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

CIVIL APPEAL NO ABU0032 OF 2002
(High Court Civil Action No. 225 of 2001)

BETWEEN:

SY PIIN CHUNG

First Appellant

PACIFIC IT (FIJI) LIMITED

Second Appellant

AND:

MONEY WORLD (FIJI) LIMITED

Respondent

Coram: Tompkins, JA
Henry, JA
Penlington, JA

Hearing: Wednesday 28th May 2003, Suva

Counsel: Mr A. Tikaram for the Appellants
Mr V. Kapadia for the Respondent

Date of Judgment: Friday 30th May 2003

JUDGMENT OF THE COURT

By his judgment of 5 June 2002, Fatiaki J entered judgment against the respondent for $94,572.64 on the respondent's application for summary judgment and granted leave to the appellants to defend the balance of the respondent's claim. In addition he awarded interest of 4% on 24 May 2001 on the amount of the judgment. The appellants have appealed against this judgment.

Background

At the relevant time the first appellant was the General Manager of the respondent which operated out of premises at FNPF's Downtown Boulevard. The respondent is a licensed foreign exchange dealer that also encashed FNPF cheques for a commission of $15.00 for every $1,000.00 encashed.

By its amended statement of claim the respondent claimed:

"(1) Against the 1st appellant

(a)	Commission on encashment of FNPF cheques (July, 2000 – March 2001)		- $102,650.92
(b)	Payments for personal expenses		- $ 45,886.75
		TOTAL	$148,537.67

(2) Against the 2nd appellant

(a)	Purchase price of Foreign Exchange Crystal display Rates Boards		- $ 8,000.00
(b)	Payments for company purchases		- $ 38,999.66
		TOTAL	$ 46,999.66"

The appellants' statement of defence and counterclaim can be summarised:

1. The first appellant denies owing the commission claimed alleging that the amount has always been in the respondent's account and the respondent is confused because of its system of trading and accounts keeping.

2. It denies that any amount is due for personal expenses and seeks better particulars.

3. It denies that $8,000.00 is due for the Foreign Exchange Rates Boards but accepts that $3,000.00 is owing.

4. It counterclaims $24,000.00 for the purchase price of the first appellant's shares in the respondent and $17,610.00 for advances claimed to have been made to the respondent.

On 21 August 2001 the respondent filed a summons to enter summary judgment against the appellants for the amounts claimed.

The onus of proof

The first ground of appeal advanced by the appellants is that the Judge erred in law in shifting the burden of proof on to the first and second appellants to satisfy the Court that there is some issue or question in dispute which ought to be heard.

In his judgment the Judge said:

> "Suffice it to say that where a plaintiff's application for summary judgment is presented in proper form and order then '... it is for the defendant to satisfy the court that there is some issue or question in dispute which ought to be tried... ' "

Order 14 rule 3 relevantly provides:

> "3.-(1) Unless on the hearing of an application under rule 1 ... the defendant satisfies the court with respect to the claim... that there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial of that claim ... the court may give such judgment for the plaintiff against the defendant on that claim ... as m ay be just... "

Although the Judge was not quoting verbatim from the rule what he said is a correct statement of the effect of the rule. As this Court pointed out in *Ali & Ors v Bank of Baroda* Civil Appeal No. ABU0005 of 1993S on page 10 of the unreported judgment, this is a factor in the Fijian legislation different from that applying in New Zealand. Order 14(3) requires the defendant to show cause to the contrary once a plaintiff's application is properly constituted. It is thus for a defendant to establish why judgment should not be given against him. This ground of appeal cannot succeed.

The FNPF cheques

In the affidavit by Ulaiasi Waqa Lee, the acting General Manager of the respondent, the deponent in paragraph 5 sets out detail of the total amount claimed of $102,650.92, showing separate amounts in respect of each month from July 2000 to December 2000 inclusive and March 2001. The first appellant denies that any amount is payable, but further says that even on the respondent's own records the amounts claimed were not correct. To support this he annexed to his affidavit what are called "Internal Memorandum" for July and August 2000. Mr Lee claimed the amount due for July 2000 was $45,892, the memorandum shows $40,811 and for

August 2000 whereas the claim is for $26,836.61, the memorandum shows $16,466.

The first appellant also exhibited to his affidavit as annexure C a statement that he said was issued by Mr Lee, he having extracted the information from the daily report sheets from the respondent's records. Exhibit C is itself undated and untitled. It is a spreadsheet of 3 columns headed "date", "receipts", "payments". The receipts total $254,104, the payments total $193,150, the balance being $60,954.00. On this exhibit the first appellant says:

> "The receipts are funds, which I had kept aside in safe custody for immediate encashment of FNPF cheques: this was to have immediate funds available and it will be noted from this list that there is a credit balance of $60,954.00 which only means that the FNPF encashment funds have been channelled back to the plaintiff's accounts".

Though the meaning of this is unclear, it is obvious that the first appellant intends to depose that no part of these commissions have been retained by him. In the respondent's affidavit in reply Mr Lee denies that he ever made annexure "C" and he is not aware of the figures referred to nor understands them. There is therefore a direct factual conflict.

In his judgment the Judge referred to the internal memoranda to which we have referred above. He says that the two amounts of $40,811.00 and $16,466.00 totalling $57,277.00 "were clearly recorded in internal memoranda of the plaintiff company supplied to the first defendant and **seemingly** accepted by the first defendant in his affidavit in opposition ... " (emphasis added). The first appellant

certainly did not expressly accept in his affidavit that these amounts were due, rather he denied it. Whether the Judge was justified in inferring acceptance must be a matter of considerable debate.

On the relevance of annexure C in this aspect of the claim generally the Judge made the following findings

> "There is a fundamental difference as to the authorship of Annexure 'C' with the first defendant asserting that it was prepared by Ulaiasi Waqa Lee and the latter denying it. But, whatever its authorship, I cannot agree with the interpretation of Annexure 'C' advanced by the first defendant or that the authorship of the document is a 'triable issue' sufficient to bar the grant of summary judgment.
>
> Quite simply, the mere fact that a document records 'receipts' and 'payments' and has a 'nett credit balance' does not necessarily mean that the actual cash which is represented by the credit balance is either in the creditor company's office safe or in its bank account.
>
> Furthermore the first defendant's deposed 'purpose' in creating the 'suspense account' i.e. to have a fund readily available for encashing FNPF cheques, differs quite graphically from the avowed purpose expressed in his earlier letter of May 4, 2001 (Annexure 'E' to the first defendant's affidavit) after he had been taxed about the 'suspense account', wherein he wrote:
>
> > 'The suspense account was created solely for the purpose of some security and insurance that when we finalise the documentation for the sale of our shareholdings to you, which we had done in March 2001, we would not be short changed and left defenceless.'
>
> Be that as it may, no explanation has been forthcoming from the first defendant as to the whereabouts of the July and August 2000 commissions received by the plaintiff company and shown in its internal memoranda nor has there been any attempt by the first defendant to account for the same other than a bald assertion that 'the plaintiff is confused."

There is an error in the last paragraph. The commissions shown in the July and August memoranda were not received by the respondent. Rather the

respondent claimed that these amounts were received by the first appellant and remained owing to it. Further, the passage indicates that, for the reasons given, the Judge was making a finding of credibility against the first appellant.

It was for these reasons that the Judge was satisfied that the first appellant has no arguable defence to the respondent's claim and he entered judgment in the sum of $57,277.00.

We do not consider this to be an appropriate approach. The affidavits have annexed to them a considerable number of exhibits in the form of letters, affidavits etc. Much of the competing contentions relating to the FNPF commissions can in our view only be properly resolved at a defended hearing. For example the relevance of annexure "C" is not apparent from the documentation but it may be able to be explained in evidence.

Similarly any claimed difference between comments the first appellant may have made in correspondence and the statements now made in his affidavit are matters that need to be explored at a defended hearing. It was not for the first appellant to provide an explanation as to the whereabouts of the July and August commissions – it was sufficient for him to establish that there was an issue or question in dispute which ought to be tried. It is generally inappropriate for findings of credibility to be made on a summary judgment application.

Crystal display rate boards

The appellants acknowledge that they are liable to $3,000.00 of the $8,000 claimed. The Judge was therefore correct to enter judgment for $3,000.00.

Personal and company expenses

It is convenient to deal with items 1(b) and 2(b) together as did the Judge.

The first appellant purchased stock for the second appellant and also made personal payments to his family members and personal purchases using the respondent's funds. The appellants acknowledge that this is so. Annexed to Mr Lee's affidavits on behalf of the respondent is a schedule showing particulars of these payments totalling of the amounts of the claim set out above.

There followed correspondence between the auditor for the respondent and the first appellant. Annexure D to the first appellant's affidavit is a letter from him to the auditor listing the purchases, showing those that have been paid and not paid, and also showing that some items had been paid for twice. The letter also set out cash advances totalling $10,610.00 made by the appellants to the respondent which the first appellant asserted had not been reimbursed. In response to a further letter from the auditor, annexure G to the first appellant's affidavit sets out details of further payments that had been made on behalf of either the first or second appellant, listing those that had been paid and those that had not been paid. The

latter totalled $26,869.56. The letter then contained the following additional information.

		$26,869.56	
PLUS: Outstandings in 1st letter		$ 7,426.08	
		$34,295.64	
LESS: Cash Advances		$17,610.00	
15/4 $3,610.00, 18/4 $6,000.00, 25/4 $1,000.00,			
12/5 $1,000.00 23/6 $1,000.00, 19/8 $5,000.00			
LESS: Double Payments Batsanis Shoes		$ 567.79	
Dosdel Singapore		$ 1,123.01	
LESS: 1ST letter payments not taken into account			
22/8/00 American Express	SGD980.55	$ 1,236.30	BOH2168
29/8/00 Nike NZ	NZD1393.77	$ 1,321.74	BOH2173
		$12,436.80	

At that stage then the first appellant was acknowledging that $12,436.80 was due.

The first appellant deposes that after he had sent exhibit annexure G, Mr Lee handed him a further schedule of amounts totalling $62,863.06. This schedule is annexure H. He claims that he responded with annexure I relisting those items paid and the items unpaid, giving credit for the cash advances of $17,610.00 and showing a balance outstanding of $1,631.56.

Mr Lee in reply deposes that he believes the first appellant is attempting to muddy the issues. He says that at no time was the respondent in need of any funds and that it is absurd for the first appellant to claim that he provided advances to the respondent. He denied that the cash advances shown in annexures E and G were ever made.

The Judge dealt with this claim shortly. He said that on the first appellant's own accounting, items were accepted by the appellants as not paid as set out in annexures E and G. Those items totalled $34,294.64 and accordingly judgment was entered against the appellants jointly for that amount.

In doing so the Judge took no account of the claim by the first appellants of advances made to the respondent. First appellant was not acknowledging that the total of the not paid advances of $34,265.64 was due because of his claim for the advances. This is a factual dispute that would clearly have to be the subject of a defended hearing to enable the Court to determine, as a matter of proof or credibility, whether these advances were made and remained outstanding. Therefore the appellants had established that there was an issue that ought to be tried in order to determine the amount if any that remained owing by the appellants to the respondent for personal expenses and company purchases, after allowing for the advances, if there were any, made by either of the appellants to the respondent.

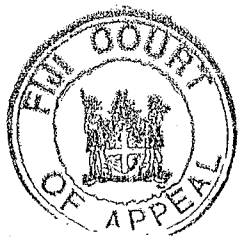
Conclusion

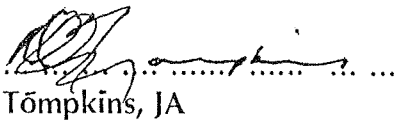
It is apparent from the affidavits filed in support of and in opposition to the application for summary judgment and the annexures to them that there are a significant number of substantial and relatively complicated financial issues between the parties. In these circumstances we do not consider that it was appropriate for summary judgment to be entered for some of the respondent's claims.

The result

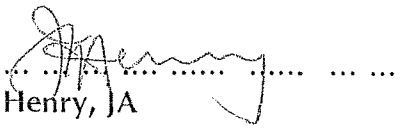
The judgment against the second appellant for $3,000.00 remains. Judgments against the first appellant for $57,277.00 and against both appellants jointly for $34,295.64 are quashed. Leave is granted to the appellants to defend the balance of the respondent's claim. The issue of interest is reserved for consideration at the hearing.

The appellants are entitled to costs which we fix at $1,000.00.

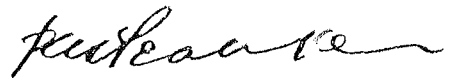




Tompkins, JA



Henry, JA



Penlington, JA

Solicitors:

Messrs.Tikaram and Associates, Suva for the Appellants
Messrs.Sherani andCo., Suva for the Respondent

C:\OFFICE\WPWIN\USHA\ABU0032U.02S