

HOME FINANCE CO LTD v RAJENDRA SINGH and Anor

HIGH COURT — CIVIL JURISDICTION

5 SINGH J

6 January 2003

[2003] FJHC 328

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Mortgages and securities — default — application to set aside default judgment — effect of filing an acknowledgment of service — discretion of court to set aside — whether the demand for payment under the mortgage was without due care — Unreasonableness — High Court Rules O 19, rr 6, 7, 7(6), 9.

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A default judgment was entered against Rajendra Singh (1st Defendant) and Cross Island Holdings Ltd (2nd Defendant) for failure to pay Home Finance Company Ltd (Plaintiff) under a personal guarantee and mortgage contract respectively. The two Defendants filed an application to set aside the default judgment on the ground that the service of summons was improper as it was not served on them making the judgment irregular. The issue is the effect of filing an acknowledgment of service.

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Held — (1) A Defendant who wishes to dispute the jurisdiction of the court or the service of the writ and any orders made must apply to the court by summons or motion supported by affidavit to set aside the writ or service on him or seek any of the various orders. It is upon the Defendant to make this objection in time and failure to do so will be deemed as a submission to the jurisdiction of the court.

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(2) It is apparent that a Defendant can enter an acknowledgment of service before a writ is served on him. The Defendant in the present action filed an appearance. He has submitted to the jurisdiction of the court. He made no application to have service set aside. The judgment entered against him is not irregular.

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(3) The 2nd Defendant was served by registered mail. A document may be served on a company by post to its registered postal address or leaving it to its registered office. This is confirmed as proper service by registered post of documents sent to postal address shown on annual returns of the company. Thus, the default judgment cannot be considered irregular on grounds of non-service of the writ.

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(4) The Plaintiff for some reason did not attach a copy of the mortgage to its affidavit in reply as that would have shown whether the mortgage was one made payable on demand or made payable only after the property had been fully developed as the Defendant alleges and it would have clarified the issue of interest rate. The Plaintiff also did not depose whether the mortgaged property had been advertised for sale before it was sold.

Default judgment set aside.

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Cases referred to

BW Holdings Ltd v Graham Eden & Associates Ltd Civ App No ABU 27/2000S, cited.

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Fiji National Provident Fund v Shri Datt [1988] 34 FLR 67; *MV Popi (Owners) v SS Gniezno* [1967] 2 All ER 738; *Pike v Michael Nairn & Co Ltd* [1960] 2 All ER 184, considered.

Anil Tikaram for the Plaintiff.

Suresh Chandra for the Defendants.

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Singh J. This is an application by the two Defendants to set aside default judgment entered against them. The Plaintiff's claim is based on mortgages and a personal guarantee given by the 1st Defendant.

Law on setting aside

There are innumerable authorities on setting aside. The application is made pursuant to O 19 r 9 of the High Court Rules which gives the court discretion to set aside a judgment entered in default of defence. Over the years the courts have adopted certain guidelines or factors which a court considers in exercise of its discretion to set aside.

Fatiaki J as he then was in *Fiji National Provident Fund v Shri Datt* [1988] 34 FLR 67 put this as follows:

- 10 The judicially recognized “tests” may be conveniently listed as follows:
 - (a) whether the defendant has a substantial ground of defence to the action;
 - (b) whether the defendant has a satisfactory explanation for his failure to enter an appearance to the writ; and
 - (c) whether the plaintiff will suffer irreparable harm if the judgment is set aside.
- 15 He went to say it was also proper to consider the delay in making the application and if the Plaintiff has taken any steps to execute the judgment.

History

On 12 July 2002 a writ of summons was issued against both Defendants. The affidavits of service show that it was served on the 2nd Defendant by registered post on 13 July 2002 and personally served on the 1st Defendant on 22 July 2002. An acknowledgment of service was filed on 19 August 2002. It does not disclose whether it was on behalf of first, or 2nd Defendant or both Defendants. I presume it was on behalf of the 1st Defendant judging by Annex “A” to 1st Defendant’s affidavit in support where solicitor for 1st Defendant states that they have filed acknowledgment for service. There was exchange of letters between solicitors for 1st Defendant and solicitors for the Plaintiff concerning extension of time to file defence. The Plaintiff’s solicitors had agreed to the 1st Defendant filing his defence by 12 September. By 12 September defence had not been filed so judgment was entered.

As far as the 2nd Defendant is concerned, there was, no acknowledgment of service filed, so on 23 August 2002 default judgment was entered.

The 1st Defendant says in his affidavit in support of motion that he found the writ of summons lying outside his door on 12 August 2002 and the judgment was entered irregularly. A proposed statement of defence and counterclaim were attached to the affidavit. The defence is that the 1st Defendant did not agree to the interest at rate of 12.5 per cent. He does not state what rate he agreed to. He says that the Plaintiff prematurely demanded payment under the mortgage and that the Plaintiff acted unreasonably and without due care. The details of unreasonableness and lack of due care are not spelt out as they should be. There is also a counterclaim in which the basic allegation is that the Plaintiff breached terms and conditions of the mortgage in that the mortgaged property was not fully developed and the mortgagee had no powers to exercise power of sale until development was completed, that the mortgagee in exercising its powers of sale had failed to consider economic downturn and sold the property at gross undervalue. He also alleges contravention of Consumer Credit Act. However, I was told from the bar table that the mortgage was executed before Consumer Credit Act came into effect and therefore this Act would not apply.

The first issue raised is that service on both Defendants was improper and therefore resulting judgment irregular. If a judgment is irregular a Defendant is entitled to have it set aside as if right.

Effect of filing acknowledgment of service

As far as the 1st Defendant is concerned the Plaintiff says the writ was served on 22 July 2002. The Defendant in effect says it was not served on him but left
5 around and he found it outside his door on 12 August 2002. He entered an appearance. The issue is what is the effect of filing an acknowledgment of service.

The relevant provisions in the High Court Rules are O 12 rr 6 and 7(6):

Order 12 Rule 6 reads:

10 “The acknowledgment by a defendant of service of a writ shall not be treated as a waiver by him of any irregularity in the writ or service thereof or in any order giving leave to serve the writ out of the jurisdiction or extending the validity of the writ for the purpose of service.”

15 Order 12 Rule 7(6) reads:

“Except where the defendant makes an application in accordance with paragraph (1), the acknowledgment by a defendant of service of a writ shall, unless the acknowledgment is withdrawn by leave of the Court under Order 21, rule 1, be
20 treated as a submission by the defendant to the jurisdiction of the Court in the proceedings.”

The effect of these two rules is that a Defendant who wishes to dispute the jurisdiction of the court or to the service of the writ, or any orders made must
25 apply to the court by summons or motion supported by affidavit to set aside the writ or service on him or seek any of the various orders mentioned in r 7. It is upon the Defendant to make his objection in time failing which he is deemed to have submitted to the jurisdiction of the court.

The issue of entry of appearance by a Defendant was considered by Cross J in
30 *Pike v Michael Nairn & Co Ltd* [1960] 2 All ER 184. On 186 he commented:

The service of the process of the court is made necessary in the interests of the defendant so that orders may not be made behind his back. A defendant, therefore, has always been able to waive the necessity of service and to enter an appearance to the writ as soon as he hears that it has been issued against him, although it has not been served
35 on him.

It is apparent therefore that a Defendant can enter an acknowledgment of service before a writ is served on him.

In *MV Popi (Owners) v SS Gniezno (Owners)* [1967] 2 All ER 738 Brandon J
40 looked at the issue of appearance and at 744 he concluded:

Looking at the matter as one of principle, it seems to me that a defendant ought to have the right to enter a voluntary appearance in this way so that in any case where an action is hanging over him he may take steps to have it dismissed. Under the present rules there is no obligation to serve a writ earlier than within twelve months, and even then
45 a plaintiff may, if he shows cause, obtain a renewal of the writ ex-parte. In this way a defendant may have an action, the existence of which is known to him, hanging over him for a very considerable period. It seems to me desirable in principle that a defendant, faced with such a situation, should be able to obtain some formality.

The Defendant in the present action filed an appearance. He has submitted to the
50 jurisdiction of the court. He made no application to have service set aside. The judgment entered against him is not irregular.

Service on 2nd Defendant

- The 2nd Defendant was served by registered mail on postal box number 2069, Government Buildings, Suva. The Defendant deposes that its registered office is at 8 Thurston Street, Suva and the writ was not served there. The Plaintiff in its
5 reply para 14 of Pravin Chand's affidavit sworn on 11 November 2002 states that Plaintiff tried to serve the writ at 8 Thurston Street but service was not accepted by the present occupants of the premises so the writ was posted to the last address shown on company's annual returns file with the Companies Office. It is not denied that PO Box 2069 belongs to the 2nd Defendant. Under s 391 of the
10 Companies Act a document may be served on a company by post to its registered postal address or leaving it to its registered office. In *BW Holdings Ltd v Graham Eden & Associated Ltd* — Civ App ABU 27 of 2000S the Fiji Court of Appeal confirmed as proper service by registered post of documents sent to postal address shown on annual returns of the company.
- 15 Hence again the default judgment cannot be considered irregular on grounds of non-service of the writ.

Defence on merits

- The Plaintiff's claim is based on mortgage. There were two mortgages to
20 secure the same debt. I was told from the bar table that one of the properties has been sold for about \$45,000. The other property has not been sold but is likely to be sold soon as a caveat which had been lodged against the title has now been removed. The Plaintiff for some reason did not attach a copy of the mortgage to its affidavit in reply as that would have shown whether the mortgage was one
25 made payable on demand or made payable only after the property had been fully developed as the Defendant alleges, and it would have clarified the issue of interest rate. The Plaintiff also did not depose whether the mortgaged property had been advertised for sale before it was sold.

- In light of the fact that the claim is under a mortgage, the Defendant's defence
30 appears a bit far-fetched. However, Mr Tikaram conceded that he is not certain whether credit has been given for the property which has been sold and second the property yet to be sold is substantial.

- In light of those concessions, I will exercise my discretion in favour of setting
35 aside upon condition that the Defendants pay a sum of \$50,000 to the Plaintiff within 28 days.

I very much suspect that this court may be revisited with an order 14 application at some later stage.

- I therefore order that the default judgments entered against the two Defendants
40 be set aside on condition that the Defendants pay a sum of \$50,000 to the Plaintiff in 28 days. The Defendants are to pay \$300 costs to the Plaintiff within the same time.

Default judgment set aside.

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