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doi:10.1017/S0008197323000302

A CENTURY ago, Bankes L.J. in *Joachimson v Swiss Bank Corporation* [1921] 3 K.B. 110 thought it unlikely that a bank would ever plead the Statute of Limitations against a customer. Times have changed. In *PT Asuransi Tugu v Citibank NA* [2023] HKCFA 3, a corporate customer's account was drained and closed on instruction of authorised signatories acting fraudulently. The Hong Kong Court of Final Appeal had to decide if the customer's cause of action in debt for the balance was time-barred. This turned on whether the cause of action accrued upon closure of the account without the need for a demand. Lord Sumption N.P.J. found for the customer, holding that its claim was not time-barred though the account was closed more than six years prior to the filing of the action. Two issues that led to this conclusion are addressed in this note: (1) when a bank is put on inquiry; and (2) the relation between account closure, the end of the banker-customer relationship and the accrual of a cause of action in debt.

The plaintiff PT Asuransi Tugu was the captive insurer of Pertamina, Indonesia's state-owned oil company. Three of its senior officers, including the President Director, were authorised to operate a Hong Kong Citibank account. Substantial sums were transferred into this account from the operating subsidiaries of Tugu. Between 1994 and 1998, the trio fraudulently instructed Citibank on 26 occasions to pay out a total of US$51.64 million from this account into their own pockets. On 16 July 1998, they transmitted a "drain and close" instruction, directing the bank to transfer the remaining funds to them and close the account. The bank closed the account on 30 July 1998.

Tugu made a demand in 2006 and in 2007 brought a debt claim against Citibank for US$51.64 million, being the reconstituted balance unaffected by the unauthorised withdrawals. An alternative damages claim was made for breach of the *Quincecare* duty to exercise reasonable care in executing payment instructions (*Barclays Bank plc v Quincecare Ltd.* [1992] 4 All E.R. 363). Both claims were time-barred in the court below. Kwan V.P. held that the causes of action had accrued in 1998 with the account closure. Focusing on the debt claim, Lord Sumption disagreed. The closure of the account discharged neither the banker-customer relationship nor the debt owed. Instead, limitation only began to run upon the demand made in 2006 for payment. Therefore the proceedings commenced in 2007 were not time-barred. The *Quincecare* claim however was not salvageable – it was clearly time-barred.

The court below found that the bank knew enough by the third payment to prevent it from relying on the ostensible authority of the signatories. All the following payments were thus unauthorised. The bank did not challenge this

on appeal. The limitation defence was raised again, anchored by three points – (1) the closure of the account was authorised; (2) that closure put an end to the relationship of banker and customer; and (3) once the relationship ended, the debt became immediately payable without a demand, and limitation ran from that point.

Lord Sumption disagreed on the first point, removing the factual basis for the second and third points. He found that the closure of the account was unauthorised because the bank was put on inquiry, having established earlier in his judgment (at [14]) that the law treats an instruction executed in breach of duty as unauthorised. This begged the question of when a bank is put on inquiry as to an agent's lack of actual authority, and therefore disentitled from relying on the agent's ostensible authority. A controversy had previously emerged in this area. In *Thanakharn Kasikorn Thai Chamkat v Akai Holdings Ltd.* (No. 2) (2010) 13 HKCFAR 479 Lord Neuberger N.P.J. stated the test as being whether it would be irrational for the bank to rely on the agent's apparent authority given what it knew. In contrast, in *East Asia Co. Ltd. v PT Satria Tirtatama Energindo* [2020] 2 All E.R. 294 the Privy Council preferred the word "reasonably", considering that Lord Neuberger had departed from orthodoxy when stating the test as one of irrationality. Lord Sumption held that the controversy was an illusion, and that irrationality was merely a specific application of the general test in a particular commercial context. The law as stated in the two cases was the same. On the facts of *Asuransi*, the closure of the account by the signatories was part of a pattern of suspicious behaviour. The previous unauthorised transfers to the officers' personal accounts were clearly improper. These previous transfers tainted the closure instruction, and the bank had no reason to regard it as a proper use of the signatory's authority under the mandate. In proceeding to close the account, it had acted irrationally and unreasonably.

Having made this finding, Lord Sumption held that the unauthorised closure of the account was a repudiation of the contractual banking relationship that was never accepted by Tugu. Tugu's contract with the bank remained on foot, and it was entitled to demand the full balance at a time of its choosing, unaffected by the unauthorised withdrawals. It is trite that a customer's cause of action in debt only accrues against his bank when a demand is made (*Joachimson*). Lord Sumption then went on to say that his conclusion would remain the same whether or not the account closure was authorised:

> The second reason applies whether the account was closed with the customer's authority or not. A banking contract may be terminated by a bank at any time on notice. But there is no principle of law which entitles a bank unilaterally to abrogate its outstanding liabilities or to discharge a debt without paying it. To effectually terminate the relationship, it must pay (or at least tender) the outstanding reconstituted balance. . . .

https://doi.org/10.1017/S0008197323000302 Published online by Cambridge University Press

> On the footing that the debt has not been discharged, it must still exist on the terms on which those deposits were made. It follows that the debt, undiminished by the unauthorised withdrawals, still subsisted in 2006 when it was demanded, and time did not begin to run for limitation purposes until then.

This alternative holding should have been avoided. It is true that the mere closing of an account does not discharge the bank's debt to the customer (*Rekstin v Severo Sibirsko* [1933] 1 K.B. 47). However, if the authorised closure of the account does properly terminate the contract between customer and bank (Lord Sumption did seem to impliedly accept this when saying that the *unauthorised* closure of the account was an unaccepted repudiation of the contract), then the debt owing to the customer is due immediately without demand. The rule in *Joachimson* that an action in debt for a bank balance only accrues on demand is an exception to a general rule carved out on account of the special incidents of a banking contract (*Joachimson*, 121). The "relation" of banker-customer depends entirely on this contract (*Joachimson*, 117). Where that contract has been terminated, the debt is still owing from the bank but now as an ordinary debtor. The general rule for debts without agreed maturation dates applies, and the cause of action accrues without demand (*Norton v Ellam* (1837) 150 E.R. 839). Section 6 of the Limitation Act 1980 was enacted to counteract the effects of this general rule, making a written demand necessary before accrual. Crucially, Hong Kong's Limitation Ordinance (cap. 347) does not contain this section, and so the general rule applies.

This case highlights the advantage of a debt claim over a claim for *Quincecare* damages in respect of limitation. *Pace* Lord Sumption, that advantage only exists where the contractual relationship of banker-customer has not been terminated. Where the relationship has ended (such as where the closure of the account is authorised) the debt claim for unauthorised debits subsists and must still be paid, but it is now taken out of the *Joachimson* exception and is immediately due without a demand. Limitation starts running at that point. Is this fair to the customer? As a matter of policy, it seems reasonable that customers should only have the protection of *Joachimson* while they remain customers of the bank. An authorised closure of the account in circumstances like these turns them from customer to ordinary creditor. Admittedly this situation does not often occur, given that most account closures do not involve previous unauthorised debits or the payment of the balance at closure to a fraudster. A bank setting up the Limitation Act against its customer does not attract sympathy. But as Fry L.J. put it

in *Reeves v Butcher* (1891) 2 Q.B. 509, another case on limitation – "We have not to determine whether the defence here set up is handsome or conscientious, but whether it is good at law – and I am of opinion that it is". But only if the account was closed with authorisation.

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https://doi.org/10.1017/S0008197323000302 Published online by Cambridge University Press