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

CIVIL APPEAL NO.ABU0057 OF 1999S
(High Court Civil Action No. HBC0260 of 1996)

BETWEEN:

SEINI SENIRAUVULA NATUWAWA
ASESELA SADOLE

Appellants

AND:

NATIONAL BANK OF FIJI

Respondent

Coram: Reddy J R, President
Eichelbaum, JA
Gallen, JA

Hearing: Monday, 13th May 2002, Suva

Counsel: Mr. S. R. Valenitabua for the Appellants
Mr. H. Nagin for the Respondent

Date of Judgment: Friday, 17 May 2002

JUDGMENT OF THE COURT

The above named appellants both entered into guarantees with the above named respondent guaranteeing, without limit, advances made by the respondent to Inies Allied Chemicals Limited a limited liability company having its registered office at 4 Howell Road, Suva..

In August of 1996 the respondent bank initiated proceedings against the appellants under the guarantees claiming to recover the sum of $75,199.74 together with

interest at the rate of $32.96 per day from 16 April 1996 and the costs of the action.

The respondent sought summary judgment against the appellants and filed an affidavit in support of the application in which it was claimed that the respondent had advanced sums of money to Inies Allied Chemicals Limited, that the company had defaulted in its obligations to the respondent, and that the appellants were liable to the respondent as guarantors of the loan or loans made.

The appellants opposed summary judgment and filed an affidavit in reply to that of the respondent. The appellants contended that the affidavit as filed on their behalf was sufficient to raise an issue of fact and law which required resolution by ordinary action and that in the circumstances summary judgment should not be entered against them.

The issue came before the Hon. Mr Justice Byrne in August and September of 1998 and reserved judgment was issued in October of 1999.

The affidavit upon which the appellants relied, in summary alleged, that Inies Allied Chemicals Limited was an importer and distributor, and that from 1990 or thereabouts it had traded in chemicals and apparatus used in secondary schools in the teaching of the subject known as "science." The affidavit alleged that the company with the knowledge approval and acquiescence of the respondent had established a trade

practice whereby the company (and before its incorporation the business which preceded it) would order chemicals and other accessories, and that the respondent would issue letters of credit to the overseas seller in payment for the imported materials. It was alleged that a trade practice to this effect continued from 1989 to 1993.

In pursuance of its business the company ordered microscopes from an Australian Company known as Silform Pty Limited and obtained a letter of credit from the respondent to effect payment. Subsequently the company wrote to the respondent advising that Silform required a bank draft and would not accept the letter of credit. The respondent did not produce any such bank draft. As a result Silform which had not been paid took proceedings against the company which was ultimately wound up.

Counsel for the appellant contended that assuming the appellant was able to prove the allegations contained in the affidavit these formed a basis for refusing summary judgment because it revealed a trade practice coupled with a fiduciary relationship between the respondent and the company which could be raised as a defence by the appellants as guarantors.

The Judge did not accept this argument. In his decision he referred first to comment of Lord Blackburn in Wallingford v. Mutual Society (1880) AC 685 at page 704. In the particular passage Lord Blackburn emphasised that:

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"an affidavit in defence must..... condescend upon particulars.....It is not sufficient to swear "I swear I owe the man nothing"..... You must satisfy the Judge that there is a reasonable ground for saying so....."

On the basis of that comment the Judge in this case accepted a submission from the respondent that the affidavit upon which the appellants relied was devoid of particulars apart from the appellants' own statement. The Judge quoted a submission from the appellants to the effect that "It is common knowlege that business transactions with offshore entities utilise such trade practice as alleged by the Defendants." The Judge expressed the view that that was no more than a broad statement of such a trade practice which did nothing to establish it and he considered that the appellants had not provided any particulars on which the Court could act or on which they might establish at least an arguable defence.

In coming to the conclusion he did the Judge has largely equated particulars as referred to by Lord Blackburn as amounting to corroborative evidence. We do not understand Lord Blackburn to be establishing a proposition as broad as that. No doubt the provision of particulars is important in identifying an argument and delineating its scope and there may well be occasions when some kind of corroboration is required of the assertions even when set out in such detail as to amount of particulars.

In the end however, the proposition for which Lord Blackburn may be cited is that the Judge must be satisfied that there is a reasonable ground for the defence raised.

There may be circumstances where this only can be established by providing corroborative evidence. But there may also be occasions when an assertion by a defendant is in context sufficient to make it plain to a Judge that there are reasonable grounds for a defence being explored in the ordinary way through an action. We agree with the Judge that the mere allegation of the existence of a trade practice would not of itself be enough to establish that there was any defence available to the appellants in the context of the relationship between the company and the respondent. The payment of indebtedness by means of bank credits might amount to a trade practice but in fact such practice might in the particular situation have been no more than a succession of applications to the bank to ensure that credit would be made available in respect of particular transactions. That certainly appears to be the case here and would not of itself even if established amount in our view to a defence.

However, the position of the appellants takes the contention rather further than that. The appellants maintained that against the context of a series of transactions where indebtedness was satisfied by the provision of a bank letter of credit, the particular transaction which is said to have led to the collapse of the company developed rather differently.

Initially the company sought and obtained a letter of credit to meet the particular indebtedness. That letter of credit was for some unexplained reason unacceptable to the creditor of the company. That being so the company then sought a

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bank draft to satisfy its creditor and that draft was refused. In consequence it is alleged that the company was unable to meet the demand upon it and as a result the company was wound up and ceased trading.

The agument for the company could not have been that the pattern of trading between the company and the respondent established a trade practice which justified it in concluding that it would receive financial support in respect of a particular transaction merely because of the pattern of support which it had received in the past. Rather the argument is that against the pattern of a series of transactions the company was entitled to expect that where the bank had issued a letter of credit in accordance with existing practice in order to finance a particular transaction, when it transpired that the letter of credit was not acceptable to the creditor then the bank would complete its obligations to the company by providing the same amount of financial support by some means acceptable to the creditor. That obligation arguably arose as the result of a fiduciary obligation established between the company and the respondent its banker by the acceptance of the bank of a request to meet a particular financial transaction by way of the issue of the letter of credit against the established pattern of transactions which had occurred and which was set out in the affidavit.

That does not of course dispose of the matter as between the company and the respondent. It may be that on a detailed examination of the particular transaction and the way in which it developed against the background of whatever indebtedness the

company had with the respondent at that time, that the company could not establish the necessary basis for the contention upon which it relied. In our view however the affidavit sufficiently sets out an arrangement in context which could give rise to obligations on the part of the respondent if the circumstances as alleged were established.

The question then arises as to whether the appellants as guarantors are entitled to take advantage of a counterclaim or set off available to the company in proceedings between the company and the respondent.

In the case of Bechervaise v. Lewis 1872 LR CV 7372 Willes J. was dealing with an action by the payee of a joint and several promissory note against one who had joined in it as a surety only. Willes J. said at page 377:

> ***"A surety has a right as against the creditor when he has paid the debt to have for reimbursement the benefit of all securities which the creditor holds against the principal. This alone would not help the defendant here because he has not nor has the principal actually paid the creditor and in our law set off is not regarded as an extinction of the debt between the parties. The surety however has another right viz that as soon as his obligation to pay is become absolute he has a right in equity to be exonorated by his principal. Thus we have a creditor who is equally liable to the principal as the principal to him and against whom the principal has a good defence in law and equity and a surety who is entitled in equity to call upon the principal to exonorate him. In this state of things we are bound to conclude that the surety has a defence in equity against the creditor and we are justified in doing so by the authority of the civil law."***

That case was cited in the third edition of Halsbury Laws of England volume 18 at page 466 for the proposition that a surety on being sued by the creditor for payment

of the debt guaranteed may avail himself of any set off or counterclaim which the principal debtor possesses" against the creditor.

In O'Donovan Philips "The Modern Contract of Guarantee" the proposition in Halsbury is examined and it is suggested that on the basis of the authorities to which reference is made that the proposition in Halsbury must be regarded as too wide. Put in very general terms the cases establish that where the right of action requires the participation of the principal debtor then it is not open to the guarantor to invoke those rights directly against the creditor. This proposition is however itself subject to the qualification that the guarantor may take advantage of those rights by joining the principal debtor as a party and who may then assert such rights. Where the principal debtor is insolvent than it is unnecessary to join the principal debtor and in such case a guarantor may successfully raise such claims in dimunition of his liability . A claim may be made even for unliquidated damages which the principal has against the creditor without joining the principal as a party. See Langford Concrete Pty Limited v. Finlay [1978] 1 NSWLR 14.

In this case in our view the company as principal debtor would have been able to argue against an action brought by the creditor that as a result of a breach of fiduciary duty in the circumstances outlined above the creditor's right to recover from the company must be reduced by the amount which the company lost as a result of the refusal of the respondent to complete the transaction into which it had already entered by furnishing a letter of credit. The amount to which the company is entitled would not

necessarily be limited to the amount of the letter of credit. The claim if established might have extended to a claim for damages arising out of what is alleged to be a further consequence that the company ceased to be a viable entity. Under the circumstances pleaded whether under the broader expression of principle contained in Halsbury or that more limited right established by the Australian cases the appellants were entitled to raise by way of counterclaim or set off the allegations which they sought to maintain in opposition to summary judgment.

In view of our conclusion we need not deal with the appellants' application to adduce further evidence for purposes of the appeal. The further evidence was designed to overcome the deficiencies perceived by the Judge. As a general proposition we would not be in favour of allowing such applications where the evidence was plainly available at the time of preparing affidavit evidence in opposition to the application for summary judgment. We would not wish to encourage the belief that if the case then made out is deficient it can be patched up on appeal.

Result

The appeal will therefore be allowed. There will be a direction that the summary judgment be set aside and the case is to proceed as an ordinary action.

The appellants are entitled to costs which we fix at $750 together with disbursements to be fixed by the Registrar.

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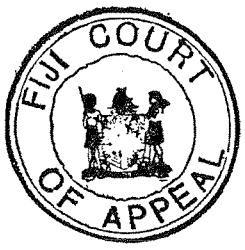

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Eichelbaum, JA

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Gallen, JA

Solicitors:

Valenitabua S.R. Esquire, Suva for the Appellants
Messrs. Sherani and Company, Suva for the Respondent

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