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

CIVIL APPEAL NO. ABU0055 OF 2003S
(High Court Civil Action No: HBC 203/2002S)

BETWEEN:

SUVA CITY COUNCIL

Appellant

AND:

MELI TABU

Respondent

Coram: Eichelbaum , JA
Penlington, JA
Scott, JA

Hearing: Thursday, 8 July 2004, Suva

Counsel: Mr. H. K. Nagin for the Appellant
Mr. D. Singh and
Mr. R. I. Kapadia for the Respondent

Date of Judgment: Friday, 16 July 2004

JUDGMENT OF THE COURT

This is an appeal from the Judgment of Jiten Singh J. wherein he dismissed an application by the Appellant, the defendant in the High Court, under Order 13 Rule 10 of the High Court Rules 1988 for an order setting aside an interlocutory judgment by default entered against the Appellant on the 11 June 2002.

Background

In 2002 the Respondent was employed by the Appellant as a lorry boy. His job was to tow away unlawfully parked vehicles in Suva.

On 13 January 2001 while working at the Council's car park near the sea wall in Suva a heavy towing bar fell on to his right leg. It caused a comminuted fracture of the right tibia. The Respondent was admitted to the CWM Hospital. The fractured leg was put in plaster and he was given pain killing medication. He was discharged from hospital on 16 January 2001 on crutches and he underwent outpatients treatment until 20 March 2001.

Following the accident the Respondent continued to suffer considerable pain and his enjoyment of life was affected. He was off work for 4 months. When he resumed work on light duties he found difficulty in standing for any length of time. He was medically assessed as having a 5% permanent partial disability.

On 15 May 2002 the Respondent commenced an action in the High Court against the Appellant claiming damages for personal injuries for alleged negligence or breaches of statutory duty under the Factories Act and in the alternative he claimed Workers Compensation.

In the Respondent's Statement of Claim he alleged that a heavy tow bar fell on his right leg when "a steel wire connecting it snapped or got released from the joint". The Respondent alleged that the Appellant had been negligent in adopting an unsafe system of work in a number of respects which were particularised in the pleading.

The Writ was served on 16 May 2002 and was accompanied by a letter from the Respondent Solicitors suggesting that the matter be referred to the Appellant's insurer.

On 21 May the Appellant's in house solicitor acknowledged the Appellant's Solicitor's letter and stated that it had referred that letter to its insurer. The Appellant's letter made no reference to liability.

The Writ contained the usual notice indicating that a failure within the time specified to return the acknowledgement of service together with a statement of intention to contest the proceedings would result in the Respondent being able to proceed with the action and enter judgment against the Appellant "without further notice". The Appellant did not acknowledge the service or file a defence. The last day for taking this step was 31 May 2002.

On 11 June 2002 the Respondent obtained a judgment by default whereunder the Appellant was required to pay the Respondent "damages to be assessed". A copy of the judgment by default was served on the Appellant on 28 August 2002. That service did not evoke any response from the Appellant at that time.

There is then undisputed evidence that the Respondent's solicitors sent the Appellant's in house solicitor a letter 13 September 2002 which was in the following terms.

> *"Re: Meli Tabu –v- Suva City Council*
> *HAC No. 203 of 2002*
>
> ***We refer to our telephone conversation (Daniel Singh/Tanya Waqanika) in connection with the above action. We confirm your advice to us that liability in this case is not in dispute and the only issue is one fixing the quantum of damages."***

The letter was an open letter. There was no response to it by letter or otherwise from the Appellant or the in house solicitor or any other person on its behalf. In the affidavit by the Appellant's in house solicitor, to which reference will be made, she

denied that there had been any discussion on the issue of liability. She asserted that the discussions with the Respondent's solicitors were on a "without prejudice" basis.

On 2 December 2002 the Appellant terminated the Respondent's employment. Thereafter he was unemployed.

On 22 January 2003 the Respondent took out two summonses, first a summons under Order 34 for an order that a date be assigned for the assessment of damages; and secondly, for an order for an interim payment under Order 29 Rule 10 and Rule 11(1)(c) of the High Court Rules 1988 . The two summonses were returnable on 9 April 2003. They were supported by a detailed affidavit from the Respondent setting out his ongoing disabilities, his recent dismissal from the employment of the Appellant and his straightened financial circumstances. He exhibited two medical reports.

On 9 April 2003 the summons for an interim payment was called in the High Court. Mr Nagin appeared as counsel for the Appellant (as he did in this Court). The court ordered the Respondent to file a supplementary affidavit showing his wages and percentage disability. This order was duly complied with and on 9 May the Respondent's application for an interim payment came on for hearing before Jiten Singh J. The Appellant was ordered to pay the Respondent $2500 which was carried out on 27 May.

On 12 June 2003, just one year after the entry of judgment by default and not quite 10 months after the service of a copy of that judgment the Appellant moved for an order setting aside the judgment. It was supported by an affidavit from the in house solicitor. We have already referred to that affidavit. In that affidavit she asserted:-

- that after service of the writ the Appellant liased with its insurer to "sort out the plaintiff's claim"
- that she believed the insurance company had done an extensive investigation in respect of the accident.

- that the Appellant has a valid and meritorious defence because the accident was caused or contributed to by the negligence of the Respondent in that he failed to check a cable pulley bolt (which he had been instructed so to do) before the hoisting of the tow bar.
- that the setting aside of the judgment would not unfairly prejudice the Respondent.

Additionally the Appellant pointed the finger at the professional conduct of the Respondent's solicitor. She asserted that there were ongoing discussions about the Respondent's case when the judgment was entered and that the entry of judgment had taken place without warning. The in house solicitor asserted that there was a pattern of professional dealing in which judgment was not entered when negotiations were under way.

An affidavit by the Respondent's solicitor was filed in reply. He deposed that following service of the judgment there was no response from the Appellant, that the Appellant had accepted liability and only disputed quantum – hence the letter of 13 September 2002 - and that it was not until the order for an interim payment was made by the Court that there was any indication that liability was disputed by the Appellant. The Respondent's solicitor denied that there had been any negotiations for settlement or that judgment by default was entered while negotiations were on foot.

The Appellant's in house solicitor made an affidavit in reply. She repeated her earlier assertion that negotiations were underway to try and settle the claim when judgment was entered. She repeated her reliance on the long standing practice, so she alleged, that default judgment would not be entered when negotiations were under way.

The Judgment Under Appeal

The Judge reminded himself of the relevant principles for the exercise of his unfettered discretion, namely, that ultimately it was for the defendant, now the Appellant, to satisfy that court that it would be just in all the circumstances to set aside the default judgment. See ***Russell v. Cox*** [1983] NZLR 654 (CA) at p.659 per McMullin J. in delivering the judgment of the Court.

The Judge then addressed the issue of whether the Appellant had a defence on the merits. He described that issue as "the primary consideration" .

The Judge focused on the accident. He said:-

> ***"The defence is that the plaintiff failed to take proper precautions for his own safety, failed to follow instructions given when towing vehicles and therefore acted in disregard to his own safety.***
>
> ***I also note from paragraph 5 of the statement of claim that the injury was caused when a heavy towing bar fell on the plaintiff's right leg when a "steel wire connecting it snapped or got released from the joint." One of the important factors in deciding liability would be what caused the wire to snap or to get released from the joint. The defendant says it was plaintiff's carelessness that caused the mishap. The defendant does not say what were the instructions that the plaintiff disobeyed. It does not state when the insurance company completed its extensive investigations. In fact Tanya Waqanika does not disclose what is her source of information that the insurance company conducted investigations. She does not name any person who is the source of such information."***

The Judge then looked at the conduct of the Appellant after it became aware, on 28 August 2002, of the default judgment and after the receipt of the Respondent's solicitors letter of 13 September 2002 stating their understanding that liability was no longer indispute. The Judge observed that there was no response. He added :-

> *"If liability is an issue, surely the council would have written back and said so. The council, in such a case, would have written back and said that they do not admit liability"*

And as to alleged past professional practice of not entering judgment while discussions were on going the judge observed that the entry of the default judgment and letter of 13September 2002 indicated to the Appellant that the Respondent's solicitors were not continuing with the past practice.

The Judge concluded his judgment by making the following findings:-

> *"In this case the defendant has shown a marked indifference to court proceedings and to protect its own interest. It appears the defendant moved in the conduct of the proceedings at its own leisure and pleasure. The days of leisured pace in conduct of civil litigation are gone. The courts expect a far greater commitment by parties in conduct of litigation. The delay here is inexcusable.*
>
> *I am also not satisfied that the defendant has shown a defence on merits as it does not disclose what instructions were disobeyed or in what way the plaintiff was at fault."*

The Judge dismissed the application to set aside the default judgment. The Appellant now appeals to this Court.

Onus on this Appeal

This is an appeal from the exercise of a judicial discretion. On the appeal the Appellant must demonstrate that the Judge acted on a wrong principle or that he failed to take into account some relevant matter or that he took into account some irrelevant matter or that he was plainly wrong.

The Competing Contentions on the Appeal

Mr Nagin for the Appellant referred us to ***Pankaj Bamola & Another v Moran Ali FCA 59/90*** in which case this Court stated:-

> ***However, in order for the court to properly exercise the discretion whether or not to set aside such a regularly obtained default judgment, it has been consistently held that certain basic preconditions must be fulfilled by the party making the application.***
>
> ***These are:-***
>
> ***(i) Reasons why judgment was allowed to be entered by default.***
>
> ***(ii) Application must be made promptly and without delay.***
>
> ***(iii) An Affidavit deposing to facts that show that the defendant has a defence on the merits."***

These three matters are the normal tests by which the justice of the case is measured. See ***Russell v. Cox*** (supra) p.659. The Judge addressed these matters and his findings thereon were put in issue by Mr Nagin.

The main thrust of the appeal, however, was that the Judge erred in his finding that the Appellant had not shown a defence on the merits. Mr Nagin submitted that on an application to set aside a default judgment whether the defendant had a defence was the major consideration and that that should transcend the other factors of delay and absence of reasonable explanation. Mr Nagin's argument dealt, first, with the appropriate threshold test to be applied on the issue of whether a defence on the merits had been established for the purpose of setting aside a default judgment, and secondly, with the adequacy of the material place before the Judge in the present case.

Mr Nagin referred us to a decision of this court in ***Wearsmart Textiles Ltd v General Machinery Hire Ltd & Another*** Civil Appeal No: ABU0030/97S. The judgment in that case was delivered on 29 May 1998. The Court consisted of Tikaram P. and Casey and

Dillon JJA. In that case this court considered the level of persuasion required of an application in relation to establishing the defence on the merits for the purpose of setting aside a default judgment. The court cited from the Supreme Court Practice 1997 (the White Book) (Vol 1 p.145) where the court's discretionary powers under the English O.13 r.9 sub-rule 14 are discussed. That is the corresponding English Rule to O.3 r.10. This court stated:-

> ***Dealing with the discretionary powers of the Courts under English Order 13 r.9 sub-rule 14 the Supreme Court Practice 1997 (The White Book) (Vol1 p.145) cites the Court of Appeal's judgment in Alpine Bulk Transport Co. Inc v. Saudi Eagle Shipping Co. Inc., The Saudi Eagle [1986] 2 Lloyd's Rep. 221 as authority for following propositions:***
>
> ***(a) It is not sufficient to show a merely "arguable" defence that would justify leave to defend under Order 14; it must both have "a real prospect of success" and "carry some degree of conviction." Thus the court must form a provisional view of the probable outcome of the action.***
>
> ***(b) If proceedings are deliberately ignored this conduct, although not amounting to an estoppel at law, must be considered "in justice" before exercising the court's discretion to set aside.***
>
> ***Notwithstanding the Court of Appeal's later decision in Allen v. Taylor [1992] P.I.O.R. 255 which purports to dilute the principles emerging from Saudi Eagle, we subscribe to the White Book's preferred view that 'unless potentially credible affidavit evidence demonstrates a real likelihood that a defendant will succeed on fact no "real prospect of success" is shown and relief should be refused."***

This passage was cited to the Judge in the written argument of the Respondent in the High Court.

By way of explanation, in ***Allen v. Taylor*** Dillon LJ. having the referred to the ***Saudi Eagle*** case said at page 259:

> ***"It is quite impossible to be dogmatic about the extent to which the court must be satisfied of the validity of the suggested defence. There must be numerous cases where the issue will turn entirely on the assessment of the facts at trial; each party's case would carry conviction if it stood alone and without conducting a trial the court is not able to say which will succeed"***

Before us Mr Nagin cited ***Day v. RAC Motoring Services Ltd*** [1999] 1 All ER 1007 (CA) in which Butler Sloss and Ward LJJ, sitting in the English Court of Appeal, held that the court need not be satisfied that there was a real likelihood that the defendant would succeed but merely that the defendant had an arguable case which carried some degree of conviction.

Mr Nagin invited us to prefer the diluted test set out in ***Allen v. Taylor*** and ***Day v. RAC Motoring Services Limited***. Mr Singh on the other hand invited us to adhere to the test set out in ***Wearsmart***.

We can state our conclusion on this point quite shortly. Notwithstanding ***Allen v. Taylor,*** which we note was considered in ***Wearsmart*** and the later case of ***Day v. RAC Motoring Services Limited*** we are not persuaded on this appeal to depart from the test which was laid down by this Court in ***Wearsmart*** in 1998 and which has stood since then. We therefore reject Mr Nagin's submission on this point.

We now turn to the second part of Mr Nagin's argument on the issue of a defence. Counsel attacked the finding of the Judge that the Appellant had not shown a defence on the merits. He submitted that the Appellant had filed an affidavit from the Appellant's in house solicitor which disclosed sufficient material concerning the Appellant's defence which would justify the Court in exercising its discretion to set aside the default judgment. Mr Nagin emphasised that the merits had not been gone into, that the Appellant should be given the opportunity of having the case properly tried, that it was possible that there was no negligence or breach of statutory duty or that there was some contributory negligence on the part of the Respondent, and that an injustice would arise if a trial did not occur.

What then was the relevant material before the Judge?

First, in the Respondent's statement of claim he pleaded that he was injured when

> ***"... a heavy towing bar fell on his right leg when a steel wire connecting it snapped or got released from the joint".***

In the particulars of negligence the Respondent pleaded, inter alia : "providing a towing truck where a towing bar was tied with a steel wire which snapped or came off its connection".

Secondly, there was affidavit evidence consisting of two affidavits from the Appellant's in house solicitor and an affidavit from the Respondent.

In the in house solicitor's affidavit in support of the application she deposed:

> ***7. THAT I verily believe that the Insurance company has also done an extensive investigation in respect of the said accident. From this report its revealed that the accident would have been avoided, if the Plaintiff would have acted cautiously by using a proper method to place the pulley bolt onto the cable.***
>
> ***Circumstances of the accident***
>
> ***8. THAT I am advised and verily believe and that on the day of the accident the Plaintiff was accompanied by the tow truck driver namely Viliame Turaga.***
>
> ***9. THAT about 9.00am they towed the sixth vehicle registration no. CN865 from Nina Street to the foreshore car-park. While they are doing so, both the Plaintiff and the driver got out of the truck registration no. DA136.***
>
> ***10. THE driver operated the tow bar winch control which was situated on the right hand side of the truck registration no.***

DA136, while the Plaintiff was standing at the left behind the truck. The tow bar was lowered and the towed vehicle CN865 was released.

11. *THE driver then hoisted the tow bar to allow the Plaintiff to secure it by chaining to the rear of the tow truck.*

12. *WHEN the tow bar had been hoisted half the normal height of about four feet the cable pulley bolt (steel bolt) slipped resulting in the tow bar falling on the Plaintiff's right leg.*

13. *THAT I am advised and verily believe that bolt was not screwed to lock the pulley and the Plaintiff should have checked this before he started his job. It was his job to check this.*

14. *THE Plaintiff was aware of the method of the operations of the tow bar as he had been doing this work for a longtime with the driver Viliame Turaga.*

15. *THE Plaintiff had himself caused and/or contributed to this accident and he sustained the alleged injuries due to his own fault.*

The in house solicitor exhibited a draft statement of defence. Paragraph 3 reads as follows:

3. *THE Defendant admits that the Plaintiff was injured on 13th January, 2001 but his injury was caused solely due to and/or contributed to by the Plaintiff's own negligence and acting contrary to instructions in towing away vehicle unlawfully parked in the City of Suva. The Defendant denies the matters contained in paragraphs 5, 6 and 7 of the Statement of Claim and denies the particulars of negligence alleged by the Plaintiff and further alleges that the Plaintiff, due to his own negligence caused his own injuries.*

PARTICULARS OF NEGLIGENCE

i) The Plaintiff failed to take reasonable steps to ensure his own safety in the course of his employment with the Defendant.

ii) *The Plaintiff failed to take adequate precautions in that when towing the motor vehicle No. CN 865 he was not paying proper attention to what he was doing.*

iii) *In normal circumstances any reasonable and careful person would have locked the pulley before towing the vehicle.*

iv) *The Plaintiff failed to take the simple precaution as a result of his own carelessness and acted contrary to instructions given as to the towing away of vehicles unlawfully parked in the City of Suva."*

In the in house solicitor's affidavit in reply to the affidavit filed on behalf of the Respondent (which referred to the Respondent's Statement of Claim) the in house solicitor deposed that the Appellant denied the allegations of negligence and breach of statutory duty put forward by the Respondent and put him to strict proof of those allegations.

We have already set out the Judge's conclusions on the defence advanced by the Appellant and the material which was before him. We entirely agree with the Judge's findings that the Appellant did not disclose what instructions were disobeyed or in what way the Respondent was at fault. We would add some further comments:

1. The Appellant's in house solicitor asserts that there was an extensive examination by the Insurer and yet the Appellant has not dealt with the essential allegation in the Respondent's statement of Claim that accident happened "when a steel wire connecting it snapped or got released from the joint". This appears to be different from what the in house solicitor alleges in her affidavit namely that "the bolt was not screwed to lock the pulley". The system of operating the tow bar has not been explained by the Appellant. Indeed the description given by the in house solicitor is hardly one which has any clarity.

2. The Appellant accepts that the driver of the tow truck was present at the time of the accident and yet there is no evidence from him (or indeed any one else who was employed by the Appellant) as to the events before the accident or as to the accident scene.

3. As the Judge said there was no evidence as to what the instructions were which the Respondent allegedly disobeyed. Other allied questions also arise. Were those instructions given orally or in writing? When were they given? And by whom? Further the in house solicitor has not stated the reason why it was the Respondent's job to check the locking of the pulley.

4. The allegations in the in house solicitor's Affidavit are not carried into the draft statement of defence. That pleading might have been sufficient as a holding defence but it would have not withstood a request for better particulars. Where a defendant is alleging that it has a good defence and is seeking to set aside a default judgment, it behoves that party to spell out the defence with sufficient particularity. That has not been done in this case. The draft defence does not plead any facts, for example, the instructions allegedly given to the Respondent which would support the allegation that the accident was the Respondent's own fault or that he was guilty of contributory negligence.

During the argument these deficiencies and those referred to by the Judge were put to Mr Nagin. He conceded that the draft statement of defence was not specific. He also conceded that generally the material before the Judge as to the defence "may not have been put clearly". In our view that was a manifest understatement of the position.

We have reached the clear conclusion for the reasons just given that the Appellant has not established an "arguable defence", let alone a defence which has "a real prospect of success" and one which carries "some degree of conviction" See ***Wearsmart*** (supra). We therefore reject the Appellant's attack on the Judge's finding in relation to the defence.

We turn next to Mr Nagin's argument on delay and the explanation of that delay.

The Judge considered that the Appellant had displayed a marked indifference to the court proceedings and found that the delay was inexcusable.

Mr Nagin frankly conceded that there was delay on the part of the Appellant and that should not have occurred. These were proper concessions.

Mr Nagin submitted that the Appellant is a large local authority which had a "poor system" in its management. There is no evidence of a "poor system" and, in any event, such an excuse for delay is unacceptable in this court.

Mr Nagin accepted that on at least four occasions the Appellant did not take any step when the circumstances, given its present stance, demanded positive action. Those occasions were:-

1. After 28 August 2002 (the service of the default judgment). If as the Appellant now claims there was a defence to the claim and, as well, there was a breach of a professional understanding (which the Respondent's advisers denied) then the service of the default judgment demanded a prompt reaction but nothing occurred.

2. After the Appellant received the Respondent's solicitor's letter of 13 September 2002 stating that quantum only was in dispute. If that

letter was wrong, as is now claimed, the circumstances demanded a reply but there was none. The Appellants inaction appears to be in admission by conduct. See ***Wiedemann v Walpole*** [1891] 2 QB 534 (CA); Cross on Evidence (NZ edition) para 18.14.

3. After 22 January 2003 when the two summonses for interim payment and the assessment of damages were served. There was no response. The comments made above again apply.

4. On 9 April 2003 when counsel the Appellant appeared before the Judge on the 2 summonses. There was no indication that liability was in issue. That stance was not made until (so we were informed from the bar by Mr Nagin) until 9 May 2003 at the interim payment hearing.

We agree with Judge's findings on delay. It was inexcusable. Indeed we would categorise it as wholly unacceptable. The Appellant ignored the processes of the court. The in action of the Appellant over nine months after it became aware of the default judgment entitled the Respondent to assume that liability was not in issue. The litigant is not entitled to behave as the Appellant did in this case and than belatedly put forward a plea that it has a good defence and expect the court to exercise its discretion in favour of setting aside a default judgment.

Finding and Result

We find that the Appellant has failed to persuade this court that the Judge wrongly exercised his discretion in refusing to set aside the default judgment.

The appeal is accordingly dismissed. The default judgment will stand.

Costs

As to costs. The Respondent sought indemnity costs "to warn litigant that this court will not tolerate this kind of appeal". While we have criticised the Appellant's inaction and have some sympathy for the Respondent we are not prepared in the circumstances to accede to the request for indemnity costs. There will be costs on a standard basis. The Appellant is to pay the Respondent's costs in the sum of $1,000 together with disbursements as fixed by the Registrar.

Trial

This litigation must be brought to a speedy conclusion. We therefore direct that the action be listed for mention in the High Court within one month of the delivery of these reasons so that a date can be fixed for a trial for the assessment of damages and so that any necessary pre trial directions can be given.

Eichelbaum, JA

FIJI COURT OF APPEAL

Penlington, JA

Scott, JA

Solicitors:

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Messrs. R. I. Kapadia & Company for the Respondent