall extend to all losses, liabilities, actions, proceedings, costs, claims and demands that may be suffered or incurred by the Company in connection with or arising from transactions in securities dealt by or through the Remisier or accepted by the Remisier or allocated or designated under the Remisier's code in the name of the Company or from any act or omission of the Remisier.

8 Clauses 8, 11 and 13.4 of the Agency Agreement read:

Charges Payable

8.1 The Remisier shall reimburse the company in respect of:

(i) all charges incurred in respect of the installation of telephones and other electronic equipment for the use of the Remisier;

(ii) all periodic charges payable to the Telecommunication Authority of Singapore for the use of such telephones and electronic equipment;

(iii) all payments and subscriptions made to the Stock Exchange of Singapore Limited by the Company on the Remisier's behalf; and

(iv) such administrative charges as shall be imposed by the Company from time to time for the use of the Company's facilities.

8.2 Such reimbursement shall be made within seven days of the Company's demand for the same.

11 Legal Advice

The Company shall be entitled, at its absolute discretion, to appoint legal advisers of its own choice to advise on any issue, claim, dispute, proceedings or other matter arising out of or having connection with the trading activities of the Remisier. All legal fees, expenses and other charges that may be incurred by the Company in respect thereof shall be borne by the Remisier.

13 Term and Termination

…

13.4 Notwithstanding the termination of this Agency Agreement for any reason whatsoever, the Remisier shall remain fully liable to the Company under this Agreement until all outstanding amounts payable hereunder shall be fully recovered by the Company.

9 The defendant's appointment as remisier ceased as of 1 July 2004. Notwithstanding his departure, the defendant under cl 13.4 of the Agency Agreement remained fully liable to pay all outstanding sums due to Kim Eng.

10 On 8 July 2004, Kim Eng, through its solicitors, demanded from the defendant payment of the total outstanding sum of $383,237.85 as at 30 June 2004. Following the defendant's query on 16 July 2004, Kim Eng provided a breakdown of the sum of $383,237.85 on 22 July 2004. A further letter was sent on 18 March 2005 to the defendant. Subsequently, by letter dated 23 March 2005, Kim Eng's solicitors demanded payment of the contra losses and accumulated interest due and owing as at 1 March 2005, that is to say, items (i) to (iii) of paragraph 15 of the Amended Statement of Claim (see [4] above). As regards, item (iv), on 4 April 2006, Kim Eng's solicitors demanded from the defendant payment of the sum of $1,054, being the legal costs incurred by Kim Eng in respect of a claim made against one Tan Ee Hwa for contra losses due and owing to Kim Eng.

11 In this action commenced on 10 May 2006, Kim Eng applied for summary judgment against the defendant. Mr Lim Thian Siong represented Kim Eng. The defendant was not legally represented. He acted in person.

12 The defendant declared that for the purposes of the O14 application and the appeal before me, he was not challenging the quantum of all of the claims in this action. The contra statements forming the contra losses claimed by Kim Eng and the contractual rate of interest of 7.5% per annum as pleaded were also not in dispute.

Contra losses and Accumulated interest

13 As stated, the Assistant Registrar entered summary judgment in favour of Kim Eng in the sum of $258.28 together with interest thereon at the rate of 7.5% per annum from 2 March 2005 until

payment. I should mention that the Notes of Arguments recorded the amount in question as $285.28 (*ie* item (i) of para 15 of the Amended Statement of Claim under the name of Tan Ee Hwa) and the defendant had also confirmed to the Assistant Registrar that there was no defence to that particular claim. A transposition error appeared to have occurred as summary judgment was entered for $258.28, and not for the correct amount of $285.28. The error was perpetuated in the order of court dated 10 November 2006. The defendant has since paid this judgment sum. Be that as it may, of significance is the defendant's non-contest of that claim for, apart from the time bar point, it exposes the fallacy in the other points the defendant took in connection with the construction of cl 7.3 of the Agency Agreement for the rest of the items of claim in paragraph 15 of the Amended Statement of Claim (see [29] and [30] below).

14 Two principal issues arose in the appeal and they were:

(i) When did Kim Eng's causes of action accrue against the defendant and were the claims time-barred when the Writ of Summons was issued on 10 May 2006?

(ii) Alternatively, had the defendant acknowledged his liability to pay Kim Eng so as to create fresh accrual of the causes of action under s 26(2) of the Limitation Act (Cap 163, 1996 Rev Ed) ("the Act").

15 In the course of their respective submissions, the parties took the points which they each made on the two issues in different orders. I shall follow the order which I have set out above.

(i) Accrual of causes of action and defence of time bar

16 It was common ground that Kim Eng's claims against the four persons named in paragraph 15 of the Amended Statement of Claim were statute-barred under s 6 of the Act. Those claims were in respect of transactions in the securities dealt by or made through the defendant as a remisier of Kim Eng and in the name of Kim Eng between 1994 and 1997. It is convenient at this juncture to set out the material part of s 6(1) of the Act which reads:

6. —(1) Subject to this Act, the following actions shall not be brought after the expiration of 6 years from the date on which the cause of action accrued:

(a) actions founded on a contract or on tort…

17 The defendant's main contention was that since the contra losses as at 1 March 2005 were statute-barred against the principal debtors (*ie* the clients), Kim Eng's claims against him for contra losses under cl 7.3 of the Agency Agreement were equally barred by s 6 of the Act. If the contra losses were statute-barred, the claims for accumulated interest would also fail. In any event, the defendant argued, more specifically, that cl 7.3 of the Agency Agreement applied only to "contract sums" due and owing to Kim Eng, and not to the contra losses which fell outside the scope of cl 7.3 of the Agency Agreement.

18 Mr Lim robustly submitted that the learned Assistant Registrar was wrong and should have entered summary judgment for the full sums claimed as there was insufficient evidence to find any triable issue that Kim Eng was not entitled to recover the full sums claimed under the terms of the Agency Agreement. In the main, Kim Eng disagreed that its claims against the defendant were statute-barred. Mr Lim pointed out that time under the Act only started to run against the defendant when the defendant was called upon to pay, that is, upon Kim Eng's demand made on its behalf by its solicitors on 8 July 2004. Thus, all sums accrued were due by 8 July 2004 (at the earliest), and they

were not statute-barred when the Writ of Summons was issued less than six years later, on 10 May 2006.

1 9 It is convenient to determine first the nature of the undertaking in cl 7.3 of the Agency Agreement, which is a question of construction. It was not disputed that a remisier is self-employed. The defendant associated himself to Kim Eng by the Agency Agreement. This Agency Agreement was intended to regulate the dealings of securities by the defendant in Kim Eng's trading room and to safeguard the interests of Kim Eng as all contracts transacted by the defendant were in the name of Kim Eng. The relationship between the defendant and Kim Eng was one of an agent and principal (see cll 1 and 12.1 of the Agency Agreement) and the latter would be vicariously responsible for the performance of all contracts the defendant as remisier had executed for the clients introduced by him. The contracts he executed for the clients were contracts made between the clients and Kim Eng. Since the clients were introduced by the defendant, Kim Eng would require the defendant to guarantee or indemnify it for any sums owed by those clients to Kim Eng (see generally *Associated Asian Securities Pte Ltd (in liquidation) v Lee Kam Wah* [1993] 1 SLR 585 at 588). It is in the context of this factual background that cl 7.3 is to be construed.

20 In my judgment, the plain wording of cl 7.3 favoured Kim Eng. The wording of the undertaking in cl 7.3 is apt for an on-demand guarantee. The pre-conditions for payment are that the liability of the guarantor arises on demand and this demand may be given anytime after the client's default (*ie* seven days after the due date). The pre-condition involving the default of the client does no more than identify the contractual events which trigger the right to call on the guarantee. In this case, there were defaults in the payment of the contra losses on the due dates. The on-demand pre-condition activates the obligation to pay once a demand is made. Clause 7.3 does not require the demand to be in any specific form.

21 The demand of 8 July 2004 from Messrs Hin Tat Augustine & Partners was as follows:

> …
>
> We are instructed that … under the terms of your engagement, you had agreed to be responsible for and are liable to our clients for all outstandings standing in your deficit account, including all losses and/or unauthorised trades arising from share transactions effected by you on behalf of the customers.
>
> As at **30 June 2004**, you are indebted to our clients in the sum of **$383,237.85** together with interest thereon at the rate of 7.5% per annum under your deficit account with our clients, full particulars of which have been rendered by our clients to you.
>
> In the circumstances, we have been instructed to and hereby give you **NOTICE** that unless the said sum of **$383,237.85** and interest thereon are paid to our clients or to us as their solicitors within **seven (7) days** from the date hereof, we have our clients' strict instructions to commence legal proceedings against you for the recovery of the same without reference to you, in which event our clients will also hold you liable for all legal costs thereby incurred. We trust that you will not render such a course of action necessary.
>
> Finally we are instructed to put you on notice that our clients reserve the rights to force sell the Malaysian shares deposited with our clients in the event you fail to make payment to our clients as aforesaid without further reference to you.
>
> …

[original emphasis added]

22 The defendant in his submissions argued that the written demand on 8 July 2004 might not be the only demand presented for the first time on that date. This contention, which was an attempt to raise factual issues, was not foreshadowed in the affidavits filed to resist the O14 application or in his pleadings. There were also no documents to substantiate his assertion. There was scant evidence to suggest that it was a matter requiring investigation at a trial. The defendant was simply hypothesizing on the various possible dates an oral demand could have been made. Realising the score, the defendant, in the course of the hearing, abandoned this point.

23 In my judgment, the defendant's time bar defence was untenable. Mr Lim argued, and rightly so, that no cause of action arose under cl 7.3 of the Agency Agreement until the demand for payment was made and the limitation period therefore, ran from that point in time. Mr Lim cited *Bradford Old Bank, Limited v Sutcliffe* [1918] 2 KB 833 for the proposition he advanced.

24 In the case of a demand guarantee, as a matter of principle, it is no defence for the guarantor to argue that the claim by the creditor against the guarantor was out of time because of the existence of a statute-barred principal transaction. In such a case, the creditor is allowed more time to enforce the demand guarantee. This common law position is settled as can be seen from the commentary in *Halsbury's Laws of England* Vol 20(1) (Lexis Nexis, 2004) ("*Halsbury's Laws of England*") at para 270:

> A guarantor cannot rely upon the provisions of the Limitation Act 1980 to defeat a claim by the creditor until the period of limitation applicable to claims under the guarantee has itself expired. *It is no defence for the guarantor simply to show that the creditor's claim against the principal debtor is time-barred, unless the claim under the guarantee is also* thereby *barred.*
>
> Prima facie, the fact that the guaranteed debt was, as against the principal debtor, statute-barred at the time when he paid it will not prevent the guarantor from recovering an indemnity from the principal debtor.
>
> [emphasis added]

25 In *Carter v White* (1883) 25 ChD 666 ("*Carter v White*") (cited as authority in para 270 of *Halsbury's Laws of England*), the defendant granted a loan to one Randle which was secured by Randle's father-in-law who deposited with the creditor stock certificates worth some £505. The principal debt was also secured by two uncompleted bills of exchange duly accepted by Randle for £250 each. The drawer's name on the bills had been left blank. Randle died in 1875 and his father-in-law became a bankrupt in 1879. The plaintiff, the trustee of the father-in-law's estate, contended that the surety was discharged from his bond because the creditor failed to enforce the bills of exchange provided by Randle, the principal debtor before he died. The English Court of Appeal decided first, that the death of the principal debtor had no effect on the right of the creditor to complete the bills. Relevant to this appeal was the holding that the surety was not discharged by the creditor's failure to realise the security obtained from the principal debtor. Cotton LJ at 670 said:

> A surety is not discharged merely by the negligence of the creditor. If he had required them to be enforced, and the creditor had refused, the surety might have been discharged, but *he [the surety] is not discharged merely by the laches of the creditor, for this reason, that the surety may at any time pay off the debt, and sue the debtor in the name of the creditor, or call on him to sue*.

[emphasis added]

26 The same views were echoed by Lindley LJ at 672. He said:

> *Is it the law that a creditor who neglects to sue his debtor till the statute has run will thereby discharge the surety?* There is no decision to that effect. *On the contrary, the true principle is that the mere omission to sue does not discharge the surety, because the surety can himself set the law in operation against the debtor*.
>
> [emphasis added]

27 In discussing the situation in which the principal contract is statute-barred, James O'Donovan and John Phillips in *The Modern Contract of Guarantee* (English Edition, Sweet & Maxwell, 2003) at para 10-260 made the same comments and, relying upon *Carter v White* as authority, said:

> A creditor's claim against the guarantor may not be statute-barred even though its claim against the principal is out of time. Such a situation may occur when the guarantee is under seal but the principal transaction is not, so that a longer period of limitation applies to the guarantee. It may also occur because the creditor's claim against the principal arises upon default, but its claim against the guarantor arises only after a demand is made upon him or her, so that the period of limitation against the guarantor begins to run only from the later time of the demand. In these circumstances it appears that the guarantor will still remain liable, despite the fact that the principal transaction is unenforceable.

2 8 *Carter v White* was acknowledged in *Mahant Singh v U Ba Yi* [1939] AC 601 at 609 and more recently, by Nelson J in *Northern & Shell plc v John Laing Construction Ltd* (2003) 90 ConLR 26 at [16].

29 A related argument is the defendant's desperate attempt to draw a distinction between the terminologies "contract sum" and "contra losses". First, the argument ignores the meaning given to the term "contract sum" in cl 7.1 which is referable to:

> All sums due and payable to the Company in respect of transactions dealt by or through the Remisier in the name of the Company.

In addition, the term "due date" is defined in cl 7.1 as "seven days of the date of despatch by the Company of the relevant debit note(s)." In my judgment, the definition of "contract sum" in cl 7.1 is wide enough to include any contra loss.

30 Separately, cl 7.3 makes reference to "the contract sum or any part thereof remaining outstanding". A contra loss is indisputably a "part [of the contract sum] remaining outstanding".

31 For these reasons, there is no time bar defence available for the defendant. Kim Eng's claims were not statue-barred, even though its claims against the principal debtors were out of time. Accordingly, I reversed the Assistant Registrar's order granting unconditional leave to defend and duly entered summary judgment in Kim Eng's favour as follows:

> (i) the sum of $137,808.74 with interest thereon at the rate of 7.5% per annum from 2 March 2005 till judgment;
>
> (ii) the sum of $119,132.18;

(iii) the sum of $51,449.06.

(ii) Acknowledgment issue

32 Notwithstanding my decision on the time bar point, the acknowledgment issue is still a relevant consideration as time bar was likewise raised as a defence in respect of the claim of $28,278.20 which I will come to later. Suffice it to say, if the e-mail of 23 February 2004 constituted an acknowledgment of debt by the defendant for the purposes of s 26(2) of the Act, there would be no issue of time bar in respect of the amounts so admitted. There would then be no reason not to grant summary judgment on the acknowledged sum. Again, I do not propose to follow the points in the same order as that taken by the parties.

33 Mr Lim's fallback argument was that the causes of action had accrued afresh within six years prior to the issuance of the Writ of Summons by the defendant's acknowledgment of the indebtedness and legal liability to pay Kim Eng in his open e-mail dated 23 February 2004. Thus, by virtue of s 26(2) of the Act, the right of action was deemed to have accrued on and not before the date of acknowledgment. Section 26(2) reads:

> (2) 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 To this contention the defendant maintained that Kim Eng could not rely on the e-mail as it would attract privilege and was not admissible in evidence. It was impliedly "without prejudice" as it was sent in the course of negotiations to settle the aging bad debts. As such, the e-mail of 23 February 2004 was not admissible in evidence. The defendant cited *Rush & Tompkins Ltd v Greater London Council and Another* [1989] AC 1280 ("*Rush & Tompkins*") and *The Cadle Co v Hearley* [2002] 1 Lloyd's Law Rep 143 ("*The Cadle case*") in argument. If the e-mail was admissible, the defendant denied that it contained any acknowledgment of the contra losses as his liability. Consequently, there was no evidence of an acknowledgment for a fresh accrual of the cause of action under s 26(2) of the Act.

35 The defendant's e-mail of 23 February 2004 to Kwek Thiam Buck ("Kwek"), the Head of Retail Operations, was in these terms:

> Subject: Amnesty of Bad Debt
>
> Hi Daniel,
>
> We discussed this subject on the 18th Feb 2004.
>
> You so kindly suggested that the subject be brought up to Mr Ong again with the proposal that the $348k be settled with the company forgiving 40% of the debt of $348k i.e. I need to raise a sum equivalent to $208 less whatever is left in my trust account (interest on the principal being waived).
>
> In addition you proposed that there is a sign-on period of five years.
>
> I have given lengthy thoughts to your suggestions and truly appreciate your kind gesture. May I

suggest that you help me put up the proposal to Mr Ong with the following amendments:

i) I raised the sum within 8 weeks half within 4 weeks; and

ii) the sign-on period being reduced to two years.

The main reason for the second amendment is that I will be 50 years old by the end of the two-year period and I have other plans for life after 50 including thoughts of emigrating after that. It is my fervent hope to settle this sad episode of my life before I turned 50. I sincerely hope that your (sic) could accede to the above requests.

My heartfelt thanks

Best Regards,

Suan Khee

36 Kwek sent two replies to the same e-mail of 23 February 2004. The first e-mail reply was sent on the same evening at 07:03pm and it reads:

Hi Suan Khee

In view of the amount to be written off, 2 years is too short a sign on period. Also, please do not forget that I'll have to make out a case to include your retention money. It has to be a Give and Take.

Regards

37 Kwek's second e-mail reply was dated 8 March 2004 at 11:27 am. It reads:

Hi Suan Khee,

Sorry, I cannot accede to your request.

Regards

38 Mr Lim argued that not only was the defendant's e-mail not marked "without prejudice", the contents and tenor of the e-mail showed that it was not sent during "without prejudice" negotiations of a dispute on liability. The defendant had in the e-mail admitted the claim amount owed within the meaning of s 26(2) of the Act and the e-mail was admissible in evidence.

39 The two issues for discussion are:

(i) Whether the defendant's e-mail had acknowledged the claims within the meaning of s 26(2) of the Act; and

(ii) Whether the defendant's e-mail was privileged so that Kim Eng could not rely upon it.

Before delving into the acknowledgment issue and the privilege question, I propose to summarise the relevant principles on what is needed to constitute an acknowledgment under the limitation regime and the legal principles of the without prejudice rule which recently came under review by the Court of Appeal in *Mariwu Industrial Co (S) Pte Ltd v Dextra Asia Co Ltd and Another* [2006] 4 SLR 807

("*Mariwu*") and *Greenline-Onyx Envirotech Phils.,Inc v Otto Systems Singapore Pte Ltd* [2007] SGCA 25 ("*Greenline-Onyx*"), a decision of the Court of Appeal which was released after the appeal before me.

40 Under s 26(2) of the Act, a cause of action in debt will accrue afresh where "the person liable or accountable for the claim acknowledges the claim." As to what was needed to constitute an acknowledgment under the limitation regime, the Court of Appeal in *Chuan & Company Pte Ltd v Ong Soon Huat* [2003] 2 SLR 205 ("*Chuan & Co*") held at [18] that to constitute an acknowledgement under s 26(2), the debt must be admitted as remaining due. The Court of Appeal in *Greenline-Onyx* at [14] accepted and adopted the principle in *Bradford & Bingley plc v Rashid* [2006] 1 WLR 2066 ("*Bradford & Bingley*") that acknowledgments for the purposes of the limitation regime are not confined to admissions of debts where liability and quantum are indisputable. Furthermore, there can be an acknowledgment of a debt for a lower amount accepted as payable (see *Greenline-Onyx* at [16]). There can also be an acknowledgment even if the quantum of the debt is not stated so long as reference can be made to extrinsic evidence to ascertain the amount. As the debt which is time-barred under the Act is not extinguished, the acknowledgment may be made after the expiration of the period of limitation (see *Chuan & Co* at [36]). There is a further principle of some importance. It is that the communication must be construed as a whole and in its context. Where words in a document are clear, it is not permissible to refer to extrinsic material to give the words a meaning that is at variance with the express words (see *Chuan & Co* at [29]).

41 I now come to the without prejudice rule. The Court of Appeal in *Mariwu* clarified that the without prejudice privilege only applied to admissions made in the context of negotiations between the parties to settle a dispute. The appellate court explained that s 23 of the Evidence Act (Cap 97, 1997 Rev Ed) is applicable to the parties to the negotiations whereas the common law rule in *Rush & Tompkins* is applicable to the situation where third parties sought to admit admissions (see [24], [25] and [28] of the report). Section 23 of the Evidence Act contemplates two situations (see [24] of the report). The first applies to negotiations expressly declared to be "without prejudice" and this included communications expressly marked "without prejudice". It follows that any admission made by either party in the context of negotiations to settle a dispute is not admissible in evidence against the party making the admission. The second part of s 23 relates to admissions made "under circumstances from which the court can infer that the parties agreed together that evidence of it should not be given." So where a statement was not expressly made "without prejudice", the law nonetheless holds that it is made without prejudice because "it was made in the course of negotiations to settle a dispute"; the appellate court at [24] cited with approval the judgment of Lord Hoffmann in *Bradford & Bingley* at [13].

42 Chan Sek Keong CJ in *Mariwu* at [30] reminded that the "public policy of the 'without prejudice' privilege is precisely aimed at encouraging out-of-court settlements and cannot be invoked where no dispute exists." To this end, the without prejudice rule has no application to apparently open communications, such as those in the present case, that were designed only to discuss the repayment of an admitted liability rather than to negotiate and compromise a disputed liability (see *Bradford & Bingley* at 2089 referred to and followed in *Mariwu* at [30] and in *Greenline Onyx* at [17]). I should add that whilst the legal burden was on Kim Eng to demonstrate acknowledgment, but since the e-mail was not expressed to be "without prejudice", the defendant had to rebut the evidential burden of admissibility (see *The Cadle case* at 151).

43 The Court of Appeal in *Greenline-Onyx* had to consider whether the appellant had, by its letter and/or other documents, acknowledged its debt to the respondent. That letter was not marked "without prejudice". If the letter constituted an acknowledgment of debt by the appellant, there would be no issue of time bar in respect of the amounts so admitted (see *Otto Systems Singapore Pte*

Ltd v Greenline-Onyx Envirotech Phils, Inc [2006] 4 SLR 924 at [10]). The question before the appellate court was whether the letter was written without prejudice although not so expressed. In the letter were clear statements that the appellant admitted that it owed money to the respondent but not in the amounts demanded as the respondent had used the wrong rate of exchange. The two questions before the appellate court were (i) whether the letter was written without prejudice although not so marked and, (ii) whether the acknowledgment of debt was admissible in evidence even if made without prejudice. It was argued in *Greenline-Onyx* that liability and quantum must be both admitted otherwise there was no acknowledgement of debt. This argument was rejected by the trial judge and the appellant court. Both questions were answered in the affirmative by the appellate court (see [14], [16] and [19]).

44 In *Bradford & Bingley,* the mortgagee sued to recover from the mortgagor the shortfall between sale proceeds and the balance due under the mortgage. The mortgagor argued that the proceedings were commenced outside the limitation period under s 20 (1) of the Limitation Act 1980 (c 58) (UK) ("Limitation Act (UK)"). The mortgagor had previously written letters to the mortgagee seeking time to pay the shortfall of approximately £15,500 due under a mortgage following repossession and sale of the mortgaged property. The first letter said that the mortgagor was not in a position to make repayment, but once his finances were in order he would start to repay the shortfall. In a subsequent letter, the mortgagor stated that he was willing to pay £500 towards the outstanding amount as a final settlement. The mortgagor had argued that the letters were protected by privilege. The House of Lords unanimously held that the letters constituted a clear acknowledgment of the debt for the purposes of s 29(5) of the Limitation Act (UK) (similar to s 26(2) of our Act) and were not protected by the without prejudice rule from being admitted in evidence as acknowledgments. There was no dispute on liability and the open communication was simply asking for a concession on repayment of an admitted liability. It was made clear that an offer contained in open communication as to how an admitted liability is to be paid is not affected by the without prejudice rule. The majority view (expressed by Lord Walker of Gestingthorpe, Lord Brown of Easton-under-Heywood and Lord Mance) was that the without prejudice rule does not attach to open communication whose ostensible purpose is to discuss the repayment of an admitted debt rather than to negotiate over a disputed liability. They reasoned that as the mortgagor had accepted liability to make the repayment to the mortgagee, there was no dispute regarding liability which could be compromised. Nor was there any dispute as to the quantum of that liability. The public policy rationale underlying the without prejudice rule did not extend the protection to communications discussing the repayment of that admitted liability. Lord Hoffmann, however, disagreed with the reasoning of the other Law Lords. He said that the without prejudice rule, as far as it is based on public policy and not upon some agreement of the parties, does not apply at all to the use of a statement as an acknowledgment for the purposes of s 29(5) of the Limitation Act (UK) (see [16] and [18] of the report). He reasoned that the exclusion of the without prejudice rule's effect could be justified on the footing that an acknowledgment for the purposes of the limitation regime was based on evidence that the statements were made as distinct from using them as evidence of the truth of anything asserted, drawing on the rule in *Subramaniam v PP* [1956] 1 WLR 965 as analogy.

45 As Chan CJ in *Greenline-Onyx* remarked at [17], the reasoning of the Law Lords grappled with the public policies underlying, on the one hand, the without prejudice rule, and on the other hand, the acknowledgment rule in s 29(5) of the Limitation Act (UK). The Law Lords had difficulty agreeing on the right solution that preserved the acknowledgment rule without undermining the without prejudice rule. Both rules represented competing policy interests, viz, that of not admitting without prejudice statements made in the course of negotiations and that of upholding acknowledgments of debt. Lord Walker explained the latter public interest at [38]:

> [I]t is also in the public interest that a debtor who acknowledges his debt, and so induces his

creditor not to have immediate resort to litigation, should not then be able to claim that the debt is statute-barred because the creditor held his hand. That is, as Lord Hoffmann says, the policy behind the acknowledgment rule, to which Parliament, in enacting the Limitation Act 1939, gave a broader and simpler scope (for the earlier history see the Fifth Interim Report (Statutes of Limitation) of the Law Revision Committee (1936) (Cmd 5334), para 19).

I should clarify that under our limitation regime, an acknowledgment given after the limitation period could revive a statute-barred claim (see *Chuan & Co* at [34] to [36]).

46 As to which of the formulations of the principle would achieve the correct balance between the without prejudice rule and the acknowledgment rule, Chan CJ left it open since it was not needed for the decision in *Greenline-Onyx.*

47 I turn to the application of these principles set out above to the facts of this case.

48 It was not disputed that a remisier left Kim Eng without first settling his dues and Kwek invited several remisiers with contra losses unpaid by clients to come forward to negotiate settlements with Kim Eng. Kwek explained in his affidavit of 27 September 2006 that on 2 September 2003, a meeting was held between the defendant, himself and Ong Seng Gee (a director of Kim Eng) and its credit officer, Ms Tan Puay Ling. At the meeting, the defendant proposed paying a lump sum of $80,000 in full and final settlement of the then aging contra losses of about $350,000 for which he was liable to Kim Eng. His financial commitments outside of Kim Eng were disclosed at the meeting. The options raised by Kim Eng were to pay either $150,000 or, $80,000 and be bonded to Kim Eng for five years. On 18 February 2004, Kwek had another discussion with the defendant on his request for forgiveness of part of his liabilities owed to Kim Eng. The defendant thereafter followed up with his email on 23 February 2004. The defendant's proposal according to Kwek was rejected by email on 8 March 2004. Both meetings centred on the defendant's financial ability to meet his liability to Kim Eng.

49 The defendant contended that the e-mail was part of without prejudice negotiations for settlement with Kim Eng. At that time, he said he was aware that the "settlement negotiation" included "all statute-barred bad debts and some not statute-barred debts, disputed or not disputed." The defendant also stated that a number of meetings were held to settle the bad debts which the defendant proclaimed "have saddled [him] for years" and he was also hoping to start life afresh.

50 In my view, the open e-mail of 23 February 2004 did not fall within the without prejudice rule because there was no existing dispute. In the circumstances, that meant that the underlying policy reason for the privilege rule would not have arisen on the facts of this case. As such, there would not be two competing public interests to contend with. The public policy underlying s 26(2) of the Act was unaffected. Lord Hoffmann had said that the public policy underlying the without prejudice rule was irrelevant to the use of a statement as an acknowledgment for the purposes of s 29(5) of the Limitation Act (UK). In this case, time bar was the only defence raised to the claims, and on Lord Hoffmann's formulation, with the lifting of the procedural bar there was every reason to grant summary judgment. It bears noting that the defendant was not contesting quantum in this appeal (see [12] above).

51 Here, there was no dispute on liability on the face of the e-mail of 23 February 2004. It was an open communication to discuss the repayment of an admitted liability rather than to negotiate and compromise a disputed liability. From the words used in the e-mail such as "Amnesty" in the subject heading and reference to "forgiving" a debt in the main body of the text (in this case 40% of $348,000), the e-mail contained an admission of liability by the defendant of the debt of $348,000. Moreover, the tenor of the e-mail was not to compromise an existing dispute but to repay the debt of

$348,000 by way of forgiveness of debt (in this case 40% of $348,000) and some time to repay the remaining balance. Thus, the email was only explicable on the footing that liability to satisfy the indebtedness of $348,000 was admitted by the defendant. In context, the e-mail made no sense at all without that premise. The request in the e-mail for Kim Eng's accommodation was necessarily predicated upon (and it was implicit from the request) the defendant's admission of the debt from which a promise to pay is to be implied. Lastly, based on the extrinsic evidence, the e-mail had not initiated a negotiation to settle a disputed debt and could not be properly characterized as one which initiated any negotiation. The e-mail was plainly admissible in evidence. It constituted an acknowledgement of a debt of $348,000 for the purposes of s 26(2) of the Act and satisfied the formal requirements of s 27(1) of the Act. Section 27(1) of the Act provides as follows:

> 27. —(1) Every such acknowledgment as is referred to in section 26 shall be in writing and signed by the person making the acknowledgment

52 I accepted Mr Lim's submissions that the defendant's e-mail satisfied the requirements of "writing and signed" prescribed by s 27(1) of the Act. The e-mail originated from the defendant and the inclusion of his name 'Suan Khee' at the end of the e-mail affirmed his act of signing off. Judith Prakash J's ruling in *SM Integrated Transware Pte Ltd v Schenker Singapore (Pte) Ltd* [2005] 2 SLR 651 on how a signature requirement is satisfied on an e-mail correspondence is by analogy applicable to the signature requirements of s 27(2) of the Act. Prakash J at [91] held:

> I am satisfied that the common law does not require handwritten signatures for the purpose of satisfying the signature requirements of s 6(d) of the [Civil Law Act]. A typewritten or printed form is sufficient. In my view, no real distinction can be drawn between a typewritten form and a signature that has been typed onto an e-mail and forwarded with the e-mail to the intended recipient of that message.

53 In my view, there had been an acknowledgment preventing the defendant from setting up the statute of limitation. The e-mail contained an acknowledgment sufficient to set time running afresh under s 26(2) of the Act. It follows that Kim Eng could, in the alternative, recover the contra losses and accumulated interest under cl 10 of the Agency Agreement.

54 In its Amended Statement of Claim, Kim Eng pleaded that the defendant was liable under cl 10 of the Agency Agreement to indemnify Kim Eng for the contra losses and accumulated interest. An indemnity is an undertaking by one party to keep the other harmless against loss arising from particular transactions or events. Clause 10 is a separate and independent promise to indemnify and keep Kim Eng harmless against losses "in connection with or arising from transactions in securities dealt by or through [the defendant] in the name of the Company (whether or not the same may have been caused by or may relate to … breach of contract or default on the part of the [defendant] or his client). As a matter of construction, the indemnity is against losses incurred or suffered by Kim Eng and the cause of action on the indemnity arose from its own losses rather than from the time when the event giving rise to the clients' liability occurred. Mr Lim had not indicated when that cause of action accrued. At the hearing, the defendant suggested that any transaction before 10 May 2000 would be excluded. In any event, the acknowledgment of 23 February 2004 would start time afresh.

Deduction of $28,278.20 for contra losses

55 This leads me to the contra losses in the total sum of $28,278.20 (see [5] above). On this claim, the defendant raised two triable issues. The first was the defence of time bar in respect of the total claim amount of $27,853.05 (see para 13 of the Amended Defence). This time bar defence was raised only in respect of the claims totalling $27,853.05. The balance sum of $424.38 was not challenged

under the time bar argument.

56 For the same reasons already explained (see [32] to [54] above), this time bar defence fails at the outset. The figure of $348,000 mentioned in the defendant's e-mail of 23 February 2004 was made up of the various sums due and owing by the clients in respect of transactions dealt by or through the defendant less a banker's guarantee of $40,000 held by Kim Eng. Included in this figure of $348,000 were the contra losses of a list of clients provided by Kwek in his affidavit of 27 September 2006. In that list were also the names of clients identified in paragraph 8 of the Amended Statement of Claim such as Oh Hong Pin, Low Keong Keong, Chua Pik Sim and Loh Fook Lum. As explained above, the acknowledgment of 23 February 2004 would start time afresh.

57 The second triable issue that was raised was whether on its true construction, cl 3.6 of the Agency Agreement allowed Kim Eng to deduct by way of set-off without obtaining the consent of the defendant. Under the terms of cl 3.6 of the Agency Agreement, there can be no set-off of this amount from moneys held in the Trust Account without the consent of the defendant. Mr Lim conceded that consent was not obtained. The set-off was wrongful as no consent was given. I accepted the defendant's position on this. As a corollary to my decision, Kim Eng will have to refund the money to the defendant's Trust Account. Mr Lim's fallback argument was that even though Kim Eng was not entitled to bring in a set-off, the claim was nonetheless valid and not defensible. Kim Eng was entitled to judgment by virtue of cl 10 of the Agency Agreement since liability was admitted and quantum was not disputed. I accepted his submissions and accordingly entered judgment in the sum of $28,278.20 in favour of Kim Eng.

Expenses and legal costs

58 I now come to the two remaining items of claim in the appeal. The defendant in his defence admitted the expense claim of $5,138.38. However, he contended that he had given a cheque of $15,000 to Kim Eng which covered payment of the expense claim of $5,138.38. In response, Kim Eng explained that $15,000 formed part of the $28,278.20 in the defendant's Trust Account which Kim Eng used to pay the contra losses identified under paragraph 8 of the Amended Statement of Claim. I did not think that my earlier ruling that the set-off was erroneous gave rise to a triable issue as regards the claim for $5,138.38 which was recoverable under cl 8 of the Agency Agreement. The fact remains that $5,138.38 was unpaid as no consent required by cl 3.6 of the Agency Agreement was given by the defendant to utilise the moneys in the Trust Account for this admitted claim.

59 As for the claim for legal costs in the sum of $1,054 in respect of the action commenced by Kim Eng against Tan Ee Hwa for the contra losses incurred under her trading account for transactions dealt by or through the defendant, Kwek explained in his affidavit of 27 September 2006 that Kim Eng commenced proceedings against Tan Ee Hwa for the contra losses owed by her to Kim Eng in the sum of $9,489.71 together with interest thereon at the rate of 7.5% per annum from 6 July 2004 till payment. In July 2004, the amount owed was partly settled by a payment of $9,000.

60 It was not the defendant's case that Tan Ee Hwa did not owe money to Kim Eng on transactions dealt by or through him. The defendant argued that as he was not told about the proposed action against Tan Ee Hwa, he was not liable for the legal costs. In my view, the defendant is liable to indemnify Kim Eng for the expenses incurred under the Agency Agreement as the contra losses had arisen from transactions dealt by or through the defendant. As such, by virtue of cll 10 and 11 of the Agency Agreement, he had bound himself to be responsible for the expenses incurred by Kim Eng in pursuing the claim against Tan Ee Hwa.

Result

61 For these reasons, I was satisfied that this was an appropriate case to allow the appeal on the basis that it was a clear case for summary judgment and there was no arguable defence.

[note: 1] Casting error but left unchanged following Amended Statement of Claim