HIGH COURT OF SOLOMON ISLANDS

WESTPAC BANK CORPORATION-V-
AIRPORT SERVICE STATION LIMITED

1st Defendant

WILLIAM GEORGE MIKI

2nd Defendant

LYDIA NEDI MIKI

3rd Defendant

Charles Ashley for Applicant/Defendant
Andrew Radclyffe for Respondent/Plaintiff

At Honiara: 10th September, 2nd November 2004

Brown J. This is an application to set aside a judgment on the 25 June 2004, entered by consent. Consent of counsel for the parties had been endorsed on the particular document and a judgment by default of defence against the defendants in the sum of $848,387.61 plus interest was then entered. This took place in court after a number of appearances by counsel on former hearing dates.

In addition, the court ordered the sale of a particular parcel of land in accordance with terms plus costs in favour of the plaintiff.

The affidavit in support of judgment recited the fact that the writ and statement of claims had been served on the 1st defendant company on the 13 February 2004. An appearance by William George Miki, as Director of the 1st defendant but no defence, had been filed at the time of the affidavit made on the 13 May 2004 by one Jeffery Pitamana, an officer of the plaintiff company filed in support of the application for judgment.

On the 11 March 2004, the writ and statement of claim were served personally on the 3rd defendant and an additional copy given the 3 defendant for the 2nd defendant, the husband of the 3rd defendant. (I am satisfied the 2nd defendant had the writ for he entered an appearance as the Director of the 1st defendant and must be presumed to have notice of it, for it was also addressed to William George Miki on its face).

No defence was entered by either the 2nd or 3rd defendant.

By virtue of O 13 r 3 in default of appearance, a plaintiff is entitled, (subject to compliance with r.11, to enter final judgment for the amount claimed. Pursuant to O 23 r 6, where a defendant has entered

an appearance he shall deliver his defence within 14 days from the time limited for appearance or defence, which ever shall be the later.

In this case the 1st defendant personally entered an appearance on the 27 February 2004 but no defence was filed by the company up to the time of the consent order for judgment. At the time judgment by consent was entered, the plaintiff had complied with the rules and was entitled to judgment in any event.

On the 12 March 2004, a document entitled "defence" was filed by Watts and Associates Legal Services where-in Mr. Watts claimed to be advocate for the 1st, 2nd & 3rd defendants.

No notice of appearance was entered by the Lawyer and consequently in absence of strict compliance with rules of court, the plaintiff was entitled to seek judgment.

But there were further matters which had a bearing on the application for judgement. The first was the document "defence", filed. It in fact admitted the basis of the plaintiffs claim, including the debt pleaded in para.1 of the statement of claim, the charge over the 2nd & 3rd defendants real estate in the particular property; the mortgage debenture by the company over its assets and the 2nd & 3rd defendants written guarantee to meet the debts due of the 1st defendant company.

The document further admitted the defendants failure to repay the outstanding loan moneys despite demand but pleaded time for "possible rescheduling of the loan but the plaintiff has not approved the proposition."

Clearly the document is not a defence in that it admits the plaintiffs claim and does not take issue with any matters pleaded, rather it seeks further accommodation from the plaintiff. In the absence of a proper notice of appearance by the Solicitor purporting the file the documents, "defence" it should perhaps been rejected but it remand on the court file. It does not however, amount to a defence in terms of the rules.

The next matter to be noted is that the consent order of the 25 June was made on the application of Mr. Radclyffe, the advocate for the plaintiff Bank filed on the 13 May, but which was originally listed for hearing on the 4 June 2004. On the 4 June, the matter was adjourned to the 18 June on Mr. Watts application for that on the 14 June 2004 he had filed a notice of change of Solicitor on behalf of the defendants. On the 18 June, the matter was again adjourned to the 25 June when Mr. Watts appeared with Mr. Radclyffe and those consent orders were

made. No valid defence had then been filed on any of the defendants part.

On the 2nd August 2004 Mr. Charles Ashley of A. &A. Legal Services filed a summons seeking to set aside the judgment and sought leave to file a defence. The "defence" was pleaded in form annexed to the 2nd defendants affidavit sworn in support of the application to set judgement aside and to be let in to defend. It in fact, raised issues on account stated.

In para.3 of that affidavit in support, the 2nd defendant says that Mr. Presley Watts did not have instructions to consent to a sale of the family home, and by implication, to the entry of judgment. He said

"On the morning of Friday 2 July 2004, I went to the High Court and discovered for the first time that the parties Solicitors had signed a consent order the previous week."

The applicant says on the authority of *Shell Company (Pacific Islands) Ltd. V- Wayne f. Morris anors* (Unreported CT of Appeal dated 2 Aug 2004) where had Slynn, the President said at 8

"that it is important the Court should keep control of its proceedings and that it may, perhaps rarely or only occasionally, refuse to enforce an order which is made "by consent" if it is persuaded that it would be unjust or wrong to do so."

The respondent Bank through Mr. Radclyffe argues very strongly that Mr. Watts was by his appearance entitled to represent these defendants. Mr. Watts appeared and was present when judgment was entered. If the defendants have been disadvantaged, their claim is against the lawyer for unprofessional conduct. I am consequently not minded to consider the judgment has been entered "unjustly" in the circumstances.

Mr. Radclyffe says before I consider setting the judgment aside I must be satisfied there is a defence on the merits. He points to the fact the argument goes to the amount actually owed, for there is no dispute the defendants borrowed the money and individually guaranteed its repayment.

Mr. Ashley says the defendants have not had a chance to argue the amount due and if the application is refused, nor will they.

The argument as to amount has been raised in the "defence" which Mr. Ashley seeks to file if let in to defend. As I have said, there appears a issue as to account stated, for the Banks spreadsheet (forming part of Mr. Radclyffe's affidavit of the 16 August) speaks of

"interest accrued but not charged between August 2003 and November 2003 by month."

Interest Aug'02	$693,427.25	Balance per
Nov'03 $154,960.36		Demand notice in August 2002
Total Balance	$848,387.61	Principal & Interest 08/2002 – 11/2003

Mr. Radclyffe's affidavit seeks to answer that "real issue to be tried" by including the interest moneys. For from perusing the statement of claim, it is clear the Bank has claimed that amount of $848,387.61.

The statement of claim does not make an allowance for interest foregone but says the loan account outstanding as at 10 February 2004 with interest is $848,387.61 which *prima facie* is correct on the Banks' material in the affidavits read by Mr Radcliffe in support of his opposition to this application to set aside.

Delay if any, has not been explained for the various defendants have been represented up to judgment and since.

I am not satisfied there is a valid defence shown when I have regard to the material of the Bank and the defendants assertion that the Bank's figures are wrong. The assertion is not supported by authority. It follows that I am not satisfied there has been any mistake sufficient to be wrong in the sense described by Lord Slynn.

The application to set aside the judgment is refused and consequently the summons is dismissed. The plaintiff shall have costs of the application.