IN THE SUPREME COURT OF FIJI ISLANDS
AT SUVA

CIVIL APPEAL NO.CBV0008 OF 2008S
(Fiji Court of Appeal No.ABU100 of 2006S)

BETWEEN:

MOBIL OIL (AUSTRALIA) LIMITED

Appellant

AND:

LAISA DIGITAKI

Respondent

Coram: **Hon. Chief Justice Anthony Gates, President of the Supreme Court**
Hon. Justice William Marshall, Justice of the Supreme Court
Hon. Justice William Calanchini, Justice of the Supreme Court

Counsel: **Mr. S. Parshotam and S. Singh for the Appellant**
Mr. G. O'Driscoll for the Respondent

Date of Hearing: **Thursday, 5th August 2010, Suva**

Date of Judgment: **Tuesday, 12th October 2010**

JUDGMENT OF THE COURT

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1. By a writ issued on 12th October 2004 Mobil Oil (Australia) Limited ("Mobil") claimed from (Ms) Laisa Digitaki ("Ms Digitaki") a debt of $357,794.41. The Indorsement of Claim reads :

> *"On 9 March 1999 the Defendant registered the business name Performance Plus (and traded as Performance Plus Service Station) and personally made application to the Plaintiff for credit on 13 May 1999 for the supply of various fuels, goods, premises and services. The Plaintiff approved the Defendant's said Application for Credit on 14 May 1999, and thereafter the Plaintiff made various supplies to the Defendant on credit that eventually totalled the sum of $357,794.41 as at 31 January 2002 ("the Debt"). Under the express or implied terms of credit, which forms part of the said credit application, the Plaintiff is entitled to charge the Defendant simple interest on outstanding and overdue monies at the rate of 6% per month. The Plaintiff has repeatedly made demand*

for payment of the Debt by the Defendant and the Defendant has failed to repay the Debt or interest thereon.

WHEREFORE *the Plaintiff claims against the Defendant the following:*

1. *The Debt.*

2. *Simple interest at the rate of 6% per month on all outstanding and overdue debts.*

3. *Costs of an incidental to this action."*

2. The debt was clarified by paragraph 9 of the Amended Statement of Claim dated 10th August 2005 as follows:

> *"9. As at 31 January 2002, the Defendant and Performance Plus Limited were jointly and severally indebted to the Plaintiff in the sum of $357,794.41 ("debt") for the following:*
>
> *(a) Rent for June 2000 to February 2001 for the leasing of premises at the service station in Walu Bay; and,*
>
> *(b) The supply by the Plaintiff to the Defendant of unleaded petrol, Diesel, Pacifimix 50, Home Kerosene, and other petroleum related products between May to December 2000; and,*
>
> *(c) Various bank charges and fees."*

3. The Plaintiff's first (and only) witness was one Yogesh Chand a well qualified credit controller and manager who had joined Mobil in 2003. But personal knowledge of this alleged debt and the underlying contractual details was one thing Mr Yogesh Chand did not have. His first words were: *"I took over case in 2003. I took information from Kamal Singh."* It appeared that Mr Kamal Singh was now the General Manager Mobil Guam.

4. Mr Yogesh Chand had custody of the files and documents, such as they were, and was the proper person to produce these. But it turned out that apart from an incomplete

ledger relating to deliveries and correspondence in which the payer was addressed by Mobil as "Performance Plus Service Station, P.O. Box 16849, Suva" there was only one other relevant document.

5. That document is an application for credit and it is signed by Ms Digitaki and dated 13th May 1999. Above her signature there is a box in the pro forma which says "PRINT NAME". Against this it appears she entered "LAISA DIGITAKI". Opposite this on the right hand side there is the instruction "TITLE" against which it appears she has written "MANAGING DIRECTOR". All this is in the fourth and last box on the part of this one page agreement which is to be filled in by the applicant for credit.

6. At the top of the page referring to the box immediately below it are the words

"I/We hereby request that a credit account be established in my/own name with Mobil Oil Australia Limited in accordance with your terms and conditions of trade."

In the box to which this refers the first item is "FULL NAME OF APPLICANT" against which it appears Ms Digitaki has written "LAISA DIGITAKI". However there a number of inconsistencies. One is that she entered against "TRADING NAME" the words "PERFORMANCE PLUS SERVICE STATION LTD." She also ticked "PRIVATE COMPANY" when the pro forma at box 1 said "PLEASE INDICATE TYPE OF BUSINESS". We shall return to this APPLICATION FOR CREDIT and its legal implications. Suffice it to say for the moment that a limited company called PERFORMANCE PLUS LIMITED was not created by the Registrar of Companies until 25th June 1999.

7. The trial in the High Court took place on 28th and 29th August 2006 before Mr Justice Coventry who gave judgment on 7th September 2008. He deals with the hearsay evidence of Kamal Singh in paragraphs 9 and 35 of his judgment.

> *"[9] Yogesh Chand accepts that he has no direct knowledge or involvement with these transactions. He joined Mobil after the events in question. He*

states he is knowledgeable of the documents in question and has had conversations with Kamal Singh. The plaintiffs accept that what Mr Chand says that Kamal Singh stated is necessarily hearsay, and say it is admissible under the Civil Evidence Act 2002 but that I must make the assessments as to weight which are required by section 6 of that Act.

[35] I have also made an assessment of the evidence of Yogesh Chand. I found him to be truthful and reliable. He did not profess to go beyond the face of the documents he had examined, his knowledge of Mobil, since joining in 2003 and his conversations with Kamal Singh. He did not purport in any way to claim first hand knowledge of what Mr Singh had told him and was at pains to point out that he had asked Mr Singh certain questions and relayed what he said were in the answers. Having taken regard of the Civil Evidence Act and in particular section 6, I accept those responses."

8. Mr Justice Coventry refused to speculate on the unusual aspects of what might have been expected to be a legally organized commercial dealing. This Court shows similar restraint.

9. What Mr Justice Coventry found was that he accepted Mobil's evidence and their figures and gave money judgment to Mobil in the sums of $323420.41 for fuel and $34373 for rental. Justice Coventry dismissed Ms Digitaki's counter claim for $20,000 per month as a consultant. In our view he was entitled to take into account not only the lack of demands from Ms Digitaki for the same but also the fact that before the litigation against her this consultancy and demand for payment for it had never been raised by her. In addition the trial judge had the advantage of observing demeanor under cross-examination and this court does not interfere with his conclusions on the counter claim.

10. An appeal to the court of appeal on a civil claim is by way of rehearing. The characteristics of different classes of appeals were explained in the High Court of Australia by Dawson J in **Harris v. Caladine** (1991) 172 CLR 84 where he said at page 123:

> *"A hearing de novo may be contrasted with an appeal strict sensu and an appeal by way of rehearing. In an appeal strict sensu the question is whether, upon the material before the tribunal below, the conclusion which was reached was correct. An appeal by way of rehearing involves the rehearing of the matter as at the date of the appeal, but upon the evidence called before the tribunal below, subject to a power to receive further evidence. On an appeal by way of rehearing the rights of the parties must be determined by reference to the circumstances, including the law, as they exist at the time of the rehearing. But an appeal by way of rehearing does not call for a fresh hearing as does a hearing de novo; the appeal court does not hear the witnesses again: see Builders Licensing Board v. Sperway Constructions (Syd.) Pty Ltd (1976) 135 C.L.R. 616 at pp 619-620; Quilter v. Mapleson (1882) 9 Q.B.D. 672, at p.676; and Victorian Stevedoring and General Contracting Co. Pty Ltd and Meakes v. Dignan (1931) 46 C.L.R. 73 at pp107-111."*

11. Ms Digitaki in her Notice of Appeal which put the hearsay decision of Mr Justice Coventry in respect of Kamal Singh at the centre of its focus did ask for a decision by a way of rehearing from the Court of Appeal "and find that (Ms Digitaki) is not liable to (Mobil)."

12. Despite the invitation, the Court of Appeal explained at considerable length the authorities upon the relatively recent statutory changes made in most common law jurisdictions in respect of hearsay evidence in civil cases. Mr Justice of Appeal Byrne, as he then was, and Mr Justice of Appeal Hickie heard the appeal on 17th April 2008 and handed down judgment on 2nd May 2008. They sent the case back to the High Court for retrial.

13. The next event was an application by Mobil for Leave to Appeal to the Supreme Court heard by the same appeal judges on 28th July 2008 with a decision handed down on 30th July 2008.

14. At paragraph 16 of this Decision their Lordships said :

> *"The question we certify to be of significant public importance is as follows :*

WHETHER on the proper construction of Section 6 of the Civil Evidence Act 2002, the Trial Judge must record all considerations relevant to weighing of hearsay evidence or whether it is sufficient for the Trial judge to have the considerations in mind when assessing the weight that should be given to the evidence but to state what those considerations were."

15. While this court will answer the points raised it must not be thought that the Supreme Court is restricted to answering certified question. The position is that leave to appeal is a threshold issue only and once the threshold has been crossed it is open to the Supreme Court to deal with the case in a number of ways and to choose between a number of alternatives. If it is appropriate to do so the Supreme Court in a civil case may deal with all the issues and make orders. That is because it is an appeal by way of rehearing.

16. In the view of this Court it is open to this Court applying the law it will explain below to assess the evidence of Kamal Singh and decide whether little or no weight can be given to it. If it falls after assessment to be treated as admissible but of no or little weight, this Court can then proceed to consider the other evidence in order to resolve the issues. This case is one where it is appropriate to resolve all issues. In major part all Mr Chand for Mobil did was to produce documents which were lawfully within his custody. We also agree with Mr Justice Coventry for the reasons given by him, that Ms Digitaki's evidence on the counter claim can be ignored. We are then left with the documents and the admissions.

Hearsay in Civil Proceedings since the 1938 Evidence Act in the United Kingdom

17. Up until the 1938 Evidence Act in the United Kingdom which related only to civil proceeding there was a strict rule against the admissibility of hearsay evidence which was subject to a number of well defined exceptions. Section 1 of the 1938 Act provided that hearsay statements must be admitted as evidence in five situations. The most important of these were:

    (1) when the maker is dead

(2) when the maker is unfit to attend as a witness by reason of his bodily or mental condition

(3) when the maker is abroad and it is not reasonably practicable to secure his attendance

18. However if the statement was made by a person interested at a time when proceedings were pending or anticipated involving a dispute as to any fact which the statement might tend to establish, it was not admissible under the 1938 Act.

19. Section 2(1) of the 1938 Act dealt with the weight to be attached to now admissible hearsay statements of evidence.

> *"2. – (1) In estimating the weight, if any, to be attached to a statement rendered admissible as evidence by this Act, regard shall be had to all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement, and in particular to the question whether or not the statement was made contemporaneously with the occurrence or existence of the facts stated, and to the question whether or not the maker of the statement had any incentive to conceal or misrepresent facts."*

20. Since 1938, hearsay reform has never been about casting aside the real dangers of hearsay. Rather it is about defining what hearsay must be kept out and not let in. The 1968 Civil Evidence Act in England maintained the same strict criteria with regard to weight and section 6(3)(a) thereof is in the same terms as section 2(1) of the 1938 Act.

21. What changed in 1968 was that the category of admissible statements was much widened. Now the five cases in Section 1 of the 1938 Act are situations in which the maker of the statement cannot be required to attend. For all others whose evidence is hearsay whether oral or in documents it is admissible if relevant. But notice and the requisite particulars must be given to all other parties and those to whom notice has been given must have elected not to require the presence at trial of the maker of the statement. The 1968 Act also regulated the admission of hearsay contained in records

and provided that statements in documents proved themselves. Although there were notices and counter notices in respect of certain documents the court had discretion to admit the documents and evidence therein as admissible evidence. In 1968 the interested party rule against the admission of statements of interested parties was repealed.

22. The situation under the 1968 Act was that there was limited admissibility, a plethora of safeguards so that no party could be taken by surprise and an insistence, as in the 1938 Act, that when hearsay was admitted the Court's duty was to consider whether it was to be given any weight. From there we fast forward in the United Kingdom to 1993 where the Law Commission in its "Report on the Hearsay Rule in Civil Proceedings" (Law Com. No.276) recommended sweeping changes on the basis that all hearsay was admissible and the judges should be trusted to apply the rules. This was to be subject to a restatement of the earlier provisions in 1938 and 1968 requiring little or no weight to be given upon the evaluation of listed statutory criteria. In addition there is a requirement that a hearsay notice be served. But a hearsay statement at trial is still admissible even if no notice is served. The amending Act in the United Kingdom is the Civil Evidence Act 1995.

23. The trend in the United Kingdom in the 1990s was towards greater case management and control by judges. It was also aimed at simplification of process and reducing costs. Already in order to avoid surprise or ambush at trials exchange of full written statements of witnesses who would give oral evidence had to be ordered at the stage of Summons for Directions. What was likely to happen was a general change following Lord Woolf's report of the way in which civil litigation was to be conducted. The resulting Civil Procedure Rules were introduced in 1998. The last Supreme Court Practice, the White Book, in the traditional format going back in one form or another to 1873 and the Judicature Acts of that year is the 1999 edition.

24. The background in the United Kingdom is in strict contrast to the situation in Fiji in the 1990s where the Rules of the High Court remained only partially developed. For a further statement of the United Kingdom situation we refer to the explanation of Baroness Hale of Richmond for the House of Lords in the case **Polanski v. Conde Nast Publications Limited** [2005] 1WLR 637 at pages 653 to 655.

25. The Fiji Evidence Act 2002 was enacted following the English Civil Evidence Act 1995.

26. In other common law jurisdictions where the 1995 Act was considered a useful reform, amendment was made to the United Kingdom framework to allow the Court to exclude hearsay evidence if to do so is not prejudicial to the interests of justice.

27. The use of this is illustrated by a lower court decision in Hong Kong. It is **Amrol v. Rivera** [2008] HKEC 494. Deputy District Judge Ko was faced with the serving of a hearsay notice by the Plaintiff served two days before trial. The witness Ms Skellham was a United States resident and an important witness with regard to discussions with the Defendant with whose evidence she was in conflict.

28. Deputy Judge Ko said in paragraphs 15, 16 and 17 of his judgment:

> *"Both Ms Skellham and the Defendant are referring to the same conversation . It is not practicable to assess the Defendant's denial without reference to Ms Skellham's evidence. The Defendant will be prejudiced if she were deprived of an opportunity to cross-examine Ms Skellham. Given its controversial character, I am satisfied that the exclusion of Ms Skellham's statement is not prejudicial to the interests of justice. I therefore excluded Ms Skellham's statement …*
> *… In any event I would have given no weight to Ms Skellham's statement for the reasons stated above even if I had ruled it in."*

29. This is in line with Baroness Hale of Richmond is **Polanski** (supra) at page 653 paragraph 74.

"The substantive law following the 1995 Act, therefore, is that relevant hearsay is always admissible; there are various procedural safeguards aimed at reducing the prejudice caused to an opposing party if he is n ot able to cross-examine the maker of the statement; but the principal safeguard is the reduced – even to vanishing – weight to be given to a statement which has not been made in court and subject to cross-examination in the usual way. The court is to be trusted to give the statement such weight as it is worth in all the circumstances of the case."

30. The next question is whether or not the judge's discretion on giving weight can be supervised on appeal or on judicial review. In the English case of **R v. Marylebone Magistrates Court ex parte Andrew Clingham** (11th January 2001) (2001) WL, 14903 the Divisional Court was considering hearsay in "anti social behavior orders" which is a recently enacted statutory civil proceeding. In such proceedings the evidence is hearsay. Said Lord Schiemann at paragraph 17 in respect of such hearsay evidence :

"If its weight is slight or it is not probative the judge can say so. If he comes to an unlawful conclusion his decision can be appealed."

Civil Evidence Act 2002

31. In these paragraphs this Court acknowledges that it is using what was well set out in the judgment of the Court of Appeal.

32. The Civil Evidence Act 2002 is divided into seven parts. Part 2 (Sections 3-9) deals with hearsay evidence. Section 4 specifies what notice is required when a party is to adduce hearsay evidence in civil proceedings. The important sections here are sections 4(1) and (4) as follows :

"4(1) A party proposing to adduce hearsay evidence in civil proceedings must, subject to the following provisions of this section, give to the other party or parties to the proceedings -

(a) a notice of that fact; and

(b) on request, the particulars of or relating to the evidence, as is reasonable and practicable in the circumstances for the purpose of enabling the other party or parties to deal with any matters arising from its being hearsay.

…

(4) A failure to comply with subsection (1) or rules made under subsection (2)(b) does not affect the admissibility of the evidence but may be taken into account by the court –

(a) in considering the exercise of its powers with respect to the course of proceedings and costs; and

(b) as a matter adversely affecting the weight to be given to the evidence in accordance with section 6."

33. Thus, even if the notice provisions of Section 4 are not complied with, the evidence is still admissible; however, the "considerations relevant to weighing of hearsay evidence" as outlined in Section 6 then apply. It reads :

*"6. In estimating any weight to be given to hearsay evidence in civil proceedings, the court **must** have regard to any circumstances from which any inference can reasonably be drawn as to the reliability or otherwise of the evidence, and in particular to the following :*

(a) whether it would have been reasonable and practicable for the party by whom the evidence was adduced to have produced the maker of the original statement as a witness ;
(b) whether the original statement was made contemporaneously with the occurrence or existence of the matters stated ;
(c) whether the evidence involves multiple hearsay ;
(d) whether any person involved had any motive to conceal or misrepresent matters ;
(e) whether the original statement was an edited account, or was made in collaboration with another or for a particular purpose ;
(f) whether the circumstances in which the evidence is adduced as hearsay are such as to suggest an attempt to prevent proper evaluation of its weight."

34. It is clear that our domestic section 6 of the Evidence Act 2002 Cap 44 is the equivalent of section 2(1) of the Evidence Act 1938. This is the key section which serves to keep hearsay evidence out of finding the facts in situations when the policy for the hearsay

rule at common law must be the dominant influence in the particular case. At the heart of most civil disputes is a clash of evidence as to what happened or what was said by one person to another. The principal means of resolving such disputes is the giving of direct evidence by the protagonists so that demeanor can be observed and the witness exposed to cross examination by counsel for the other parties.

35. At the same time it serves to emphasise that the history since 1938 is a history where the evidence at the edge of the factual framework of disputes should be agreed or made the subject of statements. Where every fact at the edge must be proved by direct evidence in court the cost of bringing non controversial witnesses to court becomes prohibitive and the proceedings become longer and with disproportionate costs.

36. The elements of section 2(1) of the Evidence Act 1938 contained in section 6 of the Evidence Act 2002 are firstly in the instruction that the court must have regard to all factors going to reliability or otherwise. Secondly they are in particular (b) concerning whether the hearsay statement is contemporaneous to the events described. Thirdly it is in particular (d) about having regard to motives or incentives that a person may have to conceal or misrepresent matters.

37. Particular (a) requires assessment as to whether it would have been reasonable and practicable for the maker of the statement to attend and give evidence. Particular (f) requires an assessment as to whether the use of hearsay is a device to prevent proper evaluation of its weight. In our opinion (a) and (f) are concerned with the same factors. Saying positively that a witness whose evidence is controversial should attend is not much removed from saying negatively that where a witness's evidence is controversial but vulnerable to cross examination they should not be able to avoid being cross examined.

38. Particular (c) goes to the increased unreliability where there is secondary or multiple hearsay. Particular (e) is new in the 1995 Evidence Act and again relates to motives to

conceal or misrepresent matters. Particular (f) requires the judge to be on guard for the signs of concealment on misrepresentation in action.

39. In the case of **English Exporters v. Eldonwall** Ltd 1973 1 Ch 415 Mr Justice Megarry said at page 421G:

> *"a transparently honest and careful witness cannot make information reliable if, instead of speaking of what he has seen and heard for himself he is merely retailing what others have told him. The other party to the litigation is entitled to have a witness whom he can cross examine on oath as to the reliability of the facts deposed to."*

This observation resonates with the court in respect of Mr Chand of Mobil's evidence. He may have been a transparent honest and careful witness. But without cross examination of Mr Kamal Singh who was an interested witness for Mobil who may have had motives to conceal or misrepresent evidence and to avoid being cross-examined, the hearsay evidence of Mr Chand was on the view of this court worthless.

40. The inadmissibility of hearsay statements of interested parties which are rightly described as statements *ante litem motam* was created in 1938 only to be removed in 1968. However if a hearsay statement is that of an interested party it is likely that the attempt to bring it in as hearsay will usually be an indication of unreliability. It will also be usually seen as an attempt to avoid cross examination.

41. Whilst in 1938, when witnesses were abroad or overseas it was difficult and expensive to communicate and to travel. In 2010 all this has changed and places are inter connected by relatively inexpensive air transport networks. In addition video link allows evidence within the first hand knowledge and experience of the witness to be given directly to the court of trial and for cross examination to take place. It is not our view that peripheral witnesses from abroad whose evidence should be capable of being agreed should travel or give evidence by video link. The Evidence Act 2002 is obviously a useful innovation in such cases. But where the witness is interested or controversial

giving contested testimony at the heart of the dispute it seem to us that if he is not present or giving evidence by video link there must arise serious questions as to the weight to be accorded to his evidence.

42. In Fiji in a judgment or ruling dated 26th March 2004 in **Wati v. Kumar and Island Buses Limited** [2004] FJHC 358, Mr Justice Gerard Winter had an application for the Plaintiff's doctor to give hearsay evidence in the form of a statement. It was a personal injury case of modest proportions. Justice Winter allowed the Plaintiff leave to adduce the report of her doctor.

43. At page 6 Mr Justice Winter said :

> *"Although wide reaching in its implications the revision of the rules of evidence provided by the Civil Evidence Act of 2002 must be welcomed and embraced. Economies of scale and proportionality particularly in countries like Fiji with a limited ability to allocate scarce Court resources must inevitably lead to a design of systems that encourage efficiency and even handedness in civil litigation. Constructing and arguing cases by ambush and winning them by virtue of economic power alone should no longer be acceptable."*

44. This court certainly agrees that trial by ambush should become a thing of the past. However in the present case, with no service of Kamal Singh's evidence the 2002 Evidence Act became an engine for surprise and ambush.

45. In the view of the Court the Evidence Act 2002 should be amended either to make it inadmissible if a hearsay notice if not served timeously, or to allow, as happens in Hong Kong, a trial judge to have power to exclude hearsay evidence. In addition exchange of witness statements generally as is now mostly the norm in common law countries would all but eliminate surprise and ambush from civil litigation in Fiji.

46. We prefer the guidance given above generally to that of Mr Justice Winter. At page 5 Justice Winter said :

> *"Where the reason for the witnesses absence is that he is unavailable by being overseas however it is likely that a judge would give "full weight" to the evidence."*

This Court does not agree. The position is that judges should be very wary where a key or controversial witness is said to be abroad or overseas.

47. This Court now answers the question certified by the Court of Appeal to be of significant public importance. We have set out this at paragraph 14 above. The answer is that what the trial judge should do will vary with the circumstances.
If it is uncontroversial framework of fact evidence the trial judge should admit it and give it weight. He should not give reasons because in the context the reasons for his decision will be obvious.

48. Where on the other hand the hearsay evidence is at the centre of the dispute and is obviously controversial the trial judge will not require elaborate reasoning to dismiss the evidence as having little or no weight. However if in such a case, as happened here with Mr Justice Coventry, he gives full or substantial weight to the hearsay, he would be well advised to try to justify the decision by the terms of the statutory criteria as applied to the facts of the case. Even then the justification may tend to confirm that no weight should have been given to the hearsay evidence.

49. In our view no weight at all should have been given to Kamal Singh's evidence. The Court at first instance and on appeal should have treated it as if it had never been given. Mr Yogesh Chand on the other hand produces the documents and records pertaining to what seems to have been an oral contract. His evidence in so doing is admissible and is important evidence relevant to the issues in the case.

Did Ms Digitaki contract on behalf of herself or on behalf of a private company to be formed some weeks later?

50. This claim started with a letter from Parshotam and Co. on behalf of Mobil to Ms Digitaki dated 24th September 2004, which states "Our client (Mobil) considers you to be jointly and severally liable with Performance Plus Limited."
The reason for including reference to the company liability may lie in the fact that Performance Plus Limited had been pursued for the debt and liquidated at the instance of Mobil. There had been no funds available to pay its debts.

51. The business name Performance Plus was registered on 17th March 1999. However that is no more than personal liability of Ms Digitaki on the basis that an individual can register a business name and can use it for trading purposes.

52. As mentioned above a private company Performance Plus Limited was incorporated as late as 25th June 1999.

53. This Court assumes that there was an oral contract between Mobil and Ms Digitaki. But there is no evidence of any terms or conditions of such oral contract. However it was to supply product to Ms Digitaki trading in her own name or as Performance Plus. But no product was supplied until an application for credit was made. This brings us back to the form "Application for Credit" dated 13th May 1999 discussed above at paragraphs 5 and 6.

54. There is no escape from the fact that the applicant who "hereby requested that a Credit account be established" was "LAISA DIGITAKI" and that in Box D its is Ms Digitaki who signs. That being so there can be no doubt that Ms Digitaki is personally liable under the oral contract supplemented by the "Application for Credit" of 13th May 1999.

55. Suppose Performance Plus Limited had been the applicant and had been the signatory. Since that company did not exist until 29th June 1999 it would be a pre incorporation

contract. In law the person signing as agent for a company not yet in existence would have been personally liable under such a contract. So if that had been the case which it was not, it would have made no difference to Ms Digitaki's personal liability.

56. The only company mentioned in the application for credit was "Performance Plus Service Station Limited." Such a company never existed. That takes the matter no further.

57. It seems clear that Ms Digitaki wished to trade with the protection of limited liability so that if the business ran up debts, her personal property and assets would not become liable to be sold to pay debts. To achieve this when she had no company in existence would have required legal advice and an agreement with Mobil that the temporary personal liability would, after her company was incorporated be replaced by a new agreement whereby her company became solely liable to pay for product and at that point her personal liability would cease.

58. There is no evidence of any later agreement replacing the application for credit of 13th May 1999. It is unlikely that Mobil having agreed personal liability would take the commercial risk of later substituting a shell company as the sole debtor. They might however have agreed that in addition to personal liability they would accept Ms Digitaki and a company as debtors who were jointly and severally liable. That would not help Ms Digitaki if the company had no capital. The only slight surprise in all this is that for reasons unknown Mobil's position was that Performance Plus Limited and Ms Digitaki were jointly and severally liable.

59. In **Kelner v. Baxter and Others** (1866-69) 2 L.R.C.P it was intended that Mr Kelner's hotel business would be bought by a limited company. Before the company was formed Mr Kelner agreed with the promoters as agents for the proposed company that he would sell and they would purchase 900 pounds of extra stock. After the collapse of the

company Mr Kelner sued the buyers personally. The Court of Common Pleas agreed that the buyers were personally liable. Chief Justice Erle explained at page 183 :

> *"I agree that if the Gravesend Royal Alexandra Hotel Company had been an existing company at this time, the persons who signed the agreement would have signed as agents of the company. But, as there was no company in existence at the time, the agreement would be wholly inoperative unless it were held to be binding on the defendants personally. The cases referred to in the course of the argument fully bear out the proposition that, where a contract is signed by one who professes to be signing "as agent", but who has no principal existing at the time, and the contract would be altogether inoperative unless binding upon the person who signed it, he is bound thereby : and a stranger cannot by a subsequent ratification relieve him from that responsibility. When the company came afterwards into existence it was a totally new creature, having rights and obligations from that time, but no rights or obligations by reason of anything which might have been done before."*

60. This Court concludes that Ms Digitaki was personally liable for the supply of product from 14th May 1999. That is the result of the only possible construction to be given to the document signed by Ms Digitaki on 13th May, 1999. There is no need to go further and apply **Kelner v. Baxter**. But if that had applied it would have had the same result.

61. This Court notes that all the material facts were admitted by a minute of pre-trial conference dated 8th May 2006. These included at items 10 to 12 :

> *"10. The Plaintiff supplied to the Defendant various fuels between May 1999 and 22 February 2001.*
>
> *11. The Plaintiff supplied to the Defendant the premises and service station at Walu Bay between May 1999 and 22 February 2001.*
>
> *12. The Defendant returned and delivered up possession of the premises and service station at Walu Bay to the Plaintiff on 22 February 2001."*

At 1 and 2 the principal issues related to whether Ms Digitaki was personally liable for the goods and fuels supplied and for the rent of the premises and service station.

62. As to the allegation that Mobil did not give credit for the stock calculated at $29690.60 taken over from Ms Digitaki and Performance Plus at Walu Bay on 23rd February 2001, it is clear from a statement dated 31st January 2002 that on 26th April 2001 Mobil gave credit for this in the sum of $30917.75.

63. In the result Ms Digitaki is liable for $357,794.41 as claimed by Mobil.

64. Mr Justice Coventry made no order for costs and the Court of Appeal ordered that each party pay its own costs of appeal. Mobil were ordered to pay both parties costs of the application for Leave to Appeal to the Supreme Court.

65. If this history seems generous to Ms Digitaki its origin lies in the lower Courts' adverse view of the way in which Mobil relied without warning or notice on the oral hearsay evidence of Kamal Singh. This in turn caused the appeal and then Mobil's unsuccessful attempt in this Court to persuade us that the trial judge's view of the hearsay in this case was to be preferred to that of the Court of Appeal.

66. In our view Mobil should pay the costs of Ms Digitaki in respect of the appeal hearing in the Court of Appeal and in respect of the application for special leave granted by the Court of Appeal on 30th July 2008. At first instance and in the Supreme Court each party should bear its own costs.

67. The orders of this Court, replacing earlier orders in the Courts below are :-

(1) Judgment in the sum of $357,794.41 to be paid by the Respondent to the applicant.

(2) Each party bear its own costs in the Supreme Court and in respect of all issues in the High Court.

(3) The appellant pay the Respondents costs of the proceedings of the Court of Appeal on appeal from the High Court and in respect of the application to the Court of Appeal for leave to appeal to the Supreme Court.

(4) The Respondent to pay interest on the judgment sum from 30th May 2001 until 12th October 2010 (being the date of this order) at the rate of 4 percent.

Hon. Chief Justice Anthony Gates
President of the Supreme Court

Hon. Justice William Marshall
Justice of the Supreme Court

Hon. Justice William Calanchini
Justice of the Supreme Court