TIME LIMITS ON LOANS PAYABLE ON DEMAND

SEMINAR FOR THE INNER WEST LAW SOCIETY

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Loans payable on demand

1. This seminar concerns loans payable "on demand", or "on request". That concept covers loans under an agreement that stipulates that repayment is to be made on demand, as well as loans where the time for repayment is not expressly stipulated. It does not concern loans where some form of notice is expressed as being a condition precedent to repayment.

The Limitation period

2. Subsection 14(1) of the Limitation Act 1969 (NSW) ("the Act") provides:

> "14 General
>
> (1) An action on any of the following causes of action is not maintainable if brought after the expiration of a limitation period of six years running from the date on which the cause of action first accrues to the plaintiff or to a person through whom the plaintiff claims:
>
> (a) a cause of action founded on contract (including quasi contract) not being a cause of action founded on a deed,
>
> (b) a cause of action founded on tort, including a cause of action for damages for breach of statutory duty,
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> (c) a cause of action to enforce a recognizance,
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> (d) a cause of action to recover money recoverable by virtue of an enactment, other than a penalty or forfeiture or sum by way of penalty or forfeiture."

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3. A loan payable on demand will in general fall within subsection 14(1)(a).

4. Time starts to run "from the date on which the cause of action first accrues to the plaintiff or to a person through whom the plaintiff claims".

5. In the case of some types of action, the Act specifies the conditions which must be satisfied for a cause of action to be deemed to "accrue" for the purpose of applying the limitation provisions. See, for example, sections 28 to 31, which deal with accrual of "causes of action" to recover land.

6. The Parliament was careful to ensure that such "accrual" provisions do not affect the substantive law other than in respect of limitations, and it achieved this through s 11(5) of the Act, which provides that:

   "(5) The provisions of this Act as to the date of accrual of a cause of action have effect for the purposes of this Act but not for any other purpose."

7. However, the Act contains no such deemed accrual provisions for causes of action founded on a contract.

8. So time starts to run when the cause of action – under general law - is complete.

9. Before I come to the settled law on this topic, let us consider the points at which a cause of action for a loan payable on demand might accrue.

10. Is it:

   - The time of entry into the contract?
   - The time of receipt of the loan by the borrower?
   - The time when a demand is made?
   - The time when, under such a demand, the money is required to be paid?
   - In the event that no such time is specified at the time of the demand, a

reasonable time after the demand?

11. The first alternative would be premature, but there is some merit in each of the other alternatives. Normally, but not in all cases, a loan will be made pursuant to a contract. Surely, one might think, if a loan is payable on demand, there is no breach of contract until the demand is made, and it is not complied with. If that analysis is correct, then one would expect that the cause of action does not accrue until the breach occurs through non payment following demand.

12. But in fact it is the second alternative that is correct. The High Court said so in *Young v Queensland Trustees Ltd*[2], and said that this position had been settled since at least the end of the seventeenth century (*Collins v Benning* (1700) 12 Mod. 444, 88 ER 1440).

13. Let us consider why.

14. The background to this lies in the obscurities of the old common law forms of action. Where a contract had been performed by Party A who was consequently entitled to be paid by Party B, Party A could sue for what was owing as a debt. Additionally, it was decided in *Slade's Case*[3] that Party A could also sue Party B in *indebitatus assumpsit*. This was a cause of action for damages, and had procedural advantages for a plaintiff over the debt action. But it was not an action for breach of contract. Rather, it was conceived as an action for damages for breach of a fictional implied promise to pay, arising when the contractual payment obligation arose – such as by the delivery of goods or performance of work.

15. Importantly, both the action in debt and the action in *assumpsit* were independent causes of action. They were not actions for breach of contract. In *Young v Queensland Trustees Ltd*[4]

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[2] (1956) 99 CLR 560.
[3] (1602) 4 Co Rep 91a; 76 ER 1072.
[4] (1956) 99 CLR 560 at 567.

> "The common law does not and never did conceive of indebtedness in a sum certain for an executed consideration as a mere breach of contract: it is rather the detention of a sum of money and that was so whether the creditor enforced his demand by an action of debt or by indebitatus assumpsit."

16. The action of indebitatus assumpsit came to substantially replace the action of debt, and was the basis of the common counts which are still in use today in New South Wales – including the count for money lent.[5]

17. The notion of an implied promise to pay, as the foundation of such actions was swept away by the High Court of Australia in *Pavey & Matthews Proprietary Limited v Paul.*[6] However, it remains the case that the indebitatus action is founded on a debt which is a distinct cause of action from a cause of action for breach of contract, although it arises from performance of the contract. In *Pavey & Matthews*,[7] Mason and Wilson JJ said:

> “The modern lawyer does not need to remember that the action of indebitatus assumpsit is founded on a separate and subsequent fictional promise to pay a debt arising out of a contract -- a promise which the Statute of Frauds does not touch -- but he needs to remember that this category of action of indebitatus assumpsit is founded on the debt to which the contract has given rise.

18. For the purpose of *indebitatus assumpsit*, a loan payable on demand created a debt at the time of the advance. It would seem that there is a long tradition, in the pleading of debt claims, for the plaintiff to assert a request, or demand, for the money. However, this was, under the old system of pleading unnecessary, even where the money was agreed to be payable on request.[8]

19. In this way, time starts to run from the time of advance.

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[5] *Pavey & Matthews Proprietary Limited v Paul* (1987) 162 CLR 221 at 231.
[6] (1987) 162 CLR 221.
[7] (1986) 162 CLR 221 at 233 – 234.
[8] As discussed in *Young v Queensland Trustees Ltd* (1956) 99 CLR 560 at 567, with reference to cases going back to 1606.

20. To the extent that common law rules can be explained on the basis of principle, Justice Young sought to do so in *Drinkwater v Caddyrack Pty Ltd (No 3)*[9]:

> "The reason why that is so really comes from the ancient idea that a loan of money, which constituted a debt, was a deposit of specific coins that the borrower was obliged to restore at any time. The nearest present day example is where one borrows one's neighbour's lawn mower. The lawn mower is returnable on demand, but one should have it ready at any time for the owner who may reclaim it whenever he or she wishes. If one looks through the early cases ... one can see that this is the basis of the principle. So that, "I promise to pay on demand" means "I am ready to pay at any time". This line of thinking extends from 1712 to the present day. "

21. It should be noted that, in addition to the *indebitatus* count, there was, and remains, an action for breach of contract to recover an overdue payment. The law could have developed a separate rule that the cause of action under the contract by which money is loaned and repayable on demand, as distinct from the debt or *indebitatus* claim, accrues on demand. However, it has not done so. To the extent that the cases in this area discuss the contract as a source of the obligation to pay, it seems that the contract is normally construed so that the loan is repayable instanter.[10] Clearly, in this area, the common law understanding of the obligation to repay is driven by the concept of indebtedness used in the *indebitatus* count (ie, detention of money from the time it was advanced), and the contract analysis follows suit.

22. The contract is not irrelevant in all cases however. In *Ogilvie v Adams*[11], Fullagar J noted that parties are free to contract out of the usual rule by using express words. However, his Honour said:

> "The courts have long since settled it that a mere statement or agreement that the money is repayable on demand (or at request or at call) is not sufficient to contract out of that situation where all else that

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[9] (NSW SC, No. 3970/1996, Young J, 28/11/97, Unreported), as quoted by the Law Reform Commission of NSW, Report 105, "Time limits on loans payable on demand".
[10] See for example *Ogilvie v Adams* [1981] VR 1041 at 1043.
[11] [1981] VR 1041 at 1043.

is known of the terms of the contract is that A has paid money to B by way of loan."

23. Fullager J also referred in that case to the case law relating to banker and customer. A bank cannot of course keep the customer's money if it is left in a current account for 6 years, even though in a real sense the money is advanced to the bank as an amount payable on demand. As His Honour explained, a term is implied in the implied banker / customer contract to the effect that the bank is not bound to repay the money to the customer until the customer demands it by writing a cheque.[12]

Collateral obligations

24. Where the defendant's liability for a loan is not a primary debtor, but arises under a guarantee or indemnity, it is settled law that the cause of action does not accrue until the making of a demand.[13]

Reform proposal

25. The New South Wales Law Reform Commission published a report on this topic in 2004. The Commission expressed the view that the current law should be changed because in its application loans between family members and close friends, the law will generally operate to defeat the intentions and expectations of the parties to the loan. In the commission's view, the expectation of parties to such informal arrangements, who may not have legal advice, would be (to the extent that they think of limitation periods) that any limitation period would run from the time a demand is made.

26. The Commission acknowledged, but was not persuaded by, countervailing arguments:

- That the 6 year limitation period protects people who have paid the

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[12] [1981] VR 1041 at 1051.

[13] *In re Brown's Estate* [1893] 2 Ch. 300 at 305; *D & J Fowler (Australia) Ltd v Bank of New South Wales* [1982] 2 NSWLR 879 at 882-3, and the further cases cited therein.

debt but no longer have the records.

- There may be an element of vindictiveness in reviving long dormant claims.

27. The Commission also said that any reform should not

- Alter the ingredients of the substantive cause of action;
- Transform other settled bodies of law; or
- Defeat legitimate commercial expectations.

28. As to the first point, the Commission was concerned to ensure that a reform to the limitation period for loans payable on demand should not unwittingly result in a formal demand becoming a prerequisite to the action. I would comment that the Commission need not be concerned. As I have said, there are several "accrual" provisions in the *Limitation Act*, but s 11(5) provides that they have effect only for the purpose of the Act.

29. As to the second point, the concern relates to a separate but collateral obligation to a loan, such as a promissory note, that might be entered into in conjunction with a loan agreement, in respect of the sum advanced. If the note is payable on a fixed date, or payable subject to a some condition precedent, then accrual of a cause of action under the note will, at present, occur at the fixed time or upon the fulfilment of the commission. The Commission proposed that collateral obligations should not be affected. It proposed to do this by stipulating that, for the purpose of determining whether a loan is payable on demand, the terms of a collateral obligation to pay the debt should be read into the loan and prevail in the event of inconsistency.

30. As to the third point, the Commission was not convinced that it was a problem.

31. The recommendations were (in summary)

- The limitation period for a loan payable on demand should run from

the date on which the demand is made.

- This provision should not affect the accrual of the cause of action.
- The limitation period for such loans should be 3 years from the demand.
- There should be an ultimate bar of 30 years from the date the loan was made.
- A demand for repayment need not be in writing before time starts to run.
- “Demand” should mean an unconditional demand for immediate payment, including a demand that allows the borrower a reasonable time to arrange payment.
- A demand for part only of the loan should not have the effect of barring future demands in respect of the loan.
- Collateral obligations should (for limitation purposes) be read into the loan agreement and prevail in the event of inconsistency.

32. The Commission did not see any need to make any special provisions to deal with deceased estates. There are laws concerning survival of causes of actions, and protection of administrators from claims made after an estate has been administered. There was no need to make any special provisions to deal with loans payable on demand.

Other jurisdictions

33. In the United Kingdom the limitation accrual rule in this area has been reformed by a slightly convoluted provision which is set out in the Commission’s Report. The Commission also noted that Queensland and Western Australia were also looking at reforms in this area.

So what of the reforms proposed by the NSWLRC?

34. A draft bill was included in the report, but it has not been introduced to

Parliament. It may be that the Attorney-General's department was persuaded not to take any steps in relation to the proposed reforms because of the closing words of the report, in which the Commission noted that the recommendations if implemented "would constitute yet one more piecemeal reform of the law of limitations in New South Wales", and opined that "a more holistic approach to reform" might be appropriate.

Discussion

35. I suggest 2 points for discussion:

- Should the law be reformed along the lines suggested by the NSWLRC?
- What should lawyers do (a) in relation to clients who want to advance money, to be repayable on demand; and (b) in relation to clients who have already done so?