DEVELOPMENT BANK OF WESTERN SAMOA v
SUHREN (RONALD AND TINA)

Supreme Court Apia
Callander CJ
28 January, 13 April 1983

PRACTICE AND PROCEDURE - Defence of Limitation Act to Plaintiff's claim to recover its loan.

HELD: The defence was successful and prevented the Plaintiff recovering its loan and accrued interest thereon.

CASES CITED:

- Re Hatton [1872] 7 L.R. Ch. App 723
- Reeves v Butcher [1891] 2Q.B. 509, 511
- Hemp v Garland [1843] 4Q.B. 519
- Cheang Thye Phin v Lam Kin Sang [1929] A.C.670 (P.C.)

LEGISLATION:

- Limitation Act 1975; Ss 6, 23, 24
- Bankruptcy Act 1869

T K Enari for Plaintiff
L R Va'ai for Defendants

Cur adv vult

By an agreement dated the 18th November 1974 the Defendants agreed to borrow $3,000 from the Development Bank. The said loan was repayable upon demand but until demand was made the Defendants were to repay the loan (with interest at 12% reducible to 9% for prompt payment) by monthly instalments of $100 commencing in December 1974 and continuing until the month of September 1977 when "the balance of the advances together with interest shall be repaid in full".

A collateral chattels security was executed by the Defendants on the 21st November 1974. It differs only insofar as repayment is concerned. Final repayment was to have been "on or before the 31st January 1976" and this clearly conflicts with the loan agreement.

The Plaintiff sues under the loan agreement, not the chattels security, claiming $5818.50 owing as at the issue of the writ together with interest to the date of judgment. Only 4 $100 payments were ever paid, the last being on the 20th February 1975. The final advance of $300 capital was made on the 8th April 1975. No demand for repayment was made until the Bank's solicitor orally did so in October 1980. The present action was commenced on the 27th October 1981. The Defendants plead s.6 of the Limitation Act 1975 by way of defence.

Mr Enari, for the Bank, argues that there was no privity of contract between the parties until 1976 but the facts do not bear him out as is clear from my above-mentioned findings. He then argues that the assignment from Asiata to the Defendants on the 12 May 1976 amounts to an acknowledgment of the debt. This document was not produced as an exhibit and, on the evidence, was an assignment of the loan. I found this difficult to comprehend bearing in mind the liability of the Defendants under the November 1974 documents. In any event there is nothing in the evidence to establish that the assignment was an acknowledgment in writing "of the claim" signed by the two Defendants.

Next it is argued that Re Hatton [1872] 7 L.R. Ch. App 723 is authority for the proposition that where an arrangement for payment has been reached, and the debtor defaults on that arrangement, time does not run until the default. This submission is misconceived. Re Hatton was concerned with a composition made by a debtor with creditors under the Bankruptcy Act 1869. The question of limitation of actions was neither argued nor relevant. I find the case of no assistance. The parties are here concerned with the effects of sections 6, 23 and 24 of the Limitation Act 1975.

Mr Enari then argues that the limitation period does not run until 1st October 1977, the date by which the total advances and interest were to have been paid.

The loan agreement provides by clause 1(a) that the advances and accrued interest are repayable on demand and it is argued that no cause of action arises until either the 1st October 1977 or when the demand was made by Mr Apa in October 1980. But this submission overlooks clause 2(b) of the Agreement which gives the Plaintiff a right of action:

> "should the borrower at any time fail to implement carry out and perform any or all of the stipulations duties and obligations imposed upon the Borrower under (the) Agreement".

Thus the cause of action arose in March 1975. As Lindley L.J said in Reeves v Butcher [1891] 2Q.B. 509, 511:

> "This expression "cause of action", has been repeatedly the subject of decision, and it has been held, particularly in Hemp v Garland 4 Q.B. 519, decided in 1843, that the cause of action arises at the time when the debt could first have been recovered by action. The right to bring an action may arise on various events; but it has always been held that the statute runs from the earliest time at which an action could be brought."

Lopes LJ in the same case pointed out that the Plaintiff in that case had a cause of action when default was made in the payment of the first interest instalment.

Just as the principal is irrecoverable so is the accrued interest it being accessory to the principal and barred with it: Cheang Thye Phin v Lam Kin Sang [1929] A.C.670 (P.C.).

In my clear view the Plaintiffs action is caught by the statute, it being filed some 7 months out of time. I therefore accept Mr Va'ais submission that the Plaintiff's claim must fail. The Defendants will have judgment with costs and disbursements to be fixed by the Registrar.