PERWIRA AFFIN BANK BHD v. LIM AH HEE
FEDERAL COURT, KUALA LUMPUR
STEVE SHIM, CJ (SABAH & SARAWAK); ABDUL HAMID MOHAMAD, FCJ; MOHD NOOR AHMAD, FCJ
CIVIL APPEAL NO: 03-3-2001 (W)
18 MAY 2004
[2004] 2 CLJ 787

***CIVIL PROCEDURE**: Interest - Judgment debt - Whether recovery of interest wholly time-barred by s. 6(3) Limitation Act 1953 if execution instituted six years after judgment date - Construction of s. 6(3) - Whether interest recoverable up to six years before date of execution - Decision of Federal Court in United Malayan Banking Corporation Bhd v. Ernest Cheong Yong Yin*

***BANKRUPTCY**: Interest - Commencement date for interest - Whether claim barred by s. 6(3) Limitation Act 1953 - Decision of Federal Court in United Malayan Banking Corporation Bhd v. Ernest Cheong Yong Yin*

***LIMITATION**: Interest - Arrears - Whether claim barred by s. 6(3) Limitation Act 1953 - Decision of Federal Court in United Malayan Banking Corporation Bhd v. Ernest Cheong Yong Yin*

***CIVIL PROCEDURE**: Execution - Writ of execution - Whether Bankruptcy proceeding a writ of execution - Rules of the High Court 1980, O. 46 r. 2*

At the appeal to the High Court judge-in-chambers, the respondent orally raised two preliminary objections. The first was that the sum claimed in the bankruptcy notice was wrong as it included statute-barred interest and, secondly, the appellant had not obtained prior leave of court under O. 46 r. 2(1)(a) Rules of the High Court 1980 ('RHC') before instituting the bankruptcy proceedings. The second preliminary objection was later abandoned as the appellant did in fact obtain leave. The learned judge however dismissed the first preliminary objection. The respondent appealed to the Court of Appeal. The Court of Appeal allowed the appeal. The appellant then filed a notice of motion applying for leave to appeal to the Federal Court. The Federal Court granted leave to appeal on the following points: (a) whether the second limb of s. 6(3) Limitation Act 1953 ('LA') is relevant to bankruptcy proceedings; and (b) whether a bankruptcy notice is valid under s. 3(2)(ii) Bankruptcy Act 1967 if the judgment debtor does not dispute that the claim in the bankruptcy notice is excessive within seven days from the date of service.

Held (dismissing the appeal)

Per Abdul Hamid Mohamad FCJ delivering the judgment of the court:

[1] A bankruptcy proceeding is not "a writ of execution" within the meaning of O. 46

r. 2 RHC.

[2]A bankruptcy proceeding, by definition of the word "action" in s. 2 LA, is an action and it is caught by the provisions of s. 6(3) LA.

[3]Therefore, a bankruptcy proceeding is an "action upon a judgment" within the meaning of s. 6(3) LA. The limitation for bringing the action is 12 years but arrears of interest may only be claimed for six years.

[4]Section 6(3) LA should be read conjunctively; s. 6(3) allows an action upon judgment to be brought within 12 years but in such an action arrears of interest may only be claimed for a period of six years.

[5]Section 6(3) LA applies to bankruptcy proceedings; and while a bankruptcy proceeding may be brought within 12 years of the date of the judgment, arrears of interest may only be claimed for a period of six years from the date of judgment.

[6]In the instant case, the judgment was obtained on 23 October 1987. Following *United Malayan Banking Corp Bhd v. Ernest Cheong Yong Yin [2002] 2 CLJ 413* FC, even though interest was calculated from 1 December 1985, it merged into the judgment debt and therefore the date the interest became due was the date of the judgment, not the earlier date. The period to be calculated was from the date of the judgment to the date of filing the bankruptcy notice.

[7]The bankruptcy notice was invalid as it contained arrears of interest outside the period of six years.

[8]As the merits of the second issue posed before the court was not considered by the High Court and the Court of Appeal, the court declined to answer the question on the grounds,*inter alia* : (a) that there were no judgments of the High Court and the Court of Appeal on the issue; (b) it would be unfair to the appellant that a point that was neither raised nor argued in the High Court, and not allowed to be raised by the Court of Appeal and therefore not argued before it, be argued for the first time in this court; (c) it would encourage parties to raise new issues as a case progresses; and (d) the objection was procedural in nature.

*[**Bahasa Malaysia** Translation Of Headnotes*

Semasa rayuan di hadapan hakim di dalam kamar di Mahkamah Tinggi, responden secara lisan telah membangkitkan dua bantahan awal. Pertamanya adalah, jumlah yang dituntut di dalam notis kebankrapan adalah salah kerana ia mengandungi faedah yang digalang masa, dan keduanya, perayu tidak mendapat kebenaran mahkamah dibawah A. 46 k. 2(1)(a) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') sebelum memulakan prosiding kebankrapan. Bantahan kedua kemudiannya diabaikan kerana perayu sememangnya telah mendapat kebenaran mahkamah. Yang arif hakim menolak bantahan awal yang pertama. Responden merayu ke Mahkamah Rayuan. Mahkamah Rayuan membenarkan rayuan tersebut. Perayu kemudiannya memfailkan satu notis usul memohon kebenaran untuk merayu ke Mahkamah Persekutuan. Mahkamah Persekutuan membenarkan rayuan mengenai dua isu berikut: (a) sama ada bahagian kedua s. 6(3) Akta Had Masa 1953 ('AHM') adalah relevan di dalam prosiding kebankrapan; dan (b) sama ada notis kebankrapan adalah sah di bawah s.

3(2)(ii) Akta Kebankrapan 1967 jika penghutang penghakiman tidak mempertikaikan tuntutan yang dibuat di dalam notis kebankrapan adalah keterlaluan di dalam tempoh tujuh hari dari tarikh serahan.

Diputuskan (menolak rayuan)

Oleh Abdul Hamid Mohamad HMP menyampaikan penghakiman mahkamah:

[1] Prosiding kebankrapan bukanlah satu "writ pelaksanaan" di dalam erti A. 46 k. 2 KMT.

[2]Sesuatu prosiding kebankrapan, mengikut definasi perkataan "tindakan" di dalam s. 2 AHM adalah satu tindakan dan ianya tertakluk kepada peruntukan s. 6(3) AHM.

[3]Oleh yang demikian, prosiding kebankrapan adalah satu "tindakan pada penghakiman" di dalam s. 6(3) AHM. Had masa untuk memulakan tindakan adalah 12 tahun tetapi tunggakan faedah hanya boleh dituntut untuk enam tahun.

[4]Seksyen 6(3) AHM patut dibaca bersama; s. 6(3) AHM membenarkan satu tindakan keatas penghakiman dibawa dalam masa 12 tahun tetapi tindakan untuk tunggakan faedah hanya boleh dituntut untuk tempoh masa enam tahun.

[5]Seksyen 6(3) AHM terpakai kepada prosiding kebankrapan dan prosiding kebankrapan boleh dibawa dalam tempoh 12 tahun dari tarikh penghakiman, tunggakan faedah hanya boleh dituntut untuk tempoh enam tahun dari tarikh penghakiman.

[6]Dalam kes semasa, penghakiman diperolehi pada 23 October 1987. Mengikut *United Malayan Banking Corp Bhd v. Ernest Cheong Yong Yin [2002] 2 CLJ 413* FC, walaupun faedah dikira dari 1 Disember 1985, ianya bersatu dan menjadi hutang penghakiman dan oleh yang demikian tarikh faedah bermula adalah tarikh penghakiman, dan bukannya tarikh yang terdahulu. Tempoh untuk kiraan adalah dari tarikh penghakiman sehingga ke tarikh notis kebankrapan difailkan.

[7]Notis kebankrapan adalah tidak sah kerana ia mengandungi tunggakan faedah diluar tempoh enam tahun.

[8]Oleh kerana merit isu kedua yang dikemukakan di hadapan mahkamah ini tidak diputuskan oleh Mahkamah Tinggi dan Mahkamah Rayuan, mahkamah ini menolak untuk menjawab persoalan tersebut atas alasan-alasan, yang antara lainnya: (a) bahawa tiada keputusan Mahkamah Tinggi dan Mahkamah Rayuan mengenai isu tersebut; (b) ianya tidak adil kepada perayu jika perkara tersebut yang tidak dikemukakan dan didebatkan di Mahkamah Tinggi dan yang tidak dibenarkan untuk dibankitkan oleh Mahkamah Rayuan dan olehitu tidak didebatkan dihadapannya, didebatkan untuk pertama kali di mahkamah ini; (c) ianya menggalakan pihak-pihak untuk membangkitkan isu-isu baru bila kes telah kehadapan; dan (d) bantahan tersebut berbentuk prosedur.

Rayuan ditolak dengan kos.]

Reported by Izzaty Izzuddin

Case(s) referred to:

Lowsley v. Forbes [1998] 3 WLR 50 ***(refd)***

Malaysia Soil Investigation Sdn Bhd v. Emko Holdings Sdn Bhd [1994] 1 CLJ 267 HC ***(refd)***

Moscow Narodny Bank Ltd v. Ngan Ching Wen [2004] 2 CLJ 241 FC ***(foll)***

United Malayan Banking Corp Bhd v. Ernest Cheong Yong Yin [2002] 2 CLJ 413 FC ***(foll)***

WT Lamb & Sons v. Rider [1948] 2 KB 331 ***(refd)***

Legislation referred to:

Limitation Act 1939 [UK], s. 2(4)

Limitation Act 1980 [UK], s. 24

Rules of Supreme Court [UK], O. 42 r. 23(a)

Counsel:

For the appellant - Porres Royan (Dahlia WM Lee); M/s Shook Lin & Bok

For the respondent - Karpal Singh; M/s Karpal Singh & Co

Case History:

Court Of Appeal : [2000] 3 CLJ 354
High Court : [1997] 4 CLJ 462

JUDGMENT

Abdul Hamid Mohamad FCJ:

On 23 October 1987, the appellant (judgment creditor) obtained a judgment against the respondent (judgment debtor) for the sum of RM2,963,054.86 with interest thereon at the rate of 16.5% per annum from 1 December 1985 until the date of realisation.

On 28 March 1996, the appellant took out a bankruptcy notice and served it on the

respondent on 3 June 1996.

On 7 June 1996 the respondent served on the appellant an "Affidavit On Application To Set Aside Bankruptcy Notice" pursuant to r. 95 of the Bankruptcy Rules 1969 claiming that the respondent had a counterclaim against the appellant which the respondent could not set up in the action in which the judgment was obtained.

On 10 June 1996, the respondent served on the appellant a notice pursuant to s. 3(2)(ii) of the Bankruptcy Act 1967 alleging that the bankruptcy notice was incorrect and excessive in that the sale of the respondent's shares and dividends on the shares had not been taken into account in the bankruptcy notice and that the appellant had not given a proper breakdown of the sales of the shares.

The respondent filed affidavits in reply in relation to both the r. 95 affidavit and the notice.

On 19 March 1997 the senior assistant registrar dismissed the respondent's r. 95 affidavit and the notice and pursuant to r. 95(2) declared that the act of bankruptcy was committed on 19 March 1997.

The respondent appealed to the judge in chambers.

At the hearing of the appeal before the learned judge, the respondent, through a new solicitor orally raised two preliminary objections. The first was that the sum demanded in the bankruptcy notice was wrong as it included statute-barred interest and, secondly, that the appellant had not obtained prior leave of court under O. 46 r. 2(1)(a) of the Rules of the High Court ("RHC 1980") before instituting bankruptcy proceedings. The second preliminary objection was later abandoned after the appellant produced the order granting the leave.

On 9 July 1997 (within six months of the act of bankruptcy) the appellant filed its creditor's petition.

On 19 August 1997 the first preliminary objection was dismissed by the learned judge.

On 26 August 1997 the respondent filed an appeal to the Court of Appeal against the learned judge's decision on 19 August 1997 dismissing the first preliminary objection. The Court of Appeal allowed the respondent's appeal on 17 January 2000.

The appellant filed a notice of motion applying for leave to appeal to this court against the decision of the Court of Appeal on 17 January 2000. This court granted leave to appeal to the appellant on 17 September 2001 on the following questions:

> (i) whether the second limb of s. 6(3) of the Limitation Act 1953 is relevant and applicable to bankruptcy proceedings; and
>
> (ii) whether the impugned bankruptcy notice is valid under the provisions of s. 3(2)(ii) of the Bankruptcy Act 1967 if the judgment debtor does not dispute that the claim stated in the bankruptcy notice is excessive within seven days from the date of service of the bankruptcy notice. (my own translation).

First Question

On the first question, the learned judge held:

> The matter before me relates to bankruptcy action taken by the judgment creditor. In my view, going by the meaning of "writ of execution" in Order 46 rule 1 of the Rules of the High Court 1980, bankruptcy actions do not come within the meaning of writ of execution and there may be no need even to get leave under Order 46 r. 2 to proceed with the bankruptcy actions. The issue of a bankruptcy notice is not a form of execution (see *Re A Bankruptcy Notice* [1988] 1 QB At page 387.) (Page 764 of the Supreme Court Practice 1997, vol.1).
>
> As seems clear to me that "action" under section 6(3) of the Act does not cover execution proceedings and what more the bankruptcy actions, it follows therefore that the bankruptcy actions do not come within the ambit of section 6(3) of the Act and is therefore not applicable.
>
> As section 6(3) of the Act refers to "actions on judgments" it would seem only sensible to interpret both limbs as applying in the same way, that is, confining to actions on judgments and excluding execution proceedings including bankruptcy actions. In my view the bankruptcy actions just like execution proceedings is the taking of a further step in an existing action rather than the commencement of a new action. In other words the bankruptcy actions do not operate on the concept of the cause of actions as is intended by the provisions of the Act.

In the alternative, after referring to *Malaysia Soil Investigation Sdn Bhd v. Emko Holdings Sdn Bhd [1994] 1 CLJ 267* (High Court), the learned judge held:

> Similarly here, the judgment debt became due on 23 October 1987 and the interest became due from 1 December 1985, a period of roughly one year and eleven months and it was therefore well within the limitation period. It follows that the Act does not prohibit the payment of arrears of interest due on a judgment debt beyond the six years after they become due so long as the act of recovery is made before the expiry of the six years period.
>
> I agree with the learned Judge's interpretation of section 6(3) of the Act and would in the circumstances rule that interest claimed is not statute barred and therefore the bankruptcy notice is not void ab initio as claimed by the counsel for the judgment debtor.

Before going any further, perhaps I should summarise the ruling of the learned trial judge:

> (1) bankruptcy actions do not come within the meaning of "writ of execution" under O. 46 r. 1 (RHC 1980) and there is no need to obtain leave pursuant to O. 46 r. 2 RHC 1980 to proceed with bankruptcy actions.
>
> (2) "actions" under s. 6(3) of the Limitation Act 1953 does not cover execution proceedings and bankruptcy actions. Therefore, bankruptcy actions do not fall within the ambit of s. 6(3) of the Limitation Act 1953 and therefore the provision of that section does not apply to bankruptcy actions.
>
> (3) Both limbs of s. 6(3) of the Limitation Act 1953 apply in the same way, that is, confining to actions on judgments and excluding execution proceedings including bankruptcy actions.
>
> (4) In the alternative, s. 6(3) of the Limitation Act 1953 does not prohibit the payment of arrears of interest on a judgment debt beyond the six years after they became due

so long as the act of recovery is made before the expiry of the six year period.

The Court of Appeal allowed the appeal. The Court of Appeal held:

> In the present case we are of the opinion that counsel for the appellant was right when he submitted that the decision of *Lowsley* affected the decision of *W.T. Lamb* in that though there is no bar in the execution of a judgment after six years, the recovery of interest is limited to six years only. In view of this the decision of the learned Judge relying on the decision of *W.T. Lamb* cannot be upheld.
>
> From the authorities it is clear that the local courts had followed the decision of Lowsley's case in respect of limitation to interest. In *Wangsini Sdn. Bhd. v. Grand United Holdings Bhd.* [1997] 5 CLJ 664, it was held that section 6(3) of the Limitation Act, 1953, will have a telling effect on the statutory notice of demand as the petitioner is only legally entitled to claim interest on the judgment in default obtained on January 19, 1990 for six years from the date on which the interest became due. It is clear from this authority that a bankruptcy notice cannot claim interest exceeding six years on a judgment obtained. It is also clear that a claim for interest exceeding six years will nullify the bankruptcy notice.
>
> ...
>
> The learned Judge made his ruling only in respect of the second limb whereby he decided that there is no limitation to interest claimed because of the decision in *W.T. Lamb*. Since *W.T. Lamb* had been overruled by *Lowsley* 's case under the law as it is now, a judgment creditor can only claim interest on a judgment sum not exceeding six years from the date it is due. In the present case the respondent is only entitled to claim interest six years from the date of judgment.
>
> The present appeal is only in respect of the ruling made by the learned Judge on limitation of interest to be claimed. We are not sure whether the bankruptcy notice included a claim of interest exceeding the limitation period. If it is so then the bankruptcy notice is void.

Lest I get carried away, I should remind myself that I am only dealing with the issue whether the second limb of the Limitation Act 1953 is applicable to bankruptcy proceedings. The High Court in this case held it does not and the Court of Appeal held it does. The answer really lies in the interpretation of s. 6(3) itself.

Rather than merely reproducing s. 6(3) what more only the so-called "second limb", I think we should look at the whole scheme of the Act.

Section 2 (Interpretation) defines "action" as follows:

> "action" includes a suit **or any other proceeding** in a court of law; (emphasis added).

Almost all the sections that follow talk about actions of all types imaginable. Section 6 itself contains a heading "Actions of Contract and Tort and Certain Other Actions" and provides:

> 6. (1) Save as hereinafter provided the following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say:
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> (a) actions founded on a contract or on tort;
>
> (b) actions to enforce a recognisance;
>
> (c) actions to enforce an award;
>
> (d) actions to recover any sum recoverable by virtue of any written law other than a penalty or

forfeiture or of a sum by way of penalty or forfeiture.

(2) An action for an account shall not be brought in respect of any matter which arose more than six years before the commencement of the action.

(3) An action upon any judgment shall not be brought after the expiration of twelve years from the date on which the judgment became enforceable and no arrears of interest in respect of any judgment debt shall be recovered after the expiration of six years from the date on which the interest became due.

(4) An action to recover any penalty or forfeiture or sum by way of penalty or forfeiture recoverable by virtue of any written law shall not be brought after the expiration of one year from the date on which the cause of action accrued:

Provided that for the purpose of this subsection the expression "penalty" shall not include a fine to which a person is liable on conviction for a criminal offence.

(5) Nothing in this section shall apply to:

(a) any cause of action within the Admiralty jurisdiction of the High Court which is enforceable in rem other than an action to recover the wages of seamen, or

(b) any action to recover money secured by any mortgage of or charge on land or personal property.

(6) Subject to the provisions of sections 22 and 32 of this Act the provisions of this section shall apply (if necessary by analogy) to all claims for specific performance of a contract or for an injunction or for other equitable relief whether the same be founded upon any contract or tort or upon any trust or other ground in equity.

It should be noted that in subsection (1) of s. 6 where actions on contract, tort, actions to enforce recognisance, actions to enforce an award, actions for an account which are limited to six years, the provisions are silent regarding limitation period for claiming of interest. However, in subsection (3) which concerns "an action upon any judgment" and for which the limitation period is twelve years, the claim for interest in respect of such judgment debt is limited to six years. In other words, in all cases the claim for arrears of interest is six years. In cases other than an action upon a judgment, no specific provision need be made as the action itself must be brought within six years.

For the same reason, in s. 20, which concerns actions to recover rent and for which the limitation period is six years, there is no mention about the limitation period for claiming interest.

Section 21 concerns actions to recover any principle sum of money secured by a mortgage or charge. The limitation period is twelve years. This is followed by subsection (5) that limits an action to recover arrears of interest payable in respect of any sum of money secured by a mortgage or other charge to six years. In other words in s. 21 we have a somewhat similar situation as in s. 6(3).

All these sections talk about "actions", all types of "actions" as specified in the respective sections and the word "action" itself is defined in s. 2 to include "a suit or any other proceeding in a court of law."

In my humble opinion, if we stick to the definition of the word "action" as provided in the

Act, the answer is easier to find and is clearer. All that we need to answer is first, whether a bankruptcy proceeding is "a suit" or a "proceeding in court" or neither. Unfortunately, confusion has arisen due to reliance on judgments, especially from other jurisdictions, where passages from those judgments are quoted without paying particular attention to the facts of the case and the law applicable in those cases.

Be that as it may, let us look at the cases.

I shall begin with the case of *W.T. Lamb & Sons v. Rider* [1948] 2 KB 331 (CA).

This is not a bankruptcy case. It is a summons-in-chambers in the main writ action in which judgment had been obtained but the judgment sum had not been satisfied. In the summons-in-chambers, the plaintiff applied for leave to proceed to execution to enforce the judgment notwithstanding that six years had elapsed since the judgment was entered. The application was made pursuant to RSC O. 42 r. 23(a) (England) which provides that where six years have elapsed since the date of the judgment, the party alleging himself to be entitled to execution may apply to court or a judge for leave to levy execution. The argument put forward was that RSC O. 42 r. 23(a) was invalid as it was in conflict with s. 2(4) of the (English) Limitation Act 1939.

It should be noted that first, the provisions of RSC O. 42 r. 23(a) is similar to the provisions of our O. 46 r. 2(1) RHC 1980.

The Court of Appeal (England) rejected that argument. The court held that RSC O. 42 r. 23(a) was not rendered invalid by the provisions of s. 2(4) of the (English) Limitation Act 1939. The court drew a distinction between "execution" in RSC O. 42 r. 23(a) and the word "action" in s. 2(4) of the Limitation Act 1939. The court held that O. 42 r. 23(a) dealt solely with execution which is essentially a matter of procedure for the purpose of enforcing a judgment when obtained. On the other hand, s. 2(4) of the Limitation Act 1939 is concerned with the right to sue on a judgment. A plaintiff who has obtained a judgment more than six years is not entitled to issue execution on it except with the leave of the court or a judge as provided by O. 42 r. 23(a) (of the English Rules).

It is this last sentence above that the case is an authority for. Furthermore, if we bear in mind that the words used in our O. 46 r. 2 RHC 1980 and in the English Rules are "A writ of execution to enforce a judgment...", clearly a bankruptcy notice or a bankruptcy petition cannot be "a writ of execution." So, in my view, our courts have been correct in holding the view that no leave of court is necessary to issue a bankruptcy notice after six years as required by O. 46 r. 2 RHC 1980. But, that does not answer the question posed to this court especially in view of the words "or any other proceeding in court". I shall come back to this later.

We now come to *Lowsley v. Forbes* [1998] 3 WLR 50 (HL). First, it must be noted that, by the time *Lowsley (supra)* was decided the provisions of s. 2(4) of the (English) Limitation Act 1939 had been replaced by s. 24 of the (English) Limitation Act 1980, which provides:

> 24 (1) An action shall not be brought upon any judgment after the expiration of six years from the date on which the judgment became enforceable.
>
> (2) No arrears of interest in respect of any judgment debt shall be recovered after the expiration of six

> years from the date on which the interest became due.

Note that besides splitting the old subsection 2(4) of the 1939 Act into two subsections, the word "twelve" in the first limb of the 1939 Act is substituted with the word "six".

*Lowsley (supra)*too was not a bankruptcy proceeding. It was an application to enforce a judgment obtained 1 1/2 years earlier by way charging an garnishee orders. The argument was that execution of the judgment was time barred by s. 24(1) of the (English) Limitation Act 1980.

The first issue, as stated by Lord Lloyd of Berwick was "whether s. 24(1) bars**execution** of a judgment after six years, or whether it only **bars the bringing of a fresh action** on the judgment." (emphasis added).

In his judgment, Lord Lloyd of Berwick, referring to the provisions of ss. 2(4) of the (English) Limitation Act 1939 held:

> Thus the position after the Limitation Act 1939 came into force was that a judgment debt became statute barred after 12 years.

His Lordship agreed with *W.T. Lamb (supra)* that RSC O. 42 r. 23(a) was not *ultra vires*.

On the first question mentioned above, his Lordship held:

> "Action" in section 24(1) means a fresh action, and does not include proceedings by way of execution.

In this respect, the head note in [1998] 3 All ER 897 is preferable because it is very clear. This is what it ways:

> Held - On its true construction, the word 'action' in s. 24(1) of the 1980 Act meant a fresh action, and did not include proceedings by way of execution. Accordingly, the section did not bar execution of a judgment after six years, but only barred the bringing of a fresh action on the judgment.

However, on the second question that involves the interpretation of sub-section (2) of s. 24 of the (English) Limitation Act 1980, the House of Lords held:

> However, there was no reason why the words 'no arrears of interest... shall be recovered' in s. 24(2) should not be given their ordinary meaning so as to bar execution after six years in respect of all judgments, since 'recovered' had a broad meaning and was not confined to recovery by fresh action. It followed that the judge had been correct to reduce the interest to six years, and to that extent the appeal would be allowed.

So, the net effects of that judgment are:

> (1) Action upon judgment must be brought within six years.
>
> (2) Execution of judgment is not subject to a limitation period. However, leave must be obtained if the execution is to be done after the period of six years;
>
> (3) However, even if it is by way of execution of a judgment, interest may only be recovered for a period of six years.

We shall now come to the judgment of this court in *United Malayan Banking Corp Bhd v. Ernest Cheong Yong Yin [2002] 2 CLJ 413*. This is a bankruptcy case. In that case, the appellant obtained a summary judgment on 15 October 1987 with interest from 1 April 1986 until full realisation. On 24 January 1996 (eight years and three months later) the appellant filed a bankruptcy notice. However, the claim for interest was only for six years from the date of the judgment. This court held:

> (1) When an act of recovery is made, future interest could not be said to be in arrears and, therefore, could not be claimed (see p 397 D).
>
> (2) The second limb of s. 6(3) of the Act provided that an action to recover arrears of interest must be brought within six years of the judgment date and because of the word 'arrears', it could not denote interest which was still not due. It must, therefore, mean arrears of interest at the time of recovery and could not include future interest even if the amount due had not been paid (see p 397D-E; *Lowsley & Anor v. Forbes* [1998] 3 All ER 897 followed.
>
> (3) Therefore, a person filing an action for recovery of arrears of interest on the last day of the six year period from the judgment date would only be entitled to that amount and nothing more. If he file it on the first day after the six year period, his action would be barred by limitation, arrears of interest included (see p 397F)
>
> (4) In the instant case, although the amount of arrears of interest claimed was only for six years from the judgment date, the bankruptcy notice had been filed long after the limitation period of six years. Accordingly, the bankruptcy notice was rendered invalid. As for the prejudgment interest, despite the Court of Appeal's finding on this point, the court held that that was in order as it was merged with the principal amount from the date of the breach, and which was the standard stipulation in all contracts, to become the judgment debt.
>
> (5) In view of the wording of the second limb of s. 6(3) of the Act, the act of recovery of the arrears of interest in respect of the judgment debt must be made within six years of the judgment date and only up to the date of the act of recovery. There was no formal defect or any irregularity in the instant case and s. 131 of the Bankruptcy Act 1967 was certainly not applicable. The only error of the appellant here was to file the bankruptcy notice out of time.
>
> (6) The court was aware of O. 42 r. 12 of the Rules of the High Court 1980 ('the RHC'), which provided that every judgment debt shall carry an interest from the date of judgment until the judgment was satisfied. These rules were made by virtue of s. 17 of the Courts of Judicature Act 1964 ('the CJA'). The words 'until the judgment is satisfied' in O. 42 r. 12 appear to be in conflict with the second limb of s. 6(3) of the Act. However, between subsidiary legislation made under the CJA, namely the RHC, if it conflicted with s. 6(3) of the Act, which was a parent law, then the Act prevailed in view of s. 23 of the Interpretation Acts 1948 and 1967.

Learned counsel for the appellant submitted that this court in that case did not consider the question now posed to this court and under present discussion. He submitted:

> In the *Ernest Cheong* case, after holding that an action for recovery of arrears of interest after 6 years from the date of judgment is barred by the 2nd limb of s. 6(3) of the Limitation Act, the Federal Court did not apply its mind as to whether bankruptcy proceedings are within the ambit of the said provision of the Limitation Act (i.e., the Court did not consider whether bankruptcy proceedings is an "action for recovery of arrears of interest"). The court had applied the said provision as a matter of course to determine the validity of the Bankruptcy Notice under consideration. The authority is therefore of no relevance here.

[It must be pointed out that leave to appeal in the instant appeal was given prior to the decision of this court in *Ernest Cheong - supra*].

Whereas I would not agree that that case *(Ernest Cheong - supra)* is of no relevance to the instant appeal, I agree that the issue now posed to this court was not discussed but rather it was assumed that s. 6(3) applies. So, the question is still open for this court to decide.

Recently, on 1 April 2004, this court delivered its decision in *Moscow Narodny Bank Ltd v. Ngan Ching Wen [2004] 2 CLJ 241* FC. The issue posed involving s. 6(3) of the Limitation Act 1953 was whether the date when interest became due under a judgment was to be taken as the date of judgment or the date of commencement of interest as stipulated in the judgment.

This question had in fact been answered in *Ernest Cheong - supra* and this court followed its earlier decision in *Ernest Cheong - supra*. Like in *Ernest Cheong - supra*, the court also did not consider the issue now posed to this court in the instant appeal.

Coming back to the issue now before this court. In my view, the answer lies in the answers to the following questions:

> 1. Whether a bankruptcy proceeding is an "action" within the meaning of s. 6(3) of the Limitation Act 1953 as defined in s. 2 of the same Act.
>
> 2. Whether the "two limbs" of ss. 6(3) should be read disjunctively or conjuntively.

We have seen from the decided cases and I agree that a bankruptcy proceeding is not "a writ of execution" within the meaning of O. 46 r. 2 RHC 1980. But, that does not necessarily mean that it is therefore "an action" within the meaning of s. 6(3). We still have to consider the meaning of "an action upon any judgment" in the light of the definition given in s. 2 of the Limitation Act 1953 that includes "a suit or any other proceeding".

Of course, by merely looking at the word "action" in s. 6(3) it appears that the word "action" does not include a bankruptcy proceeding. It is also clearly not a "suit", one of the words used in the definition of the word "action" in s. 2. But, is it not a "proceeding in a court of law" "upon any judgment" (I am reading the provisions in ss. 2 and 6(3) together).

I do not think that it can be argued that a bankruptcy proceeding is not proceeding in court. Neither can it be argued that it is not based upon a judgment. There has to be a judgment before a bankruptcy proceeding can be commenced. Then going by the definition of "action" is s. 2, it is an "action" and an action upon a judgment.

A question then may be asked: on the same reasoning, is an "execution" not a "proceeding in court"? Of course it is a proceeding in court but, I think, the distinction lies in the fact that execution is the continuation of the existing proceeding to enforce the judgment provided by the same rules of court, the RHC 1980. On the other hand, bankruptcy proceedings are provided by separate law and rules, the focus being the judgment debtor, not the debt and the object is to appoint a receiver in the person of the official assignee over the assets of the debtor and to convert the status of the debtor into a bankrupt with certain disqualification and disabilities, the most important being the loss of control over his properties to the official assignee. The fact that it is based on a judgment does not necessarily make it a continuation of the existing proceeding. Section 6(3) itself is about "action upon a judgment". Though the existence or non-existence of a cause of action may or may not be a factor to be considered, if we say that for there to be action there must be a cause of action, then the existence of a

judgment and the failure to satisfy the judgment debt itself is a cause of action. In any event, it is a remedy provided by law, whether it is to be considered as a cause of action or not, if relevant. Furthermore, a bankruptcy proceeding is by way of petition, just like divorce, winding-up or election, to name a few. Thus a bankruptcy proceeding bears the characteristics of a fresh proceeding unlike an execution proceeding.

On these grounds, I am inclined to the view that a bankruptcy proceeding, by definition of the word "action" in s. 2 of the Act is an "action" and it is caught by the provisions of s. 6(3).

The next question then is whether the so-called first and second limbs of s. 6(3) should be read conjunctively or disjunctively.

It may be argued that *Lowsley (supra)* is an authority for reading the two subsections (in the English provision) disjunctively on the ground that, even though the House of Lords held that subsection (1) does not apply to executions, yet, even in execution proceedings the claim for interest is limited to six years. But, what is important to note is that the provision of s. 24 of the (English) Limitation Act 1980 under consideration in that case is differently arranged from the Malaysian provision in s. 6(3). The provision in the (English) 1980 Act is split into two subsections. On the other hand the Malaysian provision is a one-sentence subsection, like the provision in the (English) 1939 Act which was considered in *W.T. Lamb (supra).* Could it be that the provision was redrafted as a consequence of the decision in *W.T. Lamb (supra)* ?

In any event, as I have said, s. 6(3) is but a one-sentence subsection. It is really quite misleading to refer to it as "first limb" and "second limb" giving the impression that they are to be read separately. Whatever the view of the House of Lords in England, that view is based on a differently arranged provision: there are two separate subsections in the (English) 1980 Act as against a one sentence subsection in our law.

Furthermore, we should look at the scheme of our Limitation Act 1953. Where, as has been pointed out, the limitation of action is six years, the provision is silent on the limitation period for claiming arrears of interest. The reason is clear: it is not necessary because it is automatically limited to six years. Where the limitation of action is twelve years as in s. 21 (and s. 6(3)), the limitation period for claiming arrears of interest is six years. (See *Ernest Cheong (supra)* for meaning of "arrears of interest"). So, the limitation period for claiming arrears of interest is consistent ie, six years in all cases. The exception is execution proceedings. But, first of all, it is "execution" not an "action". Secondly, if execution is to be done after six years leave of court must be obtained. That, perhaps, is the reason for the requirement of leave, leave may not be granted at all or it may be granted with condition attached, eg, the arrears of interest may be limited to six years also. On these grounds I am of the view that the whole subsection should be read together and not to be split to first and second limb and to read them disjunctively.

In conclusion, it is my considered opinion that a bankruptcy proceeding is an "action upon (a) judgment" within the meaning of s. 6(3). The limitation for bringing the action is twelve years but the arrears of interest may only be claimed for six years.

I am aware that this conclusion may be inconsistent with *Ernest Cheong (supra)* in one aspect ie, where Abdul Malek Ahmad FCJ, delivering the judgment of the court said:

> In the instant case, although the amount of arrears of interest claimed is only for six years from the

> judgment date, the bankruptcy notice had been file on 24 January 1996, long after the limitation period of six years which expired on 14 October 1993. Accordingly, the bankruptcy notice is rendered invalid. As for the prejudgment interest, despite the Court of Appeal's finding on this point, we hold that that is in order as it is merged with the principal amount from the date of the breach, and which is the standard stipulation in all contracts, to become the judgment debt.
>
> To answer the question posed, we would recapitulate by saying that in view of the wording of the second limb of s. 6(3) of the Act, the act of recovery of the arrears of interest in respect of the judgment debt must be made within six years of the judgment date and only up to the date of the act of recovery. In our view, there is no formal defect or any irregularity in the instant case and s. 131 of the Bankruptcy Act is certainly not applicable. The only error of the appellant here was to file the bankruptcy notice out of time.

With greatest respect, as I have held that the whole of s. 6(3) should be read conjunctively, s. 6(3) allows an action upon judgment to be brought within twelve years but in such an action arrears of interest may only be claimed for a period of six years. The position is somewhat similar to s. 21 where an action to recover the principal sum of money secured by a mortgage may be brought within twelve years but an action to recover arrears of interest payable in respect of the same is limited to six years. It is true that the provisions in s. 21 are to be found in two different subsections but the principle is the same. The fact that the words "action" is not repeated because the so-called second limb is part of the same sentence constituting the subsection which begins with the words "An action". The whole subsection is about an action upon a judgment.

In the circumstances I would answer the first question posed to this court in the affirmative ie, s. 6(3) applies to bankruptcy proceedings and while a bankruptcy proceeding may be brought within twelve years of the date of judgment, arrears of interest may only be claimed for a period of six years from the date of the judgment.

In this case, judgment was obtained on 23 October 1987. Even though interest was calculated from 1 December 1985, following *Ernest Cheong (supra)* it merges into the judgment debt and therefore the date the interest became due, is the date of the judgment, not the earlier date. Bankruptcy notice was filed on 28 March 1996, eight years and five months from the date of judgment which is within the twelve year period. So the filing of the bankruptcy notice is not out of time.

What about the interest claimed?

I have reproduced the relevant part of the learned judge's judgment earlier.

A few things need be said about this part of the judgment. First, the learned judge took the date from which the interest was calculated (1 December 1985) and not the date of judgment (23 October 1987) as the date the interest became due. In view of the judgment of this court in *Ernest Cheong (supra)* which was followed by this court in *Moscow Narodny Bank Ltd. (supra)*, with respect, that is not correct. Those cases held, and I agree, that regarding interest before judgment, the date the interest became due is the date of judgment. The interest merged with the judgment sum.

Secondly, the learned judge calculated the period of limitation from the date the interest was calculated in the judgment (1 December 1985) to the date of judgment (23 October 1987). In view of the two judgments of this court just mentioned, with respect, that too is not correct. As decided in *Ernest Cheong (supra)*, the period is to be calculated from the date of judgment

to the date of filing the bankruptcy notice (eight years and five months after date of judgment.) As I have held, contrary to *Ernest Cheong (supra)*, that s. 6(3) allows it to be filed within a period of twelve years, so, the filing of the bankruptcy notice was within the limitation period. But, what about the arrears of interest claimed? Again, with respect, I am of the view that the learned judge was wrong when he said that the Act does not prohibit the claim for arrears of interest beyond six years. Both in *Ernest Cheong (supra)* and *Moscow Narodny Bank Bhd (supra)* it was held and it is also my view (even though for different reasons) that in a bankruptcy proceeding arrears of interest may only be claimed for a period of six years from the date of judgment.

The Court of Appeal in this appeal said:

> We are not sure whether the bankruptcy notice included a claim of interest exceeding the limitation period. It is so then the bankruptcy notice is void.

Whether interest was claimed in excess of six years or not can be ascertained from the particulars provided in the bankruptcy notice:

> **PARTICULARS OF CLAIM**
>
> As per Judgment dated 23rd day of October 1987
>
> 1. Judgment sum RM2,963.054.86
>
> 2. Interest at the rate of 16.5%
>
> per annum from 1.2.1986 to
>
> 28.3.1996 (3,771 days) RM5,051,115.56
>
> RM8,014,170.42

The date of judgment is 23 October 1987. Interest may only be claimed for a period of six years from the date of judgment, ie, until and including 22 October 1993. But the claim was made until 28 March 1996 (the date the bankruptcy notice was filed) which is clearly more that six years. So, the arrears of interest claimed contains arrears of interest outside the period of six years allowed ie, two years and five months more than allowed. That, following *Ernest Cheong (supra)* renders the bankruptcy notice invalid.

Second Question

The issue in the second question was never raised in the High Court. Thus, understandably, the learned judge did not deal with it.

In the Court of Appeal, from the judgment, it appears that learned counsel for the appellant raised an objection "on the way" the respondent raised the issue on interest (the second issue in the High Court and the Court of Appeal and the first question in this court). Her objection was on the ground that no notice was given within seven days of service of the bankruptcy notice as required by s. 3(2) proviso (ii) of the Bankruptcy Act 1967. The issue regarding interest (first question in this court) was only raised as a preliminary objection about eleven months after the service of the bankruptcy notice. The Court of Appeal, in its judgment states

that from the record it was clear that learned counsel for the appellant did not object to the issue on interest being raised before the learned trial judge. The learned judge went on to hear the arguments and made his ruling. The Court of Appeal held that it was too late for the appellant to raise the objection before it. The Court of Appeal went on to say that it was a point of law which in its opinion could be raised at any time. And, the whole judgment of the Court of Appeal is on the issue of interest just like judgment of the High Court.

This court on 17 September 2001 granted leave not only on the issue of interest (the first question here) but also on the second question regarding the failure to give notice under s. 3(2) proviso (ii). This becomes the second question now.

I must admit that, I am in a dilemma. On the one hand, the issue was not raised in and therefore not considered by the High Court, though attempted to be raised by way of a preliminary objection in the Court of Appeal it was dismissed by the Court of Appeal as being too late to do so. The merit of the issue was not considered both by the High Court and the Court of Appeal. On the other hand, leave was granted by this court on that issue.

Should we answer the question? In fact the more pertinent question is whether should leave have been granted at all? I should not and I do not question the wisdom of this court in granting leave on the second question. However, as Abdul Malek Ahmad FCJ has very openly and honestly pointed out in *Moscow Narodny Bank Ltd (supra)* that, in that case, where he himself was a member of the panel that granted leave, "upon full analysis at the hearing" he realised that may be the question should not have been allowed at all. That is why sometimes this court, after hearing the appeal, declines to answer certain questions.

In this present appeal, personally speaking, I am very reluctant to answer the question. First, we do not have the advantage of having the judgments of the High Court and the Court of Appeal on the issue.

Secondly, it is unfair to the appellant that a point that was neither raised nor argued in the High Court and not allowed to be raised by the Court of Appeal and therefore not argued before it be argued for the first time in this court.

Thirdly, it will encourage parties to raise new issues as a case progresses, especially when a new counsel comes into picture.

Fourthly, not only there was no objection raised on that ground in the High Court, but the preliminary objection by the respondent regarding interest was argued in full and that, in fact, was the only issue argued before the High Court and decided by the learned judge and that also was the only issue decided upon by the Court of Appeal.

Fifthly, the objection regarding the failure to give notice is procedural in nature, compared to the objection regarding interest by the respondent, which actually involves interest that cannot be lawfully claimed as provided by law. (I am not saying that failure to give notice under s. 3(2) proviso (ii) of the Bankruptcy Act 1967 does not invalidate the bankruptcy notice in all cases. All I say is that the issue must properly taken at the right time.)

Sixthly, if I may venture a bit into the law without actually deciding it, s. 3(2) of the Bankruptcy Act 1967 talks about "the amount due exceeds the amount actually due", which may be due to wrong calculation or failure to take into account amounts paid subsequent to

the judgment. In this case it is the claim for arrears of interest which the law does not permit. No wonder the Court of Appeal says that "this is a point of law which in our opinion could be raised at any time." (The court was referring to the respondent's objection on the inclusion of arrears of interest exceeding six years.)

In the circumstances, I would decline from answering the second question.

I would dismiss the appeal with costs and order that the deposit be paid to the respondent on account of taxed costs.

My Chief Judge (Sabah & Sarawak) and my brother Mohd. Noor Ahmad FCJ had read this judgment in draft and had agreed with it.