IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 231 of 2012

BETWEEN : **AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED** a duly banking body having its registered office in Melbourne Australia and having its office in Suva and other branches elsewhere around Fiji.

PLAINTIFF

AND : **VIRENDRA NAND aka JAN NAND and RONEEL PRASAD** of Wailoku, Tamavua and c/- Diamond Joinery, Lot 13 Ram Sanehi Nausori respectively.

DEFENDANTS

BEFORE : **Master Thushara Rajasinghe**

COUNSEL : **Ms. Narayan B.** for the Plaintiff
Mr. Reddy A. for the 2nd Defendant
1st Defendant in person

Date of Hearing : **23rd June, 2014**
Date of Ruling : **3rd November, 2014**

RULING

A. INTRODUCTION

1. This is a summons filed by the Plaintiff pursuant to Order 14 rule 1 of the High Court Rules seeking an order to enter a summary judgment against the two defendants for sum of $53,433.03 together with an interest at the rate of $21.95 per day from 9th of May 2012 until full payment is made in respect of Cheque Account Number 9124824 and $5,609.69 together with an interest at the rate of $1.69 per day from 9th of May 2012 until full

payment is made in respect of FDA loan account No 10214466 and that both the statements of defence filed herein by the Defendants be stuck out or dismissed with cost.

2. The Plaintiff filed an affidavit of Mr. Mohid Dean in support of this summons for summary judgment. Mr. Dean in his affidavit deposed that the Plaintiff has advanced monies and provided two credit facilities to Jan Holdings Limited (hereinafter referred to as 'the Debtor Company). The first loan facility is sum of $50,000 in respect of Cheque account No 9124824. The second is sum of $29, 659 in respect of FDA loan (term loan) Account No 10214466 (hereinafter referred as the "said loan accounts). The two Defendants have executed an unlimited guarantee dated 14th of April 2009 in favour of the Plaintiff as security for payment of the said loan accounts given to the debtor company. The Debtor Company had agreed to pay interest at the rate of 10.25% per annum on both the said loan accounts.

3. Mr. Dean further deposed that the debtor company defaulted in its repayments towards the said loan accounts. The Plaintiff then served demand notices on both the debtor company and the Defendants on 11th of May 2012 demanding the payment of outstanding debt. It was not satisfied by either the debtor company or the Defendants. Mr. Dean claimed that the Debtor company owes the Plaintiff sum of $53,433.03 together with an interest at the rate of $21.95 per day from 9th of May 2012 in respect of the Cheque Account and sum of $5,609.69 together with an interest at the rate of $1.69 per day from 9th of May 2012 in respect of the FDA loan account. The Plaintiff claims that the Defendants are liable to pay this outstanding debt amount of the debtor company pursuant to their undertaking under the unlimited guarantee.

4. Having stated the factual background of this action, Mr. Dean deposed that the Defendants have no defensewith merits against the Plaintiff's claim. He alleged that the two Defendants filed their respective statements of defense only for the purpose of delaying this proceeding.

5. The first Defendant filed his affidavit in opposition, where he admitted his liability to pay this outstanding debt and sought permission to pay this outstanding debt amount in installments. Apparently, the first Defendant's position was not changed from his statement of defense as he sought the same relief in it too.

6. The second Defendant in his affidavit in opposition denied the execution of this alleged unlimited guarantee for the loan facilities given to Jan Holdings Limited. He further deposed that the document he executed was not explained to him by a legal practitioner. Moreover, he alleged that one of the Plaintiff's employees, Lance Whippy fraudulently misrepresented to him that should Jan Holdings Limited defaulted in repayment, the first name Defendant would be pursued first.

B. THE LAW,

7. Order 14 rule 1 stipulates that;

> *"where in an action to which this rules applies a statement of claim has been served on a defendant and that defendant has given notice of intention to defend the action, the plaintiff may, on the ground that the defendant has no defence to a claim included in the writ, or to a particular part of such a claim, or had no defence to such a claim or part except as to the amount of any damages claimed, apply to the court for judgment against that defendant".*

8. It appear that Order 14 r 1 has permitted the Plaintiff to apply for a summary judgment on the grounds that the defendant has no defence against the claim of the Plaintiff or part of such claim. Order 14 r 3 has stipulated the grounds to be considered in an application in this nature, where it states that;

> *"unless on the hearing of an application under rule 1, either the court dismisses the application or the defendant satisfies the court with respect to the claim, or the part of claim, to which the application relates 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 or part, the court may give such judgment for the plaintiff against that defendant on that claim or part as may be just having regard to the nature of the remedy or relief claimed.*

9. In view of Order 14 r 3(1) the Defendant is required to satisfy the court that there is an issue or question in dispute or some other reasons which required to be tried in order to

defeat the application of the Plaintiff made pursuant to Order 14 r 1. Justice Scott in **Carpenters Fiji Limited v Joes Farm Produce Limited** (Civil Appeal No. ABU0019.2006s) has discussed the applicable legal principles of summary judgment, where his lordship held that;

"here it is timely to state some of the well established principles relating to the entry of summary judgment;

a. The purpose of O 14 is to enable a plaintiff to obtain summary judgment without trial if he can prove his claim clearly and if the defendant is unable to set up, a bona fide defence or raise an issue against the claim which out to be tried,

b. The defendant may show cause against a plaintiff's claim on the merits e.g. that he has a good defence to the claim on the merits or there is a dispute as to the facts which ought to be tired or there is a difficult point of law involved ,

c. It is generally incumbent on a defendant resisting summary judgment, to file an affidavit which deals specifically with the plaintiff's claim and affidavit and state clearly and precisely what the defence is and what facts are relied on to support it,

d. Set off, which is a monetary cross claim for a debt from the plaintiff, is a defence. A defendant is entitled to unconditional leave to defend up to the amount of the set off claimed. If there is a set off at all, each claim goes against the other and either extinguishes or reduces it ***Hanak v Green (1958) 2 UB 9*** *at page 29 per Sellers LJ,*

e. Likewise where a defendant sets up a bona fide counter claim arising out of the same subject matter of the action, and connected with the ground of defence, the order should not be for judgment on the claim subject to a stay of execution pending the trial of the counter claim but should be for unconditional leave to defend, even if the defendant admits whole or part of the claim. ***Morgan and Son Ltd v Martin Johnson Co (1949) 1 KB 107 (CA)***

10. In view of the abovementioned elaborated passage of Scott JA in Carpenters Fiji Limited v Joes Farm Produce Limited (supra) that the Plaintiff is first required to satisfy the court that he has a claim which can prove clearly and the defendant has no bona fide defence

against his claim. Once the Plaintiff established it, the burden shift to the Defendant to satisfy the court that he has a defence on the merits or there is a dispute as to the facts or a difficult point of law involved, which ought to be tired. The Defendant must provide his counter objections and evidence against the Plaintiff's application for summary judgment in an affidavit. If the defence is founded on a claim of set off of the claim of the Plaintiff or the counter claim is founded on a bona fide claim arising out of the same subject matter of the action, the court should not grant a summary judgment and should allow the Defendant to proceed with the matter.

11. Having discussed the legal principles pertaining to the issue of summary judgment, I now turn to this instance case. It appears from the statement of defence and the affidavit filed by the first Defendant, that he is not disputing the claim of the Plaintiff and only sought leave to settle the debt amount in installments.

12. The second Defendant denied the execution of unlimited guarantee for the debt of Jan Holdings Limited. However, he admitted of executing of a document. He further alleged that he was not properly explained by a legal practitioner before the execution of that document. However, contrary to his previous claim, he alleged that he executed the guarantee documents due to the misrepresentation made by one of the Plaintiff's employees, Lance Whippy, where he misrepresented him that in the event of default by the debtor company, the Plaintiff will first pursue the first Defendant for the repayment.

13. Upon consideration of the objections raised by the second Defendant, it appears that his defence is founded on the plea of *non est factum*. Lord Wilberforce in **Saunders (Executrix of the estate of Rose Maud Gallie (deceased) v Anglia Building Society (formerly Northampton Town and County Building Society)** (1970) 3 All ER 961) has elaborately discussed the development of the concept of *non est factum* and the applicable test of this concept, where his lordship expounded that;

"The existing test, or at least its terminology, may be criticised, but does it follow that there are no definable circumstances in which a document to which a man has put his signature may be held to be not his document, and so void rather than merely voidable? The judgment of Lord Denning MR seems at first sight to suggest that there are not and that the whole doctrine ought to be discarded, but a closer reading shows that he is really

confining his observations to the plainest, and no doubt commonest, cases where a man of full understanding and capacity forbears, or negligently omits, to read what he has signed. That, in the present age, such a person should be denied the non est factum plea I would accept; so to hold follows in logical development from the well-known suggested question of Mellish LJ in **Hunter v Walters** *and from what was said by Farwell LJ in* **Howatson v Webb** *([1908] 1 Ch at 4). But there remains a residue of difficult cases. There are still illiterate or senile persons who cannot read, or apprehend, a legal document; there are still persons who may be tricked into putting their signature on a piece of paper which has legal consequences totally different from anything they intended. Certainly the first class may in some cases, even without the plea, be able to obtain relief, either because no third party has become involved, or, if he has, with the assistance of equitable doctrines, because the third party's interest is equitable only and his conduct such that his rights should be postponed (see* **National Provincial Bank of England v Jackson** *and cf* **Hunter v Walters** *((1871) 7 Ch App at 89)). Certainly, too, the second class may in some cases fall under the heading of plain forgery, in which event the plea of non est factum is not needed, or indeed available* **(cf Swan v North British Australasian Co Ltd)** *and in others be reduced if the signer is denied the benefit of the plea because of his negligence. But accepting all that has been said by learned judges as to the necessity of confining the plea within narrow limits, to eliminate it altogether would, in my opinion, deprive the courts of what may be, doubtless on sufficiently rare occasions, an instrument of justice.*

How, then, ought the principle, on which a plea of non est factum is admissible, to be stated? In my opinion, a document should be held to be void (as opposed to voidable) only when the element of consent to it is totally lacking, ie more concretely, when the transaction which the document purports to effect is essentially different in substance or in kind from the transaction intended. Many other expressions, or adjectives, could be used--'basically' or 'radically' or 'fundamentally'. In substance, the test does not differ from that which was applied in the leading cases of Thorough good's Case and **Foster v Mackinnon***, except in moving from the character/contents distinction to an area better understood in modern practice.*

To this general test it is necessary to add certain amplifications. First, there is the case of fraud. The law as to this is best stated in the words of the judgment in **Foster v Mackinnon** *((1869) LR 4 CP at 711) where it is said that a signature obtained by fraud:*

'... is invalid not merely on the ground of fraud, where fraud exists, but on the ground that the mind of the signer did not accompany the signature; in other words, that he never intended to sign, and therefore in contemplation of law never did sign, the contract to which his name is appended.'

In other words, it is the lack of consent that matters, not the means by which this result was brought about. Fraud by itself may do no more than make the contract voidable.

*Secondly, a man cannot escape from the consequences, as regards innocent third parties, of signing a document if, being a man of ordinary education and competence, he chooses to sign it without informing himself of its purport and effect. This principle is sometimes found expressed in the language that 'he is doing something with his estate' (***Hunter v Walters, Howatson v Webb***) but it really reflects a rule of common sense on the exigency of busy lives.*

Thirdly, there is the case where the signer has been careless, in not taking ordinary precautions against being deceived. This is a difficult area. Until 1911 the law was reasonably clear; it had been stated plainly in **Foster v Mackinnon** *that negligence--i.e. carelessness--might deny the signer the benefit of the plea. Since Bragg's case was decided in 1911 (***Carlisle and Cumberland Banking Co v Bragg***) the law has been that, except in relation to negotiable instruments, mere carelessness is not disabling; there must be negligence arising from a duty of care to the third person who ultimately relies on the document. It does not need much force to demolish this battered precedent. It is sufficient to point to two major defects in it. First, it confuses the kind of careless conduct which disentitles a man from denying the effect of his signature with such legal negligence as entitles a person injured to bring an action in tort. The two are quite different things in standard and scope. Secondly, the judgment proceeds on a palpable misunderstanding of the judgment in* **Foster v Mackinnon***; for Byles J, so far from confining the relevance of negligence to negotiable instruments (as Bragg's case suggests), clearly thought that the signer of a negotiable instrument would be liable,*

negligence or no negligence, and that negligence was relevant in relation to documents other than negotiable instruments; e.g. (as in the actual case before him) to a guarantee. In my opinion, the correct rule, and that which in fact prevailed until Bragg's case, is that, leaving aside negotiable instruments to which special rules may apply, a person who signs a document, and parts with it so that it may come into other hands, has a responsibility, that of the normal man of prudence, to take care what he signs, which, if neglected, prevents him from denying his liability under the document according to its tenor. I would add that the onus of proof in this matter rests on him, i.e. to prove that he acted carefully and not on the third party to prove the contrary. I consider therefore that ***Carlisle and Cumberland Banking Co v Bragg*** *was wrong, both in the principle it states and in its decision, and that it should no longer be cited as an authority for any purpose.*

14. This elaborative and extensive discussion of Lord Wilberforce has given a comprehensive and detailed prescription of the plea of *non est factum* with its shortcomings at early stages of it development and the suitable test to be applied in different circumstances.

15. Turning to this instance case, it appears that the factual circumstances of this action fall within the boundaries of third test enunciated by Lord Wilberforce in **Saunders**. The Plaintiff claims that the second Defendant is a business person who has been doing business with the first Defendant and a normal man of prudence and competence. The offer letter and the unlimited guarantee given by the Defendants are reflective enough to establish that the second Defendant was properly informed the contain and the purpose of the documents. The Plaintiff urged that the second Defendant were given all possible opportunity to consult anyone if he wishes and explained the purpose of the document.

16. It is the onus of Defendant to satisfy the court that he acted with all possible care and was fraudulently misled by the Plaintiff in order to find refuge behind the plea of *non est factum.* The Defendant is required to provide affidavit evidence with clarity and precisely to satisfy the court that he has a defence with merit founded on the plea of *non est factum* or there is an issue as to the facts or a difficult point of law which ought to be tried.

17. The second Defendant in his affidavit in opposition merely stated that he was not explained by a legal practitioner when he executed the document and fraudulently

misrepresented by one of the Plaintiff's employees. It is my view that mere deposition of such an allegation does not meet the standards set out by Scott JA in Carpenters Fiji Limited (supra) where his lordship expounded that the affidavit must states clearly and precisely what the defence is and what facts are relied on to support it.

18. Having carefully considered the affidavit in opposition of the second Defendant, it appears that the Defendant has not given a reasonable explanation why he required an explanation from a legal practitioner when the document itself has given an explanation with clarity. Moreover, the Defendant has failed to provide a reasonable explanation how he was fraudulently misrepresented by an employee of the Plaintiff, when the document has specifically stated the duties and obligations of the guarantors. Under such circumstances, it is my opinion that the affidavit evidence presented by the second Defendant has not met the threshold of the test enunciated by Scott JA in Carpenters Fiji Limited (supra) and Lord Wilberforce in Saunders to defeat the application of the Plaintiff for the summary judgment.

19. In my conclusion, I make following orders that;

    i. A summary judgment is hereby entered against the first and second Defendants for sum of \$53,433.03 together with an interest at the rate of \$21.95 per day from 9th of May 2012 until the full payment is made in respect of the cheque account number 9124824 and sum of \$5, 609.69 together with an interest at the rate of \$1.69 per day from 9th of May 2012 until the full payment is made in respect of FDA loan account number 10214466,

    ii. The Plaintiff is awarded sum of \$1,500 as summarily assessed cost of this action.

Dated at **Suva** this **3rd day** of **November, 2014**.

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R.D.R. Thushara Rajasinghe
Master of High Court, Suva