Cytec Industries Pte Ltd v APP Chemicals International (Mau) Ltd
[2009] SGHC 177

Case Number : Suit 160/2007, RA 173/2009, 174/2009

Decision Date : 06 August 2009

Tribunal/Court : High Court

Coram : Andrew Ang J

Counsel Name(s) : Yap Yin Soon and Edmund Tham (Allen & Gledhill LLP) for the plaintiff/respondent; Adrian Tan and Julian Kwek (Drew & Napier LLC) for the defendant/appellant

Parties : Cytec Industries Pte Ltd — APP Chemicals International (Mau) Ltd

Civil Procedure – Striking out – Limitations of actions – Correspondence amounting to acknowledgment of debt – Whether acknowledgment stopped time bar from running – Section 26(2) Limitation Act (Cap 163, 1996 Rev Ed)

Equity – Defences – Laches – Seller suing for debt owing for purchased goods – Whether equitable defence applied to legal remedy in aid of legal right

Evidence – Admissibility of evidence – Correspondence contained implied admission of debt – Whether correspondence subject to "without prejudice" privilege

6 August 2009

Andrew Ang J:

Introduction

1 The plaintiff applied for summary judgment in Summons No 777 of 2009 for recovery of a debt owed by the defendant. In so doing, the plaintiff sought to rely on correspondence between its credit re-insurers and the defendant that were marked "without prejudice". The defendant then applied, by way of Summons No 1974 of 2009 to strike out the portions of the plaintiff's affidavit referring to and exhibiting such correspondence on the basis that they were privileged.

2 Both the plaintiff's summary judgment application and the defendant's striking out application were heard by the same assistant registrar ("AR"). The AR dismissed the striking out application and granted judgment for the plaintiff with respect to part of the alleged debt. In respect of the remainder, the AR gave the defendant conditional leave to defend. The defendant appealed against the entirety of the AR's decisions in both summonses in Registrar's Appeals Nos 173 and 174 of 2009 (the former relating to the summary judgment application and the latter to the striking out application). At the conclusion of hearing the Registrar's Appeals, I dismissed them both and now give my detailed grounds of decision.

Background

3 The defendant is a Mauritian entity, which purchased chemical products from the plaintiff, a Singapore company, as evidenced by 16 purchase orders and their corresponding invoices, bills of lading and bills of exchange. Payments for the purchased goods fell due between 11 November 2000 and 5 May 2001 but were not made, resulting in a debt totalling US$1,626,494.89 ("the Debt"). The plaintiff commenced proceedings for its recovery on 13 March 2007, which was more than six years after 11 of the 16 unpaid invoices had fallen due.

4 At the material time, the defendant was owned and controlled by Asia Pulp & Paper Company Ltd ("APP Singapore"), a Singapore company which had guaranteed the defendant's payment obligations to the plaintiff. In separate proceedings, namely, Suit No 161 of 2007 which centred around the guarantee provided by APP Singapore, the plaintiff had obtained judgment against APP Singapore in respect of the Debt (see *Cytec Industries Pte Ltd v Asia Pulp & Paper Co Ltd* [2009] 2 SLR 806). APP Singapore had not disputed the Debt in those proceedings.

5 Here, although the defendant apparently could not dispute the existence of the Debt, it refused to admit to it. Additionally, it pleaded the defence of laches to argue that it would be inequitable for the plaintiff to lay claim to the Debt after such a long period during which documents relating to the Debt had been misplaced and the defendant's employees who had knowledge of the Debt became no longer contactable. In the alternative, the defendant argued that the amounts due in respect of 11 of the 16 unpaid invoices were time-barred under s 6(1)(*a*) of the Limitation Act ("the Act") (Cap 163, 1996 Rev Ed).

6 In response, the plaintiff argued that the defendant had acknowledged the Debt pursuant to s 26(2) of the Act by way of correspondence between the defendant and Coface RBI, the credit re-insurers for the plaintiff. The first was a letter dated 31 July 2001 ("the Coface letter") from Coface RBI to Dr Raymond Liu ("Dr Liu"), an employee of the defendant at the time, which read as follows:

> WITHOUT PREJUDICE
>
> AND SUBJECT TO CONTRACT
>
> …
>
> Dear Raymond
>
> I am embodying a proposal for settlement in this short note:
>
> (a) APP shall procure a third party payment to Bayer and Cytec for the sum of US$13 million and legal costs within 21 days of any settlement agreement. In return, and subject to the matters below, a new credit insurance line of US$11.7 million shall be granted to APP by Coface.
>
> (b) APP, Bayer and Coface will jointly agree an annual purchase volume within 48 hours from the date hereof.
>
> (c) APP will accept drafts for new deliveries maturing at 60 days from sight for a maximum order per month of US$1.2 million. If the draft is unpaid at maturity an avalisation from a Japanese Trading House acceptable to Coface shall be required within 5 working days.
>
> (d) This offer shall lapse at 1600 hours Singapore time on 3 August 2001.
>
> …
>
> Yours sincerely

[signed]

Guy Lepage

Chairman

7 Subsequently, on 2 August 2001, Dr Liu sent an e-mail ("the Raymond Liu e-mail") to Guy Lepage as follows:

WITHOUT PREJUDICE

…

Dear Mr. Lepage:

I am sorry to inform you that we can not accept your proposal dated 31 july [*sic*] 2001. The proposal we offered in the meeting on 31 July 2001 in Singapore is already the best we can do to resolve *the overdues* considering the difficult situation we are currently in. Please kindly reconsider our proposal so we can start to discuss with Bayer and estimate the volume/value of purchase that we plan to re-route through Bayer/other trading firms. *The payment scheme will follow our 110% program*, that is the *overdue payment* will be paid to you in advance based on the 110% value of our purchases. In return you will provide credit insurance coverage to the purchase with 180 days terms.

I hope we can find an agreeable solution soon. Looking forward to hearing from you.

Yours sincerely,

Raymond Liu

[emphasis added]

8 To understand the references to "Bayer" and "110% program" in the above correspondence, it is apposite to refer to my decision in *Lanxess Pte Ltd v APP Chemicals International (Mau) Ltd* [2009] 2 SLR 769 ("*Lanxess Pte Ltd*"), an appeal against which was dismissed by the Court of Appeal on 7 July 2009. That was a case brought by Lanxess Pte Ltd against the same defendant in this suit seeking recovery of debts that had been assigned to it by Bayer (South East Asia) Pte Ltd, that is, "Bayer". In *Lanxess Pte Ltd*, the defendant had purchased chemical products from Bayer but failed to make full payment. The parties eventually agreed on an instalment payment scheme, that is, the "110% program" referred to in the Raymond Liu e-mail whereby Bayer would continue to supply chemical products to the defendant but would charge a 10% premium over the sale price (see *Lanxess Pte Ltd* at [14] and [30]). This premium would go towards repayment of the outstanding amounts owed by the defendant to Bayer (*ibid*). The defendant did not dispute the existence of the debt owed to Bayer, merely whether it had been validly assigned to Lanxess Pte Ltd. That case concluded that Bayer had validly assigned the defendant's debt to Lanxess Pte Ltd, which was entitled to repayment of that debt.

Issues

9 Four main issues arise in the Registrar's Appeals before me:

(a) Whether the correspondence in question, namely, the Coface letter and the Raymond Liu

e-mail, were subject to "without prejudice" privilege and hence inadmissible.

(b) Whether the plaintiff had made out a *prima facie* case as to the defendant's liability for the Debt.

(c) Whether the plaintiff's claim was time-barred.

(d) Whether the defence of laches was applicable.

10 The first issue relates to Registrar's Appeal No 174 of 2009 and the remainder to Registrar's Appeal No 173 of 2009. I will proceed to deal with each of them in turn, but note at the outset that there is substantial overlap between the first and third issues as both would require determining whether there was an acknowledgment of the Debt pursuant to s 26(2) of the Act.

Whether the correspondence in question was subject to "without prejudice" privilege

11 Counsel for the defendant argued that the Coface letter and the Raymond Liu e-mail (see [6] and [7] above) were protected by "without prejudice" privilege as they were expressly labelled as such and were part of negotiations aimed at settlement of a dispute concerning, *inter alia*, the Debt. According to the defendant, citing *Sin Lian Heng Construction Pte Ltd v Singapore Telecommunications Ltd* [2007] 2 SLR 433 ("*Sin Lian Heng*"), even if it might be said that there was an admission of liability in the correspondence, "without prejudice" privilege would still apply to negotiations on quantum. The defendant contended that such was the case here. Further, as could be seen from the English Court of Appeal decision in *Forster v Friedland* (Unreported, November 1992), "without prejudice" privilege is not limited only to negotiations aimed at resolving the legal issues between the parties but would include any negotiations that were genuinely aimed at the avoidance of litigation.

12 The plaintiff, on the other hand, relied on the analysis of *Bradford & Bingley plc v Rashid* [2006] 1 WLR 2066 ("*Bradford & Bingley*") in *Greenline-Onyx Envirotech Phils, Inc v Otto Systems Singapore Pte Ltd* [2007] 3 SLR 40 at [17] ("*Greenline-Onyx*") for three situations where the "without prejudice" privilege would not apply:

(a) Correspondence discussing only the repayment of an *admitted* liability (rather than negotiating a compromise to a *disputed* liability).

(b) The use of a statement as an acknowledgment under s 26(2) of the Act.

(c) The reliance on clear admissions or statements of fact that did not form part of an offer to compromise.

The first represented the view of the majority of the law lords in *Bradford & Bingley* (see [20] below), and the latter two were derived from two separate minority opinions (see [33] and [34] below). I note that the Court of Appeal in *Greenline-Onyx* applied *Bradford & Bingley* in its entirety without endorsing the approach of the majority or the minority, leaving it open as to which view represented the correct balance between the "without prejudice" rule and the principle of acknowledgment. Because the contents of the letter in question clearly fall within all these formulations of principle expressed by their Lordships in *Bradford & Bingley*, the Court of Appeal was of the view that it was not necessary to decide which of the formulations ought to be followed for purposes of their judgment. Similarly, in the present case, the plaintiff argued that on all three counts, the Coface letter and the Raymond Liu e-mail were not subject to "without prejudice" privilege.

13 That left me to determine:

(a) the nature of the correspondence;

(b) whether the correspondence in question constituted an acknowledgment of the Debt for the purposes of s 26(2) of the Act; and

(c) if so, whether that constituted an exception or limitation to the "without prejudice" rule.

Before embarking on this discussion, however, I pause to consider the law on "without prejudice" privilege.

The law on "without prejudice" privilege

14 It is well settled that communications in the course of negotiations genuinely aimed at settlement of a dispute are protected by "without prejudice" privilege (*Rush & Tompkins Ltd v Greater London Council* [1989] AC 1280 at 1299 ("*Rush & Tompkins*"); approved in *Mariwu Industrial Co (S) Pte Ltd v Dextra Asia Co Ltd* [2006] 4 SLR 807 ("*Mariwu*")). *Rush & Tompkins* governs the situation in relation to third parties, whereas s 23 of the Evidence Act (Cap 97, 1997 Rev Ed) applies to parties to the negotiations (*Quek Kheng Leong Nicky v Teo Beng Ngoh* [2009] SGCA 33 at [22] ("*Nicky Quek*")). Section 23 has not been put in issue in this case. Where the "without prejudice" privilege applies to any correspondence or conversation, these are not admissible in court and may be struck out.

15 In a situation where communications are expressly made "without prejudice", such a privilege may be justified based on public policy, so that parties are encouraged to settle their differences rather than litigate them to the finish (*Mariwu* at [24]; *Greenline-Onyx* at [14]). To achieve this, parties should not be discouraged by the knowledge that anything said in the course of negotiations may be used to their prejudice in the course of proceedings; they should, on the contrary, be encouraged fully and frankly to put their cards on the table without fear of possible repercussions during future litigation, if any (*Greenline-Onyx* at [14]; *Cutts v Head* [1984] Ch 290 at 306). The "without prejudice" privilege has also been justified in contractual terms, where the parties to the negotiations have expressly or impliedly agreed that admissions in the negotiations will not be adduced in evidence (see *Mariwu* at [24]).

16 It is important to bear in mind that the attachment of a "without prejudice" label to a document does not conclusively or automatically render it privileged as it is for the court to determine the true nature of the document (*South Shropshire District Council v Amos* [1986] 1 WLR 1271). In *South Shropshire District Council v Amos* it was also held that an express attachment of a "without prejudice" label would lead to the *prima facie* inference that the document was intended to be a negotiating document. This corresponds with the position in Singapore. The Court of Appeal has recently held in *Nicky Quek* at [22] that where correspondence was marked "without prejudice", the burden of persuasion was placed on the party who contended that those words should be ignored. However, it must be emphasised that whether or not "without prejudice" privilege attaches is a question that must be answered by objectively construing the document as a whole in the context of the factual circumstances. As observed in David Vaver, "'Without Prejudice' Communications – Their Admissibility and Effect" (1974) 9 UBC Law Rev 85, an article which was cited approvingly in *Bradford & Bingley* ([12] *supra*) at [84]–[86] and by the Court of Appeal in *Nicky Quek* at [23], the words "without prejudice" are often indiscriminately used or used to achieve something quite distinct from inadmissibility, for example, where it is deployed by one or more parties to deprive a communication or act of all or a particular legal consequence which it would otherwise have or to reserve or preserve a course of action which might otherwise be prejudiced.

17 In my judgment, it is the existence of a dispute and an attempt to compromise it that is at the heart of the "without prejudice" privilege.

Nature of the correspondence

18 After a close analysis of the documents, I came to the conclusion that the Raymond Liu e-mail read with the Coface letter contained an implied admission as to the existence of the Debt and liability for it. In this sense, there was no ongoing *dispute* that would attract the application of "without prejudice" privilege. The majority's approach in *Bradford & Bingley* ([12] *supra*) serves to illustrate this.

19 In *Bradford & Bingley*, a mortgagee sued to recover from a mortgagor the shortfall between sale proceeds and the balance due under the mortgage. The mortgagor sought to rely on s 20(1) of the Limitation Act 1980 (c 58) (UK) ("the UK Limitation Act") to argue that the claim was time-barred. The mortgagor, however, had previously written two letters to the mortgagee asking for time to pay the "the outstanding balance, owed to [the mortgagee]" and stating that he was willing to pay £500 towards "the outstanding amount" as a final settlement. Those letters were not marked "without prejudice". The mortgagee relied on those letters to argue that there had been an acknowledgment under s 29(5) of the UK Limitation Act (in *pari materia* with s 26(2) of our Act). Although their Lordships upheld the principle relating to the inadmissibility of communications in the course of negotiations in *Rush & Tompkins* ([14] *supra*), they construed both letters as clear acknowledgments of the mortgagee's claim under s 29(5) of the UK Limitation Act and unanimously agreed that the letters were not privileged, albeit, articulating different approaches to the same conclusion.

20 The majority comprising Lord Walker of Gestingthorpe, Lord Brown of Eaton-under-Heywood and Lord Mance based their decision on the nature of the communications in issue. Lord Brown held that "without prejudice" privilege did not apply to apparently open communications designed only to discuss the repayment of an admitted liability rather than to negotiate a compromise to a disputed liability. The underlying public policy justification for the privilege did not apply to such communications. Lord Walker (at [39]) agreed that "without prejudice" privilege did not apply because the communications were not marked "without prejudice" and there was no dispute as to liability to be compromised, the only negotiation being directed to obtaining time for payment. Lord Mance (at [83]) put it this way:

> Here, the defendant, Mr Rashid, was not offering any concession. On the contrary, he was *seeking* one in respect of an undisputed debt. … [E]ven if Mr Rashid had been offering a lesser sum on a basis which could, if accepted, have precluded the claimant bank from pursuing the admitted larger debt … there would … still have been no relevant dispute about his indebtedness, and the "without prejudice" rule would still have had no application. [emphasis in original]

Although two of their Lordships in the majority placed some emphasis on the absence of a "without prejudice" label in arriving at their conclusion, the principle behind the majority decision was, in my view, that the communication did not attract the privilege because it was not concerned with settlement of a dispute. Hence, the public policy interest underlying "without prejudice" privilege (see [15] above) would not be furthered.

21 Here, unlike in *Bradford & Bingley* (see above at [19]), the correspondence in question was labelled "without prejudice". However, just as in *Bradford & Bingley*, the contents of the correspondence evinced no dispute as to liability or quantum and did not attract the policy justification for "without prejudice" privilege.

22 It is apparent from the contents of the Coface letter that it was intended by the plaintiff's credit re-insurers as a "proposal for settlement" of the payments owed by the defendant to the plaintiff and Bayer. The proposal suggested, *inter alia*, that "APP" procure a third party payment to the plaintiff and Bayer for a stipulated sum within 21 days of any settlement agreement. The defendant accepts that "APP" in the Coface letter was a reference to it and that Dr Liu, the addressee, was its employee. The Raymond Liu e-mail rejected the proposal and reiterated a previous proposal of the defendant which Dr Liu said was "the best [the defendant] [could] do to resolve *the overdues*" [emphasis added]. The e-mail continued to describe the previously suggested proposal for "overdue payment" to be paid by way of further purchases through Bayer or other trading firms by way of a "110% program". This proposal was eventually adopted and effected in respect of the debt owed to Bayer (see [8] above).

23 Reading the Raymond Liu e-mail in the context of the Coface letter, the "overdues" and "overdue payment" must be a reference to debts owed to Bayer and to the plaintiff. *Vis-à-vis* the plaintiff, this would have meant the Debt since there was no evidence of any other outstanding obligation between the plaintiff and the defendant. From the use of the descriptors "overdues" and "overdue payment" (akin to "outstanding balance" and "outstanding amount" in *Bradford & Bingley* (see above at [19])) it may be inferred that the defendant was not disputing the existence of the Debt. Further, the e-mail evinced no dispute whatsoever as to the quantum of the Debt. All that was discussed was *how* the payments were to be made. The principle in *Sin Lian Heng* ([11] *supra*) cited by the defendant (that the privilege may apply to disputes on the extent of liability) was therefore inapplicable.

24 The case of *Forster v Friedland* ([11] *supra*) can also be distinguished. That case concerned an alleged agreement for the defendant, Friedland, to purchase a substantial shareholding in a company. The claimant, Forster, sought to put in evidence secretly taped recordings of discussions which he had with Friedland. Friedland argued that the recordings were inadmissible as "without prejudice" communications. Forster then contended that the negotiations were not aimed at resolving the legal issues between the parties since Forster was merely seeking more time to acquire the shares. The English Court of Appeal found that the "without prejudice" rule was not limited to negotiations aimed at resolving legal issues between the parties but applied to those genuinely aimed at settlement. In that case, there was a dispute in the sense that although Friedland had indicated a wish to buy the shares, he made it clear that he was unwilling to complete the transaction at the time or in the manner said to have been agreed. Further, underlying the talks was a dispute over whether any legally binding agreement existed. The negotiations were therefore protected by "without prejudice" privilege. In the present case, there was no similar underlying dispute as to whether any legally binding obligation existed for the defendant to repay the Debt to the plaintiff. The correspondence in this case was for the sole purpose of buying time for the defendant to repay the Debt and the negotiations focused on how the Debt could be repaid. Such negotiations could not be said to be genuinely aimed at settlement of a dispute and therefore did not attract the public policy justification for "without prejudice" privilege.

25 Additionally, the alternative justification for "without prejudice" privilege, *ie*, an implied or express agreement between the parties (see [15] above), did not apply to the case at hand. Although the marking of the Coface letter and the Raymond Liu e-mail as being "without prejudice" could be said to indicate an intention on the part of both parties to keep their discussions inadmissible in court, such an intention was not consistent with the contents of the correspondence or the surrounding circumstances in which they were written. In my view, the "without prejudice" label appeared to have been used by the parties not to indicate an agreement as to inadmissibility but was introduced by the plaintiff's credit re-insurers out of an excess of caution as a means to deprive its proposal for settlement of legal effect. There was no reason for the plaintiff or its credit re-insurers to

preclude the use of the Coface letter in court since it did not contain a "proposal for settlement" in the true sense, *ie*, for the purpose of avoiding a legal dispute. Rather, the Coface letter embodied a demand for repayment framed as an offer to accept payments according to the manner stipulated. On the part of the defendant, the label could be viewed as attached simply because it was a response to the Coface letter which had been labelled as such. In this respect, *Forster v Friedland* ([11] *supra*) may be distinguished on another ground. In that case, the court had deduced from the secret recordings of the parties' discussions and the content of those discussions that the parties had demonstrated an intention for their discussions to be regarded as without prejudice. Such an intention was not evident here.

26 On the basis that there was effectively no dispute between the parties and further that there was no agreement that the correspondence in question should be inadmissible, the striking out application may be dismissed. Nevertheless, for the sake of completeness, I elaborate on two additional bases for my decision, *ie*, the Raymond Liu e-mail constituted an acknowledgment of the Debt pursuant to s 26(2) of the Act or an admission of fact that was not part of an offer to compromise.

Whether there was an acknowledgment of the Debt

27 Section 26(2) of the Act provides that:

> Where any right of action has accrued to recover any debt or other liquidated pecuniary claim, … 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. [emphasis added]

Simply stated, its purpose is to set time running afresh for a creditor to bring an action to recover a debt. According to Lord Hoffmann in *Bradford & Bingley* at [3], discussing the English equivalent of s 26(2) of the Act:

> … The acknowledgment rule plays an important part in furthering this policy [of encouraging settlements] because it means that a creditor, negotiating on the basis that his debt has been acknowledged, can proceed with the negotiations and give time to pay without being distracted by the sound of time's winged chariot behind him. It is also unfair that a debtor who does not dispute his indebtedness should be able to ask for time and use that indulgence to rely on the statute [of limitation]. …

28 Thus, the principle of acknowledgment may serve to further the same public policy interest as the "without prejudice" privilege. Otherwise, it may simply be regarded as being grounded on fairness to the creditor.

29 The Court of Appeal in *Chuan & Company Pte Ltd v Ong Soon Huat* [2003] 2 SLR 205 at [18] ("*Chuan & Company*") has held that to constitute an acknowledgment under the above section, the debt must be admitted as remaining due. In *Greenline-Onyx* ([12] *supra*) at [15]–[16], the Court of Appeal further accepted that acknowledgments are not confined to admissions of debt where liability and quantum are indisputable; there can be 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 (also see *Bradford & Bingley* ([12] *supra*) at [1], [21]–[22], [59]–[60], [79]). In determining whether a communication constitutes an acknowledgment, the communication must be construed as a whole and in its context (*Chuan & Company* at [27]).

30 I find that the Raymond Liu e-mail contained an acknowledgment within the meaning of s 26(2) of the Act because reading it in the context of the Coface letter, the defendant inferentially admitted that the Debt was remaining due (see [23] above). Although the quantum of the Debt was not stated, it could be ascertained objectively by reference to the invoices issued by the plaintiff to the defendant. It would be unfair to deprive the plaintiff of the opportunity to recover its debt based on the technical challenge of the time-bar when the defendant had, in the Raymond Liu e-mail, acknowledged the Debt and bought for itself time to repay the Debt.

31 I note at this juncture that there is no argument by the parties as to whether s 27(1) of the Act requiring acknowledgments under s 26 to be in writing and signed by the person making the acknowledgment have been met. I take it that they have since the acknowledgment was contained in the Raymond Liu e-mail, which was in writing and sent on behalf of the defendant. Further, the inclusion of Dr Liu's name at the end of the e-mail affirmed his act of signing off (see *Kim Eng Securities Pte Ltd v Tan Suan Khee* [2007] 3 SLR 195 at [52]).

Exceptions or limitations to the "without prejudice" rule

32 Having found that the Raymond Liu e-mail read with the Coface letter contained an acknowledgment of the Debt under s 26(2) of the Act, the issue then became whether this constituted an exception or limitation to the "without prejudice" rule. The minority in *Bradford v Bingley* ([12] *supra*) considered this issue in some detail. The difficulty was in finding a principle which, on the one hand, serves the public interest in allowing a creditor to give time to negotiate for payment of an admitted indebtedness without fear that his claim will become time-barred while, on the other hand, furthers the equally compelling public interest behind the "without prejudice" rule which allows the parties to speak freely in negotiations without fear that their statements will be held against them if the negotiations failed.

33 Lord Hoffmann was of the view that in so far as the "without prejudice" rule was based on general public policy, it ought not to apply to the use of a statement as an acknowledgment for the purpose of the UK Limitation Act. He explained the rationale for his solution as follows (*Bradford & Bingley* at [16], quoted in *Greenline-Onyx* at [18]):

> The solution … is that the without prejudice rule, so far as it is based upon general 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 section 29(5). That … is what everyone thought in *Spencer v Hemmerde* [1922] 2 AC 507. It is in accordance with principle because the main purpose of the rule is to prevent the use of anything said in negotiations as evidence of anything expressly or impliedly admitted: that certain things happened, that the party concerned thought he had a weak case and so forth. But when a statement is used as an acknowledgment for the purposes of section 29(5), it is not being used as *evidence* of anything. The statement is not evidence of an acknowledgment. It *is* the acknowledgment. It may, if admissible for that purpose, also be evidence of an indebtedness when it comes to deciding this question at the trial, but for the purposes of section 29(5) it is not being used as such. All that an acknowledgment does under section 29(5) is to allow the creditor to proceed with his case. It lifts the procedural bar on bringing the action. Questions of evidence to prove the debt will arise later. [emphasis as in original]

34 Lord Hope of Craighead held the view that the rule did not cover clear admissions or statements of fact that did not form part of an offer to compromise, and that the letters in *Bradford & Bingley*, which had not been written in the context of any dispute regarding the debt or any attempt to compromise any such dispute but had contained expressions and unequivocal admissions of the

existence of debt, did not attract the privilege.

35 The defendant had no answer to these formulations of principle which (together with that of the majority) the Court of Appeal had adopted in *Greenline-Onyx* (see [12] above). Being guided by that decision, I likewise applied the approaches outlined by Lord Hoffmann and Lord Hope to the facts of the present case. Having found that the Raymond Liu e-mail read with the Coface letter contained an acknowledgment within the meaning of s 26(2) of the Act, according to Lord Hoffmann, the correspondence would then be admissible for the purposes of proving the acknowledgment. As for Lord Hope's formulation, here, the implied admission that the Debt remained due and owing was a statement of fact; it did not form part of an offer to compromise because there was no evidence that there was any dispute as to the existence or quantum of the Debt. Therefore, this statement did not attract "without prejudice" privilege.

36 As mentioned at [12] above, however, *Greenline-Onyx* did not decide which of the three approaches enunciated in *Bradford & Bingley* struck the correct balance between the "without prejudice" rule and the acknowledgment rule. This will have to await future consideration by the Court of Appeal when a suitable case arises. But for my part, I would prefer the approach of the majority, in particular that of Lord Mance (see [20] above), especially since Lord Hoffmann's formulation (but not Lord Hope's) has been disapproved of in the recent case of *Ofulue v Bossert* [2009] 2 WLR 749.

Whether the plaintiff had made out a *prima facie* case as to the defendant's liability for the Debt

37 In order to succeed in its summary judgment application, the plaintiff had to show a *prima facie* case before the defendant was called upon to show cause why summary judgment ought not to be granted, usually by identifying triable issues.

38 I found that the plaintiff had made out a *prima facie* case by putting in evidence the 16 unpaid invoices comprising the Debt, along with their corresponding purchase orders, bills of lading and bills of exchange. I also took note that in *Cytec Industries Pte Ltd v Asia Pulp & Paper Co Ltd* ([4] *supra*) (proceedings related to a guarantee provided by APP Singapore over the Debt), APP Singapore, which controlled and owned the defendant, did not dispute the Debt. Further, I had found in relation to Registrar's Appeal No 174 of 2009 that the defendant had in fact acknowledged and admitted to the Debt in the Raymond Liu e-mail. In that same e-mail, the defendant had also acknowledged its debt to Bayer; this was consistent with the defendant's position in *Lanxess Pte Ltd* ([8] *supra*) where it admitted to its debt to Bayer and only disputed whether it had been validly assigned. All these bolstered the plaintiff's case that the defendant was liable for the Debt.

39 The defendant failed to raise a triable issue as to its liability for the Debt because all it did was to "not admit" that the 16 invoices comprising the Debt were rendered and to "not admit" that the Debt remained owing. This was certainly not sufficient to show a dispute on the facts.

40 It remained for me to consider whether there were other triable issues as to the defence of time-bar and laches.

Whether the plaintiff's claim was time-barred

41 As mentioned above at [27], s 26(2) of the Act sets time running afresh for a creditor to bring an action in court. As I found that there was an acknowledgment of the Debt in the Raymond Liu e-mail read in the context of the Coface letter (above at [30]), time would begin to run from 2 August 2001. That brought the plaintiff's claim within the six-year limit imposed by s 6(1) of the

Act. The defence of time-bar would consequently fail.

42 On that basis, on further reflection, I should perhaps have granted judgment for the plaintiff. However, after hearing Registrar's Appeal No 173 of 2009, I saw no need to disturb the AR's finding that the defence of time-bar was at best shadowy and her order that the defendant be granted conditional leave to defend on 11 of the 16 invoices which could possibly be excluded by s 6(1) of the Act. This was particularly so as judgment had already been entered against the defendant in respect of the 11 invoices on 20 May 2009 for failing to comply with the condition imposed.

Whether the defence of laches was applicable

43 In a nutshell, the defendant relied on a decision of the English Court of Appeal, *Habib Bank Ltd v Habib Bank AG Zurich* [1981] 1 WLR 1265 ("*Habib Bank*"), to argue that the principle of laches applied equally to equitable and legal rights. The defendant asserted that taking the modern broad approach, which involved considering the period of delay, the extent to which the defendant's position had been prejudiced and the extent to which that prejudice was caused by the actions of the plaintiff (*Nelson v Rye* [1996] 1 WLR 1378 at 1392), it was inequitable for the plaintiff to bring the present claim because it had not provided any explanation for the delay of approximately six years and this had caused the defendant to be handicapped in defending the action because it could no longer find documents relevant to the claim or locate the personnel which were involved in the material transactions.

44 The plaintiff took the position that the Court of Appeal, in *Scan Electronics (S) Pte Ltd v Syed Ali Redha Alsagoff* [1997] 3 SLR 13 at [19] ("*Scan Electronics*"), had agreed with the trial judge that laches, being an equitable defence, had no place in the context where the claimant was asserting rights at law. Such a defence was therefore inapplicable to its claim for the Debt, which was a legal right. In any event, the plaintiff also argued that no triable issue had been raised because there was no evidence that the delay in bringing the claim had caused prejudice to the defendant. On the contrary, the defendant was merely trying to avoid paying the Debt. It was significant that, earlier, the defendant had inconsistently sought to stay the present action on the basis that Indonesia was the more appropriate forum *as voluminous documentary evidence and all the relevant witnesses were located in Indonesia*.

45 I came to the conclusion that the defence of laches was not applicable to the present factual matrix and hence could not present any triable issue. Additionally, the defendant failed to satisfy me that there was a fair or reasonable probability that it had a real or *bona fide* defence of laches because of the inconsistent positions it had taken on the availability of evidence in the course of the entire proceedings.

46 Laches is a doctrine of equity. It is properly invoked where essentially there has been a substantial lapse of time coupled with circumstances where it would be practically unjust to give a remedy either because the party has by his conduct done that which might fairly be regarded as equivalent to a waiver thereof; or, where by his conduct and neglect he had, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him, if the remedy were afterwards to be asserted (*Sukhpreet Kaur Bajaj d/o Manjit Singh v Paramjit Singh Bajaj* [2008] SGHC 207 at [23]; *Re Estate of Tan Kow Quee* [2007] 2 SLR 417 at [32]). This is a broad-based inquiry and it would be relevant to consider the length of delay before the claim was brought, the nature of the prejudice said to be suffered by the defendant, as well as any element of unconscionability in allowing the claim to be enforced (*Re Estate of Tan Kow Quee* at [38]). Although simply stated, the application of the doctrine requires some attention.

47 Warren LH Khoo J, in *Syed Ali Redha Alsagoff v Syed Salim Alhadad* [1996] 3 SLR 410 at 423, held that laches was essentially an equitable defence in answer to a claim in equity; hence, where in that case the claim by the plaintiff as the administrator *de bonis non* was a claim to assert rights at law of the estate over the property, the defence of laches had no place. According to Khoo J, this was a case where the maxim equity follows the law aptly applied. In an appeal against this decision, *Scan Electronics* ([44] *supra*), the Court of Appeal stated (at [19]) in respect of the argument of laches that it "entirely agree[d]" with the trial judge. It then concluded (at [20]) that:

> … unreasonable delay or negligence in pursuing a right or claim, *particularly an equitable one*, may be held to disentitle the plaintiff to relief. … [emphasis added].

The defendant relied upon that statement for support of its contention that the doctrine of laches applies even when the claimant was asserting a right at law. To my mind, that reading of the judgment was untenable as it was inconsistent with the Court of Appeal's unequivocal endorsement of Khoo J's holding. What, perhaps, the Court of Appeal left unsaid was that laches may also bar entitlement to equitable remedies in aid of a legal right or claim (see John McGhee QC, *Snell's Equity* (Sweet & Maxwell, 31st Ed, 2005) at para 5-18 ("*Snell's Equity*")).

48 The rationale behind this principle becomes clear when one considers the evolution of the doctrine of laches and the Act. Historically, early limitation statutes only applied to courts of common law (*Snell's Equity* at para 5-17). The courts of equity applied the maxim *vigilantibus, non dormientibus, jura subveniunt* (equity aids the vigilant and not the indolent) to control flagrant abuses of its procedure (*ibid*, at para 5-16). Delays sufficient to prevent a party from obtaining an equitable remedy were technically called "laches" (*ibid*). However, today, the Act (based largely on the UK Limitation Act which developed from early limitation statutes) prescribes limitation periods for certain equitable rights, such as claims for non-fraudulent breach of trust (six years) (see s 22(2) of the Act). Although it is plain that the Act does not affect the equitable jurisdiction of the court to refuse relief on the ground of laches (*per* s 32 of the Act), where there is a statutory limitation period operating expressly or by analogy, the plaintiff is generally entitled to the full statutory period before his claim, whether legal or equitable, becomes unenforceable (*Tay Tuan Kiat v Pritnam Singh Brar* [1986] SLR 290 at 293, citing *In Re Pauling's Settlement Trusts* [1964] Ch 303). This was another application of the maxim equity follows the law. However, the court retains a discretion to refuse to grant an equitable remedy in aid of a legal right even though the right is subject to a statutory period which has not expired (*Snell's Equity* at para 5-18). In my view, such a discretion was exercised in *British and Malayan Trustees Ltd v Sindo Realty Pte Ltd* [1998] 2 SLR 495 at [64]. Additionally, where there are equitable claims to which no statutory limitation period applies (see, *eg*, *Re Estate of Tan Kow Quee* ([46] *supra*) concerning the recovery of trust property by the beneficiary from the trustee), these would naturally be covered by the doctrine of laches.

49 Contrary to what the defendant argued, the case of *Habib Bank* ([43] *supra*) does not stand for the proposition that the doctrine of laches applies equally to legal rights as it does to equitable rights. All that was said in that case was that the application of the doctrine of laches did not depend on whether one was asserting an equitable right or enforcing a legal right by equitable means. The English Court of Appeal (at 1285) regarded this distinction as both archaic and arcane and held that the law had developed a far broader approach to laches, *ie*, that enunciated at [46] above, that did not depend upon the historical accident of whether the particular right was first recognised by the common law or was invented by the Court of Chancery. This must be correct because in both instances, the equitable jurisdiction of the court is invoked.

50 Here, just as in *Scan Electronics* ([44] *supra*), a legal remedy was sought to enforce a legal right, and the defence of laches had no application. Further, this was a case where the Act

prescribed a particular statutory bar (s 6(1) read with s 26(2) of the Act) and considering all the circumstances of the case, in particular the inconsistent positions taken by the defendant in respect of the existence of supporting evidence, there was no reason for equity to intervene. In fact, this was a case which warranted the robust approach to summary judgment described in *Hua Khian Ceramics Tiles Supplies Pte Ltd v Torie Construction Pte Ltd* [1992] 1 SLR 884 and reiterated in *MP-Bilt Pte Ltd v Oey Widarto* [1999] 3 SLR 592 at [13]–[14].

Conclusion

51 For the foregoing reasons, I dismissed Registrar's Appeals Nos 173 and 174 of 2009 with costs.