IN THE COURT OF APPEAL
OF SOLOMON ISLANDS

Nature of Jurisdiction:	Appeal from a judgment of the High Court of Solomon Islands (Chetwynd J)
Court File Number:	Civil Appeal Case No: 05 of 2010 (on appeal from High Court Civil Case No: 377 of 2009)
Date of Hearing:	6th October 2010
Date of Reasons:	8 October 2010
The Court:	Auld (President) Adams JA Hansen JA
Parties:	**Henry Rudolf Dora (Appellant)** **v** **Brook Walalau (Respondent)**
Advocates:	Appellant: W. Rano Respondent: D Tigulu

Result:

1. **The appeal is allowed. The default judgment is set aside.**
2. **The Order for costs in favour of the plaintiff in the court below is affirmed.**
3. **Cost of the appeal to be costs in the cause of the substantive proceeding.**
4. **The plaintiff is to file an amended statement of claim within 14 days.**
5. **The defendant is to file a statement of defence 14 days thereafter.**
6. **Any reply to be filed 7 days thereafter.**
7. **Mutual disclosure 14 days after the close of pleadings.**

Reasons

At the end of the appeal we made orders as set out above. We now give our reasons.

[1] This was an appeal against the ruling of Chetwynd J dated 14th April 2010, when he refused to set aside a default judgement entered on the 12th of November 2009.

Background

[2] The respondent issued proceedings on the 1st of October 2009. In them, he alleged a contract between himself, representing his family tribe, and the Respondent for the hire of a chain saw. The alleged rate of hire was $250 per day for 5 days a week for all of 2007, 2008 and January to September of 2009. It is further alleged that the chain saw is still hired by the Defendant.
The outstanding hire charges are said to be $153,500 with only one payment of $1,500 received on the 3rd of July 2009.

[3] Service was affected on the 2nd of October 2009. A response to the claim was filed within time on the 16th of October 2009. No statement of defence was filed at that time. As already noted, default judgment was entered the 12th of November 2009.

[4] The application to set aside, pursuant to R 9.52, was filed on the 16th of November with the supporting documentation. R 9.54 reads:

The court may set aside a default judgment if it is satisfied that:

(a) the defendant has shown reasonable cause for the delay in defending the claim; and

(b) the defendant has a meritorious defence, either about his or her liability for the claim or about the amount of the claim; and

(c) there is no substantial prejudice to another party in setting aside the judgment that could not be rectified by a costs order.

The Ruling

[5] Chetwynd J found that R 5.37 dealing with service was clear. Once a claim is served any response must be filed within 14 days, but the defendant has the option of filing a statement of defence within that period. If that course is adopted a response need not be filed. However, regardless of a response being filed within 14 days, the defendant has 28 days from the date of service to file this statement of defence.

[6] Chetwynd J identified how time is computed but nothing turns on this for present purposes. He rejected the interpretation placed on the rules by the Appellant, namely, that if a response was filed a defendant has 28 days from the date of such filing to file a statement of defence. He also considered the delay to be unexplained and unreasonable and the purported defence to be without merit and based on a purported arrangement that he described as nebulous. He seems not to have dealt with any question of prejudice to the parties.

Grounds of Appeal

[7] The appellant advanced the following grounds:

(i) The delay was excusable.

(ii) There was merit in the draft defence.

(iii) No evidence was presented to the Judge that the notice for the default application was served.

(iv) The Judge wrongly exercised his discretion as he failed to consider whether the Respondent would be prejudiced if the judgment was set aside.

Alternatively it was said that, by awarding costs to the Respondent any prejudice would be minimized.

Submissions

[8] Mr Rano in the hearing conceded he could not advance ground (iii). In his submissions he referred to a number of authorities which we find it unnecessary to recite.

[9]Mr Tigulu complained that there was no affidavit from the appellant explaining the delay. The rule does not require such an affidavit. Nevertheless in this case the delay was clearly occasioned by Mr Rano's articled clerk and it was appropriate he file an affidavit explaining it. More fundamentally, despite no reference in the rule, we consider in the future that normally applications to set aside a default notice should be accompanied by, or on behalf of, an affidavit by the defendant verifying the draft defence, setting out the factual basis for such defence and exhibiting relevant documents.

[10] Mr Tigulu accepted he could identify no particular prejudice to the defendant. He also accepted he made no submissions to the judge below as to the merits of the defence sought to be advanced by the appellant

Discussion

[11] The principles applying to applications to set aside a default judgment are clearly set out in R 9.54 cited at [4]. Some of the authorities cited use the term "triable defence" as interchangeable with "meritorious defence" in the rule. We would put it rather more simply. What a defendant needs to show is that if the facts alleged are proved he has a reasonably arguable defence.

[12] We would add this. In all cases such as this, involving a discretionary order that effectively denies a hearing on the merits, the judge needs to stand back after considering all other matters and consider the overall interests of justice. (i.e. the same consideration as in a strike out application based on delay or abuse of process).

[13] In this case we have no doubt that Chetwynd J's interpretation of the rules is correct. That means the defendant had 28 days in which to file a

statement of defence, which meant it should have been filed by the 30th of October, 2009.

[14] However, the affidavit of Mr Rano's articled clerk Mr Pehu shows he was genuinely confused notwithstanding the clarity of the rules. This is evidenced by the fact that attempts were made to file a defence on the 13th of November. While he was clearly mistaken, this evidence shows the genuineness of the error. In any event the delay involved, in comparison to many similar cases, is relatively insignificant.

[15] The application to set aside pursuant to the rules was filed very promptly. The draft statement of defence clearly established that there is a factual dispute as to whether or not these parties entered into a contract for the hire of a chainsaw.

[16] The statement of claim alleges a hire agreement entered into by the plaintiff and the defendant. It is silent as to when, and where, this agreement was entered into. The only term mentioned is the amount of hire. It is simply alleged to be open-ended. It also advances what appears to be a commercially unreal transaction as the hire sought is many times the value of a chainsaw.

[17] The appellant denies there was any such agreement. His understanding was the chainsaw was the property of the respondent and there was an agreement that he would borrow it, use it and return it. He said there was a further understanding that the he would give the respondent a reward or token of appreciation for the use of the chainsaw. This could include the payment of spare parts or cash. Mr Rano said all the respondent provided was simply a chain saw motor and the appellant had to add a bar and chain. If so it would accord with the type of arrangement that the appellant alleges. Indeed Mr Tigulu accepted that such an arrangement was in accord with Solomon Islands practice.

[18] The appellant denies the $1,500 paid in July 2009 was in accord with any terms of an agreement. He said the payment was because a family member had passed away and it was a form of assistance. He says he refused

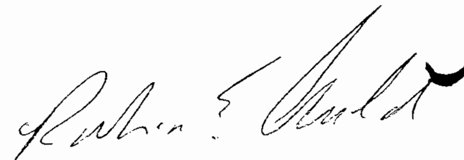
to respond to the Respondent's letters of demand because they were not part of any agreement.

[19] Clearly, there is a fundamental dispute between the appellant and the respondent as to whether or not there was any hire agreement, the terms of any such agreement and the party's obligations under it. (Put another way there is a reasonably arguable defence). We note that the appellant fails to identify where the chainsaw is presently but denies its possession. There was very short delay and no prejudice has been identified by the respondent. There is obvious substantial prejudice to the appellant in that has been prevented from having his claim heard on the merits.

[20] Finally, the overall justice of the situation entitles the appellant to have the claim heard and determined on its merits.

[21] The default judgement of 12th November 2009 is set aside. The costs awarded in the court below to the respondent are affirmed. The cost of this application will be costs in the cause of the substantive hearing. We make the following timetable order:

(a) The amended statement of claim is to be filed within 14 days.
(b) The statement of defence is to be filed 14 days thereafter.
(c) Any reply to be filed 7 days thereafter.
(d) Mutual disclosure 14 days after the close of pleadings.



Sir Robin Auld P