

THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

CIVIL ACTION No. HBC 06 of 2012

BETWEEN : FIJI DEVELOPMENT BANK
PLAINTIFF

AND : ANWAR KHAN
DEFENDANT

COUNSEL : Ms. M. Vasiti for Plaintiff
Mr. I. Fa for Defendant

Date of Hearing : 03rd March, 2016

Date of Ruling : 25th April, 2016

JUDGMENT

- [1] The plaintiff bank instituted this action claiming \$63,614.62 from the defendant with interest on the said sum at the rate of 11% per annum from 01st January 2005 until the entire sum is paid in full and costs.
- [2] According to the statement of claim of the plaintiff Vista Partition & Ceilings Limited obtained a leasing facility of \$55,195 to purchase a vehicle and the defendant who was a director of the said company and another director Satish

Chandra entered into a personal guarantee and indemnity bond securing the repayment of the loan.

- [3] The defendant while denying the averments in the statement of claim of the plaintiff averred that the claim of the plaintiff is barred by the provisions of section 4 of the Limitation Act (Cap 35).
- [4] Mr. Surendra Prasad, a bank officer, testified on behalf of the bank. It is his evidence that Vista Partition & Ceiling Limited of which the defendant is a director obtained a loan of \$55,195.00 to purchase a vehicle. The lease purchase agreement bearing No. L 0382 was tendered in evidence marked as "P4". The letter of approval dated 24th January 2000 was tendered in evidence marked as "P1" according to which the amount advanced was to be repaid in installments of \$2040.00 and at the commencement the Vista Partition & Ceiling Limited was required to pay \$6,120.00 which was equivalent to three installments.
- [5] A company called and known as Leuso Company Limited entered into a guarantee and indemnity bond (P2) with the plaintiff securing the repayment of the loan. On behalf of Leuso Company Limited the defendant and another director, Sathish Chandra entered into another guarantee and indemnity bond (P4) with the plaintiff.
- [6] When the defendant failed and/or neglected to pay the loan installments as agreed the plaintiff repossessed the vehicle on 25th November 2000 and sold it for \$30000.00. The documents pertaining to the repossession and selling of the vehicle were tendered in evidence marked as "P6" to "P10".
- [7] It was revealed in evidence that Vista Partition & Ceilings Limited was wound up in October 2000 by an order of court. The winding up order was tendered in evidence marked as "P5".

[8] At the pretrial conference both parties agreed that following are the matters to be adjudicated upon by the court at the trial;

1. Whether the defendant is one of the directors of the company?
2. Whether the defendant has executed a Guarantee and Indemnity of the leasing facility that was obtained by the company?
3. Whether the outstanding arrears calculated by the plaintiff are correct and duly owed by the defendant?
4. Whether the Guarantee and Indemnity document alleged by the plaintiff to be executed by the defendant dated 10th of February 2000 alleging liability on the part of the defendant is enforceable against the defendant pursuant to section 4 of the Limitation Act as the Guarantee relied on by the plaintiff was executed in the year 2000 which is 13 years from the date the plaintiff filed its writ against the defendant?
5. Whether the guarantee and Indemnity document alleged by the plaintiff to be executed by the defendant dated 10th of February 2000 alleging liability on the part of the defendant is null and void?
6. Whether the plaintiff is entitled to its claim?

[9] The defendant in his testimony admitted that he was a partner of Vista Partition & Ceilings Limited and also that he signed the guarantee bond marked "P3". Although the defendant referred to himself as a partner of Vista Partition & Ceilings Limited, it being a limited liability company he could not have been a partner but a director. This is borne out by the Guarantee & Indemnity Bond (P3) where he has signed as a director of the company. Therefore the first two issues above will have to be answered in the affirmative.

[10] The third issue is whether the plaintiff has correctly calculated the amount due from the defendant. According to the statement of account marked as "P12" the balance as at 01st December 2002 was \$48,728.86. As per the letter dated 28th March 2001, written by the Manager Industrial to the Managing Director of Vista Partition & Ceilings Limited the remaining balance after the vehicle was

sold, was \$22,562.52. The rate of interest as per "P1" is 11% per annum (flat). In paragraph 22 of the said document additional interest of 2% per month has been imposed on rentals in arrears but still it is not clear how the plaintiff arrived at the figure of \$48,728.86.

[11] The question is whether the action of the plaintiff is liable to be dismissed on its failure to prove that the entire sum claimed is due and owing to it from the defendant. The action cannot be dismissed unless the bank fails to prove that the defendant has no liability whatsoever towards it. If the bank can establish that it is entitled to recover any amount less than what has been prayed for, the court must enter judgment for that amount. The defendant does not deny that after the sale of the vehicle the remaining balance was \$22,562.52 and he also does not deny that as per the document "P1" the bank is entitled to recover interest at the rate of 11% per annum on the said sum and in addition 2% per month as penal interest. Therefore, the court is in a position to calculate the exact amount due and award that sum to the plaintiff.

[12] The next issue for determination is whether the cause of action of the plaintiff is out of time in terms of the provisions of section 4(1) of the Limitation Act (Cap 35).

[13] Section 4(1) of the Limitation Act provides as follows;

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 found on simple contract or on tort;
- (b) action to enforce a recognizance;
- (c) action to enforce an award, where the submission is not by an instrument under seal;

(d) actions to recover any sum recoverable by virtue of any act, other than a penalty or forfeiture or sum by way of penalty or forfeiture:

- (i) in the case of an action for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of provision made by or under any Act or independently of any contract or any such provision) where the damage claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries to any person, this subsection shall have effect as if for the reference to six years there were substituted a reference to three years; and
- (ii) nothing in this subsection shall be taken to refer to any action to which section 6 applies.

[14] The learned counsel for the defendant contended that the guarantee and indemnity bond signed by the defendant is clearly a contract in terms of section 4(1) of the Limitation Act and in support of his contention the learned counsel cited the following paragraph from Halsbury's Laws of England, Second Edition, Volume 16, page 3, paragraph 1;

...an accessory contract whereby the promisor undertakes to be answerable to the promisee for the debt, default or miscarriage of another person whose primary liability to the promisee must exist or be contemplated.

[15] The learned counsel for the plaintiff submitted that the action of the plaintiff is not time barred for the reason that the relevant provisions of the law are found in section 8 of the Limitation Act and not in section 4(1).

[16] Section 8(1) of the Limitation Act provides as follows;

No action shall be brought to recover any principle sum of money secured by a mortgage or other charge on property, or to recover proceeds of the sale of land, after the expiration of twenty years from the date when the right to receive the money accrued.

[17] In the case of **Suva City Council v K.W.March Limited** [1997] FJHC 56; HBC0957j.82s (15 May 1997) the court made the following observations:

....the defendant submits that the plaintiff is barred by section 4(1) of the Limitation Act, Cap 35 which says that actions founded on simple contract or tort shall not be brought after the expiration of six years from the date on which the cause of action accrued I disagree, first because under section 75 of the Local Government Act the recovery rates are a first charge on the land rated and the time limit for actions to recover a charge on property is 20 years by virtue of section 8(1) of the Limitation Act Cap 35, assuming that Limitation Act applies. In my judgment it does not.

[18] The above decision relied on by the learned counsel for the plaintiff is of no relevance to the matter before this court. In that case the court has arrived at its conclusion that the applicable provisions are found in section 8(1) of the Limitation Act on the basis that the rates recoverable are first imposed on the land. It was not a matter based on or arising out of a contract.

[19] In this action the defendant was not sued on the lease agreement between the plaintiff and Vista Partition and Ceilings Limited but on the guarantee and indemnity bond entered into between the plaintiff and the defendant and another in terms of which the liability is joint and/or several. The defendant has merely agreed to repay the loan in the event Vista Partition and Ceilings Limited fails and/or neglects to repay the loan. The cause of action accrued to the plaintiff to sue the defendant at the time Vista Partition & Ceilings Limited stopped paying the monthly lease rentals which was, according to the

plaintiff's own documents, in November 2000 and this action was instituted on 10th January 2012. The plaintiff's action is therefore, clearly out of time. Hence, the provisions of the Limitation Act applicable to the agreement between the plaintiff and the defendant are found in section 4(1) of the Act and not in section 8(1).

[20] The learned counsel for the plaintiff also submitted that insufficient pleading leaves the court and the plaintiff in uncertainty, in that which subsection of section 4 of the Limitation Act would apply had not been stated in the pleadings.

[21] In the case of **Blay v Poloard & Morris** [1930] 1 K.B. 628 it was held that it is not for the judge to speculate about the nature of a party's case. The judge and the parties are circumscribed by the pleadings on the record.

[22] In **Chandra v Courts Fiji Limited** [2011] FJHC 638; HBA004.2009 (6 October 2011) it was held:

At the outset, I must say that the respondent had never raised in the pleadings that the insurance did not cover the loss for want of up to date payments or for want of keeping the items at the known location. It had an opportunity to file a reply to the defence raised, but it failed to raise the same via its reply and only brought these issues during the trial. The court had considered the respondent's claim outside the pleadings.

Every party is bound by the pleadings and in this case a permission to the respondent to raise issues outside the pleadings was not justified by any reason or ground.

[23] In the present action there is no violation of the principle enunciated in the decisions cited above because in the amended statement of defence it is clearly

averred that the action of the plaintiff is barred by the provisions of section 4 of the Limitation Act.

[24] In the plaintiff's reply to the amended statement of defence, at paragraph 7, it is stated as follows;

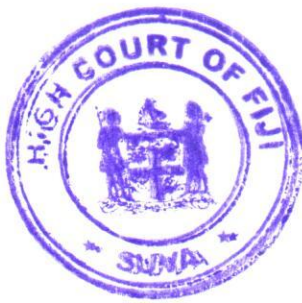
...the plaintiff says it demanded from the defendant the total outstanding together with interest rate payable under the Guarantee and Indemnity. The defendant failed to respond.


[25] If the plaintiff or its solicitors were unable to understand the position taken by the defendant, that is that its action was time barred under section 4 of the Limitation Act it could have replied in that manner. By reading this paragraph in the reply to statement of defence it is absolutely clear the plaintiff had clearly understood under what subsection of section 4 of the Limitation Act the objection to the maintainability of the action was raised. Therefore, the submission of the learned counsel for the plaintiff that the defendant's pleadings were ambiguous is without merit.

[26] For the reasons aforesaid the court holds that the action of the plaintiff is barred by the provisions of section 4(1) of the Limitation Act (Cap 35) and therefore is liable to be dismissed. Accordingly, I make the following orders.

ORDERS

1. The summons dated 10th January 2012 is struck out.
2. The plaintiff shall pay the defendant \$2000 as costs (summarily assessed) of this action.




Lyone Seneviratne