

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

HBC 244 of 2023

BETWEEN: **UB FREIGHT (FIJI) PTE LIMITED** a limited liability company having its registered office at Lot 2, SO6734, Queens Road, Natabua in Lautoka, Fiji.
PLAINTIFF

A N D: **BHAGWATI** trading as **COST TWO SAVE** having its principal place of business at Bajpai Building, Togo, Tavua, Fiji.
FIRST DEFENDANT

AND: **RESHMI LATA** of Palm Cove Road, Nakasi, Fiji, occupation unknown.
SECOND DEFENDANT

Appearances: Ms. P. Kumar for the Plaintiff
 Mr. E. Maopa for the Defendant

Date of Hearing: 16 July 2024

Date of Ruling: 25 November 2025

R U L I N G

INTRODUCTION

1. UB Freight (Fiji) Pte Limited (“**UFFPL**”) has filed a Summons for Summary Judgement through its lawyers, Lal Patel Bale Lawyers. The Summons is filed pursuant to Order 14 Rules 1 and 2 of the High Court Rules 1988. It is supported by an Affidavit of Mr. Kamleshwar Kant sworn on 12 February 2024. An Affidavit of Sandip Prasad Sharma sworn on 06 May 2024 is filed herein opposition to the Summons.

2. From the affidavits filed, the following facts appear to be not in disputed:
 - (i) **UFFPL** is a freight company whose business is to move goods/cargo from one location to another—locally and internationally.

- (ii) Ms. Bhagwati is a sole-trader. She trades under the name and style of **Cost Two Save**. Her business name is duly registered with the Registrar of Companies. She is also registered as a “sole trader” with the Fiji Revenue & Customs Service (TIN 022310200).
- (iii) on 09 May 2023, Bhagwati filled out and signed UFFPL’s standard Credit Application Form.
- (iv) UFFPL approved the application. Pursuant to that approval, Bhagwati utilized UFFPL’s freight services under the credit terms set out in the Application Form, which permitted deferred payment for services rendered.
- (v) the credit terms were:
 - (a) UFFPL would import and supply goods to Bhagwati.
 - (b) UFFPL would issue invoices on the last day of each month
 - (c) Bhagwati would pay the total sum due within seven (7) days of date of issuance of the invoice.
 - (d) non-payment within thirty (30) days would result in a late-payment levy of 5% of the total sum due.
 - (e) Bhagwati is to have a credit-limit of four (4) containers per month.
 - (f) Bhagwati is to provide a personal guarantor
- (vi) on 09 May 2023, Ms. Reshmi Lata (2nd defendant) also signed a personal guarantee.
- (vii) in due course, UFFPL shipped goods to Fiji for Bhagwati under their agreed credit-account terms.
- (viii) in May 2023, UFFPL issued the following four invoices - each corresponding to a container shipment dispatched during the month:

Invoice No.	Date of Issue	Amount
NAN068031	12/05/23	\$21,370.25
NAN068325	23/05/23	\$28,769.32
NAN069096	31/05/23	\$ 1,721.68
NAN069097	31/05/23	\$ 1,310.59

- (ix) on 21 August 2023, Lal Patel Bale Lawyers issued a Demand Notice to Bhagwati. A notation on a copy of the said Notice states that service was attempted on 23 August 2023 in Toko, Tavua but Bhagwati refused to sign. However, it is common ground that at the time this service was attempted in Tavua, Bhagwati had already closed shop in Tavua and had relocated to Nadi.
- (x) two Demand Notices were again issued on 30 August 2023. The first one was addressed to Bhagwati. The second one was addressed to Reshmi Lata.
- (xi) on 31 August 2023 in Nadi, the Demand Notice for Bhagwati was given to her son, Sandip Sharma. The process server swore that Sharma blocked him from serving Bhagwati, who was sitting on the porch in plain view. The Demand Notice to Reshmi was served on her personally on 31 August 2023.

THE LAW

- 3. The Order 14 procedure provides a mechanism for a plaintiff to obtain swift judgment without the need for a full trial where the defendant has no real defence to the claim¹.
- 4. The Court's task is to determine whether there ought to be a trial (see **Carpenters Fiji Ltd –v- Joes Farm Produce Ltd** Civil Appeal Number ABU 0019/2006, the Court of Appeal at pages 9 and 10)².
- 5. To succeed, the plaintiff must prove each claim clearly and must satisfy the Court that the defendant has no defence which has any realistic prospect of success.

¹ Order 14 Rules 1 provides as follows:

1.-(1) Where in an action to which this rule applies a statement of claim has been served on a defendant and that defendant has given notice of intention to defend the action, the plaintiff may, on the ground that that defendant has no defence to a claim included in the writ, or to a particular part of such a claim, or has no defence to such a claim or part except as to the amount of any damages claimed, apply to the Court for judgment against that defendant.

² The Fiji Court of Appeal said:

(a) The purpose of 0.14 is to enable a plaintiff to obtain summary judgment without trial if he can prove his claim clearly and if the defendant is unable to set up, a bona fide defence or raise an issue against the claim which ought to be tried.

6. Once the plaintiff establishes his claim, the defendant must then convince the Court that judgement should not be given (see **Thomas J in Hibiscus Shopping Town Pty Ltd -v- Woolworths Ltd** [1993] FLR 106 at 109). He must adduce affidavit evidence dealing specifically with the plaintiffs claim and affidavit³ and which must state clearly and precisely what facts he relies on to resist the entry of summary judgment (see **Carpenters Fiji Ltd -v- Joes Farm** (supra) at pages 9 and 10; **Magan Lal Brothers Ltd. -v- L. B. Masters & Company** Civil Appeal No: 31/84).

7. The Fiji Court of Appeal in **Carpenters Fiji Ltd -v- Joes Farm** (supra) at pages 9 and 10 continue as follows:
 - (d) Set off, which is a monetary cross claim for a debt due from plaintiff, is a defence. A defendant is entitled to unconditional leave to defend up to the amount of the set of claimed. If there is a set off at all, each claim goes against the other and either extinguishes or reduces it **Hanak v. Green** (1958) 2 QB 9 at page 29 per Sellers LJ.

 - (e) Likewise where a defendant sets up a *bona fide* counterclaim arising out of the same subject matter of the action, and connect with the grounds of defence, the order should not be for judgment on the claim subject to a stay of execution pending the trial of the counter claim but should be fore unconditional leave to defend, even if the defendant admits whole or part of the claim; **Morgan and Son Ltd v. S. Martin Johnson Co** (1949) 1 KB 107(CA).

8. Clearly, a general denial in the statement of defence or in the affidavit of opposition will not suffice to discharge that burden. If the Defendant files only a defence but not an affidavit, the Court must consider the issues raised in that defence to decide whether it has real merit or is merely a sham intended to delay judgment or avoid showing cause by affidavit (see the Fiji Court of Appeal in **Magan Lal Brothers Ltd – v- L.B. Masters** (supra); see also **Halsbury’s Laws of England (4th Edition)** volume 37 para 413 – 415, notes 4).

³ Order 14 Rule 2 (1) provides:

2.-(1) An application under rule 1 must be made by summons supported by an affidavit verifying the facts on which the claim, or the part of a claim to which the application relates is based and stating that in the deponent's belief there is no defence to that claim or part, as the case may be, or no defence except as to the amount of any damages claimed.

AFFIDAVIT IN OPPOSITION

9. Sandip Prasad Sharma's affidavit in opposition does not dispute the above facts. Instead, it sets out the following:

- (i) Bhagwati is his mother. She has authorized him to swear the affidavit.
- (ii) Bhagwati used to run a business in Tavua. The business was managed by Sharma. Bhagwati closed that business on Sharma's advice as it was running at a loss.
- (iii) the family then relocated to Nadi.
- (iv) at or about the time they departed from Tavua, or immediately upon relocation to Nadi, Bhagwati, Sharma and Reshmi formulated a business plan to engage in the wholesale supply of noodles to retail within the surrounding area.
- (v) Sharma began talking with Jagdish Punja of J. Punja Company in New Zealand. According to Sharma, he had the idea that Jagdish would "*send noodles to us and we would pay him to his local Bank Account*".
- (vi) the first shipment was for trial purposes. For this, Sharma paid \$820 into Punja's bank account.
- (vii) after that first trial-run, Punja offered to arrange for credit terms with his friend, Rohit Narayan of UBFFPL – to which Sharma agreed.
- (viii) the following day, pursuant to a prior telephone arrangement initiated by the Manager of UBFFPL, whom Sharma recalls as Mr. Anil, he collected the Application Form from Mr. Anil at Korovuto.
- (ix) Mr. Anil, who was *en route* to Suva, handed Sharma the Application Form and departed without providing any explanation as to its purpose or contents.
- (x) Sharma then took the Form home, filled it out, and asked his mother and wife to sign it, which they did – and then he emailed the signed Form to Anil as instructed.
- (xi) on the same day, Anil called him to say that a credit account had been established, enabling Sharma to procure goods on credit terms from New Zealand.
- (xii) the next day, Sharma called Punja in New Zealand and ordered noodles from his company. Sharma remembers that in May 2023, two shipments of "*Snack and Soup It*" noodles arrived. He tried to sell the noodles to

several shops, but the shopkeepers told him that the brand was not permitted for sale in Fiji.

- (xiii) later, upon his inquiries, he was advised by the Nadi Airport Health Department that the brand of noodles was banned due to its biotic acid content. It was also confirmed that he lacked the necessary import permit for such goods. Eventually, the noodles had to be destroyed.

10. At paragraphs 23 to 25 of his affidavit, Sharma deposes as follows:

- 23 that we never signed any document with Jagdish Punja. However, the named Defendants signed the Form upon the request of Anil from UB Freight to do so.
24. I verily believed that neither Anil and/or any officer from UB Freight came home to explain and advice the content of the Form to my mother and my wife.
25. That we were never provided any of the invoices and/or delivery note and neither to my mother and wife on the supply of those Noodles.

ANALYSIS

11. Given the facts set out in paragraph 2 above, I am of the view that UFFPL has established a clear case. The question really is whether or not Bhagwati and /or Reshmi Lata have set up a *bona fide* defence raising some triable issues.

Non-Est Factum

12. It would appear that the defendants are blame UBFFPL for not explaining the document to them.
13. The Supreme Court in **Singh v Singh** [2016] FJSC 48; CBV006.2015 (23 June 2016), in reference to the House of Lords decision in **Saunders et al v. Anglia Building Society** (1970) 3 All E R 961 said the case:

[32] laid down how and to whom the “non est factum” plea should be applicable. House of Lords stated that a man of full age and understanding who can read and write cannot be allowed to repudiate his signature to a document, which he knows will have legal consequences if he signs it without reading it. The petitioner being a literate and educated person cannot deny his signature placed in the deed.

14. Notably, the *Terms and Conditions* of the credit arrangement actually accompanied the Application Form. They are in fact part of the Form. There is a *Customer Acceptance*

part of the Form where Bhagwati *inter alia* accepts that she has “*read and understood our terms and conditions*” (see Annexure KK2).

15. The affidavit does not state that Bhagwati or Reshmi Lata are illiterate or uneducated or that they did not understand the nature of the transaction or the terms and conditions thereof. In fact, they signed the agreement after a first trial run of imports, which Bhagwati herself paid off. This demonstrates both her financial capacity and her operational understanding of the import process. It was only following this successful transaction, that Punja offered to arrange for UFPPL to discuss a credit contract with Bhagwati. The timing of this arrangement, following proven performance by Bhagwati after the first import, supports the inference that Bhagwati entered into the credit agreement with full knowledge of its terms and implications.
16. In my view, the fact that four containers were imported to Fiji on four separate shipments under the credit arrangement between Bhagwati and UNFFPL, together with the involvement of the guarantor—Bhagwati’s daughter-in-law—who appears to have been actively engaged in the business alongside her husband, provides added strength to the argument that all three were fully aware of the nature of the arrangement.
17. Notably, the annexed copy of the Form ‘KK2’ in Kamleshwar Kumar’s affidavit of 13 February 2024 lacks UBFFPL’s ‘*For Official Use Only*’ approval. Yet it is agreed that UBFFPL gave approval by phone and subsequently shipped four containers to Bhagwati in May 2023 under the contract. It may be noted that in a letter dated 25 May 2021, annexed as KK2 to the affidavit of Kamleshwar Kant sworn on 12 February 2024, the FRCS confirmed Bhagwati’s business registration and recorded that she had appointed Reshmi Ritashni Lata as her representative for filing the personal income tax return. As Sharma states at paragraph 4 of his affidavit in opposition, Reshmi Lata is his wife and Bhagwati’s daughter-in-law.
18. Taken together with paragraph 8 of the same affidavit, it appears that all three may have been involved in the business. The sequence of events further shows that Sharma acted as the link between Punja and Bhagwati, and between Bhagwati and UFPPL. There is no evidence that he did not understand the arrangement with UFPPL.
19. Bhagwati, Reshmi, and Sharma are well-known business people with significant experience. As Bhagwati states in Section 4 of the Form, she has managed other major

trading accounts. Interestingly, Bhagwati states her address in official documents as “C/o Motiram & Co Ltd, P O Box 202, Nadi”. This is a well-known company.

20. In any event, if Bhagwati required clarification on any term or condition in the Form, it was incumbent upon her to seek independent legal advice rather than rely on UBFFPL.

Section 59 (d) of the Indemnity, Bailment & Guarantee Act

21. The defendants rely also on section 59 (d). However, this subsection in particular only relates to “the sale of lands, tenements or hereditaments or any interest in or concerning them”. The credit contract at issue in this case does not concern the sale of land.

Duly Completed & Executed Form Constitutes a Valid Offer

22. A duly completed and executed Application Form may serve as an offer, if the wording of the Form is clear, definite, and complete, showing an intention to be bound, once accepted. Notably, the Credit Application Form in question has a section headed “Customer Acceptance”. Here, Bhagwati acknowledges that she has “received, read and understood” the terms and conditions which accompanied the Form and that she authorizes UBFFPL “to undertake credit checks” on her personally. Thus, she agrees to be bound by the terms and conditions attached, subject to UBFFPL’s checks and approval. Bhagwati is thus making an offer which will form a binding Agreement once UBFFPL grants approval. In addition, there is a section of the Form marked ‘For Official Use Only’ where UBFFPL is to record its approval after checks.

Guarantee – Executed & Delivered as a Deed

23. In the *Personal Guarantee and Indemnity* part of the Form, the following is stated:

In consideration of UB Freight supplying services to the Customer on the terms and conditions set out in the credit account application, the Guarantor agrees that:

- a) *If for any reason the Customer does not pay any money owing when due, the Guarantor will pay UB Freight the overdue amount on demand.*
- b) *The guarantor indemnifies UB Freight against all costs and expenses which are incurred in or incidental to the enforcement of this deed.*

Dated:

Executed and delivered as a Deed.

24. A deed is normally binding once executed and delivered (see **Xenos v Wickham** (1867) LR 2 HL 296 at 312). However, if the instrument requires the other party's approval, it binds only when that approval is given. In **Segboer & Anor v A J Richardson Properties Pty Limited & Anor** [2012] NSWCA 253 (14 August 2012), the New South Wales Court of Appeal made some pertinent remarks about the binding effect of Deeds at paragraphs 51 to 60 which I reproduce below in the footnotes with ellipses showing where text has been omitted⁴.

⁴ The NSW CA said:

51. It is long established law that delivery is essential to a deed...⁴
52. delivery is required where a deed is executed, not only by an individual but by a corporation.⁴
53. for at least two centuries, the requirement of "*delivery*" has been capable of being satisfied without physical delivery or transfer of the deed to the promisee or anyone else. *Norton on Deeds* states (at 13) that:
- "Delivery may be effected by words alone, or without words by the acts or conduct of the party, from which it can be inferred that he intended to deliver the deed as an instrument binding on him."
54. It is for this reason, that it held in **Xenos v Wickham** (1867) LR 2 HL 296, that a deed can be delivered even though it never leaves the possession of the party executing it: see at 323, per Lord Cranworth. Indeed, there is much older authority to that effect...⁴
55. In **Xenos v Wickham**, Blackburn J (whose opinion was upheld by the House of Lords) stated (at 312) the principles as follows:
- "no particular technical form of words or acts is necessary to render an instrument the deed of the party sealing it. The mere affixing the seal does not render it a deed; but as soon as there are acts or words sufficient to shew that it is intended by the party to be executed as his deed presently binding on him, it is sufficient. The most apt and expressive mode of indicating such an intention is to hand it over, saying: 'I deliver this as my deed;' but any other words or acts that sufficiently shew that it was intended to be finally executed will do as well. And it is clear on the authorities, as well as the reason of the thing, that the deed is binding on the obligor before it comes into the custody of the obligee, nay, before he even knows of it ..."
56. This passage was approved by the Privy Council in **Macedo v Stroud** [1922] 2 AC 330, at 337, per Viscount Haldane...⁴
57. Blackburn J stated in **Xenos v Wickham** that the mere affixation of the seal does not render a document a deed. But a document in the form of a deed which has been signed and sealed is presumed to have been delivered: **Hall v Bainbridge** (1848) 12 QB 699; 116 ER 1032. The presumption may be rebutted, for example where the circumstances show that the parties executing counterpart deeds did not intend to be bound until the deeds were exchanged: **Hooker v Christian Brothers**.
58. The question in the present case is not (as the primary Judge seems to have thought) whether, on the evidence, the guarantees had been delivered to the Developer. Physical delivery is not required for a deed to be effective. The critical question is whether the party executing the deed has evinced an intention to be bound immediately.

25. Then at paragraphs 72 to 73, the Court said as follows:

72. A deed can be delivered in escrow. The effect is that the deed is not recallable, but equally is not operative until a particular condition is satisfied: **Beesly v Hallwood Estates Ltd** [1961] Ch 105, at 118, per Harman LJ (with whom Lord Evershed MR agreed): **Federal Commissioner of Taxation v Taylor** [1929] HCA 13; 42 CLR 80, at 87-88, per Rich, Starke and Dixon JJ; **Ansett v Comptroller of Stamps**, at 79. Delivery of a deed in escrow is to be distinguished from a case where the grantor's intention is not to be bound at all until some future event occurs, in which case there is no delivery. An example is where a party to a conveyancy transaction executes a deed and returns it to his or her solicitor in the expectation that, in accordance with usual conveyancing practice, the deed will not be operative until exchange: *Hooker v Christian Brothers*, at 118, Bradbrook, at 269.

73. Whether a deed has been delivered unconditionally, delivered in escrow or not delivered at all depends on the executing party's intention. This question, as I have already indicated, is to be determined on the basis of the words used by and the conduct of the promisor, taking into account the circumstances attending the execution of the deed.

Demand Notice

26. In **Fiji Public Service Credit Union v Tuifagalele** [2012] FJHC 1427; HBC86.2012 (29 October 2012), Master Amaratunga (as he then was) held that the absence of proof of service of a demand notice in a debt-recovery claim was fatal. The application for summary judgement was therefore dismissed.

27. In this case, the Demand Notice was duly served on Bhagwati and Reshmi.

59. In *Xenos v Wickham*, it was said that the question of whether a party had evinced an intention to be bound by a deed was a question of fact for the jury: at 309, per Piggott B; **Ansett Transport Industries (Operations) Pty Ltd v Comptroller of Stamps** [1985] VR 70, at 78, per Tadgell J.

60. Some reference was made in argument to Mr. Winnick's subjective state of mind at the time the guarantees were executed and the copies sent to Mr. Madden. {H}is subjective opinions are not relevant to the question that must be addressed, namely whether the acts of the Bank or the statements made on its behalf demonstrate an intention that it should be immediately bound by the guarantees.

ORDERS

28. Summary Judgement is granted over the plaintiff's claim.
29. Costs summarily assessed at \$1,500 – 00 (one thousand and five hundred dollars only).



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Anare Tuilevuka
JUDGE

25 November 2025