

Tonga Development Bank v 'Aukamea & others

Supreme Court, Nuku'alofa

Lewis J

C.326/94

26 February, 1 March 1996

Limitation - when liability incurs

Contract - limitation - when liability incurs

The plaintiff sued the defendant on a loan agreement. Only one repayment was made on 2 March 1989. In June 1989 the plaintiff wrote a letter of demand to pay all the balance. In April 1994 a writ was issued. The defendants pleaded the claim was statute barred (i.e. outside the 5 year period).

Held:

1. Pursuant to s. 16(1) Supreme Court Act the date on which liability was incurred was 15 June 1989.
2. A default by the defendants in paying monthly instalments created a constructive default of all payments by virtue of the provisions of the loan agreement.
3. That default created an obligation in the defendant to pay the balance of the loan and interest, but that obligation only arose if the plaintiff elected to impose demand upon the defendants.
4. The plaintiff did not make demand until 15 June 1989, the proceedings were issued within the statutory limitation of 5 years and were not statute barred. There should be judgment for the plaintiff.

Cases considered

Lakshonjt v Shetani [1973] 3 All ER 737

Reeves v Butcher (1891) 20 B 509

Harry Smith v Craig (1938) 8 C 620

Statutes considered

Supreme Court Act s.16

Counsel for plaintiff

Mrs Vaihu

Counsel for defendant

Mr W. Edwards

Judgment

The scope of this action is not broad. The Plaintiff sues the Defendants jointly and severally for breach of a loan agreement (Exhibit P1) executed between the parties on 21 November 1988.

Under the terms and conditions of the Agreement the Plaintiff lender agreed to lend and the Defendants agreed to borrow TOP \$3000:00. Interest was variable at the instance of the Bank, initially 10 per centum per annum.

It was a condition of the loan agreement P1 that-

80 *repayments of the loan and interest shall be made as follows:-
 payments shall be made at the rate of \$148:00 per month. The first repayment shall be made in December 1988 a final repayment of the balance of the loan and interest then owing shall be made in November 1990.*

From the documents placed in evidence I find that the Defendants made only one repayment. It was made on 2 March 1989. It was for the sum of \$300:00. Mr. Edwards submitted that it was in response to a demand from the Plaintiff in writing. There is no evidence of a demand. I disregard the submission.

80 On 15 June 1989 the manager of the Plaintiff Bank at 'Ohonua 'Eua wrote a letter of demand for TOP \$4085 to Foueti and Katalina Taungahihifo at their address in Tauranga New Zealand. The Defendants do not refute receipt of the letter.

On 13 April 1994 the Plaintiff issued a Writ and statement of claim. It relies on the allegations in the Writ in this action. The writ and statement of claim were served on the Latus and on Katalina Taungahihifo. I find that there was proper service of proceedings.

On 19 April Solicitors for the Defendant filed a Defence pleading that the Plaintiff's claim is statute barred.

S.16(1) of the Supreme Court Act 1988 as amended Cap.10 makes provision for limitation of Actions for debt. It provides:-

70 *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.

(2) (Not relevant to this Action).

80 The defendant argue that on any view of the Section, the proceedings alleging debt were instituted on 13 April 1994.

In my opinion the breach, (i.e. the moment liability was incurred,) while appearing to have been from the very outset must be determined with reference to the actions of the Plaintiff namely, its giving notice of demand for payment of \$4069.00 by letter dated 15 June '89 (EXH.P4). The breach or incurring of liability complained about by the Plaintiff in P4, is non payment since 2 March 1989.

90 The Defence submits that even if the Court were to find that the incurring of liability occurred as late as 2 March 1989, 5 years had passed by 2 March 1994 and the issue of a Writ on 13 April 1994 is 42 days later than the provisions of S.16(1) allow, the claim is statute barred.

On its part, the Plaintiff Bank argues that the claim of the Bank is saved by the clause in the schedule at page one which provides.

"A final repayment of the balance of loan and interest then owing shall be made in November 1990."

As I understand the Plaintiffs argument it is that

- the Defendant's account was always in arrears
- the Plaintiff need not and does not rely on the proviso to S.16(1).
- the right to sue in this action derives from the fact that the calculation of limitation date and time does not commence until November 1990 given the phraseology of the clause in the schedule (supra).

With respect to Counsel for the Bank, the argument is flawed. The clause in the schedule is (apart from anything else), inconsistent with the companion provision in the schedule that repayments shall be made at the rate of TOP \$148 per month monthly, and inconsistent with clauses (a) and (g) appearing on page 2.

"The borrower agrees (a) to make the said repayments on or before time." (ie Monthly) and "(g) to promptly and faithfully with any direction.... that may be given by the Bank"

More importantly, it is evident from P4 that the Banker Plaintiff identified and acted upon a breach, by sending P4 to the Defendants - it could not be plainer. P4 demands repayment and complains of breach "June is nearly over and \$4069 is demanded including the arrears of this month".

The Bank purported to act on the breach and to demand payment of arrears by P4. Implicit in the clause in the schedule is the proposition that -

"If the agreement is still on foot in November 1990 then the final payment must be made in November 1990"

Counsel for the Defendants referred me to the decision of the Privy Council (UK) in Lakshonijit v Shetani [1973] 3 ALL ER 737. The case is distinguishable on its facts. It relates to an action for breach of an agreement for sale and possession of land. The similarity it bears to the present case rests in clauses which are in conflict being incorporated in the same agreement. In its Judgment, the Privy Council (UK) considered the decisions

Reeves v Butcher (1891) 20 B 509

Harry Smith v Craig (1938) 8C 620. Both were cases concerning loan

agreements" In each case the courts held that the Plaintiff's right of action accrued as soon as the Defendant made default in payment of an instalment and was barred after 6 years from that event. They were not treated as cases in which the Plaintiff could elect between inconsistent remedies but as cases in which each contract imposed an obligation on the Defendant to pay the principal but as soon as the interest fell into arrears"

As was said by Lord Aitchison in Harry Smith at 626" The contract as I read it simply means that on default of any payment there is a constructive default of all payment."

The Loan agreement in this action stipulates that the payments were directed as ... "ke totongi fakafoki 'a e \$148 he mēhina" "pay back \$148.00 per month," and when the Defendants became in default of any payment there was a constructive default of all payments by virtue of the operation of clause (a) of the Loan agreement P1.

The default in my view only creates an obligation in the Defendants to pay the

balance of Loan and interest under the agreement. The obligation only arises if the lender elects to impose demand upon them which it did by virtue of Exhibit P4, which demand was made I found was on 15 June 1989.

Five years from 15 June 1989 is 15 June 1994. These proceedings were instituted (ie the Plaintiff sued the Defendant's by issuing a Writ alleging breach of agreement) on 13 April 1994, i.e. within the statutory limitation of 5 years.

Accordingly I find that this action is not statute barred and there will be Judgment for the Plaintiff against the Defendants jointly and severally in the sum of \$4,687.91 plus interest thereon at the rate of 10% per annum from the 31.3.1994.