IN THE SUPREME COURT OF TONGA NO.C.818/94

CIVIL JURISDICTION

NUKU'ALOFA REGISTRY

BETWEEN : JEWETT CAMERON : *Plaintiff:*

AND : 1. TOLINI TU'UHOLOAKI
2. VALETI TU'UHOLOAKI : *Defendants:*

BEFORE THE HON. CHIEF JUSTICE WARD in chambers

COUNSEL : Mr Laki Niu for dendants/applicants
: Mr John Appleby for plaintiff/respondent

Date of Hearing : 25 February 1999
Date of Ruling : 29 March 1999

RULING OF WARD CJ

This is an application to set aside a judgment in default of defence against the defendants jointly and severally to pay the sum of $32,386.00 and interest at 10% from date of judgment, costs and disbursements. The judgment was entered on 20 September 1995 and application to set aside was only filed with the court on 19 October 1998.

It is necessary briefly to consider the background to this application in view of the unusually long period between judgment and application to set aside.

The original claim was for the unpaid balance of the cost of a building largely constructed in 1992. It was filed on 12 September 1994. Personal service was effected on the second defendant on 19 September 1994. The first defendant was abroad and so the second defendant was asked for and supplied her address over the telephone in November 1994. As a result, an application for service by registered post was granted and the writ and statement of claim and a copy of the order for service by registered post was sent to the first defendant at 3 Albert Street, Lidcombe, Sydney. It was also ordered that a further copy of the same documents should be served on the second defendant with a notice that service had been effected on the first defendant in the way ordered. This was done by personal service on 9 March 1995.

On 25 September 1994 the second defendant had replied to the solicitor for the plaintiff stating that she was "refusing to appear in court over this case and legally you should know

that I was never been part of this contract". It continues with details of the reason why she considered herself not a party. She also stated that she had contacted her sister in Sydney who had indicated a willingness to return and appear in court but that she would not be available until December 1994. Although the defendant never filed this letter with the court, it was exhibited to the affidavit supporting the application for judgment in default of defence.

What has recently appeared, and was not placed before the judge considering the application for judgment in default, is a reply from the plaintiff's solicitor to the second defendant dated 20 October 1994. He said that he had sent a copy of the letter to the plaintiff and "we will contact you when we have a response". Later it stated; "We are treating your letter as an informal defence or explanation for the time being and we will contact you if we have any need for further information."

Judgment in default of defence was granted ex parte on 20 September 1995. It was served personally on the second defendant on 17 October 1995. It is stated in one of the documents that if was dispatched by registered airmail to the second defendant the same day.

No payment was forthcoming and, on 9 March 1998, application was made for a Certificate of Judgment in order to enforce the judgment in New South Wales under the Reciprocal Enforcement of Judgments Act. It is not apparent on the documents before this Court precisely when that judgment was registered but on or about 4 September 1998 the defendants both moved the Supreme Court of New South Wales to have the order registering the judgment set aside. This was supported by an affidavit from each of the defendants and was apparently granted.

The affidavit of the first defendant states in paragraph 11:

> "11 At no time was the process of the Supreme Court of Tonga, by which purported proceedings were commenced for the recovery of the alleged debt, served upon me, and by which judgment was purported to be obtained on 20 September 1995, against myself and the other defendant to the proceedings herein, my sister Valeti Tu'uholoaki.
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> 12 Further, at no time prior to the service upon me of the order of this Court registering the judgment of the Supreme Court of Tonga, was the said judgment of the Supreme Court of Tonga brought to my attention."

In her affidavit to this Court, she explains that she moved from the address to which the documents were sent and never received them. The dates would suggest she moved after the first postal service of the writ but it was clearly well before the service, if there was such service, by post of the judgment. She admits that her sister did tell her of the action when it was first served on the sister.

No doubt, therefore, the affidavit to the Court in New South Wales is true in the careful way the words are framed. However, by that wording I am satisfied she was intending to give the court in Australia the impression she knew nothing of the case and that is manifestly untrue on her own later affidavit.

The second defendant's affidavit to the Supreme Court of New South Wales at paragraphs 13 and 14 uses identical words save for the change of her sister's name. In her case that is not true and can have only been used as a deliberate attempt to mislead the court in Australia. I

am willing for the purposes of this application to accept that she was misled by the letter from the plaintiff's solicitor into thinking she needed to do no more unless and until she heard from him but there is clear evidence that she was served with the judgment. Had she accepted that and relied on the solicitor's letter, I would have considered for these purposes that she could be truthful but her denial of having had the judgment brought to her attention is clearly false and taints her evidence generally.

By Order 13 rule 3, where there has been a judgment in default of defence, "if the defendant satisfies the Court that

(i) there was good reason for his failure to file a defence in time; and
(ii) he has an arguable defence"

the court has a discretion to set aside any summary judgment. English cases have established the basis upon which the court will decide.

The defence must establish with potentially credible evidence on affidavit that there is a real likelihood that the defendant will succeed on the facts. The merits of the case is the most important consideration in all such cases and where there is a real possibility of success the defendant should not be denied his day in court. The classic statement of the principle is by Lord Atkin in Evans and Bartlam (1937) AC 473,480 referring to the, then, equivalent rules in England which gave a discretionary power to a judge in chambers to set aside a default judgment:

"The discretion is in terms unconditional. The Courts, however, have laid down for themselves rules to guide them in the normal exercise of their discretion. One is that where the judgment was obtained regularly there must be an affidavit of merits, meaning that the applicant must produce to the Court evidence that he has a prima facie defence. It was suggested in argument that there is another rule that the applicant must satisfy the Court that there is a reasonable explanation why judgment was allowed to go by default, such as mistake, accident, fraud or the like. I do not think that any such rule exists, though obviously the reason, if any, for allowing judgment and thereafter applying to set it aside is one of the matters to which the Court will have regard in exercising its discretion. If there were a rigid rule that no one could have a default judgment set aside who knew at the time and intended that there should be a judgment signed, the two rules would be deprived of most of their efficacy. The principle obviously is that unless and until the Court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure."

When assessing the chances of the defence succeeding on the facts, the court may need to assess the credibility of the defendants because that may affect the likelihood of the trial court believing the evidence. On the affidavits that each of the defendants has filed here and in New South Wales, I have formed the view that the second defendant has lied and is not credible. The first defendant has also demonstrated a willingness to mislead even if that has been achieved without a tangible lie.

In such a case I would normally not hesitate to refuse the application especially when it is made so long after the judgment. It seems often to be forgotten that the concept of fairness applies to all parties and not just to the applicants. The inordinate delay will, if this application succeeds, no doubt cause the plaintiff real hardship. The second defendant has

certainly simply sat on her hands knowing that this action was in existence and I am far from satisfied the first defendant was being honest in her assertions to the court in New South Wales. In particular, I simply do not believe that the second defendant did not contact her sister after she received the judgment in September 1995. The two defendants are educated people; the first defendant gives her occupation as Accountant and the second as Manager. The second received a judgment against her sister and herself jointly and severally but apparently did nothing and then, in her affidavit to the court in New South Wales, lied about it. Neither has made any attempt to sort out the disputes about the standard of the building or to pay the balance they admit is owing under the contract let alone the judgment sum.

However, having said that, I have to accept that, if the second defendant is correct, she may have a defence to the action. Similarly, depending on the attitude the court takes to the letter from the plaintiff apparently adjusting the quotation down, the first defendant has a reasonable chance of success.

I shall grant the application and order that the judgment in default of defence entered on 20 September 1995 shall be set aside on the payment into the court of a sum equal to the judgment sum without interest but including the costs and disbursements ordered i.e. a total sum of $33,147.50. It appears both defendants are at present out of the jurisdiction so I shall order that they have until 1 June 1999 to pay that sum into court. Failure to do so by that time will mean the judgment is not set aside. I have allowed more time than usual for that payment to be made so I also order that the defendants, their family, servants or agents shall not in the meantime make any attempt to dispose of or otherwise deal with the house built under this contract.

The costs of the application to set aside shall be paid by the defendants in any event to be taxed if not agreed.

Finally, I have found it necessary to form and state my view of the veracity of the defendants. Should I conduct the trial, the defendants may not feel they are having a fair hearing in a case where the main issues depend on the credibility of the various witnesses. I shall order that the trial shall be conducted by a different judge and that this Ruling and Order shall not remain on the copy of the file that is placed before him.

NUKU'ALOFA: 29th March, 1999.

CHIEF JUSTICE