IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO.ABU0037/98S
(High Court Civil Action No.559 of 1996)

BETWEEN:

MAXWELL JOHN REYNOLDS

Appellant

AND:

BANK OF HAWAII

Respondent

In Chambers: The Hon. Justice I.F. Sheppard, Justice of Appeal

Hearing: No oral hearing; matter dealt with in chambers on written submissions filed by solicitors.

Date of Decision: Friday, 13 November 1998

DECISION IN CHAMBERS

To be dealt with is a notice of motion filed on 20 July 1998 on behalf of the appellant, Mr. M J Reynolds. The notice of motion seeks two orders. The first is an order setting aside the order of Pathik J made on 29 June 1998 whereby he refused the appellant's application for leave to appeal against an order made by the same Judge on 2 February 1998. The second order which is sought is that the appellant be granted leave to appeal and to appeal out of time against the order made by Pathik J on 2 February 1998 whereby he refused an application for an order that the security offered by the appellant for a stay of execution of the default judgment entered on 10 March 1997 was sufficient security. There has been no oral hearing of the motion. The parties have filed written submission and have agreed that the matter may be dealt with by a Judge sitting in chambers on the basis of the submissions which have been lodged and the material in the files of the High Court and of the Court of Appeal.

The default judgment was entered, as mentioned, on 10 March 1997. The amount of the judgment was $422,139.58 together with interest at the daily rate of $134.03 from 2 November 1996 and costs. The judgment was entered in respect of the alleged liability of the appellant, the defendant in the action, to the respondent, the plaintiff in the action. I shall hereafter refer to the respondent as "the Bank." The liability giving rise to the judgment is claimed have arisen under a guarantee.

On 14 November 1997 Pathik J dealt with two summonses dated respectively 31 July 1997 and 12 August 1997 filed on behalf of the appellant. The first summons sought an order that the judgment referred to be set aside on the ground that the appellant had a good defence to the action. The second summons sought an order that the execution of the judgment be stayed pending the disposal of the summons to set aside the judgment.

In the course of his reasons for judgment published on 14 November 1997, Pathik J. discussed the question whether there was material before him which should satisfy him that the appellant had a defence on the merits. He referred to a number of authorities and applied the well known rule that, on an application to set aside a default judgment, the court does not usually exercise its discretion in favour of making an order unless a defence on the merits is shown. I agree that that is the case.

In support of the application the appellant filed an affidavit explaining his position. His Lordship summarised the contents of this by saying that the appellant said that he was a guarantor but that he signed the document without reading it and was not advised to get

independent advice. He also complained that he had received no accounting from either the receiver of the company whose debts it was claimed he had guaranteed or the Bank as to how the assets of the appellant himself, or those of a number of companies, had been dealt with or how the indebtedness of one of the companies to the appellant had "altered".

His Lordship referred to other evidence including evidence relied upon by the respondent. His Lordship took a severe view of the appellant's case. He had the impression that the appellant's solicitors had had to chase after him to obtain further instructions to enable him to file documents in time. He thought that the Bank had been very accommodating in allowing an extension of time to file a defence. Even then it was not filed and it went ahead and obtained the judgment by default.

After considering the matter further, his Lordship said that he was not satisfied that the appellant had a defence on the merits but he nevertheless thought that, in the exercise of his discretion, he ought to let the appellant in to defend. But he ordered that the default judgment be set aside conditionally upon the appellant paying into court the sum of $200,000 being about half the principal sum claimed or giving security for that amount to the satisaction of the Bank within 30 days from the decision. His Lordship said that, in the event that such amount was not paid or that the security was not given, the application to set aside the judgment should stand dismissed.

After the judgment was delivered, there was correspondence between the solicitors for the parties in which the solicitors for the appellant maintained that, on the

appellant's instructions, the Bank already had more than sufficient security available to it to provide the $200,000 provided for by the order. The Bank's solicitors disputed this. The correspondence is inconclusive because it consists of letters by the appellant's solicitors on the one side maintaining that the Bank did have sufficient security and letters from the Bank's solicitors on the other side denying that this was the case. There was in evidence a document which is apparently a valuation of certain properties. It is dated 5 December 1995. The total value of these properties was said to be $290,000. But the solicitors for the Bank denied that this was the current market value of them. The matter remained in the inconclusive state to which I have referred.

On 28 January 1998 there was filed on behalf of the appellant a summons seeking an order that the security offered by the appellant to the respondent be deemed sufficient for the amount ordered to be provided by way of security in the court's order of 14 November 1997. What then occurred is stated in the judgment of Pathik J delivered on 29 June 1998. His Lordship referred to the order made on 14 November 1997 setting aside the default judgment conditionally upon the appellant paying into court the sum of $200,000 or giving security for that amount to the satisfaction of the Bank. He referred to the correspondence concerning security and to the fact that the summons of 28 January 1998 had been dismissed on 2 February 1998 after the court had heard counsel for the Bank. Counsel for the appellant failed to appear so that the matter was dealt with *ex parte*. A later explanation given by counsel that he was late because of his need to attend a meeting which lasted longer than he expected did not impress his Lordship who said that he was, in any event, ***functus officio.***

On 5th February 1998 a further summons was filed on behalf of the appellant seeking leave to appeal out of time against the Court's order made on 2 February 1998. His Lordship concluded that there was little prospect of the appeal succeeding. He also said that there was no sound reason advanced for the delay in filing an appeal within time. He refused the application.

If this application had been for leave to appeal against a refusal by the court to set aside the default judgment that was entered, I would have been inclined to give leave because, in my opinion, the evidence relied upon by the appellant in the application to set aside the judgment was, at least arguably, evidence of a defence on the merits. But that is now water under the bridge because, notwithstanding that his Lordship thought that there was not a defence on the merits, he did set aside the judgment although conditionally on the basis that the sum of $200,000 be paid or security be provided for that sum.

In the light of what then transpired concerning the dispute between the solicitors as to whether the respondent had already been provided with sufficient security, there should have been either an application for leave to appeal against the judgment of 14 November 1997 made within time, or preferably, an application to his Lordship to vary his order on the ground that the Bank already held security for more than $200,000.00. Nothing was done except to engage in the futile correspondence to which I have referred. Eventually, on 28 January 1998, the summons issued was filed seeking an order that the Bank already had sufficient security. But, so far as I can see from the papers, there was no evidence filed at all establishing, or tending to establish, that this was the case. There was the valuation earlier mentioned but I cannot find

any basis in the evidence on which the Court could have concluded that the properties were then of the market value which it was claimed that they had or tending to establish that they were available in an unencumbered state to provide the security which the Courts' order required.

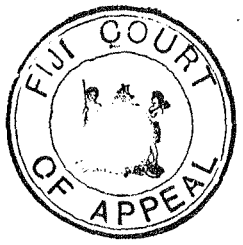
It should have been clear to the appellant and his solicitors that there was a great danger that the default judgment would after all take effect because of the failure to pay the money or provide the security.This was required to be done within 30 days from 14 November, 1997, i.e. by 14 December 1997. Morever, as Pathik J. pointed out , the security had to be provided to the satisfaction of the Bank. He did not say that, in default of an agreement by the parties about the form of the security, it was to be provided in such form as should be fixed by the Registrar, a form of order which is not uncommon. What the Judge intended was that there should be a payment of $200,000 in cash into Court or the provision of security to the satisfaction of the Bank within 30 days of 14 November 1997. Unless the appellant procured the variation of the order for which no application was made, the judgment would take effect on 14 December 1997.

That is the problem which confronts the appellant. He was given an opportunty to defend the action provided he complied with the order or, at least, sought a variation of it on the basis sufficient security had been provided. But that would have required the evidence which I do not find provided here. This should have desirably been done before 14 December 1997. But nothing effective was done by him or his solicitors. He wants now to appeal againt the dismissal of his summons seeking an order declaring that the Bank already has more than sufficient security. He has led insufficent evidence to establish that to be the case. The matter

has been allowed to drift. Much time has gone past and nothing has been done. In my opinion the appeal which the appellant wishes to bring is certain to fail.

In the submissions made on the appellant's behalf, much is made of neglect and inactivity on the part of the appellant's solicitors. But it is impossible, on the material I have, to determine whether or not such neglect as there has been has been due to the appellant's failure to give adequate instructions and to respond promptly to requests for information made to him. Certainly counsel's failure to attend on 2 February 1998 appears to have been culpable but, as I have endeavoured to show, there was not then filed sufficient evidence to enable the Court to decide whether sufficient security had already been provided.

The notice of motion is accordingly dismissed with costs which I fix at $250 inclusive of disbursements.



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Justice Sheppard
Justice of Appeal

Solicitors:

Messrs. Q.B. Bale & Associates, Suva for Appellant
Howards, Suva for the Respondent

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