

IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU0027 OF 2000S
(High Court Civil Action No. 203 of 1998)

BETWEEN:

B. W. HOLDINGS LIMITED

Appellant

AND:

GRAHAM EDEN & ASSOCIATES LIMITED

Respondent

Coram:

Hon. Jai Ram Reddy, President
Hon. Sir Mari Kapi, Justice of Appeal
Rt. Hon. John Henry, Justice of Appeal

Hearing:

Tuesday, 13th August 2002, Suva

Counsel:

Mr. S. Parshotam for the Appellant
Mr. R. Prakash for the Respondent

Date of Judgment:

Friday, 16th August 2002

JUDGMENT OF THE COURT

This is an appeal brought against a decision of the High Court in the exercise of its appellate jurisdiction under s. 12 (1) (c) of the *Court of Appeal Act* (Cap. 12).

Graham Eden & Associates Limited (Respondent) commenced proceedings against B. W. Holdings Limited (Appellant) in the Suva Magistrates Court for a sum of \$10, 810.97 plus interest and costs. The respondent's claim represents bank charges which it had incurred after it had established a letter of credit on behalf of the appellant following the purchase by the

appellant of tiles and fabric from the respondent.

The respondent filed an affidavit of service by Seru Batidradra sworn on 22nd October 1998 in which he deposed service of the writ on the appellant by posting it by registered post on 13th October 1998 to P. O. Box 2449 Government Buildings Suva.

The appellant did not file appearance or defence and the respondent obtained default judgment on 5th November 1998.

On 2nd February 1999, the appellant filed an application in the Magistrates Court to set aside the default judgment and to be given leave to defend the action under Order XXX Rule 5 of the **Magistrate's Courts Rules**. The appellant based its application on three grounds: (1) that the judgment was obtained without proper service of the writ of summons being effected on the appellant (2) that the judgment was obtained for a claim for bank charges and interest without the claim having been proved and (3) that there was no evidence to prove the bank charges and interest and the rate at which the award of interest was made.

The Magistrates Court dismissed the application on all grounds.

The appellant appealed against the decision of the Magistrates Court to the High Court. The two major grounds of appeal relied on were:

- (1) that the judgment was not entered regularly in that there was no proper service of the writ on the appellant, and in the alternative
- (2) that the Resident Magistrate should have exercised her discretion to set aside the judgment on the ground that the appellant had a defence on the merits.

The High Court held that the appellant was properly served with the writ and dismissed the first ground. In respect of the second ground, the High Court was satisfied that the Magistrates Court exercised its discretion correctly in reaching the conclusion that the appellant did not have a defence on the merits.

It is from this decision that the appellant has appealed to this Court. We set out in full the grounds of appeal:

- "1. That the learned Judge erred in fact and in law in holding that the learned Resident Magistrate was correct in concluding that the appellant had been properly served with the Writ of Summons against the weight of the evidence adduced.***
- 2. That the learned Judge erred in fact and in law in holding that the learned Resident Magistrate was correct in concluding that the appellant did not advance a bona fide defence giving rise to triable issues when the evidence adduced by the appellant and the matters set out in its proposed defence disclosed a prima facie defence to the claim giving rise to triable issues.***

3. *That the learned Judge erred in fact and in law in holding that the learned Resident Magistrate came to the conclusion that there was no prima facie defence giving rise to triable issues after carefully examining the arguments advanced by Counsel for the parties, when the contrary is disclosed in the Ruling of the learned Resident Magistrate.*
4. *That the learned Judge erred in fact and in law in not giving any or any sufficient weight and consideration to the defence set out by the Appellant but instead proceeding to try the dispute between the Appellant and the Respondent."*

The first comment we make about these grounds is that they raise matters of fact and mixed fact and law. In so far as the grounds raise matters of fact or mixed fact and law, they are incompetent. Under s 12 (1) (c) of the *Court of Appeal Act* parties may raise any ground relating questions of law only. The scope of review under this provision is therefore limited.

The only question of law that may be raised under ground 1 is whether the High Court correctly applied the law in respect of service of the writ. The relevant provision in the *Magistrates Courts Rules* is Order VII Rule 8 (3) which reads:

"(3) Service on a company shall be affected in accordance with the provisions of the Companies Act."

Section 391 of the *Companies Act* provides:

*"391 – (1) A document may be served on a company by sending it by post to the registered postal address of the Company in Fiji or by leaving it at the registered office of the company.
(2) A document may be served on the registrar by leaving it at, or sending it by post to his office."*

The appellant company failed to provide a registered postal address under s 110 of the *Companies Act* which reads:

“110. – (1) Notice of the situation of the registered office and the registered postal address, and of any change therein, shall be given within 14 days after the date of incorporation of the company or of the change, as the case may be, to the registrar for registration.

(2) The inclusion in the annual return of a company of a statement as to the situation of its registered office or registered postal address shall not be taken to satisfy the obligations imposed by this section.

(3) If the default is made in complying with this section, the company and every officer of the company who is in default shall be liable to a default fine.”

In the present case, the Notice of Situation Form 201 under the *Companies Act* disclosed no registered postal address. However, company search by the respondent revealed in the Annual Return filed on 14th May 1997 that the appellant indicated its postal address as P. O. Box 2449 Government Buildings Suva. This address was also confirmed by the appellant’s receptionist and by the Post Master that this was the appellant’s postal address.

Counsel for the appellant submits that as the respondent relies on service of the writ on the address stated in the appellant’s Annual Return, this cannot be a valid service in view of s 110 (2) of the *Companies Act*. This argument was rejected by the High Court. The Court ruled that as the appellant did not dispute postal address P. O. Box 2449 as its address, he held that the Resident Magistrate was correct in concluding that the appellant was properly served with the writ.

We do not consider that the High Court made any error of law in coming to this conclusion. We note from the undisputed facts that the appellant used the address P. O. Box 2449 as its postal address in its letterheads and received correspondence in the same address. The appellant gave no explanation why the writ was not claimed at the post office and returned to the respondent. The appellant is estopped from claiming that this is not its registered postal address. We would dismiss this ground of appeal.

The remaining grounds of appeal may be dealt with together. The only question of law that may arise is whether the trial judge applied proper principles of law in considering whether the appellant had a defence on the merits. In this regard the trial judge held:

“The granting of leave to come in and defend an action is discretionary. At the end of a 9 page careful examination of the arguments advanced by counsel for the parties the Resident Magistrate came to the conclusion that the Company was not advancing a bona fide defence giving rise to triable issues. I agree.”

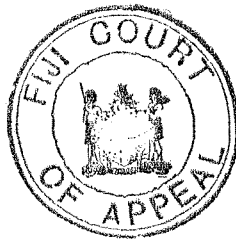
The Resident Magistrate dealt with this issue in these terms:


“The judgement being regular the defendant was required to show a defence on merits. The central requirement for the applicant to satisfy the court by evidence is that the defendant has a good defence on the merits. That the defendant has put forward a bona fide defence giving rise to triable issues....The affidavit material presented does not disclose a defence on the merits....

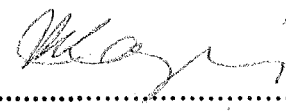
The onus at all times was the defendant to establish sufficient cause. The have not shown sufficient cause for the exercise of discretion in their favour.”

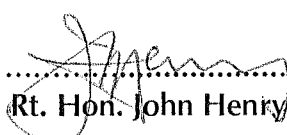
We cannot find any error in the statement of the appropriate principles by the learned Resident Magistrate when considering this issue with which the High Court agreed. We would dismiss these grounds of appeal.

The order of the Court is that the appeal is dismissed with costs of \$750.00 to the respondent.




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Hon. Jai Ram Reddy, President


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Hon. Sir Mari Kapi, Justice of Appeal


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Rt. Hon. John Henry, Justice of Appeal

Solicitors:

Messrs. Parshotam and Company, Suva for the Appellant
Messrs. Mishra, Prakash and Associates, Suva for the Respondent