

O N A P P E A L

FROM THE SUPREME COURT OF THE FEDERATION OF MALAYA

UNIVERSITY OF LONDON
W.C.1.
19 FEB 1961
INSTITUTE OF ADVANCED
LEGAL STUDIES

B E T W E E N :

CHOW YOONG HONG

Appellant

- and -

CHOONG PAH RUBBER MANUFACTORY

Respondents

63587

CASE FOR THE APPELLANT

RECORD

10 1. This is an Appeal from a judgment of the Court of Appeal of the Supreme Court of the Federation of Malaya (Hill Acting C.J. Good J. and Rigby J.) dated the 1st day of August 1959 allowing the appeal of the Respondents from a judgment of the Trial Judge (Ong J.) dated the 31st day of March 1959 whereby he gave judgment for the Appellant against the Respondents for \$31112.06 being the amount of 16 cheques issued to him by the Respondents which were dishonoured upon presentation. Final leave to appeal to His Majesty the Yang di

20 20 Pertuan Agong in Council was granted to the Appellant by the said Court of Appeal by Order dated the 18th day of April 1960.

30 2. The question in this appeal is whether, as the Court of Appeal held, the Respondents, on whom the burden of proof lay, had sufficiently established that in the transactions the subject matter of the action the Appellant had lent sums of money to the Respondents in consideration of larger sums being repaid so as to give rise to the presumption that the Appellant was a moneylender within the provisions of Section 3 of the Moneylenders Ordinance 1951 or whether, as the Trial Judge held, the Respondents had failed to discharge the burden of proving that the Appellant was acting as a moneylender in such transactions and that accordingly no burden rested upon the Appellant of rebutting such presumption.

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P.2-3

3. The Appellant by his Statement of Claim dated the 11th April 1958 specially indorsed on the Writ of Summons claimed the sum of \$31112.06 being the total amount of 16 dishonoured cheques issued by the Respondents to the Appellant. It was further alleged that on the 20th March 1958 the Appellant through his Solicitor T.C. Tang had by letter demanded from the Respondents payment of the whole of such sum and that the Respondents through their Solicitor Kam Woon Wah had replied admitting liability for such sum.

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Exs. D.1
and D.2

These letters which were produced in evidence at the trial, are as follows:-

"T.C. Tang 20th March, 1958.

The Manager,
Choong Fah Rubber Manufactory,
No.44, Cross Street,
Kuala Lumpur.

Dear Sir,

I am instructed by Mr. Chow Yoong Hong of Kuala Lumpur.

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Take notice that you drew the following cheques and negotiated the same to my client who took the same in good faith and for value and presented to the bank of China, Kuala Lumpur for payment but were dishonoured by nonpayment and you are liable therefor:-

	<u>Bank</u>	<u>Cheque No.</u>	<u>Amount</u>	<u>Date</u>	<u>Pay- able to</u>	
1.	Bank of China	KLE 704965	\$6,964.33	24.2.1958	Cash	30
2.	" " "	" 720210	2,044.45	1.3.1958	"	
3.	" " "	" 720227	1,337.50	2.3.1958	"	
4.	" " "	" 704991	521.60	2.3.1958	"	
5.	" " "	" 704925	2,000.00	3.3.1958	"	
6.	" " "	" 720262	2,517.30	4.3.1958	"	
7.	" " "	" 720228	894.38	4.3.1958	"	
8.	" " "	" 720212	368.90	4.3.1958	"	
9.	" " "	" 694822	1,250.00	5.3.1958	"	40
10.	" " "	" 694821	2,000.00	5.3.1958	"	
11.	" " "	" 694755	2,406.35	5.3.1958	"	
12.	" " "	" 704933	2,036.00	6.3.1958	"	
13.	" " "	" 720263	768.75	6.3.1958	"	
14.	" " "	" 704930	2,500.00	9.3.1958	"	
15.	" " "	" 704904	954.50	10.3.1958	"	
16.	" " "	" 704983	2,530.00	19.3.1958	"	

Further take notice that in spite of oral notice given by my client in respect of the above dishonoured cheques you wilfully neglected to pay the total sum of \$31,112.06 or any part thereof.

Further take notice that if you fail to pay my client or me as his solicitor within 48 hours from the date hereof legal proceedings may be taken against you as he may be advised without further notice.

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Yours faithfully,"

"KAM WOON WAH, & CO.
Barrister-at-Law,
Advocates & Solicitors,
Kuala Lumpur,
Fed. of Malaya.
Tel.No. 80591.

44, Cross Street,
(2nd Floor),
Kuala Lumpur.

25th March, 1958.

Your Ref:
Our Ref: 1057/58.

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Mr. T.C. Tang,
39, Klyne Street,
(1st Floor),
Kuala Lumpur.

Dear Sir,

Re Messrs. Choong Fah Rubber
Manufactory

Your letter dated 20th instant addressed to Messrs. Choong Fah Rubber Manufactory has been handed to us with instructions to reply thereto.

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Our clients say that they admit the sum claimed by your client but would request that the said claim should be withheld for some time as our clients are awaiting for compensation from various insurance Companies in respect of recent destruction by fire to their factory.

Kindly acknowledge receipt.

Yours faithfully,

(Sgd.) KAM WOON WAH & CO."

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P.5-6 4. Further and Better Particulars of the Statement of Claim were delivered on the 4th September 1958 in which the Appellant furnished particulars of the transactions relating to each of the cheques. He claimed that in relation to each of the first 8 cheques, the Respondents had given their cheque in exchange for cheques given to them by the Appellant the details of which had been written on the backs of such cheques by someone on behalf of the Respondents. He claimed that in relation to each of the remaining 8 cheques, the Respondents had given their cheque in payment for goods sold and delivered by him to them. 10

P.4 5. The Respondents by their Defence delivered on the 25th September 1958 pleaded that the Appellant was an unlicensed moneylender and that accordingly his claim was unenforceable by virtue of the provisions of Section 15 of the Moneylenders Ordinance 1951 and that in the event of his being held to be a licensed moneylender the claim was still unenforceable by virtue of the provisions of Section 16 of the Moneylenders Ordinance 1951. Paragraphs 2 and 3 of the Defence were in these terms:- 20

"2. The Defendants admit that they have had a series of Moneylending transactions with the Plaintiff over a period of three years and that they did draw cheques in favour of the Plaintiff including the cheques set out in the writ but they deny that the cheques were dated as alleged in the writ. 30

3. The Defendants deny receiving the sum of \$31,112.06 as claimed in the writ but if (which is denied) the Defendants received any sums of money in respect of the said cheques such sums were less than the sums alleged in the writ and were not received on the dates alleged in the writ".

By Paragraph 5 of the Defence the Respondents denied that any of the cheques had been given by them to the Appellant in payment of goods sold and delivered by him to them. 40

6. The relevant Sections of the Moneylenders Ordinance 1951 are as follows:-

Section 2. In this Ordinance unless the context otherwise requires:-
"Moneylender" includes every person whose business is that of moneylending

or who carries on or advertises or announces himself or holds himself out in any way as carrying on that business whether or not that person also possesses or earns property or money derived from sources other than the lending of money and whether or not that person carries on the business as a principal or as an agent but does not include - (inter alia) (c) any person bona fide carrying on the business of banking or insurance or bona fide carrying on any business not having for its primary object the lending of money in the course of which and for the purposes whereof he lends money;

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Section 3. Save as excepted in paragraphs (a), (b), (c), (d) and (e) of the definition of "moneylender" in section 2 of this Ordinance, any person who lends a sum of money in consideration of a larger sum being repaid shall be presumed until the contrary be proved to be a moneylender.

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Section 15. No contract for the repayment of money lent after the coming into force of this Ordinance by an unlicensed moneylender shall be enforceable.

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Section 16. (1) No contract for the repayment by a borrower or his agent of money lent to him or to any agent on his behalf by a moneylender or his agent after the commencement of this Ordinance or for the payment by him of interest on money so lent, and no security given by the borrower or by any such agent as aforesaid in respect of any such contract, shall be enforceable unless a note or memorandum in writing of the contract in the English language or Romanised Malay be signed by the parties to the contract or their respective agents....."

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7. Upon these pleadings and upon production of the two letters (Exhibits D1 and D2) previously

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- P.7 L.32 referred to in Paragraph 3, the Trial Judge decided that the onus of proving that the Appellant was a moneylender within the provisions of Section 3 of the Moneylenders Ordinance 1951 rested upon the Respondents.
8. Oral evidence was given at the trial on both sides. The evidence for the Respondents is summarised in this paragraph:-
- (i) Respondents' Witness 1 was Lee Chin Kong the Managing partner of the firm. He said that he had known the Appellant since childhood. He personally had had no financial transactions with the Appellant, but that his firm had had frequent transactions which started about December 1954. His firm would sometimes receive post dated cheques from customers and when the firm required cash the Appellant would give them cash in exchange for such cheques, deducting a small sum for interest. In cross examination he agreed that he submitted Income Tax returns that they were correct that in those returns there were no entries of interest paid to the Appellant and that payment of interest to the Appellant was never entered in his account books. In reply to questions regarding each of the 16 cheques concerned, he admitted that in regard to the first 8 cheques (Exhibits D3-D10) the total of the items written in pencil on the back of each cheque was equal to the amount of the cheque, and that the pencilled writing in each case was that of Chow Sek Kim the cashier of the firm. With regard to the remaining 8 cheques (Exhibits D11-D18) he denied that they were given in payment for cloth received from the Appellant, and asserted that in each case the cheque was given in exchange for cash or to cover their own customers' post dated cheques which they exchanged with the Appellant for cash. When the firm gave cheques to the Appellant they gave customers' cheques which agreed in amount and that this type of arrangement was made by the cashier and not by him.
- He further stated that the only creditors who lent on interest were the Bank of China and the Appellant and that the cashier dealt with the matter of interest.

(ii) Respondents' Witness 3 Chow Sek Kim was the cashier and the principal witness for the Respondents.

He attended to the cheques and cash transactions of the firm. The Appellant was his uncle. P.20 L.17

10 He described how the firm mostly received post dated cheques from customers and if he required cash he would exchange them for cash with his uncle, and interest would be charged at a daily rate of 8 cents per \$100. He added that in the case of P.20 L.21
P.20 L.28

outstation cheques, if the Appellant was doubtful about the cheque, he would ask the witness for his firm's cheque dated for the same day. He stated that this type of transaction with the Appellant had been frequent since December 1954 and that all the interest which had been charged had P.21 L.6
P.21 L.10

20 been received by him in notebooks which he produced (Ex.D28). He said that the entries in the notebooks were transferred to the firm's books of account, which were subsequently destroyed in the fire. He added that the interest so paid was also included in the balance sheets under the heading of interest. No balance sheets were produced. "There were no payments of interest to any other person beside P.21 L.36
P.22 L.42

30 the Plaintiff" P.23 L.17

As to the first 8 of the cheques concerned (Exs. D3-D10), he described the transactions by reference to the first (Ex. D3) in the following way:-

40 "I filled in Cheque D.3 except word "cash" I cannot write English. On back of D.3 the writing in pencil was made by me. All the 15 cheques specified on the back of this cheque were cheques drawn by the Plaintiff's customers of which he was the holder. The total of those 15 cheques came to \$6964.33. Plaintiff had no ready cash in hand so gave me those cheques which could be drawn on the banks the same day. I borrowed that amount from the Plaintiff. He charged interest. I cannot say how much interest was charged, but that was calculated on the number of days I had the loan". P.22 L.45

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- P.23 L.21 The transactions in respect of the 7 cheques (Exs.D4-D-10) were said to be similar.
- P.29 L.13 In this type of transaction the witness would give his cheque for an amount exactly equal to the total value of the Appellant's customers' cheques passed on to him. "I would pay interest on such amount by ready cash at the time of the exchange of cheques".
- P.24 With regard to the remaining 8 cheques (Exs. D11-D18), he denied that they were given for goods sold to his firm, but said that each one was given to cover cheques of his firm's customers which were exchanged with the Appellant for cash and that in each case interest was charged. "I made payment of interest by taking from the Plaintiff a cheque for an amount arrived at after deduction of interest". 10
- P.25 L.9
- P.27 L.33 In cross examination he admitted that he was unable to find recorded in his booklets (D28) any interest payment which related to any of the 16 cheques concerned and admitted that he could not prove in any manner that interest was paid on these 16 cheques. 20
- P.28 L.14
- (iii) Respondents' Witness 5 Chow Fan Seong a textile dealer and another nephew of the Appellant gave evidence that he had borrowed money from the Appellant since 1955 and paid interest, and produced documents (Exs. D29-D32) partly written by the Appellant which he claimed recorded the payment of interest. He admitted that these interest payments were never recorded in the account books of his firm. 30
- P.32 L.8
- P.32 L.17
- P.33 L.3
- P.33 L.9 He also admitted that he had been sued by the Appellant in a case which was still pending.
- (iv) Respondents' Witness 6 Hew Len Fah a textile dealer also gave evidence of a similar character and produced a document (Ex. D33) written by the Appellant which he stated recorded the payment of interest. He was unable to produce the books of account, and was unable to explain precisely how the amounts of interest recorded were calculated. He admitted that he and the Respondents had been Co-Defendants in an action brought 40
- P.35 L.26
- P.39 L.5
- P.36 L.20
- P.39 L.30

against them by the Appellant on a dishonoured cheque which he had given to the Respondents who in turn had given it to the Appellant. He had settled the claim in full.

9. The Appellant in his evidence stated that the first 8 cheques (Exs. D3-D10) were post-dated cheques given to him by the Defendants in exchange for his own customers' out-station cheques to an equivalent value. Out-station cheques ordinarily took some days to clear but as the Respondents had special arrangements with their bank by which they were allowed to draw on credit against such cheques, such transactions gave them the advantage of having ready cash for immediate use whilst he saved Bank commission on the out-station cheques. He said that the suggestion originally came from Respondents' Witness 3. "I charged no interest and no interest was paid to me".

10 P.40 L.11
P.40 L.16
P.40 L.30
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With regard to the remaining 8 cheques (Exs. D11-D18), he said that they were all given in payment for cloth previously sold by him to the Respondents on credit - and he produced various books of account containing entries to support his contention.

In cross examination he agreed that the Respondents did sometimes give him out-station cheques, and that in some cases the Respondents would have to give him their own cheque to cover the out-station cheque. Such transactions had been discontinued since the end of 1956.

30 P.44 L.78

He denied that the 8 cheques (Exs. D11-D18) were given to him by the Respondents as security for out-station cheques exchanged with him for cash, and said that it was co-incidental that he had instituted actions against various defendants on dishonoured cheques which were similar in amount and date to these 8 cheques (Exs. D11-D-18).

40 P.45

He denied receiving any interest from Respondents' Witnesses 5 and 6. He stated that the small amounts recorded in the documents (Exs. D29-D33) were commission or rebate on payment for goods sold by him. The words "interest" had not been written by him.

P.45 L.28
P.45 L.39

10. The trial Judge in the course of his judgment stated that, there being no question that the

P.60 L.5

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P.59 L.48 Respondents had received from the Appellant the moneys claimed, there was only one question in issue between the parties whether or not the Appellant was a "moneylender" within the meaning of the Moneylenders Ordinance 1951 and having decided, rightly it is submitted, that the onus rested on the Respondents, he found that the Respondents had failed to discharge the onus on them of proving that interest was collected from them by the Appellant and that accordingly they had not established that he was a moneylender. 10

P.64 L.25

11. In the course of his judgment the trial Judge after reviewing the evidence had the following observations to make about the witnesses:-

P.60 L.10

(1) "I am not impressed by the demeanour of the Plaintiff nor that of the persons in charge of the Defendants' business. I have no doubt in my mind that both the manager and the cashier of the Defendant firm had no compunction about departing from the truth whenever it suited them to do so. As to the Plaintiff, I am unable to accept his evidence as to the alleged sales in the cases of cheques Ex.D11-D18. I do not believe in coincidences occurring quite fortuitously eight times in less than a month. In the third place, I do not think it right and proper to make any comments on the evidence of Chow Fan Seong (D.W.5) as between whom and Plaintiff there is a case pending in this Court, although his evidence is not on that account to be overlooked. Of Hew Len Fah (D.W.6) this may be said, that he and the present Defendants were co-defendants in an action by the Plaintiff over a dishonoured cheque drawn by Hew, and issued to Defendants, who gave it to Plaintiff, and judgment having been given against them (against which judgment there was no appeal), they are estopped from alleging any facts to show that such judgment was wrong." 20 30 40

P.61 L.36

(ii) In regard to the notebooks (Ex.28) upon which the Respondents strongly relied, the Judge pointed out that the total of the items, which the cashier had said were records of interest payments to the Appellant, came to just under \$66000 or an average in excess of \$16000 per annum. Dealing with this, the Judge said :-

P.61 L.46

"An average yearly expenditure of over \$16000 is not an insignificant item by any standards and yet both the managing partner, 50

Lee Chin Kong and the cashier Chow Sek Kim said that the interest payments recorded in the cashier's little note-books appeared nowhere in the books of account of the partnership which had been burnt"

and again:--

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"If the firm's account books did not tell the truth, then the persons responsible for falsifying entries of expenditure must have been practising deceit on their other partners."

P.62 L.20

and again:--

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"Both Lee Chin Kong and Chow Sek Kim have stated in evidence that of all those who lent moneys to their firm, to only one man were they paying interest namely the Plaintiff all other loans were given by friends free of interest. I find that to be completely untrue if any evidentiary value is to be credited to these notebooks."

P.63 L.1

(iii) Dealing with the cashier's inability to point to any particular entry in the note-books which related to the cheques (Exs. D3-D18), the Judge said:--

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"He was afforded an opportunity between the close of the day's hearing on 14th January and its resumption the next morning to trace in Ex.D28 the interest payment in respect of Ex.D3, and in due course, to quote his own words, he said: 'I have searched through the books and I can find no entry therein'. Nor could he find any entry in Ex.D28 in respect of the other cheques, Ex.D4 to D16. He was then challenged by Plaintiff's Counsel to prove in any way he chose that interest was paid on the 16 cheques, and his answer was that he could not do so."

P.64 L.8

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(iv) The Judge continued:--

"By reason of the facts which I have already set out I am of the opinion that the Defendants' managing partner and cashier are entirely unworthy of credit and I also

P.64 L.20

reject the entries in Ex. D28 as evidence of purported payments of interest to the Plaintiff."

P.64 L.32 (v) The Judge accepted that transactions between the Appellant and the Respondents were of great frequency spread over a period of some 45 months and in asking himself why the Appellant should have been so accommodating without charging interest the Judge advanced what he regarded as the reason which was based in part upon evidence which had been given of the use by the Appellant of the Respondents' cheques to pay accounts in Singapore, and which the Judge summarised as follows:- 10

P.65 L.47 "I believe that Plaintiff received substantial benefits from the Defendants by the use of their name and their cheques to import textiles and consequently it would not be unreasonable for them to expect and to receive from him benefits in return, by cashing their cheques without interest." 20

(vi) Although the Judge had previously expressed the view that he did not accept the Appellant's evidence in relation to the 8 cheques (Exs D11-18), he concluded his judgment thus:-

P.66 L.3 "In view of the conclusions I have arrived at, it is unnecessary to discuss the evidence of the Plaintiff who does not have to discharge the onus of disproving anything which had not been proved against him. There will accordingly be judgment for Plaintiff for \$31,112.06 and costs." 30

P.70-P.74 12. From this judgment the Respondents appealed upon grounds set out in the Memorandum of Appeal (which is to be found on Pages 67-70 of the Record). In the Court of Appeal the judgment was given by Hill Acting C.J. allowing the Respondents' appeal. With this judgment Good J. and Rigby J. concurred. 40

The basis of the judgment would appear to be contained in the following passage:-

P.73 L.25 "Many of these transactions were of a peculiar nature and all concerned with cheques, but this

does not detract from the view I have formed that the Appellants had made out not necessarily a case proved in accordance with Section 3 of the Evidence Ordinance, but a prima facie case in respect of the cheques sued on by the Respondent. The Respondent was not believed and his case in answer to that prima facie case was rejected in toto by the learned trial Judge".

- 10 13. The Appellant respectfully offers the following comments upon the reasoning of the judgment:-
- (1) It being accepted that it was for the Respondents to prove their assertion that the Appellant was in the course of the cheque transactions getting back more money than he laid out, it is submitted that the requisite standard of proof of that fact was as laid down in Section 3 of the Evidence Ordinance.
- 20 In this respect it is to be observed that the learned Acting Chief Justice had already indicated earlier in the judgment that it was extremely doubtful if any relevant fact to the issue between the parties was "proved" in accordance with that standard.
- (ii) In the light of the Trial Judge's finding (with which the Court of Appeal expressed no disagreement) that the Respondents' principal witnesses were "entirely unworthy of credit", it is submitted that there were no grounds for holding that the Respondents had made out a prima facie case in accordance with the standard of proof required.
- 30 (iii) The fact that the trial Judge rejected part of the Appellant's evidence (and not in toto as is erroneously stated) could in no way advance the Respondents' case the evidence in support of which had been entirely rejected.
- 40 (iv) In dealing with the explanation which the trial Judge advanced to account for the Appellant cashing the Respondents' cheques without interest, it is submitted that the Court of Appeal erroneously regarded this explanation as constituting findings of fact upon which the trial Judge based his conclusion, whereas it was merely put forward as a reason which fortified him in the

conclusion which he had already reached namely that the Respondents had failed to discharge the onus on them of proving that interest was collected from them by the Appellant.

14. The Appellant will submit that this Appeal should be allowed for the following (among other)

REASONS

- (1) BECAUSE the Respondents by letter before action through their Solicitor admitted that the sum claimed was due to the Appellant. 10
- (2) BECAUSE the Respondents did not prove that the Appellant was a moneylender within the meaning of Section 3 of the Moneylenders Ordinance 1951.
- (3) BECAUSE the onus upon the Appellant of rebutting the presumption that he was a moneylender under the provisions of Section 3 of the Moneylenders Ordinance 1951 never arose. 20
- (4) For the reasons given by Mr. Justice Ong.
- (5) BECAUSE the judgment of Acting Chief Justice Hill was wrong for the reasons given in paragraph 13 of this Case.
- (6) BECAUSE the Court of Appeal were wrong and their judgment ought to be reversed. 30

WILLIAM STABB.

IN THE PRIVY COUNCIL

O N A P P E A L

FROM THE SUPREME COURT OF THE
FEDERATION OF MALAYA

B E T W E E N :

CHOW YOONG HONG

- v -

CHOON FAH RUBBER MANUFACTORY

CASE FOR THE APPELLANT

LAWRANCE, MESSER & CO.,
16, Coleman Street,
London, E.C.2.