

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

HBC 313 of 2019

BETWEEN : **KONTIKI FINANCE LIMITED**

PLAINTIFF

AND : **NISHANT MAHARAJ trading as VEE N VEE SHOPPING
CENTER**

DEFENDANT

BEFORE : **M. Javed Mansoor, J**

COUNSEL : **Mr. K. Goundar for the plaintiff**
Mr. S. Parshotam and Mr. P. Kumar for the defendant

Date of Hearing : **26 October 2023**

Date of Decision : **5 January 2024**

DECISION

PRACTICE & PROCEDURE

Application to set aside default judgment –

Consumer Credit Act 1999 – Order 13, High Court Rules 1988

The following cases are referred to in this decision:

- a. *Bank of Credit and Commerce International (Overseas) Ltd (in liquidation) v Habib Bank Ltd* [1998] 4 All ER 753.
 - b. *Rakib v ANZ Banking Group* [2008] FJHC 184; HBC 277.2008 (2 September 2008)
 - c. *Alam v Colonial National Bank* [2017] FJSC 32; CBV 6.2017 (15 December 2017)
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1. This is an application to set aside default judgment against the defendant. The plaintiff's action against the defendant is for the recovery of \$174,204.81 together with interest and other reliefs. The defendant did not file an acknowledgement of service or a statement of defense. Judgment in default was entered and sealed on 29 October 2019.
2. Prior to entering default judgment, court granted orders on 24 September 2019 restraining the defendant from leaving the country and from selling, disposing or removing his assets and money. He was asked to file a full statement of his assets and to surrender his travel documents and execute a bond that he would not leave the court's jurisdiction without notice. These orders were granted pursuant to an *ex parte* notice of motion filed by the plaintiff.
3. On 1 April 2020, the plaintiff filed an *ex parte* notice of motion supported by an affidavit seeking certain orders. Notice was issued on the defendant's solicitors. On 28 April 2020, the defendant's previous counsel informed court that his client had travelled to New Zealand and that he had no knowledge of how his client left the country. By that time, court had ordered the defendant to surrender his travel documents and issued a stop departure order. On 29 April 2020, orders were granted in terms of the plaintiff's notice of motion.
4. The present application is to set aside the default judgment and allow the defendant to defend the action unconditionally and for stay of execution of the judgment pending the hearing of this application. Summons to set aside default

judgment was initially filed on 10 August 2022. It was withdrawn and a fresh application was filed on 19 April 2023, upon payment of costs to the plaintiff, which was supported by an affidavit of the same date. The application has been made under Order 13 rule 10 and Order 59 of the rules. The defendant submits that it has an arguable case.

5. The defendant submitted that the plaintiff was in breach of section 133 (1) A of the Consumer Credit Act 1999 by paying on behalf of the defendant, insurance premia for a period of five years to secure the loan. The section states that a credit provider must not knowingly provide credit to the debtor to pay the premium or finance the premium on insurance taken out by the debtor over the mortgaged property for a period of insurance exceeding one year. It is submitted that by making such a payment the plaintiff increased the defendant's outstanding loan amount.
6. The defendant submits that section 70 (1) of the Consumer Credit Act allows a court to re-open a transaction if the contract, mortgage or guarantee entered into by a debtor, mortgagor or guarantor is unjust. Section 70 (2) sets out the circumstances – such as the relative bargaining power of the parties – that a court may have regard to in determining whether the term of a particular credit contract, mortgage or guarantee is unjust. The term unjust includes unconscionable, harsh or oppressive. The defendant says it had no opportunity of obtaining independent advice or of bargaining the terms of the offer letter, which was in standard form.
7. Section 70 (4) provides that in determining whether a transaction is unjust, a court must not have regard to any injustice arising from circumstances that were not reasonably foreseeable when the parties entered into it. The court may have regard to the conduct of the parties since entering into the transaction.
8. The defendant submits that he has paid the plaintiff a sum of \$112,733.05. The plaintiff's claim is \$174,204.81. He claims to have a counter claim against the plaintiff, and submits that this can be pursued only if the default judgment is set aside. The defendant submits that he would be prejudiced if the default

judgment is not set aside, as he has paid the plaintiff a substantial sum. He says he has a meritorious defence against the plaintiff.

9. Default judgment was entered on 29 October 2019. It is submitted that the defendant became aware of the default judgment only when his new solicitors made a file search of the court registry. The defendant says he acted immediately upon being advised of his options to resist the plaintiff's claim.
10. The defendant submits that the payment of interest ordered by the default judgment was not in terms of the prayer in the statement of claim, and that, therefore, the default judgment should be set aside. The statement of claim sought an interest rate of 24.68 from 1 September 2019 until date of judgment. The default judgment ordered interest until payment in full.
11. The plaintiff's claim is based on facilities granted to the defendant in a sum of \$97,527.92 to be used for the expansion of his cartage/ logistics business and retail shop. The plaintiff submitted that the credit facilities were secured by taking three vehicles as securities. Following the defendant's default and after giving notice, the vehicles were repossessed. The plaintiff says the vehicles had little resale value. The secured vehicles were sold and their proceeds credited to the loan account. The plaintiff submitted that a substantial amount was owed even after recovering from the sale of the secured assets.
12. The plaintiff denies that the defendant has a meritorious defence and submits that mere irregularities were insufficient to set aside a default judgment. The plaintiff relied on the decision in *Bank of Credit and Commerce International (Overseas) Ltd (in liquidation) v Habib Bank Ltd*¹.
13. The plaintiff says that the loan given to the defendant falls outside the Consumer Credit Act as the facility was granted entirely for a business purpose and not for a personal, household or domestic matter. The plaintiff referred to information provided by the defendant in which he says the loan was for the purpose of the

¹ [1998] 4 All ER 753

business. The plaintiff relied on the decisions in *Rakib v ANZ Banking Group*² and *Alam v Colonial National Bank*³. In *Rakib*, the court refused an application for an injunction to restrain the bank from exercising the powers of a mortgagee. The court held that if a loan is used predominantly for a business purpose, the Consumer Credit Act would not apply. In *Alam*, the Supreme Court of Fiji declined an application to stay the judgment of the Court of Appeal pending the hearing of the petition for leave to appeal. The question in this proceeding is whether default judgment should be set aside, and the defendant permitted to set up a defence.

Conclusion

14. Order 13 rule 10 allows court to set aside or vary a judgment. Order 19 rule 9 allows the court on such terms as it thinks just to set aside or vary any judgment. The court must make an assessment of the merits in the defendant's case in order to allow the application to set aside the default judgment. This does not require an inquiry in the form of a mini trial. The applicant must satisfy court that there is an arguable case in order to succeed.
15. Taken individually, the grounds urged by the defendant do not appear to be particularly strong. Nevertheless, court is of the view that it would be proper to allow the application especially for two reasons in the context of this case. Firstly, in settling a sum of \$112,733.05, the defendant has repaid the plaintiff a substantial sum. In submissions, the plaintiff does not dispute this claim. The defendant contests the amount he is alleged to owe the bank. Secondly, there is the question whether the transaction is governed by the Consumer Credit Act. On the pleadings, it would appear to be so. This is an important consideration, which, it may be more appropriate to decide after a trial so that the evidence of the parties can be considered. The application is allowed under Order 13 rule 10 of the High Court Rules.
16. In allowing the application, the court is aware of the considerably long time taken by the defendant to move court to set aside the default judgment. His

² [2008] FJHC 184; HBC 277.2008 (2 September 2008)

³ [2017] FJSC 32; CBV 6.2017 (15 December 2017)

explanation is not entirely convincing. The prejudice to the plaintiff as a result cannot be ignored. The record shows that the defendant's previous solicitor moved for time on several dates submitting that the case would be settled. The defendant is required to pay costs to the plaintiff, and will remain answerable should he be called upon to show cause for not complying with court orders.

ORDERS

- A. Default judgment sealed on 29 October 2019 is set aside.
- B. Pleadings to be completed in terms of the rules of court.
- C. Defendant to pay the plaintiff costs summarily assessed in the sum of \$4,500.00 within 21 days.

Delivered at Suva this 5th day of **January, 2024**.



M. Javed Mansoor
Judge