

IN THE HIGH COURT OF FIJI
WESTERN DIVISION AT LAUTOKA
[CIVIL JURISDICTION]

Civil Action No: HBC 102 OF 2011

BETWEEN : **ALEEMS INVESTMENT LIMITED** a limited liability Company
duly incorporated in Fiji having its registered office at c/- HLB
Crosbie & Associate, Top Floor, HLB House, Cruikshank Road,
Nadi Airport.

PLAINTIFF

AND : **KHAN BUSES LIMITED** a limited liability Company incorporated
and registered under the Laws of Fiji and having its registered
office at Navutu Industrial, Queens Highway, Lautoka, P O Box
6549, Lautoka.

DEFENDANT

Before : Hon. Mr Justice R.S.S. Sapuvida

Counsel : Mr. D. Sharma with Ms. Leena Goundar for the Plaintiff
: Ms. Natasha Khan for the Defendant

Date of Judgment: 13th February 2017

JUDGMENT

Background to the case

- [1]. The plaintiff has brought this action to recover from the defendant the sum of \$408,862.63 with interest at the rate of 10% payable from 28th January, 2005.
- [2]. By writ of summons and the statement of claim, the plaintiff alleges that as at 28th January 2005 the defendant owed the Habib Bank the sum of \$408,862.63 and this debt was paid on behalf of the defendant by the plaintiff. At the time the debt was paid the defendant was facing a Winding Up Petition that had been brought by Habib Bank of Fiji. The payment of the debt meant the agreement between the plaintiff and the defendant that the Winding Up petition by Habib Bank stands discontinued.

- [3]. In the Amended Statement of Claim the plaintiff has pleaded that the sum of \$408,862.63 was lent by the plaintiff to the defendant to enable the defendant to pay Habib Bank and avoid the winding up proceedings of the defendant by Habib Bank.
- [4]. In the Amended Statement of Defence the defendant does not deny the fact that the plaintiff paid the debt of \$408,862.63, but it states that the sum of \$408,862.63 was paid by the plaintiff to satisfy the claims for monies advanced by the defendant to the plaintiff together with overdraft interest. So, the defendant does not deny the fact that the plaintiff had made payment on behalf of the defendant to Habib Bank but in turn as a defence the defendant says that it had advanced monies to the plaintiff. The onus is therefore on the defendant to prove that it had advanced funds to the plaintiff.
- [5]. The defendant's alternative defence taken up in the Amended Statement of Defence is that the plaintiff's claim was statute barred pursuant to Section 4 of the Limitation Act [Cap 35] No.20 of 1971.
- [6]. Nevertheless, the defendant in its Amended Statement of Defence does not explain under what basis and circumstances the plaintiff's claim should be dismissed under the Limitation Act.
- [7]. Presumably the defendant's point would have been that the debt was incurred on 28th January 2005 and the Writ was filed on 1st July 2011 which was beyond the 6 year limitation period.
- [8]. The Amended Statement of Defence is limited to the following:

"AMENDED STATEMENT OF DEFENCE

1. *That the Defendant admits paragraphs 1 and 2 of the Statement of Claim.*
2. *That the Defendant denies paragraphs 3, 4 and 5 of the Statement of Claim.*
3. *By way of further defence, the Defendant says that the sum of \$408,862.63 that the Plaintiff paid Habib Bank Limited was to satisfy the claims for monies advanced by the Defendant to the Plaintiff, together with bank overdraft interest.*
4. *That the Amended Writ of Summons be struck off and dismissed pursuant to Section 4 of the Limitations Act CAP 35, 1971.*

Wherefore the Defendant prays that the Plaintiff's claim be dismissed with costs on Solicitor Client indemnity basis."

[Emphasis added]

The witnesses and the documents

[9]. The plaintiff brought only one witness and produced eight documents in evidence at the trial while the defendant summoned two witnesses and marked five documents in support of its case.

[10]. Plaintiff's Witness:

I. Mr. Krishna Sami Naidu [PW-1]

[11]. Plaintiff's Documents:

I. Document issued by the Registrar of Companies dated 25 July 2012 relating to Aleem Investment Ltd. [PE-1]

II. Letter dated 2 August 2006 sent by Habib Bank Ltd to Mr. Mohammed Aleem Khan. [PE-2]

III. Demand Notice dated 23 May 2003 sent to Khan Buses Ltd from Habib Bank Ltd. [PE- 3]

IV, Notice of Demand dated 19 February 2009 sent by Sahu Khan & Sahu Khan to Khan Buses Ltd. [PE- 4].

V. Letter sent to Khan Buses Ltd by Sahu Khan & Sahu Khan dated 8 June 2009. [PE-5].

VI. Copy of the petition filed in Winding Up proceedings in Lautoka High Court against Khan Buses Ltd in 2009. [PE- 6].

VII. Letter sent to Habib Bank Ltd by Khan Buses Ltd – [PE- 7].

VIII. Letter sent to Habib Bank Ltd by M.K.Sahu Khan & Company. [PE-8].

[12]. Defendant's Witnesses:

I. Mohammed Nasir Khan – [DW- 1]

II. Mohammed Naved Khan – [DW-2]

[13]. Defendant's Documents:

- I. Copy of the Ruling dated 28 August 2014 in Civil Action No. 129 of 2010. [DE-1].
- II. Statement of account- [DE-2].
- III. Letter sent to Habib Bank Ltd by Khan Buses Ltd dated 28 February 2001.[DE-3].
- IV. Writ of summons and Statement of Claim in Case No. HBC 005 of 2010L. [DE-4].
- V. Letter dated 12 June 2003 sent to Khan & Co. by M.K.Sahu Khan & Co. [DE-5].

Evidence at the Trial

[14]. The witness for the plaintiff Mr. Krishna Sami Naidu [PW-1] said he had acquired shares that were previously owned by Mohammed Aleem Khan and he only knew the history of the dealings from the business records that he could locate in the Company files. Though he was not a Director or a Shareholder in 2005, he said that the debt was shown in the plaintiff's Books of Account and he was duty bound to recover this amount for the company from the defendant. To his credit the witness said that if the defendant was able to produce evidence to show that the defendant had advanced funds to the plaintiff then he would be satisfied that plaintiff had owed monies to the defendant in 2005. Then, there is no claim for the plaintiff against the defendant.

[15]. The plaintiff's case was that on 19th February 2009 the plaintiff through their solicitors Messrs Sahu Khan & Sahu Khan served a Notice of Demand [PE-4] on the defendant demanding the repayment of the sum of \$408,862.63. The defendant did not respond to the said letter. Messrs Sahu Khan & Sahu Khan sent another letter [PE-5] on 8th June 2009 and once again the defendant did not respond. The plaintiff then commenced legal action by way of a Winding Up petition against the defendant on 9th July, 2009. That Petition was dismissed by the High Court at Lautoka and the matter went to the Court of Appeal. The Court of appeal dismissed the Orders made in the High Court with costs payable to the petitioner (plaintiff in these proceedings) by the defendant.

- [16]. The defendant was given notice that it was required to repay the monies on 19th February 2009 and they were given 21 days to make payment. Up until that point of time no prior demand had been made on the defendant to repay the amount which the plaintiff had paid on the defendant's behalf to Habib Bank. After the defendant failed to respond to the Notice of Demand and make payment within 21 days from 19th February 2009 they were considered to be in default.
- [17]. The cause of action against the defendant accrued from the day they became in default because that is the date when they failed to pay the debt. A cause of action to recover a loan debt doesn't arise until and unless there has been a default. The default is the trigger for the cause of action to accrue. The Borrower must be given Notice that monies are due and owing and once such Notice is given and the borrower fails to pay the debt within the time allocated for payment then it is considered to be in default.
- [18]. The time to commence legal action to recover the debt starts to accrue from the date the default occurs. Here, the 6 year time limitation period ran from 19th February 2009 and expired in 2015. It must be noted that a cause of action doesn't accrue when a debt is created, and yet it accrues when there has been a default under that loan.
- [19]. After the Court of Appeal case was concluded the plaintiff commenced this Writ action against the defendant on 1st July 2011. The Writ was amended on 31st October 2013. That was still within the limitation period.
- [20]. The plaintiff in this case was able to establish that it had paid the defendant's debt with Habib Bank. The PE- 2 confirms this transaction. Indeed, this is clearly admitted by the defendant in the Amended Statement of Defense.
- [21]. The defendant on the other hand was not able to establish through any acceptable source of evidence that it had advanced any monies to the plaintiff. The Court cannot just fill in the gaps or imply facts where there is no evidence before the Court to show that:
- (i) defendant advanced any funds to the plaintiff.
 - (ii) The account from which the fund were withdrawn to make the advance.
 - (iii) The date on which the defendant advanced the funds.
 - (iv) The purpose for which the monies were advanced.
 - (v) Any Notice of Demand served on the plaintiff.

(vi) In whose account was the monies deposited.

[22]. On the contrary, the defendant's own solicitor Mr. M K Sahu Khan wrote letters to the Habib Bank where the defendant admitted that it owed the debt to Habib Bank. These were contemporaneous letters. If the defendant denied that it owed any monies to Habib Bank or that Habib Bank had wrongfully debited their account they would have denied the debt or even sued Habib Bank.

[23]. In fact the evidence before this Court established that the defendant's main witness Nasir Khan had written a letter to Habib Bank where he denied any knowledge of the identity of the person Habib Bank had allegedly given \$200,000.00 from the defendant's overdraft account. Then the plaintiff is not a privy to the issues that had been arisen between Khan Busses Ltd and the Habib bank Ltd.

Analysis

[24]. In light of the evidence that was adduced in Court, it can be clearly concluded that the plaintiff has established that at a time it assisted the defendant by paying off the defendant's debt with Habib Bank and allowed the defendant to be saved from being wound up. There was consideration and a genuine reason for the financial assistance given by the plaintiff to the defendant. On the other hand it is more fully established that the plaintiff paid the said sum to the Habib Bank Ltd to settle a debt that had been obtained by the defendant from Habib Bank Ltd as the defendant admitted this in its Amended Statement of Defence.

[25]. The document PE-2 in which even the Habib Bank Ltd states of a settlement of \$ 408,862.63 by plaintiff, further proves this transaction. On the other hand, to prove the contrary the defendant fell short of adducing any sort of evidence to show that it had lent any monies to the plaintiff. The plaintiff is a separate corporate entity and the onus was on the defendant to show that monies were paid or deposited into the plaintiff's account or that the plaintiff received a cheque or cash as an advance from the defendant. No such evidence was put forward by the defendants at the trial. The documents DE-1 to DE-5 tendered in evidence by the defendant do not speak of any monetary award granted to the plaintiff by the defendant at any given period of time.

[26]. In the absence of such evidence to prove the defendant's version of the transaction, then only fact remains is that the defendant has never repaid the money paid by the plaintiff to the Habib Bank Ltd on behalf of the defendant. The settlement of funds in the sum of \$ 408,862.63 to the Habib Bank Ltd by plaintiff

on defendant's behalf is fully admitted by the defendant in its Statement of Defence.

- [27]. Hence, what has been revealed in evidence and proved by the plaintiff before this Court is that the defendant owes the plaintiff the sum of \$ 408,862.63 that was paid by the plaintiff to the Habib Bank Ltd by extending a hand in order to bail out the defendant.
- [28]. The defendant's alternative position was that the plaintiff's claim was statute barred. Seemingly, as I have earlier stated the defendant's point is that the debt was incurred on 28th January 2005 and the Writ was filed on 1st July 2011 which was beyond the 6 year limitation period.
- [29]. None of the witnesses who gave evidence for the defendant bothered to state and clarify as to how its defence of statute bar is applicable to the case and its alternative defence.
- [30]. However, I am declined to accept this argument in view of the provisions of the Limitation Act [Cap. 35] No.20 of 1971.
- [31]. Section 4 of the Limitation Act says that the time begins from the date the cause of action accrues. Here the cause of action only accrued when a demand was served on the defendant informing them that if they didn't pay the money within 21 days they would be deemed to be in default and this was in 19th February 2009. The claim is not when the debt is incurred but when there is a failure to pay the debt. When a debt is due and the transaction is on hoping that the other party would settle it, then there cannot be a cause of action. The cause of action activates when the debt is default by the debtor.

The Limitation Act

- [32]. Section 4 of the Limitation Act [Cap35] No. 20 of 1971 states as follows:

4.-(1) 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-

- (a) actions founded on simple contract or on tort;*
- (b) actions to enforce a recognizance;*
- (c) actions 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:*

Provided that-

- (i) *in the case of actions 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 damages 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.*
- (2) *An action for an account shall not be brought in respect of any matter which arose more than six years before the commencement of the action.*
- (3) *An action upon a specialty shall not be brought after the expiration of twelve years from the date on which the cause of action accrued:*

Provided that this subsection shall not affect any action for which a shorter period of limitation is prescribed by any other provision of this Act.

- (4) *An action shall not be brought upon any judgment 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 the expiration of six years from the date on which the interest became due.*
- (5) *An action to recover any penalty or forfeiture, or sum by way of penalty or forfeiture, recoverable by virtue of any Act or imperial enactment shall not be brought after the expiration of two years from the date on which the cause of action accrued:*

Provided that for the purposes of this subsection the expression "penalty" shall not include a fine to which any person is liable on conviction of a criminal offence.

- (6) *Subsection (1) shall apply to an action to recover seamen's wages, but save as aforesaid this section shall not apply to any cause of action within the Admiralty jurisdiction of the Supreme Court which is enforceable in rem.*

(7) *This section shall not apply to any claim for specific performance of a contract or for any injunction or for other equitable relief, except in so far as any provision thereof may be applied by the court by analogy in like manner as has, prior to the commencement of this Act, been applied. "*

[33]. The defendant therefore cannot say that the cause of action accrued from 28th January 2005 because at that stage they were not under Notice that the monies were repayable.

[34]. In a debt recovery case the time starts to run from the date on which repayment of the total debt is demanded and on that demand the debtor fails to pay.

[35]. In this instance, the date the cause of action accrued was from Dr. Sahu Khan's letter in 19th February 2009. This is very consistent with the decision in Kaisha v Eyre (1998) CA No. ABU 0026U of 1997S where the Court held that the damages for breaches was based on the defendant's failure to remedy its breaches following his solicitors' demand letter of 30th September 1992.

[36]. The proceedings of the present action instituted in 2011 by way of writ of summons and the statement of claim which was later amended on 31st October 2013. The limitation period of six years begins from the date of the demand. The demand in these proceedings was made on 19th February 2009. Hence, even if the date of commencement of these proceedings is considered to be on 31st October 2013, being the date on which the amended statement of claim was filed, the plaintiff is not out of time to file the action since the limitation period only expires in 2015.

Conclusion

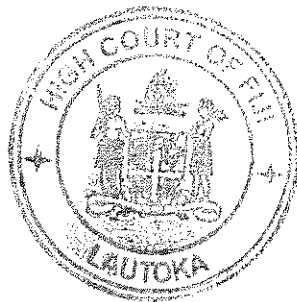
[37]. Therefore, the defendant's alternative defense that the plaintiff's cause of action is out of time has no foundation and should be dismissed at the very outset.

[38]. The necessity of weighing the balance of probability in evidence does not arise here because the payment of \$ 408,862.63 by the plaintiff to the Habib Bank Ltd is admitted by the defendant and that the defendant was unable to bring at least some evidence at the trial to prove any debt unsettled and owed by the plaintiff to the defendant prior (or after) to the plaintiff's settlement of the said sum to the Habib Bank Ltd in 2005 even to make an inference that it was an unpaid debt due from the plaintiff. Hence, it is clearly established in this case by the plaintiff that the sum in issue was paid by the plaintiff on behalf of the defendant to bail out the defendant from the Habib Bank Ltd and Winding Up proceedings.

- [39]. Therefore, on the forgoing reasons discussed I hold that the defendant is wholly liable to pay the sum of \$ 408,862.63 to the plaintiff with interest need to be worked out in accordance with the commercial value of the transaction that should be computed from 28th January 2005 to the date of the judgment and the post judgment interest in terms of section 4 of the Law Reform (Miscellaneous Provisions) (Death and Interest) Act [Cap 27] for the total sum stated in paragraph 38 from the date of the judgment until the total sum is paid in full.
- [41]. The plaintiff claims interest at the rate of 10% for the sum claimed against the defendant and yet, there was no evidence to establish that there had been an agreement to pay the interest at the rate of 10% by the defendant when the plaintiff paid the money to the Habib Bank Ltd. In the absence of evidence to prove the former, the Court has to look at the case law authorities on this issue.
- [42]. In the case of Dominion Insurance Limited v Sea Island Paper & Stationery Limited (Civil Appeal No. ABU 0008/97S, Fiji Court of Appeal) the view of the Court was to award 13.5% as commercial interest on a claim.
- [43]. In Daydream Cruises Ltd v Myers [2005] FJHC 316; HBC0291.1997L (17 February 2005) - The interest was awarded at a commercial rate of 10% per annum.
- [44]. In South Pacific Recording Ltd v Yates [1997] FJCA 43; Abu 0039u.96s (14 November 1997) - The interest in judgment was awarded at the rate of 9% per annum.
- [45]. The subject in the case in hand is with regard to an outstanding monetary transaction between two companies. Obviously this falls within the realm of a commercial transaction. Then the judgment creditor should be entitled to claim the interest rate at its commercial value.
- [46]. Having given the due regard to the guidelines laid down by the forgoing case law authorities in calculating the average interest rate in cases of this kind, I am persuaded to award the plaintiff with interest at the rate of 10% per annum on the sum claimed against the defendant.
- [47]. Final Orders of the Court
1. The judgment is entered in favor of the plaintiff in the sum of \$ 408,862.63 (Four Hundred and Eight Thousand, Eight Hundred and Sixty Two Dollars and Sixty Three cents) with interest at the rate of 10% per annum from 28th

January 2005 to the date of this judgment against the defendant to pay the plaintiff.

2. The defendant shall further pay the plaintiff the post judgment interest [on the total sum accumulated with the 10% interest stated in final order No.1 above] in terms of section 4 of the Law Reform (Miscellaneous Provisions) (Death and Interest) Act [Cap 27] as amended by Law Reform (Miscellaneous Provisions) (Death and Interest) (amendment) Decree 2011, from the date of this judgment until the total sum is paid in full.
3. The defendant shall pay the plaintiff summarily assessed sum of \$ 2000.00 as costs.



R.S.S. Sapuvida
JUDGE

Delivered at Lautoka
13th February 2017