Yam Kong Seng & Anor v Yee Weng Kai

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02–22–05 OF 2013(W)
RICHARD MALANJUM CJ (SABAH AND SARAWAK), ABDULL HAMID EMBONG, SURIYADI, ZALEHA ZAHARI AND ABU SAMAH FCJJ
19 MAY 2014

Civil Procedure — Admission — Judicial admission made in a pleading — Higher footing than evidentiary admission — Failure to rebut admission — Whether opponent may enter judgment — Debt admitted in statement of defence — Whether amounting to judicial admission of liability

Evidence — Admissibility of evidence — Electronic evidence — Information contained in short messaging service ('SMS') — Whether electronic message admissible — Whether requirement of signatures satisfied in electronic messages — Electronic Commerce Act 2006 s 8

Limitation — Accrual of cause of action — Acknowledgment of debt by defendant — Whether acknowledgement by way of short messaging service ('SMS') valid — Limitation Act 1953 s 27(1)

Statutory Interpretation — Retrospective operation — Procedural statute to be construed retrospectively — Whether retrospective or prospective in effect — Procedural provisions — Presumption of prospective effect — Whether applicable to provisions dealing with procedure

The plaintiffs had engaged the services of the first defendant ('the company') through the second defendant ('the defendants') to construct a factory. Due to the capital control requirements and in order to facilitate progressive payments, the monies meant for the progressive payments amounting to RM1,310,000 were deposited in the company's account in RHB Bank Bhd. By December 1999 the construction of the factory was completed and after progressive payments had been made, the company confirmed that the outstanding amount due to be refunded to the appellant was RM589,055.61 ('the outstanding sum'). However, the defendants failed to refund the outstanding sum. On 14 November 2005 the plaintiffs had by a Short Messaging Service ('SMS') demanded from the defendants the return of the outstanding sum. On 5 September 2006, the second defendant, by SMS ('the defendants' SMS'), sent to the plaintiffs the following message: 'Eddy sorry hear ur father death,

regarding the loan repayment sorting soon not 2 wory now Im in uk, London next week.' As the outstanding sum was still not refunded, the plaintiffs filed this action. The second defendant claimed that the plaintiffs' cause of action arose in 1999 and since the writ was filed on 7 March 2008, the action was time barred. Paragraph 8 of the defence read as follows: 'Further defendants 1 & 2 aver that the defendants were ready and willing at all material time to settle the said amount within six months but as there was no mutual agreement as to a fixed rate of interest or whether there was any interest at all, the date of breach was not fixed, and lack of a unequivocal written demand all of which put the whole outstanding sum for repayment in dispute ...'. The plaintiffs' claimed that the defendants' SMS message clearly acknowledged the debt. The High Court held that the defence of time bar was not made out by virtue of the defendants' SMS being sent out acknowledging the debt. It was held that time started to run afresh from that date. The Court of Appeal in allowing the second defendant's appeal, held that the defendants' SMS was not an unequivocal admission of a subsisting debt. The Court of Appeal further held that the SMS being an electronic short message could not be said to be in writing and was not signed as required by s 27(1) of the Limitation Act 1953 ('the Act'). Aggrieved by the decision of the Court of Appeal, the plaintiffs obtained leave to appeal to the Federal Court on the following questions of law: (a) whether an admission by a party in a pleading that he is ready and willing to repay a debt is a judicial admission of his liability in respect of such debt; and (b) whether a SMS issued by an individual acknowledging a debt, is in law an acknowledgment within the meaning of s 27(1) of the Act.

Held, allowing the appeal with costs:

(1) It is trite law that a judicial admission made in a pleading stands on a higher footing than evidentiary admission with the respondent's admission therein be made the foundation of the rights of the parties. Any failure on the part of the respondent to rebut the admission to avoid the legal consequences of his admission would entitle the appellants to enter judgment against him. Perusing the defence in particular para 8, there was clear judicial admission of the debt owed. With there being judicial admission by the respondent sufficient to hold him liable to the amount claimed, the first question was answered in the positive (see paras 16–18).

(2) The defendants' SMS was a reply to the plaintiffs' demand of payment of the debt. The defendants' SMS reflected the intention of the parties clearly and unambiguously. There was no difficulty in putting into effect what they had bargained for on reading the words of the SMS. The intention of the second defendant in the defendants' SMS was clear in that there was an acknowledgment of a debt which fell within the meaning of s 27(1) of the Act (see para 19)

(3) Section 8 of the Electronic Commerce Act 2006 ('ECA') provides that where any law requires information to be in writing, the requirement of the law is fulfilled if the information is contained in an electronic message that is accessible and intelligible so as to be usable for subsequent reference. A message from an SMS, with all the attributes of s 8 being present viz accessibility, intelligible and extractable for subsequent reference, such an electronic message is as good as in writing(see para 26).

(4) Signatures need not be written. Suffice if there be any mark, written or not, which identifies the act of the party, perhaps in the form of mark or by some distinguishing feature peculiar only to that person, then the acknowledgment has been signed. Analogically, the conventional paper is substituted by the mobile phone, which holds features that can preserve information or transmissions in the like of the SMS, with the telephone number representing the caller or the sender of some message. The legal requirement for a signature was fulfilled as the sender was adequately identified let alone admitted by him(see paras 35–37).

(5) The presumption of statutes being prima facie prospective, does not apply to provisions dealing with procedure, which includes evidence. In the circumstances of this appeal ss 5, 6, 8 and 9 of the ECA are procedural provisions and applicable to future hearings even though the matters arose before those sections were promulgated(see para 41).

[Bahasa Malaysia summary

Plaintif-plaintif telah menggunakan perkhidmatan defendan pertama ('syarikat tersebut') melalui defendan kedua ('defendan-defendan') untuk membina kilang. Akibat daripada keperluan kawalan modal dan bagi tujuan memudahkan bayaran ansuran, wang yang dimaksudkan untuk bayaran ansuran berjumlah RM1,3100,000 telah didepositkan ke dalam akaun syarikat tersebut di RHB Bank Bhd. Menjelang Disember 1999, pembinaan kilang itu telah siap dan selepas bayaran ansuran dibuat, syarikat tersebut mengesahkan bahawa baki jumlah harus kena dibayar untuk dibayar balik kepada perayu sebanyak RM589,055.61 ('baki jumlah tersebut'). Walau bagaimanapun, defendan-defendan telah gagal untuk membayar balik baki jumlah tersebut. Pada 14 November 2005 plaintif-plaintif telah melalui Perkhidmatan Pesanan Ringkas ('SMS') menuntut daripada defendan-defendan memulangkan baki jumlah tersebut. Pada 5 September 2006, defendan kedua, melalui SMS ('SMS defendan-defendan'), telah menghantar kepada plaintif-plaintif pesanan berikut: 'Eddy sorry hear ur father death, regarding d loan repayment sorting soon not 2 wory now Im in uk, London next week.' Oleh kerana baki jumlah tersebut masih belum dibayar balik, plaintif-plaintif telah memfailkan tindakan ini. Defendan kedua mendakwa bahawa kausa tindakan plaintif-plaintif timbul pada 1999 dan oleh kerana writ telah difailkan pada 7 Mac 2008, tindakan itu telah luput had masa. Perenggan 8 kepada pembelaan berbunyi seperti berikut: 'Further defendants 1 & 2 aver that the defendants

were ready and willing at all material time to settle the said amount within six months but as there was no mutual agreement as to a fixed rate of interest or whether there was any interest at all, the date of breach was not fixed, and lack of a unequivocal written demand all of which put the whole outstanding sum for repayment in dispute ...'. Plaintif-plaintif mendakwa bahawa pesanan SMS defendan-defendan jelas mengakui hutang itu. Mahkamah Tinggi memutuskan bahawa pembelaan luput had masa tidak boleh diterima menurut SMS defendan-defendan yang telah dihantar mengakui hutang itu. Adalah diputuskan bahawa masa bermula semula dari tarikh tersebut. Mahkamah Rayuan dalam membenarkan rayuan defendan kedua, memutuskan bahawa SMS defendan-defendan bukan pengakuan jelas berhubung hutang yang ada. Mahkamah Rayuan selanjutnya telah memutuskan bahawa SMS itu yang merupakan pesanan ringkas elektronik tidak boleh dikatakan adalah bertulis dan tidak ditandatangani sebagaimana dikehendaki oleh s 27(1) Akta Had Masa 1953 ('Akta tersebut'). Terkilan dengan keputusan Mahkamah Rayuan, plaintif-plaintif memperoleh kebenaran untuk merayu ke Mahkamah Persekutuan berdasarkan persoalan-persoalan perundangan berikut: (a) sama ada pengakuan oleh satu pihak dalam pliding bahawa dia bersedia dan sanggup membayar balik hutang adalah pengakuan kehakiman tentang liabilitinya berkaitan hutang tersebut; (b) sama ada SMS yang dikeluarkan oleh individu mengakui hutang, adalah pengakuan dalam maksud s 27(1) Akta tersebut.

Diputuskan, membenarkan rayuan dengan kos:

(1) Adalah undang-undang tetap bahawa pengakuan kehakiman yang dibuat dalam pliding adalah lebih kukuh daripada pengakuan keterangan yang mana pengakuan responden itu dijadikan asas hak-hak untuk pihak-pihak itu. Apa-apa kegagalan di pihak responden untuk mematahkan pengakuan itu untuk mengelak akibat perundangan berhubung pengakuannya akan memberi hak kepada perayu-perayu untuk memasuki penghakiman terhadapnya. Setelah meneliti pembelaan khususnya perenggan 8, jelas terdapat pengakuan kehakiman berhubung hutang yang perlu dibayar. Dengan adanya pengakuan kehakiman oleh responden yang mencukupi untuk mendapatinya bertanggungjawab terhadap jumlah yang dituntut, persoalan pertama telah dijawab secara positif (lihat perenggan 16–18).

(2) SMS defendan-defendan adalah jawapan kepada tuntutan plaintif-plaintif berhubung bayaran hutang itu. SMS defendan-defendan menggambarkan niat pihak-pihak adalah jelas dan tanpa sebarang keraguan. Tiada kesukaran unuk memutuskan apa yang mereka inginkan daripada pembacaan perkataan-perkataan SMS itu. Niat defendan kedua dalam SMS defendan-defendan adalah jelas bahawa terdapat pengakuan berhubung hutang yang terangkum dalam maksud s 27(1) Akta tersebut (lihat perenggan 19).

(3) Seksyen 8 Akta Elektrik Komersial 2006 ('AEK') memperuntukkan bahawa mana-mana undang-undang memerlukan maklumat secara bertulis, keperluan undang-undang perlu dipatuhi jika maklumat itu terkandung dalam pesanan elektronik yang boleh diakses dan difahami agar boleh digunakan untuk rujukan selanjutnya. Suatu pesanan daripada SMS, dengan semua elemen-elemen s 8 yang ada iaitu boleh diakses, difahami dan dipetik untuk rujukan berikutnya, pesanan elektronik sebegini adalah sebaik bertulis (lihat perenggan 26).

(4) Tandatangan tidak perlu secara bertulis. Adalah mencukupi jika terdapat apa-apa tanda, bertulis atau tidak, yang mengenali perbuatan pihak , mungkin dalam bentuk tanda atau melalui apa-apa ciri tertentu untuk membezakan orang itu sahaja, maka pengakuan itu telah ditandatangani. Secara analogi, kertas konventional telah diganti oleh telefon bimbit, yang mempunyai ciri-ciri yang boleh menyimpan maklumat atau transmisi seperti SMS, yang mana nombor telefon mewakili pemanggil atau penghantar pesanan itu. Keperluan undang-undang untuk ditandatangan dipatuhi kerana penghantar itu telah dikenal pasti sewajarnya malah diakui olehnya (lihat perenggan 35–37).

(5) Andaian statut yang secara prima facie prospektif, tidak terpakai kepda peruntukan-peruntukan berkenaan prosedur, iaitu termasuklah keterangan. Dalam keadaan rayuan ini, ss 5, 6, 8 dan 9 AEK adalah peruntukan-peruntukan prosedur dan boleh terpakai kepada perbicaraan masa hadapan meskipun perkara-perkara yang wujud berdasarkan seksyen-seksyen tersebut telah diisytiharkan (lihat perenggan 41).]

Notes

For a case on acknowledgement of debt by defendant, see 9 *Mallal's Digest* (4th Ed, 2012 Reissue) para 2138.

For a case on procedural statute to be construed retrospectively, see 11 *Mallal's Digest* (4th Ed, 2013 Reissue) para 2113.

Cases referred to

Abdul Manaf Mohd bin Ghows & Ors v Nusantara Timur Sdn Bhd & Ors [1997] 3 MLJ 661; [1997] 4 CLJ 437, CA (folld)

Bank of India, Petitioner v James Fernandez and Anor AIR 1988 Kerala 89, HC (refd)

Central Bank of India v Hartford Fire Insurance AIR 1965 SC 1288, SC (refd)

Kamala Devi v Seth Takhatmal AIR 1964 SC 859, SC (refd)

Morello Sdn Bhd v Jaques (International) Sdn Bhd [1995] 1 MLJ 577; [1995] 2 CLJ 23, FC (refd)

Morton v Copeland (1855) 16 CB 517 (refd)

PP v Datuk Haji Harun bin Haji Idris [1977] 1 MLJ 14 (refd)

SM Integrated Transware Pte Ltd v Schenker Singapore (Pte) Ltd [2005] 2 SLR 651, HC (refd)
Satish Mohan Bilal v State of UP AIR 1986 All 126 ; 1985 All CJ 507 (refd)
Selangor United Rubber Estates Ltd v Craddock and Others (No2) [1968] 1 All ER 567, Ch D (refd)
Setapak Heights Development Sdn Bhd v Tekno Kota Sdn Bhd [2006] 3 MLJ 131; [2006] 2 CLJ 337, CA (refd)

Legislation referred to

Companies Act 1948 [UK] s 167, 167(2)
Companies Act 1967 [UK] s 50
Electronic Commerce Act 2006 ss 5, 6, 8, 9, 9(1)(a), (b), (c)
Evidence Act 1950
Interpretation Acts 1948 and 1967 ss 3, 17A
Limitation Act 1953 ss 26(2), 27(1)

Appeal from: Civil Appeal No W-02–2935 of 2010 (Court of Appeal, Putrajaya)

Malik Imtiaz Sarwar (Ronnie Yoon, ML Wong, Jenine Gill and Pavendeep Singh with him) (Scully Yoon) for the appellant.
M Menon (Kamaldip Kaur wih him) (David Lingam & Co) for the respondent.

Suriyadi FCJ (delivering judgment of the court):

[1] By an agreement entered into between the plaintiffs ('the appellants') and the defendants in 1997, the appellants had engaged the services of the first defendant ('the company') through the second defendant ('the respondent') to build and construct a factory on a piece of land bearing the postal address of Lot 6486 No 2 Jalan PJS 3/2, Taman Medan, Mukim Petaling, off Old Klang Road, 46000 Petaling Jaya, Selangor Darul Ehsan ('the said land'). For easy reference, collectively the company and the respondent will be referred to as the defendants.

[2] Due to the requirements demanded by capital control measures imposed by the Malaysian Central Bank, and in order to facilitate progressive payments in respect of the construction of the factory, the appellants and the defendants agreed that monies meant for the progressive payments be deposited in the company's account in RHB Bank Bhd. The sum deposited in September 1998 was RM1,310,000.

[3] By December 1999 the construction of the factory was completed and after progressive payments had been made, the company vide a letter dated 17 December 1999 duly signed by the respondent, confirmed that the

outstanding amount due to be refunded to the appellant was RM589,055.61 ('the outstanding sum'). This sum was not promptly refunded and a grace period of six months was granted to the defendants to refund it. Exchanges took place and on 14 November 2005 the appellants had by a Short Messaging Service ('SMS') demanded from the defendants the return of the outstanding sum together with the agreed interest as compensation by 24 December 2005. On 5 September 2006, the respondent by an SMS sent to the appellants the following message (verbatim):

> Eddy sorry hear ur father death, regarding d loan repayment sorting soon not 2 wory now Im in uk London next week.

[4] As the outstanding sum was still not refunded the appellants filed the action against the defendants. The accumulated sum claimed by the appellants totalled RM1,531,538.93 as at 31 December 2007. In substance the appellants' case was that the above SMS message clearly acknowledged the debt, and expressly admitted that the respondent was aware of the outstanding sum and the agreed interest as compensation, due and payable to the appellants. The appellants also pleaded that on 28 December 2007 the defendants had acknowledged the debts.

[5] Much of the agreed issues at the High Court centred on the acknowledgment in the SMS viz whether it was a fresh acknowledgment, and its effect under the Limitation Act 1953 ('the Act'), the issue of limitation being the mainstay of the respondent's defence. The respondent pleaded that the appellants' cause of action arose on 7 July 1999, or when the factory was handed over also in 1999, or 17 December 1999 when the company issued a letter together with the statement of account. The writ was filed on 7 March 2008. Therefore by the time the action was filed limitation had set in. The eventual High Court's decision on 22 September 2010 was in favour of the appellants.

[6] The learned trial judge found the following. The appellants had placed RM1,310,000 in the name of the company and upon completion of the factory's construction a final progressive claim was paid out. The final amount paid out was RM434,169.85 thus leaving a balance of RM589,055.61. The company vide letter dated 17 December 1999, duly signed by the respondent, stated that the amount was due to be refunded to the appellants. The learned judge held that the defence of time bar was not made out by virtue of the 5 September 2006 SMS being sent out acknowledging the debt. The authenticity of the SMS was verified and the respondent had admitted sending out the SMS to the appellant. The learned judge held that time started to run afresh from that date. Even though the respondent had asserted that there was no privity of contract between the appellants and him the letter of 17 December 1999, signed by him was clearly issued to one 'Mr Yam Kong

Seng and Family' and clearly stated that the 'Balance payable to 'Yarn's Family RM589,055.61'. The respondent and the company were thus precluded from taking the point of privity. The respondent thereupon was ordered to pay the judgment sum of RM589,055.61 with interest at 1% per month.

[7] The company filed no appeal as it was wound up even before judgment was entered against it. The respondent on the other hand appealed to the Court of Appeal. On 30 January 2012 the appeal was unanimously allowed by the Court of Appeal with costs and the High Court's order was set aside.

[8] In allowing the appeal the Court of Appeal, inter alia, adjudged that s 26(2) of the Act recognised the right of action in cases where the debtor acknowledged the claim, or made any payment in respect thereof, which shall be deemed to have accrued on and not before the date of the acknowledgement. In short, in order to constitute a valid acknowledgement for the purpose of s 26(2) of the Act there must be evidence to show that there was an unequivocal admission of a subsisting debt by the respondent at the time of the acknowledgment. The Court of Appeal disagreed that the said SMS was an unequivocal admission of a subsisting debt, as it did not quantify the debt in figures nor was it capable of ascertainment by calculation or by extrinsic evidence. Further, the SMS was ambiguous and unclear as it referred to the 'loan repayment', an issue which was pleaded, the Court of Appeal further held that the SMS being an electronic short message could not be said to be in writing and was not signed as required by s 27(1) of the Act. Though it could have come from the respondent's hand phone that did not necessarily mean that he actually sent out the message. That being so the SMS could not in law amount to a valid acknowledgement of the debt claimed by the appellants against the respondent. On that premise the appellants' action had exceeded the six years period and hence was time barred. There was no evidence, either in the form of document or otherwise adduced during the trial to show that the respondent had held himself out to be personally liable for the amount claimed by the appellants. The liability to refund or to repay the amount claimed by the appellants was with the company and not with the respondent.

[9] Aggrieved by the decision of the Court of Appeal, the appellants successfully obtained leave to appeal to the Federal Court on 23 April 2013, on the following questions of law:

(a) whether an admission by a party in a pleading that he is ready and willing to repay a debt is a judicial admission of his liability in respect of such debt; and

(b) whether a message sent by Short Messaging Service (SMS) issued by an individual acknowledging a debt is in law an acknowledgment within the meaning of s 27(1) of the Limitation Act 1953.

A

THE POSITIONS TAKEN UP BY PARTIES BEFORE US

[10] The appellants reiterated that their claim was premised on the fact that they had engaged the company through the respondent, who was the managing director of the company, to build a factory on the said land. By September 1998 the appellants had transferred and deposited monies totalling RM1,310,000 to the company to facilitate the progressive payment for work done for the construction of the factory. There was no dispute as to that deposit.

B

C

[11] The construction of the factory was completed in December 1999. The appellants paid the final amount of RM434,169.85 thereby leaving a balance of RM589,055.61. The company vide letter dated 17 December 1999 also acknowledged that the latter sum was the amount outstanding and due to be refunded to the appellants. An earlier letter of 12 December 1999 stated that the final amount due to the company was RM480,977.17, with the amount due to be refunded to the appellants being RM589,055.61. Notwithstanding these letters the company and the respondent failed to refund the balance.

D

E

[12] The respondent went on the argument that though he and the company were ready and willing to settle the said amount, the absence of an agreement on the rate of interest and lack of unequivocal written demand had hindered the return of the refundable sum. He also averred that the appellants in not pursuing their claim promptly were guilty of acquiescence, waiver, and laches and that the claim was statute barred. Further, the respondent took the simplistic approach of contending that he was not to be held accountable for any liability, on account of being a mere director and an agent to the company. The liability if any was the sole responsibility of the company. In support of its case the case of *Abdul Manaf Mohd bin Ghows & Ors v Nusantara Timur Sdn Bhd & Ors* [1997] 3 MLJ 661; [1997] 4 CLJ 437 was referred to by the respondent.

F

G

[13] In respect of the issue of limitation, the appellants reiterated the stand that the SMS sent by the respondent via his mobile to the first appellant's mobile number amounted to a fresh acknowledgement of the debt due, with time beginning to start afresh. As regards the defence on acquiescence, waiver, and laches, though pleaded, were abandoned by the respondent.

H

I

BASIC FINDINGS

[14] We find that the parties were not disputing the existence of an agreement in respect of the construction of the said factory or that payments

had been made out to the company. The main issues left for consideration were whether there was a judicial admission and whether the respondent could be held liable for the claimed sum.

THE FIRST QUESTION

[15] To enable us to ascertain whether there was a judicial admission we need to refer to para 8 of the defence. It reads as follows:

> 8 ... Further Defendants 1 & 2 aver that the Defendants were ready and willing at all material time to settle the said amount within six months hut as there was no mutual agreement as to a fixed rate of interest or whether there was any interest at all, the date of breach was not fixed, and lack of a unequivocal written demand all of which put the whole outstanding sum for repayment in dispute ...

[16] The above averment was in response to para 12 of the statement of claim wherein the appellants averred that the company and the respondent had confirmed in writing of the amount owing and payable to them. It is trite law that a judicial admission made in a pleading stands on a higher footing than evidentiary admission *(Sarkar's Law of Evidence)* with the respondent's admission therein be made the foundation of the rights of the parties (*Satish Mohan Bilal v State of UP* AIR 1986 All 126, at p 128; 1985 All CJ 507). Any failure on the part of the respondent to rebut the admission to avoid the legal consequences of his admission would entitle the appellants to enter judgment against him.

[17] Having perused the defence in particular para 8, we find that there is clear judicial admission of the debt owed. The question that must follow would be whether the respondent was avoiding responsibility to pay up. In *Jacob and Goldrein's Pleadings: Principles and Practice* [1990] pp 133–134 in dealing with confession and avoidance, the following is stated:

> Confession and Avoidance Meaning
>
> The term 'confession and avoidance' is the description of a plea in the defence which, while expressly or impliedly admitting or confessing or assuming the truth of the material facts alleged in the statement of claim, seeks at the same time to avoid or destroy the legal consequences of those facts. The plea is invoked by alleging fresh or additional facts to establish some legal justification or excuse, or some other ground for avoiding or escaping legal liability. The defendant, as it were, confesses the truth of what is alleged against him but proceed immediately to 'avoid' the effect of such allegations.

[18] Having scrutinised the defence we find that the respondent has failed to avoid legal liability. With there being judicial admission by the respondent sufficient to hold him liable to the amount claimed the answer to the first question of law in this appeal must be answered in the positive.

THE SECOND QUESTION

[19] We now touch on the second question for our determination. To appreciate this question it is necessary for us to refer to the chronology of events that led to the SMS being sent to the appellants by the respondent. The appellants pleaded that the respondent had on behalf of himself and the company sent to the first appellant the abovementioned SMS on 5 September 2006. The SMS was a reply to the first appellant's demand of payment of the debt and the interest due and owing to the appellants. The SMS though short, reflected the intention of the parties clearly and unambiguously. There was no difficulty in putting into effect what they had bargained for on reading the words of the SMS (*Morello Sdn Bhd v Jaques (International) Sdn Bhd* [1995] 1 MLJ 577; [1995] 2 CLJ 23; *Central Bank of India v Hartford Fire Insurance* AIR 1965 SC 1288; *Setapak Heights Development Sdn Bhd v Tekno Kota Sdn Bhd* [2006] 3 MLJ 131; [2006] 2 CLJ 337). The court in *Kamala Devi v Seth Takhatmal* AIR 1964 SC 859 opined:

> If the language is clear and unambiguous and applies accurately to existing facts, it shall accept the ordinary meaning, for the duty of the Court is not to delve deep into the intricacies of the human mind to ascertain one's undisclosed intention, but only to take the meaning of the words used by him, that is to say his expressed intentions.

[20] Currently acknowledgment, documentary or otherwise, may come in the form of an affirmation by thumb prints (openly accepted by courts to cater to the needs of the unfortunate and illiterates), identifiable voice evidence from tape recorders, CCTV, video-conferencing (made permissible by the Evidence Act 1950) and the like. Malaysia is no more the laggard in this technologically fast moving world and gone are the archaic days when literal interpretations of the law were the order of the day. Despite the acceptance of modern construction and purposive approach in cases or statutes, before an acknowledgment is accepted by courts, it still must be proved by admissible evidence. It may be proved like any other fact.

[21] The intention of the respondent in the SMS was clear in that there was an acknowledgment of a debt which fell within the meaning of s 27(1) of the Act. The element of interest could be proved in a full trial, and the lack of its mention in the SMS did not in any way cause ambiguity, or led to the detraction of the acknowledgment.

[22] The next relevant issue is whether the acknowledgment sent by the SMS affirmed the respondent's liability. The respondent in reply submitted that the acknowledgment was flawed as it was not written let alone signed. He ventilated that the court must still put into effect the demands of the provisions, however archaic they might be.

[23] The provisions surrounding an acknowledgment of debt in the context of the Act are found in ss 26(2) and 27(1).

Section 26(2) of the Act reads:

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

Section 27(1) of the Act reads:

> Every such acknowledgment as is referred to in section 26 or in the proviso to section 16 of this Act shall be in writing and signed by the person making the acknowledgment.

On the evidential aspect not surprisingly much emphasis was put by the respondent on the acknowledgment to be in writing and signed.

Requirement of being in writing

[24] Before moving on we need to clarify that the discussion here is restricted to procedural (evidential) matters only and will avoid discussing substantive matters, say lease, where to be enforceable there must exist some written memorandum. We have left the discussion of the latter matters to another more appropriate forum.

[25] The respondent has come out strongly and ventilated that there is nothing difficult about ss 26(2) and 27(1) of the Act and thus must be read in their literal context. Regretfully we are unable to agree with the respondent's argument on this point. Parliament is not unmindful of the march of time as s 3 of the Interpretation Acts 1948 and 1967 even legislated that 'writing' or 'written' includes electronic storage or transmission or any other method of recording information or fixing information in a form capable of being preserved. This definition is a departure from the old and established definition which envisages the involvement of papers, parchment and the like, and of course the physical human touch. In *Bank of India, Petitioner v James Fernandez and Anor* AIR 1988 Kerala 89 the court opined that:

> Writing need not be by hand itself. It can be printed or type-written or by other possible methods.

Black's Law Dictionary defines writing as:

any intentional recording of words that may be viewed or heard with or without mechanical aids. This includes hard-copy documents, electronic documents on computer media, audio and videotypes, e-mails, and any other media on which words can be recorded.

[26] Section 8 of the Electronic Commerce Act 2006 ('ECA') provides that where any law requires information to be in writing, the requirement of the law is fulfilled if the information is contained in an electronic message that is accessible and intelligible so as to be usable for subsequent reference. In a word a message from an SMS, with all the attributes of s 8 being present viz accessibility, intelligible and extractable for subsequent reference, such an electronic message is as good as in writing. More on the ECA later.

[27] With the prevailing technological advancement made (and unstoppable at that), record keeping for businesses or daily affairs exchange have moved away from the laborious format of writing to the overly dependence on computers, and of which the mobile phone is one. In short we are slowly turning into a paperless society. Dictated by common sense and justice it is no surprise that not only the conservative courts but also Parliament have taken the approach that writing need not be hand written (*SM Integrated Transware Pte Ltd v Schenker Singapore (Pte) Ltd* [2005] 2 SLR 651). It follows to reason that a party alleging that a communication eg a forwarded message was sourced from, say, an electronic storage, transmission, or any other method of recording information or fixing information in a form capable of being preserved, then such communication must be construed as in writing. By similar deduction the acknowledgment here therefore was in writing.

REQUIREMENT OF ACKNOWLEDGMENT TO BE SIGNED

[28] In everyday parlance, when a document has been signed it means that a signature, invariably hand written and often fanciful stylised depiction of someone's name, nickname, or even a simple X or other marks has been left on it. The traditional function of a signature is evidential ie to give evidence of identity and having the intention to be bound by the signed document.

[29] No controversy will arise if a signature helps to identify the signatory of a particular document and more useful will it be if not denied subsequently by him. In a situation where the authenticity of the signature is being challenged the conclusiveness of a signature remains elusive; a signature thus is challengeable and may be validated or invalidated.

[30] As regards signature that is not written (and hence not possessing the characteristics of a fanciful or stylised mark), we find the remarks in *Bindra's 'Interpretation of Statute'* at p 1115 useful. The author wrote:

A Signature — *A signature is only a mark*, and where a statute merely requires that a document shall be signed, the statute is satisfied by proof of the making of a mark upon the document by or the authority of the signatory.

[31] In *Words and Phrases and Maxims* Vol 13 at p 683 signature is defined as:

B signature is the name of person written on a document to signify that the writing accords with his wishes or intentions. This is what is ordinarily meant by speaking of a person's 'signature', but the law does not always insist upon the name of the person being written; initials or a mark intended to represent a person's name have been held to be a sufficient 'signature' by him ...

C

[32] In *Morton v Copeland* (1855) 16 CB 517 Maule J had occasion to state:

The necessity of signatures arises in every case from the express requirement of the statute. *Signature* does not necessarily mean writing a person's Christian and surname, but *any mark which identifies it as the act of the party*.

D

[33] In *Bank of India, Petitioner v James Fernandez and Anor* AIR 1988 Kerala 89, S Padmanabhan J in no uncertain term said:

E Various modes of signing have been recognized in law. Thumb impression or mark or line or cross is accepted as signature in the case of persons who could not write due to illiteracy or physical inability ...

[34] In *The Law Lexicon (by P Ramanatha Aiyar)* 'signed' is defined as follows:

F 'signed' includes 'marked' when the person making the mark is unable to write his name ...

[35] From the above mundane approach of alluding to authoritative books
G and cases it has been satisfactorily established that signatures need not be written. Suffice if there be any mark, written or not, which identifies the act of the party, perhaps in the form of mark or by some distinguishing feature peculiar only to that person, then the acknowledgment has been signed. Analogically we hold the view that the conventional paper is substituted by the
H mobile phone, which holds features that can preserve information or transmissions in the like of the SMS, with the telephone number representing the caller or the sender of some message. In fact it is the norm nowadays to substitute the number of an identified person with his name to assist instant recognition. The fact that the respondent admitted sending the SMS sealed his
I liability.

[36] Besides the 1948 and the 1967 Interpretation Acts, and being forward looking, the ECA was legislated in order to deal with some of the latest technological strides, apart from contributing to business efficacy and building

the confidence of investors and public at large. Section 17A of the 1948 and 1967 Interpretation Acts, which demands courts to interpret all legislative provisions purposively, to be followed in its wake by the ECA, clearly indicates Parliament's intention to keep pace with time. FAR Bennion MA, *Bennion on Statutory Interpretation* (5th Ed) (pp 889–890) could not have put it in better terms when he authored:

> It is presumed that Parliament intends the court to apply to an ongoing Act a construction that continuously updates its wordings to allow for changes since the Act was initially framed (an updating construction). While it remains law, it is to be treated as always speaking ...

[37] Under s 6 of the ECA it is legislated that any information shall not be denied legal effect, validity or enforceability on the ground that it is wholly or partly in an electronic form. Section 9 of the ECA is more comprehensive in that where any law requires a signature of a person on a document, the requirement of the law is fulfilled if the document is in the form of an electronic message (the SMS in this case), by an electronic signature subject to the collective demands of sub-paras (a) to (c). For purposes of this appeal the legal requirement for a signature is fulfilled as, inter alia, the sender is adequately identified let alone admitted by him. To complete this issue, under s 5 of the ECA electronic signature means any letter, character, number, sound or other symbol or any combination created in an electronic form adopted by a person as a signature.

[38] The telephone number of the respondent which carried the No 012-2056363, from which the SMS was sent, confirmed that it came from the respondent ie the registered owner of that telephone. PW3 confirmed the fact that the respondent was the registered owner of the mobile phone (pp 195–196 of the appeal records). Unless rebutted by the respondent the SMS must have come from the respondent. The probability of successfully rebutting the respondent being the sender is next to nil as the respondent at questions 20 and 21 (pp 208 and 209) admitted sending the message on 5 September 2006.

[39] The respondent attempted to neutralise the ECA argument by submitting that the provision in it were not raised at the High Court or the Court of Appeal by both parties. Regretfully he stopped short of clarifying whether the ECA should be read prospectively or retrospectively. It is pertinent to note that the ECA came into force on 19 October 2006 ie after the 5 September 2006 SMS was transmitted, with the claim being filed by the appellants on 7 March 2008. In simple terms the ECA had been legislated a good two years earlier prior to the filing of the claim. It is incontrovertible that the SMS is a mere piece of evidence and nothing more. It is trite law that there is no presumption against retrospection on matters that deal with procedure. Evidence is part of procedure. In *Halsbury's Law of England* (4th Ed) Vol 44 (1)

A para 1287 the following remarks are found:

> The general presumption against retrospection does not apply to legislation concerned merely with matters of procedure; on the contrary, provisions of that nature are to be construed as retrospective unless there is a clear indication that such was not the intention of Parliament. For this purpose 'procedure' includes matters
B relating to remedies, defences, penalties, *evidence* ...

[40] In *Selangor United Rubber Estates Ltd v Craddock and Others (No2)* [1968] 1 All ER 567, the plaintiff ie Selangor URE Ltd had commenced an
C action against Craddock and several others. During the hearing a question arose as to whether transcripts of the eighth defendant which were taken by inspectors pursuant to s 167(2) of the Companies Act 1948 were admissible in evidence against him pursuant to s 50 of the Companies Act 1967. This question went back to an earlier criminal proceeding conducted by a magistrate
D who had held that the transcripts should not be relied upon. He reasoned that no express provisions about the admissibility of those transcripts were provided for in the law and hence were inadmissible in evidence. The magistrate's decision was made before s 50 of the Companies Act 1967 came into operation. This latter section provides that an answer (in the transcripts) given by a person
E to a question put to him in exercise of powers conferred by s 167 of the Companies Act 1948 may be used in evidence against him. The court held that the absence of the express provision relied on by the magistrate was cured by the passing of s 50 of the Companies Act 1967. Ungoed-Thomas J explained it in this manner:

F

> Section 50 is a procedural provision providing for the admissibility of evidence before a court when it comes to hear a case and deal with the evidence. It applies to future hearings after the Act of 1967 comes into operation; but it then applies even though the hearing be in respect of matters which arose before that section was passed. It is a procedural provision dealing with future procedure ...
G
> The position therefore is that in my view the transcript is admissible as evidence in accordance with the provision of Act 1967.

[41] It is now on established law that the presumption of statutes being
H prima facie prospective, does not apply to provisions dealing with procedure, which includes evidence (*Public Prosecutor v Datuk Haji Harun bin Haji Idris* [1977] 1 MLJ 14). In the circumstances of this appeal ss 5, 6, 8 and 9 of the ECA are procedural provisions and applicable to future hearings even though the matters arose before those sections were promulgated. The
I acknowledgment embedded in the SMS of 2 May 2006 being evidential in nature, though forwarded to the appellants before the operation of those provisions of the ECA, is admissible in law and therefore applicable in this appeal. The defence of the appellants' case being time barred is therefore unsustainable.

[42] Now that the status of the acknowledgment is answered, and found in favour of the appellants, the final question to be resolved is whether the respondent, being the managing director and majority shareholder of the company is responsible for the debts of the latter. We find little difficulty in rejecting the applicability of *Abdul Manaf Mohd bin Ghows & Ors v Nusantara Timur Sdn Bhd & Ors* [1997] 3 MLJ 661; [1997] 4 CLJ 437 as the facts in that case are distinguishable to the current appeal. There Siti Norma JCA (as Her Ladyship was then) found that the second and third respondents could not be held out to be personally liable for the debts of the company as there was no conclusive evidence adduced to make them liable. In the current appeal, from the evidence adduced and discussed earlier, specifically the letter dated 17 December 1999, again the answer must be found in favour of the appellants. This letter ie P21 clearly acknowledged the respondent's responsibility for the balance of RM589,055.61 being payable to the appellants. Our view is in line with the factual findings of the High Court.

[43] We therefore answer the second question in the affirmative.

[44] The appeal is thus allowed with costs.

Appeal allowed with costs.

Reported by Kanesh Sundrum