Bank of Tonga v Havea

Supreme Court, Vava'u
Hampton CJ
C 772/96

1 May, 30 July 1997

Banking law - consolidation of accounts - consent - transfer of funds
Contract - banking - implied terms - transfer of fund
Limitation - transfer without consent - not extend period

The bank sued for the balance outstanding on a loan account. The action was out of time (i.e. outside the 5 year limitation period) unless the bank could rely on a transfer of funds it had made (within the 5 year period) from the defendant's current account to the loan account.

Held, dismissing the claim:

1. Factually the defendant had not consented to, nor discussed with the bank, the transfer.
2. Unless a bank makes it clear to its customer that it is retaining the right at any moment to apply the credit in a current account to reduce a debt in a loan account it will be an implied term that the bank will not consolidate the two accounts.
3. Given such an implied term sums paid into a current account are appropriated to that account and cannot be used by the bank in the discharge of the loan account without the consent of the customer.
4. The transfer made here was not a sum "paid" within s.16 Supreme Court Act and the claim, accordingly, was out of time.

Cases considered : Bradford Old Bank v Sutcliffe [1918] 2 KB 833
Halesowen Presswork v Westminster Bank [1971] 1 QB 1

Statutes considered : Supreme Court Act s.16

Counsel for plaintiff : Mr Appleby
Counsel for defendant : Mr Taufaeteau

Judgment

I apologise to counsel and the parties. This file, with the submissions on it, should have come to me, I having heard evidence on the matter in Vava'u and reserved my judgment awaiting legal submissions and having made findings of fact. Why the file has gone to Lewis J, with the submissions, I do not understand and I have just found the file perchance.

The findings of fact which I made were against any consent by the defendant to the transfer of the small credit balance ($61.83) in his current account with the plaintiff, to the loan account with the plaintiff which was then some $4500 odd in debit. That transfer was done by the plaintiff on 5 September 1991 and that transfer is relied upon by the plaintiff as keeping alive it's cause of action against the defendant, the 5 year limitation period (in s.16 Supreme Court Act) having expired otherwise, prior to the issue of this Writ on 1 August 1996. (Withiout this disputed transfer the 5 year period, running from the last undisputed payment of part of the loan account on 14 August 1989, would have expired in August 1994 i.e. some 2 years before the Writ was issued).

Not only did I find that there was no consent to the September 1991 transfer but I found that there was no discussion, as alleged by the plaintiff through it's employee and witness Mr Moala, as to the proposed transfer (i.e. no discussion of it on 22 July 1991 between Mr Moala and the defendant). Mr Moala's diary note on which he relied for his memory of the events, did not record such a discussion and he conceded that he knew, and had been instructed, that all facts should be recorded in the diary notes. He (Mr Moala) also agreed that he knew that, for a transfer, such as this under discussion here, a written consent was usually required and obtained by the plaintiff. That was not done here.

The authorities (principally Bradford Old Bank Ltd v Sutcliffe [1918] 2 KB 833 (at 847) and Halesowen Presswork & Assemblies Ltd v Westminster Bank Ltd [1971] 1 QB1, & [1970] 3 All ER 477) are clear. Unless a bank makes it clear to the customer that it is retaining the right at any moment to apply the credit balance on the current account in reduction of the debt on the loan account, it will be an implied term of the arrangement that the bank will not, so long as it lasts, consolidate the two accounts. (As was said in the Bradford case by Scrutton L.J. and repeated in Halesowen), otherwise no customer could feel any security in drawing a cheque on his current account if he had a loan account greater than the credit balance on his current account. I add - quite sensbile. Little point in having a loan account otherwise).

In addition the authorities are clear that, given such an implied term, sums paid into a current account are appropriate to that account and cannot be used by the bank in the discharge of the loan account without the consent of the customer.

Here there was no consent, whether to consolidation or to transfer to the loan account. That is the end of the matter, in my view. This transfer was not a sum "paid" in terms of s 16(1) Supreme Court Act. The claim was and is out of time and cannot succeed. It must be dismissed (s 16 : "it shall not be lawful to sue .....")

Mr Taufaeteau is correct when he submits that the bank was in "clear breach of an implied term of the agreement to maintain the two separate accounts".

There was no clear understanding setting aside that important and fundamental implied term. I so find. Mr Appleby argues a lesser standard than either "consent" or the 'clear understanding made known to the customer by the bank" i.e. a mere "telling" to the customer, which he says, here, occurred at the meeting on 22 July 1991. I find against him

on the facts as I have stated ; and, as well, I doubt a mere "telling" is sufficient - the requirement is for the bank to make it clear to the customer.

I would have some concerns as well as to timing - but in view of the above I do not have to resolve or decide them. The meeting of 22 July 1991 was over 5 years before the Writ was issued. No explanation as to the delay in transfer of funds from current account to loan account was given to me in evidence i.e. delay from 22 July 1991 to 5 September 1991 meaning that the latter date was just within the 5 year period. I note that matter, no more.

100 The orders of the Court are:

(i) claim is dismissed with judgment for defendant

(ii) costs to defendant as agreed or as taxed.