

Fathom Fisheries Co. Ltd v Hon. Fakafanua

Supreme Court, Nuku'alofa

10 Ward CJ

Civil Case No 430/94

29 November, 9 December, 1994

Words and phrases - forthwith immediately

Contract - settlement agreement - interest - breach

20 A settlement involving, inter alia, an earlier default judgment was reached between the parties and a bank involving a certain payment to be made forthwith by the defendant to the plaintiff and the then consequent performance of certain obligations by both the defendant, the plaintiff and the bank. Payment was made by the defendant, by instalments, over a 4 month period and the defendant and the bank discharged their respective obligations. The plaintiff then claimed interest because payment had not been made forthwith.

Held:

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1. The Plaintiff could not call oral evidence of an additional meaning to an agreement that was clear in itself.
 2. Forthwith may be treated as practically synonymous (for the purpose of ascertaining whether there has been a breach) as "within a reasonable time".
 3. But in considering what is reasonable the word forthwith suggests a need for promptness, a lack of tardiness or delay. So that forthwith is stronger than "within a reasonable time" and implies prompt vigorous action without any delay.
 4. In the circumstances here an instant payment was not meant or intended and
40 the fact the defendant paid by instalments did not prevent the payment being forthwith in view of the size of the sum. But the total delay was not acceptable in the circumstances of the case.
 5. However even if there had been a failure the agreement did not say what would be the result of such. A consideration of the agreement as a whole indicated that the only penalty for failure would be the exercise of the other parties of their right to withdraw from the agreement for non-performance.
 6. In addition here interest was claimed back from the date of the earlier default
50 judgment. But the release agreement excluded the interest which had been awarded in the earlier default judgment.

7. The claim was dismissed.

Cases referred to	Hudson v Hill (1874) 43 LJ CP 273
	R v Aston (1850) 19 LJMC 236
	Measure v McFadyen (1910) 11 CLR 713
	R v Berkshire Justices (1878) 4 QBD 469
	Wardsworth v Lydall [1981] 2 All ER 401

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Counsel for plaintiff	Mr Appleby
Counsel for defendant	Mrs Taufateau

Judgment

In July 1992, the Plaintiff obtained judgment in default of defence for \$208,000, interest at 10% from the date of judgment and costs of \$1500.

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The case concerned two leases of land on the estate of the Defendant which the Plaintiff was to sell to two others. It is not necessary to state the details further as this case relates to the events that occurred thereafter.

After judgment, negotiations were commenced between the parties in order to draw up a "Release Agreement" whereby the defendant would pay the \$208,000 and costs of 1,500 to the Bank of Tonga who would use it to clear the Plaintiff's debt with the Bank.

On 11 September 1992 an agreement was drawn up between the plaintiff (referred to as "Fatfish"), the Bank of Tonga and the defendant after a number of drafts and amendments had been circulated.

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The agreement should be set out in full:

"WHEREAS Fatfish is in default of a loan agreement with the Bank, and has by way of mortgage to the Bank of leases 3104 and 3186 located in Nuku'alofa, Kingdom of Tonga secured repayment of the debt;

AND WHEREAS Fatfish consented to and executed an agreement for the sale of leases 3104 and 3186 by the Bank to Lisiate 'Akolo of Nuku'alofa, Tonga, (hereafter called "Akolo") and John Saafi of Virginia Beach, Virginia, USA, (hereafter called "Saafi") in satisfaction of the debt owned by Fatfish to the Bank;

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AND WHEREAS Hon. Fakafanua is the estate holder of the land upon which leases 3104 and 3186 are located, and as a result of rent review negotiations between Hon. Fakafanua and Peter Warner, formerly of Fatfish, litigation ensued between the parties hereto;

AND WHEREAS judgment was obtained by Fatfish and the Bank against Hon. Fakafanua for the full sale price of leases 3104 and 3186 in the amount for which 'Akolo and Saafi had contracted with the Bank and Fatfish to pay; AND WHEREAS Hon. Fakafanua is ready, willing and able to pay the full amount of the judgment to Fatfish and the Bank in return for the surrender to Hon. Fakafanua by Fatfish and the Bank of all their right, title and interest in

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the said leases 3104 and 3186;

NOWHEREFORE in consideration of the mutual covenants herein contained, the parties hereto agree as follows:

1. Hon. Fakafanua hereby agrees forthwith to pay to the Bank the sum of TWO HUNDRED AND EIGHT THOUSAND (T\$208,000.00) PA'ANGA (hereafter called "Judgment") plus ONETHOUSAND FIVE HUNDRED (T\$1,500,000) PA'ANGA in respect of costs (hereafter called "Costs") in full satisfaction of the Judgment and Costs awarded by the Supreme Court of Tonga in action 261/92 obtained against him by Fatfish and the Bank on 13 July 1992, and agrees to execute such further documents as may be necessary to give effect to the intent of this release agreement.
2. Fatfish and the Bank agree to execute such documents as may be necessary to surrender all their right, title and interest in leases 3104 and 3186 to the estate holder Hon. Fakafanua, such surrender to include the land and all buildings, fixtures and appurtenances attached to the said land in the present condition or state of repair whatever that may be, on an "as is, where is" basis.
3. Hon. Fakafanua hereby accepts the surrender of the said leases 3104 and 3186 and all buildings, fixtures and appurtenances attached thereto, in the present condition or state of repair whatever that may be, as is where is, and hereby releases Fatfish, the Bank, 'Akolo and Saafi and all of them jointly and severally from any claim existing now or arising in the future in respect of or arising out of the said leases 3104 and 3186, buildings or appurtenances including any rent due, covenant unfulfilled or the condition or title or otherwise of the said leases 3104 and 3186, with buildings, fixtures and appurtenances surrendered to him.
4. Hon. Fakafanua hereby abandons all claims whether existing now or arising in the future that he may against either Fatfish, the Bank, 'Akolo or Saafi or any of them jointly or severally in respect of or arising out of the agreement of purchase and sale and subsequent transfer agreements of leases 3104 and 3186 including all buildings, fixtures and appurtenances entered into by the said Fatfish, the Bank, 'Akolo and Saafi, and the said Hon. Fakafanua hereby indemnified and saves harmless Fatfish, the Bank, 'Akolo and Saafi from any damage or liability suffered or to be suffered by any of the parties or each of them as a result of or arising out of the said sale and transfer agreements regarding leases 3104 and 3186 including all buildings, fixtures and appurtenances.
5. Fatfish and the Bank hereby release and forever quitclaim all their right, title and interest in leases 3104 and 3186 together with all buildings, fixtures and appurtenances to the estate holder, Hon. Fakafanua, upon payment into the Bank by the said Hon. Fakafanua of the full amount of the Judgment of TWO HUNDRED AND EIGHT THOUSAND (T\$208,000.00) PA'ANGA plus Costs awarded of ONE THOUSAND FIVE HUNDRED (T\$1,500.00) PA'ANGA and agree to execute such

further documents as may be necessary to give effect to the intent of this release agreement.

6. Fatfish and the Bank jointly and severally hereby abandon all claims whether existing now or arising in the future that they may have either jointly or severally against Hon. Fakafanua or any of them jointly or severally in respect of or arising out of the agreement of purchase and sale and subsequent transfer agreements of leases 3104 and 3186 including all buildings, fixtures and appurtenances entered into by the said Fatfish, the Bank, 'Akolo and Saafi upon payment in full to the Bank of the said TWO HUNDRED AND EIGHT THOUSAND (T\$208,000.00) PA'ANGA plus Costs awarded of ONE THOUSAND FIVE HUNDRED (T\$1,500.00) PA'ANGA".

It is agreed that the defendant made the following payment:s:

10 September 1992	\$50,000
3 December 1992	\$50,000
14 December 1992	\$60,000
7 January 1993	\$49,500

	\$209,500

It is also clear on the evidence of the plaintiff's witness that, on receipt of the final payment, the Bank accepted the defendant had discharged his obligations under the agreement and performed its own.

Some months later, the Solicitor for the plaintiff wrote to the defendant claiming interest of \$7,523.29. The defendant denied liability and the plaintiff brought this action to recover it.

The basis of the plaintiffs' case is shortly stated; the defendant declared he was "ready, willing and able to pay the full amount of the judgment" and that judgment included interest. The defendant agreed "forthwith to pay to the Bank the sum of \$208,000 plus \$1,500 costs". He did not pay forthwith and the plaintiff is entitled to interest on any sum outstanding until it was paid. The \$7,523.29 is calculated at 10% p.a. from the date of judgment to payment of the various instalments.

The defendant relies on the wording of the agreement. It clearly refers to the payment of \$209500 as being in full satisfaction of the judgment and that interest is therefore excluded. Further the defendant suggests that, in the economic circumstances in Tonga a period of four months to pay such a sum is reasonable and falls within the meaning of the word "forthwith".

The plaintiff has called only one witness, Mr Matoto, who was the signatory to the agreement on behalf of the Bank. The plaintiff also sought to call the defendant to tell the Court what he thought the agreement meant but I refused the application to call him. This was a written agreement drafted by lawyers and signed by or on behalf of the parties to it. It must, as a general principle of interpretation, be read as it stands. It is noteworthy the plaintiff does not suggest any separate oral agreement nor any ambiguity. The intention of calling the defendant was to give oral evidence of an additional meaning to an agreement that is clear in itself. There has been no suggestion that any of the terms of the proviso to section 79 of the Evidence Act apply here.

The only possible ambiguity lies in the word "forthwith". Counsel for the plaintiff suggests it has the same meaning as "immediately" and cites the authority of Halsbury's Laws Vol 45 paragraph 1148.

"There appears to be no material difference between the terms "immediately" and "forthwith". A provision to the effect that a thing must be done "forthwith" or "immediately" means that it must be done as soon as possible in the circumstances, the nature of the act to be done being taken into account."

210 The Shorter Oxford Dictionary definition of "forthwith" includes "at once, immediately, without delay."

The cases cited in Halsbury would suggest the English Courts have not found any real difference between the terms but this has been achieved by taking away the instant nature of either word. Thus forthwith has been defined as "without reasonable delay" and even (in the same case) "as soon as is reasonably convenient" Hudson v Hill (1847) 43LJCP273. In R. v Aston (1850) 19LJMC236 'immediate' was not to be construed in its strictest sense 'on the instant' but means with reasonable promptness having regard to all the circumstances of the particular case."

220 The consideration of what is reasonable as a fact to be considered against the circumstances of the case has been accepted in Australia and New Zealand also. For example, in Measurer v Mc Fadyen (1910) 11 CLR 713, Griffith CJ at 719 suggests:

"A promise to do an act forthwith does not mean it is to be done instanter. Sometimes the word may be treated as practically synonymous for some purposes (not purposes of construction but for the purpose of ascertaining whether there has been a breach) with "within a reasonable time". The question of what is reasonable depends in every case upon the facts."

230 I would agree but it must be borne in mind in considering what is reasonable that both words, immediately and forthwith, suggest a need for promptness, a lack of tardiness or delay and I would respectfully adopt the words of Cockburn CJ:

"It is impossible to lay down any hard and fast rule as to what is the meaning of the word "immediately" in all cases. The words "forthwith" and "immediately" have the same meaning. They are stronger than the expression "within a reasonable time" and imply prompt, vigorous action without any delay" R v Berkshire JJ (1878) 4 QBD 469 at 471.

240 Unfortunately, forthwith is a word beloved of lawyers and draftsmen. In the agreement before the Court, how much better it would have been if the lawyers drafting it had instead decided the time they considered reasonable and written it into the agreement. However, they did not and I must consider "forthwith" against the facts of this case.

It is clear there was an intention by all parties to settle the matter. I cannot accept it meant an instant payment; the defendant had to have some time to collect such a large sum together. Neither does the fact he paid by instalments prevent the payment being forthwith in view of the size of the sum. On the other hand, he had said he was ready and able to pay the full sum and he knew the plaintiff was indebted to the Bank and anxious to resolve the matter.

250 What he did was to pay \$50,000 and then to pay the next instalment nearly three months later. The remainder was then paid over a period of a month. I do not, in the

circumstances of this case, feel the three months delay was acceptable in terms of an agreement to pay the total sum forthwith.

However, the matter does not end there. There is nothing in the agreement to say what would be the result of such a failure. A consideration of the agreement as a whole leads me to conclude that the only penalty for failure would be the exercise by the other parties of their right to withdraw from the agreement for non-performance. The evidence before the Court suggested that, far from that, the Bank considered the agreement was fulfilled and carried out their side.

260 There is certainly nothing to suggest that it would give rise to a liability to pay interest. In fact, despite the concern with the meaning of payment forthwith, the plaintiff's claim has been for interest from the date of judgment, 13th July, not from the date of the agreement, 11 September, which, I would suggest, would be the appropriate date if liability arose through failure to act forthwith. In those circumstances it is hard to understand how the manner of payment of the principal sum is of any consequence. If the plaintiff is suggesting that payment of the sum in full on 11st September would have released him of any obligation to any interest, I can see nothing in the agreement to suggest he is liable by tardy payments to the interest prior to 11 September. If, in the other hand, the Plaintiff is suggesting he was always liable to the interest awarded on the judgment, the question of whether and not he paid forthwith is irrelevant.

270 Thus it seems the only question is whether the defendant was liable under the release agreement to the interest awarded in the judgment.

The terms of paragraph 1 of the agreement describes the sum of \$208,000 as the judgment and of \$1500 as the costs. Those sums were to be paid "in full satisfaction of the Judgment and Costs awarded by the Supreme Court of Tonga in action 261/92." Paragraph 6 abandons all claims on payment to the Bank of \$208,000 and costs of \$1,500.

The judgment of the Supreme Court in action 261/92 was for "\$208,000 with interest thereon at the rate of 10 per centum per annum from 13 July 1992 until payment."

280 I read the terms of paragraph one as agreeing that payment by the defendant of the judgment and costs as defined in that paragraph will satisfy the judgment and costs as defined in the Supreme Court judgment. That would appear to exclude the interest and I so find.

Counsel for the plaintiff also suggested on the authority of Wadsworth v Lydall [1981] 2 All ER 401 that the signatories to the agreement knew that part of the \$208,000 was to be applied by the Bank of Tonga to clear the plaintiff's overdraft. In those circumstances the plaintiff was entitled to any interest on the overdraft that fell due to a result of the defendant's failure to pay forthwith.

290 Clearly such a claim may lie but, in this case, even if I could find as a fact that the plaintiff owed money to Bank of Tonga as a result of this action as a whole, the plaintiff has two problems.

The first is that such a claim has never been pleaded and the second that, whilst his witness endorses the fact that some of the money was applied to the overdraft, it is clear only a portion of the \$208,000 was so applied and the Court was give no detail of the exact sum of the overdraft (stated by Mr Matoto to be "around \$140,000") the dates on which it was paid off or the rate of interest the Bank was charging the plaintiff. Without such
300 evidence the claim is far too vague and, anyway, is a different claim from that in the writ

and it fails.

The claim is dismissed with costs to the defendant.