

The Chartered Bank of India, Australia and China - - Appellant

v.

Wee Kheng Chiang - - - - - Respondent

FROM

THE COURT OF APPEAL OF SARAWAK, NORTH BORNEO
AND BRUNEI

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE 25TH MARCH, 1957

Present at the Hearing:

LORD TUCKER
LORD SOMERVELL OF HARROW
MR. L. M. D. DE SILVA

[*Delivered by* LORD SOMERVELL OF HARROW]

This is an appeal by the defendant from a judgment of the Court of Appeal of Sarawak, which allowed the plaintiff's appeal from a judgment of the High Court of Sarawak.

Prior to 1946 Sarawak was an independent State under the protection of the British Crown who controlled its foreign policy and was responsible for its defence. By a law of Sarawak dated 16th February, 1928, subject to qualifications which are not material in this appeal the law of England was made the law of Sarawak. From 24th December, 1941, until the 11th September, 1945, Sarawak was occupied by the Japanese. In 1946 Sarawak became a colony of the British Crown. On the 1st February, 1950, the Debtor and Creditor (Occupation Period) Ordinance on which this case turns came into effect.

Prior to the occupation the respondent carried on a banking business in Kuching under the name of the Bian Chiang Bank. The appellant is a company incorporated by Royal Charter which carried on a banking business with a branch office in Kuching. At the time of the occupation the respondent bank had an account with the appellant with a credit balance of \$242,641.48.

The present claim is for part of that balance and the question is whether under the Ordinance a debit or payment made during the occupation is valid or to be disregarded.

As from 24th December, 1941, the Japanese "froze" all credit balances of customers of the appellant whose accounts were kept at the Kuching office. They closed down the respondent bank. Some months later the Yokohama Specie Bank, a Japanese organisation, was appointed by the Japanese authorities to act as the liquidator of a number of banks including the appellant and the respondent bank. The liquidator recovered debts but no banking business in the ordinary sense was done prior to October, 1944.

The respondent was in Singapore when the Japanese occupied Sarawak and he did not return there till after the liberation. Singapore was occupied by the Japanese in February, 1942.

On 16th October, 1940, before the Japanese had entered the war the respondent wrote to the appellant informing it that Mr. Wee Hian Tech, the respondent's son, had authority to sign cheques for the respondent bank. Mr. Lim Thian Liang also had authority to sign. The former was a merchant who also acted as insurance clerk in the respondent bank; the latter was a cashier in the bank.

One of the questions raised in the case is whether the authority to sign was abrogated by operation of law when the Japanese occupied Singapore. It is common ground that the authority was not abrogated before that date by reason of the provisions of section 2 (2) of the Ordinance. Having regard to the decision in *Hangkam Kwintong Woo v. Liu Lan Fong* [1951] A.C. 707, it would seem the authority would have continued apart from the provisions of the section. In the view which their Lordships take it is unnecessary to decide this question but some observations will be made later on the judgment of the Court of Appeal on that point.

In September, 1944, there was a military order providing that 30 per cent. of the amount of the balances with the appellant might be refunded to customers. By 10th October, 1944, the liquidator had liquid assets of the respondent bank amounting to \$273,386.47.

Shortly before 10th October, 1944, the Japanese authorities, after holding meetings and sounding public opinion, established the Kyoei bank. This bank was a joint stock company under the law of Japan. It was to be an amalgamation of the respondent bank and two other Chinese banks. Its object was to provide banking facilities for the customers of those three banks and it may be for others.

It will be convenient to set out first the agreed facts as to the events of 10th October, 1944.

Under date 10th October the appellant's liquidation account was debited with \$72,792.44 being the 30 per cent. of the amount of the respondent bank's balance with the appellant. The respondent bank's liquidation account was credited with that sum. Added to the sum of \$273,386.47 this made \$346,178.91. The respondent's liquidation account was debited and the Kyoei bank was credited with that sum.

It is also agreed that a cheque for \$72,792.44 dated the 10th October signed by Wee Hian Teck on behalf of the respondent bank was drawn on the appellant. The cheque was payable to the Bian Chiang Bank or Bearer. A receipt was also signed by Wee Hian Teck on behalf of the respondent bank and addressed to the Yokohama Specie Bank as liquidator of the appellant.

Since the termination of the occupation the appellant has repaid to the respondent bank the balance left in the account namely \$169,849.04. The claim in the present case is for the \$72,792.44. The respondent bank claimed that the payment of this sum on 10th October, 1944, was cancelled under the terms of the Ordinance, the material provisions of which are set out below. The appellant also relied on the Ordinance and submitted that the claim failed wholly or in part.

It was not suggested that the cheque was signed under duress. There was, however, argument as to whether in all the circumstances it could be regarded as amounting to a "consent" by the respondent to the transactions of 10th October within the provisions of section 7 (3) (a) of the Ordinance. On the view which their Lordships take it is unnecessary to deal with this point.

During the occupation period the currency depreciated. By October, 1944, the dollar was worth $\frac{1}{10}$ of its pre-occupation value. At the end of the occupation period the currency, presumably a paper currency, was valueless. At that date the Kyoei bank collapsed, its assets consisting of about a million dollars in valueless paper currency.

The relevant or possibly relevant provisions of the Ordinance are as follows:—

An Ordinance to regulate the relationship between Debtors and Creditors in respect of debts incurred prior to and during the period of the enemy occupation of Sarawak.

2. (1) In this Ordinance, unless the context otherwise requires, the following expressions shall have the meanings hereby respectively assigned to them, that is to say—

“absent” means absent from territories under the sovereignty, or in the occupation, of the Occupying Power, and an individual who died during the occupation period while so absent shall be deemed to have continued to be so absent, and a body corporate shall be deemed to have been so absent while its registered office was not in any such territory;

“occupation currency” means any currency issued by the Occupying Power and in circulation during the occupation period, but does not include Sarawak currency;

“Sarawak currency” means the dollar currency in circulation and constituting legal tender, in the territory now comprising the Colony, before or after the occupation period;

(2) For the purposes of this Ordinance any person, who, immediately prior to the commencement of the occupation period, had authority (hereinafter referred to as his “former authority”) to act as agent for another (hereinafter referred to as his “former principal”) shall be deemed to have been the agent of his former principal to the extent that he continued, during the occupation period and while his former principal was absent, to act on behalf of his former principal in any matter which would have been within the scope of his former authority, notwithstanding that his former authority had, upon the commencement of, or during, the occupation period and while his former principal was absent, been determined in any of the following ways, that is to say—

(a) by operation of law, as a result of the occupation of the territory now comprising the Colony by the Occupying Power;

(b) by the expiration of the period of such person’s agency, except where such agency was for the purpose of a particular transaction only;

(c) in any other manner;

3. Subject to the provisions of section 7 of this Ordinance, any pre-occupation debt which still remains wholly unpaid at the commencement of this Ordinance shall be payable in full with interest calculated in accordance with the provisions of section 10 of this Ordinance.

4. (1) Subject to the provisions of subsection (2) of this section, where any payment was made during the occupation period in Sarawak currency or occupation currency by a debtor or by his agent or by the Custodian or a liquidation officer purporting to act on behalf of such debtor, to a creditor, or to his agent or to the Custodian or a liquidation officer purporting to act on behalf of such creditor, and such payment was made in respect of a pre-occupation debt, such payment shall be a valid discharge of such pre-occupation debt to the extent of the face value of such payment.

(2) In any case—

(a) where the acceptance of such payment in occupation currency was caused by duress; or

(c) where such payment was made in occupation currency to a Custodian or liquidation officer in respect of a pre-occupation capital debt except where payment as aforesaid was caused by duress;

such payment shall be revalued in accordance with the scale set out in the Schedule to this Ordinance and shall be a valid discharge of such debt only to the extent of such revaluation.

7. (1) A transfer of money by a customer to another account of that customer in the same bank or the renewal of a fixed deposit from time to time in the same bank shall not be deemed to be a payment by the bank to the customer for the purposes of this Ordinance.

(2) Subject to the provisions of subsection (3) of this section, a payment by a bank to a Custodian or liquidation officer of any pre-occupation credit balance or part thereof of a customer shall not be deemed to be a payment to the customer for the purposes of this Ordinance.

(3) Where during the occupation period the whole or a percentage of the pre-occupation balance of the account of any person with a bank was credited to an account of that person with a Japanese bank or the Kyoei Bank and the account of such person with the first-mentioned bank was debited accordingly, such debit shall be deemed to be a payment to the customer unless he can prove that he did not draw the whole or any portion of the amount so credited to him, or that he obtained no benefit from such credit or part thereof, and in any such case—

(a) if the pre-occupation balance or the percentage thereof, as the case may be, was credited to such person's account with the Japanese bank or the Kyoei Bank, as the case may be, otherwise than at the request or with the consent of such person or his agent, such debit, except to the extent of the face value of any amount which such person has failed to prove was not drawn by him or to the extent that he has failed to prove that he obtained no benefit from such credit, shall be cancelled and shall not be deemed to be a payment to the customer for the purposes of this Ordinance;

(b) if the pre-occupation balance or the percentage thereof, as the case may be, was credited to such person's account with the Japanese bank or the Kyoei Bank, as the case may be, at the request or with the consent of such person or his agent, one half of the amount which, if paragraph (a) of this subsection applied, would be reinstated to the credit of such person in the first-mentioned bank shall be reinstated to the credit of such person in such bank.

9. Unless the contrary be proved, any payment made after the thirty-first day of December, 1942, shall be presumed to have been made in occupation currency.

The learned trial Judge accepted the appellant's submission that the "payment" was within the words of section 4 (1) and was therefore a discharge to the extent of its face value of the pre-occupation debt. The respondent had sought to bring the transaction within the terms of section 4 (2) or section 7. The learned Judge held that neither of these were applicable.

The Court of Appeal held that the transactions came within the provisions of section 7 (3). Blagden, J., held that the transaction, looked at as whole, amounted to a crediting of a percentage of the pre-occupation balance of the account of the respondent with the appellant, to the account of the respondent with the Kyoei bank. Smith Acting, C.J., said, "Section 7 (3) of Ordinance No. 18 seems to me to have been drafted precisely to meet a case of this kind". Their Lordships agree with both these findings. Assuming that the transactions amounted to a payment within the general words of section 4 (1), if they had stood alone, the Ordinance must be construed as a whole and section 7 (3) which makes express reference to the Kyoei bank is clearly the applicable provision to cases such as the present which fall within its special terms. Similar reasoning leads to the rejection of the respondent's arguments that the case should be treated as falling within section 4 (2) (c) or section 7 (2).

The next point is one of construction of the latter half of that part of section 7 (3) which precedes sub-paragraph (a). It is conceded that the respondent bank did not draw the whole or any portion of the amount so credited. The Court of Appeal held that the respondent bank did not have also to prove that it received no benefit. The debit was therefore not a payment to the respondent unless the appellant could show that the respondent "requested or consented", in which case the matter would fall under section 7 (3) (b). The appellant in the opinion of the Court of Appeal failed to do this and the claim therefore succeeded.

The point of construction is not an easy one. Their Lordships have come to the conclusion reading the subsection, as it must be read as a whole, that if the customer as here has not drawn, he must prove that he received no benefit from the credit, or from that part of it which was not drawn. This is not to read "or" as "and". If the customer has drawn, the payment is valid, or if he has received benefit the payment is valid. Put as it is in the negative form it would have avoided the ambiguity if some further words had been inserted. This construction is admittedly supported by the words used in subsection (a).

The question then is whether the respondent succeeded in proving that he obtained no benefit. The learned trial Judge apparently thought he had failed to do so. Blagden, J., in dealing with the question of interest thought there was some evidence that the respondent had obtained some benefit. There is no detailed consideration of the point as it did not arise on the view taken by either court below.

Their Lordships are satisfied that there is sufficient material before them to decide the point. The respondent in his claim alleged that he obtained no benefit, on the assumption that the provisions of section 7 (3) on this matter were or might be applicable. It was plainly for the respondent to produce the evidence relevant to this point. The relevant facts can be briefly stated.

On or about the 10th October there was as has been stated transferred to the respondent bank's account with the Kyoei bank \$346,178.91. This included the sum of \$72,792.44 in issue in these proceedings. From that date down to the end of the occupation further sums of approximately \$523,000 were collected. There were payments out to creditors of the respondent bank amounting to approximately \$675,000. These payments out were plainly a "benefit" to the respondent. They may so far as the evidence goes all have been in discharge of pre-occupation debts. If one applies the ordinary principle of "first in first out", the sum in issue was used to repay creditors. The respondent would plainly have failed to prove no benefit.

The respondent's argument was put in two ways. He submitted that there was always more than \$72,792.44 in hand. This depended on a submission of fact which can be accepted for the purpose of considering the arguments on this point. If therefore this sum could be regarded as untouchable until all other assets had been exhausted it was never required to confer the admitted benefits on the respondent. There is clearly no reason why this sum should be put in any special position. Then it was said that if this \$72,792.44 had never been transferred, everything that did happen would have happened, and the account would never have been overdrawn. If this argument were available for this item, it should be available for any other item. If one assumes, as might well be the case in a similar account, that no individual payment in exceeded the minimum credit throughout the period the account was operated, so that there would never have been an overdraft if any particular item had not been paid in, the customer would be able to show that he had received no benefit from any of the sums collected though he would have to admit that he had received benefit to the extent of \$675,000 by payments out of the account.

The proper principle to apply *prima facie* in considering whether the customer obtained or did not obtain any benefit from an amount credited is that of first in first out. If special circumstances might oust that principle there are none such here. Applying that principle the respondent failed to prove no benefit and the debit in the respondent's account with the appellant is to be deemed to be a payment.

It is therefore unnecessary to consider the application of section 7 (3) (a) and whether by the signing of the cheque or otherwise the respondent had consented to the credit.

It is desirable to refer briefly to the decision of the Court of Appeal on the question whether the authority was abrogated by operation of law.

The learned Acting Chief Justice referred to *Hangkam Kwingtong Woo v. Liu Lam Fong* [1951] A.C. 707 as supporting the view that the authority was not determined by the occupation of Sarawak although the respondent was at that time on the other side of the "line of war" in Singapore. In the *Hangkam* case this Board had to consider the position in the courts of Hong Kong, applying English law as to trading with the enemy, after Hong Kong had been occupied by the enemy. As is stated in the judgment this is a plunge into the unknown, "since the soil of England has not within the period of the development of the common law in this matter been occupied by the enemy". In that case a principal had given a power of attorney to a person in Hong Kong, the principal being at the relevant time in Free China then in alliance with the British Crown. It was held that the courts of Hong Kong could not regard the principal, being one of its inhabitants, as an enemy, although on the other side of the line of war. A study of the case shows how special and difficult is the problem of applying the common law as to trading with the enemy in territories in enemy occupation. The Acting Chief Justice went on to hold that the position changed when the Japanese occupied Singapore in February, 1942. As from that date the respondent became an enemy. He may well have relied on an observation in the judgment in the *Hangkam* case (p. 719). "Suppose that the appellant had, instead of going to the territory of an ally, gone to Japan and thence sought to maintain some contractual relations with Chan" (the attorney). "Then apart from any regulation which the occupying Power might lawfully make, a court of Hong Kong would be bound to treat him as an enemy, to deny him access to its presence and to treat the contractual relation as determined".

It is common ground in this case that if the principal had remained in Sarawak the agency would not have been determined by operation of law. It is said that Singapore being a different territory and jurisdiction the principle that those in enemy occupied territory are enemies applied. Normally such persons would be on the other side of the line

of war (*Sovfracht v. Van Udens Scheepvaart En Agentuur Maatschappij (N.V. Gebr.)* [1943] A.C. 203). In their Lordships' opinion the answer to the question might well turn, as suggested in the above passage, from the *Hangkam* case on the "regulations" made by the occupying Power. If adjacent jurisdictions such as England and Scotland were occupied by an enemy the question might well depend on the extent of interference with contractual intercourse, access to courts and so on. It would not be right in their Lordships' opinion to lay down as a matter of law that where two jurisdictions are occupied by the same enemy all contracts between those in such territories are necessarily abrogated.

In the result the claim fails. Their Lordships will humbly advise Her Majesty that the appeal be allowed and the judgment of the learned trial Judge restored. The respondent must pay the costs here and in the Court of Appeal.

In the Privy Council

THE CHARTERED BANK OF INDIA,
AUSTRALIA AND CHINA

v.

WEE KHENG CHIANG

[DELIVERED BY LORD SOMERVELL OF
HARROW]

Printed by HER MAJESTY'S STATIONERY OFFICE PRESS,
DRURY LANE, W.C.2.
1957