

The Limitation Period for Actions upon a Judgement and Execution Proceedings in Malaysia*

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Abstract

This article examines the legal position concerning an important aspect of the law on limitation periods in West Malaysia, namely, the limitation period for actions on a judgment found in section 6(3) of the Limitation Act 1953. It will be demonstrated that the operation and effect of section 6(3) is not free legal conundrums and this may cause difficulties for litigants in Malaysia. This article will argue that the application of this statutory provision is complex and uncertain and therefore reform is necessary.

I. Introduction

The law of limitation is a subject of paramount importance in a legal system. It deals with the rules limiting or restricting the time in which a litigant can bring an action in court. Once the prescribed limitation period sets in, a litigant may be left without a legal remedy as his cause of action is said to be barred by limitation. The law of limitation is promulgated for the primary object of discouraging litigants from "sleeping" on their actions and more importantly, to have an end to litigation.¹ It is based on two broad considerations. First, the presumption that a right not exercised for a long time is non-existent. The second consideration is that it is necessary that a legal right should not be left too long in a state of uncertainty, doubt or suspense.²

The law of limitation is, in essence, a creature of statute. The main legislation governing the law of limitation in West Malaysia is the Limitation Act 1953.³ In East Malaysia, the law on this subject is contained in two pieces of legislation. The Sabah Limitation Ordinance (Cap 72) governs the law of limitation in Sabah. In Sarawak, the law is contained in the Sarawak Limitation Ordinance (Cap 49).⁴ In addition to these, there are other statutes in Malaysia which prescribe limitation periods including, inter

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¹ See dicta of Hashim Yeop Sani CJ in *Fong Tak Sing v Credit Corporation (M) Bhd* [1991] 1 MLJ 409, 413-414.

² *Id.* Best CJ in referring to the Limitation Act 1623 of England said in *A'Court v Cross* (1825) 3 Bing 329, "It is, as I have often heard it called by great judges, an Act of peace. Long dormant claims have more of cruelty than of justice in them".

³ The *Limitation Act 1953* which applies in the eleven states of West Malaysia is based on the (now repealed) English *Limitation Act 1939*. In England today, the limitation regime is governed by the *Limitation Act 1980*.

⁴ The *Sabah Limitation Ordinance* and *Sarawak Limitation Ordinance* are almost identical to each other but differ substantially from the West Malaysian *Limitation Act of 1953*. This is because the Ordinances are based on the (now repealed) Indian *Limitation Acts of 1877 and 1908*.

alia, the Civil Law Act 1956, the Public Authorities Protection Act 1948, the Railway Act 1991 and the Income Tax Act 1967.

In this article, an attempt will be made to examine the legal position concerning an important aspect of the limitation law in West Malaysia, namely the limitation period for actions on a judgment found in s 6(3) of the *Limitation Act 1953*. Section 6(3) of the *Limitation Act 1953*, which is identical with s 2(4) of the *Limitation Act 1939* of England reads,

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 expiration of six years from the date on which the interest became due.

Section 6(3) has two limbs. The first limb deals with the limitation period for “an action upon a judgement”. The second limb provides the limitation period for the recovery of “arrears of interest in respect of any judgement debt”. The scope of this article is confined to the first limb of s 6(3). This article will demonstrate that the operation and effect of s 6(3) is not free from legal conundrums and this may cause difficulties for litigants in Malaysia. The application of this statutory provision is needlessly complex and uncertain and therefore reform is necessary.

II. Actions Upon a Judgment and Execution Proceedings

At the outset, an “action upon a judgment” in its traditional sense, must be distinguished from “enforcement proceedings” or “execution proceedings”. An action upon a judgment refers to a *fresh action* commenced on a judgment, be it a domestic or foreign judgment. In Malaysia, the bringing of a fresh action on a foreign judgement is an important method of enforcing these judgments. This is especially so where there is no reciprocal enforcement legislation in force between Malaysia and the foreign jurisdiction from which the judgment was obtained.⁵ However, a fresh action on a domestic judgment is less common. This may be due to the fact that a fresh action on a domestic judgment faces a danger of being struck out as an abuse of the court’s process⁶ unless there are exceptional circumstances.⁷ This particular issue was dealt with by the English Court of Appeal in *ED&F Man (Sugar) Ltd v Haryanto*.⁸ In that case, Legatt LJ, who delivered the unanimous judgment of the Court of Appeal, said as follows,

⁵ This matter is dealt with in greater detail in part VII below.

⁶ See David W. Oughton, John Lowry and Robert Merkin, *Limitation of Actions*, (1998), 137, 138 and O 18 r 19(1) of the Rules of Court. See also *Superintendent of Pudu Prison & Ors v Sim Kie Choon* [1986] 1 MLJ 494.

⁷ Some useful Indian authority on the exceptional circumstances are listed in BB Mitra, *The Limitation Act 1963*, (21st ed., 2005), 1222.

⁸ (Unreported) *The Times*, 9 August 1996.

It is plain that the Court will not give judgment in an action on a judgment unless satisfied that the action does not constitute an abuse of process, having regard, amongst other things, to the availability of execution. It would, in my judgment, be for a defendant (or a person in the position of defendant) to show that a second action did constitute an abuse of process; the primary obligation is not that of a plaintiff to justify the bringing of further proceedings. Because, in the event of abuse of process, the Court may intervene and refrain from giving judgment in the second action, it cannot be said that a second action proceeds without judicial scrutiny, even if the bringing of a second action is a matter of right and not discretion.

Execution proceedings, on the other hand, deal with the procedural steps taken to enforce a judgment. The procedure and modes governing execution of judgments are found in the rules of court, namely, the Rules of Court 2012 ("Rules of Court"). The Rules of Court provide for various modes of enforcement of judgments. For example, where the enforcement relates to a money judgment, the modes of enforcement that may be employed include applying for a writ of seizure and sale,⁹ garnishee proceedings,¹⁰ charging order¹¹ and the appointment of a receiver.¹² Where the judgment involves immovable property, the judgment may be enforced by applying for, *inter alia*, a writ of seizure and sale or a writ of possession.¹³ A vital question is whether the commencement of execution proceedings and bankruptcy proceedings are commencement of an "action" for the purpose of limitation statutes and a substantial part of this article deals with this question.

III. Section 6(3) of the Limitation Act 1953 – background and the position in England

It is of vital importance to note that the effect and impact of s. 6(3) of the Malaysian Limitation Act 1953 cannot be weighed without a discussion of its identical source, s 2(4) of the English Limitation Act 1939 and the provision that has now replaced it in England, that is, s 24 of the present Limitation Act 1980.

Behind s 2(4) of the Limitation Act 1939 is a complex history and equally intricate case law.¹⁴ Its first limb (regarding an action upon a judgment) was based on s 8 of the

⁹ A writ of seizure and sale is dealt with in O 46 of the Rules of Court. A writ of seizure and sale applies to both movable and immovable property.

¹⁰ Garnishee proceedings are dealt with in O 49 of the Rules of Court. Garnishee proceedings are used where there is a claim for money belonging to a judgment debtor in the hands of a third party.

¹¹ Charging orders are dealt with in O 50 of the Rules of Court. This method of enforcement is used in relation to securities such as shares, bonds and debentures.

¹² Equitable execution by way of appointment of a receiver is dealt with in O 51 of the Rules of Court. A receiver will be appointed to receive the income of the judgment debtor.

¹³ Writs of possession are dealt with in O 45 of the Rules of Court. This mode of enforcement is employed where the judgment creditor seeks an order for possession of immovable property.

¹⁴ A fairly good historical survey can be found in Lord Lloyd of Berwick's judgment in *Lowstey and Another v Forbes (t/a LE Design Services)* [1999] 1 AC 329.

Real Property Limitation Act 1874 whilst the second limb (on arrears of interest) was based on s 42 of the Real Property Limitation Act 1833.

When the English provision in s 2(4) came into force in 1939 it was believed that its effect (based on the case law decided before 1939) was to bar all court actions on a judgment including execution proceedings after twelve years.¹⁵ Added to this was the requirement under the (then applicable) Rules of the Supreme Court¹⁶ that if six years had passed, leave of the court was necessary before execution proceedings involving writs of execution¹⁷ could be commenced against a judgment.

It is possible that when the Federal Legislative Council (the Malayan legislature) adopted the provision in s 2(4) of the 1939 Act and enacted it as s 6(3) of the Limitation Ordinance 1953 (now the Act of 1953), it may have assumed¹⁸ that the effect of the English provision was to bar actions upon a judgment and execution proceedings after twelve years.

However, English case law decided after 1939 presented a different picture. In 1948, s 2(4) of the 1939 Act was considered by the Court of Appeal in *W.T Lamb & Sons v Rider*.¹⁹ The court took the stand that the provision was concerned with the right to sue on a judgment in its traditional sense and it did not affect the procedural machinery for enforcing judgments which it considered was dealt with solely by the *Rules of the Supreme Court*. The court referred to the use of the word "action" in s 2(4) and the definition of that word in s 31(1) of the 1939 Act as including "any proceedings in a court of law". The court was of the view that the word "proceedings" in s 31(1) did not include procedural machinery for execution proceedings, thus making s 2(4) inapplicable to execution proceedings. The effect of *W. T Lamb & Sons v Rider* was that a distinction was made between enforcing a judgment *by suing on the judgment* (which is substantive law) and enforcing a judgment *by execution of a judgment* (which is a procedural machinery).²⁰ The limitation period in s 2(4) applied to the former but did not apply to the latter. Scott LJ, who delivered the judgment of the Court of Appeal explained the matter as follows,²¹

¹⁵ Ibid 338. See also *Lougher v Donovan* [1948] 2 All ER 11.

¹⁶ O 42 r 23 of the *Rules of the Supreme Court* then in force in England.

¹⁷ They are the three writs namely, the writ of seizure and sale, writ of possession and writ of delivery described in O 45 to 47 of the Rules of Court.

¹⁸ Although there is no evidence of this in the relevant Federal Legislative Council Proceedings.

¹⁹ [1948] 2 K.B. 331.

²⁰ Another case, *Lougher v Donovan* [1948] 2 All ER 11 was an earlier contrary decision also decided in 1948. In that case the Court of Appeal had decided that s. 2(4) of the 1939 Act applied to a warrant of possession of immovable property. In *Lowsley v Forbes* [1999] 1 AC 329, 339, Lord Lloyd of Berwick pointed out that *Lougher* was not inconsistent with *W.T. Lamb* because until 1966 a warrant of possession was regarded as a separate proceeding and not as a form of execution.

²¹ *Supra* n 19, 338.

The relevant provisions of the ... Limitation Act 1939, dealt, in our opinion, with the substantive right to sue for and obtain a judgment, and with that alone. The Common Law Procedure Act 1852, and R.S.C., Ord. 42 were concerned, and concerned alone, with procedural machinery for enforcing a judgment when obtained. The two subjects were formerly quite independent and distinct, the one from the other, and we are quite unable to attribute to the definition of 'action' in the Limitation Act 1939, the effect of merging the two together.

The reasoning in *W. T Lamb & Sons v Rider* on the effect of s 2(4) was taken to be correct in a number of subsequent cases.²²

The Law Reform Committee of England in its Final Report on Limitation of Actions in 1977²³ had this to say regarding s 2(4) of the 1939 Act:

We think that the law of limitation of actions ought not to interfere with the rules in relation to execution, which currently provide for a period for issue of a writ of execution of six years, which may be extended with the leave of court. We think that provisions of this kind are the appropriate method of dealing with execution and that they could, if necessary, be extended²⁴ to cover those methods of execution which, because they are not caught by the current rules, are subject to the 12 year period.²⁵

The Committee also doubted the usefulness of s 2(4) in relation to a traditional action on a judgment by saying,

Actions on a judgment are, however, nowadays very rare indeed and we do not think that the special provision for judgments should be preserved.²⁶

It was against this background that the present s 24(1) of the Limitation Act 1980 was enacted in England to replace the first limb of s 2(4) of the 1939 Act. Section 24(1) retained the wording of the repealed s 2(4) but reduced the limitation period for actions on a judgment to six years. Significantly, the definition of "action" in s 31(1) of the 1939 Act was re-enacted in verbatim form in s 38(1) of the 1980 Act. The issue

²² See *National Westminster Bank plc v Powney & Others* [1991] Ch. 339; *Berliner Industriebank Aktiengesellschaft v Jost* [1971] 2 All ER 117 (dictum of Brandon J in this case was cited with approval by the House of Lords in *Lowsley and Another v Forbes (t/a LE Design Services)* [1999] 1 AC 329).

²³ Law Reform Committee on Limitation of Actions, Cmnd 6923, (1977).

²⁴ Malaysia's Rules of Court are based on the English *Supreme Court Rules* (the Rules referred to in the statement quoted). No steps were taken in England to "extend" the "appropriate method of dealing with execution" to other forms of execution like garnishee proceedings, charging orders and equitable execution by appointment of a receiver between 1977 (the date of the Report) and 1980 (the date Malaysia adopted the English Rules). As result of this the Malaysian Rules of Court do not contain any time limits for the commencement of these forms of execution.

²⁵ *Supra* n 23, para 4.14.

²⁶ *Ibid.*

as to whether the limitation period in s 24(1) of the *Limitation Act 1980* applies to execution proceedings was considered by the Court of Appeal in *National Westminster Bank plc v Powney & Others*.²⁷ In this case, the Court of Appeal expressed their “full and respectful agreement”²⁸ with the reasoning set out in *Lamb’s* case and confirmed that the limitation period in s 24 applied only to actions to sue on judgment and not to execution proceedings.

The next chapter in this saga was the decision of the House of Lords in *Lowsley and Another v Forbes (t/a LE Design Services)*²⁹ in 1999. The interaction of the *W. T. Lamb* case, s 24 and s 38(1) of the English Act of 1980 and the *Rules of the Supreme Court* were considered by the House of Lords in *Lowsley’s* case. In this case, the plaintiffs obtained judgment against the defendant in 1981. Eleven years later they obtained leave from the High Court to execute the judgment under O 46 r 2(1)(a) of the Rules of the Supreme Court (hereinafter “RSC”). They also obtained a charging order *nisi* over the defendant’s share in his matrimonial home and a garnishee order *nisi* over his bank account. A vital question was whether the plaintiffs’ efforts were time-barred under s 24 of the 1980 Act which, as has been seen, provided a six year limitation period for an action upon any judgment. Lord Lloyd of Berwick who delivered the unanimous judgment of the House of Lords was not in complete agreement with Scott LJ’s interpretation of history or with “the steps” in his “suspect reasoning”³⁰ in *W.T. Lamb*. However, his Lordship was reluctant to reconsider the case as “the reasoning in that case has been treated as correct in subsequent cases”.³¹ His Lordship also made reference to the comments of the Law Reform Committee in paragraph 4.14 of its report (reproduced above) and highlighted the fact that the Committee appeared to approve of the reasoning in the *W.T. Lamb* case. His Lordship then said,³²

The importance of the paragraph [4.14] is not just that it draws attention to the reasoning in the *Lamb* case. What it also does is to propose a statutory compromise. All forms of execution were to be removed from the sphere of limitation and instead made subject to a discretionary bar after six years. There would then be no need for the special limitation period of twelve years for bringing suit on a judgment. It was in the light of that proposal that Parliament passed the Limitation Amendment Act 1980...

Proceeding on this basis, the House of Lords held that the word “action” in s 2(4) of the 1980 Act referred to a new action on the judgment. Execution proceedings were not included in the word “action” and the six year period of limitation in s 24 did not apply.

²⁷ [1991] Ch. 339.

²⁸ *Ibid* 356.

²⁹ [1999] 1 AC 329.

³⁰ *Ibid* 339-340.

³¹ *Ibid*.

³² *Ibid*.

Another significant point regarding *Lowsley* should be noted. As the statutory provision in s 24 in the 1980 Act does not apply to execution proceedings, the time limits that are relevant are those found in the rules of the court. Thus O 46 r 2(1)(a) of the RSC provides a writ of execution to enforce a judgment may not be issued without the leave of court where six years or more have elapsed since the date of judgment or order. It is significant that the English *Rules of Supreme Court* which were applicable at the time *Lowsley* was decided did not provide any limit for the issuance of garnishee proceedings or to a charging order.³³ Counsel's argument in that case that this omission meant that these two modes of execution were "covered by s 24(1)" and its limitation period of six years was rejected by the House of Lords.³⁴

IV. Relevant decisions in West Malaysia before the enactment of the *Limitation Act 1953*

Reverting to West Malaysia, when the Malayan Federal Council in 1953 adopted s 2(4) of the 1939 Act and enacted it as s 6(3) of the *Limitation Act 1953*, it had the benefit of the decision in *Lamb & Sons v Rider* which was reported in 1948. Notwithstanding this fact, s 2(4) was adopted without any material change in its wording. One is tempted to argue that this was an implied indication of the Federal Council of its approval of the reasoning in the *Lamb* case.

However, the definition of "action" in s 31(1) of the 1939 Act that it "includes any proceedings in a court of law, including an ecclesiastical court" was not adopted in full by the West Malaysia's *Limitation Act 1953*. Instead the 1953 Act defines "action" as "includes a suit³⁵ or any other proceedings in a court of law". It is significant to note that the legislation of the Malay states and the Straits Settlements which the 1953 Act replaced³⁶ (e.g. s 2 of the *Limitation Ordinance* of the Straits Settlement) had defined "suit" as including "any action or other proceeding".

It is relevant to consider some of the pre-1953 cases on this definition. In 1926, *Neo Ong Tew v Neo Ong Hee*³⁷ was decided by the Court of Appeal of the Straits Settlements. The case involved article 98 of the Schedule to the Straits Settlements' *Limitation Ordinance* which provided that the limitation period for a "suit" upon a judgment was twelve years from the date of the judgment. The court held that a proceeding by way of execution was a suit which came within the words "any action or other proceeding" in s 2 of the Ordinance.³⁸ A similar case was *Daud v Ibrahim*.³⁹ This case, although

³³ As is still the position under the Malaysian Rules of Court.

³⁴ *Supra* n 29, 341.

³⁵ My emphasis.

³⁶ *Limitation Ordinance* (Cap 16) of the Straits Settlements and other legislation listed in the Schedule of the 1953 Act.

³⁷ [1926] SSLR 120.

³⁸ *Ibid* 124.

³⁹ [1961] MLJ 43.

reported in 1961 dealt with s 23 of the Kedah Limitation Enactment (an enactment repealed by the West Malaysian Act of 1953) which provided that no suit shall be brought upon a judgment obtained in the State after the expiration of twelve Muslim years to be calculated from the date of such judgment. The case involved a summons in chambers filed in 1959 to enforce a judgment obtained in 1940. The Court of Appeal of the Federation of Malaya held that the summons in chambers was barred by limitation under the *Kedah Limitation Enactment*. Good JA who delivered the judgement of the court made a passing remark that the summons would also be time-barred under s 6(3) of the Limitation Ordinance 1953 (now Limitation Act 1953) which had repealed the Kedah Enactment.⁴⁰ However, the learned judge did not elaborate on why s 6(3) applied.

The cases discussed above were decided before the enactment of the 1953 Act. A pertinent question is whether the said cases are still good law after the decision of the House of Lords in *Lowsley*, which although is not binding on Malaysian courts, is a persuasive authority based on a substantially similar provision as that contained in s 6(3) of the 1953 Act. This will be considered in the next part of this article.

V. Some arguments against the adoption of *Lowsley*

The decision in *Lowsley* prompted Mr. Chong Joo Tian, a legal practitioner, to publish an article⁴¹ in the *Malayan Law Journal* in which he argued against the adoption of the case by the Malaysian courts. Mr. Chong contends that the decision in *Lowsley* was based on a statutory interpretation of s 24 of the *Limitation Act 1980* and that it was influenced by historical development of the law relating to execution of judgments in England. He points out that the circumstances and background against which *Lowsley* was decided are peculiar to England and are different from the situation in Malaysia.⁴² Mr Chong lays stress on the wider definition of "action" in s. 2(1) of the West Malaysian Act as including "a suit or any other proceeding in a court of law". He argues that the definition is wide enough to "cover a fresh action upon a judgment as well as an action by way of execution of a judgment".⁴³ One cannot but agree with Mr Chong's conclusion that there are cogent reasons as to why there must be finality in litigation including litigation to execute a judgment and that s 6(3) and s 2(1) must be read together to include both a fresh action on a judgment as well as execution proceedings on a judgment.⁴⁴

⁴⁰ Ibid 44.

⁴¹ Chong Joo Tian, "Limitation Period for the Enforcement of Judgment: Whether the House of Lords Decision in *Lowsley* Should be Followed in Malaysia" [1999] 1 *Malayan Law Journal* lxvii.

⁴² Ibid 72.

⁴³ Ibid.

⁴⁴ Ibid 77, 78.

VI. Uncertainty in West Malaysia regarding the first limb of s 6(3)

It was seen that s 6(3) of the 1953 Act and the English provisions in s 2(4) of the 1939 Act and s 24 of the 1980 Act share a common heritage and a close similarity in substantive and procedural law. Does s 6(3) apply to the procedural machinery of execution in West Malaysia or is the position in West Malaysia similar to the position in England as decided in *Lowsley v Forbes*? No firm answer can be given to this question until the Federal Court⁴⁵ or the Court of Appeal resolves this matter. In 1997, Haidar J in *Re Lim Ah Hee @ Sim Ah Hee Ex p Perwira Affin Bank*,⁴⁶ expressed his opinion (obiter) that "it would seem clear by the description of the word "action" in s 2(1) of the Act that s 6(3) of the Act applies only to the process of bringing an action upon a judgment". His Lordship added⁴⁷ that "it does not extend to seeking execution of a judgment: the latter is a purely procedural step and is not an action within the meaning of the Act and action is defined to include a suit or any other proceedings in a court of law". When the case went on appeal, the Court of Appeal (obiter) appeared to agree with Haidar J.⁴⁸

It is respectfully submitted that such an interpretation of s 6(3) would create uncertainty as to the time limits applicable to execution proceedings. This article does not support the English position of leaving this matter to be resolved by the rules of the court. In this writer's opinion, the Rules of Court as they are presently worded cannot be relied upon to provide time limits for execution proceedings. The only provision in the Rules which prescribes a time limit for execution proceedings is O 46 r 2(1) of the Rules of Court. The provision states "a writ of execution to enforce a judgment or order may not be issued without the leave of the Court" if six years or more have lapsed since the date of the judgment or order. O 46 r 1 of the Rules of Court provide as follows,

In this Order, unless the context otherwise requires, "writ of execution" includes a writ of seizure and sale, writ of possession and to a writ of delivery.

This writer contends that when the components of the rules are read together it appears the requirement of leave mentioned in O 46 r 1 of the Rules of Court is restricted to applications to issue the three writs of execution mentioned in O 46 r 1. If this is so, the other forms of execution mentioned in the Rules for example, garnishee proceedings and charging orders, will have no time limit. This, needless to say, will be an undesirable position for enforcement of judgments. If indeed it is intended that it is the rules that

⁴⁵ In the Federal Court case of *United Malayan Banking Corp Bhd v Ernest Cheong Yong Yin* [2002] 2 MLJ 385 the House of Lord's decision in *Lowsley v Forbes* regarding the limitation period for a claim regarding judgment interest was adopted for the construction of the second limb of s 6(3) of the 1953 West Malaysian Act. No observations were made in relation to the ruling in *Lowsley* regarding the limitation period concerning the execution of judgments.

⁴⁶ [1997] MLJU 46 (High Court Kuala Lumpur) D5- 29-840 of 1996 (18.8.1997).

⁴⁷ *Ibid.*

⁴⁸ [2000] 3 MLJ 211, 215.

should regulate the time bar for execution machinery, the Rules should be amended to contain clear provisions that will apply to all forms of execution. Be that as it may, this article contends that the ideal situation will be for the Limitation Act 1953 (and not the Rules of court) to regulate time bars for execution proceedings. This article submits the present position allows a judgment debt to survive indefinitely although it is subject to the court's discretion to refuse leave for the issue of the writs of execution after six years. An added reason is that the time limit for the issuance of the writs of execution in O 46 is not a limitation period, as an application after six years is not time barred. Leave is required for the issuance of a writ of execution after the expiry of six years and the granting of leave is discretionary. The element of discretion adds to the existing uncertainty in this area of the law for both the judgment creditor as well as the judgment debtor. A more orderly and systematic development of the law will be achieved if there was one point of reference, in substantive law, which provides the limitation period for all forms of execution proceedings.

It is now pertinent to point out that Mr. Chong's article mentioned above and his comments on *Lowsley & Anor v Forbes* and the English legal position were cited with approval in *Co-operative Central Bank Bhd v Abdul Razak bin Sheikh Mahmood & Anor*⁴⁹ (a Malaysian High Court judgment reported in the Malay language). After considering the relevant statutory provisions the High Court in this case held that the words "an action upon any judgment" in s 6(3) also applied to execution proceedings. The court examined the provision in s 2(1) which reads "action includes suit, or any proceedings in a court of law" and took the view that an execution proceeding was not only an action but also a "proceeding in a court of law." This is a commendable decision which will bring certainty to the law. However since it is a High Court decision, it is not binding on other High Courts in Malaysia. Technically it is binding on the subordinate courts but in view of the differing dicta in *Lim Ah Hee*, its weight cannot be ascertained.

VII. Foreign judgements and the *Reciprocal Enforcement of Judgments Act 1958*

This discussion would be incomplete without a brief reference to the enforcement of foreign judgments in Malaysia. As has been mentioned as far as foreign judgments are concerned, commencing a fresh action on these judgments, as a method of enforcing these judgments, is a common practice in Malaysia. This would be the case where there is no reciprocal enforcement legislation in force between Malaysia and the foreign jurisdiction⁵⁰ from which the judgment was obtained. The limitation period of twelve years in the first limb of s 6(3) would apply to such an action as it is clearly a fresh action upon a judgment.

⁴⁹ [2003] MLJU 80 (High Court Kuala Lumpur) Suit No. (D4) C3 -23-3880-1986 (13.3.2000).

⁵⁰ Presently, the *Reciprocal Enforcement of Judgments Act 1958* only applies to judgments obtained in the United Kingdom, Hong Kong, Singapore, New Zealand, Sri Lanka, India and Brunei Darussalam.

With regards to the enforcement of a judgment obtained from a foreign jurisdiction with which Malaysia has reciprocity of enforcement of judgments, such judgments may be registered in the High Court under the Reciprocal Enforcement of Judgments Act 1958.⁵¹ The Reciprocal Enforcement of Judgments Act 1958 prescribes a time limit of six years (which runs from the date of the foreign judgment) for the filing of an application to register the judgment. Upon registration of the judgment, it shall have the same effect and would be subject to the rules of the registering court, as if it had been delivered by that court on the day of such registration. The procedure for the enforcement of that judgment would then follow the same steps as the court would take in enforcing its own judgment.⁵²

VIII. Bankruptcy proceedings in West Malaysia

Another related matter that needs to be considered is whether there are any time limits for the commencement of bankruptcy proceedings. One of the ways to prompt a judgement debtor to settle his judgment is to instill a healthy fear that he may be made a bankrupt. At the outset it may be mentioned that neither the Limitation Act 1953 of West Malaysia⁵³ nor the East Malaysian Ordinances deal with this issue. Case law in both territories presents a confusing picture. There is no available literature in Malaysian texts or legal periodicals on the subject.

In West Malaysia there are dicta in a number of High Court⁵⁴ cases and a Court of Appeal⁵⁵ case that bankruptcy proceedings are not execution proceedings. The English position is that it is not.⁵⁶ As bankruptcy proceedings are not execution proceedings, O 46 r 2 of the Rules of Court which states that leave is required to issue a writ of execution to execute a judgment after six years have lapsed since the date of the judgement, appears

⁵¹ Act No. 99 (Revised 1978).

⁵² The relevant procedure is set out in O 67 of the Rules of Court. For an illuminating exposition on the operation of the *Reciprocal Enforcement of Judgments Act 1958*, see ML Marasinghe, "The Recognition and the Enforcement of Foreign Judgments", (1985) 12 *Journal of Malaysian and Comparative Law* 197-223.

⁵³ In this context reference may be made to the equitable doctrine of laches which is expressly preserved by s. 32 of the 1953 Act. Laches will be important where a statute of limitation does not provide a limitation period for the cause of action. If the doctrine applies, it would be inequitable to give relief to a plaintiff who has slumbered on his rights. Lord Selbourne LC's classic statement in *Lindsay Petroleum Oil Co. v Hurd* (1874) LR 5 PC 221 at p. 239 is often quoted as an authoritative description of the doctrine. His Lordship said,

The difficulty of applying the doctrine to bankruptcy proceedings lies in the fact that it is an equitable doctrine plainly relevant where a party seeks an equitable relief such as an injunction, specific performance or rescission. A bankruptcy action is a claim, it is submitted, in law, not in equity.

Whether Malaysian courts would adhere to this rigid dichotomy or be prepared to depart from it, remains to be seen.

⁵⁴ *Wee Chow Yong, Ex p. Public Finance Bhd* [1990] 3 CLJ (Rep.) 349 (Edgar Joseph Jr. J at 350); *Re Lim Ah Hee @ Sim Ah Hee, Ex p. Perwira Affin Bank Bhd* [1997] MLJU 46 (Haidar J at 54).

⁵⁵ *Chin Sin Lan v Delta Finance Bhd* [2004] 3 CLJ 113, 119. See also *Re Lim Ah Hee, Ex p Perwira Affin Bank Bhd* [2000] 3 MLJ 211, which (with respect) seems to have erred on the effect of *Lowsley v. Forbes*, above n 29, and on *Lamb v. Rider*, supra n 19.

⁵⁶ *Re a Bankruptcy Notice* (1898) 1 QB 383, 386; *Re a Debtor (No. 50A/80/95)* [1997] 2 All ER 789.

irrelevant. Haidar J gave his reasons in *Re Lim Ah Hee @ Sim Ah Hee Ex p Perwira Affin Bank Bhd*⁵⁷ why O 46 r 2 was not applicable. His Lordship said,⁵⁸

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 action do not come within writ of execution and there may be no need even to get leave under Order 46 rule 2 to proceed with the bankruptcy actions.⁵⁹

While this writer supports Haidar J's views, it must be emphasized that some cases have assumed that O 46 r 2 is relevant to bankruptcy proceedings.⁶⁰ This is dealt with below.

It is trite that before bankruptcy proceedings can be commenced against a debtor he must have committed one of the ten acts of bankruptcy mentioned in s 3(1) of the *Bankruptcy Act 1967*. These acts "constitute presumptive evidence of insolvency"⁶¹ and they are the judicial events which the court relies upon to make a receiving order. The most common act of bankruptcy relied upon by Malaysian creditors is that stated in s 3(1)(i), that is non-compliance of the debtor of a bankruptcy notice duly constituted and duly served in accordance with that provision. Section 3(1)(i) contains a proviso⁶² which has been judicially interpreted to impose a requirement that before a creditor can issue a bankruptcy notice, he must have obtained a final judgment or a final order and "must be in a position to issue execution on his judgment at the time when he issues the bankruptcy notice".⁶³

In applying the aforesaid proviso and its judicial interpretation, no difficulty arises if execution of the judgment has been stayed. As long as a stay remains in force the creditor is not entitled to execution and no bankruptcy notice can be issued. Where execution has not been stayed, the legal position is uncertain regarding the operation of the proviso in cases where six years had passed since the date of the judgment. This is because under the existing statutory provisions it would be difficult to decide conclusively whether or not the judgment creditor is "in a position to issue execution on his judgment". This is caused by the fact that neither O 46 r 2 nor any other provision

⁵⁷ [1997] MLJU 46.

⁵⁸ Ibid 54.

⁵⁹ A case which assumes that O 46 r 2 applies to bankruptcy proceedings is *Re V Gopal, Ex p. Public Bank* [1987] 1 CLJ 602.

⁶⁰ Ibid.

⁶¹ Edgar Joseph Jr. in *Wee Chow Yong*, supra n 53, 350.

⁶² The relevant parts of proviso read, "Provided that for the purpose of this paragraph...any person who is for the time being entitled to enforce a final judgment or final order shall be deemed to be a creditor who has obtained a final judgment or final order."

⁶³ Bowen L.J. in *Ex parte Ide* [1886] 11 QBD 755, 759 cited with approval by Edgar Joseph Jr. in *Wee Chow Yong*, supra n 53, 352.

in the Rules of Court⁶⁴ imposes time limits for all forms of executions. In addition the Limitation Act 1953 contains no specific provision on the subjects of execution of a judgment or the commencement of bankruptcy proceedings. As stated earlier, the only time limit or restraint imposed on execution proceedings by the Rules is O 46 r 2, but that limit does not apply to *all* forms of execution under the Rules but only to the three writs of execution mentioned in O 46 r 1. The Rules do not impose time limits on other forms of execution, such as garnishee proceedings or a charging order or to equitable execution by way of appointment of a receiver. As there is no restraint which encompasses all forms of execution, this article submits that it is open for the creditor to argue that the force of the proviso to s 3(1)(i) is restricted to cases where execution has been stayed and that the proviso does not apply even if the bankruptcy notice is issued after six years. This uncertainty can cause difficulties to litigants and the court.

These matters have not been considered by the Malaysian courts.⁶⁵ It will be seen that similar problems can also arise in East Malaysia as the *Bankruptcy Act 1967* is Federal legislation. It is uncertain how the courts will deal with these matters if they are properly put before them for their decision.

This discussion would not be complete without reference to a further complexity. This is caused by rule 276 of the Bankruptcy Rules 1967 which provides that the rules of court shall not apply to bankruptcy proceedings. It can be argued that if full force is given to rule 276 it would render O 46 r 2 inapplicable to s 3(1)(i) and its proviso. In *Wee Chow Yong, Ex p. Public Finance*⁶⁶ Edgar Joseph Jr J. rejected a similar argument and expressed his view that this conflicting provision in rule 276 is overridden by the parent Act, the Bankruptcy Act 1967, as the rule 276 is subsidiary legislation cannot prevail over the main legislation.⁶⁷

This article submits that the uncertainty in the present legal position must be addressed as soon as possible and remedial measures as suggested below should be taken.

⁶⁴ Bankruptcy proceedings can only be commenced in the High Court.

⁶⁵ In *Lim Ah Hee*, above n 46, the bankruptcy notice was issued more than eight years after the date of the judgment. One of the grounds initially raised in the High Court to set aside the bankruptcy notice was that O 46 r 2 was not complied with. Subsequently the ground was abandoned. An attempt to revive the ground in the Court of Appeal was rejected for procedural reasons. *Chin Sin Lan* (above n 54) was an appeal from East Malaysia. In this case a bankruptcy notice issued seven years after the date of judgment was attacked on the ground that it was issued after the expiry of the limitation period for execution of a judgment. The Court of Appeal rejected the argument, holding that the issue of a bankruptcy notice was not the commencement of execution proceedings. The Court of Appeal also held that as the *Bankruptcy Act 1967* and the *Bankruptcy Rules 1967* were Federal legislation, s 3(1)(f) and its proviso applied in East Malaysia and that the judgment creditor had complied with s 3(1)(i) by obtaining leave (presumably under O 46 r 2, although this not stated in the judgment).

⁶⁶ *Supra* n 53.

⁶⁷ *Ibid* 352.

IX. Conclusion and recommendations for reform

It has been seen that the application of s 6(3) of the Limitation Act 1953 creates an uncertainty as to the limitation period applicable to execution proceedings. There is also an allied problem as to what limitation period applies to bankruptcy proceedings. It is submitted that it is not in the interest of litigants to say that execution proceedings are essentially a matter of procedure and therefore that its time limits should be regulated by the Rules of court. This article strongly recommends that the Malaysian legislature should take an urgent step to amend s 6(3) to make clear and certain that it applies to execution and bankruptcy proceedings. This can be done by adding the words "including execution proceedings related to a judgment and bankruptcy proceedings under the Bankruptcy Act 1967" after the words, "an action upon any judgment" in s 6(3).

Finally it is pertinent to point out that as trade between Malaysians and foreigners and foreign organisations continue to increase, traditional actions upon a judgment may become an important mode by which foreign judgments are enforced. This is because the procedure under the Reciprocal Enforcement of Judgments Act 1958 is at the moment restricted to judgments obtained in the United Kingdom, Hong Kong, Singapore, New Zealand, Sri Lanka, India and Brunei Darussalam. This article contends that there is no reason to provide a twelve year limitation period for actions upon a judgment. A twelve year period was probably prescribed by s 2(4) of the English Act of 1939 because of the long and close association between execution proceedings and the law of real property.⁶⁸ It is submitted that there is no justification⁶⁹ for this long limitation period and it only serves to cause hardship to a defendant who may be met with a stale claim. This writer would like to suggest that the first and second limb of s 6(3) should have a shorter and uniform limitation period and that it should be six years. A shorter limitation period is also justifiable in the interests of commercial certainty so that contingent liabilities are not left unresolved for long periods of time.

⁶⁸ See Final Report of the Law Reform Committee of England on Limitation of Action, Cmnd 6923, (1977), para 4.13.

⁶⁹ The Report of the Law Reform Committee of Singapore on the Review of the Limitation Act of Singapore (Cap 163), (February 2007) at 47 expresses the view that "there does not appear to be any compelling reason why such a long limitation period should operate" for an action upon a judgment and recommends that the limitation period in Singapore for the action be reduced to six years.

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