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

CIVIL APPEAL NO.ABU0019 OF 2001S
(Lautoka High Court Civil Action No. 444 of 1997)

BETWEEN: MOHAMMED ALEEM KHAN *Appellant*
(father's name Mohammed Hakim Khan)

AND: ARGO TRAVEL LIMITED *Respondent*

Coram: Reddy, P
Smellie, JA
Penlington, JA

Hearing: Thursday, 21 November 2002, Suva

Counsel: Ms N. Khan for the Appellant
Mr H. Nagin for the Respondent

Date of Judgment: Friday, 29 November, 2002

JUDGMENT OF THE COURT

This is an appeal from the judgment of the High Court (Madraiwiwi J.), given on the 19 of February 2001 striking out the Appellant's defence to the Respondent's claim, and entering judgment for the Respondent in the sum of $45,000.00 with interest at

13.5 per cent from 1 November 1996 to date of payment and costs assessed at $500.00.

The Respondent initiated proceedings on 22 December 1997 by issuing an endorsed writ claiming $45,000.00, which it alleged was owing to it by the Appellant in respect of airline tickets sold and delivered to the Appellant in 1995 and 1996. The Respondent also claimed interest and costs.

On 9 January 1998 the Appellant entered an appearance and filed a statement of defence which reads:

> *"1. THAT the Defendant admits that the Defendant did purchase some airline tickets from the Plaintiff in or about 1995 and 1996 but the Defendant paid for all the tickets so purchased.*
>
> *2. THAT the Defendant denies that he owes the Plaintiff the sum of $45,000.00 [FORTY FIVE THOUSAND DOLLARS] as claimed in the Statement of Claim.*
>
> *3. THAT the Defendant admits that the Plaintiff demanded payment of the sum of $45,000.00 [FORTY FIVE THOUSAND DOLLARS] from the Defendant and the Defendant responded to such demand and denied all liability thereof.*
>
> *4. THAT except as is herein expressly admitted the Defendant denies each and every other allegations contained in the Statement of Claim.*
>
> *5. THAT this action of the Plaintiff be dismissed with costs."*

On 5 March 1998, the Respondent applied to strike out the defence, and summary judgment for the amount claimed and costs. The application was supported by an affidavit sworn by its Managing Director, in which he deposed that two letters written to the Appellant, first by the Respondent, on 9 October 1996, and the second by its auditors, on 22 July 1997, invited the Appellant to acknowledge the amount owing to the Respondent as at 30 September 1996 and 30 June 1997, respectively, and the Appellant acknowledged, in writing, that the balance owing was $46,525.00 on 30 September 1996, and $45,000.00 on 30 June 1997. The Director further deposed that the Appellant was justly and truly indebted to the Respondent in the sum claimed, and did not have a reasonable defence.

The Appellant filed an affidavit in opposition, in which he deposed that he had signed the two acknowledgments, at the request of the Respondent, to facilitate "preparation of accounts" in "their dealings with the Airlines". He then deposed that the debt was not owed by him "personally" but "were in respect of arrangements made with third parties." The Appellant annexed to his affidavit a letter written by the Appellant's solicitors to the Respondent's solicitors on 18 December 1997. The letter expressed surprise that a cheque for $45,000.00 issued by the Appellant to the Respondent had been presented for payment, when the cheque was issued merely as a "security", "to be banked when the "fourth party had paid" the Appellant.

The Respondent's Managing Director replied to the Appellant's affidavit, in

which he deposed that the Appellant had made two payments in reduction of his debt, the first on 12 November 1996 of $525.00, and the second on 21 January 1997 of $1,000.00, and issued a cheque dated 24 July 1997 for the balance sum of $45,000.00, drawn on the ANZ Bank, Nadi, which was dishonoured and returned to the Respondent marked "Present Again"

On the material before him the learned Judge had no difficulty in striking out the defence, and entering judgment for the Respondent in the sum claimed with interest and costs.

The Appellant's notice sets out three grounds of appeal. He says that the learned Judge "erred in law and in fact" by deciding disputed facts on affidavit evidence, awarding interest at 13.5 per cent, and failing to properly and adequately consider the Appellant's submissions.

In order to determine the Respondent's application, the learned Judge had to consider Rules 3 and 4 of Order 14 of the High Court Rules. The tenor and effect of those rules are conveniently summarized in Halsbury's Laws of England (4th Edn) Volume 37 paras. 413-415, the relevant parts of which read:

> ***"413. Where the plaintiff's application for summary judgment under Order 14 is presented in proper form and order, the burden shifts to the defendant and it is for him to satisfy the court that there is some issue or question in***

8/14

dispute which ought to be tried or that there ought for some other reason to be a trial. Unless the defendant does so, the court may give such judgment for the plaintiff against the defendant as may be just .....

The defendant may show cause by affidavit or otherwise to the satisfaction of the court. He must 'condescend upon particulars', and, in all cases, sufficient facts and particulars must be given to show that there is a genuine defence."

The learned Judge found that neither the defence nor the affidavit filed by Appellant raised sufficient facts and particulars, to show a genuine defence. The letter of 18 December 1997 from the Appellant's solicitors to the Respondent does not identify the "third" or "fourth" party, involved in the alleged dealings. Nor does it spell out the precise nature of the "dealings" purportedly made between them. The Appellant's explanation such as it was, had to be tested against the undisputed fact that the Appellant bought tickets in 1995 and 1996, he owed the Respondent $46,529.00 on 30 September 1996, made two subsequent payments of $525.00 and $1,000.00, and issued the cheque for $45,000.00 being the balance. At no time prior to the filing of his affidavit in April 1998, did he claim that the tickets were bought by some "third" or "fourth" party and were not his responsibility.

In Pemberton v Chappell [1987] 1 NZLR 1 the New Zealand Court of Appeal said (per Somers J.) at p.4:

"....Where the defence raises questions of fact upon which the outcome of the case may turn it will not often be right to enter summary judgment. There may

however be cases in which the Court can be confident - that is to say, satisfied - that the defendant's statement s as to matters of fact are baseless. The need to scrutinise affidavits, to see that they pass the threshold of credibility, is referred to in Eng Mee Yong v Letchumanan [1980] AC 331, 341 and in the judgment of Greig J in Attorney-General v Rakiura Holdings Ltd (Wellington, CP 23/86, 8 April 1986)."

We are satisfied that on the facts of this case, the Court could with confidence enter judgment for the Respondent. On the material before him, the learned Judge was entitled to conclude, as he did, that the defence was a sham and there was no substance to it. The complaint that the learned Judge did not properly and adequately consider the Appellant's submissions is without merit. It is patently plain, that the learned Judge did consider all of the material before him, and arrived at the conclusion that the Appellant's story was inherently incredible, and was a "concoction" designed to delay payment. We see no basis for interfering with that conclusion. Plainly, the Appellant failed to discharge the onus of satisfying the Court that there was some question in dispute which ought to be tried.

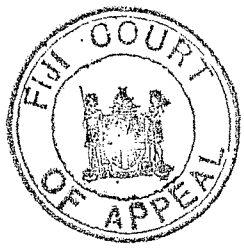
In Maganlal Brothers Limited v L.B. Narayan & Co., Civil Appeal No. 31 of 1984, this Court said:

> *" In the present case, the defence raised by the respondent is no more than a delaying tactic and we think that the appellant should have interest from the date of the initial demand namely 25th July, 1983 at 13.5%."*

Similarly, the award of interest at 13.5% was justified in this case, and we see no reason to interfere with it.

The appeal is dismissed. The Appellant will pay costs of this appeal which we fix at $750.00.

.....
Reddy, P



.....
Smellie, JA

.....
Penlington, JA

Solicitors:

Messrs Sahu Khan & Sahu Khan, Ba for the Appellant
Messrs Sherani & Company, Suva for the Respondent