IN THE FIJI COURT OF APPEAL

Appellate Jurisdiction

Civil Appeal No. 31 of 1984

Between:

MAGANLAL BROTHERS LIMITED Appellant

and

L.B. NARAYAN & COMPANY Respondent

G.P. Shankar for the Appellant
No Appearance by or on behalf of the Respondent

Date of Hearing: 5th November, 1984
Delivery of Judgment: 15th November, 1984

JUDGMENT OF THE COURT

O'Regan, J.A.

Before proceeding to deal with the appeal proper, we find ourselves constrained to express our disappointment of the events immediately preceding the hearing and at the apparent discourtesies displayed towards both Mr. Shankar and the Court.

The solicitors for both parties were notified by letter dated 17th October, 1984, of the fixture for the hearing of this appeal on 5th November, 1984 at 9 a.m. Shortly before the Court was due to sit on that day the Registrar informed us that there was no counsel for the respondent in attendance. He related to us that at

9.25 a.m. he had telephoned Messrs Scott & Company whom he knew to be the Suva agents for the respondent's solicitors, to ascertain the position. He spoke with Mr. Chand, a partner in that firm, who informed him that his firm had no instructions in the matter. He then telephoned Messrs J. Reddy & Company, solicitors, Nadi, the solicitors for the respondent and spoke with Mr. Narayan who had appeared as counsel for the defendant when the order now under appeal was made. Mr. Narayan told him that the solicitors had instructed Mr. J.N. Singh of Scott & Company to appear as counsel. The Registrar next rang Mr. J.N. Singh who stated that if he were given the indulgence of a short adjournment he would appear.

The Court thereupon sat. The position was made known to Mr. Shankar who readily agreed with the Vice President's suggestion that the hearing be adjourned until 2.15 p.m.

After the Court rose, the Registrar telephoned Scott & Company to speak with Mr. Singh and to tell him of what had taken place. He was unable to speak with Mr. Singh. He spoke with Mr. Chand and told him of the adjournment.

Shortly after 2 p.m. there being no sign of Mr. Singh in the precincts of the Court, the Registrar again telephoned Mr. Narayan at Nadi and was assured that Mr. Singh had definitely been instructed and that Mr. Narayan was confident that he would appear. But he did not. After a short delay the Court sat and dealt with the appeal.

We went to some lengths to meet what appeared to be some exigency and are saddened to find that our indulgence was met in such fashion.

The appeal itself is from the dismissal by Dyke J. of the appellant's application for judgment

pursuant to 0.14 r.1 of the Rules of the Supreme Court. The grounds for the appeal are that :

> " The learned Judge erred in law and in fact in not entering judgment for the appellant having regard to the unchallenged affidavit evidence filed by the appellant and the respondent's admission by letter annexed thereto. "

The appellant initiated proceedings on 6th September, 1983 by issuing an endorsed writ claiming $2,305.21 which it alleged to be owing to it by the respondent in respect of goods sold and delivered to the respondent at its request.

On 15th September, 1983 the respondent entered an appearance and filed a statement of defence which reads:

> " 1. The defendant denies owing to the plaintiff the sum of $2,305.21 or any sum at all and says that the defendant has paid for all goods purchased from the plaintiff.
>
> 2. Alternatively
>
> The defendant says that the plaintiff's claim is unenforceable as the plaintiff failed to comply with section 6 of the Sale of Goods Act 1979.
>
> 3. The defendant says that this action is not properly constituted. "

On 25th October, 1983 the appellant filed its application for judgment and a supporting affidavit sworn by one of its directors in which it was deposed first, that the debt was then still due and owing, secondly that the appellant had on each of its dealings with the respondent complied with section 6 of the Sale of Goods Act, and thirdly, that it had been acknowledged in writing on behalf of the respondent that the debt was owing and that the latter had sought the indulgence of being permitted to pay it off by instalments.

The written acknowledgment is contained in a letter from S.C. Pratap & Company to appellant's solicitors in response to the latter's letter of 25th July, 1983 making demand for the amount alleged to be owing. They said :

> " According to our client the amount is not disputed but he requests the further time and to make an installment (sic) of $100 per month starting from 15th September when we will post our first cheque ....."

On 11th November, 1983 the appellant's application was called before Dyke J. Counsel for each party appeared. The application was adjourned by consent to 9th December, 1983. Although the record does not show it, Mr. Shankar informed us from the bar and, of course, we accept, that it was so adjourned to enable the respondent to file an affidavit.

On 9th December, 1983, counsel for respondent applied for further adjournment to enable an affidavit in reply to be filed. This application was refused. The matter was argued and decision reserved.

On 13th January, 1984, Dyke J. delivered judgment. He dismissed the application. In his reasons for judgment he said :

> " Well on the face of it, the statement of defence certainly shows a defence. It is a denial of owing the plaintiff any sum at all. It is brief, but then so was the claim. There were also legal grounds pleaded in the alternative, but whether those grounds are well founded or not hardly matters since the main ground is clear enough. However, annexed to the plaintiff's application are copy letters, the first the letter of demand by the plaintiff, and the second an apparent admission by the defendant that the requested sum is owing, and requesting to be allowed to pay by monthly instalments of $100.
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> The plaintiff's first ground was under 0.14 of the Supreme Court Rules, but the defence filed on the face of it does indicate a defence ....."

The matters for consideration by the Judge on the determination of this matter are contained in Rules 3 and 4 of Order 14, the tenor and effect of which are conveniently summarised in Halsbury's Laws of England (4th Edn) Volume 37 paras. 413-415, the relevant portions of which read :

> "413. Where the plaintiff's application for summary judgment under Order 14 is presented in proper form and order, the burden shifts to the defendant and it is for him to satisfy the court that there is some issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial. Unless the defendant does so, the court may give such judgment for the plaintiff against the defendant as may be just .....
>
> The defendant may show cause by affidavit or otherwise to the satisfaction of the court. He must 'condescend upon particulars', and, in all cases, sufficient facts and particulars must be given to show that there is a genuine defence."

And in a note (Note 4) to the paragraph it is stated that :

> " The normal everyday practice is for the defendant to show cause by affidavit, and except in a clear case, it is rare for the court to allow a defendant to show cause otherwise than by affidavit. A defence already served may be a sufficient mode of showing cause, but not if it is a sham defence served early to avoid showing cause by affidavit: see McLardy v. Slateum (1890) 24 Q.B.D. 504. "

In the present case, the defendant did not file an affidavit but relied on a defence which he had filed contemporaneously with his entry of appearance. The first paragraph of the defence was a denial of the debt, which having regard to the acknowledgment contained in the letter of S.C. Pratap & Company of 25th August, 1984 could ex facie, only be true if payment had been made after 25th August, 1984. Having regard to that factor and the onus imposed on the respondent by O.14 r.3, the learned Judge clearly

should not have rejected the application without requiring the respondent to go on affidavit - which, perhaps, it was unwilling to do.

As to the second paragraph of the statement of defence, the appellant adduced evidence that the provisions of section 6 of the Sale of Goods Act, 1979 had been complied with. There was no evidence from the respondent to the contrary.

As to paragraph 3 of the statement of defence, it cannot in reality be called a pleading. It is a mere assertion.

Rules 3 and 4 of Order 14 are complementary. It seems to us that if a plaintiff's application for judgment under Rule 3 is declined, the defendant should normally be granted leave to defend. Such leave may be unconditional or conditional.

And when such leave is given the Court is required to give directions as to the further conduct of the action pursuant to O.14 r.6.

The learned Judge apparently did not turn his mind to these matters. At all events his reasons for judgment are silent as to them and his order was merely that the application be dismissed. Had he adverted to them he would no doubt have given consideration to the question as to whether or not leave to defend should have been conditional. In paragraph 415 of Halsbury's Laws of England (4th Edn) Volume 37 it is stated that :

> " Conditional leave to defend will be granted where the court forms the view, on the material before it that the defence is a sham defence, or is shadowy or there is little substance in it ..."

On the facts which we have already discussed, if leave had been granted it may well have been conditional.

This aspect of the case is of importance because it seems to us that had the Judge chosen to order unconditional leave to defend, no appeal would lie. Subsection (2)(b) of section 12 of the Court of Appeal Act (Cap.12) provides :

> "No appeal shall lie -
>
> (a) .....
>
> (b) from an order of a Judge giving unconditional leave to defend an action."

On the other hand it seems that an appeal lies from an order refusing unconditional leave to defend an action. Thus, we think, is the effect of subsection (3) of section 12 of the Court of Appeal Act read in conjunction with subsection (2)(f) of that section. The latter provision provides that no appeal shall lie without leave from any interlocutory order except in certain specified cases which are of no present application. Subsection (3) provides, however, that -

> " An order refusing unconditional leave to defend an action shall not be deemed to be an interlocutory order within the meaning of the section."

An order giving conditional leave is the equivalent of an order refusing unconditional leave. In Gordon v. Cradock (1964) 1 Q.B.D. 503 the Court considered the construction of section 31(2) of the Supreme Court of Judicature (Consolidation) Act 1925, which is the same as section 12(3) of the Court of Appeal Act (Cap.12). The order in respect of which it was sought to appeal was an order granting leave subject to a condition as to payment into Court. Willmer L.J., who delivered the principal judgment of the Court of Appeal, held (at p. 506) that such an order was, in effect, an order refusing unconditional leave and that accordingly there was an absolute right of

appeal without leave.

As matters turned out, the foregoing observations are of no present concern. They, of course, would have been had the Judge complemented his initial order with one or other of the orders we have just discussed. But the circumstances are such that we have no option but to treat this appeal as one pursuant to section 12(1)(a) of the Court of Appeal Act (Cap.12) which allows an appeal against any decision of the Supreme Court, including one of a Judge sitting in chambers. We see this essentially as an appeal against the dismissal of an application for judgment. And it is allowed.

Mr. Shankar sought interest on the amount claimed. Section 3 of the Law Reform (Miscellaneous Provisions) Death and Interest Act (Cap.27) provides that :

> " In any proceedings tried in the Supreme Court for the recovery of any debt or damages the Court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt ..... for the whole or any part of the period between the date when the cause of action arose and the date of judgment ..... "

In the Supreme Court Practice, in the notes to O.14 r.1 at page 127, para. 14/3-4/18, is one to the effect that proceedings under Rules of the Supreme Court Order 14 concluded by summary judgment were not proceedings tried because there was no trial, and that accordingly interest could not be awarded.

It has now been held in Gardner Steel Ltd. v. Sheffield Brothers (Profiles) Ltd. (1978) 3 All E.R. 399 by the Court of Appeal, adopting the view expressed by Lord Denning M.R. in Wallersteiner v. Moir (No.2) (1975) Q.B. 373, that the learned editors of the Supreme Court Practice had placed too narrow a construction on the word

"tried" and that interest can be ordered. We respectfully agree with that view.

In the present case, the defence raised by the respondent is no more than a delaying tactic and we think that the appellant should have interest from the date of the initial demand namely 25th July, 1983 at 13.5%.

We order that the judgment of the Supreme Court be vacated and that judgment be entered in that Court for the sum of $2,290.21 (not the amount claimed in the writ which included $15 or for costs sought in the letter of demand) together with interest thereon at 13.5% from 26th July, 1983. The appellant is also entitled to an order for costs here and below. If the quantum of such cannot be settled by agreement, then as taxed.

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Vice President

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Judge of Appeal

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Judge of Appeal