Chip Hup Hup Kee Construction Pte Ltd *v* Yeow Chern Lean
[2010] SGHC 83

Case Number : Originating Summons No 804 of 2009 (Registrar's Appeal No 378 of 2009)

Decision Date : 17 March 2010

Tribunal/Court : High Court

Coram : Andrew Ang J

Counsel Name(s) : Ling Daw Hoong Philip (Wong Tan & Molly Lim LLC)for the plaintiff; Kronenburg Edmund Jerome and Lye Huixian(Braddell Brothers LLP) for the defendant.

Parties : Chip Hup Hup Kee Construction Pte Ltd — Yeow Chern Lean

Civil Procedure – Limitation

17 March 2010

Andrew Ang J:

Introduction

1 This was an appeal by the plaintiff ("CHHK") against the decision of the assistant registrar ("the AR") on 1 October 2009 in Summons No 4717 of 2009 ("Sum 4717") in which she ordered that part of CHHK's claim against Yeow Chern Lean ("Yeow") be struck out. The AR also ordered the conversion of the originating summons into a writ action, but no appeal was made against this order.

2 Essentially, this case concerned a question of law, *viz*, the applicability of the Limitation Act (Cap 163, 1996 Rev Ed) ("the Act") to a claim for moneys had and received in respect of two United Overseas Bank cheques, No 378730 for $80,000 ("the First Cheque") and No 634684 for $100,000 ("the Second Cheque") (collectively "the Two Cheques"), issued by Neo Kok Eng ("Neo"), the majority shareholder and managing director of CHHK. I dismissed the appeal on 17 November 2009 and now give my reasons for so doing.

Background

3 Neo had originally issued three cheques, the Two Cheques as well as another cheque for $260,000, to one Lim Leong Huat ("Lim"), the general manager of CHHK at the material time. Lim handed those cheques to Yeow, who in turn encashed the First Cheque on 22 November 2000 and the Second Cheque on 4 April 2002. He applied the proceeds from the Two Cheques towards, respectively, the purchase and construction of a house at No 189 Eng Kong Garden, Singapore 599287 ("the Property"). In a previous action, Suit No 136 of 2007 ("Suit 136"), Neo sued Yeow for damages from conversion, moneys had and received and a declaration that the Property was held by Yeow on trust for Neo. Yeow pleaded that there was a private arrangement between Neo and Lim which allowed Yeow the use of the proceeds from the three cheques, and further that Neo's claim was in any case time barred. However, Yeow admitted that as he had no personal knowledge of such an arrangement he had accepted that the arrangement existed on the basis of whatever Lim had told him.

4 Suit 136 was heard by Lai Siu Chiu J ("Lai J") together with a related action, Suit No 137 of 2007, in which CHHK sued Yeow for the breach of his fiduciary duties. Lai J found, in her judgment

issued on 15 September 2008 in *Neo Kok Eng v Yeow Chern Lean* [2008] SGHC 151 (unreported) ("*Neo Kok Eng (HC)*"), that Yeow was liable to Neo for $440,000, or the sum of the three cheques, and ordered an inquiry into the percentage contribution of the $440,000 towards the profits and rental income of the Property. Significantly, Lai J, citing the decision of Judith Prakash J in *MCST No 473 v De Beers Jewellery Pte Ltd* [2001] 2 SLR(R) 669 ("*De Beers*"), held that Neo's alternative claim for money had and received was *not* a claim in tort or contract, and that therefore s 6(1)(*a*) of the Act had no application (at [130] of *Neo Kok Eng (HC)*).

5 Yeow appealed successfully against Lai J's decision. The Court of Appeal held, in *Yeow Chern Lean v Neo Kok Eng* [2009] 3 SLR(R) 1131 ("*Neo Kok Eng (CA)*"), that Neo had no *locus standi* to bring the claim in Suit 136 because he had already relinquished title to the three cheques in favour of CHHK; it was thus for CHHK and not Neo to bring a claim against Yeow (at [39] of *Neo Kok Eng (CA)*). Pertinently, the Court of Appeal observed at [52], *ibid*, that:

> 52 Neo's alternative claim for moneys had and received is contingent on him proving his claim in conversion. It fails along with his inability to prove the existence of the tort. This is so because Neo's alternative claim in restitution is premised on a 'waiver of the tort.' The House of Lords has made it clear in United Australia v Barclays Bank Ltd [1941] 1 AC 1 that the 'waiver' was really an election to take a gain-based rather than loss-based award for the tort. In the absence of the tort, this claim in restitution fails. As Viscount Simon LC explained (ibid at 18):
>
> > When the claimant 'waived the tort' and brought assumpsit, he did not thereby elect to be treated from that time forward on the basis that no tort had been committed; indeed, if it were to be understood that no tort had been committed, how could an action in assumpsit lie? It lies only because the acquisition of the defendant is wrongful and there is thus an obligation to make restitution. [emphasis added]
>
> Since Neo's claim for conversion is unsustainable, it follows that his claim for restitution of the tort also fails. Simply put, he cannot 'waive the tort' when there is no tort to waive in the first place. In any event, as the cheques were issued as loans to the Company, if any loss was suffered, it was on the part of the Company.

6 Following this decision, CHHK, in its own name, brought the current action against Yeow for moneys had and received under the three cheques as well as for a declaration that the Property was held by Yeow on trust for CHHK in the proportion that CHHK had contributed towards the purchase and construction of the Property. The AR held that, since an action for conversion of the Two Cheques was time-barred under s 6(1)(*a*) of the Act, CHHK's claim for moneys had and received in respect of the Two Cheques was doomed to fail and should therefore be struck out.

The parties' arguments

7 According to CHHK, the Act did not apply to its claim at all because it was neither founded in tort nor in contract. CHHK argued that its claim was not in conversion and therefore should not be subject to the time bar of six years applicable to torts, relying on the case of *Chesworth v Farrar* [1967] 1 QB 407 ("*Chesworth*"). It also pointed out that Lai J had considered and dismissed Yeow's arguments on time bar in Suit 136 (at [129]–[133] of *Neo Kok Eng (HC)*), and that this point had not been overturned by the Court of Appeal on appeal. Further, CHHK argued that because there was no contract between the parties, the contractual time limit could not apply, as was the case in *De Beers*.

8 Conversely, Yeow argued that CHHK's claim was doomed to fail because its alleged title to the

Two Cheques was extinguished upon the expiry of six years from the date of the first alleged conversion pursuant to 7(2) of the Act. Moreover, Yeow argued that CHHK's claim was time barred under s 6(1)(*a*) of the Act because the source or nature of the claim arose out of the tort of conversion despite the characterisation of the claim as restitutionary. I should add that no argument on laches was raised.

The law

9 This case requires an examination of the nature of a claim for money had and received based on a conversion of cheques and how it fits into the statutory limitation scheme. For that reason a brief summary of the legal history is necessary before looking at the Act itself. Broadly speaking, there are commonly understood to be two types of restitutionary claims: restitution for autonomous unjust enrichment and restitution for wrongs (see generally Andrew Burrows, *The Law of Restitution* (Butterworths, 2nd Ed, 2002) ("Burrows") at p 25; Goff and Jones, *The Law of Restitution* (Sweet & Maxwell, 7th Ed, 2007) ("Goff and Jones") at paras 1–092 to 1–095). The former, autonomous unjust enrichment, occurs when the defendant has gained at the expense of, or "in subtraction" from, the claimant. This category of restitution is commonly concerned with payments made under a mistake or an ineffective transaction. On the other hand, what the present case is concerned with is the latter category, which is to provide the claimant restitution of the benefits received by a wrongdoer from his wrongful acts, in this case Yeow's conversion of the Two Cheques. As Burrows puts it (at p 26):

> … the divide is between, on the one hand, where unjust enrichment is the cause of action or event to which restitution responds and, on the other hand, where a wrong is the cause of action or event to which restitution responds.

According to this definition, the claimant brings an action based on the tort, but chooses a restitutionary remedy instead of the usual compensatory remedy. The authors of Goff and Jones, however, note that judges often say that "restitution for wrongs is concerned with reversing the defendant's unjust enrichment" (at para 1–011), suggesting that the cause of action lies in the unjust enrichment of the wrongdoer and not in the wrong suffered.

10 Historically, in lieu of suing on a tort, a claimant could "waive the tort" and choose instead bring a claim for money had and received (see generally *United Australia, Limited v Barclays Bank, Limited* [1941] AC 1 ("*United Australia*") for a comprehensive history). The doctrine arose from necessity. In England, there was a time when an aggrieved person had to fit his claim within a specific form of action, either in *indebitatus assumpsit* (the precursor to a claim for money had and received) or an action for damages in tort. A claim in *assumpsit* had to be premised on a contract or debt between the parties. Therefore, to allow the aggrieved person whose goods had been converted to sue in *assumpsit*, the courts created the legal fiction that a defendant who improperly sold converted goods promised to repay the claimant the proceeds of such a sale, thereby allowing the claimant to claim against the defendant in *assumpsit*. (In form, this claim of *assumpsit*, and later the claim for money had and received, became recognised as "quasi-contract".) However, the same claimant could not be allowed to go on to recover compensation for the tort on top of the profits disgorged, and so it was said that a claimant who sued in *assumpsit* had chosen to "waive the tort" because under those circumstances the claimant could no longer bring an action for damages for tort.

11 In *United Australia*, a company converted a cheque payable to the plaintiff by encashing it with a bank. The plaintiff originally claimed against the company for money had and received but discontinued the action without obtaining final judgment. The issue before the House of Lords was whether the plaintiff could later choose to proceed against the bank for conversion of the cheque given that it had previously "waived the tort". The House of Lords held that the doctrine of waiver of

tort meant nothing more than a choice between possible remedies for the commission of what was at the heart of it a tort. It did not mean that the plaintiff had chosen to ignore the existence of the tortious act. Therefore the initiation of a claim for money had and received which had not been pursued to judgment did not preclude an action in tort. As noted above at [5], this interpretation was adopted by the Court of Appeal (at [52] of *Neo Kok Eng (CA)*).

12 I turn now to the relevant provisions of the Act, which state:

> **Limitation of actions of contract and tort and certain other actions**
>
> 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;
>
> …
>
> **Limitation in case of successive conversions and extinction of title of owner of converted goods**
>
> 7. —(1) Where any cause of action in respect of the conversion or wrongful detention of a chattel has accrued to any person and before he recovers possession of the chattel, a further conversion or wrongful detention takes place, no action shall be brought in respect of the further conversion or detention after the expiration of 6 years from the accrual of the cause of action in respect of the original conversion or detention.
>
> (2) Where any such cause of action has accrued to any person and the period prescribed for bringing that action and for bringing any action in respect of such a further conversion or wrongful detention under subsection (1) has expired and he has not during that period recovered possession of the chattel, the title of that person to the chattel shall be extinguished.

Quite clearly, there is no explicit reference to restitutionary claims within s 6(1)(*a*). This has led to discussion of the applicable limitation period, if any, for restitutionary claims such as in the present action, *ie*, restitution for wrongs. At first blush, a plain reading of s 6(1)(*a*) suggests that a claim for money had and received arising from the commission of a tort, in this case the alleged conversion of the Two Cheques, would fall squarely within the definition of an action that is "founded" on a tort. This was the view of the UK Law Commission Consultation Paper on *Limitation of Actions* (LCCP151), 1998, p 86 at p 91, and of Burrows at 552. Denning J also expressed the view, albeit as dicta, in *Beaman v A.R.T.S. Ltd* [1948] 2 All ER 89 at 92–93, that a claimant should not be able to evade the statutory limitation period on conversion by choosing another remedy.

13 However, that was not the position taken in *Chesworth*, where the court considered whether a plaintiff's claim for money had and received was a cause of action in tort such that it was statutorily barred six months after the tortfeasor's demise (the old *actio personalis* rule). In that case, the plaintiff had two claims: first, that her landlord had breached his duty as bailee to take proper care of the plaintiff's goods in the landlord's possession and; secondly, for money had and received by the landlord for failing to account for the proceeds of other antiques belonging to the plaintiff. The defendant argued that the latter claim was in substance a cause of action in tort and was therefore statute-barred. Edmund Davies J observed that while an action "found on tort" was not necessarily "a cause of action in tort", both expressions were to be interpreted by looking at the substance of the matter. The learned judge further accepted the decision of Bramwell LJ in *Bryant v Herbert* (1878)

3 CPD 389 as establishing that the "foundation of an action consists solely in those facts which are necessary to be alleged and proved in order to maintain it" (*Chesworth* at 413–414). He further cited the cases of *Jarvis v Moy, Davies, Smith, Vandervell & Co* [1936] 1 KB 399 and *Jackson v Mayfair Window Cleaning Co Ltd* [1952] 1 All ER 215, which established that an action was founded in tort, as opposed to contract, when there was a breach of duty independent of the defendant's contractual obligations.

14 Yet, though it was accepted that the plaintiff had first to establish that a tort had been committed, Edmund Davies J found that her claim for money had and received to recover proceeds from the sale of the converted goods was in substance "analogous to one brought in contract", and therefore did not fall within the *actio personalis* rule (*Chesworth* at p 112). Instead, the learned judge observed, on the authority of *In re Diplock* [1948] Ch 465 at 514, that the contractual limitation period ought to apply since the claim was one of quasi-contract. Parenthetically, although the court analysed it assuming that the claim was based on a conversion, that case could arguably be considered to have arisen from a contract since the (wrongful) retention of the proceeds by the landlord was ostensibly for rent arrears under the tenancy agreement; applying the contractual time limit could possibly be justified on that ground.

15 Subsequently, Hobhouse J in *Kleinwort Benson Ltd v Sandwell Borough Council* [1994] All ER 890 ("*Sandwell*") considered the question whether there was a limitation period for a bank's claim for money had and received to recover payments made under an interest rate swap agreement which was later found to be void. The learned judge held that the limitation period of six years for an action "founded on simple contract" was "sufficiently broad" to encompass a claim for money had and received because such a claim was quasi-contractual (at 942–943). Hobhouse J considered the Hansard report for the Limitation Act (UK) 1939 (upon which statute our own Act was based, see *Hong Guet Eng v Wu Wai Hong* [2006] 2 SLR(R) 458 at [16]) in which it was made clear that the legislature intended that the limitation period for "all actions founded in tort or simple contract (including quasi-contract)" should be six years (at 955). The decision was ultimately prompted, understandably, by the fear that there would otherwise be no applicable limitation period.

16 In Singapore, as far as I am aware, there is no case that deals with the question of the limitation period applicable to restitution for wrongs, although the issue has arisen with respect to unjust enrichment by subtraction. In *Ching Mun Fong v Liu Cho Chit* [2000] 3 SLR(R) 304 ("*Ching Mun Fong*"), moneys were paid out under an oral contract for the purchase of a property. However, the seller was later found *not* to have an interest in the property at all, and the buyers sued for moneys had and received arising and total failure of consideration. Woo Bih Li JC (*Ching Mun Fong* at [73]) held that the claim for moneys had and received was time-barred because the words "founded on a contract" in s 6(1)(*a*) of the Act were "wide enough to cover claims for the recovery of moneys paid pursuant to a contract where the underlying subject matter of the agreement did not exist or did not materialise". This decision was upheld by the Court of Appeal in *Ching Mun Fong v Liu Cho Chit* [2001] 1 SLR(R) 856 at [27].

17 *Ching Mun Fong* was, however, distinguished in the more recent case of *De Beers* ([4] *supra*). In that case, the subsidiary proprietors of a strata title property claimed that the management corporation had unlawfully demanded and been unjustly enriched by two payments made as a condition for its approval of certain conversion works by the subsidiary proprietors. Prakash J held that unlike the situation in *Ching Mun Fong*, the subsidiary proprietor's claim was for restitution of payments made under a mistake of law, and no contract arose or was capable of arising in the circumstances. The learned judge further considered the House of Lords' decision of *Kleinwort Benson v Glasgow City Council* [1997] 3 WLR 923 (involving the same series of interest rate swap agreements as in *Sandwell* ([15] *supra*) in which the question was whether a claim in restitution was a "matter

relating to a contract" for the purpose of determining if the English or Scottish courts possessed jurisdiction over the action. It was held that a claim for restitution of moneys paid under a void contract was *not* a matter relating to contract and therefore the English courts had no jurisdiction to entertain the claim. On that basis, Prakash J found that the subsidiary proprietors' claim was not founded on a contract and was not time-barred by virtue of s 6(1)(*a*) of the Act. However, the decision of Hobhouse J in *Sandwell* was not brought to the court's attention. The learned judge therefore did not have the opportunity to address the argument in *Sandwell* that the legislature intended for claims in money had and received to be subjected to a six year limitation period. Instead, Prakash J opined that until legislative intervention, there appeared to be no applicable limitation period for restitutionary claims which had no grounding in contract (*De Beers* at [77] and [79]). The appeal against the decision was dismissed. The Court of Appeal (in *MCST Plan No 473 v De Beers Jewellery Pte Ltd* [2002] 1 SLR(R) 418 at [32]) stated that:

> A perusal of the Limitation Act showed that a claim for unjust enrichment which was *neither grounded in contract nor tort*, and in which equitable relief was not sought, did not fall within the scope of the Act. [emphasis added]

It may therefore be inferred that there are claims for unjust enrichment (*ie*, for money had and received) that *are* grounded in tort, although the Court of Appeal did not go further into explaining what exactly was meant by "grounded" in contract or tort. (I am inclined to believe that the Court of Appeal used the word "grounded" synonymously with the word "founded" in this context.)

18 The views of learned academic commentators on this issue are varied. Corbin, in his seminal article on the topic, *Waiver of Tort and Suit in Assumpsit*, (1909–1910) 19 Yale LJ, p 233, wrote (at pp 235–236):

> In all cases where a tort is waived, there is in fact no contract. The cause of action is a tort, and the tort exists as the cause of action and must be proved as the cause of action from first to last. No trick or legerdemain on the part of the plaintiff can change the tort into a contract. Neither can the law do this. The law may allow new forms of action, and may call things by new names, but it cannot turn a theft or other conversion of goods into an innocent agreement to sell and to buy. The *assumpsit* alleged in these cases is a mere fiction and is not the cause of action … The fact that it has been used to dodge the rule that a personal action dies with the person, or to expand the right of set-off which the common law technically and inconveniently limited, is no ground for using it to nullify a legislative act based on sound public policy.

This view was supported by Professor Burrows. According to Burrows ([9] *supra*), the court in *Chesworth* ([7] *supra*) disregarded the statutory bar in respect of restitution for a tort so as to evade the *actio personalis* rule (see Burrows at 553). Prof Burrows went on to opine that:

> As a matter of policy, however, there is no good reason for the courts to reject, in respect of restitution for a tort or breach of contract, the modern six year time limit laid down for causes of action in tort or contract. In particular, there is no other obvious time limit to which they can turn. Nor is there any suggestion of this in the cases. Indeed, as we have seen, the courts are only too anxious to force claims in unjust enrichment by subtraction into the six year statutory bar. No such distortion is needed here [in relation to restitution for torts]. It would seem therefore that, whether taking the most natural or a purposive construction, a six year time limit applies to restitution for a tort or breach of contract.

19 On the other hand, the authors of Goff and Jones ([9] *supra*) accept that claims for the restitution of wrongs, being quasi-contractual, fall under the limitation period applicable to contracts

(at paras 36–013 and 43–017), although the authors take the view that whether the same limitation period should apply to actions in tort and in restitution may depend on the particular tort. According to them, while the rationale of a limitation period for conversion lies in ensuring that "title to a chattel be unencumbered from a previous theft" for the sake of commerce and the protection of purchasers of goods, the unjust enrichment of a defendant is a continuous wrong which does not end upon the transfer of title. Further, the authors contend that accrual of the cause of action lie in the receipt of proceeds by the defendant instead of, as in conversion, the wrongful act (consistent with the authors' stand that the cause of action lies in unjust enrichment and not the wrongful act). Thus, the authors conclude that in restitution the limitation period only begins to run upon the tortfeasor's receipt of the proceeds from the conversion (at para 36–013).

20 Similarly, in HM McLean's article *Limitation of Actions in Restitution* (1989) CLJ 472, it was argued that where the restitution was merely a "supplemental tortious remedy", then the limitation period should be that applicable to an action in tort; however, where the restitutionary claim arose out of the tort of *conversion*, then it was independent of the tort because "it [arose] on the defendant's receipt of a benefit (the proceeds of the sale) in circumstances (conversion) which [made] it unjust that he should retain that benefit" (at p 487).

My decision

21 It is perhaps convenient to deal with Yeow's argument on s 7(2) of the Act first. The "chattels" that were allegedly converted were the Two Cheques, and not the proceeds thereof. While it may be accurate to state that CHHK could no longer establish title to the Two Cheques after a period of six years, this was beside the point since the relevant subject matter for the purposes of CHHK's claim was the monetary proceeds received by Yeow. In other words, CHHK's claim did not seek to recover title to the Two Cheques but rested instead on establishing that Yeow had wrongfully converted the Two Cheques and received the proceeds thereof. Whether this claim could be proceeded upon depended not on s 7(2) but on s 6(1)(*a*) of the Act.

22 Next, with respect to s 6(1)(*a*) of the Act, CHHK's claim would be time-barred if it could be shown, as was the case in *Ching Mun Fong* ([16] *supra*), that there was a contract between the parties or if the claim was one founded on tort. Since there was no suggestion that there was any contract between the parties, only the interpretation of the phrase "founded on tort" was in issue. What was the nature of CHHK's claim? The foundation of an action, as stated by Bramwell LJ (above at [13]), lay in the facts necessary to be alleged and proved in order to maintain it. Here, CHHK essentially had to prove that Yeow had converted the Two Cheques (see the Court of Appeal's observation in *Neo Kok Eng (CA)* ([5] *supra*) at [52]. From that perspective, the foundation of CHHK's restitutionary claim therefore lay in the conversion of the Two Cheques. It would therefore be time-barred by virtue of s 6(1)(*a*) of the Act. This approach was a natural interpretation following the plain statutory language.

23 CHHK's reliance on *Chesworth* ([7] *supra*) was misguided because it did not stand for the proposition contended for by CHHK – that a claim for money had and received was immune from any limitation period. Instead, the position in *Chesworth* was either (a) the general proposition that claims for money had and received fell within the limitation period applicable to contract; or (b) the narrower one that, on the facts of the case, the claim for money had and received was governed by the limitation period applicable to contract. Neither position accords with that under Singapore law, as decided in the *De Beers* case and the Court of Appeal's approval thereof. (However, even if I were to apply *Chesworth*, adopting the general position that the correct limitation period is that applicable to a claim in contract, CHHK's claim would also be time-barred because the Two Cheques were encashed more than six years before the claim was brought.)

24 As would have been obvious from the above, I was not persuaded that *Chesworth* necessarily precluded an interpretation that CHHK's claim was one founded on tort for the purposes of s 6(1)(*a*). As acknowledged by Edmund Davies J, the phrase "cause of action in tort" did not necessarily mean the same thing as the phrase "founded on tort" (*Chesworth* at 41). It would appear to me that, on a plain reading, the latter phrase had a wider scope than the former. Moreover, it was suggested by Burrows that the result in *Chesworth* could have been prompted by the court's desire to circumvent the much-criticised *actio personalis* rule then extant. The policy considerations behind circumventing this rule were clearly not applicable in the context of a general limitation period, and the decision did not suggest otherwise. It is undesirable, as a general principle, that restitutionary claims should remain at large. Defendants should not have to face the prospect of litigation indefinitely, and claimants should be encouraged to settle their disputes timeously.

25 Separately, in the light of the Court of Appeal's adoption of the position in *United Australia* ([10] *supra*) that what was meant by a waiver of tort was essentially only a choice in *remedy*, it was clear that restitution was regarded as a *response* to the wrong (thus making it unnecessary to consider the alternative view taken in Goff and Jones ([9] *supra*) that the cause of action rested upon the unjust enrichment of the defendant instead). Since the difference between CHHK's claim for money had and received, and an action in conversion lay only in the remedy sought, it followed that CHHK's claim should fall within the same limitation period of six years under s 6(1)(*a*) of the Act as well. The claim for money had and received arose out of the alleged conversion of the Two Cheques. Since CHHK was barred from pursuing its claim under the tort of conversion, it was likewise barred from its claim for money had and received founded on the tort since it was in substance only a choice in remedy.

26 Accordingly, I found that s 6(1)(*a*) of the Act was sufficiently broad to encompass CHHK's claim for moneys had and received in respect of the Two Cheques and that the AR was correct in striking out the claim on the basis that it was doomed to fail.

Conclusion

27 In the result, the appeal was dismissed. I ordered that costs in the appeal were to be fixed at $7,000 to be paid by CHHK to Yeow, and further that the costs order below was to stand.