

Bank of Tonga v Tu'ivai

10 Supreme Court, Nuku'alofa
Lewis J
C969/94

12 & 16 June 1995

Contract-limitation-extension-admission
Limitation of time-extension-admission-payment

20 This was a trial of a preliminary point whether a defence, alleging expiry of the five year limitation period, was valid defence to a claim for repayment of a bank loan.

Held:

- (1) two letters of the defendants, of July 1991 and June 1992, were admissions in writing of liability within the period of 5 years, and the 5 years ran from the time of the (last) admission.
- (2) admission in writing meant some acknowledgement or recognition by the debtor of the debt
- 30 (3) the loan was a joint and several one, so the defendant was bound by the payment made by his co-debtor in July 1991 and, without else, the 5 years would have run from then in any event, so the writ and statement of claim were filed within time.

Cases considered: Wright v Pepin [1954] 2 ALLER 52
Dungate v Dungate [1965] 3 ALLER 818

Statute considered: Supreme Court Act: s 16

40 Counsel for plaintiff: Mr Appleby
Defendant in person

Judgment

Ward CJ ordered that the defence raised in paragraph 14 of the Statement of Defence filed on 4 January 1995 be tried as a preliminary point.

Para 14 of the defence is headed... "AND/OR FOR AN ALTERNATIVE GROUND OF DEFENCE" and pleads as follows:-

"14. If the Plaintiff is a prudent banker, it should come to justice within time the statute provided for it to claim it legal rights, therefore the defendant applied that the Plaintiff's claims be dismissed as its right of action is statute barred" (sic).

The pleadings to the extent they relate to statutory limitation are supported by the affidavits of the Applicant (Defendant) and one 'O. Afu'alo Matoto (the Manager of credit and lending of the Bank of Tonga).

The facts for present purposes are these. The Plaintiff carries on business throughout the Kingdom of Tonga as a banker. On his part the Defendant Mr. Tu'ivai is a licensed lawyer. In these proceedings he represents himself.

On the 1st February 1988 the Plaintiff lent the Defendant 'Amini and one Simeni Tu'ivai, a sum of \$17,000 at a rate of interest of 10% per annum. The loan agreement is annexure "A" to the affidavit of 'Amini Tu'ivai.

The validity of the loan agreement is not challenged. It is relied upon by both parties as being the best evidence of their transaction in February 1988.

Repayments were made, some as I gather by 'Amini, some by Simeni. The repayments are evidenced by Annexure "B" to the affidavit of 'Amini.

In or about mid 1988, the Tu'ivais fell out. Later they dissolved the partnership which they had had.

Simeni Tu'ivai repaid a sum of \$8332.17 from the balance owing of the joint borrowing on 19 July 1991.

'O. Afu'alo Matoto recounts in his affidavit that the Defendant admitted liability for his outstanding debt on 9 March 1989 and agreed to share repayment with Simeni Tu'ivai. The Defendant denies the meeting and denies admitting liability.

By letter to the bank dated 24 July 1991 exhibited to Mr Matoto's affidavit as EXH "D", Amini Tu'ivai says:-

"e). After the Court of Appeal and I am still loss on my case on joint account with Simeni Tu'ivai for overdraft in 1988, I hereby offer to transfer that loan for me to repay except interest from August 1988 until this case is over".

Curiously, in his answering affidavit to that of Mr. Matoto, Mr Tu'ivai says:-

"In relation to paragraph 5 of Mr. Matoto's affidavit I admit the allegations. In relation to para 6 of Mr. Matoto's affidavit I say that it was an offer and not an admission of debt. Further this offer was not accepted by the Plaintiff."

I take the law to be, as presently advised, that which is pronounced in the Supreme Court Act (Cap.10) s. 16(1).

"16(1). It shall not be lawful to sue any person for debt or damages after the expiration of 5 years from the date on which such liability was incurred nor to sue for property which has been in the undisputed possession of any person for more than 5 years. But if any part of such liability or claim has been paid within such time or the claim or liability has been admitted in writing within such time the 5 years shall commence to run from the time of such payment or admission and if there be

any deed or document between the parties covering a period of time the 5 years shall commence to run from the expiration of such period of time."

"Admitted in writing" means, in the context of section 16, that there is at law some acknowledgement by the debtor of the existence of the debt. Some recognition by the debtor of the debt.

Wright v Pepin [1954] 2 All ER 52 at 55

Dungate v Dungate [1965] 3 All ER 818

On 16 June 1992 'Amini Tu'ivai again wrote to the Plaintiff Bank (EXHIBIT G annexure to the affidavit of Mr. Matoto). In that letter Mr. Tu'ivai said inter alia "... there are four existing debts I am intending to clear, they are;

(a) T\$7500 and/or 50% of our joint partnership with Simeni Tu'ivai"

It must be said that Mr Tu'ivai maintains in his answering affidavit that he "denies any admission of debt" in that letter.

In my opinion the letters of 24 July 1991 and of 16 June 1992 are "admissions in writing" by Mr. Tu'ivai within the meaning of s.16 of the Statute of limitation contained in the Supreme Court Act.

The Plaintiff Bank is entitled to take advantage of the proviso to s.16 as it has done. The action and recovery against the Defendant is not statute barred. I so find.

I would add that I have disregarded as a factor affecting judgment here, the alleged visit to Mr. Matoto in March 1989 by the Defendant. It is contested by Mr. Tu'ivai and may, in my opinion, only be resolved by oral evidence. There is a second reason for not deciding whether the exchange occurred in March 1989 or at all. The second reason is that to resolve the issue would involve findings of credit. They should be left to be resolved at the trial of the other heads of defence.

Finally the loan was intended between the parties to be a joint and several loan by the Tu'ivai's. The loan agreement says so. Accordingly any actions by Simeni bind 'Amini. Simeni paid T\$8332.17 on 19 July 1991. For that reason alone the obligations of 'Amini under the agreement not only survive but are revived for a further 5 years from 19 July 1991, that is until 19 July 1996.

The Writ and statement of claim in this action were issued on 2 November 1994. At that time the rights of the Plaintiff were not limited by the provisions of the Supreme Court Act (Cap.10) 16 or at all.

I order that paragraph 14 of the Defence of the Defendant 'Amini Tu'ivai dated the 4 January, 1995 be struck out.