AEROLIFT INTERNATIONAL LIMITED -V- MAHOE HELI-LIFT (S.I.) LIMITED

High Court of Solomon Islands
(Palmer J)

Civil case No. 387 of 1995
Hearing: 24 April 1996
Ruling: 29 April 1996

A. NORI for Applicant/Defendants
C. ASHLEY for Respondent/Plaintiff

PALMER J: The Defendants apply by summons filed on 27 March 1996 for an order that the Judgment in Default of Defence filed on 18 March 1996 and entered on 21st March, 1996, be set aside. This application is based on Order 29 rule 12 which gives jurisdiction to this court to entertain such an application.

The leading case in this jurisdiction is Kayuken Pacific Limited -v- Harper 1987 SILR 54, in which some guidelines were laid down by his Lordship Ward C.J. Of prime importance is that there must be an affidavit of merits showing that the Defendant has a prima facie defence. This does not mean that the court should consider at that stage *"... whether the defence would be successful but simply whether a triable issue is disclosed"* (see page 58). If the court finds a viable defence then it should go on to consider its unfettered discretion under 0.29 r.12, whether to set aside default judgment or not.

IS THERE A PRIMA FACIE DEFENCE

An affidavit of merit by Andrew Nori, of counsel for the defendants has been filed on 18 April 1996, and attached therewith is a draft defence and counter-claim of the defendants.

The first issue of defence raised is that the second defendant did not undertake any logging operations in Solomon Islands and that accordingly the Agreement between the plaintiff and the second defendants had been frustrated and is unenforceable against the second defendants. The plaintiff takes the view that the second defendants did undertake logging operations in Solomon Islands but through the first defendant. The second defendants could not obtain Foreign Investment Division approval and so had to incorporate a company locally to do it. The defendants on the other hand take the view that they are separate entities altogether and therefore should be treated separately.

I am satisfied this is a triable issue.

This leads on to the second issue raised in the defence which is that there is no lease arrangement between the plaintiff and defendants jointly. There is a lease arrangement between the plaintiff and the second defendants, but no evidence of a lease arrangement with both jointly. The plaintiff takes the view that because the first and second defendants are so closely connected to each other, that the lease arrangements made with the second defendants in actual fact is also the same lease arrangement covering its relationship with the first defendant. But even if both are regarded as separate and distinct from each other, the court should apply the same lease arrangement to its dealings with the first defendant.

The defendants on the other hand take a contrary view. There is evidence of dealings between the plaintiff and the first defendant, and so even if the said lease arrangement does not bind it, the court will have to consider then what terms should be applied. I am satisfied this is also a triable issue.

The third triable issue related to an alternative claim of a breach of the above mentioned agreement, in that a wrong helicopter model for the Solomon Islands operation had been provided. This issue will obviously arise once it has been determined that the above agreement governs the relationship between the plaintiff and the defendant. The plaintiff obviously maintains that the correct model was supplied. The defendants take the contrary view and have indicated clearly that the claim of the plaintiff will be challenged. I am also satisfied that this is a triable issue.

Other issues raised will be dependent on the outcome of the above pivotal issues.

Having satisfied myself that there are triable issues, this court should next consider the three matters mentioned in Kayuken Pacific Limited (ibid) as to the exercise of the court's discretion.

First, what was the reason for the failure before the defendants to file a defence by the due date?

The main reason given was that the 1st defendant's Manager, Chris Bergman, from whom Mr. Nori gets most of his instructions, was overseas for most part of March, 1996. It appears that the reason for going overseas was to obtain more information relating to the issues in this case in particular the differences between the KA 32C and KA 32T models.

I am satisfied the defendants have given a good reason for the failure to file a defence in time.

The second consideration is whether there has been undue delay by the defendants in launching their proceedings for a summons to set aside. On this point I note the following points. The due date for a defence to be filed was 7th March, 1996. The judgment in default of defence was filed on 18th March, 1996 and entered on 21st March, 1996. It was served on the defendants on 26th March 1996. Meanwhile on 25th March, 1996, a request for further and better particulars had been served on the plaintiffs. The summons to set aside was filed on 27th March, 1996. In the circumstances, I am not satisfied that undue delay had been occasioned by the defendants in taking appropriate action to deal with the default judgment. In all there has been only a delay of some three weeks.

The third consideration is whether the other party will be prejudiced by an order to set aside. With respect I am not satisfied that will occur.

The application to set aside accordingly is granted, and time is enlarged for filing of defence. Costs in the cause.

ORDERS OF THE COURT

1. **Set aside default judgment entered on 21st March, 1996.**

2. **Time enlarged for filing of defence to 6th May, 1996.**

3. **Costs in the cause.**

ALBERT R. PALMER

A. R. PALMER
JUDGE