REEF PACIFIC (SYDNEY) PTY LTD -v- REEF PACIFIC TRADING LTD & OTHERS

High Court of Solomon Islands
(Palmer J.)
Civil Case No. 246 of 1991
Hearing: 29 July 1993
Judgment: 3 August 1993

P. Tegavota for Appellant
T. Kama for the Respondent

PALMER J: There are two summons before me. One is a summons which included inter alia, an order for renewal of a Writ of Fieri Facias filed on the 25th of May 1992, taken out by the Plaintiffs in this action. The other is a summons filed on the 20th of July 1993 which included inter alia that the Writ of Fieri Facias filed for renewal on the 25th of June 1993 and issued on the 5th of July 1993 be set aside on the ground that the judgement in respect of which that Writ had been issued was obtained by fraud.

I will deal with the latter summons first.

It is important to point out right from the beginning that the writ of Fieri Facias can only be set aside if the judgment in default of a proper statement of defence is first set aside.

Counsel for the Defendants has however presented his submissions on that basis and accordingly I will consider it along those lines.

The first submission of the defendants is that the action against them was stayed on the 19th day of December 1991 as the security for costs in the sum of $10,000.00 (SBD) provided by the Plaintiffs was defective.

With due respect, I think there has been a misunderstanding in this submission. The action was not stayed on the 19th of December 1991. The learned Registrar accepted the document submitted by the Plaintiffs as a genuine bank guarantee and subsequently the action was proceeded with, culminating in a judgment against the defendants entered on 23rd of April 1992.

The submission of the defendant in reality is that the claim of the plaintiff should have been stayed because the so-called bank guarantee lodged by the Plaintiffs was not genuine. In support of this the Second Defendant has filed an affidavit of Garry Ronald Needham marked exhibit 'C' in which was also attached a copy of a letter from the Manager of the National Australia Bank, 64 Clarence Street Branch, Sydney, stating that the Bank Guarantee mentioned was not forwarded to the Registrar of the High Court of Solomon Islands on behalf of Piko Pty Limited or Permhill Pty Limited. A copy of the incomplete and unsigned Bank Guarantee was faxed to the Company as a draft document for their perusal before acceptance. That Bank Guarantee was never proceeded with by the company and therefore no formal Guarantee was issued. That letter from the Manager was dated 20th July 1993.

The non-genuinety of that Bank Guarantee if true was never discovered because it was never queried by the learned Registrar, secondly, it was never called upon, as judgment went against the defendants, and thirdly, it was never queried or objected to by the Defendants or if they did, it was never challenged in court.

This submission with respect must fail because essentially it has been lodged late. The document purporting to be the Bank Guarantee may indeed be ineffective. But for all practical purposes it has been accepted otherwise and the case proceeded with. The time to challenge its validity has expired. That mistake if any must lie where it has fallen.

There is also another important point which needs to be borne in mind. This is that had a stay been indeed granted on the 19th of December 1991, that would not have prevented the Plaintiff from applying by motion to have the stay removed. **(see The Supreme Court Practice 1976 Vol. 2, London at par. 3349):**

> *"A stay of proceedings is not equivalent to a discontinuance or to a judgment, and might be removed if proper grounds are shown....."*

There is no evidence before this court to show that had a call been made and it was then discovered that the Bank Guarantee was ineffective, that the Plaintiff would not have been able to make it good. The court does not in any way condone or accept any form of lying, hypocrisy or trickery from any party. Where it has been misled inadvertently, it will consider whether the actions done were frivolous, vexatious, harassing, oppressive or groundless and void of any cause of action in law or equity. **(see The Supreme Court Practice 1976 Vol. 2 par. 3346).**

I am not satisfied that the non-genuinety of the Bank Guarantee has worked any serious substantial disadvantage to the Defendant.

The Defendant had equal opportunity to present their case before this court in the Motion for Judgment presented by the Plaintiff and heard before his Lordship, Muria C.J.
Further, there was no occasion ever to call upon the Bank Guarantee and so the Defendants have not lost out on anything. The motion for judgment was a separate matter. It related to the substantive issues in this action. The Bank Guarantee was inrespect of security for costs.

I now turn to the next submission on the question of setting aside the judgment entered on the 23rd day of April 1993.

Part B(1) of the Defendants submission has been partly dealt with under the first set of submissions.

The defendant rely on two case authorities to support their application for setting aside the judgment of the 23rd April 1993.

The first case authority is ***Levy & Co. -v- Bryant (1891) 4QLJ.*** In that case it was held that there is an inherent power in the Court to prevent an abuse of its proceedings and a judgement will be set aside if the circumstances of the case require it.

The second case relied on - ***Hall -v-Harris*** *1900 25 VLR 455 stated that a judge could set aside a judgement "....founded wholly upon the Judge's own error as to a fact, and not upon any mistake in his deliberations." (p.460).*

I will deal with the second part first. An example of an error as to fact mentioned in that case was where a Judge misreads a document and decides the case accordingly.

In this particular case there is no error of fact pertaining to the judgement itself. The error alleged by the defendants related to the question of security; a different or separate issue. It had nothing to do with the judgement delivered by his lordship on the 23rd of April 1993. Accordingly, it would not be proper to set aside a judgement regularly obtained simply because there had been a mistake as to the Bank Guarantee accepted by the learned Registrar of this court. The court and the parties have not been misled as to that judgement.

Further, there is no evidence before me to say that had the defect been discovered, and the action stayed, that the plaintiff could not have re-applied to have the stay removed.

Also, there is no evidence to say that the plaintiff did not have the means to make that Bank Guarantee good, and that given time the error could have been corrected.

As to the submission under the authority of ***Levy & Co -v-Bryant*** *(1891) 4Q.L.J,* for the reasons I have stated in dealing with the second case authorities submissions, I am not satisfied that the circumstances of this case warrant an order to set aside the judgement of the 23rd April 1993.

Part B (2) of the submissions of the defendants is the crucial submission. I can accept that this court has an inherent jurisdiction to set aside a judgement if it has been procurred by fraud. There are clear case authorities from the English jurisdiction. *(Cole -v- Langford (1898) 2 QB 36, Wyatt -v- Palmer (1899) 2 Q.B 106, Goldring -v-National Mutual (1916) 22 CLR p339, Spooner -v-Spooner (1956) 73 WN).*

However, what is surprising about this is why the defendants never bothered to make use of Order 29 Rule 12 of the High Court Civil Procedure Rules to have the judgement in default set aside. The learned Chief Justice referred to it in his judgement of the 23rd April 1992 at page 4. I can accept that the defendants may not have been aware of their rights under that rule, but had they made enquiries I am sure they would have been informed.

As a result of that failure considerable time has lapsed before this matter has now been placed before this court, 13 months later.

The judgement of the 23rd April 1992 was entered after his Lordship Muria C.J. had ruled that the amended statement of defence of the defendants filed on the 8th of April 1992 was not specific, insufficient and evasive.

The Amended Statement of Defence at para 3. not only denied paragraphs 3 to 9 of the Amended Statement of Claim but expressly stated and I quote:

> *"...that purported agreement referred to as having been entered into on or about 24th January, 1991 was induced through fraud, misrepresentation, duress and unfair dealing," and in the alternative it stated that the agreement of the 24th January 1991 was made conditional on:*
>
> *"(a) Rosa and Graeme Price providing to the 2nd and 3rd Defendants a valid fish processing licence in accordance with Australia law.*
>
> *(b) Rosa and Graeme Price giving 50% shares in Reef Pacific (Sydney) Pty Limited, to the 2nd and 3rd Defendants.*

(c) a proper and formal agreement to be entered into between the plaintiffs and the 1st, 2nd and 3rd Defendants after perudal and consultation between the parties respective solicitors."

At para. 4 they spelled out what the non-compliances were.

At para. 6 they not only denied para. 22 of the amended statement of Claim but stated that AUD61,900.00 worth of seafood products were supplied and delivered by them.

It is inrespect of these specific denials that his lordship ruled against in his judgment of the 23rd April 1992. With due respect to the submissions of Mr Milte his lordships judgment was not obtained by fraud. The allegation of fraud had already been spelled out in the amended statement of Defence. It has yet to be established in a trial, and is one of the defence of the defendants to the statement of claim of the Plaintiff.

This must be distinguished from his lordship's ruling that the Amended Statement of Defence was not specific, insufficient and evasive. That judgment is a regular judgment. If the defendant's wish to challenge the ruling of his Lordship, then the only proper avenue open to them is to apply under Order 29 Rule 12 to have the judgement set aside on the basis of a defence on the merits. This seems to have been the intention of the Plaintiffs, but unfortunately, wrongly made.

The Plaintiffs have been put to a lot of unnecessary expense by the delay and this wrong application.

On the question of delay, on one hand, the defendants have had ample time to take appropriate steps. The evidence however does show that there has been some misunderstanding by the defendants as to the correct procedure to adopt. Immediately after the judgement was entered on the 23rd of April 1992, they instructed their solicitor then to lodge an appeal. That was not done and by September of 1992 they were without a solicitor within the country. There then followed several attempts by the Defendants themselves to impeach the judgement of the 23rd April 1992 but were dismissed for one reason or another.

I can accept that the defendants have genuinely sought to obtain justice but have been hampered to a large extent by the non-availability of a permanent legal counsel. Even in this application they still have not got it right. Should the court strike their claim outright?

It is not for this court to advise lawyers about the proper procedures to adopt. However, in this case, it seems to me that there has basically been a genuine misunderstanding. On the other hand the Plaintiffs have been deprived of their money due in their judgement sum and after about 13 months they are now faced with the possibility of having that judgement set aside.

Unreasonable delay and inexcusable conduct may be a ground for setting aside this application but the facts surrounding that must be weighed carefully with the balance of justice that is being sought.

There are large sums of money at stake. The allegations of fraud are serious allegations, and due justice cannot be attained unless a trial of the issues has been held.

Has the Plaintiff been prejudiced? In respect of the substantive issues, no. In respect of being deprived of his judgement sum, yes. However, that deprivation has largely been due to the fact that the defendants have just not been able to pay up.

I am satisfied this is one of those instances where the Plaintiffs will be allowed costs incurred right up to this point of time on a solicitor/client basis, with the exception only of the party/party costs granted to the defendants for the adjournment of the 21/7/93.

This action has been wrongly founded and therefore must be struck off. However, I will give leave of 14 days for an application to be made under O.29 R.12 to have that judgment set aside together with any affidavit of merits to be filed. Any Affidavits of reply to be filed by the Plaintiff 14 days thereafter and the matter to be set down for hearing as soon as thereafter.

The surplus funds will be held as security for the costs of the Plaintiff incurred to date and until further orders of this court.

It is not right to release any surplus funds when the judgement is still extant. However, the Writ of Fieri Facias will also be stayed until further orders of this court.

Orders made accordingly.

(A.R. Palmer)
JUDGE