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THE SUPREME COURT OF FIJI
Civil Jurisdiction
ACTION NO. 961 OF 1983

Between:

FIJI DEVELOPMENT BANK — PLAINTIFF

- and -

NAVITALAI RAQONA — DEFENDANT

Mr. W.D. Morgan for the plaintiff.
Mr. V.K. Kapadia for the defendant.

J U D G M E N T

The plaintiff Bank's claim against the defendant is for the sum of $5,017.03 and interest thereon owing to the Bank by one Peniasi Lewadamu which said sum the defendant guaranteed to pay to the Bank on demand pursuant to the terms of a written Guarantee executed by the defendant on the 26th September, 1977.

The defendant entered An Appearance to the writ and delivered a Defence on the 16th December, 1983.

On the 30th January, 1984, the plaintiff pursuant, to Order 14 rule 1 applied for summary judgment on the grounds that the defendant has no defence to the Bank's claim. The application is supported by an affidavit sworn by Mr.D.S. Naidu the Bank's Assistant Manager - Securities and filed herein.

The defendant has filed an affidavit in reply.

Before this application was dealt with the defendant applied to amend his Defence by raising an alternative defence that the claim is statute barred. Leave was granted to amend the Defence.

The fact that the defendant had filed a Defence before the plaintiff applied for summary judgment is not necessarily fatal to the plaintiff's application if the Court is of the view that there is no defence to the claim.

In McLardy v. Slateum (1890) 2 Q.B. 504 the plaintiff succeeded in obtaining summary judgment under Order 14 one month after a Defence had been delivered.

The Defence was filed on the 14th December, 1983, during the Court's annual vacation period. Time for filing any Reply or taking any further action only started to run as from the end of that period namely the 3rd January, 1984. There was not as much delay in commencing the Order 14 proceedings as would appear. It was certainly within one month of the effective date of filing of the Defence.

The defendant has raised three alleged defences. If any of them raise a question or issue which ought to be tried the plaintiff will not succeed (Paclantic Financing Co. Inc. & Others v. Moscow Narodny Bank Ltd. (1983) 1 W.L.R. 1063.)

If however, there is clearly no merit in the alleged defences and I am satisfied there is no defence to the claim, it is my duty to give judgment for the plaintiff.

The three defences raised are:

1. The defendant says the extent of the liability and the contents of the guarantee were not fully explained and/or understood by him.

There is no dispute that the defendant executed the

Guarantee. His defence is not a plea of non est factum. The document is not one which requires by law to be read over and explained to the Guarantor.

In the House of Lords case Saunders v. Anglia Building Society [1971] A.C. 1004 it was stressed that the defence of non est factum was not lightly to be allowed where a person of full age and capacity had signed a written document embodiing contractual terms.

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.

There is in my view no merit at all in this first defence.

2. The second defence is that the agreement and/or arrangement between the parties was that the plaintiff would first proceed to recover the debt from the said Peniasi Lewadamu. If the Bank was unsuccessful in recovering all the debt then the defendant together with a co-guarantor Ratu Josaia Tavaiqia were to make arrangements for the recovery of the debt owing by the said Peniasi Lewadamu. He alleges that the plaintiff's claim is in breach of that agreement and/or arrangement.

The Guarantee is before the Court.

Nowhere in the Guarantee is there any provision evidencing the alleged agreement or arrangement. On the contrary clause 5 of the Guarantee provides that it shall be a principal obligation and shall not be treated as ancillary or collateral to any other obligation howsoever created or arising.

If the alleged agreement is a collateral or subsequent agreement to the guarantee, it has not been so

pleaded and no basis has been laid for such a defence. No consideration has been shown.

If the alleged agreement or arrangement was a verbal one made before or at the time the guarantee was executed the defendant would not be permitted to lead evidence to establish his defence.

Lord Morris in Bank of Australasia v. Palmer (1897) A.C. 540 at p.545 said :

> "Parol testimony cannot be received to contradict, vary, add to or substract from the terms of a written contract or the terms in which the parties have deliberately agreed to record any part of their contract".

The main term of the guarantee is clear and that is that the guarantor has guaranteed on demand to pay the debt owing by Peniasi Lewadamu.

There is no merit in the second defence.

The third defence which is not raised in the defendant's affidavit but was added to the original Statement of Defence is his allegation that the plaintiff's claim is statute barred. The basis for this claim, although not stated, appears to be the fact that the guarantee is dated the 28th September, 1977, and the writ was filed on the 26th October, 1983, more than 6 years later.

The defendant's liability under the said guarantee did not arise until demand was made on him for payment. That demand was made by written notice addressed to the said Ratu Josaia Tavaiqia and the defendant and dated the 12th May, 1981. Only 2½ years have elapsed since the debtor's liability arose under the guarantee and the Limitations Act has no application.

There has been no mention of the liability of

Ratu Josaia Tavaiqia. He is a co-guarantor and could have been joined in the writ. However, the liability of the two guarantors is both joint and several and no objection can be taken to the Bank deciding to claim the money from the defendant. The defendant can later claim contribution from the said Ratu Josaia Tavaiqia.

There will be judgment for the plaintiff against the defendant for the sum of $5,017.03 and the further sum of $134.56 for interest on the said sum of $5,017.03 from the 29th July, 1983, to the 26th October, 1983, and further interest on the said sum for $5,017.03 from the 26th October, 1983, at the rate of 11% per annum to the date hereof.

The plaintiff is to have the costs of this action.

R Kermode

(R.G. KERMODE)
JUDGE

S U V A,

1ST MAY, 1984.