IN THE COURT OF APPEAL
ON APPEAL FROM THE HIGH COURT

CIVIL APPEAL NO. ABU 0067 of 2011 & ABU 0060 of 2011
(High Court of Fiji HBC No. 150 of 2004)

BETWEEN	:	1. **B.W. HOLDINGS LTD** (ABU 0067 of 2011) 2. **FIJI SPORTS COUNCIL** (ABU 0060 of 2011) ***Appellants***
AND	:	**SPORTS TECHNOLOGY INTERNATIONAL PTY. LTD.** ***Respondent***
Coram	:	Basnayake JA Kotigalage JA
Counsel	:	Mr. H. Nagin (ABU 0067 of 2011) and Mr. D. Sharma (ABU 0060 of 2011) for the Appellants Mr. N. Barnes and Mr. R. Singh for the Respondent
Date of Hearing	:	14 November 2012
Date of Judgment	:	06 December 2013

JUDGMENT

Basnayake JA:

[1] The arguments in this case were heard on 14 November 2012 before Mr. Justice Kankani Chitrasiri, Mr. Justice Eric Basnayake and Mr. Justice Chandrasiri Kotigalage. Mr. Justice Kankani Chitrasiri is no longer in the panel of Visiting Justices of the Court of Appeal. This case was mentioned on 20 November 2013 before the two remaining Judges in terms of Section 19 (1) of the Court of Appeal Act Cap 12. On 20 November 2013 the learned counsel appearing for the parties consented to the delivering of the Judgment by the two remaining Judges.

[2] Two appeals have been filed by the appellants (1st & 2nd defendants) to have the judgment dated 9 November 2011 of the learned Judge of the High Court set aside. By this judgment the learned Judge had dismissed the applications of the defendants with costs.

[3] On 27 April 2004 the Respondent (plaintiff) filed an ex-parte summons for registration of a foreign judgment under the Foreign Judgments (Reciprocal Enforcement) Act (Cap 40). The plaintiff averred that the judgment was obtained by the plaintiff on 13 April 2004, against the 1st and 2nd defendants from the Supreme Court of New South Wales, Australia, in the action No. 13096 of 2003. By this judgment the plaintiff was awarded inter alia a sum of AUD $193,531.44 against the 1st defendant and a sum of AUD $163,675.00 against the 2nd defendant. The court also awarded costs against both the defendants.

[4] The plaintiff thereafter moved the High Court of Fiji for registration of this judgment. The High Court on 21 May 2004 made order to register the above judgment as a judgment of the High Court of Fiji. The defendants by way of originating summons moved the High Court to have this judgment set aside. The learned High Court Judge after a hearing, by order dated 9 November 2011, dismissed these applications with costs.

Submissions of the 1st defendant

[5] The 1st defendant was awarded a contract for the construction of a Hockey Field Pitch at Laucala Bay. The 1st defendant entered into a contract with the plaintiff for the supply and installation of materials for the synthetic hockey pitch. The 1st defendant complained that the plaintiff did carry out certain works but did not satisfactorily perform the contract. The 1st defendant submitted that the Supreme Court of New South Wales acted without jurisdiction. He further submitted that the 1st defendant neither carried on business nor was a resident of NSW. The contract was entered in Fiji and the work was to be carried out in Fiji. He further submitted that to enforce this judgment against the 1st defendant would be contrary to public policy. He said that he did not submit to the jurisdiction of the courts of NSW. The 1st defendant submitted that the learned Judge has failed to consider clause 10 properly. The learned counsel submitted that although clause 10 makes provision for the parties to refer any dispute to arbitration, there was no such arbitration proceeding.

[6] The terms of the contract appear to contradict the above contention. Clause 10 of the contract (pgs. 94 to 101 of vol. 1 of the record of the High Court (RHC) is as follows:-

> 10. DISPUTE RESOLUTION AND ARBITRATION
>
> *10a) It is the intention of the parties without creating any legal obligation that* ***any dispute, controversy or claim arising out of or relating to this contract or the breach, termination, rescission or invalidity thereof shall be the subject of the Law of the State of NSW****. The parties agree to explore alternative dispute resolution prior to submitting the matter to arbitration.*
>
> *10e) (10b,c& d are not reproduced) Notwithstanding any other sub-clause b, c and d of this clause* ***the parties agree that either party may at any time commence action in a court of competent jurisdiction in New South Wales with respect to any sum owed or obligation or any other matter however arising under this contract*** (emphasis added).

The submission of the 2nd defendant

[7] The 2nd defendant too denied jurisdiction of the court of NSW. The 2nd defendant submitted that he never entered in to a contract with the plaintiff. He submitted that he never subjected himself to the jurisdiction of the court of NSW. The 2nd defendant further submitted that the guarantee was never accepted by the plaintiff.

[8] **The plaintiff's submissions**

- By the contract dated 9 January 2003, the 1st defendant engaged the plaintiff for their services. After completion of the work, the 1st defendant failed to pay a sum of AUD 193,531.44 to the plaintiff.
- The defendants (both the 1st and 2nd) were properly served with the NSW proceedings.
- The 1st defendant cannot challenge the registration of the NSW on the merits of the case. The grounds under which they can set aside the registration are limited by section 6 of the Foreign Judgments (Reciprocal Enforcement) Act Cap 40.
- The grounds under section 6 are not satisfied.
- The NSW Judgment was properly registered in the High Court of Fiji.

Therefore the plaintiff moves that the appeals be dismissed.

The Judgment

[9] With regard to the 1st defendant the learned Judge related the following facts, namely:

- The Plaintiff alleged that it had completed its obligations under the contract and was entitled to be paid the balance sum by the 1st defendant.
- The plaintiff obtained judgment against the defendants from the Courts of NSW.
- This judgment was registered in the High Court of Fiji.

[10] The 1st defendant in the affidavit filed together with the originating summons pleaded two defenses. The 1st defendant disputed the jurisdiction of the Courts in NSW. The 1st defendant also pleaded that he never submitted to the jurisdiction of NSW.

[11] The learned Judge had answered the above with section 6 (1) (a) (ii) and section 6 (2) (a) (iii) of the Foreign Judgments (Reciprocal Enforcement) Act.

Section 6 (1) (a) (ii):-"that the courts of the country of the original court had no jurisdiction in the circumstance of the case;

6 (2):"For the purposes of this section the courts of the country of the original court shall,...be deemed to have had jurisdiction-(a).....(iii): If the judgment debtor, being a defendant in the original court, had, before the commencement of the proceedings, agreed in respect of the subject matter of the proceedings to submit to the jurisdiction of that court or of the courts of the country of that courts; or". The learned Judge has correctly held that the defendant is now not able to deny jurisdiction. By Clause 10e the 1st defendant has submitted himself to the jurisdiction of the Courts of NSW.

[12] The learned counsel for the 1st defendant admitted to having received the Notices filed in the Courts of NSW. The 1st defendant has to seek relief under section 6 of the Foreign Judgments (Reciprocal Enforcement) Act. As the 1st defendant had subjected himself to the jurisdiction of the courts of NSW I am of the view that the learned Judge had come to the correct conclusion with regard to the 1st defendant. Therefore the 1st defendant's appeal is dismissed.

[13] **<u>The Judgment with regard to the Liability of the 2nd defendant</u>**

The 2nd defendant, in the summons filed, sought to set aside the registration on the grounds that:

- The courts of NSW had no jurisdiction.

- Enforcement of the judgment is against public policy.
- The 2nd defendant did not submit to the jurisdiction of the NSW courts.
- The breach of contract arose in Fiji.

[14] The learned Judge made the following observations in his judgment;

1. It was the 2nd defendant who wanted the hockey pitch constructed.
2. It was the 2nd defendant who awarded the contract to the 1st defendant.
3. The 1st defendant entered in to a contract with the plaintiff.
4. The 2nd defendant guaranteed the payment of AUD $163,375 by the 1st defendant to the plaintiff.
5. Both the defendants sought to set aside the registration of the foreign judgment on the same grounds.

[15] The learned Judge posed this question; "the decisive factor in this is whether there was an agreement by the 2nd defendant to submit to the jurisdiction of the NSW Courts in terms of section 6 (1) (a) (ii) read with sub section (2) (a) (iii). Admittedly there was no express agreement submitting the 2nd defendant to the jurisdiction of the courts of NSW. Considering the matters discussed above, the court held that there was an implied contract. The implied contract was to guarantee payment by the 1st defendant (Amin Rasheed Shipping Corporation v Kuwait Insurance (1984) 1 AC 50, Blohu v Desser (1962) 2 QB 116 at 123, Emmanuel v Symons [1908] 1 KB 302).

[16] The learned Judge had observed that the guarantee was payable in Australian dollars. The chief Executive of the 2nd defendant had admitted in the affidavit dated 1 May 2003 (Tab 9) that the sum of AUD $163,675 was guaranteed by the 2nd defendant. The 1st defendant claimed in the written submissions filed that the 2nd defendant had guaranteed the payment by the 1st defendant to the plaintiff.

[17] The 1st defendant had submitted to the jurisdiction of the Courts of NSW by their contract with the plaintiff. The 2nd defendant guaranteed the payment of AUD $ 163,675 by the 1st defendant. Therefore the submission that the 2nd defendant did not submit to the jurisdiction of the Courts of NSW cannot be accepted.

[18] **Question of double payment**

The defendants complained that the courts of NSW had in their judgment imposed the liability on the 1st defendant as well as the 2nd defendant. Both the defendants were imposed with payments by way of interest as well. This submission is of no value as it is not open for the appellants to contest merits of the case.

[19] Therefore the appeals are the dismissed with costs fixed at $5000 payable by the appellants to the respondent.

Kotigalage JA:

[20] I agree with the reasons and conclusions of Basnayake JA.

[21] **The Orders of the court are:**

1. Appeals dismissed.
2. The Respondent is entitled to costs of $5000.00 from the appellants.

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Hon. Justice Eric L. Basnayake

Justice of Appeal

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Hon. Justice Chandra Kotigalage

Justice of Appeal