

When is a loan repayable and how long does a lender have to recover a debt?

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A loan is a type of debt where one party gives money to another party on the basis that it will be repaid at some point in time. Anyone from a friend to a company can advance or receive a loan. For example, individuals may borrow money to purchase a car or home, or a small business may borrow money to fund the running of that business.

Disputes about loans are commonplace. While they are often about recovery, disputes also arise about the terms on which the advance was made, particularly in circumstances where there are uncertainties as to when a loan is to be repaid, the manner in which it needs to be paid, and whether any interest is payable.

This article examines when a loan becomes payable, the time limitations that apply when suing to recover the debt and the avenues to extend the time available for a party to recover a debt.

When is a loan payable when the time to repay is unknown or unstated?

Loans are typically repaid in accordance with the express terms of the relevant agreement, which generally provides for the time on which it needs to be repaid.

Where there is no express timeframe or framework that provides for how and when a loan is to be repaid within the agreement, the general rule is that a loan is payable on demand or on request by the lender. These types of loans are most common when there are no formal documentations of the advance made, such as between family members and friends, when lending money to a family trust, or generally in informal and ad-hoc circumstances.

A loan payable on demand is different from loan agreements where a condition expresses some form of deadline or notice for repayment. In those circumstances, the parties to the loan have expressly contracted out of the general rule and the relevant terms of the agreements dictate the time for repayment.

Time limitation to recover an unpaid loan amount

Generally, a loan payable on demand is made pursuant to a contract arrangement (written or verbal). In NSW, when a party enters into a contract with another party and a debt becomes owing, the party who is owed money will have 6 years from the date on which the cause of action first accrues to sue the other for the repayment of the debt. Most other States and Territories have an equivalent time provision.

The question that then commonly arises is: *When does the cause of action start to accrue for loans payable on demand?* Is it:

- when the loan agreement is entered into?
- when the loan is received by the borrower?
- when the demand for repayment is made?
- when, under such a demand, the repayment is required to be made? or
- if no such time is specified in the demand, is it a reasonable time after the demand?

In the decision of the High Court in *Young v Queensland Trustees Ltd* (1956) 99 CLR 560, the Court unanimously decided that the time starts to run (i.e. the cause of action to recover the debt arises) from the time the money is advanced.

The basis for this principle is grounded in a claim traditionally known as *indebitatus assumpsit*, which is a type of legal action in which the lender seeks to recover damages for the borrower's breach of an implied promise to pay a debt to it. This principle was best articulated and simplified by Justice Young in *Drinkwater v Caddyrack Pty Ltd (No 3)*, who likened it to borrowing a 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... So that, 'I promise to pay on demand' means 'I am ready to pay at any time'."

While the presumption is that the loan is repayable immediately, parties are free to contract out of the usual rule by using express terms. However, in *Ogilvie v Adams* [1981] VR 1041 at 1043-1044, Justice Fullagar said that "a mere statement of agreement that the money is repayable on demand (or request or at call) is not sufficient to contract out of that situation where all else that is known of the terms of the contract is that A has paid money to B by way of loan".

As well as the actual words of the contract, the circumstances and relationship between the parties will also be relevant. For instance, a bank will not be entitled to keep a customer's money if it is left in an account for 6 years, even though it could be said that the money was advanced to the bank as a loan payable on demand. There is an implied term in the banking contract that means that the bank is not liable to repay the money to the customer until the customer demands it (e.g. by writing a cheque).

To illustrate this principle in practice, consider the following fact scenario:

- A advances a loan of \$100,000 to B;
- No words in the contract or other circumstances give rise to an exception to the general rule that the loan is repayable on demand;
- B does not make any repayments towards the loan from the date of receipt; and
- After 7 years A makes a demand for repayment of the loan in full.

In this scenario, A is statute barred from commencing legal proceedings against B to recover the loan amount because it is now more than 6 years after B received the loan.

Adjustments to the time limitation – confirming the debt

The time of when the cause of action begins to accrue is adjusted if the borrower made repayments or otherwise acknowledged the debt at any time within the first 6 years of the loan being advanced. For instance, if in the above scenario, B made monthly repayments to A for the first 18 months after receiving the loan and then ceased those repayments, then the cause of action starts from the date of the last repayment. As such, A would have 6 years from the last repayment to commence recovery proceedings.

The law refers to the adjusted date of when a claim accrues to recover a debt as the *date of confirmation*. This is because in making repayments towards a debt, the borrower acknowledges the existence of the debt, its terms and its responsibility to repay it. A borrower will also be taken to have acknowledged the debt by any express written acknowledgment of that debt.

It is important to note that different rules apply when seeking repayment from a third party that has guaranteed the loan advanced to a borrower. In those circumstances, the cause of action generally does not accrue until a demand is made.

Key Takeaways

Where an agreement between a lender and a borrower stipulates that the loan is repayable by a certain date, the occurrence of a certain event, or on compliance with a condition precedent to liability, the debt is not immediately due and payable and the cause of action to recover the debt does not arise until the said date, event or compliance.

However, if there are no repayment terms, the debt is due and payable immediately. In those circumstance, a lender will have only 6 years from the date of the advance to commence proceedings to recover that loan.

It therefore goes without saying that when you enter into any loan agreements, the terms of repayment ought to be clear and concise. If you are the lender, the time available to you to recover the debt may be extended by:

- contracting out of the usual rule;
- getting the borrower to acknowledge the debt in writing before the expiry of the initial 6-year period of advancing the loan; or
- receiving a repayment from the debtor as against the debt.

If you need assistance or advice with respect to preparing a written loan agreement or recovering an outstanding debt, please contact **Lesly Ann Cho**, Partner, or your usual ClarkeKann contact.