

Article Information

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Service: Dispute Resolution & Litigation

Is my claim for the debt statute-barred?

Is my claim for the debt statute-barred? The answer depends on the nature of the agreement under which the debt arises.

Limitation Act (NSW)

The *Limitation Act 1969* (NSW) (the **Act**) governs the length of time after which actions to recover debts can no longer be commenced. Where the period has expired the debt is referred to as 'statute-barred'.

There are many different types of contracts under which debts may arise. They include fixed term loans (such as personal loans), credit card contracts, home loans and contracts for the purchase of goods such as hire-purchase agreements. The type of contract under which the debt arises is critical in determining whether a 6 year or a 12 year limitation period applies.

Unsecured vs secured debts

Agreements to loan money or provide credit often include an arrangement whereby the lender can realise property of the borrower if the borrower defaults on their obligations. This property is known as security, and the debt will be classed as a secured debt. A mortgage is a common form of security. Where the debt is unsecured, a claim to recover the debt must be commenced within 6 years from the date that debt first became due (section 14 of the Act), which will usually be the date the borrower defaulted.

However, where the debt is secured by a mortgage (as defined in the Act), a claim to recover the debt may be commenced within 12 years from the date that debt first became due (section 42 of the Act). While many consumers understand a mortgage to mean the security taken by a bank or other lender over their home under a home loan, the reality is that a mortgage is much broader than that and includes a few different types of security arrangements. The definition of 'mortgage' in the Act includes mortgages over real property, mortgages over goods (known as 'chattel mortgages'), as well as charges and liens on property for securing money or money's worth.

Determining whether a contract involves a mortgage is not always straightforward. For example, hire-purchase agreements are common types of agreements used for the purpose of purchasing goods (such as vehicles) by deferred payments. The name 'hire-purchase agreement' however does not necessarily determine the nature of the contract, and whether the debt owed pursuant to it is secured or unsecured.

A true hire-purchase agreement does not involve any form of security. The key features of such agreements are:

- the hirer contracts no obligation to purchase the goods, but merely holds an option to purchase the goods;
- no title passes to the hirer (customer) until payment in full has been made; and
- the hirer (customer) retains the option to return the goods during the term of the agreement.

Any claim by the owner for unpaid rental payments is a claim for an unsecured debt and is accordingly subject to a 6 year limitation period. A claim by an owner to recover the goods under such an agreement will also be subject to a 6 year limitation period (which may be a claim for detinue or conversion).

However, under some 'hire-purchase agreements', the 'hirer' (customer) contracts to make instalment payments over a fixed term, upon complete payment of which the customer becomes the legal owner of the goods. If there remains any amount unpaid at the conclusion of the term of the contract, those amounts are usually payable on demand. Under these types of contracts there is in reality no 'option' for the customer to purchase the goods because they have already

contracted to do so by agreeing to make all payments due.

While such contracts often contain an 'option' for the hirer to 'purchase' the goods earlier (if the balance of the contract is paid out early) or the ability to terminate the contract early upon paying an 'early termination fee', such clauses do not alter the nature of the contract, being a contract under which the customer has agreed to pay the full price of the goods and agrees that legal ownership of the goods will remain with the lender as security for payment of the contracted amount. This is a traditional legal mortgage. Accordingly and despite their name, these types of contracts are not, at law, hire-purchase agreements but are instead chattel mortgages. These types of contracts fall within the definition of 'mortgage' in the Act and as such are subject to a 12 year limitation period.

The position is very similar in other states and territories, with the exception of Western Australia and South Australia where the mortgage must be in relation to real property, or a mixture of real and personal property for there to be a 12 year limitation period. Accordingly a claim in those jurisdictions to recover principal money secured only by a chattel mortgage, for example, is subject to a 6 year limitation period.

However, it should be remembered that the position in relation to deeds is different - a claim that arises under a deed (including a claim for a debt secured by a mortgage, whether in respect of real property or personal property) is subject to a 12 year limitation period (section 16 of the Act). The position is similar in all states and territories.

Confirmation of debts

Many contracts involve regular repayments being made by a party in repayment of the loan. Such payments may be made in respect of principal and/or interest. A payment made by a person who owes the debt to the person to whom the debt is owed constitutes a confirmation of the debt under section 54 of the Act. This payment has the effect of 'resetting the clock' on the running of the limitation period.

Similarly, if a person acknowledges their debt to the person to whom the debt is owed, this also constitutes a confirmation of the debt under section 54 of the Act. Such an acknowledgment must however be in writing, and be signed by the person who made it.

It is important to note that where a creditor relies on a confirmation in the form of either a part-payment or written acknowledgment for the purposes of determining when the applicable limitation period began to run, the part-payment or acknowledgment must have been made to the person to whom the debt was owed at the time of the part-payment or acknowledgment.

If you have been assigned a contract or a debt (and provided that all rights under the contract or to the debt have been validly and legally assigned), this will be particularly important, as any part-payment or acknowledgment made to the original creditor after the assignment will not constitute confirmation of the debt.

Extinguishment of rights and title to debts and property

Unlike any other Australian jurisdiction, in NSW the expiry of a limitation period extinguishes the creditor's right to the debt or title to the secured property under a mortgage, rather than just creating a bar to commencing an action to recover the debt or property. This means that after the applicable limitation period has expired, the debt is no longer owing to the creditor. In other jurisdictions, a 'statute-barred' debt remains due and owing despite the expiry of a limitation period, and may be enforced by other means.

Guarantees and indemnities

Many loan contracts include guarantees. For example, a loan to a business or a company may be guaranteed by the business owner or director (the guarantor). The obligation of the guarantor to make payment in respect of the debt is often expressed to arise 'upon demand'. It is important to know that even if a claim against the principal debtor is 'statute-barred' (e.g. because a 6 year limitation period has expired), any claim against the guarantor may not be statute-barred, depending on when the cause of action against the guarantor arose. Where the guarantor's liability is stated to arise 'upon demand', no cause of action under the guarantee arises until a demand has been made and not complied with.

PPSA

While beyond the scope of this article, it is important to note that as both hire purchase agreements and chattel mortgages create an interest in personal property that secures payment or performance of an obligation, they must be registered on the Personal Properties Securities Register.

Conclusion

Regardless of whether a 6 year or 12 year limitation period applies, it is prudent to avoid delay in making a claim to recover what you are owed, as claims can fail where there has been unreasonable delay in pursuing the debt or secured property. If in doubt, seek professional advice.