Privy Council Appeal No. 36 of 1980

Yew Bon Tew also known as Yong Boon Tiew and Another *Appellants*

v.

Kenderaan Bas Mara – – – – – – – *Respondents*

FROM

THE FEDERAL COURT OF MALAYSIA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 7TH OCTOBER 1982

Present at the Hearing:

LORD FRASER OF TULLYBELTON

LORD SCARMAN

LORD LOWRY

LORD BRIDGE OF HARWICH

LORD BRIGHTMAN

[*Delivered by* LORD BRIGHTMAN]

This appeal from the Federal Court of Malaysia raises the question whether claimants, whose cause of action became statute barred in 1973 by virtue of the Public Authorities Protection Ordinance 1948 ("the 1948 Ordinance"), can nevertheless issue a writ in 1975 in reliance upon the Public Authorities Protection (Amendment) Act 1974 ("the 1974 Act") which substituted a limitation period of 36 months for the previous period of 12 months.

On 5 April 1972 a motor bus belonging to the respondents was being driven along a road in the State of Selangor. It collided with a motor cycle driven by the first plaintiff with the second plaintiff as pillion passenger. Both were injured.

The respondents are a statutory body and the accident occurred during the course of the respondents' public duties. Consequently the plaintiffs' cause of action was liable to become statute barred on 5 April 1973 pursuant to the 1948 Ordinance, section 2 of which reads as follows:—

> "2. Where, after the coming into force of this Ordinance, any suit, action, prosecution or other proceeding is commenced in the Federation against any person for any act done in pursuance or execution or intended execution of any written law or of any public duty or authority or in respect of any alleged neglect or default in the execution of any such written law, duty or authority the following provisions shall have effect—
>
> (*a*) the suit, action, prosecution or proceeding shall not lie or be instituted unless it is commenced within twelve months next

after the act, neglect or default complained of or, in the case of a continuance of injury or damage, within twelve months next after the ceasing thereof . . . "

Unfortunately those advising the plaintiffs did not appreciate that the respondents were a public authority. As a result time slipped by without the institution of proceedings before the 12 month limitation expired on 5 April 1973.

On 5 June 1974 the 1974 Act was passed. It came into force on 13 June. It was expressed to amend the 1948 Ordinance by deleting the words " 12 months " wherever appearing in paragraph (*a*) of section 2 and substituting the words " 36 months ". Immediately before the 1974 Act came into force the plaintiffs' cause of action had been statute barred for 14 months. A further 9 months went by and on 20 March 1975 the plaintiffs issued a writ claiming damages for personal injuries caused by the negligence of the respondents' servant. Three weeks later the 36 month period of limitation, if applicable, expired. The respondents filed a defence in which they pleaded that the appellants were barred from bringing the action by virtue of the 1948 Ordinance. By the time the action came to trial, this had become the only point in the case. Liability was admitted subject to contributory negligence on the part of the first plaintiff, and substantial damages were also agreed. The sole question remained whether the plaintiffs' cause of action was finally statute barred in April 1973 or whether it was revived in June 1974.

There are two other statutory provisions which are relevant. Section 13 of the Interpretation and General Clauses Ordinance 1948 provided that:—

" Where a written law repeals in whole or in part any other written law, then, unless the contrary intention appears, the repeal shall not . . .

(*c*) affect any right, privilege, obligation or liability acquired, accrued or incurred under any written law so repealed."

This Act was replaced by the Interpretation Act 1967, section 30(1)(*b*) of which says the same thing in different words.

Their Lordships turn to consider the propositions that a Limitation Act which is not expressed to extinguish a cause of action is procedural and that a statute which is merely procedural is *prima facie* retrospective. These two propositions lie at the root of the appellants' case.

A statute of limitations may be described either as procedural or as substantive. For example, in English law, at the expiration of the period prescribed for any person to bring an action to recover land, the title of that person to the land is extinguished. Such a limitation therefore goes to the cause of action itself. In most cases however the English Limitation Act only takes away the remedies by action or by set-off; it goes only to the conduct of the suit; it leaves the claimant's right otherwise untouched in theory so that, in the case of a debt, if the statute-barred creditor has any means of enforcing his claim other than by action or set-off, the Act does not prevent his recovering by those means. In this sense, the 1948 Ordinance and the 1974 Act are procedural. Cf. *Harris v. Quine* (1869) L.R. 4 Q.B. 653 and *Rodriguez v. Parker* [1967] 1 Q.B. 116.

Apart from the provisions of the Interpretation Statutes, there is at common law a *prima facie* rule of construction that a statute should not be interpreted retrospectively so as to impair an existing right or obligation unless that result is unavoidable on the language used. A statute is retrospective if it takes away or impairs a vested right acquired under existing laws, or creates a new obligation, or imposes a new

duty, or attaches a new disability, in regard to events already past. There is however said to be an exception in the case of a statute which is purely procedural, because no person has a vested right in any particular course of procedure, but only a right to prosecute or defend a suit according to the rules for the conduct of an action for the time being prescribed.

But these expressions "retrospective" and "procedural", though useful in a particular context, are equivocal and therefore can be misleading. A statute which is retrospective in relation to one aspect of a case (*e.g.* because it applies to a pre-statute cause of action) may at the same time be prospective in relation to another aspect of the same case (*e.g.* because it applies only to the post-statute commencement of proceedings to enforce that cause of action); and an Act which is procedural in one sense may in particular circumstances do far more than regulate the course of proceedings, because it may, on one interpretation, revive or destroy the cause of action itself.

Whether a statute is to be construed in a retrospective sense, and if so to what extent, depends on the intention of the legislature as expressed in the wording of the statute, having regard to the normal canons of construction and to the relevant provisions of any interpretation statute. The sort of problem which can arise is neatly illustrated by the case of "*The Ydun*" [1899] P. 236. This was an action by the owners of the barque "Ydun" against the Corporation of Preston. On 13 September 1893 the barque went aground owing to the alleged negligence of the Preston Corporation, which was the port authority. On 5 December 1893 the Public Authorities Protection Act was passed. It came into force on 1 January 1894. It had the effect of curtailing the period of limitation applicable to the institution of proceedings in such an action from 6 years to 6 months. The position therefore at the date of the accident was that the owners had until September 1899 to issue their writ; but on 1 January 1894, if the Act applied to this cause of action, they had only until March 1894. The owners issued their writ in November 1898. By the time the case reached the Court of Appeal there were two issues, first whether the Corporation had been acting in pursuance of its public duties when the accident took place and was therefore entitled to the protection of the Act; and secondly whether the Act applied to a cause of action which had already accrued when the Act came into force. The second issue was decided against the owners, and was disposed of in the judgments with remarkable brevity for so important an issue. A.L. Smith L.J. expressed himself as follows (at page 245):—

> "The rule applicable to cases of this sort is well stated by Baron Wilde in *Wright* v. *Hale* (1860) 6 H. & N. 227, 232, namely, that when a new enactment deals with rights of action, unless it is so expressed in the Act, an existing right of action is not taken away. But when the enactment deals with procedure only, unless the contrary is expressed, the enactment applies to all actions, whether commenced before or after the passing of the Act. The Act of 1893 is an Act dealing with procedure only."

Vaughan Williams L.J. was to the same effect (at page 246):—

> "I also agree that the Act is retrospective . . . There is abundant authority that the presumption against a retrospective construction has no application to enactments which affect only the procedure and practice of the Courts."

Romer L.J. agreed with the conclusion, but expressed no reasons.

Their Lordships will return to this case later. They have cited it at this stage because it was the foundation of the judgment delivered by the learned trial judge in the High Court in Malaya.

There is a dearth of authority on the particular point which arises on this appeal, namely the re-emergence of a statute-barred right of action. It is a point that was foreshadowed by Channell J. in *R. v. Chandra Dharma* [1905] 2 K.B. 335, which merits a brief reference. In that case the first defendant was alleged to have committed an offence on 15 July 1904. At that time the Criminal Law Amendment Act 1885 provided that a prosecution for such an offence was to be brought within three months, that is to say, by 15 October 1904. On 1 October 1904 this time limit was extended by statute to 6 months, thus expiring on 15 January 1905. The prosecution was begun on 27 December 1904. Lord Alverstone C.J. said this (at page 338):—

> "The rule is clearly established that, apart from any special circumstances appearing on the face of the statute in question, statutes which make alterations in procedure are retrospective. It has been held that a statute shortening the time within which proceedings can be taken is retrospective, and it seems to me that it is impossible to give any good reason why a statute extending the time within which proceedings may be taken should not also be held to be retrospective. If the case could have been brought within the principle that unless the language is clear a statute ought not to be construed so as to create new disabilities or obligations, or impose new duties in respect of transactions which were complete at the time when the Act came into force, [Counsel for the defendant] would have been entitled to succeed; but when no new disability or obligation has been created by the statute, but it only alters the time within which proceedings may be taken, it may be held to apply to offences completed before the statute was passed. That is the case here. This statute does not alter the character of the offence, or take away any defence which was formerly open to the prisoner. It is a mere matter of procedure, and according to all the authorities it is therefore retrospective."

Channell J., who agreed, added this important rider:—

> "If the time under the old Act had expired before the new Act came into operation the question would have been entirely different, and in my view it would not have enabled a prosecution to be maintained even within six months from the offence."

The case of *Noor Mohamed Yousoff v. Teo Kai Tee* (1953) 19 M.L.J. 188 fell to be decided on comparable legislation to that which exists in the present case. This was an accident case. The accident was alleged to have been caused by the negligence of the first defendant's servant on 9 February 1952. At that time the limitation period would have expired on 9 February 1953. Before that date the plaintiff issued a writ against the first defendant. On a date which is somewhat obscure, but seems to have been either 22 February or 17 March 1953, a statute came into force which extended the limitation period to 3 years. On 10 April 1953 the plaintiff amended the writ by adding the driver of the vehicle as the second defendant. It was held that proceedings against the second defendant were not barred.

Lastly, there is the Australian case of *Maxwell v. Murphy* (1957) 96 C.L.R. 261. In that case a fatal motor car accident had occurred on 19 March 1951. At that date an action could be brought by the family of the victim within 12 months from the death under the Compensation to Relatives Act. The period therefore expired on 19 March 1952. Under an amending Act which came into force on

16 December 1953 the period was extended to six years, which would expire, if the Act applied, on 19 March 1957. On 30 November 1954 the appellant brought her action. The question arose whether the amending Act did or did not revive the right of action. It was held by the High Court of Australia that it did not. This was a decision by four members of the High Court. The fifth member, Fullagar J., dissented. The principal point involved in the case was whether the limit of time was an ingredient of the cause of action, so that the cause itself was extinguished when the period expired. The case was however also considered on the alternative basis, which is the one relevant to the instant appeal, that time barred only the remedy, and not the cause of action.

Their Lordships will return later to this case.

With these preliminary observations, their Lordships turn to the instant appeal. The plaintiffs' claim succeeded in the High Court. The learned judge decided it upon the " procedural " test. He said this:—

> " From authorities cited, it is my considered judgment that whether the prospective or retrospective rule of construction should apply depends on the nature of the new statute or amending statute. If it is purely a procedural statute and does not deal with substantive rights then the retrospective rule of construction should apply. But where the statute deals with substantive rights, or deals with both procedural and substantive rights, then the prospective rule of construction is applicable . . . From the authority laid down in *'The Ydun'* I am of the view that the amending Act deals only in procedure. In the absence of any express provision to the contrary, the amending Act should, therefore, apply retrospectively."

The learned judge added that, if the plaintiffs had begun their action before the 1974 Act came into force, the defendants would have escaped liability, thus taking the view that the Act, though retrospective in relation to a cause of action, was prospective in relation to an action to enforce that cause of action. Their Lordships mention the learned judge's comment only to illustrate the different senses in which a statute can be said to be retrospective or prospective.

The defendants appealed. The Federal Court adopted a more flexible approach to the " procedural " test:—

> " The pertinent question for determination is the nature of [the 1974 Act]—does it affect rights or procedure? An Act which makes alteration in procedure only is retrospective: see *' The Ydun'*. In our view there are no cases upon which differences of opinion may more readily be entertained, or which are more embarrassing to dispose of, than the cases where the court has to decide whether or not an amending statute affects procedure and consequently will operate retrospectively or affects substantive rights and therefore in the absence of a clear contrary intention, should not be read as acting retrospectively. The distinction between procedural matters and substantive rights must often be of great fineness. Each case therefore must be looked at subjectively; there will inevitably be some matters that are classified as being concerned with substantive rights which at first sight must be considered procedural and vice versa."

The Federal Court developed this line of reasoning by referring to part of the judgment of Williams J. in *Maxwell v. Murphy*. The passage in the judgment of Williams J. (at page 277) which the Federal Court found of great assistance, as also have their Lordships, reads as follows:—

> " Statutes of limitation are often classed as procedural statutes. But it would be unwise to attribute a *prima facie* retrospective effect

to all statutes of limitation. Two classes of case can be considered. An existing statute of limitation may be altered by enlarging or abridging the time within which proceedings may be instituted. If the time is enlarged whilst a person is still within time under the existing law to institute a cause of action the statute might well be classed as procedural. Similarly if the time is abridged whilst such person is still left with time within which to institute a cause of action, the abridgment might again be classed as procedural. But if the time is enlarged when a person is out of time to institute a cause of action so as to enable the action to be brought within the new time or is abridged so as to deprive him of time within which to institute it whilst he still has time to do so, very different considerations could arise.

A cause of action which can be enforced is a very different thing to a cause of action the remedy for which is barred by lapse of time. Statutes which enable a person to enforce a cause of action which was then barred or provide a bar to an existing cause of action by abridging the time for its institution could hardly be described as merely procedural. They would affect substantive rights."

The Federal Court in the present case accepted the reasoning of Williams J., and concluded by saying:—

"On the failure of the respondents to commence action within the specified period the appellants had acquired an 'accrued right' which was designed to give them immunity for acts done in the discharge of their public duties. That right was well preserved by the Interpretation Act 1967 . . . It therefore seems to us that in the circumstances of this case, the time for the claim was not enlarged by [the 1974 Act]. The Act is not retroactive in operation and has no application to a cause of action which was barred before the Act came into operation."

With that conclusion their Lordships entirely agree. They would wish to add only a few observations.

Whether a statute has a retrospective effect cannot in all cases safely be decided by classifying the statute as procedural or substantive. For example, in "*The Ydun*" case the barque might have grounded on 13 May instead of 13 September 1893 and the Act might have come into force on 5 December 1893 when it received the Royal Assent, instead of 27 days later. Had those been the facts the Act would, if its procedural character were the true criterion of its effect, have deprived the owners of their ability to pursue their cause of action on the day the Act reached the Statute Book. A Limitation Act which had such a decisive effect on an existing cause of action would not be "*merely* procedural" in any ordinary sense of that expression. Their Lordships assume (without expressing an opinion) that "*The Ydun*" case was, on its facts, correctly decided.

Their Lordships consider that the proper approach to the construction of the 1974 Act is not to decide what label to apply to it, procedural or otherwise but to see whether the statute, if applied retrospectively to a particular type of case, would impair existing rights and obligations. The appellants assert that a limitation act does not impair existing rights because the cause of action remains, on the basis that all that is affected is the remedy. There is logic in the distinction on the particular facts of "*The Ydun*" case, because the right to sue remained, for a while, totally unimpaired. But in most cases the loss, as distinct from curtailment, of the right to sue is equivalent to the loss of the cause of action. The Public Authorities Protection Act can be regarded

as procedural on the facts of "*The Ydun*" case, but a slight alteration to those facts would have made it substantive. A limitation act may therefore be procedural in the context of one set of facts, but substantive in the context of a different set of facts.

In their Lordships' view, an accrued right to plead a time bar, which is acquired after the lapse of the statutory period, is in every sense a right, even though it arises under an act which is procedural. It is a right which is not to be taken away by conferring on the statute a retrospective operation, unless such a construction is unavoidable. Their Lordships see no compelling reason for concluding that the respondents acquired no "right" when the period prescribed by the 1948 Ordinance expired, merely because the 1948 Ordinance and the 1974 Act are procedural in character. The plain purpose of the 1974 Act, read with the 1948 Ordinance, was to give and not to deprive; it was to give to a potential defendant, who was not on 13 June 1974 possessed of an accrued limitation defence, a right to plead such a defence at the expiration of the new statutory period. The purpose was not to deprive a potential defendant of a limitation defence which he already possessed. The briefest consideration will expose the injustice of the contrary view. When a period of limitation has expired, a potential defendant should be able to assume that he is no longer at risk from a stale claim. He should be able to part with his papers if they exist and discard any proofs of witnesses which have been taken; discharge his solicitor if he has been retained; and order his affairs on the basis that his potential liability has gone. That is the whole purpose of the limitation defence.

Lastly, their Lordships refer to *Mitchell v. Harris Engineering Co. Ltd.* [1967] 2 Q.B. 703. The appellants relied on this case in support of the submission that the 1948 Ordinance had conferred no "right" on the respondents. This was a case of mistaken identity, similar to *Rodriguez v. Parker (supra)* and was decided in the same way. The plaintiff had suffered an accident on 27 August 1963, for which he claimed damages from his employer. On 9 August 1966 he issued a writ. On 27 August the three-year period expired. There were in fact two companies, with almost identical names. One was an Irish company (Harris Engineering Company Ltd.), and the other was an English company (Harris Engineering Company (Leeds) Ltd.). The Irish company, which was the employer, carried on business from an address which was also the registered office of the English company. So the opportunity for confusion was manifest. By mistake, the defendant named in the writ was the English company. When the mistake was discovered, which was after the three years had elapsed, the plaintiff sought to amend the proceedings by substituting the name of the Irish company for the name of the English company pursuant to Rules of the Supreme Court, Order 20, rule 5, which gave the Court power in a case of mistaken identity to substitute a new defendant for the defendant originally sued, notwithstanding that a relevant period of limitation had expired. It was submitted on behalf of the employer that the rule was *ultra vires* because it enabled the Court to divest a defendant of an accrued right. The argument failed, rightly in their Lordships' view.

Lord Denning M.R. (at page 718) said that:—

> "Whenever a writ has been issued within the permitted time, but is found to be defective, the defendant has no right to have it remain defective;"

while Russell L.J. put the matter thus (at page 720):—

> "It was argued that before the amendment, the Irish company had a sure shield under the statute and the amendment removed

that shield. But its sure shield under the statute was one which was available to it in another action should one be brought out of time. Its shield in the present proceedings was not the statute, but the fact that it was not yet a defendant in them. That shield could be taken away by the procedural power of permitting amendment of these proceedings."

Their Lordships consider that there is an alternative, and perhaps preferable, approach to the *Mitchell* type of case. Not only did the two companies have a common English address, but they also had common directors and a common secretary. It was obvious to all who were concerned on behalf of the two companies that the plaintiff intended to sue his employer and that those advising the plaintiff believed that the name of his employer was correctly written as Harris Engineering Company (Leeds) Ltd. It was fortuitous that a company bearing the latter name actually existed. Had there been no such company in existence, the plaintiff's right to correct the name of the defendant would have been beyond argument. No one was misled by the use of the mistaken name in the proceedings, and the case resolves itself into one of mere misnomer which was clearly within the Court's corrective power under Order 20, rule 5: see *Whittam v. W. J. Daniel & Co. Ltd.* [1962] 1 Q.B. 271. So analysed the result of the *Mitchell* case is in no way inconsistent with the view which their Lordships take in the present case. The only other comment which their Lordships would make on the decision in the *Mitchell* case is that they do not accept the generality of the proposition stated by the learned Master of the Rolls that:—

"The Statute of Limitations does not confer any right on the defendant. It only imposes a time limit on the plaintiff."

In the opinion of their Lordships an accrued entitlement on the part of a person to plead the lapse of a limitation period as an answer to the future institution of proceedings is just as much a "right" as any other statutory or contractual protection against a future suit.

The case of *Noor Mohamed Yousoff* may call for further consideration on an appropriate occasion.

For the reasons indicated, their Lordships will advise His Majesty the Yang di-Pertuan Agong that the appeal should be dismissed. The appellants must pay the respondents' costs.

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1982