IN THE HIGH COURT OF FIJI

AT LABASA

CIVIL APPELLATE JURISDICTION

CASE NUMBER:	**HBA 3 OF 2013**
	(HBC 28 OF 2009)
BETWEEN:	**ROBIN IRWIN**
	APPELLANT
AND:	**FIJI NATIONAL PROVIDENT FUND**
	RESPONDENT
Appearances:	***Mr. Mohammed Sadiq for the Appellant.***
	Ms. L. Macedru for the Respondent.
Date/Place of Judgment:	***Monday 17 November 2014.***
Coram:	***Hon. Madam Justice Anjala Wati.***

JUDGMENT

Catchwords:

Appeal – Master's decision – Deed of Guarantee- Summary judgment against the guarantor- Setting aside - Refusal to set aside summary judgment- Right to apply for a setting aside before the Master- Guarantor's liability to pay debt under the Primary Security- Recovery Limited - Effect of not serving summary judgment within 14 days of entering the same- Defence on Merits.

Legislation:

The High Court Rules 1988 ("HCR"): Order 13 Rule 10, order 14 Rule 11 and Order 19 Rule 9.

The Cause

1. On 15 August 2013, the Master of the High Court refused the appellant's application to set aside the summary judgment entered against him on 2 October 2009 and ordered that the respondent reseals and serves the summary judgment on the appellant within 14 days of the order and that any execution of the summary judgment be stayed until proper service of the same.

2. The appellant appeals against those orders on the grounds that the Master:

    1. ***erred in law and in fact in interpreting Clause 15 of the Deed of Guarantee.***

    2. ***failed to distinguish a normal guarantee from a one where the liability of the guarantor was expressly limited to his local assets in Fiji.***

    3. ***erred in law in fact in holding that the judgment entered for $2,312,013.48 was correct when the same was contrary to clause 15 of the Deed of Guarantee.***

    4. ***erred in law and in fact in holding that the appellant was liable beyond the terms of the contract.***

    5. ***erred in law and in fact in holding that the statement of defence filed was not a meritorious one.***

    6. ***erred in law and in fact in holding that the appellant admitted his liability when in fact he had denied the claim in paragraph 2 of his statement of defence.***

7. ***erred in law and in fact in failing to give any or proper weight to the submissions filed by the appellant and particularly to the submission that since the judgment was entered beyond the appellant's assets in Fiji, the judgment was irregular; that the appellant's liability was secondary; and that he was not liable beyond the terms of the contract being Clause 15 of the Deed of Guarantee.***

Submissions

3. Mr. Sadiq argued that a guarantor cannot be liable beyond the terms of his contract. The parties had willingly entered into a Deed of Guarantee. The Deed by Clause 15 limits the liability of the guarantor to his local assets only.

4. Judgment was obtained for ***$2,312,013.48.*** The appellant does not have any local assets in Fiji. Before entering any judgment against the appellant the respondent should have checked what his local assets were worth and since the appellant did not have any local assets at the time the judgment was entered, the entering of the judgment in excess of his liability was irregular and thus must have been set aside as of right by the Master. The appellant was entitled to set aside judgment in default entered against him since the amount entered was in excess of his liability imposed by Clause 15 of the Deed. The respondent did not at any time move to reduce the judgment to suit Clause 15 so the appellant had to move to set aside the judgment.

5. Mr. Sadiq stated that the Master was wrong in upholding Clause 6 of the Deed of Guarantee in that the guarantor was liable to pay the lender the whole of the guaranteed monies. The Master's verdict suits a normal guarantee but this guarantee is a limited one in that the liability of the appellant is limited to his local assets. Clause 15 therefore overrides any liability imposed by Clause 6 of the Deed.

6. It was also argued that the Master had ruled that the setting aside was made after 3 years. The appellant did not know of the default judgment entered against him. How

could he then apply for a setting aside. The respondent was obligated by the law to serve the judgment on the appellant within 14 days of entering the same. That is why the Master ordered for resealing and service of the judgment by default. The appellant cannot be held responsible for the delay in applying for setting aside of the same.

7. The appellant came to know about the default judgment when he was served with a Bankruptcy Notice on 29 June 2011. He made the application for setting aside on 10 August 2012, almost a year later because when he was served with a Bankruptcy Notice he was to leave for New Zealand for medical treatment.

8. It was finally submitted that the Master stated in his judgment that the proposed defence did not show any defence on merits but was an admission and offered no resistance to the claim. The finding of the Master in incorrect in law and in fact because by paragraph 2 of the proposed defence the appellant denied being indebted to the extent of the claim or any sum at all. There was no admission of any liability.

9. Ms. Macedru argued that Clause 15 of the Deed of Guarantee did not limit the claim or liability of the respondent. It merely says that if the assets of the appellant were to be used for recovery of the amount of monies due then only his local assets were to be affected.

10. The Clause that establishes the appellant's liability is Clause 6 by which all the monies owing were guaranteed.

11. On the question whether the judgment was served, Ms. Macedru argued that the contention is baseless. Mr. Kohli had represented the appellant in filing a notice of intention to defend. He was also given time to respond to the application for summary judgment. He did not respond saying that he did not have any instructions on the application. The application was therefore set for hearing. The appellant was represented at the hearing and offered no defence. He was represented when the application for summary judgment was granted. He therefore at all times knew or ought

to have known of the judgment entered against him. Any delay in setting aside therefore is the delay of the appellant.

12. Ms. Macedru also argued that there is no inconsistency between Clauses 6 and 15. Clause 6 sets the liability and Clause 15 is limited to recovery of the debt from the assets of the appellant. If there are no assets to be recovered then a personal recovery action on the appellant can be brought under Clause 6 of the Deed of Guarantee. In this case a bankruptcy proceeding was issued and that is permissible under Clause 6.

13. The Master was correct in saying that the defence did not have merits. Whilst the appellant denied the sum due by him, that is negated by the Deed itself. A mere denial is therefore not sufficient to establish a defence on merits.

14. Ms. Macedru stated that the judgment entered is that of 2009. The progress of the bankruptcy proceedings is affected as it has been adjourned sine die waiting the appeal verdict. The respondent is not able to benefit from its contract and the delay is prejudicial to it.

15. The reason why the guarantor was looked at for payment of the monies was that recovery from the mortgaged property was unsuccessful. No one had shown an interest to buy the property. The guarantor has 100% interest in the mortgaged property.

The Law and Analysis

16. The majority of the grounds of appeal are based on the argument that the guarantee entered into by the appellant was limited in nature by Clause 15 in that the liability was limited to the appellant's local assets. The Court had ruled that the liability was never limited. It was however agreed by the parties that if monies were to be recovered from the assets of the appellant then only his local assets would be affected.

17. The issue mainly revolves around the construction and interpretation of Clause 15 of the Deed of Guarantee. I will deal with this Clause first, assuming that the appellant had a right to apply for a setting aside before the Master in the first place. Later in my judgment I will elaborate on this aspect.

18. Clause 15 reads:

    "It is hereby agreed that the recovery of any amount due and payable under this guarantee shall be limited to the local assets of the guarantor."

    Underlining is Mine for Emphasis

19. It is very clear from the wording of Clause 15 that the Clause does not affect the liability of the guarantor. It is only specific and to be used when the question of recovery arises and that too if the appellant's assets are to be used for payment of the monies due. The use of the word ***"recovery"*** makes the clause unambiguous and unequivocal.

20. I do not find any confusion in Clause 15 to even consider whether the said Clause overrides Clause 6 which was also a Clause that was brought to the attention of the Court by both parties.

21. Both the clauses are operational on their own without any conflict.

22. Clause 6 is the Clause that sets out the liability of the guarantor. It is headed ***"Guarantors Liability"*** and reads as follows:

    " The Guarantor shall be liable to pay the Lender the whole of the Guaranteed Monies and the Guarantor shall not, until the Lender has received one hundred cents in the dollar of the Guaranteed Monies, be entitled to have the Lender apply against the Guaranteed Monies any of the following..."

    Underlining is Mine

23. Clause 6 has used the term ***"Guaranteed Monies"*** which is defined by the Deed under the head ***"Definitions and Interpretation".*** It states that ***"Guaranteed Monies"*** means:

    (a) ***"all monies now or hereafter to become owing (whether contingently or otherwise) or payable to the Lender by the borrower arising out of the obligations assumed or accepted by the Borrower arising out of the Primary Security or and any one or more of the further Securities; and***

    (b) ***All monies which the Lender is or shall be at liberty to debit and charge the account of the Borrower under any security now or hereafter held by the Lender from the Borrower by reason of the obligations of the Borrower arising under the Primary Security and/or the Further Securities or any one of them; and***

    (c) ***all monies payable under or pursuant to any judgments or orders obtained with respect to any of the above obligations and interest accruing thereon."***

24. Clause 6 uses the term ***"liability"*** whereas Clause 15 uses the term ***"recovery"***. This in itself indicates the different purpose for which each Clause was entered into by the parties.

25. If the appellant was not so sure as to which Clause was operational and how the two were to be reconciled, it was his duty to seek legal clarification as he was exposing himself financially to a large amount of debt. From his perception Clause 15 overrides Clause 6. This ought to have been clarified before he signed the agreement, not in hope that he would be able to escape liability given his perception.

26. Clause 6 very clearly states that the Lender is liable to claim all monies under the Primary Security. That is what exactly the Lender is doing. It has sued the appellant for all monies owing under the Primary Security so the amount of the summary judgment does not in any way exceed the liability of the guarantor. That is the term on which the contract of

guarantee was entered into and the guarantor has to oblige given his agreement which is legally binding on him.

27. The other clauses that indicates that the appellant is liable for the amount due under the primary security is ***Part C*** of the Recitals, ***Clauses 4, 5, 7, 8*** and ***10(a)*** of the Deed. These clauses more or less say the same thing as Clause 6. I need not recite the clauses in full save to say that these are the clauses that sets the liability of the appellant and not Clause 15.

28. The appellant also raised the issue that after summary judgment was entered into by the respondent, the order was not served on him and so he could not have applied for setting aside any earlier. This requires me to consider the issue of the right to set aside.

29. The application for setting aside was made under Orders 13, 14 and 19. I will recite the respective orders on setting aside.

30. The first is ***Order 13 Rule 10***. It reads ***"…, the Court may, on such terms as it thinks just, set aside or vary any judgment entered in pursuance of this Order".*** This Order specifically targets judgment entered for failure to give notice of intention to defend. The records show that an intention to defend was filed so this Order is not applicable.

31. The second is ***Order 14 Rule 11*** which reads ***"any judgment given against a party who does not appear at the hearing of an application may be set aside or varied by the Court on such terms as it thinks just".***

32. The question then is whether the summary judgment was given in absence of the appellant.

33. When the application for summary judgment was listed in Court for the first time, Mr. Kohli appeared for the appellant and sought time to file affidavit in reply to the same. The matter was adjourned and when called in Court again Mr. Kohli informed the Court that he did not have any instructions in respect of the application for summary judgment but that he wished to remain on record. The matter was again adjourned for Mr. Kohli to

seek instructions from the appellant and the Court also informed the parties that if there was no response then the judgment would be entered against the appellant. The summary judgment application was listed for hearing and on the date of hearing no defence was offered and so the application for summary judgment was granted.

34. The summary judgment was not entered against the appellant in his absence. The appellant thus cannot invoke the setting aside procedure. The judgment was entered pursuant to an application for summary judgment which remained undefended despite opportunities being granted to the appellant and he being represented on the date of hearing and the order.

35. The third Order under which the application for setting aside was made was ***Order 19 Rule 9*** which reads that ***" the Court may, on such terms as it thinks just, set aside or vary any judgment entered in pursuance of this Order".*** This Order targets judgment entered in default of defence. The judgment was granted by Master on the application for summary judgment. Summary judgment was granted because no defence was offered at the day of the hearing. It was not a case where judgment was entered simply because no defence was filed. If that was the case there would not have been any Court proceeding. The respondent would have filed a judgment by default and the order would have been sealed by the Registry. In this case there was a Court proceeding to determine whether or not summary judgment should be entered. I thus find that the appellant had no right to bring an application for setting aside under this Order.

36. My final finding is that the appellant did not have the right to make an application for setting aside before the Master at all. If anything he had a right to appeal against the summary judgment entered by the Master. He is lucky that his application for setting aside was entertained by the Master which could have been struck out for want of jurisdiction.

37. Even if I am wrong in my finding on the right to set aside, I find that the appellant knew about the summary judgment and cannot say that the delay in setting aside is not his delay and should be laid at the respondent's door.

38. So far as the breach of the rules are concerned, in that the judgment should be served within 14 days of entry, it does not invalidate the judgment that has been entered. If anything, the recovery proceedings may be affected as the process leading to recovery has not been complied with.

39. I must also say that the respondent could have always sought an extension of time for service of the judgment after the time prescribed by the rules had expired.

40. In this case the Master had on his own motion granted an extension and I do not find that it has caused any prejudice to the appellant. If there are any such prejudicial effects, the same can be argued in the enforcement proceedings.

41. The appellant also argued that his liability is secondary. The liability clause states that the Lender is liable to claim the monies from the Guarantor if the monies become due and owing. It is not contradicted that the monies are due and owing to the Lender. The guarantor thus is liable to pay the monies under the primary security. He cannot evade his obligations by saying that the principal debtor must be pursued or others must be pursued. The Deed of Guarantee does not afford him that defence.

42. I do not find that there is any defence on merits, be it on the interpretation of Clause 15, the liability of the guarantor, or the service of judgment within 14 days of the entry of the same. The appeal has no basis.

Costs

43. I do not find that the appellant had any right to apply for the setting aside of the summary judgment entered against him. He was indeed lucky that he was heard on the application.

44. If he believed that he had the right to set aside, he brought the appeal only in the hope of Clause 15 which to my mind did not offer the appellant any rescue from the liability. If the Clause was carefully analysed, this appeal would not have been filed in the first place.

45. The filing of the same has put the respondent to huge costs in terms of sending a counsel from Suva to argue the case. Time and resources have also been utilized in preparation of the case.

46. It is therefore justified that costs be awarded in favour of the respondent which I will summarily assess.

Final Orders

47. The appeal is dismissed.

48. The respondent shall have costs of the proceedings in the sum of $1,500 to be paid by the appellant.

HIGH COURT OF FIJI SUVA

Anjala Wati

Judge

17.11.2014

To:

1. *Mr. M. Sadiq for the Appellant.*
2. *FNPF Legal Services for the Respondent.*
3. *File: Labasa HBA 3 of 2013 (HBC 28 of 2009).*