IN THE HIGH COURT OF KIRIBATI]
CIVIL JURISDICTION]
HELD AT BETIO]
REPUBLIC OF KIRIBATI]

HIGH COURT CIVIL CASE 97 OF 2009

BETWEEN: DEVELOPMENT BANK OF KIRIBATI PLAINTIFF

AND: BINEBA KABUTA
KABONGNGA TAWITA DEFENDANTS

FOR THE PLAINTIFF: MS BATITEA TEKANITO
FOR THE DEFENDANTS: MS DEBRAH MERCURIO

DATE OF HEARING: 23 JUNE 2010

JUDGMENT

The first defendant, Nei Bineba Kabuta, on 6 October 1994 took out a loan with the DBK for $2,929. Besides signing a loan agreement she gave a bill of sale over various items as collateral. [It is agreed that the Bank disbursed only $2,100.] The second defendant, Nei Kabongnga Tawita, guaranteed the loan.

At the beginning of the hearing Ms Tekanito for the plaintiff, the Development Bank of Kiribati, discontinued the claim against the first defendant. I strike it out. The action by the plaintiff claiming $12,683.52 (wrongly given in the Statement of Claim as $127,683.52) proceeded only against the second defendant, Nei Kabongnga.

Nei Bineba repaid $500 and Nei Kabongnga has paid under the guarantee $1,710. Nei Bineba made no payment until 1996 although under the loan agreement the first repayment had been due on 30 November 1994 with the whole loan repaid within 33 months. Nei Kabongnga was not, according to her evidence, approached for

payment until 2003 when someone from the DBK came to her office at the BTC and spoke to her: nothing in writing. The Bank has never taken any action under the Bill of Sale. The Writ was issued on 22 May 2009.

This is a very old loan. I raised the point of time. After discussion with counsel I was satisfied that, thanks to provisions in the DBK Act and in the Limitation Act, the proceedings are within time.

The Development Bank of Kiribati Act 1986 as amended:-

Recovery of debts due to the Bank

49(1) The Bank may take any action or bring any proceedings to effect recovery of any sum due and payable to the Bank in respect of any loan made under this Act.

(2) The provisions of the Limitation Act 1939 of England shall not apply to any proceedings for the recovery of any loan or part thereof repayable to the Bank .....

The Limitation Act 2004 (assented to on 09/09/04):-

37 .....(5) ----- the time for bringing proceedings in respect of a cause of action which accrued before the commencement of this Act shall, if it has not then already expired, expire at a time when it would have expired apart from the provisions of this Act or at any time when it would have expired if the provisions of this Act had at all material times been in force, whichever is the later:

Provided that where a cause of action, for which a period of limitation is prescribed by this Act, has accrued before the commencement of this Act in any case in which, but for the provisions of this Act, no time for bringing proceedings in respect hereof is limited, the time for bringing such proceedings, as limited by the provisions of this Act, shall commence to run from the commencement of this Act.

Subject to further argument the DBK will be bound by the Limitation Act after 9 September 2010.

Ms Mercurio argued two points. First that the plaintiff should have taken action to mitigate its damages. Nei Bineba was in default from 30 November 2004:-

Loan Conditions

1. **Loan Amount $2,929.00**

2. **Interest: 12% p.a. based on outstanding loan balance payable monthly from the date of first disbursement.**

3. **Prompt Payment Discount: Nil**

4. **Principal Repayment: 33 months**

5. **Security: Legal Charge and/or Bill of Sale on the following: .....**

(Exhibit P3).

The Bank had an obligation to mitigate its loss (see 11 Halsbury (3rd edition) paragraph 476 @ p. 289). Yet it did not take proceedings until 2009 and only from time to time earlier had tried for payment from either borrower or guarantor.

The Bank should have acted years ago: instead it simply let interest pile up year after year. It failed to mitigate its damage. This is, to my recollection, the first time I have applied the principle of mitigation to actions for recovery by the Bank. Probably because this is the oldest outstanding loan the Bank has tried to recover. Fifteen years is far too long to wait. After how long should the principle of mitigation require the Bank to take action? Both counsel accepted my suggestion – which is generous to the Bank - that in this case, by analogy with the period of limitation in the Limitation Act, for causes of action on simple contract, six years is reasonable.

The Bank should have acted no later than the beginning of 2001. By 2003 when the first approach was made to Nei Kabongnga it was too late.

Ms Mercurio's second point rests on the wording of the guarantee her client gave:-

GUARANTEE FOR SURELY (sic) FOR A LOAN SECURED BY BILL OF SALE OF CONVENANT/CHARGE

In consideration of Development Bank of Kiribati having advanced to Bineba Kabuta .....

I/We hereby agreed hat in the event of default in payment by the said Bineba Kabuta ..... of the said sum of Two Nine Two Nine (2929.00) or any part thereof and any interest due thereof, I/we jointly severably (sic) be answerable and responsible to you for payment of such sum and interest

as may be outstanding on receiving notice in writing from you to that effect. (Exhibit P2)

Ms Mercurio relied on the words at the end of that extract, "*on receiving notice in writing from you to that effect*". Her client never received any notice in writing: thus she was not liable.

I accept the force of both points. Perhaps the Bank is lucky to have recovered from Nei Kabongnga $1,710!

The action fails and is dismissed.

MEMORANDUM

During the hearing Ms Tekanito applied to tender a letter. Ms Mercurio objected that it had not been discovered. I had made orders for discovery. Ms Tekanito pleaded that the letter was crucial to her case: the more reason why she should have discovered it. Ms Tekanito tried in several ways to get it in but I refused.

We do not require strict compliance with O.33 rr 10 and 21 but we do enforce the principle flowing from the Rules that if a document has not been discovered within the time limited for discovery and if any party object to its use, that document may not be used at the hearing.

The reason is clear. Every party is entitled to know, well before the hearing, the case it must meet and the documents on which opposing parties propose to rely.

Dated the 25th day of June 2010

Robin Millhouse.

THE HON ROBIN MILLHOUSE QC
Chief Justice