

CP HOMES LIMITED -v- MAHLON ALI (Trading as Hovah Hardwood Enterprises)

High Court of Solomon Islands  
(Awich, Registrar)

Civil case No. 196 of 1994

Hearing: 16 February 1995

Ruling: 24 February 1995

A. Radclyffe for Plaintiff  
P. Tegavota for Defendant

Awich, Registrar: This is ruling in applications of the defendant, Mahlon Ali (Trading as Hova Handwood Enterprises, filed 8.12.94, to stay execution of a writ of fifa sued out on 7th October 1994 and to set aside the judgment entered on 29th July 1994 on account of the default of the defendant to enter appearance.

The defendant did not explain in his founding affidavit filed 8.12.94, his failure to enter appearance and to lodge his applications earlier than 8.12.94; he however, did so in a supplementary affidavit filed on Wednesday 22.2.94 after the date of hearing. I allowed supplementary affidavits from both parties because of the state of the papers on the case file. I would like to mention here that while the Court's registry has duty to receive and maintain papers filed by parties in a case, it is equally the duty of counsel to inspect the court file before any hearing to ensure that all papers filed are on the file. After all they are the ones who seek to present them to court during hearing.

The defendant's reason not to have entered appearance promptly was that his mother died on 14th July 1994, the day the writ of summons issued. That was not countered by the defence. Taking into account that default judgment was applied for on the 14th day, the most minimum days required, and the human element during bereavement, I accept that failure by the defendant to enter appearance was not a result of negligence. It, however, took him some 4 months before bring his applications. From the affidavits filed in support of the cases of both the plaintiff and defendant, it is apparent that parties in that period sought to settle the matter amicably. Both admitted meeting of 22nd August, 1994 at Airport Motel. In that meeting or subsequent meetings, the sum owed was agreed to be lower than the judgement sum of \$762,708.81. During the hearing of the applications counsel for plaintiff stated that the correct judgment sum should be 568,144.52 and not \$762,708.81 as entered on 29 July 94. That, he said, was the result of rechecking invoices. It appears to me that the defendant who was at that time not acting through assistance of solicitor, had hoped that the matter would, after all be settled. I do not find his delay of 4 months a wanton disregard of the rules and not negligent on his part nor was it induced by belief that he had no defence.

That brings me to the consideration as to whether, on the affidavits filed the defendant has on the merit of the case, a reasonable defence which has prospect of success. (See Vann -v- Awford 1986).

In the first place, counsel for plaintiff has informed the court that the correct sum to have been claimed ought to have been c\$568,164.52 and not \$762,708.81; that is \$194,544.29 less. So the default judgment of 29.7.94 was in error and therefore irregular to that extent. I accordingly set it aside to the extent of \$194,544.29, the excess sum over what the plaintiff says is the correct sum.

The central defence of the defendant as can be gleaned from his two affidavits is not that he did not owe C.P. Homes Ltd, the plaintiff, but that he has settled in full his debt some \$536,939.00 see paragraphs 7,8 and 9 of affidavit in support and 1,2 and 3 of the supplementary affidavit. The defence case is that there were no such payments as to settle in full. I have seen copies of invoices and reference to bank payments. I think this is a matter which has merits and evidence during trial may well show full payment. On the other hand it may not, but that cannot be resolved by the affidavits filed, it is better resolved at trial.

Another defence raised was that after 13 September 1994, the defendant stopped using the bull dozers of the plaintiff on hire and that it was upto the plaintiff to collect his bull dozers. From the papers filed, one cannot say for sure that it was not for the plaintiff to do so. There is definitely an arguable case with prospect of success to the extent of the hire charges from that period on. In all I am satisfied that on the affidavits availed and from the learned arguments of both counsel and find that there are grounds proved by the defendant to have the default judgement entered on 29th July 1994 set aside, I accordingly set it aside.

Costs of the application is awarded to the plaintiff but that must be deminished prorata to the extent that the sum of \$194,544.29 was claimed in error. The writ of execution is also accordingly set aside. Delivered this 24th day of February 1995 at Honiara.

(Sam Awich)  
REGISTRAR