COUNCIL OF THE FIJI INSTITUTE OF TECHNOLOGY v ANANIA CARA and 2 Ors

HIGH COURT — CIVIL JURISDICTION

JITOKO J

7 May 2003

[2003] FJHC 300

Practice and procedure — applications — summons to set aside default judgment — whether the service of writ to Defendants was irregularly entered — whether the judgment should be set aside based on a justifiable defence by Defendants — whether the Plaintiff has exhausted the proper remedy against Defendants — whether Defendants are liable under the guarantee.

The Plaintiffs entered judgment in default of service of notice of intention to defend against the Defendants. The 2nd and 3rd Defendants filed a summons to set aside the judgment against them on the grounds of irregularity and that the Plaintiffs should proceed against the 1st Defendant before seeking damages against the 2nd and 3rd Defendants as guarantors. The Defendants were employees of the Plaintiff. The 1st Defendant resigned and violated the terms of his bond where the two other Defendants acted as guarantors. The Plaintiff sent a demand letter and Defendants failed to pay up.

Held — (1) In an application to set aside a default judgment where there is a claim of irregularity, as the 2nd and 3rd Defendants are claiming, then the summons should specify the nature of the irregularity complained of.

(2) The writ was personally served and acknowledged by the Defendants by attaching their signatures at the back of the document then the conclusion must be that the Defendants were properly served. The gratuitous comments or advice from the bailiff on how they should attend to the matters at hand does not make the process of service voidable or of no legal effect. Ignorance of the law is no defence.

(3) It is not necessary for the creditor before proceeding against the guarantors to demand payment from the 1st Defendant as the principal debtor unless it is expressly stipulated in the contract. It is not a requirement that a guarantor be notified of the principal debtor's default. In the absence of stipulation to the contrary, the guarantor becomes liable at the instance of the default.

(4) The Defendants when they signed as guarantors knew the legal implication of their action. The guarantors have to meet their obligation under the guarantee and must pay damages to the Plaintiff.

Application dismissed.

Cases referred to:

Evans v Bartlam [1937] AC 473; *Fiji Development Bank v Inoke Moto* (1995) 41 FLR 236; *Re J Brown's Estate; Brown v Brown* [1893] 2 Ch 300; *Tamplin v James* (1880) 15 Ch D 215, cited.

Fiji Development Bank v Navitalai Raqona (1984) 30 FLR 151; *Fiji Forests Industries Ltd v Timber Holdings Ltd* (1994) HCA 117 (unreported); *Moschi v Lep Air Services Ltd* [1973] AC 331, considered.

No appearance for the Defendant.

T. Tuitoga and *Munro Leys* for the Plaintiff.

Jitoko J. Judgment in default of service of notice of intention to defend, was entered by the Plaintiff against the Defendants on 19 July 2002. On 16 August, some 4 weeks later, the 2nd and 3rd Defendants filed a summons to set aside the judgment against them on the grounds set out in their affidavits.

The facts are these. The Defendants were at one time or another, employees of the Plaintiff. The 1st Defendant a lecturer at the Institute, in February 1998 had, as a consequence of his undertaking a 2-year training programme under the Plaintiff's sponsorship, entered into a bond (the bond). The bond required the 1st Defendant to teach at the Institute for at least 2 years or pay a sum of $26,750 should he fail to do so. The 2nd and 3rd Defendants acted as guarantors of the bond which specifically stated that they were jointly and severally liable to pay the sum of $26,750 should the first defendant fail to comply with the terms of the bond. The 1st Defendant resigned from the Plaintiff's employment before completing the 2 years teaching period required under the bond and was therefore in breach of the terms of his bond. He now resides outside of Fiji.

In the meantime, the Plaintiff's solicitors had written a demand letter to the 1st Defendant who has not responded. The solicitors have written also to the 2nd and 3rd Defendants, as guarantors of the 1st Defendant's bond, demanding the sum of $26,750 plus interests. They too have failed to pay up.

The law of guarantee

In *Halsbury's Laws of England*, Lord Simonds Ed, vol 18, p 411, a guarantee is defined as:

> … an accessory contract, whereby the promisor undertakes to be answerable to the promisee for the debt, default or miscarriages of another person, whose primary liability to the promisee must exist or be contemplated.

While it is a contract between the promisor (guarantor/surety) and the promisee (creditor), it remains subsidiary to the primary contract between the third party (principal debtor) and the promisee. The principal debtor is not a party to the contract between the creditor and the guarantor, although he remains primarily liable to the creditor for the debt or for the obligations. The performance by the principal debtor of his obligation that discharges him will also mean that the guarantor is discharged of his obligation to the creditor. Where however there has been non-performance or repudiation by the principal debtor, the guarantor is deemed to have assumed the liability on the former's behalf. Chitty on Contracts (specific contracts) 26th ed spells out this principle as follows (p 1341):

> …. Prima facie a surety does not merely undertake to perform if the principal debtor fails to do so; he undertakes to see that the principal debtor will perform. Important results flow from this prima facie rule of construction. In particular it means that a surety is normally liable to the same extent as the principal debtor for damages for breach of the latter's obligations even though he has not in terms guaranteed the payment of damages.

A much fuller exposition on the law of guarantee and tracing its history through the ages, is set out in Lord Diplock's judgment in *Lep Air Services v Rolloswin Ltd* [1973] AC 331 at 346–9. Specifically, on the failure to perform, *Lord Diplock* stated (at 349):

> The legal consequence of this is that whenever the debtor has failed voluntarily to perform an obligation which is the subject of the guarantee, the creditor can recover from the guarantor as damages for breach of his contract of guarantee whatever sum the creditor could have recovered from the debtor himself as a consequence of the failure. The debtor's liability to the creditor is also the measure of the guarantor's.

Earlier, Lord Reid in the same House of Lords decision in *Lep Air Services* (above) had this to say on the guarantor's obligation (at 345):

> He might undertake that the principal debtor will carry out his contract. Then if at anytime and for any reason the principal debtor acts or fails to act as required by the contract, he not only breaks his own contract but he also puts the guarantor in breach of his contract of guarantee. Then the creditor can sue the guarantor, not for the unpaid instalment but for damages. His contract being that the principal debtor would carry out the principal contract, the damages payable by the guarantor must then be the loss suffered by the creditor due to the principal debtor having failed to do what the guarantor undertook that he would do.

A more recent treatment of the law of guarantee is seen in Fatiaki J's (as he then was) judgment in *Fiji Development Bank v Moto* [1995] 41 FLR 236.

As far as this case is concerned, there is no dispute by the 2nd and 3rd Defendants that they had executed the guarantee for the 1st Defendant's performance under a bond with the Plaintiff. The bond amounted to an undertaking by the 1st Defendant that he will, after completing his sponsored — studies, teach at the Fiji Institute of Technology for at least 2 years. Should he fail to carry out this undertaking, he is liable to pay $26,750 to the Plaintiff. The 2nd and 3rd Defendants, in executing the guarantee for the 1st Defendant's performance under the bond must be deemed to have understood the nature and consequence of their acts. They have not pleaded a mistake, misrepresentation or fraud. At any rate, the law since *Tamplin v James* (1880) 15 Ch D 215 is clear, and that is, a party will not be allowed to evade performance of a contract on the ground that he has made a mistake. The presumption is that a party is taken to fully understand the contents and effect of the documents he is signing especially in the case of a Guarantee. As Kermode J stated in *FDB v Raqona* [1984] 30 FLR 151 at 153:

> … The general rule is that a party of full age and understanding is normally bound by his signature to a document whether he reads or understands it or not.

By all accounts it would appear to this court that the 2nd and 3rd Defendants as guarantors automatically became liable for damages to the Plaintiff/Creditor for the breach of the 1st Defendant undertaking under the bond. The damages in this case is equivalent to the sum of $26,750 which the 1st Defendant was required to pay should he have failed to fulfil his obligation.

Application to set aside judgment

The 2nd Defendant's affidavit in support of the application contends that while he had been served with the Plaintiff's writ on 25 June 2002 he was ignorant "of its full significance and import" until much later. The process server according to the 2nd Defendant, had merely asked him to acknowledge the receipt of the document by signing at the back of the writ and who also advised him to go and see the solicitor for the Plaintiff. Since the 3rd Defendant's signature was already contained at the back of the said document, the 2nd Defendant was easily swayed to add his signature to it. He was not able, because of work commitments elsewhere in Fiji, to see the Plaintiff's solicitor until 6 August 2002, some 6 weeks after having been served with the writ.

The story with the third defendant is somewhat similar. In his affidavit in support, he states that he had been served with the writ on 21 June 2002 and having been assured by the process server that he needed not attend court, he left the writ on his desk. It was only after he had spoken to the Second Defendant on 2 August 2002, that he realised that he was in trouble and that possible bankruptcy proceedings against both him and the 2nd Defendants was being contemplated by the solicitors for the Plaintiff.

The specific grounds for setting aside the default judgment, the 2nd and 3rd Defendants say that:

(i) That the judgment was irregularly entered. The second and third Defendants were misled by the Bailiff serving Writ so that there was no effective service of the same. The Plaintiff's claim had to be satisfied against First Defendant first and this has to be proven before judgment could be entered across the registry table. The Plaintiff should have filed proof this in this action. This Honourable Court has inherent jurisdiction to set aside ex debito justiciae such irregular judgment.

(ii) Alternatively, if judgment is regular that the said judgment be set aside as the Defendants have justifiable defence to the Plaintiff's claim and their application is made within reasonable time of date of default judgment. The Plaintiff has not exhausted its remedy against the First Defendant.

The law on setting aside default judgment is well settled since *Evans v Bartlam* [1937] AC 473. However, where there is a claim of irregularity, as the 2nd and 3rd Defendants are claiming in this instance, then the summons should specify the nature of the irregularity complaint of.

According to the Defendants' Summons the irregularity arose from the wrong advise given to them by the bailiff and secondly, by the fact that the Plaintiff has failed to pursue the 1st defendant and principal debtor for the breach of contract first and foremost, before turning to them.

There is no denying by the 2nd and 3rd Defendants that the writ had been regularly served on them and in accordance with O 10 r 1 of the High Court Rules. So long as the writ was personally served on the Defendants and acknowledged as they did in this instance, by attaching their signatures at the back of the document, then the conclusion must be that the Defendants were properly served. That they received at the same time gratuitous comments or advice from the bailiff on how they should go about attending to the matters at hand, does not make the process of service voidable or of no legal effect. Both Defendants are well educated and while they be unfamiliar with legal documents or court proceedings, it would be extremely difficult for this court to accept that the Defendants had placed their future behaviour relying solely on the advice given them by the process server. In fact it would have been extremely foolish for anyone under the circumstances to do so, without as much as seeking legal advice. That the 2nd and 3rd Defendants had not done so in this case, is to their own detriment. Ignorance of the law is no defence.

The Defendants further argue that the Plaintiff should proceed against the 1st Defendant in the first instance before seeking damages against the 2nd and 3rd Defendants as guarantors. The law is clear. It is not necessary for the creditor, before proceeding against the guarantors, to demand payment from the first Defendant as the principal debtor, unless it is expressly stipulated for in the contract see: *Re Brown's Estate, Brown v Brown* [1893] 2 Ch 300; *FDB v Moto* (above). In fact the law goes further to say that it is not a requirement that a guarantor be notified of the principal debtor's default. In the absence of stipulation to the contrary, the guarantor becomes liable at the instance of the default.

The Defendants ground for the setting aside of the judgment because of irregularity fails.

I now turn to the second ground advanced by the Defendants namely, that they have good defence. But even before one gets to this stage an Applicant must satisfy the court that the application to set aside was made promptly and without

delay. Default judgment was entered against the 2nd and 3rd Defendants on 19 July 2002. Their summons to set aside was filed on 16 August, 2002, almost 1 month later. Given that their counsel is from outside of Suva, the court is of the view that had not been any delay in the making of the application.

There however remains the question of whether the defence is of sufficient merit as to convince the court to grant the application. To do so, the Defendants need only disclose an arguable or trialable issue. The court is not required to pronounce a judgment on the merits. As the court stated in *Fiji Forests Industries Ltd v Timber Holdings Ltd* 1994 HCA 117 (unreported) per Scott J at 8:

> This of course does not mean that I should attempt to resolve the issue between the parties now, that I should decide whether I think that the proposed defence is likely to be successful. All that I have to decide is whether I am satisfied that the Defendants have put forward a bona fide defence giving rise to trialable issues.

In this case, the 2nd and 3rd Defendants' affidavits, in the court's view, do not disclose sufficient facts to show that they have defence on the merit. They knew, when they signed as guarantors, the legal implication of their action. It could very well be that as it often the case in similar situations, the acceptance to guarantee is derived from motive of friendship for the principal debtor. In such a case, the question of anticipatory breach of the contract giving rise to the liability of the guarantor depends very much on the goodwill of the principal creditor. In this instance the principal debtor has decided to not adhere to the terms of his bond to the detriment, unfortunately, of his guarantors, the 2nd and 3rd Defendants. Even worse, the former has not only breached his contract, he has decamped and gone to reside abroad, leaving the guarantors to the mercy of the creditor. The guarantors have to face up to their obligation under the guarantee. They pay damages to the Plaintiff.

The summons to strike out is hereby dismissed.

I award costs of $200 against each of the Defendants.

Application dismissed.