649.

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

CIVIL APPEAL NO. ABU0036 OF 2002S
(High Court Civil Action No.0259 of 1992)

BETWEEN:

APISAI V. TORA
MELI NATALATU TORA

Appellant/Applicants

AND:

HOUSING AUTHORITY

Respondent

In Chambers: Tompkins, JA

Hearing: Tuesday, 12th November 2002, Suva

Counsel: *G O'Driscoll* for the Appellant/Applicants
V. Maharaj for the Respondent

Date of Decision: Friday, 15th November 2002

DECISION OF TOMPKINS, JA

This application for leave to appeal out of time and for a stay pending the hearing of the appeal was heard by me sitting as a single judge of appeal pursuant to s 20 (1) of the Court of Appeal Act.

650

The applicants applied to the High Court to set aside a summary judgment entered against them on 20 January 1998 for the sum of $228,556.50. That application was heard by Fatiaki J on 7 June 1999. By his judgment delivered on 27 November 2001
he dismissed the application. The applicants filed their application for leave to appeal out of time on 2 August 2002. In accordance with rule 16 of the Court of Appeal Rules, the time for appealing expired 6 weeks after the judgment of the court, namely on 8 January 2002.

At the commencement of the hearing before me, counsel for the applicants sought leave to file a further affidavit by one of the applicants referring to the reasons for the delay in applying for leave. Counsel for the respondent not objecting, I granted leave. In view of the conclusion I later reach, I do not find it necessary to examine these reasons.

In his judgment the Judge conveniently summarized the long and unsatisfactory history of these proceedings:

> "The action was first instituted by writ dated 28th May 1992 which was accompanied by a summons under Or.15 r.14 seeking the leave of the Court 'that the plaintiff be at liberty to conduct this action against the above-named defendants as trustees of Natuaniyarawa Village Housing Scheme.'
>
> The Writ was acknowledged by the defendants in a notice dated 16th June 1992 and despite being aware of it, in the absence of defence counsel on 17th July 1992, the plaintiff's application under Or.15 r.14 was granted. By summons dated 27th July 1992 the defendant's sought to set aside the Court's order under Or.15 r.14. The defendant's summons was heard on 19th October 1992 and by a ruling dated 3rd November 1992 the application was dismissed.
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> Thereafter, on 6th April 1993, in the absence of a Statement of Defence default judgment was entered against he defendants. By notice dated 26th May 1993 the defendants changed their solicitors who then filed a summons

651

seeking to set aside the default judgment and leave to defend the action. Before the defendant's application could be heard however defence counsel died and new counsel was appointed by the defendants on 14th September 1993 and they in turn, issued a fresh motion to set aside the plaintiff's default judgment. By consent order dated 4th May 1994 default judgment was eventually set aside and the defendants were granted unconditional leave to defend.

A Statement of Defence was filed on 6th May 1994 and a reply to defence was filed on 3rd August 1994 thereby closing the pleadings in the action. Procedural matters then occupied a further 2 ½ years and finally the plaintiff Authority's solicitors issued a summons for a hearing date to be fixed and for dispensing with the holding of a pre-trial conference ostensibly because 'the defendants (were) no longer legally represented .' On 4th March 1994 the defendants by their now 4th counsel served notice of change of solicitors.

A pre-trial conference was eventually held on 5th June 1997 and a fresh summons to fix a trial date was issued by the plaintiff Authority's solicitors on 8th October 1997. Thereafter it is unclear what happened to the summons to fix a trial date but it is common ground that the action was never tried.

On 3rd November 1997 the plaintiff Authority issued the present Or.14 summons seeking 'final judgments in the action against the defendants for the amount claimed.....' On 20th January 1998 in the absence of any affidavit from the defendants and in the absence of defence counsel who had been served, summary judgment was entered against the defendants with execution stayed for 3 months.

Thereafter on 4th May 1998 sealed copies of the summary judgment was personally served on the above-named defendants and that triggered the appearance of the defendants by their now 5th legal counsel who recorded his appearance by notice dated 18th September 1998. That was simultaneously followed by an application to set aside. 'the default judgment entered and sealed on 9th February 1998' The application was made under Or.14r.11 of the High Court Rules 1988 which reads:

> ***'Any judgment given against a party who does not appear at the hearing of an application under rule 1 or rule 5 may be set aside or varied by the Court on such terms as it thinks just.'***

Affidavits were exchanged between the parties and the defendant's summons was eventually heard on 7th June 1999. It is much to be regretted that it has taken this long to deliver this judgment."

652

The respondent's claim

The basis of the claim by the respondent against the applicants is in paragraph 3 of the statement of claim:

> ***"Between December 1982 and October 1986 at the defendant's request, the plaintiff advanced to the defendants at total sum of $155,026.00 for the construction and upgrading of Village Housing scheme for the benefit of the members of the Natuaniyarawa Village at Ba."***

By the time the summary judgment was entered on 20 January 1998, that sum with accrued interest had grown to $228,556.56.

There is ample evidence to support this assertion. There is produced a deed of trust dated 21 September 1985 whereby eight of the villagers appointed the applicants as trustees to hold on trust on behalf of the villagers of the Natuaniyarawa Village Housing Scheme all property both real and personal at that time or thereafter acquired. There are also produced mortgages, for example a mortgage dated 26 July 1983 evidencing an advance of $55,720 by the respondent to the second named applicant. That applicant has deposed that he entered into that mortgage in his personal capacity to construct 5 dwellings in the village. But correspondence produced makes it clear that he entered into that mortgage at trustees for the villagers, although the formal deed of trust was not completed until much later.

The defence to the claim

In their affidavit in support of the application to set aside the summary judgment, the applicants deposed that "all negotiations and all applications that we made to the Housing Authority on behalf of Natuaniyarawa Village for construction

653

of houses at the village were done purely in our capacity as Trustees and not in our personal capacity."

In their notice of appeal the applicants set out seven grounds of appeal. The only one of these that has any substance is ground (g) that in effect repeated the above claim:

> ***"That the learned judge erred in dismissing the application to set aside Summary Judgment when there was evidence before the Court that the debt was incurred by Natuaniyarawa Housing Scheme and not the appellants/applicants."***

In dealing with this ground of defence, the judge referred to the following passage in the decision of Judge Morris in *Brown Miller Press v Insight Illustrations Ltd* (1996) DCR 728, 732:

> ***"(1) Where a trustee trades or otherwise deals with trust property he or she is deemed as against all persons other than the beneficiaries to do so in his or her own account, and is consequently personally liable for all debts incurred in the course of trading or dealing. This is ameliorated only by a trustee's right of indemnity and that would be from trust assets and contribution or indemnity from co-trustees.***
>
> ***(2) A mere description of the capacity in which trustee contracts as that of trustee is insufficient to exclude full personal liability.***
>
> (3) ***The normal personal liability is only excluded by appropriate language or express stipulation that such liability is restricted to trust assets. The fact that those who deal with the trustee know he is contracting in his capacity as trustee is immaterial."***

To the same effect is the following passage from *Jacobs Law of Trusts in Australia* 5th edition at 382, where the learned authors say:

654

> *"As a general and fundamental proposition, the common law does not recognise a trustee as having assumed an additional or qualified legal personality. One consequence of this is that his liability for debts he contracts and torts he commits includes those incurred and committed in the course of performance of the trusts and his liability is not limited by, or quantified by reference to the extent of the trust's assets. As Latham CJ said in Vacuum Oil v Wiltshire(1945) CLR 319 at 324 "In respect of debts incurred by him in so carrying on the business, he is personally liable to the trading creditors – the debts are his debts""*

This personal liability can be excluded by agreement. It is commonplace for agreements or mortgages where trustees assume liabilities on behalf of trusts to provide that the liability of the trustees shall be limited to the assets of the trust. There is no such provision in the mortgages or loan agreements in the present case.

Conclusion

On an application to appeal out of time and an application to set aside a summary judgment, it is for the applicant to demonstrate that he has a realistic prospect of success on the appeal. Counsel for the applicants (not Mr O'Driscoll) filed 21 pages of submissions with voluminous citation of largely irrelevant authority. Nowhere in those submissions did counsel deal with the central issue on this application, namely whether the applicants can escape personal liability for debts incurred as trustees.

On the contrary, there are plenty of passages in the correspondence where one or both of the applicants have accepted that they are liable for the amount due. For example in a letter of 19 December 1997, the then solicitors for the applicants put forward an offer for payment by installments and add "Our clients instructions are that it [the letter in the heading refers to the two applicants] is fully committed in making payments settling the sum in full. . ."

655

For the reasons I have expressed, I am satisfied that the applicants have failed to establish that they have any, much less a reasonable, prospect of success. Mr O'Driscoll for the applicants responsibly acknowledged that there is no answer to the proposition that the applicants are personally liable for the debts incurred on behalf of the trusts. There is no challenge to the amount of the judgment.

Accordingly, the application for leave to appeal out of time is dismissed. The respondent is entitled to costs which I fix at $700.00

FIJI COURT OF APPEAL

Tompkins, JA

Solicitors:

Messrs. Iqbal Khan and Associates, Suva for the Appellant/Applicants
Messrs. Maharaj Chandra and Associates, Suva for the Respondent

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