

HELI SOLOMONS LTD -v- EAGON FOREST DEV.COMPANY LTD

High Court of Solomon Islands

(Palmer J.)

Civil Case No. 308 of 1992

Hearing: 11 December 1992

Judgment: 21 December 1992

J.C. Corrin for the Plaintiff

A.H. Nori for the Defendant

PALMER J. This is an application by the Defendant to set aside the default judgment entered against it on the 11 November 1992, and for leave to issue a third party notice against Paul Talovae of Moli, Choiseul Province.

The sequence of events is as follows.

On the 12 October a Writ of Summons with a statement of claim attached to the writ was filed at the High Court Registry.

An affidavit of service was filed on the 10th October 1992 in which it was stated that service on the defendant was effected on the 13 October 1992 by service at the defendant's Solicitor's Office, Mr. Andrew Nori.

On the 21st October 1992 a memorandum of appearance was filed.

On the 11 November 1992 a judgment in default was issued by the court.

On the 25 November 1992 a summons to set aside judgment was filed and the application was heard on the 11th December 1992.

In support of the summons the affidavit of In Sup Shin was filed on the 3 December as well. The matters for the court to consider when dealing with an application to set aside a default judgment have been partly stated in Ward's C.J. judgment in the case of Kayuken Pacific Limited v Harper. *SILR 1987, 54 at page 58* where he stated:

"when making application to set aside, there must be an affidavit of merit showing that defendant has a prima facie defence to the action. It is not necessary for the Court to consider at that stage whether the defence would be successful but simple whether a triable issue is disclosed."

Further he states,

"Where, however, the court finds there is a viable defence it is clear 0.29 and rule 12 gives it an unfettered discretion to set aside any default judgment."

The first question I ask therefore is whether there is any viable defence, a triable issue. The affidavit of In Sup Shin is the affidavit of merit. It sets out at paragraph 4 that after due investigation with the Moli Office it was ascertained that the charter in question was ordered by Mr Paul Tolavae a Choiseulese who was once the administration officer at Moli. This person had resigned in 1991 and at the time of the charter he had no authority to organise and arrange a charter on behalf of the defendant.

In paragraph 5 of the same affidavit a person by the name of Samuel Vulekana had written a letter of guarantee requesting the Defendant to pay the charter costs without first discussing the matter with the management of the Defendant. A copy of that letter was attached as annexure "SVI" and read as follows:

"I Samuel Vulekana of Kozato tribe would be very much appreciated if the Company could give payment to Heli Solomons Airservice the outstanding sum of \$12,941.00. I guarantee that the repayment of this amount shall be deducted from Kozato land or Solakolo land when all the disputes are straighten out.

Please could you save us from this great burden."

It was signed by Samuel Vulekana and dated 22 September 1992.

In the affidavit of Raybon Galo he denied ever making any charter arrangement or bookings with the Plaintiff.

This is in contrast to the affidavit of Elma Nesiko for the Plaintiff that the person she dealt with over the phone was Raybon Galo.

I am satisfied there is a viable defence.

The next step is to look at the exercise of the discretion.

Again Ward C.J sets out in Harper's case the considerations that the court should attend to. At page 58, he states;

"They can be summarised.

1. *What was the reason for the failure by the absent party to appear?*
2. *Has there been undue delay by the absent party in launching his proceedings for a new trial?*
3. *Will the other party be prejudiced by an order for a new trial?"*

He continues on the same page:

"Whilst this court would not normally interfere with the exercise of a discretion except on grounds of law, if it sees that, on other grounds, the decision will result in injustice being done, it has both the power and the duty to remedy it."

I turn to the question of lack of a defence being filed.

In paragraph 8 of the affidavit of In Sup Shin, he explained that during the months of September and October this Solicitor was away in Australia and Malaita Province.

The summons to set aside judgment was filed on the 25 November 1992. There has been some delay - however I am not altogether satisfied that I can classify it as undue delay or inexcusable.

On the question of prejudice, I am satisfied the Plaintiff will not be unduly prejudiced by setting aside the judgments.

Accordingly, I order as follows:

- (1) **The default judgment obtained on the 11 November 1992 is hereby set aside.**
- (2) **Leave is granted to file a statement of defence within 14 days.**
- (3) **Paul Talovae to be included as 2nd Defendant**
- (4) **Costs to be paid by the Defendant.**

(A. R. Palmer)
JUDGE