

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

Civil Action No. 048 OF 2007

BETWEEN: FINANCIAL SERVICES PTY LIMITED

Plaintiff

And : CHANDRAKANT LODHIA
MAHENDRA LODHIA
JAYANT LODHIA

Defendants

Before : Master Udit

Counsel : Ms. Tavo for the Plaintiff
Dr. Sahu Khan for the 1st & 3rd Defendants

Date of Hearing: 27th February, 2008

Date of Ruling: 4th April, 2008

RULING

(O. 14 – Summary judgment – compensation of signature)

Introduction

- [1] This is an application for Summary Judgment against all the defendants in the sum of US\$144,750.00 and AUS\$47,580.30. There is no dispute that a Judgment in the foreign currency can be entered by a Court in Fiji; *Paul Praveen Sharma –v- Dr. Hubert Elliot and Attorney General Suva High Court Civil Action No. 728/94.*

- [2] The summons is filed pursuant to *Order 14 rule 1 of the High Court Rules 1988*. The application is vehemently opposed by Dr. Sahu Khan, who appears for all the defendants.

Document filed

- [3] The plaintiff filed and relies upon the following documents:-
- [a] Writ of Summons with attached Statement of Claim filed on 19/2/2007.
 - [b] Summon for Summary Judgment filed on 1st November 2007.
 - [c] Affidavit of Glan Nicholson, the Director of the Financial Import Services Pty Ltd, deposed on 6th October, and filed on 1st November, 2007.
 - [d] Written submissions handed in Court on the day of hearing.

- [4] On the other hand, the defendant relies on the following documents:-
- [a] Statement of Defence filed on 13th April, 2007.
 - [b] Affidavit of Arvin Lal, a Clerk of Nadi sworn on 8th and filed on 10th of January 2008.
 - [c] Written submission filed on 20th February, 2008.

- [5] Ms. Tavo and Dr. Sahu Khan, appearing for the plaintiff and defendants respectively, supplemented the written submissions further with oral submissions. I found the respective submissions helpful.

Background

- [6] The plaintiff operates a business of supplying goods and services to business entities and individuals in the Oceania Region including Fiji. The defendants at all material times were directors of a company duly registered in Fiji namely *Lodhias Limited*. This material fact is not in dispute; (*see: paragraph 2 of the*

Statement of defence). *Lodhias Limited* and the plaintiff entered in to an agreement for the sale and purchase of powdered milk. All transaction was conducted by bills of exchange. A third company referred to as MGCL in the Statement of claim was supplying milk to the plaintiff, who in turn supplied it to *Lodhias Limited*.

- [7] Central to the claim is a “*purported*” guarantee which allegedly was duly given by the defendants as directors of *Lodhias Limited* to the plaintiff. Under the guarantee the defendants were allegedly liable to pay the debts of *Lodhias Limited* legitimately owed to the plaintiff. Guarantee was allegedly executed on 22nd September, 2003. Further the plaintiff company avers that it relied on the guarantee in supplying the milk.
- [8] Later *Lodhias Limited* faced financial hardship resulting in it being wound-up, again on an application of the plaintiff Company (*Petitioner*). The winding-up order is conclusive evidence of the fact that *Lodhias Limited* owed a sum of USD\$144,750.00 and AUD\$47,590.30 to the plaintiff.
- [9] Now the plaintiff by this action seeks to enforce the “*purported*” guarantee to recover the debt already ascertained in the winding-up proceeding. The reason for referring the guarantee as “a *purported*” one is that in the Statement of defence the defendants deny executing the same. This was one of the major points of contention raised by Dr. Sahu Khan in the submissions. A demand was subsequently made but the defendants failed or refused to pay the debt.
- [10] In the writ the plaintiff claims the following relief:-

- “(i) *The sum of USD\$144,750.00 (One Hundred and Forty Four Thousand Seven Hundred and Fifty United States Dollars);*
- (ii) The sum of AUD\$47,59030 (Fourty Seven Thousand Five Hundred and Ninety Australian Dollars and Thirty Cents);*
- (iii) Interest on debt at the rate of 18% per annum from 22nd June 2004 to date of judgment;*

(iv) *Costs;*

(v) *Further or any other Relief this Honourable Court deems just.*

Consideration

- [10] Dr. Sahu Khan in the course of his submissions identified two central issues for consideration by the Court. Firstly he argued that the purported guarantee instrument was not duly executed by the defendants. The signatures appearing on the said instrument is not that of the defendants. Secondly, he stressed that the purported guarantee if was given (*which he denied*) is unenforceable for want of considerations. That consideration, according to Dr. Sahu Khan, was a past one which merely renders the guarantee instrument null and void.
- [11] The "*standard terms and conditions*" of the "*Directors Guarantee*" (*Caption of the instrument*), is a relatively short and simple one. A copy of the same is attached to the judgment.
- [12] The Guarantee Instrument produced to the Court is executed. Dr Sahu Khan raised objection to the signature which I will deal with at length in due course.
- [13] Two of the defendants are living abroad. One is residing in Nadi. Demand notice dated 6th December, 2005 was sent to each to the Director at their residential addresses.

Principles for granting summary judgment

- [14] The principles governing the summary judgment procedure is well settled. One merely has to refer to the judgment of the Court of Appeal in *Carpenters Fiji Ltd – v- Joes Farm Produce Ltd Civil Appeal Number ABU 0019/2006*. I have as well discussed these general principles in a number of cases. For instance see *Hibiscus Air Pty Limited v Air Fiji Limited Civil Action No. HBC 46 of 2006*, *Jessey International Limited v Fiji Development Bank Civil Action No. HBC 28 of 2007*

to mention a couple. For that reason, I do not need to refer to a plethora of authorities to regurgitate the well established principles.

[15] Summary judgment is only granted where plainly there is no defence to a claim. The onus is on the plaintiff to satisfy the court that indeed there is no arguable defence. Once an applicant discharges this burden, the persuasive or evidential burden to resist a judgment being entered shifts to the defendant; *Hibiscus Shopping Town Pty Ltd –v- Woolworths Ltd [1993] FLR 106*

[16] On behalf of the plaintiff Ms. Tavo submitted that the application is based upon the guarantee which is free from any legal impediment. According to her it is a comparatively straight forward claim based on an enforceable guarantee. In support the submissions Ms. Tavo extensively referred to the Guarantee instrument and Demand Notice.

[17] On the other hand, Dr Sahu Khan primarily challenged the legal validity of the guarantee instrument.

I will deal with the issue of the guarantee first.

Guarantee

[18] The defendant's in the Statement of defence as well in the answering affidavit have denied executing the guarantee. In addition, the guarantee is undated, on which premises Dr. Sahu Khan argued that if the validity of the guarantee is upheld it will offend one of the basic contractual principles. That is, I will make a finding of an enforceable contract in an interlocutory application the validity of which is questionable for lack of consideration and/or for past consideration.

[19] The issue of the validity of the guarantee instrument requires me to deliberate upon the conflicting affidavits which a court is ordinarily restrained from doing so especially to reach a conclusive finding; *Wenlock v Moloney [1965] 2 ALLER 871*. The precise contentious issue relating to the signatures of two of the defendants does raise some compelling line of argument warranting a thorough consideration of it by me.

[20] The general rule is that a court should disinclined or at least still be cautious in making a finding as to the validity or otherwise of a signature by comparing the same without the aid of any technical evidence. More so, particularly when the consequences of any such finding results in serious residual consequences in an interlocutory application based solely on conflicting affidavit material.

[21] In *Baljeet Singh v Subindar Kaur* [1997] 43 FLR 269, *Lyons J* in respect of this issue in considering an appeal from the Magistrates' Court succinctly summarised the law on this subject at page 275 as follows:-

"Indeed Smith & Rickards' cases are authority that a Court can come to its own assessment on handwriting. But, with respect, the Learned Magistrate failed to take cognizance of the limitations of those cases put on the exercise of the discretion.

Both cases, whilst accepting the exercise of the discretion existed, must be understood to have placed a cautionary restriction particularly when the findings to be arrived at by such review of the handwriting, had serious consequences.

.....
.....

*I might also point out that later authorities such R v. Tilley [1961] 1 All ER 406 and R v. O'Sullivan [1969] 2 All ER 237 decided it was wrong for juries to be asked to compare handwriting without the assistance of an expert. (See also Shameem Mohammed v R 29FLR 155). *I venture to comment that in civil cases where the judicial person is the arbitrator of the facts, if not incorrect, then it would likely be held that such judicial person should exercise extreme caution, in coming to comparative findings on handwriting in the absence of such expertise - particularly more so when the findings support a serious allegation"**

(emphasis added)

[22] Thereafter, His Lordship at page 276 para E held that:-

"The above cases further establish the principle that whilst the standard of proof is on the balance of probability if a finding is to be made which is of a serious nature, then there is a greater preponderance of evidence needed to support it"

(emphasis added)

[23] The above principles were later upheld by the Court of Appeal in the same case, where their Lordships unanimously said that "*Lyons J. rightly held that the magistrate had erred in deciding the case on the basis of his comparison of the signatures of Gurdev Singh,...."*

- [24] In this action, the defendant challenges the signatures. The alleged guarantor namely Jayant Lodhia has two signatures on the documents. Not only that, one of the signatures is identical to that of the signature of another guarantor, namely Mahendra Lodhia.
- [25] The signatures which look alike if not identical are witnessed by Farnan Saudin. No affidavit is filed by the witness to explain or verify the same despite the defendants put the plaintiff on notice of the same in the statement of defence. This further complicates the resolution of the central issue on conflicting affidavits.
- [26] Although on the invitation of Ms Tavo, my preliminary view was to actually assess the hand writing but having considered the serious consequences of that exercise to both the parties, I decided against it. For instance if I were to rule that the signatures are not genuine the plaintiff will be greatly disadvantaged, if this matter is to proceed to trial. Conversely, if I do uphold the signatures it follows, I will have to validate the guarantee thus completely disregarding the arguable defence raised by Dr Sahu Khan. Nevertheless in view of the well established principles discussed above and generally there been a paucity of evidence of any probative value to address the issue pertaining to the signatures, for which the burden of proof lay with the plaintiff, I am restrained from exercising a discretion in favour of the plaintiff.
- [27] Accordingly, I find the plaintiff failed to discharge the burden of proof on balance of probabilities to entitle it a judgment as sought by the summons. It follows the summons ought to be dismissed.

Conclusion

- [28] In view of the aforesaid conclusion, I hold that the application be dismissed with costs to the defendants summarily assessed at \$200-00.

[29] Since the action raises a very narrow issue for determination in a trial, in my view an order for a speedy trial is warranted which I do order. Now it is up to the plaintiff to proceed with the case with due expedition.

Accordingly so, ordered.

A handwritten signature in black ink, appearing to be 'J. J. Udit', written in a cursive style.

J. J. Udit

Master

4 April, 2008