IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 154 of 2014

BETWEEN : **CREDIT CORPORATION (FIJI) LIMITED**

Respondent/Plaintiff

AND : **NOODLES BAKERY COMPANY LIMITED**

First Applicant/Defendant

BEFORE : His Lordship Justice K. Kumar

COUNSELS : Ms. L. Vaurasi for Applicants/Defendants
Mr. R. Naidu for Respondent/Plaintiff

Date of Hearing : 06 October 2014

28 July 2015

RULING

(Application to Set Aside Judgment by Default)

1.0 Introduction

1.1 On 5 September 2014, the Applicants (Defendants) filed an Application by Summons seeking following Orders:

(a) **AN ORDER** that the Judgment in Default of filing Statement of Defence entered against the Defendants on 25 July 2014 be wholly set aside;

(b) **AN ORDER** that the execution of Default Judgment entered against the Defendants be stayed pending the determination of this application;

(c) **AN ORDER** that leave be given to the Defendants to file their Statement of Defence out of time;

(d) **SERVICES** of the Summons and Affidavit to the Plaintiff be abridged to 1 day;

(e) **AN ORDER** that costs of this application be paid by the Plaintiff;

(f) **ANY OTHER ORDERS** the Court deem just and equitable.
("the Application")

1.2 The grounds for the Application are set out in the Summons as follows:

"(i) Irregularly entered. Such irregularity was a fundamental irregularity as the Default Judgment in the sum of $149,343.74 was claiming more than what the Plaintiff is entitled to. The Defendant was entitled to be heard before Judgment was entered under Order 19 Rule 2 and Order 14 Rule 1 of the High Court Rules. The Honorable Court has inherent Jurisdiction to set aside ex debito justitiae such fundamental irregular judgments irrespective of time taken learning of irregularity and applying to set aside.

(ii) Alternatively the said Judgment be set aside under Order 2 Rule 2 in the Honorable Courts discretion that the Judgment is irregular on the grounds specified in (i) above and that the application to set aside was made within reasonable time and that the Plaintiff has not taken any fresh steps to amend such Judgment.

(iii) Alternatively if the said Judgment is regular the Honorable Court is asked to exercise its discretion to set aside the said Default Judgment despite the length of time of entry of Judgment and this application in view of the Defendants having a Defence on the

merit and the reasons given for the Delay in making this application. Order 19 Rule 10 are relied upon".

1.3 On the same day, Applicants filed Ex-parte Notice of Motion for interim stay of execution of the Default Judgment pending determination of the Application when Notice of Motion for Stay was listed to be heard Inter-parte **("the Motion")**.

1.4 On 16 September 2014, being returnable date of the Motion, Applicants Counsel sought leave to withdraw the Motion and as such leave to withdraw the Motion was granted and the Motion was dismissed and struck out.

1.5 On the same day, Interim Stay of Execution of the Default Judgment was granted on the condition that Applicants pay a sum of $20,000.00 into High Court Registry by 4.00pm on 18 September 2014, and parties were directed to file Affidavits and submissions and the Application was adjourned to 6 October 2014 at 11.00 a.m for hearing.

1.6 Following Affidavits were filed on behalf of the parties:

For Applicants/Defendants

(a) Affidavit of Billy Chen sworn and filed on 5 September 2014 **("Chen's 1st Affidavit")**;

(b) Affidavit in Reply of Billy Chen sworn and filed on 3 October 2014 **("Chen's 2nd Affidavit")**

For Respondent/Plaintiff:-

Affidavit in Answer of Sheraaz Altaf Dil sworn on 23 September 2014 and filed on 24 September 2014 **("Dil's Affidavit")**.

1.7 I note that the above Affidavits carry the indorsement required under Order 41 Rule 9 (2) of the High Court Rules.

1.8 However the indorsement on Affidavits filed on behalf of the Applicants are incomplete in that date Affidavits are sworn is not completed.

1.9 Incomplete indorsement defeats the purpose of the requirement that details be indorsed in the Affidavits. It is therefore imperative for parties and the legal practitioners to complete the indorsements.

1.10 Parties filed submissions and made oral submission.

2.0 Chronology of Events

2.1 On 11 June 2014, Respondent filed Writ of Summons and Statement of Claim against the Applicants.

2.2 Writ of Summons was served on the Applicants on 18 June 2014.

2.3 On 24 June 2014, Applicants filed Acknowledgement of Service and Notice of Intention to contest the proceedings.

2.4 On 24 July 2014, Respondent filed Praecipe for Judgment and Judgment by Default in Default of Defense.

2.5 Judgment by Default was issued on 25 July 2014.

2.6 On 7th August 2014, Applicants filed Statement of Defense and Counter claim.

2.7 On 14th August 2014, Default Judgment was served on Applicants by leaving copy at Applicants Solicitors' office.

3.0 Irregular Judgment

3.1 Applicants submit that Default Judgment obtained is irregular.

3.2 The principle in respect to setting aside irregular judgment is well settled.

3.3 At paragraph 403 of Halsbury's Law of England Vol 37 4th edn it is stated as follows;

> ***"In the case of an irregular judgment, the defendant is entitled to have it set aside ex debito justitiae, and the court should not impose any terms whatsoever upon the defendant."***

3.4 Also at paragraph 13/9/8 of the Supreme Court Practice 1999 Volume 1 page 157 it is stated as follows;

> ***"Where a judgment had been obtained irregularly, the defendant was entitled ex debito justitiae to have it set aside (Anlaby v. Praetorious (1888) 20 Q.B.D. 764".***

3.5 The above principal has been adopted and applied by Courts in Fiji.

3.6 Irregular judgment is to be set aside unconditionally and as of right.

Anlaby *v.* Praetorious (1888) 20 QBD 764 (Fry L.J.)

3.7 In ground (i) for setting aside default judgment Applicants state that:-

(i) Respondent was claiming $149,343.74 which is more than Respondent was entitled to claim;

(ii) Applicants were entitled to be heard before judgment was entered under Order 19 Rule 2(a) and Oder 14 Rule 1 of High Court Rules.

3.8 The details for amount claimed by the Respondent are stated as follows at paragraphs 10 of the Statement of Claim:-

"(a)	*Principal amount*	*$131,300.00*
(b)	*Total interest for 60 months at 9% per annum*	*$ 59,085.00*
		$190,358.00
(c)	*Admin charges*	*$ 134.48*
		$190,519.48
(d)	*Less payments*	*$ 12,748.00*
		$177,771.48
(e)	*Less unearned Interest as at 30/04/14*	*$ 28,427.74*
	Balance	***$149,343.74***"

3.9 The letter of offer dated 4 September 2012 (Annexure **"SD7"** of Dil's Affidavit) to First Applicant sets down the terms and condition of the loan facility which was accepted by all the Applicants as they all signed the said letter. The relevant details of loan facilities are as follows:-

"(i) ***CUSTOMER:-*** ***NOODLES BAKERY COMPANY LIMITED***

Sureties:- ***Billy Chen and Kuang Bai Nuan***

(ii) ***Facility:-*** *Loan Facility of $155,000.00 for purchase of vehicles less deposit $25,000.00 giving a total loan facility of $130,000.00 plus 1% establishment fee of $1,300.00 giving a total loan facility of $131,300.00 being principal and interest of $59,085.00 totalling $190,385.00.*

(iii) ***Term:-*** *Fixed for 60 months.*

(iv) ***Rate of Interest:-*** *9% per annum flat which will be calculated for 60 months on the principal sum of $131,300.00 and added thereon at the commencement of the drawdown of the facility. CCL shall be*

entitled to charge simple interest at the rate of 25% per annum on any installment of the principal sum or predetermined interest which the customer shall fail to pay upon the due date thereof.

(v) ***Repayment:-*** *$3,173.08 per month over the term of 59 months and on the 60th month the final repayment shall be $3, 173.28. Your first payment will be made 30 days after the date of settlement and thereafter every month on the anniversary date of the first payment date. Your total repayment will be $190,385.00."*

3.10 The amount claimed in the Statement of Claim is as per the terms and conditions in the aforesaid letter of offer.

3.11 Also after service of the Statement of Claim the First Applicant through Second Applicant wrote to Respondent on 24 June 2014 (Annexure **"BC7"** of Chen's 1st Affidavit) in respect to repayment arrears as at June 2014 which stood at $51,029.62 offering to clear repayment arrears as follows:-

"Total overdue as per June 2014:	*$51,029.62*
Less payment to be made:	*$20,000.00*
Balance:	*$31,029.62*
Divided in 24 months	*$ 1,292.20 per month*
Plus Monthly Repayment:	*$ 3,173.08*
Total Payment per month	***$4,465.98***
For 24 months"	

3.12 On 24 June 2014 (Annexure **"BC8"** of Chen's 1st Affidavit) Respondent wrote to First Applicant informing it that Respondent has agreed to following arrangement:-

"(i) You must meet $20,000 by tomorrow 25/06/2014 on your account.

(ii) At least $4, 465.98 per month has to be met from 23 July 2014 until the payments are fully updated.

(iii) Thereafter normal repayment is to be met without any default."

3.13 Respondent has notified Applicants that if it failed to pay as above Respondent "will have no option but to proceed further with legal action".

3.14 At no point in time until filing of the Application did Applicants raise with the Respondent issue of the amount being claimed in the Statement of Claim as being more than that is owed by First Applicant to Respondent.

3.15 I find that amount claimed by the Respondent in the Statement of Claim does not exceed the amount owed by First Applicant to the Respondent.

3.16 Applicants submission that the cost of the vehicle should have been factored in the debt amount is misconceived in that the vehicle having been involved in an accident has always be in the custody and control of the Applicants.

3.17 Applicants next ground is that Applicants were entitled to be heard before Judgment was entered under Order 19 Rule 2 of the High Court Rules. Order 19 Rule 2(1) of High Court Rules provide as follows:-

"2(1) Where the Plaintiff's claim against a defendant is for a liquidated demand only, then, if that defendant fails to serve a defence on the plaintiff, the plaintiff may, after the expiration of the period fixed by or under these Rules for service of the defence, enter final judgment against that defendant for a sum not exceeding that claimed by the writ in respect of the demand and for costs, and proceed with the action against the other defendants, if any".

3.18 In terms of High Court Rules Applicants were required to file Statement of Defence by 16 July 2014 **(Order 12 Rule 4(1) and Order 18 Rule 2(1) of High Court Rules).**

3.19 With respect I do not agree with Applicants Counsels' Submission that there is requirement to hear the Applicants prior to entering Judgment in default of Defence. All that is required is that amount claimed must be liquidated and the Applicants have defaulted in filing Statement of Defence within the time prescribed by the Rules.

3.20 Even though it is not stated as a ground for setting aside the Default Judgment in the Summons, Applicants in their Submission submitted that since claim is for unliquidated sum judgment should have been entered under Order 19 Rule 3 of the High Court Rules.

3.21 In **Subodh Kumar Mishra *v.* Car Rentals (Pacific) Ltd** 31 FLR 49 the Fiji Court of Appeal stated as follows:-

"Before turning to consider the question as to whether or not the judgment was regularly obtained, we must, in the circumstances of this case, go into the question as to what is meant by such phrases as "liquidated demand" and "liquidated claim".

In *Knight v. Abbott* (1882) 10 Q.B. 11 it was held that:

"A liquidated demand is in the nature of a debt i.e. a specific sum of money due and payable under a contract. Its amount must be ascertained or ascertainable as mere matter of arithmetic."

And to like effect is a dictum in *Workman Clark & Co. Limited v. Lloyd Brazileno* (1908 1 K.B. 968 (C.A.):

"A claim is unliquidated, where even though specified or named as a definite figure, its ascertainment requires investigation beyond mere calculation."

3.22 I therefore find that the amount claimed by the Plaintiff and for which default judgment was obtained was liquidated amount as it was "ascertained or ascertainable" (**Knight *v.* Abbot**) and its ascertainment did not require "investigation beyond mere calculation" (**Workman Clark & Co. Ltd**).

3.23 Also there is no need for parties to be heard before default judgment could be entered under Order 19 Rule 2(1) of the High Court Rules.

3.24 Order 14 Rule 1 of the High Court Rules deals with Application for Summary Judgment and as such is irrelevant for the purpose of the Application.

3.25 I hold that the Default Judgment entered was not irregular.

4.0 Regular Judgment

4.1 Applicants submit that if the Default Judgment is regular then it should be set aside on the basis of principle for setting aside regular judgment.

4.2 Order 19 Rule 9 of the High Court Rules provide:-

"The Court may, on such terms as it thinks just, set aside or vary any judgment in pursuance of this order."

4.3 It is not disputed by the parties that this Court has an unfettered discretion as to whether to set aside the default judgment or not.

4.4 Principles and factors applicable to exercise of discretion under Order 13 Rule 10 of High Court Rules is also applicable to exercise of discretion under Order 19 Rule 9; **Supreme Court Practice 1999 Volume 1 paragraph 19/9/1 page 368.**

4.5 At paragraph 403 of Halsbury's Law of England Vol. 37 4th edn. it is stated as follows:-

"In the case of a regular Judgment, it is an almost inflexible rule that the application must be supported by an affidavit of merits stating the

facts showing that the defendant has a defence on the merits... For this purpose it is enough to show that there is an arguable case of a triable issue".

4.6 Also at paragraph 13/9/7 of the Supreme Court Practice 1999 Volume 1 page 157 it is stated as follows:-

"Regular Judgment- If the judgment is regular, then it is an (almost) inflexible rule that there must be an affidavit of merits, i.e. an affidavit stating the facts showing a defence on the merits (Farden v. Ritcher (1889) 23 Q.B.D 24. "At any rate where such an application is not thus supported, it ought not to be granted except for some very sufficient reasons", per Huddlestone, B., ibid. P.129, approving Hopton v. Robertson [1884] W.N. 77, reprinted 23 Q.B.D. 126 n.; and see Richardson v. Howell (1883) 8 T.L.R. 445; and Watt v. Barnett (1878) 3 Q.B.D. 183 at 363).

For the purpose of setting aside a default judgment, the defendant must show that he has a meritorious defence. For the meaning of this expression see Alpine Bulk Transport Co. Inc. v. Saudi Eagle Shipping Co. Inc., The Saudi Eagle [1986] 2 Lloyd's Rep. 221, CA, and note 13/9/18; "Discretionary powers of the Court", below.

On the application to set aside a default judgment the major consideration is whether the defendant has disclosed a defence on the merits, and this transcends any reason given by him for the delay in making the application even if the explanation given by him is false (Vann v. Awford (1986) 83 L.S.Gaz. 1725; (1986) The Times, April 23, CA). The facts that he has told lie in seeking to explain the delay, however, may affect his credibility, and may therefore be relevant to the credibility of his defence and the way in which the court should exercise its discretion (see para. 13/9/18, below).

4.7 In **Ratinam *v.* Cumaraswamy & Anor.** [1964] 3 ALL ER 933 in dealing with an Application for extension of time to file notice of appeal out of the prescribed time, Lord Guest at page 935 paragraph A stated as follows:-

"The rules of Court must, prima facie, be obeyed, and, in order to justify a court in extending the time during which some step in procedure require to be taken, there must be some material on which the court can exercise its discretion. If the law were otherwise, the party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a time table for the conduct of litigation."

4.8 The principles stated in Halsbury's Law of England, 4th Edition paragraph 403, and Supreme Court Practice 1999 Volume 1 (paragraph 13/9/7) have been

adopted and applied by Courts in Fiji in many cases dealing with Applications to set aside of Judgment by Default and in exercise of Courts discretion pursuant to Order 13 Rule 10 and Order 19 Rule 9.

See: Wearsmart Textiles Ltd v. General Machinery Hire Ltd [1998] ABU 003u. 975 (29 May 1998), Pravin Gold Industries Ltd v. The New India Assurance [2003] FJHC 298; HBC 250d. 2002s (4 February 2003), Eni Khan v. Ameeran Bibi & Ors; HBC 3/98s (27 March 2003) and Nand v. Chand [2008] FJHC 310; HBC 222.2007 L (7 November 2008)

4.9 From the above it can be said that the factors to be taken into account in dealing with such Applications are:-

(i) Whether there has been inordinate delay;

(ii) Whether the Applicants have reasonably explained the delay;

(iii) Whether Applicants have shown by way of Affidavit evidence that they have defence on merits which has some prospect of success (major consideration); and

(iii) Whether Respondent will be prejudiced and suffer any irreparable harm.

4.10 As stated at paragraph 3.18 hereof, Statement of Defence was to be filed by 16 July 2014.

4.11 The Application was filed on 5 September 2014.

4.12 In **Revici *v.* Prentice Hall Incorporated & Ors** [1969] 1 ALL ER 772 – Lord Denning M R rejecting the Appellant's submission that time does not matter as long as costs are paid stated as follows:-

"Nowadays we regard time very differently from what they did in the nineteenth century. We insist on rules at time being observed. ... so, here although time is not quite so very long, it is quite long enough."

In **Revici's** case time for appeal had expired by one month.

4.13 In this instant Application was filed almost seven (7) weeks after time for filing of Statement of Defence had expired.

4.14 I therefore find that delay has been inordinate.

Reasons for Delay

4.15 In **Tevita Fa *v.* Tradewinds Marine Ltd. & Anor.** – Civil Appeal No. ABU0040 of 1994 (FCA) His Lordship Justice Thomson (as then he was) in dismissing Appellant's application for extension to appeal made four days after the expiration of time to appeal stated:-

"The application for leave to appeal was fixed only 4 days after the end of the period of six weeks. That is a very short period but time-limits are set with the intention that they should be observed and even lateness of only a four days requires a satisfactory explanation before an extension of time can properly be granted. In this case, as stated above, the applicant has given no explanation at all. That he may have been confused is merely an inference that Mr Patel has asked me to draw from his statement of present belief that time began to run only from 8 August, 1994."

In **Tevita Fa's** case, it was submitted by Appellant's Counsel that there had been a misunderstanding on the Solicitor's part as to when time started running for Appeal.

4.16 In **Kamlesh Kumar *v.* State** Criminal Appeal No. CAV0001/09 and **Mesake Sinu *v.* State** Civil Appeal No. CAV001/10 his Lordship the Honorable Chief Justice Gates, President of the Supreme Court of Fiji stated as follows:-

"[7] The rights of appeal are granted by statute within a framework of rules. Enlargement normally can only be granted because of specific powers granted to the appellate courts. No doubt because of a need to bring litigation to finality, once there is non-compliance, the courts can only exercise a limited discretion. Viliame Caubati AAU0022.03S 14th November 2003 at p.5.

4.17 His Lordship also quoted the following from Rhodes Cr App. R 35 at 36:-

"A short delay may be disregarded by the Court if it thinks fit, but where a substantial interval of time a month or more elapses, it must not be taken for granted that an extension of time will be allowed as a matter of course without satisfactory reasons."

4.18 Applicants at paragraphs 18 to 20 of Chen's 1st Affidavit states the reason for delay as follows:-

"(18) We have instructed Qoro Legal and acknowledgement of service was filed on 24 June 2014 but not the Defence. In order to prepare for the Defence, Qoro Legal advise us that they need the Asset Purchase Agreement, Guarantee and Dominion Insurance Policy. Unfortunately we do not have them with us.

(19) So Qoro Legal by letter dated 24 July 2014 requested the Plaintiff's counsel to provide them with the following documents;-

a) Letter of offer dated 04 September 2012;
b) Letter dated 05 October 2012;

c) Asset Purchase Agreement;
d) Guarantee dated 05 October 2012;
e) A copy of letter 01 April 2014;

(Annexed herewith and marked 'BC10' is a true copy of Qoro Legal's letter dated 24 July 2014).

(20) By letter dated 25 July 2014, the Plaintiff's counsel supplied Qoro Legal with the above mentioned documents except for letter dated 5 October 2012. (Annexed herewith and marked 'BC11' is a true copy of the Naidu Law's letter dated 25 July 2014)."

4.19 At paragraph 16 of Dil's Affidavit filed on behalf of Respondent he stated as follows:-

"16. As to paragraph 18 of Chen's Affidavit, the Plaintiff had provided the First Defendant with the Asset Purchase Agreement and the Guarantee when the First, Second and Third Defendants had signed these documents way back in 2012".

4.20 I accept Respondent's Affidavit evidence that Applicants had the requisite documents in their possession.

4.21 The request for the documents by Applicants Solicitors was only a delaying tactic on Applicants part for following reasons:-

(i) Applicants by letter dated 24 June 2014 offered to clear repayment arrears by making lump sum payment of $20,000.00 and paying $1,292.90 per month in addition to monthly repayment of $3,173.08;

(ii) On the same day Respondent wrote to Applicants stating that lump sum payment of $20,000.00 should be paid by next day (25/6/2014);

(iii) After receipt of e-mail from Respondent, Applicants Solicitors wrote to Respondents Solicitors requesting for copies of documents;

(iv) It is apparent that Applicants only requested for documents because they could not make lump payment of $20,000.00 by 25 June 2014.

4.22 For reasons stated above, I find that Applicants explanation for failure to file Statement of Defence is not entirely satisfactory.

Whether Applicant has shown Defence on merits which has some prospect of success.

4.23 Applicants proposed defence to Respondent's claim are that:-

(i) Respondent has failed to mitigate its loss by first seizing the vehicle and selling it;

(ii) The Second and Third Applicants are illiterate and did not understand the contents of the Agreement and Guarantee.

4.24 In relation to first proposed defence Applicants submit that the Respondent should have taken possession of the vehicle subject to Asset Purchase Agreement and disposed it to mitigate its loss.

4.25 It is well established that a Claimant has a duty to mitigate its loss by taking appropriate steps.

4.26 Applicants relied on the case of **Credit Corporation (Fiji) Ltd v. Khan** [2009] FJHC 203, HBC 334 2000L (11 September 2009) and **Credit Corporation (Fiji) Ltd v. Taz HBC 55/2001 and 10/2003 (12 August 2013)**

4.27 Both cases went for trial and in **Credit Corporation *v.* Khan**:-

(i) Plaintiff seized the bulldozer subject to Hire Purchase Agreement and sold it;

(ii) The issues before the Court was whether Plaintiff was justified in charging penalty interest of 25% after termination of the contract;

(iii) Court whilst finding that under the Agreement, Defendant was obliged to pay penalty interest of 25% on the installments Court adjusted penalty interest because of Plaintiff's conduct in letting default interest accrue for three years from date vehicle was sold and until the Plaintiff commenced recovery action.

4.28 In both the above cases vehicles subject to the Hire Purchase Agreement were repossessed and Creditor was able to recover the amount owing under the Agreement with agreed interest.

4.29 In this instant Respondent did not re-possess the vehicle and the reason for that is stated at paragraphs 14 (a) and (b) of Dil's Affidavit in following terms:-

"14.(a) Since the Jeep was in the possession of Dominion Insurance and under repair, the Plaintiff saw it prudent not to take possession of the Jeep. The Plaintiff did not want to take risk of signing the discharge with Dominion Insurance since the Defendants were not satisfied with the repairs that were carried out on the Jeep and furthermore the Jeep was still under repair.

b) There is no obligation on the Plaintiff to take possession of the Jeep".

4.30 The fact that the vehicle was repaired by Arkay Motors and Pala's Auto and that the Applicants were not satisfied with the repair works carried out through the insurer in that the Tyre Pressure Sensor light was not fixed it was not incumbent upon it to take possession of the vehicle.

4.31 I agree with Respondent's contention that there is no obligation on the part of the Respondent to re-possess the vehicle.

4.32 In respect to other proposed defence, Applicants at paragraph 8 of Chen's 1st Affidavit states as follows:-

"*The third Defendant and I are Chinese and our knowledge of English is limited. The terms and conditions of both the said Asset Purchase Agreement and Guarantee were not fully explained to us in Chinese language to fully understand and comprehend our rights and obligations contain herein."*

4.33 In response Respondent at paragraph 1.8 Dils Affidavit state as follows:-

"I do not accept paragraph 8 of Chen's affidavit and further say as follows:

a. When the First Defendant entered into discussions with the Plaintiff seeking finance from the Plaintiff, I met with the Second and Third Defendants who spoke to me in English. Most of the talking was done by the Second Defendant. I explained to the Second and Third Defendants the nature of the loan and the terms and conditions associated with the loan.

b. The asset purchase agreement was signed under common seal of the First Defendant.

c. The signatories to the asset purchase agreement did not inform or indicate to me that they did not understand the contents of the asset purchase agreement at the time of signing when I explained the contents of the asset purchase agreement to them.

d. I gave the guarantee to the Second and Third Defendants for signing and informed them to obtain independent legal advice from a solicitor of their choice before signing the guarantee. I verily believe they obtained independent legal advice from Ms Marie A. Chan, a solicitor practicing in Suva. Upon completion of the signing they returned the guarantee to me without any complains and they were very pleased with the financing."

4.34 The Defence of non-est factum was dealt it in ***Fiji Development Bank v. Raqona*** (1984) 30 FLR 151. In **Raqona's** case His Lordship Justice Kermode (as he then was) at page 153 stated as follows:

> ***"There is no dispute that the defendant executed the Guarantee. His defence is not a plea of non est factum. The document is not one which is required by law to be read over and explained to the Guarantor.***
>
> ***In the House of Lords case Saunders v. Anglia Building Society (1971) A.C.1004 it was stressed that the defence of non est factum was not lightly to be allowed where a person of full age and capacity had signed a written document emboding contractual terms.***
>
> ***The general rule is that a party of full age and understanding is normally bound by his signature to a document whether he reads or understands it or not."***

4.35 The following principle from ***Seaton v Heath*** (1899) 1 Q. B. 79 was adopted and applied in ***Fiji Development Bank v. Moto*** [1995] FJHC 166; HBC 55j; 95s (22 November 1995):-

> ***"...ordinary contracts of guarantee are not amongst those requiring 'uberrima fides' on the part of the creditor towards the surety; and mere non-communication to the surety by the creditor of facts known to him affecting the risk to be undertaken by the surety will not vitiate the contract, unless there is fraud or misrepresentation ..."*** (page 792)
>
> At page 793 Court further stated that:
>
> ***"...in general, contracts of guarantee are between persons who occupy, or ultimately assume, the positions of creditor, debtor, and surety, and thereby the surety becomes bound to pay the debt or make good the default of the debtor. In general, the creditor does not go to the surety, or represent, or explain to the surety, the risk to be run...The risk undertaken is generally known to the surety, and the circumstances generally point to the view that as between the creditor and the surety it was contemplated that the surety should take upon himself to ascertain exactly what risk he was taking upon himself."*** Page 793)

4.36 In this instant as is stated in Dil's Affidavit Asset Purchase Agreement was signed by Applicant and he gave the Guarantee to Second and Third Applicants for them to obtain independent legal advice on the Guarantee. There was no allegation or evidence of any fraud or misrepresentation against the Respondent.

4.37 The signature of Second and Third Applicants to be Guarantee (Annexure **"BC4"** of Chen 1st Affidavit) was witnessed by Ms. Marie Chan, Solicitor.

4.38 Second and Third Applicants therefore had all the opportunity to obtain independent legal advice and have Guarantee explained to them and if they chose not to do so then they did so at their own peril.

4.39 Guarantors who are of full age and capacity are bound by their signatures and there is no need for the guarantee to be witnessed.

Bank of New Zealand v. Geesteranus (1991) 3 NZBLC 102, 180 (Court of Appeal)

4.40 Applicants cannot rely on defence of non-est factum in relation to the Asset Purchase Agreement and the Guarantee for following reasons:-

(i) Second and Third Applicants are directors of First Applicant;
(ii) Second and Third Applicants are of full age and capacity and as such are bound by their signatures;
(iii) Applicants have been conducting business in Fiji and as such are deemed to have knowledge of how business transactions such as Bank loan are to be transacted;
(iv) Respondent is not obliged to explain or give advice in respect to obligation under the Guarantee.
(v) Respondent did give Second and Third Applicants opportunity to obtain legal advice and sign the Guarantee.
(vi) Guarantee was signed by Second and Third Applicants in the presence of a Solicitor and as such they had all the opportunity to obtain legal advice.
(vii) Second and Third Applicants did sign an acknowledgment in following terms:-

"I HEREBY ACKNOWLEDGE that I have carefully read and understood the purpose of the within Guarantee. And I hereby request the Mortgagee to make such advances to and enter into other financial arrangement including entering into various Bill of Sale and/or Asset Purchase Agreements with the within-mentioned Customer as the Mortgagee may from time to time think proper."

(viii) Applicants did have the benefit of the credit facility and had use of the Motor vehicle until such time it was involved in an accident.

4.41 It is apparent that defence of non est factum was an afterthought and manufactured in order to set aside Default Judgment and to delay the inevitable.

4.42 I therefore reject Applicants proposed defence of non est factum as it lacks merit and has no prospect of success.

Whether Respondent should have seized vehicle prior to commencing the proceeding

4.43 Applicants submitted that Respondent should have seized the motor vehicle and sold it to recover the debt owed by First Applicant before commencing this proceeding.

4.44 It is not disputed that vehicle was in the garage and due to dispute as to repairs carried between the Applicant and insurer Dominion Insurance Ltd, Applicants failed or refused to take possession of the vehicle as repair works were not to their satisfaction.

4.45 Respondent at paragraph 14 of Dil's Affidavit (quoted at paragraph 4.29 hereof) stated why Respondent did not take possession of the vehicle.

4.46 I agree with the Respondent's contention that "Respondent was not obliged to take possession of the vehicle".

4.47 It had been stated time and again by this Court that a Creditor who wants to recover its debt, has three options available to it and that being;-

(i) To enforce its securities; or

(ii) To sue the Creditor; and/or

(iii) To sue the Guarantor;

4.48 In ***China & South Sea Banks v. Tan Soon Gin*** *(1990) 1 A C 536* in response to submission that the creditor owed a duty in exercising power of sale confirmed by a mortgage which would have reduced the surety's liability substantially or eliminated in respect to Summary Judgment Application Privy Council stated as follows:-

"The Creditor had three sources of repayment. The creditor could sue the debtor, sell the mortgaged securities or sue the surety. All these remedies could be exercised at any times or times simultaneously, contemporaneously or successively or not at all."

4.49 The above principle was adopted with approval in **Fiji Development Bank v. Moto** [1995] FJHC 166; HBC 55j; 95s (22 November 1995).

4.50 In this instance the vehicle was still in the garage as a result of dispute between the Applicants and the insurer.

4.51 In view of principle stated made in **China Sea** case and approved by Courts in Fiji the Respondent in this action had option to either seize the vehicle and dispose it or sue the Creditor and/or Guarantor for the amount lent by

Respondent to First Applicant (Creditor). The Respondent chose the latter which it had the right to do.

4.52 Also section 6 of ***Indemnity Guarantee and Bailment Act Cap 232*** provides as follows:-

> ***"6. The liability of surety is co-extensive with that of the principal debtor unless otherwise provided by the contract."***

4.53 I have not been directed to or seen any contrary provisions in the Guarantee.

4.54 In contrast clause 6 (a) of the Guarantee provides that:-

> **".. that the Guarantee shall be a continuing guarantee AND shall be principal obligation between the Guarantor and the mortgagee"**

4.55 Therefore, I hold that the obligation of the Second and Third Applicant to pay Respondent debt co-existed with that of First Applicant's obligation and that this action was properly commenced by Respondent under the Asset Purchase Agreement and the Guarantee.

Whether Plaintiff correctly claimed the Amount

4.56 I refer to paragraph 3.7 to 3.15 of this Ruling in this regard and hold that Respondent claimed for debt that was subject to the Asset Purchase Agreement and it had all the right to do so.

Whether Asset Purchase Agreement was varied without consent of Second and Third Applicants as Guarantor

4.57 Applicants in proposed Statement of Defence allege that Second and Third Applicants are not liable under the guarantee on the ground that Asset Purchase Agreement was varied by e-mail dated 24 June 2014, from Narend Kumar for Respondent to First Applicant.

4.58 I find this proposed defence to be unmeritorious for following reasons:-

(i) On 24th June 2014, First Applicant wrote to Respondent stating that it will make **"lump sum payment of twenty thousand dollars ($20,000) upon acceptance of request and balance will be distributed over a period of twenty four (24) months."**

(ii) This letter was signed by Second Applicant as director of First Applicant.

(iii) Plaintiff through Narend Kumar confirmed acceptance of First Applicant's request only.

4.59 I fail to understand as to how this proposed defence can succeed on the face of the letter signed by Second Applicant.

Whether Respondent will be prejudiced if the Default Judgment is set aside

4.60 Even though there is no evidence provided by the Respondent to show that it will be in any prejudice this Court takes notice of the fact that Respondent is a financial institution and like any other commercial entity needs to recover its debt and run smoothly without the necessity of unwarranted litigations and to deal with the contingencies in respect to debts owed to it.

4.61 Public Policy and interest of Justice also dictates that recovery of debt properly incurred by debtors should not be delayed on the basis of unmeritorious defence by debtor and/or their legal advisers to delay the inevitable.

Statement of Defence and Counterclaim filed on 7 August 2014

4.62 Statement of Defence and Counterclaim was filed on 7 August 2014 when Judgment in Default of defence was entered on 25 July 2014.

4.63 It appears to me that the Statement of Defence and Counterclaim was filed by inadvertence and mistake on part of the Applicants Solicitors and Registry Staff. However if Respondent and/or its Solicitor are of the view that there was any impropriety in filing and issuing of Statement of Defence and Counterclaim, they can raise it with the Chief Registrar if they so wish to do.

4.64 In view of above comments I have no alternative but to strike out the Statement of Defence and Counterclaim dated 6 August 2014 and filed on 14 August 2014.

5.0 Conclusion

5.1 In conclusion and in view of the reason stated in this Ruling I make following findings;

(i) Default Judgment is regular.

(ii) There has been inordinate delay in filling application to set aside Default Judgment.

(iii) Reasons for delay is not satisfactory.

(iv) Defendants have failed to establish that they have defence on merits which has some prospect of success.

5.2 In respect to costs I take into consideration that Applicants owed money to the Respondent and attempted to delay the inevitable by filling the Application and Defence which did not have any prospect of success. I also take into account that parties have filed Affidavits and submissions and at the hearing mostly relied on written submissions.

5.3 I make following orders;-

(i) Statement of Defence and Counterclaim filed on 14 August 2014 is struck out;

(ii) Interim Stay and Execution of Judgment by Default entered on 25 July 2014 ordered on 16 September 2014 be set aside;

(iii) Applicants/Defendants Application to set aside Default Judgment dated 25 July 2014 by Summons dated and filed on 5 September 2014 is dismissed and struck out;

(iv) The sum of twenty thousand dollars ($20,000) paid into Court by the Applicants/Defendants pursuant to Order of this Court made on 16 September 2014 together with accrued interest (if any) be forthwith paid out to Respondent/Plaintiff and/or its Solicitors Trust Account;

(v) Applicants/Defendants jointly and severally are to pay Respondent/Plaintiff's cost assessed in the sum of $1,500.00 within fourteen (14) days of this Ruling.

K. Kumar
JUDGE

At Suva

28 July 2015

Messrs. Qoro Legal for the Applicants/Defendants

Messrs. Naidu Law for the Respondent/Plaintiff